

TEACHERS' RIGHTS IN PUBLIC EDUCATION

“First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to speech or expression at the schoolhouse gate.”¹

--Justice Abe Fortas

The Constitution protects *all* persons, no matter what their calling – including public school teachers. Thus, “[a]ny inhibition of freedom of thought, and of action upon thought in the case of teachers brings the safeguards of [the First Amendment] vividly into operation.”² Nevertheless, because teachers are not only private citizens, but also agents of the state, courts have held that “the rights of teachers in public schools are not automatically coextensive with the rights of adults in other settings.”³ The following is an overview of how the courts have weighed these competing interests in determining the rights of public school teachers.

Speech and Expression Outside the Schoolhouse Gate

The extent of a teacher’s First Amendment freedoms depends largely upon the content of the expression as well as the context in which the teacher chooses to exercise those freedoms. The Supreme Court has spoken clearly in defense of the First Amendment rights of public school teachers in their capacities as private citizens.⁴ In *Pickering v. Board of Education*, a teacher was fired because he sent to a local newspaper a letter he had written criticizing the Board of Education concerning past efforts to raise revenue for schools. The Supreme Court held that “a teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.”⁵ The Court reasoned that because the letter concerned “a matter of public interest” and there was no evidence that it interfered with (1) his or her ability to perform classroom duties or (2) the regular operation of the school, the teacher’s rights were no different than those of any other member of the general public. Thus, the teacher could not be dismissed for the exercise of his freedom of speech.⁶

Lower courts have also struck down school board policies or decisions that forbade public school employees from placing their child in a private school,⁷ from testifying in another employee’s lawsuit against the Board of Education,⁸ or leading off-campus student Bible studies.⁹ Teachers should similarly be free to attend church or otherwise discuss religion with students off-campus. Moreover, the rule that teachers may exercise their rights as private citizens in a manner that does not interfere with their classroom duties or the operation of the school is not limited to simply protecting teachers from being discharged. *No* adverse employment decisions, including demotions, reductions in salary or responsibilities, or even *threats* of discharge may be made because of a teacher’s exercise of these rights.¹⁰ Where a teacher’s out-of-school expression satisfies the *Pickering* test, the adverse employment decision will only be constitutionally

permissible if the school administrators show that the decision was not substantially motivated by the teacher's actions or that the decision would have been made regardless of the teacher's conduct.¹¹

Speech and Expression Inside the Schoolhouse Gate

The Supreme Court has employed two different standards to evaluate the free speech rights of teachers while on school grounds. In *Tinker v. Des Moines Independent School District* the Supreme Court held that a group of students' freedom of speech was abridged when school officials suspended the students for wearing black armbands to protest the Vietnam War.¹² The Court said that restrictions on in-school speech are valid only if the expressive activity (1) "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school," or (2) "[collides] with the rights of others."¹³ The Court also said that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."¹⁴ Moreover, school officials may not prohibit speech merely to avoid "discomfort and unpleasantness" accompanying a particular viewpoint.¹⁵

Although *Tinker* only directly involved the free speech rights of students, the Court indirectly recognized the similar rights of teachers as well.¹⁶ Thus, in *James v. Board of Education*, a federal appeals court applied the *Tinker* test and held that a high school teacher also had a First Amendment right to wear a black arm band into the classroom to protest the Vietnam War.¹⁷ The Court held that the teacher's armband passed the two-part test in *Tinker* and also did not interfere with the teacher's classroom duties.¹⁸ The court said that although the teacher had a more persuasive influence over a "captive" student audience than would another student, the teacher was not coercive and did not "arbitrarily inculcate doctrinaire views in the minds of students."¹⁹ Rather, the court said that high school students were able to distinguish between a teacher's personal views and those that were the official position of the school board.²⁰

However, *Tinker* no longer represents the sole analysis that courts will apply to teacher or student speech on school grounds. In *Hazelwood School District v. Kuhlmeier* the Supreme Court held that a school principal did not violate the free speech rights of students when he censored and edited their school newspaper articles.²¹ The Court held that courts must "defer to [any] school decision to 'disassociate itself' from speech that a reasonable person would view as bearing the imprimatur of the school" so long as that decision is "reasonably related to legitimate pedagogical concerns."²² The Court distinguished *Tinker*, implying that no reasonable person would have attributed the students' arm bands to the school.²³ Courts will almost always find that school administrators' decisions are "reasonably related to legitimate pedagogical concerns."²⁴ Therefore, if a court finds that a teacher's expressive activity is such that a reasonable person would attribute it to the school, thus invoking the *Hazelwood* test rather than the *Tinker* test, the administrators' decision to restrict the speech is likely to be upheld.

In *Bishop v. Aronov*, a federal appeals court applied the *Hazelwood* test and held that the University of Alabama could limit the freedom of expression of a college

professor inside the classroom.²⁵ Bishop, an exercise physiology teacher, occasionally referred to his religious beliefs in class and discussed his view of the “creative force behind human physiology.” He qualified these comments as his “personal bias.”²⁶ At the end of the semester he invited students to an optional class at which attendance was voluntary and in which he discussed “Evidences of God in Human Physiology.”²⁷ Bishop used a blind grading system to ensure that attendance in this class would not influence his grading. Nevertheless, after several students complained the University ordered him to cease discussing religion in his class and to stop offering his optional class, contending that holding this class violated the Establishment Clause.²⁸

The court held that Bishop’s comments and optional class had a “coercive effect on students” and said that the school had an interest in ensuring that its courses are “taught without personal religious bias unnecessarily infecting the teacher or the students.”²⁹ The court held that these interests were sufficient to subordinate Bishop’s free speech rights. According to the court, Bishop’s “interest in academic freedom and free speech do not displace the University’s interest inside the classroom.”³⁰ The court indicated however that the University’s censorship of Bishop would not have been permissible if it had attempted to regulate meetings Bishop had explicitly disassociated from mandatory course work. The court explained that it was concerned that “[t]he phrasing ‘optional class’ or ‘optional meeting’ and the scheduling before finals gave the impression of official sanction” and that the university rightfully could seek to avoid such an appearance. If, however, the professor “makes it plain to his students that such meetings are not mandatory, not considered part of the course work, and not related to grading, the University cannot prevent him from conducting such meetings.”³¹ An even greater degree of explicit disassociation would likely be required of a secondary or elementary school teacher before a court would find that the teacher’s expressive activity was private speech not reasonably attributable to the school.

Establishment Clause Concerns

The government may not restrict a teacher’s religious expression or exercise when the teacher is acting in his or her capacity as a private individual.³² However, the government (or a school board) has greater authority to limit a teacher’s religious expression or exercise when it is necessary to avoid a violation of the Establishment Clause. The Supreme Court has held that the Establishment Clause forbids the government from acting with the purpose or effect of advancing or inhibiting religion, becoming excessively entangled with religion, endorsing religion, or coercing individuals to participate in a religious practice.³³ For the religious expression of a public school teacher to violate the First Amendment’s prohibition against an establishment of religion, the teacher’s expression must constitute “state action.” Public school teachers acting in their capacity as classroom teachers are usually considered “state actors.”³⁴

Thus, in the classroom the government (or a school board) may limit a teacher’s religious expression to ensure that the teacher does not violate the Establishment Clause. However, where the Establishment Clause would not actually be violated by a teacher’s religious expression, a school district may not restrict the teacher’s speech or expression

simply because of a desire to create a “religiously neutral environment.”³⁵ The following are examples of how courts have applied the Establishment Clause to the actions of teachers in specific situations.

Wearing Religious Garb

Teachers should generally be free to wear clothing, jewelry, etc. indicating their adherence to a religious faith, so long as the garb is not proselytizing or disruptive.³⁶ Numerous courts have held that nuns could not be forbidden from wearing their habits while teaching in public schools.³⁷ Similarly, teachers should be free to wear cross necklaces, inconspicuous WWJD bracelets, yarmulkes, or abayas.³⁸ The Third Circuit had previously rejected the claim of a Muslim teacher reprimanded for wearing an abaya in class in violation of a Pennsylvania law prohibiting teachers from wearing religious garb. The Court recognized that permitting the teacher to wear the abaya may not present an Establishment Clause violation, but held that the prohibition was justified by the school district’s interests in maintaining a “religiously neutral environment” and avoiding litigation.³⁹ However, a federal district court in Pennsylvania recently recognized that that decision may no longer be good law in holding that the application of the Pennsylvania statute to punish a teacher for wearing a cross necklace violated the teacher’s First Amendment rights. “Merely employing an individual, such as plaintiff, who unobtrusively displays her religious adherence is not tantamount to government endorsement of that religion, absent any evidence of endorsement or coercion.”⁴⁰ Nevertheless, items which convey advocacy for a particular religion, (i.e. a t-shirt with the message “JESUS 2000, J2K”), or particularly conspicuous religious garb that would disrupt the classroom environment, (i.e. Sikh clothing, including the traditional turban), might still be constitutionally prohibited.⁴¹

Discussions About Religion With Students Outside Classroom Time

A teacher is most clearly acting as the agent of the state when the teacher is teaching in the classroom. However, a teacher will also have contact with students at school outside of the normal classroom time. Teachers may be permitted slightly more leeway in discussing religious matters with students outside the classroom than they would otherwise have inside the classroom. This is because teacher’s have a more “captive audience” in their classrooms than they do during non-instructional time.⁴² A teacher may also have a greater degree of freedom to discuss religious matters with students outside of the classroom environment when the conversations are student-initiated and the teacher is merely responding to the student’s questions. In *Roman v. Appleby*, a federal district court recognized that a school guidance counselor need not avoid all discussion of religious matters with a student, particularly where the student initiates the conversation.⁴³

However, in *Pelozo v. Capistrano Unified School District*, a federal appeals court held that a school district’s order preventing him from discussing religion with students during both instructional and non-instructional time was constitutional because of the district’s interest in preventing an Establishment Clause violation.⁴⁴ Although the Court

held that the restriction was a violation of Pelozza's free speech rights, it said, "[t]he school district's interest in avoiding an Establishment Clause violation trumps Pelozza's right to free speech." The Court said:

"While at the high school, whether he is in the classroom or outside of it during contract time, Pelozza is not just an ordinary citizen. He is a teacher. He is one of those especially respected persons chosen to teach in the high school's classroom. He is clothed with the mantle of one who imparts knowledge and wisdom. His expressions of opinion are all the more believable because he is a teacher. The likelihood of high school students equating his views with those of the school is substantial. To permit him to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause of the First Amendment."⁴⁵

The court drew no distinction between student-initiated conversations and those initiated by Pelozza.

Recently, a federal district court held that a school district could not prohibit elementary school teachers from assisting with after-school Good News Clubs at schools other than their own.⁴⁶ However, in the same opinion, the court held that the Establishment Clause could be violated were elementary school teachers to work in after-school Good News Clubs at their own school.⁴⁷ As demonstrated above, courts have reached different conclusions as to the constitutionality of teachers' conversations about religious beliefs with students on school grounds outside instructional time. To the extent that teachers engage in such conversations they should ensure that the conversation is student-initiated and give brief answers to the student's questions. Teachers should also refrain from advocating any particular religious viewpoint.

Religious Discussions With Other Teachers

School administrators cannot prohibit religious discussions among faculty members when they are not engaged in actual classroom instruction.⁴⁸ Religious discussion among adult faculty members not in the presence of students does not implicate the Establishment Clause concerns which courts have found in teacher/pupil religious discussions.⁴⁹ Moreover, once a school opens the school grounds for teachers to hold meetings unrelated to school business, it cannot prohibit other groups of teachers from meeting to discuss religious matters. However, if the school has a general policy prohibiting teachers from holding organized meetings unrelated to school business on school grounds, it may apply that policy to also prohibit teachers from holding organized religious meetings on school grounds as well.⁵⁰ Thus, to the extent that school facilities are open for other groups of teachers to use the facilities for meetings about non-religious matters, the facilities should also be open to groups of teachers who wish to pray or study their Bibles together.

Student Religious Meetings

The Equal Access Act provides that if a school receiving federal funding allows at least one non-curriculum non-religious student group (such as a chess club or scuba club) to meet on its campus during non-instructional time, the school must also permit student religious groups to similarly use school facilities.⁵¹ Moreover, the Act specifically provides that school employees may be present at the meetings in a non-participatory role.⁵² Thus, although teachers may attend meetings of student religious groups, teachers should not promote, lead, or actively participate in student religious meetings.⁵³ Nor may teachers be required to attend student religious meetings if the content of the speech at that meeting is contrary to the teacher's beliefs.⁵⁴

Distribution of Religious Literature

As will be explained more fully below, teachers are free to distribute religious literature as part of their instruction about religion. Beyond these instances, however, teachers may not disseminate religious literature to students at school because courts have held that such activities violate the Establishment Clause.⁵⁵ In *Jabr v. Rapides Parish School Board*, a federal district court held that a school principal violated the Establishment Clause by distributing Bibles to students. The court held that the principal's distribution of the Bibles failed every Establishment Clause test. There was no secular purpose for the distribution of the Bibles, the primary effect of the Bible distribution was to advance religion, the distribution conveyed a message of endorsement of Christianity, and the principal's position as an authority figure coerced the students into accepting the Bibles.⁵⁶ Thus, outside of the context of a teacher's permissible assignments pertaining to study about religion or comparative religion, teachers may not distribute religious literature or advertisements for religious activities at school.

CURRICULUM AND ACADEMIC FREEDOM

The authority to determine the content of courses taught in public schools generally lies with the school board.⁵⁷ Thus, teachers may not override the authority of the school board by adding or omitting coursework from the prescribed curriculum.⁵⁸ Nevertheless, the school board's authority to determine the curriculum is not absolute. For example, "school boards may not fire teachers for random classroom comments."⁵⁹ The Supreme Court has held that allowing school officials to completely exclude a particular subject from the classroom runs the risk of "cast[ing] a pall of orthodoxy over the classroom."⁶⁰ Thus, the government (or a school board) may not prohibit the teaching of evolution,⁶¹ and it would likewise probably be prohibited from proscribing any mention of religion in the schools.⁶² As one court stated, "[teachers] cannot be made to simply read from a script prepared or approved by the [school] board."⁶³

The Supreme Court has recognized that a teacher's academic freedom is "a special concern of the First Amendment."⁶⁴ Because school boards retain authority to control the curriculum, a public school teacher's academic freedom is likely to be more

limited than that of a college or university professor.⁶⁵ Courts have held that public school teachers possess some discretion in determining the methods of instruction that they use to teach the required curriculum.⁶⁶ Thus, courts have held that teachers could not be dismissed for such teaching methods as using a magazine survey that included items about sexually explicit matters in her high school speech and sociology classes⁶⁷ or using a simulation technique that evoked strong emotions on racial issues to teach about Reconstruction.⁶⁸ At least where the teacher's chosen method of instruction does not cause substantial disruption in school order, interfere with others' rights, or effect the proscribed course content teachers have a modicum of discretion in choosing their instruction methods.⁶⁹

Because, as will be discussed below, teaching *about* religion is permissible in the public schools, teachers should similarly be permitted to use the Bible or other religious texts in their literature, history, or other courses so long as it is reasonably related to the subject matter in the curriculum.⁷⁰ (For instance, assigning a passage from the Psalms in a literature class while discussing styles of poetry)⁷¹. One federal court has also held that a school board order prohibiting "all political speakers" from access to the school violated a teacher's right to choose the methods of instruction.⁷² In that case, the school board order was issued in response to a teacher's decision to invite a Communist speaker to address her class. Applying the *Tinker* test, the court found no evidence of any material disruption of order in the school or any violation of others' rights, and thus held that this order infringed on the teacher's right to use outside speakers as a method of teaching the proscribed curriculum.⁷³ The court also held that the order violated the equal protection clause because it was intended to silence a particular viewpoint (Communism).⁷⁴ The court said that the desire to avoid the discomfort that accompanied this unpopular viewpoint did not justify the order.⁷⁵ Nevertheless, if a school had a policy prohibiting all non-students or faculty members from access to the school during instructional hours, the policy could probably be applied to prevent a teacher from bringing outside speakers, including speakers with a religious viewpoint, into the classroom. However, teachers should refrain from inviting only speakers with a religious viewpoint.

Religious Instruction

Public school teachers may not lead students in prayer, the recitation of scripture, or any other religious exercise.⁷⁶ However, the Supreme Court has also clearly recognized that the study of the Bible and comparative religion in the public school classroom is constitutional.⁷⁷ In *Abington Township v. Schempp*, the Supreme Court held that a Pennsylvania law requiring public schools to begin the day by having students read from the Bible violated the Establishment Clause. However, the Court explained that this decision did not mean that the Bible was banished from the public schools:

“[I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that the study of the Bible or of religion, when

presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.”⁷⁸

Although courses on religion or comparative religion are rarely offered in public schools, teachers may teach about religious matters in connection with other subjects. Courts have held that such inclusion of religious matters do not violate the Establishment Clause so long as: (1) they are presented objectively; (2) no disruption occurs; and (3) they are relevant to the subject matter.⁷⁹

Moments of Silence

Although we do not recommend that teachers institute regular moments of silence in their classrooms on their own initiative, teachers should be aware that a federal appeals court recently held that such policies may be constitutional. In *Brown v. Gilmore*, a federal appeals court recently upheld a state statute requiring all public schools to begin each day with a minute of silence so that “each pupil may, in the exercise of his or her individual choice, meditate, pray, or engage in any other silent activity which does not interfere with, distract, or impede other students in the like exercise of individual choice.”⁸⁰ The court held that this policy had secular purposes -- the accommodation of religion and calming students and focusing them on the day ahead -- and that the statute did not have the impermissible effect of advancing religion because it was neutral between religious and non-religious modes of introspection or other silent activity.⁸¹ The court distinguished *Wallace v. Jaffree*, where the Supreme Court held that an Alabama moment of silence statute was unconstitutional. The court said that unlike the Virginia statute, the purpose behind the Alabama statute was clearly to circumvent prior Supreme Court decisions prohibiting school sponsored prayer and to return prayer to the schools.⁸²

Teaching Alternative Theories to Evolution

Again, as explained previously, school boards generally possess the authority to determine curriculum in the public schools and teachers may not unilaterally add or subtract from the proscribed curriculum.⁸³ Thus, several federal appellate courts have held that teachers do not have a right to teach creationism or to refuse to teach evolution.⁸⁴ However, the fact that a teacher cannot teach creationism or refuse to teach evolution does not mean that a teacher may not mention alternative theories of the origin of life when teaching evolution as proscribed in the curriculum.⁸⁵ As one Supreme Court justice has said:

“A state is entirely free ... to decide that the only foreign language to be taught in its public school system shall be Spanish. But would a State be constitutionally free to punish a teacher for letting his students know that other languages are also spoken in the world? I think not. It is one thing for a State to determine that ‘the subject of higher mathematics, or astronomy, or biology’ shall or shall not be included in its public school curriculum. It is quite another for a State to make it a criminal offense for

a public school teacher so much as to mention the very existence an entire system of respected human thought. That kind of criminal law, I think, would clearly impinge upon the guarantees of free expression contained in the First Amendment.”⁸⁶

Although teachers may not unilaterally change the school board’s proscribed curriculum, teachers should be aware of the most relevant opinions concerning the teaching of evolution and other theories about the origins of life. In *Epperson v. Arkansas*, the Supreme Court struck down an Arkansas statute that banned the teaching of the Darwinian theory of evolution in public schools.⁸⁷ The Court held that the law constituted an impermissible endorsement of a particular religious viewpoint because the purpose of the statute was to suppress the teaching of theory of evolution because of the belief of some that it denied the divine creation of man.⁸⁸ The Court stated that the First Amendment mandates government neutrality between various religions, and between religion and non-religion.⁸⁹ The Court said that although the government has authority over its curriculum, this authority does not extend to excluding a scientific theory on a basis that violates the First Amendment.⁹⁰

In *Edwards v. Aguillard*, the Court considered a Louisiana statute that required public schools to teach creationism whenever the school chose to teach evolution, and vice versa. The state argued that the purpose of the statute was to promote “academic freedom.”⁹¹ After reviewing the legislative history, however, the Court declared this stated purpose a “sham.”⁹² The Court held that the stated purpose was a mere pretext for the real motive: “to advance the religious viewpoint that a supernatural being created humankind.”⁹³ Thus, the Court concluded that the statute endorsed religion in violation of the Establishment Clause.⁹⁴

However, the Court stated that its decision did not “imply that a legislature could never require that scientific critiques of prevailing scientific theories be taught.”⁹⁵ Rather, the Court said, “teaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction.”⁹⁶ Thus, a state (or school board) might constitutionally require the teaching of several scientific critiques of evolution, or the examination of several theories of the origins of life, including the theory of evolution and various religious accounts, so long as the action was taken with a secular purpose.⁹⁷

UNION DUES AND MEMBERSHIP

“To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.”⁹⁸

--Thomas Jefferson

Teachers who object to contributing to or participating in unions typically do so because (1) the union uses the dues to support a political or ideological agenda to which the teacher objects, or (2) the teacher objects, on religious grounds, to any support or

affiliation with a labor union.⁹⁹ The extent of a teacher's rights in this area depend upon a number of factors including the state in which the teacher works and the basis for the teacher's objection.¹⁰⁰

Objection to a Union's Political Agenda

At the time of the publication of this brochure, twenty-two states had enacted so-called "Right to Work" laws. These laws secure the rights of employees, including teachers, not only to not join a labor union, but also to refuse to pay *any* fees to a labor union. The twenty-two states that have enacted these laws are: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia and Wyoming.¹⁰¹ Teachers in these states, regardless of the basis for their objections, may not be required to join or make any contributions to a labor union as a condition of their employment.¹⁰² However, these laws may not apply to collective bargaining agreements entered into before the effective date of the relevant state statute.¹⁰³ For this reason, and because state laws vary and are subject to change, we strongly encourage teachers to review the most recent versions of their state's laws.

Even teachers not protected by one of these state statutes cannot be required, as a condition of employment, to support a labor union's political or ideological causes to which they object. In *Abood v. Detroit Board of Education*, the Supreme Court held that the First Amendment freedoms of speech and association protect a public school teacher from compulsion to "contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher."¹⁰⁴ Although labor unions may spend funds for the expression of political views or toward the advancement of ideological causes, "the Constitution requires ... that such expenditures be financed from charges, dues or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of government employment."¹⁰⁵

Nevertheless, teachers who work in states that have not enacted "Right to Work" laws may be required to pay a limited "agency fee" to the union as a condition of their employment.¹⁰⁶ This "agency fee," however, must be no more than the teacher's *pro rata* share of the costs of expenses incurred in activities like collective bargaining, contract administration and grievance adjustment.¹⁰⁷ A union may only charge dissenting employees for that portion of dues (1) germane to collective-bargaining activity, (2) justified by the government's vital policy interest in labor peace and avoiding "free riders," and (3) which do not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.¹⁰⁸ Thus, the Supreme Court has held that while a union may collect from dissenting employees their share of costs for union conventions, publications and social events,¹⁰⁹ the union may not compel dissenting employees to pay for the union's lobbying activities, at least when those activities are not connected to legislative ratification or appropriations for their collective-bargaining agreement.¹¹⁰

The union and the employer must also follow certain procedures to ensure a teacher's right to pay only this "agency fee."¹¹¹ These procedural safeguards include (1) "an adequate explanation of the basis for the fee," (2) "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker," and (3) "an escrow for the amounts reasonably in dispute while [the] challenges are pending."¹¹² Moreover, the union bears the burden of proving the amount that is chargeable to dissenting employees.¹¹³

Objection to Any Association with a Union

Although the Supreme Court has held that dissenting employees may not be compelled to financially support a union's political agenda, the Court has nevertheless held that compulsory affiliation with a union or financial support of a union's collective bargaining related activities does not necessarily violate a public school teacher's First Amendment rights. Thus, although a teacher may not be compelled to pay for union activities beyond the "agency fee" as explained above, a teacher may generally be compelled to affiliate with a labor union.¹¹⁴

Some religious groups, such as Seventh-Day Adventists, hold religious objections to *any* affiliation with a labor union. Furthermore, some teachers may have a religious objection to the political views supported by certain labor unions (i.e., those favoring the right to abortion), and conclude that even though their agency fees may not be used to support political causes (under the safeguards explained in the previous section), any association by them with the union would violate their religious beliefs.¹¹⁵

Two federal provisions, section 19 of the National Labor Relations Act ("NLRA") and section 701(j) of Title VII of the Civil Rights Act of 1964, and several state statutes, may accommodate persons who object on religious grounds to the payment of union dues by allowing them to give to a charitable organization as a substitute for their union dues.¹¹⁶

First, section 19 of the NLRA requires that employers and unions subject to the Act accommodate religious objectors through the payment of substitute dues to a *nonreligious* charitable organization.¹¹⁷ Although section 19 ostensibly accommodates religious persons, it is facially discriminatory against religious charities. Moreover, at least one federal appellate court has held that section 19's requirement that an objector be a member a "*bona fide* religion ... which has historically held conscientious objections to joining or financially supporting labor organizations" is an unconstitutional preference for some religious beliefs over others in violation of the Establishment Clause.¹¹⁸

Second, some state statutes may also permit objectors to nonreligious charities or other charities mutually agreed upon by both the union and the objector.¹¹⁹ These state statutes are potentially more accommodating of religious objectors because the beneficiary mutually agreed upon by both the union and the objector could conceivably be a religious organization.¹²⁰ However, because the substitute charity must be mutually agreed upon, the state legislatures which have enacted these laws have effectively

conditioned such donations upon union consent. Thus, these statutes still prohibit a religious objector from choosing a religious charity as the recipient of their substitute payment.

Finally, section 701(j) of Title VII of the Civil Rights Act prohibits employers from discriminating on the basis of religion unless they cannot reasonably accommodate the employee without undue hardship on the union or employer.¹²¹ Numerous courts have interpreted this provision to require accommodation through substitute charitable payments.¹²² Moreover, unlike section 19 of the NLRA, section 701(j) does not mandate that the beneficiaries of such payments be nonreligious. In fact, section 701(j)'s express prohibition against employment discrimination based on a person's religion and its requirement that employers accommodate an employee's religious observances or practices (absent undue hardship on the employer's business) supports the argument that statutes which limit beneficiaries of substitute payments to nonreligious charities may constitute a civil rights infringement under Title VII.

At a minimum, the broader protection of Title VII should apply when an employee is covered by Title VII *and* the NLRA or one of the applicable state statutes providing for substitute dues payments to a charity. For example, one federal court has held that the broader protections of Title VII applied to an employee who objected to supporting the union on religious grounds, but who did not qualify under the NLRA's requirement of belonging to a religion with historically conscientious objections to joining unions.¹²³

Although unions may require some documentation concerning a religious objector's religious beliefs, the Equal Employment Opportunity Commission recently ordered the National Education Association to cease its practice of requiring religious objectors to resubmit such documentation every year. Thus, teachers should only be required to file once as a religious objector to such union dues.¹²⁴

Employees' Accommodation Under Title VII

Employees who have religious objections to joining a union or paying any dues to a union have some responsibility for reaching an accommodation with the union or their employers. Employees are entitled to a reasonable accommodation of their religious needs, but they may not be entitled to an absolute accommodation on their own terms.¹²⁵

For example, in *Yott v. North American Rockwell Corp.*, an employee refused to (1) join his union because of his religious beliefs; (2) pay an equivalent amount of his union dues to any local charity; and (3) accept the accommodation offered by his employer and the union, that he make a charitable contribution to his own church. He was discharged from employment. The court held that when an employee proves he informed his employer that the payment of union dues is contrary to his religious beliefs, the burden shifts to the employer to prove that the employer made a good faith effort to accommodate those religious beliefs and that those efforts proved unsuccessful.¹²⁶ Because the employer had showed the required good faith and

reasonable efforts to accommodate the employee's religious beliefs, the court held that the objecting employee's refusal of any accommodation proposal constituted undue hardship on both the employer and the union. Thus, the employee's discharge from employment did not violate Title VII.¹²⁷

Thus, teachers who seek to take advantage of section 701(j)'s prohibition against discrimination on the basis of religion should be as cooperative as their religious beliefs permit in reaching an accommodation with their employer or union. Teachers are also reminded to document their correspondence concerning efforts to reach such an accommodation.

CONCLUSION

Teachers do not unconditionally surrender their constitutional rights once they enter public education. The courts, however, have determined that there are contexts in which these rights may be subject to limitation or must defer to other interests. Although recent court decisions have helped elucidate the extent to which a teacher may assert his or her constitutional rights in light of other competing interests, many unresolved issues remain. As a consequence, the struggle for the individual freedom of teachers continues. Teachers who read this brochure, therefore, should do so *not only* to understand their rights, but also to weigh judicial and legislative means by which they as private citizens may achieve greater protection for the constitutional rights of public school teachers.

¹ *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969).

² *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

³ *Daugherty v. Vanguard Charter School Academy*, 116 F. Supp. 2d 897, 910 (W.D. Mich., 2000).

⁴ See *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *Mt. Healthy City Board. Of Educ. V. Doyle*, 429 U.S. 274 (1977).

⁵ *Pickering*, 391 U.S. at 574.

⁶ *Id.* at 574-75.

⁷ *Fyfe v. Curlee*, 902 F.2d 401 (5th Cir. 1990); *Stough v. Crenshaw County Board of Education*, 744 F.2d 1479 (11th Cir. 1984); *Brantley v. Surles*, 718 F.2d 1354 (5th Cir. 1983), *appeal after remand*, 765 F.2d 478 (5th Cir. 1985).

⁸ *Reeves v. Claiborne County Board of Education*, 828 F.2d 1096 (5th Cir. 1987)

⁹ *Wigg v. Sioux Falls School District 49-5*, 2003 U.S. Dist. LEXIS 13353 (D. SD July 2, 2003).

¹⁰ *Fyfe*, 902 F.2d at 404.

¹¹ *Brantley*, 718 F.2d at 1358, citing, *Montgomery v. Boshears*, 698 F.2d 739 (5th Cir. 1983); *Mt. Healthy*, 429 U.S. at 274).

¹² *Tinker*, 393 U.S. at 514.

¹³ *Id.* at 512-13.

¹⁴ *Id.* at 508.

¹⁵ *Id.* at 509.

¹⁶ *Id.* at 506.

¹⁷ *James v. Bd. of Ed. of Central Dist. No. 1 of the Towns of Addison*, 461 F.2d 566, 572 (2nd Cir. 1972), *cert. denied*, 409 U.S. 1042.

¹⁸ *Id.*

¹⁹ *Id.* at 573.

²⁰ *Id.* at 574.

²¹ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 274 (1988).

²² *Id.* at 273.

²³ *Id.* at 271-72.

²⁴ *See id.* at 273.

²⁵ *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991).

²⁶ *Id.* at 1068.

²⁷ *Id.* at 1068-69.

²⁸ *Id.* at 1069.

²⁹ *Id.* at 1076.

³⁰ *Id.*

³¹ *Id.*

³² *See, Wigg*, U.S. Dist. LEXIS 13353.

³³ *Lee v. Weisman*, 505 U.S. 577 (1992); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

³⁴ *Breen v. Runkel*, 614 F.Supp. 355, 358 (C.D. Mich. 1985). *See also Doe v. Duncanville Indep. School Dist.*, 70 F.2d 402, 406 (5th Cir. 1995); *Roberts v. Madigan*, 921 F.2d 1047, 1054 (10th Cir. 1990) and *Downing v. W. Haven Bd. of Ed.*, 162 F.Supp. 2d 19, 27 (Conn. 2001).

³⁵ *Nichol v. ARIN Intermediate Unit 28*, 2003 U.S. Dist. LEXIS 10810 (W.D. Pa., June 25, 2003).

³⁶ *Hysong v. Gallitzin Borough Sch. Dist.*, 164 Pa. 629, 657 (1894); *Rawlings v. Butler*, 290 S.W. 2d. 801, 804 (Kent. 1956). Holly M. Bastian, "Case Comment: Religious Garb Statutes and Title VII: An Uneasy Coexistence," 80 Geo. L.J., 211, 214 (1991) ("In jurisdictions where no religious garb statute or regulation exists, courts have cited *Hysong* with approval and held that the wearing of religious garb by public school teachers does not constitute sectarian teaching.")

³⁷ *Rawlings*, 290 S.W.2d. at 804; *State ex. rel. Johnson v. Boyd*, 217 Ind. 348 (1940); *Gerhardt v. Heid*, 66 N.D. 444 (1936); *Hysong*, 164 Pa. at 657.

³⁸ *See, Nichol*, at 39.

³⁹ *Board of Ed. for the Sch. Dist. Of Philadelphia*, 911 F.2d at 890-91.

⁴⁰ *Id.*

⁴¹ *Board of Ed. for the Sch. Dist. Of Philadelphia*, 911 F.2d at 890-91; *Cooper v. Aaron*, 301 Ore. 358 (

⁴² *Keyishian v. Board of Regents*, 385 U.S. 589, 607 (1967).

⁴³ *Roman v. Appleby*, 558 F. Supp. 449, 457 (E.D.P.A. 1983).

⁴⁴ *Pelova v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 521 (9th Cir. 1994).

⁴⁵ *Id.*

⁴⁶ *See, Wigg*, supra note 9.

⁴⁷ *Id.*

⁴⁸ *May*, 787 F.2d at 1114.

⁴⁹ *See Hall v. Board of School Comm'rs*, 681 F.2d 965 (5th Cir. 1982); *Friedman v. Union Free School Dist.*, 314 F.Supp. 223 (E.D.N.Y. 1970).

⁵⁰ *May v. Evansville-Vanderburgh School Corp.*, 787 F.2d. 1105, 1114 (7th Cir. 1986).

⁵¹ 20 U.S.C.S. § 4071; *Mergens*, 496 U.S. at 235-36.

⁵² 20 U.S.C.S. § 4071(c)(3).

⁵³ *Mergens*, 496 U.S. at 236.

⁵⁴ *Id.*

⁵⁵ *Jabr v. Rapides Parish Sch. Bd.*, 171 F. Supp. 2d. 653, 660 (W.D.L.A. 2001); *Culbertson v. Oak Ridge Sch. Dist. No. 76*, 258 F.3d 1061, 1065 (9th Cir. 2001) (enjoining teachers from distributing permission slips for a Bible Club meeting reasoning that such participation would give the impression of school endorsement of the Bible Club). *See also Peck v. Upshur County Bd. of Ed.*, 155 F.3d 274, 287 (4th Cir. 1998) (upholding a school policy permitting religious groups to disseminate religious literature at the schools once per year and noting that no school official actually participated in making the materials available).

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- ⁵⁶ *Jabr*, 171 F. Supp. 2d at 664.
- ⁵⁷ See *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968); *Adams v. Campbell County Sch. Dist.*, 511 F.2d 1242 (10th Cir. 1975); *Herndon v. Chapel Hill-Carrboro City Bd. of Ed.*, 899 F. Supp. 1443, 1452 (M.D.N.C.); *Cary v. Bd. of Ed. of the Adams-Arapahoe Sch. Dist. 28-J*, 427 F. Supp. 945 (D. Colo. 1977), *aff'd*, 598 F.2d 535 (10th Cir. 1979);
- ⁵⁸ See, e.g., *Palmer v. Bd. of Ed. of the City of Chicago*, 603 F.2d 1271 (7th Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980) (upholding dismissal of kindergarten teacher who refused to teach patriotic songs.)
- ⁵⁹ *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1007 (7th Cir. 1990); *Zykan v/ Warsaw Comm. Sch. Corp.*, 631 F.2d 1300, 1305 (7th Cir. 1980).
- ⁶⁰ *Keyishian*, 385 U.S. at 603.
- ⁶¹ *Epperson*, 393 U.S. at 107.
- ⁶² See *Zykan*, 631 F.2d at 1305-06 (school board may not flatly prohibit teachers from mentioning certain topics relevant to a classroom discussion).
- ⁶³ *Krizek v. Bd. of Ed.*, 713 F. Supp. 1131, 1138 (N.D. Ill. 1989), *quoting Cary*, 427 F.Supp. 945, 953
- ⁶⁴ *Keyishian*, 385 U.S. at 603.
- ⁶⁵ See Donald F. Uerling, "Academic Freedom in K-12 Education," 79 Neb. L. Rev., 956, 957 (2000).
- ⁶⁶ See *Kingsville Ind. Sch. Dist. v. Cooper*, 611 F.2d 1109, 1113 (5th Cir. 1980); *Dean v. Timpson Ind. Sch. Dist.*, 486 F. Supp. 302, 308 (E.D. Tex. 1979); *Wilson v. Chancellor*, 418 F. Supp. 1358 (D. Or. 1976).
- ⁶⁷ *Dean*, 486 F. Supp. At 308
- ⁶⁸ *Kingsville*, 611 F. 2d at 1113.
- ⁶⁹ *Dean*, 486 F. Supp. at 308; *Milliken v. Bd. of Dir.*, 611 P.2d 414, 417-18 (Wash. 1980); Uerling, 79 Neb. L. Rev. 956, 968. See also *Tinker*, 393 U.S. 503.
- ⁷⁰ *Sch. Dist. of Abington Township. v. Schempp*, 374 U.S. 203, 225 (1963).
- ⁷¹ See *Id.*
- ⁷² *Wilson*, 418 F. Supp. 1358, 1363.
- ⁷³ *Id.* at 1363, 1367.
- ⁷⁴ *Id.* at 1366-67.
- ⁷⁵ *Id.* at 1364.
- ⁷⁶ *Abington*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421, 434 (1962).
- ⁷⁷ *Abington*, 374 U.S. at 225.
- ⁷⁸ *Id.*
- ⁷⁹ See *Abington*, 374 U.S. at 225; *Florey v. Sioux Falls Sch. Dist. 49-5*, 464 F. Supp. 911 (D. S.D. 1979), *aff'd*, 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980); *Parducci v. Rutland*, 316 F. Supp. 352, 356 (M.D. Ala. 1970).
- ⁸⁰ *Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001), *cert. denied*, 122 S.Ct. 465.
- ⁸¹ *Id.* at 276-77.
- ⁸² *Id.* at 279, *citing Wallace v. Jaffree*, 472 U.S. 38, 41 (1985).
- ⁸³ See *Palmer*, 603 F.2d 1271.
- ⁸⁴ See, e.g., *Webster*, 917 F.2d 1004 (holding that a teacher's discussion of creationism in the classroom would be unconstitutional); *Pelozo*, 782 F. Supp. 1412 (C.D. Calif. 1992), *aff'd*, 37 F.3d 517 (9th Cir. 1994) (holding that teaching of evolution did not violate the Establishment Clause.)
- ⁸⁵ See *Zykan*, 631 F.3d at 1305-06 (school board can not prohibit teacher from mentioning material relevant to course content).
- ⁸⁶ *Epperson*, 393 U.S. 97, 115-16 (Stewart, J., concurring in the result). At least three members of the present Court have also indicated that teachers should be permitted to "[suggest] to students that other theories besides evolution – including, but not limited to, the Biblical theory of creation – are worthy of their consideration." *Cert. denied, Tangipahoa Parish Bd. of Ed. v. Freiler*, 530 U.S. 1251, 1255 (2000) (Scalia, J. dissenting, joined by Rehnquist, C.J. and Thomas, J.).
- ⁸⁷ 393 U.S. at 107.
- ⁸⁸ *Id.*
- ⁸⁹ *Id.* at 104.
- ⁹⁰ *Id.* at 107.
- ⁹¹ *Edwards v. Aguillard*, 482 U.S. 578, 586 (1987).
- ⁹² *Id.* at 586-87.
- ⁹³ *Id.* at 591.

⁹⁴ *Id.* at 593.

⁹⁵ *Id.*

⁹⁶ *Id.* at 594.

⁹⁷ *See Id. See also Tangipahoa*, 530 U.S. at 1255 (Scalia dissenting); *Epperson*, 393 U.S. at 115-16 (Stewart, J., concurring in the result).

⁹⁸ Jefferson, “A Bill for Establishing Religious Freedom,” preamble, reprinted in 5 “The Founder’s Constitution,” 84 (P. Kurland & R. Lerner eds. 1987).

⁹⁹ *E.E.O.C. v. University of Detroit*, 904 F.2d 331 (6th Cir. 1990).

¹⁰⁰ Of course, teachers should also examine their union agreement as well to determine if the agreement itself permits teachers to withhold certain dues or even to choose not to join the union.

¹⁰¹ “Right to Work States,” <http://www.nrtwc.org/rtws.php3>, site visited August 8, 2002.

¹⁰² *See, i.e.*, §40.1-62, Va. Code, 1970, §25-7-34, Ala. Code, 1953 (“No employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees or other charges of any kind to any labor union or labor organization.”).

¹⁰³ For example, Oklahoma’s “Right to Work” law became effective as of September 25, 2001, and does not apply to collective bargaining agreements entered into prior to that date. “Questions & Answers about Right to Work,” <http://www.state.ok.us/~okdol/admin/rtw%20faq.pdf>, site visited August 8, 2002.

¹⁰⁴ 431 U.S. 209, 235 (1977).

¹⁰⁵ *Id.* at 235-36.

¹⁰⁶ *Id.* at 225-26. This “agency fee” is also often called a “union fee” or a “fair share fee.”

¹⁰⁷ *Id.*

¹⁰⁸ *Lehnert v. Ferris Faculty Association*, 500 U.S. 507, 519 (1991).

¹⁰⁹ *Id.*, discussing *Ellis v. Railway Clerks*, 466 U.S. 435, 456.

¹¹⁰ *Id.* at 522 and 559.

¹¹¹ *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

¹¹² *Id.*, at 310.

¹¹³ *Id.* at 306, quoting *Abood*, 431 U.S. at 239-240, n. 40, quoting *Bro. of R. & S.S. Clerks v. Allen*, 373 U.S. 113, 122 (1963).

¹¹⁴ *Lehnert*, 500 U.S. 507, 517; *Abood*, 431 U.S. 209, 222. Of course, as explained above, a teacher protected by a “Right to Work” law may not be compelled to join or pay any fees to a labor union.

¹¹⁵ For example, in *E.E.O.C. v. University of Detroit*, 904 F.2d at 333, an employee objected to having to pay any fees to the union. The employee wrote: “Regardless of the amount of the fee that I might pay, a percentage as estimated will be used to support issues to which I object. The choice I must make is to either pay nothing, in which case no support goes to objectionable issues, or to pay a reduced amount, in which case a percentage goes to the support of objectionable issues. Since I believe that abortion is absolutely wrong I must choose the course that minimizes the support of it. *The gravity of this issue is so great that I must consider my job expendable.*” (emphasis supplied).

¹¹⁶ 29 U.S.C.A. § 169 (1995 West Supp.); 42 U.S.C.A. §§ 2000e(j), 2000-2(a) (1994). *See also*, Frederic Scott & Cynthia Weingart, *A Professor’s Choice: Employment or Religious Conviction: E.E.O.C. v. University of Detroit*, 18 J.C. & U.L. 315 (1991).

¹¹⁷ 29 U.S.C.A. § 169 (1995 West Supp.)

¹¹⁸ *Wilson v. N.L.R.B.*, 920 F.2d 1282, 1287-88, 1290 (6th Cir. 1990), *cert denied*, 112 S. Ct. 3025 (1992).

¹¹⁹ *See e.g.*, Or. Rev. Stat. Ann. §243.666 (1991); Wash. Rev. Code Ann. § 41.56.122(1) (1991).

¹²⁰ *Yott v. North American Rockwell Corp.*, 602 F.2d 904, 906 (9th Cir. 1979).

¹²¹ 42 U.S.C.A. §§ 2000e(j), 2000e-2(a) (1994).

¹²² *University of Detroit*, 904 F.2d at 333; *Int’l Assoc. of Machinists & Aerospace Workers, Lodge 751 v. Boeing Co.*, 833 F.2d 165 (9th Cir. 1987), *cert. Denied*, 485 U.S. 1014 (1988); *Nottelson v. Smith Steel Workers D.A.L.U.* 19806, 643 F. 2d 445 (7th Cir. 1981), *cert. Denied sub nom.*; *AO Smith Corp. v. Nottelson*, 454 U.S. 1046 (1981); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239 (9th Cir. 1981), *cert. denied*, 454 U.S. 1098 (1981); *Yott v. North American Rockwell Corp.*, 602 F.2d 904 (9th Cir. 1979, *cert. denied*, 445 U.S. 928 (1980); *McDaniel v. Essex Int’l, Inc.*, 571 F.2d 338 (6th Cir. 1978).

¹²³ *Int’l Assoc. of Machinists v. Boeing Co.*, 833 F.2d at 170.

¹²⁴ “Nation’s Largest Teacher Union to be Prosecuted for Violating Teachers’ Civil Rights,”

<http://www.nrtw.org/b/nr.php3?id=112>, site visited August 13, 2002.

¹²⁵ *University of Detroit*, 904 F.2d 331.

¹²⁶ *Yott*, 602 F.2d at 906.

¹²⁷ *Id.* at 908.