No government activity exerts a more pervasive influence on Americans for a longer period of their lives than the regulation of education. The state seeks through its educational system to achieve two goals: the development of the basic reading, writing and other academic skills that any productive member of society must possess; and the inculcation of values deemed essential for a cohesive, harmonious and law-abiding society. Basically, through uniformity and standardization of the education experience the state attempts to guarantee that children will not become liabilities to society and that a minimal acceptance of shared values and norms will be attained. These ends can be achieved only through a certain degree of educational “egalitarianism”—that is, through a common exposure of all children to values that educational decision-makers deem essential.

To explore the significance of the educational system in shaping our social order, the *Michigan Law Review* has chosen education law as the subject of this year’s Project.

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I. Introduction

This Project focuses on how the "collectivist" functions of the educational system,1 which are to inculcate community norms and a minimum scholastic ability, may conflict with, and then ultimately be reconciled with, the interests that parents, students and teachers have in defining the particular norms and in seeking to preserve auton-

1. For a fuller discussion of the meaning of the term "collectivist," see note 48 infra and text at notes 43-52 infra.
omy from the standards imposed by educational authorities. It will be demonstrated that these interests in autonomy, which are identified in the Project as being "pluralistic," do not necessarily repudiate goals of the established decision-makers—the development of responsible, stable, self-sufficient, and capable citizens able to live and function together. Pluralistic interests can, in fact, reflect varied ideological content; they may be advanced either in favor of or in opposition to such controversial programs as sex education and religious observance in schools. What unites these pluralistic interests is that they are all associated with individuals or groups seeking, in various contexts, to avoid the specific means of imparting academic skills and of socialization that a given educational system is using.

A. Background: Institutions of the Educational System

A survey of the institutional framework within which educational policy decisions are made reveals that the initial accommodation of interests is performed by the state legislature; pursuant to its reserved power to control education, the legislature formulates general policy and frequently delegates to local community institutions broad powers to effectuate that policy. It is within these local institutions that the community articulates its values and desired norms and translates them into affirmative goals and practices of the school system. When the formulation or effectuation of these values intolerably infringes on the interests of one or more groups in society, recourse may be had either through judicial intervention or through the exertion of political and economic pressure.

1. The Authority of the States

The several states have plenary power in the sphere of education so long as they do not violate provisions of the United States

2. See note 54 infra and text at notes 53-59 infra.
3. See section I-A infra.

State control over education typically originates in a state constitutional provision for the encouragement of education. See, e.g., Mich. Const. art. 8, § 1; N.C. Const. art. IX, § 1. Some state constitutions further provide for public educational systems. See, e.g., Mass. Const. pt. 2, ch. V, § 2; Mich. Const. art. 8, § 2; N.C. Const. art. IX, § 2; Pa. Const. § 44. Such provisions are held to vest state legislatures with broad authority over education. See, e.g., Child Welfare Soc. v. Kennedy School Dist., 220 Mich. 290, 296-98, 189 N.W. 1002, 1004-08 (1922); Coggins
Constitution. In delegating considerable educational policymaking


5. See Cumming v. Richmond County Bd. of Educ., 175 U.S. 528, 545 (1899) ("[T]he education of the people in schools maintained by state taxation is a matter belonging to the respective States, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land").

Although education is primarily a state function under the tenth amendment, the federal government also exerts considerable influence on educational policy. It can levy and collect taxes for educational purposes pursuant to its delegated power to promote the general welfare of the United States, see generally United States v. Gettysburg Elec. Ry., 160 U.S. 668 (1896), and can specify how funds accepted by a state pursuant to a federal program must be spent. Failure of the state to comply with the federal standards may result in termination of the assistance. See Steward Mach. Co. v. Davis, 301 U.S. 548 (1937). However, because the method of financing education, the distribution of money among districts, and the policies and procedures involved in organizing districts are within the realm of state authority, see note 4 supra, the federal government can assert a national interest in education only by tying federal outlays to desired state reform. See The President's Commn. on School Finance, Schools, People & Money: Final Report xxi (1972).

The federal government first became involved in education by providing funds for school lunch programs in the 1930s. During World War II and the Korean War, the federal role increased when Congress passed legislation to assist communities that were financially overburdened by increased school enrollments due to the proximity of war factories and military installations. See A. Lapati, Education and the Federal Government 20-22 (1945). The National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580, further increased the federal role by providing federal aid for specific educational purposes and types of instruction. Although the Act did not alter the fact that primary responsibility for education rests with the states and localities, it did recognize for the first time that the federal government has a major role in encouraging and assisting the states to meet national educational goals. See H.R. Rep. No. 2157, 85th Cong., 2d Sess. 1 (1958). To help achieve the objectives of the Great Society programs of the 1960s, Congress passed the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27. The ESEA represented a fundamental change in federal policy; instead of providing funds for specific purposes or types of instruction as did the NDEA, the ESEA provided federal aid on a general basis. See A. Lapati, supra, at 35. Generally, federal programs are not designed to promote changes in decision-making at the local level. Instead, federal efforts primarily encourage experimentation and innovation. Few such programs are intended to increase participation. See M. Gittell & T. Hollander, Six Urban School Districts 194-200 (1968).

Federal educational programs are administered by the Office of Education (USEOE), which is directed by the Commissioner of Education. The Office is responsible to the Department of Health, Education, and Welfare, which presents reports and evaluations to Congress on all federal educational programs. The authority of the USEOE is specific: to utilize the services and agencies of the national government in order to expedite federal educational programs. See generally A. Lapati, supra, at 7-13.

To what extent federal programs have succeeded in meeting specific educational objectives is uncertain. One observer who has analyzed the implementation of Title I of the ESEA has concluded that the limited capacity of federal and state agencies to carry through with the federally initiated reform has left local schools fairly free to function according to their own priorities. Murphy, Title I of ESEA: The Poli-
authority to local agencies, states have “not surrendered their prerogatives, but have merely determined the machinery by which the state function shall be performed.”

Only rarely have legislatures taken a broad interest in formulating and controlling educational policy. Most states have left such matters to administrative agencies and various elected bodies at the state and local levels. At the summit of the administrative hierarchy is a board that has been established in all the states. The powers of the various state boards differ. In some, the board may control all aspects of the state’s educational program; in others, wide delegation to local agencies may limit the board to a very narrow range of activities. While the boards are responsible for implementing legislation and also possess policy-making discretion, out of deference to local institutions this policy-making power is rarely exercised.

All states also have a superintendent of schools who typically performs such functions as the enforcement of laws, adoption of regulations, distribution of funds and financial accounting. In recent years, the state superintendents have been given greater responsibility for research and development and for general supervision of the schools. An institution at the state level, usually referred to as the


6. See text at notes 31-33 infra.


9. The state board is provided for either in the constitution or in specific legislation. W. Keesecker, State Boards of Education and Chief State School Officers 11 (1950). See generally note 4 supra. The members of the board are generally either appointed by the governor (32 states) or directly elected (11 states). C. Fitzwater, supra note 8, at 50; The President’s Commn. on School Finance, supra note 5, at 122-23. See L. Peterson, R. Rossmiller & M. Volz, The Law and Public School Operation 14-16 (1969). See also F. Beach & R. Will, The State and Education (1955).

10. L. Peterson, supra note 9, at 14-16.

11. One survey of curriculum requirements has revealed that few states, either through the legislatures or the boards, have strict standards. Instead, most curriculum decisions are left to the localities. Almost all states require instruction on the dangers of alcohol and narcotics. However, only a slight majority require study of United States history, only half require physical education, and less than half require instruction in other specific subjects. See Marconnit, State Legislatures and the School Curriculum, 49 Phi Delta Kappan 269, 272 (1968). However, California, Indiana and Iowa require instruction in 30 different subjects. See Cal. Educ. Code §§ 8351-53, 8571 (West 1975); Ind. Ann. Stat. §§ 20-10.1-3-1, -4-1 to -9 (Burns Supp. 1976); Iowa Code Ann. § 237.25 (Supp. 1976).

12. L. Peterson, supra note 9, at 16-17. The superintendent is appointed by the governor in 5 states and by the state board in 25 states; in 20 states, however, the superintendent is directly elected, sometimes on a partisan basis. The President’s Commn. on School Finance, supra note 5, at 122-23.
"department of education," consists of supporting personnel who assist the superintendent in his administrative duties.

Many of the functions performed at the state level, such as the distribution of research data and the publication of journals, merely aid the schools in their daily operations. These have little direct impact on the student and thus rarely lead to conflicts among the various interests within the educational community. Other, typically regulatory, state functions are designed, however, to serve collectivist interests in education. Most important are the controls on citizens that devolve from the legislature. Thus, socialization of all children is assured by compulsory education requirements, while the particular values and standards of achievement sought through socialization are defined by state curriculum requirements. Moreover, states have other, less direct means of defining the community norms that the educational system is designed to further. For example, all states require teachers to be certified. Licensing requirements narrow the class of individuals that will be allowed to teach to those who possess traits considered worthy of being nurtured in students. Thus, successful applicants must have a good, moral character, though what activities or traits satisfy this requirement is often uncertain. In addition, minimum education requirements for teacher's certification are typically prescribed by a state administrative


15. State constitutions sometimes require instruction in certain areas deemed to be particularly important. See, e.g., LA. CONST. art. XII, § 3 (1955) ("There shall be taught in the elementary schools only fundamental branches of study, including instruction upon the constitutional system of State and national government and the duties of citizenship"); N.D. CONST. art. VIII, § 149 (instruction to be given to inculcate "vital importance of truthfulness, temperance, purity, public spirit and respect for honest labor of every kind"); OKLA. CONST. art. XIII, § 7 ("Legislature shall provide for the teaching of the elements of agriculture, horticulture, stock feeding, and domestic science . . ."); TENN. CONST. art. XI, § 12 (duty of legislature "to cherish literature and science").


17. L. Peterson, supra note 9, at 485.


agency. Such standards are intended to guarantee that teachers possess a minimum level of competence. They exemplify the state's interest in ensuring that students in all localities achieve a certain level of academic prowess through their exposure to teachers with adequate credentials. States also prescribe certain standards for such facilities as buildings, libraries, and equipment. This exercise of control over the quality of the student's environment is perfectly consistent with the state's interest in academic achievement. Yet the state may actually go further and impose requirements, such as the displaying of an American flag in each school, that advance the state's interest in inculcating patriotism in the young.

Despite these examples of control at the state level, the management of the educational system for the most part occurs at the local level. In recent years, state concern has been largely focused on increasing financial support for programs managed by the local communities. Great differences in wealth and resources exist among communities and some districts are unable to support an adequate system of public schools without state aid. Thus, much of the state effort in education in the past few years has been directed at these

20. The New York legislature, for example, has delegated this authority to the commissioner of education. See N.Y. EDUC. LAW § 3004 (McKinney Supp. 1975).
22. See, e.g., CAL. EDUC. CODE § 1530 (West 1969); IND. ANN. STAT. § 20-5-32-1 to -33-1 (Burns 1975).
26. See, e.g., MICH. COMP. LAWS ANN. § 340.367 (1976): "Each district shall purchase a United States flag of a size of not less than 4 feet 2 inches by 8 feet . . . and shall display said flag . . . at a conspicuous place upon the school grounds thereof, at all times during school hours . . . ."
27. See authorities cited note 689 infra. See generally A. LAPATI, supra note 5, at 142-47.
28. One analysis of this problem uses the illustration of two students living across the street from each other, one in the Oakland, California, school district and the other in Emeryville. Because of this slight locational difference they attend separate schools, resulting in expenditures of $600-$700 for the first child and nearly three times that amount for the second. The authors note that these figures are neither the highest nor the lowest in the State of California. As a final irony, the tax rate for Oakland is nearly twice that of Emeryville. J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND THE PUBLIC EDUCATION xviii-xix (1970).

One proposed solution to the problem is a statewide equalization with the state's share of the funds depending on the tax rate of the district. Simon, The School Finance Decisions: Collective Bargaining and Future Finance Systems, 82 YALE L.J. 409, 414 (1973).
problems, but enormous discrepancies in expenditures per pupil remain.

2. The Nature of Local Control

Historically, Americans have considered schools to be an extension of the local community. Thus, although state legislatures possess plenary power over the educational system, local initiative with respect to education is so highly regarded that most states have delegated extensive authority over the actual administration of the schools to local institutions. States have divided their territory into "school districts" that perform the sole function of establishing and maintaining the public schools. Boards of education, commonly referred to as school boards, have been created as the governing body of the school district and are typically responsible for the day-to-day operation of the public schools.

Although the diversity of state statutory schemes makes it difficult to generalize about school board composition and authority, it is clear that the school board is intended to be the instrument for the public's expression of educational policy. That educational decision-making is regarded as requiring closer ties to the public than other governmental functions is demonstrated by the unique status accorded most boards. For example, school districts are usually distinct from their corresponding political units—village, city, or

29. For a discussion of the effort of Texas to ensure an adequate statewide system of public education, see San Antonio Indp. School Dist. v. Rodriguez, 411 U.S. 1, 6-14, 44-46 (1973).
32. See text at note 4 supra.
33. See e.g., CAL. EDUC. CODE §§ 1001-1086 (West 1969); IND. ANN. STAT. §§ 20-5-2-1 to -3 (Burns 1975); MICH. COMP. LAWS ANN. §§ 340.561-.641 (1976); see 2 EDUCATION IN THE STATES: NATIONWIDE DEVELOPMENT SINCE 1900, supra note 31, at 73; E. Bolmeier, supra note 7, at 63.
As of 1970 there were about 17,500 school districts operating schools in the United States. THE PRESIDENT'S COMMN. ON SCHOOL FINANCE, supra note 5, at 126-27. The consolidation movement of the past 25 years has significantly reduced the number of districts. G. Johnson, EDUCATION LAW 15 (1969).
county—even though the boundaries may be identical. In states
in which the school board is elected directly by a district's voters,
the contests are held separately from those for municipal government
offices and are almost always conducted on a nonpartisan basis.
The severing of education from general local politics caused by
these distinctions is generally respected by municipal officials, who
avoid direct involvement in educational matters.

B. State Interests and Individual Rights: An Overview

Educational policy can never satisfy all the needs and desires of
all members of society. Ideally, the various state and local institutions
charged with formulating and implementing policies reflect the
values and norms of the "people" as well as possible, considering
the limitations of "pure democracy" in any complex society. Inevitably,
however, groups or individuals do feel that governmental institu­
tions are not responsive to them and that the achievement and
socialization aims of any educational system are incompatible with
their personal interests and rights.

At times, such dissatisfaction are reflected in efforts either to
reorganize the decision-making institutions or to reallocate power
within the process. More often, however, individuals and groups
challenge certain practices and policies of the school system itself.
These challenges do not question the basically democratic nature of
the system for developing and implementing educational policies.
Instead, the visible assertion of these complaints exemplifies the
inevitable tension between the majority's goals and its methods of im­
plementing them, as articulated through state legislatures or through
local school boards, and the interests of individuals and groups that
wish to deviate from the majority in a particular context.

The organization of the Project preserves the demarcation be­
tween challenges to practices within the system and attempts to alter
the system itself. Sections II and III focus on judicial intervention

36. See N. Edwards, supra note 35, at 93-94.
37. See, e.g., INDIANA ANNOTATED STATUTE CODE § 20-4-8-18 (Bikins 1975); KANSAS STATUTE ANNOTATED
38. See, e.g., IOWA CODE ANN. § 277.1 (Supp. 1976); MICHIGAN COMPANION LAWS ANN.
(1973).
This does not mean school board contests are not affected by local politics. See
F. MICHELMAN & T. SANDALOW, MATERIALS ON GOVERNMENT IN URBAN AREAS 463
Rev. 1032, 1040 (1959).
40. See Lyke, Representation and Urban Schoolboards, in COMMUNITY CONTROL
41. This may not be true in large cities. See F. MICHELMAN & T. SANDALOW,
supra note 39, at 463.
required when majoritarian educational institutions infringe on the interests of groups and individuals in maintaining their autonomy. Section IV focuses on efforts of groups or individuals to protect their rights through reorganization of the institutions that define community norms and values and through exertion of organized pressure on educational decision-making institutions from other sources within the community.

Specifically, section II discusses conflicts over access to education. It first explores the nature and underlying purposes of the state's compulsory education requirement. It then analyzes the problems that arise when individuals, in pursuit of equal education opportunities, seek not an exemption from compulsory education but greater access to public schooling.

In this section, the central theme is the accommodation of society's collectivist interest in standard socialization of students to core consensus values with the pluralistic interest of groups and individuals in diversity of belief and action. The judicial role is to achieve a balance that best protects the welfare of both the individual and society. In section II this process is predominantly a contest between educational decision-makers who purportedly represent the "state's" interest and parents who seek either to shelter their children from socialization in the public schools or to gain access to that socialization experience.

Following the determination of who receives an exemption from or greater access to education, section III of the Project explores the scope of individual rights within the educational system. Two broad areas of controversy, challenges to the academic curriculum and to noncurricular activities, are discussed. In this section, the accommodation of parental and state interests described above is complicated by the need to consider the interests and rights of other parties, primarily teachers and students. These include the freedoms of religion, speech and personal expression, the right of nurture and the right of privacy. An additional complication arises from the frequently expressed interest of still another group—school administrators—in the smooth and efficient operation of the system. The educational system's tendency toward uniformity and standardization is strengthened by the imperatives of administrative "necessity," which often generate conflict with the rights of individuals.

Finally, section IV demonstrates how various members of the educational community seek to advance their interests by altering an institutional structure they consider unfair or unrepresentative or by exerting external pressure through organized demands on the system. Advocates of school district decentralization, for instance, complain that the purportedly democratic school system is structurally unable to accommodate the interests of large segments of the
population, either because it is composed of over-sized units or because of bureaucratization. Decentralization is a demand for power; it is a rejection of the basic fairness of the decision-making and enforcing process in the field of education. Unionization of teachers is also analyzed as a similar effort to exert pressure on the institutions charged with education and to reallocate power within the system.

The Project's analysis of the issues summarized above does not purport to offer a conclusive reconciliation of the diverse, competing interests of the members of the educational community. Instead, the discussion sketches the contours of the various conflicts and provides an analytical framework with which to probe questions of great importance for American society.

II. THE STATE'S REQUIREMENT OF COMPULSORY EDUCATION AND THE INDIVIDUAL'S RIGHT OF ACCESS TO EDUCATION

The system of universal compulsory education is such an integral part of American society\(^{42}\) that its underlying assumptions are rarely questioned.\(^{43}\) Yet conflicts arise both when the state seeks to force


As the Court in Brown stated:

"Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."


Concerned over the pressure to integrate public schools, Mississippi, South Carolina, and Virginia repealed their laws in the 1950s. Law of April 11, 1924, ch. 283, § 161, [1924] Miss. Laws 464 (repealed 1956); Act of May 15, 1937, No. 344, [1937] S.C. Acts 556 (repealed 1955); Act of March 27, 1918, ch. 412, § 1, [1918]
public education upon those who do not want it\(^4\) and when individuals demand greater access to the benefits of public education than the state is willing to provide.\(^4\) Increasingly, individuals have resorted to both federal and state courts for the resolution of these disputes.\(^4\)

Underlying these conflicts between individuals\(^4\) and the state is a fundamental tension inherent in virtually any system of public education. Public education is intended primarily to serve the collectivist function of promoting equality of attitude and of experience, thus advancing social uniformity and national cohesion.\(^4\) Both the indivi-

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\(^4\) Va. Acts 752 (repealed 1959). Virginia has since reinstated its compulsory attendance law. Va. Code Ann. § 22.275-1 (1973). The fact that fear of racial integration prompted some states to abandon compulsory school attendance is evidence that compulsory schooling facilitates a generally valued social integration. See Rothbard, supra, at 21-22 ("educationists of the mid-nineteenth century saw themselves as using an expanded network of free public schools to shape and render uniform all American citizens, to unify the nation, to assimilate the foreigner, to stamp all citizens as Americans, and to impose cohesion and stability on the often unruly and diverse aspirations of the disparate individuals who make up the country"). See also D. Tyack, THE ONE BEST SYSTEM (1974). The "melting pot" effect of compulsory schooling is not examined in this section of the Project, although the degree to which education may legitimately be used to further achieve it will be emphasized.

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47. For the purpose of this section of the Project, parental and children's interests in education are assumed to be identical and are together called the individual interest. For discussion of a child's legal interest in education, see Knudsen, The Education of the Amish Child, 62 Calif. L. Rev. 1506 (1974). See generally Forer, Rights of Children: The Legal Vacuum, 55 A.B.A.J. 1151 (1969).

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48. As one observer noted, "the equality on which our institutions are founded cannot be too intimately interwoven in the habits of thinking among our youth; and it is obvious that it would be greatly promoted by their continuance together, for the longest possible period, in the same schools of juvenile instruction . . . ." C. Mercer, A DISCOURSE ON POPULAR EDUCATION 76 (1826), quoted in L. Cremin, THE AMERICAN COMMON SCHOOL: AN HISTORIC CONCEPTION 87 (1951). See note 43 supra. See also Morgan v. Kerrigan, 401 F. Supp. 216, 222-24 (D. Mass. 1973), affd., 530 F.2d 401 (1st Cir. 1976).

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"Collectivist," as used in this Project, is synonymous with "integrationist," and refers to that pertaining to the "collective." "Collective" is defined as that (1) "involving . . . all members of . . . [a] group as distinct from . . . individuals"; (2) "marked by . . . similarity . . . among all the members of a group (as a whole society)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 444-45 (1971). "Integration" is defined as "the act, process, or an instance of integrating . . . a unification and mutual adjustment of diverse groups or elements in a relatively coordinated and harmonious society or culture with a consistent body of normative standards."
individual and society benefit when each individual achieves the academic competence needed for political literacy and economic self-sufficiency and acquires sufficient social awareness to assure his adherence to fundamental societal norms. Through its academic and socialization functions, public education substantially furthers these goals, but it naturally tends to do so through standardization of the educational experience. This tendency infringes upon the right of parents to control the upbringing of their children and therefore necessarily conflicts with the freedom of choice and the cultural diversity of a pluralistic society.

In all cases involving state-individual conflicts over compulsory education and access to education, the courts must accommodate the collectivist interest of achieving academic and socialization goals and the pluralistic interest of preserving autonomous spheres free from

Id. at 1174. Thus, the realization of collectivist goals necessarily includes a process of integration.


50. See, e.g., Stephens v. Bongart, 15 N.J. Misc. 80, 82, 189 A. 131, 132 (Juv. & Dom. Rel. Ct. 1937) ("It is within the police power of the state to compel every resident of New Jersey so to educate his children that the light of American ideals will permeate the life of our future citizens"). See also H. MANN, REPORT FOR 1848, in 4 LIFE AND WORKS 278 (1891) ("Had the obligations of the future citizen been sedulously inculcated upon all the children of this Republic, would the patriot have had to mourn over so many instances where the voter, not being able to accomplish his purpose by voting, has proceeded to accomplish it by violence . . . ?").

51. The distinction between the academic and socialization functions of education, more conceptual than descriptive, is most clearly conveyed by example: Mathematical instruction exemplifies the academic function, while the experience of social group interaction that necessarily arises from school attendance illustrates the socialization function. Both purposes of education are advanced through the choice of curriculum and instructional methods.

52. "For reasons which may have been valid in the 19th and early 20th centuries, schools were given the mandate to teach children a common language, common political and economic goals and common standards of behavior. In the process of monopolizing most of the child's time and energy . . . today's schools still encourage an unnecessary degree of cultural and psychologic uniformity . . . ." R. Kay, Our American Education System 8 (1969).


54. See R. Kay, supra note 52, at 8 ("[Public schools] still risk destroying a healthy diversity in points of view, in styles of life, in underlying value commitments and innate capacities"); Wisconsin v. Yoder, 406 U.S. 205 (1972) (public schools conflicting with the integrity of an Amish community).

Webster's Third New International Dictionary, supra note 48, at 1745, defines "pluralism" as "a state or condition of society in which members of diverse ethnic, racial, religious, or social groups maintain an autonomous participation in and development of their traditional culture or special interest within the confines of a common civilization." Parental control over the education of their children is a central tenet of pluralism, for through such control parents maintain the autonomous development of their families and cultural beliefs.
the uniformity of universal public education. During the course of litigation, both the state and individuals may appeal to either collectivist or pluralistic interests to justify their positions. Thus, when the state attempts to compel education, it asserts the intellectual and socializing interests in public education; in response, the individual asserts his interest in being free from the standardizing effects of state-imposed educational requirements. Conversely, when individuals attempt to force the state to grant them greater educational benefits, they frequently do so in terms of equality of educational opportunity; the state responds by emphasizing the importance of local control of public schools to parental participation in educational decision-making.

This section of the Project analyzes how courts have responded to the assertions of countervailing collectivist and pluralistic interests in education. It concludes that, despite the dissimilarity in remedies sought, courts have accommodated these conflicting values consistently, both in cases in which the individual seeks to escape from state-imposed educational requirements and in cases in which the individual seeks to compel the state to confer increased educational benefits. It is submitted that in both controversies, courts have allowed core collectivist interests to be realized through education but have not permitted collectivist interests, whether invoked by the state or by individuals, to supersede entirely the countervailing interests of pluralism. Thus, it appears that whenever practical within a framework of state control, courts ensure the participation of parents in the process of educational decision-making.

A. The Conflict over Compulsory Education

Courts have been forced to accommodate these antagonistic interests in education both in statutory and constitutional challenges to state compulsory education laws. In each case, pluralistic interests have been asserted in terms of a parental right to control the

60. See note 4 supra.
upbringing of their children. In constitutional challenges, parents have sought to educate their children without any sort of interference. In contrast, parents in statutory challenges generally have not contested the legality of basic state-imposed education requirements, but have urged that these requirements be fulfilled in an unregulated, noninstitutional setting.

This discussion will focus on the constitutional limits that have been imposed upon the state's power to regulate education. However, a brief examination of various judicial responses to statutory claims of parents who seek to educate their children at home illustrates the conflict between pluralistic and collectivist interests that also confronts the courts on the constitutional level. Such statutory challenges have compelled courts to define the kind of educational experience that fulfills the state's interests. Since the goal of academic achievement is rarely questioned in these cases, the focus has been on the socialization function of education.


64. The unregulated setting can range from the education of one's children in the home, see, e.g., Commonwealth v. Renfrew, 332 Mass. 492, 126 N.E.2d 109 (1955), to private but unapproved schools, see, e.g., Commonwealth v. Roberts, 159 Mass. 372, 34 N.E. 402 (1893).

65. “To many who support compulsory schooling, the use of compulsion is necessary to bring up the young to respect and practice the virtues and customs of the society. To the critics of compulsory schooling, it is precisely this coercive intrusion of the collective into the life and mind of the individual that represents the most damnable feature of compulsory schooling.” Introduction, THE TWELVE YEAR SENTENCE 2 (W. Rickenbacker ed. 1974).

66. A few compulsory education statutes, however, contain a provision allowing for education in the home. See, e.g., OHIO REV. CODE ANN. § 3321.04(A)(2) (Baldwin 1976 Supp.). Courts sometimes avoid the question of whether home education fulfills the state's interests by making technical distinctions. For example, if the statute requires attendance at approved private schools, courts have held that home education does not satisfy the state interest solely on the ground that the home has not been approved as a private school rather than on the ground that the term "private school" can never be construed to include instruction at home. See State v. Hoyt, 84 N.H. 38, 146 A. 170 (1929); State ex rel. Shoreline v. Superior Ct., 55 Wash. 2d 177, 346 P.2d 999 (1959), cert. denied, 363 U.S. 814 (1960). Contra, State v. Cournort, 69 Wash. 361, 363, 124 P. 910, 911 (1912).

67. Courts are very reluctant to allow academic instruction lower in quality than that provided in the public schools. See People v. Levisen, 404 Ill. 574, 578, 90 N.E.2d 213, 215-16 (1950) (“No parent can be said to have a right to deprive his child of education advantages at least commensurate with the standards prescribed for the public schools, and any failure to provide such benefits is a matter of great concern to the courts”). See also Wisconsin v. Yoder, 406 U.S. 205, 239 (1972) (White, J., concurring).
Two New Jersey cases, both interpreting the same statute but decided thirty years apart, reveal the wide divergence in judicial perceptions of the nature of socialization warranted by the state's collectivist interests. The New Jersey compulsory education law requires public or private institutional education or its equivalent. The issue presented by such a statute is whether social as well as academic equivalency is required. In Stephens v. Bongart, decided in 1937, the phrase "equivalent education elsewhere than at school" was interpreted to exclude home education. The court clearly viewed education as primarily society's responsibility, based on its observation that "the instilling of worthy habits and attitudes, appreciation and skills is far more important than [the] mere imparting of subject matter," it concluded that an institutional setting was necessary to socialize children properly. In the 1967 case of State v. Massa, however, another New Jersey court concluded that "equivalent education elsewhere than at school" did not require social equivalence that could be achieved only through group instruction; otherwise, it reasoned, the phrase "elsewhere than at school" would be meaningless because only public education or equivalent private-school education would suffice. The court therefore rejected Stephens and held that the statute did not require social contact and development equivalent to that obtained through public education.

A result identical to Massa was reached by the Illinois supreme court under a statute that, unlike New Jersey's law, required education in a public or private school. The issue was whether the home

72. 15 N.J. Misc. at 84-85, 189 A. at 133 ("[T]he natural right of the father to the custody of his child cannot be treated as an absolute property right, but rather as a trust reposed in the father by the state, as parens patrie for the welfare of the child"). See Allison v. Bryan, 21 Okla. 557, 569, 97 P. 282, 286 (1908) ("The rights of the parent in his child are just such rights as the law gives him; no more, no less"); Ex parte Crouse, 54 Pa. 9, 11 (4 Whart. 1839) ("It is to be remembered that the public has a paramount interest in the virtue and knowledge of its members, and that of a strict right, the business of education belongs to it").
73. 15 N.J. Misc. at 92, 189 A. at 137.
75. To avoid rendering the phrase "elsewhere than at school" meaningless and thus to reach its result, the court, relying on Rainbow Inn, Inc. v. Clayton Natl. Bank, 86 N.J. Super. 13, 205 A.2d 753 (App. Div. 1964), applied the rule that, if possible, a court must interpret a statute in such a way as to uphold the statute's validity. 95 N.J. Super. at 390, 231 A.2d at 257.
76. 95 N.J. Super. at 390, 231 A.2d at 257.
could qualify as a private school under such a statute. In *People v. Levisen*, the court held that the defendant's home was a private school despite clear legislative history to the contrary. The court determined that the role of compulsory education was merely "to enforce the natural obligation of parents to provide an education for their young, an obligation which corresponds to the parents' right of control over the child." Thus, it concluded that, if academic standards were satisfied, the manner and place of education was a matter of parental discretion. The court clearly viewed the state's basic collectivist interests as limited to the academic component of education and thus interpreted the act narrowly to restrict the scope of state regulation.

These statutory cases are ostensibly judicial attempts to interpret the legislatively intended scope of compulsory education laws. In reaching conflicting conclusions, however, the courts have manipulated canons of statutory construction and selectively read legislative history to achieve an accommodation between state goals and individual interests that they considered appropriate. Yet while these

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79. 404 Ill. 574, 90 N.E.2d 213 (1950).


82. The parents, Seventh-Day Adventists, established regular daily hours for instruction, recitation and study. Tests proved the child to have average academic proficiency for her age. 404 Ill. at 576, 90 N.E.2d at 214.

83. 404 Ill. at 577, 90 N.E.2d at 215. See also *Trustees of Schools v. People*, 87 Ill. 303, 308 (1877); *Rulison v. Post*, 79 Ill. 567, 573 (1875). The position that parents should have a primary role in directing the education of their children was endorsed by the United Nations General Assembly in *The Universal Declaration of Human Rights*, G.A. Res. 217 [III], art. 26 (1948) ("Parents have a prior right to choose the kind of education that shall be given to their children").

84. The statutory interpretation in the two New Jersey cases, *Stephens v. Bongart*, 15 N.J. Misc. 80, 189 A. 131 (Juvenile & Dom. Rel. Ct. 1937), and *State v. Massa*, 95 N.J. Super. 382, 231 A.2d 252 (Morris County Ct., L. Div. 1967), provides a good example. In *Massa*, in order to limit the scope of the collectivist socialization interest, the court relied heavily on the rule that a statute should not, if at all possible, be interpreted to render one of its provisions inoperative; in *Stephens*, however, the court had ignored the fact that its interpretation of the statute requiring institutional education rendered certain language of the statute meaningless.

A further example is provided by the legislative history of the statute interpreted in *People v. Levisen*, 404 Ill. 574, 20 N.E.2d 213 (1950). The statute originally provided for home education. The option was eliminated in 1929 in an amendment that incorporated all other previous legislation on school attendance. Under a rule of statutory construction, expressly adopted by Illinois courts, portions of an old statute not repeated in its successor are automatically repealed. See Comment, *supra*
cases all address the question whether the socializing influence of institutional education should be deemed a basic collectivist interest of the state, they do not discuss the constitutional issue of what accommodation the states, if they do in fact intend to compel institutional schooling, are required to achieve between collectivist and countervailing pluralist interests.

As a general rule "[t]here is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education."85 State and federal courts have almost universally upheld the constitutionality of compulsory education requirements that have been challenged as violative of the parents' right to control the upbringing of their children.86 However, in two cases, Pierce v. Society of Sisters87 and Wisconsin v. Yoder,88 the Supreme Court has declared that compulsory education requirements exceeded the bounds of permissible state regulation and thus has limited the power of the state to utilize education to achieve collectivist goals.

In Pierce v. Society of Sisters,89 the Court held unconstitutional an Oregon compulsory education act that required public school attendance.90 The Oregon law had been enacted by a popular referendum after a volatile campaign during which public debate focused on the merits of social diversity. The stated goal of the act's nativis-

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85. Wisconsin v. Yoder, 406 U.S. 205, 213 (1972). See State v. Bailey, 157 Ind. 324, 329, 61 N.E. 730, 731-32 (1901) (natural rights of parent to custody and control of infant child are subordinate to power of state and may be restricted and regulated by municipal laws); DeLease v. Nolan, 185 App. Div. 82, 84, 172 N.Y.S. 552, 554 (1918) ("The State is sovereign in the matter of the attendance of a child at school. The dominion of the State is absolute as far as attendance upon instruction is concerned . . . . The consent of the parent to the absence of the child has no effect upon this lawful dominion of the State").


87. 268 U.S. 510 (1925).
89. 268 U.S. 510 (1925).
90. The Oregon Compulsory Education Act, ch. 1, § 1 [1923] Or. Laws 9, adopted November 7, 1922 under the initiative provision of the Oregon constitution, see generally note 4 supra, provided exemptions from public school attendance only "for children who are not normal, or who have completed the eighth grade, or who reside at considerable distances from any public school, or whose parents or guardians hold special permits from the County Superintendent." 268 U.S. at 530-31.
tic supporters, which included the Ku Klux Klan, was to extirpate pluralism in society by eliminating it in education. They envisioned a "common school" in which all children would receive a standardized education and thereby develop a uniform outlook on social and political issues. Thus, the Oregon act manifested the collectivist interest in education in its most extreme form.91

The law was challenged in the courts by two private schools, the Hill Military Academy and the Society of Sisters.92 In holding the public school requirement unconstitutional, the Court did not question the legitimacy of the state interests in academic achievement or in inculcating certain basic values in students, both of which could be adequately served by reasonable state regulation of all schools.93 What Pierce did say quite emphatically is that, while the state may seek to achieve individual equality and commonality of outlook through a moderate socialization program, it may not impose absolute uniformity:

The fundamental theory of liberty upon which all Governments in this Union repose excludes any general policy of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right coupled with the high duty, to recognize and prepare him for additional obligations.94


92. These two private schools challenged the act in the courts after many groups had unsuccessfully campaigned against it. As one author has stated:

A sense of outrage united an otherwise miscellaneous collection of opponents of the school bill. Religious leaders—Catholic, Protestant, and Jewish—deeply resented the implication that "sectarianism" was "unpatriotic." Businessmen feared increased taxes for new schools and a lower rate of investment and population growth because of such "freak legislation." Minority groups, like Negroes, Jews, and the foreign-born, detected totalitarian undertones in the arguments of the bill's supporters. Private-school proprietors fought for their very existence. And citizens of many persuasions saw the tyranny of the majority in a law that threatened religious freedom, parental duty, and constitutional rights.

Tyack, supra note 91, at 86.

93. No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

268 U.S. at 534. Thus, Pierce affirms the constitutionality of the state's promotion of collectivist socialization goals through compulsory school attendance. See Board of Educ. v. Allen, 392 U.S. 236, 245-46 (1968) ("Since Pierce, a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy State compulsory-attendance laws, be at institutions which provide minimum hours of instruction . . . . Indeed, the State's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes") (footnotes omitted).

94. 268 U.S. at 535.
Thus, the Court was able to accommodate the state’s collectivist interests in academic regulation and institutional socialization with the parents’ pluralistic interest in affecting the socialization of their children.

In contrast to Pierce, in which the Court’s recognition of this parental interest did not infringe on the state’s control over the academic function of education, the facts of Yoder did not allow the Court a means of distinguishing the academic and socialization functions of schools. In Yoder, the Court used the balancing test that the decision in Sherbert v. Verner requires in free exercise adjudications and held that a Wisconsin compulsory education statute, in so far as it compelled education beyond the eighth grade, was unconstitutional as applied to members of the Amish faith. The Court determined that the fundamental Amish belief in nonworldliness was totally incompatible with both the socialization and academic function of education.

95. 374 U.S. 398 (1963). In Sherbert, the Court held that the first amendment free exercise right of the plaintiff, a member of the Seventh-Day Adventist Church who was denied unemployment compensation when she could not find a job because of her refusal to work on Saturday, was unconstitutionally infringed. In so holding, the Court declared that state action indirectly interfering with the free exercise of religion could only be justified by a showing of a compelling need to regulate without exception. 374 U.S. at 403-04.

In Yoder, Chief Justice Burger apparently interpreted the Sherbert test to require a balancing of the conflicting interests: "[W]e must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objections that would flow from recognizing the claimed Amish exemption. See, e.g., Sherbert v. Verner . . . ." 406 U.S. at 221. “[A] State’s interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on other fundamental rights and interests, such as those specifically protected by the Free Exercise Clause . . . .” 406 U.S. at 214.


demic goals of public education beyond the eighth grade.\textsuperscript{99} This total incompatibility forced the Court to choose between the state's collectivist interests and the individuals' pluralistic interests; no middle ground was possible. Although the Court conceded that compulsory education was a compelling state interest in the "generality of cases,"\textsuperscript{100} it concluded that the interests of individuals outweighed those of the state once the Amish students had received a "basic" education.\textsuperscript{101}

The state in \textit{Yoder} asserted two major rationales for applying the full compulsory education requirement to the Amish. First, it advanced the collectivist argument that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society."\textsuperscript{102} The Court accepted this formulation but held that, because of the unique character of Amish society, eight years of school was sufficient to fulfill the state's interest.\textsuperscript{103} In justifying its conclusion, the Court repeatedly emphasized the success of the Amish as a cohesive group within society:

The Amish alternative to formal secondary school education has enabled them to function effectively in their day-to-day life under self-imposed limitations on relations with the world, and to survive and prosper in contemporary society as a separate, sharply identifiable and highly self-sufficient community for more than 200 years in the country. In itself this is strong evidence that they are capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eighth grade at the price of jeopardizing their free exercise of religious belief.\textsuperscript{104}

Second, the state asserted its power as \textit{prens patriae} to intervene between child and parent to secure the benefit of secondary education for the child.\textsuperscript{105} In support of this contention, reliance was placed on \textit{Prince v. Massachusetts},\textsuperscript{106} which had allowed the application of state child labor laws to prevent children of the Jehovah's Witness faith from publicly distributing pamphlets. The Court, however, interpreted \textit{Prince} so narrowly as to apply only to situations

\begin{itemize}
\item \textsuperscript{99} 406 U.S. at 218. For general discussions of Amish society, see J. Hostetler, \textit{Amish Society} (1968); J. Hostetler & G. Huntington, \textit{Children in Amish Society} (1971); W. Schreiber, \textit{Our Amish Neighbors} (1962); E. Smith, \textit{The Amish People} (1958).
\item \textsuperscript{100} 406 U.S. at 221.
\item \textsuperscript{101} 406 U.S. at 234.
\item \textsuperscript{102} 406 U.S. at 221.
\item \textsuperscript{103} 406 U.S. at 222, 225.
\item \textsuperscript{104} 406 U.S. at 225.
\item \textsuperscript{105} 406 U.S. at 229.
\item \textsuperscript{106} 321 U.S. 158 (1944).
\end{itemize}
in which a substantial threat of "harm to the physical or mental health of the child or to the public safety, peace, order or welfare is demonstrated or may be properly inferred." 107 Conceding that political illiteracy and economic dependency were substantial threats to society, the Court held that the state possessed no power under Prince to alter the decisions of the Amish parents because the parents had demonstrated that their children posed no such threat. 108

In rejecting the state's arguments, the Court recognized that the interests of pluralism secured for the Amish a right to be free from state-regulated education after the eighth grade. At the same time, the Court implied the existence of a core collectivist function in compulsory education—a compelling state interest in requiring education to the point at which an individual no longer threatens to be a liability to society either politically, economically, or socially. Although the state continues to have an interest in education beyond this threshold level, an interest in producing individuals who are in fact assets to society, the Yoder Court appeared unwilling to label this as compelling. 109

To recapitulate, Pierce focuses on the socialization function of formal education, which is of greatest significance to individuals who seek to preserve autonomy from governmental regulation, and establishes a limit beyond which collectivist goals will not be supported. Standardization of students is not a legitimate state interest in education. Yoder, on the other hand, indicates a limit below which pluralistic interests will not be recognized. The parental desire to control the upbringing of children is not a legitimate interest if it will produce individuals who may be economic or political liabilities to society.

With the holdings of Pierce and Yoder thus stated, it is now necessary to consider their implications for current parental attempts to escape from the application of state compulsory education laws. The Pierce Court articulated two grounds for its holding: the "economic

108. 406 U.S. at 234.
109. In his concurring opinion, however, Justice White expressed his belief that the state has an interest in affirmatively developing the productive potential of its children: "A State has a legitimate interest not only in seeking to develop the latent talents of the children but also in seeking to prepare them for the life style that they may later choose . . . ." 406 U.S. at 240. Apparently, if it could have been proved that as a result of an exemption to compulsory education beyond the eighth grade, these latent talents would not have been realized, Justice White would have found this state interest to be of a compelling nature and thus sufficient to override the parents' free exercise claims. However, Justice White, believing that an exemption would not stifle any latent talents of the Amish children, concluded that the legitimate state interest was not compelling and that full compliance with compulsory education was not necessary. 406 U.S. at 240.
substantive due process” right of the private schools to conduct their business and the “personal substantive due process” right of parents to control their children. Since the former theory has long been abandoned by the Court, the present vitality of the case now rests on the parents’ personal substantive due process rights, which are encompassed by the developing constitutional right of privacy. The majority opinion in Roe v. Wade specifically indicated that the fundamental right of privacy protects the parental activities of child rearing and education. Accordingly, to the extent that the state’s compulsory education requirements abridge this fundamental right, the state should seemingly be required to demonstrate that the legislation imposing such requirements is “narrowly and precisely drawn” in furtherance of a “compelling state interest.”
Yoder's recognition that the state has a compelling interest in promoting certain academic achievements and in socializing children takes on added significance in light of this interpretation of Pierce. For a court to uphold the application of a state's compulsory education statute to particular plaintiffs, the facts must show that the state's collectivist interests cannot be furthered through less restrictive means. In other words, the statute, as applied, must be drawn with sufficient narrowness and precision. 

Yoder indicates that in most cases the state will have no difficulty demonstrating the necessity of fulfilling its statutory compulsory education requirements. But the rationale of Yoder indicates that if particular parents can demonstrate the existence of an alternative method of achieving the state's core collectivist interests, they should be able to gain an exemption from compulsory education.

Thus, the crucial question raised by Yoder is what alternatives to compulsory education will satisfy these interests. In those states


Despite the fact that Chief Justice Burger, in Wisconsin v. Yoder, expressly adopted a balancing test to determine the constitutionality of the statute that infringed upon the free exercise rights of the Amish Yoder does not contradict this analysis. First, Burger cited as authority Sherbert v. Verner, which required that the statute be justified by a compelling state interest. See note 95 supra. Second, the balancing in Yoder is similar to a "strict scrutiny" analysis, which involves some balancing: The asserted fundamental right is inevitably used as a standard against which to judge whether the state interest is compelling. However, it must be noted that one court has concluded that the Yoder balancing standard is a substantive departure from the compelling state interest standard. See Davis v. Page, 385 F. Supp. 395, 399 (D.N.H. 1974).

Even though the constitutional analysis invoked by parental challenges to compulsory education should be the same whether or not the parental challenge has a free exercise basis, parents' interest in the religious upbringing of their children will undoubtedly weigh heavier than a general nurture interest in the balancing of the asserted parental and state interests. Yoder provides an example of this phenomenon. See text at note 121 infra.

116. The application of this constitutional interplay between Pierce and Yoder can best be shown in the context of a specific example. In Scoma v. Board of Educ., 391 F. Supp. 452 (N.D. Ill. 1974), the plaintiff-parents sought a declaratory judgment against the Board's enforcement of the Illinois compulsory education statute. The plaintiffs, relying on Pierce, asserted that they had a fundamental right "to be protected in their family privacy and personal decision-making from governmental intrusion." 391 F. Supp. at 460, quoting Complaint for Plaintiff. The court found that the parents asserted no fundamental right "within the bounds of Constitutional protection," 391 F. Supp. at 461, and thus upheld the statute's constitutionality on the ground that "the state need not demonstrate a 'compelling interest'; it must act only 'reasonably' in requiring children to attend school." 391 F. Supp. at 461. Although the result in Scoma would appear to be correct, but see note 119 infra; the court's determination that the asserted parental right is not fundamental is erroneous in light of Roe and Doe, see note 112 supra. The state should have been required to demonstrate a compelling interest in compulsory education, see text at note 115 infra, a demonstration that Yoder indicates will be routine in most cases. 406 U.S. at 221.

117. See Wisconsin v. Yoder, 406 U.S. 205, 222-26 (1972); Knudsen, supra note 47, at 1512.
that permit "home education" because their legislatures consider only the academic interest to be compelling, it is relatively easy to show that a noninstitutional alternative has satisfied core collectivist goals in education. For example, whether state requirements such as curriculum content are met in the alternative setting can be readily determined, and a child's rate of academic achievement can be easily measured. However, in the majority of states, which consider socialization a compelling interest in education, the task of determining whether the alternative meets Yoder's nonliability-to-society standard is more problematic. Socialization requirements are intangible and difficult to measure. As a result, courts must generally rely on legislative standards that typically define socialization to require an institutional setting. Thus, the perceived inadequacy of the noninstitutional alternative in fulfilling the socialization requirement is the major obstacle to parental attempts to remove their children from traditional public education.

In Yoder, the Amish were allowed an exemption from the compulsory education requirement only after they had persuasively demonstrated that their scheme of alternative education beyond the eighth grade fulfilled core collectivist interests. In fact, the opinion indicated that the Amish community was perhaps better able than outsiders to achieve the goals of obedience to law and self-suffi-

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118. See note 82 supra.

119. The home education alternative to institutional education, recognized in some states either specifically by statute, see note 55 supra, or by judicial construction, see text at notes 55-84 supra, has interesting constitutional implications. The cases allowing for home education clearly demand that the noninstitutional alternative establish adequate academic standards. See note 67 supra. Rather than recognizing that home education fulfills collectivist socialization interests, however, these cases simply hold that the compulsory education statute fails to assert a compelling state interest in the socialization function of education. It follows that if institutional socialization is not deemed a compelling state interest, then the state's core collectivist interests in education are limited to state required academic instruction; thus, under the rationale of Yoder, if there is an educational alternative satisfying state academic requirements, then the state is denied the power to compel institutional education.

Such an elevation of the home education alternative to the status of a constitutional right is the issue with which the federal district court in Scoma v. Board of Educ., 391 F. Supp. 452 (N.D. Ill. 1974), should have been concerned. Plaintiff-parents sought a declaratory judgment that the Illinois compulsory education statute was unconstitutional as applied to them. See note 116 supra. As the Illinois Supreme Court declared in People v. Levisen, 404 Ill. 574, 90 N.E.2d 213 (1950), see text at notes 79-83 supra, the Illinois compulsory education statute is primarily concerned with the academic education of the state's children; the socialization of children is left for parental direction in the choices of manner and place of instruction. Under this law, had the district court applied the doctrinal analysis dictated by Pierce, Roe and Yoder, see text at notes 111-17 supra, the sole issue as to the constitutionality of the statute as applied to the Scomas would have been whether the home instruction provided by the Scomas satisfied the state's compelling interest in the academic function of education. However, the court, avoiding the issue, relied on the traditionally cited but outdated cases that hold compulsory education to be within the reasonable exercise of a state's police power. See 391 F. Supp. at 461.
iciency, even though the means used by the Amish involved autonomy from state regulation. However, the carefully chosen language and the unique fact situation of Yoder indicate that the range of noninstitutional alternatives that can satisfy the socialization requirement and thereby fulfill the state's asserted interests in education is narrow indeed. First, the Amish did not challenge the requirement of institutional education during the first eight years of schooling; rather, they only sought an exemption from the one or two years of state-mandated education beyond the eighth grade. Second, the Yoder Court, by repeatedly emphasizing the religious foundation of the Amish claim, strongly implied that the courts should not be receptive to parental claims that are not firmly rooted in a bona fide religious belief. Finally, and most significantly, the uniqueness of Amish culture itself makes it highly unlikely that other cultures will possess the characteristics that prompted the Court to grant an exemption in Yoder. Because the Amish were "a separate, sharply identifiable and highly self-sufficient community," the Court assessed the individual's potential to be a social liability not within the framework of mainstream American society but rather within the Amish community itself. Moreover, the Amish could point to a history of more than 200 years in this country as an independent and successfully functioning social unit. The Court indicated that these factors compelled its finding that the additional year or two of compulsory education would yield the state "at best a speculative gain."

In conclusion, it is doubtful that any extant religious or social group could satisfy the strict standards of Yoder. Nevertheless, the case does establish a theoretical foundation upon which further exemptions to compulsory education could be built. If societal views evolve to the point at which institutional education is no longer perceived to further core interests, then Yoder would support a conclusion that the state interest in institutional education is no longer compelling. Once that conclusion is reached, parents who assert a fundamental right to control their children's education should be able to gain exemptions from state compulsory education requirements.

120. See 406 U.S. at 224-25.
121. 406 U.S. at 235.
122. 406 U.S. at 225. See text at note 104 supra.
123. 406 U.S. at 226-27.
124. See 406 U.S. at 227.
125. But see Knudsen, supra note 47, at 1512 n.36.
126. The intellectual foundation for such an evolution exists. See generally I. Berg, Education and Jobs: The Great Training Robbery (1971); P. Goodman, Compulsory Mis-Education and the Community of Scholars (1964); I. Illich, Deschooling Society (1971).
at least if they can demonstrate that society's remaining core collectivist interests can be satisfied in a noninstitutional context.

B. The Conflict over Equal Educational Opportunity

The second type of conflict over the scope of universal education involves the demands of individuals for greater educational benefits than the state is willing to provide. Since the 1954 Supreme Court decision in *Brown v. Board of Education*, such claims for greater access, usually asserted under the equal protection clause, have substantially outnumbered individual efforts to secure exemptions from formal education.

As noted above, individuals demanding greater educational opportunities in such cases assert the collectivist interest in equality of educational experience to support their claims, and the state responds by appealing to such pluralistic interests as "local control" and parental input in educational decisions. The ultimate accommodation that the courts have achieved is very similar to that reached in the context of claims for exemption from compulsory education. An individual claim for increased access to the academic and socialization opportunities of public education is likely to prevail if it coincides with the core collectivist interests of the state (i.e., achievement of sufficient political literacy, economic self-sufficiency, and social integration). However, an aspiration for educational opportunities exactly equal to those enjoyed by others is analogous to the

127. See note 45 supra.
129. The equal protection clause alone does not create an individual right to education. Individual rights to education arise under the equal protection clause only when (1) a state maintains a tax-supported school system, and (2) the state laws governing such system infringe on an individual's right to equal protection of the law. See Comment, supra note 4, at 351-52.

In equal protection terms, the argument that will be advanced in section II-B of the text is that a basic education sufficient to prevent an individual from becoming a liability to society is a fundamental right, see text at notes 135-40 infra; any state interference with this right through discriminatory regulation or administration of public schools should invoke strict judicial scrutiny. The proposition that a basic education is a fundamental right includes both the academic and socialization functions of education. However, the proposition will most likely only be an issue when the academic function of education is the primary concern. An allegation of a deprivation of adequate socialization will usually involve the suspect classification of race, which would require the strict scrutiny analysis.

The argument in section II-B of the text will be that the individual's interest in basic socialization should be given greater weight in determining when a suspect state classification exists. See text at notes 187-204 infra. Of course, the most controversial issue in the public school desegregation area has been the scope of the required remedy once an unconstitutional state classification has been found. On this issue the argument below is that the required scope of the remedy is tied to the provision of an adequate community-wide socializing experience through public education. See text at notes 212-49 infra.

130. See text at notes 58-59 supra.
state's desire to standardize people asserted in Pierce, and the individual asserting such a claim will generally lose. This section will first examine individual claims for increased academic opportunities. It will then analyze the desegregation cases as an example of individual demands for equal access to the socialization function of education.

1. Access to Academic Opportunities

In San Antonio Independent School District v. Rodriguez, the Supreme Court established constitutional guidelines for the right of greater exposure to academic opportunities in education. Specifically, the Court held that the Texas system of local property taxation was a constitutional method of financing public schools even though it resulted in unequal per pupil expenditures among the state's school districts. The Court held that there was no fundamental right to education and that the Texas financing system had a reasonable relation to the legitimate state interest in local control of education.

Conceptually, Rodriguez is the mirror image of Pierce. The individual claim for equal dollar expenditures per pupil can be viewed as a demand for standardization of the educational product closely akin to the state's demand in Pierce for compulsory attendance at standardized schools. Not surprisingly, therefore, the local control rationale used by the Rodriguez Court to justify its denial of the claim for uniform expenditures protects parental input into public education just as Pierce protected parental direction of the education of their children.

The plaintiffs in Rodriguez argued that a fundamental constitutional right to education was implicit in the right of free speech ("[t]he marketplace of ideas is an empty forum for those lacking basic communicative skills") and in the right to vote ("a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed"). The Texas school system indisputably provided every child with at least the "opportunity to acquire the basic minimal skills necessary for the enjoyment of the right of speech and of full participation in the political process," and the Rodriguez Court strongly implied that individuals have a fundamental right to such a level of schooling.

132. 411 U.S. at 37.
133. 411 U.S. at 55.
134. See text at notes 89-94 supra.
135. 411 U.S. at 35.
136. 411 U.S. at 36.
137. 411 U.S. at 37.
138. Even if it were conceded that some identifiable quantum of education is
The Court held, however, that the Constitution establishes no fundamental right to education beyond this basic level. It concluded that while the Constitution guarantees these rights, it does not guarantee "the most effective speech or the most informed electoral choice" and, accordingly, it does not implicitly guarantee an opportunity to experience the most effective education.

Thus, the individual apparently does have a fundamental right to education that coincides with the state's compelling interest in requiring education. Both the right and the interest focus on considerations of political literacy and economic self-sufficiency. Education, therefore, might be viewed as a reciprocal arrangement between the individual and the state for their mutual benefit. What a state can constitutionally compel, it ought to have a constitutional duty to provide, and, conversely, what a state cannot compel, individuals should not have a right to demand.

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139. 411 U.S. at 36 (emphasis original).

140. The suggested *quid pro quo* rationale for imposing upon the state a duty to provide a minimal education is still valid even if a state should decide not to compel education. This follows for two reasons. First, the individual's right to demand should arise by virtue of the state's *power* to compel. The state can compel one to experience the opportunity of achieving a basic education; thus the individual should have the right to demand the opportunity of achieving a basic education whether or not the state chooses to compel. The state's decision not to compel is equivalent to the individual's decision not to demand.

Second, the equal protection clause supports the imposition of such a duty on a state that provides public education, independent of the compulsory nature of such education. Assuming, under the strong implications of *Rodriguez*, that individuals have a fundamental right to seek knowledge and education sufficient to guarantee the meaningful exercise of the rights to vote and speak, then a state system of public education that interferes with this right is subject to a high degree of judicial scrutiny. Public education interferes with the right to pursue a basic education in three circumstances: when a child is excluded from public education, when a child is classified into an educational level beneath the child's intellectual ability and, finally, when a child unable to achieve a basic level of education from exposure to generally pro-
The pluralistic interest that limited the plaintiffs' rights in *Rodriguez*, local control of schools, parallels the interest that limited the state's power in *Pierce* and *Yoder*, parental control over the education of children. Pierce recognized the right of parents to direct the education of their children, at least to the extent of choosing between private and public schools. While the parents of children who attend public schools are unable to supervise the individual education of their children, local control at least allows such parents some input into the educational decision-making process. As Justice Powell stated in *Rodriguez*, local control permits parents both the opportunity to generate increased revenues for the support of the public schools that educate their children and, "[e]qually important, . . . the opportunity . . . [to participate] in the decision-making process that determines how these local tax dollars will be spent." Thus, the Court in *Rodriguez* achieved an accommodation between collectivist and pluralistic interests in academic education.

vided public instruction is offered only such instruction. Therefore, a state that decides not to compel education, but classifies students in one of the above ways, ought to make a compelling showing of why it should not make available to each child the best possible opportunity for achieving a basic level of education. See Mills v. Board of Educ., 348 F. Supp. 866, 874-75 (D.D.C. 1972); Dimond, supra note 138, at 1121-26; Handel, supra note 138, at 367-74. Contra, Cuyahoga County Assn. for Retarded Children & Adults v. Essex, 44 U.S.L.W. 2479 (U.S.D.C. Ohio, May 5, 1976) (refusing to find a fundamental right to even a minimal level of education).

141. The Court in *Rodriguez* clearly viewed local control of public schools as a manifestation of pluralism:

In an era that has witnessed a consistent trend toward centralization of the functions of government, local sharing of responsibility for public education has survived . . . .

. . . Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence. An analogy to the Nation-State relationship in our federal system seems uniquely appropriate. Mr. Justice Brandeis identified as one of the peculiar strengths of our form of government each State's freedom to "serve as a laboratory; and try novel social and economic experiments." No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.

411 U.S. at 49-50.

142. See text at note 94 supra.

143. It has been forcefully argued that local control of schools might have some degree of constitutional protection:

I do not believe recognition of [the] right [to educate one's children as one chooses, which was recognized in *Pierce*] can be confined solely to a parent's choice to send a child to public or private school. Most parents cannot afford the luxury of a private education for their children, and the dual obligation of private tuitions and public taxes. Those who may for numerous reasons seek public education for their children should not be forced to forfeit all interest or voice in the school their child attends. It would, of course, be impractical to allow the wishes of particular parents to be controlling. Yet the interest of the parent in the enhanced parent-school and parent-child communication allowed by the neighborhood unit ought not to be suppressed by force of law.


144. 411 U.S. at 49-50.
tion parallel to that which was achieved in the compulsory education context. The state can regulate the mode of education and can itself be required to provide education until the goals of self-sufficiency and political literacy are reached. But beyond that point, pluralism, whether manifested in enhanced local school board power or in direct parental control over the education of their children, must prevail over the powers and duties of the state.

Although this collectivist-pluralist continuum provides an effective method of analyzing the countervailing interests in education, the determination of the actual educational level at which the rights and duties in education should shift poses a difficult problem. The definitional problems inherent in concepts such as "political literacy" and "economic independence" have forced the courts in compulsory education cases to rely substantially upon the meanings given these terms by the states in their compulsory education requirements. Similarly, the courts in equal educational opportunity cases have usually been forced to defer to the educational offerings actually provided by the state in determining what is meant by a "basic education." In Rodriguez, the Court recognized that no clear relationship between educational input (including resources, methods, and policies) and educational results has yet been established. Thus, rather than defining the right to education in terms of either resources or results, it did so in terms of the state's efforts to ensure

145. "The Texas system of school finance is responsive to these two forces. While assuring a basic education for every child in the State, it permits and encourages a large measure of participation in and control of each district's schools at the local level." 411 U.S. at 49. One state court has also acknowledged this accommodation of interests in the educational program:

Where one district may offer a richer program in music and dramatic arts, another may go beyond the State's requirements in science or social studies, or physical education or agriculture, and others may emphasize more than one field of student activity beyond the college preparatory phases. . . . These are choices which inhere in the idea of viable local participation in establishing, operating and funding the common schools. If these differences are of constitutional dimension, there exists a remedy in equity to compel the particular school district or the state in a particular case to provide such services . . . . Northshore School Dist. No. 417 v. Kinnear, 530 P.2d 178, 191 (Wash. 1974).

146. See text at notes 108-09 supra.

147. See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) (indicating that Court, in generality of cases, would uphold state's system of compulsory education).


149. The relationship between educational inputs and educational outcomes has been called the education production function. See Yudof, supra note 42, at 422-29. Although the production function of education has been extensively discussed, few definitive conclusions have been reached as to what actually accounts for educational achievement. See generally J. COLEMAN, E. CAMPBELL, C. HOBSON, J. McPORTLAND, A. MOOD, F. WEINFOLD & R. YORK, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966) [hereinafter J. COLEMAN]; J. GUTHRIE, G. KLIENDORFER, H. LEVIN & R. STOUT, SCHOOLS AND INEQUALITY (1971); Mosteller & Moynihan, A Pathbreaking Report, in ON EQUALITY OF EDUCATIONAL OPPORTUNITY 347 (F. Mosteller & D. Moynihan eds. 1972).
that state-determined basic educational resources are available in all schools.\textsuperscript{150} In effect, this means that for most children, the fundamental right to an adequate education is merely the right to attend public schools.

However, just as a unique showing of "self sufficiency" by the Amish in \textit{Yoder} forced the state to alter its compulsory education requirement because the standard means of advancing collectivist interests were not needed, unique showings of educational need may force a state to alter its functional definition of "basic education."\textsuperscript{151} An example of a group with unique needs is provided by children whose native language is not English and who are thereby substantially more difficult to teach.\textsuperscript{152} Such non-English speaking students have in several cases sought to provide them with a compensatory educational program.\textsuperscript{153} They have asserted that a "basic education" provided solely in English does not permit them to achieve political literacy and economic self-sufficiency.\textsuperscript{154} The state has replied that in

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  \item[150.] See 411 U.S. at 44-45.
  \item[152.] A second group of children that possesses unique educational needs are children with mental, emotional or physical handicaps. See generally \textit{Weintraub & Abelson, Appropriate Education for All Handicapped Children: A Growing Issue, 23 Syl. L. Rev. 1037} (1972). A right to a basic education for handicapped children is gaining recognition in both constitutional and legislative contexts. See \textit{Fiske, Special Education Is Now a Matter of Civil Rights}, N.Y. Times, April 25, 1976, § 12 (Spring Survey of Education), at 1, col. 1 (late city ed.). Constitutional support for the right to a basic education can be derived from the equal protection clause, guaranteeing exposure to instruction adequate to create for the handicapped child the opportunity to achieve a basic education, or from the due process clause, guaranteeing proper procedural placement of a handicapped child within an educational system. See \textit{Mills v. Board of Educ.}, 348 F. Supp. 866, 875-76 (D.D.C. 1972); \textit{Dimond, supra note 138; Handel, supra note 138}. The handicapped child's right to a basic education has been recognized in state and federal legislation. Forty-eight states have enacted laws mandating special education for handicapped children and enforcement appears to be growing. \textit{Fiske, supra}, at 14, col. 5. See, e.g., \textit{Mich. Comp. Laws Ann. §§ 340.10-12, 340.20-22, 340.32a, 340.329c, 340.601-601b, 340-613-773a, 340.780k} (1976). Congress recently passed the \textit{Education of All Handicapped Children Act of 1975}, Pub. L. No. 94-142, 89 Stat. 773, which requires states after 1977, to provide a "free, appropriate education" for all handicapped children. All Congressional requirements for education of the handicapped are now set out in 20 U.S.C. §§ 1401-1461 (1970), as amended, (Supp. 1975). In light of these statutory developments, it is doubtful that courts, in the context of handicapped children, will be able to address as a matter of constitutional law the implication of \textit{Rodriguez} that a basic education is a fundamental right for equal protection or due process purposes. See \textit{Harrison v. Michigan}, 350 F. Supp. 846, 847 (E.D. Mich. 1972) (plaintiffs' equal protection complaint held moot). See also text at note 177 infra.
  \item[154.] The overlap between the academic and socialization functions of education, see note 51 supra, is manifest here. The claim is essentially that the inability to achieve adequate academic performance, caused by the linguistic obstacle, leads to
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such cases responsibility for educational achievement must rest not on society but on the individual. Because the collectivist interests asserted in such cases parallel those that prevailed in the compulsory education cases and were recognized by implication in Rodriguez, it seems that they should prevail in this context as well. While courts have consistently recognized in cases brought under the Civil Rights Act of 1964 that special courses for non-English speaking students are necessary means of achieving literacy and self-sufficiency, they have differed on whether such student claims are supported by the equal protection clause.

The basic issue in cases that assert a constitutional claim is whether similar treatment of persons not similarly situated necessarily satisfies the equal protection clause. The plaintiffs in these cases generally do not contend that the state has acted to deprive them of educational opportunities; rather, they assert that the state has an affirmative duty to ameliorate their linguistic disadvantage to ensure them opportunities equal to those of individuals who enter school without such handicaps. Such plaintiffs are faced with a difficult doctrinal obstacle to the establishment of a violation of the fourteenth amendment. Equal protection claims require a showing of state action.

Courts have differed on whether claims that request compensatory programs to ensure equal educational opportunities have successfully demonstrated unconstitutional state action. In Lau v. Nichols, the Ninth Circuit Court of Appeals, finding no state ac-

social stigmatization; moreover the combination of poor academic achievement and social isolation prevents the educational training and experience necessary for integrated participation in the political and economic mainstreams of American society:

Undisputed evidence shows that Spanish surnamed students do not reach the achievement levels attained by their Anglo counterparts. Achievement tests, which are given totally in the English language, disclose that students with English language deficiencies are almost a full grade behind [other] children. In reading, language mechanics and language expression... Children who are not achieving often demonstrate both academic and emotional disorders. They are frustrated and they express their frustration in lack of attendance, lack of school involvement and lack of community involvement. Their frustrations are reflected in hostile behavior, discipline problems and eventually dropping out of school.

Serna v. Portales Municipal Schools, 499 F.2d 1147, 1149-50 (10th Cir. 1974).

155. See text at note 162 infra.
161. 483 F.2d 791 (9th Cir. 1973).
tion, denied the request of Chinese children in San Francisco for compensatory education in English:

Every student brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background, created and continued completely apart from any contribution by the school system. That some of these may be impediments which can be overcome does not amount to a "denial" by the Board of educational opportunities within the meaning of the Fourteenth Amendment should the Board fail to give them special attention, even though they are characteristic of a particular ethnic group.\(^\text{162}\)

In support of its conclusion that the plaintiffs had asserted the requisite state action, the \(\textit{Lau}\) dissent argued that because the children were "functionally" excluded from education,\(^\text{163}\) the state had acted even though it had not actually "classified" such students.\(^\text{164}\) The dissent emphasized that the state's system of universal compulsory education,\(^\text{165}\) which was based on English,\(^\text{166}\) and which required mastery of English as a prerequisite to graduation from public high school, carried with it reciprocal responsibilities:\(^\text{167}\) "The pervasive involvement of the state with the very language problem challenged forbids the majority's finding of no state action."\(^\text{168}\) In \(\textit{Serna v. Portales Municipal Schools}\),\(^\text{169}\) Spanish-speaking plaintiffs brought a sim-

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\(^{162}.\) 483 F.2d at 797. However, the court contradicted the above implication that the achievement of English literacy is essentially an individual responsibility and hence a pluralistic interest. It asserted that the "use of English as the language of instruction . . . is intimately and properly related to the educational and socializing purposes for which public schools were established." 483 F.2d at 798. This assertion of collectivist interests in individual achievement of English literacy is meaningless if the state assumes no responsibility for "educating and socializing" isolated cultural and linguistic groups.

\(^{163}.\) For a general presentation of the educational and legal problems concerning exclusion and "functional exclusion" from public schools, see D. \textit{Kirp} & M. \textit{Yudof}, supra note 46, at 628-43.

\(^{164}.\) See 483 F.2d at 805 (Hufstedler, J., dissenting from denial of hearing en banc).


\(^{168}.\) 483 F.2d at 806; \textit{cf.} text at note 191 infra. This argument finds some support in the Supreme Court criminal justice cases of \textit{Griffin v. Illinois}, 351 U.S. 12 (1956), and \textit{Douglas v. California}, 372 U.S. 353 (1963), which held that an individual cannot be denied access to various aspects of the criminal justice system on account of lack of ability to pay, and which required the state to take affirmative action to provide access. Both criminal justice and educational systems are compulsory. An indigent convict cannot fully utilize the criminal justice system without money and a non-English speaking student cannot take advantage of an educational system without compensatory education. A convict's poverty is no more attributable to the state than is the language deficiency of non-English speaking students. However, the situations are distinguishable in terms of classification. Indigent convicts were actually deprived of access to state benefits; non-English speaking students were only functionally denied a state education.

ilar claim for a compensatory educational program. The court adopted a position on the state action issue similar to that advocated by the Lau dissent and, in effect, held that the denigration of an individual's interests in education through the "promulgation and institution of a program . . . which ignores the needs of [non-English speaking] students does constitute state action."170

Because no similar doctrinal obstacle to recognition of an individual's interest in gaining sufficient education exists in claims based on federal legislation,171 courts in such cases have universally recognized a statutory right to compensatory education for non-English speaking students.172 Thus, the Supreme Court in Lau v. Nichols173 chose not to reach the equal protection issue. Instead, it held that section 601 of the Civil Rights Act of 1964174 placed an affirmative duty on the State of California to ensure that the Chinese children of San Francisco received a "meaningful" education and thus had their collectivist interests in education satisfied.176 In so interpreting section 601, the Court placed considerable emphasis on the reciprocity rationale articulated by the dissenting Ninth Circuit judges that a "basic" education becomes a fundamental right when the state undertakes to compel education:

170. 351 F. Supp. at 1283.

171. See The Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000d (1970). The Department of Health, Education, and Welfare guidelines provide: "Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students." 35 Fed. Reg. 11,595 (1970). In addition, Congress has enacted The Equal Educational Opportunity Act of 1974, § 204(f), 20 U.S.C.A. § 1703(f) (Supp. 1976), which provides that no state shall deny equal educational opportunity by failing "to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."

172. The appropriate remedy for non-English speaking students who have been denied a basic education appears to be within the discretion of the district courts. See Lau v. Nichols, 414 U.S. 563, 564-65 (1974) ("No specific remedy is urged upon us. Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another. There may be others"); Serna v. Portales Municipal Schools, 499 F.2d 1147, 1154 (10th Cir. 1974) ("[T]he trial court, under its inherent equitable power, can properly fashion a bilingual-bicultural program which will ensure that Spanish surnamed children receive a meaningful education"). The bilingual-bicultural program ordered in Serna recognized the necessity of accommodating the pluralistic interests of the Spanish surnamed in their own language and culture while satisfying the collectivist goal of a basic education for everyone.


174. 42 U.S.C. § 2000d (1970) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance"). See note 171 supra.

175. See 414 U.S. at 566.
Under those state-imposed standards there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.

Basic English skills are at the very core of what these public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education. We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful.

The fact that courts can point to a statutory right to a meaningful "basic" education would seem to explain, at least in part, why more courts have not recognized a constitutional right to compensatory programs for non-English speaking students. Because they have been able to protect the interests of individuals in acquiring an education without extending the doctrine of state action, courts have not yet been forced to recognize the implication of *Rodriguez* that all individuals have a constitutional right to an academic education sufficient to ensure their political literacy and economic self-sufficiency.

2. **Access to Socialization Opportunities: The Example of Desegregation**

Individuals have also asked the courts to recognize their fundamental right to take part in the socialization process inherent in a commonly experienced "basic" education. Indeed, the modern era of education litigation began with the Supreme Court's acknowledgement in *Brown v. Board of Education* that racial segregation in the public schools caused Black students to suffer serious injury by denying them access to the mainstream of American society: "[T]o separate [minority children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to be undone."
The socialization function of education is to inculcate certain attitudes and behavioral patterns in the young so they will not become social liabilities. Exposure to a common educational experience is a means of establishing channels of communication between children of diverse backgrounds, fostering understanding, and thus preventing the development of feelings of inferiority that detract from an individual's ability to participate effectively in society. Attendance at integrated schools can create a sense of belonging which is arguably a prerequisite to actually becoming a productive member of a cohesive and harmonious society. Thus, although individuals may seek access to greater socialization opportunities in a variety of contexts, the vast majority of such claims have sought to compel racial desegregation of the schools. Since Brown, the courts have struggled to define and protect the Black child's interest in undergoing socialization in the public schools—an interest that must be advanced if the schools are to perform their function as "melting pots" of society. However, primarily because racial desegregation is an emotional issue, courts have not yet arrived at the same accommodation of the collectivist interest in equality of educational experience and the countervailing pluralistic interest of parents in preserving the "neighborhood school" achieved in other education disputes.

The following discussion contends that the process of achieving an accommodation in the desegregation area has heretofore been impeded because courts, in determining the existence of constitutional violations, have tended to undervalue the interests of socialization, while in fashioning desegregation remedies, they have overemphasized these interests to the detriment of pluralism. This undervaluation has often led courts to deny the existence of constitutional violations.

180. See note 48 supra and accompanying text.

181. See text at note 50 supra.

182. For example, the claims of non-English speaking students for compensatory education reflect a desire for greater access to the socialization benefits of public education. See note 154 supra.


184. Professor Yudof presents two ethical principles, which he believes were the bases for Brown, as alternative rationales for directing desegregation: The "racial neutrality principle" is based on pluralistic values and the "universalist" principle is based on collectivist values. See Yudof, supra note 42, at 446-64. It is contended in this section of the Project that judicial direction of desegregation is premised upon an accommodation of these ethical principles.
by refusing to find state action sufficient to satisfy the fourteenth amendment. The result is that despite the integrated nature of their communities, many Black students are being forced to attend segregated schools and are thus denied the benefits of socialization. On the other hand, once the courts have found a constitutional violation, they have often imposed remedies that unnecessarily disrupt "the deeply felt desire of citizens for a sense of community in their public education." It is submitted, however, that the courts are now re-evaluating the countervailing interests in desegregation and, as a result, have begun both to expand the theory of violation and to limit the scope of their remedial orders. Thus, courts now appear to be gradually achieving an accommodation consistent with that reached in other conflicts over access to education.

The threshold issue in desegregation litigation is, of course, whether the plaintiffs have asserted a violation of the equal protection clause. As in equal protection claims for access to academic opportunities, the state has no duty to desegregate racially divided schools unless the plaintiffs have demonstrated the existence of state action. In determining whether the requirement has been fulfilled, courts have traditionally distinguished between de facto and de jure segregation and have required a finding of the latter. However, the utility of this doctrinal distinction has been increasingly questioned. As the Fifth Circuit Court of Appeals stated in Cisneros v. Corpus Christi Independent School District:

The Negro child in Cleveland, Chicago, Los Angeles, Boston, New York, or any other area of the nation which the opinion classifies under de facto segregation, would receive little comfort from the assertion that the racial make-up of their school system does not violate their constitutional rights because they were born into a de facto society, while the exact same racial make-up of the school system in the 17 southern and border states violates the constitutional rights of their counterparts, or even their blood brothers, because they were born into a de jure society. All children everywhere in the nation are protected by the Constitution, and treatment which violates their constitutional rights in one area of the country, also violates such constitutional rights in another area.

185. See note 159 supra.
187. See note 159 supra.
190. 467 F.2d 142 (5th Cir. 1972).
191. 467 F.2d at 148, quoting United States v. Jefferson County Bd. of Educ.,
The de jure-de facto distinction has had the effect of insulating large numbers of Northern schools from court-ordered desegregation even though minority students in these schools are denied the fullest socialization opportunities of public education. Consequently, courts have begun to expand the concept of de jure segregation. In Keyes v. School District No. 1, the Supreme Court found for the first time de jure segregation in a school district that had "never been operated under a constitutional or statutory provision that mandated or permitted racial segregation in public education." In one part of the school system, the district court and court of appeals had discovered a clear case of de jure segregation in the school board's "'undeviating purpose to isolate Negro students' in segregated schools 'while preserving the Anglo character of [other] schools.'" The Court held that these "intentionally segregative school board actions in a meaningful portion of [the] school system" created a presumption that other segregated schools within the district were also the product of intentional state action. By thus placing the burden of proving nonsegregative motive upon the school board, the Keyes Court substantially facilitated the proof of state action in large-scale desegregation cases.

Although the Keyes Court in this way extended the reach of de jure segregation theory, it did not consider how presumptions of segregative intent might be applied to cases in which there is no proof of intentionally segregative state action in any part of the school system. Thus, the Keyes majority perpetuated the distinction between de facto and de jure segregation for most purposes. In his separate opinion, however, Justice Powell contended that because "public schools are creatures of the state" and because the focus of concern in desegregation litigation should be "for those who attend such schools, rather than for perpetuating a legalism rooted in history rather than present reality," it should not be constitutionally relevant "whether the segregation is state-created or state-assisted or merely state-perpetuated . . . ." Thus, he advocated a sharp departure from previous constitutional analysis:

Rather than continue to prop up a distinction no longer grounded in principle, and contributing to ["uneven and unpredictable results,

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193. 413 U.S. at 191.
195. 413 U.S. at 208.
196. 413 U.S. at 227 (Powell, J., concurring in part and dissenting in part).
197. 413 U.S. at 219.
198. 413 U.S. at 227.
to protracted and inconclusive litigation, to added burdens on the federal courts, and to serious disruption of individual school systems"], we should acknowledge that wherever public school segregation exists to a substantial degree there is prima facie evidence of a constitutional violation by the responsible school board. It is true, of course, that segregated schools—wherever located—are not solely the product of the action or inaction of public school authorities. . . . But it is also true that public school boards have continuing, detailed responsibility for the public school system within their district . . . .

As foreshadowed in Swann and as implicitly held today, school boards have a duty to minimize and ameliorate segregated conditions by pursuing an affirmative policy of desegregation. It is this policy which must be applied consistently on a national basis without regard to a doctrinal distinction which has outlived its time.199

In numerous desegregation cases since Keyes, lower courts have been required to assess whether segregated schools were the result of intentional state action, and a number of courts have adopted Justice Powell’s position on the use of presumptions of segregative intent even in the absence of a showing of deliberate acts of segregation. Thus, the Second, Third, and Eighth Circuits applied such a presumption when it was established that school authorities had engaged in acts or omissions, the natural and foreseeable consequence of which was to bring about or maintain segregation.200 School boards, therefore, are increasingly being required to prove that "segregative intent was not among the factors that motivated their actions."201

The growing judicial application of a presumption of intent against school boards that maintain segregated schools substantially emasculates the concept of de facto segregation and thus should enable more plaintiffs to succeed in desegregation cases.202 This trend is grounded on the belief that all children are fully entitled to the

199. 413 U.S. at 235-36.
202. Recognition as de jure discrimination of school segregation that results from action of a type other than discriminatory conduct of school officials, such as zoning or housing laws or practices, would further undercut the concept of de facto segregation. This still appears to be an open question. See Milliken v. Bradley, 418 U.S. 717, 728 n.7 (1974); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 23 (1971). But see Evans v. Buchanan, 393 F. Supp. 428 (D. Del.), affd., 423
socialization opportunities of nonsegregated public schools. Moreover, it is consistent with the reciprocity rationale articulated in connection with academic opportunities. Because the state can constitutionally compel children to attend educational institutions to socialize them for meaningful participation in society, it should have an affirmative duty to ensure that all children who demand an adequate socializing experience receive such an experience "on an equal basis to all."

Once the fact of de jure segregation is established, either by direct proof or by unrebutted presumption, school authorities have a duty not only to dismantle the dual school system, but also to establish a "unitary school system" in which the effects of past de jure segregation have been eliminated "root and branch." In fashioning desegregation orders, courts have usually relied on a combination of remedies—student transportation, redrawing attendance zones, and other administrative practices—to establish a unitary system of education. Generally, the goal of such remedies has been to achieve a student population in each school that approximates the Black-White ratio in the community as a whole. This remedy has been increasingly criticized, however, as an attempt to use the public schools to further broad and controversial social objectives rather than

U.S. 963 (1975) (relying in part on state involvement in housing to find de jure discrimination in interdistrict context).

203. See note 140 supra and accompanying text.

204. Keyes v. School Dist. No. 1, 413 U.S. 189, 225-26 (1973) (Powell, J., concurring in part and dissenting in part) ("I would now define it as the right, derived from the Equal Protection Clause, to expect that once the State has assumed responsibility for education, local school boards will operate integrated school systems within their respective districts") (emphasis original).


If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing . . . we would . . . reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.

[However,] awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations.
than a means of safeguarding the individual's interest in adequate socialization.209

Until recently, most school desegregation remedies sought only to achieve collectivist interests by imposing student ratios, without taking into account the countervailing pluralistic interests of parents and students.210 Thus, once a constitutional violation was established, the courts devoted their attention almost exclusively to achieving socialization. The interest of parents in participating in the educational decision-making that affects their children and the interest of students in attending neighborhood schools were accorded little weight.211 It appears, however, that courts are now seeking to protect these interests at the remedial stage in a manner that is consistent with the resolution of other access disputes. By limiting their remedial orders, courts are demonstrating increased respect for parental involvement in the education process.

In Swann v. Charlotte-Mecklenburg Board of Education,212 the Supreme Court approved for the first time a remedial order requiring substantial busing in a large metropolitan school district. Swann asserted that "the scope of a court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."213 The decision thereby established a precedent for large-scale remedial orders that has been followed by lower courts.214 Chief Justice Burger, writing for the Court, stressed, how-

209. See Goodman, supra note 179, at 388 ("[e]quality of treatment . . . is better served by individual option than by forced desegregation . . . . [S]ince a racially representative classroom is not equally suited to every child . . . . the state may best treat black children equally by giving them equal opportunity to choose, rather than by imposing upon them an objectively uniform school environment . . . ."); Yudof, supra note 42, at 457, quoting Novak, White Ethnic, Harper's, Sept. 1971, at 46 ("Blacks, frustrated by the historical experience with integration, have begun to challenge the universal ideal and to question the legitimacy of institutions, even integrated institutions, exclusively controlled by whites. White ethnic groups too have been critical of [l]iberal education [t]hat tends to separate children from their parents, from their roots, from their history, in the cause of a universal and superior religion"). See also Fein, Community Schools and Social Theory: The Limits of Universalism, in Community Control of Schools 76, 88-91 (H. Levin ed. 1970).


211. While courts often paid lip service to pluralistic interests of the parent and child, substantive limitations on the collectivist goal of uniform racial ratios were rare. See, e.g., Bradley v. Milliken, 345 F. Supp. 914 (E.D. Mich. 1972) (requiring transportation of students out of their home districts to achieve racial ratios in the schools consistent with those throughout an entire metropolitan area), revd. in part, 418 U.S. 717 (1974).


213. 402 U.S. at 15.

ever, that the concept of a unitary school system does not require "as a matter of substantive constitutional right, any particular degree of racial balance or mixing." He emphasized that desegregation remedies should be the product of a "reconciliation of competing values." Four years later, in *Milliken v. Bradley*, a majority of the Court did in fact limit a lower court's remedial desegregation order in part because it failed to accord sufficient weight to pluralistic interests in education.

In *Milliken*, the plaintiffs sought to desegregate the Detroit school system, which had an extremely high percentage of Black students. Although the plaintiffs proved the existence of de jure segregation in the Detroit schools, no showing was made that significant constitutional violations had occurred in the surrounding suburban school districts or that racially discriminatory acts of any district or the state had resulted in interdistrict segregation. Nevertheless, having as its aim the establishment of a unitary school system, the district court ordered cross-district busing of students in the Detroit school district and fifty-three of the eighty-six outlying school districts to achieve a Black-White student ratio in each "school, grade [and] classroom" equal to that throughout metropolitan Detroit. The Supreme Court reversed, emphasizing that the autonomy of the local districts included in the plan should have been accorded substantially more weight in the formulation of the remedy:

"Boundary lines may be bridged where there has been a constitutional violation calling for interdistrict relief, but the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country. No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."

Significantly, the Court reaffirmed its position, previously articulated in *Rodriguez*, that local control over the educational process is necessary to afford "citizens an opportunity to participate in decision-making, [to permit] the structuring of school programs to fit local conditions."
needs, and [to encourage] 'experimentation, innovation, and a healthy competition for educational excellence.'

Thus, the Court's holding in *Milliken* that a district court can use its equitable power to remedy de jure segregation only in districts affected by the constitutional violation is in effect a new accommodation of pluralistic interests with the goals of desegregation. The Court's concern that an interdistrict remedy could adversely affect the ability of parents to participate in the educational decision-making process was manifested in a series of questions raised by the majority: "What would be the status and authority of the present popularly elected school boards? Would the children of Detroit be within the jurisdiction and operating control of a school board elected by the parents and residents of other districts? What board or boards would levy taxes for school operations in these fifty-four districts constituting the consolidated metropolitan area...?" The Court's deference to existing school district boundaries was most likely based on a reluctance to fashion remedies that restructure state and local governmental operations rather than on a determination that limiting judicial remedies to the districts where constitutional violations occurred is an appropriate accommodation of interests.

222. 418 U.S. at 742.
223. 418 U.S. at 744-45.
224. 418 U.S. at 743.
225. See *Hills v. Gautreaux*, 44 U.S.L.W. 4480, 4483 (U.S. April 20, 1976) ("[T]he *Milliken* decision was based on basic limitations on the exercise of the equity power of the federal courts and not on a balancing of particular considerations presented by school desegregation cases... "). Thus, the *Gautreaux* Court concluded that *Milliken* was primarily based on separation of power considerations that limit judicial equity power rather than on pluralistic interests such as local control of schools. The District Court's remedy in *Milliken* was impermissible "not because it envisioned relief against a wrongdoer extending beyond the city in which the violation occurred but because it contemplated a judicial decree restructuring the operation of local governmental entities that were not implicated in any constitutional violation." 44 U.S.L.W. at 4484.

In *Gautreaux*, Black tenants in, and applicants for, public housing in Chicago brought separate class actions against the Chicago Housing Authority and the Department of Housing and Urban Development. The plaintiffs urged that public housing sites had been selected within Chicago to avoid placing Blacks in predominantly White neighborhoods in violation of federal statutes and the fourteenth amendment. The Seventh Circuit Court of Appeals ordered the district court to require the CHA and HUD to provide a comprehensive plan not necessarily confined to the geographical limits of Chicago to remedy this past discrimination. In upholding the order that mandated a comprehensive metropolitan area plan, the Court concluded that *Milliken* did not bar a public housing plan that extended beyond the Chicago city limits even though all constitutional violations involved Chicago alone. In *Milliken*, the Detroit school district had no power in suburban school districts and so could not have been ordered to act within them. The state of Michigan, also "guilty" of de jure discrimination within Detroit, had such power but could not have been ordered by the court to exercise it in fashioning a remedy because such exercise would have necessarily entailed restructuring the operation of local governmental entities. In *Gautreaux*, however, HUD had certain limited powers in the Chicago suburbs that the court could require to be exercised in fashioning a remedy without interfering with local political subdivisions. See 44 U.S.L.W. at 4485-86.
However, *Milliken* specifically acknowledges the importance of pluralistic interests in the desegregation context and clearly establishes that parents, both in Detroit and in the surrounding suburbs, are entitled to the degree of control over education that present school districts provide.

In school districts with a high percentage of minority students, the remedial limitations imposed by *Milliken* may effectively bar such students from schools that have substantial nonminority attendance. Although this phenomenon arguably reduces the opportunities for socialization that come with attending racially mixed schools, the Court apparently concluded that the core collectivist interest in education is limited to providing all children with a nonstigmatizing educational experience that prepares them for participation in their community. The decision reflects the view that this core interest can be satisfied by ensuring that no discriminatory assignment of students occurs within the school district where the student resides. It would therefore follow that any possible benefits of further socialization should be subordinated to the strong parental interest in participating in education decision-making at the local level. This result is

Notwithstanding the *Gautreaux* Court's denial that the pluralistic interests underlying local political subdivisions were determinative in *Milliken*, the *Milliken* Court had indeed invoked these interests to support its decision. See text at notes 221-24 *supra*. That these pluralistic interests were mentioned in the educational context, yet were explicitly rejected as relevant in the public housing context, suggests that the Court, despite its purported exclusive reliance on institutional concerns, was actually accommodating pluralistic and collectivist interests in both cases, and that the unique nature of pluralistic interests in education was the real difference between the cases. By this analysis, the Court, in directing HUD to provide housing units in the greater metropolitan area outside the city of Chicago, effectuated collectivist interests in adequate housing and social integration, and did not significantly impair pluralistic interests, which would probably be the interests in maintaining the social and ethnic composition of neighborhoods.

In *Milliken*, the Court similarly accommodated interests, but, unlike *Gautreaux*, found that the pluralistic interests were much stronger. The pluralistic interests in *Milliken*, in essence, involved the integrity of the family unit because granting an inter-district remedy would have impaired the parental interest in how their children would be educated. This interest is arguably more strongly identified with how the family unit functions than the interest in what type of neighborhood surrounds the family unit. However, where an interdistrict remedy does not seriously threaten pluralistic interests in education, courts may search hard for an interdistrict violation, which allows a remedy to be granted regardless of the effect on local governments and, thus, allows an accommodation of interests similar to that in *Gautreaux*. See *Evans v. Buchanan*, 393 F. Supp. 428 (D. Del.), affd., 423 U.S. 963 (1975); text at notes 230-34 *infra*.


227. See text at note 179 *supra*.

228. There is increasing awareness of Black pluralistic interests and of the necessary conflict of these interests with the collectivist goal of integration, even among those who have worked for and value integration. See Ravitch, *supra* note 55, at 217:

Those blacks who are critical of the current thrust of the integration movement are not separatists; they are professionals who move in a racially mixed
analogous to that reach in *Yoder*, in which the Court recognized a core collectivist interest in educating individuals to the point at which they no longer threaten to be a liability to society. The *Yoder* Court recognized that there is a further interest in preparing individuals to be assets to society, but it concluded that the autonomy of the Amish had greater weight. Similarly, the *Milliken* Court recognized the importance of a limited amount of socialization that could arguably prevent individuals from becoming community liabilities, but it held that socialization with a broader geographic referent could outweigh the benefits of local control.229

*Milliken* represents the initial judicial effort to accommodate meaningfully the conflicting interests in desegregation cases. Subsequent interdistrict and intradistrict desegregation decrees show a continuing evolution in this accommodation process. Thus, a number of courts have narrowly construed *Milliken*’s limitation on interdistrict remedies by reading broadly its statement that such remedies may be appropriate where there has been “a constitutional violation within one district that produces a significant segregative effect in another district.”230 For example, one three-judge court actually held that certain governmental acts—encouraging discrimination in the private housing market and providing public housing almost exclusively in the inner city—were “responsible to a significant degree” for the racial imbalance between city and suburbs and constituted “segregative action with inter-district effects under *Milliken.*”231 These courts have distinguished *Milliken* on the ground that, because their order of an interdistrict remedy would have a narrower geographical scope, it would not create the administrative problems, the extensive disruption of education, and the infringement on parental control that the Supreme Court feared would result

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229. The accommodation of pluralist and collectivist interests is reflected in the *Milliken* Court's adoption of the existent school district boundaries as the limit on the desegregation order. See note 225 supra.


from a metropolitan remedy in Detroit.\textsuperscript{232} As the Sixth Circuit recently stated: An "interdistrict [consolidation] in this case would not be likely extensively to disrupt and alter the structure of public education . . . nor require the creation of a vast new super school district, as may have resulted from the broad metropolitan remedy considered in \textit{Milliken}.\textsuperscript{233} Thus, it appears that the lower courts are, in effect, interpreting \textit{Milliken} not as a constitutional ban on interdistrict remedies, but as a mandate to consider the pluralistic interests of home-school proximity and effective community participation in public education.\textsuperscript{234} Upon a determination that these interests can be accommodated within the framework of an interdistrict remedy, the courts appear willing to formulate such a decree.

The courts in single-district desegregation cases also appear to be giving greater consideration to pluralistic interests while deemphasizing the achievement of specific racial ratios. Two recent district court orders exemplify this trend. In \textit{Morgan v. Kerrigan},\textsuperscript{235} the highly publicized Boston desegregation case, the court expressly recognized that the collectivist interest in racially mixed schools inevitably conflicts with "legitimate concerns of the community."\textsuperscript{236} According to the court, an appropriate remedy must both "reflect the primacy of the need to achieve equal opportunity in education,"\textsuperscript{237} and "recognize the central importance of minimizing the distance between the student's home and [his] assigned school"\textsuperscript{238} and of allowing the student to "maintain ties developed in school while in [his] home [neighborhood]."\textsuperscript{239} To this end, the court devised an elaborate desegregation plan that would encourage voluntary desegregation by offering special programs of study in "magnet schools,"\textsuperscript{240} ensure a continuity of school-neighborhood contacts by assigning students to schools on a neighborhood rather than an individual basis,\textsuperscript{241} and minimize home-school distances by establishing desegregated community school districts.\textsuperscript{242}

Similarly, the district court in \textit{Bradley v. Milliken},\textsuperscript{243} upon remand from the Supreme Court, put considerable emphasis on the importance of accommodating "the legitimate concerns of the school

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\item \textsuperscript{232} 510 F.2d at 1359-60; 393 F. Supp. at 446-47; 388 F. Supp. at 1060.
\item \textsuperscript{233} 510 F.2d at 1360.
\item \textsuperscript{234} See note 225 supra.
\item \textsuperscript{235} 401 F. Supp. 216 (D. Mass. 1975), affd., 530 F.2d 401 (1st Cir. 1976).
\item \textsuperscript{236} 401 F. Supp. at 233.
\item \textsuperscript{237} 401 F. Supp. at 233.
\item \textsuperscript{238} 401 F. Supp. at 240.
\item \textsuperscript{239} 401 F. Supp. at 241.
\item \textsuperscript{240} 401 F. Supp. at 246-48.
\item \textsuperscript{241} 401 F. Supp. at 240-42.
\item \textsuperscript{242} 401 F. Supp. at 236, 250-56.
\end{itemize}
system and the community at large, [which include] the undesirability of forced reassignment of students achieving only negligible desegregative results" and "the overriding community concern for the quality of educational services available in the school district."244 Thus, it refused to adopt any plan that required all schools to achieve rigid racial ratios245 because the majority of schools would necessarily have been between seventy-five and ninety per cent Black even after massive intradistrict transportation, due to Detroit's large Black population.246 The Court did stress that all "racially identifiable" White schools had to be eliminated,247 but instead of focusing on the racial compositions of each school in the system, it sought to "balance the practicalities that affect the system as a whole."248 As a result, the court's remedial guidelines emphasized the importance of secondary desegregation procedures, such as community relations programs designed to encourage "a cooperative flow of information from the school to the community and from the community to the school."249

Thus, those recent cases that have granted both intradistrict desegregation orders and interdistrict remedial orders indicate that since Milliken the lower courts have paid increasing attention to pluralistic interests in education. At the same time, as was previously noted, the lower courts have been increasingly willing to declare the deprivation of core-community socialization opportunities unconstitutional if segregation in the schools can be demonstrated, even when traditional state action is difficult to prove.250 These two trends suggest that courts are beginning to reach an accommodation between collectivist and pluralistic interests analogous to that achieved in other conflicts concerning the universality of and access to education.

III. INDIVIDUAL RIGHTS WITHIN THE PUBLIC SCHOOL SYSTEM

Courts do not only determine when the state can require education or can be required to provide education; they must also frequently find an appropriate accommodation among the various parties who have an interest in determining the specific content of the educational experience provided by the public school system. Par-

244. 402 F. Supp. at 1102.
245. "In our analysis, we have been mindful that rigid and inflexible desegregation plans too often neglect to treat school children as individuals, instead treating them as pigmented pawns to be shuffled about and counted solely to achieve an abstraction called 'racial mix.'" 402 F. Supp. at 1101.
246. 402 F. Supp. at 1102.
247. 402 F. Supp. at 1126, 1127, 1132.
248. 402 F. Supp. at 1133.
249. 402 F. Supp. at 1145.
250. See text at notes 187-205 supra.
ent-state conflicts are particularly common. On the one hand, the state seeks to instill through the educational system certain values and traits in its citizens. To achieve collectivist goals of academic achievement and socialization, school boards are empowered to prescribe curricula and to regulate conduct within the schools. But parents may differ with the educational decision-makers on the values that should be inculcated in their children and on the best means of utilizing the schools to guide their children's development. When confronted with school procedures and policies with which they do not agree, parents must often seek judicial vindication of their interests in shaping the character and attitudes of their children.

Numerous factors may affect the courts' readiness to protect the interests of parents who are opposed to decisions of school authorities and who desire to be free of the system's regulatory power in a given area. First, the state has an important interest in ensuring that the schools are operated efficiently so that the essential function of educating students is not disturbed. Accordingly, the parental desire for diversity of educational experience may be ignored if any deviation from standardized procedures or policies would significantly impair the administration of the school system. Second, the process of accommodating rights and interests and of choosing remedies often entangles courts in educational judgments that they do not feel competent to make. Rather than overrule the school board on a particular controversy involving the literary merit of a book or the appropriateness of an innovative teaching method, the court will probably defer to the board's judgment because of its "professional expertise" or its "democratic" mandate.

Finally, because a school system consists of numerous parties other than the school board and parents, such as students, teachers, and administrators, obeisance to parental demands may infringe not only on the interests of the state but on those of other groups as well. For example, a parent's attempt to insulate his child from exposure to a certain book may conflict with a teacher's interest in discussing it or with another student's interest in reading it. When confronted with such a dispute, courts frequently conclude that the best way to protect the rights of unrepresented groups is to defer to the school board, whose judgment ostensibly represents the best interests of the entire community. Such deference is manifested not only when judgments requiring expertise are involved, but also when the interests of conflicting parties must be reconciled. Yet board judgments should not be considered sacrosanct, for they may infringe on

251. See note 48 supra & text at notes 48-50 supra.
253. See text at note 467 infra.
254. See, e.g., text at notes 31-41 supra, 272 infra.
interests that merit safeguarding even from a genuinely democratic institution that reflects the majority of its constituents.

Despite the tendency of courts toward deference to school board decisions, increasing numbers of parents, students, and teachers are challenging the power of schools to influence the minds of students and the lives of both students and teachers. The following section of the Project will examine such claims and see how they are resolved. It will first analyze challenges to substantive curriculum and then will discuss conduct regulation and disciplinary procedures.

A. Challenges to the Substantive Curriculum

In September 1974, parents of elementary, junior high, and high school students in Kanawha County, West Virginia, protested the decision of the county school board to use new English textbooks in the schools. Few observers foresaw that this conflict would develop into a protracted and turbulent struggle over control of the curriculum. The degree of parental concern was reflected in the intensity of the dispute; before the year ended, the superintendent had resigned, the school had been boycotted, and one school had been bombed. The parents who objected to the new texts argued that the books encouraged permissiveness and thus posed a threat to traditional American morals and values. They further contended that their children would not receive a good education because of purported deficiencies in the contents of the books. Those who supported

255. See section III-A infra.
256. See section III-B infra.
using the texts asserted that the books prepared students to handle problems of adulthood and hence contributed to a meaningful education.

Parents sought an injunction against the use of the challenged texts, claiming that the school board's decision had violated their own rights of free exercise of religion and family privacy and the personal privacy rights of their children. In denying relief, the United States District Court for West Virginia stated that because the plaintiffs' claim was essentially only a disagreement with the values being taught in the schools, the complaint did not allege a violation of constitutional rights. The parents were thus left with a remedy whose inadequacy had brought them to court in the first place: the opportunity to exert political pressure on the school board for redress of grievances.

The dispute in Kanawha County highlights the central issues that are raised in controversies over curriculum: the right of teachers, parents, and students to affect school board decisions; the right of parents to insulate their children from policies with which they disagree; and the appropriateness of judicial intervention in such disputes. This section of the Project will first examine the sources and uses of school board power over curriculum and the historical background of curriculum litigation. It will then analyze the constitutional challenges of parents and teachers to board decisions—challenges based on the first amendment's establishment and free exercise clauses, a parental nurture right, the equal protection clause, a "free thought" right of children derived from the free speech clause, and a free speech right of teachers.

1. The Nature of School Board Authority over Curriculum

Except where restrained by the federal Constitution, the states possess plenary power over the public school curriculum. Accordingly, all states have enacted statutes that either require, pro-
hibit, or permit certain subjects to be taught in the public schools.262 Although the legislatures have generally established basic requirements, the bulk of authority with respect to curriculum matters has been either expressly delegated to the local school boards263 or sustained on an implied delegation of powers theory.264

States and school boards have exercised this plenary power to make the curriculum an effective instrument of socialization to the norms of the community, at least as these are perceived by the educational decision-makers.265 Pursuant to their authority to require courses "plainly essential to good citizenship" and to prohibit courses "manifestly inimical to the public welfare,"266 states generally have mandated a "highly prescriptive and noncontroversial" curriculum.267 The subject matter required in civics, government, and literature courses is selected to perpetuate and reaffirm "basic American ideals."268 Moreover, religiousity is considered an integral part of American life and thus frequently is emphasized in the curriculum. American history courses often dramatize the religious spirit that has purportedly influenced the nation's development.269 The hard-working, prudent, God-fearing individual is portrayed as the dominant force in the nation's growth.270 Thus, the


263. G. Johnson, supra note 34, at 81-83.


265. See R. Dawson & K. Prewitt, Political Socialization 147 (1969); Introduction, The "Inequality Controversy" (D. Devine & M. Bane eds. 1975). The transmission of selective knowledge has been accomplished through both the "hidden" and substantive curriculum. The "hidden" curriculum, the rules and regulations that are necessary for the efficient and safe operation of schools, has implicitly conveyed to students the values of order, discipline, and authority. D. Kirp & M. Yudof, supra note 46, at 126-34. See R. Dawson & K. Prewitt, supra, at 163; Berkman, Students in Court: Free Speech and the Functions of Schooling in America, in Education and the Legal Structure 35, 37 (Harv. Educ. Rev. Reprint Series No. 6, 1971). Critics of the school system assert that schools foster such traits as competitiveness and conformity, as well as passivity. See C. Jencks, Inequality 131 (1972).


268. R. Dawson & K. Prewitt, supra note 265, at 147, citing V. Key, Jr., Public Opinion and American Democracy 317 (1961). See P. Goodman, supra note 126, at 87, in which the author describes the school system "with its increasingly set curriculum, stricter grading, incredible amounts of testing" as a "vast machine to shape acceptable responses."

269. See generally R. Dawson & K. Prewitt, supra note 265, at 147-67; D. Kirp & M. Yudof, supra note 45, at 88-134.

270. See generally P. Slater, supra note 258; W. Taylor, Cavalier and Yankee 21 (1961).
public school curriculum can be used to transmit and foster particular values deemed by some as essential to achieving the collectivist goal of developing good and productive citizens. 271

When the social, political, and religious values expressed through the curriculum are not shared by some parents, judicial conflict-resolution may be necessary. In curriculum controversies, courts have traditionally deferred to the vast discretionary authority of the school board. 272 However, during two distinct periods of judicial activism, courts have questioned whether legislatures and school boards are willing to establish curriculum content that does not infringe upon fundamental individual liberties. 273

During the late nineteenth and early twentieth centuries, the prevailing judicial philosophy emphasized the protection of individual rights against governmental encroachment. 274 In this period, courts eagerly scrutinized the use of legislative powers and, accordingly, circumscribed legislative authority. Because statutory grants of power were generally construed narrowly, courts held that a number of local school rules and regulations exceeded the delegated authority of school boards. 275 Constitutional doctrine reflected this suspicion of the exercise of legislative power. Recognition of personal substantive due process rights imposed the first significant limits on compulsory education 276 and on the power of states to prescribe curriculum. 277

The demise of substantive due process made curriculum litigation a rarity between the 1930s and the late 1960s. 278 The judicial retreat from performing what were perceived to be exclusively legislative functions 279 resulted in judicial deference to school board au-

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271. R. Dawson & K. Prewitt, supra note 265, at 178. Education has been a powerful agent of political and social control because ideas and values can be disseminated through a centralized and uniform system. Id. at 179. See E. Friedenberg, Coming of Age in America 49, 168 (1965); Berkman, supra note 265, at 37; Hutchins, supra note 258, at 200; cf. M. Katz, supra note 43, at 117.


279. See B. Schwartz, The Law in America 159-63 (1974).
This deference was consistent with a general faith in administrative agencies, professionals, specialists, and most importantly, the over-all quality of American education. Courts professed a lack of competence to formulate educational policy and thus acceded to the "expertise" of educators and administrators, particularly where judgments of educational value were required. Furthermore, courts were conscious of their own undemocratic nature and consequently were reluctant to overturn local school board decisions that supposedly reflected community values.

The second period of judicial activism began with the 1954 Supreme Court decision in Brown v. Board of Education, which marked the emergence of judicial concern for the problems of public education and of judicial willingness to scrutinize the decisions of local school boards. Brown illustrated the loss of faith in American schools that would soon produce a new wave of curriculum litigation. Since the late 1960s, the frequency of litigation has intensified. Parents and teachers, seeking judicial protection of their right to control the classroom curriculum, have brought an unprecedented number of suits. Parents have most frequently been motivated by fear and dislike of the values taught in the schools. Teachers, on the other hand, have resorted to litigation to clarify their proper role in the educational system, for the instability in institutional rules and values has created uncertainty about their freedom to deviate from traditional pedagogical techniques. Although parents and teachers are linked together by a common, though amorphous, feeling of personal oppression, the courts have not yet clearly articulated a unified constitutional doctrine that embraces their claims.

2. Constitutional Challenges to the Curriculum

a. Pure establishment and free exercise clause challenges. During the 1940s and early 1950s when public school curriculum was not challenged directly in the courts, a number of first amendment religion cases defined the public school's power to inculcate, or sometimes accommodate, religious values. Since these
suits helped frame a relatively clear body of law limiting school board discretion, the establishment and free exercise clauses have subsequently provided the basis for most curriculum challenges, including bona fide religious claims and claims in which the underlying disagreement concerns a nonreligious value conflict between parents and the school board. These decisions provide particular insight into the scope of school boards' power to determine what ideas, values, and traditions can be transmitted to American children through the public school curriculum.

The majority of successful suits against the school boards have been based on the establishment clause,288 which has sometimes been viewed as erecting a "wall of separation between church and state"289 that prohibits any introduction of religion in the schools.290 Thus, as articulated in Everson v. Board of Education, "[n]either a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions or prefer one religion over another. . . ."291 The Court in Zorach v. Clauson,292 however, implicitly recognizing that schools necessarily shape values and attitudes and believing that a requirement of indifference or hostility to religion would actually result in a preference of nonreligion over religion, held that some accommodation of religion in the public schools was needed.293 In upholding the practice of releasing children from public schools during the school day so that they could attend religious instruction, the Court observed that

[we are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.294

288. See Nahmod, supra note 272, at 1479.
293. 343 U.S. at 314.
294. 343 U.S. at 313-14. The Court, in Abington School Dist. v. Schempp, 374 U.S. 203 (1963), reaffirmed this view: "It is true that religion has been closely identified with our history and government . . . . It can be truly said, therefore,
In recognizing that religiosity is a part of the "national" tradition and should be tolerated in the schools, the Zorach Court did not apply the absolute neutrality standard but instead sought to determine the extent to which government may accommodate certain religious theories.

In the religion cases courts have had difficulty defining the relationship between the duties and limitations of the state under the establishment clause and the rights of individuals under the free exercise clause. The need to maintain a proper balance is apparent, since untrammeled protection of free exercise could conceivably result in the establishment of religion. As the Court noted in Abington School District v. Schempp: "While the Free Exercise Clause clearly prohibits the use of state action to deny rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs." Although interpretations of the interplay between the establishment clause and free exercise clause have shifted periodically, the parameters of permissible religious activity in the schools now seem relatively clear.

Courts will not permit religious activity that might engender sectarian divisiveness, exacerbate consciousness of religious differences or exert psychological pressure on the nonparticipants to attend the religious activities. In his concurring opinion in McCollum v. Board of Education, Justice Frankfurter stressed that "[i]n no activity of the State is it more vital to keep out divisive forces than in its schools." Thus, free exercise of religion must be limited if it has the effect of either coercing minorities or giving official governmental support to a particular denomination or belief.

that today, as in the beginning, our national life reflects a religious people . . . ." 374 U.S. at 212-13. Zorach thus undermined the absolutist notion of separation established in Everson. See Kauper, supra note 290, at 1049. The free exercise clause was interpreted to be a limitation upon the establishment clause. Id. at 1049.

295. 343 U.S. at 312-13. See Kauper, supra note 290, at 1049; text at notes 269, 270 supra.


300. 333 U.S. at 231 (Frankfurter, J., concurring).

in the religious exercise is voluntary\textsuperscript{302} and the activity causes only a minor encroachment on the nonparticipants' rights.\textsuperscript{303} However, free exercise rights are accommodated to the extent of allowing children to leave school early to attend religious classes;\textsuperscript{304} apparently the Court did not believe that this practice is unduly divisive or puts psychological pressure on the children who remain in school.

The cases further reveal that activity presented in a purely "religious" as opposed to a "secular" context is forbidden.\textsuperscript{305} Although the boundary between religious and secular activity is often nebulous, courts attempt through this demarcation to encourage the student's exposure to a diversity of ideas but to prevent his indoctrination to a single set of religious beliefs.

The released time\textsuperscript{306} and prayer\textsuperscript{307} cases demonstrate how the courts distinguish between objectionable "pure" religious activity and permisssable secular activity. The ban on religious observances extends to officially composed prayers,\textsuperscript{308} the Lord's Prayer,\textsuperscript{309} and even to prayers that do not refer explicitly to God.\textsuperscript{310} However, recitation of "patriotic" passages containing references to God is clearly permitted.\textsuperscript{311} Moreover, while school facilities cannot be used by private teachers for religious instruction\textsuperscript{312} and the Bible cannot be

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\begin{enumerate}
\item[303.] See DeSpain v. Dekalb County Community School Dist., 384 F.2d 836 (7th Cir. 1967), cert. denied, 390 U.S. 906 (1968). However, one district court has found the following program to be permissible: the prayer is to be voluntary, conducted at least five minutes before or after the regularly scheduled class day, in a classroom other than the regular homeroom, and not signified by a bell. Reed v. Van Hoven, 237 F. Supp. 48 (W.D. Mich. 1965).
\item[304.] See Zorach v. Clauson, 343 U.S. 306 (1952).
\item[308.] See Engel v. Vitale, 370 U.S. 421 (1962).
\item[310.] See DeSpain v. Dekalb County Community School Dist., 384 F.2d 836 (7th Cir. 1967), cert. denied, 390 U.S. 906 (1968).
\item[311.] See Engel v. Vitale, 370 U.S. 421, 435 n.21 (1962).
\item[312.] McCollum v. Board of Educ., 333 U.S. 203 (1948). The Court held that
\end{enumerate}
\end{footnotesize}
used as part of religious ceremony in the schools, an objective study of the Bible in a secular educational program does not offend the establishment clause.

The nature of the distinction has also been explored in a series of cases involving the teaching of evolution in the public schools. These cases reveal that courts will not permit the introduction of religious ideas in the schools that show a preference for one religious group over another. In *Epperson v. Arkansas*, for example, a teacher requested a declaratory judgment on the constitutionality of an Arkansas statute making it unlawful in any state-supported school or university to teach or use a textbook that included evolutionary theory. The challenged law was similar to the Tennessee statute upheld in the celebrated Scopes "monkey" trial. It was unclear whether the Arkansas statute prohibited any explanation of the theory of evolution or merely proscribed teaching that the theory was true. The Court concluded that under either interpretation the statute was intolerable because it was based solely on the religious convictions of a particular sect. "The State's undoubted right to proscribe the curriculum in its public schools does not carry with it the right to prohibit . . . the teaching of a scientific theory or doctrine where that prohibition is based on reasons that violate the First Amendment."

Although the Court noted the importance of pro-

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317. 393 U.S. at 107-08.
318. 393 U.S. at 107.
tecting teachers and students from arbitrary restrictions on their academic freedom, it avoided this rationale and rested its decision upon the narrower grounds of the establishment clause.

The resurgence of the creationist movement has given new vitality to the controversy over the teaching of evolution. In Daniel v. Waters, public school teachers, some of whom were also parents, successfully challenged a Tennessee statute that explicitly favored the creationist view of evolution. A consistent result was reached in Moore v. Gaston County Board of Education, a dispute over the discharge of a teacher, who, in response to student questions, had approved Darwinian theory and agnosticism and had challenged the literal interpretation of the Bible. In granting the teacher relief, the court also preferred to base its decision upon the establishment clause rather than upon principles of academic freedom. The court warned that if the teacher were discharged because his ideas did not conform to local community beliefs, the students would be indoctrinated to a particular religious orthodoxy, which would amount to impermissible official approval of local religious values.

The evolution cases demonstrate the clear preference of courts for the certainty and simplicity of the establishment clause as a basis for limiting school board discretion. By relying on the historical principle of separation of church and state, courts can intervene in curriculum decisions without having to make the difficult assessments of educational value required by a free speech analysis or the equally difficult determinations concerning the importance and sincerity of individuals' religious beliefs required by a free exercise analysis. The establishment clause protects society against the imposition of a state religion. The remedy for its breach is a complete prohibition of the offending practice. In contrast, the free exercise clause protects individuals from infringement of the right to practice their religious beliefs. The remedy here is the creation of a curriculum exemption specifically tailored to curtail the particular kind of encroachment on the individual's religious right. Yet the courts are aware that a single exemption causes disruption in the school and

321. See LeClercq, supra note 290, at 209-10.
322. 515 F.2d 485 (6th Cir. 1975).
323. 515 F.2d at 487.
326. 357 F. Supp. at 1043.
that numerous exemptions may seriously impair the efficiency of the public school system. Thus, it is not surprising that very few successful challenges to the state's control over curriculum have been based on the free exercise clause.\(^{327}\)

One notable exception to this pattern is Wisconsin v. Yoder.\(^{328}\) Although primarily a compulsory education exemption case, Yoder can also be read as the most significant successful attempt by parents to shield their children from the public school curriculum.\(^{329}\) The decision, which upheld the right of Amish parents to remove from school their children who had completed eight grades, rested heavily on the special religious interests of the Amish community.\(^{330}\) The unique facts of Yoder made it unnecessary for the Court to rely on the establishment clause; it could grant a free exercise exemption because the extreme remedy of complete exemption from school disrupted the daily operations of the school system less than did other more limited remedies. The effect of the remedy for the plaintiffs in this case was analogous to the relief granted for establishment clause violations—absolute prohibition from an offending practice. Yoder suggests the very difficult and somewhat capricious distinctions that courts must draw in granting religious free exercise exemptions from subjection to the school system. A judge must initially determine whether the group seeking relief has a bona fide religious belief. Although the Court recognized that what constitutes a "religious practice" entitled to constitutional protection is a "most delicate question,"\(^{331}\) Yoder does articulate certain standards. Objections cannot be based on either purely personal values\(^ {332}\) or on a mere disagreement with the method of education in the schools. It seems certain, however, that predispositions of judges will influence their determination of the sincerity and importance of an individual religious belief.\(^ {333}\) In Yoder, their approval of the law-abiding history of the Amish people, whose nonconformity imposed no burdens on society, must have influenced the majority to find the

\(^{327}\) Two of the cases in which a free exercise violation has been found are Mitchell v. McCall, 143 S.2d 629 (Ala. 1962) (student was granted a limited exemption on the ground of a free exercise claim; she was compelled to attend physical education classes but was not forced to wear the required uniform or perform exercises which would be immodest in regular attire); Hardwick v. Board of School Trustees, 54 Cal. App. 696, 205 P. 49 (1921) (forced participation in school dancing program violated both the free exercise and establishment clauses).

\(^{328}\) 406 U.S. 205 (1972).

\(^{329}\) See text at notes 95-109 supra.

\(^{330}\) See 406 U.S. at 210, 211, 216, 219.

\(^{331}\) 406 U.S. at 215.

\(^{332}\) 406 U.S. at 216.

Amish beliefs sincere and important.\textsuperscript{334} Thus, the success of a free exercise challenge may depend on whether a religious group espouses philosophies or fashions a lifestyle with which the majority of the court empathizes.

Once a bona fide religious belief is established, there must next be a balancing of state and individual interests, a process in which judges are also apt to interject their own values. The (1) sincerity and importance of the religious belief and (2) the degree of infringement on the practice required by the belief must be balanced against (1) the state's interest in requiring certain educational activity, (2) the reasonableness of the educational requirements with respect to the underlying interest, and (3) the impact that a particular exemption would have on the requirement.\textsuperscript{335} In measuring state interests, courts must reach conclusions on the merits of different aspects of the state's educational program. Yet most judges clearly lack the expertise necessary to make these evaluations. Consequently, the Court in \textit{Yoder} urged that the judiciary exercise caution in weighing the necessity for a free exercise exemption against the state's legitimate interest in providing a basic education: "[T]he obvious fact [is] that courts are not school boards or legislatures, and are ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education."\textsuperscript{338} This warning, in effect, operates to constrain the use of the free exercise exemption.

As analyzed above, the parental challenges to curriculum that have defined the scope of first amendment rights have typically involved bona fide religious disputes. Yet a number of challenges are not based on pure religious objections but rather reflect disagreement of parents with nonreligious values implicit in the curriculum approved by the school board. In some of the complaints, the underlying value dispute is disguised through the use of first amendment establishment or free exercise clause language, while in others, different constitutional grounds are articulated.

b. \textit{Value-oriented challenges claiming religious and other constitutional violations.} The notion of a parental right to control the upbringing of children emerged in the late nineteenth and early twentieth centuries\textsuperscript{337} during the first period of judicial activism in education. In the majority of cases, courts upheld the school boards' selection of courses.\textsuperscript{338} However, several decisions affirmed the right of parents

\begin{itemize}
  \item \textsuperscript{334} See 406 U.S. at 222; Recent Development, \textit{Wisconsin v. Yoder}, 18 \textit{VILL. L. REV.} 955, 960 (1973).
  \item \textsuperscript{335} See Giannella, \textit{supra} note 333, at 1390.
  \item \textsuperscript{336} 406 U.S. at 235.
  \item \textsuperscript{337} See text at notes 53, 274-77 \textit{supra}.
  \item \textsuperscript{338} See, e.g., Samuel Benedict Memorial School v. Bradford, 111 Ga. 801, 36 S.E. 920 (1900) (students refusing to write compositions and enter debates may be disciplined by school authorities); \textit{State ex rel. Andrews v. Webber}, 108 Ind. 31,
to select courses on the ground that parents were better able to know what was best for their children.\textsuperscript{339}

The Supreme Court first recognized the right of parents to control the education of their children in \textit{Meyer v. Nebraska}.\textsuperscript{340} The Court invalidated a statute that prohibited teaching German to children who had not completed the eighth grade. Its opinion recognized both the parental right and the teacher's right to teach,\textsuperscript{341} and apparently viewed the fourteenth amendment as the source of both rights:

Without doubt, [the fourteenth amendment] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness of free men.\textsuperscript{342}

The collectivist purposes of the statute, fostering American ideals and preparing a citizenry for intelligent participation in civic matters, were considered permissible; however, the means adopted were deemed to exceed the powers of government.\textsuperscript{343} The view of the parental right advanced in \textit{Meyer} was affirmed in \textit{Pierce v. Society of Sisters}.\textsuperscript{344} A statutory requirement that all children from eight to sixteen years of age attend public schools, which was intended

8 N.E. 708 (1886) (school authorities not required to readmit student who had been dismissed for failure to participate in a music class); Sewell v. Board of Educ., 29 Ohio St. 89, 1 W.L.B. 338 (1876) (failure to participate in prescribed rhetoric instruction could be ground for suspension); E. REUTTER, JR. & R. HAMILTON, supra note 25, at 110; Note, \textit{Sex Education: The Constitutional Limits of State Compulsion}, 43 S. CAL. L. REV. 548, 556-57.

339. See, e.g., Kelly v. Ferguson, 95 Neb. 63, 144 N.W. 3039 (1914) (father has right to make a reasonable selection of courses for his child; upon father's request, the child was permitted to substitute music lessons for the required home economics course); State ex rel. Sheibley v. School Dist. No. 1, 31 Neb. 552, 48 N.W. 393 (1891). The father in \textit{Sheibley} refused to permit his child to study grammar because grammar was not taught when he went to school. The court, upholding the parent's right, stated: "The right of the parent . . . to determine what studies his child shall pursue is paramount to that of the trustees or teacher . . . . [N]o pupil attending the school can be compelled to study any prescribed branch against the protest of the parent that the child shall not study such branch . . . ." 31 Neb. at 556-57, 48 N.W. at 395.

340. 262 U.S. 390 (1923). Accord, Farrington v. Tokushige, 273 U.S. 284 (1927). In \textit{Farrington}, Hawaii's laws prohibiting instruction in a foreign language were held to infringe the fifth amendment rights of the owners of the Japanese schools and parents whose children attended the schools. The Court, citing \textit{Meyer} and \textit{Pierce v. Society of Sisters}, 268 U.S. 510 (1925), concluded that enforcement of the law would deprive the parent of his right to direct the education of his own child without unreasonable interference.

341. 262 U.S. at 400.
342. 262 U.S. at 399.
343. 262 U.S. at 402.
344. 268 U.S. 510 (1925).
to "standardize" children, was deemed to interfere "with the liberty of the parents and guardians to direct the upbringing and education of children under their control." The Court emphasized both the parental right and duty to educate their children: "The Child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

The decline of substantive due process in the 1930s weakened the doctrinal foundation of the parental right. Although the continuing vitality of personal substantive due process theory is apparent in recent cases developing the constitutional right of privacy, the precise scope and strength of the right is still unclear. Consequently, current litigants generally buttress their objections to prescribed curricula by raising a combination of establishment, free exercise, parental nurture and privacy claims. It is difficult, therefore, to calculate what potency the parental nurture right would possess if asserted by itself. However, even when the parental nurture right is advanced in combination with other constitutional claims, plaintiffs have had little success either in obtaining individual exemptions from curriculum requirements or in changing school board policy as a whole.

A recent example of an unsuccessful challenge to the public school curriculum that combined a parental nurture right claim with a free exercise claim is Davis v. Page. According to the tenets of the Apostolic Lutherans, the plaintiffs' sect, it is a sin to watch or hear movies, television, radio broadcasts, or images produced by audio-visual equipment. Hence, the parents charged that the children's exposure to audio-visual equipment interfered with the free exercise of religion and the parental right to control the children's education. The court held that when the audio-visual equipment was used for educational purposes, the children could not leave the classroom, although the children could be excused when the equipment was used for entertainment purposes. The parents also claimed that the health and music courses impinged on their free exercise right, but the court concluded that this was not a significant burden.

Because the parents' free exercise and nurture rights mandated

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345. 268 U.S. at 534-35.
346. 268 U.S. at 534.
347. See B. Schwartz, supra note 279, at 163.
350. 385 F. Supp. at 397-98.
the same standard of review, the court considered the rights conjunctively. The court was persuaded that allowing the children to leave the classroom every time audio-visual equipment was used would seriously impair the quality of the educational experience, although limited excuses were deemed permissible. Thus, an important factor in the decision was the court's concern that attempts to restrict the scope of education would frustrate the state's objective of exposing children to a "broad educational spectrum, . . . where . . . general knowledge is the right of all and not the privilege of a few." 351

Davis and Yoder are similar in that the parents in both cases based their claims for relief on the parental nurture and free exercise rights. Yet in Yoder, but not in Davis, the Court concluded that this combination presented a sufficiently strong claim to justify an exemption from the public school curriculum for the children. 352

This result is not surprising, for despite the similarity of the asserted claims, the judicial approaches in these cases differ significantly. 353 In Davis, the court interpreted the interests of the state and the child to be coterminous and in opposition to the parental interest. The assumption underlying this alignment is that the state has a duty to protect the child from the idiosyncratic religious views of his parents. This approach directly conflicts with Yoder, which upheld the parents' right to mold children's religious beliefs. 354 Yoder held that once the state's interest in exposing the child to basic skills and social norms is fulfilled, the parents should have at least some control over whether the child must receive advanced or specialized education. 355 Davis attempted to distinguish Yoder on the ground that the involvement of elementary school children necessitated greater state control, 356 but the distinction is inapt. The aspects of the curriculum to which the plaintiffs in Davis objected, the use of audio-visual equipment and the health and music classes, were clearly less essential to a basic education than post-eighth grade

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353. The court distinguished Yoder, in which the interests of the child were considered to be synonymous with those of his parents. It refused to believe that the child understood the "ramifications of his religious beliefs": It would be naive for this court not to recognize that the children's asserted freedom of exercise of religion is, in essence, that of their parents. In fact, the freedom asserted is the right of the parents to inculcate and mold their children's religious beliefs to conform to their own without the children being subjected to school programs and materials which the parents deem offensive and subversive of their beliefs.
354. 406 U.S. at 233.
355. 406 U.S. at 221-22.
study, an interest that Yoder held did not outweigh that of the Amish parents.\textsuperscript{357} Certainly if Yoder did not align the state interest with that of the child, then Davis should not have done so.

However, even if the Davis court had remained consistent with Yoder, it might not have granted a remedy for any one of several independent reasons.\textsuperscript{358} First, considerable concern was expressed regarding the potential impact of an exemption on the school. The court was primarily concerned with maintaining an integrated educational program and the “operational efficiency” of the school: “To allow students and parents to pick and choose which courses they want to attend would create a stratified school structure, where division and derision would flourish.”\textsuperscript{359} The remedy sought by the plaintiffs, a limited exemption from particular aspects of the curriculum, would impinge on the interests of other students and the school system in general. In contrast, the complete exemption remedy in Yoder did not burden the internal workings of the school system.

Second, even though the plaintiffs asserted a bona fide free exercise claim, the court was unsympathetic. Refusal to give relief may have stemmed from doubts concerning the sincerity and importance of the religious belief or from a judgment that infringement had not been severe. Since the sincerity of the plaintiff’s religious belief seems clear, the court’s skepticism might be attributable to a simple inability to empathize with this particular sect.

Third, the court’s belief that the plaintiffs’ objection was based on a disagreement with values taught in the schools\textsuperscript{360} is most significant, since it appeared to temper the court’s general attitude toward the plaintiffs. The court thought that a limited free exercise exemption was an inappropriate remedy in such a situation. It was “reluctant to become involved with school curriculums and educational philosophy”\textsuperscript{361} and stated that the proper forum for presentation of

\textsuperscript{357} See 406 U.S. at 224.

\textsuperscript{358} The court asserted, for example, that attendance of separate classes in which the objectionable teaching methods would not be used was a violation of the establishment clause. 385 F. Supp. at 401. Given the fact that courts do accommodate interests in establishment clause cases, see text at notes 292-94 supra, this conclusion is not self-evident. Separate classes would be no more divisive and would impose no greater psychological pressure than the released-time practice approved in Zorach v. Clauson, 343 U.S. 306 (1952), discussed in note 312 supra. Furthermore, the plaintiffs did not request that their beliefs be taught in school. If the Davis plaintiffs had sought to have their religious beliefs taught in school, the case would have been similar to Abington School Dist. v. Schempp, 374 U.S. 203 (1963), or McCollum v. Board of Educ., 333 U.S. 203 (1948).

\textsuperscript{359} 385 F. Supp. at 405.

\textsuperscript{360} 385 F. Supp. at 402-04, 405-06.

\textsuperscript{361} 385 F. Supp. at 406.
these parental objections to curriculum was the public school board meeting.362

Even though the approaches adopted by the courts differ, the result reached in Davis is not inconsistent with Yoder. In Yoder, the rejection of values taught in the schools did not preclude granting a remedy, since rejection of mainstream values and complete separation from worldly influence are essential to salvation in the Amish faith.363 Apparently, only objections to contemporary values wholly founded upon and inextricably connected with religious doctrine are entitled to religious protection.

Davis illustrates the predicament of a parent whose challenges to the general curriculum on constitutional grounds disguise an underlying disagreement with the values taught in school. Numerous constitutional theories have similarly been used by parents to attack specific courses. For example, the school board's authority to prescribe sex education courses has been challenged. Many such claims have alleged violations of the free exercise clause, but courts have rejected them using three different rationales: (1) the first amendment does not protect a religious sect from any or all objectionable views;364 (2) the first amendment neither requires nor permits the state to tailor its courses or programs of instruction to the religious principles of one sect; courts must protect freedom of speech as zealously as freedom of religion;365 (3) the possibility of conflict with religious beliefs in one area of the curriculum does not outweigh the governmental interest in establishing a course with a wholly secular purpose.366

Even when the parental right to control the child's education is asserted in combination with the religious claim, courts have held that the parental interest does not outweigh the broad authority of school boards to require sex education.367 Contentions that parents have an exclusive constitutional right to teach their children about sexual matters368 and that sex education classes unnecessarily in-

363. 406 U.S. at 209-12.
368. Citizens for Parental Rights v. San Mateo School Bd., 51 Cal. App. 3d 1,
fringe upon the constitutional zone of privacy have also been rejected. Equal protection objections have been dismissed on the ground that the sex education program applied equally to all students of varied religious beliefs. Finally, one court rejected the argument that a statutory excusal feature in a sex education program created an arbitrary and unreasonable classification.

Parents have not only objected to courses but also challenged the use of particular novels in literature classes on purported religious grounds. In *Todd v. Rochester Community Schools,* the parents claimed that religious references in Kurt Vonnegut's novel, *Slaughterhouse Five,* violated free exercise rights. The court responded that "[b]y couching a personal grievance in First Amendment language, one may not stifle freedom of expression"; a book's mere reference to religious matters was not a violation of any right. The court warned that if the parents' claim were upheld, children would be deprived of the opportunity to study great masterpieces: "Our Constitution does not command ignorance; on the contrary, it assures the people that the state may not relegate them to such a status and guarantees to all the precious and unfettered freedom of pursuing one's own intellectual pleasure in one's own personal way."

Similarly, in *Rosenberg v. Board of Education,* a court rejected the request to prohibit the use of *Oliver Twist* and *The Merchant of Venice* in the secondary schools. The plaintiffs asserted that the literature tended to engender anti-Semitic feelings, but the court concluded that suppression would not necessarily remedy bigotry and would have the undesirable effect of interfering with learning and free inquiry in the school. Suppression, the court stated, would be

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373. 41 Mich. App. at 329, 200 N.W.2d at 93.
374. 41 Mich. App. at 328, 200 N.W.2d at 93.
377. 196 Misc. at 543, 92 N.Y.S.2d at 345.
justified only if a book were written with the explicit purpose of fostering hatred toward a particular group.\textsuperscript{378}

In the cases that challenge the general curriculum, courses, or books, parents have sought protection, under the guise of free exercise, parental nurture, privacy, or other theories, of their right to socialize their children according to their own values. In response, courts have expressed an overriding concern that the personal attitudes and values of individual parents must not be allowed to stifle the free interchange of ideas in public school classrooms needed to achieve the educational system's goals.

Until recently, the notion that education serves to develop the critical inquiry and open-mindedness necessary for democracy has been considered applicable only to universities.\textsuperscript{379} The secondary school environment has been distinguished from the university setting in several ways: the secondary school acts more "\textit{in loco parentis} with respect to minors",\textsuperscript{380} secondary school teachers frequently lack the "independent traditions," broad discretion over teaching methods, intellectual qualifications, and experience of the university faculty; and secondary students and sometimes teachers are less intellectually and emotionally mature than their university counterparts.\textsuperscript{381}

While still emphasizing the indoctrination function of secondary schools,\textsuperscript{382} educators and courts in the last several decades have recognized that maximum exposure to ideas is also an important concern not only at the university level but also at lower levels of public education.\textsuperscript{383} As a result, judicial reluctance to allow parents to

\textsuperscript{378} 196 Misc. at 543, 92 N.Y.S.2d at 345-46. But see Presidents Council, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289 (2d Cir.), cert. denied, 409 U.S. 998 (1972), in which the court affirmed the school board's decision to remove a novel claimed by parents to be obscene from the junior high school libraries. The court stated that academic freedom was "scarcely fostered by the intrusion of three or even nine federal jurists making curriculum or library choices for the community of scholars." 457 F.2d at 292.

\textsuperscript{379} See Keyishan v. Board of Regents, 385 U.S. 589, 603 (1967) ("[T]he [university] classroom is peculiarly the 'marketplace of ideas' in which the exposure of students to a robust exchange of ideas is essential"); Developments, supra note 281, at 1050.


\textsuperscript{381} 323 F. Supp. at 1392.


This broad view of education has been justified by its tendency to strengthen
censor classroom discussion is understandable. *Citizens for Parental Rights v. San Mateo School Board*, 384 a recent California appeals court case, epitomizes the nature of the parental challenge and judicial response. The court rejected a parental privacy claim that was based on *Meyer* and *Pierce*.

*Meyer* and *Pierce* are supportive of the explicit freedoms of speech and press rather than the penumbral right of privacy. Citing these two cases, the Supreme Court drew the following conclusion in *Griswold v. Connecticut* [citation omitted]: "In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." Yet, this is the very thing that the plaintiffs would have this court do. *They seek to "contract the spectrum of available knowledge" by enjoining the county from continuing with its family life and sex education program.*

The court's primary emphasis on free speech is appropriate in the curriculum setting. Although recognizing a privacy right to withdraw entirely from public school would merely limit the knowledge of the individual claimant, allowing parents to alter the public school curriculum would encroach on the rights of other members of the school community to teach, learn, and speak. Thus, courts have subordinated the interest of individual parents in fashioning a curriculum to reflect their own values not only because satisfaction of all diverse desires would be administratively impossible, but also because satisfaction of the individualistic interest would be paradoxically counterproductive to preserving free expression.

Free expression is therefore necessary for the creation of an atmosphere in which the school boards can effectively carry out their collectivist functions of academic achievement and socialization. The exchange of ideas and exposure to diversity within the school curriculum prepare the student for life in a democratic society that values a certain degree of heterogeneity. They are a prerequisite to good citizenship, and it is in the state's interest to expose all children to the experience. and reaffirm the pluri-associative nature of American society in which "knowledge is the right of all and not the privilege of a few." *Davis v. Page*, 385 F. Supp. 395, 400 (D.N.H. 1974). *See Bright v. Isenbarger*, 314 F. Supp. 1382, 1391 (N.D. Ind. 1970), *affd.*, 445 F.2d 412 (7th Cir. 1971). Courts also have increasingly stressed the importance of education to the success and welfare of the child: "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954). *See, e.g., San Antonio Indp. School Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973); *Wisconsin v. Yoder*, 406 U.S. 205, 245 (1972) (Douglas, J., dissenting); *Davis v. Ann Arbor Public Schools*, 313 F. Supp. 1217, 1225 (E.D. Mich. 1970).

384. 51 Cal. App. 3d 1, 124 Cal. Rptr. 68 (1975).
Recognition that the free exchange of ideas is a fundamental value in the public schools does not, however, mean that individuals have no right to challenge the established curriculum. Clearly, school board policy may be as parochial and destructive of individual inquiry as parental censorship. When the public school curriculum serves as an instrument for the oppression of minority groups or for the suppression of ideas, it may violate the fourteenth amendment equal protection clause, the first amendment free speech clause, or both.

c. Direct challenges: equal protection and free speech claims.
An order to cease violating the equal protection clause could arise from two different types of claims. First, a group might assert that it did not receive an education equivalent to that of other groups because the public school curriculum was used to portray it unfairly and prejudicially. As the court indicated in Rosenberg v. Board of Education,\textsuperscript{388} elimination from the curriculum of a book or a course that fosters hatred or preaches the inferiority of a particular group would be justified.\textsuperscript{389}

A variant of this type of equal protection claim is that the group has been stereotyped in the textbooks. The stereotyping of women in texts as wives and mothers arguably denies female students equal protection of the law by providing them with a substantially different and inferior education to that provided male students.\textsuperscript{390} Ethnic or religious groups might make similar claims. For example, due to the failure of the school system to give proper credit to Blacks in texts and classes,\textsuperscript{391} Blacks may have been unable to develop the self-esteem necessary to function effectively in society and to take advan-

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\textsuperscript{388} 196 Misc. 542, 92 N.Y.S.2d 344 (Sup. Ct. 1949).
\textsuperscript{389} 196 Misc. 543, 92 N.Y.S.2d 346. \textit{See} text at notes 376-78 supra.
\textsuperscript{390} It has been demonstrated that people rise to what is expected of them. \textit{See} R. Rosenthal & L. Jacobson, \textit{Pygmalion in the Classroom} (1968); Milgram, \textit{Behavioral Study of Obedience}, 67 J. Abnorm. & Soc. Psych. 371-78 (1963). Expectations are often communicated to the child through school textbooks. Several studies have revealed that women and girls are given very limited roles in school texts and that boys are the main characters in most of the stories. While girls are depicted as passive and dependent, boys are portrayed as being adventurous, skillful, and creative. Women seldom have exciting jobs, while men are employed in a variety of interesting jobs. \textit{See generally} U'Ren, \textit{The Image of Women in Textbooks}, in \textit{Women in Sexist Society} (V. Gornick & B. Moran eds. 1971); Note, \textit{Teaching Woman Her Place: The Role of Public Education in the Development of Sex Roles}, 24 Hastings L.J. 1191, 1199-202 (1973). The contributions of famous women are rarely acknowledged in textbooks. In one text, Madame Curie is portrayed as a lab assistant to her husband, U'Ren, supra, at 222. Due to the inadequate representation of girls and women in texts, girls' aspirations and their potential for achievement are limited. \textit{See} Note, supra, at 1202. \textit{See also} Comment, \textit{Sex Discrimination: The Textbook Case}, 62 Calif. L. Rev. 1313, 1338 (1974).

tage of the "amazing world of diversity."\textsuperscript{392} Claims alleging such injuries from stereotyping have not yet been litigated; moreover, courts might be reluctant to engage in the psychological, sociological, and educational analyses necessary to decide these issues. It appears, however, that organized minority groups have successfully brought this problem to the attention of local boards and textbook manufacturers and have effected significant changes without judicial assistance.

The second type of equal protection claim involves a challenge to "sex tracking," the designation of different curricula for girls and boys in an attempt to train girls for certain occupations and boys for others.\textsuperscript{393} In \textit{Robinson v. Washington},\textsuperscript{394} the court held that the plaintiff's challenge to a regulation making home economics a degree requirement only for female high school students did not present a substantial federal question under the equal protection clause. However, in \textit{Sanchez v. Baron},\textsuperscript{395} the court reached a contrary conclusion on similar facts. The plaintiffs contended that a policy that excluded women from industrial arts classes resulted in a denial of fourteenth amendment rights by "arbitrarily channelling women, controlling their education and therefore, limiting their options in careers and life roles."\textsuperscript{396} In a preliminary hearing to determine whether the case should be certified as a class action, the court agreed that "girls in junior and senior high schools . . . are being discriminated against because of their sex."\textsuperscript{397}

The equal protection claim, like the free exercise and parental nurture claims, is in a sense an oblique attack upon the school board's power to socialize students. A more direct approach, which has not yet been attempted, would challenge on free speech grounds the board's power to shape and influence children's minds through the academic curriculum. Parents might assert, based on the principles articulated in \textit{West Virginia Board of Education v. Barnette},\textsuperscript{398} a right on behalf of their children to be free from interference with thought.

The disputed school board regulation in \textit{Barnette} required student participation in a flag salute ceremony and imposed penalties for refusal to participate. The Court held the regulation invalid as applied to a child of the Jehovah's Witness sect. Although the flag


\textsuperscript{393} See Note, supra note 390, at 1212.

\textsuperscript{394} Civil No. 9576 (W.D. Wash., April 6, 1971), cited in 2 WOMEN'S RIGHTS LAW RPRTR. 42 (1972).

\textsuperscript{395} Civil No. 69-C-1615 (E.D.N.Y. 1970).

\textsuperscript{396} Note, supra note 390, at 1212.

\textsuperscript{397} Civil No. 69-C-1615 (E.D.N.Y. 1970).

\textsuperscript{398} 319 U.S. 624 (1943).
salute conflicted with a religious principle forbidding all forms of idolatry, Justice Jackson's majority opinion emphasized that the decision was based upon a general right of freedom of thought rather than upon freedom of religion:399 "Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual."400

The Court found that the statute compelled either an affirmation of belief or a simulation of assent;401 such coercion was held to invade the sacred sphere of intellect that the first amendment was designed to insulate from official and political control. "One's right to life, liberty, and property, to free speech, to free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."402

The court noted that in the educational setting, individual rights may be particularly vulnerable to infringement because local school boards "may feel less sense of responsibility to the Constitution" than do other units of government.403 Despite its admitted lack of expertise in public education, the Court concluded that it must intervene when such constitutional invasions occur rather than defer to the school board:404 "[E]ducating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."405 While the Court noted, as it had in Meyer and Pierce, that the collectivist goal of national unity was permissible, it held that coercion of thought was an impermissible means.406 Such coercion was particularly objectionable in the public schools because "[p]robably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program shall compel youth to unite in embracing."407

The student who is indoctrinated to the beliefs and values espoused by the school board and transmitted through the curriculum is arguably coerced no less than the student in Barnette. As dis-

399. See Kauper, supra note 290, at 1062.
400. 319 U.S. at 634-35.
401. 319 U.S. at 633.
402. 319 U.S. at 638.
403. 319 U.S. at 637-38.
404. 319 U.S. at 640.
405. 319 U.S. at 637.
406. 319 U.S. at 640.
407. 319 U.S. at 641.
cussed earlier, the educational system's socialization function is well established and control by the board over the curriculum is a permissible means of discharging it. However, when the core collectivist interests of the state are not at stake, limits on the educational authorities' power to manipulate the curriculum's content may be reached, and the countervailing right of individual freedom of expression should be invocable. The student, compelled to attend school, is forced to learn the ideas approved by the school board; the child's mind could be shackled if no provision is made for exposure to different and opposing ideas. In both Barnette and the curriculum cases, diversity is sacrificed to the state's demands for ideological conformity.

A complicating factor in determining how school board power should be limited is that, unlike the parental nurture and free exercise rights, the right of freedom of thought belongs to the child. Of course, when the child is very young, the parent must bring the action to moderate board control over socialization on the child's behalf. However, it is at least arguable that since the process of socialization acts directly upon the student, and since education is primarily intended to benefit the child instead of the parent, a child of appropriate age should be allowed to assert independently his own rights and opinions. As Justice Douglas noted in his dissent in Yoder, "It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny." Douglas relied on Tinker v. Des Moines Independent Community School District, which held that students were "persons" possessing fundamental rights under the Constitution. In the language of Tinker, students are not "closed-circuit recipients of only that which the state chooses to communicate." It is difficult to determine, however, when children would be capable of asserting the right on their own behalf. The children in Tinker were sixteen-year-old junior high school students, but Justice Douglas believed that even a fourteen-year-old child generally possesses the necessary

408. See text at notes 251-52 supra.

409. Although this issue has not been decided by the courts, there seems to be no procedural problem if a child who does not have parental approval wishes to litigate. Federal practice provides that the "[c]ourt shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person." Fed. R. Civ. P. 17(c). This provision has been broadly construed. Thus, when an infant's interests conflict with those of his parents, the court has power to appoint a special representative. See C. Wright & A. Miller, 6 Federal Practice and Procedure § 1570, at 774 (1971).


412. 393 U.S. at 511.
emotional and intellectual maturity to exercise judgment with respect to his education.\(^{413}\)

A court that recognizes the child's right to be free from interference with thought should fashion a remedy that minimizes the socialization impact of the curriculum. Because a degree of socialization is inherent in the compulsory education system,\(^{414}\) an absolutely neutral curriculum is not possible and therefore could not be mandated. Indeed, a totally neutral curriculum would not be desirable; there are strong state interests to be furthered through socialization that must necessarily outweigh the individual right.\(^{415}\) However, specific curriculum changes could be made that would help safeguard the interest of the child. For example, schools could be required to give parents and students greater choice in the exposure of students to socially and politically charged subjects, such as sex education and the potentially role-defining studies of industrial arts and home economics. In courses such as history and political science that traditionally have emphasized consensus values, the state could be compelled to expose the student to a balanced presentation of ideas. A judicial requirement that students be exposed to a diversity of ideas would, in effect, represent a declaration that free expression is a consensus value and that the schools, by setting an example of openness to diverse ideas, must communicate it to the students.

The recognition of a right of free thought, however, would present problems similar to those that restrained courts in the religion and privacy cases, but which did not exist in *Barnette*.\(^{416}\) In the curriculum indoctrination situation, for example, courts must assess educational policies and values to determine a violation and fashion a remedy. It would be difficult, however, to determine when exposure has become indoctrination or when a balanced presentation of ideas has occurred. Such determinations require an understanding of subtle interactions and relationships in the educational system, including the manner in which various subjects, ideas, and techniques influence students. Clearly, courts do not possess the level of expertise necessary to make such judgments. In *Barnette*, on the other hand, the parents attacked the required observance of a ritual, which was merely an adjunct to the content of the curriculum. In that case, the determination of unconstitutionality was based primarily upon a judgment of good citizenship, which the Court felt


\(^{414}\) See text at notes 265-72 supra. See generally K. Dawson & K. Prewitt, supra note 265, at 45, 164; D. Kirp & M. Yudof, supra note 46, at 85-134.

\(^{415}\) See note 48 supra and text at notes 48-50 supra.

uniquely competent to make. Thus, the court's lack of competence in educational matters was less important.

There are, moreover, several problems with the proposed remedy for curriculum indoctrination. Separate programs for dissenting children could create detrimental divisiveness, which has been a continuing concern of the courts in religion cases and was further reiterated in *Barnette*. Further, the efficiency of school operations and the quality of education might be seriously impaired by a complex system of exemptions and special classes.

Thus, while the right to be free from interference with thought appears to have been given a sound theoretical foundation in *Barnette*, the courts' relative inexpertise in the field of education and the practical difficulties of formulating a remedy are likely to prevent them from recognizing such a claim, thereby leaving intact the school boards' pervasive control of curriculum.

3. **Free Speech Protections of Teachers' Rights**

In contrast to the courts' refusal to protect students in curriculum disputes is their recent willingness to make the protection of the rights of teachers the only area in which school board authority has been successfully challenged on free speech grounds. This new deference towards teachers' rights and the departure from traditional solicitude toward school board authority are consistent with the increasingly recognized role of the school as a "marketplace of ideas." 

Although the right to teach was recognized in *Meyer v. Nebraska*, the free speech right of teachers has long been limited because of their unique position in the classroom. On the one hand, the teacher serves as the "mouthpiece" of the educational authorities and must thereby implement prescribed policies and curric-

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417. See text at notes 298-304 supra.
418. See text at note 407 supra.
419. But see Miami Herald, Oct. 19, 1975, § A, at 1, 26, col. 2. Some members of the Florida legislature favor mandating alternative programs, thus preferring classroom disruption to the encroachment upon the right of parents to control their child's upbringing.
420. See text at notes 379-83 supra.
422. See, e.g., Adler v. Board of Educ., 342 U.S. 485, 492 (1952) (while teachers have "the right under our law to assemble, speak, think and believe as they will . . . [i]t is equally clear that they have no right to work for the school system on their own terms"); Beilan v. Board of Educ., 357 U.S. 399 (1958); Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927). However, the notion that employees could be compelled to relinquish constitutionally protected rights as a condition of public employment has since been rejected. See, e.g., Keyishan v. Board of Regents, 385 U.S. 589, 605-06 (1967). See Nahmod, supra note 272, at 1494-95. See also Comment, *The Dwindling Rights and the Closing Courthouse Door*, 44 FORDHAM L. REV. 511 (1975); Note, 48 N.Y.U.L. REV. 1176, supra note 383.
ulum. On the other hand, in his tutorial role, the teacher often identifies with the interests of the child and may thus be brought into conflict with administrators. Moreover, the teacher deals directly with parents and may consequently become entangled in disputes between parents and administrators concerning educational policy and values. Whatever his relationship to competing forces outside the classroom, within it the teacher wields extraordinary power. As a "role-model"423 and primary disciplinarian,424 the teacher has a powerful socializing influence on his pupils.425 Because the state compels his students to attend school, he addresses a "captive audience,"426 and the force of his ideas are not counterbalanced by the views of any comparable authority.427 While generally the teacher utilizes his power as the transmitter of the board's prescribed values and ideas, his special status allows him to modify the official curriculum, thus making the teacher a potential counterweight to the parochialism of an unchallenged school board program.

Obviously, the teacher stands at the crossroads of the educational system.428 Through him, the rights and interests of all members of the educational community can be thwarted or vindicated. The failure of courts to develop a unified theory of academic rights and obligations that accommodates all of the "unique institutional demands, social policies, and personal interests involved in the educational situation"429 is most evident in the case of teachers, who have been

423. Wishart v. McDonald, 500 F.2d 1110, 1115 (1st Cir. 1974); Comment, supra note 422, at 511.
424. See R. DAWSON & K. PREWITT, supra note 265, at 158.
427. Van Alstyne, supra note 426, at 856. Moreover, students are not free to respond to the teacher for fear of his sanctions. Id. at 856.
428. See generally Miller, supra note 258, at 839-40. The unique position of the teacher illustrates the potential countervailing interests of the state, parents, and students in the teacher's classroom expression. Since the state's ultimate interest is in the development of its children, it is therefore concerned with both how the teacher conducts class and the subject matter to which the child is exposed in the classroom. The parents' interest is in the intellectual and emotional development of their children. See Nahmod, supra note 272, at 1493; Note, 48 N.Y.U. L. Rev. 1176, supra note 383, at 1185. Finally, the student has a right to be exposed to a broad use of knowledge as well as to a classroom environment that will foster his intellectual and emotional development. See Nahmod, supra note 272, at 1494. In Minarchini v. Strongsville City School Dist., 384 F. Supp. 698 (N.D. Ohio 1974), students claimed that the school board's text selection contrary to faculty recommendations violated their first amendment learning freedoms. The court noted the fairness of the selection process and found for the school board. The court, emphasizing "the professional teacher's obligation to utilize individual teaching methodology," implicitly recognized students' academic learning rights as encompassing exposure to a variety of ideas. 384 F. Supp. at 707 (emphasis added).
429. Case Note, supra note 421, at 1348 n.40.
accorded rights only in piecemeal fashion. Still, as indicated earlier, the free speech right has at least been recognized, and the cases have evinced certain standards that identify its scope.

While some courts have recognized only the teacher's procedural right not to be dismissed without prior notice that his methods are unacceptable, several have overcome their fear of inexpertise in questions involving educational judgment and have recognized a substantive right of academic freedom. In these cases, courts balance the state's interests in the students' welfare and in operating an efficient school system against the teacher's freedom to conduct his classes in the manner he believes will most effectively implement the curriculum and stimulate critical thinking. Thus, the teacher's right is not absolute. For example, courts have generally rejected attempts by teachers to discuss matters completely unrelated to the subjects that the teachers were hired to present. In certain cases,

431. See, e.g., Parducci v. Rutland, 316 F. Supp. 352, 354 (M.D. Ala. 1970). Similarly, in Sterzing v. Fort Bend Indp. School Dist., 376 F. Supp. 657 (S.D. Tex.), vacated for reconsideration of relief granted, 496 F.2d 92 (5th Cir. 1972), the court recognized the substantive rights of a teacher to choose a teaching method, which, in the court's view, on the basis of expert opinion, served a demonstrated educational purpose, and the procedural right of a teacher not to be discharged for the use of a teaching method which was not proscribed by a regulation or definite administrative action, and as to which it was not proven that he had notice that its use was prohibited.
376 F. Supp. at 662. But see Oakland Unified School Dist. v. Olicker, 25 Cal. App. 3d 1098, 1109, 102 Cal. Rptr. 421, 429 (1972), in which the court stated that its sole function was to determine whether the teaching technique disrupted or impaired discipline in the classroom; it was not to assess the academic merit of the pedagogical technique.
433. When the teacher's deviation from the established curriculum was deemed to be more substantial, dismissals have been upheld. See Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969) (teacher's right to introduce the word "motherfucker" in context of discussion of article from Harpers magazine, in senior English class upheld); Webb v. Lake Mills Community School Dist., 344 F. Supp. 791 (N.D. Iowa 1972) (drama teacher's use of words "damn" and "son of a bitch" were deemed reasonably relevant to the subject matter she was employed to teach); Sterzing v. Port Bend Indp. School Dist., 376 F. Supp. 657 (S.D. Tex.), vacated for reconsideration of relief granted, 496 F.2d 92 (5th Cir. 1972) (damages for value of reinstatement granted to high school civics teacher who was dismissed because he raised and discussed controversial issues, used contemporary anti-war literature, and implemented a six-day section on race relations); Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ala. 1970). But see Mailloux v. Kiley, 323 F. Supp. 1387 (D. Mass.), aff'd, 448 F.2d 1242 (1st Cir. 1971) (teacher who had written "fuck" on the blackboard and asked students to define it during a discussion on societal taboos was reinstated; however, the court held that if a teacher uses a method that is relevant to the subject matter and approved by some experts but not by a preponderance of the teaching profession as having a serious educational purpose, he may be discharged if he was put on notice that the method was not permitted).

When the teacher's deviation from the established curriculum was deemed to be more substantial, dismissals have been upheld. See Brubaker v. Board of Educ., 502
courts have also circumscribed the right by insisting that the teacher give a balanced presentation of ideas to avoid indoctrination or proselytization of the students.\(^434\)

In assessing the educational value of pedagogical methods, courts have relied heavily upon whether the disputed language or concept is available to the student either in books in the school library\(^435\) or in other accessible literature,\(^436\) and whether the student already might be familiar with the controversial language or subject.\(^437\)

While courts have sought the expert opinions of administrators, professors, and teachers on these matters,\(^438\) reliance upon parental objections has been conspicuously absent.\(^439\)

\textit{Parducci v. Rutland}\(^440\) illustrates the general judicial approach in teachers' rights cases. In \textit{Parducci}, a high school teacher assigned Kurt Vonnegut's story "Welcome to the Monkey House" to her junior English class. Three students asked to be excused from the assignment, and several parents complained. The superintendent, describing the story as "literary garbage," ordered her not to teach it. She was subsequently dismissed on the ground that her assigned materials had a "disruptive effect" on the class. The court held that the dismissal violated the teacher's first amendment right of academic freedom. The court noted that although the right to teach was not one of the enumerated rights of the first amendment,\(^441\) it had been acknowledged by many courts as fundamental to the preservation of democracy. The court emphasized that first amendment protection of the right of academic freedom was necessary because unwarranted invasions would otherwise have a "chilling" effect on

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  \footnote{P.2d 973 (7th Cir. 1974), cert. denied, 421 U.S. 965 (1975) (dismissal of three teachers for distributing a poem that referred to the pleasures derived from smoking marijuana and urging students not to accept the discipline and moral tenets imposed on them was held not to violate the first amendment); Ahern v. Board of Educ., 456 F.2d 399 (8th Cir. 1972) (teacher drafted corporal punishment regulation during economics class); Moore v. School Bd., 364 F. Supp. 355 (N.D. Fla. 1973) (teacher's class statements concerning prostitutes and other illegitimate topics were not protected by the first amendment); Robbins v. Board of Educ., 313 F. Supp. 642 (N.D. Ill. 1970) (dismissal of English teacher because of her chronic tardiness, leaving class unattended on several occasions, discussion of disciplinary action taken against another teacher, use of offensive sexual references during class, and inadequate teaching methods held not to violate first and fourteenth amendments).}
  \footnote{435. See Note, 48 N.Y.U. L. Rev. 1176, supra note 383, at 1187 & n.78.}
  \footnote{437. See Note, 48 N.Y.U. L. Rev. 1176, supra note 383, at 1187 & n.78.}
  \footnote{439. See Nahmod, supra note 434, at 1052.}
  \footnote{440. 316 F. Supp. 352 (M.D. Ala. 1970).}
  \footnote{441. 316 F. Supp. at 355.}
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other teachers.\textsuperscript{442} However, cognizant of the disproportionate influence of the teacher and the "state's vital interest in protecting the impressionable minds of its young people from any form of extreme propagandism in the classroom,"\textsuperscript{448} the court acknowledged the need to temper the teacher's right in certain circumstances.\textsuperscript{444} In \textit{Parducci}, the decision to protect the teacher's right to assign the story was based on two factors: no substantial disruption resulted from the teacher's action and the story was, in the judgment of the court, appropriate for high school students.\textsuperscript{446}

\textit{Parducci} was the first case to apply the standard articulated in \textit{Tinker v. Des Moines Independent Community School District}\textsuperscript{446} of "material and substantial interference with school work or discipline" in the context of teacher free speech.\textsuperscript{447} The student's response in the classroom, which the court characterized as apathetic, was the sole basis for finding that there was no substantial disruption; parental objections were not considered.\textsuperscript{448} Rather than assess community and parental sensibilities to determine whether the story chosen for classroom study was obscene, the court focused on student maturity, sophistication, and experience.\textsuperscript{449}

The court's assessment of the educational value of the classroom materials markedly contrasts with the typical approach used in parental challenges. In agreeing with the teacher that the story had literary and social merit, the court in effect substituted its judgment of educational value for that of the school board.\textsuperscript{450} Apparently the
court found it easy to judge independently the story’s educational value in this case because the school board’s position was entirely arbitrary. The board had failed to articulate any standards to guide teachers in selecting literature for classroom study. In fact, inconsistency pervaded the entire system.\textsuperscript{451} The court noted that both the school library and the English department’s recommended reading list contained books with philosophies and language far more controversial than any to be found in the Vonnegut story.\textsuperscript{452} Because of the absence of standards, the teacher received no prior notice that her action violated Board policy, and, therefore, the dismissal violated her right of due process.\textsuperscript{453} Although the court was generally reluctant to interfere with the decision-making of the school board, it could not on the facts of the case “find any substantial interest of the schools to be served by giving defendants unfettered discretion to decide how the First Amendment rights of teachers are to be exercised.”\textsuperscript{454}

Although the teacher’s right of academic freedom is receiving increasing support in the courts, it appears that the judiciary is not intervening solely to protect teachers. For example, their references to student needs when determining the scope of a teacher’s academic freedom\textsuperscript{455} indicate that courts are also concerned that prohibition of controversial subject matter might diminish the intellectual opportunities of students.\textsuperscript{456} When the curriculum content issue is framed in terms of teacher rights, the teacher, in effect, becomes the guardian of academic freedom for the entire school community.

\textit{Parducci} also highlights the conflict between the academic freedom of teachers and the right of parents to influence their children’s education. Ostensibly, a teacher’s right of free speech, like all constitutional rights, should be immune from popular pressure. For example contravenes the basic political premise upon which the system is founded: parents would be denied access to the school board, the intended forum for parental communication of grievances.

\textsuperscript{451} 316 F. Supp. at 357, 358.
\textsuperscript{452} The English Department provided a reading list for teachers and students for each grade. The court concluded that J.D. Salinger’s \textit{Catcher in the Rye}, a recommended novel on the junior English reading list, contained far more controversial language than the assigned story. 316 F. Supp. at 357.
\textsuperscript{453} 316 F. Supp. at 357. This reasoning seems consistent with Meyer v. Nebraska, 262 U.S. 390 (1923). The statute in \textit{Meyer} forbidding foreign language instruction for students who had not passed the eighth grade was held to be “arbitrary and without reasonable relation to any end within the competency of the State.” 262 U.S. at 403. Emphasizing the sanctity of the right to teach, the Court stated that the legislature had “attempted materially to interfere with the calling of modern language teachers.” 262 U.S. at 401. See LeClercq, \textit{supra} note 290, at 237.
\textsuperscript{454} 316 F. Supp. at 357.
\textsuperscript{455} See text at notes 435-39 \textit{supra}.
ample, parental objections should not be sufficient to justify a dismissal for teaching evolution; such action would violate the teacher's rights under the establishment clause.\textsuperscript{457} Even so, parents do have a legitimate interest in the curriculum. They are understandably frustrated when the values they teach at home are undermined by a teacher who commands significant attention and respect from their children. This dissatisfaction is frequently manifested in parental objection to school board policy. Ignoring parental desires and granting teachers absolute freedom to control the content of classroom discussion would risk omitting from the children's educational experience important political and social values about which parents are properly concerned. Accordingly, the court in \textit{Parducci} recognized that the teacher's right of free speech was not unlimited,\textsuperscript{458} although it considered itself better able to define the scope of the right than either the Board or the parents.\textsuperscript{469}

Clearly, when assessing the merit of challenges to the curriculum, courts must not limit themselves to the judgments of professionals who, in designing educational policies, may overlook constitutional values. Rather, courts must scrutinize and reject arbitrary educational policies if constitutional rights are to be adequately protected. However, courts should also retain a degree of sensitivity to the reasonable concerns of parents. In \textit{Adams v. Campbell County School District},\textsuperscript{460} for example, the court indicated that parental concerns could be considered in setting school policy. The court stated that although the teacher's pedagogical method may have had educational value, the teacher did not necessarily have a constitutional right to adopt the method. Particularly in small communities, it concluded, the board possesses the right to require the teacher to use a more orthodox approach.\textsuperscript{461} Apparently, a school board action that amounts to an obvious surrender to parental pressures will be condemned by the courts without even an evaluation

\textsuperscript{457} See text at notes 315-26 supra.
\textsuperscript{458} 316 F. Supp. at 355.
\textsuperscript{459} The court concluded: “We do not question the good faith of the defendants in believing that some parents have been offended. With the greatest of respect to such parents, their sensibilities are not the full measure of what is proper education.” 316 F. Supp. at 356, quoting Keefe v. Geanakos, 418 F.2d 359, 361-62 (1st Cir. 1969).
\textsuperscript{460} 511 F.2d 1242 (10th Cir. 1975).
of the action on its merits. However, a change in school board policy that is responsive to reasonable parental involvement is usually presumed valid.

4. Conclusion

Because of their reluctance to review school board policy, courts have assumed a limited role in most curriculum matters. As a result, school board policies have been affirmed in the majority of cases. Courts have intervened only to protect certain fundamental rights: freedom from an established religion, free exercise of religion, equal protection of the law, and especially freedom of expression. Both by rejecting parental efforts to censor classroom discussion and by upholding teacher's rights of academic freedom, courts have consistently recognized the value of a "wide exposure to that robust exchange of ideas which discovers 'truth' out of a multitude of tongues [rather] than through any kind of authoritative selection." Even though the value of a free exchange of ideas has been stressed, courts have not addressed directly the problem of school board indoctrination. Many courts assume that the classroom is and should be an open intellectual community. Unfortunately, the ideal of academic freedom for teachers and students is still limited by the general presumption of validity accorded school board policies and curricula. Certainly the protection of free speech rights of teachers ensures some diversity, thereby mitigating the effects of school board indoctrination. However, even though it is apparent that a curriculum itself may embody a particular set of values, courts have not objected to the transmission of these values to students. The concern in the academic freedom cases is for protecting impressionable young minds only from the indoctrination of values not fostered by the state. In the final analysis, students, teachers, and parents who share the school board's value orientation are generally protected by the board's preferred position in curriculum litigation. However, those students, teachers, and parents whose values differ significantly from those of the majority in a community and who accordingly can-

462. The question of what impact parental preference should have on a teacher's rights also arises when a school board tries to dismiss a tenured teacher on the grounds of incompetency or inefficiency. In Beebee v. Haslett Pub. Schools, 66 Mich. App. 718, 239 N.W.2d 724 (1976), the court held that a disagreement over teaching philosophy was not "just and reasonable cause" for dismissal under the tenure law. The court noted that a teacher who was criticized by all parents "would surely have an effect on the school detrimental enough to jeopardize his or her tenure." However, the suggestion that a teacher had to be liked by everyone was "ridiculous on its face. Some parents will always criticize a teacher, especially one who utilizes methods different from those used when they went to school." 66 Mich. App. at 727, 239 N.W.2d at 729.


not influence school board policy are, for the most part, left unprotected by the courts.

B. **Control over Conduct, Behavior, and Discipline in the Public Schools**

Conflicts arise not only over what values and attitudes should be communicated through the academic curriculum, but also over communication through noncurricular activities. Thus, this subsection will examine the rules that govern the daily operations of the school and control the conduct of teachers and students. The educational authorities use this system of regulation of grooming, sexual behavior, noncurricular speech and other behavior no less than they use the academic curriculum to transmit particular values and attitudes. Moreover, because certain rules, such as limits on hair length, necessarily affect the individual outside of the school environment, conduct regulation involves even greater intrusion into the personal affairs of students and teachers.

Local school boards derive their power to establish such rules and to discipline teachers and students from state legislation that either proscribes specific conduct or delegates broad disciplinary authority to the boards. Such statutes often place the disciplinary power in the context of the school board's general operational powers, thereby emphasizing the relationship between conduct regulation and the concern for safety and operational efficiency.

In addition, courts have implied disciplinary power over students under the theory that schools act *in loco parentis*. By establishing a connection between school board authority and the responsibility of parents for the social development of their children, this doctrine in particular reflected the socialization purpose of many rules of conduct, especially those governing sexual and social behavior. The artificiality of this rationale for school disciplinary authority was appar-

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466. See, e.g., IOWA CODE § 279.8 (1975); KY. REV. STAT. ANN. § 160.290 (1971); ME. REV. STAT. ANN. tit. 20, §§ 353, 356 (1976-77 Supp.); NEB. REV. STAT. § 79-443 (1971). The Iowa statute, for example, provides that "[t]he board shall make rules for its own government and that of the directors, officers, teachers, and pupils, and for the care of the schoolhouse, grounds, and property of the school corporation, and aid in the enforcement of the same, and require the performance of duties by said persons imposed by law and the rules." IOWA CODE § 279.8 (1972).

467. See text at note 253 supra.

468. For a review of the *in loco parentis* doctrine as it applies to the school's plenary disciplinary power over pupils while in school, see Goldstein, *The Scope and Sources of School Board Authority To Regulate Student Conduct and Status: A Non-constitutional Analysis*, 117 U. Pa. L. Rev. 373, 377-84 (1969).
ent to many observers, since it is the parents who challenge the school's disciplinary action in court. 469 With the demise of in loco parentis theory, the school's power to regulate student conduct has been weakened considerably. 470 Accordingly, students and teachers have been increasingly successful in recent years in challenging school rules and disciplinary procedures. In rare instances courts have struck down a local rule because it exceeded the statutory power of the school board 471 or because it was unconstitutionally vague. 472 The majority of successful claims, however, have alleged violations of substantive constitutional rights, such as freedom of expression, substantive due process, and privacy.

This section of the Project first explores the scope of substantive rights of teachers and students in the areas of noncurricular free speech, grooming, and sexual behavior. It concludes with an examination of the scope of students' procedural rights, giving particular emphasis to the implications of expanded procedural safeguards for the school community itself.

1. Noncurricular Speech and Communicative Conduct

Students and teachers spend a considerable number of hours each day in school. Obviously, during this time a substantial amount of communication between teacher and student transpires that is not related to the substantive academic curriculum. While the distinction between curricular speech 473 and noncurricular communication is often tenuous, it is apparent that very different considerations do in fact influence the regulation of noncurricular or "casual" speech,

469. For a criticism of the doctrine as an inadequate explanation of the legal relationship between the student and the school, see Developments, supra note 281, at 1144-45. This study points out that the doctrine has met with disfavor because it confers powers but not responsibilities on the schools, because it artificially usurps power when parents expressly refuse their consent, and because it condones excessive regulation of conduct.

470. When the in loco parentis theory was at its height, courts upheld a variety of school board regulations, subjecting them to only minimal scrutiny. See, e.g., Board of Directors v. Green, 259 Iowa 1260, 147 N.W.2d 854 (1967) (excluding married persons from extracurricular activities held reasonable); State ex rel. Idle v. Chamberlain, 12 Ohio Misc. 44, 175 N.E.2d 539 (C.P. 1961) (excluding a pregnant girl held reasonable); State ex rel. Thompson v. Marion County Bd. of Educ., 202 Tenn. 29, 302 S.W.2d 57 (1957) (temporary suspension of married pupils is reasonable); Sherman v. Inhabitants of Charlestown, 62 Mass. (8 Cush.) 160 (1851) (excluding a female student because of her immoral monetary connections with men held reasonable).

471. See, e.g., Alvin Indp. School Dist. v. Cooper, 404 S.W.2d 76 (Tex. Civ. App. 1966) (exclusion of a mother held ultra vires). One commentator argues that this approach should be used more often. See Goldstein, supra note 263, at 376-77.


473. See section III-A supra.
once it is so identified, in the classroom. For example, although the school board clearly has a strong interest in ensuring that noncurricular activity does not obstruct the communication to students of the subject matter embodied in the curriculum, courts are less inclined to defer to the school board on issues that do not necessitate appraising the educational value of the prescribed curriculum and hence require no “professional expertise.”

Just as the content of the academic curriculum can be adjusted to socialize students to particular values, so, too, can noncurricular communication. To further the collectivist interest in training patriotic citizens, schools typically attempt to instill respect for flag and country. School programs generally include the recitation of the Pledge of Allegiance, the singing of the National Anthem and other patriotic hymns, and the performance of nationalistic rituals. Yet individuals have an interest in freely expressing their attitudes and ideas and in resisting standardization of beliefs. Students and teachers may, for example, seek to state their views on a broad range of issues and subjects concerning both the school and events outside the school's premises. They will be thwarted unless the school is viewed as a community whose functions and influences reach far beyond the mere imparting of knowledge to students.

The interest in resisting standardization of belief was supported by the Court in *West Virginia State Board of Education v. Barnett*, in which the notion of a right of “freedom of thought” for students was first articulated. The Court held that a student could not be expelled from public school for refusing to participate in a compulsory flag salute ritual, resting its opinion on the ground that the state could not constitutionally compel either belief or the appearance of belief through ritualistic conduct designed to inculcate certain values in its captive student audience. In distinguishing the flag salute ritual from academic instruction in American history and civics that would “tend to inspire patriotism and love of country,” the Court said that “[t]he issue here is whether this slow

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475. See text at notes 265-71 *supra*.
476. 319 U.S. 624 (1943).
477. 319 U.S. at 645 (Murphy, J., concurring).
478. The distinction between teaching and secular study on the one hand, and compulsion or proselytizing on the other, had also arisen in the context of establishment and free exercise of religion in the schools. See, e.g., *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963). The courts are unanimous that the latter is an unconstitutional infringement of individual rights, but in practice the line is not an easy one to draw. The problem is particularly acute when a teacher, who clearly exerts great influence over students, see text at notes 422-27 *supra*, exercises his right of free expression in the classroom.
and easily neglected route [academic instruction in civics and history] to aroused loyalties constitutionally may be short-cut by substituting a compulsory salute and slogan. 480

*Russo v. Central School District No. 1* 481 presented a similar fact situation to that in *Barnette* except that the plaintiff was a teacher instead of a student. School officials discharged the teacher because she stood silently at attention in front of her class during flag ceremonies instead of saluting the flag and reciting the Pledge of Allegiance as required by school regulations. The court framed the issue as whether the teacher's constitutional rights relative to those of students were lessened due to her voluntary presence in school and her function as a socializing agent of the state. 482 It then maintained,

> There is little room in what Mr. Justice Jackson once called the “majestic generalities of the Bill of Rights,” West Virginia State Board of Education *v.* Barnette . . ., for an interpretation of the First Amendment that would be more restrictive with respect to teachers than it is with respect to their students, where there has been no interference with the requirements of appropriate discipline in the operation of the school, *Tinker v. Des Moines Independent School District.* 483

The court recognized that the state has a legitimate interest in instilling a healthy respect for symbols of the national government in young minds, 484 but concluded that in this case the teacher's free expression of her personal beliefs had not undermined the state's interests: No class was disrupted and the students were not prevented from reciting the pledge, 485 since the ceremony proceeded under the supervision of a second homeroom teacher. 486 Furthermore, the court noted that because the tenth-grade students were approaching the age when they “form their own judgments,” 487 they were not susceptible to undue influence by their teacher's nonparticipation.

Both *Barnette* and *Russo* demonstrate that courts will not allow the state, in its attempts to inculcate certain basic values in students, to force individuals either to share the beliefs of the majority or to give the appearance of shared belief. The accommodation of the collectivist function of education with individual interests in diversity in these two cases parallels the accommodation achieved in *Pierce*

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480. 319 U.S. at 631 (footnotes omitted).
482. 469 F.2d at 631.
483. 469 F.2d at 631-32 (citations omitted).
484. 469 F.2d at 632.
485. 469 F.2d at 633.
486. 469 F.2d at 625, 626, 633.
487. 469 F.2d at 633.
v. Society of Sisters. The state may seek a moderate amount of general socialization but may not use its power to regulate the schools to achieve standardization of belief. As Barnette and Russo indicate, the state's ability to control behavior and conduct within the school is limited by the individual's interest in freedom of belief and thought.

The strength of the individual's interest in active expression of beliefs is, however, another matter. Active expression of an individual's ideas raises the possibility, as recognized in Barnette, that the rights of other groups in the school community might be infringed and that disruptive influences might be created. Several cases have dealt specifically with the active free expression rights of both students and teachers.

The Court in Tinker v. Des Moines Community School District, for example, declared that "students in school as well as out of school . . . are possessed of fundamental rights which the State must respect," but indicated that limits on the right of free expression are imposed "in light of the special characteristics of the school environment." In that case, the Court held that a student could not be suspended for wearing an armband to protest the Vietnam war. In so holding, the Court affirmed the meaning of Barnette—that the state may not use its power to regulate conduct in the schools to standardize belief—as applied to a student's active expression of belief. However, the Court noted that the student's right of free speech could be overridden upon a showing that the state's core interest—preserving order in the schools to permit educating and socializing students—has been seriously jeopardized:

[The student] may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline on the operation of the school" and without colliding with the rights of others . . . .

488. 268 U.S. 510 (1925).
489. "Active" expression refers to expression that requires an affirmative act on the part of the communicator. This distinguishes the "passive" expression in Barnette, in which the student took no affirmative steps to communicate an idea.
491. 393 U.S. at 511.
492. 393 U.S. at 506.
493. The Court characterized the armband as tantamount to "pure" speech, distinguishing cases on skirt length, clothing, hair style, or deportment in that none of these constituted pure speech. 393 U.S. at 507-08.
rially disrupts class work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. . . .

Infringement upon noncore state interests will not suffice: "[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." A reasonable forecast of a substantial disruption is necessary.

In thus affirming individual interests in active expression, the Court emphasized that public schools cannot be viewed solely as a conduit for teaching academic skills. Instead, the school serves a variety of other functions, including the facilitation of personal intercommunication among students, all of which are integral parts of the educational process. By imposing no conditions of age or maturity on the students' rights of free expression, the majority accorded significant strength to the value of a free exchange of ideas in the school community. Justice Stewart, in his concurring opinion, had urged that protection be limited to students "possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees, thereby recognizing the right only when students themselves are undeniably old enough to appreciate it. Although this approach has been rejected, the students' age might be a factor in forecasting disruption when appraising the extent to which the state's interest in avoiding disturbances in the school is threatened. Even so, the majority opinion presumes that all students, through communication with their peers, are able to contribute to the educational process; Tinker, therefore, stands for the proposition that all students regardless of age have a strong individual interest in expressing their views within the school community.

This same accommodation of the rights of students with the interests of the educational authorities also appears in lower court opinions that uphold the students' right to publish "underground" literature and distribute it in the schools. Although a conflict exists among the circuits over whether schools may constitutionally require students to submit the publication for review prior to distribution, the rights of other students to be secure and to be let alone. 393 U.S. at 508.

494. 393 U.S. at 513 (citation omitted). Justice Fortas earlier alluded to what these rights might be: "the rights of other students to be secure and to be let alone." 393 U.S. at 508.

495. 393 U.S. at 508.

496. 393 U.S. at 512.

497. The children involved in the case were of different age and grade levels: 15- and 16-year-old high school boys and a 13-year-old junior high school girl.


499. The Seventh Circuit has prohibited all forms of substantive prior approval. See Fujishima v. Board of Educ., 460 F.2d 1355 (7th Cir. 1972). Other circuits have been less sweeping in their treatment of the issue. The First Circuit, for exam-
Courts have uniformly placed a strict procedural burden on school officials to insure that arbitrary censorship does not occur.\textsuperscript{500} Courts also agree that the school may impose reasonable regulations on the time, place, and manner of distribution, and punish students who publish and distribute obscene or libelous literature.\textsuperscript{501} While the courts have occasionally approved regulations that effectively eliminate the underground student press from the schools,\textsuperscript{502} a showing of substantial harm or disruption to the school community is required. School officials thus are not allowed automatically to stifle student publications merely because they claim possible disruptive influences: "Perhaps 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."\textsuperscript{503}

The teacher's active right of free expression in the schools has also been recognized,\textsuperscript{504} for example in\textit{Tinker}, in which the Supreme Court indicated that the teacher as well as his students retains

\textsuperscript{500}See\textit{Eisner v. Stamford Bd. of Educ.}, 440 F.2d 803 (2d Cir. 1971).

\textsuperscript{501}See, e.g.,\textit{Fujishima v. Board of Educ.}, 460 F.2d 1355, 1359 (7th Cir. 1972).

\textsuperscript{502}See, e.g.,\textit{Katz v. McAulay}, 438 F.2d 1058 (2d Cir.),\textit{cert. denied}, 402 U.S. 996 (1971). In\textit{Katz}, a complete ban on solicitation of money in primary and secondary schools was upheld despite its impact as an effective ban on certain student publications. The rule was not aimed at expression but at the probability of harm to the students (especially those too poor to afford a donation) from multiple solicitations.


\textsuperscript{504}The distinction between "active" and "passive" expression,\textit{see note 489 supra}, is more attenuated with regard to teachers. It may be that a teacher who stands silently at attention during a flag salute ceremony, for instance, transmits values as directly as a teacher who wears an armband to class, as in\textit{James v. Board of Educ.}, 461 F.2d 556 (2d Cir.),\textit{cert. denied}, 409 U.S. 1042 (1972),\textit{discussed in note 507 infra}. A distinction may be that in the former case the teacher makes no effort to transmit the value to the student. Instead, the school system requires the teacher to perform a certain communicative (although nonacademic) act and the teacher passively resists. In the armband situation the teacher affirmatively seeks to communicate an idea.
constitutional rights in the classroom. However, the teacher cases are distinguishable from the student cases in the important respect that different interests must be accommodated. Thus, the state has no core collectivist interest in inculcating basic societal values or in promoting the academic achievement of a teacher, and, of course, parents have no countervailing interest in nurturing attitude and personality development. Instead, courts must consider the state's interest, articulated in *Tinker*, in avoiding disruption in the school's institutional functions as well as the special "interest of the State as an employer in promoting the efficiency of the public services it performs through its employees." 

The scope of the teacher's right of active free expression was dealt with in *James v. Board of Education*, in which the Second Circuit held that the dismissal of a teacher who wore a symbolic armband in class violated his right of free speech. The facts of *James* paralleled those of *Tinker*, and the court accommodated the countervailing interests in the same manner. The court expressly noted that the interest of the school in maintaining order and discipline was the same with respect to both students and teachers. Because there was no showing that the teacher's action actually disrupted or threatened to disrupt classroom activities, the school had failed to justify its restriction on the teacher's freedom of speech.

The *James* court confirmed that all public education, curricular and noncurricular, serves fundamental collectivist interests: "[A] principal function of all elementary and secondary education is indoctrinative—whether it be to teach the ABC's or multiplication tables or to transmit basic values of the community." Thus, one of the teacher's affirmative duties is to inculcate certain values that educational authorities have deemed desirable. Because his special status in the classroom and unique relationship with students enables the teacher to exert powerful influence upon students, the teacher may obstruct rather than assist the state in transmitting designated basic values to students. The court thus recognized that a teacher must not abuse his special relationship with students, but, in this instance, the court held that *James* had not done so. Wearing the armband violated his right of free speech.

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505. 393 U.S. at 506.
508. 461 F.2d at 572.
509. 461 F.2d at 573.
510. See text at notes 48-52 supra.
511. 461 F.2d at 573.
512. See text at notes 423-27 supra.
anti-war armband did not interfere with James’ teaching function, and there was no suggestion that his teaching was deficient in any respect. He had made no effort to proselytize his students, who regarded the armband as no more than a benign symbolic expression.513 Moreover, the court observed that the students were eleventh graders on the “eve of their first venture into the voting booth,”514 and indicated that a policy of shielding students from political controversy would be foolhardy: “Schools must play a central role in preparing their students to think and analyze and recognize the demagogue. Under the circumstances present here, there was a greater danger that the school, by power of example, would appear to the students to be sanctioning the very ‘pall of orthodoxy’ . . . which choked freedom of dissent.”515 The fact that the school authorities had tolerated other types of in-class teacher expression, including display of a pro-war bumper sticker,516 was not decisive. Rather, the court’s primary concern was that the teacher have the right to express his ideas freely though not to the point of propagandizing his students.517

The accommodation of interests achieved in James parallels that reached in the cases dealing with academic curriculum.518 Just as the teacher cannot present a course or book that advocates a particular political value to the exclusion of all others, a teacher cannot in noncurricular speech advocate a particular political view and suppress dissent. Thus, although schools do indoctrinate through the academic curriculum and through regulation of noncurricular behavior, and, although they have broad discretion to set classroom standards, they cannot infringe upon society’s interest in freedom of speech.

The Supreme Court decisions in Barnette and Tinker when read in conjunction with the Second Circuit decisions in Russo and James create a very broad right of freedom of expression for students and teachers in the classroom, although the right may be limited to prevent interference with the functions of teaching academic skills and socializing students. A student may, for example, freely express his beliefs by wearing an armband or button or by printing and distributing political literature if these actions are not likely to cause violence or other disruptions, although the student may be required to submit his material to a school official for prior approval. The teacher may also wear an armband or button to class and can even explain its meaning so long as he does not attempt to use his position.

513. 461 F.2d at 574.
514. 461 F.2d at 574.
515. 461 F.2d at 574.
516. 461 F.2d at 575.
517. See text at notes 433-43 supra.
to propagandize values inimical to the core collectivist interests of the state and does not cause disruptions in the school’s operations. Thus, these courts have viewed the public school classroom as a relatively open environment in which intellectual exchange and diversity are to be protected under the first amendment.

Not all courts, however, have arrived at an accommodation of the countervailing interests of the educational community that similarly safeguards free expression. One example is Guzick v. Dre­
bus,519 in which the court held constitutional the suspension of a sev­­
enteen-year-old, eleventh-grade student for refusing to remove a button soliciting participation in an anti-war demonstration. Unlike the impermissible ad hoc response of the school official in Tinker to the student’s armband demonstration, the court stated, the prohibition against buttons in Guzick was a long-standing, uniformly enforced rule that applied to all cause-supporting buttons not related to school activity. Most importantly, the school in Guzick, whose population was seventy per cent Black, had a history of racial disturbances catalyzed by racially inflammatory buttons.520 Although the message on Guzick’s button was not considered to be racially offensive, the court maintained that “abrogation of the rule would inevitably result in collisions and disruptions which would seriously subvert Shaw High School as a place of education for its students.”521 The court also noted the administrative difficulties in attempting to distinguish between permissible and impermissible buttons,522 and therefore reasoned that “school authorities should not be faulted for adhering to a relatively non-oppressive rule that will indeed serve our ultimate goals of meaningful integration of our public schools.”523

The question that faced the court in Guzick—how to accommodate the state’s interest in avoiding disruptive influences with the individual’s interests in free expression—is identical with that raised in Tinker. The court in Guzick appeared to believe that the state’s interests would be so extensively infringed by allowing the student to wear an anti-war button that his right of free expression had to be curtailed. The court, however, stated this conclusion in the following language: “Unless [the buttons] have some relevance to what is being considered or taught, a school classroom is no place for the untrammeled exercise of such a right.”524 Such language is needlessly overbroad. Its apparently neutral ban on all political

520. 431 F.2d at 596. One such racially antagonistic button read “Happy Easter, Dr. King” (the late Dr. Martin Luther King having been assassinated during the Easter season).
521. 431 F.2d at 598.
522. 431 F.2d at 598-99.
523. 431 F.2d at 597.
524. 431 F.2d at 600-01.
expression ignores the standard articulated in *Tinker* that only expression that substantially disrupts or risks substantial disruption in the classroom should be restricted. The court rejected as administratively impossible a less restrictive alternative of requiring prior approval of all buttons, although such an alternative has been approved and used successfully in some cases involving student newspapers.526 The court's language essentially appears to condone total prohibitions of noncurricular free expression in the classroom.526 Yet, if the state's interests in maintaining order are not impaired by the expression, such prohibitions are unnecessary and a different accommodation of interests is appropriate.

Another reading of *Guzick* is plausible. By upholding the ban on all buttons, a rule originally designed to avoid racial disruption and thereby to promote integration, the court might be viewed as attempting to promote racial balance.527 However, while such an objective might justify suppression of racially inflammatory buttons, it provides no rationale for prohibiting buttons with no racial overtones.528 Thus even under this interpretation of *Guzick*, the total limitation on noncurricular free expression in the classroom appears extreme and unnecessary.

Although courts have strongly supported the right of students and teachers to express their beliefs freely in the schools,529 they have curtailed this right when certain state interests, such as the communication of fundamental social values and the preservation of order in the schools, are infringed. Not surprisingly, the process of accommodating the countervailing interests in these cases concerning noncurricular communication parallels that employed in the compulsory education and substantive curriculum cases. Even so, it is apparent that courts are not always consistent in what strength they accord the competing interests.

2. **Student and Teacher Behavior**

Schools also further conformity to social norms as defined by the

525. See note 499 supra.

526. This may simply be the result of ill-chosen language. Earlier in the opinion the court did recognize the state's interest in avoiding disruption and appeared to be applying the *Tinker* disruption test. If so, a more appropriate conclusion would have been to hold that on the facts of *Guzick* the particular noncurricular expression would have caused substantial disruption, rather than that all noncurricular expression in the classroom is impermissible.

527. One newspaper analysis of school desegregation in Detroit, headlined "Tough Discipline Helps Make Busing Work," Detroit Free Press, April 19, 1976, § A, at 4, col. 2 (metro ed.), reported that a school characterized by "freeness" in discipline had been "torn by tensions, fear and declining faculty morale." The principal was replaced by someone who would exercise stricter control.

528. See 431 F.2d at 601 (McAllister, J., dissenting).

educational authorities through rules that attempt to regulate student and teacher behavior. Most litigation involves challenges to either hair\textsuperscript{530} and grooming codes\textsuperscript{531} or to rules governing social and sexual behavior. In each of these areas, courts have disagreed about whether there is a constitutional right of privacy or liberty that protects the proscribed conduct.\textsuperscript{532} Moreover, even when courts have recognized that a constitutional interest is at stake, they have disagreed about the extent to which such interests are protected within the school environment.


\textsuperscript{532} The point of transition from conduct that will trigger a free speech analysis to conduct concerning which such an analysis is inappropriate is by no means clearcut. For instance, some courts have characterized the individual's interest in the choice of personal appearance as a free speech interest. See, e.g., Finot v. Pasadena City Bd. of Educ., 250 Cal. App. 2d 189, 58 Cal. Rptr. 520 (1967) (teacher's right to wear a beard), a case predating \textit{Tinker}. While \textit{Tinker} specifically distinguished cases on skirt length, clothing, hair style, and deportment on the basis that none involved "pure speech," 393 U.S. at 507-08, \textit{Tinker} itself has been characterized by Justice Marshall as a case in which personal appearance merely took on a first amendment dimension. See \textit{Kelley v. Johnson}, 425 U.S. 238 (1976). (Marshall, J., dissenting). In isolated haircut/grooming cases a free speech analysis might be tenable. Consider, for example, an American Indian student who wishes to wear his hair in braids as a demonstrable symbol of his heritage. Hatch v. Goerke, 502 F.2d 1189 (10th Cir. 1974), a case presenting this fact situation, was argued not on behalf of the student seeking vindication of his free speech rights, but on behalf of the parents claiming that their rights to rear their children according to their own religious, cultural, and moral values had been violated. The Court held that there was no basis in the Constitution for such a claim. \textit{But see Wisconsin v. Yoder}, 406 U.S. 205 (1972), \textit{discussed in text at notes 95-109 supra.} See generally text at notes 340-87 supra. The student himself probably did not challenge the haircut regulation on the ground of free speech because the Tenth Circuit had barred that possibility in \textit{Freeman v. Flake}, 448 F.2d 258, 260-61 (1971). See note 530 supra. The constitutional right of privacy rather than of free speech better accommodates the teachers' and students' interests in lifestyle and personal appearance.

\textsuperscript{533} 425 U.S. 238 (1976).
ers. In upholding the regulations of New York’s Suffolk County Police Department, the Court did not decide, but assumed arguendo, that “the citizenry at large has some sort of liberty interest within the Fourteenth Amendment in matters of personal appearance . . .” 534 However, applying the principle that the rights of a state employee are necessarily qualified by the demands of his employment, 535 the Court held that the general liberty interest did not outweigh the police department’s need for “discipline, esprit de corps, and uniformity.” 536 The Court noted that the regulations were entitled to a presumption of validity because they were “unquestionably at the core of the State’s police power . . .” 537

The Kelley opinion is ambiguous in its implications for the regulation by schools of teachers’ and students’ personal appearance. 538 Most of the justifications asserted by Justice Rehnquist for regulating the appearance of police do not apply to teachers, even though both

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534. 425 U.S. at 244.
535. 425 U.S. at 245.
536. 425 U.S. at 246.
537. 425 U.S. at 247.
538. *Kelley* could be based on any of three independent rationales: (1) a special presumption of validity and special restrictions appropriate in the context of uniformed police employees, 425 U.S. at 247; (2) the general power of the state to restrict even fundamental rights of public employees, 425 U.S. at 245; or (3) a holding that the interest in personal appearance has a constitutional basis only in the broad principles of substantive due process as distinguished from the fundamental right of privacy involved in Roe v. Wade, 410 U.S. 113 (1973), and Griswold v. Connecticut, 381 U.S. 479 (1965). See 425 U.S. at 244. See also 425 U.S. at 248 (Marshall, J., dissenting). The first basis for decision would produce a very narrow holding. The second would have ramifications for teachers but not for students. The third, by requiring only minimal scrutiny of the infringing regulation, would signal a retreat from the expansion of constitutional personal autonomy that could affect all privacy interests.

Justice Rehnquist argued in dissent in *Roe v. Wade*:
If the Court means by the term “privacy” no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of “liberty” protected by the Fourteenth Amendment, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty. . . . But that liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective. 410 U.S. at 172-73 (emphasis added). If *Kelley* means that Justice Rehnquist has persuaded a majority of the Court to accept his view that privacy is really only substantive due process in modern dress, the Court will have come full circle in its analysis of personal liberty. Returning to the approach of cases like Meyer v. Nebraska, 262 U.S. 390 (1923) (right to study German in private school), and Pierce v. Society of Sisters, 268 U.S. 510 (1925) (right to educate one’s child in private school). This view would stop the expansion of the fundamental right of privacy that began in Griswold v. Connecticut, 381 U.S. 479 (1965) (right of access of married couples to information on contraceptives), evolved slowly through Stanley v. Georgia, 394 U.S. 557 (1969) (right to possession of obscene materials in the privacy of the home), and Eisenstadt v. Baird, 405 U.S. 438 (1972) (right of unmarried adults to use contraceptives), and culminated in the potentially expansive abortion decision in *Roe*. 
are public employees. Teachers are generally not expected to experience and are not trained to deal with situations that require "discipline, esprit de corps, and uniformity." The teaching profession is not a "uniformed civilian service" in which uniformity in personal appearance assists public recognition. It is revealing that other aspects of police regimentation that the Court apparently approved, such as the requirement that a uniformed police officer salute the flag, and that he not actively participate in local political affairs, have already been held unconstitutional when applied to teachers.

Nevertheless, the opinions in *Kelley* are relevant as models of the accommodation of countervailing interests that would have been employed had the Court faced the issue of teacher grooming regulations. Justice Marshall, in a dissent joined by Justice Brennan, vigorously argued that the individual's interest in personal appearance is of fundamental significance and possibly is derived from first amendment free expression guarantees. Justice Marshall is probably correct that none of his colleagues would uphold a law regulating the appearance or hair length of the general population. However, a teacher is not merely a member of the general population; he is also a public employee expected to assist in the transmission of the community's values to students. The majority would thus presumably ask if the grooming regulation for teachers bears a rational connection to any core interest of the state.

This was the question raised in *Miller v. School District No. 167*, in which the Seventh Circuit held that "the impact of teacher appearance on the educational process, and on the associational in-

539. 425 U.S. at 248.
540. 425 U.S. at 248.
541. 425 U.S. at 245-46.
543. Justice Marshall advances an interesting argument, supported by records of the debate on the Bill of Rights, that the interest in personal appearance was omitted from the express guarantees only because it was unthinkable that any democratic government would try to infringe so fundamental a right of personal liberty. 425 U.S. at 251-52.
544. 425 U.S. at 251 n.2.
545. Although Justice Rehnquist, by assuming arguendo an individual interest in personal appearance, did not reach this issue, Justice Powell, in a concurring opinion, found "no negative implication in the opinion with respect to a liberty interest within the Fourteenth Amendment as to matters of personal appearance." 425 U.S. at 249.
546. Justice Powell's separate opinion in *Kelley* bypasses the difficulties of choosing strict, minimal or "intermediate" scrutiny and asserts that when a state interest exists it must simply be balanced against that of the individual. 425 U.S. at 249.
547. 495 F.2d 658 (7th Cir. 1974).
terests of the children for whose education they are responsible." made promulgation of a grooming regulation by local school boards legitimate. Judge, now Justice, Stevens, writing for the court, accorded the school boards' policy a strong presumption of validity and maintained that, even if a particular appraisal of the need to regulate a teacher's appearance was incorrect, "the importance of allowing school boards sufficient latitude to discharge their responsibilities effectively" outweighed the individual's interest in determining his own appearance. The court recognized that the school board, elected by the community, is the institution responsible for protecting the interests of parties who are not represented in the litigation. Judge Stevens explained that students "have a valid interest in not being compelled to associate with persons they or their parents consider objectionable," and thus it is appropriate for the school board to choose the teachers with whom the students will associate.

It is evident that the result in Miller turned more on the weakness of the teacher's interest in personal appearance than on the strength of the state's interests: "[W]e merely hold that as long as no greater interest than that involved in this controversy is at stake, the decision is one that the school board is entitled to make." Accordingly, if the teacher's interests had been stronger, for instance, if the teacher's free speech or other constitutional right had been infringed, the court would not have deferred to the school board but would instead have intervened to protect the teacher's interest. When not joined with other rights, however, the teacher's interest in setting his own appearance can be regulated in accordance with his socializing and role-model functions.

Unlike teachers, students do not voluntarily assume their positions in school and, of course, are not public employees. Since students are compelled to attend school, rules of conduct and behavior should be more closely scrutinized for possible infringement of personal rights. Moreover, a regulation governing the appearance

548. 495 F.2d at 667.
549. 495 F.2d at 667.
550. 495 F.2d at 667.
551. 495 F.2d at 668.
552. See, e.g., text at notes 440-44 supra.
553. Some courts have seen the relationship between student and teacher regulation but have gone the other way to strike down student codes where teachers were unregulated. See, e.g., Miller v. Gillis, 315 F. Supp. 94, 101 (N.D. Ill. 1969) ("[T]he court is a clear stroke of arbitrariness to operate on the basis that the appearance of a student with long hair would be substantially disruptive, when in the same school teachers who stand before these 2,500 students wearing hair equally long or longer are not disciplined or suspended or made to conform to the school code").
554. Some judges believe the fact that a student's long hair follows him home is partially dispositive of the question of the regulation's validity. See, e.g., Richards v. Thurston, 424 F.2d 1281, 1285 (1st Cir. 1970); Breen v. Kahl, 419 F.2d 1035,
of all public school children should be examined closely since it approximates the regulation of the general populace that Justices Marshall and Brennan assumed would offend any constitutional conception of personal liberty. \(^{555}\)

Any legislation, even under minimal constitutional scrutiny, must bear "a rational relation to a valid state objective." \(^{556}\) It is well established that mere standardization is not a valid state objective. It not only exceeds the state's permissible collectivist interest in moderate socialization \(^{557}\) but also contradicts the principle that schools should facilitate diversity in expression and belief. \(^{558}\) Thus, it seems clear that the school board cannot justify regulation of student hair length solely on the rationale that, as the educational body expressing the community's majority will, it is empowered to inculcate particular values in children.

However, school authorities have advanced other justifications for grooming codes that are ostensibly based on the school's interests in avoiding disruption and in promoting safety and operational efficiency. Some cases note that students who disapprove of their classmates' long hair have caused disturbances in school, such as fights, taunting, or even attempts to cut the hair by force. \(^{559}\) By imposing restrictions on the student's personal appearance instead of directly controlling the audience-generated disturbance, however, these courts allow short-haired disrupters to deprive the student of the rights he seeks to assert. Other cases refer to disruptions caused by the student himself, such as persistent, distracting combing of long hair in class \(^{560}\) and the creation of safety hazards in laboratory classes, \(^{561}\) while still others point to problems arising when the student represents the school in competition. \(^{562}\) Each of these concerns is legitimate, but none necessitates requiring short hair on students. Disruption could be dealt with directly, students could wear hair restraints for

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\(^{559}\) See, e.g., Ferrell v. Dallas Indp. School Dist., 392 F.2d 697, 700-01 (5th Cir. 1968).


\(^{561}\) But see Karr v. Schmidt, 460 F.2d 609, 613 (5th Cir.), cert. denied, 409 U.S. 989 (1972) (rejecting the safety hazard rationale).

laboratory and sports activities, and for such activities as band competition, in which aesthetics may be a factor in scoring, students might even wear wigs.

Each of the rationales in favor of regulating student hair length might survive minimal scrutiny by a court. However, if school authorities are actually attempting to impose their personal views of proper appearance under the guise of safety and efficiency requirements, then their actions amount to a general regulation of the citizenry, which courts should not condone. Of course, this does not mean that schools can never regulate student hair length: "An epidemic of lice might conceivably authorize the shearing of locks." Yet, where the essential purpose of a student hair-length regulation is standardization of the student body, the student's "liberty interest" in his own personal appearance and not the state's collectivist interest should prevail. Indeed, if anyone should limit a student's freedom in this regard, it is his parents, who are ultimately responsible for the student's nurture and socialization.

In contrast to regulations on personal appearance, school rules governing the sexual and social behavior of students and teachers rest solely on the collectivist interest in socializing students to community views of morality and decency. The scope of constitutional protection for the countervailing privacy interest in matters of sex, procreation and family life, like the scope of constitutional protection for the individual's interest in his appearance, is uncertain.

Both students and teachers have challenged school regulations that attempt to control sexual behavior. The student challenges have typically involved rules or decisions that penalize pregnancy, sexual promiscuity, and motherhood, regardless of

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563. Fear that the entire band or other group would lose points because of the appearance of a few students was a motivation for the rule in Dostert.
whether the student is wed or unwed. The teacher cases have typically involved pregnancy out of wedlock, cohabitation, homosexuality, adultery and acts of sexual promiscuity, both public and semi-public.

Until recently, it appeared that the expansive notion of personal autonomy articulated in Roe v. Wade protected a broad range of individual sexual choice. However, the Supreme Court's decision


574. See, e.g., Freeman v. Inhabitants of Bourne, 170 Mass. 289, 49 N.E. 435 (1898).


in Doe v. Commonwealth's Attorney\textsuperscript{578} summarily affirmed a lower court's judgment that Virginia's sodomy statute was constitutional both on its face and as applied to consenting adults practicing homosexuality within their own home. The trial court concluded that the state's interest in the "promotion of morality and decency" and in the prohibition of conduct deemed "likely to end in a contribution to moral delinquency" permitted the exercise of its legislative power.\textsuperscript{579} In fact, the state's interest was deemed sufficiently strong to outweigh the individual's interest in fashioning his own private sexual lifestyle. The right of privacy was held not even to protect the homosexual act within the seclusion of one's own home. This decision appears consistent with the Court's holding in Kelley, in which the right of privacy as identified in previous cases involved "certain basic matters of procreation, marriage and family life."\textsuperscript{580} Thus the current scope of constitutional protection for nonmainstream sexual behavior is narrow. Obviously, this type of conduct on the part of teachers or students would not be protected under present constitutional doctrines. The remaining question is whether conduct clearly within the constitutional right of privacy, such as marriage, pregnancy, or even parenthood out of wedlock,\textsuperscript{581} may be regulated by schools in furtherance of their socialization function.

The privacy of unwed female teachers who are pregnant or who have children is particularly vulnerable. Regulations concerning unwed pregnancy typically punish only female teachers because the consequence of the premarital sexual conduct is apparent only in the woman. Similarly, rules denying employment to unwed parents weigh more heavily against the female, perhaps because males less frequently rear their illegitimate children. Courts have responded to the inequity by finding regulations that deny employment to parents of illegitimate children to be violative of due process and equal protection rights.\textsuperscript{582} Courts have also acknowledged, however, that the state does have an interest in creating an environment in the schools that does not so offend moral sensibilities as to disrupt the educational process.\textsuperscript{583} As in the grooming cases, school authorities attempt to justify regulation of teacher conduct by pointing to student emulation of teacher behavior and to the responsibility of teachers to inculcate

\textsuperscript{579} 403 F. Supp. at 1202.
\textsuperscript{580} 425 U.S. at 244.
\textsuperscript{583} 371 F. Supp. at 31.
fundamental values in students. In offering this justification, school authorities presumably must demonstrate a “compelling” reason for regulating a teacher’s constitutionally protected sexual behavior, such as a disruptive impact on the school or actual harmful influence on student behavior. At least two courts have searched for such compelling reasons and have been unable to find them in cases involving private homosexuality and cohabitation. A like result was reached on statutory grounds when one court reversed the discharge of a tenured teacher who had married when seven-and-a-half months pregnant. The tenure law’s provision requiring dismissal for “immorality” was deemed to apply “only where the record shows harm to pupils, faculty, or the school itself,” none of which was demonstrated.

Although courts generally agree that to justify dismissal a teacher’s conduct must have adverse in-school effects, it is not clear exactly what type of harm will suffice. One court, in concluding that the dismissal of a teacher for cohabitation did not violate what the court identified as her “substantive due process” rights, was persuaded that widespread community disapproval of the teacher’s behavior “would make it difficult for [the teacher] to maintain the

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584. The Fifth Circuit summarized the school’s three rationales offered to justify the regulation: (1) unwed parenthood is prima facie proof of immorality; (2) unwed parents are improper communal role models; and (3) employment of unwed parents as teachers materially contributes to the problem of school-girl pregnancies. None of the rationales was sufficient to support the regulation. The third rationale was dismissed as being “without support, other than speculation and assertions of opinion.”

585. Because the Fifth Circuit invalidated the rule in Andrews on traditional equal protection grounds, it did not reach other substantive constitutional grounds such as the right to privacy or the right to procreation.

586. Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969) (holding that a teacher could not be discharged for homosexuality unless a relationship was established between the conduct and fitness to teach).

587. Fisher v. Snyder, 346 F. Supp. 396 (D. Neb. 1972), holding that discharge for conduct unbecoming a female teacher (on several occasions males not related to the teacher had stayed in her apartment for periods ranging from one night to one week) violated the teacher’s rights of association and privacy in the absence of proof that her conduct affected classroom performance, her relationship with her students, or other state interests.


589. The same argument has been successful even where the conduct violates a criminal law. See, e.g., Board of Trustees of Santa Maria Union High School Dist. v. Judge, 50 Cal. App. 3d 920, 123 Cal. Rptr. 839 (1975) (a teacher cannot be dismissed from service on grounds of “evident unfitness for service” or “moral turpitude” unless his actions indicate his unfitness to teach, which was not demonstrated by conduct that consisted of growing a single marijuana plant).

proper educational setting in her classroom." 591 Thus, at least for this court, concern that majoritarian desires might infringe on important individual interests, a concern that has caused community sentiment to be largely overlooked when freedom of speech is at stake, 592 is less important in the area of sexual behavior. 593 Still unresolved as well is whether harm to students can be inferred from mere awareness of the teacher's behavior or whether it must be empirically proved that students have been adversely influenced by the teacher's example. 594

The underlying assumption in the cases involving teacher behavior is that the schools do have a legitimate interest in regulating not only the conduct that might adversely affect the social and sexual development of students, but also the actual behavior of students. The cases involving direct regulation of student conduct must answer two related questions: whether students possess the same ability to make decisions about social and sexual matters as adults, 595 and whether schools should have significant responsibility in this area.

The argument that students lack the capacity to make important decisions has not persuaded courts to sustain rules that deny married students the right to participate in school activities to the same extent as students who are not married. 596 Moreover, the Supreme Court

591. 387 F. Supp. at 1247. The court cited a petition signed by about 140 community members as evidence of the strong community reaction to the teacher's behavior.

592. See text at notes 492-503 supra.

593. See also Burton v. Cascade School Dist. Union High School No. 5, 353 F. Supp. 254 (D. Ore. 1973), aff'd, 512 F.2d 850 (9th Cir. 1975), which held the statute authorizing dismissal for "immorality" unconstitutionally vague, but which refused to reinstate the homosexual teacher fearing the disruption that may have been engendered within the school district, staff, student body, and community. This holding was over a dissent that emphasized the dangers of majoritarian dictatorship:

It is clearly inappropriate to consider community resentment in deciding whether to reinstate a person to a position from which she was unconstitutionally removed . . . . If community resentment was a legitimate factor to consider, few Southern school districts would have been integrated. One of the major purposes of the Constitution is to protect individuals from the tyranny of the majority. That purpose would be completely subverted if we allowed the feelings of the majority to determine the remedies available to a member of a minority group who has been the victim of unconstitutional actions. 512 F.2d at 855-56.


595. Justice Powell, dissenting in Goss v. Lopez, 419 U.S. 565, 590-91 (1975), points to the "long history of our law, recognizing that there are differences which must be accommodated in determining the rights and duties of children as compared with those of adults . . . . Until today, and except in the special context of the First Amendment issue in Tinker, the educational rights of children and teenagers in the elementary and secondary schools have not been analogized to the rights of adults or to those accorded college students."

has refused to limit the constitutional right of free speech according to age. Even so, the view that students who have not reached their majority do not enjoy the same constitutional right of privacy as adults merits further examination. Sexual activity can arguably be distinguished from free speech in that it risks substantial harm to the student. Rules that attempt to discourage youthful sex and marriage by limiting the educational opportunities available to such students reflect a conventional wisdom that young lives will be ruined if students assume family responsibilities for which they are ill-prepared. Ironically, many of the most destructive effects of teen-age marriage— isolation from peers, uncompleted education, unemployment—result directly from school policies that ostracize married students.

Even if it is assumed that students are "still in a state to require being taken care of by others" and that they should be firmly guided in their decisions concerning sexual conduct and marriage, the question remains whether schools or parents are better suited to perform this function. While it may not be realistic to recognize a fourteen-year-old's privacy interest in making his or her own decisions in the constitutionally protected area of marriage, procreation, and family, it is entirely reasonable to assert that such decisions, being within the familial zone of privacy, should be regulated by the parents and not by the state. Certainly those parents who do supervise the development of their children's social lives expect that schools will not undermine their efforts by transmitting different values. Many parents, however, are reluctant to offer sexual guidance to their adolescent youngsters. These parents would prefer that the schools assume both the educational and socialization burden in this area. The question of which parental view, if any, should prevail is made even more complex if a privacy right of married or pregnant students is recognized; this right may conflict with the parents' interest in controlling their children's sexual and social behavior.

Many courts are inclined to allow schools to resolve these conflicts in most circumstances. Even though the decision to marry or...
have children is constitutionally protected, the school has a compelling interest in insulating other children from the influence of sexually advanced students. For example, one court has held that the equal protection clause forbids excluding unwed mothers from school unless they are found to be "so lacking in moral character that their presence in school would taint the education of the other students." The court indicated, however, that the school could exclude the female student during her pregnancy, for purposes that were both "practical and apparent." Still another court, while acknowledging that the right of privacy protects a student's decision to marry or have children, found reasonable the school board's policy of excluding from day classes students who marry or become parents, though accredited night school education remained open to them: "[such] students . . . are normally more precocious than other students. Because of their precociousness, it is conceivable that their presence in a regular daytime school could result in the disruption thereof." Some courts, however, have required schools to show a strong likelihood that the presence of married students actually causes disruption or disciplinary problems.

Generally, parental claims to control exclusively the sexual and social behavior of their children have not been successful. This result parallels the outcome in cases in which parents have challenged the academic curriculum. Demands based on the privacy interest


601. Perry v. Grenada Municipal Separate School Dist., 300 F. Supp. 748, 753 (N.D. Miss. 1969). See also Nett v. Board of Educ., 128 Kan. 507, 278 P. 1065 (1929), which held that a school board could not exclude a married mother of a child conceived out of wedlock from a public high school absent a showing of "a licentious or immoral character." 128 Kan. at 508, 278 P.2d at 1066. In light of the state's policy of encouraging children to become educated and in light of the student's desire to reenter school, the fact that the child was conceived out of wedlock was insufficient to demonstrate such a character. 128 Kan. at 509, 278 P.2d at 1066. The holding was over a dissent that the majority, contrary to established practice, had substituted its judgment for that of the school board. 128 Kan. at 509-10, 278 P.2d at 1067.

602. 300 F. Supp. at 753.


604. See also State ex rel. Idle v. Chamberlain, 12 Ohio Misc. 44, 175 N.E.2d 539 (C.P. 1961) (upholding rule excluding pregnant student on grounds of student's "physical well-being," student morale, and effect on orderly daily routine in the school).

of parents in nurturing their children cannot encroach unduly on the free expression rights of other members of the school community. Similarly, although recognition of the right of privacy would allow a particular student to decide whether to marry or to procreate, it may be necessary to accommodate this interest with the desire of parents to insulate their own children from those who make such decisions at an early age.

3. Procedural Rights in Discipline and Conduct Decisions

The multiplicity of interests that have been accommodated in determining the scope of substantive rights have also been appraised and balanced in delineating procedural guarantees. The right of teachers to procedural due process in connection with dismissal or nonrenewal of contracts is well established constitutionally and is also protected under state tenure laws. Moreover, other interests of teachers are protected by unions or other organizations. Until recently, however, the scope of the procedural due process right for students was not well defined. Although it was firmly established that a public school student was entitled to notice and a rudimentary hearing before expulsion or suspension for a period tantamount to expulsion, district and circuit courts were split on whether due process protections applied to a short-term removal from school. This conflict was resolved in Goss v. Lopez.

In a five-four decision, the Court held rudimentary due proc-

606. See text at notes 349-51 supra.

607. See Board of Regents v. Roth, 408 U.S. 564 (1972) (although upholding dismissal of untenured teacher, court, in dictum, indicated a tenured teacher could demand due process).

608. See note 746 infra.

609. See section IV-B infra.


ess was required for such suspensions from public school. The plaintiffs, high school students in Cleveland, Ohio, were suspended for ten days for disruptive conduct and disobedience during a period of widespread student unrest. The Court found that the students had both "property" and "liberty" interests under the fourteenth amendment. Because Ohio had extended the right to a public education to all people of the plaintiffs' class, the court concluded that "the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause . . . ." 613 In addition, the Court noted that recording the charges in a permanent record could damage reputation, relationships with teachers and other students, and later opportunities for employment and further education, and therefore could result in "arbitrary deprivations of liberty." 614

Having established what the dissent referred to as a "new constitutional right," 615 the Court proceeded to determine the scope of that right by defining "what process is due": 616 "[D]ue process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." 617

Generally, the notice and hearing should precede any disciplinary action. However, the Court recognized that in dangerous or disrup-

613. 419 U.S. at 574. The holding was over an objection that the Ohio compulsory education statute defines its own due process requirements: "The Court . . . disregards the basic structure of Ohio law in posturing this case as if Ohio had conferred an unqualified right to education, thereby compelling school authorities to conform to due process procedures in imposing the most routine discipline." 419 U.S. at 587 (Powell, J., dissenting). In a footnote, Powell distinguished *Goss* from Arnett v. Kennedy, 416 U.S. 134 (1974), a civil service case in which he had taken exactly the opposite position on statutorily defined due process: "There simply is no analogy between termination of nonprobationary employment of a civil service employee and the suspension of a public school pupil for not more than 10 days." 419 U.S. at 587 n.4 (emphasis original).

614. 419 U.S. at 574. The Court held neither interest to be de minimis: "Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary." 419 U.S. at 576. The dissent objected to this reasoning as well on the ground that the infringement that arguably existed as a result of the short suspension was "too speculative, transitory, and insubstantial to justify imposition of a constitutional rule." 419 U.S. at 586 (emphasis original).

615. 419 U.S. at 585.


617. 419 U.S. at 581. The Court ruled out more sweeping forms of procedural safeguards like right to counsel, right to cross-examine witnesses, and right to call witnesses in the case of short suspensions, for practical reasons of administrative feasibility and cost as well as for the reason that such sweeping procedures would destroy the effectiveness of disciplinary measures as part of the teaching process. 419 U.S. at 583.
tive situations, immediate removal would be justified.618 In those
cases, due process would only be postponed, not eliminated. Defining
the kind of situation that presents an "ongoing threat of disrupting
the academic process"619 obviously requires the exercise of discre­tion
that could be abused by school authorities.620 Even if school
officials circumvented the requirement of prior due process, how­
ever, the Court noted that they would be obligated to fulfill the no­
tice and hearing requirements as soon as practicable after the sus­
pension.621

The real significance of Goss is that it indicates a pronounced
shift in the judiciary's proclivity to interfere in the public schools.
Instead of simply setting limits on the actions of school officials, Goss
tells administrators how they must proceed in certain situations. The
Court was less willing to defer to the "expertise" of community au­
thorities; indeed, the Court expressed concern that school authorities
may take "erroneous action"622 in discipline cases. In effect, the
Court has dictated the manner in which the educational authorities
perform their discretionary function623 by requiring "at least an in­
formal give-and-take between student and disciplinarian."624 The
holding, by giving the pupil "the opportunity to characterize his con­
duct and put it in what he deems the proper context,"625 also en­
courages students not to capitulate to authority. While this is not
likely to invite challenges to the disciplinary authority of teachers as
feared by the dissent,626 it does represent a change in how schools

618. "[T]here are recurring situations in which prior notice and hearing cannot
be insisted upon. Students whose presence poses a continuing danger to persons or
property or an ongoing threat of disrupting the academic process may be immediately
removed from school." 419 U.S. at 582.
619. 419 U.S. at 582.
620. See, e.g., Sweet v. Childs, 518 F.2d 320 (5th Cir. 1975). Initially decided
prior to Goss, Sweet was relitigated to test for consistency with the Supreme Court's
guidelines. The court held that the Black public high school students' sitdown, class
disruption, and walkout which resulted in their suspension was "more than an
'ongoing threat of disrupting the academic process.'" 518 F.2d at 321. The
post-suspension conferences, in turn, fulfilled Goss' postponed hearing requirement.
Thus, no violation of procedural due process was found. See also Note, Procedural
Due Process and Short Suspensions from the Public Schools: Prologue to Goss v.
621. 419 U.S. at 582-83.
622. 419 U.S. at 583.
623. "[R]equiring effective notice and informal hearing permitting the student
to give his version of the events will provide a meaningful hedge against erroneous
action. At least the disciplinarian will be alerted to the existence of disputes about
facts and arguments about cause and effect . . . . [H]is discretion will be more
informed and we think the risk of error substantially reduced." 419 U.S. at 583-84.
624. 419 U.S. at 584.
625. 419 U.S. at 584.
626. "When an immature student merits censure for his conduct, he is rendered
disservice . . . if procedures . . . are so formalized as to invite a challenge to
will henceforth perform their socialization functions. Virtually any routinized procedure in the schools has some socialization effect. Prohibition of violent conduct to prevent harm to persons and property socializes toward peaceful behavior; stressing a calm atmosphere in class socializes toward personal discipline and achievement; even the chosen procedure for disciplining proscribed conduct may socialize toward a particular model of problem solving. The procedure of judicial intervention required by Goss emphasizes an adversarial system and thus promotes many of the same values that were evident in the free speech cases.627 If the schools seek to communicate the value of free expression of ideas, an informal adaptation of judicial decision-making that stresses rational disagreement seems highly appropriate.

Although the Goss majority did not allude to the socialization aspects of judicial intervention, the four dissenters recognized that the decision might change the process and the results of decision-making in the public schools. Justice Powell, writing for the dissenters, argued that because education attempts to further "the inculcation of an understanding in each pupil of the necessity of rules and obedience thereto," the Supreme Court should not have altered the "lesson of discipline" by imposing an adversarial framework on routine classroom problems.628 Such an approach, he argued, "misapprehends the reality of the normal teacher-pupil relationship. There is an ongoing relationship, one in which the teacher must occupy many roles — educator, adviser, friend, and, at times, parent-substitute. It is rarely adversary in nature except with respect to the chronically disruptive or insubordinate pupil whom the teacher must be free to discipline without frustrating formalities."629 In contrast, Justice White argued for the majority that the required procedures would not be inappropriate in the classroom and would, "if anything, [be] less than a fair minded school principal would impose upon himself in order to avoid unfair suspension."630

Although Justices White and Powell clearly differ in their perceptions of what is proper disciplinary practice in the public schools631 and disagree about whether courts should intervene in ad-

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627. See text at notes 518-19 supra.
628. 419 U.S. at 593 (Powell, J., dissenting).
629. 419 U.S. at 594 (footnotes omitted).
630. 419 U.S. at 583.
631. Justice Powell's perceptions may be based on personal experience, since he served on the Virginia State Board of Education. However, another experienced educator, formerly a teacher, principal, superintendent, and deputy state superintendent, argues that the procedures outlined in Goss merely reflect good administrative practices. Interview with Dr. Robert H. Jerry, Professor of Education, Indiana State
administrative problems, neither seriously contended that the majority imposes an unusual requirement on the schools. The decision simply demands that school authorities adhere to the same standards of conduct as officials of other public institutions, notwithstanding the dissent's position that the "unique nature of public education" requires limited judicial supervision. The Court apparently concluded that neither the need for discretion to maintain order, long recognized as a legitimate state interest, nor the socialization interest in "the lesson of discipline" justified risking arbitrary and possibly erroneous disciplinary judgments.

A most important question generated by Goss is what other types of decisions by school officials, if any, might be subjected to judicial supervision. The dissent expressed concern that students in many other situations might claim infringements that would receive constitutional protection: Today's ruling appears to sweep within the protected interest in education a multitude of discretionary decisions . . . that may have serious consequences for the pupil. They must decide, for example, how to grade a student's work, whether a student passes or fails a course, whether he is to be promoted, whether he is required to take certain subjects, whether he may be excluded from interscholastic athletics or other extracurricular activities, whether he may be removed from one school and sent to another, whether he may be bused long distances when available schools are nearby, and whether he should be placed in a "general," "vocational," or "college-preparatory" track.

University. See also Wash. Ad. Code ch. 180-40 (1972). Enacted before Goss and Baker, the statute commands the state board of education to promulgate rules and regulations concerning substantive and procedural rights of public school students. Subsequently, the board promulgated rules uniformly applicable from kindergarten to the twelfth grade. The portion of the Washington framework concerning procedural rights specifies disciplinary authorities, procedural due process for severe penalties (suspension and expulsion), and summary procedures for emergency situations. While this framework anticipated Goss, enactment of a similar (or broader) provision subsequent to Goss in other states would effectively convert that decision into a mere statement of the constitutional limits on legitimate discipline rather than an affirmative source of authority on the question of appropriate due process. In addition to obviating dangers of hostility on the part of educational personnel to judicial infringement of their functions, such an approach would avoid the need for the kind of judicial line-drawing suggested by Justice Powell. See text at note 635 infra. For an appraisal of the Washington system, see Note, Due Process for Washington Public School Students—Wash. Ad. Code ch. 180-40, 50 Wash. L. Rev. 675 (1975).

632. The majority opinion represents a departure from traditional judicial reluctance to intervene in local school matters, see text at notes 622-24 supra, while the dissent attempts to justify deference to local school boards and school administrators. See Note, Right to Due Process Attaches to School Suspensions, 24 Kan. L. Rev. 202, 218 (1975).

633. 419 U.S. at 590.

634. See text at notes 493-95 supra.

635. 419 U.S. at 597 (footnotes omitted).
The Supreme Court has already interpreted *Goss* to require due process in cases of corporal punishment. It is arguable that this extension, which mandates that due process be provided in any disciplinary action regardless of whether exclusion from school is the punishment, should become the outside limit of the scope of *Goss*. This would restrict the holding to disciplinary decisions that involve a determination of wrong-doing and the fashioning of a remedy to punish the wrongdoer. Thus, a purely academic judgment such as grading would not require due process protection unless, for example, a poor grade were given for misconduct. Similarly, other decisions such as exclusion from athletics or transfers to other schools would require due process safeguards only if these actions were intended to be punitive.

Although the general reluctance of courts to question "academic" or "professional" judgments would suggest that the scope of *Goss* was not intended to be overly broad, the language of the decision provides no limiting principle. Certainly it is not absurd to argue that rudimentary due process guarantees should accompany nondisciplinary school decisions. In fact, "later opportunities for higher education and employment," which can be as seriously damaged by an adverse academic judgment as by a disciplinary action, were included in the liberty interest. The deprivation of privileges may portend as significant an infringement of a student's property and liberty interests as suspension from school. For example,
the promising athlete who is not allowed to participate in school sports could lose his opportunity for a college scholarship and eventual employment.641

_Goss_ also affirmed the lower court's order that all references to the plaintiff's suspension be removed from school records,642 implying that due process attaches to all permanent notations of censure in a student's file. However, as one district court observed,643 it is difficult to distinguish between a professional judgment recorded for the benefit of future teachers that a child is a discipline problem, and a notation that disciplinary action for punitive purposes has occurred. Because such a notation arguably serves an informational function in all cases, it seems impossible to avoid some overlap with the professional function of evaluating students. Judicial intrusion into the making of these professional judgments might well produce ludicrous results. However, since _Goss_ requires only a very informal notice and hearing, this conclusion is not self-evident. It is not an intolerable burden to require a teacher to explain why a child is a discipline problem or why the student has been assigned to a vocational track. Indeed, it may not be unreasonable to require the teacher to explain why a student received a poor grade. Since due process is a flexible right in the sense that the severity of the notice and hearing requirements varies with the strength of the entitlement that is infringed, the procedure used to ensure due process need not impose an onerous burden on school administrators.644

In _Tinker_, the first case to recognize substantive constitutional rights in the school, Justice Black voiced his concern in dissent that the decision was the harbinger of "an entirely new era in which the power to control pupils by the elected 'officials of state supported public schools . . .' in the United States is in ultimate effect transferred to the Supreme Court."645 In his dissent in _Goss_, Justice Powell reiterated Black's prophecy646 and expressed his own fear that "one can only speculate as to the extent to which public education will be disrupted by giving every school child the power to control in court any decision made by his teacher which arguably in-

641. See Buss, supra note 637, at 584-85; Recent Developments, 20 VILL. L. REV. 1069, 1080 (1975).
642. 419 U.S. at 571.
644. In the case of a grade or transfer to a new curriculum, the notice requirement would be met when the student is given his grade or informed of the change. The hearing requirement would presumably be met if it was explained to the student that he could express objections to those who made the decision. Of course, to protect the student adequately, the notice should also be sent to the parent, as in the case with notices of suspension.
646. 419 U.S. at 600 n.22 (Powell, J., dissenting).
fringes the state-conferred right to education."\textsuperscript{647} Justice Powell, in arguing that active judicial intervention on behalf of the children is improper, predicted that "[t]he discretion and judgment of federal courts across the land will be substituted for that of the fifty state legislatures, the 14,000 school boards, and the 2,000,000 teachers who heretofore have been responsible for the administration of the American public school system."\textsuperscript{648}

It is unlikely that parents will bring a sufficient number of suits to threaten seriously the discretionary powers of the schoolboards. A judicial remedy is likely to serve merely as a valuable, though not extensively used, check on the small minority of administrators, who, in their zeal to preserve order, needlessly infringe on such basic values as free expression and equitable treatment of precocious students.

Still, the number of cases in which students allege violations of their constitutional rights is increasing, and the prophecies of Justices Black and Powell are being at least partially fulfilled. Those who believe that the educational system should carry out the indoctrination of passive students with state-defined values and norms undoubtedly will find this tendency unfortunate.

If, however, as \textit{Barnette} established, students are not mere receptacles of state-imposed wisdom,\textsuperscript{649} and if, as espoused in \textit{Tinker}, the school is a community in which certain fundamental collectivist values are accommodated with individual rights;\textsuperscript{650} and if the judiciary is sensitive in avoiding the usurpation of the functions of professional educators, then good faith challenges of school decisions that infringe upon basic constitutional rights should be encouraged and not feared.

\textbf{IV. Control of Educational Decision-Making}

The two preceding sections of the Project have demonstrated that the educational system must accommodate a multiplicity of interests. Judicial intervention is sought when the policies of educational decision-makers, either on questions of exposure to the system itself or of specific content of the school experience, intolerably infringe on the interests of one or more groups within the educational community. The final section of the Project, in contrast, will deal with efforts of members of the community to affect educational decision-making through alteration of the institutional structure or through exertion of political and economic pressure. Subsection A

\begin{footnotes}
\footnote{647. 419 U.S. at 600 n.22 (emphasis original).}
\footnote{648. 419 U.S. at 599 (footnote omitted).}
\footnote{649. See text at notes 476-80 supra.}
\footnote{650. See text at notes 490-98 supra.}
\end{footnotes}
will focus on decentralization of the schools while subsection B will briefly examine unionization of teachers.

A. Demands for Community Control

All school-district organization schemes attempt to establish school boards that are directly responsible to and controlled by the general public, of which parents are certainly the most important subgroup. In practice, however, the ideal of effective local control of educational policy is rarely realized. Shortcomings endemic to almost all political institutions pervade the school board and make it unresponsive to its constituents. 651 First, the apathy that is common in our political system except at times of particular controversy affects the system of choosing educational authorities. Thus, in most districts, school board positions are not the object of vigorous competition. Board candidates often run unopposed, thereby avoiding any necessity for discussion and critical analysis of educational issues. Second, elected school board members are constantly tempted to defer to appointed staff personnel who are believed to have superior educational expertise. Most school board members are not professional educators but instead are laypersons drawn from a fairly narrow stratum of the population. 652 The increasing complexity of administrative and policy problems generates the attitude among elected board members that they lack the competence to make policy decisions. The result is deference to an even narrower and less responsive circle of experts who frequently believe that they alone are capable of making policy. 653 This has had the effect, particularly in large cities, of virtually excluding elected representatives, let alone parents, from a significant role in the educational system, thus undermining one of the traditional bases of the public school system. 654

The unresponsiveness of school boards to the surrounding communities derives not only from reliance of the boards on unelected experts but from the structure of the school district scheme itself. Ostensibly, if defects in the system's structure could be corrected, some of the general problems of bureaucratism might be alleviated.

The physical boundaries of the school district, as is the case with almost all governmental units, are fixed by "self-conscious legal and

651. See generally Eliot, supra note 39, at 1032-36.
Although these boundaries determine the territorial effect of a school board's decisions, they may not be coterminous with the residential locations of particular class, ethnic, and racial groupings. Each grouping typically embraces different values that it desires the school to reflect. When the physical boundaries of any one school district encompass several groupings or "communities," all values cannot be fully and absolutely represented. Groups with less power whose interests are ignored or superseded may feel frustrated and betrayed. It is not surprising, therefore, that various socioeconomic and racial groups claim that school boards are not responsive to their interests.

It should be noted, however, that how responsive a school board is to its constituents depends in large part on the nature of the district. For example, the nature of citizen control of board policies in a school district composed of the entire metropolitan area of Detroit, which has more students than the entire state of Mississippi, is substantially different from citizen control in a small, rural village with a one-room school attended by a few dozen students. In the latter case, it is much more likely that the functional community boundaries will be coterminous with the physical, legal boundaries of the school district. In the former case, such a result is assuredly impossible.

Thus, the demand for increased citizen control of schools through decentralization is articulated, for the most part, only in urban areas in which the vastness of the metropolis has obliterated any semblance of parental supervision of the schools. It is in these areas that

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Although essentially fixed, school district boundaries are not totally static. History evidences a natural tendency toward fewer and larger school districts—partly as a response to population shifts to metropolitan areas and partly from a need to both avoid duplication and offer specialized services. See G. Johnson, supra note 34, at 15, 25 n.24; President's Commn. on School Finance, supra note 5, at 127.

656. J. Koerner, supra note 8, at 120. The author also points out that neither the size of the state nor the population of school age children is significantly related to the number of school districts. Id. at 118-19.

657. The problems of differing local conditions and attitudes within a large urban school district have been widely noted. See, e.g., M. Gitell, supra note 653, at 50-51: "While parent associations are active in individual schools, with regard to localized and personalized problems, the highly centralized organization of the school system is a serious deterrent to communication between parent groups and policy makers."

parents are most frustrated because of their apparent inability to influence or alter prevailing school board policies.669

As articulated by its proponents, decentralization involves a reallocation of power between the central authorities, usually a city-wide board, and local boards established in the neighborhoods.660 Usually these proposals envisage substantial autonomy for the local boards in such areas as curriculum, budgeting, teacher negotiation, and hiring and releasing of personnel. Essentially, those who support decentralization are attempting to assert greater control over educational policy by moving the locus of power closer to the citizenry.661

In particular, those parents who support decentralization desire greater control of the socialization of their children. It has been observed that decentralization "has implications for the school's political socialization role. . . . [T]he public schools have historically inculcated Americanism and allegiance to certain generalized political norms. . . . Some of the advocates of community control, however, reject the white middle-class character of the socialization process and clearly hope to use the schools to encourage ethnic solidarity and challenge traditional American myths."662 Yet for the most

659. See M. GITTELL & T. HOLLANDER, supra note 5, at 196-201. School boards may be unresponsive to parental demands for a number of reasons. Members are often uncomfortable with their responsibilities because they lack training in educational policy and, therefore, prefer to occupy themselves with housekeeping details. In some cases such outside influences as state boards or departments, professional associations, or unions act to prevent innovations. J. KOERNER, supra note 8, at 124-27.

660. There are several general approaches to effecting decentralization of schools. One approach involves creating local school boards and providing them with substantial decision-making powers, although some sort of city-wide coordination is usually retained. This is the pattern in New York City. See text at notes 667-76 infra. Another approach is to subdivide the city-wide district into independent, autonomous local districts, which have total responsibility for the schools within the district. A final approach envisions the development of "education parks," which are groups of schools constructed in one large, central campus. This approach has been suggested as one means to increase desegregation but has the obvious problem of the high costs involved in constructing the necessary facilities. See U.S. COMMISSION ON CIVIL RIGHTS, EDUCATION PARKS (1967).

661. This reflects the idea that citizens themselves should set the goals of education and the experts should develop means to accomplish them. More often today's experts are telling the society or the community what its educational goals should be. J. KOERNER, supra note 8, at 160-61.

Suburbanization of our metropolitan cities is, in effect, another form of decentralization. Suburbanization has a political meaning: It can be viewed as another example of individuals attempting to exert greater influence over their government by moving out of the city and forming smaller communities. This enables them to make choices on such subjects as tax rates, types of city services, and, of course, educational policy, that would not be possible in the larger city. In part, this ability to make one's government more accountable is a result of relative suburban homogeneity. See Elazar, supra note 658, at 181.

662. G. LANOVE & B. SMITH, supra note 39, at 19. School boards have traditionally been dominated by the middle- and upper-middle classes and have consequently served as a forum for middle-class values. Id. at 15-23. See text at note 652 supra.
part, proponents of community control do not seek to establish a separate polity. Instead, these individuals seek to establish and preserve their own identity within the framework of the political system: “Most Americans of whatever race, creed or ethnic origin, share common values and goals as Americans. What they seek are variations on ‘the American way of life,’ not completely separate ways. Thus they strive for the kind of local control that makes the maintenance of those variations possible, not local separatism.”

When viewed in this manner, it is clear that community control is not intended to infringe upon the core interests of the state, namely a certain minimum level of socialization to those consensus values referred to above, but instead intends only to express pluralistic interests of ethnic, racial or other groups.

Certainly any effort to shift educational decision-making power, even when the underlying motivation is not inconsistent with collectivist interests, will meet with resistance from groups that have a vested interest in maintaining the status quo. In those areas in which decentralization has occurred, almost all members of the school community—administrators, teacher organizations, lay members of the boards, and even some of the organized parent groups—have opposed it. High-level administrators tend to resist the transfer of their power to local authorities while lower-level managerial personnel oppose decentralization because they perceive no net increase in their influence when substantial power is transferred to nonadministrative community groups. Teacher unions, for the most part, prefer to assert their influence at one central location rather than to negotiate with a large number of small districts. Unions gain strength from centralization and naturally oppose plans that allow districts to establish separate policies affecting teaching responsibilities, class size, and other working conditions. Finally, because major interest groups typically are organized on a city-wide basis, their ability to influence policy would diminish if decision-making power were less concentrated.

Many of these difficulties were evidenced during the major de-
centralization experiment of the last decade implemented in New York City in accordance with a 1969 plan of the state legislature. The city school district, which included the entire city of New York, was divided into about thirty community districts of at least twenty thousand pupils. Each district was to be governed by a community school board composed of elected nonprofessionals. Included in the broad mandate of each community board was the power to frame the curriculum and choose textbooks, to name a community superintendent and hire teachers, to allocate funds and supervise their expenditure, and to launch building programs.

Not surprisingly, the city school board was reluctant to surrender its authority to the community districts. Diffusion of control was hampered by provisions in the enabling statute that gave the city board, through the chancellor, power to set minimum standards in areas such as textbook selection. Effective decentralization of power to citizens of small neighborhood units was also impeded by teachers' strikes and racial tension.

The New York plan, which has been met with varying appraisals as to its success, epitomizes many of the uncertainties raised by the debate over decentralization. Even when decentralization is effectively carried out against its many obstacles, it is unclear whether the basic problems of individual participation and institutional re-

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668. Criteria for division included "the common and special educational needs of the communities and children involved, transportation facilities, and existing and planned school facilities"; the appropriate scale needed for efficient policy making and economic management; convenience of location for pupil attendance; a reasonable number of pupils and heterogeneity of the pupil population; and the relationship to the geographic areas for which the city of New York plans and provides services. N.Y. Educ. Law § 2590-b.3 (McKinney 1970).

669. N.Y. Educ. Law § 2590-b.2(b) (McKinney 1970).

670. N.Y. Educ. Law § 2590-c.4 (McKinney 1970). In practice candidates endorsed by unions or by religious groups were more successful than candidates of parent associations. G. LaNOVE & B. SMITH, supra note 39, at 193.


672. N.Y. Educ. Law § 2590-e.3 (McKinney 1970).


675. See N.Y. Educ. Law § 2590-i.8 (McKinney 1970).


678. N.Y. Educ. Law § 2590-h.8 (McKinney 1970).


 sponsiveness are alleviated. Community control assumes that a substantial consensus about values exists among members of the community, a consensus that is assuredly absent in the large metropolitan districts\(^{682}\) in which certain groups have been visibly "disenfranchised." The rationale underlying decentralization is that small units can be responsive to particular groups—an unrealizable result when a few large districts embrace a large proportion of the student population.\(^{683}\) Yet it is very dubious that metropolitan districts can be subdivided\(^{684}\) so that each community district will reflect a homogeneous constituency with similar demands and expectations.\(^{685}\) In New York, even in the small school districts, various interest groups waged intensive and divisive campaigns to elect people to the boards who would be favorable to their positions.\(^{686}\) That experiment failed to erase all feelings that the educational structure was unresponsive.\(^{687}\)

Even if decentralization accomplishes the goal of greater individual and group involvement in educational decision-making, it is by no means certain that basic state interests do not suffer too severely in the process. First, opponents of decentralization assert the collectivist interest in ensuring that the educational system adequately prepares citizens to function effectively in society, and claim that with neighborhood controls on schooling, this aim cannot be achieved.\(^{688}\) It is beyond dispute that financial resources are not evenly distributed among existing school districts, let alone among neighborhoods

\(^{682}\) See text at note 656 supra. But see A. Altshuler, Community Control: The Black Demand for Participation in Large American Cities 131 (1970) (author suggests that proponents of community control should avoid homogeneity even if neighborhood lines could be drawn to roughly fit ethnic, class or racial groups because of the potential explosiveness of the homogeneity question).

\(^{683}\) One author has observed that half of the nation's local school boards have fewer than 300 students, but nearly 200 boards have over 25,000 students apiece. New York City's board alone has over 1 million students, which is a greater student population than is found in a majority of the states. He notes that nearly half of all U.S. students are under the control of less than 3 per cent of the nation's school boards. J. Koerner, supra note 8, at 120.

\(^{684}\) See G. LaNove & B. Smith, supra note 39, at 115-52.

\(^{685}\) See A. Altshuler, supra note 682, at 124-34; Elazar, supra note 658, at 182-84.


\(^{687}\) However, the New York experiment clearly eliminated the apathy surrounding school board elections, see text at notes 651-52 supra, and apparently shifted school board deference as to educational policy from educational experts, see text at notes 652-54 supra, to community interest groups. Thus, it clearly seems reasonable to argue that the New York experiment erased the unresponsiveness of the educational structure, discounting, of course, the inevitable unresponsiveness of any democratic structure to voters who supported losing candidates.

\(^{688}\) There is virtually no evidence that increased parental participation in school policy results in increased student achievement. There is a similar absence of evidence that smaller school districts, presumably less bureaucratic, are able to produce higher levels of student achievement. See G. LaNove & B. Smith, supra note 39, at 212-15.
within those districts. Certain neighborhoods may be so poor that they are unable to support a school system that is capable of providing even a minimal educational program. It is certainly in the state's interest to avoid massive discrepancies in the quality of educational training, but to prevent such a development, it would be necessary for the state to provide financial support to the underdeveloped communities. It is unlikely that central educational authorities will elect to underwrite these localities and at the same time surrender control over how such monies are expended. Although such criticisms of community control have not gone unchallenged, it seems clear that any decentralization plan that sacrifices this collectivist interest will be strongly resisted by the school board and other authorities.

Another concern is that decentralization will impair the state's interest in integration. Because community schools would be small and local, many of them would be within predominantly Black neighborhoods. It has been argued, in response, both that neighborhood boundaries need not be drawn to preserve racial, ethnic or class


691. Gittell, Three Demonstration School Districts in New York City, in Local Control in Education 39 (1972); A. Althsuler, supra note 682, at 19-61.

692. Integration, as a collectivist interest, was clearly identified by the President's Commission on School Finance: "In any reorganization of school districts . . . [s] prime [consideration] . . . is the attainment of diversity in the school population. The most important resource of any district [sic] is the people who are served. Economic or ethnic isolation of children reduces the ability of school systems to provide equal education opportunity and quality education." The President's Commn. on School Finance, supra note 5, at xix.

The reasons for pursuing integration in public schools are compelling. According to the widely publicized Coleman Report, the educational achievement of minority pupils, with some exceptions, is lower at every level than the performance of White pupils. Furthermore, the difference in achievement widens as grade levels increase. See J. Coleman, supra note 149, at 20-21. The Report found that Black educational achievement can be increased by sending Blacks to schools that are integrated. Moreover, the Report found that sending Blacks to integrated schools could mitigate racist attitudes, see id. at 28-30, thereby furthering the state's socialization interests. See M. Katz, supra note 43, at 133-34. See generally Symposium—Milikken v. Bradley and the Future of Urban School Desegregation, 21 Wayne L. Rev. 751 (1975).

The controversial findings of the Coleman Report have been widely discussed and critically reviewed. See, e.g., On Equality of Educational Opportunity (F. Monteller & D. Moynihan eds. 1972); The "Inequality" Controversy (D. Levine & M. Bane eds. 1975).
homogeneity\textsuperscript{693} and that community schools would have no greater segregation effects than the present centralized systems.\textsuperscript{694} If that were true, the same dissatisfaction that caused decentralization to be demanded initially, namely that certain groups have relatively less power than others and consider themselves left out of the decision-making process,\textsuperscript{695} would again be generated. After all, much of the appeal of decentralization rests on its promise of allowing individual groups to control schools that serve their particular racial or ethnic orientation.\textsuperscript{696} In reality, it appears that community control and racial balance in the schools are incompatible.\textsuperscript{697} Indeed, as a purely practical matter, it would be easier for dissatisfied families to move out of a neighborhood district than it would be to leave an entire metropolitan area. If families who consider themselves disenfranchised were to flee their districts, then residential housing patterns would become even more segregated. Charges that decentralization could lead to increased class separation\textsuperscript{698} were buttressed by evidence in New York that the population of some community school districts fell after the educational system's reorganization.\textsuperscript{699}

Since decentralization may very well be counterproductive to integration, the obvious question is whether community control is constitutional. Indeed, the recent interpretations of the fourteenth amendment by the Supreme Court suggest that it may not survive judicial scrutiny.

The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck down by Brown I as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be corrected by the remedial measures of Brown II. That was the basis for the holding in Green that school authorities are "clearly charged with the affirmative duty to take whatever steps might be necessary

\begin{footnotesize}
\textsuperscript{693} See A. ALTSHULER, supra note 682, at 131-34.
\textsuperscript{694} Id. at 19-28.
\textsuperscript{695} See text at notes 658-61 supra. See also N.Y. Times, Jan. 14, 1973, at 118, col. 2 (late city ed.) (Blacks complaining that their power had been diluted by decentralization).
\textsuperscript{697} "Community control and integration are incompatible, and for anyone who wants both that is a very hard fact to admit. Decentralized community schools must of necessity be small and local." M. KATZ, supra note 43, at 133. But cf. A. ALTSHULER, supra note 682, at 131-34 (suggesting that boundaries need not be drawn to create ethnically homogeneous neighborhoods).
\textsuperscript{698} Many supporters of community control admit the incompatibility but think integration is often impossible in any case. See COMMUNITY CONTROL OF SCHOOLS 6-7 (M. Levin ed. 1970).
\textsuperscript{699} See N.Y. Times, Feb. 13, 1973, at 41, col. 1 (late city ed.).
\end{footnotesize}
to convert to a unitary system in which racial discrimination would be eliminated root and branch. ..."

If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. 700

It is certain that if a White-dominated school board were to use community control to establish or to perpetuate a system of segregated schools, the board action would violate the fourteenth amendment. 701 It is less clear whether a community control scheme administered in a racially neutral manner is constitutionally impermissible. This was the specific question left open in Keyes v. School District No. 1: 702 "We have no occasion to consider in this case whether a 'neighborhood school policy' of itself will justify racial or ethnic concentrations in the absence of a finding that school authorities have committed acts constituting \textit{de jure} segregation." 703 The Sixth Circuit has found constitutionally permissible a board action that results in a racial imbalance so long as the action was not intended to have a segregative effect. As that court concluded in Deal v. Cincinnati Board of Education, 704 nondiscriminatory implementation of a neighborhood school policy does not possess the "arbitrary, invidious characteristics of a racially restrictive system." 705 The necessary element of a constitutionally impermissible school board action, it stated, is a racial imbalance intentionally caused by discriminatory practices of the board. "When no discrimination is shown, racial imbalance alone is no warrant for relief." 706 This view has

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701. See Keyes v. School Dist. No. 1, 413 U.S. 189, 212 (1973). The majority recognized a distinction between de jure and de facto segregation based on "\textit{purpose or intent} to segregate. 413 U.S. at 208 (emphasis original). In Keyes, the neighborhood school scheme was promulgated by authorities who were found to have the requisite intent to avoid integration. Keyes explained that a school board can rebut a prima facie case of de jure segregation by showing either that "\textit{segregative intent}" was not among the factors that motivated its actions or "that its past segregative acts did not create or contribute to the current segregated condition." 413 U.S. at 211. Thus, for de jure segregation, at least a finding of segregative intent is necessary. See United States v. School Dist. 151, 404 F.2d 1125 (7th Cir. 1968), \textit{cert. denied}, 402 U.S. 943 (1969).

702. 413 U.S. 189 (1973). In Keyes, the petitioners sought desegregation of the public schools in the Denver, Colorado, school district. The Court remanded for further findings but held that a finding that school authorities practice de jure segregation in a "meaningful portion of the school system" creates a prima facie case of intentional segregation in the remaining schools. 413 U.S. at 212. See text at notes 192-95 supra.

703. 413 U.S. at 212.


705. 369 F.2d at 60.

706. 369 F.2d at 63: Appellants' right to relief depends on a showing of more than mere statistical imbalance in the Cincinnati schools. They must also expose that added quantum of discriminatory state action which deprives them of their constitutional right to freedom of choice. If the school officials, through overt practice or
recently been reaffirmed by the Sixth Circuit.\textsuperscript{707}

Other courts, however, have taken a different approach. Both the Eighth Circuit, in \textit{United States v. School District of Omaha},\textsuperscript{708} and the Second Circuit, in \textit{Hart v. Community School Board of Education},\textsuperscript{709} held that segregative intent, and therefore \textit{de jure} segregation, exist when school authorities engage in acts or omissions, the natural, probable and foreseeable consequence of which is to cause or to maintain segregation. Such a definition of \textit{de jure} segregation would have profound implications for many systems of community control. Decentralization of schools, even though administered in a racially neutral manner, could well have racial imbalance among the districts as a "foreseeable consequence"\textsuperscript{710} and, accordingly, would be constitutionally impermissible if segregation resulted.

The viability of a community control scheme thus depends on which definition of \textit{de jure} segregation is used by the courts. It is very unlikely that an urban area could be decentralized without reinforcing racial divisions. Under the \textit{Hart} and \textit{Omaha} test, such an effort would likely be barred, but under the \textit{Deal} test, which at least is not inconsistent with the Supreme Court's decision in \textit{Keyes},\textsuperscript{711} if a community control scheme has segregative tendencies but no discriminatory purpose, the plan could be upheld.

\begin{itemize}
\item by subterfuge, have treated students differently solely because of race, then they not only must cease doing so, but also must take affirmative action to remedy the condition which they have caused. Thus, even if the Negro students were distributed uniformly in the schools, if other forms of discrimination were used against them they would still be entitled to the aid of the law. When no discrimination is shown, racial imbalance alone is no warrant for relief.\textsuperscript{707}
\end{itemize}

\textsuperscript{707} \textit{See Higgins v. Board of Educ.}, 508 F.2d 779, 792-93 (6th Cir. 1974); Bronson v. Board of Educ., 525 F.2d 344, 345-47 (6th Cir. 1975). In \textit{Higgins}, Black students and their parents brought a class action charging that the Board was operating the Grand Rapids schools in a manner designed to perpetuate a segregated system. The Board had decided to retain the concept of a neighborhood school system to meet the needs of the district, the lines of which were coterminous with the city limits. The court found that the school board's decisions were not motivated by segregative intent even though many of the schools were predominantly Black. Instead, the racial imbalance in the schools was attributed to segregative acts in the housing market. The court stated that such a racial imbalance need not be remedied: "The law imposes no affirmative duty upon school officials to correct the effects of segregation resulting from factors over which they have no control." 508 F.2d at 790.

\textsuperscript{708} 521 F.2d 530 (8th Cir.), cert. denied, 423 U.S. 946 (1975).
\textsuperscript{709} 512 F.2d 37 (2d Cir. 1975).
\textsuperscript{710} See note 697 supra and accompanying text.

\textsuperscript{711} \textit{Keyes} clarifies how a school board can rebut a prima facie showing of segregative intent, not whether a remedy is necessary in the absence of intent. The latter question was squarely posed in \textit{Deal}, and the court held that a remedy was not required. \textit{See Higgins v. Board of Educ.}, 508 F.2d 779, 792-93 (6th Cir. 1974). However, some doubt has been cast on the \textit{Deal} test of intent by Milliken v. Bradley, 418 U.S. 717 (1974). In \textit{Milliken}, the Court affirmed district court findings of \textit{de jure} segregation, some of which were based on the "foreseeable consequence" test. 418 U.S. at 725-28, 738 n.18. \textit{See United States v. School Dist.}, 521 F.2d 531, 536 n.10 (6th Cir. 1975).
One commentator has suggested another distinction between permissible and impermissible community control schemes that focuses on whether the central school board has actually relinquished decision-making power. No transfer of power has occurred, for example, when the school board, without the consent of affected communities, simply assigns teachers or adjusts boundaries in a manner that has racially predictable consequences. If the school board transfers power to local boards with concentrated ethnic and racial constituencies, however, it has not acted in the same overt, racially motivated manner. Although this distinction is tenuous, it does highlight the difference between a racially oppressive plan and one which, though leading to the same racial isolation, involves a genuine transfer of power and authority.

It has also been suggested that because integration as mandated by Brown v. Board of Education does not prohibit voluntary racial isolation, community control that results in de facto segregation may be possible. Thus, the segregation proscribed in Brown was involuntary, since the plaintiffs had been forced to send their children to an all-Black school. On the other hand, a community control plan that allows parents to choose as an alternative an integrated education at a school other than the one in the neighborhood might not be unconstitutional. However, this conclusion is by no means assured. In Green v. County School Board, the Supreme Court held that a desegregation plan under which students were allowed to choose their school was unconstitutional. The system in question had only two schools on opposite sides of the county. One was previously all-Black and the other all-White, though housing patterns were not segregated. To remain eligible for federal aid, the school board was required to develop an integration plan. The "freedom-of-choice" plan adopted by local authorities was struck down because it failed to take "whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."

A plan that provides an alternative to the segregated school in a community control scheme is very similar to the freedom-of-choice plan in Green. It is true that the situations can be distinguished. In Green, the politically dominant White community supported a plan that had the effect of perpetuating a dual system of education that in-

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712. Kirp, supra note 690, at 1372. See note 707 supra.
714. Kirp, supra note 690, at 1362.
715. See id. at n.27.
717. 391 U.S. at 437-38.
herently deprived Blacks of both power and a quality education, while the underlying rationale of a system of community control is that the quality of education will be raised through the involvement of Black parents. If isolation of the races is to be eliminated, however, this distinction should not be adequate to validate the scheme. Decentralization plans should be upheld only if sufficient numbers of both races choose to be educated out of their district, thereby eliminating segregation.

In his opinion in *Keyes*, Justice Powell urged that the de jure-de facto distinction be abolished.\(^{718}\) At first glance, this would have the effect of invalidating any community control scheme, since all such plans are likely to result in de facto segregation. Justice Powell noted, however, that "*Swann* itself recognized limits to desegregative obligations. . . . Particular schools may be all White or all Black and still not infringe constitutional rights if the system is genuinely integrated and school authorities are pursuing integrative steps. . . ."\(^{719}\) In fact, he specifically recognized the vitality of the neighborhood school concept: "Neighborhood school systems, neutrally administered, reflect the deeply felt desire of citizens for a sense of community in their public education."\(^{720}\) In referring to the close relationship between the concept of community control and the rights and duties of parents with respect to their children's education, Justice Powell concluded that the "Court should be wary of compelling in the name of constitutional law what may seem to many a dissolution in the traditional, more personal fabric of their public schools."\(^{721}\) He thus would accommodate the state's collectivist interest in integration with the parent's interests in running local schools and in supervising more directly the upbringing of their children. This process is not unlike the balancing of interests in other educational contexts. The unique feature here, however, is that the process involves the power to make educational decisions rather than the content of the decisions themselves. The outcome of this contest will determine the nature of the institutional framework in which educational decisions are made.\(^{722}\)

\(^{718}\) 413 U.S. at 219-36. See text at notes 196-99 supra.

\(^{719}\) 413 U.S. at 244.

\(^{720}\) 413 U.S. at 246.

\(^{721}\) 413 U.S. at 246.

\(^{722}\) Decentralization is but one proposal to increase citizen participation in public school policy. Another suggestion is the utilization of parental advisory committees. See generally J. Koerner, *supra* note 8, at 146-54; Murphy, *supra* note 5, at 90-91. Many schools have established parent groups, many of which are connected with the Parent-Teacher Association (PTA). Such committees rarely possess authority over fundamental policy matters but do serve the important function of facilitating communication. With the exception of civil rights groups, most organized parental interest groups are hesitant to be critical of established policies. M. Gittel & T. Holland, *supra* note 5, at 199.
B. Teacher Unionization

Parents disenchanted with the unresponsiveness of educational decision-makers to their interests urge alteration of the institutional framework through decentralization. Teachers, on the other hand, have sought to protect their own interests not through institutional reform but through the collective pressure of unions on educational authorities. Although teachers have had professional organizations for over one hundred years, they have only recently affiliated with unions—organizations that engage in collective bargaining and utilize the strike to support their demands. Through unions, teachers are increasingly requesting additional economic and professional benefits and demanding a broader role in fundamental policy decisions.

It is only relatively recently that teachers have been able to bargain with school boards. Initially, the boards possessed virtually absolute power to control the working conditions of their employees. Courts held that the school board was “sovereign” in the sense that it had to be free to exercise the power, entrusted to it by the citizenry, to control education. To bargain with, let alone capitulate to, teacher organizations on matters of educational policy would, pur-

723. The National Education Association (NEA) is the largest and oldest of the professional teacher organizations. It was organized in Philadelphia in 1857 by a group of superintendents, principals, college presidents and professors. Perry & Wildman, The Impact of Negotiations in Public Education, in Evidence from the Schools 25 (1970). For a detailed history, see E. Wesley, NEA: The First Hundred Years, The Building of the Teaching Profession (1957). Because it was predominately composed of administrators instead of classroom teachers, early NEA efforts were not specifically directed at helping the classroom teacher. See id. at 329. See also J. Kerner, supra note 8, at 32. The majority of the NEA's 1.8 million current members are classroom teachers, Economic Crisis in Schools Threatens the Nation, 14 NEA Rptr. 3 (1975), indicating a change in the organization's focus.

724. In contrast to the NEA's concern for professionalism, the American Federation of Teachers (AFT) has been deeply influenced by organized labor. The AFT was founded in 1916 in San Antonio, Texas, and was chartered by the AFL in 1916. Because the AFT associated teachers with blue collar workers, it had to overcome adverse public, school board, and even teacher opinion. Perry & Wildman, supra note 723, at 7-8, 18. In the 1950s, the AFT increased in importance as public sector bargaining increased in acceptance. The AFT has been successful in large cities, including New York, Philadelphia, and Chicago. The AFT is organized specifically for the benefit of classroom teachers. M. Moskow, Teachers and Unions 98 (1966). See also R. Doherty & W. Oberer, Teachers, School Boards, and Collective Bargaining: A Changing of the Guard 32-33 (1967).

The NEA responded to AFT breakthroughs by becoming more activist and by attempting to strengthen its union identification. See generally E. Shils & C. Wittier, Teachers, Administrators, and Collective Bargaining 21-92 (1968). The right to organize a labor union in the public sector was given constitutional protection in McLaughlin v. Tilden, 398 F.2d 287 (7th Cir. 1968). Under certain circumstances, however, courts have circumscribed this right. See Elk Grove Firefighters Local No. 2340 v. Willis, 400 F. Supp. 1097 (N.D. Ill. 1975). See also Local No. 201 (AFL-CIO) v. City of Muskegon, 369 Mich. 384, 120 N.W.2d 197, cert. denied, 375 U.S. 833 (1963); Perez v. Board of Police Comrs., 78 Cal. App. 2d 638, 178 P.2d 537 (1947).
suant to this theory, amount to an unauthorized delegation of power. This approach, which minimized the influence of teacher organizations, has, however, been eroded in recent years. Courts initially recognized in states without bargaining statutes that school boards could voluntarily negotiate with teachers and that agreements would not be per se illegal. It is now firmly established that a school board may negotiate and bargain with a teachers' organization.

The extent to which teachers' unions will be allowed to bargain about and thereby influence educational policy depends largely on the statutes authorizing negotiations that have been passed in many states. Where such statutes exist, the school board will generally have a duty to bargain over traditional contract items—wages, hours, pensions, transfers, conditions of employment—that are within the teachers' "worker interest." Demands that fall within these categories may very well have a profound impact on the educational system, for the allocation of resources to meet these needs necessarily precludes other possible expenditures. Additionally, the specialized training that teachers receive gives them a "professional interest" in participation in the selection of teaching materials, the planning of curriculum and other matters requiring expertise and professional judgment. These policies may, however, be considered to

725. See, e.g., Minneapolis Fedn. of Teachers Local 59 v. Obermeyer, 275 Minn. 347, 147 N.W.2d 358 (1966) (suggesting, however, promulgation of a statute for procedural purposes); Norwalk Teachers' Assn. v. Board of Educ., 138 Conn. 269, 83 A.2d 482 (1951).

The right of public employees once organized to bargain collectively has not been accorded constitutional stature, however, and courts have upheld statutes that prohibit public employees from engaging in collective bargaining. See Winston-Salem/Forsyth County Unit v. Phillips, 381 F. Supp. 644 (M.D.N.C. 1974); Atkins v. City of Charlotte, 295 F. Supp. 1068 (W.D.N.C. 1969). Thus, in order to have bargaining, either a statute mandating it or a willing employer must exist. See 14 N.E.A. REPTR., supra note 723, at 4 (NEA to lobby for federal statute guaranteeing teachers right to negotiate).


727. Prior to the emergence of formal negotiations, school board-teacher communication was conducted on an informal consultation and suggestion basis, in which the superintendent was frequently the dominant factor. Gradually, teachers began to have more input in school policy. See A. ROSENTHAL, PEDAGOGUES AND POWER, TEACHER GROUPS IN SCHOOL POLITICS 3-6, 19 (1969).

Some states have had systems that involve more than mere consultation but less than bargaining. Perhaps the most notable of these schemes was the "meet and confer" system of bargaining in California. See Law of July 23, 1965, ch. 2041, § 2, [1965] Cal. Stats. 4660 (repealed 1976); Comment, California's Alternative to Collective Bargaining for Teachers: The Winton Act, 1965-1974, and Proposals for Change, 5 PACIFIC L.J. 698 (1974).


be at the core of school board discretion in a manner analogous to management rights in the private sector that "lie at the core of entrepreneurial control" and are not mandatory subjects of collective bargaining. 730 It is not infrequent that the teacher's "worker interest" will justify bargaining where the "professional interest" would not, as, for example, in the case of appropriate class size which affects teachers' conditions of employment. 731 Courts have been inconsistent in their determinations of proper bargaining scope, 732 with some insulating school boards 733 and others more willing to find particular areas mandatory subjects of bargaining. 734

In asserting their interests through collective bargaining teachers frequently infringe on the interests of particular members of the educational community, who may then challenge the negotiation process in court. 735 Courts, however, have recognized that collective bargaining is most effective when citizen input is limited. 736 An additional conflict may arise when a teachers' union, in attempting to organize, takes actions that jeopardize the interests of other teachers or their organizations. 737 Finally, the interests of the union may con-


735. See, e.g., City & County of San Francisco v. Cooper, 13 Cal. 3d 898, 534 P.2d 403, 120 Cal. Rptr. 707 (1975).


Competition between the NEA and the AFT has been widely publicized and stud-
conflict with those of the entire community. An example was the widely discussed controversy at Ocean Hill-Brownsville in 1968, precipitated by the New York City decentralization plan.\textsuperscript{738} In giving control over personnel to local community boards to enhance the quality of education, certain rights bargained for by the teachers' union at the city-wide level were compromised. In this instance, teachers whose methods and approach did not comport with the community board's impressions of proper pedagogy were dismissed. Thus, the "worker" and "professional" interests of the teachers were pitted against the community's interest in supervising the entire educational environment.

The growing power of teachers' unions has been sustained, in part, by the availability of the ultimate weapon—the strike.\textsuperscript{739} It is true that many statutes expressly prohibit strikes by public employees\textsuperscript{740} and that, in the absence of such language, courts will generally enjoin strikes under traditional equitable principles.\textsuperscript{741} Injunctive relief, however, is not automatic,\textsuperscript{742} for school boards can only obtain it if they have "clean hands" and have fulfilled other requirements.\textsuperscript{743} Moreover, the threat of illegal strikes is a potent weapon that lies below the surface of negotiations. Still, the restrictions on strikes, when combined with statutes governing procedures for col-

\textsuperscript{738} For general discussions of the Ocean Hill controversy, see Mayer, \textit{The Full and Sometimes Very Surprising Story of Ocean Hill, the Teachers' Union and the Teacher Strikes of 1968}, N.Y. Times, Feb. 2, 1969, § 6 (Magazine), at 18, col. 1; M. Berube & M. Gitter, supra note 680; B. Carter, Pickets, Parents, and Power: The Story Behind the New York City Teachers' Strike (1971). For other aspects of the New York decentralization plan, see text at notes 667-80 supra.


Collective bargaining and the duty of school boards to protect their entire constituency serve to limit somewhat the power of unions to place the interests of teachers above those of the educational community.

744. See, e.g., DEL. CODE ANN. tit. 14, §§ 4001-4013 (1975); IOWA CODE ANN. §§ 20.1-27 (Supp. 1976); MO. REV. STAT. §§ 105.500-.530 (1969); WIS. STAT. ANN. §§ 111.80-.97 (1974). The Connecticut law, for example, provides that the public employer has a duty to bargain over "salaries and other conditions of employment." CONN. GEN. STAT. ANN. § 10-153d (Supp. 1976). The omission of hours from this formulation is significant; it has been interpreted to exclude discussions over hour-related matters that otherwise might be considered conditions of employment, such as the durations of the class day and school year. West Hartford Educ. Assn., Inc. v. DeCourcy, 162 Conn. 566, 579-80, 295 A.2d 526, 534 (1972). However, specific conditions of employment, including hours, are part of several state statutes. See, e.g., CAL. GOVT. CODE § 3543.2 (West Supp. 1976); HAWAI Rev. Stat. § 89-9 (Supp. 1975).


746. It is important to note that teacher organizations are not the only agencies that accord protection to teacher interests. States also play an important role through legislative enactments. See generally NATIONAL EDUCATION ASSOCIATION OF THE UNITED STATES, THE TEACHER AND THE LAW 30-73 (1959). Civil service laws may specify certain procedures for hiring, firing and promotion policies. See, e.g., CONN. GEN. STAT. ANN. §§ 10-151 to -151b (Supp. 1976), amending CONN. GEN. STAT. ANN. § 10-151 (1967). More important, however, has been the protection of teachers through tenure statutes. See generally NATIONAL EDUCATION ASSOCIATION OF THE UNITED STATES, TRENDS IN TEACHER TENURE THRU LEGISLATION AND COURT DECISION (1957); L. PETERSON, supra note 9, at 528-66; H. PUNKE, THE TEACHER AND THE COURTS 399-462 (1971). These statutes were originally designed to reduce the large turnover in the teaching profession, which was caused in part by widespread discharges for political and disciplinary reasons. See Comment, Teachers' Tenure Legislation, 37 Mich. L. Rev. 430 (1939). Of course, tenure relationships between the teacher and the school district may be a product of contract. Most teachers, however, are protected by specific statutes. H. PUNKE, supra, at 407-13. Tenure provides teachers with a property right in their job; this entitles them to a due process hearing pursuant to the fourteenth amendment before their job may be taken away. See Perry v. Sinderman, 408 U.S. 593, 601-03 (1972). Nontenured teachers do not have this property right in their jobs. See Board of Regents v. Roth, 408 U.S. 564, 569 (1972). See also Lanzarone, Teacher Tenure—Some Proposals for Change, 42 FORDHAM L. REV. 526, 532-35 (1974); Slutz, Due Process for Public School Teachers in Nonrenewal and Discharge Situations, 25 Hastings L.J. 881 (1974).

These statutes, of course, do not eliminate the need for union protection. Those areas not affected by the statutes, most obviously the rights of nontenured teachers, are vital areas of union concern.