St. John's Law Review

Volume 69
Number 3 *Volume 69, Summer-Fall 1995, Numbers 3-4*

Article 3

March 2012

Liberty and Authority: Two Facets of the Inculcation of Virtue

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LIBERTY AND AUTHORITY: TWO FACETS OF THE INCULCATION OF VIRTUE

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I. INTRODUCTION: CONFLICTING PERSPECTIVES

A. Tinker *in Context*

Adolescence is a time of rebellion, growth, change, and the beginning of meaningful self-awareness. It is not suprising, therefore, that the 1960s, which constituted the adolescent period of the baby-boomer generation, was noted for its lack of commitment to discipline, obedience and deference to authority.[1] It was a time remembered more for political and cultural conflict, urban chaos, civil rights battles, free speech movements on university campuses, and, perhaps most of all, the national divide over the Vietnam War. The 1960s was an era during which the value of order—of deference to authority—was challenged profoundly, to the great chagrin of those who view order as an imperative in a civilized society.

This era of turmoil is the context in which one must understand the Supreme Court's decision in *Tinker v. Des Moines Independent Community School District*,[2] the twenty-fifth anniversary of which decision this Symposium commemorates. In *Tinker*, the Supreme Court struck down a school regulation prohibiting the wearing of black armbands to protest the Vietnam War. In sweeping language, the Justices declared their rejection of the proposition that students "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[3]

In an age when claims of liberty were embraced increasingly while those heralding authority were deemed suspect, one would have been most

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[1] The 1960s created a "new mood," displacing "social complacency" with a "clamor for bold leadership in all areas of American life." ROBERT WEISBROT, FREEDOM BOUND: A HISTORY OF AMERICA'S CIVIL RIGHTS MOVEMENT 18 (1990). This "new mood" was based in part on the "restless idealism of the postwar baby-boom generation that was just coming of age." *Id.*

[2] 393 U.S. 503 (1969).

[3] *Id.* at 506.

surprised had the Court ruled that students were totally devoid of First Amendment protections.[4] Indeed, as Professor Bruce Hafen, my colleague in this symposium, has noted, the facts of *Tinker* provided an ideal setting for the affirmation of students' free speech interests.[5] The students wore black armbands peacefully and with their parents' consent, their symbolic expression addressed what likely was the most important political issue of the day, and their statement did not contest educational policy; it was more akin to a personal conversation among students concerning public issues, a conversation that neither intruded upon the work of the schools, nor implied any official endorsement.[6]

The language of the Court's opinion, however, initially appeared to be significantly more far-reaching than the aforementioned facts warranted. Committed to the position that state-operated schools were forbidden from serving as little "enclaves of totalitarianism" in which school officials possessed "absolute authority over their students,"[7] the Court held that the state could not confine students to the expression of only officially approved sentiments.[8] Noting the need to foster intellectual traits consistent with those required of a democratic polity, the majority emphasized the role of education in providing a participatory forum for the exchange of ideas, a forum crucial in the training of future leaders.[9] Essentially, the classroom was to serve as a "marketplace of ideas."[10] Thus, school officials could not prohibit expression on the basis of an "undifferentiated fear or apprehension of disturbance,"[11] but could do so only on the basis of "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with

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[4] Indeed, earlier cases had already demonstrated that free speech claims were potentially valid in public school environs. *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (prohibiting schools from compelling students to salute American flag).

[5] Bruce C. Hafen, Hazelwood School District *and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685, 688 [hereinafter Hafen, Hazelwood].

[6] *Id.*

[7] *Tinker*, 393 U.S. at 511.

[8] *Id.*

[9] *Id.*, at 512. The Court emphasized that such training required "wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than any kind of authoritative selection.'" *Id.* (alteration in original) (citation omitted) (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)). The Court appeared to be merging free speech arguments grounded in the community's interest in character building with those based on an uninhibited "search for truth." For a discussion of the multi-faceted functions of rights claims generally and free speech claims specifically, see *infra* notes 73-91 and accompanying text.

[10] *Tinker*, 393 U.S. at 512.

[11] *Id.* at 508.

school activities. . . ."[12]

Such language understandably was disconcerting to those who believed that order and obedience to authority are necessary prerequisites for effective learning.[13] *Tinker* engendered fear of anarchy, of schools in utter disarray as students questioned the decisions and disobeyed the directives of educational officials and professionals. Envisioning educational institutions increasingly beleaguered by students "running loose, conducting break-ins, sit-ins, lie-ins and smash-ins,"[14] Justice Black cried out in dissent, "I . . . disclaim . . . that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students."[15]

Tinker may not have caused the cataclysmic results feared by Justice Black, but the decision did portend difficulty for many school officials. If their authority were constrained by student free speech rights, what limit could be placed upon students' disregard of efforts to establish a given level of order and decorum in the schools? If free speech rights meant that students could choose their own beliefs, at what juncture would schools be prohibited from requiring the acceptance of certain information or from inculcating certain values? Would every effort to impose authority be open to defiance, leading to litigation if disciplinary action were taken? Under such a regime, how could schools educate? Were there no longer any *givens* or *truths*? As one scholar lamented during this period of institutional uncertainty, school personnel "are no longer sure that they know what is right, or if they do, that they have any right to impose it."[16]

Most assuredly, much obedience and deference to authority is necessary for schools to function effectively.[17] In fact, Bruce Hafen has

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[12] *Id.* at 514.

[13] *See, e.g., id.* at 522 (Black, J., dissenting) (arguing that purpose of public schools is to teach children through use of order and discipline).

[14] *Id.* at 525 (Black, J., dissenting).

[15] *Tinker*, 393 U.S. at 526 (Black, J., dissenting).

[16] Gerald Grant, *The Character of Education and the Education of Character*, AM. EDUC., Jan.-Feb. 1982, at 37, 42. Bruce Hafen attributes this self-doubt in educational professionals to the development of a pluralistic society:

> If American society's pluralism makes it inappropriate for a school to teach particular religious and moral values, we can easily begin to believe that same pluralism also makes it inappropriate to teach general moral values—especially in a day when we increasingly, and unwisely, associate all moral codes and assumptions with particular ethnic and class-oriented backgrounds.

Bruce C. Hafen, *Schools as Intellectual and Moral Associations*, 1993 B.Y.U. L. REV. 605, 617 [hereinafter Hafen, *Schools*].

[17] In fact, some published studies suggest that academic achievement improves when schools maintain strong disciplinary policies, homework expectations, and attendance requirements. *See,*

gone so far as to insist that "*only by submitting* to the authoritative direction of teachers [can] young people learn the skills, attitudes, and understandings without which they cannot successfully sustain the operation of a democratic society."[18] The importance of education in inculcating values and, thereby, integrating children into their normative community was recognized by the Court in the landmark civil rights decision *Brown v. Board of Education*.[19] *Brown* described education as government's most important duty precisely because "it is a principal instrument in awakening the child to cultural values."[20]

Despite its importance, however, education through the exercise of authority and the insistence upon obedience is risky business. Given the universality of compulsory education in America,[21] state-sponsored education necessarily raises important questions about government's proper role in controlling thought and expression and, thereby, in molding character in a democratic society. An abusive government might use schools to induce captive[22] and immature children uncritically to accept values that support and enhance the status quo.[23] Such government action

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e.g., JAMES S. COLEMAN ET AL., HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC, AND PRIVATE SCHOOLS COMPARED 186-87 (1982).

[18] Hafen, *Schools*,*supra* note 16, at 619 (emphasis added).

[19] 347 U.S. 483 (1954).

[20] *Id.* at 493. The policy of inculcating community values through education has ancient and respected roots in Western thought. Plato, for instance, proposed censoring the stories that teachers told so that children would not assimilate "opinions for the most part contrary to those that we shall think it desirable for them to hold when they are grown up." PLATO, THE REPUBLIC, bk. II, ch. VII, at 177 (Paul Shorey trans., 1930). Aristotle believed that legislators could produce good citizens by instilling in them virtuous habits from childhood. *See* ARISTOTLE, THE NICOMACHEON ETHICS, bk. II, ch. I, at 71 (Harris Rackam trans., 1939). This notion that instilling morality—building character—is a vital function of education has continued into modern times. *See, e.g.*, DESIDERIUS ERASMUS, THE EDUCATION OF A CHRISTIAN PRINCE 212-13 (L. Born trans., 1936); JOHN LOCKE, SOME THOUGHTS CONCERNING EDUCATION 90 (R. Quick ed., 1913). The attitude regarding character enhancement has thrived in the United States. *See* Ambach v. Norwick, 441 U.S. 68, 76-77 (1979) (asserting that education is foundation of citizenship, preparing children for public responsibility, professional training, and cultural appreciation). One hundred and fifty-five years ago de Tocqueville observed: "In the United States politics are the end and aim of education." Richard L. Berkman, *Students in Court: Free Speech and the Functions of Schooling in America*, 40 HARV. EDUC. REV. 567, 569 (1970) (citation omitted) (quoting Alexis de Tocqueville).

[21] Since 1918, all states have required that children within a specified age group attend school. ROBERT M. O'NEIL, CLASSROOMS IN THE CROSSFIRE 59 (1981).

[22] Of course, in Pierce v. Society of Sisters, 268 U.S. 510, 525 (1925), the Court recognized a parent's right to place her child in a private school. That right, however, may have little significance for a parent who cannot afford private education or who independently values the social interaction of public education.

[23] Mark G. Yudof, *Library Book Selection and the Public Schools: The Quest for the Archimedean Point*, 59 IND. L.J. 527, 540 (1984) [hereinafter Yudof, *Library Book Selection*].

may severely undermine the ability of individuals to judge independently and intelligently. Consequently, schools easily might subvert the very core justifications of the First Amendment.[24]

The dilemma of public education is thus manifest. Because few institutions affect young, impressionable personalities as profoundly as do our schools,[25] we as a community are justifiably concerned that our educational program should promote the "right" skills and values for the development of an individual capable of contributing in a meaningful way to our community. Yet by authorizing schools to develop this "right" environment, we leave our children highly vulnerable to "village tyrants"[26] who might pervert the education process. Under the guise of properly educating the young, government could predispose children to accept and defer to authority while passively adopting prevailing values and current attitudes.[27] The school system, consequently, epitomizes the tension between liberty and authority.

B. Tinker's *Aftermath*

Over the twenty-five years since *Tinker*, many have questioned whether the Court's response to this tension was too one-sided, too supportive of liberty.[28] Although *Tinker* has never been overruled, its

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"The power to teach, inform, and lead," cautions Provost Yudof, "is also the power to indoctrinate, distort judgment, and perpetuate the current regime." Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 865 (1979) [hereinafter Yudof, *When Governments Speak*].

[24] As Stephen Arons warns: "If the government were able to use schooling to regulate the development of ideas and opinions by controlling the transmission of culture and the socialization of children, freedom of expression would become a meaningless right. . . . " STEPHEN ARONS, COMPELLING BELIEF: THE CULTURE OF AMERICAN SCHOOLING 206 (1983).

[25] In fact, in many ways public schools are an indoctrinator's dream. *See* Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 647 (1980). First, attendance is compulsory, and students lack the independent knowledge or psychological sophistication necessary to evaluate critically what their teachers tell them. Second, public schools can disguise their message as highly valued "education" rather than less trustworthy propaganda. Third, the adult teacher's authority and seemingly vast fund of knowledge will likely impress the children. Finally, teachers reward and punish students according to how well they learn the lesson of the day. *See* Yudof, *When Governments Speak*, *supra* note 23, at 875.

[26] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

[27] *Cf.* Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CAL. L. REV. 1104, 1104 (1979) (proposing that courts interpret First Amendment to prohibit political establishment in order to alleviate government's power to indoctrinate citizens).

For an exhaustive work on the subject of government's role as communicator and educator, see MARK YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW AND GOVERNMENT EXPRESSION IN AMERICA (1983).

[28] *See, e.g.*, Hafen, *Schools*, *supra* note 16, at 613 ("This seemingly unqualified holding left lower courts in considerable doubt about the right of schools to control curriculum-related

significance has been severely eroded, perhaps as a reaction to this criticism. The legal trend is unmistakably toward increasing deference to the decisions of school administrators.[29] By providing First Amendment rights to students only "in light of the *special characteristic of the school environment*,"[30] *Tinker* essentially sowed the seeds of its own virtual demise. The italicized language above easily justifies judicial reluctance to second-guess the day-to-day judgments rendered by those represented as uniquely trained and experienced in educating our young.[31] If, for example, alternative educational philosophies support greatly differing degrees of student participation and creative inquiry, on what basis are courts to choose and mandate one approach over another? Judges may understandably question whether their legal training adequately qualifies them to determine the "educational suitability"[32] of various teaching techniques and materials. Judges, therefore, may feel ill-equipped to police public education.[33] Supervising compliance with a decree to desegregate is one thing, but regularly reviewing the orchestration of the school environment is quite another.

Two Supreme Court cases illustrate the extent to which emphasis has

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expression that was not disruptive.").

[29] *See* Stuart L. Leviton, *Is Anyone Listening to Our Students? A Plea for Respect and Inclusion*, 21 FLA. ST. U. L. REV. 35, 38 (1993) (discussing use of lower court rhetoric to support increasing deference to school administrators and resulting narrowing of students' rights); *see also* Roger J.R. Levesque, *International Children's Rights Grow Up: Implications for American Jurisprudence and Domestic Policy*, 24 CAL. W. INT'L L.J. 193, 208 (1994) (discussing trend of U.S. courts to limit rights of students by deferring to discretion of school administrators).

[30] *Tinker*, 393 U.S. at 506 (emphasis added).

[31] For a discussion of the societal threat posed by those claiming that their expertise insulates their judgment from societal review, see *infra* text accompanying notes 179-86 and note 183. *See also* Stanley Ingber, *Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 34-37 [hereinafter Ingber, *Socialization*] (questioning educators' insistence on choosing curricula because of claims of specialized training and experience).

[32] "Educational suitability" was deemed by the Court as an acceptable criterion for a school board to use when determining whether a given book review could remain in the school library. Board of Educ. v. Pico, 457 U.S. 853, 857 (1982) (plurality opinion). In *Pico*, the Court imposed constitutional limits on a school board's discretion to remove books from junior and senior high school libraries. *Id.* at 869. Although such removals are found unlawful when based on "narrowly partisan or political" motivations, deletions are "perfectly permissible" when based on determinations of educational suitability. *Id.* at 870-71. Educational suitability, however, may be even harder for a jurist to identify than is obscenity. Yet when discussing obscenity, one Justice confessed that all he could state with assurance was that "I know it when I see it." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[33] *E.g.*, Epperson v. Arkansas, 393 U.S. 97, 114 (1968) (Black, J., concurring) (asserting that courts lack ability to supervise "the curriculum of every public school in every hamlet and city in the United States").

again been placed on upholding the authority of school officials when these officials are confronted by student speech activities. In *Bethel School District No. 403 v. Fraser*,[34] the Court upheld a three-day suspension of a high school student who used "an elaborate, graphic, and explict sexual metaphor" while delivering a speech before a school assembly to nominate a fellow classmate for a student government position.[35] Although the Court repeatedly spoke of public education's role in inculcating "'fundamental values necessary to the maintenance of a democratic political system,'"[36] it recognized that First Amendment freedoms nevertheless had to be "balanced against the society's countervailing interest in teaching students the boundaries of *socially appropriate behavior*."[37] More importantly, the majority concluded that "[t]he determination of what manner of speech in the classroom or in the school assembly is inappropriate properly rests with the school board."[38] Most telling in *Bethel* was the Court's acceptance of the proposition that learning obedience to authority was fundamental to the initiation of the child into the community and to her preparation for citizenship.[39]

Bethel left uncertain whether this constraint on student expression applied to contexts beyond that of offensive vulgarity.[40] The Court clarified this issue two years later in *Hazelwood School District v. Kuhlmeier*.[41] In *Hazelwood*, the Court relied on *Bethel* to affirm school officials' broad authority over all school-sponsored expressive activities.[42] The school newspaper at Hazelwood East High School was part of a journalism course which was a "regular classroom activit[y]" for which the students received academic credit.[43] The journalism teacher exercised considerable control over the newspaper, including selecting its editors, setting publication dates, editing stories, and assigning story ideas.[44] The

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[34] 478 U.S. 675 (1986).

[35] *Id.* at 677-78.

[36] *Id.* at 683 (quoting Ambach v. Norwick, 441 U.S. 68, 77 (1979)).

[37] *Id.* at 681 (emphasis added). This language paved the way for school boards to consider enacting speech codes either prohibiting hateful comments or mandating political correctness. Although I find this conclusion troubling, there is an extent to which I believe *Bethel*'s rationale compelling. *See infra* text accompanying notes 261-69.

[38] *Bethel*, 478 U.S. at 683.

[39] *Id.* ("The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order.").

[40] Hafen, *Schools*, *supra* note 16, at 613.

[41] 484 U.S. 260 (1988).

[42] *Id.* at 266-67.

[43] *Id.* at 268.

[44] *Id.*

school principal reviewed every issue prior to publication.[45] When the principal excised two pages from the newspaper after performing a pre-publication review, three student staff members sued, alleging that their First Amendment rights had been violated.[46] The principal defended his actions on the grounds that the deleted pages contained two articles—one describing the experiences of pregnant students, the other discussing the impact of divorce on students at the school—that impinged on the privacy rights of parents and pregnant students.[47] Using language that swept significantly beyond that necessary to uphold the principal's actions, the Court proclaimed that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are *reasonably related to legitimate pedagogical concerns*."[48]

Hence, *Hazelwood*, together with *Bethel*, establishes a huge category of student speech to which *Tinker* no longer applies: "school-sponsored expressive activities."[49] Neither case, however, questioned *Tinker*'s insistence that schools are to prepare students for self-governance as members of a democratic polity. Instead, they portrayed their holdings as creating the structure and order needed to educate and create the enlightened citizenry whose existence is a prerequisite to self-government.[50] They adhered to the belief, expressed earlier by Justice Powell, that "[l]egal restrictions on minors . . . may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding."[51]

Unfortunately, the *Hazelwood* Court failed to properly consider the

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[45] *Id.* at 269.

[46] *Hazelwood*, 484 U.S. at 263-64.

[47] *Id.* at 274-75. The principal made this argument even though the pregnant students had agreed to discuss their experiences, and the article used fictitious names. *Id.* at 263. The principal's concern was that, because there were few pregnant students, the personal information in the article would reveal the identity of the students. *Id.* at 274.

[48] *Id.* at 273 (emphasis added).

[49] *Hazelwood*, 484 U.S. at 273.

[50] The relationship between democracy and education was understood clearly by our nation's founding generation. Thomas Jefferson, for example, concluded that "illuminat[ing] the minds of the people" was the most effective means of preventing those with power—even in the best of governmental forms—from "perverting it into tyranny." Thomas Jefferson, *Bill for the More General Diffusion of Knowledge* (1779), *quoted in* EVA T.H. BRANN, PARADOXES OF EDUCATION IN A REPUBLIC 40-41 (1979).

[51] Bellotti v. Baird, 443 U.S. 622, 638-39 (1979). Similarly, Professor Hafen stated that "children have a special need to submit themselves . . . to the yoke of educational demands in order to develop their own capacity for autonomous action." Hafen, *Schools*, *supra* note 16, at 612.

fact that children gain more than information and skills from school. They also learn socially accepted patterns of behavior and role expectations. Thus, beyond authority and obedience, students also must be exposed to liberty—the experience of liberty—if they are to be forged into contributing members of a democratic polity. The paradox in granting liberty to children stems from the realization that society must indoctrinate children so that they may be capable of autonomy. The centrality of this paradox to the mission of education has been forgotten in recent years.

II. THE SUBTLETIES OF LIBERTY

Appreciating the importance of preparing children to experience liberty, without condemning order, requires a subtle understanding of liberty in general. Yet one's understanding of liberty may be influenced by the ideological perspective used when analyzing the concept.

A. Two Alternative Political Perspectives: An Historical Approach

Even during our nation's founding era, many political leaders recognized the interplaying roles of autonomy, responsibility and obedience in the development of liberty.[52] Embraced in this recognition was the insight that liberty or freedom could too easily degenerate into what eighteenth-century thinkers called license or licentiousness.[53] Licentiousness, it was feared, could threaten the very existence of the new nation by sapping its economic and political strength, "leaving its people too weak

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[52] *See* DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 148-49 (1994) (discussing James Madison's concerns of preserving will and autonomy of majority).

[53] Jeremiah Atwater, the first president of Middlebury College, cautioned the assembled Vermont legislature in 1801 that "[l]iberty, if considered as a blessing, must be taken in a qualified sense. The freedom which it implies, must be a limited, not [an] absolute freedom . . . for the very idea of government always supposes some restraint." Jeremiah Atwater, *A Sermon*, *in* 2 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760-1805, at 1170, 1172 (Charles S. Hyneman & Donald S. Lutz eds., 1983). John Locke, one of the inspirations for the American experiment with republican government, wrote that "[f]reedom . . . is not . . . [a] liberty for every one to do what he lists, [or] to live as he pleases." JOHN LOCKE, TWO TREATISES OF GOVERNMENT 301-02 (Peter Laslett ed., critical ed. 1960) (3d ed. 1698). Benjamin Rush, a noted Philadelphia doctor and educator, commented in 1787: "In our opposition to monarchy, we forgot that the temple of tyranny has two doors. We bolted one of them by proper restraints; but we left the other open, by neglecting to guard against the effects of our own ignorance and licentiousness." Benjamin Rush, An Address (1787), *quoted in* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 3 (1985). For a contemporary perspective on the interrelationship between liberty and responsibility, see LAWRENCE M. MEAD, BEYOND ENTITLEMENT: THE SOCIAL OBLIGATION OF CITIZENSHIP 43 (1986) ("Those who are free of responsibility for themselves cannot be free to make their own way in society.").

and dissolute to repel corruption from within or invaders from without."[54] Thus, the compelling challenge of the age "was to make authority and liberty compatible."[55]

To respond to this challenge, Americans drew on two competing visions of social order. One vision, embodied by the liberal tradition of the Enlightenment[56] and embraced by the federalists,[57] emphasized the individualism of people acting in society, and examined how social institutions rest on and constrain individual preferences.[58] Each person was viewed as a distinct unit.[59] Autonomy and separation were emphasized; relationships among individuals were secondary.[60] According to this tradition, the purpose of the community was simply to give individuals the needed security (i.e. freedom) to pursue their private interests. So viewed, liberty was the extent to which the individual, once assured of this minimum level of security, was left unrestricted by the state.[61]

The alternative vision, drawing on the tradition of civic republicanism,[62] emphasized the essential social nature of individuals. This

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[54] Suzanna Sherry, *Without Virtue There Can be No Liberty*, 78 MINN. L. REV. 61, 62-63 (1993).

[55] JAY FLIEGELMAN, PRODIGALS AND PILGRIMS, THE AMERICAN REVOLUTION AGAINST PATRIARCHAL AUTHORITY 1750-1800, at 14 (1982).

[56] *See* 1 PETER GAY, THE ENLIGHTENMENT: AN INTERPRETATION, THE RISE OF MODERN PAGANISM 3-27 (1966) (discussing intellectual climate of European Enlightenment giving birth to views of many American political thinkers of era).

[57] *See* THE FEDERALIST PAPERS (Clinton Rossiter ed., 1961).

[58] This analysis of the liberal tradition is drawn primarily from LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA (1955) and C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE (1962).

[59] Theorists emphasizing our separateness included: THOMAS HOBBES, LEVIATHAN 110 (Liberal Arts Press ed., 1958) (1651) ("The condition of man . . . is a condition of war of every one against every one . . . ."); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 296 (Peter Laslett ed., 1967) (3d ed. 1698) ("[A]ll men are naturally in [the] State [of nature], and remain so, till by their own consent they make themselves Members of some Politick Society . . . ."). For an account of the central role of individualism in the seventeenth century English thought that shaped Western political philosophy, see MACPHERSON, *supra* note 58.

[60] DAVID A.J. RICHARDS, THE MORAL CRITICISM OF LAW 51 (1977); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 133 (1982).

[61] Accordingly, public liberty was viewed as synonymous with individual liberty. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 63 (1969); Stanley N. Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J.L. & ECON. 467, 482 (1976). Because the interest of the community was equated with the aggregate of individual interests, the prosperity of the nation increased in conjunction with increased freedom of individuals to pursue their own desires.

[62] *See* J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 462 (1975); CAROLINE ROBBINS, THE EIGHTEENTH-CENTURY COMMONWEALTHMAN: STUDIES IN THE TRANSMISSION, DEVELOPMENT, AND CIRCUMSTANCES OF ENGLISH LIBERAL THOUGHT FROM THE RESTORATION OF CHARLES II UNTIL

perspective—embraced most fully by the anti-federalists who feared large, impersonal and powerful government[63]—rejected the individualism of the Enlightenment and focused instead on republican theorists dating back to ancient Greece and the Italian city-states.[64] Republicanism perceived people as gaining an understanding of their lives from participation and interaction with others in a social world that they jointly created.[65] Consequently, the assumption was that people were shaped by the institutions in which they functioned; the central theme was connection rather than autonomy.[66] Society preceded the individual, for self-knowledge was possible only with reference to the social matrix within which individuals found themselves.[67] Institutions of social life, therefore, were important because they forged the character of citizens.[68] It was the responsibility of these institutions to promote "civic virtue"—a capacity to overcome private passion, or appetite, in public decision-

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THE WAR WITH THE THIRTEEN COLONIES (1959); GARRY WILLS, EXPLAINING AMERICA: THE FEDERALIST (1981); WOOD, *supra* note 61.

[63] *See generally* HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR (Murray Dry ed., 1981). Although, the "home" of republican thought in American constitutionalism may have been in the work of the anti-federalists, *see* Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1547 (1988), many republican themes existed in federal thought as well. H. Jefferson Powell, *Reviving Republicanism*, 97 YALE L.J. 1703, 1705 (1988). The philosophical distinction between the federalists and anti-federalists was not one of total opposition but one of emphasis and degree. *See* Linda K. Kerber, *Making Republicanism Useful*, 97 YALE L.J. 1663, 1666-67 & n.13 (1988).

[64] *See* Richard A. Epstein, *Modern Republicanism—Or the Flight from Substance*, 97 YALE L.J. 1633, 1634 (1988).

[65] According to this tradition, "man was by nature a political being, a citizen who achieved his greatest moral fulfillment by participating in a self-governing republic." Gordon S. Wood, *Classical Republicanism and the American Revolution*, 66 CHI.-KENT L. REV. 13, 23 (1990).

[66] Theoretical works accepting this social nature of humanity included: ADAM FERGUSON, AN ESSAY ON THE HISTORY OF CIVIL SOCIETY 4 (Duncan Forbes ed., 1966) (1767) (arguing that "[m]ankind are to be taken in group[s], as they have always subsisted" and that "[t]he history of the individual is but a detail of the sentiments and thoughts he has entertained in the view of his species"); DAVID HUME, A TREATISE OF HUMAN NATURE 485 (L.A. Selby-Bigge ed., 1967) ("'Tis by society alone [man] is able to supply his defects, and raise himself up to an equality with his fellow-creatures. . . .'").

[67] *See* Paul W. Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 YALE L.J. 449, 517 (1989) ("[A]s a member of a particular discursive community, the individual simultaneously creates both his own individual identity and that of the community.").

[68] This perspective insisted that we each define and understand ourselves through personal attachments. We acquire our values through the interplay of innumerable influences of family, friends, neighbors, church, schools, cultural figures, and others. *See* Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 209, 211-12 (1979). Human individuality is formed through processes of language, thought, and feeling, which naturally and necessarily include other persons.

making.[69] A virtuous citizenry was one that had learned from its institutions that the public good differed from the aggregate of private preferences.[70] For such a citizenry, liberty consisted of a process of seeking and structuring a shared *telos*, consisting of a common value system for citizen and community.[71] The quintessential public institutions were those that allowed individuals to *experience* liberty through an ongoing process of self-determination.[72]

B. The Constitutional Concept of "Right"

Given these differing conceptions of liberty,[73] it is significant that it was the anti-federalists (rather than the federalists), with their commitment to this republican orientation, who were the force that galvanized support for the inclusion of a Bill of Rights in the United States Constitution.[74] Viewing society as a teacher—a molder of character—rather than just a

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[69] As one pair of scholars remarked, "Good republican government might transform individuals; good liberal (Lockean) government merely protected them." DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 13 (1990).

[70] A virtuous citizen had an independent mind and a willingness to use it for the good of the community. Virtue meant taking responsibility for oneself and one's community. Virtue also meant letting reason control passion, and letting long-term community interests override selfish individual wants. Citizens in a virtuous republic deliberated rationally about what would best serve the interests of the community. For republicans, governmental decisions were not mere responses to private interests, but were efforts to decide upon and implement communal values. *See* JOSEPH VINING, LEGAL IDENTITY 13-33 (1978). Rather than Locke, the philosophical emphasis was on Rousseau, *see* JUDITH N. SHKLAR, MEN AND CITIZENS: A STUDY OF ROUSSEAU'S SOCIAL THEORY 104 (1969) (discussing Rousseau's preoccupation with republican governments), Machiavelli, *see generally* POCOCK, *supra* note 61, and Aristotle, *see* ERNEST BARKER, THE POLITICAL THOUGHT OF PLATO AND ARISTOTLE 295 (1959) (describing Aristotle's concept of citizenship as participation in political decision-making).

[71] *See* Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1109 (1981); *see also* JANE J. MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY 26-28 (1980) (describing development of common interests in political community); CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 1-21 (1970) (commenting on political and communal values of democratic society).

[72] *See* HANNA ARENDT, ON REVOLUTION 248-55 (1963); DAVID HELD, MODELS OF DEMOCRACY 186-220 (1987). For republicans, individual fulfillment came from "sharing in a collective autonomy, a collective freedom and glory." HANNA PITKIN, FORTUNE IS A WOMAN: GENDER AND POLITICS IN THE THOUGHT OF NICCOLO MACHIAVELLI 81 (1984).

[73] Isaiah Berlin's distinction between "negative" and "positive" liberty captured the essential difference between liberty under individualism, as embraced by the federalists, and liberty under republicanism, as embraced by the anti-federalists. Isaiah Berlin, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118, 118-35 (1969).

[74] *See* STORING, *supra* note 63, at 64 ("It is often said that the major legacy of the Anti-Federalists is the Bill of Rights.").

regulator of conduct,[75] the anti-federalists believed that the proposed Constitution inadequately accounted for this character-building role. An important component of their argument for a federal bill of rights was the role they hoped the document would play in providing the political and moral education necessary for the development of a virtuous citizenry.[76]

This history should cause us to question the common contemporary perception that constitutional rights are designed solely to secure the interests of individuals, most commonly the interest of personal autonomy, by respecting individual choice.[77] A more subtle comprehension of these rights reveals that they may serve multiple purposes. Of course, in order for a right to be enforced through litigation, some individual must be privileged to claim it. Nevertheless, rights not only encompass individualistic values but those that are interpersonal or communal as well.[78] The individual, therefore, may possess that right only, or at least partially, in an agency or fiduciary capacity, thus, protecting the interests of others or the polity in general.

The multifarious functioning of constitutional rights is clearly apparent in the context of the First Amendment right to free speech. The argument

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[75] Anti-federalist Melancton Smith captured this spirit when he said:

> Government operates upon the spirit of the people, as well as the spirit of the people operates upon it—and if they are not conformable to each other, the one or the other will prevail. . . . Our duty is to frame a government friendly to liberty and the rights of mankind, which will tend to cherish and cultivate a love of liberty among our citizens.

Melancton Smith, Address Delivered in the Course of Debate by the Convention of the State of New York on the Adoption of the Federalist Constitution (June 21, 1788), *reprinted in* 6 THE COMPLETE ANTI-FEDERALIST 155, 160-61 (Herbert J. Storing ed., 1981).

[76] One anti-federalist insisted that a bill of rights would provide "the first lesson of the young citizens becoming men, to sustain the dignity of their being." 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 75, at 273.

[77] *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-1, at 1302 (2d ed. 1988); Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 187 (1983). Most contemporary "rights-based" theories of constitutional law are centered around concern for upholding individual action. *See, e.g.*, Ronald Dworkin, *Liberalism*, *in* PUBLIC AND PRIVATE MORALITY 113, 127 (Stuart Hampshire ed., 1978) (arguing that liberalism supposes that individuals must be free to choose own vision of "good life").

The seminal defense of rights theory is contained in RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977). An assessment of the role of rights theory can be found in Peter Westen, *The Rueful Rhetoric of "Rights"*, 33 UCLA L. REV. 977, 977-78 (1986) ("The language of 'rights' has become the rhetoric of choice in our society for asserting moral and legal claims.").

[78] *See* Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1389 (1984) (contending that constitutional rights protect values other than individual choice); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1490 (1989) (stating that "constitutional liberties . . . do not simply protect individual rightholders piecemeal").

against censorship is often stated in terms of autonomy, and attributes to free speech an overriding purpose of respecting and protecting an individual's absolute freedom of thought and conscience necessary to promote self-realization and self-expression.[79] Speech, however, is not the only means by which these autonomy-based interests can be served. They may be furthered through virtually all voluntary conduct, including one's choice of profession, dress, and consumer goods.[80] Consequently, a recognition of the social importance of free speech is necessary to explain why speech has been singled out for constitutional protection.

The often-used metaphor of the "marketplace of ideas" encapsulates the interpersonal or systemic interests of free speech, resting as much on its importance to the receiver of any message as it does to the communicator.[81] This perspective of free speech interests has two component parts. The first assumes that a process of robust debate, if uninhibited by governmental interference, will lead to the discovery of truth, or at least to the best perspectives on solutions for social problems.[82] The second component emphasizes the social value of an informed citizenry acting as sovereign overseeing governmental action.[83] Proponents of this latter

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[79] Some commentators assert that autonomy is the singular—or at least the primary—justification for free speech. *See, e.g.*, Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).

[80] "An individual may develop his faculties . . . from trading in the stock market, following his profession as a riverport pilot, working as a barmaid, engaging in sexual activity, playing tennis, rigging prices or in any of thousands of other endeavors." Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 25 (1971); *see also* Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 303-04 (1992).

[81] *See, e.g.*, Board of Educ. v. Pico, 457 U.S. 853, 866-68 (1982) (emphasizing student's "right to receive information and ideas"); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (claiming that interests of recipients of speech rather than that of communicator are paramount for First Amendment purposes). The core insight of the *Red Lion* case, which upheld the FCC's Fairness Doctrine against constitutional attack by broadcasters, was that the interest in legally protected private autonomy from government is not always connected with the interest of democratic self-governance. *Id.* at 392-93.

[82] Although this classic image of competing ideas and robust debate dates back to English philosophers John Milton, *see* John Milton, *Aeropagitica* (London 1644), *in* THE PROSE OF JOHN MILTON 265 *passim* (J. Max Patrick ed., 1967), and John Stuart Mill, *see* JOHN STUART MILL, ON LIBERTY 15-71 (Elizabeth Rapaport ed., 1978), Justice Holmes first introduced this concept into American jurisprudence in his 1919 dissent to Abrams v. United States, 250 U.S. 616 (1919), stating that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

[83] *See* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 23-25 (1975). *See generally* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 523, 529-44 (1977) (stating that free expression is check against abuse of official power).

conception insist that the best decisions can be reached in a democracy only if the citizenry is fully aware of the issues involved, the options available, and the interests or values at stake.[84]

Yet for many, these interpersonal or systemic functions of free speech do not explain the need to safeguard extremist or hateful communication such as the anti-semitic message of the Nazis. Few, for example, were willing to credit the Nazis who wished to march through Skokie, Illinois,[85] with expanding the menu of views from which individuals choose their truths.[86] Such a strong commitment to free speech may be more fully explained by another set of interests—communal interests. Through our legal response to speech activity, we create a social identity that reflects and embodies the aspirations and values of the community. The protection of the Skokie march thus can be viewed as a collective, self-disciplinary exercise in communal tolerance.[87]

The communal interest in free speech, therefore, need not be based on the skeptic's fear of the fallibility of governmental attempts to identify truth. Rather, it is based on a desire to nurture certain character traits in the polity. Free speech seeks to make people courageous, resilient, and tolerant. It attempts to create a polity willing to stake confidence and resolve against deviance and dissent, one that is unafraid to hear the worst that can be said about its own moral and cognitive situations.[88] So

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[84] *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 88 (1948) (asserting that First Amendment's primary purpose is to give every voting citizen fullest possible understanding of problems with which members of self-governing society must deal).

[85] *See* National Socialist Party of Am. v. Village of Skokie, 434 U.S. 1327 (1977) (denying stay); National Socialist Party of Am. v. Village of Skokie, 432 U.S. 43 (1977) (per curiam); Collin v. Smith, 578 F.2d 1197 (7th Cir.), *stay denied*, 436 U.S. 953, *and cert. denied*, 439 U.S. 916 (1978). *See generally* David Goldberger, *Skokie: The First Amendment Under Attack by its Friends*, 29 MERCER L. REV. 761, 772 (1978) (stating that committment to Bill of Rights can be "peeled away, one supporting group at a time").

[86] Holmes argued that all views, even those we detest, need to be given the opportunity to *succeed* in the marketplace. *See* Gitlow v. New York, 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting). Unsurprisingly, the Jewish community of Skokie questioned why the arguments of anti-semitism and genocide should be offered such an opportunity. For many, the contention that unrestricted expression of the precepts of Nazism must be protected because we cannot know whether such ideas are actually false is both unpersuasive and offensive. *See* DONALD A. DOWNS, NAZIS IN SKOKIE: FREEDOM, COMMUNITY AND THE FIRST AMENDMENT 32 (1985) (estimating that ACLU lost 30,000 members—15% of its total membership—and $500,000 per year in contributions because of defense of Nazis' right to march through Skokie).

[87] *See* LEE C. BOLLINGER, THE TOLERANT SOCIETY 198-200 (1986).

[88] Thus, free speech presently builds character through both the experience of communicating and that of reacting to communication. In the very act of talking, values such as power, enlightenment, skill, affection, respect, health and well-being are latently shaped and shared. Social structures that foster active involvement can cultivate qualities essential to a democratic society,

viewed, the emphasis of the First Amendment shifts from the value of the speech, as represented by the interpersonal interest in information exchange, to the value of the response, as represented by the communal interest in tolerance.[89] Tolerance becomes a means through which society communicates and affirms its own principles, thereby creating a sense of community.[90] The deep structure of this character-based argument, therefore, is collectivist and communitarian, rather than individualistic.

C. *The Importance of Intermediary Institutions*

Despite the availability of this more subtle, holistic approach to liberty, the civic republican language of community has all but disappeared from the lexicon of rights.[91] Instead, the rhetoric of liberal political philosophy—a philosophy which posits individuals capable of freely choosing among values without constraint—provides the bedrock from which our modern commitment to liberty, including free speech, arises.[92]

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qualities such as self-confidence, inquisitiveness, and a willingness to question authority. *See* PATEMEN, *supra* note 71, at 45-66 (examining positive correlation between participation and sense of political efficacy).

But perhaps of even greater importance, a strong doctrine of free expression has its greatest effect on the character of those who possess the power to control speech. They are required to be more tolerant and respectful of individual integrity, more open to change, and more accustomed to, or less fearful of, challenge.

[89] *See* Suzanna Sherry, *An Essay Concerning Toleration*, 71 MINN. L. REV. 963, 976 (1987) (describing contribution of scholarship of Lee Bollinger in understanding value of free speech).

[90] *See* Lee C. Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J. 438, 460 (1983) (noting community is created and defined through tolerance). In this light, it is revealing to compare the opinion of Justice Holmes in Gitlow v. New York, 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting), emphasizing the importance of offering even extremist speech a chance to *succeed* in the marketplace, with that of Justice Brandeis in Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis J., concurring). In this landmark opinion, Justice Brandeis cautioned that "repression breeds hate . . . ." *Id.* at 375. This phrase can be read as a double-entendre. Brandeis was concerned not only with the hate experienced by dissidents, but also with the hate experienced by those with power to punish dissent. The passage is not primarily about consequences or tactics; it is about character. For Brandeis, tolerance was an act of civic courage. *See* Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653, 691 (1988) ("The courageous attitude, Brandeis asserts, is that of receptivity to new arrangements and new ways of thinking.").

[91] There has been, however, somewhat of a revival of republican philosophy in present social theory. *See, e.g.*, Symposium, *The Republican Civil Tradition*, 97 YALE L.J. 1493 (1988) (symposium on civil republicanism).

[92] *See* Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 544-45 (1986) (asserting that present paradigm of political and moral philosophy is individualist). For many, individualism is the foundation upon which our constitutional commitment to free speech is built. *Id.* "Individualism lies at the very core of American culture," writes one group of scholars. ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 142 (1985). "We believe in the

But by asserting that individuals are independent and self-sufficient originators of their own ideas and beliefs—that they exist free of cultural context—the individualist perspective denies the community's role in both shaping and reflecting an individual's values.[93] Thus, individualism provides an unrealistic account of our moral existence; individuals cannot be separated from the community in which they reside.[94]

Yet even with this realization of the importance of "community," the concept is problematic in today's large and heterogeneous state. The community which now structures the individual's sense of self and dominates the process of character building can no longer be equated with the state. Today, the obligation of character development essentially falls on intermediate level institutions or social groupings situated somewhere between the isolated individual and the distant, and often abstract, state.[95] These groups and institutions, such as civic and voluntary organizations, social and recreational clubs, churches, workplaces, schools, families and neighborhoods, with their face-to-face interplay among members, serve as

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dignity, indeed the sacredness, of the individual. Anything that would violate our right to think for ourselves, judge for ourselves, make our own decisions, live our lives as we see fit, is not only morally wrong, it is sacrilegious." *Id.*

[93] *See* MACPHERSON, *supra* note 58, at 263-64; David A.J. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957, 976 (1979) (discussing foundation of constitutional morality).

[94] In spite of our best efforts, we can never truly extricate ourselves from the influence of our cultural milieu. As historian Isaiah Berlin notes:

> For am I not what I am, to some degree, in virtue of what others think and feel me to be? When I ask myself what I am, and answer: an Englishman, a Chinese, a merchant, a man of no importance, a millionaire, a convict—I find upon analysis that to possess these attributes entails being recognized as belonging to a particular group or class by other persons in my society, and that this recognition is part of the meaning of most of the terms that denote some of my most personal and permanent characteristics. I am not disembodied reason. Nor am I Robinson Crusoe, alone upon his island. It is not only that my material life depends upon interaction with other men, or that I am what I am as a result of social forces, but that some, perhaps all, of my ideas about myself, in particular my sense of my own moral and social identity, are intelligible only in terms of the social network in which I am . . . an element.

Berlin, *supra* note 73, at 155.

[95] An early commentator on American society was struck by the abundance and importance of these intermediate institutions. 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 114-28 (Phillips Bradley ed., 1945). "Americans of all ages, all conditions, and all dispositions constantly form associations." *Id.* at 114. Justice Brennan heralded voluntary associations as "critical buffers between the individual and the power of the State." Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984). Bruce Hafen has also written extensively of the importance of intermediate institutions, what he calls "mediating institutions." Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools As Mediating Structures*, 48 OHIO ST. L.J. 663, 696 (1987) [hereinafter Hafen, *Developing Student Expression*].

the situs of a majority of those experiences which give moral and intellectual meaning to our world.[96] They are the true bases and bear the primary responsibility for social integration and the formation of ideals and beliefs.[97] Essentially, character development is the responsibility of an individual's interactive community.

Thus, character-building depends on lessons gained in the interplay of daily life. Without day-to-day opportunities for meaningful participation in microsettings, people will not develop the relevant skills and attitudes desirable within the community, and may lack a sense of their ability to make a difference in broader political arenas.[98] It is, therefore, the

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[96] *See* Grant McConnell, *The Public Values of the Private Association*, *in* NOMOS XI: VOLUNTARY ASSOCIATIONS 147, 149 (J. Roland Pennock & John W. Chapman eds., 1969) (noting that private associations "build norms and patterns of behavior"); Richard B. Stewart, *Organizational Jurisprudence*, 101 HARV. L. REV. 371, 380-84 (1987) (describing alternative normative conceptions of intermediate organizations) (reviewing MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY (1986)).

If we are to recognize the importance of these intermediate groups in relation to character building, we also must be aware of the danger. The more one's sense of self is tied to one's role in these institutions that incorporate face-to-face contact, the more coercive pressure to conform these groups exercise. Consequently, for some, these small "governing" units represent the greatest danger to individual liberty. *See* THE FEDERALIST NO. 10, at 77-79 (James Madison) (Clinton Rossiter ed., 1961) (expressing fear of coercive power of small groups).

[97] These small-scale institutions can serve as "private boot camps for citizenship . . . serv[ing] not as havens for the dominant culture, but as vehicles for teaching the primacy of the common good, writ small." Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1720 (1988). Some urge that, because of the opportunities for greater participation, feelings of attachment, and common purpose, these smaller associations can give their members a sense of interdependence in the creation of the meanings that give life to the institution. Thus, they can provide the experience of acting for the public good. *See* Gerald E. Frug, *Cities and Homeowners Associations: A Reply*, 130 U. PA. L. REV. 1589, 1600-01 (1982).

[98] *See* Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1 (1990) [hereinafter Ingber, *Rediscovering*].

> What [most people] fail to recognize is that for most Americans those contexts of greatest First Amendment protection [voting, participation in protest marches, demonstrations, picketing, and leafletting] are tangential to their daily lives. Most of us probably would feel sheepish if the degree to which we take advantage of and experiance the opportunity to express our opinions or exercise independent thought were assessed. Mark Twain's notorious comment regarding the practical impact upon individuals of our present legal protection of speech behavior retains its sting: "It is by the goodness of God that in ourt country we have those three unspeakably precious things: freedom of speech, freedom of conscience, and the prudence never to practice either of them."

Id. at 49 (footnotes omitted) (quoting MARK TWAIN, FOLLOWING THE EQUATOR 196 (1987)). A system which protects speech only in contexts experienced by few will have little effect on character the development of the citizenry. *See also* Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 192 (1995) (discussing importance of First Amendment freedoms in "education for republican citizenship").

structure society imposes upon day-to-day intercourse that creates the habits of interaction, socializes proper role expectations, and communicates subtly but powerfully those values for which the community stands.[99] Each of us are constructed by the social setting in which we find ourselves, determining our attitudes towards such factors as hierarchy, expertise, creativity and independence.[100]

Consequently, we must give considerable attention to the vital lessons learned in these mundane contexts, for I believe that it is within these settings that character is actually built and values inculcated. If responsible freedom cannot be fostered in these day-to-day contexts, then a political community built on civic virtue and courage is an impossible dream.[101] Intermediate institutions are integral to the fulfillment of First Amendment concerns; they serve both as the boot camp and the front line in the effort to forge the character of a democratic polity.[102]

Unfortunately, this insight is missing from the Supreme Court's recent willingness to minimize free speech experiences in public school settings—settings vital to the creation of who we are as individuals, and what we care and stand for as a community.

III. EDUCATION FOR CITIZENSHIP

A. Children and Liberty

If constitutional rights presently are based on the rhetoric of individualism,[103] it is not surprising that the individual interests encompassed by

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[99] Other authors have recognized the character-building or communal value of communicative freedom. *See, e.g.*, BOLLINGER, *supra* note 87; Sherry, *supra* note 92. They see First Amendment jurisprudence as playing a largely educative role. Through our legal response to speech activity, they believe we create a social identity that reflects and embodies the aspirations and values of the community. *See* MEIKLEJOHN, *supra* note 84, at 58 ("The Supreme Court, we have said, is and must be one of our most effective teachers. It is, in the last resort, an accredited interpreter to us of our own intentions.").

[100] *See* Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 YALE L.J. 1623, 1628 (1988) ("[T]he methods or habits of 'constitutional thinking' likely cannot be developed on the spur of the moment.").

[101] The values a community hopes its citizens exude, therefore, must be embodied in the community's institutional arrangements. Consequently, it is submitted that if we exclude institutional settings from First Amendment coverage, the concept of a society founded on virtuous, popular participation is likely to remain unfamiliar and foreign, perforce making its attainment unrealistic. If we are trained in our daily lives quietly to accept authority or, alternatively, enthusiastically to wield authority, we cannot expect to create a polity capable of anything other than acceptance of an entrenched status quo.

[102] *See* Sullivan, *supra* note 97, at 1720.

[103] *See supra* text accompanying note 92.

the First Amendment fare poorly in school settings. Given that individualism posits persons capable of choosing among values without constraint from others or the state, children surely constitute the "Achilles heel of liberal ideology."[104] For children, the communal role in character-building is incontrovertible[105] because children are not born with a community allegiance or a particular cultural orientation.[106] Society must teach values, thereby molding character, if children are to have conceptions of the public good as adults. Although the initial source of a child's self-perception lies with the home and family, once the child begins to attend school, a major initiative passes beyond the family to the educational institution.[107] Consequently, many commentators argue that education's inherent indoctrinative character leaves the First Amendment with no legitimate role in our public schools.[108]

One may not simply gloss over the importance of liberty for children, however, by insisting that because they lack the facility to choose in an intelligent, rational, and independent manner, children fail to possess "that full capacity for individual choice which is the presupposition of First Amendment guarantees."[109] Regardless of whether one accepts an

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[104] Shiffrin, *supra* note 25, at 647. Others echo Shiffrin's characterization. *See, e.g.*, Larry Alexander, *Liberalism as Neutral Dialogue: Man and Manna in the Liberal State*, 28 UCLA L. REV. 816, 855 (1981).

[105] Even libertarian John Stuart Mill, in discussing liberty as autonomy, recognized children as a necessary limit upon his philosophy. MILL, *supra* note 82, at 9. Little remains of the concept of unrestrained choice, however, if the educational process may socialize children for 18 years with the intent of forging "good citizens."

[106] Yodof, *Library Book Selection*, *supra* note 23, at 531.

[107] *See* Jules Henry, *Attitude Organization in Elementary School Classrooms*, *in* READINGS IN THE SOCIAL PSYCHOLOGY OF EDUCATION 254 (Werrett W. Charters & Nathaniel L. Gage eds., 1963) (stating that classroom "does not merely sustain attitudes . . . created in the home, but reinforces some, de-emphasizes others, and makes its own contribution"). As children get older, their peer community and the pop-media culture will also have an effect.

[108] *See, e.g.*, JOSEPH TUSSMAN, GOVERNMENT AND THE MIND 51-85, 167 n.29 (1977) (concluding that state's "teaching power" involves inducting children into community, rendering notions of children's free speech and state ideological neutrality irrelevant); David A. Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477 (1981) (contending that schools' indoctrinative function precludes recognizing First Amendment rights for children); Brian A. Freeman, *The Supreme Court and First Amendment Rights of Students in the Public School Classroom: A Proposed Model of Analysis*, 12 HASTINGS CONST. L.Q. 1, 24 (1984) (asserting that classroom dialogue facilitates learning process which includes "value inculcation," instead of forum for free trade of ideas); Stephen R. Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293 (1976) (stating that scope of indoctrinative interests in public education precludes in-class activities contrary to wishes of school authorities).

[109] Ginsberg v. New York, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring). The argument goes further still, claiming that children need to be protected from the consequences of

individual or communitarian perspective on the value of speech conduct, this view begs two fundamental questions: (1) How can young adults autonomously choose among competing options if they have had little prior experience with such choice? and (2) How can individuals as adults exemplify the civic virtues of public-spiritedness, participation, and tolerance if their experiences during their most formative years inhibit such traits? Both the individualist and communitarian goals of free speech are unattainable if societal institutions are structured so as to cultivate interactive habits in children which are inconsistent with the needs of a democratic polity.[110] Students who receive nothing but predigested ideas throughout their childhood cannot miraculously transform into autonomous, free-thinking individuals upon reaching adulthood.

Public institutions, of course, are established to fulfill specified societal needs; schools are established to educate the young. They must be given the tools and freedom to efficiently fulfill that mission. Part of that mission, however, is the preparation of students for induction into a democratic polity. Regardless of the students' readiness for autonomy, our communitarian goals require that they be exposed to free speech experiences in an environment capable of promoting civic virtue, of character building. Therefore, we must structure our schools so that they may succeed not only in the education *of* citizens but also in the education of students *for* citizenship.[111]

B. The Mission of Education

Citizens who lack education also lack the capacity for meaningful participation in a democracy. Even during the founding era of the eighteenth-century, many writers and speakers stressed the necessity of education, recognizing that an ignorant people cannot sustain freedom.[112]

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their own poor choices. *See* Bellotti v. Baird, 443 U.S. 622, 635 (1979) (commenting that children "lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them"); *see also* Bruce C. Hafen, *The Learning Years: A Review of The Changing Legal World of Adolescence*, 81 MICH. L. REV. 1045, 1048-49 (1983) [hereinafter Hafen, *The Learning Years*] (noting that limitations on choice are "form of protection for minors . . . against their own immaturity and against their vulnerability to exploitation by others").

[110] Thus, Professor Hafen acknowledges that despite his belief that infants and young children totally lack the capacity for self-governance, "[a]dolescence . . . is another matter." Hafen, *The Learning Years*, *supra* note 109, at 1045.

[111] *See* Sherry, *supra* note 54, at 77 (distinguishing between education "for" citizenship and education "of" citizens).

[112] In 1782, Zabdiel Adams preached that "[a]n ignorant people will never long live under a free government. They will soon become slaves." Zabdiel Adams, An Election Sermon (1782), *in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760-1805, *supra* note 53,

Thus, education of citizens—education intended to inform and to create certain skills, including those of communication and comprehension—is indispensable to the fostering and nourishing of the underlying values of the First Amendment.[113] Students must gain the capacity to enjoy these free speech values. They must "receive knowledge," and to do so they may well have to accept the authority of their teachers.[114]

To accomplish these goals, schooling certainly requires a degree of order and discipline.[115] Without it, students may well be denied the "right" to an effective education. Based on this need to educate citizens, Professor Hafen concludes that "courts should presume the constitutional validity of rational decisions by public school officials that implicate educational matters, both curricular and extracurricular."[116] This presumption is "grounded in interests associated with students' right to be taught the values underlying the [F]irst [A]mendment."[117]

As previously stated, however, schools are responsible not only for education *of* citizens but also for education *for* citizenship.[118] Schools invariably teach values.[119] Thus, Professor Hafen also appreciates that

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at 539, 555. In 1799, Samuel Knox wrote that "[i]gnorance . . . has ever been the parent and stupid nurse of civil slavery . . . ." Samuel Knox, *An Essay On the Best System of Liberal Education*, *in* ESSAYS ON EDUCATION IN THE EARLY REPUBLIC 271, 288 (Frederick Rudolph ed., 1965). Joel Barlow noted in 1801 that "[i]gnorance is everywhere . . . an infallible instrument of despotism." Letter II from Joel Barlow to His Fellow Citizens of the United States: On Certain Political Measures Proposed to Their Consideration (1801), *in* 2 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760-1805, *supra* note 53, at 1099, 1121.

[113] *See* Hafen, *Developing Student Expression*, *supra* note 95, at 669 ("Public education seeks affirmatively to teach the capacity to enjoy first amendment values--to mediate between ignorance and educated expression.").

[114] Professor Hafen, in fact, describes education as "necessarily [an] authoritarian process." Hafen, *Schools*, *supra* note 16, at 619. He further concludes that the "widespread reduction of institutional authority in public schools over the past generation is statistically correlated with the recently publicized declines in the academic achievement of American students." Hafen, Hazelwood, *supra* note 5, at 700.

[115] *See* New Jersey v. T.L.O., 469 U.S. 325, 350 (1985) ("Without first establishing discipline and maintaining order, teachers cannot begin to educate their students.").

[116] Hafen, *Developing Student Expression*, *supra* note 95, at 664.

[117] *Id.*

[118] *See supra* text accompanying note 111. Although the Supreme Court often mentions democratic citizenship as one goal of education, *see, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986); Board of Educ. v. Pico, 457 U.S. 853, 864 (1982), there has been little or no careful consideration of what an education for citizenship might entail.

[119] Even schools wishing to avoid "value-training" inevitably teach values. Curricular choices, such as whether to supply a wood-working shop or to hire a music teacher, convey delicate value judgments about the purpose of education. Having students read Gabriel Garcia Marquez's novel, *One Hundred Years of Solitude*, rather than Geoffrey Chaucer's *Miller's Tale*, communicates something about the value of multiculturalism. The very pedagogical style and procedural environment of the classroom (through students' day-to-day interpersonal experiences with

schools must commit themselves to initiating students into the normative culture of our community by transmitting "fundamental civic and moral virtues such as integrity, cooperation, self-reliance, and responsibility."[120]

Still, a problem exists. Although value transmission is essential for preparing the student for citizenship, if such indoctrination is too successful, it threatens the development of a democratic personality. Controlling the system of value transmission is "a hallmark of totalitarianism."[121] Thus, any effort to indoctrinate "official" values[122] is in tension with our designs to have a democratic polity.[123] The desire to induct children into their community "must be tempered by the realization that much of what society achieves depends on individuals who do not or will not conform to the prevailing wisdom."[124]

Herein lies the dilemma. Society must indoctrinate children so they may be capable of independent, critical thought. Paradoxically, education

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teachers, administrators, and other children) instills value positions on matters such as the respect due authority, the worth of creative or critical thinking, and the tolerance due opposing opinions. *See* MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 7 (1964) (suggesting that medium itself may be most significant message); *see also* Galles, *A Basement Tour of the Ivory Tower*, GAINESVILLE SUN, June 9, 1989, at 13A (contending that classroom experiences, rather than formal curricula, provide most significant school lessons). A value-neutral system is simply inconceivable.

[120] Hafen, *Developing Student Expression*, *supra* note 95, at 700. Clearly, this was part of the pressure behind the Court's positions in both *Hazelwood* and *Bethel*. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (deferring to school official's decision when reasonably related to legitimate pedagogical concerns); *Bethel*, 478 U.S. at 681 (confirming school's role in "teaching students the boundaries of socially appropriate behavior"). For a fuller review of both cases, see *supra* text accompanying notes 34-51.

[121] PETER L. BERGER & RICHARD J. NEUHAUS, TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY 6 (1977) (discussing alternative methods to provide "welfare-state services").

[122] *Webster's Third New International Dictionary* defines "indoctrinate" as follows: "to cause to be impressed and usu. ultimately imbued (as with . . . partisan or sectarian opinion, point of view, or principle) . . .: cause to be drilled or otherwise trained (as in a sectarian doctrine) and usu. persuaded . . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1153 (1971). Implicit in the concept of indoctrination is the sense that the individual has been restricted in her ability to perceive new ideas and to appreciate perspectives contrary to the point of view with which she has been "imbued."

[123] Freedom of speech presupposes that the beliefs and opinions that individuals form are not the product of deliberate efforts to shape and condition those beliefs to conform with official policy. To allow officials to inculcate values is to admit that free speech protects expression only so long as the speaker has been conditioned to say what those in authority accept. In a society of such preconditioned speakers, freedom of speech is virtually irrelevant. *See supra* notes 22-27 and accompanying text (noting schools may be used as forum to induce children into adopting values that enhance status quo); *see also* text accompanying notes 103-11 (noting that schools play role of indoctrinating students with values, which may suppress individual choice).

[124] Yudof, *Library Book Selection*, *supra* note 23, at 530.

must promote autonomy while simultaneously denying it by shaping and constraining present and future choices.[125]

Resolving this dilemma requires a re-evaluation of the school's mission as value inculcator. Schools inevitably play a crucial role in the process by which the young are inducted into society.[126] But this induction process must ensure that the adults it produces see themselves as worthy and capable of participating meaningfully in an ongoing process of collective self-determination. Consequently, if schools are to fulfill their mission of educating youths for citizenship, the norms embodied in the First Amendment also must be transmitted. The very impressionability of children makes it vital that community institutions inculcate within the young the free speech values which are crucial to the promotion of a democratic personality. Schools must support free speech not because of any concern over autonomy, but because of our communal interest in character development.[127]

Accepting this character-building interest, public institutions must recognize that certain virtues are public goods to be nurtured. Under any set of social conditions, American democracy will be the poorer if our public institutions do not foster communal support and indoctrinate the values of individual dignity, creativity, mutual respect, inquisitiveness, civic and intellectual courage, and the willingness (on occasion) to question authority.[128] Through the experiences of conveying and reacting to communication, individuals—under a free speech regime—can be socialized

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[125] *See* ROBERT M. HARE, DECISIONS OF PRINCIPLE, PHILOSOPHY AND EDUCATION 72, 85 (Israel Scheffler ed., 1958); Yudof, *Library Book Selection*, *supra* note 23, at 528 (noting education both promotes and denies autonomy by shaping and constraining one's choices); *cf.* EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE, *reprinted in*, SELECTED WRITINGS OF EDMUND BURKE 343, 350-54 (W.J. Bate ed., 1960) (noting paradox in fact that freedom of choice was necessary for "legal existence of the sovereign magistry" while at same time laws dictated that king must hold crown by succession).

[126] Indeed, public schools may be "the primary vehicle for transmitting 'the values on which our society rests.'" Plyler v. Doe, 457 U.S. 202, 221 (1982) (quoting Ambach v. Norwick, 441 U.S. 68, 76 (1979)).

[127] People must be socialized to think critically and independently if we wish to deter what Lee Bollinger referred to as the "obedient mind," a mind unable to think for itself. BOLLINGER, *supra* note 87, at 247. Despite Professor Hafen's antipathy to judicial enforcement of student free speech claims, *see* Hafen, *Developing Student Expression*, *supra* note 95, at 664 (recommending deference to most decisions of school officials), he appreciates that "[a]s holders of inchoate rights of democratic citizenship, students have a high stake in the development of their own critical powers to act in the future as sovereign citizens." *Id.* at 707.

[128] I believe this idea is to a great extent what Justice Brandeis had in mind in his opinion in Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (relating to governmental system fostering "courageous, self-reliant men"), *overruled on other grounds*, Brandenburg v. Ohio, 395 U.S. 444 (1969).

to think (and then to act) critically, independently, and tolerantly.[129]

The task for schools, therefore, is to instill within children a belief that society promotes and appreciates diverse views, independent inquiry, critical thought, and public debate. To inculcate children with the belief that individuals who resist becoming indoctrinated with all of the mores of a society are valuable to that society is not an easy task. To do so, public schools not only must intone the rhetoric of free speech, they must act and structure themselves to give credibility to their statements.[130] Children are unlikely to internalize the values of civic virtue if their schools appear to systematically trivialize or ignore such values. Consequently, the public recognition of First Amendment rights for students serves a necessary pedagogical function.[131]

But in schools, as in other institutions, the claims of order compete with the claims of freedom. Certainly education requires some degree of discipline within the institution.[132] But a student who is taught in an environment where opposing views are suppressed to emphasize discipline and order gets improper signals regarding democratic values and personal self-awareness.

Consequently, to fulfill their inculcative functions, schools must offer the *experience* of expressive liberties. It is through the experience of making particular independent decisions that children develop the capacity for making them generally.[133] "Being mature takes practice," reminds

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[129] For an earlier, more extensive discussion of the character-building implications of free speech experiences, see *supra* note 88.

[130] Schools that extol the virtues of free speech but then restrict expression institutionally are actually teaching children powerful lessons about what rights really mean: "Watch what I do, not what I say."

[131] *See* John H. Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321, 344-47 (1979) (justifying free speech for children in terms of its educational function).

[132] *See* Eva-Lotta Jansson, *Disciplinean Issue at Center but Some Say District Troubles are Typical Rather than a Substantial Concern*, KAN. CITY STAR, June 22, 1995, at 1 (discussing problems of student discipline and behavior in one school district); Shannon D. Murray, *Hammond Teachers Plan Uniform Approach to Discipline at Overcrowded School*, BALTIMORE SUN, July 30, 1995, at 10C (noting one school's response to increased disobedience ranged from verbal reprimand to detention for using vulgar language and insulting other students). Unquestioningly, order has deteriorated so severely in some schools that a significant emphasis on discipline is warranted in these settings. Even in such environments, however, students will be better prepared to be contributing members of society if their schools also convey the importance of liberty, and indicate that there exist appropriate times and means responsibly to question authority.

[133] Hafen, *Developing Student Expression*, *supra* note 95, at 696. The issue, thus, is focused more on character development than autonomy. *Cf.* Rogers M. Smith, *The "American Creed" and American Identity: The Limits of Liberal Citizenship in the United States*, 41 W. POL. Q. 225, 247 (1988) ("Freedom should not be understood to mean simply a lack of hindrance in doing

Franklin Zimring.[134] "To know this is to suppose [one] justification for extending privileges in public law . . . to those who have not yet reached full maturity."[135] It is also through experience, rather than rhetoric, that students see and come to understand the way authority responds to nonconformity in our society. Thus, schools must be aware of the vital lessons they teach concerning the interplay of power, status, independence, and inquisitiveness.

Education for citizenship is a complicated task. It requires children to be socialized into the norms of society while remaining free to question or even abandon them.[136] It demands that while teaching children what they need to know (i.e., education of citizens), a process that necessitates a degree of order and obedience to authority, they also must be taught the value of, and skills needed for, questioning authority. Both liberty and authority are essential to the inculcation of virtue. Consequently, the question we must answer is: how should schools be structured to convey our commitment to, and the importance of, both of these seemingly conflicting values?

IV. SOME PRACTICAL IMPLICATIONS

The mission of public education—consisting of both the education of citizens and the education for citizenship—is formidable. Elsewhere I have depicted this effort as an "ideological enigma":[137]

> Schools are asked simultaneously to respect and nurture both the communal and individual aspects of the human spirit. Schools invariably shape children's attitudes through selectively exposing them to ideas and perspectives, thereby predisposing them to accept certain established views as adults. Yet, while indoctrinating the child, schools also ostensibly exist to equip each child with the skills and self-confidence necessary to allow him to reflect critically upon the values with which he is being socialized. The school system, consequently, epitomizes the tension between the focus of liberal political theory on individual autonomy and the community's need to sustain and perpetuate itself.[138]

Because of this "tension," public schools historically have been the stage

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what we will. It means valuing and exercising our capacities for reflective self-direction and choosing ways of life that preserve and enhance those capacities for all.").

[134] FRANKLIN E. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE 89 (1982).

[135] *Id.*

[136] HARE, *supra* note 125, at 85.

[137] Ingber, *Socialization*, *supra* note 31, at 94.

[138] *Id.* at 94-95.

of passionate struggles and conflicts.[139] Interestingly, this conflict most often has not been over the lofty and potentially conflicting goals of education.[140] Rather, it has concerned the question of how these goals are to be attained[141]—how schools should function and be structured, and who should monitor their success. In turning to these practical problems, let us first consider whether (and if so, how) we can create an educational environment that supports order and obedience while encouraging critical thought and the questioning of authority.

A. A Divided Educational Program

One would think the various components of the educational program—the classroom, the library, extra-curricular activities and others—would be structured to reinforce the efforts to fulfill common educational goals. The problem is that we have identified goals which may not, in all contexts, be consistent with each other. Developing virtue requires both an obedience to authority and experiences of independent, critical thought; the latter are sometimes at odds with authority. Perhaps the answer is to artificially divide the educational program, dedicating part to one perspective on the interplay between obedience and independence, and the other to an alternative perspective.[142]

1. *Board of Education v. Pico*: An Illustrative Case

This suggestion about artificially dividing the educational program, although perhaps not revolutionary, seems the only way to understand cases such as *Board of Education v. Pico*.[143] In *Pico*, the Supreme Court

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[139] *See id.* at 40-47 (discussing historical conflicts over selection of school texts for students).

[140] For example, my writing has differed markedly with that of Professor Hafen over the need for courts to recognize and uphold student free speech claims. *Compare* Hafen, Hazelwood, *supra* note 5, at 685 (praising *Hazelwood* decision for reinforcing institutional authority of schools) *with* Ingber, *Rediscovering*, *supra* note 98, at 83-84 (criticizing *Hazelwood* as giving school officials too much deference in controlling student speech). Yet, when Professor Hafen describes "helping each individual to realize his own autonomous sense of self while simultaneously inducting him into membership in the democratic community" as part of education's mission, Hafen, *Developing Student Expression*, *supra* note 95, at 728, I can do nothing but concur.

[141] For example, Professor Hafen has expressed his concern that efforts to uphold individualism were excessive and had taken their "toll on community and institutional continuity, especially with respect to . . . institutions [such as schools]." Hafen, *Developing Student Expression*, *supra* note 95, at 703.

[142] Undoubtedly, no aspect of the educational program can be exclusively devoted to either perspective. Degrees of both obedience and independence must exist in all contexts to avoid imbuing either subservience or self-centeredness. However, differing contexts can *emphasize* one perspective over another.

[143] 457 U.S. 853 (1982) (plurality opinion).

found that the First Amendment restricts the power of school officials to indoctrinate students. Specifically, the Court imposed constitutional limits on a school board's discretion to remove books from junior and senior high school libraries.[144] The Court was highly fragmented;[145] nonetheless, a clear majority held that a boundary exists beyond which school authorities cannot venture to indoctrinate children with community values.[146]

Writing for the plurality,[147] Justice Brennan found that the school board in *Pico* had violated the student's "'right to receive information and ideas.'"[148] Brennan distilled this right from the "role of the First Amendment . . . in affording the public access to discussion, debate, and the dissemination of information and ideas."[149] This role, he concluded, applied equally to public schools: "[J]ust as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which

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[144] *Id.* at 871-72.

[145] The nine Justices filed seven separate opinions. *Id.* at 854-55.

[146] *See Pico*, 457 U.S. at 871-72 (plurality opinion) (determining that U.S. Constitution limited school board's otherwise broad discretion to remove books from libraries); *id.* at 879-80 (Blackmun, J., concurring) (agreeing that First Amendment restricted school board's authority to remove books from library); *id.* at 883 (White, J., concurring) (agreeing that U.S. Constitution limited school board's removal of books).

[147] The plurality consisted of Justices Brennan, Marshall and Stevens. *Id.* at 854.

[148] *Id.* at 867 (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969)). Arguably, the Court had recognized a right to receive information in many different contexts. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council Inc., 425 U.S. 748, 756-57 (1976) (holding that consumers have right to receive information through price advertisements by pharmacists); Kleindienst v. Mandel, 408 U.S. 753, 762-65 (1972) (recognizing right of university officials to hear Marxist lecturer, but decided on other grounds); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 377-80 (1969) (stating that radio listeners have right to ideologically balanced broadcasts); *Stanley*, 394 U.S. at 577 (addressing right to receive obscenity in home); Lamont v. Postmaster Gen., 381 U.S. 301 (1965) (discussing addressee's right to receive Communist publication in mail); Martin v. City of Struthers, 319 U.S. 141, 143 (1943) (considering right to receive handbills and pamphlets).

Despite these cases, the plurality opinion seemed to depart from prior court doctrine. Before *Pico*, the Supreme Court had predicated the "right to know" upon the speaker's right to speak. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 757 ("If there is a right to advertise, there is a reciprocal right to receive the advertising . . . ."). In other words, the right to know merely protected the speaker's right to communicate with a willing listener. Authors, editors, and publishers have no similar right requiring public schools to choose and distribute their books. A "right to know" may prevent the government from unreasonably blocking the flow of information. This right, however, certainly does not require the state affirmatively to aid speakers in reaching potential recipients. *See* Garvey, *supra* note 131, at 374 (noting that right to know does not place obligation on state to provide information to children).

[149] *Pico*, 457 U.S. at 866 (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978)).

they will soon be adult members."[150] Thus, Brennan found that a student's right to receive ideas was inherent in the justifications used to support the free speech guarantee generally.

The problem with this approach is that it neglects the very purpose of public schools. A right to receive ideas is essentially inconsistent with the inculcative function of public school education,[151] a function which even Justice Brennan acknowledged as legitimate.[152] "Selectivity" is essential to any school system. The plurality's view of education, taken to its logical conclusion, would prohibit school boards from making even curricular decisions—decisions which inherently compel choices of inclusion and exclusion.

Justice Brennan was not oblivious to the conceptual difficulties that a "right-to-know" in public schools created. He revealed his discomfort by seeking to impose certain limits on this newly articulated right, including a distinction between the classroom and the school library.[153] He stated that value inculcation might justify a school board's absolute control over the curriculum, but that such control was inappropriate in the school library's atmosphere of unrestricted inquiry.[154]

Distinguishing between the classroom and the library has some surface appeal.[155] The classroom is prescriptive by nature, as evidenced by its requirements of compulsory attendance and uniform curriculum. Curriculum choices necessarily hinge upon the limited time and resources available to the school system, and the need for students to use the same textbook in a given course. The library, however, is different. Schools do not compel students to use it. Its stacks may contain works beyond the standard curriculum, where students can pursue individualized interests. Consequently, the voluntary library seems more consistent with the

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[150] 457 U.S. at 868.

[151] *See* Yudof, *Library Book Selection*, *supra* note 23 (asserting that schooling enterprise requires board's ability to choose textbooks and courses). The dissenting Justices in *Pico*—Burger, Rehnquist, Powell, and O'Connor—emphasized this apparent conflict between the plurality's First Amendment perspective and the long accepted goal of public education to train values. *See, e.g.*, *Pico*, 457 U.S. at 889 (Burger, C.J., dissenting) (stressing that in order to inculcate students with necessary values, school board must have discretion to decide appropriateness of materials for school); *id.* at 914 (Rehnquist, J., dissenting) (noting that concept of students' rights of access to information in schools is contrary to nature of education as inculcative).

[152] *See Pico*, 457 U.S. at 864 ("We have . . . acknowledged that public schools are vitally important . . . as vehicles for 'inculcating fundamental values' . . . ." (quoting Ambach v. Norwick, 441 U.S. 68, 76-77 (1979)).

[153] *Pico*, 457 U.S. at 869.

[154] *Id.*

[155] *See* Yudof, *Library Book Selection*, *supra* note 23 (noting "different attributes" of classrooms and libraries).

hub-bub of the marketplace than does the compulsory classroom.[156] Unlike the classroom, the library poses no risk of exposing students to viewpoints they find disturbing or undesirable. A library book will be read only by those who seek it out.[157]

Despite these favorable points, Brennan's distinction between the classroom and the library remains unconvincing. Viewing a school library as a place of *bounded* student inquiry under the school authorities' direction is no more unreasonable than viewing it as a place of broad, self-directed student exploration. If the public school system in its entirety may inculcate ideas, surely school libraries may contribute to that process.[158] The plurality severs the library from the goals of the educational venture generally. Although some may prefer its approach, the plurality fails to justify it as a constitutional requirement.

Thus, it simply is not illogical to choose to integrate the library into the public school system's process of value inculcation. Our normal predilections are to treat logically indistinguishable cases consistently. Consistency loses its appeal, however, when it produces less beneficial, rather than more beneficial, outcomes.[159] In such situations, inconsistency can have an affirmative value.[160]

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[156] Minarcini v. Strongsville City Sch. Dist., 541 F.2d 577, 582-83 (6th Cir. 1976) (noting that library rather than classroom is "mighty resource in the free marketplace of ideas") (citing Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J. dissenting)).

[157] Society, therefore, need not protect children from the library in the same way that it might need to protect the child from unsolicited vulgarity over the radio. *See* FCC v. Pacifica Found., 438 U.S. 726, 749-50 (1978) (noting that children may be exposed to vulgarity over radio against their wishes and without warning).

[158] Board of Educ. v. Pico, 457 U.S. 853, 878 (1982) (Blackmun, J. concurring). The plurality appears to have equated the public school library, which may reasonably be perceived as an adjunct to the educational system, with the entrepreneur bookseller, who has no similar responsibility.

[159] *See* RALPH WALDO EMERSON, *Self-Reliance*, *in* ESSAYS 45, 57 (1904) ("A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines.").

[160] Logic, simply, may not be the only constitutionally valid criterion for making distinctions. Lee Bollinger, for example, in his article on regulating mass media, argues that although, for First Amendment purposes, electronic broadcasting and the print media are indistinguishable, a "powerful rationality" exists for treating the two mediums differently—regulating the electronic media more restrictively than is constitutionally permitted for its print media analogue. Lee C. Bollinger, Jr., *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 2-3 (1976). He concludes:

> What the Court has never fully appreciated is that the very similarity of the two major branches of the mass media provides a rationale for treating them differently. By permitting different treatment of the two institutions, the Court can facilitate realization of the benefits of two distinct constitutional values, both of which ought to be fostered: access in a highly concentrated press and minimal governmental intervention. Neither

The public school system, as represented by *Pico*, was such a case. As character-building institutions aimed at fostering a virtuous, democratic polity, schools must inculcate both the importance of authority and the value of liberty. By accepting an otherwise *illogical* distinction between the classroom and the library—thus treating potentially like things differently—the Court resolved the dilemma of promoting contending norms simultaneously by "dividing" the school program into two theoretical units, with one serving a broad indoctrinative function and the other exhorting a student's right to receive a broad spectrum of information.[161] Both liberty and authority received public affirmation.

2. Other Points of Division

Although *Pico* divides the education program between the curriculum and the library, others have suggested alternative points.[162] In fact, the

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side of the access controversy emerges victorious. The Court has imposed a compromise—a compromise, however, not based on notions of expediency, but rather on a reasoned, and principled, accommodation of competing first amendment values.

Id. at 36. By treating like things differently, the Court, at least partially, achieves two inconsistent goals that otherwise could not be realized simultaneously.

[161] The library is an ideal place to fulfill this latter role, thereby allowing schools to avoid the appearance of imposing official orthodoxy upon our youth. First, overt ideological screening of library books will more likely appear as the "book burning" that we equate with repressive governments. Libraries and book stores play a crucial role in our culture and are closely intertwined with the history and tradition behind freedom of speech and the press. Although one may distinguish the function of a grade school library from that of a bookstore or a general library open to the public-at-large, *see supra* note 156 and accompanying text, the distinction is subtle, and not necessarily easily conveyed. On the other hand, society more fully equates the classroom with the training of youth and the inculcation as performed by the family. *See, e.g.*, Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386, 2391 (1995) ("[T]eachers and administrators of . . . schools stand in loco parentis over children entrusted to them."). Official control of library materials, therefore, strikes closer to the core of First Amendment rhetoric and threatens the perception of individual choice and liberty.

[162] One education-law scholar, Stephen Goldstein, argues that what we are confronting is two differing conceptual models of education—one prescriptive and the other analytic. Stephen Goldstein, *Reflections of Developing Trends in the Law of Student Rights*, 118 U. PA. L. REV. 612, 614 (1970). While recognizing that these polar models signify only "theoretical paradigm[s] that never exist in pure form," he then divides education not spatially (as in *Pico*) but rather, chronologically. *Id.* He views pre-college public education as essentially prescriptive, involving a passive student absorbing furnished information and accepted truths, and college and post-graduate studies as analytic, where student and teacher engage each other as active participants in the search for truth. *Id.* By dividing the educational process into two totally distinct phases, Goldstein attempts to find a compromise between authoritative inculcation and the development of the ability to think critically.

Yet after analysis, Goldstein's effort at a chronological division must be rejected. Smothering grade school children in orthodox values may preclude independence in college, since truly successful inculcation inevitably colors future working and thinking habits. More troubling, however, is that those students who never attend college will totally miss an education that

interplay of *Tinker* and *Hazelwood* creates a new partition between the domain of authority and that of independent choice. As described by Professor Hafen, "*Hazelwood* now draws a . . . distinction between a student's private speech, which remains eligible for protection under *Tinker*, and her expression through official school channels, which *Tinker* no longer protects."[163] A case once viewed as an effort to structure an environment which would serve as a "forum crucial in the training of future leaders"[164] has been relegated to a position of protecting "private student interpersonal communication in such places as school yards and cafeterias."[165] Furthermore, both *Hazelwood* and *Tinker* itself limit the protection of student speech to conversation topics not directly challenging school policies or confronting school authorities.[166] The domain of critical, independent thought—an intellectual trait essential to a virtuous democratic personality—has become limited indeed. If, during the adolescence of the baby-boomer generation (the 1960s), we leaned strongly toward rebellion, growth and change, then during the middle-age of that same generation (the 1980s and 90s), the overwhelming emphasis is respect for authority and deference to the judgment of "professional experts."

Both distinctions—that of private versus institutionally-sponsored speech and that of institutionally-oriented versus institutionally-unrelated speech—are most unfortunate if our educational mission includes, as I believe it should, an effort to publicly support, promote experiences of, and inculcate First Amendment norms. Once we acknowledge the necessity of inculcating the free speech virtues of participation and tolerance as part of education's central mission of character development, there is something insidious about relegating free speech experiences to contexts unsponsored by the educational institution. One would think inculcation would demand a *public showing* of institutional commitment to free speech values. To deny such values in all school sanctioned activities—the classroom, the

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promotes free inquiry. Thus, we cannot so easily discount the primary and secondary school student's role in educational decisions.

For another more flexible effort to account for a child's increasing readiness for exposure to liberty experiences as she grows older, see Hafen, *Developing Student Expression*, *supra* note 95, at 696.

[163] Hafen, Hazelwood, *supra* note 5, at 689.

[164] Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 511 (1969).

[165] Hafen, *Developing Student Expression*, *supra* note 95, at 728.

[166] The Court in *Tinker* stressed that the students' actions "neither interrupted school activities *nor sought to intrude in the school affairs* or the lives of others." *Id.* at 514 (emphasis added). *Hazelwood* continued to emphasize the need for deference to school official determinations which are "reasonably related to legitimate pedagogical concerns." Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

school newspaper, school produced plays, etc.—demonstrates vividly the insincerity of any rhetorical claims of the importance of free speech to the molding of a democratic personality. The grudging acceptance of independent, critical thought in contexts viewed as irrelevant to the educational mission thereby explicitly excludes from that mission the virtues embodied in the First Amendment.[167]

Even more troubling is the inference that *Tinker*'s impact should be limited to its facts. Unlike *Bethel* and *Hazelwood*, the student communication prohibited in *Tinker* was unrelated to any school concern; it merely happened to take place on school grounds. To confine *Tinker*'s significance to institutionally-unrelated speech, however, would be both ironic and counterproductive. Such a limitation opens the school to discussions of only those issues unconnected to the educational environment.[168] Reason would support an opposite policy.[169] One would think the classroom (as involved in *Tinker*) would serve *least well* as a forum for discussing matters extraneous to the course.[170]

More importantly for purposes of the character-enhancing role of free speech experiences, the distinction between institutionally-oriented and institutionally-unrelated expression is not merely unjustified, it is also dysfunctional.[171] To teach students that they are free to speak only as

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[167] Thus, I strongly disagree with Professor Hafen's attempt to develop a continuum of school activities as a method for analyzing free speech claims, with the classroom curriculum at one extreme and private intercommunication at the other. Hafen, *Developing Student Expression*, *supra* note 95, at 728. For Hafen, the stronger the educational content of the activity, the more it falls on the curricular side of the continuum and the less open it is to free speech claims. *Id.* But Hafen is ignoring the inculcative, character-building function of education. (Or, at the very least, he is describing the myopic view of the *Hazelwood* Court.) It is precisely in these "educational" contexts that the child learns what the public school and, assumedly, society itself value and what they do not. This is the vital lesson that most concerns me.

[168] Examples of speech left unprotected would include a student's rejection in a history class of the portrayal of Thomas Jefferson—an owner of slaves—as a defender of freedom, criticism of an officially prescribed dress code, or the protestation of a decision to discontinue music training as a cost-saving measure.

[169] *Cf.* Brown v. Louisiana, 383 U.S. 131, 141-43 (1966) (holding that protest held in municipal library was constitutionally protected precisely because library itself was focus of expressive activity).

[170] As Justice Stevens aptly noted: "Any student of history who has been reprimanded for talking about the World Series during a class discussion of the First Amendment knows that it is incorrect to state that a 'time, place, or manner restriction may not be based upon either the content or subject matter of speech.'" Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 544-45 (1980) (Stevens, J., concurring) (quoting majority's opinion at 536).

[171] Elsewhere, I have argued similarly against the Court's effort in Connick v. Myers, 461 U.S. 138 (1983), to categorize speech according to differing degrees of protection afforded when evaluating the free speech rights of public employees. Ingber, *Rediscovering*, *supra* note 98, at 58. The Court's requirement in *Connick* that protected statements must involve "matters of

long as their message is tangential to their institutional environment is to give a lesson in subservience rather than in participation and civic courage.[172] To tell school officials that, as speech regulators, they need permit only student comments that are consistent with, or at least unthreatening to, their "expert" perception of proper pedagogy or educational suitability is to convey nothing to officials (or students) about the importance of tolerance. Instead, such an approach cultivates a respect for elitism and hierarchy. Any effort to instill the intellectual and interpersonal habits of civic virtue must focus considerable attention on the structuring of our educational institutions. The character-building lessons learned through the experience of communicating with others, and responding to the communication of others, are not dependent upon the subject matter of the expression.[173]

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public concern," 461 U.S. at 147, would make sense if the First Amendment were concerned only with the interpersonal or systemic interests of free speech as a means of developing an informed citizenry. But the requirement is flawed when one also considers the communal component of free speech. The character-enhancing lessons of free speech learned through the experience of communicating and regulating communication of others are not dependent on the subject matter of the communication. In *Connick*, where the plaintiff was dismissed for complaining about intra-office policies, 461 U.S. at 141, the employee learned that questioning authority and attempting to retain some measure of control over a vital part of one's life (i.e. one's work environment) is a risky enterprise. Ingber, *Rediscovering*, *supra* note 98, at 58. Her supervisor, in turn, learned that those in positions of power can suppress challenges to authority. *Id.* Clearly, the employee is not encouraged to embrace the value of self-governing participation, nor is her supervisor encouraged to embrace that of tolerance.

Finally, there is something discomforting about government agency supervisors, or even courts, determining whether or not a particular matter is one of public concern. "Whenever a governmental institution decides that a given fact . . . is not a fitting topic for public discussion nor relevant to any issue of public concern, it is essentially imposing an ideological perspective . . . . " Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 66 CAL. L. REV. 772, 845 (1985) [hereinafter Ingber, *Rethinking Intangible Injuries*]; *cf.* Walter Weyrauch, *Law as Mask—Legal Ritual and Relevance*, 73 CAL. L. REV. 699, 709 (1978) (discussing judge's role in deciding what is relevant in trial as reflecting "prevailing value judgments" of society of which judge is part).

[172] Such was the fear that Justice Brennan expressed in his *Hazelwood* dissent. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 284 (1988) (Brennan, J., dissenting).

[173] Perhaps this realization led Professor Meiklejohn to abandon his distinction between public and private speech. Initially, he insisted that only public speech deserved First Amendment protection. *See* MEIKLEJOHN, *supra* note 84, at 24-25. Subsequently, however, he found the distinction difficult to maintain. He finally was compelled to conclude that "novels and dramas and paintings and poems" also fell within the ambit of free speech protection. Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 257. Essentially, Meiklejohn had come to understand that the First Amendment protected not only the development of political values but also anything that goes into the making of a good political actor. The Court, occasionally, also has suggested this insight. *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977) (suggesting that expression concerning philosophical, social, artistic, economic, literary, and ethical matters is entitled to full First Amendment protection).

B. Rethinking Divisions and the Role of the Judiciary

1. The Meaning of Efficiency

The Court in *Bethel* unquestionably is correct when it states that "[t]he process of educating our youth for citizenship in public school is not confined to books, the curriculum, and the civic class."[174] It is equally true that all components of the educational program—curriculum, library and extra-curricular activities, such as student publications, election assemblies and performing arts programs—may be structured and called upon to contribute to the efficient fulfillment of the educational mission. The problem is defining that mission. Efficiency is a concept that takes on meaning only in relation to substantive goals.[175]

Given our constitutional mandate, our educational goals should not be limited to imparting to children useful information and transmitting to them the cultural norms of the past. Our educational institutions also must accept their responsibility for promoting democratic virtues in order to further the communal goal of building the character necessary for a democratic polity. Authority and obedience may aid the efficient pursuit of some of our goals, but if free speech is neglected in the day-to-day contexts so central to the character-forging experiences of our impressionable youth, we risk breeding caution and stifling initiative, thereby fostering only the virtue of obedience.[176] Thus, along with their ability to achieve our prescriptive goals for education, schools must be structured to offer experiences in which authority can be challenged and norms questioned if they are to further the virtues of participation and tolerance, and help to fulfill our polity-developing goals. Somewhere within the official structure of our schools, we must promote the experience of free speech values, and nowhere may we obviously and formally denigrate them.[177]

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[174] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

[175] *See* Mario J. Rizzo, *The Mirage of Efficiency*, 8 HOFSTRA L. REV. 641 (1980).

[176] Outside of educational contexts, courts have evaluated the impact on free speech goals of regulations intended efficiently to aid the state's effort at maintaining litter-free streets and freely circulating traffic. *See, e.g.*, Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 654 (1981) (holding that only if "alternative forums for the expression of . . . protected speech exist" may state regulate distribution and sale of literature at state fair to further efficient crowd flow); Schneider v. State, 308 U.S. 147, 162 (1939) (rejecting ban on leafletting intended to prevent littering).

[177] The importance of public schools in the development of a democratic polity explains why the rejection of student free speech claims cannot be justified simply as time, place and manner restrictions. *See* Cox v. New Hampshire, 312 U.S. 569, 576 (1941) (developing time, place and

2. A Question of Trust and Symbolism

a. Deference to Expertise

Some scholars agree that schools should provide experiences promoting student initiative and criticism of authority, yet still insist that courts should reject student free speech claims.[178] Essentially, these critics believe that, although such opportunities may be good pedagogy, their existence, timing, and frequency are matters of educational philosophy left to educational officials and professionals. Consequently, these opportunities should not be compelled by courts as constitutional mandates.[179] This position of judicial deference, often accepted by jurists, represents a deep-seated discomfort with the competence of courts to second-guess decisions of alleged school experts.[180] Because the courts lack special knowledge of proper pedagogy for our schools, they should avoid reviewing policies made by those who claim expertise and are immersed in the educational settings.[181]

Claims of expertise, however, should not be a talisman that magically insulates a group's judgment from review.[182] On the contrary, the very immersion of educational specialists into the mire of conflicts they are to resolve should call into question the advisability of deference. Individuals accustomed to wielding power cannot readily see issues from the perspec-

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manner doctrine). A student who claims a right of access to a particular book, for example, may be reminded that despite the book's absence from the school library, it remains available at the public libraries and local bookstores. A student prohibited from denouncing a school dress code during a school assembly may well be able to state the same complaint in a public park across the street from the school yard. Obviously, if First Amendment claims are to be recognized, the rationale cannot be truly a right of access to information or to communicate one's thoughts. Rather, the concern must be for the values that schools ought to be inculcating and the character traits they ought to be forging. For those purposes, access or opportunity away from the school is irrelevant. *But see* Hafen, *Developing Student Expression*, *supra* note 95, at 724 (noting that under Supreme Court doctrine child wishing to express herself in ways prohibited at school continues to have "entire off-campus world" at her disposal). For further discussion of this point, see *infra* text accompanying notes 184-88.

[178] *See, e.g.*, Hafen, *Schools*, *supra* note 16, at 615.

[179] *Id.*

[180] *See* Board of Curators v. Horowitz, 435 U.S. 78, 90 (1978) (asserting that educational specialists, rather than courts, should make decisions requiring academic judgment).

[181] Hafen, *Developing Student Expression*, *supra* note 95, at 699 (stating that schools must be protected from "second-guessing by the courts when educational issues are at stake").

[182] Burton Bledstein has studied the dangers of professionalism and the claims of expertise generally. He concludes by cautioning his readers to beware of the "arrogance, shallowness, and potential abuses . . . by . . . individuals who justify their special treatment and betray society's trust by invoking professional privilege, confidence and secrecy." BURTON J. BLEDSTEIN, THE CULTURE OF PROFESSIONALISM 334 (1976).

tive of those who are the subjects of their authority. Judges, of course, are not immune from this disability,[183] nor are they necessarily wiser or more beneficent than other bureaucrats. But at least the controversies they are asked to resolve do not involve individuals questioning judicial authority and then asking tolerance of the court.[184] The immersion of educators in the institutional setting of public schools likely makes their authority in such settings a fundamental source of self-image. Relying on them to tolerate the questioning of their judgment by students (i.e. underlings) may be a highly unrealistic expectation.[185] Because judges are detached from the controversy, they have less at stake and may be more willing to consider the character-building significance embedded in the First Amendment's provisions. Given the risk of petty tyrants, some measure of judicial oversight of public school decision-makers is essential to motivate them to consider the communal worth of recognizing constitutional claims. Consequently, continued judicial deference to school official discretion denigrates First Amendment values. If our voiced commitment to develop the intellectual attributes of a democratic polity is not to ring hollow, a meaningful and visible degree of judicial review of public school decisions is imperative.

b. Confirming Free Speech Rhetoric: An Illustration

Such a demonstration of public commitment, however, does not require the courts to be in the business of micro-managing our schools by reviewing each and every educational decision.[186] It is sufficient that courts review school officials' decisions and acknowledge students' speech

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[183] As Thomas Grey has noted, judges are simply "officials given more job security than other civil servants. . . . They are comfortably middle-of-the-road, senatorially confirmable lawyer-politicians. . . . [U]nder the robes, federal judges are ordinary members of the comfortable classes." Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 23-24 (1984).

[184] Courts have been unsympathetic to parties who claim the right to question judicial authority through disobedience, although similar questioning of legislative authority has been upheld. *Compare* Shuttlesworth v. Birmingham, 394 U.S. 147, 160-61 (1969) (Harlan, J., concurring) (asserting that one should be able to act on his belief in unconstitutionality of prior restraint on speech and ignore restraint, rather than being compelled to seek review by court) *with* Walker v. Birmingham, 388 U.S. 307, 317-19 (1967) (holding that, despite questionable constitutional validity of injunction against street parades, affected individuals were obligated to apply to courts for dissolution of injunction rather than simply to disobey it).

[185] Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1334 (1984) (insisting that bureaucratic self-policing is not credible).

[186] Justice Black, in his concurrence in Epperson v. Arkansas, 393 U.S. 97 (1968), essentially made this point. *Id.* at 114 (Black, J., concurring) (insisting that courts lack wherewithal to supervise "every public school in every hamlet and city in the United States").

rights with sufficient frequency to retain the credibility of our claimed commitment to First Amendment values. Courts also must react to those occasional "outrageous" cases where the conflict between our free speech rhetoric and public school reality is simply too blatant.[187]

Again, *Pico* may help to illustrate this point.[188] Justice Brennan, in articulating a students' "right to know," carefully limited the restriction on school board discretion to situations where the board removed library books, rather than simply never acquiring them in the first place.[189] Given that limited resources obviously prohibit schools from acquiring every book published, this distinction between the acquisition and removal of books appears sensible.

Upon closer analysis, however, the distinction seems totally inconsistent with any notion of a student's right to know. The student suffers the same loss of perspectives regarding exposure to new ideas whether the school removes the books or initially rejects them.[190] Either way, selective exposure may shape children's attitudes. The "right-to-know" surely does not depend on whether school officials read a book and officially reject its perspectives after, rather than before, its purchase.

Justice Blackmun's concurrence in *Pico*, however, clarifies the significance of this distinction. Blackmun saw the constitutional issue differently from the plurality. According to the Justice, the state could emphasize certain values or subjects, and even inculcate community perspectives, as long as it did not "attempt to shield students from certain ideas that officials find politically distasteful."[191] The issue was not whether students had access, but whether the board's act symbolically stigmatized the rejected book, author or perspective. Under his approach, schools, consistent with their function of inculcating values, could support one point of view while critically evaluating and rejecting an alternative. Only by condemning an idea—by officially labeling it as beyond the pale

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[187] Wilson v. Chancellor, 418 F. Supp. 1358 (D. Or. 1976), illustrates an overt conflict with constitutional symbols that required court intervention. In *Wilson*, a high school teacher who had invited a series of outside speakers to address his political science class challenged a school board order prohibiting political guest speakers. *Id.* at 1361. The board issued its order after speeches by a Democrat, a Republican, and a member of the John Birch Society, but before a scheduled speech by a Communist. *Id.* The content and timing of the order made it obvious that the board's purpose was to prevent student access to, and to stigmatize, a specific political perspective. *Id.* at 1364. The Oregon district court held the order unconstitutional, stating that it unreasonably infringed on the student's right to know. *Id.*

[188] *See supra* text accompanying notes 143-54.

[189] Board of Educ. v. Pico, 457 U.S. 853, 862 (1982).

[190] *See* Diamond, *supra* note 108, at 516; Garvey, *supra* note 131, at 372.

[191] *Pico*, 457 U.S. at 882 (Blackmun, J., concurring).

of free discussion and scrutiny—would schools violate the Constitution.

Justice Blackmun thus identified the symbolic importance of the Court's distinction. The issue did not involve access to expression, or even whether the government may actually control and indoctrinate. Instead, the issue was whether there existed the *appearance* of governmental manipulation and repudiation of First Amendment values.[192] Refusal to purchase a book merely makes that book one of innumerable others that the school has not acquired.[193] Removal, on the other hand, singles out a book for disapproval. This kind of purge is more inimical to the First Amendment because it dramatically communicates official disapproval of the condemned work in a way that failing to acquire a book normally does not. Again, since both failure to acquire and removal prevent a student from reading a particular work in the school library, the issue is clearly one of symbols rather than access.[194]

Thus, the Court intervened in *Pico* because the school board's effort to manipulate students to conform to board members' political and social tastes was simply too flagrant—too reminiscent of the "book burning" we

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[192] With exemplary candor, Justice Blackmun noted the importance of appearances, confessing:

> I also have some doubt that there is a theoretical distinction between removal of a book and failure to acquire a book. But as Judge Newman [of the Second Circuit] observed [in his concurrence to the lower Second Circuit decision], there is a profound practical and evidentiary distinction between the two actions: "removal, more than failure to acquire, is likely to suggest that an impermissible political motivation may be present. There are many reasons why a book is not acquired, the most obvious being limited resources, but there are few legitimate reasons why a book, once acquired, should be removed from a library not filled to capacity."

Id. at 878 n.1 (Blackmun, J., concurring) (quoting Pico v. Board of Educ., 638 F.2d 404, 436 (2d Cir. 1980), *aff'd*, 457 U.S. 853 (1982)).

[193] Thus, to make a constitutional case, a teacher or student would have the difficult—if not impossible—task of proving that the school was not purchasing a book because the librarian or school board found its content objectionable.

[194] Judge Newman, of the Second Circuit, clearly addressed in his *Pico* opinion the central importance of symbolism in the school board's actions:

> The symbolic effect of a school's action in removing a book solely because of its ideas will often be more significant than the resulting limitation upon access to it. The fact that the book barred from the school library may be available elsewhere is not decisive. What is significant is that the school has used its public power to perform an act clearly indicating that the views represented by the forbidden book are unacceptable. The impact of burning a book does not depend on whether every copy is on the fire. Removing a book from a school library is a less offensive act, but it can also pose a substantial threat of suppression.

Pico, 638 F.2d at 434 (Newman, J., concurring).

equate with repressive governments.[195] The Court was obliged to uphold constitutional symbols and aid the process of inculcating First Amendment values. The risks of excessive judicial involvement in public schools were, however, also obvious to the Court. Much of *Pico*, therefore, may be explained as an effort to uphold constitutional appearances while limiting judicial intrusion to only those cases in which appearances are most in jeopardy.

c. Motivating Tolerance and Constitutional Sensitivity

As I stated earlier, when courts refrain from questioning any decision labeled "pedagogical" by school officials, they have acceded to the judgment of educational professionals and their claims of expertise.[196] Relying on such individuals to exhibit the virtue of tolerance and to promote that of questioning authority is unrealistic when it is their very authority that is being contested.[197] Consequently, self-policing is no more credible when practiced by school authorities than when practiced by anyone else in society. Yet judicial deference must assume that just this form of self-regulation will take place.

Occasional judicial intervention when First Amendment values appear most in jeopardy offers students a degree of proof of the importance their community attaches to the democratic virtues of participation, critical thought, and tolerance. The potential of judicial oversight, however, does more than confirm the importance of free speech norms to students as they are inducted into our democratic polity. It also motivates school officials to consider and to exhibit the democratic virtue of tolerance. If school officials know that courts will involve themselves, at least in extreme cases, they may have sufficient reason to regard seriously their responsibility for both nurturing and exhibiting the civic virtues of a democratic polity and refrain from acting precipitantly.[198]

Furthermore, the very possibility of judicial oversight has a disciplinary effect on the sorts of measures or regulations that school officials can

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[195] *See supra* note 161 (discussing reasons libraries, compared to classrooms, are well suited to symbolize schools' recognition of free speech values).

[196] *See supra* text accompanying notes 178-85 and note 182 (discussing dangers of deferring to claims of expertise).

[197] *See supra* text accompanying note 185 (noting that it is unlikely that educators will tolerate students' questioning of their judgment).

[198] *See* Yudof, *Library Book Selections*, *supra* note 23, at 553; *see also* James v. Board of Educ., 461 F.2d 566, 575 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972). The Second Circuit stressed its belief that the very threat of judicial involvement would temper school board abuse. *Id.* For some, this possibility was the most significant contribution of *Pico*. *See* Comment, Board of Education v. Pico: *The Supreme Court's Answer to School Library Censorship*, 44 OHIO ST. L.J. 1103, 1124 (1983).

propose or enforce because of the potential need to present publicly the rationale for these actions.[199] When positions must be defended by argument and reason, they are not likely to be justified in terms of self-interest. The requirement of appeal to public-oriented reasons may increase the probability that public-oriented actions will be taken in the end.[200] The risk associated with the more visible process of decision-making involved in a judicial critique of state proffered rationales heightens the likelihood of such pressures. Thus, a convergence is possible—and necessary—between the adjudicatory process, by which some limited number of conflicts are resolved, and promoting civic virtues throughout the corridors of government, including those of our public schools.[201]

The greatest influence of intermittent judicial intervention, therefore, may be on the method and content of the deliberations of school boards and officials. As such, the constitutional limits posed may serve an important function even if these limits do appear poorly defined,[202] mostly symbol-

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[199] Several constitutional theorists posit a conception of constitutional review that features precisely this process of public explanation and discussion. *See, e.g.*, ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 91 (1970) (depicting constitutional decisions as part of national conversation); Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952) (referring to judicial discussion of problems as "a vital element in the community experience through which American policy is made"); *see also* Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 14 (1979) ("The task of a judge . . . should be seen as giving meaning to our public values and adjudication as the process through which that meaning is revealed or elaborated.").

[200] Tocqueville suggested as much. *See* JOHN STUART MILL, *Tocqueville on Democracy in America*, *in* ESSAYS ON POLITICS AND CULTURE 187, 223-24 (1962); *see also* WILLIAM N. NELSON, ON JUSTIFYING DEMOCRACY 94-130 (1980) (emphasizing public deliberation as value of democracy); JON ELSTER, SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY 35-42 (1983) (critically discussing this view). Of course, it would be a mistake to exaggerate the extent of this effect. Self-interest motivations may merely be concealed; the requirement of deliberation can invite hypocrisy. Even hypocrisy, however, may create feelings of guilt that, in turn, may act as a constraining factor. Stanley Ingber, *The Interface of Myth and Practice in Law*, 34 VAND. L. REV. 309, 353-56 (1981).

[201] Thus, the aim of occasional judicial intervention is not increased litigation. The most important character-building lessons are not those gained from isolated judicial decisions. Rather, these lessons are learned from the way educational institutions handle conflict generally. Judicial oversight serves its function best when it motivates all parties—teachers, administrators, parents, and students—to seek methods of conflict resolution, other than courts, which promote the development of those attributes conducive to a democratic polity. *See infra* note 202 (discussing similar point); *see also* Ingber, *Rediscovering*, *supra* note 98, at 93-97 (considering judicial role in encouraging decisional processes consistent with "structural due process").

[202] The amorphous and incomplete nature of the rules which the courts have designed for the public schools provides institutional flexibility but also imposes a high level of institutional uncertainty and insecurity. These indeterminate precepts do supply the means, however, for courts to confront those "outrageous" cases while avoiding the need to thrust themselves into all of the multitudinous conflicts that may arise daily in our public schools. *See supra* text

ic,[203] and self-enforced.[204] Cases such as *Tinker* and *Pico*, by interjecting a constitutional element into educational matters, may do more than simply make school board members aware of the risk of litigation.[205] Hopefully, they also imbue board members and the community they represent with a different sense of their educational role and responsibility, a sense that recognizes the importance of inculcating an appreciation for tolerance and independent, critical thought—as well as for authority—in a process of educating for citizenship.

3. Imprecise Divisions

a. Messages of Exclusion

Earlier, I suggested the possible need to divide the educational program, dedicating part to experiences fostering the virtues of order and authority, and part to those instilling the virtues of liberty, including independent, critical thought and tolerance.[206] Such a division, I mentioned, hopefully would demonstrate the cultural importance given to these virtues (thus facilitating the process of inculcation) while allowing students to practice the differing skills required for virtuous citizenship.

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accompanying note 183-85 (discussing court deference to educational experts).

[203] Thurmond Arnold, critiquing the role of symbolism in government, cogently exclaimed: "Almost all human conduct is symbolic. Almost all institutional habits are symbolic. The symbols are everywhere inconsistent. Society is generally more interested in standing on the side lines and watching itself go by in a whole series of different uniforms than it is in practical objectives." THURMOND ARNOLD, THE SYMBOLS OF GOVERNMENT 17 (1935).

[204] Yudof, *Library Book Selection*, *supra* note 23 (making same point).

[205] Some concern for litigation may not be bad. School boards (and other school officials) may avoid the cost and potential embarrassment of lawsuits if they encourage all parties of interest to enter the deliberative process early, and listen to all positions with respect and consideration. The heart of democratic government is a sense shared by all that their particular interests, prejudices, and diverse characteristics are brought to bear on the decision-making process. *See* ARNOLD, *supra* note 203, at 34 (recognizing that government must give diverse groups at least symbolic recognition and respect for worth of differing precepts when writing, "the function of law is not so much to guide society, as to comfort it"). Regardless of the decision reached, all concerned will more likely accept the result if no affected group feels alienated from the decision-making process. *See, e.g.*, Loewen v. Turnipseed, 488 F. Supp. 1138, 1152-53 (N.D. Miss. 1980) (suggesting that school boards should be prevented from functioning unless they provide method to be heard for those affected by board decisions). School boards, reading these decisions, should feel pressure to solicit, rather than ignore or deprecate, the views of various affected groups. Such pressure and the behavior it promotes are consistent with the virtues of a democratic polity—virtues that schools should inculcate by deed as well as by word.

[206] *See supra* text accompanying note 142. I also cautioned, at that point, against the possible misconception that any part of the education program could be *exclusively* devoted to any one pattern of experiences. *See supra* note 142.

More recently, I attempted to limit judicial intrusion upon school affairs to only that number of occasions needed to publicly reaffirm our society's commitment to First Amendment values, especially where the conflict between free speech rhetoric and public school reality is so glaring as to threaten the credibility of our resolve.[207]

Fulfilling the purpose I have set for judicial oversight, however, likely hinders our ability to maintain a clear division regarding which aspect of the educational program will concentrate on which component of civic virtue. Divisions cannot be precise because the messages conveyed can be profoundly different as one varies the circumstances from which they emerge.

For example, an analysis of court decisions would suggest that although school boards must be cautious in removing books from a school library, the latitude they have in determining what books to order initially is considerable.[208] Yet the very justification that supports this distinction between removing and obtaining a book compels it to remain obscure. The issue at stake in these library cases, as revealed earlier,[209] was not informational access for students. Rather, it was whether an idea had been officially condemned as beyond the pale of free discussion and scrutiny. This stigmatization—this badge of infamy—simply is more obvious when books are removed than when they *merely* are not purchased. This situation, however, might not always be the case.

Consider a situation where the school board publicly announces that it is determined never to buy a work written by a homosexual or one that portrays homosexuality in a positive light. Such action communicates, as clearly as any book removal, that the views of homosexuals, or a favorable perspective on homosexual life, are so unacceptable—so "beyond the pale"—as to be unworthy of even the slightest consideration.[210] It is this

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[207] *See supra* text accompanying notes 186-87.

[208] *See* Board of Educ. v. Pico, 457 U.S. 853, 863-72 (1982) (plurality opinion).

[209] *See supra* text accompanying notes 191-94.

[210] Justice Rehnquist recognized the possibility of such a situation in his dissent in *Pico*, rejecting the distinction between initial purchases and the removals of school library books. *Pico*, 457 U.S. at 916-17 (Rehnquist, J., dissenting). If the issue was public visibility, he reasoned, "a school board's public announcement of its refusal to acquire certain books would have every bit as much impact on public attention as would an equally publicized decision to remove the books." *Id.* Justice Rehnquist is clearly right. His only error is in his conclusion that once we recognize that book removals and acquisitions cannot be theoretically distinguished, the only option for courts is to refrain from oversight of public school library policies altogether. The alternative, quite obviously, in those situations where the basis for nonacquisition is sufficiently well known to make the purchase/removal distinction unconvincing, is to dismiss the distinction and condemn both deeds.

official message of exclusion, rather than any concern about access or the ability to categorize the deed as one of removal rather than of nonacquisition,[211] that justifies judicial intervention in order to reinforce symbolically our conception of individual integrity[212] and our commitment to tolerance as a civic virtue.[213]

b. Curriculum and Classroom Activities

Analysis of the importance, for First Amendment purposes, of messages of exclusion emanating from public schools is illuminating but complicated. It brings into question some understandings about the importance of order and authority in divisions of the educational process where these values normally are assumed to reign supreme. Both jurists and scholars have generally agreed that the judgment of school boards concerning the curriculum[214] (except where that judgment implicates

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[211] The distinction between removal and nonacquisition is essentially a surrogate means for noting the presence of such a message of exclusion. In reality, given the need for routine decisions as to which books the schools initially should purchase, no need normally exists to publicize a decision not to purchase any given book. The decision to remove a book already purchased, however, is likely to be sufficiently exceptional to require, if noticed, some public explanation. *See supra* text accompanying notes 192-94 and note 192 (recognizing practical, evidentiary significance of book removals compared to purchases).

[212] Earlier, I noted that under the republican political theory an individual cannot be understood outside of her communal interactive context. *See supra* text accompanying notes 65-73. Because of their inculcative role, schools, perhaps more than other institutions, implicitly accept this perspective. But for those persons committed to liberal individualism, *see supra* text accompanying notes 56-61, a reference to the First Amendment as a limitation on indoctrination by public schools serves to protect the *appearance* of promoting individual integrity. In this vein, and given the present primacy of liberal political philosophy, *see supra* text accompanying note 92, elsewhere I have asserted:

> Public acceptance of the myth of individual autonomy and the value neutral state imparts an aura of legitimacy and authority to government. Although obvious discrepancies exist between this myth and the reality of value inculcation, full public awareness of these discrepancies could threaten the legitimacy of governmental decision making. Preserving the myth thus is crucial to continued social stability. Preservation requires that the public perceives no systematic manipulation of the individual's perspective by processes of indoctrination or socialization.

Ingber, *Socialization*, *supra* note 31, at 71-72 (footnotes omitted). The values of the First Amendment thus serve important functions both under individualism and under civic republicanism. For one, they legitimate government; for the other, they promote character-building and civic virtue.

[213] Although official messages of exclusion always should be judicially suspect, I conclude below that they are sometimes justified. *See infra* note 218. The questions to be asked are, of course, what are the standards of justification, and who shall enforce them.

[214] Decisions overtly as diverse as *Tinker*, *Pico* and *Hazelwood* appear to agree that curricular judgments of school officials are virtually absolute (excluding those implicating separation of church and state). *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988)

separation of church and state)[215] and the judgment of teachers concerning the use and substance of classroom discussions[216] are not subject to judicial second-guessing. Student liberty claims seem least compelling (and, thus, least likely to gain judicial support) when they are directed at these issues or contexts.[217] Yet understanding the proper judicial/constitutional grounds for discomfort over messages of exclusion may necessitate reconsideration of this general belief in an unbridled commitment to authority when dealing with these issues. Upon reflection, the very concept of academic freedom,[218] which is at times judicially enforced,[219] represents a limitation upon the supremacy of order and

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(determining that educators are entitled to exercise significant control over "activities [that] may fairly be characterized as part of the school curriculum"); Board of Educ. v. Pico, 457 U.S. 853, 869 (1982) (plurality opinion) ("[School Board members] might well defend their claim of absolute discretion in matters of *curriculum* . . . ."); *see also* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 514 (1969) (stressing fact that student petitioners had not "interrupted school activities nor sought to intrude in the school affairs"). Many scholars concur. *See, e.g.*, Hafen, *Developing Student Expression*, *supra* note 95, at 728 (noting that student free speech claims are least likely to obtain judicial approval when directed at classroom curriculum); Diane Ravitch, *The Continuing Crisis: Fashions in Education*, 1984 AM. SCHOLAR 183, 193 (expressing doubt as to whether academic curriculum can be democratized "without cheapening it").

[215] *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578 (1987) (holding unconstitutional state law requiring teaching of "creation science" whenever theory of evolution is taught); Epperson v. Arkansas, 393 U.S. 97 (1968) (striking down state law prohibiting public school teachers from teaching evolution).

[216] *See, e.g.*, *Hazelwood*, 484 U.S. at 271 (recognizing authority of teachers to control student expression to assure other students learn intended lesson); *Tinker*, 393 U.S. at 514 (emphasizing that students' act of protest, although taking place within classroom, was not directed at school or its personnel and, as silent demonstration, did not interrupt class); Hafen, *Developing Student Expression*, *supra* note 95, at 728 (minimizing legal significance of student free speech claims in classroom).

[217] Needless-to-say, school boards or teachers, without judicial insistence, could decide for their own institutional or pedagogical reasons to encourage participation of students, and other school community members, in curricular deliberations and in the structuring of norms of classroom discussion.

[218] The initial concept of academic freedom grew out of a German university setting. It included the "idea of 'convincing' one's students, of winning them over to the personal system and philosophical views of the professor . . . ." Walter P. Metzger, *The German Contribution to the American Theory of Academic Freedom*, *in* 1 EMERSON, HABER AND DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 806 (4th ed. 1976). American academic opinion has not condoned fully this pedagogical approach. *Id.* For a comprehensive history of academic freedom in this country, see RICHARD HOFSTADTER & WALTER P. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES (1955).

[219] Regarding the constitutional basis of academic freedom, the Supreme Court generally has confined itself to a few "eloquent but isolated statements." THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 616 (1971). These statements always are made in reference to more traditional constitutional doctrines. Thus, the Court has at various times derived academic freedom from free speech, due process, the rule against vagueness in statutory language, and the

authority even when dealing with curricular matters.

A school board, intent on conveying information and inculcating norms valued by its members, rightfully would insist upon the authority to determine what to exclude, as well as what to include, in the school's curriculum.[220] Nevertheless, courts have distinguished curricular inclusions from exclusions, acknowledging greater school board control over minimum, rather than maximum, curriculum content. Teacher discharge cases illustrate this pattern. The courts have permitted the school board to discharge a teacher to assure that the board's own chosen material was transmitted to the student, but have prohibited a discharge that was grounded in an effort to assure that the material was transmitted *to the exclusion of competing perspectives*.[221] Only in the latter situation has the dismissal communicated an official rejection of specific information or perspectives. Only then has the board sent a message of exclusion and intolerance for the community, including students, to hear.

Consequently, the doctrine of academic freedom is best explained not as a constitutional entitlement of the teacher per se, but as a mechanism for restricting the school system's ability to impose uniform values upon a captive and impressionable audience.[222] It prevents the school board from communicating to the students, through the spectacle of a teacher's discharge, the importance of subservience and the danger of independent,

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rule against established religion. *Id.* at 610. For some relevant cases upholding academic freedom claims, see *infra* notes 221-22.

[220] "[E]ducation may be viewed as providing certain inputs to students with the decision of what not to communicate being equally as significant as that of what to communicate." STEPHEN R. GOLDSTEIN & E. GORDON GEE, LAW AND PUBLIC EDUCATION 108 (1974); *see* Board of Educ. v. Pico, 457 U.S. 853, 914 (Rehnquist, J., dissenting) ("Determining what information *not* to present to the students is often as important as identifying relevant material.").

[221] *See* Kingsville Indep. Sch. Dist. v. Cooper, 611 F.2d 1109 (5th Cir. 1980) (protecting teacher's right to include controversial material relevant to prescribed curriculum even when forbidden to do so by superiors); *see also Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1098 (1968) (theorizing that minimum, but not maximum standards, are inherent in concept of compulsory education). *Compare* Palmer v. Board of Educ., 603 F.2d 1271, 1273 (7th Cir. 1979) (permitting discharge of teacher who refused to teach "patriotic ceremonies"), *cert. denied*, 444 U.S. 1026 (1980) *with* Russo v. Central Sch. Dist. No. 1, 469 F.2d 623 (2d Cir. 1972) (protecting teacher's right to sit silently and not participate while another teacher conducted class flag ceremonies), *cert. denied*, 411 U.S. 932 (1973).

[222] Most court decisions on academic freedom ground themselves in the belief that independent thinking by teachers is needed to cultivate students' capacity for critical and independent thought through exposure to a diversity of views. *See* Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Wieman v. Updegraff, 344 U.S. 183, 194-98 (1952) (Frankfurter, J., concurring); Cary v. Board of Educ., 427 F. Supp. 945, 949 (D. Colo. 1977), *aff'd*, 598 F.2d 535 (10th Cir. 1979); Albaum v. Carey, 283 F. Supp. 3, 10-11 (E.D.N.Y. 1968); *see also* TUSSMAN, *supra* note 108, at 58-59.

critical thought. Such a lesson would be inconsistent with the necessity to educate for citizenship, and to enhance the character of a democratic polity.

The classroom component of this argument is somewhat more difficult to document. Instead, let me address your educated instincts. In 1987, the Supreme Court rejected, as being in violation of the Establishment Clause, Louisiana's attempt to require instruction in "creation science" whenever the theory of evolution was taught.[223] Does the prohibition of a school system from teaching "scientific creationism" equally permit a teacher's silencing of a student who, consistent with the normal pattern of student discussion,[224] wishes to state her concern over evolution's deviation from the biblical account of the creation of humankind? There seems something quite different between a public school's inability to promote a specific religious belief,[225] and a public school teacher's authority to banish from his classroom as unworthy of comment—as beyond the pale[226]—a perspective held by people of good will within the community. The difference may be one between preventing schools from fostering religious beliefs within students and allowing teachers to officially denigrate those same beliefs when expressed by children in their classes.[227] Thus, even the classroom must be structured to avoid the blatant besmirching of First

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[223] Edwards v. Aguillard, 482 U.S. 578, 597 (1987).

[224] Thus, I am excluding from my question the student who decries the instructor or other students, who screams, or who refuses to yield the floor after the accustomed limit on a single student's speaking time has elapsed.

[225] The Court in *Aguillard* found Louisiana's purpose in requiring the teaching of "creation science" to be the advancement of a particular religious belief. 482 U.S. at 593.

[226] This argument cannot be taken too far. Some perspectives really may be beyond the pale: for example, one supporting the sexual abuse of children. In the process of defining ourselves as a community, some values become so entrenched and widely accepted in our cultural community that they are no longer subject to serious debate. At this point they become part of our "civil religion," *see* Robert N. Bellah, *Civil Religion in America*, 96 DAEDALUS 1 (1967) (introducing term "civil religion" into modern lexicon), and their antithesis comes to reside *outside* the universe of culturally conceivable options. *See* Ingber, *Rediscovering*, *supra* note 98, at 1517-20 (trying to capture this concept through image of "community agenda of alternatives"). The value of protecting children from sexual abuse has likely reached such a position in contemporary America. Thus, silencing the classroom expression of a contrary perspective is unlikely to even raise a judicial eyebrow. The same cannot be said with respect to the status of the cultural debate over the origin of humankind and the significance of the biblically-based perspective. Defining the boundary of our "universe of culturally conceivable options" may sometimes appear self-evident; at other times, it may constitute the most difficult decision that school officials and, at times and in due course, courts, must make.

[227] Silencing such beliefs is a violation of both the Free Speech and Free Exercise Clauses. *See* Widmar v. Vincent, 454 U.S. 263, 277 (1981) (finding that concept of free speech was violated in university's refusal to provide facilities to student group wishing to use them for religious worship and discussion, while generally making those facilities available to other student groups).

Amendment values.

c. Extra-Curricular Activities

As shown, even the curricular and classroom components of public education may be *judicially* compelled at times to communicate the virtues of liberty.[228] Nevertheless, these components remain most dependent on the alternative virtues of order and authority. A reasonable pedagogical theory that educators might choose perceives the grade-school classroom as prescriptive by nature, and identifies curriculum choices as hinging upon the limited time and resources of the school system and the requirement that students use the same textbooks in a given course.[229] Consequently, when evaluating the degree of judicial oversight properly directed toward extra-curricular activities, one finds that some activities are virtually part of the classroom curriculum, demanding much the same emphasis on order and authority. Others, however, can—and likely should—proceed quite effectively without this emphasis and with a greater recognition of the cultural significance of liberty.[230] Under the latter set of circumstances, if liberty is denied unnecessarily, it communicates to students the undesirable message of institutional indifference or societal disregard for liberty-oriented virtues. This message is most disquieting given our alleged

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[228] *See supra* text accompanying notes 214-27.

[229] *See supra* text following note 152; *see also* Yudof, *Library Book Selection*, *supra* note 23, at 547 (stressing educational limitations of classroom). Other pedagogical perspectives reject these perceptions. Beginning with John Dewey, some education theorists have stressed the communitarian significance of the child's role in his own education. *See* JOHN DEWEY, DEMOCRACY AND EDUCATION 393 (1916); *see also* Lawrence Kohlberg & Rochelle Mayer, *Development as the Aim of Education*, 42 HARV. EDUC. REV. 449, 494 (1972) (agreeing with Dewey's view and asserting "that all children . . . are 'philosophers' intent on organizing their lives into universal patterns of meaning"). For such theorists, education must be participatory.

Despite this conflict, one should recall Justice Holmes' famous dissent in Lochner v. New York, 198 U.S. 45, 74-76 (1905), noting that "[t]he Fourteenth Amendment does not enact Mr. Herbet Spencer's Social Statics." *Id.* at 75 (Holmes, J., dissenting). If Holmes is correct, there would seem no greater justification for interpreting the Constitution to impose John Dewey's educational viewpoint. *See* DEWEY, *supra*. Educators may choose the pedagogical theory they prefer as long as they do not apply it in ways which communicate and inculcate denigration of values of liberty. The communal interests of free speech cannot permit this.

[230] This portion tracks the contextual standard for protecting speech employed in Grayned v. City of Rockford, 408 U.S. 104 (1972). In *Grayned*, the Court sustained an ordinance barring certain demonstrations near schools after questioning "whether the manner of expression [was] basically incompatible with the normal activity of a particular place at a particular time." *Id.* at 116. Under a "basic incompatibility" test, the nature or mission of the institution initially dictates whether the regulation is appropriate. *See* International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992). If the communicative pattern is compatible with the institution's continued effective functioning, then *tolerance* should be exercised and *participation* encouraged.

attempt to inculcate democratic values as part of the community's educational mission.

Thus, not all extra-curricular activities justify equal degrees of judicial deference to the judgment of educational professionals. The Court's lack of this understanding in *Hazelwood* is more troubling than its precise holding. Because the school newspaper at issue was a graded classroom assignment of a journalism course,[231] it arguably was subject to the same school and faculty oversight as any other classroom assignment. The Court, however, did not limit itself to these facts. Instead, it gave educators carte blanche control over the content of all "school-sponsored" student speech whenever a pedagogical explanation was possible. The phrase "school sponsored" appears to be defined so broadly as to include any student communication relevant to, and delivered during, a school--authorized activity.[232] This definition not only encompasses classroom expression, but also student speech associated with all extra-curricular activities. As previously suggested, this perception extends judicial deference too far.[233] It allows schools, with the imprimatur of constitutionality, to be structured to enforce subservience to an unrelenting authority. The lessons taught in such an environment are antithetical to those needed to habituate civic virtue.

Contemplating a different type of extra-curricular activity helps demonstrate the unfortunate consequences of the Court's ruling. Given the Justices' apparent indifference to the precise facts of *Hazelwood*, one can only assume the Court would reach the same conclusion in a case involving a student newspaper that was not associated with any journalism course, but was produced by students on school grounds as an on-going project of an offically-recognized extra-curricular journalism club with a faculty advisor. Under such circumstances, however, I would argue that the greater detachment of the student paper from the school curriculum and, therefore, its greater symbolic similarity to the press generally, make official silencing[234] of the paper much more damaging to our goal of forging a

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[231] For a review of the factual details of the *Hazelwood* conflict that occurs in Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988), see *supra* text accompanying notes 43-47.

[232] *Hazelwood*, 484 U.S. at 271-74. Again we see the irony of a free speech interpretation that only protects expression which is irrelevant to the context in which it is delivered. *See supra* text accompanying notes 164-67. It seems that, if anything, such circumstances actually *increase* the justification for requiring the speech to be taken elsewhere, where it may be equally, if not more, effective.

[233] *See supra* text accompanying notes 164-70.

[234] I use the word "silencing" rather than "censoring" to reduce any bias in my argument. If the school's action can be seen as consistent with the proper educational mission of our public schools, than the action cannot rightfully be labeled "censorship."

democratic polity.

To fortify the argument that greater official recognition of the liberty virtues is both possible and mandated in my "reformulated" *Hazelwood* context, we need only consider the Court's response to the educational conflicts that developed in the wake of its decision in *Widmar v. Vincent*.[235] In *Widmar*, the Court held that a public university, while directed by the Establishment Clause to avoid promoting religion, was *required* by the Free Speech Clause to provide religious groups equal access to the university's "open forum."[236] Prompted by uncertainty about the extent of *Widmar's* application to elementary and secondary schools, Congress enacted the Equal Access Act of 1984.[237] The Act prohibits public secondary schools which have established a "limited public forum" from denying a student religious group permission to meet on school premises during non-instructional time.[238]

Despite the statute, school officials at Westside High School, a public secondary school in Omaha, Nebraska, refused to allow students to form a Christian club, which would have joined the thirty other student groups already approved as after-school extra-curricular activities.[239] In *Board of Education of the Westside Community Schools v. Mergens*,[240] the Supreme Court found that the school's action violated the Equal Access Act,[241] and that the Act, to the extent that it provided public school facilities to student groups intending to use them for religious purposes, did *not* violate the Establishment Clause.[242] Much of the Court's opinion focused on whether a "limited public forum" existed at the school[243] and

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[235] 454 U.S. 263 (1981).

[236] *Id.* at 269. The Court rejected the university's claim that granting access would imply school sponsorship of the religious groups involved or of their practices. *Id.* at 274.

[237] 20 U.S.C. § 4071 (1988).

[238] *Id.* § 4071(a). The Equal Access Act states that "[a] public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during non-instructional time." *Id.* § 4071(b). The statute is not limited by its terms to protecting religious groups. *Id.* § 4071(a). It also prohibits public schools which receive federal financial assistance from denying student groups access on the basis of the "political, philosophical or other content of speech [likely to be engaged in at the group's] meetings." *Id.*

[239] *See* Board of Educ. v. Mergens, 496 U.S. 226, 231-33 (1990) (plurality opinion).

[240] *Id.* at 226.

[241] *Id.* at 247.

[242] *Id.* at 253. Specifically, Justice O'Connor stated that "[a]lthough the Act permits 'the assignment of a teacher, administrator, or other school employee to the meeting for custodial purposes,' such custodial oversight of the student-initiated religious group, merely to ensure order and good behavior, does not impermissibly entangle government in the day-to-day surveillance or administration of religious activities." *Id.*

[243] *Mergens*, 496 U.S. at 234-47.

on the substance of Establishment Clause doctrine.[244] The Court also analyzed what constituted "school-sponsored expressive activities" within extra-curricular activities.[245] We will concentrate on this latter aspect of the opinion since the term, as used in *Mergens*, appears to have a significantly narrower meaning than it had in *Hazelwood*.

Westside's school board had adopted a policy covering student groups and organizations that heralded them as a "vital part of the total education program as a means of developing good citizenship, wholesome attitudes, good human relations, knowledge and skills."[246] Notwithstanding the obvious effort of the board (totally consistent with the philosophy of *Hazelwood*) to integrate all extracurricular activities into the common educational missions of information presentation, skills development and value inculcation, the *Mergens* Court not only refused to defer to the board's curricular judgment, but adamantly rejected it.[247] Yet the board's policy hardly was indefensible, its pedagogical approach hardly unheard of.[248] Despite its reasonableness, the Court recognized that the Congressional attempt, through the Equal Access Act, to demonstrate our nation's support for, and desire to promote, experiences of expressive liberty in our schools would be totally defeated if the board's holistic understanding of education were approved.[249] The board's approach would mandate an emphasis on order and authority in *all* extra-curricular meetings and functions equivalent to that which is justified in the classroom, thereby smothering efforts to stress independence and tolerance in any school activity.

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[244] *Id.* at 247-53.

[245] *Id.* at 249-52.

[246] *Id.* at 231 (quoting Board Policy 5610).

[247] *Mergens*, 496 U.S. at 243-45. The Court stated: "To the extent that petitioners contend that 'curriculum related' means anything remotely related to abstract educational goals . . . we reject that assignment." *Id.* at 244. The Court then adopted the language of the Court of Appeals, indicating that

> [a]llowing such a broad interpretation . . . would make the [Act] meaningless. A school's administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined educational goal. At the same time the administration could arbitrarily deny access to school facilities to any unfavored student club on the basis of the content of the speech of that group.

Id. at 244-45 (quoting Board of Educ. v. Mergens, 867 F.2d 1076, 1078 (8th Cir. 1989), *aff'd*, 496 U.S. 226 (1990)).

[248] *See supra* text accompanying notes 158-70 (recognizing logic of choosing to fully integrate varying school components into common and consistent enterprise of value inculcation).

[249] Board of Educ. v. Mergens, 496 U.S. 226, 244-45 (1990).

Thus, as in *Pico*,[250] the Court marked an educationally important, if not a logical, division among extra-curricular activities, relegating some to the domain of authority and others to that of liberty. Using a clearly different understanding of "curriculum" than had the board, the Justices in *Mergens* found that some officially-recognized, after-school activities were curriculum-related and that others were not.[251] For those clubs or groups not adequately tied to the curriculum, the student expressive activities associated therewith were understood properly as "permit[ted]" by the school rather than "endorse[d]" or "support[ed]."[252] *Tolerating* speech activities was different from *sponsoring* them.[253] Even the requirement that each student organization, in order to be officially recognized, have a faculty sponsor present at its meetings was insufficient to turn student expression into institutional expression.[254] If school officials feared others might erroneously conclude that the communication of students in officially permitted expressive activities equaled school-sponsorship, they needed only to publicly disavow the connection.[255] For some extra-curricular activities, the virtues of liberty—tolerance, participation and independent thought—were to come to the fore, thus adding another dimension to the school's effort to educate for citizenship.[256]

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[250] Board of Educ. v. Pico, 457 U.S. 853 (1982).

[251] *Mergens*, 496 U.S. at 239-41. The Court defined "curriculum related" to include any student group of which

> the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit.

Id. at 239-40.

[252] *Id.* at 250 (stating "proposition that schools do not endorse everything they fail to censor").

[253] *Id.* at 252 ("Although a school may not itself lead or direct a religious club, a school that *permits* a student-initiated and student-led religious club to meet after school . . . does not convey a message of state approval or endorsement of the particular religion.") (emphasis added).

[254] *Id.* at 252-53.

[255] *Mergens*, 496 U.S. at 251.

[256] *Mergens*, of course, involved the interpretation of a statute. Too broad a definition of "curricular-sponsored expressive activities" would have defeated the Congressional purpose in enacting the legislation. Congressional attempts to ensure both liberty and authority experiences in our schools, however, deserve no greater judicial support than does the Constitution's character-building goals to which I have referred so often. *See supra* text accompanying notes 88-90. In fact, as explained earlier, *see supra* text accompanying notes 235-38, the Equal Access Act was an effort to extend to secondary schools the constitutional principles announced in Widmar v. Vincent, 454 U.S. 263 (1981). Consequently, I have no difficulty extending the Court's analysis in *Mergens* to constitutional challenges, such as those involved in Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

My conclusion that a *Hazelwood*-type situation (as earlier reformulated[257]) should be decided in a manner more consistent with that of *Mergens* is augmented by my sympathy for the efforts of the *Hazelwood* student journalists. These high school students were not acting in an immature or unprofessional manner. If the political issue of the day during *Tinker*'s 1960s was the Vietnam War, then the defining political and cultural issues of the 1980s and 1990s well might involve divisions and concerns relating to abortion, teen pregnancy, sexual harassment and abuse, and parental responsibility. The articles deleted from the student paper in *Hazelwood* were sincere attempts to consider the impact of these issues upon the students of the school, from those students' perspective. When responsible efforts to confront the real-life problems of today's adolescents are silenced as too sensitive for publication, those affected are likely to equate their experience with official disregard of free-speech values, rather than with an attempt to secure needed school decorum in the face of childish student behavior. Such lessons "teach youth to discount important principles of our government as mere platitudes."[258] Students rightfully would perceive such silencing as an act of "censorship."[259]

Precisely because of the reasons which cause me to sympathize with the *Hazelwood* student journalists, I find the *Bethel* decision[260] more compelling. The use of the sexual metaphor in the student's nominating speech *was* juvenile and may well have conflicted with the school's mission of teaching the limits of socially appropriate discourse. Inculcation of civic virtue may necessitate public disapproval of vulgarity during a school assembly.

To take such a posture, however, requires reconsideration of the position I have long held: that the First Amendment should not "indulge . . . the facile assumption" that one can somehow separate the substance and form of speech.[261] "Speakers often choose words," I have written, "not only for their cognitive content but for their emotive force.

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[257] *See supra* text accompanying notes 231-34.

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

[259] I believe the use of the label has now been proven appropriate. *See supra* note 234.

[260] *See supra* text accompanying notes 34-39.

[261] *See, e.g.*, Ingber, *Socialization*, *supra* note 31, at 65-66; Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 32-36. The quoted phrase comes from Justice Harlan's opinion in Cohen v. California, 403 U.S. 15, 26 (1971), in which the Court held that the First Amendment protects a person's right to wear a jacket bearing the words "Fuck the Draft" in a courthouse corridor. More fully, Harlan warned: "[W]e cannot indulge in the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." *Id.*

Unconventional terminology used to convey unpopular ideas may be essential to communicate the intensity with which the speaker holds his perspective."[262]

When writing these words, I was still of the opinion that liberal political philosophy properly provided the foundation of our constitutional commitment to free speech. My conception of free-speech rights, therefore, focused on their importance in furthering the goal of individualism to promote autonomy and, relatedly, their interpersonal function of promoting a "marketplace of ideas."[263] More recently, I have come to view as of equal, if not superior importance, the communal value of free speech in fostering civic virtue and the democratic polity based upon it.[264] This more subtle conception of rights—including individual, systematic and communal components—was presented earlier.[265] Also suggested was the proposition that, when dealing with children, the significance of free speech relates more to the communal interest of character development than to the individual's concern for the protection of autonomy, an autonomy that children do not yet fully possess.[266] When dealing with adults, therefore, for whom the securing of autonomy is of great import, free speech demands that much significance be given to the individual's choice of wording, with all of its nuances and shadings. For children, however, especially in their role of student, where the inculcation of civic virtue is the strongest justification for recognizing free-speech claims, promoting a capacity to overcome private passion or appetite in public decision-making is likely more consistent with First Amendment goals. Consequently, one can approve of the monitoring of vulgar language in a school assembly, as in *Bethel*,[267] to promote a preferred level of social discourse without simultaneously conferring upon the state the power to control the language

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[262] Ingber, *Socialization*, *supra* note 31, at 65. Justice Brennan stressed this point in FCC v. Pacifica Found., 438 U.S. 726, 750-51 (1978) (holding that FCC may regulate radio broadcasts that use indecent but not necessarily obscene language). In his dissent, Justice Brennan insisted:

> The idea that the content of a message and its political impact on any who might receive it can be divorced from the words that are the vehicle for its expression is transparently fallacious. A given word may have a unique capacity to capsule an idea, evoke an emotion or conjure up an image.

Id. at 773 (Brennan, J., dissenting).

[263] *See* Ingber, *Socialization*, *supra* note 31, at 15, 47-48.

[264] *See generally* Ingber, *Rethinking Intangible Injuries*, *supra* note 171 (discussing importance of free speech as it relates to community interaction in general).

[265] *See supra* text accompanying notes 73-90.

[266] *See supra* notes 103-11 and accompanying text.

[267] Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986).

of public debate generally.[268]

4. An Overall Perspective

Apparently, not a single aspect of the education process can separate itself from education's inculcative mission. The inculcation of virtue, a process upon which our founding generation depended for the success of our nation,[269] requires an appreciation for the value of both liberty and authority. That appreciation realistically can be obtained only if students—the youth of our nation—simultaneously become habituated to the roles of order and authority and of tolerance and independence through experiences that give credence to the proclaimed virtues of each. One difficulty faced by schools which makes them such complex and fragile institutions is that experiences of some of these virtues can overshadow the experiences of others.[270] Yet, experiences of all are necessary for the molding of the virtuous, democratic personality.

Dividing the educational process into separate components, each accentuating a different set of virtues, is of some help. It is a blunt

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[268] This distinction may be of greatest significance when school boards attempt to use vulgarity as a reason to remove a book from a public school's library. A student told that she must delete vulgarity from her school assembly address is still able to repackage her message to convey some, if not all, of her meaning. Any loss in substance due to the change in form may be outweighed by the training in preferred styles of social discourse. When a book is removed for vulgarity, however, there is no opportunity for rephrasing, and the author's message is fully removed from the school. This difference, when added to the symbolic communication of school library book removals as described earlier, *see supra* text accompanying notes 191-94, cautions against the "facile assumption" that substance and form can be separated in the library context.

[269] Sherry, *supra* note 54, at 68-70.

[270] Here lies the hopefully implicit limitation of Professor Hafen's assertion that "regulation can *protect* adolescents even as it restricts them as a way to help them *learn* by their own experience as their normal developmental processes unfold." Hafen, *The Learning Years*, *supra* note 109, at 1061. Certainly, students need order and authority if they are to obtain the information and information-gathering skills needed to be informed as adults. In addition, students sometimes must be protected even from themselves because they do not yet possess personalities with sufficient maturity to avoid risks of their own making. *Id.* at 1048-49 ("[L]imitations on choice rights represent a form of protection for minors because they protect minors against their own immaturity and against their vulnerability to exploitation by others."). But if we protect them to the point that they do not experience the need to tolerate diversity, the thrill of independent thought, and the empowerment gained by questioning authority, then we shall have protected them to the point where they have *learned* the character traits of conformity and subservience.

Although public schooling requires us to admit that cultures do and should constrain, we must not equate cultural influence with cultural domination. The socialization process within the schools must appear to inculcate a tradition that we acknowledge to be unfinished or incomplete. ALASDAIR C. MACINTYRE, AFTER VIRTUE 207 (1981). Society must perceive inculcation as neither too successful, nor too efficient. The system must remain ostensibly pervious—leaving a space for liberty to reign.

instrument, however, needing further refinement to avoid institutional communications that "outrageously" denigrate any of these values. There is little chance that school officials or education professionals will act to discredit the school's commitment to order and authority, for these values provide those individuals with their institutional status. But to ensure that their actions do not impinge upon the believability of their liberty-supportive and tolerance-supportive rhetoric, a credible threat of judicial oversight must exist.[271] Even if exercised solely for egregious cases, judicial intervention in defense of free speech norms can both motivate greater sensitivity of those norms by educators and provide public proof of the sincerity of the community's belief in liberty's importance to otherwise potentially skeptical students. Such a demonstration may help accomplish the difficult task of indoctrinating children with the belief that individuals who resist becoming wholly indoctrinated are highly valuable to society. And so the educational enigma continues.

V. ADDENDUM

The desk at which I sat while writing this Article is only a few miles away from the various sites associated with the *Tinker* conflict. In fact, in Des Moines, the case virtually has become part of the community's folklore.[272] This glorification of *Tinker* happened despite my belief that the sweeping language used by the Court to ensure that our schools inculcate the virtues of liberty frightened educators and led to a judicial backlash. As a result of this backlash, the virtues of order and authority have been reestablished as supreme in virtually all aspects of the official

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[271] Thus, although the Supreme Court appears to have embraced the position of *Hazelwood*, 484 U.S. at 272-73, I cannot accept what Professor Hafen characterizes as his "modest and general observation" that courts, subject to the principle of separation of church and state, should defer expansively to judgments of educational institution authorities. Hafen, *Schools*, *supra* note 16, at 607. An assurance of deference may undermine Professor Hafen's own encouragement that schools, on occasion, "elect non-directive methods that distinctly lack authority or that place a premium on student initiative or student criticism of authority." *Id.* at 615.

[272] A few years ago, for example, many of the principals of Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969), came back to Des Moines to participate in a "Visiting Scholars" program at Roosevelt High School, one of the schools where students wore armbands. The first evening, a public discussion about the events leading to the decision and its effect over the years, was held in the school's auditorium. *See School Report*, DES MOINES REG., Apr. 27, 1992, at 9A. The following day, the *Tinker* students (and their former attorney) spent time at the school talking with their present-day counterparts. Mary Challender, *Three Who Took a Stand See Results of Effort*, DES MOINES REG., May 9, 1992, at 3M. A day after their departure, the *Des Moines Register* had an editorial praising their courage and their role as defenders of free speech. Dennis Ryerson, *Reflecting on the Tinker Case*, DES MOINES REG., May 10, 1992, at 3E.

educational process.[273] It appears that *Tinker* has been left to reign in contexts such as the cafeteria and school yard as well as other areas where the speech involves private interpersonal communications among students which neither are incorporated into, nor impact upon, the educational mission. The residual significance of *Tinker*, therefore, has little to do with the need to recognize a place for inculcating tolerance, participation, and independent, critical thought—the virtues of liberty—in the planning of our school structure.

Still, *Tinker* provides students with some expressive rights that did not exist as clearly prior to the decision. The domain of private speech and that of noninterruptive demonstrations of views not directly challenging school policy would seem to remain—for whatever that is worth—within the decision's continuing sphere of protection. But even here, twenty-five years after *Tinker*, school officials still may not have heard or understood *Tinker*'s message regarding the importance of preparing students for, and habituating them to, both the glory and responsibility of liberty.

Thirty miles up Interstate 35 from the scenes of *Tinker* is the city of Ames, Iowa, an academic community housing Iowa State University. Just last year an issue arose at Ames Middle School where four eighth-graders were suspended for a day for wearing T-shirts designed to protest what they perceived as sexism within their community.[274]

The newspaper account of the story goes something like this: For over a year and without any institutional objection, a number of Ames Middle School boys had been wearing T-shirts to school bearing the logo of a restaurant chain known as Hooters.[275] The shirts portray owl eyes peering out from Os in the word "Hooters". The shirts carry slogans such as "More than a mouthful."[276] The sexual innuendo is obvious.

Some girls at the school did not think the trumpeting of a message about women's breast sizes from boys' garments was the most collegial

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[273] There is one exception, however. Although presented initially only as a plurality view, the restrictions on library book removals set forth in Board of Educ. v. Pico, 457 U.S. 853 (1982), presumably remain in force.

[274] Douglas Burns, *Four Students Suspended Over T-Shirt Controversy*, DAILY TRIB., Apr. 20, 1994, at A1; Thomas R. O'Donnell, *Kids Air Thoughts on T-Shirt Flap*, DES MOINES REG., Apr. 27, 1994, at 1M.

[275] In May of 1994, the national restaurant chain settled a sexual harassment lawsuit filed by six of its waitresses. All Hooters waitresses are required to wear Hooters T-Shirts—often cropped or knotted—and short shorts. The dress code had been an issue in the lawsuit, but terms of the settlement were not disclosed. *Sexual Harassment Suits at Hooters Are Settled*, STAR TRIB., May 11, 1994, at 1B.

[276] Burns, *supra* note 274, at A2; *Teen Girls Crow Back at Sexism*, PLAIN DEALER, June 21, 1994, at 1E [hereinafter *Teen Girls Crow*].

move in coeducation. So as both a spoof and a protest, the girls designed and produced their own T-shirts sporting a picture of a rooster and accompanied by the word, "Cocks."[277] The back of the shirt carried the slogan "Nothing to crow about."[278] Before wearing their shirts to school, however, the girls approached the principal for permission.[279] *He denied it.*[280] Some students wore the shirts anyway, and when a few refused to obey the principal's order that they remove them or turn them inside out, the principal suspended them.[281]

Given Ames' location, no one should have been surprised when the local paper, *The Daily Tribune*, published an editorial criticizing the school's actions that quoted at length from *Tinker*.[282] The editorial reminded school officials that "'students are entitled to freedom of expression of their views,'" that "'schools may not be enclaves of totalitarianism,'" and that "'students may not be . . . confined to the expression of those sentiments that are officially approved.'"[283] Recognizing that the entire skirmish was not a public relations bonanza for the school, administrators organized a forum to discuss the incident and the related issues of free speech and sexual harassment.[284] During the forum, the students defending the prohibited action were poised and articulate. The history teacher who moderated the forum voiced his pride in the girls.[285] The Assistant Superintendent of Schools lauded them as "thoughtful young people" who had been "beautiful through this."[286] The principal even conceded that he may have been wrong.[287]

How did the school then show its support to these "thoughtful young people" who, despite institutional discouragement, had practiced the virtues

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[277] Burns, *supra* note 274, at A1.

[278] *Id.*

[279] The girls actually asked permission! At the very moment of their resolve, they still sought approval of the institutional authority. Somehow I doubt that the boys even considered such deference before wearing their shirts.

[280] *Teen Girls Crow*, *supra* note 276, at 1E.

[281] *Id.* One may be curious about why the principal saw the need to ban the wearing of the girls' T-shirt for even a day, when the boys had been freely wearing T-shirts parodying women's breasts for over a year without raising any official concern.

[282] *Editorial: Controversial T-Shirts, Message Are Harmless*, DAILY TRIB., Apr. 26, 1994, at A10 (quoting Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 511 (1969)) [hereinafter *Editorial: Controversial T-Shirts*].

[283] *Id.*

[284] Thomas R. O'Donnell, *Ames Officials Cluck at Students' T-Shirts*, DES MOINES REG., Apr. 22, 1994, at 1M.

[285] Rekka Basu, *Girls Give a Hoot About Free Speech*, USA TODAY, June 9, 1994, at 11A.

[286] *Editorial: Controversial T-Shirts*, *supra* note 282, at A10.

[287] *Teen Girls Crow*, *supra* note 276, at 1E.

of participation and independent, critical thought? How did it correct this error and portray support for tolerance rather than intolerance? It banned *both* T-shirts.[288] Someone clearly had missed *Tinker*'s message.[289] Or perhaps that message simply has been washed away in the history of the last twenty-five years.

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[288] *Id.*

[289] The students were not the ones missing the message. For example, one of the girls involved said, "We wanted to make people talk and think about [the sexist implications of the Hooters T-shirts]. . . . We wanted them (the Hooters shirts) to be socially unacceptable rather than legally unacceptable." Basu, *supra* note 285, at 11A (quoting student).