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Achieving a Student-Teacher Dialectic in Public Secondary Schools: State Legislatures Must Promote Value-Positive Education

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ACHIEVING A STUDENT-TEACHER DIALECTIC IN PUBLIC SECONDARY SCHOOLS: STATE LEGISLATURES MUST PROMOTE VALUE-POSITIVE EDUCATION

I. INTRODUCTION

A. *Schools in Crisis*

Over the past twenty years, the United States Supreme Court has moved from a vision of the secondary school as a participatory center for personal and civic growth where future "leaders [are] trained through wide exposure . . . [to a] robust exchange of ideas,"[1] to a view of education as a mechanism for inculcating traditional community values. This shift has come at a time when critics—both liberal[2] and conservative[3]—are attacking the manner in which America educates its youth, and parents are questioning the values that public school education purports to impart. Concerned citizens bemoan the fact that over half of high school seniors cannot read at levels adequate to carry out moderately complex tasks,[4] while the business community looks enviously at the Japanese system, warning that better trained students are needed to regain America's economic advantage.[5] At the same time, Americans suffer from collective guilt over their failure to transmit moral values to their youth, a responsibility that Justice Powell once noted has increasingly been abdicated to the nation's schools.[6] Increases in pregnancies, crime, drug use, and even suicide among teens are not merely signs of a national malaise or fall-out from the "me-generation"—they are cries for guidance and attention. Indeed, the Department of Education has sounded the alarm:

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1. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 512 (1969).

2. *See, e.g.*, Michael S. Cain, *Censorship by the Religious Right Undermines Education*, *in* CENSORSHIP: OPPOSING VIEWPOINTS 145 (Terry O'Neill ed., 1985); Fred L. Pincus, *The Left Must Guard American Values*, *in* CENSORSHIP: OPPOSING VIEWPOINTS, *supra*, at 163.

3. *See, e.g.*, Jerry Falwell, *The Religious Right Must Guard American Values*, *in* CENSORSHIP: OPPOSING VIEWPOINTS, *supra* note 2, at 151, 153-57.

4. *See* Ann Rosewater, *Child and Family Trends: Beyond the Numbers*, *in* CARING FOR AMERICA'S CHILDREN 13 (Frank J. Macchiarola & Alan Gartner eds., 1989).

5. *See* Ernest L. Boyer, *The Third Wave of School Reform*, CHRISTIANITY TODAY, Sept. 22, 1989, at 16.

6. *See* Goss v. Lopez, 419 U.S. 565, 593 (1975) (Powell, J., dissenting) (stating that when the home and church play a diminishing role in shaping the character and value judgments of the young, a heavier responsibility falls upon the school).

unless educational reform takes place, the United States will remain "[a] [n]ation at [r]isk."[7]

It may be that the dichotomous educational mandate of the public schools is impossible to resolve. How are schools to promote self-growth and individualism while meeting the needs of the work force and maintaining an orderly democracy for the common good? Today that task seems especially formidable, as families and other social structures that once approached education as partners in a joint venture with the state[8] appear to have broken down. Furthermore, the nation has become strikingly pluralistic. Even though most parents want the public school to instill moral principles in their children, they can't agree on who is qualified to teach them or by what means.[9] Even more controversial is the question of what values should be instilled.[10]

To avoid confronting this divisive dilemma, many educators have "retain[ed] the authority to refuse . . . to associate the school with any position other than neutrality on matters of political controversy."[11] No wonder Johnny can't read—school is boring him with neutral rhetoric instead of engaging his mind through challenging debate.

This note suggests that states must take legislative action to ensure that value-neutral education will not be used to exonerate local boards of education from their responsibility to address divisive issues of public concern. Furthermore, legislatures must act to ensure that all students throughout the state are awakened to their individual capacities and are made active participants in the common quest to achieve a better society.

B. *Value-Positive Education*

The purpose of this note is to propose a way to teach skills and impart values without engaging in indoctrination—a way to respect diversity while formulating a collective societal vision. The process is a dialectical one, and will be referred to in this note as "value-positive education." Its premise is that moral education is not only necessary, but is inevitable.

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7. NATIONAL COMM. ON EXCELLENCE IN EDUC., U.S. DEPT. OF EDUC., A NATION AT RISK (1983).

8. Part of that venture was an effort to integrate new immigrants into the melting pot of American values. Some scholars have condemned this effort as one of "rubber stamping children of newly arrived immigrants and turning out millions of standardized Americans." Joel Moskowitz, *The Making of the Moral Child: Legal Implications of Values Education*, 6 PEPP. L. REV. 105, 110 n.23 (1978) (citation omitted).

9. *See* Boyer, *supra* note 5, at 17-18; James J. Digiacomo, *Schools and Moral Development*, *in* CARING FOR AMERICA'S CHILDREN, *supra* note 4, at 159.

10. Digiacomo, *supra* note 9, at 161.

11. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988).

Even education that purports to be neutral is actually promulgating value-laden messages, if only by teaching students through a hidden curriculum to accept the (hierarchical) status quo. Value-positive education acknowledges that students learn at least as much from the manner in which they are taught as they do from the curricular content.[12] Moreover, it recognizes that learning is not synonymous with education. If educators fail to assist in guiding students' moral development while they still have a chance, there are messages—in the media and on the streets—that may capture these young minds first.[13]

What is dialectical education?[14] It is a manner of teaching that does not attempt to avoid controversial issues merely because they are politically divisive.[15] Rather, it invites the resolution of such issues through debate.[16] In fact, dialectical education is not a new concept, but is a participatory model of education built on the works of John Dewey.[17] According to Dewey, the goal of the learning process is not to convey adult knowledge to a child as one would pour facts into a void, but rather to reorganize the child's thought process by presenting him with increasingly complex conflicts.[18] The dialectical approach embraces core First Amendment values because the participatory model encourages student diversity and expression, and permits the teacher to voice his own opinion as one among many views.[19] Students are taught not only logical reasoning but also tolerance and self-respect, since they are themselves respected.[20] Thus, dialectical education presupposes a high level of

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12. *See* ROBERT WEISSBERG, POLITICAL LEARNING, POLITICAL CHOICE, AND DEMOCRATIC CITIZENSHIP 17-18 (1974).

13. *See* Digiacomo, *supra* note 9, at 160-61.

14. John Dewey and Jean Piaget borrowed the dialectical metaphor from Plato and molded it into a psychological method. *See* Lawrence Kohlberg & Rochelle Mayer, *Development As the Aim of Education*, 42 HARV. EDUC. REV. 449, 456 (1972).

15. *See* William B. Senhauser, Note, *Education and the Court: The Supreme Court's Educational Ideology*, 40 VAND. L. REV. 939, 947 (1987).

16. *See id.* at 947-48.

17. For Dewey's works, see JOHN DEWEY, EXPERIENCE AND EDUCATION (1938); JOHN DEWEY, DEMOCRACY AND EDUCATION (1916) [hereinafter DEMOCRACY AND EDUCATION]; JOHN DEWEY, MORAL PRINCIPLES IN EDUCATION (1909); JOHN DEWEY, THE CHILD AND THE CURRICULUM (1902).

18. *See* DEMOCRACY AND EDUCATION, *supra* note 17, at 50-51.

19. *See generally* Richard L. Roe, *Valuing Student Speech: The Work of the Schools As Conceptual Development*, 79 CAL. L. REV. 1271, 1320-22 (1991) (discussing the advantage of the "conceptual development" model, which, like dialectical education, also defines education as development of students' knowledge in conjunction with their cognitive capacity).

20. *See id.* at 1313, 1329.

academic freedom at the secondary-school level for both students and teachers, subject only to constitutional restraints. However, because recent United States Supreme Court decisions have effectively eliminated whatever glimmer of academic freedom once shined in the classroom,[21] this note urges individual states to act to open the schoolhouse forum to diverse ideas.

II. FROM *TINKER* TO *KUHLMEIER*: THE SUPREME COURT'S SUPPRESSION OF STUDENT-INITIATED SPEECH

If one of the primary purposes of the public education system is to prepare citizens for active participation in the pluralistic democracy,[22] then the process of teaching students how to develop rational arguments about social issues appears to be a compelling state goal. However, although the Supreme Court seems to have endorsed the voicing of student opinion in the classroom at least when it involves *silent* speech,[23] the Court has moved to suppress any speech even remotely associated with the curriculum if it departs from majoritarian values.[24] With the addition of new members, the Court has turned toward a view of education as a cultural transmission mechanism.[25] The public high school, which, unlike the university,[26] was never an open forum, has shut its doors on dissenting voices and innovative techniques.

A. *The Promise of* Tinker

In 1943, the Supreme Court, in *West Virginia Board of Education v. Barnette*,[27] stated for the first time that public school students have constitutional rights. Striking down a state statute that required all students to salute the American flag, the Court said: "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

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21. *See infra* notes 37-53 and accompanying text.

22. *See* Ambuch v. Narwick, 441 U.S. 68, 76 (1979).

23. *See infra* notes 27-36 and accompanying text.

24. *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 685 (1986); Board of Educ. v. Pico, 457 U.S. 853 (1982). For a detailed discussion of these cases, *see infra* notes 54-68 and accompanying text.

25. Senhauser, Note, *supra* note 15, at 941.

26. *See, e.g.*, J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251 (1989) (discussing academic freedom on university campuses).

27. 319 U.S. 624 (1943).

matters of opinion or force citizens to confess by word or act their faith therein."[28]

The Court seemed to reaffirm this view more than two decades later in *Tinker v. Des Moines Independent Community School District*,[29] when it found that a school regulation that mandated suspension of students for wearing black armbands in protest of the Vietnam War violated the students' First Amendment rights. Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[30] The majority explicitly rejected the view that students may be treated as "closed-circuit recipients"[31] of the state's inculcative message and held that students may express their opinions, so long as they do not "'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school'"[32] and do not collide with the rights of other students.[33] Significantly, the Court viewed students' expression of controversial ideas as "an important part of the educational process."[34] Only Justice Black, dissenting, felt that students' self-expression was inconsistent with the learning process, which encompasses value transmission and discipline.[35] According to Black, given students' immaturity and inexperience, "at their age they need to learn, not teach."[36]

B. *The Shifting Views of the Court*

Tinker thus seemed to stand for the view that students had a participatory role to play in shaping the educational process.[37] The Court's view of the proper function of public schooling, however, and even of its own role in evaluating the means employed to fulfill educational goals, was about to shift. Within three years of the *Tinker* decision, four Supreme Court Justices were replaced,[38] including Justice

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28. *Id.* at 642.

29. 393 U.S. 503 (1969).

30. *Id.* at 506.

31. *Id.* at 511.

32. *Id.* at 513 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

33. *Id.*

34. *Id.* at 512.

35. *See id.* at 515 (Black, J., dissenting).

36. *Id.* at 522.

37. Rosemary C. Salomone, *Children Versus the State: The Status of Students' Constitutional Rights*, *in* CARING FOR AMERICA'S CHILDREN, *supra* note 4, at 186, 189.

38. *Id.* Warren E. Burger replaced Earl Warren as Chief Justice in 1969, *see* John P. Mackenzie, *Warren E. Burger*, *in* 4 THE JUSTICES OF THE UNITED STATES SUPREME

Fortas, who wrote the *Tinker* opinion. Although the Court did not specifically address the issue of public schools' suppression of student ideas for more than a decade after *Tinker*, there were signs that the Court was increasingly moving away from the progressive educational ideology expressed in that case. For example, in its 5-4 decision in *Goss v. Lopez*,[39] the Court extended due process protections to students who were suspended from school, thus implicitly endorsing students' participatory rights in the quest for truth.[40] The four dissenting Justices, however, emphasized the inculcative function of the school and its need to censure immature students in order to protect the rights of other children.[41]

Justice Powell, who authored the *Goss* dissent, had once been President of the Richmond (Virginia) School Board and the State Board of Education of Virginia.[42] Four years after his dissent in *Goss*, Powell wrote the majority opinion in *Ambach v. Norwick*,[43] an equal protection case in which the Court upheld a New York law forbidding certification of public school teachers who had not manifested an intent to become United States citizens. Relying on the findings of social scientists, Powell characterized the function of primary and secondary public schools as that of "inculcating fundamental values necessary to the maintenance of a democratic political system."[44] The Court found that "a State properly may regard all teachers as having an obligation to promote civic virtues,"[45] a duty the Court found inconsistent with the retention of "primary duty and loyalty"[46] to a foreign country.

In 1982, the Supreme Court specifically addressed the right of students to receive supplementary information and ideas that were at odds

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COURT 1789-1969, at 3111, 3111-12 (Leon Friedman & Fred L. Israel eds., 1969), Justice Blackmun replaced Justice Fortas in 1970, *see* Michael Pollet, *Harry A. Blackmun*, *in* 5 THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 3, 3 (Leon Friedman ed., 1978), and in 1972 Justice Rehnquist replaced Justice Harlan, and Justice Powell replaced Justice Black, *see* David L. Shapiro, *William Hubbs Rehnquist*, *in* THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS, *supra*, at 108, 110.

39. 419 U.S. 565 (1975).

40. *See* Senhauser, Note, *supra* note 15, at 959.

41. *See Goss*, 419 U.S. at 592-93 (Powell, J., dissenting). Chief Justice Burger and Justices Blackmun and Rehnquist joined Justice Powell's dissent in this case. *See id.* at 584.

42. Melvin I. Urofsky, *Mr. Justice Powell and Education: The Balancing of Competing Values*, 13 J.L. & EDUC. 581, 582 (1984).

43. 441 U.S. 68 (1979).

44. *Id.* at 77.

45. *Id.* at 80.

46. *Id.* at 81.

with the school's approved message in *Board of Education v. Pico*.[47] The seven separate opinions in this plurality decision indicate that the Court was struggling to balance the school board's "*duty* to inculcate community values"[48] with the students' "'*right* to receive information and ideas.'"[49] According to Justice Brennan, writing for the plurality, the school board could legitimately exercise "*absolute discretion* in matters of curriculum."[50] The narrowly drawn issue for Brennan was whether the school board had the right to absolute discretion in the removal of books from the school library—books that were voluntarily read by students outside of the curricular context.[51] Only in the unique setting of the library did the plurality find that students enjoy a broad right to receive information and ideas.[52] Not one of the Justices, however, questioned the inculcative function of secondary education. Furthermore, as a harbinger of the Court's reluctance to even address such issues, four Justices stated that the removal of nine books from a high school library was not a proper subject for federal court review.[53]

C. Fraser *and* Kuhlmeier*: The Role of the School Board in the Constitutional Scheme*

The Court's emerging educational ideology was more clearly set forth in *Bethel School District No. 403 v. Fraser*,[54] a case in which the Court weighed a student's free speech right against not only the school's inculcative and *parens patriae* interests, but also against the rights of other students who formed what the Court called a "captive audience."[55] In *Fraser*, a seventeen-year-old high school senior delivered a speech peppered with sexual innuendo at a student assembly from which students could elect to opt out.[56] Rather than treating the young man's nomination of a fellow student for elective office as political speech, deserving of the highest protection,[57] the Court drew a distinction between the

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47. 457 U.S. 853 (1982).

48. *Id.* at 869 (emphasis added).

49. *Id.* at 867 (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969)) (emphasis added).

50. *Id.* at 869 (emphasis added).

51. *See id.* at 855-56, 862.

52. *See id.* at 862.

53. *See id.* at 890-91 (Burger, C.J., with whom Powell, Rehnquist, and O'Connor, JJ., join, dissenting).

54. 478 U.S. 675 (1986).

55. *Id.* at 684.

56. *See id.* at 677-78.

57. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-

constitutional rights of adults and those of students, and held that the school could properly limit forms of speech it considered inappropriate or contrary to community values.[58] According to a majority of the Justices, value inculcation is "truly the work of the schools."[59]

Fraser's broad view of government authority over student voices was extended in *Hazelwood School District v. Kuhlmeier*,[60] in which the Court upheld the right of a school principal to delete two pages of a school newspaper because he found their content objectionable. Defining the school newspaper as part of the curriculum,[61] the Court stated that "educators do not offend the First Amendment by exercising editorial control over the style and *content* of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[62] School censorship in the broadly defined curricular context is permissible in order to ensure "that participants learn whatever lessons the activity is designed to teach, that readers and listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school."[63] Significantly, the Court noted that "[a] school must retain the authority to refuse . . . to associate the school with any position other than neutrality on matters of political controversy."[64]

Within two decades, the Supreme Court has moved from *Tinker*'s view of education as a participatory process embracing the marketplace of ideas to a vision of the school as a place where school boards, perhaps responsive to local majoritarian values, can legitimately squelch dissenting views.[65] By distinguishing the cases on their facts, the Court has avoided applying *Tinker*'s material and substantial disruption standard[66] to subsequent forms of student expression. Moreover, by failing to establish any other standards by which to evaluate student speech in *Fraser* and *Kuhlmeier*, the Court has handed almost unbridled authority to local

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GOVERNMENT 15-16, 24-27, 39 (1984).

58. *See Fraser*, 478 U.S. at 675.

59. *Id.* at 683.

60. 484 U.S. 260 (1988).

61. *See id.* at 271.

62. *Id.* at 273 (emphasis added). The Court based this standard on its finding that school activities that form part of the curriculum operate as closed forums. *See id.* at 269.

63. *Id.* at 271.

64. *Id.* at 272.

65. *See* Salomone, *supra* note 37, at 189-90.

66. *See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 505, 514 (1969).

school officials to determine what is permissible expression inside the public schools.[67] Thus, as one observer has noted:

> [E]xtending the Court's ideology to its logical extreme, schools will no longer serve as arenas where ideas can be tested and challenged in the search for truth; the curriculum will inevitably become narrowed to reflect a set of neutral (i.e., noncontroversial) values, and students will be deprived of the stimulation and challenge necessary to develop creative minds.[68]

III. FROM *PICKERING* TO *KUHLMEIER*: HOW MUCH SPEECH MAY TEACHERS INITIATE?

Prior to *Kuhlmeier*, Supreme Court rhetoric hinted at students' rights to academic freedom,[69] and lower federal courts maintained that "even those who go on to higher education will have acquired most of their working and thinking habits in grade and high school"[70] and thus need an opportunity to "operate in an atmosphere of open inquiry, feeling always free to challenge and improve established ideas"[71] there. Indeed, as one court noted, "[t]o restrict the opportunity for involvement in an open forum for the free exchange of ideas to higher education would not only foster an unacceptable elitism, it would also fail to complete the development of those not going on to college, contrary to our constitutional commitment to equal opportunity."[72]

If indeed public school students have a constitutional right to receive information and ideas, not confined to officially approved expression,[73] then, logically, public school teachers should have broad latitude to examine the strengths and weaknesses of different views.[74] For "the right

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67. *See* Salomone, *supra* note 37, at 190.

68. *Id.* at 198.

69. *See, e.g.*, *Tinker*, 393 U.S. at 512 (citing Keyishian v. Board of Regents, 395 U.S. 589, 603 (1968)) (discussing the particular importance of constitutional freedoms in American schools).

70. Albaum v. Carey, 283 F. Supp. 3, 10 (E.D.N.Y. 1968).

71. *Id.* at 11.

72. Cary v. Board of Educ., 427 F. Supp. 945, 953 (D. Colo. 1977), *aff'd on other grounds*, 598 F.2d 535 (10th Cir. 1979).

73. *See Tinker*, 393 U.S. at 513.

74. *See* Pico v. Board of Educ., 638 F.2d 404, 433 (2d Cir. 1980) (Newman, J., concurring), *aff'd*, 457 U.S. 853 (1982).

to receive ideas follows ineluctably from the *sender's* First Amendment right to send them."[75]

Consistent with the vigilant protection of First Amendment freedoms, some courts have applied the balancing test propounded in *Pickering v. Board of Education*[76] to protect teachers' comments on matters of public concern[77] inside the classroom,[78] so long as they did not impede "the teacher's proper performance of his daily duties in the classroom or . . . [interfere] with the regular operation of the schools generally."[79] Following the Supreme Court's decision in *Mt. Healthy City School District Board of Education v. Doyle*,[80] these courts have placed the initial burden on the teacher to show discharge or discipline for engaging in constitutionally protected conduct. He must show that

> the protected conduct was a "substantial" or "motivating" factor behind the school board's conduct. Once the teacher carries these two burdens, the school board must then show by a preponderance of the evidence that it would have taken its action even if the teacher had not engaged in the constitutionally protected conduct.[81]

Furthermore, it is not enough for the school board to show that it *could* have reached the same decision; the board must show that, without

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75. *Pico*, 457 U.S. at 867.

76. 391 U.S. 563 (1968).

77. Comments on matters of public concern by public employees include whatever statement can be "fairly considered as relating to any matter of political, social, or other concern to the community." Connick v. Myers, 461 U.S. 138, 146 (1983); Wulf v. City of Wichita, 883 F.2d 842, 857 (10th Cir. 1989) (quoting *Connick*, 461 U.S. at 146). The subject must have more than "purely personal significance." Ware v. Unified Sch. Dist., 881 F.2d 906, 909 (10th Cir. 1989). Although "[t]he inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern," Rankin v. McPherson, 483 U.S. 378, 385 (1987), "content, form and context" must be considered, *id.* at 387.

78. *See, e.g.*, Nicholson v. Board of Educ., 682 F.2d 858 (9th Cir. 1982); Kingsville Indep. Sch. Dist. v. Cooper, 611 F.2d 1109, 1113 (5th Cir. 1980); Miles v. Denver Pub. Sch., 733 F. Supp. 1410, 1413 (D. Colo. 1990). *But cf.* Gregory A. Clarick, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U. L. REV. 693, 702 (1990) (stating that *Pickering* and its progeny provide "an inappropriate model for the examination of teachers' in-class speech" because of special concerns inherent in the classroom).

79. *Pickering*, 391 U.S. at 572-73.

80. 429 U.S. 274 (1977).

81. Eckmann v. Board of Educ., 636 F. Supp. 1214, 1217 (N.D. Ill. 1986) (citing Knapp v. Whitaker, 757 F.2d 827, 845 (7th Cir. 1985)).

considering the teacher's constitutionally protected conduct, it *would* have reached the same result.[82] This burden must be met regardless of whether the teacher has tenure status.[83]

Courts then weigh the "the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees," to determine what action the school is entitled to take.[84]

Other courts have held that dismissal is permissible whenever a teacher introduces material with which the school board disagrees or which frustrates, or is likely to frustrate, a basic school board objective. Applying a *Tinker*-type test to the teacher's expression, these courts have said that dismissal is possible

> if the teacher's activity was reasonably expected to cause material and substantial disruption; if what the teacher said, or brought into the class, was not relevant to the course and was shocking and disturbing for the students in the class; or if the materials introduced or statements made did not serve a serious educational purpose and/or were shocking and inappropriate.[85]

Since the *Kuhlmeier* decision, however, it is probable that a school board may legitimately curtail a teacher's statements on political or social issues inside the classroom if those statements contradict the official

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82. *See* Johnson v. Lincoln Univ., 776 F.2d 443, 455 (3rd Cir. 1985).

83. *Mt. Healthy*, 429 U.S. at 274.

84. *Id.* at 284 (quoting *Pickering*, 391 U.S. at 568); *Pickering*, 391 U.S. at 568.

85. TYLL VAN GEEL, THE COURTS AND AMERICAN EDUCATION LAW 219 (1987); *see also* Brubaker v. Board of Educ., 502 F.2d 973 (7th Cir.) (irrelevancy and inappropriateness), *aff'd by an equally divided en banc court*, 502 F.2d 1000 (7th Cir. 1974), *cert. denied*, 421 U.S. 965 (1975); James v. Board of Educ., 461 F.2d 566 (2d Cir.) (material and substantial disruption), *cert. denied*, 409 U.S. 1042 (1972); Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969) (shocking or inappropriate); Mailloux v. Kiley, 323 F. Supp. 1387 (D. Mass.) (serious educational purposes), *aff'd on other grounds*, 448 F.2d 1242 (1st Cir. 1971). Note that these are rather nebulous standards. Indeed, some courts have held that under the Due Process Clause of the Fourteenth Amendment, teachers may not be sanctioned without prior notice that the challenged behavior was forbidden. *See, e.g., Mailloux*, 448 F.2d at 1243; *Keefe*, 418 F.2d at 362. Note also that the Second Circuit has combined the *Tinker* and *Pickering* standards in a two-pronged test. *See James*, 461 F.2d at 572 (stating that the school has the burden to show that its regulatory policies would bar only disruptive expression or that the teacher's expression would impede the efficiency of the school); *see also* Russo v. Central Sch. Dist. No. 1, 469 F.2d 623, 632 (2d Cir. 1972) (stating that any regulations that impose a substantial burden on a teacher's First Amendment activities must be narrowly drawn).

message.[86] Nor may teachers place undue reliance on *Pickering*, because the Court's actual holding there was limited to a teacher's comments *outside* the classroom.[87] Furthermore, even outside the classroom, only speech that is "substantially correct" may be made by public school teachers without fear of retaliatory dismissal, when "[t]he statements are in no way directed towards any person with whom [the teacher] would normally be in contact in the course of his daily work," and when "no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented."[88]

In fact, the Supreme Court has never directly addressed the issue whether a teacher has a constitutional right to free speech on matters inside the classroom.[89] However, teachers' classroom speech rights have been severely jeopardized by the *Kuhlmeier* decision.[90] The Supreme Court's dramatic expansion of school boards' power to regulate student speech in that case,[91] its emphasis that school curricular activities occur in nonpublic forums,[92] and its use of a rational basis test for speech in school-sponsored activities,[93] suggest that the Court would apply neither *Pickering* nor *Tinker* to protect a teacher's comments in class.[94] Indeed, the Court has already let stand an opinion that "[t]here is nothing in the First Amendment that gives a person employed to teach the constitutional right to teach beyond the scope of the established curriculum," when it summarily affirmed the decision of a three-judge district court rejecting a teacher's claim that his First Amendment rights had been violated by a Michigan statute that prohibited any discussion of birth control.[95]

Thus, not only has the Supreme Court implicitly rejected the "marketplace of ideas" concept of education, it has also characterized the public school teacher as a licensed agent of the state, employed to faithfully teach only those values that the school board approves and adopts through its curriculum. Furthermore, teachers must be careful to

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86. *See* Epperson v. Arkansas, 393 U.S. 97, 113 (1968) (Black, J., concurring) (stating that he could not "imagine why a State is without power to withdraw from its curriculum any subject deemed too emotional and controversial for its public schools").

87. *See Pickering*, 391 U.S. at 572-73.

88. *Id.* at 569-70.

89. Clarick, *supra* note 78, at 694-95.

90. *See id.* at 709.

91. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988).

92. *See id.* at 267-73.

93. *See id.* at 273.

94. *See* Clarick, *supra* note 78, at 713-17.

95. Mercer v. Michigan State Bd. of Educ., 379 F. Supp. 580, 585 (E.D. Mich.), *aff'd mem.*, 419 U.S. 1081 (1974).

refrain from voicing their own opinions on matters of public concern inside the classroom, because the Court views teachers as role models who act *in loco parentis* to protect a student "audience," which the Court increasingly labels as being immature.[96]

IV. THE POWER—AND PROMISE—OF STATE LEGISLATIVE ACTION TO PROTECT EDUCATIONAL DEBATE BY DESIGNATING LIMITED PUBLIC FORUMS IN PUBLIC SCHOOLS

By failing to establish any procedural guidelines for evaluating classroom expression, the Supreme Court has essentially relegated expressional rights in the classroom to the will of local school boards—boards that may or may not represent community values. This direction, however, is not unavoidable. A citizen's ability to participate effectively in the political and social life of the state, as well as the nation, is particularly dependent upon education,[97] and the formulation of educational policy is within the plenary power of the states, deriving from the reservation of powers under the Tenth Amendment.[98] Although states have long delegated great discretion over educational policymaking to localities, they have "not surrendered their prerogatives."[99] State legislatures may impose any requirements on schools within their jurisdictions, so long as they do not violate mandates of the Constitution. Since one of the values of federalism is the ability of states to experiment with innovative social programs,[100] it is certainly within the power of the

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96. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986); *see also supra* notes 54-59 and accompanying text.

97. *See* Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (stating that education "is the very foundation of good citizenship").

98. U.S. CONST. amend. X. The U.S. Constitution is completely silent on the subject of education. Since the states, by virtue of the Tenth Amendment, possess all powers not specifically prohibited to them by the Federal Constitution, states legislatures can exercise their powers extensively on the subject of education unless their state constitutions forbid them from so doing.

99. Project, *Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373, 1377 (1976).

100. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel and social experiments . . . ."). *But cf.* Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593 (1980) (stating that few useful experiments will be carried out by state governments because of the re-election motive and the impact of migration).

state to designate certain subjects taught by its schools as limited open forums to foster diversity and debate.[101]

It is of paramount importance for states to ensure that dissenting voices—both of students and of teachers—are heard in addition to the school board's message. No one denies the fact that government speech is a legitimate *part* of education, for to deny the government's power to inform and to lead would amount to denying the nation "the means of protecting and enhancing democratic values, of improving its leadership capacity, of enforcing its public policies, and . . . of securing its ability to survive."[102] Yet, as Dean Yudof has noted, "[t]he power to teach, inform and lead is also the power to indoctrinate, distort judgment and perpetuate the current regime," no matter how inequitable that regime may be.[103] Furthermore, as Professor Emerson has reminded us, when government can monopolize the means of communication and force its message on a captive audience, the system is "the antithesis of . . . free expression" and poses a grave threat to personal beliefs.[104]

A. *The Public Forum Concept: Why States Must Act*

The degree of First Amendment protection afforded speech on public property depends on where the speech occurs. Although there is no absolute right to speak freely on government property, certain types of publicly owned property, most notably streets and parks, have traditionally been considered open, or public, forums because from "time out of mind, [they] have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[105] Strict judicial scrutiny is accorded when the government acts to restrain expression occurring on such property because "the First Amendment means that

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101. Authority over schools and school affairs has long been within the power of the state, acting through its legislature, and does not belong to localities. It is for the state legislature "to determine whether the authority shall be exercised by a state board of education, or distributed to county, township, or city organizations throughout the state." State *ex rel.* Clark v. Haworth, 23 N.E. 946, 947 (Ind. 1890). And the state's power is not exhausted by delegation of some functions: "The legislature, having tried one plan, is not precluded from trying another. It has a choice of methods . . . ." *Id.* at 948.

102. MARK G. YUDOF, WHEN GOVERNMENT SPEAKS 41 (1983).

103. *Id.* at 42.

104. THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 698, 710, 713 (1970). According to Emerson, the government is entitled to *persuade*, but not to coerce. The line between persuasion and coercion is difficult to draw, but the distinction between the two is fundamental. Free expression is essential to avoid government coercion. *See id.* at 22.

105. Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939).

government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[106] Content-neutral time, place or manner restrictions are permissible, however, so long as they are "narrowly tailored to serve a significant governmental interest, and . . . they leave open ample alternative channels for communication of the information."[107]

Public schools have never possessed the attributes associated with the traditional public forum. Congress, state legislatures or school officials, however, may designate public schools, or any part of public schools, as limited public forums, for general or specific purposes.[108] Although such a forum may be closed at any time by government officials, restraints on expression during its existence would be subjected to strict judicial scrutiny; as with traditional open forums, however, time, place, and manner regulations may apply.[109] Furthermore, access to designated forums may be limited to certain categories of speakers or subjects, so that any expression occurring there is compatible with the traditional use of the property. Thus, public schools that allow student groups access to their facilities may exclude nonstudent speakers on the basis that such exclusion is necessary to preserve the school's educational function.[110]

In the absence of legislation creating a limited public forum, it is a judicial question whether a nonpublic, or closed, forum has been designated a limited public forum.[111] A closed forum exists on public property that is set aside for particular purposes, such as a hospital or a prison.[112] Restrictions on expression occurring in such closed forums are not given heightened scrutiny.[113] Unless government officials demonstrate a "clear intent to create a public forum," which is not displayed "by inaction or by permitting limited discourse," but which *may* be influenced by legislation, "[c]ontrol over access [to schools and other] nonpublic forum[s] can be based on subject matter and speaker identity so

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106. Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).

107. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

108. *See* Nadine Strossen, *A Constitutional Analysis of the Equal Access Act's Standards Governing Public School Student Religious Meetings*, 24 HARV. J. ON LEGIS. 117, 126 (1987).

109. *See id.* at 126-27.

110. *See id.* at 127 (citing Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985), and Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983)).

111. *See Cornelius*, 473 U.S. at 799-806; *Perry*, 460 U.S. at 37.

112. *See* Grayned v. City of Rockford, 408 U.S. 104, 115-16 (1972).

113. *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 90-91 (1987).

long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."[114]

If all student groups at a school are curriculum-related, then a public school remains a nonpublic forum, in the absence of clear and contrary government intent.[115] Indeed, one commentator has noted that the Supreme Court's recent decisions in *Perry Education Ass'n v. Perry Local Educators' Ass'n*[116] and *Cornelius v. NAACP Legal Defense & Education Fund*[117] have "effectively eliminated the limited public forum as an analytically separate category,"[118] at least absent explicit legislation.[119] According to Professor Strossen, consistent with these cases

> a school could apparently manipulate its definition of appropriate subjects for a student forum to exclude, for example, all subjects deemed "controversial" . . . [for] to avoid divisiveness and to provide a harmonious atmosphere conducive to education would probably be viewed as "reasonable" and not intended "merely" to suppress particular viewpoints.[120]

Thus, in order to promote active debate on important political and social issues, states that wish to provide a value-positive education for their students should designate appropriate curricular subjects as limited open forums in their public schools.

V. AN EXAMPLE OF DIALECTICAL EDUCATION IN A LIMITED PUBLIC FORUM IN THE CONTEXT OF A "SEX EDUCATION" CLASS

Reo Christenson, in *Christianity Today*, provided an example of dialectical education in his discussion of how schools might deal with the controversial subject of sex education in secular classrooms in a manner respectful of personal and religious views, without violating the Establishment Clause of the Constitution.[121] He proposed that

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114. *Cornelius*, 473 U.S. at 802, 806.

115. *See* Hazelwood Sch. Dist. v. Kulmeier, 484 U.S. 260, 270 (1988).

116. 460 U.S. 37 (1983).

117. 473 U.S. 788 (1985).

118. Strossen, *supra* note 108, at 127.

119. *See id.* at 129.

120. *Id.* at 128-29.

121. *See* Reo Christenson, *Sex Ed: Why Wait?*, CHRISTIANITY TODAY, Sept. 22, 1989, at 19.

> [b]eginning in the earliest teen years, students would be encouraged to discuss openly and fully in the classroom the relevant facts and arguments surrounding this subject. After an opening session in which students air their initial views, the teacher's job would be to make sure all of the relevant facts, issues, and questions were covered and discussed. At the conclusion of sessions, students would make a final evaluation of the issue in the light of all they had learned.[122]

Facts and issues to be covered in the course would include physical hazards such as unwanted pregnancies, possible abortions, and disease risks; emotional hazards, including possible guilt feelings and the premature burdens of adulthood if pregnancy occurs; and economic hazards and hard facts on the cost of dropping out of school and rearing a child.[123]

Moral considerations to be discussed would include not only the responsibilities of parents toward their children but also what various religious traditions teach for students with different heritages.[124] Moral issues related to birth control would involve questions such as whether the precautions of birth control make premarital sex acceptable and facts such as whether sexually active teens are likely to use birth control.[125] Dating issues, common assumptions and rationalizations used to engage in sex and misconceptions about safe practice would be openly discussed in this hypothetical classroom.[126] According to Christenson:

> A sex-education program of this nature would encourage children to discuss sexual behavior and sexual morality with their parents, and at a time appropriate to the pressures and temptations teens face. And would not most parents, reflecting on questions like these, be better prepared to give their offspring wise guidance? This development could be the most beneficial by-product of the entire program.[127]

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122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 19-20.
126. *Id.*
127. *Id.* at 20.

VI. OBJECTIONS TO DIALECTICAL CLASSROOM DEBATE

A. *Students' Immaturity, Impressionability, and Incompetency*

Limitations on children's rights are generally based upon assumptions of incompetency.[128] Although the Supreme Court has stated that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority,"[129] "[e]xamination of the key Supreme Court cases involving children over the past 15 years suggests that the Court's assessment of minors' 'maturity' in making decisions lies heavily in their determinations of the degree to which minors may exercise the rights accorded to adults."[130] The Court's attitude towards public school education has changed markedly during this period, with a narrowing of students' rights.[131] The Justices, however, have *not* relied on mounting social science evidence—evidence indicating that "in fact children have the cognitive capacity to exercise rational choices at a significantly earlier age than the law assumes."[132] Rather, the Court has relied exclusively on the "pages of human experience" to support its assumptions.[133] The Court has identified three assumptions underlying its conclusion that children's rights are not coextensive with those of adults: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."[134]

The Supreme Court's decisions indicate that its views on high school students' maturity have been result-oriented. It has been suggested by several commentators that, as the Court has grown more conservative, it has changed educational ideologies, justifying its decisions on the basis of children's immaturity in order to accommodate a desired restriction on student rights.[135] Particularly in Establishment Clause cases, the Court

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128. *See* Michael P. Roche, *Childhood and Its Environment: The Implications for Children's Rights*, 34 LOY. L. REV. 5, 7 (1988).

129. Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976).

130. GARY B. MELTON, CHILD ADVOCACY: PSYCHOLOGICAL ISSUES AND INTERVENTIONS 175-76 (1983).

131. *See* Senhauser, Note, *supra* note 15, at 941.

132. Gary B. Melton, *Children's Competence to Consent: A Problem in Law and Social Science*, *in* CHILDREN'S COMPETENCE TO CONSENT 15 (Gary B. Melton et al. eds., 1983).

133. MELTON, *supra* note 130, at 176 (quoting Parham v. J.R., 442 U.S. 584, 602 (1979)).

134. Bellotti v. Baird, 443 U.S. 622, 634 (1979).

135. *See* Roche, *supra* note 128, at 14; Senhauser, Note, *supra* note 15, at 948.

has relied on a view of high school students as impressionable and immature as compared with university students, in order to justify dissimilar treatment of the two groups,[136] at least in the absence of Congressional legislation.[137]

Consider the Court's emphasis on participatory education in *Tinker v. Des Moines Independent Community School District*.[138] There, the Court imposed no age or maturity restrictions on student expression.[139] Although the *Tinker* petitioners were students of thirteen, fifteen, and sixteen years of age, the Court was aware that students as young as eight and eleven were involved in the protest.[140] As the Court moved away from *Tinker*'s view of students as self-determining individuals to children in need of protection in *Bethel School District No. 403 v. Fraser*[141] and *Hazelwood School District v. Kuhlmeier*,[142] the result was an erosion in the expressive rights of students and an increase in the discretion given school authorities to discipline students for speech that deviates from appropriate norms.[143]

Fraser and *Kuhlmeier* seriously underestimate the sophistication of modern students.[144] Furthermore, they ignore the work of major

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136. *See, e.g.*, Tilton v. Richardson, 403 U.S. 672 (1971) (relying on high school students' greater susceptibility to indoctrination as compared with university students, in upholding government grants to sectarian colleges while striking down grants to sectarian lower schools); *see also* Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 YALE L.J. 499, 504-05 (1983) (discussing the relative impressionability of high school students with respect to religious versus nonreligious First Amendment activity).

137. *See, e.g.*, Board of Educ. v. Mergens, 496 U.S. 226 (1990) (holding that the Equal Access Act prohibits schools from encouraging one noncurriculum student group over another on the basis of the content of its speech). *See generally* Strossen, *supra* note 108 (articulating principles for reconciling the competing constitutional concerns in equal access controversies and comparing these principles with those specified in the Equal Access Act).

138. 393 U.S. 503 (1969); *see also supra* notes 29-36 and accompanying text.

139. *See Tinker*, 393 U.S. at 503.

140. *See id.* at 516 (Black, J., dissenting).

141. 478 U.S. 675 (1986); *see also supra* notes 54-59 and accompanying text.

142. 484 U.S. 260 (1988); *see also supra* notes 60-64 and accompanying text.

143. *See supra* notes 65-68 and accompanying text.

144. *See, e.g.*, Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 555-56 (1986) (Powell, J., dissenting) (stating that "the few years difference in age between high school and college students" does not justify restricting the high school students' First Amendment rights). *But cf. Fraser*, 478 U.S. at 677, discussed *supra* notes 54-59 (drawing a distinction between the constitutional rights of adults and those of students, and holding that a school may properly limit forms of speech it considers inappropriate or contrary to the community values).

developmental psychologists and sociologists such as Piaget, Kohlberg, Gessell, Kay, and Ilg.[145] "On the basis of cognitive-developmental theory and research, all authors suggest that children age 14 and older possess the requisite cognitive and intellectual capacities to render them comparable to adults, as a group, relative to competency."[146] Indeed, it has been suggested that "the social and legal dependency displayed by children may be more the product of a particular social structure than of developmental incapacity."[147] Further, Garbarino and Bronfenbrenner, drawing from historical and cross-cultural research, have urged that in order to develop morally mature and independent judgment and behavior, children must be exposed to a pluralistic human ecology, or at least to alternative points of view.[148] Such thinking forms the basis for a program of dialectical education.

B. *Parental Rights*

The Supreme Court has recognized that among those factors that determine the extent of legal rights accorded children is the parental right to direct a child's upbringing.[149] In *Meyer v. Nebraska*,[150] the Court explicitly rejected a platonic model of education whereby "no parent is to know his own child, nor any child his parent"[151] when it struck down a state law making it a misdemeanor to teach young schoolchildren a subject in a language other than English.[152] *Pierce v. Society of Sisters*[153] and *Wisconsin v. Yoder*[154] also indicate the Court's willingness to accommodate the parental interest in directing a child's education. Stating that parents have the right to enroll their children in

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145. *See* Roche, *supra* note 128, at 15-16.

146. *Id.* at 16.

147. *Id.* at 17; *see also* Arlene S. Skolnick, *Introduction* to RETHINKING CHILDHOOD 8, 8-9 (Arlene S. Skolnick ed., 1976) (suggesting that after the age of seven, the child's "computer" becomes programmed by the atmosphere in which he lives).

148. *See* James Garbarino & Urie Bronfenbrenner, *The Socialization of Moral Judgment in Cross-Cultural Perspective*, *in* MORAL DEVELOPMENT AND BEHAVIOR: THEORY, RESEARCH, AND SOCIAL ISSUES 70, 80 (Thomas Lickona ed., 1976).

149. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622, 634 (1979).

150. 262 U.S. 390 (1923).

151. *Id.* at 401-02 (citations omitted).

152. *See id.* at 390.

153. 268 U.S. 510 (1925).

154. 406 U.S. 205 (1972).

private schools, the Supreme Court in *Pierce* could find no "general power of the State to standardize its children."[155]

Exposure to alternative views through dialectical education is the antithesis of state standardization. Through classroom debate, students are given the opportunity to consider as many facts and opinions as are relevant to the subject and to draw on their own personal and family experiences to arrive at a reasoned point of view. Thus, parents still have a strong role to play in their children's moral and intellectual development—a role that might otherwise be harmed if the school presented only one point of view. When schools offer a balanced presentation of controversial issues, the parental interest is still exercised in the form of guidance and persuasion. Parents, however, should not be able to exercise a heckler's veto over student expression that occurs in the context of academic debates taking place as part of the school curriculum.[156]

Certainly, some families might worry over their children's exposure to alternative viewpoints and their development of independent, critical faculties. Yet, apprehensions concerning the impact of increased autonomy of children upon family harmony have not been substantiated by social scientists.[157] Indeed, it has been suggested that there may be some psychological harm to children when family privacy and parental autonomy in childrearing is overemphasized.[158] As Professor Roche has noted, "especially when older children are involved, 'family' should mean more than parents and 'harmony' should mean more than control."[159]

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155. *Pierce*, 268 U.S. at 535.

156. In Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ala. 1970), the court found that a teacher's dismissal for assigning Kurt Vonnegut's *Welcome to the Monkey House* to her ninth grade English class violated the teacher's First Amendment rights to academic freedom. The court noted that the sensibilities of parents "are not the full measure of what is proper education." *Id.* at 362. Indeed, absent any disruptive or deleterious effect on the educational process, a parent's complaint should not be accorded great weight. *But cf.* Stephen R. Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293, 1321 n.94 (1976) (noting that the *Parducci* court unjustifiably minimized two legitimate concerns: "the participation of parents in the process and the political responsiveness of school authorities to the wishes of constituent groups").

157. *See* Roche, *supra* note 128, at 19.

158. *See id.* at 20.

159. *Id.*

C. *The Captive Audience*

Because of compulsory education laws, students constitute a captive audience in the classroom.[160] This is true regardless of whether the teacher presents a balanced point of view. Indeed, the danger that a teacher will "use the classroom as a forum to inculcate allegedly obnoxious doctrines and attitudes in his students"[161] is *greater* when students are not encouraged to debate controversial issues, although the state's interest in teacher fitness does act to curtail the teacher's power.[162] In *Parducci v. Rutland*,[163] the court acknowledged the state's interest in protecting the impressionable minds of its young people from *any* form of extreme propagandism in the classroom.[164]

Professor van Alstyne has strongly questioned the power of the teacher over the captive student audience, especially when students are unable to offer dissenting views for fear of teacher sanctions:

> [The teacher] is insulated within his classroom even from the immediate competition of different views held by others equally steeped in the same academic discipline. Indeed, the use of his classroom by a teacher or professor deliberately to proselytize for a personal cause or knowingly to emphasize only that selection of data best conforming to his own personal biases is far beyond the license granted by the freedom of speech and furnishes precisely the just occasion to question his fitness to teach.[165]

Dialectical education, which offers a balanced presentation through student debate, is an effective means of diminishing the inculcative power of the teacher. Yet, the teacher still has an important role to play in supervising the debate and ensuring that discussion is relevant to the subject matter. Indeed, Professor Nahmod has suggested that "a classroom

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160. See ARVAL MORRIS, THE CONSTITUTION AND AMERICAN EDUCATION 53 (2d ed. 1980), for a typical compulsory education statute. *But cf.* Strossen, *supra* note 108, at 145 n.122 (noting that since "school attendance ceases to be compulsory once a student has attained the age of sixteen, which generally occurs in the tenth or eleventh grade," most high school students "are no longer subject to compulsory education requirements"; thus, they do not necessarily constitute a captive audience).

161. Sheldon H. Nahmod, *Controversy in the Classroom: The High School Teacher and Freedom of Expression*, 39 GEO. WASH. L. REV. 1033, 1047 (1971).

162. *See id.*

163. 316 F. Supp. 352 (M.D. Ala. 1970).

164. *See id.* at 355.

165. William van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841, 856.

is one of the few places where controversial subjects can be discussed in a supervised and reasonably thorough manner."[166] Yet, where student debate is not encouraged, he warns:

> In making an unbalanced presentation, a teacher impedes the development of critical and other faculties; the point of view espoused and perhaps received so uncritically may in fact be erroneous and ultimately harmful to the students. Although this may also occur in the context of a balanced presentation, students at least will have had the opportunity to decide otherwise.[167]

The opportunity to participate in debate over controversial issues of public concern thus avoids the danger that the state, through its teachers, will engage in the indoctrination that lies at the heart of captive audience concerns.[168] Furthermore, dialectical education will ensure that students are afforded the opportunity to develop into the type of informed, self-governed citizens contemplated by the First Amendment.[169] "At the very minimum this means that American schools must equip all students . . . with the tools of learning . . . and with curious and independent minds that are open to new and different worlds in which they may live . . . ."[170] These requirements are best met by encouraging student debate in the classroom.[171] For, although the First Amendment does not require that all persons agree with one another, "it is essential that the people understand and communicate with each other. This means that the people must first learn to listen to one another, and hence another function of the American school can be identified."[172]

D. *The Establishment Clause*

The religious liberty clauses of the First Amendment were designed to ensure that the convictions of personal conscience could exist free of

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166. Nahmod, *supra* note 161, at 1048.

167. *Id.*

168. The Supreme Court has stated: "'A teacher works in a sensitive area in a school room. There he shapes the attitudes of young minds toward the society in which they live. In this, the state has a vital concern.'" Shelton v. Tucker, 364 U.S. 479, 485 (1960) (quoting Adler v. Board of Educ., 342 U.S. 485, 493 (1952)).

169. *See* MORRIS, *supra* note 160, at xvii-iii.

170. *Id.* at 50.

171. *See* Robert B. Keiter, *Judicial Review of Student First Amendment Claims: Assessing the Legitimacy-Competency Debate*, 50 MO. L. REV. 25 (1985).

172. MORRIS, *supra* note 160, at 50.

state interference and that the interests of particular religions would not be extended by the state.[173] Especially in the public schools, where the state has had a virtual monopoly over the means of providing education to the masses since the inception of compulsory education laws, and because of the perceived impressionability of youth, the Supreme Court has considered it of paramount importance that no religious expression take place.[174] Thus, one objection to dialectical education is that by permitting students' free expression on controversial subjects, the state will impermissibly, even if unwittingly, encourage expression of religious views.

It is important, in this respect, to examine the purpose of the religious liberty clauses. Adopted when the nation's population and character were clearly Protestant, the Establishment Clause and the Free Exercise Clause of the First Amendment were designed to resolve the cultural and religious tensions existing in the eighteenth century among the Protestant sects and to provide a broader foundation of public justice.[175] Just as the religious guarantees were tested by tensions arising from the massive immigration of Irish Catholics and German Jews in the mid-nineteenth century, these guarantees are being challenged by the explosion of religious and cultural pluralism taking place today.[176] At the same time, divisions between liberal and orthodox factions in the major religions have also occurred. Side by side with the growth of religious pluralism has been the growth in the number of secularists—those who claim no religious preference at all.[177]

Indeed, today American society is characterized by so much diversity that it seems difficult to respect a wide range of opinion in matters of faith while achieving a consensus on what moral values to impart to the nation's youth. Furthermore, it has been argued, especially by those on the "religious right," that schools have overstepped the bounds of neutrality mandated by the Establishment Clause by promoting the "religion" of

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173. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971); Zorach v. Clauson, 343 U.S. 306, 312-14 (1952); Everson v. Board of Educ., 330 U.S. 1, 14-16 (1946).

174. *See* Widmar v. Vincent, 454 U.S. 263, 273 (1981).

175. *See Everson*, 330 U.S. at 8.

176. *See* James D. Hunter, *On Secular Humanism, Today's Pluralism*, CURRENT, Sept. 1990, at 2, 13. "There are about as many Muslims in America, for example, as there are Mormons, and more Muslims than Episcopalians. The number of Hindus and Buddhists has also grown prodigiously since the end of World War II." *Id.* Twenty-eight percent of the population is Catholic, 2.5% Jewish, and 1.6% Mormon. *Id.* Mormons, for example, are "one of the fastest growing religious denominations in America." *Id.*

177. Secularists have grown from 2% of the population in 1952 to approximately 11% in 1990. *Id.*

secular humanism.[178] Although secular humanism shares some of the characteristics of religion,[179] it may be more aptly described as a "latent moral ideology" rather than a formal ideological religion.[180] Yet, to the extent that humanistic perspectives exist in the larger society, they have been reflected in the education provided by the country's schools. Moreover, "[t]o the degree that public schools advance these perspectives without respect for cultural traditions that might dissent, the claim that the principles of the [E]stablishment [C]lause are violated gains credibility."[181]

Dialectical education is a means to resolve the tension between the two religion clauses and between the secularists and the orthodox. It offers a way to instill moral responsibilities in students while respecting their beliefs, for "[a]n amoral silence that ignores the common good for the sake of diversity has failed."[182] By permitting students to discuss controversial issues, bringing their own ethical and even religious views to bear in their reasoning, public schools can acknowledge and respect pluralism while helping students achieve higher ethical standards. As Ernest Boyer, President of the Carnegie Foundation for the Advancement of Teaching, has explained: "The goal is not to indoctrinate students, but to provide a climate in which ethical and moral choices can be thoughtfully examined and convictions formed. These are the characteristics by which, ultimately, the quality of public education must be measured."[183]

E. *The Impact of Teachers' Expressive Rights*

How much freedom of expression teachers should have in the classroom depends on the model of public schooling that is adopted. If schools exist primarily to inculcate values in youth, then teachers and students have few expressive rights.[184] However,

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178. *See, e.g.*, Falwell, *supra* note 3, at 153-57.

179. *See* Nadine Strossen, *"Secular Humanism" and "Scientific Creationism": Proposed Standards for Reviewing Curricular Decisions Affecting Students' Religious Freedom*, 47 OHIO ST. L.J. 333, 365 nn.188-89 (1986).

180. Hunter, *supra* note 176, at 16. Social theorist Talcott Parsons spoke of secular humanism as America's fourth religion in this sense. *Id.*

181. *Id.* at 17.

182. Boyer, *supra* note 5, at 18.

183. *Id.* at 19.

184. This is the direction that the Supreme Court has taken since *Tinker*. *See supra* notes 37-41, 54-68, 90-95 and accompanying text.

> if we only express our fear that the unchecked authority of the school board to inculcate is dangerous, a function has been found for freedom of expression in the schools . . . to protect the voices of students and teachers as a countervailing force to the potentially overweening voice of the school board.[185]

Once state legislatures adopt a model of public education that stresses the value of the school as a marketplace of ideas by designating particular curricular subjects as open forums, teachers should be permitted to express their own views. However, teachers' opinions, like those of students, would be limited by constitutional and statutory constraints, and would occur only after balanced student debate.

Professor Nahmod has advocated this approach.[186] He has argued that granting public school teachers the right to express their opinions after they have presented "a balanced presentation on a controversial subject relevant to the curriculum" poses little danger that the teacher's opinion will have a detrimental effect, because students will already have discussed the other side.[187] Furthermore, permitting teachers to express their opinions in this manner would serve an important educational function because

> students in high school are aware that adults have different opinions on many matters; to deny them access to their teacher's opinion in the classroom tends to make classroom discussion sterile and might prevent students from offering their own opinions. Prohibiting such expression by teachers would, furthermore, result in their standing mute even when asked by students for their opinion. Such a prohibition would not only fail to serve valid state, student and parental interests, but also would interfere with the teaching and learning process.[188]

It has been suggested that there are "substantial difficulties with Nahmod's resolution of the conflict between the marketplace of ideas concept and the authority-figure status of the teacher."[189] Professor Goldstein has stated that

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185. VAN GEEL, *supra* note 85, at 213.

186. *See* Nahmod, *supra* note 161.

187. *Id.* at 1048-49.

188. *Id.* at 1049.

189. Goldstein, *supra* note 156, at 1345.

> [a] true marketplace of ideas should be totally free, and ideally no limits should be placed on those who have the opportunity to expose their ideas to students. Obviously, however, only a limited number of people may be employed as teachers by a public school. In order to try to obviate this fundamental difficulty with the free market concept, students may be exposed to outside lecturers and encouraged to join in the educational process themselves by developing their own means of expression. . . . Yet, these additional elements cannot change the fact that only certain people are employed to teach and evaluate the students, thus giving them a unique position in the marketplace. Moreover, the conflict between this unique position of teachers and the ideal of the marketplace is much more pronounced at the secondary school level than it is at the university level.[190]

Although Goldstein's reliance on "the difference in impressionability and susceptibility to indoctrination"[191] between high school and college students is debatable,[192] no indoctrination would occur under the dialectical model. Relevance would still be an important inquiry in any classroom presentation because of the state's interest in efficiency and teacher competence. Teacher competence precludes "any form of extreme propagandism in the classroom."[193]

Other constraints on teachers' speech are required by the Constitution and by federal and state law. Because "[o]bscenity is not within the area of protected speech and press,"[194] it could not be voiced in the classroom. Although determining when a teacher's speech or material is obscene might be problematic, in such instances the educational purpose of the speech or material, its relevance to the curriculum, and its impact on the students would be proper inquiries.[195] Nor would libel or slander be permissible. Indeed, under *Pickering v. Board of Education*,[196] any

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190. *Id.* at 1343.

191. *Id.*

192. *See* Nahmod, *supra* note 161, at 1048 (stating that "it should be recognized that no one knows how to measure indoctrinating effect . . . . as reflected in current debates on educational reform, relatively little is known about what significantly affects intellectual development at any age level"). This distinction, however, often relied on by the Court, *see* Widmar v. Vincent, 454 U.S. 263 (1981), led Congress to pass the Equal Access Act, 20 U.S.C. § 4071 (1988).

193. Parducci v. Rutland, 316 F. Supp. 352, 355 (M.D. Ala. 1970).

194. Roth v. United States, 354 U.S. 476, 485 (1957).

195. *See* Nahmod, *supra* note 161, at 1052 (stating that "educational considerations should influence the outcome of any judicial inquiry into obscenity in the classroom").

196. 391 U.S. 563 (1968); *see also supra* notes 76-79 and accompanying text.

comments on matters of public concern, even if substantially correct, would not be permissible if they interfered with the school's regular operation or impeded the teacher's classroom performance. Thus, the use of any words or acts that would create a "hostile environment," such as racist or sexist speech, would be prohibited, either under Title VII,[197] *Pickering* or teacher fitness statutes.

A presumption of constitutionality would attach to the teacher's expression in the dialectical classroom.[198] The school board would have the burden to prove that a teacher's expression was so disruptive of the classroom or the efficiency of the school, as to substantially impede the educational functions.[199] As Professor Nahmod has suggested, "[i]nterests in teacher competence, efficient use of classroom time, and the prevention of the teacher's use of the classroom as a [personal] forum will in many cases justify an inquiry into curriculum relevance and balance."[200] Nonetheless, "[j]udicial intervention in curriculum matters [would not be] limited to protecting the teacher's constitutional liberties. Equally important is the student's interest in learning."[201] Under the dialectical education model, it is the student's interest in learning that is paramount.

F. *No Opt-Out Provision: Free Exercise Implications*

One further objection to a program of curricular debates on controversial issues is that it might violate the Free Exercise Clause of the Constitution, and thus would require an opt-out provision. This argument is premised on the theory that "a governmental requirement that a person be exposed to ideas he or she finds objectionable on religious grounds constitutes a burden on that person's religious practice as forbidden by the

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197. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1988), prohibits, among other things, the use of racial, ethnic or gender-offensive words and acts that create a hostile environment in the workplace. Although employees, not students, are the intended beneficiaries of the Act's protection, arguably a prohibited hostile expression would create the kind of environment among school employees that the Act was intended to prevent. Likewise, Title IX of the Education Act Amendments of 1972, 20 U.S.C. § 1681(a) (1988), prohibits sex-based discrimination "under any education program or activity receiving Federal financial assistance." Furthermore, state statutes and tort actions might be available to a complainant. *See* NATIONAL INST. AGAINST PREJUDICE & VIOLENCE, STRIKING BACK AT BIGOTRY: REMEDIES UNDER FEDERAL & STATE LAW FOR VIOLENCE MOTIVATED BY RACIAL, RELIGIOUS AND ETHNIC PREJUDICE (1986).

198. *See* Nahmod, *supra* note 161, at 1044.

199. *See id.* at 1046-47.

200. *Id.* at 1062.

201. *Id.* at 1054.

First Amendment."[202] The requirement that students attend classes in which controversial ideas are being discussed, however, does not constitute any governmental *compulsion* to engage in any speech or action that offends the individual's beliefs. This is especially true in the balanced context of dialectical education. As the Sixth Circuit recently stated:

> The requirement that students read the assigned materials and attend . . . classes *in the absence of a showing that this participation entailed affirmation or denial of a religious belief, or performance or non-performance of a religious exercise or practice*, does not place an unconstitutional burden on the students' free exercise of religion.
>
> . . . .
>
> "Were the free exercise clause violated whenever governmental activity is offensive to or at variance with sincerely held religious precepts, *virtually no governmental program would be constitutionally possible.*"[203]

An opt-out provision would be inconsistent with "the public school's compelling interest in 'promoting cohesion among a heterogeneous democratic people.'"[204] Furthermore, such a provision would create substantial disruption in the school, as an unpredictable number of students might elect to opt out of different debates.[205] Furthermore, accommodating students' and parents' religious objections might lead to an excessive state entanglement with religion, forbidden by the Establishment Clause of the Constitution.[206] Therefore, no opt-out provision need be added to the state education statute.

VII. A MODEL STATE ENACTMENT

WHEREAS, it is the policy of the State of _____ to educate young people in the democratic tradition while fostering a respect for individual beliefs and social responsibility; and

WHEREAS, the State of _____ recognizes that the strength of the pluralistic democracy is promoted by the free exchange of ideas; and

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202. Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1063 (6th Cir. 1987), *cert. denied*, 108 U.S. 1029 (1988).

203. *Id.* at 1065-68 (quoting Grove v. Mead Sch. Dist., 753 F.2d 1528, 1545 (9th Cir. 1985), *cert. denied*, 474 U.S. 826 (1986)).

204. *Id.* at 1072 (Kennedy, J., concurring) (quoting Illinois *ex rel.* McCullum v. Board of Educ., 333 U.S. 203, 216 (1948) (Frankfurter, J., concurring)).

205. *See id.*

206. *See id.*

WHEREAS, teaching students how to think critically about complex and controversial topics is a primary purpose of the public school system, necessary to prepare students for active participation as citizens of the State and the Republic;

The State of _____ does hereby designate the subjects of _____ and _____ as open forums for grades ten through twelve, to be used for the purpose of debate on issues of social concern, relevant to the respective curricular subjects, as such issues are formulated by committees composed of local school board members, teachers of the respective subject, and district parents.

This Act, entitled An Act to Promote Value-Positive Education, is to take effect on the ___ day of _____, in the year 19___.

VIII. CONCLUSION

This note has attempted to demonstrate why state legislatures should act to create limited public forums in selected curricular areas to promote student debate. Once this is done, however, educational reform will still not be complete. In a true democracy, value-positive education would be ongoing. Not only would debate over issues of public concern occur among students and teachers in the classroom, but there would also be greater discourse and collaboration among students, educators, school boards, parents, and business and community leaders to achieve educational and societal goals. As contemplated by this note, those goals will be designed to prepare students and other citizens to live in an interdependent, pluralistic society, and to live an ethical and productive life—"a life of worth," not merely a life of work.[207]

Lee Gordon

207. Mary H. Futrell, *Fourth-Wave Education Reform: Are We Ready?*, EDUC. DIG., Nov. 1989, at 3, 5.