Freedom of Speech in Public Schools: Using Communication Analysis to Eliminate the Role of Educational Ideology

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Introduction

Since 1969, when the Supreme Court decided *Tinker v. Des Moines Independent School District*,[1] federal and state courts have been called upon to adjudicate a variety of student free speech claims, including those arising from student protests,[2] school newspaper censorship,[3] library book[4] and textbook[5] selection and removal, selection and cancellation of school plays,[6] student dress codes,[7] and even senior prom attendance by same-sex couples.[8] Part I of this article will discuss the modes of analysis that courts have used in adjudicating these claims and will argue that those analyses are poorly suited to the special problems inherent in student speech controversies. Because the Court has failed to

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1. 393 U.S. 503 (1969).

2. *See, e.g.*, Boyd v. Board of Directors of McGehee Sch. Dist. No. 17, 612 F. Supp. 86 (E.D. Ark. 1985); Dodd v. Rambis, 535 F. Supp. 23 (S.D. Ind. 1981).

3. *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Nicholson v. Board of Educ., 682 F.2d 858 (9th Cir. 1982); Gambino v. Fairfax County Sch. Bd., 429 F. Supp. 731 (E.D. Va. 1977), *aff'd*, 564 F.2d 157 (4th Cir. 1977); Pliscou v. Holtville Unified Sch. Dist., 411 F. Supp. 842 (S.D. Cal. 1976).

4. *See, e.g.*, Board of Educ. v. Pico, 457 U.S. 853 (1982) (plurality opinion); Bicknell v. Vergennes Union High Sch. Bd. of Directors, 638 F.2d 438 (2d Cir. 1980); Sheck v. Baileyville Sch. Comm., 530 F. Supp. 679 (D. Me. 1982); Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269 (D.N.H. 1979).

5. *See, e.g.*, Pratt v. Independent Sch. Dist. No. 831, 670 F.2d 771 (8th Cir. 1982); Zykan v. Warsaw Community Sch. Corp., 631 F.2d 1300 (7th Cir. 1980); Minarcini v. Strongsville City Sch. Dist., 541 F.2d 577 (6th Cir. 1976).

6. *See, e.g.*, Seyfried v. Walton, 668 F.2d 214 (3d Cir. 1981); Bell v. U-32 Bd. of Educ., 630 F. Supp. 939 (D. Vt. 1986).

7. *See, e.g.*, Massie v. Henry, 455 F.2d 779 (4th Cir. 1972); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971); Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971).

8. Fricke v. Lynch, 491 F. Supp. 381 (D.R.I. 1980).

expressly define the school interest that is served by censorship of student speech, the outcome of student speech disputes has often rested on the educational ideology of the judges charged with adjudicating those disputes. Part II will present an analytical framework for the adjudication of free speech claims brought by high school students.[9] That framework will attempt to define the school's interest in a manner that both meets the demands of First Amendment adjudication and eliminates the role educational ideology plays in that adjudication. This Article concludes by applying the proposed framework to a variety of hypothetical school speech scenarios, including the conundrum of whether a school can be constrained from removing books from the school library while retaining discretion to select and reject textbooks for use in classrooms.

I. Modes Of Analysis

Any analysis of high school students' free speech claims must begin with the basic premise underlying First Amendment jurisprudence: all individuals are free to speak on any subject, and to express any viewpoint, unless the content of the expression or the manner of its delivery causes some harm to third parties.[10] For a First Amendment analytical framework to be of practical use, it must provide a definition of "harm" that embodies a balance between the competing interests concerned. It must also provide guidelines by which judges can determine when in fact that harm has occurred or is about to occur. In other words, a framework that is to be applied to student speech must define which school interests should prevail over student speech rights, and must provide guidelines for the largely factual determination of what degree of interference with those school interests constitutes "harm."

Courts have employed different analyses in adjudicating student speech disputes. Sometimes courts have employed different analyses even within a single case. Three of these frameworks take the form of tests: the "substantial disruption" test,[11] the "public forum" test,[12] and a curriculum-based analysis.[13] The curriculum-based analysis is not a framework at all, but is instead each judge's educational ideology, his or her

9. This framework will not be a proposed "test" for evaluating those claims, but rather will attempt to identify which factors are important and which are unimportant to courts making such evaluations. The framework will include an assessment of the state interests that courts previously have asserted as justification for the curtailment of student free speech rights.

10. Smith v. Arkansas State Highway Employees, 441 U.S. 463, 464 (1979); Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949).

11. *See* Part I.B.

12. *See* Part I.C.

13. *See* Part I.D.

subjective opinion of the proper role of education. A judge's educational ideology works in tandem with whichever of the two other frameworks that judge uses, giving an individualized interpretation to the framework's general definition of "harm." Objective decision-making demands that the role of educational ideology in student speech dispute resolution be minimized as much as possible. Unfortunately, because none of the three frameworks is well suited to the adjudication of student speech claims, purely objective decision-making has not occurred, and claims are often decided, by default, according to the judge's own educational ideology.[14]

A. The Role of Educational Ideology

All First Amendment adjudication involves balancing the individual's free speech interests against the government's interest in suppressing that speech. In regard to public schools and libraries, the result of that balancing is that "[g]overnment enjoy[s] [the right] to preserve such tranquility as the facilities' central purpose requires . . . but no power to exclude peaceful speech or assembly compatible with that purpose."[15]

The key issue, therefore, is the definition of the "purpose" of public schools. Unfortunately, First Amendment analysis of student speech disputes often degenerates into a struggle between competing educational ideologies. The spoils of the struggle is the right to define the school's purpose, and hence to determine the outcome of each case.

Scholars have identified three dominant, conflicting educational ideologies:[16] (1) "cultural transmission," which "defines education as the transmission of knowledge, skills, morals, and social rules to the student";[17] (2) "romanticism," which "views education as the unfolding of an innate pattern of development facilitated by the proper environment";[18] and (3) "progressivism," which defines "the driving force of education [as] the child's active thinking, stimulated by cognitive con-

14. For two excellent discussions of the history of educational ideology in First Amendment cases concerning schools, see William B. Senhauser, Note, *Education and the Court: The Supreme Court's Educational Ideology*, 40 VAND. L. REV. 939 (1987), and Robert B. Keiter, *Judicial Review of Student First Amendment Claims: Assessing the Legitimacy-Competency Debate*, 50 MO. L. REV. 25, 47-55 (1985).

15. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-21, at 690 (1978).

16. *See* Lawrence Kohlberg and Rochelle Mayer, *Development as the Aim of Education*, 42 HARV. EDUC. REV. 449 (1972).

17. Senhauser, *supra* note 14, at 943; *see also* Kohlberg and Mayer, *supra* note 16, at 452-53.

18. Senhauser, *supra* note 14, at 945; *see also* Kohlberg and Mayer, *supra* note 16, at 451-52.

flict; therefore, the educational environment should maximize the student's active role."[19]

The differences between these three ideologies which are relevant to First Amendment analysis of student free speech claims are those relating to each ideology's perception of the proper and necessary relationship between school and student. Romanticism and progressivism can be grouped together here, for each holds that the school's basic role is to elicit some desired skill or attribute from the student; this ideology will be referred to as "non-inculcative." The cultural transmission model, on the other hand, seeks to instill information, morals, and the like into the student; this ideology will be referred to as "inculcative."

In *Tinker*,[20] the Court "did not balance the speech interests involved against an indoctrinative interest, sacrificing one to protect the other. Instead, the Court viewed the protection of student speech as important *because* of its educational value."[21] The dissent however, had a different view of education. Justice Black equated allowing students to speak freely with allowing students to "allocate to themselves the function of deciding how the pupils' school day will be spent."[22] "The original idea of schools . . . ," Justice Black reasoned, "was that students had not yet reached the point of experience and wisdom which enabled them to teach all of their elders."[23] Given his paternalistic view of the nature of education, Justice Black's dissent was not surprising.

This ideological split was even more apparent, and more determinative, in *Board of Education v. Pico*.[24] In that case the Court plurality held that a school cannot remove books from a school library on the basis of disagreement with the views expressed therein. The Court cited with approval the observation of *Keyishian v. Board of Regents*,[25] that " 'students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding,' "[26] and reasoned that it is "the unique role of the school library"[27] to provide the student with an oppor-

19. Senhauser, *supra* note 14, at 947; *see also* Kohlberg and Mayer, *supra* note 16, at 454.

20. 393 U.S. 503, 507 (1969).

21. Senhauser, *supra* note 14, at 955; *see Tinker*, 393 U.S. at 512 ("[Student intercommunication] is not only an inevitable part of the process of attending school; it is also an important part of the educational process.").

22. 393 U.S. at 517 (Black, J., dissenting).

23. *Id.* at 522.

24. 457 U.S. 853 (1982) (plurality opinion).

25. 385 U.S. 589 (1967).

26. *Pico*, 457 U.S. at 868 (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957))).

27. *Id.* at 869.

tunity to pursue such "self-education and individual enrichment."[28]

The dissenters, however, did not value the tenets of student inquiry and evaluation. In Chief Justice Burger's view, "all activity within a primary or secondary school involves the conveyance of information."[29] Similarly, Justice Rehnquist's view of education is that "[e]ducation consists of the selective presentation and explanation of ideas."[30] To such adherents of inculcative educational ideology, there is simply no room in the schools for independent student research and exploration. Anything less than absolute school discretion over the content of the library interferes with the school's ability to fulfill its inculcative function.[31]

As is illustrated by these two cases, and indeed by the entire history of student speech jurisprudence,[32] the use of an analytical framework in which educational ideology is an important part, leaves student free speech rights adrift and at the mercy of the shifting ideological winds generated by each change in court personnel.[33] Furthermore, educational ideology is the province of educators, not judges. The ideal analyt-

28. *Id.*

29. *Id.* at 889 (Burger, C.J., dissenting).

30. *Id.* at 914 (Rehnquist, J., dissenting).

31. Student free speech analysis that hinges on the analyst's educational ideology is not confined to the courts. Professor Tyll van Geel has argued that inculcative ideologies are incompatible with the First Amendment. Tyll van Geel, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197, 289 (1983). This is not to suggest that van Geel's analysis is unprincipled. On the contrary, he objectively argues that the goals the Supreme Court has found to justify scholastic indoctrination are inadequate. *Id.* at 262-89. His First Amendment analysis stands or falls on his rejection of inculcative ideology, objective though it may be. If the reader rejects van Geel's opposition to indoctrination, then van Geel's analysis is no longer useful.

Other scholars have fallen prey to the seduction of applying subjective ideologies to student speech analysis, and have based their ultimate conclusions regarding the demands of the First Amendment on concepts such as that "the development as well as the expression of those beliefs . . . that constitute individual consciousness should be free of government manipulation." Stephen Arons & Charles Lawrence III, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 HARV. C.R.-C.L. L. REV. 309, 313 (1980). Still another has criticized the *Tinker* "substantial disruption" test on the basis that the test "misunderstands the pedagogical nature and function of public schools." David A. Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 477-78 (1981). *See also* Leon Letwin, *Regulation of Underground Newspapers on Public School Campuses in California*, 22 UCLA L. REV. 141, 199 (1974) (The purported state interest in regulating student speech to prevent psychological harm to students is illegitimate because "the opportunity to cope with such ideas is a part of growth and education.").

32. *See* Senhauser, *supra* note 14, for a discussion of the role of educational ideology in free speech jurisprudence.

33. In addition, because most student speech cases are decided in the state and lower federal courts, an analytical framework that allows decisions to rest so heavily upon the ideologies of individual judges can only result in the circumstance that students in some parts of the country enjoy less freedom of speech than their peers who live in jurisdictions where the presiding judges subscribe to a less inculcation-oriented educational ideology.

ical framework would define both the state interest and the student interest, so that the principal issue in each case would be whether the student activity at issue in fact threatens the state interest.

B. The "Substantial Disruption" Test

Since 1969, the principal test that courts have used to assess student free speech claims has been the "substantial disruption" test announced that year in *Tinker v. Des Moines Independent School District*.[34] *Tinker* was a suit brought by several students who had been suspended for wearing black armbands in protest of the Vietnam War. The Court upheld the students' right to wear the armbands and held that a school regulation that limits students' rights of expression is valid only if it can be "justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school."[35] *Tinker* arose out of a student protest that took place in part in the classroom, which is a particularized and comparatively rare type of student speech controversy.[36] The fact that this seminal case arose in such unusual circumstances has had unfortunate ramifications for subsequent student speech jurisprudence. The substantial disruption test, as it was formulated in *Tinker*, is reasonably well suited to the adjudication of protest cases. It is not sufficiently precise, however, for application to other types of student speech disputes. Its use has led to strained analysis and has circumscribed paths that courts might have taken toward more satisfactory accommodations of the competing interests involved in those cases.

Application of the substantial disruption test to other types of controversies is problematic because "[e]ssential to a definition of disruption is identification of the disrupted endeavor."[37] Thus, conflict adjudication by use of the substantial disruption test ultimately devolves to a determination of the question, Disruption of what? In student protest cases, this question is fairly easily answered: "expression that prevents class meetings or diverts discussions from the subject for a considerable time will constitute disruption."[38] Such criteria are usually not helpful in student speech cases that do not concern protest. In most student speech cases,

34. 393 U.S. 503 (1969).

35. *Id.* at 513.

36. Most student speech cases concern censorship of student publications, library and textbook controversies, and the ubiquitous dress code disputes. *See supra* notes 2-8 and accompanying text.

37. Susan Garrison, Comment, *The Public School as Public Forum*, 54 TEX. L. REV. 90, 113 (1975).

38. *Id.*

the harm that the school seeks to prevent is not so immediate and tangible as the direct interruption of class meetings.[39]

Because the substantial disruption test fails to identify the types of harms that the school may avoid by curtailing student free speech rights, the question Disruption of what?, is left to be answered according to the educational ideology of each judge. Therefore, the substantial disruption test falls short of the ideal set forth above. While the very term "substantial disruption" admirably provides guidelines for determination of when the school's interest is threatened sufficiently to allow curtailment of student free speech rights, the test fails because it does not identify the state interests whose protection merits such curtailment.

C. The Public Forum Test

In *Hazelwood School District v. Kuhlmeier*,[40] the Supreme Court for the first time applied public forum analysis to a student free speech case[41] and declined to apply the *Tinker* substantial disruption test to a school speech controversy.[42] Unfortunately, the Court's decision to abandon

39. In Trachtman v. Anker, 563 F.2d 512, 519 (2nd Cir. 1977), the Second Circuit applied the "substantial disruption" test and upheld the school's prohibition of the distribution to students of a sex questionnaire that school officials claimed would cause "significant psychological harm." *Id.* at 519. The legitimacy of the school's concerns was bolstered by expert psychological testimony. *Id.* at 517-19.

In Frasca v. Andrews, 463 F. Supp. 1043 (E.D.N.Y. 1979), the "substantial disruption" test was held fulfilled. There, a school seized an issue of the school newspaper which printed a letter from the school lacrosse team that complained of the lack of sports coverage by the newspaper, and which included a threat to "kick your [the editor's] greasy ass." *Id.* at 1046. The school's action was motivated by "the possibility that: 'an impressionable 14 year old member of the freshman Lacrosse team [might] take the letter as a license to hunt up the sports editor for the stated purpose of the letter,' " *id.* at 1051 (quoting affidavit of the principal); and that " 'the letter foreseeably could provoke a confrontation . . .' " *id.* (quoting affidavit of the newspaper's faculty advisor).

As these cases illustrate, the definition of "substantial disruption" has in practice become very broad indeed.

40. 484 U.S. 260 (1988).

41. The Court has never expressly stated that the public school or any part of it is a public forum. *See* Forrest E. Claypool, Note, *Public Forum Theory in the Educational Setting: The First Amendment and the Student Press*, 1979 U. ILL. L. REV. 879 (1979). For a discussion of the contention that *Tinker* established the public school as a public forum, see Garrison, *supra* note 37. *See also* TRIBE, *supra* note 15, at 690 (Courts have treated schools as "semi-public forums."); Sheldon H. Nahmod, *Beyond* Tinker: *The High School as an Educational Public Forum*, 5 HARV. C.R.-C.L. L. REV. 278 (1970) (The high school campus is a public forum for purposes of protest and the distribution of literature.). For an opposing view, arguing that treating the public school as a public forum makes it impossible for schools to fulfill their educational mandate, see Carol M. Schwetschenau, Note, *Constitutional Protection for Student Speech in Public High Schools*: "Bethel School Dist. No. 403 v. Fraser," 106 S. Ct. 3159 (1986), 55 U. CIN. L. REV. 1349 (1987).

42. *Kuhlmeier*, 484 U.S. at 270.

the substantial disruption test in favor of public forum analysis was ill-advised.[43] The substantial disruption test, regardless of its flaws, was designed expressly to balance and accommodate the competing interests that arise in school free speech cases.[44] In contrast, public forum analysis is not school-specific; rather, public forum analysis arose as a means of dealing with generic, non-school controversies.[45] As a result, public forum analysis is poorly suited to the resolution of free speech controversies that arise in public schools.[46]

Public forum analysis is incompatible with student free speech claims primarily because the relationship between students and a public school is not analogous to that between citizens and the state; and the relationship forms the predicate to the application of the public forum test. Student speech is routinely restricted and regulated in ways in which the government cannot regulate the speech of the general citizenry.[47] Under public forum analysis, speech restrictions would indicate

43. The adoption of public forum analysis necessarily entails a rejection of *Tinker*. Although the *Tinker* majority found it "relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance," 393 U.S. 503, 510 (1969), which might seem to indicate that *Tinker* stands only in the way of student speech restrictions that are not content-neutral, the Court found the viewpoint discrimination of the respondent school district merely "relevant," not controlling. The holding of *Tinker* is unequivocal: "[The student] may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others." *Id.* at 512-13 (quoting Burnside v. Byers, 363 F.2d 744, 749 (5th Cir. 1966)). The dependent clause, "even on controversial subjects," demonstrates that content-neutral restrictions are within the purview of the "substantial disruption" test. Of course, the question of whether a particular expression is in fact "substantially disruptive" will often turn on the controversial nature of the expression, but the scope of the applicability of the *Tinker* test is, of course, independent of the factual issue of what constitutes "substantial disruption." Thus, public forum analysis seems to be fundamentally at odds with *Tinker*.

44. *Tinker*, 393 U.S. at 506.

45. *See, e.g.*, Brown v. Louisiana, 383 U.S. 131 (1966) (sit-in at public library); Edwards v. South Carolina, 372 U.S. 229 (1963) (protest at statehouse grounds).

46. Professors Daniel Farber and John Nowak argue that public forum analysis is irrelevant to many free speech claims. As an example, they cite United States Postal Serv. v. Council of Greenburgh Civic Ass'n, 453 U.S. 114 (1981), which involved a challenge to a federal law forbidding the placement of unstamped mailable matter in home mailboxes. Much of the Court's analysis focused on whether a mailbox is a public forum. "The issue in *Greenburgh*, however, was whether the limitation of public access to this medium of communication so inhibited the communication of ideas as to be inconsistent with the [F]irst [A]mendment. Public forum analysis only clouded consideration of the compatibility of the governmental regulation with [F]irst [A]mendment values." Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1223 (1984).

47. For example, students are often required to write papers on controversial subjects and are asked to argue in favor of a viewpoint that they do not share. Also, the subject matter of speech in the classroom is closely regulated; not only may a student be forbidden to discuss

that the government has not opened the school to general discourse; hence, the school is a nonpublic forum. A determination that the school is a nonpublic forum, however, is by definition a determination that the school can exclude speech on any subject, as long as the exclusion is "reasonable."[48]

Use of public forum analysis necessarily will result in the diminution of student free speech rights, for under the "reasonableness" standard in *Hazelwood*, almost any speech restriction will be upheld absent a finding that the school program which censored the speech is a public forum. In most cases such a finding will be absent.

In dictum not limited to student newspapers alone, the *Hazelwood* majority stated that

> The public schools do not possess all of the attributes of streets, parks, and other traditional public forums that "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[49] Hence, school facilities may be classified as public forums only if school officials have "by policy or by practice" opened those facilities "for indiscriminate use by the general public"[50] or by some segment of the public, such as student organizations.[51]

The Court, in declaring that public schools are not public forums under the "traditional use" test, apparently inferred that school newspapers, as a subset of the public schools, fail the "traditional use" test as well. That argument has three serious flaws.

First and most serious is that the Court's conclusory statement that the public school has not traditionally been dedicated to citizen discourse is premised on an inculcative view of the function of the public school. In the eyes of an observer who is an adherent of a non-inculcative theory, which holds that the school's purpose is to foster the development of the student's innate skills and to elicit critical thinking on the part of the student, the school can indeed be seen as a traditional public forum. The non-inculcative schools pursue their educational goals through interaction between student and teacher, and such interaction probably would fall within the definition of "discourse."[52] Public forum analysis, then, is

history in algebra class, but she may be forbidden even to discuss last week's homework in this week's session.

48. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270 (1988).

49. *Id.* at 267 (quoting Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939) (citation omitted)).

50. *Id.* (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983)).

51. *Id.* (citation omitted).

52. My placement of the word "discourse" in quotation marks here is a recognition that some might consider the typical content of student verbal intercourse unworthy of a term

flawed by its dependence on educational ideology. The *Hazelwood* Court's conclusory holding that public schools are not "traditional public forums" is a stark manifestation of the dangers inherent in using an analytical framework that is vulnerable to usurpation by educational ideology.

The second flaw in the Court's reasoning is that outside the classroom, the public school arguably *is* akin to streets and parks.[53] Admittedly, the general public cannot enter the school grounds and conduct debate as they can at a public park. It seems reasonable, however, that when a court applies public forum analysis to a school dispute, it should focus not on whether the general public has access to the school, but whether the student body has traditionally used the school grounds for "discourse." In the context of the First Amendment, the hallway, the playing field, and the lunchroom of the public school seem to stand in the same relationship to the student as streets and parks to the general public.[54] Thus, the *Hazelwood* Court's holding that the public school is not a public forum is dubious.

The final flaw in the Court's reasoning is a corollary to the previous argument. The Court concluded that the public school is not a traditional public forum and seemed satisfied that, such being the case, the school newspaper is also not a traditional public forum.[55] As alluded to above, the public school is composed of many disparate arenas and activities, any one of which might have traditionally been used for public discourse by the student body. A bare finding that the public schools are not traditional public forums does not determine whether a particular facet of the school is in fact a public forum, despite the *Hazelwood* majority's erroneous assumption that such a finding as to the whole school was in fact a finding that the school newspaper was not a public forum.

traditionally associated with the lofty goals of the First Amendment i.e., preserving the democratic system by granting citizens the right and the opportunity to debate pressing matters of public urgency. The First Amendment, however, does not countenance such distinctions among subjects of discourse.

53. *See* Nahmod, *supra* note 41, at 294.

54. It does not detract from this argument to point out that, even in the hallways, student free speech rights might be subject to greater restrictions than are the rights of citizens in the park. Those more stringent restrictions, if they are legitimate, are legitimate not because students have fewer rights than adult citizens, nor because the school hallways are not public forums, but because those restrictions serve school interests that are absent in the streets and parks. *See infra* Part II.A.

55. The Court never expressly stated that all school newspapers are not public forums. Rather, the Court simply made a conclusory statement that the public schools are not traditional public forums, 484 U.S. at 266, and then determined whether the school newspaper at issue was opened by the school authorities for "indiscriminate use" by the student body. *Id.* at 270 (citation omitted).

Thus, *Hazelwood*'s finding as to the public school as a whole is not dispositive of future cases.

This flaw is serious because public forum analysis simply is not equipped to generate any rule that is broadly and easily applicable to "the public school" as a whole. The *Tinker* substantial disruption test, which was designed to deal with school speech controversies, is equally applicable to disputes arising in all school contexts. In contrast, the determination that a school newspaper is not a public forum offers little guidance to a court considering the First Amendment status of school plays;[56] likewise, a decision regarding school plays sheds little light on controversies regarding the school library, textbooks, or the senior prom.

Indeed, public forum analysis is particularly ill-suited to the adjudication of the most troublesome of school speech issues: library book and textbook censorship. These types of controversies involve not the right to speak, but the right to receive information. The right[57] to receive information and the issues raised in adjudicating it are not consonant with the themes of public forum analysis.[58]

Application of the second public forum test, whether "the government 'by policy or by practice' has opened the [public school or parts thereof] for 'indiscriminate use by the general public' or by some segment

56. Although *Hazelwood* contains much dicta that indicates school plays should be treated analogously to school newspapers, that part of the Court's opinion dealt not with whether the newspaper was a public forum, but rather it set forth the Court's rationale for applying a different test to censorship of "school-sponsored" speech than to censorship of student speech that just "happens to occur" on campus. *See Hazelwood*, 484 U.S. at 270-73. This aspect of *Hazelwood* is discussed *infra* at Part II.D.

57. Whether such a right in fact exists is a matter of much controversy. The right to receive information was first expressly recognized by the Court in Board of Educ. v. Pico, 457 U.S. 853, 866-68 (1982), although, as Justice Brennan's plurality opinion argues, *id.* at 866, the right has antecedents in dicta in Griswold v. Connecticut, 381 U.S. 479, 482 (1965) and First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978).

The *Pico* dissenters vigorously criticized the plurality for resting their opinion on the existence of a right that "has [not] previously been recognized." 457 U.S. at 887 (Burger, C.J., dissenting). Justice Rehnquist considered "the very existence of a right to receive information . . . [to be] wholly unsupported by our past decisions and inconsistent with the necessarily selective process of elementary and secondary education." *Id.* at 910. *See also* Mark Tushnet, *Free Expression and the Young Adult: A Constitutional Framework*, 1976 U. ILL. L. REV. 746, 753 (1976) ("Whatever the rationale for excluding young adults from voting probably would justify denying them the First Amendment right to receive information.").

For the purposes of this Article it can be assumed that the right to receive information does indeed exist; and hereinafter all references to "student free speech rights" or "student First Amendment rights" should be understood to include the right to receive information.

58. By the same token, the substantial disruption test is equally ill-equipped to adjudicate such claims. *See infra* notes 139-58. The framework proposed in Part II of this article does, however, accommodate this issue.

of the public,"[59] is extremely awkward. First, that test cannot yield uniform rules for application to schools in general because each school, and indeed each classroom, has different policies in regard to student expression. Thus, the public forum test will yield different results from school to school and from classroom to classroom.

Of course, this problem is not unique to public forum analysis of student free speech claims, for results can vary when the test is applied to hospitals,[60] courthouses,[61] and other state-owned properties. Unlike hospitals and jails, however, the very purpose of schools necessitates some form of communication between school and student. Each school's or teacher's view of that purpose, the educational ideology of each school and teacher, is likely to yield widely divergent policies in regard to student discourse. Thus, while divergent hospital or jail policies *may* lead to uneven results, divergent policies by different schools *must* lead to uneven results.[62]

Use of the public forum test can also yield unrealistic, undesirable results and can involve the decision-maker in unnecessary complexities. Because the test focuses on past school procedures, a change in procedures can implicate free speech rights and lead to additional burdensome litigation. For example, the State of California currently has a law that guarantees to student publishers the right to publish articles on any topic, subject only to a few relatively unrestrictive statutory limitations.[63] Were that law repealed, the procedural history engendered by the statute

59. *Hazelwood*, 484 U.S. at 266; Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46, 47 n.7 (1983).

60. *Compare* Low Income People Together v. Manning, 615 F. Supp. 501 (N.D. Ohio 1985) *with* Dallas County Hosp. Dist. v. Dallas Ass'n of Community Orgs. for Reform Now, 670 F.2d 629 (5th Cir. 1982), *cert. denied*, 459 U.S. 1052 (1982).

61. *Compare* Cox v. Louisiana, 379 U.S. 559 (1965) *with* Edwards v. South Carolina, 372 U.S. 229 (1963).

62. The public forum analysis of *Hazelwood* illustrates the extent to which the results of public forum analysis can be very dependent upon the facts of the particular case.

The majority emphasized that the faculty advisor " 'was the final authority with respect to almost every aspect of the production and publication of [the school newspaper], including its content,' " 484 U.S. at 268 (citation omitted), and endorsed the trial court's finding that "[r]espondents' assertion that they had believed that they could publish 'practically anything' in [the school newspaper] Spectrum was . . . 'not credible.' " *Id.* at 269 (citation omitted).

The Court's analysis implies that, had the administration exercised less control over the school newspaper, or if the students had had legitimate reason to believe that they could in fact print "practically anything," the outcome of the Court's public forum analysis might have been different. (The outcome of the case would probably have been the same, for as argued *supra* at notes 40-46, and *infra* notes 139-42, the Court's determination that the content of school newspapers can be closely regulated by the school administration did not rest on a finding that all school newspapers are non-public forums.).

63. Cal. Educ. Code § 48907 (West Supp. 1987).

would remain, because for the period that the statute had been in force, California schools had in fact treated school newspapers as public forums. Could a California school subsequently institute *Hazelwood*-style restrictions, or would the past procedures, mandated by the now-defunct statute, preserve the school newspaper as a public forum?[64] Such are the issues engendered by public forum analysis.

Public forum analysis suffers from an additional disability when applied to school free speech controversies. When the analysis is applied to the typical non-school case, the issue is simply whether the facility has been opened for discourse by the "general public."[65] Thus, there is typically no need to differentiate among speakers, and public forum analysis works reasonably well.

In contrast, school speech controversies can involve the rights of students, teachers,[66] and outside speakers.[67] Results of the application of the public forum test will vary according to which of these groups is involved and each school's past policies toward speech by each group. Because the rights of each group must be determined by looking to the policies that the school has followed in regard to that group alone, the adjudication of one group's claim will shed little or no light on the rights of any of the other groups. Use of the public forum test, therefore, can lead to inefficient, multiplicative litigation.

The merits of public forum analysis for adjudicating most free speech claims are not at issue here. It is not an indictment of public forum analysis to recognize that student speech cases should be exempt from its application. Instead, that recognition is simply a confirmation that for First Amendment purposes, schools are indeed a "special environment."[68] Therefore, adjudication of free speech cases that arise in that environment demands a specialized form of analysis to complement public forum analysis when public forum analysis is inappropriate.

64. *But see* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) ("[A] State is not required to indefinitely retain the open character of the facility . . . .").

65. *Id.* at 47; *Hazelwood*, 484 U.S. at 267.

66. *See, e.g.*, Cary v. Board of Educ., 598 F.2d 535 (10th Cir. 1979); Palmer v. Board of Educ., 466 F. Supp. 600 (N.D. Ill. 1979); Millikan v. Board of Directors, 611 P.2d 414 (Wash. 1980).

67. *See, e.g.*, Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 777 F.2d 1046 (5th Cir. 1985); Clergy and Laity Concerned v. Chicago Bd. of Educ., 586 F. Supp. 1408 (N.D. Ill. 1984); Solmitz v. Maine Sch. Admin. Dist. No. 59, 495 A.2d 812 (Me. 1985). For a discussion of what limits, if any, exist on schools' power to exclude outside speakers, see Garrison, *supra* note 37, at 28.

68. Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 (1969).

D. Curriculum-Based Analysis

Many commentators have argued that in order for schools to operate properly, school officials must be granted a great deal of discretion in their administration of the school.[69] School officials are not, however, entitled to deference in regard to issues that do not concern education. In either explicit or implicit recognition of these arguments, many courts have addressed student speech claims by applying a curriculum-based test.[70] Under this analysis, courts give school officials authority to proscribe student speech that affects curriculum—for example, speech occurring in the classroom. But these same courts frown upon official censorship that takes place during noncurricular or extracurricular activities—for example, in the hallway between classes, or on the football field—unless the censored speech threatens to disrupt the curriculum.

This approach is not without attractions. It provides a more satisfactory analysis of speech controversies not involving student protest than does the *Tinker* test, because, unlike *Tinker*, it does not require a court to answer the question, "disruption of what"?[71] Moreover, it is based on a recognition that the state interest in curtailing student speech is quite low when noncurricular matters are at issue.

Unfortunately, curriculum-based analysis suffers from serious flaws. It is of little use in assessing censorship of speech that occurs in noncurricular arenas but that might have an indirect effect on curricular matters. More importantly, the curriculum/noncurriculum distinction is at its heart a form of balancing by proxy. The analysis equates the school interest with curriculum. For all purposes, this analysis declines to undertake true case-by-case balancing of interests and instead operates on the assumption that when curriculum is affected by speech, the balance

69. *See* Schwetschanau, *supra* note 41; Keiter, *supra* note 14, and cases cited therein.

70. Petitioners might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values. But we think that petitioners' reliance upon that duty is misplaced where, as here, they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway.

Board of Educ. v. Pico, 457 U.S. 853, 869 (1982). *See also* Gambino v. Fairfax County Sch. Bd., 429 F. Supp. 731, 736 (E.D. Va. 1977), *aff'd*, 564 F.2d 157 (4th Cir. 1977) (school newspaper is not part of the school curriculum). *See also* Karen Kramer Faaborg, *High School Play Censorship: Are Students' Rights Violated When Officials Cancel Theatrical Productions?*, 14 J.L. & EDUC. 575 (1985) (criticizing Seyfried v. Walton, 668 F.2d 214 (3rd Cir. 1981) for an overly broad definition of "curriculum."); Deborah A. Churton-Hale, Note, Tinker *Goes to the Theater: Student First Amendment Rights and High School Theatrical Productions in* Seyfried v. Walton, 11 HASTINGS CONST. L.Q. 247, 254 (1984) ("Characterization of the play as part of the school 'curriculum' is inconsistent with accepted definitions of the term.").

71. *See supra* Part I.B.

between student rights and the school interest almost always will tilt in favor of the school, but when curriculum is not affected, the balance generally sways in favor of protection of student rights.[72] Not only is this an abdication of the Court's responsibility to actually weigh competing interests, but the curriculum/noncurriculum distinction has developed an inertia of its own. Courts and commentators who employ label-based analyses tend to base their decisions on the label itself, rather than on the policies that underlie the label and for which policies the label is simply shorthand.[73] The result, at best, is the use of definitions of "curriculum" that simply reflect the prejudices of the particular judge; and, at worst, the result is the use of definitions of "curriculum" that simply are irrelevant to First Amendment analysis.

This latter result can occur when the judge employs a dictionary definition of curriculum. The only definition of curriculum consistent with curriculum-based analysis is, roughly, the parts of the school day in which unfettered student speech, if allowed, would interfere with the accomplishment of the school purpose, whatever it may be. Use of a definition such as "(1) the courses offered by an educational institution or one of its branches; [or] (2) a set of courses constituting an area of specialization,"[74] is simply useless as an aid to a court attempting to balance competing First Amendment interests, because those interests do not figure in the formulation of the definition.

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72. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 283 (1988) (Brennan, J., dissenting),

> [U]nder *Tinker*, the school may constitutionally punish the budding political orator if he disrupts class but not if he holds his tongue for the cafeteria. That is not because some more stringent standard applies in the curricular context. . . . It is because student speech in the noncurricular context is less likely to disrupt materially any legitimate pedagogical purpose.

(citation omitted); *accord* C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 110 (1986) ("[C]onceptual approaches . . . simply yield an inadequate jurisprudence of labels. In place of careful, candid weighing of competing free speech and public order values, . . . judicial opinions embodying conceptualistic, categorical analyses reflect under-the-table definitional balancing."); *see also* Justice Blackmun's dissent in Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 821 (1985) ("Rather than taking the nature of the property into account in balancing the First Amendment interests of the speaker and society's interest in freedom of speech against the interest served by reserving the property to its normal use, the Court simply labels the property and dispenses with the balancing.").

73. For an analysis of the different processes that courts and commentators use to define First Amendment-related terms, and a discussion of the consequences which flow from the use of those processes, see Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 269-73 (1981) and the authorities cited therein.

74. Faaborg, *supra* note 70, at 590; *see also* Churton-Hale, *supra* note 70, at 254 (quoting WEBSTER'S NEW WORLD DICTIONARY 348 (2d college ed. 1968)).

The better of the two results of curriculum-based analysis leads back to the old bugaboo of school speech analysis, namely, educational ideology. If the outcome of a controversy rests on whether the speech affects curriculum, then the outcome in fact rests on the definition of curriculum. In turn, that definition rests on the educational ideology of the judge formulating the definition. An adherent of the inculcative ideology, which views the entire school day as a learning experience,[75] may define curriculum so broadly as to annul the distinction between curricular and noncurricular elements of the school day and thereby severely curtail student speech rights.

The impracticality of curriculum-based analysis is evident on examination of the various controversies that most often arise in the school setting. For example, is a school newspaper a part of the curriculum? The *Hazelwood* majority reasoned that "activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."[76] The dissent argued with equal force, however, that the curricular aspect of a school newspaper begins and ends with teaching the skills of research, writing, and editing a newspaper, so that the actual content of the published articles is beyond the scope of the curriculum.[77] Both definitions are persuasive, but neither is helpful to a court that is trying to perform the basic task facing courts in student speech cases: balancing the student speaker's interests against those of the school.

Similarly, the *Pico* plurality rested its decision—curtailing school officials' discretion to remove books from the school library—on its view that the school library serves an educational function different from that of the rest of the school.[78] The dissent, however, took a very different view of the curricular role played by the school library:

> The libraries of [elementary and secondary] schools serve as supplements to [the schools'] inculcative role. Unlike university or public libraries, elementary and secondary school libraries are not designed for freewheeling inquiry; they are tailored, as the public school curriculum is tailored, to the teaching of basic skills and

75. *See, e.g.*, Diamond, *supra* note 31, at 478 n.4 ("The teaching function of school pervades the school day. Children are educated . . . when they are required to walk in an orderly fashion from class to class, despite their desire to run.").

76. *Hazelwood*, 484 U.S. at 271.

77. *Id.* at 283-84 (Brennan, J., dissenting).

78. Board of Educ. v. Pico, 457 U.S. 853, 868-69 (1982). *See supra* notes 24-28 and accompanying text. *See also infra* Part II.C.

ideas.[79]

The viability of the *Pico* decision rests on the continued acceptance of the noninculcative ideology inherent in the plurality's view of the role of the school library.

The fatal flaw of curriculum-based analysis is manifest: there can be no consistency to school free speech jurisprudence if courts employ an analysis that leaves the crucial issues of the nature and weight of the school's interest to the whim of each judge's educational ideology.

II. Proposed Analytical Framework

A. Schools Have Greater Power to Limit Speech Than Society Has in General

All free speech adjudication requires the assessment of both the speaker's right to be heard (or the listener's right to receive information[80]) and the weight of the state's interest in suppressing the speech. But it is the state interest that judges should focus on when deciding student speech cases. There are four reasons that the state interest is of primary importance.

First, as argued in Part I, the analytical frameworks that judges use to assess student speech claims do not provide a means of assessing the state interest asserted in each case. The result is that the assessment of the state interest, and hence the final outcome of each case, ultimately rests on the educational ideology of each judge.[81] To avoid the pitfalls inherent in allowing educational ideology to play a dominant role in student free speech adjudication,[82] courts should use a framework that analyzes the state interest in a manner independent of educational ideology.

Second, the weight of the student interest involved in each case has historically been of little consequence in the adjudication of student free speech claims because there has been very little disagreement among judges regarding that interest. As a rule, courts and commentators agree that student free speech interests are indeed quite weighty. The cases reveal a largely unarticulated but nonetheless widespread recognition that student free speech claims which are unsuccessful in the school context might prevail in outside society. Dissenting in *Pico*, Chief Justice

79. *Pico*, 457 U.S. at 915 (Rehnquist, J., dissenting).

80. *See supra* note 57.

81. *See* Senhauser, *supra* note 14.

82. See Walter A. Kamiat, Note, *State Indoctrination and the Protection of Non-State Voices in the Schools: Justifying a Prohibition of School Library Censorship*, 35 STAN. L. REV. 497, 505 (1983), which argues that the reason for the confusion of *Pico*'s many opinions is that "very few of the opinions of the prevailing judges analyzed the legitimacy of this asserted state indoctrinative interest."

Burger refused to condemn the removal of books from the school library in part on the grounds that "no restraints of any kind are placed on the students. They are free to read the books in question, which are available at public libraries and bookstores . . . ."[83] This reasoning rests on the assumption that public libraries cannot deny students access to the books at issue. Because the weight of the student interest in receiving information does not fluctuate as the student crosses and recrosses the threshold of the school entrance, the school library's greater ability to restrict the free speech rights of students must be traceable to some interest held by the school library that is not shared by its civic counterpart. The operative variable that distinguishes the school library from the public library, then, is not the nature of the student interest but the nature of the state interest.[84]

Third, the very fact that educational ideology has played a dominant role in student free speech jurisprudence demonstrates that the nature of the state interest has indeed been the determinative issue in student speech balancing, because educational ideology has operated in the guise and in the role of the state interest. Time and again, student speech cases have depended not on the weight of the student interest, but on the weight of the state interest as it is defined by each judge's educational ideology.[85] If the influence of educational ideology is eliminated, the student interest and the state interest are not left on even footing. Instead, the student interest remains of little consequence, while the state interest reacquires from educational ideology the role of the determinant variable in the balancing equation.

Finally, analysis of school speech controversies must focus on the state-interest arm of the balance because the existence of a greater state interest is the only way that legitimate school speech restrictions can be distinguished from other speech restrictions which, if applied to school-aged citizens by society at large, would be illegitimate. Although various rights of children can be curtailed to a greater extent than can the rights of adults—examples range from compulsory education laws to age restrictions on the right to vote[86]—those curtailments do not extend to free

83. *Pico*, 457 U.S. at 886.

84. The widespread recognition of the weight of the student interest is further evidenced by the almost talismanic recitation in every school speech case, regardless of outcome, of *Tinker*'s assertion that "students . . . [do not] shed their constitutional . . . rights at the schoolhouse gate." Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 506 (1969); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988); *Pico*, 457 U.S. at 886 (Burger, C.J., dissenting), 910 (Rehnquist, J., dissenting).

85. *See supra* notes 11-14 and accompanying text, and Part I.A.

86. Even these restrictions can be seen as legitimate not because children's rights in these areas are less than the rights of adults, but rather that the state has compelling interests which

speech rights. Indeed, the free speech rights of school-age citizens outside of school are largely coterminous with those of adults.[87]

The reason that speech restrictions which would be unconstitutional if applied to school-aged minors by society at large become legitimate when applied by school officials to their students is traceable not to some lesser student interest but to a greater state interest in education. The truth of this thesis becomes more apparent on the realization that not only are the rights of students subject to greater restrictions in school than outside of school, but so too are the rights of adults.[88] For example, the free speech rights of adult school students are subject to many of the same restrictions that apply to minor students.[89] Surely, the most basic of student speech restrictions, those pertaining to the subject of classroom discussions, are the same for both minor students and adult students. In addition, courts have repeatedly held that the academic freedom of elementary and secondary school teachers is subject to

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are served by limiting the exercise of these rights by children. Compulsory education laws are legitimate not because the liberty interests of children are less substantial than the liberty rights of adults, but because the state has a compelling interest in ensuring that its citizens are educated. Similarly, voting age restrictions do not reflect a judgment that citizens under 18 years old have less stake in the outcome of elections than do their elders; instead, those laws are legitimate because they serve the state interest in preserving the integrity of the electoral system.

87. See, e.g., Aladdin's Castle Inc. v. City of Mesquite, 630 F.2d 1029 (5th Cir. 1980), in which the court overturned a local ordinance making it illegal for the operator of a coin-operated amusement machine to allow it to be used by minors unaccompanied by a parent or guardian. The court analyzed the ordinance as a limitation on minors' First Amendment right of association. The court stated that "[t]he standard that the ordinance must meet is not reduced because minors are involved." *Id.* at 1042. *Accord* Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.").

See also Tushnet, *supra* note 57, at 747 ("If a statute prohibits certain expressive activities by young persons that would be protected by the [F]irst [A]mendment if engaged in by adults, the statute probably is unconstitutional.") (citation omitted); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 688 (1986) (Brennan, J., concurring) ("If respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate.").

88. It is essential at this point to clarify one matter. I do not argue that the rights of minors are precisely congruent with those of adults. Adults, simply by virtue of their status as adults have interests that minors do not have. For example, it can be argued that compulsory education laws could not constitutionally be applied to adults, even though the state interest in having an educated citizenry is no less in regard to adults than in regard to minors, because adults have legal responsibilities that they could not meet if they were burdened by the time requirements of education. The state interest falls before the interests of adults but defeats the interests of minors not because the liberty interest of adults is qualitatively different from the liberty interest of minors, but because the minors' liberty interest stands alone, while the adult liberty interest is supplemented by the adult interest in meeting legal and financial duties.

89. *See* Fischler v. Municipal Court, 43 Cal. Rptr. 882, 883-84 (1965).

greater limitations by the state than is the academic freedom of teachers and professors at the post-secondary level.[90] The distinction between elementary and secondary teachers on the one hand, and post-secondary teachers on the other, stems not from a disparity between the rights of each group of instructors, nor from some idea that elementary and secondary teachers are not real academics, but from the special environment of the public school within which elementary and secondary teachers, unlike their colleagues at the post-secondary level, operate. Therefore, their rights must yield to the special state interests that are absent in post-secondary institutions.

A final indication that student speech rights are not alone in falling victim to school interests, demonstrating that school speech controversies turn on the scope of the school interest rather than the scope of the student interest, can be found in *American Future Systems, Inc. v. State University of New York at Courtland.*[91] In that case, a corporation engaged in selling certain products to college students through group demonstrations brought suit to challenge a university rule banning that activity in the university dormitories. The court viewed the sales presentations as commercial speech,[92] and so applied the standard enunciated in *Central Hudson.*[93] However, the court did not simply treat the case as a typical commercial speech case; rather, it "note[d] that this particular regulation of commercial speech must be evaluated 'in light of the special characteristics of the school environment' ";[94] and it defined its "task . . . [as] measur[ing] the regulation against the *Central Hudson* standard, with due consideration for the university's educational objec-

90. *See* Adams v. Campbell City Sch. Dist., 511 F.2d 1242, 1247 (10th Cir. 1975) ("[Teachers do not] have an unlimited liberty as to structure and content of the courses, at least at the secondary level."); Millikan v. Board of Directors, 611 P.2d 414, 418 (Wash. 1980) ("Since . . . course content is manifestly a matter within the board's discretion, petitioners' claims of academic freedom are not well taken." (footnotes omitted)); *see also* Nicholson v. Board of Educ., 682 F.2d 858 (9th Cir. 1982) (holding that a high school journalism teacher's First Amendment right to print the articles of his choice are effectively equal to that of his students).

But see Dean v. Timpson Indep. Sch. Dist., 486 F. Supp. 302, 307 (E.D. Tex. 1979) ("[A] teacher has a constitutional right . . . to engage in a teaching method of his or her own choosing . . .").

91. 565 F. Supp. 754 (N.D.N.Y. 1983).

92. *Id.* at 761-62.

93. Central Hudson Gas and Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980). Speech that is "related solely to the economic interests of the speaker and its audience," *id.* at 561; can be regulated if the regulation serves a "substantial" governmental interest, *id.* at 566; the regulation "directly advances the governmental interest asserted," *id.*; and the regulation is "not more extensive than is necessary to serve that interest," *id.*

94. *American Future Sys. Inc.*, 565 F. Supp. at 763 (citation omitted).

tives."[95] Thus, a curtailment of commercial speech interests that admittedly would have been invalid in the context of outside society was upheld because the speech at issue took place in the "special environment" of the schools.

Student speech interests often bow to the interests of the school not because student speech interests are less weighty than those of adults, but because the school asserts special interests that are not normally asserted by outside society.[96] In order to construct a framework for determining when the school's interest takes precedence over the free speech interests of students, the first step must be to determine the nature and weight of the school's interest.

B. Defining the School Interest

Part I of this Article argued that schools may restrict the speech of their students to a greater degree than outside society can restrict the speech of school-aged citizens because schools are a special environment in which special state interests inhere. The necessary corollary to that thesis is that schools may enforce those greater restrictions on student speech only when those restrictions are enacted in pursuit of some interest unique to the public schools and absent in outside society. If such were not the case, there would be no call to construct a unique analytical framework for application to school speech controversies. If the interests of students and school-aged citizens are identical, and if the interest of the state did not vary according to the locus of the speech, then any analysis suitable for the adjudication of generic speech controversies would be equally suitable for the adjudication of student speech disputes.

For example, a school regulation forbidding on-campus possession by students of *Playboy* magazine must be judged by the same standard as a state statute that forbids possession by all school-aged citizens, unless the school regulation serves some school-specific purpose that is not served by the hypothetical state statute. Likewise, absent a school-specific purpose, school library censorship must be judged by the same standard employed to adjudicate borrowing restrictions imposed on school-aged patrons by a public library.[97] This general principle has been utilized by the Supreme Court in regard to high school students' Fourth Amendment rights. In *New Jersey v. T.L.O.*[98] the Court held that school

95. *Id.*

96. *But see* Diamond, *supra* note 31, at 490 ("A number of Supreme Court cases decided after *Tinker* demonstrate . . . the impractical nature of the Court's statement that schoolchildren are 'persons' and thus entitled to First Amendment protection.").

97. *See infra* Part II.C.

98. 469 U.S. 325 (1985).

officials need only reasonable suspicion of criminal activity to search the persons and effects of students. This contrasts with the probable cause standard that applies to some searches and seizures conducted by government agents operating in outside society.[99] *T.L.O.* was based in small part on the rationale that school officials should not be held to the search and seizure standards that apply to law enforcement officers because school officials are not trained in search and seizure rules and techniques.[100] But the principal distinction that the Court drew between the school and outside society was that the risk of harm from unconfiscated contraband and weapons is greater in the school than in outside society.[101] The decision most emphatically was not based on a determination that student Fourth Amendment rights are of less moment than are Fourth Amendment rights of non-students.[102] The Court recognized that school searches serve state interests that are not implicated by the usual search that takes place outside school grounds. Therefore, the balance between the state interests and the Fourth Amendment interests of suspects leans more heavily toward the state interests during on-campus searches, and so the standard of suspicion required to justify an on-campus search is less stringent.[103]

T.L.O. was an extension of a series of Supreme Court decisions that have held many general criminal procedure rules, such as the warrant requirement, inapplicable when exigent circumstances exist. Exigent circumstances exist when an important governmental interest will be frustrated if the usual rules are followed.[104] The existence of school-specific interests that stand in opposition to student free speech rights are analogous to the exigent circumstances of Fourth Amendment jurisprudence.

99. *See, e.g.*, Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973); Sibron v. New York, 392 U.S. 40, 62-66 (1968).

100. *T.L.O.*, 469 U.S. at 343.

101. "It is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject." *Id.* at 340. *See also id.* at 352-53 (Blackmun, J., concurring) ("Indeed, because drug use and possession of weapons has become increasingly common among young people, an immediate response frequently is required not just to maintain an environment conducive to learning, but to protect the very safety of students and school personnel.").

102. "A search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy." *Id.* at 337-38 (footnote omitted).

103. *Id.* at 341 ("the accomodation of the privacy interests of the schoolchildren with the substantial need . . . to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause.").

104. *See id.* at 340. ("Just as we have in other cases dispensed with the warrant requirement when 'the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search,' Camara v. Municipal Ct., 387 U.S. at 532-33, we hold today that school officials need not obtain a warrant before searching a student who is under their authority.").

Just as a lower standard of Fourth Amendment protection applies only when "exigent circumstances" exist, so too a lower standard of First Amendment protection may apply only when the existence of special, school-specific interests demand greater student speech restrictions than those imposed on school-aged citizens by outside society.

Analysis of student speech controversies, therefore, must include an examination of the school interest that purportedly justifies the challenged speech restriction. This examination must focus on whether that interest is unique to the school environment, in which case the reviewing court must employ a school-specific analysis, or whether the school regulation is designed to serve some general societal interest, in which case no special, school-specific analysis need be applied, and the reviewing court may analyze the restriction on the same grounds as if it were asserted generally by outside society.[105]

The school-specific interests of the public school are those interests that arise out of the public school's unique role as the educator of youth. Despite the existence of competing educational ideologies, there is relatively little disagreement among courts as to the general nature of that role. Rather, the disagreement arises over the means by which the public school fulfills its role. All agree that the fundamental purpose of the public school is to teach facts and skills, and to "inculcat[e] fundamental values" necessary to the maintenance of a democratic system.[106]

But, another ideological current also runs through the cases. The Supreme Court stated that "[i]n our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved."[107] The Court further stated, "[i]f

105. By "asserted generally" I do not mean to suggest that the school regulation should be analyzed as if it was a time, place, and manner restriction; i.e., it should not be analyzed as if it were a state statute that forbids expression of the speech at issue on school grounds. Rather, because in the absence of some school-specific interest the school stands in relation to the students precisely as the state stands in relation to its school-aged citizens, the school regulation should be analyzed as if it were a state statute, the terms of which are identical to those of the school regulation but that applies those restrictions to all school-aged students regardless of the location of the speech.

106. Ambach v. Norwick, 441 U.S. 68, 77 (1979); *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 278 (1988) (Brennan, J., dissenting); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986); Board of Educ. v. Pico, 457 U.S. 853, 864 (1982); *id.* at 876 (Blackmun, J., concurring); *id.* at 889 (Burger, C.J., dissenting); *id.* at 896 (Powell, J., dissenting).

107. Tinker v. Des Moines Indep. Sch. Dist., 369 U.S. 503, 511 (1969). *Accord Fraser*, 478 U.S. at 689-90 (Brennan J., concurring); *Pico*, 457 U.S. at 864-66, 886 (Burger, C.J., dissenting); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

there is one fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."[108]

The last two decades of student speech jurisprudence have been essentially a struggle between these two conflicting principles. Repeatedly, this struggle has been resolved only by recourse to educational ideology. To diminish or eliminate the dominant role of educational ideology, courts must employ an analysis that removes the tensions between these two competing tenets.[109]

In his concurrence in *Pico*, Justice Blackmun recognized that a conflict exists between the two principles,[110] and he suggested a method of reconciling them. Justice Blackmun proposed that a reviewing court "strike a proper balance [between the two principles] . . . by holding that school officials may not remove books for the *purpose* of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials' disapproval of the ideas involved."[111] As an example of how his analysis would be applied, Justice Blackmun hypothesized that "removing a learned treatise criticizing American foreign policy from an elementary school library because the

108. *West Va. Bd. of Educ.*, 319 U.S. at 642; *see also Keyishian*, 385 U.S. at 603 ("[T]he First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom.").

109. It can be argued that no such conflict exists because Supreme Court concerns extend only to school efforts to "prescribe . . . orthodox[y]", *Barnette*, 319 U.S. at 642, in matters involving politics and religion, which matters are distinct from "societal values." But that distinction exists more in fantasy than in fact. In modern society, virtually every issue includes some political component. The public school may well perceive its anti-drug message as an attempt to inculcate values and morality, rather than an attempt to "prescribe . . . [political] orthodox[y]," *id.*; nevertheless, the truth remains that "LSD guru" Timothy Leary's "tune in, turn on, drop out" was very much a political message.

Similarly, "thou shalt not kill" is clearly a moral message, and, despite its Judeo-Christian origins, few would question that the public school may attempt to inculcate that value. Even that seemingly simple admonition has a political component, however, for society does not view "thou shalt not kill" as an absolute. Rather, "the shared values of a civilized [American] social order," *Fraser*, 478 U.S. at 683, deem killing permissible when in self-defense, or when the victim is an enemy who is killed on the battlefield, but deem killing impermissible when it takes the form of euthanasia. A school that attempts to inculcate "values" may find itself instead asserting a political middle ground between students who subscribe to an interpretation of "thou shalt not kill" that is either more expansive ("Killing is never right") or less expansive ("Euthanasia is moral") than the interpretation that is adopted by society. This is nothing less than the "prescri[ption] . . . of orthodox[y]" that the First Amendment forbids.

The distinction between political or religious views and values or morality is a chimera, and so the argument that the public school has the right to successfully inculcate values or morality has no analytical legs upon which to stand.

110. "To my mind, this case presents a particularly complex problem because it involves two competing principles of constitutional stature." *Pico*, 457 U.S. at 876.

111. *Id.* at 879-80.

students would not understand it[112] is an action unrelated to the *purpose* of suppressing ideas. In my view, however, removing the same treatise because it is 'anti-American' raises a far more difficult issue."[113] Thus, Justice Blackmun would alleviate the tension between the school's power to inculcate values and the students' free speech rights by scrutinizing the reasons behind the school's attempts at censorship. His analysis focuses on whether school officials have abused their discretion over the process of inculcation. His approach limits that discretion by providing guidelines, based on the school's purpose, for the exercise of that discretion.

Justice Blackmun's proposed framework, while solid in theory, might prove ineffective in practice. Under his analysis, school officials seeking to avoid conflict with the First Amendment rights of their students would need only to claim that the restrictions were intended to serve some innocuous purpose.[114] A court confronted with a speech restraint, such as the removal of library books, justified by school officials on the basis that the expression involved is "psychologically or intellectually inappropriate for the age group,"[115] would have no choice but to rule in favor of the school. The court would have no practical way to challenge the officials' assertion that the expression was inappropriate, for the question of appropriateness for a particular age group is a determination particularly within the expertise of school officials. The court would have little recourse but to defer to the school's judgment.[116]

The Court is simultaneously devoted to two countervailing principles: the public school's role is to inculcate community values and student free speech rights are most holy. An alternative to resolve this dilemma is to define the school's inculcative interest in a manner that eliminates conflict with the First Amendment. "Inculcation" can in fact

112. For a discussion of the often asserted school interest in censoring speech that is inappropriate for student audiences, see *infra* notes 147-50, 162-64 and accompanying text.

113. *Pico*, 457 U.S. at 881.

114. Justice Blackmun mentions several such innocuous purposes, including avoiding student exposure to offensive language, *id.* at 880, removing books that are "psychologically or intellectually inappropriate" for students, *id.*, and protecting students from ideas that are " 'manifestly inimical to the public welfare' " (citation omitted), *id.*

115. *Id.*

116. Arguably, a trial court could make an independent judgment as to the appropriateness of any particular expression on the basis of expert testimony; however, the resulting battle of experts might prove to be somewhat less than illuminating. It can also be argued that the circumstances surrounding the promulgation of speech restrictions can reveal ulterior motives. *See* Wallace v. Jaffree, 472 U.S. 38, 56-57 (1985) (The Court looked to legislative history of "moment-of-silence" statute; the bill's sponsor had "inserted into the bill, apparently without dissent, a statement indicating that the legislation was an 'effort to return voluntary prayer' to the public schools."). It seems doubtful, however, that in most cases the record would provide so clear a picture of the motives of school officials.

be used in at least two ways. It can mean "an attempt to instill" or "a successful attempt to instill." Because the scope of student free speech rights is derived from the school's interest in suppressing speech, the definition of inculcation should be paramount in student speech jurisprudence. To restate this issue in terms of balancing the free speech interests of students against the countervailing interests of the school, the question is the following: Is the school's inculcative interest fulfilled when the school's message has been communicated by the school and received by the students, or is that interest fulfilled only when the students have both received the message and adopted it as well?

Only Justice Brennan seems to have recognized this distinction, but even he has failed to recognize that the essential issue is the definition of the school's interest. Although he has never expressly explored the definition of inculcate, Justice Brennan has implicitly employed a definition that means "attempt to instill." His selection of synonyms for inculcate most strongly evidences this interpretation. In *Pico*, Justice Brennan concluded his discussion of the inculcative interest of the public school by adopting language from the respondent school board's brief: "We are therefore in full agreement with petitioners that local school boards must be permitted to 'establish and apply their curriculum[s] in such a way as to *transmit* community values . . . .' "[117] In *Hazelwood*, Justice Brennan defined the school interest as "*convey[ing]* . . . information and tools" and, again, as "*transmitting* to [students] an official dogma of 'community values.' "[118] Justice Brennan employs the "attempt to instill" definition. Because he views the school interest as "transmitting" its message, it is not clear if he realizes that his definition of inculcate is different from that of his colleagues. Justice Brennan has, however, recognized that a distinction exists between student speech that interferes with the school's ability to communicate its message, and student speech that merely competes with that message and thereby interferes only with the adoption of the school's message by the students. Because Justice Brennan's analysis implicitly argues that defining the school's interest as "successful inculcation" is inconsistent with the First Amendment, it is worthy of quotation at length:

> Free student expression undoubtedly sometimes interferes with the effectiveness of the school's pedagogical functions. Some brands of student expression do so by directly preventing the school from pursuing its pedagogical mission: The young polemic who stands on a soapbox during calculus class to deliver an eloquent political

117. *Pico*, 457 U.S. at 864 (quoting Brief for Petitioners at 10) (emphasis added).

118. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 278 (1988) (Brennan, J., dissenting) (emphasis added) (citation omitted).

> diatribe interferes with the legitimate teaching of calculus. . . . Other student speech, however, frustrates the school's legitimate pedagogical purposes merely by expressing a message that conflicts with the school's, without directly interfering with the school's expression of its message: A student who responds to a political science teacher's question with the retort, "socialism is good," subverts the school's inculcation of the message that capitalism is better. . . . Likewise, the student newspaper that . . . conveys a moral position at odds with the school's official stance might subvert the administration's legitimate inculcation of its own perception of community values.
>
> If mere incompatibility with the school's pedagogical message were a constitutionally sufficient justification for the suppression of student speech, school officials could censor each of the students or student organizations in the foregoing hypotheticals, converting our public schools into "enclaves of totalitarianism," (citation omitted) . . . . The First Amendment permits no such blanket censorship authority.[119]

The unexpressed rationale that underlies Justice Brennan's analysis is inescapable. His argument that the First Amendment prevents school censorship of student speech that is "mere[ly] incompatible with the school's pedagogical message," is valid only if the school's interest is limited to communicating the message. If instead the school's interest is defined as "successful inculcation," then any student speech which criticizes or expresses a view contrary to that message reduces the chances that other students will accept the validity of the school's message and thereby interferes with the accomplishment of the school's interest. As a result, the school could indeed "censor each of the students or student organizations" that Justice Brennan hypothetically presents in his *Hazelwood* dissent, including "the maverick who sits in class passively sporting a symbol of protest against a government policy" and "the gossip who . . . swap[s] stories of sexual escapade [and thereby] muddle[s] a clear official message . . . condemning teenage sex."[120] If the First Amendment does not protect such student speech it is difficult to imagine what speech it does protect. A definition of the school's purpose as "successful inculcation" simply cannot coexist with the notion that student First Amendment rights survive the students' daily passage through "the schoolhouse gate."[121]

Justice Brennan has provided the completion of our analytical framework. That framework defines the school's interest as communicative; that is, the school's attempt to inculcate is complete, and so its inter-

119. *Id.* at 279-80 (Brennan, J., dissenting).
120. *Id.* at 280.
121. Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 506 (1969).

est is fully served when its message has been communicated by the school and received by the students. Therefore, the school cannot restrict any student speech right,[122] unless the students' exercise of that right interferes with the transmission or reception of the school's message.

A hypothetical[123] that illustrates this framework (hereinafter "communication analysis") is the following: Can a school censor a school newspaper that describes how to "freebase" cocaine?[124] The first step of the analysis is to identify the interests served by the speech restriction. Under this hypothetical, the school's censorship serves two interests.[125] It clearly serves to prevent drug use by minors. It arguably also serves a second interest of inculcating the "community value" that drug use is wrong.[126]

The next step is to determine whether the interests are school-specific or of a type asserted generally[127] by outside society. A school-specific interest either relates to the school's inculcation of values and information, or addresses problems that exist only in schools.[128] The interest in preventing drug use is not school-specific because drug use is a society-wide problem, and as a result a plethora of drug-use regulations have been adopted and apply throughout society. In contrast, the interest in inculcating the value that drug use is improper is school-specific. Of course, society as a whole has an interest in inculcating that particular value in minors as a means of preventing drug use, but schools are the mechanism by which society attempts to inculcate that message. This special school role is the very source of the school's ability to restrict student speech to a greater degree than society can restrict similar speech outside the special environment of the school.[129] If a school speech restriction serves an interest that is asserted generally by outside society, then it should be analyzed under traditional First Amendment analysis.

122. Included in the term, "student speech right," are all of the rights that arguably are included within the protections of the First Amendment, including the right to receive information. *See* Board of Educ. v. Pico, 457 U.S. 853, 866-68 (1982).

123. This hypothetical was suggested by a colleague. Thomas Shantz, Remarks at Informal Gathering (April 15, 1988).

124. For purposes of this hypothetical, a student newspaper will be treated as a generic student expression, rather than as student expression that is "sponsored" by the school. *See Hazelwood*, 484 U.S. at 270-73. The *Hazelwood* Court's distinction between school-sponsored and other student speech is discussed *infra* at Part II.D.

125. When a speech restriction serves more than one state interest, the reviewing court should analyze each interest separately.

126. Courts have identified several, apparently non-communication-oriented, school interests. Those interests are discussed *infra* at notes 147-50, 163-71 and accompanying text.

127. *See supra* note 105 and accompanying text.

128. *See supra* notes 91-96 and accompanying text.

129. *See* Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 507 (1969).

That is, the school regulation should be analyzed as if it were a state statute that imposes identical restrictions on all school-aged citizens. This analysis is appropriate for school regulations that serve societal interests because only regulations that serve school-specific interests can legitimately discriminate between students in school and school-aged citizens outside of school.[130] Returning to the hypothetical, a reviewing court should first analyze the censorship by assuming that the regulation is in fact a state statute that forbids the dissemination of drug use information to all minors. The reviewing court's determination of the constitutionality of such a hypothetical statute would then control the determination of the constitutionality of the school regulation.[131] If the school regulation does not serve a societal interest, or if the societal interest served by the regulation fails to justify the regulation under review, then the reviewing court should employ communication analysis to examine the regulation in the context of the school-specific interest that it serves. The court must determine whether the student speech interferes with the school's communication of its message. If the school's ability to communicate is unhampered by the student speech, then the regulation would be unconstitutional. Under this analysis, the regulation would be illegitimate. The article on "freebasing," with its implied message that drug use is acceptable, certainly competes with the school's message that drug use is immoral, but it leaves the channels of communication between the school and its students unobstructed. Of course, if the regulation legitimately serves a societal interest, its failure to serve a legitimate school-specific interest is moot.

Under this same analysis, *Tinker* was properly decided, for it is only under unusual circumstances that silent student protest will prevent the school from communicating with its students.[132] The essence of communication analysis is that student expression which prevents the school from communicating its message simply cannot coexist with that school

130. *See supra* note 97 and accompanying text. The corollary to this principle is that a state statute that regulates only the speech of students and that serves school-specific interests should be treated as if it were a school regulation and analyzed under communication analysis.

131. For example, if the Court had employed this analysis, it would have analyzed Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 676 (1986) (lewd student speech at school assembly), as being controlled in large part by FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (FCC can limit broadcast of lewd program to hours when children are unlikely to be listening). *See infra* notes 173-81 and accompanying text.

132. Such circumstances may arise when a silent protest sparks widespread physical disturbances, or when, despite the teacher's efforts to teach, class discussion is diverted from the subject at hand to the subject of the protest.

It should be noted that Justice Black found just such a diversion of attention to have occurred in *Tinker*: "There is also evidence that a teacher of mathematics had his lesson

message. In most instances, silent or symbolic student speech can indeed coexist with that of the school; while a student oration at the back of the classroom drowns out the teacher's attempts to communicate with the students, a passive student protest has no such effect.

Because this analysis defines the school's inculcative interest as "attempting to inculcate" and therefore allows the school to censor only student speech that prevents the school from expressing its message, it eliminates the role of educational ideology as the determining factor in adjudication of student speech controversies. Regardless of whether the school chooses to inculcate values by telling students that certain values are good, or instead by prodding students into discovering the virtues of those values by themselves, the school's interest in communicating its message is identical.

A school that employs an inculcative ideology cannot teach if its statement "premarital sex is bad," is interrupted or drowned out by Justice Brennan's "young polemic who stands on a soapbox"[133] during class. That same young polemic equally frustrates teaching by a school that employs a non-inculcative ideology if his or her expression drowns out the school's communication of those questions that the school hopes will elicit from students the realization that "premarital sex is bad." Both schools seek to instill the same value, and both schools, regardless of educational ideology, must be able to communicate with their students. Therefore, if the school's interest is defined as being able to communicate, the young polemic is equally subject to censorship in either school.

In contrast, the student who politely raises a hand, waits to be recognized by the teacher, and thereupon expresses the opinion that "premarital sex is good," disrupts communication by neither school. Both schools will be upset with the student, not only because he or she has failed to accept the lesson that each school attempted to instill, but also because the student's expression of a value contrary to that the school sought to inculcate might influence other students to reject the school's value. The inculcative school's interest in suppressing the student's speech should not be considered greater than that of the non-inculcative school. The inculcative school may no more suppress student speech that does not compete with its message than can the non-inculcative

period practically 'wrecked' chiefly by disputes with Mary Beth Tinker, who wore her armband for her 'demonstration.' " 393 U.S. at 517-18 (Black, J., dissenting).

However, it seems from this brief description that the "disputes with Mary Beth Tinker" were carried out not by other students but by the mathematics teacher. Certainly, a school speech restriction cannot be upheld on the ground that teaching was disrupted not by the speech itself, but by school efforts to silence the speech.

133. *See supra* note 119 and accompanying text.

school. Under communication analysis, educational ideology is irrelevant because the school's interest in suppressing speech is identical regardless of the educational ideology that the school employs.

C. Communication Analysis and the School Library Conundrum[134]

Perhaps the most intractable problem in student speech jurisprudence is whether there should be a distinction, for First Amendment purposes, between school library book removal and school library book acquisition.

Justice Brennan's plurality opinion in *Pico* took pains to distinguish that case from a case in which school acquisition of books was challenged:

> [T]he action before us does not involve the *acquisition* of books. Respondents have not sought to compel their school Board [sic] to add to the school library shelves any books that the students desire to read. Rather, the only action challenged in this case is the *removal* from the school libraries of books originally placed there by school authorities, or without objection from them.[135]

The distinction between book removal and book acquisition immediately provoked criticism and controversy. Justice Blackmun, in his concurrence, expressed "doubt that there is a theoretical distinction between removal of a book and failure to acquire a book,"[136] but argued that a distinction between book removal and book acquisition is justified because

> [T]here is a profound practical and evidentiary distinction between the two actions: "Removal, more than failure to acquire, is likely to suggest that an impermissible political motivation may be present. There are many reasons why a book is not acquired, the most obvious being limited resources, but there are few legitimate reasons why a book, once acquired, should be removed from a library not filled to capacity."[137]

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134. Library book removal is often justified on the basis that particular books are inappropriate for students or that the books are vulgar. The public school's interest in excluding speech that is inappropriate for children is discussed *infra* at notes 147-50, 162-64 and accompanying text. The public school's interest in censoring vulgar speech is discussed *infra* at Part II.E.

135. Board of Educ. v. Pico, 457 U.S. 853, 862 (1982).

> As noted earlier, nothing in our decision today affects in any way the discretion of a local school board to choose books to *add* to the libraries of their schools. Because we are concerned in this case with the suppression of ideas, our holding today affects only the discretion to *remove* books.

Id. at 871-72.

136. *Id.* at 878 n.1 (Blackmun, J., concurring).

137. *Id.* at 878-79 n.1 (quoting Judge Newman's concurring opinion in the Court of Appeals decision in Pico v. Board of Educ., 638 F.2d 404, 436 (2d Cir. 1980) (Newman, J.,

The dissenters objected to the plurality's distinction, and in particular took issue with its argument that avoidance of the suppression of ideas justifies the distinction:

> According to the plurality, the evil to be avoided is the "official suppression of ideas." It does not follow that the decision to *remove* a book is less [sic] "official suppression" than the decision not to acquire a book desired by someone. Similarly, a decision to eliminate certain material from the curriculum, history for example, would carry an equal—probably greater—prospect of "official suppression."[138]

The Sixth Circuit in *Minarcini v. Strongsville City School District*,[139] decided before *Pico*, took another approach to the distinction between removal and acquisition of books. *Minarcini* concerned a school board decision to reject certain books for use as textbooks and to remove copies of the books from the school library. The court upheld the board's decision to reject the books for use as textbooks, but it held that the First Amendment forbids removal of copies of the books from the school library. In regard to textbook selection, the court reasoned that "discretion as to the selection of textbooks must be lodged somewhere and we can find no federal constitutional prohibition which prevents its being lodged in school board officials . . . ."[140] In contrast, the court employed a public forum-like analysis to the book removals:

> Neither the State of Ohio nor the [school district] was under any federal constitutional compulsion to provide a library . . . or to choose any particular books. Once having created such a privilege for the benefit of its students, however, neither body could place conditions on the use of the library which were related solely to the

concurring)). *See also* Joy Koletsky, Case Note, *First Amendment-Free Speech: Right to Know-Limit of School Board's Discretion in Curricular Choice-Public School Library as Marketplace of Ideas*, 27 CASE W. RES. L. REV. 1034, 1049 (1977) ("The only apparent distinction between a case involving selection of books and one involving removal is an evidentiary problem in the former.").

138. *Pico*, 457 U.S. at 892-93. (Burger, C.J., dissenting) (footnote and citation omitted). *See also id.* at 895 (Powell, J., dissenting).

> If a 14-year-old child may challenge a school board's decision to remove a book from the library, upon what theory is a court to prevent a like challenge to a school board's decision not to purchase that identical book? And at the even more "sensitive" level of "receiving ideas," does today's decision entitle student oversight of which courses may be added or removed from the curriculum, or even of what a particular teacher elects to teach or not to teach in the classroom? Is not the "right to receive ideas" as much— or indeed even more— implicated in these educational questions?

Id. at 916 (Rehnquist, J., dissenting) ("The failure of a library to acquire a book denies access to its contents just as effectively as does the removal of the book from the library's shelf.").

139. 384 F. Supp. 698 (N.D. Ohio 1974), *aff'd*, 541 F.2d 577 (6th Cir. 1976).

140. 541 F.2d at 579.

social or political tastes of school board members.[141]

This analysis is no more convincing than Justice Brennan's in *Pico*. First, the court's public forum test used to analyze library book removal collapses if the school library is viewed as a non-public forum. The view that a school library is not a public forum is consistent with Justice Rehnquist's view of the school library as simply another tool that serves the school's inculcative efforts. But, like Justice Brennan's *Pico* analysis, the *Minarcini* analysis was partly predicated on the school library's "special[ ] dedicat[ion] to broad dissemination of ideas."[142] This view conflicts with that of Justice Rehnquist, and so the *Minarcini* holding is premised on acceptance of the court's particular opinion of the nature of the school library.

The problems with distinguishing book selection from book removal vanish if First Amendment protection is extended only to student speech that does not interfere with communication by the school. As a matter of educational policy, a school can make a judgment that students must be exposed to certain books as a part of the school curriculum, or that students must at least have access to those books through the school library.[143] A student demand that certain books be selected interferes with the school's pursuit of that policy; because school resources are finite, the school's purchase of one book demanded by students forces the school to forego the purchase of a book of the school's choosing. Any such restriction on the school's ability to purchase the books it chooses necessarily interferes with the school's attempt to communicate the messages expressed by those books.[144]

In contrast, restrictions on the school's ability to remove books from the school library do not interfere with the school's ability to communicate. The presence in the library of books that the school deems undesirable does not interfere with student access to other books that the school endorses. Unlike the case of the young classroom polemic whose speech drowns out the speech of the teacher, the two sets of books can coexist, neither preempting the other. At most, the presence of undesirable

141. *Id.* at 582.

142. *Id.* at 583.

143. *See generally* E.D. HIRSCH, JR., CULTURAL LITERACY: WHAT EVERY AMERICAN NEEDS TO KNOW (1987) (arguing that the primary role of education is the acculturation of youth, which is accomplished in part by exposing them to certain culturally significant texts).

144. This same argument holds in regard to the school's decision as to "which courses may be added or removed from the curriculum, or even [as to] what a particular teacher elects to teach . . . ." Board of Educ. v. Pico, 457 U.S. 853, 895 (1982) (Powell, J., dissenting). Student insistence that the school offer a course in particle physics interferes with the school's ability to commit classroom and human resources to physical education, and it prevents the communication of the lessons inherent in the teaching of that other class.

books only competes with the school-endorsed books for the attention of students, but such competition is at the center of First Amendment values. Surely, the school may not remove a work by Marx because students find that book more persuasive and compelling than a school-endorsed tome written by Adam Smith. Further, while the school can assert a legitimate pedagogical interest in ensuring that students have access to certain "great books," school attempts to prevent exposure to other books serves no such valid pedagogical purpose[145] and clearly is an attempt to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[146]

D. "School-Sponsored" Speech

Application of communication analysis to school censorship of student newspapers and school plays is more problematic. In *Hazelwood School District v. Kuhlmeier*,[147] the Court established a dichotomy between school censorship of "a student's personal expression that happens to occur on the school premises"[148] and censorship of student expression that arises out of "school-sponsored . . . expressive activities."[149] The Court held that because the school has interests in regulating school-sponsored speech that it does not have in regulating speech that "happens to occur" on campus, a different standard should apply to censorship of these two types of speech. "A school," the Court reasoned, "must . . . retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with 'the shared values of a civilized social order.' "[150]

145. But see Justice Rehnquist's dissent in *Pico*, in which he argues that "[o]f necessity, elementary and secondary educators must separate the relevant from the irrelevant, the appropriate from the inappropriate. Determining what information *not* to present to the students is often as important as identifying relevant material." 457 U.S. at 914 (Rehnquist, J., dissenting). Justice Rehnquist's argument is not persuasive. It is certainly reasonable for a high school biology teacher, in the interests of saving time and facilitating student understanding of basic concepts, to limit the class readings on evolution to the works of Darwin and to omit the works of Huxley and Lamarck. It is another matter for the school to decree that a proper education in biology necessarily precludes exposure to the works of those two scientists, and so student access to the scientists' books must be prevented. Justice Rehnquist's argument is a cogent one for granting schools wide latitude in selecting library books and planning curriculum, but it utterly fails as a rationalization for library book removal.

146. West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

147. 484 U.S. 260 (1988).

148. *Id.* at 271.

149. *Id.*

150. *Id.* at 272 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).

This pronouncement misstates the issue presented in *Hazelwood*. The issue was not whether a school can be forced "affirmatively to promote"[151] student speech with which the school disagrees, but whether the school, having created a "school-sponsored . . . expressive activit[y],"[152] can legitimately censor speech that occurs during that activity because the school disagrees with the message expressed by that speech.[153] Although the state may not be forced to open a facility to public discourse, once it opens such a facility, the First Amendment forbids it from censoring speech that occurs there on the grounds of state disagreement with the views expressed.[154] *Hazelwood*'s holding that the school newspaper at issue was not a public forum[155] is essentially irrelevant to this issue. The Court's finding that the school newspaper was not a public forum was based on the specific facts of that case and amounted only to a holding that that particular student newspaper was not a public forum.[156]

The Court did conclude that student speech which appears in a school newspaper is entitled to less First Amendment protection than other speech, but that conclusion was based on a distinction between the school's ability to censor student speech that "happens to occur" on campus and student speech by participants in "school-sponsored . . . expressive activities."[157] In turn, that distinction was based not on the grounds that the campus is a public forum and "school-sponsored . . . expressive activities" are not, but rather on the basis that:

> Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.[158]

The school's interest in "assur[ing] that participants learn whatever lessons the activity is designed to teach" is indeed weighty. But it is

151. *Id.* at 270-71.

152. *Id.* at 271.

153. *Id.* at 286 (Brennan, J., dissenting):

> The State's prerogative to dissolve the student newspaper entirely (or to limit its subject matter) no more entitles it to dictate which viewpoints students may express on its pages, than the State's prerogative to close down the schoolhouse entitles it to prohibit the non-disruptive expression of antiwar sentiment within its gates.

154. *See* Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 800 (1985); Education Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45-46 (1983).

155. 484 U.S. at 267-70.

156. *See supra* notes 40-46, 55 and accompanying text.

157. *Hazelwood*, 484 U.S. at 271.

158. *Id.*

hardly grounds for distinguishing the school's ability to censor "school-sponsored" student speech from its ability to censor other student speech, because that interest is essentially identical to the school's general interest in teaching students, and that interest is served by all school censorship efforts.

"[S]chool-sponsored . . . expressive activities" do teach a lesson, however, which is different from that taught by most other arms of the school; that is, those activities teach expressive skills to students. Journalism classes seek to teach students how to research and write newspaper articles, and that articles which are "ungrammatical, poorly written, inadequately researched, [or] biased or prejudiced"[159] cannot be published in a quality newspaper. The school communicates that lesson by allowing publication of only those student articles that are properly researched and written. Therefore, publication of a student article that is "ungrammatical, poorly written, inadequately researched, [or] biased or prejudiced" prevents the school from communicating its lesson.[160]

Although the unique lesson that is taught by "school-sponsored . . . expressive activities" allows the school to censor poorly written articles, it does not imply that the school may censor the content of school-sponsored student speech. Students can learn proper grammar, proper research techniques, and the dangers of biased reporting regardless of the values expressed in the articles they write. The First Amendment allows an English teacher to give a poor grade to a student who uses the word "ain't" in an essay, but it does not allow the teacher to give a higher grade to a student whose essay argues that "Drugs ain't good" than she gives to a student whose otherwise identical essay asserts that "Drugs ain't bad." Despite the Court's assertion otherwise, the school's interest in "assur[ing] that participants learn whatever lessons [the journalism class] is designed to teach" does not permit the school to censor school newspaper articles solely because those articles "advocate . . . conduct . . . inconsistent with 'the shared values of a 'civilized social order.' "[161]

159. *Id.* The Court also reasons that the school can also censor speech that is "biased . . . or profane, or unsuitable for immature audiences." *Id.* The school's interest in censoring such speech is unrelated to "assur[ing] that participants [in school-sponsored expressive activities] learn whatever lessons the activity is designed to teach." The school's interest in censoring student speech which is "vulgar or profane" is discussed *infra* at Part II.E.

160. Justice Brennan reached this same conclusion in his *Hazelwood* dissent: "The enumerated criteria [i.e., 'ungrammatical,' 'poorly written,' et al.] reflect the skills that the curricular newspaper 'is designed to teach.' The educator may, under *Tinker*, constitutionally 'censor' poor grammar, writing, or research because to reward such expression would 'materially disrup[t]' the newspaper's curricular purpose." 484 U.S. at 284 (Brennan, J., dissenting) (alteration in original).

161. *Id.* at 271-72 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).

The school's pursuit of the first special school interest that *Hazelwood* identifies with school-sponsored student speech, therefore, does not merit excepting censorship of that speech from communication analysis.

The second interest that the Court identifies as the basis for such an exception is the school's interest in "assur[ing] . . . that readers or listeners are not exposed to material that may be inappropriate for their level of maturity."[162] *Hazelwood* was not the first decision to endorse the idea that schools may censor "inappropriate" speech.[163] Neither *Hazelwood* nor any other opinion, however, has done more than simply assert without analysis, that censorship aimed at serving that interest does not run afoul of the First Amendment. In particular, *Hazelwood* fails to explain why the risk of harm from student exposure to school-sponsored inappropriate speech is any greater than the risk of harm from exposure to inappropriate speech outside school-sponsored activities. The Court was concerned that inappropriate material in a school newspaper might be "taken home to be read by students' even younger brothers and sisters,"[164] but that same danger exists in regard to student-distributed "underground" newspapers and political leaflets. In short, the school's interest in preventing student exposure to inappropriate material is not unique to school-sponsored speech, so that interest does not justify subjecting censorship of school-sponsored student speech to a different standard from that applied to censorship of other student speech.

The final interest that *Hazelwood* identifies as a ground for distinguishing school-sponsored student speech from student speech that "happens to occur" on school grounds is "assur[ing] . . . that the views of the individual speaker are not erroneously attributed to the school."[165] The Court indicates that the school's censorship powers are broad in regard to all "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[166] The Court does not explain why the school's pursuit of this interest justifies a special rule for censorship of school-sponsored speech. In particular, there seems be no reason for holding that the school's interest in avoiding confusion by students and the general public merits censorship. Although allowing such confusion to occur might be politically inexpedient,[167] that interest has no relation to the function of

162. *Id.* at 271.

163. *See* Board of Educ. v. Pico, 457 U.S. 853, 871, 880 (1982).

164. *Hazelwood*, 484 U.S. at 275.

165. *Id.* at 271.

166. *Id.*

167. *See* Letwin, *supra* note 31, at 204-05 ("The 'pragmatic' administrator may feel the failure to [censor student speech] will be taken as tacit approval of objectionable speech, with

schools. Quite simply, assuring that the (presumably unconventional) views and values of student participants in school-sponsored expressive activities are not erroneously attributed to the school by non-students, is not "reasonably related to legitimate pedagogical concerns."[168] Under the very standard enunciated in *Hazelwood*, therefore, school censorship aimed at ensuring that non-students do not confuse the views of students with those of the school, is illegitimate.

The school's interest in avoiding such confusion by students, on the other hand, does indeed relate to a legitimate pedagogical concern. But, even this interest does not justify the application of a different standard to censorship of school-sponsored speech, because that interest can be adequately protected by communication analysis. If student speech is delivered in such a manner that other students actually confuse the student expression with that of the school, then the student expression clearly interferes with the school's communication of its message; the student speaker, perhaps unwittingly, has in effect replaced the school's message with the speaker's own. Therefore, if the trial court in a particular case makes a factual finding that students actually "erroneously attributed" the student speech at issue to the school,[169] then the court might be justified in upholding the school's power to censor that speech.

In order for the school to prevail in its attempt to censor school-sponsored student speech, it must show more than the actual existence of student confusion of the censored message with that of the school, for " 'even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' "[170] In many instances, the school can serve its interest in avoiding confusion of a student message with that of the school by means that are less restrictive of student rights than blanket censorship. For example, the school

unpleasant political consequences. Here again, to accept this reasoning would virtually deny students the protection of the First Amendment.").

168. *Hazelwood*, 484 U.S. at 273.

169. The school most likely would be hard pressed to show that such confusion actually occurred, at least in regard to student expression of values. It is one thing for the school to argue that the publication of ungrammatical articles in a student newspaper might lead students to believe that, despite the protestations of their English teachers, the school does not consider the use of proper grammar to be important. It is quite another thing to convince a reasonable fact finder that an article in a student newspaper convinced students that, in actuality, the school believes that drug use and premarital sex should be encouraged. In the final analysis, the school's assertion that it seeks to censor student speech because of the risk that students will confuse the students' message with that of the school seems to be a contrived, poorly masked attempt to censor ideas that the school considers objectionable.

170. *Hazelwood*, 484 U.S. at 289 (Brennan, J., dissenting) (quoting Keyishian v. Board of Regents, 385 U.S. 589, 602 (1967), quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)).

could include a disclaimer and/or publish its opposing view on the subject addressed by the student speech.[171]

In some cases, the use of less restrictive means might not be practical. School officials do not have prepublication access to "underground" newspapers, and disclaimers and opposing viewpoints cannot be "attached" to verbal speech as they can be to publications. There are no obstacles, however, to the use of less restrictive means when the objectionable student speech occurs in a school newspaper. Even if naive readers of the *Hazelwood* school newspaper had erroneously interpreted the articles on teenage pregnancy as school endorsement of premarital sex, the school could have dispelled those misconceptions quite easily, either by requiring that the newspaper publish a disclaimer or by insisting on the inclusion in that issue of an administration editorial setting forth the school's view of premarital sex by teenagers.

Thus, the last of the interests *Hazelwood* identifies as grounds for distinguishing the school's power to censor school-sponsored student speech from its power to censor student speech that "happens to occur on the school premises,"[172] proves inadequate to justify that distinction. Absent some other interest uniquely served by school censorship of school-sponsored student speech, the conflicting interests of school and student which are implicated by school censorship of school-sponsored student speech seem best accommodated by communication analysis.

E. Vulgar or Profane Student Speech

The Court has stated repeatedly that schools may censor student speech that is "vulgar or profane."[173] The Court discussed this principle most extensively in *Bethel School District No. 403 v. Fraser*.[174] The *Fraser* Court made passing reference to the principle that vulgar or profane speech is less protected by the First Amendment than is other speech,[175] but the Court did not rest its holding on this distinction. Instead, the Court framed the issue as a determination of the balance between "[t]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms" and "society's countervailing interest in teach-

171. *See id.* at 289 (Brennan J., dissenting).

172. *Id.* at 271.

173. *Id. See also* Board of Educ. v. Pico, 457 U.S. 853, 871 (1982) (schools can remove library books that are "pervasively vulgar."); *id.* at 880 (Blackmun, J., concurring); *id.* at 919 (Rehnquist, J., dissenting).

174. 478 U.S. 675 (1986).

175. *Id.* at 680 ("The marked distinction between the political message of the armbands in *Tinker* and the sexual content of respondent's speech in this case seems to have been given little weight by the Court of Appeals.").

ing students the boundaries of socially appropriate behavior,"[176] and held that

> Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the "fundamental values necessary to the maintenance of a democratic political system" disfavor the use of terms of debate highly offensive or highly threatening to others . . . . The inculcation of these values is truly the "work of the schools."[177]

School censorship of student speech that is vulgar or profane serves two interests. First is the school's interest in "inculcat[ing] the habits and manners of civility."[178] The second interest is in preventing young students from being offended[179] by exposure to such speech. The prevention of student exposure to "offensive" speech is not a school-specific interest, for that interest is exercised throughout society by statutes that forbid dissemination of pornography to minors and by federal regulations such as those at issue in *FCC v. Pacifica Foundation*.[180] Such censorship, therefore, should be judged according to the *Pacifica* standard, not according to communication analysis.[181]

Communication analysis[182] can be applied, however, to a school's attempts to serve its pedagogical function of "inculcat[ing] the habits and manners of civility"[183] by censoring student speech that is vulgar or profane. When that speech occurs during a student address before a school assembly as in *Fraser*, or in an article in a student newspaper as in *Hazelwood*, censorship[184] is appropriate. Just as the school's refusal to publish student articles that are poorly written is the very essence of the school's

176. *Id.* at 681.

177. *Id.* at 683 (quoting Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 508 (1969)).

178. *Id.* at 681.

179. *Id.*

180. 438 U.S. 726 (1978). In *Pacifica*, the Court held that the FCC could regulate the broadcast time of a program that included speech that was " 'vulgar,' 'offensive,' and 'shocking,' " *id.* at 747, in order to avoid exposing children to that speech. School censorship of vulgar or profane student speech, censorship aimed at preventing student exposure to that speech, must be adjudicated not according to communication analysis, which applies only to censorship in pursuit of school-specific interests, but instead according to the principles laid down in *Pacifica*.

181. Application of *Pacifica*'s analysis to school censorship of student speech is problematic, but it is beyond the scope of this paper.

182. See *supra* notes 117-33 and accompanying text, for discussion of communication analysis.

183. *Fraser*, 478 U.S. at 681.

184. "Censorship" can of course take different forms. The school can serve its interest by simply excising the offending words from a student newspaper article, but such limited censorship cannot be applied in cases such as *Fraser*, where the school could censor only after the fact.

communication of its message that poorly written articles are inappropriate for publication in a quality newspaper, the school's only practical means of communicating the lesson that profane speech is inappropriate in public discourse is to censor that speech when it occurs in student public discourse.[185]

Of course, recognition that in certain circumstances students' vulgar speech interferes with the school's communication of its lesson that such speech is inappropriate in public discourse, leaves unresolved many problems associated with school censorship of vulgar speech. Among those problems is the issue of what level of vulgarity justifies school censorship.[186]

Also, it is difficult to determine to what extent school removal of library books which contain vulgar speech serves the school's interest in teaching that such speech is inappropriate in public discourse. Does presence of such speech in school library books indicate to the student that such speech is appropriate? If so, that message merely competes with the school's message without stifling it. Unlike the case of school censorship of vulgar student speech, school censorship of books that contain vulgar speech is not essential to the school's communication of the message that such speech by *students* is inappropriate.[187] In the final analysis, schools should not be able to remove library books simply because their presence interferes with the school's ability to communicate its lesson that vulgar speech is inappropriate. The school certainly cannot remove *Huckleberry Finn* in pursuit of its goal of teaching proper grammar,[188] and so the school cannot remove the same book for the analogous purpose of teaching that vulgar speech is improper. In addi-

185. Such a rule might appear to be contrary to Justice Brennan's assertion that the school cannot censor speech by "the gossip who sits in the student commons." Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 280 (1988) (Brennan, J., dissenting). School censorship of casual speech, unlike censorship of student speech that applies during student assemblies and in student newspapers, is unrelated to the school's goal of "inculcat[ing the] fundamental values necessary to the maintenance of a democratic political system.' " *Fraser*, 478 U.S. at 681 (quoting Ambach v. Norwick, 441 U.S. 68, 76-77 (1979)). "Respondent's speech may well have been protected had he given it in school but under different circumstances, where the school's legitimate interests in teaching and maintaining civil public discourse were less weighty." *Id.* at 689 (Brennan, J., concurring).

186. *Pico* speaks of "pervasively vulgar" speech. Board of Educ. v. Pico, 457 U.S. 853, 871 (1982). *Fraser* did not need to address this issue, because the speech there was peppered throughout with sexual innuendo. *See Fraser*, 478 U.S. at 687 (Brennan, J., concurring).

187. *See supra* notes 144-46 and accompanying text.

188. The books at issue in *Pico* contained vulgarities, but the Court did not consider them "pervasively vulgar." In contrast, HUCKLEBERRY FINN is certainly pervasively ungrammatical; its very first sentence reads, "You don't know about me without you have read a book by the name of THE ADVENTURES OF TOM SAWYER; but that ain't no matter." MARK TWAIN, THE ADVENTURES OF HUCKLEBERRY FINN 11 (Signet Classics 1959).

tion, allowing schools to remove books on the ground that the books contain vulgarities provides a golden opportunity for abuse by schools that might mask their disagreement with the content of certain library books by asserting that the books are inappropriate because they are vulgar.[189] Such a risk is undoubtedly real and merits caution in granting schools the power to censor speech because it is vulgar.

F. Discipline

A final interest often used to justify school censorship of student speech is the school's interest in promoting student discipline.[190] This interest is certainly legitimate, but it is essential to recognize that the school in fact has two interests that relate to discipline. The school has an interest in instilling in students discipline and respect for authority, and it also has an interest in maintaining discipline in the classroom. The school's interest in maintaining discipline in the classroom poses no challenge to the viability of communication analysis.[191] As a means of maintaining order, discipline is in fact equivalent to a lack of interference with school communication. If student speech threatens to disrupt order in the classroom to the extent that the teacher is no longer able to communicate the lessons, the First Amendment does not bar the school from censoring the disruptive speech. Such was the import of *Tinker*. A different issue is presented when the school attempts to censor student speech as a means of inculcating the character trait of discipline into students. There is no doubt that the school can enact rules aimed at inculcating discipline, and there is little doubt that many school rules have this effect, intended or not.[192] Most school disciplinary rules do not impinge upon student First Amendment interests. Students do indeed learn a valuable lesson when they are "required to walk . . . despite their desire to run."[193] But as a rule, running is not expression, so the school's ability to censor speech in an attempt to inculcate discipline cannot be measured by the school's broad powers to enact disciplinary rules that do

189. *See* Justice Brennan's dissent in *Hazelwood:* " '[P]otential topic sensitivity' is a vaporous nonstandard . . . that invites manipulation to achieve ends that cannot permissibly be achieved through blatant viewpoint discrimination . . . ." 484 U.S. at 287 (Brennan, J., dissenting).

190. *See* Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 524 (1969) (Black, J., dissenting) ("School discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens.").

191. See *supra* notes 117-33 and accompanying text, for discussion of communication analysis.

192. "Children are educated . . . when they are required to walk in an orderly fashion from class to class, despite their desire to run." Diamond, *supra* note 31, at 478 n.4.

193. *Id.*

not affect student speech interests. The issue is not whether "students [may] . . . refuse[ ] to obey a school order,"[194] but whether the school can require obedience to an order that is designed to inculcate discipline when such obedience requires that the students surrender their free speech rights.

It seems manifest that the school cannot require obedience to such an order. It is difficult to imagine how student speech can prevent the school from *communicating* its attempt to inculcate discipline. Discipline is not like grammar; suppressing speech is not the essence of the school's lesson in regard to discipline. Although a school rule that suppresses speech, like any other rule, can certainly teach students discipline and obedience to authority, the school can teach that same lesson by the enforcement of a plethora of other rules that do not infringe students' rights.

Also, a standard that recognizes a school's right to teach discipline by enforcing rules that suppress speech would enable the school to enforce any rule, no matter how arbitrary. Indeed, the more arbitrary a rule is, the more effective it is as a tool for teaching discipline, because an arbitrary rule contains no other lesson.

In his *Tinker* dissent, Justice Black stated that he feared the Court's holding was tantamount to holding that "the federal Constitution compels the teachers, parents and elected school officials to surrender control of the American public school system to public school students."[195] Such a statement reflects a confusion of the two discipline-related school interests. Allowing students to speak freely where such speech does not interfere with the communication of any lesson is certainly a restraint on the school's absolute ability to inculcate discipline. But, it does not interfere with the school's interest in maintaining order in the classroom. Awareness of this distinction is essential for reaching an equitable accommodation of the competing interests of school and students.

Conclusion

The history of student speech jurisprudence has been a stormy one. *Tinker* was a broadly worded endorsement of student liberty, but it was marred by an unusually bitter dissent by Justice Black.[196] Subsequently, the Court could muster only a plurality opinion to support student free

194. *Tinker*, 393 U.S. at 524-25 (Black, J., dissenting).

195. *Id.* at 526. The Court has recently resurrected this language in both Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686 (1986) and Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 n.4 (1988)

196. 393 U.S. at 515-26.

speech in *Pico*, with Justice Blackmun concurring in the result but pointedly differing from much of the plurality's rationale,[197] while the dissenters authored four different opinions.

In *Fraser* and *Hazelwood*, the pendulum swung toward allowing schools to restrict student speech rights. But the ideological split within the Court remained pronounced, particularly in *Hazelwood*. The source of this recurring disagreement can be traced to the Justices' differing educational ideologies, but educational ideology need not be the determining factor in student speech jurisprudence. The crucial role played by educational ideology resulted from the Court's failure to formulate a single definition of the school interest which is served by suppression of student speech, a definition necessary for First Amendment analysis.

This Article has argued that the First Amendment permits only a definition of the school interest as avoiding interference with its *attempt* to inculcate values. Pursuant to that definition, this Article suggests an analytical framework whereby a reviewing court can determine whether the school interest justifies suppression of student speech in a particular case. School censorship is justified only when student speech, if left unchecked, would prevent the school from communicating with its students, or when the student speech is of a type that could legitimately be censored by the state were the speech uttered (or, in the case of the right to receive information, received) outside of school by school-aged citizens.

197. Board of Educ. v. Pico, 457 U.S. 853, 875-82 (1982) (Blackmun, J., concurring).