

May 1976

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Recommended Citation

Frederick F. Schauer, *School Books, Lesson Plans, and the Constitution*, 78 W. Va. L. Rev. (1976).

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SCHOOL BOOKS, LESSON PLANS, AND THE CONSTITUTION

FREDERICK F. SCHAUER*

I. INTRODUCTION

In recent years, there has been a rebirth of controversy and attention regarding the choice of school books, teaching methods, and curricula in the public schools. The school book controversy in West Virginia is a matter of common knowledge. Many states have enacted or are considering enactment of statutes or regulations governing the ways in which biology, history, and other subjects are taught. The introduction of sex education courses has caused much public concern. New textbooks which contain modern, and frequently unpopular or controversial, readings have been introduced. Non-traditional teaching methods have become much more common. And, as a background to all of this, the rights of school children and the rights of school teachers have been expanded by recent decisions of the state and federal courts.

Quite clearly, there are significant political and policy arguments regarding the substance of what goes on in the public school classroom. Questions of educational philosophy and the role of the public schools proliferate. But there are also significant constitutional questions, and the exploration of these constitutional issues is the purpose of this article. First, the concept of academic freedom will be discussed. As between school teacher and school board, who has the ultimate power in choice of teaching methods and materials? Are these powers subject to constitutional restrictions? Is there a "right to teach"? The next section will be an analysis of the substantive constitutional restrictions on what can be taught. This section will deal primarily with freedom of religion. Does the establishment clause prohibit the public schools from

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teaching certain subjects or teaching in certain ways? Does the free exercise clause also serve as a restriction in this area? Finally, the rights of parents and school children will be discussed. Particularly, is there a right not to attend the public schools if certain subjects or teaching methods are part of the curriculum? If so, is this choice that of the parents or that of the children?

There are, of course, no easy answers to any of these questions, and it is not the purpose of this article to provide simple solutions. But an understanding of all of the constitutional implications of choice of school books and teaching methods should make it easier to establish procedures for the making of these choices in such a way that some accommodation of many competing interests is possible.

II. WHO MAKES THE CHOICE?—THE CONCEPT OF ACADEMIC FREEDOM

The starting point for this examination of the constitutional aspects of choice of teaching methods and teaching materials must be the concept of academic freedom, for it is this which determines *who* makes the choice of what goes on in the classroom. Any attempt to analyze substantive constitutional restrictions on the choice of curriculum and choice of books must be based on a prior understanding of the locus of the decision.

Academic freedom is a concept far broader than that merely of the teacher's power to decide on instructional methods and materials.¹ Numerous definitions are available,² but for the present

¹ See generally *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045 (1968); Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841 (1970); Murphy, *Academic Freedom—An Emerging Constitutional Right*, 28 LAW & CONTEMP. PROB. 447 (1963) [hereinafter cited as MURPHY]; Cowan, *Interference With Academic Freedom: The Pre-Natal History of a Tort*, 4 WAYNE L. REV. 205 (1958); Fellman, *Academic Freedom in American Law*, 1961 WIS. L. REV. 3 (1961); Moskowitz and Casagrande, *Teachers and the First Amendment: Academic Freedom and Exhaustion of Administrative Remedies Under 42 U.S.C. Section 1983*, 39 ALBANY L. REV. 661 (1975); Comment, *Academic Freedom—Its Constitutional Context*, 40 U. COLO. L. REV. 600 (1968); 55 MARQ. L. REV. 379 (1972); Jones, *The American Concept of Academic Freedom*, in ACADEMIC FREEDOM AND TENURE 224 (L. Joughin ed. 1967); R. HOFSTADTER and W. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* (1955); R. KIRK, *ACADEMIC FREEDOM* (1955); R. MACIVER, *ACADEMIC FREEDOM IN OUR TIME* (1955); cf. Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027 (1969).

² See MURPHY, *supra* note 1, at 451-52.

purpose it is sufficient to define it as the idea of the teacher's freedom from external control in order to foster free discussion and interchange of ideas in an academic environment. Academic freedom can be separated into three components. One is the freedom of a teacher or professor in his or her life outside of the academic environment, such as freedom from control³ as to personal lifestyle, personal beliefs or opinions, membership in organizations, and freedom of expression away from the academic setting. Second would be freedom of belief, action, and speech in the academic setting but outside of the classroom. Finally, there is academic freedom as the freedom to choose course content, course materials, and instructional methods or styles. It is, of course, the last of the three that is most relevant to this article, but an understanding of this requires an understanding of the other two forms of academic freedom. Naturally, none of these forms of academic freedom are absolutes, and this discussion is a presentation of the dimensions of, and restrictions on, academic freedom in each of these three contexts.

A. *Academic Freedom and Out-of-School Activities of Teachers and Professors*

Much of today's body of law relating to academic freedom is derived from a series of United States Supreme Court cases which rejected the formalistic notions of the right-privilege distinction.⁴ The right-privilege distinction, in its clearest form, stood for the proposition that public employment, being a privilege and not a right, could be granted on the condition that the grantee forfeit what would otherwise be constitutional rights. Thus, in *McAuliffe v. Mayor of City of New Bedford*,⁵ Mr. Justice Holmes, while a justice of the Supreme Judicial Court of Massachusetts, said that

The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman . . . The servant cannot complain, as he takes the employment on the terms which are offered to him.⁶

³ Control may be direct control, but also includes qualifications for hiring, promotion, and retention.

⁴ See generally Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 7.11-7.13 (1958, Supp. 1970).

⁵ 155 Mass. 216, 29 N.E. 517 (1892).

⁶ *Id.* at 220, 29 N.E. at 517-18.

And the Supreme Court in 1952 expressed its agreement in remarkably similar terms in upholding a New York law declaring ineligible as public school teachers those who advocated the overthrow of the government or published materials so advocating, or organized or was a member of any group with those beliefs.⁷

It is clear that such persons have the right under our law to assemble, speak, think and believe as they will It is equally clear that they have no right to work for the State in the school system on their own terms. . . . They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not.⁸

In these and many other cases the recipients of governmental benefits or employment were held to be at the mercy of the public employer, or public authority dispensing the benefits, and thus limitations on substantive rights were constitutionally acceptable.⁹ But in the last twenty-five years, courts have been virtually unanimous in rejecting the right-privilege distinction when it was used to justify a restriction on specifically protected constitutional rights. In most of the cases, first amendment rights have been protected against indirect infringement via the right-privilege distinction. The first inclination of movement in this direction came in *Hannegan v. Esquire, Inc.*¹⁰ Congress had provided that the second class mailing privilege was to be restricted to only those

⁷ This was the "Feinberg Law," N.Y. Laws 1949, ch. 360 § 12-a.

⁸ *Adler v. Board of Educ.*, 342 U.S. 485, 492 (1952). The opinion of the Court of Appeals of New York specifically followed and quoted the *McAuliffe* epigram. *Thompson v. Wallin*, 301 N.Y. 476, 490, 95 N.E.2d 806, 812 (1950).

⁹ *E.g.*, in *Willkie v. O'Connor*, 261 App. Div. 373, 25 N.Y.S.2d 617 (1941), welfare benefits were terminated because the recipient insisted on sleeping on a bed of rags in an old barn. "Appellant also argues that he has a right to live as he pleases while being supported by public charity. One could admire his independence if he were not so dependent, but he has no right to defy the standards and conventions of civilized society while being supported at public expense. This is true even though some of those conventions may be somewhat artificial." 261 App. Div. at 375, 25 N.Y.S.2d at 619. *See also* *Davis v. Massachusetts*, 162 Mass. 510, 511, 39 N.E. 113, 113 (1895), *aff'd*, 167 U.S. 43 (1897) (Holmes, J.) (since City of Boston could completely deny access to the Boston Common, it could therefore limit free speech on the Common); *Scopes v. State*, 154 Tenn. 105, 109, 289 S.W. 363, 364 (1927).

¹⁰ 327 U.S. 146 (1946).

publications which the Postmaster General found to be in the public interest. The promulgation of standards was left entirely to the discretion of the Postmaster General. In overturning the statute, the Supreme Court held that the mere existence of a privilege did not give Congress the right to indirectly impose censorship which would otherwise be in violation of the first amendment.¹¹

Four years later, in *Communications Association v. Douds*,¹² Mr. Justice Frankfurter, in a concurring opinion, observed that:

Congress may withhold all sorts of facilities for a better life, but if it affords them it cannot make them available in an obviously arbitrary way or *exact surrender of freedoms unrelated to the purpose of the facilities*.¹³ (emphasis added).

While this statement may appear somewhat revolutionary for 1950, especially in light of the Court's 1952 opinion regarding the freedom of New York school teachers,¹⁴ by the proviso that the surrender of freedoms be "unrelated to the purpose of the facilities," Mr. Justice Frankfurter merely stated what should have been obvious even at the time, namely, that pushed to the extreme, the right-privilege distinction could justify an abrogation of virtually every constitutional right. For example, the distinction may even be taken as justifying a program by the government to deny public employment on racial or religious grounds, a position which was clearly untenable even in 1950.¹⁵

One outgrowth of the McCarthy era was the opportunity it gave the courts to deal with a wide range of first amendment restrictions on the right of government to dispose or withdraw government benefits, particularly public employment. In *Wieman v. Updegraff*,¹⁶ a college teacher was fired for failing to take a loyalty oath which included broad assertions as to non-membership in or non-affiliation with subversive organizations. Finding that this oath unduly restricted the right to free association, the Court said:

¹¹ *Id.* at 156.

¹² 339 U.S. 382 (1950). The decision upheld one of the anti-communist provisions of the Taft-Hartley Act. Labor Management Relations Act, ch. 120 § 9(h), 61 Stat. 146 (1947) (repealed 1959).

¹³ 339 U.S. at 415 (Frankfurter, J., concurring).

¹⁴ See note 8 *supra*.

¹⁵ See *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947).

¹⁶ 344 U.S. 183 (1952). See generally Morris, *Academic Freedom and Loyalty Oaths*, 28 LAW & CONTEMP. PROB. 487 (1963).

We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.¹⁷

A similar rationale was followed in *Shelton v. Tucker*,¹⁸ which struck down an Arkansas statute requiring public school teachers to file annually an affidavit listing all organizations to which they belonged. Although the effect on first amendment rights was less direct than in *Wieman*, the Court nonetheless found something akin to a "chilling effect" on associational rights.¹⁹

A more recent case is *Keyishian v. Board of Regents*,²⁰ which overturned the dismissal of college professors who had refused to sign non-communist affidavits. The Court explicitly rejected the notion that public employment might be conditioned on the surrender of first amendment speech or associational rights.²¹ In doing so, the Court specifically rejected *Adler v. Board of Education*²² as being based on outmoded constitutional doctrines.²³ The same logic was followed in *Pickering v. Board of Education*,²⁴ where a teacher had been dismissed for writing a letter to a newspaper criticizing the school board and the superintendant of schools.

To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court.²⁵

¹⁷ 344 U.S. at 192.

¹⁸ 364 U.S. 479 (1960). See also *Elfbrandt v. Russell*, 384 U.S. 11 (1966).

¹⁹ The late Professor Bickel criticized this decision in some detail, arguing that it overly restricted the state's power to examine teacher qualifications. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 51-54 (1962).

²⁰ 385 U.S. 589 (1967).

²¹ *Id.* at 605-06.

²² 342 U.S. 485 (1952).

²³ 385 U.S. at 595. The bar-exclusion cases have also rejected the view that bar admission may be conditioned on the applicant's exercise of his first amendment rights. *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *Application of Stolar*, 401 U.S. 23 (1971). But the concept of character investigations has been upheld. *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154 (1971).

²⁴ 391 U.S. 563 (1968).

²⁵ *Id.* at 568.

The cases have not been limited to restrictions on rights of speech and association. In *Slochower v. Board of Education*,²⁶ a teacher had been fired for invoking the fifth amendment privilege against self-incrimination before a Senate committee. In finding an unconstitutional restriction on this fifth amendment right, the Court found irrelevant the fact that an individual has no right to public employment.²⁷ And in *McLaughlin v. Tilendis*,²⁸ the Seventh Circuit held that although there was no right to public employment, a public employee could not be dismissed for joining or helping to organize a labor union. This, it was held, would create an unconstitutional burden on the independent right to join and form a union.²⁹

In this line of cases, one common theme comes through. The state may not use the right-privilege distinction to justify an indirect limitation on specifically protected constitutional rights and thereby escape the reach of the protection of those rights. The state may not do through the doctrine of privilege what it is prohibited from doing directly. Thus, the fact of employment as a teacher or professor may not allow restrictions on the out-of-school activities

²⁶ 350 U.S. 551 (1956).

²⁷ See also *Ault Unemployment Compensation Case*, 398 Pa. 250, 157 A.2d 375 (1960) (unemployment compensation may not be denied because of refusal to answer questions regarding Communist affiliation). But see *Nelson v. Los Angeles County*, 362 U.S. 1 (1960), where the Court upheld the dismissal of social workers who had specifically disobeyed an order to answer questions at a subversive activities hearing. The Court distinguished *Slochower* by saying that in that case the statute had provided for automatic dismissal of anyone invoking the fifth amendment, whereas in *Nelson* there was a specific act of insubordination. But since the order had the same effect as the New York statute in *Slochower*, it is hard to accept the distinction. Cf. *Schlesinger v. Gates*, 249 F.2d 111 (D.C. Cir. 1957), cert. denied, 355 U.S. 939 (1958) (contractor debarred from obtaining further government contracts after refusal to answer questions before Senate subcommittee; debarment upheld because of past defaults in performance).

Slochower was followed in *Garrity v. New Jersey*, 385 U.S. 493 (1967), where the Court disallowed the dismissal of policemen for refusal to answer questions about alleged ticket fixing, and in *Spevack v. Klein*, 385 U.S. 511 (1967), disallowing the disbarment of an attorney who refused to produce his financial records and refused to testify at a professional misconduct investigation. See also *Gardner v. Broderick*, 392 U.S. 273 (1968), and *Uniformed Sanitationmen's Ass'n. v. Commissioner*, 392 U.S. 280 (1968).

²⁸ 398 F.2d 287 (7th Cir. 1968).

²⁹ The court found that the right to form and join a union was a first amendment right, citing, *inter alia*, *Thomas v. Collins*, 323 U.S. 516 (1945), and *Hague v. C.I.O.*, 307 U.S. 496 (1939).

See also *Pred v. Board of Public Instruction*, 415 F.2d 851 (5th Cir. 1969).

of the individual which would not otherwise be permitted.³⁰ But, like all other principles in this area, there are limitations on this concept. In *Pickering v. Board of Education*,³¹ where public criticism of the school board was permitted by the Supreme Court, the Court specifically noted that there was no showing of any effect on classroom duties³² and no showing that these statements were any evidence of lack of fitness on the part of the teacher.³³ It is clear that if out-of-class activities can be shown to have a direct effect on the teacher's classroom performance, then appropriate restrictions on certain out-of-class activities would be justified, and similarly, if public criticism of a superior would undermine an ongoing and close working relationship, this criticism may be prohibited.³⁴ Thus, the true test is the relationship of the challenged activity to the official duties of the teacher or the professor. If there is no such relationship, or the relationship is highly attenuated, then such restrictions are impermissible. But if the outside activities can be shown to impair the teacher's ability to teach, then reasonable restrictions on those activities have been upheld.³⁵

B. *Restrictions on School-Related But Out-of-Class Activities*

It was seen in the previous subsection that permissible restrictions on the out-of-school activities of teachers and professors increase as a direct correlation can be shown between those activities and performance of the teacher's duties. *A fortiori*, when those

³⁰ See Comment, *Personality Control and Academic Freedom*, 1975 UTAH L. REV. 234 (1975), discussing, *inter alia*, *Rampey v. Allen*, 501 F.2d 1090 (10th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975). See also *Acanfora v. Board of Educ.*, 359 F. Supp. 843 (D. Md. 1973), *aff'd*, 491 F.2d 498 (4th Cir. 1974) (homosexual teachers may not be barred on that account), *noted at* 7 CREIGHTON L. REV. 92 (1973).

³¹ 391 U.S. 563 (1968).

³² *Id.* at 572-73.

³³ *Id.* at 573 n.5.

³⁴ Cases applying the *Pickering* rationale to uphold or reject restrictions on out-of-class activities include *Roberts v. Lake Central School Corp.*, 317 F. Supp. 63 (N.D. Ind. 1970); *Watts v. Seward School Bd.*, 454 P.2d 732 (Alas. 1969), *cert. denied*, 397 U.S. 921 (1970); *Pietruni v. Board of Educ.*, 128 N.J. Super. 149, 319 A.2d 262, *cert. denied*, 419 U.S. 1057 (1974); *Hostrop v. Board of Junior Colleges*, 337 F. Supp. 977 (N.D. Ill.) *rev'd* 471 F.2d 488 (7th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973).

³⁵ Compare *Morrison v. Board of Educ.*, 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969) and *Jarvella v. Willoughby—Eastlake City School Dist.*, 12 Ohio Misc. 288, 233 N.E.2d 143 (Comm. Pl. 1967) with *Horosko v. School Dist.*, 335 Pa. 369, 6 A.2d 866, *cert. denied*, 308 U.S. 553 (1939) and *Gover v. Stovall*, 237 Ky. 172, 35 S.W.2d 24 (1931).

activities take place in the school or on the campus, the courts have held that permissible restrictions on speech and speech-related activities are even greater. It is clear that the teacher's responsibilities and duties are not solely within the classroom. Therefore, if one accepts the obvious proposition that some restrictions on speech and other protected activities are permissible while the employee is performing his or her duties,³⁶ then greater restrictions are allowable as to activities in the school setting than as to activities wholly unrelated to the teacher's duties. Thus, sanctions have been held to be constitutionally permissible against a teacher as a result of inflammatory or divisive statements made in staff meetings and in the teachers lounge.³⁷ Similarly, the Sixth Circuit has held valid a prohibition against controversial speeches made at student rallies during school hours.³⁸ And a federal court in Missouri upheld disciplinary action against a teacher whose speeches to students were found expressly to impede school policy by interfering with R.O.T.C. recruiting at the school.³⁹ But these cases should not be taken to indicate that any and all restrictions on teacher activity during school hours, or on campus, are free from constitutional considerations. In *Tinker v. Des Moines Independent Community School District*,⁴⁰ the Supreme Court upheld, on first amendment grounds, the right of students to wear armbands, as a protest against the Vietnam War, during school hours.⁴¹ In the course of its decision, the Court noted that

It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.⁴²

³⁶ While *McAuliffe* might very well be decided differently today, there is no doubt that *McAuliffe* could validly be prohibited from making his political speeches while directing traffic.

³⁷ *Amburgey v. Cassady*, 370 F. Supp. 571 (E.D. Ky. 1974).

³⁸ *Whitsel v. Southeast Local School Dist.*, 484 F.2d 1222 (6th Cir. 1973).

³⁹ *Birdwell v. Hazelwood School Dist.*, 352 F. Supp. 613 (E.D. Mo. 1972), *aff'd*, 491 F.2d 490 (8th Cir. 1974); *cf. Glover v. Daniel*, 318 F. Supp. 1070, 1075 (N.D. Ga. 1969), *aff'd*, 434 F.2d 617 (5th Cir. 1970).

⁴⁰ 393 U.S. 503 (1969).

⁴¹ This case is also significant for its discussion of the problem of "symbolic speech." See also *Spence v. Washington*, 418 U.S. 405 (1974) (peace symbol of an American flag is form of protected expression) and *United States v. O'Brien*, 391 U.S. 367 (1968) (prohibition of draft card burning not aimed at expression and therefore valid). See generally *Nimmer, The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A. L. REV. 29 (1973).

⁴² 393 U.S. at 506. Compare the dissenting opinion of Mr. Justice Black, 393 U.S. at 522.

Applying this aspect of *Tinker*, lower courts have upheld a limited right of free expression during school hours for teachers and professors. Thus, it has been held that teachers, as well as students, have a right to wear protest armbands during school hours.⁴³ The Second Circuit has also upheld the right of a school teacher to refuse to salute the flag, although leading the class in the flag salute was nominally part of the teacher's duties.⁴⁴ And a New Jersey court overturned an attempted restriction on the discussion of salary and related matters by teachers with students, primarily on prior restraint grounds.⁴⁵

In determining, therefore, the allowability of restrictions on speech-related activities which take place in the school but outside of the classroom, both *Pickering* and *Tinker* provide the touchstones for the analysis. If the activity would, in other settings, be clearly constitutionally protected, if it is not disruptive of school activities or school administration, and if it is not obstructive of the educational purpose and policies of the school, then it should generally be allowed. But if the activity, even if speech or some other constitutionally protected activity, is actually disruptive, or is in fact a challenge to or obstructive of clearly defined educational or administrative policies of the school, then that activity may properly be restricted by either administrative regulation or appropriate disciplinary action.

C. *Restrictions on Classroom Teaching*

With the foregoing as background, it is time to turn to the crux of this section. What is the permissible scope of restrictions on classroom teaching, or, stated in another way, what is the extent of the concept of academic freedom when applied to the actual teaching activities of the teacher or professor?⁴⁶ Since the emphasis

⁴³ *James v. Board of Educ.*, 461 F.2d 566 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972).

⁴⁴ *Russo v. Central School Dist. No. 1*, 469 F.2d 623 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973). *See also Hanover v. Northrup*, 325 F. Supp. 170 (D. Conn. 1970). These cases, of course, grant to teachers the same privilege which was given to students in *West Virginia State Board of Educ. v. Barnette*, 319 U.S. 624 (1943).

⁴⁵ *River Dell Educ. Ass'n v. River Dell Bd. of Educ.*, 122 N.J. Super. 350, 300 A.2d 361 (1973). *See also Smith v. Losee*, 485 F.2d 334 (10th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974).

⁴⁶ *See generally Miller, Teachers' Freedom of Expression Within the Classroom: A Search for Standards*, 8 GA. L. REV. 837 (1974); Nahmod, *Controversy in the Classroom: The High School Teacher and Freedom of Expression*, 39 GEO.

here is with the exact and defined duties of the teacher, it is clear now that the scope of constitutional protection is narrowest in this area. "In the first place, the free speech clause of the first amendment, though a logical textual source of a constitutional right of academic freedom, is of questionable relevance to speech in public elementary or secondary school classrooms."⁴⁷ But this is exactly opposite of the earliest origins of the concept of academic freedom, the *Lehrfreiheit* of the German universities in the nineteenth century, which gave virtually unlimited freedom to the individual professor in the classroom, but granted no protection against restrictions on activities outside of the classroom.⁴⁸ With the first amendment providing general protection for speech and associational rights, however, American academic freedom developed primarily in the area of restriction on the allowable area of control over non-classroom activities. But this protection relates not only to general first and fourteenth amendment rights, but also to the particular function of the teacher in our society. Thus, in a number of cases, the Supreme Court related the teacher's protection against interference with outside activities to the teacher's function in the classroom. In *Wieman v. Updegraff*,⁴⁹ one of the loyalty oath cases, Mr. Justice Frankfurter commented as follows:

But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are

WASH. L. REV. 1032 (1971); Nahmod, *First Amendment Protection for Learning and Teaching: The Scope of Judicial Review*, 18 WAYNE L. REV. 1479 (1972); Le Clercq, *The Monkey Laws and the Public Schools: A Second Consumption?* 27 VAND. L. REV. 209, 232-37 (1974); Note, *Academic Freedom in the Public Schools: The Right to Teach*, 48 N.Y.U.L. REV. 1176 (1973). See also authorities cited in note 1 *supra*. The entire concept of academic freedom was ridiculed in *Jones v. Board of Control*, 131 So. 2d 713 (Fla. 1961).

⁴⁷ *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1053 (1968). This, of course, is an oversimplification, as the remainder of this section will show, but virtually every free speech and public employment case in the last thirty years has supported the proposition that free speech rights are less when attempted to be exercised during the actual performance of duties.

⁴⁸ *Developments, supra* note 47, at 1048-49; Note, *Academic Freedom, supra* note 46, at 1177-79.

⁴⁹ 344 U.S. 183 (1952).

immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers.⁵⁰

His thesis, which as an abstract proposition cannot be seriously questioned, is that selection of teachers on political grounds, or on the basis of lack of exercise of free speech rights, results in a uniformity and conformity within the academic community, a situation incompatible with the concept of an academic institution as a center for the interchange of ideas, both in and out of the classroom. This theme recurs in other cases. In *Shelton v. Tucker*,⁵¹ the Supreme Court, in invalidating an Arkansas statute requiring all teachers to file an affidavit listing all organizations to which they belonged, noted that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."⁵² That academic freedom generally has first amendment origins was made clear in *Keyishian v. Board of Regents*.⁵³

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."⁵⁴

Keyishian is one of few Supreme Court cases to relate academic freedom directly to what goes on in the classroom, and to the function of classroom education. Thus, although the Court has consistently recognized the concept of academic freedom,⁵⁵ the only case even remotely dealing with classroom academic freedom is *Sweezy v. New Hampshire*.⁵⁶ *Sweezy* involved an investigation

⁵⁰ *Id.* at 195 (Frankfurter, J., concurring).

⁵¹ 364 U.S. 479 (1960).

⁵² *Id.* at 487.

⁵³ 385 U.S. 589 (1967).

⁵⁴ *Id.* at 603.

⁵⁵ See *Barenblatt v. United States*, 360 U.S. 109, 112 (1959) (opinion of Harlan, J.).

⁵⁶ 354 U.S. 234 (1957).

as a result of a number of activities by a university professor, but the most significant was a lecture delivered in class at the University of New Hampshire. Noting the importance of an interchange of ideas and opinions in the classroom, the Supreme Court went on to say that

We believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread.⁵⁷

Thus, the only Supreme Court case to deal with classroom academic freedom dealt with it on the university level. It may not be wholly appropriate to draw the facile analogy between college level education and elementary and secondary education. We have accepted the idea that the university is a marketplace of ideas, and that is one of the functions of university education. As *Sweezy* and other cases show, this function has even been elevated to a constitutional position, so ingrained is it in the conception of the function of higher education. But the purposes of elementary and secondary education in the public schools⁵⁸ are far from clear. A century and a half ago, Alexis de Tocqueville commented that “[i]n the United States, politics are the end and aim of education.”⁵⁹ In its exhaustive 1968 study of academic freedom, the Harvard Law Review contrasted the purposes of elementary and secondary education with those of higher education.

The assumptions of the “free marketplace of ideas” on which freedom of speech rests do not apply to school-aged children, especially in the classroom where the word of the teacher may

⁵⁷ *Id.* at 250.

⁵⁸ This article is, of course, concerned with public elementary and secondary schools, and not with private schools. To the extent that rights to academic freedom are constitutionally based, there is a requirement that any deprivation be by state action before a constitutional claim could be located. There are, however, circumstances under which state involvement in private education is such as to subject the private institution to the requirements of the Constitution. This problem of state action and the private educational institution has arisen most often in the context of procedural due process requirements in colleges and universities. See generally Hendrickson, “State Action” and *Private Higher Education*, 2 J.L. & EDUC. 53 (1973); Schubert, *State Action and the Private University*, 24 RUTG. L. REV. 323 (1970); Note, *Common Law Rights for Private University Students; Beyond the State Action Principle*, 84 YALE L.J. 120 (1974).

⁵⁹ Quoted in Berkman, *Students in Court: Free Speech and the Functions of Schooling in America*, 40 HARV. EDUC. REV. 567, 569 (1971). See also 3 J. BRYCE, *THE AMERICAN COMMONWEALTH* 276-77 (1891).

carry great authority. It seems unwise to assume as a matter of constitutional doctrine that school children possess sufficient sophistication or experience to distinguish "truth" from "falsity." Furthermore, since one function of elementary and even secondary education is indoctrinative—to transmit to succeeding generations the body of knowledge and set of values shared by members of the community—some measure of public regulation of classroom speech is inherent in the very provision of public education.⁶⁰

But this view of education in the public schools is clearly not universally accepted.

The catalytic factor seems to have been acceptance of the view that the primary purpose of education is intellectual stimulation. If this proposition seems self-evident, it should be remembered that, for centuries, education was viewed as primarily an inculcation of social and moral values.⁶¹

The primary function of the public school should be to encourage students to develop an appropriate methodology for engaging in intellectual inquiry.⁶²

It is obvious that there exists considerable division of opinion as to whether an elementary or secondary school should be a place for the development of intellectual methodology, or on the other hand a place for the indoctrination of specific facts, specific knowledge, and specific views. The real question, however, is not which of these philosophies is correct. The question is whether the choice of philosophies is one of constitutional proportion. Is the elementary or secondary classroom a locus of the marketplace of ideas? If so, then there may be some degree of first amendment protection for the concept of academic freedom. But if the classroom is a place for indoctrination, or inculcation of facts or specific knowledge, then the teacher's individual freedom of expression in the classroom is of little relevance. While it is true that the state may not ignore first amendment considerations in deciding on the use to

⁶⁰ *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1053 (1968). See also *James v. Board of Educ.*, 461 F.2d 566, 573 (2d Cir.), cert. denied, 409 U.S. 1042 (1972).

⁶¹ Note, *Academic Freedom in the Public Schools: The Right to Teach*, 48 N.Y.U.L. REV. 1176, 1177 (1973).

⁶² Le Clercq, *The Monkey Laws and the Public Schools: A Second Consumption?* 27 VAND. L. REV. 209, 235 (1974). This article views the indoctrinative theory of education as "authoritarian." "A school should not be like a hospital or a jail." *Id.* at 235 n.158.

which its facilities are placed,⁶³ it is equally true that all public property is not per se open to first amendment activity.⁶⁴ The test seems to be whether or not allowance of first amendment activity would be compatible or incompatible with the primary purpose of the facility.⁶⁵ But saying this may not make the problem any easier, for who is it that decides what is the primary purpose of the facility? A state can say, as in *Adderley v. Florida*,⁶⁶ that its jails have a primary purpose which is inconsistent with first amendment activity, but it cannot say that its public streets or public parks may not be so used.⁶⁷ The distinction depends in large part upon the judiciary's evaluation of the inherent purpose of a particular location or a particular facility. This brings the inquiry back to determining just what is the inherent purpose of the elementary and secondary school classroom, and who makes the choice. Clearly, in the area of the state's employees performing the state's functions, where the inquiry is into the very performance of those duties, the primary determination should be a legislative one as to the functions of the public schools. There seems no compelling reason for the first amendment to control the choice as to the proper philosophy for elementary and secondary education in the United States, rather than leaving this decision to the appropriate legislative bodies. The classroom of the public school is certainly not so fundamentally a locus for the marketplace of ideas, or the free exchange of opinion, as is the public park, the public street, the public auditorium, or even the college classroom. In the absence of this degree of unanimity, the determination should probably remain outside of the courts. And this conclusion is buttressed by a general reluctance to extend first amendment protection to speech which is actually part of the performance of the duties of the employee. A policeman may not exercise first amendment

⁶³ See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

⁶⁴ See, e.g., *Greer v. Spock*, 96 S. Ct. 1211 (1976); *Adderley v. Florida*, 385 U.S. 39 (1966) (jail); *Bullock v. Mumford*, 509 F.2d 384 (D.C. Cir. 1974) (Library of Congress); *United States v. Crowthers*, 456 F.2d 1074 (4th Cir. 1972) (Pentagon concourse).

⁶⁵ *Adderley v. Florida*, 385 U.S. 39 (1966). See generally Kalven, *The Concept of the Public Forum*, 1965 SUP. CT. REV. 1 (1965); Note, *The Right of Peaceful Protest*, 55 CALIF. L. REV. 549 (1967).

⁶⁶ 385 U.S. 39 (1966).

⁶⁷ *Hague v. C.I.O.*, 307 U.S. 496 (1939); *Kunz v. New York*, 340 U.S. 290 (1951); *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Gregory v. City of Chicago*, 394 U.S. 111 (1969); *Coates v. Cincinnati*, 402 U.S. 611 (1971). Compare *Cox v. Louisiana*, 379 U.S. 559 (1965) and *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

rights while investigating a crime, and few would contend that an announcer or actor for a publicly financed television station could claim the protection of the first amendment if he or she deviated from the script for a particular show. Nonetheless, as this analysis has shown, the choice as to which loci are appropriate for first amendment activity, and which are not, is one that inevitably involves the courts in making this choice, in order that the scope of constitutional protection may be ascertained. So, while it may be a basic proposition that overall control of educational philosophy and educational methods lies with the state, the first amendment is not wholly irrelevant, and thus the courts must become involved with issues of educational philosophy and educational methods.⁶⁸

The application of these principles by the courts shows the difficulty of the problem of recognizing basic administrative authority over choices of teaching methods and teaching materials, while not wanting to eliminate completely any possible area of discretion by the individual teacher. At the outset, however, mention should be made of cases such as *Parducci v. Rutland*.⁶⁹ In this case, a teacher was dismissed for assigning "Monkey House," by Kurt Vonnegut, Jr., to high school juniors. While acknowledging that "[t]his 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,"⁷⁰ the court then proceeded to place the burden on the school authorities to show that the assignment was inappropriate, or that it created a significant disruption of the educational process.⁷¹ Thus, freedom in the choice of materials was presumed to rest with the teacher, subject to a showing of inappropriateness by the school administration, an allocation of burdens that seems inconsistent with the true role of the first amendment in the area of classroom teaching. Similarly, in *Keefe v. Geanakos*,⁷² a high school English teacher had been suspended for assigning an article on protest as outside reading, and then discussing, in class, the use of the word "mother-fucker"

⁶⁸ See Miller, *Teachers' Freedom of Expression Within the Classroom: A Search for Standards*, 8 GA. L. REV. 837, 845-49, 859 (1974).

⁶⁹ 316 F. Supp. 352 (M.D. Ala. 1970).

⁷⁰ *Id.* at 355.

⁷¹ *Id.* at 356. Much of this was dicta, since the court also determined that the teacher was dismissed without appropriate procedural due process safeguards.

⁷² 418 F.2d 359 (1st Cir. 1969).

in that article. But the court held that the article and the class discussion were educationally relevant, despite objections by some parents. "With the greatest of respect to such parents, their sensibilities are not the full measure of what is proper education."⁷³ Read broadly, cases such as these may stand for a basic substantive right of academic freedom on the part of the teacher in the choice of educational methods and educational materials.⁷⁴ But perhaps they are more properly seen as cases recognizing a degree of academic freedom within parameters set down by school authorities. In other words, if there is no specific prohibition on the particular teaching activity, then some degree of individual choice by the teacher is permissible.

This concept can be seen in those cases dealing with academic freedom concurrently with the issue of proper notice. The leading case seems to be the decision of Judge Wyzanski in *Mailloux v. Kiley*.⁷⁵ The teacher had been suspended for using the word "fuck" in class, as part of a particular lesson. Judge Wyzanski distinguished the freedoms of secondary school teachers from those of college teachers, since the high school is less of an open forum, involves more parental interest in the specific educational process, and involves students who are not voluntarily in class.⁷⁶ However, there was still a qualified right to some academic freedom even as to in-classroom teaching. This right, however, was subject to the ultimate power of the school authorities, but this power must be exercised by specific regulations made known in advance of the activity upon which the disciplinary action was based.⁷⁷ Thus, notice is the primary issue, but the validity of the regulation and the specificity required in the notice is dependent on the basic recogni-

⁷³ *Id.* at 361-62.

⁷⁴ See also *Webb v. Lake Mills Community School Dist.*, 344 F. Supp. 791 (N.D. Iowa 1972); *Sterzing v. Fort Bend Independent School Dist.*, 376 F. Supp. 657 (S.D. Tex. 1972), *vacated on other grounds*, 496 F.2d 92 (5th Cir. 1974); cf. *Oakland Unified School Dist. v. Olier*, 25 Cal. App. 3d 1098, 102 Cal. Rptr. 421 (1972).

⁷⁵ 323 F. Supp. 1387 (D. Mass.), *aff'd*, 448 F.2d 1242 (1st Cir. 1971).

⁷⁶ *Id.* at 1392.

⁷⁷ *Id.* Other cases raising the notice issue in this or similar contexts include *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969); *Moore v. Gaston County Bd. of Educ.*, 357 F. Supp. 1037 (W.D.N.C. 1973); *Sterzing v. Fort Bend Independent School Dist.*, 376 F. Supp. 657 (S.D. Tex. 1972), *vacated on other grounds*, 496 F.2d (5th Cir. 1974); *Webb v. Lake Mills Community School Dist.*, 344 F. Supp. 791 (N.D. Iowa 1972); *Parducci v. Rutland*, 316 F. Supp. 352, 356-58 (M.D. Ala. 1970).

tion of some degree of teacher independence. This was made clear in the First Circuit's opinion in the same case.

[F]ree speech does not grant teachers a license to say or write in class whatever they may feel like, and . . . the propriety of regulations "or" sanctions must depend on such circumstances as the age and sophistication of the student, the closeness of the relation between the specific technique used and some concededly valid educational objective, and the context and manner of presentation.⁷⁸

Thus, although the simplest view, and one certainly not without substantial justification, is that in the actual performance of duties the teacher does not have any rights to academic freedom,⁷⁹ and that the school exercises ultimate and absolute control,⁸⁰ more recent cases have attempted to define a carefully qualified limited range of classroom academic freedom for the elementary and secondary school teacher. Broadly, then, the control of the school administration is perhaps less absolute as to classroom activities than it is as to other areas, such as the school library.⁸¹ Judge Wzyanski has found a substantive right to select teaching methods serving demonstrable educational purposes if they are either shown to be necessary, or supported by the weight of teaching opinion, or otherwise plainly permissible.⁸² Thus, one area of inquiry must be as to whether the method used or book selected serves a valid educational purpose.⁸³ The determination of this involves not only a determination of educational validity in the abstract, but also the relevance of the methods or materials chosen to the purposes of a particular class. Valid educational methods lose their validity when employed to advance goals outside of the

⁷⁸ *Mailloux v. Kiley*, 448 F.2d 1242, 1243 (1st Cir. 1971).

⁷⁹ See *Parker v. Board of Educ.*, 237 F. Supp. 222, 229-30 (D. Md.), *aff'd*, 348 F.2d 464 (4th Cir. 1965), *cert. denied*, 382 U.S. 1030 (1966) (use of *Brave New World* in the classroom not protected activity).

⁸⁰ See *Evans v. Selma Union High School Dist.*, 193 Cal. 54, 222 P. 801 (1924) (control over textbooks); *Leeper v. State*, 103 Tenn. 500, 53 S.W. 962 (1899) (same). See generally *Fellman, Academic Freedom in American Law*, 1961 Wis. L. Rev. 3, 21-23 (1961).

⁸¹ See *President's Council v. Community School Bd.*, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972).

⁸² *Mailloux v. Kiley*, 323 F. Supp. 1387 (D. Mass.), *aff'd*, 448 F.2d 1242 (1st Cir. 1971).

⁸³ *Lindros v. Governing Bd. of the Torrance Unified School Dist.*, 26 Cal. App. 3d 38, 103 Cal. Rptr. 188 (1972), *rev'd*, 9 Cal. 3d, 524, 510 P.2d 361, 108 Cal. Rptr. 185 (1973).

purposes of the particular educational function at issue.⁸⁴ If, then, the methods used or the materials assigned are educationally valid and educationally relevant, the case law seems to support the proposition that "academic freedom implies the limited introduction of unapproved material into the classroom."⁸⁵ But all of this implies no clear abrogation of, or contradiction with clearly defined school policies. If, as the cases seem to say, and the Constitution appears to allow, the school administrator, acting on behalf of the state, may decide issues of educational policies and educational materials and methods used, the range of academic freedom seems limited to that which does not result in wholesale changes in, or exclusions of, the official curriculum.⁸⁶ The same applies as well to general teaching philosophy or style. Academic freedom "does not encompass the right of a nontenured teacher to have her teaching style insulated from review by her superiors . . . just because her methods and philosophy are considered acceptable somewhere within the teaching profession."⁸⁷

What this all amounts to, which is a logical extension of the basic, although not unlimited, right of the state to decide what will be taught in the public schools and how it will be taught,⁸⁸ is that classroom academic freedom exists mainly within the parameters set by the appropriate governing authority. The school administration has ultimate control over the subject matter, the materials which will be used, and the manner in which the subject will be

⁸⁴ See *Downs v. Conway School Dist.*, 328 F. Supp. 338 (E.D. Ark. 1971); *Knarr v. Board of School Trustees*, 452 F.2d 649 (7th Cir. 1971); *Sterzing v. Fort Bend Independent School Dist.*, 376 F. Supp. 657 (S.D. Tex. 1972), *vacated on other grounds*, 496 F.2d 92 (5th Cir. 1974); *Pred v. Board of Public Instruction*, 415 F.2d 851 (5th Cir. 1969); *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973); *Ahern v. Board of Educ.*, 456 F.2d 399 (8th Cir. 1972); *Robbins v. Board of Educ.*, 313 F. Supp. 642 (N.D. Ill. 1970); *cf. Goldwasser v. Brown*, 417 F.2d 1169 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970).

⁸⁵ Miller, *Teachers' Freedom of Expression Within the Classroom; A Search for Standards*, 8 GA. L. REV. 837, 872 (1974).

⁸⁶ *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973); *cf. Drown v. Portsmouth School Dist.*, 451 F.2d 1106 (1st Cir. 1971), *cert. denied*, 402 U.S. 972 (1972); *President's Council v. Community School Bd.*, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972); *Brubaker v. Board of Educ.*, 502 F.2d 973 (7th Cir. 1974), *cert. denied*, 421 U.S. 965 (1975).

⁸⁷ *Hetrick v. Martin*, 480 F.2d 705, 709 (6th Cir.), *cert. denied*, 414 U.S. 1075 (1973). See also *Cook County College Teachers Union, Local No. 1600 v. Byrd*, 456 F.2d 882 (7th Cir.), *cert. denied*, 409 U.S. 848 (1972).

⁸⁸ See text accompanying notes 58-68 *supra*.

taught. But all of this power must be exercised specifically, by proper notice and proper procedures. To the extent, and seemingly only to the extent, that matters are not so specifically dealt with, the teacher has the right to select valid and relevant educational methods and materials which are not inconsistent with overall school goals. As so defined, of course, the extent of constitutional protection of the teacher's in-class activities is very limited, since it is subject to the properly exercised limitation by governing authorities, but this does not seem inappropriate. The schoolroom is not yet so universally accepted as an open marketplace of ideas that this concept rises to the level of a constitutional right, either for the teacher or for the student. And in the absence of such a right, there is nothing to preclude the school administration or school board from making binding decisions as to teaching methods, subjects to be covered, and materials to be used.

III. RESTRICTIONS ON THE CHOICE

That the choice of instructional materials and instructional methods may constitutionally be allocated to the school authorities does not mean that the choices are completely outside of the scope of constitutional scrutiny. Thus, the substance of the choice, as distinguished from the locus of the choice, may involve constitutional considerations, primarily under the religion clauses of the first amendment. Before turning to these, however, a brief discussion of the current implications of an earlier mode of analysis is called for.

A. *Substantive Due Process*

Normally, the very mention of substantive due process is enough to scare the modern constitutional scholar, and thus any attention to it would be surprising. It is mentioned here because of the existence of two Supreme Court cases that, on their face, bear strongly on the general issue under consideration. The cases are *Meyer v. Nebraska*,⁸⁹ and *Bartels v. Iowa*,⁹⁰ both decided during the high point of substantive due process. In *Meyer*, the Court was called upon to review a Nebraska statute which prohibited the teaching, in a public or private school, of any subject in any language other than English, and prohibited the teaching of foreign

⁸⁹ 262 U.S. 390 (1923).

⁹⁰ *Id.* at 404.

languages prior to the completion of the eighth grade. *Bartels* dealt with similar statutes in Iowa and Ohio, as well as another case arising out of Nebraska. All of the convictions under review involved the teaching of the German language in various parochial schools. The purpose of the statutes was generally aimed at the assimilation of the recent wave of immigrants, primarily German, in the states involved. The Supreme Court, in opinions written by Mr. Justice McReynolds, overturned the statutes as interfering with the liberty guaranteed by the fourteenth amendment. Finding that liberty included the right "to engage in any of the common occupations of life," and that teaching was one of those occupations, the Court concluded that the teacher's right to follow the calling of a modern language teacher, and "his right thus to teach and the right of parents to engage him so to instruct their children . . . are within the liberty of the Amendment."⁹¹ Since "[m]ere knowledge of the German language cannot reasonably be regarded as harmful,"⁹² the Court found the statute unconstitutional as arbitrary and not reasonably related to any valid state goal.

To the extent that *Meyer* stands for the proposition that the Court will evaluate in detail the reasons for the legislation, it is clear that it is no longer "good law."⁹³ Of course, if a state prescribed educational requirements which were wholly without basis, then a substantive due process claim might be successful.⁹⁴ This, however, is highly unlikely. The arguable significance of *Meyer* is its statement that there is a substantive right, found in the concept

⁹¹ *Id.* at 399-400.

⁹² *Id.*

⁹³ See *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Ferguson v. Skrupa*, 372 U.S. 726 (1963). Since *Meyer* dealt with private schools, it is, in any event, of questionable relevance to any purported right to teach certain subjects in the public schools.

⁹⁴ An example given has been the hypothetical requirement "that all students in eighth-grade English, as a condition precedent to successful completion of the course, successfully make 3 parachute jumps from an altitude of at least 5,000 feet." LeClercq, *The Monkey Laws and the Public Schools: A Second Consumption?* 27 VAND. L. REV. 209, 240 n.181 (1974). Professor LeClercq implies, however, that the same mode of analysis could be used to invalidate legislation dealing with the teaching of creationist, as opposed to Darwinian, or evolutionary, theories of the origin of man. But creationist theory has a widely accepted, albeit religious, basis. The fact that that basis may be constitutionally impermissible, by virtue of the establishment clause of the first amendment, does not make it irrational in constitutional terms. That which is constitutionally impermissible is not necessarily lacking in any rational basis, even if it is scientifically, if not religiously, thought to be invalid. Compare *Roe v. Wade*, 410 U.S. 113 (1973).

of liberty in the fourteenth amendment, to teach particular subjects and, therefore, perhaps also to teach in a particular manner or with particular materials. This aspect of *Meyer* seems to survive,⁹⁵ but it must be looked at in its proper perspective. Virtually every recent case dealing with the "common occupations," has been a procedural due process case.⁹⁶ That something may not be taken away without notice and a hearing is a far cry from an absolute right to engage in that activity in the public sector. What remains of any kind of substantive liberty to teach must be found, if at all, in and around the first amendment, a subject that has been discussed at length in the previous section of this article.

B. *The Establishment Clause of the First Amendment*

The most important substantive restrictions on what can be taught in the public schools seem to come from the religion clauses of the first amendment, primarily the establishment clause, providing that "Congress shall make no law respecting an establishment of religion,"⁹⁷ and equally applicable to the states through the fourteenth amendment.⁹⁸ There have been a large number of cases decided by the Supreme Court under the establishment clause, but few have dealt with actual instructional activities in the public schools. Many have dealt with financial support to parochial schools,⁹⁹ others have dealt with attempts to involve the public schools in formal religious education,¹⁰⁰ and of course there have been the school prayer cases.¹⁰¹ What emerges from all of these cases is a three part test, providing that the state activity have a plainly secular *purpose*, that its actual *effect* neither pro-

⁹⁵ See *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

⁹⁶ See, e.g., *Willner v. Committee on Character*, 373 U.S. 96 (1963) (attorney); *Goldsmith v. Board of Tax Appeals*, 270 U.S. 117 (1926) (accountant); *Milligan v. Board of Registration in Pharmacy*, 348 Mass. 491, 204 N.E.2d 504 (1965); cf. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).

⁹⁷ U.S. CONST. amend I.

⁹⁸ *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

⁹⁹ See, e.g., *Committee for Public Educ. v. Nyquist*, 413 U.S. 756 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971), *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Board of Educ. v. Allen*, 392 U.S. 236 (1968); *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

¹⁰⁰ See, e.g., *Zorach v. Clauson*, 343 U.S. 306 (1952); *McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

¹⁰¹ *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

mote nor inhibit religion, and that there be no excessive governmental *entanglement* with religion.¹⁰² The application of these general principles to instructional activities and materials in the public schools is the subject of the remainder of this section.

The most important case on the establishment issue is *Epperson v. Arkansas*,¹⁰³ decided by the Supreme Court in 1968. *Epperson* involved an Arkansas statute which provided for criminal penalties, as well as dismissal, for any school teacher who taught evolutionary theories in the public schools.¹⁰⁴ The statute was based on the Tennessee statute which had been upheld in the famous Scopes "monkey trial."¹⁰⁵ Writing for the Court, Mr. Justice Fortas reaffirmed the state's basic right to prescribe the curriculum for the public schools, which would clearly include the study of religion and the Bible from literary and historic viewpoints.¹⁰⁶ But in making these curricular decisions, the state must be religiously neutral. It cannot promote or inhibit any religious view, or promote or inhibit religion. This statute violated the establishment clause, as well as the free exercise clause,¹⁰⁷ since it was enacted to promote a particular religious view, and in fact would have that effect.

The overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group.¹⁰⁸

¹⁰² Committee for Public Educ. v. Nyquist, 413 U.S. 756 (1973).

¹⁰³ 393 U.S. 97 (1968).

¹⁰⁴ The suit had been commenced as a declaratory judgment action by a teacher. The statute itself had never been enforced.

¹⁰⁵ Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927). See generally LeClercq, *The Monkey Laws and the Public Schools: A Second Consumption?* 27 VAND. L. REV. 209 (1974). For general background on the issues in the Scopes trial, see the authorities cited *id.* at n.2.

¹⁰⁶ 393 U.S. at 106-107.

¹⁰⁷ The free exercise clause and the establishment clause may overlap in their prohibitions in situations, such as this, where the establishment of religion, in a coercive environment such as a public school, also has the effect of preventing the free exercise of contrary beliefs, such as the belief that evolutionary theory is wrong, or that school prayers are not the appropriate way to worship. *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).

¹⁰⁸ 393 U.S. at 103 (footnote omitted). *Epperson* was followed in *Smith v. State*, 242 So. 2d 692 (Miss. 1970). An attempt to draft an "equal time" statute which required a "disclaimer" on textbooks dealing with evolution, and required the

The key point of *Epperson* is its inquiry into the religious purpose of the Arkansas statute. While legislative purpose is not relevant in all areas of constitutional law,¹⁰⁹ its function in establishment clause cases is important, since virtually all legislation may be said to affect someone's religious beliefs in some way.¹¹⁰ Where the law's purpose is plain from the very prohibition or requirement, as in the school prayer cases, the inquiry into purpose may be unnecessary. But other cases present harder problems. Thus, an attack on the teaching of evolution, as constituting the establishment of an atheistic, sectarian religion, was rejected because the practice had an educational and scientific, rather than a religious, purpose.¹¹¹ Similarly, sex education courses and materials, although offensive to some religious groups, do not constitute an establishment of religion since their purpose is based on educational, and not religious (or anti-religious) goals.¹¹²

The issue of government entanglement with religion is unlikely to be significant in most establishment clause cases involving school books and subjects taught. And while many books or classes might have some effect which incidentally promotes or inhibits a particular religious viewpoint, this too is not likely to be

teaching of the Genesis theory if the Darwinian theory was taught was rejected in *Daniel v. Waters*, 515 F.2d 485 (6th Cir. 1975). See also *Wright v. Houston Independent School Dist.*, 366 F. Supp. 1208 (S.D. Tex. 1972), *aff'd*, 486 F.2d 137 (5th Cir. 1973), *cert. denied sub nom.*, *Brown v. Houston Independent School Dist.*, 417 U.S. 969 (1974). "If this approach were applied in other areas, teachers might be obliged to provide equal time for an exposition of the Mormon belief in the inequality of the races, and for indoctrination in the Christian Science view of health and disease." 366 F. Supp. at 1211 n.6.

¹⁰⁹ See *United States v. O'Brien*, 391 U.S. 367 (1968).

¹¹⁰ The Supreme Court has held that a statute's original religious purpose may be superseded by the current reason for its continuance. *McGowan v. Maryland*, 366 U.S. 420 (1961) (upholding validity of Sunday closing laws).

¹¹¹ *Wright v. Houston Independent School Dist.*, 366 F. Supp. 1208 (S.D. Tex. 1972), *aff'd*, 486 F.2d 137 (5th Cir. 1973), *cert. denied, sub nom.*, *Brown v. Houston Independent School Dist.*, 417 U.S. 969 (1974).

¹¹² *Cornwell v. State Bd. of Educ.*, 314 F. Supp. 340 (D. Md. 1969) *aff'd*, 428 F.2d 471 (4th Cir.), *cert. denied*, 400 U.S. 942 (1970); *Medeiros v. Kiyosaki*, 52 Haw. 436, 478 P.2d 314 (1970). Similarly, a state law prohibiting the classroom discussion of birth control has been upheld since, unlike the *Epperson* prohibition, this prohibition did not have a religious purpose, even though it had the effect of assisting those religions opposed to birth control. *Mercer v. Michigan State Bd. of Educ.*, 379 F. Supp. 580 (E.D. Mich. 1974), *aff'd without opinion*, 419 U.S. 281 (1975). See *Recent Developments—Constitutional Law—Church and State—Freedom of Religion*, 68 MICH. L. REV. 1050 (1970).

the determining consideration. Rather, the purpose of the statute, however it may be determined, will most often provide the controlling consideration. Courses or books dealing with sex, or those discussing religion in some way, are destined to promote some religious beliefs and to suppress others. But if they are based on valid educational goals, unrelated to religion, and do not select viewpoints for religious reasons, then they seem to create no establishment clause problem.

C. *The Free Exercise Clause*

It is possible that certain school books, or courses, or methods of instruction, may offend the religious beliefs of the students involved, and there are thus created significant issues under the free exercise clause¹¹³ of the first amendment, to the extent that compulsory activities in compulsory schools may force students to violate their religious convictions. The Supreme Court has never faced this issue in the context of actual classroom instruction per se, but two cases are nonetheless instructive. In *West Virginia State Board of Education v. Barnette*,¹¹⁴ the Court held that the children of Jehovah's Witnesses could not be compelled to salute the flag in school, since the significance of forced oath to the Jehovah's Witnesses was not outweighed by the state's interest in promoting loyalty.¹¹⁵

Of even greater relevance is the relatively recent case of *Wisconsin v. Yoder*.¹¹⁶ Wisconsin, like most states, had a statute which required school attendance to the age of sixteen. This conflicted with the practice of the Amish religion of not sending children to school past the eighth grade. In a decision written by Chief Justice Burger, the Court held that Amish children could not be compelled to attend school past the eighth grade. The significance of the case lies in the fact that normally, the free exercise clause

¹¹³ See generally Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327 (1969).

¹¹⁴ 319 U.S. 624 (1943) (Jackson, J.), overruling *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940).

¹¹⁵ Lower court cases following *Barnette* include *Banks v. Board of Public Instruction*, 314 F. Supp. 285 (S.D. Fla. 1970), vacated on procedural grounds, 401 U.S. 988 (1971), *aff'd*, 450 F.2d 1103 (5th Cir. 1971); *Frain v. Barron*, 307 F. Supp. 27 (E.D.N.Y. 1969).

¹¹⁶ 406 U.S. 205 (1972). See Knudsen, *The Education of the Amish Child*, 62 CALIF L. REV. 1506 (1974).

has been held to apply to religious beliefs, and not to conduct,¹¹⁷ and in the general reluctance of the courts to inquire into the validity of religious beliefs.¹¹⁸ But *Yoder* was based on a finding by the Court that, in balancing the respective interests, the fundamental religious beliefs involved outweighed the state's interest in compelling two additional years of schooling. Thus, the Amish objected, concededly sincerely, to higher education not only because of the "worldly" things that were taught, but also because of the very concept of the school, involving a competitive environment, being away from the home and the land at a time when such was religiously necessary, and other factors. These principles were found to be fundamental to the Amish religion's, "basic religious tenets and practices" which were inseparable from the religious beliefs of the Amish.¹¹⁹

Thus, while neutrality on the part of the state might suffice to meet the requirements of the establishment clause, this neutrality may still impair the free exercise of religion, requiring that those affected be given the opportunity to avoid the governmental compulsion.¹²⁰ But the *Yoder* "exception" is extremely narrow. The claims must be religious in origin, based on "deep religious convictions," be shared by an organized group, and be intimately related to daily living. Furthermore, the claims must be based on an aversion to activity that goes to the very heart of the religious beliefs involved.¹²¹ If these conditions are met, then a child may have the right to be excused from classes or the use of materials which are religiously offensive to that child.¹²² This would seem to apply, for example, to the right of Catholic children to be excused from classes discussing birth control or abortion. There may very well be other examples, but since the validity of the claim to the right to be excused depends upon the relationship of the activity to particular religious beliefs, discussion of which claims might be upheld seems beyond the abilities of this writer. Also the balancing

¹¹⁷ See, e.g., *Reynolds v. United States*, 98 U.S. 145 (1878) (polygamy statutes upheld despite objections of Mormons); *United States v. Ballard*, 322 U.S. 78 (1944).

¹¹⁸ *Torcaso v. Watkins*, 367 U.S. 488 (1961).

¹¹⁹ 406 U.S. at 218-20.

¹²⁰ *Id.* at 220-21.

¹²¹ *Id.* at 216-18.

¹²² Of course, the right of the individual to be excused will prevent a free exercise attack, but does not remedy an establishment of religion. See *Medeiros v. Kiyosaki*, 52 Haw. 436, 478 P.2d 314 (1970).

process involves an evaluation of the importance of the particular material from which the student is excused, and thus different considerations may compel different results depending on the exact instructional material or process involved.

IV. THE RIGHTS OF PARENTS OR THE RIGHTS OF CHILDREN?

Clearly, if there is a right to be excused, under some circumstances, from saluting the flag, or going to school, or attending certain classes, then this right must be exercised either by the parent or the child. Who, as between parent and child, can exercise the choice, presents an extremely troublesome issue.¹²³ In *Wisconsin v. Yoder*,¹²⁴ the Court mentioned the issue but felt it need not decide it, since the record did not suggest that any child of the parents involved had desired to attend school past the eighth grade.¹²⁵ The Court did, however, reject the *parens patriae* claim of the state that it, rather than the parents, should decide what is educationally best for the child.¹²⁶ Certainly, in some areas, the wishes of parents are not controlling, where the best interests of the child are to be sacrificed.¹²⁷ If the wishes of the parent and the child are the same, then, as in *Yoder*, the *parens patriae* argument is subsumed under the balancing of religious beliefs against state interest, for if the balance is in favor of the religious interests, then the interests of the state, *parens patriae*, have already been considered. But if the interests of the parent and the child are different, then the problem becomes harder. We clearly accept, as a general proposition, that control over the educational and religious upbringing of children rests with the parents. But it is the child who benefits, after the age of majority, from the education he or she is given prior to that age. Obviously, the situation may arise in one of two ways. The parent may wish to keep the child in a class which the child, for religious reasons, chooses not to attend, or the parent

¹²³ See generally Moskowitz, *Parental Rights and State Education*, 50 WASH. L. REV. 623 (1975).

¹²⁴ 406 U.S. 205 (1972). See text accompanying notes 116-22 *supra*.

¹²⁵ 406 U.S. at 229-34. Compare the dissent of Mr. Justice Douglas on this issue, *id.* at 241-46.

¹²⁶ *Id.* at 229-34.

¹²⁷ See, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944), upholding the power of the state to prohibit the children of Jehovah's Witnesses from selling religious pamphlets on the street, despite the religiously based wishes of the parents.

¹²⁸ *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

may wish to keep the child out of a class which the child, for educational reasons, wishes to attend.¹²⁹ Since it is a balancing process which is involved, the resolution of these two situations might not be the same, if the concept of children's rights irrespective of the wishes of the parents is accepted in this area. The age of the child is also a significant factor. But since a full exploration of this issue involves problems far beyond the scope of this article, and since issues of the control by parents over children are of greater legal magnitude than those relating solely to the educational process, no solution will be suggested here. The issue, however, is one that must at least be considered in dealing with this area.

V. CONCLUSION

This article has dealt with a wide variety of legal problems relating to the instructional process in elementary and secondary public schools. None admit of easy solutions, and, in all, the current case law is unsettled. But by separating the distinct constitutional problems involved, and recognizing the often conflicting rights and interests of the states, of teachers, of parents, and of children, solutions may be easier to find. It is all too easy to talk of abstract rights, such as academic freedom and religious freedom, without placing them in the proper context. And it is equally easy to defer to the courts for all of these problems, without realizing that courts are clearly not the institutions best suited to running the schools. Courts are, however, the institutions best suited to making determinations of constitutional rights, and the nature of the educational process is such that the periodic intervention of the courts is inevitable. The development of consistent and reasoned methods of analysis in the areas discussed in this article should help to reduce the number of occasions in which courts intervene in the educational process and increase the effectiveness of judicial decisions on those occasions when the courts must intervene.

¹²⁹ Another possibility is that the religious views of the parents are not shared by the child, but the child would like to take advantage of the parents' religious views so as to avoid the requirement. But since the inquiry, under *Yoder*, is based not so much on individual beliefs as on the fundamental tenets of the religion, this problem seems nonjusticiable.