

ACADEMIC FREEDOM AND THE LEGITIMATE PEDAGOGICAL CONCERN OF PRODUCING STUDENTS WHO ARE STRONG CRITICAL THINKERS

by
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Abstract

The majority and dissenting opinions in Boring v. Buncombe County Bd. of Educ., 136 F.3d 364, 366 (4th Cir. 1998), represent two important ways for modern courts to characterize the issue and analyze applicable law when considering issues related to a teacher's academic freedom in an American public high school. Boring demonstrates the importance of characterization, such as an employment dispute or as a First Amendment free speech matter, when arguing academic freedom cases. School administrators and the courts should consider several important, relevant factors when faced with disputes involving academic freedom, and careful consideration of these factors should result in decisions that enable high school teachers to exercise academic freedom in order to produce students who are formidable critical thinkers.

Introduction

Margaret Boring was an English and drama teacher at Owen High School in Buncombe County, North Carolina,¹ which is located in the Blue Ridge Mountains approximately fifteen miles east of Asheville, North Carolina.² In the fall of 1991, Ms. Boring selected “the play *Independence* for four of her students in her advanced acting class to perform in an annual statewide competition.”³ Ms. Boring described “the play [as] ‘powerfully depict[ing] the dynamics within a dysfunctional, single parent family – a divorced mother and three daughters; one a lesbian, another pregnant with an illegitimate child.’”⁴

After winning 17 of a possible 21 awards at a regional competition, a scene from the play was performed by Ms. Boring's advanced drama students for one of the English classes at Owen High School.⁵ However, prior to this in-class performance, Ms. Boring recommended to the English teacher that her students return parental permission slips due to the play's “mature

subject matter,” but the teacher failed to confirm that all of the permission slips were returned prior to the performance.⁶ After this in-class performance, a parent complained to the principal, Mr. Ivey, who then asked Ms. Boring for a copy of the play’s script.⁷ After reading the script, Mr. Ivey decided that Ms. Boring’s advanced drama students would not be permitted to perform the play at the upcoming state competition.⁸

Ms. Boring then invited Principal Ivey and the superintendent to attend a performance of the play with the parents of the student-actresses.⁹ Both administrators declined this invitation and barred the play’s further performance at Owen High School.¹⁰ Parents of the student-actresses and Ms. Boring then met with Mr. Ivey to persuade him to allow the advanced drama students to perform *Independence* at the state competition.¹¹ He agreed to their participation, but only if certain scenes were deleted.¹² The students performed the play at the state competition, presumably without the scenes that Mr. Ivey had censored, and earned second place.¹³

After the school year ended the following June, Principal Ivey requested to the Buncombe County Superintendent that Ms. Boring be transferred from Owen High School, “citing ‘personal conflicts resulting from actions she initiated during the course of the school year.’”¹⁴ In addition to the clamor caused by her choice of the play *Independence*, Ms. Boring had allowed for props used in a school musical production to be affixed to the stage’s maple floor with screws, thus requiring the floor to need refinishing.¹⁵ After the musical production, Mr. Ivey wrote to an administrator that [Boring] had damaged the floor maliciously.”¹⁶

The superintendent approved the transfer, citing Ms. Boring’s “fail[ure] to follow the school system’s controversial materials policy in producing the play.”¹⁷ While the trial record is sparse as it relates to the school’s controversial materials policy, it does state that its purpose “was to allow parents to comment on certain materials to which the students might be exposed. [Ms. Boring] sent the play script home with her drama students and received parental consent to the involvement of each student with the play.”¹⁸ While Ms. Boring conceded “that the purpose of the controversial materials policy [was] to give the parents some control over the materials to which their children are exposed in school,” she argued “that at the time of the production [of

Independence], the controversial materials policy did not cover dramatic presentations, and that the school's policy was amended subsequently to include dramatic presentations."¹⁹ The Board of Education upheld Ms. Boring's transfer at an appeal hearing held in September 1992.²⁰

Ms. Boring brought suit against the Buncombe County Board of Education and several additional defendants, including Principal Ivey and the superintendent.²¹ She asserted "that her transfer was in retaliation for expression of an unpopular view through the production of the play and thus in violation of her right to freedom of speech under the First and Fourteenth Amendments" and similar violations of her state constitutional rights.²² The federal district court ruled against Ms. Boring on all of her claims, but a divided panel of the Court of Appeals for the Fourth Circuit reversed the dismissal of her federal First Amendment claim.²³ That decision was subsequently vacated by the Fourth Circuit after it agreed to rehear the case en banc.²⁴

After the rehearing en banc, the Fourth Circuit, in a 7 to 6 opinion, affirmed the district court opinion "holding that the plaintiff's *selection and production* of the play *Independence* as part of the school's curriculum was *not protected speech under the First Amendment*."²⁵ (emphasis added) The majority and minority positions in Boring²⁶ represent two important ways for modern courts to characterize the issue and analyze applicable law when considering issues related to a teacher's academic freedom in an American public high school. The majority's approach was to characterize the issue as "nothing more than an ordinary employment dispute"²⁷ rather than as a First Amendment dispute. The majority relegates its limited characterization of the issue as a First Amendment matter only in a footnote:

This case concerns itself exclusively with employee speech, [] whether or not a public teacher has a First Amendment right to insist on a part of the curriculum of the school. The case does not concern any right a teacher might have to participate in the makeup of the curriculum of a public high school other than the right claimed here under the First Amendment.²⁸

In sharp contrast, Judge Motz, who had written the original majority opinion by the circuit panel that was later vacated by the en banc opinion,²⁹ wrote for all six dissenters and characterized the issue as one that "is not an employment dispute. Rather it is a challenge to a restriction on classroom speech, which involves matters of public concern."³⁰ Note that Judge

Motz focused on classroom speech, rather than the choice of curriculum, which is a subtle, but important, distinction. Judge Hamilton, who was joined by one other judge, also dissented and struck a similar chord as Judge Motz in characterizing the issue as being “far from an ‘ordinary employment dispute’” and agreed with Ms. Boring that the School Board had made her “a scapegoat and used her to shield them from the ‘heat’ of the negative outcry resulting from the performance of *Independence*.”³¹ Judge Hamilton argued that the Board “should be required to articulate some legitimate, pedagogical concern for restricting Boring’s speech. This burden is hardly onerous, and it is the least we require of public officials charged with making curriculum decisions.”³²

This paper will use the Boring case and others to explore the realm of academic freedom in the modern American high school. After defining academic freedom in this context and providing a brief history of its consideration by the courts, the paper will then turn to the importance of characterization when arguing academic freedom cases. How the school administrators and the courts characterize the issue and relevant facts, such as an employment dispute or as a First Amendment free speech matter, is often determinative of the outcome. Finally, the paper will provide a list of important, relevant factors for school administrators and the courts to consider when faced with disputes involving academic freedom. Careful consideration of these factors should result in decisions that enable high school teachers to exercise academic freedom in order to produce students who are formidable critical thinkers.

I. Defining Academic Freedom

In 1915, the American Association of University Professors, chaired at the time by John Dewey, defined academic freedom as “a right claimed by the accredited educator, as teacher or investigator, to interpret his findings and to communicate his conclusions without being subjected to any interference, molestation, or penalization because the conclusions are unacceptable to some constituted authority within or beyond the institution.”³³ This notion of academic freedom was derived from the German term *lehrfreiheit*, which means freedom to teach.³⁴ *Lehrfreiheit*

“afforded university professors the latitude to determine the content of their lectures and publish the findings of their research outside the chain of command that bound other government officials. This freedom was not considered a right so much as an ‘exceptional privilege’ of the university professor that did not extend to [] secondary school teachers.”³⁵ In borrowing this concept, John Dewey’s

committee drew a distinction between what it considered to be a true university – a place where free inquiry was accepted – and what it labeled ‘proprietary institutions,’ schools that existed to propagate prescribed doctrines. Teachers in the latter institutions could make no claim to academic freedom. Public school teachers, of course, did not occupy the position of university faculty and thus were not³⁶

considered to have the same level of academic freedom. Thus, the legacy of academic freedom is that such freedom is stronger in a university setting than it is in a high school classroom.

John Dewey’s individual work was consistent with his work as chairman of the American Association of University Professors, but his individual work had direct application to school-aged children and criticized the “mechanical administration of education” in favor of “observation and inquiry.”³⁷ For the purposes of this paper, and in an effort to apply modern American legal standards, “academic freedom will mean the *First Amendment protections of professional discretion* that a public school teacher may exercise in the course of performing his or her teaching functions.”³⁸ (emphasis added) This definition is broad in scope and gives deference to teachers’ professional discretion.

II. A Brief History of Judicial Consideration of Academic Freedom

A. Academic Freedom and Pedagogical Concerns

While Meyer v. Nebraska³⁹ is generally known to stand for parents having a fundamental right to control the upbringing of their children, this case “is often mentioned as the United States Supreme Court’s earliest exposition of a right of academic freedom.”⁴⁰ Note that the plaintiff, Mr. Meyer, was a teacher who was convicted of violating a state statute that prohibited the teaching of foreign languages.⁴¹ The Meyer Court interpreted the substantive due process rights

embodied in the Fourteenth Amendment to include “the right ‘to engage in any of the common occupations of life,’ which [] included teaching.”⁴² It took the Supreme Court nearly thirty years after the Meyer decision before the phrase “academic freedom” appeared in one of its opinions,⁴³ and even then it was invoked only in dissent.⁴⁴

A notable opinion for academic freedom came in 1967 with the Keyishian decision.⁴⁵ Keyishian “truly launched[ed] the modern academic freedom cases,” though it might have been the “passage of time [which] played the greater role because doctrinally Keyishian broke little new ground.”⁴⁶ The Keyishian case did not involve academic freedom in the classroom, but instead considered the complaint of a group of “college professors who refused to sign an oath stating that they had never been members of the Communist party.”⁴⁷ In spite of the fact that the case did not involve academic freedom in the classroom, the Court still took the opportunity to express a broad, though somewhat rhetorical, admonition about its application to a classroom setting:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a *pall of orthodoxy* over the classroom.⁴⁸ (emphasis added)

Justice Brennan’s strong rhetoric is consistent with my notion that allowing teachers to exercise academic freedom to teach controversial issues will lead to the development of strong critical thinking skills in students, and that denial of such academic freedom will inevitably “cast a pall of orthodoxy over the classroom.”⁴⁹ This language also provides judicial notice that academic freedom has significant value to society beyond the confines of the classroom, and this emphasis on public concern will have significance in cases that characterize academic freedom cases as employment disputes.⁵⁰ Finally, Justice Brennan’s language from Keyishian characterizes academic freedom as being of “a special concern of the First Amendment,”⁵¹ which is the most logical characterization given its context and the need for deference to be given to the teacher’s professional discretion.

However, despite Justice Brennan’s forceful language, instead of establishing a foundation for a new line of academic freedom cases, “Keyishian marked the close of the era of

loyalty oath cases. After Keyishian, the Court never solidified the rhetoric of the loyalty oath cases into an individual right of academic freedom . . . ”⁵² Thus, the Supreme Court casts its own shadow of orthodoxy over American classrooms by failing to capitalize on the opportunity to build on, or breathe life into, Keyishian’s rhetoric.

The Supreme Court decided Epperson v. Arkansas⁵³ one year after Keyishian.⁵⁴ Epperson and its progeny help to explain, perhaps, why the Court chose not to embrace academic freedom as a concept of free speech, but instead chose to decide these cases by relying on the Establishment Clause of the First Amendment.⁵⁵ The issue in Epperson was the teaching of evolution, specifically an “Arkansas law that [made] it unlawful for a teacher in any state-supported school or university ‘to teach the theory or doctrine that mankind ascended or descended from a lower order of animals,’ or ‘to adopt or use in any such institution a textbook that teaches’ this theory.”⁵⁶ Violation of the Arkansas statute at issue in Epperson was a misdemeanor and a violator also could be dismissed from his or her teaching position.⁵⁷

Epperson provided the Court with its “first opportunity to make something out of the rhetoric of Keyishian,”⁵⁸ but instead of capitalizing on this opportunity to build on that foundation, the Court chose to go a different route by resolving the case using Establishment Clause⁵⁹ principles. However,

that resolution did not necessarily occur outside traditional notions of academic freedom. Indeed, the belief that scientific knowledge should not be subject to religious veto is precisely the concern that made academic freedom necessary in the first place. In a very real sense then, Epperson joined the issue of academic freedom in dramatic fashion.⁶⁰

Therefore, Epperson provides an example of the Court avoiding seemingly obvious free speech notions of academic freedom and instead choosing to resolve the issue by employing other, narrower, legal principles, namely the Establishment Clause.⁶¹

Nineteen years passed after Epperson before the Supreme Court revisited the issue of creationism in Edwards v. Aquillard.⁶² Here, the Court considered the constitutionality of the Louisiana Balanced Treatment Act, which “required public schools to teach creation science if evolution was taught.”⁶³ Like Epperson, once “[a]gain, the case [] involved the conflict between

science and faith, the traditional flashpoint for academic freedom disputes.”⁶⁴ Ironically, the Louisiana legislators who supported the Act argued that it would protect academic freedom.⁶⁵ However, the Court rejected this argument by succinctly noting “that requiring schools to teach creation science with evolution does not advance academic freedom.”⁶⁶ As with Keyishian, Justice Brennan wrote for the Court, but here he seemed to retreat from his previous strong rhetoric, as one commentator noted, “construing academic freedom to mean an individual right to teach what one pleased, [he] dismissed academic freedom as irrelevant in a hierarchical system such as the secondary school system . . .”⁶⁷ However, this retreat was relegated to a mere footnote and was not necessarily emphasized in the opinion.⁶⁸

A high school student’s constitutional right to academic freedom may have climaxed in Hazelwood Sch. Dist. v. Kuhlmeier.⁶⁹ Hazelwood involved the proposed publishing of an edition of a high school newspaper that was to include articles on “three Hazelwood East students’ experiences with pregnancy” and another on “the impact of divorce on students at the school.”⁷⁰ Despite efforts to maintain the anonymity of students profiled in the article, the principal at the school, who had final editorial control over the content, decided to eliminate both articles completely. The principal feared that the identity of some of the students described in the articles could be identified from their context, so he exercised editorial control by eliminating the two pages where the stories would have appeared.⁷¹ In siding with the school administrators having the ability to exercise editorial discretion, the Court held that “[e]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to *legitimate pedagogical concerns*.”⁷² (emphasis added)

Hazelwood is important for several reasons. First, it recognizes school administrators, not just classroom teachers, as “educators.”⁷³ Therefore, since the term educators includes school administrators, if these individuals are provided with the same academic freedom rights as classroom teachers, this could have important implications for the subject matter and curriculum that teachers ultimately use in the classroom, and may be of particular significance when

teachers and administrators disagree over the material to be taught in the classroom. In short, school administrators might invoke the holding in Hazelwood, in the name of academic freedom, to quash a classroom teacher's use of particular materials if the administrator can articulate a legitimate pedagogical concern in quashing such materials.⁷⁴

Second, the phrase "legitimate pedagogical concerns" provided lower courts with the means "to regulate the classroom speech of teachers so long as the regulations were reasonably related to legitimate pedagogical concerns."⁷⁵ The danger here is that courts could rely on this language to censor teachers' classroom speech similar to the way the principal in Hazelwood had censored the school's newspaper.⁷⁶

The cases described above laid the foundation for providing a framework for resolving constitutional challenges to a teacher's academic freedom. In contrast to the characterization of academic freedom as being a legitimate pedagogical concern, and using this framework to analyze academic freedom issues, a divergent line of cases developed which provided a significant alternative characterization of the issues and facts, and thus a different paradigmatic way of analyzing academic freedom cases. The alternative characterized the dispute in the employment context and weighed "whether the teacher's speech involves a *matter of public concern*, and if so, then moved to a *balancing test* to weigh the *teacher's interest in speaking out against the school's interest in conducting its educational mission without disruption*."⁷⁷ (emphasis added)

B. An Alternative Characterization: Pickering⁷⁸/Connick⁷⁹

In Pickering v. Bd. of Educ.,⁸⁰ the Court developed a balancing test for resolving academic freedom cases by considering "the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."⁸¹ The Pickering Court conceded that this is a vague standard, but made an effort to "indicate some of the general lines along which analysis of the controlling interests should run."⁸² The Court defined those lines

around the teacher's employment relationship and whether a teacher's actions have "either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally."⁸³

The plaintiff, Marvin Pickering, was a teacher in Township High School District 205 in Will County, Illinois, who was fired after he sent "a letter to a local newspaper in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools."⁸⁴ After Pickering's letter was published, the school board met and determined "that the publication of the letter was 'detrimental to the efficient operation and administration of the [district schools].'"⁸⁵ The Board relied on the Illinois statute that provided them with broad authority to act "whenever, in its opinion, the interests of the schools require it . . ."⁸⁶ The Board also rejected Pickering's argument that "his writing of the letter was protected by the First and Fourteenth Amendments."⁸⁷

Pickering brought suit in Illinois state court claiming that his letter was protected by the federal First and Fourteenth Amendments.⁸⁸ The trial court affirmed the Board's "dismissal on the ground that [his] letter was detrimental to the interests of the school system [,which] was supported by substantial evidence and that the interests of the schools overruled [his] First Amendment rights."⁸⁹ Over the dissent of two Justices, the Illinois Supreme Court affirmed.⁹⁰ While the case did not involve classroom speech, it still addressed teachers' important free speech rights as citizens.

The United States Supreme Court granted a writ of certiorari and reversed.⁹¹ The Court agreed with Pickering that his "rights to freedom of speech were violated"⁹² and held that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."⁹³ The Court reasoned that a teacher's relationship with his employer was unique:

[Pickering's] employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for

which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning.⁹⁴

While the Pickering case did not involve classroom speech, its rule may reasonably be applied to issues surrounding a teacher's classroom speech because such speech may be considered to inherently involve "issues of public importance."⁹⁵ For example, in Cockrel v. Shelby County Sch. Dist.,⁹⁶ the Court of Appeals for the Sixth Circuit held that the teacher's classroom speech that discussed the merits of the industrial hemp plant touched on matters of public concern, thus invoking Pickering.⁹⁷ This reasoning is sound and an appropriate application of Pickering because it will often be impossible to determine whether the issues discussed in class are a matter of public concern.

Since all classroom discussion is a matter of public concern, a simple and justified rule for all courts to apply is that all classroom speech is constitutionally protected. Even if the reader is unwilling to accept this broad application to all classroom speech made by a teacher, few would argue that teaching students to become strong critical thinkers is not a matter of public concern. Therefore, classroom speech that can reasonably be described as intended to develop strong critical thinking skills is worthy of constitutional protection.

Fifteen years later, in Connick v. Myers⁹⁸ the Supreme Court refined its rule from Pickering and shifted the emphasis to "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."⁹⁹ The Connick Court also helped to identify factors that lower courts could use to determine if the speech at issue dealt with a matter of public concern by looking at its "content, form, and context . . . as revealed by the whole record."¹⁰⁰ The Connick Court referred to its refinement of the balancing test from Pickering as "particularized balancing."¹⁰¹ In contrast to Pickering, which ultimately favored the teacher's free speech rights over the state's interests as an employer, Connick shifted this pendulum back in favor of the state.¹⁰² The Connick Court held that a federal court was not the appropriate forum to review a personnel decision of a public agency.¹⁰³ The Boring Court relied

on this rationale from Connick and expressed extreme reluctance to interfere with the “personnel decision” to transfer Ms. Boring.¹⁰⁴

The problem with Connick’s reasoning and the Boring court’s reliance on it is that it gives far too much deference to school administrators’ decisions. When courts defer to administrators, wrongly disciplined or unfairly discharged teachers are left without a legal forum for seeking a remedy. Deference to administrators also might cause administrators to take extreme personnel actions that they might not otherwise take but for the deference given to them under Connick’s reasoning. The other primary flaw with Connick’s focus on the employment context is that it fails to frame the issue of academic freedom in an educational, or pedagogical, context, which would be more logical if the party seeking constitutional protection is a teacher wishing to exercise academic freedom.

III. Applying the Two Alternatives and the Importance of Characterization

“Currently, courts rely on either the precedent established in Hazelwood or Pickering to resolve cases addressing the First Amendment protection accorded to teachers’ in-class speech.”¹⁰⁵ Yet because of the differing characterization employed by these cases, “Pickering and Hazelwood lend themselves to utterly divergent analytical paths.”¹⁰⁶ The slim majority (7 to 6) in the Boring case relied on Connick to hold that Ms. Boring had no First Amendment right to select the play *Independence* for production.¹⁰⁷ Boring’s majority characterizes the issue as “whether a public high school teacher has a First Amendment right to participate in the makeup of the school curriculum through the selection and production of a play.”¹⁰⁸ Note that the majority seemingly focuses on the free speech rights available under the First Amendment, but ultimately decides that such rights are not available to Ms. Boring for her selection and production of *Independence*.¹⁰⁹ As one commentator wrote of the majority’s opinion, “[t]he Boring court’s decision suddenly refocused the argument. It was no longer how Hazelwood should be applied, but whether it should be applied.”¹¹⁰

A significant flaw in the Pickering rationale is that it “focuses on teachers as citizens, rather than as educators, largely limiting the application of the precedent to core First Amendment activities.”¹¹¹ The “particularized balancing” gloss that Connick added to the Pickering line of cases allows the court to “narrowly define issues that qualify as ‘matters of public concern.’”¹¹² As one cynical commentator noted regarding the Boring court’s reliance on Pickering, “[t]he Fourth Circuit’s reliance on Pickering makes sense only if the court was hell-bent on upholding the Buncombe County Board of Education.”¹¹³ For these reasons, the Pickering/Connick line of cases provides an unsuitable means for resolving issues related to teachers exercising academic freedom in the classroom.

In contrast, Boring’s six dissenters focused on the Hazelwood decision and noted that Hazelwood’s “careful reasoning” was “authored by Justice White and joined by all members of the present Court then sitting.”¹¹⁴ The dissenters believe that “the simpler and more rigorous Hazelwood analysis should apply to a teacher’s in-class speech . . .”¹¹⁵ The dissent criticizes the “public concern” element from Connick as

fail[ing] 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.¹¹⁶

This powerful, well-reasoned argument gives the dissenters the stronger position. They seem to be saying that Hazelwood’s focus on pedagogy is where the focus ought to be, rather than focusing on any potential public concern the teacher’s speech may have. The dissent also seems to suggest that even if the Connick test that weighed the employee’s free speech rights against the state’s interest in providing efficient services were the appropriate one, the majority has misapplied it by failing to recognize that even speech made by a teacher within the confines of a classroom may be of legitimate public concern.

The dissenters in Boring also characterize the issue as one relating to employment and view the school’s action against the teacher as serving “‘to punish and retaliate against her for expressing an unpopular point of view through the production of the play’ in violation of her First

Amendment rights.”¹¹⁷ Note that the dissenters emphasize the school’s decision for transferring Ms. Boring just as much as they emphasize her free speech rights. When courts emphasize employment concerns in characterizing the legal issue, free speech rights otherwise available under the First Amendment might become subservient to the personnel decisions of school administrators. When administrators choose to discipline or fire a teacher when she is merely exercising academic freedom, such a decision might be avoided (or remedied by a court) if administrators follow Hazelwood’s emphasis on pedagogy.¹¹⁸ While the holding in Hazelwood applied to limitations on student speech,¹¹⁹ not teacher speech, a reasonable extension of that rule would be to make it applicable teacher speech when such speech has the legitimate pedagogical concern of developing students’ critical thinking skills. If the teacher were using controversial materials that she reasonably believed would develop students’ critical thinking skills, which is a legitimate pedagogical goal, and the factors described below were satisfied, then this exercise of the teacher’s academic freedom should receive constitutional protection.

“With no precedent directly on point, lower courts have relied primarily on Pickering or Hazelwood to resolve the question of how much protection should be afforded to teachers’ in-class speech.”¹²⁰ Given this lack of precedent, the federal Circuit Courts of Appeals are nearly as equally split as the majority and dissenters were on the Boring court:

[A] split among the Courts of Appeals has developed along the Pickering/Hazelwood fault line. The Third, Fourth, Fifth, Ninth, and D.C. Circuits apply Pickering, while the First, Second, Seventh, Eighth, and Tenth Circuits employ Hazelwood in their analysis of teachers’ in-class speech rights. State supreme courts are similarly divided in their resolution of cases addressing teachers’ First Amendment rights.¹²¹

Given our Nation’s long history of local control of education, the Supreme Court may not be too anxious to grant a writ of certiorari to reconcile this split in the federal appellate courts. Similarly, as we have seen in the evolution cases, the Court will often avoid implication of free speech and resolve disputes under other constitutional provisions, such as the Establishment Clause.¹²²

IV. The Case for Academic Freedom and the Legitimate Pedagogical Concern of Producing Strong Critical Thinkers: Factors for School Administrators and the Courts to Consider

“[I]ssues centered on contentious current events, the advocacy of alternative viewpoints, non-traditional teaching methodologies, appropriate instructional materials, and the advocacy of religion in public schools are very much live controversies.”¹²³ Therefore, our schools and teachers do currently face these issues related to academic freedom. John Houser, an award-winning English and History teacher at Snider High School in Fort Wayne, Indiana, has noted that “the school board is only interested in choosing textbooks,” but that classroom teachers have discretion to select movies to show or novels to assign.¹²⁴ For R-rated movies, teachers in Fort Wayne Community Schools must follow written procedures and submit a form to administrators prior to showing the film indicating that the film is age-appropriate and tied to the curriculum, or that the curriculum would be enhanced by the film or novel.¹²⁵ Guest speakers are considered to be “an extension of the teacher” and the speaker’s words will be imputed to that teacher.¹²⁶ R-rated movies and other materials that might be considered controversial might reasonably be incorporated into the curriculum by the teacher to spark classroom dialogue between the teacher and students, thus spawning students’ critical thinking skills.

In the spirit of Hazelwood¹²⁷ and its emphasis on pedagogy, school administrators and the courts must recognize that producing students with strong critical thinking skills is one of the most important pedagogical goals of American public high schools. With this goal in mind, school administrators and the courts should consider the following factors when weighing whether a teacher has exercised academic freedom that should be supported and upheld as being constitutionally protected.

A. The Importance of Using Controversial Subject Matter to Teach Critical Thinking

From my undergraduate studies in secondary education,¹²⁸ as well as my field experience and student teaching, I have formed a strong belief that the best way to teach critical thinking to high school students is to expose them to controversial subjects. This can be done by incorporating current newsworthy events into the curriculum, or by highlighting controversial issues within the assigned subject matter. I agree with the Court of Appeals for the Ninth Circuit,

as it identified both the importance of teaching controversial topics in the classroom and the need to critically inspect our Nation's history:

It cannot be disputed that a necessary component of any education is learning to think critically about offensive ideas – without that ability one can do little to respond to them . . . it is important for young people to learn about the past – and to discover both the good and bad in our history.¹²⁹

An example of a current newsworthy event would be the issues surrounding the recent death of Terry Schiavo, a Florida woman whose husband fought a legal battle with his in-laws to have a feeding tube removed from his wife after it had sustained her for several years in a persistent vegetative state.¹³⁰ Should physician-assisted suicide be legal? How should we define “life”? Who should get to make end-of-life decisions if there is no advance directive? There are no easy answers to these questions, and these queries will make many uncomfortable, but asking students to think about these questions will stimulate critical thinking.

Similarly, teachers may incorporate controversial topics into the assigned curriculum. For example, in a high school American History class, the teacher might challenge students to think about the fact that George Washington and Thomas Jefferson were slave owners. Were these Founding Fathers respected Virginia planters who were simply a product of their times, or should we reconsider their vaulted position in history as we ponder their enslavement of fellow human beings? Likewise, the teacher might encourage students to read the textbook like a literary or social critic would critique it. For example, the teacher might ask students to consider whether the text focuses on the accomplishments and history of white men, or provides fair treatment to women and minorities.

At least one leading child development expert agrees with me that teaching controversial subject matter will create students who are better thinkers. Dr. Stanley Greenspan, Clinical Professor of Psychiatry, Behavioral Sciences, and Pediatrics at George Washington University Medical School and a practicing child psychiatrist has “observed that more emotionally interactive [teaching] styles tended to produce thinking that was both more creative and more abstract” in school-aged children.¹³¹ Controversial issues are likely to be “emotionally interactive,” therefore,

teaching such topics will not only lead to better critical thinkers, but in the opinion of Dr. Greenspan, more creative and abstract thinkers as well.¹³²

If our schools are to produce students capable of advanced levels of critical thought, teachers must not shy away from controversial subjects. Therefore, teachers should be encouraged to take on controversial subjects, and administrators and the courts must not quash efforts by teachers to expose students to controversial subjects. “The punishment of teachers for utilizing innovative techniques or materials in the classroom exerts a chilling effect on the profession.”¹³³ Students capable of critical thought will be better equipped to compete in the global marketplace for jobs, and they will be better prepared to handle new forms of standardized tests, including the new essay portion of the Scholastic Aptitude Test.¹³⁴

The Hazelwood approach to analyzing academic freedom cases, with its emphasis on pedagogy, provides the better approach for permitting controversial subjects to be discussed in a high school classroom. When teachers have a legitimate pedagogical reason for using controversial materials, school administrators and the courts must give deference to them. However, such deference must not be without certain limits. For example, teachers should not be permitted to “engage in inappropriate speech, [such as] religious proselytizing, irresponsible gossip, vulgarities, or even sexual or racial harassment.”¹³⁵ Courts must hedge on the side which finds that a teacher’s academic freedom has the legitimate pedagogical objective of producing students who are strong critical thinkers.

B. Greater Deference to the Classroom Teacher

The great educational philosopher and reformer, John Dewey, recognized the importance of showing deference to qualified teachers in their exercise of academic freedom:

The teacher who is an intelligent student both of individual mental operations and of the effects of school conditions upon those operations, can largely be *trusted to develop for himself methods of instruction* in their narrower and more technical sense – those best adapted to achieve results . . .¹³⁶ (emphasis added)

Despite the history and pedigree of John Dewey's support for deference to the professional judgment of the classroom teacher, deference in the Hazelwood case was provided to the school's principal, but not to the classroom teacher.¹³⁷ Yet it is the teacher who spends each school day with the students in his or her classroom and is able to learn the students' cognitive abilities and maturity level. Given the daily interaction that teachers have with students, administrators and the courts need to show greater deference to teachers' professional judgment.

School administrators must recognize that teachers are professionals who are fully capable of recognizing the necessary and appropriate curriculum to be taught. The "micro-management of the teaching process reduces teacher morale, discourages innovative educational methods, and creates disincentive for intelligent, independent-minded individuals to enter into the profession."¹³⁸ Therefore, pedagogical decisions are best left to the capable hands of classroom teachers.

C. The Age and Maturity of the Students

While exercising professional discretion, teachers must at all times be mindful of the age and maturity level of their students, and choose topics and adjust classroom discussion accordingly. Fort Wayne teacher John Houser has noted that in the advanced placement English courses at Snider High School, "not only is the rigor increased, but so is the maturity and expectations."¹³⁹ Therefore, it would be reasonable for teachers to use more mature subject matter in honors and advanced placement courses. A teacher who fails to give appropriate attention and consideration to students' age and maturity level might reasonably have his academic freedom thwarted by administrators or the courts.

In the context of teaching evolution and creation in science classes, one note writer has proposed an age-sensitive test for Establishment Clause cases that challenge religion being taught in public schools:

Under this test, the Court must first determine the age range for the intended audience of a religious message. If the audience is pre-adolescent (generally younger than twelve) the Court should consider the extent to which a perception

of government endorsement of religion is likely. If the audience is older than twelve, the Court should determine if the school's position on religious activities within the school is neutral toward religion.¹⁴⁰

This test uses age twelve as a dividing line and assumes that children under age twelve are generally more impressionable and less likely to recognize when the school or teacher is endorsing a particular position.¹⁴¹ I believe this test is reasonable, easy to apply as a bright line, and consistent with the notion that older students are more sophisticated and less impressionable than younger students.

D. The Teacher Must Remain Neutral

At first blush, my suggestion that the teacher should make a good faith effort to remain neutral while discussing controversial issues with students seems inconsistent with my endorsement of broad academic freedom for classroom teachers. However, just as we are not free to rely on the First Amendment to protect us if we shout "Fire!" in a crowded movie theater when there is no fire,¹⁴² neither is a teacher free to say just anything in the classroom and expect constitutional protection by invoking academic freedom. The Supreme Court succinctly noted the influential role teachers have over students in observing that

[a] teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities.¹⁴³

In addition to the high court's proclamation, John Dewey also recognized that a teacher's "influence upon morals and manners, upon character, upon habits of speech and social bearing, are almost universally recognized."¹⁴⁴ Given this recognized influence that teachers have over their students, it is important that teachers make a good faith effort to remain neutral at all times while discussing controversial issues. The teacher's opinion on the subject is not important. Rather, what is important is that students be exposed to the issue in order to develop their critical thinking skills. Teachers must attempt to present all sides of an issue without necessarily taking any particular side. The goal is to have students consider all sides, then take one and be

prepared to defend it, rather than have the teacher impose her ideas upon students. School administrators and the courts should be mindful of the teacher's in-class position on a controversial subject and should stress the importance of the teacher's neutrality to achieve the educational goal of teaching students to be strong critical thinkers. If the teacher failed to make a good faith effort to remain neutral, then the school board or court might reasonably hold that the teacher's academic freedom is not protected.

I would distinguish between a teacher's good faith effort to remain neutral when discussing a controversial subject from a teacher responding to a sensitive question posed by a student during that discussion. As for the latter, I agree with Professor Stanley Ingber that a teacher's refusal to answer the question might teach students

more about subservience than about participation and civic courage. Further, conveying to school officials that they need permit only speech consistent with, or at least unthreatening to, their 'expert' perception of proper pedagogy or social acceptability teaches nothing about the importance of tolerance. Instead, it cultivates a respect for elitism and hierarchy.¹⁴⁵

Thus, the teacher should remain neutral when presenting the issue to students, and should encourage students to discuss the issue amongst their fellow students, but the teacher should not be muzzled when posed a difficult question by students during that discussion.

E. Notice and Specificity

In addition to the notions of free speech embodied in the First Amendment,¹⁴⁶ another important constitutional doctrine that must be considered when developing a standard for academic freedom is procedural due process,¹⁴⁷ particularly the concept of notice. My recommendation is that school administrators should develop reasonable rules for teachers to follow when they are going to teach controversial subject matter (including any presentations by guest speakers), show a movie that could generate controversy (including all R-rated films), or assign a controversial novel (including all books that use the F-word or contain sexually explicit material). Administrators should include teachers in the development of these rules.

Once the rules have been established, administrators must communicate these guidelines to teachers in writing prior to the start of each school year. Any interim changes also must be provided in writing to teachers prior to their application. Administrators, and the lawyers advising them, should have teachers document that they received the guidelines and agree to abide by them. Such written notice would satisfy constitutional notions of procedural due process.¹⁴⁸

Once the rules have been developed, communicated, and accepted, teachers must follow through in complying with them. Teachers should exercise professional discretion in deciding when proposed material is controversial, thus triggering the controversial materials policy and prior approval from administrators. Problems may arise if the rules are poorly constructed, not communicated to teachers, or teachers fail to make a good faith effort to abide by them. For example, in Cockrel v. Shelby County Sch. Dist.,¹⁴⁹ a fifth grade teacher in Kentucky invited the actor Woody Harrelson to speak on the virtues of the industrial hemp plant, which, despite its prohibition from being grown in the state, can be used to make products otherwise made from trees and contains an insufficient amount of the substance tetrahydrocannabinol to have any narcotic effect.¹⁵⁰ The school principal claimed that the teacher told him only “that the presentation to be given was about agriculture.”¹⁵¹ Reporters and cameras from CNN and local television stations covered Harrelson’s visit and many parents and other teachers wrote letters to the school board to complain.¹⁵² While the Court of Appeals for the Sixth Circuit reversed the previous summary judgment for the school and remanded¹⁵³ to the trial court to apply the Pickering/Connick¹⁵⁴ analysis, the court also took judicial notice of the fact that the “[s]chool adopted a new visitors policy for ‘controversial’ topics that required advance approval by school administration and written consent by students’ parents. This policy was put to use [] during the *next* school year . . . ”¹⁵⁵ (emphasis added) If the school had clear guidelines, and the teacher had followed those guidelines, it is reasonable to assume that much of the controversy¹⁵⁶ surrounding this case would have been avoided.

I propose the following guidelines for a school's controversial materials policy. Generally, the material the teacher intends to use must relate to the curriculum being taught, the teacher must not advocate a particular position, and discussion must be "objective and scholarly with minimum emphasis on opinion and maximum emphasis on intelligent analysis," with all sides "given equal presentation and emphasis."¹⁵⁷ Guest speakers may be invited when they "offer qualifications and resources not available in the schools," and "[w]henever possible, teachers who invite visitors to present one side of an issue will also invite visitors to present the other side(s)."¹⁵⁸ Finally, permission for guest speakers should be obtained from the principal 48 hours prior to the planned presentation.¹⁵⁹

F. Parental Concerns

Aside from the very early cases, starting with Meyer v. Nebraska¹⁶⁰, which gave parents broad authority to control the upbringing of their children, more recent academic freedom cases have remained silent on parental rights. Neither of the two primary lines of cases discussed in this paper, including the cases leading up to and including Hazelwood¹⁶¹ and its focus on pedagogy, as well as the Pickering/Connick line focusing on the balancing of free speech and public concern against the state's interest as an employer, considers parental concern as an element for consideration in deciding academic freedom cases. I agree with the approach taken by the two lines of later cases and believe that the interests of parents generally are imputed to their children, as it is in the best interest of parents and students alike that students be taught to become strong critical thinkers. Advance parental permission, in the form of a signed and dated permission slip, would likely absolve the teacher and school of liability stemming from the discussion of the controversial topic, since students and parents would be on notice. However, such record-keeping would be too cumbersome in most instances and is inconsistent with the teacher being able to exercise her professional discretion to decide when the school's controversial materials policy applies.

V. Conclusion

Critical thinking is an important skill that all American high school children should develop to the fullest extent possible. Constitutionally protected academic freedom for the American high school teacher will empower teachers with the necessary tools, namely freedom to discuss controversial issues, and this protected empowerment that teachers need and deserve will produce students capable of advanced critical thought. Critical thinking skills are necessary for success on ever-evolving standardized tests and essential for competing in the increasingly-global marketplace. Given the important pedagogical role that academic freedom plays, the line of cases leading up to and including Hazelwood¹⁶² provides the superior framework for analyzing academic freedom and its appropriate place in the classroom. Refining the elements that the courts should consider will lead to better results, mainly students who are better critical thinkers.

High school teachers should not be discouraged from tackling controversial issues, and this reasonable framework will satisfy that important objective. Teachers must be shown the professional respect, and deference, they deserve, subject to compliance with the reasonable limitations imposed by administrators, and awareness by teachers of exposing students to material that is age- and maturity-level appropriate. The Keyishian Court had it right:

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.¹⁶³ (internal quotes omitted)

Maintaining legal principles that encourage teachers to exercise academic freedom will lead to our schools producing students with superior critical thinking skills.

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¹ See Boring v. Buncombe County Bd. of Educ., 136 F.3d 364, 366 (4th Cir. 1998). See also Boring v. Buncombe County Bd. of Educ., 1995 WL 17001368 (W.D.N.C. 1995).

² See Charles D. Owen High School <<http://www.cdohs.buncombe.k12.nc.us/>> (accessed Mar. 27, 2005). See also Blue Ridge Online <<http://www.blueridgeonline.com/Asheville.htm>> (accessed Mar. 27, 2005). See also Yahoo Maps <<http://maps.yahoo.com/ddresult?ed=xTowJeV.wimQQVd6MsEKU7USFw--&csz=asheville%2C+nc&country=us&tcsz=Black+Mountain%2C+NC&tcountry=us>> (accessed Mar. 27, 2005).

³ See Boring, 136 F.3d at 366.

⁴ Id.

⁵ Id.

⁶ Id.

⁷ Id.

⁸ Boring, 136 F.3d at 366.

⁹ Boring v. Buncombe County Bd. of Educ., 1995 WL 17001368 at 2 (W.D.N.C. 1995).

¹⁰ Id.

¹¹ Boring, 136 F.3d at 366.

¹² Id.

¹³ Id.

¹⁴ Id. at 366-367.

¹⁵ Id. at 366.

¹⁶ Boring, 1995 WL 17001368 at 2.

¹⁷ Boring, 136 F.3d at 367.

¹⁸ Boring, 1995 WL 17001368 at 2.

¹⁹ Boring, 136 F.3d at 367.

²⁰ Id.

²¹ Id.

²² Id.

²³ See Boring v. Buncombe County Bd. of Educ., 98 F.3d 1474 (1996), vacated and rev'd by 136 F.3d 364 (4th Cir. 1998).

²⁴ Id.

²⁵ Boring, 136 F.3d at 367.

²⁶ 136 F.3d 364 (4th Cir. 1998).

²⁷ Id. at 368.

²⁸ Id. at 371, n. 2.

²⁹ Boring v. Buncombe County Bd. of Educ., 98 F.3d 1474 (1996), vacated and rev'd by 136 F.3d 364 (4th Cir. 1998).

³⁰ Boring v. Buncombe County Bd. of Educ., 136 F.3d 364, 379 (4th Cir. 1998) (Motz, J., dissenting).

³¹ Boring v. Buncombe County Bd. of Educ., 136 F.3d 364, 374 (4th Cir. 1998) (Hamilton, J., dissenting).

³² Id. at 374.

³³ W. Stuart Stuller, High School Academic Freedom: The Evolution of a Fish Out of Water, 77 Neb. L. Rev. 301, 308 (1998).

³⁴ Id.

³⁵ Id.

³⁶ Id. at 309.

³⁷ John Dewey, How We Think 53 (D.C. Health and Co. 1933).

³⁸ Donald K. Uerling, Academic Freedom in K-12 Education, 79 Neb. L. Rev. 956 (2000).

³⁹ 262 U.S. 390 (1923).

⁴⁰ Stuller, 79 Neb. L. Rev. at 310. See also Tinker v. Des Moines Indep. Community Sch., 393 U.S. 503, 506 (1969). See also Epperson v. Arkansas, 393 U.S. 97, 105 (1968).

⁴¹ Meyer v. Nebraska, 262 U.S. 390, 396 (1923).

⁴² Stuller, 79 Neb. L. Rev. at 311, citing Meyer, 262 U.S. at 399.

⁴³ Stuller, 79 Neb. L. Rev. at 311.

⁴⁴ See Stuller, 79 Neb. L. Rev. at 311-312, citing Adler v. Bd. of Educ., 342 U.S. 485, 509 (1952) (Douglas, J., dissenting.).

⁴⁵ Keyishian v. Bd. of Regents, 385 U.S. 589 (1967).

⁴⁶ Stuller, 79 Neb. L. Rev. at 313.

⁴⁷ Stuller, 79 Neb. L. Rev. at 313, citing Keyishian, 385 U.S. at 592 (1967).

⁴⁸ Keyishian, 385 U.S. at 603.

⁴⁹ Id.

⁵⁰ Id. See also Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

⁵¹ Keyishian, 385 U.S. at 603.

⁵² Stuller, 79 Neb. L. Rev. at 314.

⁵³ 393 U.S. 97 (1968).

⁵⁴ See Stuller, 79 Neb. L. Rev. at 314.

⁵⁵ U.S. Const. amend. I.

⁵⁶ Epperson, 393 U.S. at 98-99.

⁵⁷ Id. at 99.

⁵⁸ Stuller, 79 Neb. L. Rev. at 315.

⁵⁹ U.S. Const. amend. I.

⁶⁰ Stuller, 79 Neb. L. Rev. at 315.

⁶¹ U.S. Const. amend. I.

⁶² 482 U.S. 578 (1987).

⁶³ Stuller, 79 Neb. L. Rev. at 316.

⁶⁴ Id.

⁶⁵ See Edwards, 578 U.S. at 586. See also Uerling, 79 Neb. L. Rev. at 316.

⁶⁶ Edwards, 578 U.S. at 586.

⁶⁷ Stuller, 79 Neb. L. Rev. at 316. See also Edwards, 482 U.S. at 586.

⁶⁸ Edwards, 578 U.S. at 586, n. 6.

⁶⁹ 484 U.S. 260 (1988).

⁷⁰ Id. at 263.

⁷¹ Id. at 263-264.

⁷² Id. at 273.

⁷³ Id.

⁷⁴ Hazelwood, 484 U.S. at 273.

⁷⁵ Stuller, 79 Neb. L. Rev. at 323.

⁷⁶ 484 U.S. at 263-264 (1988).

⁷⁷ Stuller, 79 Neb. L. Rev. at 328-329.

⁷⁸ Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

⁷⁹ Connick v. Myers, 461 U.S. 138 (1983).

⁸⁰ 391 U.S. 563 (1968).

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⁸² Id. at 569.

⁸³ Id. at 572-573.

⁸⁴ Id. at 564.

⁸⁵ Pickering v. Bd. of Educ., 391 U.S. at 564-565 (1968).

⁸⁶ Id. See also 105 ILCS 5/10-224.

⁸⁷ Pickering, 391 U.S. at 565 (1968).

⁸⁸ Id.

⁸⁹ Id.

⁹⁰ Id.

⁹¹ Id.

⁹² Pickering, 391 U.S. at 565 (1968).

⁹³ Id. at 574.

⁹⁴ Id. at 570.

⁹⁵ Id. at 574.

⁹⁶ Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036 (2001).

⁹⁷ Id. at 1052.

⁹⁸ 461 U.S. 138 (1983).

⁹⁹ Id. at 140.

¹⁰⁰ Id. at 148.

¹⁰¹ Id. at 150.

¹⁰² Id. at 148.

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¹⁰⁷ Boring, 136 F.3d at 368.

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¹¹⁵ Id. at 378.

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¹¹⁷ Id. at 375-376.

¹¹⁸ See Stuller, 79 Neb. L. Rev. at 323.

¹¹⁹ Hazelwood, 484 U.S. at 273 (1988).

¹²⁰ Karen C. Daly, 30 J.L. & Educ. at 7.

¹²¹ Id. at 16-17.

¹²² See Epperson v. Arkansas, 393 U.S. 97 (1968). See also Edwards v. Aquillard, 482 U.S. 578 (1987).

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¹²⁵ Id.

¹²⁶ Id.

¹²⁷ 484 U.S. 260 (1988).

¹²⁸ See n. a1, supra.

¹²⁹ Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1031 (9th Cir. 1998).

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¹⁴⁶ U.S. Const. amend. I.

¹⁴⁷ U.S. Const. amend. XIV, § 1.

¹⁴⁸ Id.

¹⁴⁹ 270 F.3d 1036 (2001).

¹⁵⁰ Id. at 1041-1042.

¹⁵¹ Id. at 1042.

¹⁵² Id. at 1043.

¹⁵³ Id. at 1060.

¹⁵⁴ See sec. II.B. of this paper, *supra*.

¹⁵⁵ Cockrel, 270 F.3d at 1043.

¹⁵⁶ Id. Many parents went to the school to voice their objections to the principal.

¹⁵⁷ See Ayer Public Schools, Ayer, MA <<http://www.ayer.mec.edu/policy/policyi2.html>> (accessed Apr. 30, 2005).

¹⁵⁸ Id.

¹⁵⁹ Id.

¹⁶⁰ 262 U.S. 390 (1923). See also Pierce v. Society of Sisters, 268 U.S. 510 (1925) and Wisconsin v. Yoder, 406 U.S. 205 (1972).

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