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Cary v. Board of Education: Academic Freedom at the High School Level

Doris B. Truhlar

CASE NOTE

CARY V. BOARD OF EDUCATION: ACADEMIC FREEDOM AT THE HIGH SCHOOL LEVEL

INTRODUCTION

Academic freedom, now recognized as one of the protected first amendment interests, is a relative newcomer in the catalogue of safeguarded rights.[1] Perhaps because it encompasses so many varying interests, its development has been piecemeal.[2] While the federal courts have been eager to recognize the existence of academic freedom, those courts that have grappled with issues involving this interest have not been able to define its contours.

The Tenth Circuit Court of Appeals, in *Cary v. Board of Education*,[3] authored a recent chapter in the continuing development of academic freedom. A case of first impression,[4] *Cary* has the potential of foreclosing any right of high school teachers to select and supplement materials used in their own classes. *Cary* was a civil rights action[5] in which five high school teachers in the Aurora, Colorado schools sought a declaratory judgment that their rights were violated when the school board banned ten books.[6] All the books had been used previously.[7]

The trial court found that, although the teachers did have a constitutional right to use the books,[8] the right had been waived by the plaintiffs

1. For a comparison of the treatment of academic freedom in two twentieth century cases decided 41 years apart, *see* Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927) and Epperson v. Ark., 393 U.S. 97 (1968), discussed in notes 41-53 and accompanying text *infra*. *See also* Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841, 841-47 [hereinafter cited as *Teachers Rights*]. *See* note 41 *infra*.

2. In addition to teachers and students, other groups often are involved in academic freedom controversies. Parents often have been the plaintiffs in actions involving educational issues. *See, e.g.*, Williams v. Bd. of Educ., 388 F. Supp. 93 (S.D.W.V. 1975), in which the plaintiff-parents claimed their rights were violated because school textbooks undermined their religious beliefs and invaded their families' privacy because they were anti-Christian in content. 388 F. Supp. at 94-95.

See note 88 *infra* for a discussion of the categories of cases that may be viewed as related to academic freedom.

3. 598 F.2d 535 (10th Cir. 1979).

4. *Id.* at 542.

5. The plaintiffs alleged jurisdiction under 28 U.S.C. § 1343 (1976), 42 U.S.C. § 1983 (1976), and 28 U.S.C. § 1331 (1976). Cary v. Bd. of Educ., 427 F. Supp. 945 (D. Colo. 1977), *aff'd on other grounds*, 598 F.2d 535 (10th Cir. 1979).

6. 598 F.2d at 536.

7. *Id.* at 537. The books that were banned had been used in three elective courses for junior and senior high school students. *Id.* Those that had been used in contemporary literature classes were: THE EXORCIST by William P. Blatty; A CLOCKWORK ORANGE, Anthony Burgess; THE REINCARNATION OF PETER PROUD, Max Ehrlich. Banned from use in contemporary poetry classes were: NEW AMERICAN POETRY, Donald Allen; THE YAGE LETTERS, William Burroughs and Allen Ginsberg; CONEY ISLAND OF THE MIND, Lawrence Ferlinghetti; STARTING FROM SAN FRANCISCO, Lawrence Ferlinghetti; KADDISH AND OTHER POEMS, Allen Ginsberg; LUNCH POEMS, Frank O'Hara. Outlawed for use in American masters classes was ROSEMARY'S BABY by Ira Levin. 598 F.2d at 537 n.1.

8. 427 F. Supp. at 953.

through a collective bargaining agreement between the teachers' union and the school board.[9] The Tenth Circuit, though affirming, found the teachers had no right to use materials which the board did not approve.[10] It based its decision on the rationale that under Colorado law the school board has plenary power over curricular selection.[11]

I. THE SUPREME COURT DECISIONS

Recognition of the idea that learning and teaching—receiving and transmitting knowledge—are protected interests has been greatest in the area of higher education; latitude has been widest when the rights of university or college professors and students have been involved.[12] When the rights at stake, however, have been those of teachers whose students are at the elementary and secondary level, the courts have assumed that the schools are acting to a large extent in the role of *in loco parentis*.[13]

In fact, deference to the rights of parents is the cornerstone of the Supreme Court's emerging recognition of the special interests of the academic community in two companion cases that mark the beginning of the modern trend.[14] The Court found, in *Meyer v. Nebraska*[15] and *Bartels v. Iowa*,[16] that the state did not have the right to prohibit the teaching of foreign languages.[17] While the Court indicated that foreign language teachers had an interest in pursuing their profession,[18] it relied in large part on the

9. *Id.* at 955-56.

10. 598 F.2d at 544.

11. *Id.* at 543.

12. *See* Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293, 1297 (1976) [hereinafter cited as *Public School Teachers*] and Note, *Developments in the Law: Academic Freedom*, 81 HARV. L. REV. 1045, 1049-50, 1067-68 (1968) [hereinafter cited as *Developments*].

13. *See, e.g.*, Mailloux v. Kiley, 323 F. Supp. 1387, 1392 (D. Mass.), *aff'd on other grounds*, 448 F.2d 1242 (1st Cir. 1971), discussed in notes 122-28 and accompanying text *infra*.

14. In Waugh v. Mississippi University, 237 U.S. 589 (1915), which was decided only eight years prior to the cases marking the beginning of the modern trend, the Court found that the fourteenth amendment did not prohibit the state legislature from outlawing Greek letter fraternities at a state university. *Id.* at 596. The Court based its holding on a finding that it was reasonable for a legislature to establish a disciplinary rule designed to make certain the attention of students was not diverted from their studies. *Id.* at 596-97.

In a turn-of-the-century case, Ward v. Bd. of Regents, 138 F. 372 (8th Cir. 1905), the discharge of a college professor was upheld without any discussion of constitutional considerations. The circuit found valid a statute giving the board of regents plenary power to remove professors. *Id.* at 376. "Questions concerning the efficiency of a teacher . . . his usefulness, his relations to the student body and to the other members of the faculty, are so complicated and delicate that they are peculiarly for the consideration of the governing authorities of the institution." *Id.* at 377.

As recently as 1937, it was noted in a law journal article that, in teacher discharge cases, courts did not discuss academic freedom. Note, *Academic Freedom and the Law*, 46 YALE L. J. 670, 672 (1937). The article also stated that university professors had been dismissed because of their opinions and that "many are inhibited in what they say and write on socially controversial issues, and in their political activity as citizens, by the fear of academic reprisals." *Id.* at 670.

For a collection of Supreme Court cases relating to education, *see* THE SUPREME COURT AND EDUCATION (Teachers College Press, Columbia University, 1976).

15. 262 U.S. 390 (1923). For a discussion of *Meyer* by an author who believes the holding of the case is extremely limited, *see Public School Teachers, supra* note 12, at 1305-09.

16. 262 U.S. 404 (1923).

17. 262 U.S. at 403, 262 U.S. at 411.

18. 262 U.S. at 400-01.

rationale that parents have a right to educate their children in a manner of the parents' choosing, and therefore a right to hire a teacher of their choice.[19] And, while indicating that the state had gone too far in prohibiting the teaching of foreign languages, the Court held that the state can make regulations for schools, including prescribing the curriculum for state schools.[20]

Parental rights also played a key role in *West Virginia State Board of Education v. Barnette*,[21] which was another of the stepping stones in the emergence of recognition of the rights of members of the academic community. In striking down a resolution requiring children to salute the United States flag,[22] the Court held that the first amendment rights of both children and their parents had been violated.[23] As in *Meyer*, academic freedom was not mentioned. Instead, the Court found the flag salute to be a form of expression that the state could not prescribe without infringing on the freedom of expression guaranteed by the first amendment.[24] The Court went on to state that boards of education do not have such absolute control over their schools that they are immune from constitutional dictates. Respect for constitutional guarantees is necessary to avoid "strangl[ing] the free mind[s]" of school children.[25] In noting that *Barnette* overruled a decision it had made just three years earlier in *Minersville School District v. Gobitis*,[26] the Court stated that there are circumstances in which courts can overrule decisions of local school boards.[27]

The next major steps in the recognition of academic freedom as a protected interest occurred in a series of cases dealing with the constitutionality of loyalty programs. Although one of many cases dealing with loyalty programs involving public employees generally,[28] *Sweezy v. New Hampshire*[29] indicated that there are special considerations when an alleged constitutional violation involves a teacher. The Court termed the need for freedom in the university community "essential" and stated that "[t]eachers and students

19. *Id.* at 400-02.
20. *Id.* at 402.
21. 319 U.S. 624 (1943).
22. *Id.* at 642.
23. *Id.* at 630-31, 642.
24. *Id.* at 632-33.
25. *Id.* at 637.
26. 310 U.S. 586 (1940).
27. 319 U.S. at 637. The power of school boards is statutory. COLO. REV. STAT. § 22-32-109 (l)(t)(1973) requires school boards to select textbooks. COLO. REV. STAT. § 22-32-110(r) (1973) permits boards to remove materials that are "immoral or pernicious." R.I. GEN LAWS § 16-2-16 (1969) gives local school committees the power to designate curriculum and select texts. MONT. REV. CODES ANN. § 20-7-602 (1978) provides that the district superintendent or principal is to choose books, subject to the approval of school trustees. MONT. REV. CODES ANN. § 20-7-111 (1978) allows a state board to specify the "basic instructional program," with local boards of trustees empowered to approve "other instruction."
28. *See, e.g.*, United States v. Robel, 389 U.S. 258 (1967). For other cases involving teachers and loyalty programs, *see, e.g.*, Cramp v. Bd. of Pub. Instruction, 368 U.S. 278 (1961); Barenblatt v. United States, 360 U.S. 109 (1959); and Wieman v. Updegraff, 344 U.S. 183 (1952). *See generally* Israel, Elfbrandt v. Russell: *The Demise of The Oath?*, 1966 SUP. CT. REV. 193.
29. 354 U.S. 234 (1957). For a discussion of *Sweezy* and the application of the case to elementary and secondary teachers, *see* Note, *Academic Freedom in the Public Schools: The Right to Teach*, 48 N.Y.U. L. REV. 1176, 1183-84 (1973) [hereinafter cited as *Right to Teach*].

must always remain free to inquire, to study and evaluate, to gain new maturity and understanding . . ."[30]

An issue similar to the one in *Sweezy* was involved in a case decided three years later in *Shelton v. Tucker*.[31] The plaintiff was a public school teacher[32] who challenged the constitutionality of a state law requiring disclosure by teachers of all organizations to which they had belonged or contributed within five years of filing an annual affadavit.[33] The Court found that protection of constitutionally guaranteed freedoms was "nowhere more vital [than] in the community of American schools."[34] However, while recognizing that freedom of association was particularly important in the academic setting, the Court reaffirmed its holdings in two earlier cases in which it had found that the state has a strong interest in insuring that teachers are competent.[35]

A third case involving a teacher who objected to a loyalty program was *Keyishian v. Board of Regents*,[36] in which the Court overturned[37] a New York law that disqualified from employment anyone who joined a group advocating the overthrow of government by force.[38] The Court stated that the country was deeply committed to protecting academic freedom. The first amendment did not allow laws "that cast a pall of orthodoxy" over the classroom, which the Court found to be "peculiarly the 'marketplace of ideas.' "[39] The Court went on to state that the country's future depends on providing young people a wide exposure to a variety of concepts, rather than limiting students to the ideas only of those in authority.[40]

The year after *Keyishian*, the Court had an opportunity to deal with a controversy involving curriculum. *Epperson v. Arkansas*[41] was a challenge to an anti-evolution statute that prohibited teaching of the theory of evolu-

30. 354 U.S. at 250.

31. 364 U.S. 479 (1960).

32. *Id.* at 482.

33. *Id.* at 480.

34. *Id.* at 487.

35. *Id.* at 485 (citing Adler v. Bd. of Educ., 342 U.S. 485, 493 (1952) and Beilan v. Bd. of Educ., 357 U.S. 399, 406 (1958)). In *Adler*, the Court upheld a New York law disqualifying teachers who belonged to subversive organizations that were included in a list made by the state board of regents. 342 U.S. at 493. In *Beilan*, the Court upheld the removal of a teacher who had refused to answer questions about communist activities. 357 U.S. at 409. The teacher's discharge, however, was based on incompetency and insubordination, not on loyalty grounds. 357 U.S. at 406.

While *Sweezy, Shelton, Adler* and *Beilan* all involved teachers, the cases primarily dealt with loyalty programs, which involved the issue of freedom of association. *See* J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 794-801 (1978).

36. 385 U.S. 589 (1967).

37. *Id.* at 609-10.

38. *Id.* at 593.

39. *Id.* at 603. The origin of the term "marketplace of ideas" was not indicated in *Keyishian*. It was first coined after a Supreme Court decision by Justice Holmes, dissenting in Abrams v. United States, 250 U.S. 616, 630 (1919). The theory did not originate with Holmes. *See, e.g.*, J.S. MILL, ON LIBERTY ch. II (1859).

40. 385 U.S. at 603 (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

41. 393 U.S. 97 (1968). For a discussion of *Epperson* from the point of view of an author who disagrees with the rationale of the case, *see Public School Teachers, supra* note 14, at 1309-16.

tion.[42] The Court found the law unconstitutional because it was a violation of the first amendment prohibitions on establishment of religion or on denial of the free exercise of religion. Although it based its decision on the religious dictates of the first amendment, the Court found that the state was not free to impose on teachers conditions restrictive of their first amendment freedoms.[43] The Court indicated that it would not hesitate to intervene when the state imposed arbitrary restrictions "upon the freedom of teachers to teach and of students to learn."[44]

While the Court indicated that teachers and students are entitled to constitutional protections, it cautioned, however, that the decision was not an attempt to deal with "the multitude of controversies that beset our campuses today."[45] Instead, *Epperson* resolved the issue of the teaching ban within the narrow confines of the first amendment's religious freedom guarantees.[46] The Court also stated that, for the most part, public education is to be controlled by state and local authorities. Courts will not intervene in conflicts arising in schools when the issues involved do not sharply implicate basic constitutional values.[47]

In a separate concurrence, Justice Black indicated that he was more adamant than the majority in his belief that the control of education was almost wholly within the power of the states. Schools should be free to choose their own curricula so long as such action "does not palpably conflict with a clear constitutional command." He could find no reason a state would be prohibited from "withdraw[ing] from its curriculum any subject deemed too emotional and controversial for its public schools." Instead of basing the decision on religious freedom, Justice Black stated he would have struck down the Arkansas statute on vagueness grounds.[48]

In a portion of the concurrence quoted verbatim in *Cary*,[49] Justice Black stated that it was questionable whether academic freedom would permit a teacher to breach his contract by straying from the subjects approved by school officials.[50] Furthermore, he expressed doubts about the wisdom of the Supreme Court supervising and censoring the curricula of schools "in every hamlet and city in the United States."[51]

Justice Stewart, concurring in *Epperson*, emphatically asserted that states are free to designate school curricula.[52] Stewart, who also was quoted

42. 393 U.S. at 98. An anti-evolution statute was the issue in a famous early twentieth century case, Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927), which has generated a great deal of literature, both legal and nonlegal. *See* note 1 *supra*. *See also* Le Clercq, *The Monkey Laws and the Public Schools: A Second Consumption?*, 27 VAND. L. REV. 209 (1974) and *Right to Teach, supra* note 29, at 1176. Nonlegal literature includes L. ALLEN, BRYAN AND DARROW AT DAYTON (1967) and J. LAWRENCE & R. LEE, INHERIT THE WIND (1955).

43. 393 U.S. at 103-07 (citing *Keyishian*, 385 U.S. at 603, 605-606).

44. 393 U.S. at 105 (citing *Meyer*, 262 U.S. at 390).

45. 393 U.S. at 105-06.

46. *Id.* at 103.

47. *Id.* at 104.

48. *Id.* at 112-13.

49. 598 F.2d at 540.

50. 393 U.S. at 113-14.

51. *Id.* at 114.

52. *Id.* at 115.

in the *Cary* decision, based his concurrence on the rationale that a state could not constitutionally forbid a teacher to mention the theory of evolution. However, he stated that the state is free to mandate that particular subjects be excluded. For example, the state could dictate that Spanish would be the only foreign language taught, but could not constitutionally punish a teacher for informing the students that other languages are spoken.[53]

The rights of both teachers and students were addressed by the Court a few months after the *Epperson* decision in *Tinker v. Des Moines School District*,[54] in which the Court found that the plaintiffs, public school students, could not be suspended for wearing armbands because their conduct was protected by the free speech clause of the first amendment.[55] But while the Court found that students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[56] it reaffirmed its earlier holding that state and school officials have wide discretion in running the schools.[57] This authority will yield only when there is a clear indication of danger, and it is not enough for school authorities merely to show that suppression of expression is grounded on a wish to avoid "discomfort and unpleasantness that always accompany an unpopular viewpoint."[58]

The Court went on to state that, while officials may avoid material disruptions, the schools are not "enclaves of totalitarianism" in which the students may be regarded as "closed-circuit recipients" of only the ideas the authorities think appropriate.[59] Among the purposes of a school is communication among students,[60] an indication that students have the right to receive information, as well as the right to express their own ideas.

In a dissent cited in the *Cary* decision,[61] Justice Black stated that a teacher does not have a "complete right" to free expression when instructing elementary and high school students.[62] Black again[63] found that teachers are hired to teach a specified curriculum, and are obligated to adhere to it.[64]

Justice Stewart, in a separate concurrence, indicated that children do not have first amendment rights equal to those of adults. Analogizing a child to "someone in a captive audience," Justice Stewart indicated a child's individual choice, in some circumstances, would be less than that of an adult.[65]

Tinker was the last of the major extensions of a general right of academic freedom. Although the Burger Court has had the opportunity to ad-

53. *Id.* at 115-116.
54. 393 U.S. 503 (1969). For a discussion of *Tinker, see* Miller, *Teachers' Freedom of Expression Within the Classroom: A Search for Standards*, 8 GA. L. REV. 837, 849-56 (1974) [hereinafter cited as *Standards*].
55. 393 U.S. at 505-06.
56. *Id.* at 506.
57. *Id.* at 507.
58. *Id.* at 509.
59. *Id.* at 511.
60. *Id.* at 512.
61. 598 F.2d at 540.
62. 393 U.S. at 521.
63. *See* note 50 and accompanying text *supra*.
64. 393 U.S. at 522.
65. *Id.* at 515.

dress the issue of academic freedom, it has declined to do so.[66] In fact, the Burger Court only once has used the phrase "academic freedom" in its opinions dealing with educational issues.[67]

In *San Antonio Independent School District v. Rodriguez*,[68] the Court found there was no constitutional infirmity[69] in a state education financing plan in which there were wide disparities between local districts in expenditures.[70] Texas' aid to education plan had been attacked on the grounds that it discriminated on the basis of wealth.[71] While stating that education is probably the most important function of local government,[72] the Court held that there is no constitutional right to an education.[73] "[T]he undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation."[74]

In *Healy v. James*,[75] petitioners were college students who claimed their first amendment rights of freedom of expression and association were violated when the president of the school refused to grant official recognition to a chapter of the Students for a Democratic Society.[76] While reaffirming some of the major themes of its previous decisions recognizing the rights of members of the academic community,[77] the Court was unwilling to find that the students had a right to official campus recognition.[78] Instead, the case was remanded for a determination of whether or not the petitioners would abide by reasonable campus regulations.[79]

While the Court in *Healy* stated that institutions of higher education are not immune from the first amendment, it also reiterated the position it had taken in *Tinker*, that school authorities have great authority in controlling conduct of students.[80] The Court relied on *Shelton* in finding that a college is a particularly appropriate place for a free interchange of ideas, and stated it was not a new idea that the country is dedicated to protecting academic freedom.[81]

The rights of high school students were at issue in *Goss v. Lopez*,[82] in which the Court found by a 5-4 margin that due process requires school officials to conduct informal, on-the-spot hearings before suspending stu-

66. The Burger Court denied certiorari in three academic freedom cases and affirmed without opinion a third. All three lower court holdings curtailed academic freedom. *See* notes 156-59 and accompanying text *infra*.
67. Healy v. James, 408 U.S. 169, 180-81 (1972).
68. 411 U.S. 1 (1973).
69. *Id.* at 58-59.
70. *Id.* at 9-17.
71. *Id.* at 19-20.
72. *Id.* at 29 (quoting Brown v. Bd. of Educ., 347 U.S. 483 (1954)).
73. 411 U.S. at 33.
74. *Id.*
75. 408 U.S. 169 (1972).
76. *Id.* at 172-77.
77. *Id.* at 180-81.
78. *Id.* at 194.
79. *Id.*
80. *Id.* at 180 (quoting *Tinker*, 393 U.S. at 507).
81. *Id.* (citing *Shelton*, 364 U.S. at 487).
82. 419 U.S. 565 (1975).

dents for 10 days or less.[83] While academic freedom was not mentioned, the Court again restated its view that students do not lose their constitutional rights by virtue of attending school. However, it tempered this recognition of rights by finding the authority of school officials to be "very broad."[84] The Court noted that the lower federal courts had uniformly held the due process clause applicable to expulsions of students from state institutions.[85]

While *Goss* marked the extension of constitutional protections to high school students, the case also can be interpreted as signalling a possible future retreat by the Court in the area of the rights of members of the academic community. Not only was *Goss* a 5-4 decision, but one of the majority was Justice Douglas, who retired later in the year. His replacement, Justice Stevens, often has voted with the four *Goss* dissenters, Justices Powell, Blackmun, and Rehnquist, and Chief Justice Burger.[86]

To summarize, the Supreme Court has dealt with the issue of academic freedom in a variety of settings. While it has recognied that constitutional rights apply to students and teachers, the court also, however, has stated that control is vested primarily in the local school authorities, and particularly in school boards. Although the Court has indicated that academic freedom exists, it has done little to define the extent of that freedom, beyond indicating that traditional constitutional safeguards apply to members of the academic community.

In particular, the Court has not defined the limits of the state's powers in the area of curriculum contols, which was the issue addressed in *Cary*. Of the modern Supreme Court cases recognizing the right of academic freedom, only *Epperson*[87] has dealt with the issue of how far the state may go in forbidding the teaching of particular topics. And *Epperson* could be interpreted as standing only for the proposition that a state, while it has road power to control curriculum, cannot infringe on religious freedom through a law that establishes a particular religion by promoting that religion's doctrine via its schools.

III. DEVELOPMENT OF THE CONCEPT IN THE LOWER FEDERAL COURTS

Although the Supreme Court has defined the contours of academic freedom only in broad terms, many of the lower federal courts have attempted to provide more substantive guidelines for the rights of members of the academic community.[88] In doing so, the courts have lacked consistency. In the

83. *Id.* at 581.

84. *Id.* at 574 (quoting *Tinker*, 393 U.S. at 506-07; *Barnette*, 319 U.S. at 637).

85. 419 U.S. at 576-78 n.8.

86. For cases in which Stevens has voted with the *Goss* dissenters, *see, e.g.*, United States v. Grayson, 438 U.S. 41 (1978); United States v. New Mexico, 438 U.S. 696 (1978). *Contra*, Houchins, Sheriff v. KQED, Inc., 438 U.S. 1 (1978).

87. *See* notes 41-53 and accompanying text *supra*.

88. Several difficulties arise in defining the parameters of academic freedom. First, the freedom applies to several groups. *See* note 2 *supra*. In addition, there are a number of types of cases involving issues that may be viewed as related, at least peripherally, to academic freedom:

1. Cases involving the right of school authorities to remove or ban books used in the school library and curriculum. *See, e.g.*, Minarcini v. Strongsville City School

area of curricular controls, in fact, there is a split in the circuits.[89]

There are hundreds of federal court decisions dealing with educational issues. Many of these involve the due process rights of students and teachers.[90] Those cases are beyond the scope of this paper, which focuses on control of curriculum and teaching methods. Within this area, two recent cases have involved the removal of books from school libraries. Most of the controversies have arisen, however, when high school teachers have been fired for using materials deemed improper by school authorities. A third group of opinions included in this section relates to the need for school authorities to supply reasons for their actions, thus establishing a record for review.

A. *The Pre-Academic Freedom Cases*

The curriculum cases did not arise in a vacuum. Prior to the decisions concerning teaching materials, there were many federal court opinions dealing with other issues involving school authorities and education, for exam-

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Dist., 541 F.2d 577 (6th Cir. 1976), discussed in notes 178-79 and accompanying text *infra*.

2. Curriculum content cases, including those in which teachers were discharged for using teaching materials or methods that school authorities found to be obscene or inappropriate. *See, e.g.*, Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969), discussed in notes 100-10 and accompanying text *infra*.

3. Discharge cases in which teachers claim procedural due process violations. *See, e.g.*, Ahern v. Bd. of Educ., 456 F.2d 399 (8th Cir. 1972); Prebble v. Brodrick, 535 F.2d 605 (10th Cir. 1976).

4. Cases in which students have alleged that there have been due process violations in some action taken against them. *See, e.g.*, *Goss*, discussed at text accompanying notes 82-85 *supra*.

5. Cases in which teachers have alleged their rights to free expression and free assembly have been violated. *See, e.g.*, Hastings v. Bonner, 578 F.2d 136 (5th Cir. 1978); Mabey v. Reagan, 537 F.2d 1036 (9th Cir. 1976). For a discussion of the free speech rights of teachers when the speech involves extramural activities, *see Public School Teachers, supra* note 12, at 1303-05. *See also* (by the same author) Goldstein, *Academic Freedom: Its Meaning and Underlying Premises as Seen Through the American Experience*, 11 ISRAEL L. REV. 52 (1976).

6. Cases in which students have alleged their rights of free expression and assembly have been violated. *See, e.g., Tinker*, discussed at text accompanying notes 54-65; Esteban v. Cent. Mo. State College, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970). *See also* Abbott, *Due Process and Secondary School Dismissals*, 20 CASE W. RES. L. REV. 378 (1969); Van Alstyne, *The Judicial Trend Toward Student Academic Freedom*, 20 U. FLA. L. REV. 290 (1968). A landmark case in which a court of appeals found that an expelled student was entitled to certain rights as a matter of procedural due process was Dixon v. Ala. State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961). Among the lawyers arguing the case for the plaintiffs was Thurgood Marshall, who was appointed to the Supreme Court in 1967.

7. Cases in which the method of taxation to support schools is alleged to be unconstitutional. *See, e.g., Rodriguez*, discussed in text accompanying notes 68-74 *supra*.

8. Those in which the spending of public money for parochial schools or the children attending such schools is alleged to be a violation of the first amendment establishment clause prohibiting the establishment of a religion. *See, e.g.* Meek v. Pittenger, 421 U.S. 349 (1975); School Dist. of Abington Township, Pa. v. Schempp, 374 U.S. 203 (1963); Zorach v. Clauson, 343 U.S. 306 (1952); Everson v. Bd. of Educ., 330 U.S. 1 (1947).

89. *See* Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969), discussed at notes 100-110 and accompanying text *infra*. In *Keefe*, the court found unconstitutional the firing of a teacher who had used a "vulgar term" during a discussion of a magazine article he had assigned. 418 F.2d at 361-62. *But see* Brubaker v. Bd. of Educ., 502 F.2d 973 (7th Cir.), *aff'd on rehearing en banc*, 502 F.2d 1000 (7th Cir. 1974), *cert. denied*, 421 U.S. 965 (1975), discussed at notes 134-45 and accompanying text *infra*.

90. *See* note 88 *supra*.

ple, the procedural due process rights of students.[91] Recognition of the rights of teachers and students, however, is relatively new. As recently as the mid-1960s, some courts still were reluctant to recognize the constitutional free speech rights of teachers. In a 1965 case, *Parker v. Board of Education of Prince George's County, Md.*,[92] the Fourth Circuit stated it need not rule on the validity of a discharged teacher's first amendment claims because the instructor was a probationary teacher.[93] The plaintiff had assigned a book included in an approved school book list, *Brave New World* by Aldous Huxley. He was told his contract would not be renewed after a parent complained about the assignment.[94] Academic freedom was not mentioned in either the district or appeals courts' decisions.

Nor was academic freedom discussed in two cases decided the next year by the Fifth Circuit.[95] The cases involved the wearing of freedom buttons indicating support of the civil rights movement.[96] In one case, the wearing of the buttons was found to be free speech protected by the first amendment.[97] In the other, the circuit court held school authorities could prohibit the wearing of the buttons where school discipline was undermined.[98] The cases were predecessors to *Tinker*, and were cited extensively by the Supreme Court in that decision three years later.[99]

B. *The Teaching Method and Curriculum Content Cases*

The existence of a teacher's academic freedom to teach was said to be conceded by the school authorities in a First Circuit decision handed down a few months after the Supreme Court's *Tinker* opinion.[100] In *Keefe v. Geanakos*,[101] a teacher was suspended after he led a class discussion of a "dirty" word that appeared in an *Atlantic Monthly* article assigned to senior English class students.[102] Finding no precedent with which it agreed, the court stated bluntly that it was not impressed with the reasoning of the Fourth Circuit in *Parker*.[103] Since there were at least five books in the school library containing the same word, it would be inconsistent for the school authorities

91. *E.g.*, Dixon v. Ala. State Bd. of Educ., 294 F.2d 50 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); Hammond v. S.C. State College, 272 F. Supp. 947 (D.S.C. 1967).

92. 348 F.2d 464 (4th Cir. 1965), *cert. denied*, 382 U.S. 1030 (1966). For an example of a decision in which a court held that first amendment claims must be considered, *see* Pred v. Bd. of Pub. Instruction, 415 F.2d 851 (5th Cir. 1969), discussed in notes 198-199 and accompanying text *infra*.

93. 348 F.2d at 465.

94. 237 F.Supp. 222, 224-25 (D. Md.), *aff'd per curiam*, 348 F.2d 464 (4th Cir. 1965), *cert. denied*, 382 U.S. 1030 (1966).

95. Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966); Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966).

96. 363 F.2d at 746; 363 F.2d at 750.

97. 363 F.2d at 747-49.

98. 363 F.2d at 754.

99. 393 U.S. at 505-13.

100. Tinker was decided in 1969. *See* notes 54-65 and accompanying text *supra*.

101. 418 F.2d 359 (1st Cir. 1969). For an extended discussion of *Keefe, see* Nahmod, *Controversy in the Classroom: The High School Teacher and Freedom of Expression*, 39 GEO. WASH. L. REV. 1032, 1036-37 (1971) [hereinafter cited as *Controversy*].

102. 418 F.2d at 360-61. The word was described by the court as a "vulgar term for an incestuous son." *Id.* at 361.

103. *Id.* at 362. *Parker* is discussed in text accompanying notes 92-94 *supra*.

to fire a teacher for discussing it in class.[104]

Further, the *Keefe* court noted that the word was "currently used." If the students had to be protected from such language, the court would "fear for their future." Conceding that the word would offend some parents, the court surmised that the term was not unknown to many high school seniors. The circuit stated that it agreed with the school authorities, however, that obscenity standards should be variable—what would be obscene for students would not be obscene for adults.[105]

While noting that school authorities have the right to regulate speech in the classroom,[106] the First Circuit found the magazine article to be "scholarly, thoughtful and thought-provoking."[107] Furthermore, there would be a chilling effect if the state were allowed to engage in such "rigorous censorship."[108]

The *Keefe* court made this ground-breaking decision in the absence of any guidelines, except for reference to opinions that the court recognized as dealing with academic freedom generally.[109] Nor did the circuit court try to formulate a test to be used in the future. Instead, the appeals court evaluated the material used and the discussion by the teacher of the offending word, and virtually took judicial notice of the fact that the article and discussion were appropriate for high school seniors.[110]

In *Parducci v. Rutland*,[111] decided a few months after *Keefe*,[112] a federal district court adopted a rationale similar to that of the First Circuit. The teacher, whose ability was unquestioned, was fired after she refused to stop assigning a story, "Welcome to the Monkey House," by Kurt Vonnegut, Jr., to her junior English classes.[113] Finding that there were books on an approved list and in the school library containing language more offensive than that used in the Vonnegut story,[114] the court relied on two Supreme Court decisions, *Roth v. United States*[115] and *Ginsberg*,[116] to determine whether the

104. 418 F.2d at 362-63.

105. *Id.* (citing Ginsberg v. New York, 390 U.S. 629 (1968)). In *Ginsberg*, the Supreme Court found that the state is not constitutionally prohibited from applying different standards for the sale of obscene material to minors than it does for adult sales. The Court based its decision on the rationale that the state's authority to control minors' conduct is more extensive than its authority over adults. *Id.* at 637-43.

The *Ginsberg* "variable obscenity" test is based on the premise that the adults "who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility," as well as the government's interest in protecting minors. *Id.* at 639-40.

106. *Id.* at 362.

107. *Id.* at 361.

108. *Id.* at 362.

109. *Id.*

110. The court stated that it did not need affidavits to find the article "scholarly, thoughtful and though-provoking." *Id.* at 361.

111. 316 F. Supp. 352 (N.D. Ala. 1970). For an extended discussion of *Parducci, see Controversy, supra* note 101, at 1036-41.

112. The court cited the portion of *Keefe* in which the First Circuit discussed the common use of the "dirty" word involved and the fear of school authorities that parents might be offended. 316 F. Supp. at 356 (citing 418 F.2d at 361-62 (1st Cir. 1969)).

113. 316 F. Supp. at 353-54. *See* note 169 *infra*.

114. Id. at 356-57.

115. 354 U.S. 476 (1957).

116. 390 U.S. 629 (1968). *See* note 105 *supra*. For a discussion of the applicability of the

story was obscene.[117]

In addition to the obscene nature of the material, the court considered the appropriateness of the story for students who were high school juniors. It also relied heavily on evidence that the assignment had not threatened or caused disruption of the educational process.[118] The court did not explicitly state that it was formulating a three-pronged test consisting of the material's appropriateness, its obscene nature, and interference with school discipline. The rationale came closer, however, to formulating a test for evaluating curriculum controversies than did most of the other opinions dealing with similar issues.

Although the *Parducci* court indicated that teachers should be given latitude in choosing teaching materials, it based its holding in part on the unfairness of discharging a teacher for conduct not previously prohibited by school authorities. The court also noted that it was not commenting "upon the advisability of requiring school administrators to promulgate rules and regulations . . . ."[119] These comments indicate that the court would have found that school officials have the authority to promulgate rules governing teaching materials.

The most extensive effort by any federal court to devise guidelines for resolving curriculum disputes was attempted by a federal district court in *Mailloux v. Kiley*.[120] The district court's test for evaluating the acceptability of teaching materials was not affirmed on appeal, even though the First Circuit did uphold the portion of the trial court's opinion finding the firing of a teacher impermissible on the ground that rules governing teacher conduct were too vague.[121]

The plaintiff in *Mailloux* had written the word "fuck" on the blackboard during a discussion of a novel in his English class of high school juniors. The word was not used in the novel, nor was it spoken during the class. There was an unsupported allegation that the teacher had asked a girl to define the word. There were no school regulations governing the use of such words. Experts testified the word was relevant and served an educational purpose, but school authorities testified to the contrary. The trial court found that, under the circumstances, the word was not inappropriate.[122]

Relying on *Keefe* and *Parducci*, the district court found that a public school teacher not only has a right to freedom of speech inside and outside of the classroom, but also a measure of academic freedom in his classroom teaching.[123] The court defined the issue as whether a secondary teacher had a right to choose a method that was not necessary, not shown by the weight

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Ginsberg obscenity test to the classroom setting, *see Controversy, supra* note 101, at 1050-53.

117. 316 F. Supp. at 355-56.

118. *Id.* at 356.

119. *Id* at 356-57.

120. 323 F. Supp. 1387 (D. Mass.), *aff'd on other grounds*, 448 F.2d at 1242 (1st Cir. 1971). For a discussion of *Mailloux, see Public School Teachers, supra* note 12, at 1324-31.

121. 448 F.2d at 1243. The case was before the First Circuit twice. *See* note 127 *infra*.

122. 323 F. Supp. at 1387-90.

123. *Id.* at 1390.

of opinion as permissible, and not obviously proper, but was relevant, and in the opinion of experts served a serious educational purpose. The court found that this qualified right was the central tenant of academic freedom.[124] The court limited its holding, however, by finding that when a teacher uses such a method, he may be fired if he has been given advance notice that the method is prohibited.[125]

The court also distinguished the rights of secondary teachers from those of college professors. Not only is a secondary teacher less skilled, but he is hired to concentrate on "transmitting basic knowledge" and is expected to indoctrinate students in the *mores* of society, the court held. While high schools are not inflexible, neither are they "open forums" for the exchange of ideas.[126]

In affirming the decision on the vagueness grounds, the First Circuit stated in a brief opinion that, while the district court's effort to formulate guidelines was "sensitive," this test would cause more problems than it would solve. The circuit could find 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."[127]

Curriculum was only one of several issues presented in the first of two cases considered by the Seventh Circuit, *Clark v. Holmes*,[128] which involved the firing of a temporary, nontenured university teacher. The plaintiff had been warned that he counselled too many students, overemphasized sex in health classes,[129] counselled students with his door shut, and criticized other faculty members in discussions with students. His superiors had disapproved of all of these practices. The court found for the university, primarily on the ground that the state has wide discretion in deciding whom to employ as a teacher.[130]

In discussing the curriculum issue, the court found that academic freedom is not "a license for uncontrolled expression at variance" with established curriculum.[131] The circuit also distinguished the teacher's comments from those made by public employees speaking as citizens, rather than in their roles as government workers.[132] Further, the court found that a

124. *Id.* at 1392.

125. *Id.*

126. 323 F.2d at 1392.

127. 448 F.2d at 1243. The case was before the First Circuit for the second time, having been dismissed without prejudice earlier in the year. 436 F.2d 565 (1st Cir. 1971). The first appeal was brought by school authorities, who were unsuccessful in an attempt to obtain a stay of the district court's preliminary injunction requiring that the plaintiff be returned to work pending trial. In upholding the district court's issuance of the stay order, the circuit indicated that factors to be considered in determining the appropriateness of teaching materials include the age and sophistication of students, relevance of the educational purpose, and context and manner of presentation. 436 F.2d at 566.

128. 474 F.2d 928 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973).

129. The overemphasis on sex in the teacher's health course was the only curricular issue in the case.

130. 474 F.2d at 929-31.

131. *Id.* at 931.

132. *Id.* at 931-32. The Seventh Circuit distinguished several cases on the ground that they involved teachers who were fired for speaking about public issues. In particular, the court found the fact pattern in *Clark* to be distinguishable from that in Pickering v. Bd. of Educ., 391

teacher may be limited in what he teaches by the need to maintain discipline in the classroom, by a need for confidentiality between the teacher and other members of the faculty, or because the teacher's conduct interferes with his duty to teach.[133]

In the second of the two Seventh Circuit opinions, *Brubaker v. Board of Education*,[134] the court upheld the discharge of three eighth grade teachers on the ground they had distributed "obscene and improper" materials to students. The teachers had distributed brochures about a documentary movie depicting Woodstock, a 1969 rock music festival. There were references in the brochure to drugs, sex, and what the court called "vulgarities."[135]

Two of the teachers claimed that the brochure was relevant to the subjects they taught. The class of one of the plaintiffs, who taught language arts, had been studying the history of rock music.[136] Another appellant taught industrial arts and said the brochure contributed to the students' interest in constructing musical instruments. The third teacher made no claims about the relevancy of the material. She did not, however, distribute the brochure directly to the students. Instead, she gave it to the other two plaintiffs, placed some copies in the teachers' lounge, and displayed a poster from the brochure in her classroom.[137]

The circuit quoted extensively from the testimony of two "eminently educated" experts who found the materials to be both relevant and appropriate.[138] It also found that a member of the staff of the state Superintendent of Public Instruction was qualified to testify as an expert. The staff member stated that the brochure, which had no educational value, was inappropriate for elementary school students.[139] After excerpting from the experts' testimony at length, the court indicated that there was no need for expert testimony, since the controverted material was in evidence.[140]

Although the court did not indicate what test it was using or even state explicitly that it had found the material to be obscene with respect to junior high students, the opinion clearly indicated that the court was shocked. In addition to terming the material "vulgar," the court asked: "It is probably a fair inference that by second or third year high school (sic) most American

U.S. 563 (1968), in which the Supreme Court found it unconstitutional to fire a teacher who had written a letter to a newspaper criticizing the school board. The Court found that the state did not have any significantly greater interest in regulating its employees' speech than in regulating the expression of other citizens when the speech was comment on public issues. 391 U.S. at 568.

133. 474 F.2d at 931. The Seventh Circuit stated that the legitimate state interests that could be used as a basis for limiting a teacher's speech were suggested by *Pickering*, discussed in note 132 *supra*.

134. 502 F.2d 973 (7th Cir.), *aff'd on rehearing en banc*, 502 F.2d 1000 (7th Cir. 1974), *cert. denied*, 421 U.S. 965 (1975).

135. 502 F.2d at 975-76.

136. The court appeared to be puzzled as to the reason rock music history was a topic studied in a language arts class. "We are not advised what rock music has to do with Language Arts . . . ." *Id.* at 978.

137. *Id.* at 977-78.

138. *Id.* at 980-81.

139. *Id.* at 982.

140. *Id* at 984.

males have become familiar with, and at times employ, these and like words. Is it only a forlorn hope, however, that most of our young ladies will never employ that kind of speech?"[141] The court also indicated it thought the teachers should have expressed "regret" over the matter.[142]

In a dissent, Judge Fairchild stated that the brochure was not obscene. Noting that "[t]he use of profanity does not tranform the controversial into the obscene," he found that academic freedom gives a teacher some latitude in selecting material. He also commented that the appropriateness of a discussion topic could not be judged solely by the topic of the course. A successful teacher may relate to his students through a philosophical discussion, since "academic freedom is the exchange of ideas which promote education in its broadest sense."[143]

The difficulty with the *Brubaker* opinion is that the Seventh Circuit gave no reasons for upholding the discharge, other than the clear indication that the judges were shocked. Although the court devoted extensive space to excerpts from the testimony of the experts who supported the use of the brochure, it did not state why the experts' opinions were disregarded. The opinion is mostly a recitation of the facts[144] with almost no rationale. The court excuses this failure on the ground that its conclusion "emerges so clearly that we decline to add . . . to the already abundant literature on the subject . . . ." Just where the court found such a wealth of material on the subject is a mystery, since the opinion cited only one other curriculum case, *Mailloux*.[145]

The teaching of a controversial unit on race relations and other topics led to the firing of a high school teacher of civics and political science in *Sterzing v. Fort Bend Independent School District*.[146] In finding that the Texas teacher's rights had been violated, the district court stated that a teacher must be able to adapt his course to modern times. While there may be some limits placed on a teacher's methods, he should not have to risk dismissal for including controversial issues in his curriculum. In what is the strongest of any statement of the right of a teacher to designate course content, the court said that "[a] responsible teacher must have freedom to use the tools of his

141. *Id.* at 976. The court also stated that the poetry in the brochure could be interpreted as a "beckoning" for students to "throw off the dull discipline imposed on them by the moral environment of their home life, and in exchange to enter into a new world of love and freedom . . . to take their clothes off and to get an early start in the use of . . . vulgarities . . . ." Among the words that appeared to shock the court were "shit" and "fucking." *Id.*

142. *Id.* at 982.

143. *Id.* at 991-92.

144. *Id.* at 983. The court indicated it was supplying such detailed factual background to "expose the correctness" of its decision.

145. *Id.* at 984-85 (citing *Mailloux*, 436 F.2d at 566, 448 F.2d at 1243, discussed at notes 120-27 and accompanying text *supra*).

146. 376 F. Supp. 657, 658-60 (S.D. Tex. 1972), *vacated and remanded*, 496 F.2d 92 (5th Cir. 1974). The appeal was brought solely on the ground that the district judge, while awarding monetary damages, had denied reinstatement of the teacher. The Fifth Circuit remanded for reconsideration of the remedy, finding that it was impermissible for the trial court to consider that reinstatement would be "too antagonistic." While not ordering reinstatement, the court of appeals commented: "Enforcement of constitutional rights frequently has disturbing consequences. Relief is not restricted to that which will be pleasing and free of irritation." 496 F.2d at 93.

profession as he sees fit." The court termed such freedom of choice a substantive right.[147]

The *Sterzing* court placed on the school authorities the burden of making sure that sensitive subjects are handled properly. The court suggested that a school district, rather than manacling its teachers because it fears controversial subjects will be treated improperly, should hire instructors who are capable of teaching responsibly. It also indicated that it was relying on favorable expert opinion concerning the acceptability of the materials, the fact there was shown to be an educational purpose, and the procedural right of a teacher to use a method not prohibited by school regulations. Although indicating that its holding was based in part on the fact the teaching method was not proscribed, the court seemed to imply that a school district would not have the right to forbid the teaching of topics "within the ambit of accepted professional standards."[148]

A statutorily imposed curriculum control was unsuccessfully challenged in *Mercer v. Michigan State Board of Education*,[149] in which a three-judge district court panel upheld a law prohibiting the discussion of birth control in public schools.[150] While finding that a teacher had the right to raise the issue of the constitutionality of the law on his own behalf, the panel held that he did not have standing to assert students' rights to learn about birth control.[151]

In a strongly worded opinion, the court, while stating that the right of the state is not absolute,[152] found that the first amendment does not give a teacher a right to instruct "beyond the scope of the established curriculum." It is perfectly proper, the panel held, for the state to establish a curriculum either by law, as it did in the birth control statute, or by delegating the responsibility to local school boards.[153]

Parents who do not agree with the state's choice of curriculum have the choice of sending their children to private schools, the *Mercer* court reasoned. In addition, the banned information could be "left for grasping from other sources, such as the family, peers or other institutions."[154] The court seemed to imply that, because the information was available elsewhere, it was not unconstitutional for the state to prohibit its teaching, a justification that appears to be contrary to the Supreme Court's pronouncements in the area of restraints on expression.[155]

But perhaps the most significant aspect of the *Mercer* case is its affirm-

147. 376 F. Supp. at 661-62.

148. *Id.* at 662. In addition to the academic freedom ground, the court based its holding on procedural due process grounds, since the teacher was not given notice of the charges against him or a chance to rebut them. *Id.* at 660. The court also chided the school authorities for not learning firsthand about the teaching methods involved, indicating that instead the court had relied on "hearsay remarks." *Id.* at 661.

149. 379 F. Supp. 580 (E.D. Mich.), *aff'd*, 419 U.S. 1081 (1974).

150. *Id.* at 582, 587.

151. *Id.* at 584.

152. *Id.* at 585 (citing *Epperson*, 393 U.S. at 107, discussed in notes 41-53 and accompanying text *supra*).

153. 379 F. Supp. at 585.

154. *Id.* at 586.

155. *E.g.*, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975); Spence v. Washington, 418 U.S. 405, 411 n. 4 (1974); Schneider v. State, 308 U.S. 147, 163 (1939).

ance by the Burger Court.[156] Although upheld without opinion, *Mercer* is the only one of the lower court decisions dealing with curriculum controls that was affirmed by the Supreme Court. Certiorari was denied by the Court in three other curriculum decisions that were clearly restrictive of academic freedom, *Brubaker*,[157] *Presidents Council, District 25 v. Community School Board No. 25*,[158] and *Clark v. Holmes*.[159]

A teaching method was at issue in *Wilson v. Chancellor*,[160] in which a district court found that the right of academic freedom encompasses the decision of high school teachers to use outside speakers. *Wilson* is unusual among the cases considering teaching methods because there had been no teacher discharge. The court held that, even in the absence of actual or threatened loss of employment, proscriptions on teaching methods impliedly indicate a threat of sanction, thereby restricting the teacher's freedom of expression.[161]

Noting that few courts had considered the extent to which academic freedom is protected by the first amendment, the opinion stated that secondary school teachers are to be accorded less free rein than university professors. It based this difference on the assumption that professors are involved on a quest for knowledge, while secondary teachers merely disseminate information.[162] Furthermore, the court found school boards should be allowed wide discretion in making decisions. A court should not intervene merely on the basis that the school board's decision appears unwise. If the board has violated someone's constitutional rights, however, then courts are required to intervene.[163]

C. *The Book Banning Cases*

During the same year that the Seventh Circuit decided that it was permissible to fire a college teacher for including too much about sex in his health classes, the Second Circuit put its stamp of approval on the removal of books from junior high school libraries in *Presidents Council, District 25 v. Community School Board No. 25*.[164] The case is similar to both *Cary* and *Wilson* in that no teacher was fired. Instead, the plaintiff was an organization of presidents and past presidents of parent and parent-teacher groups, three students, seven additional parents, two teachers, a librarian and a principal.[165] The action was brought after the school board voted to remove a

156. 419 U.S. 1081 (1974).

157. Discussed in notes 134-145 and accompanying text *supra*.

158. Discussed in notes 164-177 and accompanying text *infra*.

159. Discussed in notes 128-33 and accompanying text *supra*.

160. 418 F. Supp. 1358 (D. Or. 1976). Attorneys fees were awarded to the plaintiffs, a student and a teacher, in a subsequent opinion. 425 F. Supp. 1227, 1231 (D. Or. 1977).

161. 418 F. Supp. at 1361-63.

162. *See Public School Teachers*, note 12 *supra*.

163. 418 F. Supp. at 1362.

164. 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972).

165. This alliance of plaintiffs was the most inclusive of any plaintiff group in any of the cases presented in this paper. The opponents of the book ban undoubtedly thought their chances of success would be heightened if all segments of the community were represented. If, for example, parents' rights were not found to be violated, those of teachers or students might

book containing obscenities and sex.[166]

The circuit, quoting from the portion of *Epperson* that indicated courts should not interfere in the day-to-day operations of schools,[167] found there had been nothing more than a "miniscule" infringement on the constitutional rights of any of the plaintiffs,[168] however, it did not discuss the separate rights of each of the groups involved. Instead, the circuit reasoned that some authority has to select the books for school libraries. The court was unconvinced by any claim of constitutional violations: "shouts of book burning, witch hunting and violation of academic freedom" did not elevate an issue involving daily operation of schools to a controversy of constitutional level. The circuit stated that the infringement would have to be much more severe to excuse "the intrusions of three or even nine federal jurists making curriculum or library choices for the community of scholars."[169] The court did not indicate what would constitute an infringement of sufficient magnitude.

The court was equally unmoved by the plaintiffs' argument that the initial selection or rejection of a book was different from removing volumes from the shelves:

> This concept of a book acquiring tenure by shelving is indeed novel and unsupportable under any theory of constitutional law we can discover. It would seem clear to us that books which become obsolete or irrelevant or where improperly selected initally, for whatever reason, can be removed by the same authority which was empowered to make the selection in the first place.[170]

Keefe[171] and *Parducci*[172] were distinguished on the ground that they involved the discharge of teachers, and therefore presented due process considerations. Further, the *Presidents Council* court clearly stated that it was disagreeing with the holdings in those two cases to the extent that the courts had found that first amendment rights are violated when a court disagrees with school authorities about the material assigned by a teacher.[173]

In a lone dissent to the Supreme Court's denial of certiorari,[174] Justice Douglas indicated he would find that the school authorities had violated the first amendment rights of school children "to hear, to learn, to know." Noting that academic freedom had been upheld against various attacks,[175] Jus-

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be. However, the Second Circuit did not address the rights of each group separately. 457 F.2d 289.

166. 457 F.2d at 290. The book was DOWN THESE MEAN STREETS, by Piri Thomas.

167. 393 U.S. at 104. The circuit quoted the portion of the opinion stating that courts cannot intervene in local school affairs unless constitutional rights are sharply implicated. 457 F.2d at 291.

168. 457 F.2d at 290-92.

169. *Id.* at 292. For a discussion of the role of the courts in resolving controversies in the schools, see *Right to Teach, supra* note 29, at 1194-99.

170. 457 F.2d at 293.

171. *See* notes 101-10 and accompanying text *supra*.

172. *See* notes 111-119 and accompanying text *supra*.

173. 457 F.2d at 293-94.

174. 409 U.S. 998 (1975).

175. *Id.* at 999 (citing *Keyishian*, 385 U.S. 589; Wieman v. Updegraff, 344 U.S. 183 (1952); *Sweezy*, 354 U.S. 234). The cases cited involved loyalty programs, discussed at notes 28-40 and accompanying text *supra*.

tice Douglas implied that it was improper for a school board to make such a decision on the basis that its own "sensibilities" had been offended. He thought the purposes of education should include eliminating prejudices and teaching children to solve the world's problems. Further, he stated that, under *Tinker*,[176] such restrictions on first amendment rights should be invoked only when there were disciplinary problems.[177]

The Sixth Circuit, deciding an almost identical issue, held in *Minarcini v. Strongsville City School District*[178] that the first amendment rights of teachers and students had been violated[179] by the removal of books from the library and a ban on further teaching or shelving of the books. The outlawed novels were *Catch 22* by Joseph Heller, *God Bless You, Mr. Rosewater* by Kurt Vonnegut, and *Cat's Cradle*, also by Vonnegut.[180] The district court found for the defendants, based on *Presidents Council*. The Sixth Circuit found that the holding in *Presidents Council*[181] was not broad enough to allow the school board "to destroy" books "without concern for the first amendment." Furthermore, the court stated it would not follow *Presidents Council* if its holding were that broad.[182] The removal of books from a library is a much more serious restraint on academic freedom that the armband wearing that was constitutionally protected in *Tinker*, the court found. Neither the school board nor the state of Ohio could place conditions on library use "related solely to the social or political tastes of school board members."[183] In the absence of an explanation, the court assumed the books were removed because board members found the content objectionable, and because the board assumed it had censorship power.[184] The circuit found that the privilege of using a school library was not subject to the whims of school boards who want to eliminate books on the basis of content. However, it indicated that a school board could, without violating constitutional rights, stop stocking a book that had worn out or was obsolete, or because of limited shelf space.[185]

Although the rationale in *Minarcini* clearly supports a broad right of

176. *See* notes 54-65 and accompanying text *supra*. For a discussion of the application of the *Tinker* test to classroom activities, *see Controversy, supra* note 101, at 1038-41.

177. 409 U.S. at 999.

178. 541 F.2d 577 (6th Cir. 1976).

179. *Id.* at 581-82. Although the opinion addressed the rights of both students and teachers, the plaintiffs did not include any teachers. The suit was a class action brought on behalf of five students. *Id.* at 579.

For other cases in which the rights of students to receive information was at issue, *see, e.g.*, *Shanley v. N.E. Independent School Dist.*, 462 F.2d 960 (5th Cir. 1972); *Bayer v. Kinzler*, 383 F. Supp. 1164 (E.D.N.Y. 1974), *aff'd*, 515 F.2d 504 (2d Cir. 1975), in which courts held school officials could not restrain distribution of student newspapers containing birth control information. *Contra, Trachtman v. Anker*, 563 F.2d 512 (2d Cir.), *cert. denied*, 435 U.S. 925 (1977).

180. 541 F.2d at 579. Vonnegut's works appear to have a propensity to shock local school boards. Use of a story by Vonnegut led to the plaintiff's discharge in *Parducci*, discussed at notes 111-19 and accompanying text *supra*.

181. 384 F. Supp. 698 (N.D. Ohio 1974).

182. 541 F.2d at 581 (quoting 457 F.2d at 293).

183. 541 F.2d at 582 (footnote omitted).

184. *Id.* Compare the assumption of the Tenth Circuit in *Cary*, in which the court assumed that, in the absence of reasons, the book ban would be presumed to be based on permissible grounds. 598 F.2d at 537, 544.

185. 541 F.2d at 581.

academic freedom, that freedom is not without limits. The court stated that the school faculty could not make its textbook choices prevail over the selections of the school board, which was empowered under Ohio law to choose textbooks.[186] The limiting language is somewhat contradictory, considering the court's strong stand on teachers' rights elsewhere in the opinion.

In fashioning a remedy, the court ordered the school board to invalidate resolutions that would have prohibited discussion of the books or use of the works as supplemental reading.[187] It also ordered the board to replace the banned volumes, using the first money available.[188]

D. *Academic Freedom Cases Indicating a Need for a Record*

Some of the opinions discussed previously in which curriculum content and book banning were at issue indicated a need for the school board to state its reasons or to rely on articulated standards in taking action relating to selection or proscription of materials. In *Parducci*, the district court was concerned with a "total absence of standards."[189] The situation that resulted in the discharge of the plaintiff illustrates "how easily arbitrary discrimination can occur when public officials are given unfettered discretion to decide what books should be taught and what books should be banned," the court stated.[190]

In *Minarcini*, the Sixth Circuit found that, since books were banned in the absence of reasons "neutral in first amendment terms," the court should assume the board had acted as a censor, outlawing the volumes on the basis of content.[191] In fact, as in *Cary*,[192] the only explanation given for the *Minarcini* book ban was a negative minority report of a textbook committee. The secretary for the *Minarcini* committee had indicated one of the controversial books was "garbage."[193] No explanation was given at all by the board itself when it banned the books.[194]

The *Wilson* court found that school authorities must have established standards before imposing a prior restraint.[195] *Wilson* involved the banning of political speakers by school officials.[196] The court found that the invalidity of such prior restraints is strongly presumed.[197]

The need for a board to furnish reasons for not rehiring teachers who have first amendment claims also has been established. For example, in *Pred v. Board of Public Instruction*,[198] the Fifth Circuit rejected a claim that school authorities could simply let a teacher's contract expire without supplying

186. *Id.* at 579-80.
187. *Id.* at 584.
188. *Id.* at 584.
189. 316 F. Supp. at 357, discussed in notes 111-19 and accompanying text *supra*.
190. 316 F. Supp. at 358.
191. 541 F.2d at 582, discussed in notes 167-77 and accompanying text *supra*.
192. 598 F.2d at 537, 427 F. Supp. at 947-48. *See* text accompanying notes 256-63 *infra*.
193. 541 F.2d at 581.
194. *Id.* at 580-81.
195. 418 F. Supp. at 1364, discussed in text accompanying notes 160-63 *supra*.
196. 418 F. Supp. at 1361.
197. *Id.* at 1364.
198. 415 F.2d 851 (5th Cir. 1969).

reasons when a first amendment claim was involved.[199]

These cases are cited as illustrative of the principle that, in the area of academic freedom, as well as in other areas of the law, courts usually expect to find that reasons have been supplied to justify official action. This principle is probably most firmly established in the area of administrative law.[200] However, it is not inapplicable to *Cary*, since under Colorado law, rules applying to agencies appear to be applicable to local school boards.[201]

E. *Summary*

There is a split among the circuits in the curriculum content and book banning cases. The First Circuit, in *Mailloux* and *Keefe*, the two cases involving "dirty words" has taken a position protective of academic teachers' rights, as did the Sixth Circuit in *Minarcini*, the book banning case. The Seventh Circuit, in *Holmes*, the sex counseling case, and *Brubaker*, in which teachers had distributed the Woodstock brochure, has shown an unwillingness to find first amendment violations in the actions of school authorities. The Sixth Circuit, in *Presidents Council*, the case in which a book ban was upheld, also has shown a readiness to reject constitutional claims. The split is particularly noticable in the area of book bans, in which the Sixth and First Circuits came to the opposite conclusions in deciding almost identical issues.

Among the four federal district courts that have considered these issues, one has taken a strong position that the state may make almost any choices it wishes in restricting curriculum. The other three have placed some constitutional limitations on the state's power.

The courts that have considered the need for findings have indicated that, where first amendment claims are raised, a school board should supply reasons to justify its action.

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199. *Id.* at 855-59. For a discussion of the procedural due process rights afforded to discharged teachers, *see Teachers Rights, supra* note 1, at 858-74.

200. *See, e.g.*, Secretary of Agriculture v. United States, 347 U.S. 645 (1954); SEC v. Chenery Corp., 332 U.S. 194 (1947); Yonkers v. United States, 320 U.S. 685 (1944); Chicago v. FPC, 458 F.2d 731 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972); Medical Com. for Human Rts v. SEC, 432 F.2d 659 (D.C. Cir. 1970), *cert. granted*, 401 U.S. 973 (1971), *dismissed as moot*, 404 U.S. 403 (1972); Saginaw Broadcasting Co. v. FCC, 96 F.2d 554 (D.C. Cir.), *cert. denied*, 305 U.S. 613 (1938).

201. COLO. REV. STAT. § 22-32-109 (1)(r) (1973) requires a local board to comply with Article 4 of Title 24 of COLO. REV. STAT., which is the Administrative Procedure Act. COLO. REV. STAT. § 24-4-102 (3) (1973) defines an agency as any board, bureau, commission, department, institution, division, section, or officer of the state. The definition, while specifically excluding some entities, does not mention school boards. In addition, the Colorado Supreme Court treated a local school board as an agency in Littleton Educ. Ass'n v. Arapahoe County School Dist., 191 Colo. 411, 553 P.2d 793 (1976).

However, the applicability of administrative law standards to the Aurora board's action was not argued.

IV. *CARY* ANALYZED

A. *The Facts*

All of the books banned in *Cary*[202] were optional reading materials used in elective courses for high school juniors and seniors. The courses were Contemporary Literature, Contemporary Poetry, and American Masters. Pursuant to a policy adopted the previous year, a textbook evaluation committee was formed to make recommendations to the school board.[203] The committee was composed of school district employees, including teachers, parents, and students.[204] The year the books were banned was the first year the committee had operated. Previously, the school board had no policy regarding review of teaching materials,[205] although Colorado law required school boards to select textbooks.[206] The prior procedure was for language arts coordinators to review and approve book purchase requests made by teachers.[207]

A majority of the committee recommended that 1,285 books be approved by the board. A minority report listed ten books that the dissenting committee members believed should be rejected. Six of the ten singled out by the minority were among the books outlawed by the school board.[208] Nine of the banned books had been used in courses for at least three years. The tenth book had been in use for two years.[209] The parties to the lawsuit stipulated that the board's action meant that teachers could be dismissed for insubordination for adding the books to their course reading lists, assigning the books to students, giving students credit for reading them, reading the volumes aloud or causing them to be read aloud, or discussing the works at "such length as to amount to a constructive assignment of the materials."[210] Permitted activities were commenting on the books, recommending them to students, and discussing the works with students outside of class.[211] The board did not order that the books be removed from school libraries.[212]

There was no obscenity issue in the case: The five plaintiff-teachers and the defendant school board[213] agreed that the works were not obscene.[214]

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202. *See* note 7 *supra* for a listing of the banned works.

203. 598 F.2d at 537, 427 F. Supp. at 945.

204. There is some confusion about the membership of the committee. The district court opinion states that students, parents, and school board members were on the panel. 427 F. Supp. at 947. The court of appeals decision states that the membership included teachers, administrators, parents, and students. 598 F.2d at 537. The brief of the defendants states that the committee was composed of teachers, parents, and students. Brief for Defendants-Appellees and Cross-Appellants at 3, 598 F.2d 535 [hereinafter cited as Defendants' Brief].

205. Reply Brief for Defendants-Appellees and Cross-Appellants at 7, 598 F.2d 535 [hereinafter cited as Defendants' Reply Brief].

206. COLO. REV. STAT. § 22-32-109 (1)(t) (1973). COLO. REV. STAT. § 22-32-110 (1)(r) (1973) permits school boards to remove materials that are "immoral or pernicious." *See* note 27 *supra*.

207. Defendants Reply Brief at 7 (quoting from the record at 150-51, 427 F. Supp. 945).

208. 598 F.2d at 537.

209. Brief of Appellants and Cross-Appellees at 4, 598 F.2d 535 (citing the record at 10, 427 F. Supp. 945) [hereinafter cited as Plaintiffs' Brief].

210. 598 F.2d at 538.

211. Defendants' Reply Brief at 10.

212. 427 F. Supp. at 947.

213. The school board was named as a defendant, along with four members of the panel

They also stipulated that the board had not made a systematic effort to exclude any one system of thought or philosophy, and that it would be possible constitutionally for a decision to be made to study the books in high school classes.[215]

The book banning was not the only controversy in which the Aurora board was involved. Three members of the board had been elected on a "Christian slate" the previous year.[216] Just a few months prior to the book banning, the school board had reviewed and revised the district's sex education program.[217] Another proposal considered by the board was a motion to support the repeal of the Colorado Equal Rights Amendment.[218] About a year after the book banning, the board defeated a motion to require that each school day begin with a period of silent meditation or prayer.[219]

The general thrust of some of the board's proposals had been to establish an atmosphere in which religious concerns appeared paramount. In fact, one member of the board indicated that his religious convictions were of prime importance in all his decisions. Another stated that, while his religious beliefs governed everything he did, he was not attempting to force them on others.[220] However, the issue of whether the board's actions in banning the books constituted an establishment of a particular religion in violation of the first amendment was not argued by the plaintiffs.[221]

The teachers defined the issue as whether the state could prohibit them

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individually: Doyle K. Seawright, Douglas A. Johnson, DeWitte C. Gordon, and Glenna G. James. 598 F.2d at 536.

The fifth member of the board, William Davis, was not named as a defendant. The Rev. Davis was the only member of the board who voted against banning all 10 books. Minutes, Adams-Arapahoe School Dist. 28-J, Aurora, Colo. Board of Education, Jan. 12, 1976. (The minutes are available for public inspection at the Aurora School Administration building, 1085 Peoria St., Aurora, Colo.).

Prior to the board's action, Rev. Davis urged other board members to consider the legal aspects of banning books "for reasons that are not clearly and soundly academic." The Denver Post, Jan. 13, 1976, at 19. (All citations to articles in The Denver Post were written by the author who was a newspaper reporter at the time of the book banning and regularly reported the school board's actions).

214. 598 F.2d at 538.

215. *Id.*

216. The Denver Post, Nov. 5, 1975 at 16 (Zone 2 Section).

See also Taryle, *Aurora Bd. of Educ. Stages 'Best Show in Town,'* The Denver Post, May 2, 1976, at 23. (This signed editorial criticized some members of the school board for an inability to assume a leadership role in the community because of a focus on religion and "fundamentalist philosophy." It was also written by the author).

217. The Denver Post, Dec. 10, 1975 at 4 (Zone 2 Section). The president of the school board, Doyle K. Seawright, had stated shortly after his election in May 1975 that he thought boys and girls should be separated for sex education instruction. The Denver Post, May 21, 1975 at 22 (Zone 2 Section).

218. The Denver Post, Oct. 25, 1976, at 21. The motion to support the repeal of the Colorado Equal Rights Amendment was turned down by the board 3-2.

219. The Denver Post, Jan. 12, 1977 at 3 (Zone 2 Section).

220. the Denver Post, April 7, 1976 at 6 (Zone 2 Section).

221. Plaintiffs' Brief and Combined Answer and Reply Brief of Appellants and Cross-Appellees, 598 F.2d 535, [hereinafter cited as Plaintiffs' Reply Brief]. The plaintiffs were represented by the American Civil Liberties Union Foundation of Colo., Inc., Denver, Colo.

For a case in which the issue of the establishment of a religion in violation of the first amendment was crucial, *see Epperson*, discussed at notes 41-53 and accompanying text *supra*.

from using non-obscene books[222] based on "the personal predilections" of school board members. Further, they contended that, when elective courses were involved, it was constitutionally improper to uphold the ban, since the board had no explanation other than a dislike for the material coupled with a claim of absolute discretion to restrict conduct in the classroom. To rule that the board had such a broad power would, the plaintiffs asserted, make academic freedom "a nullity."[223]

The school board defined the issue as whether the first amendment required the school board to allow textbook decisions to be made by individual secondary teachers, despite a state law mandating the local school boards to select books.[224] In addition, the board indicated in its brief that the decision to ban the books had been made because the board "believes these books to be inappropriate,"[225] hardly an enlightening explanation.

In finding for the board of education, the court of appeals held that it was legitimate for the school district's curriculum to reflect the value system of parents and taxpayers. It was proper for the state to delegate textbook control to the board, and, while the board could not tailor the curriculum to reflect a religious viewpoint, it was otherwise free to control instruction as it saw fit. The school board was acting within its rights, even though the decision was political and influenced by its members' personal views.[226]

B. *The Tenth Circuit's Rationale*

Although the Tenth Circuit, quoting from the briefs of the parties, noted that the teachers and the board had defined the issue differently,[227] it did not explicitly resolve this difference by supplying its own statement of the issue. It would have been possible for the court to focus more sharply the issue to provide guidance for future school boards and courts considering this sort of problem. The court could have stated the issue, for example, as did the Second Circuit in *Presidents Council*,[228] to be whether the constitutional infringement was great enough to warrant an intrusion into the daily operations of a school district. It could then have devised a standard for measuring the magnitude of such infringements.

The only constitutional prohibition suggested is provided in Judge Logan's statement that a school board cannot select books in a way that will promote a religious viewpoint. Absent such a religious motivation, school boards appear free to ban books, even though they have been used previously, and even though the decision is political and "influenced by the personal views" of board members.[229]

The opinion cited decisions from other federal courts, including the

222. Plaintiffs' Reply Brief at 4.
223. *Id.* at 11-12.
224. Defendants' Brief at 10.
225. *Id.* at n. 1.
226. 598 F.2d at 543-44. Colorado statutes delegate control of curriculum and textbook selection to local school boards. *See* notes 27 & 206 *supra*.
227. 598 F.2d at 542-43.
228. Discussed in notes 164-73 and accompanying text *supra*.
229. 598 F.2d at 544.

landmark Supreme Court opinions dealing with academic freedom. However, in indicating the Supreme Court precedents which it found controlling, the court, more often than not, failed to rely on majority opinions.

In citing *Meyer*,[230] the court quoted from the dissenting opinion of Justice Holmes, who would have found it was reasonable to ban the teaching of foreign languages.[231] The circuit also quoted the opinions of Justices Stewart and Black in *Epperson*,[232] a case in which the two Justices, while concurring, did not join in the majority opinion.[233] Justice Black concurred only on the ground that he could have found the anti-evolution law void for vagueness.[234] He would not have found that the law violated the establishment clause of the first amendment. Further, he could not "imagine" a reason a state would be without power to withhold from its schools' curricula "any subject deemed too emotional and controversial . . . ."[235] Justice Stewart found the law so vague as to be invalid under the fourteenth amendment.[236]

The Tenth Circuit also quoted a portion of Justice Frankfurter's concurrence in *Wieman v. Updegraff*,[237] indicating that teachers have the "special task" of furthering critical inquiry and "open-mindedness" by their students. The circuit court did not indicate, however, how its decision would enable teachers to carry out that task.

The *Cary* court also quoted the portion of the *Tinker* majority opinion which stated that the first amendment does not allow school officials to take action casting " 'a pall of orthodoxy over the classroom' " without compelling reasons.[238] In a later irreconcilable portion of the opinion, the Tenth Circuit found that it was legitimate for a school board to censor curriculum so as "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."[239] This justification hardly seems to be of the nature mandated by the Supreme Court in *Tinker*. Equally unconvincing is the circuit's statement that a board could justify its course offerings on the ground the subjects to be taught were chosen with an eye toward promoting a "particular viewpoint."[240]

The circuit stated that secondary teachers have the freedoms previously indicated by the Supreme Court. It also found that teachers cannot be "made to simply read from a script prepared or approved by the board."[241] Yet, in the same opinion, the court found that a school board had absolute authority to ban the study of any material it wished, without supplying a

230. Discussed in text accompanying notes 15-20 *supra*.
231. 262 U.S. at 412.
232. Discussed in text accompanying notes 41-53 *supra*.
233. 598 F.2d at 540-41 (quoting from 393 U.S. at 113-16).
234. 393 U.S. at 114.
235. *Id.* at 112-13.
236. *Id.* at 116.
237. 344 U.S. 183, 196 (1952).
238. 598 F.2d at 539.
239. *Id.* at 543.
240. *Id.*
241. *Id.*

constitutionally valid reason. Carried to its logical extreme, this rule would appear to permit a board of education to select only one book for each class, prohibiting the use of any other materials. Such a requirement would certainly appear to come close to relegating teachers to the role of script readers, despite the court's statement to the contrary.

In the portion of *Cary* dealing with Supreme Court precedents, the Tenth Circuit stated that most of the cases have "arisen at the university level . . . ."[242] This certainly is not true of the High Court opinions cited by the circuit. Of the nine Supreme Court cases dealing with academic freedom to which the Tenth Circuit refers, only two— *Keyishian* and *Wieman*— arose in a college or university setting. The other seven all involved controversies in elementary or secondary schools.[243] Nor do the modern lower federal court decisions, either those cited[244] or others not treated in *Cary*, predominately involve university professors. In fact, most of the cases dealing with curricular controls appear to have arisen in the secondary school setting.[245] Of the fourteen lower court decisions[246] cited by the circuit, thirteen involve the rights of secondary and elementary teachers and students. Only one arose at an institution of higher education.[247]

The problem with the Tenth Circuit's attempt to distinguish the secondary school controversies from those arising in the university setting is that, while the court indicates there is a difference, it does not address that difference in any way. Nor does it indicate any precedent of any court that would aid in establishing guidelines for evaluating the claims of either secondary teachers or university professors. If this difference is essential, as the court of appeals implied, then the circuit should have delineated the difference. The court appears to justify its holding in *Cary* on the basis that the case involved high school students. While some differences in approach undoubtedly can be justified on this basis,[248] the court did not clearly indicate how much it

242. *Id.* at 539.

243. The seven Supreme Court cases cited which dealt with controversies at the elementary and secondary levels were *Tinker, Shelton, Meyer, Bartels, Epperson, Barnette*, and *Rodriguez*, *id.* at 539-43, discussed in notes 16-87 and accompanying text *supra*. For a discussion of academic freedom in higher education, *see Kutner, The Freedom of Academic Freedom: A Legal Dilemma*, 48 CHI.-KENT L. REV. 168 (1971).

244. 598 F.2d at 541-43.

245. The lower federal court opinions in which curricular or teaching method controls were at issue are discussed in notes 100-163 and accompanying text *supra*.

246. Of the fourteen lower federal court cases cited by the Tenth Circuit, eleven are discussed in notes 88-201 and accompanying text *supra*. Adams v. Campbell County School Dist., is discussed in text accompanying notes 253-58 *infra*.

The remaining two cases cited involve what may be termed "outrageous conduct" by high school teachers. In Moore v. School Bd. of Gulf County, 364 F. Supp. 355, 358-59 (N.D. Fla. 1973), the discharged teacher had related his personal sexual experiences to students during class. In Ahern v. Bd. of School Dist. of Grand Island, 456 F.2d 399, 401 (8th Cir. 1972), the teacher was fired after she turned over control of her classes to students, referred to a substitute teacher as a "bitch" in front of students, and ignored administrator's instructions.

247. Clark v. Holmes, discussed at notes 128-33 and accompanying text *infra*.

248. *See* Wilson v. Chancellor, 418 F. Supp. 1358, 1362 (D. Or. 1976), in which the court distinguishes the role of college professors from that of elementary and secondary teachers on the ground that the former engage in a search for knowledge, while the latter "merely disseminate knowledge." *See also Developments, supra* note 12 at 1053.

The Second Circuit, in James v. Bd. of Educ., 461 F.2d 566, 573 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972), stated that the role of an elementary and secondary teacher is indoctrinative.

relied on this factor.

One of the cited lower court opinions, *Parker*, appears not to be a viable precedent today.[249] The case was cited with a group of others in which teachers were fired. Judge Logan indicated that the cases in which courts found in favor of teachers could be distinguished because they were situations in which school authorities did not have a general policy proscribing the use of the materials involved. None of these precedents were discussed. In citing both the cases in which discharges were upheld and those in which the decisions of school authorities were overturned, the circuit did not indicate that it was following either group, beyond distinguishing the pro-teacher cases in one sentence.[250] Nor did the court explain why it chose to disregard the discharge cases in which courts found, on academic freedom grounds, that there was a right of teachers to some choice in selecting teaching methods and curricular content.[251] The opinion did not even explicitly indicate that it was choosing to follow precedents such as *Presidents Council* and *Brubaker*, rather than those like *Minarcini* and *Keefe*. The *Cary* rationale would have been stronger if the court had indicated which of the other circuits it was following and given its reasons for doing so, as did the Sixth Circuit in *Presidents Council*.[252]

The circuit indicates that it is following its own precedent, established in *Adams v. Campbell County School District*,[253] the only Tenth Circuit precedent cited in *Cary*. In *Adams*, high school teachers whose contracts were not renewed argued that they were fired in violation of their first amendment rights because of the wearing of an arm band to mourn soldiers killed in Vietnam, and discussing the war and flag burning, and because they were suspected of assisting in publication of an underground newspaper. The *Adams* trial court accepted the defendants' explanation that the non-renewal of the contracts was due to poor teaching practices, and not because the plaintiffs had exercised their first amendment rights.[254] The Tenth Circuit, while finding the trial court's findings to be supported,[255] stated that teachers "[u]ndoubtedly . . . have some freedom in the [teaching] techniques to be employed . . . ." However, this freedom is not without limits, "at least at the secondary level."[256] It is this portion of *Adams* that is quoted in *Cary*.[257] However, it is interesting that the circuit relied on a teacher discharge case in *Adams*, while rejecting other discharge cases, those in which teachers were reinstated, on the ground that they involved situations in which school authorities did not have a general policy prohibiting the use of the materials at

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However, despite a statement that school boards have wide latitude in matters of discipline, the court found that the board did not have the "unfettered discretion to violate fundamental constitutional rights." *Id.* at 575. The circuit found that the board could not fire a teacher who wore an armband in protest of the Vietnam war without infringing on those rights. *Id.* at 568.

249. *See, e.g.*, *Keyishian*, discussed in notes 36-40 and accompanying text *supra*.

250. 598 F.2d at 541-42.

251. *Id.*

252. *See* text accompanying note 173 *supra*.

253. 511 F.2d 1242 (10th Cir. 1975).

254. *Id.* at 1244-45.

255. *Id.* at 1248.

256. *Id.* at 1247.

257. 598 F.2d at 543-44.

issue. The *Cary* court does not mention the portion of *Adams* that indicates some kind of findings are necessary, at least in teacher discharge cases in which first amendment rights are asserted. The *Adams* court found that it was permissible for the school board to adopt the recommendations of school administrators rather than supplying its own findings.[258] This indicates that some kind of a statement of reasons for the board's action is needed. Applying the findings requirement to a situation in which there has been no discharge, as other courts have done,[259] the board should have stated reasons for the ban. While the board in *Cary* might have been able to adopt the reasons of the textbook committee's minority faction to explain its ban of six of the ten books, there were four books that the board culled itself, which were, incidently, not discussed in the minority report.[260] Therefore, *no* explanation was given for the banning of four of the volumes.

Judge Doyle, in a brief concurrence,[261] indicated that he would not approve arbitrary choices of books. He further noted that the majority opinion could be read as prohibiting such selections. Judge Doyle went on to state:

> The approach which I prefer would be that the exclusion of books for secondary school students is not to be an arbitrary exclusion. Therefore, reasons have to be given so that there can be court review. If they [the books] are excluded because the Board member disapproves for a subjective reason, I would say that this is an unlawful and unconstitutional invasion of the classroom.[262]

The judge's concurrence made a valid point. While the court of appeals might have decided that the book ban was constitutionally permissible after reviewing the board's reasons for its action, the Tenth Circuit should not have given judicial approval to an action that might have been arbitrary or based on some other constitutionally impermissible ground. Although the parties agreed that the board's action was not the result of an attempt to exclude a particular theory or type of book,[263] it would seem that, in the face of a constitutional claim alleging censorship, the court should have asked for more in the way of justification of the action.

V. THE SEARCH FOR GUIDELINES: A SUGGESTED TEST

Courts have failed to establish guidelines for evaluating secondary curricular and textbook decisions made by local school authorities. The test suggested below is intended to be broad enough to be used in both the book banning controversies and in the teacher discharge situations.[264]

The proposed test is a method of inquiry for resolving whether contro-

258. 511 F.2d at 1245.
259. *Minarcini* and *Wilson* are discussed in notes 191-97, 178-88, and 160-63 *infra*.
260. 598 F.2d at 537.
261. *Id.* at 544 (Doyle, J., concurring).
262. *Id.*
263. *Id.*
264. It is assumed at the outset that a court, in applying the proposed test, would not reach such an inquiry if the school board has based its decision on a constitutionally prohibited ground. For example, the test would not be used in a case in which it were established that

verted secondary materials can be subjected to censorship by school officials. This subjective test has two major prongs: the maturity of the students and the appropriateness of the materials. Two questions should be asked by a court when it attempts to resolve a controversy involving teaching materials or methods:

1) Were the students to whom the material or teaching method was directed *generally* mature enough to handle the material and/or method without any adverse effects?; and

2) Was the material or method appropriate in the classroom or school setting in which it was used?

If the answer to both questions is yes, then the board's ban on the use of the materials or discharge of a teacher should be reversed. When the answer to either question is no, then the school board's action should be upheld.

The two prongs of the test are discussed separately below. In addition, there are several other factors that a court could consider in borderline cases in which it is difficult to answer either or both questions.

A. *The Maturity of the Students*

While there have been significant changes in secondary education during the past several decades,[265] it has been recognized that there still is less academic freedom at the high school level than in higher education.[266] While there have been indications that secondary teachers are expected to

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officials had based their decision on a desire to further the tenets of a particular religion. *See* the discussion of *Epperson* in notes 41-53 and accompanying text *supra*.

For another author's suggestion of a test to be used in evaluating claims relating to teacher's in-class expression, *see Standards, supra* note 54 at 857-97.

265. During the same time that academic freedom has become recognized as a constitutionally protected interest, rapid changes have occurred in elementary and secondary education. See J. BRUBACHER, A HISTORY OF THE PROBLEMS OF EDUCATION 633-34 (1947) (cited in the Amici Curiae Brief of National Education Ass'n, Colorado Educational Ass'n, and the Aurora Educational Ass'n) [hereinafter cited as BRUBACHER]; CREMIN, THE TRANSFORMATION OF THE SCHOOL 116-17 (1962). Many more courses are offered in high schools than were a century ago. R. HOFSTADTER, ANTI-INTELLECTUALISM IN AMERICAN LIFE 342 (1963). The number of students who go to college has increased significantly in recent decades. HISTORICAL STATISTICS OF THE U.S., COLONIAL TIMES TO 1970, BICENTENNIAL ED. PT. 1 at 379 (1975); AMERICAN COUNCIL ON EDUC., FACT BOOK ON HIGHER EDUCATION, table 76.79 (1976). As a result, high schools increasingly have assumed the burden of college preparation, offering electives similar to courses formerly offered only on college campuses. G. HILLOCKS, ALTERNATIVES IN ENGLISH: A CRITICAL APPRAISAL OF ELECTIVE PROGRAMS 29 (1972) [hereinafter cited as *Hillocks*]. *See also* Albaum v. Carey, 283 F. Supp. 3, 10 (E.D.N.Y. 1968).

Changes also have occurred in the qualifications of teachers, and in their use of materials. Nineteenth century teachers concentrated on the basic facts, were not well trained, and did not assert the right of academic freedom. BRUBACHER, *supra* at 633-34. However, the situation changed in the twentieth century. By 1971, only 1.1 percent of U.S. secondary teachers did not have a college degree, while more than a third had a masters degree. NATIONAL CENTER FOR EDUC. STATISTICS, DIGEST OF EDUC. STATISTICS Table 53 at 56 (1976). These teachers increasingly found it necessary to use a wide range of materials, rather than limiting themselves to only one standardized text. Since the early 1940s, when paperback books became more available, such books have become a resource for teachers, with some instructors choosing to assign them in their classes directly, rather than relying on them only for outside study. A. APPLEBEE, TRADITION AND REFORM IN THE TEACHING OF ENGLISH: A HISTORY 207 (1974); J. LYNCH & B. EVANS, HIGH SCHOOL ENGLISH TEXTBOOKS: A CRITICAL EXAMINATION 61-62 (1963).

266. While there have been significant changes in education, it has been recognized that there still is less academic freedom at the high school level than in higher education. *See Developments, supra* note 12 at 1050, 1098. The Tenth Circuit recognized this distinction in *Adams* when

concentrate on transmitting basic information, there also has been recognition that minors, as they approach college age, should not be overly protected. Some courts have implied that the increased maturity of today's students is a factor which should be considered in evaluating what teaching materials or methods may be used.[267]

Although age is one aspect of maturity, the latter should be used as the standard because it is flexible. If the next generation of secondary students mature faster than did their parents, the standard will change. Also, maturity is intended to take into account the sophistication of the community,[268] since it is to be expected that students in some communities—probably more urbanized areas—mature intellectually at a faster rate than those in others.

In considering the level of maturity, the courts should attempt, however, to focus closely on the students themselves, rather than the conceptions of their parents in this regard. In some instances, school board members and parents may be shocked by materials or methods that would not offend or harm their children in the least. Courts also should make certain that a school board is not arguing for low level of maturity on the part of students to excuse a decision made on the basis of the political, social, or personal tastes of board members.[269]

It should be noted that, in the library book cases, the maturity of the students is likely to be the controlling factor. This is because the second prong of the test, appropriateness, is likely to be impossible to either establish or disprove. It is difficult to conceive of a situation in which the removal of a book could be justified on the ground that the volume is inappropriate for any topic that could be discussed in any course offered in the school.

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it stated that secondary teachers have "some freedom" in teaching methods, but do not have an unlimited right to determine course content. 511 F.2d at 1247.

The *Mailloux* court indicated that, at the secondary level, school authorities are more clearly acting in a role of *in loco parentis*, since most students are minors. The court commented that secondary schools are more closely governed, and their faculty members do not have the wide discretion of college professors. Most members of the community expect secondary teachers to concentrate on transmitting information and, at least to some extent, "indoctrinate" children in societal values. 323 F. Supp. at 1392. *See* the discussion of *Mailloux* at notes 120-26 and accompanying text *supra*.

267. The *Keefe* court did not believe that high school seniors had to be safeguarded from reading obscene words. If the students needed such shielding, "we would fear for their future," the court stated. 418 F.2d at 361. *See* the discussion of *Keefe* at notes 101-10 and accompanying text *supra*. The *Wilson* court noted that modern-day high school students are "suprisingly sophisticated, intelligent, and discerning." 418 F. Supp. at 1368. Such students are "far from easy prey" and will not be harmed by exposure to nontraditional or even Unamerican theories of thought. *Id.* at 1368, 1361. The Second Circuit, in James v. Bd. of Educ., noted that 18-year-olds have the right to vote and commented that it would be "foolhardy to shield our children from political debate and issues until the eve of their first venture into the voting booth." 461 F.2d 574. *See* note 248 *supra* for a discussion of *James*.

268. *Cf. Adams*, 511 F.2d at 1247, in which the Tenth Circuit recognized that the approach to evaluating first amendment claims at the secondary level might depend, at least in part, on the community standards. The court stated that, in a small community such as the one involved, school authorities "have a right to emphasize a more orthodox approach . . . ." *Id.*

269. This problem was indicated as a concern by the court in *Minarcini*, discussed at notes 178-88 and accompanying text *supra*. 541 F.2d at 582.

B. *Appropriateness of the Teaching Material or Method*

The second major area of inquiry, appropriateness of the material or method, often—but not always—will be the same as relevance to the course topic. Both relevance and appropriateness have been used as standards by the courts in evaluating curricular restraints.[270] Appropriateness is used rather than relevance because the latter would appear to indicate the acceptability of materials only when they are shown to have a direct relationship to the course title or to a specific topic of inquiry in a specific class. Appropriateness in the classroom or school setting is intended to be broader so as to include, for example, a discussion that might arise as a result of a legitimate question asked by a student. The term also indicates considerations of the obscenity or non-obscenity of materials or methods, since those of an obscene nature would appear to be per se inappropriate.[271]

C. *Other Factors to Consider*

The maturity-appropriateness test incorporates most of the considerations that should be weighed in resolving curricular and book disputes at the secondary level, but the two prongs are not exclusive. In borderline cases, there are other factors that could tip the scales.

One such consideration is the testimony of experts, if any.[272] Such testimony would most likely indicate the experts' opinions as to the students' maturity and the appropriateness of the material or method. Another factor, which ordinarily would be applied only in the teacher discharge cases, is the disruptive effect of the use of the materials or methods.[273] This factor usually would not be considered in book banning cases, since it is difficult to imagine a situation in which the stocking of a book in the school library or classroom would disrupt school discipline.

Still another consideration in some cases will be whether the controverted materials or method is used in an elective class or in a required

270. In *Mailloux*, discussed in notes 120-26 and accompanying text *supra*, the district court recognized that the use of a "taboo word" was "relevant" to the teaching of high school English. 323 F. Supp. 1389. In an Eighth Circuit case, a mathematics teacher's comments about Army recruiters were said to be "irrelevant" to the class curriculum. Birdwell v. Hazelwood, 491 F.2d 490, 492-93 (8th Cir. 1974). The court in *Parducci*, discussed in notes 111-19 and accompanying text *infra*, indicated that it found a story assigned by a teacher to be "appropriate for high school students . . . ." 316 F. Supp. at 356. The *Wilson* court found that the use of political speakers was not "inappropriate." 418 F. Supp. at 1364. *See* notes 160-63 and accompanying text *supra*.

271. Some courts have applied the Supreme Court's obscenity standard as enunciated in *Ginsberg*, 390 U.S. 629. *See* discussion at note 105 *supra*. For cases in which courts have applied *Ginsberg* to secondary curricular disputes, *see Keefe* and *Parducci*, discussed in notes 100-19 and accompanying text *supra*.

272. For a case in which the opinions of experts were disregarded, *see Brubaker*, discussed at notes 134-45 and accompanying text *supra*. *Contra*, *Sterzing* discussed in notes 146-48 and accompanying text *supra*.

273. The Supreme Court indicated in *Tinker* that actual or threatened disruption of school discipline is to be weighed in considering the validity of prior restraints in the school setting. *See* discussion at notes 54-65 and accompanying text *supra*. For a case in which disruptiveness was considered, *see Keefe*, discussed at notes 101-10 *supra*.

course.[274] This factor is relevant because students and their parents can control whether the student enrolls in an elective course, thereby eliminating a situation in which a student is forced to be exposed to ideas or words that he or his parents find offensive. Similarly, when the controversy involves materials, the court can consider whether or not the student is offered a meaningful opportunity to select alternative materials to fulfill course requirements.[275]

A final factor which could be weighed is whether the offending material or method is used in a college preparatory course. This is relevant because many school districts today offer classes with subject matter similar to that studied at the college level as a way of preparing students for a higher education.[276] Since the content of these courses more closely resembles the college curriculum than it does the typical high school offering, it would seem logical to allow more latitude to teachers.

It is time for the courts to apply a uniform means of resolving disputes involving teaching materials and methods at the secondary level. The use of such a test for weighing the competing interests in curricular controversies would help to establish the contours for the important new right of academic freedom, and would aid in establishing the secondary school as a true marketplace of ideas.[277]

*Doris B. Truhlar**

274. All of the banned books in *Cary* were proposed for use in elective courses. 598 F.2d at 537.

275. It is assumed that, if a student or his parents objected to materials, the student would be excused from the assignment. In *Cary*, any student could request and receive an alternate assignment. Plaintiffs' Reply Brief at 30.

276. HILLOCKS, *supra* note 265, at 29-30.

277. *See* note 39 *supra*.

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