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COMMENTS

THE DWINDLING RIGHTS OF TEACHERS AND THE CLOSING COURTHOUSE DOOR

I. INTRODUCTION

In recent years, teachers and the school authorities that employ them have been waging a major battle in the courts throughout the country. The conflict arises from the unique character of the teaching profession in our society. It is agreed that teachers or at least the schools stand in loco parentis with their students. It is unclear, however, in the place of which parent the teacher stands. Some believe that teachers, like Caesar's wife, must be above reproach and subservient to the wishes of the most pious in the community, because teachers are expected to be "role-models" for their pupils. On the other hand, some would argue that teachers cannot be required to surrender constitutionally protected rights as a condition to their employment.

This Comment will survey recent decisions in which teachers have challenged actions against them claiming that they were impermissible infringements upon their rights to freedom of association, speech, privacy, and equal protection of the laws. There will also be a brief discussion of the jurisdictional bases for bringing actions in federal courts, the unique problems facing the non-tenured teacher, and the remedies available to a teacher who has been unconstitutionally denied employment.


3. E.g., a 1969 conversation with the associate superintendent of public instruction for the state of California:

"Superintendent: Teaching is a privilege, not a right. If one wants this privilege, he has to give up some of his rights.

"Author: Just what constitutional right does one have to give up in order to enter teaching?

"Superintendent: Any right his community wants him to give up." Fischer & Schimmel, supra note 1, at 6.

4. Wishart v. McDonald, 500 F.2d 1110, 1115 (1st Cir. 1974).


6. The actions under examination include dismissal, suspension, and non-renewal of a contract that has expired.

7. See notes 36 to 49 infra and accompanying text.

8. See notes 50 to 94 infra and accompanying text.

9. See notes 95 to 126 infra and accompanying text.

10. See notes 146 to 165 infra and accompanying text.

11. See notes 198 to 220 infra and accompanying text.

12. See notes 166 to 197 infra and accompanying text.

13. See notes 221 to 244 infra and accompanying text.
Perhaps the most celebrated case involving a teacher's rights was the "Monkey Trial," *Scopes v. State*. In *Scopes*, a young biology teacher was discharged for teaching "a certain theory that denied the story of the divine creation of man, as taught in the Bible, and did teach instead thereof that man had descended from a lower order of animals." The view of the Tennessee Supreme Court was that the Constitution did not apply to public employees at all, declaring that, "[i]n dealing with its own employees engaged upon its own work, the State is not hampered by the limitations of . . . the Fourteenth Amendment to the Constitution of the United States." Indeed, prevailing attitudes of proper teacher behavior at that time indicated that celibacy and purity of thought and conduct were not only to be hoped for, but in some instances were required.

The initial reactions of other courts in public employment cases generally were comparable to that of the Tennessee court in *Scopes*. They allowed the states, as employers, to condition employment on the surrender of constitutional rights. As Justice Holmes, then a member of the Supreme Judicial Court of Massachusetts, wrote at the turn of the century: "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."
As recently as 1952, in Adler v. Board of Education, the Supreme Court apparently agreed, declaring that, while teachers "have the right under our law to assemble, speak, think and believe as they will. . . . [i]t is equally clear that they have no right to work for the State in the school system on their own terms." The Court stated that the teacher would have to abide by the terms laid down by the proper authorities. If these were not satisfactory, the Court continued, "they are at liberty to retain their beliefs and associations and go elsewhere." Such requirements were not considered a deprivation of any constitutionally protected rights.

However, in 1967, in Keyishian v. Board of Regents, the Court struck down the same New York loyalty statute it had upheld in Adler. The Court held that membership alone in a "subversive" organization would not be a sufficient basis for disqualification from public employment, saying "legislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization . . . violates constitutional limitations." Thus, the Court protected the teacher's right to associate, making the requirement for dismissal as rigorous as that which it had created for criminal prosecutions.

The Court reinforced its position regarding the teacher's right to associate in Perry v. Sindermann. In Perry, a non-tenured college instructor alleged that he was refused re-employment because he was active in a teachers' union and had testified before committees of the Texas legislature in opposition to the college administration's policy. The Supreme Court, in reversing the trial court's summary dismissal of the complaint, held that the reasons alleged to have been relied upon by the school board were violative of the teacher's first amendment rights. The Court made clear that it was not advocating that

20. 342 U.S. 485 (1952). Adler upheld the constitutionality of New York's Feinberg Law, N.Y. Educ. Law § 3022 (McKinney 1970), which provided for the dismissal of teachers who were members of any organization advocating the overthrow of the government by force, violence or any unlawful means and was intended to curb the presence of Communists in the schools.
21. 342 U.S. at 492 (citation omitted).
22. Id.
23. Id.
25. Id. at 608. Although Keyishian struck down the statute upheld in Adler, it did not specifically overrule the earlier case, but impliedly rejected its rationale. See id. at 605-06. The result has been two lines of cases—those that uphold disciplinary actions for the exercise of constitutional rights cite Adler, while those that reverse cite Keyishian. A recent example of this dichotomy is the majority and dissenting opinions in Cook v. Hudson, 511 F.2d 744 (5th Cir. 1975), discussed at text accompanying notes 37-49 infra.
27. 408 U.S. 593 (1972).
28. Sindermann v. Perry, 430 F.2d 939, 941 (5th Cir. 1970), aff'd, 408 U.S. 593 (1972). Although Sindermann was not tenured, he did allege the existence of a "de facto" tenure system at the university. The Court said that proof of "de facto" tenure might be a sufficient "property" interest to require a hearing before non-renewal of the teacher's contract. 408 U.S. at 599-602; see Board of Regents v. Roth, 408 U.S. 564, 576-78 (1972).
a teacher had a "right" to a "valuable governmental benefit," but merely that such a benefit cannot be denied on a basis that infringed upon constitutionally protected rights.29 The Court reasoned that if the government could deny a benefit for such a reason, the teacher's exercise of his rights "would in effect be penalized and inhibited," thus permitting the government to control indirectly what it was unable to control outright.30

It appeared at the time that Perry guaranteed that teachers would enjoy the full spectrum of constitutional rights. This, however, has not proven to be the case, since the conflicting rights of the community had yet to be considered. In an earlier attempt to reconcile this conflict where it involved freedom of speech, the Supreme Court, in Pickering v. Board of Education,31 promulgated a "balancing test." In Pickering, the plaintiff, a high school teacher, was dismissed because he wrote a letter critical of school board athletic policies to the newspapers, during a referendum on an educational bond issue. The Supreme Court foreshadowed its holding in Perry in reversing the dismissal. The Court cautioned, however, that the state did have legitimate interests as an employer that differed from its interests in regulation of the speech of the general public. To resolve the dilemma of the conflicting interests, the Court suggested that:

The problem in any case is to arrive at a balance between 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.32

29. 408 U.S. at 597. "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." Id. See also Board of Regents v. Roth, 408 U.S. 564, 575 n.14 (1972).
30. 408 U.S. at 597.
32. Id. at 568. Balancing tests have not been without controversy. In Time, Inc. v. Hill, 385 U.S. 374 (1967), a case which balanced the individual's right to privacy against the freedom of the press, Justice Black discussed the problem of applying balancing tests to first amendment rights: "The 'weighing' doctrine plainly encourages and actually invites judges to choose for themselves between conflicting values, even where, as in the First Amendment, the Founders made a choice of values, one of which is a free press. Though the Constitution requires that judges swear to obey and enforce it, it is not altogether strange that all judges are not always dead set against constitutional interpretations that expand their powers, and that when power is once claimed by some, others are loath to give it up.

"[I]f the judicial balancing choice of constitutional changes is to be adopted by this Court, I could wish it had not started on the First Amendment. The freedoms guaranteed by that Amendment are essential freedoms in a government like ours. That Amendment was deliberately written in language designed to put its freedoms beyond the reach of government to change while it remained unamended. If judges have, however, by their own fiat today created a right of privacy equal to or superior to the right of a free press that the Constitution created, then tomorrow and the next day and the next, judges can create more rights that balance away other cherished Bill of Rights freedoms." Id. at 399-400 (Black & Douglas, JJ., concurring) (footnote omitted).
At the same time, the Court placed two limitations on the scope of its decision which have been the source of almost constant litigation ever since. First, the Court cautioned that it was reserving decision on the situation where either discipline by immediate superiors or harmony among co-workers was in issue. In addition, the Court pointed out that its opinion dealt only with the protection of teachers' comments on matters of public interest. The Court did not say that speech which raised a question of discipline by a superior or which was not on a matter of public interest was unprotected, but rather noted that "significantly different considerations would be involved in such cases."

The task of balancing the interests of the community, as represented by the employer school board, against the right of the teachers to be protected in the exercise of their constitutional rights was thus left to a case-by-case resolution in the federal courts. The recent products of this struggle and the significance of the approaches that the courts have taken will be the focal point of the balance of this Comment.

III. FREEDOM OF ASSOCIATION

The decisions concerning the teacher's right of association, and in particular membership in controversial organizations, have been dominated by the presence of Keyishian. It has been argued that under Keyishian no school board or state legislature could disqualify teachers who are members of the Black Panther Party, the American Nazi Party, or any other revolutionary, extremist.

33. 391 U.S. at 570. The Court refused to speculate on what its decision would be where a relationship existed between a supervisor and a subordinate that was "of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them . . . ." Id. at 570 n.3. The results in later cases suggest the question is resolved in favor of the school board. See notes 57-61 infra and accompanying text.

34. Id. at 574. The Court stated that in a case such as this, Pickering's false statements could not serve as grounds for dismissal unless those false statements were knowingly or recklessly made. Id. See Note, Judicial Protection of Teachers' Speech: The Aftermath of Pickering, 59 Iowa L. Rev. 1256, 1263-65 (1974).

35. 391 U.S. at 570 n.3. Justice Douglas, dissenting in Arnett v. Kennedy, 416 U.S. 134 (1974), discussed the impact of limiting the speech of federal employees: "The fact that appellee in the present case inveighed against his superior is irrelevant. The matter on which he spoke was in the public domain. His speaking may well have aroused such animosity in his superior as to disqualify him from being in charge of disciplinary proceedings; and conceivably it could cause disharmony among workers. And these consequences are quite antagonistic to the image which agencies have built . . . ."

". . . It is, of course, none of a court's problem what the employment policies may be. But once an employee speaks out on a public issue and is punished for it, we have a justiciable issue. Appellee is in my view being penalized by the Federal Government for exercising his right to speak out. The excuse or pretense is an Act of Congress and an agency's regulations promulgated under it in the teeth of the First Amendment: 'Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .' Losing one's job with the Federal Government because of one's discussion of an issue in the public domain is certainly an abridgment of speech." Id. at 204-06 (Douglas, J., dissenting) (footnotes omitted).
or controversial organization unless it could show that the teacher specifically intended to pursue the organization's illegal aims and activities.\(^{36}\)

One of the most interesting and controversial recent offspring of *Keyishian* was *Cook v. Hudson*.\(^{37}\) In this case, three public school teachers were not rehired because they sent their children to a racially discriminatory private school. The district court upheld the school board saying that the board had acted within its discretion in implementing a desegregation order.\(^{38}\) The board argued that the teachers would be less effective because their students would feel a sense of inferiority due to the teachers' own actions.\(^{39}\) The district court also accepted the implication that "teachers who send their own children to a segregated school manifest a belief that segregation is desirable in education and a distrust in desegregated schools."\(^{40}\) The court concluded that this was sufficient justification for the decision of the board and that it was "in keeping with the command of the Fourteenth Amendment and the desegregation order . . . to eliminate racial discrimination and remove its pervasive influence from the county's public schools."\(^{41}\)

On appeal, the Fifth Circuit affirmed; the majority in separate opinions essentially held that the action was within the discretion of the school board in deciding how to implement the desegregation order.\(^{42}\) The dissent declared

36. Fischer & Schimmel, supra note 1, at 94. One interesting precursor to *Keyishian* was *Shelton v. Tucker*, 364 U.S. 479 (1960). In this case, the Supreme Court ruled unconstitutional an Arkansas law requiring teachers to file an annual list of organizations to which they belonged or contributed. The Court ruled that the disclosure requirement, with its "unlimited and indiscriminate sweep," went "far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers" and impermissibly inhibited the teachers' right of free association. Id. at 490. See generally Fischer & Schimmel, supra note 1, at 74-95; Rubin, supra note 1, at 86-94. See also Douglas, *The Right of Association*, 63 Colum. L. Rev. 1361 (1963).

37. 511 F.2d 744 (5th Cir. 1975), aff'g 365 F. Supp. 855 (N.D. Miss. 1973).


40. 365 F. Supp. at 860. Apart from the psychological testimony that the teachers' actions would have an impact on the students, there was no evidence that the plaintiffs were other than competent teachers. See Brief for Appellant at 11, *Cook v. Hudson*, 511 F.2d 744 (5th Cir. 1975). On appeal, Judge Clark, dissenting, declared: "Today's case is cast in the appealing garb of reinforcing public school desegregation by suppressing the right to educate one's child in a segregated private school. . . . Another such victory, bought at the expense of surrendering constitutionally protected rights to the expertise of psychological opinion, and we are undone." *Cook v. Hudson*, 511 F.2d 744, 757 (5th Cir. 1975) (dissenting opinion).

In *McCrary v. Runyon*, 515 F.2d 1082 (4th Cir. 1975), cert. granted, 44 U.S.L.W. 3279 (U.S. Nov. 11, 1975) (No. 75-62), the Fourth Circuit, in outlawing "white academies," ruled that 42 U.S.C. § 1981 (1970) "is violated by the school as long as the basis of exclusion [of students] is racial, for it is then clear that the black applicant is denied a contractual right which would have been granted to him if he had been white." Id. at 1087.

41. 365 F. Supp. at 860.

42. *Cook v. Hudson*, 511 F.2d 744 (5th Cir. 1975).
that the school board could not infringe upon teachers' constitutional right of free association; i.e., their right "as parents to choose the academic environment in which their children will be educated,"\textsuperscript{43} unless the board could prove that such activities "substantially and materially" interfered with the operation of the schools.\textsuperscript{44} Five judges joined in dissenting from a denial of a petition for a rehearing en banc, saying that the teachers' "rights [were] trampled by the school district's arbitrary edict of forced conformity in a citizen's private life."\textsuperscript{45}

In accord with the dissenting view in Cook is the 1967 opinion of the Fourth Circuit in Johnson v. Branch.\textsuperscript{46} In Johnson, the court reversed a decision upholding the dismissal of a high school English teacher because of her civil rights activities. The plaintiff had participated in a demonstration at a local restaurant, in a voter registration drive, and in a federal voting suit. The court would not allow the school board to infringe upon the teacher's freedom to associate or to voice her ideas and opinions, declaring that it was self-evident that the objections held either by the Board or the Principal to the plaintiff's exercise of her personal and associational liberty to express her feelings about segregation would not justify refusal to renew her contract so long as these activities did not interfere with her performance of her school work.\textsuperscript{47}

Thus, the holding in Keyishian, that a teacher's associational activities must, in effect, be criminal to provide a constitutional basis for dismissal, has been weakened by the decision in Cook v. Hudson. The holding in the older Johnson case and the dissent in Cook\textsuperscript{48} would have apparently allowed the dismissal if the school board could show a "material and substantial" interference with the operation of the school.\textsuperscript{49} However, the majority in Cook did

\textsuperscript{43} Id. at 750 (dissenting opinion); Green v. Connally, 330 F. Supp. 1150 (D.D.C.), aff'd sub nom. Colt v. Green, 404 U.S. 997 (1971) (freedom of association supports the right to educate child in the school of parent's choice).

\textsuperscript{44} 511 F.2d at 757 (dissenting opinion). But cf. Berry v. Macon County Bd. of Educ., 380 F. Supp. 1244 (M.D. Ala. 1971). In Berry, the court ordered reinstatement of a bus driver and a mechanic who were not rehired by the school board after sending their children to racially discriminatory schools. The court declared that: "[T]he action of [plaintiffs] in sending their children to a private school . . . was conduct which [they] were entitled to engage in under the United States Constitution. That freedom is infringed upon when a school board attaches onerous conditions to employment." Id. at 1247. It is arguable whether Berry would have been decided as it was had Cook v. Hudson preceded it. At the same time, the different societal requirements for teachers and for bus drivers and mechanics might be sufficient to account for the contrary results, notwithstanding the broad language of the court in Berry.

\textsuperscript{45} Cook v. Hudson, 515 F.2d 762 (5th Cir. 1975).

\textsuperscript{46} 364 F.2d 177 (4th Cir. 1966), cert. denied, 385 U.S. 1003 (1967).

\textsuperscript{47} Id. at 182.

\textsuperscript{48} See Cook v. Hudson, 511 F.2d at 757 (Clark, J., dissenting). "The failure of the evidence to demonstrate that their protected activity would substantially and materially interfere with the discharge of their teaching duties and responsibilities should have brought the balance down on the teachers' side." Id.

\textsuperscript{49} In a more recent case involving a type of extracurricular activity similar to that guaranteed in Johnson, the Eighth Circuit in Evans v. Page, 516 F.2d 18 (8th Cir. 1975), upheld
not require such a showing. In the special context of school districts under a desegregation order, it held it to be within the discretion of the school board to limit a teacher's freedom of association. The approach taken by the court in Johnson seems more reasonable under the circumstances. If a teacher's associations do not impair his effectiveness nor interfere with school operations, the community should not be able to dictate his exercise of constitutionally guaranteed rights. If, on the other hand, his associations are more than just an embarrassment, and impair performance in some way, the school board would be justified in ordering dismissal. Such a decision, however, ought to be dictated by specific circumstances, and not by general rules and regulations.

IV. FREEDOM OF SPEECH OUTSIDE THE CLASSROOM

The Pickering decision could have been the final word on freedom of speech for teachers outside the classroom. Unfortunately, as a result of its qualifications, it actually opened the way to more tests of teachers' rights than it settled. Pickering is virtually self-distinguishing, protecting only teacher comments on matters of public interest which will not cause disharmony among co-workers nor undermine the effectiveness of the working relationship with a superior.

Recent decisions in the Ninth, Third, and Tenth Circuits illustrate how the courts have used Pickering both to limit and expand the rights of teachers. In Gray v. Union County Intermediate Education District, the Ninth Circuit upheld the decision of a school board which had refused to renew plaintiff's contract as a special education teacher because she had advised a pregnant student of her "right" to a therapeutic abortion. The student was mentally retarded and had been made a ward of the state welfare department, which had decided an abortion was not in her best interests, but the teacher a school board action in not renewing plaintiff's contract as a teacher's aide because she had served as an election official during a school board election contrary to the wishes of the school superintendent. The court said "The right allegedly infringed in this case, i.e., the right to serve as an official in a school board election, is neither a constitutional right nor a basic personal right secured under federal law." Id. at 21. Rather, the court said it was a privilege arising under state law and thus, not a question for the federal courts. Id.
DWINDLING RIGHTS OF TEACHERS

persistence in engaging in a "heated discussion" with the psychiatrist who had examined the girl, expressing her opposition to the caseworker, telephoning the judge overseeing the girl's custody, and speaking to the pregnant girl and her relatives contrary to welfare department instructions. The court concluded that Mrs. Gray's activities were not protected free speech.\textsuperscript{55} Also, since the welfare department needed to maintain a close working relationship with the school board, the court placed Gray into one of the loopholes of Pickering. It reasoned that Mrs. Gray's actions, which had strained relations between the school board and the welfare department, raised issues concerning discipline by an immediate superior and harmony among co-workers.\textsuperscript{56}

In Roseman v. Indiana University of Pennsylvania,\textsuperscript{57} the Third Circuit affirmed the non-renewal of a non-tenured professor who, during a faculty meeting, accused the acting chairman of her department of wrongfully suppressing another professor's application for the chairmanship.\textsuperscript{58} The court distinguished Pickering on the grounds that Roseman's comments were not made in an open forum and did not concern an issue of public interest, and also that the comments called into question the integrity of her immediate superior.\textsuperscript{59} The latter ground was explicitly left open in Pickering.\textsuperscript{60} The court concluded that the plaintiff's actions were, therefore, outside the protection of the first amendment.\textsuperscript{61}

Not all speech-related activities which displease superiors will justify a dismissal. In Rampey v. Allen,\textsuperscript{62} eleven professors and three administrative
employees of Oklahoma College of Liberal Arts were discharged.\(^{63}\) The college president testified that he dismissed the plaintiffs because they were “divisive” and unwilling to talk informally with him, and notably, “because they had a tendency to talk among themselves and with the students.”\(^{64}\) In disallowing the school’s action, the Tenth Circuit emphasized that it was the “personal and subjective” views of the college president that had led to the dismissals, and that the plaintiffs had a “right to be free from this kind of personality control.”\(^{65}\) The reversal was also based in part on the fact that the college did not show that the plaintiffs’ activities were “excessive or unduly burdensome to the school.”\(^{66}\)

In another Tenth Circuit decision, *Bertot v. School District No. 1,*\(^{67}\) involving the non-renewal of the contracts of two school teachers, one of the plaintiffs alleged that her contract was not renewed because she spoke on the students’ side of a dress code dispute on a local radio show.\(^{68}\) But the board members testified that her appearance on the radio show did not influence their judgment; rather the decision was based on their knowledge of “discipline problems and antagonism of students.”\(^{69}\) The court upheld the jury verdict for the school board in this instance because the teacher had not sustained the burden of proof.\(^{70}\)

The other teacher involved in the case was not rehired because she encouraged the publication of an underground newspaper by her English honors class.\(^{71}\) The court held that her assistance and association with the publication of the newspaper was a protected activity under the first amendment.\(^{72}\) The justification offered, “that such publications tend to ‘degenerate,’” was found to be “inadequate, being no more than an undifferentiated fear, which cannot serve to infringe free speech rights.”\(^{73}\)

The recent decisions concerning teachers’ speech outside the classroom have interpreted the balancing test of *Pickering* to require the school authorities to show some substantial interference with the operation of the school before the speech activities will lose their constitutional protection. However, the extent

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63. Id. at 1092. The plaintiffs had criticized the president of the college and some members of the Board of Regents at a press conference, but this was found not to be the basis for their dismissals. Id. at 1091-92.

64. Id. at 1092.

65. Id. at 1098. See 1975 Utah L. Rev. 234.

66. 501 F.2d at 1098. See note 48 supra and accompanying text.

67. 522 F.2d 1171 (10th Cir. 1975).

68. Id. at 1178-79. The principal’s written comments to the school board stated that “[a]t that point, such public involvement by a school person [in the dress code controversy] could quite possibly have hampered the progress being made by the student councils and by the Board.” Id. at 1178.

69. Id. at 1179.

70. Id.

71. Id. at 1180, 1181-83.

72. Id. at 1184.

73. Id. at 1183. Applying the balancing test advocated by Pickering, the court resolved the case in favor of the plaintiff because there was no showing that her actions impeded the “performance of her classroom duties or interfered with the regular operation of the school . . . .”
to which the courts will examine the validity of the school board's claim of interference has varied.

The Third Circuit seemed content to interpret *Pickering* narrowly holding that if the nature of the communications could be distinguished from the communications at issue in *Pickering*, they would not gain the protection of the first amendment.\(^\text{74}\) At the same time, the court did mention that the attack on the integrity of the acting department chairman would have a disruptive effect on harmonious relations within the school,\(^\text{75}\) and that such an attack would fall outside *Pickering*'s protection.

The Ninth Circuit gave weight to the notion that the comments in issue raised a question of discipline by an immediate superior, again narrowly interpreting *Pickering* to place such comments outside its protection. The court was also concerned with the effect of her comments—in this case, resulting in a pregnant student's removal from school before the completion of the school term.\(^\text{76}\)

On the other hand, the Tenth Circuit in *Bertot*, in interpreting *Pickering* more broadly, was primarily concerned with the actual effect of the teacher's activities. Since the school authorities had not shown that the publication of the newspaper had any actual impact on the operation of the school, the court would not allow the dismissal simply on the basis that the teacher's activity displeased her superiors.

It would seem that all three decisions can be reconciled on the basis of a strict interpretation of *Pickering*. Where a teacher's comments have clearly disrupted the harmony of the school and made its effective operation impossible, or clearly created problems of discipline with a superior, no court would argue that *Pickering* would afford protection. But *Pickering*'s protection should encompass all speech that is not exposed by these exceptions. Thus, speech which is controversial but has no serious repercussions, and which therefore does not impair the effectiveness of the teacher should not be restricted, and the teacher in this situation should not be penalized. By limiting the application of the *Pickering* exceptions to those situations that clearly meet their requirements, the basic holding of that case will be effectuated and teachers will be protected in their exercise of rights guaranteed to them.

V. FREEDOM OF SPEECH IN THE CLASSROOM

The Supreme Court has yet to decide a case involving a teacher's dismissal as a result of the use of offensive language in the classroom.\(^\text{77}\) The leading

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74. Roseman v. Indiana Univ. of Pennsylvania, 520 F.2d 1364, 1369 (3d Cir. 1975).
75. Id. at 1368. The court also noted that, "[t]he trade-off between vigorous intradepartmental debate and the harmonious atmosphere essential to academic pursuits is a matter of departmental, not constitutional, concern." Id. at 1369 n.13.
76. Gray v. Union County Intermediate Educ. Dist., 520 F.2d 805, 807 (9th Cir. 1975).
77. On a teacher's freedom of speech inside the classroom, see generally Fischer & Schimmel, supra note 1, at 29-44; Rubin, supra note 1, at 24-47; Miller, Teachers' Freedom of Expression Within the Classroom: A Search for Standards, 8 Ga. L. Rev. 837 (1974); 86 Harv. L. Rev. 1341 (1973) (the right to engage in mild political expression). See also Sweezy v. New Hampshire, 354
decisions in the area, therefore, have come from the various courts of appeals, and in particular from the First Circuit.

In *Keefe v. Geanakos*, the court held that a tenured high school teacher could not be dismissed for assigning to his senior English class a controversial article in *Atlantic Monthly*. The court recognized that some public regulation of classroom speech is inherent in any provision of public education, and that what is appropriate for students is not to be judged by adult obscenity standards. However, the court said the dismissal was improper because the "chilling effect" it would have on teachers' freedom of speech would demean "any proper concept of education," especially since, in the court's opinion, the article had educational value.

The First Circuit, in *Mailloux v. Kiley*, elaborated on the factors it would consider in deciding whether a teacher's use of offensive language would be grounds for dismissal. There, the court declared that the issue was best left to a case-by-case inquiry considering "the age and sophistication of the students, the closeness of the relation between the specific technique used and some concededly valid educational objective, and the context and manner of presentation."

In a recent case, *Brubaker v. Board of Education*, the Seventh Circuit was faced with material far more controversial than that involved in *Keefe*. There, three non-tenured elementary school teachers were discharged for distributing to their eighth grade classes a brochure from the movie "Woodstock." The school board found that the material was obscene, suggestive and that it promoted a viewpoint "contrary to the requirements of the laws of the State in regard to teaching about the harmful effects of alcoholic drinks and narcotics . . . ." The court affirmed the dismissals, saying that no expert testimony was required to show the materials were obscene and that "these teachers should have known better than to hand to . . . ."


78. 418 F.2d 359 (1st Cir. 1969).
79. Id. at 361.
80. Id. at 362.
81. Id. The court found the article was "in no sense pornographic" but was "scholarly, thoughtful and thought-provoking." Id. at 361.
82. 448 F.2d 1242 (1st Cir. 1971) (per curiam).
83. Id. at 1243.
84. 502 F.2d 973 (7th Cir. 1974), cert. denied, 421 U.S. 965 (1975).
85. Id. at 975. Clara Brubaker was a French teacher who placed the brochures in the teacher's lounge and displayed a poster from the brochure in her classroom but did not give the brochure to students. Ronald Stewart, a language arts teacher, and John Brubaker, an industrial arts teacher, both made the brochure available to their students, but not as part of any course work. Id. at 976, 979.
86. Id. at 976.
their young students something that invited the use of . . . drugs." It indicated further that it did not intend "to give carte blanche in the name of academic freedom to conduct which can reasonably be deemed both offensive and unnecessary to the accomplishment of educational objectives." Relying on the guidelines proposed in Mailloux the court concluded that the school board's action was not arbitrary or capricious, and did not invade the teacher's constitutional rights.

Since the language in the material in Brubaker was not very different from that allowed in Keefe, the differentiating factors seem to have been the age of the students and the relevancy of the material to the curriculum.

A recent district court case in the Fifth Circuit may have added another criterion to those previously enumerated. In Parducci v. Rutland, a high school teacher in Montgomery, Alabama was dismissed for assigning to her eleventh grade English class "Welcome to the Monkey House," a short story by Kurt Vonnegut, Jr., which contained several vulgar terms and a reference to an act of rape. The court placed the burden of proof on the school district:

Since the defendants have failed to show either that the assignment was inappropriate reading for high school juniors, or that it created a significant disruption to the educational processes of this school, this Court concludes that plaintiff's dismissal constituted an unwarranted invasion of her First Amendment right to academic freedom.

Thus, in addition to the educational objective, the manner of presentation, and the age of the students, the effect might, if sufficiently disruptive, be grounds for dismissal.

As in other areas previously examined, courts use a balancing test to reach their result when teachers choose to employ controversial material or language in teaching. In the area of classroom speech, the burden in such a test is placed on the school authorities to demonstrate that the teacher's method "(1) . . . is not relevant to the subject being taught, (2) . . . is not appropriate to the age

87. Id. at 984.
88. Id. at 984-85 (emphasis deleted), quoting Mailloux v. Kiley, 436 F.2d 565, 566 (1st Cir. 1971). See notes 82-83 supra and accompanying text.
89. 502 F.2d at 983.
90. None of the teachers in Brubaker claimed that the brochure involved was relevant to the curriculum. Id. at 979. The dissent, however, argued that the brochure did have some relevancy, as one class had been studying rock music and the other class had been studying the construction of musical instruments. Id. at 991 (Fairchild, J., dissenting). The language and literature involved in Keefe was more clearly relevant to the curriculum, as the plaintiff was an English teacher. 418 F.2d at 360.
92. Id. at 353, 355.
and maturity of the students, or (3) . . . disrupts school discipline. . . .

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the actions will lose the protection of the first amendment. As with the exercise of freedom of association and speech outside the classroom, a wider range of state interests has been raised to balance the teacher's exercise of his freedom to teach. In most of the cases examined, the teacher's activities and discretion have been allowed as reasonable and relevant pedagogic tools, appropriate for the students he is teaching. In the one case where the dismissals were affirmed, the material distributed lacked any relevancy to the subjects being taught, betrayed a disturbing lack of judgment by the teachers, and created a furor in the school system. Under the circumstances, their dismissals were understandable and fit within the guidelines laid down by *Mailloux* and *Parducci*. The teacher's freedom of speech within the classroom, however, rests on much more delicate bases than the freedoms previously examined. The effect of its abuse can be far more dangerous to those most vulnerable—the students. At the same time, the teachers must be allowed the freedom to teach effectively. The guidelines adopted in *Mailloux* and *Parducci* represent reasonable solutions to this most difficult of problems. So long as they are discretely applied to those situations that clearly represent abuses of discretion, the system will continue to function effectively and the students will be well served.

VI. THE RIGHT TO PRIVACY

At one time, a teacher's conduct outside the classroom was more important to his employer than his conduct within the classroom. "For example, until World War I, [d]ancing, card playing, smoking, drinking, theatre-going, and Sabbath-breaking were still regarded by multitudes as sinful. . . . The teacher was expected in all these matters to be exemplary.'" 95 In recent years, however, the courts have considerably circumscribed "immoral conduct" dismissals.

A. Homosexuals

The federal courts have yet to decide whether homosexuality per se is a valid basis for teacher dismissal. Several recent cases, faced with the problem of homosexual teachers, have reacted in a variety of ways.

In *Acanfora v. Board of Education*, 96 a non-tenured homosexual teacher challenged a school board which transferred him to a non-teaching position shortly after he appeared with his parents on a television program which was designed to help parents and homosexual children cope with the problems confronting them. 97 The district court found that Acanfora's public activities

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94. Fischer & Schimmel, supra note 1, at 43.
97. 491 F.2d at 500. Acanfora stressed on the broadcast that he would not discuss his sexuality with his students. Id.
were outside the protection of the first amendment and denied relief. The Fourth Circuit held that the plaintiffs public comments were protected by the first amendment, but denied relief for lack of standing.

In Burton v. Cascade School District Union High School, a non-tenured female teacher was dismissed because she was a "practicing homosexual." The court held that the firing was wrongful because the Oregon statute which provided for dismissals for "immorality" was unconstitutionally vague. As in Acanfora, the issue of the teacher's right to be a homosexual was not addressed.

One commentator who has considered the unanswered question has suggested that a familiar test should be employed:

Courts are demonstrating a reluctance to enforce or bar conduct solely on the basis of conventional wisdom, historical precedent, or "expert" opinion. Rather, they are requiring that there be a connection between the conduct in question and actual teaching performance.

Applying this test to the situation at hand, it would be necessary to show that the teacher's homosexuality affects his teaching performance before it would be possible to remove him from his position. Such an approach elevates

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99. 491 F.2d at 502-04. Acanfora had belonged to the Homophiles of Penn State while attending that university, and had intentionally omitted this affiliation from his application, which asked for information about all the organizations to which he had belonged. Since he had "purposely misled" school officials in order to be hired, the court refused to allow the plaintiff to invoke its assistance. Id. at 501, 504. The court based its decision on Dennis v. United States, 384 U.S. 855 (1966). In Dennis, the Supreme Court held that a petitioner cannot challenge the constitutional validity of a statute he deliberately attempts to circumvent. Id. at 866. However, Dennis dealt with a criminal prosecution, while Acanfora was a civil suit. For a well reasoned criticism of Acanfora on this basis, see 48 Temp. L.Q. 384, 393-96 (1975).
100. 512 F.2d 850 (9th Cir. 1975), cert. denied, 96 S. Ct. 69 (1975).
101. Id. at 851.
102. Id. at 853.
103. Although the court found the dismissal to be "wrongful" it refused to order the plaintiff reinstated. Id. at 854. See notes 210-15 infra and accompanying text.
104. La Morte, Legal Rights and Responsibilities of Homosexuals in Public Education, 4 J. Law & Educ. 449, 466-67 (1975). See also Moskowitz & Casagrande, Teachers and the First Amendment: Academic Freedom and Exhaustion of Administrative Remedies under 42 U.S.C. Section 1983, 39 Albany L. Rev. 661 (1975). "In dealing with the problem of homosexual teachers, the courts are faced with two basic questions. First, is homosexuality a legally protectable interest? Second, if it is, upon what objective standard can a homosexual teacher's employment be denied or terminated?... [C]ourts seem unwilling to deny a homosexual teacher employment solely on that basis, yet, they are also unwilling to employ a rational relation test to weigh the effect of homosexuality on the particular school situation. To be consistent with the standards utilized in such cases as James, Russo, Pickering, and Tinker, a rational relation test should be employed by the courts to assess whether any measurable harm is occurring to a school because of the employment of a homosexual teacher. If no harm is found, any termination for homosexuality should be held invalid." Id. at 694 (italics omitted).
reason over passion, to whatever extent possible on an issue over which so many have become passionate. To allow a teacher to be removed for his status as a homosexual would be both unreasonable and unwarranted. However, the school authorities, in their regulation of classroom speech, could prohibit advocacy of homosexuality just as they have been permitted to prohibit obscene speech. Homosexual advances toward students would undoubtedly be per se basis for dismissal, just as heterosexual activity between teachers and their students has proven to be.

B. Heterosexuals

In cases involving private heterosexual conduct the courts have distinguished between teacher liaisons with students and those involving non-students. Where school officials have questioned the morality of teachers' conduct with non-students, the courts have been reluctant to permit any sanctions. In *Andrews v. Drew Municipal Separate School District*, 106 a case dealing with non-tenured teacher aides, the Fifth Circuit ruled unconstitutional the policy of a school district which forbade the employment of parents of illegitimate children. 107 The court said that the schools have the right to create a "properly moral scholastic environment" but that they must do so in a manner consistent with the equal protection clause. 108 The school board advanced three justifications for its policy. First, it argued that unwed parenthood is prima facie proof of present immorality. The court rejected this reasoning, declaring that any equation of illegitimate birth with irredeemable moral disease [was] not only patently absurd, it is mischievous and prejudicial, requiring those who administer the policy to "investigate" the parental status of school employees and prospective applicants. Where no stigma may have existed before, such inquisitions by overzealous officiandom can rapidly create it. 109

The board next argued that students might seek to emulate the life styles of the teacher-aides who were unwed mothers. This argument was also dismissed as "improbable" and "speculative," 110 as was the board's third rationale "that the presence of unwed parents in a scholastic environment

107. Id. at 617.
108. Id. at 614.
109. Id. at 615, quoting from the district court opinion, 371 F. Supp. 27, 34 (N.D. Miss. 1973) (footnote omitted). Indeed, if the investigation by the school officials contributes to the notoriety of a given indiscretion by a school teacher, the board may be estopped from asserting the impairment of public confidence as a ground for dismissal. See, e.g., *Jerry v. Board of Educ.*, 35 N.Y.2d 534, 324 N.E.2d 106, 364 N.Y.S.2d 440, 446 (1974); notes 122-24 infra and accompanying text.
110. 507 F.2d at 616-17.
materially contributes to school-girl pregnancies . . ."\textsuperscript{111} The court seemingly was following a policy recently articulated by an Illinois court, that "immorality" would be sufficient to justify dismissal only where consequent harm to either pupils, faculty or the school itself could be shown.\textsuperscript{112}

Not all jurisdictions take such a permissive approach. In \textit{Sullivan v. Meade County Independent School District},\textsuperscript{113} a non-tenured elementary school teacher in a rural school district was discharged because she was living with her boyfriend. The school board justified the dismissal by showing the plaintiff's conduct failed to meet community standards of morality. It reasoned that continuance of the conduct set a bad example for her "impressionable" pupils.\textsuperscript{114} The court felt that these fears were reasonably based, and that they represented the sentiment of the community at large. The court concluded that community antagonism toward the plaintiff would make it difficult for her to be effective in the classroom and that dismissal was therefore justified.\textsuperscript{115} The \textit{Sullivan} decision can be reconciled with \textit{Andrews.} In \textit{Andrews}, broad sensibilities may have been affected, but nothing more substantial could be found to justify dismissals. In \textit{Sullivan}, however, the court concluded that the plaintiff could not function effectively in the community since her conduct had engendered antagonism.

Two critical factors relied on in \textit{Sullivan} are more clearly highlighted in cases involving sexual activity between teachers and their students.

Though the teacher's sex life with outsiders, unless "notorious," ordinarily may be a private affair, courts have invariably frowned on sexual liaisons between teachers and their students. In \textit{Board of Trustees v. Stubblefield},\textsuperscript{116} a junior college teacher was discharged after he was discovered by a sheriff's deputy apparently engaging in a sexual act with a student in his car parked on a dark street.\textsuperscript{117} The court held that either a potential for misconduct with students or notoriety which would impair school relationships would be a sufficient basis to discharge a teacher.\textsuperscript{118}

\textsuperscript{111} Id. at 617.

\textsuperscript{112} Reinhardt v. Board of Educ., 19 Ill. App. 3d 481, 485, 311 N.E.2d 710, 713 (1974). The court in Reinhardt also adopted the language from Jarvella v. Willoughby-Eastlake City School Dist. Bd. of Educ., 12 Ohio Misc. 288, 292, 233 N.E.2d 143, 146 (Ct. C.P. 1967): "The private conduct of a man, who is also a teacher, is a proper concern to those who employ him only to the extent it mars him as a teacher . . . Where his professional achievement is unaffected, where the school community is placed in no jeopardy, his private acts are his own business and may not be the basis of discipline." Id. at 485-86, 311 N.E.2d at 713.


\textsuperscript{114} Id. at 1247.

\textsuperscript{115} Id. Factors which went into the decision included: Miss Sullivan taught the first four grades at a two-teacher elementary school; the trailer she and her boyfriend lived in was one-eighth of a mile from the school; the trailer was provided by the school board; at a hearing before the board, a petition with approximately 140 signatures was presented showing strong community reaction. Id. at 1240-43, 1247.

\textsuperscript{116} 16 Cal. App. 2d 820, 94 Cal. Rptr. 318 (2d Dist. 1971).

\textsuperscript{117} Id. at 823, 94 Cal. Rptr. at 320. The court noted that the teacher also assaulted the sheriff's deputy and tried to escape. Id.

\textsuperscript{118} The facts demonstrated more than a potential for misconduct with students. Although
The court recognized that the role of a teacher encompassed certain restrictions not imposed on other persons:

There are certain professions which impose upon persons attracted to them, responsibilities and limitations on freedom of action which do not exist in regard to other callings. Public officials such as judges, policemen and schoolteachers fall into such a category.

As a result, the court held that the teacher's conduct had threatened the integrity of the educational system, and that such a threat clearly justified his dismissal.

The Stubblefield decision points out one factor that was underscored in Sullivan—that community attitudes may place restrictions on teachers' privacy where sexual conduct is involved. Here, more than in speech or association controversies, the threat, as seen by the community, is allowed to dictate the result, without significant challenge by the teacher. While such an approach is understandable, it is not clear that it is justified lacking the development of reasonable standards. A recent New York decision, Jerry v. Board of Education, illustrates one attempt to develop such standards. In Jerry, a male tenured high school guidance counselor was dismissed for having spent an August night with an alumna of the June graduating class. The court rejected the contention that constitutional protection of the teacher's right of privacy precluded the use of this information as a basis for disciplinary proceedings. It declared that other interests had to be protected, and that, in this instance, those of the school were paramount:

In our view what might otherwise be considered private conduct beyond the scope of licit concern of school officials ceases to be such in at least either of two circumstances—if the conduct directly affects the performance of the professional responsibilities of the teacher, or if, without contribution on the part of school officials, the conduct has become the subject of such public notoriety as significantly and reasonably to impair the capability of the particular teacher to discharge the responsibilities of his position.

The court further stated that the five weeks between graduation and the incident in question was sufficiently brief as to raise an inference of misconduct during the school year, thus affecting "the performance of [professional] responsibilities."

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119. See notes 16-19 supra and accompanying text.
120. 16 Cal. App. 3d at 824-25, 94 Cal. Rptr. at 321.
121. Id. at 826-27, 94 Cal. Rptr. at 323.
123. Id. at 543-44, 324 N.E.2d at 111, 364 N.Y.S.2d at 446 (emphasis added).
124. Id. at 544, 324 N.E.2d at 111, 364 N.Y.S.2d at 446. It is apparently possible to waive the right to privacy by conduct which is sufficiently public. In Wishart v. McDonald, 500 F.2d 1110 (1st Cir. 1974), affg 367 F. Supp. 530 (D. Mass. 1973) plaintiff, a tenured junior high school teacher, was dismissed for "displaying and carrying on" on his property, in a lewd and suggestive manner with a camera tripod, to which he had strapped a pillow and then clothed it with his...
Thus, the teacher's private sexual activity will be deemed to have an adverse effect on the discharge of his duties, and will serve as a basis for dismissal in either of two circumstances: (1) if the school board can show either potential or actual misconduct with students or (2) if the school authorities can show that the teacher's sexual activity with non-students is so notorious (though not as a result of school board investigation) that it would impair the integrity of the school in the eyes of the community. The burden of proof on the board is less, however, than when freedom of speech is involved. In that area, a "material and substantial" interference has to be established. Where sexual conduct is involved, community resentment, if sufficiently vocal, will suffice.

In the areas of permissible sexual conduct, the courts seem to be gravitating toward allowing the community standards of morality to control, similar to the modified community standard the Supreme Court has applied in obscenity cases. Whether a teacher's conduct will be protected will depend, therefore, not only on the conduct itself, but also on the moral standards of the community in which he chooses to work. To the extent that such a result reflects a determination that the teacher's effectiveness has been significantly impaired, dismissal represents a reasonable approach by the school board. Where such is not the case, however, and there has been no showing of misconduct with students or inability to function effectively, the attitudes of the community alone should not be allowed to dictate the private conduct of teachers. Here, as elsewhere, a balancing test should be employed, and only where the community can show a greater interest than the teacher's corresponding interest in his privacy should sanctions be allowed.

VII. Equal Protection of the Laws

Discrimination in employment based upon sex or race is unlawful under Title VII of the 1964 Civil Rights Act. However, until recently, the special interest of the state in efficiently administering its educational system was held to be a paramount consideration in determining whether a teacher's private sexual conduct was protected. In Fischer v. Board of Educ., 450 F.2d 535 (7th Cir. 1971), the court held that a teacher's private sexual conduct was protected from governmental intrusion, the evidence in this case being that on various occasions the conduct was public in nature or at least was carried on with such reckless disregard of whether or not he was observed that it lost whatever private character it might have had. 367 F. Supp. at 535. Recognizing that teachers should be examples for their students, the court said: "We have no doubt that the conduct would seem sufficiently bizarre and threatening so that, in the minds of many, it would destroy his ability to serve as a role-model for young children." 500 F.2d at 1115.

125. See Fischer & Schimmel, supra note 1, at 60.


127. Section 2000e-2(a), provides "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin. . . ." 42 U.S.C. § 2000e-2(a) (Supp. II 1972), amending 42 U.S.C. § 2000e-2(a) (1970).
to justify mandatory pregnancy leave regulations\(^{128}\) and "anti-nepotism" rules which forbid employment of husband and wife teachers.\(^{129}\) In addition, there has been recent litigation concerning the extent to which teachers contribute to and are affected by desegregation.\(^{130}\)

Where sex discrimination is involved, the courts have required that school boards demonstrate a legitimate purpose for policies that affect one sex differently than the other.\(^{131}\)

One notable group of cases in this area involved arbitrary pregnancy regulations. In *Cleveland Board of Education v. LaFleur*,\(^ {132}\) the Supreme Court declared unconstitutional a school board rule which required that pregnant teachers take leave at the beginning of the fifth month of pregnancy. The Court recognized that the state had a legitimate interest in preserving the continuity of education,\(^ {133}\) but the arbitrary cutoff date was not rationally related to this purpose. The Court concluded that such a "sweeping mandatory" regulation was justified neither by a state interest in "keeping physically unfit teachers out of the classroom" nor by the interest in continuity.\(^ {134}\)

An example of a statute that met constitutional requirements can be found in *Geduldig v. Aiello*.\(^ {135}\) In this case, a California statute providing for payment of disability benefits excluded disability resulting from normal pregnancy. In holding that the statute did not violate the equal protection clause the Court declared:

Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition."\(^ {136}\)

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128. See notes 132-42 infra and accompanying text.
129. See notes 143-49 infra and accompanying text.
130. See notes 150-65 infra and accompanying text.
131. See, e.g., *Weise v. Syracuse Univ.*, 522 F.2d 397 (2d Cir. 1975). In *Weise*, two female instructors claimed they were turned down for appointment in favor of less qualified males. The Second Circuit did not decide the merits of the case, but remanded directing that the issue of state action be judged by the "less onerous" standard heretofore reserved for cases involving racial discrimination. This may be a step in adding sex to the list of suspect classifications which merit strict judicial scrutiny under the equal protection clause.

But a claim of sex discrimination will not justify the creation of a special position for the claimant. In *Zimdars v. Special School Dist. No. 1, Minn.*, 230 N.W.2d 465 (1975), a longtime mathematics teacher alleged discrimination in the failure of the school board to create an intermediate position which would lead to an administrative role for her. The court rejected the claim, holding that the law only prohibits discriminatory preference. Id. at 446. See *Hutchison v. Lake Oswego School Dist. No. 7*, 519 F.2d 961 (9th Cir. 1975), cert. filed, 44 U.S.L.W. 3239 (U.S. Oct. 10, 1975) (No. 75-568), where a denial of sick leave pay during pregnancy leave was held not to violate the equal protection clause.
Thus, pregnancy leave policies that are shown to be rationally related to a legitimate state interest will be allowed, while those policies that are shown to be pretexts for sex discrimination will be barred. Two recent cases illustrate this distinction.

In *Paxman v. Wilkerson*, a school board rule required that a teacher who becomes pregnant prior to the beginning of a new term must notify the superintendent and obtain a release from her contract. The board argued that this policy was distinguishable from that invalidated in *LaFleur*. The district court, however, called the argument "a distinction without a difference," since the policy erroneously presumed unfitness at the beginning of the school year, regardless of the stage of pregnancy.

In *Leechburg Area School District v. Commonwealth Human Relations Commission*, the school board attempted to deny maternity leave to unmarried female teachers. The Pennsylvania court found the regulation to be discriminatory on the basis of sex, suggesting that if the purpose of the rule were to prohibit immoral conduct it would have to apply equally to male teachers who had participated in extra-marital sex.

Pregnancy has not been the only area to give rise to examinations of discrimination on the basis of sex. Discrimination has also been questioned in two recent cases involving "anti-nepotism" rules which preclude simultaneous employment of a husband and wife by the same educational body. In *Sanbonmatsu v. Boyer*, a New York appellate court struck down an anti-nepotism rule which prohibited the spouse of a faculty member from being appointed to a permanent position. The court found that the rule was unnecessary, discriminatory, and without a valid purpose. In twenty-seven applications of the rule at this particular university it was always the husband who received the permanent appointment, while the wife received only temporary employment. Thus it was apparent that the rule had been unfairly applied and that female teachers had been the victims.

In *Keckeisen v. Independent School District 612*, however, the court upheld that portion of a school district policy forbidding the employment of a husband and wife in an administrator-teacher relationship. Plaintiff, a high
school principal, sought an injunction alleging that the rule infringed his right to marry.148 The court upheld the policy, concluding that the rule was designed to prevent favoritism and conflicts of interest, avoidance of which was a valid concern of the school board.149

The courts have thus looked closely at actions by the state that may have the effect of sex discrimination. They will examine the purpose and application of pregnancy leave and anti-nepotism policies to be sure that these further a legitimate interest of the school authorities and are not merely pretexts for sex discrimination.

In addition to close consideration of regulations based on sex, the recent decisions have shown that a school board's hiring, assignment, and dismissal of teachers will be carefully considered in determining whether racial discrimination exists and will be affected by implementation of desegregation orders.150

In Morgan v. Kerrigan,151 the First Circuit affirmed a finding of racial discrimination in the Boston public school system. The court said the use of a ranking system based on scores on the National Teacher Examination for hiring purposes had the effect of discriminating against blacks and that these scores were not substantially related to job performance: "high test scores do not indicate ability to teach."152 It also found that the board's "segregative assignment and transfer policies" had the effect of isolating "black students, black teachers and black administrators in a limited number of schools, thereby denying to those students the equal educational opportunity to which they are constitutionally entitled."153 In a later action against implementation relationship, is not challenged on this appeal and is not affected by our holding in this case." Id. at 1065, n.2.


149. "We have no doubt that in many cases where husbands and wives are employed in supervisor-supervisee capacities, the married couple makes an exemplary effort to maintain fairness, but we cannot say that a policy based on the assumption that married couples are susceptible to the natural prejudices of their relationships is irrational, arbitrary or capricious." 509 F.2d at 1066.

150. Apart from desegregation orders, other forms of racial discrimination will not go unredressed. See, e.g., Cross v. Board of Educ., 395 F. Supp. 531 (E.D. Ark. 1975), where the court ordered appointment of a black teacher-coach to the position of head football coach and athletic director. The court said where there has been a history of discriminatory hiring practices, "subjective" criteria could not be used by the school board. The court found the plaintiff was "objectively" more qualified than the white coach who was appointed because, inter alia, the plaintiff had a better "win-loss" record during his coaching career.


152. Id. at 597; accord, United States v. North Carolina, 400 F. Supp. 343 (E.D.N.C. 1975).

153. Id. at 597-98; accord, Oliver v. Michigan State Bd. of Educ., 508 F.2d 178 (6th Cir. 1974), cert. denied, 421 U.S. 963 (1975): "The inevitable result of assigning 80% of the system's Black elementary staff to schools with predominantly Black student bodies was to increase the identifiability of those schools as 'Black.' . . . [T]he disproportionate staff assignment by race clearly supports the District Court's conclusion that school board policies and actions served to create and strengthen the District Court's conclusion that school board policies and actions served to create and strengthen the racial identifiability of certain schools as 'Black' and thereby to further and perpetuate a dual school system in Kalamazoo." Id. at 185.
of the district court's desegregation order, the First Circuit would not evaluate the fairness of giving qualified black teachers priority in hiring.\textsuperscript{154}

Dismissals are also affected by desegregation orders, as these often involve the merger of black and white faculties, as well as students. To eliminate the use of pretexts to justify discriminatory dismissals of teachers, the Fifth Circuit, in \textit{Singleton v. Jackson Municipal Separate School District},\textsuperscript{155} laid down guidelines for faculty dismissals in school districts under a desegregation order. The court required school boards to develop and apply objective, non-racial criteria for dismissal or demotion of staff members.\textsuperscript{156}

In one recent case involving the dismissal of four black teachers, the same circuit had occasion to apply the \textit{Singleton} guidelines. In \textit{United States v. Coffeeville Consolidated School District},\textsuperscript{157} the Fifth Circuit required the \textit{Singleton} standards of objective criteria to be set out in advance of any dismissal proceedings, except in cases of dismissal which would be obviously justifiable under any reasonable standards of teacher performance.\textsuperscript{158} In this case, three black teachers were ordered reinstated and the dismissal of another was remanded for a new trial.

While all three panel judges concurred in finding that the discharge for incompetency of a shop teacher was improper under the requirements of \textit{Singleton},\textsuperscript{159} the court was unanimous in reversing and remanding the reinstatement of plaintiff Miller, who customarily disciplined her twelve-year-old students by having them stand for ten minutes while touching their toes. The court felt the absence of objective criteria would not excuse an act that might "indicate a form of intolerable sadism."\textsuperscript{160} The court divided, but affirmed the reinstatement of plaintiff Chapman, who had used an explicit vulgarity during the course of a classroom discussion on homosexuality.\textsuperscript{161} The court held that this "single instance of bad judgment" was not just cause for dismissal.\textsuperscript{162} Finally, the majority affirmed the reinstatement of plaintiff

\textsuperscript{154} See Morgan v. Kerrigan, 509 F.2d 599 (1st Cir. 1975). This was an action against the district court's remedy, while the earlier case challenged its findings.

\textsuperscript{155} 419 F.2d 1211 (5th Cir. 1969) (per curiam), cert. denied, 396 U.S. 1032 (1970).

\textsuperscript{156} Id. at 1218.

\textsuperscript{157} 513 F.2d 244 (5th Cir. 1975).

\textsuperscript{158} Id. at 248-49. "[T]he hands of a school district are not tied. A school district does not have to put up with incompetency, poor performance, failure to abide by school regulations, lack of cooperation, or the like. All the district has to do is to develop objective, not subjective, criteria, in advance." Id. Accord, Wright v. Houston Ind. School Dist., 393 F. Supp. 1149 (S.D. Tex. 1975). However, the court in Coffeeville noted that "under certain circumstances, Singleton notwithstanding, discharges for just cause may be warranted without reference to any pre-established objective, reasonable standards . . . ." 513 F.2d at 248 (italics deleted), citing Thompson v. Madison County Bd. of Educ., 476 F.2d 676, 678 (5th Cir. 1973).

\textsuperscript{159} 513 F.2d at 249.

\textsuperscript{160} Id. at 249-50. "[A] girl, age twelve, called by Mrs. Miller as her own witness, testified that she had been required to bend over touching her toes for about ten minutes, but that 'it did not make her sick.' " Id. at 249.

\textsuperscript{161} Id. at 250-51.

\textsuperscript{162} Id. at 251. The dissent would have reversed, calling the finding of the district court "clearly erroneous." Id. at 253 (dissenting opinion).
Bennett who was dismissed for taping shut the mouths of students, paddling second grade students, and driving to school in a car bearing the bumper sticker: "IF AT FIRST YOU DON'T SUCCEED, TRY A-GUN." The court held that such conduct was not "repulsive to the minimum standards of decency" and affirmed Bennett's reinstatement.\textsuperscript{163} Judge Coleman, dissenting, said that to suggest violent sentiments to students "is something that a school board and the general public ought not to have to tolerate."\textsuperscript{164}

In deciding whether to issue a desegregation order, the courts will consider the hiring and assignment of teachers. After the order is issued they may require the school board to develop objective non-racial criteria for dismissals of teachers.\textsuperscript{165} Such an approach demonstrates the importance the federal courts have given to the elimination of racial discrimination.

Thus, the recent cases show a continuing judicial protection of the teacher's right to be free from both racial and sexual discrimination. While contrary to the general tendency of the courts of expanding the discretion of school boards, this protection is understandable as an outgrowth of the more explicit commands of the Supreme Court in this area.

VIII. THE RIGHTS OF THE NON-TENURED TEACHER—DUE PROCESS

If a tenured teacher is dismissed from his position he will be entitled under traditional notions of due process to a hearing and to an explanation of the reasons for his loss of employment.\textsuperscript{166} The type of procedure might vary according to state statute\textsuperscript{167} or local contract,\textsuperscript{168} but in no case may the school board eliminate it, since a tenured teacher's interest in his continued employment has been interpreted by the courts to be a property right within the protection of the due process clause of the constitution.\textsuperscript{169}

It is generally agreed that non-tenured teachers, absent some statutory or contractual right, have no such constitutional right to procedural due process, since there is no inherent property right in a non-tenured teaching position.\textsuperscript{170}

\textsuperscript{163} Id. at 251-53.
\textsuperscript{164} Id. at 253 (dissenting opinion).
\textsuperscript{165} See notes 155-64 supra and accompanying text.
\textsuperscript{166} See, e.g., Board of Regents v. Roth, 408 U.S. 564, 577 (1972).
\textsuperscript{167} Not all state statutes address this question.
\textsuperscript{168} Fischer & Schimmel, supra note 1, at 133.
\textsuperscript{170} E.g., Board of Regents v. Roth, 408 U.S. at 569; Jeffries v. Turkey Run Consolidated School Dist., 492 F.2d 1, 3 (7th Cir. 1974). See Fischer & Schimmel, supra note 1, at 134-37. For a general overview of the problems facing non-tenured as well as tenured teachers, see Frakt, Non-Tenure Teachers and the Constitution, 18 Kan. L. Rev. 27, 39-53 (1969); Griffis & Wilson, Constitutional Rights and Remedies in the Non-Renewal of a Public School Teacher's Employment Contract, 25 Baylor L. Rev. 549, 560-78 (1973); Lanzarone, Teacher Tenure—Some Proposals for Change, 42 Fordham L. Rev. 526, 529-37 (1974); O'Brien, Due Process for the Nontenured in Private Schools, 3 J. Law & Educ. 175 (1974); Developments in the Law—
With a few important exceptions, the non-tenured teacher who has just been dismissed not only has no recourse by way of administrative hearing or discovery, but also will find the courtroom door secured against his entry.

Prior to 1972, the general attitude of the courts to the plight of a dismissed non-tenured teacher was that

[the board has the absolute right to decline to employ or re-employ any applicant for any reason whatever or for no reason at all. The board is responsible for its actions only to the people of the city, from whom, through the mayor, the members have received their appointments. It is no infringement upon the constitutional rights of anyone for the board to decline to employ him as a teacher in the schools, and it is immaterial whether the reason for the refusal to employ him is because the applicant is married or unmarried, is of fair complexion or dark, is or is not a member of a trades union, or whether no reason is given for such refusal. The board is not bound to give any reason for its action.]

In 1972, however, the Supreme Court decided two cases involving the rights of the non-tenured teacher, and these decisions have at least put a dent in the invulnerable armor of the school board. In Board of Regents v. Roth, the Court reaffirmed the general rule that non-tenured teachers have no right to a statement of reasons or a hearing. At the same time the Court indicated that, if the non-tenured teachers, through custom or circumstance, had an implied promise of continued employment, that interest would be sufficient to create a property right that would entitle them to all the requisites of due process. In Perry v. Sindermann, the companion case to Roth, the Court also indicated that, where the teacher's dismissal violated a constitutionally protected right, the dismissal would be set aside.

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171. See text accompanying notes 175-78 infra.
174. Id. at 569.
175. E.g., id. at 577; Perry v. Sindermann, 408 U.S. 593, 599-603 (1972). In Roth, the Court found that no implied promise existed, 408 U.S. at 578, but in Perry, the question was not so easily disposed of. Sindermann's long service and the peculiar rules of the school which employed him might have been sufficient to give Sindermann protection. 408 U.S. at 600. See Lanzarone, Teacher Tenure—Some Proposals for Change, 42 Fordham L. Rev. 526, 533-34 (1974).
176. 408 U.S. 593 (1972).
177. Id. at 597. "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' . . . Such interference with constitutional rights is impermissible." Id. (citation omitted).
tion to these two exceptions, a third basis for challenging actions of a school board was set out by the Roth Court. Where a dismissal has been carried out in such a way as to impinge the good name or reputation of the teacher, due process will afford him an opportunity to refute the charges that led to the dismissal. 178

These three exceptions to the general rule denying due process to non-tenured teachers might, with a broad construction, be sufficient to give any non-tenured teacher a right to a hearing upon a dismissal. 179 The courts have not, however, taken a broad approach. Most cases which have granted non-tenured teachers the right to challenge their dismissals have involved clear deprivations of constitutionally guaranteed rights. 180 Only in rare instances have teachers been able to show the sort of "implied promise of continued employment" that is the necessary prerequisite to a hearing and statement of reasons. 181

Two decisions in the Seventh Circuit illustrate the problem that faces the non-tenured teacher. In Jeffries v. Turkey Run Consolidated School District, 182 a non-tenured teacher was dismissed without a hearing or adequate explanation. She argued that the reasons of the school board were insufficient and that, as such, the action denied her due process. 183 She did not allege that any of her fundamental constitutional rights had been violated, nor that her reputation had been brought into question. Nor did she allege such an expectancy interest in continued employment as to justify application of that exception. 184 The Seventh Circuit held that none of the plaintiff's rights were violated by the lack of proceedings, since she had no property right in continued employment. 185

More recently, a district court in the Seventh Circuit went even farther in closing the courts to the non-tenured teacher. In Phillippe v. Clinton-Prairie
three non-tenured teachers active in union activities were
dismissed for reasons that, according to the school board, had nothing to do
with those activities. The teachers involved, however, alleged that the real
reason behind the dismissals was the union activities and, as a result, the
dismissals had violated their rights of freedom of association and freedom of
speech.

The court disposed of any possible injury to reputation by noting that the
plaintiffs had not been unsuccessful as a result of their termination in finding
further employment. It also stated flatly that since tenure in the state was
governed by statute, there could be no expectation interest which might give
rise to a property right. As to the alleged violations of constitutionally
protected rights, the court found that the reasons of the school board were
permissible, reasonable, and sufficient to preclude further inquiry.

As had the court in Turkey Run, the court in Phillippe refused to examine the validity
of the reasons given by the school board for their actions, declaring:

Thus, in most cases, all that the dismissed teacher will be afforded is the
opportunity to prove that his constitutionally protected rights have been
violated. As to this allegation, it is not quite clear what burdens rest on the
plaintiff, or on the school board. Because the decision of the trial court will
rarely be reversed on appeal, however, meeting the burden becomes all the
more important.

187. Id. at 318-19.
188. Id. at 318.
189. Id. at 322.
190. "A teacher-employee does not acquire the substantive rights of statutory terms provided
by Burns' Indiana Statutes, § 28-4501 et seq., IC 1971, 20-6-7-1, until such person serves more
than five years continuously with the same school authority." Id. at 318.
191. Id. at 319. Indeed, even if the plaintiff could show a legitimate protected interest, there
is no guarantee, in the Seventh Circuit at least, that due process would be afforded. See Miller v.
School Dist. No. 167, 495 F.2d 658 (7th Cir. 1974), in which the importance of allowing the
school board latitude in its decision-making process was considered paramount to the individual
interest infringed upon by the board's action: "Although the interest of children in associating
with persons of their choice is, of course, severely limited by both their parents and the State, we
should not ignore the fact that they do have a valid interest in not being compelled to associate
with persons they or their parents consider objectionable. In the classroom, since their presence is
compelled, they necessarily must look to the school board for protection of this interest. For this
reason, it is appropriate for the school board, elected by the local community, to select the people
with whom it wants the minors of the community to associate as teachers." Id. at 667.
193. E.g., Adams v. Campbell County School Dist., 511 F.2d 1242, 1246 (10th Cir. 1975)
("Since there was substantial evidence to support the trial court's findings that plaintiffs had
failed to meet their burden, a reversal would require a determination that the findings were
Perhaps the approach of the Third Circuit in *Roseman v. Indiana University of Pennsylvania*\(^\text{194}\) is the most reasonable under these circumstances. There, the district court placed on the plaintiff "the burden of proving by a preponderance of the evidence that her non-retention was caused in substantial part by restraint on her freedom of speech . . . ."\(^\text{195}\) The Third Circuit, in affirming the result, nevertheless indicated that

the district court appears to have misunderstood the proper standard of review where a public employee alleges that his employment has been terminated in retaliation for the exercise of protected speech. It is not enough merely to find that other grounds were adequate for the discharge, or that retaliation did not constitute a substantial part of the reason for the discharge. Instead, the plaintiff need only prove that the discharge was "predicated even in part on his exercise of first amendment rights."\(^\text{196}\)

It seems reasonable where constitutional rights are involved, that the teacher should not have to do more than show that the exercise of his rights was in some way responsible for his dismissal. To require more is to potentially penalize the teacher for exercising his rights.\(^\text{197}\) To require less is to potentially clearly erroneous, that 'on the entire evidence [the court] is left with the definite and firm conviction that a mistake has been committed.'\(^\text{198}\) See, e.g., Skehan v. Board of Trustees, 501 F.2d 31, 39 (3d Cir. 1974), vacated and remanded, 421 U.S. 983 (1975); Callahan v. Price, 513 F.2d 51, 53 (5th Cir. 1975) (per curiam), petition for cert. filed, 44 U.S.L.W. 3095 (U.S. Aug. 19, 1975) (75-238); Amburgey v. Cassady, 507 F.2d 728, 730 (6th Cir. 1974); Frazier v. Curators of Univ. of Mo., 495 F.2d 1149, 1153 (8th Cir. 1974).

Trial courts as a rule have hesitated to challenge the discretionary exercise of power by the school board. See, e.g., Gorham v. Jewett, 392 F. Supp. 22, 26 (D. Mass. 1975); Doscher v. Seminole Common Consol. School Dist. No. One, 377 F. Supp. 1166, 1169 (N.D. Tex. 1974): "It is not the function of this court to make a determination as to the wisdom of the board's decision so long as there does not appear to be any arbitrary or capricious action . . . ."

\(^{194}\) 520 F.2d 1364 (3d Cir. 1975).


\(^{196}\) 520 F.2d at 1367. This approach has also been adopted by the Second Circuit in Simard v. Board of Educ., 473 F.2d 988 (2d Cir. 1973), where a non-tenured teacher claimed that his contract was not renewed because of union activity. "While we have concluded that adequate evidence supported the Board's action, that does not necessarily defeat a claim of retaliatory nonrenewal; a discharge motivated only in part by demonstrable retaliation for exercise of speech and associational rights is equally offensive to the Constitution." The court affirmed the action because the Board members testified they had only considered the plaintiff's conduct as a teacher. Id. at 995-96; see Gray v. Union County Intermediate Educ. Dist., 520 F.2d 803 (9th Cir. 1975): "A decision to terminate employment of a teacher which is only partially in retaliation for the exercise of a constitutional right is unlawful." Id. at 806 (emphasis deleted). See also Rubin, supra note 1, at 15. Thus, if a teacher were discharged for being an incompetent and a Republican the result absent sufficient testimony in the trial record, would be a remand to determine if the school board would have fired the teacher if he were only incompetent.

Finally, where racial discrimination has been alleged, the burden of proof shifts to the school board to show that its action was in no way racially motivated. See, e.g., Moore v. Board of Educ., 448 F.2d 709, 711 (8th Cir. 1971); Cato v. Collins, 394 F. Supp. 629, 632 (E.D. Ark. 1975).

\(^{197}\) Not all judges agree that the substantive constitutional rights of teachers should be protected. At least one has declared: "If we as Americans are at the moment dissatisfied with the permissive and chaotic nature of society in general, then surely one of the reasons for this
tially penalize the school boards by making it impossible for them to effectively act. The approach taken in Roseman, however, would protect the teacher without harassing the school board, and this is the "balance" that should be sought.

IX. JURISDICTION

Perhaps the most significant trend in the recent decisions is the approach of the federal courts to the jurisdictional question. The majority of actions in federal courts brought by teachers against school authorities for denial of constitutional rights allege jurisdiction under section 1343 for denial of rights guaranteed by section 1983.198 However, the question of whether the school board _qua_ school board is a "person" within the meaning of section 1983 has resulted in a conflict among the circuits.

In _Burt v. Board of Trustees_.,199 the Fourth Circuit said the assumption on the part of the district court "that the Board itself was not a suable party under § 1983 was correct . . ."200 Conversely in _Keckeisen v. Independent School District_,201 the Eighth Circuit said "municipal corporations were not intended to be included as 'persons' under § 1983 . . . but it would defeat the central intention of the Civil Rights Act to disallow actions against individuals employed by municipal corporations."202 The court held the school board was a "person" and that plaintiff had stated a cause of action under section 1983.203 Under the doctrine of _Monroe v. Pape_, the teacher can obtain jur-

198. Section 1343 provides in part: "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. . . ." 28 U.S.C. § 1343 (1970).

Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any right, privilege, or immunity secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (1970).

199. 521 F.2d 1201 (4th Cir. 1975) (per curiam).

200. Id. at 1204 n.3.

201. 509 F.2d 1062 (8th Cir. 1975) cert. denied, 96 S. Ct. 57 (1975).

202. Id. at 1065.

203. Id. at 1064-65. See, e.g., _Aurora Educ. Ass'n East v. Board of Educ._, 490 F.2d 431, 435 (7th Cir.), cert. denied, 416 U.S. 985 (1974); see also _Stebbins v. Weaver_, 396 F. Supp. 104 (W.D. Wisc. 1975) (suggesting that section 1983 would not bar suit under these circumstances); but see _Sellers v. Regents of Univ. of Calif._, 432 F.2d 493, 500 (9th Cir. 1970), cert. denied, 401 U.S. 981 (1971) (indicating jurisdiction is improper under section 1983); but cf. _Campbell v._
isdiction over the individual members of the school board either in their official or individual capacities, but this result raises problems of remedies. 204

An alternative jurisdictional basis to section 1983 was implemented in Gray v. Union County Intermediate Education District. 205 There the plaintiff alleged jurisdiction under section 1331 206 claiming that her suit involved a federal question with over $10,000 in controversy. 207 The court reasoned that since plaintiff charged a violation of her constitutional rights and sought back pay and $100,000 in incidental damages, the requirements of section 1331 were met. 208 Basing jurisdiction on this section avoided the "person" requirements of section 1983 under which political subdivisions are immune from suit. 209

A recent district court decision, however, has held jurisdiction lacking under both section 1983 and section 1331. In Fanning v. School Board of Independent School District No. 23, 210 a non-tenured teacher claimed his non-renewal was based on his union activities. The court said the school board was not a person under section 1983 and that, therefore, damages and injunctive relief were not available. 211 The court also held that jurisdiction could not be based on section 1331 since the teacher's contract was not renewed pursuant to a state statute. Thus, the question arose under state, not federal law. 212 The court would not hear the case, saying, "actions of local school officials involving these types of issues are pre-eminently and peculiarly in the local province." 213

Masur, 486 F.2d 554 (5th Cir. 1973) (per curiam); Green v. Dumke, 480 F.2d 624, 629 (9th Cir. 1973).

204. 365 U.S. 167 (1961). Monroe held that individual police officers, but not the city itself, were subject to liability for damages under section 1983. In City of Kenosha v. Bruno, 412 U.S. 507 (1973), the Court held that equitable relief was similarly unavailable in an action against a municipality under section 1983. Id. at 513.


205. 520 F.2d 803 (9th Cir. 1975).

206. Section 1331(a) provides: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331(a) (1970).

207. Plaintiff also alleged jurisdiction under section 1983. The court noted the "person" controversy but found it unnecessary to rule on the question. 520 F.2d at 805.

208. Id.


211. Id. at 21.

212. Id. at 20-23.

213. Id. at 23. Another basis for jurisdiction was found in Kelly v. West Baton Rouge Parish School Bd., 517 F.2d 194 (5th Cir. 1975), where the court reinstated two black non-tenured
In Grossman v. Bernards Township Board of Education, another recent district court case, plaintiff was dismissed from a teaching position because she had undergone a sex change operation. Plaintiff alleged six jurisdictional bases, but the action was dismissed for failure to state a claim upon which relief might be granted and lack of subject matter jurisdiction. The court held that the school board, as a political subdivision of the state, was not an "employer" within the meaning of the National Labor Relations Act of 1947. Further, there was no jurisdiction under section 1981, because that statute protects only against racial discrimination. Nor were sections 1983 and 1985 relevant, since the school board was not a "person" within the meaning of these statutes. Finally, the court said plaintiff did not state a cause of action for sex discrimination under the Equal Employment Opportunity Act of 1972, because she was discharged "not because of her status as a female, but rather because of her change in sex from the male to the female gender."

It seems clear that in seeking to avoid becoming entangled in the administration of the schools, the federal courts have been slowly closing their jurisdictional doors to teachers seeking to challenge unconstitutional actions against them. The question of the extent of the teacher's substantive constitutional rights truly becomes moot if the teachers are unable to get into court to determine if those rights have been wrongfully abridged. The solution to the jurisdictional problems of section 1983 is to allow the teachers seeking to redress a denial of constitutional rights to bring actions under section 1331 against the school board qua school board. This result also has the advantage of avoiding the remedies problems inherent in actions against individual school board members.

X. REMEDIES

Even if the teacher prevails in establishing jurisdiction and proving his case, he may find that he is still without a remedy. It seems clear that a non-tenured public school teacher is entitled to damages and equitable relief, under section 1983, if his discharge or denial of tenure or reemployment is in retaliation for the exercise of his first amendment rights. Unique considerations of community attitudes, however, may frequently make equitable

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215. Id. at 3-4.
218. Id. at 4-5. The court also held that section 1988 creates no substantive federal cause of action.
220. No. 74-1904 at 6.
222. See, e.g., Amburgey v. Cassady, 507 F.2d 728, 730 (6th Cir. 1974).
relief difficult to effect. One recent Ninth Circuit decision dramatizes the problem that faces the court. In Burton v. Cascade School District Union High School No. 5, the Ninth Circuit ruled that a homosexual non-tenured teacher was wrongfully dismissed because the statute providing for discharges for "immorality" was unconstitutionally vague. The court refused to order the plaintiff reinstated, calling reinstatement an "extraordinary equitable remedy" limited to teacher dismissals involving racial discrimination and reprisals for the exercise of free speech. It held the district court was acting within the bounds of its remedial discretion in awarding plaintiff a half year salary in addition to the award of back pay for the unserved portion of her one year contract. The court agreed it was proper to balance plaintiff's interest in completing the few months left in her contract against the disruption her reinstatement would cause to the school and the community.

Judge Lumbard, dissenting, declared that reinstatement, far from being "extraordinary," was the proper remedy for "an individual who has been removed from her job in violation of the Constitution." He reasoned that if community resentment was allowed to defeat constitutional rights, few school districts would ever be desegregated. In addition, Judge Lumbard found the award of damages inappropriate, for such an award would allow the school board to replace constitutional rights by means of the state's treasury.

On the question of damages, several important immunities may totally defeat recovery from individual school board members. While such persons are proper parties under section 1983, the Tenth Circuit suggested in Bertot v. School District No. that they are immune from damages if they have acted in good faith. To recover damages from a school board member the

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224. 512 F.2d 850 (9th Cir. 1975) (per curiam), cert. denied, 96 S. Ct. 69 (1975). See notes 110-14 supra and accompanying text.
225. Id. at 853.
226. Id. at 854.
227. Id. at 853. Regarding equitable relief, the Fourth Circuit said in Burt v. Board of Trustees of Edgefield County School Dist., 521 F.2d 1201 (4th Cir. 1975), that in a suit against the school board members, as individuals, they would not even have the power to "reinstate or order back pay out of school board or county funds." Id. at 1204.
228. 512 F.2d at 854 (dissenting opinion).
229. Id. at 855-56 (dissenting opinion).
230. 522 F.2d 1171 (10th Cir. 1975).
231. Id. at 1184. The court quoted from Wood v. Strickland, 420 U.S. 308 (1975): "Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. That is not to say that school board members are 'charged with predicting the future course of constitutional law.' . . . A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." Id. at 322
teacher would have to prove he "acted with a malicious intention to cause a deprivation of constitutional rights or other injury." The rationale for such a requirement was to permit individual board members to exercise their duties free from fear of damage suits, by affording them a qualified privilege.

If the members of the school board are sued in their official capacity, or if the school board *qua* school board can be made a party, it has been argued that recovery of damages would be barred by the sovereign immunity of the state under the eleventh amendment. Such an argument has been rejected in recent circuit court cases. If, however, the school board is set up as an agency or "alter ego" of the state, sovereign immunity may still attach.

In *Edelman v. Jordan,* the Supreme Court held that an order directing the Illinois Department of Public Aid to pay retroactive welfare payments was barred by the eleventh amendment. In *Hutchison v. Lake Oswego School District No. 7,* the Ninth Circuit recently held that this did not mean that

(citation omitted). See Shirley v. Chagrin Falls Exempted Village Schools Bd. of Educ., 521 F.2d 1329, 1332 (6th Cir. 1975) ("The question, therefore, is whether the school board action taken with regard to Mrs. Shirley was not only violative of her constitutional rights, but was also at that time so in disregard of the 'settled, indisputable law' and 'unquestioned constitutional rights' that it cannot reasonably be characterized as being in good faith."); Hutision v. Lake Oswego School Dist. No. 7, 519 F.2d 961, 968 (9th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3239 (U.S. Oct. 21, 1975) (No. 75-568) ("The school board members did not disregard 'settled, indisputable law' " in enforcing a pregnancy leave policy. "[T]he board members clearly acted in good faith and within their official capacities and are therefore entitled to qualified immunity from the payment of damages."). Thus, the determination of whether a school board member in his individual capacity will enjoy immunity from damages must undergo the following analysis: if the action violates a teacher's undisputed constitutional right, the intent of the school board members is irrelevant and they will be liable for damages. If, however, the nature and extent of constitutional protection is unsettled, the school board members will be immune unless the teacher can prove that they acted with malicious intent.

232. 522 F.2d at 1185.

233. Id.

234. This assumes the school board is a "person" under section 1983 or that another jurisdictional basis exists. See notes 198-220 supra and accompanying text.

235. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.


239. Id. at 678. This defense need not be asserted in trial court to be raised on appeal. "[T]he Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court. . . ." Id.

240. 519 F.2d 961 (9th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3239 (U.S. Oct. 21, 1975) (No. 75-568).
all state subdivisions were necessarily immune from damages, but rather that the character of the agency had to be examined. The court stated that, to be immune under the eleventh amendment, the school board would have to be an "alter ego" of the state. The most important factor in this determination would be whether the judgment would have to be paid out of the state treasury. Since, in Hutchison, funds came from local sources the school board had the power to obtain funds to satisfy a monetary judgment. Further, since it was precluded by statute from applying state funds to satisfy such a levy, eleventh amendment immunity did not apply.

The recent decisions have cast doubt on the judicial relief available to the teachers who have been dismissed in reprisal for the exercise of their constitutional rights. The equitable remedy of reinstatement is always discretionary, and an award of damages may be barred by lack of jurisdiction or by immunity. Thus, the teacher who can successfully prove that his uncertain constitutional rights have been violated may still find the federal courts unwilling or unable to furnish a remedy. Such a state of affairs should prove disturbing to teachers and non-teachers alike. That a teacher has been employed by a public entity should not lead to the conclusion that he has consented to be stripped of the rights and remedies guaranteed to all other citizens, and any result that seems to flow from such a conclusion should be resisted.

XI. CONCLUSION

The teacher who is dismissed for the exercise of a constitutional right is virtually forced into court, for in today's job market an uncontested dismissal for cause is a professional kiss of death. The federal courts, however, have gradually closed their doors to these suits, perhaps in the belief that school administration is a local matter, or perhaps out of the apprehension of entering into situations requiring continuing judicial supervision.

Procedurally, the obstacles which block access to the courts by a dismissed teacher are paradoxical. The Supreme Court has tried to give teachers the same substantive rights as other citizens, to the extent that they may be balanced with valid community interests. By placing heavy burdens of proof on the teacher, removing any viable remedies that might exist for him, and

241. Id. at 966.
242. Id. at 966-68. Other factors cited by the court were: "performance by the entity of an essential governmental function, ability to sue or be sued, power to take property in its own name or in the name of the State, and corporate status of the entity." Id. at 966. Accord, Burt v. Board of Trustees, 521 F.2d 1201, 1205 (4th Cir. 1975). Compare Stebbins v. Weaver, 396 F. Supp. 104, 110-11 (W.D. Wis. 1975) (eleventh amendment would not bar money judgment against a school board member in his official capacity, but the amendment would bar a retroactive money judgment against the board) with King v. Caesar Rodney School Dist., 396 F. Supp. 423 (D. Del. 1975) (school board was not an "alter ego" of the state and not immune under the eleventh amendment).
243. See U.S. News and World Rep., Sept. 1, 1975, at 53: "In Michigan, 6,000 pink slips had already been sent out . . . because enrollment declines were reducing demand for teachers. In the meantime, schools of education in that State are turning out 11,000 job-hungry graduates a year."
finding that the teacher cannot get jurisdiction over any of the parties who have injured him, the lower federal courts have made the substantive rights articulated by the Supreme Court a hollow echo.

More reasonable approaches to the procedural issues would not be impossible to develop. An allegation by a teacher that his discharge was predicated on a violation of his constitutional rights ought to be enough to state a cause of action. Additionally, even non-tenured teachers should be assured a fair hearing upon dismissal, recognizing that they are indeed injured by dismissal. Finally, there is no reason why a teacher who has been wrongfully dismissed should not be granted an appropriate remedy. If such a remedy is reinstatement, it ought to be allowed.

If the procedural roadblocks can be surmounted, substantive issues will again have meaning for a dismissed teacher. Essentially, all substantive problems involving teacher's rights depend on one fundamental issue: the role of the teacher in the community, and the discretion of the school board in fixing that role.

To the extent that the courts have defined the substantive rights of teachers, the trend has been to gradually contract the earlier definitions by application of balancing tests. Courts have not directly limited teachers' rights but they have allowed a wider range of state interests to outweigh the teacher's interest in the free exercise of his constitutional rights.

It may be traditional or expedient to vest broad discretion in local school boards, but it is questionable whether it is advisable to vest such powers in boards when important constitutional guarantees are involved. Therefore, along with this broad grant of authority which is the source of community control of the schools, there should be a corresponding duty on the part of the school boards to secure the protections of the Constitution for their employees. The most flagrant abuses of discretion could be mitigated by requiring that non-tenured teachers be provided with statements of reasons for termination.

The practice of limiting the constitutional rights of teachers to a greater extent than those of other public employees is based, at least in part, on the idea that a teacher does more than just deliver information to his students. Society expects and may require that the teacher also function as an example to his pupils. The values a teacher should transmit and the methods he

244. This notion is not without the support of the Supreme Court. See, e.g., Wood v. Strickland, 420 U.S. 308, 326 (1975) ("The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members, and § 1983 was not intended to be a vehicle for federal court correction of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees."); Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities. 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 implicate basic constitutional values.").

245. "All education implies the transmission of values. How a teacher acts toward children; how he resolves disputes among them; whether or not he requires children to be responsible for
chooses to transmit them may be subject to the approval of the local community. In fact,

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. However, the danger of sanctifying conformity is always present when relying upon consensus judgments for a determination of right behavior.

Justice Douglas, dissenting in Adler v. Board of Education, stated:

A pall is cast over the classrooms. There can be no real academic freedom in that environment. Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect. Supineness and dogmatism take the place of inquiry. A "party line"—as dangerous as the "party line" of the Communists—lays hold. It is the "party line" of the orthodox view, of the conventional thought, of the accepted approach. A problem can no longer be pursued with impunity to its edges. Fear stalks the classroom. The teacher is no longer a stimulant to adventurous thinking; she becomes instead a pipeline for safe and sound information. A deadening dogma takes the place of free inquiry. Instruction tends to become sterile; pursuit of knowledge is discouraged; discussion often leaves off where it should begin.

Thus, the right of the teacher to work without fear of retaliation over trivialities is an important element in academic freedom which must concern us all, for in our schools lies the future of our country. Teachers must be sure of their own rights and not afraid to exercise them out of fear of retaliation.

As Justice Douglas declared,

themselves and to act responsibly toward others—in short, every lesson he teaches, decision he makes, every expectation he holds, has the potential of influencing his students' ideas about the world. . . . By refusing to guide, inspire, prod or challenge his students, by withholding choices and declining to impart skills and attitudes, he may be actively blocking the child's freedom and growth." U.S. News & World Rep., Sept. 1, 1975, at 43, quoting author and education critic Diane Ravitch.

247. Adler v. Board of Educ., 342 U.S. 485, 510 (1952) (Douglas, J., dissenting). See also R. Emerson, Self-Reliance, in The Writings of Ralph Waldo Emerson, 145, 152 (1969): "A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines. With consistency a great soul has simply nothing to do. He may as well concern himself with his shadow on the wall. Speak what you think now in hard words and to-morrow speak what to-morrow thinks in hard words again, though it contradict every thing you said to-day.—'Ah, so you shall be sure to be misunderstood.'—Is it so bad then to be misunderstood? Pythagoras was misunderstood, and Socrates, and Jesus, and Luther, and Copernicus, and Galileo, and Newton, and every pure and wise spirit that ever took flesh. To be great is to be misunderstood."

249. In Goss v. Lopez, 419 U.S. 565 (1975), Mr. Justice Powell suggested that the need for discipline in the schools may be as important as more traditional concepts of education: "The State's generalized interest in maintaining an orderly school system is not incompatible with the individual interest of the student. Education in any meaningful sense includes the inculcation of an understanding in each pupil of the necessity of rules and obedience thereto. This understand-
We need be bold and adventuresome in our thinking to survive. A school system producing students trained as robots threatens to rob a generation of the versatility that has perhaps been our greatest distinction. The Framers knew the danger of dogmatism; they also knew the strength that comes when the mind is free, when ideas may be pursued wherever they lead.\textsuperscript{250}

Peter J. Neckles

...ing is no less important than learning to read and write. One who does not comprehend the meaning and necessity of discipline is handicapped not merely in his education but throughout his subsequent life. In an age when the home and church play a diminishing role in shaping the character and value judgments of the young, a heavier responsibility falls upon the schools." Id. at 592-93 (Powell, J., dissenting).

\textsuperscript{250} 342 U.S. at 511. The following news item illustrates what the independent teacher in a hostile community may be up against: "High school authorities in Drake, N.D. raided student lockers in November, 1973, and confiscated as profane all copies of 'Slaughterhouse Five,' by Kurt Vonnegut Jr., and 'Deliverance,' by James Dickey. Copies of the Vonnegut novel were burned. 'Deliverance' was banned.

"Bruce Severy, the 26-year-old English teacher who had assigned the books, sued in Federal court in February, 1974, charging deprivation of academic freedom. In June, 1974, his contract to teach was not renewed.

"Last week the court case was settled. The Drake Board of Education has agreed that 'Slaughterhouse Five' and 'Deliverance' can be taught in the 11th and 12th grades. Mr. Severy, who now lives in Fargo, N.D., will get $5,000 in damages, and he agrees not to seek reinstatement as a teacher in Drake.

"'I don't feel there would be any point to going back there now after two years,' he says. 'I don't think it would be safe.'

"In his last months in Drake, he reports, death threats were made against him, his wife and their 7-year-old daughter.

"Mr. Severy, who was represented by the American Civil Liberties Union in his court action, is unemployed at present..." N.Y. Times, Sept. 28, 1975, at 43, col. 1.