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Curriculum, Pedagogy, and the Constitutional Rights of Teachers in Secondary Schools

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CURRICULUM, PEDAGOGY, AND THE CONSTITUTIONAL RIGHTS OF TEACHERS IN SECONDARY SCHOOLS

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CURRICULUM, PEDAGOGY, AND THE CONSTITUTIONAL RIGHTS OF TEACHERS IN SECONDARY SCHOOLS

I. INTRODUCTION

American schools have served as battlegrounds for competing social policies for generations. Major national disputes have centered on racial problems, busing, and federal funding. Local debate continues over curricula, teacher competence, pedagogical methods, textbooks and library books, discipline, and such trivial matters as hairstyle. Nationally, the current debates about school prayer and tax credits for the payment of private school tuition have consumed the time and resources of numerous individuals.¹ These disputes show no sign of abating.

Elementary and secondary schools, most of which are publicly supported, are essential institutions in the United States. They provide each generation with the learning skills needed in a post-industrial democracy, as well as the social skills necessary for society to function smoothly. The daily operation and administration of these schools is important not only to students, teachers, and administrators, but to all of us. The explosion of laws, regulations, and judicial orders affecting the operation of schools raises serious questions about the desirability of greater legal interference because of the adversarial confrontations that often follow. The law's intrusion into the operation of schools, nevertheless, has led to a greater appreciation and understanding of the constitutional issues affecting schools.

Teachers are the most significant participants in the educational process. Their work involves those activities—speaking, writing, and questioning—that constitute the core values protected by the first amendment. The law, however, subjects teachers from the kindergarten through the university levels to a variety of limita-

1. Stories about the attempted introduction of prayer in public schools have filled the popular press. Recently, the United States Supreme Court upheld a Minnesota statute allowing a state income tax deduction for tuition, transportation, and textbook expenses incurred in connection with the education of elementary and secondary schoolchildren. The statute was challenged as a violation of the establishment clause of the first amendment because 95% of the private school students in Minnesota attended sectarian schools. *Muel-ler v. Allen*, 103 S. Ct. 3062 (1983). The author previously addressed the issues raised by such legislation. See Hunter, *The Continuing Debate Over Tuition Tax Credits*, 7 HASTINGS CONST. L. Q. 523 (1980).

tions on both written and spoken expression. Statutes, ordinances, regulations, and contract provisions affect classroom activity, academic research, publication decisions, hiring and firing within the school, and sometimes, the scope of permissible behavior outside the school itself.

Throughout the educational system, a constant tension exists between the constitutional value of unfettered speech and the social, political, and academic goals of those who control the schools. The educational system provides a fascinating opportunity to consider competing and complementary values in a political system that treats free expression as central to the pursuit of truth,² while recognizing the social need for some limitations on individual speech and inquiry.³ Reconciliation of the competing values depends upon whether the educational system should provide a forum for free speech and research, transmit acquired knowledge and train individuals for useful occupations, serve as social laboratories for pursuing identified social goals, or accomplish some combination of these objectives.

The relative importance and difficulty of these questions vary greatly among the different functional levels of educational institutions. This Article focuses on the interplay between the constitutional structures that protect identified individual rights⁴ and the institutional mechanisms that have developed for educating American children through the secondary school level.⁵ Part II examines

2. See *Abrams v. United States*, 250 U.S. 616, 627-31 (1919) (Holmes, J., dissenting). For a rejection of Holmes's classic statement of the "marketplace of ideas", see Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964 (1978).

3. The government may subject protected speech to reasonable time, place, and manner restrictions. See, e.g., *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175 (1968); *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Saia v. New York*, 334 U.S. 558 (1948). The right of the press to publish a story, collect information, or conceal the identity of sources must yield, in some circumstances, to a criminal defendant's right to a fair trial or the state's interest in enforcing the criminal laws. See, e.g., *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). But cf. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Branzburg v. Hayes*, 408 U.S. 665 (1972).

4. These rights include interests identified or identifiable through the political and judicial processes. This Article focuses on issues of the positive law and does not attempt to solve underlying normative problems involving theories of rights.

5. For an overview of the kinds of problems facing higher education, see GOVERNMENT REGULATION OF HIGHER EDUCATION (W. Hobbs ed. 1978); THE COURTS AND EDUCATION (C. Hooker ed. 1978); W. KAPLIN, THE LAW OF HIGHER EDUCATION (1978); Hunter, *The Constitutional Status of Academic Freedom in the United States*, 19 MINERVA _____ (1982);

cases that establish the applicable standards of the positive law. Part III reconciles inconsistent strands of the relevant case law, offering a consistent approach for defining the Constitution's role in the operation of our schools. The author concludes that some conflicts between social goals and individual rights in the educational system cannot be reconciled. For reasons of policy and practicality, the political process should attempt to resolve these conflicts; but to ensure adequate protection for basic substantive rights, clearly articulated institutional processes should exist that permit proper consideration of those rights.

II. STATE CONTROL OF THE CONTENT AND PROCESS OF TEACHING

A. *The Background*

Academic freedom is important to teachers because it allows them to influence curriculum content and pedagogical methods. The German concept of *Lehrfreiheit*⁶ underlies the doctrine that teachers should be responsible for the subject matter and teaching methods used in their classes. Nevertheless, in the primary and secondary schools a teacher often has only limited control over curriculum structures and course content. He may have some discretion, however, in the use of individual pedagogical methods.⁷ The judicial decisions that seek to balance external controls and teacher discretion suggest that the balance may raise first amendment questions.⁸ The decisions have created little definitive law on the subject; to the contrary, they have left a muddled field of constitutional jurisprudence filled with vague notions about free speech.

Several United States Supreme Court opinions and numerous

Note, *Academic Freedom and Federal Regulation of University Hiring*, 92 HARV. L. REV. 879 (1979); *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045 (1968).

6. Wilhelm von Humboldt wrote the modern seminal work. W. VON HUMBOLDT, *THE SPHERE AND DUTIES OF GOVERNMENT* (London 1854). See also Nisbet, *Max Weber and the Roots of Academic Freedom*, in *CONTROVERSIES AND DECISIONS* 103 (C. Frankel ed. 1976).

7. The state usually interferes less directly in university curricula, but the resolution of competing interests may be more difficult at the post-secondary level. See generally Hunter, *Federal Antibias Legislation and Academic Freedom: Some Problems with Enforcement Procedures*, 27 EMORY L.J. 609 (1978); O'Neil, *God and Government at Yale: The Limits of Federal Regulation of Higher Education*, 44 U. CIN. L. REV. 525 (1975).

8. See *infra* text accompanying notes 58-139.

commentaries address the general subject of academic freedom, but few focus specifically on the conflict between direct state regulation of the curriculum and the expressed interests of individual teachers. The two most significant decisions are *Meyer v. Nebraska*,⁹ a substantive due process opinion, and *Epperson v. Arkansas*,¹⁰ the latter-day "monkey trial."

Meyer arose during the early twentieth century when some mid-western states with large immigrant populations enacted statutes limiting foreign language study. The ostensible state purposes were to foster the integration of foreign ethnic groups into American life and to avoid the development of a multi-lingual society.¹¹ Mr. Meyer taught German in a parochial school in Nebraska. He was convicted for violating a Nebraska criminal statute that prohibited instruction in the German language before the eighth grade.¹² The United States Supreme Court held that the Nebraska statute violated the Constitution, but did not base its decision on the first amendment.¹³ Rather, *Meyer* followed a line of substantive due process decisions announced by the Court during the late nineteenth and early twentieth centuries.¹⁴

Justice McReynolds, writing for the majority, identified three constitutional flaws in the Nebraska statute: the statute limited Meyer's freedom to pursue a lawful calling;¹⁵ it restricted the op-

9. 262 U.S. 390 (1923).

10. 393 U.S. 97 (1968).

11. 262 U.S. at 397-98.

12. 1919 Neb. Laws 249. The Court invalidated a similar Iowa statute in a companion case, *Bartels v. Iowa*, 262 U.S. 404 (1923).

13. Indeed, the Court had not yet applied the first amendment to the states. The incorporation of first amendment rights into those protected by the fourteenth amendment came a few years later in *Gitlow v. New York*, 268 U.S. 652 (1925), and *Fiske v. Kansas*, 274 U.S. 380 (1927).

14. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *Mugler v. Kansas*, 123 U.S. 623 (1887); see also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 8-1 to 8-7, at 427-55 (1978).

15. 262 U.S. at 401. Justice McReynold's language suggests that Meyer had a property interest in his profession. More recent Court decisions support this notion, holding that the Constitution entitles professors at public institutions to some minimal due process before discharge. See *Perry v. Sinderman*, 408 U.S. 593 (1972); *Connell v. Higginbotham*, 403 U.S. 207 (1971). But see *Board of Regents v. Roth*, 408 U.S. 564 (1972) (a non-tenured teacher has no property or liberty interest in his job); *Hetrick v. Martin*, 480 F.2d 705 (6th Cir.) (notice and hearing not required before dismissal of a non-tenured professor), *cert. denied*, 414 U.S. 1075 (1973).

portunities for students below a certain age to acquire knowledge;¹⁶ and it restrained the ability of parents to exercise control over their families by contracting with instructors for the children's education.¹⁷ The Court in *Meyer* thus based its decision on the property interest in pursuing a profession, the freedom to contract, the right to acquire information, and the parental interest in controlling the family unit. In one passage, Justice McReynolds defined the Court's underlying concept of liberty as including

not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.¹⁸

The Court did not indicate whether the statute would have been constitutional if limited to public schools, nor how to resolve properly a dispute among parents, teachers, and school authorities concerning the inclusion or exclusion of subject matter. The Court recognized, however, that the state could pay for public schools, require school attendance,¹⁹ and exert some control over the curric-

16. 262 U.S. at 401. The Court implied that children had an undefined constitutional right to receive or acquire information. *Id.* The Court's approach to children's rights has been somewhat uneven. See, e.g., *Carey v. Population Services Int'l*, 431 U.S. 678 (1977); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Goss v. Lopez*, 419 U.S. 565 (1975); *Ginsberg v. New York*, 390 U.S. 629 (1968). See generally Burt, *Developing Constitutional Rights In, Of and For Children*, 39 LAW & CONTEMP. PROBS. 118 (1975); *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156 (1980) [hereinafter cited as *Developments*]. For a discussion of the right to receive information, see *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and *infra* text accompanying notes 140-254.

17. 262 U.S. at 401. See also *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (first amendment free exercise clause gives Amish parents the right to keep their children out of public school after the eighth grade). But cf. *Prince v. Massachusetts*, 321 U.S. 158 (1944) (aunt of a nine-year-old child convicted for violating state child labor laws by sending her niece into the streets to sell religious magazines, even though child did so enthusiastically); *Davis v. Page*, 385 F. Supp. 395 (D.N.H. 1974) (parents' religious belief that audio-visual equipment was "sinful" could not be imposed on their children in public schools, even though use of the equipment interfered with the children's "free exercise" of religion).

18. 262 U.S. at 399.

19. A state may require attendance at private or public schools. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). But cf. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

ulum.²⁰ Thus, Meyer's status as a private school teacher may have been crucial to the decision.²¹

For years *Meyer* received little attention. Courts occasionally placed it in the "family rights" area, along with *Pierce v. Society of Sisters*.²² In *Pierce*, the Court relied on *Meyer* to invalidate an Oregon law that effectively eliminated private schools, creating a state monopoly in elementary and secondary education.

Forty-five years after *Meyer*, the Court in *Epperson v. Arkansas*²³ heard a challenge to another statute that imposed criminal sanctions for teaching a particular subject. An Arkansas law prohibited any teacher in a public school or state university from teaching or using any textbook suggesting that "mankind ascended or descended from a lower order of animals."²⁴ The challenge raised issues considerably different from those in *Meyer*. The prohibition only affected public institutions, leaving private school and university teachers unaffected. The prohibition also only affected a portion of a scientific subject area: biology teachers could teach anything except evolution. Finally, the state had not enforced the statute for forty years. Teachers in public institutions had taught evolutionary theory, and state prosecutors had shown little inclination to enforce the law.²⁵ If a teacher had not brought a declaratory judgment action to challenge the statute, it likely would have been left to desuetude.²⁶

The teacher in *Epperson* argued that the law had an impermissi-

20. 262 U.S. at 402.

21. See Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293, 1308-09 (1976).

22. 268 U.S. 510 (1925). The Court reasoned in *Pierce* that an Oregon law interfered unreasonably with parental control over child rearing. See generally *Developments, supra* note 16.

23. 393 U.S. 97 (1968).

24. ARK. STAT. ANN. §§ 80-1627, 80-1628. Cf. *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927) (upholding the constitutionality of Tennessee's infamous "monkey law").

25. 393 U.S. 97, 101-02 (1968). "[T]he pallid, unenthusiastic, even apologetic defense of the Act presented by the State in this Court indicates that the State would make no attempt to enforce the law should it remain on the books for the next century." *Id.* at 109-110 (Black, J., concurring).

26. The recent popularity of "scientific creationism" has made the old statute seem less of an anachronism. See *McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. 1255 (E.D. Ark. 1982) (holding unconstitutional a recent Arkansas statute that required the teaching of "creationism," a modified version of the *Genesis* creation story).

ble chilling effect on speech and violated due process because the statute was vague and ambiguous.²⁷ She also argued that the statute amounted to an unconstitutional establishment of religion because, by negative implication, it made *Genesis* a publicly supported version of the truth.²⁸ The majority rejected the free speech and due process arguments, but agreed that the statute violated the establishment clause.²⁹ Justice Fortas, writing for the Court, said:

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.³⁰

Epperson thus became another brick in the constitutional wall between public education and the advocacy of religious doctrine.³¹

Justices Black and Stewart filed concurring opinions in *Epperson*.³² Justice Black's concurrence legitimately criticized the majority's opinion and raised many difficult questions. He rejected the establishment clause analysis, finding instead that the statute was unconstitutionally vague.³³ Unlike Justice Stewart, he did not believe that the central issue was the teacher's right to speak.³⁴ Black reasoned that the state had broad discretion to exercise curriculum control in public schools. The state could remove entire subjects from the curriculum if the materials were too controversial or emo-

27. 393 U.S. at 102.

28. *Id.* at 103.

29. *Id.* By focusing on the establishment of religion question, the Court avoided the problem of defining speech in the teaching context.

30. *Id.* at 103 (footnote omitted).

31. See, e.g., *School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962). Several commentators have addressed the general problem of state involvement with religious education. See generally Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260 (1968); Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969); Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, 80 HARV. L. REV. 1381 (1967); Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513 (1968).

32. 393 U.S. at 109 (Black, J., concurring); *id.* at 115 (Stewart, J., concurring).

33. *Id.* at 112-13 (Black, J., concurring).

34. *Id.* at 113-14 (Black, J., concurring). For a discussion of Justice Stewart's opinion, see *infra* notes 40-43 and accompanying text.

tionally charged for young minds. In such instances, he reasoned, the state simply left responsibility for instruction to the parents. A state's curriculum exclusion would implicate constitutional issues only if the exclusion had a pernicious effect on other clearly protected rights or interests.³⁵

Justice Black and the majority had fundamentally different understandings of the Arkansas Supreme Court decision upholding the statute.³⁶ The majority interpreted the statute to mean that the biblical story of creation was official state dogma.³⁷ This reading obviously facilitated application of the establishment clause rationale. Black, on the other hand, thought that the statute and the Arkansas Supreme Court decision prohibited the teaching of both *Genesis* and the theories of Darwin; the state had excluded entirely a controversial topic from the curriculum.³⁸

The legislature may have acted unwisely by eliminating the teaching of evolution but, in Black's view, the state did not act unconstitutionally. The remedy for unwise choices lays in the political process, rather than the judicial arena. Turning such choice-making into a constitutional issue would restrict unnecessarily political freedom of action. According to Black, the Arkansas legislature violated the Constitution by drafting a statute that was so ambiguous that it offended due process—not by choosing to dictate a portion of the curriculum.

Justice Black also disagreed further with Justice Stewart's argument that the Court should focus on the rights of the individual teacher. Black maintained that a teacher in a state-supported school does not have a right to control the curriculum and the pedagogical method. Rather, states may regulate both the method and the content of teaching.³⁹ Justice Black did not elaborate on this observation which appears to support unfettered state bureaucratic control of curriculum content and teaching methodology. His reliance on due process as a basis for the concurrence indicates, however, that state regulation could not be arbitrary or capricious.

35. *Id.* at 112 (Black, J., concurring).

36. 242 Ark. 922, 416 S.W.2d 322 (1967) (per curiam) (upholding statute as an exercise of police power without reaching basic constitutional issues).

37. 393 U.S. at 103.

38. *Id.* at 113-14 (Black, J., concurring).

39. *Id.*

Justice Stewart's concurring opinion was enigmatic, yet it contained an important doctrinal seed. He declared that a state may exclude a subject from the curriculum, but may not punish a teacher who makes students aware of knowledge that is not in the prescribed curriculum.

It is one thing for a State to determine that the "subject of higher mathematics, or astronomy, or biology" shall or shall not be included in its public school curriculum. It is quite another thing for a State to make it a criminal offense for a public school teacher so much as to mention the very existence of an entire system of respected human thought. That kind of criminal law, I think, would clearly impinge upon the guarantees of free communication contained in the First Amendment, and made applicable to the states by the Fourteenth.⁴⁰

Under Justice Stewart's view, if Arkansas law required all high school students to take a course in biology, including an introduction to Darwin's theory of evolution, then a biology teacher who discussed the biblical theory of creation also would receive first amendment protection. *Genesis* represents a respected part of our cultural and religious heritage. A study of *Genesis* assists in the appreciation of human nature and suggests, albeit indirectly, that limitations exist on knowledge acquired through the scientific method. Yet, the majority's opinion provided a basis that would justify taking action against the biology teacher: discussion of *Genesis* in a context other than a secular class on religion may give rise to the concerns with "establishment of religion" that underlay the majority opinion.⁴¹

Justice Stewart did not define what he meant by a "system of respected human thought,"⁴² nor did he explain why a state could strike a subject from the curriculum altogether, but could not discipline a teacher for discussing the subject. He might have been

40. *Id.* at 116 (Stewart, J., concurring).

41. Some scholars have expressed concern that the Court may have gone so far in demanding religious neutrality that the state now must be antireligious. Arguably, the application of the establishment clause may conflict with the free exercise clause. See generally Greenawalt, Whalen, Riles, Sugarman & Karsh, *Education in a Democracy: Financial Support of Private, Public and Parochial Schools*, 3 HUM. RTS. 17 (1973); Costanzo, *Wholesome Neutrality: Law and Education*, 43 N.D.L. REV. 605 (1967).

42. 393 U.S. at 116 (Stewart, J., concurring).

considering occasional comments outside the prescribed curriculum that could merit protection as casual, extraneous speech.⁴³

Nevertheless, Justice Stewart looked at the problem in *Epperson* from a fundamentally different perspective from the majority's—a viewpoint critical to an appreciation of later cases. The central figure in Stewart's opinion was the teacher; his primary concern was with limitations on a teacher's speech within the classroom. Stewart conceded that states have general power over school curricula. He did not believe, however, that a state could use this general authority to restrict unduly a teacher's methods of instruction, including the teacher's decision to discuss related areas not specifically included in the curriculum. Justice Stewart did not propose that the Constitution entitles teachers to control school curricula. He simply maintained that a teacher does not abdicate all individual rights of free speech when he enters the classroom, provided that the exercise of those rights does not interfere with the performance of his professional duties. In his view, *Epperson* was a free speech case, not an establishment case.

Justice Stewart addressed a potentially significant problem that the rest of the Court ignored. A subject area that the state excised from the curriculum could be critical to a sound understanding of the entire subject matter. A teacher compelled to present a fundamentally untrue picture of the subject area might feel professionally derelict. The issue then becomes whether a state may constitutionally require a teacher to teach something other than, or perhaps less than, the truth. The Supreme Court has held that a state cannot compel a newspaper to publish an article,⁴⁴ or compel a private citizen to display a motto on his automobile license plate when he disagrees with the sentiment expressed.⁴⁵ These two cases support the proposition that the right of free speech includes the right to be silent. Thus, a teacher might argue that he has a constitutional basis for refusing to teach an untruth or partial truth.⁴⁶

43. For a discussion of extracurricular speech, see *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

44. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

45. *Wooley v. Maynard*, 430 U.S. 705 (1977).

46. Whether the right to be silent or to speak affects the state's power to regulate an employee's speech in the performance of his job is an issue considered later in this Article. See *infra* text accompanying notes 297-324.

Three additional cases add texture to the background of the curriculum-control issue. In *West Virginia State Board of Education v. Barnette*,⁴⁷ the Supreme Court ruled that a state could not compel a child to salute the flag in a public school in violation of his religious beliefs. *Barnette* is, in one sense, the other half of *Epperson*. The state may not compel a student to act against his religious beliefs, nor may the state compel the teaching of an inherently religious doctrine, as in *Epperson*.⁴⁸ The state law at issue in *Barnette* violated the free exercise clause, however, not the establishment clause.

A few months after *Epperson*, the Court held in *Tinker v. Des Moines Independent Community School District*⁴⁹ that the first amendment protected children who wore black armbands to school to protest the Vietnam war. The Court said that both teachers and students possessed first amendment rights on school campuses,⁵⁰ and suggested that the first amendment protected speech as well as religious interests, subject to reasonable time, place, and manner

47. 319 U.S. 624 (1943). See also *Russo v. Central School Dist. No. 1*, 469 F.2d 623 (2d Cir. 1972) (school teacher excused from patriotic activities because of religious convictions), cert. denied, 411 U.S. 932 (1973). In *Barnette*, the Court overruled *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940), a case involving virtually identical facts. For an interesting discussion of the Court's remarkable reversal, see Danzig, *How Questions Begot Answers in Felix Frankfurter's First Flag Salute Opinion*, 1977 Sup. Ct. Rev. 257.

48. An interesting problem arises when racial inequality is a basic religious tenet. See *Runyon v. McCrary*, 427 U.S. 160, 167 (1976); *Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310 (5th Cir. 1977) (en banc), cert. denied, 434 U.S. 1063 (1978); Note, *Racial Exclusion by Religious Schools*, 91 HARV. L. REV. 879 (1978); Note, *Racial Discrimination in Private Schools, Section 1981, and the Free Exercise of Religion: The Sectarian Loophole of Runyon v. McCrary*, 48 U. COLO. L. REV. 419 (1977). Some courts have imposed limits on the extent to which a state must accommodate religious beliefs. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Palmer v. Board of Educ.*, 603 F.2d 1271 (7th Cir. 1979), cert. denied, 444 U.S. 1026 (1980). Cf. *Sherbert v. Verner*, 374 U.S. 398, 421 (1963) (Harlan, J., dissenting) (the dissent maintained that *Sherbert* effectively overruled *Braunfeld*). The Supreme Court recently upheld an Internal Revenue Service denial of tax-exempt status to two educational institutions that practice racial discrimination. *Bob Jones Univ. v. United States*, 103 S. Ct. 2017 (1983).

49. 393 U.S. 503 (1969).

50. *Id.* at 506. The Court did not limit to a specific location the students' right to wear armbands. Implicitly then, the students' right extended to all areas of the campus.

In an interesting passage, Justice Fortas said: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years." *Id.* He cited *Meyer* for support. *Meyer* was not a first amendment case though, a point noted by Justice Black in his dissenting opinion. *Id.* at 519-21 (Black, J., dissenting).

restrictions.⁵¹ The decision demonstrated that school authorities could not abridge campus speech activities without raising fundamental constitutional issues.

Two years after *Tinker*, the Court ruled in *Wisconsin v. Yoder*⁵² that Amish children need not attend school beyond the age deemed appropriate by their religious sect, despite a state law requiring attendance beyond that age. The Court in *Yoder* recognized that even basic, widely accepted educational policy decisions may have to yield to constitutional concerns. *Yoder* thus provides a framework for constitutional limitation of state authority in the educational field. The Court acknowledged the power of states to enact compulsory attendance laws, set accreditation standards, and establish the general curriculum.⁵³ At the same time, the Court recognized a legitimate interest in parental control over the children's education that might differ fundamentally from the majoritarian sentiment expressed by the state legislature.⁵⁴

The Court's treatment of the family as an institution has been ambiguous.⁵⁵ In *Yoder*, however, the Court expressed concern for the value of the family institution, notwithstanding the value of an education acquired through prescribed methods. One commentator has suggested that *Yoder* reflects a societal consensus on the value of education, but a societal uncertainty about the most desirable means of providing it.

[I]n *Yoder* the Court was faced by an ambiguous condition in the mores, both at the level of popular belief and at the level of sophisticated and conscientious reflection. The opinion is widespread in our society that children should be educated at least until the age of 16. But disagreements as to what is a proper and

51. *Id.* at 508-09. *Tinker* was not an easily achieved victory for the students. The United States District Court for the Southern District of Iowa dismissed the complaint. 258 F. Supp. 971 (S.D. Iowa 1966). The United States Court of Appeals for the Eighth Circuit heard the case *en banc* but divided evenly, thus affirming the district court's decision. 383 F.2d 988 (8th Cir. 1967). In the Supreme Court, Justices Black and Harlan dissented, and Justices Stewart and White concurred on grounds narrower than those relied upon by the majority. 393 U.S. at 514 (Stewart, J., concurring); *id.* at 515 (White, J., concurring); *id.* (Black, J., dissenting); *id.* at 526 (Harlan, J., dissenting).

52. 406 U.S. 205 (1972).

53. *Id.* at 213.

54. *Id.* at 214.

55. See *Developments, supra* note 16.

effective education—whether it should be in the classroom or outside, whether it should be academic for all or vocational or highly individualized, or religious or secular, or “cognitive” or “affective”—are rife both in the teaching profession and the community at large. In these circumstances, the Amish provide simply one more system of education, and one worth permitting if for no other reason than its useful demonstration purposes.⁵⁶

Meyer, Epperson, and Tinker demonstrate that the Constitution can play a significant role in the resolution of problems within schools and in the allocation of educational responsibilities. *Yoder* put the entire educational process in a broad social context containing a host of values that at times may conflict with one another. *Yoder* suggests that the assertion of a fundamental value by one interest group may conflict with a fundamental value of another group. Nevertheless, a court should exercise discretion in raising issues to constitutional proportions because freedom of action becomes circumscribed once an interest becomes a constitutional right.⁵⁷

B. The Search for Guidelines in the Lower Courts

Several cases have involved conflicts between teachers and school administrators over course content and pedagogical methods. These cases have involved fairly particularized problems, and

56. Frankel, *The Jurisprudence of Liberty*, 46 Miss. L.J. 561, 620 (1975). Professor Kurland believed that *Yoder* conflicted with *Prince v. Massachusetts*, 321 U.S. 158 (1944), in which the Court upheld the conviction of a Jehovah's Witness who had sent her nine-year-old niece into the street to sell religious tracts. The Massachusetts child labor laws outweighed family preservation and parental authority. See Kurland, *The Supreme Court, Compulsory Education, and the First Amendment's Religious Clauses*, 75 W. VA. L. REV. 213, 240-41 (1973). Professor Frankel believed that “[t]he Court in *Prince* acted on what is now the almost universally accepted moral principle that child labor is prima facie suspect, and that state intervention even against parents is justified when child labor is involved.” 46 Miss. L.J. at 620.

57. This suggestion does not mean that freedom of action by governing authorities is an unqualified good. Eighteen years ago, the United States District Court for the District of Maryland easily affirmed the nonrenewal of a teacher's contract because she had assigned Aldous Huxley's *BRAVE NEW WORLD*. *Parker v. Board of Educ.* 237 F. Supp. 222 (D. Md.), *aff'd per curiam*, 348 F.2d 464 (4th Cir. 1965), *cert. denied*, 382 U.S. 1030 (1966). As a general rule, school authorities have a legitimate interest in reading assignments. Perhaps the Court's refusal to constitutionalize the teacher's discretion to make reading assignments was wise, but the punishment does appear to have been draconian.

do not fit easily into a comprehensive pattern. To the extent that they offer any guidance, one can conclude that some right exists for teachers, and sometimes students, to make choices about curriculum content and teaching methods. Courts usually define and justify this right by reference to communal interests rather than individual ones.

Two cases often cited for the proposition that secondary school teachers have a constitutional right to select pedagogical methods are *Keefe v. Geanakos*⁵⁸ and *Parducci v. Rutland*.⁵⁹ Both cases indicate how deeply the adversarial process has penetrated the public schools.

Keefe involved a high school English teacher in Ipswich, Massachusetts who assigned his senior students an article from the *Atlantic Monthly*. The article concerned the nature of dissent and contained a strong expletive. The teacher, fearing that the article might offend some students, provided an alternative assignment. Some parents complained nonetheless, and their complaints resulted in disciplinary action against the teacher, who then filed suit. The United States Court of Appeals for the First Circuit decided that the article was not obscene,⁶⁰ found that other books in the school library contained the word,⁶¹ and concluded that high school seniors were bright enough to read their assignments discriminately.⁶² The court, without making a principled analysis, adopted a reasonableness standard and substituted its decision for that of the school administrators. The court did not state why the teacher or the court were more qualified to decide than the school authorities.⁶³

In *Parducci*, school administrators fired an eleventh-grade

58. 418 F.2d 359 (1st Cir. 1969).

59. 316 F. Supp. 352 (M.D. Ala. 1970).

60. A straightforward obscenity analysis could lead one astray because different standards apply to minors. See *Ginsberg v. New York*, 390 U.S. 629 (1968). If something is obscene, however, that should be prima facie evidence of its unsuitability for classroom instruction.

61. The appearance of a particular word in a library book, however, does not make that word an appropriate topic for classroom discussion.

62. 418 F.2d at 361-62.

63. The court also skirted the issue of insubordination. The teacher had said that he would not refrain from further use of the word. 418 F.2d at 361. Similarly, in *Parducci*, the teacher said that she would make assignments in her own discretion, regardless of the wishes of her superiors. 316 F. Supp. at 354. See Goldstein, *supra* note 21, at 1331 n.123.

teacher who had assigned a Kurt Vonnegut story. The school administrators admittedly had not read the story before firing the teacher.⁶⁴ The United States District Court for the Middle District of Alabama said that the notion that "teachers are entitled to First Amendment freedoms is an issue no longer in dispute."⁶⁵ This was a novel statement for the court to make in the context of this case because no court had suggested previously that teachers have a first amendment right to make their own decisions about high school reading materials, free from administrative control. Surprisingly, the court relied on *Tinker*, a case that had nothing directly to do with curriculum content or pedagogy. *Tinker* involved the use of public schools as forums for individual political expression by students. The court in *Parducci* did not say that teachers are free from all controls over curriculum and pedagogy, but placed the burden on the school authorities to prove that the limitations on a teacher's constitutional interest in determining course content were reasonable. The court decided that the Vonnegut story would not disrupt the classroom and was within the scope of reasonable instruction for an eleventh-grade English class.⁶⁶

In both *Keefe* and *Parducci*, federal judges reviewed decisions by local school authorities concerning the proper content of high school curricula. Both courts raised the disputes to constitutional levels. The *Atlantic Monthly* article may have had literary value, but it is reasonable for school authorities to raise legitimate concerns about the assignment of materials that contain vulgar language. A teacher is an authority figure who has a captive audience with relatively immature minds. Although one may look askance at a school principal who characterizes a Vonnegut story as "literary garbage" without having read the story, this does not mean that the Constitution should protect a teacher's choice of reading assignments. The courts in *Keefe* and *Parducci* cast fairly routine internal disputes in constitutional terms, and actually read the materials in order to make substantive value judgments. Both decisions encourage an adversarial relationship between teachers and

64. The principal and the associate superintendent characterized the work as "literary garbage" that condoned free sex and the killing of old people. 316 F. Supp. at 353-54.

65. *Id.* at 354.

66. *Id.* at 356-57.

administrators, and substitute judges as arbiters of homework assignments. They fail, however, to offer a principled basis for the constitutional protection afforded the two teachers.

In a much more thorough opinion, the United States District Court for the District of Massachusetts considered many of the same issues. *Mailloux v. Kiley*⁶⁷ involved an eleventh-grade English instructor who wrote an offensive word on the blackboard during a discussion of social conventions and taboos. He asked for a volunteer to define the word in polite language; one student did so, and a brief discussion followed. The school committee charged the instructor with "conduct unbecoming a teacher"⁶⁸ and subsequently discharged him. He sued for reinstatement.⁶⁹

Mailloux argued that he had a substantive constitutional right to choose a teaching method that served a demonstrated educational purpose. He also asserted a procedural right not to be discharged for using a method not proscribed by regulation or other prior notice. Although the court did not adopt Mailloux's arguments completely, the court specifically recognized the teacher's qualified constitutional right to determine his own teaching method, so long as it is "relevant" and "has a serious educational purpose."⁷⁰ The court placed the burden of proof on the teacher who uses an unorthodox method to show that the method "has the support of the preponderant opinion of the teaching profession or of the part of it to which he belongs."⁷¹ In the absence of such a showing, a school board could discipline a teacher, despite the teacher's good faith use of a relevant method described by experts as serving "a serious educational purpose."⁷²

Compared with *Parducci*, the *Mailloux* decision exhibits much more deference to local control. Under *Mailloux*, the Constitution

67. 323 F. Supp. 1387 (D. Mass.), *aff'd per curiam*, 448 F.2d 1242 (1st Cir. 1971).

68. 323 F. Supp. at 1389.

69. After the school board dismissed Mailloux, he sought injunctive relief. Citing *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969), the United States Court of Appeals for the First Circuit granted a preliminary injunction. The defendants immediately appealed, and asked the court to stay the order pending the appeal. The First Circuit denied the motion for a stay and dismissed the appeal, sending the case back for a trial on the merits. 436 F.2d 565 (1st Cir. 1971).

70. 323 F. Supp. at 1391.

71. *Id.* at 1392.

72. *Id.*

protects a teacher's unorthodox method. If school administrators object, however, the teacher must prove that his methods are pedagogically sound. Although *Mailloux* limits the "freedom to teach," it also provides a constitutional basis for challenging disciplinary action that results from the use of a particular method of instruction. But the approach in *Mailloux* still requires a careful evidentiary review that may be time-consuming and detrimental to the educational process.⁷³

The decision in *Mailloux* did not accord a high school teacher much flexibility in selecting a pedagogical method.⁷⁴ But to assure adequate protection for the limited liberty that the court did define, the court carefully included an element of due process. To justify disciplinary action under *Mailloux*, the school board must prove that the teacher had prior notice—by regulation, contract, or otherwise—that the school board had proscribed the challenged teaching method. According to the court, the Constitution entitles a teacher to fair notice and due process, not by reason of state employment or "because he is a citizen,"⁷⁵ but because in his teaching capacity he is engaged in the exercise of what may plausibly be considered 'vital First Amendment rights.'"⁷⁶ Toward the end of the *Mailloux* opinion, the court stated its ultimate justification for recognizing a limited first amendment right:

In his teaching capacity he is not required to "guess what conduct or utterance may lose him his position. . . ." If he did not

73. See *infra* notes 331-40 and accompanying text.

74. The court distinguished between the high school and university levels, stating that society should accord university teachers greater individual freedom than secondary school teachers in course development. In distinguishing the two systems, the court noted a variety of differences: high schools operate *in loco parentis* and are governed by locally chosen school boards; secondary school teachers, as a group, do not have the tradition of independence, broad discretion concerning teaching methods, or intellectual qualifications of post-secondary instructors; many high school teachers have limited experience; society views high school teachers primarily as transmitters of knowledge; society expects high school teachers to indoctrinate students with prevailing value systems; and high school students are a captive audience. 323 F. Supp. at 1392.

75. The phrase "because he is a citizen" may cause confusion. A teacher's employment does not alter his rights as a citizen. The issue is whether his rights as a citizen are manifested in his professional occupation and, therefore, entitled to legal protection.

76. 323 F. Supp. at 1392 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967)). Teaching includes "vital First Amendment rights" not because it involves speech, but because it is an instrument of the democratic process.

have the right to be warned before he was discharged, *he might be more timid than 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*.⁷⁷

The court found that Mailloux had not received adequate notice. Therefore, the school committee had discharged him improperly.

As in *Keefe* and *Parducci*, the court in *Mailloux* based the right of a high school teacher to teach according to his conscience on the free speech clause of the first amendment. In the court's analysis, teaching is an exercise of the right of expression and not, as in *Meyer*, a property right.⁷⁸ Mailloux challenged the school board because the state, acting through the board, punished him for an act of expression without prior warning of possible disciplinary action. Mailloux's due process claim derived from the state's infringement of his free speech rights, not from a notion that the state had infringed a property interest in his profession. Thus, the approach in *Mailloux* avoids the problem of "entitlements" and of defining the scope of a property interest in public employment.⁷⁹ The court thus defined the teacher's limited right not by reference to the individual's interest in expression, but in terms of the pub-

77. *Id.* (emphasis added). The United States District Court for the Southern District of Texas employed this rationale to support a decision favoring a teacher who had been discharged by a school board for adding teaching materials on race relations to those approved for his course, and for stating that he personally did not oppose interracial marriage. *Sterzing v. Fort Bend Indep. School Dist.*, 376 F. Supp. 657 (S.D. Tex. 1972), *vacated and remanded on remedial grounds*, 496 F.2d 92 (5th Cir. 1974). The trial court said:

The Court finds these rights to be evident, the substantive rights of a teacher to choose a teaching method, which . . . 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 or definitive administrative action, and as to which it was not proven that he had notice that its use was prohibited.

376 F. Supp. at 662 (citing *Mailloux v. Kiley*, 323 F. Supp. 1387 (D. Mass.), *aff'd per curiam*, 448 F.2d 1242 (1st Cir. 1971)). The court's principal point in *Sterzing* was that the school board punished the teacher not for incompetence, insubordination, or proselytizing, but for making a casual statement of personal views. Arguably, a forthright statement of such views might be helpful in determining possible biases in the presentation of teaching materials.

78. See *supra* note 15.

79. See, e.g., *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972). See generally Terrell, "Property," "Due Process," and the Distinction Between Definition and Theory in Legal Analysis, 70 GEO. L.J. 861 (1982).

lic's interest in creative teaching. Consequently, a teacher can only be as experimental as the public interest demands, regardless of whether he feels personally constrained by school regulations. The court, by using the nebulous concept of the "public interest," turned an individual right into a collective one.

Secondary schools transmit information and inculcate values. The schools are locally oriented and should be sensitive to local concerns. Therefore, society must define individual teacher creativity by reference to the particular community interests. Administrators, on the other hand, act unreasonably if they thwart the community's interest in encouraging creative teaching. Thus, in the court's analysis, competing and complementary community interests may subsume the question of teachers' rights. *Mailloux* serves as a paradigm for the continuing American dialectic on rights, how they are defined, and what justifies state intrusion for purposes of limiting or protecting them. A high school teacher may have a right to speak, but so long as he speaks *as* a high school teacher, community interests may limit his right. Community interests diminish in importance, however, as the teacher moves outside the classroom.

The district court's approach in *Mailloux* sensitively addressed the interrelationships of interests in the public schools. A similar result was reached in *Ahern v. Board of Education*⁸⁰ through the use of ordinary contract theory. A high school economics teacher attended a workshop in educational theory and returned to her school determined to employ "democratic" teaching methods. She allowed her students to participate in the selection of course materials and topics for class discussion. Current political issues were a favorite topic, but they provoked disorder in the classroom. School administrators admonished the teacher to teach economics and to restore classroom control. The teacher disagreed with the administrators and allowed her students to organize protests. Shortly thereafter, the school board discharged the teacher for insubordination.⁸¹

In a suit for reinstatement, the teacher alleged that her dismissal violated her constitutional right to academic freedom. On appeal,

80. 456 F.2d 399 (8th Cir. 1972).

81. *Id.* at 401-02.

the United States Court of Appeals for the Eighth Circuit disagreed:

Simply stated, our conclusion is that Miss 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 in economics."⁸²

Despite allegations of constitutional infringement, the decision in *Ahern* essentially rested on contract law. Ahern presumably understood the generally accepted standards of decorum and methods of instruction within the school district. The workshop she attended prompted her to change previously acceptable teaching methods. She could have followed procedures within the school system to achieve changes in the prevailing teaching methods, at least on an experimental basis.⁸³ Instead, she unilaterally changed her teaching format without consulting her superiors.

The substantive content of Ahern's dispute lay in contract theory. A course in economics cannot ignore political reality, but economics is not political science, history, civics, or current events. Whatever rights the teacher may have had, once she signed a contract to teach economics, the contract restricted her freedom under the Constitution to teach other subjects. Similarly, requiring a teacher to maintain reasonable classroom decorum is a matter of contract law and professionalism.⁸⁴

Mailloux also could have followed a contract analysis because Mailloux might have breached his contract by using the offensive word in the classroom. His action may have comported, however, with acceptable practices, expectations, or previous interpretations of school regulations. Even if a breach had occurred, it may not have been substantial enough to justify repudiation of the contract. Arguably, the school authorities were attempting a unilateral

82. *Id.* at 403-04 (quoting the lower court opinion, 327 F. Supp. 1391, 1397 (D. Neb. 1971)).

83. Perhaps such efforts would be futile. All that appears from the record is that Ahern did not seek modification of the approved pedagogy.

84. Even in *Tinker*, the Supreme Court recognized a legitimate state interest in maintaining classroom discipline. 393 U.S. 503, 507 (1969).

modification of the contract, and may have failed to act in good faith. Thus, even under a contract analysis, the result in *Mailloux* may not have changed.

A contract analysis is consistent with the general judicial disposition of avoiding constitutional questions whenever possible.⁸⁵ A consequence of *Keefe*, *Parducci*, and *Mailloux* may be a fundamental alteration in the relationship between teachers and school authorities because the teacher's first amendment rights become a matter of paramount concern. A court could view virtually any classroom methodology related to the subject area as an exercise of first amendment rights, and thus require that any regulations meet constitutional standards rather than less onerous principles of contract interpretation. Nothing in the *Mailloux* analysis prevents application of contract theory to regulations adopted before a disputed act, however, if a teacher challenges the regulations as unconstitutionally restrictive.

Courts have rejected the argument that teachers have an absolute first amendment right to determine curricula and appropriate teaching methods. For instance, in *Mercer v. Michigan State Board of Education*,⁸⁶ the United States District Court for the Eastern District of Michigan upheld the constitutionality of a Michigan statute that prohibited instruction in methods of contraception, and that allowed parents to have their children excluded from sex education classes. Several teachers had challenged the

85. Federal courts traditionally avoid broad constitutional decisions if a narrower, satisfactory alternative basis for a decision exists. See, e.g., *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947); *Ashwander v. TVA*, 297 U.S. 288 (1936). In the words of Justice Frankfurter, "the most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible." *United States v. Lovett*, 328 U.S. 303, 320 (1946) (Frankfurter, J., concurring). Federal courts also defer to state courts if a state law remedy is available. See, e.g., *Martin v. Creasy*, 360 U.S. 219 (1959); *Alabama Pub. Serv. Comm'n v. Southern Ry.*, 341 U.S. 341 (1951); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). Of course, the federal district court in *Mailloux* would not have had jurisdiction over a contract dispute.

86. 379 F. Supp. 580 (E.D. Mich.), *aff'd*, 419 U.S. 1081 (1974) (mem.). See also *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973); *Simard v. Board of Educ.*, 473 F.2d 988 (2d Cir. 1973); *Drawn v. Portsmouth School Dist.*, 451 F.2d 1106 (1st Cir. 1971); *Fluher v. Alabama State Bd. of Educ.*, 441 F.2d 201 (5th Cir. 1971); *Goldwasser v. Brown*, 417 F.2d 1169 (D.C. Cir. 1969); *Knarr v. Board of School Trustees*, 317 F. Supp. 832 (N.D. Ind. 1970), *aff'd*, 452 F.2d 649 (7th Cir. 1971).

statute by relying upon *Epperson* and *Meyer*.⁸⁷ The court said that *Epperson* was inapposite because it involved the establishment clause, and that *Meyer* was distinguishable as a substantive due process case concerned with unreasonable restrictions on the pursuit of a legal calling.⁸⁸ The district court declared that

"[t]he State may establish its curriculum either by law or by delegation of its authority to the local school boards and communities. . . . 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."⁸⁹

The solution in *Mercer* is not without its own difficulties. For example, a biology teacher who must present students with the scientific facts concerning birth control methods should endeavor to be purely factual so that the instruction is scientific and informative while not directly or indirectly encouraging sexual permissiveness. That is a difficult task, and even the most limited discussion might offend the religious beliefs of a teacher whose religion denominates as immoral any discussion of birth control. Alternatively, strict limitations on the scope of instruction might interfere with the personal beliefs of a teacher who believes birth control should be encouraged, especially among adolescents who might be inclined to experiment regardless of the instruction they receive in school. The sweeping language of *Mercer* precludes consideration of either teacher's belief.

Although a substantive due process analysis had re-emerged by 1974,⁹⁰ judicial reluctance to apply the rationale of *Lochner* and its progeny continued. Thus, the court in *Mercer* had some difficulty reconciling *Meyer*, but should not have called *Meyer* inapposite. In *Meyer*, the Nebraska statute did not prohibit the teaching of German; it only limited the age of children who could study the subject. In *Mercer*, the Michigan statute did not prohibit biology teachers from plying their trade; it only prevented them from telling a portion of the story. The Michigan statute applied only to

87. 379 F. Supp. at 585.

88. *Id.*

89. *Id.*

90. See, e.g., Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

the public sector, providing a sound basis for distinguishing *Meyer*, but the statute did not provide a reason for finding *Meyer* irrelevant.

The Court's decision in *Meyer* allowed some limitation on the pursuit of a lawful calling, provided that the limitation has a rational basis. The district court in *Mercer* avoided the *Lochner* approach to constitutional decisionmaking,⁹¹ but failed to address the student-rights and parental-control arguments found in *Meyer*.⁹² *Mercer* does not indicate whether the prohibition against birth control instruction infringed upon the opportunity of students to acquire information. The district court could not anticipate the Supreme Court's uncertain efforts over the next few years to develop a first amendment right to receive information,⁹³ but *Meyer* at least had suggested the issue. The Michigan statute in *Mercer* also may have interfered with the parents' interest in their children's education. On balance, however, the statute probably interfered no more than other curricular decisions. Nevertheless, *Meyer* compelled at least cursory consideration of the issue.

The decision in *Mercer* is consistent with Holmes's dissent in *Meyer*⁹⁴ and Black's concurrence in *Epperson*.⁹⁵ The state, for reasons not patently arbitrary, chose to exclude a subject from the curriculum. States make these decisions all the time. One hardly can envisage federal judges constantly reviewing school curricula for pedagogical soundness.⁹⁶ Under Justice Stewart's concurring opinion in *Epperson*,⁹⁷ however, a discussion of birth control might involve a body of respected thought and thereby merit some constitutional protection. The teacher could lose the protection if the

91. The court did not characterize *Meyer* as a first amendment case, as Justice Fortas had done in *Tinker*. 393 U.S. 503, 506.

92. See *supra* notes 16-17 and accompanying text. The student-rights and parental-control prongs of *Meyer* could lead to inconsistent results. *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Prince v. Massachusetts*, 321 U.S. 158 (1944), illustrate the conflicts that sometimes arise among parents, their children, and the state.

93. See *infra* text accompanying notes 140-254.

94. *Bartels v. Iowa*, 262 U.S. 404, 412 (1923) (Holmes, J., dissenting in both *Bartels* and *Meyer*).

95. *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968) (Black, J., concurring).

96. Ironically, the courts did review such matters in *Keefe*, *Parducci*, and *Mailloux*. See *supra* text accompanying notes 60-63 & 70-73.

97. 393 U.S. 97, 116 (Stewart, J., concurring).

discussion were to degenerate into proselytizing. The *Keefe*, *Parducci*, and *Mailloux* opinions suggest that prima facie constitutional protection exists for a discussion of birth control in the classroom, and are logically related to Stewart's approach in *Ep-person*. Application of the *Mailloux* test does result in greater flexibility for school authorities than the *Keefe* and *Parducci* tests.⁹⁸ A contract analysis similar to that in *Mercer* examines questions of custom, expectations, language interpretation, and reasonableness of remedy. Notwithstanding the varying approaches to academic freedom for schoolteachers, each court in the cases above would allow school authorities to discipline teachers for discussing subjects outside the specified curriculum—even those courts that afford constitutional status to pedagogical decisions.

Two years after *Mercer*, in *Wilson v. Chancellor*,⁹⁹ the United States District Court for the District of Oregon addressed an issue akin to speaking on a subject not approved for the curriculum. Wilson, a high school political science teacher, invited four speakers—a Democrat, a Republican, a Communist and a member of the John Birch Society—to share their views with the class. The principal and school board discussed and approved the plan. Three of the speakers appeared without incident, but a group of parents protested the invitation to the Communist. After a heated debate and before the Communist was scheduled to appear, the school board issued an order banning “all political speakers” from the high school. Wilson challenged the board's action on the basis of the first and fourteenth amendments and on vagueness and overbreadth grounds.¹⁰⁰

The court held that the choice of a teaching method is a form of expression within the meaning of the free speech clause: “The act of teaching is a form of expression, and the methods used in teaching are media [for that expression].”¹⁰¹ The court made no attempt to define a special “academic freedom” based upon the occupational status of teachers, nor did it draw any distinction between high school and college teachers.¹⁰² Reasoning that teaching was

98. See *supra* text accompanying notes 70-76.

99. 418 F. Supp. 1358 (D. Or. 1976).

100. *Id.* at 1361.

101. *Id.* at 1363.

102. See *infra* notes 112-13 and accompanying text.

protected speech,¹⁰³ the court asserted that the protected right was personal to the teacher, and not defined, as in *Mailloux*, by reference to larger community interests.

Wilson's right to choose materials—in this case speakers—for his class formed the basis of the decision, not the right of the invited Communist to speak or the students' rights to hear. The teacher's right to choose materials was subject to reasonable time, place, and manner restrictions.¹⁰⁴ But the court found that the restriction in *Wilson* was unreasonable because it did not relate to a valid educational purpose, and because the school board enacted the regulation in response to political pressure.¹⁰⁵ The court in *Wilson* ignored the myriad concerns that characterized *Mailloux* and *Mercer*, and adopted a straightforward approach similar to the one in *Parducci*.¹⁰⁶ Teaching is expression protected by the first amendment. Therefore, limitations on that expression raise *prima facie* constitutional issues that courts should subject to careful scrutiny.

The issues raised in the previously discussed cases converged in *Cary v. Board of Education of Adams-Arapahoe School District*.¹⁰⁷ The plaintiffs in *Cary* were high school English instructors who taught various elective courses on contemporary literature and poetry. A dispute arose when the school board removed ten books from a list of 1275 recommended for high school usage. All the parties agreed that the proscribed books were not obscene and that, as a group, they did not represent any particular "system of thought or philosophy."¹⁰⁸ The teachers argued that the ban unconstitutionally invaded their right to academic freedom. The court described the opposing views of the teachers and school board members as irreconcilable: "The logical extension of plaintiffs'

103. This approach begs a host of questions. See *infra* notes 258-64 and accompanying text.

104. "[S]chool boards may restrict teachers' expression if the restrictions are reasonable in light of the special circumstances of the school environment." 418 F. Supp. at 1364.

105. The court was not content to stop at this point. It also found that the ban was an unconstitutional prior restraint, void for vagueness, and violative of the equal protection clause because it discriminated against political science teachers and their students. *Id.* at 1364-67.

106. See *supra* text accompanying notes 64-66.

107. 427 F. Supp. 945 (D. Colo. 1977), *aff'd*, 598 F.2d 535 (10th Cir. 1979).

108. 427 F. Supp. at 947-48.

contention is that they can teach without accountability to their employer. . . . The logical extension of defendants' contention is that they have the power to cause teachers to teach from a prepared script."¹⁰⁹

The court noted that academic freedom was an adaptation of first amendment rights of free speech and press intended "to protect communication in the classroom as a special market place of ideas."¹¹⁰ The court cited two Supreme Court cases that had nothing to do with curriculum control,¹¹¹ and concluded that academic freedom was "such a widely held belief and traditional view that it is unlikely that a board of regents or other public authority would even attempt to deny a college professor the authority and responsibility to select the materials to be used in his classes."¹¹² Even if one accepts the court's characterization of academic freedom, the Constitution does not protect automatically every interest that custom or tradition recognizes.

The court also noted that academic freedom does not have the same meaning in high schools that it has in universities because of fundamental institutional differences.¹¹³ The court in *Cary* rejected the rationales of *Keefe* and *Parducci* because those rationales in-

109. *Id.* at 949.

110. *Id.*

111. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (overturning application of New York's Feinberg Law, 1949 N.Y. Laws 360, current version at N.Y. EDUC. LAW § 3022 (McKinney 1970), which prohibited employment of anyone as a public school teacher who was a member of an organization advocating the overthrow of the government "by force, violence or any unlawful means"); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (overturning contempt citation for refusal of Mr. Sweezy to answer questions from New Hampshire's attorney general, at instance of the legislature, about a lecture he gave at the University of New Hampshire, and about his membership in the Progressive Party). Both cases contain discussions of academic freedom, but neither deals with state interference in curricular or pedagogical disputes.

112. 427 F. Supp. at 949. Closely related problems arose in a suit brought by a political science professor who charged that the University of Maryland improperly denied him a position as Chairman of the Department of Government and Politics at the University of Maryland because of his admittedly Marxist political beliefs, and because of the fear that those beliefs might affect his choice of teaching materials. *Ollman v. Toll*, 518 F. Supp. 1196 (D. Md. 1981). The district court found that the plaintiff had not met his burden of proving that his beliefs were a substantial or motivating factor in the denial. *Id.* at 1214.

113. The court recognized the significant substantive differences in purpose, form, content of instruction, and age and sophistication of the students. See *supra* note 74. Interestingly, the court did not cite *Mailloux*.

volved a substantive analysis of the teaching methodology and assignment.¹¹⁴ The court apparently believed that if society wishes to protect academic freedom in high schools, controversies about its scope cannot be resolved by judicial review of the quality or character of the communications involved.

The court in *Cary* adopted a fundamentally different approach from that followed by the court in *Mailloux*. The quality of the instruction was critical to the analysis in *Mailloux*. In *Cary*, the court determined that the Constitution would not countenance such judicial review, because the issue involved the right to choose, and not the right to choose subject to judicially imposed qualitative standards. Although the court's interpretation of its role in a suit alleging speech infringement has some support,¹¹⁵ nevertheless, courts regularly do review the content of questioned speech within a particular context to determine the reasonableness of a challenged regulation.¹¹⁶ For example, courts often determine whether certain material is obscene,¹¹⁷ whether the effect of allegedly obscene material is greater on children than it is on adults,¹¹⁸ whether commercial speech is "truthful and legitimate,"¹¹⁹ and whether certain speech represents a "clear and present" danger.¹²⁰

Cary also addressed the arguments raised in an article by Professor Goldstein.¹²¹ The court attempted to develop a theoretical basis for protecting a high school teacher's control over teaching methodology and content. The court noted that Professor Gold-

114. "The institutional role of the court is to determine whether the Constitution controls who has the authority to choose in a given context, and what are the constitutional limitations on the power of the decision-maker. The quality of the decision is irrelevant." 427 F. Supp. at 950.

115. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 293-97 (1964) (Black, J., concurring).

116. See, e.g., *Widmar v. Vincent*, 454 U.S. 263 (1981).

117. See, e.g., *Miller v. California*, 413 U.S. 15 (1973). *Penthouse v. McAuliffe*, 610 F.2d 1353 (5th Cir.), cert. dismissed, 447 U.S. 931 (1980), illustrates the detail with which courts examine the content of allegedly obscene publications.

118. See *New York v. Ferber*, 102 S. Ct. 3348 (1982); *Ginsberg v. New York*, 390 U.S. 629 (1968).

119. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); Hunter, *Prescription Drugs and Open Housing: More on Commercial Speech*, 25 EMORY L.J. 815, 825-35 (1976); cf. *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981) (examining validity of ordinance prohibiting outdoor advertising displays).

120. See *Near v. Minnesota*, 283 U.S. 697 (1931).

121. Goldstein, *supra* note 21.

stein "apparently believes that the function of all public education is the implantation of a set of societal values, and therefore, decisions about what is to be taught in those schools are community decisions to be made through the democratic process."¹²² This statement does not capture fully the scope of Professor Goldstein's article, although Goldstein gives great weight to value-inculcation as a goal of public education.¹²³ At the elementary school level, the court apparently agreed with Goldstein. The state, having forced children to leave direct parental control at an early age, must provide not only basic skills, but also must support majoritarian values.¹²⁴ In high schools, the court noted that the Constitution mandates a different approach. High schools should expose students to conflicting viewpoints and allow students to engage in decision-making, thus encouraging independence and free thought.

As the student advances in age, experience, information, and skills, the need for controlling the educational environment diminishes. Assuming an adequate initiation into the fundamentals, the secondary school student must be given an opportunity to participate openly if he is to become the kind of self-controlled, individually motivated and independent-thinking person who can function effectively as a contributing citizen in a society of ordered liberty.¹²⁵

Despite the court's criticisms of Professor Goldstein, the two positions do not differ significantly. The court recognized that the cognitive development of most high school students is sufficient to enable them to analyze conflicting viewpoints and to confront the marketplace of ideas. Full enjoyment of citizenship requires an ability to make intellectual choices; high school is the last opportunity to train many students to make such choices. Thus, the court took a central value of the system of free expression—the marketplace of ideas—and contended that high school students should receive practical training in the full development of this value. Such a contention is consistent with Professor Goldstein's position that the inculcation of values is the primary purpose of public

122. 427 F. Supp. at 952.

123. Goldstein, *supra* note 21.

124. 427 F. Supp. at 952.

125. *Id.* at 953.

education.

The court in *Cary* believed that the Constitution entitles high school teachers to some degree of flexibility in determining course content and teaching methodology. But the conclusion that some limited *Lehrfreiheit* exists at the secondary school level finds support not in the individual instructor's interest in free speech, but in the societal interest of developing student respect for the values of free speech. Such a position is similar to the reasoning in *Mailoux*. Carried to its logical conclusion, this position could lead to mandated dissent, or a kind of "fairness doctrine" for high schools.¹²⁶ Despite the court's contention in *Cary*, the crux of the case is not a teacher's freedom, but rather the public's interest in developing a certain mode of thinking. Furthermore, the court failed to define adequately the scope of the freedom an individual teacher should have in pursuing and developing the marketplace of ideas within the classroom.

The court's discussion in *Cary* was moot because the teacher and his colleagues had organized a labor union that negotiated a collective bargaining agreement effective for the year in which the book-banning issue arose. The agreement granted the school board the right to "[d]etermine the processes, techniques, methods and means of teaching any and all subjects."¹²⁷ The court concluded that the teachers had bargained away any right that they had to determine course content:

Whatever may be the scope of the protection of the First and Fourteenth Amendments for a freedom to communicate with students, directly in a classroom speech or indirectly through reading assignments, such protection does not present a legal impediment to the freedom to contract. . . . One can, for consideration, agree to teach according to direction.¹²⁸

Both sides appealed the district court's judgment, and the Tenth Circuit affirmed on other grounds.¹²⁹ The Tenth Circuit read the collective bargaining agreement more narrowly, and concluded that

126. The fairness doctrine developed in the context of governmental regulation of access to the electronic media. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

127. 427 F. Supp. at 948.

128. *Id.* at 955-56.

129. 598 F.2d 535 (10th Cir. 1979).

the agreement did not give the school board unfettered control over course materials. Moreover, the agreement did not amount to a surrender of any individual constitutional rights that the teachers may have possessed.¹³⁰ The appellate court was unclear in reaching its conclusions. The court might have been construing the contract in such a way as to avoid the question of constitutional infringement, or might have been confronting the constitutional issue. But to suggest, as a matter of contract law, that a person cannot agree to limit his expression for good consideration is an unusual position. The opinion does not indicate adequately which line of reasoning the court pursued.

The Tenth Circuit agreed that teachers have certain constitutional interests in academic freedom that were implicated by the school board's decisions. On the facts, however, the court did not find a constitutional violation. Although the teachers could not assign certain books, the school board had not banned the books from the school libraries or from classroom discussion. Furthermore, the court noted that the courses were electives, and were in the curriculum at the school board's discretion.¹³¹ Thus, the board could remove the courses from the curriculum, mooted any concern with individual teaching methodology.¹³² The court expressly approved of value inculcation as a principal function of public education. "It is legitimate for the curriculum of the school district to reflect the value system and educational emphasis which are the

130. "We thus construed the contract as giving control over textual material to the school board insofar as it can be done consistent with the federal and Colorado constitutions." *Id.* at 539.

131. *Id.* at 544.

132. One judge would have required that the board show that the exclusion was not arbitrary. *Id.* (Doyle, J., concurring). The court's observation raises an interesting issue. Under appropriate circumstances, the Tenth Circuit's reasoning suggests that the court would follow *Keefe*, *Parducci*, and *Mailloux* in finding that the school board could not prohibit a teacher from using or discussing particular books. That is, if the teachers in *Cary* had not contracted away their right to determine course content, and if the school board had not only proscribed the books, but had also proscribed classroom discussion and removed the books from the school library, the Tenth Circuit might have found a constitutional violation. In their concurring opinions in *Epperson*, Justices Black and Stewart both maintained that a school board could constitutionally delete entire subjects from the curriculum. See *supra* text accompanying notes 32-40. Thus, the school board might be powerless to delete particular books while having absolute discretion to delete the courses in which the books would be used.

collective will of those whose children are being educated and who are paying the costs."¹³³ The Tenth Circuit thus involved itself in direct curricular review, similar to that undertaken by the courts in *Keefe*, *Parducci*, and *Mailloux*, while simultaneously accepting the notion of ultimate school board control over the curriculum.

The views expressed by the Tenth Circuit in *Cary* echoed the court's earlier decision in *Adams v. Campbell County School District*.¹³⁴ In *Adams*, the court upheld the nonrenewal by the school board of the contracts of three untenured teachers. The court confused the question of curriculum control and pedagogy, however, with questions of behavioral control and insubordination. The teachers had filed a civil rights action claiming that the nonrenewals constituted punishment for their expression of minority viewpoints in the classroom.¹³⁵ The school board contended that it had based the nonrenewals on various disciplinary problems.¹³⁶ One of the grounds stated by the school board—that an English teacher discussed current events in her class—had some similarity to a pedagogical dispute.¹³⁷ The trial court found that the school board based the nonrenewals on legitimate employer-employee contractual grounds, and the appellate court refused to

133. *Id.* at 543 (citing *Adams v. Campbell County School Dist.*, 511 F.2d 1242 (10th Cir. 1975)).

134. 511 F.2d 1242 (10th Cir. 1975).

135. Even an untenured teacher has a right not to be dismissed for exercising constitutional rights. 511 F.2d at 1246 (citing *Perry v. Sindermann*, 408 U.S. 593 (1972)); see *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *Ramsey v. Allen*, 501 F.2d 1090 (10th Cir. 1974); *Smith v. Losee*, 485 F.2d 334 (10th Cir. 1973). See also *Connell v. Higginbotham*, 403 U.S. 207 (1971). But cf. *Board of Regents v. Roth*, 408 U.S. 564 (1972).

136. One teacher played records in his classroom so loudly that it disturbed other classes. Another teacher had confrontations with another faculty member and the principal. The third teacher maintained no classroom discipline. *Id.* at 1243-44.

137. *Id.* The resemblance exists only in the sense that the stated ground was directly related to the learning experience. Even those persons who favor broad academic freedom for high school teachers would not argue that someone hired to teach English may disregard grammar, Shakespeare, and Thomas Hardy in favor of politics, economics, or algebra.

The interests that some teachers believe should receive constitutional protection can strain credulity. See, e.g., *East Hartford Educ. Ass'n v. Board of Educ.*, 562 F.2d 838 (2d Cir. 1977) (dress code for teachers is constitutional); *Brubaker v. Board of Educ.*, 502 F.2d 973 (7th Cir. 1974) (nonrenewals based on distribution to students of "Woodstock" brochure containing paean to free sex, LSD, and marijuana were constitutional); *Moore v. School Bd.*, 364 F. Supp. 355 (N.D. Fla. 1973) (nonrenewal of contract constitutional when teacher discussed his personal experiences with a Japanese prostitute and questioned students about frequency of masturbation).

disturb that finding.¹³⁸ The Tenth Circuit stated further:

Plaintiffs also argue that teachers have a First Amendment right to discuss controversial subjects and use controversial materials in the classroom. Undoubtedly they have some freedom in the techniques to be employed, 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. Thus in a small community like Gillette the Board members and the principal surely have a right to emphasize a more orthodox approach, for example, and it would seem that they may insist that record playing and current events do interfere with this program. We have found no law which allows a high school teacher to have the broad latitude which appellants seek.¹³⁹

The Tenth Circuit in *Adams* found a community interest, expressed through the politically sensitive school board, in maintaining control over curriculum and pedagogy. This conclusion does not answer fully the question of how much latitude a teacher has within his classroom. It does put that question within the context of a larger community interest in the educational process, however, and places the community's concerns above the teacher's interest in self-expression. The Tenth Circuit could have decided *Adams* without the additional rhetoric quoted above because *Adams* essentially involved teacher insubordination and incompetence. Although *Adams* represents another struggle with the assertion of individual rights, the court's decision reflects larger societal and institutional concerns.

138. 511 F.2d at 1246.

139. *Id.* at 1247 (footnote omitted). The court relied on *Semard v. Board of Educ.*, 473 F.2d 988 (2d Cir. 1973) (school board may demand more than mere competent classroom instruction); *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972) (no constitutional right to override judgment of superiors as to proper course content), *cert. denied*, 411 U.S. 972 (1973); *Flicker v. Alabama State Bd. of Educ.*, 441 F.2d 201 (5th Cir. 1972) (permissible to terminate two college teachers in favor of ones with better qualifications); *Drown v. Portsmouth School Dist.*, 451 F.2d 1106 (1st Cir. 1971) (nonrenewal legitimate when teacher's methods are too unconventional); *Knarr v. School Trustees*, 317 F. Supp. 832 (N.D. Ind. 1970) (legitimate to terminate teacher for being chronically late, advising students to disobey dress codes, using classroom as personal forum, and being rude to other teachers), *aff'd*, 452 F.2d 649 (1971).

C. Students and the Right to Receive

One justification for providing first amendment protection for a speaker's utterances is the concomitant "right to hear" of his listeners.¹⁴⁰ Courts have defined a "right to know" as an independent basis for challenging the actions of school authorities, especially when the controversy has involved the selection of books for school libraries or course bibliographies.¹⁴¹ Many courts have discussed the right to know, but few courts have explained the concept.

Courts invoke the right to know in four distinct situations: when the government seeks to limit the speech of a citizen, raising concern about the speaker's free speech rights and the opportunity for his potential audience to hear him; when the government possesses information to which a citizen seeks access, usually under the Freedom of Information Act¹⁴² or similar state "sunshine" and "open records" laws;¹⁴³ when a citizen seeks admittance to government-owned or government-controlled property;¹⁴⁴ and when the government provides inadequate or limited information through a service, or terminates the service altogether. This last situation may involve the "public utility" concept.¹⁴⁵ The right to know, or to receive information, influenced the United States Supreme Court's recent decision that a school board's removal of library books violated the first amendment because the removal was content

140. See, e.g., *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978); *Bates v. Arizona State Bar*, 433 U.S. 350 (1977); *Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

141. See *infra* text accompanying notes 183-254. See also, Note, *School Board Removal of Books from Libraries and Curricula*, 30 KAN. L. REV. 146 (1981); Note, *Schoolbooks, School Boards and the Constitution*, 80 COLUM. L. REV. 1092 (1980); Note, *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. 457 (1978).

142. 5 U.S.C. § 552 (1976).

143. Other statutes offer varying degrees of access. See, e.g., FLA. STAT. ANN. § 286.011 (West 1975 & Supp. 1983); GA. CODE ANN. §§ 50-14-1 to -4 (1982); N.C. GEN. STAT. § 143-318.9 to 318.18 (Supp. 1981); TENN. CODE ANN. §§ 8-44-101 to -107 (1980 & Supp. 1981).

144. See, e.g., *Houchins v. KQED*, 438 U.S. 1 (1978); *Pell v. Procunier*, 417 U.S. 817 (1974); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974).

145. The closest analogy is the system of federal control over the electronic media. See 47 U.S.C. §§ 151-609 (1976 & Supp. IV 1980). For a discussion of the public utility concept, see *infra* notes 169-82 and accompanying text.

based.¹⁴⁶

1. *The Right to Hear as a Corollary of the Right to Speak*

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,¹⁴⁷ the Supreme Court declared unconstitutional a Virginia statute¹⁴⁸ prohibiting pharmacists from advertising prescription drugs. Although the statute limited speech by pharmacists, the state justified the limitation by citing the Supreme Court decision in *Valentine v. Chrestensen*,¹⁴⁹ which held that "commercial speech" lies outside the scope of the first amendment. *Virginia Pharmacy* overruled *Chrestensen* and afforded commercial speech constitutional protection.¹⁵⁰

The facts in *Virginia Pharmacy* forced the Court to consider whether the right to speak also encompasses a right to hear. The plaintiffs who challenged the statute were not the pharmacists who would bear any burden imposed for a violation; rather, they were a group of consumers who argued that the statute's prohibition against advertising by pharmacists unconstitutionally deprived them of an opportunity to receive information. The Court overcame a thorny standing problem by concluding that a necessary corollary of the right to speak is the right to hear the speaker, and that interference by the state with one right is also interference with the other.¹⁵¹

146. Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 102 S. Ct. 2799 (1982). See *infra* text accompanying notes 186-225.

147. 425 U.S. 748 (1976).

148. VA. CODE § 54-524.35 (1974).

149. 316 U.S. 52 (1942). For earlier criticism of *Chrestensen*, see Dun & Bradstreet, Inc. v. Grove, 404 U.S. 898, 904-06 (1971) (Douglas, J., dissenting from denial of cert.); Gardner, *Free Speech in Public Places*, 36 B.U.L. REV. 239 (1956).

150. Although the Court held that commercial speech is entitled to first amendment protection, the Court maintained a distinction between commercial and noncommercial speech and allowed greater regulation of the former. 425 U.S. 748, 771 n.24. See L. TRIBE, *supra* note 14, § 12-15, at 655-56.

151. This was the most straightforward enunciation of the proposition, but it was not novel. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 7-11 (Vintage ed. 1967); Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191 (1965). But cf. *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (upholding Attorney General's statutory denial of nonimmigrant visa to alien journalist who advocated communism, and rejecting first amendment right of American citizens to hear him speak). Professor Tribe suggests, however, that

The Court's approach in *Virginia Pharmacy* is well-founded. Free speech would be a meaningless concept if the state, while disregarding the speaker, could prevent the audience from hearing what the speaker had to say. Speaking and listening are interdependent concepts, a notion recognized in the twin principles of *Lehrfreiheit* and *Lernfreiheit*, although the German concepts have somewhat broader overtones.¹⁵²

The Court's concern with the free flow of information from speaker to listener continued in several cases after *Virginia Pharmacy*.¹⁵³ Despite the real and apparently lasting concern for the free receipt of information by listeners, however, the cases did not advance significantly the analysis of constitutional interests within the classroom. If *Virginia Pharmacy* is the model, the right of the teacher to speak necessarily defines the students' right to hear. As one court noted, "[t]he right to receive information in the free speech context is merely the reciprocal of the right of the speaker."¹⁵⁴ A limitation imposed on a teacher may provide a basis for an independent action by students who allege that the limitation unconstitutionally restricts the teacher's free speech and, therefore, interferes with the students' right to hear. *Virginia Pharmacy* does not enlarge the teacher's right to speak, however, by recognizing a reciprocal right to hear whatever may rightfully be spoken.

2. Government Control of Access to Information and Places

The access cases differ fundamentally from *Virginia Pharmacy* and its progeny.¹⁵⁵ Those cases that have involved questions of ac-

Kleindienst is not authority to the contrary. L. TRIBE, *supra* note 14, § 15-15, at 957-58 n.25.

152. See W. VON HUMBOLDT, *supra* note 6.

153. Most notable are: *Bates v. Arizona State Bar*, 433 U.S. 350 (1977) (invalidating a ban on lawyer advertising); *Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (invalidating a prohibition on posting "For Sale" and "Sold" signs); and *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978) (invalidating a state ban on certain forms of political advocacy by corporations).

154. *Bicknell v. Vergennes Union High School*, 475 F. Supp. 615, 620 (D. Vt. 1979).

155. See *supra* note 153. A thorough discussion of these cases is beyond the scope of this Article. See generally Note, *Press Access to Government-Controlled Information and the Alternative Means Test*, 59 TEX. L. REV. 1279 (1981); Comment, *Developments Under the Freedom of Information Act—1981*, 1982 DUKE L.J. 423; Comment, *Newsgathering: Sec-*

cess to areas under direct governmental control, such as jails, have held uniformly that no general constitutional right of access exists within the first or fourteenth amendments.¹⁵⁶ In the latest Supreme Court decision considering the access issue, *Houchins v. KQED*,¹⁵⁷ the Court divided sharply.¹⁵⁸ But courts generally agree that safety and national security may justify limitations on the right of access,¹⁵⁹ and that the press enjoys the same right of access as the general public.¹⁶⁰

The "public forum" cases, on the other hand, have long recognized a general right of access to public parks, lands, buildings, and streets for the purpose of engaging in free speech activities, subject to reasonable time, place, and manner regulations.¹⁶¹ The "petition and assembly" clause contemplates such activities. But a considerable difference exists between allowing Nazis to engage in political expression by marching in Skokie, Illinois¹⁶² and allowing a person to explore a government establishment to satisfy his own curiosity, even if he directs his curiosity toward the goal of becoming a more informed citizen.

In 1980, the Court in *Richmond Newspapers, Inc. v. Virginia*¹⁶³

ond-Class Right Among First Amendment Freedoms, 53 TEX. L. REV. 1440 (1975).

156. See, e.g., *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974).

157. 438 U.S. 1 (1978).

158. Chief Justice Burger and Justices White and Rehnquist found no constitutional basis for a right of access. 438 U.S. at 14. Justice Stewart concurred in the judgment, but did not join the majority. *Id.* at 16. Justices Stevens, Brennan, and Powell filed a strong dissent. *Id.* at 19. Justices Marshall and Blackmun did not participate. *Id.* at 16.

159. National security also may provide a basis for upholding a prior restraint. See *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis.), *motion to reconsider and to vacate preliminary injunction denied*, 486 F. Supp. 5 (W.D. Wis.), *writ of mandamus for expedited appeal denied sub nom. Morland v. Sprecher*, 443 U.S. 709, *dismissed as moot*, 610 F.2d 819 (7th Cir. 1979).

160. See *Pell v. Procunier*, 417 U.S. 817 (1974). Some limitations on the use of recording devices may have the practical effect of limiting opportunities for electronic-media reporters. See *Garrett v. Estelle*, 556 F.2d 1274 (5th Cir. 1977), *cert. denied*, 438 U.S. 914 (1978); *Sigma Delta Chi v. Speaker, Md. House of Delegates*, 270 Md. 1, 310 A.2d 156 (1973). *Cf. Nevens v. City of Chino*, 233 Cal. App. 2d 775, 44 Cal. Rptr. 50 (1965).

161. See, e.g., *Coates v. Cincinnati*, 402 U.S. 611 (1971); *Bachellar v. Maryland*, 397 U.S. 564 (1970); *Cox v. Louisiana [Cox II]*, 379 U.S. 559 (1965); *Cox v. Louisiana [Cox I]*, 379 U.S. 536 (1965).

162. See *National Socialist Party of Am. v. Skokie*, 432 U.S. 43 (1977); *Collin v. Smith*, 447 F. Supp. 676 (N.D. Ill.), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

163. 448 U.S. 555 (1980).

held that the first amendment provides a right of access to criminal trials. This decision followed the Court's decision a year earlier in *Gannett Co. v. DePasquale*¹⁶⁴ that no right of access exists to a pretrial suppression hearing in a criminal case. The Court in *Richmond Newspapers* left standing its decision in *Gannett*,¹⁶⁵ indicating that the scope of the right of access to criminal proceedings is not absolute.¹⁶⁶ The Court in *Richmond Newspapers* based the right of access to criminal proceedings on Anglo-American traditions of criminal due process.¹⁶⁷ Little case law now exists to support an expansion of the impact of *Richmond Newspapers* beyond the area of criminal trials.

Although these cases have little direct relationship to issues of school curricula and teaching methods, they demonstrate that the term "right to know" might have widely different meanings and consequences in various contexts. Furthermore, the arguments favoring greater access to government-controlled information and places are consistent with the arguments favoring greater student demand for educational offerings, and for access to school resources based upon a student's purported right to know. These arguments have been especially important in the school library cases discussed below.¹⁶⁸

3. The "Public Utility" Concept

Some courts maintain that if the state provides an educational system, it must provide not only space for all children who want to attend, but also access to a full range of information and educational opportunities.¹⁶⁹ This approach may be called the "public

164 443 U.S. 368 (1979).

165. 448 U.S. at 564.

166. See *San Jose Mercury-News v. Municipal Court*, 30 Cal.3d 498, 638 P.2d 655, 179 Cal. Rptr. 772 (1982) (exclusion of press and public from preliminary hearings upon request of criminal defendant not unconstitutional). But see *United States v. Brooklier*, 685 F.2d 1208 (9th Cir. 1982) (press and public have first amendment right of access to *voir dire* in criminal cases); *United States v. Criden*, 675 F.2d 5506 (3d Cir. 1982) (press and public have first amendment right of access to pretrial suppression, due process, and entrapment hearings).

167. 448 U.S. at 569.

168. See *infra* notes 183-254 and accompanying text.

169. See, e.g., *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703 (D. Mass. 1978).

utility" concept as it is similar to the requirements placed on electric, gas, and water companies which either are owned by the government or operate as highly regulated monopolies. The approach often may appear politically desirable, and is reflected in the proliferation of American educational institutions. Virtually every American citizen is now within commuting distance of a post-secondary school.

A federal district court in *Right to Read Defense Committee v. School Committee*¹⁷⁰ noted that a school "should be a readily accessible warehouse of ideas." Few would disagree that public schools should provide a sound and broad education if taxpayers are willing to provide the necessary funds. But the case law suggests that the Constitution does not compel the government to provide educational opportunities.¹⁷¹

The Supreme Court decision in *San Antonio Independent School District v. Rodriguez*¹⁷² is a prime example. In *Rodriguez*, a divided Court decided that the Texas system of financing public schools did not violate the equal protection clause, even though the system reflected gross discrepancies in per capita expenditures among school districts. Like most states, Texas largely financed public schools through property taxes, and the available revenues varied with the tax base and the applicable tax rates. Despite some attempts at equalization by state officials, qualitative differences in education persisted between tax-poor and tax-rich districts. A member of the majority characterized the Texas system as "chaotic and unjust,"¹⁷³ but the system withstood an equal protection challenge for three reasons: the alleged discrepancies were among school districts, not individuals, and therefore the plaintiffs did not

170. *Id.* at 710. In *Arundar v. DeKalb County School Dist.*, 620 F.2d 493 (5th Cir. 1980), the complainant asserted a "right" to enroll in certain courses to which he had been denied access. He argued that he needed the courses to acquire background knowledge for advanced study in a highly technical field. The court rejected his argument. *Id.* at 495.

171. Although the United States Constitution may not compel the government to provide educational opportunities, some state constitutions explicitly do so. For example, Connecticut's constitution declares that "[t]here shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation." CONN. CONST. art. VIII, § 1.

172. 411 U.S. 1 (1973).

173. *Id.* at 59 (Stewart, J., concurring).

represent an identifiable class;¹⁷⁴ wealth is not a suspect classification, such as race, which would invoke strict scrutiny;¹⁷⁵ and education is not a fundamental right.¹⁷⁶

The Court in *Rodriguez*, however, did not rule out a constitutional basis for compelling the state to provide educational opportunities. The Court suggested that the Constitution might require the state to provide "some identifiable quantum of education [as] a constitutionally protected prerequisite to the meaningful exercise" of the right to speak or the right to vote.¹⁷⁷ The Court implied that some education may be necessary for the meaningful exercise of certain fundamental liberties, and that the state must meet this minimum requirement. Similarly, the Court hinted that Texas children might invoke the Constitution if subjected to "an absolute denial of educational opportunities."¹⁷⁸ A teacher's cause of action based on the dicta in *Rodriguez* would be circumscribed and would not support a "right to know" sufficient to provide a basis for any sophisticated analysis of curriculum or pedagogy.

The Court's recent decision in *Plyler v. Doe*¹⁷⁹ may aid interpretation of the dicta in *Rodriguez*. In *Plyler*, the Court held that a state must permit children of resident illegal aliens to attend public schools.¹⁸⁰ The Court apparently relied on the premise that the illegal alien children would continue to live in this country and, if the state denied them educational opportunities, they would not be able to participate properly in the American social order.¹⁸¹ The Court's opinion had two related lines of reasoning: education

174. *Id.* at 22-23.

175. The Court noted that if a state charged tuition at public schools and then refused to provide financial assistance to indigents, a much stronger justification for judicial involvement would exist. *Id.* at 25 n.60. Additional cases on the issue of wealth include *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Boddie v. Connecticut*, 401 U.S. 371 (1971); and *Dandridge v. Williams*, 397 U.S. 471 (1970).

176. 411 U.S. at 35. Justice Brennan argued that education is a penumbral right, such as privacy or freedom of association, because education is intertwined inextricably with the exercise of voting rights and free speech. *Id.* at 62-63 (Brennan, J., dissenting).

177. *Id.* at 36.

178. *Id.* at 37.

179. 457 U.S. 202 (1982).

180. *See id.* at 230. *But cf. Martinez v. Bynum*, 103 S. Ct. 1838 (1983) (school district may deny tuition-free admission to student who lives apart from person having lawful control of student, if student's presence in district is for primary purpose of attending public schools).

181. *Id.* at 221-22.

would benefit the children by helping them obtain good jobs and become good citizens; and education would benefit society by socializing the children and preventing them from becoming wards of the state.¹⁸² Although *Plyler* rested on equal protection grounds, the decision reflected the suggestion in *Rodriguez* that the state must provide some minimal education. This line of thought surfaces again in the school library cases.

4. *The School Library Cases*

Against this background, lower courts have decided a number of cases involving the policies of school boards with regard to textbooks, reading lists, and library acquisitions or deletions.¹⁸³ These cases indicate substantial agreement about two points.¹⁸⁴ First, school managers have considerable discretion in choosing books for school use and in approving books for reading lists. Second, a school is not constitutionally required to have a library. The courts have divided sharply, however, over deletion policies.¹⁸⁵ These two factors led to the recent Supreme Court decision in *Board of Education, Island Trees Union Free School District No. 26 v. Pico*.¹⁸⁶ The Court in *Island Trees* found a first amendment constraint on school library deletion practices. The nine justices filed seven opinions, and none attracted a majority.

In *Island Trees*, several junior and senior high school students challenged the school board's limitation of access to one book, and the removal of eight others from the school libraries. Three members of the Island Trees school board had attended a 1975 conference sponsored by Parents of New York United, described by Jus-

182. *Id.* at 221-24.

183. See *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300 (7th Cir. 1980); *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577 (6th Cir. 1976); *President's Council, Dist. 25 v. Community School Bd. No. 25*, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972); *Loewen v. Turnipseed*, 488 F. Supp. 1138 (N.D. Miss. 1980); *Bicknell v. Vergennes Union High School*, 475 F. Supp. 615 (D. Vt. 1979); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269 (D.N.H. 1979); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703 (D. Mass. 1978).

184. See generally Note, *School Board Removal of Books from Libraries and Curricula*, 30 U. KAN. L. REV. 146 (1981); Note, *Schoolbooks, School Boards and the Constitution*, 80 COLUM. L. REV. 1092 (1980).

185. See *infra* notes 227-35 and accompanying text.

186. 102 S. Ct. 2799 (1982).

tice Brennan as "a politically conservative organization of parents concerned about education legislation in the State of New York."¹⁸⁷ At that meeting the board members obtained a list of books considered objectionable and inappropriate for schools. They later found nine of these books¹⁸⁸ in the local high school library and one in the junior high school.¹⁸⁹ The three board members prevailed upon the school principals to give them the books to read.¹⁹⁰ Subsequently, an outside review committee also read the books. The committee made a mixed recommendation,¹⁹¹ and the board decided to return one book,¹⁹² to put one on restricted access,¹⁹³ and to ban the remaining books.

The United States District Court for the Eastern District of New York granted the school board's motion for summary judgment.¹⁹⁴ On appeal, the United States Court of Appeals for the Second Circuit reversed and remanded.¹⁹⁵ The Second Circuit noted that the removal issue posed constitutional questions and that the complaint raised factual issues that should not have been decided summarily.¹⁹⁶ The Supreme Court granted certiorari and affirmed the Second Circuit's decision.

187. *Id.* at 2802.

188. A. CHILDRESS, *A HERO AIN'T NOTHING BUT A SANDWICH* (1973); E. CLEAVER, *SOUL ON ICE* (1968); *BEST SHORT STORIES BY NEGRO WRITERS* (L. Hughes ed. 1967); O. LA FARGE, *LAUGHING BOY* (1929); D. MORRIS, *THE NAKED APE* (1967); P. THOMAS, *DOWN THESE MEAN STREETS* (1967); K. VONNEGUT, *SLAUGHTER HOUSE FIVE* (1974); R. WRIGHT, *BLACK BOY* (1945); *GO ASK ALICE* (1971). In addition, another objectionable book, B. MALAMUD, *THE FIXER* (1966), was on a twelfth-grade reading list.

189. *A READER FOR WRITERS* (J. Archer ed. 1971).

190. When this became public knowledge, the board issued a press release stating that the board had removed books that were "anti-American, anti-Christian, anti-Semitic, and just plain filthy." 102 S. Ct. at 2803 (quoting the lower court opinion, 474 F. Supp. 387, 390 (E.D.N.Y. 1979)).

191. The committee said that five books should be retained and two books removed. As to the other books, the committee took no position on one, said that one book should be subject to parental permission, and could not agree about the remaining two books. 102 S. Ct. at 2803.

192. O. LA FARGE, *LAUGHING BOY* (1929).

193. R. WRIGHT, *BLACK BOY* (1945).

194. 474 F. Supp. 387 (E.D.N.Y. 1979).

195. 638 F.2d 404, 418 (2d Cir. 1980).

196. Judge Mansfield dissented from the decision, observing that: "the First Amendment entitles students to reasonable freedom of expression but not to freedom from what some may consider to be excessively moralistic or conservative selection by school authorities of library books to be used as educational tools." *Id.* at 432 (Mansfield, J., dissenting).

Justice White's concurrence provided the necessary fifth vote for affirmance. His reasoning suggests the narrowness of the particular holding:

The District Court found that the books were removed from the school library because the school board believed them "to be, in essence, vulgar." Both Court of Appeals judges in the majority concluded, however, that there was a material issue of fact that precluded summary judgment sought by petitioners. The unresolved factual issue, as I understand it, is the reason or reasons underlying the school board's removal of the books. I am not inclined to disagree with the Court of Appeals on such a fact-bound issue and hence concur in the judgment of affirmance. Presumably this will result in a trial and the making of a full record and findings on the critical issues.¹⁹⁷

The other members of the Court, however, engaged in lengthy discussions of constitutional issues all derived from this fairly simple factual context. Justice Brennan, writing the plurality opinion, conceded that school boards are vested with great discretion in the management of schools.¹⁹⁸ But he also noted that students have first amendment rights that "may be directly and sharply implicated by the removal of books from the shelves of a school library."¹⁹⁹ In reaching this conclusion, he cited *Tinker*, *Epperson*, and *Barnette*. Those cases certainly stand for the proposition that schools do not operate independently of the first amendment, but they are distinguishable from *Island Trees*. The holding in *Tinker* allowed students to express themselves politically at school, subject to ordinary rules of decorum.²⁰⁰ *Epperson* was an establishment clause case²⁰¹ and *Barnette* was a free exercise case.²⁰² The decisions in *Epperson* that *Genesis* cannot be incorporated into the curriculum, and in *Barnette* that a Jehovah's Witness cannot

197. 102 S. Ct. at 2816 (White, J., concurring in the judgment) (quoting 474 F. Supp. at 397) (citation omitted). Justice Rehnquist criticized Justice White for avoiding consideration of the constitutional questions and the merits. Traditionally, once four justices agree to hear a case, it will be decided on the merits. 102 S. Ct. at 2827 n.1 (Rehnquist, J., dissenting).

198. *Id.* at 2806.

199. *Id.* at 2807-08.

200. See *supra* notes 49-51 and accompanying text.

201. See *supra* notes 23-46 and accompanying text.

202. See *supra* notes 47-48 and accompanying text.

be forced to participate in a patriotic exercise are far from a finding that books must be kept in a school library. This distinction is brought home when one recognizes that the Constitution does not require that schools acquire books,²⁰³ or that schools provide a library.

Justice Brennan reasoned that because students have first amendment free speech rights, they can prevent the removal of books from the school library. He relied on the "right to receive" information,²⁰⁴ but made an important and unprecedented addition to that right. The right to receive information prevents government limitations on a reader's access to a writer's works. The right is merely the reciprocal of the writer's interest in writing. But Justice Brennan expanded the right: "More importantly, the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press and political freedom."²⁰⁵

Knowledge is essential to self-development and the exercise of political freedoms, but finding a *right* to receive ideas implies that an obligation exists on the part of government to provide the ideas or, at a minimum, to provide the opportunity to receive the ideas. *Virginia Pharmacy* and its progeny placed limits on the government's power to intrude upon a willing speaker and a willing listener; the cases placed a restraint on government action.²⁰⁶ Justice Brennan's approach may compel government action to insure that the right he defines can be enjoyed fully.

The issue in *Island Trees* was the removal of a few books from two school libraries serving students between the ages of twelve and eighteen. None of the books was obscene,²⁰⁷ and, presumably, the children could buy them at bookstores or order the books from a catalogue. Moreover, the books were available in the local public library, which displayed the books during the dispute.²⁰⁸ The school board did not deny access to the books, nor did it deny the

203. *Id.* at 2805.

204. "[T]he right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them. . . ." *Id.* at 2808.

205. *Id.*

206. See *supra* notes 147-54 and accompanying text.

207. 474 F. Supp. 387, 392.

208. 102 S. Ct. at 2833 (Rehnquist, J., dissenting).

authors the opportunity to have their books sold to or read by the students. The school board merely decided that tax revenues no longer would be spent to keep these books in two school libraries. Justice Brennan did not express any opinion on whether students could demand that the school board acquire the books,²⁰⁹ but such an implication arises from his opinion.²¹⁰

Justice Brennan attempted to limit the scope of the right to receive:

Petitioners [the school board members] rightly possess significant discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner. . . . Thus whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution.

. . . In brief, we hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."²¹¹

Although Brennan used the word "ideas" in his condemnation of content-based removals, he apparently meant "political ideas" because he acknowledged that books could be removed if they were "pervasively vulgar" or educationally unsuitable for the stu-

209. *Id.* at 2805.

210. The students might argue that a school that does not have a library must start one. They also could raise constitutional questions any time an old book was removed to make room for a new one. Chief Justice Burger noted the logical extension of such an argument:

[I]f the need to have an informed citizenry creates a "right," why is the government not also required to provide ready access to a variety of information? This same need would support a constitutional "right" of the people to have public libraries as part of a new constitutional "right" to continuing adult education.

Id. at 2819 (Burger, C.J., dissenting).

211. *Id.* at 2810 (footnote omitted) (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

dents.²¹² Evidently, Brennan's view is that the Constitution does not mandate a general right to receive ideas. Rather, when the government provides a source of information, government officials may not provide only those ideas that they prefer. Motivation, rather than a broad right to receive information, is the key.

This interpretation of Justice Brennan's opinion appears more reasonable when one considers Justice Blackmun's concurrence. Blackmun addressed the motivation issue and expressed concern that a content-based decision to remove books might constitute an attempt by the state to suppress ideas.

I suggest that certain forms of state discrimination *between* ideas are improper.

. . . [W]e must reconcile the schools' "inculcative" function with the First Amendment's bar on "prescriptions of orthodoxy."

In my view, we strike a proper balance here by holding that school officials may not remove books for the purpose of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials' disapproval of the ideas involved.²¹³

Read together, the opinions of Justice Blackmun and Justice Brennan expand upon a due process right. Generally, the state has no obligation to provide the funds, or the opportunity, for the exercise of an individual right.²¹⁴ Once the state decides to act, the fourteenth amendment may require the state to provide due process before the state can alter its action. The state is not perpetually bound: the law, regulation, or contract may be amended, modified, rescinded, repealed, or not renewed. The state's method of alteration, however, often must comply with constitutional standards of procedural due process. In many instances, the recipient

212. 102 S. Ct. at 2810. Justice Brennan failed to provide school authorities with any definition of "pervasive vulgarity" or "educational suitability." Conceivably, the works of Aristotle, Kant, Hume, Locke, Bentham, Mill, and Lenin could be educationally unsuitable.

213. *Id.* at 2814 (Blackmun, J., concurring in part and concurring in the judgment).

214. *See, e.g.,* Bell v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977); Poelker v. Doe, 432 U.S. 519 (1977) (exclusion of nontherapeutic abortions from medical procedures that are funded with tax monies constitutional). The general rule has some exceptions. For example, an indigent criminal defendant is entitled to counsel at taxpayers' expense. Gideon v. Wainwright, 372 U.S. 335 (1963).

of a government benefit is treated as having a property interest in the benefit that cannot be taken without due process;²¹⁵ nor can the benefit be taken away because the recipient exercises his constitutional rights.²¹⁶ Justice Blackmun and, to a lesser extent, Justice Brennan implied that a student in a public school has the first amendment rights of any citizen, subject to reasonable limitations imposed by age²¹⁷ and the need to maintain order in the school. The Constitution does not require that the school have a library, or indeed, that there even be a school.²¹⁸ If a school has a library, however, the first amendment protects a student's use of it. If a school board restricts library use by removing a book, the action affects a student's exercise of a first amendment right and requires proper justification. Proper justification is ambiguous, but certainly obscenity or obscenity would be acceptable justifications. Although this rationale may not explain the two opinions, it places them within the framework of prior decisions.²¹⁹ In any event, the language in Justice Brennan's opinion suggests a dramatic shift to a broader conceptual basis for the student's rights.

The dissenters sharply criticized the suggestion that an entitlement or right of access to school library books exists,²²⁰ and argued vigorously that the local school boards should operate through the political process with minimal judicial interference.²²¹ The dissenters also emphasized that school boards must have broad discretion to ensure that public schools inculcate values.²²² They agreed, however, that the first amendment does play a role in the operation of the public schools, and that school boards cannot ignore its impact.²²³

215. See, e.g., *Perry v. Sindermann*, 408 U.S. 593 (1972); cf. *Board of Regents v. Roth*, 408 U.S. 564 (1972). See generally Terrell, *supra* note 79.

216. See, e.g., *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

217. See, e.g., *Ginsberg v. New York*, 390 U.S. 629 (1968).

218. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

219. See *supra* notes 215-16 and accompanying text.

220. 102 S. Ct. at 2817-21 (Burger, C.J., dissenting); *id.* at 2830-32 (Rehnquist, J., dissenting).

221. *Id.* at 2820-21 (Burger, C.J., dissenting); *id.* at 2822 (Powell, J., dissenting); *id.* at 2835 (O'Connor, J., dissenting); *id.* (Rehnquist, J., dissenting) (quoting *Epperson v. Arkansas*, 393 U.S. at 104).

222. 102 S. Ct. at 2823 (Powell, J., dissenting); *id.* at 2819-21 (Burger, C.J., dissenting).

223. *Id.* at 2818 (Burger, C.J., dissenting) (agreeing with the proposition that "students do not 'shed their rights to freedom of speech or expression at the schoolhouse gate.'")

The dissenters seized upon a glaring fallacy in the plurality's opinion—the suggestion that the removal of the nine books from the school library had greater constitutional implications than school board decisions about curriculum content. Justice Brennan had stated:

Petitioners emphasize the inculcative function of secondary education, and argue that they must be allowed *unfettered* discretion to “transmit community values” through the Island Trees schools. But that sweeping claim overlooks the unique role of the school library. It appears from the record that use of the Island Trees school libraries is completely voluntary on the part of students. Their selection of books from these libraries is entirely a matter of free choice; the libraries afford them an opportunity at self-education and individual enrichment that is wholly optional. Petitioners might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values. But we think that petitioners' reliance upon that duty is misplaced where, as here, they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway.²²⁴

The dissenters noted that if the plurality feared the suppression of ideas, the plurality should have been concerned with occurrences inside the classroom. A strong authority figure can affect substantially the lives of his captive audience; ideas can be suppressed more easily in the classroom. In contrast, the school library is not critical to the functioning of the school. Unwise acquisition or deletion policies may exist that adversely affect learning and the development of critical faculties, but these policies are unlikely to have nearly the impact of decisions concerning curriculum content. Justice Brennan's premise is unsound as well: *Meyer* and *Epperson* demonstrate that school boards do not have unfettered discretion over the curriculum.²²⁵

(quoting the plurality opinion, *id.* at 2807, quoting *Tinker*, 393 U.S. at 506); 102 S. Ct. at 2834 (Rehnquist, J., dissenting); *id.* at 2835 (O'Connor, J., dissenting).

224. *Id.* at 2809.

225. *See supra* text accompanying notes 9-46. Although Justice Blackmun concurred in the judgment and part of Justice Brennan's plurality opinion, he refused to concur in the

The Supreme Court's attempt to deal with school library policies in *Island Trees* provides few guidelines for implementing constitutional norms. The Court's decision terminated the litigation,²²⁶ so the Court will have no immediate opportunity to reconsider this particular scenario. But the inability of the Court to reach a consensus reflects previous uncertainty among the lower federal courts. Prior to *Island Trees*, the United States Court of Appeals for the Second Circuit held in *President's Council, District 25 v. Community School Board No. 25*²²⁷ that federal courts should avoid disputes over school library acquisition and deletion policies, primarily because judicial interference might cause more damage than simply leaving such issues to the local political process.²²⁸

portion of the opinion that contained this reasoning. 102 S. Ct. at 2814. Justice Blackmun's concurring opinion exhibited greater sensitivity to the application of the first amendment to the operation of schools. *Id.* at 2812-16 (Blackmun, J., concurring in part and concurring in the judgment). See also *Loewen v. Turnipseed*, 488 F. Supp. 1138 (N.D. Miss. 1980) (a state schoolbook selection committee did not have unfettered discretion to select books for classroom use).

226. The board of education returned the nine books to the school libraries and instituted a new procedure by which students could borrow them. When one of the books is checked out by a student, a note is sent to his parents stating that the book contains material considered by the board to be inappropriate. Although the parties reached no final agreement about this procedure, further litigation appears unlikely. Telephone interview with George Lipp, Counsel to the Board of Education (Nov. 2, 1982).

227. 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972). In *Island Trees*, the district court had relied on *President's Council* in holding for the school board. *Pico v. Board of Educ., Island Trees Union Free School Dist. No. 26*, 474 F. Supp. 387 (E.D.N.Y. 1979).

228. The United States District Court for the District of Vermont reached a similar result in *Bicknell v. Vergennes Union High School*, 475 F. Supp. 615 (D. Vt. 1979). In *Bicknell* the school board removed R. PRICE, *THE WANDERERS* (1974) and P. MANN & L. WALLER, *DOG DAY AFTERNOON* (1974) from school libraries after receiving complaints about the books. The board also restricted the authority of school librarians over book acquisitions. Students, librarians and a committee purporting to represent a variety of interests challenged the board's action.

The students asserted that the board's policy infringed their "right to know" and interfered with the academic freedom of librarians and teachers. The students argued that *President's Council* required a showing of educational reasons for removal, prohibiting arbitrary exercises of discretion. The students also relied on *Virginia Pharmacy*.

The court in *Bicknell* held that the right to speak belonged to the authors of the books, and that the right did not create a basis for compelled state distribution of the author's ideas. Therefore, a right to speak upon which the students could base their claim of a right to hear was not present. *Bicknell*, 475 F. Supp. at 620-21.

The students could have asserted a derivative claim based upon a right of their teachers or librarians. But no teacher appeared as a named plaintiff, and the court found that the allegations were too vague and conclusory to state a cause of action. *Id.* at 621 n.4. The

The United States Court of Appeals for the Sixth Circuit, however, had reached a strikingly different result on similar facts.²²⁹ The Sixth Circuit upheld the authority of a school board to choose books, and found that the faculty had no constitutional right to be involved in the selection process.²³⁰ The court indicated, however, that once the school board selected a book, any removal of the book must meet a constitutional standard of reasonableness; the book could not be removed simply because it offended the social or political tastes of school board members.²³¹ The United States District Court for the District of Massachusetts entered a dispute, and developed four constitutionally permissible reasons for removing a book: obsolescence; obscenity; a shortage of shelf space; and improper initial acquisition.²³² Lastly, the United States District

court also said that the librarians, as a group, had no independent first amendment right to control the library collection. *Id.* at 622 n.5.

Finally, the court rejected a suggestion that the *President's Council* decision implicitly required an "articulable educational" reason for the removal of a book. *Id.* at 620. A federal court in New Hampshire had previously accepted that interpretation of *President's Council*. *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269, 1274 (D.N.H. 1979). The court in *President's Council* used straightforward language, which the court in *Bicknell* interpreted literally, to suggest that removal based on controversial content was essentially no different from removal based on obsolescence or physical deterioration. 457 F.2d 289, 293. The board's authority was broad and was generally to be left undisturbed. Thus, *Bicknell*, read with *President's Council*, supports broad school board discretion in the acquisition and removal of books.

229. *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577 (6th Cir. 1976).

230. *Id.* at 579-80.

231. The court stated:

Neither the State of Ohio nor the Strongsville School Board was under any federal constitutional compulsion to provide a library for the Strongsville High School or to choose any particular books. Once having created such a privilege for the benefit of its students, however, neither body could place conditions on the use of the library which were related solely to the social or political tastes of school board members.

Id. at 582. The court relied on *Virginia Pharmacy* and reasoned that the acquisition of a book by the state creates a right of access to that book that the state may not limit without strong justification. *Id.* at 583.

232. *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 711 (D. Mass. 1978). Several difficulties exist with the *Right to Read* opinion, including the absence of a clear articulation of the constitutional right infringed by the removal of the book in question. The court cited *Tinker* to support the proposition that removal could be justified only by "an interest comparable to school discipline." *Id.* at 713. The court expressed concern for the possible "sanitizing" of school libraries by successive, increasingly repressive school boards. *Id.* at 714. In conclusion, the court stated, "[w]hat is at stake here is the right to read and be exposed to controversial thoughts and language—a valuable right subject to

Court for the District of New Hampshire reversed a school board decision to remove *Ms.* magazine from the school library.²³³ The court reasoned that the purchase of a magazine or a book for the school library created a "privilege" for the students that could not be divested for reasons "related solely to the social or political tastes of Board members."²³⁴ The court's reliance on *Virginia Pharmacy* suggests that the privilege involves some variation of the right to know, coupled with an entitlement theory.²³⁵

A recent decision by the United States Court of Appeals for the Seventh Circuit, *Zykan v. Warsaw Community School Corp.*,²³⁶ attempted to reconcile these conflicting decisions. The school board precipitated the litigation by removing books from the schools,

First Amendment protection," *id.* (citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)).

In *Red Lion*, the Supreme Court upheld Federal Communication Commission rules that required broadcast licensees to afford reply time for opposing editorials. *Red Lion* compels a private broadcaster to allow access to his broadcast facilities for the expression of views contrary to his own—a form of state coercion that would not be countenanced but for the limited availability of air waves, which are licensed by the state for the public benefit. Thus, if *Red Lion* is the guide, the court in *Right to Read* must have applied a public utility approach to education. If one accepts the proposition of the court in *Right to Read* that a "right to . . . be exposed to controversial thoughts and language" exists, then school authorities would have a constitutional duty to afford students a general exposure to books and ideas. But if this is the basis of the court's decision, the duty should apply to acquisition as well as deletion policies. If the rationale does not apply to acquisitions, then perhaps the court based its decision on a vested interest, akin to a property right in a book itself, that students or teachers acquire as soon as the book is purchased for public use.

The court's reasons in *Right to Read* for justifiable removal also leave open a number of questions. If a book is legally obscene, it presumably can be removed without objection. The same should be true if the book is illegally or mistakenly acquired. But the other two reasons—obsolescence and shelf-space shortages—may necessitate detailed content analysis, and may involve conflicts between school board members and librarians, teachers, or students. The removal of one book to make room for another may involve the exercise of subjective value judgments. Unfortunately, the court's reasons for removal may serve as cloaks for the very motives the court deems impermissible, again opening the door for extensive judicial intrusion into the educational process.

233. *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269 (D.N.H. 1979). The board objected to *Ms.* because: it contained advertisements for sexual aids and contraceptives, as well as materials related to lesbianism and witchcraft; it contained advertisements promoting *The Guardian*, which board members described as a "pro-communist" newspaper; it encouraged readers to order records made by "known communist folk singers;" and it contained materials not suitable for reading aloud in the classroom. *Id.* at 1272.

234. *Id.*

235. *Id.* at 1274.

236. 631 F.2d 1300 (7th Cir. 1980).

prohibiting the use of certain texts in a course entitled "Women in Literature," eliminating seven courses from the curriculum, and refusing to rehire two teachers.²³⁷ The plaintiffs alleged that the board's actions restricted the plaintiffs' opportunities to learn from their teachers and to associate with them, thus creating a "chilling effect on the free exchange of knowledge."²³⁸ The district court dismissed the complaint for want of subject matter jurisdiction.²³⁹ The Seventh Circuit agreed that the complaint as written did not state a constitutional claim. Instead of affirming, however, the Seventh Circuit vacated and remanded, instructing the trial court to dismiss the complaint with leave to amend because the board's actions might have implicated important constitutional interests.²⁴⁰

The Seventh Circuit rejected the proposition that the purchase of a book for the library or for a course makes the book's removal a *prima facie* constitutional issue, but the court did not give the board free rein. The court stated that a school board constitutionally could not purge a library of "all material offensive to a single, exclusive perception of the way of the world," nor could a library collection be acquired accordingly.²⁴¹ Thus, acquisition policies, as well as removal policies, may implicate constitutional values. Furthermore, the court stated that the school board could not prohibit a student from buying or reading a particular book and bringing it to school for discussion.²⁴² The statement, although applied to students, is analogous to Justice Stewart's conclusion in *Epperson* that a school board could not discipline a teacher for mentioning a respected body of thought, even though it might be beyond the prescribed curriculum.²⁴³

237. *Id.* at 1302. The troublesome books were: I. LEVIN, *THE STEPFORD WIVES* (1972); *GROWING UP FEMALE IN AMERICA* (E. Merriam ed. 1973); S. PLATH, *THE BELL JAR* (1971); *GO ASK ALICE* (1972); and a textbook entitled *VALUES CLARIFICATION* (S. Simon ed. 1978). The board also promulgated a policy prohibiting the use of materials "that might be objectionable", causing excisions to be made in R. COX & S. LEWIS, *THE STUDENT CRITIC* (1974), a high school text. 631 F.2d at 1302.

238. 631 F.2d at 1302-03.

239. *Id.*

240. *Id.* at 1308-09.

241. *Id.* at 1308.

242. *Id.* Under *Tinker*, however, school authorities may place reasonable limitations on the use of a book in order to avoid disruption. Also, they legitimately could ban pornography from the campus.

243. 393 U.S. at 116 (Stewart, J., concurring).

The court in *Zykan* recognized that schools are important institutions for value inculcation and that considerable local discretion is necessary to insure the maintenance and propagation of basic community values. Moreover, most public school students are not fully developed intellectually; they lack the cognitive abilities necessary to make rational value decisions from among a host of competing and conflicting choices.²⁴⁴ Nevertheless, relying on *Virginia Pharmacy*, the court stated that "[s]econdary school students certainly retain an interest in some freedom of the classroom, if only through the qualified 'freedom to hear' that has lately emerged as a constitutional concept."²⁴⁵ Thus, despite the deference paid to local school boards for the purpose of assuring value inculcation, the court in *Zykan* concluded that school officials do not operate without constitutional constraints. The Seventh Circuit noted that the board's control over extracurricular matters is limited by "time, place, and manner" qualifications;²⁴⁶ the board cannot discipline a teacher for random comments that offend school authorities so long as the teacher fulfills his professional duties;²⁴⁷ it cannot use the curriculum to promote particular religious beliefs;²⁴⁸ and it cannot prohibit the mention of topics relevant to the curriculum and matters under study.²⁴⁹ Students are free to express an

244. 631 F.2d at 1304-05. The court relied on *Ambach v. Norwick*, 441 U.S. 68 (1979) (upholding a New York statute forbidding permanent certification as a school teacher of any person not a United States citizen, unless that person has manifested an intention to apply for citizenship); *Healey v. James*, 408 U.S. 169 (1972) (invalidating a college's refusal to permit students to form a local SDS chapter and to use college facilities for meetings); *Palmer v. Board of Educ.*, 603 F.2d 1271 (7th Cir. 1979) (school system did not have to rearrange kindergarten curriculum to suit the religious beliefs of an untenured teacher), *cert. denied*, 444 U.S. 1026 (1980); *Cary v. Board of Educ. of the Adams-Arapahoe School Dist.*, 427 F. Supp. 945 (D. Colo. 1977), *aff'd*, 598 F.2d 535 (10th Cir. 1979). *Healey*, a freedom of association case, appears to support the plaintiffs' argument and is more akin to *Tinker*. It identifies value inculcation as part of the educational process, but only in dicta.

245. 631 F.2d at 1304.

246. *Id.* at 1305 (citing *Tinker* and *Thomas v. Board of Educ.*, 607 F.2d 1043 (2d Cir. 1979), *cert. denied sub nom. Granville Cent. School Dist. v. Thomas*, 444 U.S. 1081 (1980)).

247. 631 F.2d at 1305 (citing *Sterzing v. Fort Bend Indep. School Dist.*, 376 F. Supp. 657 (S.D. Tex. 1972)).

248. 631 F.2d at 1305-06 (citing *Epperson v. Arkansas*, 393 U.S. 97 (1968)).

249. 631 F.2d at 1305-06. This echoes portions of Justice Stewart's concurrence in *Epperson*. 393 U.S. at 115-16 (Stewart, J., concurring). *But see Mercer v. Michigan State Bd. of Educ.*, 379 F. Supp. 580 (E.D. Mich. 1974).

interest in topics not covered by the curriculum,²⁵⁰ although they are still subject to ordinary rules of discipline. Their freedom also would not justify classroom discussion of subjects legitimately excluded from the curriculum.²⁵¹ Finally, the court stated that the school officials cannot impose a "‘pall of orthodoxy’ . . . which might either implicate the state in the propagation of an identifiable religious creed or otherwise impair permanently the student’s ability to investigate matters that arise in the natural course of intellectual inquiry."²⁵² School authorities constitutionally may apply "social, political and moral tastes to secondary school educational decisions," but the Constitution prohibits a "systematic effort to exclude a particular type of thought" or to promote a uniform ideological preference.²⁵³

The court in *Zykan* based its decision on the student’s "right to know". Because of this right, the court concluded that school board discretion must be limited, although only slightly, to avoid ideological indoctrination. According to the court, however, the right was not the reciprocal of any right to speak. Indeed, the court held that the students lacked standing to seek redress for the perceived denial of their teachers’ rights, and expressed skepticism that the board’s decisions limited any rights of the teachers.²⁵⁴ The "right to know" found in *Zykan* differs from that of *Virginia Pharmacy*, and suffers from the same conceptual shortcomings as the "right to know" described by Justice Brennan in *Island Trees*.

III. THEMES AND COUNTERTHEMES

The decided cases fail to provide any comprehensive scheme for delineating the role of the Constitution in resolving curricular and pedagogical conflicts. In many instances, courts have recognized a

250. 631 F.2d at 1306.

251. For instance, a student may freely discuss Evangelical Christianity in the context of a classroom consideration of religion. He could not use the classroom as a forum to proselytize, but subject to the strictures of *Tinker*, he might be able to do so in areas outside the classroom. Cf. *Zorach v. Clauson*, 343 U.S. 306 (1952) (approving a "released time" program that allowed public school students to attend religious classes at another location during school hours).

252. 631 F.2d at 1306.

253. *Id.*

254. *Id.* at 1307-08. The court noted, however, that failure to rehire a particular teacher may be evidence of an attempt to impose ideological orthodoxy. *Id.*

right of free speech for teachers that is partially manifested through the work of teaching, including the choice of materials and methods. Nonetheless, the right is subject to rather broad regulation by school authorities. Courts appear reluctant to hold that the actual work a teacher contracts to perform implicates constitutional values. The Constitution, however, does protect speech outside the school, within the school but outside the classroom, and even within the classroom but outside the prescribed curriculum.²⁵⁵ Such speech may not serve as a basis for disciplining a teacher unless the speech clearly affects the teacher's performance of his professional duties.²⁵⁶

The school library cases have tried, to some extent, to define student interests in book-selection decisions by developing aspects of the "right to hear" or the more amorphous "right to know." *Island Trees* and other "right to know" cases extend *Virginia Pharmacy*. They suggest that the first amendment imposes a duty on the state, acting through the public schools, to provide a balanced curriculum and refrain from limiting student access to library materials and controversial ideas. The cases thus offer a basis for student assertions of *Lernfreiheit*, independent of the students' assertion of any particular rights of the teachers. The cases do not withstand serious analysis, but their systemic approach to constitutional adjudication does comport with prior cases, such as *Mailloux*, in which courts have justified the assertion of an individual right by reference to a communal interest in the quality of education.

The decisions are frustrating because they often gloss over fundamental questions by asking an "inflated question."²⁵⁷ The issue most often posed is whether the school authorities have placed limitations on a teacher's freedom to engage in speech activity. Presented in this manner, the central issue—whether teaching is itself an activity protected by the first amendment—is simply assumed. The issue becomes the reasonableness of the limitations, instead of whether a constitutional right even exists. This con-

255. See, e.g., *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

256. See, e.g., *Megill v. Board of Regents*, 541 F.2d 1073 (5th Cir. 1976); *Keddie v. Pennsylvania State Univ.*, 412 F. Supp. 1264 (M.D. Pa. 1976); cf. *Cooper v. Ross*, 472 F. Supp. 802 (E.D. Ark. 1979); *Patterson v. Ramsey*, 413 F. Supp. 523 (D. Md. 1976) (dealing with superintendents), *aff'd*, 552 F.2d 117 (4th Cir. 1977).

257. The phrase belongs to Prof. Richard Danzig. See Danzig, *supra* note 47.

struction assures a case-by-case examination with a heavy burden of proof on the school authorities to demonstrate the reasonableness of the limitations.²⁵⁸ A federal judge ultimately decides the content of high school courses and the methods that may be used in the classroom. Admittedly, a high school principal should recognize that Kurt Vonnegut is not a pulp writer of pornography. The principal's failure to do so, however, does not mean that an eleventh-grade English teacher with little prior experience should be free, as a matter of federal constitutional right, to assign books and materials without regard for the opinions of her superiors. One may question whether a federal judge is better equipped to make reading lists for high school juniors than those charged by law with administering the educational system.²⁵⁹

General agreement exists that teaching is a form of speech; at times, it also may involve freedom of the press. This consensus is of little aid however. The assertion that teaching involves speech or press freedoms avoids the definitional problems of symbolic speech and speech versus conduct, but begs the question of the extent to which the Constitution protects such activity.²⁶⁰ Extortion, fraud, and conspiracy involve speech, but the speech itself is part of a crime and is not constitutionally protected. An actor is

258. Despite some decisions that put the burden of proof on the teacher as plaintiff, *e.g.*, *Mailloux v. Kiley*, 323 F. Supp. 1387 (D. Mass.), *aff'd per curiam*, 448 F.2d 1242 (1st Cir. 1971); *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979); and *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), the school authorities must bear the expense of disruptions. As one court noted:

In this day and age, school board members and regents are probably exposed more than any other group to constitutional claims, issues, and arguments in their day-to-day duties. . . . Since they are so exposed to these issues, and receive information, reports, rumors, complaints, and harassment from so many sources, it is understandable that the Supreme Court has held, in substance, that the "consideration" of improper or constitutionally protected conduct does not ipso facto constitute a violation of constitutional rights justifying remedial action.

Franklin v. Atkins, 562 F.2d 1188, 1190 (10th Cir. 1977), *cert. denied*, 435 U.S. 994 (1978).

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

260. The Supreme Court has never asserted that all speech is protected speech. Obscenity, for example, is beyond the scope of protected speech. *See Miller v. California*, 413 U.S. 15 (1973). The same was once true of commercial speech. *Valentine v. Chrestensen*, 316 U.S. 52 (1942). Some other forms of speech, such as libel, though not considered beyond the protected area, are subject to regulation. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

engaged in a pursuit dependent upon speech; but an actor who contracts to play the role of Othello is not protected by the first amendment from a breach of contract action if he decides, for reasons of individual artistic expression, to recite Hamlet's famous soliloquy during his climactic murder scene with Desdemona. The vocal expression of political support for a candidate for elective office is speech, and a core first amendment value, but the speaker cannot broadcast his views in a residential neighborhood at two o'clock in the morning.²⁶¹ Is there something about education that mandates full constitutional status for the speech of teachers, or should the speech be treated as a manifestation of a job that school officials may control pursuant to statute, regulation, or contract?²⁶² The first, and perhaps most critical, step in answering this question entails an examination of the context in which the speech of teaching arises, and the purposes for which the speech activity is undertaken.

American public schools provide the educational basis that enables most citizens to deal with the complexities of life in the modern American socio-political system. The assertion of an absolute constitutional right to teach whatever material the teacher wants to teach, in whatever manner he wants to teach it, must be examined in light of the larger context in which the teaching is taking place. The same may be said of an assertion of absolute control by school board members over the school's curriculum.²⁶³ On the other hand, one cannot deny the importance to the teacher of the

261. See, e.g., *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Saia v. New York*, 334 U.S. 558 (1948).

262. The focus is obviously on public schools because private limitations on speech, unaccompanied by state action, would not raise a first amendment problem. Private schools are not free, however, from state control. They are subject to accreditation standards that greatly affect the fashioning of the curriculum. They also must abide by extensive Internal Revenue Service (IRS) regulations to maintain non-profit status. For example, the IRS denied a tax exemption to Bob Jones University because of its racial policies, even though the policies were supported by allegedly valid religious beliefs. The Supreme Court upheld the IRS decision. *Bob Jones Univ. v. United States*, 103 S. Ct. 2017 (1983). Private, commercially operated nonsectarian schools also may not use race as an admission standard. *Runyon v. McCrary*, 427 U.S. 160 (1976).

263. A school board could not require, for instance, that the curriculum include only books sympathetic to the Republican Party and critical of the Democratic Party. The Supreme Court agreed on that point in *Island Trees*. 102 S. Ct. at 2810; *id.* at 2828-29 (Rehnquist, J., dissenting).

work in which he is engaged. A conflict exists between the instrumentalist value of teaching as a means of providing the education a citizen needs to survive in a democracy and the individualist value of teaching as a method of self-expression and self-actualization.²⁶⁴

One of the principal functions of the educational system through the secondary level, often overlooked in the cases and commentaries, is the transmittal of acquired knowledge. Basic mathematics, grammar, reading, vocabulary, spelling, writing, foreign languages, and science are not appropriate subjects for intellectual colloquy at the elementary school level. The subjects often require discipline, rote memorization, practice, and careful instruction. As students grow older, their cognitive abilities develop enabling them to deal more easily with competing ideas and "softer" subjects, such as political science, sociology, and economics.²⁶⁵ A proper educative process should expose students to the problems of making intellectual choices among conflicting options, and should teach students about the American system of free expression so that a student can function effectively in the democratic process. If the educational system does not transmit acquired knowledge from one generation to the next, then other concerns with the schools are of little consequence.²⁶⁶

The individual teacher's role in transmitting knowledge is crucial, especially in the lower grades where children are exposed to a single teacher for nine months. Thus, any right to determine curriculum content must be weighed against the professional and contractual duty to insure an adequate transmittal of information. A

264. See Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) (discussing the self-realization value). Cf. Baker, *Realizing Self-Realizations: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. PA. L. REV. 646 (1982); Redish, *Self-Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker*, 130 U. PA. L. REV. 678 (1982).

265. By "softer" I do not mean less rigorous, only less certain. We know as a matter of provable fact that the square of the hypotenuse of a right triangle equals the sum of the squares of the other two sides, and that it always will, at least in a two-dimensional plane. We do not know with anything approaching this degree of certainty whether a particular economic theory, however sound the theoretical justifications, will explain inflation and tell us how to cure the problem.

266. The Supreme Court may have been suggesting this in *Rodriguez* by noting the connection between education and the exercise of fundamental rights. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 35-37 (1973). See also *Plyler v. Doe*, 457 U.S. 202, 221-23 (1982).

conclusion that a teacher is constitutionally entitled to decide curriculum content would make the teacher the ultimate arbiter of contractual performance. Teachers obviously are important participants in the educational process because of their professional expertise, but a system that allows every teacher to determine curriculum content independently would be disjointed, and perhaps anarchic.

A second function of elementary and secondary education is to inculcate majoritarian values.²⁶⁷ The state compels school attendance; therefore, the state should not operate schools that disserve the fundamental values of society. This function, although widely recognized, has caused considerable controversy. Value inculcation is often viewed as value indoctrination and as a method of imposing the will of the majority on recalcitrant minorities. The courts have been solicitous of minority interests that might be suppressed by majoritarian values. *Meyer* protected a minority interest in private language instruction against a majority position favoring a mono-lingual society. *Barnette* recognized an individual's freedom of conscience against a collective interest in patriotic expression. The school prayer cases prevent the state from favoring a particular religion despite widespread public sentiment favoring overt religious expression. Similarly, *Tinker* protected political dissent within schools. Recognizing the importance of value inculcation does not necessarily preclude protection for minority expression. Rather, the protection of minority interests is itself a form of value inculcation—respect for and tolerance of minority views.

The purpose of value inculcation and its relationship to the role of individual teachers in the educational process has received fundamentally different treatment from two respected scholars, Professor Stephen Goldstein and Professor William Van Alstyne. Goldstein has maintained:

The central fact in the distinction between higher and lower education is the role of value inculcation in the teaching process.

267. See, e.g., Goldstein, *supra* note 21; Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477 (1981); Nahmod, *First Amendment Protection for Learning and Teaching: The Scope of Judicial Review*, 18 WAYNE L. REV. 1479 (1972); Project, *Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373 (1976).

The public schools in the United States traditionally have viewed instilling the young with societal values as a significant part of the schools' educational mission. Such a mission is directly opposed to the vision of education that underlies the premises of academic freedom in higher education. If the purpose of teaching is to instill values, there would seem to be little reason for the teacher, rather than an elected school board or other governmental body ultimately responsible to the public, to be the one who chooses the values to be instilled.²⁶⁸

In contrast, Van Alstyne has argued:

Indeed, arbitrary restrictions on alternative sources of information or opinion, resulting not from understandable budgetary constraints or the restraints upon the time available for study by teachers and students, are precisely what the first amendment disallows. Against a school board decree requiring the inculcation of one theory and forbidding mention or examination of another, for instance, a mere taxpayer should have standing to contest his compelled financial support for the propagation of ideas to which he is opposed. . . . Against a state law provision that a student might be disciplined for consulting any source of education save that prescribed in regimented detail, the student could also succeed on a first amendment claim. . . . Correspondingly, neither must teachers or professors endure similarly arbitrary restrictions in the course of their own inquiries or upon their own communicated classroom references.²⁶⁹

Van Alstyne's comments, although rhetorically appealing, do not withstand critical inquiry. The first amendment does not necessarily prevent "arbitrary restrictions on alternative sources of information or opinion"²⁷⁰ unless a defined right to communicate, to in-

268. Goldstein, *supra* note 21, at 1342-43 (footnote omitted).

269. Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841, 857.

270. Professor Goldstein said:

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

Goldstein, *supra* note 21, at 1349 (footnote omitted).

quire, or to receive information exists. A court can determine whether such a right exists only from a contextual analysis of the situation in which the communication occurred. In one sense, the first amendment requires that the government refrain from interfering with "arbitrary restrictions" on the free flow of information; it forbids the government to compel speech except in the most limited circumstances.²⁷¹ The first amendment also does not provide a constitutional basis for free access to all information in the government's possession.²⁷²

The definition of "arbitrary restrictions" is also unclear. If a public school teacher tells his high school English students that a book by Kurt Vonnegut is forbidden in class, is that an arbitrary restriction on an alternative source of information, or merely a free exercise of individual pedagogical expression? The teacher, as a paid state employee, is no less an agent of the state than the school principal.

In Van Alstyne's scheme, budgetary and time shortages justify limitations on the curriculum, but that begs the question of what limitations are justified. All school systems must operate within finite temporal and financial limits. The problem of choice is the critical issue, not the scarcity of resources. The distinction, however, can be exaggerated. Few would argue with the proposition that certain basic skills must be taught. Therefore, choices about matters outside this core curriculum become more narrowly circumscribed by budgets and schedules.²⁷³

Van Alstyne's suggestion that a "mere taxpayer" should have standing to contest the use of taxes for the support of ideas he opposes expands the federal courts' concept of standing.²⁷⁴ If every taxpayer could challenge the government's use of tax monies, a severe impact on the integrity of the legislative and judicial processes would result.

Generally, a student who is disciplined for consulting materials

271. See, e.g., *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

272. *Houchins v. KQED*, 438 U.S. 1 (1978). The plurality opinion in *Island Trees*, however, came close to holding a right of access to such information. See *supra* text accompanying note 206.

273. See Goldstein, *supra* note 21, at 1350 n.183.

274. See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *Flast v. Cohen*, 392 U.S. 83 (1968).

outside the prescribed curriculum may have cause for complaint. The context in which the issue arises is critical to a determination of the appropriate response. A high school student should not be free to read *Playboy* during an algebra class. Even in a purely disciplinary context, however, *Tinker* mandates a consideration of the student's free expression interests. Courts have held that a student also is entitled to some measure of due process in a disciplinary proceeding.²⁷⁵ Similarly, teachers should be able to follow their own paths of inquiry in their work, provided that the inquiry does not interfere with the performance of their job responsibilities and does not involve questions of moral turpitude. Outside the classroom, a teacher's actions are personal, although the employer may have some interest.²⁷⁶

None of the foregoing, however, justifies Van Alstyne's conclusion that the first amendment provides a constitutional shield for utterances by a teacher inside a classroom. Van Alstyne recognizes that the typical classroom is not a free marketplace of intellectual exchange.²⁷⁷ A teacher has a captive audience, and often can make or break a student with grades, discipline, and letters of recommendation. A teacher frequently has far greater knowledge of the material than the students, and easily can humiliate a pupil. Teachers can start discussions, stop them, conduct a Socratic dialogue, or engage in a soliloquy; students are usually in no position to compete. Thus, the assertion that the Constitution should protect the teacher and the process of intellectual exchange cannot be founded on any notion of the classroom as a free marketplace of ideas.²⁷⁸

A teacher, therefore, should not be accorded the same treatment as a street preacher or a soapbox politician. The Constitution does not require that a captive audience of students be subjected to the pedagogical whims of a multitude of teachers. Van Alstyne is concerned primarily with school board mentalities, not individual teachers. The teachers, in his view, are the last defense against the philistinism of rampant majoritarianists who would ban books and

275. See *Goss v. Lopez*, 419 U.S. 565 (1975).

276. See *supra* notes 255-56 and accompanying text.

277. Van Alstyne, *supra* note 269, at 856. Thus, he would be willing to dismiss the teacher who uses the rostrum to promote personal ideology.

278. See generally Diamond, *supra* note 267, at 496-505.

keep morality scorecards. Neither school boards nor majorities always are enlightened, but the defense against possible abuse is not to cast a constitutional cloak over one set of actors in the drama. After all, school principals, superintendents, PTA members, and school board members have interests in expression that may be implicated by the concerns Van Alstyne has suggested.

An individual teacher also may try to impose doctrinal uniformity on students. If Van Alstyne's purpose is to avoid ideological indoctrination, then the purpose is not served by granting teachers constitutional protections. The public schools are potentially powerful institutions of indoctrination. *Meyer* and *Epperson* are but two examples of attempts to use the public schools for the propagation of highly particularized political, cultural, or religious beliefs. Van Alstyne's analysis is of little value in identifying constitutionally infirm indoctrination and the method for handling the problem of indoctrination, if it exists.

A person's perception of what constitutes indoctrination depends on the values that are being inculcated and one's view of those values. To paraphrase Professor Sidney Hook, our own first principles are "truths" that should be central to the educational scheme; the first principles of those with whom we disagree are mere "prejudices" that should be discarded.²⁷⁹ Simply stating that disagreement exists over the values that should be inculcated, however, and determining whether a given scheme of indoctrination is therefore "good" or "bad" provides little guidance for lawmaking or constitutional interpretation. Such disagreement provides one reason why it is unsatisfactory to declare that teachers, as opposed to all other actors in the educational system, should have some form of ultimate authority. Merely recognizing the controversy does not provide a formula for determining the role of the Constitution in the classroom.

Nevertheless, recognition that citizens frequently differ over values, and that their differences often may be irreconcilable at a normative level, furnishes a major clue to at least one overarching point of societal consensus—allowing disagreement is an agreed upon value. Indeed, the first amendment supports this notion, and

279. Hook, *Introduction* to S. HOOK, P. KURTZ & M. TODOROVICH, *THE UNIVERSITY AND THE STATE: WHAT ROLE FOR GOVERNMENT IN HIGHER EDUCATION?* 2-3 (1978).

the bulk of first amendment decisions have recognized a core value in dissent and individual expression.²⁸⁰ One commentator has characterized the entire democratic enterprise as a continuing dialectic based upon the model of the academy.²⁸¹ Within the context of the public schools, *Barnette* and *Tinker* support a constitutionally protected freedom to be different.²⁸² The trial court in *Cary*²⁸³ also protected the values of dissent and diversity.

If the freedom to be different is a value upon which a consensus can be reached, then Professor Van Alstyne's argument and the trial court's opinion in *Cary* should make one wary of a wholesale approval of Professor Goldstein's analysis. Most people agree that public schools should inculcate values. The difficulty lies in determining which values the schools should emphasize and what degree of deference schools should accord to those values outside the mainstream. Goldstein is correct in his criticism of Van Alstyne's deference to the teacher as the principal decisionmaker; he understands that the political climate in which school administrators operate may make them more sensitive than teachers to community values. The problem that Van Alstyne suggested and that worried the court in *Cary*, however, remains unresolved. Majoritarian values, as defined by the school board, may not recognize the dignity, worth, and "truth" of values espoused by a minority. If applied with consistency and sophistication, the majoritarian values may indoctrinate students with the idea that certain beliefs are inherently incorrect²⁸⁴ and may stifle the interest in being different. Thus, schools may fail to fulfill both functions: by inadequately training students in the intellectual decisionmaking processes required of functioning adults in a democratic polity, they fail to transmit knowledge; and by teaching students to become intoler-

280. See, e.g., *National Socialist Party of Am. v. Skokie*, 432 U.S. 43 (1977); *Brown v. Louisiana*, 383 U.S. 131 (1966); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Lovell v. Griffin*, 303 U.S. 444 (1938).

281. See, T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 7-8 (1966).

282. The cases protecting a teacher in extracurricular expression manifest the same interest. See *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

283. See *supra* text accompanying notes 107-26.

284. The current debate over role models in school textbooks is a case in point. The remedies proposed by some critics may be worse than the original problem. See Hodgson, *Sex, Texts, and the First Amendment*, 5 J.L. & EDUC. 173 (1976).

ant of minority viewpoints, they fail to inculcate the agreed-upon values of dissent and free expression.

The Constitution does not require the state to remain silent, except in religious matters.²⁸⁵ Although the Constitution may prevent a state from silencing individual citizens, the state can sponsor patriotic programs and try to engender feelings of loyalty. Citizens are free to disagree or to abstain from participation, but no constitutional basis exists for preventing state propaganda. Thus, so long as those who dissent are not compelled to participate, school authorities can sponsor a wide range of value inculcation programs.²⁸⁶ Of course, the teaching process itself inculcates values.

How, then, can the concerns of Professor Van Alstyne be addressed? That is, how can we ensure that permissible propaganda does not become a form of indoctrination in an orthodoxy counter to the values of free expression? The immediate answer, and the one on which Professor Goldstein relies, is that the political process should redress any imbalance.²⁸⁷ A political solution should work because elected school officials and other supervisory personnel generally act in good faith. However, political systems in some communities actually may accept an imbalanced, intolerant educational program.²⁸⁸ The cases discussed in Part II of this article suggest that the vociferous complaints of a relatively few people may skew the political process. School authorities may reflect accurately the expressed community values, leaving few realistic alternatives for the children of parents who do not conform to the local wisdom.²⁸⁹

Two theoretical arguments exist for challenging a narrow, intolerant curriculum that reflects majoritarian values.²⁹⁰ The first, an

285. See, e.g., *School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

286. See, e.g., *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

287. See Goldstein, *supra* note 21, at 1356. Diamond reached the same conclusion. Diamond, *supra* note 267 at 528.

288. The pattern of school segregation in the South was an example of such a problem. Segregation reinforced the inculcation of the belief in racial inequality.

289. Private schools are a theoretical alternative, and in some instances home education may be appropriate. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972). These alternatives are unrealistic for most people, however, especially with the combined effect of rising tuition for private schools and rising property taxes to support public schools.

290. I express my own bias by suggesting that a curriculum developed in response to the

individualist approach, provides a remedy for a teacher who is forced to teach half-truths. The second, an instrumentalist approach, uses a systemic analysis to develop more fully the public utility argument discussed or implied in a variety of cases.²⁹¹ The first argument views self-expression under the first amendment as an end in itself. The second approach treats the first amendment as a means to achieve an educated, enlightened citizenry that will collectively nourish the democratic process and advance the search for truth. Both arguments have substantial support in case law and in scholarly commentaries, although the latter approach is more prevalent in the case law.²⁹² Realistically, separating the interests central to both lines of argument is often difficult.

Justice Stewart viewed *Epperson* as a free speech case.²⁹³ He believed that the Constitution protects a teacher who speaks in the classroom on a particular subject, even if the subject is outside the scope of the prescribed curriculum, so long as the subject is part of a "system of respected human thought."²⁹⁴ Stewart's opinion provides a basis for arguing that a teacher should not be punished for classroom remarks that relate to human knowledge and culture. His language suggests, and the case law generally confirms,²⁹⁵ that the employer's ability to control the teacher's speech increases as the teacher's speech moves from off the campus to on the campus to within the classroom.²⁹⁶ The critical question is whether Justice Stewart's concurrence in *Epperson*, or first amendment law in general, furnishes a basis for a teacher's assertion of a right to speak what he believes is the truth, or to refuse to speak what he consid-

political process and in accordance with majoritarian views may be narrow and intolerant.

291. See *supra* notes 169-82 and accompanying text.

292. See generally L. TRIBE, *supra* note 14, § 12-1, at 576-79.

293. See *supra* text accompanying notes 40-43.

294. *Epperson v. Arkansas*, 393 U.S. 97, 116 (1968) (Stewart, J., concurring).

295. Compare, e.g., *Pickering v. Board of Educ.*, 391 U.S. 563 (1968) (off campus) with *Moore v. School Bd.*, 364 F. Supp. 355 (N.D. Fla. 1973) (within classroom).

296. Justice Stewart's language is consistent with the time, place, and manner decisions in which the degree of state interest varies depending on when and where the activity occurs and what it entails. See generally *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Adderley v. Florida*, 385 U.S. 39 (1966); *Brown v. Louisiana*, 383 U.S. 131 (1966). Compare *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) with *Stanley v. Georgia*, 394 U.S. 557 (1969).

ers an untruth or half-truth.

The current debate over "scientific creationism" provides a good example of the problems that might face a conscientious biology teacher under the individualist approach. A biology teacher who must discuss scientific creationism must disregard the scientific method. He must teach, as truth, a concept based on religious doctrines. A state requirement to teach scientific creationism would compel him to disseminate misleading information about provable facts and strongly inferable conclusions.

Arguably, if a teacher's employment contract delineates the prescribed curriculum, including scientific creationism, then the teacher is estopped to complain later of a constitutional intrusion. If the dispute were between private parties, the argument would be compelling; the dispute would be subject to ordinary rules of contract interpretation. But the government stands in a different posture. Public employment cannot be predicated on the surrender of individual constitutional rights,²⁹⁷ except in limited circumstances involving national security²⁹⁸ or the military.²⁹⁹ Thus, a contract that requires the teaching of a particular subject must meet constitutional standards, notwithstanding the interest in freedom of contract.³⁰⁰

The privacy cases since *Griswold v. Connecticut*³⁰¹ have suggested that the first amendment³⁰² protects the concept of personal autonomy.³⁰³ Speech is one means by which an individual may express himself, but expression is not limited to speech. Expression also may embrace the peculiarly individual aspects of a person's

297. *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

298. See *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam); *United States v. Marchetti*, 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972).

299. See *Brown v. Glines*, 444 U.S. 348 (1980); *Greer v. Spock*, 424 U.S. 828 (1976).

300. If, for example, a teacher signed a contract that required daily prayers in the classroom, the freedom of contract argument would not overcome the constitutional invalidity of the contract.

301. 381 U.S. 479 (1965).

302. Other amendments also may contribute to the constitutional protection of personal autonomy. The Court in *Griswold* cited the first, third, fourth, fifth, ninth, and fourteenth amendments to support its decision.

303. See L. TRIBE, *supra* note 13, § 12-1, at 576-79. See also Greenawalt, *Personal Privacy and the Law*, WILSON Q., Spring 1978, at 67; Konvitz *Privacy and the Law: A Philosophical Prelude*, 31 LAW & CONTEMP. PROBS. 272 (1966); Negley, *Philosophical Views on the Value of Privacy*, 31 LAW & CONTEMP. PROBS. 319 (1966).

lifestyle, including decisions about marriage,³⁰⁴ cohabitation,³⁰⁵ styles of dress,³⁰⁶ procreation,³⁰⁷ sexual relations,³⁰⁸ and movie viewing.³⁰⁹ Although the state may place reasonable limitations on the exercise of these various activities, the state is usually powerless to require an individual to perform any of them against his will. The state can require children under a certain age to attend school, but a child cannot be forced to speak, write, or read once he is there. The state can withhold rewards, however, such as advancement to the next grade level or the conferral of a diploma. People cannot be required to marry, although states may presume a status of marriage after a man and a woman have lived together openly for a period of time.³¹⁰ Similarly, a couple cannot be forced to have children, although the state may place limitations on the distribution of contraceptives³¹¹ and the availability of abortions.³¹² A state may control pornography,³¹³ but not within a citizen's home;³¹⁴ the government cannot ban writings, movies, or other forms of depiction unless the material meets delineated standards of obscenity and unless it is distributed publicly.³¹⁵

304. *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967).

305. *See Moore v. City of E. Cleveland*, 431 U.S. 494 (1977). *But cf. Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

306. The state may enforce, consistently with the Constitution, certain standards of discipline through dress-code requirements for police, *Kelley v. Johnson*, 425 U.S. 238 (1976), or teachers, *East Hartford Educ. Ass'n v. Board of Educ.*, 562 F.2d 838 (2d Cir. 1977).

307. *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

308. The state, however, may punish adultery. *See Hollenbaugh v. Carnegie Free Library*, 436 F. Supp. 1328 (W.D. Pa. 1977), *aff'd*, 578 F.2d 1374 (3d Cir.), *cert. denied*, 439 U.S. 1052 (1978). The state may prohibit homosexual relations as well. *See Doe v. Commonwealth's Att'y*, 403 F. Supp. 1199 (E.D. Va. 1975) (*en banc*) (Virginia's sodomy law not unconstitutional), *aff'd*, 425 U.S. 901 (1976) (*mem.*).

309. *Stanley v. Georgia*, 394 U.S. 557 (1969), established an individual's right to read or view virtually anything within his own home.

310. *See H. CLARK, LAW OF DOMESTIC RELATIONS* 45-58 (1968) (discussing common law marriage).

311. *See Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977).

312. *See Harris v. McRae*, 448 U.S. 297 (1980); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Roe v. Wade*, 410 U.S. 113 (1973).

313. *Miller v. California*, 413 U.S. 15 (1973).

314. *Stanley v. Georgia*, 394 U.S. 557 (1969).

315. *Miller v. California*, 413 U.S. 15 (1973). *See also Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973) (public distribution of pornography).

The Supreme Court's strongest statements on coerced speech came in *Miami Herald Publishing Co. v. Tornillo*³¹⁶ and *Wooley v. Maynard*.³¹⁷ In *Tornillo*, the Court invalidated a Florida right-to-reply statute that had provided a mechanism for a public figure to demand newspaper space for a response to unflattering editorials or news stories. Chief Justice Burger, writing for the Court, stated:

The clear implication [of prior cases] has been that any such compulsion to publish that which " 'reason' tells them should not be published" is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.³¹⁸

In *Wooley*, the Court held that a New Hampshire citizen could not be compelled to display the motto "Live Free or Die" on his license plates. The state was free to print the motto on the license plates, but could not punish someone who chose to cover or erase the motto. A contrary result would invade "the sphere of intellect and spirit" of the individual.³¹⁹

These two cases, as well as *Barnette*, indicate a judicial resistance to state-mandated expression contrary to the legitimately held beliefs of an individual. As Professor Lawrence Tribe has indicated,³²⁰ *Barnette* provided protection against coerced majoritarianism by allowing the dissenter to refrain from participation in a state-mandated activity. *Tornillo* and *Wooley* extended this principle by forbidding the state to make a citizen an agent, even a passive one, for the propagation of ideas that the citizen opposed.³²¹

Similar arguments might be applied to classroom instruction. If

316. 418 U.S. 241 (1974).

317. 430 U.S. 705 (1977).

318. 418 U.S. at 256. See also *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971); *Chicago Joint Bd., Amalg. Clothing Workers v. Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970), cert. denied, 402 U.S. 973 (1971); *Carpets By the Carload, Inc. v. Warren*, 368 F. Supp. 1075 (E.D. Wis. 1973).

319. 430 U.S. at 715 (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

320. L. TRIBE, *supra* note 14, § 15-5, at 901 n.15.

321. The Florida statute in *Tornillo* made newspapers the vehicles for the propagation of individual views that the newspaper opposed.

a teacher need not participate in patriotic ceremonies because of validly held personal beliefs, he should not be forced to teach unfounded theories, such as scientific creationism.³²² If the school board members insist on instruction in the subject, they probably can find someone who can teach it with a clear conscience. But courts should not allow the school board to require a trained biologist, upon pain of losing his job, to act as a mouthpiece for the dissemination of information that is scientifically unsound and misleading. By the same token, a teacher who has a validly held religious belief that evolution is wrong and that its teaching is sinful should not be required to teach that subject. The curriculum need not exclude evolution, creationism,³²³ or planned parenthood. A reasonable accommodation should be made for a teacher who finds that teaching such subjects intrudes upon personal, religious, moral, or scientific beliefs, and denies the teacher's personal autonomy.³²⁴

One assumes that school authorities could not subject a teacher to disciplinary action simply for mentioning ideas, theories, or major figures not covered adequately in the textual materials; but whether a teacher may assert a violation of his right of free speech because he is told to teach a subject area without including major substantive theories or figures is unclear. A policy dispute over the use of a particular textbook does not implicate a teacher's personal autonomy in the same manner as a requirement to teach quasi-religious theories. But by focusing on a teacher's interest in autonomy, a court can test decisions of school authorities while avoiding the sometimes flawed mechanisms of the political process.

In addition to the individual interests a teacher has in his profession, the community also has an interest in seeing that tax-supported institutions, such as the public schools, provide a balanced

322. The basis for excusing the teacher in this instance is respect for the teacher's autonomy. An instrumentalist argument against including creationism in the science curriculum may exist because creationism does not prepare students to deal with science and the scientific method.

323. *Epperson* may not permit the teaching of creationism if the method of instruction is too closely bound up with *Genesis*.

324. Such an accommodation does not mean that the curriculum must be tailored to the idiosyncracies of every teacher. See *Palmer v. Board of Educ.*, 603 F.2d 1271 (7th Cir. 1979), cert. denied, 444 U.S. 1026 (1980).

view of the world, train students adequately, and preserve social values, including a respect for free expression. These notions subsume much of the courts' opinions in *Mailloux* and in *Cary*. The concepts also underlie Professor Van Alstyne's theory and are apparent in Justice Stewart's concurrence in *Epperson*. The concepts could provide a basis for arguing that a student or his taxpaying parent should have standing to challenge the actions of a school system that does not adequately pursue these goals.³²⁵ Such a challenge might run afoul of decisions holding that education is not a fundamental right,³²⁶ and that a person has no right to demand a particular quality of curriculum.³²⁷

At first blush, the public utility analogy and the focus on the community interest in encouraging teacher creativity or in preventing doctrinal orthodoxy would appear to have little relevance to the constitutional protection of free speech. The first amendment serves generally as a restraint on governmental interference in matters of individual conscience, expression, and publication. The assertion that a teacher has a constitutional right to teach as he likes is grounded in the notion that individual expression should be free of state regulation. On the other hand, the public utility analogy posits a model based on interests defined by reference to the entire polity. Individual speech may be important in the public utility model, but is subsumed within an overriding concern for communal interests expressed through a state mechanism. Carried to its logical conclusion, the public utility analogy does not adequately take into account the individual interests of the participants in public education. If balanced presentations and equal time for opposing views are required, it would be difficult to provide an individual teacher with the discretion necessary to maintain a modicum of autonomy with respect to curriculum content and pedagogical method. The system, not the discrete individual actors, would be the focus. Absent an administrative regulatory

325. See Van Alstyne, *supra* note 269, at 857. But cf. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974); *Flast v. Cohen*, 392 U.S. 83 (1968).

326. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973). An equal protection argument may exist if an identifiable class is systematically excluded from participation in educational programs meeting minimal standards of quality. *Plyer v. Doe*, 457 U.S. 202 (1982).

327. See *Arundar v. DeKalb County School Dist.*, 620 F.2d 493 (5th Cir. 1980).

scheme, judges would become the ultimate arbiters of most disputes concerning curriculum and pedagogy.³²⁸

Nevertheless, a combination of individual and communal interests may provide a framework for a model that retains the public utility analogy while focusing on the individual participants. If teachers have a right not to speak, based on the notion of personal autonomy and manifested through self-expression, then their audiences have a reciprocal right to be free from false indoctrination. Whether this theory could develop into a full-scale right to know, thereby allowing students to demand a broad range of academic services, is problematic and fraught with potentially disastrous policy implications. The theory could develop, however, into a right not to be impeded in the pursuit of free inquiry and into a right not to hear. The crux of the matter involves two different coercive forces—the taxing laws that provide revenues for public education, and mandatory attendance laws. Because the state forces people to pay for and attend school, a strong argument can be made that the service should be free from coerced ideological indoctrination because such coercion is contrary to the fundamental tenets of the first amendment.³²⁹

The classroom is far from the paradigmatic marketplace of ideas. Although a teacher is accorded some basic constitutional protection for work within the classroom, he does not have absolute discretion over curriculum content and pedagogical method. A con-

328. The closest analogy is FCC regulation of the electronic media. Rules requiring "fairness" or "equal time" for political candidates are limitations on the rights of licensees that are justified by the scarcity of the resource and the limited monopoly granted by the government to broadcast licensees. One can make an analogous argument for free expression in schools:

Free expression is therefore necessary for the creation of an atmosphere in which the school boards can effectively carry out their collectivist functions of academic achievement and socialization. The exchange of ideas and exposure to diversity within the school curriculum prepare the student for life in a democratic society that values a certain degree of heterogeneity. They are a prerequisite to good citizenship, and it is in the state's interest to expose all children to the experience.

Project, *supra* note 267, at 1441.

329. The presence of private schools is not an acceptable alternative to non-neutral state education. Not enough private schools are available, and most are expensive. They also are subject to at least some state accreditation standards, and students are subject to compulsory attendance laws.

trary result would invite anarchy and subject students to the doctrinaire pronouncements of a single teacher. To succeed, students might be required to learn, espouse, and accept ideas contrary to their own values, or to adopt notions outside the mainstream of American thought. This indoctrination would violate their personal autonomy in the same way that requiring a teacher to speak might interfere with the teacher's personal autonomy. Additionally, the indoctrination would constitute a failure to transmit accurately knowledge of how to operate in a free and open polity, and a failure to inculcate important values upon which societal consensus exists. Precisely the same could be said of attempts by doctrinaire school boards to limit student awareness of various ideas and subject matter. The Constitution does not require a balanced presentation of all subjects. Instead, the argument simply indicates that a state that compels attendance at school cannot subject students to ideological propaganda that imposes conformity, encourages intolerance, or presents a factually skewed view of the world.³³⁰

If the student derives his right not to hear from the teacher's right not to speak falsely, a question arises whether a student may complain because the teacher willingly propounds ideological propaganda mandated by the school board. Tying the student's right to the teacher's right may circumscribe too narrowly the student's interest. Although the Court in *Virginia Pharmacy* spoke of the right to hear as the reciprocal of a speaker's right to speak, the listener's right was independent of the speaker's. The consumers had standing regardless of the pharmacists' desire to advertise. Thus, the issue in *Virginia Pharmacy* was not whether anyone actually wanted to speak, but whether the form of communication was subject to state control. The opposite also should hold true. If

330. One cannot realistically argue, as Justice Rehnquist did in *Island Trees*, that ideas are not suppressed or orthodoxy not imposed if students are allowed to read and discuss ideas outside the school. 102 S. Ct. 2799, 2832-33 (1982) (Rehnquist, J., dissenting). His criticisms of the plurality opinion in *Island Trees* are well-taken and, on the facts, his opinion is not without merit. He tends to overlook, however, the overwhelming importance that schools have in molding young minds. Schools are the most important and time-consuming activity for most children between the ages of six and eighteen. The availability of ideas for discussion outside the school is no doubt important, but what happens inside school undoubtedly will be substantially more important.

the state requires the speech-related activity involved in teaching, then the recipients, regardless of the speaker's interest in dissemination, have a right not to hear as well as a right to hear. Indeed, because the presence of the listeners is coerced and the opportunities for rebuttal are limited, sensitivity to the students' interests should be particularly heightened.

The first amendment should and does have some role in the operation of our schools. Identifying and vindicating first amendment interests on a daily basis is another matter. Judges consistently have expressed a desire for the maintenance of local control of schools with minimal judicial interference,³³¹ although some judges are not deterred from engaging in close scrutiny of educational decisions.³³² On the whole, judicial non-interference is desirable. The Constitution does not demand educational conformity. Indeed, the essence of the argument in support of a first amendment presence in the schools is that diversity, dissent, pluralism, and individuality are important. Judicial interference, however, could lead to a nationally homogeneous educational system that would lack spirit and creativity. The curriculum best suited to a farming community may be quite different from the one best suited to an urban school system. Differences in curriculum should be encouraged, but they will not flourish if judicial activism results in the constitutionalization of every curricular and pedagogical dispute.

Moreover, litigation in an adversarial setting tends to weaken the collegial bonds within institutions. One who has legitimate cause for complaint should be free to seek judicial redress, but frequent judicial intervention alters intra-institutional relationships. Admittedly, school teachers and their administrative superiors are not always close associates, but treating often trivial disputes as constitutional issues of national importance can create an institutional framework of adversarial relationships that poisons the educational atmosphere. Thus, for most issues, Professor Goldstein's approach of deferral to local political mechanisms for the vindication of individual and group interests is sound. But a proper con-

331. See, e.g., *East Hartford Educ. Ass'n v. Board of Educ.* 562 F.2d 838, 857 (2d Cir. 1977).

332. See, e.g., *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969); *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970).

cern for specific individual interests and an avoidance of ideological indoctrination must exist as alternative bases for challenging educational policies.

The procedures used in reaching decisions that may affect constitutional interests are important to ensure a proper balance. A few cases holding against school managers have involved precipitate action.³³³ Fining or suspending a teacher is a harsh remedy that may affect a judge who wants to ensure fairness. Similarly, if books are suddenly withdrawn from a library or a reading list, those affected may feel aggrieved. Yet some risk always exists that a teacher will raise a constitutional smokescreen to mask incompetence or unprofessional conduct. As the Supreme Court noted in a recent decision:

A borderline 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.³³⁴

The earlier discussion of *Island Trees* suggested that the opinions of Justices Brennan and Blackmun, read together, imply a procedural due process right as much as a substantive right.³³⁵ Although Justice Brennan's opinion emphasized a newly defined right to receive information, a narrower process-oriented reading comports with both precedent and practical application. Such an interpretation would furnish a process that allows the free expression of disagreements about a proposed policy.

Policies affecting the acquisition, use, dissemination, or removal of classroom and library materials implicate the first amendment because the policies affect teachers' abilities to teach, students' opportunities to learn, and the overall quality of the educational ex-

333. See, e.g., *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970); cf. *Parker v. Board of Educ.*, 237 F. Supp. 222 (D. Md.) (holding in favor of school board), *aff'd per curiam*, 348 F.2d 464 (4th Cir. 1965), *cert. denied*, 382 U.S. 1030 (1966).

334. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 286 (1977).

335. See *supra* text accompanying notes 212-19.

perience. These policies also have a pedagogical impact because they express a community view about what is important and what is not. The imposition of some discretionary limitations on school managers, therefore, is reasonable. Requiring school authorities to ensure minimal procedural safeguards, to allow fair notice of policies and policy changes, and to grant those affected an opportunity to be heard would not interfere unreasonably with the discharge of managerial obligations. A due process requirement would also provide a framework for institutional consideration of constitutional interests without externalizing conflicts among students, teachers, and school authorities. Courts already recognize that students and teachers have due process rights in disciplinary proceedings. Teachers and students may rely on the first amendment in certain circumstances. Consistency demands that procedural safeguards protect first amendment interests in contexts other than disciplinary proceedings.

Professor David Diamond has argued that:

Tinker's conception of the relationships between the first amendment and the public schools, between teachers and students and the Constitution, and between the courts and the local school administration, was fundamentally incorrect. Contrary to the *Tinker* Court's conclusion, . . . courts should apply only a limited standard of review to local school administration action: the minimum rationality standard currently used to review government activity that does not implicate fundamental rights.³³⁶

Diamond's essay notes the danger of widespread judicial interference in school systems, but his argument fails to recognize that school board actions do occasionally implicate first amendment rights. Both teachers and students have these rights as citizens; the Supreme Court has held consistently that these rights are not lost by virtue of the status of a teacher as a teacher or a student as a student.³³⁷ One can question whether wearing black armbands, as

336. Diamond, *supra* note 267, at 477.

337. Even the *Island Trees* dissenters agreed "with the fundamental proposition that 'students do not "shed their rights to freedom of speech or expression at the schoolhouse gate.'" 102 S. Ct. 2799, 2818 (Burger, C.J., dissenting) (quoting the Court, *id.* at 2807, quoting *Tinker*, 393 U.S. at 506).

in *Tinker*, is a form of expression that should be permitted in schools without questioning the fundamental notion that a student retains free speech rights when he enters the school. The same is true for a teacher or any other public employee. Thus, a minimum rationality standard does not afford enough protection when a complaint asserts a denial of a free speech right.

Excessive judicial interference, however, can be avoided if the court focuses initially on the process afforded to those affected by a particular decision. Coupled with a recognition of the values of diversity and of community control through the local political system, a process-oriented approach protects individual rights, recognizes majoritarian interests, and minimizes judicial involvement. This bridges the gap between the approaches of Professors Van Alstyne and Goldstein. Substantive judicial review still would be available for egregious cases and for the protection of individualist concerns of conscience against majoritarian sentiments, as in *Barnette*. Someone must ultimately determine "educational suitability." Group decisions reached after full debate may not always be just, but if the process allows for debate, and if the courts stand ready to rectify the worst cases, the result is a balanced policy that avoids the extremes of leaving such decisions wholly to the vagaries of community politics or wholly to the whims of federal judges.

Governmental processes are rarely neutral. If questions of curriculum content and textbook selection are decided solely through the political process, except in situations of obvious abuse of a constitutional right³³⁸ or when the government exceeds its authority,³³⁹ the balance shifts toward majoritarianism and away from individual liberty. If, on the other hand, the Constitution has a more direct role in deciding such questions, then the schools must become more sensitive to individual rights. In a slightly different context Charles Frankel wrote:

The law may cease taking the sides it does with regard to particular issues, but it cannot cease taking some side. To ease the abortion laws may seem morally neutral because it does not require any individual with conscientious scruples against abortion

338. See, e.g., *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

339. See, e.g., *Epperson v. Arkansas*, 393 U.S. 97 (1968); *School Dist. v. Schempp*, 374 U.S. 203 (1963).

to receive an abortion. But it changes the effective scale of values in society. It gives new powers to one set of moral norms and reduces the power and influence of the other. Each time that a court takes action, even in the name of the individual's right to be different, it legislates not simply for liberty but for a new balance among moral norms. Liberty is always limited by considerations, spoken or unspoken, of what is morally legitimate. When actions are permitted that have previously been prohibited, the circle of legitimacy changes.³⁴⁰

The balancing process need not be such that individual liberty excludes all other values. Rather, it is consistent with the goals of transmitting knowledge, inculcating democratic values and developing intellectual abilities for schools to implement the values inherent in the first amendment. This does not mean that discipline, pedagogical control, and community values should take a secondary position, but only that the protection of free speech interests should not be left solely to the political process.

IV. CONCLUSION

This Article has examined a wide range of cases dealing with various issues in elementary and secondary education, and has attempted to identify and articulate some unifying constitutional themes. The proper and efficient functioning of our public school systems is important to all of us and to the continued strength of American democracy. The schools must train succeeding generations in the central values of democracy. Public schools also must recognize and encourage the values of diversity and pluralism. These institutions are proper subjects of constitutional concern, and it is appropriate to examine school operations to ensure that they preserve a proper regard for individual interests and for free expression. We should avoid, however, an unremittingly nationalist approach to constitutional adjudication that involves the federal judiciary in essentially local, and often inconsequential, disputes. Education will not improve and the Constitution will not be vindicated by the wholesale application of constitutional protections to individual teachers or students, or by the wholesale rejection of

340. Frankel, *supra* note 56, at 621.

constitutional principles in favor of reliance on the local political process.