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## Constitutional Rights of Students, Their Families, and Teachers in the Public Schools

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## ARTICLES

### CONSTITUTIONAL RIGHTS OF STUDENTS, THEIR FAMILIES, AND TEACHERS IN THE PUBLIC SCHOOLS

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## I. INTRODUCTION

An examination of first amendment constraints in the operation of public elementary and secondary schools requires a multifaceted analysis. The local school boards and other state agencies responsible for public education are invested with public policy interests of such magnitude — even constitutional in scope — that they rightfully demand a broad margin of autonomy against the claims for first amendment protection asserted by teachers, parents, and students. Many of their claims, however, are of great importance and they must be recognized and upheld. Commentators typically have weighed specific constitutional claims of parents, students, and teachers only against the relevant countervailing interests asserted by public school administrators<sup>1</sup> and have not focused on conflicts among first amendment rights. The inconsistencies between the teacher's academic freedom and the student's right not to have offensive religious materials imposed on him, for example, need to be evaluated, and to the extent possible, resolved. This article searches for resolutions of constitutional conflicts, not only between the state as public school administrator and individual students, parents, and teachers, but also among the competing

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1. E.g., Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293 (1976); Strossen, "Secular Humanism" and "Scientific Creationism": Proposed Standards for Reviewing Curricular Decisions Affecting Students' Religious Freedom, 47 OHIO ST. L.J. 333 (1986).

constitutional demands of the individuals whose interests are affected by the system of public education.

Part II of this article addresses the public interests and values in which the educational system is rooted. Part III identifies and discusses the first amendment rights at stake in public education: freedom of expression; the right to receive communication; freedom of religion; and the protection against establishment of religion and familial childrearing rights. Part IV contains an elaboration of measures that may be taken to protect or accommodate the individual constitutional rights at stake; considers the extent to which these measures may be applicable in the contexts of school libraries, textbooks and courses of instruction, teacher's lectures and assignments, and extracurricular activities; and offers resolutions of the competing educational and constitutional claims in accordance with applicable case law.

## II. INTERESTS AND VALUES SERVED BY PUBLIC SCHOOL ADMINISTRATIONS

Under the tenth amendment the states have plenary authority to operate public school systems.<sup>2</sup> The most essential objectives of public education are to prepare youth for citizenship, vocation, and a satisfactory personal life.<sup>3</sup> Compulsory school attendance laws and child labor laws were enacted at about the same time and for the same purpose of ensuring a working class adequately trained to be productive, which would develop an economically strong nation.<sup>4</sup> The functions of public elementary and secondary schools include the development of individual potentialities; the transmission of the cultural heritage; discovery and systemization of knowledge; development of character; and inculcation of values, beliefs, and ideals of the social group, enabling the individual "when he

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2. *Project: Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373, 1380 (1976) (hereinafter *Project*); Kemerer & Hirsh, *The Developing Law Involving the Teacher's Right to Teach*, 84 W. VA. L. REV. 31, 35 (1981).

3. Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321, 344-45 (1978) (children must be equipped to function as autonomous, productive adults in self-governing society); Hirschhoff, *Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused From Objectionable Instruction?*, 50 S. CAL. L. REV. 871, 874-75, 877-82 (1977); *Plyler v. Doe*, 457 U.S. 202, 221-24 (1982) (education enables youth to obtain good jobs and become good citizens).

4. Hirschhoff, *supra* note 3, at 881 n.30; Tyack, *Ways of Seeing: An Essay on the History of Compulsory Schooling*, 46 HARV. EDUC. REV. 355, 377-83 (1976).

assumes an adult role in society to be economically self-supportive, socially dependable, politically insightful, and morally self-directive."<sup>5</sup> Most states by statute or regulation impose specific curriculum requirements directed toward attainment of these broad educational goals. Almost uniformly, these include the teaching of certain basic skills — reading, writing, and arithmetic.<sup>6</sup> Many states have enacted requirements aimed at achieving a satisfactory personal life, such as instruction on the effects of alcohol, tobacco, and drugs; sex education; consumer education; and the teaching of honesty, cooperation, hard work, and punctuality.<sup>7</sup> The Supreme Court rightfully described public education as “perhaps the most important function of state and local governments . . . required in the performance of our most basic public responsibilities.”<sup>8</sup>

While the Supreme Court has held that a free public education is not a federally protected constitutional right,<sup>9</sup> it indicated that there is some constitutional entitlement to a minimal educational opportunity.<sup>10</sup> The Court also has established that, if the state provides public education to its citizens, the fourteenth amendment requires that it be provided equally to resident aliens, even those illegally present in the country.<sup>11</sup> Additionally, the Supreme Court has ruled that state-provided education is an entitlement of such value that students cannot be suspended or expelled unless procedural due process requirements are observed.<sup>12</sup>

The inculcation of values, beliefs, and ideals of the society is uniformly recognized as a public educational function of great importance.<sup>13</sup> By the inculcative model of education, information is administered to passive students. Since the school authorities are charged with importing social values, it follows that they must be empowered to prescribe what values are orthodox. This power

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5. J. SAYLOR, CURRICULUM PLANNING FOR MODERN SCHOOLS 126-27 (1966).

6. Hirschhoff, *supra* note 3, at 880 n.28.

7. *Id.* at 881-82 nn.32-36.

8. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

9. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).

10. *Id.* at 36-37.

11. *Plyler v. Doe*, 457 U.S. 202 (1982).

12. *Goss v. Lopez*, 419 U.S. 565 (1975).

13. *See supra* note 5. *See also* *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982) (legitimate interest in promoting respect for authority and traditional social, moral, and political values); *Ambach v. Norwick*, 441 U.S. 68, 77 (1979); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 640-41 (1943).

seems inconsistent with the right to engage in critical inquiry and debate that is at the heart of the first amendment. Some commentators contend that the proper discharge of the inculcative function of schools essentially does, and should, rule out any freedom of expression and freedom of religious claims on the part of teachers and students.<sup>14</sup>

Other writers prefer an analytic model for public instruction. They argue that, with appropriate guidance from parents and teachers, students ought to be presented with objective information on divergent viewpoints and make decisions for themselves. Thus stimulated, students develop reasoning abilities and better prepare themselves for the innumerable choices required in adult life.<sup>15</sup> The analytic model, of course, is highly conducive to rigorous protection of first amendment freedoms. In *Tinker v. Des Moines School District*,<sup>16</sup> the Court expressed approval of the analytic model, saying that schools seek to educate through "wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues [rather] than through any kind of authoritative selection."<sup>17</sup>

A plurality of the Supreme Court embraced the principle in *Board of Education, Island Trees Union Free School District v. Pico*<sup>18</sup> that a school board violates the first amendment when it orders the removal of school library books simply because they dislike the ideas in them. Justice Brennan, in the plurality opinion, and Justice Blackmun, in his concurrence, expressed acceptance of both the inculcative and analytic models of public education.<sup>19</sup> Justice Blackmun acknowledged the apparent inconsistency between inculcation and analysis and posed a tough question that is of central importance in this article: how to reconcile the schools' inculcative function with the first amendment ban on the prescrip-

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14. J. TUSSMAN, *GOVERNMENT AND THE MIND* 51-85, 167 n.29 (1977); Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477 (1981); Goldstein, *supra* note 1, at 1342-43.

15. Note, *Textbook Adoption Laws, Precensorship, and the First Amendment: The Case Against Statewide Selection of Classroom Materials*, 17 J. MARSHALL L. REV. 167, 178-80 (1984); Comment, *What Will We Tell the Children? A Discussion Of Current Judicial Opinion On The Scope Of Ideas Acceptable For Presentation In Primary And Secondary Education*, 56 TUL. L. REV. 960, 962-68 (1981).

16. 393 U.S. 503 (1969).

17. *Id.* at 512.

18. 457 U.S. 853 (1982).

19. *Id.* at 864-66, 876-77.

tion of orthodoxy.<sup>20</sup>

The dilemma posed by Justice Blackmun is significantly dissipated and the apparent conflict between pedagogical and first amendment goals is substantially diminished, however, when the underlying purposes served by inculcation are separately examined. First, the great majority of courses taught in the public schools by their nature are not appropriately the subject of the analytic model of study. The teaching of mathematics, the mechanics of English, and foreign languages clearly has no place for critical inquiry and debate. Likewise, at the high school level the physical sciences essentially involve the study of facts about which there is not much debate. The life sciences, to a large extent, also use fact-based curricula about which there is little disagreement, except for the fields of health and psychology and with regard to the evolution controversy. Courses consisting of physical activity, like physical education, vocational studies, and music are inappropriate settings for the analytic model. The analytic model has little relevance then, except in literature, creative writing, drama, and art courses; health and psychology; and the social sciences — history, political science, sociology, and economics.

Second, the analytic model of instruction requires a certain degree of maturity on the part of the student. While some materials can be effectively presented in primary schools by means of debate and analysis, this mode of education is more suited for high school students who have attained higher levels of intellectual and emotional maturity.

Third, the values which the public schools are expected to inculcate are the same values that form the basic assumptions on which the analytic model depends.<sup>21</sup> These values include individual freedom of choice as expressed in a democratic system of government; freedom of intellectual inquiry in the form of free speech, free press, and religious freedom; and toleration of ethnic and cultural diversity. On many occasions the Supreme Court has made it clear that these are the inculcative values which are of the greatest importance in public education. In *Ambach v. Norwick*,<sup>22</sup> the Court noted that the state assumes the responsibility to “[incul-

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20. *Id.* at 879.

21. See Note, *State Indoctrination and the Protection of Non-State Voices in the Schools: Justifying a Prohibition of School Library Censorship*, 35 STAN. L. REV. 497, 520-23 (1982).

22. 441 U.S. 68 (1979).

cate] fundamental values necessary to the maintenance of a democratic political system . . . .”<sup>23</sup> Justice Frankfurter, concurring in *Wieman v. Updegraff*,<sup>24</sup> stated, “It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion.”<sup>25</sup> The state is legitimately interested in instilling state-supported values such as patriotism and adherence to the democratic form of government, the Court observed in *West Virginia Board of Education v. Barnette*.<sup>26</sup> In that case, the Court also said, “That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”<sup>27</sup> The fundamental values that schools are supposed to teach, according to the Court in *Bethel School District v. Fraser*,<sup>28</sup> include “tolerance of divergent political and religious views . . . .”<sup>29</sup>

The foregoing discussion demonstrates that the conflict be-

23. *Id.* at 77. “[T]eacher[s] [have the] opportunity to influence the attitudes of students toward government, the political process, and a citizen’s social responsibilities. This influence is crucial to the continued good health of a democracy.” *Id.* at 79.

24. 344 U.S. 183 (1952).

25. *Id.* at 196. “They . . . [teachers] cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma.” *Id.*

26. 319 U.S. 624, 631, 640-41 (1943).

27. *Id.* at 637. The state may require teaching “‘of all in our history and in the structure and organization of our government, including the guaranties of civil liberty, which tend to inspire patriotism and love of country.’” *Id.* at 631.

28. 106 S. Ct. 3159 (1986).

29. *Id.* at 3164. See 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, 55 (1984) (schools should be allowed to teach religious tolerance, racial equality and the merits of representative democracy, but to teach the converse would be impermissible indoctrination); Hirschoff, *supra* note 3, at 930-34 (basic constitutional provisions need to be understood to function effectively as a citizen). The relationship of freedom of expression to self-government is developed in the writings of Alexander Meiklejohn. A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Meiklejohn, *What Does the First Amendment Mean?*, 20 U. CHI. L. REV. 461 (1953).



tween the schools' inculcative function and first amendment values is not so great as might appear upon first impression, but a considerable degree of tension remains between the two. Where conflict arises, the courts are quite deferential to school boards. The courts recognize the high public duties carried out by the school authorities and are reluctant to interfere. The courts also recognize that almost all public schools are controlled by elected local school boards so that judicial involvement in school affairs impinges on democratic institutions.<sup>30</sup> Courts are also inclined against interfering with school operations because educational programs are experimental, ever changing, and locally distinctive, so that the judges often lack uniform standards against which to evaluate a particular school action.<sup>31</sup> As the Supreme Court stated in *Milliken v. Bradley*,<sup>32</sup> "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential . . . to the maintenance of community concern. . . . [L]ocal control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.'"<sup>33</sup>

Yet, judicially cognizable constitutional claims do arise in the operation of public schools. While the courts should not ordinarily "intervene in the resolution of conflicts which arise in the daily operation of school systems,"<sup>34</sup> deference to local school authorities ends when their actions "directly and sharply implicate basic constitutional values."<sup>35</sup>

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30. Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Non-Constitutional Analysis*, 117 U. PA. L. REV. 373 (1969); *Project*, *supra* note 2, at 1375-81.

31. Thus, the courts will not second-guess school authorities as to decisions primarily academic in nature. *University of Miss. v. Horowitz*, 435 U.S. 78 (1978).

32. 418 U.S. 717 (1974).

33. *Id.* at 741-42. See Strossen, *supra* note 1, at 354; Keiter, *Judicial Review of Student First Amendment Claims: Assessing the Legitimacy-Competency Debate*, 50 Mo. L. Rev. 25, 26 (1985).

34. *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 507 (1969).

35. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

### III. INDIVIDUAL CONSTITUTIONAL RIGHTS IN THE PUBLIC EDUCATIONAL SYSTEM

#### A. *Freedom of Expression*

In a series of recent cases, the Supreme Court has searched for principles and limitations to define what circumstances are appropriate for constitutionally protected speech, who possesses the expressive rights, and the range of topics that rightfully can be discussed.<sup>36</sup> At one extreme, a public forum, like the parks and streets to which the Court referred in *Hague v. Committee on Industrial Organization*,<sup>37</sup> is dedicated to all members of the public for making communications on any subject at any time. At the other extreme, there are places like prisons<sup>38</sup> and military bases<sup>39</sup> where the Court has allowed authorities essentially total control over public speech.

The public schools fall somewhere in between, sometimes referred to as non-public forums,<sup>40</sup> or limited public forums.<sup>41</sup> The present discussion is not concerned with outsiders' claims to use school facilities for communication purposes, a subject often addressed in the cases;<sup>42</sup> rather, the concern here is with first amendment rights of teachers and students, those for whose use the schools are established. The Supreme Court has indicated that students and teachers possess constitutionally-protected rights of expression within the schools. The key principle is that once objective criteria are set out by the school authorities, such as the prescription of a particular course of study, any expression that is pertinent to the subject is protected<sup>43</sup> unless the government can

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36. *E.g.*, *Bethel School Dist. v. Fraser*, 106 S. Ct. 3159 (1986); *Perry Educ. Assoc. v. Perry Local Educ. Assoc.*, 460 U.S. 37 (1983); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Jones v. North Carolina Prisoner's Labor Union, Inc.*, 433 U.S. 119 (1977); *City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976); *Greer v. Spock*, 424 U.S. 828 (1976); and *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

37. 307 U.S. 496 (1939).

38. *Jones*, 433 U.S. 119.

39. *Greer*, 424 U.S. 828.

40. *Widmar*, 454 U.S. at 266-67; *Perry*, 460 U.S. at 46-47.

41. *Widmar*, 454 U.S. at 267-68; *Perry*, 460 U.S. at 45 n.7.

42. *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Widmar*, 454 U.S. 263.

43. *City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175 n.8 (1976); *Perry*, 460 U.S. at 46; *Grayned*, 408 U.S. at 120.

justify the suppression.<sup>44</sup> This principle is a specific application of the general rule against content-based discrimination in speech.<sup>45</sup> As the Supreme Court said in *Tinker v. Des Moines School District*,<sup>46</sup> “[S]tate operated schools may not be enclaves of totalitarianism[,]” where students are exposed to “only to that which the state chooses to communicate.”<sup>47</sup> In the words of Justice Brandeis, the remedy imposed by the First Amendment is “more speech, not enforced silence.”<sup>48</sup>

If the objective criteria which gave rise to the expressive right are changed, Supreme Court decisions indicate that the student and faculty speech rights are modified accordingly.<sup>49</sup> If, for example, a course of study is eliminated, the teacher no longer has the right to teach, nor the student the right to be taught, that subject except to the extent it falls within conceivable limits of relevance in other courses.

The state interests that justify public school authorities’ suppression of speech<sup>50</sup> principally are the interests in preventing disruption, precluding indecency, and avoiding violation of the establishment clause. Obviously, the school administration has the right and duty to maintain order and discipline.<sup>51</sup> However, an invocation of this interest does not automatically justify interference with speech. The debate of ideas may foment discussion or arouse emotions, but that does not rob speech of its constitutional protec-

44. Traditionally, the government could prevail only by showing that the restriction is required by a compelling state interest. *Carey v. Brown*, 447 U.S. 455 (1980). Recently the Court indicated that restrictions on speech in a non-public forum would be subjected only to minimal scrutiny and need not be justified by a compelling state interest. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985).

45. “There is an ‘equality of status in the field of ideas,’ and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.” *Police Dep’t v. Mosley*, 408 U.S. 92, 96 (1971).

46. 393 U.S. 503 (1969).

47. *Id.* at 511.

48. Concurring in *Whitney v. California*, 274 U.S. 357, 377 (1927). See also *West Virginia Bd. of Educ. v. Barnette*: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion . . . .” 319 U.S. 624, 642 (1943).

49. *Widmar*, 454 U.S. at 266-67; *Perry*, 460 U.S. at 46.

50. See *supra* text accompanying note 44.

51. *Tinker*, 393 U.S. at 509.

tion.<sup>52</sup> The constitutional duty of the school administration should be to maintain order by quieting those who interfere with the speaker's right to speak, not by compelling the speaker's silence.<sup>53</sup> Moreover, the mere undifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom of expression.<sup>54</sup> In order to provide sufficient opportunity for the school's program of instruction to be carried out, as well as to optimize the opportunity for others who wish to be heard, the timing and manner of expressing oneself at school are subject to reasonable regulation.<sup>55</sup>

Minors constitutionally may be accorded greater protection from sexually explicit and other offensive speech than is permissible under obscenity standards applicable to adults.<sup>56</sup> Accordingly, school authorities are within their rights to rule out indecent and offensive speech at school.<sup>57</sup>

School boards and teachers are enjoined against engaging in religious exercises and prescribing religious instruction by the establishment clause of the first amendment.<sup>58</sup> This injunction forms another basis to justify limitations placed on communications at school.<sup>59</sup>

52. *Widmar*, 454 U.S. at 269; *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940). See the opposing view of Freeman, *supra* note 29, at 12, who argues that the only speech protected in school is that which is ineffective and largely ignored by others because if it is effective, it naturally interferes with the educational process and may be banned.

53. See *Terminiello v. Chicago*, 337 U.S. 1 (1949). See also *Massie v. Henry*, 455 F.2d 779, 783 (4th Cir. 1972) (high school hair length regulations invalidated — no proof of ineffectiveness in disciplining those who disrupted the longhaired students). *But see Ferrell v. Dallas Indep. School Dist.*, 392 F.2d 697 (5th Cir. 1968) (hair length regulation upheld because presence of longhaired students might be disruptive).

54. *Tinker*, 393 U.S. at 508.

55. See *Grayned*, 408 U.S. at 115-16.

56. *Federal Communications Comm'n. v. Pacifica Found.*, 438 U.S. 726 (1978); *Ginsberg v. New York*, 390 U.S. 629 (1968).

57. School officials were held to have properly disciplined a high school student for using sexually suggestive language in a school assembly in *Bethel School Dist. v. Fraser*, 106 S. Ct. 3159 (1986). *But see Erznosnick v. Jacksonville*, 422 U.S. 205, 213-14 (1975) (state may not suppress speech solely to protect the young from ideas or images that a legislative body thinks unsuitable for them).

58. *E.g.*, *Edwards v. Aguillard*, 107 S. Ct. 2573 (1978); *School Dist. of Abington v. Schempp*, 374 U.S. 203 (1963).

59. *Widmar*, 454 U.S. at 271 (avoiding violation of establishment clause "may be characterized as compelling"); *Bender v. Williamsport Area School Dist.*, 741

### B. *Teachers' Freedom of Expression: Academic Freedom*

The Supreme Court repeatedly has spoken in the most reverent terms about academic freedom in colleges and universities. In *Keyishian v. Board of Regents*,<sup>60</sup> the Court struck down a requirement that faculty sign loyalty oaths, expressing the concern that robust discussion in the classroom would be inhibited. The Court stated that the first amendment does not tolerate laws that "cast a pall of orthodoxy over the classroom . . . [which is] 'the marketplace of ideas' . . . . Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."<sup>61</sup> In *Sweezy v. New Hampshire*,<sup>62</sup> the Court set aside the punishment of a professor for contempt who refused to answer questions regarding a college lecture. Chief Justice Warren, in his opinion for the plurality, stated, "The essentiality of freedom in the community of American universities is almost self-evident . . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."<sup>63</sup>

In the above-quoted passages from *Keyishian* and *Sweezy*, the Court was referring to the conception of academic freedom that embraces the free speech right of teachers in their classrooms. Academic freedom also can be viewed as an institutional right, ultimately possessed by the governing body of the college or university. It was this concept of academic freedom to which Justice Frankfurter adverted in his concurring opinion in *Sweezy* when he identified "the four essential freedoms" of a university — to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."<sup>64</sup> Justice Powell also referred to academic freedom as an institutional prerogative when he described it as "a special concern of the First Amendment," concurring in *University of California Regents v. Bakke*.<sup>65</sup> On the high school and grade school levels, the

F.2d 538 (3d Cir. 1984), *rev'd on other grounds*, 475 U.S. 534 (1986).

60. 385 U.S. 589 (1967).

61. *Id.* at 603. The future of the country depends on people who are trained to seek the truth through "a multitude of tongues" rather than through "authoritative selection." *Id.*

62. 354 U.S. 234 (1957).

63. *Id.* at 250.

64. *Id.* at 263.

65. 438 U.S. 265, 312 (1978).

institutional aspect of academic freedom would belong to the school board. Perhaps this is another way of emphasizing the great value assigned in our constitutional system to the autonomy of local boards of education.<sup>66</sup>

Nevertheless, in *Keyishian* the Supreme Court stated in unmistakable terms that teachers at the college level have the right to speak freely in the classroom. Commentators are divided as to whether teacher academic freedom must be respected at the secondary or primary levels.<sup>67</sup> There are vast differences between college and high school level courses. The Supreme Court noted in *Tilton v. Richardson*<sup>68</sup> that college teachers, as contrasted with high school teachers, have "a high degree of academic freedom and seek to evoke free and critical responses from their students."<sup>69</sup>

The Supreme Court has spoken clearly in vindication of public school teachers' first amendment freedom *outside* the classroom. Their freedom of association<sup>70</sup> and their right to speak freely outside of class<sup>71</sup> are now established beyond question.

In *Epperson v. Arkansas*,<sup>72</sup> the Court struck down a statute which forbade the teaching of evolution in public schools. The majority decided the case on establishment clause grounds but relied

66. See *supra* text accompanying notes 30-33. There is considerable agreement that academic freedom is difficult to define. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 611-16 (1970); Fellman, *Academic Freedom in American Law*, 1961 WIS. L. REV. 3, 17; Goldstein, *supra* note 1; Smalls, *A Legal Framework for Academic Freedom in Public Secondary Schools*, 12 J. LAW & EDUC. 529, 541-43 (1983); *Developments in the Law — Academic Freedom*, 81 HARV. L. REV. 1045, 1053 (1968).

67. Those opposing protection of academic freedom in the public schools include: Goldstein, *supra* note 1, at 1242-43; Smalls, *supra* note 66, at 538-43, 541-43 (argues that academic freedom is central to the educational process but is too difficult to define to be entitled to protection). Those favoring protection of academic freedom in the public schools include: Nahmod, *Controversy in the Classroom: The High School Teacher and Freedom of Expression*, 39 GEO. WASH. L. REV. 1032 (1971); Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841; Murphy, *Academic Freedom — An Emerging Constitutional Right*, 28 LAW & CONTEMP. PROB. 447 (1963); J. BRYSON, *CENSORSHIP OF PUBLIC SCHOOL LIBRARY AND INSTRUCTIONAL MATERIAL* § 4.1 at 143-44 (1982).

68. 403 U.S. 672 (1971).

69. *Id.* at 686 (plurality opinion).

70. *Shelton v. Tucker*, 364 U.S. 479 (1960).

71. *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

72. 393 U.S. 97 (1968).

in part on the principle of teacher academic freedom.<sup>73</sup> Justice Stewart based his concurring opinion entirely on the academic freedom of teachers to teach or not to teach about evolution as they saw fit.<sup>74</sup> This prompted a criticism by Justice Black in his concurring opinion, but he acknowledged that some actions would violate academic freedom, giving the example of compelling a teacher to teach as true only one theory of a given doctrine.<sup>75</sup>

The warmth with which the general concept of teachers' academic freedom was endorsed in *Keyishian*, the close similarity which the reasoning in support of this concept bears to the Court's reasoning that favors the toleration of free inquiry and critical analysis in the public schools,<sup>76</sup> and the opinions of the justices in *Epperson*, all lead to the conclusion that public school teachers are vested with academic freedom in the classroom. The lower courts with near unanimity have determined that public school teachers have academic freedom,<sup>77</sup> and even those courts which have ruled against teachers in certain situations usually recognize that there is a constitutionally protected zone of academic freedom surrounding the classroom teacher.<sup>78</sup>

It has been suggested that any academic freedom a public school teacher possesses is bargained away in the teacher's individual or union contract specifying employer prerogatives with respect to the curriculum.<sup>79</sup> This notion is contrary to the principle that an individual may not be required to relinquish first amendment rights as a condition to securing public employment<sup>80</sup> and ought to be rejected.

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73. *Id.* at 104.

74. *Id.* at 110.

75. *Id.* at 111.

76. *See supra* text accompanying notes 22-29.

77. *E.g.*, *Kingsville Indep. School Dist. v. Cooper*, 611 F.2d 1109 (5th Cir. 1980); *Dean v. Timpson Indep. School Dist.*, 486 F. Supp. 302 (E.D. Tex. 1979); *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970).

78. *E.g.*, *Cary v. Board of Educ.*, 598 F.2d 535, 543 (10th Cir. 1979) (upholding school board's removal of ten books from total of 1,285 books available for language arts classes); *Brubaker v. Board of Educ.*, 502 F.2d 973, 984-85 (7th Cir. 1974) (upholding discharge of teacher for distribution of "Woodstock" poem celebrating marijuana use and freedom from discipline to eighth graders).

79. *Cary*, 598 F.2d 535; *Hunter, Curriculum, Pedagogy, and the Constitutional Rights of Teachers in Secondary Schools*, 25 WM. & MARY L. REV. 1, 67 (1983).

80. *Hunter, supra* note 79; *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977); *Elrod v. Burns*, 427 U.S. 347, 357-60 (1976) (plurality opinion).

### C. *Students' Rights To Express Themselves and To Receive Communications*

In *West Virginia Board of Education v. Barnette*,<sup>81</sup> the Supreme Court laid the groundwork for free expression rights of students within public schools by striking down a compulsory flag salute requirement that Jehovah's Witnesses families found to be conscientiously objectionable. The majority opinion used a freedom of expression analysis, rather than basing its decision on religious freedom. The individual whose "Constitutional freedoms" the Court found to be deserving of "scrupulous protection"<sup>82</sup> was the individual student.

Later, in *Tinker v. Des Moines School District*,<sup>83</sup> the Supreme Court made it unambiguously clear that public school students retain rights of free expression while they are in school. They do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>84</sup> The Court held that a student had the right to wear a black armband to school in silent protest against the Vietnam War.

More recently, in *Board of Education, Island Trees Union Free School District v. Pico*,<sup>85</sup> the Supreme Court again confirmed the free expression rights of students in the public schools, deciding that school boards are in violation of the first amendment if they remove books from the library shelves solely because they dislike the ideas in them. For the first time the *Pico* plurality secured constitutional protection for the free flow of information and ideas to students.<sup>86</sup>

The progression from *Barnette* to *Tinker* to *Pico* is a dramatic expansion of student expression rights. In *Barnette*, the student was freed of compulsion to express himself in a manner that violated his conscience. In *Tinker*, the student was permitted to ex-

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81. 319 U.S. 624 (1943).

82. *Id.* at 637.

83. 393 U.S. 503 (1969).

84. *Id.* at 506.

85. 457 U.S. 853 (1982).

86. The plurality relied on a series of cases recognizing a constitutional right to receive information in various contexts. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972); *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965); *Martin v. Struthers*, 319 U.S. 141 (1943). The Court has made it plain that the recipient's rights are independent of the rights of the communicator. *Procurier v. Martinez*, 416 U.S. 396 (1974).



press himself in the manner of his own choosing. In *Pico*, the school authorities were forbidden to remove instruments of expression that the students might wish to use.

From the academic freedom cases,<sup>87</sup> it is apparent that students, as well as teachers, are constitutionally protected to engage in wide-ranging, free inquiry and debate. As the plurality opinion in *Sweezy v. New Hampshire*<sup>88</sup> states, "Teachers and students must always remain free to inquire, to study, and to evaluate . . ."<sup>89</sup>

Student free speech rights are subject to limitations by the same compelling state interests as heretofore identified, including ban of indecency, maintenance of order and discipline, and avoiding the establishment of religion.<sup>90</sup>

#### D. *Right Not To Participate in Unwanted Communication: The Religious Clauses and Familial Rights*

There is a well-grounded free speech basis for a student's objection to taking part in a ceremony or making a pledge, declaration, or affirmation that is offensive to him. Since *West Virginia Board of Education v. Barnette*,<sup>91</sup> school children have been free from forced subscription to doctrines which they conscientiously oppose. "[N]o official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein."<sup>92</sup>

A corollary free speech right, not to have to listen to unwanted communications while a member of a captive audience, although seemingly based on sound doctrine,<sup>93</sup> has never gained recognition by a majority of the Supreme Court.<sup>94</sup> While freedom of expression has not developed in this direction, the religious clauses of the first

87. See *supra* text accompanying notes 60-78.

88. 354 U.S. 234 (1957).

89. *Id.* at 250 (emphasis added).

90. 319 U.S. 624 (1943); see *supra* text accompanying notes 51-59.

91. See *supra* notes 81-82 and accompanying text.

92. *Barnette*, 319 U.S. at 642. It may violate *Barnette* to require a student to recite or express an opinion which he does not hold. Hirschhoff, *supra* note 3, at 913 n.149.

93. Haiman, *Speech v. Privacy: Is There a Right Not to be Spoken To?* 67 Nw. U.L. Rev. 153 (1972).

94. *Public Utility Comm'n v. Pollak*, 343 U.S. 451, 467-69 (1952) (Douglas, J., dissenting); *id.* at 466 (Black, J., separate opinion); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 305-08 (1974) (Douglas, J., concurring).

amendment and the doctrine of familial privacy derived from the fourteenth amendment have been interpreted in ways that provide extensive protection to the public school student against unwanted communications.

### 1. *Establishment of Religion*

The framework of the first amendment establishment clause largely has been developed by cases involving public education. Thus, among the landmark establishment clause cases are *Engel v. Vitale*,<sup>95</sup> disapproving the recitation of a "denominationally neutral" school prayer, and *School District of Abington v. Schempp*,<sup>96</sup> forbidding daily Bible readings in the schools. The Court has made it clear that "teaching and learning" must not "be tailored to the principles or prohibitions of any religious sect or dogma."<sup>97</sup> The establishment clause not only prohibits discrimination among religious denominations but also requires that no preference be granted to those with religious faith over those who profess no religion at all.<sup>98</sup> The Supreme Court has rigorously applied the establishment clause to religious activities in the public schools.<sup>99</sup> The Court reasons that school children are particularly vulnerable to religious influences in the schools on account of their relative immaturity and susceptibility, their required presence by virtue of the compulsory attendance laws, the schools' coercive and authoritarian atmosphere, the influences of teachers as role models, and the peer pressure applied by conformist fellow students.<sup>100</sup>

Currently, establishment clause questions are resolved by the application of a three-part test announced in *Lemon v. Kurtzman*,<sup>101</sup> a case dealing with the extent to which public financial aid of religious educational institutions is permitted. For a questioned

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95. 370 U.S. 421 (1962).

96. 374 U.S. 203 (1963).

97. *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968).

98. *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947); *School Dist. of Abington*, 374 U.S. at 216. "Whenever the state itself speaks on a religious subject, one of the questions that we must ask is 'whether the government intends to convey a message of endorsement or disapproval of religion.'" *Wallace v. Jaffree*, 472 U.S. 38, 60-61 (1985).

99. See *infra* note 102.

100. *Edwards v. Aguillard*, 107 S. Ct. 2573 (1987); *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 383 (1985); *Wallace v. Jaffree*, 472 U.S. 38, 60 n.51 (1985); *Meek v. Pittinger*, 421 U.S. 349, 369 (1975).

101. 403 U.S. 602 (1971).

practice or activity to pass muster under the establishment clause, it must be shown that: the legislative or other governmental entity adopted the law or practice with a secular purpose; the principal or primary effect of the statute or practice is one that neither advances nor inhibits religion; and the statute or practice does not result in an excessive entanglement of government with religion.<sup>102</sup> A violation of any one of the three *Lemon* tests requires that the questioned law or practice be prohibited.<sup>103</sup> The *Lemon* tests were devised to provide for a more sensitive analysis of church-state issues than would be possible by literally invoking “[t]he metaphor of a ‘wall’ or impassable barrier between Church and State”<sup>104</sup> to provide “room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.”<sup>105</sup> The second, or “primary effect,” *Lemon* test seemingly has been converted into a requirement that any nonsecular effect be remote, indirect, and incidental so that many secondary effects can serve to invalidate laws or practices.<sup>106</sup> The main concern of the third, or “entanglement,” *Lemon* test is to avoid an improperly high level of administrative surveillance over religious practices.<sup>107</sup> Additionally, the purpose of the “entanglement” test is guarding against political divisions of soci-

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102. *Id.* at 612-13. The *Lemon* tests, while occasionally questioned, *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) (plurality); *id.* at 688 (O'Connor, J., concurring) (creche in public parks if accompanied by plastic Santa Claus and reindeer not an establishment of religion), and departed from in other contexts, e.g., *Marsh v. Chambers*, 463 U.S. 783 (1983) (state legislative chaplaincy not an establishment of religion), have been relied upon in every Supreme Court decision dealing with religion in the education of children. *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985).

103. *Stone v. Graham*, 449 U.S. 39, 40-41 (1980).

104. *Gillette v. United States*, 401 U.S. 437, 450 (1971).

105. *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970).

106. *See Meek v. Pittinger*, 421 U.S. 349, 366, 368 (1975) (guidance counselors in religious schools); *Committee for Public Educ. v. Nyquist*, 413 U.S. 756, 783 n.39 (1973). *See also* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-9, at 840 (1978). An alternative explanation for the same result is reliance on the third or “entanglement” test to invalidate actions that have only secondary effects. *Lemon v. Kurtzman*, 403 U.S. 602, 613-14 (salary supplements to teachers in religious schools who taught wholly secular subjects); *Meek*, 421 U.S. at 367-72. *But see Wolman v. Walter*, 433 U.S. 229 (1977), allowing the expenditure of public funds for secular textbooks to be loaned to students in religious schools and for standardized tests and diagnostic and therapeutic services — the primary effect was held to be to advance education.

107. *Walz*, 397 U.S. at 674-75.

ety along religious lines.<sup>108</sup> Recently, the Supreme Court signaled that the "entanglement" test is to be applied in a somewhat less rigorous fashion than in prior cases.<sup>109</sup> The Court also recently stated that "no fixed *per se* rules can be framed" for establishment clause analysis, and the outcome of each case must depend on "all the circumstances of a particular relationship."<sup>110</sup>

The extent to which school boards and teachers can accommodate religious preferences and aversions out of regard for free exercise clause values, without violating the establishment clause, is an issue of great importance in any examination of the first amendment in the public schools. In *Zorach v. Clauson*,<sup>111</sup> the Supreme Court indicated that the establishment clause is not violated when the governmental action in question has only the effect of accommodating religious preferences and aversions, not endorsing them. Thus, in *Wisconsin v. Yoder*,<sup>112</sup> the Court held that Amish families should be allowed to withdraw their children from public schooling beyond the eighth grade in order to protect their religious beliefs because this accommodation did not in itself violate the establishment clause.<sup>113</sup>

A recent Supreme Court decision, *Estate of Thornton v. Caldor, Inc.*,<sup>114</sup> imposes limitations on the validity under the establishment clause of accommodations to religious interests. In *Caldor*, the Court struck down a state statute compelling employers to honor employees' choice of a sabbath by not requiring them to work on that day. The Court reasoned that this law was an establishment of religion under the second *Lemon* test since the law had the primary effect of advancing religious practices over observing a

108. *Lemon*, 403 U.S. at 622-23; *Meek* 421 U.S. at 372; *Committee for Public Educ. v. Nyquist*, 413 U.S. at 797-98 (political divisiveness "a warning signal not to be ignored").

109. In *Mueller v. Allen*, 463 U.S. 388 (1983), the Court upheld tax deductions for public and private school expenses, ruling that it did not violate the "entanglement" test for state officials to determine which textbooks are for teaching religious tenets, doctrine or worship for inculcative purposes and are therefore nondeductible. Contrast with *Lemon*, 403 U.S. at 615-22, and *New York v. Cathedral Academy*, 434 U.S. 125 (1977).

110. *Lynch v. Donnelly*, 465 U.S. 668, 678-79 (1984).

111. 343 U.S. 306, 314 (1952). The Court in *Lynch*, 465 U.S. at 673, went much further, stating that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions . . . ."

112. 406 U.S. 205 (1972).

113. *Id.* at 234 n.22.

114. 472 U.S. 703 (1985).

sabbath. The Court expressed particular concern over the burdens and inconveniences to employers and fellow employees.

While *Caldor* appears to represent a retreat from the permissive attitude toward accommodation displayed in earlier cases, it may have no impact on accommodations of religious interests in the field of public education. In this area the burdens on other students and faculty are minimal, and, most importantly, the primary effect is to advance the cause of *religious freedom* rather than to advance *religious practices*.<sup>115</sup> Some of the courts of appeals have concluded that public schools' accommodations of religion by tolerating religious speech will be perceived inaccurately by the students as state sponsorship of religion, which would violate the establishment clause.<sup>116</sup> These conclusions, at least for upper grade levels, are rendered suspect by a body of research in adolescent psychology which shows that high school students are independent and capable of critical inquiry,<sup>117</sup> they possess sophisticated and complex intellectual functions,<sup>118</sup> they have the ability to reject the views of others,<sup>119</sup> and they have established new self-identities and formed personal ideals and values.<sup>120</sup> Most importantly, psychologists have found that adolescents expect respect and tolerance from the school authorities and recognize when the authorities attempt to control their lives.<sup>121</sup> This same body of research has negative implications for the Supreme Court's rationale

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115. See *infra* notes 191-212.

116. *Lubbock Civil Liberties Union v. Lubbock Indep. School Dist.*, 669 F.2d 1038, 1045-46 (5th Cir. 1982); *Brandon v. Board of Educ.*, 635 F.2d 971, 978 (2d Cir. 1980); *Bender v. Williamsport Area School Dist.*, 741 F.2d 538 (3d Cir. 1984), *rev'd on other grounds*, 475 U.S. 534 (1986). Similarly, *Strossen*, *supra* note 1, at 394, suggests that deleting or adding materials to the curriculum to accommodate the religious objections of some students conveys the message that the school approves of the religious beliefs of the objecting students.

117. Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 YALE L.J. 499, 507 (1983).

118. Piaget, *The Intellectual Development of the Adolescent*, ADOLESCENCE 23 (G. Caplan, ed. 1969); Osterrieth, *Adolescence: Some Psychological Aspects*, ADOLESCENCE 14-15; Gallagher & Noppe, *Cognitive Development and Learning*, UNDERSTANDING ADOLESCENCE 208-16 (J. Adams ed. 1976).

119. Coleman, *Friendship and the Peer Group in Adolescence*, HANDBOOK OF ADOLESCENT PSYCHOLOGY 424-25 (J. Adelson ed. 1980).

120. E. Erikson, *IDENTITY: YOUTH AND CRISIS* (1968).

121. K. Garrison, *PSYCHOLOGY OF ADOLESCENCE* 79 (1975). *But see* older studies indicating contrary to the foregoing that students are impressionable and susceptible, cited in Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 343-44 (1963).

of coercion and influence that is invoked to support the Court's rigorous enforcement of the establishment clause in public school controversies.<sup>122</sup>

A vital question for examination of establishment clause issues in public education is what constitutes religion. If the definition of religion is borrowed from a free exercise clause analysis, a very broad conception would apply. In *United States v. Seeger*,<sup>123</sup> a free exercise case, the Supreme Court held that humanistic and nonsectarian moralistic beliefs are religious beliefs for the purpose of construing the conscientious objection exemption to the draft.<sup>124</sup> Some jurists and commentators have urged that the definition of religion should be the same for free exercise and establishment purposes.<sup>125</sup> Other scholars argue that the sweeping definition of religion for free exercise purposes is inappropriate in an establishment analysis.<sup>126</sup> The latter commentators appear to have the better argument, for if religion for establishment clause purposes meant something broader than the classical conception of religion, a host of the government's social and humanitarian programs would be subject to prohibition. Thus, in several decisions, the Supreme Court assumes that the teaching of morality and a variety of commonly held social values in the public schools is not only a permissible secular activity but also a highly appropriate, if not essential, part of the education of youth.<sup>127</sup>

On the other hand, it is conceivable that the state could invest a secular philosophy with so much of the trappings of a religion<sup>128</sup>

122. See *supra* text accompanying notes 99-100.

123. 380 U.S. 163 (1965).

124. *Id.* at 187.

125. *Everson v. Board of Educ.*, 330 U.S. 1, 32 (Rutledge, J., dissenting); *Malnak v. Yogi*, 592 F.2d 197, 211-13 (3d Cir. 1979) (Adams, J., concurring); *Strossen, supra* note 1, at 372.

126. Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1686-87 n.14 (1969); Galanter, *Religious Freedom in the United States: A Turning Point?* 1966 WIS. L. REV. 217, 266; L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 827-28 (1978); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1085-86 (1978).

127. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954); *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853 (1982); *Ambach of Norwich*, 441 U.S. 68 (1979); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *McGowan v. Maryland*, 366 U.S. 420, 442 (1961) ("[T]he 'Establishment Clause' does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions").

128. Systems of beliefs are labeled religious when they (1) address ultimate

that the establishment clause would be violated. In *School District of Abington v. Schempp*,<sup>129</sup> the Supreme Court said, "[T]he State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'" <sup>130</sup> In *Torasco v. Watkins*,<sup>131</sup> a free exercise case, the Court said, "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are . . . Ethical Culture, Secular Humanism, and others."<sup>132</sup> Many conservative religionists, after examining modern school texts and other teaching materials, became convinced that current public education had adopted a secular humanist creed in violation of the establishment clause.<sup>133</sup> Humanistic education programs commonly used in public school systems focus primarily on methodology: teachers confront pupils with a question, experience, or moral dilemma and ask them to state a value judgment or feeling; then a dialogue follows in which the consequences and intellectual sufficiency of the responses are weighed.<sup>134</sup> Humanistic education teaches that there are few inherently right and wrong values<sup>135</sup> and that man is in-

concerns, (2) espouse a comprehensive life view, (3) possess external indicia such as ritual and symbols and organizational structure. *Malnak v. Yogi*, 592 F.2d 197, 207-10 (3d Cir. 1979) (Adams, J., concurring).

129. 374 U.S. 203 (1963).

130. *Id.* at 225.

131. 367 U.S. 488 (1961).

132. *Id.* at 495 n.11. Humanism is regularly accepted as a religion for free exercise purposes. *Washington Ethical Soc'y v. District of Columbia*, 249 F.2d 127, 129 (D.C. Cir. 1957); *Fellowship of Humanity v. Alameda Co.*, 153 Cal. App. 2d 673, 315 P.2d 394 (1957).

133. *E.g.*, Hill, *Parents Sleep While Humanism Destroys Souls of Youth*, VOICE OF FREEDOM 87 (June 1980); McMaster, *Our Public Schools*, CHRISTIAN LIFE MAGAZINE 32 (June 1980) ("Humanism is such a pleasant-sounding word that it disarms most people. But unless this trend in education is rooted out of our public schools, the future of the nation is imperiled.").

134. SIMON, A HANDBOOK OF PRACTICAL STRATEGIES FOR TEACHERS AND STUDENTS (1972); SIMPSON, HUMANISTIC EDUCATION: AN INTERPRETATION 77-91 (1976). Some examples of questions from SIMON, *supra*, at 10, 41, 43, 50-53, 140 include: "How many of you would encourage legal abortion for an unwed daughter . . . read Playboy magazine . . . would be upset if organized religion disappeared . . . think that parents should teach their children to masturbate . . . would choose to die and go to heaven if it meant playing a harp all day long?"

135. SIMON, *supra* note 134, at 15-17; Harmon, *Values*, in ALLEN, THE TEACHER'S HANDBOOK 294 (1971).

nately good.<sup>136</sup> Most humanistic education programs reject the idea that human purposes and goals can be determined by God or any other external standard.<sup>137</sup> Humanistic education evolved into a comprehensive social and moral philosophy,<sup>138</sup> which coincides with the nontheistic philosophical movement of secular humanism.<sup>139</sup> In contrast, several major religious faiths teach that: man is primarily a spiritual being; values are determined from external standards; there are right and wrong values which are transcendental and absolute rather than situational and relative; and man is by nature sinful.<sup>140</sup> Depending on the applicable definition of religion, humanist education programs likely can be presented in such a way as to constitute an establishment of religion. The implications of humanist education, however, are even more serious when examined in light of the free exercise clause.

## 2. *Free Exercise of Religion*

School children and their families have the right to hold and exercise their religious beliefs free of interference by the state. Whether or not there is a constitutional entitlement to a public education,<sup>141</sup> it is a state-provided benefit of enormous value and importance and, indeed, either it or a substituted private educa-

136. SIMPSON, *supra* note 134, at 4.

137. *Id.* at 3.

138. *Id.* at 67; Newman, *Social Action and Humanistic Education*, HUMANISTIC EDUCATION 67 (R. Weller ed. 1977).

139. Brubaker & Zahorik, *Toward More Humanistic Instruction* (1972) (making the connection between humanistic education and the philosophic movement explicit); *A Humanist Manifesto*, 6 NEW HUMANIST (1933); *Humanist Manifesto II*, 33 HUMANIST 4 (1973) (God, religion and supernatural are irrelevant; specific religious beliefs including heaven or hell, life after death, separate human soul, creation of man by direct act of God are dangerous; moral values are wholly relative and situational; meaning is a function of present happiness; no form of sexual conduct short of unbridled promiscuity is evil; faith in God who hears and answers prayers is assumed to love humankind and is an unproved and outmoded faith); A SECULAR HUMANIST DECLARATION 7-29 (P. Kurtz ed. 1980).

140. *E.g.*, Southern Baptist Convention, *Baptist Faith and Message* (1963) (man sinful by nature; Bible is supreme standard). Much of the discussion in the text *infra* notes 133-39 and the material in these notes was taken from Note, *The Establishment Clause, Secondary Religions Effects and Humanistic Education*, 91 YALE L.J. 1196, 1208-09 nn.64-68 (1982).

141. *See supra* text accompanying notes 9-12. It is clear that public education is treated as a constitutional entitlement under many state constitutions. *E.g.*, N.C. CONST. art. I, § 15; *id.* at art. IX, § 2(1).



tion is compulsory.<sup>142</sup> In *Sherbert v. Verner*<sup>143</sup> and *Thomas v. Review Board*,<sup>144</sup> the Supreme Court held that one cannot be forced to forsake or alter religious beliefs in order to secure a state benefit, unless the state has a compelling interest to overcome the religious right and pursues this interest by the least restrictive means.<sup>145</sup> In *Thomas*, which held that state unemployment benefits cannot be denied to a worker who refuses to work on his sabbath for religious reasons, the Court said, "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by a religious belief, . . . a burden upon religion exists."<sup>146</sup> While *Thomas* was reaffirmed as recently as 1987,<sup>147</sup> the 1986 case of *Bowen v. Roy*<sup>148</sup> raises a question as to limits that may be imposed on the *Sherbert-Thomas* doctrine. In *Bowen*, the Court rejected the free exercise claims of parents who had refused to apply for a social security number for their infant daughter on religious grounds and accordingly were denied food stamps and welfare benefits for her. Chief Justice Burger wrote for an eight-member majority of the Court<sup>149</sup>; only Justice White dissented, feeling that *Sherbert* and *Thomas* were controlling.<sup>150</sup>

The Supreme Court decision of *Wisconsin v. Yoder*<sup>151</sup> is the leading authority on the conflict between public school requirements and student families' freedom of religion. Amish parents be-

142. *Project*, *supra* note 2, at 1383 n.43 (48 states have compulsory attendance laws).

143. 374 U.S. 398 (1963).

144. 450 U.S. 707 (1981).

145. *Thomas v. Review Bd.*, 450 U.S. 707; *Sherbert v. Verner*, 374 U.S. at 406-07; *United States v. Lee*, 455 U.S. 252, 258 (1982) ("overriding" interest).

146. *Thomas*, 450 U.S. at 717-18. Religious speech, as well as religious worship and prayer, are protected communications under the free speech clause of the first amendment. *McDaniel v. Paty*, 435 U.S. 618, 640 (1978) (Brennan, J., concurring); *Widmar v. Vincent*, 454 U.S. 263, 269 (1981). The free speech principles discussed *supra* in Part III, A of this Article provide an alternative source of protection for the religious free exercise claims discussed in this part of the article.

147. *Hobbie v. Unemployment Appeals Comm'n*, 107 S. Ct. 1046 (1987).

148. 476 U.S. 693 (1986).

149. "Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family." *Id.* at 696 (emphasis in the original).

150. *Id.* at 699.

151. 406 U.S. 205 (1972).

lieved that sending their children to high school would endanger the children's religious salvation. The Amish hold as a central belief that salvation requires life in a church community separate from worldly influence. The Court upheld the right of the Amish to discontinue formal education after the eighth grade, concluding that one or two years of additional education are not necessary to prepare Amish children for life in a segregated, agrarian community. The Court invoked the principles that only state interests of the highest order can overcome freedom of religion claims and that the state must employ only the least restrictive means.<sup>152</sup> The Court decided that the state's asserted interests of need to prepare children for effective participation in the political system and self-sufficiency in society were not compelling enough to overcome the religious rights of the Amish families.

Not every asserted religious claim against public school programs will be entitled to protection under *Yoder*. Several requirements must be met in order for a religious claim to prevail. First, the belief must be sincerely held. Some claims are "so bizarre, so clearly nonreligious in motivation" that they should be denied credence under the free exercise clause.<sup>153</sup> Second, the belief must be essential to the religious doctrinal basis, *and* the activity in question must create a substantial burden for the claimant.<sup>154</sup> Peripheral, tangential, or trivial claims will not be upheld. Religious claimants are entitled to protection only from those matters that are truly abhorrent and irreconcilable with their beliefs and not merely from those which are distasteful or unpleasant.<sup>155</sup> Third, the religious claim must yield to a compelling state interest if ad-

152. *Id.* at 215.

153. *Thomas*, 450 U.S. at 715. Although the truth of a belief "is not open to question, there remains the significant question whether it is 'truly held.'" *United States v. Seeger*, 380 U.S. 163, 185 (1965).

154. *Sherbert*, 374 U.S. at 403; *Wisconsin v. Yoder*, 406 U.S. at 218 ("very real threat" to "basic religious tenets and practices"); *Fiedler v. Marmusco Christian School*, 631 F.2d 1144, 1151 (4th Cir. 1980); *Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310, 313-14 (5th Cir. 1977). See Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 329-44 (1969); Gianella, *Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1390 (1967).

155. "[T]he state has no legitimate interest in protecting any or all religions from views distasteful to them . . ." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952). *Accord Harris v. McRae*, 448 U.S. 297, 319-20 (1980); *McGowan v. Maryland*, 366 U.S. 420, 442 (1961); *Epperson v. Arkansas*, 393 U.S. 97, 102 (1967).

vanced by the least restrictive means.<sup>156</sup> Compelling state interests include such basic governmental responsibilities as maintenance of public safety, order, peace, and health. Thus, in *Prince v. Massachusetts*,<sup>157</sup> the Supreme Court upheld a law that prohibited young children from publicly soliciting contributions against the religious claims of a Jehovah's Witnesses' family.<sup>158</sup> Were it not for these limitations, entirely too much of the useful, even vital, process of government could be paralyzed by demands of conscientious objectors. As Justice Jackson stated, "If we are to eliminate everything that is objectionable to any of [the religious bodies existing in the United States] or inconsistent with any of their doctrines, we will leave public education in shreds."<sup>159</sup>

The *Yoder* Court indicated that free exercise claims in the context of public schooling would be limited to those of traditional religious denominations<sup>160</sup> and would not encompass philosophical and personal beliefs that had been equated with religious claims for the purpose of the draft law conscientious objector exemption in *United States v. Seeger*.<sup>161</sup> This limitation would in no way diminish the strength of claims by members of the religious right that they are being deprived of the free exercise of religion in humanistic educational programs<sup>162</sup> since generally they belong to organized, recognized, traditional religious sects; they object, not subscribe, to a secular substitute for religion. The *Yoder* opinion suggests a further limitation of the decision to apply to groups like the Amish with long histories of living in isolated, unified communities.<sup>163</sup> The limitation may well have been intended as to the drastic remedy of eliminating altogether a part of the compulsory education requirement rather than as a limitation to the general

156. *Thomas*, 450 U.S. 707; *Sherbert*, 374 U.S. at 406-07; *United States v. Lee*, 455 U.S. 252, 258 (1982) ("overriding" interest).

157. 321 U.S. 158, 168 (1944).

158. See also *Harris v. McRae*, 448 U.S. 297 (1980) (upholding Medicaid funding of abortion); *United States v. Reynolds*, 98 U.S. 145 (1878) (upholding law against polygamy).

159. *McCollum v. Board of Educ.*, 333 U.S. 203, 235 (1948) (Jackson, J., concurring).

160. *Wisconsin v. Yoder*, 406 U.S. at 215-16.

161. 380 U.S. 163 (1965). It has been suggested that the *Seeger* analysis is not appropriate in contexts other than exemption from conscription. Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1063 (1978).

162. See *infra* discussion at notes 166-67.

163. *Yoder*, 406 U.S. at 236. See *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1067 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1029 (1988).

principle that conscientious religious objections to certain aspects of school programs ought to be honored if it reasonably can be done. The Court also noted in *Yoder* that high schools "tend to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students,"<sup>164</sup> values inconsistent with the central beliefs of the Amish. The same values are inconsistent with the tenets of several fundamentalist Protestant sects, whose adherents are as fully deserving of protection as are the Amish.<sup>165</sup>

Some aspects of humanistic education programs, as well as the teaching of evolution and certain other subjects, substantially burden the belief systems of many fundamentalist Christians. Children may be taught in school that man is by nature good, while their religion teaches that man is sinful; they may be taught in school that most values are relative and independent of external referents, while their religion teaches that values are derived from the external Biblical standard.<sup>166</sup> If these educational programs succeed, students will be likely to reject certain of their religious beliefs.<sup>167</sup> *Yoder* and the *Sherbert-Thomas* line of cases lead to the conclusion that students and their families whose religious beliefs are subject to impairment in the public schools are entitled by the free exercise clause to some form of relief.

### 3. *Familial Childrearing Rights*

In *Meyer v. Nebraska*,<sup>168</sup> the Supreme Court struck down a state law forbidding the teaching of modern foreign language in

164. *Yoder*, 406 U.S. at 211.

165. Consider, for example, the clear religious conflicts that Apostolic Lutherans have within the public schools; they are forbidden to study evolution or "humanistic" philosophy, or to listen to the radio or watch television. Comment, *Teaching the Theories of Evolution and Scientific Creationism in the Public Schools: The First Amendment Religion Clauses and Permissible Relief*, 15 U. MICH. J.L. REF. 421, 445 n.109 (1982).

166. See *supra* notes 134-40 and accompanying text.

167. See Bird, *Freedom of Religion and Science Instruction in Public Schools*, 87 YALE L.J. 515, 537 n.107 (1978); Rice, *Conscientious Objection to Public Education: The Grievance and the Remedies*, 1978 B.Y.U.L. REV. 847.

168. 262 U.S. 390 (1923). The Court referred to the Spartan system of assembling males at age seven into barracks and entrusting their education and training to official guardians. Such ideas "touching the relationship between individuals and State were wholly different from those upon which our institutions rest . . . ."

*Id.* at 402.

public and private schools. The Court found that the statute violated parental interests in their children's upbringing, the parental rights to "establish a home and bring up children."<sup>169</sup> In *Pierce v. Society of Sisters*,<sup>170</sup> the Supreme Court invalidated a law that required all children to attend public schools. On the authority of *Pierce*, parents have an absolute constitutional right to withdraw their children from public schools and enroll them in private or parochial schools. The Court based its opinion in part on the parental right to "direct the upbringing and education of children under their control,"<sup>171</sup> stating that this liberty "excludes any general power of the state to standardize its children . . . . The child is not the mere creature of the State . . . ."<sup>172</sup>

*Meyer* and *Pierce* have been variously explained<sup>173</sup> and rationalized.<sup>174</sup> However, they have retained their vitality. The Court in *Wisconsin v. Yoder* referred to *Pierce* "as a charter of the rights of parents to direct the religious upbringing of their children."<sup>175</sup> The *Meyer-Pierce* doctrine contributes to the structural needs of the political system, making it impossible for the state to withdraw completely the parents' right to inculcate their children, thereby preventing the state from creating an indoctrinative monopoly.<sup>176</sup>

169. *Id.* at 399.

170. 268 U.S. 510, 534 (1925).

171. *Id.* at 534-35.

172. *Id.*

173. These cases are sometimes viewed as judicial reactions to the strong post-World War I political pressures on the states to use their schools to create an ideologically homogenous population, purged of "foreign" ideas. Moskowitz, *The Making of the Moral Child: Legal Implications of Value Education*, 6 PEP-PERDINE L. REV. 105, 110-11 (1987); Tyack, *The Perils of Pluralism: The Background of the Pierce Case*, 77 AM. HIST. REV. 74 (1968).

174. *Meyer* depended in part on the substantive due process right of language teachers to engage in their occupations, 262 U.S. at 400, and *Pierce* in part was based on the substantive due process rights of private schools to conduct their businesses, 268 U.S. at 536, which are now of questionable validity. These cases are sometimes discussed in terms of first amendment values — limitations on the indoctrinating power of the state. *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 506-07 (1969); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-6 (1970); Arons & Lawrence, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 HARV. C.R.-C.L. L. REV. 309, 318 n.28 (1980).

175. *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972).

176. Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and its Critics*, 53 B.U.L. REV. 765, 772-73 (1973); Note, *State Indoctrination and the Protection of Non-State Voices in the Schools: Justifying a Prohibition of School Library Censorship*, 35 STAN. L. REV. 497, 532-33 (1982).

#### IV. MEASURES FOR PROTECTING CHILDREN'S, FAMILIES', AND TEACHERS' CONSTITUTIONAL RIGHTS

A variety of measures can be employed to eliminate or mitigate the aspects of public educational programs that are antithetical to interests with which the first amendment is concerned. Some of these measures can be claimed as a matter of constitutional entitlement. Others, while not constitutionally mandated, can be invoked by school administrations as sound public policy.

##### A. *Exemptions from Public School or Any School*

*Pierce v. Society of Sisters*<sup>177</sup> established beyond question the rights of parents to withdraw their children from public school and place them in private or parochial school. This right is absolute. While the parents may be motivated by religious or doctrinal reasons, they are not hindered by any burden of proof of reason or cause. This simple outlet for dissatisfaction with public schooling relieves tensions and resolves dilemmas that otherwise would be overwhelming. Each religious and ideological splinter group is free to form its own educational institutions.

The option of removal is seriously flawed in one respect: it is expensive. The parent, with a large share of his or her tax dollar spent for public education, must find the additional financial resources to maintain his or her child in a separate privately financed system. There are constitutional constraints against public financial assistance since most government grants to church-related private schools violate the establishment clause,<sup>178</sup> although tuition tax deductions do not.<sup>179</sup>

Home education is a refuge for the family who has conscientious objections against various educational programs, public or private. Home education is far less expensive than private education, provided the parents have sufficient time to be teachers. While there is no constitutional right to home education,<sup>180</sup> a grow-

177. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

178. *E.g.*, *Meek v. Pittinger*, 421 U.S. 349 (1975); *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Providing such assistance only to nonchurch-related schools would likely be either politically unworkable or violative of the equal protection clause.

179. *Mueller v. Allen*, 463 U.S. 388 (1983).

180. *Scoma v. Chicago Bd. of Educ.*, 391 F. Supp. 452 (N.D. Ill. 1974); *State v. Shaver*, 294 N.W.2d 883 (N.D. 1980). *Cf.* *Board of Educ. v. Allen*, 392 U.S. 236, 245-46 (1968) (dictum).

ing number of states authorize it by statute.<sup>181</sup>

The ultimate protection from perceived undesirable influences of education is the right to terminate schooling altogether, as was granted the Amish at the end of the eighth grade in *Wisconsin v. Yoder*.<sup>182</sup> However, for reasons heretofore indicated, few other groups could make a sufficient showing to be entitled to the same exemption.<sup>183</sup>

It is in the interest of those families who have chosen alternative educational arrangements not to have the states impose requirements and prohibitions similar to those that inspired them to abandon public education. The Supreme Court in *Farrington v. Tokushige*<sup>184</sup> held unconstitutional, as violative of the parents' right to control the child's education, a statute that regulated the use of textbooks, teacher qualifications, curriculum, language used, and entrance and attendance requirements in private schools. Forty-four of the states no longer impose teacher certification, courses of instruction, or other content requirements on nonpublic schools.<sup>185</sup> The few states that do have such requirements include specifications like sex education courses, which some religious dissenters would find highly offensive.<sup>186</sup> Generally, the teacher certification requirements have been upheld on the theory that the state has a compelling interest in competent, qualified teachers,<sup>187</sup> and the other more intrusive requirements have not been judicially tested recently,<sup>188</sup> although they would seem to fall afoul of *Far-*

181. As of 1986, only nine states did not authorize home education. Note, *The Constitutionality of Home Education Statutes*, 55 UMKC L. REV. 69, 75-76 (1986).

182. 406 U.S. 205 (1972).

183. See *supra* text accompanying note 163.

184. 273 U.S. 284 (1927).

185. *Sheridan Road Baptist Church v. Department of Educ.*, 426 Mich. 462, 396 N.W.2d 373, 419 (1986). A minority of states require certification of home education instructors. Note, *supra* note 181, at 76 n.65.

186. See MICH. COMP. LAWS § 388.382, § 380.1169-70, § 380.1173, § 380.1501-02, § 380.1516. (*E.g.*, cultures of ethnic, religious, and racial minorities, contributions of women).

187. *Nebraska v. Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571 (1981); *State v. Rivinius*, 328 N.W.2d 220 (N.D. 1982), *Sheridan Road Baptist Church v. Department of Educ.*, 426 Mich. 462, 396 N.W.2d 373 (1986) (equally divided court). *Contra* *People v. Turner*, 263 P.2d 685 (Cal. 1953), *appeal dismissed*, 347 U.S. 972 (1954) (home education law); *Kentucky State Bd. of Educ. v. Rudasill*, 589 S.W.2d 817 (Ky. 1979).

188. See *Baker, Regulation of Fundamental Christian Schools: Free Exercise of Religion v. The State Interest in Quality Education*, 67 Ky. L.J. 415

ington. The Supreme Court has held that private schools are subject to laws against race discrimination in admitting students<sup>189</sup> but at the same time made it clear that the law did not "inhibit in any way the teaching in these schools of any idea or dogma," including the desirability of racial discrimination.<sup>190</sup>

### B. *Excuses and Substitutions*

Students can be excused from courses, blocks of instruction, and lectures to which they object on freedom of religion or freedom of expression grounds. Alternative reading or study assignments ordinarily can be arranged readily. In light of the relatively few requests and the relative commonality of them (e.g., evolution and sex education), it should not create an undue administrative burden to provide accommodation to first amendment values in this way.<sup>191</sup> If the school were not in a position to provide alternative studies, the dissenting students should be required to avail themselves of relevant nonpublic or home instruction opportunities, if the state properly regarded the particular subject or area of study as an essential part of its educational program. It is argued quite convincingly that the applicable governmental interests<sup>192</sup> are not sufficiently strong to compel some form of education in anything but reading, writing, arithmetic, and basic principles of government.<sup>193</sup> If this view is correct, an unconditional excuse would be justifiable for most types of instruction that were found objectionable on ideological grounds. Teachers who are conscientiously opposed to giving certain types of instruction also could be accommodated easily, by exchanging assignments with other nonobjecting teachers.<sup>194</sup> None of the above accommodations would create an

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(1979). Some states expressly forbid government interference in church-related schools' selection of faculty, curriculum, and textbooks. *E.g.*, TENN. CODE ANN. § 49-50-801(b) (Supp. 1987). However, *Kentucky State Bd. of Educ. v. Rudasill*, 589 S.W.2d 817 (Ky. 1979), struck down text and curriculum regulations for these schools.

189. *Runyon v. McCrary*, 427 U.S. 160 (1976) (private, nonchurch-related school). *Accord* *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (private, church-sponsored school; elimination of tax exempt status).

190. *Runyon*, 427 U.S. at 176.

191. *Cf.* *Thomas v. Review Bd.*, 450 U.S. 707 (1981).

192. *See supra* text accompanying notes 3-8 and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

193. *Hirschhoff, supra* note 3, at 918-19, 926-34.

194. *Hunter, supra* note 79, at 70.



imposition on the nonobjecting students, since no cognizable injury is sustained by being required to obtain more education than somebody else.<sup>195</sup>

In light of the foregoing analysis, the granting of excuses should be a preferred, and in many instances, a required, accommodation of conscientious objectors in school. The Supreme Court has not provided any direct guidance on this point but has indicated generally that claims for excuses must be weighed cautiously: "[C]ourts must move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exception from generally applicable educational requirements."<sup>196</sup> A number of common law cases allowed families to require that their children be excused from courses of instruction to which they were opposed,<sup>197</sup> even after the adoption of compulsory school laws,<sup>198</sup> but there were other cases to the contrary.<sup>199</sup> Among the more recent cases, which have used a constitutional analysis, the results have been mixed. Some cases dealing with sex education have ruled that excuses must be granted,<sup>200</sup> and others have upheld sex education programs in part by reason that provision is made for excuses.<sup>201</sup> However, others have rejected attacks on sex education courses without regard to the availability of excuses.<sup>202</sup> Two courts sustained conscientious objections to scant clothing in physical education courses, and the students were excused from wearing the uniform attire.<sup>203</sup> Excuses

195. Most accommodations of conscientious objectors do not discriminate against others. Galanter, *supra* note 126, at 291. Cf. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), where on establishment grounds the Supreme Court invalidated a requirement of honoring every employee's designated sabbath, in part because it burdened employers and fellow employees. See *supra* text accompanying note 114.

196. *Wisconsin v. Yoder*, 406 U.S. at 235.

197. See *supra* cases in Hirschoff, note 3, at 886 n.44.

198. *Kelley v. Ferguson*, 95 Neb. 63, 144 N.W. 1039 (1914); *School Bd. Dist. No. 18 v. Thompson*, 24 Okl. 1, 103 P. 579 (1909).

199. See *supra* cases in *Project*, *supra* note 2, at 1433 n.338.

200. *Citizens v. San Mateo County Bd. of Educ.*, 51 Cal. App.3d 1, 124 Cal. Rptr. 68 (1975), *appeal dismissed*, 425 U.S. 908 (1976).

201. *Medeiros v. Kiyosaki*, 52 Haw. 436, 478 P.2d 314 (1970).

202. *Cornwell v. State Bd. of Educ.*, 314 F. Supp. 340 (D. Md. 1969), *aff'd*, 428 F.2d 471 (4th Cir. 1970) (per curiam); *Hopkins v. Hamden Bd. of Educ.*, 29 Conn. Supp. 397, 289 A.2d 914 (1971), *aff'd*, 165 Conn. 793, 305 A.2d 536 (1973).

203. *Mitchell v. McCall*, 143 So. 2d 629 (Ala. 1962); *Moody v. Cronin*, 484 F. Supp. 270 (C.D. Ill. 1979).

from mandatory ROTC<sup>204</sup> and dancing<sup>205</sup> classes have been allowed. Apostolic Lutherans who object to audiovisuals were excused from movies and videotape entertainment but not instruction in that form.<sup>206</sup> One court correctly held that there was no violation of a student's rights when the student's conscientious objections to an assigned book were accommodated by substituting another book for it.<sup>207</sup>

A major attack on the Holt series of basic reading books was mounted by fundamentalist Christian families of public school children in *Mozert v. Hawkins County Public Schools*.<sup>208</sup> They maintained that the texts emphasized themes that were "feminist, . . . humanist, . . . pacifist, . . . anti-Christ, . . . vegetarian, or [advocating] one-world government," which were "repulsive to their Christian faith . . . ." <sup>209</sup> The district court found that the families' free exercise rights were violated, reasoning that, while there was a compelling state interest to provide education, the state was pursuing it by unnecessarily broad means to require that the objectors use the books in question. The court ordered that the students be excused from the objectionable texts and be allowed to substitute home reading instruction in accordance with state law.<sup>210</sup> The Sixth Circuit recently reversed, ordering the case dismissed.<sup>211</sup>

The appeals court's primary rationale was that freedom of religion was not violated because the children were not required to affirm their belief in any of the ideas mentioned in the challenged material.<sup>212</sup> The district court decision seems to have been better reasoned and more faithful to Supreme Court precedent than was the appellate decision. The *Sherbert-Thomas* line of cases does not require that one be compelled to adopt an antithetical belief to suffer violation of his religious freedom. It is sufficient proof of a constitutional claim under these cases that one's religious beliefs

204. *Spence v. Bailey*, 465 F.2d 797 (6th Cir. 1972).

205. *Hardwick v. Board of School Trustees*, 54 Cal. App. 696, 205 P. 49 (1921).

206. *Davis v. Page*, 385 F. Supp. 395, 401 (D.N.H. 1974).

207. *Grove v. Mead School Dist. No. 354*, 753 F.2d 1528 (9th Cir. 1985).

208. 765 F.2d 75 (6th Cir. 1985), *on remand* 647 F. Supp. 1194 (E.D. Tenn. 1986), *rev'd*, 827 F.2d 1058 (6th Cir. 1987).

209. *Mozert*, 647 F. Supp. at 1199.

210. *Id.* at 1201.

211. *Mozert*, 827 F.2d 1058, 1070.

212. *Id.* at 1063-66.

are insulted as the price of accepting a public benefit.<sup>213</sup>

On one narrow aspect of the excuse issue, there is a clear constitutional rule. *West Virginia Board of Education v. Barnette*<sup>214</sup> excuses students from making expressions of belief, affirmances, and pledges as to symbols, ideas, values, and principles to which they are conscientiously opposed.

The constitutional issues raised by claims for excuses are far easier to resolve than the issues raised by demands to require additions to and deletions from the school program which are discussed in the following sections. Excuses involve only conflict between the state's interest in public education and individual constitutional rights and do not implicate competing constitutional claims, whereas efforts to alter school programs often bring to bear the inconsistent constitutional demands of free expression and the religious clauses, as well as the ever-present clash with the school administration's values.

### C. *Removals and Additions*

Controversies over removals and additions of school materials and activities can arise in different ways. In some instances, conscientious objectors seek the removal of offensive materials. In other instances, teachers and students who want to use certain materials protest school administrators' decisions to remove them. Similar disputes arise over whether certain materials must be incorporated into the school program. The interests and values at stake as well as weighty practical considerations differ with respect both to the type of first amendment interest (free expression, free exercise of religion, establishment of religion) that is asserted and whether the materials or activities in question are library books; curricula or courses; lectures, questions, or assignments; or extracurricular activities.

#### 1. *Library Books*

In *Board of Education, Island Trees Union Free School District v. Pico*,<sup>215</sup> the Supreme Court in a five-to-four decision held that summary judgment was improperly granted against student families' claims that the school board had violated their first

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213. See *supra* text accompanying notes 143-46.

214. 319 U.S. 624 (1943).

215. 457 U.S. 853 (1982).

amendment rights by removing school library books for ideological reasons.<sup>216</sup> The plurality, consisting of Justices Brennan, Marshall, Stevens, and Blackmun (who concurred separately) adopted the affirmative constitutional principle that school authorities may not remove school library books because they dislike the ideas in them.<sup>217</sup> The plurality opinion relied heavily on the first amendment right of students to receive communication.<sup>218</sup> Justices Rehnquist, Powell, and Burger dissented but nevertheless acknowledged that there were some circumstances in which a constitutional injury would be imposed by removal of library books, such as where a Republican board discarded all books favorable to Democrats.<sup>219</sup> Only Justice O'Connor in her dissenting opinion embraced the absolutist position that school authorities have unfettered discretion

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216. Justice White concurred only on the ground that summary judgment had been improvidently granted. 457 U.S. at 883-84. One court expressed the opinion that the narrowness of the White concurrence deprived *Pico* of all precedential value on the constitutional issue presented. *Muir v. Alabama Educ. Television Comm'n.*, 688 F.2d 1033, 1045 n.30 (5th Cir. 1982). This view appears to be erroneous since Justice White's concurrence necessarily stands for the proposition that some kind of constitutional violation may occur when books are weeded out of a library. Freeman, *supra* note 29, at 38.

217. *Pico*, 457 U.S. at 871, 879 (Blackmun, J., concurring). Local citizens had attended a conservative political conference and received a list of books thought to be improper for students. Nine of the books were found in the high school library including Kurt Vonnegut's *Slaughter House Five* (Vonnegut has probably done more to advance the field of constitutional law, as we shall see in the following sections, than he has done to enrich American literature), *Best Short Stories of Negro Writers*, edited by Langston Hughes, and *Soul on Ice* by Eldridge Cleaver. The school board disregarded existing procedures for reviewing questioned books. The board appointed a special book review committee which recommended removal of two books, retention of six books (one to be circulated only with parental approval), and either disregarded or took no positions on the others. The board rejected the committee's decision, ordering that all the books be removed except two (one subject to parental approval). The removals included the works listed above.

218. *Id.* at 866-68. The plurality cited a number of cases upholding the right to receive written and verbal expression, including *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972); *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965); and *Martin v. Struthers*, 319 U.S. 141 (1943). The plurality quoted Madison's statement that "[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a tragedy; or, perhaps both. Knowledge will forever govern ignorance; [a]nd a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." 9 WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910).

219. *Pico*, 457 U.S. at 907 (Rehnquist, J., dissenting).

over the contents of school libraries.<sup>220</sup>

The *Pico* plurality readily acknowledged that the schools have a legitimate interest in inculcating respect for authority and traditional social, moral, and political values.<sup>221</sup> The plaintiffs had conceded, and the plurality agreed, that library books could be removed for "pervasive vulgarity" or "educational unsuitability."<sup>222</sup> The plurality also indicated books that were "psychologically inappropriate" or promoted ideas "manifestly inimical to public welfare" could be eliminated.<sup>223</sup> On the other hand, the plurality expressed the view that the state could not throw out books on grounds of patriotism, fear of potential disturbance, or desire to suppress unpopular, controversial, or minority views.<sup>224</sup> The weight of lower court authority supported the plurality's position.<sup>225</sup> Commentators predicted that, because the Court had not agreed on standards, a great deal of litigation would be spawned.<sup>226</sup> Contrary to these predictions, the *Pico* decision must have created a broad consensus in the school community, because not a single published case in which library book removals was challenged appeared from the time of *Pico's* filing in 1982 to the time this article went to press.

The *Pico* plurality specified that the decision was not intended to affect book selection decisions.<sup>227</sup> Both the dissenters<sup>228</sup> and several commentators were critical of what they regarded as an unprincipled distinction between book selection and removal,<sup>229</sup> and from the latter came suggestions of complicated plans whereby balanced literary offerings could be judicially mandated.<sup>230</sup> There

220. *Id.* at 921.

221. *Id.* at 864.

222. *Id.* at 871.

223. *Id.* at 880.

224. *Id.* at 869-71, 874-75, 880 (Blackmun, J., concurring).

225. See Annotation, Propriety, Under the First Amendment, of School Board's Censorship of Public School Libraries or Coursebooks, 64 A.L.R. FED. 771 (1983).

226. Comment, *Board of Education v. Pico: The Supreme Court's Answer to School Library Censorship*, 44 OHIO ST. L.J. 1103 (1983); Note, *The First Amendment in the Classroom: Library Book Removals and the Right of Access to Information*, 23 B.C.L. REV. 1471, 1527 (1982).

227. *Pico*, 457 U.S. at 869.

228. *Id.* at 887 (Burger, C.J.); *id.* at 910 (Rehnquist, J.).

229. *E.g.*, Note, 19 WAKE FOREST L. REV. 119, 134-35 (1983).

230. Note, *First Amendment Limitations on the Power of School Boards to Select and Remove High School Texts and Library Books*, 52 ST. JOHN'S L. REV.

seem to be only two reported decisions dealing with schools' refusals to acquire specified library materials, both of which favor the school authorities.<sup>231</sup> There is a principled distinction of considerable importance between reversing removals and requiring acquisitions: in the former case, the court is typically overriding the school board and confirming the school librarian's academic freedom; while in the latter case, the court is called upon to interfere with the librarian's academic freedom.<sup>232</sup> There are also sharp practical distinctions between removals and acquisitions of library books. Removal invariably has been accomplished in a censorial way, in the most abhorrent tradition of bookburning.<sup>233</sup> Acquisition, on the other hand, is the product of the librarian's trained, skilled work, with access to various comprehensive lists of recommended books and often with the aid of balanced advisory committees.<sup>234</sup> Another practical distinction is that book removals entail the waste of public funds, whereas acquisitions represent enduring investments. Finally, the judicial role is far more complex with a much less predictable outcome when the court faces the task of ensuring that the school library has a balanced array of publications than when it must decide only whether a book removal was unconstitutionally motivated.<sup>235</sup>

## 2. *Textbooks, Courses, and Curricula*

When the Board of Education of Kanawha County, West Virginia, voted in 1974 to purchase certain textbooks despite citizens' petitions urging rejection, "homes were firebombed, schools were

457, 474-83 (1978).

231. *Bicknell v. Vergennes Union High School Bd. of Directors*, 638 F.2d 438, 442 (2d Cir. 1980), holds that the school board could alter a librarian's right to purchase new books. *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577 (6th Cir. 1976) upholds the school board's refusal to purchase Vonnegut's *God Bless You, Mr. Rosewater* and Joseph Heller's *Catch-22* for the library, while at the same time holding against the school board's right to remove Vonnegut's *Cat's Cradle* and Heller's *Catch-22* from the library.

232. Note, *What are the Limits to a School Board's Authority to Remove Books from School Library Shelves?*, 1982 WIS. L. REV. 417, 431.

233. There actually was a public bookburning of books removed from the school library in *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300 (7th Cir. 1980).

234. Dunn, *Pico and Beyond: School Library Censorship Controversies*, 77 LAW LIB. J. 435, 455-56 (1984).

235. See van Geel, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197, 218-20 (1983).

dynamited, gunfire was exchanged . . . ."<sup>236</sup> Disputes over textbooks, courses and curricula tend to be the most divisive and also are the most difficult to resolve in constitutional terms, of all of the types of decisions affecting the public schools discussed in this article.

The governmental interest opposing individual first amendment claims in this area is of the highest order. Courses, curricula, and textbooks constitute the heart of the educational program and are the primary instruments by which the public schools carry out their mission to educate youth. As much as eighty percent of instruction presented in public school comes from textbooks.<sup>237</sup> State law and regulations commonly impose standards, often very detailed, for the curriculum and course offerings.<sup>238</sup> About half the states select textbooks by local school boards and the other half select textbooks on a statewide basis; where statewide selection is used, individual schools or teachers often have the option of selecting from a limited number of available titles.<sup>239</sup> Because of the magnitude of the government interest at stake, courts have tended to be very deferential to the school authorities in this area with the exception of establishment clause issues. Perhaps the most convenient approach to the subject is to break the discussion down by the types of claims advanced to challenge the school officials' decision — establishment of religion, free exercise of religion, and freedom of expression.

#### a. *Establishment of Religion*

The Supreme Court has made it clear that efforts to use the school curriculum for the inculcation of religious doctrine will not

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236. Schember, *Textbook Censorship — The Validity of School Board Rules*, 28 AD. L. REV. 259 (1976).

237. English, *The Politics of Textbook Adoption*, PHI DELTA KAPPAN 275 (Dec. 1980).

238. L. PETERSON, *THE LAW AND PUBLIC SCHOOL OPERATION* 321-34 (2d ed. 1978); E. REUTTER, *THE LAW OF PUBLIC EDUCATION* 107-14, 116-25 (1970).

239. Note, *Textbook Adoption Laws, Precensorship, and the First Amendment: The Case Against Statewide Selection of Classroom Materials*, 17 J. MARSHALL L. REV. 167, 168 nn.10, 11 (1984). Textbook selection has become a battleground for ideological forces competing for control of schools. Conservative political and religious groups have successfully influenced textbook selection in many instances. *Id.* at 169 nn.16-20, 170 nn.21-22; Rhode, *Is Secular Humanism the Religion of the Public Schools?* DEALING WITH CENSORSHIP 117-19 (J. Dany ed. 1979). Liberal organizations also have campaigned for textbook changes. 11 COUNCIL ON INTERNATIONAL BOOKS FOR CHILDREN BULL. 8 at 7, 9 (1980).

be tolerated. In *School District of Abingdon v. Schempp*,<sup>240</sup> the Court ruled that daily Bible reading as part of a school course of instruction amounted to an unconstitutional establishment of religion. In *Stone v. Graham*,<sup>241</sup> the Court invalidated on establishment grounds a state requirement that the Ten Commandments be posted in each schoolroom. In *Epperson v. Arkansas*<sup>242</sup> the Court determined that the state's prohibition of teaching evolution was religiously motivated and hence violated the establishment clause. The establishment clause applies fully to courses that subscribe to the religious tenets of non-Christian religions; in *Malnak v. Yogi*,<sup>243</sup> the Third Circuit Court of Appeals ordered the elimination of a transcendental meditation course that included ceremonies involving offerings to a deity.

Louisiana was among several states that recently enacted "balanced treatment" legislation, forbidding the teaching of evolution unless accompanied by instruction in creation science. The Supreme Court in *Edwards v. Aguillard*<sup>244</sup> invalidated the statute as violative of the establishment clause. The stated purpose of the law was to protect academic freedom. The Court observed that academic freedom was restricted, not advanced, by the statute, since it compelled teachers to teach a theory with which they may not agree or alternatively to remain silent about the entire subject — clearly at odds with the "freedom of teachers to teach what they will."<sup>245</sup> From the face of the statute the Court found it had a predominant religious purpose in violation of the first *Lemon v. Kurtzman* test,<sup>246</sup> its real purpose being to discredit "evolution by counterbalancing its teaching at every turn with the teaching of creation science . . ."<sup>247</sup> In reaching its conclusion, the Court first noted that Louisiana had singled out evolution from among the many scientific subjects for unique treatment.<sup>248</sup> Next, it referred to the historic and contemporaneous links between the teachings of certain religious denominations and opposition to Darwinian

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240. 374 U.S. 203 (1963).

241. 449 U.S. 39 (1980).

242. 393 U.S. 97 (1968).

243. 592 F.2d 197 (3d Cir. 1979).

244. 107 S. Ct. 2573 (1987).

245. *Id.* at 2578.

246. *See supra* text accompanying notes 101-03.

247. *Edwards*, 107 S. Ct. at 2580 (citation omitted).

248. *Id.* at 2582.



evolution.<sup>249</sup> Then the Court observed that the statute favored creationism by requiring that curriculum guides be developed and research services supplied for that theory but imposing no similar requirement with respect to evolution and by forbidding discrimination against one who teaches creationism but not one who teaches evolution.<sup>250</sup>

The Supreme Court has stated expressly that religion can be studied objectively in public schools by teaching its history, by examining the Bible and other religious texts as literature, and in terms of comparative religion.<sup>251</sup> The establishment clause is violated only when students are indoctrinated with religious beliefs, when the values of one religious sect are preferred over those of another sect, or when religious, as opposed to nonreligious, beliefs are given preference.<sup>252</sup>

Just as the state cannot prefer religious beliefs over nonreligious beliefs, it also may not establish a "religion of secularism . . . preferring those who believe in no religion over those who do believe."<sup>253</sup> The plaintiffs in *Smith v. Board of School Commissioners*<sup>254</sup> contended that the state had done exactly that by adopt-

249. *Id.* at 2580-81.

250. *Id.* at 2579.

251. "[I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment."

*School Dist. of Abington v. Schempp*, 374 U.S. 203, 225 (1963). Even the Ten Commandments could be an appropriate subject of study in a secular educational program. *Stone v. Graham*, 449 U.S. 39, 42 (1980). *Cf. Widmar v. Vincent*, 454 U.S. 263, 271, 281 (Stevens, J., concurring) (1981) (where the potential for undue influence is less significant at the college level than in high school, courses in religion and theology could be offered).

252. See *supra* text accompanying note 98.

253. *School Dist. of Abington*, 374 U.S. 203, 225 (1963).

254. 655 F. Supp. 939 (S.D. Ala. 1987), *rev'd*, 827 F.2d 684 (11th Cir. 1987). This case was the outgrowth of *Jaffree v. Board of School Comm'rs*, 554 F. Supp. 1104 (S.D. Ala. 1983), where district judge Brevard Hand upheld the Alabama "moment of silence" statute against a free exercise challenge, opining that the Supreme Court had been in error for sixty years in holding that the First Amendment is applicable to the states. See Curtis, *Judge Hand's History: An Analysis of History and Method in Jaffree v. Board of School Commissioners of Mobile County*, 86 W. VA. L. REV. 109 (1983). This decision was reversed by the Eleventh Circuit, 705 F.2d 1526, which was affirmed by the Supreme Court, 472 U.S. 38

ing textbooks that were biased in favor of secular humanism and against traditional religion. The district court ruled in favor of the plaintiffs, but the Court of Appeals for the Eleventh Circuit reversed. The appellate court applied both the first, purpose, and second, effects, *Lemon* tests to the home economics and social studies books that the district court condemned. The court found that the purpose behind the books was purely secular.<sup>255</sup> The primary effect of the books did not convey a message of governmental approval of secular humanism or disapproval of theism, and the information presented was essentially neutral in religious content.<sup>256</sup> The court further found that the home economics books had an entirely appropriate secular effect by advocating such religiously neutral values as independent thought, tolerance of diverse views, self-respect, maturity, self-reliance, and logical decisionmaking.<sup>257</sup> The social science books did not have the effect of promoting secular humanism simply because historical facts concerning religion were omitted or there was no thorough discussion of the place of religion in modern society.<sup>258</sup>

Viewed together, *Edwards v. Aguillard* and *Smith v. Board of School Commissioners*<sup>259</sup> totally reject any notion, repeatedly advanced by some commentators,<sup>260</sup> that the state has a duty under the establishment clause to present balanced offerings of religious and nonreligious theories or facts. Indeed, if the state undertakes to do so, such an effort itself will violate the establishment clause if

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(1985). In his initial decision, Judge Hand had indicated that if he were reversed on his First Amendment view, he would undertake an examination of secular humanism as a religion in the public schools in violation of the church-state separation doctrine.

255. *Smith*, 827 F.2d at 694.

256. *Id.* at 690.

257. *Id.* at 692.

258. *Id.* at 693.

259. Plaintiffs contending that textbooks are part of a state-established religion have invariably lost. *Wright v. Houston Indep. School Dist.*, 366 F.Supp. 1208 (S.D. Tex. 1972) (evolution); *Willoughby v. Stever*, 504 F.2d 271 (D.C. Cir. 1974) (evolution); *Williams v. Board of Educ.*, 388 F. Supp. 93 (S.D. W. Va. 1975), *aff'd*, 530 F.2d 972 (4th Cir. 1975) (Kanawha County textbook controversy, *see supra* text accompanying note 236).

260. Emerson & Haber, *The Scopes Case in Modern Dress*, 27 U. CHI. L. REV. 522, 526-28 (1960); van Geel, *supra* note 235, at 290, 297; Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 884-88 (1979); Bird, *supra* note 167, at 542-43; Stern, *Challenging Ideological Exclusion of Curriculum Material: Rights of Students and Parents*, 14 HARV. C.R. - C.L.L. REV. 485 (1979).

it is religiously motivated. These cases represent a triumph for school administrators. They are relatively unrestrained by the establishment clause in carrying out their critical task of making text and course choices, provided they do not act with religious or anti-religious purpose.

### b. *Free Exercise of Religion*

School children and their parents have maintained in several cases that prescribed texts, courses, and curricula, typically in the areas of evolution and sex education, violate their freedom of religion, and for that reason either they should be removed, the offending material should be deleted, or more balanced material should be added.<sup>261</sup>

The religious minorities' claims based on conscientious objections to texts and courses are theoretically well-founded upon the *Sherbert-Thomas* and *Yoder* lines of cases.<sup>262</sup> A number of commentators have argued, in addition, that since many courses in politically, morally, and religiously controversial areas necessarily will clash with, and tend to alter, the religious views of the minority,<sup>263</sup> school authorities have a duty under the first amendment free exercise clause to offer balanced presentations in which all views are taught.<sup>264</sup> These commentators draw an analogy to the Federal Communications Commission's "fairness doctrine,"<sup>265</sup> contending that, because public schools dominate the field of education, teaching time becomes a limited and scarce resource that must be allocated fairly to represent opposing points of view.<sup>266</sup>

Nevertheless, the free exercise claims of school families who want changes made in texts and courses to resolve their religious objections uniformly have been denied.<sup>267</sup> The decisions adverse to

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261. See Strossen, *supra* note 1, at 392-96.

262. See *supra* text accompanying notes 162-66. The imposition of evolution in public schools is viewed as a state attack on fundamentalist religious views. Bird, *supra* note 167, at 515; Rice, *supra* note 167, at 847.

263. See Note, *Freedom of Religion and Science Instruction in Public Schools*, 87 YALE L.J. 515, 537 n.107 (1978).

264. See *supra* note 260.

265. *Red Lion Broadcasting Co. v. Federal Communications Comm'n*, 395 U.S. 367, 390 (1969) (doctrine not only justified, but required by First Amendment).

266. van Geel, *supra* note 235, at 289-92; Stern, *supra* note 260, at 508-13.

267. *Williams v. Board of Educ.*, 388 F. Supp. 93 (S.D. W. Va. 1975), *aff'd*, 530 F.2d 972 (4th Cir. 1975) (Kanawha County textbook controversy, see *supra*

those claims, unfortunately, are seldom accompanied by focused discussions of the relevant constitutional values at stake. In *Smith v. Board of School Commissioners*,<sup>268</sup> for example, the free exercise claim, which in many respects was more compelling than the establishment claim, was dismissed in a footnote without discussion. Even if they are not adequately reasoned, these cases are not necessarily wrongly decided, either by reason of constitutional theory or practical considerations. The vital and often overlooked, but sometimes perceived,<sup>269</sup> countervailing constitutional consideration is that to grant relief in such a case as this at the same time ordinarily results in a denial of teachers' academic freedom "to teach what they will."<sup>270</sup> The practicalities also weigh heavily against these claims. First, resolution of these claims is ill-suited to the judicial process, because the courts would have to become deeply involved in the complexities of course and book details. Second, significant burdens would be placed on the school authorities, teachers, and nondissenting students. Third, relief in the form of excusing students from the offensive materials, rather than altering them, would be far less disruptive to the education process and nearly as satisfactory as far as the aggrieved students are concerned.<sup>271</sup>

### c. *Freedom of Expression*

#### *In Board of Education, Island Trees Union Free School Dis-*

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note 236); *Davis v. Page*, 385 F. Supp. 395 (D.N.H. 1974); *Cornwall v. State Bd. of Educ.*, 314 F. Supp. 340 (D. Md. 1969), *aff'd*, 428 F.2d 471 (4th Cir. 1970) (per curiam); *Citizens for Parental Rights v. San Mateo School Bd.*, 51 Cal. App. 3d 1, 124 Cal. Rptr. 68 (1975), *appeal dismissed*, 425 U.S. 908 (1976); *Hopkins v. Hamden Bd. of Educ.*, 29 Conn. Supp. 397, 289 A.2d 914 (1971), *aff'd*, 165 Conn. 793, 305 A.2d 536 (1973); *Medeiros v. Kiyosaki*, 52 Haw. 436, 478 P.2d 314 (1970); *Todd v. Rochester Community Schools*, 41 Mich.App. 320, 200 N.W.2d 90 (1972); *Rosenberg v. Board of Educ.*, 196 Misc. 542, 92 N.Y.S.2d 344 (Sup. Ct. 1949) (objections to *Oliver Twist* and *The Merchant of Venice* as anti-Semitic).

268. 827 F.2d 684, 695 n.12 (11th Cir. 1987). See *supra* text accompanying notes 254-58.

269. *Citizens for Parental Rights v. San Mateo School Bd.*, 51 Cal. App. 3d 1, 124 Cal. Rptr. 68 (1975); *Todd v. Rochester Community Schools*, 41 Mich. App. 320, 200 N.W.2d 90 (1972); *Rosenberg v. Board of Educ.*, 196 Misc. 542, 92 N.Y.S.2d 344 (Sup. Ct. 1949); *McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. 1255, 1273 (E.D. Ark. 1982) ("balanced treatment" law).

270. *Edwards v. Aguillard*, 107 S. Ct. 2573 (1987).

271. See *supra* text accompanying notes 191-213.

*trict v. Pico*,<sup>272</sup> the plurality opinion expressed doubt as to any application of the right of free expression to the school curriculum. School officials "might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values."<sup>273</sup> Since only four Justices joined in the plurality opinion, and the positions of the other Justices were in varying degrees more conservative than those who subscribed to the plurality opinion with respect to constitutional limitations on school boards' authority, it is reasonable to predict that a freedom of expression challenge to selection of textbooks, curricula, and courses would be virtually certain to fail in the high court.<sup>274</sup>

In two lower court cases decided before *Pico*, teachers on academic freedom grounds successfully challenged decisions to remove textbooks or courses.<sup>275</sup> However, in the majority of cases they were unsuccessful.<sup>276</sup> In the single post-*Pico* case on this point the teacher lost her academic freedom claim of a right to require use of a textbook disapproved by the school board.<sup>277</sup>

### 3. Teachers' Lectures, Questions, and Assignments

As discussed above, decisions concerning textbook and course selection are made sometimes on a statewide basis and sometimes by local school boards.<sup>278</sup> On the other hand, choices of lecture con-

272. 457 U.S. 853 (1982). See *supra* text accompanying notes 215-24.

273. *Id.* at 869 (emphasis in original).

274. Justice Blackmun, who concurred separately, agreed that curriculum decisions were reserved to the school authorities. *Id.* at 878 n.1. *Pico* cannot be logically limited to school libraries, and its reasoning applies with equal force to curriculum, according to some commentators. *E.g.*, Note, *supra* note 229, at 136. Regardless of this analysis, the Supreme Court votes for extending *Pico* to curricular decisions simply are not there.

275. *Harris v. Mechanicville Cent. School Dist.*, 86 Misc. 2d 144, 382 N.Y.S.2d 251 (1976); *Loewen v. Turnipseed*, 488 F. Supp. 1138 (N.D. Miss. 1980). The latter decision may still be good law since plaintiffs successfully proved that the decision to exclude an award-winning history text was racially motivated, thereby implicating equal protection values.

276. *Cary v. Board of Educ.*, 598 F.2d 535 (10th Cir. 1979); *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972); *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300 (7th Cir. 1980); *Palmer v. Board of Educ.*, 603 F.2d 1271 (7th Cir. 1979). *Cf. Minarcini v. Strongville City School Dist.*, 541 F.2d 577 (6th Cir. 1976) (refusal of school board to purchase requested texts upheld).

277. *Fisher v. Fairbanks North Star Borough School Dist.*, 704 P.2d 213 (Alaska 1985).

278. See *supra* text accompanying notes 238-39.

tents, supplementary reading materials and films, questions to the class, assignments, and testing are traditionally within the discretion of individual teachers.<sup>279</sup> Similarly, contents of student reports and other assignments, responses to questions, and volunteered comments in class, by their very nature, cannot be prescribed by higher authority. These considerations of tradition and practicality are consistent with an substantial measure of academic freedom for teachers and students alike in the day-to-day classroom setting.

Despite the foregoing differences, the result must be the same here as in other aspects of public school operation, on issues of church-state separation. A religious exercise in class, like daily Bible reading<sup>280</sup> or prayer,<sup>281</sup> is no less violative of the establishment clause if done on the individual teacher's prerogative than if prescribed by the authorities for the entire school system.

As suggested in the *Edwards v. Aguillard*<sup>282</sup> opinion, application of the establishment clause to a particular school problem often will confer the incidental benefit of expanding teacher academic freedom. *Moore v. Gaston County Board of Education*,<sup>283</sup> a federal district court decision, provides an excellent example of that process at work. A teacher was discharged for responding to a student's question by expressing approval of Darwinian evolution and agnosticism and challenging Biblical inerrancy. The court ordered the teacher's reinstatement on establishment clause grounds.<sup>284</sup>

In the sensitive areas of religion, morality, and politics, the teacher runs far less risk of violating students' first amendment rights by presenting the subject matter in an objective way in which varying points of view are discussed than by attempting to indoctrinate the students to subscribe to set opinions. School classes are captive audiences; they are taught to respect their teachers; they are immature; and they are highly susceptible to the influence of their elders. Therefore, in order to protect students' rights to

279. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 593-94 (1970); *Mailoux v. Kiley*, 323 F. Supp. 1387 (D. Mass. 1971), *aff'd*, 448 F.2d 1242 (1st Cir. 1971); *Sterzing v. Fort Bend Indep. School Dist.*, 376 F. Supp. 657, 662 (S.D. Tex. 1972), *vacated and remanded*, 496 F.2d 92 (5th Cir. 1974).

280. *School Dist. of Abington v. Schempp*, 374 U.S. 203 (1963).

281. *Engel v. Vitale*, 370 U.S. 421 (1962).

282. 107 S. Ct. 2573 (1987). *Accord Smith v. Board of School Comm'rs*, 827 F.2d 684, 689-94 (11th Cir. 1987).

283. 357 F. Supp. 1037 (W.D.N.C. 1973).

284. *Id.* at 1043.

hold their own views,<sup>285</sup> teachers should not proselytize.<sup>286</sup> Courts, quite rightly, have held that academic freedom does not grant teachers the right to propagandize their students.<sup>287</sup> In order to steer clear of propagandizing, a teacher need not conceal his own views. He has a right to hold beliefs and make them known, even controversial and unpopular beliefs. He goes too far only when he says, "You must believe," not when he says, "I believe." The teacher widens the margins of his academic freedom when he offers objective explanations of opposing views as well as his own views. To avoid indoctrination, the teacher can present competing views, encourage students to express disagreement, subject all theories to critical examination, allow students to select optional materials, and ensure that grades are dependent not on any particular view but instead on understanding diverse views.<sup>288</sup> In addition, an express disclaimer of any particular religious or other controversial position can be published by the school.<sup>289</sup> In short, the analytic model, rather than the inculcative model,<sup>290</sup> tends both to minimize friction with student religion and speech interests and to maximize academic freedom. The occasional judge who orders,<sup>291</sup> and the occasional commentator who argues,<sup>292</sup> that topics of religion or morality must be altogether avoided in the public schools are wrong.

If the teacher tries to impose religious positions, he risks viola-

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285. *Edwards*, 107 S. Ct. at 2575; *Bird*, *supra* note 167, at 532. There is a well-established constitutional right not to have to hold any particular belief on any controversial subject. *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980). *See van Geel*, *supra* note 235, at 260-61 (young person's autonomy should be preserved, so he can make decisions for himself upon reaching adulthood).

286. *Van Alstyne*, *supra* note 67, at 856; Note, *Schoolbooks, School Boards, and the Constitution*, 80 COL. L. REV. 1092, 1109 (1980); *Yudof*, *supra* note 260, at 874-75.

287. *James v. Board of Educ.*, 461 F.2d 566, 573-74 (2d Cir. 1972); *Knarr v. Board of School Trustees*, 317 F. Supp. 832, 836 (N.D. Ind.), *aff'd*, 452 F.2d 649 (7th Cir. 1971); *Burns v. Rovaldi*, 477 F. Supp. 270 (D. Conn. 1979) (communist urging fifth graders to prepare to "kick out the rich rotten bosses").

288. *Strossen*, *supra* note 1, at 383.

289. *Id.* Note, *The Constitutional Dimension of Student-Initiated Religious Activity in Public High Schools*, 92 YALE L.J. 499, 507 (1983).

290. *See supra* text accompanying notes 13-29.

291. *Reed v. Van Hoven*, 237 F. Supp. 48, 56 (W.D. Mich. 1965) (ordering no projects be assigned on religious or irreligious topics such as "Why I Believe or Disbelieve in Religious Devotions").

292. *See Note*, *supra* note 140, at 1223.

tion of both the establishment and the free exercise clauses. If the teacher tries to impose moral and political views, he risks the sort of compelled conformity on subjects of public importance that *West Virginia Board of Education v. Barnette* condemns as a violation of freedom of expression.<sup>293</sup> There is an exception of great importance to the general rule. The teacher is within his rights to inculcate those fundamental constitutional values — free suffrage, democratic control of government, freedom of expression, fair procedures, and toleration and equal treatment of minorities — that our national experience reveals are essential for all freedoms to be enjoyed maximally.<sup>294</sup> In other words, teachers must be empowered to inspire respect for these basic values in our system that operate to ensure the very freedom of religion and expression that are enforceable as limitations on academic freedom. Thus, one court held that a teacher could not be fired for teaching about the interests and rights of racial minorities<sup>295</sup> any more than he could be discharged for advocating the maintenance of free elections, no matter how offensive these doctrines might be to idiosyncratic dissenters.

As pointed out above,<sup>296</sup> the Supreme Court indicated it will uphold state maintenance of uniformity of texts and courses against academic freedom claims by teachers. The acceptance of orthodoxy in this aspect of the public school instructional program heightens the importance of enforcing respect for diversity in teachers' choices of lecture materials, supplementary readings, and other details of instruction. In this traditional area of teacher free choice, academic freedom should be rigorously upheld. In the words of Justice Brandeis, the best remedy is "more speech, not enforced silence."<sup>297</sup> Most courts generally have protected faculties from discharge and other sanctions imposed on account of their (non-propagandistic)<sup>298</sup> classroom expressions.<sup>299</sup> Exceptions un-

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293. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

294. See *Freeman*, *supra* note 29, at 55.

295. *Kingsville Indep. School Dist. v. Cooper*, 611 F.2d 1109, 1113 (5th Cir. 1980).

296. See *supra* text accompanying notes 272-74.

297. *Whitney v. California*, 274 U.S. 357, 377 (1927) (concurring). The state cannot suppress speech if further communication might avert the threatened harm. *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 97 (1977).

298. See *supra* text accompanying note 287.

299. *Mailloux v. Kiley*, 323 F. Supp. 1387 (D. Mass.) *aff'd*, 448 F.2d 1242 (1st Cir. 1971); *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970) (assigning



derstandably have been made for speech that is completely outside the scope of what the teacher is assigned to teach,<sup>300</sup> that which is indecent (taking into account its educational relevance and the age and maturity of the students),<sup>301</sup> and that which is likely to bring about disorder.<sup>302</sup> Efforts toward formulating general standards of protected academic expression, such as nebulous concepts of educational appropriateness, have not produced useful results.<sup>303</sup> The

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Vonnegut's "Welcome to the Monkey House" as outside reading); *Wilson v. Chancellor*, 418 F. Supp. 1358 (D. Ore. 1976) (cannot ban communist visiting speaker in political science class); *Dean v. Timpson Independent School Dist.*, 486 F. Supp. 302 (E.D. Tex. 1979); *Downs v. Conway School Dist.*, 328 F. Supp. 338 (E.D. Ark. 1971) (second grade "Think and Do" assignment in which students made pictures critical of inoperative water fountain and dangerous incinerator); *Pratt v. Independent School Dist.*, 670 F.2d 771 (8th Cir. 1982); *Webb v. Lake Mills Community School Dist.*, 344 F. Supp. 791 (N.D. Iowa 1972); *Beebee v. Haslett Pub. Schools*, 66 Mich. App. 718, 239 N.W.2d 724 (1976). *Cf. Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969) (relying on procedural due process). *Contra Parker v. Board of Educ.*, 237 F. Supp. 222 (Md.), *aff'd*, 348 F.2d 464 (4th Cir. 1965) (per curiam) (*Huxley's Brave New World* assigned). *Drown v. Portsmouth School Dist.*, 451 F.2d 1106 (1st Cir. 1971); *Adams v. Campbell County School Dist.*, 511 F.2d 1242 (10th Cir. 1975). The teacher can be required to make at least a minimum presentation of the prescribed curriculum. *Palmer v. Board of Educ.*, 603 F.2d 1271 (7th Cir. 1979); *Cooley v. Board of Educ.*, 327 F. Supp. 454 (E.D. Ark. 1971), *vacated*, 453 F.2d 282 (8th Cir. 1972). Of course, if the teacher conscientiously objects, he should be excused and a substitute provided. *See supra* text accompanying note 194.

300. *Ahern v. Board of Educ.*, 456 F.2d 399 (8th Cir. 1972); *Fowler v. Board of Educ.*, 819 F.2d 657 (6th Cir. 1987) (Pink Floyd movie on noninstructional day); *Robbins v. Board of Educ.*, 313 F. Supp. 642 (N.D. Ill. 1970).

301. *Mercer v. Michigan State Bd. of Educ.*, 379 F. Supp. 580 (E.D. Mich.), *aff'd*, 419 U.S. 1081 (1974) (upholding statute prohibiting instruction on methods of contraception); *Moore v. School Bd.*, 364 F. Supp. 355 (N.D. Fla. 1973) (questioned students about frequency of masturbation); *Brubaker v. Board of Educ.*, 502 F.2d 993 (7th Cir. 1974) (poem about free love, drugs, and Woodstock — eighth grade); *Mailloux v. Kiley*, 323 F. Supp. 1387 (D. Mass.), *aff'd* 448 F.2d 1242 (1st Cir. 1971) (discussion of word "fuck" approved for high school classroom).

302. *Ahern*, 456 F.2d 399; *Birdwell v. Hazelwood School Dist.*, 352 F. Supp. 613, 622 (E.D. Mo. 1972). As to the three foregoing exceptions, *see supra* text accompanying notes 51-57.

303. *Compare Mailloux*, 323 F. Supp. 1387, 1391-92 (D. Mass. 1971) (relevant, used in good faith and regarded by experts as serving a serious educational purpose) *with Mailloux*, 448 F.2d 1242, 1243 (1st Cir. 1971) (legitimate interests of authorities are demonstrably sufficient to circumscribe a teacher's speech) *and Kingsville Indep. School Dist. v. Cooper*, 611 F.2d 1109, 1113 (5th Cir. 1980) (substantial disruption overshadows the teacher's usefulness as an instructor) *and Smalls*, *supra* note 66, at 556-57 (no protection for individual statements, questions, assignments, unless pattern or practice of suppression).

preferable approach is to regard all faculty classroom expression to be protected except for the abovementioned categories of irrelevance, indecency, and disorderly.

Student academic freedom in the context of participating in classroom discussions and submitting written work has not been the subject of litigation except for the Supreme Court's recent student newspaper case, *Hazelwood School District v. Kuhlmeier*.<sup>304</sup> Unfortunately, other interests and considerations present in that case overwhelm the issue of student academic freedom with which this article is concerned. The student newspaper in *Hazelwood* was an integral part of the high school journalism course. The principal had censored two articles, one containing personal accounts of teenage pregnancy by students under assumed names and the other concerning the effects of divorce on children, which included interviews with students from divorced families. The majority seized on the elastic concept of educational appropriateness, identified in the *Pico* case,<sup>305</sup> as a justification for content-based censorship. The Court rejected the idea that the school newspaper had become a public forum, stating instead that its limited purpose was a supervised learning experience for student journalists, so that its contents are the subject of reasonable regulation.<sup>306</sup> It is essential to recognize that students were not being punished for speaking or prevented from speaking; the school merely made its official publication unavailable for the republication of their views. The *Tinker* case,<sup>307</sup> where students were held to be able to wear their own armbands as a form of silent protest, was far different from *Hazelwood* and was readily distinguished by the Court.<sup>308</sup> Perhaps in a future case the Court will express what limits are to be placed on the concept of educational appropriateness to avoid excessive erosion of the domain protected by the first amendment. *Hazelwood* is a striking instance of the abuse of settled journalistic standard and deviation from sound educational policy by the school authorities but probably not a departure from prevailing first amendment doctrine by the Court.

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304. 108 S. Ct. 562 (1988). The Court had indicated, however, in *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 508 (1969) that "word[s] spoken, in class . . ." by students are subject to first amendment protection.

305. *Board of Educ., Island Trees Union Free School Dist. v. Pico*, 457 U.S. 853 (1982). See *supra* text accompanying note 222.

306. *Hazelwood*, 108 S. Ct. at 562.

307. *Tinker*, 393 U.S. 503 (1969).

308. *Hazelwood*, 108 S. Ct. at 562.

#### 4. *Extracurricular Activities*

Extracurricular activities by their nature are inessential to the primary educational mission of the school. Accordingly, the state's interest in exerting control over the educational system is greatly diminished in the area of extracurricular activities. Students and faculty who must participate in the instructional program are not compelled to take part in extracurricular events. They have the option of not participating or of becoming involved in alternative off-campus activities. Thus, individual first amendment claims with regard to the extracurricular program do not possess the same sense of urgency as when they arise out of the compulsory instructional process. The diminished interests on both sides of the question tend to be offsetting, with the result that establishment, free exercise, and free expression claims relating to extracurricular activities tend to be resolved in much the same way as are such claims in the context of assignments, lectures, and class colloquy discussed above.

School prayers and religious meditation, even when undertaken outside the regular instructional program, are not sustainable under the establishment clause. The Supreme Court and lower courts considered three statutes in *Wallace v. Jaffree*.<sup>309</sup> A 1978 statute authorized a one-minute period of silence for meditation. The district court upheld this law, and the plaintiffs did not appeal.<sup>310</sup> A 1981 statute authorized a period of silence for meditation or *voluntary prayer*. The Supreme Court voted six to three to invalidate this statute under the first *Lemon v. Kurtzman* test,<sup>311</sup> determining that it had no secular purpose, since any secular purpose could have been fully served by the 1978 enactment, and the addition of "or voluntary prayer" was deemed to have characterized prayer as the favored purpose.<sup>312</sup> A 1982 statute authorized teachers to lead willing students in a prescribed prayer to God. The Supreme Court unanimously held this last enactment to be an unconstitutional establishment of religion.<sup>313</sup> Courts are deeply divided

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309. 472 U.S. 38 (1985).

310. *Id.* at 41. A similar statute was invalidated by *May v. Cooperman*, 780 F.2d 240 (3d Cir. 1985), *appeal dismissed for want of jurisdiction*, 108 S. Ct. 388 (1987), where from the legislative history, a religious purpose of enactment was found. *Contra* *Gaines v. Anderson*, 421 F. Supp. 337 (D. Mass. 1976).

311. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). See *supra* text accompanying notes 101-10.

312. *Wallace*, 472 U.S. at 59-60.

313. *Id.* at 38.

in passing on the constitutionality of prayer and other religious expressions that occur at commencement exercises and on other occasions outside the school day.<sup>314</sup>

Just as in the outside world,<sup>315</sup> the courts appear to be perplexed in dealing with challenges to religious symbols, music, art, and holiday trappings that appear in the public schools. In *Floreys v. Sioux Falls School District*,<sup>316</sup> the Eighth Circuit upheld school board rules permitting the observation of only those holidays that have both a religious and secular basis; allowing music, art, and drama having religious themes only if used in a "prudent and objective manner" and as a traditional part of the the cultural heritage; and authorizing religious symbols only as a temporary teaching aid or resource. The court's views concerning the third *Lemon* test, entanglement, were, first, to suggest that the test perhaps is not applicable at all, and, second, even if the test applied, the rules steered the school clear of entanglement with religion.<sup>317</sup> This is a crude and very result-oriented analysis.

One of the most vexing church-state issues, combining both establishment and free expression problems, outside the curriculum, arises when a nonschool-sponsored student group seeks to maintain a religious club under the same conditions as nonreligious clubs are permitted to operate. Religious speech, of course, is as fully protected as other speech.<sup>318</sup> By allowing clubs generally to operate, the school has opened up a limited forum within which content-based suppression ordinarily should not be tolerated.<sup>319</sup> The ultimate question is whether the school administration's concern for enforcement of the establishment clause is a sufficiently compelling governmental interest to override students' free expression. The Supreme Court held in *Widmar v. Vincent*<sup>320</sup> that on a

314. Prayers enjoined: *Graham v. Central Community School Dist.*, 608 F. Supp. 531 (S.D. Iowa 1985); *Doe v. Aldine Indep. School Dist.*, 563 F. Supp. 883 (S.D. Tex. 1982). Prayers upheld: *Wiest v. Mt. Lebanon School Dist.*, 457 Pa. 166, 320 A.2d 362 (1974); *Grossberg v. Deusebio*, 380 F. Supp. 285 (E.D. Va. 1974); *Wood v. Mt. Lebanon Township School Dist.*, 342 F. Supp. 1293 (W.D. Pa. 1972).

315. *Lynch v. Donnelly*, 465 U.S. 668 (1984) (creche in municipal park).

316. 619 F.2d 1311 (8th Cir. 1980).

317. *Id.* at 1318. This view appears inconsistent with *Widmar v. Vincent*, 454 U.S. 263, 272 n.11 (1981) (excluding religious exercises carries risk of excessive entanglement by attempting to determine which speech constitutes religious worship).

318. *Widmar v. Vincent*, 454 U.S. 262, 269 (1981).

319. See *supra* text accompanying notes 40-48.

320. 454 U.S. 263 (1981).

college campus the religious club in this circumstance must be allowed to operate. A federal district court in *Bender v. Williamsport Area School District*<sup>321</sup> held that the same result is required on public high school campuses. The Third Circuit reversed,<sup>322</sup> because the immaturity of high school students made it likely that they would regard school accommodation as amounting to school sponsorship.<sup>323</sup> The Supreme Court summarily dismissed the appeal,<sup>324</sup> on a procedural point and not on the merits, so that the district court opinion favorable to student rights was reinstated.

Congress attempted to resolve this controversy for meetings outside the official school day by passing the Equal Access Act in 1984.<sup>325</sup> The Act prohibits public secondary schools from denying access during noninstructional hours to student meetings based on the content of speech, where other "noncurriculum related student groups"<sup>326</sup> have been offered the opportunity to meet. The Equal

321. 563 F. Supp. 697 (M.D. Pa. 1983).

322. 741 F.2d 538 (3d Cir. 1984). *Brandon v. Board of Educ.*, 635 F.2d 971 (2d Cir. 1981), a pre-*Widmar* case is in accord with the court of appeals in *Bender* but on the theory that the high school is not a public forum. Also in agreement with the court of appeals is *Bell v. Little Axe Indep. School Dist.*, 766 F.2d 1391 (10th Cir. 1985), but there faculty members were initiators and participants in the meetings. *Lubbock Civil Liberties Union v. Lubbock Indep. School Dist.*, 669 F.2d 1038 (5th Cir. 1982), also rules against this form of accommodation to student groups, but there the school's policy was tailored to authorize student religious groups and no others. See *supra* note 117. Also in agreement with the court of appeals in *Bender* are *Johnson v. Huntington Beach Union High School Dist.*, 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (1977); *Hunt v. Board of Educ.*, 321 F. Supp. 1263 (S.D. W.Va. 1971); *Trietley v. Board of Educ.*, 65 A.D.2d 1, 409 N.Y.S.2d 912 (1978); *Commissioners of Educ. v. School Committee*, 358 Mass. 776, 267 N.E.2d 226 (1971). *Contra* *Reed v. Van Hoven*, 237 F. Supp. 48 (W.D. Mich. 1965); *May v. Evansville-Vanderburgh School Corp.*, 615 F. Supp. 761, 766 (S.D. Ind. 1985), *aff'd*, 787 F.2d 1105 (7th Cir. 1986). These cases are all prior to the Equal Access Act of 1984, see *infra* text accompanying notes 325-332, and some of them likely would now be decided differently.

323. *Bender*, 741 F.2d at 547-49.

324. 475 U.S. 534 (1986).

325. 20 U.S.C. § 4071 (Supp. III 1985).

326. Legislative history indicates that the Act relates only to meetings occurring before and after the official school day. 130 Cong. Rec. § S8353 (daily ed. June 27, 1984) (statement of Sen. Hatfield), 130 Cong. Rec. § S8355-56 (daily ed. June 27, 1984) (statement of Sen. Denton). Legislative history suggests that the term noncurriculum related is to be defined broadly, that is, in favor of coverage by the Act. Strossen, *A Constitutional Analysis of the Equal Access Act's Standards Governing Public School Student Religious Meetings*, 24 HARV. J. LEGIS. 117, 162 nn.176-78 (1987).

Access Act reaches both religious and secular student meetings. Because a single instance of access granted to another group will trigger applicability of the Act,<sup>327</sup> it places much greater limitations on school authorities' discretion than current constitutional doctrine, which would both require the establishment of a forum for speech and permit the school officials to change or withdraw the forum.<sup>328</sup>

The Equal Access Act provides that a school shall be deemed in accordance with the law if it complies with five specified conditions: (1) meetings are "voluntary and student-initiated"; (2) there is no government sponsorship; (3) any governmental employees present at religious meetings are in a "non-participatory capacity"; (4) meetings do not interfere with the educational activities of the school; and (5) nonschool persons may not "direct, conduct, control, or regularly attend activities of student groups." Although neither the language of the statute nor the legislative history specifies whether these five conditions are mandatory, commentators agree that they are.<sup>329</sup> If the foregoing criteria were not mandatory, religious meetings in many instances would violate the establishment clause, as where faculty were permitted to participate.<sup>330</sup>

The Equal Access Act significantly expands student free speech rights.<sup>331</sup> It prefers the value of freedom of expression over that of church-state separation, perhaps even to the extent that certain applications of the statute could violate the establishment clause.<sup>332</sup>

Student free exercise (and right to silence, a component of free speech)<sup>333</sup> claims in extracurricular matters were settled long ago by *West Virginia Board of Education v. Barnette*,<sup>334</sup> holding that

327. 20 U.S.C. § 4071(b) (Supp. III 1985). See *Student Coalition for Peace v. Lower Merion School Dist.*, 633 F. Supp. 1040 (E.D. Pa. 1984).

328. See *supra* text accompanying notes 40-49.

329. 20 U.S.C. § 4071(c) (Supp. III 1985). See *supra* Strossen, note 326, at 165 n.189.

330. *Bell v. Little Axe Indep. School Dist.*, 766 F.2d 1391 (10th Cir. 1985).

331. Note, *The Equal Access Act: A Haven for High School "Hate Groups"?* 13 HOFSTRA L. REV. 589, 592 (1985).

332. See *supra* Strossen, note 326, at 178, 181. But see *Thompson v. Waynesboro Area School Dist.*, 673 F. Supp. 1379, 1390 (M.D. Pa. 1987), drawing from the legislative history of the Equal Access Act to support the conclusion that accommodation to religious free speech on a high school campus does not impermissibly advance religion for purposes of the establishment clause.

333. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

334. *Id.*

students cannot be compelled to participate in ceremonies that offend their consciences. Similarly, teachers are not subject to the requirement of participating in extracurricular programs and exercises to which they are opposed.<sup>335</sup>

Teachers and students are accorded a wide measure of academic freedom in noncurricular activities such as school plays.<sup>336</sup> The Supreme Court carefully limited its opinion upholding limited newspaper censorship in *Hazelwood School District v. Kuhlmeier*<sup>337</sup> to school-owned newspapers which are integral parts of journalism courses.<sup>338</sup> The lower courts have decided a number of cases involving the rights of students to circulate "underground" and other unofficial publications. Some cases uphold students' rights,<sup>339</sup> but others have enforced preclearance requirements, content standards (e.g., "pervasive vulgarity," defamation, invasion of privacy), and time-place-manner restrictions.<sup>340</sup>

Both student and teacher academic freedoms in the extracurricular setting are subject to the same general limitations that are noted elsewhere in this article.<sup>341</sup> Indecent speech can be suppressed, as it was with the Supreme Court's approval in *Bethel School District v. Fraser*,<sup>342</sup> where a student used sexually sugges-

335. *Russo v. Central School Dist.*, 469 F.2d 623 (2d Cir. 1972). Cf. 20 U.S.C. § 4071(d)(4), Equal Access Act provision that school employees shall not be required to attend meetings where the contents of speech are contrary to their beliefs.

336. *Webb v. Lake Mills Community Schools Dist.*, 344 F. Supp. 791 (N.D. Iowa 1972) (play would be given, to which authorities objected because of the words "son of a bitch" and "damn"); *Bowman v. Bethel-Tate Bd. of Educ.*, 610 F. Supp. 577 (S.D. Ohio 1985); *Bell v. U-32 Bd. of Educ.*, 630 F. Supp. 939 (D. Vt. 1986) (upholding authorities' decision not to sponsor school play that was "indecent" and psychologically unsuitable); *Seyfried v. Walton*, 668 F.2d 214 (3d Cir. 1981) (play with sexual theme inappropriate).

337. 108 S. Ct. 562 (1988).

338. *Id.* at 571.

339. *Scoville v. Board of Educ.*, 425 F.2d 10 (7th Cir. 1970) (en banc); *Quarterman v. Byrd*, 453 F.2d 54 (4th Cir. 1971); *Eisner v. Stamford Board of Educ.*, 440 F.2d 803 (2d Cir. 1971); *Hall v. Board of School Comm'rs*, 681 F.2d 965 (5th Cir. 1982) (unlimited prior approval regulations invalidated); *Thompson v. Waynesboro Area School Dist.*, 673 F. Supp. 1379 (M.D. Pa. 1987) (striking down restrictions of school distribution of religious literature to areas outside the schoolhouse).

340. *Bystrom v. Fridley High School*, 822 F.2d 747 (8th Cir. 1987); *Sullivan v. Houston Indep. School Dist.*, 475 F.2d 1071 (5th Cir. 1973).

341. See *supra* text accompanying notes 51-57 and 300-302.

342. 478 U.S. 675 (1986).

tive speech in a school assembly. Likewise, extracurricular programs apt to result in disorder may properly be cancelled.<sup>343</sup>

#### D. *Postscript on Procedural Due Process*

In *Pico*<sup>344</sup> the Supreme Court plurality said that the case would have been different if the school board had established and carried out regular and facially unbiased procedures for review of controversial library books.<sup>345</sup> A number of cases have faulted school officials' decisions on procedural due process grounds, such as when teachers were dismissed without advance warning that teaching particular materials was forbidden,<sup>346</sup> when textbook selections took place without receiving the views of interested parties,<sup>347</sup> and in various other contexts.<sup>348</sup>

If fair procedures exist for the determination of disputes over library contents, textbooks, assignments, and other areas of controversy within the school program, a great many potential constitutional lawsuits will be resolved. Also, the availability of some form of administrative hearing may result in the production of a record for review and clarification of issues before the court in those controversies that do proceed to litigation. The practical advantages of a reasonable system of procedures thus are enormous.<sup>349</sup>

Nevertheless, first amendment disputes in public education

343. *Silmitz v. Maine School Admin. Dist. No. 59*, 495 A.2d 812 (Me. 1985) (authorities could cancel "tolerance day" program, including homosexual's speech, after bomb threats received).

344. *Board of Educ., Island Trees Union Free School Dist. v. Pico*, 457 U.S. 853 (1982). See *supra* text accompanying notes 215-29.

345. *Id.* at 874.

346. *Stachura v. Truszowski*, 763 F.2d 211, 215 (6th Cir. 1985), *rev'd in part on other grounds*, 477 U.S. 299 (1986) (teacher terminated for teaching sex education class with approved text, film, and teaching methods); *Scheck v. Baileyville School Comm.*, 530 F. Supp. 679 (D.Me. 1982); *Sterzing v. Fort Bend Independent School Dist.*, 376 F. Supp. 657 (S.D. Tex. 1972), *vacated for reconsideration of relief*, 496 F.2d 92 (5th Cir. 1974); *Mailloux v. Kiley*, 436 F.2d 565 (1st Cir. 1971).

347. *Loewn v. Turnipseed*, 488 F. Supp. 1138 (N.D. Miss. 1980).

348. *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269 (D.N.H. 1979) (board's failure to follow its own rules in removing Ms. magazine from library).

349. Bartlett, *The Iowa Model Policy and Rules for Selection of Institutional Materials* DEALING WITH CENSORSHIP 202 (J. Davis ed. 1979); Donelson, *Censorship in the 1970's: Some Ways to Handle It When It Comes (And it Will)*, DEALING WITH CENSORSHIP 165 (J. Davis ed. 1979); Hunter, *supra* note 79, at 75-77; Comment, *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 12 HOFSTRA L. REV. 561, 576-81 (1984).



implicate substantive constitutional rights of crucial importance. Under established precedent, the claimants of individual constitutional rights must have the opportunity to try their substantive claims in court, regardless of whether fair administrative procedures have been applied.<sup>350</sup>

## V. CONCLUSION

The Supreme Court has developed a number of specific rules. These rules directly apply to many areas of conflict among competing constitutional claims in public education.

Claims relating to the establishment of religion are now largely resolved. The Court's decisions in *School District of Abington v. Schempp*, *Edwards v. Aguillard*, and *Wallace v. Jaffree* make it plain that official advocacy of religion by means of textbooks, course materials, extracurricular activities, and other parts of the school program will not be tolerated. The unresolved establishment clause issues of current importance are whether secular humanism is to be regarded as a state-sponsored substitute for religion and whether nonschool-sponsored religious groups should be accorded the same status as other voluntary student organizations.

Religious free exercise claims of those who wish to withdraw from public education into private or parochial schools or home education are fully protected under *Pierce v. Society of Sisters*. Also, the state is precluded to a considerable extent from imposing its general educational regulations on religious schools. Religious free exercise claims of students who remain in the public schools ought to be accommodated by excusing them and permitting the use of alternative materials and courses of study, and although the *Sherbert-Thomas* doctrine and the *Yoder* case indicate this is a constitutionally-mandated measure, it is by no means clear how controversies in this area will be finally resolved. The alternative approach of accommodating free exercise claims by eliminating books, courses, and other materials has an unacceptable adverse impact on the academic freedom of nondissenting teachers and students.

The *Pico* case stands for the proposition that school authorities may not remove books from school library shelves for impermissible ideological reasons, but they are under no constitutional limitations with respect to library acquisitions. Even though the

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350. *Perry v. Sindermann*, 408 U.S. 593, 599 (1972).

Court was badly divided and did not produce a majority opinion in *Pico*, the decision seems to have calmed what had been a raging controversy about school libraries.

Because the state has such a powerful interest in maintaining uniformity in the prescribed course of study, neither religious freedom nor free expression claims will be granted to dictate additions to, or deletions from, textbooks, courses, and curricula.

On the other hand, the academic freedom of teachers and students should create a zone of protection against encroachment by school authorities in matters of lectures, class questions, and discussions, supplementary materials, assignments, and testing. The Supreme Court has not provided definitive rules for this part of the school program, except to hold in *Barnette* that students may not be forced to affirm or subscribe to beliefs against their will. However, the lower courts, by clear consensus, are protective of academic freedom in this area, other than for materials that are indecent, productive of disorder, or entirely outside the scope of the subject matter under study.

Because both school administrators and students have interests in extracurricular activities with somewhat diminished importance, which tend to be mutually offsetting, claims in this context are generally resolved in accordance with the same rules that apply in the day-to-day classroom setting.

In unclear situations, the school officials and the courts should opt in favor of more speech and expanded debate, rather than the suppression of expression. Schools are expected to inculcate students with widely accepted community values. If the schools seek to place the greatest emphasis on those values that are consistent with our free and participatory style of government — values including free speech, voting rights, procedural fairness, and toleration of religious and other minorities — the analytic mode of instruction becomes the accepted method of presenting controversial subjects. The analytic mode, by means of critical and broad inquiry, debate, and objective analysis, serves to expand academic freedom and at the same time avoids the establishment of religion and minimizes both religious and free speech conscientious objection.