Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School

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[D]o as I say, not as I do.

—John Selden*
1584–1659

I. INTRODUCTION

In Twentieth Century America, it is widely accepted that parents can be compelled to send their children to public schools, or their legal equivalent,[1] for the major part of their childhood. But does the state have a free hand in dictating the content of the education the child receives, the manner in which it is delivered, the rules and regulations governing the educational enterprise, and the extent to which access to alternative view-

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I was delighted to learn that the *Yale Law Journal* planned an issue honoring Professor Charles L. Black on his retirement from teaching at Yale Law School, and I am most appreciative of the opportunity the editors have given me to contribute to the issue. Had I dreamed when I was a student in his class in constitutional law that I would myself go into legal education, I would have noted then that Charles Black was the perfect role model for a teacher. He was compassionate, stimulating, engaged, concerned with fairness, and made one care about the law not only as an intellectual exercise, but also for the role it could play in bringing about a more just society. One of my classmates (now also in legal education) commented after class one afternoon that he had finally decided what he wanted to be when he grew up—Charles Black. If we did not realize then that he was to be our role model for a teacher and scholar, we already knew that he was our role model for a human being. It is a privilege to be asked by the editors to write an essay on law and the schools in honor of my friend and mentor for nearly a quarter of a century.

* R. WATERS, JOHN SELDEN AND HIS TABLE-TALK 174 (1899).

1. *See, e.g.*, N.J. STAT. ANN. § 18A:38-25 (West 1968) (replacing N.J. STAT. ANN. § 18:14-14 (West 1965)), requiring each child to attend either the state public schools or "a day school in which there is given instruction equivalent to that provided in the public schools . . . or to receive equivalent instruction elsewhere than at school." The language, "equivalent instruction elsewhere than at school," from the predecessor of that law has been interpreted to require only a showing of *academic* equivalence for non-school instruction. State v. Massa, 95 N.J. Super. 382, 390, 231 A.2d 252, 257 (Morris County Ct. 1967).

points is permitted? Courts have played an increasing role in this area, trying to strike a balance between the rights of the individual (parent or child) and the interests of the state. Basic to any discussion of the role of courts in educational decision-making is the primacy of education in American ideology.[2] Americans believe that education is central to the realization of a truly democratic and egalitarian society. It is through education that the skills necessary to exercise the responsibilities of citizenship and to benefit from the opportunities of a free economy will be imparted, no matter how recently arrived or previously disadvantaged the individual.

The Supreme Court shares the generally accepted view that the mission of our educational institutions is to transmit society's common values and beliefs to the next generation,[3] including those essential to participation in a democracy.[4] This, one assumes, must include such constitutional values as freedom of expression, freedom to worship as one wishes, and the right to privacy, among other important individual rights. The Supreme Court has also indicated that democratic norms cannot be taught in an institution that suppresses democratic values: The fact that schools "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."[5] However, while students do not "shed their

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2. The essence of the American common school, even by 1950, was a school "providing students of diverse backgrounds with a minimum common educational experience, involving the intellectual and moral training necessary to the responsible and intelligent exercise of citizenship." L. CREMIN, THE AMERICAN COMMON SCHOOL 219 (1951).

3. *See, e.g., Ambach v. Norwick*, in which the Court acknowledges the importance of the public schools "in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests . . . ." 441 U.S. 68, 76 (1979). *See also Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, noting that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political." 457 U.S. 853, 864 (1982) (plurality opinion) (quoting Brief for Petitioners at 10). Many states require both moral and "patriotic" instruction in the public school curriculum. *See, e.g.*, N.Y. EDUC. LAW § 801 (McKinney 1969) ("In order to promote a spirit of patriotic and civic service and obligation and to foster in the children of the state moral and intellectual qualities which are essential in preparing to meet the obligations of citizens . . ., the regents . . . shall prescribe courses of instruction in patriotism and citizenship . . . ."); S.D. CODIFIED LAWS ANN. §§ 13-33-6 (1982):

> [T]here shall be given . . . special moral instruction intended to impress upon the minds of students the importance of truthfulness, temperance, purity, public spirit, patriotism, respect for honest labor, obedience to parents, respect for the contributions of minority and ethnic groups to the heritage of South Dakota, and due deference to old age.

See also id. at § 13-33-5 (patriotic instruction required).

4. If education is essential to the maintenance of a democratic form of government, one wonders why the Framers failed to make it either a federal responsibility or a constitutional right. *Cf.* U.S.S.R. CONST. art. 45 ("Citizens of the USSR have the right to education.").

The responsibility of the state for education developed slowly. In colonial times, the Puritans and others regarded it as appropriate for the state to establish schools, but the state was acting principally on behalf of the church; education was in the service of religion. The Anglicans, on the other hand, thought education was not the business of the state. Thus, at the time of the drafting of the Constitution, there was no uniformly accepted view of the role of state schools or state-compelled education.

5. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

constitutional rights . . . at the schoolhouse gate,"[6] the Supreme Court has indicated that the "special characteristics of the school environment"[7] may limit the reach of constitutional protections. Thus the very nature of the process of inculcating values in those who are not yet adults apparently necessitates that the constitutional rights of both teachers and students be somewhat circumscribed.

The dilemma is clear: Education necessarily involves the process of selection, but it also requires some degree of order within the institution to carry out the educational mission. On the other hand, if the educational institution is wholly undemocratic, students are likely to get mixed signals with regard to the democratic values needed to function as citizens in our society: The way in which school administrators operate schools may have a more powerful influence on students than the lessons in their civics textbooks. Socialization to values through a uniform educational experience necessarily conflicts with freedom of choice and the diversity of a pluralistic society. Recent cases reflect this conflict between creating a protected environment for the transmission of society's democratic values and the message that such an environment—where the rights of the individual are given less emphasis than the need for order and control—conveys to students. The courts have failed to articulate clear guidelines for reconciling this conflict.[8]

The mission of schools as the transmitters of social, moral, and political values makes it inevitable that disputes will arise over which values are to be inculcated and who is authorized to make these decisions. There is no consensus, for example, on whether schools should emphasize a common language, history, and culture promoting assimilationist and national norms, or emphasize pluralism and diversity. Should the primary goal of education be to enhance the self-realization of the student or to mold the student to advance the common goals of society? Until the middle of the twentieth century, these policy choices were almost solely the prerogative of school administrators and local boards of education.[9] Today, however, various competing groups and individuals—school boards, school administrators, teachers, parents, students, community leaders, minority groups, and federal and state agencies—seek to control education decision-making,

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6. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969).
7. *Id.*
8. The state clearly may use the "public schools [to] . . . inculcat[e] fundamental values necessary to the maintenance of a democratic political system . . . ." Ambach v. Norwick, 441 U.S. 68, 77 (1979). On the other hand, school officials may not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
9. That children, in certain contexts, have constitutional rights not subject to abridgement by government was not clearly established until 1967. *In re* Gault, 387 U.S. 1, 13 (1967) ("neither the Fourteenth Amendment nor the Bill of Rights is for adults alone").

to have a say in which values are transmitted and how. Their struggles for control have often ended up in the courts.[10]

As the courts have attempted to outline the nature and extent of the constraints placed upon school authorities by the Constitution, some people have expressed the growing concern that the schools are becoming "le-

10. Since Brown v. Board of Educ., 347 U.S. 483 (1954), the Supreme Court has decided cases involving constitutional claims that touch on nearly every major area of educational policy. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97 (1968) (school curriculum); Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853 (1982) (removal of books from school libraries); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (student rights of expression and non-disruptive protest); Papish v. Board of Curators, 410 U.S. 667 (1973) (same); Pickering v. Board of Educ., 391 U.S. 563 (1968) (teacher rights of expression); Mount Healthy City Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (same); Wisconsin v. Yoder, 406 U.S. 205 (1972) (exemptions from state compulsory school attendance laws); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (school finance reform); Brown v. Board of Educ., 349 U.S. 294 (1955) (school desegregation); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979) (same); Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982) (same); Milliken v. Bradley, 418 U.S. 717 (1974) (reorganization of school district boundaries to undo segregation); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (school personnel policies); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (academic freedom); Healy v. James, 408 U.S. 169 (1972) (students' rights of expression and association); Widmar v. Vincent, 454 U.S. 263 (1981) (student association rights); Shelton v. Tucker, 364 U.S. 479 (1960) (teacher association rights); Engel v. Vitale, 370 U.S. 421 (1962) (prayer in public schools); School Dist. v. Schempp, 374 U.S. 203 (1963) (same); Wallace v. Jaffree, 105 S. Ct. 2479 (1985) (same); Goss v. Lopez, 419 U.S. 565 (1975) (student discipline); Ingraham v. Wright, 430 U.S. 651 (1977) (same); Board of Curators v. Horowitz, 435 U.S. 78 (1978) (academic dismissal); New Jersey v. T.L.O., 105 S. Ct. 733 (1985) (search of student for evidence of rules infraction); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (discrimination in admission to schools or programs on basis of gender); Vorchheimer v. School Dist., 430 U.S. 703 (1977), *affirming by an equally divided Court*, 532 F.2d 880 (3d Cir. 1976) (same); Wood v. Strickland, 420 U.S. 308 (1975) (liability of school officials for violating rights of students); Carey v. Piphus, 435 U.S. 247 (1978) (nature of damages, once liability found).

The Supreme Court has also dealt with issues involving discrimination in the education of the handicapped, Irving Indep. School Dist. v. Tatro, 104 S. Ct. 3371 (1984), Board of Educ. v. Rowley, 458 U.S. 176 (1982), and of those with limited English proficiency, Lau v. Nichols, 414 U.S. 563 (1974), in resolving federal statutory claims.

Earlier in this century, the Supreme Court decided landmark cases involving issues of compulsory public schooling, Pierce v. Society of Sisters, 268 U.S. 510 (1925), state regulation of private schools, Farrington v. Tokushige, 273 U.S. 284 (1927), Meyer v. Nebraska, 262 U.S. 390 (1923), and coerced professions of belief in public schools, West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

The involvement in questions of educational policy on the part of lower federal courts and state courts has been even more pervasive. *See, e.g.*, Debra P. v. Turlington, 644 F.2d 397 (5th Cir. 1981) (minimum competency testing); Berkelman v. San Francisco Unified School Dist., 501 F.2d 1264 (9th Cir. 1974) (discrimination on basis of gender and race in admission to schools); United States v. North Carolina, 400 F. Supp. 343 (E.D.N.C. 1975) (teacher certification); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972) (failure to provide appropriate education for handicapped); Hobson v. Hansen, 327 F. Supp. 844 (D.D.C. 1971) (unequal resources for poor and minority school children); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (en banc) (tracking and ability grouping); Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976) ("educational malpractice"); Hoffman v. Board of Educ., 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979) (same).

The intervention of the courts has largely been concerned with either the appropriate balance between individual liberties and societal interests or protecting the right of equal access to an education. *See generally* KIRP & YUDOF'S EDUCATIONAL POLICY AND THE LAW (M. Yudof, D. Kirp, T. van Geel & B. Levin eds. 2d ed. 1982) [hereinafter cited as EDUCATIONAL POLICY AND THE LAW] (examining shift in decision-making of educational policy from local to state and federal levels of government, and assessing impact of these changes on educational policy and practice).

Free School District No. 26 v. Pico,[21] the Court has noted the state's considerable interest in inculcating democratic values and traditions. Several commentators have recently addressed this issue. Each has looked at the role of the government versus the rights of the individual and concluded that the constitutional rights of the individual student (or teacher) and his or her parents should be given greater weight than the interest of the state, but each commentator has relied on different reasons. For Professor Yudof, protection of the rights of free speech, press, religion, and academic freedom requires limiting the power of government to indoctrinate the young.[22] "The power to teach, inform, and lead is also the power to indoctrinate, distort judgment, and perpetuate the current regime,"[23] whether in the school or the outside world. He even sees *Pierce v. Society of Sisters* as a decision limiting the power of government to indoctrinate, whether consciously on the part of the Court or not: "A contrary decision in *Pierce* would have fostered a state monopoly in education, a monopoly that would dangerously strengthen the state's ability to mold the young."[24] Professor Kamenshine goes beyond Professor Yudof and rejects the notion that society has any interest in the schools inculcating "political" values, inasmuch as there are no "uniformly acceptable" political values. For this reason, groups outside the school (family, religious organizations, etc.) are more suitable for instilling values in youth.[25] Overriding any such arguable societal interest, Professor Kamenshine asserts, is a fundamental interest in preventing political establishments. He therefore argues for an implied political establishment prohibition analogous to the establishment of religion prohibition.[26] Finally, Professor van Geel, in a recent article, argues that schools need to show a compelling interest supporting the exercise of power to inculcate values in order to override the interest in the freedom of student belief.[27] He argues further that social science research suggests that schools could not make such a showing.[28]

The approach taken in this Article, however, is to assume that the government does have an important interest in inculcating the values and traditions of our society. My argument for giving greater weight to individual rights and freedoms than the courts have done thus far is that without such protection schools' attempts to inculcate the values of a democratic

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21. 457 U.S. 853 (1982) (for discussion of case, see *infra* notes 53-65 and accompanying text).
22. Yudof, *supra* note 14, at 874-91.
23. *Id.* at 865.
24. *Id.* at 890.
25. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104, 1134 (1979).
26. *Id.* at 1132-38.
27. van Geel, *supra* note 12.
28. *Id.*

society will be unsuccessful.[29] The courts have often balanced the need to inculcate values *against* the protection of individual rights, yet it is the constitutional values that form the basis of the individual rights that society wishes to inculcate. The argument here is that if educational institutions are not subject to the same constitutional constraints as other governmental agencies,[30] students will not come to an understanding of the value of a democratic, participatory society, but instead will become a passive, alienated citizenry that believes that government is arbitrary. My argument is reinforced by research suggesting that democratic values are taught to youth by more than formal instruction, particularly where the formal instruction is inconsistent with the students' observations and experience.[31]

In this Article I will identify some points of tension in the effort to inculcate democratic values, and will discuss the lessons being taught to students when the balance is struck in favor of the educational institution rather than individual rights.

II. Constitutional Limits on the Inculcation of Religious, Political, and Moral Values in Public Schools

There has been much litigation regarding the constitutional limits on the inculcation of religious, political, and moral values in the public schools, both in terms of what values should be inculcated and who should make those decisions. Indeed, it is argued that the decision of schools *not* to inculcate certain ethical, moral, and religious values inculcates other values: A value-free education is not possible. The charge that schools are actively promoting "secular humanism" is based on this argument.[32]

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29. *Cf.* Cohen & Lazerson, *Education and the Corporate Order*, in Power and Ideology in Education 373-86, 382-86 (J. Karabel & A. Halsey eds. 1977) (students cannot learn democracy in school because school is not democratic).

30. Justice Rehnquist, however, would distinguish the government in its role as educator from the government in its role as sovereign. Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 904 (1982) (Rehnquist, J., dissenting).

31. *See, e.g.*, R. Weissberg, Political Learning, Political Choice, and Democratic Citizenship (1974); R. Dawson & K. Prewitt, Political Socialization (1969); Litt, *Civic Education, Community Norms, and Political Indoctrination*, 28 Amer. Soc. Rev. 69 (1963).

One theory is that the child's early life experiences in the family and in the school affects his or her relationships toward authority. If the family or school is authoritarian and the children do not participate in decision-making, the children learn to be submissive to authority. A more democratic family or school is thought to predispose children to democratic values. R. Hess & J. Torney, The Development of Political Attitudes in Children 93-115 (1967). Another study emphasizes that the most important aspect of political socialization is the atmosphere of the classroom—whether it is democratic or authoritarian. One "fosters attitudes and skills consonant with democratic values;" the other fosters hierarchical values and "deference to power." R. Dawson & K. Prewitt, *supra*, at 165-66. *But see* Merelman, *Democratic Politics and the Culture of American Education*, 74 Am. Pol. Sci. Rev. 319 (1980) (discussing weaknesses in school's socialization of democratic values).

32. *See* Grove v. Mead School Dist. No. 354, 753 F.2d 1528, 1534 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 85 (1985) (challenge to assignment of book as constituting governmental promotion of

Religious values. The principal cases resolving the question of the proper place of religion in the curriculum of the public schools—that is, the extent to which school authorities constitutionally may socialize their students to religious values—were decided in the early 1960's. The development of the law in this area illustrates well the tensions between parent and state in the educational enterprise. The concern on one hand is whether the school—a government agency—should be conducting a religious program and, on the other hand, whether the total omission of religion from the schools may itself be teaching children something about the role of religion that is contrary to the message their parents want taught.

The Supreme Court has taken a very restrictive view toward any attempt on the part of school authorities to inculcate religious values. In *Engel v. Vitale*,[33] the Court held that a non-denominational prayer written by the New York Board of Regents for use in the public schools violated the First Amendment's prohibition of an establishment of religion. A year later, in *School District v. Schempp*,[34] the Supreme Court struck down the practice of reading verses from the Bible and the recitation of the Lord's Prayer in public schools, holding that the state's obligation to be neutral with regard to religion forbids it to conduct a religious service even with the consent of the majority of those affected.[35] Justice Clark was careful, however, to distinguish between the study of religion or of the Bible "when presented objectively as part of a secular program of education" and religious exercises.[36] Not until 1980 did the Supreme Court deal with another school prayer case. In *Stone v. Graham*,[37] the Court held violative of the establishment clause a Kentucky law that required that the Ten Commandments be posted on the walls of public school classrooms in the state, because the law had "no secular legislative purpose."[38] The Court again indicated, however, that the case would be different if the Ten Commandments were integrated into the school's curriculum, where the Bible could be studied as history, ethics, or comparative religion.[39]

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secular humanism as religion).

33. 370 U.S. 421 (1962). In an often-quoted statement, Justice Black said that the establishment clause "must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." *Id.* at 425.

34. 374 U.S. 203 (1963).

35. *Id.* at 225-26.

36. *Id.* at 225.

37. 449 U.S. 39 (1980) (per curiam).

38. *Id.* at 41.

39. *Id.* at 42. In the most recent school prayer case, Wallace v. Jaffree, 105 S. Ct. 2479 (1985), the Court struck down an Alabama statute authorizing a period of "meditation or voluntary prayer" as not reflecting a clear secular purpose and as thus violating the first *Lemon* test. *Id.* at 2491-92. It should be noted that most of the establishment clause cases have arisen in the context of public aid to

Thus religious worship or religious doctrines, no matter how generalized or ecumenical, cannot be part of the curriculum, although the study of religion as a secular subject is permissible. However, if students and their parents are Christian Fundamentalists, for example, would not the teaching of the Bible as history or as part of a course in comparative religion be inconsistent with and unduly burden the free exercise of their religion? Justice Stewart, in his dissenting opinion in *School District v. Schempp*,[40] argued that "a doctrinaire reading of the Establishment Clause leads to irreconcilable conflict with the Free Exercise Clause."[41] He pointed out that there was a "substantial free exercise claim on the part of those who affirmatively desire to have their children's school day open with the reading of passages from the Bible."[42] The majority, however, gave little weight to this argument in the face of the strong establishment clause claim.

Lower courts have considered a variety of free exercise claims, with mixed results. In these cases, parents assert that the subject matter of the courses taught,[43] the books and materials assigned,[44] the manner in which such courses are taught,[45] and the imposition of certain school rules and regulations[46] unconstitutionally burden the practice of their religion. In considering such claims, courts have generally attempted to strike an accommodation between the right of parents to determine the religious upbringing of their own children and the power of school authorities to de-

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parochial schools rather than religious socialization in the public schools. *See, e.g.*, School Dist. v. Ball, 105 S. Ct. 3216 (1985); Aguilar v. Felton, 105 S. Ct. 3248 (1985); Mueller v. Allen 463 U.S. 388 (1983); Wolman v. Walter, 433 U.S. 229 (1977); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976); Meek v. Pittenger, 421 U.S. 349 (1975); Sloan v. Lemon, 413 U.S. 825 (1973); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Hunt v. McNair, 413 U.S. 734 (1973); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971).

40. 374 U.S. 203, 308 (1963) (Stewart, J., dissenting).

41. *Id.* at 309.

42. *Id.* at 312.

43. *See, e.g.*, Roman v. Appleby, 558 F. Supp. 449 (E.D. Pa. 1983) (counseling sessions with student on matters of religion, sex, family relationships, etc., violated neither parents' nor students' free exercise rights); Cornwell v. State Bd. of Educ., 314 F. Supp. 340 (D. Md. 1969), *aff'd*, 428 F.2d 471 (5th Cir.1970), *cert. denied*, 400 U.S. 942 (1970) (sex education programs upheld over parental religious objections on grounds of state's compelling interest in public health).

44. *See, e.g.*, Williams v. Board of Educ., 388 F. Supp. (S.D. W. Va.), *aff'd*, 530 F.2d 972 (4th Cir. 1975) (dismissal of parents' complaint seeking to enjoin use of textbooks allegedly offensive to Christian morals); Davis v. Page, 385 F. Supp. 395 (D.N.H. 1974) (parents sought to have their children excluded from health and music classes, and classes in which audio-visual equipment used, as religiously and morally offensive).

45. *See, e.g.*, Moody v. Cronin, 484 F. Supp. 270 (C.D. Ill. 1979) (compulsory co-educational physical education classes in which "immodest" clothing was worn violated free exercise rights of some students where state could not show compelling interest or that less restrictive means could not be employed).

46. *See, e.g.*, Menora v. Illinois High School Ass'n, 683 F.2d 1030 (7th Cir. 1982), *cert. denied*, 459 U.S. 1156 (1983) (prohibition against headgear in basketball games not unconstitutional in excluding yarmulkes).

cide which values are to be imparted and to which norms students are to be socialized. In reaching this accommodation, courts have had to determine whether the parents' or childrens' practice of their religion was burdened by the state regulation, and if so, whether the state's interest in the requirement was sufficiently important to outweigh the burden.

The courts' emphasis on the establishment clause—striking down various attempts to introduce religious worship or teachings into the public schools—may teach children that the Constitution prohibits the establishment by the state of a religion even if it is the wish of the majority of those affected, and that the rights of minorities, who may have other ways of worshipping, are protected by the Constitution. The lesson taught is that government and religion are to be separate.

One commentator's analysis of the School Prayer cases suggests that the practice of daily prayer in schools leads to religious indoctrination by rote and ritual, a result which is not permissible where the child (or parent) may not hold the religious belief being recited.[47] This reading makes the cases somewhat analogous to *West Virginia v. Barnette*, which prohibits the coercion of an expression of a political belief.[48] But this coerced expression of a belief analysis grounds the School Prayer cases in the free exercise rather than the establishment clause. It has been argued by others that even if there were no establishment clause, courts should "treat compulsory school prayers as interferences with the associational and free-exercise-of-religion rights of the listeners, with the indoctrination element supporting a limitation on school prayer activity."[49] While I do not disagree with this approach, it fails to address Justice Stewart's concern expressed in *Abington*. However, as noted above, the courts have been less protective of free exercise claims, especially when the accommodation of religious beliefs appears to foster the "establishment" of a particular religion. It may be that the two clauses can never be reconciled—that is, the effect of "neutrality" under one clause may be to violate the other.

Political and Moral Values. Although the extent to which religious socialization may be undertaken by school authorities has been sharply limited by the courts,[50] the constitutional limits on political and moral socialization are less clear. *West Virginia v. Barnette*[51] acknowledged the

47. Yudof, *supra* note 14, at 875.
48. 319 U.S. 624 (1943).
49. M. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 215 (1983).
50. *See, e.g.*, Wallace v. Jaffree, 105 S. Ct. 2479 (1985); Stone v. Graham, 449 U.S. 39 (1980) (per curiam); Epperson v. Arkansas, 393 U.S. 97 (1968); School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962); *see also* McClean v. Arkansas Bd. of Educ., 529 F. Supp. 1255 (E.D. Ark. 1982); Aguillard v. Edwards, 765 F.2d 1251 (5th Cir. 1985).
51. 319 U.S. 624 (1943).

right of school authorities to attempt to foster national unity and patriotism in the schools, but limited the means by which they can do so. The Supreme Court in that case held that the Constitution protects the right of non-participation in a patriotic ritual that, in effect, coerces an expression of belief. The First Amendment also appears to prevent the editing out of the school curriculum particular ideas with a view to "prescrib[ing] what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[52] However, the removal of books and curricular materials from the school library may be permitted under certain circumstances. The plurality opinion in *Board of Education, Island Trees Union Free School District No. 26 v. Pico* held that the Constitution would not bar school officials from removing books from the school library that are "pervasively vulgar" or educationally unsuitable.[53]

The *Island Trees* case, which elicited seven separate opinions, demonstrates the difficulty the Court has had in agreeing on the extent to which the "special characteristics of the school environment" may permit constitutional rights to be infringed. Justice Brennan, writing for a plurality of the Court, recognized a limited First Amendment right of students to receive information, at least in the context of removal of books from a school library.[54] In his view, for students to be prepared to participate in a political system, they must have access to the "marketplace" of ideas and be free to choose among ideas and schools of thought.[55] Access to ideas "prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members."[56] Justice Brennan noted, however, that the decision would not affect the discretion of school officials with regard to adding books to their school libraries.[57] By grounding his decision in a First Amendment "right to re-

52. Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 872 (1982) (plurality opinion) (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. at 642).

53. 457 U.S. at 871.

54. *Id.* at 868. The right to receive information and ideas is "an inherent corollary of the rights of free speech . . . explicitly guaranteed by the Constitution," *id.* at 867 (plurality opinion), and students too have these First Amendment rights.

55. Justice Brennan draws on precedent to demonstrate that the Constitution protects the right to receive information and ideas, noting that the "marketplace of ideas" requires buyers as well as sellers. 457 U.S. 853, 867 (1982) (quoting Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965)). Justice Blackmun, in his opinion, also refers to precedent, noting that the *Keyishian* decision, in "address[ing] itself . . . to public education . . . held that '[t]he classroom is peculiarly the marketplace of ideas.'" 457 U.S. at 877 (Blackmun, J., concurring in part) (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)).

56. 457 U.S. at 868.

57. *Id.* at 871–72. In an earlier case decided by the Seventh Circuit, the court there held that although school administrators have broad discretion with regard to the school library, the Constitution would bar an administrator *either* from removing a book as part of an attempt to purge "all material offensive to a single, exclusive perception of the way of the world" *or* from formulating a library acquisitions policy on that basis. Zykan v. Warsaw Community School Corp., 631 F.2d 1300, 1308 (7th Cir. 1980).

ceive information," however, he makes it difficult to distinguish logically between the act of removing a book from the library and the act of refusing to purchase that same book initially. As Justice Rehnquist notes, "[t]he failure of a library to acquire a book denies access to its contents just as effectively as does the removal of the book from the library's shelf."[58] Justice Brennan may have made the removal/purchase distinction for practical rather than legal reasons, however. In the case of a decision not to purchase, identifying the motive may prove more difficult than in the case of a decision to remove. Or it may be that the judiciary would be overwhelmed if it embarked upon reviewing decisions not to purchase books.

Justice Blackmun, in his concurring opinion, attempts to avoid the dilemma by constructing a narrower principle than the "right to receive information." He would prohibit school officials from removing 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."[59] While narrower in scope, Justice Blackmun's principle will prove difficult to apply, as it will necessarily involve courts in analyzing the motives of school officials.

It is unclear what message Justice Brennan's opinion in *Island Trees* conveys to students. The Constitution gives students the freedom to choose among ideas and schools of thought in their school libraries, but only to the extent that school officials may not remove books already purchased because they dislike the ideas contained in those books. And it is unclear how courts are to distinguish a decision to remove a book that is not "educationally suitable" from a decision to remove a book to prevent access to its ideas. Furthermore, there is nothing to restrict the school library's collection from being selected with a view to a particular set of values the authorities wish to convey. More importantly, a school is not constitutionally compelled to have a library at all, despite the fact that the school library is the "principal locus" of the freedom "to inquire, to study and to evaluate, to gain new maturity and understanding."[60] And, in dictum, Justice Brennan even suggests that school officials may have absolute discretion in the classroom with regard to the selection of what is to be taught and how, including the discretion to exclude alternative ideas and perspectives.[61] But allowing school officials to exclude totally a particular

58. 457 U.S. at 916 (Rehnquist, J., dissenting).

59. *Id.* at 879–80 (Blackmun, J., concurring in part) (emphasis in original).

60. *Id.* at 868–69 (citation omitted).

61. "Petitioners might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values." *Id.* at 869 (plurality opinion) (emphasis in original). Justice Brennan's statement here is inconsistent with his reliance on *Keyishian*, which states that "[t]he *classroom* is peculiarly the 'marketplace of ideas.'" Keyishian v. Board of Regents, 385

idea or ideology from the classroom would certainly run the risk of "cast[ing] a pall of orthodoxy over the classroom."[62] What lessons would it convey to students if only one point of view or school of thought were presented in the classroom? Would this teach "children to respect the diversity of ideas that is fundamental to the American system"?[63]

Justice Rehnquist, in a dissent joined by Chief Justice Burger and Justice Powell, set forth a very different view of education and, in particular, the role of school libraries. In his view, "inculcating social values and knowledge in relatively impressionable young people"[64] may be undertaken by school authorities without any constitutional requirement to include the values and norms of others. "The idea that . . . students have a right of access, *in the school*, to information other than that thought by their educators to be necessary is contrary to the very nature of an inculcative education."[65] Justice Rehnquist would not distinguish between schools and their libraries, viewing the libraries as simply supplementing the schools in their inculcative role.

These two conflicting views highlight the difficulty in determining how students, who are not yet adults, can be taught democratic norms if access to values and ideas of other communities and political systems is prevented. The tension between the First Amendment's prohibition of censorship of ideas and the desire to transmit to the young certain constitutional values is illustrated by the question whether a student's right to receive information includes a right of access to books or curricula that reflect racial, religious, or gender bias. In that situation, the First Amendment's right to free expression and access to ideas collides sharply with the school's legitimate role of socializing youth to the community's constitutional, political, and moral values of non-discrimination.

The reverse side of the coin involves the question of the extent to which parents may constitutionally compel certain books and materials to be *excluded* from the school library or from the public school curriculum. And to what extent may their children be exempt from having to read those books or take those courses if parents object to the values or ideas contained in them?

Absent a clear establishment clause claim, it is unlikely that parents can demand, on moral or philosophical grounds, that certain books or courses be excluded from the public school curriculum approved by school author-

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U.S. 589, 603 (1967) (emphasis added) (citation omitted). While *Keyishian* involved college teachers, the law struck down by the Court covered more than just higher education.

62. *Keyishian*, 385 U.S. at 603.

63. *Island Trees*, 457 U.S. at 880 (Blackmun, J., concurring in part).

64. *Id.* at 909 (Rehnquist, J., dissenting).

65. *Id.* at 914 (emphasis in original).

ities.[66] And absent a clear free exercise claim—that is, that a fundamental tenet of their religion is being unduly burdened[67]—it is also unlikely that parents can exempt their children from certain courses to which they may object.[68] While early cases suggested that parents have a fundamental right "to direct the upbringing and education of children under their control"[69]—locating this "fundamental" right in the due process clause of the Fourteenth Amendment—more recent cases have suggested that this "parental right" is a very limited one.[70] It thus may be that even if the Constitution protects the right of parents to bring up their children as they wish, that right may be given short shrift in the public schools as long as *Pierce* protects the parental option of sending their children to private schools.[71]

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66. *See, e.g.*, Grove v. Mead School Dist. No. 354, 753 F.2d 1528 (9th Cir.) (use of book in sophomore English curriculum upheld against First Amendment religious claims), *cert. denied*, 106 S. Ct. 85 (1985); Mozert v. Hawkins County, Pub. Schools, 582 F. Supp. 201 (E.D. Tenn. 1984) (use of textbooks upheld against free exercise claim); Hopkins v. Hamden Bd. of Educ., 29 Conn. Supp. 397, 289 A.2d 914 (New Haven County, Conn. C.P. 1971) (compulsory sex education course upheld against free exercise and right of privacy claims); Todd v. Rochester Community Schools, 41 Mich. App. 320, 200 N.W.2d 90 (1972) (use of allegorical anti-war novel in high school literature class upheld against establishment clause claim). *But see* Grosser v. Woollett, 45 Ohio Misc. 15, 341 N.E.2d 356 (Cuyahoga County, Ohio C.P. 1974) (enjoining assignment of certain books as part of the curriculum unless parental consent obtained). *Cf.* Wisconsin v. Yoder, 406 U.S. 205, 216 (1972), which indicated that a modern day Thoreau, who rejected contemporary secular values accepted by the majority because of his philosophical and personal beliefs, would not be protected by the Constitution in a claim against state regulation of education.

67. *See, e.g.*, Pratt v. Independent School Dist. No. 831, 670 F.2d 771 (8th Cir. 1982); Davis v. Page, 385 F. Supp. 395 (D.N.H. 1974).

68. *See generally* Hirschoff, *Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused from Public Instruction?*, 50 S. CAL. L. REV. 871 (1977).

69. Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). The *Pierce* Court identified the interest at stake as "the liberty of parents . . . to direct the upbringing and education of children under their control," 268 U.S. at 534–35, and noted that "those who nurture [the child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535.

70. The Supreme Court more recently identified the right of parents to direct the upbringing of their children as "cardinal," but cautioned that "neither rights of religion nor rights of parenthood are beyond limitation. . . . [T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare . . . ." Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944) (upholding state law applied to prevent child from passing out religious literature on streets). The extent of the state's power in education was held to be quite broad in Baker v. Owen, 395 F. Supp. 294 (M.D.N.C.), *aff'd mem.* 423 U.S. 907 (1975), which declared, in a case where the parent opposed corporal punishment, that the parent's right to direct the upbringing of his child was not "fundamental." 395 F. Supp. at 299.

71. Compare Justice Brennan's comments in the context of the First Amendment's religion clauses:

> Attendance at the public schools has never been compulsory; parents remain morally and constitutionally free to choose the academic environment in which they wish their children to be educated. The relationship of the Establishment Clause of the First Amendment to the public school system is preeminently that of reserving such a choice to the individual parent, rather than vesting it in the majority of voters of each State or school district. *The choice which is thus preserved is between a public secular education with its uniquely democratic values, and some form of private or sectarian education, which offers values of its own.* In my judgment the First Amendment forbids the State to inhibit that freedom of choice by diminishing the attractiveness of either alternative—either by restricting the liberty of the private schools to

III. Freedom of Expression in the School Environment

To what extent does the Constitution protect the right of free expression in the schools? Complete freedom of expression is inconsistent with the schooling enterprise, which requires order and control. Thus, while there is a constitutionally protected right of expression, this right may be limited where its exercise would disrupt the educational enterprise.

Students' rights of expression. Tinker v. Des Moines Independent Community School District,[72] the leading case on the First Amendment rights of public school students, involved several high school students who, as a symbol to protest the Vietnam War, violated the school's regulation prohibiting the wearing of black armbands while on school premises. The school authorities argued that they could ban the wearing of armbands because those with opposing viewpoints might become upset, resulting in a disruptive atmosphere. The Court replied that although an "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression,"[73] school officials could limit expression if they were able to show "that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'"[74]

The *Tinker* standard clearly provides less protection for free expression in the special environment of the schools than is available to the ordinary citizen. Moreover, because "substantial or material disruption of the educational process" could result from the reaction of others to the speaker's message, the prohibition against permitting the heckler's veto to be the basis for suppressing speech[75] does not appear to apply within the school environment. The Court also failed to articulate any clear standards for determining what showing is required in order to find "material and substantial interference."[76] Since *Tinker*, one court has indicated that the potential for *psychological* disruption from the distribution of a questionnaire surveying high school students' sexual attitudes and experiences for publication in the student newspaper was sufficient grounds for sup-

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inculcate whatever values they wish, or by jeopardizing the freedom of the public schools from private or sectarian pressures.

School Dist. v. Schempp, 374 U.S. 203, 242 (1963) (Brennan, J., concurring) (emphasis added).

72. 393 U.S. 503 (1969).

73. *Id.* at 508.

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

75. *See, e.g.*, Terminiello v. Chicago, 337 U.S. 1 (1949).

76. Thus some lower courts have applied *Tinker* quite restrictively. *See, e.g.*, Guzick v. Drebus, 431 F.2d 594 (6th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971) (regulation against wearing of button announcing anti-war demonstration upheld in light of potential disruptive effect); Hatter v. Los Angeles City High School Dist., 310 F. Supp. 1309 (C.D. Cal. 1970) (distribution of leaflets and wearing of tags urging boycott of school candy sale to protest dress code not protected activity).

pressing the survey, even though school officials could not "predict with certainty that a certain number of students . . . would be harmed."[77]

Clearly, how school officials handle student newspapers and student organizations will also provide lessons for students in democratic values and constitutional rights. School authorities have frequently required that before any student-written material is disseminated, it must be submitted for approval. Most courts take a restrictive view toward such prior restraint requirements, requiring them to be accompanied by adequate procedural safeguards.[78] Because of the "special characteristics of the school environment,"[79] however, the standard applied to the public schools appears to be less restrictive than that applied to society at large.[80] Judicial protection for the First Amendment rights of students to express themselves through student newspapers, whether underground or school-sponsored, exists only as long as the material being disseminated does not substantially disrupt or materially interfere with school activities (with wide latitude given to interpret such a standard) or is not obscene (and the Supreme Court has permitted a lesser standard for obscenity when children rather than adults are involved[81]).

First Amendment protection for student associational rights also is limited in the context of the "special characteristics of the school environment." In *Healy v. James*,[82] the Supreme Court noted that under the *Tinker* standard "[a]ssociational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education,"[83] although because the denial of recognition of a student organization is a form of prior restraint, school authorities have a heavy burden of proving the likelihood of disruption.[84]

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77. Trachtman v. Anker, 563 F.2d 512, 519 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978). *Cf.* Merriken v. Cressman, 364 F. Supp. 913 (E.D. Pa. 1973) (questionnaire to identify potential drug abusers administered by school authorities violated right of privacy).

78. *See, e.g.*, Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973).

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

80. Only a few courts have held that school officials cannot require prior approval under *any* circumstances without violating the First Amendment's prohibition of censorship. *See, e.g.*, Fujishima v. Board of Educ., 460 F.2d 1355 (7th Cir. 1972).

81. Ginsberg v. New York, 390 U.S. 629 (1968).

82. 408 U.S. 169 (1972).

83. *Id.* at 189.

84. The college in the *Healy* case had refused to recognize a "local chapter" of Students for a Democratic Society (SDS), thus denying it the use of campus facilities, while various other student organizations were permitted such access. Thus, *Healy* might be read to be concerned with equal treatment; that is, if a college generally permits student organizations access to its facilities, it may not exclude an organization based on the political or social views it espouses, although it could exclude *all* student organizations. In Widmar v. Vincent, 454 U.S. 263 (1981), the Supreme Court also held that once a university permits its facilities to be used by student groups, it may not exclude from the forum any speech activity based on content—including religious speech—absent a compelling state interest. The Supreme Court implied, however, that a state university may be a public forum, meaning that

Teachers' rights of expression. If school authorities can control to only a limited degree what students might hear from their fellow students, are they equally limited with respect to messages that students might hear from teachers? The question of whether a teacher's right of expression may be restricted in light of the special demands of the school environment arises in two principal contexts. One is the extent to which the right of the teacher as *citizen* to free expression is circumscribed by being an employee of the school system.[85] The other concerns the teacher as a *professional* and his or her right to determine course content, the selection of books, and the ideas and values to be presented in the classroom. Another question, also not yet clearly resolved, is whether there is an independent right of academic freedom protected by the Constitution.[86] It is these latter two questions that are most relevant here.

The Supreme Court has never decided a case that squarely deals with the issue of academic freedom in the classroom. *Keyishian v. Board of Regents* notes that academic freedom is "a special concern of the First Amendment" and that protecting the free exchange of ideas within our schools is fundamentally important in promoting an open society.[87] *Keyishian* also noted that "the classroom is peculiarly the 'marketplace of ideas'" in our society.[88] *Keyishian*, however, involved neither the public

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constitutionally it may not adopt a general prohibition against access to its facilities by student organizations. In a footnote in *Widmar v. Vincent*, the Court indicated that it interpreted *Healy v. James* as holding that a state university is an open forum *per se* for students, so that any attempt to restrict students' access to buildings, facilities, and the various forms of communication on campus "must be subjected to the level of scrutiny appropriate to any form of prior restraint." 454 U.S. at 268 n.5. Whether an educational institution is constitutionally obligated to provide a public forum may also depend on whether it is a college or a high school. The Third Circuit, in ruling that the use of high school classrooms for religious student group meetings violates the establishment clause, also noted, contrary to the implications in *Widmar v. Vincent*, that the school district "would have been justified in refusing to reserve high school property for use as a public forum for expression, and would violate no constitutional constraints in doing so." Bender v. Williamsport Area School Dist., 741 F.2d 538, 546 (3d Cir. 1984), *rev'd on other grounds*, 54 U.S.L.W. 4307 (U.S. Mar. 25, 1986) (No. 84-773).

85. In Pickering v. Board of Educ., 391 U.S. 563 (1968), and subsequent cases, the Supreme Court has indicated that under certain limited circumstances, a teacher's public criticism of school administrators or criticism voiced privately to an administrator or to his or her fellow teachers, *see, e.g.*, Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 415 n.4 (1979), may be constitutionally protected. However, if a teacher's statements can be shown to have impeded his or her performance in the classroom or otherwise interfered with the regular operation of the school, the speech might not be protected. *Pickering*, 391 U.S. at 572–73. It is not clear whether First Amendment protection would extend to teachers who voice their criticisms in the classroom or before a student audience elsewhere on school premises. *See, e.g.*, Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973); Nigosian v. Weiss, 343 F. Supp. 757 (E.D. Mich. 1971).

86. The majority in *Epperson v. Arkansas* cites Meyer v. Nebraska, 262 U.S. 390 (1923), as holding that the due process clause prohibits arbitrary restrictions upon the freedom of teachers to teach. 393 U.S. 97, 105 (1968).

87. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

88. *Id.* (citation omitted).

school classroom nor the teacher's right to choose the curriculum or to teach in any particular way.[89]

While *Epperson v. Arkansas* comments on "arbitrary" restrictions upon the freedom of teachers to teach and students to learn, the case was decided on the basis of the establishment clause.[90] The state's "undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit, on pain of criminal penalty, the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment."[91] Justice Black, in his concurring opinion, sharply narrowed the idea that some notion of "academic freedom" is protected by the First Amendment.

> I am . . . not ready to hold that a person hired to teach school children takes with him into the classroom a constitutional right to teach sociological, economic, political, or religious subjects that the school's managers do not want discussed. . . . I question whether . . . "academic freedom" permits a teacher to breach his contractual agreement to teach only the subjects designated by the school authorities that hired him.[92]

Justice Stewart, however, while allowing the state to determine whether a particular subject should or should not be included in a public school curriculum, declared that it would be constitutionally impermissible to punish a teacher for mentioning that there are other approaches to a particular subject.[93] Thus, while Justice Stewart believed that the individual teacher has a right to decide on the pedagogical approach, it appears that in Justice Black's view, the state should have complete control over both the content of the curriculum and the way in which the teacher teaches the curriculum.

Although lower court decisions vary significantly as to the extent to which "academic freedom" in a classroom, with regard to subject matter, content, and selection of books and materials, is constitutionally pro-

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89. In *Keyishian*, faculty members of a state university in New York refused to sign a certificate that required them to declare that they were not Communists, or that if they had been Communists, that they had communicated that fact to the president of the university. 385 U.S. at 595–96. Thus, the case involved the attempt of a state to exclude subversives from holding a university position altogether, rather than restricting what was taught in the classroom. Although *Keyishian* dealt with university professors, the case does not suggest that the holding might be so limited. The Court declared the entire state law unconstitutional—not merely the amendment covering higher education.

90. 393 U.S. 97 (1968). In Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271 (1984), Justice Brennan, in a dissenting opinion, seems to imply that *Epperson* was decided on grounds of academic freedom rather than the establishment clause. *Id.* at 296.

91. 393 U.S. at 107.

92. *Id.* at 113–14 (Black, J., concurring).

93. *Id.* at 115–16 (Stewart, J., concurring).

tected,[94] the cases, on varying grounds, suggest that the teacher has some limited discretion to select the content and methodology, finding this right to lie in the First Amendment's freedom of expression.[95] However, teachers have no First Amendment right of free expression granting them absolute discretion in this selection.[96] In some of these cases, the judges appear to be substituting their *own* judgment for that of school administrators or boards of education as to whether the materials are "appropriate" for the age of the children involved and the course being taught.[97]

As noted earlier, dicta in Justice Brennan's plurality opinion in *Island Trees* suggested that school boards have unfettered discretion to inculcate community values through the curriculum.[98] If this view prevails, the teacher would appear to have no unilateral right to dictate the lessons (especially value lessons) to which the student will be exposed. Some have argued that there is no constitutional reason for permitting the teacher, rather than the local school board, to be the one to choose the values to be imparted to youth.[99]

In discussing the student's First Amendment "right to know," Justice Brennan states that the right to receive information and ideas "is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution. . . . [T]he right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them . . . ."[100] If the student's right to receive information is a corollary of the sender's First Amendment rights, we have made no progress in determining what rights of free speech the teacher has in the classroom. However, the plurality opinion goes on to note:

> [T]he right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom. . . . Of course all First Amendment rights accorded to stu-

94. *Compare* Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ala. 1970) (teacher has right to determine use of appropriate classroom materials that are not obscene or disruptive) *with* Cary v. Board of Educ., 598 F.2d 535 (10th Cir. 1979) (teachers have no right to choose books banned by school board).

95. Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969); Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ala. 1970); Mailloux v. Kiley, 323 F. Supp. 1387 (D. Mass.), *aff'd*, 448 F.2d 1242 (1st Cir. 1971) (per curiam).

96. Mercer v. Michigan State Bd. of Educ., 379 F. Supp. 580 (E.D. Mich.), *aff'd mem.*, 419 U.S. 1081 (1974).

97. *See* Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ala. 1970); Burns v. Rovaldi, 477 F. Supp. 270 (D. Conn. 1979).

98. 457 U.S. at 869.

99. *See, e.g.*, Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293, 1342–43 (1976). *But see* M. YUDOF, *supra* note 49, at 216 ("the focus should be not on the constitutional entitlements of the teacher *per se* . . . but on the place of the teacher in the system of government expression").

100. *Island Trees*, 457 U.S. at 867 (emphasis in original).

> dents must be construed "in light of the special characteristics of the school environment."[101]

This seems to bring us full circle. Because the opinion suggested that local school boards might have absolute discretion in matters of curriculum in "the compulsory environment of the classroom,"[102] the right to receive ideas in the classroom may be limited to those ideas that the board thinks will best inculcate community values. If the teacher's right of academic freedom is only a corollary of the right of students to receive ideas, teachers may have no academic freedom in the classroom. The Seventh Circuit, in a case decided two years before *Island Trees*, found that students have a "freedom to hear" protected by the First Amendment, but indicated that this right is sharply limited at the secondary school level both by the immaturity and lack of intellectual development of the student and by the responsibility of the school to inculcate social, political, and moral values.[103] If the classroom is the vehicle for imparting values, perhaps it cannot also be an open "marketplace of ideas." Rather, any aspect of "academic freedom" that has independent constitutional protection[104] may exist only at the college or university level and not in public schools.[105] Thus, for neither the sender (the teacher) nor the receiver (the student) is there a constitutional right to ideas or viewpoints contrary to those the school authorities wish to be promulgated. As Justice Blackmun notes in *Island Trees*, this denial of access to other viewpoints "hardly teaches children to respect the diversity of ideas that is fundamental to the American system."[106]

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101. 457 U.S. at 867-68 (quoting Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969)) (emphasis in original).

102. *Id.* at 869.

103.

> [T]wo factors tend to limit the relevance of "academic freedom" at the secondary school level. First, the student's right to and need for such freedom is bounded by the level of his or her intellectual development. A high school student's lack of the intellectual skills necessary for taking full advantage of the marketplace of ideas engenders a correspondingly greater need for direction and guidance from those better equipped by experience and reflection to make critical educational choices. Second, the importance of secondary schools in the development of intellectual faculties is only one part of a broad formative role encompassing the encouragement and nurturing of those fundamental social, political, and moral values that will permit a student to take his place in the community.

Zykan v. Warsaw Community School Corp., 631 F.2d 1300, 1304 (7th Cir. 1980).

104. For contrasting views of the extent to which "academic freedom" is protected by the Constitution, compare Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841 with Goldstein, *supra* note 99.

105. Although Professor Yudof finds no clear academic freedom right of the teacher that is independent of other First Amendment considerations, he argues that the focus should not be on the teacher's right *per se*, "but on the place of the teacher in the system of government expression." M. YUDOF, *supra* note 49, at 216. By this he means that the autonomy of the classroom teacher will help to limit the government's power of indoctrination. *Id.*

106. 457 U.S. at 880 (Blackmun, J., concurring in part and concurring in the judgment).

IV. The Requirements of Fair Procedures in the School Environment

Institutional rules and regulations may be as important to the socialization of students as the formal curriculum. School rules that are concerned with certain patterns of behavior on the part of both students and teachers—hair and dress styles; smoking, drinking or the use of drugs; talking in the classroom or the halls or talking back to teachers; tardiness; marriage, pregnancy, sexual activity, or homosexuality—clearly inculcate particular values, as do the procedures for determining whether those rules have been violated and what sanctions should be imposed. Some argue these rules are essential to train students in behaviors appropriate to higher education or to jobs, to prevent students from making decisions that will adversely affect their education, to maintain order and prevent distraction from the educational mission, or simply to teach "the necessity of rules and obedience thereto" in society.[107] Despite our rhetoric that the purpose of education is to impart to youth democratic values and political participation skills, however, the real purpose of education at times seems to be to create a passive, docile citizenry.[108] Schools may give discipline and conformity higher priority than self-inquiry.[109] Rules that encourage silence and passivity, and promote lack of privacy, abuse of power, and authoritarianism are generally accepted by the majority of students as the way life is.[110]

To what extent does the Constitution constrain school authorities in their application of rules and regulations regarding student behavior? At issue is whether certain procedures must be followed before a student's person or property can be searched for evidence of the commission of a crime or a violation of a school rule, or before disciplinary action can be taken for failure to comply with institutional rules and norms. Important constitutional values are incorporated in our notions of procedural fairness. To what extent does the nature of the school environment and its

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107. Goss v. Lopez, 419 U.S. 565, 593 (1975) (Powell, J., dissenting).

108. *See generally* C. Silberman, Crisis in the Classroom 113–57 (1970) (schools' preoccupation with order and control).

109. *Id.* at 145, 152–53. Social scientists have noted that teachers place greater emphasis on compliance with rules than on other topics:

> Second and third grade teachers consider the obligation of the child to conform to school rules and laws of the community a more important topic than reading and arithmetic. . . . At the same time that teachers emphasize compliance, they underemphasize the right of citizens to participate in government.

R. Dawson & K. Prewitt, *supra* note 31, at 163. *See also* Merelman, *supra* note 31, at 325–27.

110. *See* E. Friedenberg, Coming of Age in America: Growth and Acquiescence 27–50 (1965); *see also* Noyes & McAndrew, *Is This What Schools Are For?*, Saturday Rev., Dec. 21, 1968, at 58.

special demands affect the traditional requirements of due process that apply to citizens in our society?

Fourth Amendment Requirements. The Supreme Court, in *New Jersey v. T.L.O.*,[111] has held that because of the need to maintain order in the school environment, the requirements of the Fourth Amendment, while unable to be dispensed with entirely, are considerably relaxed when applied to searches conducted by school officials. This exception for schools once again points up the dilemma involved in trying to convey constitutional values to our youth through an institution which itself places less value on the particulars of some of these constitutional values[112] and more

111. 105 S. Ct. 733 (1985).

112. Constitutional privacy issues have arisen in the context of regulating students' personal appearance. Claims that a student has a constitutional right to govern his own appearance have generally relied on the First Amendment's freedom of expression or the right of privacy found in the penumbras of the First, Fourth, Fifth and Fourteenth Amendments, but they have also relied on the equal protection and due process clauses of the Fourteenth Amendment. The issue whether a male student attending a public school has a constitutionally protected right to wear his hair in any manner that he pleases has thoroughly divided the federal courts of appeals. Four circuits have voted affirmatively on this issue. Holsapple v. Woods, 500 F.2d 49 (7th Cir.) (per curiam), *cert. denied*, 419 U.S. 901 (1974); Massie v. Henry, 455 F.2d 779 (4th Cir. 1972); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970). Five other circuits rejected these constitutional claims. Zeller v. Donegal School Dist. Bd. of Educ., 517 F.2d 600 (3d Cir. 1975); Hatch v. Goerke, 502 F.2d 1189 (10th Cir. 1974); Karr v. Schmidt, 460 F.2d 609 (5th Cir.) (en banc), *cert. denied*, 409 U.S. 989 (1972); Olff v. East Side Union High School Dist., 445 F.2d 932 (9th Cir. 1971), *cert. denied*, 404 U.S. 1042 (1972); Gfell v. Rickelman, 441 F.2d 444 (6th Cir. 1971). To further illustrate the confusion, one circuit, having decided that high school authorities could regulate the length of a student's hair without violating his constitutional rights, determined in a later case that, where the student was a college student, the balance was in favor of the individual. With the more mature student, the educational institution's role was diminished. *Compare Karr*, 460 F.2d 609 (5th Cir.) (en banc) (high school student), *cert. denied*, 409 U.S. 989 (1972) *with* Lansdale v. Tyler Junior College, 470 F.2d 659 (5th Cir. 1972) (en banc) (college student), *cert. denied*, 411 U.S. 986 (1973). By contrast, the Ninth Circuit has stood firm against finding that either college or high school students have a constitutionally protected right to wear their hair as they wish. *See* King v. Saddleback Junior College Dist., 445 F.2d 932 (9th Cir.), *cert. denied*, 404 U.S. 979 (1971); *Olff*, 445 F.2d 932 (9th Cir. 1971), *cert. denied*, 404 U.S. 1042 (1972).

The Supreme Court has contributed to the stalemate by refusing to review such cases. However, it did decide a case concerning a police officer who claimed that a hair length regulation violated his First Amendment freedom of expression, as well as the Fourteenth Amendment's guarantee of due process and equal protection. Kelley v. Johnson, 425 U.S. 238 (1976). The majority held that either a "desire to make a police officer readily recognizable to the members of the public, or a desire for the esprit de corps which such similarity is felt to inculcate within the police force itself" was a rational justification for the regulation. *Id.* at 248. Whether and to what extent the *Kelley* decision is applicable to teachers and students in schools remains a matter of speculation. Teachers are not employees in a state military organization, although they are supposed to be role models for students. Students, on the other hand, are neither analogous to police officers nor to teachers.

Some courts have suggested that a school-imposed dress code may not be unconstitutional, even though regulations dealing with hair length may be, because clothes, unlike hair length, can be changed after school. *See* Wallace v. Ford, 346 F. Supp. 156 (E.D. Ark. 1972), which struck down a regulation of hair length as a violation of the students' liberty interests under the Fourteenth Amendment, but which upheld a dress code, noting that the constitutional standard to be applied to dress codes is lower because clothes can be changed. *See also* Richards v. Thurston, 424 F.2d 1281, 1285 (1st Cir. 1970); Copeland v. Hawkins, 352 F. Supp. 1022, 1025 (E.D. Ill. 1973); Dunham v. Pulsifer, 312 F. Supp. 411, 419 (D. Vt. 1970). Other jurisdictions have struck down school-promulgated dress codes as infringing upon a personal liberty protected by the Fourteenth Amendment unless there is a sufficiently important state interest to justify the infringement. Bannister v. Paradis, 316 F. Supp.

on the safety and control of that institution.[113]

Ordinarily, a search made of private property is "unreasonable" under the Fourth Amendment if made without a valid search warrant.[114] Even when the circumstances are such that courts have permitted warrantless searches (such as when it is necessary to prevent concealment or destruction of evidence[115]), however, such searches usually require a showing of a "probable cause" belief that the law has been violated.[116] However, the Supreme Court, in balancing school authorities' "substantial" interest in maintaining discipline against students' legitimate expectations of privacy, has fashioned a less protective standard. In *New Jersey v. T.L.O.*,[117] the Supreme Court held that although the Fourth Amendment's prohibition against unreasonable searches and seizures does apply to searches of students by public school officials, such searches may be conducted without a warrant or probable cause.[118] All that is constitutionally required is that the search be reasonable "under all the circumstances,"[119] a criterion to be determined by balancing "the individual's legitimate expectations of privacy and personal security" against "the government's need for effective methods to deal with breaches of public order."[120] A determination of reasonableness in the context of a public school search turns upon a two-part inquiry: whether the search is "justified at its inception" and whether the scope of the search is "reasonably related" to the circumstances which originally justified the search.[121] A search is "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated either the law or rules of the school. The search is of permissible scope when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[122]

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185 (D.N.H. 1970).

113. One recent study concluded that only eight percent of the nation's schools had a serious crime problem. NATIONAL INST. OF EDUC., VIOLENT SCHOOLS—SAFE SCHOOLS: THE SAFE SCHOOL STUDY REPORT TO THE CONGRESS 2 (1978).

114. Camara v. Municipal Court, 387 U.S. 523, 528–29 (1967).

115. Chimel v. California, 395 U.S. 752 (1969).

116. Almeida-Sanchez v. United States, 413 U.S. 266, 270 (1973).

117. 105 S. Ct. 733 (1985).

118. *Id.* at 743.

119. *Id.*

120. *Id.* at 741.

121. *Id.* at 744 (citations omitted).

122. *Id.* In the course of its opinion, the Court identified—but did not rule on—a variety of related questions. While the petition for *certiorari* questioned the applicability of the exclusionary rule to evidence in criminal juvenile delinquency proceedings obtained illegally by school authorities, the Court's finding that the search was legal obviated the need to address the exclusionary rule. Consequently, the Court expressly reserved judgment on that issue after noting a split in lower court authority. *Id.* at 738–09 & nn.2–3. Because there was no ruling on this matter, the Court also did not address whether, even if it should find that the exclusionary rule applied to illegally obtained evidence

What are the implications of these differing standards for the socialization of students to our constitutional values, to the obligation to respect other people's rights, and to attitudes toward invasions of privacy? As Justice Stevens noted in his concurrence:

> Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry. If the Nation's students can be convicted through the use of arbitrary methods destructive of personal liberty, they cannot help but feel that they have been dealt with unfairly.[123]

The Supreme Court in *T.L.O.* has, once again, left unresolved society's ambivalence between a concern for order and safety and the desire to inculcate in students an understanding of the constitutional rights of individuals, but it has perhaps sharpened the dilemma for us.

The *T.L.O.* decision points up the Court's and our own confusion about the nature of the relationship between school authorities and students. Justice Powell, in this case as well as in *Goss v. Lopez*[124] and *Ingraham v. Wright*,[125] emphasizes the special relationship between students and teachers that "make[s] it unnecessary to afford students the same constitutional protections granted adults and juveniles in a nonschool setting."[126] In his view, the relationship between student and teacher is akin to that between child and parent, and thus students should not have the same expectation of privacy as the population generally. But the notion that teachers are *in loco parentis*[127] is no longer a viable one, which

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used in criminal proceedings, the same evidence could be used by school officials in a disciplinary proceeding.

Several more unanswered questions concern police involvement in school searches. The Court limited its holding to searches made by school authorities acting on their own and, although raising the issue, did not intimate its opinion about searches in which the police and school authorities act together or where one acts at the request of the other. *Id.* at 741 n.5 & 744 n.7. Furthermore, the standard articulated in *T.L.O.* turned on the Court's acknowledgment of the student's legitimate expectation of privacy in her personal property. The Court noted that it is an open question whether or not the same expectation of privacy in school storage space (e.g., lockers or desks) is in fact legitimate and thus entitled to Fourth Amendment protection. While the Court did not answer the question, it noted that lower courts are divided on the issue. *Id.* at 741 n.5.

123. *Id.* at 760–61 (Stevens, J., concurring in part and dissenting in part) (footnotes omitted).

124. 419 U.S. 565 (1975).

125. 430 U.S. 651 (1977).

126. 105 S. Ct. at 747 (Powell, J., concurring).

127. Blackstone's *Commentaries* are frequently cited as the source of the *in loco parentis* doctrine:

> [The parent] may . . . delegate part of his parental authority . . . to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz.: that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

1 W. BLACKSTONE, COMMENTARIES *557. Of course, the situation to which Blackstone was referring was one in which a parent voluntarily employed a tutor.

Justice Powell himself has recognized.[128] Compulsory attendance laws have clearly altered the relationship between parent, teacher, and student.[129] Moreover, the large urban schools of today (or the consolidated schools in rural areas) hardly permit the development of parent-like relationships on the part of the teacher. As one commentator has noted, what is at issue in these cases is not a parental relationship between school official and student but a law enforcement relationship, where school authorities are acting to protect the safety and welfare of the general student population.[130] Of course, if the *in loco parentis* doctrine were relevant, then the Fourth Amendment would be unlikely to apply even with relaxed standards.

Obviously, there must be a safe environment for learning, but as Justice Stevens pointed out, the *T.L.O.* majority has failed to distinguish between invasions of privacy for minor and for serious matters. "[A] search for curlers and sunglasses in order to enforce the school dress code is apparently just as important as a search for evidence of heroin addiction or violent gang activity."[131] Moreover, the *T.L.O.* opinion leaves it to school authorities to decide what is reasonable, again conveying to students that authority is arbitrary and stacked against them.

On the other hand, in this case and in the question of procedural due process in the school setting, the "legalization" of dispute resolution in schools may have brought a formality that belongs in the courtroom but not in the classroom. The values of fairness, liberty, dignity, and participation protected by the requirement of formal rules and procedures are juxtaposed against the nature of the relationship between teacher and student in the educational process, potentially setting up students and teachers as adversaries rather than as participants in the learning process. Should the same strict requirements that apply to the search for evidence in cases where criminal penalties will be imposed by the state apply in the case of a school disciplinary code?

Due Process Requirements. The extent to which the Fourteenth Amendment's due process clause prevents the infringement of a student's

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128. Ingraham v. Wright, 430 U.S. 651, 662 (1977).

129. *See* New Jersey v. T.L.O., 105 S. Ct. 733, 741 (1985) ("[P]ublic school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies."). A number of commentators have pointed out that it is these laws that give the schools authority over the child and not delegation by a parent of his authority. *See, e.g.*, Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739, 767 (1974) [hereinafter cited as Buss, *Fourth Amendment*]; Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. PA. L. REV. 545, 560 (1971); Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. PA. L. REV. 373, 384 & n.44 (1969).

130. Buss, *Fourth Amendment*, *supra* note 129, at 768 & n.191.

131. 105 S. Ct. at 763 (Stevens, J., concurring in part and dissenting in part) (footnote omitted).

(or teacher's) liberty or property interest is yet another area that the Supreme Court has failed to clarify. *Goss v. Lopez*,[132] in a five-to-four opinion, held that state-created entitlements to a public education are protected by the due process clause of the Fourteenth Amendment from even temporary deprivations. Thus, absent fair procedures for determining whether misconduct has occurred, the right to an education may not be withdrawn on the ground of misconduct. However, although the Court in *Goss* decided that some process is due, the procedural requirements appear to be quite minimal in the school environment. In the case of a ten-day suspension of a student for disciplinary reasons, *Goss* required only that the student be given notice of the charges against him, an explanation of the evidence, and an opportunity to explain his version of the story. Immediate removal from school may be justified in some cases even before the hearing. The hearing itself may be simply a brief meeting between the student and the school official minutes after the alleged transgression has occurred.[133] More stringent safeguards, however, may be required for deprivations of education significantly longer than the ten-day period involved in *Goss*.[134]

Goss clearly demonstrates the ambivalence of the Court regarding "legalizing" dispute resolutions in the schools.[135] Justice White, speaking for a majority of five members of the Court, balances the student's interest in "avoid[ing] unfair or mistaken exclusion from the education process"[136]

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132. 419 U.S. 565 (1975).

133. *Id.* at 582. *But cf.* Bell v. Burson, 402 U.S. 535 (1971) (suspension of driver's license requires pre-suspension hearing to establish whether there is reasonable possibility that driver will lose suit); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare recipients entitled to more involved pretermination hearing).

As one commentator has noted:

> *Goss* is surely much ado about very little. Given the miniscule opportunities it provides for a student's defense and the automatic resolution of credibility issues against that student, *Goss* is remarkable not for its innovation but for the fact that it was so long in coming, so vigorously contested en route, so narrowly affirmed when it finally came, and so parsimonious in the rights it recognized upon arrival. Such prodigious labor, one might say, to achieve so little.

Letwin, *After* Goss v. Lopez: *Student Status As Suspect Classification?*, 29 STAN. L. REV. 627, 637 (1977) (footnote omitted).

134. For example, more formal hearings could be required at which the student may be represented by counsel, confront witnesses against him and cross-examine them, and call his own witnesses. *Goss*, 419 U.S. at 583-84.

Goss also held that arbitrary deprivations of liberty are prohibited by the Constitution. The Court found that students have a liberty interest in their "'good name, reputation, honor, or integrity,'" *id.* at 574 (citations omitted), and noted that the charges of misconduct, if sustained, could damage the students' standing among classmates and teachers, as well as "interfere with later opportunities for higher education and employment," *id.* at 575 (citations and footnote omitted), thus mandating procedural safeguards.

135. This concern has also been raised with regard to the approach taken in the Education of the Handicapped Act, Pub. L. 91-230, 84 Stat. 175 (1970) (codified as amended at 20 U.S.C. §§ 1401-1441 (1982 & Supp. II 1984)), which is designed to protect handicapped children by mandating due process requirements rather than substantive programs.

136. 419 U.S. at 579.

against the school's interest in maintaining "[s]ome modicum of discipline and order . . . if the educational function is to be performed."[137] He concludes that the minimal requirements of notice and an informal hearing—"rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school"[138]—will not unduly interfere with the educational process or prove too costly. The majority notes, however, that "further formalizing the suspension process and escalating its formality and adversary nature may . . . destroy its effectiveness as part of the teaching process."[139]

The *Goss* dissent has a very different view of the impact of the decision on the governance of schools, noting that "[f]ew rulings would interfere more extensively in the daily functioning of schools."[140] Justice Powell, speaking for the four dissenting members of the Court, defines education to include the inculcation in students of the necessity of rules and obedience to them,[141] noting that the schools bear responsibility for "shaping the character and value judgments of the young."[142] Yet the issue is not challenges to rules, but an opportunity to challenge the determination that the rules have been violated, and violated by the student so charged. Justice Powell totally ignores the value of the requirements of due process as a means of assuring that the rules are accurately and consistently followed and that the student is not wrongly punished.

The real fear on the part of the dissenters is that formalizing procedures invites a challenge to the authority of the teacher, thus undermining the relationship between teacher and pupil necessary for learning to take place. The dissenting opinion also gives greater weight to the responsibility of school officials to the impact on the education of the other children,[143] while the majority is concerned more with protecting individuals (and groups[144]) against government arbitrariness. Thus the dissenters see it as more harmful to the educational enterprise to impose procedural

137. *Id.* at 579-80.

138. *Id.* at 581 (footnote omitted).

139. *Id.* at 583.

140. *Id.* at 591 (Powell, J., dissenting).

141. *Id.* at 593 (Powell, J., dissenting). *See also* Dillon v. Pulaski County Special School Dist., 468 F. Supp. 54 (E.D. Ark. 1978), *aff'd*, 594 F.2d 699 (1979) (a goal of educational process is to instill respect for authority).

142. *Goss*, 419 U.S. at 593 (Powell, J., dissenting).

143. To manage the educational enterprise, some degree of order and control is clearly necessary. But in some schools, order and control appear to be given undue emphasis. See C. SILBERMAN, *supra* note 108, at 122-34. "The most important characteristic schools share in common is a preoccupation with order and control." *Id.* at 122. As one writer noted, American high schools' "most memorable arrangements are its corridor passes and its johns; they dominate social interaction." E. FRIEDENBERG, *supra* note 110, at 29.

144. Studies have shown that minorities are suspended or expelled from school proportionately more frequently than non-minorities. *See, e.g.*, CHILDREN'S DEFENSE FUND, CHILDREN OUT OF SCHOOL IN AMERICA 308-45 (1974).

safeguards than to punish an innocent individual (and have the wrongdoer go unpunished).

In his dissent in *Goss*, Justice Powell posed a parade of horribles of academic decisions by teachers that may require procedural safeguards: grades, the passing or failing of a course, promotion.[145] In *Board of Curators v. Horowitz*,[146] however, the Court suggested that the requirements of *Goss* need not apply to such decisions. In that case, the Supreme Court was presented with the dismissal of a student for academic reasons rather than for misconduct. Because, according to the Court, academic grades and evaluations typically involve more subjective and evaluative judgments than do the factual questions present in disciplinary decisions, such evaluations are not readily adapted to procedural tools.[147] Thus, the determination of "what process is due" turns on whether the disputed action is deemed to be academic or disciplinary in nature. The Court in *Horowitz*, however, did not necessarily say that absolutely no process is due when the dispute is "academic" in nature,[148] but it is hard to think of a more minimal process than that mandated in *Goss*.

Just two years after *Goss*, the Court held in *Ingraham v. Wright*,[149] also a five-to-four opinion, that although the administration of corporal punishment for allegedly violating school rules implicated a constitutionally protected liberty interest, "the traditional common-law remedies are fully adequate to afford due process."[150] Thus, no advance procedural safeguards were constitutionally required.[151] The Court thus seems to be

145. *Goss*, 419 U.S. at 597–99 (Powell, J., dissenting).

146. 435 U.S. 78 (1978).

147. *Id.* at 89–90. *See* Regents of the Univ. of Mich. v. Ewing, 106 S. Ct. 507, 514 (1985) (expressly following *Horowitz*, noting that academic decisions are "not readily adapted to . . . procedural tools").

148. 435 U.S. at 85–86. The Court referred to the requirements of *Goss* for school conduct rule violations and held that for a failure to meet academic standards, "far less stringent procedural requirements" are necessary. *Id.* at 86 (footnote omitted). Because Horowitz—a medical student—had been warned several times that her progress was not satisfactory and was even examined by seven independent professors of medicine prior to her dismissal, those minimal requirements were met in her case.

149. 430 U.S. 651 (1977).

150. *Id.* at 672.

151. *Id.* at 676–80. *Ingraham* also held that the Eighth Amendment is inapplicable in public school corporal punishment cases. The Court looked first to "traditional common-law concepts" to determine the extent of the Eighth Amendment's prohibition on cruel and unusual punishment. *Id.* at 659 (quoting Powell v. Texas, 392 U.S. 514, 535 (1968)). The Court found that the use of corporal punishment as a means of disciplining school children dates back to the colonial period and continues to play a role in public education today, and that professional and public opinion is sharply divided as to the merits of the practice of corporal punishment. *Id.* at 660–61. The Court further found that the "openness of the public school and its supervision by the community," state laws prohibiting excessive punishment, and recourse against school officials in civil or criminal actions provide adequate protection for the student. *Id.* at 670–71. Thus, in the Court's view, the child is quite unlike a sequestered criminal who may need constitutional redress for beatings at the hand of a jailer. The Court concluded that there was neither justification in case law nor in the history of the Eighth Amendment to extend its protection beyond criminals. Justice White argued in a strong dissent that the existence of

retreating from its reliance on due process to resolve disputes and to minimize governmental arbitrariness in the schools. While *Goss* required notice and an informal hearing prior to even a brief suspension from school, *Ingraham* says that not even this minimal process is necessary prior to the imposition of corporal punishment. Those Justices concerned about escalating the adversarial nature of schooling and its effect on the teaching and learning process seem to have prevailed.

The primary concern of the majority in *Goss* appeared to be the possibility of injustices; due process hearings are important because they might uncover errors of fact.[152] As the majority opinion noted, the due process clause would "not shield [the student] from suspensions properly imposed."[153] A different reason may be postulated for mandating procedural protections, however. Minimizing the risk of arbitrary governmental action may convey a message even to those students who are not victims of a mistake. Not only would due process hearings produce fairer outcomes, but the outcomes might be more likely to be accepted as fair by those students affected and by those students observing. Socializing students to the view that they are respected participants in the educational process may be an important value to convey in a democracy.[154]

Neither the majority nor the dissenting opinions in *Goss* and *Ingraham* considered the value of what has been called the "dignitary" theory of due process, which "focuses on the degree to which decisional processes preserve and enhance human dignity and self-respect."[155] While a number of commentators have criticized the increasing "legalization" of authority relationships,[156] others have suggested that such legalization may eliminate arbitrary decisionmaking by public school officials.[157] Schools are not as Justice Powell envisions them, but are large bureaucracies that often give students a feeling of distrust of authority. Due process requirements may give some protection to students' interests in dignity, participation, and

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various safeguards or state authorized redress is irrelevant to the Constitution's prohibition against excessive punishment. *Id.* at 690–91 (White, J., dissenting). As long as there are any excessive beatings in schools, those beatings are "punishments" within the meaning of the Eighth Amendment and subject to judicial scrutiny. It is absurd, he argued, to hold that "corporal punishment in public schools, no matter how barbaric, inhumane, or severe, is never limited by the Eighth Amendment." *Id.* at 692.

152. 419 U.S. at 579–80.

153. *Id.* at 579.

154. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 502–03 (1978).

155. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U.L. REV. 885, 886 (1981).

156. *See, e.g.*, Wilkinson, Goss v. Lopez: *The Supreme Court as School Superintendent*, 1975 SUP. CT. REV. 25.

157. *See, e.g.*, Kirp, *Proceduralism and Bureaucracy: Due Process in the School Setting*, 28 STAN. L. REV. 841 (1976); Yudof, *Legalization of Dispute Resolution, Distrust of Authority, and Organizational Theory: Implementing Due Process for Students in the Public Schools*, 1981 WIS. L. REV. 891.

uniformity of treatment. Although Justice Powell believes that requiring due process in the school setting would undermine the authority of teachers and principals and destroy the relationship of trust necessary for the educational process, the feeling that one is being treated fairly and being heard may actually help restore trust.

Again, the question of what lessons are being taught is raised. For Justice Powell, the most important lesson is respect for authority and respect for the rights of others.[158] But there are other important lessons. The principle of due process is deeply embedded in our constitutional values and the Supreme Court has required due process hearings as a means of protecting individuals against arbitrary governmental actions in many areas.[159] Should not these values be imparted to students through their experiences with the governmental institution which most affects and controls their lives?

However, neither the dignitary[160] nor the "instrumental" view[161] of due process seemed to prevail in *Ingraham*. Speaking only to the view that due process serves the function of revealing mistakes—the "instrumental" approach—the Court conceded that "the child has a strong interest in procedural safeguards that minimize the risk of wrongful punishment."[162] Nevertheless, the Court held that a prior hearing would reduce the risk only marginally and would impose too great a burden on school authorities, who might even choose to abandon corporal punishment in the face of such burdens.[163]

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158. *Goss*, 419 U.S. at 593–94 (Powell, J., dissenting).

159. *See, e.g.*, Pickering v. Board of Educ., 391 U.S. 563 (1968) (public employment); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits); Fuentes v. Shevin, 407 U.S. 67 (1972) (prejudgment attachments); Perry v. Sindermann, 408 U.S. 593 (1972) (tenured employment).

160. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 502–03 (1978) (referring to "intrinsic" value of due process).

161. *See id.* at 503.

162. *Ingraham*, 430 U.S. at 676.

163. Social science research does not tend to support the efficacy of corporal punishment. One writer notes that "it is increasingly clear that most professional and public opinion [regarding corporal punishment] is shaped more by hunch, folklore, and conjecture than by empirical evidence. There appear to be no applied empirically based studies that support the use of corporal punishment." Rose, *Current Uses of Corporal Punishment in American Public Schools*, 76 J. EDUC. PSYCHOLOGY 427 (1984); *see also* Hyman & McDowell, *An Overview*, in CORPORAL PUNISHMENT IN AMERICAN EDUCATION 4 (I. Hyman & J. Wise eds. 1979) ("no evidence to support its use or to prove its efficacy as a tool of education"). Corporal punishment has been found to impede the accomplishments of the five major developmental aspects of school-aged children. These include: (1) basic trust; (2) a feeling of autonomy; (3) initiative; (4) industry or the ability to learn, work, and accomplish tasks; and (5) identity development. Friedman & Friedman, *Pediatric Considerations in the Use of Corporal Punishment in the Schools*, in CORPORAL PUNISHMENT IN AMERICAN EDUCATION 337, 337–38 (I. Hyman & J. Wise eds. 1979). Social scientists have also noted that corporal punishment tends to produce socially disruptive and aggressive behavior. *See* Bongiovanni, *An Analysis of Research on Punishment and its Relation to the Use of Corporal Punishment in the Schools*, in CORPORAL PUNISHMENT IN AMERICAN EDUCATION 351, 364–65 (I. Hyman & J. Wise eds. 1979).

Corporal punishment also seems contrary to values we wish to inculcate in youth. It may suggest to them that problems can best be solved through the use of physical force rather than through discus-

VI. Conclusion

The First Amendment rights of free expression and free exercise of religion of an adult citizen in our society can be circumscribed only when the State has shown a compelling justification which cannot be accomplished by less restrictive means. In the case of schoolchildren, however, the courts balance First Amendment rights against the interests of the school authorities in inculcating community values and in maintaining order and control so that the educational mission can be accomplished, using less rigorous constitutional standards in the balancing. In most instances, the interest of the educational enterprise in socializing students to particular values or in order and control is given considerable weight, while that of the individual schoolchild is given relatively little. The courts have taken the same approach with regard to Fourth Amendment protections and the procedural due process requirements of the Fourteenth Amendment.

The "special characteristics" of the elementary and secondary school environment include the fact that students, being compelled to attend school, are a captive audience, that the students are not yet fully developed intellectually or emotionally,[164] that the educational enterprise has an obligation to protect the safety of all students and to provide them with an atmosphere conducive to education, and that the purpose of compulsory education is to inculcate the social, moral and political values of the community (however defined) and, in particular, to prepare the young to participate as citizens in our democratic society. However, the courts have held that there are some constitutional constraints on the authority of school officials in order to protect minority interests and some limited expression of dissent. The failure to so constrain would, in itself, be a form of value inculcation and impart values contrary to our Constitution. Courts have also held that the state is not disabled from promoting patriotism, nationalism, or other values, with the exception of religious values

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sion, negotiation, or counseling.

164. Several establishment clause cases, in assessing the "primary effect" of state aid programs, emphasize college students' maturity and skepticism versus high school students' impressionability. *Compare* Widmar v. Vincent, 454 U.S. 263 (1981) (religious student groups may use university facilities for meetings) *with* Bender v. Williamsport Area School Dist., 741 F.2d 538 (3rd Cir. 1984) (religious student groups may not use high school facilities for meetings), *rev'd on other grounds*, 54 U.S.L.W. 4307 (U.S. Mar. 25, 1986) (No. 84-1773); and *compare* Roemer v. Board of Pub. Works of Md., 426 U.S. 736 (1976) (permitting public aid to sectarian colleges); Tilton v. Richardson, 403 U.S. 672 (1971) (same) *with* Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216 (1985) (prohibiting public aid to sectarian elementary and secondary schools); Lemon v. Kurtzman, 403 U.S. 602 (1971) (same). This approach is taken by other cases in the area as well. *Compare* Karr v. Schmidt, 460 F.2d 609 (5th Cir.) (en banc), *cert. denied*, 409 U.S. 989 (1972) (high school hair regulations are appropriate given the schools' mission and relative immaturity of high school students) *with* Lansdale v. Tyler Junior College, 470 F.2d 659 (5th Cir. 1972) (en banc), *cert. denied*, 411 U.S. 986 (1973) (college student's right to wear hair any length he wishes is protected).

or where the manner of inculcating values involves coercing the profession of a belief. Only where establishment clause issues are involved (where individual rights are not necessarily infringed) has the Supreme Court taken an absolutist position. But the courts have permitted individual rights to be diluted in the school environment.

In preventing access to alternative ideas and expression or in failing to provide fair procedures, school officials subordinate the individual's constitutional rights to the interest of others in the educational enterprise or to the interest of teachers and officials in authority and control. In so doing, the schools may be imparting values unacceptable to a democratic society. As Justice Stevens pointed out in connection with the application of Fourth Amendment requirements in the school environment:

> The schoolroom is the first opportunity most citizens have to experience the power of government. Through it passes every citizen and public official, from schoolteachers to policemen and prison guards. The values they learn there, they take with them in life. One of our most cherished ideals is the one contained in the Fourth Amendment: that the Government may not intrude on the personal privacy of its citizens without a warrant or compelling circumstance. The Court's decision today is a curious moral for the Nation's youth.[165]

On the other hand, there is a legitimate concern that the courts, as well as federal and state legislatures and agencies, will "overlegalize" the schools and make it difficult for them to perform their educational mission. Some cases have clearly involved too much judicial intrusion into educational decisions, such as where judges interpose their own notions of the "appropriateness" of books and curricular materials.[166] In other cases, there has not been enough judicial intrusion to protect the rights of individuals, as with in-school searches or the administration of corporal punishment. Here the values that are conveyed, I believe, are inconsistent with those of the Constitution and a democratic society.

In trying to find an acceptable compromise between applying overly intrusive constitutional standards and giving excessive discretion to school authorities regardless of minority interests or individual rights, the Supreme Court, in several of its decisions, has succeeded only in muddying the question rather than clarifying it. Thus lower courts, school administrators, and teachers will continue to struggle to interpret the requirements mandated by *T.L.O.*, *Tinker*, *Island Trees*, and *Goss*.

The struggle to determine both *what* viewpoints are to be heard and

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165. New Jersey v. T.L.O., 105 S. Ct. 733, 767 (1985) (Stevens, J., concurring in part and dissenting in part).

166. *See, e.g.*, Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ala. 1970).

who decides, and the extent to which constitutional protections apply to students as against the need of the educational enterprise for order and control will undoubtedly continue. Although an increased role for the courts is a matter of concern, the cost of less judicial involvement will not only be in diminished protection for the rights of students, but also in the value lessons this teaches students. Our constitutional values are concerned with the relationship between the individual citizen and government, and the curtailment of the constitutional rights of schoolchildren says much about this relationship that may be the opposite of the lessons intended. The importance to the educational institution of order and control should not allow constitutional values to be subrogated or parcelled out in niggardly fashion. And in determining the extent to which school authorities should be constrained by constitutional requirements, courts should bear in mind that the nature of the educational institution has changed. It is no longer the institution pictured by Justice Powell. In that changed institution, where students and teachers do not know each other, where teachers are often of a different race than their students, where a single high school can have the same population as a small town, where *in loco parentis* no longer is relevant, then constitutional protections become more important. The school is not the extension of the parent, but of the government. And among our most important democratic values are the disabling of government from acting arbitrarily and from suppressing dissenting viewpoints and ideas.