

1980

Schoolbooks, School Boards, and the Constitution [notes]

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Recommended Citation

Columbia Law Review, Vol. 80, Issue 5 (June 1980), pp. 1092-1124

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Schoolbooks, School Boards, and the Constitution

The books our children read in public schools and the subjects they are taught are increasingly becoming the focus of heated courtroom controversies.¹ School boards claim absolute discretion; teachers, parents, and students challenge the boards' decisionmaking authority on first amendment grounds. The courts are grappling with these conflicting interests and with the underlying tension between individual rights and majoritarian decisionmaking in the public schools.

This Note suggests that the public school student's first amendment right to receive information, and the teacher's right to communicate are substantial rights warranting protection through judicial review of school board decisionmaking. After examining the leading cases in this area, the Note discusses the state's interest in retaining control of public education. In Part III, the Note suggests that the first amendment is generally applicable to the public schools, despite the difficulty of applying traditional first amendment analysis in this context. It then considers the student's right to know, the teacher's right to free expression, and the justifiable limits on those rights imposed by the exigencies of public education. Building upon these competing interests, the Note proposes a standard for judicial review that would sustain school board decisions when justified by reasonable educational policy, and concludes by applying this standard to seven illustrative cases.

I. THE CASES

Within the last decade, the Courts of Appeals for the Second, Sixth, and Tenth Circuits have all considered how, if at all, the Constitution limits a school board's authority to select, remove, or prohibit the assignment of textbooks, library books, and other printed materials for classroom use. The courts so far have reached uneven and contradictory conclusions based upon incomplete and unsatisfactory reasoning.

In *Presidents Council, District 25 v. Community School Board*,² the board, responding to parental complaints about junior high school students' access in school to Piri Thomas's *Down These Mean Streets*, a graphic novel about life in Spanish Harlem, placed the book on a limited access shelf where students could obtain it only if their parents borrowed the book for them.³ An association of presidents of parent-teacher organizations, parents, teachers, and students challenged this action in federal district court, asserting a violation of the first

1. See, e.g., *Cary v. Board of Educ.*, 598 F.2d 535 (10th Cir. 1979); *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577 (6th Cir. 1976); *Presidents Council, Dist. 25 v. Community School Bd.*, 457 F.2d 289 (2d Cir.), cert. denied, 409 U.S. 998 (1972); *Bicknell v. Vergennes Union High School Bd. of Directors*, 475 F. Supp. 615 (D. Vt. 1979), appeal pending, No. 79-7676 (2d Cir. Feb. 6, 1980); *Pico v. Board of Educ.*, 474 F. Supp. 387 (E.D.N.Y. 1979), appeal pending, No. 79-7690 (2d Cir. Feb. 6, 1980); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269 (D.N.H. 1979).

2. 457 F.2d 289 (2d Cir.), cert. denied, 409 U.S. 998 (1972).

3. This was a compromise solution, reached after the board's initial decision to remove the book altogether. *Id.* at 290.

amendment rights of the parents, children, and teachers.⁴ The district court dismissed the complaint, and the Court of Appeals for the Second Circuit affirmed. Since the board had not prohibited the book's discussion in class or assignment as outside reading, and parents could borrow the book for their children, the court found only a "minuscule" intrusion on any first amendment constitutional rights.⁵ It reasoned that a book, having once been shelved in a school library, could "be removed by the same authority which was empowered [by statute] to make the selection in the first place" without raising a constitutional issue.⁶

Two years later, the Court of Appeals for the Sixth Circuit rejected this reasoning in *Minarcini v. Strongsville City School District*.⁷ In *Minarcini*, the plaintiff high school students, through their parents, claimed that the school board's schoolbook decisionmaking had violated their first and fourteenth amendment rights. The board had removed Kurt Vonnegut's *Cat's Cradle* and Joseph Heller's *Catch-22* from the school library, rejected faculty recommendations that it authorize *Catch-22* and Vonnegut's *God Bless You, Mr. Rosewater* as library books or textbooks, and passed resolutions limiting discussion of all three in class and their use as supplementary reading.⁸ The district court found these actions constitutional.⁹

The court of appeals, noting that the removal had been ordered because individual board members found the books "objectionable in content," found no "explanation of the Board's action which is neutral in First Amendment terms."¹⁰ It reasoned that neither the state nor the school board, once having created for students the privilege of a high school library, "could place conditions on [its use] which were related solely to the social or political tastes of school board members."¹¹ Although the books could be removed for a variety of practical reasons, such as lack of shelf space or wear and tear, their removal because their content "occasioned . . . displeasure or disapproval"¹² impermissibly infringed the student's first amendment "right to know."¹³ The court

4. The plaintiffs brought suit under 42 U.S.C. § 1983 (1976). *Id.* at 289.

5. *Id.* at 292.

6. *Id.* at 293. Judge Mulligan stopped short of articulating a standard of absolute school board discretion over book removal: "To suggest that the shelving or unshelving of books presents a constitutional issue, particularly where there is no showing of a curtailment of freedom of speech or thought, is a proposition we cannot accept." *Id.* (emphasis added). It is reasonable to assume, then, that the court envisioned some circumstances that would constitute such curtailment. Unfortunately, it made no attempt to analyze what the elements of unconstitutional school board decisionmaking would be, and what standard courts should apply in evaluating the decisionmaking process itself.

7. 541 F.2d 577 (6th Cir. 1976).

8. *Id.* at 579.

9. 384 F. Supp. 698 (N.D. Ohio 1974), *rev'd*, 541 F.2d 577 (6th Cir. 1976).

10. 541 F.2d at 582.

11. *Id.* The court was troubled by the potential burden upon classroom discussion and not reassured by the books' availability elsewhere. It referred to the library as a "forum for silent speech," and a "mighty resource in the free marketplace of ideas," *id.* at 582-83, concepts of traditional first amendment analysis that are of limited applicability in the public school context.

12. *Id.* at 581.

13. *Id.* at 583. See also notes 74-113 and accompanying text *infra*.

accordingly remanded to the district court with directions to order the reshelving of the books.¹⁴

In a 1979 decision, *Cary v. Board of Education*,¹⁵ the Court of Appeals for the Tenth Circuit attempted to establish the limits of school board authority to override high school teachers' selection of literature for their reading lists. The plaintiffs, teachers of eleventh and twelfth grade elective language arts classes, had submitted for approval a list of 1,285 books, ten of which the school board ordered removed.¹⁶ The teachers admitted that the school board had the power to change the curriculum and presumably to cancel the course itself.¹⁷ They argued, however, that the board, having approved the course, could not impose restrictions "based upon the personal predilections of members of the school board" without violating teachers' rights of academic freedom.¹⁸ The court disagreed, upholding the school board's action.¹⁹ It recognized that first amendment protection of freedom of expression had some "carryover . . . to teachers' expressions in the context of course work and classroom teaching,"²⁰ but found that the school board, as the legitimate transmitter of community values and as the guardian of "the collective will of those whose children are being educated and who are paying the costs, . . . was acting within its rights in omitting the books, even though the decision was a political one influenced by the personal views of the members."²¹ The court thus concluded in effect that the school board members were within their rights in excluding schoolbooks according to "personal predilections."²²

In all three of these cases the courts confronted the same dilemma: by establishing public schools and authorizing school boards to prescribe curricula and select schoolbooks, the states require their delegates to engage in the type of content-based regulation of expression that the first amendment seems to prohibit.²³ Although according to traditional first amendment principles "govern-

14. *Id.* at 584. The court affirmed the district court's finding that procedural due process requirements had been satisfied, and that the actions of the board were not "arbitrary and capricious."

15. 598 F.2d 535 (10th Cir. 1979).

16. The banned volumes, all of which had been used in previous years, were: A. Burgess, *A Clockwork Orange*; W. Blatty, *The Exorcist*; M. Ehrlich, *The Reincarnation of Peter Proud*; D. Allen, *New American Poetry*; L. Ferlinghetti, *Starting from San Francisco*; W. Burroughs & A. Ginsberg, *The Yage Letters*; L. Ferlinghetti, *Coney Island of the Mind*; A. Ginsberg, *Kaddish and Other Poems*; F. O'Hara, *Lunch Poems*; I. Levin, *Rosemary's Baby*.

The board, which gave no reasons for its decision, made no effort to prohibit discussion of the books. The parties stipulated that "the books were not obscene, no systematic effort had been made to exclude any particular system of thought or philosophy, and a 'constitutionally proper decision-maker' could decide these books were proper for high school language arts classes." *Id.* at 538.

17. *Id.* at 542.

18. *Id.* at 542-43.

19. While the court affirmed the judgment of the district court, it rejected the lower court's conclusion that the teachers had waived their constitutional rights concerning book assignments by the terms of their collective bargaining agreement. 427 F. Supp. 945 (D. Colo. 1977), *aff'd*, 598 F.2d 535 (10th Cir. 1979).

20. 598 F.2d at 543.

21. *Id.* at 543-44.

22. *Id.* at 544.

23. See, e.g., *Police Dep't v. Mosley*, 408 U.S. 92, 95-96 (1972). For a fuller discussion of the impact of educational decisionmaking on first amendment analysis, see section IV.A. *infra*.

ment has no power to restrict expression because of its message, its ideas, its subject matter, or its content,"²⁴ school boards must base their decisions to acquire or reject schoolbooks on precisely those criteria. Schools cannot teach all there is to learn; school boards must choose the subjects they wish to transmit and select those books which will accomplish this purpose. None of the courts addressed this paradox directly. The *Minarcini* court, in holding the school board's action unconstitutional merely because it was content-based, failed to recognize the legitimacy and necessity of making educational decisions on the basis of what is being taught. In contrast, the *Cary* and *Presidents Council* courts concluded that the need for content-based regulation makes the first amendment inapplicable in the classroom, overlooking the first amendment interests of students and teachers. Neither approach appropriately reconciles the values of education and free expression with state regulation of public education.

II. THE NATURE OF STATE REGULATION OF PUBLIC SCHOOLS

Public schooling in the United States has traditionally been the responsibility of the states,²⁵ typically provided for in their constitutions²⁶ and administered through complex and comprehensive laws.²⁷ School systems are by nature majoritarian, directed by school boards either directly or indirectly chosen by democratic process, and answerable to the people they represent.²⁸ In this way the community theoretically is able to maintain a school system that reflects its values and particular needs.²⁹

The states have compelling reasons to exercise substantial control over the school systems, and over their curricula in particular. These interests are closely related to perhaps the most basic first amendment value: the protection of "the freedom of those activities of thought and communication by which we 'govern.'"³⁰ To protect that freedom, the states attempt to ensure that their citi-

24. *Id.* at 95.

25. The provision of public education has been fairly described as "perhaps the most important function of state and local governments . . . required in the performance of our most basic public responsibilities." *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

26. State constitutions may require the establishment and maintenance of the public schools themselves. See, e.g., N.J. Const. art. 8, § 4, ¶ 1; N.Y. Const. art. XI, § 1. Some states make more general constitutional provision for the encouragement of education. See, e.g., Mich. Const. art. 8, § 1; Mass. Const. pt. 2, ch. V, § 2.

27. See, e.g., N.Y. Educ. Law (McKinney 1969). See also Project, *Education and the Law: State Interests and Individual Rights*, 74 Mich. L. Rev. 1374, 1375-81 (1976) [hereinafter cited as Project].

28. For comprehensive discussions of school board structure and the delegation of educational authority, see 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) [hereinafter cited as Goldstein, *School Board Authority*]; Project, *supra* note 27, at 1375-81.

29. For a critique of government control of history schoolbook selection in the primary and secondary schools, arguing that school boards traditionally have opted for texts depicting a distorted, homogenized view of American society, see F. FitzGerald, *America Revised: History Schoolbooks in the Twentieth Century* (1979).

30. Meiklejohn, *The First Amendment is an Absolute*, 1961 S. Ct. Rev. 245, 255 [hereinafter cited as Meiklejohn, *First Amendment*]. In a sense, then, by deferring to first amendment values, the state is pursuing its own long-term best interests.

zens will be at least minimally equipped to function as autonomous, productive adults in a self-governing society,³¹ and to defend the welfare of their children.³² They thus require that children be educated for a certain number of years,³³ that instruction be provided by qualified, licensed teachers,³⁴ and that the curriculum include whatever courses of study each state deems essential for the students' "intellectual, moral, and social development."³⁵

Although state and local school boards generally have broad discretion to administer the schools and to establish curricula,³⁶ parents frequently can bring about changes in schoolbook policies through the exertion of political force within the community.³⁷ This is not surprising, since the authority of the boards, whether elected or legislatively created, ultimately depends upon their

31. See Garvey, *Children and the First Amendment*, 57 *Tex. L. Rev.* 321, 344-45 (1979) [hereinafter cited as *Garvey, First Amendment*].

32. It has long been established that the state may restrict even constitutionally protected expression in order to prevent harm to minor children. See, e.g., *Ginsberg v. New York*, 390 U.S. 629 (1968); *Prince v. Massachusetts*, 321 U.S. 158 (1944); notes 78-87 and accompanying text *infra*.

33. See *Project*, *supra* note 27, at 1386-99.

The state may not compel parents to use the public as opposed to private schools. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Indeed, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), suggests that states may not always compel "in school" attendance. In that case the Court held that Amish parents who withdrew their children from public school after eighth grade to insure free exercise of their religion could not be punished for violating a state compulsory education law. *Yoder* may, in fact, stand for the same parental right of choice regarding education upheld in *Pierce*, since the Court in effect recognized the Amish lifestyle as "learning-by-doing"—a form of bona fide home instruction. See Hirschhoff, *Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused from Objectionable Instruction?* 50 *S. Cal. L. Rev.* 871, 902 (1977); Moskowitz, *Parental Rights and State Education*, 50 *Wash. L. Rev.* 623, 630-36 (1975).

34. *Project*, *supra* note 27, at 1378-79.

35. Note, *Academic Freedom in the Public Schools: The Right to Teach*, 48 *N.Y.U. L. Rev.* 1176, 1186-87 (1973) [hereinafter cited as *Right to Teach*]. See also *Project*, *supra* note 27, at 1378-80; Note, *First Amendment Limitations on the Power of School Boards to Select and Remove High School Text and Library Books*, 52 *St. John's L. Rev.* 457, 459 n.13 (1978) [hereinafter cited as *First Amendment Limitations*].

Some elements of indoctrination by the school system are permissible. Many states require by statute that students be taught American history and government. See, e.g., *Ariz. Rev. Stat. Ann.* § 15-1021 (West 1975); *Mich. Comp. Laws Ann.* §§ 340.361-362 (West 1976). Some also require instruction concerning capitalism. See, e.g., *Fla. Stat. Ann.* § 233.064 (Harrison 1977); *Utah Code Ann.* § 53-14-7.5 (Supp. 1979); *First Amendment Limitations*, *supra*, at 459 n.13. See also Kamenishine, *The First Amendment's Implied Political Establishment Clause*, 67 *Calif. L. Rev.* 1104, 1135-36 & nn.106-10 (1979). There is ample evidence that the reasonable implementation of the educational goals reflected in these statutes—i.e., the fostering of good citizenship and patriotism—is not inconsistent with the Supreme Court's view of freedom of thought and expression in the public schools. See e.g., *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); cf. *Palmer v. Board of Educ.*, 603 F.2d 1271 (7th Cir. 1979), cert. denied, 404 U.S. 1026 (1980). But it is equally clear from *Barnette* that the schools may not go too far and attempt the "coercive elimination of dissent." 319 U.S. at 641.

36. See sources collected in notes 27-28 *supra*.

37. Parental complaints to school board officials often succeed in effecting the removal of books. See, e.g., *Bicknell v. Vergennes Union High School Bd. of Directors*, 475 F. Supp. 615 (D. Vt. 1979) (parents successfully used school board procedure to request review of book they wished removed), appeal pending, No. 79-7676 (2d Cir. Feb. 6, 1980); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703 (D. Mass. 1978) (parent's complaint about language in a poem caused anthology to be withdrawn from school library); *Brubaker v. Board of Educ.*, 502 F.2d 973 (7th Cir. 1974) (teacher dismissed after parental complaints about brochures distributed to class containing poem advocating free love and drugs), cert. denied, 421 U.S. 965 (1975).

responsiveness to local needs. At a more immediate level, board members, being citizens, taxpayers, and often parents themselves,³⁸ are likely to share the concerns and attitudes of the community they represent, and may therefore be especially sensitive to matters generating controversy among local parents.³⁹

When a parent, or local board member, protests the use of a book, or asserts that "a particular viewpoint conflicts with accepted community values,"⁴⁰ the board as a whole may act as the representative of that community interest. In this way, responsive majoritarian public education helps to retain a region's local character, maintain national diversity, and pass along to the young the values and beliefs of their society. It is only when this agency of the state seeks by majority rule to abridge interests that the Constitution puts above the vote that the courts may intervene in school board decisionmaking. In the next section this Note examines the impact of individual first amendment rights on public school schoolbook controversies.

III. CONSTITUTIONAL RESTRAINTS ON STATE REGULATION OF PUBLIC SCHOOLS

A. *The First Amendment in the Schools*

When parents, teachers, and students challenge the schoolbook policies of the public school system, they invariably invoke the first amendment as one source of their rights.⁴¹ The plain language of the amendment⁴² is sufficiently unambiguous to create a strong presumption against any state regulation of ex-

38. See Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. Pa. L. Rev. 1293, 1356 (1976) [hereinafter cited as Goldstein, *Asserted Right*]; Goldstein, *School Board Authority*, supra note 28, at 384-86; Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 Duke L. J. 841, 855-58; Milliken v. Green, 389 Mich. 1, 203 N.W.2d 457, 483 (1972) (Brennan, J., dissenting).

39. The desirability of this state of affairs depends on one's view of the primary role of public elementary and secondary education. If public education is simply a passive transmitter to the child of the collected, valued knowledge and mores of the community, this "parochial" attitude is entirely appropriate—restrained by whatever limitations the Constitution places on state action.

40. *Developments in the Law: Academic Freedom*, 81 Harv. L. Rev. 1045, 1054 (1968) [hereinafter cited as *Developments*].

41. See, e.g., *Cary v. Board of Educ.*, 598 F.2d 535 (10th Cir. 1979); *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577 (6th Cir. 1976); *Presidents Council, District 25 v. Community School Bd.*, 457 F.2d 289 (2d Cir.), cert. denied, 409 U.S. 998 (1972); *Bicknell v. Vergennes Union High School Bd. of Directors*, 475 F. Supp. 615 (D. Vt. 1979), appeal pending, No. 79-7676 (2d Cir. Feb. 6, 1980); *Pico v. Board of Educ.*, 474 F. Supp. 387 (E.D.N.Y. 1979), appeal pending, No. 79-7690 (2d Cir. Feb. 6, 1980); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703 (D. Mass. 1978).

Although the first amendment seems a logical source of protection for academic freedom, see *Developments*, supra note 40 at 1053, one commentator has suggested that academic freedom may "[m]ore properly" be derived "from the 'emanations' of a series of constitutional provisions," including first amendment freedom of expression and freedom of religion, and the fourteenth amendment guarantees of due process and equal protection. T. Emerson, *The System of Freedom of Expression* 612-13 (1970). See also Emerson & Haber, *The Scopes Case in Modern Dress*, 27 U. Chi. L. Rev. 522, 524-26 (1960).

42. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. Const., amend. 1.

pression.⁴³ However, the first amendment does not protect all expression;⁴⁴ it safeguards the expressions that are necessary for the survival of basic first amendment values.⁴⁵ To determine whether the first amendment is applicable to schoolbook controversies, then, one must first identify these core values and determine whether and to what extent their preservation requires the protection of expression within the public schools.

Although there is no consensus concerning the core values of the first amendment,⁴⁶ there are two major schools of thought on the subject. The first, notably advocated by Professor Alexander Meiklejohn,⁴⁷ views the first amendment as a limit only upon government regulation of "public speech." Public speech as a classification is itself susceptible to several interpretations, ranging from the narrowest concept of purely political speech⁴⁸ to a broader definition embracing all expression that informs political judgments.⁴⁹ This view of freedom of expression under the first amendment is essentially utilitarian, justifying restraints on government regulation to protect the process of democratic government.⁵⁰

The second approach identifies as a core value of the first amendment this political concern for self-government and at the same time emphasizes a

43. The first amendment is made applicable to action by the states by virtue of the fourteenth amendment. See Wellington, *On Freedom of Expression*, 88 *Yale L.J.* 1105, 1109 (1979).

44. There are, of course, forms of "expression" that lie outside the protective sphere of the first amendment. This Note is not concerned with attempts to incorporate into the public school curriculum or libraries "fighting words," see, e.g., *Gooding v. Wilson*, 405 U.S. 518, 522 (1972); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); "obscenity," see *Miller v. California*, 413 U.S. 15 (1973); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966); or speech that "incit[es] or produc[es] imminent lawless action," *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). When the state may legitimately restrict adults with regard to such forms of expression, a fortiori it may prohibit children's exposure to them. Indeed, the Supreme Court has upheld state regulation of even constitutionally protected conduct or expression when motivated by the state's interest in safeguarding the welfare of minor children. See, e.g., *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Ginsberg v. New York*, 390 U.S. 629 (1968); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

45. Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 *Va. L. Rev.* 1, 5, 9 (1979) [hereinafter cited as *Commercial Speech*].

46. See, e.g., T. Emerson, *supra* note 41, at 6-7; A. Meiklejohn, *Free Speech and Its Relation to Self-Government* 88-89, 106-07 (1948) [hereinafter cited as *Meiklejohn, Free Speech*]; BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 *Stan. L. Rev.* 299, 302-03 (1978); Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L.J.* 1, 26-28 (1971); Meiklejohn, *First Amendment*, *supra* note 30, at 255-57, 263.

47. See sources cited in notes 30 & 46 *supra*.

48. See Bork, *supra* note 46, at 26-27. Bork argues that "[f]reedom of non-political speech rests, as does freedom for other valuable forms of behavior, upon the enlightenment of society and its elected representatives." *Id.* at 28.

49. See BeVier, *supra* note 46, at 302-03; Meiklejohn, *First Amendment*, *supra* note 30, at 263.

50. Professor Wellington has criticized this view for overlooking the inherent difficulty in making nice distinctions between "public" and "nonpublic" speech. Wellington, *supra* note 43, at 1111. Indeed, Professor Meiklejohn himself had difficulty maintaining a narrow definition of political speech, as can be seen by comparing his narrow ambit of public speech protection in *Free Speech*, *supra* note 46, written in 1948, and his 1961 views in *First Amendment*, *supra* note 30, which concluded that "the people do need novels and dramas and paintings and poems, 'because they will be called upon to vote.'" *Id.* at 263 (quoting Kalven, *Metaphysics of the Law of Obscenity*, 1960 *Sup. Ct. Rev.* 1, 16). Professor Meiklejohn's "public speech" protection ultimately embraced "[e]ducation, in all its phases . . . [t]he achievements of philosophy and the sciences . . . [l]iterature and the arts . . . [and] [p]ublic discussions of public issues, together with the spreading of information and opinion bearing on those issues . . ." *Id.* at 257.

broader concern for individual fulfillment through free expression. This view, which has been elaborated principally by Professor Thomas Emerson, stresses the essential role played by free expression in advancing knowledge, in permitting participation in political and cultural decisionmaking, and in "achieving a more adaptable and hence a more stable community, [and] maintaining the precarious balance between healthy cleavage and necessary consensus."⁵¹ It thus looks not only to utilitarian values of benefit to society at large, but also to overtly individualistic values of personal development.⁵²

Taken together, these different values can be seen as embodying a fundamental first amendment concern with the development and preservation of an "educated citizenry,"⁵³ a core value different from Professor Meiklejohn's "informed electorate" but its necessary antecedent. Thus, when public school students, teachers, and parents assert the "right to know" against school board restrictions of educational expression, the basis of their claims lies in the constitutional value of an educated citizenry.

The protection of this core value requires that courts recognize the public school student's right to receive educational information and the teacher's correlative right to impart such information. Neither of these first amendment rights is absolute, as suggested later in this Note, but both must be accorded judicial protection against abuses by school board authorities.

Although Supreme Court decisions have not yet recognized the rights to receive and impart educational information, the Court has long acknowledged the first amendment's protection of "academic freedom."⁵⁴ In *Keyishian v. Board of Regents*,⁵⁵ the Court invalidated a New York statute imposing a loyalty program on public employees, including teachers in the public schools and universities. Although the statute was invalidated on grounds of vagueness and over-

51. T. Emerson, *supra* note 41, at 6-7. See also *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring); Note, *The Right to Know in First Amendment Analysis*, 57 *Tex. L. Rev.* 505, 512-15 (1979) [hereinafter cited as *Right to Know*].

52. See Rehnquist, *The First Amendment: Freedom, Philosophy and the Law*, 12 *Gonz. L. Rev.* 1, 3-8 (1976).

53. See *Right to Know*, *supra* note 51, at 514; Meiklejohn, *First Amendment*, *supra* note 30, at 263. See also *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumers Council, Inc.*, 425 U.S. 748, 765 (1976).

54. See *University of California Regents v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J.) ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment."). For an excellent analysis of the legal implications and scope of academic freedom in higher education in the United States, see T. Emerson, *supra* note 41, at 593-626.

Academic freedom as commonly understood means freedom from government intervention in the schools. Even judicial intervention at the instance of parents and teachers sets troubling precedents for a "governmental presence in the academic world [that] would be repressive and destructive rather than liberating." T. Emerson, *supra* note 41, at 615. Cf. *Presidents Council, District 25 v. Community School Bd.*, 457 F.2d 289, 292 (2d Cir.) ("Academic freedom is scarcely fostered by the intrusion of three or even nine federal jurists making curriculum or library choices for the community of scholars."), cert. denied, 409 U.S. 998 (1972).

Whatever the risk of inviting the courts into the academic world, they serve as an essential check on arbitrary state regulation of public education and may strike down policies that infringe the constitutional rights of children, parents, and teachers.

55. 385 U.S. 589 (1967).

breadth, Justice Brennan, speaking for the majority, observed that "[o]ur Nation is deeply committed to safeguarding academic freedom,⁵⁶ which is of transcendent value to all of us That freedom is . . . a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."⁵⁷ The Court was concerned that laws inhibiting the extracurricular expressions of faculty members would also chill the free exercise of the intellectual skills for which they were hired, and lead finally to state-imposed intellectual and ideological conformity.⁵⁸ The *Keyishian* majority anticipated that the chilling of a teacher's expression outside the classroom might lead to the inhibition of discussion within the classroom itself. This inhibition, with its attendant constraint on the free exchange of ideas, might eventually result in the coercion of uniform beliefs within the public education system, disapproved twenty-five years earlier in *West Virginia State Board of Education v. Barnette*.⁵⁹

In its most recent statement on the role of the first amendment in the public school system, *Tinker v. Des Moines Independent Community School District*,⁶⁰ the Supreme Court addressed for the first time the minor student's first amendment right to freedom of expression in the classroom. The student petitioners filed complaints, through their fathers, seeking to enjoin the school and district administrator from disciplining students who wore black armbands to protest the Vietnam War.⁶¹ The Court found that the school's regulation unconstitutionally infringed the students' right to "silent speech," because there was no showing either that their conduct "materially disrupt[ed] classwork or involve[d] substan-

56. See notes 54 supra & 88 infra.

57. 385 U.S. at 603.

On the classroom as a marketplace of ideas, see text accompanying notes 88-90 infra.

58. Justice Brennan explained: "It would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery. . . . The result must be to stifle 'that free play of the spirit which all teachers ought especially to cultivate and practice.'" 385 U.S. 589, 601 (1967) (citing *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring)).

59. 319 U.S. 624 (1943). Although the claim in *Barnette* was one of infringement of religious belief by compelling salute of the flag in violation of the proscription of worship of "graven images," an element of the faith of Jehovah's Witnesses, the Court's opinion went beyond the religious claim and held that state compulsion to declare any belief "invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Id.* at 642. Cf. *Russo v. Central School Dist.*, 469 F.2d 623, 631-32 (2d Cir. 1972) (teacher cannot be compelled to take part in flag salute), cert. denied, 411 U.S. 932 (1973).

The danger of coerced conformity of belief is equally serious when the teacher, rather than the school authorities, is the source of indoctrination:

[T]eachers cannot be allowed to patrol the precincts of radical thought with the unrelenting goal of indoctrination When a teacher is only content if he persuades his students that his values and only his values ought to be their values, then it is not unreasonable to expect the state to protect impressionable children from such dogmatism.

James v. Board of Educ., 461 F.2d 566, 573 (2d Cir.), cert. denied, 409 U.S. 1042 (1972). See notes 125-31 and accompanying text infra.

60. 393 U.S. 503 (1969).

61. The school had adopted a policy forbidding any student wearing an armband to attend school. The district court had dismissed the complaint, holding the regulation to be a "reasonable" measure aimed at maintenance of school discipline. 258 F. Supp. 971 (S.D. Iowa 1966). The court of appeals, en banc, divided evenly and affirmed without opinion. 383 F.2d 988 (8th Cir. 1967).

tial disorder or invasion of the rights of others" or that the school administration could "reasonably have [been] led . . . to forecast substantial disruption of or material interference with school activities."⁶² Justice Fortas declared:

[S]tate 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.⁶³

Students, then, retain some constitutional rights within the public schools that the state may not suppress without inviting judicial intervention. *Tinker*, *Barnette*, and *Keyishian* illustrate the Court's willingness to review state regulation of public education when it trenches upon important first amendment rights of academic freedom and extracurricular freedom of expression and belief. They shed little light, however, on the limitations, if any, that the right to free expression and the right to receive information place on state control of school curricula or materials. Although the Court has not yet addressed this question directly, *Epperson v. Arkansas* provides glimmerings of one possible answer.⁶⁴ In *Epperson*, the Court struck down a statute prohibiting the teaching of evolution in Arkansas public schools⁶⁵ as violative of the establishment clause⁶⁶ of the first amendment. The trial court had invalidated the statute on first amendment academic freedom grounds,⁶⁷ but its judgment was reversed by the Arkansas Supreme Court, which found the statute to be a "valid exercise of the state's power to specify the curriculum in its public schools."⁶⁸ The United States Supreme Court again reversed, basing its decision on religious, not academic, freedom. Nonetheless, Justice Fortas, writing for the majority, observed more broadly that "[o]ur courts . . . have not failed to apply the First Amendment's

62. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 513, 514 (1969).

63. *Id.* at 511. This passage has been cited in support of the proposition that the "marketplace of ideas" model, prohibiting "arbitrary indoctrination," is constitutionally required in the public school system as well as in institutions of higher education. See Van Alstyne, *supra* note 38, at 857; notes 89-90 *infra*.

64. 393 U.S. 97 (1968).

65. The statute made it unlawful:

for any teacher . . . in any . . . [educational] institution of the State, which is supported in whole or in part from public funds . . . to teach the theory or doctrine that mankind ascended or descended from a lower order of animals and also it shall be unlawful for any teacher, textbook commission or other authority exercising the power to select textbooks for above mentioned educational institutions to adopt or use in any such institution a textbook that teaches [that] doctrine . . .

Initiated Act No. 1, Ark. Acts 1929; Ark. Stat. Ann. § 80-1627 (1960 Repl. Vol.).

66. "Congress shall make no law respecting an establishment of religion. . . ." U.S. Const., amend. I.

67. T. Emerson, *supra* note 41, at 605.

68. *State v. Epperson*, 242 Ark. 922, 416 S.W.2d 322 (1967).

mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief."⁶⁹

Some indication of the nature of this first amendment limit on state control over the content of public education may be gleaned from the somewhat enigmatic concurring opinion of Justice Black. Although he believed the Arkansas statute to be unconstitutionally vague, Justice Black could imagine "no reason . . . why a State is without power to withdraw from its curriculum any subject deemed too emotional and controversial for its public schools."⁷⁰ Even he conceded, however, that there are some restrictions that no state can impose on its teachers.⁷¹ Once the state decides to include a particular subject in its curriculum, the teacher cannot be compelled to endorse or present one particular viewpoint to the exclusion of all others.⁷² Justice Stewart reached a similar conclusion, stating that the criminal punishment of the teaching of certain points of view "would clearly impinge upon the guarantees of free communication contained in the First Amendment."⁷³

Thus, for Justices Stewart and Black at least, some degree of first amendment protection extends to the expression of teachers at work in public school classrooms. Unfortunately, neither undertook any deeper exploration of the extent to which the first amendment restrains the state's power to control what its teachers teach. In the sections that follow, this Note seeks to show that the teacher's right to speak in the classroom is the necessary complement of the public school student's right to receive educational information.

69. 393 U.S. at 104. The majority's partial reliance on traditional principles of academic freedom led Justice Black to protest the Court's headlong leap "into the middle of the very broad problems involved in federal intrusion into state powers to decide what subjects and schoolbooks it may wish to use in teaching state pupils." *Id.* at 110 (Black, J., concurring).

70. *Id.* at 113.

71. One commentator has suggested that the state may not engage in "arbitrary restrictions on alternative sources of information or opinion." Van Alstyne, *supra* note 38, at 857. Arbitrary restrictions would be those not based on budgetary, time, or space considerations. Thus, any deliberate attempt to indoctrinate through book selection would be unconstitutional. This analysis is flawed because such "nonarbitrary" restrictions do not dictate final selection of materials, they merely compel someone to make choices with regard to which books to purchase or retain. Final selection decisions will be prompted by other considerations, such as content, relevance, timeliness, and need. See Goldstein, *Asserted Right*, *supra* note 38, at 1349 n.183; Garvey, *First Amendment*, *supra* note 31, at 327.

72. "It is plain that a state law prohibiting all teaching of human development or biology is constitutionally quite different from a law that compels a teacher to teach as true only one theory of a given doctrine." 393 U.S. at 111 (Black, J., concurring).

One commentator has suggested that when the school board wants *no* presentation of certain materials, e.g., certain language or ideas in class assignments, the avoidance of apparent "legitimization" of such language or ideas is itself a valid educational interest that justifies book restrictions. See Goldstein, *Asserted Right*, *supra* note 38, at 1345. However, this Note suggests that when no prior valid prohibitive policy has been established and a teacher assigns a particular book for a reasonable educational purpose, the state must prove a reasonable educational policy for prohibiting its use. See Section IV *infra*.

73. 393 U.S. at 116 (Stewart, J., concurring).

B. *The Student's Right to Receive Educational Information*

The right of public school students to receive educational information⁷⁴—to hear, to read, and to learn—has only recently begun to be defined by the courts.⁷⁵ The right derives from the first amendment right to receive information,⁷⁶ which itself is a corollary to the right of free expression,⁷⁷ and is critical to the promotion of an educated citizenry in a free society. While the extent to which a child, or his or her parents or teachers, can assert the child's right to receive information in the public schools is at best unclear, courts have generally concluded that the minor's right to know is more circumscribed than the adult's.

In *Ginsberg v. New York*,⁷⁸ for example, the Supreme Court upheld a state statute that made it illegal to sell constitutionally protected salacious materials to

74. The right to receive information furthers both the personal and utilitarian purposes of the first amendment. See notes 46-53 and accompanying text *supra*. However, in view of the immaturity and relative incapacity of children, their right to receive information may be viewed principally as a means to an end: their development into adults capable of the "effective exercise of First Amendment freedoms and . . . intelligent utilization of the right to vote." *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

75. It is unclear whether a child may assert a right to receive information that neither the state nor her parent wishes her to receive; but where parent and child act in unison, a number of courts have recognized such a right under the first amendment. See, e.g., *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 582 (6th Cir. 1976) (student has right to hear teacher's discussion of controversial library book and then to "find and read" the book); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269, 1273-75 (D.N.H. 1979) (infringement of student's right to receive information valid only where authorities show substantial interest served by restriction); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 714 (D. Mass. 1978) ("What is at stake here is the right to read and be exposed to controversial thoughts and language—a valuable right subject to First Amendment protection."). See also *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (statute interfered with "the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control" the education of their child) (emphasis added).

76. See generally *Right to Know*, *supra* note 51. The Supreme Court typically has referred to the right to receive information in the context of challenges to restrictions on speech. See, e.g., *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943); *Right to Know*, *supra*, at 507-10. However, several decisions have recognized that this right can also be asserted by the *listener*, whether or not a willing speaker is able to assert her right to speak. See *Richmond Newspapers, Inc. v. Virginia*, 100 S. Ct. 2814 (1980); *Bates v. State Bar*, 433 U.S. 350 (1977); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *Stanley v. Georgia*, 394 U.S. 557 (1969). See also *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) ("[W]here a speaker exists, . . . the protection afforded is to the communication, to its source and to its recipients both."). Thus, even when the speaker does not or cannot assert a right to free expression, the listener may attempt to vindicate the opportunity for reciprocal "communication" between them. See, e.g., *Procunier v. Martinez*, 416 U.S. 396 (1974) (scope of speaker-prisoner's rights did not have to be determined because of clear infringement of recipient's rights).

77. As Justice Brennan, concurring in *Lamont v. Postmaster General*, pointed out:

[T]he protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful. . . . [T]he right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.

381 U.S. 301, 308 (1965) (Congress may not require addressees to request in writing delivery of mail from communist countries).

78. 390 U.S. 629 (1968). *Ginsberg* established "variable obscenity" analysis concerning minors' access to sexually explicit material that would not be obscene as to adults. Note, *Regulation of Programming Content to Protect Children After Pacifica*, 32 Vand. L. Rev. 1377, 1389 (1979) [hereinafter cited as *Program Content*].

minors. The Court concluded that the statute did not invade "the area of freedom of expression constitutionally secured to minors,"⁷⁹ and was within the state's authority to proscribe conduct affecting children that it would be powerless to prohibit in the case of adults.⁸⁰ The statute was not unconstitutional because it acknowledged the primacy of parental control over childrearing while it reasonably reflected the legislature's concern for the potential harm that uncontrolled exposure to erotica might inflict on children.⁸¹

The same concern about unsupervised children gaining access to constitutionally protected but controversial adult material took the Court one step beyond *Ginsberg* in *FCC v. Pacifica Foundation*.⁸² *Pacifica* upheld the FCC's authority to regulate the airing of "patently offensive"⁸³ material that was "not obscene in the constitutional sense"⁸⁴ at times when children are likely to be listening. Only a plurality concluded that this was a regulation of "form, rather than . . . content."⁸⁵ A majority, however, argued that "broadcasting is uniquely accessible to children, even those too young to read,"⁸⁶ and invoked the protection-of-minors rationale articulated in *Ginsberg*, to justify the regulation of expression that is not even variably obscene.⁸⁷

It would seem, then, that a child does have a right to receive certain kinds of information, although that right is limited by parental prerogatives and by the state's interest in protecting unsupervised children from uncontrolled exposure to sexually explicit or offensive materials intended for adult consumption. Recognition of this basic right is a key factor in the analysis of schoolbook controver-

79. 390 U.S. at 637.

80. *Id.* at 638. See also *id.* at 708 (Harlan, J., concurring).

81. Justice Brennan, writing for the majority, explained that the statute did not affect parental prerogatives: parents were not prohibited from purchasing the magazines and giving them to their own children if they desired. Moreover, the statute aided objecting parents in preventing their children from coming in contact with such erotic materials. *Id.* at 639-40.

82. 438 U.S. 726 (1978).

83. *Id.* at 743.

84. *Id.* at 756 (Powell, J., concurring in part and concurring in the judgment). The majority in *Pacifica* for the first time approved the restriction of children's access to expression that was not adjudged obscene even as to minors by the variable obscenity test established in *Ginsberg*. *Id.* at 767 (Brennan, J., dissenting). Indeed, it did not even refer to this theory in reaching its decision. See Program Content, note 78 *supra*, at 1395.

85. *Id.* at 743 n.18.

86. *Id.* at 749. This rationale tacitly endorsed Judge Leventhal's dissent on the same grounds in *FCC v. Pacifica Foundation*, 556 F.2d 9, 30 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978). Judge Leventhal's opinion, which Justice Powell cited with approval, 438 U.S. 757 n.1, clearly enunciated a protectionist rationale and would have sustained the FCC ruling "that the language as broadcast was indecent" and could be restricted with regard to the time of broadcast. 556 F.2d at 31 (emphasis in original). See also note 87 *infra*.

87. Justice Powell joined the judgment on this ground only. *Id.* at 755-62 (Powell, J., concurring in part and concurring in the judgment). He rejected the plurality's views that regulation of nonobscene but "patently offensive references to excretory and sexual organs and activities," *id.* at 743, was control of "form, rather than . . . content," *id.* at 743 n.18, and that such expression was less valuable to society and less deserving of first amendment protection than other expressions. *Id.* at 747. This approach was first articulated by Justice Stevens in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 61 (1976), when a plurality of the Court recognized a category of expression outside the sphere of "ideas of social and political significance." See Program Content, note 78 *supra*, at 1384-85.

sies, although somewhat different limits on the right may be found where educational rather than sexual material is concerned.

Courts dealing with the right to receive information in the context of higher education have evolved a "marketplace of ideas" model as the best means of protecting the first amendment value of an educated citizenry as well as the traditional ideal of academic freedom.⁸⁸ This model is particularly apt within the college or university community, where young adults attempt through critical and creative analysis to increase the universe of what is known. It may be of questionable applicability in primary and secondary public schools, where attendance is compulsory and students have little control over their exposure to course content.⁸⁹ Some sources suggest that this marketplace of ideas model should also obtain in the public schools;⁹⁰ minor students, however, lack the capacity to participate fully as buyers in that marketplace. Moreover, the public school is not a traditional public forum.⁹¹ Thus, the state may seek to persuade, even reasonably to indoctrinate, its young people to conform to societal values and norms, although it must stop short of imposing totalitarian control.⁹²

The state's power to regulate expression is most severely limited when that expression takes place in a "public forum."⁹³ Aside from traditional public

88. See, e.g., *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). The popular conception in the United States of "academic freedom," see also note 54 *supra*, thought to emerge from the first amendment guarantees of free speech, inaccurately reflects the reality of public education.

89. "The secondary school more clearly than the college or university acts *in loco parentis* with respect to minors Most parents, students, school boards, and members of the community usually expect the secondary school to concentrate on transmitting basic information, teaching the best that is known and thought in the world, training by established techniques and, to some extent at least, indoctrinating in the *mores* of the surrounding society." *Mailloux v. Kiley*, 323 F. Supp. 1387, 1392 (D. Mass.), *aff'd*, 448 F.2d 1242 (1st Cir. 1971). See *Developments*, *supra* note 40, at 1051; *Right to Teach*, *supra* note 35, at 1179-80, 1184; *Nahmod, Controversy in the Classroom: The High School Teacher and Freedom of Expression*, 39 *Geo. Wash. L. Rev.* 1032, 1032-33 (1971) [hereinafter cited as *Nahmod, Controversy*]; *Goldstein, Asserted Right*, *supra* note 38, at 1350-51; *Note, Academic Freedom in the High School Classroom*, 15 *J. Fam. L.* 706, 724 (1977) [hereinafter cited as *Academic Freedom*].

90. But see *Right to Teach*, *supra* note 35 at 1180-82, where the author suggests that the "marketplace of ideas" model may now be applicable to lower education, having been given impetus by the "open classroom" movement. Several court decisions appear to recognize this possibility. See, e.g., *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 582-83 (6th Cir. 1976); *Parducci v. Rutland*, 316 F. Supp. 352, 355 (M.D. Ala. 1970). Whether or not this interpretation would be desirable, these decisions seem to reflect a misconception that originated in *Tinker*. The Court in *Tinker* quoted with approval Justice Brennan's forceful statement that "[t]he classroom is peculiarly the 'marketplace of ideas'" in *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). See also text accompanying notes 55-58 *supra*. *Keyishian*, however, concerned the right of a state university teacher not to be subjected to a loyalty program. Both the facts that *Keyishian* was a university teacher and that the first amendment claim did not relate to conduct in the classroom call into question the *Tinker* Court's invocation of the "marketplace of ideas" model in the context of a public school. Moreover, it is important to remember that *Tinker* itself addressed only student expression, invalidating school restrictions on nondisruptive symbolic student speech. It did not purport to establish a student's right to receive information and a teacher's reciprocal right of free expression in the classroom. See *Goldstein, Asserted Right*, *supra* note 38, at 1350-55.

91. See *Kalven, The Concept of the Public Forum: Cox v. Louisiana*, 1965 *Sup. Ct. Rev.* 1; *L. Tribe, American Constitutional Law* 689-90 (1978); notes 93-97 and accompanying text *infra*.

92. See *Yudof, When Government Speaks: Toward a Theory of Government Expression and the First Amendment*, 57 *Tex. L. Rev.* 863, 874-75 (1979).

93. The term "public forum" was introduced by Professor Kalven, see *Kalven*, *supra* note 91, at 11-12. Professor Tribe has characterized the public forum as "constitutional shorthand for the

meeting places such as parks, sidewalks, and public streets, which *must* be employed as public forums,⁹⁴ facilities such as municipal theatres or meeting houses become public forums when they are dedicated by the state to "the exchange of views among members of the public."⁹⁵ The critical question is whether such facilities were created for the primary purpose of public access and communication. Public schools traditionally have not been deemed to come within this definition: they are created not for public interchange but for closely regulated and structured transmission of particular ideas and skills. There is no clear intent to dedicate the public school to unrestricted public access and communication.⁹⁶ The state, then, has more leeway to limit expression, "to preserve such tranquility as the facilit[y]'s central purpose requires," than would obtain in the case of a true public forum.⁹⁷

The analysis of the child's first amendment right to know is further complicated because the state can interfere with that right in two ways. First, the state may regulate speech by silencing a teacher in some circumstances⁹⁸ or by removing a book from the library. Second, it may itself refuse to speak, by deciding not to teach certain subjects or purchase certain books. In traditional first amendment jurisprudence only the regulation of speech, not the refusal to speak at all, is thought to raise a constitutional issue.⁹⁹ There is, however, both

proposition that, in addition to its usual obligation of content-neutrality (an obligation that exists whether or not a public forum is involved), government cannot regulate speech-related conduct in such places except in narrow ways shown to be necessary to serve significant governmental interests." L. Tribe, *supra* note 91, at 689 (citations omitted).

94. *Id.* at 690.

95. *Id.* at 689-90.

96. Professor Tribe calls such facilities as schools and libraries "semi-public forums"—neither private property nor public facilities "created primarily for public interchange." *Id.* at 690; Yudof, *supra* note 92, at 884-88. See also *Greer v. Spock*, 424 U.S. 828, 836 (1976) (no constitutional principle exists "that whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a 'public forum' for purposes of the First Amendment").

97. *Id.* Thus the state is not required to tolerate behavior, whether by speech or action, that unduly interferes with the effective operation of its public schools. Compare *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 513 (1969) ("conduct . . . which . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is . . . not immunized by the constitutional guarantee of freedom of speech"), and *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (conduct creating noise may be excluded from public property adjacent to school in session), with *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (free speech "best serve[s] its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger"). Professor Yudof suggests, however, that a total prohibition of outside influences is inconsistent with educational purposes and concludes that outside individuals and groups should be able to assert a qualified right of access to the public schools. Yudof, *supra* note 92, at 885.

98. See section III. C. *infra*.

99. See Tribe, *supra* note 91, at 580-84; see also note 72 and accompanying text *supra*.

At the time this Note was set in print, the Supreme Court had never explicitly held that the first amendment conferred on the public a right of access to governmental sources of information. The Court's recent decision in *Richmond Newspapers, Inc. v. Virginia*, 100 S. Ct. 2814 (1980), suggests a willingness to do so, at least with regard to criminal trials. Although there was no majority opinion for the Court, seven Justices, each endorsing a first amendment right of public access in this context, voted to reverse a state judge's order closing a criminal trial to the press and the public. Justice Powell took no part in this decision, but his concurring opinion in *Gannett Co. v. DePasquale*, 443 U.S. 368, 397 (1979), suggests there may be an eighth vote favoring this view.

reason and precedent for bringing the state as unwilling speaker within the scope of the first amendment.¹⁰⁰

Although the state has considerable latitude in directing the public schools and determining the content of public education,¹⁰¹ protection of fundamental first amendment values—utilitarian and individual—requires it to refrain from certain types of selective silence that may be tantamount to active indoctrination. It is this realization that led the Court in *Red Lion Broadcasting Co. v. FCC*¹⁰² to uphold the constitutionality of the FCC's "fairness doctrine," which requires even unwilling licensed broadcasters to provide air time for opposing viewpoints on controversial subjects. Writing for the majority, Justice White explained that the fairness doctrine is justified and even *required* by the first amendment, whose purpose, he pointed out, is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee . . ."¹⁰³ Thus, the Court acknowledged for the first time that there are instances when the public's first amendment right to receive information can require even the unwilling speaker to speak.¹⁰⁴

Even if the marketplace of ideas principle is not fully applicable to lower levels of schooling, the principles set out in *Red Lion* are certainly relevant to

Richmond may herald a new receptivity by the Court to a vision of the first amendment that, in certain circumstances, compels an unwilling governmental source of information to "speak" because of the public's right to "listen." It should be noted, however, that *Richmond* is not a clear mandate for a general right of access. The Justices emphasized the "presumption of openness [that] inheres in the very nature of a criminal trial under our system of justice." 100 S. Ct. at 2825 (Burger, C.J., joined by White and Stevens, JJ.). See also *id.* at 2842 (Blackmun, J., concurring in the judgment); *id.* at 2834 (Brennan and Marshall, JJ., concurring in the judgment); *id.* at 2840 (Stewart, J., concurring in the judgment). Thus, it would be premature to assume that the same right of access can automatically be applied to other contexts which do not share this tradition of publicity.

100. Although it is reasonable to characterize books and teachers as willing—and restrictive school boards as unwilling—speakers, it is not necessary to do so to raise the constitutional issue. The student's first amendment right to receive information and the first amendment values of an educated citizenry independently restrain school board authority to regulate schoolbooks. See Section III. A. *supra*.

101. See section II *supra*. But see Emerson, Symposium—The First Amendment and the Right to Know: Legal Foundations of the Right to Know, 1976 Wash. U.L.Q. 1, 8 (1976) (suggesting that the Court in *Epperson v. Arkansas*, 393 U.S. 97 (1968), should have acknowledged that "in the field of education, where the government has a virtual monopoly, certain kinds of curriculum restrictions seem to run afoul of the right to know").

102. 395 U.S. 367 (1969).

103. *Id.* at 390.

104. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), at first glance seems conclusively to preclude any "right" of access to non-broadcast media. In *Tornillo*, the state attempted to legislate a right of access to the privately owned press. The Court unanimously rejected this abridgment of the freedom of the press to make editorial judgments without governmental interference. As Chief Justice Burger explained, "governmental coercion [of newspapers] at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years." *Id.* at 254. The "express provision" to which the Court referred, that "Congress shall make no law . . . abridging the freedom of the Press," U.S. Const., amend. I, prevents "supplant[ing] private control of the press with the heavy hand of government intrusion. . . ." *Id.* at 260 (White, J., concurring). Without its protection, the "government [might become] the censor of what the people may read and know." *Id.*

Tornillo is, thus, of limited value in schoolbook controversies, where the speaker-editor is the state, and application of a qualified "fairness doctrine" furthers the same goal of minimizing governmental interference with the free flow of ideas.

schoolbook controversies. The fairness doctrine attempts to prevent the creation of "an unconditional monopoly of a scarce resource which the Government has denied others the right to use."¹⁰⁵ Obviously, since government controls the allocation of airwaves through licensing but does not control the establishment of alternatives in education, the analogy to public schools cannot be stretched too far. Within the public schools themselves, however, the state has complete editorial control. It broadcasts its chosen educational message to an audience made up of children. The schools do not utilize a physically limited medium of expression, but they have neither enough time nor resources to permit all books, or even books "worth reading," to be read by their students.¹⁰⁶ Choices must be made, and the school boards will select some books and exclude others.¹⁰⁷ The student's right to receive information requires that when the board intentionally omits material from the school's message, it should have a reason for doing so consistent with its educational mission.¹⁰⁸ When the board's restrictions of expression are not motivated by educational judgment, students, parents, and teachers should be able to turn to the courts for relief.

A final paradox concerning the student's right to know is presented by the "captive audience" status sometimes attributed to public school students.¹⁰⁹

105. 395 U.S. at 391.

106. Cf. *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.* 412 U.S. 94, 122 (1973) ("With broadcasting, where the available means of communication are limited in both space and time, the admonition of Professor Alexander Meiklejohn that '[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said' is peculiarly appropriate. *Political Freedom* 26 (1948).").

107. This Note does not, therefore, advocate the rigid imposition on the schools of the "equal time" type of "fairness doctrine" used in broadcasting. See generally *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *NBC, Inc. v. FCC*, 516 F.2d 1101 (D.C. Cir. 1974) (Leventhal, J.), cert. denied, 424 U.S. 910 (1976). Some commentators, however, have suggested that if the government is the speaker-educator, the first amendment may require "a fairly balanced exposition of various relevant theories and points of view, and of alternatives open for action." Emerson & Haber, *supra* note 41, at 527. The authors, referring to basic curricular, rather than book, choices, would consider the extent to which the state's audience was denied access to alternative and opposing views as well as the age and relative maturity of its members before imposing a rigid balance requirement. In a public school, children make up the audience, and the state controls the content of the message. Such considerations might impose a higher degree of obligation on the public schools with regard to "fairness" than would obtain in other areas of government communication. *Id.* at 527-28.

Similarly, Justices Black and Stewart suggested in *Epperson*, 393 U.S. at 111, 115, that a teacher must be permitted to present balanced material once the subject matter has been included in the curriculum. See notes 71-73 *supra*. See also Nahmod, *First Amendment Protection for Learning and Teaching: The Scope of Judicial Review*, 18 *Wayne L. Rev.* 1479, 1510 (1972); Nahmod, *Controversy*, *supra* note 89, at 1047-50; *Right to Teach*, *supra* note 35, at 1186.

108. The principal disadvantage of a rigid "balanced presentation" requirement lies in its cost in terms of judicial intrusion as a watchdog over the school system. Not only would this have the practical effect of requiring a factfinding hearing with respect to virtually all school board educational choices, it would vest final educational decisionmaking authority in the courts, rather than the local educational authorities, as the state legislatures intended. Comment, 55 *Tex. L. Rev.* 511, 521 (1977) (courts might be tempted to substitute their own judgments for those of the educational authorities through imposition of the fairness doctrine on school library collections).

109. See *Mailloux v. Kiley*, 323 F. Supp. 1387, 1392 (D. Mass. 1971). See also *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring) (state "may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment

Captive audience status is usually invoked to justify governmental limitations on the freedom of expression in certain places at certain times.¹¹⁰ Children in public schools intentionally are subjected to a preselected curriculum in part because they lack the capacity to assess their own educational needs and make independent choices. The state makes the selection for them, supplying useful materials they can comprehend, while protecting them from exposure to potentially harmful expression. But while this very dependency justifies state regulation of expression to children¹¹¹ it makes them vulnerable to governmental abuses. Children are incapable of distancing themselves from and critically evaluating the state's educational message.¹¹² Moreover, the public school environment traditionally has rewarded compliance and conformity, encouraging acceptance of educational messages from authority figures. In such an atmosphere, the courts must be sensitive to efforts by students, parents, and teachers to prevent abuse of the state's extraordinary "power . . . to persuade."¹¹³ Explicit judicial recognition of the public school student's right to receive educational information would considerably diminish the potential for such abuse.

C. *The Teacher's Rights in the Public School Classroom*

The public school teacher who wishes to challenge school board regulation of classroom discussions and materials can assert a two-faceted first amendment right against the state.¹¹⁴ First, like any other individual, the teacher has a personal right of free expression that is not shed "at the schoolhouse gate."¹¹⁵

guarantees"). Indeed, one commentator has suggested that all children, not only those in a public school classroom, might be characterized as a captive audience. See Program Content, *supra* note 78, at 1381-82.

110. See generally Black, *He Cannot Choose But Hear: The Plight of the Captive Auditor*, 53 *Colum. L. Rev.* 960, 963-64 (1953) [hereinafter cited as Black, *Captive Auditor*]; *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302, 308 (1974); *Public Util. Comm'n v. Pollak*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting); *id.* at 466 (Black, J., concurring in part).

111. See also notes 78-87 and accompanying text *supra*.

112. As one commentator has noted, "[l]government broadcasting to a captive audience on a bus is not very different from government broadcasting to school children, except that silence is an available alternative only in the first situation." See Garvey, *First Amendment*, *supra* note 31, at 369 (referring to *Public Util. Comm'n v. Pollak*, 343 U.S. 451 (1952)). It is important to remember, however, that in schoolbook conflicts, the plaintiffs, rather than demanding restriction of expression, often are attempting to compel expression in the form of books or materials that have been denied to them.

113. See Yudof, *supra* note 92, at 874-75.

114. The teacher's freedom of instructional expression may be described as twin rights: a "speech" right and a "structural" right. Cf. Brennan, *Address*, 32 *Rutgers L. Rev.* 173, 176-77 (1979) (articulating two models of first amendment protection for the press: (1) a "speech" model under which the press has the right to speak out and (2) a "structural" model that focuses on the role of the press as provider and circulator of the information necessary for informed public discussion).

The teacher's "speech" right to free expression is personal—a right to self-expression that flows from the individualist values inherent in the first amendment. The "structural" right is instrumental, flowing from the utilitarian value of an educated citizenry. See Section III. A. *supra*. This structural right is the complement to the student's right to receive information and is, arguably, the more important of the two. When a teacher is silenced, the students may never receive the restricted information. Their injury is not known to them and, not knowing of the deprivation, they are not likely to seek to correct it. The teacher's institutional expertise thus makes him or her the appropriate champion of the child's right to receive information. See note 117 *infra*.

115. *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. at 506. Justice Fortas's dictum about teachers' rights, *id.*, prompted Justice Black to respond, in dissent, that a teacher "no more carries

Although a state employee, the public school teacher retains first amendment protection against excessive state regulation of noninstructional expression.¹¹⁶ In addition, the teacher has a discrete first amendment right not to be compelled to infringe his or her students' first amendment right to receive information.¹¹⁷

Difficult problems arise in attempting to reconcile these rights with the legitimate educational interests of the state in disputes over the content of instruction, where the state's interests are strongest. In *Epperson v. Arkansas*,¹¹⁸ the Supreme Court sidestepped the issue of state control of instructional content when it invalidated Arkansas's anti-evolution statute on the ground that it violated the first amendment's establishment clause. The Court addressed the issue of curriculum and state control of the content of a teacher's classroom expression only in dictum.¹¹⁹

In one recent case, *Kingsville Independent School District v. Cooper*,¹²⁰ the Court of Appeals for the Fifth Circuit expressly held that the content of a teacher's classroom discussion is protected by the first amendment. The teacher, who used role-playing in her presentation of Reconstruction-era history, was not rehired after she refused "not to discuss Blacks in American history" and did not eliminate everything "controversial" from classroom discussions.¹²¹ The Fifth Circuit ordered her reinstated with back pay, holding that "classroom dis-

into school with him a complete right to freedom of speech and expression than ... [any other employee of an institution does to act] contrary to [its] rules and speak his mind on any subject he pleases. ... [A] teacher is not paid to go into school and teach subjects the State does not hire him to teach as a part of its selected curriculum." *Id.* at 521-22. But see note 116 *infra*.

116. See, e.g., *Givhan v. Western Line Consolidated School*, 439 U.S. 410 (1979) (teacher cannot be terminated because of private expression of opinion to school principal); *Mount Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (where school board claims mixed motives, it must show that nontenured teacher was not rehired for reasons other than exercise of first amendment freedom outside of classroom); *Russo v. Central School Dist.*, 469 F.2d 623 (2d Cir. 1972) (teacher has first amendment right to refuse to participate in flag salute), cert. denied, 411 U.S. 932 (1973).

117. *Academic Freedom*, *supra* note 89, at 725.

Whether a teacher has standing to assert a student's right to receive information has not yet been decided by the Supreme Court, and lower courts have reached conflicting conclusions. In *Mercer v. Michigan State Bd. of Educ.*, 379 F. Supp. 580 (E.D. Mich.), *aff'd mem.*, 419 U.S. 1081 (1974), the district court refused to grant a teacher third-party standing to sue on behalf of his students and their parents, finding that the students and parents could have asserted their rights themselves and that the court would not easily be able to determine whether any parents or students desired a change in the challenged statute.

Mercer's viability has been cast in doubt by *Craig v. Boren*, 429 U.S. 190 (1976), in which the Supreme Court recognized the third-party standing of one who was legally obliged to engage in conduct that would "result indirectly in the violation of third parties' rights." *Id.* at 195 (quoting *Warth v. Seldin*, 422 U.S. 490, 510 (1975)). Thus, when a teacher has been compelled to implement school policies that may unconstitutionally infringe the first amendment rights of students, courts should recognize his or her standing to bring the claim. See generally Note, *Standing to Assert Constitutional Jus Tertii*, 88 *Harv. L. Rev.* 423 (1974).

118. 393 U.S. 97 (1968). See notes 64-70 and accompanying text *supra*. See also T. Emerson, *supra* note 41, at 605-07.

119. See 393 U.S. at 104-05.

120. 611 F.2d 1109, 1113 (5th Cir. 1980).

121. *Id.* at 1111, quoting school district's personnel director. After she completed the unit, the school board decided not to renew her contract despite the strong recommendations of her principal and the school superintendent.

cussion is protected activity” and that the board’s actions violated her first amendment rights.¹²²

The *Kingsville* court, acknowledging that first amendment protection must be qualified in the classroom context, concluded that such discussions are protected unless they “ ‘clearly . . . overbalance [the teacher’s] usefulness as an instructor.’ ”¹²³

This standard appears to give inadequate deference to the school board’s authority over curriculum: the board is entitled to use reasonable judgment in evaluating the relative educational advantages and disadvantages not only of overall performance, but also of a teacher’s approach to particular subjects.¹²⁴ Too much deference to the teacher could lead to interference with the school’s effort to transmit legitimate values and ideals to its students. For example, the teacher is not free to decide unilaterally to omit some portions of the prescribed curriculum. In *Palmer v. Board of Education*,¹²⁵ the Court of Appeals for the Seventh Circuit held that a probationary kindergarten teacher who was a Jehovah’s Witness was not free to disregard the prescribed curriculum regarding patriotic matters despite her claim that participation would violate her religious beliefs. The court noted the compelling parental and state interests in having democratically chosen representatives select the curriculum, and concluded that “[i]t cannot be left to individual teachers to teach what they please.”¹²⁶

122. *Id.* at 1113. Of course, the texts may have included a comprehensive representation of the material, in which case there was, if anything, less reason to impose sanctions on the teacher’s classroom discussions. If the books themselves omitted this significant material, the first amendment should protect the teacher’s right to distribute appropriate material to fill the gap, as well as the student’s right to receive it.

123. 611 F.2d at 1113 (quoting *Kaprelian v. Texas Woman’s University*, 509 F.2d 133, 139 (5th Cir. 1975)).

124. Any other result would assure a teacher the right to continue to be useless, or even disruptive, in one subject area if his or her overall performance was more useful than not.

Courts sometimes prefer to decide these cases in whole or in part on procedural due process grounds, focusing on inadequate guidelines and lack of notice to the teachers being disciplined. See, e.g., *Mailloux v. Kiley*, 436 F.2d 565 (1st Cir.), on remand, 323 F. Supp. 1387 (D. Mass.), *aff’d*, 448 F.2d 1242 (1st Cir. 1971); *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969); *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970). As *Kingsville* indicates, these cases can be viewed through a first amendment, as well as a due process, prism. To the extent that established educational policy does not constrain the teacher’s choice, he or she enjoys discretion to make first-line educational decisions without fear of loss of, or suspension from, employment. See *Mailloux v. Kiley*, 323 F. Supp. 1387, 1392 (D. Mass. 1971).

Although the courts in *Keefe* and *Parducci* emphasized the lack of adequate notice, in both cases the teachers had been instructed not to continue the activities in question, and no action was taken against them until they expressly refused to follow such instructions. See *Keefe*, 418 F.2d at 361; *Parducci*, 316 F. Supp. at 354. While the courts in these cases may simply have avoided making hard decisions, it may be that broader concerns than the absence of fair notice explain these rulings. In particular, first amendment considerations suggest that if the school authorities are unable to show a reasonable educational basis for their prohibition, the teacher’s choice of methods or materials should be respected. See Section IV *infra*. See also *Brubaker v. Board of Educ.*, 502 F.2d 973, 991-92 (7th Cir. 1974) (Fairchild, J., dissenting), cert. denied, 421 U.S. 965 (1975).

125. 603 F.2d 1271 (7th Cir. 1979), cert. denied, 100 S. Ct. 689 (1980).

126. *Id.* at 1274.

The teacher, then, is required to adhere to the general curriculum, to prepare and select relevant materials¹²⁷ reasonably tailored to the age and sophistication of the class,¹²⁸ and to use methods that appropriately maintain discipline in the classroom.¹²⁹ A teacher who fails to meet these conditions and who has adequate notice of the consequences may justifiably be discharged.

The state's power to supervise instructional content, as reflected in these requirements, is warranted as a check on the autonomous teacher's considerable power over students¹³⁰—power that brings both benefit and danger into the classroom. Unfortunately, courts have tended to focus only on the danger to the exclusion of the benefit. The teacher's autonomy is more often an insulator against ideological bombardment than it is a danger. As long as all teachers retain the right to express independent views in the classroom, the state is unable to speak with a single voice.¹³¹

127. Relevance is not always self-evident. While it is clear that a science teacher is hired to teach science, not history, see, e.g., *Birdwell v. Hazelwood School Dist.*, 352 F. Supp. 613 (E.D. Mo. 1972); *Ahem v. Board of Educ.*, 327 F. Supp. 1391 (D. Neb. 1971), *aff'd*, 456 F.2d 399 (8th Cir. 1972), determinations of relevancy are issues of fact that the teacher is often required to prove. See, e.g., *Brubaker v. Board of Educ.*, 502 F.2d 973, 977 (7th Cir. 1974), *cert. denied*, 421 U.S. 965 (1975) (teachers unsuccessfully attempted to show by expert testimony that Woodstock brochures were relevant and of educational value). But see *id.* at 991 (dissenting view that material was neither "so irrelevant to educational goals [nor so] patently offensive that the plaintiffs were precluded from exercising their judgment as teachers and electing to employ it in their classes"). Indeed, even demonstrably relevant expression may be restricted if there are valid educational justifications for imposing restraint. See *Mailloux v. Kiley*, 323 F. Supp. 1387, 1387, 1392 (D. Mass.), *aff'd*, 448 F.2d 1242 (1st Cir. 1971).

128. The "age and sophistication" requirement seems as much a question of common sense as of pedagogical theory. A younger child is generally more impressionable than an older child who has had time to develop critical and analytical skills. See *Brubaker v. Board of Educ.*, 502 F.2d 973, 976, 985 (7th Cir. 1974) (poem about free love and drugs too controversial for eighth-grade students), *cert. denied*, 421 U.S. 965 (1975); *Keefe v. Geanakos*, 418 F.2d 359, 361-62 (1st Cir. 1969) (class discussion of assignment containing word "motherfucker" not too great a shock for high school seniors to stand). Sophistication does not always follow chronological age and might vary depending on geography and local custom. The teacher must thus be sensitive to the particular capabilities and sensibilities of the students in his or her charge.

See also *Kamenshine*, *supra* note 35, at 1134 (reaching the seemingly anomalous result that it is acceptable to instill patriotic sentiments in very young school children, whereas junior or senior high school students must be shielded from indoctrination because they are mature enough to understand but lack the sophistication to be skeptical).

129. Concern for maintenance of discipline is a factor bearing on students' right to receive information, see note 97 and accompanying text *supra*, but it also arises in the context of teachers' activities. See, e.g., *Russo v. Central School Dist.*, 469 F.2d 623 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973); *James v. Board of Educ.*, 461 F.2d 566 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972).

In this connection, the courts look not to the form of expression but to its impact on the school. See *Birdwell v. Hazelwood School Dist.*, 352 F. Supp. 613, 622 (E.D. Mo. 1972) (teacher's exhortation to students caused the "disruptions of the orderly and disciplined operation of the school").

130. See *Van Alstyne*, *supra* note 38, at 855-58; *Goldstein, Asserted Right*, *supra* note 38, at 1345; *Shelton v. Tucker*, 364 U.S. 479, 485 (1960); *Adler v. Board of Educ.*, 342 U.S. 485, 493 (1952). See also *James v. Board of Educ.*, 461 F.2d 566 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972); *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970).

131. See *Yudof*, *supra* note 92, at 876-77:

The greater the ability of the school system to control what goes on in every classroom, the greater the danger of its promulgating a uniform message to its captive listeners.... [J]ust

Thus, the teacher's right to free expression requires the same balancing of first amendment freedoms against majoritarian educational values necessary in the analysis of the student's right to know. Accordingly, the same standard of judicial review is applicable in both contexts. The remainder of this Note develops an approach for the balancing of these interests.

IV. A FRAMEWORK FOR RESOLVING SCHOOLBOOK CONTROVERSIES

The process of selection and removal of public school text and library books by school boards generates feelings powerful enough to tear communities apart.¹³² The courts are struggling to reconcile the substantial constitutional claims of the parties to the conflict; to date, however, their attempts to accommodate the clashing concerns of states, parents, teachers, and students have produced no analysis capable of resolving the disputes. Before a satisfactory resolution can emerge, it is necessary to identify and address directly the latent tension between the first amendment values discussed above and the particular characteristics of the public school context.

A. *Public School Decisionmaking: The Standard of Review*

Any reasonable approach to schoolbook controversies must begin with recognition of the inevitable tension between basic first amendment values and legitimate majoritarian control over public education. While the public schools are not constitutionally prohibited from espousing particular viewpoints or from engaging in social and civil indoctrination, they may not transgress the Constitution's limits on infringement of free speech and expression. It seems clear that the states themselves may not determine where those limits lie;¹³³ that responsibility must rest with the courts.¹³⁴

as the balkanization of responsibility for education among governments reduces the potential danger of a thorough indoctrination, the autonomy of the classroom teacher diminishes the power of government to work its will through communication.

132. See Schember, *Textbook Censorship—the Validity of School Board Rules*, 28 Ad. L. Rev. 259, 259 (1976) (outbreaks of violence in Kanawha County, West Virginia, after new textbooks were ordered that local community believed would “demean, encourage skepticism, or foster disbelief in the institutions of the United States of America and in Western civilization”). See also Murphy, *The Meaning of Freedom of Speech: First Amendment Freedoms from Wilson to FDR* 208-10 (1972); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 706-10 (D. Mass. 1978).

133. Cf. *Kalven*, *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 Sup. Ct. Rev. 191, 201 (“If the constitutional principle, for example, is that the state may regulate X, the principle can become illusory if the state is left free to define X as it will.”).

134. It has been suggested that, whenever a first amendment claim is raised, *only* a judicial, rather than an administrative, determination “in an adversary proceeding ensures the necessary sensitivity to freedom of expression . . .” *Freedman v. Maryland*, 380 U.S. 51, 58 (1965). See also Monaghan, *First Amendment “Due Process,”* 83 Harv. L. Rev. 518, 524 (1970) (“Courts alone are institutionally able consistently to discern, and to apply, the values embodied in the constitutional guarantee of freedom of speech.”).

The inherent tension between respecting democratic control of the schools and protecting freedom of thought and expression within them is typical of what one commentator has described as "the seeming anomaly of judicial supremacy in a democratic society."¹³⁵ The ideal of democratic governance is the legislative implementation of "popular sovereignty,"¹³⁶ and the courts should refrain from disturbing this process unless there are compelling reasons "to regard the question at hand as appropriately committed to anti-majoritarian resolution."¹³⁷ This dilemma is particularly acute in the case of first amendment review, because the amendment itself exalts both the ideals of democratic self-government by majority rule and the vindication of the minority's right to disagree.¹³⁸ But despite the difficulty, the courts must undertake the task of patrolling the line between reasonable majoritarian education¹³⁹ and abuses of discretion that may undermine the first amendment rights of parents, teachers, and students.¹⁴⁰ If, in fact, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools"¹⁴¹ and the first amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom,"¹⁴² the courts must safeguard the essential precondition of enlightened democracy: an educated citizenry.

135. Bork, *supra* note 46, at 2. See also *id.* at 3:

There are some things a majority should not do to us no matter how democratically it decides to do them.... [For this reason] [s]ociety consents to be ruled undemocratically [i.e., by judicial review] within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution.

See also A. Bickel, *The Least Dangerous Branch* 16 (1962) ("The root difficulty is that judicial review is a counter-majoritarian force in our system.").

136. Commercial Speech, *supra* note 45, at 6-7.

137. *Id.* at 7.

138. See Wellington, *supra* note 43, at 1137-38 & nn.130-40; BeVier, *supra* note 46, at 313.

139. The courts are not educators and their intervention should be limited to the correction of clear abuses by school boards. It is important to remember, however, that many local school boards, unlike some administrative agencies, are composed of civically responsible local citizens having no particular educational expertise. There is, then, no compelling reason always to defer to their nonexpert educational judgments. Moreover, administrative law principles make clear that even expert bodies are not beyond review. See generally L. Jaffe, *Judicial Control of Administrative Action* (1965). The mere knowledge that their policies are subject to review may, in fact, encourage reasonableness and flexibility on the part of local boards and "combat any imposition of monolithic, authoritarian standards on children." Burt, *Developing Constitutional Rights of, in, and for Children*, 39 *Law & Contemp. Prob.* 118, 132 (1975).

140. It is not a complete answer to suggest that those parents and teachers who object to school board policies enroll their children and seek employment in private schools. Parents and teachers cannot dictate educational policy to the state, but the state may not condition receipt of its benefits—i.e., access to and employment in its schools—on acquiescence in the violation of constitutional rights. See *Sherbert v. Verner*, 374 U.S. 398 (1963) (state cannot condition unemployment benefits on willingness to work on Saturdays in violation of Sabbath observance). See also *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593-94 (1926). But see Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 *Harv. L. Rev.* 1439, 1448 (1968) ("The basic flaw in the doctrine [of unconstitutional conditions] is its assumption that the same evil results from attaching certain conditions to government-connected activity as from imposing such conditions on persons not connected with government.").

141. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

142. *Epperson v. Arkansas*, 393 U.S. 97, 105 (1968) (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

To do so, they must apply a standard of review sufficiently deferential to the school board to protect community interests, and yet rigorous enough to protect freedom of expression. One such standard is a test requiring that "reasonable educational judgment" underlie schoolbook decisions made by school boards.

This concept of reasonable educational judgment incorporates the spectrum of factors involved in school board decisionmaking. It encompasses all the practical considerations that inform decisions at the initial acquisition stage, including financial constraints, space limitations, curricular priorities, duplication of resources, relevance and timeliness of subject matter, scholarship, relative educational impact, and appropriateness to the age of the student body. A school board is virtually certain to consider several of these factors in making the initial decision whether to purchase a book or include it in the curriculum,¹⁴³ and no board basing decisions on such considerations alone should be held to have acted in violation of the Constitution.

As noted earlier, reasonable educational policy may also encompass some degree of indoctrination by persuasion.¹⁴⁴ School boards may seek to promote certain social and political values through the selection and rejection of schoolbooks. But a school board's decision to regulate student access to books and the information they contain must at all times be governed by legitimate *educational* concerns.

Thus, to withstand first amendment review, a schoolbook purchase decision may take account of the pragmatic realities of the school's needs and resources and be responsive to community values and goals, but it must fall within the range of reasonableness established by the professional educational community, and serve educational purposes in the manner least restrictive of the teachers' and students' respective rights to convey and receive information. Adherence to such a standard of decisionmaking would leave the school board with substantial discretion to make its selections while affording students and teachers protection from unjustified infringements of their first amendment rights. However, a somewhat different treatment may be warranted for book removal decisions.

143. Regular book selection procedures with prescribed guidelines would help to establish the reasonableness of the board's educational policy. Although the statutes conferring the power to select books are often framed in general terms, see, e.g., *Cary v. Board of Educ.*, 598 F.2d 535 (10th Cir. 1979) (Colo. Rev. Stat. § 22-32-109 (1973)), and do not require the promulgation of regulations, when such regulations exist and are followed the courts may take them into consideration as evidence from which the absence of arbitrariness may be inferred. Conversely, where the board has established routine procedures, deviations from them may create suspicion of impropriety in the decisionmaking process. Compare *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269 (D.N.H. 1979) (school board's cancellation of magazine without following established procedures; court ordered board to resubscribe upon showing that board members were attempting to censor political content), with *Cary v. Board of Educ.*, 598 F.2d 535, 544 (10th Cir. 1979) (board's failure to adhere to procedure and explain its decision to exclude ten books overlooked where parties stipulated no attempt "to exclude any particular type of thinking or book"). But see *Bicknell v. Vergennes Union High School Bd. of Directors*, 475 F. Supp. 615 (D. Vt. 1979) (liberal language of school board's library policy does not enlarge scope of plaintiff student's "right to read" or "right to access"), appeal pending, No. 79-7676 (2d Cir. Feb. 6, 1980).

144. See note 35 and accompanying text *supra*.

B. *Distinguishing Book Selection from Book Removal*

The courts are most sharply divided over the appropriate analysis for school board decisions to remove books already selected for library or classroom use. In *Presidents Council, District 25 v. Community School Board*,¹⁴⁵ the Second Circuit equated the "shelving [and] unshelving of books" and found no constitutional issue in either situation. In *Minarcini v. Strongsville City School District*,¹⁴⁶ however, the Sixth Circuit did distinguish book selection from book removal, although it failed to articulate its reasons for doing so.¹⁴⁷ The distinction appears valid: while the substantive issues are the same—school board regulation of expression through schoolbook policy and its impact on the student's right to receive information—the risk of unconstitutional action is considerably greater at the removal stage.¹⁴⁸

When a school board, or other authorized educational decisionmaker,¹⁴⁹ selects a book for its collection, it has the opportunity to consider such factors as the book's scholarship, instructional value, subject matter, relevance, interest, and appropriateness to the age of the student body. In reaching a decision, it balances these factors against available funds and shelf space and competing priorities. On the other hand, when a decisionmaker *removes* a book from circulation, it is in effect overriding the prior educational judgment that led to its acquisition and shelving. The fact of this earlier educational evaluation gives rise to a presumption when the same book is removed that other, noneducational considerations have come into play. Once the priorities have been ordered, the money spent, and the book shelved, there is an increased likelihood of unconstitutional decisionmaking.¹⁵⁰

Thus, while book removal and acquisition decisions should be subject to the same constitutional standard of reasonable educational judgment, different presumptions may be appropriate. Initial acquisition decisions¹⁵¹ by authorized educational decisionmakers in accordance with regular procedures may properly be regarded as presumptively constitutional. Accordingly, when plaintiffs challenge a school board's initial decision not to purchase a book, they bear the burden of showing that the decision was *not* prompted by reasonable educational judgment.

Recognition of this presumption in favor of the state serves to minimize judicial intervention in school board decisionmaking. It is appropriate not only because the initial educational decisionmaker may be presumed to have acted

145. 457 F.2d 289, 293 (2d Cir.), cert. denied, 409 U.S. 998 (1972). See also *Pico v. Board of Educ.*, 474 F. Supp. 387 (E.D.N.Y. 1979), appeal pending, No. 79-7690 (2d Cir. Feb. 6, 1980).

146. 541 F.2d 577, 581-83 (6th Cir. 1976). See also *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 710-11 (D. Mass. 1978).

147. See text accompanying notes 7-14 supra.

148. See notes 149-57 and accompanying text infra.

149. The relevant decisionmaker may be the board, a teacher acting not in contravention of established policy, librarian, library committee, textbook committee, etc.

150. See Comment, 55 Tex. L. Rev. 511, 520-21 (1977).

151. By this standard, book removal is a subsequent, not an initial, determination with regard to any particular volume. However, where a properly defined prohibitive policy exists, such as the exclusion of *all* discussion of a particular subject matter, see *Epperson v. Arkansas*, 393 U.S. 97, 111-13, 115-16 (1968) (Black & Stewart, JJ., concurring), that policy constitutes an initial determination.

properly,¹⁵² and because improper motivations at the initial stage are extremely difficult to detect,¹⁵³ but also because the school and its agents are the preferred sources of educational policy.¹⁵⁴ Thus, the school board need not justify its initial schoolbook decisions unless the challenging party can come forward with sufficient evidence to rebut the presumption of an educationally proper motive.¹⁵⁵

A teacher acting not in contravention of an initial school board decision should enjoy the benefit of the same presumption if the school board seeks to interfere with his or her initial schoolbook decision. In such a case, the board would bear the burden of demonstrating that its decision is based on a reasonable educational policy.¹⁵⁶

Since the presumption of constitutionality attaches to the original decision, the school board stands in a different position when it seeks to remove a book. Any conflicts at the initial stage were presumably resolved in favor of inclusion by some person authorized to make such determinations. It seems reasonable, therefore, to recognize that there is a significantly greater risk that removal of the books is unconstitutionally motivated.¹⁵⁷ The initial decision should be protected by the proposed presumption of educational validity, and the school board desiring removal of a book should bear the burden, in accordance with usual first amendment practice, of demonstrating by a preponderance of the evidence that its action is the result of a reasonable educational policy determination. Such an approach should prove a disincentive to arbitrary and unconstitutional removal decisions since the board must, if challenged, be prepared to persuade the trier of fact that its action was based on a legitimate educational consideration. Thus in all cases the standard of review is the presence or absence of a reasonable educational policy underlying the school board's schoolbook decisions, and the burden of proof is on the party challenging the initial educational determination.

152. An analogy may be drawn to the presumption that public officers acting in their official capacity do so legally and in a regular manner. C. McCormick, *Handbook of the Law of Evidence* 807 (2d ed. 1972).

153. *Id.* See also Garvey, *First Amendment*, *supra* note 31, at 372; Goldstein, *Asserted Right*, *supra* note 38, at 1349 n.183.

154. See generally Section II, and notes 108 & 139 *supra*.

155. *Cf. Cruz v. Beto*, 603 F.2d 1178 (5th Cir. 1979) (plaintiff has burden of proving absence of prison director's good faith in order to pierce his qualified immunity to suits for damages).

Evidence rebutting the presumption of validity may take a variety of forms, ranging from a specific record of improper motivation with respect to an individual book to an official statement of general policy or a pattern of decisions explicable only by the presence of impermissible considerations. *Cf. Note, Discriminatory Purpose and Disproportionate Impact: An Assessment After Feeney*, 79 *Colum. L. Rev.* 1376, 1395 (1979) ("With . . . a pattern of activity [extending over time] to review, a court could legitimately place emphasis on the *number* of foreseeably segregative choices made: the *cumulative* results of many independent school board decisions can present a reasonably accurate indication of what the institution as a whole is up to.") (referring to proof of discriminatory purpose in school desegregation cases) (emphasis added).

156. For an illustration, see text accompanying notes 158-59.

157. This approach is further justified by traditional first amendment analysis with regard to willing and unwilling speakers. The state's silencing of a "willing speaker" on the basis of content—in this case a book—is inherently suspect, whereas the state's own refusal to speak at all typically has not been viewed as raising a first amendment issue. See notes 98-99 and accompanying text *supra*. The refusal to buy a book may be analogized to the refusal to speak.

C. *Seven Illustrative Cases*

1. *School Board Refusal to Permit Use of Teacher-Furnished Materials.* A high school social studies teacher wants to discuss the controversial subjects of American race relations and United States participation in the Vietnam conflict.¹⁵⁸ Both clearly fall within the rough outlines of "current events" and "social studies" established by the curriculum. In support of her class discussions, she distributes reprints of literature not in the school library collection. These materials, which are not proscribed by any existing school board policy, explore views on these topics differing from those in the authorized social studies textbook. A number of parents then complain to the school board about the views their children are bringing home, and the school board responds by directing the teacher to alter her presentation. Resisting what she regards to be unconstitutional censorship, the teacher seeks to enjoin the board from restricting her presentation of alternative views. The board claims that its authority to control the curriculum includes the power to prohibit use of any disfavored materials.

In this case, the teacher is the first-line educator hired and licensed by the state to implement the curriculum, and her distributions did not contravene established school board policy. Hers is therefore the initial determination, and is entitled to the presumption of constitutionality accorded to such determinations. The presumption, of course, is not conclusive; the board will prevail if it can meet its burden of demonstrating a reasonable educational policy for barring her supplemental material.¹⁵⁹ To make this showing, the board cannot simply rest on its superior position in the educational hierarchy, nor can it assert that it was merely deferring to parental wishes. Instead, the board must demonstrate that a reasonable body of professional educational opinion regards the teaching of a "negative" view of American race relations and involvement in the Vietnam conflict as unsuitable for high school students. Such a showing establishes a constitutionally acceptable motivation for content discrimination. Since the Con-

158. This hypothetical case is loosely based on *Sterzing v. Fort Bend Indep. School Dist.*, 376 F. Supp. 657 (S.D. Tex. 1972), vacated for reconsideration of relief granted, 496 F.2d 92 (5th Cir. 1974). The teacher challenged his dismissal by the school board, and the district court, although it did not order actual reinstatement, found that the teacher had been dismissed without adequate notice.

The court reached its conclusion after determining that the teacher's conduct served a "demonstrated educational purpose," stating that "[t]he freedom of speech of a teacher and a citizen of the United States must not be so lightly regarded that he stands in jeopardy of dismissal for raising controversial issues in an eager but disciplined classroom." 376 F. Supp. at 661-62. Although this language seems to suggest that a board may not contravene the reasonable instructional choices of a teacher, a better view is that in the absence of a reasonable, constitutional prohibitive policy, no teacher can be dismissed for exercising sound educational judgment. If such a prohibitive policy exists and the teacher deliberately violates it, however reasonable the proscribed behavior, the board may discipline the teacher without running afoul of the first amendment. See also *Kingsville Indep. School Dist. v. Cooper*, 611 F.2d 1109 (1980) (teacher's classroom discussion of controversial aspects of Reconstruction era); notes 120-24 and accompanying text *supra*.

159. Thus, if the board can show that the teacher used materials that were irrelevant or inappropriate to the age of the students, or attempted to proselytize in the classroom, the trier of fact would be justified in finding that the board's restriction was merely an implementation of legitimate educational judgment rather than an unconstitutional restraint. See notes 124-30 and accompanying text *supra*.

stitution is not offended by decisions grounded in reasonable educational policy, the dispute between a teacher and a properly motivated board must be resolved in favor of the latter's superior authority, by virtue of state law, over education in the public school.

2. *School Board Refusal to Approve Teacher Requisition of New Course Books.* Another teacher, attempting to present an alternative view of current events to his high school class, requisitions a new set of schoolbooks, and the school board refuses to authorize the purchase. When the teacher goes to court seeking to require the board to purchase the books requested, the board's refusal should enjoy presumptive educational validity. In this case, the teacher bears the burden of proving the *absence* of a reasonable educational policy underlying the board's decision.¹⁶⁰

If the teacher is able to show that the board's refusal is not prompted by educational concerns, the court may compel the board to act constitutionally by correcting the imbalance of curricular subject matter. But even when the teacher successfully carries this burden, it is not clear that the court can require the school board to purchase any specific volume. The Constitution may require that the board protect the student's right to receive information unless there is educational justification for the omission but it does not mandate the manner in which the board corrects an imbalance. The board may be able to meet the constitutional requirement without expending funds,¹⁶¹ or, if materials must be purchased, the board may reasonably conclude that other books will better serve the constitutional interests at stake.

3. *School Board Removal of Teacher-Assigned Materials from School Library Shelves.* Yet another teacher attempts to correct an unbalanced approach toward race relations or the Vietnam conflict in the required social studies textbook by making reading assignments from a book in the school library. Bombarded by parental complaints about the "radical" opinions to which their children have been exposed, the school authorities remove the offending volume from the library. The teacher then goes to court seeking its reinstatement.¹⁶²

A book included in a school library collection has already been approved by an authorized educational decisionmaker, whether that board or its predecessor or the school librarians. The court may therefore presume that its inclusion was based on reasonable educational judgment and place the burden of proof on the

160. Although this would be a heavy burden, it is not an impossible one. The teacher could, for example, show a pattern or practice of rejections of such materials, while other books presenting one side of a controversial issue within the curricular subject matter have been routinely approved.

161. For example, the teacher could lead in-class discussions, supplemented by materials she has prepared or by assigning outside reading.

162. If school officials in Arkansas had attempted to destroy all volumes containing material about evolution, after the *Epperson* decision, see text accompanying notes 64-69 *supra*, they probably would have been enjoined from doing so. Such action would have been *prima facie* evidence of an intent to perpetuate the unconstitutional policy. See *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 539-40 (1979); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 456-58 & n.7 (1979). See also *Loewen v. Turnipseed*, 488 F. Supp. 1138 (N.D. Miss. 1980) (in light of legislative history favoring racial segregation, committee which rejected school history text on basis of racial content deprived authors, teachers, and students of their first and fourteenth amendment rights).

objecting board to show an educational purpose for its removal.¹⁶³ It would not be sufficient to argue that removal is necessary simply to open up shelf space for new books. Whenever the removal of a particular book raises parental, teacher, or student objection, the board's decision cannot be deemed content-neutral; a book's removal must be justified in terms of reasonable educational policy related to the content of that particular book.

4. *School Board Exclusion of Ten out of 1,285 Previously Used Books from Elective-Course Reading Lists.* A group of senior high school language arts teachers seeks board approval of a list of 1,285 books for use in elective language courses. The books had been used in the past and are still owned by the school. The board of education approves all but ten of the books. The teachers seek to enjoin the exclusion of the ten disfavored books.¹⁶⁴ At the trial, both parties stipulate that the ten books are not obscene, that a "constitutionally proper decision-maker" could choose to include them in the list, and that there has been no attempt on the part of the board to exclude a "particular system of thought or philosophy."¹⁶⁵

This case is considerably more difficult from the teachers' perspective than the preceding hypothetical. On the one hand, the ten excluded books had been previously selected and used by authorized educational decisionmakers, a decision presumably unchallenged in past years. This inclusion decision, then, enjoys a presumption of educational validity that places the burden on the school board to demonstrate its own reasonable educational purpose in excluding the volumes. On the other hand, the first amendment does not require inclusion in a reading list of every book that could be of conceivable value in a course. The school board's cause is aided by the stipulation that it was not attempting to exclude "any particular system of thought or philosophy," but it must still prove that some reasonable educational purpose, such as inappropriateness to the age of students of the language used, or the complexity and subtlety of the subject

163. In *Presidents Council, Dist. 25 v. Community School Bd.*, 457 F.2d 289 (2d Cir.), cert. denied, 409 U.S. 998 (1972), see notes 2-6 and accompanying text *supra*, the school board argued that restricting access to a book violated no constitutional rights, since the teachers were permitted to discuss the subject matter and even the book itself in class, although they could not assign it to be read. Dissenting from the denial of certiorari in the case, Justice Douglas found this anomaly unacceptable. He noted that the students "can do everything but read it. This in my mind lessens somewhat the contention that the subject matter of the book is not proper." 409 U.S. 998, 999 (1972). Justice Douglas seemed to anticipate the risk of abuse when one school board weeds the library collection amassed by its predecessors. See text accompanying notes 145-50 *supra*. Yet his suggestion that if a book's subject matter is proper it cannot be removed is not sound; the board may well be able to demonstrate that its removal decision was motivated by a reasonable educational policy.

See also *Pico v. Board of Educ.*, 474 F. Supp. 387 (E.D.N.Y. 1979), appeal pending, No. 79-7690 (2d Cir. Feb. 6, 1980).

164. This hypothetical is derived from *Cary v. Board of Educ.*, 598 F.2d 535 (10th Cir. 1979). See notes 15-22 and accompanying text *supra*.

165. *Id.* at 542-43. Although the board decision at issue in *Cary* seems not unreasonable, since no attempt was made to skew the presentation of ideas, the court gave insufficient weight to the constitutionally relevant issue of the board's motivation. As the concurrence urged, "the exclusion of books for secondary school students is not to be an arbitrary exclusion." *Id.* at 544. The "personal predilections" of board members are improper—unconstitutional—grounds for exclusion of a book unless those predilections coincide with some reasonable educational policy.

matter, rather than personal dislike by the board members, prompted these particular exclusions.

5. *Parental Objection to Teacher-Assigned Readings Approved by the School Board.* A senior high school student has been assigned *Oliver Twist* and *The Merchant of Venice* for a required English course.¹⁶⁶ Her parents object to these books because they contain stereotypical portraits of Jews that, it is asserted, may engender anti-Semitism in the community. The teacher is unwilling to substitute other works by Dickens and Shakespeare, and the school board supports the teacher's decision. The parents seek to enjoin the assignment of the books.

Since the books in question have already been chosen by a first-line educator, they enjoy a presumptive constitutional validity. The board's endorsement of the teacher's assignments indicates its view that the use of these books serves a legitimate educational goal. Consequently, the parents bear the considerable burden of demonstrating that the use of these books advances no legitimate educational purpose.¹⁶⁷ In this case, it is obvious that a high school teacher's choice of these two classics is not educationally unreasonable, and that the board acted properly in approving the choice.¹⁶⁸

For equally valid educational reasons, the board might also conclude that, in the future, *David Copperfield* and *Julius Caesar* would be equally valuable and less controversial for adolescent students who are more vulnerable than adults to the suggestive power of stereotypes.¹⁶⁹ If the teacher were to challenge such a decision, operating prospectively, the court should view the case in the same light as it would a school board's attempt to remove teacher-assigned materials from the library shelf. The board would thus bear the burden of justification; in this case, it seems likely that the board would be able to demonstrate a reasonable educational basis for the decision.

6. *Parental Veto of a Mature Minor's Access to a Restricted Book Shelf.* A seventeen-year-old high school senior wants to read a book that the school has placed on a limited-access library shelf. The school is willing to lend the book to the minor's parents directly, so that they can decide whether they want their child to read it. The parents refuse to permit their child to read the book. The child seeks to compel the school board to ignore the parental veto and lend her the book.

166. This situation arose in *Rosenberg v. Board of Educ.*, 196 Misc. 542, 92 N.Y.S.2d 344 (Sup. Ct. 1949). The court refused to order removal where no showing was made of deliberate intent by the *author* to generate anti-Semitism among readers.

167. Parents, having chosen to send their child to public school, are entitled only to the board's reasonable educational judgment. As long as the board continues to make its book decisions for legitimate educational reasons, without attempting to coerce beliefs, infringe religious freedom, or abridge the student's right to receive educational information, parents have no personal constitutional right to require or prevent the use of any particular book. Their only recourse is to alternative education, either private school or, under proper circumstances, instruction at home.

168. Of course, the teacher may not use the books to espouse anti-Semitism; indeed, he or she might even be directed by responsible school authorities to discuss and counterbalance the social misconceptions to which the parents object.

169. See *Epperson v. Arkansas*, 393 U.S. 97, 113 (1968) (Black, J., concurring) (asserting that the state may exclude from its curriculum subjects "too emotional and controversial" for public school students).

The school board's judgment that this book is so controversial—in its ideas or language or both—that it wishes to defer to the wishes of parents, should be respected by the court. The rearing of children has always been viewed in this country as a fundamental prerogative of parents.¹⁷⁰ When parents enroll their child in the public school system, they implicitly waive this right to control the child's environment during school hours, at least to the extent the school is pursuing a legitimate educational program.¹⁷¹ This "delegation" of decision-making power is not irreversible, however, and the state may choose to restore a portion of the responsibility to parents when it sees fit.¹⁷² Thus, it is really parental authority that the student wishes to challenge. While there is ample precedent for state intervention between parent and child when the state's interest in the child's welfare is paramount,¹⁷³ when the harm is no greater than tolerating a waiting period before the child may read a particular book, state intervention might inflict unjustifiable harm on family relationships.¹⁷⁴

Of course, the state may not abdicate its educational responsibilities and use this parental veto device to infringe indirectly the student's right to receive information or to impose orthodox beliefs. The burden, however, is on the student to show that no reasonable educational concerns justify the abridgment of his or her right to receive information by restricting access to the book.

7. *The Student's Right to Receive Educational Information from an Unwilling Speaker.* A family from the Deep South moves to a small New England community, where the fifteen-year-old daughter enrolls in the local high school. In history class she studies the Civil War and the Reconstruction era. The class text portrays the North as a generous victor whose efforts to rebuild the nation were thwarted by the venality of the South. The daughter's parents, deeply disturbed, ask the teacher to supplement the text with materials concerning carpet-bagging and the punitive measures directed against the southern states by the post-war government. He refuses and the school board supports his decision. The parents seek an injunction to compel the school to change its text on the grounds that it distorts the subject matter and infringes the student's right to receive information.

170. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). The complex issue of parental substantive due process interests in the rearing of their children is beyond the scope of this Note. For interesting discussions of parental rights and state interests, see Burt, *supra* note 139; Garvey, *Child, Parent, State and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S. Cal. L. Rev. 769 (1978); Hirschoff, *supra* note 33; Moskowitz, *supra* note 33.

171. See, e.g., Sugarman & Kirp, *Rethinking Collective Responsibility for Education*, 39 *Law & Contemp. Prob.* 144, 207-08 (1975); *Davis v. Page*, 385 F. Supp. 395, 406 (D.N.H. 1974).

172. Cf. *Mercer v. Michigan State Bd. of Educ.*, 379 F. Supp. 580, 586 (E.D. Mich.), *aff'd mem.*, 419 U.S. 1081 (1974) (state "has the power to permit the parents to make the final decision as to exactly which courses [in this case elective sex education courses] the child should take").

173. See generally Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 *Stan. L. Rev.* 623 (1976).

174. If the state wishes to allow "mature minors" to make their own book choices, it should do so not on a case-by-case basis, but by legislation defining the age of maturity, in order to avoid lawsuits between parent and child over the issue of maturity. Cf. Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 *Yale L.J.* 645, 662-64 (1977).

Because the school's selection of texts is presumed constitutional, the parents bear the burden of showing that continued use of this text *alone* is educationally unreasonable at the high school level. The parents claim that the students have the right to receive an accurate picture of this important period in the nation's political and legal development—a right that the first amendment protects even when the state-speaker wishes to be silent.¹⁷⁵ They will try to muster expert testimony to support their contention that the school's presentation does not fall within the range of reasonableness for high school instruction in this subject.

The parents seem unlikely to prevail in this instance. The "range of reasonableness" is very broad, and courts will intervene only where the school board has egregiously violated acceptable standards of scholarship. The students have the right to demand that the school board exercise educational judgment, but not more.¹⁷⁶

CONCLUSION

Controversies over schoolbook policies have generated considerable litigation and the procession to the courthouse is likely to continue. What the public schools teach their students is vitally important to each child's future and to the well-being of society generally. Accordingly, the states wish to control the curricular content of public school instruction, and particularly the selection of schoolbooks, without interference from local parents and students, or from teachers. Moreover, if schools are to operate effectively, state and local boards must be free to make and carry out educational policy, including decisions whether or not to acquire or retain certain books for classroom and library use. Nevertheless, public school regulation of educational expression places at risk the first amendment value of an educated citizenry; while the state may educate its young, it may not abrogate the first amendment rights of students and teachers within its public schools.

The students' right to receive educational information and the teachers' complementary right to impart it may not be infringed by arbitrary and unjustified school board restrictions. Courts, thus far, have had difficulty striking the precarious balance that honors majoritarian decisionmaking while preserving these first amendment interests. This Note suggests that a challenged school board action should be subjected to a test of educational reasonableness. In practice, this would allow school boards to exercise freely their discretion to select and remove schoolbooks as long as their decisions are supported by legitimate educational concerns. All initial schoolbook decisions—whether reached by a

175. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), suggests that under certain circumstances this may be true. See notes 99 & 101-08 and accompanying text *supra*.

176. If the teacher chose to implement the parents' suggestion by distributing supplementary materials, and the board objected, the burden would shift. To restrict the teacher's presentation, the board would have to prove that suppression of these materials was justified by reasonable educational concerns.

prior school board, a librarian, or a teacher acting not in contravention of established educational policy—should enjoy a presumption of constitutionality. The burden of proving the absence of reasonable educational policy should therefore fall on the challenger of an initial decision—whether student, parent, teacher, or removing school board.

This proposed framework for judicial review would accord proper deference to the school board as the preferred educational decisionmaker. At the same time it would recognize the substantial first amendment interests at stake, and create an avenue for relief from patent abuses of authority.

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