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[E]ducation is, in fact, the drawing and leading of children to the rule which has been pronounced right by the voice of the law, and approved as truly right by the concordant experience of the best and oldest men.

—Plato, *Laws*, Bk. II

[State-sponsored education] is a mere contrivance for moulding people to be exactly like one another: and as the mould in which it casts them is that which pleases the predominant power in the government, whether this be a monarch, a priesthood, an aristocracy, or the majority of the existing generation, in proportion as it is efficient and successful, it establishes a despotism over the mind. . . .

—J.S. Mill, *On Liberty*

I. Introduction

The system of public elementary and secondary education in the United States is designed to enable students to gain the skills necessary to become knowledgeable and productive participants in a democratic society.[1] But in addition to this "epistemic" function[2] of education, parents, legislatures, and the courts have often viewed the system of

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[1] *See* ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. VI, § 1; ME. CONST. art. VIII, § 1; MASS. CONST. § 91; MICH. CONST. art. VIII, § 1; MINN. CONST. art. XIII, § 1; MO. CONST. art. IX, § 1(a); NEV. CONST. art. XI, § 1; N.H. CONST. pt. 2, art. 83; N.C. CONST. art. IX, § 1; N.D. CONST. art. VIII, § 1; TEX. CONST. art. VII, § 1; VA. CONST. art., I., § 15.

[2] *See infra* notes 22-25 and accompanying text. *Cf.* RATIONALITY AND THE SCIENCES 4-5 (S.I. Benn & G.W. Mortimore eds. 1976); Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U.L. REV. 1137, 1155 (1983).

public education as serving a second, "inculcative" function:[3] to serve as media for transmitting the values, beliefs, and ideology of their community to the next generation.[4] Bitter controversies tend to arise, however, when the community fails to agree on the nature of the values that it wishes the schools to transmit to its youth. Courts have hesitated to intervene in these curriculum[5] conflicts except where the values the state[6] attempts to inculcate are expressly prohibited by the Constitution.

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[3] *See, e.g.*, MASS. CONST. § 91; Board of Educ. v. Pico, 457 U.S. 853, 869 (1982); Plyler v. Doe, 457 U.S. 202, 221 (1982); Ambach v. Norwick, 441 U.S. 68, 76-77 (1979). *See also* J. CHILDS, EDUCATION AND MORALS 3-20 (1950); R. DAWSON, K. PREWITT & K. DAWSON, POLITICAL SOCIALIZATION 137-57 (2d ed. 1977); R. DERR, A TAXONOMY OF SOCIAL PURPOSES OF PUBLIC SCHOOLS (1973); I. ILLICH, DESCHOOLING SOCIETY (1971); VALUES IN AN AMERICAN GOVERNMENT TEXTBOOK (E. Lefever ed. 1978); N. MCCLUSKEY, PUBLIC SCHOOLS AND MORAL EDUCATION 1-6 (1958); N. POSTMAN & C. WEINGARTNER, TEACHING AS A SUBVERSIVE ACTIVITY (1969); J. RICH, EDUCATION AND HUMAN VALUES (1968); Arons, *The Separation of School and State*: Pierce *Reconsidered*, 46 HARV. EDUC. REV. 76 (1976); Arons & Lawrence, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 HARV. C.R.-C.L. L. REV. 309 (1980); Bereday, *Values, Education and the Law*, 48 MISS. L.J. 585 (1977); Diamond, *The First Amendment and the Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 497 (1981); Goldstein, *The Asserted Constitutional Right of Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293 (1976); Hirschoff, *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 (1977); Hunter, *Curriculum, Pedagogy, and the Constitutional Rights of Teachers in Secondary Schools*, 25 WM. & MARY L. REV. 1 (1983); Jaros & Canon, *Transmitting Basic Political Values: The Role of the Education System*, 77 SCH. REV. 94 (1969); Katz, *The Present Moment in Educational Reform*, 41 HARV. EDUC. REV. 342, 355 (1971); Schauer, *School Books, Lessons Plans, and the Constitution*, 78 W. VA. L. REV. 287 (1976); Tyack, *Ways of Seeing; An Essay on the History of Compulsory Schooling*, 46 HARV. EDUC. REV. 355 (1976).

[4] The epistemic and the inculcative functions of education are not mutually exclusive; indeed, they overlap significantly where the values the schools attempt to transmit are democratic values. A tension arises, however, when schools attempt to transmit the values of democracy by means of exhortation, drill, and compulsion. *See* S. ARONS, COMPELLING BELIEF (1983); K. HARRIS, EDUCATION AND KNOWLEDGE: THE STRUCTURAL MISREPRESENTATION OF REALITY (1979); I. ILLICH, *supra* note 3; C. JENCKS, INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA (1972); H. KOHL, THE OPEN CLASSROOM (1969); N. POSTMAN & C. WEINGARTNER, *supra* note 3; C. SILBERMAN, CRISIS IN THE CLASSROOM: THE REMAKING OF AMERICAN EDUCATION (1970); Saario, Tittle & Jacklin, *Sex Role Stereotyping in the Public Schools*, 43 HARV. EDUC. REV. 386 (1973); Project, *Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373, 1426 (1976) [hereinafter cited as Michigan PROJECT]. The Supreme Court has recognized that because schools "are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943). One commentator has characterized the tension as an irreconcilable conflict between passing the shared values of the community on to the next generation and telling children what to think. Project, *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 1, 151-60 (1982).

[5] "Curriculum" means individual courses of study and their substantive content. Curriculum therefore includes textbooks and other instructional materials, as well as teaching methodology. It is thus the prime battleground for disagreements over fundamental educational values. *See generally* O'NEIL, CLASSROOMS IN THE CROSSFIRE (1981).

[6] Local schools are the agents of the state, and their actions are state action for fourteenth

Court intervention has therefore been limited to rejecting attempts by school authorities to use the curriculum to further racial discrimination,[7] to infringe on the free exercise of religion,[8] or to establish religion.[9] Nevertheless, courts have failed to recognize that freedom of expression also might impose significant substantive restrictions on the content of public education.

The present centralized system of control over the public school curriculum enables the states to use the curriculum to advance particular ideological goals and viewpoints. Regardless of whether it is the state legislature, local school boards, or individual teachers who use the curriculum to advance their own views, it is the state government or its agents who are using the public school curriculum to transmit values to children in its care. At the same time, one of these basic values, incorporated in the first amendment, is that the states are disabled from distorting the marketplace of ideas by transmitting values. Resolution of this paradox requires a critical examination of how a free society ought to educate its young.

The purpose of this article is to begin such an examination by investigating the tensions that exist in the contemporary system of public education and by advancing a tentative means of addressing the conflicts that inevitably result. Part II of the article will focus on society's dual interests in establishing a system of public education—ensuring that individuals will become rational political decisionmakers and transmitting society's common values and beliefs to the next generation.[10] Part III will reflect on the nature of freedom of expression and the extent to which it should protect the development and maintenance of the values and beliefs of public school students.[11] Part IV will examine the prevailing method by which states attempt to achieve the goals of education, which is to effectively centralize curriculum decisionmaking in the hands of a few decisionmakers, thus creating an orthodox view of reality to present to our children.[12] Part V will examine the tension between, on the one

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amendment purposes. *See* Engel v. Vitale, 370 U.S. 421 (1962). Because different states have allocated educational policymaking decisions to different levels of state government, *see infra* notes 95-112 and accompanying text, this article will characterize any action by any school official, whether on the state, county, or local district level, as state action.

[7] Loewen v. Turnipseed, 488 F. Supp. 1138 (N.D. Miss. 1980).

[8] *E.g.*, Stone v. Graham, 449 U.S. 39 (1980); Wisconsin v. Yoder, 406 U.S. 205 (1972).

[9] *E.g.*, Epperson v. Arkansas, 393 U.S. 97 (1968); Chamberlin v. Dade County Bd. of Pub. Instruction, 377 U.S. 402 (1964), *rev'd per curiam*, 160 So. 2d 97 (Fla. 1964); School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963).

[10] *See infra* notes 15-28 and accompanying text.

[11] *See infra* notes 29-94 and accompanying text.

[12] *See infra* notes 95-121 and accompanying text.

hand, students' interest in freedom of expression and the state's congruent interest in ensuring rational political decisionmaking, and on the other hand, the inculcation of orthodox values in children. This tension is resolved by recognizing that freedom of expression allows the state to transmit only those values that are either express or implied in the Constitution; school authorities may not indoctrinate students with nonconstitutional or contraconstitutional values without infringing on students' interests in developing their own understandings of reality.[13] Finally, Part VI will apply this analysis to two particular areas of public school curriculum: course mandates and instructional materials, including textbooks.[14]

II. State Interests in Education

Constitutions in all fifty states provide for a system of free public education.[15] Several of these constitutions expressly recognize that the purpose for establishing a public educational system is that "knowledge," "intelligence," or "learning" are necessary to maintain a free society.[16] For example, a provision in the Virginia Bill of Rights expresses a common rationale for establishing a system of public education:

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[13] *See infra* notes 122-165 and accompanying text.

[14] *See infra* notes 166-264 and accompanying text.

[15] ALA. CONST. amend. no. 284; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 1; *id.*, § 5; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VII, § 1; HAWAII CONST. art. IX, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX, pt. 2, § 3; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, pt. 1, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. § 91; MICH. CONST. art. VIII, § 1; *id.*, § 201; MINN. CONST. art. XIII, § 1; MISS. CONST. art. 8, § 201; MASS CONST. art. 8, § 201; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 1; *id.*, § 2; N.H. CONST. pt. 2, art. 83; N.J. CONST. art. VIII, § 4, ¶ 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 1; *id.*, § 2; N.D. CONST. art. VIII, §§ 1-4; OHIO CONST. art. VI, § 2; *id.*, § 3; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; *id.*, § 2; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. II, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 1; *id.*, § 2; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1.

[16] *See* CAL. CONST. art. IX, § 1 (". . . general diffusion of knowledge and intelligence [is] essential to the preservation of the rights and liberties of the people . . ."); IDAHO CONST. art. IX, § 1 ("The stability of a republican form of government [depends] mainly upon the intelligence of the people . . ."); IND. CONST. art. VIII, § 1 ("Knowledge and learning . . . [are] essential to the preservation of a free government . . ."); ME. CONST. art. VIII, pt. 1, § 1 (". . . general diffusion of the advantages of education [is] essential to the preservation of the rights and liberties of the people . . ."); MASS. CONST. § 91 ("Wisdom and knowledge . . . diffused generally among the body of the people, [are] necessary for the preservation of their rights and liberties . . ."); MINN. CONST. art. XIII, § 1 ("The stability of a republican form of government [depends] mainly upon the intelligence of the people . . ."); MO. CONST. art. IX, § 1(a) ("A general diffusion of knowledge and intelligence [is] essential to the preservation of the rights and liberties of the people . . ."); N.H.

> That free government rests, as does all progress, upon the broadest possible diffusion of knowledge, and that the Commonwealth should avail itself of those talents which nature has sown so liberally among its people by assuring the opportunity for their fullest development by an effective system of education throughout the Commonwealth.[17]

Constitutions in other states stress more moralistic benefits of education: "virtue," "morality," "religion," "patriotism," and "integrity" are all singled out as being necessary to good government and human happiness, thereby purportedly justifying state establishment of public education systems.[18] In short, states tend to view providing a system of public education as a moral duty.

A. Purposes of Education

The states have a profound interest in ensuring that its citizens are educated. It is only recently, however, that legal commentators have begun to examine in any depth precisely what those interests are or should be.[19]

CONST. pt. 2, art. 83 ("Knowledge and learning, generally diffused throughout a community, [are] essential to the preservation of free government"); R.I. CONST. art. XII, § 1 ("The diffusion of knowledge . . . [is] essential to the preservation of [the people's] rights and liberties . . ."). *See also* ILL. CONST. art. X, § 1 ("A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities."); MONT. CONST. art. X, § 1(1) ("It is the goal of the people to establish a system of education which will develop the full educational potential of each person."); CAL. EDUC. CODE § 33080 (West Supp. 1983) ("Each child is a unique person, with unique needs, and the purpose of the educational system of this state is to enable each child to develop all of his or her potential.").

[17] VA. CONST. art. I, § 15.

[18] *See* MASS. CONST. § 91 (the purpose of the public schools is to "inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality . . .; sincerity, good humor, and all social affections, and generous sentiments among the people"); N.D. CONST. art. VIII, § 3 ("In all schools instruction shall be given as far as practicable in those branches of knowledge that tend to impress upon the mind the vital importance of truthfulness, temperance, purity, public spirit, and respect for honest labor of every kind"). *See also* ARK. CONST. art. XIV, § 1 ("Intelligence and virtue [are] the safeguards of liberty and the bulwark of a free and good government. . ."); MICH. CONST. art. VIII, § 1 ("Religion, morality and knowledge [are] necessary to good government and the happiness of mankind. . ."); N.C. CONST. art. IX, § 1 ("Religion, morality and knowledge [are] necessary to good government and the happiness of mankind. . ."); N.D. CONST. art. VIII, § 1 ("A high degree of intelligence, patriotism, integrity and morality, on the part of every voter in a government by the people [are] necessary in order to insure the continuance of that government and the prosperity and happiness of the people. . ."); S.D. CONST. art. VIII, § 1 ("The stability of a republican form of government [depends] on the morality and intelligence of the people. . ."); VT. CONST. ch. II, § 68 ("Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force and duly executed; and a competent number of schools ought to be maintained. . .").

[19] *See e.g.*, T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 617 (1970); S. GOLDSTEIN, LAW AND PUBLIC EDUCATION 2-3 (1974); D. KIRP & M. YUDOF, EDUCATIONAL POLICY AND THE LAW 28-29 (1974); L. PETERSON, R. ROSSMILLER & M. VOLZ, THE LAW AND PUBLIC SCHOOL OPERATION (1978); F. WIRT & M. KIRST, SCHOOLS IN CONFLICT 39-46 (1982); F. PIVEN, PUBLIC EDUCATION AND POLITICAL DEMOCRACY 208-18. *See also*, Hirshoff, *supra* note 3, at 877-78 (state's goals are to transmit skills, information, ideas, attitudes, and values to children in order to prepare youth for citizenship,

1. The epistemic function.

Rational political decisionmaking in any society presupposes rational decisionmakers. In a democracy, therefore, where political decisions are to be made by the citizenry as a whole, it is necessary that each citizen both have access to information necessary to make a rational decision and be capable of drawing conclusions from that information in order to direct their subsequent political actions.[20] The government's goals in ensuring that its citizens are educated, therefore, are to provide those facts

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for a vocation, and for a satisfactory personal life); Hunter, *supra* note 3, at 58-50 (principal functions of education include transmittal of acquired knowledge and inculcation of majoritarian values); Kalven, *A Commemorative Case Note:* Scopes v. State, 27 U. CHI. L. REV. 505, 520 (1960) (one function of education may be to unsettle old and half thought out beliefs, thereby strengthening them); Kamenshine, *First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104, 1133 (1979) (two purposes of education are to produce graduates who share a fundamental commitment to a particular way of life and who are capable of independently and critically assessing American society); LeClerq, *The Monkey Laws and the Public Schools: A Second Consumption*, 27 VAND. L. REV. 209, 235 (1974) (a primary function of public school should be to encourage students to develop an appropriate methodology for engaging in intellectual inquiry); Schauer, *supra* note 3, at 301-02 (purposes of education are often specified in state constitutions or statutes); Michigan PROJECT, *supra* note 4, at 1384-85 (two goals of public education are to develop basic academic skills that any productive member of society must possess, and to inculcate those values deemed essential for a cohesive, harmonious, and law-abiding society).

David Tyack has identified five historical purposes of compulsory public education, all of which still exist to greater or lesser extents:

(1) Education is a means of incorporating people into a nation-state; it creates and legitimates citizens and institutionalizes the authority of the state.
(2) Education is a means of socializing members of a variety of ethnic and cultural groups into becoming representatives of the dominant American culture: white, middle-class, protestant, republican.
(3) Education is a synthesis of various institutional organizations; it has enabled an educational bureaucracy to develop and maintain itself.
(4) Education is a means of increasing the human capital of the society by increasing worker competency, productivity, and earnings.
(5) Education perpetuates hierarchical social relations of the capitalist system of production.

Tyack, *supra* note 3.

Sociologists, educators, and historians have generally devoted substantial attention to identifying the purposes of public education. *See generally* R. DERR, *supra* note 3; J. DEWEY, PHILOSOPHY OF EDUCATION (1956); J. DEWEY, DEMOCRACY AND EDUCATION (1924); R. DREEBAN, ON WHAT IS LEARNED IN SCHOOLS (1968); W. FRANKEMA, PHILOSOPHY OF EDUCATION (1965); USES OF THE SOCIOLOGY OF EDUCATION (C. Gordon ed. 1974); COMMUNITY CONTROL OF SCHOOLS (H. Levin, ed. 1970); A. LIGHTFOOT, URBAN EDUCATION IN SOCIAL PERSPECTIVE (1978); R. PRATTE, THE PUBLIC SCHOOL MOVEMENT: A CRITICAL STUDY (1973); R. PRATTE, CONTEMPORARY THEORIES OF EDUCATION (1971); J. RICH, *supra* note 3; M. ROKEACH, THE OPEN AND CLOSED MIND (1960); SEXTON, THE AMERICAN SCHOOL (1967); C. SILBERMAN, *supra* note 4; V. THAYER & M. LEVIT, THE ROLE OF THE SCHOOL IN AMERICAN SOCIETY (1966); F. WIRT & M. KIRST, *supra* note 19; F. WIRT & M. KIRST, THE POLITICAL WEB OF AMERICAN SCHOOLS (1972); WHITEHEAD, *The Aim of Education*, in CONTEMPORARY AMERICAN EDUCATION 5 (S. Dropkin, H. Full & E. Schwarcz eds., 3d ed. 1966).

[20] *See supra* note 2.

relevant to political decisionmaking and to train the citizen to draw conclusions from those facts.[21] Mark Yudof has described how "[t]he ideology of democratic government posits the existence of autonomous citizens who make informed and intelligent judgments about government policies, free of a state preceptorship that substantially impedes individual choice and consent by selective transmission of information."[22] Successful fulfillment of the epistemic function of education would develop what Yudof calls "self-controlled citizens"[23] who understand reality and can act to further that understanding by actively participating in the common system of discourse.

Government also has a secondary, economic interest in ensuring that its citizenry is educated.[24] An uneducated individual will obviously be less economically productive than an educated one: the former will be fit only for unskilled manufacturing, service, or agricultural labor, while the latter will be capable of performing more skilled technical or managerial tasks. A society composed of educated persons will clearly be better able to produce goods and services beyond a subsistence level, thereby establishing a higher standard of living. As a result, a state with an educated citizenry will tend to increase its revenues by increasing productivity and attracting new capital. Furthermore, where individuals are better able to develop their capabilities to their capacity and to fulfill their own interests, they are less likely to call for fundamental political changes.[25]

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[21] *See supra* note 3.

[22] M. YUDOF, WHEN GOVERNMENT SPEAKS 32 (1983).

[23] *Id.*

[24] *See* Parsons, The *School Class as a Social System: Some of Its Functions in American Society*, in EDUCATION, ECONOMY, AND SOCIETY 435 (A. Halsey, J. Floud & C. Anderson eds. 1961). Some commentators have argued that the economic function was historically the primary purpose for establishing a system of public education in the late nineteenth century. Briefly, this view maintains that economic elites urged the states to insure that all citizens received a minimal education in order to provide industry with a skilled and docile labor force. *See* PIVEN, *supra* note 19, at 208-11. Public education may also serve an experimental function by providing a mechanism for developing needed social change. *See* A. LIGHTFOOT, *supra* note 19, at 14-15.

[25] The epistemic function of education involves development of those skills that Benjamin Bloom has identified as cognitive skills. Primarily, it includes the ability to read, write, and compute. On a secondary level, individuals must have knowledge of a basic set of specific facts regarding their environment; of conventional methods of organizing those specific facts; and of general patterns into which the facts are organized. Additional cognitive levels require the ability to deal with materials and problems; to apply generalizations to particular situations; to analyze relationships between components of a whole; to join particular elements into a whole; and to evaluate the extent to which a particular factor satisfies criteria. B. BLOOM, TAXONOMY OF EDUCATIONAL OBJECTIVES: COGNITIVE DOMAIN (1956).

An individual who has successfully been educated epistemically would probably approximate what Milton Rokeach has described as an "open-minded individual," a person with the "capacity to receive, evaluate, and act on relevant information received from the outside on its own intrinsic merits, unencumbered by irrelevant factors in the situation arising from within the person or from the outside." M. ROKEACH, *supra* note 19, at 57.

or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[29] Many commentators have recognized that the elements of this seemingly unrelated list of protected activities appear to be different facets of a single, complex principle underlying the amendment.[30] The problem, of course, has been to identify the nature of this central meaning of the first amendment, which we may call "freedom of expression."[31]

At a minimum, freedom of expression is an instrument for maintaining the democratic political process. The narrowest view of this political model of freedom of expression, that of Robert Bork, is that the first amendment protects only explicitly and predominantly political speech.[32] Bork defines political speech as speech that discovers and spreads political truths as they have been decided by the majority of citizens.[33] Bork's approach not only excludes constitutional protection for scientific, educational, commercial or literary expressions, limiting protection to evaluation and criticism of government electioneering, and propaganda, but also fails to protect minority political expression.[34]

A better view of freedom of expression as protecting political speech is that of Alexander Meiklejohn, who took a broader view of what constitutes political speech.[35] Meiklejohn argued that because self-government requires intelligent, sensitive, unselfish, and ethical voters, then any activity contributing to those qualities was protected by the first amendment.[36] Meiklejohn therefore concluded that philosophy, the sciences, literature, the arts, public discussions of public issues, and, especially, education, were all protected by the first amendment.[37] Under Meiklejohn's analysis, the formation and maintenance of values is at the core of

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[29] U.S. CONST. amend. I.

[30] T. EMERSON, *supra* note 19; A. MEIKLEJOHN, POLITICAL FREEDOM (1960) [hereinafter cited as POLITICAL FREEDOM]. *See, e.g.*, Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964 (1978); Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B.F. RESEARCH J. 523; Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Kalven, *The* New York Times *Case: A Note on the "Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191; Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975); Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

[31] While Thomas Emerson gave the phrase a particular technical meaning, other commentators have tended to use the phrase more generally to refer to their own particular conceptions of the fundamental value or values underlying the first amendment.

[32] Bork, *supra* note 30.

[33] *Id.* at 30-31.

[34] *Id.* at 27-28. *See also* Be Vier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978).

[35] A. MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 30, at 75.

[36] Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255 [hereinafter cited as *First Amendment*].

[37] *Id.* at 256-57. *See also* Kamenshine, *supra* note 19, at 1113.

for talking back to teachers, while they may be rewarded for attentiveness in class or perfect attendance. These elaborate rules of conduct and codes of behavior, which exist in every educational setting, are designed to cause children to internalize values, beliefs, and behaviors desired by adults.

Two basic methods of teaching values are available, which, while they often overlap, can be distinguished. The directive or prescriptive approach involves *transmitting* information and accepted truths to passive and absorbent students.[27] Instruction is designed to increase the likelihood that students internalize desired values and beliefs. Instructors, whether parents, teachers, or even peers, utilize exhortation, coercion, and systems of reward and punishment under this method, which is functionally no different from indoctrination.

In contrast, the discursive or analytical approach to values inculcation is characterized by active examination of data by both teacher and student.[28] Instructors *present* values to students—often by personal, historical, or literary example—and then discuss and analyze the moral, logical, and practical consequences of those values. Reason and dialogue characterize the discursive approach, which minimizes coercion and indoctrination.

Finally, it must be remembered that not all values education occurs in schools. Families, peer groups, religious institutions, and the mass media also contribute significantly to the formation of values in children. Nevertheless, these sources of values education differ both quantitatively and qualitatively from schooling. After all, students spend the bulk of their waking hours either in school or involved in school related activities. Furthermore, schooling, in both its epistemic and inculcative modes, has long been viewed as a particularly important function of state, local, and, more recently, federal governments. And government, of course, is subject to the constraints of the first and fourteenth amendments to the Constitution. Therefore, we must examine whether the constitutional principle of freedom of expression affects how the inculcative function of education may be realized in the public school curriculum.

III. Freedom of Expression in Public Schools

A. The Nature of Freedom of Expression

The first amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,

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[27] Goldstein, *supra* note 3, at 1297.

[28] *Id.*, at 1292.

The question arises, however, as to what the content of this epistemic training should consist. Obviously, learning should match the developmental level of the learner. Certain subjects are, by consensus, deemed to be required: English grammar and literature, mathematics, science, and social studies (including history and geography) are most commonly suggested. Computer sciences, foreign languages, humanities, and consumer skills are often added to the list. Beyond that, however, there is little agreement. Should the curriculum focus on the "well-established truths" of each discipline or should all points of view be presented? Should "established truths" be determined by state agencies, by political majorities, or by independent scholarship? Should teaching methodology be directive or discursive? To what extent should students' interests and abilities contribute to curriculum decisions? These types of questions and others like them can only be answered by appealing to the underlying values of the decisionmakers.

2. The inculcative function.

No human society can continue to exist if it fails to maintain a system by which its common values and beliefs can be transmitted from one generation to the next. Human society presupposes a common ideology. Individuals must understand how their society operates and what their roles in that society are in order for the society to be more than a mere collection of individuals.

Teaching values is not only necessary to the survival of any human society, but is also an inevitable result of the process of education. All teaching involves choices between what to teach and what not to teach. Choosing to teach one course of study or to use one type of instructional material precludes teaching or using another. The choices that are made inevitably reflect the values of the decisionmakers.

Furthermore, every aspect of education involves teaching values. As James Rachels has pointed out:

> Children learn values in school even when teachers do not specifically set out to teach them. Teachers naturally insist that students do their own work, without cheating, and so honesty is learned. Hard work is rewarded with good grades, while laziness results in poor marks, and so industriousness is encouraged. There are group projects, in which students must learn to work cooperatively, sharing responsibilities and respecting other people's rights. This kind of moral education occurs as the inevitable byproduct of classes in ordinary subjects such as arithmetic and literature.[26]

Nonacademic rules also contribute significantly to values education. Students may be punished for failing to carry passes in the hallways or

[26] Rachels, *Moral Education in Public Schools*, 79 J. PHIL. 678 (1982).

first amendment protection: "It is [the] mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed."[38]

Meiklejohn's view that the first amendment protects the thinking process of the individual from mutilation by government focuses first on the process of communication, and second, on the individual's thinking process. Paul Chevigny has examined Meiklejohn's first concern through the lens of modern philosophy of language, arguing that the communications process is possible only if speech is free. He points out that a particular proposition has meaning only in relation to a system of discourse, which can be established only through inquiry and dialogue. Thus, any political system that denies a right of free discourse suffers a loss of meaning, that is, its communications degenerate into slogans:

> This rationale for freedom of expression, rooted in the nature of speech itself, implies that slogans, formulas for which no reply is permitted, are not really part of language. They have no meaning because they have no context, and cannot be put in context without the social dimension of language, without interplay between the slogan and a responsive reader or speaker. We cannot want to forbid a dialogue about anything spoken or written in a human language, unless we want to eliminate the search for the purpose and understanding of what is said.[39]

Martin Redish focuses on Meiklejohn's second concern by searching for the rationale for choosing to protect democratic values in the first place. In his view, the Constitution guarantees free speech in order to serve the value of self-realization, which includes both self-development and self-rule.[40] Thus, Redish would argue that any state interference with the development of an individual's beliefs and values implicates the first amendment.

Thomas Emerson's model of the first amendment combines elements of both the political and self-realization models.[41] Emerson identifies four fundamental values that the first amendment protects: individual self-fulfillment; knowledge and discovery of truth; participation in decisionmaking by all members of society; and maintenance of a proper balance between stability and change.[42] The first two values are analogous

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[38] A. MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 30, at 27; Meiklejohn, *First Amendment*, *supra* note 36, at 257-58. *See also* Arons & Lawrence, *supra* note 3, at 314-15.

[39] Chevigny, *Philosophy of Language and Free Expression*, 55 N.Y.U.L. REV. 157, 177 (1980).

[40] Redish, *supra* note 30, at 601-04. C. Edwin Baker has proposed a similar model of the first amendment which he calls the liberty model. This model would protect those actions that foster individual self-realization and self-determination without improperly interfering with the legitimate claims of others. Baker, *supra* note 30.

[41] T. EMERSON, *supra* note 19.

[42] *Id.* at 6-9.

to the self-realization model, while the last two correspond to the political model.

Michael Perry has suggested that all of these approaches to freedom of expression ultimately contain the same normative content, which can be expressed in either of two equivalent ways: either as the "democratic value" of protecting access to information and ideas useful in the pursuit of political vision, or the "epistemic value" of protecting access to information and ideas useful in the pursuit of a better understanding of reality.[43] In this view, freedom of expression recognizes that government has no legitimate interest in dominating the process of inquiry. Furthermore, state attempts to influence discourse raise the possibility of government perpetuating its own ideological views through coercion and by overwhelming alternative centers of understanding. Thus, under Perry's synthetical approach, any attempt by government to enter the process by which individuals develop their own world views should be subject to judicial scrutiny.[44] This approach satisfactorily protects individuals from governmental attempts to "mutilate the thinking process"[45] while recognizing government's legitimate interests in communicating information and ideas.

Because the purpose of the first amendment is to protect access to information and ideas useful in the pursuit of a better understanding of reality, it necessarily grants certain privileges and immunities to individuals while imposing correlative limitations and disabilities on government. The first amendment enables individuals to formulate and maintain their own political, moral, or religious understandings of reality, free from any right or claim of others to dominate that understanding or of government to control it. Furthermore, the first amendment prohibits government from requiring individuals to hold a particular understanding of reality or from controlling the general content of that understanding, although it does not prohibit governmental restrictions on behavior that results from an individual's particular world view.

B. Freedom of Expression in the Public Schools

While the first amendment does not protect children to the same extent that it protects adults,[46] the Supreme Court has held that school officials may not prevent students from expressing their personal or political beliefs unless that expression creates a substantial danger of disrupting the

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[43] Perry, *supra* note 2, at 1152, 1155.

[44] *Id.* at 1160.

[45] *Cf.* text accompanying *supra* note 38.

[46] *See* Ginsberg v. New York, 390 U.S. 629, 638 (1968); Prince v. Massachusetts, 321 U.S. 158, 170 (1943). *See also* Diamond, *supra* note 3, at 487-96.

educational process.[47] Furthermore, the Court has recognized that "children are not the mere creatures of the state"[48] and that school authorities may not cast a "pall of orthodoxy" over the classroom.[49] These restraints implicitly recognize a unique aspect of the school environment: that the state not only tends to be the sole speaker, but determines the content of discourse as well as ensuring that the audience is captive. Thus, the first amendment should serve to protect public school students from the effects of government's domination of the system of discourse in which they find themselves.

In a legal context, the first amendment interests of students to be free from governmental domination of the system of discourse must be distinguished from parents' interest in transmitting their values and beliefs to their children. While the latter interest often determines the type of schooling chosen for individual children, it is essentially a privacy interest beyond the scope of the first amendment. It is a common law interest that courts continue to recognize.[50] But even if we accept the notion that parents have the power to transmit their own values and beliefs to their children, it does not follow that parents may delegate that power to an agent of the state—the public schools. In fact, it makes no sense to do so. First, powers derived from the right of privacy fail if delegated to a third party because they cease to be private. And, second, even if we could accept the notion that parents could delegate their power to transmit values and beliefs to their children, the first amendment disables government from exercising those particular powers.

1. Governmental Speech Doctrine.

In recent years, commentators have begun to recognize that the first amendment restricts governmental participation in the marketplace of ideas.[51] These commentators have identified several dangers to free discourse when the government becomes a participant in the

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[47] *See* Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).

[48] Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

[49] Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

[50] *Cf.* Wisconsin v. Yoder, 406 U.S. 205, 213-14 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).

[51] *See e.g.*, 2 Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 732-34 (1947); M. YUDOF, *supra* note 22; Kalven, *supra* note 19; Kamenshine, *supra* note 19; Shiffrin, *Government Speech*, 27 U.C.L.A. L. REV. 565 (1980); Van Alstyne, *The First Amendment and the Suppression of Warmongering Propaganda in the United States: Comments and Footnotes*, 31 LAW & CONTEMP. PROB. 530 (1966); Yudof, *When Governments Speak: Toward a Theory of Government Expression and The First Amendment*, 57 TEX. L. REV. 863 (1979); Comment, *Unconstitutional Government Speech*, 15 SAN DIEGO L. REV. 815 (1978).

marketplace: it inhibits the political process by coercing other participants to attain consensus;[52] it elevates the position and prestige of the government, thus establishing its beliefs and propositions as true and presenting the impression of governmental infallibility;[53] and it threatens to predominate over alternative voices who have access to fewer resources.[54]

Robert Kamenshine argues that the courts should read the first amendment as containing an implied prohibition against advocacy of political viewpoints by the government, analogous to the religious establishment clause.[55] Kamenshine adopts the premise that the principal interest of the first amendment is to protect freedom of political expression necessary to the proper functioning of a democratic society.[56] He reasons that governmental participation in disseminating political ideas poses a threat to open public debate by distorting the marketplace of political ideas.[57]

Kamenshine applies his implied political establishment prohibition analysis to governmental dissemination of political views to public school students.[58] While he recognizes that the problem of political establishment may be inherent in the very concept of public education, he assumes that public education may function consistently with an implied political establishment clause: political establishment problems would exist only where a public school advocates a particular viewpoint to the exclusion of others.[59] Kamenshine concludes that society's interest in values inculcation is not sufficiently compelling to overcome the interest in prohibiting political establishment for two reasons: values inculcation (at least when performed directively) assumes the existence of "correct," or at least, uniformly acceptable, political values, which may not even be discoverable; and there are alternative means besides the public schools to instill values in children.[60] While Kamenshine concedes that instilling generalized patriotic sentiments in students during the earliest years of education would not be subject to judicial intervention under the political establishment prohibition because it is "not sufficiently discreet to be actionable,"[61] he views communication of more specific political viewpoints at the junior and senior high school levels as a matter of constitutional concern because of the susceptibility of these almost-voters

[52] Comment, *Unconstitutional Government Speech*, 15 SAN DIEGO L. REV. 815, 833 (1978).
[53] *Id.* at 834.
[54] *Id.* at 900.
[55] Kamenshine, *supra* note 19, at 1104.
[56] *Id.* at 1113.
[57] *Id.* at 1116.
[58] *Id.* at 1132-38.
[59] *Id.* at 1133.
[60] *Id.* at 1134.
[61] *Id.*

to political indoctrination that could seriously distort the political process.[62]

Steven Shiffrin has also recognized that first amendment theorists must examine the process by which government adds its voice to the marketplace.[63] Shiffrin examines several models of first amendment analysis that could integrate government speech into the "constitutional constellation."[64] He examines and rejects four models of the first amendment: an equality model derived from the rationale of *Mosely v. Police Department of the City of Chicago*;[65] a dissenting taxpayers model;[66] a model that focuses on government drowning out private sources of communication;[67] and a governmental functions model.[68] He advocates an eclectic approach that would draw on the strengths of each of these models to balance the formidable governmental interests in communicating against the serious dangers that government speech poses to individual choice.

In the context of public education, Shiffrin identifies the question as "how to balance the effect of government speech on a captive audience of small children, a legitimate state interest in educating its citizenry, and a profound countervailing concern with preventing indoctrination and preserving individual choice."[69] He concludes that the system of public education as it is presently constituted generally is adequate to accommodate the competing interests, especially where teacher autonomy is encouraged as a desirable structural check on comprehensive governmental domination of the curriculum.[70]

Mark Yudof has presented the most detailed analysis of government speech problems. He has recognized that a paradox arises when government enters the marketplace of ideas: on the one hand, government expression may teach, inform, and lead; but on the other hand, it may also indoctrinate, distort judgment, and perpetuate the current regime.[71] Yudof examines possible approaches to resolving this paradox within a framework of a system of freedom of expression, viewing government expression as part of a matrix in which traditional first amendment claims are examined.[72] He concludes that courts should invalidate

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[62] *Id.* at 1134-35.
[63] Shiffrin, *supra* note 51.
[64] *Id.* at 571.
[65] 408 U.S. 92 (1972).
[66] Shiffrin, *supra* note 51, at 589-93.
[67] *Id.* at 600-01.
[68] *Id.* at 601-03.
[69] *Id.* at 622.
[70] *Id.* at 647.
[71] M. YUDOF, *supra* note 22, at 42.
[72] *Id.* at 202-03.

government speech that is particularly offensive and likely to interfere with individual judgment unless it is specifically authorized by legislative bodies.[73]

Yudof views captive audiences in public schools as one situation where an individual could claim that government expression distorts the intelligence functions of citizens, advocates undemocratic or unconstitutional values, violates the citizens' right not to pay taxes to support objectionable expression, or drowns out opposing messages by capturing the listening audience.[74] He would require the state to strengthen centers of communication, such as autonomous teachers, independent student newspapers, and private alternatives to public education, that would counter or check the pervasive power of the government.[75]

While the Supreme Court has never expressly addressed the question of whether the first amendment restricts government speech,[76] it has implicitly accepted the notion in several cases. For example, in *Wooley v. Maynard*,[77] the Court upheld the right of a Jehovah's Witness to cover New Hampshire's "Live Free or Die" motto on his license plates because the message was antithetical to his religious beliefs. The Court reasoned that while the state may legitimately seek to communicate an official ideology, the expression of that ideology may be outweighed by an individual's privilege to avoid becoming a courier for such a message.[78] Similarly, in *West Virginia State Board of Education v. Barnette*,[79] the Court invalidated a compulsory flag-salute regulation on the grounds that the first amendment forbids the government from defining ideological orthodoxy.[80]

The government speech doctrine, by restricting government's power to participate in the marketplace of ideas, embodies the view that the essence of the first amendment is to protect information and ideas useful in the pursuit of a better understanding of reality. After all, while the government can contribute knowledge and information to the process of discourse, it is incapable, qua government, of pursuing a better understand-

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[73] *Id.* at 301-03.

[74] *Id.* at 213-33.

[75] *Id.*

[76] *Cf.* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (the first amendment does not countenance monopolization of the marketplace of ideas either by government or by a private licensee). *But cf.* Lathrop v. Douglas, 367 U.S. 822, 852 (1961) (Harlan, J., concurring) (free speech clause does not imply a political establishment prohibition).

[77] 430 U.S. 705 (1977).

[78] *Id.* at 717.

[79] 319 U.S. 624.

[80] *Id.* at 637. *See also* Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974); School Dist. of Abington Township v. Schempp, 374 U.S. 203, 226 (1963); Public Utilities Comm'n v. Pollak, 343 U.S. 451, 469 (1952) (Douglas, J., dissenting).

ing of reality.[81] Its only legitimate interest in free speech, therefore, is to ensure that individual citizens are able to pursue their own understandings of reality by having the freedom to speak and to receive information and ideas. In addition, the government speech doctrine furthers the purpose of the first amendment by establishing a privilege on the part of individuals to be free from government attempts to influence their beliefs, values, and understandings. The doctrine prohibits the government from requiring individuals to be the couriers of its speech.[82] The interest of students in having access to information and ideas useful to pursue a better understanding of reality not only imposes disabilities on government as speaker, but requires an independent recognition that students must be free to receive information.

2. "Right" to Receive Information.

By holding that a "right" to receive information is inherent in the first amendment,[83] the Supreme Court has recognized that the meaningfulness of a communication depends on the existence of at least three elements: a speaker, a message, and a recipient.[84] If any of these three elements is missing, then communication is impossible and information and ideas useful to pursue a better understanding of reality cannot be conveyed between individuals. The Court, however, has been mistaken in calling the first amendment interest a "right" to receive information because it imposes no correlative duty on a speaker to speak.[85] At least where the speaker is the government, as in the public schools, such a duty would conflict with the government speech doctrine which restricts the government's power to speak. Rather, an individual's interest in receiving information appears to be more of an immunity: the recipient should be free from third party—particularly governmental—interference with receiving the communication. This immunity imposes a corresponding disability on government, which would have no control over the recipient's access to the communication.

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[81] Individuals in government, however, are capable of pursuing a better understanding of reality, and as individuals, they would be free from any restrictions the government speech doctrine would impose on government itself. *See* M. YUDOF, *supra* note 22, at 305-06.

[82] *Cf.* Wooley v. Maynard, 430 U.S. 705, 717 (1977).

[83] *See* Board of Educ. v. Pico, 457 U.S. 853, 867-68 (1982); Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 756-57 (1976); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Martin v. City of Struthers, 319 U.S. 141, 143 (1943).

[84] *Cf.* Lasswell, *The Structure and Function of Communications in Society*, in THE COMMUNICATION OF IDEAS 37 (L. Bryson ed. 1948); C. SHANNON & W. WEAVER, THE MATHEMATICAL THEORY OF COMMUNICATION 98 (1949).

[85] Justice Blackmun has recognized that the "right" to receive information fails to impose a duty on a speaker to speak. Board of Educ. v. Pico, 457 U.S. 853, 878 (1982) (Blackmun, J., concurring). He correctly noted that students' right to receive information does not require the

In the context of public education, the first amendment immunity from governmental interference with the receipt of communications disables government from using the public schools as a policy tool. This disability may take one of two forms. First, government may not selectively communicate only the information and ideas with which it agrees.[86] Such content-based discrimination is not only beyond the powers of government, but could also infringe on children's first amendment interest in gaining access to important information and ideas necessary for them to develop and maintain their own understandings of reality. Second, government may not restrict students' access to information and ideas already available to them for the sole reason that it disagrees with the content of the information and ideas.[87] Government's decision to halt access to information and ideas with which it disagrees implicitly imposes its own understanding of reality on children just as surely as does explicit communication of the government's point of view.

3. Captive Audiences.

The Supreme Court has recognized that serious first amendment difficulties may also arise where an audience is subjected to speech from which it is unable to escape.[88] If freedom of expression restricts governmental interference with the process of communication, it necessarily prohibits government from forcing an unwilling listener to listen to the same extent that it prohibits government from forcing an unwilling speaker to speak. Thus, the captive audience doctrine complements the listener's interest in receiving information by restricting governmental attempts both to limit desired access to information and ideas and to force access to undesired information and ideas. The captive audience doctrine protects two interests of potential receivers of communication: it protects listeners' privacy interests of preferring not to listen to particular communications and it also protects listeners' interests in undominated inquiry by disabling particular speakers from dominating communication in particular circumstances. This latter interest recognizes that forcing people to listen to unwanted communications is antithetical to the purposes of the first amendment because it enables speakers to impose particular ideas and information—their understandings of reality—on

schools to supply that information. *Id.* The receipt of information thus becomes a "right" only *after* a willing speaker chooses to speak.

[86] *Cf.* Board of Educ. v. Pico, 457 U.S. at 878-79 (Blackmun, J., concurring); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1977); Grayned v. City of Rockford, 408 U.S. 92 (1972); Police Dept. v. Mosely, 408 U.S. 92 (1972).

[87] This is the approach taken by Justice Blackmun in *Pico*. *See infra* note 259 and accompanying text.

[88] *Cf.* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974); Cohen v. California, 403 U.S. 15 (1977); Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952) (Douglas, J., dissenting).

listeners. As Justice Douglas observed in dissent in *Public Utilities Commission v. Pollack*: "When we force people to listen to another's ideas, we give the propagandist a powerful weapon."[89]

Public school students are the quintessential captive audience: their attendance in school is mandatory; an elaborate system of rewards and punishments encourages them to accept the truth of the communications; the speaker is a figure of great authority; and they are not mature enough to subject the communications to critical evaluation.[90] While the captive nature of an audience has never been held sufficient in itself to invalidate governmental regulation of communication, in the public school context it creates sufficient dangers of imposing ideological orthodoxy on the audience that it should be subject to judicial scrutiny when challenged.

4. Public Forum.

The Supreme Court has held that where government opens a public facility to expressive activity, it may enforce a content-based exclusion only where necessary to serve a compelling state interest or where its regulation is limited to reasonable time, place, or manner restrictions.[91] But where the facility is not a forum for public communication, the Court has held that the state may preserve the property for its intended purposes by imposing any reasonable regulation on speech that does not suppress expression merely because public officials oppose the speaker's views.[92] The Court has held that while public schools are not traditional public forums, "First Amendment rights, applied in light of the special characteristics of the school environment, are available. . . ."[93] Thus, school authorities may not transmit only those values with which they agree: they may not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[94] But in fact, this is what tends to happen as a result of the manner in which school authorities determine the content of the public school curriculum.

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[89] 343 U.S. at 469 (Douglas, J., dissenting).

[90] *See* M. YUDOF, *supra* note 22, at 213-22. Yudof notes further, however, that children are captive only a few hours a day and have ready access to information outside the school environment. *Id.* at 233.

[91] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46; United States Postal Service v. Council of Greenburgh, 453 U.S. 114, 132 (1981); Carey v. Brown, 447 U.S. 455, 461 (1980).

[92] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. at 46; United States Postal Service v. Council of Greenburgh, 453 U.S. at 129; Greer v. Spock, 434 U.S. 828, 836 (1976); Adderley v. Florida, 385 U.S. 39, 48 (1966).

[93] Board of Educ. v. Pico, 457 U.S. at 866; Tinker v. Des Moines School Dist., 393 U.S. 503, 506 (1969).

[94] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

IV. Methods of Curriculum Decisionmaking

States have implemented their epistemic and inculcative interests in education through a variety of complex schemes. Nevertheless, the varying constitutional and statutory patterns of curriculum control have not resulted in any substantial diversity in curriculum content. In fact, just the opposite has occurred. As a practical matter, textbook adoption boards in a few states—particularly Texas and California—exercise almost complete control over curriculum content nationwide. Furthermore, these boards are not subject to electoral control and their decisions tend to be subject to minimal administrative or judicial review. In order to understand how this nondemocratic and epistemically questionable result occurs, it is necessary to examine methods of curriculum decisionmaking in greater detail.

A. State Controls Over Curriculum Decisionmaking

1. Constitutional controls.

A few state constitutions contain curriculum provisions, particularly regarding courses of study and textbook selections. The North Dakota Constitution requires that "instruction shall be given as far as practicable in those branches of knowledge that tend to impress upon the mind the vital importance of truthfulness, temperance, purity, public spirit and respect for honest labor of every kind."[95] The Oklahoma Constitution requires the legislature to provide for the teaching of "agriculture, horticulture, stock feeding, and domestic science in the common schools of the State,"[96] while the Utah Constitution commands that the metric system be taught in the public schools.[97]

Constitutions in several states contain provisions regarding the selection of textbooks and other instructional materials. California and Virginia require that the state board of education adopt textbooks,[98] while Oklahoma directs the governor to appoint a textbook selection committee "of active educators . . . whose duty it shall be to prepare official multiple textbook lists from which textbooks for use in [the common] schools shall be selected. . . ."[99] On the other hand, Colorado,

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[95] N.D. CONST. art. VIII, § 3.

[96] OKLA. CONST. art. XIII, § 7.

[97] UTAH CONST., art. X, § 11. *See generally* L. Peterson, R. Rossmiller & M. Volz, *supra* note 19.

[98] CAL. CONST. art. IX,§ 7.5; VA. CONST. art. VIII, § 5(d). The California Supreme Court has held that that state constitution's allocation of textbook adoption powers to the board of education operates to exclude the legislature from the textbook selection process. State Bd. of Educ. v. Levit, 52 Cal. 2d 441, 343 P.2d 8 (1959).

[99] OKLA. CONST. art. XIII, § 6.

Utah, and Wyoming all provide that neither the legislature nor the state board of education shall have the power to prescribe public school textbooks.[100] The West Virginia Constitution contains a unique provision prohibiting any person connected with the public school system from having an interest in the sale, proceeds, or profits of any book "or other thing" to be used therein.[101]

State constitutions tend to allocate supervision of the public school system primarily to the legislature, although some constitutions vest limited power in a state board of education.[102] As a result, issues of curriculum and educational policy are subject to the political control of state legislatures, with the potential for majoritarian abuse that that entails.[103]

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[100] COLO. CONST. art. IX, § 16; UTAH CONST. art. X, § 9; WYO. CONST. art. VII, § 11. Wyoming's provision refers to the State Superintendent of Public Instruction rather than to a Board of Education.

In Utah, the legislature has provided by statute that the state textbook commission "shall decide what textbooks shall be adopted for use in the district schools and the high schools of the state, and their use shall be mandatory in all district and high schools in the state." UTAH CODE ANN. § 53-13-2 (1981). While this provision has never been challenged, it appears to be contrary to UTAH CONST. Art, X, § 9, which states that "neither the legislature nor the State Board of Education shall have the power to prescribe textbooks to be used in the common schools." If a state constitution disables the legislature from adopting textbooks, it also disables the legislature from delegating the power to adopt textbooks to a statutorily created state agency.

[101] W. VA. CONST. art. XII, § 9.

[102] Twenty state constitutions vest the state board of education or an equivalent constitutional entity with general supervision or control of the public schools. ALA. CONST. amend. no. 284; ARIZ. CONST. art. XI, § 1; COLO. CONST. art. IX § 1; HAWAII CONST. art. X, § 3; IDAHO CONST. art IX, § 2; ILL. CONST. art. X, § 2; KAN. CONST. art. VI, § 2; LA. CONST. art. VIII, § 3; MICH. CONST. art. VIII, § 3; MO. CONST. art. IX, § 2(a); MONT. CONST. art. X, § 9(3); NEB. CONST. art. VII, § 2; N.M. CONST. art. XII, § 6; N.C. CONST. art. IX, § 5; OKLA. CONST. art. XIII, § 5; UTAH CONST. art. X, 8; VA. CONST. art. VIII, § 4; W. VA. CONST. art. XII, § 2; WIS. CONST. art. X, 1; WYO. CONST. art. VII, § 14. Seven state constitutions fail to define the scope of the duties for the constitutionally created state education agency; in these states, the legislature defines the agency's duties. CAL. CONST. art. IX, § 7; FLA. CONST. art. IC, § 2; GA. CONST. art. VIII, § 2; MISS. CONST. art. VIII, § 203; OHIO CONST. art. VI, § 4; S. C. CONST. art. XI, § 1; TEX. CONST. art. VII, § 8. A third group of state constitutions contain no provision at all for a state board of education. These states include Alaska, Arkansas, Connecticut, Delaware, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, North Dakota, Oregon, Pensylvania, Rhode Island, South Dakota, Tennessee, Vermont, and Washington.

[103] *See generally* E. BOLMEIER, THE SCHOOL IN THE LEGAL STRUCTURE (2d ed. 1973); R. F. CAMPBELL, L. CUNNINGHAM, R. NYSTRAND & M. USDAN, THE ORGANIZATION AND CONTROL OF THE SCHOOLS (3d ed. 1975); R. CAMPBELL & T. MAZZONI, JR., STATE POLICY MAKING FOR THE PUBLIC SCHOOLS (1976); J. KOERNER, WHO CONTROLS AMERICAN EDUCATION (1968); COMMUNITY CONTROL OF SCHOOLS, *supra* note 19; T. VAN GEEL, AUTHORITY TO CONTROL THE SCHOOL PROGRAM (1976); Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. PA. L. REV. 373 (1969); McCann, *Quality Control for Instructional Materials*, 12 HARV. J. LEGIS. 511 (1975); Marconnit, *State Legislatures and the School Curriculum*, 49 PHI DELTA KAPPAN 269 (1968); Reutter, *The Law and the Curriculum*, 20 L. & CONTEMP. PROB. 91 (1955); Seitz, *Supervision of Public Elementary and Secondary School Pupils Through State Control Over Curriculum and Textbook Selection*, 20 L. & CONTEMP. PROB. 104 (1955); Shelton, *Legislative Control Over Public School Curriculum*, 15 WILLAMETTE L. REV. 473

While some state constitutions contain restrictions on the legislature's control of education, these restrictions tend to be minimal. The most common is a requirement that public schools be free;[104] others prohibit expending funds for teaching sectarian doctrines,[105] require provision of free textbooks,[106] or require teaching the metric system.[107]

2. Statutory controls.

Because almost every state constitution vests control of education in the legislature, educational policy will primarily be defined within the boundaries of the state education code. Legislatures tend to follow one of three models for allocating authority over education. In the centralized model, the legislature delegates almost complete authority over curriculum to a state board of education, superintendent of education, or other

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(1979); Turck, *State Control of the Public School Curriculum*, 15 KY. L.J. 277 (1927). *But cf.* State Bd. of Educ. v. Levit, 52 Cal. 2d 441, 343 P.2d 8 (1959) (state constitution prohibited legislature from interfering with textbook selections).

[104] COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; FLA. CONST. art. IX, § 1; MD. CONST. art. VIII, § 1; MICH. CONST. art. VIII, § 2; MISS. CONST. art. VIII. § 201; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, § 1(3); NEB. CONST. art. VII, § 1; N.M. CONST. IX, § 1; N.D. CONST. art. VIII, § 2; OKLA. CONST. art. XIII, § 1; S. C. CONST. art. XI, § 3; TENN. CONST. art XI, § 12; TEX. CONST. art. XII, § 1; WYO. CONST. art. VII, § 1.

[105] CAL. CONST. art. IX, § 8.

[106] OKLA. CONST. art. XIII, § 6.

[107] UTAH CONST. art. X, § 11.

A recent case involving Louisiana's "creation-science" statute illustrates the tension that arises between state constitutional delegation of "control" over the public school curriculum to a state board of education and the legislature's plenary authority over the public school curriculum. In Aguillard v. Treen, 440 So.2d 704 (La. 1983), the Louisiana Supreme Court answered a question certified from the United States Court of Appeals for the Fifth Circuit by holding that the state constitutional provision granting the state board of education authority over the system of public education did not preclude the legislature from prescribing courses of study in public schools. The lawsuit was filed in federal district court to declare Louisiana's "Balanced Treatment for Creation-Science and Evolution-Science Act," L.S.A. §§ 17:286.1-17.286.7, unconstitutional under the Establishment Clause of the first amendment. *Cf.* McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255 (E.D. Ark. 1982) (similar Arkansas statute held unconstitutional). The federal court attempted to avoid the first amendment issue by holding that the state constitution granted the board of education exclusive authority to determine courses of study. Aguillard v. Treen, Civil Action No. 81-4787 (E.D. La. Nov. 22, 1982). The Fifth Circuit certified the state law question to the state Supreme Court, which effectively reversed the district court.

While *Aguillard* has resolved the allocation of curriculum authority in Louisiana in favor of the legislature, cases in several other states may require a contrary result. *See* Medeiros v. Kiyosake, 52 Hawaii 436, 478 P.2d 314 (1970) (state board of education had the authority to require schools to show students a film series on family life and sex education); Willing v. Board of Educ., 382 Mich. 620, 171 N.W. 2d 545 (1969) (board of education had authority to regulate the number of hours constituting a school day); Board of Educ. v. Judge, 538 P.2d 11 (Mont. 1975) (invalidating statute authorizing state board of education to supervise and control vocational education despite constitutional provision vesting power over vocational education in a state board of public instruction); Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975) (state board of education's power to control education included control over all the affairs of the school).

state agency. The state agency will most likely prescribe the courses of study, adopt textbooks statewide, and develop detailed curriculum guides specifying content to be covered and methods of presentation in each course. This approach leaves little discretion to local school officials in matters of curriculum. In moderately centralized states, the legislature grants somewhat more authority to local boards of education in matters of curriculum. The statute may exempt local school districts over a certain size from control of the state agency, or allow some discretion to local school officials in developing curriculum. Finally, the decentralized model delegates broad control over the curriculum to local boards of education. State agencies are relegated to advising and assisting the local districts. For example, specialists in the state agency may develop curricula that local schools may use or adapt, as they wish.[108]

While legislatures generally delegate considerable power over education to state or local agencies, the legislature still retains ultimate control over the curriculum. As a result, education codes tend to enumerate numerous course of study requirements.[109] Some courses—usually courses on the dangers of alcohol and narcotics, or U.S. or state history—are required of every student in the state.[110] Furthermore, the statute may specify a minimum amount of time to be devoted to a particular course.[111] Other statutes may specify the content of the course or even the pedagogical methods to be used in teaching it.[112]

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[108] van Geel, *New Law of the Curriculum*, in VALUE CONFLICTS AND CURRICULUM ISSUES 25, 54-55 (J. Schaffarzick & G. Sykes eds. 1979).

[109] *See* Marconnit, *supra* note 103, at 270-71; Shelton, *supra* note 103, at 504-05.

[110] *See* Shelton, *supra* note 103, at 481-89.

[111] *E.g.*, ALA. CODE § 16-40-4 (twenty minutes of instruction a week shall be devoted to humane treatment of animals); ARK. STAT. ANN. § 80-1616 (1960) ($100-$500 fine or thirty days to six months in jail for teacher who fails to provide one hour per week of instruction in United States history or other citizenship subjects); TEX. EDUC. CODE ANN. § 4.15 ($25-$200 fine for teachers who fail to teach Texas history at least two hours a week); *id.*, § 4.16 (discharge and $500 fine for teacher who fails to teach patriotism ten minutes a day).

[112] *E.g.*, ALA. CODE § 16-40-3 (1975) (requiring teaching of a course in the communist threat). The Alabama statute requires that instruction be given:

> for the primary purpose of instilling in the minds of students a greater appreciation of democratic processes, freedom under law and the will to preserve that freedom.
>
> The direction of study shall be one of orientation in contrasting the government of the United States of America with the Soviet government and shall emphasize the free-enterprise competitive economy of the United States of America as one which produces higher wages, higher standards of living, greater personal freedom and liberty than any other system of economics on earth. It shall lay particular emphasis upon the dangers of communism, the ways to fight communism, the evils of communism, the fallacies of communism, and the false doctrines of communism.

Id. § 4-3(c).

B. Textbook Selection Process

While almost every state imposes broad course of study requirements, curriculum decisionmaking in the United States depends almost entirely on the content of textbooks. Especially at the primary levels, the textbook tends to be the curriculum: the teacher merely starts at the beginning and works his or her way through. This journey tends to be accompanied by an almost total reliance on teaching methods suggested in the teacher's guides. This uncritical acceptance of textbooks as the foundation of education is so unusual that Europeans call it the "American System."[113]

Because of this reliance on textbooks as the foundation of the curriculum, statutory restrictions on textbook selection will necessarily impose severe restraints on the diversity of curriculum content. Approximately half the states—mostly in the South and West—select textbooks by means of a statewide adoption system.[114] In these adoption states, the agency charged with textbook selections generally prescribes specific requirements for adoption.[115] Many of these specifications are physical, dealing with quality of printing or binding, type of cover, cost, and so forth.[116] Other requirements are administrative, dealing with the selection

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[113] F. FITZGERALD, AMERICA REVISED 19 (1980). A recent study indicates that textbooks continue to be the dominant teaching tool and that teachers not only rely on, but also believe in, the textbook as a source of knowledge. Shaver, Davis & Helburn, *The Status of Social Studies Education: Impressions from Three NSF Studies*, 43 SOC. EDUC. 150-53 (Feb. 1979).

[114] *See* ALA. CODE §§ 16-36-8, 16-36-9 (1977); ARK. STAT. ANN. § 80-1704 (1980); CAL. EDUC. CODE § 60200 (West Supp. 1983) (elementary school only); FLA. STAT. ANN. § 233.16 (West Supp. 1983); GA. CODE ANN. § 20-2-1010 (1981); IDAHO CODE § 33-118 (1981); IND. CODE ANN. § 20-10.1-9-1 (Burns Supp. 1982); KY. REV. STAT. § 156.435 (Supp. 1982); LA. REV. STAT. ANN. § 17: 7(4) (West 1982); MISS. CODE ANN. § 37-43-19(b) (Supp. 1982); NEV. REV. STAT. § 390.140 (1981); N.M. STAT. ANN. § 22-15-8 (1978); N.C. GEN. STAT. § 115C-86 (Supp. 1981); OKLA. STAT. ANN. tit. 70, § 16-102 (West 1972); OR. REV. STAT. § 337.050 (1981); S.C. CODE ANN. § 59-31-30 (Law Co-op. 1977); TENN. CODE ANN. § 492008 (1977); TEX. EDUC. CODE ANN. § 12.11(e) (Vernon 1972); UTAH CODE ANN. § 53-13-2 (1981); VA CODE § 22.1238 (1981); W. VA. CODE § 18-2A-2 (1977). *See also* DEL. CODE ANN. tit. 14, § 122(b) (1981) (requiring state board of education to prescribe rules and regulations governing the selection of textbooks); IDAHO CODE § 33-118 (1981) (allowing state board of education to establish procedures for textbook selection). *See generally* F. FITZGERALD, *supra* note 113, at 32; PEOPLE FOR THE AMERICAN WAY, AS TEXAS GOES, SO GOES THE NATION: A REPORT ON TEXTBOOK SELECTION IN TEXAS 5 (1983) [hereinafter cited as AS TEXAS GOES]. Other states allow local schools to select instructional materials on their own. Three state constitutions forbid statewide adoptions. *See supra* note 100. *See generally* McCann, *supra* note 103, at 514-16.

[115] An agency's regulation of the selection process should be subject to administrative restraints, however. *See generally* Schember, *Textbook Censorship—The Validity of School Board Rules*, 28 ADMIN. L. REV. 259 (1976).

[116] *E.g.* KY. REV. STAT. § 157.145 (Supp. 1982) (authorizing rebinding of textbooks); TEX. EDUC. CODE ANN. § 12.24(b) (mechanical construction, paper, print, and price are factors to be considered). *See* Seitz, *supra* note 103.

process itself.[117] But the most important specifications deal with content. Besides requiring that textbooks cover certain topics, they often contain rather general guidelines:

> 1.4 Textbooks shall contain no material of a partisan or sectarian character.
>
> 1.5 Textbook content shall promote citizenship and understanding of the free enterprise system, emphasize patriotism and respect for recognized authority, and promote respect for human rights. Textbooks adopted shall be objective in content, impartial in interpretations, and shall not include selections or works which encourage or condone civil disorder, social strife, or disregard for the law.
>
> . . . .
>
> 1.7 Textbooks offered for adoption shall not include blatantly offensive language or illustrations.
>
> 1.8 Textbooks offered for adoption shall not present material which would cause embarrassing situations or interference with the learning atmosphere of the classroom.[118]

Sometimes the guidelines are more specific:

> (A) Textbooks that treat the theory of evolution shall identify it as only one of several explanations of the origins of humankind and avoid limiting young people in their search for meanings of their human existence.
>
> (A) Textbooks presented for adoption which treat the subject of evolution substantively in explaining the historical origins of man shall be edited, if necessary, to clarify that the treatment is theoretical rather than factually verifiable. Furthermore, each textbook must carry a statement on an introductory page that any material on evolution included in the book is clearly presented as theory rather than verified.
>
> (B) Textbooks presented for adoption which do not treat evolution substantively as an instructional topic, but make reference to evolution indirectly or by implication, must be modified, if necessary, to ensure that the reference is clearly to a theory and not to a verified fact. These books will not need to carry a statement on the introductory page.
>
> (C) The presentation of the theory of evolution should be done in a manner which is not detrimental to other theories of origin.[119]

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[117] *Id.* For example, California statutes prescribe the frequency of adoptions, the minimum and maximum number of selections in each subject, CAL. EDUC. CODE § 60200 (West Supp. 1983), require public inspection of submissions, *id.* § 60202, and require public hearings. *Id.* § 60203.

[118] Texas Textbook Proclamation, General Content Guidelines (1982), reprinted in AS TEXAS GOES, *supra* note 114, at Appendix A. For other examples, see F. FITZGERALD, *supra* note 113, at 33-34.

[119] 8 TEX. REG. 3988 (1983). The Texas Board of Education repealed this rule in April 1984 after an opinion by the State Attorney General concluded that the rule violated the establishment clause of the United States Constitution. The opinion reasoned that the rule failed to demonstrate a secular

Texas and California have the greatest impact of all the adoption states on textbook content nationwide.[120] Because of the large number of students attending public schools in those two states, publishers cannot afford to ignore content requirements of the Texas and California textbook adoption boards, no matter how educationally or academically questionable they may be.[121] Willful restrictions on student access to academically essential information have, not surprisingly, been major contributors to the well-documented and occasionally-lamented functional illiteracy of the American public. If a textbook, which is the basis of the curriculum, cannot be selected for use in the schools because members of a state agency disagree with its viewpoint, it is hard to see how one can conclude that students' first amendment interests in gaining access to ideas and information useful in the pursuit of a better understanding of reality have not been invaded. Such a state of affairs seems to be a direct attempt by an organ of state government to indoctrinate children in ideological orthodoxy, requiring judicial intervention to protect students' freedom of expression.

V. Model Analysis of Curriculum Decisions

The preceding discussion illustrates that a fundamental paradox underlies public education in the United States. On the one hand, the public,

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purpose, and thus failed the three-pronged test formulated in Lemon v. Kurtzman, 403 U.S. 602 (1971). Tex. Att'y Gen. Op. No. JM-134 (March 12, 1984). *See* Time, April 30, 1984, at 81.

[120] Texas is the single largest purchaser of textbooks in the country. AS TEXAS GOES, *supra* note 114, at 3. *See also*, Reinhold, *Textbook Debate Broadens in Texas*, N.Y. Times, Aug. 13, 1983. California is second only because it requires statewide adoption only at the elementary level. *Cf.* CAL. EDUC. CODE § 60400 (1978) (local districts may adopt instructional materials for secondary schools).

[121] Perhaps the most notorious example of local restrictions on curriculum content affecting education nationwide involves textbook treatment of the theory of evolution during the thirty-five years following the *Scopes* case. *See* Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927). As a result of restrictions that Texas and other states, mostly in the South, placed on teaching the theory, no major biology textbooks used the word "evolution" until the early 1960's. *See* F. FITZGERALD, *supra* note 113, at 33-34; S. GOULD, HEN'S TEETH AND HORSE'S TOES 282-85 (1983); D. NELKIN, SCIENCE TEXTBOOK CONTROVERSIES AND THE POLITICS OF EQUAL TIME 16 (1977); Nelkin, *Creationism Evolves*, in CREATIONISM, SCIENCE, AND THE LAW 73, 76 (1983); Grabiner & Miller, *Effects of the Scopes Trial*, 185 SCIENCE 832 (1974). Rather than make changes they consider to be too drastic in order to comply with the requirements of the Texas State Textbook Commission, publishers occasionally produce a separate, "Lone Star" edition of a textbook. F. FITZGERALD, *supra* note 133, at 33-34. Furthermore, in trying to please state adoption boards, special interest groups, parents, teachers, school administrators, and state legislators, publishers have tended to publish textbooks with little substance; virtually no one connected with the textbook production and selection process seems willing to support books that either reflect modern scholarship or contain material that would meet the needs of students; almost all modern textbooks tend to be dull, bland, and noncontroversial. *See id.*, at 9-47; Broudy, *The Trouble with Textbooks*, 77 TEACHERS C. REC. 13 (1975). *See also* Butler, *Adopting Textbooks in Texas: Facts and Fancies*, 11 INTERRACIAL BOOKS FOR CHILDREN 7, 11, at 7 (1980).

government, and the courts have all viewed public education as a tool for inculcating community values in children. One of the most basic community values, however—inherent in the first amendment's protection of freedom of expression—is that government should not determine the values by which individuals choose to live their lives. As a practical matter, the methods by which states select the public school curriculum does result in imposing certain values on children in public schools. When the schools transmit particular values, defining them as "correct" values, they are guilty of casting a "pall of orthodoxy" over the classroom. Further, when curriculum choices have the effect of limiting students' access to ideas and information, the state will be transmitting the values of ignorance and intolerance. These results are intolerable both as a matter of educational policy and as a matter of constitutional law.

The first amendment's guarantee of freedom of expression protects an individual's access to information and ideas useful in the pursuit of a better understanding of reality. This interest in freedom of expression, however, is equivalent to the state's epistemic interest in education, which is to provide children with access to information and ideas useful to becoming rational decisionmakers in a democratic society. Decisionmaking can only be rational to the extent that it is based on a good understanding of reality, while a better understanding of reality often leads to more rational decisionmaking.[122] Thus, to the extent that government acts to further students' access to information and ideas useful to becoming rational decisionmakers, it would also refrain from restricting students' access to information and ideas useful to pursue a better understanding of reality. Similarly, actions of school authorities that restrict students' access to information and ideas useful to pursue a better understanding of reality conflict with the state's own interest in promoting student access to information and ideas useful in becoming rational decisionmakers.[123] Curriculum decisions of school authorities will therefore impede the epistemic function of education to the extent that their decisions are inconsistent with freedom of expression.

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[122] In this view, both free expression and education are necessary to enable an individual to define his or her own relationship to the world. Such a view recognizes that the religion clauses of the first amendment are not essentially distinct from the speech, press, and assembly clauses: religion is one way for an individual to define his or her relationship to the world.

[123] John Childs has noted that:

> [D]emocratic education believes in the nurture of human personality. It holds that the nurture of human personality involves as its very essence the nurture of mind, and that the nurture of mind is incompatible with any attempt to inculcate beliefs and attitudes by a process that involves the deliberate withholding of knowledge. Such a process of suppression and indoctrination can breed a "mind in the individual," but it cannot nurture "individual mind". . . .

Furthermore, inculcation of values by the state may directly conflict with freedom of expression by prescribing "what shall be orthodox in politics, nationalism, or other matters of opinion. . . ."[124] The disability on state attempts to impose orthodoxy extends to state attempts to indoctrinate children: the child is not the mere creature of the state.[125] School authorities may not regard students as "closed-circuit recipients of only that which the State chooses to communicate. [Students] may not be confined to the expression of those sentiments that are officially approved."[126]

As late as the late 1960's, however, courts and legal scholars had generally failed to recognize the tensions inherent in the inculcative function of public education. The attitude of the courts is exemplified in the opinions of the United States Supreme Court in *Epperson v. Arkansas*[127] and *Tinker v. Des Moines School District*.[128] In *Epperson*, Justice Fortas stated the prevailing judicial approach to public education curriculum problems:

> By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.[129]

In *Epperson*, the Court was able to avoid the question of whether freedom of expression was a "basic constitutional value" in the public schools by basing the decision to invalidate Arkansas' anti-evolution statute on the establishment clause. But in *Tinker*, the Court was forced to address the question squarely, even though the case did not deal with an attempt to inculcate values. Nevertheless, Justice Fortas' opinion changed the terms of future debate:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.[130]

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[124] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
[125] Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).
[126] Tinker v. Des Moines School Dist., 393 U.S. 503, 511 (1969).
[127] 393 U.S. 97 (1968).
[128] 393 U.S. 503 (1969).
[129] 393 U.S. at 104 (footnotes omitted).
[130] 393 U.S. at 511.

In light of *Epperson* and *Tinker*, legal scholars slowly began to reevaluate their unquestioned acceptance of values inculcation as a legitimate function of public education. William Van Alstyne, while focusing primarily on the rights of teachers, was the first to recognize that the implications of *Epperson* and *Tinker* imposed constraints on the power of legislatures and school boards "to use the classroom as an instrument of ideological proselytism. . . ."[131] In Van Alstyne's view, the first amendment should shield teachers, students, and even the general public from the use of the curriculum in such a fashion.[132]

In contrast, Stephan Goldstein does not view the Constitution as precluding values inculcation as a function of public education.[133] He argues that "the deliberate inculcation of the right societal values" has long been accepted as a major function of public education:

> This has been evident in the United States since 1647, the year in which the first education act in the American colonies was passed. The Massachusetts Education Act of 1647 explicitly sets forth its purpose to thwart "Satan" by teaching children to read the *Bible* and to educate its youth "not only in good literature, but in sound doctrine." This vision of public education has continued over the years, though the views of what is "sound doctrine" may have varied from time to time and place to place.[134]

Goldstein's historical argument, of course, begs the question of the legitimacy of values inculcation as a function of public education. Bible-reading and prayer were also accepted as major functions of public education for over 300 years, yet the Supreme Court, in *Engel v. Vitale*[135] and *School District of Abington Township v. Schempp*,[136] concluded that they were illegitimate functions, inconsistent with the first amendment's establishment clause. Goldstein dismisses the question of whether values inculcation implicates freedom of expression by a perfunctory reference to *West Virginia State Board of Education v. Barnette*:[137]

> in which the Court, while holding unconstitutional a state-required compulsory flag salute, contrasted the flag salute with the constitutionally valid route to accomplishing the same end of "impos[ing] patriotism and love of country" through "teaching by instruction and study."[138]

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[131] Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841, 856 (1970).

[132] *Id.* at 856-57.

[133] Goldstein, *supra* note 3.

[134] *Id.* at 1350-51 (emphasis in original) (footnotes omitted).

[135] 370 U.S. 421 (1962).

[136] 374 U.S. 203 (1963).

[137] 319 U.S. 624 (1943).

[138] Goldstein, *supra* note 3, at 1351 (footnotes omitted).

It is not clear, however, whether "imposing patriotism" is, in fact, the "same end" as requiring patriotic behavior. A distinction of constitutional significance can be made between governmental efforts to *inspire* patriotism—that is, to influence children discursively to be patriotic (especially during wartime)—and *imposition* of patriotic values directively through state-mandated patriotic activities. *Barnette* expressly addressed the latter practice and held it to be illegitimate.[139] After *Barnette*, government may inspire patriotism, by, for example, encouraging study of patriotic actions by historical individuals, but it may not force children to act patriotically. Goldstein recognizes that government may not make "arbitrary curricular decisions"[140] and he would probably agree with Justice Rehnquist's cheerful concession that a Democratic school board may not constitutionally order removal of all books by Republican authors.[141] Nevertheless, Goldstein's approach, which views the marketplace of ideas model of the first amendment to be inapplicable to public education, fails to address the key question of when a curricular decision becomes so "arbitrary" that society's interest in encouraging freedom of expression outweighs efforts to transmit majoritarian values to public school children. As Howard O. Hunter has pointed out:

> Majoritarian values, as defined by the school board, may not recognize the dignity, worth, and "truth" of values espoused by a minority. If applied with consistency and sophistication, the majoritarian values may indoctrinate students with the idea that certain beliefs are inherently incorrect and may stifle the interest in being different. Thus, schools may fail to fulfill both functions: by inadequately training students in the intellectual decisionmaking processes required of functioning adults in a democratic polity, they fail to transmit knowledge; and by teaching students to become intolerant of minority viewpoints, they fail to inculcate the agreed-upon values of dissent and free expression.[142]

In other words, we must attempt to answer the question: To what extent does freedom of expression curb the state's power to use public education to mold ideological beliefs?

Professor Goldstein's response to this question is that only the political process—not the first amendment—restricts government from using the curriculum to impose orthodox values and beliefs on public school children.[143] This response fails to consider the possibiliy that intolerant or misguided legislatures, supported by substantial majorities of like-minded voters, could require public schools to transmit constitutionally unacceptable values. Segregated schools and religious education in public

[139] 319 U.S. 624 (1943).

[140] Goldstein, *supra* note 3, at 1349.

[141] *See* Board of Educ. v. Pico, 457 U.S. 853, 907 (Rehnquist, J., dissenting). *See also id.*, at 870-71 (Brennan, J.).

[142] Hunter, *supra* note 3, at 64-65.

[143] Goldstein, *supra* note 3, at 1356.

schools have been common enough to indicate that the political process does not always adequately protect minority rights.

Stephen Arons has taken a position at the opposite extreme from that of Goldstein. In his view, protection of minority rights always outweighs inculcation of values: he concludes that "the present political and financial structure of American schooling is unconstitutional."[144] Arons views the first amendment as protecting both the political individual and the "sanctity of human personality and its development from government coercion."[145] Thus, application of the first amendment to public schools requires broadening the freedom to express one's beliefs to include the freedom to form one's beliefs:

> [T]he connection between expression and formation of beliefs is so close they are nearly inseparable. Freedom of expression makes possible the unfettered formulation of belief and opinion in an atmosphere of open exchange unconstricted by government. In turn, the governmentally uncoerced formulation of beliefs and opinions is essential to freedom of expression. If the government were able to use schooling to regulate the development of ideas and opinions by controlling the transmission of culture and the socialization of children, freedom of expression would become a meaningless right; just as government control of expression would make the formation of belief and opinion a state-dominated rather than an individually based process. If the First Amendment protected only the communication and not the formation of ideas, totalitarianism and freedom of expression could be characteristics of the same society. In modern times, the opportunity to coerce consciousness precedes, and may do away with, the need to manipulate expression.[146]

Arons' formulation of first amendment principles as including development as well as expression of beliefs, opinions, world views, and aspects of conscience that constitute individual consciousness correctly requires restrictions on government coercion through schooling.[147] Arons goes too far, however, when he concludes that this formulation of the first amendment prohibits governmental involvement in education because he does not admit the compelling nature of governmental interests in transmitting society's knowledge, learning, and fundamental values to the next generation of Americans. By viewing education as an essentially private, as opposed to public function, Arons' approach would likely result in a parochial, xenophobic society without shared knowledge, values, and traditions. In short, the privitization of education would raise serious concerns about the viability of our civilization.

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[144] S. ARONS, *supra* note 4, at 198. *See also*, Arons & Lawrence, *supra* note 3.

[145] S. ARONS, *supra* note 4, at 202.

[146] *Id.* at 205-06.

[147] *Id.* at 206.

Howard O. Hunter has recently offered a less drastic approach to the problem.[148] Hunter recognizes that the Constitution imposes restraints on curriculum choices, yet he views the restraint as primarily procedural rather than substantive. His approach would give the teacher who objects to a particular curriculum topic the right to choose not to teach that topic. Thus, a school board should be required to make a reasonable accomodation for a teacher who objects, for example, to teaching the theory of evolution because of his or her religious beliefs. Such an accomodation would protect the teacher's personal autonomy while ensuring that students are exposed to generally-accepted scientific theories.[149]

On the other hand, if it is the school board or the legislature that objects to a particular idea (or favors including a particular idea in the curriculum), Hunter would take a systemic approach and focus on the right of students to be free from false indoctrination.[150] In this view, "a state that compels attendance at school cannot subject students to ideological propaganda that imposes conformity, encourages intolerance, or presents a factually skewed view of the world."[151] Hunter concludes that student interests in freedom from ideological propaganda would be adequately protected by adopting minimal procedural safeguards, such as fair notice of policies and policy changes, and granting those affected an opportunity to be heard. He would allow judicial interference only as a last resort.[152]

Hunter's analysis is fundamentally sound in that it recognizes and attempts to balance the competing interests. It fails, however, to explore adequately the nature of and limitations on the substantive first amendment interest in freedom from "false indoctrination." While Hunter mentions tolerance, diversity, and factual accuracy as examples of consensus values that schools should inculcate, he does not explain why these values in particular are subject to first amendment protection while other values may not be. Mere consensus is not a sufficient criterion to discern the legitimacy of teaching specific values because that standard is subject to the same inadequacies as relying solely on the political process to determine curriculum: it is subject to abuse of minorities by political majorities. A complete theory of constitutional limitations on values inculcation must give school boards, legislatures, and courts some criterion to determine when inculcation becomes indoctrination; otherwise, pro-

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[148] Hunter, *supra* note 3.
[149] *Id.* at 69-70.
[150] *Id.* at 72.
[151] *Id.* at 73.
[152] *Id.* at 76.

viding procedural remedies becomes meaningless. Only when it is possible to define clearly the extent of permissible inculcation of values can students' interests in developing their own understandings of reality be adequately protected. Such a standard emerges when we focus on the nature of the values that the state is attempting to inculcate.

As stated earlier, the inculcative function of education is necessary to ensure that the common values and beliefs of a society are transmitted to the next generation.[153] The problem, however, is that in a diverse, complex society such as the United States, it is difficult to identify the common set of values and beliefs that should be transmitted by the socialization process. Almost every value is objectionable to someone. Nevertheless, if the inculative function is to be more than merely a means of transmitting the prejudices of a particular community, it is essential to identify some set of values that are basic to American society as a whole.

An obvious place to look for these values is in the basic contract that created the nation in the first place: the Constitution. American society has already agreed that the values inherent in the Constitution are desirable. The Preamble explicitly identifies specific values that the Constitution was designed to protect: justice; domestic tranquility; defense; promotion of the general welfare; and liberty. Other values are either implicit throughout the document and its amendments, or presupposed by it: sovereignty of the people; majority rule; individual autonomy; privacy; due process; equality before the law; and the sanctity of private property. It is certainly possible to identify yet other values, many of which are explicitly identified in state constitutions as well.[154]

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[153] *See supra* note 18 and accompanying text. In contrast, Professor Tyll van Geel has recently argued that empirical studies fail to establish that values inculcation in public schools can serve governmental goals. van Geel, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197, 262-87 (1983). As a result, he concludes that government has no compelling interest in values inculcation. *Id.* at 297. Even assuming that Professor van Geel has drawn the correct conclusion from the empirical data, however, it does not follow as a matter of political philosophy that some minimal inculcation of values should not remain a compelling interest of a society that desires to maintain a common stratum of belief and values. Professor van Geel's conclusion requires that we reject, as does Stephen Arons, the constitutionality of public education in the first place. *Cf. supra* notes 144-47 and accompanying text. A better conclusion is that, given the questionable efficacy of values inculcation in the public schools, the scope of that inculcation should be restricted to transmitting only those values necessary to the continued existence of society.

[154] For example, several state constitutions recognize the value of knowledge, CAL. CONST. art. IX, § 1; IND. CONST. art. VIII, § 1, MASS. CONST. § 91; MO. CONST. art. IX, § 1(a); N.H. CONST. pt. 2, art. 83; R.I. CONST. art XII, § 1, intelligence, CAL. CONST. art. IX, § 1; IDAHO CONST. art. IX, § 1; MINN. CONST. art. XIII, § 1; MO. CONST. art. IX, § i(a), virtue, ARK. CONST. art. XIV, § 1; VT. CONST. Ch. II, § 8, wisdom, MASS. CONST. § 91, and patriotism, N.D. CONST. art. VIII, § 1. Nevertheless, if the values identified in the state constitution conflict with those of the federal, the federal constitutional values prevail under the Supremacy Clause. Thus, attempts to inculcate religious values in Michigan or North Carolina, which expressly identify religion as "necessary to good

Government has a compelling interest in transmitting these values to children, thereby allowing the constitutional contract to continue for yet another generation. Because the people have already agreed to accept constitutional values, socialization of children to those values—either directively or discursively—does not place impermissible burdens on students' interests in freedom of expression.[155] It is therefore a proper purpose of public education to require children to believe in constitutional values. Furthermore, acceptance of constitutional values requires rejection of contraconstitutional values. Thus, not only would schools be prohibited from practicing racial segregation or otherwise inculcating racism, but they have a duty to transmit values of human equality.

But what of other values neither implicit nor explicit in the Constitution? Does teaching values such as honesty, respect for authority, thrift, or integrity infringe on students' constitutional interests in developing their own values and beliefs? The answer depends on the method school authorities use to teach these values.

The discursive method of teaching nonconstitutional values is compatible with first amendment principles. A method of teaching based on dialogue and undominated inquiry does not measurably affect any interest in freedom of expression that students may have. Even though the end result of teaching nonconstitutional values discursively would be to present the values to the schoolchildren, it does so with minimal intrusiveness and coercion because it does not require students to believe in them.

In contrast, the directive method, by its very nature, requires coercion and imposition of beliefs on unreceptive children. Students' access to information and ideas is effectively restricted when desired beliefs are rewarded and undesired beliefs are punished. Serious questions about the effect of directive education on individual autonomy and the development of tolerance and pluralism have not been resolved.[156] As a result,

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government and the happiness of mankind", MICH. CONST. art. VIII, § 1; N.C. CONST., art. IX, § 1, would run afoul of the first amendment's establishment clause, and would therefore be invalid. *See* Stone v. Graham, 449 U.S. 39 (1980) (statute requiring posting a copy of the Ten Commandments on the wall of every public school classroom violated the establishment clause).

[156] Arguably, this conclusion assumes that an institution such as the public schools can successfully transmit values in the first place. Empirical research has failed to demonstrate that values can even be effectively inculcated in public school students. *Compare* Langton & Jenning, *Political Socialization and the High School Civics Curriculum in the United States,* 62 AM. POL. SCI. REV. 852 (1968) (study indicating that civics curriculum is not the source of political socialization) *with* Litt, *Civic Education, Community Norms, and Political Indoctrination*, 28 AM. SOC. REV. 69 (1963) (study indicating that civics curriculum has some effect on political attitudes of high school students, although students in different socioeconomic settings are exposed to different political roles). *See also* THE POLITICAL IMAGINATION (E. Litt, ed. 1966) (students are receptive to textbooks that portray a political world confirmed by their own observation or other socialization). *Cf.* Anyon,

directive teaching of nonconstitutional values appears to cross the line dividing legitimate inculcation of consensus values from illegitimate indoctrination of majoritarian values.

Given the compatibility of the discursive method of teaching values with freedom of expression and the relative incompatibility of directive teaching, it seems clear that any inculcation of nonconstitutional values should be done primarily by means of the discursive approach. By definition, nonconstitutional values are not essential to the continued existence of democratic society. Nevertheless, such values as honesty, truthfulness, and respect for others are desirable values in any society. They should not be excluded from the public school curriculum as long as they can be taught without coercing students into actually believing in them. Such a view does not preclude exposing students to these values, to arguments for them, and to the moral and logical consequences of rejecting them. For example, truthfulness is a necessary prerequisite for communication.[157] And communication is necessary to attain the first amendment goals of discourse, knowledge, and development of self-controlled citizens. But use of the directive approach to teaching truthfulness is probably not desirable either psychologically, educationally, or constitutionally.

The distinction between directive and discursive methods of values inculcation fits nicely into the substantive due process analysis proposed in this article. Freedom of expression disables government from distorting the process of inquiry by dominating an individual's access to information and ideas useful in the pursuit of a better understanding of reality.

Ideology and United States History Textbooks, 49 HARV. EDUC. REV. 361 (1970) (study of seventeen widely-used secondary-school U.S. History textbooks reveals content bias in favor of dominant socio-economic group in the United States, underrepresentation of views of minorities and working class); Lightfoot, *Politics and Reasoning: Through the Eyes of Teachers and Children*, 43 HARV. EDUC. REV. 197 (1973) (research concluding that social and cognitive development in black children reflect differences in teachers' political ideology and educational philosophy and practice); Saario, Tittle & Jacklin, *supra* note 4 (study of elementary school basal readers, achievement tests, and differential curriculum requirements for males and females reveals that schools foster passivity, conformity, and dependency among female students). *See generally* SCHOOLING AND THE RIGHTS OF CHILDREN (V. Haubrich & M. Apple eds. 1975); R. HESS. & J. TORNEY, THE DEVELOPMENT OF POLITICAL ATTITUDES IN CHILDREN (1967); VALUES IN AN AMERICAN GOVERNMENT TEXTBOOK, *supra* note 3; N. MCCLUSKEY, *supra* note 3; P. MINUCHIN, B. BIBER, E. SHAPIRO, & H. ZIMILES, THE PSYCHOLOGICAL IMPACTS OF SCHOOL EXPERIENCE (1969); J. SCHAFFARZICK & G. SYKES, VALUE CONFLICTS AND CURRICULUM ISSUES (1979); Dreeben, *The Contribution of Schooling to the Learning of Norms*, 37 HARV. EDUC. REV. 211 (1967); Jaros & Canon, *supra* note 3; van Geel, *supra* note 153.

Given that the research casts doubt on the efficacy of inculcating values in the public schools, it is not surprising that numerous educators and sociologists have recently begun to question the desirability of using the public schools as media for inculcating values. *See, e.g.*, I. ILLICH, *supra* note 3; C. Jencks, *supra* note 4; H. KOHL, *supra* note 4; N. POSTMAN & C. WEINGARTNER, *supra* note 3; C. SILBERMAN, *supra* note 4; PIVEN: *supra* note 19; Postman, *The Politics of Reading*, 40 HARV. EDUC. REV. 244 (1970).

[156] Sher & Bennett, *Moral Education and Indoctrination*, 79 J. PHIL. 665, 667-675 (1982).

[157] *See* Rachels, *supra* note 26, at 679.

Public education threatens children's interests in freedom of expression by attempting to influence the development of particular ideas and values. Certain values—those embedded in the constitution—are necessary to the continuation of a democratic society; therefore, teaching them to students is a compelling state interest that outweighs the infringement of students' interests in freedom of expression. In contrast, the state has no legitimate interest at all in attempting to teach contraconstitutional values. Nonconstitutional values, however, are more problematic. Many are so noncontroversial that challenges to teaching them should be rare. Given the sensitive nature of curricular decisions, school authorities should have the benefit of a presumption that their curricular decisions were based on value-neutral educational considerations. If a plaintiff were able to meet his burden of pleading and proof of indoctrination, however, the school authorities could defend on the ground that teaching the value did not intrude on freedom of expression where the teaching was done discursively.

Mark Yudof has examined and rejected the use of judicial distinctions between constitutional and nonconstitutional values in the context of imposing direct first amendment limits on government speech. While recognizing that government speech may, through indoctrination and withholding of information, undermine the power of the citizenry to judge intelligently and to communicate those judgments, he concludes that a direct constitutional limitation of government expression would be unworkable.[158] For example, courts would be required to distinguish between propaganda and education by focusing on the content of the message and the values contained therein:

> The courts could be set up in the business of distinguishing democratic from nondemocratic values, treated only the latter as propaganda, and hence as unconstitutional. Propaganda about tolerance, majority rule, electoral participation, and respect for minorities would not be treated as propaganda at all.
>
> Perhaps any advocacy by government of unconstitutional values (e.g., involuntary servitude, segregated schools, unreasonable searches) should be curbed. What government does not have the power to do within the constitutional system, it should not have the power to say.[159]

Yudof rejects this approach because "the lines become fuzzy"[160] and it would preclude government from disagreeing with Supreme Court interpretations of the Constitution, perhaps to the extent that it might preclude amending the Constitution.[161]

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[158] M. YUDOF, *supra* note 22, at 166-73. *See also* Yudof, *supra* note 51, at 897-98.
[159] M. YUDOF, *supra* note 22, at 167 (footnotes omitted).
[160] *Id.*
[161] *Id.*

Yudof's concerns appear to be unfounded. Application of the distinction between constitutional and nonconstitutional values would be no more unworkable than any other form of constitutional adjudication. Lawyers and judges live and work with "fuzzy" standards all the time. Indeed, Yudof himself proposed a workable standard: whether the Constitution permits the government to do that which it is advocating. For example, the Constitution prohibits a legislature from passing laws whose purpose is to discriminate on the basis of race. It would make no sense to allow a legislature to advocate actions that would fulfill an identical purpose. Similarly, because the Supreme Court in *Barnette* held that government may not require individuals to act patriotically, no legitimate purpose would be served by allowing government to advocate patriotism to the exclusion of other political values.[162] In short, the substantive provisions of the Constitution would provide an easily manageable standard by which courts could distinguish constitutional from nonconstitutional or contraconstitutional values.[163]

Furthermore, when school authorities elect to inculcate values in children, courts *must* distinguish between propaganda and education because values formation is at the heart of the activities protected from majoritarian control. It is a particularly judicial function to make this distinction. In the political arena, communications with which the majority disagrees are generally characterized as "propaganda." The interests of minorities are not protected when majorities decide what is "truth" and what is "propaganda." For example, in the early 1980's, the majority of the Arkansas legislature, as well as the majority of the people of Arkansas, apparently believed that "creation-science" was "true" science, and should therefore be taught in the public schools of that state.[164] It took a federal district court to say "[t]he application and content of First Amendment principles are not determined by public opinion polls or by a majority vote."[165] Only courts can prevent ideological orthodoxy from developing in this way.

Allowing courts to decide whether inculcating a particular value is a legitimate state function need not preclude government from disagreeing with those decisions, as Yudof fears. Individuals in government could still voice their disagreements with court decisions and legislatures could

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[162] *See* Kamenshine, *supra* note 19, at 1133.

[163] Whenever the Supreme Court imposes limits on a state's actions, it does so because it recognizes that the Constitution views some values as being more legitimate, in the constitutional sense, than other values. The same inappropriate values that may not motivate state action (e.g., racial discrimination) would be just as inappropriate for the state to attempt to inculcate in children in its care.

[164] *See* McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255, 1274 (E.D. Ark. 1982).

[165] *Id.*

still call for constitutional amendments. The only effect would be to invalidate governmental actions that would require individuals to believe in nonconstitutional values.

VI. Application of the Model of Analysis

In recent years, critics of public education have charged that public schools not only fail to prepare students for their role as knowledgeable adults, but that they also fail to fulfill their function of inculcating values.[166] Attempts to meet the challenge of inculcating values have generally failed either because the values chosen to be taught were essentially religious values (thus running afoul of the establishment clause) or the community was unable to agree on what values should be taught. In order to avoid controversy, teachers, administrators, and textbook authors and publishers have hesitated to address the question of the proper role of values inculcation in the public school curriculum, doing so only when forced by angry parents or legislators. The result of this ad hoc approach to values inculcation is that public education has become a focus of political, religious, social, and economic strife, subject to hysteria and demagoguery. This merely compounds the problem: where adults are unable to agree on what values should be taught, children are understandably confused and cynical about the entire socialization process.

The solution is to develop a systematic and consistent approach to defining the place of values inculcation in the public schools. But the solution must also be workable. That can only be determined by studying how the model would operate when used to resolve actual controversies. The remainder of this article will address that problem in two central concerns of public education: course mandates and the selection (and removal) of instructional materials.[167]

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[166] *See, e.g.*, Williams, *Reagan Says Schools Need Discipline, Not More Federal Money*, Washington Post, Dec. 8, 1983, § 1, at A2.

[167] The model of analysis proposed in this article could also be useful in resolving other educational controversies. For example, states have recently begun to attempt to close fundamentalist Christian schools that operate without state accreditation. It would appear, however, that accreditation is not relevant to the question of whether the schools should remain open: parents should be free to choose to send their children to specialized schools (which tend to be ethnic, religious, or foreign language schools) regardless of whether those schools are accredited. If the parents fail to send their children to an accredited school in addition to an unaccredited specialized school, the proper remedy would be to prosecute the parents under truancy statutes—not to close the school.

On the question of accreditation itself, however, the approach advocated in this Article indicates that courts should hold that the state's accreditation power is limited to ensuring that children obtain a minimal epistemic education and are subject to inculcation of at least constitutional values. State interests beyond those are not sufficiently compelling to overcome the free exercise interests of

A. Course Mandates

State legislatures have historically taken great interest in the public school curriculum.[168] Nearly every state specifies that certain courses of study be included in the curriculum. The courses most commonly required include instruction in the dangers of alcohol, tobacco, and drugs (forty-six states); the United States Constitution (forty-four states); government or civics (thirty-seven states); health and sanitation (thirty-five states); United States history (thirty-five states); state history (thirty-one states); and physical education (thirty-one states).[169] In some cases, legislatures have responded to pressure groups who have lobbied to require such specialized topics in the curriculum as agriculture; humane treatment of animals; truth, honesty, and morality; Bird Week; respect for parents; Bible reading; meditation; contributions of minorities; and the dangers of Communism.[170] Still other courses, while not required, have received specific legislative authorization, often with restrictions on the manner of instruction. Examples of these courses include sex education; military science; consumer education; and firearms training.[171] Finally, a few states have prohibited teaching certain subjects altogether, for example, religious education, birth control information, or adverse reflections on any race, religion, or nationality.[172]

Many of these curriculum laws are obviously based upon legislative desires to inculcate certain values in children, often at the expense of other values. For example, the motivation for mandating courses in the United States Constitution is to further patriotism and an understanding of the democratic system of government. Occasionally, however, students or parents object to the values represented by mandated courses, and seek either to release the student from the course or to prevent its teaching altogether. In recent years, many of these challenges have centered on attempts to teach the theory of evolution, citizenship education, and sex education.

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students, parents, and school authorities. On the other hand, state accreditation should be denied where sectarian schools inculcate contraconstitutional values. *Cf.* Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

[168] As early as 1851, California required courses in United States and state constitutions and governments. 1851 Cal. Stats. pp. 499-500. *See generally* Shelton, *supra* note 103.

[169] Shelton, *supra* note 103, at 504-05.

[170] *Id.*

[171] *Id.* at 489.

[172] *Id.* at 490.

1. Theory of evolution.

Ever since the publication of the *Origin of Species*[173] in 1859, opponents of the theory of evolution have viewed it as repudiating their fundamental religious values.[174] Their earliest efforts to reject evolutionary theory involved statutory prohibitions on teaching it in the public schools.[175] These efforts culminated in the celebrated Scopes "Monkey Trial" in Tennessee in 1923.[176]

Not until 1968, however, did the United States Supreme Court decide the question of whether a statutory ban on teaching the theory of evolution violated the United States Constitution. In *Epperson v. Arkansas*,[177] the Court struck down the statute on the ground that it constituted an establishment of religion in violation of the first amendment.[178]

Subsequent efforts to limit teaching the theory of evolution have also been rejected by the courts. In *Wright v. Houston Independent School District*,[179] the court rejected a claim that teaching the theory of evolution violated the free exercise of plaintiff's religion.[180] In *Crowley v. Smithsonian Institution*[181] the court rejected a claim that governmental depiction of the theory of evolution constituted establishment of the

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[173] C. DARWIN, ON THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION (1859).

[174] *See e.g.*, M. FREDERICK, RELIGION AND EVOLUTION SINCE 1859 79-84 (1935); D. NELKIN, THE CREATION CONTROVERSY 25-37 (1982); D. NELKIN, SCIENCE TEXTBOOK CONTROVERSIES AND THE POLITICS OF EQUAL TIME 9-20 (1977); C. RUSSETT, DARWIN IN AMERICA: THE INTELLECTUAL RESPONSE 1865-1912 (1976); Pfiefer, *United States* in THE COMPARATIVE RECEPTION OF DARWINISM 168 (T. Glick, ed. 1974).

[175] *See e.g.*, Initiated Act No. 1, 1929 Ark. Acts, §§ 1, 2, quoted in and invalidated by Epperson v. Arkansas, 393 U.S. 97, 99 n.3 (1968); MISS. CODE ANN. §§ 6798, 6799 (1942), quoted in and invalidated by Smith v. State, 242 So. 2d 692, 693 n.1 (Miss. 1970); TENN. CODE ANN. § 49-1922 (1966) (repealed 1967).

[176] Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927). John Scopes, a high school teacher in Rhea County, Tennessee, was convicted of teaching the theory of evolution in violation of 1925 Tenn. Pub. Acts, Ch. 27, which prohibited the teaching of any theory that claimed that man had descended from a lower order of animals. The Supreme Court of Tennessee upheld the constitutionality of the statute because it did not require teaching the religious doctrine of creationism, although they did reverse Scope's conviction on the ground that the jury, not the judge, should have imposed the $100 fine. Scopes v. State, 154 Tenn. at 120-21, 289 S.W. at 367.

[177] 393 U.S. 97 (1968).

[178] *Id.* at 106-07. Justice Black concurred on the ground that the statute was unconstitutionally vague.

[179] 366 F. Supp. 1208 (S.D. Tex. 1972), *aff'd per curiam*, 486 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974).

[180] *Id.* at 1210. The Supreme Court has held that in order to establish a violation of the free exercise clause, plaintiffs must show that an enactment has a coercive effect as it operates against the practice of their religion. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 223 (1963). *See also* Willoughby v. Stever, No. 1574-72 (D.D.C. May 18, 1973), *aff'd mem.*, 504 F.2d 271 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 927 (1975) (rejecting claim that use of textbooks presenting the theory of evolution violated students' religious beliefs).

[181] 636 F.2d 738 (D.C. Cir. 1980).

religion of secular humanism. In *Daniel v. Waters*,[182] the court invalidated a statute requiring public schools to give equal emphasis to all theories of origins because it exhibited a clear preference for the Biblical version of creation.[183] Finally, the court in *McLean v. Arkansas Board of Education*[184] struck down a statute requiring balanced treatment for "creation-science" and the theory of evolution on the ground that "creation-science" was in reality a religious belief.[185]

The common thread in the cases since *Epperson* has been judicial recognition that popular opposition to the theory of evolution is essentially sectarian and that efforts to prohibit or limit its teaching in the public schools constitute an attempt to inculcate students with religious values and beliefs. Nevertheless, courts have failed to recognize the philosophical values underlying the objections to the theory of evolution: that the theory of evolution—and the scientific method in general—embodies a mechanistic, non-spiritual understanding of reality that many people find offensive.[186] Thus, the constitutional objections to teaching the theory of evolution involve not only the religion clauses of the first amendment, but also the general guarantee of freedom of expression.

Under this view, a plaintiff who attempted to enjoin teaching the theory of evolution could claim that it interferes with students' access to information and ideas useful in their pursuit of a better understanding of reality[187]—namely, a non-scientific understanding of reality. The court would then be forced to determine whether the values advanced by teaching the theory of evolution—secularism and scientific literacy—are values implicit or explicit in the Constitution.

A court would be justified in concluding that both values underlying a decision to teach the theory of evolution involve inculcation of constitutional values. The establishment clause of the first amendment expressly prohibits the government from establishing religion, thus requiring the government to have nonsectarian, i.e., secular, reasons for all of its actions. Implicit, therefore, in the establishment clause is adoption of the value of secularism. Furthermore, the Constitution expressly promotes

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[182] 515 F.2d 485 (6th Cir. 1975). *See also* Steele v. Waters, 527 S.W. 2d 72 (Tenn. 1975).

[183] 515 F.2d at 489.

[184] 529 F. Supp. 1255 (E.D. Ark. 1982).

[185] *Id.* at 1272. *Cf.* Keith v. Louisiana Dept. of Educ., 553 F. Supp. 295 (M.D. La. 1982) (Suit to uphold Balanced Treatment Act dismissed for lack of subject-matter jurisdiction). *See generally* Note, McLean v. Arkansas Board of Education: *Finding the Science in "Creation Science"*, 77 Nw. U.L. Rev. 374 (1982) [hereinafter cited as Northwestern Note].

[186] *See generally* D. Nelkin, The Creation Controversy 165-83 (1982).

[187] Past challenges in similar cases have formulated the claim as a violation of academic freedom. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, (1968); McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255, 1273 (E.D. Ark. 1982).

the value of scientific literacy by granting Congress the authority to "promote the Progress of Science. . . ." through copyright and patent protection.[188]

In contrast, the validity of a legislative effort to teach creationism would depend on the educational context of the requirement. An effort to teach "scientific creationism" should fail because creationism is a religious, not a scientific, doctrine.[189] The only value served by teaching creationism in a science class is to advance a particular view of the creation of the world—that found in the Book of Genesis: it makes no sense to advance a non-scientific view of science. Legitimate constitutional values may be served, however, by introducing students to creationism in the context of the humanities. It would emphasize the importance of religion to human beings, a value implicit in the free exercise clause of the first amendment; in conjunction with creation myths from other cultures, it would advance respect for other cultures, a value implicit in the Equal Protection Clause of the Fourteenth Amendment; and it could illustrate the limitations of the scientific method, thus providing students with information and ideas useful in the pursuit of a better understanding of reality.[190]

2. Citizenship education.

Forty-eight of the fifty states require public schools to provide some type of citizenship education. Courses in this area include the study of United States and state history and constitutions, the contributions of minorities, safety, government and civics, patriotic exercises, citizenship, flag etiquette, the dangers of communism, voting procedures, the free enterprise system, respect for the law, fire prevention, and health and sanitation.[191]

Challenges to citizenship education have met with little success, primarily because the values it seeks to inculcate represent those constitutional values basic to the inculcative function in the first place. For example, in *Ambach v. Norwick*,[192] the Supreme Court upheld a state requirement that an alien must manifest an intention to apply for citizenship before receiving permanent certification as a teacher. The Court

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[188] U.S. CONST. art. I, § 8, cl. 8.

[189] *See* NORTHWESTERN Note, *supra* note 185, at 396-98.

[190] *Id.* at 401 n.164. *Cf.* School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963) ("first amendment does not forbid study of Bible or of religion, when presented objectively as part of a secular program of education. . . .").

[191] Shelton, *supra* note 103, at 504.

[192] 441 U.S. 68 (1979).

noted that "a state may properly regard all teachers as having an obligation to promote civic virtues and understanding in their classes, regardless of the subject taught."[193]

Nevertheless, while the state may require citizenship instruction in the public schools, it may violate the first amendment when it requires patriotic behavior. In *West Virginia State Board of Education v. Barnette*,[194] the Supreme Court invalidated a State Board of Education requirement for all children to participate in a daily flag salute. While the plaintiffs in *Barnette* were Jehovah's Witnesses who objected to the flag salute by their children on religious grounds, the Court took a broader view of the interests involved and held that requiring flag salutes infringed on plaintiffs' interests in freedom of expression. "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 or force citizens to confess by word or act their faith therein."[195]

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[193] *Id.* at 80.

[194] 319 U.S. 624 (1943), *overruling* Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

[195] 319 U.S. at 642. *See also* Farrington v. Tokushige, 273 U.S. 284 (1926) (territorial legislature may not regulate private school curriculum to promote Americanism); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (state may not require all children to attend public schools in order to promote cultural homogeneity); Meyer v. Nebraska 262 U.S. 390 (1923) (state may not outlaw teaching of foreign languages to promote cultural homogeneity); Russo v. Central School Dist. 469 F.2d 623 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973) (ordering reinstatement of teacher who refused, as a matter of conscience, to salute the flag). *But cf.* Palmer v. Chicago Bd. of Educ., 603 F.2d 1271 (7th Cir. 1979) (refusing to order reinstatement of teacher dismissed for refusing on religious grounds to take part in patriotic songs and exercises).

The Seventh Circuit in *Palmer* distinguished *Barnette* on the ground that in *Barnette* it was students, not the teacher, who were required to participate in a patriotic pledge contrary to their beliefs. 603 F.2d at 1273. The court viewed the distinction as important because a teacher "has no constitutional right to require others to submit to her views and to forego a portion of their education. . . ." *Id.* at 1274. The court concluded that "[b]ecause of her religious beliefs, plaintiff would deprive her students of an elementary knowledge and appreciation of our national heritage." *Id.*

The court thus viewed the teacher's refusal to follow the prescribed curriculum concerning patriotic matters as interfering with parents' interests in the content of their children's education and with students' access to information and ideas useful to pursue a better understanding of reality. Furthermore, the court assumed that the inculcation of patriotism fulfilled a legitimate constitutional value: "[S]ome of the students may be called upon in some way to defend and protect our democratic system and constitutional rights, including plaintiff's religious freedom. That will demand a bit of patriotism." 603 F.2d at 1274.

Nevertheless, the court's unquestioning assumption that patriotism was a legitimate constitutional value appropriate for the public school curriculum appears unfounded after *Barnette*, where the Supreme Court concluded that patriotic exercises are not necessary to the continued existence of a constitutional system of government: "To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds." 319 U.S. at 641.

The Court's distinction between citizenship instruction and patriotic behavior, while it goes far in protecting individuals' interests in free expression, fails to completely protect students' access to information and ideas useful in the pursuit of a better understanding of reality. Some citizenship education requirements appear to go beyond inculcation of the values inherent in the democratic system of government by attempting to instill in students particular orthodox political and ideological beliefs. For example, state requirements that schools must teach the evils of communism[196] or the benefits of the free enterprise system[197] seem to be attempts to cast a "pall of orthodoxy" on the classroom[198] by furthering values neither explicit nor implicit in the Constitution. Teaching the "evils" of communism requires not merely that students understand communist doctrine, but that they hold a particular belief with respect to it. Such a requirement constitutes an externally imposed understanding of reality antithetical to freedom of expression. Similarly, the free enterprise system is not inherent in the Constitution: should the electorate so decide, nothing would prevent establishment of a socialistic economic system in the United States so long as the government abided by the requirements of due process. Again, a state requirement that a particular economic system be taught in a particular way constitutes indoctrinative propaganda restricting the development of and adherence to alternative understandings of economic reality.

3. Sex education.

Since 1969, courts have been faced with numerous parental challenges to requirements that public school students take courses in sex education. These challenges have generally alleged that sex education in the public schools violates the free exercise of parents' religion; constitutes an establishment of a secular religion; invades the privacy of students,

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[196] *See* ALA. CODE § 16-40-3 (1975); FLA. STAT. ANN. § 233.064 (West 1977); MISS. CODE ANN. § 37-13-13 (1972); NEB. REV. STAT. § 79.213 (1976).

Another Alabama statute provides:

> In addition to all other laws which forbid the use of textbooks in the public schools of the state by authors who are members of the communist party or members of communist front organizations, all contracts with publishers for furnishing state-owned textbooks shall stipulate that the author or authors of such book or books is not a member of the communist party or known advocate of communism or Marxist socialism and is not a member of the communist party or a communist front organization.

ALA. CODE § 16-36-10 (1975).

[197] *See, e.g.*, ARIZ. REV. STAT. ANN. § 15-711 (Supp. 1982); FLA. STAT. ANN. § 233.0641 (West 1977); NEV. REV. STAT. § 389.080 (1981); TENN. CODE ANN. § 49-1928 (1977); TEX. EDUC. CODE ANN. § 21.101(a)(9) (Vernon Supp. 1982); UTAH CODE ANN. § 53-14-7.5 (1982).

[198] In Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967), the Court stated that "the First Amendment . . . does not tolerate laws which cast a pall of orthodoxy over the classroom."

parents, and the family unit; and infringes on the parents' interest in teaching their children about sex at home. The challenges have all been unsuccessful.[199]

Where the course is not compulsory, courts have rejected free exercise claims on the ground that the course involves no coercion of religious beliefs and practices.[200] Courts have rejected free exercise claims even where the course is compulsory, holding that the state's interest in public health outweighs parents' free exercise claims.[201] Courts also rejected establishment clause challenges on the grounds that secularism is not a religion.[202] Privacy claims have also been unsuccessful in overcoming what courts have viewed as a compelling state interest in public health.[203] Finally, where parents attempted to challenge the course as an infringement of their right to teach their children about sexual matters themselves, the court held that there was no authority for the existence of such a constitutional right.[204]

Under traditional modes of analysis, judicial reluctance to invalidate sex education courses seems appropriate. But as in the case of the theory of evolution, parental objections to sex education course often result

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[199] *See, e.g.*, Davis v. Page, 385 F. Supp. 395 (D.N.H. 1974); Cornwell v. State Bd. of Educ., 314 F. Supp. 340 (D. Md. 1969), *aff'd mem.*, 428 F.2d 471 (4th Cir.), *cert. denied*, 400 U.S. 942 (1979); Citizens for Parental Rights v. San Mateo County Bd. of Educ., 51 Cal. App. 3d 1, 124 Cal. Rptr. 68 (1975), *appeal dismissed*, 425 U.S. 908, *reh'g denied*, 425 U.S. 1000 (1976); Hopkins v. Hamden Bd. of Educ., 29 Conn. Supp. 397, 289 A.2d 914 (1971); Medeiros v. Kiyosaki, 52 Hawaii 436, 478 P.2d 314 (1970); Holboth v. Greenway, 52 Mich App. 682, 218 N.W.2d 98 (1974); Valent v. New Jersey State Bd. of Educ., 114 N.J. Super. 63, 274 A.2d 832 (Ch. Div. 1971). *See also* Mercer v. Michigan State Bd. of Educ., 379 F. Supp. 580 (E.D. Mich. 1974), *aff'd*, 419 U.S. 1081 (1975) (upholding statute prohibiting teaching about birth control in public schools). *See generally* Annot., 82 A.L.R.3d. 579 (1978).

[200] Citizens for Parental Rights v. San Mateo County Bd. of Educ., 51 Cal. App. 3d 1, 124 Cal. Rptr. 68 (1975); Medeiros v. Kiyosaki, 52 Hawaii 436, 478 P.2d 314 (1970); Hobolth v. Greenway, 52 Mich. App. 682, 218 N.W.2d 98 (1974).

[201] Davis v. Page, 385 F. Supp. 395 (D.N.H. 1974); Cornwell v. State Bd. of Educ., 314 F. Supp. 340 (D. Md. 1969), *aff'd mem.*, 428 F.2d 471 (4th Cir.), *cert. denied*, 400 U.S. 942 (1970); Hopkins v. Hamden Bd. of Educ., 29 Conn. Supp. 397, 289 A.2d 914 (1971). *Cf.* Prince v. Massachusetts, 321 U.S. 158 (1943) (upholding state's power to prohibit child labor despite guardian's religious objections).

[202] Cornwell v. State Bd. of Educ., 314 F. Supp. 340 (D. Md. 1969), *aff'd mem.*, 429 F.2d 471 (4th Cir.), *cert. denied*, 400 U.S. 942 (1970). Citizens for Parental Rights v. San Mateo County Bd. of Educ., 51 Cal. App. 3d 1, 124 Cal. Rptr. 68, *appeal dismissed*, 425 U.S. 908, *reh'g denied*, 425 U.S. 1000 (1976).

[203] Citizens for Parental Rights v. San Mateo County Bd. of Educ., 51 Cal. App. 3d 1, 124 Cal. Rptr. 68 (1975), *appeal dismissed*, 425 U.S. 908, *reh'g denied*, 425 U.S. 1000 (1976); Hopkins v. Hamden Bd. of Educ., 29 Conn. Supp. 397, 289 A.2d 914 (1971); Medeiros v. Kiyosaki, 52 Hawaii 436, 478 P.2d 314 (1970).

[204] Cornwell v. State Bd. of Educ., 314 F. Supp. 340 (D.C. Md. 1969), *aff'd mem.*, 428 F.2d 471 (4th Cir.), *cert. denied*, 400 U.S. 942 (1970); Citizens for Parental Rights v. San Mateo County Bd of Educ., 51 Cal. App. 3d 1, 124 Cal. Rptr. 68 (1975), *appeal dismissed*, 425 U.S. 908, *reh'g denied*, 425 U.S. 1000 (1976); Hopkins v. Hamden Bd. of Educ., 29 Conn. Supp. 397, 289 A.2d 914 (1971).

from a particular understanding of reality that finds the course intellectually and morally distasteful.[205] Such philosophical objections should require a court to examine whether the course infringes on students' interests in freedom of expression.

The basis of the parents' claim is that sex education courses conflict with values parents are attempting to transmit to their children, particularly values of chastity and rejection of birth control. It is not clear, however, that sex education courses do conflict with either of these values. A claim that a sex education course conflicted with parental inculcation of chastity should allege that the course *as taught* promoted sexual activity. In actual practice, however, most sex education courses are taught discursively; they tend to teach the virtues of abstinence, or at least attempt to remain neutral on the subject.[206] Similarly, an objective presentation of methods of birth control does not necessarily conflict with any parental or religious rejection of the morality of actually using birth control.[207]

Even if plaintiffs were able to demonstrate an actual conflict between their values and a sex education course, however, a court would be justified in concluding that the values underlying the course—a concern for the general health and welfare of the population—are essentially constitutional values. While the first amendment's protection of an individual's freedom of expression tends to preempt the state's police power interest in protecting public morality, it has no effect on state regulation of public health.[208] Thus, sex education courses do not appear to infringe

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[205] *Cf.* Davis v. Page, 385 F. Supp. 395 (D.N.H. 1974).

[206] *See* E. BOLMEIER, SEX LITIGATION AND THE PUBLIC SCHOOLS (1975); M. BREASTED, OH! SEX EDUCATION! (1970); J. JOTTOIS & N. MILNER, THE SEX EDUCATION CONTROVERSY (1975); Note, *Sex Education: The Constitutional Limits of State Compulsion*, 43 S. CAL. L. REV. 548 (1970).

[207] *But cf.* Mercer v. Michigan State Bd. of Educ., 379 F. Supp. 580 (D. Mich. 1974), *aff'd* 419 U.S. 1081 (1975) (upholding statute prohibiting instruction, advice, or information on the subject of birth control in public school sex and health education classes). *Mercer* may be consistent with the analysis of this article only because the plaintiffs were a physician and a teacher: the court held that the physician lacked standing and that the teacher had no interest in determining curriculum content contrary to legislative determinations. It would appear, however, that a teacher's interest in presenting information and ideas relevant to the course he or she is teaching should be protected by freedom of expression. *See supra* notes 70 and 75 and accompanying text. Furthermore, the result may have been different had a student been the plaintiff. In the analysis suggested by this article, prohibiting student access to information and ideas regarding birth control in the context of a sex education class interferes with students' pursuit of a better understanding of reality. The substantive interference in students' interests in receiving birth control information outweighs the state interest asserted in *Mercer*: allocating scarce teaching resources. Once a state permits public schools to teach a course in sex education, it has no legitimate interest in arbitrarily prohibiting students from receiving information relevant to that subject.

[208] *Cf.* Jacobson v. Massachusetts, 197 U.S. 11 (1905) (state may require vaccinations despite individual's religious objections).

on the freedom of expression of any parties in the system of public education.

B. Instructional Materials

Perhaps no area of the system of public education has engendered more bitter controversy than the selection, use, and removal of instructional materials. These controversies tend to involve clashes between often irreconcilable views of the values public schools ought to instill in children. Furthermore, they implicate the constitutional interests of authors and publishers, state and local governmental agencies, teachers, and parents, as well as students.

1. Statewide textbook adoptions.

A system of statewide adoptions of instructional materials serves a variety of administrative purposes. It enables a state to ensure that a textbook can withstand the physical abuse it is likely to undergo during the four to eight years it is in use; it ensures that the book's format and design are attractive and useful to students; and it allows the state to determine whether the textbook is pedagogically sound and substantively accurate.[209] But in many states, the textbook adoption process is also used as a forum to inject particular values and beliefs into the public school curriculum. Such a purpose raises a question of whether the state is using its control over public school instructional materials to indoctrinate students in particular points of view, thus infringing on the freedom of expression of authors, publishers, teachers, and students.

Textbooks are often rejected solely because of their intellectual approach to a particular subject. For example, in 1982, Texas was adopting junior high school geography textbooks. One book, Scott, Foresman's *Land and People: A World Geography*,[210] received high praise from educators and geographers.[211] Nevertheless, during the Texas adoption process, individuals filed eighty objections to the book, primarily protesting the book's "evolutionary speculations."[212] The book received nine of the

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[209] Reynolds Seitz has identified four major justifications for statewide uniformity in curriculum and textbooks: (1) states are able to purchase books in quantity, thus saving substantially on the cost of each book; (2) state commissions may be better qualified than local boards to review the substantive content of the book; (3) if families move to a different school district within the state, children can still use the same books; and (4) it facilitates a uniform course of study throughout the entire state. Seitz, *supra* note 103, at 119.

[210] G. DANZER & A. LARSON, LAND AND PEOPLE: A WORLD GEOGRAPHY (1979).

[211] *See, e.g.*, Lipsky, Book Review, 18 CURRICULUM REV. 340 (1979); 5 DATABOOK OF SOCIAL STUDIES MATERIALS AND RESOURCES 43 (J. Hedstrom ed. 1980).

[212] AS TEXAS GOES, *supra* note 114, at 13.

ten votes needed to adopt it. On subsequent votes, however, the book received six votes, then two, and finally, none.[213] As a result, the book was foreclosed from being sold in the largest textbook market in the country.[214]

In order to prevent rejection in Texas, publishers often accede to the demands of protestors in that state by making substantial changes in their materials. For example, in 1981, Houghton-Mifflin offered to delete "offensive words" from the *American Heritage Dictionary*[215] in order to make it marketable in Texas.[216] Textbook suggestions for student discussion and analysis are often eliminated to respond to the views of one protestor, who claims that "Leaving students to make up their own minds about things just isn't fair to our children."[217] Similarly, other groups criticize textbooks that portray, for example, a preponderance of males working in traditionally male roles[218] or that fail to emphasize the roles of particular minority or ethnic groups in American society.[219]

Such discrimination based on ideological content has rarely been challenged in court. Authors and publishers often try to make suggested changes quietly rather than antagonize their customers—who, after all, maintain monopsony control of their market.[220] Nevertheless, in *Loewen*

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[213] *Id.*

[214] Texas has an annual textbook budget of approximately $45 million. D. NELKIN, THE CREATION CONTROVERSY 153 (1982).

Dorothy Nelkin has summarized the effects of such protests on biology textbooks:

> [P]ublishers have been ready to accommodate creationist pressures by adding qualifications to statements about evolution theory or by simply avoiding sensitive issues. Some avoid the word "evolution" altogether by substituting "change." Some delete references to fossil formations, geological eras, the age of the earth, and Cro-Magnon man. Some include material on divine creation. Most banish the discussion of evolution to a single chapter than [sic] can be avoided or simply plucked out.

Id. In Frances FitzGerald's view, the publishers' lack of intellectual standards means "that truth is a market commodity, determined by what will sell." F. FITZGERALD, *supra* note 113, at 31. As a result, in a market where the state is the major buyer, the state is effectively determining "the truth," despite the Supreme Court's pronouncement in *Barnette* that "no official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . ." 319 U.S. at 642.

[215] AMERICAN HERITAGE DICTIONARY (W. Morris ed. 1976).

[216] AS TEXAS GOES, *supra* note 114, at 4. Dictionaries have often been the targets of protesters. *See* E. JENCKINSON, CENSORS IN THE CLASSROOM 75-82 (1979). Protesters have objected to dictionary definitions of such words as "across-the-board," "attempt," "bed," "brain," "bucket," "john," and "knock". *Id.* at 78.

[217] AS TEXAS GOES, *supra* note 114, at Appendix C. *See also* D. NELKIN, THE CREATION CONTROVERSY, at 63-68 (1982).

[218] Maeroff, *Texas Textbook Choices Prompt Wide Concern*, N.Y. Times, Aug. 15, 1982, § 1, at 2.

[219] *See* F. FITZGERALD, *supra* note 113, at 83-114.

[220] *Id.* at 33-34; D. NELKIN, THE CREATION CONTROVERSY 153-54 (1982).

v. Turnispeed,[221] the authors and publisher of a state history textbook did challenge the decision of the Mississippi state textbook adoption agency to reject their book. The plaintiffs claimed that the board rejected their book, which focused on the role of blacks in Mississippi history, for racial reasons. The district court agreed and ordered the book placed on the state's approved textbook list.[222]

Loewen may be unremarkable when viewed against a historical background of institutionalized racial discrimination: the court recognized that the textbook commission was attempting to further contraconstitutional values. But on the other hand, it may have a broader significance as recognizing, for the first time, that authors and publishers of educational materials have substantial constitutional interests in not having their materials excluded from the public school curriculum solely on the basis of ideology.[223] The decision could also be viewed as a recognition that students' interests in obtaining access to ideas and information would be restricted by a state decision to impose ideological orthodoxy in textbook selection. Finally, the court accepted the notion that it could properly intervene in a statewide textbook adoptions process to protect interests of authors, publishers, and students in freedom of expression.

Other court challenges to content-based selection decisions should also succeed. For example, Scott, Foresman could have sued to enjoin the Texas Textbook Adoption Committee to disregard that section of its Adoption Proclamation dealing with textbook treatment of the theory of evolution on the grounds that it constituted an establishment of religion and interference with freedom of expression in violation of the first amendment.[224] Similarly, had the publishers of the *American Heritage Dictionary* failed to delete the "offensive words" from the dictionary, leading to rejection of the book, they should have had a cause of action claiming interference with their own freedom of expression and that of students. Their argument would focus on the Textbook Adoption Committee's interference with their presentation of ideas and information useful in the pursuit of a better understanding of reality. To prevent a student from discovering the meaning of a word he or she encounters in reading because the word itself offends the sensibilities of a state official seems contrary to the purpose of the first amendment.[225]

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[221] 488 F. Supp. 1138 (N.D. Miss. 1980). *See also*, F. FITZGERALD, *supra* note 113, at 29-30.

[222] 488 F. Supp. at 1155-56.

[223] *See* Note, *Ideological Exclusion of Curriculum Materials*, 14 HARV. C.R.-C.L. L. REV. 485 (1979).

[224] *See supra* notes 118-19 and accompanying text.

[225] Because rejection of a textbook by a state agency in a sense defames the author and publisher, a concrete test of the book's acceptability should be whether the controversial material in it is, in

The agency would, of course, respond that it is merely performing its inculcative function by rejecting books containing "offensive" words. But under the analysis suggested here, this response does not end the case, but imposes on the court the necessity to determine whether the values the state agency intends to inculcate are essentially constitutional values. Thus, if the words were truly obscene, the state would be justified in rejecting the book.[226] But if, as is more likely, rejection of the book were an attempt to impose ethical and intellectual conformity on the school children of the state, the court should order the adoption of the book.

2. Use of instructional materials.

Once a book has been approved for use in the public schools, however, its capacity to cause controversy does not diminish. In fact, no area of school law has led to more inflamed controversy than protests against the use of particular instructional materials in the public schools.

The controversy that erupted during the 1974-75 school year in Kanawha County, West Virginia, illustrates the depths of the passion aroused over public school instructional materials.[227] That year, the local school board adopted a new language arts curriculum on the recommendation of a teachers committee. Of the 325 textbooks adopted for use in the program, several raised protests from parents. By early September, feelings were so high that several of the area's coal mines were shut down by miners who objected to the textbooks. The superintendent decided to withdraw the textbooks from use and to review the entire language arts series. But this failed to placate the protesters and the schools were closed for a week. Violence broke out in mid-October, including vandalism, firebombings, and dynamiting of several school buildings. In November, a citizens committee formed to review the language arts series concluded that the series was educationally sound and should be retained. Nevertheless, the school board decided to limit access to the most

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fact, an accurate portrayal of the subject. In other words, as in libel cases, truth should be a defense to a state agency's decision to reject a textbook.

[226] *Cf.* Ginsberg v. New York, 390 U.S. 629 (1968) (state may prohibit sale of sexual material to minors).

[227] For general discussions of the Kanawha County controversy, see F. FITZGERALD, *supra* note 113, at 30; J. HEFLY, TEXTBOOKS ON TRIAL (1976); E. JENKINSON, *supra* note 216, at 17-27; National Education Association, KANAWHA COUNTY, WEST VIRGINIA: A TEXTBOOK STUDY IN CULTURAL CONFLICT (1975); D. NELKIN, THE CREATION CONTROVERSY 95-97 (1982); D. NELKIN, SCIENCE TEXTBOOK CONTROVERSIES AND THE POLITICS OF EQUAL TIME (1977); R. O'NEIL, *supra* note 5, at 3-9. *See also* Williams v. Board of Educ., 388 F. Supp. 93 (S.D. W.Va. 1975), *aff'd mem.*, 530 F.2d 972 (4th Cir. 1975).

controversial titles in the series. Violence continued, however, including gunshots fired at school buses and the firebombing of the car of parents supporting the textbooks. Finally, the school board adopted new guidelines for textbook selection, which specified that materials "must encourage loyalty to the United States," "must not contain profanity," "must recognize the sanctity of the home," "must not intrude on the privacy of the student's home by asking personal questions about the interfeelings [*sic*] or behavior of themselves or their parents, or encourage them to criticize their parents by direct questions, statement or inference."[228] The board created citizen screening committees to review textbook selections, thus minimizing the role of teachers. These and other actions reduced the tensions, although many were subsequently held to be illegal under state law.[229]

At the height of the controversy, several parents brought a lawsuit in federal court challenging the adoption of the language arts series. In *Williams v. Board of Education*,[230] the district court rejected the claim that the textbooks and supplementary materials impaired and undermined their children's religious beliefs and invaded their personal and familial privacy. The complaint stated, in part, that:

> textbooks adopted for use by the defendant contain, both religious and anti-religious materials, matter offensive to Christian morals, matter which invades personal and familial morals, matter which defames the Nation and which attacks civic virtue, and matter which suggests and encourages the use of bad English. The textbooks so adopted contain within them articles and stories promoting and encouraging a disbelief in a Supreme Being, and encouragement to use vile and abusive language and encouragement to violate the Ten Commandments as given by the Almighty to Moses, and an encouragement to violate not only Christian beliefs but the civil law.[231]

The court found that the materials involved were "offensive to plaintiffs' beliefs, choices of language, and code of conduct."[232] The court held, however, that defendants' actions did not constitute an establishment of religion and did not infringe on the free exercise of plaintiffs' religion or on their personal or familial privacy.[233]

While the court did recognize that the basis of the plaintiffs' claim was that the instructional materials offended their beliefs and values, it failed to construe that assertion as a claim that the school board was infringing

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[228] O'NEIL, *supra* note 5, at 5.

[229] National Education Association, *supra* note 227, at 25-26; O'NEIL, *supra* note 5, at 5-6.

[230] 388 F. Supp. 93 (S.D. W.Va. 1975), *aff'd mem.*, 530 F.2d 972 (4th Cir. 1975).

[231] 388 F. Supp. at 94-95.

[232] *Id.* at 96.

[233] *Id.*

on plaintiffs' freedom of expression. An allegation that the public schools are indoctrinating children with nonconstitutional or contraconstitutional values should be construed as stating a valid claim upon which relief can be granted. While perhaps inartfully drawn, the complaint in *Williams* did make this allegation. For example, the allegation that the textbooks encouraged children to violate the Ten Commandments possibly referred to materials that the parents viewed as teaching children to reject parental authority. If true, such materials would be transmitting nonconstitutional values, and their use should be enjoined if it were established that the materials presented the values directively.[234]

The Kanawha County controversy is only the most spectacular of the many battles over the use of instructional materials in the public school curriculum.[235] By failing to recognize that the public schools' inculcative function is limited by freedom of expression, lower federal courts have presumptively upheld actions of school boards without examining whether those actions imposed significant burdens on the freedom of expression of students and parents. For example, in *Rosenberg v. Board of Education*,[236] the court rejected a claim that the use of *Oliver Twist* and *The Merchant of Venice* in high school English courses should be enjoined as contributing to anti-Semitism. The court reasoned that educational officers must be granted wide discretion to guide teachers and pupils toward the goal of developing free inquiry and learning, and that "[t]heir discretion must not be interfered with in the absence of proof of actual malevolent intent."[237]

Similarly, in *Zykan v. Warsaw Community School District*,[238] the court upheld a school board decision to remove certain books from a high school "Women in Literature" course despite a claim that the board removed the books merely because it disliked their contents.[239] The court identified two factors limiting students' access to academic information: high school students' lack of intellectual skills necessary for taking full advantage of the marketplace of ideas, and the importance of encouraging and nurturing fundamental social, political, and moral values

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[234] A trial probably would have established that the values inherent in the materials were essentially constitutional values, such as developing students' skills of intellectual inquiry, which is inherent in the first amendment's protection of free expression, and secularism, which is implicit in the establishment clause. Thus, *Williams* would not have had a different result under the analysis suggested by this article.

[235] *See generally* E. JENKINSON, *supra* note 216; R. O'NEIL, *supra* note 5.

[236] 196 Misc. 542, 92 N.Y.S.2d 344 (1949).

[237] *Id.* at 544, 92 N.Y.S.2d 346.

[238] 631 F.2d 1300 (7th Cir. 1980).

[239] *Id.* at 1302. For a fuller discussion of the Warsaw, Indiana, controversy, which included mass public book burnings, see E. JENKINSON, *supra* note 216, at 1-16.

that would enable students to take their place in the community.[240] The court reasoned that because the legislature vested local school boards with the responsibility for fulfilling the inculcative function of education, "it is in general permissible and appropriate for local boards to make educational decisions based upon their personal social, political, and moral views."[241] In the court's view, the Constitution limited the board's wide discretion only by precluding imposition of a "pall of orthodoxy" that "might either implicate the state in the propogation of an identifiable religious creed or otherwise impair permanently the student's ability to investigate matters that arise in the natural course of intellectual inquiry."[242]

Finally, in *Seyfried v. Walton*,[243] the United States Court of Appeals for the Third Circuit upheld the decision of a school principal to cancel a school play because of its "sexual themes." The court reasoned that school officials must be allowed to decide how best to use their limited resources to achieve their socialization goals, which necessarily involves a preference of some values over others.[244]

All three courts accepted the notion that school officials must be granted wide discretion in order to fulfill the inculcative function of education. But even granting that wide discretion, it does not follow that school officials must be allowed to make curriculum decisions solely on the basis of whether they agree with the political, social, or moral content of the materials. Such content discrimination requires an examination of the values upon which the decision rests so that the court could determine whether there was, indeed, a danger of imposing a pall of orthodoxy in the classroom.

The Eighth Circuit Court of Appeals recognized this in *Pratt v. Independent School District No. 831*,[245] when it was faced with a challenge to a school board's decision to remove a film version of Shirley Jackson's short story, "The Lottery," from the curriculum. Plaintiffs alleged that the board banned the film because it objected to the ideas expressed in it.[246] The court agreed, finding that the board had banned the film not out of a purported concern about violence, but because it found

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[240] 631 F.2d at 1304.

[241] *Id.* at 1305.

[242] *Id.* at 1306.

[243] 668 F.2d 214 (3rd Cir. 1981).

[244] *Id.* at 217. *See also* Cary v. Board of Educ., 598 F.2d 535 (10th Cir. 1979) (upholding school board's authority to reject the use of certain books in secondary school elective literature courses). The court in *Cary* failed to address the students' interests in having access to the information and ideas in the rejected books.

[245] 670 F.2d 771 (8th Cir. 1982).

[246] *Id.* at 777.

the film's ideological and religious themes offensive.[247] Thus, the court held that the board banned the film to indicate that "the ideas contained in the film are unacceptable and should not be discussed or considered."[248] *Pratt* is therefore one of the few cases to recognize explicitly that students' access to ideas and information useful in the pursuit of a better understanding of reality may be infringed when a school board attempts to impose its own ideological values on the public school curriculum.

3. Removal of books from school libraries.

In *Board of Education v. Pico*,[249] the Supreme Court had the opportunity to adopt the *Pratt* court's view that freedom of expression imposes substantive constitutional limitations on the public schools' inculcative function. Unfortunately, it failed to do so.

In *Pico*, three members of the local board of education had attended a conference at which they obtained a list of "objectionable" books. Upon returning to school, they discovered that ten of the books on the list were available in their schools' libraries.[250] As a result, the board ordered the books removed, characterizing them as "anti-American, anti-Christian, anti-Semitic, and just plain filthy."[251] Several students thereupon brought suit, alleging that the board had

> ordered the removal of the books from school libraries and proscribed their use in the curriculum because particular passages in the books offended their social, political, and moral tastes and not because the books, taken as a whole, were lacking in educational value.[252]

The district court granted summary judgment in favor of the school board, accepting their contention that the books were vulgar.[253] A three-judge panel of the Second Circuit Court of Appeals reversed, with each judge filing a separate opinion.[254] One judge focused on the board's procedural irregularities and concluded that the case should be remanded to

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[247] *Id.* at 778.

[248] *Id.* at 779.

[249] 457 U.S. 853 (1982).

[250] The ten books were: Anonymous, GO ASK ALICE (1971); A READER FOR WRITERS (J. Archer, ed. 3d ed. 1971); A. CHILDRESS, A HERO AIN'T NOTHIN' BUT A SANDWICH (1977); E. CLEAVER, SOUL ON ICE (1967); BEST SHORT STORIES BY NEGRO WRITERS (L. Hughes, ed. 1967); O. LAFARGE, LAUGHING BOY (1971); D. MORRIS, THE NAKED APE (1967); P. THOMAS, DOWN THESE MEAN STREETS (1967); K. VONNEGUT, JR., SLAUGHTER HOUSE FIVE (1969); R. WRIGHT, BLACK BOY (1945). Another listed book was included in the curriculum of a twelfth grade literature course: B. MALAMUD, THE FIXER (1966). 457 U.S. at 856 n.3.

[251] 457 U.S. at 857.

[252] *Id.* at 858-59.

[253] 474 F. Supp. 387 (E.D.N.Y. 1979).

[254] 638 F.2d 404 (2d Cir. 1980).

allow plaintiffs "to persuade the trier of fact that the ostensible justifications for [the board's] action . . . were simply pretexts for the suppression of free speech."[255] A second judge concurred in the result on the grounds that the case retained a contested factual issue: whether the board's decision to remove the books was motivated "by an impermissible desire to suppress ideas."[256] The third judge argued that the court should uphold the board's decision because the books were, indeed, vulgar.[257]

The question was squarely before the Court, therefore, for it to determine the extent to which freedom of expression limits the authority of a school board to remove books from school libraries in order to further the inculcation of community values.[258] Nevertheless, a bitterly divided Court—reflecting the bitterness of the issue itself—failed to resolve the issue clearly. Five justices (Brennan, Marshall, Stevens, Blackmun, and White) agreed with the court of appeals that the case should be remanded to resolve the factual issue of the reasons for the school board's actions. On the other hand, five justices (Blackmun, Burger, Rehnquist, Powell, and O'Connor) agreed that the school board had no affirmative obligation to provide students with information or ideas. Finally, at least seven justices (Brennan, Marshall, Stevens, Blackmun, Rehnquist, Burger, and Powell) agreed that school boards may not exercise their discretion to determine the content of their school libraries in a narrowly partisan or political manner—although Justices Rehnquist, Burger, and Powell disagreed with the plurality's conclusion that this case presented that issue.[259]

Pico therefore demonstrates that the first amendment prohibits a school board from removing books from the school library for the purpose of restricting access to the political ideas or social perspectives

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[255] *Id.* at 417 (Tifton, J.).

[256] *Id.* at 436-37 (Newman, J., concurring).

[257] *Id.* at 439 (Mansfield, J., dissenting).

[258] Lower federal courts were divided on the issue. *Compare* Pico v. Board of Educ., 638 F.2d 404 (2d Cir. 1980) (prohibiting school board from removing books from library if motivated by an impermissible desire to suppress ideas) *and* Minarcini v. Strongsville City School Dist., 541 F.2d 577 (6th Cir. 1976) (enjoining school board from removing books from the school library and curriculum solely because those books offended the social or political tastes of the school board members) *and* Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269 (D.N.H. 1979) (requiring school board to demonstrate substantial and legitimate governmental interest before it may remove magazines from the library) *with* Presidents Council, Dist. 25 v. Community School Bd., 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972) (allowing school board to place objectionable book on limited access library shelf) *and* Cary v. Board of Educ., 598 F.2d 535 (10th Cir. 1979) (upholding decision of school board to remove ten books from approved reading list because of the board's personal predilections).

[259] 457 U.S. at 907-08 (Rehnquist, J., dissenting).

discussed in them.[260] The extent to which *Pico* will guide further adjudications of curriculum controversies remains unclear, however, given the Court's lack of unity and its desire to limit its holding to the special conditions of public school libraries.[261]

The Court could have provided clear guidance for future cases, however, had it focused its analysis on the nature of the values the school board was attempting to promote. The board claimed to have removed the books because they were vulgar, anti-American, anti-Christian, and anti-Semitic. Thus, its actions would appear to have been taken in order to further the values of tastefulness, Americanism, and religious tolerance. But the Constitution does not require that discourse be in good taste[262] or that it be nationalistic.[263] Therefore, (ignoring procedural irregularities by the school board), the board could have theoretically defended its action by showing either that removing the books was necessary to advance the Constitutional value of religious tolerance, or that the methods it used to remove the books were essentially discursive. Furthermore, the question at trial should not have been whether the material contained isolated phrases, which, when taken out of context, could be viewed as anti-Christian or anti-Semitic, but whether the theme or purpose of the material, when taken as a whole, was anti-Christian or

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[260] *Id.* at 879 (Blackmun, J., concurring). Justice Blackmun's attempt to reconcile the schools' inculcative function with the first amendment's bar on prescriptions of orthodoxy, *id.*, would appear, in theory, to command the agreement of the majority of the Court. Furthermore, his analysis of the tension between those two functions does not differ essentially from the analysis proposed in this Article.

[261] Justice Brennan described the school library as the principle locus of the freedom to gain a new understanding of reality, as opposed to the more structured atmosphere of the classroom. *Id.* at 868-69. On the other hand, Chief Justice Burger responded by pointing out that required reading and textbooks would have a greater likelihood of imposing a "pall of orthodoxy" over the educational process than would optional reading because of the captivity of the audience. *Id.* at 2821 (Burger, C.J., dissenting). Both Justices thus recognized the potential infringements on student's freedom of expression when school boards interfere with students' access to ideas and information; Justice Brennan could afford to focus on the school library because the classroom was not at issue in *Pico*, while Chief Justice Burger's *reductio* is absurd only if one accepts that the inculcative function of education is not restrained by student's interests in freedom of expression.

[262] *See* Papish v. Univ. of Missouri Curators, 410 U.S. 667, 670 (1973) (offense to good taste does not justify restrictions on speech). *Cf.* Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969). In *Keefe*, the court stated the issue as:

> whether a teacher may, for demonstrated educational purposes, quote a "dirty" word currently used in order to give special offense, or whether the shock is too great for high school seniors to stand. If the answer were that the students must be protected from such exposure, we would fear for their future. We do not question the good faith of the defendants in believing that some parents have been offended. With the greatest of respect to such parents, their sensibilities are not the full measure of what is proper education.

Id. at 361-62.

[263] *See supra* note 162 and accompanying text.

anti-Semitic.[264] At least at the high school level, a few expressions of religious prejudice by fictional characters would not be likely to produce a shock too great for students to stand. But on the other hand, the school board might be able to establish that removal of a book such as *Mein Kampf*, whose major theme was the promotion of contraconstitutional values, was necessary to ensure that the public understands that the state is not endorsing those values.

VII. Conclusion

This article has attempted to explore the inherent tensions between the state's interest in inculcating values in public school children and the first amendment interests of those children in developing and maintaining their own values. These tensions have often created seemingly intractable controversies that have inevitably spilled over into the courts, which have been unable to develop a consistent approach to resolving them.

This article suggests that the courts should recognize that students' first amendment interests in free expression impose substantive limitations on the content of the values the state seeks to inculcate through the public school curriculum. School authorities should be limited to inculcating those values necessary to maintain a democratic system of government, namely, values explicit or implicit in the Constitution. Nonconstitutional values should be taught only where the method of teaching them does not coerce students into believing in them. Otherwise, the courts would be permitting the state to restrict students' freedom of expression for the sake of values that the community has not agreed ought to be transmitted to children.

The ultimate goal of American education—both public and private—is to enable children to develop the skills, attitudes, and opportunities to become literate, happy, independent, and successful adults. This noble goal can only be achieved by ensuring that children have ready access to ideas and information, without prior governmental approval of the content of those ideas.

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[264] For example, black parents have occasionally demanded that HUCKLEBERRY FINN be removed from the public school curriculum because one of its major characters is called "Nigger Jim." *See* E. JENKINSON, *supra* note 216, at 157. Taken out of context, the name is, of course, offensive and demeaning to blacks. Nevertheless, when viewed against the novel as a whole, the name becomes ironic because Jim is probably the most admirable character in the book.