October 1981

The Developing Law Involving the Teacher's Right to Teach

Frank R. Kemerer
North Texas State University

Stephanie Abraham Hirsh
Richardson Texas School System

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Education Law Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol84/iss1/4

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
# THE DEVELOPING LAW INVOLVING THE TEACHER'S RIGHT TO TEACH

FRANK R. KEMERER*

AND

STEPHANIE ABRAHAM HIRSH**

## I. Introduction ........................................... 32

## II. State Control Over Curriculum ..................... 35

A. State Agencies and the Right to Establish Curriculum .................. 35

B. The Right of School Officials to Require Teachers to Follow the Curriculum .... 37

C. State Control Weakens with Student Age .................................. 39

## III. The Teacher's Asserted Right to Teach ............. 45

A. An Overview of Academic Freedom ....... 45

B. Academic Freedom: Freedom of Association ................................. 47

C. Academic Freedom: Right to Expression Outside of Class .................. 48

D. Academic Freedom: Applied to the Classroom Setting ...................... 50

## IV. Contemporary Patterns of Decision Making in the Federal Courts ............ 54

A. Judicial Support for Teacher Classroom Academic Freedom ................... 55

---

* Professor of Education Law and Administration, North Texas State University; Ph.D., education administration, Stanford University with a minor in law from Stanford law school, 1974. Dr. Kemerer has authored and co-authored several books, articles and reports related to constitutional law, education law, academic collective bargaining, educational administration, and college enrollment management.

** Currently a curriculum specialist in the Richardson, Texas, School system and a doctoral candidate at North Texas State University. She is also a member of the Texas Textbook Selection Committee. Her interest in education law stems from her professional concerns about the role of the teacher in curriculum development and classroom teaching, as well as the responsibility of school administrators for effective teacher evaluation.

Ms. Hirsh and Dr. Kemerer have given joint presentations on the academic freedom rights of teachers at several professional meetings.
In 1967, Ms. Janet Cooper was employed by Kingsville Independent School District in Texas to teach American History. Each year thereafter, her contract was renewed. In the fall of 1971, Ms. Cooper employed a simulation exercise to introduce her students to the characteristics of rural life during the post-Civil War Reconstruction era. The role-playing triggered controversy in the classroom and in the community of Kingsville. In a subsequent consultation with her principal and the district personnel director, Ms. Cooper was admonished "not to discuss Blacks" in class and that "nothing controversial should be discussed in the classroom." However, she was not advised to discontinue the simulation exercise, and thus she completed the project with her class. In the spring Ms. Cooper was again recommended for reemployment by the principal and superintendent. But contrary to their recommendation, the Board of Trustees declined to reissue a contract. Court proceedings commenced. School board members testified at the trial that they disapproved of Ms. Cooper's simulation technique and maintained that the complaints engendered by its use undermined her effectiveness as a teacher. The district court found for Ms. Cooper, awarding her $15,000 damages and $4500 attorney fees. Both parties appealed. On remand, the district court ordered that she be reinstated as well. Both parties appealed again.

At the second appeal, the Fifth Circuit Court of Appeals rejected the school district's claims that no cause of action existed under either 42 U.S.C. § 1983 or the Constitution, that no violation of Cooper's constitutional rights had occurred, and that the court had no power to award attorney fees. In upholding the district court's finding that Ms. Cooper had sustained her prima facie burden of showing a violation of her constitutional rights,

1 Kingsville Independent School Dist. v. Cooper, 611 F.2d 1109, 1111 (5th Cir. 1980).
Judge Godbold for the three-judge panel placed the Fifth Circuit clearly on the side of academic freedom in the classroom for the public school teacher: "We thus join the First and Sixth Circuits in holding that classroom discussion is protected activity." He went on to declare that based on the Fifth Circuit's ruling in Kaprelian v. Texas Woman's University, the proper test to determine if a teacher has abused the right is "not whether substantial disruption occurs but whether such disruption over-balances the teacher's usefulness as an instructor." Here, there was no evidence that Ms. Cooper's usefulness as a teacher had been impaired. Indeed, school administrators had recommended that her contract be renewed. The appeals court affirmed the trial court's order of reinstatement but remanded the case for a reevaluation of both back pay and attorney fees.

Three, possibly four, federal circuits have now gone on record as upholding some degree of academic freedom in the classroom as a constitutional right for public school teachers. But the exact contours of the right remained undefined. The differing factual situations in the three cases further muddy the waters. Not only are teachers in these circuits left with considerable uncertainty about their "right to teach," school administrators also cannot be sure how much authority they have to control teacher classroom behavior. For example, schools have traditionally determined the curriculum and controlled the selection of teaching materials. Do teachers now have some in-

---

2 *Id.* at 1113.
3 509 F.2d 133 (5th Cir. 1975).
4 611 F.2d at 1113 n.4.
5 Initial interest in this issue was generated by one of the authors' involvement in a school curriculum implementation project. The authors sought to determine the degree to which teachers could be required to teach specially designed materials on free enterprise in conformity with a state law. Section 21.1031(a) of the Texas Education Code requires that "[a]ll public high schools shall give instruction on the essentials and benefits of the free enterprise system. Instruction shall be given in accordance with the course of study prescribed by the State Board of Education . . . . The State Board of Education shall prescribe suitable teaching material for the instruction." Tex. Educ. Code Ann. vol. 2 § 21.1031(a) (Vernon 1972). Section 21.120, known as the "Economic Education Act of 1977," provides in part that the teaching of economic education shall be part of the grades 1-12 curriculum, and specifies the role of the Central Education Agency. Tex. Educ. Code Ann. vol. 2 § 21.120 (Vernon Cum. Supp. 1980-1981). The announcement of the *Kingsville* decision coincided with the authors' preparation of material and instructional techniques.
fluence in these areas? To what extent can a teacher deviate from the school-approved lesson plan in introducing new ideas and conducting classroom discussion? Under what circumstances can a teacher be disciplined for what he or she expresses in the classroom?

The purpose of this article is to eliminate some of the uncertainty surrounding teacher academic freedom in the public school classroom by charting its more recent developments and examining their implications for both teachers and administrators. We will draw extensively from case law, from earlier considerations of this issue, and from our own insights as educators. We have limited the scope of our research to the federal courts. We begin with a review of the traditional right of the

---

6 Thus, for example, would a Texas teacher have the right to entertain class discussion on the negative aspects of the free enterprise system, contrary to the express wording of the statute? Section 21.120(c) of the Texas Education Code provides that "while dealing with economic problems and issues, the program shall teach the positive values of a basically private-enterprise economy . . . ." TEX. EDUC. CODE ANN. vol. 2 § 21.120(c) (Vernon Cum. Supp. 1980-1981).


8 It is important, however, to note that state law can have an important role in determining the civil rights of teachers in the school. For example, in the state of Washington, the Washington Supreme Court recently decided that school districts in the state can require conformity in teaching methodology despite teacher allegations that doing so violates their classroom academic freedom rights. Millikan v. Board of Directors, 93 Wash. 2d 522, 611 P.2d 414 (1980). Millikan involved two high school teachers whose team-teaching assignment for an innovative history course was altered when enrollment shifted. One of the teachers alleged that his transfer to the science laboratory was in retaliation for his joining his team colleague in filing a grievance over the way the school was registering students in history courses. The Washington Supreme Court refused to recognize the teachers' claim to a constitutional right to select teaching methods and materials, distinguishing relevant federal court decisions. However, the court did note that "teachers should have some measure of freedom in
TEACHER'S RIGHT TO TEACH

state to control the school curriculum.\(^9\)

II. STATE CONTROL OVER CURRICULUM

A. State Agencies and the Right to Establish Curriculum

The tenth amendment to the Constitution reserves all powers not specifically delegated to the federal government to the individual states. Hence, a state legislature possesses plenary power over public education systems within its borders.\(^10\) Customarily, the state legislature establishes the structure of public education and delegates to state agencies and local institutions the authority to operate schools.\(^11\) Most of the responsibility, therefore, for day-to-day school management falls upon local school boards. And, consequently, local school administrators have considerable authority with respect to particular curriculum matters.

teaching techniques employed," although not to the extent of ignoring or omitting "essential course material or . . . the course calendar." Id. at 529, 611 P.2d at 417. Insofar as the reassignment from the science lab was concerned, the court concluded that the facts did not bear out the teacher's contention of retaliation for his filing of a grievance.

The case law, of course, can also go the other way. Increasingly, plaintiffs are looking to state constitutions for protection of their rights. A case in point is Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980). In Pruneyard, the United States Supreme Court ruled unanimously that states may use their own state constitutional provisions to grant persons broad access and free speech rights at privately-owned establishments. The California Supreme Court had held that the California Constitution protects speech and petitioning in shopping centers, even if privately owned. Justice Rehnquist for the Court noted that "Our reasoning in Lloyd v. Tanner, 407 U.S. 551 (1972) . . . does not . . . limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." Id. at 2040. In the education context, state constitutions have provided the legal means found wanting in San Antonio v. Rodriguez, 411 U.S. 1 (1973), to equalize school finance. See, e.g., Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); Horton v. Meskill, 31 Conn. 377, 332 A.2d 113 (1974); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973). Of course, given the traditional power the state has exercised over the curriculum, it seems unlikely that state law will become a major source for teacher classroom academic freedom rights.

\(^9\) For the purpose of this article, "curriculum" will be defined as a course of study occurring within a classroom at a designated time.


\(^11\) Id. at 1380-81.
On numerous occasions, judges have reaffirmed the legitimate authority of the state and the school board to implement and enforce curriculum policy. For example, in *Epperson v. Arkansas*, the Supreme Court struck down an Arkansas statute forbidding the teaching of evolution in the public schools because of its conflict with the Establishment Clause of the first amendment. But at the same time, the Court acknowledged that "[b]y and large, public education in our Nation is committed to the control of state and local authorities." In 1974, the Supreme Court affirmed without opinion a district court decision upholding the right of the state to prohibit discussion of birth control in public schools. In the course of its opinion, the district court observed that "[t]he State may establish its curriculum either by law or by delegation of its authority to the local school boards and communities."

These recent rulings reinforce the traditional view that the state has the right to control the public school curriculum and to delegate this function to local school boards. The controlling rationale relates to the historic role of public schools in American society. Acting *parens patriae*, states established public schools in part to teach skills and in part to socialize children to the American way of life. Courts have long recognized the important relationship between the school curriculum and community values. Several recent decisions are illustrative. In *Mercer v. Michigan State Board of Education*, the district court observed that the fact that the state delegates its curricular authority to the local school board

12 393 U.S. 97 (1968).
13 *Id.* at 104.
15 379 F. Supp. at 585.
16 *See also Zykans v. Warsaw Community School Corp.*, 631 F.2d 1300, 1305 (7th Cir. 1980) ("virtually every judicial body that has commented on the matter has acknowledged the need for broad discretionary powers in local school boards."); Presidents Council, Dist. 25 v. Community School Bd., 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972) (school board has power to determine access to books in library); Palmer v. Board of Educ., 466 F. Supp. 600 (N.D. Ill.), aff'd, 603 F.2d 1271 (7th Cir. 1979), *cert. denied*, 100 S.Ct. 689 (1980) (school board had "undoubted right" to regulate its curriculum).

https://researchrepository.wvu.edu/wvlr/vol84/iss1/4
is a long recognized system of operation in our Nation.... This is in part a deference to local control which is a recognition of the varying wants and needs of the Nation's diverse and varied communities, each with its own character, standards, and sense of social importance of a variety of values.19

In Cary v. Board of Education,20 which involved a school district's decision not to accept all textbooks recommended for an elective course by a delegation of high school English teachers, Judge Logan commented that "[i]t is legitimate for the curriculum of the school district to reflect the value system and educational emphasis which are the collective will of those whose children are being educated and who are paying the costs."21 In Palmer v. Board of Education,22 a federal district court upheld the dismissal of a public school teacher for refusing to carry out her responsibilities in the classroom. In the course of its opinion, the district court noted that "[s]tates acting through local school boards are possessed of power to 'inculcate basic community values. ...'"23 And in upholding the right of school officials to remove books from the curriculum and library, the Seventh Circuit has said that "it is in general permissible and appropriate for local boards to make educational decisions based upon their personal, social, political and moral views."24

B. The Right of School Officials to Require Teachers to Follow the Curriculum

As a necessary corollary to the school board's power to control the curriculum, school officials have generally been accorded

19 Id. at 585.
20 427 F. Supp. 945 (D. Col. 1977), aff'd on other grounds, 598 F.2d 535 (10th Cir. 1979).
21 598 F.2d at 543.
22 466 F. Supp. 600 (N.D. Ill.), aff'd, 603 F.2d 1271 (7th Cir. 1979), cert. denied, 100 S. Ct. 689 (1980).
23 466 F. Supp. at 602-03.
substantial control over teacher classroom behavior. The primary rationale is that the teacher as an employee must carry out the directives of the employer. If the teacher deviates from the lesson plan, then the power of the state and local school board over the curriculum is thwarted. Justice Black probably stated the proposition in its bluntest form in his dissent in the landmark student rights case, *Tinker v. Des Moines Independent School District*: "[t]eachers in the state controlled public schools are hired to teach there... [C]ertainly a teacher is not paid to go into school and teach subjects the State does not hire him to teach as part of its selected curriculum."25

In the Michigan case involving a state law prohibiting the discussion of birth control in the public schools, the district court asserted that "[t]here is nothing in the first amendment that gives a person employed to teach the Constitutional right to teach beyond the scope of the established curriculum."26 A recent relevant district court decision recognizes the right of school authorities to terminate a kindergarten teacher for non-compliance with the school curriculum even though she attributed her behavior to her observance of the Jehovah's Witness faith.27 The district court judge noted that "refusal to conform classroom teaching to a prescribed curriculum is not protected."28

---

27 Palmer v. Board of Educ., 466 F. Supp. 600 (N.D. Ill.), aff'd, 603 F.2d 1271 (7th Cir. 1979), cert. denied, 100 S. Ct. 689 (1980).
28 Id. at 604. For additional discussion of employer-employee relationship, see Drown v. Portsmouth School Dist., 451 F.2d 1106 (1st Cir. 1971) (nonrenewal of a teacher for being too innovative and unconventional would be proper under the wide discretion given school boards); Ahern v. Board of Educ., 327 F. Supp. 1391 (D. Neb. 1971), aff'd, 456 F.2d 399 (8th Cir. 1972) (teacher had no right to persist in a course of teaching behavior which contravened the valid dictates of her employers and the public school board regarding classroom method); Nigosian v. Weiss, 343 F. Supp. 757 (E.D. Mich. 1971) (no infringement on constitutional rights of teacher who was discharged for allowing classroom discussion of labor dispute without permission). But see Hall v. Board of School Comm'rs, 496 F. Supp. 697 (S.D. Ala. 1980) (school board policies which restrict teachers in distributing literature and communicating about employment matters on campus must be narrowly drawn and must provide a right of appeal), and Substitutes United for Better Schools v. Rohter, 496 F. Supp. 1017 (N.D. Ill. 1980) (school board may not prohibit teachers from selling a newspaper which disseminated the views of an organization to which they belong on school grounds).
C. State Control Weakens with Student Age

While the state has traditionally been accorded substantial control over the school curriculum and over teacher classroom behavior, courts have recognized that the age of the students involved may have a direct bearing on the extent of state influence. As the child grows older, his interest in having an unfettered opportunity to explore ideas and gain knowledge broadens. An oft-cited case is *Keyishian v. Board of Regents*, a 5-to-4 decision striking down the New York teacher loyalty law. In dictum, Justice Brennan for the majority asserted that

[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.]

He recited a litany of cases in support of classroom freedom, including *Sweezy v. New Hampshire* where the Court asserted that "[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."

These cases, however, involve postsecondary education. Courts have found themselves in a quandary when drawing an analogy to the public school teacher. Precedent supporting the role of the public school in inculcating community values is abundant. Yet, should the state have extensive authority at all grade levels? While there are striking differences in the character of secondary education as compared with collegiate, the age and

---

24 Id. at 603.
26 The district court in *Mailloux v. Kiley*, 323 F. Supp. 1387 (D. Mass.), aff'd, 448 F.2d 1242 (1st Cir. 1971) (per curiam) offered this contrast:
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 professor[s]. Among secondary school teachers, 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 concen-
maturity differences between upper level high school students and lower level college students are less obvious.\textsuperscript{33}

\textsuperscript{33} The findings of leading early childhood researchers indicate that the maturity levels of high school students are not much different from adults. According to Piaget, the highest level of moral development reached by most individuals is achieved in early adolescence. PIAGET, THE MORAL JUDGMENT OF THE CHILD (1979). Between the ages of 11-14, an individual develops the mental operations for adult thinking. The child can think and reason in abstract terms, consider alternatives, and form hypotheses. The child at this age can imagine the possible consequences of an act. These intellectual abilities allow an individual to think objectively about moral situations. He can be flexible in interpreting and generalizing about rules. Kohlberg similarly views the adolescent as capable of making independent moral judgments. L. KOHLBERG, STAGES IN THE DEVELOPMENT OF MORAL THOUGHT AND ACTION (1969). For a general discussion of research, see BIEHLER, CHILD DEVELOPMENT: AN INTRODUCTION (1976); BROPHY, CHILD DEVELOPMENT AND SOCIALIZATION (1977); SMART, CHILDREN: DEVELOPMENT AND RELATIONSHIPS (1979). Compare the views of Piaget and Kohlberg with those of the court in Zykan v. Warsaw Community School Corp., 631 F.2d 1300, 1304 (7th Cir. 1980). "A high school student's lack of the intellectual skills necessary for taking full advantage of the marketplace of ideas engenders a corresponding need for direction and guidance from those better equipped by experience and reflection to make critical choices." Note also the district court's assertion in Mailloux that "[s]ome teachers and most students have limited intellectual and emotional maturity." 323 F. Supp. at 1392.

In the recent decision striking down a Massachusetts statute as overly restrictive of the rights of minors to secure abortions, Justice Powell acknowledged the inevitable arbitrary nature of age-of-majority determinations. "[T]he . . . problem of determining 'maturity' makes clear why the State generally may resort to objective, though inevitably arbitrary, criteria such as age limits, marital status, or membership in the armed forces for lifting some or all of the legal disabilities of minority." Bellotti v. Baird, 443 U.S. 622, 643 n.23 (1979). The fact that the state continues through compulsory school laws and curriculum requirements to restrain the freedom of many mature young people suggests that more, not less, classroom freedom may be warranted for these students. Indeed, if, as Chief Justice Burger has asserted, a prime rational for compulsory high school educa-
The conception of an age-activated sliding scale for determining the permissible extent of state authority over curriculum in the elementary-secondary sector has yet to receive extensive judicial support. However, the use of student age as a criterion does appear to be gaining ground. The earliest case is *Keefe v. Geanakos*, which involved the dismissal of a teacher who assigned an essay containing the term "motherfucker" to his senior English class. In siding with the teacher, the United States Court of Appeals for the First Circuit observed that if "the students must be protected from such exposure [to the term], we would fear for their future." The court did agree that "what is to be said or read to students is not to be determined by obscenity standards for adult consumption," citing *Ginsberg*...
v. New York. The appeals court also took note of the fact that five books in the school library contained the same word. "Such inconsistency on the part of the school has been regarded as fatal."

The First Circuit again confronted the age question in a 1971 case, Mailloux v. Kiley, involving a teacher's discussion of the word "fuck" in a high school classroom. The district court discussed the implications of the particular situation with respect to the age of the students, finding that eleventh grade students "have a sophistication sufficient to treat the word from a serious educational viewpoint." However, the court recognized that secondary schools "are [not] open forums in which mature adults, already habituated to social restraints, exchange ideas on a level of parity." In affirming the decision that the teacher could not be dismissed under the circumstances of this case, the First Circuit acknowledged that "free speech does not grant teachers a license to say or write in class whatever they may feel like," and that the propriety of regulations or sanctions "must depend on such circumstances as the age and sophistication of the students. . . ." The circuit court expressed doubt that workable guidelines could be developed for weighing such circumstances as the age and sophistication of the students: "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."

In Webb v. Lake Mills Community Schools District, an Iowa federal district court ruled in favor of the plaintiff in a dispute over the high school drama coach's choice of two plays found objectionable due to the presence of certain terms ("son of a bitch" and "damn"). In deciding for the plaintiff, the court noted that "[a]lthough Keyishian is concerned with college teachers, the rationale must extend to high school and even elementary teachers. The state interest in limiting the discre-

390 U.S. 629 (1968).
418 F.2d at 362.
323 F. Supp. at 1389.
Id. at 1392.
448 F.2d at 1243.
Id.
tion of teachers grows stronger, though, as the age of the students decreases..."

Explicitly asserting that students have a constitutional "right to hear," the federal district court in Wilson v. Chancellor struck down a school board ban on political speakers. In

---

"Id. at 799. A district court in Connecticut was unsympathetic to the free speech claims of a dismissed teacher in Burns v. Rovaldi, 477 F. Supp. 270 (D. Conn. 1979), in part because of the relative youth of his students. The teacher had initiated a pen-pal program, whereby his fifth grade students practiced their penmanship by writing a letter to his fiancee. She in turn wrote to each of them, informing them that she was a communist like their teacher and telling them that "[w]e are both working hard for the day when you kids and the rest of us working people kick out all the rich rotten bosses and then we can all run everything ourselves." The school board ordered Burns' dismissal on the basis of his violating a by-law against partisan instruction in the school. In upholding the dismissal, the court commented that "[e]ven a most expansive concept of 'a market-place of ideas' would not be extended to include a class of fifth graders among those with whom to discuss what is wrong with the world and how it can be put right." Id. at 276. The court concluded that:

The bald facts are that the plaintiff used the school time of the students to arbitrarily indoctrinate them in concepts having nothing whatever to do with skill or knowledge of penmanship. Only in bad faith can one refuse to recognize the difference between impartial and undogmatic instruction and advocacy of a partisan political doctrine together with the rejection of everything opposed to it.  

Id. at 277 (emphasis in original).

45 418 F. Supp. 1358 (D. Or. 1976). The court briefly reviewed the roots of the "right to hear/know" rationale, citing cases involving the denial to prisoners of access to periodicals, cases involving members of a potential audience for a speaker prohibited from speaking, and cases related to the public's "right to know." Of these, the court concluded that only the potential audience cases applied, and cited Vail v. Board of Educ., 354 F. Supp. 512 (D.N.H. 1973); Brooks v. Auburn Univ., 290 F. Supp. 188 (M.D. Ala.), aff'd, 412 F.2d 1191 (5th Cir. 1969); Smith v. University of Tenn., 300 F. Supp. 777 (E.D. Tenn. 1969). Cf. Moore v. School Bd., 364 F. Supp. 355, 360 (N.D. Fla. 1973) ("[t]enth [g]rade [b]iology students have the right and freedom not to listen and as a captive audience should be able to expect protection from improper classroom activities."). See also Close v. Lederle, 303 F. Supp. 1109 (D. Mass. 1969), rev'd, 424 F.2d 988 (1st Cir.), cert. denied, 400 U.S. 903 (1970). More recently, courts have found a right to hear/know in the context of the school library. See, e.g., Minarcini v. Strongsville City School Dist., 384 F. Supp. 698 (N.D. Ohio 1974), aff'd in part, 541 F.2d 577 (6th Cir. 1976), where the appeals court cited several United States Supreme Court cases to support "both the First Amendment right to know ... and the standing of the student plaintiffs to raise the issue." 541 F.2d at 583. The court ordered the books replaced. Cf. Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980). See note 47 infra. In Zykan, the Seventh Circuit agreed that "[s]econdary school students certainly retain an interest in some freedom of the classroom, if only through the qualified
the course of its opinion, the court observed that "today's high school students are surprisingly sophisticated, intelligent, and discerning." Widespread endorsement of a constitutional right to hear or know for high school students in the classroom setting would clearly challenge traditional school board control of what goes on in high school classrooms. To date, however, the "right to know" rationale has made little headway in the secondary school classroom context.

Finally, the age issue has surfaced in a slightly different first amendment context, that of censorship of student news-

"freedom to hear' that has emerged as a constitutional concept" (citing Virginia Pharmacy Brd. v. Virginia Citizen's Consumer Council, 425 U.S. 748 (1976)), but concluded that the age of the students and the traditional curricular control of school board overbalanced the constitutional argument. The student-appellants were protesting the school board's decision to terminate an innovative English program including a "Woman in Literature" course and to exclude the books from the curriculum. The students argued that the action infringed upon their "right to hear" and "right to know," as well as chilled teacher academic freedom, and was based only on the personal belief systems of the school board members. The case was remanded to see if the plaintiffs could "amend their complaint . . . to allege the kind of interference with secondary school academic freedom that has been found to be cognizable as a constitutional claim." 631 F.2d at 1309. One commentator noted that if the students had succeeded in convincing the court, "virtually every decision made by a school board would be subject to reversal by the federal courts." Flygare, The Zykan Case: A Triumph for School Board Authority, 62 Phi DELTA KAPPAN 279, (December, 1980). For a detailed discussion of the student's right to know issue, see Comment, School Library Censorship: First Amendment Guarantees and the Student's Right to Know, 57 U. DET. J. URB. L. 523 (1980). See also Nicolai, The Right to Read and School Library Censorship, 10 J. L. AND EDUC. 23 (1981).

44 418 F. Supp. at 1368. Cf. the Seventh Circuit's more condescending view of high school students as expressed in Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980):

[T]wo factors tend to limit the relevance of 'academic freedom' at the secondary school level. First, the student's right to and need for such freedom is bounded by the level of his or her intellectual development. A high school student's lack of the intellectual skills necessary for taking full advantage of the marketplace of ideas engenders a correspondingly greater need for direction and guidance from those better equipped by experience and reflection to make critical educational choices. Second, the importance of secondary schools in the development of intellectual faculties is only one part of a broad formative role encompassing the encouragement and nurturing of those fundamental social, political, and moral values that will permit a student to take his place in the community.

Id. at 1304. Contrast the court's view of the intellectual maturity of high school students with the views of leading childhood researchers. Note 33 supra.
papers. The leading case is Trachtman v. Anker. There, student newspaper editors sought to distribute a sex questionnaire to fellow high school students and print the results in the newspaper. School officials prevented distribution, citing in part potential psychological harm to some students. The district court agreed younger students who are in the process of developing sexual identities could suffer harm. The court identified "younger students" as being 13 and 14 years of age and upheld the ban as applied to them. However, the court felt high school juniors and seniors were sufficiently mature, given their existence in New York City, to answer the questionnaire. The Court of Appeals for the Second Circuit reversed the ruling, concluding in a 2-to-1 decision that school officials had sufficient grounds for believing psychological harm could accrue to older as well as younger students. Both the district court decision and Circuit Judge Mansfield's lengthy dissent in which he advocated allowing all students to complete the questionnaire are reflective of growing judicial cognizance of the relationship between age/maturity and student entitlement to constitutional rights.

To summarize this section, there continues to be extensive judicial support for the state, acting either centrally or through local school boards, to determine the curriculum and regulate the behavior of the classroom teacher. However, some courts acknowledge that as the age of students increases, the extent of state curricular control decreases. Thus, rather than a sharp demarcation line between the "closed" classroom of the high school and the "open" classroom of the college, a gradualist approach emerges whereby older students have more freedom of inquiry than younger students. The states' control of the curriculum and teacher behavior declines commensurately. The next section examines more closely the claims of teachers to a "right to teach."

III. THE TEACHER'S ASSERTED RIGHT TO TEACH

A. An Overview of Academic Freedom

Historically, teachers have justified their quest for curricular control through the philosophy of academic freedom. Aca-

---

*426 F. Supp. 198 (S.D. N.Y. 1976), rev'd, 563 F.2d 512 (2d Cir. 1977), cert. denied, 435 U.S. 925 (1978). For an in-depth discussion of this case and the school district's argument that it has a duty to protect the interests of younger students, see Diamond, Interference with the Rights of Others: Authority to Restrict Students' First Amendment Rights 8 J. L. AND EDUC. 347 (1979).*
ademic freedom originated from the nineteenth century German concepts of lehrfreiheit and lernfreiheit implying the teacher's freedom to teach and the student's freedom to learn.\textsuperscript{48} Virtually unlimited freedom and discretionary powers were awarded European university professors.

Much of the controversy over the nature and extent of academic freedom in the United States relates to the fact that it is not specifically mentioned in the Constitution. Nonetheless, the American Association of University Professors (AAUP) has ardently and continuously claimed the principle for the collegiate teaching profession.\textsuperscript{49} Academic freedom can be sepa-

\textsuperscript{48} "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." Goldstein, The Asserted Constitutional Right of Public School Teachers to Determine What They Teach, 124 U. PA. L. REV. 1293, 1299 (1980) [hereinafter cited as Goldstein].

\textsuperscript{49} The AAUP issued a statement in support of academic freedom at its founding in 1915. The current AAUP policy tracks that of the earlier statement and can be found in AAUP, POLICY DOCUMENTS AND REPORTS 2 (1977). The current policy reads:

a. The teacher is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of his other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

b. The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

c. The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer he should remember that the public may judge his profession and his institution by his utterances. Hence he should at all time be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman.

For an extended discussion of academic freedom, see generally The Concept
rated into three categories: the freedom of association beyond the academic environment, the freedom of expression outside the classroom, and the freedom to control class discussion and to select appropriate teaching methods.

B. Academic Freedom: Freedom of Association

The first and fourteenth amendments have been construed to guarantee the public school teacher and college professor a freedom of association outside the academic environment. Two United States Supreme Court decisions strongly support this aspect of academic freedom. In Shelton v. Tucker, the Supreme Court struck down an Arkansas statute requiring teachers to file affidavits listing membership in organizations for the previous five years. In a brief but potent majority opinion, Justice Stewart wrote that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American Schools." He concluded that "[t]he statute's comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers."

In Keyishian v. Board of Regents, the Supreme Court ruled that loyalty oaths required of faculty members at the State University of New York unconstitutionally denied teachers' association rights. Justice Brennan stated:

---

Citing Shelton, the Seventh Circuit declared in McLaughlin v. Tilendis, 398 F.2d 287, 288 (1968), that since "it is settled that teachers have the right to free association," they have a right to join unions. "Unless there is some illegal intent, an individual's right to form and join a union is protected by the First Amendment." Id. at 289. The court went on to note that "even if this record disclosed that the union was connected with unlawful activity, the bare fact of membership does not justify charging members with their organization's misdeeds." Id.

---

Kemerer and Hirsh: The Developing Law Involving the Teacher's Right to Teach

1981] TEACHER'S RIGHT TO TEACH 47


50 364 U.S. 479 (1960).
51 Id. at 487.
52 Id. at 490.
Our nation is deeply committed to safeguarding academic freedom, which is of transcendant value to all of us and not merely to 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.\textsuperscript{54}

C. Academic Freedom: Right to Expression Outside of Class

The second classification of academic freedom establishes the right to expression outside of the classroom. The doctrinal case is Pickering \textit{v. Board of Education}\.\textsuperscript{55} Justice Marshall, writing for a unanimous Court, recognized that

the State has interests as an employer in regulating the speech of its employees. \ldots The problem \ldots is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in prompting the efficiency of the public services it performs through its employees.\textsuperscript{56}

Thus, outside comments are acceptable if not made recklessly or with knowledge of their falsity and do not impede school operations.

Two other recent United States Supreme Court decisions involving teacher rights of expression should be briefly noted here. The first, \textit{Mt. Healthy v. Doyle},\textsuperscript{57} involved a teacher who, in addition to other incidents occurring within the school, made comments critical of the school over a local radio station. The Court held that while a teacher cannot be denied reemployment for the legitimate exercise of constitutional rights, the teacher

\begin{itemize}
  \item[\textsuperscript{54}] Id. at 603.
  \item[\textsuperscript{55}] However, in Knight \textit{v. Board of Regents}, 390 U.S. 36 (1968), \textit{aff'g mem.}, 269 F. Supp. 339 (S.D. N.Y. 1967), the Court affirmed a lower court ruling upholding a provision of the New York Education Law requiring public and private school teachers and professors to swear allegiance to the state constitution and United States Constitution. In 1971, the Court relied on the \textit{Knight} opinion as precedent in unanimously approving part of a similar Florida statute. Connell \textit{v. Higginbotham}, 403 U.S. 207 (1971). The Court, however, struck down a portion of the oath requiring the signer to pledge that he does not believe in overthrow of the government by force or violence since the provision did not provide for notice and a hearing prior to dismissal.
  \item[\textsuperscript{56}] 391 U.S. 563 (1968).
  \item[\textsuperscript{57}] Id. at 568.
  \item[\textsuperscript{57}] 429 U.S. 274 (1977).
\end{itemize}
has the burden of proving that the action taken against him stemmed primarily from the exercise of the right. In the words of Justice Rehnquist, who spoke for the Court:

A border line or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.58

The second decision, Givhan v. Western Line Consolidated School District,59 involved private communication between a public school teacher and a school principal. In a unanimous reversal of the Fifth Circuit Court of Appeals, the Supreme Court ruled that a private, as well as public, expression is protected by the first amendment in the context of public employment. Justice Rehnquist stated for the Court that, "[t]he First Amendment forbids abridgement of the 'freedom of speech.' Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public."60

Nevertheless, the Court repeated the caveat expressed in Pickering that a teacher does not have an absolute right to free expression. If the expression is recklessly made, impedes the performance of the teacher's duties, or interferes with school functioning, the expression loses its protection, and action may be taken against the teacher. The Court added that since subordinate-superior relations are particularly sensitive, the content of what is said in private expression, as well as the time, place, and manner in which it is said, can be taken into account in deciding what is and what is not constitutionally protected. The Court remanded the Givhan case to determine if the decision not to reappoint would have been made even if the protected encounters with the school principal had never occurred.

58 Id. at 286.
60 Id. at 415-16.
Taken together these three cases provide the public school teacher with some degree of constitutional protection for the exercise of rights of expression. However, they neither accord the teacher academic freedom in the classroom nor carte blanche in criticizing superiors. Furthermore, they place the burden on the teacher to prove that the legitimate exercise of a constitutional right was a substantial factor in whatever sanctions are imposed. Once this is proven, the school then must show that, even if the protected communication had never occurred, the same action would have been taken against the teacher.\(^{61}\)

D. Academic Freedom: Applied to the Classroom Setting

The third classification of academic freedom relates to control of classroom methodology and discussion. The principles of the AAUP do not endorse unlimited rights in this area. "The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject."\(^{62}\)


\(^{62}\) AAUP, POLICY DOCUMENTS AND REPORTS, supra note 49. One commentator long associated with the AAUP has written in an often quoted article that:

As individuals, we have our viewpoints on political and social issues of our times. As professors, in that role, we do not. Our only commitment is to academic freedom and autonomy within the university because these are the indispensable conditions for our work for learning and the pursuit of truth. This is the posture of neutrality which affords us to claim just entitlement to public and governmental support regardless of what political views are at any moment in the ascendance, and which gives us and our students protection as individuals against official pressures toward uniformity and orthodoxy. Once we ourselves break this neutrality by using the university itself and our roles as professors within it to advance political judgments we hold personally, we forfeit the strongest moral link in the chain of our defenses.

While the widely-endorsed principles of the AAUP have furnished college professors at public institutions with considerable academic freedom in the classroom, they have not equally benefitted the public school teacher. In asserting that they, too, should have a "right to teach," public school teachers advance essentially two arguments. They argue first, that the teacher has an obligation to see that the classroom is truly a "marketplace of ideas" in line with previous Supreme Court decisions supporting this idea, and second, that public school teachers as professionals are entitled to the same professional prerogatives in the classroom as their college and university counterparts. This section reviews each in turn.

The marketplace of ideas theory is in direct contrast to the philosophy that the schools are to devote their energies to the inculcation of community values. Advocates of classroom academic freedom for teachers perceive the teacher as responsible for seeing that the classroom presents a marketplace of ideas. They take their cue from several United States Supreme Court decisions, including *Wieman v. Updegraff*[^63], *Sweezy v. New Hampshire*[^64], *Shelton v. Tucker*[^65], and *Keyishian v. Board of Regents*[^66]. Each case talks about the value of an open classroom environment. Justice Frankfurter, concurring in *Wieman*, recognized the relevance of an open classroom environment to the development of the students' critical thinking and open-mindedness.

To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action,

[^63]: 344 U.S. 183 (1952).
[^64]: 354 U.S. 234 (1957).
[^65]: 364 U.S. 479 (1960).
into the meaning of social and economic ideas, into the checkered history of social and economic dogma.\textsuperscript{67}

In \textit{Sweezy}, the Court asserted that "[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die."\textsuperscript{68} In \textit{Shelton}, Justice Stewart wrote that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."\textsuperscript{69} And in \textit{Keyishian}, Justice Brennan asserted that "[t]he classroom is peculiarly the 'marketplace of ideas.'"\textsuperscript{70}

While none of these cases directly involved public school teacher classroom freedom,\textsuperscript{71} teacher groups have drawn upon them in support of the assertion that it is their unique responsibility to see that the classroom is a marketplace of ideas. Thus, it has been argued that

\begin{quote}
[g]iven the importance of education in American society and the importance of the emotional, intellectual and moral development of the child, the courts should play an active role in insuring that the high school student is exposed to the 'marketplace of ideas.' Because the teacher is in the best position to facilitate the students' free inquiry, given the reciprocal nature of academic freedom, the teacher is the best protector of that right to academic freedom.\textsuperscript{72}
\end{quote}

In its 1974 Position Statement on the Freedom to Teach and Learn, the National Council for the Social Studies, representing

\begin{itemize}
\item \textsuperscript{67} 344 U.S. at 196.
\item \textsuperscript{68} 354 U.S. at 250.
\item \textsuperscript{69} 364 U.S. at 487.
\item \textsuperscript{70} 385 U.S. at 603.
\item \textsuperscript{71} \textit{Wieman} and \textit{Keyishian} involved public employee loyalty oaths. \textit{Sweezy} dealt with a college professor's refusal to answer questions about his political affiliations and the contents of his lecture at a state university. \textit{Shelton} concerned a state statute compelling public school teachers and college professors to reveal their organizational memberships.
\item \textsuperscript{72} Comment, 15 J. Fam. Law 706, 730 (1977).
\end{itemize}

The question arises, however, whether a teacher has standing to raise the rights of students in contested actions. In Mercer v. State Bd. of Educ., 379 F. Supp. 580 (E.D Mich.), aff'd mem., 419 U.S. 1081 (1974), the court rejected the contention. In Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980), the Seventh Circuit refused to allow students to raise the constitutional rights of their teachers. "It is difficult to conceive how a student may assert a right to have the teacher control the classroom when the teacher herself does not have such a right." \textit{Id.} at 1307.
teachers from kindergarten through graduate school, stated that:

Professional educators must set an example in their communities that illustrates their respect for schools and classrooms as a free marketplace of ideas as well as an appreciation for the concerns of parents and other members of the community who legitimately disagree. By showing our faith as educators in the clash of opposing viewpoints, we can hope to achieve a society that functions according to this precept.³³

The notion of teacher professionalism is also raised as a basis of academic freedom. National educational organizations claim that their members have a professional entitlement to classroom academic freedom. The National Education Association, the largest teacher organization in the country with a membership of 1.8 million, maintains that public schools should "stimulate the spirit of inquiry, the acquisition of knowledge and understanding, and the thoughtful formulation of worthy goals."³⁴ It supports academic freedom and tenure as "essential to the teaching profession."³⁵ The National Council for the Social Studies (NCSS) established its policy regarding academic freedom in the 1974 Position Statement on Student Rights and Responsibilities. The NCSS maintains that all educators have a professional right as well as a responsibility to maintain academic freedom in the classroom.

A teacher's freedom to teach involves both the right and the responsibility to use the highest intellectual standards in studying, investigating, presenting, interpreting, and discussing facts and ideas relevant to his or her field of professional competence. As professionals, teachers must be free to examine controversial issues openly in the classroom. The right to do so is based on the democratic commitment to open inquiry and on the importance to decision-making of the expression of opposing informed views and the free examination of ideas. The teacher is professionally obligated to maintain a spirit of free inquiry, open-mindedness and impartiality in the classroom.³⁶

³⁵ Id. at policy 68-29.
³⁶ NCSS (1974), note 73 supra. The statement also includes the following policy with respect to academic freedom and students.
Where applicable all students shall have those rights, of academic
These position statements are often argued in support of teacher entitlement of classroom academic freedom in the case law.

IV. CONTEMPORARY PATTERNS OF DECISION MAKING
IN THE FEDERAL COURTS

In this part, the pattern of federal court decision making regarding teacher classroom academic freedom is reviewed. To assist the reader, a table has been developed which charts the decisions. See Table 1. Several caveats are in order. First, the table includes only those United States Supreme Court and circuit court of appeals decisions which either directly involve teacher classroom academic freedom or are sufficiently related to be instructive. Second, there are a growing number of federal district court decisions from these circuits which likely will

freedom as specified by the National Council for the Social Studies in its previous Policy Statements. All students should be able to:
1. develop intellectually without censorship;
2. raise questions on political, social, moral, economic and religious issues in appropriate situations;
3. disagree with their teacher on such issues;
4. study a variety of materials, sources, and perspectives.

In Ambach v. Norwich, the Supreme Court upheld New York State's right to deny public school teaching certificates to aliens. Justice Powell, writing for the five-person majority, acknowledged the teacher's independent role as a professional:

Within the public school system, teachers play a critical part in developing students' attitudes toward government and understanding of the role of citizens in our society. Alone among employees of the system, teachers are in direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school. In shaping the students' experience to achieve educational goals, teachers by necessity have wide discretion over the way the course material is communicated to students. . . . No amount of standardization of teaching materials or lesson plans can eliminate the personal qualities a teacher brings to bear in achieving these goals. Further, a teacher serves as a role model for his students, exerting subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy.

change the pattern as they move into the appellate stage. These cases have been included in the discussion.\footnote{There are also federal district court decisions supportive of teacher classroom academic freedom from circuits not listed in the table. These have been referred to periodically in the footnotes.}

A. Judicial Support for Teacher Classroom Academic Freedom

While the United States Supreme Court has not issued a ruling directly involving public school teacher classroom academic freedom, several opinions have touched on the issue. Five are briefly discussed here, beginning with the oldest, \textit{Meyer v. Nebraska}.\footnote{262 U.S. 390 (1923).} \textit{Meyer} involved the conviction of a private school teacher who taught reading in the German language to a ten year-old pupil. This violated a Nebraska law prohibiting teachers from teaching "any subject to any person in any language other than the English language"\footnote{Id. at 397.} below the eighth grade. The Court concluded that the statute "attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own."\footnote{Id. at 401.} Justice McReynolds, author of the Court's opinion, especially noted that Meyer's "right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the [Fourteenth] Amendment."\footnote{Id. at 400.}

Of course, \textit{Meyer} involved a private, not public school, though the statute applied to "any private, denominational, parochial or public school."\footnote{Id. at 402.} Furthermore, Justice McReynolds noted that no challenge was being made to "the State's power to prescribe a curriculum for institutions which it supports."\footnote{Id. at 397.}

\footnote{Id. at 402. Goldstein focuses on this aspect of the opinion in asserting that \textit{Meyer} has no relevance to public school teachers' claims to academic freedom in the classroom. \textit{See} Goldstein, supra note 48, at 1305-16. While Goldstein's factual analysis is correct, the \textit{Meyer} decision clearly has influenced expansion of public school teacher classroom rights. As Goldstein notes, Justice Fortas uses \textit{Meyer} as precedent for his statement in \textit{Epperson v. Arkansas}, 393 U.S. 97, 105 (1968), sup-}
Nevertheless, the decision has been relied upon sufficiently in later cases to warrant inclusion among cases supportive of teacher classroom freedom.84

The second decision does not involve teacher academic freedom at all. However, West Virginia State Board of Education v. Barnette85 often has been cited to support the "open forum" concept of the school classroom.86 In Barnette, Justice Jackson declared in the course of the Court's opinion striking down the compulsory flag salute that

[boards of education] have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.87

The third case, Sweezy v. New Hampshire,88 involved a college professor at a public institution, but it directly relates to academic freedom in the classroom. Sweezy was judged in contempt by New Hampshire courts after refusing to answer certain questions put to him by the Attorney General, or to reveal the

porting "the freedom of teachers to teach and students to learn" in the public schools and for his assertion in Tinker v. Des Moines Independent School Dist., 393 U.S. 503, 506 (1969) that neither "teachers [nor] students shed their constitutional rights to freedom of speech or expression at the school-house gate."

These cases have been relied on by the lower courts in extending teacher classroom academic freedom. See, e.g., Dean v. Timpson Independent School Dist. 486 F. Supp. at 308 ("Epperson teaches that a particular subject or theory may not be forbidden in the classroom simply because it offends the dominant views or beliefs of a community."), and Webb v. Lake Mills Community School Dist. 344 F. Supp. 791, 803 (N.D. Iowa 1972) (The Supreme Court has found proscriptions against the teaching of foreign languages in the public schools . . . repugnant to the Constitution.")

84 262 U.S. at id.
85 319 U.S. 624 (1943).
87 319 U.S. at 637.
contents of a lecture given in a humanities course at the University of New Hampshire. In ruling for Sweezy, Chief Justice Warren wrote that “[t]eachers and students must always remain free to inquire, to study, and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”

Table 1: Judicial Response to Teacher Classroom Academic Freedom

<table>
<thead>
<tr>
<th>SUPPORTIVE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supreme Court</td>
</tr>
<tr>
<td>Meyer v. Nebraska (1923)</td>
</tr>
<tr>
<td>West Virginia State Board of Education v. Barnette (1923)</td>
</tr>
<tr>
<td>Sweezy v. New Hampshire (1957)</td>
</tr>
<tr>
<td>Keyishian v. Board of Regents (1967)</td>
</tr>
<tr>
<td>*Epperson v. Arkansas (1968)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>First Circuit</th>
</tr>
</thead>
<tbody>
<tr>
<td>*Mailloux v. Kiley (1971)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Second Circuit</th>
</tr>
</thead>
<tbody>
<tr>
<td>James v. Board of Education (1972)</td>
</tr>
<tr>
<td>Russo v. Central School District (1972)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Fifth Circuit</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Sixth Circuit</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>UNSUPPORTIVE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supreme Court</td>
</tr>
</tbody>
</table>

---

89 Id. at 250.
First Circuit

Second Circuit
Presidents Council v. Community School Board (1972)
*East Hartford Education Association v. Board of Education (1977)
Trachtman v. Anker (1977)

Fourth Circuit
Parker v. Board of Education (1965)
*Frison v. Franklin (1979)

Seventh Circuit
*Palmer v. Board of Education (1979)
Zykan v. Warsaw Community School Corp (1980)

Eighth Circuit
*Ahern v. Board of Education (1972)

Tenth Circuit
*Adams v. Campbell City School District (1975)
*Cary v. Board of Education (1979)

*Decisions relating directly to academic freedom in the public school classroom.

In Keyishian v. Board of Regents,90 another case involving college professors, the Court struck down the New York loyalty law. Justice Brennan, citing several cases including Sweezy, noted that academic freedom is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."91

The fifth United States Supreme Court decision included in Table 1 is Epperson v. Arkansas.92 The Court struck down a

90 385 U.S. 589 (1967).
91 Id. at 603.
92 393 U.S. 97 (1968).
state law prohibiting the teaching of evolution in the public schools. Of the five cases, Epperson provides the most support of teacher academic freedom in the classroom. Asserting that “[o]ur courts . . . have not failed to apply the First Amendment’s mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and belief,” Justice Fortas acknowledged “the broad premise which the Court’s decision in Meyer furnishes” in support of the “freedom of teachers to teach and of students to learn.” He added that “it is much too late to argue that the State may impose upon the teachers in its schools any conditions it chooses, however restrictive they may be of constitutional guarantees.” However, the Court did not decide the case on the basis of teacher academic freedom, choosing instead to invalidate the anti-evolution law as an impermissible advancement of religion under the establishment clause of the first amendment.

Concurring in the result, Justice Stewart sought to clarify his position on the power of the state over the curriculum versus the teacher’s claim to academic freedom. He agreed that a state could decide that only one foreign language would be taught in the public school system, but doubted that a state could punish a teacher for asserting in the classroom that other languages existed.

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 State by the Fourteenth.

53 Id. at 104.
54 Id. at 105-06. See in this context the discussion, at note 83, supra.
55 Id. at 107.
56 Id. at 116 (Stewart, J., concurring). Justice Black, in his concurring opinion, stated the opposite view. “I am . . . not ready to hold that a person hired to teach school children takes with him into the classroom a constitutional right to teach sociological, economic, political, or religious subjects that the school’s managers do not want discussed.” Id. at 113-14 (Black, J., concurring).
These cases have furnished the lower federal courts so inclined with the opportunity to expand teacher classroom academic freedom. So far, only four of the circuit courts of appeal have endorsed some degree of classroom freedom for the public school teacher. Two cases place the First Circuit in this category.

The first, Keefe v. Geanakos, involved a tenured English teacher who assigned an article to his class from Atlantic Monthly containing the word "motherfucker." The school district suspended the teacher and sought his discharge for assigning the article and discussing how the word had been used in the article. The appeals court identified the issue as "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." Noting the absence of a school policy on the question, that the library contained books with the same word, and that the availability of money damages would not amelorate the issue, the court reversed the district court's decision.

We accept the conclusion of the court below that 'some measure of public regulation of classroom speech is inherent in every provision of public education.' But when we consider the facts at bar as we have elaborated them, we find it difficult not to think that its application to the present case demeans any proper concept of education.

However, the court never stated clearly its position on teacher academic freedom when it reversed the district court's denial of an interlocutory decree pending a decision on the merits.

The First Circuit reaffirmed its Keefe decision in Mailloux v. Kiley, but refused to go as far as the district court in endorsing teacher classroom academic freedom. The case involved an eleventh grade English teacher who used the word "fuck" in class to illustrate a taboo word in American society. In its decision,

---

98 418 F.2d 359, 361.
99 Id.
100 323 F. Supp. 1387 (D. Mass.), aff'd, 448 F.2d 1242 (1st Cir. 1971) (per curiam).
sion, the district court cited the proposition that a teacher has not only a constitutional "civic right to freedom of speech both outside . . . and inside . . . the schoolhouse, but also some measure of academic freedom as to his in-classroom teaching." The court said the Keeffe and Parducci decisions upheld two kinds of academic freedom:

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 had notice that its use was prohibited.

The appeals court affirmed the decision, but declined to endorse the lower court's "sensitive effort to devise guidelines" for weighing academic freedom issues. Declaring that "we suspect that any such formulation would introduce more problems than it would resolve," the appeals court stated that, "at present we see no substitute for a case-by-case inquiry into whether the legitimate interests of the authorities are demonstrably suf-

101 323 F. Supp. at 1390.
102 Id.
103 Federal District Court Judge Wyzanski set forth these guidelines in his opinion:

[T]his court rules that when a secondary school teacher uses a teaching method which he does not prove has the support of the preponderant opinion of the teaching profession or of the part of it to which he belongs, but which he merely proves is relevant to his subject and students, is regarded by experts of significant standing as serving a serious educational purpose, and was used by him in good faith, the state may suspend or discharge a teacher for using that method but it may not resort to such drastic sanctions unless the state proves he was put on notice either by a regulation or otherwise that he should not use that method. This exclusively procedural protection is afforded to a teacher not because he is a state employee, or because he is a citizen, but because in his teaching capacity he is engaged in the exercise of what may plausibly be considered 'vital First Amendment rights.' [citation omitted]. In his teaching capacity he is not required to 'guess what conduct or utterance may lose him his position.' . . . If he did not have the right to be warned before he was discharged, he might be more timid that it is in the public interest that he should be, and he might steer away from reasonable methods with which it is in the public interest to experiment.

Id. at 1392.
104 448 F.2d at 1243.
ficient to circumscribe a teacher's speech." Thus, while public school teachers in the First Circuit have some degree of first amendment protection to engage in classroom discussion with older students and to choose teaching methodology, the demarcations are unclear.

Id. The court tried to place its earlier holding in Keefe in perspective by noting that:

free speech does not grant teachers a license to say or write in class whatever they may feel like . . . the propriety of regulations or sanctions must depend on such circumstances as the age and sophistication of the students, the closeness of the relation between the specific techniques used and some concededly valid educational objective, and the context and manner of presentation.

Id.

Several district courts in other circuits have relied on these cases. Thus, a district court in the Eighth Circuit relied on Keefe, Mailloux, and Parducci in ordering reinstatement of a high school drama teacher dismissed from her job when school officials objected to some aspects of play rehearsals (drinking scenes, use of vulgarity). Webb v. Lake Mills Community School Dist., 344 F. Supp. 791 (N.D. Iowa 1972). The court concluded that the arbitrary and capricious standards used by the United States Court of Appeals for the Eighth Circuit to assess the legality of school official acts "means much the same thing" as the rationale advanced in these cases. Thus, the district court held that teachers enjoy two kinds of academic freedom:

the substantive right of a teacher to choose a teaching method which in the court's view served a demonstrated educational teaching 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 shown that the teacher should have had notice that its use was prohibited.


The art of teaching is a form of expression, and the methods used in teaching are media. Wilson's use of political speakers was his medium for teaching; similarly, the short story was Parducci's medium and the article containing the controversial word was Keefe's medium. The various school boards which restricted the media employed by Wilson here, and by Keefe, Parducci, and Sterzing in the cases cited, suppressed expression which the First Amendment protects.

Id. at 1363-64. See also Moore v. Gaston County Bd. of Educ., 357 F. Supp. 1037 (W.D.N.C.)
In the Second Circuit, the principal cases involving teacher classroom academic freedom are *James v. Board of Education* and *Russo v. Central School District*. *James* involved the dismissal of an eleventh grade public school teacher who wore a black armband protesting the Vietnamese War in his classes. In reversing the lower court's summary judgment for the school district, Judge Kaufman framed the issue and the appeals court's answer thusly.

We are asked to decide whether a Board of Education, without transgressing the first amendment, may discharge an 11th grade English teacher who did no more than wear a black armband in class in symbolic protest against the Vietnam War, although it is agreed that the armband did not disrupt classroom activities, and as far as we know did not have any influence on any students and did not engender protest from any student, teacher or parent. We hold that the Board may not take such action.

On remand, the district court held that the school district failed to justify dismissal and ordered compensatory damages and attorneys' fees for the plaintiff.

*James*, of course, does not go as far in protecting classroom academic freedom as the decisions of the First Circuit, primarily because it involves symbolic, rather than overt, expression. The same is true of the other Second Circuit decision, *Russo v. Central School District*. In *Russo*, Judge Kaufman reversed and remanded a lower court decision dismissing a teacher's suit against the school board after she was discharged for not leading the class in pledging allegiance to the flag. Noting that the Supreme Court had upheld the right of students to refuse

---

1973 (cites *Parducci* and *Marilloux* in some detail, but orders teacher's reinstatement on establishment clause grounds), and *Downs v. Conway School Dist.*, 328 F. Supp. 338 (E.D. Ark. 1971) (relies in part on *Parducci* in supporting elementary teacher's claim to a denial of first amendment freedoms when she was dismissed for voicing various complaints, including a request that her students be served raw, rather than cooked, carrots).


109 461 F.2d at 568.


111 469 F.2d 623 (2d Cir. 1972).
the flag pledge in West Virginia State Board of Education, Judge Kaufman wrote that

There is little room in what Mr. Justice Jackson once called the 'majestic generalities of the Bill of Rights' [citation omitted] for an interpretation of the First Amendment that would be more restrictive with respect to teachers than it is with respect to their students, where there has been no interference with the requirement of appropriate discipline in the operation of the school. . . . 113

As noted in the next section, the Second Circuit's Presidents Council District v. Community School Board114 decision, together with Trachtman v. Anker,115 suggests that support for teacher classroom academic freedom in this circuit is lukewarm at best.

The Court of Appeals for the Fifth Circuit encountered the public school teacher academic freedom issue in a case predating Kingsville Independent School District v. Cooper.116 However, the court did not take the assertive position in support of teacher academic freedom evidenced in Kingsville. The earlier case, Moore v. Winfield City Board of Education,117 involved a

---

112 319 U.S. 624 (1943).
113 469 F.2d at 631-32. See also Palmer v. Board of Educ., 466 F. Supp. 600 (N.D. Ill.), aff'd, 603 F.2d 1271 (7th Cir. 1979), cert. denied, 444 U.S. 1026 (1980) (Russo distinguished in upholding dismissal of teacher who refused to salute the flag for religious reasons), and Hanover v. Northrup, 325 F. Supp. 170 (D. Conn. 1970) (violation of first amendment rights to dismiss a junior high school teacher who refused to lead her class in the salute to the flag because she believed the phrase “with liberty and justice for all” was an untrue statement).

In Bayer v. Kingzler, 383 F. Supp. 1164 (E.D. N.Y. 1974), aff'd without opinion, 515 F.2d 504 (2d Cir. 1975), the district court relied in part on Russo in declaring that the seizure and prohibition of distribution of a sex education supplement to a high school newspaper violated the students' first and fourteenth amendment rights of expression. Judge Costantino stated that:

It is relevant to note that in Russo [citation omitted] the court in dictum recognized that tenth graders were sufficiently mature that a teacher's symbolic act in falling to lead the flag salute would not have a 'destructive effect' on her students .... Responsible presentation of information about birth control to high school students is not to be dreaded.

Id. at 1164.

114 457 F.2d 289 (2d Cir. 1972).
116 611 F.2d 1109.
117 452 F.2d 728 (5th Cir. 1971). See also Pred v. Board of Public Instruction, 415 F.2d 851 (5th Cir. 1969) (community college teachers did state a cause of ac-
teacher who claimed her contract was not renewed because of her activities as president of a teacher association. In affirming the lower court ruling in support of the school board, the appeals panel emphasized the limited extent of teacher rights of expression. "The constitutionally protected right of a public schoolteacher to criticize the school administration and to comment on matters of public concern is a limited right, a right which must be balanced against the need for orderly school administration."118

Prior to the Kingsville ruling, there were several interesting district court decisions in this circuit. The first is the oft-cited Parducci v. Rutland119 case, in which the court ruled that dismissal of an eleventh grade English teacher for assigning Kurt Vonnegut's Welcome to the Monkey House infringed her first amendment rights. The teacher, Marilyn Parducci, maintained she had a professional obligation to teach the story, and that the denial of her right to do so was done in the absence of standards governing the selection of course materials. Ms. Parducci was considered an effective teacher and would have received a favorable evaluation from her principal but for the incident. In its decision, the court began by declaring that teacher entitlement to first amendment freedoms was certain, but agreed that academic freedom is not absolute. "This court is keenly aware of the state's vital interest in protecting the impressionable minds of its young people from any form of extreme propagandism in the classroom."120 However, in this instance, the court found the reading appropriate for high school students. "Since the defendants have failed to show either that the assignment was inappropriate reading for high school juniors, or that it created a significant disruption to the educational processes of this school, this Court concludes that plaintiff's dismissal constituted an unwarranted invasion of her First Amendment right to academic freedom."121 Judge Johnson added

---

118 452 F.2d at 728.
120 Id. at 355 (emphasis in original).
121 Id. at 356.
that the absence of standards for choosing curriculum materials compounded the problem.

[We are concerned not merely with vague standards, but with the total absence of standards. When a teacher is forced to speculate as to what conduct is permissible and what conduct is proscribed, he is apt to be overly cautious and reserved in the classroom. Such a reluctance on the part of the teacher to investigate and experiment with new and different ideas is anathema to the entire concept of academic freedom.]

A second district court decision in this circuit directly related to public school teacher classroom academic freedom is *Sterzing v. Ft. Bend Independent School District*. The case involved a high school civics teacher who engaged frequently in classroom discussion on controversial topics, *e.g.*, race relations, and occasionally supplemented the textbook with additional materials, *e.g.*, a fund solicitation letter on behalf of students arrested during an anti-war protest which was used to illustrate how interest groups seek to arouse public support. After several run-ins with school officials, Henry Sterzing was dismissed.

After reviewing the disputed material and the record, the

---

122 Id. at 357. Suppose the school district had written standards which precluded Marilyn Parducci’s selecting the Vonnegut reading. Would the outcome have been different, or would the school district have had the added burden of showing the exclusion of the Vonnegut reading to be appropriate in light of student age and the possibility of disruption? While Judge Johnson did not directly address this issue, he did state that “[h]owever wide the discretion of school officials, such discretion cannot be exercised so as to arbitrarily deprive teachers of their First Amendment rights.” Id. Still, it seems reasonable to believe that had there been specific curriculum standards for selecting readings, the school would have been on firmer ground, given the general judicial recognition of the school districts’ control of the curriculum. For a discussion of the implications of *Parducci* and other cases supportive of teacher academic freedom, see notes 211-12 infra and accompanying text.

123 376 F. Supp. 657 (S.D. Tex. 1972), vacated as to remedy and remanded, 496 F.2d 92 (5th Cir. 1974) (per curiam).

124 Judge Bue found it strange that the principal had never visited Henry Sterzing’s classroom and was unfamiliar with his teaching methods. Judge Bue added, “[y]et it is this pattern of unfamiliarity which seems to permeate the so-called chain of command, culminating with the board, which then proceeded to act and reach decisions without the benefit of firsthand knowledge as to what was going on in Mr. Sterzing’s classroom.” Id. at 661. It is apparent that the absence of effective personnel evaluation and a consequently well-documented record may seriously undermine the credibility of school officials in the eyes of many judges.
court found for the plaintiff. While acknowledging that "a teacher's methods are not without limits," Judge Bue added that, "[i]t would be ill-advised to presume that a teacher would be limited, in essence, to a single textbook in teaching a course today in civics and social studies." The court asserted that, "[t]he freedom of speech of a teacher and a citizen of the United States must not be so lightly regarded that he stands in jeopardy of dismissal for raising controversial issues in an eager but disciplined classroom." At the same time, Judge Bue cautioned that classroom academic freedom places a heavy responsibility on the teacher:

[i]t must also be that a teacher's duty to be exceptionally fair and objective in presenting his personally held opinions, to actively and persuasively present different views, in addition to open discussion. It is the duty of the teacher to be cognizant of and sensitive to the feelings of his students, their parents, and their community.

Since the school did not or could not produce any evidence of material disruption, insubordination, or abuse of professional standards, the court sided with the plaintiff. However, rather than reinstate Sterzing, the court awarded monetary damages. Judge Bue feared reinstatement would "only serve to revive antagonisms." It was this aspect of the case that the Fifth Circuit panel found troubling. In a per curiam decision, the appeals court vacated the remedy and remanded the case. The court observed in a footnote that it was confining itself solely to the issue of remedy; therefore, it expressed no view on the constitutional question.

As noted previously, the Fifth Circuit's ruling in Kingsville confined itself to classroom discussion as a protected right.

---

125 376 F. Supp. at 661.
126 Id.
127 Id. See in this respect Burns v. Rovaldi, discussed at note 44 supra and accompanying text.
128 The court observed that Sterzing's two immediate department supervisors had generally approved his teaching procedures and general conduct. Id. Cf. Moore v. School Bd., 364 F. Supp. 355 (N.D. Fla. 1973) (teacher has no right to use biology class as a springboard for criticisms of school officials or relating descriptions of experiences with prostitutes).
129 Id. at 663.
130 496 F.2d at 93 n.3.
131 See notes 1-2 infra and accompanying text.
Since Ms. Cooper had not been instructed to cease using the simulation technique, the matter of academic freedom to choose teaching methodology or materials was not involved. However, a Texas district court ruling which occurred about the same time as Kingsville reaches this issue. Dean v. Timpson Independent School District\(^\text{132}\) involved the discharge of a teacher who introduced a sex role survey printed in Psychology Today into her high school psychology and speech classes.\(^\text{133}\) Dean, a well-respected teacher who had taught in the district for six years, earlier had encountered criticism from the school principal and district superintendent over an ethics survey dealing with a number of social issues, e.g., use of hallucinogenic drugs, euthanasia. While evidence conflicted, the court concluded that Dean had not been instructed effectively about the future use of supplementary materials in class as a result of these earlier run-ins with school officials. No memoranda were made nor were written policies evident in the school's policy handbook about the use of classroom materials.

The sex-role survey was administered by a student on Dean's instructions. It appears that the teacher had not actually adapted the survey for classroom use, nor had she read the Psychology Today article in its entirety. However, the student respondents were advised to omit certain questions dealing with sexual activity and to feel free not to respond to others. No significant disruption occurred in the classes or in the school. However, the matter became a major issue in the conservative east Texas community of Timpson.

Judge Robert M. Parker concluded that use of the surveys constituted the sole reason for Dean's discharge. Not aware of the Kingsville decision, Judge Parker relied on most of the cases already discussed in holding that "a teacher has a constitutional right protected by the First Amendment to engage in a teaching method of his or her own choosing, even though the subject matter may be controversial or sensitive."\(^\text{134}\) This statement appears to be the most specific endorsement to date of teacher academic freedom in the selection of teaching methodol-


\(^{133}\) The survey in question was entitled "Masculinity—What it Means to be a Man." It appears in the March, 1976, issue of Psychology Today.

\(^{134}\) 486 F. Supp. at 307.
ogy. While Judge Parker concurred with *Parducci* and similar rulings that teacher academic freedom is not absolute, he asserted that attempts to regulate it must be specifically worded and clearly promulgated. Thus, even if the conference between Dean and school officials triggered by the Ethics Survey was construed as an official policy against using other surveys, the judgment would be the same. "If the Court takes Mr. Bogue and Mr. Higginbotham at their word and disregards the testimony of Ms. Dean, it would, nevertheless, reach the same result. Whatever restriction that might have been placed on Ms. Dean in the course of a conversation would be void for vagueness."\(^{135}\)

The court ordered reinstatement, back pay, and attorney's fees. This case, coinciding with the *Kingsville* decision, places the Fifth Circuit in the forefront of judicial support for teacher academic freedom. What has yet to be decided is how far a school district can go in restricting teacher classroom academic freedom by developing and promulgating specific policy statements.\(^{136}\)

The Sixth Circuit indirectly recognized a right to classroom academic freedom in *Minarcini v. Strongsville City School District*.\(^{137}\) *Minarcini* involved an attempt by the school board to remove allegedly distasteful books from the school library. In the course of declaring the school board's actions unconstitutional,\(^{138}\) the court gave tangential attention to academic

\(^{135}\) *Id.* at 309.

\(^{136}\) In a case involving the discharge of a public mental hospital administrator who spoke out against hospital policies, a Rhode Island district court asked rhetorically, "Is it too much to recognize . . . that members of a profession have, as a matter of conscience, commitments to standards and philosophies of practice; and that, at least without clear agency rules to the contrary, they may not be disciplined for expressing the dictates of their professional conscience?" *Pilkington v. Bevilacqua*, 439 F. Supp. 465, 479 n.11 (D.R.I. 1977). It would seem that the presence of a clearly worded policy statement would be a material factor in teacher classroom academic freedom cases. See note 211 *infra* and accompanying text regarding a need for specific policy statements.


freedom in the classroom. It noted that the public school library has an important relationship to the classroom.

If one of the English teachers considered Joseph Heller's *Catch 22* to be one of the more important modern American novels, ... we assume that no one would dispute that the First Amendment's protection of academic freedom would protect both his right to say so in class and his students' right to hear him and to find and read the book.\(^{129}\)

However, while recognizing that the school board's actions "had a somewhat chilling effect upon classroom discussion," the appeals court affirmed the district court's conclusion that the teachers' academic freedom had not been unconstitutionally infringed. The district court had entered this finding of fact:

Faculty members were not foreclosed or limited either formally or informally, directly or indirectly, to utilize individual teaching methodology or from discussing any subject including the books here in issue or assigning said books as outside or supplemental reading or the subject of a review in the course of classroom instruction. No faculty member was intimidated, reprimanded, discharged or threatened with such action as a result of circumstances here involved . . . . \(^{140}\)

---


For recent discussions of school library censorship, see Niccolai, *Right to Read and School Library Censorship*, 10 J. L. AND EDUC. 23 (1981); Comment, *Censoring the School Library: Do Students Have the Right to Read?*, 10 CONN. L. REV. 747 (1977); Comment, *School Library Censorship: First Amendment Guarantee and the Student's Right to Know*, 57 U. DET. J. URB. L. 523 (1980); Comment, *Constitutional Aspects of Removing Books from School Libraries*, 66 KY. L.J. 127 (1977); Comment, *First Amendment Limitations on the Power of School Boards to Select and Remove High School Text and Library Books*, 52 ST. JOHN'S L. REV. 421 (1977). Niccolai makes the interesting observation that since the school has control of the classroom curriculum, the library is the one place where a diversity of viewpoints ought to be found. "It is, therefore, vital to the citizenry and the duty of the state to maintain the school library as a true marketplace of ideas, open to the works of controversial authors, differing literary tastes and dissenting points of view." Niccolai, supra, at 32.

\(^{129}\) 541 F.2d at 582.

\(^{140}\) 384 F. Supp. at 708.
B. Judicial Support for School Board Curricular Control

The Supreme Court has not issued a ruling directly related to teacher classroom academic freedom. However, the Court has recognized that teachers have constitutional rights within the public school. At the same time, several of these decisions provide the rationale for regulating, even curtailing, the exercise of constitutional rights. Thus, for example, in *Pickering v. Board of Education*, the Court recognized that the state has an interest as an employer in regulating the expression rights of its employees. "The problem . . . is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." In *Pickering*, the Court advanced the proposition that teacher comments outside of school "are acceptable if not made recklessly or with knowledge of their falsity and do not impede school operations." In the landmark *Tinker v. Des Moines School District* decision, the majority asserted that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." But Justice Fortas acknowledged the Court's repeated support for the state's comprehensive authority over school matters. He concluded, with respect to students, that "conduct . . . in class or out of it, which for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." While Justice Fortas spoke of students, school officials and judges have used the "materially disrupts—substantial invasion of the rights of others" rationale to determine the appropriateness of teacher behavior as well. *Pickering* and its progeny,

---

1 See notes 50-71 supra and accompanying text.
13 Id. at 568.
14 Id. See also the further restrictions on teacher expression imposed by Mt. Healthy v. Doyle, 429 U.S. 274 (1977), and Givhan v. Western Line Consolidated School Dist., 439 U.S. 410 (1977).
15 393 U.S. 503.
16 Id. at 506.
17 Id. at 513.
along with Tinker, lay a foundation for curtailing teacher expression in or out of the classroom.

In 1974, the Court affirmed without opinion a district court decision upholding the power of the state to regulate teacher classroom expression. Mercer v. Michigan State Board of Education148 dealt with a teacher's suit against a state education law prohibiting discussion of birth control in the public schools. Mercer contended the prohibition infringed on his academic freedom. However, the district court viewed the situation this way:

Among other things, teachers are engaged to impart to the students the various bodies of knowledge and learning contained in and offered by the curriculum. There is nothing in the First Amendment that gives a person employed to teach the Constitutional right to teach beyond the scope of the established curriculum. Nor are there any judicial decisions giving the teacher the right to teach beyond an established curriculum.149

Of course, the Court's affirmance does little to indicate the Justices' views on the parameters of teacher classroom academic freedom. But it suggests the state has considerable authority to establish the curriculum and to expect teachers to comply.

The remainder of this section reviews decisions of federal appeals courts upholding the power of school officials in the face of teacher claims of classroom academic freedom infringement. Six circuits are in this category; refer to Table 1.

The First Circuit, already listed among those supportive of teacher classroom freedom, has on at least one occasion sug-


I may add that it seems odd to me that... the school administration may validly forbid a teacher in the school system to instruct his or her pupils in contraceptive practices, but is powerless to forbid the student editor of the school paper, distributed to the pupils, under the school sponsorship and with school support, from instructing on those same practices in the columns of the school paper.

Id. at 188 (Russell, J., dissenting).
ggested that it will not ignore the authority of school boards. In a 1970 case, *Drown v. Portsmouth School District,* the First Circuit agreed that a dismissed teacher has a right to a list of reasons for her termination. The list led to a follow-up suit in which the teacher claimed the reasons submitted were arbitrary and capricious. In his second discussion of the case, Judge Coffin relied on a statement he had made in *Drown I* implying that "non-renewal of a teacher for being 'too innovative and unconventional' would be proper under the wide discretion accorded to the school board. . . . [citation omitted], even if a court or another board would think it wiser to have innovative but 'unco-operative' teachers rather than bland 'cooperative ones.'" Although classroom academic freedom was not at issue in *Drown II,* the decision would appear to affirm school board power over teacher classroom behavior.

Balancing *James v. Board of Education* and *Russo v. Central School District* in the Second Circuit is the oft-cited *Presidents Council* decision, which squarely supports school board authority. The case involved the removal of various allegedly objectionable books from a school library by action of the local school board. In upholding the power of the local board to do so, Circuit Judge Mulligan repeated the traditional approach courts have taken in such matters:

The ensuing shouts of book burning, witch hunting and violation of academic freedom hardly elevate this intramural strife to first amendment constitutional proportions. If it did, there would be a constant intrusion of the judiciary into the internal

---


151 She was primarily concerned with reason number two. "While your class work was assessed 'satisfactory' the English Department at the high school reports that you have been uncooperative, disregarding schedules and not accepting direction." *Id.* at 1108.

152 *Id.* at 1109.

153 Note that the First Circuit also backed away from its *Keefe* decision in *Mailoux,* claiming that there could be no substitute for a case-by-case analysis in situations involving teacher speech. *See* notes 97-105 supra and accompanying text. *Drown I* and *II,* in combination with *Mailoux,* suggest that the First Circuit accords teacher classroom academic freedom only limited support.

154 *See* notes 107-08 supra and accompanying text.

155 Presidents Council, Dist. No. 25 v. Community School Bd., 457 F.2d 289 (2d Cir.), *cert. denied,* 409 U.S. 998 (1972). For other cases involving the removal of books from the school library, see note 138 supra.
affairs of the school. Academic freedom is scarcely fostered by the intrusion of three or even nine federal jurists making curriculum or library choices for the community of scholars. When the court has intervened, the circumstances have been rare and extreme and the issues presented totally distinct from those we have here.\(^{156}\)

In 1977, the Second Circuit faced lengthy and tangled litigation over what appeared to be a relatively simple matter—a teacher dress code.\(^{157}\) The teacher, Richard Brimley, brought suit in district court claiming that the school dress code requiring all male teachers to wear a coat and tie denied him his first and fourteenth amendment guarantees. The lower court dismissed the complaint, and the teacher appealed. Initially, a three-judge panel ruled in favor of the teacher and remanded the case for a hearing on the merits. Judge Meskill dissented. He petitioned for a rehearing en banc, and wrote the opinion reversing the three-judge panel. Judge Messkill cited Presidents Council in support of broad school board authority and included this statement from James v. Board of Education.\(^{158}\)

\(^{156}\) 457 F.2d at 292. Note this interesting footnote in the opinion: "While the First Circuit has indicated that it does not 'regret' its decision in Keeffe v. Geanakos, its enthusiasm for intrusion into academic issues seems to be lessening, see Mailloux v. Kiley . . . ." 457 F.2d at 294 n.7 (citations omitted). The Supreme Court refused to hear Presidents Council. 409 U.S. 998 (1972). Justice Douglas, however, dissented:

Actions of school boards are not immune from constitutional scrutiny. Academic freedom has been upheld against attack on various fronts. The First Amendment involves not only a right to speak and publish, but also the right to hear, to learn, and to know. And this Court has recognized that this right to know is 'nowhere more vital than in our schools and universities' . . . .

In Tinker the Court held that the First Amendment can only be restricted in the schools when a disciplinary problem is raised. No such allegation is asserted here. What else can the school board now decide it doesn't like? Are we sending our 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 998-1000 (citations omitted) (Douglas, J., dissenting from denial of certiorari). For cases in accord and contra Presidents Council, see note 138 supra.


\(^{158}\) See note 107 supra and accompanying text.
TEACHER'S RIGHT TO TEACH

The interest of the state in promoting the efficient operation of its schools extends beyond merely securing an orderly classroom. Although the pros and cons of progressive education are debated heavily, 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.\(^{159}\)

Hence, the court concluded that "[in] view of the uniquely influential role of the public school teacher in the classroom, the board is justified in imposing this regulation."\(^{160}\)

---

\(^{157}\) 562 F.2d at 859, quoting with approval, 461 F.2d 566, 573 (2d Cir. 1972). Judge Meskill further asserted that in contrast to James and Russo, "[t]he First Amendment claim made here is so insubstantial as to border on the frivolous." 562 F.2d at 860. Judges Oakes and Smith did not see it this way. Finding for the plaintiff when the case was heard by a three-judge panel, they cited at length the cases and articles supportive of academic freedom in the secondary schools. Balancing the interests of the school board against the teacher liberty interest in personal grooming and academic freedom in the classroom setting, the pair found for the latter.

Teenagers, who are so often rebellious against authority, may find a tieless teacher to be a less remote, more contemporary individual with whom they can more easily interact, and hence to whom they are better prepared to listen with care and attention. It is highly questionable, and certainly not established on this motion for summary judgment, that the Board's valid end of prompting discipline is substantially, or even incrementally, furthered by the tie regulation.

\(^{158}\) Id. at 864 n.2.

On remand, the pair dissented, arguing that the majority trivialized the interests at stake in an apparent attempt to support traditional values.

Teaching methods in public high schools are in many instances protectible under the First Amendment . . . . While serious questions arise in measuring the parameters of the right in the context of public high school teaching, as the panel majority fully recognized, answers to those questions are not aided by the ostrich-like presumption that they do not exist.

\(^{159}\) Id. at 863-64 (Oakes, J., dissenting).

\(^{160}\) Id. at 863.

In Burns v. Rovaldi, 477 F. Supp. 270 (D. Conn. 1979), a district court case in the Second Circuit involving the dismissal of a fifth grade teacher for engaging his class in a penmanship pen-pal activity that led to the students receiving a letter from the teacher's fiance advocating the communist philosophy, the court rejected the first amendment academic freedom argument, citing this passage from East Hartford: "[E]ducational decisions must be made by someone; there is no reason to create a constitutional preference for the views of individual teachers over those of their employers." Id. at 277-78. See also Gilbertson v. McAlister, 383 F. Supp. 1107 (D. Conn. 1974).
In the same year as *East Hartford*, the Second Circuit upheld the authority of the school board from a different perspective. In *Trachtman v. Anker*, the court refused to recognize a constitutional right for student newspaper staffers to conduct a sex survey of the student body and print the results in the school newspaper. Drawing in part on the rationale advanced in *Tinker*, the Second Circuit supported the regulatory right of school officials, noting that its action in suppressing the sex survey "is not so much a curtailment of any First Amendment rights; it is principally a measure to protect the students committed to their care... from peer contacts and pressures which may result in emotional disturbance...."  

The concern of the Second Circuit for the welfare of students and the smooth operation of schools, as evidenced in the *Presidents Council, East Hartford*, and *Trachtman* decisions, suggests that its support for teacher rights of expression in *James* and *Russo* is unlikely to extend to overt demonstrations of teacher academic freedom in the classroom. 

One of the earliest controversies regarding academic freedom emerged in the Fourth Circuit in 1965. A teacher, Ray Parker, brought suit in district court claiming that his assignment of Aldous Huxley's *Brave New World* triggered his nonrenewal and that he was denied due process. The district court rejected his arguments. The court noted that insofar as his academic freedom claim was concerned, "Plaintiff cites no case which supports his First Amendment Claims." The Fourth Circuit upheld the lower court's decision on the due process issue,  

---  

142 See note 145 supra and accompanying text.  
143 563 F.2d at 519.  
144 In *Russo*, a flag salute case discussed, at note 108 supra and accompanying text, the Second Circuit refused to allow infringement of the teacher's First Amendment right to refuse to lead the class in the pledge; it added the following: "By our holding today we do not mean to limit the traditionally broad discretion that has always rested with local school authorities to prescribe curriculum, set classroom standards, and evaluate conduct of teachers...." 469 F.2d at 633.  
TEACHER'S RIGHT TO TEACH

avoiding the academic freedom claim.\(^{165}\) While this circuit has yet to hear a case directly involving teacher classroom discussion or choice of teaching methodology/materials, the appeals court did recognize the broad authority of the school board over teacher classroom behavior in *Prison v. Franklin County Board of Education*.\(^{167}\) The case involved a teacher demoted for reading the contents of a student note aloud to the class to discourage students from passing notes. The note contained some vulgar terms. The appeals panel noted that "we find no error in the district court's ruling. The regulations prescribing a teacher's speech and conduct are necessarily broad; they cannot possibly mention every specific kind of misconduct."\(^{168}\)

The Seventh Circuit has given considerable attention to the issue of teacher classroom academic freedom. In a 1979 case, three teachers challenged their discharge from the Cook County Schools on the grounds that the school had abridged their first and fourteenth amendment freedoms.\(^{169}\) They had distributed "Woodstock" literature and poems discussing the joys of marijuana and a free lifestyle. In a 2-to-1 ruling, the appeals court gave substantial attention to professional opinion regarding the relevancy of the materials to the teaching assignment, to district curriculum guidelines, and to the age of the students (eighth graders). The court affirmed the lower court judgment for the school district. Undoubtedly influential in the outcome,

\(^{165}\) 348 F.2d 464 (4th Cir. 1965) (per curiam), *cert. denied*, 382 U.S. 1030 (1966). Parker later reinstigated the case with the same arguments but different defendants. The district court decision was again affirmed. 384 F.2d 873 (4th Cir. 1967) (per curiam).

\(^{167}\) 596 F.2d 1192 (4th Cir. 1979).

\(^{168}\) *Id.* at 1194. See the concurring opinion of Circuit Judge Bryan. "Above all, I deplore the entry of the National courts into a State public school student—discipline incident .... Our dockets cannot afford the time and effort to grind such petty grist." *Id.* at 1194-95. See also Cornwall v. State Bd. of Educ., 428 F.2d 471 (4th Cir.) (per curiam), *cert. denied*, 400 U.S. 942 (1970) (school district has right to provide comprehensive program of family life and sex education), and Moore v. Gaston County Bd. of Educ., 357 F. Supp. 1037 (W.D.N.C. 1973) (district court cites *Keefe* and *Mailoux*, among other cases, in support of teacher academic freedom to engage in classroom discussion, but ultimately relies on the Establishment Clause in supporting teacher right to respond to student questions with answers aproving Darwinism theory, indicating personal agnosticism, and questioning literal interpretation of the Bible).

in addition to the age of the students, was the fact that the teacher involved did not seek an accommodation with school officials when the incident became known, but resorted instead to litigation. In dissent, Circuit Judge Fairchild maintained that the "Woodstock" brochure was relevant to educational goals, and that teachers should have the prerogative of employing its use in their classes in the absence of specific school policy.

A teacher may be more successful with his students if he is able to relate to them in philosophy of life, and, conversely, students may profit by learning something of a teacher's views on general subjects. Academic freedom entails the exchange of ideas which promote education in its broadest sense. 179

The Seventh Circuit had occasion to affirm its support for school board authority over teacher classroom behavior in a 1979 case involving a member of the Jehovah's Witnesses. In Palmer v. Board of Education, 171 the district court upheld the dismissal of a probationary kindergarten teacher who refused to teach and direct the pledge of allegiance and patriotic songs in class. The district court distinguished Palmer from two decisions in the second circuit, Russo v. Central School District 172 and Hanover v. Northrup, 173 noting that considerable evidence of dislocation of normal school activities and dissatisfaction of parents, students, and staff members existed. Further, the school principal had made a significant effort to accommodate the teacher's religious views. Assuming that a teacher has a constitutional right not to pledge allegiance to the flag, the court relied on the Mt. Healthy test to conclude that the school would have dismissed anyone who refused to follow the curriculum requirements. In affirming the district court's decision, the appeals court reiterated its view that "the First Amendment was not a teacher license for uncontrollable expression at variance with established curricular content." 174 The court went on to say

170 502 F.2d at 991-92.
171 466 F. Supp. 600 (N.D. Ill.), aff'd, 603 F.2d 1271 (7th Cir. 1979), cert. denied, 444 U.S. 1026 (1980). In a 1976 case, Fern v. Thorp Pub. School, 532 F.2d 1120 (7th Cir. 1976), the appeals court reviewed the dismissal of a teacher for distributing a sex survey in class. Although the teacher claimed a violation of the first and fourteenth amendments, the 2-to-1 reversal and remand was based on improper use of injunctive procedure.
174 603 F.2d at 1273.
that "[t]here is a compelling state interest in the choice and adherence to a suitable curriculum for the benefit of our young citizens and society. It cannot be left to individual teachers to teach what they please."\textsuperscript{175}

The Seventh Circuit reiterated this view in a unique 1980 case involving the academic freedom rights of students. The students in \textit{Zykan v. Warsaw Community School Corp.}\textsuperscript{176} were protesting termination of an experimental English curriculum, including a minicourse entitled "Women in Literature" and the books used in the course. The teacher who had taught the course was not offered a new contract when the phase-out occurred. Two students sued, alleging that their "right to know" and "right to read" had been infringed, that the decisions were based on the personal tastes of the school board and not on pedagogy, and that the entire episode affected the academic freedom of students and teachers alike. The district court dismissed the case on the ground that no constitutionally protected right had been infringed.

Though substantially agreeing with the lower court ruling, the Seventh Circuit remanded the case to determine if the plaintiffs could amend their complaint "to allege the kind of interference with secondary school academic freedom that has been found to be cognizable as a constitutional claim."\textsuperscript{177} The appeals court agreed that students do have some entitlement to a "freedom to hear" in the classroom, but held that the school board has "a vital and compelling interest" in selecting a suitable curriculum. The court noted the "students' lack of the intellectual skills necessary for taking full advantage of the marketplace of ideas,"\textsuperscript{178} and the interest of the school board in seeing that the intellectual development of students includes "the encouragement and nurturing of those fundamental social, political, and moral values that will permit a student to take his place in the community."\textsuperscript{179} The court again strongly endorsed school board authority. "The Constitution neither disparages the application of social, political, and moral tastes to secondary school educa-

\textsuperscript{175} Id. at 1274.
\textsuperscript{176} 631 F.2d 1300 (7th Cir. 1980).
\textsuperscript{177} Id. at 1309.
\textsuperscript{178} Id. at 1304.
\textsuperscript{179} Id.
tional decisions nor specifies that such criteria are irrelevant or alien to the legitimate exercise of educational choice." Insofar as teacher academic freedom was concerned, the Seventh Circuit found it "difficult to conceive how a student may assert a right to have the teacher control the classroom when the teacher herself does not have such a right."

It would appear from Brubaker, Palmer, and Zykan that the Seventh Circuit is strongly committed to the traditional view that schools should be orderly places where community values are inculcated and teachers are required to adhere to the prescribed curriculum.

The Eighth Circuit likewise has supported school board and administrative authority over teacher classroom academic freedom. In its first consideration of the issue, the Eighth Circuit was confronted with a case involving a teacher dismissed for refusing to abide by the principal's directive that she cease talking about a substitute teacher's slapping of one of the pupils in the context of student and teacher rights and that she concentrate on teaching economics. Frances Ahern viewed her continued discussion of the incident as part of her effort to maintain rapport with her students and as an expression of her constitutional right to choose teaching methodology. In affirming the district court's rejection of her argument, Chief Judge Matthes observed that "Ahern was invested by the Constitution with no right either (1) to persist in a course of teaching behavior which contravened the valid dictates of her employers, the public school board, regarding classroom method, or (2) as phrased by the district court, 'to teach politics in a course of economics.'"

The Eighth Circuit reiterated its support for school board authority a year later in Birdwell v. Hazelwood School District. This time the court chose to examine the situation within the context of the Tinker and Pickering decisions. On appeal from an adverse district court ruling, Birdwell claimed that the school

---

100 Id. at 1306.
101 Id. at 1307.
103 456 F.2d at 403-04.
104 352 F. Supp. 613 (E.D. Mo. 1972), aff'd, 491 F.2d 490 (8th Cir. 1974).
105 See notes 141-47 supra and accompanying text.
district had denied him his constitutionally protected right to free speech by firing him as the result of his derogatory statements made to mathematics students during a school visit by ROTC representatives. In essence, he told his students that they were "4000 strong" and could get the ROTC off campus if they wanted. The teacher's comments were not only found irrelevant to his teaching assignment but "'infused with the spirit of violent action' to the degree that the authorities found a situation of potential disruption."\(^{165}\)

In the three cases coming before it, the Tenth Circuit also has endorsed the traditional approach, though with some recognition of a teacher's right of commentary and choice of methodology in the classroom. In the first case, Adams v. Campbell County School District,\(^ {167}\) the appeals court affirmed a lower court ruling that nonrenewal of appellants' contract did not infringe protected rights. The teachers had sought to show that the school board took the action to retaliate for their alleged connection with the publication of an underground newspaper and the use and discussion of controversial materials in the classroom and school. The appeals court recognized that teachers do have some freedom in the use of classroom techniques, "but this does not say that they have an unlimited liberty as to structure and content of the courses, at least at the secondary level."\(^ {168}\) The court elaborated:

In the case at bar the teaching methods of Adams and Wiseman may have had educational value as the expert testified, but this is not equivalent to saying they had a constitu-

\(^{165}\) 491 F.2d at 493-94. But see the district court decision in Downs v. Conway School Dist., 328 F. Supp. 338 (E.D. Ark. 1971). An Arkansas teacher whose contract was not renewed because of alleged "insubordination, lack of cooperation, and teaching second graders to protest" charged that the nonrenewal was a violation of her right of free speech. The conduct objected to by the school involved her "Think and Do" program for second graders which encouraged pupil expression through drawing and writing. Some pupils drew pictures illustrating matters that concerned the teacher relating to the health and welfare of the children, such as inoperative water fountains, an attractive-nuisance incinerator, and poor nutritional planning in the lunchroom. The court held that the teacher was denied substantive due process regarding freedom of expression and censorship in teaching. It followed Tinker in reasoning that the censorship implied was contrary to the development in children of a capacity for independent thought.

\(^{167}\) 511 F.2d 1242 (10th Cir. 1975).

\(^{168}\) 511 F.2d at 1247.

\(^{169}\) Id.
tional right absolute in character to employ their methods in preference to more standard or orthodox ones.189

Powers v. Mancos School District190 involved a teacher who claimed his nonrenewal was in retaliation for presenting a lesson to his class concerning the rock opera, Jesus Christ Superstar. The Tenth Circuit affirmed the lower court's dismissal of the case, noting that there were substantial reasons for his nonrenewal unrelated to first amendment rights. The court acknowledged that employment decisions are partly subjective, based on "personal impressions," but declared the remedy for imperfections lies in the political, not judicial, domain. "Those aggrieved by school board decisions may seek recourse by the power of the ballot in efforts to effect removal of those board members who do not share their philosophy."191

In the most recent case, Cary v. Board of Education192 the district court came close to recognizing some entitlement of public high school teachers to academic freedom in selecting classroom teaching materials. "Effective citizenship in a participatory democracy must not be dependent upon advancement toward college degrees. Consequently, it would be inappropriate to conclude that academic freedom is required only in the colleges and universities."193

But the court did not decide whether the school board or teachers ought to prevail in the dispute over the teaching of materials in elective courses. It ruled that while the school board itself had consented to allow students and teachers the freedom to explore contemporary literature by allowing the courses to be taught as electives, the teachers had bargained away their freedom over classroom instructional materials in collective negotiations. At issue were ten books out of a list of 1,285 which the school board deleted from the list without explanation.194 The parties agreed that the books were not obscene, that no systematic effort had been made to exclude any particular system of thought or philosophy, and that a "constitu-

190 539 F.2d at 44.
192 427 F. Supp. at 953.
193 Among the books were Anthony Burgess' A Clockwork Orange, William Blatty's The Exorcist, and Ira Levin's Rosemary's Baby.
tionally-proper decision maker" could decide the books were appropriate for high school language arts classes.\textsuperscript{195}

The Tenth Circuit affirmed, but on the grounds of the inherent authority of the school board to control the curriculum. However, Judge Logan did recognize some constitutional protection for classroom discussion. "We think teachers do have some rights to freedom of expression in the classroom, teaching high school juniors and seniors. They cannot be made simply to read from a script prepared or approved by the board."\textsuperscript{196} Since the board decision did not prohibit mention of the books in class (it did prohibit such extensive discussion as to countermand the book ban) but was limited to keeping the books from becoming part of a class assignment, the board's action was found within its discretion to determine curricular parameters. Judge Logan reviewed previous academic freedom cases and noted law review articles discussing some of the underlying complexities, but opted not to add additional commentary to the teacher academic freedom debate. According to the court, the teachers claimed a right to be free from the "personal predilections of the board." The court responded that, "[w]e do not see a basis in the constitution to grant their wish."\textsuperscript{197}

In his concurrence, Circuit Judge Doyle stated he would have the school board advance reasons for the exclusion so that there can be a court review. "If they are excluded because the Board member disapproves for a subjective reason, I would say that this is an unlawful and unconstitutional invasion of the classroom."\textsuperscript{198} It is not clear what he had in mind, for there seems little difference between "subjective reason" and "personal predilections of the Board," which the court upheld.

V. IMPLICATIONS

A. For Teachers

Federal court involvement in the last decade with teacher academic freedom suggests that while broad control of the state

\textsuperscript{195} 427 F. Supp. at 947-48.
\textsuperscript{196} 598 F.2d at 543.
\textsuperscript{197} Id. at 544. Note the similarity of the Seventh Circuit's conclusion in Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980). See also note 176-81 supra and accompanying text.
\textsuperscript{198} Id.
and school district over curriculum and related classroom activity continues to garner substantial recognition, the claims of upper level public school teachers to some degree of academic freedom in the classroom have received growing judicial attention. To date, four circuits have supported some facet of teacher classroom academic freedom.\(^{199}\) Even in a few of the circuits which continue to accord states and school boards plenary curriculum control, classroom academic freedom for teachers below the collegiate level has not been completely ignored. Thus, the Tenth Circuit recognized in Cary v. Board of Education\(^{200}\) that teachers have some degree of freedom in the use of classroom techniques.\(^{201}\)

It is important for teachers to understand, however, that even in those circuits supportive of classroom academic freedom there remains considerable attachment to broad state and school board curriculum control. Thus, the First Circuit backed away from the district court's guidelines in Mailloux v. Kiley, one of the key teacher classroom academic freedom precedents. That court opted for a case-by-case balancing approach to ascertain "whether the legitimate interests of the authorities are demonstrably sufficient to circumscribe a teacher's speech."\(^{202}\)

Given the variations among the circuits it is important for teachers, teacher professional organizations, and those involved in teacher education to understand the law as it applies to them. This requires continuous monitoring of the case law, since this area of education law appears to be in transition.

Teachers should use caution in asserting a claim to engage in classroom discussion or choose teaching methodology. In addition to knowing the law in their locale, teachers should endeavor to ascertain what school policy is with respect to curriculum practices and the role of the teacher. Since the quality of the employer-employee relationship has recently caught the atten-

\(^{199}\) See notes 97-140 supra and accompanying text.

\(^{200}\) 598 F.2d 535 (10th Cir. 1979).


\(^{202}\) 448 F.2d 1242, 1243 (1st Cir. 1971) (per curiam). See the discussion of Mailloux, at notes 100-106 supra and accompanying text.
tion of courts, teachers should be careful not to exercise rights of expression within the school in such a way as to seriously erode their ability to work with school administrators and colleagues.

B. For Administrators

The implications of the developing teacher classroom academic freedom are important for administrators. To consider these return to the Fifth Circuit's Kingsville ruling, with which the article began. In light of the court's decision, the Kingsville administrators failed in two important respects. First, they failed to order Cooper to cease using the teaching technique. Their orders "not to discuss Blacks in American history" and not to discuss anything controversial in the classroom were thus doomed from the start. Cooper could not avoid controversy as long as the simulation technique continued. Nor could she be found insubordinate in using an unauthorized teaching method. Second, administrators recommended that her term contract be renewed. This precluded the assertion that she was an ineffective teacher. The board was left with only one reason for its decision of nonrenewal, a reason that turned out to be unconstitutional.

What could the administrators have done differently to win the case? Suppose they had sent the teacher a memo containing the same directives they expressed orally. In some circuits the existing case law suggests that may have been sufficient. Clearly, however, a memo would not change the Kingsville decision, because the memo would have been directed toward discussion, which the Fifth Circuit supported as a legitimate academic right. Even if the administrators had documented continued controversy in and out of the classroom, the outcome probably would have remained the same. The Fifth Circuit noted that even if substantial disruption were to occur, the

---

203 See the discussion of Mt. Healthy and its progeny, note 57 supra and accompanying text.
204 See notes 1-5 supra and accompanying text.
205 611 F.2d at 1111.
teacher could not be dismissed. What must be shown is that the disruption "overbalances the teacher's usefulness as an instructor." A series of reports documenting continued controversy would not pass this test.

Suppose the administrators had recommended that Cooper's contract not be renewed. Since the school district had not adopted the Texas Continuing Contract Law, but relied on term contracts, the district would not have had to justify nonrenewal, even if requested. Should the teacher go to court, however, the school district, under Mt. Healthy, would again be left without sufficient reasons unrelated to the classroom discussion to support the nonrenewal.

Suppose the administrators had ordered Cooper to cease using the simulation technique in the classroom and had put the demand in writing. Assuming she refused to do so and was then dismissed following appropriate notice and a hearing, this would satisfy those courts requiring some specific policy statement against which teacher behavior can be measured. On the other hand, if the court were to look behind the directive, the motive for its promulgation may undermine its validity. Courts, such as the Fifth Circuit, which have recognized a teacher's constitutional right to engage in classroom discussion may be unwilling to accept a school directive, if it can be shown that its primary purpose is to curtail that right of classroom discussion.

207 611 F.2d at 1113 n.4.
209 In Dennis v. S & S Consolidated School Dist., 577 F.2d 338 (5th Cir. 1978), the court stated that, "under our holding, of course, the State remains free to terminate or decline to rehire a non-tenured employee for no reason at all or for stigmatizing, even false reasons privately stated." Id. at 343. In Dennis, the school had voluntarily given reasons, one member telling the teacher his renewal occurred because he had a "drinking problem," thus creating a cause of action for infringement of a fourteenth amendment liberty interest.
211 As it was, the district court in Kingsville had requested the school district to offer new evidence, but the district declined to do so, standing on its claim that the nonrenewal was justified by the complaints about Cooper's classroom project.
213 See Judge Bue's comment in Sterzing v. Ft. Bend Independent School Dist., 376 F. Supp. 657 (S.D. Tex. 1972), vacated as to remedy and remanded, 496
If the Kingsville school district had had a policy statement regulating the use of simulation techniques in the classroom, had used it to require Cooper to cease using the Sunshine project, but not to cease class discussion of controversial topics and she had refused, the case would probably have come out differently.213 But it appears that, short of clear documentation showing that Cooper's classroom discussion had generated so much controversy as to overbalance her effectiveness as an instructor, there was no way that the school administrators could have legally sought her dismissal or sustained a nonrenewal challenge under the circumstances of the case.

The implications for school personnel decision making, which has often been notoriously lax,214 are clear. In circuits where some degree of teacher classroom academic freedom has been recognized school authorities must devote more attention to developing school curriculum policies in light of legal developments so that teachers can know ahead of time how much discretion they have to engage in classroom discussion and

---

213 Returning to the question which triggered this research, i.e., whether under the Texas free enterprise law the state can prevent teachers from using other than the state-prescribed materials and instructional techniques (see note 5 supra), since Kingsville does not reach this issue and Dean did not involve a specific school policy statement, it appears that the state can legally limit teacher academic freedom in this way. The case law, however, clearly indicates that the state cannot proscribe teacher discussion of free enterprise-related issues. See note 6 supra. Thus, to the extent the statute limits teaching to the "essentials and benefits of the free enterprise system," it may be overly restrictive.

214 Personnel evaluation, as currently practiced in most schools by administrators, has all too often followed the pattern revealed by Judge Bue in Sterzing.

It seems strange, indeed, to this Court that the principal had never visited the classroom of Mr. Sterzing and was wholly unfamiliar with his teaching methods. Yet it is this pattern of unfamiliarity which seems to permeate the so-called chain of command, culminating with the board, which then proceeded to act and reach decisions without the benefit of firsthand knowledge as to what was going on in Mr. Sterzing's classroom.

376 F. Supp. at 661, discussed at note 124 supra.
to choose classroom materials and teaching methodology.\textsuperscript{215} Classroom teaching must be more carefully and consistently monitored, and deficiencies must be documented. Requests that teachers cease using a particular technique or material in light of school policy pronouncements must be made in writing. Even though, in many jurisdictions nonrenewals need not be accompanied by a recitation of the reasons for the actions,\textsuperscript{216} administrators should be prepared to reveal them should a disgruntled employee pursue the matter in court, alleging that nonrenewal was in retaliation for the exercise of protected liberty rights.

VI. CONCLUSION

This article has reviewed recent developments in education law related to teacher classroom academic freedom in the public schools and the implications for both teachers and administrators. A brief look at the difficult questions underlying the issue, questions with which the courts, the ultimate deciders of "what the law is," must contend, concludes this article.

First, are public school students entitled to a "right to know/hear" in the classroom at any age? How much credibility should be accorded the findings of researchers about student intellectual and emotional maturity?\textsuperscript{217} Should the mixed motives for keeping young people in school through late adolescence have any influence on the character of the learning environment?\textsuperscript{218}

Second, what significance should be accorded the fact that, through the media, peer conduct, and general community life, students are exposed to all types of messages which many school board members may consider objectionable? Should the inconsistency doctrine be used as a criterion in determining the legality of school curriculum control?\textsuperscript{219} If not, will the school en-

\textsuperscript{215} In Cary v. Board of Educ., Judge Logan noted in his review of the cases upholding teacher claims of classroom academic freedom infringement that most "seemed to be situations where school authorities acted in the absence of a general policy, after the fact, and had little to charge against the teacher other than the assignment with which they were unhappy," 598 F.2d 535, 541.
\textsuperscript{216} See Dennis v. S & S Consolidated School Dist., 577 F.2d 338, discussed, note 209 supra and accompanying text.
\textsuperscript{217} See note 33 supra and accompanying text in connection with this issue.
\textsuperscript{218} Id.
\textsuperscript{219} See Keefe v. Geunakos, 305 F. Supp. 1091, discussed, at notes 34-37 supra and accompanying text.
virement become so sterile and "unreal" to students that disenchantment will increase, causing more students to drop out mentally and/or physically?

Third, do public school teachers have, by virtue of their professional training and experience, entitlement to the same degree of classroom academic freedom enjoyed by their collegiate counterparts?220

Fourth, how much relevance should be given to the presence of clearly worded and promulgated school policy statements regarding teacher classroom academic freedom? Should courts look behind them to assess their impact on teacher expression rights? Or should courts defer to the wishes of the school board as a political body?221

220 Compare the assertions of the National Education Association, discussed, at note 74 supra and accompanying text, with the views of the district court in Mailloux, discussed at note 32 supra and accompanying text.

221 One commentator argues that because the nature of first amendment rights of students and teachers is so difficult to define in the classroom context, the judiciary is best off deferring to the elected school board. The 'free speech' analysis asserts the primacy of certain results—the diversity of views on which a democracy thrives—over the democratic process itself. Those results may be important—they are, in my view. But they are not necessarily more legitimate than the process of governance wherein elected official supervise texts and curricula in the schools just as they do all the other functions of representative government. The issues raised in text and curricular disputes go to the heart of the role of American education. It is for just that reason that they ordinarily should be resolved in the traditional forums of educational politics and governance.


The problem with Orleans' thesis is that it reads the first amendment out of the classroom altogether at the pre-collegiate and quite possibly at the post-secondary level as well, id. at 3 n.6., thus ignoring the academic freedom case law which has already developed. More fundamentally, it seems clear that the role of government in education is not the same as in other activities, such as road-building, for education uniquely involves the communication of ideas and the formulation of beliefs. It thus can be argued that in no other area are first amendment freedoms more recognizable, even though their demarcations are not easily discerned. It should not be forgotten that school attendance is compulsory, a factor which augers for more exposure to ideas, not less, in an open society where minority interests are safeguarded in the face of majoritarian control.

For a contrasting viewpoint, see Aarons, The Separation of School and State: Pierce Reconsidered, 46 HARV. EDUC. REV. 76, 100 (1976).

The state provides a 'free' public education to all children of appropriate age and qualifications through its system of public schools.
Ultimately, judges cannot avoid facing questions of value about the purpose of education. Is the purpose of public education, in the words of the district court in *Pico v. Board of Education*, "indoctrinative, to transmit basic values of the community," or, in the words of Justice Douglas, is it to educate "our youth to shed the prejudices of the past, to explore all forms of thought, and to find solutions to our world's problems?" If the answer depends in part on the age and level of schooling, where should the lines be drawn, and by whom? The questions are profound, and to the extent constitutional interests are wrapped up in the answers, it is an evasion of judicial responsibility not to confront them.

But the state may not condition the provision of this education—whether it be a right or a privilege—upon the sacrifice by parents of their First Amendment rights. Yet this is precisely the effect of a school system that requires a child to attend a school controlled by a majority of the public in order to receive a 'free' education. That public school will represent and attempt to inculcate values that a particular family may find abhorrent to its own basic beliefs and way of life. The family is then faced with the choice of (1) abandoning its beliefs in order to gain the benefit of a state-subsidized education, or (2) forfeiting the proffered government benefit in order to preserve the family belief structure from government inference.

See also Comment, *Challenging Ideological Exclusion of Curriculum Material: Rights of Students and Parents*, 14 HARV. CIV. RIGHTS L. REV. 485 (1979), and Niccolai, *The Right to Read and School Library Censorship*, 10 J. L. AND EDUC. 23 (1981). Niccolai discusses the standards to be used in deciding the constitutionality of library book removal and selection. Whether involving book removal or selection, Niccolai maintains that workable standards can be developed to preclude school officials from making decisions solely on the basis of their own personal tastes and to guide judges in applying the first amendment.

The focus on rights definitions and decision making standards, while important, tends to obfuscate the underlying issues: what should be the purpose of schooling in a democratic society and what role should the judiciary play in resolving first amendment disputes within the educational setting?
