# LOCKING UP THE MARKETPLACE OF IDEAS AND LOCKING OUT SCHOOL REFORM: COURTS' IMPRUDENT TREATMENT OF CONTROVERSIAL TEACHING IN AMERICA'S PUBLIC SCHOOLS

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*Courts have recognized two primary, oft-conflicting interests in teacher speech cases: (1) a societal interest in exposing students to a robust exchange of ideas, usually promoted by protecting teachers' academic freedom, and (2) a broad and unspecified, but not unconstrained, state interest in value inculcation, usually promoted by limiting teachers' academic freedom. In this Article, Professor Welner explores the legal landscape for teachers who use controversial instructional methods or materials in the classroom. He demonstrates that the current constitutional framework courts most often apply to these cases limits courts' analyses to relatively meaningless inquiries based on one or more of three superficial considerations: (1) The courts should not interfere with democratic decisions made by locally elected school boards; (2) teacher speech is protected only if it addresses a matter of public concern; and (3) because it is part of the curriculum, teacher classroom speech is subject to district regulation and given little, if any, protection. Following this examination of legal approaches, Welner explores the values and assumptions underlying these court decisions in light of present-day realities in American schools, as exemplified by three representative and widespread school reform policies. He concludes by offering a rubric for expanding the current legal framework to better account for the special roles played by American schools and teachers.*



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## INTRODUCTION

Two New Mexico teachers are fired after being told not to teach about Robert F. Kennedy, the U.S. Constitution, or the concept of justice.[1] An acclaimed English teacher in Missouri is fired for refusing to instruct her high-school students to refrain from using "indecent" language in their writing assignments.[2] In South Dakota, a teacher is asked to teach sex education and is

1. David Hill, *Sisters in Arms*, TCHR. MAG., Aug./Sept. 1997, at 28, 32. The school district had accused the two teachers of bringing these and other topics into their curriculum as part of a strategy to stir the anger of Chicano students toward their Anglo and Spanish neighbors. *Id.* at 31. The specific restrictions set forth in the text concerned a seventh-grade class called "Skills for Living," designed to address issues such as drugs, violence, and playing a positive societal role. *Id.*

Nadine and Patsy Cordova, sisters who had taught in the Vaughn, New Mexico school district for twelve and seventeen years, respectively, had both earned strong evaluations from their supervisor. *Id.* But the perceived political message underlying their teaching incurred the wrath of a school board member, who told them that, if they wanted to teach Chicano history, they should use books written from "an Anglo point of view." *Id.* The teachers accused this board member of working behind the scenes with his board colleagues and the superintendent to orchestrate their removal. *Id.* at 32. Following their firing for "insubordination" in the summer of 1997, the two sisters filed a lawsuit in federal court, asserting a violation of their First Amendment rights. *Id.* at 34. In November 1998, they won a $520,000 settlement from the district. *See* Kathleen Kennedy Manzo, *Fired Teachers Get $520,000*, EDUC. WEEK, Nov. 25, 1998, at 4.

2. *See* Lacks v. Ferguson Reorganized Sch. Dist., 147 F.3d 718, 719–20 (8th Cir. 1998). The teacher had made a conscious pedagogical decision to resist correcting the indecent language because she felt that her inner-city students were easily discouraged. *See* Karen Diegmueller, *Expletives Deleted*, TCHR. MAG., Sept. 1995, at 24, 27. If she substantially criticized their initial efforts at writing, she reasoned, she would get no further efforts. *Id.*

The appellate panel reversed the lower court's grant of summary judgment in favor of the teacher. The panel held that the teacher's termination was reasonably related to a legitimate pedagogical concern. *Lacks*, 147 F.3d at 724.

fired for responding in too much detail to a question about homosexuality.[3] A Florida teacher sues her district, challenging a ban on classroom use of President Clinton's grand jury testimony or Kenneth Starr's report.[4] Across America, teachers are second-guessed and denounced when their choices of reading materials are perceived to cross acceptable boundaries concerning issues such as race, sexual orientation, religion, language, and politics.[5]

Yet educational experts strongly support the instructional inclusion of controversial issues to foster the development of skills needed for effective participation as a citizen in a democracy,[6] as well as the development of

3. *See* Collins v. Faith Sch. Dist., 574 N.W.2d 889 (S.D. 1998). South Dakota's Supreme Court ordered the reinstatement of a teacher who had been fired for "incompetency." *Id.* at 890. The teacher had been assigned to serve as a resource teacher for a sex education unit given to a group of boys in fourth, fifth, and sixth grade. *Id.* at 891. When one of the boys asked how two men could have sex (which he had heard of outside the class), the teacher responded that society disapproved of such conduct, and he then described oral and anal sexual intercourse in explicit language. *Id.* The teacher later agreed that his detailed response was inappropriate, but the court nonetheless held that this single incident could not justify a finding of incompetence. *Id.* at 894.

More recently, a high-school teacher in California, who was disciplined for discussing anti-homosexual and racial discrimination in his honors English class, filed a federal suit challenging, as a denial of his free speech rights, his district's policy on discussing controversial issues in the classroom. *See* Karen L. Ambercrombie, *Class Discussions Prompt Suit*, EDUC. WEEK, Mar. 3, 1999, at 4. The plaintiff, Carl Debro, split his claims between federal and state courts, eventually settling both. *Id.* The defendant, San Leandro School District, removed the disciplinary notation from Debro's personnel file in 2001 (as a partial settlement of the federal case) and then agreed in August of 2002 to a monetary settlement of $1,155,000. *Id.* The damage settlement followed an announced jury award of $500,000 in emotional distress damages plus a jury finding of a legal basis for punitive damages (the settlement was reached before the punitive damages phase of the trial had yet begun). *See* Press Release, Haddad & Sherwin, San Leandro Teacher Settles Landmark Civil Rights Case for over $1,000,000, After Judge Holds Gag Order Unconstitutional, and Jury Awards $500,000 in Emotional Distress Damages and Finds Punitive Damages Liability (Aug. 28, 2002) (on file with author); *see also* Elizabeth Schainbaum, *Teacher Suing for Right to Speak out*, DAILY REV., July 29, 2002, at B1 (describing the dispute).

4. Kathleen Kennedy Manzo, *Teacher Sues over Starr Report*, EDUC. WEEK, Dec. 16, 1998, at 4. The teacher, Linda Manning, wished to use the material in her college-level American government class. *Id.* However, the district had sent a memorandum to teachers informing them that district policy forbad the use of the testimony and/or report—citing their explicit nature. *Id.* Ms. Manning unsuccessfully appealed to her school principal then grudgingly complied with the policy. *Id.* But she also brought a lawsuit in federal court, arguing academic freedom and seeking an injunction. *Id.* This action was settled in December 1999, with the district agreeing to set up a review committee to consider future proposed curricular limitations in a timely manner. *See East Lake Teacher Wins Settlement in Starr Report Suit*, BRECHNER REP., Feb. 2000, at 3, *available at* http://www.jou.ufl.edu/brechner/reports/2000/rpt0002.htm (last visited Feb. 18, 2003).

5. *See* HERBERT N. FOERSTEL, BANNED IN THE U.S.A.: A REFERENCE GUIDE TO BOOK CENSORSHIP IN SCHOOLS AND PUBLIC LIBRARIES 1–90 (1994).

6. *See* AMY GUTMANN, DEMOCRATIC EDUCATION 41–47 (1987); Fred M. Newmann, *Reflective Civic Participation*, 53 SOC. EDUC. 357 (1989); *see generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

interpersonal and critical thinking skills.[7] In the case of the fired teacher in Missouri, the National Council of Teachers of English declared that the teaching methods at issue were representative of the type of pedagogy that is most helpful in encouraging students to write, and the organization backed her legal action against the school district.[8] Advocates for "character education"[9]

7. Angela M. Harwood & Carole L. Hahn, *Controversial Issues in the Classroom*, ERIC DIG. ED327453 (1990), *available at* http://www.ericfacility.net/ericdigests/ed327453.html. *See generally* ELLEN HENSON BRINKLEY, CAUGHT OFF GUARD: TEACHERS RETHINKING CENSORSHIP AND CONTROVERSY (1999) (presenting an overview of the issues confronting teachers using controversial pedagogy).

8. Diegmueller, *supra* note 2, at 28. The National Council of Teachers of English also sent a letter of support on behalf of the two New Mexico teachers. Hill, *supra* note 1, at 33.

One illustrative set of instructional guidelines was issued by the widely respected Center on Organization and Restructuring of Schools (CORS). For an explanation of the guidelines, see FRED M. NEWMANN ET AL., A GUIDE TO AUTHENTIC INSTRUCTION AND ASSESSMENT: VISION, STANDARDS AND SCORING (1995). Following their nationwide study of twenty-four restructuring schools, CORS issued a guide for "authentic instruction." The authors define "authenticity" as "the extent to which a lesson, assessment task, or sample of student performance represents construction of knowledge through the use of disciplined inquiry that has some value or meaning beyond success in school." *Id.* at 4. Such instruction, the CORS authors contend, is grounded in higher-order thinking, depth of knowledge, substantive conversing, and connections to the world beyond the classroom. *Id.* at 28–43. Similar ideas are advocated by traditional educators, *see* MORTIMER J. ADLER, THE PAIDEIA PROPOSAL: AN EDUCATIONAL MANIFESTO (1982), and progressive educators, *see* HUGH MEHAN ET AL., CONSTRUCTING SCHOOL SUCCESS: THE CONSEQUENCES OF UNTRACKING LOW-ACHIEVING STUDENTS 3–20 (1996).

9. America is also in the midst of a renewed call for the teaching of morals in the classroom. For instance, President George W. Bush's education plan increases funding for character education. *See* No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (to be codified at 20 U.S.C. §§ 6301–7941); *see also* Scott Baldauf, *Reading, Writing, and Right and Wrong*, CHRISTIAN SCI. MONITOR, Aug. 27, 1996, at 1 (citing a 1994 Gallup poll wherein 49 percent of parents agreed that values should be taught in public schools, with this support growing stronger—to 90 percent—when parents were told what would be taught, such as industry, compassion, and civility). Similarly, in a Gallup poll taken August 24–26, 1999, 48 percent of Americans agreed that character education should be required of high-school students, and another 42 percent answered that character education should be offered as an elective. Only 7 percent felt that it should not be offered. This material was retrieved August 30, 2001 from http://www.gallup.com/poll/indicators/indeducation2.asp. *See also* GUTMANN, *supra* note 6, at 53–54; Joan F. Goodman, *Talk of the Good Is Good Talk*, EDUC. WEEK, Sept. 24, 1997, at 32. Many school districts, as well the two major teachers' unions and other groups, have endorsed the concept of character education. *See* Baldauf, *supra*. Some of these advocates of values education present a traditional, indoctrination perspective. *See, e.g.*, WILLIAM KILPATRICK, WHY JOHNNY CAN'T TELL RIGHT FROM WRONG 13–19 (1992). In districts that have adopted this approach, teachers risk punitive action when they stray beyond the approved curricular boundaries. Other advocates of values education invite teachers to exercise more discretion and to engage in innovative practices. *See* NEL NODDINGS, THE CHALLENGE TO CARE IN SCHOOLS: AN AFFIRMATIVE APPROACH TO EDUCATION 173–80 (1992); *see also* Baldauf, *supra*.

Character education raises concerns at both political poles. Some civil libertarians worry that teachers will smuggle their religious views into class, while some conservatives worry that teachers will try to separate the teaching of values from their religious roots. *See* PEOPLE FOR THE AMERICAN WAY, A RIGHT WING AND A PRAYER: THE RELIGIOUS RIGHT AND YOUR PUBLIC SCHOOLS *passim* (1997); CHILD ABUSE IN THE CLASSROOM *passim* (Phyllis Schlafly ed., 1984).

and "critical pedagogy"[10] similarly promote curricula and teaching methods likely to lead teachers into controversies. Responding to these advocates, the nation's educational reform agenda includes prominent policies that promote innovation and that depend, in part, upon devolving authority to schools, teachers, and community members.

But what happens to teachers who heed this advice or otherwise bring controversy into the classroom? This Article explores the safeguards offered, presently as well as historically, by the U.S. Constitution to teachers who use controversial pedagogy. Part I of this Article sets forth the context for this exploration by examining the role that Americans have traditionally asked public schools and teachers to play. When courts restrict or expand constitutional protections for teacher classroom speech, they effectively

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Either way, someone's ox is gored. However, as discussed later in this Article, value-neutrality is realistically impossible and theoretically inconsistent—because it excludes illiberal conceptions of the good that necessitate value indoctrination. *See generally* Alfie Kohn, *How Not to Teach Values: A Critical Look at Character Education*, PHI DELTA KAPPAN, Feb. 1997, at 429 (denouncing character education programs grounded in rewards systems that teach children that they will get what they want by behaving in certain ways).

10. Perhaps the strongest advocates for the introduction of controversy into the classroom are the so-called critical pedagogues. *See generally* PETER MCLAREN, LIFE IN SCHOOLS: AN INTRODUCTION TO CRITICAL PEDAGOGY IN THE FOUNDATIONS OF EDUCATION (2d ed. 1994); IRA SHOR, EMPOWERING EDUCATION: CRITICAL TEACHING FOR SOCIAL CHANGE (1992); JOAN WINK, CRITICAL PEDAGOGY: NOTES FROM THE REAL WORLD (2d ed. 2000). These educators and scholars argue that students should be taught critical thinking skills for use in deconstructing dominant societal norms concerning issues such as race, class, and sexual orientation. *See, e.g.*, Shor, *supra*, at 13–15. Public schools, they contend, should be used transformatively to create a more just society. *See, e.g.*, *id.* at 15–17.

Thirty years ago, another group of reformers pushed for "open classrooms." Like the present-day advocates of authentic instruction and critical pedagogy, open classroom proponents sought to develop students' critical faculties and their desire for future inquiry. Designed primarily for the elementary grades, open classrooms eschew whole-class learning in favor of more individualized, informal, constructivist (student-driven) instruction. The reform was strongly influenced by Jean Piaget's ideas concerning developmental stages, with younger students focusing heavily on experiential learning. Open classroom reforms are described in ROLAND S. BARTH, OPEN EDUCATION AND THE AMERICAN SCHOOL (1972); HERBERT KOHL, THE OPEN CLASSROOM: A PRACTICAL GUIDE TO A NEW WAY OF TEACHING (1969); CHARLES E. SILBERMAN, CRISIS IN THE CLASSROOM (1970); Lydia A. H. Smith, *"Open Education" Revisited: Promise and Problems in American Educational Reform (1967–1976)*, 99 TCHRS. C. REC. 371 (1997). Like today's critical pedagogues, these open classroom reformers challenged traditional instruction, and teachers implementing open classrooms sometimes found that their controversial pedagogy received insufficient protection from the courts. *See, e.g.*, Ahern v. Bd. of Educ., 456 F.2d 399, 403–04 (8th Cir. 1972). A contemporaneous law review note explained:

> [O]pen-classroom educators require a measure of academic freedom more or less equal to that of a college professor. Given the goals of open education, it is clear that a teacher must be prepared and permitted to pursue student inquiry almost anywhere within the bounds of relevancy. To censor such inquiry merely because it treads into controversial areas would be anathema to the principles of open education.

Note, *Academic Freedom in the Public Schools: The Right to Teach*, 48 N.Y.U. L. REV. 1176, 1182 (1973).

weigh in on a longstanding debate about whether American schools should encourage an open exploration of ideas or should instead inculcate values.[11]

Accordingly, Part I offers a brief treatment of this broader philosophical debate, then surveys and analyzes the legal protections and constraints[12] on controversial teacher speech.[13] I discuss courts' past recognition of two primary, oft-conflicting interests in teacher speech cases: (1) a societal interest in exposing students to a robust exchange of ideas, usually promoted by protecting teachers' academic freedom, and (2) a broad and unspecified, but not unconstrained, state interest in value inculcation, usually promoted by limiting teachers' academic freedom. I then demonstrate in Part II that this historical focus on the substance of teacher speech disputes has degenerated into treatment of these cases as common labor disputes or as generic quarrels over decisionmaking power.[14] The current constitutional framework that courts most often apply to these cases limits courts' analyses to relatively meaningless inquiries based on one or more of three superficial considerations: (1) The courts should not interfere with democratic decisions made by locally elected school boards; (2) teacher speech is protected only

11. Support of value inculcation, as discussed *infra* at Part II.A, also effectively stands as support for giving school officials, particularly school board members, the authority to exercise their discretion in determining which values to inculcate.

12. In addition to legal constraints, teachers also face political constraints and economic and social forces that push them toward conformity with traditional education practices. All of these forces combine to determine the context for teachers' decisions about controversial pedagogy. In focusing herein on legal issues, the author in no way intends to minimize the importance of these other factors.

13. The word "speech" is used in its broad, First Amendment sense—meaning expressive speech or conduct. Included are such pedagogical activities as selection of curricula and teaching methods. *See, e.g.*, Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036, 1050, 1055 (6th Cir. 2001) (holding that the choice of a guest speaker on a given topic was indeed protected speech). *But see* Fowler v. Bd. of Educ., 819 F.2d 657, 662 (6th Cir. 1987) (holding that a teacher's decision to show a particular movie to her students—a movie she had not previewed and had selected on the basis of student preference—was "conduct" and "clearly . . . not 'speech' in the traditional sense of the expression of ideas through use of the spoken or written word"). As demonstrated by the cases discussed in this Article, however, the vast majority of courts disagree with the *Fowler* court's narrow interpretation of speech. *See, e.g.*, Krizek v. Bd. of Educ., 713 F. Supp. 1131, 1130–33, 1144 (N.D. Ill. 1989) (ruling in favor of the school district, but only after balancing the school's right to control the curriculum with the rights of expression of the plaintiff teacher, who had shown her class of third-year high-school students the film *About Last Night*, an R-rated film with "a great deal of vulgarity and sexually explicit scenes"); Bd. of Educ. v. Wilder, 960 P.2d 695, 701–02 (Colo. 1998) (finding that the district had a legitimate pedagogical interest that outweighed the teacher's First Amendment rights, and therefore upholding the district's firing of a teacher who had shown an R-rated film replete with nudity, sex, and violence).

14. Contemporary decisions have also quite appropriately stressed the state's interest and responsibility in determining curriculum. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988). However, as discussed in Part III of this Article, recognition of this state role should be only the first step in a complete inquiry, and yet courts' treatment of this issue has been dangerously superficial.

if it addresses a matter of public concern; and (3) because it is part of the curriculum, teacher classroom speech is subject to district regulation and given little, if any, protection.

In Part III, following this examination of legal approaches, I explore the values and assumptions underlying these court decisions in light of present-day realities in American schools, as embodied by three representative and widespread school reform policies. I conclude that the legal analysis now employed in teacher speech cases is too often divorced from the full range of public schools' educational approaches and functions, leaving little or no room for such considerations as academic freedom and the "marketplace of ideas."[15] Perhaps more importantly, there exists a powerful tension between recent court decisions and the goals and requirements of national educational reform policy. I therefore offer, in Part IV, a rubric for expanding the current legal framework to better account for the special roles played by American schools and teachers.

## I. PUBLIC SCHOOLS' ROLE IN SOCIETY

The conflict over the permissible scope of teacher speech in the public school classroom[16] is largely shaped by two opposing, influential arguments. One perspective is the traditional view of schools as a vehicle for teaching American youth shared values and norms, as determined by an equitable and trusted democracy:

> Respect for the beliefs which society deems "proper" must be instilled in the citizenry of tomorrow. The child, when young and "susceptible to ideas," should be sheltered from hostile ideology. A love of country and an idealized status quo will promote the greatest resistance to subversions. Education is inculcation, not exposure.[17]

Those who share this perspective are likely to assign the teacher a role with limited discretion and autonomy. This traditional view is often held in concert with a view of schools as economic tools, preparing tomorrow's workers and thereby ensuring the nation's future competitiveness.[18]

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15. Keyishian v. Bd. of Regents, 395 U.S. 589, 603 (1967).

16. Hereinafter, unless otherwise noted, this Article will use the shortened term "teacher speech" to refer to public school teacher classroom speech, with the meaning of "classroom" including extra-classroom activities directed or encouraged by the teacher.

17. Comment, *School Boards, Schoolbooks and the Freedom to Learn*, 59 YALE L.J. 928, 941 (1950).

18. *See* NATIONAL COMMISSION ON EXCELLENCE IN EDUCATION, A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM 6–7 (1983). This view of schools as economic tools is not necessarily in conflict with a view of schools that encourages broad freedom for teacher speech, so

The other prominent perspective sees the school as a marketplace of ideas.[19] Not surprisingly, those sharing this perspective support a much broader scope of protected teacher speech. They tend to believe that the classroom should be free from inculcation of traditional beliefs, values, and ideas.[20] One commentator who holds this viewpoint has articulated it in terms of the First Amendment goals of self-fulfillment, self-realization, and autonomy:

> The [First Amendment] right to autonomy implies that people are to be won over to a particular viewpoint with means that demonstrate respect for them as rational, freely choosing individuals. Belief is to be formed, if at all, through dialogue. Therefore, an educational effort consistent with respect for the autonomy of students must be one that exposes them to controversy; it must avoid seeking to imbue students with beliefs, but must instead encourage them to think critically about the goals and values they choose to pursue through life. An educational effort consistent with the notion of autonomy would prepare students to resist manipulation . . . . The effort to inculcate "official" values, whether directly through explicit instruction, indirectly through forced participation in ceremonies such as patriotic exercises, or even more obliquely through "protection" of children from "dangerous" materials and viewpoints, is inconsistent with the right of autonomy.[21]

Such thinkers often cite John Stuart Mill's warning that, through such inculcation of values, state-sponsored education can establish "a despotism over the mind."[22]

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there is no detailed discussion of this economic view herein. It deserves mention only because it is a very widely held—and largely unquestioned—view of schools in American society.

19. *See Keyishian*, 385 U.S. at 603. The critical pedagogues support a variation of this "marketplace" perspective. *See, e.g.*, MCLAREN, *supra* note 10, at 175–78. They believe that the present social and political structure is inequitable, and they question the ability of the American political system to fairly represent subordinated members of society. *Id.* at 178–88. As a result, they encourage teachers to create a community of critical practice—to challenge the dominant societal structure—within their classrooms. *See generally* MCLAREN, *supra* note 10 at 165–66; CRITICAL PEDAGOGY, THE STATE, AND CULTURAL STRUGGLE 248–51 (Henry A. Giroux & Peter L. McLaren eds., 1989); WINK, *supra* note 10, *passim*.

20. It should be noted that some adherents to the marketplace-of-ideas model for schools advocate the *teaching* of values even while denouncing the *inculcation* of values. *See* GUTMANN, *supra* note 6, at 41–46 (calling for teaching that will prepare children for deliberate moral reasoning).

21. Tyll van Geel, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197, 253 (1983).

22. JOHN STUART MILL, ON LIBERTY WITH THE SUBJECTION OF WOMEN AND CHAPTERS ON SOCIALISM 106 (Stefan Collini ed., Cambridge Univ. Press 1989) (1859). Values education, Mill explained, can make state-sponsored education

> a mere contrivance for moulding people to be exactly like one another: and as the mould in which it casts them is that which pleases the predominant power in the government, whether this be a monarch, a priesthood, an aristocracy, or the majority of the existing

These perspectives inform the debate over the proper role of public schools in America. In the past, at least, they have also informed courts' consideration of cases involving controversial teacher speech. In Parts I.A and I.B, I further explore the tension between these perspectives through a presentation of two thoughtful, opposing philosophical views of the role of schools and of teachers. Both viewpoints pay homage to America's status as a democracy. The first perspective emphasizes reliance on the present democratic process[23] and on the popular governance of schools. The second perspective concentrates on the classroom, emphasizing the importance of free expression to the future of the American democratic system.[24]

## A. Reliance on the Political Process to Govern Classrooms

As commentators on both the left and the right flanks of the political spectrum have pointed out, some inculcation of values in schools is inevitable.[25] Given this inevitability, the important question becomes who should

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generation, in proportion as it is efficient and successful, it establishes a despotism over the mind.

*Id.*

23. *See* Malcolm M. Stewart, *The First Amendment, the Public Schools, and the Inculcation of Community Values*, 18 J.L. & EDUC. 23, 29 (1989).

24. *See* Stephen Arons & Charles Lawrence III, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 HARV. C.R.-C.L. L. REV. 309, 310 (1980).

25. From the left, Stephen Arons and Charles Lawrence explain that

> Even when a school bends over backwards (as it almost never does) to provide all points of view about ideas and issues in the classroom, it barely scratches the surface of its system of value inculcation. A school must still confront its hidden curriculum—the role models teachers provide, the structure of classrooms and of teacher-student relationships, the way in which the school is governed, the ways in which the child's time is parceled out, learning subdivided and fragmented, attitudes and behaviors rewarded and punished. Even in those areas concerned with basic skills it is clear that teaching is never value-neutral, that texts, teachers, subject matter and atmosphere convey messages about approved and rewarded values and ideas.

*Id.* at 316–17. From the right, Malcolm Stewart agrees that "the process of education must inevitably be inculcative, in the sense that it will dispose students to accept some values and opinions and reject others." Stewart, *supra* note 23, at 25; *see also* Susan H. Bitensky, *A Contemporary Proposal for Reconciling the Free Speech Clause with Curricular Values Inculcation in the Public Schools*, 70 NOTRE DAME L. REV. 769, 772–73 (1995) (arguing in favor of purposeful values indoctrination).

A related idea is expressed by Stanley Ingber, who argues that, given the nature of young children as lacking full autonomy, we are presented with a philosophical dilemma: "Society must indoctrinate children so that they may be capable of autonomy. They must be socialized to the norms of society while remaining free to modify or even abandon those norms. Paradoxically, education must promote autonomy while simultaneously denying it by shaping and constraining present and future choices." Stanley Ingber, *Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 19 (footnote omitted).

Ingber also notes: "One of the greatest shortcomings of any attempt at a value-neutral education lies in the enormous mass of information and perspectives that exist in the world. With only

choose the values to be inculcated and how those values should be instilled.[26] One answer to this question is to affirm allegiance to the democratic process, on the basis that there is nothing "constitutionally suspect about public educational policies which have their genesis in community political pressures."[27]

In support of this position, Malcolm Stewart points out that teacher speech would not be possible or effective without significant government "subsidies."[28] He sets forth three forms of government subsidy for teacher speech: (1) economic (for example, the teacher's salary), (2) a captive audience, and (3) the imprimatur of state approval.[29] While Stewart concedes that teachers have a right to express themselves, he asserts that they have no right to government assistance in support of that expression.[30]

Stewart's position fully endorses the political process of decision-making.[31] Parents *should* be able to use that process to influence their children's education—particularly with regard to the values taught to their children.[32] Because there is no pedagogical way to determine the best values

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limited resources and time, schools cannot possibly provide a truly neutral curriculum. Choices of inclusion and, necessarily, exclusion must be made." *Id.* at 26.

26. Stewart, *supra* note 23, at 25.

27. *Id.* at 50–58. *But see* KEVIN G. WELNER, LEGAL RIGHTS, LOCAL WRONGS: WHEN COMMUNITY CONTROL COLLIDES WITH EDUCATIONAL EQUITY 232 (2001) (highlighting the potential for local control to disempower political minorities); IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 96–121 (1990) (same).

28. *See* Stewart, *supra* note 23, at 62.

29. *Id.* at 62–63.

30. *Id.* at 72–73.

31. *See* David A. Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 498 (1981) (arguing that schools' indoctrinative function precludes recognizing First Amendment rights for children because "one of public education's principal functions always has been to indoctrinate a generation of children with the values, traditions, and rituals of society"); Brian A. Freeman, *The Supreme Court and First Amendment Rights of Students in the Public School Classroom: A Proposed Model of Analysis*, 12 HASTINGS CONST. L.Q. 1, 24, 30 (1984) (contending that classroom dialogue should facilitate the learning process, including value inculcation, rather than offer a free trade of ideas); Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 OHIO ST. L.J. 663, 699–702 (1986) (asserting that public schools are more than mere extensions of the state bureaucracy whose intrusion into students' personal expression is presumptively chilling, and arguing that schools should instead be understood as mediating institutions between individuals and the state, charged with developing key values among their students).

32. Many of these arguments assume a tightly coupled school organization, whereby the actual functioning of the classroom is conclusively determined by official policy. For instance, a top-down requirement that all reading be taught using a "phonics" approach would, according to this perspective, actually exclude all other approaches from the classroom. Real school organizations, however, are loosely coupled, meaning that there exist only weak linkages among the units that make up the organization. *See* Karl E. Weick, *Educational Organizations as Loosely Coupled Systems*, 21 ADMIN. SCI. Q. 1, 17 (1976). As a practical matter, teachers can be considered "street-level bureaucrats," meaning that they override the demands of superior bureaucrats in

to teach, this decision should be left to the political process.[33] Yet a significant weakness in this approach is inadvertently highlighted by Stewart himself:

> One might certainly question whether the political pressures in cases like *Board of Education v. Pico* were truly brought to bear by "the community" or simply by obstreperous factions. Of course, the potential for an impassioned and vocal minority to exercise political influence that is disproportionate to its numbers is hardly limited to the local school board. *Assuming that no systemic barriers exist to participation in the political process*, it seems implausible to suggest that courts should undertake inquiries into the "true" beliefs of the electorate. If the political pressures to which the school board is subjected do not accurately reflect community sentiment, then the obvious response is that citizens of different sensibilities should become more actively involved in the formulation of educational policy—not that they should seek relief in the courts.[34]

Whether de jure or merely de facto, there are definite "systemic barriers" to the participation of many who are members of subordinate groups or cultures in American society. For example, in a mixed-income community, lower-income families invariably have a weaker political voice than do higher-income families.[35] This can be attributed in part to a lower level of participation and in part to lesser per capita political influence.[36] That

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the hierarchy because it is the teachers who have effective control over the daily classroom practice. *See* MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY 3–25 (1980).

33. Stewart explains his reliance on the political system as follows:

> Our system of locally elected school boards seems clearly to presuppose a pattern of educational decision-making which is responsive to community preferences. To say that the Constitution proscribes politically motivated decision-making by local school boards is really to say that there is something illegitimate about parents' attempts to influence, through the political process, the ways in which their children are educated.
>
> This is particularly true where the educational decision in question concerns the nature of the values to be transmitted through the public schools. To say that school officials should be motivated by pedagogical rather than political concerns suggests that these officials should use their expertise to develop the "best" educational program for the students rather than the program which the electorate prefers. But the choice of "appropriate" values is hardly a subject on which professional expertise can be brought to bear (though the technique for transmitting those values may be). The legitimacy of a school official's choice of the values to be transmitted is derived solely from his [or her] stature as a representative of the community. If the inculcation of values is an appropriate function of public education, then there exists no bright line between pedagogical and political motivation.

Stewart, *supra* note 23, at 51.

34. *Id.* (emphasis added).

35. See Amy Stuart Wells & Irene Serna, *The Politics of Culture: Understanding Local Political Resistance to Detracking in Racially Mixed Schools*, 66 HARV. EDUC. REV. 93 (1996), for an excellent discussion of the powerful role played by "local elites" in the control of local school decisionmaking. *See also* WELNER, *supra* note 27, at 234–36.

36. *See* Wells & Serna, *supra* note 35, at 98–99.

is, lower income correlates to less political engagement as well as to less effectiveness for those that do engage. Stewart has fallen victim to what Nancy Fraser identifies as a liberal political theory that "assumes the autonomy of the political in a very strong form [and] . . . assumes that it is possible to organize a democratic form of political life [notwithstanding societal] . . . structures that generate systematic inequalities."[37] Liberals such as Stewart may wish to insulate political institutions, thereby achieving presumptively equitable interactions rather than those premised on structural and systemic relations of inequality. However, this is likely an unreachable ideal: "[T]he weight of circumstance suggests that in order to have a public sphere in which interlocutors can deliberate as peers, it is not sufficient merely to bracket social inequality."[38]

Accordingly, Fraser contends that participatory parity must instead be grounded in the elimination of systemic social inequalities, thus breaking the cycle of power inequalities.[39] She defines this as a "sort of rough equality that is inconsistent with systemically generated relations of dominance and subordination."[40] Participatory parity, she concludes, "is essential to a democratic public sphere and . . . rough socioeconomic equality is a precondition of participatory parity."[41]

Whether or not one disputes the practicality of Fraser's remedy, her diagnosis rings true. Many people in American society exist in a state of relative political powerlessness, and such people are disproportionately members of racial minority and lower socioeconomic groups.[42] Political and normative power[43] tends to be concentrated in the hands of those who are white and wealthy, and this dynamic can drive educational policies damaging to the interests of poor and minority members of the community.[44]

Advocates of increased teacher discretion thus generally reject as naive the presumption that the democratic process will yield an indoctrination that

37. Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, *in* HABERMAS AND THE PUBLIC SPHERE 109, 121 (Craig Calhoun ed., 1992).

38. *Id.*

39. *See id.*; *see also* Henry A. Giroux, *Living Dangerously: Identity Politics and the New Cultural Racism*, *in* BETWEEN BORDERS: PEDAGOGY AND THE POLITICS OF CULTURAL STUDIES (Henry A. Giroux & Peter McLaren eds., 1994).

40. Fraser, *supra* note 37, at 121.

41. *Id.* at 133.

42. *See* Wells & Serna, *supra* note 35, at 97; WELNER, *supra* note 27, at 7.

43. Normative power is the power to shape understandings, values, and beliefs. For instance, in the context of the distribution of educational opportunities, normative beliefs may include the idea that resources are wasted when spent on children with a history of low academic achievement.

44. *See generally* PAULINE LIPMAN, RACE, CLASS, AND POWER IN SCHOOL RESTRUCTURING (1998). This critique of the reliability of the democratic process to produce just results is a theme that will become more important later, in considering the question of whether the legal framework presently used by American courts in teacher speech cases should be expanded to better account for the special roles played by schools and teachers.

can fairly be termed equitable. Given that school attendance is compulsory and that the student audience is effectively captive, Mark Yudof, among others, looks hopefully upon the autonomy of the classroom teacher.[45] This autonomy, he says, creates the potential for an educational pluralism, which he touts as reducing the risk of indoctrination.[46] While teachers can generally be counted on to dependably convey a school board's prescribed values and ideas, their special status gives them the power to modify the official curriculum, "thus making the teacher a potential counterweight to the parochialism of an unchallenged school board program."[47] Teachers' freedom and individuality provide the potential for placing important limits on state indoctrination.[48]

Proponents of these views stand in stark contrast to those who advocate an inculcative role for public schools and who place a great deal of trust in the democratic political system to render the ideal curriculum. As Malcolm Stewart explains, "The notion that a conscious, carefully considered decision by actors responsible to the public [for example, a school board] is likely to produce a worse result than would the chance concatenation of choices by individual teachers reflects a rather dismal view of the potential for democratic self-government."[49] Accordingly, this camp believes that a

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45. *See* Mark G. Yudof, *When Government Speaks: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 877 (1979).

46. *Id.* at 877–78. Mark Yudof explains,

> If teachers were free to interpose their own judgments, values and comments, without close supervision, a sort of pluralism would exist in the school environment, a pluralism that is particularly important when student attendance is compulsory and the audience, in practical terms, is not free to absent itself from the classroom. Hence, just as the balkanization of responsibility for education among governments reduces the potential danger of a thorough indoctrination, the autonomy of the classroom teacher diminishes the power of government to work its will through communication.

*Id.* at 877.

47. Michigan Law Review, *Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373, 1448 (1976). Similarly, Stanley Ingber, noting that a student continually changes teachers, contends that "a series of teachers expos[ing] their charges to several ideologies, may in fact enhance the child's education by letting the student assess divergent opinions as presented by wholehearted enthusiasts." Ingber, *supra* note 25, at 39. "In contrast," he continues, "school board proselytizing is significantly more dangerous; the school board, unlike the individual teacher, can organize an entire curriculum along specific ideological lines." *Id.*

48. Another way to approach this issue recognizes the layering of power within the American federalist system. *See* WAYNE PARSONS, PUBLIC POLICY: AN INTRODUCTION TO THE THEORY AND PRACTICE OF POLICY ANALYSIS 245–46 (1995). Various mandates concerning curriculum and instruction originate from Washington, D.C., from state capitals, from state and federal courts, from school district offices, and from school principals. Teachers, operating at the bottom of this policymaking food chain, make decisions within a range that has already been tightly bounded. Given such constraints, teachers' exercise of increased discretion is more likely to diffuse overall indoctrination than to constitute effective indoctrination in its own right.

49. Stewart, *supra* note 23, at 65.

teacher should have no right to exercise classroom discretion that may serve to modify the democratically prescribed message.[50]

I contend that conclusions such as Stewart's are based on an ideal democracy that we do not find in the present system. Were courts to accept this flawed analysis, abandon any significant constitutional supervisory role, and rely instead on the remedial powers of the political system, teachers and students would be vulnerable to demands for obedience to whatever orthodoxy prevails among the political powers in their particular community. Thus, before adopting a minimalist view of the judiciary's role, a court should carefully question the premise: that a tyranny of the majority is proper within the public educational system.[51]

## B. Reliance on Classrooms to Protect the Political Process

Alexander Meiklejohn viewed the First Amendment as the linchpin of a system of free expression, democracy, and self-government.[52] This First

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50. In the recent case of *Boring v. Buncombe County Board of Education*, 136 F.3d 364 (4th Cir. 1998), Chief Judge J. Harvie Wilkinson III offered the following concurrence, which strongly argues for democratic political control:

> Traditionally, indeed for most of our history, education has been largely a matter of state and local concern. The dissents, however, approach education as a federal judicial enterprise. The dissents seize upon one loose, slippery, litigious phrase—legitimate pedagogical concern—and consign it to the mercies of the federal courts. They provide not one iota of guidance to local school administrators on the interpretation of this tantalizing formulation, nor could they. What is "legitimately pedagogical" will inevitably mean one thing to one judge or jury and something else to another.
>
> This is precisely the process by which 42 U.S.C. § 1983 becomes an instrument of disenfranchisement. In this case, that provision would remove from students, teachers, parents, and school boards the right to direct their educational curricula through democratic means. The curricular choices of the schools should be presumptively their own—the fact that such choices arouse deep feelings argues strongly for democratic means of reaching them.

*Id.* at 371–72 (Wilkinson, C.J., concurring). Another concurrence, by Judge Michael Luttig, similarly argued:

> [W]ere every public school teacher in America to have the constitutional right to design (even in part) the content of his or her individual classes, as the dissent would have it—the Nation's school boards would be without even the most basic authority to implement a uniform curriculum and schools would become mere instruments for the advancement of the individual and collective social agendas of their teachers.

*Id.* at 373 (Luttig, J., concurring).

51. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 145–58 (Henry Reeves trans., Random House 1981) (1835) (discussing the concept of a tyranny of the majority); *see also* MILL, *supra* note 22, at 56 (arguing that certain freedoms may not legitimately be restricted even by a democratic society).

52. *See* MEIKLEJOHN, *supra* note 6; ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 8–14 (1960); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255–63.

Amendment model is premised on the importance to a democracy of a free and informed people. From this perspective, "the society that can utilize institutional power to reduce an individual's control over the development of personal consciousness has made that individual politically impotent."[53] Therefore, in order for the First Amendment to have meaning, it must ultimately ensure Americans' capacity to produce and to use knowledge in ways that are personally and politically effective.[54]

The educational system must thus be responsive to this democratic need: "To implement this conception of the First Amendment in the world of universal, institutionalized education requires a broadening of the amendment's traditional protection of *expression* of belief and opinion to embrace *formation* of belief and opinion."[55] The schools, Stephen Arons and Charles Lawrence argue, are failing in this mission, to the particular detriment of those who benefit least overall from the present educational system:

> In addition to being well informed, effective participants in the political process must understand what is in their own self-interest. If schools expose children only to values and ideas that buttress the status quo and legitimize the position of those in power, it is unlikely that those who are presently oppressed will learn the cause of their oppression or the means of overcoming it.[56]

This critique has interesting implications. Perhaps the most consistent constitutional paradigm to arise out of their analysis is one that acknowledges a governmental interest in inculcating only those values that "promote the community's continued capacity to govern itself through critical and independent intellectual inquiry, public debate, and participation in elections."[57]

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53. Arons & Lawrence, *supra* note 24, at 314–15; *see also* STEPHEN ARONS, COMPELLING BELIEF: THE CULTURE OF AMERICAN SCHOOLING 206 (1983) ("If the government were able to use schooling to regulate the development of ideas and opinions by controlling the transmission of culture and the socialization of children, freedom of expression would become a meaningless right . . . .").

54. *See* Arons & Lawrence, *supra* note 24, at 315.

55. *Id.* at 312; *see also* van Geel, *supra* note 21, at 261 ("It would make a mockery of the protection of an adult's freedom of belief if the government could pre-condition his beliefs by indoctrinating him during childhood.").

56. Arons & Lawrence, *supra* note 24, at 322–23; *see also* PAULO FREIRE, PEDAGOGY OF THE OPPRESSED 29–56 (Myra Bergman Ramos trans., Continuum Publ'g Co. 1990) (1970) (advocating that education should be transformative, awakening the critical consciousness of learners).

57. Note, *State Indoctrination and the Protection of Non-State Voices in the Schools: Justifying a Prohibition of School Library Censorship*, 35 STAN. L. REV. 497, 519 (1983). This *Stanford Law Review* note also discusses Alexander Meiklejohn's self-government rationale for freedom of expression. *See id.* at 518–20.

Such an analysis also rejects any "government interest in inculcating values for the purpose of influencing the outcomes of future public debates."[58]

The manageability of such a distinction may be difficult, however, given that outcomes of public debates frequently hinge upon the willingness of citizens to think (or to avoid thinking) critically. For example, would a hypothetical educator who, in 1983, encouraged her class to question the president's rationale for the invasion of Grenada be attempting to influence a public debate or attempting to teach critical and independent thought? Notwithstanding these difficulties, however, this paradigm, unlike a model that relies on the democratic political process, recognizes the role that schools have played in reproducing inequalities and attempts to configure an analytical structure to minimize these ill effects.[59]

## II. CONSTITUTIONAL PROTECTIONS FOR TEACHER SPEECH

The above-described perspectives on the proper role of schools exist on a continuum. At one extreme, some view schools as a blunt indoctrinative tool that should be freely used by the state. At the other extreme, those who advocate critical pedagogy view schools as a means to question or critique even the most sacred values of the dominant society.[60]

This continuum should be kept in mind when considering the opinions of the U.S. Supreme Court. When, for example, the justices refer to a marketplace of ideas,[61] they likely have in mind a much more circumscribed set of ideas than do advocates of critical pedagogy. This distinction should become apparent through the following review of past case law, the founda-

58. *Id.*

59. Nonetheless, as this example demonstrates, it is also unclear whether such an analysis would provide significantly greater protection for teacher speech. Moreover, advocates of the traditional, inculcation model of schooling would likely reject this critique of the traditional democratic model, arguing instead that schools can most effectively reduce inequalities by teaching each child the values and knowledge of society's mainstream.

60. The following discussion focuses primarily on the free speech protections provided by the First Amendment to the U.S. Constitution. It is important to note, however, that the nation's constitutional framework places primary control of education (as a power not specifically reserved to the federal government) with the individual states. U.S. CONST. amend. X. Moreover, state governments have generally delegated such authority to localities within the states, which are customarily governed by locally elected boards of education. In total, schools are governed by state and federal constitutions, state and federal statues and regulations, district regulations, and school rules, as well as by such collateral sources as collective bargaining agreements. FREDERICK M. WIRT & MICHAEL W. KIRST, THE POLITICAL DYNAMICS OF AMERICAN EDUCATION 32–52 (1997). This layered system of governance creates multiple recourses, both political and judicial, for those seeking to challenge a curricular or personnel decision. *See id.*; Michigan Law Review, *supra* note 47, at 1375.

61. *See, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

tional arguments of which correspond with the philosophies discussed in the previous part. One line of legal cases supports the role of American public schools as indoctrinating institutions.[62] A second line of cases supports the role of these schools as marketplaces of ideas and developers of critical thinking skills.[63] A third line, which can be thought of as an extension of the first line, highlights courts' deference[64] to the democratic political process in deciding the proper role of public schools.[65]

The issue of constitutional protection for teacher speech has presented judges with a considerable dilemma. On the one hand, precedent broadly embraces the state's interest in inculcating societal norms in American youth.[66] On the other hand, precedent generally concedes the First Amendment interests of public school teachers as well as their students.[67] The following discussion (Parts II.A–II.E) details the historical development of these lines of jurisprudence. Parts II.F and II.G of this Article then explore more recent developments and the present state of the law.

## A. Support for Schools' Inculcative Role

The Supreme Court has repeatedly stated that inculcation of values is a proper role for public schools. For example, in *Ambach v. Norwick*,[68] the Court held that the First Amendment does not protect the right of

62. *See* Ambach v. Norwick, 441 U.S. 68, 76–80 (1979); James v. Bd. of Educ., 461 F.2d 566, 573 (2d Cir. 1972); Mailloux v. Kiley, 323 F. Supp. 1387, 1392 (D. Mass. 1971), *aff'd*, 448 F.2d 1242 (1st Cir. 1971) (per curiam).

63. *See Keyishian*, 385 U.S. at 603; Webster v. New Lenox Sch. Dist., 917 F.2d 1004, 1007 (7th Cir. 1990); Keefe v. Geanakos, 418 F.2d 359, 361–63 (1st Cir. 1969); Webb v. Lake Mills Comm. Sch. Dist., 344 F. Supp, 791, 799 (N.D. Iowa 1972).

64. "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicated basic constitutional values." Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (footnotes omitted). Examples of such deference include *Lacks v. Ferguson Reorganized School District*, 147 F.3d 718 (8th Cir. 1998); *Boring v. Buncombe County Board of Education*, 136 F.3d 364 (4th Cir. 1998); *Steirer v. Bethlehem Area School District*, 987 F.2d 989 (3rd Cir. 1993); and *Cary v. Board of Education*, 598 F.2d 535 (10th Cir. 1979).

65. Interconnecting the first line of cases with the third line of cases highlights an important fact: The local political process will generally result in an inculcation of values reflective of dominant norms and will repress the expression of less popular ideas and values. This should not be a surprise. The First Amendment's protection of free speech rights is inherently antidemocratic. Only unpopular speech is likely to need the courts' protection. Accordingly, courts' willingness to defer to the judgment of local school boards effectively tips the balance in favor of value inculcation and against the marketplace of ideas.

66. *See* Ambach v. Norwick, 441 U.S. 68, 76–80 (1979).

67. *See Webster*, 917 F.2d at 1007; *Webb*, 344 F. Supp. at 799.

68. 441 U.S. 68 (1979).

noncitizens to teach in public schools.[69] In so holding, the Court emphasized the inculcative nature of k–12 education:

> The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions . . . . Other authorities have perceived public schools as an "assimilative force" by which diverse and conflicting elements in our society are brought together on a broad but common ground. These perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists.[70]

The Court's reliance on these social scientists is somewhat misplaced; they offered little support for the Court's statement.[71] Nevertheless, the justices have continued to voice their support for inculcative education.[72]

This role for public schools is firmly ingrained in American history. The deliberate inculcation of "correct" values has historically been a major function of American public education: For example, "[t]he Massachusetts Education Act of 1647 explicitly sets forth its purpose to thwart 'Satan' by teaching children to read the *Bible* and to educate youth 'not only in good literature, but in sound doctrine.'"[73] Horace Mann, an education pioneer

69. *Id.* at 80–81.

70. *Id.* at 76–77 (citations omitted).

71. *See, e.g.*, RICHARD E. DAWSON & KENNETH PREWITT, POLITICAL SOCIALIZATION 152, 165–66 (1969) (advocating the teaching of democratic values through classrooms designed around an open, democratic atmosphere); JOHN DEWEY, DEMOCRACY AND EDUCATION 12–26 (1916) (stressing the importance of providing a democratic classroom—*not* inculcation—in order to teach democratic values—*not* assimilation) [hereinafter DEMOCRACY AND EDUCATION]; ROBERT D. HESS & JUDITH V. TORNEY, THE DEVELOPMENT OF POLITICAL ATTITUDES IN CHILDREN 217–18 (1967) (criticizing schools for avoiding the teaching of controversial topics and for "stress[ing] ideal norms and ignor[ing] the tougher, less pleasant facts of political life in the United States"); V.O. KEY, JR., PUBLIC OPINION AND AMERICAN DEMOCRACY 323–43 (1961) (providing no support for the Supreme Court's position that education with a certain content is important to form desired dispositions and attitudes).

72. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 914 (1982) (Rehnquist, J., dissenting) ("The idea that . . . students have a right of access, *in the school*, to information other than that thought by their educators to be necessary is contrary to the very nature of an inculcative education."); *see also* Palmer v. Bd. of Educ., 603 F.2d 1271, 1274 (7th Cir. 1979) (upholding the discharge of a Jehovah's Witness kindergarten teacher who refused to teach the patriotic aspects of the prescribed curriculum). The *Palmer* court characterized these matters as a fundamental aspect of teachers' obligations:

> Parents have a vital interest in what their children are taught. Their representatives have in general prescribed a curriculum. There is a compelling state interest in the choice and adherence to a suitable curriculum for the benefit of our young citizens and society. It cannot be left to individual teachers to teach what they please.

*Id.*

73. Stephen R. Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293, 1350–51 (1976) (footnote omitted).

and the first Secretary of the Massachusetts Board of Education (1837–1848), stressed the importance of education in controlling and restraining the populace so that they would not threaten social harmony.[74] He expressed concern that educators too often ignored students' "moral natures" and "social affections."[75] He therefore called for greater state control over school curricula and practices.[76]

Similar sentiment is evident in the Nebraska Supreme Court's rejection, in the early 1920s, of a constitutional challenge to a statute barring the teaching of foreign languages in public schools.[77] Although the U.S. Supreme Court subsequently struck down the same statute on First Amendment grounds,[78] the state court's reasoning was illustrative of contemporary attitudes. The Nebraska court reasoned that to educate the children of foreigners in their mother tongue was "to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country."[79]

While the U.S. Supreme Court has accepted an inculcative role for public schools, it has (quite reasonably) never specified the particular values appropriate for inculcation. For instance, in *Ambach*, the Court stated that "a State properly may regard all teachers as having an obligation to promote civic virtues and understanding in their classes, regardless of the subject taught."[80] However, the Court made no attempt to define these "civic virtues," leaving state and local authorities to fill the void.[81]

Rising to the challenge, several commentators have offered their opinions as to which values should be inculcated. A former officer in the national Parent-Teacher Association (PTA), for example, suggested that "[e]ach school district has an obligation to teach those values that are common—honesty, citizenship, patriotism, cooperation, tolerance, democracy, truthfulness."[82] Others appear to have shied away from such values as doctrinaire forms

74. HENRY J. PERKINSON, TWO HUNDRED YEARS OF AMERICAN EDUCATIONAL THOUGHT 64 (1976).

75. *Id.*

76. *See id.* at 65–67. Because Horace Mann was wary of the divisive potential of bringing politics into schools, he argued for the teaching of only noncontroversial aspects of government and governance. *See* HORACE MANN, THE REPUBLIC AND THE SCHOOL: HORACE MANN ON THE EDUCATION OF FREE MEN 94–97 (Lawrence A. Cremin ed., 1970) (1957).

77. Meyer v. State, 107 Neb. 657, 664–65 (1922), *rev'd on other grounds*, 262 U.S. 390 (1923).

78. *Meyer*, 262 U.S. at 400–02.

79. *Id.* at 398.

80. Ambach v. Norwick, 411 U.S. 68, 80 (1979).

81. *Id.*

82. Arnold F. Fege, *Academic Freedom and Community Involvement: Maintaining the Balance*, *in* ACADEMIC FREEDOM TO TEACH AND TO LEARN: EVERY TEACHER'S ISSUE 48, 57 (Anna S. Ochoa ed., 1990).

of patriotism that have the potential to endow one set of beliefs with the imprimatur of societal dominance, thereby subordinating conflicting values. Amy Gutmann calls for "non-neutral" educational practices that will (1) predispose children toward "good" ways of life and (2) develop a "democratic character" in children that will equip them for deliberate moral reasoning.[83] Children's capacity to morally evaluate should therefore be developed within two "principled limits:" nonrepressiveness and nondiscrimination.[84]

Ironically, one of the values frequently inculcated in American schools is the importance of freedom of speech and expression.[85] To advocates of a traditional model of schooling, in which teachers supply knowledge and students passively receive that knowledge, there is no inconsistency to such instruction. However, for those who believe that the most important lessons in schools are actively lived, free speech and expression cannot be meaningfully taught in an environment where those freedoms are denied.[86]

Of course, even a system of education that fosters tolerance would expose some children to values that their parents might reject.[87] Nevertheless, more tolerant teacher attitudes would tend to "infringe the rights of fewer people" and would "infringe them less severely" than would a "narrower official doctrine."[88]

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83. *See* GUTMANN, *supra* note 6, at 41–46.

84. *See id.* at 44–47. A somewhat opposing argument calls for the teaching of virtues, "habits such as diligence, sincerity, personal accountability, courage, and perseverance." Kevin Ryan & Karen Bohlin, *Values, Views, or Virtues?*, EDUC. WEEK, Mar. 3, 1999, at 72, 49. These authors distinguish the teaching of such virtues from the teaching (or exploration) of "values," which can be overly relativistic. *Id.* at 72.

85. For instance, in January 2002, Justice Anthony Kennedy, in conjunction with the American Bar Association, launched a program called "Dialogue on Freedom," designed to teach high school students about some core American (and broadly democratic) beliefs. Lori Litchman, *Kennedy: Initiative Will Teach American Democracy*, LEGAL INTELLIGENCER, Feb. 4, 2002, at 3. Among the beliefs that Justice Kennedy hopes his program will help students understand are important principles contained in the U.S. Constitution such as freedom of speech. *See* http://www.abanet.org/dialogue (providing information on the program).

86. *See* DEMOCRACY AND EDUCATION, *supra* note 71, at 321–22.

87. Some fundamentalist Christians, for example, strongly advocate a system of absolute values. *See* KARIANE MARI WELNER, EXPLORING THE DEMOCRATIC TENSIONS WITHIN PARENTS' DECISIONS TO HOMESCHOOL 14 (Nat'l Center for the Study of Privatization in Educ., Occasional Paper No. 45 2002), *available at* http://www.ncspe.org/ocpap/op_pa_detail.php?pap_id=00045 (last visited Feb. 18, 2003). Teaching "tolerance" of other values implicitly conflicts with the teaching that Biblical values are definite and absolute. *See id.* at 14–15, 19.

88. *See* Arons & Lawrence, *supra* note 24, at 356 n.136 (hinting at the importance of teaching tolerance as a value by noting that "[t]hese fundamental values of 'habits and manners of civility' essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular"); *see also* Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681 (1986); Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1068 (6th Cir. 1987) (stressing that one of the roles of public schools is to teach "'tolerance of divergent political and religious views'") (quoting *Bethel*, 478 U.S. at 681).

B. Limits on Schools' Inculcative Role

Notwithstanding the Court's endorsement of an inculcative education, it has also occasionally held that schools have exceeded constitutional bounds in fulfilling the inculcative role—most significantly in the oft-cited cases of *West Virginia Board of Education v. Barnette*[89] and *Tinker v. Des Moines Independent Community School District*.[90]

In *Barnette*, the Court struck down a requirement that students recite the Pledge of Allegiance.[91] More important than this result, however, are several of the Court's statements, which have retained their influence more than a half-century after their initial publication. For example, the Court recognized the aforementioned difficulty of choosing the appropriate values to inculcate: "Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing."[92]

The Court also stressed the difference between compulsion and persuasion. "National unity as an end which officials may foster by persuasion and example is not in question," the Court explained.[93] "The issue here is whether this slow and easily neglected route to aroused loyalties constitutionally may be short-cut by substituting a compulsory salute and slogan."[94] The justices also emphasized the importance of academic freedom and the danger of compelled orthodoxy, noting that the Constitution must be enforced "as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end."[95] The Court continued, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[96]

89. 319 U.S. 624 (1943).
90. 393 U.S. 503 (1969).
91. *Barnette*, 319 U.S. at 642.
92. *Id.* at 641.
93. *Id.* at 640.
94. *Id.* at 631 (footnotes omitted).
95. *Id.* at 637. *See generally* J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251 (1989) (discussing the scope and limits of academic freedom).
96. *Barnette*, 319 U.S. at 642. In the almost six decades since the *Barnette* decision in 1943, America has become substantially more diverse; the pluralistic concerns raised by the *Barnette* Court have become more salient with each passing year. The demographics of today's America suggests, too, the futility of attempts to prescribe a national orthodoxy. But local orthodoxies may nonetheless thrive. According to the Census Bureau's analysis of the 2000 census data, "The percentage minority increased rapidly in every region since 1980, especially in the West". FRANK HOBBS & NICOLE STOOPS, U.S. CENSUS BUREAU, DEMOGRAPHIC TRENDS IN THE 20TH CENTURY 88 (2002), http://www.census.gov/prod/2002pubs/censr-4.pdf.

Language in the Court's *Tinker* decision has been similarly influential. *Tinker* concerned a First Amendment challenge to a school's ban on students' wearing of black armbands to protest the Vietnam War.[97] In striking down the ban, the Court explained that state sponsorship of public schools creates a dangerous threat to the autonomy of those who work and learn within them.[98] For this reason, the Court urged lower courts to guard against the transformation of schools into "enclaves of totalitarianism."[99]

While noting that the states retain comprehensive authority to "prescribe and control" conduct in the schools,[100] the Court affirmed its rejection of the "principle that a State might so conduct its schools as to 'foster a homogeneous people.'"[101] "In our system," the Court maintained, "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved."[102]

In spite of the continued vitality of this language in *Barnette* and *Tinker*, courts have hesitated to extend the holdings in these cases to other instances of indoctrination. This hesitancy has been criticized by those who argue that the type of direct and forthright compulsion at issue in *Barnette* is no worse than indoctrination through a controlled curriculum: "The requirement that the school's attitudes be accepted with silent consent [is] no less a coercive ritualistic confession than a flag salute. It [is] no less a denial of . . . students' first amendment rights. [Such students are] being trained to be passive, docile, self-denying individuals . . . ."[103]

### C. Support for Schools' Role as a Marketplace of Ideas and for Academic Freedom

At the same time that courts have championed, albeit within limits, schools' inculcative role, they have acknowledged a countervailing interest

97. Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503, 504 (1969).
98. *Id.* at 512–15.
99. *See id.* at 511–12.
100. *Id.* at 507.
101. *Id.* at 511 (quoting Meyer v. Nebraska, 262 U.S. 390, 402 (1923)).
102. *Id.* at 511; *see also* Loewen v. Turnipseed, 488 F. Supp. 1138, 1152–54 (N.D. Miss. 1980) (holding that the state textbook purchasing board unconstitutionally applied viewpoint discrimination in the selection of textbooks). The *Loewen* court noted that the "avowed purpose" of the statutory scheme creating the purchasing board was "to insure that no unauthorized ideas crept into the classroom." *Id.* at 1153. This, the court held, was unacceptable because "there must be some method, by which uninhibited governmental control over 'the free exchange' of ideas can be checked." *Id.* at 1154.
103. Arons & Lawrence, *supra* note 24, at 331; *see also* Michigan Law Review, *supra* note 47, at 1444.

in free expression and thought. This interest was plainly set forth in *Keyishian v. Board of Regents*:[104] "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"[105]

The values underlying this concept of a marketplace of ideas were perhaps best expressed by Justice Frankfurter:

> [Unwarranted inhibition of thought chills] that free play of the spirit which all teachers ought especially to cultivate and practice. . . . It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free

104. 385 U.S. 589 (1967).

105. *Id.* at 603 (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945)). *Keyishian* addressed a requirement that college professors certify that they are not communists. *Id.* at 593; *see also* Webb v. Lake Mills Comm. Sch. Dist., 344 F. Supp. 791, 799 (N.D. Iowa 1972) (applying *Keyishian*'s marketplace-of-ideas concept to all public schools, but also noting that the "state interest in limiting the discretion of teachers grows stronger . . . as the age of the students decreases"). *But see* Webster v. New Lenox Sch. Dist., 917 F.2d 1004, 1007 (7th Cir. 1990) ("A junior high school student's immature stage of intellectual development imposes a heightened responsibility upon the school board to control the curriculum."). *Tinker*, a case involving high school students, nevertheless adopts *Keyishian*'s marketplace-of-ideas concept. *Tinker*, 393 U.S. at 512.

To understand the rationale behind the "marketplace" abstraction, consider the analysis in *Dean v. Timpson Independent School District*, 486 F. Supp. 302, 308 (E.D. Tex. 1979), wherein a district court held that a psychology teacher's First Amendment rights had been violated when she was terminated in response to her use of a survey, originally published in *Psychology Today*, entitled "Masculinity—What It Means to Be a Man." *Id.* at 304. The survey included an explicit discussion of the subject of sexual intercourse. *Id.* Without thoroughly reviewing the survey or giving the students specific and concrete instructions on how to deal with this sensitive material, Dean allowed a senior student to administer the survey, as make-up work. *Id.* at 305. Although the students weren't disrupted, there was a significant community reaction, ultimately resulting in the teacher's termination. *Id.* at 306.

The *Dean* court's opinion set forth a standard giving teachers broad discretion in choosing whether to expose learners to controversial ideas. *Id.* at 307–08. If such censorship were allowed, the court held,

> No subject which differed from the majoritarian view would ever be taught in the public schools. Every scientific advancement was at one time a new idea, and most new ideas are controversial. The process of education has been described as the shedding of dogmas. There is comfort in the security of old and familiar dogmas and . . . many times the cloak of morality and even righteousness becomes intertwined with familiar values, perceptions, and dogmas. To exclude a subject from the public school curriculum because it offends the community, or to discharge a teacher from objectively presenting that subject, runs counter to the spirit of the First Amendment, and poses a threat greater than the unsettling effect on the community precipitated by the student's intellectual exposure to matters that approach concepts long regarded as taboo.

*Id.* at 308 (citation omitted).

> inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied them.[106]

Inextricably tied to the freedom of students to be exposed to a robust exchange of ideas is the freedom of teachers to present these ideas.[107] Courts have often phrased First Amendment protections for teachers in terms of such academic freedom.[108] The *Keyishian* Court explained that academic freedom is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[109]

Several courts have applied this concept of academic freedom to k–12 schools.[110] In *Keefe v. Geanakos*,[111] for example, the U.S. Court of Appeals for

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106. Wieman v. Updegraff, 344 U.S. 183, 195–96 (1952) (Frankfurter, J., concurring). Malcolm Stewart, however, presents a strong critique of this marketplace model:

> It might be objected that . . . the first amendment stands for the principle that a cacophony of voices is preferable to the dangerous sort of "order" imposed by conscious selection on the part of governmental officials. The error in this argument is subtle but significant. The argument confuses the constitutional requirement that a cacophony of voices be *available* to every listener with the unprecedented notion that each individual's reading should be characterized by randomness and disorder. In fact, we prevent government from reducing the available range of knowledge precisely because we feel confident that mature individuals can impose order upon the chaos by choosing for themselves those materials which they wish to read. Typically, of course, we do not regard primary and secondary school students as fully competent to make such choices. Moreover, the high school environment effectively precludes such a process of selection. High school students typically do not choose their teachers; within any given course the teacher rather than the student generally decides what shall be read. If no centralized authority restricts the autonomy of individual teachers in order to ensure a coherent program, the students themselves will have no opportunity to create an order.

Stewart, *supra* note 23, at 65. This argument is flawed in at least two respects. First, youth are capable of critical thought. *See* MICHELLE FINE, FRAMING DROPOUTS: NOTES ON THE POLITICS OF AN URBAN PUBLIC HIGH SCHOOL 103–37 (1991). Additionally, a crucial role of schools is to develop that critical thought. *See Wieman*, 344 U.S. at 196; *see also* Smith v. Bd. of Sch. Comm'rs, 827 F.2d 684, 692 (11th Cir. 1987) (reasoning that giving students an opportunity to think for themselves is at the heart of the schools' mission). Second, Stewart appears to argue that, because the schools aren't pure marketplaces of ideas, it is preferable to allow the school officials to dictate an orthodoxy than to allow each teacher the freedom to present a variety of ideas. However, the First Amendment simply does not sanction the position that no freedom is better than limited freedom.

107. *See* Krizek v. Bd. of Educ., 713 F. Supp. 1131, 1137 (N.D. Ill. 1989) ("[T]he protection [of teachers' expression in the classroom] is primarily for the benefit of the student, and as a result, society in general. In a sense, it protects the student's 'right to hear.'").

108. *See, e.g.*, *Keyishian*, 385 U.S. at 603; *see also* William G. Buss, *Academic Freedom and Freedom of Speech: Communicating the Curriculum*, 2 J. GENDER RACE & JUST. 213, 274–77 (1999); Kara Lynn Grice, Note, *Striking an Unequal Balance: The Fourth Circuit Holds That Public School Teachers Do Not Have First Amendment Rights to Set Curricula in* Boring v. Buncombe County Board of Education, 77 N.C. L. REV. 1960, 2005 (1999); W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish out of Water*, 77 NEB. L. REV. 301 (1998) (tracing the development of substantive and procedural academic freedom in secondary public schools).

109. *Keyishian*, 385 U.S. at 603.

110. *See* Fowler v. Bd. of Educ., 819 F.2d 657, 661 (6th Cir. 1987) ("Many courts have recognized that a teacher's First Amendment rights encompass the notion of 'academic freedom' to

the First Circuit recognized First Amendment protection for the academic freedom of a high-school English teacher. The board of education had suspended the teacher because he had used the word "motherfucker" in class while discussing a magazine article containing the word.[112] The article discussed dissent, protest, radicalism, and revolt in the late 1960s and repeatedly used the offending word.[113] In analyzing the article, the teacher explained the derivation of the expletive and its relevance to the then-contemporary protest movement.[114]

The court began its analysis by acknowledging the necessity of some regulation of classroom speech.[115] However, fearing "the general chilling effect of permitting such rigorous censorship,"[116] the court found that shielding high-school seniors from the expletive demeaned the educational process.[117] "If the answer were that the students must be protected from such exposure, we would fear for their future," the court explained.[118] The court also affirmed the teacher's right to quote an author when no "proper study of the article could avoid consideration of the word."[119] The court added that the speech neither harmed the students nor disrupted the educational process.[120]

Similarly, in *Sterzing v. Fort Bend Independent School District*,[121] the district court granted judgment in favor of a high-school civics teacher who was dismissed because he raised and discussed controversial issues, used contemporary anti-war literature, and implemented a six-day section on race relations. The court recognized a right to academic freedom, supporting the

> substantive rights of a teacher to choose a teaching method, which, in the Court's view, on the basis of expert opinion, served a demonstrated

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exercise professional judgment in selecting topics and materials for use in the course of the educational process."); *see also* Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1655–77 (1986); Yudof, *supra* note 46, at 888–91.

111. 418 F.2d 359 (1st Cir. 1969).

112. *Id.* at 361.

113. *Id.*

114. *Id.*

115. *Id.* at 362.

116. *Id.*

117. *Id.* at 361.

118. *Id.*

119. *Id.*

120. *Id.* at 361–63. *But see* Martin v. Parrish, 805 F.2d 583, 584 (5th Cir. 1986) (involving a teacher who used words such as "hell," damn," and "bullshit" repeatedly in class—simply as an aspect of his daily speech). The *Martin* court held that this teacher could, indeed, be terminated for his use of profanity, because it carried fundamental value lessons at odds with the appropriate function of a public-school education. *Id.* at 585. Academic freedom, the court reasoned, does not prevent schools from prohibiting the "'use of vulgar and offensive terms in public discourse.'" *Id.* (quoting Better Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986)).

121. 376 F. Supp. 657, 662 (S.D. Tex. 1972), *vacated for reconsideration of relief granted*, 496 F.2d 92 (5th Cir. 1974).

> educational purpose, and the procedural right of a teacher not to be discharged for the use of a teaching method which was not proscribed by a regulation of definite administrative action, and as to which it was not proven that he had notice[122] that its use was prohibited.[123]

"A responsible teacher," continued the *Sterzing* court, "must have freedom to use the tools of his profession as he sees fit."[124]

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122. *See* the discussion of notice, *infra* Part II.D.

123. *Sterzing*, 376 F. Supp. at 662; *see also* Albaum v. Carey, 283 F. Supp. 3, 11 (E.D.N.Y. 1968). The *Albaum* court similarly reasoned:

> The considerations which militate in favor of academic freedom—our historical commitment to free speech for all, the peculiar importance of academic inquiry to the progress of society, the need that both the teacher and student operate in an atmosphere of open inquiry, feeling always free to challenge and improve established ideas—are relevant to elementary and secondary schools as well as to institutions of higher learning.

*Id.* at 11. Similarly, the court in *Malverne Union Free School District v. Sobol*, 586 N.Y.S.2d 673, 677–78 (App. Div. 1992), upheld the N.Y. Commissioner of Education's prevention, on grounds of academic freedom, of the discipline of a teacher who had refused to comply with the school board's directive to rescind an assignment requiring students to write on the locally controversial firing of a television sports commentator. And in *Stachura v. Truszkowski*, 763 F.2d 211, 215 (6th Cir. 1985), the court held constitutionally protected, as an exercise of his academic freedom, a teacher's inclusion of sexual material in his life science class. But compare the court's opinion in *Miles v. Denver Public Schools*, 944 F.2d 773, 779 (10th Cir. 1991), deciding that a secondary-school teacher has no right to academic freedom. See also *Mailloux v. Kiley*, 323 F. Supp. 1387, 1392 (D. Mass. 1971), *aff'd*, 448 F.2d 1242 (1st Cir. 1971) (per curiam), wherein the district court rejected an academic freedom claim by a teacher who had been dismissed as a result of his discussion of "taboo words," including "fuck," with his eleventh-grade English class. The court reasoned as follows:

> The secondary school more clearly than the college or university acts *in loco parentis* with respect to minors. It is closely governed by a school board selected by a local community. The faculty does not have independent traditions, the broad discretion as to teaching methods, nor usually the intellectual qualifications, of university professors. Among secondary school teachers there are often many persons with little experience. Some teachers and most students have limited intellectual and emotional maturity. Most parents, students, school boards, and members of the community usually expect the secondary school to concentrate on transmitting basic information, teaching "the best that is known and thought in the world," training by established techniques, and, to some extent at least, indoctrinating in the *mores* of the surrounding society. While secondary schools are not rigid disciplinary institutions, neither are they open fora in which mature adults, already habituated to social restraints, exchange ideas on a level of parity.

*Id.*

Note that the *Mailloux* court went on to hold that the discharge violated the teacher's due process rights, and that the opinion of the U.S. Court of Appeals for the First Circuit affirmed this part of the holding. *Mailloux*, 448 F.2d at 1243. However, the First Circuit panel also avoided endorsing the lower court's restricted view of academic freedom. *Id.*

124. A teacher who is *not* responsible, however, may not be entitled to similar deference. *See* Simon v. Jefferson Davis Parish Sch. Bd., 289 So.2d 511 (La. Ct. App. 1974) (finding that a teacher's statements regarding the sexual behavior of African Americans were not entitled to academic freedom protection, because they were found by the court to lack any pedagogical justification).

A significant stumbling block to the application of academic freedom and of related First Amendment protections to teacher speech is the aforementioned hesitancy of courts to infringe upon the role of political bodies. As explained by Arons and Lawrence, "at the heart of American school ideology is the belief that schooling decisions, like most government decisions, are the proper province of the political majority."[125] In fact, while several older cases recognize a measure of academic freedom for the k–12 teacher, more recent decisions unquestioningly accept the premise that school boards enjoy broad authority to determine the curriculum.[126] As long as school officials can articulate a legitimate pedagogical reason for their decisions, it is likely that today's courts will sustain the exercise of their broad authority.[127]

Among older cases, perhaps the most deferential treatment granted to a school board can be found in *Cary v. Board of Education*.[128] The board had banned ten books from the high-school curriculum, and the teachers' association responded by challenging the ban.[129] The court first noted that, although "[c]ensorship . . . should be tolerated only when there is a legitimate interest of the state which can be said to require priority," the school board "may determine what subjects are taught, even selecting ones which promote a particular viewpoint."[130] On this basis, the court saw no reason why the board should not also be allowed to exclude certain texts from the curriculum.[131]

125. Arons & Lawrence, *supra* note 24, at 324. Consider also the following critique of the court's opinion in *Keefe*, on the grounds that the court improperly valued the teacher's sensibilities over the parents' and the school board's: "Nowhere in the opinion does the court explain the grounds on which a teacher's curricular decisions take constitutional precedence over those of the school board or other school authorities superior to the teacher under state law." Goldstein, *supra* note 73, at 1321.

126. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271–73 (1988).

127. *See* John L. Strope, Jr. & Cathy Broadwell, *Academic Freedom: What the Courts Have Said*, *in* ACADEMIC FREEDOM TO TEACH AND TO LEARN, *supra* note 82, at 31, 45–46. See also the discussion in Part II.F., *infra*, of courts' standards of review and associated levels of scrutiny.

128. 598 F.2d 535 (10th Cir. 1979).

129. *Id.* at 536.

130. *Id.* at 543.

131. *Id.* at 544; *see also* Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 801 (5th Cir. 1989) (concluding that teachers have no First Amendment right to substitute their own supplemental reading list for the officially adopted list); Minarcini v. Strongsville City Sch. Dist., 541 F.2d 577, 579 (6th Cir. 1976) ("Clearly, discretion as to the selection of textbooks must be lodged somewhere and we can find no federal constitutional prohibition which prevents its being lodged in school board officials who are elected representatives of the people.").

Arguably, the *Cary* decision retains no persuasive authority following the Supreme Court's decision in *Board of Education v. Pico*.[132] However, even Justice Brennan, writing for the Court in *Pico*, acknowledged that courts should allow local school boards the freedom to set school curricula in a manner that transmits community values to students.[133]

D. Due Process and Notice

Notwithstanding the hesitancy of courts to protect teachers' substantive First Amendment free speech rights in the classroom, many courts have recognized a procedural protection:[134] Sanctions against teachers can only follow the provision of notice.[135] Courts are averse to upholding punitive actions against teachers taken with no prior warnings.[136] For example, in *Parducci v. Rutland*,[137] the court held that a teacher's dismissal, for having assigned her eleventh-grade English class Kurt Vonnegut's *Welcome to the Monkey House*, violated her due process rights.[138] She had been given no warning that this assignment would be grounds for discipline—or even disapproval—yet she was dismissed following parental complaints and a confrontation with the school administration.[139] Correspondingly, courts are much more likely to uphold a punitive action if the teacher has been given fair warning.[140]

132. 457 U.S. 853 (1982). The *Pico* Court held that school officials "may not remove books from school library shelves simply because they dislike the ideas contained in those books." *Id.* at 872.

133. *Id.* at 862–64.

134. As discussed later in this Article, substantive and procedural concerns can and should interlink in courts' analyses of teacher classroom speech controversies. *See infra* text accompanying notes 345–350. Educational policy concerns dictate a need for policymakers to have the freedom to decide the level of discretion to give teachers. In such a system, teachers must feel secure in relying on the information and assurance offered by those policymakers. The requirement of adequate notice is a key component of providing such predictability.

135. For a comprehensive exploration of this notice requirement, see Buss, *supra* note 108, at 264–73. William Buss proposes five possible bases for this requirement: (1) implied contractual rights, (2) the creation of a designated public forum, (3) procedural due process, (4) the vagueness doctrine, and (5) substantive due process. *Id.*

136. *See* Sterzing v. Ft. Bend Indep. Sch. Dist., 376 F. Supp. 657, 662 (S.D. Tex. 1972); Mailloux v. Kiley, 323 F. Supp. 1387, 1392–93 (D. Mass 1971). The *Mailloux* court observed that "the state may suspend or discharge the teacher for using that method but it may not resort to such drastic sanctions unless the state proves he was put on notice either by a regulation or otherwise that he should not use that method." *Mailloux*, 323 F. Supp. at 1392. Because no such warning was given to the plaintiff, the court ordered his reinstatement. *Id.* at 1393.

137. 316 F. Supp. 352 (M.D. Ala. 1970).

138. *Id.* at 355–56.

139. *Id.* at 353–54; *accord* Harris v. Mechanicville Cent. Sch. Dist., 382 N.Y.S.2d 251, 255 (1976) (requiring that the banning of books from curriculum be accompanied by procedural due

Importantly, a *fair* warning does not necessarily translate to a *specific* warning. In *Conward v. Cambridge School Committees*,[141] the First Circuit upheld the discharge of a tenured high-school teacher for engaging in sexually harassing speech.[142] The court found that a general state statute prohibiting "conduct unbecoming a teacher" provided sufficient notice that a teacher should not give a female student a document entitled, "Application for a Piece of Ass."[143] Less plausibly, the district court in *Parker v. Board of Education*[144] held that a teacher had notice and did not follow school regulations in choosing to have his class read *Brave New World*.[145] Even though the county board's reading list contained the book, and even though the only "notice" provided was a warning on the reading list that "great care [should] be taken in making book assignments,"[146] the court gave great deference to the school's after-the-fact determination that assignment of the book was inappropriate, reasoning that the school had the right to require the teacher to heed the cautionary note.[147]

## E. The First Amendment Rights of Students and Parents

The concept of schools as marketplace of ideas is most accurately viewed as protecting the right of students to shop, rather than as protecting the

process). The court in *Keefe v. Geanakos*, 418 F.2d 359, 362 (1st Cir. 1969), also pointed to the lack of notice as a grounds for its ruling in favor of the teacher.

140. *See, e.g., Parducci*, 316 F. Supp. at 358 (finding that a teacher's due process right was violated when she was dismissed for assigning a book she was never told not to use); Fisher v. Fairbanks N. Star Borough Sch. Dist., 704 P.2d 213, 215 (Alaska 1985) (upholding discipline of a teacher who used a book after being instructed by the principal not to use it).

141. 171 F.3d 12 (1st Cir. 1999).

142. *Id.* at 22.

143. The body of this "Application" comprised a series of lewd questions written in a style emulating a standard employment application. *Id.* at 17. The teacher conceded that he hadn't read the document before giving it to the student but, having subsequently read it, acknowledged that it was "wholly inappropriate for school use." *Id.* at 23 n.2.

144. 237 F. Supp. 222 (D. Md. 1965), *aff'd on other grounds*, 348 F.2d 464 (4th Cir. 1965).

145. *Id.* at 228–29.

146. *Id.* at 225.

147. *See id.* at 228–29; *see also* Frison v. Franklin County Bd. of Educ., 596 F.2d 1192, 1193–94 (4th Cir. 1979) (holding that under the First and Fourteenth Amendments, a teacher was entitled to prior notice that her in-class speech was grounds for adverse employment action, but that a state statute explaining the duties and the grounds for dismissal of a teacher provided the defendant fifth-grade teacher with adequate notice that discussing student notes containing vulgar words was not protected speech); Fern v. Thorp Pub. Sch., 532 F.2d 1120, 1131 (7th Cir. 1976) (upholding the discharge of a teacher who failed to follow a school's controversial materials policy and then did not seek a hearing concerning the discharge). Even in *Lacks v. Ferguson Reorganized School District*, 147 F.3d 718 (8th Cir. 1998), the court concluded that the student discipline code, combined with administrative advice, gave the teacher adequate notice. *Id.* at 723–24.

right of teachers to sell.[148] The Court has offered assurance that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[149] These protections deserve mention because students' classroom speech rights are so closely linked to those of teachers. That is, courts turning to a marketplace-of-ideas rationale for protecting teachers' speech may sensibly turn to these students' rights cases for help in defining the parameters of that protection. Such cases also clarify and buttress the deference courts give to educational policymakers such as principals, superintendents, and school board members.

In *Steirer v. Bethlehem Area School District*,[150] the U.S. Court of Appeals for the Third Circuit ruled on a First Amendment challenge by a student who objected to a district requirement that students complete sixty hours of community service as a condition for receiving a high-school diploma.[151] The plaintiff argued that students who participated in the community service program were forced to engage in expressive conduct in violation of the First Amendment.[152] Altruism, she said, was an ideological viewpoint, and compulsory altruism amounts to a compelled expression of that viewpoint.[153]

The court acknowledged that, pursuant to *Barnette*, a school could not compel a student to affirm a belief or an attitude of mind. Moreover, the court stated that it could envision a scenario in which a student could claim a constitutional violation arising out of a school-imposed requirement of community service.[154] However, the court explained, the First Amendment would only be implicated if that student was required to provide community service to an organization whose message conflicted with the student's contrary view.[155] The program at issue, however, did not so limit the students.

148. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 867–69 (1982); Pratt v. Indep. Sch. Dist., 670 F.2d 771, 779 (8th Cir. 1982) (noting a fundamental First Amendment "right to receive information and to be exposed to controversial ideas," and upholding the right of three students to view a film that the district had withdrawn following ideologically related complaints from a group of parents). *But see* Seyfried v. Walton, 668 F.2d 214, 217 (3rd Cir. 1981) (rejecting students' First Amendment challenge to a school board's content-based decision to cancel a high-school production of *Pippin*).

149. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969); *accord* W.V. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

150. 987 F.2d 989 (3rd Cir. 1993).

151. *Id.* at 990.

152. *Id.*

153. *Id.* at 993.

154. *Id.* at 996.

155. *See id.*

The court concluded:

> We may assume arguendo that the members of the school board who approved the mandatory community service program believed that there was a value in community service . . . . The gamut of courses in a school's curriculum necessarily reflects the value judgments of those responsible for its development, yet requiring students to study course materials, write papers on the subjects, and take the examinations is not prohibited by the First Amendment.[156]

Accordingly, students' First Amendment rights concerning curriculum decisions exist within extremely tight parameters.[157]

Comparable parental rights are similarly limited. Such parental claims, again focusing on the hidden ideological influence of school curricula, invariably rely on the Supreme Court's decision in *Pierce v. Society of Sisters*,[158] wherein the Court sustained a challenge by parochial and private schools to an Oregon law requiring students to attend public schools.[159] In its discussion, the Court acknowledged a parent's interest in the education of his or her child: "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[160]

Most often, contemporary parental claims of this nature have been pursued by fundamentalist Christians who view public schools as teaching a doctrine labeled "secular humanism:"[161]

> Secular educators no longer make learning their primary objective. Instead our public schools have become conduits to the minds of our youth, training them to be anti-God, anti-moral, anti-family, anti-free enterprise and anti-American.

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156. *Id.* A similar claim was rejected in *Immediato v. Rye Neck School District*, 73 F.3d 454 (2d Cir. 1996).

157. *See, e.g.*, Bell v. U-32 Bd. of Educ., 630 F. Supp. 939 (D. Vt. 1986) (upholding a school board's decision to disallow a student production of the play *Runaways*); *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266–67 (1988); Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683–86 (1986).

158. 268 U.S. 510 (1925).

159. *Id.* at 534–36. The challenged Oregon law is generally conceded to have been motivated by a desire to lessen the influence of the Catholic Church, as well as post–World War I fears about Bolshevism and the influx of aliens. *See* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 634–35 (Kermit L. Hall ed., 1992).

160. *Pierce*, 268 U.S. at 535.

161. While this is a politically charged term that is likely to be rejected by those labeled as such, "secular humanists" ostensibly accept the following tenets: the supremacy of human reason, the denial of the relevance of deity, the inevitability of progress (modernism), the role of science as the guiding force of progress, the centrality and autonomy of humankind, and adherence to the theory of evolution. *See* Eric C. Freed, Note, *Secular Humanism, the Establishment Clause, and Public Education*, 61 N.Y.U. L. REV. 1149, 1555 (1986).

. . . .

> Public education today is a self-serving institution controlled by elitists of an atheistic, humanist viewpoint; they are more interested in indoctrinating their charges against the recognition of God, absolute moral values, and a belief in the American dream than they are in teaching them to read, write, and do arithmetic.[162]

A representative example of such parental claims is provided by the case of *Smith v. Board of School Commissioners*.[163] Fundamentalist Christian parents found various books objectionable, because the books purportedly taught the children to use the scientific method and to think independently.[164] The district court agreed and issued an order banning the books.[165] The parents' objections, however, were not as persuasive for the appellate court, which reversed the lower court, reasoning that giving students an opportunity to think for themselves was at the heart of the schools' mission.[166] A similar parental claim in California resulted in the following judicial response:

> The Constitution of the United States does not vest in objectors the right to preclude other students who may voluntarily desire to participate in a course of study under the guise that the objector's liberty, personal happiness or parental authority is somehow jeopardized or impaired. To adhere to such a concept would use judicial constitutional authority to limit inquiry to conformity, and to limit knowledge to the known.[167]

Parents of high-school students in Massachusetts also lost their suit claiming a mandatory school assembly violated their right to direct the upbringing of their children.[168] The assembly, concerning AIDS awareness,

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162. TIM LAHAYE, THE BATTLE FOR THE PUBLIC SCHOOLS 13–14 (1983).

163. 827 F.2d 684 (11th Cir. 1987).

164. *See id.* at 693.

165. *Id.* at 689.

166. *Id.* at 693–94.

167. Citizens for Parental Rights v. San Mateo County Bd. of Educ., 51 Cal. App. 3d 1, 32 (1975); *see also* Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1064 (6th Cir. 1987) (finding the parents' religious curricular objections were simply too extensive and that to reasonably accommodate the parents, the school would have had to develop a curriculum that would foster only the plaintiffs' own particular religious views); Williams v. Bd. of Educ., 388 F. Supp. 93 (S.D. W. Va. 1975), *aff'd*, 530 F.2d 972 (4th Cir. 1975). In *Williams*, conservative parents protested a school board decision to adopt new texts that arguably challenged traditional American values and morals. *Id.* at 95–96. In rejecting the parents' action claiming that the decision had violated their rights of free exercise of religion and family privacy, as well as the personal privacy rights of their children, the district court stated that because the plaintiffs' claim was essentially only disagreement with the values being taught in the schools, the complaint did not allege a violation of constitutional rights. *See id.* at 96.

168. *See* Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 541 (1st Cir. 1995).

was sexually explicit but did not rise to the level of shocking the conscience and was therefore not actionable.[169]

Like the previously discussed decisions rejecting teachers' First Amendment claims, these decisions consistently defer to the discretion of school boards and principals and to the accepted role of schools in inculcating norms.[170]

F. Levels of Scrutiny

The previous discussion illustrates courts' historical recognition of two primary, yet oft-conflicting interests when considering teacher speech cases: (1) a societal interest in exposing students to a robust exchange of ideas, usually promoted through protecting teachers' academic freedom, and (2) a broad and unspecified, but not unconstrained, state interest in value inculcation, usually promoted through limiting teachers' academic freedom. I will now examine the development of the law concerning the level of scrutiny applied by courts when reviewing state actions alleged to have run afoul of one of these interests.

In recent years, the U.S. Supreme Court has consistently applied "public forum analysis" to cases involving restrictions of speech on government property such as school classrooms.[171] Courts have found this approach particularly useful when members of the public might reasonably perceive the speech to bear the imprimatur of the government.[172] Pursuant to this analysis, a court must initially decide whether the government property is a traditional public forum,[173] a designated public

169. *Id.* at 531–32.

170. *See* Howard O. Hunter, *Curriculum, Pedagogy, and the Constitutional Rights of Teachers in Secondary Schools*, 25 WM. & MARY L. REV. 1, 4 (1983) (arguing that deference to the local political process should be balanced with the constitutional protection of teacher classroom speech).

171. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–10 (2001); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301–05 (2000); Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 672–75 (1998).

172. *See* Slotterback v. Interboro Sch. Dist., 766 F. Supp. 280, 290 (E.D. Pa. 1991); *see also* Gregory A. Clarick, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U. L. REV. 693, 708–17 (1990).

173. Traditional public fora are those public places that have long been devoted to assembly and debate. The U.S. Supreme Court explained that such a forum is a place that has "immemorially been held in trust for the use of the public and, time out of mind, [has] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hague v. Comm. for Indus. Org., 307 U.S. 491, 515 (1938). Such traditional public fora have been limited to public streets, parks, and sidewalks. *See* G. Sydney Buchanan, *The Case of the Vanishing Public Forum*, 1991 U. ILL. L. REV. 949, 951. Those types of property have as "a principal purpose . . . the free exchange of ideas." Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 800 (1985). The state must permit expression within traditional public fora, subject only to time, place, and manner restrictions. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

forum,[174] or a nonpublic forum.[175] The level of scrutiny to be applied to the state action is dependent upon the forum designation. In other words, if the court determines that the speech is taking place in a traditional or—under some circumstances—a designated public forum, a restriction on that speech will likely be declared unconstitutional, while a restriction on speech in a nonpublic forum will likely be upheld.[176]

174. Public fora created by government designation are those public places that the government intentionally designates as a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for discussion of certain subjects. *See* Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1992). Designated public fora have included the student center at a state university, a state fairgrounds, and a municipal theater. *See Perry*, 460 U.S. at 45–46. A designated public forum is not required to maintain that status indefinitely. It can become a nonpublic forum if the government intentionally changes its designation. *Id.* at 46. Among designated public fora, the Supreme Court has identified a subcategory called "limited public fora" based on government intent to open the forum for use by certain groups or for discussion of limited subjects. *Id.* at 45 n.7; *Cornelius*, 473 U.S. at 802. The *Perry* Court refers to the creation of a public forum only for "entities of a similar character" to those that the government intends to include within the limited public forum. *Perry*, 460 U.S. at 48. Content discrimination within the designated, limited scope is subject to strict scrutiny. *Cornelius*, 473 U.S. at 800.

175. Nonpublic fora are those public places (including military bases and county jails) that are not traditional public fora or designated public fora. *See* Buchanan, *supra* note 173, at 952.

176. The standard of review for a traditional or a designated public forum, assuming the restriction is content-selective (that is, is directed at speech concerning a particular topic or topics), is strict scrutiny. *Id.* at 953–54. Therefore, the restriction will be held to pass constitutional muster only if it is found to be necessary to serve a compelling government interest and to be narrowly drawn to achieve that interest. *See* Widmar v. Vincent, 454 U.S. 263, 270 (1981). If the restriction is content-neutral, however, an intermediate level of review is applied. Buchanan, *supra* note 173, at 953. In such a case, the regulation will be upheld if it is found to be narrowly tailored to serve a significant governmental interest and if it leaves open ample alternative channels of communication. *See id.*

The standard of review for a nonpublic forum, when the restriction is not viewpoint-selective (that is, is not directed at suppressing a particular viewpoint), is merely rational basis. The restriction will be upheld if it was passed in pursuit of a rational interest and if it employs a means reasonably calculated to achieve that interest. This rational basis test will be applied even if the restriction is not content-neutral or speaker-neutral, so long as it is viewpoint-neutral. *Id.* at 954.

To date, the Court has not definitively articulated a standard of review to be applied if the restriction is viewpoint-selective, but it has indicated that a strict scrutiny test would be proper. *See* City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984); *see also* Buchanan, *supra* note 173, at 954–55. As Laurence Tribe explains, "When the government clearly takes aim at a disfavored message . . . , it makes no difference where that speech occurs." 2 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 987 (2d ed. 1988).

Of course, viewpoint selectivity is difficult to divorce from curriculum selection, a reality that severely limits the applicability of general rules against viewpoint selectivity in the classroom context. That is, courts look to school leaders to make policy decisions concerning which curriculum to include and which to exclude, and such decisions necessarily reflect the viewpoints of the policymakers. As William Buss explains,

> in any case in which a teacher is discharged or disciplined for a curricular communication or simply ordered to desist from offering the wrong book, poem, play, or explanation, the curriculum struggle will be about the teacher's unacceptable point of view. . . . [G]overnment speech will always involve privileging the viewpoint of the government spokesperson who is authorized over the views of a rival government spokesperson who is denied

For purposes of the analysis in this Article, it is important to understand three consequences of public forum analysis. First, it is easily manipulable.[177] This means that courts can (and, in Laurence Tribe's view, often do) use the public forum designation of property as a pretense—a shorthand way of concluding that free speech in a particular case is important and should be protected.[178] The converse, of course, is also true.[179]

Second, a narrow public forum analysis applied to a classroom speech dispute is likely to shortchange important considerations, unique to the classroom, such as the marketplace-of-ideas and academic freedom concerns discussed earlier.[180] The classroom exists in order to serve an exceptional function: to facilitate learning, sometimes inculcative but often analytic and critical. To date, such important factors have been excluded from judges' public forum deliberations, which have (even in the most thoughtful opinions) been limited to attempting to divine the degree to which the governmental creator of the classroom intended to allow free speech.[181]

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> authority. For purposes of communicating the curriculum in a state educational institution, the authority must be traced back to the source that created and sustains that institution. In short, the usual nonpublic forum test that prohibits viewpoint discrimination must be modified for contexts involving curriculum decisions (and in all contexts in which government legitimately prefers its own speech).

Buss, *supra* note 108, at 255 (footnotes omitted).

177. *See* 2 TRIBE, *supra* note 176, at 987.

178. *Id.* Consider, for example, the Court's opinion in *Widmar*. The University of Missouri had a policy of routinely providing university facilities for meetings of student organizations, presumably in order to encourage such activities. *Widmar*, 454 U.S. at 264. However, the university also adopted a regulation prohibiting the use of such facilities for purposes of religious worship or religious teaching. *See id.* at 265. A student religious organization challenged the regulation, and the Court invalidated it, primarily applying a free speech analysis. *Id.* at 267–76.

After noting that the university may impose reasonable restrictions compatible with its educational mission, the Court decided that the university had opened its facilities to students in general, thereby creating a designated public forum. *Id.* at 267–68. Because the regulation was content-selective, the Court applied strict scrutiny. *Id.* at 269–70.

The problem with the Court's analysis is that it depends upon the initial characterization of the government's invitation. In this case, the invitation was considered to be to the general student population, and the exclusion of religious groups was considered to be an unconstitutional exception. However, if the Court had decided that the channel of communication was not particularly important, it could have manipulated the analysis to avoid the public forum designation. *See* Buchanan, *supra* note 173, at 958–61 (explaining that the Court could have classified the facilities as a nonpublic forum if it found that the university had extended its original invitation to "all students who want to speak on any subject other than religious matters").

179. Robert Post likewise offers a critique and reformulation of the public forum approach. *See* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1782–84 (1987).

180. *See supra* text accompanying notes 89–133.

181. This second concern and possible means of addressing it are discussed in greater detail in Part III of this Article.

Related to this second concern is a third concern: The level of scrutiny applied to a restriction on teacher speech—and thus the chances of that speech receiving meaningful constitutional protection—depends on whether the classroom is found to be a designated public forum,[182] and this determination depends on the intent of the government body or bodies that created the forum. Yet a school classroom should be thought of as created by an amalgam of federal, state, and local governmental actors.[183] Pursuant to the Tenth Amendment, the federal government effectively passed along the creation and maintenance of k–12 schooling to the individual states.[184] The states retain ultimate authority and responsibility for the schools,[185] but much of that power is usually delegated to local school districts, and is there divided between the boards of education and the district administrative offices.[186] The local school districts, in turn, give individual schools varying amounts of authority over what takes place in the classroom.[187] And, of course,

182. A classroom is clearly not a traditional public forum.

183. *See* JOEL SPRING, CONFLICTS OF INTEREST: THE POLITICS OF AMERICAN EDUCATION (2d ed. 1993); Douglas E. Mitchell, *Governance of Schools*, *in* 2 ENCYCLOPEDIA OF EDUCATIONAL RESEARCH 549–58 (Marvin C. Alkin ed., 6th ed. 1992).

184. *See* FREDERICK M. WIRT & MICHAEL W. KIRST, THE POLITICAL DYNAMICS OF AMERICAN EDUCATION 195 (1997); Michael W. Kirst & Frederick Wirt, *State Role, Legislative and Executive*, *in* 4 ENCYCLOPEDIA OF EDUCATIONAL RESEARCH, *supra* note 183, at 1267, 1268; *see also* Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 507 (1969) (noting that state and local school officials have the authority, within constitutional limits, "to prescribe and control conduct in the schools"); United States v. Darby, 312 U.S. 100, 124 (1941) (explaining that the Tenth Amendment was intended "to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers").

Federal involvement in education is most felt in terms of programs, for example, the Elementary and Secondary Education Act (ESEA), Pub. L. No. 103-382, 108 Stat. 3519 (1994) (codified at 20 U.S.C. §§ 6301–8962 (2000)), provides approximately $12 billion to school systems across the country for compensatory education provided to children at risk of school failure who live in low-income communities); civil rights mandates (*e.g.*, 20 U.S.C. §§ 1681–1688; 42 U.S.C. § 2000d(1)–(7) (2000)); and research (for example the Department of Education's new Institute of Education Sciences, which replaces the Office of Educational Research and Improvement (OERI) and houses national education centers focused on research, statistics, and evaluation). More recently, national standards and assessments, as well as the promotion of internet technology, charter schools, and building of more school facilities, have become a federal focus. *See, e.g.*, Titles III 20 U.S.C. §§ 6801–7001 (technology), and XI §§ 8501–8510 (facilities), of ESEA. In each case, the federal involvement is technically voluntary. For example, if local districts choose to forego federal money, they need not comply with the civil rights rules set forth in Title VI and Title XI, *see, e.g.*, 42 U.S.C. § 2000d-1.

185. *See* Butt v. State, 842 P.2d 1240, 1251 (Cal. 1992) (holding the state of California ultimately responsible for ensuring the education of students in a financially unviable school district).

186. *See* Kirst & Wirt, *supra* note 184, at 1269.

187. *See* Martin Burlingame, *The Politics of Education and Education Policy: The Local Level*, *in* HANDBOOK OF RESEARCH ON EDUCATIONAL ADMINISTRATION 439–51 (Norman Boyan ed., 1988); William L. Boyd, *Local Role in Education*, *in* 2 ENCYCLOPEDIA OF EDUCATIONAL RESEARCH, *supra* note 183, at 753, 753–61.

teachers are ultimately given some discretion—if only because of the impossibility of absolute regulation.[188]

Whose intent, then, should a court look to in order to ascertain whether the government intends to create a designated public forum in the classroom? Because we are ultimately attempting to determine the extent of protection for teachers' speech, courts will not allow teachers themselves to create a public forum. Also, because the federal government's involvement in the administration and control of schooling is still relatively limited,[189] federal intent (which is, even in the best of situations, quite difficult to determine) should not be particularly persuasive.[190] Consequently, courts, if they are so inclined, would most likely search for intent at the state level, at the district level, and at the school level.[191] Such a search will rarely yield a single, clear intent.

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188. *See* LIPSKY, *supra* note 32, at 3–25. For an overview of school structure and governance, see JAMES W. GUTHRIE & RODNEY J. REED, EDUCATIONAL ADMINISTRATION AND POLICY: EFFECTIVE LEADERSHIP FOR AMERICAN EDUCATION (1986).

189. *See* Terry A. Astuto & David L. Clark, *Federal Role, Legislative and Executive*, in 2 ENCYCLOPEDIA OF EDUCATIONAL RESEARCH, *supra* note 183, at 491, 491–498. Even the No Child Left Behind Act, which essentially requires each state to administer a particular type of accountability system, and which stands as the federal government's most extensive intrusion upon states' authority in education, leaves some discretion and most clerical chores to the states. *See* 20 U.S.C. § 6311(b).

190. Paul Brest has set forth persuasive arguments attacking the wisdom of seeking to determine legislative intent in the context of racial discrimination. *See* Paul Brest, *In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976); Paul Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 119–30; Paul Brest, *Reflections on Motive Review*, 15 SAN DIEGO L. REV. 1141, 1142–46 (1978); *see also* Kenneth L. Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163, 1165–66 (1978).

191. At each of these levels, we find a variety of attempts to control what goes on in the classroom. At the state level, for example, consider the following hodgepodge of mandates from the government of California concerning what must be included in the k–12 course of study: (1) "the nature of alcohol, narcotics, [and] restricted dangerous drugs," CAL. EDUC. CODE § 51203, (West 1997), (2) venereal disease, § 51202, (3) "the development of the American economic system including the role of the entrepreneur and labor," §§ 51210, 51220, (4) "a study of the role and contributions of both men and women, black Americans, American Indians, Mexicans, Asians, Pacific Island people, and other ethnic groups to the economic, political, and social development of California and the [United States]," § 51213, (5) the American legal system, the rights and duties of citizenship, and human rights issues, including "the inhumanity of genocide, slavery, and the Holocaust," § 51220, and (6) parenting skills, including the teaching of self-esteem, § 51220.5. Note, however, that a student can be exempted from this parenting skills curriculum if she demonstrates mastery of the course material. § 51220.5(c).

In addition, the California Education Code provides that, while sex education courses cannot be required of students, § 51550, any such courses which are offered must emphasize abstinence, cite the failure and success rates of condoms, discuss the "possible social and psychological consequences of preadolescent and adolescent sexual intercourse outside of marriage," and teach honor and respect for monogamous, heterosexual marriages, § 51553.

Certain curriculum is also prohibited. For example, the instruction cannot "reflect adversely upon persons because of their race, sex, color, creed, handicap, national origin, or ancestry." § 51500.

With this background in mind, consider the Supreme Court's public forum treatment of schools in *Hazelwood School District v. Kuhlmeier*.[192] The Hazelwood school administration had censored the school newspaper on the basis of the principal's judgment that the articles were improper. The Court, after deciding that the school newspaper constituted a nonpublic forum, held that this censorship did not violate the student-authors' rights.[193]

Writing for the Court, Justice White reasoned that the newspaper was a nonpublic forum because it was a closely supervised curricular learning experience.[194] The level of scrutiny applied, therefore, was rational basis: whether the censorship was "reasonably related to legitimate pedagogical concerns."[195] The Court found sufficient school rationales to meet this low level of scrutiny.[196] For example, the Court determined that the school needs to censor, at times, in order to protect itself from having people attribute speech to it with which it disagrees.[197] Moreover, a school should not be forced to tolerate "speech that is inconsistent with its 'basic educational mission.'"[198]

Among the cases that followed *Hazelwood*, *Virgil v. School Board*[199] is typical, in that it failed to engage in a well-defined public forum analysis.[200] The appellate court decided in favor of a school board that had removed certain texts from the eleventh- and twelfth-grade curriculum following parental complaints that the curriculum contained sexually offensive materials. The court simply cited *Hazelwood* for its decision to apply rational basis scrutiny.[201]

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Also, a teacher is prohibited from teaching communism "with the intent to indoctrinate or to inculcate in the mind of any pupil a preference for communism." § 51530.

192. 484 U.S. 260 (1988).

193. *Id.* at 267–68.

194. *Id.* at 268.

195. *Id.* at 273.

196. *Id.* at 274–75.

197. *Id.* at 271–73.

198. *Id.* at 266.

199. 862 F.2d 1517 (11th Cir. 1989).

200. *See also* Lacks v. Ferguson Reorganized Sch. Dist., 147 F.3d 718, 724 (8th Cir. 1998) (citing *Hazelwood* and applying the "legitimate pedagogical concern" standard, but never addressing public forum analysis); *see also* Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719, 722–723 (2d Cir. 1994).

201. The decision in *Hazelwood* was also applied in *Roberts v. Madigan*, 921 F.2d. 1047 (10th Cir. 1990), which upheld a school board decision forbidding a fifth-grade teacher from reading his Bible in class (and ordering the removal of religious books from his classroom library). *Id.* at 1059. While this decision largely turned on the court's application of the Free Exercise and Establishment Clauses, the court also addressed the teacher's claim of academic freedom. *Id.* at 1053–57. In applying *Hazelwood* and rejecting the teacher's claim, the court stated that it found "no reason here to draw a distinction between teachers and students where classroom expression is concerned." *Id.* at 1057.

Notwithstanding the rather cavalier treatment of students' First Amendment rights in *Hazelwood* and related cases, it is important to note that the *Hazelwood* Court's holding did not reach the public forum status of the classroom. Nor did the Court's holding address protections for teachers, as opposed to students. The Court's only allusion to these issues—and one that several lower courts have since cited—was the dictum that if "no public forum has been created . . . school officials may impose reasonable restrictions on the speech of students, *teachers*, and other members of the school community."[202] On its face, this dictum leaves open the question of whether any given classroom has been created as a designated public forum, but some lower courts have converted the Court's conditional "if" statement into an absolute directive.

In particular, the U.S. Court of Appeals for the Fifth Circuit, in *Kirkland v. Northside Independent School District*,[203] and the Fourth Circuit, in *Boring v. Buncombe County Board of Education*,[204] have set forth baffling opinions, combining this *Hazelwood* dictum with a second line of cases concerning teachers' First Amendment free speech protections outside the classroom.[205] The *Boring* court, in fact, reached the conclusion that teachers' classroom speech has virtually no First Amendment protection.[206]

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In a case similar to *Madigan*, the U.S. Court of Appeals for the Seventh Circuit held that academic freedom did not protect the right of a junior-high-school social studies teacher to teach "nonevolutionary theories of creation." Webster v. New Lenox Sch. Dist., 917 F.2d 1004, 1006 (7th Cir. 1990). The court's stated rationale for this holding was that the school board had the sole authority to set curriculum, the board had prohibited religious advocacy, including the teaching of creation science, and the teacher had deviated substantially from that directive: "The first amendment is 'not a teacher license for uncontrolled expression at variance with established curricular content.'" *Id.* at 1047 (citation omitted); *see also* California Teachers Ass'n v. State Bd. of Educ., 271 F.3d 1141, 1148–49 (9th Cir. 2001) (assuming, without deciding, that *Hazelwood* would supply the appropriate standard for deciding if a teacher enjoys constitutional protection for instructional speech); Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517, 521 (9th Cir. 1994) (rejecting the claim of a high-school biology teacher who claimed that his school district wrongfully forced him to teach evolution).

202. *Hazelwood*, 484 U.S. at 267 (emphasis added).

203. 890 F.2d 794 (5th Cir. 1989).

204. 136 F.3d 364 (4th Cir. 1998) (en banc); *see also* Harrison v. Coffman, 111 F. Supp. 2d 1130, 1132–33 (E.D. Ark. 2000) (explaining that the Eighth Circuit rejects the *Boring* approach); Drew Lindsay, *Dramatic License*, TCHR. MAG., Oct. 1998, at 24–28 (discussing the *Boring* controversy).

205. This second line of cases features *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983).

206. The *Kirkland* court only held that teachers could not substitute their own supplemental reading list for the officially adopted list. *Kirkland*, 890 F.2d at 802. That is, the teachers could not disobey what was essentially a direct order. In contrast to *Boring*, the *Kirkland* court was careful not to stray beyond the facts before it. The court, in fact, cautioned that it did not "suggest that public school teachers foster free debate in their classrooms only at their own risk or that their classrooms must be 'cast with a pall of orthodoxy.' We hold only that public school teachers are not

*Boring* involved a high-school drama teacher in the Town of Black Mountain, in western North Carolina, who had been involuntarily transferred to another school following her selection, direction, and production of a play called *Independence*.[207] The drama depicts a dysfunctional, single-parent family consisting of a divorced mother and three daughters.[208] One daughter is a lesbian, and a second daughter is pregnant with an illegitimate child.[209] The teacher's suit claimed First Amendment protection for her activities.[210]

The appellate court's opinion held, in very strong terms, that the teacher had no First Amendment right to participate in the "make-up" of the school curriculum through the selection and production of a play.[211] These activities are simply not protected First Amendment speech, the court concluded.[212] Rather, they gave rise to "nothing more than an ordinary employ-

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free, under the first amendment, to arrogate control of curricula." *Id.* at 801–02 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)). The *Kirkland* court misquoted *Keyishian*. The original quote was "cast a pall of orthodoxy." *Keyishian*, 385 U.S. at 603.

207. *Boring*, 136 F.3d at 366–67.

208. *Id.* at 366.

209. *See id.*

210. By all accounts, the teacher did not violate previously stated curriculum standards, and she followed every previously required standard set forth for the selection and approval of the school production. *Id.* In addition, when the principal so requested, she redacted certain portions of the production and only permitted its performance after that performance had been explicitly approved by her principal. *See* Lindsay, *supra* note 204, at 25. These facts place the *Boring* decision outside the mainstream line of cases that require reasonable notice prior to disciplining a teacher. *See also* Lacks v. Ferguson Reorganized Sch. Dist., 147 F.3d 713 (8th Cir. 1998); Bd. of Educ. v. Wilder, 960 P.2d 695, 695 (Colo. 1998). The *Wilder* court found that the district had a legitimate pedagogical interest that outweighed the teacher's First Amendment rights, and therefore upheld the district's firing of a teacher who had shown an R-rated film ("1900") replete with nudity, sex, and violence. *Id.* at 704–05. As defined by the District, "controversial learning resources" are those "not included in the approved learning resources of the district and which are subject to disagreement as to appropriateness because they refer or relate to controversial issues or present material in a manner or context which is itself controversial." *Id.* at 698. Because Boring was only transferred, the court may have viewed the dispute as merely over whether a teacher should be allowed to re-decide curriculum. That is, when a sanction is light, a court may see itself as having to decide which curriculum option is most appropriate, and it will almost always defer to the school board's or administrators' authority and discretion to make such a decision. Thus, the court in *Krizek v. Board of Education*, 713 F. Supp. 1131, 1142 (N.D. Ill. 1989), concluded that an appropriate standard of review would consider the severity of the sanction imposed upon the teacher, reasoning that the severity of the sanction is proportional to the chilling effect. *See also* Mailloux v. Killey, 323 F. Supp. 1337, 1392 (D. Mass. 1971) (discussed *supra* note 136).

211. *See Boring*, 136 F.3d at 366.

212. *Id.* at 367; *accord* Erskine v. Bd. of Educ., 207 F. Supp. 2d 407, 409 (D. Md. 2002). In *Erskine*, the plaintiff-teacher had been investigated and reassigned after parental complaints about his writing "negro," for the color black, on the chalkboard as part of a Spanish lesson. *Id.* at 405. Because the teacher was simply following the school's lesson plan, the court held that he was not engaging in protected speech. *Id.* at 409. Applying *Connick*, the court noted that this was not speech related to a public concern and, in fact, "[p]laintiff cannot claim that he has a protected

ment dispute."[213] Even if the teacher's activities did constitute protected speech, the court opined, the school could constrain that speech: "The makeup of the curriculum of [the school] is by definition a legitimate pedagogical concern."[214] This line of reasoning was subsequently rejected in *Cockrel v. Shelby County School District*,[215] creating a split between the Sixth Circuit (in *Cockrel*) and the Fourth and Fifth Circuits (in *Boring* and *Kirkland*, respectively).

Another noteworthy aspect of the *Boring* and *Kirkland* decisions is that they applied a line of cases that address teachers' First Amendment speech protections outside the classroom.[216] *Pickering v. Board of Education*[217] and subsequent cases, most notably *Connick v. Myers*,[218] outlined the parameters

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interest in speech that, by his own admission, was not his." *Id.* One troubling implication of this holding is that such a teacher is unprotected whether he strays from the district's lesson plan or whether he sticks to it.

213. *Boring*, 136 F.3d at 368; Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 802 (5th Cir. 1989).

214. *Boring*, 136 F.3d at 370. This type of circular reasoning arises with alarming frequency. *See supra* text accompanying notes 199–201. Rational basis scrutiny becomes meaningless in the face of such a "definition."

215. 270 F.3d 1036 (6th Cir. 2001), *cert. denied*, 123 S. Ct. 73 (2002). Relying in part on *Boring* and *Kirkland*, the district court in *Cockrel* had determined that the plaintiff's presentation to her fifth-grade class of a lesson on industrial hemp (with actor Woody Harrelson visiting as a guest presenter) constituted the unprotected conduct of selecting a curriculum, not speech in the sense that she was trying to convey her own opinions. *Id.* at 1046. The court of appeals reversed, reasoning that *Boring* and *Kirkland* had overextended *Connick* in their determination that a teacher, in choosing curriculum, is not speaking as a citizen but rather as an employee on matters of private interest. *Id.* at 1051. The *Boring* and *Kirkland* courts' interpretation of *Connick*, the *Cockrel* court explained,

> essentially gives a teacher no right to freedom of speech when teaching students in a classroom, for the very act of teaching is what the employee is paid to do. Thus, when teaching, even if about an upcoming presidential election or the importance of our Bill of Rights, the Fourth and Fifth Circuits' reasoning would leave such speech without constitutional protection, for the teacher is speaking as an employee, and not as a citizen.

*Id.* at 1051–52. The court continued:

> If the Fourth and Fifth Circuits' interpretation of *Connick* were correct, then any time a public employee was speaking as an employee . . . the speech at issue would not be protected. As the Supreme Court made clear in its analysis, however, the key question is not whether a person is speaking in his role as an employee or a citizen, but whether the employee's speech in fact touches on matters of public concern.
>
> . . . In Cockrel's case, although she was speaking in her role as an employee when presenting information on the environmental benefits of industrial hemp, the content of her speech . . . most certainly involved matters related to the political and social concern of the community, as opposed to mere matters of private interest. Thus, contrary to the analyses in *Boring* and *Kirkland*, we hold that Cockrel's speech does touch on matters of public concern.

*Id.* at 1052.

216. *See, e.g.*, *Boring*, 136 F.3d at 368.

217. 391 U.S. 563 (1968).

218. 461 U.S. 138 (1983).

of teachers' extra-classroom speech protections.[219] The basic rule of these cases is that only speech that addresses a "matter of public concern" is eligible to receive heightened First Amendment protection.[220] "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."[221]

The *Boring* and *Kirkland* courts, however, imported this rule into the classrooms.[222] The result is strained, contrived, and nonsensical; how does one characterize instruction as a "matter of public concern" or "not a matter of public concern"?[223] As the *Boring* dissent points out, extra-classroom cases differ from intra-classroom cases in that the former do not directly implicate the teachers' professional role in the classroom.[224] That is, they do not reach the schools' educational function:

> The public concern element articulated in *Connick* fails to account adequately for the unique character of a teacher's in-class speech. When a teacher steps into the classroom she assumes a position of extraordinary public trust and confidence: she is charged with educating our youth. Her speech is neither ordinary employee workplace speech nor common public debate. Any attempt to force it into either of these categories ignores the essence of teaching—to educate, to enlighten, to inspire—and the importance of free speech to this most critical endeavor. As the Supreme Court proclaimed more than forty years ago: "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[225]

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219. A high school teacher wrote a letter to a local newspaper criticizing the Board of Education's expenditure of tax money on athletic facilities instead of on education. *Pickering*, 391 U.S. at 566. The letter also criticized a current proposal to increase the tax rate to support public schools. *Id.* The Board of Education responded by firing the teacher. *Id.* The U.S. Supreme Court found that Pickering's right to freedom of speech was violated, since the raising and expenditure of tax money is matter of legitimate public concern. *Id.* at 574. "[S]tatements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors." *Id.*

220. *Connick*, 461 U.S. at 146.

221. *Id.* at 148.

222. *See, e.g.*, *Boring*, 136 F.3d at 368.

223. In this regard, recall Alexander Meiklejohn's perspective, arguing that the First Amendment is the linchpin of a system of free expression. *See* sources cited *supra* note 52. When focusing on the teacher, the dispute is about employment. But when focusing on the students' right to learn or on society, democracy, and education, First Amendment concerns come to the fore and use of *Pickering* becomes inappropriate.

224. *See Boring*, 136 F.3d at 378.

225. *Id.* at 378 (Motz, J., dissenting) (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)).

Two cases do present facts that bridge the intra- and extra-classroom lines of cases. *Piver v. Pender County Board of Education*[226] applied the *Pickering/Connick* analysis to a case of in-class teacher speech, finding First Amendment protection for a social studies teacher who allowed classroom discussion of the principal's hiring and gave classroom time for the preparation of a student petition offering support for the principal.[227] The court in *Downs v. Conway School District*[228] granted a fired second-grade teacher injunctive and monetary compensation against a school district that had retaliated against her complaints, primarily concerning school maintenance.[229] Part of the teacher's offending activities merged with classroom instruction. For instance, she asked her students to depict their feelings about the classroom's broken water fountain, and she then sent these drawings (of, for example, wilted flowers and of pupils lying down and asking for water) to the school principal.[230] She also supported a student project that involved drafting letters to the school's supervisor of the lunch program, asking that raw (rather than cooked) carrots be served.[231]

It should be noted that even the dissenting judges in *Boring*, while they rejected the applicability of the *Pickering* line of cases and while they contended that the teacher's speech was indeed entitled to some First Amendment protection, still adopted the *Hazelwood* "legitimate pedagogical concern" standard, thus extending *Hazelwood* from students to teachers.[232] In doing

226. 835 F.2d 1076 (4th Cir. 1987).

227. *See id.* at 1079–82.

228. 328 F. Supp. 338 (E.D. Ark. 1971).

229. *Id.* at 350.

230. *Id.* at 341.

231. *See id.*; *see also* Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 10–11 (2001). Karen Daly has written:

> In the educational context, the line between public concern and personal grievance is often blurred. . . . Teacher speech on school overcrowding, excessive student to teacher ratios, or the merits of standardized testing, to name a few examples, can be plausibly read as either a contribution to ongoing community debate on a controversial educational issue or an individualized complaint about employment conditions.

*Id.* (citation omitted).

232. Blind application of the "legitimate pedagogical concern" standard has also obscured the general rule that, even in nonpublic fora, restrictions on speech must not be viewpoint-selective. *See supra* text accompanying note 176 (discussing viewpoint selectivity). This points to a direct conflict between, on the one hand, authorities giving school districts the discretion to determine curriculum for the teaching of values and, on the other hand, the application of public forum analysis to teacher speech cases. For instance, a strong present-day American norm favors heterosexuality over homosexuality—and this norm can become evident in teacher speech cases. *See* Boring v. Barcombe County Bd. of Educ., 136 F.3d 364, 366–80 (4th Cir. 1998); Fisher v. Fairbanks N. Star Borough Sch. Dist., 704 P.2d 213, 216–17 (Alaska 1985) (holding that the school board has a duty to inculcate community values and has a right to control curriculum and to discipline a teacher who used a gay-rights book, in defiance of the principal's instructions). Given this norm, a hypothetical fifth-grade teacher would likely feel free to read her class a love story about a male and a

so, the dissenters implicitly denied the possibility of the classroom being a designated public forum. Equating teachers' free speech rights with those of students similarly undercuts the professional nature of the teachers' position. If Americans want their teachers to exercise discretion in the classroom, then these teachers must be given greater than the bare minimum of First Amendment protection.[233]

At least two additional courts have decided that a classroom is a nonpublic forum. *Ward v. Hickey*[234] concerned a ninth-grade biology teacher who had discussed the abortion of Down's Syndrome fetuses with the class.[235] Mirroring *Boring* and *Kirkland*, the *Ward* court failed to substantively address the issue of whether the government had taken any steps to create a designated public forum in the classroom. The court simply reasoned, "Like the newspaper [at issue in *Hazelwood*], a teacher's classroom speech is part of the curriculum. Indeed, a teacher's principal classroom role is to teach students the school curriculum. Thus, schools may reasonably limit teachers' speech in that setting."[236] This analysis simply assumes that the setting for any activity tied to the curriculum is a nonpublic forum.[237]

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female. However, that same teacher would likely hesitate before reading NANCY GARDEN, ANNIE ON MY MIND (Aenal ed., 1992) (1982), a novel for young adults that depicts a romantic relationship between two teenage girls. *But see* Case v. Unified Sch. Dist., 908 F. Supp. 864, 875–76 (D. Kan. 1995) (ruling unconstitutional a district's removal of this book). Using public forum analysis and assuming that this teacher's classroom is held to be a nonpublic forum, restrictions placed on the reading of *Annie* should nonetheless be held unconstitutional if the teacher can prove that the restriction was based on ideological content—that it arose only because the teacher expressed a particular viewpoint on that topic. As noted earlier in this Article, such a contention of viewpoint selectivity places courts in the difficult position of trying to divorce appropriate curricular decisionmaking from inappropriate partisanship. But the plaintiff-teacher may, for example, make the court's job easier by demonstrating selective censorship—that the district has ignored a multitude of other incidents involving teaching outside the boundaries of expressly approved curriculum, even on the same topic. Nonetheless, those who believe that the political process should govern classrooms would argue that such censorship is well within the role that the district should play—and an example of schools' traditional task of indoctrination. *See, e.g.*, *Boring*, 136 F.3d at 366–70.

233. The dissent basically concedes this point, noting the very limited protection given by the *Hazelwood* standard: "In all likelihood, if remanded, this case would be resolved in favor of the Board at the summary judgment stage, as several pedagogical concerns probably justified the Board's action." *Boring*, 136 F.3d at 374 (Hamilton, J., dissenting).

234. 996 F.2d 448 (1st Cir. 1993).

235. *Id.* at 450.

236. *Id.* at 453.

237. In general, courts' analyses in these public forum cases have been slipshod, leaving the observer to speculate as to each court's rationale. One is tempted, in reading these cases, to charitably conclude that each court implicitly determined that the school board's intent was to have the classroom be a nonpublic forum. But the courts have provided little basis for presuming even this minimal insight.

The *Miles v. Denver Public School District*[238] court added slightly more depth to its analysis. A ninth-grade government teacher had discussed with his class a rumor concerning the alleged sexual behavior of two of the school's students.[239] Superficially, at least, the teacher's comment was related to the day's curriculum, but he later acknowledged his own poor judgment.[240] The court began its opinion with a short discussion of *Connick* and *Pickering*, then turned to *Hazelwood*. In determining whether the classroom constituted a public forum, the court wrote,

> A podium before a captive audience of public school children is decisively different from a street corner soapbox. The Court in *Hazelwood* explained that a public forum is not created "by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." If the creation and operation of a school newspaper as part of a journalism class can be devoid of an intent to open a classroom for public discourse then an ordinary classroom—such as the one in which Miles taught—is not a public forum. There is no evidence that school authorities intended to open Miles' government class for public discourse. Therefore, we conclude that the school "reserved the forum for its intended purpose" of teaching government.[241]

The *Miles* court's analysis is probably the most appropriate among the line of cases applying *Hazelwood* to the classroom, if only because the court included the statement, "There is no evidence that school authorities intended to open Miles' government class for public discourse." The court's implication here is that the plaintiff failed at the trial level to create a record upon which the appellate court could have considered acts by school authorities creating a designated public forum. But if such evidence had been available, the court would have considered it.

238. 944 F.2d 773 (10th Cir. 1991).

239. *Id.* at 774.

240. The teacher had been discussing a purported decline in the "quality" of the school since 1967. *Id.* This topic was not challenged as inappropriate or outside the curriculum. When a student asked for specific examples, the teacher replied that in the past the school had fewer soda cans littering the school grounds, and he asserted that school discipline was better. *Id.* These statements, too, were not objected to by school authorities. However, he then added, "I don't think in 1967 you would have seen two students making out on the tennis court." *Id.* This comment referred to a widely rumored alleged incident that two students were observed the previous day having sexual intercourse on the tennis court during lunch hour. *Id.*

241. *Id.* at 776 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988)).

In this regard, the court in *Newton v. Slye*[242] found, for purposes of considering a motion seeking a preliminary injunction, that a bulletin board outside a teacher's classroom was a designated public forum.[243] The injunction sought would have allowed the plaintiff-teacher to post pamphlets discussing banned books on the board.[244] The court reasoned, based on *Boring*, that the pamphlets, if part of the curriculum, could themselves be banned because the teacher had no First Amendment rights to control the curriculum.[245] But the court also considered the plaintiff's assertion that the school created a designated public forum "open to a particular class of people, namely teachers, in permitting the teachers to post items on their doors."[246] The court accepted, for purposes of considering the motion, the plaintiff's contention that the school maintained a longstanding practice of allowing teachers to use these bulletin boards to display items of interest to students, teachers, or others in the school community, thus creating a designated public forum.[247] But the court also reasoned that the principal's request for the removal of the pamphlets showed that the school intended to limit the topics that could be posted to "topics consistent with the approved curriculum and appropriate for students of [the school]."[248] The court continued:

> It would be ludicrous to insistent [sic] that teachers could post anything they want on their doorways. If this were the case, the school hallways could potentially be filled with pornography, guides to getting away with the perfect murder, instructions on how to build a bomb, etc. To prevent such a situation, there has to be some restrictions on what can be posted on the doorways. As it is appropriate to limit topics in designated public forums, it does not appear that the plaintiff is likely to succeed on this claim.[249]

This reasoning calls to mind Tribe's warning that public forum analysis is ripe for ex post facto manipulation.[250] The school district should have been required to demonstrate a compelling state interest for the limitation on the teacher's speech within the designated public forum.[251] But the court

242. 116 F. Supp. 2d 677 (W.D. Va. 2000).

243. *Id.* at 687. For the most part, the court followed *Boring*'s line of reasoning, but the court also analyzed the public forum claim on its own merits.

244. *Id.* at 681.

245. Curriculum is "out of the realm of public concern." *Id.* at 684.

246. *Id.* at 687.

247. *Id.*

248. *Id.*

249. *Id.*

250. *See* 2 TRIBE, *supra* note 176, at 987.

251. Cornelius v. NAACP Legal Def. and Educ. Fund, 473 U.S. 788, 800 (1985) ("[W]hen the Government has intentionally designed a place or means of communication as a public forum speakers cannot be excluded without a compelling governmental interest.").

maneuvered its way around this requirement by defining the terms of the designation to exclude any material of which the school authorities presently disapproved.[252]

In contrast, other (pre-*Hazelwood*) cases indicate that the discretion given by courts to school boards does (or, at least, did) have limits. In *Zykan v. Warsaw Community School Corp.*,[253] for example, the court explained that school boards may not "fire teachers for every random comment in the classroom" or flatly prohibit discussion of a topic pertinent to subjects being taught.[254] While the court acknowledged the need for local school boards to maintain "broad discretion" over curricular decisions, it noted that such discretion is not unfettered by constitutional considerations.[255] The First Amendment, the court concluded, protects teachers' general comments and discussion.[256]

Moreover, some courts and commentators have taken the position that classroom teachers should be granted wider discretion in the area of teaching methodology than in the area of curriculum content.[257]

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252. *See Newton*, 116 F. Supp. at 687.

253. 631 F.2d 1300 (7th Cir. 1980).

254. *Id.* at 1305.

255. *Id.*

256. *Id.* at 1305–06. However, the occasional granting of broad discretion to school boards in curricular decisions is a phenomenon that long preceded *Hazelwood*. *See, e.g.*, Ahern v. Bd. of Educ., 456 F.2d 399, 403–04 (8th Cir. 1972) (holding that a teacher who addressed political issues in an economics course and who referred to a substitute teacher as a "bitch" was not protected by the First Amendment); Mercer v. Mich. State Bd. of Educ., 379 F. Supp. 580, 585–86 (E.D. Mich. 1974), *aff'd*, 419 U.S. 1081 (1974) (holding that a teacher who challenged statutes prohibiting the giving of any information on birth control in a sex education class had no right to teach anything beyond the established curriculum); Parker v. Bd. of Educ., 237 F. Supp. 222, 229–30 (D. Md. 1965), *aff'd*, 348 F.2d 464 (4th Cir. 1965) (finding no protection for a high-school teacher "non-retained" because he assigned *Brave New World*, and explaining that free speech may be reasonably curtailed as a requisite for government employment); Fisher v. Fairbanks N. Star Borough Sch. Dist., 704 P.2d 213, 216–17 (Alaska 1985) (discussed *supra* note 232).

It should be noted that these older cases do not generally employ a public forum analysis but, nevertheless, apply the type of low-level scrutiny that would result from a finding that the classroom is a nonpublic forum. This is arguably attributable to the courts' conclusions concerning the appropriate role of the principal and school board (as opposed to the teacher and the students) in determining the scope and content of classroom curriculum. In other words, and as noted above, it could be argued that these courts have implicitly ruled that the school boards have not evidenced an intent to create a designated public forum.

257. Even for those courts that grant greater freedom for methodological decisions, however, the distinction between methods and content can be difficult to draw. For instance, in *Millikan v. Board of Directors of Everett School District*, 611 P.2d 414 (Wash. 1980), the school board had prohibited two teachers from team-teaching a history course. The teachers challenged the prohibition on First Amendment grounds, arguing that they should have the freedom to select teaching methodology. *Id.* at 523. The district countered that this methodology would result in a significant loss of course content, which, the court agreed, "is manifestly a matter within the board's discretion."

The rationale for this distinction was explained by Stephen Goldstein:

> Presumably the special training and experience of a teacher have equipped him to decide issues of pedagogical methodology. But issues of what should be taught, as distinguished from those concerning how to teach, may involve completely different kinds of considerations. . . . These are truly political questions that should be determined by instruments of societal will rather than by professional experts.[258]

This distinction helps account for the decision of the court in *Kingsville Independent School District v. Cooper*,[259] which granted First Amendment protection to a teacher who had been disciplined for employing a particular pedagogical method.[260] Cooper (the teacher) had used role-playing to teach about the Reconstruction Era.[261] The technique had elicited strong emotional responses and provoked parental complaints.[262] Incredibly, the district personnel director reacted by telling Cooper "not to discuss Blacks in American history" and that "nothing controversial should be discussed in the classroom."[263] The court held that the school could not punish Cooper for her speech unless it could show that the speech caused substantial disruption that outweighed her usefulness as an instructor.[264]

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*Id.* at 418. Thus, requiring the teachers to cover the content in the traditional manner did not violate their academic freedom.

258. Goldstein, *supra* note 73, at 1337–38.

259. 611 F.2d 1109 (5th Cir. 1980).

260. *Id.* at 1111.

261. *Id.*

262. *Id.*

263. *Id.* Similarly, in *Pred v. Board of Public Instruction*, 415 F.2d 851 (5th Cir. 1969), the court rejected the district's contention that high-school teachers can be fired for teaching notions of "freedom" in a literature class: "[I]t would obliterate cherished ideas about the relationship of teacher-pupil and the teacher's role in character building were instruction so closely confined to the technicalities of a particular subject or academic discipline." *Id.* at 857 n.17.

264. *See Kingsville*, 611 F.2d at 1113. But compare *Bradley v. Pittsburgh Board of Education*, 910 F.2d 1172, 1176–77 (3rd Cir. 1990), wherein the court upheld the board's exercise of discretion in forbidding the use of a teaching method called "Learnball." The technique had a sports format, with the class divided into teams, with elected leaders and students given responsibility for rules and grading exercises, and with winners given rewards such as radio playing and shooting a foam basketball. *Id.* at 1174. The court affirmed "the School District's undisputed right to control the classroom curriculum" and determined that the teacher did not have a right to academic freedom under the First Amendment that extended to choice of classroom techniques. *Id.* at 1176–77; *accord* Murray v. Pittsburgh Bd. of Educ., 919 F. Supp. 838 (W.D. Pa. 1996) (upholding a school policy prohibiting the use of "Learnball" at an alternative high school); *see also* Adams v. Campbell County Sch. Dist., 511 F.2d 1242 (10th Cir. 1975). The *Adams* court stated that, although the teachers' nontraditional pedagogical methods may have had educational value, the teachers did not necessarily have a constitutional right to adopt the method. *Id.* at 1247. Particularly in small communities, it concluded, the board possesses the right to require the teacher to use a more orthodox approach. *Id.*

The "disruption" standard applied by the *Cooper* court had been popularized by the Supreme Court in *Tinker*, which had suggested that the state may restrict student speech when that speech poses a "substantial disruption of or material interference with school activities."[265] The *Cooper* court is one among several courts that has applied this same standard to teacher speech.[266] However, this approach has been rightly criticized: "To congratulate [teachers] for refraining from disruption is surely to damn [them] with faint praise; and the notion that [teachers fulfill their functions and earn their salaries] by not disrupting class reflects something of a minimalist view of education."[267]

In a related line of cases, courts have held that school boards have the authority to sanction teachers for "extreme propagandism in the classroom."[268] Thus, the court in *Burns v. Rovaldi*[269] had no trouble upholding the dismissal of a fifth-grade teacher, Philip Burns, who had devised a letter-writing activity as part of a handwriting lesson. The letters were written to his fiancée, who then responded to each student with the following (or a similar) statement:

> I am a communist, in the Progressive Labor Party, just like Phil is. We are both working hard for the day when you kids and the rest of us working people kick out all the rich rotten bosses and then we can

265. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969). The mechanical importation of this standard from *Tinker* mirrors the simplistic use in more recent decisions of the standards in *Hazelwood* and *Pickering*. None of these three cases "grapple with the primary distinguishing factor of the school system as a governmental agency—the function of the schools as a stimulus to intellectual development." Norman R. Miller, *Teachers' Freedom of Expression Within the Classroom: A Search for Standards*, 8 GA. L. REV. 837, 857 (discussing *Tinker* and *Pickering*). A Kamawha County judge in West Virginia recently applied the disruption standard to uphold a school's demand that a fifteen-year-old student not wear a t-shirt reading, "When I saw the dead and dying Afghani children on TV, I felt a newly recovered sense of national security. God Bless America." Michelle Saxton, *Judge Rules on Student Anarchy Club*, ASSOCIATED PRESS ONLINE, Nov. 1, 2001, 2001 WL 29789577.

266. *See, e.g.*, James v. Bd. of Educ., 461 F.2d 566, 572 (2d Cir. 1972) (holding that the school district did not demonstrate a rational basis for discharging a teacher who insisted on wearing a black armband, protesting the Vietnam War, since there was no evidence of disruption); Dean v. Timpson Indep. Sch. Dist., 486 F. Supp. 302 (E.D. Tex. 1979); Parducci v. Rutland, 316 F. Supp. 352, 355 (M.D. Ala. 1970).

267. Stewart, *supra* note 23, at 63. Nevertheless, see *Drown v. Portsmouth School District*, 451 F.2d. 1106 (1st Cir. 1971), wherein the court stated that nonrenewal of a teacher for being "'too innovative and unconventional' would be proper under the wide discretion afforded the school board." *Id.* at 1109 (citation omitted).

268. Moore v. Gaston County Bd. of Educ., 357 F. Supp. 1037, 1040 (W.D.N.C. 1973); *accord* Knarr v. Bd. of Sch. Trs., 317 F. Supp. 832, 836 (N.D. Ind. 1970), *aff'd*, 452 F.2d 649 (7th Cir. 1971) (upholding a school's decision not to rehire a teacher who used his classroom "as his personal forum to promote union activities, to sanction polygamy, to attack marriage, to criticize other teachers and to sway and influence the minds of young people without a full and proper explanation of both sides of the issue") (citation omitted).

269. 477 F. Supp. 270 (D. Conn. 1979).

> all run everything ourselves. That is what communism really means. Then we can all cooperate and have a good and happy life. My son, Chris, is learning to be a communist too![270]

Notwithstanding the fact that these older cases have not been expressly overruled (and that most have rarely been criticized), the line of post-*Hazelwood* cases leading to *Boring* does raise serious questions as to the older cases' continued viability. The clear trend among recent decisions is to view *Hazelwood* as broadly setting forth a standard for regulating all school-sponsored expression. This trend, if it continues, could have profound implications for American classrooms. As discussed in greater detail in the final parts of this Article, the most troubling aspect of the trend is not the use of public forum analysis per se. Properly applied, such an analysis could yield meaningful protections for innovative teachers. Rather, what is most troubling is that, as applied thus far, public forum analysis has blinded courts to half of the nation's ongoing dialogue about the role of teachers and schools. Gone are *Tinker*, *Barnette*, and *Keyishian*. Gone are Meiklejohn and Mill. The new rubric, as applied, leaves no room for such considerations as academic freedom and the marketplace of ideas.

### G. Curriculum, Public Interest, and the Missing First Amendment

Recall the case of *Newton v. Slye*, in which a teacher was prohibited from posting "banned books" pamphlets on a bulletin board outside her classroom door. The court first noted that, pursuant to *Boring*, a teacher has no First Amendment rights to control the curriculum.[271] The court then reasoned that, if the pamphlets were not considered curriculum, *Pickering* controlled and the public interest analysis should be used: "First Amendment protection depends on whether the posting of the pamphlets was a matter of public concern or of curriculum."[272] But this statement implies that the choice between these two options will determine whether a teacher may, in fact, be protected by the First Amendment. Is this really the case?

Whether the pamphlets fall within the definition of "curriculum" depends on which definition is used.[273] A curriculum can be categorized as

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270. *Id.* at 272. Similarly, in *Brubaker v. Board of Education*, 502 F.2d 973 (7th Cir. 1974), the court upheld the school board's decision to dismiss three teachers who had distributed a poem that referred to the pleasures derived from smoking marijuana and that urged students not to accept discipline and moral tenets imposed on them. *Id.* at 975–76.

271. Newton v. Slye, 116 F. Supp. 2d 677, 684 (W.D. Va. 2000).

272. *Id.* at 685.

273. For a discussion of the wide variety of definitions, see Philip W. Jackson, *Conceptions of Curriculum and Curriculum Specialists*, *in* HANDBOOK OF RESEARCH ON CURRICULUM 3, 4–11 (Philip W. Jackson ed., 1992).

"intended," "hidden,"[274] "delivered," or "experienced."[275] Courts are primarily interested in the intended and the implemented curricula—the lesson plans and what actually takes place in the classroom.[276] This narrow definition might not include a posting outside a classroom door.[277] But recent court decisions have also taken a fairly expansive view of the scope of curriculum, presumptively including such activities as newspapers,[278] plays,[279] and bulletin board material.[280]

Thus, given the broad definitions used by courts and many curriculum specialists, the pamphlets most likely should be considered curriculum material. But this determination makes little difference. Using the *Newton* rubric, a determination that the pamphlets are curricular means that *Hazelwood*, and not *Pickering*, provides the applicable law. Assuming, however, that *Pickering* had been applied (that is, if the pamphlets were not considered curricular), the court would then consider the *Pickering* dichotomy between private speech and speech that presents matters of public concern. Moreover, in the context of the classroom, the *Newton* court highlights a second, related dichotomy between curriculum and private speech. Even if an instance of controversial teaching were somehow to be characterized as outside the curriculum, the chances are very high that it would fail the *Pickering* test, because it would likely also be outside the public interest. Any classroom speech becomes either unprotected curriculum (matters of public concern), or unprotected noncurriculum (private speech).

These false dichotomies squeeze out the First Amendment. Pursuant to *Hazelwood*, the First Amendment affords little oversight for curricular decisions. Pursuant to *Pickering*, the First Amendment affords little oversight

274. Elliot Eisner has argued that what is left out of a given lesson (the so-called "null curriculum" or "hidden curriculum") is as important as what is included. Elliot W. Eisner, *Curriculum Ideologies*, *in* HANDBOOK OF RESEARCH ON CURRICULUM, *supra* note 273, at 302, 302–305.

275. Jackson, *supra* note 273, at 9.

276. *See, e.g.*, Lacks v. Ferguson Reorganized Sch. Dist. 147 F.3d 718 (8th Cir. 1998).

277. Or it might. A court may determine that the pamphlets were posted with the intent (perhaps successful) of teaching the students a lesson. Scholars generally prefer more comprehensive definitions, accounting for the unwieldy inclusiveness of the learning process. Franklin Bobbitt, for instance, defined curriculum to include that which occurs in the society at large: "that series of things which children and youth must do and experience by way of developing abilities to do the things well that make up the affairs of adult life; and to be in all respects what adults should be." FRANKLIN BOBBITT, THE CURRICULUM 42 (1918). Joseph Schwab narrowed the definition to focus on the teacher's role, but he nevertheless defined curriculum broadly as that which is successfully conveyed in different degrees to different students by teachers. JOSEPH J. SCHWAB, SCIENCE, CURRICULUM, AND LIBERAL EDUCATION: SELECTED ESSAYS (Ian Westbury & Neil J. Wilkolf eds., 1978).

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

279. *See* Boring v. Buncombe County Bd. of Educ., 136 F.3d 364, 368 (4th Cir. 1998) (en banc).

280. *See* Newton v. Slye, 116 F. Supp. 2d 677, 685 (W.D. Va. 2000).

of decisions to punish or squelch private speech. The dichotomies appear to leave no room for academic-freedom arguments protecting instructional techniques or curricular implementation that is too creative.

One obvious step along the path out of this trap would be to renounce use of the *Pickering* test for in-class teacher speech.[281] Another step would be to recognize that *Hazelwood*'s discussion of curriculum is not directly transferable from students to teachers.[282] Finally, as discussed in greater detail in the remainder of this Article, courts could and should engage in a meaningful, case-by-case analysis of classrooms' potential status as designated public fora.[283]

## III. THE IMPACT OF DECENTRALIZATION, PROFESSIONALIZATION, AND SCHOOL CHOICE ON TEACHER SPEECH

This part considers three ongoing, interconnected educational reforms that are presently having a major impact on American schooling and educational policy.[284] The content, presuppositions, and implications of these reforms highlight the need for courts to move toward a broader, more comprehensive analysis of teacher-speech cases.[285]

The three reforms—decentralization, professionalization, and school choice—are designed to distribute more power among teachers, students, and parents.[286] Several high-profile 1986 reports by the Carnegie Forum on

281. *See* discussion *supra* note 223. Supporting the argument that the *Pickering* approach dooms in-class speech claims, consider the analysis performed by Ann Hassenpflug, *Avoiding Violations of Faculty First Amendment Freedom of Speech Rights*, 134 ED. L. REP. 439, 440–43 (1999). Hassenpflug examines all post-*Connick* cases where teacher speech was determined by the court to be on a matter of public concern, finding no cases of in-class speech where teachers prevailed. *Id.*

282. *See supra* note 232 and accompanying text.

283. *See* discussion *infra* Part V. Of course, courts finding limited public fora must also avoid the *Newton* court's approach, making such a characterization irrelevant. *See supra* notes 242–245 and accompanying text.

284. A version of the material contained in Parts III and IV was presented in November 2002 at the 48th Annual Conference of the Educational Law Association and published in the ELA Conference Book. Kevin Welner, *Examining the Present and the Future of Legal Protections for Controversial Teaching in Public Schools*, *in* 48TH ANNUAL CONFERENCE BOUND NOTEBOOK (Educ. L. Ass'n 2002).

285. For a related argument, also contextually grounded in the role and purpose of public education, see Gregory A. Clarick, Note, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U. L. REV. 693 (1990), which argues that courts should allow teachers to retain broad First Amendment protections in order to carry out their legitimate teaching duties.

286. *See* JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS AND AMERICA'S SCHOOLS (1990); KENNETH HOWE, UNDERSTANDING EQUAL EDUCATIONAL OPPORTUNITY 109–127 (1997); William Foster, *Restructuring Schools*, *in* 3 ENCYCLOPEDIA OF EDUCATIONAL RESEARCH, *supra* note 183, at 1108, 1111–13; Priscilla Wohlstetter & Thomas Buffett, *Decentralizing Dollars Under School-Based Management: Have Policies Changed?*, 6 EDUC. POL'Y 35, 36 (1992).

Education and the Economy[287] and the Holmes Group,[288] among others, urge schools to adopt the first two of these reforms, and many have done so.[289] These reports offer a straightforward rationale: "[S]tudents are better served

287. CARNEGIE FORUM ON EDUCATION AND THE ECONOMY, A NATION PREPARED: TEACHERS FOR THE 21ST CENTURY (1986).

288. HOLMES GROUP, TOMORROW'S TEACHERS (1986). The Holmes Group is a group of deans of schools of education.

289. *See* NATIONAL CENTER FOR EDUCATIONAL STATISTICS, U.S. DEPARTMENT OF EDUCATION, TEACHER PROFESSIONALIZATION AND TEACHER COMMITMENT: A MULTILEVEL ANALYSIS (1997), *available at* http://nces.ed.gov/pubs/97069.pdf (assessing the effects of teacher professionalization); CROSS CITY CAMPAIGN FOR URBAN SCHOOL REFORM, DECENTRALIZATION PROGRESS (1999). My selection of only these three reforms is not meant to minimize the importance of other ongoing change efforts. In fact, American schools are presently engaged in several additional widespread and important reforms. Standard-based, systemic reforms, for example, are ubiquitous in state legislatures and in Washington, D.C. Every state except Iowa has adopted standards in core academic areas. SANDRA THOMPSON & MARTHA THURLOW, NAT'L CENTER ON EDUCATIONAL OUTCOMES, 1999 STATE SPECIAL EDUCATION OUTCOMES: A REPORT ON STATE ACTIVITIES AT THE END OF THE CENTURY, http://education.umn.edu/NCEO/OnlinePubs/99statereport.htm (last visited Feb. 18, 2003); *see also* Marshall S. Smith & Jennifer O'Day, *Systemic School Reform*, *in* THE POLITICS OF CURRICULUM AND TESTING 233, 234–35, 245–61 (Susan H. Fuhrman & Betty Malen eds., 1991). Marshall Smith and Jennifer O'Day proposed their systemic reform model as a means of combining restructuring reforms, such as decentralization and professionalization, with a series of "intensification" reforms that had grown out of the 1983 *A Nation at Risk* report, NATIONAL COMMISSION ON EXCELLENCE IN EDUCATION, A NATION AT RISK: THE IMPERATIVE FOR EDUCATION REFORM, 24–30 (1983). Smith & O'Day, *supra* at 258–61. President Bush's "No Child Left Behind" legislation, reauthorizing the Elementary and Secondary Education Act (ESEA), combines school choice with standards-based accountability approaches. 20 U.S.C. § 6301 (both purposes); *id.* §§ 7221–7225g (school choice); *id.* §§ 7301–7301b, 7325–7325f (accountability). Grade retention has also recently been revived as a popular reform—framed as a backlash against "social promotion." *See, e.g.*, Robert C. Johnston, *Calif. Targets K–12 "Social Promotions"*, EDUC. WEEK, Sept. 9, 1998, at 1, 33; *see also* Lorrie A. Shepard et al., *Failed Evidence on Grade Retention*, *in* PSYCHOLOGY IN THE SCHOOLS 251, 251–61 (1996) (reviewing KARL ALEXANDER ET AL., ON THE SUCCESS OF FAILURE: A REASSESSMENT OF THE EFFECTS OF RETENTION IN THE PRIMARY GRADES (1994)) (examining and critiquing the research on grade retention). Teacher incentive pay has also gained popularity in recent years. *See, e.g.*, ALLAN ODDEN & CAROLYN KELLEY, PAYING TEACHERS FOR WHAT THEY KNOW AND DO: NEW AND SMARTER COMPENSATION STRATEGIES TO IMPROVE SCHOOLS (1996). Finally, policies at the national, state, and district levels have recently included a strong push for increased use of technology, particularly computers, in the classroom. *See, e.g.*, PRESIDENT'S COMMITTEE OF ADVISORS ON SCIENCE AND TECHNOLOGY, REPORT TO THE PRESIDENT ON THE USE OF TECHNOLOGY TO STRENGTHEN K–12 EDUCATION IN THE UNITED STATES (1997).

Some or all of these reforms could be subjected to analyses similar to that which I offer for decentralization, professionalization, and choice. For instance, the push for the integration of computers into instruction presents the likelihood of important variations among classrooms. Some schools may decide to implement computer-learning policies that dictate structured, formulaic lessons. Other schools may seek to use the computers for project-based exploration. *See, e.g.*, Marcia C. Linn & James D. Slotta, *WISE Science*, EDUC. LEADERSHIP, Oct. 2000, at 29, 29–32. In the former situation, teacher discretion will be minimized. In the latter, however, the school leadership effectively asks the teacher to use her discretion constantly, responding to each student's immediate questions and needs. While the district may place some reasonable constraints on this discretion (most obviously, directing students away from racist or pornographic web sites), it could never anticipate many of the possibilities that may arise and must be addressed instantaneously by the teacher.

by teachers who are prepared to make responsible decisions and then given the authority to do so."[290] Similarly, the ongoing school-choice movement is intended to create laboratories of experimentation in school design and instruction.[291]

## A. Decentralization

The most common decentralization reform is site-based management, which involves, at a minimum, a reform of the district's structural hierarchy, devolving power from the district central office and school administrators to school-based councils consisting of teachers, parents, administrators, and, sometimes, students and community members.[292] These changes are designed to enhance the consideration of community needs.[293]

Decentralization reforms implicate issues of teacher accountability in several distinct ways. For instance, one of the most significant variables in the teacher accountability equation is the extent of parental and community power granted by decentralization reforms.[294] While active involvement by such ground-level stakeholders is seen by many as crucial to making schools responsive to the varied needs of different communities,[295] local school

290. Linda Darling-Hammond & Arthur E. Wise, *Teacher Professionalism*, *in* 4 ENCYCLOPEDIA OF EDUCATIONAL RESEARCH, *supra* note 183, at 1359, 1359.

291. *See* FREDERICK M. HESS, REVOLUTION AT THE MARGINS: THE IMPACT OF COMPETITION ON URBAN SCHOOL SYSTEMS 30–52 (2002); STEPHEN D. SUGARMAN & FRANK R. KEMERER, SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW 38–40 (1999); AMY STUART WELLS, TIME TO CHOOSE: AMERICA AT THE CROSSROADS OF SCHOOL CHOICE POLICY 28–29 (1993).

292. Site-based management reforms are widespread but uneven and, as discussed *infra*, often very superficial. *See* PATRICIA WOHLSTETTER & THOMAS BUFFETT, SCHOOL-BASED MANAGEMENT IN BIG CITY DISTRICTS: ARE DOLLARS DECENTRALIZED TOO? (1991). *See generally* Abby Barry Bergman, *Lessons for Principals from Site-Based Management*, EDUC. LEADERSHIP, Sept. 1992, at 48 (outlining the nature and benefits of site-based management); Paul T. Hill et al., *Uplifting Education: Set Schools Soaring with Site-Based Management*, AM. SCH. BOARD J., Mar. 1992, at 21–25 (same).

293. Foster, *supra* note 286, at 1111.

294. As discussed above, the general pattern has been for parents and other groups to serve in an advisory capacity only. *See id.* Moreover, parents, once given control, will tend to delegate that control to trusted professional educators. *See* PAUL T. HILL & JOSEPHINE BONAN, DECENTRALIZATION AND ACCOUNTABILITY IN PUBLIC EDUCATION 26–27 (1991).

295. Dan A. Lewis provides a nice description of the goals behind parental involvement in school-site management:

> In the deinstitutionalization [decentralization] model, parents are treated as agents of change, with common interests and a common motivation to change how the schools are operating. The victim of bureaucracy becomes its master. These parents can articulate their shared interests in opposition to the interests of other groups or classes that have controlled the educational process in the past. Reformers and activists help parents in that articulation process by amplifying and clarifying those interests. If the governance structure changes to accommodate parental interests and treat parents with respect, then parents will soon be able to articulate their own interests and develop their own leadership. Community

politics have historically been dominated by the middle- and upper-middle classes and have consequently served as a forum for their values.[296] In part for this reason, giving parents and community members more structural political power has concerned some who fear "that school councils could become the captives of narrowly based, external interest groups."[297] Arons and Lawrence have voiced a similar apprehension, focused on the possibility that a minority view in a racially mixed community could be excluded:

> Community control of schools for those who have been excluded from the political process must involve a conscious and vigorous effort to destroy barriers to their involvement. Those who profess to

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> organizations and protest organizations that purport to represent parents' interests are very important in the reform process, for they teach parents not to accept the powerlessness that professionals impute to them, and they draw parents together to act politically. In this way, more democracy transforms the institution and creates a better educational system.

Dan A. Lewis, *Deinstitutionalization and School Decentralization: Making the Same Mistake Twice*, *in* DECENTRALIZATION AND SCHOOL IMPROVEMENT: CAN WE FULFILL THE PROMISE 84, 91–92 (Jane Hannaway & Martin Carnoy eds., 1993).

296. *See* WELNER, *supra* note 27, at 148–53; *see also* GEORGE R. LANOUE & BRUCE L. R. SMITH, THE POLITICS OF SCHOOL DECENTRALIZATION 227–35 (1973). Nevertheless, many progressive activists, focusing on subordinate communities, look to decentralization as a tool to move the norms taught in those communities closer to the communities' own norms. Michelle Fine, for example, envisions a site-based management transformation that frees individual schools and teachers to institute a critical pedagogy. FINE, *supra* note 106, at 205–06. This vision, however, is not necessarily one of academic freedom—it may instead represent only a shift to a different set of prevailing values. George LaNoue and Bruce Smith also point out that

> Decentralization . . . has implications for the school's political socialization role. While the public schools have historically inculcated Americanism and allegiance to certain generalized political norms, the pluralism of their constituencies, the ethos of professional educators, and the watchfulness of the federal courts have checked most tendencies toward overt partisan or sectarian indoctrination. Some of the advocates of community control, however, reject the white middle-class character of the socialization process and clearly hope to use the schools to encourage ethnic solidarity and challenge traditional American myths.

LANOUE & SMITH, *supra*, at 19.

The desire to increase the political power of subordinate groups was a prime motivating factor in the modern development of the decentralization movement. Discussing these reforms, historian David Tyack explains,

> [S]ome protest groups wanted radical decentralization. Militant blacks in cities, who were fed up with the glacial pace of desegregation and eager to run local schools, called for community control of ghetto schools. Responding to such demands for local participation in school decision making, federal and state lawmakers sometimes mandated school-community councils to administer the new categorical programs, thereby sometimes strengthening the influence and participation of parents in individual schools but rarely altering the overall distribution of power.

David Tyack, *School Governance in the United States: Historical Puzzles and Anomalies*, *in* DECENTRALIZATION AND SCHOOL IMPROVEMENT, *supra* note 295, at 1, 19 (citation omitted).

297. Boyd, *supra* note 187, at 759. From this perspective, school-based decisionmaking rules and system-level accountability requirements should be "designed to minimize this danger." *Id.*

> advance such a goal must be willing to insure that these barriers are eliminated and that advances in the transfer of control are protected in reality as well as in theory.[298]

Another notable potential consequence of active parental involvement in school-site councils may be a weakening of the effectiveness of community censors. Following failed attempts to resolve parental complaints informally, censorship disputes often become highly politicized. The creation of school-site councils with active parental involvement may alter the structure of such disputes, giving the community's parents a voice within the system and also creating a body that is perfectly suited to act as mediator. Of course, it is also possible that a well-organized political or religious group could come to dominate the council, thus increasing the potential for censorship.[299]

As noted above, school-restructuring efforts sometimes combine decentralization with professionalization,[300] which, as conceptualized by school reformers, is grounded in a view of practice that is client-centered and knowledge-based.[301] As one commentator explained, "The school-based management model is itself based on the theory that if the top down system of administration is abandoned in favor of policy decided by all the constituent elements of a school community including supervisors, teachers, parents, and students, a more harmonious atmosphere based upon individual responsibility will prevail."[302] Among the consequences of this approach is that the teaching professional is expected, and empowered, to make decisions with respect to the unique needs of each client-student.[303]

These two reforms have clear repercussions concerning the inculcation of values in American students. As William Foster explains, "[T]he school serves as a major avenue for formation of political consciousness among the young, and such a consciousness is better learned through practice than through lecture."[304] More bureaucratic structures, he continues, are less responsive to minority students' needs.[305] Further, a "paternalistic structure, where decision making occurred only at the top, seemed hardly adequate models for teaching social equality and participation in political life."[306] Restruc-

298. Arons & Lawrence, *supra* note 24, at 354–55. William Foster also warns that "[l]ocalizing decision-making power always raises the issue of protecting the rights of minorities and the underrepresented." Foster, *supra* note 290, at 1113.

299. *See* Boyd, *supra* note 187, at 759.

300. Professionalization is sometimes referred to simply as "professionalism."

301. Darling-Hammond & Wise, *supra* note 290, at 1359.

302. John J. Byrne, *Teacher as Hunger Artist: Burnout: Its Causes, Effects, and Remedies*, 69 CONTEMP. EDUC. 86, 90 (1998).

303. Darling-Hammond & Wise, *supra* note 290, at 1359.

304. Foster, *supra* note 286, at 1110.

305. *Id.* at 1111.

306. *Id.* at 1110–11.

turing, Foster contends, can help build "an educational community founded on the political principles of participation, equality, and freedom."[307]

These restructuring reforms also demand changes in teacher responsibility and accountability.[308] The hierarchical structures presumed by past courts to govern schools, with classroom teachers at the bottom of the pyramid, do not necessarily hold true in today's system.[309] In some schools, teachers are now expected to take on meaningful governance responsibilities; in others, teachers continue with more traditional roles.[310] Decentralization may even result in *increased* organizational control over teachers,[311] and

307. *Id.* at 1111. Compare the U.S. Supreme Court's statement in *Bethel School District v. Fraser*, 478 U.S. 675 (1986): "The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order." *Id.* at 683.

308. Foster describes the ideal decentralization/professionalization paradigm as follows:

> Teachers become the source of the curriculum, creating, modifying, or otherwise manipulating texts for the conditions of their particular classroom. . . . Teachers also take on a variety of governance responsibilities, particularly those related to the quality of instruction; decision making for the school site is now considered a standard responsibility for teachers, either shared with the administrator or adopted entirely by teachers.

Foster, *supra* note 286, at 1111.

309. However, not all schools engaged in restructuring reforms have adopted actual changes to the usual power dynamic. According to Richard Elmore, "the evidence suggests that the implementation of site-based management reforms has a more or less random relationship to changes in curriculum, teaching, and students' learning." Richard F. Elmore, *School Decentralization: Who Gains? Who Loses?*, *in* DECENTRALIZATION AND SCHOOL IMPROVEMENT, *supra* note 295, at 33, 40 (citation omitted). Following an extensive literature review, Elmore concluded that the authority of school-site councils "is either very vaguely specified or highly circumscribed; seldom if ever does school-site management actually mean real control over core elements of the organization [including curriculum]." *Id.* at 44.

310. For better or worse, the conservative model of site-based management is presently prevailing. *See* Betty Malen et al., *What Do We Know About School-Based Management? A Case Study of the Literature—A Call for Research*, *in* 2 CHOICE AND CONTROL IN AMERICAN EDUCATION: THE PRACTICE OF CHOICE, DECENTRALIZATION AND SCHOOL RESTRUCTURING 289, 290, 296–97 (William H. Clune & John F. Witte eds., 1990). At least in those districts that have not also engaged in professionalization reforms, the changes tend not to significantly increase teacher classroom autonomy. A substantial body of research has confirmed that site-based management reforms have rarely decentralized significant portions of the budget, provided substantive personnel authority, been comprehensive, or improved student achievement. *See* Priscilla Wohlstetter & Allan Odden, *Rethinking School-Based Management Policy and Research*, 28 EDUC. ADMIN. Q. 529, 531 (1992). In addition, few programs have engaged teachers in reformed curriculum and instruction. *See* Mark A. Smylie, *Redesigning Teachers' Work: Connections to the Classroom*, *in* 20 REVIEW OF RESEARCH IN EDUCATION 129, 161–62 (Linda Darling-Hammond ed., 1994).

311. "[T]he discretion of school-level actors in many decentralized systems may be far more restricted than the discretion of school-level actors in traditionally organized systems." Jane Hannaway, *Decentralization in Two School Districts: Challenging the Standard Paradigm*, *in* DECENTRALIZATION AND SCHOOL IMPROVEMENT, *supra* note 296, at 135, 139. This is because the reformed structure opens the teachers to greater scrutiny:

> In a decentralized arrangement, where teachers are involved in decisions about their work, their professional life is more observable and therefore more open to monitoring and

teachers may experience a new, multidirectional accountability.[312] This variety exists with regard to schoolwide issues as well as issues impacting individual classrooms.[313]

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influence by others. At least their views of their work, the way they go about planning for it, and their reports about what goes on in their classrooms are more public than in a traditionally organized school, where individual teachers in their classrooms function in isolation.

*Id.* at 138–39. Paul Hill and Josephine Bonan provide an alternative description of the effects of removing the traditional hierarchical structure; they focus on the old incentives to avoid being noticed:

> Past efforts to control schools in detail from the outside, by contract, court decree, regulation, and financial incentives, have made schools more responsive to higher authorities than to the students and parents they are supposed to serve. Many principals and teachers, because they do not feel free to make full use of their professional judgment, have come to concentrate on tasks that are discrete, bounded, and noncontroversial—that is, the implementation of programs and the imparting of specific facts and skills—rather than on cognitive development, the integration of ideas, and students' personal growth.

HILL & BONAN, *supra* note 294, at vii–viii.

312. "School staff remain accountable upward, to the school board and central administration. They must also account downward to parents, students, and community members, and laterally to one another and to the staffs of other schools to which their students will someday graduate." *Id.* at 45. These authors also analogize the accountability of teachers at site-based management schools with that of politicians:

> As bureaucrats, they were accountable to higher-ranking bureaucrats, and the basis of accountability was compliance with policies. As initiative-taking operators, they are accountable to multiple constituencies—higher officials, parents, and the public—and the basis of the accountability is confidence. Different constituencies each have their hopes for what the school will do, and they have a reciprocal obligation to support the schools.

*Id.* at 42.

313. Decentralization's immediate classroom impact is likely to involve conflicting elements. While increased teacher classroom autonomy is generally included in the reforms, *see* CARNEGIE FORUM ON EDUCATION AND THE ECONOMY, *supra* note 287, at 56; Foster, *supra* note 286, at 1112, this principle is seen by some as problematic. These detractors warn of the danger of decentralization being *misperceived* by teachers as a grant of autonomy:

> As we saw in many schools in all the districts we visited, if site-based management is mistakenly regarded as a commitment to the independence of individual teachers, many schools will be unable to change, hamstrung by irreconcilable internal differences.
>
> Site management gives teachers and principals the opportunity to collaborate with their coworkers. It does not, however, convey to anyone, teacher or principal, the absolute right to work where and how one chooses.

HILL & BONAN, *supra* note 294, at 20. The Supreme Court has stated that teachers "have no right to work [in the public] school system on their own terms." Adler v. Bd. of Educ., 342 U.S. 485, 492 (1952) (upholding a New York statute that prohibited those advocating the overthrow of the government from teaching in public schools). Stewart, commenting on the zeal with which some promote a right of teachers to academic freedom, describes the "unspoken assumption . . . that classroom teachers tend to be more progressive or enlightened than their supervisors; but of course the first amendment right enunciated here could just as easily serve to insulate the classroom teacher's outmoded or backward method from effective review by superiors." Stewart, *supra* note 23, at 61. Goldstein agrees, pointing out that, given teachers' historical resistance to change, granting more control and freedom to teachers may actually *hamper* educational reform. Goldstein, *supra* note 73, at 1357.

Decentralization reforms, then, have driven greater variations among schools. Any given teacher in any given classroom is likely to have different responsibilities and freedoms than his or her colleague in a neighboring school or school district. Courts should account for these differences when determining the nature of such classrooms, the type of notice provided teachers, and these teachers' reasonable expectations.[314]

B. Professionalization

Many advocates of decentralization also aim to treat teachers as professionals who can and should be held responsible for their decisions and actions.[315] "[A] responsible teacher must have freedom to use the tools of his profession as he sees fit."[316] As Professor Foster explains, if teachers "are to be held accountable, they must be given the power to make their own decisions regarding instruction [and this model] is thus sympathetic to the development of teacher-based curricula."[317] In such a model of professionalization, the newly envisioned role of decentralized district administration moves away from the traditional type of authority. Restructured district offices often take on the role of "an agency designed to *aid* individual efforts rather than to *control* them."[318] Similarly, the principal's role is generally reconceptualized to share leadership power and responsibilities with the teachers.[319] "The idea of teacher empowerment is more than having teacher-run committees advising the principal on school decisions; it also incorporates the notion that the teacher is in control of his or her practice within the classroom itself and can thereby engage in fresh and innovative instruction."[320]

Accordingly, while decentralization reforms usually devolve centralized authority to collective decisionmaking at the school site, professionalization reforms effectively devolve that authority to individual

314. As Karen Daly explains,

> At the same time courts are hardening in their opposition to teachers' contributions to the curriculum, educational reformers are urging a greater role for teachers to help improve the performance of public schools. School-based management, a common element in proposals for education reform, is directly at odds with the sharp teacher/school board dichotomy that characterizes recent opinions.

Daly, *supra* note 231, at 50.

315. *See* Susan Watson & Jonathon Supovitz, *Autonomy and Accountability in the Context of Standards-Based Reform*, 9 EDUC. POLICY ANALYSIS ARCHIVES 1 (2001), *available at* http://epaa.asu.edu/epaa/v9n32.html (last visited Jan. 13, 2003).

316. Sterzing v. Fort Bend Indep. Sch. District, 376 F. Supp. 657, 662 (S.D. Tex. 1972).

317. Foster, *supra* note 286, at 1111.

318. *Id.* (emphasis added).

319. Boyd, *supra* note 187, at 759.

320. Foster, *supra* note 286, at 1111.

teachers.[321] Reflecting on this latter reform, Foster argues that the most important impact of restructuring would be for teachers to "consider themselves professionals who can choose to engage students in the manner they feel most appropriate."[322] Paul Hill and Josephine Bonan, however, see a potential clash: "[T]he boundaries between individual teacher's [sic] autonomy and collective decision-making can lead to time-consuming and painful conflicts."[323] Perhaps reflecting this concern, few districts and schools have given teachers substantial professional freedom to control their own classrooms' curricula.[324]

In sum, these two new reforms (however envisioned and implemented) presently enjoy considerable support among policymakers and are accordingly finding homes, albeit in a haphazard fashion, in schools throughout the United States. The reforms include forces that may constrain teachers' curricular discretion as well as forces that may increase that discretion. By ignoring this diversity, courts may undermine reform efforts underway in schools pursuing the latter course and may unfairly limit the freedoms of teachers in those schools.[325]

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321. *See* Richard Pratte & Juan L. Rury, *Teachers, Professionalism, and Craft*, 93 TCHRS. C. REC., 59, 59–72 (1991).

322. Foster, *supra* note 286. at 1112.

323. HILL & BONAN, *supra* note 294, at 21.

324. Of course, the public school teacher is not "the archetypal professional [who] is an independent contractor who sells his [or her] skills or work product to clients on the open market." Goldstein, *supra* note 73, at 1337–38; *accord* ROBERT P. ENGVALL, THE PROFESSIONALIZATION OF TEACHING 56 (1997) ("Unlike other professionals, teachers lacked control over entry into their ranks, they were subjected to policies over which they exercised little control, they suffered high turnover rates and a low public image, and were generally dominated and overshadowed by administrators."); *see also* Nicholas Burbules & Kathleen Densmore, *The Limits of Making Teaching a Profession*, 5 EDUC. POL'Y 44, 49–52 (1991). These factors may account for the effective resistance to the advancement of the professionalization movement.

325. Before leaving the topic of teacher professionalism, it is interesting to note the similarities between the limited discretion still accorded classroom teacher speech and the high level of control and restraint that schools historically exercised over the personal lives of teachers. *See, e.g.*, Tardif v. Quinn, 545 F.2d 761 (1st Cir. 1976) (reinstating a female teacher who had been fired because she wore midthigh-length skirts); Horosko v. Sch. Dist., 6 A.2d 866, 868 (Pa. 1939). The *Horosko* court upheld the dismissal of a primary-school teacher who worked part-time at her husband's restaurant, where patrons engaged in some beer drinking and legal gambling because

> [i]t has always been the recognized duty of the teacher to conduct himself in such a way as to command the respect and good will of the community, though one result of the choice of a teacher's vocation may be to deprive him of the same freedom of action enjoyed by persons in other vocations.

*Horosko*, 6 A.2d at 868; *see also* DAVID B. TYACK, THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION 60 (1974). The use of the generic masculine pronoun by the *Horosko* court carries the irony that the high level of control held by school officials over the personal lives of teachers was largely traceable to the fact that the former were overwhelmingly male and the latter were overwhelmingly female.

## C. School Choice

While decentralization and professionalization reforms seek to devolve power to the school and teacher levels, school choice reforms are designed to increase experimentation and to diversify educational approaches by devolving that power to parents and to those who take it upon themselves to design, create, and maintain choice schools.[326] Within choice governance systems, policymaking is decentralized, and greater importance is placed on students' and parents' decisions about what sort of educational experiences are best for them. Teachers, too, select schools with philosophies consistent with their own. This is far from a one-size-fits-all model.

Charter school legislation, for instance, is specifically designed to promote local innovation by freeing charter schools from a variety of state legislation.[327] Magnet schools came into prominence as a desegregation tool, intended to lure white students to inner-city schools with innovative programs.[328] Voucher reforms are similarly grounded in the idea of parental choice among meaningful alternatives.[329] All these choice approaches eschew the premise that schools should attempt to replicate the norm. If they are not innovative, then there remains little or no policy rationale for their existence.

Accordingly, a charter school (or a magnet or voucher school) might theoretically be designed around a "marketplace of ideas" theme. Another such school might be designed around an "indoctrination" theme. A court faced with twin teacher-speech cases arising out of two such dissimilar hypothetical schools should employ a legal rubric allowing consideration of the unique school goals and school designs. Consider three common

326. *See generally* THOMAS L. GOOD & JENNIFER S. BRADEN, THE GREAT SCHOOL DEBATE: CHOICE, VOUCHERS AND CHARTERS (2000); HESS, *supra* note 291; WHO CHOOSES? WHO LOSES? CULTURE, INSTITUTIONS, AND THE UNEQUAL EFFECTS OF SCHOOL CHOICE (Bruce Fuller et al. eds., 1996). *But see* AMERICAN FEDERATION OF TEACHERS, DO CHARTER SCHOOLS MEASURE UP? THE CHARTER SCHOOL EXPERIMENT AFTER 10 YEARS 68 (2002) (concluding that "unique approaches to curriculum, teaching, and classroom-based instruction rarely occur in charter schools").

327. *See generally* INSIDE CHARTER SCHOOLS: THE PARADOX OF RADICAL DECENTRALIZATION (Bruce Fuller ed., 2000) (describing the rationale of innovation as well as examples of innovative and noninnovative charter schools); Amy Stuart Wells et al., *Charter Schools as Postmodern Paradox: Rethinking Social Stratification in an Age of Deregulated School Choice*, 69 HARV. EDUC. REV. 172 (1999) (same).

328. *See* CLAIRE SMREKAR & ELLEN B. GOLDRING, SCHOOL CHOICE IN URBAN AMERICA: MAGNET SCHOOLS AND THE PURSUIT OF EQUITY 7 (1999); Kimberly C. West, *A Desegregation Tool That Backfired: Magnet Schools and Classroom Segregation*, 103 YALE L.J. 2567, 2568–69 (1994).

329. *See* CHUBB & MOE, *supra* note 286, at 217–18; BRIAN P. GILL ET AL., RHETORIC VERSUS REALITY: WHAT WE KNOW AND WHAT WE NEED TO KNOW ABOUT VOUCHERS AND CHARTER SCHOOLS 1–12 (2001); JOHN F. WITTE, THE MARKET APPROACH TO EDUCATION 18 (2000).

whole-school reform models, all of which were recognized by the U.S. Congress through its Comprehensive School Reform Demonstration Program.[330] On the one hand, schools may adopt E.D. Hirsch's "Core Knowledge" curriculum[331] or Robert Slavin's "Success for All" program,[332] both of which are rather highly structured. Teachers at such schools would likely be considered to have notice that certain lessons are acceptable and certain lessons are not. Other schools, however, may decide to participate in Ted Sizer's Coalition of Essential Schools, which seeks to develop students' critical thinking skills and asks teachers to play the role of coach and professional rather than merely delivering predetermined curriculum.[333]

## IV. A MORE COMPREHENSIVE ANALYTICAL FRAMEWORK

As discussed above, the Supreme Court has not yet applied public forum analysis to a teacher classroom speech case. Yet, in light of the Court's recent adherence to this framework,[334] a strong possibility exists that the Court would do so if presented with the appropriate case. If so, the narrow focus of such an analysis would exclude or obscure the concerns regarding academic freedom and the marketplace of ideas that the Court recognized in earlier cases.[335] Given the weaknesses inherent in this approach, some commentators have renounced the use of public forum analysis, particularly in curricular speech

330. The Comprehensive School Reform Demonstration program, begun in 1998, was designed to increase the quality and accelerate the pace of schoolwide reforms in high-poverty and low-achieving schools, especially schools receiving Title I funds. *See* U.S. DEPARTMENT OF EDUCATION, CSRD IN THE FIELD: FINAL UPDATE (2000), *available at* http://www.ed.gov/offices/OESE/compreform/csrd00report.html. The legislation promotes the adoption of comprehensive school reforms that are based on reliable research and effective practices, and that include an emphasis on basic academics and parental involvement. *Id.* The seventeen programs referenced in the legislation are not exclusive; the list was intended only to provide guidance of the sort of program that would be approved for funding. *Id.*

331. *See generally* E. D. HIRSCH, JR., THE SCHOOLS WE NEED AND WHY WE DON'T HAVE THEM (1996); SAM STRINGFIELD, AMANDA DATNOW, & NUNNERY, J., FIRST-YEAR EVALUATION OF THE IMPLEMENTATION OF THE CORE KNOWLEDGE SEQUENCE: QUALITATIVE REPORT (1997); WHAT YOUR 6TH GRADER NEEDS TO KNOW: FUNDAMENTALS OF A GOOD SIXTH-GRADE EDUCATION (E.D. Hirsch, Jr. ed., 1993) (outlining the design and implementation of core knowledge schools).

332. *See* ROBERT E. SLAVIN ET AL., EVERY CHILD, EVERY SCHOOL: SUCCESS FOR ALL 1–9 (1996).

333. *See* THEODORE R. SIZER, HORACE'S SCHOOL: REDESIGNING THE AMERICAN HIGH SCHOOL 207–21 (1992).

334. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001); Santa Fe Indep. Sch. Dist. v. Do, 530 U.S. 290, 302–05 (2000); Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 672–82 (1998).

335 *See* Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 512 (1969); Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 681, 637 (1942).

cases.[336] But the discussion presented below argues instead that it can and should be applied in a manner that would present finders of fact with a contextualized understanding of any given classroom. In fact, I contend that school reforms such as decentralization, professionalization, and choice have the potential to compel the Court to focus on such context.

As generally articulated, a designated public forum is created on government property when the government so intends.[337] But, as noted earlier, classrooms are governed by a variety of edicts issued in a variety of ways by people and bodies at a variety of governmental levels. School boards, for example, have the authority to micromanage classroom curricula and instruction, but they normally delegate that authority to the school site.[338] This raises issues of fairness in instances in which those school boards attempt to punish teacher speech. As Stanley Ingber notes, school authorities, "[h]aving developed, whether or not intentionally, a decentralized decision-making structure, . . . should be judicially bound to abide by it."[339]

From a perspective that accounts for such delegations and other contextual differences between schools, the key to a public forum analysis of teacher classroom speech will be a court's findings concerning the intent of diffuse governmental authorities to open the classroom to expressive activity.[340] In *Miles*, for instance, the court looked at school-level intent: "There is no evidence that school authorities intended to open Miles' government class for public discourse."[341] But such intent will not always be the same. If the government (for example, the state, the school district, the founders of a choice school, the principal, or the site-based council formed as part of a decentralization reform) had been found to have structured Miles's

336. *See* Helene Bryks, Comment, *A Lesson in School Censorship*: Hazelwood v. Kuhlmeier, 55 BROOK. L. REV. 291, 304–09 (1989) (arguing that public forum analysis should not be applied to curricular speech); *see also* 2 TRIBE, *supra* note 176, at 987 (pointing out weaknesses in the framework).

337. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983).

338. "School boards . . . normally delegate the authority to decide matters of policy implementation to professionally trained personnel. Thus, in practice, school boards give varying degrees of discretion to principals, teachers, and librarians through explicit or implicit delegations of authority." Ingber, *supra* note 25, at 89 (footnotes omitted).

339. *Id.* at 90; *see also* Cary v. Bd. of Educ., 598 F.2d 535, 543–44 (10th Cir. 1979); Sterzing v. Port Bend Indep. Sch. Dist, 376 F. Supp. 651, 662 (S.D. Tex. 1972).

340. A determination of whether the state has created a designated public forum begins with an examination of governmental intent through an evaluation of past and present policy and practice. The next step is an analysis of whether past use of the forum "has been limited by well-defined standards tied to the nature and function of the forum." Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1371 (3rd Cir. 1990). Finally, the court may investigate the "permission procedure" and permission history related to speech in the forum. *Id.*; *see also* Duran v. Nitsche, 780 F. Supp. 1048, 1053 (E.D. Penn. 1991).

341. Miles v. Denver Pub. Sch. 994 F.2d 773, 776 (10th Cir. 1991).

classroom for the teaching of critical thinking, then diverse ideas and opinions would have likely been welcomed, and the classroom would arguably have been a designated public forum.[342] Similarly, if the government is found to have engaged in an extensive professionalization reform, then this, too, would likely invite the teacher to introduce diverse ideas and opinions, and the classroom would be a designated public forum.

Governmental intent can also be viewed in terms of adequate notice. The organizational and political context surrounding a teacher may indeed be large and unwieldy, but it can nonetheless result in clear notice. The teacher in *Conward v. Cambridge School Commission*,[343] for instance, should have known that a general state statute prohibiting "conduct unbecoming a teacher" encompassed his decision to give a female student an "Application for a Piece of Ass."[344] No contrary rules were set forth at other organizational layers. And the teacher in *Kirkland* had clear notice of the district's officially adopted reading list.[345] But these are questions of fact. If a principal tells teachers that they are free to adopt a particular book even though it is not on the official list, then a court may find that the teacher did not have adequate notice that use of a given book not on the list would result in sanctions.

Alternatively, consider what happens to adequate notice if the principal tells the teacher, "Here's the district's official reading list, but pursuant to our restructuring reforms, I want you to exercise your professional discretion in deciding whether to use books not on that list." Put in terms of public forum analysis, has this principal acted as a governmental policymaker and created a designated public forum? As William Buss has pointed out,[346] this

342. But *Miles* may still have taken the classroom discussion beyond what was appropriate for the forum. Recall that a designated public forum can be confined to certain groups or to the discussion of certain topics. *Perry*, 460 U.S. at 45 n.7. Thus, policymakers could choose to designate the classroom as a public forum but to restrict that forum to teachers. Similarly, the forum can be confined to those topics that the policymakers or the teachers choose to include in the curriculum. For example, a relatively narrow classroom public forum might be limited to *expressive activity compatible with the district's adopted curriculum*, while a broader forum would allow *expressive activity compatible with the district's goal of producing intelligent, moral, critical thinkers*. Thus, creation of the classroom as a designated public forum would not necessarily open the classroom up as a public forum for students or others in attendance. Alternatively, a classroom can be conceived as a designated public forum insofar as the students' "right to receive information," comparable to the forum recognized in *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1250–55 (3rd Cir. 1992). *Kreimer* held that libraries are limited-purpose public fora, enjoying public forum status as to the right to receive information, even though that status did not extend to expression (for example, making speeches in the reading room). *Id.* at 1261–62. A similar framework may work well in some classrooms.

343. 171 F.3d 12 (1st Cir. 1999).

344. *Id.* at 17–23.

345. Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 796 (5th Cir. 1989).

346. Buss, *supra* note 108, at 253.

is an odd sort of forum because the teacher is the only one given the associated speech rights.[347] Accordingly, a notice analysis may be more apt.[348] In contrast, public forum analysis seems fairly appropriate in a scenario in which school authorities pursue an open classroom approach throughout the school, clearly inviting a marketplace of ideas.[349] A teacher should prevail in such cases if either (1) she was acting properly within the scope of a designated public forum, or (2) she was given inadequate notice that her action would be improper. In the former circumstance, the teacher should have free speech protection; in the latter, the teacher's due process rights should provide protection.

Public school teachers unquestionably serve as vehicles for curricular delivery, but they are also people with First Amendment protections.[350] Moreover, teachers' implementation of curricula can be viewed as existing along a continuum. At one end is the fidelity approach, whereby teachers implement the curriculum document exactly as created. At the other end is the mutually adaptive (or evolutionary) approach, whereby teachers apply their best professional judgment, adapting the curriculum to meaningful practice within their particular classroom context. In fact, many curricular documents are written for the latter group of teachers, hoping for flexibility.[351] Most teachers do much more than simply read a script. These teachers, while technically instructional tools, are not automatons. Each will necessarily deliver curriculum that is at least slightly different than that of his or her colleagues down the hall. Such differences are seen by most educational scholars as highly desirable.[352]

Consequently, each case must be judged on its own merits. While recent, more restrictive decisions recognize the expanded authority of school boards and other policymakers to prescribe curricula in an exacting and controlling way, this deference should be balanced against legal and policy concerns about notice, academic freedom, and the pedagogical value of free

347. Although the teacher may then be free to act in her own governmental capacity, creating a designated public forum for the students in the class.

348. Notice analysis and public forum analysis are both based on consideration of the facts of a given classroom or school within its unique context.

349. *See generally* KOHL, *supra* note 10; SILBERMAN, *supra* note 10; Smith, *supra* note 10.

350. *See, e.g.*, Stachura v. Truszkowski, 763 F.2d 211, 215 (6th Cir. 1985).

351. Jean A. King, *Curriculum Implementation*, *in* 1 ENCYCLOPEDIA OF EDUCATIONAL RESEARCH, *supra* note 183, at 267, 267–73. Other curriculum is written with the former group of teachers in mind and is often referred to as "teacher-proof," meaning that even poor-quality teachers can do well so long as they follow the specific directions. *See* JEROME BRUNER, THE CULTURE OF EDUCATION 84 (1996) (explaining "[y]ou cannot teacher-proof a curriculum any more than you can parent-proof a family").

352. Of course, teacher discretion becomes undesirable when it is used to subvert the intent of curriculum designers or of the teachers' bosses.

speech.[353] These recent cases have gone too far when they allow arbitrary, ex post facto punishment of teachers' curricular decisions that had never been proscribed with adequate notice. And, perhaps more importantly, courts should not forbid school authorities from adopting policies that do just the opposite—that free up teachers to use the classroom as a place for modeling democracy and for developing critical thinking skills. If policymakers affirmatively create this sort of designated public forum, then courts should recognize and respect those decisions. As a policy matter and as a First Amendment matter, courts should protect the right of teachers to speak freely within the bounds set by those teachers' superiors.

This analysis points to the need for a new constitutional framework to be used by courts faced with teacher-speech cases. This framework must allow courts to view classrooms as they truly are and to understand the daily struggles of teachers as they try to create a stimulating and meaningful educational experience for their students. Pursuant to the weight of educational scholarship and generally accepted national goals, today's classrooms and today's teachers should be provided with the freedom and the incentives to instill morals and interpersonal skills and to teach critical and so-called "higher-order" thinking skills.[354] Further, American students should be equipped to participate fully as insightful members of a democracy.[355] The constitutional framework that courts now apply most often to these cases gives short shrift to these concerns.[356] Instead, these courts limit

353. Mark Yudof, discussing these concerns about teacher expectations and adequate notice, offers the framework of "irrevocable delegation." Mark G. Yudof, *Library Book Selection and the Public Schools: The Quest for the Archimedean Point*, 59 IND. L.J. 527, 553–54 (1984); *see also* Ingber, *supra* note 25, at 79–94.

354. *See* Karen Ngeow & Yoon-San Kong, *Learning to Learn: Preparing Teachers and Students for Problem-Based Learning*, ERIC DIG. ED457524 (2001), *available at* http://www.ericfacility.net/ericdigests/ed457524.html; *see also* NODDINGS, *supra* note 9, at 44–62; Goodman, *supra* note 9, at 32–35.

355. *See* R. Freeman Butts, *National Standards and Civic Education in the United States*, INT'L J. SOC. EDUC., 86, 86–94 (1993).

356. To observe how this legal landscape is portrayed to future school leaders, consider the change brought about by the *Boring* and *Lacks* decisions, by comparing two editions of the same textbook. First, from 1996: "Although courts have recognized that teachers have the right to academic freedom, as with other constitutional rights, it is not absolute and must be balanced against the competing interests of the larger society." MICHAEL W. LAMORTE, SCHOOL LAW: CASES AND CONCEPTS 207 (5th ed. 1996). Then, from 2002:

> A review of modern case law dealing with academic freedom reveals that it is no longer as strong a defense as it once was for teachers. . . . For the academic freedom defense to prevail for classroom conduct, it must be shown that the teacher did not defy legitimate state and local curriculum directives, followed accepted professional norms for that grade level and subject matter, discussed matters that were of public concern, and acted professionally and in good faith when there was no precedent or policy.

MICHAEL W. LAMORTE, SCHOOL LAW: CASES AND CONCEPTS 199–200 (7th ed. 2002).

themselves to a relatively meaningless analysis based on one or more of three superficial considerations: (1) The courts should not interfere with democratic decisions made by locally elected school boards; (2) teacher speech is protected only if it addresses a matter of public concern; and (3) because it is part of the curriculum, teacher classroom speech is subject to district regulation and given little, if any, protection. The first consideration simply begs the question; we do not live in an unrestricted democracy. The judicial review process is intended precisely to prevent a tyranny of the majority.[357] The key question presented to the courts is whether the teacher's rights have been violated. If they have, then the court is obliged to interfere with the school board's decision.[358]

The second consideration, which is generally used alternatively with the third, is a spurious application of a rule set forth by the Court for analysis of speech taking place outside the classroom. It is difficult, if not impossible, to characterize curricular speech as inside or outside the scope of "public concern."

The third consideration is also in need of alteration. Circular reasoning, concluding without analysis that teacher speech is relatively unprotected, arises out of the presently preferred rubric—public forum analysis—but both the selection and the operation of this rubric are uncertain. The resulting court decisions have often been ad hoc and arbitrary.

If courts are to use public forum analysis, then the scope of that analysis should be more comprehensive. In considering whether the classroom is a designated public forum, the courts should weigh the role of the classroom and the role of teachers in today's society *and* in the teacher's particular school.[359] American policymakers have stressed the importance of teacher professionalism, of teaching higher-order thinking skills, of preparing students to be insightful participants in American democracy, of developing

357. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); *see also* DE TOCQUEVILLE, *supra* note 51, at 145–58; MILL, *supra* note 22, at 56.

358. "Judicial opinions enlarging the scope of school board power undermine . . . much-needed educational reforms, exacerbating the bureaucratization in American public schools. Extension of school boards' curricular oversight into the details of methodology and lesson plans constrains teacher innovation, directly harming the quality of students' classroom experience." Daly, *supra* note 231, at 51.

359. *See* Clarick, *supra* note 285 (arguing that courts should incorporate a deeper understanding of the educational process when they encounter challenges involving teacher classroom speech); Lee Gordon, Note, *Achieving a Student-Teacher Dialectic in Public Secondary Schools: State Legislatures Must Promote Value-Positive Education*, 36 N.Y.L. SCH. L. REV. 397, 407–08 (1991) ("The public forum analysis bases the government's regulation of the speech in question on the nature of the forum in which the speech takes place.").

interpersonal skills, and of instilling morals.[360] Some schools pursue these goals very diligently. Yet these schools' teachers are unlikely to fulfill such demands if making the effort would subject them to discipline. Courts that broaden the scope of their public forum analysis to include consideration of these policy goals, when appropriate, are much more apt to conclude that the relevant set of policymakers have, indeed, intended to create a designated public forum.

This sharpened public forum approach focuses on the educational context. Notice, delegation, and designated public fora each offer potentially useful perspectives. But each must also be applied in such a way as to recognize the reality of difference at the school-site level. Some schools are specifically designed to place teachers in a ministerial role, while others will only be successful if teachers exercise their own discretion. It is therefore at the site level that courts will often find the most compelling evidence of governmental expectations and notice.

Recall the example given at the outset of this Article of the Missouri teacher who was fired for refusing to instruct her high-school students to refrain from using "indecent" language in their writing assignments.[361] She had made a conscious pedagogical decision to resist correcting such language because she felt that her inner-city students were easily discouraged. If she substantially criticized their initial efforts at writing, she reasoned, she would get no further efforts.[362] The National Council of Teachers of English came to her defense, pointing out that the teaching methods she used were of the type that they most highly recommend to encourage student writing.[363]

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360. *See generally* HOLMES GROUP, *supra* note 288, at 6–10; NATIONAL EDUCATION GOALS PANEL, NATIONAL EDUCATION GOALS REPORT: BUILDING A NATION OF LEARNERS (1996) (concerning higher-order thinking skills), *at* http://www.negp.gov/reports/goalsrep.pdf; HAROLD WENGLINSKY, HOW TEACHING MATTERS: BRINGING THE CLASSROOM BACK INTO DISCUSSIONS OF TEACHER QUALITY (2000) (discussing teacher professionalism); Karen Irmsher, *Communication Skills*, ERIC DIG. ED390114 (1996), *available at* http://www.ericfacility.net/ericdigests/ed390114.html (developing interpersonal skills); No Child Left Behind Act of 2001, P.L. 107-110, 115 Stat. 1425 (2002) (to be codified at 20 U.S.C. §§ 6712–6715) (instilling morals).

361. Lacks v. Ferguson Reorganized Sch. Dist., 147 F.3d 718 (8th Cir. 1998).

362. "'If I censor that first work,' she explained, 'then I don't get to that last good one.'" Diegmueller, *supra* note 2, at 27 (quoting Cecilia Lacks, the Missouri teacher).

363. The National Council of Teachers of English argued:

> "Dr. Lacks' instructional activities . . . appear to demonstrate approaches that the profession has long valued—providing literary models for students to read, enjoy, and emulate; encouraging students to write freely and creatively from the basis of their experience and imagination; acknowledging that some student depictions, like those of professional authors, properly involve realistic plot and dialogue; providing appropriate audiences for student works so that they don't become mere English-class experiences."

Diegmueller, *supra* note 2, at 28 (quoting Letter from Charles Suhor, Deputy Executive Director of the National Council of Teachers of English, to the Ferguson-Florissant School Board).

The U.S. Court of Appeals for the Eighth Circuit ignored these concerns, applying instead the *Hazelwood* "legitimate pedagogical concern" standard and doing so in a rather superficial way.[364] This court did, however, have a variety of other available options. It could have decided not to apply public forum analysis and could have relied instead on one of the earlier lines of cases. For example, it could have cited *Kingsville Independent School District v. Cooper* for the proposition that teachers should be given wider discretion in the area of methodology than in the area of curriculum content.[365]

Alternatively, applying the constitutional framework proposed herein, the court could have considered the role of the classroom and the teacher in today's society and in the particular school in question. It would weigh the conflicting directives or types of notice that policymakers have given teachers—taking into account national and state policies as well as local policy. It would take testimony concerning any professionalization policies. Assuming that the school had formed a site-based council, the court would consider policies originating therefrom. If the school had a special focus, as do most choice schools, then this focus would be considered. Then, based on a comprehensive understanding of these factors, the court would determine the marching orders given to this teacher. Was this teacher given notice that the teaching approach was forbidden? If not, then her due process rights should have prevented her termination. Alternatively, did policymakers

364 *Lacks*, 147 F.3d at 724.

365. The *Lacks* court might have cited *Oakland Unified School District v. Olicker*, 102 Cal. Rptr. 421 (Ct. App. 1972). In *Oakland*, the court had ordered the reinstatement of a teacher who, while working with struggling eighth-grade students, had employed a student-centered writing technique almost identical to that used by Cecilia Lacks. *See id.* at 424–25. As in the *Lacks* case, this technique elicited vulgarities but also elicited much greater student involvement and effort. *Id.* at 425. Also as in *Lacks*, Olicker presented expert testimony validating the writing method as "a sound educational approach." *Id.* at 429. But the legal issues in the two cases were different. The *Olicker* court focused on the interpretation and application of the governing statute, authorizing the dismissal of teachers for immoral conduct and evident unfitness for service. *Id.* at 427–28. It concluded that, as a matter of law, the teacher's conduct did not demonstrate her unfitness to teach. *Id.* at 429–30. An academic freedom contention, the court reasoned, simply begs the question: If the teacher's behavior is immoral or makes her unfit, then there is no academic freedom protection. *Id.* at 430. More recently, in *Hosford v. School Committee*, 659 N.E.2d 1178 (Mass. 1996), the court took a similar approach. The school district had disciplined a special education teacher who had allowed a classroom discussion of multiple word meanings to include a short, student-initiated discussion of several vulgar words. *Id.* at 710. The class consisted of three thirteen-year-old, male, seventh-grade, special-needs students. *Id.* The teacher had used the episode to tell the students that use of these words is not acceptable. However, she also incorporated their suggestions into the lesson, eliciting definitions and multiple usages. *Id.* at 1179–80. The court held that the disciplinary action (suspension followed by nonrenewal) violated the teacher's First Amendment free speech rights (as well as similar rights guaranteed under the Massachusetts Declaration of Rights). *Id.* at 1180–82. The court found no applicable school policy that she violated and also found the teacher's instructional practices to be reasonable. *Id.* at 1182. The court characterized the school authorities' actions as arbitrary and capricious. *Id.*

intend to give the teacher the protections found in a designated public forum? If so, then the court must determine whether the teacher acted properly within the scope of that forum.

Consider also the teacher in *Boring v. Buncombe County Board of Education*. While the school probably did not create a designated public forum, the teacher was just as probably given inadequate notice that the play was forbidden. Her complaint alleged that she notified her principal "as she did every year" of the name of the play she had chosen and that the principal "did not comment or react."[366] Pursuant to my proposed framework, the court would examine policies emanating from the principal's office. After considering the entire scope of school policymaking, the court could have reasonably decided that the policymakers with responsibility for Boring's classroom did not intend to create a designated public forum. But the court should not have neglected the importance of notice.[367] This proposed standard acknowledges America's decentralized system of education—rejecting the one-size-fits-all mentality predetermining all classrooms to be nonpublic fora. Of necessity, it leaves in place the judicial task of subjectively weighing criteria, but only after first requiring that the court consider the most relevant considerations.

## CONCLUSION

Each of us has our own perspective on the role of American public schools within larger society. If we accept the traditional view of schools as a vehicle for inculcating youth to accept shared values and norms, as determined by an equitable and trusted democracy, then we are likely to assign teachers a role with limited discretion and autonomy. If, however, we hold a more dynamic view of schools and society, we may see the need for greater teacher discretion and greater First Amendment protection. For instance, we may value the teaching of critical thinking or teacher professionalism and teacher-initiated innovation. Or we may want to encourage community-initiated innovation through decentralization or school choice. From any of these perspectives, we would likely see a need to protect teachers from the second-guessing that often follows controversial pedagogy.

366. Boring v. Buncombe County Bd. of Educ., 136 F.3d 364, 375 (4th Cir. 1998) (Motz, J., dissenting).

367. The court dismissed the issue of notice: "Plaintiff's contention that she was not given notice as to what was being proscribed is, of course, without merit, the plaintiff having no First Amendment right to participate in the makeup of the curriculum." *Id.* at 371 n.2. Because the job action in this case was only a transfer to another school, the teacher's property interests were not impaired to the same extent as those of a teacher who is terminated. But the *Boring* court never expressly considered such matters.

Importantly, each of these perspectives has been endorsed, to one degree or another, by policymakers and by courts. Yet the constitutional framework presently favored by courts is being applied so narrowly that only the traditional perspective (viewing teachers as serving in a purely ministerial role) is being considered. This framework has led courts to a superficial analysis and to predetermined outcomes. By broadening the framework's scope, courts can engage in a more comprehensive analysis, reaching more balanced results.

Teachers in these cases tend to fall at one or the other extreme. Many teachers who bring controversy into the classroom are simply acting irresponsibly.[368] In contrast, however, many others should be lauded for bringing enormously educative innovations to their work.[369] Nothing is more important to a child's education than the quality of his or her teacher.[370] The challenge facing courts is to apply a standard that allows for educational

368. For a particularly egregious example, consider *Regina v. Keegstra*, [1990] 3 S.C.R. 697, in which the Supreme Court of Canada upheld the hate speech conviction of a high-school teacher who taught his students that Jews are treacherous, subversive, sadistic, money-loving, power-hungry child killers and fabricators of the Holocaust. *Id.* at 714. The teacher had used in-class responses plus formal examinations to assess his students' learning of these lessons. *Id.* Notwithstanding the indefensible nature of this "education," the decision upholding a criminal conviction has been the subject of considerable criticism. *See, e.g.*, Terry Heinrichs, *Censorship as Free Speech! Free Expression Values and the Logic of Silencing in* R. v. Keegstra, 36 ALTA. L. REV. 835 (1998).

369. "Ironically, the teachers who get in trouble over censorship are often the teachers who are most sensitive to connecting their curriculum with their students' real lives and who don't flinch when students, either individually or as a class, want to explore such topics. Adults may shun controversy but adolescents often thrive on it." Barbara Miner, *Reading, Writing, and Censorship*, RETHINKING SCHS. ONLINE, Spring 1998 (1998), *at* http://www.rethinkingschools.org/Archives/12_03/cenmain.htm (visited Feb. 18, 2003). Perhaps the most well-known teacher firing of this sort was by the Boston School Committee. In the spring of 1965, the Committee fired a teacher who taught his fourth grade inner-city class "The Ballad of the Landlord" a Langston Hughes poem about the exploitation of black tenants by white property owners. The next day, a district official explained to him that all literature used must have been expressly approved by a supervisor or have been included in the official district Course of Study. This incident is recounted by the teacher, Jonathan Kozol, in his classic 1967 book DEATH AT AN EARLY AGE: THE DESTRUCTION OF THE HEART AND MINDS OF NEGRO CHILDREN IN THE BOSTON PUBLIC SCHOOLS 193–202 (1967).

370. Differences in the quality and effectiveness of teachers are a strong determinant of student learning. *See* Kati Haycock, *Good Teaching Matters . . . A Lot*, THINKING K–16, Summer 1998, at 3, 3–15, http://www.edtrust.org/main/documents/K16_summer98.pdf; *see also* WILLIAM L. SANDERS & JUNE C. RIVERS, CUMULATIVE AND RESIDUAL EFFECTS OF TEACHERS ON FUTURE STUDENT ACADEMIC ACHIEVEMENT 7 (1996), http://www.ncela.gwn.edu/oela/summit/cd/files/sbr/sanders.pdf; S. Paul Wright et al., *Teacher and Classroom Context Effects on Student Achievement: Implications for Teacher Evaluation*, J. PERSONNEL EVALUATION EDUC. 57, 57–67 (1997).

authorities to discipline abuses yet protects one of the most valuable of American resources: the innovative teacher.[371]

371. Another sad irony that is often lost amid the details of these cases is that little is ever done to discipline or remove any of the dishearteningly large pool of teachers who merely exhibit mundane, pedestrian incompetence—those who do a poor job assisting in the learning processes of their students. Many of the same parents and administrators who complain the loudest at controversial pedagogy (concerning, for example, sex or race) will ignore or silently tolerate a teacher with demonstrably low academic expectations of students. *See generally* LIPMAN, *supra* note 44; PATRICK J. MCQUILLAN, EDUCATIONAL OPPORTUNITY IN AN URBAN AMERICAN HIGH SCHOOL (1998). Both Lipman and McQuillan discuss the accepted nature of such low expectations.