THREE FACES OF ACADEMIC FREEDOM

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More than three decades ago, the great legal realist Karl Llewellyn complained that the law for the sale of goods was uncertain and unsettled and that results were difficult to predict. He particularly objected to the concept of title, urging that it was a lump concept that shrouded more than it revealed. As a monolithic concept, it "works out, no less, either to obfuscate statement of results of rather reasonable decisions, or to misguide decision." Had Llewellyn confronted the concept of academic freedom, he would have found it to be equally lumpy and perhaps he would have been similarly puzzled.

In my judgment the attempt to create only one face for academic freedom is a form of plastic surgery that ill serves the ends of justice and public policy. If, in our enthusiasm to protect the academy, we wish to etch the concept into a stone image oblivious

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1. Llewellyn, Through Title to Contract and a Bit Beyond, 15 N.Y.U. L.Q. Rev. 159, 171 (1938) (quoted in Hillinger, The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve the Good, the True, the Beautiful in Commercial Law, 73 Geo. L.J. 1141, 1166 (1985)).
to the changes wrought by time, perhaps we should aspire to the multiple faces of Mt. Rushmore. Even so stalwart a defender of academic freedom as Robert O'Neil is quick to admit that we use the term "with a degree of confidence that may surpass our common understanding."\(^2\)

In my lecture today, I would like to sketch and critique three distinct, though related, faces of academic freedom and along the way to discard a few false faces that are less worthy of serious consideration. I also will compare the justifications for academic freedom in elementary and secondary schools and in universities. The former context is one in which the concept has been least explored and from which it does not derive. I should note, however, that I embark on this enterprise with some trepidation. What the historian Michel Foucault said of sex in modern societies appears to be equally true of academic freedom: It is not that we have consigned academic freedom "to a shadow existence," but rather that we have dedicated ourselves "to speaking of it ad infinitum, while exploiting it as the secret,"\(^3\) failing to reveal its core with precision. My hope is to clarify and amplify, not to participate in the "poly-morphous incitement to discourse."\(^4\)

I

In 1937 Professor Arthur Lovejoy, writing for the Encyclopedia of the Social Sciences, defined academic freedom in an accurate, though somewhat long-winded, manner:

Academic Freedom is the freedom of the teacher or research worker in higher institutions of learning to investigate and discuss the problems of his science and to express his conclusions, whether through publication or in the instruction of students, without interference from political or ecclesiastical authority, or from the administrative officials of the institution in which he is employed, unless his methods are found by qualified bodies of his own profession to be clearly incompetent or contrary to professional ethics.\(^5\)

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4. Id. at 34.
5. Lovejoy, Academic Freedom, in 1 Encyclopedia of the Social Sciences 384 (1930). Compare id. with Developments in the Law—Academic Freedom, 81 Harv. L. Rev. 1034, 1045 (1968) ("Academic freedom is that aspect of intellectual liberty concerned with the
Note that Lovejoy limits the scope of academic freedom to "higher institutions of learning." The question that has puzzled courts, educators, and scholars for nearly fifty years is whether the concept has application to the thousands of professional teachers who practice their art in public and private elementary and secondary schools.6

The whole concept of professorial autonomy is in some ways counterintuitive and perhaps only a product of a mature democracy, confident about its future and willing to risk criticism of its basic tenets. In a sense we ask that government and other established institutions lay the ground for their own criticism and, perhaps, modification or destruction, by supporting the speech of those who may profoundly disagree with the dominant cultural, political, social, and economic norms. And, at least in public universities, this objective is accomplished at government expense and by denying the legality of some restraints on what its communicators may say.7 For some the extension of these notions beyond public universities appears to elevate the counterintuitive to the counterproductive8 by replacing a needed sense of community and common purpose with anomie and philosophical solipsism.

The concept of academic freedom traces its roots to university governance in the nineteenth and twentieth centuries on the European continent. These Western nations, particularly Germany, developed a complex pattern of authority over universities. Governments appointed university professors, funded higher education, and determined the curriculum, but "university teachers above a certain grade" were granted "the privileges and obligations of civil servants." Once appointed, "there was a very large measure of academic freedom for the individual university teacher."9 The teacher had a high degree of autonomy in pursuing his research, in questioning conventional wisdom, and in presenting materials to his peculiar institutional needs of the academic community.

classes. For ease of expression, I call this the personal autonomy face of academic freedom.

The personal autonomy concept of academic freedom, protecting that rarest and most vulnerable of species, the *homo academicus*, has great allure and force. As Oscar Wilde once opined, "the public is wonderfully tolerant. It forgives everything except genius." But can the concept justifiably be extended to elementary and secondary school teachers? If we are not speaking of a privileged caste of classroom mandarins—teachers and professors having status rights denied their less fortunate brothers and sisters who produce goods and services and not words, then the question must be whether the interests advanced by this model in the university are also advanced in elementary and secondary schools. As Professor Van Alstyne has wisely counseled academics, the rationale for academic freedom should lie in social utility, not in feudal right or natural law:

[T]he justification [for academic freedom] rests on an observation (or supposition) about the nature of [the academic's] work: that the essence of the academic profession is the critical examination of received wisdom and that therefore it is essentially the public interest that benefits from the careful protection of an academic's professional liberty. A community that can require the dismissal of a teacher because of the critical content of his or her critical professional utterances frustrates the social usefulness of the academic profession.

But to frame the question in this manner suggests the following question. How perfect or imperfect is the fit between the aims of academic freedom, in its personal autonomy garb, and the characteristics of elementary and secondary schools and of those who teach there?

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10. See generally R. MacIver, Academic Freedom in Our Time (1955). But see Fisk, Academic Freedom in Class Society, in The Concept of Academic Freedom, supra note 2, at 5, 7 ("[T]he base of the right to academic freedom in our society is the tendency of the class to which academics belong to serve the capitalist class by providing ideological props for the order in which that class is a ruling class.").


The overarching mission of universal and compulsory schooling is the inculcation of civic, cultural, and other values and the transmission of skills;¹⁴ it is not designed to be value-neutral or to countenance unbridled innovation. No culture can survive without a reliable means of passing on its exogenic heritage, its basic norms, its institutional arrangements, its language, its myths and accepted truths. The polity, through its elected representative and arcane bureaucracies, determines that children will study American history, not Bulgarian history, that they are not to strive to reinvent calculus or geometry, that words have accepted meanings. We teach them that murder and child abuse are wrong, that universal suffrage and equality under law are right.

To be sure, there is room for critical thinking—there is a delicate and elusive balance between cultural grounding and cultural determinism—and we hope to mesh communal commitment and individual autonomy.¹⁶ That is to say, one of the norms we embrace is the norm of reflective and critical inquiry.¹⁶ But children must learn the accumulated knowledge and values before they can evaluate them; there must be centripetal forces of shared culture to balance centrifugal forces of free inquiry. And the dominant purpose of elementary and secondary schools is to bring the new generation of young people—Tawney described them as savages¹⁷—into full membership into the polity. The teacher's mission is primarily to facilitate acculturation, to convey those values, norms, and skills that the community deems essential to individual and group survival. In Van Alstyne's terms, the essence of her job is the transmission of "received wisdom," not its "critical examination."¹⁸

In our scheme of things, critical thinking is supposed to come later, as the students mature and are better grounded in the cul-


¹⁶. See generally A. MacIntyre, After Virtue 205-07 (1981); M. Sandel, Liberalism and the Limits of Justice 16-17 (1982).


¹⁸. W. Van Alstyne, supra note 12, at 52; see also Miller, supra note 6.
ture. Higher education is not universal and compulsory, and at least in aspiration, it seeks to advance the frontiers of knowledge and not merely to transmit information. The university student generally is free to select her curriculum, teachers and, indeed, her university. She is presumed to be sufficiently mature and tutored in the "conventional wisdom" that she can evaluate intelligently the received traditions and rules of the game. She exercises her capacity for autonomous decision-making against a backdrop of understanding, not ignorance. While some high school students may have these characteristics—and many college students do not—a line must be drawn somewhere. American states have drawn that line through their public school and compulsory attendance laws.

University professors, when they are doing their job, are expected to engage in critical examination of the dominant paradigms in their fields. Research and publication are the *sine qua non* of promotion and tenure, though some neither publish nor perish, and university professors are given significant latitude in teaching assignments and near unbridled discretion in their research. Conversely, by virtue of their training and mission, elementary and secondary school teachers are rarely engaged in advanced research, in publishing research results, or in testing and sharing their hard-won insights with their students. They are expected to teach the grade-levels and courses assigned to them, and their discretion is circumscribed by state and local curricular requirements.

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20. See W. Van Alstyne, * supra* note 12, at 52; Jones, *Academic Freedom as a Moral Right*, in *The Concept of Academic Freedom*, * supra* note 2, at 37, 46 ("Academics are expected to discover and transmit—in research, teaching, and publication—what they honestly have found to be true."); Levinson, *Professing Law: Commitment of Faith or Detached Analysis*, 31 St. Louis L.J. 3, 21 (1986) ("Contemporary claims for academic freedom ... often rest on epistemological assumptions concerning truth.").


figures, commanding the respect and deference of their charges. Their messages are as frequently conveyed by who they are as by what they say. Thus, the educational functions of elementary and secondary school teachers are viewed as radically different from those of university professors, and the protection of their pedagogical and intellectual autonomy is unlikely to advance the same goals as are identified with higher education.

II.

Having made the obligatory distinctions between academic freedom in different schooling settings, let me confess that I am deeply troubled by the concept of academic freedom defined in terms of the intellectual autonomy of the professor. In particular, how does the claim to academic freedom rise to the level of a constitutional entitlement under the first amendment to the Constitution? In what sense is freedom of speech involved? Why is the language of rights involved? Professor Dworkin has urged that rights, taken seriously, trump the utilitarian calculus of policy, that principles should overwhelm policy advantages. He even seems to relish the triumph of rights where the consequences of adhering to them are destructive of important policy objectives. Thus a personal right to academic freedom suggests that it should prevail even where, in instrumental terms, it does not advance sound educational objectives. Yet, the reasons generally proffered for academic freedom are highly instrumental in nature. In a variation


25. See supra note 24.


27. R. Dworkin, Taking Rights Seriously 191 (1977) (“If citizens have a moral right of free speech, then governments would do wrong to repeal the First Amendment that guarantees it, even if they were persuaded that the majority would be better off if speech were curtailed.”). Professor Van Alstyne suggests that academic freedom is more accurately described as a “freedom” (i.e., a liberty marked by the absence of restraints or threats against its exercise) rather than a “right” (i.e., an enforceable claim upon the assets of others) in the sense that it establishes an immunity from the power of others to restrain its exercise . . . .” Van Alstyne, supra note 2, at 71. The distinction, while important, does not alter the uncertainties over the constitutionalization of academic freedom.

28. See, e.g., R. MacIver, supra note 10, at 11 (1955) (Academic freedom “is inherently bound up with the performance of the university’s task, something as necessary for that performance as pen and paper, as classrooms and students, as laboratories and
of the "what is good for General Motors is good for the nation" theme, what is good for professors is thought to be good for education. But if that is all that can be said for academic freedom, how persuasive is the argument?

In my judgment, a persuasive constitutional argument for academic freedom as professorial autonomy has yet to emerge from the cases and scholarly works. The core difficulty is that it is one thing for government to censor the private speech of individuals in the world at large, and quite another thing for public and private educational institutions to control the speech of those whom they pay to speak for them. For example, I am sure that few of us are troubled by a judicial decision declaring that a professor constitutionally cannot be prohibited from speaking on the allegedly misbegotten policies of his board of regents at the speakers' corner in a local city park. And most of us would agree that a public university should not be able to dismiss him for embodying those views in a letter to the local press—even if his relationship with the university's central administration deteriorated as a result of his critique. But if the professor is employed by a public university to teach demography, could he not be properly dismissed for spending valuable class time on the mismanagement of the university? In a sense, the university accomplishes its legitimate mission by hiring the professor to speak for it, and without the ability to control his speech, the whole enterprise comes to nothing.

The answer surely does not lie in a personal autonomy vision of freedom of expression, for inevitably we slip into a thoroughgoing libertarianism. Zoning laws and traffic regulations also interfere with autonomy, though their constitutionality has been upheld. Even from a pure speech perspective it is no more meaningful to speak of academic freedom as autonomy for the teacher than it is to speak of the freedom of the telephone operator at city hall to discuss sexual promiscuity with those who seek to speak with the mayor. Or consider the postal employee who embraces the constitutional right to be rude to patrons by eschewing regulations requiring civility in his dealings with stamp-purchasers as an uncon-
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scionable interference with his professional autonomy, or the printer at the Government Printing Office who adds an addendum to the President's State of the Union Address. Unless an abridgment of speech lies in every exercise of governmental authority to speak through individuals—and how else might abstract entities called governments speak?—it is difficult to countenance the view that government control of its own professional speakers violates the historically developed concepts of freedom of expression.

There are a number of answers that might be offered by a proponent of academic freedom as personal autonomy. One frequently suggested point is that there is a distinction between dismissing a teacher for failing to teach the course assigned to her or acting in a professionally incompetent way and dismissing her for the materials she chooses or her critical attitude toward the conventional wisdom in her field. That is, there is a difference between teaching university mismanagement in the demography class and teaching a Marxist view of demography that treats demographic studies as a product of the ruling elite's efforts to maintain its hegemony. But does this amount to anything more than a policy distinction? What does it have to do with rights? The fundamental principle is that the public university can control what is spoken in the classroom, and the line-drawing does not seem rooted in a cognizable right of the professor. Her autonomy is already limited severely, and the suggested constitutional standard only distinguishes between complete or partial subversion of the curriculum or professionally competent or incompetent approaches to the subject. That there may be the more or the less does suggest a rights analysis. We first must determine the warrant for any autonomy. As things stand, the lines of demarcation do not emerge from a coherent concept of freedom of expression, rather they appear rooted in good and bad educational consequences.

A related counterthrust is that professors who are free to structure their subject, to criticize, and to promote reflection are better teachers because students learn more and learn to think for themselves. I could not agree more. But in the framework of rights, why is there a personal right of the professor to teach in the most

efficacious manner? Is there a constitutional right to embrace an assertedly superior educational philosophy\textsuperscript{38} or are we left only with recent yuppie theories of free speech, the assertion that expression promotes self-realization?\textsuperscript{38} If so, why do not engineers at NASA have the constitutional right to engineer rockets in the most efficient, productive and self-realizing manner—even if their managers and the Congress disagree with them? To be sure, professors speak and write for a living and engineers conceptualize problems and design solutions (a form of communication) but why should that matter? So too, hot tubs, home ownership, and football games, sometimes, may also promote self-realization; but constitutional entitlements to those aspects of the good life have yet to be established.

The association of academic freedom with educational excellence reminds me of W.H. Auden’s insightful defense of poetry. Auden argued:

Poetry is speech at its most personal, the most intimate of dialogues. A poem does not come to life until a reader makes his response to the words written by the poet.

Propaganda is a monologue which seeks not a response but an echo. To recognize this is not to condemn all propaganda as such. Propaganda is a necessity of all human social life. But to fail to recognize the difference between poetry and propaganda does untold mischief to both: poetry loses its value and propaganda its effectiveness.\textsuperscript{37}

A defense of academic freedom bottomed on the educational efficacy of professorial autonomy is very much like a preference for poetry over prose—or propaganda in Auden’s terms. It speaks to different types of learning and different concepts of the involvement of the listener in the enterprise. But the distinction speaks to personal, aesthetic and philosophical preferences, not to rights. Perhaps Auden would have comprehended and embraced a right to be a poet in a modern society. But does each professor have a constitutional right to such status in the classroom, though her employer hires her to promulgate and teach prose?

Note that the term propaganda, so broadly construed by Au-

\textsuperscript{35} See Goldstein, supra note 8.
\textsuperscript{36} See generally F. Schauer, supra note 32.
den, has taken on a much more menacing connotation in the twentieth century. For many, the term is the very opposite of education, for it suggests a deliberate brainwashing to perpetuate the ends of those who wield political power. And this use may be a weighty objection to the governmentally-imposed constraints on the autonomy of professors and teachers in the public sector. It suggests a “negative” first amendment argument for academic freedom: government may act from illicit motives and may not be trusted to regulate its own expression. But, as we shall see soon, this objection is structural in nature and may give rise to a concept of academic freedom conceived as a limit on government more than as a personal right to professional autonomy.

Equally as important, the argument may go to the substance of whether what is taught as democratic values is or is not instilled in the students. Indeed, the scope of academic freedom—Lysenkoism notwithstanding—may be sharply limited by such a defense, for in many subject areas it seems doubtful that constraints on professorial autonomy have the purpose or effect of political propaganda.

Finally, most defenses of academic freedom as a right are historically rooted in the freedom to conduct and publish research, to advance knowledge and truth. Interestingly enough, many eminent modern first amendment scholars, Professor Schauer for example, have rejected this justification as a general theory of free speech despite its impressive lineage. If, however, freedom of expression is premised on the recognized right to pursue truth and knowledge, autonomy in research and scholarship would seem to be logically connected to that right. It seems sensible to suggest that a successful scholar must be free to take his research where the data and his imagination take him.

38. See M. Yudof, supra note 13, ch. 5.
42. F. Schauer, supra note 32, at 15-34. See also Levinson, supra note 20, at 22 (Truth is “only [a] synonym for culturally shared conventions. At the very least, there are no self-evident immutable or eternal truths.”).
43. See O’Neil, supra note 2, at 284.
Note, however, a number of caveats. First, there must be unbridled freedom to do research, while the constraints in the classroom are more severe. Research outside of the classroom may be thought to be more analogous to the speaker in the park than to the hired speaker in the post office or university building. Second, even research is not entirely a matter of personal autonomy. I have never encountered a case in which the government has hired a professor to do a particular type of research—say on the biological impact of space flights—where the researcher has argued successfully that he has a constitutional right to investigate what he pleases—say the mating habits of the abominable snowman. Indeed, faculties and university officials routinely evaluate scholarly works for tenure and promotion purposes, and no constitutional rights are thought to be implicated if the scholarship is deemed intellectually inadequate.

It also seems necessary, though perhaps uncharitable, to inject some realism into the research justification for a right to academic freedom. Academic freedom is frequently purveyed as a right broadly applicable to all professors, as befits a personal right. But as a consequentialist argument we are justified in seeking to determine how much pursuit of truth and knowledge we purchase at the price of professional autonomy and job security for all. Professor Finklestein recently reported in his study of the American academic that “the American academic profession is essentially a teaching as opposed to a scholarly profession.” One-third of all professors admit to spending no time at all on research, while more than half spend less than five hours a week on it. Another survey determined that 60% of a sample of 5000 professors had never published or even edited a book in their subject areas. In some ways the problem is worse for full professors with tenure, as they appear to lose interest in both teaching and research. Permanent appointees make up as much as 80% of our faculties, and yet these academicians, freed from the pressure of tenure decisions, are the

44. See Hacker, supra note 21.
very ones who are most likely to lose themselves in committee assignments, institutional governance, consulting, or lethargy. In short, the research justification for academic freedom protects the many while it is rooted in the mores of the few.

Lest the audience fear for the plight of the University of Texas Law School, I confess that I am committed personally to the concept and practice of academic freedom in our universities. But I am committed at the level of policy and not constitutional entitlement under an autonomy theory. More importantly, The University of Texas, its Legislature, Board of Regents, administrators, and faculties are committed to academic freedom. Some have suggested that it is this commitment that enshrines academic freedom in the pantheon of constitutional rights. Presumably, most universities embrace academic freedom, while NASA has no similar devotion to engineers’ freedom and the postal service is not taken with the autonomy of postal employees. But why is it relevant that most of our modern universities have voluntarily accepted the wisdom of protecting, within broad limits, the professional autonomy of academic employees? Under some fancy and elaborated concept of equal protection or due process of law, perhaps courts should hold a university to its articulated purposes. It should not be able to claim allegiance to academic freedom in its policies, while denying its application in practice. But if this counts as a justification for a constitutional right, that right is certainly flimsy and contingent. Once a university brings its articulated purposes into line with its operational decisions, the inconsistency, and hence the right, may disappear.

But would a modern university officially repudiate academic freedom, risking the wrath of the AAUP and the flight of distinguished professors from its campus? Perhaps the point to be gleaned from this analysis is that the autonomy face of academic freedom in universities is less a matter of law and courts than it is a matter of history, tradition, politics and attitudes. Thus, we may explain the courts’ apparent willingness to embrace academic freedom symbolically, while declining to rely on it as a ground for decision. And consider the frequent extension of academic freedom to

47. See Hacker, supra note 21; CHRON. HIGHER EDUC., supra note 46.
48. See generally Searle, supra note 29.
49. The various American Association of University Professors policy statements on academic freedom are discussed in ACADEMIC FREEDOM AND TENURE (L. Joughlin ed. 1967); Van Alstyne, supra note 2. But see E. SCHRECKER, NO IVORY TOWER (1986).
private schools, though state action is lacking. Thus, the survival of this face of academic freedom may depend on the continued internalization of the values implicit in the concept, on the widespread acceptance of its philosophical and educational value. So long as politicians, administrators, and professors believe that great universities cannot be created and maintained where academic freedom has withered, just so long the “right” to such freedom will be tolerated widely. Until a more persuasive constitutional argument for academic freedom as professional autonomy is set forth, the Constitution and the language of rights will do little to bolster its case. At best we will encounter only a symbolic affirmation by the courts of academic freedom as personal autonomy, an approach readily evidenced by the near absence of clear-cut academic freedom holdings—despite some extravagant language by our most able jurists.50

III.

Having communicated my reservations about academic freedom as personal autonomy, let me return to my central theme. Despite the ill fit between academic freedom in universities and the role of non-university teachers, a few courts—not many—have attempted to assimilate the rights of elementary and secondary school teachers to those of university professors. Perhaps the most interesting example of this phenomenon is Judge Johnson’s 1970 decision in Parducci v. Rutland.51 Without elaborating on the details of the litigation, a high school English teacher was dismissed for assigning Kurt Vonnegut’s “Welcome to the Monkey House” to her class. She intended to use the work as a vehicle for discussing comic satire in short stories, but the principal and school board were not amused. They viewed the work as advocating the killing of the elderly. Upon review of the constitutional issues, the court ordered the school board to reinstate the teacher.

Judge Johnson’s analysis treats academic freedom as a monolithic, unified concept and affords Ms. Parducci the protections of the personal autonomy model previously applied to university professors. The court addresses two questions: 1.) Is the reading

50. See Katz, supra note 26.
appropriate for high school juniors? 2.) Is there a significant likelihood that its presentation and discussion will cause a substantial and material disruption of the educational processes? The implicit assumption is that the teacher is autonomous in matters of book selection and course content, so long as the material meets some minimal standard of relevance to the established curriculum, is not so vulgar as to be inappropriate for students of that particular age, and does not disrupt the school. Authority lies in the hands of the teacher, and the school board has the power only to temper professionally incompetent instructional judgments.

The constitutionally mandated allocation of authority is bolstered by Judge Johnson’s express reliance on *Tinker v. Des Moines Independent Community School District,* a case affirming the first amendment rights of students in public schools. *Tinker* is premised on the idea that students are autonomous citizens, with bundles of rights, and that those rights travel with them. Their freedom of expression cannot be entirely circumscribed even in the special setting of public education. Students decide what they may say and where they may speak, so long as they do not substantially disrupt the institution’s educational mission. The rights are personal, the limits are only those demanded by institutional necessity. In *Parducci,* the speech rights of teachers are viewed through virtually identical lenses. The result of this approach, as Professor Tribe has noted, is that public schools become a limited public forum, one open only to the school community and not to outsiders.

The remainder of Judge Johnson’s decision may be aptly described as a truncated book review. Vonnegut is described as a “prominent contemporary writer,” the book is compared to Pope’s *Rape of the Lock,* and the short story is endorsed as a satire that symbolizes “the increasing depersonalization of man in society.” The judicial message is clear. “Welcome to the Monkey House” is a literate, subtle, relevant, non-disruptive short story, and the school board has no business telling a teacher not to use it.

53. *Id.* at 506.
55. *Parducci,* 316 F. Supp. at 353.
56. *Id.* at 356.
But what if the school board preferred nineteenth century Russian novels to modern American short stories, or suppose it thought that tragedies or romances were more important for high school juniors? Does the teacher always get to decide such questions within the minimal constraints imposed by the court? Should the teacher decide what values and skills are to be communicated? And in what sense do we need to protect the teacher’s autonomy to conduct her research, discuss her ideas, and advance her theories? Were such interests at stake in *Parducci*? Should the interests of the teacher and those of the student be treated identically? We are all repelled by the crudeness of the board’s censorship, by the literary crime of confusing satire with outrageous advocacy of misdeeds, but does the infraction fit the autonomy model traditionally applied to university professors?

I think it is fair to say that *Parducci* never became the law of the land because of its lack of persuasive power in its application to the myriad circumstances of conflict between teachers, administrators and school boards.\(^5\) Perhaps this is because student and teacher free expression rights have generally received less protection in recent years. But there may be a more fundamental change taking place. In this regard, it is instructive to review a transitional case, one that implicitly rejected the premises of *Parducci*, while seeking some alternative conceptualization of the academic freedom of elementary and secondary school teachers.

IV.

In *Cary v. Board of Education*,\(^5\) decided in 1979 by the Court of Appeals for the Tenth Circuit, the court did not expressly reject *Parducci*, but it elaborated on the case in a way which would have surprised Judge Johnson and a careful reader of his opinion. In the view of Judge Logan, the problem in *Parducci* was that the school board had failed to act pursuant to general standards, that its policy was *ad hoc* and after the fact, and that there was unhappiness only with a specific teacher and her assignment.\(^6\) By the magic of law school training and the ability to reinterpret precedents in the light of present necessities, *Parducci* was converted into a procedural case involving a civil “bill of attainder” and a failure to give

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57. See, e.g., Zykan v. Warsaw Community School Corp. 631 F.2d 1300 (7th Cir. 1980).
58. 598 F.2d 535 (10th Cir. 1979).
59. Id. at 541-42.
prior notice of proscribed behavior.

But the teachers in Cary had sought to assign a number of books, including *A Clockwork Orange* and *Rosemary's Baby*, and the school board had declined to approve those assignments. The board asserted that it, and not the teacher, should decide; and despite the dutiful nod to *Parducci*, the Cary court sided with the school board. How then could the court justify its decision? Principled application of *Parducci* should have led to a contrary result. What of the autonomy of teachers? Were the excluded books irrelevant to a high school language arts class? Did their assignment cause riot and disruption? These questions were neither posed nor answered.

The Cary court, focusing more on the substance than the timing of the school board's action, said that the appropriate standard for academic freedom in high schools allows for only limited judicial review of school board decisions. The question is whether the school board's action was motivated by a desire to exclude systematically a particular school of thought from the curriculum and classroom. Only under such circumstances of illicit motive would the school board be constitutionally prohibited from ordering teachers to exclude particular books from the classroom. Consider what the court had to say:

If the board may decide that Contemporary Poetry may not be offered; if it may select the major text of the course; why may it not go further and exclude certain books from being assigned for instruction in the course? . . .

. . . . *T*he stipulation declares that no systemic effort was made “to exclude any particular type of thinking or book.” And no objection was made that the board was not following its own standards in rejecting the books. . . . No objection is made by the teachers that the exclusions prevent them from studying an entire representative group of writers. Rather the teachers want to be freed from the “personal predilections” of the board. We do not see a basis in the constitution to grant their wish.60

It is critical to understand the revolution in the law of academic freedom that Cary presaged and the new face it gave to that concept. *Parducci*, drawing on the personal autonomy model, held

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60. *Id.* at 544.
that teachers were constitutionally empowered to decide on what is presented in the classroom, subject to the strictures of relevance and non-disruption. This view clearly fits the traditional approach articulated by Professor Lovejoy. The Cary court, however, holds that school boards decide such questions, subject to the proviso that they act in accordance with good faith educational reasons, embodied in general policy, and not pursuant to an illegitimate impulse to stamp out competing ways of thinking. Under the latter view of academic freedom, the teacher may make reasonable presentational choices around the fringes—she cannot be prevented from mentioning particular books, criticisms, or ideas, but the basic power to decide lies with administrators and elected officials. The constraints on the teacher emanate from the allocation of decision-making authority and not from the limits of professional competence.

Equally as profound, the second face of academic freedom is not primarily rooted in a concern for the advancement of knowledge or for critical thinking; rather it is rooted in a fear that government may press its advantage in universal and compulsory public schools and indoctrinate children to particular ideologies by overwhelming competing points of views. In other words, this face of academic freedom is designed more to curb government overreaching than it is to promote professional autonomy. For this reason, I describe this view as the government expression face of academic freedom.\(^6^1\)

I have written extensively on the subject of government expression, and my children and I urge you to buy your own copy of *When Government Speaks*. In the present context, I limit myself to a few observations. The impulse to limit government expression, by forbidding school districts from turning teachers into pedagogical robots, is premised on the notion that democratic societies should aspire to produce self-controlled citizens, citizens able to understand and criticize their political and economic arrangements and to select their governmental leaders and their policies. It rests on the supposition, in Justice Harlan’s words, of a “freedom from governmental manipulation of the content of a man’s mind,”\(^6^2\) and reflects a recognition that ideological and political domination, the falsification of consent, may occur as much through government

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indoctrination as through government suppression of private speech. It connects with the personal autonomy face of academic freedom in that it suggests that government is not always worthy of our trust; sometimes it constrains the teacher for ideological and not educational reasons. As Thomas Emerson once said, "the principles of academic freedom provide detailed substantive and procedural rules for implementing the fundamental concept that diverse positions should be given expression, despite the fact that the sole source of expression is the government itself."

But the application of the government expression model of academic freedom to public schools is made particularly treacherous by virtue of the fact that the very mission of public schools is to indoctrinate. Too much protection of the teacher's freedom undermines the capacity of government to convey its messages. Courts have responded to this dilemma, in two not entirely satisfactory ways. First, they dwell primarily on political indoctrination with respect to currently controversial issues and ignore other forms of indoctrination. Indoctrination to sexual morality is unquestioned; advocacy of Democratic Party politics is forbidden. Second, they protect the right of parents to send their children to private schools, schools that may seek to socialize students to competing values and opinions.

The Cary opinion, logically, would apply to all manner of curricular and library decisions by school officials, and subsequently, in the Board of Education v. Pico case, a majority of the United States Supreme Court applied variations of the good faith educational motive test to library deacquisition policies. A step necessary to perfect this model of academic freedom in elementary and secondary schools is the abandonment of the Tinker analogy and the acceptance of Pico as the commanding precedent. Public schools would remain limited public forums, at least in classrooms, for students only. This shift is predictable, but not inevitable, if the courts are serious in their efforts to uncover the government

63.  T. Emerson, supra note 30, at 715.
64.  See Board of Educ. v. Pico, 457 U.S. 853 (1982); Piarowski v. Illinois Community College, 759 F.2d 625 (7th Cir. 1985); Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980).
expression face of academic freedom.

The preliminary evidence is that a paradigmatic shift is occurring. Consider, for example, a recent decision of the Supreme Court of Alaska. In *Fisher v. Fairbanks North Star Borough School District*, Rex Fisher had assigned the book *The Front Runner* for the homosexual rights unit of his American minorities class. Fisher had failed to secure the approval of the Superintendent of Schools, despite a written policy requiring such approval, and he was dismissed, *inter alia*, for insubordination. The teacher mounted a first amendment challenge to the board's action, but the court ruled in favor of the school district. The court cited both *Pico* and *Cary*, but not *Tinker* or *Parducci*. After its extensive analysis of *Pico*, the court held that those judicial decisions "which place control over instructional material in school boards . . . more accurately [reflect] . . . federal constitutional law." 68

The court also was quite articulate in adopting the government expression model of academic freedom:

[W]hile those authorities which we accept hold that the school board's authority over the classroom materials is very broad, it is not entirely unfettered by the constitution. A board may not design a curriculum to favor a particular religion. Similarly, any effort by a board to force racial bias or partisan political preference into the classroom would be constitutionally suspect, as would an attempt to exclude discussions of "an entire system of respected human thought." Further, in cases of doubt as to what may and what may not be distributed or taught to students, advance notice may be required before punishment can be imposed.

This case, however, involves none of the above limitations. 69

My strong intuition is that the *Fisher* motivation test will come to be typical of academic freedom analysis in cases arising in elementary and secondary schools. The second face will be turned toward primary and secondary schools, the first face will turn only toward the universities.

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68. 704 P.2d at 217.

69. Id. (citations omitted) (footnote omitted).
Thus far, I have been speaking only of the rights of teachers in public schools, for all of the cases under consideration involved state action by a public authority against allegedly miscreant instructors. The concept of academic freedom is equally applicable to private institutions, but the violation of academic freedom has a constitutional dimension only in the public sphere. By contract or other arrangements, private institutions may choose to afford the personal autonomy protections of academic freedom to their teachers, but the Constitution cannot plausibly be construed as requiring them to do so. But there is a third face to academic freedom, a face that is turned toward private schools, that seeks to limit the power of governments to impose their will on such institutions. Consistent with the scholarly work of Professor Matthew Finkin, I describe this as the institutional face of academic freedom.

By way of historical background, the continental tradition of academic freedom as professorial autonomy differed substantially from the pattern of academic freedom, developed over many centuries, in Great Britain and, much later, in the United States. This tradition centered on the "legally autonomous university, chartered by the government or Parliament or the Crown," and it reposed basic institutional authority in internal, academic governing bodies. While this allocation of authority was of great consequence for individual instructors, its basic thrust was the protection of institutional or corporate autonomy and not the protection of the personal autonomy of individual professors. Professor Shils has gone so far as to state that "[l]egislators in Great Britain as on the continent did not regard the universities as falling within their jurisdiction." He hastens to add that "American state legislators

74. Shils, supra note 9, at 480.
75. Id. at 481.
did not take quite the same attitude.’’

In varying forms and degrees, institutional academic freedom was thought to apply to both public and private universities, though the relationship between lay governing boards and academic communities in public universities has sometimes been uneasy and contentious. But it is important to note that through a curious infusion of federal constitutional law, the institutional autonomy face of academic freedom turned toward private elementary and secondary schools in the early years of this century. The leading cases are *Pierce v. Society of Sisters,* and *Meyer v. Nebraska,* 1920’s substantive due process decisions of the United States Supreme Court. The Court in *Pierce* held that Oregon could not require all school-age children to attend public schools, and, in effect, that the institutional autonomy of private schools was constitutionally protected. In *Meyer* the justices overturned a law that forbade the teaching of German in private schools. Though the substantive due process underpinnings of *Pierce* and *Meyer* have been thoroughly repudiated over the last sixty years, interestingly enough the results have never been repudiated, and a number of justices, of varying judicial persuasions, have embraced them on one ground or another.

From a constitutional perspective, *Pierce* and *Meyer* may represent a recognition of the right of parents to direct the education of their children, the right of teachers to affiliate with a private school, the right of individuals to affiliate with each other, or perhaps the right of religious students, parents and groups to organize their own schools. Each of these justifications is problematic, and many law review pages have been written on this engaging subject. The essential points, however, are that institutional academic freedom protects the private school from an overreaching governmental authority, and that, as in the case of the government expression face of academic freedom, the concept tends to dimin-

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76. *Id.*  
77. 268 U.S. 510 (1925); see Yudof & Kirp, supra note 51, at 9-19.  
78. 262 U.S. 390 (1923).  
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ish the ability of government to suppress competing ideas and ideologies.\textsuperscript{81} From my perspective, institutional academic freedom has less to do with the rights of private schools—and those of their operators, teachers and patrons—than it does with a limitation on the communications powers of government.

The third face of academic freedom does not always smile on individual teachers.\textsuperscript{82} The protection of institutional autonomy may require that private school authorities have substantial authority over who teaches and what is taught in their schools.\textsuperscript{83} The institution will not be autonomous, a parochial school cannot convey its religious message, if it is required to allow teachers to discuss the pros and cons of abortion or birth control.\textsuperscript{84} Indeed, institutional academic freedom does not purport to resolve disputes within a private school; it does not draw a line between the authority of the academicians and that of administrators and governing board members.

Note also that there are limits to institutional autonomy, just as there are limits to personal autonomy, and there are times when governmental regulation is entirely permissible. Private schools may not practice racial discrimination,\textsuperscript{85} they may have to abide building and fire codes, they may be subject to various labor relations, minimum wage, and employment statutes.\textsuperscript{86} They also may be required to offer particular courses, to keep attendance records, and to hire qualified teachers if their students are to satisfy compulsory attendance laws.\textsuperscript{87} In each case the compelling nature of the public policy and the limits of tolerance must balance against

\textsuperscript{81} M. Yudof, supra note 13, at 227-30.
\textsuperscript{82} See generally Finkin, supra note 71; Katz, supra note 26, at 916-31, Levinson, supra note 20, at 8-10.
\textsuperscript{84} See Levinson, supra note 72, at 199-200.
\textsuperscript{86} See generally Yudof & Kirp, supra note 51, at 62-85. Such requirements may be relaxed by statute or on constitutional grounds for religious institutions. See NLRB v. Catholic Bishop, 440 U.S. 490 (1979); City of Sumner v. First Baptist Church, 97 Wash. 2d 1, 639 P.2d 1358 (1982) (en banc).
\textsuperscript{87} See T. Van Geel, Authority to Control the School Program 153-57 (1976); Elson, State Regulation of Nonpublic Schools: The Legal Framework, in Public Controls for Nonpublic Schools 103 (E. Erickson ed. 1969). The application of such requirements to private religious schools, however, may raise state or federal constitutional questions. See, e.g., Kentucky State Bd. for Elementary & Secondary Educ. v. Rudasill, 589 S.W.2d 877 (Ky. 1979); State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976).
the specific infringement on institutional autonomy. Not surprisingly, principled results are frequently elusive.

The institutional face of academic freedom is very much in vogue, and a case raising such issues, *Dayton Christian Schools, Inc. v. Ohio Civil Rights Commission,* was recently disposed of by the United States Supreme Court on abstention grounds. Bob Jones University, in a case that brought national attention, unsuccessfully argued that the Internal Revenue Service constitutionally could not require non-discriminatory treatment of minority students as a condition for being granted tax-exempt status. Princeton University also invoked institutional academic freedom a few years ago in unsuccessfully seeking to bar pamphleteers from its campus. Some academicians seem appalled at Princeton's effort to invoke academic freedom because of their belief that the doctrine protects individual teachers and professors and not institutions. But such a view commits the fatal error of confusing the different faces of the concept. Institutional academic freedom may well grant some protections to the managers of private schools, while affording few to faculty members. Put somewhat differently, there is no reason to assume that the personal autonomy model of academic freedom is the only acceptable one or that that model, in its constitutional formulation, should have easy application to private schools.

VI.

Institutional academic freedom also went through an interesting transmutation in Justice Powell's opinion in *Regents of the University of California v. Bakke,* the famous affirmative action case arising from the admissions policies of the University of California at Davis Medical School. In his effort to justify the special admissions program for minorities, Justice Powell urged "[t]he freedom of a university to make its own judgments as to education

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89. The Court concluded that the federal district court should have abstained from adjudicating the case under Younger v. Harris, 401 U.S. 37 (1971), and later cases recognizing that federal courts should generally refrain from enjoining pending state criminal, civil or administrative proceedings. 106 S. Ct. at 2722-23.
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includ[ing] the selection of its student body." He then invoked Justice Frankfurter's "four essential freedoms" from Sweezy v. New Hampshire: the freedoms to determine who may teach, what may be taught, how it shall be taught, and who shall be taught.

While Justice Powell embraces institutional academic freedom in Bakke, he never focuses on the fact that the University of California at Davis is a public institution. If public universities are entitled to institutional autonomy in admissions policies, does this suggest that state legislation setting student tuition, student body size, or non-resident enrollments for public universities is unconstitutional on academic freedom grounds? Or is Powell suggesting that faculties have institutional prerogatives that may not be overridden by university administrators and governing boards—for example, admissions criteria—even in the public sector? In other words, is there a constitutionally mandated delegation of certain types of academic decisions to the academic community within the public sphere?

Justice Powell does not amplify on his revisionist view of institutional academic freedom. If it were to emerge as a serious fourth face of academic freedom, it might have significant, indeed revolutionary, implications for the government of public elementary and secondary schools. For example, public institutional academic freedom might give life to the previously rejected notion of a constitutional right to local control of educational decisions; and school districts might insist, on first amendment grounds, that state governments are not empowered to adopt curricular, teacher qualification, attendance, and class size policies for local school districts. Or the mandatory delegation might empower those at the sub-district level. Some decisions would be entrusted, as a matter of constitutional law, to faculties and not to superintendents or school boards. For example, perhaps only faculty could approve required texts for classroom use or teaching assignments.

But before contemplating these radical changes in school governance, it is worth noting that courts have not followed, in non-race cases, Justice Powell's analysis of academic freedom. My own suspicion is that the Powell approach to academic freedom—as my professors used to say in law school—was for that day and trip

93. Id. at 312.
94. Id. (citing Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957)).
only and that this face of academic freedom will quickly fade. Had he completely omitted reference to academic freedom in his opinion and simply stated that the goal of student body diversity is a compelling state interest that permits race to be taken into account in admissions decisions, he would have reached the same result without muddying further institutional academic freedom. But few judges, at least in dicta, can resist the temptation to endorse parenthood, family, patriotism, and academic freedom.

My suspicion that the academic freedom aspect of *Bakke* is an unnecessary sport is reinforced by the Supreme Court’s recent decisions. In *Minnesota State Board for Community Colleges v. Knight,* 9 decided in 1984, the Court upheld a state statute requiring public employers to exchange views on mandatory subjects of bargaining with the exclusive bargaining representative selected by its professional employees. Community college instructors, who declined to become members of the Minnesota Community College Faculty Association, challenged the law on many grounds, including an alleged violation of academic freedom. The majority held that “this Court has never recognized a constitutional right of faculty to participate in policymaking in academic institutions.” 96 Even the dissenters, including Justice Powell, did not challenge this aspect of the majority’s opinion. No member of the Court suggested, in reliance on *Bakke,* that the faculty of a public community college had a constitutional right to govern itself in the face of a contrary state statute.

In *Bakke,* an outsider to the University, an applicant for admission, challenged the University’s admissions policies, and, in the name of institutional academic freedom, the University’s position was largely vindicated. In *Knight* the challenge came from within the academy as professors challenged the policies of those higher up in the chain of command, the members of the state legislature. The lesson may well be that institutional academic freedom is invoked to protect the normal decision-making processes of educational institutions, both academic and political. In the context of disputes within the established governmental hierarchy over appropriate policy, it does not allocate power in the way that *Bakke* might suggest.

96. Id. at 287.
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In Regents of the University of Michigan v. Ewing,97 decided more recently, a unanimous Court held that a faculty's decision to deny a student's request to retake a written examination was constitutional. The Court deferred to the faculty's "professional judgment," specifically referring to academic freedom as "autonomous decision-making by the academy itself."98 The medical student, like the applicant in Bakke, was not entitled to interfere with the institution's academic judgments. Thus, the post-Bakke decisions appear to reinforce the view that institutional academic freedom in the public sector is a make-weight. It does not allocate authority within the governing structure of universities, rather it is used only to emphasize the need to insulate the established order of governmental decision-making from challenges to its authority.

VII.

To conclude this brief foray into the conceptual underpinnings of academic freedom, I have explored three faces of this "lump" concept, and my effort has been motivated by a desire to bring greater conceptual clarity amidst considerable analytic confusion. My anthropomorphic approach is not designed to expand the concept of academic freedom or to lengthen the list of the constitutionally protected interests and desires of academic man and woman. I have ignored the more outlandish claims. For example, "[a]cademic-freedom claims become too easily just ways of defending job security."99 Nor have I discussed transparent efforts to relabel constitutional rights that teachers share with all other citizens.100 Sanitation workers too, when working for government, may not be required to take unconstitutional loyalty oaths or to refrain from public speaking. I also thought it prudent to treat with malevolent neglect the recent flurry of cases on a "qualified academic peer review privilege" in the context of claims of confidentiality in the tenure review process.101

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98. Id. at 514 n.12.
101. See, e.g., Gray v. Board of Higher Educ., 692 F.2d 901 (2d Cir. 1982); In re Dinman, 661 F.2d 426 (5th Cir. Unit B Nov. 1981). These cases are discussed in Katz, supra note 26, at 885-89. See also EEOC v. Franklin & Marshall College, 775 F.2d 110 (3d Cir.
To understand my perspective, you might consider the famous Greek aphorism that “the fox knows many things, but the hedgehog knows one big thing.”102 Admittedly, I am not entirely sure what single insight the hedgehog has. But the philosopher Isaiah Berlin relied on this ancient maxim to illustrate a profound point:

[T]here exists a great chasm between those, on the one side, who relate everything to a single central vision, one system less or more coherent or articulate, in terms of which they understand, think and feel . . . and, on the other side, those who pursue many ends, often unrelated and even contradictory, connected, if at all, only in some de facto way . . . .103

We all admire the systematizers and the universalists, but in the case of academic freedom we must learn to tolerate a more complex reality. We must learn to be foxes, striving to understand and to indentify the multiple strands of the concept. If academic freedom has only one face, it surely is not turned toward the heavens.

103. Id. at 7-8.