ARTICLES

The Supreme Court and First Amendment Rights of Students in the Public School Classroom: A Proposed Model of Analysis

By BRIAN A. FREEMAN*

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* Professor of Law and Associate Dean, Capital University Law School. A.B., 1962, Oberlin College; J.D., 1965, The Ohio State University. The author currently is serving as Vice President of the Bexley City Board of Education. He wishes to thank his research assistant, Mr. Brian J. McMonagle of the class of 1984, for his invaluable assistance in the preparation of this Article.

Introduction

Public school officials claim that they have the duty, often imposed by statute, to educate and to inculcate students so that they learn specific subject matter, acquire life-long learning skills, and become committed to the fundamental societal values necessary for the exercise of the rights and obligations of citizenship.[1] Advocates of an expansive view of the

1. J. SAYLOR & W. ALEXANDER, CURRICULUM PLANNING FOR MODERN SCHOOLS 126-27 (1966) lists the functions of public elementary and secondary schools in the United States. Several of these functions relate to the intellectual and emotional growth of the child: "[d]etermination of individual talents, capacities, and abilities; . . . [d]evelopment of individual potentialities; . . . [t]ransmission of the cultural heritage; . . . [d]iscovery and systemization of knowledge; [and] [d]evelopment of character." *Id.* (emphasis omitted). Another function is the "[i]nculcation of values, beliefs, and ideals of the social group," which is defined as "provid[ing] educational experiences that give pupils an understanding of the values, mores, and traditions of society, and that will ensure adherence to these values in behavior." *Id.* at 127 (emphasis omitted). This Article uses the term "value inculcation" in this sense. The final function described by the authors, "[p]reparation [of children] for adulthood," implicitly involves value inculcation. This preparation consists of "provid[ing] learning experiences that will enable the individual when he assumes an adult role in the society to be economically self-

First Amendment contend that public school officials exceed their constitutional authority through curricular and instructional decisions that inculcate young people to accept only those ideas and beliefs approved by others.[2] The central issue represented in these competing viewpoints focuses on the applicability of First Amendment[3] freedoms to students in public elementary and secondary schools.

This Article attempts to reconcile the inculcative function served by public education with First Amendment limitations on governmental authority. Section I examines United States Supreme Court decisions that discuss these competing constitutional values. The following section discusses the unique status of public school students as minors in a captive audience. The Article then extensively analyzes the 1982 Supreme Court decision, *Board of Education v. Pico*.[4] The final section proposes a model of analysis to use in resolving issues concerning First Amendment rights of students in the public school classroom.

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supportive, socially dependable, politically insightful, and morally self-directive." *Id.* (emphasis omitted). *See also* J. CONANT, THE CHILD, THE PARENT, AND THE STATE 76-77 (1959); L. TAYLOR, D. MCMAHILL & B. TAYLOR, THE AMERICAN SECONDARY SCHOOL 4-7 (1960); Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 497-500 (1981); Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293, 1343, 1350-54 (1976); Orleans, *What Johnny Can't Read: "First Amendment Rights" in the Classroom*, 10 J. L. & EDUC. 1, 5-9 (1981).

2. *See, e.g.*, T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 623-26 (1970); Emerson & Haber, *The* Scopes *Case in Modern Dress*, 27 U. CHI. L. REV. 522, 526-28 (1960); Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841, 856-57; Comment, *Challenging Ideological Exclusion of Curriculum Material: Rights of Students and Parents*, 14 HARV. C.R.-C.L. L. REV. 485, 492-503 (1979). *See generally* N. DORSEN, P. BENDER & B. NEUBOURNE, 1 EMERSON, HABER & DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 879-90 (4th ed. 1976) (citing numerous cases involving rights of students).

3. U.S. CONST. amend. I provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." This Article limits its discussion to Supreme Court decisions that interpret the First Amendment. While numerous lower federal and state courts have decided cases involving the rights of children in public school classrooms, a comprehensive discussion of the divergent approaches and conclusions is impractical in an article of this scope. Furthermore, this Article analyzes the applicability of First Amendment freedoms to students in public school classrooms in the context of Supreme Court decisions. It does not discuss alternative approaches unlikely to be adopted by the Supreme Court.

4. 457 U.S. 853 (1982) (plurality opinion).

I. The Function of the Public School Classroom: Value Inculcation or Marketplace of Ideas?

Opinions of the United States Supreme Court have long recognized that a primary function of public elementary and secondary education is to inculcate young people with the fundamental values of our democratic society.[5] Other opinions of the Court suggest that the public school classroom serves as a marketplace of ideas.[6] This section examines the apparent inconsistency by analyzing several lines of Supreme Court cases. A careful study of these cases reveals that the Supreme Court has never held that the public school classroom is a marketplace of ideas, even though occasional suggestions to the contrary have appeared in dicta.

A. The Function of Value Inculcation in Public Elementary and Secondary Schools

Courts in the United States consistently have recognized the importance of the inculcative function of public education, particularly at the elementary and secondary levels. One of the earliest Supreme Court cases to discuss the authority of the state to regulate schools, *Meyer v. Nebraska*,[7] held that "the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally."[8] Similarly, *Pierce v. Society of Sisters*[9] recognized that states may require "that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare."[10] Although these early cases were decided during the now discredited *Lochner v. New York*[11] substantive due process era, more recent cases also recognize the importance of value inculcation in our system of public education.

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5. *See infra* text accompanying notes 7-20.

6. The expression "marketplace of ideas" is derived from Justice Holmes' view of the First Amendment freedoms of speech and press. In Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting), Justice Holmes stated:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . .

Id. at 630.

7. 262 U.S. 390 (1923). *See infra* notes 22-30 and accompanying text.

8. 262 U.S. at 401.

9. 268 U.S. 510 (1925). *See infra* text accompanying notes 31-38.

10. 268 U.S. at 534.

11. 198 U.S. 45 (1905). *See infra* notes 24-25.

In the landmark case of *Brown v. Board of Education*,[12] the Supreme Court noted the relationship between public education and our democratic form of government:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities . . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.[13]

Because public education plays a critical role in educating the nation's youth, and teachers serve an important function in the process, the Supreme Court in *Ambach v. Norwick*[14] upheld a state statute[15] that prohibited non-United States citizens from teaching in New York public schools. The Court expressly recognized the vital role played by public schools in "inculcating fundamental values necessary to the maintenance of a democratic political system."[16] Emphasizing the part that teachers play in this process, the Court noted the teachers' "opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy."[17] The Court rejected the argument that the restriction of an alien's freedom to teach in public schools is "contrary to principles of diversity of thought and academic freedom embodied in the First Amendment,"[18] and stated that "the attempt to draw an analogy between choice of citizenship and political expression or freedom of association is wide of the mark, as the argument would bar any effort by the State to promote particular values and attitudes toward government."[19] The Court recognized not only the authority but also the duty of public schools to prepare the youth of America for participation in the democratic process. The Court adamantly refused to hinder state efforts to accomplish this goal.

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12. 347 U.S. 483 (1954). *Brown* held that racially segregated schools violate the Equal Protection Clause of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1. In his opinion for the Court, Chief Justice Warren cited numerous sociological studies that examined the effect of racial segregation on black school children. 347 U.S. at 494-95 n.11.

13. 347 U.S. at 493.

14. 441 U.S. 68 (1979).

15. N.Y. EDUC. LAW § 3001(3) (McKinney 1981).

16. 441 U.S. at 77.

17. *Id.* at 79.

18. *Id.* at 79 n.10.

19. *Id.*

The most recent and the most significant Supreme Court decision to affirm the power of state and school officials to inculcate public elementary and secondary school students with the basic values of our society was the 1982 case of *Board of Education v. Pico*.[20] *Pico* strongly reaffirms the appropriateness, the importance, and the constitutionality of the inculcative function of public education.

B. Early Substantive Due Process Cases

Two cases decided by the Court in the 1920's suggest that students possess First Amendment rights in the public school classroom.[21] Neither case, however, furnishes significant authority for this proposition.

In *Meyer v. Nebraska*,[22] the Supreme Court invalidated a Nebraska law,[23] as applied to nonpublic schools, that prohibited instruction in any language other than English prior to the ninth grade. Far from recognizing the existence of First Amendment rights of students, the case actually was decided on substantive due process grounds.[24] The analysis of the Court in *Meyer* invoked the approach enunciated earlier in *Lochner v.*

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20. 457 U.S. 853 (1982) (plurality opinion).

21. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

22. 262 U.S. 390 (1923).

23. Teaching Foreign Languages in Schools Act, ch. 249, 1919 Neb. Laws 1019, provided in pertinent part:

> Section 1. . . . No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language other than the English language.
>
> Section 2. . . . Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides.
>
> Section 3. . . . Any person who violates any of the provisions of this act shall be deemed guilty of a misdemeanor . . . .

24. By 1923 when *Meyer* was decided, the Supreme Court had not yet begun selectively incorporating various provisions of the Bill of Rights into the Fourteenth Amendment, and thereby extending its prohibitions to state as well as to federal action. *See, e.g.*, Twining v. New Jersey, 211 U.S. 78 (1908). Gitlow v. New York, 268 U.S. 652 (1925), is generally regarded as the first case that applied the Free Speech Clause of the First Amendment to the states. Prior to the incorporation of specific guarantees of the Bill of Rights into the Fourteenth Amendment, courts typically determined whether the challenged state action violated fundamental freedoms included within the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1, provides in part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." Substantive due process analysis began with Allgeyer v. Louisiana, 165 U.S. 578 (1897) and was soon extended to a wide range of property and economic rights. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905). This "economic rights prong" of substantive due process has suffered a precipitous decline since the time of the *Lochner* decision. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963).

New York,[25] perhaps the most notorious of the early substantive due process cases. According to *Meyer*, the liberty guaranteed by the Fourteenth Amendment included "the right of the individual to contract, to engage in any of the common occupations of life, . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[26]

Using this mode of analysis, the Court held that the teacher involved "taught this [German] language . . . as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the [Fourteenth] Amendment."[27] Only passing references were made to "the opportunities of pupils to acquire knowledge"[28] and "the power of parents to control the education of their own."[29] The Court focused not on rights of free expression but rather on the state's interference "with the calling of modern language teachers."[30] The economic and contract rights of the teachers in private schools, not the personal free speech rights of students in public schools, led the Court to strike down the application of the statute to nonpublic schools.

Similarly, the Court in *Pierce v. Society of Sisters*[31] struck down an Oregon statute[32] that required, with only a few exceptions, all children between the ages of eight and sixteen to attend public schools. In effect, the statute prohibited the fulfillment of the state's compulsory education requirement[33] at any nonpublic school. Writing for the Court, Justice

25. 198 U.S. 45 (1905). Often considered the high-water mark of substantive due process, *Lochner* held that legislation regulating working hours of adult males violated liberty of contract as guaranteed by the Due Process Clause of the Fourteenth Amendment.

26. 262 U.S. at 399 (citing *Lochner* and various other liberty of contract/substantive due process cases).

27. *Id.* at 400.

28. *Id.* at 401.

29. *Id.*

30. *Id.*

31. 268 U.S. 510 (1925).

32. Act of Nov. 7, 1922, ch. 1, 1923 Or. Laws 9 (codified as amended at OR. REV. STAT. §§ 339.10-339.30 (1977)), provided in pertinent part:

> *Children between the Ages of Eight and Sixteen Years*—Any parent, guardian or other person in the state of Oregon, having control or charge or custody of a child under the age of sixteen years and of the age of eight years or over at the commencement of a term of public school of the district in which said child resides, who shall fail or neglect or refuse to send such child to a public school for the period of time a public school shall be held during the current year in said district, shall be guilty of a misdemeanor and each day's failure to send such child to a public school shall constitute a separate offense . . . .

33. At present, compulsory education laws exist in all 50 states. These laws vary as to the maximum age at which a child must start school and the minimum age when a child can withdraw from school. In most states, however, children must attend school from ages 7 to

McReynolds, who also wrote the *Meyer* opinion, ignored any rights students may have possessed. He focused on the right of parents to raise their children and on the economic interests of the private schools. Regarding the rights of parents, Justice McReynolds stated:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[34]

Justice McReynolds' statement has been interpreted as holding that states lack the constitutional authority to inculcate students. That point, however, was not intended by Justice McReynolds. He was not concerned with childrens' rights. Rather, he focused on the right and "high duty"[35] of parents to prepare their children for the responsibilities of adulthood through the process of value inculcation. Far from repudiating the function of value inculcation, Justice McReynolds recognized its importance. He merely took the narrower position that states cannot interfere with the authority of parents to inculcate their own children.

After this brief recognition of parental rights, the Court then discussed the liberty of private schools, which "have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which [state authorities] are exercising over present and prospective patrons of their schools."[36] Thus, the Court held that the schools could seek judicial "protection against arbitrary, unreasonable and unlawful interference with their patrons and the consequent destruction of their business and property."[37] Injunctions therefore may issue "to protect business enterprises against interference with the freedom of patrons or customers."[38] This portion of the opinion proves that the decision did not rest on the rights of students or even on parental rights. Rather, the Court's holding rested on the violation of private schools' economic rights.

Meyer and *Pierce* both failed to set forth any theory regarding free speech rights of public school students. Decided under the influence of

16. In addition, most states permit children to attend school between the ages of 6 and 21. S. GOLDSTEIN & E. GEE, LAW AND PUBLIC EDUCATION: CASES AND MATERIALS 11 (2d ed. 1980).

34. 268 U.S. at 535.

35. *Id.*

36. *Id.*

37. *Id.* at 536.

38. *Id.*

the now discredited liberty of contract doctrine, these cases have no more enduring validity than *Lochner v. New York*.[39] Not only did *Meyer* and *Pierce* fail to discuss freedom of speech considerations, but neither even remotely mentioned the concept of the public school or classroom as a marketplace of ideas. To suggest that these cases support the First Amendment rights of students in public schools is misleading.

C. Freedom of Expression of Public School Students in the Classroom

The first significant United States Supreme Court case that upheld the First Amendment rights of public school students and questioned, by implication, the constitutionality of value inculcation by the state was *West Virginia State Board of Education v. Barnette*.[40] Speaking through Justice Jackson, the Court held that public school students could not be compelled to participate in compulsory flag salute ceremonies. Although challenged by Jehovah's Witnesses who asserted that the practice violated both their religious freedom and their freedom of speech,[41] the Court did not decide the case on the narrow grounds of the Free Exercise Clause. Rather, the Court held that the compulsory flag salute violated the right of students to exercise their freedom of expression. Recognizing that "censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish,"[42] the Court held that "involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence."[43]

In discussing the applicability of the First Amendment to public education, Justice Jackson made two pertinent points. First, Justice Jackson stated his concern with the potential for public school officials to abuse their authority by instituting programs of political or religious indoctrination:

> Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction. If it is to impose any ideological discipline, however, each party or denomination must seek to control, or failing that, to weaken the influence of the educational system.[44]

39. 198 U.S. 45 (1905). The analysis in *Lochner* formed the foundation for the Court's rationale in both *Meyer* and *Pierce*. *See supra* text accompanying notes 24-25.

40. 319 U.S. 624 (1943).

41. *Id.* at 630.

42. *Id.* at 633.

43. *Id.*

44. *Id.* at 637.

To Justice Jackson and the majority in *Barnette*, the compulsory flag salute and accompanying pledge of allegiance was a naked attempt by the state to engage in narrow ideological indoctrination of students, a practice prohibited by the First Amendment.[45]

Second, Justice Jackson expressly recognized the role of public education in preparing young people to participate in the democratic process. Noting that boards of education have "important, delicate, and highly discretionary functions,"[46] he nevertheless held that they must perform these functions "within the limits of the Bill of Rights."[47] "That *they are educating the young for citizenship* is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[48] Thus, Justice Jackson clearly recognized competing constitutional principles: public schools serve the critical and distinctive purpose of inculcating young people with fundamental values and attitudes that will prepare them for citizenship, but this goal will not be met by narrow ideological indoctrination that stifles the free exchange of ideas upon which effective democracy depends. Nevertheless, to state that public school students have a First Amendment right to be free from ideological indoctrination does not mean that the public school classroom is a marketplace of ideas to which students have a right of access.

The leading Supreme Court decision upholding First Amendment freedom of expression rights of public school students is *Tinker v. Des Moines Independent Community School District*.[49] Speaking for the Court, Justice Fortas held that the First Amendment barred the suspension of students who violated a school regulation by wearing black armbands to protest the Vietnam War. To justify prohibiting the expression of a particular opinion, school officials must show that such expression would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[50] This required proof was lacking in *Tinker*.[51]

Justice Fortas found it significant that prohibiting the wearing of

45. *Id.* at 642.

46. *Id.*

47. *Id.*

48. *Id.* (emphasis added).

49. 393 U.S. 503 (1969).

50. *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

51. 393 U.S. at 508-09, 514.

political insignia was not content-neutral.[52] Other students were permitted to wear "buttons relating to national political campaigns"[53] and even "the Iron Cross, traditionally a symbol of Nazism."[54] One particular symbol expressing one particular idea "was singled out for prohibition."[55]

Justice Fortas in dictum also discussed his perception of the public school as a marketplace of ideas. Public schools, he stated, are not "enclaves of totalitarianism. School officials do not possess absolute author-

52. In Police Dep't v. Mosley, 408 U.S. 92 (1972), the Supreme Court stated that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* at 95. Several subsequent cases similarly have struck down regulations of speech because they were content-based. *E.g.*, Widmar v. Vincent, 454 U.S. 263 (1981) (striking down a state university regulation that permitted the use of university facilities by student organizations except religious groups that desired to use the facilities for worship and religious speech); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (striking down a city ordinance that permitted some commercial but no noncommercial advertising on billboards); Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981) (striking down a city ordinance that prohibited all forms of live entertainment in the city); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980) (striking down a statute that prohibited monthly bill inserts discussing controversial public policy issues); First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) (striking down a statute that prohibited corporations from spending corporate funds to express views on public issues not directly related to the corporation's business); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (striking down a statute that prohibited the advertising of contraceptives).

Despite the apparently absolute nature of the rule announced in *Mosley*, other cases have permitted content-based regulations. *See, e.g.*, Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (upholding a ban on the sale of political advertising within the interior of rapid transit vehicles even though commercial and public service oriented advertising was sold) (*see infra* text accompanying notes 125-28); Greer v. Spock, 424 U.S. 828 (1976) (upholding a ban on partisan political speech on a military base although other speech was permitted). A plurality of the Court expressly criticized the principle of content-neutrality in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (plurality opinion) (upholding a city ordinance requiring the dispersal of "adult" movie theaters while not requiring the dispersal of theaters not exhibiting "adult" movies). In his plurality opinion, Justice Stevens argued that the degree of protection accorded expression may vary depending on its content. *Id.* at 66-71. He stated that sexually explicit speech, near the borderline between protected and unprotected speech, is less deserving of First Amendment protection than is political speech. *Id.* at 70. This view apparently was adopted by a majority of the Court in New York v. Ferber, 458 U.S. 747 (1982), which upheld a child pornography statute even though the material was not obscene under the test of Miller v. California, 413 U.S. 15 (1973). In the areas of commercial speech and sexually explicit speech, particularly where there is distribution to children or to a captive audience, the Court is not reluctant to uphold content-based regulations. Indeed, the principle of content-neutrality has come under increasing attack by commentators. *See, e.g.*, Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727 (1980); Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981); Note, *Content Regulation and the Dimensions of Free Expression*, 96 HARV. L. REV. 1854 (1983).

53. 393 U.S. at 510.

54. *Id.*

55. *Id.* at 510-11.

ity over their students."[56] Therefore, "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."[57] As a result, "school officials cannot suppress 'expressions of feelings with which they do not wish to contend.' "[58]

The presence of a content-based regulation should have sufficed as a narrower basis for the decision. Such a regulation discriminates among competing viewpoints within the same category of ideas.[59] In *Tinker*, the regulation prohibited political speech that criticized American policy in Vietnam, but permitted political speech on other topics. Content-based regulations that discriminate against particular political viewpoints are closely akin to the compulsory flag salute requirement in *Barnette*.[60] They have the potential of imposing narrow political or partisan indoctrination.

The relevance of Justice Fortas' discussion of the public school as a marketplace of ideas is questionable. Throughout his opinion, he emphasized that no evidence showed that wearing black armbands materially or substantially disrupted the educational process.[61] Teaching and learning continued; normal classroom activities remained essentially unchanged.[62] The statement that political expression which does not affect classroom activities is protected by the First Amendment differs substantially from the bald assertion that the First Amendment permits teachers and students to decide the content of those activities. Justice Fortas held that the First Amendment protects speech in the classroom if that speech is ineffective and largely ignored by others. If the speech becomes controversial and initiates debate in the classroom, it loses its First Amendment protection because it now "materially and substantially interfere[s] with"[63] the educational process. Were the public school classroom a true marketplace of ideas, the proper function of the courts would be to guard controversial speech that would stir the type of debate invited by the First Amendment.[64] Justice Fortas concluded to the contrary: ineffec-

56. *Id.*
57. *Id.*
58. *Id.* (quoting Burnside v. Byars, 363 F.2d at 749).
59. *See supra* note 52.
60. 319 U.S. 624 (1943). *See supra* text accompanying notes 40-48.
61. 393 U.S. at 508-09, 514.
62. *Id.* at 514.
63. *Id.* at 505 (quoting Burnside v. Byars, 363 F.2d at 749).
64. Protecting controversial speech raises the problem of the hostile audience or heckler's veto. Feiner v. New York, 340 U.S. 315 (1951) upheld a disorderly conduct conviction of a streetcorner speaker who refused to cease speaking when so directed by police who feared that

tive speech is protected; effective speech is not.

In a strong dissent,[65] Justice Black refused to recognize the public school classroom as a marketplace of ideas. He denied the assertion of the majority that "it has been the 'unmistakable holding of this Court for almost 50 years' that 'students' and 'teachers' take with them into the 'schoolhouse gate' constitutional rights to 'freedom of speech or expression.' Even *Meyer* did not hold that."[66] In his view, the prohibition against wearing political insignia in a public school was not a content-based censorship of ideas, beliefs, or speech. Rather, it was a valid determination by the school that the classroom was not an appropriate forum for the exercise of First Amendment rights. He denied that public school students were "sent to the schools at public expense to broadcast political or any other views to educate and inform the public."[67] Quoting the adage that "children are to be seen not heard,"[68] Justice Black hoped to "be permitted to harbor the thought that taxpayers send children to school on the premise that at their age they need to learn, not teach."[69]

Besides rejecting the argument that the public school classroom is a public forum for the exercise of First Amendment freedoms, Justice Black recognized the long history and the critical importance of the inculcative function of public education:

> Change has been said to be truly the law of life but sometimes the old and the tried and true are worth holding. The schools of this Nation have undoubtedly contributed to giving us tranquility and to making us a more law-abiding people. Uncontrolled and uncontrollable liberty is an enemy to domestic peace. We cannot close our eyes to the fact that some of the country's greatest problems are crimes committed by the youth, too many of school age. School discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better

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the reaction of the speaker's hostile audience would result in violence. In dissent, Justice Black noted that "if, in the name of preserving order, [law enforcement officers] ever can interfere with a lawful public speaker, they first must make all reasonable efforts to protect him." *Id.* at 326 (Black, J., dissenting). Although *Feiner* has never been overruled, subsequent cases appear to have limited its holding to the narrow factual situation where police are unable to control the hostile audience. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536, 550 (1965) (75 to 80 police officers separated 1,500 peaceful demonstrators from a crowd of 100 to 300 onlookers); Edwards v. South Carolina, 372 U.S. 229, 230-31, 233 n.7 (1963) (demonstrators attracted a crowd of between 200 and 300 peaceful onlookers; 30 police officers were at the scene and adequate reinforcements were readily available).

65. 393 U.S. 503, 515 (1969) (Black, J., dissenting).

66. *Id.* at 521 (citing Meyer v. Nebraska, 262 U.S. 390 (1923)).

67. 393 U.S. at 522.

68. *Id.*

69. *Id.*

citizens.[70]

Neither *Barnette* nor *Tinker* support the broad view that the public elementary and secondary classroom is a marketplace of ideas. *Barnette* stands for the much more limited proposition that state and school officials cannot engage in narrow religious or political indoctrination of students.[71] When the sweeping dicta of *Tinker* is set aside, that case simply recognizes that school officials are powerless to punish students for expressing partisan political viewpoints when that expression does not interfere with the educational process.[72] Both cases thus support the premise of this Article: state and school officials may engage in the traditional function of value inculcation, but not in the practice of narrow political, partisan, or religious indoctrination.

D. Academic Freedom in Public Schools

In discussing First Amendment rights of teachers, the Supreme Court has focused on the principle of academic freedom and the concept of public schools as a marketplace of ideas. Chief Justice Warren's plurality opinion in *Sweezy v. New Hampshire*[73] discussed the critical importance of college professors' liberties in the areas of academic freedom and political expression and association:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[74]

In a similar vein ten years later, Justice Brennan, in *Keyishian v. Board of Regents*,[75] stated that academic freedom

> is of transcendent value to all of us and . . . is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust

70. *Id.* at 524.
71. *See supra* text accompanying notes 44-45.
72. *See supra* text accompanying notes 50-55, 59-60.
73. 354 U.S. 234 (1957) (plurality opinion).
74. *Id.* at 250.
75. 385 U.S. 589 (1967).

> exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."[76]

Although both *Sweezy* and *Keyishian* discussed the principle of academic freedom and the need for open inquiry in education, their rationale is inapposite to the First Amendment rights of students in the public elementary and secondary classroom for three reasons. First, both cases involved state investigations into the membership of university faculty in allegedly subversive organizations. The plurality opinion in *Sweezy* reversed a contempt citation based on the failure of a university lecturer to answer questions posed by a state attorney general.[77] It was uncertain whether the state legislature had authorized the attorney general to make such an inquiry.[78] *Keyishian* struck down a loyalty-security program that permitted the discharge of a university teacher for nonparticipating membership in a subversive organization.[79] Both decisions were based on the First Amendment rights of university teachers outside the classroom. Neither case turned on whether the classroom is a marketplace of ideas. The Court's discussions of academic freedom and the need for open inquiry in the classroom were merely dicta.

Second, both cases dealt with First Amendment rights of university teachers, not elementary and secondary students. Unlike university faculty,[80] public elementary and secondary students are minors in a captive audience, which permits governmental regulation of free expression in ways normally not permitted. To the contrary, university faculty members are noncaptive adults able to exercise First Amendment freedoms.

Third, *Sweezy* and *Keyishian* discussed the importance and longstanding tradition of academic freedom at the collegiate level. This tradition is not present at the elementary and secondary levels of education. Elementary and secondary teachers ordinarily lack the tradition of intel-

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76. *Id.* at 603 (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

77. 354 U.S. at 239-44.

78. *Id.* at 253.

79. 385 U.S. at 609-10. It is well settled that an individual cannot be punished or subjected to burdens for affiliating with an organization engaged in unlawful conduct unless the person both knows of the illegal aims of the organization and shares a specific intent to further such aims. *E.g.*, United States v. Robel, 389 U.S. 258 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966); Aptheker v. Secretary of State, 378 U.S. 500 (1964). The loyalty program in *Keyishian* provided for the discharge of any teacher who was a member of a subversive organization, if the teacher knew of the illegal purposes of that organization, regardless of whether or not the teacher shared a specific intent to further those illegal purposes. Thus, the prohibition was "overbroad" in violation of the First Amendment. 385 U.S. at 605-10.

80. *See infra* part II of this Article.

lectual and pedagogical independence, discretion in the choice of teaching materials and subject matter emphasis, and the scholarly qualifications of college and university professors.[81] Additionally, public elementary and secondary schools more often and more pervasively act *in loco parentis*[82] with respect to children. As one commentator noted:

> The central fact in the distinction between higher and lower education is the role of value inculcation in the teaching process. The public schools in the United States traditionally have viewed instilling the young with societal values as a significant part of the schools educational mission. Such a mission is directly opposed to the vision of education that underlies the premises of academic freedom in higher education.[83]

The Supreme Court has recognized this distinction between elementary and higher education. Contrasting the education at church-related colleges to elementary and secondary education, the Court stated:

> There is substance to the contention that college students are less impressionable and less susceptible to . . . indoctrination. Common observation would seem to support that view. . . . The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the . . . limitations [prohibiting religious instruction]. Furthermore, by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines. Many . . . colleges and universities are characterized by a high degree of academic freedom and seek to evoke free and critical responses from their students.[84]

Equating academic freedom and the openness of scholarly inquiry at the university level with classroom education at the elementary and secondary level is a dubious proposition at best.

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81. *See, e.g.*, Mailloux v. Kiley, 323 F. Supp. 1387, 1392 (D. Mass.), *aff'd*, 448 F.2d 1242 (1st Cir. 1971).

82. *Id.* "*In loco parentis*" means "in the place of parents." This doctrine justifies the authority of schools to discipline students for infractions of school rules, just as parents discipline children for the infraction of parental rules. *See, e.g.*, Indiana State Personnel Bd. v. Jackson, 244 Ind. 321, 192 N.E.2d 740 (1963); Harris v. Galilley, 125 Pa. Super. 505, 189 A. 779 (1937).

83. Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293, 1342-43 (1976).

84. Tilton v. Richardson, 403 U.S. 672, 686 (1971) (plurality opinion). In *Tilton*, the Supreme Court upheld the federal Higher Education Facilities Act of 1963, Pub. L. No. 88-204, Title I §§ 101-111, 77 Stat. 363, 364-70 (repealed 1972), which authorized the appropriation of federal funds for construction at colleges and universities, including those that were church-related. On the same day, the Court struck down state payments of salary supplements to teachers in parochial and other nonpublic elementary and secondary schools. Lemon v. Kurtzman, 403 U.S. 602 (1971). One significant distinction between the cases involved the perceived difference between the nature and function of elementary and secondary education and college and university education.

The leading Supreme Court case upholding First Amendment rights of public elementary and secondary teachers is *Pickering v. Board of Education*.[85] In *Pickering*, the Court held that a public school teacher could not be dismissed for writing a nonlibelous letter to the editor of a newspaper which was highly critical of the Board of Education and the Superintendent of Schools.[86] In holding that public employees normally do not relinquish their rights to comment on work-related matters of public interest,[87] the Court clearly recognized the First Amendment rights of teachers outside the classroom. The case, however, furnishes no authority for the proposition that the same expression would have been protected had it occurred in the classroom.

The few Supreme Court cases affirming First Amendment rights of teachers do not address or determine the First Amendment freedoms of students in the public elementary or secondary school classroom. These prior cases involved expressive and associational activities of public teachers outside the classroom, and most dealt specifically with college and university professors.

E. Judicial Review of the Public School Curriculum

Except for the substantive due process case of *Meyer v. Nebraska*,[88] the only Supreme Court decision addressing the constitutional limitations on state power to determine the curriculum of public schools is *Epperson v. Arkansas*.[89] In *Epperson*, the Court struck down an Arkansas statute[90] that prohibited its public schools from teaching that man evolved from other species of life.[91] In an unreported opinion, the Chancery Court of Arkansas held that the statute violated the First Amendment because it "tends to hinder the quest for knowledge, restrict the

85. 391 U.S. 563 (1968).

86. *Id.* at 566, 574.

87. *Id.* at 568.

88. 262 U.S. 390 (1923). *See supra* text accompanying notes 22-30.

89. 393 U.S. 97 (1968).

90. Act of Oct. 6, 1928, Initiated Act No. 1, 1929 Ark. Acts 1518, provided in pertinent part:

> [I]t shall be unlawful for any teacher or other instructor in any University, College, Normal, Public School, or other institution of the State, which is supported in whole or in part from public funds derived by State and local taxation to teach the theory or doctrine that mankind ascended or descended from a lower order of animals and also it shall be unlawful for any teacher, textbook commission, or other authority exercising the power to select textbooks for above mentioned educational institutions to adopt or use in any such institution a textbook that teaches the doctrine or theory that mankind descended or ascended from a lower order of animals.

91. The best known work setting forth the biological theory of evolution is C. DARWIN, THE ORIGIN OF SPECIES (1859). Anti-evolutionists argue the opposing view of creationism, which is based upon a literal interpretation of *Genesis*.

freedom to learn, and restrain the freedom to teach."[92] The Arkansas Supreme Court reversed in a two sentence opinion, expressing "no opinion on the question whether the Act prohibits any explanation of the theory of evolution or merely prohibits teaching that the theory is true . . . ."[93] Despite this statement, counsel for Arkansas argued before the United States Supreme Court that Arkansas interpreted the statute "to mean that to make a student aware of the theory . . . just to teach that there was such a theory" would be grounds for dismissal of the teacher involved.[94] Justice Fortas, speaking for the Court, stated that "[t]he overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine . . . ."[95] To Justice Fortas, the Arkansas law was an attempt at narrow religious indoctrination:

> Arkansas' law cannot be defended as an act of religious neutrality. Arkansas did not seek to excise from the curricula of its schools and universities all discussion of the origin of man. The law's effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read. Plainly, the law is contrary to the mandate of the First, and in violation of the Fourteenth, Amendment to the Constitution.[96]

Critical to Justice Fortas' decision was the broad interpretation of the statute argued by the State of Arkansas.[97] Under this interpretation, the statute did not merely remove all discussion of a particular body of knowledge from the school curriculum, but made it a criminal act to teach or even to mention the existence of the nonreligious theory of evolution. The statute did not, however, prohibit the teaching of the contrary religious theory of creationism. Justice Fortas believed that the statute discriminated against a nonreligious idea in favor of a competing religious idea,[98] and thus censored religious views in violation of the First Amendment.[99]

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92. 393 U.S. at 100 (quoting unpublished Arkansas Chancery Court opinion).

93. 242 Ark. 922, 416 S.W.2d 322 (1967).

94. 393 U.S. at 102-03.

95. *Id.* at 103.

96. *Id.* at 109.

97. *See supra* text accompanying note 94.

98. 393 U.S. at 107-08 n.15 (quoting Leflar, *Legal Liability for the Exercise of Free Speech*, 10 ARK. L. REV. 155, 158 (1956)).

99. U.S. CONST. amend. I, provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." The first clause, referred to as the Establishment Clause, prohibits government from aiding religion. The second clause, the Free Exercise Clause, prohibits government from interfering with reli-

In his concurring opinion, Justice Black took the view that while the state could remove a particular body of knowledge from the public school curriculum, it could not favor one religious idea or theory over competing ideas or theories within that body of knowledge:

> It is plain that a state law prohibiting all teaching of human development or biology is constitutionally quite different from a law that compels a teacher to teach as true only one theory of a given doctrine. It would be difficult to make a First Amendment case out of a state law eliminating the subject of higher mathematics, or astronomy, or biology from its curriculum.[100]

While Justice Black stated that "there is no reason I can imagine why a State is without power to withdraw from its curriculum any subject deemed too emotional and controversial for its public schools,"[101] he was extremely sensitive to the danger of permitting school officials to choose among competing religious and nonreligious viewpoints. Justice Black suggested that the teaching of evolution to the exclusion of creationism presents the same constitutional difficulty as the reverse situation:

> [T]he State must be neutral, not favoring one religious or anti-religious view over another. . . . Since there is no indication that [creationism] is included in the curriculum . . . , does not the removal of the subject of evolution leave the State in a neutral position toward these . . . competing religious and anti-religious doctrines? Unless this Court is prepared simply to write off as pure nonsense the views of those who consider evolution an anti-religious doctrine, then this issue presents problems under the Establishment Clause far more troublesome than are discussed in the Court's opinion.[102]

Although Justice Black and the majority framed the issue in terms of the religion clauses, a parallel can be drawn to First Amendment freedom of speech. Just as government can neither advance nor inhibit religion,[103] government regulation of speech often must be content-neutral.[104] The recurring theme throughout the opinions of Justices Fortas and Black is that while a state cannot discriminate against certain religious and nonreligious viewpoints on a particular topic, the state may

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gion. Taken together, the First Amendment religion clauses command government neutrality in religious matters. *See, e.g.*, Everson v. Board of Educ., 330 U.S. 1 (1947).

100. 393 U.S. 97, 111 (Black, J., concurring). Justice Black preferred to "either strike down the Arkansas Act as too vague to enforce, or remand to the State Supreme Court for clarification of its holding and opinion." *Id.* at 114.

101. *Id.* at 113.

102. *Id.*

103. *See supra* note 99.

104. *See supra* note 52.

decide to delete all discussion of that topic from the curriculum of public elementary or secondary education. While creationism cannot be taught to the exclusion of evolution, the state can remove biology from the prescribed list of courses taught in its public schools. Even within a particular discipline, the state can allocate finite resources and time to omit particular topics from the curriculum. For example, in teaching English, state or school authorities can require instruction in composition to the exclusion of literature, or require teaching Shakespeare to the exclusion of Spenser. Although state and school officials have the authority to require that certain subjects or topics be taught to the exclusion of others, they cannot pick and choose among competing political or religious viewpoints. While public school authorities can prescribe the curriculum and engage in value inculcation, they cannot mandate narrow political, partisan, or religious indoctrination.[105]

II. The Constitutional Status of Public School Students—Minors in a Captive Audience

From the perspective of the First Amendment, public elementary and secondary students have a unique status. As part of a captive audience, they cannot refuse to receive information disseminated to them.[106] Additionally, the constitutional rights of minors are not coextensive with those held by adults.[107] This section will explore both of these factors.

A. Public School Students as a Captive Audience

Any discussion of the applicability of First Amendment freedoms to the public school classroom must recognize the fact that students in the classroom constitute a captive audience. The basic premise underlying compulsory school attendance laws[108] is that states can compel students to attend school, sit in class, and read, hear, study, and learn certain specified bodies of knowledge prescribed by state authorities.[109]

The existence of a captive audience permits government to impose regulations on free expression that normally are not permissible.[110] Regulations of speech upheld under the captive audience rationale are not intended to restrict ideas and beliefs, but rather to protect the privacy

105. *See* 393 U.S. at 103, 107-08 n.15, 109 (Fortas, J.); *see also id.* at 111-13 (Black, J., concurring).

106. *See infra* text accompanying notes 108-09, 134-38.

107. *See infra* text accompanying notes 150-54, 159-65.

108. *See supra* note 33.

109. *See* S. GOLDSTEIN & E. GEE, *supra* note 33, at 57.

110. *See infra* text accompanying notes 125-28.

interests of individuals.[111] This rationale permits persons to decline to receive ideas, information, and messages that they do not want to receive. This point was expressly recognized by Justice Douglas in *Public Utilities Commission v. Pollak*.[112] *Pollak* involved the practice of a privately-owned street railway company that amplified radio programs through loudspeakers in its streetcars and buses. Although the majority upheld this practice,[113] Justice Douglas argued that the right of privacy, or the "right to be let alone,"[114] was infringed when a captive audience was subjected to "coercion to make people listen."[115] Noting that "in a practical sense" riders of streetcars and buses "are forced to ride, since this mode of transportation is today essential for many thousands,"[116] he stated that these riders constituted a captive audience. Although Justice Douglas framed his objections in terms of a right of privacy, there were some First Amendment implications as well:

> When we force people to listen to another's ideas, we give the propagandist a powerful weapon. . . . The right of privacy should include the right to pick and choose from competing entertainments, competing propaganda, competing political philosophies. . . . The strength of our system is in the dignity, the resourcefulness, and the independence of our people. Our confidence is in their ability as individuals to make the wisest choice. That system cannot flourish if regimentation takes hold. The right of privacy . . . is a powerful deterrent to any one who would control men's minds.[117]

Justice Douglas' opinion in *Pollak* was ratified in part by the Supreme Court's decision in *Lehman v. City of Shaker Heights*.[118] In *Lehman*, the Court upheld a municipal policy of prohibiting political advertising but allowing other types of advertising on city-owned transit vehicles.[119] Quoting from Justice Douglas' dissent in *Pollak*, Justice Blackmun in his plurality opinion noted that the "streetcar audience is a

111. *See, e.g.*, Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (discussed *infra* text accompanying notes 118-28); Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970) (upholding a federal statute permitting an addressee of mail to request that the post office prohibit all future mailings to the addressee from a particular sender); Breard v. City of Alexandria, 341 U.S. 622 (1951) (upholding an ordinance prohibiting solicitors from knocking on doors of private residences without a prior invitation from the owner or occupant).

112. 343 U.S. 451, 467 (1952) (Douglas, J., dissenting).

113. *Id.* at 463-66 (majority opinion).

114. *Id.* at 467 (Douglas, J., dissenting).

115. *Id.* at 468.

116. *Id.*

117. *Id.* at 469.

118. 418 U.S. 298 (1974) (plurality opinion).

119. *Id.* at 300 n.1.

captive audience. It is there as a matter of necessity, not of choice."[120] He thus concluded that "viewers of . . . streetcar signs [have] no 'choice or volition' to observe such advertising and [have] the message 'thrust upon them by all the arts and devices that skill can produce. . . . The radio can be turned off, but not so the . . . streetcar placard.' "[121]

Furthermore, the Court held that the interior of a streetcar or bus does not constitute a public forum where First Amendment rights can be exercised.[122] Addressing the argument that the interior of a bus is a public forum, Justice Blackmun stated: "Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce."[123] Merely because public property was involved, the public ownership of that property did not convert it into a public forum for the exercise of First Amendment freedoms.[124]

The Court in *Lehman* held that because commuters are a captive audience and because the interior of a bus is not a traditional public forum, the government may impose regulations on free expression that normally are not permissible. The existence of a captive audience creates a situation "different from the traditional settings where First Amendment values inalterably prevail."[125] In captive audience situations, "[t]he legislature may recognize degrees of evil and adapt its legislation accordingly."[126] For these reasons, the *Lehman* Court upheld the power of government to distinguish different types of advertising. Noting that the sale of political advertising would cause streetcar riders to "be subjected to the blare of political propaganda,"[127] the Court held that "the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation."[128] This part of the Court's opinion is

120. *Id.* at 302 (quoting *Pollak*, 343 U.S. at 468 (Douglas, J., dissenting)).

121. 418 U.S. at 302 (quoting Packer Corp. v. Utah, 285 U.S. 105, 110 (1932)).

122. Noting that "American constitutional jurisprudence, in the light of the First Amendment, has been jealous to preserve access to public places for purposes of free speech," *id.*, Justice Blackmun nevertheless stated that "the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question." *Id.* at 302-03.

123. *Id.* at 303.

124. Other cases are in accord. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (interschool mail system and teacher mailboxes); United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981) (residential mailboxes); Greer v. Spock, 424 U.S. 828 (1976) (United States Army base); Adderley v. Florida, 385 U.S. 39 (1966) (grounds of a county jail).

125. 418 U.S. at 302.

126. *Id.* (quoting *Packer Corp.*, 285 U.S. at 110).

127. 418 U.S. at 304.

128. *Id.*

particularly significant because it expressly upheld the power of government to treat different types of expression differently, depending upon its content.

In his concurring opinion,[129] Justice Douglas agreed with many of Justice Blackmun's points. First, he rejected the claim that "the city has turned its buses into free speech forums and . . . is now prohibited by the First Amendment . . . from refusing space for political advertisements."[130] According to Justice Douglas, a bus is "not a park or sidewalk or other meeting place for discussion, any more than is a highway. It is only a way to get to work or back home. The fact that it is owned and operated by the city does not without more make it a forum."[131]

He also agreed with Justice Blackmun that bus riders constitute a captive audience with privacy interests that should be protected:

> While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it. In my view the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.[132]

Justice Douglas rejected the argument that the interior of a bus constituted a public forum, thereby requiring a First Amendment right of access. Consequently, the city did not violate the petitioner's First Amendment rights by refusing to sell advertising.

The lesson of *Lehman* is clear. The interior of a city-owned bus is not a public forum for the exercise of First Amendment freedoms. The passengers are a captive audience. A city has authority to protect the captive audience by refusing to allow political expression to be thrust upon that audience, even though commercial and public-service oriented expression is permitted.[133]

There are some obvious similarities between the interior of a bus and the public school classroom. Neither is a "meeting hall, park, street corner, or other public thoroughfare."[134] Just as the City of Shaker Heights was engaged in the business of transportation,[135] public schools are engaged in the business of education. Both situations involve a captive audience on public property that is not a traditional public forum.

129. *Id.* at 305 (Douglas, J., concurring).
130. *Id.*
131. *Id.* at 306.
132. *Id.* at 307.
133. *Id.* at 304. *See supra* text accompanying notes 125-28.
134. 418 U.S. at 303.
135. *Id.*

Therefore, the state has the authority—if not the constitutional duty—to avoid imposing political messages on captive audiences.

Students in the public school classroom, like commuters on a bus, are not free from all unwanted government intrusions on their privacy. The Court in *Lehman* expressly upheld the city's authority to display commercial and public-service oriented advertising in the interior of buses.[136] It was only "the blare of political propaganda"[137] that the city refused to permit. Similarly, public schools can disseminate information to their students and require them to receive it, suggesting that public schools may engage in the traditional practice of value inculcation in the classroom. It is only narrow political, partisan, and religious indoctrination that is prohibited.

There are, of course, obvious differences between the interior of a bus and the public school classroom. These differences give additional weight to the authority of public schools to impart information to captive students. For example, a bus and a classroom serve dissimilar functions. Buses are means of transportation, while classrooms are means of education. Communication and the dissemination of information are crucial to the process of education, but not to riding a bus. Communication in the classroom, however, is not the same as freedom of expression. Classroom speech and exchange of ideas is primarily for the purpose of facilitating the learning process, including value inculcation, and not for the sake of promoting a "free trade in ideas."[138] The dissemination of information justifies the very existence of public education, while it is irrelevant to a municipality's operation of a public transportation system. Thus, the authority of the state to disseminate information in the public school classroom is much greater than the interest of a city to sell advertising inside rapid transit vehicles. Moreover, the captive audience in the classroom consists of children. Commuters on a bus are both adults and children. As the following discussion reveals, First Amendment rights of children are not coextensive with those of adults.[139]

B. First Amendment Rights of Minors

The Supreme Court has long recognized that states have the constitutional authority to impose regulations on children that would be constitutionally unacceptable if imposed on adults.[140] Although the states'

136. *Id.* at 303-04.

137. *Id.* at 304.

138. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). *See supra* note 6.

139. *See infra* text accompanying notes 150-54, 159-66.

140. *Id.*

powers are not boundless, they can restrict the First Amendment rights of children to a greater degree than they can restrict the same rights of adults.[141]

One leading case that exemplifies this principle is *Prince v. Massachusetts*.[142] This case arose after Sarah Prince, a Jehovah's Witness, permitted her children and her nine year old niece to distribute religious literature on a public street. She was subsequently convicted for violating Massachusetts' child labor laws.[143] The Supreme Court upheld the conviction.

The majority opinion addressed the conflict between the respective powers of the state and parents to control children and to regulate their training, particularly in the context of religious freedom. The Court recognized that two constitutional rights were involved. First, the parent has a right "to bring up the child in the way he should go," which for Mrs. Prince meant "to teach him the tenets and the practices of their faith."[144] The second right concerned the child's freedom of religion, including the right "to preach the gospel."[145] The Court expressly recognized the vital importance of these liberties: "The parent's conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters."[146] As fundamental and sacred as these private interests are, however, the Court recognized the overriding interest of society in protecting the welfare of children. This interest is "no mere corporate concern of official authority," but rather "the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens."[147] Here, then, is a clear

141. *See, e.g.*, Ginsberg v. New York, 390 U.S. 629 (1968); Prince v. Massachusetts, 321 U.S. 158 (1944).

142. 321 U.S. 158 (1944).

143. Act of June 19, 1913, ch. 831, § 11, 1913 Mass. Acts 930, 933, *amended by* Act of Aug. 12, 1939, ch. 461, § 7, 1939 Mass. Acts 622, 625 (current version at MASS. GEN. LAWS ANN. ch. 149, § 69 (West 1982)), provided in pertinent part:

> No boy under twelve and no girl under eighteen shall sell, expose or offer for sale any newspapers, magazines, periodicals or any other articles of merchandise of any description, or exercise the trade of bootblack or scavenger, or any other trade, in any street or public place.

In addition, the statute makes it an offense punishable by fine or imprisonment for any "parent, guardian or custodian having a minor under his control" to compel or permit "such minor to work in violation of any provision of sections sixty to seventy-four, inclusive . . . ." MASS. GEN. LAWS ANN. ch. 149, § 81 (West 1982).

144. 321 U.S. at 164.

145. *Id.*

146. *Id.* at 165.

147. *Id.*

recognition of the principle that parental rights and First Amendment freedoms must sometimes give way to a regulation of the conduct of children, even though the regulation imposes incidental burdens on personal liberties. Although the Court recognized that several previous cases had sustained constitutional challenges to exercises of state authority over children,[148] it also provided examples of valid exercises of state authority over children. "Acting to guard the general interest in youth's well being, the state . . . may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways."[149]

More significantly, the Court expressly recognized that children can be regulated by the state in ways that adults cannot. "Concededly a statute or ordinance identical in terms with § 69,[150] except that it is applicable to adults or all persons generally, would be invalid. But the mere fact a state could not wholly prohibit this form of adult activity . . . does not mean it cannot do so for children."[151] Therefore, the Court concluded that the "state's authority over children's activities is broader than over like actions of adults."[152]

The Court did more than merely state the proposition. It provided a rational justification for permitting the state to exercise more authority over children than over adults. "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into

148. *Id.* at 165-66 (citing West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923)).

149. 321 U.S. at 166. *But see* Wisconsin v. Yoder, 406 U.S. 205 (1972), which held that the application of a compulsory attendance law to Old Order Amish, who objected to formal education past the eighth grade for religious reasons, violated the First Amendment Free Exercise Clause. While affirming the general validity of compulsory education laws, the Court held that such a law could not be applied to the Old Order Amish because the state had not proved that compulsory education after the eighth grade was necessary to promote a compelling governmental interest. *Id.* at 221-27. The holding of the case was very narrow, and the Court suggested that it would not extend the holding beyond the facts of the case. *Id.* at 236. *Cf.* United States v. Lee, 455 U.S. 252 (1982) (Free Exercise Clause does not require an exemption for members of the Old Order Amish from payment of Social Security taxes).

150. *See supra* note 143.

151. 321 U.S. at 167-68 (citations omitted).

152. *Id.* at 168. In other situations, the Supreme Court has also held that the constitutional rights of children are not co-extensive with those of adults. *See, e.g.*, McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (plurality opinion) (holding that the Constitution does not require trial by jury in juvenile court delinquency proceedings despite their quasi-criminal nature). However, other Fifth and Sixth Amendment rights that attach to adults in criminal proceedings also apply to juveniles in delinquency proceedings. *See, e.g., In re* Winship, 397 U.S. 358 (1970) (presumption of innocence and standard of proof of guilt beyond a reasonable doubt); *In re* Gault, 387 U.S. 1 (1967) (notice of charges, right to free appointed counsel if indigent, privilege against self-incrimination, and right to confrontation and cross-examination).

full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection."[153] Thus, the Court recognized that the state has a vital duty to prepare our nation's youth for the responsible exercise of the rights and obligations of citizenship. This duty affords ample justification for the state's authority to engage in value inculcation in its schools, as well as to take other measures to prepare youth for adulthood.

The Court also recognized that the fullest exercise of First Amendment freedoms by children might have a deleterious effect upon them, although not upon adults who exercise those same freedoms:

> The zealous though lawful exercise of the right to engage in propagandizing the community, whether in religious, political or other matters, may and at times does create situations difficult enough for adults to cope with and wholly inappropriate for children, especially of tender years, to face. Other harmful possibilities could be stated, of emotional excitement and psychological or physical injury. Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.[154]

Although the Court spoke of "emotional excitement and psychological or physical injury"[155] in the context of speaking or preaching on street corners, the same or similar effects might be felt by children in a public school classroom. In fact, several courts and commentators have made this point.[156]

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153. 321 U.S. at 168.

154. *Id.* at 169-70.

155. *Id.* at 170.

156. *See, e.g.*, Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978), which upheld a decision of school officials to prohibit students from distributing a questionnaire seeking opinions of other students on topics such as "premarital sex, contraception, homosexuality, masturbation and . . . 'sexual experience.'" 563 F.2d at 515. The court of appeals expressly recognized the authority of school officials to restrict freedom of expression on the part of students when the restricted expression had the potential of causing psychological or emotional injury to other students. *Id.* at 516-20. Several commentators have urged that the prevention of psychological or emotional injury is a constitutional basis on which to restrict freedom of expression by students in public schools. *See, e.g.*, Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 494-95, 502-05 (1981); Gyory, *The Constitutional Rights of Public School Pupils*, 40 FORDHAM L. REV. 201, 219-20 (1971). The Supreme Court has recognized the potential for harm resulting from the access of children to sexually explicit speech. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726 (1978) (upholding the authority of the FCC to admonish a radio station for broadcasting a recording containing indecent language at a time when children were likely to be in the listening audience); Ginsberg v. New York, 390 U.S. 629, 641 (1968) (stating that "minors' reading and seeing sex material" can "reasonably be regarded as harmful").

A second major Supreme Court case affirming the authority of the state to accord a lesser degree of First Amendment protection to children is *Ginsberg v. New York*.[157] In *Ginsberg*, the Court upheld a New York criminal obscenity statute that prohibited the sale to minors of material deemed to be obscene to minors but not to adults.[158] Speaking for the majority, Justice Brennan held that "even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . . .' "[159] After stating that the "well-being of its children is of course a subject within the State's constitutional power to regulate,"[160] Justice Brennan held that two interests justified the limitation on the sale to minors.

First, citing *Prince*, he noted that "the parents' claim to authority . . . to direct the rearing of their children is basic in the structure of our society."[161] Justice Brennan also stated that the "legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility."[162] When parents and children conflict, the state may intervene on the side of the parents and enforce their authority to raise their children as they deem best. The First Amendment interests of children must give way to the combined authority of parents and the state.

His second justification addressed the situation where the parents align on the side of the child in opposition to state authority. According to Justice Brennan, the state can exercise authority over children despite a First Amendment conflict. Commenting that the state "also has an independent interest in the well-being of its youth,"[163] he stated:

> While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such

157. 390 U.S. 629 (1968).

158. Act of June 7, 1965, ch. 326, 1965 N.Y. Laws 480 (current version at N.Y. PENAL LAW §§ 235.20-.22 (McKinney 1980)).

159. 390 U.S. at 638 (quoting Prince v. Massachusetts, 321 U.S. at 170).

160. 390 U.S. at 639.

161. *Id.* (citing *Prince*, 321 U.S. at 166).

162. 390 U.S. at 639.

163. *Id.* at 640.

material to adults.[164]

The Court in *Ginsberg* reiterated that parental control of children is not absolute. The state has a paramount interest in providing for the welfare of children. While not formulating a theory as to why the state may treat children differently than adults, Justice Brennan quoted a widely acclaimed article discussing First Amendment principles:

> The world of children is not strictly part of the adult realm of free expression. The factor of immaturity, and perhaps other considerations, impose different rules. . . . [R]egulations of communication addressed to them need not conform to the requirements of the First Amendment in the same way as those applicable to adults.[165]

In a brief concurring opinion, Justice Stewart explained why, in his view, the theoretical underpinnings of the First Amendment are not fully applicable to children.[166] Referring to the view of Justice Holmes that the purpose of freedom of expression is to preserve a "free trade in ideas,"[167] Justice Stewart discussed the scope of this freedom. Not only does freedom of expression encompass the right "to say or write or publish" what a person wants, but it "secures as well the liberty of each man to decide for himself what he will read and to what he will listen."[168] Therefore, the "Constitution guarantees . . . a society of free choice. Such a society presupposes the capacity of its members to choose."[169] Justice Stewart then recognized that this capacity to choose is not always present. Its absence may justify governmental regulation of expression. "When expression occurs in a setting where the capacity to make a choice is absent, government regulation of that expression may co-exist with and even implement First Amendment guarantees."[170] Justice Stewart noted two instances in which the capacity to choose may be lacking, thus justifying limitations on the person making the choice:

> I think a State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise . . . that a State may deprive children of

164. *Id.* at 640 (quoting People v. Kahan, 15 N.Y.2d 311, 312, 206 N.E.2d 333, 334-35 (1965) (Fuld, C.J., concurring)).

165. 390 U.S. at 638 n.6 (quoting Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 939 (1963)).

166. 390 U.S. at 648 (Stewart, J., concurring).

167. *Id.* at 649 (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

168. 390 U.S. at 649 (Stewart, J., concurring).

169. *Id.*

170. *Id.*

> other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults.[171]

Justice Stewart makes an incontrovertible point. The First Amendment permits the exercise of those liberties that are essential to the functioning of a democracy. Our democratic system rests upon the presence of a well-informed, enlightened citizenry which is capable of exercising the right to vote only after becoming acquainted with the facts, opinions, and arguments involved in public issues.[172] Without such knowledge and without the opportunity for "uninhibited, robust, and wide-open" debate,[173] the electorate cannot make knowing and voluntary choices at the ballot box.

This rationale assumes the existence of voters who are intellectually and emotionally capable of making rational decisions. Such decisions facilitate the exchange of ideas and beliefs necessary for a democracy. Minors often lack full capacity to make choices in an intelligent, rational, and independent manner.[174] Just as the government does not permit

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171. *Id.* at 649-50.

172. *See generally* A. MEIKLEJOHN, POLITICAL FREEDOM (1960); A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948). Professor Meiklejohn is perhaps the foremost proponent of the theory that the primary purpose of the First Amendment is to protect political expression. In his view, absolute protection of political speech is essential to intelligent self-government. Freedom of speech is protected by the First Amendment not for its own sake, but because it is essential to the democratic political process. All other forms of speech would be protected only by substantive due process. For an opposing viewpoint, see T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-7 (1970). Professor Emerson defends freedom of speech not only as a means of providing for effective participatory democracy, but also as an end in itself to guarantee the right of individual self-fulfillment and self-realization. Under this view, many forms of nonpolitical expression receive First Amendment protection.

173. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

174. *See* Bellotti v. Baird, 443 U.S. 622 (1979) (plurality opinion), which struck down a Massachusetts statute prohibiting a minor from obtaining an abortion without the consent of either her parents or a court. The statute was defective because the parents or the court could veto the abortion decision of a minor "who has been determined to be mature and fully competent to assess the implications of the choice she has made." *Id.* at 650. In his plurality opinion, Justice Powell recognized "the general rule that a State may require a minor to wait until the age of majority before being permitted to exercise legal rights independently," but "we are concerned here with the exercise of a constitutional right of unique character." *Id.* The reason for this uniqueness is that "the abortion decision . . . simply cannot be postponed, or it will be made by default with far-reaching consequences." *Id.* at 643. In reviewing past cases, Justice Powell stated: "We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." *Id.* at 634. Justice Powell elaborated on the second reason, citing Ginsberg v. New York, 390 U.S. 629 (1968), and Prince v. Massachusetts, 321 U.S. 158 (1944):

> Second, the Court has held that the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with poten-

children to vote due to their lack of capacity to choose,[175] so too may society impose outer boundaries on children's freedom of expression. *Ginsberg* thus held that the state may limit the access of children to certain types of sexually explicit material. The Court's holding provides strong support for the proposition that the public school can also limit the access of children to ideas, beliefs, and materials that are considered deleterious to our youth.

III. *Board of Education v. Pico*

The most recent Supreme Court case concerning First Amendment rights of public school students is the 1982 decision, *Board of Education v. Pico*.[176] In *Pico*, the Court held that the First Amendment limits the discretion of public school officials to remove books from the school library.

A. Facts and Background

Several members of the Island Trees Board of Education attended a conference sponsored by a "politically conservative organization of parents concerned about education legislation in the State of New York."[177] At this conference, the school board members received a list of books described by one board member as "objectionable" and by another as "improper fare for school students."[178] After determining that several of the listed books were in either the high school or junior high school library of the school district, the Board of Education appointed a "Book Review Committee" of four parents and four school staff members to read the questioned books and to recommend to the school board those

tially serious consequences. These rulings have been grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.

443 U.S. at 635.

175. Oregon v. Mitchell, 400 U.S. 112 (1970) (plurality opinion) recognized the authority of the states to limit the voting age to persons 21 and over. Reviewing the constitutionality of a provision of the Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, §§ 301-05, 84 Stat. 314, 318-19 (current version at 42 U.S.C. § 1973bb (1982)), which lowered the voting age to 18 in both federal and state elections, the Court upheld the provision as applied to federal elections but held that this provision could not constitutionally be applied to state elections. 400 U.S. at 117-18. Subsequently Congress proposed, and the states ratified, the Twenty-Sixth Amendment to the federal Constitution, which lowered the voting age to 18 in all federal and state elections. U.S. CONST. amend. XXVI.

176. 457 U.S. 853 (1982) (plurality opinion).

177. *Id.* at 856.

178. *Id.*

which should be removed from the library.[179] The school board's policy directed the committee to make its recommendations by "taking into account the books' 'educational suitability,' 'good taste,' 'relevance,' and 'appropriateness to age and grade level.' "[180] Of the eleven questioned books, the committee recommended that five be retained in the library, that two be removed, and that one "be made available to students only with parental approval."[181] After the committee reported its recommendations, the school board "substantially rejected" the report and ordered that nine of the books be removed from all school libraries in the district.[182] One book was returned to the high school library without restriction, and the other was returned to the library to be made available to students only with parental approval.[183] No reasons were given by the school board as to why the committee's recommendations were rejected.[184]

Suit was filed by several students challenging the removal of the books.[185] They alleged that the decision of the school board members was taken "because particular passages in the books offended their social, political and moral tastes and not because the books, taken as a whole, were lacking in educational value."[186] The district court granted summary judgment in favor of the school board, holding that:

> [T]he board acted not on religious principles but on its conservative educational philosophy, and on its belief that the nine books removed from the school library and curriculum were irrelevant, vulgar, immoral, and in bad taste, making them educationally unsuitable for the district's junior and senior high school students.[187]

On appeal, the Second Circuit "viewed the case as turning on the contested factual issue of whether [the school board's] removal decision was motivated by a justifiable desire to remove books containing vulgarities and sexual explicitness, or rather by an impermissible desire to suppress ideas."[188] Therefore the court of appeals reversed the district court judgment and remanded the case for trial, allowing the students the op-

179. *Id.* at 857.

180. *Id.*

181. *Id.* at 858. The committee could not agree on two books and took no position on the final book because not all committee members had read it. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 858-59.

187. Pico v. Board of Educ., 474 F. Supp. 387, 392 (E.D.N.Y. 1979).

188. 457 U.S. at 861 (citing *Pico*, 638 F.2d 404, 436-37 (2d Cir. 1980) (Newman, J., concurring)).

portunity to prove unconstitutional motivation.[189] The Supreme Court affirmed.[190]

B. The Plurality Opinion

The plurality opinion in *Pico* was written by Justice Brennan, joined by Justices Marshall and Stevens. Justice Blackmun joined in part of the plurality opinion and wrote a separate concurring opinion. Justice White also wrote a separate concurring opinion, while the remaining four Justices dissented.

Justice Brennan was careful to limit the effect of the holding by noting what the Court did not decide:

> Respondents do not seek . . . to impose limitations upon their school board's discretion to prescribe the curricula of the Island Trees schools. . . . Furthermore, . . . the action before us does not involve the *acquisition* of books. . . . Rather, the only action challenged in this case is the *removal* from school libraries of books originally placed there by school authorities . . . .[191]

Justice Brennan recognized the importance of the inculcative function of public education. After quoting from *Ambach v. Norwick*,[192] he recognized that "local school boards must be permitted 'to establish and apply their curriculum in such a way as to transmit community values,' and that 'there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.' "[193]

The authority of school officials to educate the nation's youth and to prepare them for adulthood is, however, subject to constitutional limitations. Justice Brennan noted the "role of the First Amendment . . . in affording the public access to discussion, debate, and the dissemination of information and ideas."[194] This role applies also to public schools. "[J]ust as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members."[195] While conceding that "First Amendment rights accorded to students must be construed 'in light of the special characteristics of the

189. 457 U.S. at 860.
190. *Id.* at 875.
191. *Id.* at 862 (emphasis original).
192. 441 U.S. 68, 76-77 (1979). *See also supra* text accompanying notes 14-19.
193. 457 U.S. at 864 (quoting Brief for Petitioners at 10).
194. 457 U.S. at 866 (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978)).
195. 457 U.S. at 868.

school environment,' "[196] Justice Brennan noted that "the special characteristics of the school *library* make that environment especially appropriate for the recognition of the First Amendment rights of students."[197] Noting that libraries are devoted in part to the pursuit of knowledge, and that students are free to inquire into areas not covered by the prescribed curriculum,[198] Justice Brennan apparently concluded that the inculcative function of public school education was not involved in this case. Thus, while school authorities may well claim

> absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values, . . . 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.[199]

Justice Brennan suggested a distinction between the public school classroom and the public school library, but this distinction is tenuous.[200]

While rejecting the school board's claim of absolute discretion to remove books from public school libraries, Justice Brennan admitted that "local school boards have a substantial legitimate role to play in the determination of school library content."[201] The issue to him became the need to reconcile school board authority with First Amendment limitations on that authority. Justice Brennan feared that school board authority would be exercised in such a way as to indoctrinate students in matters of politics, religion, and other areas.[202] "[S]tudents may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."[203] Even in the context of public education, "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, or other matters of opinion."[204] Finally, Justice Brennan reiterated that "the First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom."[205]

Applying this latter principle to the *Pico* case, he stated that the "significant discretion" of school boards "to determine the content of

196. *Id.* (quoting Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969)).

197. 457 U.S. at 868 (emphasis original).

198. *Id.* at 869.

199. *Id.* (emphasis original).

200. *See infra* text accompanying notes 284-90.

201. 457 U.S. at 869.

202. *Id.* at 870-71.

203. *Id.* at 868 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

204. 457 U.S. at 870 (quoting West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

205. 457 U.S. at 870 (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)).

their school libraries . . . may not be exercised in a narrowly partisan or political manner."[206] He then proceeded to give some examples of "narrowly partisan or political" removals of books from school libraries:

> If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books. The same conclusion would surely apply if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration.[207]

Because Justice Brennan recognized that some library book removals would be valid, it was necessary for him to devise a mode of inquiry that would permit the Court to make a sensitive judgment on the removal issue. In his view, the judgment turned on the motivation underlying school board actions. If the school officials "*intended* by their removal decision to deny [students] access to ideas with which [the school officials] disagreed, and if this intent was the decisive factor in [the removal] decision, then [the school officials] have exercised their discretion in violation of the Constitution."[208] Justice Brennan also noted that "[b]y 'decisive factor' we mean a 'substantial factor' in the absence of which the opposite decision would have been reached."[209] In focusing upon motivation, he seemed to admit that removal decisions, even if based on the content of the books, would be permissible absent an intent to limit student access to ideas disapproved by school officials. In particular, he agreed with the concession of the students that removal of "pervasively vulgar" books or books lacking "educational suitability" would have been "perfectly permissible."[210] These latter motivations "would not carry the danger of an official suppression of ideas"[211] and would not, presumably, violate the First Amendment rights of students.

C. The Concurring Opinions

Justices Blackmun and White both wrote separate concurring opinions, which provided the critical votes to affirm the judgment of the court of appeals.[212] Not only were the votes of Justices Blackmun and White decisive, but their opinions were narrower in scope than the plurality opinion. Therefore, their opinions controlled.

206. 457 U.S. at 870.
207. *Id.* at 870-71.
208. *Id.* at 871 (emphasis original).
209. *Id.* at 871 n.22. *See also infra* note 386 and accompanying text.
210. 457 U.S. at 871.
211. *Id.*
212. *Id.* at 875, 883.

Like Justice Brennan, Justice Blackmun noted "two competing principles of constitutional stature" present in the case.[213] The first principle involved the role of public education "in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests."[214] Recognizing the "essential socializing function" of public schools, Justice Blackmun stated that school officials are empowered "to promote civic virtues" and to "inculcat[e] fundamental values necessary to the maintenance of a democratic political system."[215]

On the other hand, Justice Blackmun stated that "schools and school boards must operate within the confines of the First Amendment."[216] He reiterated the principle that the "imposition of 'ideological discipline' [is] not a proper undertaking for school authorities."[217] "[S]chool officials may seek to instill certain values 'by persuasion and example,' or by choice of emphasis. That sort of positive educational action, however, is the converse of an intentional attempt to shield students from certain ideas that officials find politically distasteful."[218]

After noting the conflict between these constitutional principles, and referring to the general First Amendment rule that often proscribes content-based regulations of speech,[219] Justice Blackmun announced what he believed should be the controlling principle: "[T]he State may not suppress exposure to ideas—for the sole *purpose* of suppressing exposure to those ideas—absent sufficiently compelling reasons."[220] Unlike Justice Brennan, however, Justice Blackmun rejected the notion that public school students have a First Amendment right to receive information. "[T]he principle involved here is both narrower and more basic than the 'right to receive information' identified by the plurality. I do not suggest that the State has any affirmative obligation to provide students with information or ideas . . . ."[221] To Justice Blackmun, it is "state discrimination *between* ideas" that is prohibited.[222] Furthermore, such discrimination between ideas is prohibited only when certain motives for that discrimination are present: "[T]he State may not act to deny access

213. *Id.* at 876 (Blackmun, J., concurring).

214. *Id.* (quoting Ambach v. Norwick, 441 U.S. 68, 76 (1979)). *See also supra* text accompanying notes 14-19.

215. 457 U.S. at 876 (Blackmun, J., concurring) (quoting *Ambach*, 441 U.S. at 80).

216. 457 U.S. at 876 (Blackmun, J., concurring).

217. *Id.* at 877 (quoting *Barnette*, 319 U.S. at 637). *See also supra* text accompanying notes 40-64, 75-76.

218. 457 U.S. at 882 (Blackmun, J., concurring) (quoting *Barnette*, 319 U.S. at 640).

219. *See supra* note 52.

220. 457 U.S. at 877 (Blackmun, J., concurring) (emphasis original).

221. *Id.* at 878.

222. *Id.* at 878-79 (emphasis original).

to an idea simply because state officials disapprove of that idea for partisan or political reasons."[223] As Justice Blackmun stated in a footnote, his focus differs significantly from that of Justice Brennan's plurality opinion. "[W]hile the plurality focuses on the failure to provide information, I find crucial the State's decision to single out an idea for disapproval and then deny access to it."[224]

According to Justice Blackmun, "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."[225] For a removal decision to be valid, the school board must have "had something in mind in addition to the suppression of partisan or political views it did not share."[226]

Justice Blackmun then proceeded to describe several constitutionally permissible purposes for removing books from public school libraries. "School officials must be able to choose one book over another . . . when the first book is deemed more relevant to the curriculum, or better written, or when one of a host of other politically neutral reasons is present."[227] He also noted that the First Amendment would not prohibit school authorities from refusing "to make a book available to students because it contains offensive language, . . . or because it is psychologically or intellectually inappropriate for the age group, or even, perhaps, because the ideas it advances are 'manifestly inimical to the public welfare.' "[228] School authorities "must have the authority to make educationally appropriate choices in designing a curriculum"[229] and "may seek to instill certain values 'by persuasion and example,' . . . or by choice of emphasis. That sort of positive educational action, however, is the converse of an intentional attempt to shield students from certain ideas that officials find politically distasteful."[230] Thus, while Justice Blackmun's focus differed from the plurality's, he agreed that the constitutional issue turned on the motivation of those who decided to remove the books from the Island Trees District school libraries.[231]

223. *Id.* at 879.
224. *Id.* at 879 n.2.
225. *Id.* at 879-80 (emphasis original).
226. *Id.* at 880.
227. *Id.*
228. *Id.* (quoting Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925)).
229. 457 U.S. at 882 (Blackmun, J., concurring).
230. *Id.* (quoting *Barnette*, 319 U.S. at 640).
231. In addition to addressing the issue of motivation in his separate concurring opinion, Justice Blackmun also joined Justice Brennan's plurality opinion on this point. 457 U.S. at 879-80 (Blackmun, J., concurring).

Justice White, who concurred in the judgment, addressed only the procedural issue.[232] He stated that the summary judgment was improper since a material issue of fact needed to be resolved.[233] He declined to discuss the substantive constitutional issues, believing that to do so was both unnecessary and premature in the absence of a concrete factual record.[234] By concurring in the judgment to remand, however, Justice White implicitly acknowledged that the school board's motivation would be determinative of the constitutional question. The only disputed issue of fact was the motivation of the school board. Had Justice White not believed that the board's motivation was significant—if not determinative—of the constitutional issue, he would have concluded that the disputed issue of fact was not material and that summary judgment was appropriate.

D. The Dissenting Opinions

Several dissents were registered in *Pico*. Chief Justice Burger's dissent,[235] in which Justices Powell, Rehnquist, and O'Connor joined, criticized the plurality opinion on several counts. First, the Chief Justice denied that the First Amendment creates any right of student access to books in a public school. While agreeing that there is a First Amendment right to receive ideas, he stated that "[i]t does not follow . . . that a school board must affirmatively aid the speaker in its communication with the recipient."[236] He thus rejected the suggestion that "if a writer has something to say, the government through its schools must be the courier."[237]

Second, Chief Justice Burger thought that the plurality opinion did not sufficiently recognize either the importance of the inculcative function of public education or the necessity for content-based regulations to serve that function. "If . . . schools may legitimately be used as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system,' . . . school authorities must have broad discretion to fulfill that obligation."[238] He added that these "fundamental values" cannot "be inculcated except by having school boards make content-based decisions about the appropriateness of retaining materials in

232. 457 U.S. at 883-84 (White, J., concurring).
233. *Id.* at 883.
234. *Id.* at 884.
235. *Id.* at 885 (Burger, C.J., dissenting).
236. *Id.* at 887.
237. *Id.*
238. *Id.* at 889 (quoting Ambach v. Norwick, 441 U.S. 68, 77 (1979)).

the school library and curriculum."[239] Chief Justice Burger thus admitted that such decisions are inevitably content-based.[240] As he pointed out, even Justice Brennan's rationale permits content-based decisions.[241] While Justice Brennan would not permit school authorities to remove library books based upon narrow partisan or political considerations, he did concede that school authorities could consider factors such as pervasive vulgarity and educational suitability in determining which books to remove.[242] To the Chief Justice, however, "educational suitability" is a "standardless phrase" that provides no guidance to school authorities or to the courts.[243] He concluded that such decisions should be made by elected local school boards which then select the administrators and teachers who can best decide which books belong in public school libraries.[244] Even if those decisions are content-based, they are justified by the inculcative role of public education and the necessity for school officials to have the authority to select the values to be inculcated.

The Chief Justice was not concerned that local school boards might act irresponsibly in choosing how to best inculcate community values. Noting that the tradition of "local control of education involves democracy in a microcosm," he stated that in most school districts "*parents* have a large voice in running the school. . . . [A] school board is not a giant bureaucracy far removed from accountability for its actions; it is truly 'of the people and by the people.' "[245] If parents believe that the school board has erred in setting educational policy, they can easily correct the error by resorting to the ballot box.[246] In this way parents ensure that local school board members reflect the values of the community that elects them.

Finally, Chief Justice Burger rejected Justice Brennan's distinction between libraries and classrooms. If courts concern themselves with school board actions that cast a "pall of orthodoxy"[247] over public education or carry the risk of "official suppression"[248] of ideas, certainly this concern applies even more to the classroom than it does to the library.

239. 457 U.S. at 889 (Burger, C.J., dissenting).

240. *Id.*

241. *Id.* at 890.

242. *Id.* at 871 (plurality opinion).

243. *Id.* at 890 (Burger, C.J., dissenting).

244. *Id.* at 890-91.

245. *Id.* at 891 (emphasis original).

246. *Id.*

247. *Id.* at 892 (quoting 457 U.S. at 870 (plurality opinion), which in turn quoted Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)).

248. 457 U.S. at 892 (Burger, C.J., dissenting) (quoting 457 U.S. at 871 (plurality opinion)).

While reading library books usually remains optional for students, reading prescribed texts is mandatory. Thus, reasoned the Chief Justice, school board control over classroom materials carries an even greater risk of casting a "pall of orthodoxy" over the educational process.[249] "Similarly, a decision to eliminate certain material from the curriculum, history for example, would carry an equal—probably greater—prospect of 'official suppression.' "[250]

In a brief dissent, Justice Powell noted a contradiction in the plurality opinion.[251] First, he referred to Justice Brennan's recognition of the *Ambach v. Norwick*[252] principle that by inculcating fundamental values of our democratic system, schools play a vital role in preparing young people to be effective participants in that system.[253] However, "when a school board . . . takes its responsibilities seriously and seeks to decide what the fundamental values are that should be imparted, the plurality finds a constitutional violation."[254] Justice Powell interpreted the plurality opinion to mean that a "school board's attempt to instill in its students the ideas and values on which a democratic system depends is viewed as an impermissible suppression of other ideas and values on which other systems of government and other societies thrive."[255] Justice Powell "would not *require* a school board to promote ideas and values repugnant to a democratic society or to teach such values to *children*."[256]

In a separate dissenting opinion joined by Chief Justice Burger and Justice Powell, Justice Rehnquist rejected the plurality's argument that public school students have a First Amendment right of access to ideas in the public school.[257] Referring to the public school environment, he argued that the plurality failed "to explain the constitutional or logical underpinnings of a right to hear ideas in a place where no speaker has the right to express them."[258] Furthermore, "the denial of access to ideas inhibits one's own acquisition of knowledge only when that denial is relatively complete."[259] But here, those ideas are readily available from

249. 457 U.S. at 892 (Burger, C.J., dissenting).
250. *Id.* at 892-93.
251. *Id.* at 893 (Powell, J., dissenting).
252. 441 U.S. 68 (1979). *See supra* text accompanying notes 14-19.
253. 457 U.S. at 896 (Powell, J., dissenting) (citing 457 U.S. at 864 (plurality opinion)).
254. *Id.*
255. *Id.*
256. *Id.* at 897 (emphasis original).
257. *Id.* at 904 (Rehnquist, J., dissenting).
258. *Id.* at 912.
259. *Id.* at 913.

other sources,[260] and therefore "the benefits to be gained from exposure to those ideas have not been foreclosed by the State."[261]

Crucial to Justice Rehnquist's argument was the distinction he drew between the state as an educator and the state as a sovereign.[262] He conceded that a town council, acting as a sovereign, could not prohibit private booksellers within the town from selling the books in question.[263] On the other hand, when the state "acts as an educator, at least at the elementary and secondary school level, the government is engaged in inculcating social values and knowledge in relatively impressionable young people."[264] In making decisions with regard to curriculum changes, book purchases, and teacher employment, school board members "will act on the basis of their own personal or moral values, will attempt to mirror those of the community, or will abdicate the making of such decisions to so-called 'experts.' "[265] Thus "it is 'permissible and appropriate for local [school] boards to make educational decisions based upon their personal social, political and moral views.' "[266]

Justice Rehnquist also expressed his belief that the right of access rationale advanced by the plurality opinion conflicted with its acceptance of the inculcative function of public school education:

> Education consists of the selective presentation and explanation of ideas. The effective acquisition of knowledge depends upon an orderly exposure to relevant information. Nowhere is this more true than in elementary and secondary schools, where, unlike the broad ranging inquiry available to university students, the courses taught are those thought most relevant to the young students' individual development. Of 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. This winnowing process necessarily leaves much information to be discovered by students at another time or in another place, and is fundamentally inconsistent with any constitutionally required eclecticism in public education.[267]

This "winnowing process" applies not only in matters of curriculum choice and classroom teaching, but also in the public school library.

260. Other sources include public libraries, university libraries, and bookstores. *Id.* at 915.
261. *Id.* at 913.
262. *Id.* at 908-09.
263. *Id.* at 908.
264. *Id.* at 909.
265. *Id.*
266. *Id.* (quoting Zykan v. Warsaw Community School Corp., 631 F.2d 1300, 1305 (7th Cir. 1980)).
267. 457 U.S. at 914 (Rehnquist, J., dissenting) (emphasis original).

Noting that "elementary and secondary schools are inculcative in nature," Justice Rehnquist stated that their libraries "serve as supplements to this inculcative role."[268] Furthermore, he distinguished university and public libraries from elementary and secondary school libraries, stating that the latter "are not designed for freewheeling inquiry; they are tailored, as the public school curriculum is tailored, to the teaching of basic skills and ideas."[269] Justice Rehnquist concluded, "the nature of [public] school libraries" cannot be relied on "to escape the fact that the First Amendment right to receive information simply has no application to the one public institution which, by its very nature, is a place for the selective conveyance of ideas."[270]

E. Summary

The Supreme Court was sharply divided in *Pico*, and the diversity of the views expressed in its several opinions obscures the precedential value of the case. Moreover, the decision was limited to the narrow issue of the constitutional authority of public school officials to remove books from the school library. Nevertheless, the next section will apply the principles enunciated in *Pico* to situations that arise in public elementary and secondary school classrooms.

IV. A Proposed Model of Analysis for Free Speech in the Public School Classroom

This final section proposes and explains an analytic model to use in resolving issues concerning First Amendment rights of students in the public school classroom. This model strongly supports the inculcative function of public school education and rejects attempts to convert the classroom into a marketplace of ideas where students have a right of access to information of their choice. It wholly supports, however, the First Amendment's proscription of narrow political, partisan, and religious indoctrination. This model provides a basis on which to distinguish between permissible value inculcation and impermissible indoctrination and describes the appropriate role of the courts in reviewing questioned decisions of state and school officials.

268. *Id.* at 915.

269. *Id.*

270. *Id.*

A. There Is No Right of Access to Information in the Public School Classroom

In his attempt in *Pico* to justify his conclusion that the First Amendment guarantees a right of access to ideas and information, Justice Brennan advanced two arguments. First, he contended that "the right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them . . . ."[271] Second, and "[m]ore importantly, the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom."[272] Despite these two arguments, Justice Brennan's contention is untenable. Not only is he unclear on what he means by a right of access, but he also fails to explain the source of this right. Several Supreme Court cases cited by Justice Brennan hold that the government cannot significantly interfere with a person's right to receive information.[273] Yet, none of them supports his contention that students have a right of access to information and ideas in the public school or that public schools have the affirmative constitutional duty to provide requested information. A review of the cases cited reveals that Justice Brennan created a new right without admitting it.

One of the earliest cases that mentioned the right to receive ideas was *Martin v. City of Struthers*.[274] In *Martin*, the Supreme Court struck down a municipal ordinance that prohibited door-to-door distribution of handbills, including religious pamphlets.[275] Noting that the prohibition applied even where occupants were willing to be summoned to the door and to receive the proffered information, the Court stated in dicta that "[t]he right of freedom of speech and press . . . embraces the right to distribute literature . . . and necessarily protects the right to receive it."[276]

Several other Supreme Court cases decided between 1965 and 1974 also alluded to the right to receive ideas.[277] However, it was not until

271. 457 U.S. at 867 (plurality opinion) (emphasis original).

272. *Id.* (emphasis original).

273. *See infra* notes 274-80 and accompanying text.

274. 319 U.S. 141 (1943).

275. *Id.* at 142. The ordinance provided:

> It is unlawful for any person distributing handbills, circulars or other advertisements to ring the door bell, sound the door knocker, or otherwise summon the inmate or inmates of any residence to the door for the purpose of receiving such handbills, circulars or other advertisements they or any person with them may be distributing.

Id.

276. *Id.* at 143.

277. *See, e.g.*, Procunier v. Martinez, 416 U.S. 396 (1974) (striking down regulations regarding the censorship of prisoners' mail); Kleindienst v. Mandel, 408 U.S. 753 (1972) (upholding the plenary power of the federal government to exclude an alien who was an advocate

1976, with its decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[278] that the Supreme Court expressly recognized the right to receive ideas. In that case, the Court struck down a Virginia statute that prohibited licensed pharmacists from advertising the retail prices of prescription drugs.[279] According to the Court, not only does the advertiser have a First Amendment right to disseminate commercial speech by means of advertising, but the consumer has "a reciprocal right to receive the advertising."[280]

None of the cases cited resembled *Pico*. They dealt with the right of a willing recipient to receive information, and the right of a willing distributor to disseminate information, free from unwarranted governmental interference. The Court never discussed the right of a willing recipient to receive information from an unwilling distributor. Conversely, the students in *Pico* demanded the right to read certain books in the possession of school officials,[281] thereby insisting that they had a right to receive ideas and information from a distributor who was not willing to disseminate it.

Thus, Justice Brennan appears to have created a new and broad right of public school students to receive ideas and beliefs that they insist upon receiving, even if a court must compel the state through its local schools to disseminate the desired information. Not only is such a right without precedent, but also it appears to have no principled limits. Justice Brennan attempted to narrow the scope of this new right by stating that it applied only in the context of the removal of books from school libraries and not to the acquisition of library books or to curriculum decisions.[282] His distinction, however, is wholly unconvincing. If students have a right of access to books of their choice, then it should not matter

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of world communism, in spite of objections of those who desired his entry so that they could communicate personally with him and engage in an academic exchange); Stanley v. Georgia, 394 U.S. 557 (1969) (holding that persons have the right to possess obscene material in the privacy of the home free from government intrusion); Lamont v. Postmaster Gen., 381 U.S. 301 (1965) (striking down a federal statute permitting the Postmaster General to deliver "communist political propaganda" to the addressee only if the addressee affirmatively requested in writing that it be delivered to him).

278. 425 U.S. 748 (1976).

279. Act of Apr. 5, 1968, ch. 803, 1968 Va. Acts 1419 (current version as amended at VA. CODE § 54-524.35 (1982)), provided in pertinent part:

> Any pharmacist shall be considered guilty of unprofessional conduct who . . . (3) issues, publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by prescription.

280. 425 U.S. at 757.

281. *Pico*, 457 U.S. at 859 (plurality opinion).

282. *Id.* at 862.

whether a school board's decision to deny that access comes before or after its acquisition by a school librarian.[283] No constitutional principle justifies denying students in one school district access to a book because school board members read and rejected it prior to its purchase, while granting students in an adjacent district a constitutional right of access to that same book because its board rejected it only after it had been purchased and become the object of parental or community complaints.

Justice Brennan's error in propounding the existence of a right of access developed because he incorrectly perceived the function of a public school library.[284] Rather than viewing it as an adjunct to the classroom, designed to serve the inculcative function, Justice Brennan viewed the school library as he did a public library or university library—as a place devoted to the pursuit of knowledge and to the freedom of wide-ranging inquiry and intellectual exploration.[285] Were his perception of the school library accurate, Justice Brennan might have correctly argued for a right of access. It is at least debatable that such a right of access exists for public libraries and even perhaps for libraries of public universities.[286] Justice Brennan's view of the public elementary and secondary school library, however, defies reality. Few school districts have the monetary or physical resources to create a library that serves the role favored by Justice Brennan. As a matter of economic necessity and educational policy, most public school libraries serve the more limited function described by Justice Rehnquist.[287]

283. *Id.* at 892 (Burger, C.J., dissenting); *id.* at 916-17 (Rehnquist, J., dissenting).

284. Although Justice Brennan conceded the importance of the inculcative function of public education, 457 U.S. at 864 (plurality opinion), he failed to recognize that school libraries as well as classrooms can be used to fulfill this function. Constitutional limitations on the inculcative function may preclude school officials from engaging in intentional, purposeful suppression of partisan or political views merely because they disapprove of those ideas. *See infra* text accompanying notes 308-14. However, a lack of authority to indoctrinate students in narrow, political, partisan, or religious views is not the same as requiring school officials, through the creation of a right of access, to "promote ideas and values [that are] repugnant to a democratic society" and that are inconsistent with the values sought to be inculcated by the public schools. 457 U.S. at 897 (Powell, J., dissenting). As Justice Rehnquist noted in his *Pico* dissent, the inculcative function of public education not only requires school officials to decide what information is going to be presented to students, but also requires them to decide what information is *not* going to be presented to students. *Id.* at 914 (Rehnquist, J., dissenting). If the public school library is to serve the inculcative function, and if its purpose is to support this function in the classroom, then the library is not a marketplace of ideas to which students have a right of access.

285. *Id.* at 868-69 (plurality opinion).

286. Justice Rehnquist, who viewed the elementary and secondary school library as inculcative in nature, conceded that public and university libraries are "designed for freewheeling inquiry." *Id.* at 915 (Rehnquist, J., dissenting). Therefore, even he may agree that there is some right of access to public and university libraries.

287. *See supra* text accompanying notes 268-70; *see also supra* note 284.

Even if Justice Brennan were correct in finding a right of access to public school libraries, he conceded that this right cannot extend to the public school classroom.[288] However, he offered no principled basis on which to distinguish the classroom from the library. Were students to have a true right of access to ideas and beliefs, coupled with the right to compel schools to distribute that information, reason would dictate that this right apply equally in the classroom and in the library.[289] If students have a right of access to certain books in the school library, it follows that they also have a right of access to textbooks and ideas in the classroom. The only possible distinction between the library and the classroom is that only the latter serves the inculcative function of public education while the former does not. The public elementary and secondary school library, however, exists primarily for inculcative purposes, and is tailored to supplement curriculum decisions and classroom education.[290] More fundamentally, Justice Brennan failed to explain why, even if the classroom/library distinction is valid, the state's interest in engaging in the inculcative function in the classroom outweighs the student's right of access to ideas and beliefs in the classroom.[291]

In spite of this failure, there is little doubt that a right of access conflicts with the inculcative function. Unless courts are willing to review curriculum decisions systematically, school officials have virtually uncontrolled discretion to determine the general curriculum and to determine the content of individual courses. These decisions inevitably provide access to some ideas and beliefs while denying access to others. A decision to eliminate classical languages from the curriculum denies

288. 457 U.S. at 869 (plurality opinion).

289. *Id.* at 892-93 (Burger, C.J., dissenting); *id.* at 914-15 (Rehnquist, J., dissenting). *See also supra* notes 247-50 and accompanying text.

290. *See supra* text accompanying notes 285-86.

291. 457 U.S. at 581. Justice Brennan could have provided a plausible explanation. In Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), the Supreme Court held that the First Amendment mandates a public right of access to criminal trials. Simply stated, this right cannot be impaired by closing the trial to the public and press absent an overriding governmental interest. *Id.* at 580-81. In a well-reasoned concurring opinion, Justice Brennan explained that the public right of access to information in the hands of the government depends in part on the importance of access to the governmental process at issue. *Id.* at 589 (Brennan, J., concurring). Because "[c]losed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law," the public's right of access to the criminal trial is important to the criminal justice system. *Id.* at 595. Similarly, were Justice Brennan correct in his assumption that the public school library serves the function of permitting the pursuit of knowledge, wide-ranging inquiry, and intellectual exploration, then a public right of access would be important in terms of the process itself. Conversely, just as a right of access is not important to, and indeed would defeat, the function of jury deliberations which are held in secrecy, a right of access is not important to and would defeat the inculcative function of the educational process in the classroom.

access to information. A decision not to add a course in Asian history restricts the free flow of information. These content-based decisions presumably represent an informed decision that some types of information are more valuable than others. Such decisions are commonplace, and the authority of school officials to make them is almost universally accepted. Some critics of the decision may disagree because of educational concerns, but rarely will they argue that a constitutional right has been violated.

Furthermore, the way a teacher conducts a class necessitates numerous content-based decisions that deny access to ideas and beliefs. School officials and teachers must have the ability to control classroom activities to accomplish the varied educational goals of the school and the community, including the goal of value inculcation. "[U]ninhibited, robust, and wideopen" debate[292] on public and other issues will defeat these goals in many instances. Discussion must be guided, limited to the subject matter at hand, and even prohibited where necessary for the efficient operation of the classroom. Only in this way can educational goals and the inculcative function of public education be served effectively.

Additional factors militate against a right of access to a marketplace of ideas in the public school classroom. First, elementary and secondary public school students are minors, often lacking the capacity for individual free choice.[293] It is proper to restrict the access of minor public school students to information, not only to provide for the well-being of the students but also to fulfill the inculcative function of public education. If society expects its schools to train and prepare students to assume the duties of citizenship, it must give school officials the necessary authority to make the decisions that enable them to perform this tremendous responsibility. Democratically accountable school boards should have the authority to chart the educational path that our schools follow. In turn, school boards should be permitted to delegate the authority to make educational decisions to professional administrators and teachers.

Second, the captive audience rationale affords no support for a right of access to information in public school classrooms. Although First Amendment and privacy interests often afford individuals the right to be free from being part of a captive audience,[294] this rationale is inapplicable to the inherently coercive environment of a public school classroom.[295] Not only do elementary and secondary students lack the full capacity for

292. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

293. *See supra* text accompanying notes 165-75.

294. *See supra* text accompanying notes 111-21.

295. *See supra* text accompanying notes 134-38.

individual choice, but they are also part of a captive audience by necessity. The premise of compulsory school attendance laws is that children can be compelled to attend school and to study. Far from being free to reject ideas and information, they can be compelled to read, see, hear, study, and learn those values and bodies of knowledge prescribed by the community through its school boards and professional educators. To assert a right of access to information and ideas of the students' own choice is to deny the validity of compulsory education laws.[296]

Finally, the reality of limited resources for public elementary and secondary education must be faced. Given the number of hours in the school day, and the number of weeks and months in the school year, it is obvious that the amount of time available for education is not unlimited.[297] Competing demands for scarce time often become intense and cannot easily be satisfied. Monetary resources of public schools are also extremely limited.[298] Most school districts lack the financial resources to provide the best education possible, or even the quality of education that school boards and professional educators would prefer to offer. In this reality of limited time and limited money, decisions allocating resources must be made. Someone must be authorized to choose among competing demands for time in the classroom, space in the curriculum, and money for more teachers, instructional material, physical facilities, and support personnel. Were there a true right of access to ideas and information of the students' choice, it would be the students who, by insisting upon this right, would determine the allocation of scarce time and fiscal resources. Not only would the inculcative function of education be impaired, but what remained would be an educational mish-mash, a "cacophony of competing voices, none of which could be clearly and predictably

296. *See supra* note 33.

297. It is typical in public schools in the United States for students to attend school for six hours per day for 180 days per year. By contrast, in Great Britain and other industrialized nations, it is common for students to attend school for eight hours per day for 220 days per year. THE NATIONAL COMMISSION ON EXCELLENCE IN EDUCATION, A NATION AT RISK: THE IMPERATIVE FOR EDUCATION REFORM 21 (1983) [hereinafter cited as NATIONAL COMMISSION]. After noting many perceived problems with public education in the United States, this report recommended that state legislatures and local school boards "should strongly consider 7-hour school days as well as a 200- to 220-day school year." *Id.* at 29.

298. S. GOLDSTEIN & E. GEE, *supra* note 33, at 9. Another major recommendation of the National Commission on Excellence in Education was a call to citizens to provide the degree of financial support necessary to achieve excellence in public education. NATIONAL COMMISSION, *supra* note 297, at 32. A major source of funding for public schools is local property tax revenue, which is tied directly to the value of property within a district as well as to the tax rate ("millage"). Consequently, the per pupil expenditures in some districts far exceed those of others. This method of funding public schools was upheld in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

heard."[299]

Rather than students, local school officials, both the democratically accountable school boards and the professional educators, should be empowered to allocate scarce time, money, and other resources. Justice Blackmun expressed this view when he noted two reasons why it was "difficult to see the First Amendment . . . playing a role in a school's choice of curriculum."[300] First, recognizing the limited time and finite resources available for public education, he stated that public school officials must "make sensitive choices between subjects to be offered and competing areas of academic emphasis; subjects generally are excluded simply because school officials have chosen to devote their resources to one rather than to another subject."[301] Such choices, in his view, do not violate the First Amendment. Second, he noted that "the Court has recognized that students' First Amendment rights in most cases must give way if they interfere 'with the schools' work or [with] the rights of other students to be secure and to be let alone.' "[302] This interference "will rise to intolerable levels if public participation in the management of the curriculum becomes commonplace."[303] Conversely, "library books on a shelf intrude not at all on the daily operation of a school."[304] Thus Justice Blackmun, like Justice Brennan, limited the scope of his *Pico* opinion to the question of public school libraries. By expressly disavowing any relevance of First Amendment principles to curriculum decisions, however, he departed from the opinion of Justice Brennan, who left this issue open.[305] By this disavowal, any potential majority of Supreme Court Justices willing to intervene in curricular decisions has evaporated because the four dissenting Justices indicated similar views on curricular matters.[306]

Although a strong case can be made that courts should never interfere with curricular and instructional choices of public school officials, such a rule cannot be cast in absolute terms. Courts should be prepared to intervene, but only in those rare instances when decisions of state and school officials are based upon narrow political, partisan, or religious considerations. Otherwise, curriculum choices are entitled to maximum

299. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 376 (1969).

300. *Pico*, 457 U.S. at 878 n.1 (Blackmun, J., concurring).

301. *Id.*

302. *Id.* (quoting Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 508 (1969)).

303. 457 U.S. at 878 n.1.

304. *Id.*

305. *Id.* at 861-62 (plurality opinion).

306. *Id.* at 889-92 (Burger, C.J., dissenting); *id.* at 893-94 (Powell, J., dissenting); *id.* at 909, 914, 918, 921 (Rehnquist, J., dissenting).

deference by the courts, applying the traditional substantive due process "rational nexus" standard of judicial review.[307]

B. Narrow Political, Partisan, or Religious Indoctrination in Public School Violates the First Amendment

This Article has maintained that, given the importance of value inculcation, public elementary and secondary school students have no constitutionally based right of access to information in the classroom.[308] However, it also recognizes that value inculcation cannot be so narrow as to result in political, partisan, or religious indoctrination.[309] In his plurality opinion in *Pico*, Justice Brennan stated that the First Amendment would be violated by politically motivated decisions of a Democratic school board to remove "books written by or in favor of Republicans,"[310] and by racially motivated decisions of an all-white school board to remove "books authored by blacks or advocating racial equality and integration."[311] Justice Blackmun agreed;[312] and even dissenting Justice Rehnquist conceded this point.[313] It appears that at least seven Justices are willing to distinguish between permissible value inculcation in public education and impermissible narrow political, partisan, and religious indoctrination. Yet none of the Justices suggested a principled basis on which to make the distinction.[314]

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307. This standard of judicial review has its origins in the famous dissent of Justice Holmes in Lochner v. New York, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting). In his view, a court should hold a statute unconstitutional only if "a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." *Id.* at 76. This standard of review presently is utilized in cases involving economic and social legislation. Williamson v. Lee Optical Co., 348 U.S. 483 (1955). The standard is referred to in various terms: "rational basis" (United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938)); "rational relation" (Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 84 (1978)); "debatable issue" (Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 425 (1952)); or simply "rational way" (*Lee Optical*, 348 U.S. at 488)). For a specific application of this standard of review to curricular decisions of school officials, see *infra* text accompanying note 372.

308. *See supra* text accompanying notes 292-303.

309. *See generally infra* text accompanying notes 320-23.

310. 457 U.S. at 870-71.

311. *Id.* at 871.

312. *Id.* at 878 (Blackmun, J., concurring).

313. *Id.* at 907 (Rehnquist, J., dissenting).

314. The seven Justices are: Justices Brennan, Marshall, and Stevens (the Justices of the plurality opinion); Justice Blackmun (the author of the concurring opinion); and Chief Justice Burger and Justice Powell joining Justice Rehnquist's dissenting opinion. Justice White did not reach the substantive issues. *See supra* text accompanying notes 232-34. Justice O'Connor, who joined the Chief Justice's dissent, also wrote an extremely brief dissent in which she did not address this issue. 457 U.S. at 921 (O'Connor, J., dissenting). Given the procedural context of the case, it was not necessary for either Justice Brennan or Justice Black-

1. Reconciling the Inculcative Function with the Proscription Against Narrow Political, Partisan, or Religious Indoctrination

Any attempt to provide a basis on which to distinguish between permissible value inculcation and impermissible indoctrination must begin with a clear understanding of the importance of these competing constitutional values. Courts have long recognized the traditional and critical importance of the inculcative function of public school education and the broad discretion conferred on state and school officials to ensure that this function is performed efficiently.[315] The heart of the public educational process is the transmittal of information, including substantive knowledge, learning skills, and societal values. This process is strictly controlled to serve the inculcative function.

State legislatures and state agencies often fasten minimum educational standards on local school districts.[316] These standards typically encompass matters such as teacher qualifications, the length of the school day and school year, curriculum and course offerings, and—occasionally—the content of educational materials. Local school boards, as the elected representatives of parents and other community residents, typically impose additional and higher educational standards.[317] These school board decisions usually reflect community values as to what students should be taught. In carrying out these decisions, administrators and teachers often institute plans to integrate curriculum and instruction to make the twelve years of public education a coherent and comprehen-

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mun to provide a principled basis for distinguishing between permissible value inculcation and impermissible indoctrination. Both of them apparently preferred to withhold any further discussion of this distinction until the trial court had the opportunity to resolve the factual issue of the motivation and reasons behind the school board's actions. Justice Rehnquist also did not suggest a basis on which to distinguish between inculcation and indoctrination. Because he found that eight of the books were removed due to their profanity and vulgarity, and that the ninth book "contained nothing that could be considered partisan or political," Justice Rehnquist concluded that the removal decisions fell well within constitutionally permissible limits. *Id.* at 907-08. Consequently, it was not necessary for him to place outer limits on the authority of school officials.

315. *See supra* text accompanying notes 7-20.

316. *See, e.g.*, N. EDWARDS, THE COURTS AND THE PUBLIC SCHOOLS 27-29 (3d ed. 1971); S. GOLDSTEIN & E. GEE, *supra* note 33, at 57; L. PETERSON, R. ROSSMILLER & M. VOLZ, THE LAW AND PUBLIC SCHOOL OPERATION 319-20 (2d ed. 1978); D. SCHIMMEL & L. FIRSCHER, THE RIGHTS OF PARENTS IN THE EDUCATION OF THEIR CHILDREN 75 (1977); Diamond, *supra* note 1, at 506-07 nn.130-31.

317. *See, e.g.*, L. PETERSON, R. ROSSMILLER & M. VOLZ, *supra* note 316, at 321-34; E. REUTTER & R. HAMILTON, THE LAW OF PUBLIC EDUCATION 107-14, 116-25 (1970); D. SCHIMMEL & L. FIRSCHER, *supra* note 316, at 75; Diamond, *supra* note 1, at 506-07 nn.130-31.

sive whole.[318] They then select those textbooks and instructional materials which will best implement their plans. Individual teachers must adhere to the curriculum and instructional model. Teachers test students to discover if they have learned the information and skills imparted to them. Grades and academic achievement depend upon "correct" responses to test items; responses are "correct" only if they conform to the views that have been taught. This process is value inculcation at work and is the reality of contemporary public education.[319]

Although the inculcative function of public education is critically important, school officials must remain highly sensitive to the dangers of narrow political, partisan, and religious indoctrination. These dangers are exacerbated by the status of the students: minors in a captive audience. School children are "not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."[320] Lacking the skepticism of college students, public elementary and secondary students are impressionable and susceptible to indoctrination.[321] Additionally, public school children cannot decline to receive disseminated information. Rather, they are compelled to sit in the classroom and to read, see, hear, study, and learn that which the state and school officials require.[322] Compulsory education presents no constitutional difficulty when its purpose is to inculcate values and to educate students in order to prepare them to take their place as enlightened citizens in society. Only narrow political, partisan, or religious indoctrination violates the First Amendment.

The Supreme Court in *Pico* was sensitive to the dangers of indoctrination. While accepting the inculcative model of public education in the

318. *See, e.g.*, M. ALPREN, THE SUBJECT CURRICULUM GRADES K-12, at 6-7 (1967); Le Clercq, *The Monkey Laws and the Public Schools: A Second Consumption?*, 27 VAND. L. REV. 209, 235 (1974); Miller, *Teachers' Freedom of Expression Within the Classroom: A Search for Standards*, 8 GA. L. REV. 837, 846 (1974).

319. Although the preceding paragraph describes public school education as it exists in this country, it does not imply that school districts must follow the inculcative model. Neither the First Amendment nor any other constitutional provision dictates that one educational model be utilized to the exclusion of any other. Justice Brennan committed this fundamental error in *Pico*. He implicitly held that the First Amendment prohibits the inculcative function in the context of the public school library. He found that the First Amendment guarantees students a right of access to a marketplace of ideas, yet he did not explain why the First Amendment permits a public school classroom but not a public school library to be used for inculcative purposes. *But see supra* note 291. By permitting school officials to tailor a public school library for inculcative purposes, the dissenting Justices accepted the reasonableness of the decision of the Island Trees school officials and deferred to that decision.

320. Ginsberg v. New York, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring).

321. *See* Tilton v. Richardson, 403 U.S. 672, 686 (1971) (plurality opinion). *See also supra* text accompanying note 84.

322. *See supra* text accompanying notes 134-38.

classroom, the Court nevertheless indicated that it would not tolerate narrow political, partisan, or religious indoctrination, at least in the public school library.[323] In suggesting that narrow political, partisan, and religious indoctrination is prohibited, perhaps the Justices implied that *only* narrow indoctrination is prohibited. A narrow construction of the word "indoctrination" is fully consistent with the inculcative function of public education.

2. *Religious Indoctrination*

Although neither the Supreme Court nor the court of appeals in *Pico* discussed what religious indoctrination might entail, past cases provide a sufficient explanation. Particularly helpful are the school prayer cases, *Engel v. Vitale*[324] and *School District of Abington Township v. Schempp*.[325] Although both cases were decided on Establishment Clause grounds,[326] a strong argument can be made that the Free Exercise Clause was also violated[327] despite the contention that the school prayers were characterized as voluntary. The inherently coercive environment of public schools, together with external factors such as peer pressure and the typical reluctance of a child to be labelled "different," forces children to participate in "voluntary" school prayer—thus making the activity involuntary on their part.[328] Such coerced religious activity violates the Free

323. Seven Justices indicated that they would not permit the removal of books "written by or in favor of Republicans" or "authored by blacks or advocating racial equality and integration." 457 U.S. at 870-71. While these examples may present an extreme case, it may well be that only such an extreme case would violate the First Amendment. *See also supra* text accompanying notes 309-14.

324. 370 U.S. 421 (1962).

325. 374 U.S. 203 (1963).

326. "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I. The Establishment Clause prohibits government from aiding religion. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971); Everson v. Board of Educ., 330 U.S. 1 (1947). In the school prayer cases, the Court held that religion was aided by a program which constituted tacit governmental approval of religion.

327. "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ." U.S. CONST. amend. I. The Free Exercise Clause prohibits the government from interfering with the right of the person to practice his or her faith. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940). There is no violation of the Free Exercise Clause unless a person is coerced to act or refrain from acting in violation of that person's religious beliefs. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (Old Order Amish children compelled to attend public school after the eighth grade; *see supra* note 149); Sherbert v. Verner, 374 U.S. 398 (1963) (holding that the denial of unemployment compensation benefits to a Seventh Day Adventist who refused to work on Saturday due to her religious beliefs unconstitutionally imposed a significant burden on freedom of religion by "coercing" her to choose between her religion and the receipt of state benefits).

328. *See, e.g.*, School Dist. of Abington Township v. Schempp, 374 U.S. 203, 287-93 (1963) (Brennan, J., concurring), and authorities cited therein.

Exercise Clause. Additionally, given their subtly coercive nature, school-sponsored and endorsed prayers constitute vivid examples of the type of narrow religious indoctrination to which several Justices in *Pico* alluded.

Conversely, the school prayer cases implicitly affirmed the authority of school officials to teach ethical and moral values to public school students, noting that religious materials might be used as a vehicle for instilling these values.[329] Thus, the Court recognized the inculcative function of public education and marked a clear distinction between permissible inculcation of ethical and moral values and impermissible religious indoctrination. Although the study of ethical and moral values might involve a study of religious values, the First Amendment is not violated absent narrow religious indoctrination.[330]

As the school prayer cases noted, a topic need not be excluded from the curriculum or from classroom discussion merely because it involves a study of religious influences. This result is possible only by narrowly construing the term "religious indoctrination" to mean attempts to proselytize students or to instill them with religious or antireligious beliefs.

3. Political and Partisan Indoctrination

The phrase "narrow political or partisan indoctrination" also should be strictly construed. Not only would this construction mirror the concerns expressed by a majority of the Justices in *Pico*,[331] but it would also provide needed recognition to the inculcative function of public education. A narrow construction would prohibit school officials from indoctrinating students in partisan political ideas and beliefs, yet would permit them to inculcate students with the general political values that lie at the heart of representative democracy. A few examples illustrate how strictly construing "narrow political and partisan indoctrination" helps distinguish between inculcation and indoctrination.

Discrimination between different and noncompeting subject matter in the public school curriculum does not offend the First Amendment.[332] Similarly, no constitutional issue arises when school officials require that one viewpoint be taught to the exclusion of a competing viewpoint, pro-

329. *Schempp*, 374 U.S. at 223-25.

330. A study of contemporary moral and ethical values would be incomplete without discussing whether, and to what extent, those values are tied to religious beliefs. Because "[t]he history of man is inseparable from the history of religion," Engel v. Vitale, 370 U.S. 421, 434 (1962), the study of history dictates a study of religious influences on the march of history. Ancient and recent events in the Middle East, the Reformation, the English Civil War, and the settling of the American colonies are but a few examples.

331. *See supra* text accompanying notes 309-14.

332. *See supra* text following note 104.

vided no political, social, or religious considerations are present. For example, school officials may decide to replace "new math" with "old math" or vice versa. Although such a choice is clearly content-based and reflects a purposeful decision to advocate one particular viewpoint over another, it does not violate the First Amendment. Since no political, partisan, or religious considerations are present, most federal courts probably would refuse to entertain a constitutional challenge to such a decision.

Somewhat more difficult from a constitutional standpoint are decisions of public school officials that inculcate general political and social values while winnowing out competing viewpoints. School officials should be permitted to decide that students be inculcated with fundamental political and social values such as religious tolerance, racial equality, and the merits of representative democracy. The inculcation of such values does not require that equal time be given to persons, materials or information that advocate religious bigotry, racial prejudice, or totalitarianism. While such decisions raise issues of constitutional dimension,[333] they ordinarily can be resolved by narrowly construing the First Amendment prohibition against political or partisan indoctrination.

Impermissible indoctrination would arise when the inherently coercive nature of the public school classroom is used to compel students to study, learn, and accept the principles of a particular political party.[334] This type of indoctrination treads most heavily on First Amendment principles without furthering the inculcative function of public education.

Another example of impermissible political or partisan indoctrination involves the suppression of views advocating racial equality and integration.[335] This example, however, presents an inherent inconsistency. A decision of school officials to teach principles of racial equality constitutes permissible value inculcation, while a contrary decision to teach the competing viewpoint of racial prejudice constitutes impermissible political or partisan indoctrination. This apparent inconsistency can be resolved only by examining the sources of contemporary political and social values.

333. Such content-based decisions "inculcate" students in certain political viewpoints and "suppress" competing viewpoints, but one suspects that most school districts have made these decisions.

334. *See supra* text accompanying notes 309-14.

335. *Id.*

4. Determining the Source of Fundamental Political and Social Values Inculcated in Public School Students

The United States Constitution provides the first source of those fundamental values that public schools may inculcate. The principles of our democratic form of government pervade the Constitution.[336] Religious tolerance and freedom are deeply imbedded in our constitutional tradition,[337] as well as principles of racial equality and freedom from racial discrimination.[338] It should be permissible for school officials to choose to inculcate students in constitutionally recognized fundamental values while refusing to permit the study of beliefs contrary to those values. Thus, school officials can decide to inculcate students in the fundamental values of religious tolerance, racial equality, and the merits of democracy while refusing to permit discussions of religious bigotry, racial prejudice, and totalitarianism.

Admittedly, not all fundamental values that public schools traditionally impart to students are rooted in constitutional tradition. Many of these values, however, are imbedded in federal, state, and local laws which in turn mirror social and moral values of society. Therefore, public school officials can inculcate students in such matters as personal honesty and integrity, family life and responsibilities, sexual standards, and the harmful effects of drug and alcohol abuse. Competing viewpoints need not receive equal time.

Other values that public schools inculcate are not constitutionally or legally based. Rather, they are founded on moral and ethical viewpoints.

336. U.S. CONST. art. I, § 2 (providing for election of members of the House of Representatives); U.S. CONST. art. II, § 1, cl. 2-4 (providing for election of the President and Vice President by the Electoral College); U.S. CONST. amend. XII (reforming the procedure of the Electoral College); U.S. CONST. amend. XIV, §§ 1-2 (providing that no state shall abridge privileges or immunities of citizens of the United States or deny to any person equal protection of the laws, and further providing for the reduction of representation in the House of Representatives if the right to vote is denied to eligible voters); U.S. CONST. amend. XV (prohibiting the abridgement of the right to vote on grounds of race, color, or previous condition of servitude); U.S. CONST. amend. XVII (providing for the direct election of United States Senators); U.S. CONST. amend. XIX (extending the right to vote to women); U.S. CONST. amend. XXII (limiting the Presidential term of office); U.S. CONST. amend. XXIII (permitting voters in the District of Columbia to vote in Presidential elections); U.S. CONST. amend. XXIV (prohibiting poll taxes as a condition for voting in federal elections); U.S. CONST. amend. XXVI (reducing the voting age to 18 in federal and state elections).

337. U.S. CONST. amend. I. *See supra* notes 326-27.

338. U.S. CONST. amend. XIII (abolishing slavery and involuntary servitude); U.S. CONST. amend. XIV, § 1 (conferring citizenship on persons born in the United States, and prohibiting states from abridging privileges or immunities of citizens of the United States, from depriving persons of life, liberty, or property without due process of law, and from denying persons equal protection of the laws); U.S. CONST. amend. XV (prohibiting abridgement of the right to vote on account of race, color, or previous condition of servitude).

Examples include respect for others, personal hygiene, civic responsibility, and the work ethic. Because these values are not rooted in the Constitution or in federal, state, or local law, the state's interest in inculcating these values may be less substantial. Nevertheless, there are few—if any—First Amendment interests at stake.[339] Therefore, the inculcation of these values ordinarily should be permitted. Pursuant to this analysis, perhaps the only ideas and beliefs that cannot be imparted without offending the First Amendment are those that are contrary to constitutionally or legally based values.[340]

It is possible to distinguish between value inculcation and narrow political, partisan, and religious indoctrination. By scrutinizing the content of the imparted information and determining the proximity of the information to constitutionally or legally based values, it ordinarily can be determined whether the teaching of the questioned information is inculcative or indoctrinative. If the answer is clear, there need be no further inquiry. In some cases, however, the answer will not be apparent. In these instances, it becomes necessary to examine the motivation behind the decision to impart the challenged information to students.

C. Motivational Inquiry—A Last Resort

1. The Appropriateness of Motivational Inquiry in the Public School Classroom

In *Pico*, Justice Brennan indicated that the constitutionality of a school board's decision to remove books from the school library "depends upon the motivation behind [the school board's] actions."[341] While recognizing that school officials "possess significant discretion to determine the content of their school libraries," Justice Brennan reiterated that "that discretion may not be exercised in a narrowly partisan or political manner."[342] The First Amendment is violated if school officials "*intended* by their removal decision to deny [students] access to ideas with which [the school board] disagreed, and if this intent was the deci-

339. Values such as respect for others and personal hygiene are not likely to implicate First Amendment interests if the Amendment's scope in the public school context is limited to a prohibition of narrow political, partisan, and religious indoctrination.

340. As noted previously, examples include religious bigotry, racial prejudice, and antidemocratic beliefs. Narrow political or partisan indoctrination is another example of imparting an antidemocratic belief. The effect of indoctrinating students in the principles of a particular political party is akin to indoctrinating them in the principles of totalitarianism. The practice of indoctrinating students in the principles of the political party currently in power is one hallmark of a totalitarian regime.

341. 457 U.S. at 871 (plurality opinion).

342. *Id.* at 870.

sive factor in [the] decision."[343] Conversely, the students in *Pico* conceded—and Justice Brennan implicitly agreed—that "unconstitutional motivation would *not* be demonstrated if it were shown that [the school board] had decided to remove the books at issue because those books were pervasively vulgar" or "if it were demonstrated that the removal decision was based solely upon the 'educational suitability' of the books."[344]

Justice Blackmun agreed, stating in concurrence 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."[345] For the removal decision to be valid,

> the school board must "be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," . . . and that the board had something in mind in addition to the suppression of partisan or political views it did not share.[346]

By concurring in the judgment to remand the case for a trial on the merits, Justice White implicitly acknowledged that a determination of the school board's motivation would be decisive in resolving the constitutional issue.[347]

a. Curricular Decisions

Pico dealt with the removal of books from a public school library. Faced with that issue, a majority of the Justices believed that an inquiry into the motivation of the school board was required. Motivational inquiry will rarely be necessary when scrutinizing curricular and instructional choices of states and school authorities because the First Amendment plays little or no part in curricular choices.[348] Even when First Amendment issues are raised, the analysis suggested earlier is likely to resolve these issues without resorting to a motivational inquiry.[349] Nevertheless, an inquiry into the motivation underlying curricular and instructional decisions may occasionally be necessary.

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343. *Id.* at 871 (emphasis original).

344. *Id.* (emphasis original).

345. *Id.* at 879-80 (Blackmun, J., concurring) (emphasis original).

346. *Id.* at 880 (quoting Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 509 (1969)).

347. *See supra* text accompanying notes 232-34.

348. 457 U.S. at 878 n.1 (Blackmun, J., concurring). *See also supra* text accompanying notes 300-03.

349. *See supra* part B of this section.

For example, such an inquiry may be required where school officials decide that a biology course should contain a unit on the theory of evolution but not one on creationism. *Epperson v. Arkansas*[350] indicated that the teaching of creationism to the exclusion of evolution would violate the First Amendment Establishment Clause.[351] This practice could also be held to violate the Free Exercise Clause and the First Amendment's prohibition against narrow religious indoctrination in public schools.[352] While efforts to teach creationism to the exclusion of evolution have largely disappeared, believers in creationism today advocate a balanced approach in the teaching of biology.[353] Rather than directly attacking the teaching of evolution, they urge that equal time be given to the teaching of creationism.[354] This argument is based on the proposition that the First Amendment converts the public school classroom into a marketplace of ideas in which students have a right of access to information, ideas, and beliefs. In addition, proponents of a balanced approach argue that the teaching of evolution to the exclusion of creationism constitutes narrow antireligious indoctrination.[355] Conversely, the overwhelming opinion of biologists is that this content-based decision to teach evolution but not creationism reflects sound educational and pedagogical goals.[356]

According to this proposed model, the initial inquiry must determine the proximity of the information being taught to legitimate societal values. Admittedly, the theory of evolution is not constitutionally or legally based and does not reflect any ethical, moral, or social value.

350. 393 U.S. 97 (1968). *See supra* text accompanying notes 89-104.

351. 393 U.S. at 109.

352. *See supra* text accompanying notes 324-30.

353. For two analyses of the current attempt by creationists to require a balanced approach to the teaching of the origins of life, see Le Clercq, *supra* note 318, at 209; Note, *Freedom of Religion and Science Instruction in Public Schools*, 87 YALE L.J. 515 (1978). The latter suggests that the First Amendment requirement of governmental neutrality in religious matters necessitates neutralized instruction in the origins of the world and of life. *Id.* at 550-64. Conversely, Le Clercq takes the position that the teaching of creationism, even as part of a balanced approach, violates the Establishment Clause. Le Clercq, *supra* note 318, at 214-26. This conclusion follows from his assumption that creationism is a purely religious theory and has no plausible scientific basis. *Id.* at 214. However, he concedes that the Free Exercise Clause rights of students whose religious beliefs are offended by being compelled to receive instruction in the theory of evolution may necessitate that those students be exempted from compulsory attendance at classes where the theory of evolution is taught. *Id.* at 230-32 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972), which held that Old Order Amish children could not be compelled to attend public schools after the eighth grade when objected to on Free Exercise Clause grounds).

354. Le Clercq, *supra* note 318, at 210-12, 216; Note, *supra* note 353, at 550-65.

355. Note, *supra* note 353, at 536-43.

356. Le Clercq, *supra* note 318, at 214 (citing Resolution of the Comm'n. on Science Educ. of the Am. Ass'n for the Advancement of Science (Oct. 13, 1972), in THE BIOLOGICAL SCIENCES CURRICULUM STUDY NEWSLETTER NO. 49, at 17 (1972)).

Rather, the teaching of evolution merely imparts information concerning a widely accepted scientific theory and does not constitute value inculcation. School officials cannot justify their decision to teach evolution but not creationism solely by reference to the source of the legitimate societal value being taught. No such value exists except for the value of imparting knowledge. The problem is compounded when one recognizes that a balanced approach to the teaching of evolution and creationism arguably is necessary to protect students from narrow antireligious indoctrination.[357]

Although the teaching of evolution does not constitute value inculcation, it does have the potential of resulting in narrow antireligious indoctrination. Consequently, the initial inquiry into the content of the imparted information and its proximity to legitimate societal values does not lead to the conclusion that the teaching of evolution constitutes value inculcation rather than indoctrination. This issue can be resolved only by a second inquiry that examines the motivation underlying the decision to teach evolution to the exclusion of creationism. If the decision is based on sound educational and pedagogical reasons and is supported by the weight of expert opinion, the decision should be upheld. If, however, the decision is based on a desire to suppress an unpopular or officially disfavored religious belief, the decision cannot stand.

b. Decisions Regarding Student Expression in the Classroom

Motivational inquiry may also be necessary in cases concerning classroom activities of students that are not directly related to the curriculum or teaching methodology: the wearing of political insignia by students;[358] profane, vulgar, or sexually explicit comments;[359] racial epithets;[360] and speech by students that school officials neither invite nor desire. Even in these cases, a utilization of this proposed model will often

357. *See supra* text accompanying notes 353-55. Justice Black raised precisely this point in his concurring opinion in Epperson v. Arkansas, 393 U.S. at 113 (Black, J., concurring). *See supra* text accompanying note 102.

358. *See supra* text accompanying notes 49-64.

359. *See, e.g.*, Rosenfeld v. New Jersey, 408 U.S. 901 (1972). Although the majority summarily vacated the judgment of a New Jersey court that upheld a conviction for the use of indecent and offensive language, Justice Powell argued that "the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience" is not protected by the First Amendment. *Id.* at 905 (Powell, J., dissenting). Although this view has never been adopted by the Court, a strong argument can be made that, in the restricted environment of the public school classroom with a captive audience consisting of minors, such language ought not to receive any constitutional protection. *See also* Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321, 375-79 (1979).

360. Just as the use of offensive and indecent language that offends the sensibilities of minors held captive in the public school classroom should not be protected by the First Amend-

be unnecessary. If a student's exercise of First Amendment freedoms in the classroom does in fact disrupt the educational process, it can be restricted and punished as unprotected conduct.[361] For example, students can be punished for "making noise in class," even if the "noise" happens to be a political speech delivered in an algebra class. In such an instance, the speech wasted scarce class time, and therefore interfered with the educational process. It would be a rare instance when speech in the classroom, unrelated to the topic of discussion, could not be restricted and punished as unprotected conduct.

A more difficult situation arises when verbal expression in the classroom is germane to the subject matter under discussion, but nevertheless is silenced. In such a case, it might be difficult for school officials to demonstrate that the comments disrupted the educational process, unless they can prove that the expression did nothing more than waste valuable class time. According to this proposed model, it will be necessary to determine whether the decision to silence the student proximately relates to the inculcation of permissible societal values. If this inquiry does not reveal that the decision to silence the student substantially furthered the goal of value inculcation rather than indoctrination, a second, motivational, inquiry becomes necessary. Two examples illustrate this point.

In the first example, a student is silenced after advocating the notion of white supremacy in a civics class devoted to a discussion of racial equality and tolerance. In this instance, the speech of the student directly contradicts the constitutionally based value of racial equality. Therefore, school officials should be permitted to silence this expression, and no subsequent inquiry into the motivation underlying this decision is necessary. Similarly, school officials should be permitted to silence student speech in the classroom advocating views that contradict legally based values, such as speech that espouses cheating, dishonesty, illegal use of drugs, or sexual promiscuity.

In the second example, a student is silenced after advocating creationism in a biology class devoted to a discussion of evolution.[362] The decision to silence this type of speech does not bear a close proximity to the inculcation of permissible societal values, but it has the potential of resulting in narrow religious indoctrination. The initial inquiry into the proximity of the decision to legitimate societal values does not answer the

ment, *see supra* note 359, racist remarks should also remain unprotected in this restricted environment. *See* Garvey, *supra* note 359, at 361-66.

361. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969). *See supra* text accompanying notes 61-64.

362. *See supra* text accompanying notes 350-57.

question whether the decision was inculcative or indoctrinative. Thus, an inquiry into motivation is required.

An inquiry into motivation may also be required where school officials suppress student expression in the classroom that is passive, takes no class time, and does not disrupt the educational process. An example would be a decision by school officials to require students to remove armbands that symbolize a political belief.[363] If this action is not disruptive, it cannot be restricted as unprotected conduct. An examination of the proximity of the decision to suppress the speech to the inculcation of legitimate societal values reveals that there is no close proximity. Therefore, an inquiry into the motivation underlying the decision must be made. If the purpose is to suppress the expression of a political viewpoint opposed by school officials, the decision could not stand.[364]

Another example would be a situation where a high school French teacher displays travel posters of France in the classroom but denies a student request to display travel posters of Spain or political posters in the classroom. The display of the additional posters would not disrupt the educational process, and therefore cannot be disallowed on the grounds that it is unprotected conduct. Additionally, the decision to suppress the expression does not further the inculcation of legitimate societal values. Hence, an inquiry into the motivation of the teacher is required. In this case, the teacher undoubtedly will argue that the display of travel posters of France aids the educational goal of heightening student interest in France and the French language, and that the display of other posters would detract from that goal. A decision based upon this motivation is consistent with the function of public education to transmit knowledge, and should be upheld as having been made for sound pedagogical reasons and not for the purpose of suppressing disfavored ideas.

2. *Motivational Inquiry in Operation*

In *Pico*, both Justices Brennan and Blackmun suggested the nature of the inquiry to be made by courts in examining the motivation underlying decisions of school officials.[365] Two factors must be examined: the substantive criteria devised by school officials used in making decisions, and the regularity of the procedures used to arrive at the particular decision being challenged.

The Island Trees school board appointed a Book Review Committee to recommend which of the questioned books should be retained or re-

363. *Tinker*, 393 U.S. 503 (1969). *See supra* text accompanying notes 49-64.
364. 393 U.S. at 509-11.
365. 457 U.S. at 872-75 (plurality opinion); *id.* at 879-80 (Blackmun, J., concurring).

moved.[366] In its charge to the committee, the school board directed the committee to consider several factors: "educational suitability," "good taste," "relevance," and "appropriateness to age and grade level."[367] None of the Justices in *Pico* manifested any disagreement with those criteria. Justice Blackmun noted several factors that could be used in a book removal decision: "School officials must be able to choose one book over another . . . when the first book is deemed more relevant to the curriculum, or better written, or when one of a host of other politically neutral reasons is present."[368] He added that school boards could "refuse to make a book available to students because it contains offensive language, . . . or because it is psychologically or intellectually inappropriate for the age group, or even, perhaps, because the ideas it advances are 'manifestly inimical to the public welfare.' "[369] Finally, Justice Blackmun stated that "school officials may choose one book over another because they believe that one subject is more important, or is more deserving of emphasis."[370]

Such standards tacitly recognize the appropriateness of the inculcative function of public education. Of all the terms used, perhaps "educational suitability" is the most comprehensive standard. "Appropriateness to age and grade level," "relevance to the curriculum," "better written," and "psychologically or intellectually inappropriate" are subsumed within the more general standard of "educational suitability."

The term "educational suitability" is ambiguous and capable of different constructions. It is not, however, "standardless" or "highly subjective" as the dissenting opinions in *Pico* assert.[371] The more specific terms described above clarify this ambiguous standard and give it precise meaning. By construing the standard with due regard for the inculcative function of public education, and by giving maximum deference to the decisions of school officials as to the values to be instilled, a clearly understood standard results. If the school board action is undertaken with a view to students' physical, psychological, and mental well-being, and if reasonable persons can differ as to whether the challenged action will promote that well-being, then the educational suitability standard has

366. *Id.* at 857 (plurality opinion).

367. *Id.*

368. *Id.* at 880 (Blackmun, J., concurring).

369. *Id.* (partially quoting Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925)). *See supra* text accompanying notes 9-10.

370. 457 U.S. at 880 (Blackmun, J., concurring).

371. *Id.* at 890 (Burger, C.J., dissenting); *id.* at 894 (Powell, J., dissenting).

been met.[372] On the other hand, if the challenged action was taken to impose narrow political, partisan, or religious views upon students with a corresponding refusal to permit students to have access to competing views, then the challenged action must be invalidated.

In addition to examining the substantive criteria upon which the challenged school board action was based, an inquiry into the motivation underlying that action must include an examination of the regularity of the procedures used to arrive at that decision. In his opinion for the court of appeals in *Pico*, Judge Sifton made this inquiry.[373] After noting that the Island Trees Board of Education had rejected the recommendations of its Book Review Committee, and that the committee had followed board-established substantive criteria which focused on the standard of educational suitability, Judge Sifton characterized that board action as "an unusual and irregular intervention in the school libraries' operations by persons not routinely concerned with such matters."[374] Justice Brennan made the same point: "This would be a very different case if the record demonstrated that [the school board] had employed established, regular, and facially unbiased procedures for the review of controversial materials."[375] He further noted that the complaining students had alleged that, in making its decision, the school board had "ignored 'the advice of literary experts,' the views of 'librarians and teachers within the . . . system,' the advice of the Superintendent of Schools, and the guidance of publications that rate books for junior and senior high school students."[376] Finally, after rejecting decisions arrived at through established channels, the board "resorted to the extraordinary procedure of appointing a Book Review Committee—the advice of which was later rejected without explanation."[377] Justice Brennan concluded that the school board's "removal procedures were highly irregular and ad hoc—the antithesis of those procedures that might tend to allay suspicions regarding [the board's] motivations."[378]

An examination of the procedures used to reach the challenged decision is not unusual in judicial inquiries into the motivation of governmental decisionmakers. It is common in cases involving Equal

372. This inquiry is an application of the traditional "rational nexus" standard of judicial review discussed *supra* note 307 and accompanying text.

373. *Pico*, 638 F.2d 404 (2d Cir. 1980) (plurality opinion).

374. *Id.* at 414.

375. 457 U.S. at 874 (plurality opinion).

376. *Id.*

377. *Id.* at 875.

378. *Id.*

Protection Clause[379] challenges to governmental action that appears racially neutral on its face but has a racially disproportionate impact.[380] In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[381] the Supreme Court noted several procedural factors that may be examined in an effort to ascertain the motivation behind the governmental agency's decision:

> The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. . . . The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes. . . . Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.
>
> The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege.[382]

379. U.S. CONST. amend. XIV, § 1, provides in pertinent part: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

380. Several Supreme Court cases have noted that a law that is racially neutral on its face and serves ends "within the power of government to pursue," does not deny equal protection of the laws "simply because it may affect a greater proportion of one race than of another." Washington v. Davis, 426 U.S. 229, 242 (1976) (upholding a requirement that applicants for the Washington, D.C. Police Department pass an objective written test of verbal skills, in spite of evidence that the failure rate of blacks was significantly higher than the failure rate of whites). Disproportionate impact is relevant, but must be coupled with "[p]roof of racially discriminatory intent or purpose" to show a denial of equal protection. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (upholding a municipality's refusal to rezone a 15-acre parcel of land from single family to multiple family classification, in spite of the argument that excluding low and moderate income tenants had a disproportionate effect on persons who were both poor and black). Similarly, school desegregation cases have held that the mere fact of racial imbalance in schools in a school district is not in itself violative of the Equal Protection Clause. "[T]he differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate." Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973) (emphasis original). It is also significant that the Supreme Court will inquire into the purpose of governmental actions that are challenged as violating the First Amendment Establishment Clause, *supra* note 326. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971).

381. 429 U.S. 252 (1977).

382. *Id.* at 267-68. Although the Supreme Court in *Pico* did not refer to these procedural factors, Judge Sifton not only referred to them but quoted them at length. *See Pico*, 638 F.2d at 417 (plurality opinion).

In applying these procedural factors to the facts alleged by the students in *Pico*, it is clear that the trial court could have found ample evidence of unconstitutionally motivated action. Presumably the normal procedural sequence of events would be for a school district's professional staff, including teachers and librarians, to make decisions involving the acquisition and removal of books. However, the Island Trees Board of Education apparently ignored the professional judgment of these educators.[383] Similarly, after appointing a Book Review Committee and providing it with facially unbiased criteria to use in making its recommendations, the school board rejected those recommendations without explanation.[384] Finally, the students alleged that the board members made statements tending to prove that the removal decisions were based on "their social, political and moral tastes."[385] Had the students been able to prove these allegations, then a prima facie case of unconstitutional motivation would have existed. This prima facie case would have shifted the burden to the school board to demonstrate, by a preponderance of the evidence, that the same decision would have been reached even in the absence of this impermissible motivation.[386]

A similar type of motivational inquiry can be used to review decisions of school officials concerning classroom activities. The reviewing court should first examine the substantive criteria promulgated by school officials. In response to challenges to curricular and instructional decisions, school officials can present evidence of their overall curriculum and instructional model, established criteria for textbook selection, and policies concerning both teaching methodology and the values to be instilled in students.[387] Such criteria includes factors like educational suit-

383. 457 U.S. at 874 (plurality opinion).

384. *Id.* at 875.

385. *Id.* at 858-59.

386. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977). The *Mt. Healthy* rule regarding mixed motivation was expressly adopted by the plurality opinion in *Pico*. Justice Brennan stated that if the intent to deny students access to ideas with which the school officials disagreed was a "decisive factor" in the decision to remove books from the school library, then the decision violated the First Amendment. 457 U.S. at 871. Justice Brennan added that "[b]y 'decisive factor' we mean a 'substantial factor' in the absence of which the opposite decision would have been reached." *Id.* at 871 n.22 (citing *Mt. Healthy*, 429 U.S. at 287). For example, if school board actions concerning curricular or instructional matters are based upon both a permissible motivation to inculcate students in societal values and an impermissible motivation to suppress ideas objected to on narrow political, partisan, or religious grounds, the removal decision would stand if the school officials can prove, by a preponderance of the evidence, that the decision would have occurred even in the absence of the impermissible motivation.

387. Nothing in the Constitution would prevent school officials from adopting variable standards based on the age and grade level of students. Some subjects that might be appropriate for high school students would not only be inappropriate but also psychologically damag-

ability, appropriateness to age and grade level, relevance to the established curriculum, and psychological and intellectual appropriateness.[388] In challenges to actions of school officials that silence a student's speech in the classroom, the school officials can present evidence of rules and policies governing classroom deportment, teacher authority, and student discipline.[389] Such criteria should be clear, nonambiguous, and narrowly tailored to serve the school's interests in preventing disruption of the educational process and in serving the inculcative function of that process.

After examining the substantive criteria, the court should examine the regularity of the procedures used to arrive at the challenged decision, measuring the procedures actually used against the factors detailed in *Arlington Heights*.[390] In challenges to curricular and instructional decisions, the court should examine evidence of the types of procedural irregularities alleged in *Pico*.[391] In challenges to the actions of school officials which silence a student's speech in the classroom,[392] the court should inquire into the fairness, impartiality, and consistency of the procedure. This inquiry might seek evidence that school officials have departed substantially from principles typically associated with procedural due process.[393]

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ing to younger children. For example, sex education as it is taught to teenagers is quite different from that taught to students in the primary grades. *See, e.g.*, Trachtman v. Anker, 426 F. Supp. 198 (S.D.N.Y. 1976), *rev'd in part*, 563 F.2d 512 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978). *See also supra* note 156. Furthermore, public elementary and secondary school students are minors. The younger the child, the less likely it is that the child possesses the intellectual and emotional maturity to make rational and independent decisions. As Justice Stewart noted in Ginsberg v. New York, 390 U.S. 629, 649 (1968) (Stewart, J., concurring), the capacity for free choice is the basic presupposition of the First Amendment. Finally, the child's degree of "captivity" in the inherently coercive environment of the public school classroom may well depend on his or her emotional and intellectual maturity. For all of these reasons, common sense dictates that students at different levels of physical, emotional, and intellectual development be treated differently.

388. *See supra* text accompanying notes 367-70.

389. *See supra* text accompanying notes 363-64 for a hypothetical example. There is no constitutional reason why these types of school rules and policies cannot contain variable standards. *See supra* note 387. For example, codes of student conduct may permit high school students, but not elementary school students, to write and publish a student newspaper; to have freedom of mobility within the school building; or to be permitted to leave school early when the day's school work is completed. Conversely, certain types of misconduct, such as cheating or plagiarism, might be treated as a more serious offense when committed by a high school student than when committed by an elementary school student.

390. *See supra* text accompanying note 382.

391. 457 U.S. at 874-75 (plurality opinion). *See supra* text accompanying notes 374-78.

392. *See supra* text accompanying notes 363-64 for a hypothetical example.

393. Goss v. Lopez, 419 U.S. 565 (1975) held that on the basis of state law, public school students have "legitimate claims of entitlement to a public education," which are property interests protected by the Due Process Clause of the Fourteenth Amendment. *Id.* at 573.

Drawing analogies from criminal law and procedure, the reviewing court might also permit the introduction of evidence suggesting the retroactive application of a rule or policy;[394] evidence comparing the punishment imposed on the complaining student with punishments imposed on similarly-situated students;[395] evidence suggesting that the punishment was disproportionate to the misconduct of the student;[396] and evidence of the decisionmaker's bias against or dislike of the student.[397] Such facts, if alleged and proved, would indicate that the silencing and subsequent punishment of the student was motivated by a desire to punish the student for his objectionable ideas and beliefs, and not by a concern for the efficient functioning of the educational process.[398]

A judicial inquiry into motivation probably would result in the examination of both the substantive criteria upon which the challenged ac-

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Therefore, a suspension from public school necessitates both notice and a hearing. The Court held that with short suspensions of 10 days or less, the "process" that is "due" consists only of "effective notice and informal hearing permitting the student to give his version of the events" to the disciplinarian. *Id.* at 583. The Court suggested, however, that longer suspensions or expulsions may require more formal procedures, such as the right to retain counsel, to confront and cross-examine witnesses, and to call the student's own witnesses. *Id.* at 583-84.

394. In a proceeding to punish a student for misconduct, retroactivity does suggest procedural irregularity. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 474-77 (1978). The Ex Post Facto Clauses, U.S. CONST. art. I, § 9, cl. 3, and U.S. CONST. art. I, § 10, cl. 1, apply only to attempts to enact criminal or penal measures that have a retroactive effect. Calder v. Bull, 3 U.S. (3 Dall.) 386, 390, 397 (1798). Although disciplining a public school student is not criminal in nature, *see* Ingraham v. Wright, 430 U.S. 651 (1977), general retrospective legislation may violate due process. Railroad Retirement Bd. v. Alton R.R. Co., 295 U.S. 330 (1935).

395. Although such a comparison is not constitutionally mandated even in capital or other criminal cases, Pulley v. Harris, 104 S. Ct. 871 (1984), the imposition of widely divergent penalties on students who have committed the same or similar offenses is an indication of procedural irregularity.

396. The prohibition of cruel and unusual punishment, U.S. CONST. amend. VIII, has been held to prohibit criminal sentences that are significantly disproportionate to the offense committed. Solem v. Helm, 463 U.S. 277 (1983), struck down a life sentence with no possibility of parole imposed on a defendant convicted of uttering a "no account" check for $100. The defendant, who had six prior felony convictions, all for nonviolent offenses, was sentenced as a recidivist.

397. An impartial jury in criminal cases is required by the Sixth Amendment. U.S. CONST. amend. VI. Similarly, due process requires an impartial judge in criminal proceedings. Ward v. Village of Monroeville, 409 U.S. 57 (1972). The requirement of an impartial decisionmaker has been applied to civil proceedings as a matter of procedural due process. *E.g.*, Goldberg v. Kelly, 397 U.S. 254, 271 (1970). In short suspensions from public schools for 10 days or less, the decisionmaker himself can be a witness of the conduct that forms the basis for the charge. Goss v. Lopez, 419 U.S. 565, 584 (1975).

398. The establishment of a prima facie case of unconstitutional motivation will shift to the school board the burden to demonstrate, by a preponderance of the evidence, that the same decision would have been reached even in the absence of the impermissible motivation. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977). *See supra* note 386 and accompanying text.

tion was based and the procedural regularity surrounding the decision. By being sensitive to the possibility of such an inquiry, school boards and administrators can take steps to insure that they do not act out of improper motives or give such an appearance. They should take care to adopt facially unbiased, nonambiguous substantive criteria and follow procedures that are tailored to serve articulated and legitimate educational functions. These preventive measures will protect school officials from unwelcome litigation and fully serve the principles of the First Amendment.

Conclusion

The tradition of value inculcation in public education and the desire of students to have access to ideas and beliefs ideally should complement each other and not be in conflict. Responsible and sensitive school boards, administrators, and teachers should recognize and attempt to attain this ideal by permitting various ideas and views to be heard within the context of the prescribed curriculum and the necessity for value inculcation. Where the interested parties are unable to reconcile their conflicting views, however, a resolution of the dispute must rest on a determination of the constitutional interests of the respective parties.

This Article has canvassed Supreme Court cases that have addressed the constitutional issues involved and has concluded that the First Amendment rights of public school students in the classroom are extremely limited. The Supreme Court consistently has affirmed the legitimacy and appropriateness of the inculcative function of public education, and has recognized that a doctrine of wide-ranging First Amendment rights in the public school classroom would contradict and ultimately defeat that function.

At the same time, this Article recognizes that public school classrooms are not wholly immune from First Amendment limitations. In particular, school officials are not permitted to indoctrinate students in narrow political, partisan, or religious views. Courts therefore must occasionally intervene to prevent such indoctrination. By making a twin inquiry into the content of the information being taught and the constitutional, legal, or other basis of the values being instilled, courts ordinarily will be able to determine if the challenged practice constitutes permissible value inculcation or impermissible indoctrination. In close cases, it will be necessary to make a further inquiry into the motivation underlying the challenged action.

Courts should proceed with extreme caution in reviewing decisions of school officials. School boards, while not possessing educational ex-

pertise, are democratically accountable and should be presumed to reflect the values, goals, and aspirations of the community. Teachers and school administrators, while not democratically accountable, possess the educational expertise to make decisions and recommendations based on valid educational and pedagogical goals. Courts, which are neither democratically accountable nor possessed with educational expertise, should pay extreme deference to decisions of school officials, and intervene only in rare instances.

School officials do not appreciate judicial intervention into classroom activities, but by being aware of the possibility, they can become sensitive to the underlying constitutional ramifications of their proposed actions. School officials, while they should reflect valid community concerns, have the constitutional duty to make decisions based upon valid financial and educational considerations and not on the basis of narrow political, partisan, or religious views. To insure that appropriate educational concerns are being addressed, school boards should rely heavily on the expert advice of their professional educators when curricular and instructional decisions are made. If school officials act with caution, deliberation, and sensitivity, their decisions rarely will be successfully challenged. At the same time, the First Amendment interests of all parties will be fully protected.