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FREE SPEECH AND PUBLIC EDUCATION: AN OVERVIEW OF LEGAL, SOCIAL, AND POLITICAL ISSUES

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I. INTRODUCTION

> "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[1]

With these twenty-four words from the Supreme Court, in *Tinker v. Des Moines School District,* the nature of relationship among all school personnel has been dramatically redefined,[2] and the very pur-

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1. Tinker v. Des Moines School Dist., 393 U.S. 503, 506 (1969).

2. *See id.* at 506. Although *Tinker* is acknowledged to be the fount of teacher's rights, the irony is that *Tinker* did not involve teachers as complainants. *See id.* at 504 (plaintiffs were three high school students). In the end, however, teachers became gratuitous beneficiaries of a lawsuit asserting solely student rights. *See id.* at 512 ("student's rights . . . do not embrace merely the classroom hours"); *see also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983). This inclusion of teachers in *Tinker* unquestionably abbreviated the legal

poses and functions of education have been scrutinized with greater intensity by courts.[3] Although student and teacher rights have come to include far more than just free expression, it was this area that first exposed the schools to stresses similarly experienced by other parts of society due to the extension of constitutional rights.[4] Traditionally, American schools had been viewed as possessing a conservator function, to protect children from experimentation and to protect society, in general, from rapid disintegration.[5] Public schools responded slowly to social changes, as the forces of secularization, urbanization, and industrialization increasingly forced schools to perform functions that had normally been furnished outside the environs of the school room.[6] With increased demands being placed upon them, it was inevitable that the role of public schools should be altered from that of merely responding to social change to one of initiating social change.[7]

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process of according teachers rights similar to those of students, but such expansive awarding of rights contradicts the general principle that judicial resolutions of conflicts is restricted to the facts before the court. *See id.* at 39 & n.1 (refused to address issue not properly before Court); Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 971 (5th Cir. 1972) ("we realize that specific problems will require individual and specific judgments").

3. *Cf.* Tinker v. Des Moines School Dist., 393 U.S. 503, 512 (1969) (Court discusses purpose of schools); Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 968 (5th Cir. 1972) ("While a school is certainly a market-place for ideas, it is just as certainly not a market place."). Notwithstanding the holding in *Tinker,* courts have persistently recognized the importance of school boards and administrators being afforded great deference in making decisions regarding the operation of schools. For example, the United States Supreme Court cited the function of a school board and its administration in determining school curriculum as falling within the context of community values:

> We are therefore in full agreement with petitioners that local school boards must be permitted "to establish and apply their curriculum in such a way as to transmit community values," and that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral or political."

Board of Educ. v. Pico, 457 U.S. 853, 864 (1982) (quoting Petitioner's Brief at 10).

4. *See* Berkman, *Students in Court: Free Speech and the Functions of Schooling in America,* 40 HARV. EDUC. REV. 569, 597 (1970). The *In re Gault* decision, which declared that minors had procedural rights in juvenile proceedings, was unquestionably a harbinger of student rights in schools. *See In re* Gault, 387 U.S. 1, 31-59 (1967).

5. *See* R.L. POUNDS & J.R. BRYNER, THE SCHOOL IN AMERICAN SOCIETY 476-78 (Macmillan 1967). "School is not just a place to park your kids, the way you leave a car to be washed and polished and returned to you at the end of the day." J.B. SHEPPERD, FREEDOM'S ADVOCATE 11 (Texas Heritage Foundation 1954).

6. The role of schools has long been entwined with the role of the home in determining the directions and content of education. This is evidenced by the legal fiction *in loco parentis,* which has been both a cause and an explanation for school activities. *See* Koenig, *The Law and Education in Historical Perspective,* in THE COURTS AND EDUCATION 8-15 (C.P. Hooker ed. 1978); Mawdsley, *In Loco Parentis: A Balancing of Interests,* 61 ILL. B.J. 638, 638 (1973).

7. *See generally,* J. DEWEY, LECTURES IN THE PHILOSOPHY OF EDUCATION: 1899

This process of leading and directing social change, already underway by the time of the *Tinker* decision, came as a result of the pressure for democratization of education.[8] But it was the declaration that students in a school setting had constitutional rights which struck most profoundly at the very foundations of education.[9] Although it can be argued that *Tinker* and its early progeny of cases were really asserting the rights of the home (parent and child) against school authority,[10] the arming of students with an arsenal of constitutional rights would eventually permit them to attack the authority of any institution, including that of the parents in the home.[11]

(Random House 1966). Although not the sole advocate of schools as change-agents, John Dewey became an early leader for such a role. *See id.* at 1899. Mr. Lawrence Cremin documented the enormous changes that took place in schools as societal expectations of schools changed. *See* L. CREMIN, TRADITIONS OF AMERICAN EDUCATION 101 (Basic Books 1976).

8. The pressure for democratization in schools appeared to build because the traditional multiple functions of parents in preparing their children to work and live in society had been sharply reduced through urbanization and industrialization. Schools, with this increased burden of socialization, became mechanisms to prepare young people for society. This new responsibility mandated new styles of teaching to facilitate the students' adjustment to the world beyond high school. *See* Anshen, *The Family in Transition,* in 5 THE FAMILY: ITS FUNCTION AND DESTINY 165 (R.N. Anshen ed. 1949); E.W. BURGESS, H.J. LOCKE & M.M. THOMAS, THE FAMILY: FROM INSTITUTION TO COMPANIONSHIP 2 (American Book Co. 1963); Ogburn, *The Changing Functions of the Family,* in SELECTED STUDIES IN MARRIAGE AND THE FAMILY 157 (R.F. Winch, R. McGinnis & H.R. Barringer eds. 1962); Parsons, *The Normal American Family,* in READINGS ON THE SOCIOLOGY OF THE FAMILY 53, 60-62 (B.N. Adams & T. Weirath ed. 1971). Examples of the new style of classroom teaching encouraged by the enhanced role of schools can be found in M. MEACHAM & A. WIESER, CHANGING CLASSROOM BEHAVIOR: A MANUAL FOR PRECISION TEACHING 9 (Int'l Book Co. 1969).

9. *See* Tinker v. Des Moines School Dist., 393 U.S. 503, 512 (1969). The traditional role of educators in determining what is best for students became subject to judicial scrutiny. *See* R. O'NEIL, CLASSROOMS IN THE CROSSFIRE 23, 23-70 (Indiana Univ. Press 1981).

10. *See* Tinker v. Des Moines School Dist., 393 U.S. 503, 504 (1969) (students' actions in wearing black armbands represented political viewpoint shared by parents). There appears to be little doubt that the majority in *Tinker* saw the facts as a home-school conflict rather than just a student-school conflict. *See id.* at 504; *see also* Bishop v. Colaw, 450 F.2d 1069, 1074-75 (8th Cir. 1971) (parents may have greater right to control child's lifestyle than school authorities); Axtell v. La Penna, 323 F. Supp. 1077, 1080 (W.D. Pa. 1971) ("in loco parentis" section of school code not intended to give schools all parental authority). *But see* Zucker v. Panitz, 299 F. Supp. 102, 105 (S.D.N.Y. 1969) (students versus educational community).

11. *See, e.g.,* Parham v. J.R., 442 U.S. 584, 606 (1979) (commitment of minors to mental health facilities requires inquiry by "neutral fact finder" other than parent); Carey v. Population Servs. Int'l., 431 U.S. 678, 691-99 (1977) (dissemination of birth control information and contraceptives to minors); M.S. v. Wermers, 557 F.2d 170, 176 (8th Cir. 1977) (minor may obtain contraceptives without parental consent). Courts have increasingly been called upon to decide questions where a child's interests are perceived as differing from those of the parents. *See generally* R. FARSON, BIRTHRIGHTS (Macmillan 1974); H. FOSTER, A BILL OF RIGHTS FOR CHILDREN (Charles C. Thomas Co. 1974).

The purpose of this article will be to examine the present state of free speech rights enjoyed by students and teachers in grades K-12. In doing so, it is necessary to track the development of free speech in school settings, focusing on four kinds of legal problems. First, courts have had to define the parameters of free speech. Although not every utterance or public display is deserving of constitutional protection,[12] judicial attempts at providing guidelines have been far from consistent or clear.[13] Second, even after a particular conduct or activity is determined to be subsumed within the definition of free speech, courts must determine whether students and faculty are equally protected. It cannot be assumed that students will be afforded the same degree of free speech rights inside the school as they would outside,[14] or that they will necessarily be entitled to the same range of expression of free speech rights inside the school as would teachers.[15] Third, free speech

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12. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) ("the lewd and obscene, the profane, the libelous and the insulting" raise no constitutional problems); Garza v. Rodriguez, 559 F.2d 259, 260 (5th Cir. 1977) (fighting words not protected speech), *cert. denied,* 439 U.S. 877 (1978).

13. *Compare* Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 968 (5th Cir. 1972) (public school operation subject to constitutional review) *with* Ferrell v. Dallas Indep. School Dist., 392 F.2d 697, 703 (5th Cir.) ("That which . . . hinders the state in providing the best education . . . must be eliminated . . ., even when that which is condemned is the exercise of a constitutionally protected right."), *cert. denied,* 393 U.S. 856 (1968). The problems of consistency and clarity reflect the judiciary's attempt to reconcile excessive infringement of rights with the need for school administrators to maintain control of their schools. *Compare* Tinker v. Des Moines School Dist., 393 U.S. 503, 506 (1969) ("First Amendment rights . . . are available to teachers and students") *with id.* at 507 ("Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials"). Ironically, the *Tinker* Court furnished very little light for resolution of competing student-school interests by citing two earlier cases with similar facts decided by the same federal court of appeals on the same day, but with different results. *See id.* at 511, 513 (citing Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)); *id.* at 513 (citing Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749, 754 (5th Cir. 1966)).

14. *See* Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 969 (5th Cir. 1972) (right of free speech in schools "is subject to reasonable constraints more restrictive than those constraints that can normally limit First Amendment freedoms"). Any difference in treatment can largely be attributed to courts' willingness to permit greater administrative control in the artificial school environment where most students are subject to compulsory attendance laws. *See id.* at 968 ("substantive difference between schools and the street corner").

15. *See* Nicholson v. Board of Educ., 682 F.2d 858, 863 (9th Cir. 1982) (student's free press rights less than adult's). The status of free speech rights as compared between students and faculty or between various members of the school staff is by no means clear. *Compare* Fink v. Board of Educ., 442 A.2d 837, 842 (Pa. Commw. Ct. 1982) (teacher's religious expression rights no broader than student's), *dismissed,* 460 U.S. 1048 (1983) *with* Russ v. White, 541 F. Supp. 888, 896 (W.D. Ark. 1981) (school administrator's academic freedom rights less than teacher's), *aff'd,* 680 F.2d 47 (8th Cir. 1982). For a discussion of religious expression, see

rights cannot be determined without considering such rights within the broad matrix of the proper function of education. Consideration must be given to whether clear judicial declaration of the function of education in a free speech setting has been furnished and whether a simple and concise statement of the functions of education in general has been stated.[16] Fourth, and finally, the subject of free speech needs to be considered against the backdrop of changing social values. To what extent should free speech rights reflect changing social mores or community values indigenous to different communities?[17] Should schools merely follow changes in home or community values, or should schools be change-agents to effect changes in homes or communities regarding student or faculty free expression?[18]

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generally Mawdsley & Permuth, *Legal Rights: Is the Public School Off-Limits for Religious Activities?,* 9 EDUC. L. REP. 1, 1-20 (1983).

16. The purpose of a school has been defined as a place to present "a market place of ideas" and a forum "to learn intelligent involvement." *See* Eisener v. Stamford Bd. of Educ., 440 F.2d 803, 807 (2d Cir. 1971). In more recent education cases, the concept of a school as a "public forum" has generated differing interpretations. *Compare* Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981) (university is market-place of ideas) *with* Brandon v. Board of Educ., 487 F. Supp. 1219, 1233 (N.D.N.Y. 1980) (public school "associated with state sanctioned instruction"), *aff'd,* 635 F.2d 971 (2d Cir. 1980), *cert. denied,* 454 U.S. 1123 (1982); *see also* Piele & Pitt, *The Use of School Activities by Student Groups for Religious Activities,* 1982 SCHOOL L. UPDATE 1, 12 (Nat'l Org. on Legal Problems of Educ. 1983) (summary of public forum concept as related to religious speech). Certainly, some would argue that the purpose of education is the encouragement of pluralism and diversity, although a recent Supreme Court case may cast doubt on that purpose. *See* Bob Jones Univ. v. United States, __ U.S. __, __, 103 S. Ct. 2017, 2035, 76 L. Ed. 2d 157, 181 (1983). *See generally* Nordin, *Bob Jones University v. United States: A Case Comment,* 13 EDUC. L. REP. 921, 927-31 (1983); Mawdsley & Permuth, *Bob Jones University v. United States: A Decision with Little Direction,* 12 EDUC. L. REP. 1039, 1045-47, 1051 (1983); Note, *Internal Revenue Service—Tax Exemptions—Bob Jones University v. United States,* 15 ST. MARY'S L.J. 461, 469-70 (1984).

17. The role that community standards should play in setting appropriate parameters for free speech in schools needs to be set against the backdrop of *Roth v. United States,* where contemporary local community standards were to be applied in defining obscenity. *See* 354 U.S. 476, 489 (1957); *see also* Miller v. California, 413 U.S. 15, 24 (1973); Comment, *Indecency on Cable Television—A Barren Battleground for Regulation of Programming Content,* 15 ST. MARY'S L.J. 417, 424-26 (1984) ("The Supreme Court's Definition of Obscenity"). However, because students are basically a captive audience, courts have reasoned that the standards for adults do not have to be those imposed upon students. *See* Ginsberg v. State of New York, 390 U.S. 629, 638 (1968); Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 969 n.6 (5th Cir. 1972). Likewise, language used by a teacher which may not be appropriate in a classroom setting may be protected when made to an administrator in a private office. *See* Hastings v. Bonner, 578 F.2d 136, 142-43 (5th Cir. 1978).

18. *See* O'NEIL, CLASSROOMS IN THE CROSSFIRE 57 (Indiana Univ. Press 1981). "If the curriculum simply perpetuates parental values and beliefs, regardless of external principles, then the schools fail to serve [their] basic function in a society where education has been an

II. DEFINING THE PARAMETERS OF FREE SPEECH

A. *Pure Speech vs. Symbolic Speech*

The emergence and protection of any form of expression in a complex industrial society depends upon the recognition of several elements of human development: physical and mental characteristics of the individual, including use of imagination in expression;[19] environmental factors which may affect an individual's need or opportunity to express himself or the possibility of encounters with other groups;[20] and social practices or cultural patterns which will largely determine what knowledge is available for one to learn, to what part of the existing knowledge a learner has access, and what behavior will be approved or disapproved.[21] Cultural diversity, aided by immigration

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avenue not only for growth and development but also for change." *See id.* at 57. For the importance of changes in education as related to the survival of our culture, see C.P. SNOW, THE TWO CULTURES AND THE SCIENTIFIC REVOLUTION 30-42 (Cambridge Univ. Press 1961).

19. *See* E. LEACH, CLAUDE LEVI-STRAUSS 43-44 (Penguin Books 1970). Although probably self-evident, it is worth noting that man's mental capacity for expression is significant in that only he of all creatures is apparently able to use symbols to express thoughts. *See id.* at 43-44.

20. It is probably doubtful that geographical separation has much effect today on forms of expression because of the possibilities of rapid immediate communication. What differences may exist among various peoples are more likely differences among social tolerances, acceptabilities, or dynamic leadership than lack of communication. *Cf.* Comment, *Indecency on Cable Television—A Barren Battleground for Regulation of Programming Content,* 15 ST. MARY'S L.J. 417, 432-33 (1984) (moral activists and first amendment advocates battle over cable television regulation). For example, all of the just-mentioned factors would be needed to explain why non-violent confrontations or civil disobediences, so effectively used in India in the 1920's to the 1940's to achieve independence, were not adopted until the 1960's by American blacks to achieve equality of opportunities. *See* R. KIRK, THE ROOTS OF AMERICAN ORDER 469 (Open Court 1974).

21. Nowhere is this social dimension better highlighted in America than in the conflicts which the Amish have had with public school educators. At the very heart of the differences is the kind of information and the setting in which that information is to be presented to school children. *See* PUBLIC CONTROLS OF NONPUBLIC SCHOOLS 1, 1-59 (Donald Erikson ed. 1969). In a particularly pointed and telling manner, one educator states:

> Common controversies in education revolve not so much around what students should know, and how they should learn, but on how stupid we can permit them to be without wrecking the country and the world. In education for stupidity a nice line has to be drawn between teaching the child how to make obvious inferences and letting him make inferences that are too far-reaching for comfort; between training him to see the validity or the truth of a proposition in plane geometry and teaching him to perceive the fraudulence of a proposition in advertising, political economy, international relations and so on.

Henry, *Is Education Possible?,* PUBLIC CONTROLS FOR NONPUBLIC SCHOOLS 87 (Donald Erikson ed. 1969).

into the United States and migrations within the country, has constituted the fertile soil from which concern for individual interests has matured into increasingly complex and conflicting socially-defined rights.[22] As the nation became more populous and a relationship formed among substantially divergent individuals and groups, an elaborate system of rights developed, with some rights and associated duties more important than others.[23] While free speech, as a first amendment right, has been awarded a prominent place in the pantheon of protected amendment rights,[24] not all the variegated aspects of free speech have shared the same degree of protection.

Clearly "free speech was not intended to grant teachers or students the right to say or write whatever they please in a classroom."[25] But it was probably not as predictable that speech would extend far beyond what has been termed "pure speech," words expressed audibly or in written form.[26] Symbolic speech became equated with "pure speech" and was advanced by students and teachers in a wide range of acts or conduct as worthy of protection under the free speech or free

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22. *See* C. ROSSITER, SEEDTIME OF THE REPUBLIC: THE ORIGIN OF THE AMERICAN TRADITION OF POLITICAL LIBERTY 39-43 (Harcourt, Brace & Co. 1953).

23. *See* O. BROWNSON, THE AMERICAN REPUBLIC 363-64 (P. O'Shea 1865); R. KIRK, THE ROOTS OF AMERICAN ORDER 468-70 (Open Court 1974). Any discussion of rights and their development must be set against the backdrop of the tensions between performance and progression in society in general. *See* H. BARTH, THE IDEA OF ORDER: CONTRIBUTIONS TO A PHILOSOPHY OF POLITICS 2, 3 (E.W. Hankaner & W.M. Newell trans. 1960); E. VOEGELIN, THE NEW SCIENCE OF POLITICS (Univ. of Chicago Press 1952).

24. *See* Near v. Minnesota, 283 U.S. 697, 707 (1931) (freedom of speech is an "essential personal liberty"). The Supreme Court, through constitutional interpretation, has found several fundamental rights deemed to have a value essential to individual liberty. *See, e.g.,* Carey v. Population Serv. Int'l., 431 U.S. 678, 693 (1977) (right of privacy: to bear or beget children); Zablocki v. Red Hail, 434 U.S. 374, 385 (1978) (right of marriage); Bullock v. Carter 405 U.S. 134, 142 (1972) (right to vote and be candidate for public office). *But see* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (no fundamental right to public education).

25. Mailloux v. Kiley, 323 F. Supp. 1387, 1391 (D. Mass. 1971) (profane or obscene words not protected speech), *aff'd,* 448 F.2d 1242 (1st Cir. 1971); *see also* Fink v. Board of Educ., 442 A.2d 837, 842-44 (Pa. Commw. Ct. 1982) (conducting religious exercises in public school species of speech which must yield to establishment clause of Constitution), *dismissed,* 460 U.S. 1048 (1983).

26. *Compare* Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 505 (1969) (wearing of arm bands "closely akin to 'pure speech' ") *with* Cox v. Louisiana, 379 U.S. 536, 555 (1965) (those who communicate by "patrolling, marching, or picketing" do not have same freedom as "those who communicate ideas by pure speech"). *Accord* Hall v. Board of School Comm'rs, 681 F.2d 965, 968 (5th Cir. 1982) (literature distribution by teachers protected under first amendment); Lindsey v. Board of Regents, 607 F.2d 672, 674 (5th Cir. 1979) (questionnaire soliciting views protected under first amendment).

expression umbrella.[27] The tendency of courts in the late 1960's and early 1970's to expand the parameter of the kinds of protectable words, conduct, or actions under free speech was not without its detractors. No less a strong libertarian than Justice Black argued, in his dissenting opinion in *Tinker,* that:

> One does not need to be a prophet or the son of a prophet to know that after the Court's holding today some students . . . will be ready, able, and willing to defy their teachers on practically all orders. . . . Turned loose with law suits for damages and injunctions against their teachers as they are here, it is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools rather than the right of the States that collect the taxes to hire the teachers for the benefit of the pupils.[28]

It is true that the *Tinker* majority had established a limit to free speech where student or teacher conduct could "reasonably have led school authorities to forecast substantial disruption of or material interference with school activities . . . [or] intru[sion] in the school affairs or the lives of others."[29] Courts proceeded, however, with an almost evangelistic zeal to recognize and give constitutional protection to a variety of forms of expression. School rules objected to as prohibiting or inhibiting freedom of expression failed to pass constitu-

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27. There are numerous cases addressing the right of expression of oneself through a type of hairstyle. *Compare* Karr v. Schmidt, 460 F.2d 609, 613-14 (5th Cir.) (hairstyle does not have sufficient communicative content for first amendment protection), *cert. denied,* 409 U.S. 989 (1972) *and* King v. Saddleback Junior College Dist., 445 F.2d 932, 937 (9th Cir. 1971) (hair length regulations do not violate constitutional right of free speech or due process), *cert. denied sub nom.* Olff v. East Side Union High School Dist., 404 U.S. 1042 (1972) (Justice Douglas offers strong dissent to denial of certiorari) *with* Hatch v. Goerke, 502 F.2d 1189, 1194-95 (10th Cir. 1974) (student suspension for failure to cut hair sufficient cause to assert due process claim) *and* Richards v. Thurston, 424 F.2d 1281, 1283-85 (1st Cir. 1970) (hair length of student protected by fourteenth, not first, amendment). *See generally* H.H. PUNKE, SOCIAL IMPLICATIONS OF LAWSUITS OVER STUDENT HAIRSTYLES 99 (Interstate Printers & Publishers 1973). Other forms of conduct have been alleged to be protected by the first amendment. *See* Lipp v. Morris, 579 F.2d 834, 836 (3rd Cir. 1978) (refusal to stand for flag salute); Genosick v. Richmond Unified School Dist., 479 F.2d 482, 483 (9th Cir. 1973) (ecology and peace symbols); Melton v. Young, 465 F.2d 1332, 1335 (6th Cir. 1972) (Confederate flag patch), *cert. denied,* 411 U.S. 951 (1973); *see also* Burnside v. Byars, 363 F.2d 744, 748-49 (5th Cir. 1966) (regulation prohibiting "freedom buttons" unreasonable); Blackwell v. Issaquena City Bd. of Educ., 363 F.2d 749, 754 (5th Cir. 1966) (regulation prohibiting "freedom buttons" reasonable); Aryan v. Mackey, 462 F. Supp. 90, 91-92 (N.D. Tex. 1978) (wearing of masks).

28. Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 525 (1969) (Black, J., dissenting).

29. *See id.* at 514.

tional muster, either because they did not further a legitimate school interest, such as health or safety,[30] or because they were viewed as an improper prior restraint on constitutionally protected expression.[31] While *Tinker* held that public education in our nation is committed to the control of state and local authorities and that federal courts should not ordinarily intervene in the resolution of conflicts which arise in the daily operation of school systems,[32] the judicial crusade to recognize a variety of forms of student and teacher expression would inevitably begin to redefine the nature of the learning process. Although school rules continued to be important, their enactment and enforcement now "must be related to the state interest . . . lest students' imaginations, intellects, and wills be unduly stifled or chilled."[33] One federal judge was prompted to address the subject of school suppression of student expression with the caustic observation that "[p]erhaps it would be well if those entrusted to administer the teaching of American history and government to our students began their efforts by practicing the document on which that history and government are based."[34]

The judicial search for a manageable definition of free speech has led to a consideration of balancing various interests. Although courts

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30. The United States Supreme Court has recognized that health and safety concerns are part of the compelling state interests that supersede even the most fundamental constitutional rights. *See, e.g.,* Wisconsin v. Yoder, 406 U.S. 205, 213 (1972); Braumfeld v. Brown, 366 U.S. 599, 603 (1961); Prince v. Massachusetts, 321 U.S. 158, 170 (1944).

31. *See* Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 973 (5th Cir. 1972) ("Reasonable regulation of expression is constitutionally preferable to restraint."); Sullivan v. Houston Indep. School Dist., 333 F. Supp. 1149, 1160-61 (S.D. Tex. 1971) (prior restraint not favored by Constitution), *vacated,* 475 F.2d 1071 (5th Cir.), *cert. denied,* 414 U.S. 1032 (1973). Prior restraint arguments focus on the language of a rule or standard of conduct as it applies to constitutionally protected expression. Where health and safety are not at issue, rules or standards will be constitutionally acceptable on their face where they are precise enough to be enforceable, where prompt approval or disapproval by a teacher or administrator is required using non-context-oriented reasons, and where an adequate and prompt appeals procedure is available. *See, e.g.,* Nitzberg v. Parks, 525 F.2d 378, 383-84 (4th Cir. 1975) ("prior restraint procedure . . . must provide prompt and adequate review"); Baughman v. Freienmuth, 478 F.2d 1345, 1348-49 (4th Cir. 1973) (prior restraint must be balanced by procedural safeguards); Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 977-78 (5th Cir. 1972) (four requirements listed for school screening regulations).

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

33. *See* Scoville v. Board of Educ., 425 F.2d 10, 14 (7th Cir.), *cert. denied,* 400 U.S. 826 (1970).

34. *See* Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 978 (5th Cir. 1972). In *Shanley,* the Court stated that "the school board likewise failed to recognize even the bare existence of the First Amendment when it first drafted" its regulation. *See id.* at 966 n.2.

are still called upon to determine whether certain conduct or words are free speech,[35] courts today seem to examine more carefully the impact of that expression upon the school setting.[36] In other words, a determination that certain conduct is protected by the first amendment is not usually solely dispositive of the facts before the court. One reason for the change, of course, is that rules regarding certain kinds of expression, such as hairstyles, have been simply abolished or have been substantially altered.[37] In addition, schools have incorporated better procedural safeguards for students and teachers which have minimized the prospect of summary discipline.[38] It could also be suggested that the increased use of section 1983[39] to seek compensatory and punitive damages, as opposed to earlier lawsuits which usually sought only equitable (reinstatement, expunging of records) or declarative (rule was unconstitutional) relief,[40] may well have caused courts to be more cautious in assigning protected constitutional status

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35. *See* Karnstein v. Pewaukee School Bd., 557 F. Supp. 565, 567 (E.D. Wis. 1983) (failure to elect high school student to national honor society did not deprive him of free speech right).

36. *See* Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 969 (5th Cir. 1972). "The test for curtailing in-school exercise of expression is whether or not the expression or its method of exercise 'materially and substantially' interferes with the activities or discipline of the school." *Id.* at 969; *see also* Egner v. Texas City Indep. School Dist., 338 F. Supp. 931, 944 (S.D. Tex. 1972) ("preservation of discipline and order" takes precedence over exercise of expression inconsistent with those two goals).

37. However, as recently as 1978, a court refused to hold that a school rule requiring male students to be clean shaven violated plaintiff's freedom of speech. *See* Ferrara v. Hendry County School Bd., 362 So. 2d 371, 374 (Fla. Dist. Ct. App. 1978), *cert. denied,* 444 U.S. 856 (1979).

38. Some of the administrative changes which appear to have caused courts to rule favorably on behalf of schools have been the elimination of mandatory punishment rules. *See, e.g.,* Fisher v. Burkburnett Indep. School Dist., 419 F. Supp. 1200, 1203 (N.D. Tex. 1976) ("School Board had the inherent authority to ignore . . . mandatory language."); Kirtley v. Armentrout, 405 F. Supp. 575, 577 (W.D. Va. 1975) (delay in imposing punishment until appeal process exhausted); French v. Cornwell, 276 N.W.2d 216, 219 (Neb. 1979) (use of suspensions that permit some in-school privileges).

39. 42 U.S.C. § 1983 (1982). Section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

40. *Compare* Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 967 (5th Cir. 1972) (parents of students sought injunction to clear students' permanent records and to permit distribution of underground newspaper) *with* Guerra v. Roma Indep. School Dist., 444 F. Supp.

to a particular form of expression.[41]

B. *Public Forum as a Basis for Decision*

The range of kinds of expression to which courts are willing to render protection is considerable,[42] but judicial resolution seldom ends at the definition stage. Courts consider the form of expression in its educational context and thus define free speech concerns by the kind of forum provided by a school.[43] In the recent case of *Perry Education Association v. Perry Local Educator's Association,*[44] the United States Supreme Court decided it is possible that certain areas within a school are not traditional public forums.[45] The plaintiff union sought access to teacher mailboxes after the defendant union had been certified as the exclusive bargaining agent for teachers in the school district.[46] The labor agreement between the defendant union

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812, 816 (S.D. Tex. 1977) (teachers brought 1983 action claiming that school board's failure to rehire them was retaliation for their support of political candidate).

41. The Supreme Court has concluded that board members and superintendents are liable under § 1983 for violating students' and teachers' due process rights. *See* Wood v. Strickland, 420 U.S. 308, 314-15 (1975). The Court somewhat reduced the impact of *Wood* by ruling that only nominal damages can be awarded without proof of actual injury. *See* Carey v. Piphus, 435 U.S. 247, 266-67 (1978). In addition, the Court has given public officers "good faith" immunity for violating certain constitutional rights. *See* Monell v. Department of Social Servs., 436 U.S. 658, 694-95 (1978). However, in 1980, the Court denied governing boards the use of the "good faith" defense which had been bestowed upon public officers. *See* Owen v. City of Independence, 445 U.S. 622, 635-58 (1980); *see also* Wood v. Strickland, 420 U.S. 308, 321-22 (1975). The Court has determined that § 1983 remedies will apply to deprivations falling under federal statutory law, as well as under constitutional law. *See* Maine v. Thiboutot, 448 U.S. 1, 8 (1980).

42. *See* Board of Educ. v. Pico, 457 U.S. 853, 866-67 (1982) (access to ideas); Bowman v. Pulaski County Special School Dist., 723 F.2d 640, 645 (8th Cir. 1983) (criticism of punishment); McGee v. South Pemiscot School Dist., 712 F.2d 339, 342 (8th Cir. 1983) (letter to newspaper); *see also* Hall v. Board of School Comm'rs, 681 F.2d 965, 968-69 (5th Cir. 1982) (right of teachers' union to disseminate literature); Pratt v. Independent School Dist., 670 F.2d 771, 779 (8th Cir. 1982) (film version of short story entitled "The Lottery"). *But see* Seyfried v. Walton, 668 F.2d 214, 220 (3d Cir. 1981) (administrator's decision to cancel play did not violate student's dramatic expression).

43. *See* Belcher v. Mansi, 569 F. Supp. 379, 385 (D.R.I. 1983) (taping school board meetings); Smith v. Harris, 560 F. Supp. 677, 693 (D.R.I. 1983) (griping about work away from workplace); Anderson v. Central Point School Dist., 554 F. Supp. 600, 606-07 (D. Or. 1982) (letter from teacher to board members), *aff'd,* 746 F.2d 505 (9th Cir. 1984); Sheck v. Baileyville School Comm., 530 F. Supp. 679, 686 (D. Me. 1982) (right to receive ideas through books in school library); Lake Park Educ. Ass'n v. Board of Educ., 526 F. Supp. 710, 717 (N.D. Ill. 1981) (teachers discussing union membership during school hours).

44. 460 U.S. 37 (1983) (5-4 decision).

45. *See id.* at 44.

46. *See id.* at 39.

and the school district stipulated that rights to insert material in teachers' mailboxes would be accorded only to the defendant union.[47] Based upon a determination that the school mail facilities represented a non-public forum, the Court upheld the exclusive labor agreement.[48] In restricting the right of access to information "to the special purpose for which the property is used,"[49] the Court appeared to be suggesting that protectable free speech can be defined by the kind of forum.[50] *Perry Education Association* must be considered in light of an earlier Supreme Court decision, *Board of Education v. Pico.*[51] In *Pico,* the majority[52] chose to totally ignore the question whether a school library is a non-public forum and instead focused solely on the student's "right to receive ideas . . . [which were] a necessary predicate to . . . [the] meaningful exercise of his own rights of speech, press, and political freedom."[53]

Although the nature of the forum is a basis for decision in free speech cases,[54] it must be conjectured whether this is an appropriate factor to define speech. The use of a public forum concept to determine the parameter of free speech has not produced consistent results. For example, a school board rule prohibiting placards or signs in

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47. *See id.* at 39. The case raised, but did not resolve, another interesting question; namely, whether interschool delivery of materials to teachers at various schools in the district violates the Private Express statutes, 18 U.S.C. §§ 1693-1699 (1976) and 39 U.S.C. §§ 601-606 (1976). *See* Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 39 n.1 (1982).

48. *See* Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 48-49 n.1 (1982); Connecticut State Fed'n of Teachers v. Board of Educ. Members, 538 F.2d 471, 481 (2d Cir. 1976).

49. *See id.* at 55.

50. *See id.* at 55. The strong dissent in *Perry Education Association* vigorously assailed the majority's ignoring of the free speech issue. *See id.* at 62 (Brennan, J., dissenting). "By focusing on whether the interschool mail system is a public forum, the Court disregards the independent First Amendment protection afforded by the prohibition against viewpoint discriminations." *Id.* at 62 (Brennan, J., dissenting).

51. 457 U.S. 853 (1982) (5-4 decision).

52. *Pico* also contained a strong dissent which vigorously asserted the rights of local school boards to monitor the contents of school libraries consistent with community values. *See id.* at 885, 890-91 (Burger, C.J., dissenting).

53. *See id.* at 867.

54. *See* Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 44-49 (1982). The Supreme Court recognized the categories of property use which determined the permissive bounds of free speech: places which, by long traditions or by government fiat, have been devoted to assembly and debate, such as streets and parks; public property which the state has opened for use by the public as a place for expressive activity; and public property, not by designation or tradition, a forum for public communication which can be restricted to its intended purposes. *See id.* at 45-46.

school board meetings, a limited public forum, was permissible because there were alternate methods for citizens to make their interests known to the board.[55] On the other hand, a state statute prohibiting solicitation of voters in polling sites, a public forum, was held violative of the free speech rights of a citizen, who sought to solicit signatures for a petition at a public school polling site, because there was no evidence of a threat to normal school activities.[56] There are two limited public forum cases involving use of school premises: one court held that opening the school during non-school hours for rental to "recognized community groups" requires the school district to include rentals to religious groups,[57] but another court held that allowing clubs promoting "intellectual, physical and social development of the student" to meet during school hours did not include religious groups.[58] While judicial discussion of the public forum concept may appear to provide a convenient rationale, it does nothing to aid students and teachers in predicting what kinds of speech ought to be constitutionally protected.

C. *Effect of Decisions on the Educational Process*

A better basis for defining free speech would seem to be an understanding of the educational process. Education involves interactions of students, administrators, teachers, parents, board members, and taxpayers. It can reasonably be expected that such interactions will involve criticism of persons or policies,[59] creation of rules to en-

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55. *See* Godwin v. East Baton Rouge Parish School Bd., 408 So. 2d 1214, 1218 (La. 1981), *dismissed,* 459 U.S. 807 (1982). The court found that the board's rule allowing any citizen to speak for five minutes and present documents to the board was a reasonable alternative to signs or placards because it permitted the board to conduct its meetings in an orderly fashion even though there was no evidence of disruption. *See id.* at 1217.

56. *See* Dorn v. Board of Trustees, 661 P.2d 426, 433 (Mont. 1983). The *Dorn* court simply identified public schools as public forums without any considerations given to ascertaining the kind of forum. *See id.* at 431.

57. *See* Country Hills Christian Church v. Unified School Dist., 560 F. Supp. 1207, 1216-17 (D. Kan. 1983).

58. *See* Bender v. Williamsport Area School Dist., 741 F.2d 538, 559 (3rd Cir. 1984) ("interest in protecting free speech . . . outweighed by the Establishment Clause").

59. *See* Bowman v. Pulaski County Special School Dist., 723 F.2d 640, 645 (8th Cir. 1983) (criticism of head football coach by assistant coaches found acceptable); McGee v. South Pemiscot School Dist., 712 F.2d 339, 342 (8th Cir. 1983) (letter of teacher to newspaper responding to prior letter of board member held to be protected speech); Russ v. White, 541 F. Supp. 888, 897 (W.D. Ark. 1981) (criticism of administrator in conjunction with refusal to supervise held non-protected speech), *aff'd,* 680 F.2d 47 (8th Cir. 1982).

courage or stop certain behaviors,[60] changes in programs, personnel, or curricula to reflect needs as perceived by those responsible for the changes,[61] and attempts to influence educational policy by seeking access to channels of information within schools.[62] By evaluating free speech issues in the complex matrix of interactions within the educational setting, it is apparent that courts have tended to consider more carefully the impact of their decisions on the purpose and process of education. However, while such categories as pure speech, symbolic speech, and free expression have remained the same, the more frequent recent concern with the kind of forum, effect on school discipline, and the importance of school boards and administrators as educational managers has made the definition of free speech far less predictable. What courts have accomplished with reasonable success is establishing the parameters of free speech where the issues are those such as defamation,[63] open meeting laws,[64] and invasion of privacy.[65]

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60. *See* Nicholson v. Board of Educ., 682 F.2d 858, 863-64 (9th Cir. 1982) (requirement of submission of school newspaper to principal prior to publication to check for accuracy held constitutional); Belcher v. Mansi, 569 F. Supp. 379, 385-86 (D.R.I. 1983) (school board rule prohibiting tape recording of school board meetings held violation of free speech); Dean v. Guste, 414 So. 2d 862, 864 (La. Ct. App. 1982) (no prior restraint where school board rule prohibits sound recording of executive sessions), *cert. denied sub. nom.* Dean v. St. Bernard Parish School Bd., 459 U.S. 1070 (1982).

61. *See* White v. South Park Indep. School Dist., 693 F.2d 1163, 1168 (5th Cir. 1982) (coach's death threats against athletic director non-protected speech); Pratt v. Independent School Dist., 670 F.2d 771, 776-77 (8th Cir. 1982) (school board's prohibition of use of film violated students' right to ideas); Seyfried v. Walton, 668 F.2d 214, 217 (3d Cir. 1981) (refusal of principal to allow play to be performed permissible control of curriculum); *see also* Sheck v. Baileyville School Comm., 530 F. Supp. 679, 690 (D. Me. 1982) (removal of book from library violated students' right to receive information); McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255, 1264-73 (E.D. Ark. 1982) (state statute requiring balanced teaching of creationism and evolution violated teacher's academic freedom).

62. *See* Hall v. Board of School Comm'rs, 681 F.2d 965, 968-69 (5th Cir. 1982) (school board rules regarding distribution of faculty literature held violative of free speech; but rule regulating visitors acceptable prior restraint); Dunn v. Tyler Indep. School Dist., 460 F.2d 137, 143 n.8 (5th Cir. 1972) (suspension from school of students who participated in walk-out not violative of students' freedom of speech); Dodd v. Rambis, 535 F. Supp. 23, 30-31 (S.D. Ind. 1981) (discipline of students for distributing leaflets calling for students' walk-out held not violative of students' free speech); Washington Educ. Ass'n v. Smith, 638 P.2d 77, 81 (Wash. 1981) (state refusal to permit voluntary payroll deductions for union dues held not violative of employees' free speech).

63. *See* Small v. McRae, 651 P.2d 982, 996-97 (Mont. 1982) (removal of department chairman for failure to adequately perform did not raise issue of libel); Spano v. School Dist., 316 A.2d 162, 164 (Pa. 1974) (teacher calling superintendent "liar" was properly dismissed), *cert. denied,* 420 U.S. 966 (1975); Ranous v. Hughes, 141 N.W.2d 251, 255 (Wis. 1966) (letter read to faculty by administrator about teacher and containing words such as "impatriotic attitude," "intemperate," and "offensive behavior" held defamatory). *See generally* K.D. MORAN

The complex balancing of interests in which courts have engaged, however, has not made the definition of free speech more discernible, but has aided in making schools more manageable.

III. APPLICATION OF FREE SPEECH TO THE SCHOOL POPULATION

Although the *Tinker* decision suggests that student and teacher rights of free speech are equal,[66] it is by no means clear that they are. Indeed, there are fact situations where teacher expression may be

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& M.A. MCGHEHEY, THE LEGAL ASPECTS OF SCHOOL COMMUNICATIONS 7-40 (Nat'l Org. on Legal Problems of Educ. 1980); R.D. MAWDSLEY & S. PERMUTH, LEGAL PROBLEMS OF RELIGIOUS AND PRIVATE SCHOOLS 21-25 (Nat'l Org. on Legal Problems of Educ. 1984).

64. The belief that the public is entitled to greater access to meetings of government bodies has inspired all 50 states to pass statutes that require certain public agencies to conduct all official meetings in sessions open to the public. *See The Minnesota Open Meeting Law After Twenty Years—A Second Look,* 5 WM. MITCHELL L. REV. 375, 375 n.1 (1979); Little & Tompkins, *Open Government Laws: An Insider's View,* 53 N.C.L. REV. 451, 487 app.II (1974). Because open meeting statutes are enacted for the public benefit, they are generally construed with a liberal interpretation most favorable to the public. *See* Laman v. McCord, 432 S.W.2d 753, 755 (Ark. 1968); Greene v. Athletic Council, 251 N.W.2d 559, 560 (Iowa 1977). Open meeting laws have been held not to violate the free speech and assembly rights of those participating in the meeting. *See* St. Cloud Newspapers v. District 742 Community Schools, 332 N.W.2d 1, 7 (Minn. 1983). However, where access to certain kinds of meetings is expressly prohibited by the state statute, the United States Supreme Court has suggested that the first amendment is not a "constitutional sunshine law." *See* Gannet Co. v. De Pasquale, 443 U.S. 368, 405 (1979) (Rehnquist, J., concurring) (press and public not deprived of first amendment right when denied access to pretrial hearings in criminal case); *see also* Dean v. Guste, 414 So. 2d 862, 864 (La. Ct. App. 1982) (refusal to permit school board member to tape record school board executive committee sessions according to state open meeting law held not violative of his free speech rights), *cert. denied sub. nom.* Dean v. St. Bernard Parish School Bd., 459 U.S. 1070 (1982); Minneapolis Star & Tribune v. Housing and Redev. Auth., 251 N.W.2d 620, 625 (Minn. 1976) (limited exception to open meeting law created to protect attorney-client privilege). For a discussion of open meeting laws as statutory declaration of rights that had not formerly existed, see *Open Meeting Statutes: The Press Fights for the Right to Know,* 75 HARV. L. REV. 1199, 1203-04 (1962).

65. Four separate torts are actionable under the rubric of invasions of privacy: public disclosure of a private fact; intrusion upon a person's solitude or private affairs; false light publicity; and appropriation of a person's name or likeness to the advantages of another person. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 804-14 (4th ed. 1971). Courts have had to balance the right of privacy against competing interests to publish or inform about newsworthy matters. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 494-95 (1975). In *Diaz v. Oakland Tribune, Inc.,* a college student had undergone a sex change operation, and the defendant newspaper reported this briefly 13 years after the operation. *See* 188 Cal. Rptr. 762, 765-66 (Ct. App. 1983). In upholding a $250,000 award to the plaintiff, the court observed that the public's right to know was not of sufficient newsworthy value to warrant intrusion into the plaintiff's privacy. *See id.* at 767.

66. *See* Tinker v. Des Moines School Dist., 393 U.S. 503, 506 (1969).

identical to student expression; there are also situations, however, where the function of the teacher in a school setting may demand constraints different from a student.[67] Control of school curricula by school boards can involve questions of academic freedom and subordination to authority for the teacher. Although the questions for students may be similar, they involve different nuances. To a large degree, the student's right of access to information might be viewed as derivative of the teacher-administration relationship. To express the problem in a different manner, do students have the right of access to material where the administration's interest in controlling curriculum is more persuasive than the teacher's right of academic freedom? Must the teacher's rights prevail before the student's can? If the teacher elects not to assert his/her free speech rights, does such a decision preclude students from asserting their free speech rights? If certain forms of expression, such as strikes, are prohibited for teachers, would similar conduct by students necessarily also be prohibited? How should failure of teachers or students to follow an established grievance procedure affect the assertion of constitutional free speech rights? Should degree of distance between the source of constraint on expression and the recipient of that constraint (school board — student vs. teacher — student) influence the permissible level of constraint? Would speech constraints pass constitutional muster if at least a majority of those affected by the constraint approved the limitations prior to implementation?

While it is true that students and teachers do not lose their constitutional rights at the schoolhouse gate, it is equally true that they must recognize certain limitations upon their rights due to the inherent nature of educational institutions. It is well established that teacher criticism of school policies is protected free speech.[68] This

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67. A teacher assumes a position of employment while at the same time retaining his rights as a private citizen. *Cf.* Guerra v. Roma Indep. School Dist., 444 F. Supp. 812, 820-21 (S.D. Tex. 1977) (district cannot fail to renew teacher's contract where nonrenewal is retaliation for teacher's political activity). This status, as teacher/citizen, prevents the teacher from using profanity in the classroom, while permitting him to use or listen to such profanity in other public settings. *Compare* Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 281-82 (1977) (teacher utilizing obscene gesture and profanity to students properly dismissed) *with* FCC v. Pacifica Found., 438 U.S. 726, 750 n.28 (1978) (adults desiring to hear profanity "may purchase tapes and records or go to theaters and nightclubs to hear" them).

68. *See* Pickering v. Board of Educ., 391 U.S. 563, 568 (1968). As a general rule, a school board may not dismiss an employee for criticizing school policies that are of public interest unless the speech contains knowingly or recklessly made false statements, undermines the abil-

criticism, however, must be a matter of public interest in order to be protected by the first amendment.[69] Where a teacher alleges that he/she has been disciplined or terminated for exercising the right of free speech,[70] that teacher bears the burden of establishing that the protected conduct was a motivating or substantial factor in the decision to discipline or terminate.[71] The school can still prevail, however, if it can show by a preponderance of the evidence "that it would have reached the same decision . . . in the absence of the protected conduct."[72] In determining whether the alternative reasons are adequate to support the disciplinary action, the Supreme Court has declared a number of factors to be considered: need for harmony in the office or work place; whether the employees' responsibilities require a close working relationship with co-workers which might deteriorate because of his/her speech; the time, manner, and place of the speech; the context in which the dispute arose; the degree of public interest in the speech; and whether the speech impeded the employee's ability to perform his/her duties.[73] Generally, criticisms by teachers of school board policies are protected by free speech since school boards are not

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ity of a teacher to function, or interferes with the operation of the school. *See id.* at 574; *see also* Grimm v. Cates, 532 F.2d 1034, 1039 (5th Cir. 1976); Ferguson v. Thomas, 430 F.2d 852, 859 (5th Cir. 1970).

69. *Compare* McGee v. South Pemiscot School Dist., 712 F.2d 339, 342 (8th Cir. 1983) (elimination of junior high track of public interest) *with* Renfroe v. Kirkpatrick, 722 F.2d 714, 715 (11th Cir.) (grievance about job sharing arrangement not of public interest), *cert. denied,* __ U.S. __, 105 S. Ct. 98, 83 L. Ed. 2d 44 (1984). *But see* White v. South Park Indep. School Dist. 693 F.2d 1163, 1168 n.7 (5th Cir. 1982) (speech not "necessarily unprotected . . . because it concerns internal operating procedures").

70. Termination or internal discipline within the institution appears to receive equal emphasis. *See* Bowman v. Pulaski County Special School Dist., 723 F.2d 640, 645 (8th Cir. 1983). Assistant coaches transferred after criticizing the head coach's use of corporal punishment were ordered reinstated because "involuntary transfers can be as effective as discharges in chilling the exercise of First Amendment rights." *See id.* at 645.

71. *See* Mount Healthy City School Dist. v. Doyle, 429 U.S. 274, 287 (1977); Bowman v. Pulaski County Special School Dist., 723 F.2d 640, 643 (8th Cir. 1983).

72. *See* Mount Healthy City School Dist. v. Doyle, 429 U.S. 274, 287 (1977); *see also* Russ v. White, 541 F. Supp. 888, 897 (W.D. Ark. 1981), *aff'd,* 680 F.2d 47 (8th Cir. 1982). "[I]f the exercise of . . . [free speech] rights by the teacher materially and substantially impedes the teacher's proper performance of his daily duties in the classroom or disrupts the regular operation of the school . . . a restriction of his rights will be tolerated." Lusk v. Estes, 361 F. Supp. 653, 660 (N.D. Tex. 1973); *see also* White v. South Park Indep. School Dist., 693 F.2d 1163, 1169 (5th Cir. 1982); Pred v. Board of Pub. Instruction, 415 F.2d 851, 857-59 (5th Cir. 1969).

73. *See* Connick v. Myers, 461 U.S. 138, 147-48 (1983).

the immediate supervisors of teachers.[74] However, criticism of one's immediate supervisor will meet with closer judicial scrutiny, since the more frequent the daily work contact, the more threatened would be the smooth functioning of the organization.[75]

Such a concern for the object of the criticism, on the other hand, does not appear to be part of decisions involving students. Courts, instead, tend to view student conduct in relationship to the broad purposes of education.[76] The rights of students under *Tinker* are not " 'co-extensive [sic] with those of adults' " and "may be modified or curtailed by school policies that are 'reasonably designed to adjust those rights to the needs of the school environment.' "[77] In summary, it appears students may find their free speech rights curtailed where there is a likelihood of substantial disruption to the normal school routine.[78]

Where a court's perception of the problem shifts from interpersonal relationships[79] to the kind of curricular information students nor-

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74. *See* McGee v. South Pemiscot School Dist., 712 F.2d 339, 342 (8th Cir. 1983); Anderson v. Central Point School Dist., 554 F. Supp. 600, 606-07 (D. Or. 1982), *aff'd,* 746 F.2d 505 (9th Cir. 1984).

75. *See* White v. South Park Indep. School Dist., 693 F.2d 1163, 1168-69 (5th Cir. 1982) (teacher/coach termination upheld for death threats against athletic director); Hitwood v. Feaster, 468 F.2d 359, 360-61 (4th Cir. 1972) (college has right to expect harmonious cooperation with department head: bickering can be part of basis for dismissal); Russ v. White, 541 F. Supp. 888, 893, 897 (W.D. Ark. 1981) (dismissal of academic dean upheld for telling president of college he needed psychiatric help and for refusing to supervise faculty members hired over his objections), *aff'd,* 680 F.2d 47 (8th Cir. 1982); Williams v. Day, 412 F. Supp. 336, 340 (E.D. Ark. 1976) (dismissal of teacher upheld for refusing to cooperate with administrators after being refused position of athletic director), *aff'd,* 553 F.2d 1160 (8th Cir. 1977).

76. *See* Board of Educ. v. Pico, 457 U.S. 853, 866 (1982) (quoting Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 506 (1969)) (free speech rights should be " 'applied in light of the special characteristics of the school environment' "); Williams v. Spencer, 622 F.2d 1200, 1205 (4th Cir. 1980) (students' rights "must yield to the superior interest of the school" where there is danger to students' health or safety on school property).

77. *See* Williams v. Spencer, 622 F.2d 1200, 1205 (4th Cir. 1980) (quoting Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 515 (1969) (Stewart, J., concurring) and Quarteman v. Byrd, 453 F.2d 54, 58 (4th Cir. 1971)); *see also* Nicholson v. Board of Educ., 682 F.2d 858, 863 (9th Cir. 1982).

78. *Compare* Dodd v. Rambis, 535 F. Supp. 23, 30-31 (S.D. Ind. 1981) (explusion of students upheld for distributing leaflets urging school boycott) *with* Hall v. Board of School Comm'rs, 681 F.2d 965, 968-69 (5th Cir. 1982) (school rule requiring prior approval of all political, sectarian, or special interest materials brought into school by teachers held unconstitutional).

79. While inter-personal relationships at all levels in a school are undoubtedly an important part of any learning process, such socialization skills vary significantly from one individual to the next and, thus, do not have the finite characteristics of textbooks and library books.

mally receive in school, it tends to be almost equally protective of students and teachers. The authority of administrators or school board members to prohibit the discussion of ideas or remove books based on content has been severely restricted.[80] This is true whether phrased as the right to receive information,[81] the right to receive ideas,[82] the right to be free from suppression of ideas,[83] or the right to dramatic expression.[84] In areas not involving students, teachers are faced with unique situations regarding forms of expression, such as union dues payroll deductions,[85] the right to organize as a union,[86] and the right of rival unions to use school facilities.[87]

When either students or teachers have sought to expand free expression to include religious expression, courts have tended to be consistent in their decisions to restrict such expressions.[88] The apparent inconsistency of permitting content-based restrictions for religious speech, but not for other forms of speech, will undoubtedly become an issue of intensified judicial scrutiny.[89] It is most probable that the

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See S. BOOCOCK, AN INTRODUCTION TO THE SOCIOLOGY OF LEARNING (Houghton Mifflin Co. 1972).

80. In *Pico,* the Court appeared to suggest that schools could have a system for removing books from a library, but the school board in that case had refused to follow the established procedure. *See* Board of Educ. v. Pico, 457 U.S. 853, 874-75 (1982).

81. *See* Sheck v. Baileyville School Comm., 530 F. Supp. 679, 686 (D. Me. 1982).

82. *See* Board of Educ. v. Pico, 457 U.S. 853, 867 (1982).

83. *See* Pratt v. Independent School Dist., 670 F.2d 771, 777 (8th Cir. 1982) (court's remedy of restoring film to curriculum exceeded that of school committee established to hear such complaints).

84. *See* Seyfried v. Walton, 668 F.2d 214, 216-17 (3d Cir. 1981) (court upheld superintendent's decision not to produce "Pippin").

85. *See* Washington Educ. Ass'n v. Smith, 638 P.2d 77, 80-81 (Wash. 1981) ("contributing to an organization for the purpose of spreading a political message is protected by" free speech); *see also* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233-37 (1977).

86. *See* Lake Park Educ. Ass'n v. Board of Educ., 526 F. Supp. 710, 717 (N.D. Ill. 1981) (abolition of staffing system in reaction to teacher interest in reestablishing teacher's association violated first amendment).

87. *See* Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 44 (1983) ("free speech applies to teacher mailboxes").

88. *See* Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038, 1044-45 (5th Cir. 1982) (school not required to permit students to meet prior to school), *cert. denied,* 459 U.S. 1155 (1983); McLean v. Arkansas Bd. of Educators, 529 F. Supp. 1255, 1274 (E.D. Ark. 1982) (balanced treatment statute violative of establishment clause); Fink v. Board of Educ., 442 A.2d 837, 843-44 (Pa. Commw. Ct. 1982) (teacher dismissal upheld for praying and reading Bible in classroom), *dismissed,* 460 U.S. 1048 (1983).

89. For example, in *Agiullard v. Treen,* the Louisiana Supreme Court upheld a balanced treatment statute. *See* 440 So. 2d 704, 707 (La. 1983). To not enforce religious freedom, as the rights of speech and press are enforced, is to engage in a tautology: free exercise of religion has

Court's heightened awareness of and sensitivity to the complex business of education, since *Tinker,* will restrict the ascription of free speech rights to only those forms of expression where the end product of the educational process, namely the student and his knowledge and understanding of life problems, would be unduly hampered.[90] The increased vulnerability of board members and administration to section 1983 civil rights lawsuits makes it mandatory for courts to be more precise in their definitions of free speech constitutional rights.[91]

IV. FREE SPEECH AND THE FUNCTION OF EDUCATION

The question of application of free speech rights to students, teachers, and administrators must be considered within the context of a school's function. While it may appear to be axiomatic that the function of a school is to educate, courts have furnished a rather check-

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a religious purpose, therefore, it is unenforceable. The effect of such a tautology is to make it impossible for any student or teacher in a public school to ever raise a constitutional claim based on the free exercise of religion because the very raising of the claim would preclude protection. For a discussion of the legal implications of religious issues in public schools, see Mawdsley & Permuth, *Legal Rights: Is the Public School Off Limits for Religious Activities?,* 9 EDUC. L. REP. 1, 10-19 (1983).

90. *See* Seyfried v. Walton, 668 F.2d 214, 217 (3d Cir. 1981). In *Seyfried,* the court upheld the public school superintendent's decision to cancel a high school dramatic production. The concurring Judge Rosenn offered the following rationale:

> No attempt has been made to restrict access to the play: two copies of the unedited script remain available in the school library. Nor is it alleged that discussion of the play or its subject matter has been restricted. In sum, the decision of the school authorities to prohibit production of "Pippin" in a high school forum because of its sexual overtones does not threaten to stifle the free exchange of ideas so as to warrant judicial interference with the decision of the school authorities.

Id. at 220 (Rosenn, J., concurring). The extent to which the right of students to receive ideas is a necessary predicate of the right of teachers or authors to present ideas will continue to be litigated, especially in light of the strong dissent in the *Pico* decision, which declared that elected school boards are best able to set educational policy regarding access to ideas. *See* Board of Educ. v. Pico, 457 U.S. 853, 890-91 (1982) (Burger, C.J., dissenting). " 'The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones.' Moreover, exclusion of the rival union may reasonably be considered a means of insuring labor peace within the schools." *Id.* at 52 (quoting Abood v. Detroit Bd. of Educ. 431 U.S. 209, 221 (1977)). In *Perry,* the Court very narrowly construed the question of access and determined that admission of such organizations as the YMCA, Cub Scouts, and other civic and church organizations to use the facilities was irrelevant since none of those organizations had access to teacher mailboxes. *See id.* at 48.

91. *See* Wood v. Strickland, 420 U.S. 308, 314-15 (1975) (board members and administrators liable under § 1983); Guerra v. Roma Indep. School Dist., 444 F. Supp. 812, 816 (S.D. Tex. 1977) (teachers brought § 1983 action against school board).

ered record as to just how this is to be accomplished.[92] The entire subject of the function of schools, as it relates to free speech, is inextricably intertwined with and complicated by the question of governance: "Who runs the schools?"[93] While an academic discussion of what constitutes free speech and how it applies to school clientele may be useful, it does little to determine who should determine the content and means of expression of such speech.[94] In his famous dissent in *Tinker,* Justice Black, while suggesting prohibition on the right of government "to regulate or censor the content of speech,"[95] nonetheless lamented that the majority's opinion effectively ushered in "an entirely new era in which the power to control pupils by the elected 'officials of state supported schools . . .' in the United States is in ultimate effect transferred to the Supreme Court."[96] Where the *Tinker* majority limited the control of free speech by school authorities to those areas where there was substantial disruption of the educational program,[97] the outcome was more than a decade of

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92. For a discussion of the varied functions of education, see R.F. CAMPBELL, B. CONNINGHAM & R. MCPHEE, THE ORGANIZATION AND CONTROL OF AMERICAN SCHOOLS 14-18 (Charles E. Merrill Publishing Co. 1965); L. W. DOWNEY, THE TASK OF PUBLIC EDUCATION 78, 79 (Midwest Admin. Center 1960). For an explanation of purposes of education as related to non-public schools, see PRIVATE SCHOOLS AND THE PUBLIC GOOD, at XVII-XXVI (E. Graffney ed. 1981). The dilemma of determining and implementing the function of education has been expressed by one author:

> "It is not simply that the range of offspring [in schools] has become broader in recent years, but more that communities now demand that the schools offer instruction in the very areas that are most sensitive and most divisive, the schools are damned if they do and damned if they don't; when a community wants teaching about sex, or race relations, or consumer behavior, it can generally force the schools to comply. Yet the very response to these pressures may open a whole new range of problems which were unknown in times of simpler curricula.

R. M. O'Neil, CLASSROOMS IN THE CROSSFIRE 24 (IND. UNIV. PRESS 1981).

93. GOVERNING EDUCATION, at VII-VIII (A. Rosenthal ed. 1969).

94. *See* Eisner v. Stanford Bd. of Educ., 440 F.2d 803, 807-08 (2d Cir. 1971) (schools are "a market place of ideas" and a forum "to learn intelligent involvement").

95. *See* Tinker v. Des Moines School Dist., 393 U.S. 503, 517 (1969) (Black, J., dissenting).

96. *See id.* at 515 (Black, J., dissenting). The majority in *Tinker* acknowledged that the Court had "repeatedly emphasized . . . the comprehensive authority of the States and the school officials . . . to prescribe and control conduct in the schools," but then focused on the "hazardous freedom" of students to express their feelings because such is "the basis of our national strength and of the independence and vigor of Americans." *See id.* at 507-09.

97. *See id.* at 511. The precise wording of the Court's standard was: "Clearly the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with school work or discipline, is not constitutionally permissible." *Id.* at 511.

litigation[98] concerning "how, by whom and through whose influence" the function of education should be determined.[99]

Most recently, in *Board of Education v. Pico,*[100] the United States Supreme Court had an occasion to reconsider the relationship between free speech and governance.[101] In *Pico,* the local school board had ordered eleven books removed from the junior high and senior high libraries and school curriculum.[102] The board characterized the books as " 'anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy,' and concluded that '[i]t is our duty, our moral obligation, to protect the children in our schools from this moral danger as surely as from physical and medical dangers.' "[103] Despite the existence of a board policy that the superintendent appoint a committee to review objections to school materials, and over the objection of the superintendent that the board's removal order had violated its own policy, the board appointed its own book review committee. The committee recommended:

[T]hat five of the . . . books be retained[104] and that two others be re-

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98. One of the ironies resulting from the multitude of free speech education cases spawned by *Tinker* is that the act of litigation now "is itself a form of expression protected by the First Amendment." *See* Smith v. Harris, 560 F. Supp. 677, 693 (D.R.I. 1983); *see also In re* Halken, 598 F.2d 176, 182-83 (D.C. Cir. 1979).

99. *See* GOVERNING EDUCATION, at VII-XVIII (A. Rosenthal ed. 1969).

100. 457 U.S. 853 (1982).

101. It is important to recognize that while *Tinker* dealt with the discipline of three students for wearing black armbands, and *Pico* dealt with removal of books from the school library by the local school board, both cases pose the same issue of the tension between free speech and governance of public schools. *See* Byron, *Conservative Pressures on Curriculum,* 1982 SCHOOL L. UPDATE 142, 142-47 (Nat'l Org. on Legal Problems of Educ. 1983). *See generally* G. Walter, *Censorship in Public Schools: Board of Education v. Pico,* EDUCATORS AND THE LAW 131, 131-36 (1983).

102. "The nine books in the High School library were: SLAUGHTER HOUSE FIVE, by Kurt Vonnegut, Jr.; THE NAKED APE, by Desmond Morris; DOWN THESE MEAN STREETS, by Peri Thomas; BEST SHORT STORIES OF NEGRO WRITERS, edited by Langston Hughes; GO ASK ALICE, of anonymous authorship; LAUGHING BOY, by Oliver LaFarge; BLACK BOY, by Richard Wright; A HERO AIN'T NOTHIN' BUT A SANDWICH, by Alice Childress; and SOUL ON ICE, by Eldridge Cleaver. The book in the Junior High School library was A READER FOR WRITERS, edited by Jerome Archer. Still another listed book, THE FIXER, by Bernard Malamud, was found to be included in the curriculum of a 12th-grade literature course." Board of Educ. v. Pico, 457 U.S. 853, 856 n.3 (1982). For exerpts of objectionable passages from the above books, see Board of Educ. v. Pico, 457 U.S. 853, 897-903 app. (1982) (Powell, J., dissenting).

103. *See id.* at 857.

104. *See id.* at 857-58 n.5 ("The Fixer, Laughing Boy, Black Boy, Go Ask Alice, and Best Short Stories by Negro Writers").

> moved from the school libraries.[105] As for the remaining four books, the Committee could not agree on two,[106] took no position on one,[107] and recommended that the last book be made available to students only with parental approval.[108] The Board substantially rejected the Committee report, deciding that only one book should be returned to the High School library without restriction,[109] [and] that another be made available subject to parental approval.[110]

The Board also decided the remaining nine books were to be prohibited from school libraries and curriculum. The students brought a Section 1983 action against the school board, alleging violations of first amendment rights because removal of the books was based on the " 'social, political and moral tastes' " of the board " 'and not because the books, taken as a whole, were lacking in educational value.' "[111] The district court granted summary judgment for the school board.[112] The court observed that while the board's removal of the books for the reasons that they were "irrelevant, vulgar, immoral, and in bad taste" may "reflect a misguided educational philosophy, it does not constitute a sharp and direct infringement of any first amendment right."[113]

In affirming the court of appeals' decision to remand,[114] the

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105. *See id.* at 858 n.6 ("The Naked Ape and Down These Mean Streets").

106. *See id.* at 858 n.7 ("Soul On Ice and A Hero Ain't Nothin' But A Sandwich").

107. *See id.* at 858 n.8 ("A Reader for Writers").

108. *See id.* at 858 n.9 ("Slaughter House Five").

109. *See id.* at 858 n.10 ("Laughing Boy").

110. *See id.* at 858 n.11 ("Black Boy").

111. *See id.* at 858-59 (quoting from app. 4).

112. *See* Pico v. Board of Educ., 474 F. Supp. 387, 398 (E.D.N.Y. 1979), *reversed,* 457 U.S. 853 (1982).

113. *See id.* at 392, 397.

114. *See* Board of Educ. v. Pico, 457 U.S. 853, 875 (1982). The Supreme Court recognized the procedural nature of the appeal in the case and remanded the case for trial on the merits, but there is a question whether the Court instead should have resolved the case on its merits. Under the Court's "rule of four," "any case warranting consideration in the opinion of [four justices] of the Court will be taken and disposed of" on the merits. *See* Ferguson v. Moore-McCormack Lines, 352 U.S. 521, 560 (1957) (Harlan, J., concurring & dissenting). For other summary judgment appeals where the Court resolved questions of law, see Ernst & Ernst v. Hochfelder, 425 U.S. 185, 215 (1976). Thus, the result of *Pico* is a decisionmaking statement about right of access; however, it is unclear whether lower courts resolving similar cases on their merits must treat *Pico* as new substantive law. *Compare* Bender v. Williamsport Area School Dist., 563 F. Supp. 697, 707 (M.D. Pa. 1983) (*Pico* cited as permitting content-based decisionmaking), *rev'd on other grounds,* 741 F.2d 538 (3rd Cir. 1984) *with* Sheck v. Baileyville School Comm., 530 F. Supp. 679, 685 (D. Me. 1982) (*Pico* cited as severely restricting suppression of ideas).

Supreme Court made some significant statements about the function of education as defined by the interaction of student free speech rights with school board control of school actions. The Court acknowledged that "local school boards have broad discretion in the management of school affairs."[115] It appeared to suggest, however, that a student's access to ideas can be restricted only in certain situations: when there is evidence of material disruption to the school;[116] where books are "pervasively vulgar" or educationally unsuitable;[117] where unbiased established procedures are used to evaluate books;[118] or where the books at issue are part of the curriculum rather than the library.[119] The Court's holding that "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books"[120] does nothing to explain what constitutes an idea[121] or who determines which ideas are to be presented. The *Pico* plurality, and its obsession with access to ideas,

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115. *See* Board of Educ. v. Pico, 457 U.S. 853, 863-64 (1982). As support for its statement, the Court cited three of its earlier opinions, but in none of them did the Court uphold the authority of the school board in the facts before it. *See id.* at 863-64 (citing Epperson v. Arkansas, 393 U.S. 97, 109 (1968); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 403 (1923)). A cynic might conclude from the Court's statement that the authority of school boards to manage their schools when free speech issues are at stake is more evident by its exceptions to the rule than by support of the rule.

116. *See id.* at 866.

117. *See id.* at 871.

118. *See id.* at 874.

119. *See id.* at 869. "Petitioners might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values. But we think that petitioners' reliance upon that duty is misplaced where, as here, they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway." *Id.* at 869. Even if the Court's statement becomes substantive law, it is questionable how much assistance it will be to lower courts since there is no agreement among courts as to what constitutes the school curriculum. *Compare* Pratt v. Independent School Dist., 670 F.2d 771, 779 (8th Cir. 1982) (film used in class part of curriculum and ideas therein could not be suppressed) *with* Seyfried v. Walton, 668 F.2d 214, 216-17 (3d Cir. 1981) (school play considered integral part of curriculum, and, therefore, school authorities could determine whether play could be performed).

120. *See* Board of Educ. v. Pico, 457 U.S. 853, 872 (1982).

121. The Court appears to suggest that an idea is created any time there is disagreement with school materials. *See id.* at 872. If such is the case, school authorities would appear to be destined to defend on some neutral acceptable basis every change in school program where students or teachers object. Such a perpetual defensive posture does little to distinguish the roles of "government as educator" and "government as sovereign." *See id.* at 909. (Rehnquist, J., dissenting).

has missed the problem faced by school authorities in performing the educative function, a problem appropriately addressed by the dissent:

> Education consists of the selective presentation and explanation of ideas. The effective acquisition of knowledge depends upon an orderly exposure to relevant information. . . . Of necessity, elementary and secondary educators must separate the relevant from the irrelevant, the appropriate from the inappropriate. Determining what information *not* to present to the students is often as important as identifyng relevant material. This winnowing process necessarily leaves much information to be discovered by students at another time or in another place, and is fundamentally inconsistent with any constitutionally required eclecticism in public education.[122]

The *Pico* plurality appears to be making a significant policy statement about the educative function of schools vis-a-vis the educative function of parents.[123] The Supreme Court has traditionally recognized the important educative function of parents and has assiduously protected that function, even where it is opposed to valid state interests.[124] Lower federal courts and state courts have also repeatedly recognized the right of students to be exempt from certain educational requirements because of parental views regarding educational content to which their children should or should not be exposed.[125] Implicit in these cases is a recognition that parents have a significant educative function that may require them to expose their children to ideas at home not presented in school or to counteract at home ideas to which

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122. *See id.* at 914 (Rehnquist, J., dissenting).

123. *See id.* at 866, 869, 871, 874.

124. *See, e.g.,* Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (right of parents to select educational setting appropriate to established religious values in contravention to state compulsory attendance statutes); West Virginia v. Barnette, 319 U.S. 624, 642 (1943) (parent's right upheld to have child excused from pledge of allegiance although contravenes state statute); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (parent's right upheld to choose non-public forum of education in contravention to state statute).

125. *See* Florey v. Sioux Falls School Dist., 619 F.2d 1311, 1318-19 (8th Cir.) (students could be excused from school programs at Christmas time), *cert. denied,* 449 U.S. 987 (1980); Moody v. Cronin, 484 F. Supp. 270, 277 (C.D. Ill. 1979) (students excused from coeducational physical education class on religious grounds); Wright v. Houston Indep. School Dist., 366 F. Supp. 1208, 1212-13 (S.D. Tex. 1972) (student excused from portions of courses where evolution presented), *aff'd,* 486 F.2d 137 (5th Cir. 1973); *see also* Medeiros v. Kiyosaki, 478 P.2d 314, 317-18 (Hawaii 1970) (students excused from family life and sex education course); Todd v. Rochester Community Schools, 200 N.W.2d 90, 94-95 (Mich. Ct. App. 1972) (objectionable books part of elective course not required reading for all students); Smith v. Ricci, 446 A.2d 501, 506 (N.J. 1982) (students excused from objectionable portions of family life education program), *dismissed sub. nom.* Smith v. Brandt, 459 U.S. 962 (1982).

their children are exposed at school.[126] Where a court determines that library books cannot be removed from a school library even though they presumably would be available to students in public libraries or bookstores, it is not clear whether the Court is making some subtle assumptions about parents. Is it important to have books in school libraries because parents know of the books but are unwilling to allow their children access to them? Is the purpose of books in school libraries to overcome parental ignorance of contemporary literature? Or is the issue at stake an economic one, namely that many parents could not afford to transport their children to public libraries or purchase the books? From a more sweeping perspective, is the public school now being called upon to serve a surrogate parental educative function because of the deterioration of the family as a stable unit in contemporary society?[127]

V. FREE SPEECH AND COMMUNITY VALUES

Although the above questions are speculative in nature, they do raise the broader issue of the extent to which the public schools should reflect the cultural values of the community. Should free speech be a vehicle by which a public school can direct and shape community cultural values, or should free speech be an elastic concept shaped by variations among numerous communities? Even if free speech is to be elastic in nature, which segment's views are to be

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126. For example, the Supreme Court did not prohibit the use of the pledge of allegiance, and, thus, the Seventh Day Adventist parents had to explain their religious beliefs to their child excused from participation in the pledge. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 641-42 (1943). A child excused from the pledge could be subjected to some peer pressure at school, but the function of educating the child belonged to the parent. Only where the Court has determined that the school's activity is of a religious nature has it operated in an inconsistent manner and prohibited the entire school activity, rather than letting the parents counteract its effect on the child at home. *See* Engel v. Vitale, 370 U.S. 421, 436 (1962); *see also* Abington School Dist. v. Schemmp, 374 U.S. 203, 225-27 (1963) (excusal of objecting students from mandated prayer and Bible reading considered inadequate because of negative peer pressure).

127. For a thorough discussion of the disintegration of the contemporary American family, see C. LASCH, HAVEN IN A HEARTLESS WORLD: THE FAMILY BESEIGED (Basic Books 1975). It is worth noting that the *Pico* Court rejected both the book review committee's and school board's recommendations which would have placed two of the 11 books on a restricted list subject to parental approval. *See* Board of Educ. v. Pico, 457 U.S. 853, 869 (1982). In *Pratt v. Independent School Dist.*, the Court returned a film to the required school curriculum and disregarded a challenge committee's recommendations that before the film was shown in the future, a sheet be sent to the students' parents advising them they could exclude their children from viewing the film. *See* 670 F.2d 771, 774, 779-80 (8th Cir. 1982).

represented and how are those views to be determined? The *Pico Court* recognized that:

> local school boards must be permitted "to establish and apply their curriculum in such a way as to transmit community values," and that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political."[128]

However, what the plurality in *Pico* addressed as a free speech right-of-access question became for the dissent a more complicated concern about "inculcating social values and knowledge in relatively impressionable young people."[129] Courts have speculated in numerous decisions about the impressionability of students as related to school curricula or activities, each decision with varied conclusions regarding the impact upon students.[130] What those courts have frequently failed to illuminate is why courts are better monitors of the cultural sensitivities of young people throughout the United States than school officials elected or appointed in the local communities.[131] To conclude, as the *Pico* plurality does, that school boards can inculcate val-

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128. Board of Educ. v. Pico, 457 U.S. 853, 864 (1982) (quoting Petitioner's Brief at 10); *see also* Pratt v. Independent School Dist., 670 F.2d 771, 775 (8th Cir. 1982) (school board's discretion can "reflect local community views and values as to educational content and methodology"). *But see* Dean v. Timpson Indep. School Dist., 486 F. Supp. 302, 307 (E.D. Tex. 1979). The *Dean* court provided: "[A] teacher has a constitutional right protected by the First Amendment to engage in a teaching method of his or her own choosing, even though the subject matter may be controversial or sensitive." *Id.* at 307.

129. *See* Board of Educ. v. Pico, 457 U.S. 853, 909 (1982) (Rehnquist, J., dissenting).

130. In cases involving religious issues, the impressionability argument does not seem to be so much a factor of the child's age as it is of the captive-audience setting school children are in because of state compulsory attendance statutes. *See* Roemer v. Board of Pub. Works, 426 U.S. 736, 766 (1976). A federal appeals court, however, refused to require a public school to permit students to pray in school rooms before school began because "the prayer meetings would create an improper appearance of official support" and "surveillance would be required to guarantee that participation in the prayer meeting would always remain voluntary." *See* Brandon v. Guilderland High School, 635 F.2d 971, 979 (2d Cir. 1980), *cert denied,* 454 U.S. 1123 (1981).

131. Courts have demonstrated an increasing propensity to take judicial notice of the "higher levels of intellectual and emotional development of students in the latter grades of" high school. *See* Seyfried v. Walton, 668 F.2d 214, 219 (3d Cir. 1981) (Rosenn, J., concurring); *see also* Russo v. Central School Dist., 469 F.2d 623, 633 (2d Cir. 1972), *cert. denied,* 411 U.S. 932 (1973); James v. Board of Educ., 461 F.2d 566, 574 (2d Cir. 1971), *cert. denied,* 409 U.S. 1042 (1972); Boyer v. Kinzler, 383 F. Supp. 1164, 1166 (E.D.N.Y. 1974), *aff'd,* 515 F.2d 504 (2nd Cir. 1975). Such changes in students, however, are no more reason to deny school authorities the authority to make educational policy decisions for their schools than it is reason to authorize judicial intrusion into the determination of curricular or library decisions.

ues but cannot suppress ideas[132] represents literary legerdemain. If elected board members or their appointed representatives cannot remove isolated library books containing objectionable material, then presumably the only solution would be to remove all books from the library. Similarly, if textbooks or other materials in a particular course cannot be removed without violating students' free speech rights, then the school board may be left with a Draconian alternative of eliminating the course.[133] In either case, a school board is either anesthetized by the threat of a lawsuit into doing nothing or overreacts with resultant loss to all students.

The role of politics in influencing educational policy under the *Pico* decision would become a hollow exercise since candidates elected because of a particular value system would have difficulty in translating their system into changes in the school program.[134] The *Pico* Court was apparently willing to accept the board's criteria for book selection of " 'educational suitability,' 'good taste,' 'relevance,' [and] 'appropriateness to age and grade level,' " but it was not prepared to accept the application of those standards by the board as based upon the board members' "personal values, morals and tastes."[135] Since board members are generally not professional educators, it could certainly be argued that what they do bring to their task is primarily their " 'personal values, morals and tastes.' "[136] With the media explosion in our nation providing ready access by students to information from a variety of sources, the judiciary's concern about suppression of ideas

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132. *See* Board of Educ. v. Pico, 457 U.S. 853, 871-72 (1982).

133. There is no indication that courts would permit either solution, but the *Pico* plurality seems to suggest that elimination of all ideas, be they through a course or library books, would be acceptable as long as board action was not limited to materials with which the board disagreed. *See id.* at 871.

134. *See id.* at 872 n.24. The *Pico* plurality made a critical note of the board members' assertions that they were political conservatives who had been elected and reelected by at least a majority of those casting votes, who presumably were sympathetic with the board members' values. *See id.* at 872 n.24.

135. *See id.* at 873 (quoting Brief for Appellee at 67); *id.* at 872 (quoting Brief for Appellee at 139).

136. *Cf. id.* at 872 (quoting Brief for Appellee at 139). One prominent theory of governance would dispute that school board members represent the values of the community, but simply explain and legitimize the district's policies as declared and implemented by the superintendent. This theory flows from the assumption that the community is ignorant of its schools, and board members elected from that community typify the community ignorance. *See* N.D. Kerr, *The School Board As An Agency of Legitimation,* in GOVERNING EDUCATION 163-72 (A. Rosenthal ed. 1969).

based on political pressure from constituents appears misplaced.[137] Admittedly, the possibility exists of abuse by an overly aggressive school board in drawing the lines of permissible school curricula or activities so narrowly that students may not be adequately prepared for college or vocations.[138] The danger of such an event, however, is probably no more likely than the non-restricted exposure to a warehouse of ideas[139] that would produce students with "anti-American" behaviors.[140] As long as courts are preoccupied with the free speech concept of right of access to ideas, there will be little more than lip service to school boards' authority to inculcate students with community values; such inculcation would require greater recognition of the political nature of school boards and the role they must play as responders to the opinions of the electorate.

VI. CONCLUSION

Free speech is a multi-faceted consideration in public education. The formative concern in the 1960's and 1970's as to which forms of expression would constitute free speech has been replaced by a more sophisticated balancing of interests. Schools are more than places where information is presented; they are social settings where teachers, students, administrators, board members, parents, and taxpayers must interact with a fairly high level of agreement if students are to be educated. To the extent that the school program is constantly subject to the ebb and flow of public-opinion politics, students face the possibility of a disrupted or truncated education. However, to the extent that changes in school programs are prohibited because of assertions

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137. *Cf.* Pratt v. Independent School Dist., 670 F.2d 771, 779 (8th Cir. 1982). In *Pratt,* the Court ordered return of a film to a literature course after objections by some parents to the film's negative impact upon the religious and family values of students. *See id.* at 778. The court admitted that because the film existed in the library in printed form and photographic recording, its removal from the classroom was really only "symbolic." *See id.* at 779.

138. *See* McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255, 1273 (E.D. Ark. 1982). In *McLean,* the following argument was made by the district court in striking down the Arkansas Balanced Treatment Statute:

> Evolution is the cornerstone of modern biology, and many courses in public schools contain subject matter relating to such varied topics as the age of earth, geology and relationships among living things. Any student who is deprived of instruction as to the prevailing scientific thoughts on these topics will be denied a significant part of science education.

See id. at 1273.

139. *See* Right to Read Defense Comm. v. School Comm., 454 F. Supp. 703, 710 (D. Mass. 1978).

140. *See* Board of Educ. v. Pico, 457 U.S. 853, 872-73 (1982).

of free speech, local communities are deprived of the opportunity to have any influence on establishing a normative standard of education for their children. In addition, there may be yet a future danger that trying to make the public schools all things to all people will effectively permit parents the escape, by default, from their educative responsibilities.

There is no question that constitutional rights in public schools, and free speech rights in particular, have had some dramatic and positive effect upon the school environment. The purpose and function of education has been reexamined, albeit the process has often been a wrenching and painful one. Fifteen years of constitutional rights have produced a school environment that is more human and is fairer. There is concern now, however, whether courts in their zeal to protect free speech rights have lost sight of the balance which must be preserved if schools are to perform their educative function. Very few educators or parents would want to return to the pre-*Tinker* days when students and teachers had no rights of free speech. But without the exercise of judicial discretion in the future, it could be possible under the guise of free speech to replace the school board and administrative autocracy of the past with a form of student (and possibly also teacher) autocracy. At stake is not only the function of education, but also the perpetuation of our nation as founded upon community schools. Courts in future free speech cases would be admonished that in their zeal to establish a national standard for free speech, they not crush the cultural and social diversity which has formed a vital link in the nation's commitment to pluralism.