

1998

High School Academic Freedom: The Evolution of a Fish Out of Water

W. Stuart Stuller

Caplan and Earnest, LLC, [sstuller@celaw.com](mailto:ssuller@celaw.com)

Follow this and additional works at: <https://digitalcommons.unl.edu/nlr>

Recommended Citation

W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish Out of Water*, 77 Neb. L. Rev. (1998)

Available at: <https://digitalcommons.unl.edu/nlr/vol77/iss2/4>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

High School Academic Freedom: The Evolution of a Fish out of Water

TABLE OF CONTENTS

I. Introduction	301
II. What is Academic Freedom?	307
III. The Supreme Court and Academic Freedom	310
A. The Road to <i>Keyishian</i>	310
B. The Road Not Taken	314
IV. The First Coming of High School Academic Freedom— Procedure and Substance.....	317
V. <i>Hazelwood</i> and the Regulation of School-Sponsored Speech.....	322
VI. The Second Coming of Academic Freedom—All Procedure No Substance	324
VII. When the State Speaks	329
VIII. Back to the Classroom	332
IX. The Substantive Right of Academic Freedom	333
X. The Procedural Right of Academic Freedom: Can There Be Procedure Without Substance?	339
XI. Conclusion	342

I. INTRODUCTION

Much of the strength of the First Amendment arises from the power of its rhetoric. It is a rare judge who can decide a First Amendment case without composing, or at least copying, a short ode to free speech. If nothing else, the introductory rhetoric, like a congressional benediction, solemnizes the decision, reiterating that paramount val-

© Copyright held by the NEBRASKA LAW REVIEW.

* Associate, Caplan and Earnest LLC, J.D. University of Colorado; B.S., University of Wisconsin, LaCrosse.

ues are at stake.¹ The rhetoric represents a thumb on the scale favoring protection of First Amendment values.²

Within the broad arena of education law, a rhetoric of academic freedom has developed, much of it springing from Justice Brennan's memorable passage in *Keyishian v. Board of Regents*.³

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'⁴

Despite the tributes, courts are remarkably consistent in their unwillingness to give analytical shape to the rhetoric of academic freedom. Twenty years ago, a federal district court in the Ninth Circuit noted: "The Supreme Court of the United States has discussed academic freedom in eloquent and isolated statements. Lower courts have spoken more frequently, but none has clearly defined the theory's legal contours. Nor will I."⁵ Recently, the Ninth Circuit noted: "Neither the Supreme Court nor this Circuit has determined what scope of First Amendment protection is to be given a public college professor's classroom speech. We decline to define today the precise contours of the protection the First Amendment provides the classroom speech of college professors . . ."⁶

-
1. See *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984)(O'Connor, J., concurring)(recognizing that government acknowledgments of religion serve secular purposes by "solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society")
 2. The power of rhetoric did not go unnoticed by the Justices who sought to diminish the strictures of the Establishment Clause. See *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985)(Rehnquist, J., dissenting)(criticizing Court's reliance on Jefferson's Wall of Separation metaphor); *Lynch v. Donnelly*, 465 U.S., 668, 673 (1984)(recognizing that Jefferson's Wall of Separation metaphor "is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state")
 3. 385 U.S. 589 (1967).
 4. *Id.* at 603 (alteration in original)(citations omitted). For other discussions of the importance of academic freedom, see *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)(Warren, C.J., plurality); *Id.* at 260-64 (Frankfurter, J., concurring); *Wieman v. Updegraff*, 344 U.S. 183, 196-98 (1952)(Frankfurter, J., concurring); and *Kim v. Coppin State College*, 662 F.2d 1055, 1063-64 (4th Cir. 1981).
 5. *Wilson v. Chancellor*, 418 F. Supp. 1358, 1362 (D. Or. 1976) (citations omitted).
 6. *Cohen v. San Bernardino Valley College*, 92 F.3d 968, 971 (9th Cir. 1996); see also *Cooper v. Ross*, 472 F. Supp. 802, 813 (E.D. Ark. 1979)(declining to reach issue of academic freedom).

Not surprisingly then, scholars are just as consistent in criticizing courts' failure to give shape to the rhetoric.⁷ To borrow a wonderful phrase: "Lacking definition or guiding principal, the doctrine floats in the law, picking up decisions as a hull does barnacles."⁸ This analogy would be entirely accurate except that barnacles tend to look somewhat alike while academic freedom cases do not. The disparity of conclusions is stunning: a school district may refuse to rehire a teacher because he assigned Aldous Huxley's *Brave New World*.⁹ A school district may not dismiss a teacher because he assigned Kurt Vonnegut's "Welcome to the Monkey House."¹⁰ A university professor has a right of academic freedom in the grades he assigns.¹¹ No, he does not.¹² A high school art teacher cannot be compelled to recite the Pledge of Allegiance,¹³ but a kindergarten teacher can be so compelled.¹⁴ A

7. *E.g.*, Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1289 (1988) ("A sizeable literature of legal commentary asserts that the Supreme Court constitutionalized academic freedom without adequately defining it.")

The body of scholarship dealing with academic freedom is substantial. Three law reviews have devoted symposia to the subject: *Academic Freedom and Tenure Symposium*, 15 PACE L. REV. 1 (1994); Symposium, *Freedom and Tenure in the Academy: The Fiftieth Anniversary of the 1904 Statement of Principles*, 53 LAW & CONTEMP. PROBS., Summer 1990, at 1; *Symposium on Academic Freedom*, 66 TEX. L. REV. 1247 (1988). A sampling of articles not included in these symposia include J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251 (1989); Gregory A. Clarick, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U. L. REV. 693 (1990); Stephen R. Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293 (1976); Richard H. Hiers, *Academic Freedom in Public Colleges and Universities: O Say, Does that Star-Spangled First Amendment Banner Yet Wave*, 40 WAYNE L. REV. 1 (1993); Katheryn D. Katz, *The First Amendment's Protection of Expressive Activity in the University Classroom: A Constitutional Myth*, 16 U.C. DAVIS L. REV. 857 (1983); Norman R. Miller, *Teachers' Freedom of Expression Within the Classroom: A Search For Standards*, 8 GA. L. REV. 837 (1974); Sheldon H. Nahmod, *Controversy in the Classroom: The High School Teacher and Freedom of Expression*, 39 GEO. WASH. L. REV. 1032 (1971); William Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841 (1970); Charles Alan Wright, *The Constitution on Campus*, 22 VAND. L. REV. 1027 (1969); *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045 (1968); Mark G. Yudof, *Three Faces of Academic Freedom*, 32 LOY. L. REV. 831 (1987); John M. Ryan, Comment, *Teacher Free Speech in the Public Schools: Just When You Thought It was Safe to Talk*, 67 NEB. L. REV. 695 (1988).

8. Byrne, *supra* note 7, at 253.

9. See *Parker v. Board of Educ.* 237 F. Supp. 222 (D. Md. 1965).

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

11. See *Parate v. Isibor*, 868 F.2d 821, 830 (6th Cir. 1989); *In re Termination of James E. Johnson's Teaching Contract*, 451 N.W.2d 343, 346 (Minn. Ct. App. 1990).

12. See *Lovelace v. Southeastern Mass. Univ.*, 793 F.2d 419 (1st Cir. 1986).

13. See *Russo v. Central Sch. Dist.* No 1, 469 F.2d 623 (2d Cir. 1972).

14. See *Palmer v. Board of Educ.*, 603 F.2d 1271 (7th Cir. 1979).

teacher's right of academic freedom encompasses a right to wear a turtleneck in preference to a necktie.¹⁵ No more so than he has a constitutional right to have students sit in a circle in preference to rows.¹⁶ A high school teacher has a right of academic freedom "in choosing a particular pedagogical method for a course, so long as the course is part of the school's official curriculum and the teaching method serves a demonstrable educational purpose."¹⁷ A high school teacher has no right of academic freedom.¹⁸

The formulas used to resolve academic freedom cases are equally divergent. The "material and substantial interference" standard of *Tinker v. Des Moines Independent Community School District*¹⁹ has been applied,²⁰ as has the balancing test of *Pickering v. Board of Education of Township High School District 205*.²¹ The "legitimate pedagogical concern" standard of *Hazelwood School District v. Kuhlmeier*²² is now the dominant framework,²³ but courts are in disagreement as to how to apply it. Some courts apply *Hazelwood* in straightforward

-
15. See *East Hartford Educ. Ass'n v. Board of Educ.*, 562 F.2d 838, 844 (2d Cir. 1977)(en banc). The claim of academic freedom in classroom attire does not mark the far end of the spectrum of academic freedom claims. One teacher asserted that the right of academic freedom included the authority to permanently remove the glossary from more than one hundred textbooks. See *Board of Trustees v. Landry*, 638 N.E.2d 1261 (Ind. Ct. App. 1994).
 16. See *East Hartford Educ. Ass'n v. Board of Educ.*, 562 F.2d 838, 857 n.5 (2d Cir. 1977)(en banc).
 17. *Watson v. Eagle County Sch. Dist.* RE-50, 797 P.2d 768, 770 (Colo. Ct. App. 1990); see also *State Bd. for Community Colleges and Occupational Educ. v. Olson*, 687 P.2d 429, 437 (Colo. 1984)(dicta regarding community college instructors).
 18. See *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 779 (10th Cir. 1991).
 19. 393 U.S. 503, 511 (1969).
 20. See *Dean v. Timpson Indep. Sch. Dist.*, 486 F.Supp. 302, 307 (E.D. Tex. 1979); *Parducci v. Rutland*, 316 F. Supp. 352, 355 (M.D. Ala. 1970).
 21. 391 U.S. 563 (1968); see *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364 (4th Cir. 1998)(en banc)(holding that drama instructor's choice of play not a matter of public concern); *Blum v. Schlegel*, 18 F.3d 1005 (2d Cir. 1994)(applying *Pickering* to law professor's in-class remarks); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794 (5th Cir. 1989)(holding that teacher's use of supplemental reading materials for class not matter of public concern); *Martin v. Parrish*, 805 F.2d 583, 584-85 (5th Cir. 1986)(applying *Pickering* to teacher's in-class use of profanity); *Birdwell v. Hazelwood Sch. Dist.*, 491 F.2d 490, 493 (8th Cir. 1974)(applying *Pickering* to high school teacher's classroom remarks); *Westbrook v. Teton County Sch. Dist. No. 1*, 918 F. Supp. 1475, 1482 (D. Wyo. 1996)(applying *Pickering* test to school policy prohibiting open criticism of staff); *Scallet v. Rosenblum*, 911 F. Supp. 999, 1011 (W.D. Va. 1996)(applying *Pickering* to professor's in-class remarks); *Cohen v. San Bernardino Valley College*, 883 F. Supp. 1407 (C.D. Cal. 1995) (applying *Pickering* test to college professor's in-class speech).
 22. 484 U.S. 260, 273 (1988).
 23. See *Silano v. Sag Harbor Union Free Sch. Dist.*, 42 F.3d 719, 722 (2d Cir. 1994); *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993); *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 778 (10th Cir. 1991); *Bishop v. Aronov*, 926 F.2d 1066, 1074 (11th Cir.

fashion.²⁴ Other courts supplement *Hazelwood* with a notice standard.²⁵ Some courts have suggested that *Hazelwood* requires a balancing test.²⁶

This schizophrenia is not limited to varying courts. Justice Brennan, whose writing in *Keyishian* inspired many lower courts to recognize a right of academic freedom in the secondary school setting, also wrote:

The Court of Appeals stated that academic freedom embodies the principle that individual instructors are at liberty to teach that which they deem to be appropriate in the exercise of their professional judgment. But, in the State of Louisiana, courses in public schools are prescribed by the State Board of Education and teachers are not free, absent permission, to teach courses different from what is required. 'Academic freedom,' at least as it is commonly understood, is not a relevant concept in this context.²⁷

Thus, Justice Brennan takes a "special concern of the First Amendment" in one case and reduces it to an irrelevant concept in another.

High school academic freedom took flight nearly three decades ago, powered by the rhetoric of *Keyishian*.²⁸ The arc of its trajectory flattened, however, as courts began to question whether academic freedom claims were really just arguments as to who was entitled to exercise state power.²⁹ Recently, academic freedom cases have pop-

1991); *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1008 (7th Cir. 1990); *Board of Educ. v. Wilder*, 960 P.2d 695 (Colo. 1998).

24. See *Miles v. Denver Pub. Sch.*, 944 F.2d 773 (10th Cir. 1991).
25. See *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718 (8th Cir. 1998); *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir. 1993).
26. See *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 936 F. Supp. 676, 684 (E.D. Mo. 1996), *rev'd*, 147 F.3d 718 (8th Cir. 1998); *Wilder v. Board of Educ.* 944 P.2d 598, 602 (Colo Ct. App. 1997), *rev'd*, 960 P.2d 695 (Colo. 1998).
27. *Edwards v. Aguillard*, 482 U.S. 578 586 n.6 (1987)(citations omitted); see also *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 287 (1984)(stating that the Court has never recognized that the faculty has a constitutional right to participate in the policymaking of academic institutions).
28. For a sample of the early cases, see *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969); *Webb v. Lake Mills Community Sch. Dist.*, 344 F. Supp. 791 (N.D. Iowa 1972); *Sterzing v. Fort Bend Indep. Sch. Dist.*, 376 F. Supp. 657 (S.D. Tex. 1972), *vacated*, 496 F.2d 92 (5th Cir. 1974); *Mailloux v. Kiley*, 323 F. Supp. 1387 (D. Mass. 1971), *aff'd per curiam*, 448 F.2d 1242 (1st Cir.1971); and *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970).
29. See *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3rd Cir. 1990); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 795 (5th Cir. 1989); *Lovelace v. Southeastern Mass. Univ.*, 793 F.2d 419, 426 (1st Cir. 1986); *Cary v. Board of Educ. Arapahoe Sch. Dist.*, 598 F.2d 535, 542-43 (10th Cir. 1979); *Adams v. Campbell County Sch. Dist.*, 511 F.2d 1242, 1247 (10th Cir. 1975); *Ahern v. Board of Educ.*, 456 F.2d 399, 403-04 (8th Cir. 1972).

ped up again,³⁰ reduced in scope but still lacking analytical coherence.³¹

A number of factors contribute to this state of affairs. Courts have failed to examine or define the parameters of academic freedom. Courts also have failed to inquire into the nature and theoretical origins of academic freedom. While academic freedom had its genesis in the evolution of the modern university,³² the bulk of academic freedom cases have arisen in the context of secondary schools.³³ There is much salience in the observation that the justification for academic freedom must be found in the character and function of the institution and the scholar's role within that institution.³⁴

Most significantly, however, courts have not confronted the analytical questions that must be addressed if academic freedom is to be constitutionalized. These questions are unique in constitutional theory: To what extent does the Constitution recognize a right that is not available to the public at large? And to what extent does the Constitution, which typically operates to *limit* state power, *protect* an individual's exercise of state power?

High school academic freedom lies along a speech continuum bounded at one end by wholly private speech and on the other end by statements that are unmistakably speech of the government. At various points along the continuum a different set of issues is raised: the three-tiered analysis of public forum jurisprudence,³⁵ the rules that apply to funding for the National Endowment for the Arts,³⁶ the rules underlying government regulation of the airwaves,³⁷ and, of course,

30. See *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364 (4th Cir. 1998)(en banc); *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996); *Lacks v. Ferguson Reorg. Sch. Dist. R-2*, 936 F. Supp. 676 (E.D. Mo. 1996), *rev'd*, 147 F.3d 718 (8th Cir. 1998); *Westbrook v. Teton County Sch. Dist. No. 1*, 918 F. Supp. 1475 (D. Wyo. 1996); *Scallet v. Rosenblum*, 911 F. Supp. 999 (W.D. Va. 1996); *Silva v. University of New Hampshire*, 888 F. Supp. 293 (D. N.H. 1994); *Board of Educ. v. Wilder*, 960 P.2d 695 (Colo. 1998); *Hosford v. School Comm.*, 659 N.E. 2d 1178 (Mass. 1996).

31. See *infra* text accompanying notes 162-203.

32. See *infra* text accompanying notes 41-58.

33. See Metzger, *supra* note 7, at 1296 ("[S]choolteachers have greatly outnumbered academics as litigants in academic freedom cases.")

34. See Glenn R. Morrow, *Academic Freedom*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 4, 6 (David L. Sills ed., MacMillan & Free Press 1968). While it is in the interest of public school teachers to position themselves as closely as possible to university faculty, this is not necessarily a healthy development for academic freedom at the university which depends on a recognition of the unique status and character of the university.

35. See *e.g.*, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

36. See *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168 (1998); Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151 (1996).

37. See *Turner Broad. Sys., Inc. v. Federal Communications Comm'n*, 114 S. Ct. 2445 (1994).

claims of academic freedom within public institutions. Because of its relative position on the continuum, the high school setting provides a convenient vehicle for identifying the theoretical hurdles that must be overcome if a right of academic freedom is to be formulated based on something more than rhetoric.

II. WHAT IS ACADEMIC FREEDOM?

Discussions of academic freedom inevitably are preceded by powerful images that color our perceptions of the issues: Socrates put to death for raising difficult questions; Galileo brought before the Inquisition for accurately reporting what he saw through the telescope; and John Scopes haled up on criminal charges for instructing high school students on scientific observations that were already sixty-five years old. Notwithstanding the clarity of these images, the term "academic freedom" itself is hardly self-defining. It is indicative of the malleability of the term that Laurence Tribe can observe that the Supreme Court has never recognized academic freedom as an independent constitutional doctrine,³⁸ while William Van Alstyne can write that the Court has incorporated academic freedom into the Constitution,³⁹ and both can be right.⁴⁰

Prior to the Civil War, the concept of academic freedom was "literally inconceivable" in the educational institutions of this country.⁴¹ Nineteenth century colleges were not the modern research institutions of today. "The goal of higher education was to train young men in religious piety and mental discipline as a preparation for the clergy and other gentlemanly professions, such as law and medicine."⁴² Original knowledge was not produced on campus. Instead, it was disbursed down a chain of command that, as often as not, originated with God.⁴³ Against this cultural backdrop, academic freedom would only

38. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 12-4, at 812-13 n.32 (2d ed. 1988).

39. See William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 *LAW & CONTEMP. PROBS.*, Summer 1990, at 79, 81.

40. See *infra* text accompanying notes 241-46 for the proposition that Professor Alstyne is right, and see *infra* text accompanying notes 91-111 for the proposition that Professor Tribe is right.

41. See Byrne, *supra* note 7, at 269; see also RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES*, 263 (1955) ("For the most part, the concept of academic freedom as it is usually expressed today had not received a clear formulation in the ante-bellum period."); Metzger, *supra* note 7, at 1265 ("[T]he systematic search for a definition did not effectively begin until after the Civil War and did not bear significant fruit until after the turn of the century.")

42. Byrne, *supra* note 7 at 269.

43. The Book of Genesis contains a short account of humankind's pursuit of original knowledge, and it does not have a happy ending. See *Genesis* 3:1-24.

result in divine retribution, generally in the form of career termination.

Universities expanded their function beyond merely dispersing knowledge. "The change is usefully, if simple-mindedly, expressed as a movement from a paradigm of fixed values vouchsafed by religious faith to one of relative truths continuously revised by scientific endeavor."⁴⁴ Questioning prevailing knowledge was no longer considered an attack upon religious faith—at least within the university. Outside the university, however, the notion that faith and science were severable was not so quick to catch on, especially with lay regents. To sustain the vitality of the new university, a mechanism was needed to protect the process of distilling truth through challenges to accepted wisdom.⁴⁵

German universities of the time were guided by two notions, *lehrfreiheit* and *lernfreiheit*, which were alien to American universities.⁴⁶ *Lehrfreiheit*, or freedom to teach, afforded university professors the latitude to determine the content of their lectures and publish the findings of their research outside the chain of command that bound other government officials.⁴⁷ This freedom was not considered a right so much as an "exceptional privilege" of the university professor that did not extend to civil servants of similar rank or to secondary school teachers.⁴⁸

Lernfreiheit, or freedom to learn, distanced the university from any control over a student's course of study except for preparation for state professional examinations.⁴⁹ Unlike school children, university students presented themselves as autonomous and self-reliant persons responsible for making their own way in the world outside the university.⁵⁰

These concepts were considered by a committee of the American Association of University Professors (AAUP) charged with writing a report on academic freedom and tenure. The report, released in 1915 when educational theorist John Dewey was chairman of the AAUP, is regarded as the seminal statement on academic freedom. While the protections of *lehrfreiheit*, freedom to teach, were adopted by the AAUP, the AAUP took the position that these protections were not applicable to all post-secondary institutions. Consistent with the transformation of the university that created the need for academic

44. Byrne, *supra* note 7, at 271; see also Metzger, *supra* note 7, at 1267-69.

45. See Byrne, *supra* note 7, at 278-79; Metzger, *supra* note 7, at 1267-69.

46. See Metzger, *supra* note 7, at 1269; Goldstein, *supra* note 7, at 1299.

47. See Byrne, *supra* note 7, at 272; Metzger, *supra* note 7, at 1269-70; Goldstein, *supra* note 7, at 1299.

48. See Metzger, *supra* note 7, at 1269-70.

49. See *id.*; Goldstein, *supra* note 7, at 1299.

50. See Metzger, *supra* note 7, at 1269-70; Bryne, *supra* note 7, at 272-73; Goldstein, *supra* note 7, at 1299.

freedom, the committee drew a distinction between what it considered to be a true university—a place where free inquiry was accepted—and what it labeled “proprietary institutions,” schools that existed to propagate prescribed doctrines.⁵¹ Teachers in the latter institutions could make no claim to academic freedom. Public school teachers, of course, did not occupy the position of university faculty and thus were not included in the AAUP’s embrace of *lehrfreiheit*.⁵²

In its 1915 Declaration of Principles, the AAUP defined academic freedom as “a right claimed by the accredited educator, as teacher and investigator, to interpret his findings and to communicate his conclusions without being subjected to any interference, molestation, or penalization because the conclusions are unacceptable to some constituted authority within or beyond the institution.”⁵³

Academic freedom of this sort does not insulate the scholars from criticism or even sanctions.⁵⁴ Indeed, perhaps no group of writers look over their shoulders with greater trepidation than academics, their careers quite literally dependent upon writing something that meets accepted standards.⁵⁵ Who should set the standard by which the scholar’s work is to be evaluated—the clergy, lay regents, the individual scholar, the academy, or the university as a self-governing entity? If, as is the general practice, it is the university informed by the academy that sets the standard, claims of academic freedom raised by individual professors can run headlong into what has been called the institutional academic freedom of the university to conduct its affairs free from judicial interference.⁵⁶

51. See Metzger, *supra* note 7, at 1279.

52. See *id.* at 1271-73. The AAUP also declined to adopt *lernfreiheit*, possibly because of the different supervisory expectations placed upon American universities. See *id.* at 1271-72.

53. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, THE 1915 DECLARATION OF PRINCIPLES, in ACADEMIC FREEDOM AND TENURE 155 (Louis Joughin ed. 1969); see also ROBERT M. MACIVER, ACADEMIC FREEDOM IN OUR TIME 6 (1955).

54. See Byrne, *supra* note 7, at 258-59.

55. See *id.* (stating that persons who engage in academic speech are rigidly controlled).

56. See *e.g.*, Keen v. Penson, 970 F.2d 252, 257 (7th Cir. 1992) (“[T]he asserted academic freedom of a professor can conflict with the academic freedom of the university to make decisions affecting that professor.”); Rubin v. Ikenberry, 933 F. Supp. 1425, 1433 (C.D. Ill. 1996)(citations omitted)(“Academic freedom refers to the freedom of university professors and the university administrators to function autonomously, without interference from the government. It also refers to the freedom of individual teachers to not suffer interference by the administrators of the university. These two freedoms can come into conflict.”); Cooper v. Ross, 472 F. Supp. 802, 813 (E.D. Ark. 1979)(“The present case is particularly difficult because it involves a fundamental tension between the academic freedom of the individual teacher to be free of restraints from the university administration, and the academic freedom of the university to be free of government, including judicial, interference.”). For Supreme Court discussion of this freedom see *Regents of the Univ. v. Ewing*, 474 U.S. 214, 226 n.12 (1985); *Widmar v. Vincent*,

Most significant for purposes of the discussion that follows, the AAUP included a value not expressly embodied by the two German freedoms: the freedom of extracurricular comment. In 1915, a police officer had a right to talk politics but not a right to be a police officer.⁵⁷ Thus, there was no constitutional prohibition against conditioning a university professor's employment upon what he might say as a citizen. As a result, in order to allow public discussions to benefit from the expertise of the academy, the AAUP included the freedom of extracurricular comment in the scope of academic freedom.⁵⁸

III. THE SUPREME COURT AND ACADEMIC FREEDOM

A. The Road to *Keyishian*

It was only after the issuance of the AAUP's Declaration of Principles was issued that courts began discussing academic freedom. *Meyer v. Nebraska*⁵⁹ is often mentioned as the United States Supreme Court's earliest exposition of a right of academic freedom.⁶⁰ *Meyer*, a Lochner era case, involved a private school teacher who was convicted of violating a statute that criminalized teaching the German language. At this time, modern free speech doctrine amounted to little more than a dissent by Justices Holmes and Brandeis.⁶¹ In fact, it was not until two years after *Meyer* that the Supreme Court first held that the First Amendment applied to the states.⁶² Thus, while to the modern eye *Meyer* presented a classic example of content discrimination, the First Amendment was not yet equipped to resist such proscriptions, leaving the statute to be challenged and overturned on substantive due process grounds.

In the Supreme Court's view, the group of rights protected by the Fourteenth Amendment included the right "to engage in any of the common occupations of life," which, of course, included teaching.⁶³

454 U.S. 263, 279 n.2 (1981) (Stevens, J., concurring); and *Regents of the Univ. v. Bakke*, 438 U.S. 265, 312 (1978). See also Paul Brest, *Protecting Academic Freedom Through the First Amendment: Raising the Unanswered Questions*, 66 TEX. L. REV. 1359 (1988); Matthew W. Finken, *Intramural Speech, Academic Freedom and the First Amendment*, 66 TEX. L. REV. 1323 (1988); Mark G. Yudof, *Intramural Musings on Academic Freedom: A Reply to Professor Finken*, 66 TEX. L. REV. 1351 (1988); Yudof, *supra* note 7, at 851-57. In the end, institutional academic freedom appears to nothing more than a manner of phrasing judicial deference to the expertise of the particular agency.

57. See *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

58. See Goldstein, *supra* note 7, at 1299.

59. 262 U.S. 390 (1923).

60. See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969); *Epperson v. Arkansas*, 393 U.S. 97, 105 (1968); Goldstein, *supra* note 7, at 1305-09; Van Alstyne, *supra* note 39, at 92.

61. See *Abrams v. United States*, 250 U.S. 616, 624-30 (1919) (Holmes, J. dissenting).

62. See *Gitlow v. New York*, 268 U.S. 652 (1925).

63. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

The right to engage in the common occupations of life is a right not all that distinct from a baker's right to contract.⁶⁴ To the extent that the Court in *Meyer* was concerned with the exchange of knowledge, it focused on the right of students to *acquire* knowledge,⁶⁵ not necessarily a teacher's right to individual autonomy within an educational institution.⁶⁶ While *Meyer* is rightfully recognized as a formative academic freedom case,⁶⁷ the teacher in *Meyer*, like the teacher in its companion case, *Bartels v. Iowa*,⁶⁸ was privately employed. Therefore, the case involved academic freedom of the sort embodied by Socrates, freedom of one citizen to instruct another on a subject of their mutual choosing. As a result, the Supreme Court could and did observe that the case did not raise the issue of "the state's power to prescribe a curriculum for institutions which it supports."⁶⁹

If *Meyer* marked the beginning of a new era, the dawn was very slow in breaking. The term "academic freedom" did not appear in a Supreme Court opinion for almost thirty years.

Just as the educational setting played a significant role in the evolution of equal protection doctrine,⁷⁰ it also played a crucial role in dispatching the right-privilege distinction embodied by Justice Holmes' epigram regarding police officers and politics. First, Justice

64. See *Lochner v. New York*, 198 U.S. 45 (1905).

65. See *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923).

66. The teacher's right to instruct as he pleased would have been presented more directly if he had been teaching German to the students despite the contrary wishes of the students' parents. Recognizing that the teacher possessed such a right, however, would have directly conflicted with a third concern articulated in *Meyer*, "the power of parents to control the education of their own." *Id.* at 401. Two years after *Meyer*, the Supreme Court seemed to place the full weight of the decision on this last concern, *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925), and today, *Meyer* has become a vehicle for parents to challenge the curricular choices made by school authorities. See *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174 (4th Cir. 1996)(challenging community service requirement); *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454 (2d Cir. 1996) (same); *Brown v. Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525 (1st Cir. 1995)(challenging safe sex program); *Murphy v. Arkansas*, 852 F.2d 1039 (8th Cir. 1988)(challenging requirements for home schooling); *Doe v. Irwin*, 615 F.2d 1162 (6th Cir. 1980) (challenging condom distribution program); *Null v. Board of Educ.*, 815 F. Supp. 937 (S.D. W. Va. 1993)(challenging home schooling requirements); *Clonlara, Inc., v. Runkel*, 722 F. Supp. 1442 (E.D. Mich. 1989)(same); *Hanson v. Cushman*, 490 F. Supp. 109 (W.D. Mich. 1980)(same); *Curtis v. School Comm.*, 652 N.E.2d 580 (Mass. 1995)(challenging program of condom availability); *People v. Bennett*, 501 N.W.2d 106 (Mich. 1993)(challenging requirements for home schooling); *Alfonso v. Fernandez*, 606 N.Y.S.2d 259 (N.Y. App. Div. 1993)(challenging condom distribution program).

67. See *Van Alstyne*, *supra* note 39, at 90.

68. 262 U.S. 404 (1923).

69. *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

70. See *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

Douglas invoked academic freedom in *Adler v. Board of Education*,⁷¹ a McCarthy era case challenging New York's Feinberg law which contained a host of First Amendment indignities. For the time being, however, the right-privilege distinction held, relegating Justice Douglas' exhortations to a dissent. Later that same year, however, the Supreme Court upheld a challenge by college professors to a loyalty oath requirement in *Wieman v. Updegraff*.⁷² Justice Frankfurter concurred, authoring one of the classic statements concerning academic freedom:

The process of education has naturally enough been the basis of hope for the endurance of our democracy on the part of all our great leaders, from Thomas Jefferson onwards.

To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole.⁷³

Despite the breadth of Justice Frankfurter's language, to the extent that *Wieman* involved academic freedom, the freedom at issue involved extracurricular comment. As with *Meyer* and *Adler*, the question of whether the First Amendment placed a limitation on the state's ability to regulate persons when they spoke as agents of the state was not presented.

Speech inside the classroom *was* involved in *Sweezy v. New Hampshire*,⁷⁴ but the plurality opinion by Chief Justice Warren carefully excluded the issue of the extent to which the state could regulate the content of state-supported education. Paul Sweezy was haled before a state attorney general charged with rooting out subversive persons. Mr. Sweezy was suspected of being just that sort of person and was generally forthright in his answers. Nevertheless, he refused to answer a question regarding a guest lecture he had delivered to a humanities class at the University of New Hampshire.⁷⁵ Mr. Sweezy's status as a guest lecturer, and therefore private citizen, left the Supreme Court with little opportunity to examine the state's ability to regulate the speech of teachers employed by the state. Chief Justice Warren framed the inquiry narrowly:

The State Supreme Court carefully excluded the possibility that the inquiry was sustainable because of the state interest in the state university. . . . The sole basis for the inquiry was to scrutinize the teacher as a person, and the inquiry must stand or fall on that basis.⁷⁶

Unburdened of the difficult issue, Chief Justice Warren concluded, "[w]e believe that there unquestionably was an invasion of petitioner's

71. 342 U.S. 485, 509 (1952).

72. 344 U.S. 183 (1952).

73. *Id.* at 196 (Frankfurter, J., concurring).

74. 354 U.S. 234 (1957).

75. *See id.* at 243-44.

76. *Id.* at 249 (citation omitted).

liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread.”⁷⁷

Justice Frankfurter added a concurrence, drawing academic freedom back to the university.

In a university knowledge is its own end, not merely a means to an end. A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest. A university is characterized by the spirit of free inquiry, its ideal being the ideal of Socrates—‘to follow the argument where it leads.’ . . . Dogma and hypothesis are incompatible, and the concept of an immutable doctrine is repugnant to the spirit of a university. The concern of its scholars is not merely to add and revise facts in relation to an accepted framework, but to be ever examining and modifying the framework itself.⁷⁸

While the rhetorical power of Justice Frankfurter’s writing seems at least equal to Justice Brennan’s work in *Keyishian*,⁷⁹ it took *Keyishian*, and the passage of time, to truly launch the modern academic freedom cases.⁸⁰ The passage of time, however, appears to have played the greater role because doctrinally *Keyishian* broke little new ground. The case involved another challenge to New York’s Feinberg law by college professors who refused to sign an oath stating that they had never been members of the Communist party. Fifteen years after *Adler*, the Court found the law to be unconstitutional.

While *Keyishian* anchors many lower court academic freedom cases, the case had precious little to do with the classroom speech of teachers. Instead, the right at issue was the right of political association,⁸¹ which is closely linked to the freedom of extracurricular comment, a right that now extends beyond university professors⁸² to

77. *Id.* at 250. Chief Justice Warren’s description of academic freedom is heavily anchored to a concern for independent inquiry and the production of scholarship.

No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Id.

78. *Id.* at 262-63 (Frankfurter, J., concurring)(quoting The Open Universities in South Africa 10-12)(statement of a conference of senior scholars from the University of Cape Town and the University of Witwatersrand).

79. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

80. See e.g., *State Bd. for Community Colleges and Occupational Educ. v. Olson*, 687 P.2d 429, 437 (Colo. 1984).

81. See *Elrod v. Burns*, 427 U.S. 347, 358-59 (1976)(Brennan, J., plurality)(“*Keyishian* squarely held that political association alone could not, consistently with the First Amendment, constitute an adequate ground for denying public employment.”); see also *Healy v. James*, 408 U.S. 169, 185-86 (1972)(citing *Keyishian* for proposition that government may not deny rights and privileges based upon “a citizen’s association with an unpopular organization”).

82. See *Perry v. Sindermann*, 408 U.S. 593 (1972).

public school teachers,⁸³ clerical workers⁸⁴ and trash haulers who serve the government as independent contractors.⁸⁵

In a very real sense, *Keyishian* marked the close of the era of loyalty oath cases rather than the start of a new era of academic freedom cases.⁸⁶ After *Keyishian*, the Court never solidified the rhetoric of the loyalty oath cases into an individual right of academic freedom within the educational institution.

B. The Road Not Taken

A year after *Keyishian*, the Supreme Court decided *Epperson v. Arkansas*⁸⁷ which involved a challenge to a state statute prohibiting the teaching of evolution.⁸⁸ The statute was a contemporary of, and similar to, the statute under which John Scopes had been prosecuted.⁸⁹ While Mr. Scopes lost at trial, he escaped sanction on appeal because of a sentencing error.⁹⁰ The Tennessee Supreme Court, however, made clear that the constitutionality of the statute was not to be doubted:

The statute before us is not an exercise of the police power of the state undertaking to regulate the conduct and contracts of individuals in their dealings with each other. On the other hand it is an act of the state as a corporation, a proprietor, an employer. It is a declaration of a master as to the character of work the master's servant shall, or rather shall not, perform. In dealing with its own employees engaged upon its own work, the state is not hampered by the limitation of . . . the Fourteenth Amendment to the Constitution of the United States.⁹¹

Writing for the Supreme Court in *Epperson* with a now-vibrant Free Speech Clause at his disposal, Justice Fortas linked the substantive due process decision of *Meyer* to modern notions of academic freedom, reciting *Keyishian's* admonition that "the First Amendment 'does not tolerate laws that cast a pall of orthodoxy over the classroom.'"⁹² *Meyer's* revival as a free speech case, however, was cut short as Justice Fortas abruptly changed directions: "For purposes of the present case, we need not re-enter the difficult terrain which the Court, in

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

84. See *Rankin v. McPherson*, 483 U.S. 378 (1987).

85. See *Board of County Comm'rs, Wabaunsee County v. Umbehr*, 518 U.S. 668 (1996).

86. Actually, *Whitehill v. Elkins*, 389 U.S. 54 (1967), decided later that term marked the end of the line. Related cases of the era that have not been discussed include *Baggett v. Bullitt*, 377 U.S. 360 (1964) and *Shelton v. Tucker*, 364 U.S. 479 (1960).

87. 393 U.S. 97 (1968).

88. See *id.* at 98.

89. See *Scopes v. State*, 289 S.W. 363 (Tenn. 1927).

90. See *id.* at 367.

91. *Id.* at 364-65.

92. *Epperson v. Arkansas*, 393 U.S. 97, 105 (1968)(quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

1923, traversed without apparent misgivings,⁹³ ignoring that the Court, in 1923, expressly had stated that it was not entering that terrain.⁹⁴ In the modern Court's view, the prohibition on evolution was a straightforward violation of principles set forth in earlier Establishment Clause cases.

While Establishment Clause principles offered an easy resolution of the case, that resolution did not necessarily occur outside traditional notions of academic freedom. Indeed, the belief that scientific knowledge should not be subject to religious veto is precisely the concern that made academic freedom necessary in the first place. In a very real sense then, *Epperson* joined the issue of academic freedom in dramatic fashion. Justice Fortas' discussion, however, did not prompt a discussion of the relationship between academic freedom and the Establishment Clause; rather it prompted concurrences from various Justices distancing themselves from the position stated by Justice Fortas that was linked to the Free Speech Clause. Justice Harlan disassociated himself from the discussion,⁹⁵ while Justice Stewart put a fence around it.⁹⁶ Justice Black, often considered a First Amendment absolutist, directly challenged Justice Fortas in terms that sounded much like the Tennessee Supreme Court in *Scopes*:

I am . . . not ready to hold that a person hired to teach school children takes with him into the classroom a constitutional right to teach sociological, economic, political, or religious subjects that the school's managers do not want discussed. . . . I question whether it is absolutely certain, as the Court's opinion indicates, that 'academic freedom' permits a teacher to breach his contractual agreement to teach only the subjects designated by the school authorities who hired him.⁹⁷

Thus, as the first opportunity to make something out of the rhetoric of *Keyishian*, *Epperson* did little in that regard. The Court then remained silent about individual academic freedom for nearly two decades.⁹⁸

93. *Id.*

94. See *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) ("Nor has challenge been made of State's power to prescribe a curriculum for the institutions which it supports.")

95. See *Epperson v. Arkansas*, 393 U.S. 97, 115 (Harlan, J., concurring).

96. See *id.* at 116 (Stewart, J., concurring):

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.

Id.

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

98. The Court, however, did discuss institutional academic freedom. See *Regents of the Univ. v. Ewing*, 474 U.S. 214, 226 n.12 (1985); *Widmar v. Vincent*, 454 U.S. 263, 278-79 (1981) (Stevens, J., concurring); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 747-48 (1979) (Powell, J., dissenting); *Regents of the Univ. v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell).

A genuine high school academic freedom case, *Memphis Community School District v. Stachura*,⁹⁹ reached the Supreme Court in 1986, but without the academic freedom question. In *Stachura*, a seventh grade teacher was placed on suspension following a public uproar over his teaching of a Life Science course that included a component of sex education. The teacher appeared to be more scapegoat than renegade. The material that the teacher had taught was part of the assigned curriculum.¹⁰⁰ As a lower court put it, the teacher's "exercise of 'academic freedom' had followed rather than violated his superior's instructions."¹⁰¹

The Supreme Court, however, expressly limited its decision to whether compensatory damages in a suit brought under 42 U.S.C. § 1983 could be based on the jury's assessment of the importance of the right at stake.¹⁰² When the teacher argued that the challenged damage award was appropriate because the case involved "a *substantive* constitutional right—[the teacher's] First Amendment right to academic freedom,"¹⁰³ the Court brusquely responded, "[o]ur grant of certiorari in this case does not encompass the question whether respondent stated or proved a claim under either the Due Process or the First Amendment,"¹⁰⁴ hardly an acknowledgment that the underlying judgment rested on settled law.

Two years later, creationism reappeared in *Edwards v. Aquilard*,¹⁰⁵ in which the Court assessed the constitutional validity of Louisiana's Balanced Treatment Act that required public schools to teach creation science if evolution was taught.¹⁰⁶ Again, the case again involved the conflict between science and faith, the traditional flashpoint for academic freedom disputes. Perhaps sensing the need to claim the pedagogical high ground, the legislators who adopted the Act asserted that the Act protected academic freedom.¹⁰⁷ As mentioned above, Justice Brennan, construing academic freedom to mean an individual right to teach what one pleased, dismissed academic freedom as irrelevant in a hierarchical system such as the secondary school setting, using terms that sounded suspiciously like those used by Justice Black in *Epperson*, and, by extension, the Tennessee

99. 477 U.S. 299 (1986).

100. *See id.* at 300-01.

101. *Stachura v. Truskowski*, 763 F.2d 211, 215 (6th Cir. 1985), *rev'd in part on other grounds sub nom.* *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299 (1986).

102. *See Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 304 (1986).

103. *Id.* at 309 (emphasis in original).

104. *Id.* at 309 n.12.

105. 482 U.S. 578 (1987).

106. *See id.*

107. *See id.* at 586.

Supreme Court in *Scopes*: “[T]eachers are not free, absent permission, to teach courses different from what is required.”¹⁰⁸

In the end, if one stares straight into the light of the Supreme Court’s rhetoric, it is possible to envision a right of academic freedom that allows teachers to do what Justice Brennan said that they may not, but as demonstrated by the limitations stated in *Meyer* and *Sweezy*, as well as by the footnotes in *Edwards* and *Stachura*, the Court itself has kept its eyes well-shaded. Individual academic freedom cases have come before the Supreme Court in three contexts. First, *Meyer* involved a prohibition that today would be quickly settled on the basis of the First Amendment’s prohibition against content-based restrictions on private speech.¹⁰⁹ Second, academic freedom played a quixotic role in the creationism cases, offered as an alternative justification in *Epperson* and dismissed as irrelevant in *Edwards*. Finally, academic freedom was invoked in the loyalty oath cases, all of which involved freedom of extracurricular comment, a right that is no longer reserved for teachers. As powerful as the Court’s rhetoric might have been, “*Keyishian* dealt with that brand of regulation most offensive to a free society: loyalty oaths. The Court’s pronouncements about academic freedom in that context, however, cannot be extrapolated to deny schools command of their own courses.”¹¹⁰ That, however, is precisely what happened to *Keyishian*.¹¹¹

IV. THE FIRST COMING OF HIGH SCHOOL ACADEMIC FREEDOM— PROCEDURE AND SUBSTANCE

Two years after the United States Supreme Court decided *Keyishian*, the First Circuit was presented with a case, *Keefe v. Geanakos*,¹¹² in which a high school teacher was dismissed after he assigned an article from *Atlantic Monthly* that used the word “motherfucker.”¹¹³ The case was framed by two important concessions. First, the district conceded that the teacher possessed a constitutionally protected right of academic freedom, but argued that the right was limited to using the materials selected by the school committee.¹¹⁴ Second, the district conceded that a teacher would have a constitutional right to challenge an arbitrary limitation on classroom

108. *Id.* at 586 n.6. *Accord* *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 779 (10th Cir. 1991) (“[T]he caselaw does not support [the] position that a secondary school teacher has a constitutional right to academic freedom.”); *Cary v. Board of Educ.*, 598 F.2d 535, 540 (10th Cir. 1979) (quoting with approval Justice Black’s concurrence in *Epperson*).

109. *See Reno v. American Civil Liberties Union*, 117 S. Ct. 2329 (1997).

110. *Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991).

111. *See infra* text accompanying notes 112-49.

112. 418 F.2d 359 (1st Cir. 1969).

113. *See id.* at 361.

114. *See id.* at 360.

materials.¹¹⁵ The issue then was whether the board's action was arbitrary. The court stated, "when we consider the facts at bar as we have elaborated them, we find it difficult not to think that its application to the present case demeans any proper concept of education."¹¹⁶

Keefe was followed shortly by *Parducci v. Rutland*¹¹⁷ which involved the dismissal of a teacher who assigned Kurt Vonnegut's "Welcome to the Monkey House" to an eleventh grade class.¹¹⁸ For guidance as to the teacher's constitutional rights in the classroom, the court relied upon *Tinker v. Des Moines Independent Community School District*,¹¹⁹ which famously stated that neither students nor teachers shed their constitutional rights at the schoolhouse gate.¹²⁰ Thus, the *Parducci* court considered the dispositive question to be whether the assignment caused a "material and substantial disruption" to the school environment,¹²¹ the standard articulated in *Tinker* for regulating the private speech of students¹²²

*Mailloux v. Kiley*¹²³ filled out what came to be the nucleus around which subsequent high school academic freedom cases came to orbit. The case concerned the dismissal of a teacher who used the word "fuck" as a means of explaining the concept of taboo. The First Circuit initially addressed the case after the teacher obtained a preliminary injunction from the district court enjoining his dismissal. The appellate court appeared to give a measured embrace of its earlier decision in *Keefe*:

The court in no way regrets its decision in *Keefe v. Geanakos*, but it did not intend thereby to do away with what, to use an old-fashioned term, are considered the proprieties, or to give carte blanche in the name of academic freedom to conduct which can reasonably be deemed both offensive and unnecessary to the accomplishment of educational objectives.¹²⁴

115. *See id.*

116. *Id.* at 362.

117. 316 F. Supp. 352 (M.D. Ala. 1970).

118. *See id.*

119. 393 U.S. 503 (1969).

120. *See id.* at 506.

121. *Parducci v. Rutland*, 316 F. Supp. 352, 355-56 (M.D. Ala. 1970).

122. *Tinker* involved the authority of school officials to regulate private speech that happens to occur on school grounds, not the authority of school officials to regulate the speech of teachers addressing a captive audience of students. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

123. The case involved three published decisions. The first affirmed the district court's entry of a preliminary injunction. *See Mailloux v. Kiley*, 323 F. Supp. 1387 (D. Mass. 1971). The second represented the district court's decision on the merits. *See Mailloux v. Kiley*, 436 F.2d 565 (1st Cir. 1971). The third involved the First Circuit's review of the final disposition. *See Mailloux v. Kiley*, 448 F.2d 1242 (1st Cir. 1971).

124. *Mailloux v. Kiley*, 436 F.2d 565, 566 (1st Cir. 1971) (citation omitted). The remark caused the Second Circuit to speculate that the First Circuit was retreating from *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969). *See Presidents Council, Dist. 25 v. Community Sch. Bd. No. 25*, 457 F.2d 289, 294 n.7 (2d Cir. 1972).

Regardless of whatever hesitation the circuit court may have been expressing, it affirmed the district court's order issuing the preliminary injunction and remanded the case for a trial on the merits.

On remand, the district court construed *Pickering v. Board of Education of Township High School District 205*,¹²⁵ an extracurricular comment case, and *Tinker*, a case involving the private speech of students, as demonstrating that teachers have free speech rights both in and out of the classroom although neither case had anything to do with the classroom speech of teachers. The court then distilled two distinct rights from *Keefe* and *Parducci*.¹²⁶

The first right was procedural, protecting a teacher from being discharged for using a teaching method that he or she would not have known was prohibited.¹²⁷ The second right was substantive, extending constitutional protection to a teacher's choice of teaching methods.¹²⁸ The court, however, stopped short of adopting the substantive right: "Perhaps, though *Keefe* and *Parducci* do not say so, the school authorities there involved were constitutionally free by express proscription to forbid the assignment of outside reading of magazine articles and novels of undoubted merit and propriety for which the teacher had not secured advance approval."¹²⁹ The court then formulated an awkwardly worded test of its own:

[T]his court rules that when a secondary school teacher uses a teaching method which he does not prove has the support of the preponderance opinion of the teaching profession or of the part of it to which he belongs, but which he merely proves is relevant to his subject and students, is regarded by experts of significant standing as serving a serious educational purpose, and was used by him in good faith the state may suspend or discharge a teacher for using that method but it may not resort to such drastic sanctions unless the state proves he was put on notice either by a regulation or otherwise that he should not have used that method.¹³⁰

The court defined this safeguard as an "exclusively procedural protection . . . afforded to a teacher not because he is a state employee, or because he is a citizen, but because in his teaching capacity he is engaged in the exercise of what may plausibly be considered 'vital First Amendment rights.'"¹³¹

Applying this procedural rule to the facts of the case, the court stated,

125. 391 U.S. 563 (1968).

126. See *Mallieux v. Kiley*, 323 F. Supp. 1387, 1390 (D. Mass. 1971), *aff'd per curiam*, 448 F.2d 1242 (1st Cir. 1971).

127. See *id.*

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

129. *Mailloux v. Kiley*, 323 F. Supp. 1387, 1390 n.3 (D. Mass. 1971), *aff'd per curiam*, 448 F.2d 1242 (1st Cir. 1971).

130. *Id.* at 1392.

131. *Id.* (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967)).

[t]here is no substantial evidence that [the teacher's] methods were contrary to an informal rule, to an understanding among school teachers of his school or teachers generally, to a body of disciplinary precedents generally, to precise canons of ethics, or to specific opinions expressed in professional journals or other publications.¹³²

When the case returned to the First Circuit, the panel began by denying that its earlier statement regarding *Keefe* marked a retreat.¹³³ While the First Circuit affirmed the district court's decision, it distanced itself from the analysis used by the district court: "[W]e suspect that any such formulation would introduce more problems than it would resolve."¹³⁴ More significantly, the circuit court was unable to conclude that the teacher's conduct fell within the protection of the First Amendment.¹³⁵ Instead, the court affirmed the lower court's decision solely on the basis of notice.¹³⁶

Although the doctrinal foundations of *Keefe*, *Parducci*, and *Mailloux* were built on extrapolations from a student speech case and extracurricular comment decisions, a line of high school academic freedom cases quickly attached those cases without any serious examination as to the strength of the anchor. A federal district court in Iowa, relying on all three cases, recognized the substantive and procedural rights mentioned by the district court in *Mailloux*.¹³⁷ A federal district court in Texas, again relying on *Keefe*, *Parducci* and *Mailloux*, then recognized a more limited right of academic freedom in the classroom.¹³⁸ The Fifth Circuit, however, vacated the district court's decision, expressly noting that it was not passing judgment on the district court's constitutional analysis.¹³⁹ The next year, however, in yet another case, the Fifth Circuit stated, "We thus join the First and Sixth Circuits in holding that classroom discussion is protected activity,"¹⁴⁰ despite the fact that the Sixth Circuit case that it cited had not reached such a conclusion,¹⁴¹ and the First Circuit's position was

132. *Id.*

133. *See Mailloux v. Kiley*, 448 F.2d 1242, 1243 (1st Cir. 1971)(per curiam).

134. *Id.*

135. *See id.* ("Here, however . . . we are not of one mind as to whether plaintiff's conduct fell within the protection of the First Amendment.")

136. *See id.*

137. *See Webb v. Lake Mills Community Sch. Dist.*, 344 F. Supp. 791, 799 (N.D. Iowa 1972).

138. *See Sterzing v. Fort Bend Indep. Sch. Dist.*, 376 F. Supp. 657, 661 n.1 (S.D. Tex. 1972), *vacated*, 496 F.2d 92 (5th Cir. 1974)("The freedom of speech of a teacher and a citizen of the United States must not be so lightly regarded that he stands in jeopardy of dismissal for raising controversial issues in an eager but disciplined classroom.")

139. *See Sterzing v. Fort Bend Indep. Sch. Dist.*, 496 F.2d 92, 93 (5th Cir. 1974).

140. *Kingsville Indep. Sch. Dist. v. Cooper*, 611 F.2d 1109, 1113 (5th Cir. 1980).

141. *See Minarcini v. Strongsville City School District*, 541 F.2d 577 (6th Cir. 1976), which held that the school board violated the First Amendment by removing

somewhat ambiguous in light of *Mailloux*.¹⁴² The Louisiana Court of Appeals then relied on *Mailloux* and *Keefe* to recognize a right of academic freedom, but held that a teacher's speech must have "some serious educational purpose" to receive constitutional protection.¹⁴³ The Fourth Circuit, relying on *Mailloux*, recognized the procedural notice right of academic freedom, but held that notice was provided by the statutory grounds for dismissal.¹⁴⁴ Still another federal district court in Texas, relying on *Keefe*, *Parducci* and *Mailloux*, recognized both the procedural and substantive rights.¹⁴⁵ A federal district court in New York then recognized a substantive right of academic freedom in the pedagogical methods used by a teacher, but was somewhat ambiguous as to the nature of the state interest necessary to overcome the right.¹⁴⁶ Next, the Colorado Supreme Court, relying on many of the cases mentioned above, stated

[v]arious courts, in the wake of *Keyishian*, have recognized that a teacher in a public educational institution has a constitutionally protected First Amendment interest in choosing a particular pedagogical method for presenting the idea-content of a course, as long as the course is part of the official curriculum of the educational institution and the teaching method serves a demonstrable educational purpose.¹⁴⁷

Later, in *Watson v. Eagle County School District RE-50*,¹⁴⁸ the Colorado Court of Appeals, taking the substantive right to its logical conclusion, held that the faculty advisor to a high school newspaper had a

some books from the library, but not by removing books from the curriculum, stating

[t]o the extent that this suit concerns a question as to whether the school faculty may make its professional choice of textbooks prevail over the considered decision of the Board of Education empowered by state law to make such decisions, we affirm the decision of the District Judge in dismissing that portion of the plaintiff's complaint.

Id. at 579-80.

142. The *Kingsville* court referred to *Keefe* as addressing the First Circuit's position, ignoring *Mailloux's* later treatment of *Keefe* and the fact that *Mailloux* declined to hold that a teacher's classroom speech is protected by the First Amendment. See *Mailloux v. Kiley*, 448 F.2d 1242, 1243 (1st Cir. 1971)(per curiam).
143. *Simon v. Jefferson Davis Parish Sch. Bd.*, 289 So.2d 511, 517 (La. Ct. App. 1974).
144. See *Frison v. Franklin County Bd. of Educ.*, 596 F.2d 1192, 1194 (4th Cir. 1979).
145. See *Dean v. Timpson Indep. Sch. Dist.*, 486 F. Supp. 302, 307 (E.D. Tex. 1979).
146. See *Mahoney v. Hankin*, 593 F. Supp. 1171, 1174-75 (S.D.N.Y. 1984).
147. *State Bd. for Community Colleges and Occupational Educ. v. Olson*, 687 P.2d 429, 437 (Colo. 1984). Notably, the case did not involve a disagreement concerning teaching methodology, but whether a program that the teacher directed would continue to be funded, an issue which the court acknowledged was left to the "broad discretion" of administrators. See *id.* at 438.
148. 797 P.2d 768 (Colo. Ct. App. 1990). *Watson* appears to have been implicitly overruled by a recent decision of the Colorado Supreme Court. See *Board of Educ. v. Wilder*, 960 P.2d 695 (Colo. 1998).

constitutional right to publish an article in the student paper despite a prior directive from her principal not to do so.¹⁴⁹

V. HAZELWOOD AND THE REGULATION OF SCHOOL-SPONSORED SPEECH

What is most surprising about *Watson* is that the opinion was written without reference to a two year old Supreme Court decision with facts so similar but a conclusion so different that it should have given the lower court at least some pause. In *Hazelwood School District v. Kuhlmeier*,¹⁵⁰ school administrators refused to allow student journalists to publish two articles in the school newspaper, raising the issue of the extent to which the school could regulate school-sponsored student speech.¹⁵¹ The Court did not apply *Tinker's* "material and substantial" disruption standard. Instead, it explained that *Tinker* involved "a student's personal expression that happens to occur on school premises,"¹⁵² while *Hazelwood* involved speech that "[s]tudents, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."¹⁵³ The Court held that in this setting "[e]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."¹⁵⁴ This standard is far more deferential to school officials' regulation of speech than *Tinker*: essentially, rational basis review in the educational setting.¹⁵⁵

149. See *Watson v. Eagle County Sch. Dist.* RE-50, 797 P.2d 768, 770 (Colo. Ct. App. 1990).

150. 484 U.S. 260 (1988).

151. This, of course, is precisely the same question raised by *Watson* except the challenge in *Watson* came from the faculty sponsor of the newspaper, not the students themselves.

152. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

153. *Id.*

154. *Id.* at 273.

155. See e.g., *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 533 (1973) (holding nonsuspect classifications only need be rationally related to a legitimate governmental purpose).

Legitimate pedagogical interests include prohibiting school-sponsored speech "that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with 'the shared values of a civilized social order,' or to associate the school with any position other than neutrality on matters of political controversy." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988) (citation omitted) (quoting *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683 (1986)). See also, *Miles v. Denver Pub. Schs.*, 944 F.2d 773, 778 (10th Cir. 1991) (holding schools have legitimate pedagogical interest in insuring that speech of teacher is sufficiently sensitive to privacy interests of students, is not inappropriate for maturity level, exhibits sound professional judgment, and does not embarrass students among their peers); *Virgil v. School Bd.*, 862 F.2d 1517,

While *Hazelwood*, like *Tinker*, did not involve the classroom speech of teachers, the Court noted that so long as school facilities have not been converted into a public forum, "school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the community."¹⁵⁶ Lower courts quickly interpreted this statement as authorizing school officials to regulate the classroom speech of teachers so long as the regulations were reasonably related to legitimate pedagogical concerns.¹⁵⁷

This standard was hardly new. The Second Circuit had applied a similar standard more than fifteen years earlier.¹⁵⁸ Comparable standards also had been invoked in other decisions,¹⁵⁹ including *Mailoux*¹⁶⁰ and Justice Holmes' dissent in *Meyer's* companion case.¹⁶¹

1523 (11th Cir. 1989)(holding legitimate pedagogical concerns include considering the sexuality and vulgarity used in texts); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 795 (5th Cir. 1989)(holding schools have legitimate pedagogical interest in shaping their curricula and demanding that teachers adhere to it); *Borger v. Bisciglia*, 888 F. Supp. 97, 100 (E.D. Wis. 1995)(holding schools have legitimate pedagogical interest in not exposing students to nudity, profanity, or graphic violence); *Krizek v. Board of Educ.*, 713 F. Supp. 1131, 1139 (N.D. Ill. 1989)(holding schools have legitimate pedagogical interest in preventing vulgarity and depictions of sexual conduct).

156. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988).

157. See *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 722 (2d Cir. 1994); *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993); *Miles v. Denver Pub. Schs.*, 944 F.2d 773, 778 (10th Cir. 1991); *Bishop v. Aronov*, 926 F.2d 1066, 1074 (11th Cir. 1991); *Roberts v. Madigan*, 921 F.2d 1047, 1057 n.11 (10th Cir. 1990); *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1008 (7th Cir. 1990); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 801 (5th Cir. 1989)(recognizing *Hazelwood*, but applying *Pickering*); *Virgil v. School Bd.*, 862 F.2d 1517, 1520-21 (11th Cir. 1989); *Lacks v. Ferguson Reorg. Sch. Dist. R-2*, 936 F. Supp. 676, 684 (E.D. Mo. 1996), *rev'd*, 147 F.3d 718 (8th Cir. 1998); *Krizek v. Board of Educ.*, 713 F. Supp. 1131, 1143 (N.D. Ill. 1989); *Board of Educ. v. Wilder*, 960 P.2d 695 (Colo. 1998). The *Hazelwood* standard also has been rejected by at least one court. See *Scallet v. Rosenblum*, 911 F. Supp. 999 (W.D. Va. 1996). Other courts have resolved such cases without reference to *Hazelwood* at all. See *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172 (3d Cir. 1990); *Hosford v. School Comm.*, 659 N.E.2d 1178 (Mass. 1996).

158. See *James v. Board of Educ.*, 461 F.2d 566, 574 (2d Cir. 1972)("What we require, then, is only that rules formulated by school officials be reasonably related to the needs of the educational process and that any disciplinary action taken pursuant to those rules have a basis in fact.")

159. See *Russo v. Central Sch. Dist. 1*, 469 F.2d 623, 631 (2d Cir. 1972)("Reasonable regulations designed to effect legitimate purposes, are well within the Board's power, and will be upheld against challenge, by the courts."); *Wilson v. Chancellor*, 418 F. Supp. 1358, 1364 (D. Or. 1976)("[S]chool boards may restrict teachers' expression if the restrictions are reasonable in light of the special circumstances of the school environment.")

160. See *Mailoux v. Kiley*, 448 F.2d 1242, 1243 (1st Cir. 1971)(per curium)("At present we see no substitute for a case-by-case inquiry into whether the legitimate interests of the authorities are demonstrably sufficient to circumscribe a teacher's speech."); see also *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir.

While *Hazelwood* has become the predominant framework for resolving high school classroom speech cases, its application has hardly been uniform, allowing a second strain of academic freedom cases to develop.

VI. THE SECOND COMING OF ACADEMIC FREEDOM—ALL PROCEDURE NO SUBSTANCE

The second generation of high school academic freedom cases, like the first generation, can be traced to the First Circuit. In *Ward v. Hickey*, a nontenured teacher's contract was not renewed following her discussion of aborting fetuses afflicted with Down Syndrome.¹⁶² She brought suit alleging a violation of her First Amendment rights. The jury returned a verdict in favor of the school district. On review the First Circuit stated, "we find that a school committee may regulate a teacher's classroom speech if: (1) the regulation is reasonably related to a legitimate pedagogical concern, and (2) the school provided the teacher with notice of what conduct was prohibited."¹⁶³ The circuit court cited to *Hazelwood* for the first proposition, and to *Keyishian* for the second, the latter having been decided on vagueness grounds.

The circuit court acknowledged that *Hazelwood* rejected a constitutional requirement of written regulations,¹⁶⁴ but assumed that the Supreme Court's discussion was limited to prepublication control of speech, suggesting that the Supreme Court would require notice for disciplining a teacher after the speech occurred, a suggestion *Ward* supported not with citation to Supreme Court authority but to *Mailoux* and *Keefe*.¹⁶⁵

Ward cast its notice requirement in the familiar formula of due process jurisprudence:

Of course, while we acknowledge a First Amendment right of public school teachers to know what conduct is proscribed, we do not hold that a school must expressly prohibit every imaginable inappropriate conduct by teachers. The relevant inquiry is: based on existing regulations, policies, discussions, and other forms of communication between school administrators and teach-

1993)("This circuit's test of teachers' speech regulation, as set out in *Mailoux*, is consistent with the Supreme Court's test, as set out in *Kuhlmeier*.")

161. See *Bartels v. Iowa*, 262 U.S. 404, 412 (1923) (Holmes, J., dissenting)("No one would doubt that a teacher might be forbidden to teach many things, and the only criterion of his liberty under the Constitution that I can think of is whether, considering the end in view, the statute passes the bounds of reason and assumes the character of arbitrary fiat.") (quotation omitted)

162. See *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993).

163. *Id.* at 452 (citations omitted).

164. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 n.6 (1988).

165. See *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir. 1993).

ers, was it reasonable for the school to expect the teacher to know that her conduct was prohibited.¹⁶⁶

Then, like Justice Fortas in *Epperson*, the First Circuit rendered its entire discussion superfluous by acknowledging that the teacher waived any notice argument.¹⁶⁷ The court quickly affirmed the verdict against the teacher and remanded the case to determine which portion, if any, of the teacher's litigation was frivolous.¹⁶⁸

Nevertheless, *Ward*, like *Keefe* before it, became the anchor for a second line of academic freedom cases built on the concept of notice.¹⁶⁹ In *Silva v. University of New Hampshire*,¹⁷⁰ a technical writing instructor who had been disciplined for violating the university's sexual harassment policy brought suit alleging a violation of his First Amendment rights.¹⁷¹ The allegations seemed fairly damning. Students complained about in-class remarks with sexual overtones, including a graphic description of sexual intercourse, and a description of a belly dancer as looking like a plate of Jello stimulated with a vibrator.¹⁷² Students were required to keep a daily log of their activities, cataloguing "what they did, with whom they did it, as well as what they thought and dreamed about."¹⁷³ The instructor requested and retained personal information from students ostensibly for a research project, but for which he had not obtained informed consent.¹⁷⁴ When an alternate section was set up for students who objected to the instructor's classes, twenty-six students transferred.¹⁷⁵

166. *Id.* at 454. Compare *Connaally v. General Const. Co.*, 269 U.S. 385, 391 (1926)(holding a statute fails to provide constitutionally adequate notice where persons of ordinary intelligence would have to guess at its meaning).

167. See *Ward v. Hickey*, 996 F.2d 448, 454-55 (1st Cir. 1993).

168. See *id.* at 455-56.

169. See *infra* notes 170-82, 193-94 and accompanying text. The notice requirement has not been uniformly accepted. The Second Circuit, relying on the same passage from *Hazelwood* that the First Circuit distinguished in *Ward*, held that notice was not a prerequisite for imposing discipline on a teacher for his or her classroom presentation. See *Silano v. Sag Harbor Union Free Sch. Dist. Bd. Of Educ.*, 42 F.3d 719, 723 (2nd Cir. 1994). In addition, prior to *Ward*, the Tenth Circuit upheld a school district's imposition of sanctions against a teacher for classroom speech in circumstances where the teacher had little reason to know that his speech would lead to sanctions. See *Miles v. Denver Pub. Sch.*, 944 F.2d 773 (10th Cir. 1991).

170. 888 F. Supp. 293 (D.N.H. 1994).

171. See *id.*

172. See *id.* at 306.

173. *Id.* at 307.

174. See *id.*

175. See *id.* A university appeals panel found that the teacher made a number of inappropriate remarks including remarking to a female student who was on her knees, "[i]t looks like you've had a lot of experience down there." *Id.* at 310. The district court, however, suspected that the panel was contaminated by the bias because during the university hearing, a panel member admonished the instruc-

Nevertheless, the district court enjoined the university from disciplining the instructor, finding on the basis of *Ward*, a First Amendment violation.¹⁷⁶ Specifically, the court concluded that the university's sexual harassment policy did not preclude verbal conduct that was not of a sexual nature. Then, addressing only the instructor's description of a belly dancer, and not the other incidents, the court stated that "the six complainants who were offended by [the statement] were under the mistaken impression that the word 'vibrator' necessarily connotes a sexual device."¹⁷⁷ Therefore, the court concluded the notice requirement was not satisfied.¹⁷⁸

Ward's notice requirement proved to be pivotal in a decision by the Supreme Judicial Court of Massachusetts, holding that a school board violated the First Amendment by refusing to rehire a nontenured teacher following a short classroom discussion about profanities including the term "fuck."¹⁷⁹

While the court professed to avoid the issue of academic freedom and resolve the case in terms of traditional First Amendment principles,¹⁸⁰ its conclusion was not framed by reference to any traditional free speech doctrine, but was based upon its determination of what constituted proper pedagogy:

[T]he case comes down to the single issue whether the decision first to discipline and then to take an unfavorable personnel action against Hosford because of that one brief class segment violated her constitutional rights. We are certain it did. The distinction between what the defendants concede was pedagogically valid at the beginning of that brief segment and the continuation of that same discussion for a few minutes more . . . is so insubstantial as to justify characterizing it as arbitrary and capricious.¹⁸¹

This passage would seem to dispose of the case, but the court hedged its position, stating that if there had been a policy flatly prohibiting the use of such words, "we might conclude that [the teacher] was bound to respect it on pain of the very consequences that were visited upon her."¹⁸² Thus, the court appeared to hold that arbitrary restrictions on speech are permissible so long as they are memorialized, creating a strong sense that the court was more concerned with employment protections than speech protections.

Later that same year in *Lacks v. Ferguson Reorganized School District R-2*,¹⁸³ *Hazelwood* was converted into a balancing test.¹⁸⁴ The

tor when, following a student's statement that not every household has Jello or a vibrator, the instructor audibly remarked, "[e]specially Jello." *Id.* at 309, 324.

176. *See id.* at 312-13.

177. *Id.* at 313.

178. *See id.*

179. *See Hosford v. School Comm.*, 659 N.E.2d 1178, 1179 (Mass. 1996).

180. *See id.* at 1180.

181. *Id.* at 1182.

182. *Id.*

183. 936 F. Supp. 676 (E.D. Mo. 1996), *rev'd*, 147 F.3d 718 (8th Cir. 1998).

case involved a teacher who was dismissed for allowing students to use what the school district termed "excessive profanity" in plays written and performed by the students.¹⁸⁵ The court stated,

Hazelwood contains the appropriate legal standard to apply in this case: Was defendant's termination of plaintiff reasonably related to legitimate pedagogical concerns? Application of this legal standard will inherently require the appropriate balance of the school's interest in prohibiting profanity and the teacher's interest in using the teaching method at issue in this case¹⁸⁶

Hazelwood, of course, contemplates categorization, not balancing, i.e., if the reason forwarded by supervising educators can be categorized as being reasonably related to legitimate pedagogical concerns, the inquiry is over.¹⁸⁷

The Eighth Circuit reversed the district court, but without expressly addressing the notion that *Hazelwood* becomes a balancing test when applied to teachers.¹⁸⁸ Instead, the court viewed the case as involving a teacher's failure to enforce the school district's policy regarding the use of profanity.¹⁸⁹ Thus, the policy regulating profanity, not the teacher's failure to enforce the policy, was the subject of First Amendment scrutiny. Once the policy was validated, the court, without expressly stating so, treated the teacher's failure to follow it as if no First Amendment issue was raised at all.¹⁹⁰ As to the notice argument, the court took note of the First Circuit's decision in *Ward*,¹⁹¹ but held that the teacher had been given adequate notice.¹⁹²

184. *See id.*

185. *See id.* at 678. The profanities included "nigger," "bitch," "ass," "shit," and, of course, "fuck." While the discussion in the text focuses on issues related to *Parducci*, the *Lacks* court drew *Ward*, and thereby *Keefe*, into the analysis. *See id.* at 684-85.

186. *Id.* at 684 (citations omitted). Moreover, the court interpreted *Hazelwood* as requiring that courts consider the severity of the sanction imposed for violating an otherwise legitimate restriction. *See id.* The notion that the First Amendment is concerned not only with the reasonableness of regulations, but the reasonableness of sanctions imposed for violating those regulations confuses the First Amendment with the Due Process Clause.

187. *Accord* *Virgil v. School Bd.*, 862 F.2d 1517, 1523 (11th Cir. 1990) ("It is of course true, as plaintiffs so forcefully point out, that *Lysistrata* and *The Miller's Tale* are widely acclaimed masterpieces of Western literature. However, after careful consideration, we cannot conclude that the school board's actions [in removing the books from the approved reading list] were not reasonably related to its legitimate concerns (for this high school audience) of the sexuality and vulgarity in these works.")

188. *See Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718 (8th Cir. 1998).

189. *See id.* at 724.

190. *See id.* at 724.

191. *See id.* at 723.

192. *See id.* The teacher in *Lacks*, unlike the teacher in *Ward*, had achieved tenure which would have entitled her to the due process protections of notice without reliance on the First Amendment.

The following year, the Colorado Court of Appeals converted the objective notice requirement of *Ward* into a subjective test in *Wilder v. Board of Education of Jefferson County School District*.¹⁹³ There, a teacher failed to abide by the school district's policy that required teachers to confer with the principal before using a controversial learning resource; in this case, an R-rated movie that contained scenes of explicit sexuality, nudity, violence, and repeated profanities. While the court acknowledged that other teachers had discussed the need for prior approval in the teacher's presence, and that a faculty meeting had been held to discuss the procedures that were used prior to showing the R-rated *Schindler's List*, it held "[w]e conclude that, absent a finding that [the teacher] had *actual knowledge* of that policy or that the policy was contained in some document that [the teacher] was required by Board policy to read, the board's decision was arbitrary and capricious and cannot stand."¹⁹⁴

The Colorado Supreme Court reversed the lower court, applying a straightforward *Hazelwood* analysis.¹⁹⁵ The Court treated the notice issue as one involving due process concerns, not the First Amendment, and held that publication satisfied due process.¹⁹⁶

Perhaps the most significant development arose in the Fourth Circuit where a panel reversed the dismissal of a drama teacher's claim that she had been deprived of her First Amendment rights because she was transferred after having her students stage a play that some members of the school community considered unsuited for a high school production.¹⁹⁷ The court applied *Hazelwood*, but held that *Hazelwood* is not amendable to resolving cases in the context of a motion to dismiss where only the teacher's allegations, not the school district's justifications are before the court.¹⁹⁸

Reviewing the case en banc, the full circuit held in a 7-6 vote that *Hazelwood* did not supply the controlling test, but that the *Pickering/Connick* line of cases should be applied.¹⁹⁹ Under *Pickering*, a court must first decide whether the teacher's speech involves a matter of public concern, and if so, then move to a balancing test to weigh the

193. 944 P.2d 598 (Colo. Ct. App. 1997), *rev'd*, 960 P.2d 695 (Colo. 1998).

194. *Id.* at 603 (emphasis added).

195. *See* Board of Educ. v. Wilder, 960 P.2d 695, 705-06 (Colo. 1998). As in *Lacks*, the teacher had earned tenure, and therefore could claim the protection of notice on due process grounds.

196. *See id.* at 705; *see also* Boring v. Buncombe County Bd. of Educ., 98 F.3d 1474, (4th Cir. 1996), *rev'd en banc*, 136 F.3d 364 (4th Cir. 1998).

197. *See* Boring v. Buncombe County Bd. of Educ., 98 F.3d 1474, 1478-79 (4th Cir. 1996).

198. *See* Boring v. Buncombe County Bd. of Educ., 136 F.3d 364 (4th Cir. 1998)(en banc)(relying on *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794 (5th Cir. 1989)).

199. *See id.* at 368; *see also* *Connick v. Myers*, 461 U.S. 138, 150 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563, 574 (1968).

teacher's interest in speaking out against the school's interest in conducting its educational mission without disruption.²⁰⁰ While other courts have found the classroom statements of teachers to be matters of public concern, the Fourth Circuit, relying on an earlier Fifth Circuit case, *Kirkland v. Northside Independent School District*,²⁰¹ found that the teacher's curricular speech was not a matter of public concern and therefore not entitled to any First Amendment protection.²⁰² On its face the court's conclusion seems completely incongruous; how could public education not be a matter of public concern? The Fifth Circuit's explanation is more precise than the Fourth's: "Issues do not rise to the level of public concern by virtue of the speaker's interest in the subject matter; rather they achieve that protected status if the words or conduct are conveyed by the teacher in his *role as a citizen* and not in his *role as an employee* of the school district."²⁰³

The *Boring* court's decision suddenly refocused the argument. It was no longer how *Hazelwood* should be applied, but whether it should be applied. *Hazelwood* is predicated on the assumption that when a teacher stands before a high school audience, his or her exercise of state power is clothed with at least some measure of constitutional protection. It is time to examine whether this proposition is true.

VII. WHEN THE STATE SPEAKS

The Supreme Court appears to have had something to say about the issue:

When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message. In the same vein, in *Rust v. Sullivan*. . . [w]e recognized that when the government appropriates government funds to promote a particular policy of its own it is entitled to say what it wishes.²⁰⁴

200. See *Blum v. Schlegel*, 18 F.3d 1005, 1012 (2nd Cir. 1994)(teacher's in-class speech on public policy issues is matter of public concern); *Birdwell v. Hazelwood Sch. Dist.*, 491 F.2d 490, 493 (8th Cir. 1974)(court assumed without elaboration that teacher's classroom remarks were matter of public concern); *Scallet v. Rosenblum*, 911 F. Supp. 999, 1011 (W.D. Va. 1996)(instructor's classroom speech matter of public concern); *Cohen v. San Bernardino Valley College*, 883 F. Supp. 1407 (C.D. Cal. 1995)(college professor's in-class speech matter of public concern).

201. 890 F.2d 794 (5th Cir. 1989).

202. See *Boring v. Buncombe County Sch. Dist.*, 136 F.3d 364 (4th Cir. 1996)(en banc).

203. *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 798-99 (5th Cir. 1989)(emphasis in original).

204. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2518 (1995)(citing *Rust v. Sullivan*, 500 U.S. 173 (1991)).

This passage comes from *Rosenberger v. Rector and Visitors of the University of Virginia*,²⁰⁵ which to be sure, was a public forum case, not an academic freedom case. Nonetheless, the Supreme Court drew a distinction of constitutional significance between persons using university resources for private expression and persons speaking on behalf of the university itself. The Court's reference to *Rust v. Sullivan*²⁰⁶ emphasized this point. *Rust* squarely addressed the issue of the extent to which the government could regulate the speech of persons speaking on its behalf.²⁰⁷ *Rust* involved a challenge to regulations adopted by the Department of Health and Human Services that prohibited recipients of Title X funding from discussing abortion as a family planning method. The regulations were challenged as an impermissible viewpoint-based restriction on speech. According to Chief Justice Rehnquist's majority opinion, however, neither viewpoint discrimination nor the First Amendment were involved. The government had "merely chosen to fund one activity to the exclusion of the other,"²⁰⁸ i.e., the government's decision to say one thing but not another is no concern of the First Amendment.

The Court recognized that "[t]he employees' freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority,"²⁰⁹ reasoning that sounds much like Justice Holmes' explanation of the relationship between police officers and politics. In *Rust*, however, participation in the program was not conditioned upon what a physician said outside the program. Instead, participation in the program was conditioned upon complying with the mission of the program itself. To reduce the *Rust* Court's reasoning to Justice Holmes' epigram: A police officer may have a right to criticize *Miranda v. Arizona*,²¹⁰ but he still has to read suspects their rights.²¹¹ Viewed in this manner, Chief Justice Rehnquist's reasoning is consistent with Justice Brennan's footnote in *Edwards* regarding academic freedom, Justice Black's concurrence in *Epperson*, and the Tennessee Supreme Court's reasoning in *Scopes*.

The political backdrop for *Rust* succeeded in making the case more controversial than its reasoning. The case is best explained by recognizing a straightforward point: the First Amendment does not require the government to speak out of both sides of its mouth, i.e.,

205. *Id.* at 2510.

206. 500 U.S. 173 (1991).

207. *See id.*

208. *Id.* at 193.

209. *Id.* at 199.

210. 384 U.S. 436 (1966).

211. *See id.*

where the government has to make a choice as to what will be said, it is allowed to make and enforce that choice. The Reagan administration deliberately chose not to give voice to a viewpoint that it found distasteful. In the context of public forum jurisprudence, this sort of picking and choosing is not tolerated even in nonpublic forums where the government's ability to regulate private speech is the strongest.²¹² The Court, of course, did not treat the federally-sponsored program as any sort of public forum. Instead, the Court treated the program as embodying the speech of the government, holding that the First Amendment is not implicated by the government's decision to say one thing, but not another, and by requiring its representatives to abide by the decision that has been made.²¹³

Thus, while the ideological gerry-rigging of medical advice in *Rust* is subject to attack on many fronts, the legal framework of the decision was neither new,²¹⁴ and in hindsight perhaps not particularly controversial. As Robert Post has since observed, "when the government is authorized to act in its own name as a representative of the community, its decision to promote one value cannot by itself carry an internal constitutional compulsion to simultaneously support other values."²¹⁵

The process of deciding what the government shall say is not a constitutional issue, but is left to the political process. While the Constitution places certain speech options, such as endorsing or denigrating religious beliefs, beyond the reach of the political process,²¹⁶ the Con-

212. See *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93 (1993); *Perry Educ. Ass'n. v. Perry Local Educ. Ass'n*, 460 U.S. 37, 46 (1983). Many courts and commentators have fallen into the increasingly strong gravitational pull of public forum jurisprudence by inquiring whether the classroom is a public or nonpublic forum. See *Miles v. Denver Pub. Sch.* 944 F.2d 773, 776 (10th Cir. 1991)(teacher's expression during class "must be treated as school-sponsored expression in a nonpublic forum"); *Murray v. Pittsburgh Bd. of Educ.*, 918 F. Supp. 838, 844 (W.D. Pa. 1996)("A public high school classroom is a nonpublic form."); see also Clarick, *supra* note 7, at 715-17 (discussing classroom as a nonpublic forum). *Rosenberger*, however, draws a clear distinction between a public forum created by university resources and the speech of the university itself. See *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2518 (1995). Public forum doctrine sets the rules that the government must follow when it allows private citizens access to public facilities for private speech. See *Lamb's Chapel* 508 U.S. 384 (nonpublic forum case involving private use of public facility); *Perry Educ. Ass'n*, 460 U.S. 37 (same). It does not intrude into the policymaking process used to determine what the government will say.

213. See *Rust v. Sullivan*, 500 U.S. 173, 193 (1991).

214. See *FCC v. League of Women Voters*, 468 U.S. 364, 405 (1984)(Rehnquist, J., dissenting); *Regan v. Taxation With Representation*, 461 U.S. 540 (1983).

215. Post, *supra* note 36, at 184 (emphasis deleted).

216. See *Capital Square Review and Advisory Bd. v. Pinette*, 115 S. Ct. 2440, 2446 (1995).

stitution has nothing to say about which constitutionally permissible speech option the political process ultimately must select.

VIII. BACK TO THE CLASSROOM

While *Keyishian* observed that the classroom is "peculiarly the marketplace of ideas,"²¹⁷ this observation does not address the question of who gets to stock the shelves of the market. The public school classroom is most assuredly not an open market. Only teachers, licensed by the state, are allowed to take the podium and speak. The citizens gathered before them are there under force of mandatory attendance laws. Dissenting members of the community have no right of access to this audience. Dissenting students have no constitutional right to opt out of a curriculum with which they disagree,²¹⁸ nor do they have an individual right that the curriculum be tailored to their beliefs.²¹⁹ Instead, dissenting students and parents have a collective right to seek a change in the curriculum through the democratic process, a right shared equally with teachers.²²⁰

The speech of a public school teacher is unquestionably an exercise of state power. If it were not, there would be no violation of the Establishment Clause when a teacher attempts to use the classroom to forward his or her religious beliefs.²²¹ The question of how state power will be exercised is answered by reference to state law.²²² Generally,

217. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

218. *See Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987)(holding that mere disagreement with ideas presented does not entitle students to opt out of curricula).

219. *See Herndon v. Chapel Hill-Carrboro Bd. of Educ.*, 89 F.3d 174 (4th Cir. 1996)(rejecting student/parent challenge to participation in school district's mandatory community service program); *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454 (2d Cir. 1996)(same); *Sherman v. Community Consol. Sch. Dist. 21*, 980 F.2d 437 (7th Cir. 1992)(holding that student who objects to reciting the Pledge of Allegiance has no right to demand that others do not recite it in his presence).

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

221. *See Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971)(holding that state-subsidized teachers may not inculcate religious beliefs); *Helland v. South Bend Comm. Sch. Corp.*, 93 F.3d 327, 331 (7th Cir. 1996)(holding that state-subsidized teachers may not inculcate religious beliefs); *Pelozo v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994)(stating "[t]o permit [the teacher] to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause of the First Amendment"). While a concurring judge in *Boring* tried to draw a distinction between the curricular classroom speech of teachers and their noncurricular classroom speech, *Boring v. Buncombe County Board of Educ.*, 136 F.3d 364, 372 (4th Cir. 1998)(Luttig, J., concurring), as a practical matter there may be no pen fine enough to draw this line. *See generally*, Macarena Hernandez, *Fired Teacher Is Stunned by Furor Over School Prayer*, N.Y. TIMES, June 30, 1998, at A21(describing dismissal of a teacher for violating school policy against religious proselytization).

222. *See e.g.*, *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988).

state law makes the local board of education the final decisionmaking authority for matters of curriculum.²²³ To date, the Supreme Court has recognized only Establishment Clause limitations upon what may or may not be taught in public schools.²²⁴ Beyond the Establishment Clause limitations, the Court has stated that members of a school board "might well defend their claim of absolute discretion in matters of curriculum by reliance upon their duty to inculcate community values."²²⁵

So where does this leave high school academic freedom?

IX. THE SUBSTANTIVE RIGHT OF ACADEMIC FREEDOM

Notwithstanding the broad statements of cases like *Parducci*, the substantive right of academic freedom has been overwhelmingly rejected.²²⁶ Indeed, courts were rejecting this right while the *Keefe*

-
223. See *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities."); see also COLO. CONST. art. IX, § 15 (1973) (vesting control of instruction in local boards of education).
224. See *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Stone v. Graham*, 449 U.S. 39 (1980); *Epperson v. Arkansas*, 393 U.S. 97 (1968). As a result, it is not unfounded to state, as the Seventh Circuit has, that the Establishment Clause provides the *only* limitation on a board's authority to set curriculum. See *Sherman v. Community Consol. Sch. Dist. 21*, 980 F.2d 437, 445 (7th Cir. 1992); see also *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1073 (6th Cir. 1987) (Bogg, J., concurring).
225. *Board of Educ. v. Pico*, 457 U.S. 853, 869 (1982). Few doubt, however, that the First Amendment would be powerless to prevent a school board from striking all favorable references to one political party from textbooks. Nonetheless, this does not answer the question of who would suffer the First Amendment violation, state actors or the victims of state action. In these circumstances the students' right to acquire knowledge, certainly an aspect of academic freedom, that was articulated in *Pico*, would expand beyond the school library. See *id.* at 866-67. In *Pico*, where the Supreme Court placed limitations on a school board's authority to remove books from the school library, the right ran to the students, not to the librarian. See *id.*
226. See *Edwards v. California Univ. of Pennsylvania*, 156 F.3d 488, 491 (3rd Cir. 1998) ("[A] public university professor does not have a first amendment right to decide what will be taught in the classroom."); *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 370 (4th Cir. 1998) (en banc) ("[W]e are of opinion that [the teacher] had no First Amendment right to insist on the makeup of the curriculum"); *Keen v. Penson*, 970 F.2d 252, 257 (7th Cir. 1992) ("This Court has recognized the supremacy of the academic institution in matters of curriculum content."); *Sherman v. Community Consol. Sch. Dist. 21*, 980 F.2d 437, 439 (7th Cir. 1992) ("The right of the school board to decide what the pupils are taught implies a corresponding right to require teachers to act accordingly."); *Bishop v. Aronov*, 926 F.2d 1066, 1077 (11th Cir. 1991) ("The University's conclusions about course content must be allowed to hold sway over an individual professor's judgments."); *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1007-08 (7th Cir. 1990) (First Amendment does not authorize teachers to ignore curricula or directives of supervisors); *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176

Parducci/Mailloux line of cases was developing.²²⁷ Moreover, subsequent decisions of the Supreme Court, have deprived *Parducci's* substantive right of virtually all support.

Recognizing a substantive right of academic freedom would effectively reverse the polarity of state power, allowing the decisions of subordinates to prevail over the decisions of their supervisors. Ultimately, the substantive right fails for a very basic reason: the Consti-

(3rd Cir. 1990)(teacher has no right of academic freedom that extends to the choice of classroom management techniques); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 802 (5th Cir. 1989)("We hold only that public school teachers are not free, under the first amendment, to arrogate control of curricula."); *Love-lace v. Southeastern Mass. Univ.*, 793 F.2d 419, 426 (1st Cir. 1986)("The first amendment does not require that each nontenured professor be made a sovereign unto himself."); *Palmer v. Board of Educ.*, 603 F.2d 1271, 1273 (7th Cir. 1979)(teachers do not have a constitutional right to disregard the valid dictates of their superiors); *Cary v. Board of Educ.*, 598 F.2d 535, 544 (10th Cir. 1979)("[T]he teachers want to be freed from the 'personal predilections' of the board. We do not see a basis in the constitution to grant their wish."); *East Hartford Educ. Ass'n v. Board of Educ.*, 562 F.2d 838, 857 n.5 (2nd Cir. 1977)("This final claim does not implicate the First Amendment. It is merely an assertion that one teaching technique is to be preferred over another."); *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 579 (6th Cir. 1976)("Clearly, discretion as to the selection of textbooks must be lodged somewhere and we can find no federal constitutional prohibition which prevents its being lodged in school board officials who are elected representatives of the people."); *Adams v. Campbell County Sch. Dist.*, 511 F.2d 1242, 1247 (10th Cir. 1975)("In the case at bar the teaching methods of [the teachers] may have had educational value as the expert testified, but this is not equivalent to saying that they had a constitutional right absolute in character to employ their methods in preference to more standard or orthodox ones."); *Hetrick v. Martin*, 480 F.2d 705, 709 (6th Cir. 1973)("Whatever may be the ultimate scope of the amorphous 'academic freedom' guaranteed to our Nation's teachers and students, it does not encompass the right of a nontenured teacher to have her teaching style insulated from review by her superiors")(citations omitted); *Clark v. Holmes*, 474 F.2d 928, 931 (7th Cir. 1972)("[T]he teacher] has cited no sound authority for his proposition that he had a constitutional right to override the wishes and judgment of his superiors. . . ."); *Ahern v. Board of Educ.*, 456 F.2d 399, 403-04 (8th Cir. 1972)("Miss Ahern was invested by the Constitution with no right . . . to persist in a course of teaching behavior which contravened the valid dictates of her employers, the public school board, regarding classroom method. . . ."); *Murray v. Pittsburgh Bd. of Pub. Educ.*, 919 F. Supp. 838, 844 (W.D. Pa. 1996)(teacher does not have constitutional right to select classroom management technique prohibited by administrators); *Fisher v. Fairbanks North Star Borough Sch. Dist.*, 704 P.2d 213, 216 (Alaska 1985)(when teacher and administrator disagree as to curricular content, administrator prevails); *Millikan v. Board of Dir.*, 611 P.2d 414, 417 (Wash. 1980).

227. See *Cary v. Board of Educ.*, 598 F.2d 535 (10th Cir. 1979); *East Hartford Educ. Ass'n v. Board of Educ.*, 562 F.2d 838 (2nd Cir. 1977); *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577 (6th Cir. 1976); *Adams v. Campbell County Sch. Dist.*, 511 F.2d 1742 (10th Cir. 1975); *Hetrick v. Martin*, 480 F.2d 705 (6th Cir. 1973); *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972); *Ahern v. Board of Educ.*, 456 F.2d 399 (8th Cir. 1972); see also *supra* note 212 and cases cited therein.

tution *limits* state power, it does not *allocate* state power to persons of its own choosing.

While there may be circumstances that justify creating this warp in state power in the university setting, the theory underlying academic freedom was not developed for the pedagogical model represented by the public schools. The high school is not the university writ small and failure to take full account of the differences between the two settings is a disservice to the university, diminishing its unique function and independence.²²⁸

Even when courts do not ignore the differences between the university and the high school setting, they tend to focus on only the obvious differences, not necessarily the most important ones. A surprisingly harsh summary of the obvious differences can be found in *Mailloux*:

The secondary school more clearly than the college or university acts *in loco parentis* with respect to minors. It is closely governed by a school board selected by a local community. The faculty does not have the independent traditions, the broad discretion as to teaching methods, nor usually the intellectual qualifications, of university professors. Among secondary school teachers there are often many persons with little experience. Some teachers and most students have limited intellectual and emotional maturity. Most parents, students, school boards, and members of the community usually expect the secondary school to concentrate on transmitting basic information, teaching 'the best that is known and thought in the world,' training by established techniques, and, to some extent at least, indoctrinating in the *mores* of the surrounding society. While secondary schools are not rigid disciplinary institutions, neither are they open forums in which mature adults, already habituated to social restraints, exchange ideas on a level of parity. Moreover, it cannot be accepted as a premise that the student is voluntarily in the classroom and willing to be exposed to a teaching method which, though reasonable, is not approved by the school authorities or by the weight of professional opinion. A secondary school student, unlike most college students, is usually required to attend school classes, and may have no choice as to his teacher.²²⁹

The most important difference, however, is the educational model applicable to each setting. Academic freedom arose not to mandate ideological diversity in proprietary institutions—which, after all, would interfere with the ideological freedom of those institutions—but to protect the ability of scholars at true universities to challenge existing knowledge without fear of sanction from those outside the academic community. The production of scholarship does not fall within the job description of high school teachers. Instead, the Supreme Court has described public schools in terms that are reminiscent of the AAUP's description of "proprietary institutions":

228. See Byrne, *supra* note 7, at 288 n.137 (arguing that a clear distinction should be kept between claims of academic freedom by university professors and school teachers).

229. *Mailloux v. Kiley*, 323 F. Supp. 1387, 1392 (D. Mass. 1971), *aff'd per curiam*, 448 F.2d 1242 (1st Cir. 1971).

We have . . . acknowledged that public schools are vitally important 'in the preparation of individuals for participation as citizens,' and as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system.' We are therefore in full agreement with petitioners that local school boards must be permitted 'to establish and apply their curriculum in such a way as to transmit community values,' and that 'there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.'²³⁰

The Court also has recognized the pivotal role that teachers play in the success of this process:

[A] teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities.²³¹

Given the importance of this function, the notion that a teacher is authorized to exercise state authority in a manner of his or her own choosing misapprehends academic freedom, misunderstands the Constitution and generally tilts at windmills. It misapprehends academic freedom because it mistakes one educational model for another. It misunderstands the Constitution because it treats the First Amendment as a delegation of state power. And finally, it tilts at windmills because while the evil imagined is a school system turned into an ideological empire, ideology is almost never at issue in high school aca-

230. *Board of Educ. v. Pico*, 457 U.S. 853, 864 (1982)(Brennan, J., plurality)(citations and quotations omitted); *see also* *Ambach v. Norwick*, 441 U.S. 68, 76 (1979)("The importance of public schools in the preparation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions."); *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1953)("[Public education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."); *Zykan v. Warsaw Community Sch. Corp.*, 631 F.2d 1300, 1305 (7th Cir. 1980)(citation omitted) ("[I]t is in general permissible and appropriate for local boards to make educational decisions based upon their personal social, political and moral views."); *Cary v. Board of Educ.*, 598 F.2d 535, 543 (10th Cir. 1979)(citation omitted)("It is legitimate for the curriculum of the school district to reflect the value system and educational emphasis which are the collective will of those whose children are being educated and who are paying the costs.")

Nonetheless, courts often retreat to the rhetoric of *Keyishian* that the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). *See* *Dube v. State Univ. of New York*, 900 F.2d 587, 598 (2d Cir. 1990)(quoting *Keyishian v. Board of Regents*, 385 U.S. 589 (1967)); *Zykan v. Warsaw Community Sch. Corp.*, 631 F.2d 1300, 1306 (7th Cir. 1980)(quoting *Keyishian v. Board of Regents*, 385 U.S. 589 (1967)); *Scallet v. Rosenblum*, 911 F. Supp. 999, 1014 (W.D. Va. 1996)(quoting *Keyishian v. Board of Regents*, 385 U.S. 589 (1967)). This passage from *Keyishian*, however, hardly forwards the analysis. Are schools free to inculcate orthodox values, but constitutionally forbidden from doing an effective job of it? If the constitutional critical mass is a "pall," how is such a thing measured?

231. *Ambach v. Norwick*, 441 U.S. 68, 78-79 (1979).

democratic freedom cases. More often, the dispute is over the use of profanity, hardly the stuff for which Socrates died.²³² The issues presented in high school academic freedom cases do not require technical expertise or detailed knowledge of a discrete field. Instead, the questions generally involve value-based decisions that require a sense of the community. These are precisely the questions that are best resolved through the democratic process. So long as the local board's choices do not intrude on the constitutional rights of students, limited perhaps exclusively to rights under the Religion Clauses, there is no reason for courts to intrude into disagreements between state actors as to which constitutionally permissible form of expression is the most appropriate choice.

Two primary arguments are raised in favor of vesting high school teachers with preeminent authority over the classroom, one prescriptive, the other proscriptive. The proscriptive argument is that by delegating state authority to individuals, we diminish the power of the schools to impose a unitary view on students. Besides its awkward constitutional structure, this argument is flawed on a number of fronts. First, students are expected to emerge from secondary school with a sense of, and respect for, the values of the community.²³³

Second, the argument overestimates the ability of schools to work their will. *Tinker's* reminder that students do not shed their constitutional rights at the school house gate, makes us forget what happens to students' constitutional rights when they *exit* the gate. Beyond the school yard are a number of voices competing for their attention: parents, siblings, friends, and the roar of popular culture, all protected by a powerful and free-ranging First Amendment. While this unitary view argument is fueled by our fear of Big Brother, Big Brother never had to compete with the likes of John Lennon, Johnny Rotten, or Tupac Shakur. So long as the First Amendment remains vital, there never will be a shortage of persons reminding students that school officials, teachers included, do not have a monopoly on moral rectitude.²³⁴

232. See *Fowler v. Board of Educ.*, 819 F.2d 657 (6th Cir. 1987); *Martin v. Parish*, 805 F.2d 583 (5th Cir. 1986); *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969); *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 936 F. Supp. 676 (E.D. Mo. 1996), *rev'd*, 147 F.3d 718 (8th Cir. 1998); *Krizek v. Board of Educ.*, 713 F. Supp. 1131 (N.D. Ill. 1989); *Webb v. Lake Mills Community Sch. Dist.*, 344 F. Supp. 791 (N.D. Iowa 1972); *Mailloux v. Kiley*, 323 F. Supp. 1387 (D. Mass. 1971), *aff'd per curiam*, 448 F.2d 1242 (1st Cir. 1971); *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970); *Hosford v. School Comm.*, 659 N.E. 2d 1178 (Mass. 1996); *Board of Educ. v. Wilder*, 960 P.2d 695 (Colo. 1998).

233. See *supra* text accompanying notes 230-33; Yudof, *supra* note 7, at 849 ("[T]he very mission of public schools is to indoctrinate.")

234. See generally Paul Simon, *Kodachrome* (1973) ("When I think back on all the crap I learned in high school, it's a wonder I can think at all.")

A third problem with the proscriptive argument is that the First Amendment is brutally strong medicine. In the eyes of the First Amendment, the racist tract, *THE TURNER DIARIES*,²³⁵ is the equal of Ralph Ellison's *INVISIBLE MAN*.²³⁶ If we incorporate the First Amendment into the classroom in its full vigor²³⁷ at the invitation of a single person, hateful voices would gain entry to a room where listeners are not permitted to leave. To prevent this, we would have to create a First Amendment Lite which tolerates some ideas, but not others. This, of course, returns us to the original dilemma: who decides what viewpoints are appropriate for the classroom?

The prescriptive argument is the mirror image to the proscriptive argument: delegating state curricular authority to individuals preserves democracy which thrives on a diversity of ideas. This argument, however, contains the same flaws as the proscriptive argument. Public schools serve an inculcative function. There is no shortage of diverse voices speaking to students. And someone has to decide what values are to be conveyed in the classroom. While vesting this decision in individuals might seem like diversity, it would not feel like diversity to the students in the classroom dominated by the teacher.²³⁸ Finally, the prescriptive argument carries with it the odd assertion that democracy is served by removing democracy from the educational decisionmaking process. One virtue of the board of education system is that when dissenting parents assert that the school curriculum offends their sensibilities,²³⁹ the curriculum has been legitimized through the democratic process.²⁴⁰ While the curriculum may not suit parents or teachers who have not prevailed in the political process, losing in the marketplace of ideas is a routine experience in a democracy.

Some courts have articulated an abbreviated substantive right of academic freedom authorizing teachers not to set, but to implement,

235. ANDREW MACDONALD, *THE TURNER DIARIES* (1980).

236. RALPH ELLISON, *INVISIBLE MAN* (1952).

237. See Clarick, *supra* note 7, at 717-20 (arguing that viewpoint discrimination is never an appropriate pedagogical end).

238. See Goldstein, *supra* note 7, at 1343 ("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.")

239. See *Herndon v. Chapel Hill-Carrboro City Bd. Of Educ.*, 89 F.3d 174 (4th Cir. 1996); *Immerato v. Rye Neck Sch. Dist.*, 73 F.3d 454 (2nd Cir. 1996).

240. See *Sherman v. Community Consol. Sch. Dist. 21*, 980 F.2d 437, 445 (7th Cir. 1992)(citation omitted)("Government . . . retains the right to set the curriculum in its own schools and insist that those who cannot accept the result exercise their right under *Pierce v. Society of Sisters*, and select private education at their own expense. The private market supports a profusion of schools, many tailored to religious or cultural minorities, making the majoritarian curriculum of the public schools less oppressive.")

the curriculum in a manner of their own choosing.²⁴¹ This abbreviated right, however, is subject to the same critique as the broader right. If the Constitution plays no favorites in large pedagogical disagreements (setting the curriculum), there is little basis for asserting that it picks the winners in small pedagogical disagreements (implementing the curriculum). In addition, given that this right protects only methodology, not ideology, the ideological diversity argument offers no support for the right. Finally, the abbreviated right ignores that the most passionate debates in modern education are not over *what* will be taught, but *how* it will be taught.²⁴²

X. THE PROCEDURAL RIGHT OF ACADEMIC FREEDOM: CAN THERE BE PROCEDURE WITHOUT SUBSTANCE?

While courts generally have rejected the substantive right of academic freedom, the procedural right of notice shows remarkable persistence. The unexamined issue here is from where does this right arise?

Even courts that recognize the procedural right concede that teachers do not have a substantive speech right.²⁴³ Instead, the procedural right reflects a due process concern.²⁴⁴ Due process, however, is not a self-executing right. Instead, there must be a constitutionally protected interest which due process safeguards.²⁴⁵ Generally, once teachers have served a certain period of time, state law confers a property interest in continued employment protected by the Due Process Clause, and with it, the requirement of notice. Thus, when a tenured teacher is being dismissed, notice is a constitutional requirement wholly apart from the First Amendment.

241. See *e.g.*, *State Bd. for Community Colleges and Occupational Educ. v. Olson*, 687 P.2d 429, 437 (Colo. 1984).

242. See generally *Bradley v. Pittsburgh Bd. of Pub. Educ.*, 910 F.2d 1172 (3rd Cir. 1990)(teacher sought right to implement classroom management techniques of her choosing); *Murray v. Pittsburgh Bd. of Pub. Educ.*, 919 F. Supp. 838, 844 (W.D. Pa. 1996) (same); see also Nicholas Lemann, *The Reading Wars*, ATLANTIC MONTHLY, Nov. 1, 1997 at 128 (describing the debate in California over the use of phonics and/or whole language reading methodologies).

243. See *Hosford v. School Comm.*, 659 N.E. 2d 1178, 1182 (Mass. 1996); *Mailloux v. Kiley*, 448 F.2d 1242, 1243 (1st Cir. 1971)(per curiam).

244. See *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1177 (3d Cir. 1990)("Although [the teacher] couches her claim in First Amendment terms, her argument is basically a due process one."); *Mailloux v. Kiley*, 448 F.2d 1242, 1243 (1st Cir. 1971)(per curiam)("Sanctions in this circumstance would be a denial of due process.")

245. See *e.g.*, *Board of Regents v. Roth*, 408 U.S. 564 (1972). Not surprisingly then, academic freedom cases often involve untenured teachers who do not have a property interest in continued employment. See, *e.g.*, *Lovelace v. Southeastern Mass. Univ.*, 793 F.2d 419 (1st Cir. 1986); *Hetrick v. Martin*, 480 F.2d 705 (6th Cir. 1973); *Krizek v. Board of Educ.*, 713 F. Supp. 1131 (N.D. Ill. 1989); *Hosford v. School Comm.*, 659 N.E.2d 1178 (Mass. 1996).

School districts may refuse to renew the contracts of untenured teachers for any or no reason and wholly without notice.²⁴⁶ Under the procedural right, however, a school district cannot release a nontenured teacher, or impose a sanction short of dismissal upon a tenured teacher, for something he or she said in the classroom unless the teacher was adequately appraised that the statement would lead to discipline. Indeed, if the procedural right is a speech-based right, then school authorities would not be able to issue a disciplinary memo to a tenured teacher or choose not to renew the contract of an untenured teacher, absent prior notice, for any of the following reasons:

- The teacher's statement of class objectives was not sufficiently specific;
- The teacher referred to a student's older sibling as an example of someone with little ambition or promise; or
- The teacher delivered a history lesson that was not sufficiently sensitive to the concerns of minority students.

In each of these circumstances, employment decisions are based on speech. Nevertheless, it is doubtful that courts would intervene in these circumstances.

So what gives courts the impetus and, more important, the authority, to intervene in academic freedom cases? As to the issue of authority, the Massachusetts Supreme Judicial Court invoked the procedural right through simple assertion: "In this case . . . what is in issue is quite straightforwardly an attempt by government officers to punish a person for what that person has said, and this squarely implicates the First Amendment."²⁴⁷

The court's point, however, is more straightforward than accurate. We routinely punish people for things they say without so much as a wink at the First Amendment. Conspiracy, price fixing,²⁴⁸ sexual harassment,²⁴⁹ extortion,²⁵⁰ blackmail,²⁵¹ and threatening the President of the United States,²⁵² all punish people for things they say, yet the First Amendment is not implicated because conduct that is otherwise sanctionable does not become constitutionally protected merely because it is effected through speech.²⁵³ The illustrations offered above reflect poor judgment on the part of the teacher and poor judgment manifested through speech is not entitled to any greater constitutional dignity than poor judgment manifested through action.

246. See *Mount Healthy City Sch. Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274, 283 (1977).

247. *Hosford v. School Comm.*, 659 N.E.2d 1178, 1181 (Mass. 1996).

248. See *Federal Trade Comm'n v Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 431 (1990).

249. See 42 U.S.C. § 2000e-5 (1994).

250. See MODEL PENAL CODE § 223.4 (1962).

251. See *id.*

252. See 18 U.S.C. § 871 (1994).

253. See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

Teaching is an occupation effected through speech. Indeed, the normal operations of schools would be rife with First Amendment horror shows if only the First Amendment applied.²⁵⁴ Teachers are routinely required to have their lesson plans approved in advance: prior restraints. They are often called upon to teach from a text with which they have a measure of disagreement: coerced speech. And, of course, viewpoint discrimination is rampant: humans evolved from lower species; the Holocaust did occur, and racial stereotyping is bad.

At what point then does an occupation effected through speech become a constitutionally protected activity? If viewpoint discrimination is impermissible, then the constitution creates a "balanced treatment act" for virtually every aspect of the curriculum. If speech that reflects poor teaching, and therefore poor conduct, is the line of demarcation, the line is more illusory than real.

In practice, the procedural right arises only in cases that *feel* like First Amendment cases. Suppose that precisely the same incident that occurred in *Hosford*, where the teacher's contract was not renewed after a brief classroom discussion concerning the word "fuck," occurred in a second school district. Here, however, the school board recognized that the teacher was faced with a difficult situation and her use of profanity, while unfortunate, was not serious enough to merit even mild discipline. Nevertheless, the board felt that it could find a teacher who would respond more gracefully in difficult situations. Therefore, it declined to renew the teacher's contract in the hope that the school district could find a candidate who is quicker on her feet.

As in *Hosford*, the board's decision is based entirely on the board's assessment of what the teacher said in the classroom. Moreover, in the hypothetical situation, the teacher would have the same basis for arguing that she had little reason to know that her speech would cause the board to look for another candidate. Nevertheless, it is doubtful that a court would intervene in this second scenario. Yet, if knowledge of what speech might diminish one's chances of being hired is the object to be protected, then the teacher should be entitled to reinstatement.

The easy distinction to make is that the hypothetical board's decision was based on a performative aspect of teaching, which, of course, feels like *conduct* for which the First Amendment offers no protection.²⁵⁵ In contrast, the board's decision in *Hosford* was based on op-

254. See Yudof, *supra* note 7, at 838-39 ("Or consider the postal employee who embraces the constitutional right to be rude to patrons by eschewing regulations requiring civility in his dealings with stamp-purchasers as an unconscionable interference with his professional autonomy . . .")

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

position to the use of the word "fuck" which feels like a content-based sanction on speech.

But does the distinction hold up? If the sole concern is notice, there is no distinction. In each case, the teacher is entirely without notice that the incident would cause her not to be rehired. If the object to be protected is speech, in each case, the board reached a judgment based entirely on what the teacher said. In the hypothetical case, the board decided not to rehire the teacher because it felt that the teacher's conduct was not up to the district's standards of performance. In *Hosford*, the board decided not to rehire the teacher because it felt that the teacher's conduct was substandard because of what she said, i.e., the use of profanity. To argue that the situation in *Hosford* was based on an impermissible consideration assumes that regulating the use of profanity in the classroom is, to borrow *Hazelwood's* terminology, not a legitimate pedagogical concern, and it would be a rare court that would reach such a conclusion directly.

In the end, the notice requirement is an anomaly invoked by courts where they sense that an *employment* injustice has been done; an ostensibly speech-based right that protects employment, not speech, in situations where the Constitution does not protect employment. As an anomaly, of course, its application is less than uniform. Almost certainly, government employees whose work is not effected through speech are dismissed for reasons they did not anticipate. "Academic-freedom claims become too easily just ways of defending job security."²⁵⁶ Providing an adequate measure of job security ought to be a concern of any rational society, but it does not necessarily follow that job security is a concern of the First Amendment.

XI. CONCLUSION

Academic freedom is of unquestioned importance and it comes in many forms. The Supreme Court's decision in *Reno v. American Civil Liberties Union*²⁵⁷ was an important victory for the freedom of citizens to exchange information on topics of their choosing. While some would still like to exercise a religious veto over scientific inquiry, the Constitution prevents the government from protecting religious beliefs from the results of scientific inquiry.²⁵⁸ Similarly, the freedom of public employees to speak out on matters of public concern, while no longer limited to the academy, unquestionably exists.²⁵⁹ Academic freedom ought to protect the work of publicly-employed scholars from sanctions imposed for reasons unrelated to the scholarly merit of their

256. Edmund L. Pincoffs, *Introduction in THE CONCEPT OF ACADEMIC FREEDOM*, ix (Edmund L. Pincoffs ed., 1972).

257. 117 S. Ct. 2329 (1997).

258. See *Epperson v. Arkansas*, 393 U.S. 97 (1968).

259. See *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

work, and public concern jurisprudence probably does so. In this sense, academic freedom indeed is "a special concern of the First Amendment."²⁶⁰ Nonetheless while liberty is a special concern of the Fourteenth Amendment, we do not assume that zoning regulations are constitutionally suspect. Instead, we inquire further. When it comes to academic freedom, however, we neither define our terms nor inquire further. It is ironic that a value intended to strengthen our basic premises by subjecting them to challenge, should go undefined and unchallenged. Theories that are exempted from challenge tend to be the weakest and the easiest to destroy once they are challenged. In the spirit of inquiry then, courts and scholars alike should resolve that when they speak of academic freedom they will define their terms, ask the difficult questions and follow the argument where it leads.

260. *Id.* at 603.