Developing Student Expression Through Institutional Authority: Public Schools As Mediating Structures

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On exactly the same July day in 1986, two federal courts diverged in the dimly charted woods of student free expression.[1] In one case, *Kuhlmeier v. Hazelwood School District*,[2] the Eighth Circuit overturned a federal district court to hold that a high school administrator may not delete sensitive stories written by students from an official school newspaper, unless the administrator can show that publication would create substantial disorder or would subject the school to tort liability. In the other case, *Bethel School District No. 403 v. Fraser*,[3] the Supreme Court overturned, 7-2, decisions of both a federal district court and the Ninth Circuit to hold that a high school administrator may discipline a student for a vulgar speech in a school assembly, even when the speech caused neither a material disruption nor harm to others.

The widely differing perspectives of these cases reflect the uncertainties and contradictions that characterize today's constitutional rulings involving public school students. They also underscore the need—part of an emerging national need for educational reform—to develop a coherent first amendment theory for public education that will stablize and encourage sound educational structures for the long range benefit of students in American schools. As a step toward such a theory, this Article suggests that courts should presume the constitutional validity of rational decisions by public school officials that implicate educational matters, both curricular and extra-curricular. This rebuttable presumption of an institution's educational autonomy is grounded in interests associated with students' right to be taught the values underlying the first amendment. The schools' role in nurturing those values is clarified by understanding that public schools are not typical arms of the bureaucratic state, but are unique "mediating" institutions having historical and conceptual ties to both the public and private sectors.

INTRODUCTION

The point of departure for virtually all student free expression analysis over the last twenty years was *Tinker v. Des Moines Independent Community School District*,[4] a peaceful protest case from the Vietnam War era, in which the Supreme Court first held that public school students are entitled to some forms of first amendment protection. Eighteen years after *Tinker*, the Supreme Court reached a more restrictive result in the *Fraser* case—perhaps on grounds that the expression in *Fraser* was vulgar rather than political, as it was in *Tinker*. However, the *Fraser* Court appeared to signal some interest in a broader perspective on student speech. Stating that "the process of educating our youth for citizenship" is "not confined to books, the

1. Both opinions were handed down on July 7, 1986.

2. 795 F.2d 1368 (8th Cir. 1986), *cert. granted*, 107 S. Ct. 926 (1987). For some discussion of the case, see *infra* text accompanying notes 287–88.

3. 106 S. Ct. 3159 (1986). For discussion, see *infra* text accompanying notes 136–44 and 289–94.

4. The Court held that students' free speech interests protected their right to wear black armbands on the school grounds in protest against the government's conduct of the war, so long as their symbolic speech did not cause a substantial disturbance of or material interference in school activities. 393 U.S. 503 (1969).

curriculum, and the civics class,"[5] the Court invoked the once antiquated doctrine of *in loco parentis*[6] and cited Justice Black's dissent in *Tinker*. Justice Black had predicted in 1969 that application of traditional free expression concepts to students below the age of majority could seriously undermine discipline and, hence, educational quality in American schools.[7] He viewed *Tinker* as a child of the revolutionary 1960s,[8] a strange and unsettling period that challenged traditional authority in ways that arguably contributed toward our becoming by the early 1980s "a nation at risk" due to a weakened educational system.[9] *Fraser* may thus begin to clarify how courts should apply free expression concepts to students in the light of post-*Tinker* experience in both the schoolhouse and the courthouse.

The differing perspectives on student expression represented by *Tinker* and *Fraser* reflect the divergence between the 1960s and the 1980s on a multitude of issues. They also echo a very old debate about the relationship between freedom and discipline in both educational processes and theories of personal and political development. In one sense this debate is but one more manifestation that "Americans have a . . . hang-up about authority," even as they also recognize that "[e]ducation . . . is by its nature an exercise in authority . . . since the teacher presumably seeks to impart something that the student does not or cannot do."[10]

The degree of authority required to teach children and to preserve an educational environment is fundamentally at odds with the anti-authoritarianism of the first amendment tradition, because education by definition involves the imposition of restraints. This dilemma illustrates that "[c]hildren are the Achilles heel of liberal ideology," for, indeed, "[t]o make education compulsory" in the first place "was itself to challenge liberal ideology."[11] Some commentators argue that the schools' authority must nonetheless be subject to the same free speech limitations as those imposed on any governmental agency in order to protect students against state indoctrination,[12] to prevent the establishment of uniform political values,[13] to allow

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5. 106 S. Ct. 3159, 3165 (1986).

6. The Court recognized "the obvious concern on the part of parents, and school authorities acting *in loco parentis* to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech." *Id.*

7. "I . . . disclaim . . . that the federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students." 393 U.S. 503, 522, 526 (Black, J., dissenting), *quoted in* 106 S. Ct. 3159, 3166 (1986).

8. "[G]roups of students all over the land are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins." 393 U.S. 503, 525 (1969).

9. The College Board's Scholastic Aptitude Tests (SAT) taken by high school seniors "demonstrate a virtually unbroken decline from 1963 to 1980," a "rising tide of mediocrity" so serious that the nation was told in 1983 by the much publicized National Commission on Excellence that it had "lost sight of the basic purposes of schooling." THE NATIONAL COMMISSION ON EXCELLENCE IN EDUCATION, A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM 5 (1983) [hereinafter A NATION AT RISK]. This report was one of many during the early 1980s to reach similar conclusions. *See infra* note 98 and section I.C.2.

10. Ravitch, *The Continuing Crisis: Fashions in Education*, 1984 THE AMERICAN SCHOLAR 183, 189.

11. Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 647–48 (1980).

12. *See* Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863 (1979).

13. *See* Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104 (1979).

the autonomous development of student beliefs,[14] and to teach students the processes of democratic participation.[15]

These arguments clarify the freedom side of the tension between freedom and discipline in the learning process, but they take little account of the risk that weakened authority among teachers and administrators can undermine student educational development—on which the sustaining of democratic values also depends. Indeed, a strong educational tradition is a crucial prerequisite to maintaining a strong tradition of individual rights.[16] Excessive student autonomy can impair the most fundamental learning processes, which are finally the lifeblood of responsible democratic participation. For example, if free speech is to be meaningful, a citizen must have something worth saying, together with the maturity and the skill needed to say it. Indeed, "freedom of expression" has two meanings: (1) freedom *from* restraints upon expression and (2) freedom *for* expression—that is, having the capacity for self-expression. Schools must be especially concerned with the second meaning, interacting with students in ways unique among all interaction between the individual and the state. They educate to enable expression, thus affirmatively nurturing the values of the first amendment.

Unfortunately, experience since the 1960s now demonstrates that reductions of discretionary authority in the schools and elsewhere have—along with other factors—reduced support and guidance for children, creating a vacuum that has not been filled with other sources of educational nurturing.[17] While complex cause and effect relationships are difficult to establish, some empirical connections have recently emerged linking this decline in authority to declines in educational achievement.[18] The Court thus handed down *Fraser* at a time when the debate over authority needed closer attention to the schools' side of the equation, not to establish unbridled discretion in ways that seriously threaten the right of students to development toward autonomy, but to restore the balance needed to facilitate that same development over the long term.

The need to shore up one side of a paradoxical equation in education is hardly a new one. Our entire educational history has been like a pendulum swinging between traditional, authoritative approaches to education and innovative, free wheeling approaches. The nation experienced the "old school" rigor of Horace Mann during

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14. *See* van Geel, *The Search for Constitutional Limits on Government Authority to Inculcate Youth*, 62 TEX. L. REV. 197, 239 (1983) (arguing for the establishment of "a principle that would protect students from any effort by public schools to inculcate pupils with political ideas, attitudes, viewpoints, ideologies, values or beliefs").

15. *See* Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647 (1986).

The arguments in these articles at times echo dominant themes from the 1960s. For example, one of the root ideas from that era was "participatory democracy," which was embodied in the Port Huron statement of 1962 adopted by Tom Hayden and other leaders of Students for a Democratic Society, having been inspired by C. WRIGHT MILLS, THE POWER ELITE (1956). *See* M. VIORST, FIRE IN THE STREETS: AMERICA IN THE 1960S 163–96 (1979). This idea has logical links to social science literature developing the idea that, "If the family or school is authoritarian . . . the children learn to be submissive to authority. A more democratic family or school is thought to predispose children to democratic values." Levin *id.* at 1654.

16. *See* Hafen, *Children's Liberation and the New Egalitarianism*, 1976 B.Y.U. L. REV. 605, 656-58.

17. "You don't replace something with nothing. Of course, that was exactly what the educational reform of the sixties was doing." A. BLOOM, THE CLOSING OF THE AMERICAN MIND 320 (1987).

18. *See infra* section I.C.

the last half of the 19th century, followed by the broad view of schools as socialization agents held by John Dewey and other advocates of Progressive education. After a brief return to traditional standards following the Soviets' launch of Sputnik in 1957, the late 1960s erupted into a period of unprecedented anti-authoritarian innovations.

Following an unusually strong series of calls to return to higher academic standards in the last few years, the educational pendulum is moving once more—even if uncertainly—toward a reassertion of authority. As it moves, it now carries greater weight from one side to the other, loaded with increasingly heavy social and political policies in addition to its more traditional burden of teaching.

Because this historical pattern now interacts inevitably with the nation's legal system, we need theories of constitutional law and legal policy that capture and enable, rather than block or unravel, the productive and dynamic paradoxes that are inherent in the educational process. The swings that have occurred in our educational history (now being reflected in the swings of constitutional law) are but manifestations of paradoxical conflicts between legitimate and competing principles that deal both with learning and with the important social purposes served by education.

Important paradoxes are inherent in the very idea of a state-operated school system in a democratic society, an idea Professor Franklin Zimring has described (as it prevailed during the first half of this century) as "special case socialism at a time when socialism was a dirty word."[19] A review of our educational history shows that schools in the early days of the Republic were almost literally extensions of the home. The tradition of local control of education has its roots in that era. Yet Jefferson and others of his day saw great political and social value for the nation in making a uniform system of education available to all its children. A predictable tension between parents and the state as dual sources of authority for the schools has continued and grown to the present day, creating a tangled political and organizational paradox. Here is a legal agency of the state—a public school—that is at once an extension of the governmental sphere and an extension of the private family sphere—"in loco parentis." It is a unique legal entity of dualistic origins. In applying that paradox in students' lives, a school simultaneously helps students develop the skills they need for personal autonomy as well as social cohesion. The student is both person and citizen. In a democratic society, these conflicting roles do not force a permanent choice, but are mutually reinforcing, despite the appearance of occasional conflict. In assisting each student to accept this paradox, public schools are institutions that mediate between the individual and the megastructures of society. This is but one reason why their institutional uniqueness must find clearer expression in our constitutional theory.

Consider other educational paradoxes. The most desirable mix of liberty and discipline necessary for effective teaching and learning depends upon a host of variables so complex as to defy abstract and generalizable prescription. At one time a student may need the temporary repression of discipline in order to develop the

19. F. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE 35 (1982).

skills necessary for genuine freedom. At other times, that same student may need to be left completely free (perhaps even pushed to break free) to try his or her creative wings.

We also expect the schools to teach principles of both revolution and preservation. On the one hand, inspired by Jefferson, we teach our children the spirit of the Declaration of Independence, that they might be sufficiently self-reliant to recapture political authority when it is abused by those entrusted with the power to govern. On the other hand, inspired by Washington and Lincoln, we teach them the spirit of the Constitution, that they might conserve existing institutions with "a passionately rational reverence,"[20] in order to ensure stability and continuity in our public institutions.

A paradox arises from the commitment of the schools to equal educational opportunities for all the nation's children, even as they also aspire to the excellence of stretching the most gifted students. Our system has also been traditionally committed to a foundation of moral commitment, even as it emphasizes the value of free inquiry.[21]

Another important paradox in the education of children arises from the status and conditions of childhood. State compulsory education laws *compel* children to attend school, violating what would be the most fundamental liberties of adults. Our tradition asserts that this compulsion is in the best interest of children, because education ultimately develops their capacity to enjoy the full and meaningful exercise of their adult liberties. Throughout the legal system and society, our laws discriminate on the basis of age by placing restrictions on the right of minors to vote, contract, or marry. In an age when discrimination is thought to be harmful in any guise, American society continues to believe that age discrimination can advance the best interests of its young people. In the paradox involving discrimination *for* children, we advance their liberty by limiting it.[22]

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20. E. BRANN, PARADOXES OF EDUCATION IN A REPUBLIC 43 (1979).

21. Compared with private, religious education, public education has naturally placed its primary emphasis on the fundamentals of open inquiry and the assumption of multiple paths to educational truth. The doctrine of separation of church and state as well as the obligation of public schools to an increasingly diverse constituency have reinforced the sense of neutrality inherent in the public schools as state-sponsored institutions. Yet the public school tradition, reflected in everything from the copybook headings to the pledge of allegiance, also includes a commitment to both personal character and public virtue. The idea that education was essential to the theory of democracy depended in no small part on the assumption that education would aid the development of these general abilities and attitudes as universally shared matters of value.

Developments in recent years, however, have revealed considerable difficulty in our ability to deal with the paradox of diversity and unity on questions of value as well as the paradox of blending free inquiry with matters of moral commitment. Professor Stephen Aarons has observed that the court-ordered removal of "religious teaching and observance" from the public schools since the early 1960s has apparently been followed by the unnecessary and at times unwitting removal in many schools of an entire range of "beliefs, commitments, and passionately held values" underlying "the most enduring questions of civilization and human nature." Action and attitudes of this kind have not necessarily been mandated by the courts, but are unfortunately assumed to be the logical extension of the reasoning behind the religion cases by many "citizens, school officials, and teachers wary of . . . conflict . . . that might breed trouble." *Commentary*, EDUCATION WEEK, Nov. 7, 1984, at 24. *See infra* text accompanying notes 183–84.

22. Family life creates the first and most pervasive authoritarian structure children experience. Our laws protect the right of parents constantly to make decisions affecting their children—frequently with arguably negative consequences—because legal protection for the autonomous discretion of parents is essential if the nurturing developmental capabilities of relationships based on kinship are to take root and, over time, bear the fruit of deeply felt commitments. If law intervenes too easily in these relationships, the relationships are constantly uprooted, and the fruit may never come to

In all of these areas of paradox in the lives of school-age children, parents, teachers, and other adults who function in custodial and teaching roles make paternalistic decisions constantly, weighing the merits of the conflicting principles in each situation: order and liberty, inquiry and inculcation, love and discipline. On a given day with a given child, the judgmental preference may well be toward one side of the paradox; the next day with another child, one prefers the other. These are matters of discretion. The educational and parenting processes are saturated with this elusive, subtle, and ultimately unsupervisable necessity. Thus, despite our grand educational visions and our recurring focus upon large social abstractions, in reality "the effort of the single teacher is the ultimate resort of excellence in education."[23]

How can the law, constitutional or otherwise, with its crude, rough instruments, enhance such complex processes? Surely law must protect vulnerable young people from serious abuses of adult discretion, but it must do so without destroying the learner's confidence in her teacher.[24] The law's capacity to undermine wise discretion is far greater than its capacity to improve it. Moreover, the law has a deeply ingrained propensity—its strength as well as its weakness—to resolve paradoxes by splitting them, favoring one principle over another, because strong constitutional presumptions prevail over all opposition or because a "result" is necessary in a given case.

More specifically, how does the first amendment's grand commitment to free expression apply to public school students? The needs of children often call for restraints on liberty of expression in order to teach the values of expression. Moreover, rather than posing a threat to a child's interests in expression, schools are dedicated fundamentally to developing the very values for which the first amendment stands. Our analysis of freedom of expression claims for children in schools thus requires greater sophistication than merely stating our preference for one side of the paradoxical equations inherent in educational development.

Public education seeks affirmatively to teach the capacity to enjoy first amendment values—to mediate between ignorance and educated expression. It is a process that invites intrusion, requires authoritarian paternalism, and depends upon the exercise of unsupervisable discretion. There must be legal protection against clearly harmful abuse of this flexibility, but without some strong influence from those apparent enemies of personal autonomy in the educational process, little serious education is possible. Traditional first amendment jurisprudence was never designed to deal with governmental action of this kind, because the original cases arose in contexts involving adults and were concerned only with when to limit governmental action, not with how to encourage it toward such complex ends as educational development. In schools, as in other contexts primarily involving the young, "children have a very special place in life which law should reflect. Legal theories

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blossom. Short of legal standards for abuse and neglect, we leave children at lesser but still significant forms of risk, because experience teaches us no better means of child development. In the paradox of belonging based on love, the bonds of family life can bring fulfillment rather than bondage.

23. BRANN, *supra* note 20, at 5.

24. For discussion of the relationship between educational achievement and school authority patterns, see *infra* section I.C.2.

and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a state's duty toward children."[25]

As will be shown below, the Supreme Court's public school cases have already begun to develop a special brand of constitutional law that in sometimes awkward ways shows the broad outlines of a *sui generis* kind of jurisprudence. To this pattern should be added the idea of affirmative first amendment protection for the role of public schools as mediating institutions involved uniquely in developing and transmitting constitutionally protected values. Within this vision, the paradoxes of education can remain in place, to be applied, adjusted, and worked through for the benefit of each individual child by individual teachers and individual administrators in the small communities of learning we call schools.

Part I of this Article reviews the origins and purposes of public schools, considering both the private and the public heritage. It reviews changes in our social and political assumptions regarding child-oriented historical movements, giving special attention to the "reform" era of the 1960s, which challenged the assumptions of the previous half-century. This Part then offers some observations about reform efforts in child-centered institutions in the 1960s and 1970s, which include recent flourishes of interest in restoring higher academic standards to the schools, perhaps in part to regain some of the educational losses incurred in the post-1960 reforms. Part I concludes that our attitudes toward public schools and children are currently in a state of profound ambivalence.

Part II seeks to clarify our current uncertainties by arguing that public schools should be understood as "mediating institutions" between individuals and the state, rather than being seen only as extensions of the state bureaucracy whose intrusion into students' personal expression is presumptively chilling. In this vision, as shown by the application of first amendment theory to children, educational institutions are themselves entitled to certain forms of first amendment protection as a means of developing among their students the values guaranteed by our system of freedom of expression. When schools are seen in this mediating role, many issues that appear to raise constitutional questions will be understood as issues that primarily raise questions of educational policy.

Part III reviews the Supreme Court cases that have recently introduced the doctrine of institutional academic freedom, then applies that first amendment perspective to the problems of student expression in extracurricular activities.

I. The Historical Context

A. *Origins and Purposes of American Schools*

From its beginning, the American public school movement was built upon three major interests: the interest of parents in providing for the education of their children, the child's personal interest in education, and society's interest in an educated

25. May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).

citizenry. The child's right to education is treated as part of the first amendment theory discussed in Section II.C.2. This Section A. is concerned primarily with the historical development of parental and societal interests in education.

1. *Extensions of Home, Family, and Local Community*

Both chronologically and conceptually, the education of American children was originally viewed as a natural extension of family life and parental interests. As recipients of delegated parental authority, the schools empowered by this heritage have long nurtured children through the entire complex of intellectual and social processes necessary to the development of personal autonomy and public citizenship. The courts and other non-educational agencies have generally deferred to this authority for many of the same reasons that led to our longstanding tradition of nonintervention in family life.

In the ancient societies of Athens and Rome, both of which were more deeply committed to the idea of education than were the European medieval societies, parents assumed primary responsibility for the education of children.[26] The very concept of childhood, let alone the notion of prolonged education for children, took on reduced meaning during the Middle Ages.[27] But with the Reformation's commitment to Bible literacy and the Enlightenment's new faith in the power of reason, the idea of education for children returned with full vigor.

Because political and religious leaders also saw during this period that educational practices had a powerful effect on the attitudes and skills of succeeding generations, the role of the family in education was much debated, with differing results in various nations. Germany and France took an early lead in the development of centralized state school systems during the 18th and 19th centuries, but the English tradition preferred, on grounds of both religious and political theory, parental control and private education.[28] While the German, French, and English attitudes all influenced the development of American schools, the English emphasis on private control was—with the exception of the New England colonies—dominant in the colonial era. Massachusetts first introduced a formal public interest in education with laws adopted in 1642 and 1647, although even these laws placed primary obligation to provide education upon parents.[29]

The nationalism and the optimism of the revolutionary era moved the nation strongly in the direction of establishing a system of free, public schooling; however, the public debate over the proper relationship between state and parental interests grew increasingly intense throughout the 19th century and continues to the present day. The general momentum in this debate, despite occasional pauses and diversions, has moved for two centuries in the direction of greater emphasis on governmental

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26. *See* J. CARCOPINO, DAILY LIFE IN ANCIENT ROME (1940); J. MAHAFFY, SOCIAL LIFE IN GREECE FROM HOMER TO MENANDER (1902).

27. *See* P. ARIES, CENTURIES OF CHILDHOOD (1962).

28. J. BRUBACHER, A HISTORY OF THE PROBLEMS OF EDUCATION 540-47 (1947).

29. *Id.* at 547–50.

control. Nonetheless, the family/private side of the argument has enjoyed moments of notable significance in the development of our constitutional and political theory.

In 1816, for example, the legislature of New Hampshire attempted to transform Dartmouth College into a state institution as part of a "new national spirit" in education;[30] however, accepting Daniel Webster's celebrated argument, the Supreme Court overturned the state's action as an unconstitutional impairment of a private contract.[31] A century later, in *Pierce v. Society of Sisters*,[32] the Supreme Court again protected private, parental choice in education. *Pierce* culminated the longstanding struggle in which private, religious education (primarily Catholic schools) had sought accomodation with the movement toward state-financed and state-mandated public schools.[33] Rejecting an attempt by the State of Oregon to require compulsory *public* school education, the Court reaffirmed the constitutional primacy of parental control over the education of children in a democratic society.[34]

Pierce, which built upon doctrine introduced in *Meyer v. Nebraska* just two years earlier,[35] was described by the Court almost fifty years later as "a charter of the rights of parents to direct the religious upbringing of their children."[36] The Court viewed the constitutional place of parents not only in religious liberty terms protected by the first amendment, but as "an enduring American tradition" of "parental concern for the nurture and upbringing of their children"[37] protected by the due process liberty clause of the fourteenth amendment.

The Court also reaffirmed in *Pierce* the state's general power to establish compulsory education laws and educational standards for private education in satisfaction of the state's *parens patriae* duty to educate children for the larger benefit of society.[38] This balance represents the theoretical framework in which parents may direct the education of their children in ways that also satisfy significant state interests.

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30. E. CUBBERLY, THE HISTORY OF EDUCATION 706 (1920).

31. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819). Webster's own mixed views captured the conflict of his day between the overlapping public and private interests in education. His position that private property was vested with a public interest regarding education became an important plank in the platform of the public school movement: "For the purpose of public instruction, we hold every man subject to taxation in proportion to his property, and we look not to the question, whether he himself have, or have not, children to be benefited by the education for which he pays. We regard it as a wise and liberal system of police, by which property, and life, and the peace of society are secured." 1 THE WORKS OF DANIEL WEBSTER 41–42 (1885), *quoted in* BRUBACHER, *supra* note 28, at 527.

32. 268 U.S. 510 (1925).

33. *See* BRUBACHER, *supra* note 28, at 560-67.

34. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power 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.

268 U.S. 510, 535 (1925).

35. 262 U.S. 390 (1923).

36. Wisconsin v. Yoder, 406 U.S. 205 (1972).

37. *Id.* at 232.

38. 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. 510, 534 (1925).

Beyond the question of allocating responsibility for education, this theory also reflects the fundamental, pluralistic assumptions of democracy, which presuppose "a social system of family units, not just of isolated individuals."[39] These family units do "not simply co-exist with our constitutional system"; rather, they are "an integral part of it," because:

> In democratic theory as well as in practice, it is in the family that children are expected to learn the values and beliefs that democratic institutions later draw on to determine group directions. The immensely important power of deciding about matters of early socialization has been allocated to the family, not to the government.[40]

By contrast, controlling the system of value transmission is "a hallmark of totalitarianism";[41] therefore, "[f]or obvious reasons, the state nursery is the paradigm for a totalitarian society."[42] The notion that public schools are acting pursuant to a delegation of primary authority from parents is thus a politically as well as educationally significant idea in the democratic structure.

Because the idea of formal schooling has historical and conceptual roots that tie it close to family life, the public school system has long nourished cooperation with and some sense of accountability toward parents. The schools have been, at times quite literally, *in loco parentis*: in the place of the parents. This natural link influenced and was then reinforced by the tradition of local control and financing of public education, which relies heavily on locally elected school boards and local property tax revenues. The pattern of local control of education was historically so strong that education is not mentioned in the U.S. Constitution at all; yet nearly all of the state constitutions require a system of public education. This state-assured right, made specific in compulsory education laws, responds not only to children's needs, but reflects the belief that "the stability of a republican form of government [depends] mainly upon the intelligence of the people."[43]

Local control has been an important issue in debates over national educational policy in the modern era. For example, despite widespread agreement about the need for more and better shared educational resources, most early attempts to provide federal financial aid to public education during the two decades following World War II were turned back by widespread fears in Congress and elsewhere that, among other risks, federal assistance would undermine community authority over education.[44] The policy of local control also played a major role in the Supreme Court's 1973 decision holding that comparatively inequitable funding among local school districts within a single state did not violate the Equal Protection Clause.[45] This case demonstrates the

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39. Heymann & Barzelay, *The Forest and the Trees:* Roe v. Wade *and its Critics*, 53 B.U.L. REV. 765, 772 (1973).

40. *Id.* at 773.

41. P. BERGER & R. NEUHAUS, TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY 6 (1977).

42. D. MURPHEY, BURKEAN CONSERVATISM AND CLASSICAL LIBERALISM 270 (1979) (Modern Social and Political Philosophies Series).

43. MINN. CONST. of 1857, art. VIII, § 1.

44. D. RAVITCH, THE TROUBLED CRUSADE: AMERICAN EDUCATION, 1945-1980 1, 6, 26–42 (1983).

45. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). In addition to acknowledging that local financial control allows each district the choice of devoting "more money to the education of one's children," the Court noted "the opportunity [local control] offers for participation in the decision-making process that determines how

continued validity of the idea that schools are extensions, and ultimately the responsibility, of both local communities and the homes that comprise them.

Despite the well documented and still viable tradition of local control, however, today's schools are influenced by a far more diffuse authority structure than was the case but a generation ago. This significant change began with *Brown v. Board of Education*,[46] which called upon the public schools to assume the role of direct state agents in the desegregation of society. In this role, schools acted not as parental agents but as arms of the federal government, engaged in an immensely important, complex task that was social, economic, and political as well as educational in nature. *Brown* was followed by a series of wrenching changes in the internal climate, the public expectations, and the governmental supervision of American schools.[47]

The cumulative effect of these changes moved schools ever further from the localized world of home and family toward the nationalized world of federal policy, supervised by federal judges and agencies. As a result, it is today by no means clear where the schools fit among the complex structures that reach from home and family to the federal government. The *in loco parentis* tradition remains in place in much of the public mind and throughout the school corridors, continuing to perform many of public education's oldest roles. This tradition is a primary source of the discretionary, parent-like authority of teachers and administrators, augmented by the doctrine of *parens patriae*, which authorizes the state to care for dependent persons. But schools as state agents have also assumed a new tradition backed by new forms of governmental sponsorship. The reality is that a public school is cast in both public and private roles, creating structural and philosophical ambiguities that are a continuing source of tension and ambivalence in the minds of teachers and administrators, as well as among students and the public.[48]

2. *The American Social Interest in Education*

Although developments during the past thirty years have placed the schools in new and demanding roles dictated by broad national policies, the nation's social interest in its schools in fact has much older origins. The creation of the new American nation gave early impetus to the idea of public schools as a source of both political vitality and national unity.[49] Thomas Jefferson believed such a system would help to ensure democratic society's ability to hold its elected leaders accountable under the original political theory of the social contract embodied in the Declaration

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these local tax dollars will be spent." Moreover, "[p]luralism [which local control encourages] also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence." *Id.* at 50. Although recognizing inequities in the funding provided by locally financed districts, the Court believed that this difficulty was outweighed by the need to keep public schools within the control of the citizens whose taxes sustain them and whose children attend them.

46. 347 U.S. 483 (1954).

47. *See infra* section I.B.

48. *See infra* section I.D.

49. *See generally* L. CREMIN, AMERICAN EDUCATION: THE NATIONAL EXPERIENCE 1783-1876 (1980). For a briefer summary, see H. COMMAGER, THE PEOPLE AND THEIR SCHOOLS (1976).

of Independence.[50] The idea of an enlightened citizenry was of course prerequisite to the very idea of self-government.

Jefferson and such other figures as Benjamin Rush and Horace Mann also persuaded their countrymen that education would create a needed sense of national unity, not only as a matter of patriotic loyalty, but as a matter of common understanding and language, forged in the egalitarian community of a public school inhabited by children of all classes and origins. With the growth of immigration in the late 19th century, the idea of public schools as national melting pots assumed wide significance. The states gradually implemented these ideas through laws providing for free, universal primary schools and, beginning in 1852 in Massachusetts, laws requiring compulsory attendance.[51]

The advocates of national unity through public education were motivated in part by a desire to overcome the potential for divisiveness they saw in the nation's growing religious and ethnic diversity, even as they also saw a need for religious and moral foundations in public education. The American school movement thus developed during the middle 1800s a general sense of nonsectarian Christian morality typified by the views of Horace Mann, whose "definition of what should be taught came remarkably close to the [Boston Unitarian] conceptions of the day—a common piety rooted in Scripture, a common civility revolving around the history and the state documents of a Christian Republic, and a common intellectual culture conveyed via reading, writing, spelling, arithmetic, English grammar, geography, singing, and some health education."[52] While some argued that this vision indeed included a particular brand of Christianity, the differences among competing Protestant approaches were ultimately resolved in favor of attitudes similar to Mann's by the need to develop a pattern to which increasing numbers of immigrants would be expected to conform.[53]

The Catholic minority, however, many of whom were new immigrants, rejected the dominant pattern in favor of education founded in their own distinctive religious tradition. The *Pierce* case finally validated the right of Catholic and other parents to satisfy the compulsory school laws with their own schools, although the Establishment Clause cases dealing with aid to parochial schools eventually limited the practical significance of the private alternative by severely restricting access to public funds. The Protestant/Catholic conflict, historically recast in rough terms into a public school/private school conflict, nonetheless remains as an important countertheme in the march of universal education toward national uniformity. This strand of history also verifies the continuing theoretical validity of the private, family-centered heritage of today's commitment to public education, which helps to distinguish schools from other agencies of government.

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50. "Whereas . . . even under the best forms [of government], those entrusted with power have . . . perverted it into tyranny; . . . the most effectual means of preventing this would be, to illuminate . . . the minds of the people . . . " T. Jefferson, *Bill for the More General Diffusion of Knowledge* (1779), *quoted in* BRANN, *supra* note 20, at 40–41.

51. *See* BRUBACHER, *supra* note 28, at 551–60.

52. CREMIN, *supra* note 49, at 140.

53. *See* GLENN, *"Molding" Citizens*, in DEMOCRACY AND THE RENEWAL OF PUBLIC EDUCATION 47 (R. Neuhaus ed. 1987).

Inspired by John Dewey and other American pragmatists, the public school movement further expanded its educational vision with the rise of progressive education near the turn of the century. The schools developed a broadened sense of social responsibility during the same years in which industrialization, urbanization, and immigration were sowing the seeds of an increasing cultural diversity. In part as a response to the social problems brought on by massive industrialization and the challenges of life in the burgeoning cities, the schools of the progressive era were increasingly seen as a source of "social and political regeneration."[54] As a result, the educational emphasis in the schools shifted from traditional intellectual goals toward social adjustment for students in the larger name of social utility. The schools also enrolled more students and kept them longer, as secondary schooling became increasingly universal and the compulsory age limit rose.

The American juvenile court movement also emerged contemporaneously with and shared many assumptions of progressive education. The schools, the juvenile courts, and voluntary child welfare agencies of this "child saver" era[55] all reasoned from the premises of *parens patriae*, which regarded state agents and child care professionals as necessary supervisors in ensuring the training and control of children. These agencies were widely supported, reflecting a strong national commitment to child welfare. They were also characteristically operated on the basis of paternalistic discretion, exercised by relatively authoritarian father figures, symbolized by the school principal and the juvenile judge. At the same time, the progressive era's brand of authority in the schools and elsewhere reflected greater benevolence and flexibility than the more rigid attitudes of 19th century disciplinarians.[56]

While the progressive child-oriented agencies acknowledged the primary role of the family, some cultural historians argue that "the belief that the family no longer provided for its needs justified the expansion of the school and of social welfare services."[57] Indeed, some saw compulsory school laws as important protection from parental exploitation of child labor.[58] The attitudes and practices of the progressive era did allow schools and other state agencies enough discretionary authority to appropriate parental functions to themselves in ways that extended beyond the assumptions on which the public schools were originally founded. The broad discretion these agencies enjoyed inevitably led to some abuses. It is also apparent that social and economic conditions changed toward mid-century faster than the child saving organizations could adapt. But, as discussed shortly, the attempts of the 1960s and 1970s toward the reform of paternalistic institutions were motivated less by

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54. RAVITCH, *supra* note 44, at 45 (quoting L. CREMIN, THE TRANSFORMATION OF THE SCHOOL: PROGRESSIVISM IN AMERICAN EDUCATION 1876-1957 (1961)).

55. *See* ZIMRING, *supra* note 19, at 30–48.

56. Teachers trained in progressive ideology "learned of the epochal struggle between the old-fashioned, subject-centered, rigid, authoritarian, traditional school and the modern, child-centered, flexible, democratic, progressive schools." RAVITCH, *supra* note 44, at 44.

57. C. LASCH, HAVEN IN A HEARTLESS WORLD 14 (1977).

58. *Id.*

systematic evidence of actual abuse than by a profound change in overall social attitudes that shattered public confidence in authoritarian institutions.

The philosophy of progressive education dominated the public schools throughout the first half of the twentieth century, establishing the appearance of both uniformity and conformity, and creating an illusion of confidence that the schools were capable of solving far more than educational problems. As criticism of progressive education increased, however, there was ample basis for concluding that these appearances were at best unrealistic, if not misguided. Ironically, our educational histories recorded the demise of public confidence in the progressive movement in the mid-1950s, just when our legal histories recorded the emergence of school desegregation—the heaviest social burden the public schools had yet been asked to bear. Simultaneously, our political history recorded the Soviets' launching of Sputnik—a symbol of international competitiveness—as a crucial standard for measuring educational quality. Our confidence in what had become an established pattern was waning at the same time as our need for strong institutions was increasing.

B. *The Rejection of Paternalism: The Reform Era of the 1960s and 1970s*

A thorough commentary on this important period in our social and political history is beyond the scope of the present treatment. In general during these years, from a multitude of causes, "[a]ll the institutions traditionally relied on for socializing the young and directing human behavior to the achievement of social purposes . . . sustained massive losses of confidence and corresponding erosions of morale."[59] Of particular significance for our interest in legal and educational processes were the reform era's influence on authority patterns in schools and the use of courts for group litigation and bureaucratic reform that included an interest in constitutional rights for children.

1. *Structural Reform*

When *Brown v. Board of Education* introduced school desegregation into American society, the Warren Court also introduced a fundamental re-thinking of the relationship between the judiciary and all bureaucratic organizations, because "desegregation was a total transformational process in which the judge undertook the reconstruction of an ongoing social institution."[60] As other large agencies gradually came under similar judicial scrutiny, the concept of "structural reform" emerged—a new group litigation process built on the assumption that state bureaucracies inherently constitute an ongoing threat to the general constitutional values of equality and individual liberty. In the vision of structural reform, threats to civil liberties were seen not only as discrimination against minority groups; rather, "the victim of these

59. F. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 19 (1981). For some general accounts, see BLOOM, *supra* note 17; S. TIPTON, GETTING SAVED FROM THE SIXTIES (1982); VIORST, *supra* note 15; W. O'NEILL, COMING APART: AN INFORMAL HISTORY OF AMERICA IN THE 1960'S (1971).

60. FISS, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 3 (1979).

organizations is the citizenry itself."[61] Moreover, "[a]t the core of structural reform is the judge,"[62] who focuses not on particular "incidents of wrongdoing," but on "a social condition" and "on the bureaucratic dynamics that produce that condition."[63] By this means, judges "restructure the organization"[64] through broad supervision, not because judges necessarily possess superior management expertise, but because they "articulate and elaborate the meaning of our constitutional values."[65]

Structural reform is both a general pattern and a specific analytical tool. As a general pattern, this concept of adjudication captures the cumulative effects of constitutional litigation as a principal means by which many aggrieved groups challenged the prevailing institutional structures of American society (including public schools) in the quarter century following *Brown*. As a tool of constitutional analysis, structural reform (in part because of the effect of constitutional tests in civil liberties cases) shifts the presumption of political legitimacy away from institutional authority and toward judicial authority. This approach materially aided the process of desegregation; however, its more general application to public schools challenged the very idea of compulsory education, because structural reform begins from the premise that the heirarchical structure on which traditional teaching methods are based is illegitimate.[66]

The expansion of social and welfare services in the 1960s also created incentives for procedural challenges to governmental actions that affected the availability of benefits—including educational benefits. Reformers pressed the courts to expand civil due process guarantees both to curb "governmental arbitrariness in decisionmaking" and to erect "sufficient procedural hurdles . . . that the costs of governmental action would be so high that the government would refrain from taking away some benefit it had granted . . . ."[67] As the courts responded, the scope of administrative discretion in many agencies correspondingly contracted.

The idea of discouraging the removal of government benefits was less productive in education than it might have been with financial entitlements, however, because education cannot be "granted" in a material sense, even if physical attendance improves. Reducing the discretion of school personnel reduces, to some extent, their incentive as well as their capacity to provide meaningful instruction. For this and other reasons, although far more minority students were enrolled in school in 1980 than in 1950, educational quality for these same students deteriorated drastically.[68]

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61. *Id.* at 8.

62. *Id.* at 17.

63. *Id.* at 22.

64. *Id.* at 2.

65. *Id.* at 57.

66. A study of recent American educational history described the general effect of this pattern: "Programs, regulations, and court orders began to reflect the strong suspicion that those in control of American institutions were not to be trusted with any discretion where minorities, women, and other aggrieved groups were concerned." RAVITCH, *supra* note 44, at 271.

67. R. MNOOKIN, R. BURT, D. CHAMBERS, M. WALD, S. SUGARMAN, F. ZIMRING, R. SOLOMON, IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY 471–72 (1985). *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970); Goss v. Lopez, 419 U.S. 565 (1975).

68. *See* C. MURRAY, LOSING GROUND 102–05 (1984). *See also infra* note 92.

2. *The Revolution and Education*

The experience of the 1960s and 70s shook the very foundations of American education, most visibly on college campuses. There was a special kind of irony in higher education's becoming a target for student protest, because the "youthful revolutionaries . . . tried to destroy the one institution in American society that provided a sanctuary for their views."[69] Oddly, general student attitudes at Berkeley only weeks prior to the "Free Speech Movement" reflected a high level of satisfaction with the university experience.[70] Nevertheless, the spirit of protest quickly swept across the most prestigious campuses, at times challenging the university as a surrogate for white, corporate, and corrupt society.

The objectives announced by leaders of the student revolts were very general. Tom Hayden, for example, asked "not to reform the university but to transform it into a new institution, 'standing against the mainstream of American society.'"[71] Particular administrative acts or policies on a given campus were thus selected according to their usefulness in serving the more fundamental purpose of challenging the overall authority structure. As was said at Berkeley, "the issue is not the issue."[72] In this way the process of civil disobedience became an end in itself, providing opportunities for relevant social and political action as a way of life.

The student movement was also accelerated by events and pulsations in public attitude that were not directly related to the movement's goals. A series of tragic events occured, for example, including the assassinations of Martin Luther King and Robert Kennedy, and finally the killing of six students at Kent State and Jackson State. Much of the reform era's momentum was also fueled by intense, publicly demonstrated reactions against the federal government's conduct of the war in Vietnam. Variations and multiples among tangled political and social motivations coalesced for some to justify a rejection of not only traditional governmental patterns, but the entire value structure of the prevailing "Corporate State."[73] At the same time, the movement's links with more mainstream causes such as racial equality and opposition to Vietnam "kept the student movement, sometimes in spite of itself, close to the center of [publicly supported] political activity."[74]

While the effects on public schools were less visible, they were in many ways no less profound. The radical critique shook public confidence in the schools and in traditional teaching methods by portraying the schools as enemies of true learning and instrumentalities of social control.[75] As the spirit of personal liberation also emerged

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69. RAVITCH, *supra* note 44, at 183.

70. In the fall of 1964, 82% of the students reported they were "satisfied or very satisfied" with their classroom experience and 92% believed the university administration was "really trying very hard to provide top quality educational experience for students here." *Id.* at 196.

71. *Id.* at 205. Some revolutionaries targeted universities not so much because they were repressive, but because they were thought to represent centers of influence in which to train elite student populations for revolt against society. In that sense, these leaders reflected their own belief in the power of education. *See* VIORST, *supra* note 15, at 163–96.

72. RAVITCH, *supra* note 44, at 223.

73. *See generally* C. REICH, THE GREENING OF AMERICA (1970).

74. "The sympathy enjoyed by the students created an illusion, which was long in dying, that young people could rebel against the inherited structure of society—with widespread parental approval." VIORST, *supra* note 15, at 165.

75. *See* REICH, *supra* note 73, and ALLEN, *supra* note 59, at 22–23.

among the large scale social and political issues, "the counterculture posed a challenge to any institution attempting to assert authority over young adults, even teenagers. With its contempt for rationality and its reverence for immediacy, the counterculture openly opposed the self-discipline, order, and respect for reason that educational institutions rely on."[76] The empirical studies of Gerald Grant and David Riesman found that the most widespread and significant impact of the educational upheaval was expanded student autonomy, which led to broad reductions in traditional academic and behavioral expectations.[77] The elimination of many fixed academic requirements led high schools to lower their general education and graduation requirements, because many believed there was little reason to maintain standards that were not required for university admission.[78]

The developments of the revolutionary era also affected overall approaches to learning in elementary and secondary schools. Although the Russians' launching of Sputnik in 1957 had spurred reforms of progressive education with the aim of greater scientific rigor, the needs of poor and minority students assumed ultimate priority in the early 1960s. Then, when the early programs designed to help disadvantaged students showed disappointing results and the mood of the times led to a rejection of traditional approaches of all kinds, the stage was set for a series of innovative experimental programs that opposed any form of authoritarian education.

One of the best known examples of the educational protest literature was A.S. Neill's *Summerhill*, which challenged the discipline of traditional schools with the argument that a child is "innately wise and realistic. If left to himself without adult suggestion of any kind, he will develop as far as he is capable of developing."[79] The "open education" and "free schools" inspired by such assumptions sparked educational movements that linked attitudes toward teaching and learning with the general rejection of adult authority. Such innovations were adopted in various ways in the schools, in part as a step toward greater social relevance, but also in the hope of raising student interest as a way to cope with increasing behavioral problems. The open emphasis also appealed to younger teachers, who themselves had been the college students of the 1960s. At the same time, the loosening of traditional authority contributed toward the erosion of public confidence in the schools, aggravating the perception that lack of discipline was a major problem.[80]

3. *The Children's Rights Movement*

The original civil rights movement of the 1950s and 60s did not regard the nation's children as a disadvantaged minority group. On the contrary, children had long enjoyed the privileges of specialized classification reflected in a widespread and expensive system of schools, a juvenile court system, and other forms of both

76. RAVITCH, *supra* note 44, at 200.

77. G. GRANT AND D. RIESMAN, THE PERPETUAL DREAM: REFORM AND EXPERIMENT IN THE AMERICAN COLLEGE 188–89 (1978). *See generally* A. CHASE, GROUP MEMORY: A GUIDE TO COLLEGE AND STUDENT SURVIVAL IN THE 1980S (1980).

78. RAVITCH, *supra* note 44, at 225.

79. A.S. NEILL, SUMMERHILL: A RADICAL APPROACH TO CHILD REARING 4 (1960).

80. *See* RAVITCH, *supra* note 44, at 228–66.

protection and affirmative assistance. Civil rights workers soon saw, however, that the natural dependency of children compounded the harms inflicted on their parents by poverty and discrimination. The need for improved services for minority group children eventually became a focal point in attempts to reform both laws and social institutions. Because of their inherent vulnerability to abuses of authoritarian discretion, children also became identified with institutionalized or otherwise dependent persons whose needs brought them within the reformers' scrutiny.

In addition, some writers argued that the legal concept of minority status was itself a source of harmful discrimination—not because of particular evidence of harm or even the possibility of demonstrable new benefits, but because the very idea of "repressive" laws based on the arbitrary fact of age was repugnant to the free spirit of the day.[81] The advocates of this view included some who were leaders in the open school movement.[82]

The courts and other agencies responded to child advocacy claims by giving new attention to the basic needs of children—particularly those from disadvantaged classes. New procedural standards were adopted for the guidance of juvenile courts and public schools, clarifying the terms on which the state could intrude into the parent-child relationship or could regulate the behavior of young people. The voting age was lowered from twenty-one to eighteen and the rights of children began being described in constitutional terms.

Although the rhetoric of full blown children's liberation was seldom accepted by courts or legislatures, the children's rights decisions of the Supreme Court created a basic (although, as the cases have developed, largely symbolic) shift in perceptions about the relationship between children and governmental authority figures, including public school personnel. The cases did not generally conclude that children should determine their own choices; rather, they simply rejected the "child saver" era's assumption that state agents in juvenile courts and public schools enjoy *unrestricted* paternalistic discretion. Thus, having made the point that children do not shed their rights at the schoolhouse gate or the courthouse door, the Supreme Court has been very reluctant actually to interfere with the discretion needed by authorized providers of child supervision. It has also stopped short of authorizing constitutional protection for children's *choice* rights as distinguished from their rights to *protection*.[83]

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81. For example, one advocate of liberating children from compulsory school laws and from legal restrictions on voting, marrying, and contracting wrote:

> In another sense, asking what is good for children is beside the point. We will grant children rights for the same reason we grant rights to adults, not because we are sure that children will then become better people, but more for ideological reasons, because we believe that expanding freedom as a way of life is worthwhile in itself.
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> . . . .
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> If all this sounds too open and free, we must recognize that in this society . . . we are not likely to err in the direction of too much freedom.

R. FARSON, BIRTHRIGHTS 31, 153 (1974).

82. *See, e.g.*, J. HOLT, ESCAPE FROM CHILDHOOD (1974), which urges society to grant children "the right to do, in general, what any adult may legally do," including voting, having financial independence, choosing how one is educated, and determining where one lives. *Id.* at 18–19. For references to additional literature see Hafen, *supra* note 16, at 630–32.

83. For more complete commentary on the children's rights cases, see *infra* section I.C.3.

C. *Critiquing the Reform Era*

The accumulation of experience and evidence now allows consideration of some effects, intended and unintended, of the reform era. The scope of this Article does not call for a comprehensive review of that evidence, but, in general, most students of the period conclude that the "revolution" created a vacuum by removing many traditional standards and patterns without replacing them. Allan Bloom, for example, regards the reforms as "without content." They were "the source of the collapse of the entire American educational structure," but did not offer a new system.[84] With respect to the problems of children and schools, a sample of available findings generally shows that the costs associated with the reform era's reductions in paternalistic discretion probably outweighs the benefits. Taken together, this accumulation of evidence offers little support for educational or legal patterns rooted in the working hypotheses of the 1960s.

1. *Structural Reform, Child Advocacy Litigation, and Adolescent Behavior*

Many characteristics of the group-oriented litigation model of structural reform have become accepted procedure; however, its limitations have also been revealed in evaluations pointing out its corrosive effects on judicial legitimacy,[85] the conflicts created by advocates who are driven by broad ideological goals more than by the immediate interests of class action clients,[86] and the resistance of the Burger Court to broad doctrines of justiciability because of threats to the constitutional concepts of federalism and separation of powers.[87] In addition, structural reform has come under recent attack because it has not yielded the results it promised, because the judiciary itself has become increasingly bureaucratized, and because of fears that the public values adopted by the activist state of the 1960s are themselves a threat to privately chosen ends.[88]

Child advocacy litigation in the form of public interest class actions, introduced by *Brown v. Board of Education*, was highly successful as measured by the pro-plaintiff results it achieved in many cases.[89] However, a study of selected cases

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84. "Without entering into the strictly political issues, the intellectual picture projected is precisely the opposite of truth. The sixties were the period of dogmatic answers and trivial tracts. Not a single book of lasting importance was produced in or around the movement. . . . Even the figures most seminal for 'the movement' like Marcuse, Arendt, and Mills, did what serious work they did prior to 1960." BLOOM, *supra* note 17, at 322. Similarly, Steven Tipton concluded that the conflict between the traditional culture and the counterculture "left both sides of the battlefield strewn with expired dreams and ideological wreckage. It resulted in the disillusioned withdrawal" of both sides. TIPTON, *supra* note 59, at 29. *Accord* VIORST, *supra* note 15, at 548.

85. *See, e.g.*, Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979); Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982).

86. *See, e.g.*, Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

87. *See* Floyd, *The Justiciability Decisions of the Burger Court*, 60 NOTRE DAME L. REV. 862 (1985).

88. O. Fiss, *The New Procedure*, address given at Brigham Young University (Jan. 17, 1986) (publication forthcoming).

89. One study of 167 education cases, for example, found that the public interest party prevailed in 79% of the cases. The cases dealt with a variety of education issues, including special education, financing policies, and free speech. The variables most associated with successful outcomes were minority interests, the use of a formal advocacy organization

found that "legal victories in children's cases, especially those securing procedural safeguards, may have little real impact on children's welfare." Judicial supervision of discretionary choices increases the formality or may alter location of choices affecting children, but "because of the inherent subjectivity and indeterminacy involved in such decisionmaking, regardless of who is the decisionmaker, these adjustments may do little more than reshuffle the discretionary deck, without net improvements in the policies or decisions affecting children."[90] Perhaps more significantly, because children unavoidably lack the maturity to ensure the quality of their own choices, reductions in the discretionary authority of custodial figures can create a vacuum of support that has the effect of abandoning children to their procedural rights.[91]

In educational settings, such forms of abandonment were illustrated by declining incentives for students to learn and for teachers to teach. Ironically, the students most damaged by these effects are those most in need of educational assistance.[92]

In other areas of adolescent behavior, recent data cast additional doubt on the reformist assumption that extending increased legal liberties to young people would benefit them more than harm them. In the early 1970s, for example, when 18 year olds were being drafted for the war in Vietnam and were given the right to vote by the twenty-sixth amendment, half of the states lowered the minimum drinking age from 21 to 18 or 19. Between 1976 and 1983, however, about twenty states raised the legal drinking age to its former level. In 1984, responding to new evidence correlating high accidental death rates with age, Congress followed the strong recommendation of a presidential commission on drunken driving by enacting legislation that withholds federal highway funds from any state that fails to establish a minimum drinking age of 21 by 1987.[93]

Adolescent pregnancy is another area in which policies based on the assumption that teenagers are capable of mature decisionmaking are coming under increased scrutiny. While the complexities of empirical research in this area make it difficult to draw definitive conclusions from any particular study, new research shows that as both the number and proportion of adolescent clients increase in federally funded contraception clinics, teenage pregnancy and abortion rates increase rather than decrease. Even though increased participation in the clinics is associated with lower

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as counsel, and the use of class actions. Lee & Weisbrod, *Public Interest Law Activities in Education*, in PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 322–23 (B. Weisbrod ed. 1978).

90. Hafen, *Exploring Test Cases in Child Advocacy*, a review of IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY (R. Mnookin ed. 1985), 100 HARV. L. REV. 435, 437 (1986).

91. *See id.*

92. Despite higher enrollments among minority students during the reform period, "more students seemed to learn to read and write and calculate in 1960 than in 1970." MURRAY, *supra* note 68, at 172. The causes for such change are complex, but a review of empirical evidence related to changes in welfare policy and economic incentives found that "a student who did not want to learn was much freer not to learn in 1970 than in 1960, and freer to disrupt the learning process for others. Facing no credible sanctions for not learning and possessing no tangible incentives to learn, large numbers of students did things they considered more fun and did not learn." *Id.* at 173-74.

93. *Rewriting a Rite of Passage*, TIME, July 2, 1984, at 24. *See generally* MINIMUM DRINKING AGE LAWS: AN EVALUATION (H. Wechsler ed. 1980). Public ambivalence on the drinking-age issue is reflected in Michigan's experience between 1971 and 1980, when "lawmakers and voters were required to decide about minimum drinking ages three times in less than ten years, and to choose among three different minimum ages." ZIMRING, *supra* note 19, at 3–4.

birthrates, "the impact on the *abortion* and total *pregnancy* rates was exactly opposite the stated intentions of the [federal] program."[94]

2. *Educational Attainment and School Authority Patterns*

The impact of the reform era on educational attainment was especially unsettling. Educational historian Diane Ravitch found that both the educators and the federal supervisors who encouraged open-ended innovations so vigorously in the late 1960s and early 1970s oversimplified the problems they tried to solve. Some of the advocates of open schools had relied upon reports of success in an apparently flexible British program, the "structure" of which was widely misunderstood by its American proponents. Moreover, federal policy makers who pushed hard for innovative programs mistakenly believed "that a major cause of the schools' troubles was their rigidity and traditionalism, and that federal dollars should be used to free the schools from existing practices."[95] In fact, however, experimental, open school alternatives failed "not because of the backwardness or insincerity of local schools officials" but because the practical implementation of the programs "laid bare the contradictions and vacuousness inherent in much of the contemporary rhetoric of educational reform."[96]

A possible relationship between reform era attitudes and declines in academic achievement was suggested by the report in 1975 that Scholastic Aptitude Test scores among high school seniors had fallen steadily since 1963. When this report was first issued, some observers assumed that the drop in scores was caused by increasing numbers of disadvantaged students who were taking the tests. Subsequent research controlled for those variables, however, finding that test scores continued to fall after 1970, when demographic factors were held constant.[97] The ominous report in 1983 of the National Commission on Excellence in Education might also have been discounted as having a partisan flavor, since the Commission was appointed by a conservative Republican president. However, when the panel was created in 1981, there were already more than twenty other prominent groups studying similar problems and ultimately producing similar findings, all oriented toward documenting and recouping the past generation's losses in academic achievement.[98]

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94. Weed, *Curbing Births, Not Pregnancies*, Wall St. J., Oct. 14, 1986, at 32, col. 5. *See generally* Olsen and Weed, *Effects of Family-Planning Programs for Teenagers on Adolescent Birth and Pregnancy Rates*, 20 FAM. PERSP. 153 (1987).

95. RAVITCH, *supra* note 44, at 257.

96. *Id.* at 259.

97. Ravitch, *supra* note 10, at 184–85. *Accord* J. COLEMAN, T. HOFFER, & S. KILGORE, HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC, AND PRIVATE SCHOOLS COMPARED 188 (1982).

98. For a summary of these reports see *id.* at 185-88. The National Commission was alarmed at the "rising tide of mediocrity that threatens our very future as a Nation and a people," because other nations "are matching and surpassing our educational attainments." Reviewing the last generation, the Commission warned that, "We have even squandered the gains in student achievement made in the wake of the Sputnik challenge" to the point that we "have lost sight of the basic purposes of schooling." A NATION AT RISK, *supra* note 9, at 5. In its specific findings, the Commission reported that SAT scores demonstrated "a virtually unbroken decline from 1963 to 1980. . . . Both the number and proportion of students demonstrating superior achievement [on the same tests] have also dramatically declined." *Id.* at 8–9. It also found that the "extensive student choice" in the curriculum undermined a sense of educational purpose; that

The reports of these groups, especially in their common recommendations for a basic required curriculum, remain subject to the criticism that a standard set of academic course work may not serve the widely diverse abilities and interests of all students equally well. The paradox of a national commitment to both excellence and equal opportunity is unlikely to be quickly resolved. At the same time, the overwhelmingly negative results of an excessively permissive approach to education during the reform era make it clear that, whatever the curricular offering for a particular student, his or her educational needs were not well served by policies that reduced the demands made of students. When "the guiding principle" was essentially "to give students what they wanted" the results reported by the national panels seemed inevitably to follow.[99]

A Nation at Risk links the ability of public schools to respond to the contemporary pressure for academic revitalization to the "crucial leadership role" played by principals and superintendents.[100] It is ironic if school leaders are now held responsible for recent declines in discipline and achievement, because the relaxation of standards during the 1960s and 1970s was in response to overwhelming, even if confusing, external pressures to accomodate the *Zeitgeist*. External forces will continue to make multiple demands on local leaders, now that many policies are centralized at the state level[101] and policies and funding for a variety of special circumstance groups are determined at the federal level.[102] Yet one of the key casualties of the reform era may be its adverse impact on the capacity of school administrators and faculty to exert meaningful authority. A determination to attack institutional authority was an overriding and unifying focal point among many reformers, and in that respect the movement accomplished in diverse ways—some of them unintentional—much of what it set out to do.

It is of course very difficult to establish cause and effect relationships between declines in school authority patterns and educational achievement. As with any complex set of empirical variables, even the most thorough research can only establish associational patterns. However, the relationships demonstrated in recent studies allow some potentially significant inferences.

For example, educational researcher Gerald Grant found in his field studies that the authority structure of the schools was diffused and decimated by developments of the last twenty years. He also found that strong connections exist between a school's leadership policies and its educational quality. In general, his research in high schools demonstrated that "the new adversarial and legalistic character of urban public schools" would be the most noticeable change "to an observer who had not visited a public school since the mid-1960s." This overall pattern is "a shift of profound

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demands in courses, homework, textbooks, and college prerequisites were not sufficiently demanding; that insufficient time demands were made on students; and that teacher training programs lacked adequate rigor. *Id.* at 18. In a variety of ways, including recommendations concerning high school graduation requirements, the Commission urged "higher expectations, for academic performance and student conduct." *Id.* at 27.

99. Ravitch, *supra* note 10, at 190. *See supra* note 98.

100. A NATION AT RISK, *supra* note 9, at 32.

101. For example, twenty-two states now choose textbooks on a statewide basis. Baer, *American Public Education and the Myth of Value Neutrality*, in DEMOCRACY AND THE RENEWAL OF PUBLIC EDUCATION 4 (R. Neuhaus ed. 1987).

102. *See generally* chapter 8, *The New Politics of Education*, in RAVITCH, *supra* note 44, at 267–320.

dimensions," as "adult authority is increasingly defined by what will stand up in court."[103]

Grant found that teachers and counselors have become consistently unwilling to exert authority, in part because they fear litigation, but also because they "are no longer sure that they know what is right, or if they do, that they have any right to impose it."[104] In significant part, this attitude is also influenced by the prevailing assumption among school personnel that "children are adults capable of choosing their morality as long as they do not commit crimes."[105] These assumptions about the maturity of children are similar to the premises of the more extreme forms of the children's rights movement and open schools.[106] The Supreme Court has been unwilling to recognize such assumptions in cases involving "choice rights" rights for children under the age of majority.[107]

Perhaps the most significant large-scale empirical evidence about the relationship between school authority and educational outcomes is found in the work of James Coleman and his colleagues comparing public and private schools in 1982.[108] This study is best known for its basic finding that students in private schools generally perform better on standardized achievement tests by about two grade levels than do students in public schools. However, Coleman's methodology and sampling techniques also allow more precise inferences about factors relevant to whether authority in public schools is correlated with student academic achievement. Coleman found that demographic and other student background characteristics accounted for about half the variance between public and private school students. The other half of the variance was attributable to the effects of academic and discipline policies in the schools. Significantly, authoritarian institutional policies in these areas correlated with high academic achievement *in public as well as private schools*.[109]

Specifically, Coleman reported that (1) school discipline policies, (2) homework requirements, and (3) attendance requirements were the three primary variables associated with academic achievement on reading, mathematics, and other standardized tests.[110] The research also found that school disciplinary requirements are not

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103. Grant, *The Character of Education and the Education of Character*, 18 AMERICAN EDUCATION 41 (1982).

104. *Id.* at 143.

105. *Id.* at 146.

106. *See supra* section I.B.3.

107. *See infra* section I.C.3.

108. COLEMAN, *supra* note 97.

109. Professor Coleman has explained that, in order to respond to anticipated criticism that private school achievement was higher because of student background characteristics rather than because of school policies, his research team controlled for background variables. They also controlled for variables distinguishing public and private schools.

> When we examined, wholly within the public sector, the performance of students similar to the average public school sophomore, but with levels of homework and attendance attributable to school policy in . . . private schools, and those levels of disciplinary climate and student behavior attributable to school policy in the . . . private schools, the levels of achievement are approximately the same as those found in the Catholic and other private sectors.
>
> . . . .
>
> [T]hese attributes . . . are in fact those which make a difference in achievement in all American high schools no matter what sector they are in.

Coleman, *Private Schools, Public Schools, and the Public Interest*, THE PUB. INTEREST, Summer, 1981, 19, 25.

110. Variables in school policy that were *not* found to be consistently related to achievement, on the other hand, included per pupil expenditures as a measure of resources, laboratories, libraries, recency of textbooks, and breadth of

only stronger, but are perceived by students as being more fair in private schools.[111] In addition, reductions in school authority over the past several years have been most damaging to the educational achievement of disadvantaged students, because "it is they who are most likely to be exposed to an undisiciplined environment."[112]

These statistical correlations in the context of other reported research show that "both academic and disciplinary demands in high school have slackened during the 1970s."[113] The precise causal factors behind these changes are more difficult to isolate, but one of the apparent causes is "a fundamental change in the relation of the school to the student, which had been that of trustee for parental authority." Other influences include broad social changes, federal policies that reduce school discretion, and reduced parental interest in the education of their children.[114]

Other research corroborates these findings. Professor Grant cites the longitudinal studies of Michael Rutter, which show that shared perspectives among administrators, teachers, and students about discipline in a school make major differences in the school's ability to educate disadvantaged students.[115] Grant's own research verified this same correlation between leadership and educational outcomes, revealing that to understand the educational climate of a school, one must "understand the relationship between intellectual and moral climates on the one hand and the nature of authority on the other." He found that the authority most likely to be associated with productive educational outcomes is not "authoritarian" in the raw or rigid sense, but is of a coordinating and vision-sharing kind that "assures the united action of a multitude" in pursuit of a common educational mission. However, the absence of the informal trust associated with such authority patterns remains as a primary legacy from the complex influences of the reform era. In Grant's view, "where that trust does not exist, I think we are headed for ever greater stress, instability, and perhaps the eventual abandonment of the public schools."[116] Unless students submit to some degree of authority, little significant learning can occur.[117]

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course offerings. COLEMAN, *supra* note 97, at 186–87.

111. Coleman, *supra* note 109, at 22.

112. COLEMAN, *supra* note 97, at 190. *See also* note 92.

113. *Id.* at 188.

114. Coleman regards the "increased willingness of parents to relinquish authority over and responsibility for their adolescent children" as the most significant long range concern. *Id.* at 189–90.

115. *See* M. RUTTER, B. MAUGHAN, P. MORTIMORE, & J. OUSTON, FIFTEEN THOUSAND HOURS: SECONDARY SCHOOLS AND THEIR EFFECTS ON CHILDREN (1979), *cited in* Grant, *supra* note 103.

116. *Id.* at 146. Other research showing compatible conclusions is summarized in C. MURRAY, *supra* note 68, at chapter 7, especially note 15, which summarizes the general pattern that "lack of resources and lack of pedagogical knowledge have not been important explanatory variables" regarding educational outcomes; rather, such "fundamental characteristics" as "strong leadership by the principal, high expectations of the students, an orderly environment, and close, continuing evaluation of the students' progress" are more typically the key variables.

117. Philosopher Michael Polanyi has written that neither basic nor sophisticated skills can be learned without the sense of trust inherent in personal master-apprentice relationships:

> An art which cannot be specified in detail cannot be transmitted by prescription, since no prescription for it exists. It can be passed only by example from master to apprentice. . . . To learn by example is to submit to authority. You follow your master because you trust his manner of doing things even when you cannot account in detail for its effectiveness. By watching the master and emulating his efforts in the presence of his example, the apprentice unconsciously picks up the rules of the art, including those which are not explicitly known to the master himself. These hidden rules can be assimilated only by a person who surrenders himself to that extent uncritically to the imitation of another. A society which wants to preserve a fund of personal knowledge must submit to tradition.

The foregoing summary of empirical evidence does not directly show that expanded free expression rights for students are negatively correlated with academic achievement. The more appropriate inference related to judicial supervision of student expression is that court-imposed restraints on the exercise of discretion related to educational matters by school officials are likely to reduce a school's general exercise of authority. As identified in the reported research, this phenomenon occurs as something of a "chilling effect" that inhibits the development of overall authority patterns in the learning and disciplinary environment. In that sense, heightened judicial scrutiny and the fear of litigation can adversely affect the implementation of academic and disciplinary policies that are in fact related to achievement. When such policies are not authoritatively maintained, a school is likely to be less productive in fulfilling such first amendment values as developing students' understanding, powers of expression, and intellectual autonomy.

3. *The Children's Rights Cases*

I have discussed elsewhere the historical justification for the concept of children's legal status as minors and how the early children's rights cases appeared to question that concept.[118] I have also summarized elsewhere the development of the Supreme Court's more recent children's cases, finding that the Court's attitude toward liberationist arguments in those cases has over time become much more cautious than was discernible in its early bursts of interest in the novel idea of constitutional rights for children.[119]

Taken together, the children's cases show that the Court has not significantly altered the fundamental assumptions governing children's status as minors, nor has it departed substantially from the idea that children lack the maturity necessary to exercise constitutional rights involving free choice. Nearly all of the cases are designed to *protect* children from procedural or other forms of abuse. These forms of constitutional protection are not related to changed assumptions about children's mature capacity; on the contrary, it is precisely because of children's dependency and unique vulnerability that additional forms of protection have been developed. Thus, the argument of open school advocates that children are "innately wise and realistic" and are "capable of developing" without "adult suggestion of any kind"[120] has not been accepted by the Court. Moreover, the anti-authoritarianism that pervaded the reform movement has influenced the Court only toward ensuring greater protection for children against the abuses of utterly unchecked adult discretion. It has not generally caused the Court to direct transfers of actual decisionmaking authority from adults to children.

M. POLANYI, PERSONAL KNOWLEDGE: TOWARDS A POST-CRITICAL PHILOSOPHY 53 (1964).

118. *See* Hafen, *supra* note 16, at 605.

119. *See* Hafen, *The Constitutional Status of Marriage, Kinship and Sexual Privacy: Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 511–17 (1983).

120. *Supra* note 79.

These observations are illustrated by briefly reviewing selected reform era children's cases. Virtually all of these cases involve rights granted to *protect* minors, not rights that guarantee minors' freedom to make their own decisions. The juvenile court cases, for example,[121] are built upon the premise that children's status as minors does not by itself justify complete disregard for the standards of procedural due process. While the development of this limitation on judicial discretion has altered some juvenile court procedures and has led to recommendations for more clear-cut standards designed to discourage state intervention in ongoing families and to discourage punishment for non-criminal behavior,[122] the essentially paternalistic character of the juvenile court remains. Indeed, subsequent to *Gault* the Court refused to grant juveniles the right to a jury trial for reasons related to its commitment to the "paternal attention that the juvenile court system contemplates."[123]

Reform era cases also subjected school disciplinary procedures to due process standards, but at a *sui generis* level so minimal that these cases stand primarily for the Court's unwillingness to conclude that due process has no application at all to schools. *Goss v. Lopez* first established in 1975 that students are entitled to "rudimentary" procedural "precautions," holding that they may not be suspended without "*some* kind of notice" and "*some* kind of hearing."[124] The Court recognized the unusual character of the school environment by leaving discretion with school officials to define the level of formality required, reflecting its intent not to alter fundamentally the paternalism inherent in school discipline. As noted in a thorough study of *Goss*, "Principals are fathers, but failure to listen to the students' side of the story is a species of child neglect."[125] And in recently accepting the concept that the fourth amendment applies to searches in schools, the Court imposed neither a warrant requirement nor a probable cause standard, preferring the less demanding test of "reasonableness, under all the circumstances."[126] The majority reaffirmed "the comprehensive authority" of appropriate officials "to prescribe and control conduct in the schools" and was "unwilling to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules."[127]

Other cases establish a variety of constitutional protections for children that are distinct from rights ensuring their autonomous personal choices. In free expression cases outside the educational setting, for instance, the Court has primarily restricted adult expression in order to protect children from indecent material that is not "obscene" under adult standards.[128] Moreover, adolescents' constitutionally pro-

121. This line of cases began with *In re* Gault, 387 U.S. 1 (1967).

122. *See* B. FLICKER, STANDARDS FOR JUVENILE JUSTICE: A SUMMARY AND ANALYSIS (2d ed. 1982) (prepared for the American Bar Association Juvenile Justice Standards Project).

123. McKiever v. Pennsylvania, 403 U.S. 528, 550 (1971).

124. 419 U.S. 565, 579 (1975).

125. MNOOKIN, *supra* note 67, at 486.

126. New Jersey v. T.L.O., 469 U.S. 325 (1985).

127. *Id.* at 342 and n.9.

128. *See, e.g.*, Ginsberg v. New York, 390 U.S. 629 (1968), involving the sale of soft-core pornographic magazines; FCC v. Pacifica Found., 438 U.S. 726 (1978), involving the use of vulgar language on public radio trans-

tected access to contraceptives is based on their need for protection rather than a right to choose to have sexual relations or to bear children.[129]

The validity of the distinction between protection rights and choice rights is further underscored by recalling that adolescents do not enjoy such fundamental constitutional choice rights as voting, contracting, and marrying.[130] Even the minors' abortion cases, which do grant a right of choice to "mature" minors, are consistent with the traditional theory underlying the concept of minority status, because the choice right is conditioned on a judicial determination of maturity—a subjective substitute for statutory age-based determinations of adult status. Moreover, the plurality opinion in the most recent abortion case, *Bellotti v. Baird*,[131] contains the Court's most complete statement to date of the reasons why "the constitutional rights of children cannot be equated with those of adults"—the "peculiar vulnerability" of children, their inability to "make critical decisions in an informed, mature manner," and the importance of the parental role, which supervises children's decision making.[132]

Experience since the *Bellotti* case with adolescent abortion also provides a sobering demonstration of what happens to children when courts reduce the scope of discretionary judgment exercised by authority figures to the point that children are deprived of an affirmative source of needed support and guidance.[133]

Judicial intervention designed to guard against harmful decisions by school officials is a different matter from judicial intervention designed to sustain free choices by students. Arguments intended to protect against abuses of discretion do not necessarily establish a basis for allowing student choice, especially in cases involving immature children who may require protection against the consequences of their own poor choices as much as they require protection against administrative compulsion. This distinction is a potential flaw in the arguments of those who

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missions; and New York v. Ferber, 458 U.S. 747 (1982), involving the use of material showing children engaged in sexual conduct.

129. The plurality opinion in Carey v. Population Serv. Int'l, 431 U.S. 678 (1977), granted minors the right to prevent conception in the name of their right of privacy, but the justices' primary concern was clearly their fear that without access to contraception, sexually active teenagers would be left unprotected against the serious risks of venereal disease and pregnancy. "The sexually active 15-year-old is given access to birth control not out of recognition of his or her mature judgment. Indeed, the *less* equipped a particular individual is for the burdens of parenthood, the stronger the argument against denying access to contraception when we cannot deny access to sex. . . . The civil right being vindicated is the right not to be gratuitously harmed." ZIMRING, *supra* note 19, at 63.

130. The Second Circuit recently held that requiring parental consent as a condition of issuing a marriage license to adolescents below a specified age does not violate their constitutional rights of privacy or freedom to marry. Moe v. Dinkins, 669 F.2d 67 (2d Cir.), *cert. denied*, 459 U.S. 827 (1982).

131. 443 U.S. 622 (1979) (plurality opinion).

132. *Id.* at 634.

133. The plurality opinion in *Bellotti* provided that a pregnant adolescent is entitled to a judicial hearing to determine whether she is sufficiently mature to make her own decision about an abortion. If she is found not to be mature, the judge determines whether an abortion would be in her best interests. Research conducted in a two-year period following this decision found that of 1,300 pregnant minors who sought judicial authorization for abortions without parental consent, all eventually obtained an abortion. MNOOKIN, *supra* note 67, at 239. The shift from parental discretion to judicial discretion in these cases seems to mean little discretion at all, because judges have been unwilling to substitute their personal judgment for the preference of an expectant teenager, regardless of her age or psychological maturity. This result follows not necessarily from a belief that minors should be liberated from their restricted status, but more likely from skepticism about paternalistic authority—in families or in a judge's chambers—combined with an awkward, subjective constitutional concept.

evidently assume that the need to discourage official indoctrination necessarily implies an occasion for student choice.[134] It should discourage the illogical leap from protection against abuse to assurance of autonomous choice to know that the Supreme Court has sought to protect children against their vulnerability but has not sought to authorize their choices.

4. Tinker *and* Fraser *in Historical Perspective*

Free expression for children, a particular focus of this Article, remains as a unique category of constitutional rights for minors, probably located closer to protection rights than to choice rights.[135] Leaving until Section II.C. a more complete treatment of general first amendment values in the school context and leaving until Section III.C. the specific issues relating to student newspapers, this section on context next places *Tinker* and *Fraser* in historical perspective.[136]

The turbulence of the late 1960s virtually demanded an affirmative answer to the question whether students have any expression rights *at all*. For the Court to have answered negatively would have aggravated mounting national frustrations that moved students to express their grievances. A negative answer would also have required the Court to overlook several key elements in the facts of *Tinker* that made it a nearly ideal case in which to recognize that student expression should *at some point* outweigh the general interest in the institutional autonomy of public schools. The students wore black armbands in a peaceful protest against the government's conduct of the war in Vietnam, the most important public issue of the day. This participation in democratic political expression claimed the highest form of traditional first amendment protection. They expressed their views in restrained silence akin to "personal intercommunication," removed from any connections with the curriculum, extracurricular activity, or other appearance of official acquiescence.

Moreover, it was clear by the 1960s that the progressive education of the child-saver era had indulged state agents in such an expansive paternal role that the place of parents was at times being displaced. Given the original link between public schools and parental interests, there were reasons to be concerned about those excesses, and there were reasons to encourage closer ties between schools and parents. The children in *Tinker* wore their armbands as the result of encouragement by their parents, who were also wearing armbands the same day as part of a common family plan.[137] For schools to accomodate parental interests in this non-disruptive and principled participation in the education of their children also hearkened back to a high tradition in public education. Thus, student expression under these facts was held protected by the first amendment unless school officials could reasonably forecast a material disruption.

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134. *See supra* notes 12–15 and accompanying text.

135. As shown in section III.C., *Tinker* can be understood as a freedom of the mind case having a relatively narrow scope that does not depend upon maturity. In that sense, it is a protection case more than a choice case.

136. For additional discussion of the *Fraser* case, see *infra* text accompanying notes 289–94.

137. *See* 393 U.S. 503, 504 (1969).

Fraser, on the other hand, called for a nearly opposite response, as indicated by the agreement among eight members of the Court that a vulgar speech in a student assembly was not protected expression.[138] The speech involved indecent language, which moved it toward the unprotected side of the speech continuum. It was also delivered at an officially sponsored school event, even though outside the formal curricular offerings. There was parental involvement in bringing suit against the school district, but no indication that the content of the speech pursued a parent's educational objective. The record also showed there was no material disruption, which suggests that the *Fraser* Court made its decision on grounds other than the *Tinker* standard.

The *Fraser* case also arose in a much altered historical setting. Just as the 1960s asked for reassurance that students are people too, the early 1980s asked for reassurance that schools should be more seriously devoted to meaningful education. As described earlier, the schools steadily lost academic quality, authority, morale, and public confidence in the generation between *Tinker* and *Fraser*.[139] The Supreme Court, in one of its most stirring moments, had already stated its belief that "education is perhaps the most important function of state and local governments;"[140] therefore, it was of no trivial consequence that in the same month when Matthew Fraser gave his speech to the studentbody at Bethel High School,[141] the National Commission on Excellence in Education released "an open letter to the American people" declaring that "the educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people."[142]

One other important element about the contrast between *Tinker* and *Fraser* is that both lower federal courts in *Fraser* missed seeing that the differences between the two cases called for a different standard. Reflecting a perspective on student speech cases that typified the understanding of many other lower courts (and of Justice Marshall's dissent), both the district court and the Ninth Circuit looked primarily for evidence of substantial disruption or obvious harm. This view of *Tinker* holds that a school's attempt to limit any student expression is presumptively chilling, and in the absence of a reasonable basis for forecasting serious disruption or tangible harm to others, any doubts of either fact or law should be resolved against administrative or faculty authority. If schools were adult public forums, that would be classic first amendment theory. But, as Justice Stewart noted in the Court's first free speech case involving minors, "a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."[143] And as the Supreme Court could perhaps see in developing a historical perspective about the

138. Justices Marshall and Stevens dissented, but Justice Stevens agreed with the school's right to regulate the speech. He objected only to punishment in the absence of a reliable warning to the student that his speech might violate a school rule. 106 S. Ct. 3159, 3171 (1986) (Stevens, J., dissenting).

139. *See supra* section I.C.2.

140. Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

141. April, 1983.

142. A NATION AT RISK, *supra* note 9, at 5.

143. Ginsberg v. New York, 390 U.S. 629, 649–50 (1968)(Stewart, J., concurring).

implications of ruling for the student in *Fraser*, twenty years of treating schools as if they were adult public forums had undermined what could be the most fundamental interest young people have in the values of the first amendment—the right to receive a serious education. That right had not been expressed in *Tinker*, because it was too obvious in 1969. But by 1986, too many judges, like too many other Americans, perhaps had "lost sight of the basic purposes of schooling."[144]

D. *The Contemporary Ambivalence*

Many results of the reform era are now fixed characteristics of the public schools, so that numerous basic conflicts will remain indefinitely. Desegregation in the schools has made a monumental contribution toward other forms of social, political, and economic desegregation, thus aiding a larger healing of wounds in a society that carried for too long the pain of racism. Our school populations are likely to remain pluralistic and heterogeneous. The momentum of mainstreaming other children once excluded from the benefits of public education also carries the promise of long term benefits. The rights of students, faculty, and others who experience serious maltreatment are also more clearly assured as a result of demystifying a wide variety of administrative procedures.

At the same time, despite new calls for qualitative reform, it is far from clear that we can "democratize the academic curriculum . . . without cheapening it."[145] Nor have we found a satisfactory means to limit the potential for authoritarian abuse without also undermining the sense of involvement, commitment, and responsibility administrators and teachers must sense in order to be educationally productive with their students. A balance between these competing interests is essential in public education, because the schools are among the few established structures that affirmatively nurture the wellsprings of individual liberty over the long term.

Yet our attempts to transfer civil liberties doctrines from the adult contexts in which they originated to schools involving children have confused our understanding of the very nature of public schools. This ambivalence is nicely captured by the contradictions regarding the idea of *in loco parentis* in two of the Supreme Court's most recent school cases. In holding that school personnel are "state agents" for fourth amendment purposes when they conduct searches in connection with disciplinary functions, the Court said "school officials act as representatives of the State, not merely as surrogates for the parents."[146] But only the next year, the *Fraser* Court said its past cases "recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis* to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech."[147]

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144. A NATION AT RISK, *supra* note 9, at 5.

145. Ravitch, *supra* note 10, at 193.

146. New Jersey v. T.L.O., 469 U.S. 325 336 (1985). " '[T]he concept of parental delegation' as a source of school authority is not entirely 'consonant with compulsory education laws.' Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies." *Id.* (quoting Ingraham v. Wright, 430 U.S. 651, 662 (1977)) (citation omitted).

147. Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159, 3165 (1986). This language echoes Justice Brennan's

This apparent inconsistency is not necessarily an unwitting contradiction. Both expressions carry seeds of truth. School officials *are* state agents for many purposes, but the same cases establishing this role in disciplinary functions have created standards of constitutional procedure that are unique to the school setting. In that sense, school personnel are not treated the same as other state agents, nor does procedural due process have the same meaning in school cases that it does elsewhere.[148]

At the same time, teachers and administrators acting in daily roles of temporary but de facto child custody literally are standing in the place of parents for many custodial purposes, just as juvenile courts may appoint welfare workers to act on behalf of children when a competent parent is absent. These factors illuminate both the dual heritage[149] and the *sui generis* nature of the public school as a legal entity. Rather than lurching back and forth between public or judicial moods, we need a constitutional concept that captures both the paradox and the uniqueness of the public school, allowing teachers and administrators to be *both* state agents and *in loco parentis*. Though not yet an established legal construct, an appropriate model to aid our thinking toward this end might be that of the mediating institution.[150]

We are also becoming ambivalent about the nature of children. The excesses of our flirtation with children's liberation have created a lingering sense of uncertainty whether children really do lack the necessary maturity to be treated as adults. Marie Winn's *Children Without Childhood*,[151] for example, describes "a profound alteration in society's attitude toward children,"[152] tracing the connections among a general erosion of institutional authority, the instability of marriage, the sexual revolution, and "the crucial [but unjustified] assumption: that children have the same capacity as adults to assimilate and utilize knowledge and experience."[153] Recent research about the effects of television also suggests that TV's careful attempts to appeal to mass audiences erases the traditional distinctions between adults and children, with adverse effects on the normal psychic maturation of children.[154]

Such uncertainty is aggravated by the conflict of interest adults experience in thinking about legal rights for children. When school personnel or parents liberate their children from watchful supervision, they also liberate themselves from some of the arduous self-sacrifice that has traditionally been required of those devoted to the

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earlier statement that a "legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibilty." Ginsberg v. New York, 390 U.S. 629, 639 (1968).

148. Nevertheless, the traditional weight of constitutional presumptions may make this primarily a rhetorical point. In deciding that the fourth amendment does apply to school searches, the Court stated that "the courts should, as a general matter, defer to [the] judgment [of school administrators]" on the legitimacy of existing disciplinary rules—unless it is "suggested" that "the rule violates some substantive constitutional guarantee." New Jersey v. T.L.O., 469 U.S. 325, 343 n.9 (1985). It is easy enough for modern advocates to allege constitutional violations that this posture is not as deferential toward school discretion as it may appear. Still, there is tangible acknowledgement of the paternalistic nature of a school in the Court's unwillingness to impose standard probable cause and a warrant requirement on schools. *See id.*

149. *See supra* section I.A.

150. *See infra* section II.B.

151. M. WINN, CHILDREN WITHOUT CHILDHOOD (1981).

152. *Id.* at 5.

153. *Id.* at 197.

154. *See* N. POSTMAN, THE DISAPPEARANCE OF CHILDHOOD (1982).

serious nurturing of children. It is a tantalizing but deceptive thought that we serve the interests of our children by simply deferring to their preferences, because serving their interests in that way also serves the personal interests of adults who are inconvenienced by the needs and demands of children. The concern of the 1960s and 1970s with the excessive paternalism of the progressive era was not without foundation, but the children in our schools need more than the vacuum created by reducing paternalistic discretion and not putting some form of meaningful support in its place.

It may help our perceptions of this problem to recall Justice Powell's insight that:

> Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.[155]

Public schools as mediating institutions for children might, consistent with this vision, stand between the tradition of parental authority and the tradition of individual liberty.

II. Public Schools as Mediating Institutions that Sustain First Amendment Values

Part I suggests that students in the public schools may have experienced the excesses of oversupervision during the progressive era and the excesses of undersupervision during the reform era of the 1960s and 1970s. Being aware of risks at the extreme edges of the continuum between liberty and order,[156] we need legal concepts that maintain a productive and continuing balance between individual and social interests. That need is especially relevant in our attitudes toward young people, because the choice is not simply between viewing them as totally dependent or totally independent. Professor Franklin Zimring has argued persuasively that "the theory that those who are not totally independent should be regarded as totally dependent is the most troublesome aspect of the legal theory of early adolescence associated with juvenile courts, public schools, and social services for most of this century."[157] The most troublesome aspect of more recent theories is the simple reversal that causes some to regard young students as totally independent.

Children are not the victims of permanent restrictions on their autonomy. If the restrictions are wisely applied, they both learn from them and quickly outgrow them.

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155. Bellotti v. Baird, 443 U.S. 622, 638–39 (1979).

156. John Stuart Mill, known for his advocacy of unrestrained liberty, recognized the risks of excess at either extreme. He wrote that "[i]n some early states of society," the forces of individual autonomy were "too much ahead of the power which society then possessed of disciplining" them. Those were times "when the element of spontaneity and individuality was in excess, and the social principle had a hard struggle with it." When Mill wrote these lines in 1859, it seemed to him that "society has now fairly got the better of individuality; and the danger which threatens human nature is not the excess, but the deficiency, of personal impulses and preferences." J. Mill, On Liberty 73–74 (Liberal Arts Press ed. 1956). From this perspective, the revolutionary stirrings of the 1960s may have been a reaction against too much social conformity, just as today's need for reassertion of "the social principle" is perhaps an understandable reaction against a quarter century of witnessing the excesses of "personal impulses and preferences."

157. Zimring, *supra* note 19, at 27–28.

As for self-expression, "[t]o every thing there is a season, and a time to every purpose under the heaven: . . . a time to keep silence, and a time to speak."[158] The older children become, the greater their need to move from a time of silence to a time to speak. We might productively view adolescence as the learning years, a time when young people should be heard as well as seen, for these are years of expanding horizons. By seeing the consequences of writing or speaking their minds, they will learn from experience in what is usually a low risk way.[159] As children grow, they must develop the capacity to make decisions by *making* some.[160] Learning of that kind requires customized mixes of autonomy and restraint, fashioned and guided toward the end of maximizing personal maturation and skill development.[161]

The process of guiding children through this stage is essentially a teaching process. Such teaching, especially when done by public school faculty and administrators, is also mediational in nature: it mediates between the private world of the home and the public world of society; between childhood and adulthood. Toward this end, public schools are mediating institutions.

A. *Mediating Institutions*

A mediating institution is a conceptual rather than a technical, legal category of analysis. Such institutions are the "little platoons," to use Edmund Burke's phrase, that stand between the public and private spheres.[162] The personal, private sphere is where "meaning, fulfillment, and personal identity are to be realized" for each person. The public sphere, which can include the institutions of the national economic marketplace as well as the institutions of government, is comprised of "megastructures" that are "typically alienating . . . [and] not helpful in providing meaning and identity for individual existence."[163] Standing between the individual and the megastructures are such mediating structures as families, churches, neighborhoods, schools, and voluntary associations. Some of these have been called "the value-generating and value-maintaining agencies in society."[164] Traditionally, these have also been major sources of social continuity and stability, as well as a critical source of protection against the development of totalitarian tendencies.[165]

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158. *Ecclesiastes* 3:1,7.

159. "Expression is normally conceived as doing less injury to other social goals than action. It generally has less immediate consequences, is less irremediable in its impact." T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 9 (1970). *But see* Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321 (1979).

160. "Being mature takes practice. To know this is to suppose . . . [one] justification for extending privileges in public law and family life to those who have not yet reached full maturity." ZIMRING, *supra* note 19, at 89.

161. Zimring calls this a "learner's permit" stage of life, requiring more freedom than young children enjoy but more restrictions than are placed on adults. *See id.*

162. *See* P. BERGER & R. NEUHAUS, TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY (1977). The significance of intermediate institutions in democratic political theory is developed in R. NISBET, THE QUEST FOR COMMUNITY (1953). The American city as an intermediate structure is fully explored in Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980), which also contains a brief summary of relevant literature in its note 1. For a discussion of religious organizations as mediating institutions, see *Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1606, 1740–81 (1987).

163. BERGER & NEUHAUS, *supra* note 162, at 2.

164. *Id.* at 6.

165. *See* NISBET, *supra* note 162.

This theme is the modern expression of a central thesis in Alexis deTocqueville's classic study of American character and institutions of the early 1800s, *Democracy in America*. Tocqueville feared that the strong individualistic strain in democracy could, if unrestrained, tear apart the very connections that hold a free nation together.[166] For him, our system's primary source of protection against this risk was the people's interest in voluntary, intermediate associations, through which "the Americans combat the effects of individualism by free institutions."[167] Tocqueville found that "Americans . . . are forever forming associations,"[168] which included not only spontaneous and cooperative approaches to local government or industry, but "the *intellectual and moral associations*" he thought to be so important that "nothing . . . more deserves attention."[169] Tocqueville took particular interest in religion and family life. The "mores" formed in such places—these he called "the habits of the heart"—were "one of the great general causes responsible for the maintenance of a democratic republic in the United States,"[170] because "[t]here have never been free societies without mores."[171] The development of mores restrained the destructive, acquisitive appetites of individualism and developed a sense of personal and civic virtue. In Tocqueville's mind, these were the civilizing traditions on which the long term future of the democratic experiment hinged. As we have seen, Jefferson, Mann, and others believed the schools would play a key role in that same process.[172]

Some mediating structures are institutional, such as the nuclear family, churches, and schools, while others are more loosely organized, such as neighborhoods or kinship-based ethnic groups.[173] Institutions of the mediating kind are usually private, voluntary organizations, but a few might technically belong to the governmental sphere, such as schools and certain local governmental units, yet they still serve both political and personal functions as mediating institutions. Of special interest to the present discussion are the structures devoted to what Tocqueville called "intellectual and moral" matters, because that is the core concern of the first amendment. Schools can be seen to fit many contours of this model, because they are engaged in intellectual processes that make a school a carrier of meaning. At the same time, a public school does not transmit highly personal sources of value interpretation in the same way as do families and churches.

Under our theory of government, the State is not the primary source of the substantive values that give ultimate meaning to individual lives. Indeed, we

166. "[N]ot only does democracy make men forget their ancestors, but also clouds their view of their descendants and isolates them from their contemporaries. Each man is forever thrown back on himself alone, and there is danger that he may be shut up in the solitude of his own heart." A. DETOCQUEVILLE, DEMOCRACY IN AMERICA 508 (Mayer ed. 1966).

167. *Id.* at 509.

168. *Id.* at 513.

169. *Id.* at 517 (emphasis added).

170. *Id.* at 287.

171. *Id.* at 590.

172. *See supra* section I.A.

173. I use the term "mediating institutions" to describe those having institutional character, while "mediating structures" includes all groups or organizations performing ongoing mediating roles between the private and public sectors.

discourage the State from that role by such doctrines as separation of church and state. The totalitarian state, by contrast, gladly and aggressively assumes the role of imposing on all its citizens "one comprehensive order of meaning."[174] The guarantees of the Bill of Rights are primarily process-oriented values—liberty, equality, due process, free speech—that define the terms on which the State must deal with its citizens. At the same time, however, these processes consciously seek to assure each individual citizen of the governmental protection and the freedom necessary for his or her own pursuit of personal meaning and fulfillment.[175] These procedural and structure-establishing values are an essential means toward the end of personal self-determination. Schools help provide tools for this quest.

Individuals are not left totally to their own resources in the personal quest for purpose. The right freely to pursue personal meaning is embodied primarily in the values of the first amendment, which are usually regarded as a set of individual liberties. Yet the tradition of the first amendment also recognizes and protects certain intermediate structures—those "intellectual and moral associations"—that are carriers of meaning and developers of the tools necessary to explore meaning. Thus, the first amendment and related constitutional sources should protect not only individual religious liberty, but the institutional liberty of churches; not only personal academic freedom, but the institutional liberty of schools and colleges;[176] not only individual freedom of speech, but the associational or institutional freedom of groups and newspapers; not only the personal right to seek meaning and education, but the institutional role of the family to direct the moral, intellectual, and spiritual development of its children. The "little platoons" are a deliberate part of the structure, for they nurture the values that ultimately sustain the entire system—as well as sustaining the personal quest of each citizen.

For these reasons, our constitutional theory protects these institutions from excessive governmental or other forms of harmful intrusion, except when the institutions cause serious harm to the members of their groups or when there are serious conflicts with overriding governmental policies. Thus, the interest of parents in freely rearing their children is subject to such limitations as child abuse and compulsory education laws. The interests of churches and educational institutions are subject to various forms of government regulation, but only when the regulations pose no material threat to the religious or academic mission of the institution. As an institution's purpose moves further from the first amendment's special interests in the intimacy of family and kinship or in political, religious, and intellectual freedom, its protections are correspondingly reduced.

Because the developments of recent years have moved the schools away from a family model and toward a more traditional state agency model,[177] a *public* school today probably would not satisfy the criteria for associational or intimate relationships

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174. BERGER & NEUHAUS, *supra* note 162, at 3.

175. "We live in a Republic that does not attempt to provide happiness but to facilitate its pursuit; hence, all its ways are instrumental—our public realm is primarily one of means." BRANN, *supra* note 20, at 61.

176. *See infra* section II.B.

177. *See supra* section I.A.

protected under the first amendment.[178] However, public schools come—and for educational purposes should come—closer to fulfilling mediating and even associational functions than do other units of government. To be sure, a state-sponsored school must respect the autonomy of each child's beliefs—in significant part because the inculcation of personal beliefs is allocated to parents under democratic theory.[179] Yet the needs of children and the very nature of the educational process suggest that schools need not be far removed from the institutions and associations that "have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs."[180]

The state must show unusually compelling reasons for intervening in these highly protected relationships. The law is reluctant to allow legal claims against the mediating institution arising from alleged harms to its own members. For example, relationships involving familial intimacy are not supervised by the state, unless serious abuse is inflicted or unless the relationship itself is threatened. This reticence arises from the overriding commitment of constitutional theory to the value of encouraging continuity and intimate interaction within the protected sphere, because that continuity is essential for mediating institutions to perform their functions. Educational functions are similarly dependent upon intimacy and continuity in student-teacher relationships.

In recent years, however, the influence of most mediating structures has been declining. Legal and social attitudes have come to reflect a strong individual rights flavor, which looks with suspicion upon the institutional character of many mediating structures. Federal regulation has also become increasingly intrusive toward local organizations, in large measure motivated by understandable concerns about abuses of discretionary power. Thus, the growing influence of regulation has dramatically reduced the scope of discretionary activity, thereby reducing from the megastructure side the autonomy and, hence, the influence of mediating institutions. Their influence was simultaneously eroding on the private side through the fragmentation of shared personal values and an emerging distrust of institutions in general. As the megastructure of government has grown, fears of government's intrusive power were somehow transferred into fears of all institutional power.

B. *Public Schools as Mediating Institutions that Sustain First Amendment Values*

As noted occasionally in the preceding Section, the traditional role and function of the public school corresponds in many ways with the roles of other mediating institutions that have their roots in the values and the protections of the first amendment. The primary source of doubt whether a public school really stands *between* the public and private sectors is that the school is itself a public institution, despite its historical ties to the private sphere of family life. Moreover, as a public institution, a school can be terminated by governmental action.

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178. *See* Board of Directors, Rotary Int'l v. Rotary Club of Duarte, 107 S. Ct. 1940 (1987); Roberts v. United States Jaycees, 468 U.S. 609 (1984).

179. *See supra* notes 38–39 and accompanying text.

180. Roberts v. United States Jaycees, 468 U.S. 609, 618–19 (1984).

The *family*, on the other hand, "is the major institution within the private sphere,"[181] where it performs society's central mediating, value-generating function. As part of their constitutionally protected role of value transmission, however, parents have enjoyed the right (and the duty) to direct the education and rearing of their children. Thus, the schools to which parents sent their children have for many purposes stood in the place of the parents.[182] In this sense, both private and public schools assumed a mediating role as extensions of the family. Over time, however, affected by the consequences of school desegregation and other sources of increasing cultural heterogeneity, the place of the public school has become less clear.[183] In fact, public schools are not true extensions of the value-laden private sphere in the way a private school or most other mediating institutions would be.

The development of establishment clause law has also raised questions about the mediating role of public schools, at least with respect to the schools' role in the inculcation of religious values. Yet the traditional commitment of the schools to teach children such fundamental civic and moral virtues as integrity, cooperation, self-reliance, and responsibility remains central to the task of public education. In teaching children these "habits of the heart" in moral education, the schools are engaged in the core mediating role of value transmission.

The schools also perform many of the custodial and child-nurturing functions associated with the parental role. In addition, the schools by nature reflect a mediation-like commitment to first amendment values so fundamental that this fact alone may establish their essential character as mediating institutions. The schools stimulate the development of students' capacities to discover their own forms of meaning and purpose, as illustrated by the way schools nurture both the values and the skills related to self-expression.[184]

Because of the hybrid character of their source of authority,[185] schools also stand in an unusual interactive relationship with both the private family sphere and the public governmental sphere. Parents are required by law to see that their children are educated, but they can provide that education in private schools or, increasingly in many states, they can provide it at home. Thus the parental choice to enroll children in a public school does contain a theoretically significant voluntariness, even though the financial incentive to accept public school enrollment is for most people overwhelming. The factor of local control[186] and the tradition of parent-teacher interaction also reinforce at least some sense of accountability from school to parent.

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181. BERGER & NEUHAUS, *supra* note 162, at 19.

182. *See supra* section I.A.1.

183. The disciplinary issues in racially integrated schools, for example, have raised questions about the legitimate authority of the school principal to rule his educational flock as a father. . . . But it is difficult to understand the origins of this conflict without understanding that the children in this educational family were black and the 'parents' largely white. Does father know best when father is white and the putative child is black? How do black families, including fathers and mothers with their own children, respond to a family model of public education in an era of rights consciousness?

MNOOKIN, *supra* note 67, at 458.

184. *See* section II.C.

185. *See supra* section I.A.

186. *See supra* section I.A.1.

Moreover, the major role of public schools in influencing the maturation and developmental processes of young people, both intellectually and psychologically, places them squarely in a mediating role between the tradition of family autonomy that protects children and the tradition of individual autonomy that frees them. The individual tradition accords each child the eventual right of full participation in democratic institutions, public and private. But the fulfillment of individualism's promise of personal liberty depends upon the maintenance of other traditions necessary to give it full meaning. One reason the family is so significant in the democratic structure is that children, born with undeveloped natural faculties, find in families the protection and the intrafamily commitments through which they develop the skills and attitudes that are essential to their capacity to enjoy "the Blessings of Liberty."[187]

Children have no more fundamental "right" than this claim to affirmative nurturing, because without it the promise of individual autonomy is an empty abstraction. The needs of children thus go far toward justifying the preferred position of marriage and family in the constitutional framework.[188] This same level of need among children explains why "the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding."[189] Schools play a similar, though more detached, role in helping children benefit from their status as minors within the family tradition in fulfillment of their right to be prepared for entrance into the tradition of individual autonomy. In this sense, the family and the school are much more like each other than either of them is like any other social institution.

Finally, schools can be understood to be mediating institutions because, despite their battered present state, they truly function as "little republics"—tiny communities of learning in which all participants have the interactive opportunity (and, indeed, the constitutionally mandated task) of developing those "habits of the heart" without which there is no larger community. As Robert Bellah and his associates have documented, the decline of community in this day of ardent individualism creates one of the nation's most urgent needs.[190] The general decline of community-based environments for public schools also hampers the important educational and social process James Coleman calls "intergenerational closure," in which student-teacher interaction is part of a larger school-community interaction involving parents who know each other.[191]

"A school is not the world. And yet it is *a* world, a small republic of the intellect within the political community."[192] When this element of life in a public school is

187. *See* Hafen, *supra* note 119, at 476–83.
188. *See id.* at 473–76.
189. Bellotti v. Baird, 443 U.S. 662, 638–39 (1979).
190. *See* R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER, AND S. TIPTON, HABITS OF THE HEART (1985).
191. Coleman, *Schools and the Communities They Serve*, 66 PHI DELTA KAPPAN 527, 530 (1985).
192. BRANN, *supra* note 20, at 146.

understood for both its educational and its social significance, we are more likely to understand the seriousness of impairing the trust and the natural structures of cooperation and authority on which intimate communities—mediating structures—depend.[193] We are also more likely to see that schools are not simply government agencies, any more than they are simply extensions of the family. Public schools are institutions in their own right and might profitably be seen as such from a legal perspective that would entitle schools to a greater degree of judicial deference (when educational matters are implicated) than could be claimed by other governmental entities.[194]

C. *First Amendment Values in the Public Schools*

In the public school environment, freedom of expression has unique meaning—both for school age children and for the school as a mediating institution. This discussion assumes, of course, that the first amendment interests of parents are not directly implicated.[195]

1. *Free Speech Theories and Students*

Professor John Garvey has pointed out that most judicial approaches to free speech for school children make one of two mistakes: either they assume that the speech rights are presumptively plenary, as would be the case in an adult public forum; or they discount adult concepts of free expression by some arbitrary factor because children are involved. A more thoughtful approach would recognize the instrumental value of free expression for children by acknowledging both their lack of mature capacity and their need to develop powers of expression, then by asking how first amendment concepts might best be applied toward the end of developing expressive powers.[196] We are then asking a question that is more in the nature of educational philosophy than it is a question of constitutional law. That fact alone should make judges cautious about assuming that the blunt tools of legal (even

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> Such an association is, to be sure, a curtailed commonwealth; it is an unnatural city deprived of the dignity that attaches to communities into which people are born and from which they die their natural death. . . . [L]ife in such a school has, albeit in a blither fashion, the chief characteristic of the larger republic: that the more each person does in his own behalf, the richer is the public realm.

Id. at 146–47.

193. This, reports Gerald Grant, is why we are mistaken to regard schools as factories, in which the rules are designed to produce maximum efficiency and formalistic impersonality. There must be "emotional commitment" and "agreement on the . . . worthwhileness of what is produced." For "education by its very nature must occur in a community, must draw on emotional commitments, engender sympathy for others, and produce something in us that we feel has great value." Grant, *supra* note 103, at 146–47.

194. *See* Skillen, *Changing Assumptions in the Public Governance of Education: What Has Changed and What Ought to Change*, in DEMOCRACY AND THE RENEWAL OF PUBLIC EDUCATION 108–09 (R. Neuhaus ed. 1987) (Schools "have a life of their own with an identity and quality peculiar to them. . . ." Thus, government should view schools "as distinct agencies of education instead of mere departments of state.").

195. Parents have at times attempted to influence the curriculum and other matters of educational policy, often by citing their own interests in religious liberty. *See, e.g.*, Mozert v. Hawkins County Pub. School, 647 F. Supp. 1194 (E.D. Tenn. 1986); Hafen, *Privacy in the Family and the Home*, at ¶ 22.02[4][c] in 3 PRIVACY LAW AND PRACTICE (G. Trubow ed. 1987). Those issues are beyond the scope of this Article, which concerns itself only with the expression rights of students and the relationship under first amendment doctrine between students and school personnel.

196. *See* Garvey, *supra* note 159, at 321.

"constitutional") analysis are a preferred substitute for the subtle, personal, extended process we call education.

Children, to a greater or lesser degree depending upon their age, lack the rational ability that is a prerequisite to the meaningful application of traditional free speech theories. For that reason, most standard theoretical justifications for free speech have only limited relevance in the public school environment.

For example, John Stuart Mill excluded children from his celebrated principle of liberty, with which free speech as the "marketplace of ideas" is closely associated.[197] Other advocates of liberty have recognized the same limitation. Jefferson, for example, believed that, "[C]hildren should not be forced to be men too soon, . . . there is a time in childhood when the memory and not the judgment should be exercised."[198] Similarly, Plato distinguished between preparatory education and the serious education of the dialectical process. Without the foundational discipline of the *paideia* to prepare the "puppies," he thought their attempts at true educational dialogue would be little "more than a playful yapping."[199] As Justice Stewart put it, "a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."[200] And from Anna Freud's perspective in psychology, a child's "confidence is shattered by his critical powers being too early awakened."[201] Thus, a child is "not permitted that measure of independence, or able to exercise that maturity of judgment, which a system of free expression rests upon."[202]

It is precisely because of children's inability to judge the meaning and implications of expression in the school marketplace that special establishment clause rules have been developed, prohibiting formal group prayer in public schools while allowing it in legislative chambers.[203] Yet many courts read *Tinker* as requiring the use of standard free speech analysis in school cases, shifting the burden of proof and requiring school personnel to justify any restrictions on expression on the basis of disruption or harm. The heavily freighted presumptions of adult civil liberties cases force these courts to assume, whether consciously or not, that they are dealing with rational adults who can make their own mature judgments about the normative nature or the state sponsorship of any expression they hear in such places as a school paper. The Eighth Circuit, for example, concluded in *Kuhlmeier v. Hazelwood School*

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197. It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others must be protected against their own actions as well as against external injury. . . . But as soon as [they] have attained the capacity of being guided to their own improvement by conviction of persuasion . . ., compulsion . . . is no longer admissible as a means to their own good. . . .

MILL, *supra* note 156, at 13–14.

198. BRANN, *supra* note 20, at 81.

199. *Id.* at 17.

200. Tinker v. Des Moines School Dist., 393 U.S. 503, 515 (1969)(Stewart, J., concurring) (quoting Ginsberg v. New York, 390 U.S. 629, 649–50 (1968)).

201. *See* WINN, *supra* note 151, at 73.

202. EMERSON, *supra* note 159, at 496–97. "This does not mean that the First Amendment extends no protection to children; it does mean that children are governed by different rules." *Id.*

203. *Compare* Wallace v. Jaffree, 472 U.S. 38 (1985) *with* Marsh v. Chambers, 463 U.S. 783 (1983).

District that an official high school newspaper was a public forum and was therefore subject to a broad reading of *Tinker*, because (among other similar facts) the beginning issue each school year published a policy statement that "the articles and editorials reflected the view of the [student] staff and not the administrators or faculty of the high school."[204] Query whether this same reasoning would allow the school to post a copy of the Ten Commandments on the walls of Hazelwood High School without violating the establishment clause, so long as small print at the bottom of the poster states that the poster does not necessarily reflect the views of the administration or faculty.[205]

Consider now the application of particular free speech theories to children in the schools. The marketplace theory, introduced by the previous reference to Mill, has general application, but has been recognized in the court decisions of this century primarily in cases involving political speech. After some hesitation in its first few cases,[206] the Supreme Court invoked the first amendment to bring ideological and other minorities within the marketplace of legitimate political expression.[207] Pursuing this attitude into the broader realm of intellectual inquiry during the red-baiting era of the 1950s, the Court placed academic freedom for college faculty alongside political expression as an area "in which government should be extremely reticent to tread."[208] The marketplace principle was extended in the 1960s and 1970s to include those who challenged prevailing cultural and social, as well as political, orthodoxies.

While these free speech cases are typically viewed as protecting individual civil liberty, the boundaries erected around the marketplace of ideas indicate how much its ultimate commitment views rational debate as crucial to the health and the long term progress of society. In addition to excluding children from the marketplace because they lack the intellectual capacity to engage in reasoned discourse, the theory also excludes obscenity on the grounds that it lacks "the slightest redeeming *social* importance."[209] The social interest in free expression is also at stake in the role of a public school.

A public school has powerful connections with the political, intellectual, and social goals of the free marketplace of ideas, not because the school is literally part of the public marketplace, but because a principal task of education is the

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204. Kuhlmeier v. Hazelwood School Dist., 795 F.2d 1368, 1372–73 (8th Cir. 1986).

205. Under current interpretations, the establishment clause is violated by a state law that requires the posting of a copy of the Ten Commandments on the walls of public classrooms. *See* Stone v. Graham, 449 U.S. 39 (1980).

206. The premises for today's accepted free speech doctrine are taken from dissents or concurrences in the early cases. *See, e.g.*, "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market. . . . That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). *See also* Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring).

207. These cases implicitly adopted Mill's assumption that unorthodox ideas should be included in the public dialogue to allow both "the opportunity of exchanging error for truth" and to allow "the clearer perception and livelier impression of truth produced by its collision with error." MILL, *supra* note 156, at 21.

208. *See* Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957). Academic freedom has not yet been identified as a constitutional right independent of general freedom of expression.

209. Roth v. United States, 354 U.S. 476, 484 (1957) (emphasis added). Thus, obscenity is not constitutionally protected, despite its obvious character as a form of speech, because "[T]o equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom." Miller v. California, 413 U.S. 15, 34 (1973).

development of the rational powers that change the public square from a place for "playful yapping" and mob rule into a place for the mature public discourse that is "indispensable to the practice of self-government."[210] As part of this preparatory role, public schools must train the "Nation's future . . . leaders" through "wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues.'"[211]

Yet the precise way in which a given student's intellectual skill might best be developed is a crucial question of educational policy, more than it is a question of constitutional law. The mere absence of restraint is unlikely to be the best means toward the end of developing rational capacity. But it is virtually impossible for judicial interpretation in student expression cases to achieve much more than the removal of restraints. Of course judicial intervention can also prohibit coercion of the mind in a school,[212] but to mark the extremes between coercion and intellectual anarchy is barely the beginning in analyzing the methodologies of educational development.

The spirit of dogmatism and the Inquisition are wrong not only because they violate the spirit of the first amendment; they are also wrong because *they don't work* as an educational proposition. No student can learn to read or play the piano or understand mathematics without voluntary involvement to some important degree. I can lead a child to a book, but I can't make her read it. Even less can I make her understand it, if that is against her will. Yet a child needs also to be taught in order to learn. If my child wants to have "freedom of expression" at the piano, he must submit himself to the discipline of the authoritarian rules of music and the demanding expectations of a music teacher over many years. If his teacher's role in assisting his eventual expression consists primarily of not restraining him, his "freedom of expression" will be little more than idle noisemaking. It is the place of educational philosophy and methodology to find, according to each pupil's needs, the right balance between too much direction and not enough. By contrast, it is the place of constitutional interpretation to avoid actual harm at the utter extremes of that process. Thus, while it helps avoid the uncritical application of adult free expression doctrine to say that we should guarantee free speech rights for children in ways that "play an instrumental role in advancing the search for knowledge and truth,"[213] the reasonable judgment calls about that process are essentially questions of educational policy.

The Court's exploration of marketplace notions in *Board of Education v. Pico*[214] in 1984 illustrates the limitations on the judiciary's ability to supervise, in the name of a free marketplace, processes that are inherently educational. *Pico* challenged the right of a school board to remove books from a school library because of offensive

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210. Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159, 3164 (1986) (quoting C. BEARD & M. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).

211. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (1943)). *Accord* Board of Educ. v. Pico, 457 U.S. 853 (1982).

212. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

213. Garvey, *supra* note 159, at 344.

214. 457 U.S. 853 (1982).

content. A plurality of three Justices believed the first amendment guarantees students a "right to know," which assures them of affirmative access to whatever the library contains. Two additional Justices thought the problem should be explored further by lower courts, while four entered vigorous dissents. Virtually all of the substantive questions raised by the case were left unresolved, in part because it is so difficult to use constitutional doctrines to deal with the kinds of educational policy questions raised by the case.

The *Pico* Court unanimously agreed that school boards, as a matter of discretionary judgment, must control the curriculum, select the text books, and place initial orders for library books. Even on the disputed issue of removing books already in the library, the plurality would allow removal that is determined according to "educational suitability" and "pervasive vulgarity," rather than due to the arbitrary supression of ideas. But it is perfectly obvious that ideas about suitability and vulgarity will differ from one board member or judge to another and that nothing peculiar to legal training ensures better understanding of those subjective questions. This puzzle is amplified by the contradiction that allows complete school board discretion in placing initial orders but prevents it in removal.[215]

When reasonable minds can so easily differ on such issues, and when constitutional concepts add so little to our understanding, the most important question is simply "who gets to decide" about educational policy. That question returns us to the basic issue raised by the students at Berkeley in 1964: who *does* decide what happens in an educational institution, not only in the classroom but also in officially sponsored co-curricular and extra-curricular activities? In a public school, the marketplace of ideas cannot be controlled by judges as a practical matter, nor can it be controlled by students as a matter of personal maturity; therefore, if faculty and administrators lack the discretion to control it, there is little meaningful marketplace at all—neither in the school nor in the public square of the future.

Second, similar issues arise in viewing the connections between public schools and the idea of popular sovereignty as a theoretical justification for free speech. As most fully articulated by Alexander Meiklejohn,[216] freedom of expression serves the purpose of protecting both the individual's right of participation in self-government and the right of democratic society to retain ultimate authority in the people. A more recent variation on this theme is the "checking value" theory, which argues for broad protection of public commentary on government as a way of checking against governmental abuse.[217] This theory reflects the origins of social contract theory,

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215. Justice Blackmun's concurring opinion expressed "some doubt that there is a theoretical distinction between removal of a book and failure to acquire a book." 457 U.S. 853, 878 n.1 (Blackmun, J., concurring). But he believed that removal is more likely to suggest the presence of "an impermissible political motivation." *Id.* (quoting Board of Educ. v. Pico, 638 F.2d 404, 436 (2d Cir. 1980)). The difficulty with this distinction is its implication that if judges could only know the "real reasons" why school boards or library committees select or fail to select particular books (presumably text books as well) in the first instance, the judiciary should supervise their every choice.

216. *See, e.g.*, A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960); Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245.

217. Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521. *See also* Schauer, *The Role of the People in First Amendment Theory*, 74 CALIF. L. REV. 761 (1986).

assuring the accountability of government to those from whom the state's authority is derived.[218]

But, although no one has a greater stake than students in the outcome of school board elections, students do not have the constitutional right to vote, again due to their lack of rational maturity. Given that complete limitation on the most fundamental of democratic rights, public schools are not accountable to their students. However, the popular sovereignty theory combined with our understanding of the general relationship between child, parent, and state does suggest that schools are in an important sense accountable to the parents of their students. The parental interest is reflected in their right to elect school boards. Parents also represent by their own voting their children's stake in the outcome of school elections and policymaking through the parental role that determines a child's best interests.

This view of first amendment theory reinforces the concept that the schools are not merely state agents, but are mediating institutions whose authority is derived both from parents and from the delegation of state power. Application of the checking value theory argues for local public awareness of educational activities and for a strong spirit of disclosure to enable communication and cooperation between schools and parents. However, it does not support the assumption that student media organizations should play the same independent role in providing public evaluations of school policies—even though there is great *educational* value in encouraging public comment by students. The analogy to the public press in the democratic marketplace is inapposite, due to the absence of ultimate student authority. To the extent that public evaluation of educational policy originates in parental interests, however, the theory of popular sovereignty is more applicable.

In addition, there is recourse beyond the schoolhouse gates that can help parents ensure accountability for the soundness of educational policy from educational rather than only constitutional or other legal perspectives. School administrators are accountable to local and state school boards, but are also accountable for academic quality to non-governmental accreditation agencies. Thus, when decisions regarding curricular issues or other matters of educational policy impinge on self-expression interests in ways that create an overall climate that is hostile to sound educational values, accreditation may be jeopardized on academic grounds.

The interest in self-governance also applies to students in a longer term sense. As holders of inchoate rights of democratic citizenship, students have a high stake in the development of their own critical powers to act in the future as sovereign citizens. However, as with the marketplace of ideas, the best means of developing an enlightened citizenry is not dictated by acceptance of the desirability of the *end*. It is an educational rather than a constitutional problem to determine what pedagogy is best calculated to achieve the objective of teaching democratic skills and values. Within that framework, the nature of student activities calculated to provide experience in self-governance are clearly important matters of educational policy.

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218. "The Government's power to censor the press was abolished so that the press would remain forever free to censure the government." N.Y. Times v. United States, 403 U.S. 713, 717 (1971).

To place priority on the obligation of schools to teach citizenship skills is to urge a broadening, not a narrowing, of educational supervision in extracurricular activities. That idea was at the core of the *Fraser* Court's rationale in reaffirming the importance of school control in a student assembly, perhaps precisely because the assembly involved student body elections. Some would see the election context in *Fraser* as grounds for broader protection for student autonomy in recognition of the priority of political activity in free expression theory. However, the Court made clear that when immature and impressionable school children are involved, school officials can best promote the first amendment's interest in teaching democratic processes by maintaining standards that "teach by example the shared values of a civilized social order."[219]

A third theoretical justification for freedom of expression is the general notion of self-expression as an aspect of personal autonomy. This idea differs from the marketplace and popular sovereignty theories by emphasizing the individual interest in expression, quite apart from—and perhaps even contrary to—the broader social interest. Because this theory is ultimately grounded in self-autonomy, it does not generally apply to children, whose very lack of actual autonomous power dictates their need for protection against their own immaturity. Furthermore, it is unclear whether the first amendment's interest in freedom of expression should protect broad individual autonomy. While some of the Supreme Court's earlier opinions suggested that a general right to personal autonomy might develop from among the "penumbras" of underlying first amendment values, no such right has in fact emerged.[220] Moreover, autonomy-based self-expression theories are arguably "unsound . . . for they fail to differentiate a theory of free speech from a theory of general personal liberty. . . . "[221]

Even acknowledging these limitations, however, the core idea of personal dignity inherent in viewing self-expression as an end in itself suggests the value of protecting especially private and personal forms of student expression in a first amendment theory. For the most part, the forms of expression that relate to self-identity and self-realization are directly related to the role of mediating institutions as carriers of meaning. Good educational policy thus gives high priority to providing students with opportunities for self-discovery and self-definition. Because students left to their own imagination may act out this basic urge in ways destructive to themselves or others, it is especially important that schools provide children with constructive opportunities for distinguishing themselves—"as a basketball player, a mechanic, a social critic, a wit."[222] For that reason, especially in dealing with older students, an educationally sound high school journalism program would encourage a robust exchange of views. As with opportunities to learn the skills necessary for participation in the marketplace of ideas or the skills of citizenship, the development

219. Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159, 3165 (1986).

220. *See* Hafen, *supra* note 119, at 517–27.

221. Schauer, *supra* note 217, at 774. For contrary views, see the sources cited in *id.* at 772 n.52.

222. Garvey, *supra* note 159, at 365.

of self-expression opportunities is almost always a matter of discretionary educational policy and methodology, not a matter for judicial supervision.

Within the most private and personal sphere, however, a child's most intimate sense of self should also be entitled to constitutional protection of the type established in *Tinker*. Suppose that a child wishes to pray, privately and inaudibly, before taking a final examination. Or suppose a student assigned to write a theme on his most important friend decides to describe his relationship with God. Would the establishment clause dictate that a teacher should tell these students that their expression is not permitted, in view of legal concerns about religion in public schools? I think not, since no appearance of school sanction is involved in the child's expression and since the free exercise interests of the child's parents are otherwise likely to be threatened. Indeed, *not* to allow personal expression of this kind comes very close to the coercion of belief that was eloquently condemned as violating the "freedom of [the] mind" in the *Barnette* case.[223]

This first amendment interest is not dependent upon a child's having developed mature capacities of expression, in part because it is derived from the core right of the child's parents to direct value transmission processes in rearing their children. In addition, it is precisely because a child's young mind is impressionable that coercive influences applied to highly sensitive political and religious values—such as saluting the flag or offering a private prayer—can be so damaging. These are, of course, interests in *private* expression that do not require access to official school channels of communication.[224]

2. *The First Amendment Right to Education*

We have seen that traditional first amendment theory has minimal direct application to children, not because children have no interest in the values for which the amendment stands, but because they lack the capacity to profit from the essentially negative posture developed by the case law. The system of freedom of expression operates on free market principles in which traditional first amendment doctrine plays "a largely negative role" designed primarily to exclude state interference unless important social interests dictate special reasons for limitations. As a result, "[t]he most challenging problems in first amendment theory today lie in the prospect of using law *affirmatively* to promote more effective functioning of the system of freedom of expression."[225] Among those problems is the need to clarify our understanding of children's affirmative right to education as an expression of the first amendment's most basic values.

There is little question that each child indeed has a right to education, but enforcement of the right is problematic. Horace Mann believed in an "immutable principle of natural law . . . antecedent to all human institutions . . . which proves the *absolute right* to an education of every human being that comes into the world;

223. 319 U.S. 624, 637 (1943).

224. *See infra* text accompanying notes 322–29.

225. EMERSON, *supra* note 159, at 627 (emphasis added).

and which, of course proves the correlative duty of every government to see that the means of that education are provided for all."[226] State governments accepted Mann's argument during the 19th century, creating a vast system of publicly funded schools, which is by itself an impressive acknowledgement of the right of children to education. Recognition of this same right moved the National Commission on Excellence to conclude in 1983 that, because of what appeared to be an inadequate national commitment to educational quality, "a basic promise is not being kept."[227]

The Supreme Court similarly found no need to "dispute [the] proposition" that "education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms."[228] However, the Court does not regard this right as "fundamental" for purposes of equal protection analysis in disputes about disparities in local funding levels.[229]

Children's right to education is similar to and associated with their right to parental care. John Locke believed that parents owe an obligation to "Nature" to "nourish and educate" their children until their "understanding be fit to take the government of [their] will."[230] By this means, parents would prepare children to enter the marketplace of ideas as rational beings. Thus, said Locke, "we see how natural freedom and subjection to parents may consist together, and are both founded on the same principle."[231] Compulsory education statutes represent the law's commitment to ensuring parental compliance with this duty. State constitutional provisions and a variety of statutes seek to ensure fulfillment of other basic educational rights. Still, enforcement of educational quality goals is limited simply because the law lacks not only legal but practical power to enforce most of the broad affirmative obligations involved in teaching. This is true in part because overregulation can quickly choke off the free academic climate essential to meaningful teaching and learning.

At the same time, legal and educational policy can uphold the interest of both children and society in the right to education by maintaining minimum quantitative and qualitative standards that are subject to some forms of specific enforcement. For example, even when parents elect to send their children to private schools or to educate them at home, "There is no doubt as to the power of a State . . . to impose reasonable regulations for the control and duration of basic education."[232] The state can also "insist that attendance at private schools . . . be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction."[233] Among public schools, a wide array of state and, more recently, federal standards also create specific enforcement mecha-

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226. *Quoted in* BRUBACHER, *supra* note 28, at 556–57.

227. A NATION AT RISK, *supra* note 9, at 12.

228. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

229. The judiciary has "neither the ability [nor] the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice," even though the Court does not doubt that "these may be desirable goals of a system of freedom of expression." *Id.* at 36.

230. J. LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT ¶¶ 56, 59 (1690).

231. *Id.* ¶ 61.

232. Wisconsin v. Yoder, 406 U.S. 205, 213 (1972).

233. Board of Educ. v. Allen, 392 U.S. 236, 245–46 (1968).

nisms. Along with state standards for physical facilities, curriculum, and teacher qualifications, important policies assure the minimal educational opportunity rights of disadvantaged students.

In addition, the maintenance within the schools of the authority patterns necessary for truly effective education is, paradoxically, one important means of fulfilling children's educational rights. Thus, a child's right *not* to be abandoned to the laissez-faire isolation of adult freedom of expression concepts may be among the core values of the right to education.

John Rawls included children within his principles of justice, but because of their acknowledged lack of rational maturity, his theory posits that adult guardians should make decisions on children's behalf that would reflect what the children would want for themselves if they enjoyed adult capacity.[234] Because certain forms of authoritarian direction do enhance educational development,[235] a child's right to education argues for such direction, even when it overrides preferences a child may express while still a child. Moreover, to the extent that the uncritical transfer of adult free expression theory to public school cases undermines a school's affirmative assertion of educational authority, children's rights to educational development are undermined.

Much of the children's liberation literature reflects the fear that any authoritarian interference with the lives of children violates their moral and constitutional right to personal autonomy.[236] As noted earlier,[237] this concern stems more from ideological commitments to "freedom as a way of life" than it does from evidence that authority patterns have in fact been harmful to children. Nonetheless, the preservation of the authority patterns essential to educational quality is not only in the best interest of children, it may be a primary means of preserving their most vital long-range rights. On the other hand, constitutional interpretations that call into serious question the fundamental authority of teachers and administrators tend to foster noncommittal attitudes among school personnel. They may fear they have no right to give direction to their students, or they may fear that in giving direction they will encounter the chilling effects of threatened litigation. When that happens, the loss is not only to their students, but to the larger interests of a society that depends upon an educated citizenry.[238] For that reason, the sustaining of legal and educational policies that encourage the assumption of teaching resonsibility is in direct fulfillment of the otherwise unenforceable right to education.

In summary, while children clearly have the right to be educated, their right is not susceptible of total enforcement, because enforcement depends so heavily upon the fulfillment of affirmative duties by schools that are beyond the capacity of courts to supervise in productive, specific ways. The institutional strength of the schools, however, affects their ability to deliver on the promise of education. That strength

234. J. RAWLS, A THEORY OF JUSTICE 209, 244, 249 (1971). *See also* Worsfold, *A Philosophical Justification for Children's Rights*, 44 HARV. EDUC. REV. 142, 156 (1974).

235. *See supra* section I.C.2.

236. *See* Hafen, *supra* note 16, at 651–56.

237. *See supra* section I.B.3.

238. *See supra* section I.C.2.

also affects the schools' ability to play the larger mediating role within which good education occurs. Just as the institutional vitality of family life significantly enhances a child's basic right to be nurtured, the institutional vitality of schools contributes toward fulfilling the right to be educated. Institutional academic freedom is thus relevant both to children's rights and to the distinct right of schools as mediating institutions to their own institutional autonomy.

III. Institutional Academic Freedom and Educational Policy

As noted in Part I, the social as well as the legal momentum of recent years has reduced discretionary authority wherever it was found, in public schools, juvenile courts, in churches, families, and elsewhere. Vulnerable persons need protection against state overreaching through inappropriate and subjective discretionary actions; however, the law's unwillingness to sustain the core sense of institutional authority within a mediating institution can ultimately impair the institution's capacity to fulfill its contribution to first amendment values, at the expense of both individuals and the larger society. For a variety of reasons, including the excesses of the earlier era in which authority structures were seldom questioned, we now give such priority to preventing abuses of discretionary authority, public or private, that it is hardly fashionable to raise questions about current priorities. But our ongoing critique of our own institutions and values suggests the wisdom of constant inquiry.

For most of our history, we had little reason to ask about constitutional sources of authority for schools as institutions, because that authority was a given condition. Now that we have constitutionalized so many old questions, however, the Supreme Court has begun quietly—almost as a series of asides—to consider the place of an educational institution, qua institution, within first amendment theory.[239] This nascent idea deserves exploration; otherwise, our traditional assumption that the first amendment is concerned essentially with the relationship between individuals and the state will continue to cast public schools exclusively in a state role, which our established constructs view as the chilling censor—and hardly the generous sponsor—of the values of freedom of expression. But as discussed in Parts I and II, public schools are not mere extensions of the state, either in the ultimate origins of their authority or in the many parent-like and mediating functions they perform. Thus they deserve consideration as first amendment creatures in their own right.

Against this historical and conceptual background, we now consider the idea of institutional academic freedom for public schools. The issues and relationships that could arise in such an examination are numerous and complicated, offering many fit subjects for future research and analysis. For example, we might compare the problems of higher education with those of public schools, perhaps drawing distinctions among various age-based levels within the public schools; we could examine the need for institutional freedom from external forces, including government regulation; we could consider—as academic freedom concepts usually have—the need to protect faculty members from undue interference, either from the

239. *See infra* section III.A.2.

institutional administration or from external sources; the roles of faculty and students in institutional governance might also be examined. Some or all of these issues should be compared with the entire field of first amendment jurisprudence, linking particular points of tension in the educational world to various free expression problems in the larger public and private spheres.

However, for reasons of scope, Part III limits itself to only one small sub-cluster in this large constellation of issues: the institutional authority of a public school to regulate student expression in curricular and extra-curricular activities. I will argue that, so long as matters of educational policy and practice are implicated, the courts should defer to the rational decisions of faculty and administrative personnel. This focus is suggested by the Supreme Court's recent interest in libraries, student body assemblies, and school newspapers. While these may appear to be narrow matters calling for finely focused attention, the Court's interest in them implies that problems arising in this area represent the still uncertain but important middle ground between the traditional curriculum (which the Court considers subject to broad discretionary control by school officials)[240] and private expression by students in realms removed from any official school activity or educational policy (which *Tinker* defines as presumptively student expression territory).[241]The concepts developed in response to these cases will have much to say about the future educational environment in American schools.

A. *Institutional Academic Freedom*

The following discussion explores a theoretical framework that reverses the constitutional presumptions derived from adult first amendment theory that give preferred protection to student expression in educational environments. Because *Tinker* has established *some* protection for student expression as a beginning premise, this Section considers the effect of institutional academic freedom in protecting the discretionary judgment of school officials in the broad educational sphere of public schools—so long as the judgment has both a rational and an educational basis. Because this source of institutional protection is also grounded in first amendment theory, it can be an acceptable basis for analysis without undermining constitutional protection for limited, private student expression outside the curriculum and extracurriculum.

1. *The Development of Academic Freedom Rights*

Until well past 1950, American courts deferred heavily to the discretionary judgments of those responsible for the operation of educational (and most other) institutions. Chief administrators exercised broad discretion over faculty as employees of their institutions, while legislatures and governing boards enjoyed similar latitude in their dealings with school administators. At the same time, longstanding customary patterns insulated schools from much external interference, leaving natural

240. *See* Board of Educ. v. Pico, 457 U.S. 853, 869 (1982).

241. *See infra* text accompanying notes 322–29.

authority patterns both informal and rarely challenged.[242] The earliest recognition of a need to protect the academic work of faculty occurred in discussions about the importance of free inquiry in higher education, which has been traditionally concerned with the *discovery* of new knowledge, while public schools were concerned more with the *transmission* of knowledge. The idea of academic freedom for communities of scholars originated in German universities, where the "Lehrfreiheit" of the faculty blended with an interest in institutional autonomy because administrators were elected by the faculty.[243] The lay control of American universities, however, led to an almost exclusive emphasis on faculty autonomy—indeed, the institution's lay governing board was often seen as the opponent of academic freedom for the faculty.[244]

Consistent with such beginnings, the recent emergence of academic freedom as a constitutionally protected interest occurred primarily in higher education cases involving faculty speech. The first cases arose during the anti-communism waves of the 1950s, leading to explicit protection for expression and inquiry by university faculty within the broader theory of freedom of expression.[245] The *Tinker* case then extended protection for on-campus expression both to the public schools and to students, without mentioning academic freedom as such.[246]

Even though academic freedom has been acknowledged as a worthy companion to political speech, thus enjoying the highest priority among first amendment values,[247] it has not been accorded the status of an independent constitutional right.[248]

This historical pattern demonstrates that first amendment freedom of expression was used to chip away gradually at the original status quo in which institutional authority was presumed to enjoy a nearly irrebuttable presumption of deference in its favor. Through this process, academic freedom emerged as an individual, not an institutional, right. Indeed, educational institutions have frequently been, as state agents, the adversary party against whom academic freedom was asserted. For this reason, as the law has come to recognize first amendment interests on the nation's campuses, the direction and momentum—accelerated by the student movements of

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242. *See, e.g.*, Murphey, *Academic Freedom—An Emerging Constitutional Right*, 28 LAW & CONTEMP. PROBS. 447 (1963); Note, *Academic Freedom and the Law*, 46 YALE L.J. 670 (1937).

243. "[I]nstitutional autonomy was perceived as an integral element of the theory of academic freedom and played an important role in making German institutions among the intellectually freest in the world." Finkin, *On "Institutional" Academic Freedom*, 61 TEX. L. REV. 817, 825 (1983).

244. *Id.* at 828. In 1940 the American Association of University Professors and the Association of American Colleges jointly adopted a "Statement on Principles on Academic Freedom and Tenure." This Statement held that "Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition." EMERSON, *supra* note 159, at 593–94. The primary vehicle for assuring faculty protection from administrative and other forms of outside censorship was the right to tenure.

245. *E.g.*, Keyishian v. Board of Regents, 385 U.S. 589 (1967); Sweezy v. New Hampshire, 354 U.S. 234 (1957).

246. "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students." 393 U.S. 503, 506 (1969).

247. "[A]cademic freedom and political expression [are] areas in which government should be extremely reticent to tread." 354 U.S. 234, 250 (1957); "Our Nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and . . . is therefore a special concern of the First Amendment . . . ." 385 U.S. 589, 603 (1967).

248. *See* Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, in THE CONSTITUTIONAL STATUS OF ACADEMIC FREEDOM (W. Metzger ed. 1977); EMERSON, *supra* note 159, at 611–16.

the 1960s—of legal development have been almost entirely in the direction of reducing institutional authority. This background makes it difficult to conceive of academic freedom in other than individualistic terms.

Nevertheless, the inherent first amendment interests of educational institutions have not totally escaped recognition and, in fact, may now be asserting themselves in ways that will balance our understanding of academic freedom as having both institutional and individual components. To the extent that the interests of faculty and professional educational administrators are blended through their common commitment to academic values in a school, an institutional perspective on academic freedom is theoretically consistent with the original German concepts.[249]

2. *Institutional Academic Freedom in Supreme Court Cases*

As early as *Sweezy v. New Hampshire*,[250] which upheld the *individual* academic freedom interests of a faculty member, Justice Frankfurter recognized in his now well-known concurring opinion the "essential" *institutional* "freedoms of a university" to "'determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'"[251] This provocative language did not become the rationale for a holding of the Court, however, until Justice Powell relied on it in his controlling opinion in *University of California Regents v. Bakke* in 1978. *Bakke* examined the constitutionality of a university's medical school admissions program, which included a voluntary affirmative action plan that allegedly discriminated on the basis of race. Justice Powell found that, because the use of racial classification made the university's action suspect, it could be upheld only on the basis of a substantial state interest. He located such an interest, citing Justice Frankfurter, in a university's freedom to create a diverse student body by determining "who may be admitted to study" as a matter of educational policy. The first amendment origins of this institutional right made it "a countervailing constitutional interest" that, among other factors, outweighed the competing equal protection interest in avoiding discrimination based on racial classifications.[252]

Then in 1985, a unanimous Court cited both Justice Frankfurter's *Sweezy* opinion and Justice Powell's *Bakke* opinion in upholding the University of Michigan's dismissal of a student for academic reasons, relying heavily and explicitly on the "prerogatives" and the "*academic freedom*" of "state and local educational *institutions*."[253] The *Ewing* opinion, written by Justice Stevens, addressed a classic issue of academic expertise and discretion—the collective judgment of a university faculty

249. *See supra* note 243. A different interpretation is possible if the original institutional authority of German universities is thought to be derived politically from the consent of the faculty, rather than from the unity of academic purpose that arises from combined faculty and administration commitments to the values of free inquiry.

250. 354 U.S. 234 (1957).

251. 354 U.S. 234, 263 (Frankfurter, J., concurring) (quoting *The Open Universities in South Africa* 10–12).

252. "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." 438 U.S. 265, 312 (1978).

253. Regents of Univ. of Mich. v. Ewing, 106 S. Ct. 507, 514 (1985) (emphasis added).

committee regarding the academic qualifications of a student.[254] Rejecting the student's claim that the University had misjudged his fitness for continued enrollment, the Court would not override "the faculty's professional judgment" unless "it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."[255] Noting that "considerations of profound importance counsel restrained judicial review of the substance of academic decisions," the Court stressed the judiciary's unsuitability to "evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions." Justice Stevens then explained this deferential attitude in part by reference to institutional academic freedom: "Academic freedom thrives *not only* on the independent and uninhibited exchange of ideas among *teachers and students . . . but also, and somewhat inconsistently*, on autonomous decisionmaking by *the academy itself.*"[256]

Lest more be made of *Ewing*'s language than the Court intended, the case clearly dealt with discretionary, professional judgment in the subjective process of evaluating academic competence. Read narrowly, its holding does little more than reaffirm prior cases involving the academic judgment calls of university faculty.[257] At the same time, the academic judgment here was not primarily the qualitative, subjective evaluation of an essay or dissertation. The key facts of the case were susceptible of sufficient objective summary that the Sixth Circuit had found for the student, essentially on the grounds that the university's action was arbitrarily inconsistent with its past practice in similar cases.

Ewing does represent an explicit acknowledgement of institutional academic freedom as a first amendment right significant enough to outweigh an acknowledged substantive due process interest, not merely a contract or property interest. The case also expands the potential meaning of Justice Powell's use of institutional freedom in *Bakke*, because its use there might have been viewed largely as an extraordinary theoretical stretch made necessary by the peculiar demands of affirmative action as a national policy. There were no such unusual overtones in *Ewing*. At the same time, the concept of institutional first amendment interests is easier to see in *Ewing* than it would be in a conflict between an educational institution and a member of its own faculty, because the Michigan faculty and administration acted in concert, as they often would in student-related decisions. And the student in *Ewing* made no first amendment claim, which also leaves one uncertain how competing claims for the same source of constitutional protection should be evaluated.[258]

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254. The student had completed four years of a six-year program, but failed a national qualifying test after having barely completed his other requirements. His suit alleged arbitrary and capricious action by the university in violation of his substantive due process right to continued enrollment, noting that he was the only student to fail the test who had not been permitted to retake it.

255. 106 S. Ct. 507, 513 (1985). The Board's judgment was found "not beyond the pale of reasoned academic decision-making" in light of the student's entire university career. *Id.* at 515.

256. *Id.* at 514 n.12 (emphasis added).

257. *See, e.g.*, Board of Curators v. Horowitz, 435 U.S. 78 (1978).

258. Justice Stevens' recognition that there might be "inconsistency" in recognizing both individual and institutional rights suggests his awareness that competing academic freedom claims might well be considered, even if both originate in the same constitutional source. The Supreme Court has already faced the analogous theoretical problem of

A constitutional doctrine of academic autonomy for an educational institution arises from the linkage between the intellectual/educational matters with which schools are concerned and the first amendment's concern with intellectual freedom and the unhampered nurturing of intellectual growth and educational development. More purely "proprietary" institutional concerns, such as matters involving a school's physical plant, for example, are outside this protected scope. For that reason, institutional academic freedom is not broad enough to cover total institutional autonomy.[259] Thus, student discipline for non-academic infractions may be sufficiently removed from core academic activity to call for greater due process protections than would be appropriate in evaluations of academic performance,[260] which helps explain why the Supreme Court is less willing to sustain broad institutional autonomy in behavioral discipline cases than it is in decisions about curriculum.[261] As the *Fraser* case suggests, such extracurricular activities as student publications, performances, and assemblies are—especially in a public school—even more clearly part of the school's educational mission than non-academic discipline.[262] In addition, decisions about the use of extracurricular facilities,[263] admissions, curriculum content, and teaching methodology are within an institution's academic purview,[264] because educational policy is so directly implicated by such decisions. It can be argued that academic freedom should protect primarily the interests of teachers and researchers rather than the administrative policy decisions of an administration or governing board,[265] but when administrative decisions are made by professional educators for reasonable educational purposes, the underlying justification for protecting academic freedom still applies.[266]

When *Sweezy*, *Bakke*, and *Ewing* are considered together, it appears that the educational policy decisions of universities are entitled to the full weight of academic freedom as a preferred first amendment interest, and that this constitutional value can outweigh the traditional presumptions favoring equal protection and substantive due process claims. These are of course higher education cases, which could suggest a greater need than would exist in public schools to protect the free inquiry needed for research and discovery of new knowledge. On the other hand, public schools do need protection against external intrusion that undermines their teaching role. Moreover, the educational mission of a public school is more likely to be broadly

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weighing the constitutional privacy claim of a child against the constitutional privacy claim of the child's parents in the context of parental consent requirements for minors' abortions. *See* Hafen, *supra* note 119, at 511–17.

259. *See* State v. Schmid, 84 N.J. 535, 423 A.2d 615 (1980), *appeal dismissed sub nom.* Princeton Univ. v. Schmid, 455 U.S. 100 (1982); Finkin, *supra* note 243.

260. *See* Levin, *supra* note 15, at 1675.

261. *Compare* New Jersey v. T.L.O., 469 U.S. 325 (1985) *and* Goss v. Lopez, 419 U.S. 565 (1975) *with* Board of Educ. v. Pico, 457 U.S. 853 (1982). The argument has been persuasively made, of course, that student discipline is also part of the educational process in public schools. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 584 (1975) (Powell, J., dissenting) and Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 522 (1969) (Black, J., dissenting).

262. "The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; . . . ." 106 S. Ct. 3159, 3165 (1986).

263. Widmar v. Vincent, 454 U.S. 263, 277 (1981) (Stevens, J., concurring).

264. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

265. *See* Finkin, *supra* note 243, at 851.

266. *See supra* note 243.

defined than would be the case at a university, suggesting the need for a more expansive reading of institutional authority. The public school's mission is broader not only because of its traditional socializing role,[267] but because the relative dependence of its students creates the need for sufficient institutional authority to nurture the development of their intellectual skills[268] and to protect them from the harmful effects of undisciplined "role models."[269]

B. *Protection for First Amendment Values Through a Presumption of Institutional Autonomy in Educational Matters*

As we saw in Parts I and II, the first amendment is concerned in the educational sphere with such values as free inquiry, the discovery of new truth, personal intellectual development, and, especially in the case of public school students, the development of citizenship skills. These are core constitutional values that serve the interests not only of students and faculty, but of the larger community. In a democratic society, the work of schools, colleges, and universities is a fountainhead for the intellectual, and in many ways the moral, life of the local as well as national community. These are intimate, nurturing processes that flourish best in the protected enclaves we call school grounds, which represent symbolically as well as geographically a sense of distance from the noisy and undisciplined atmosphere of the political and economic marketplace. As Justice Stevens observed in *Ewing*, "academic freedom thrives . . . on autonomous decisionmaking by the academy itself."[270]

In this sense, a school is unlike any other arm of the federal or state governments, because non-educational institutions have fundamentally different purposes and functions. It is perhaps for such reasons, together with the legal status of children as minors, that the Court has construed the constitutional concepts applied to public schools regarding procedural due process and search and seizure in minimal as well as conceptually unique ways.[271]

The peculiar characteristics and purposes of schools, as discussed in Part II, have much in common with other mediating institutions in which individual growth thrives through protected spheres of intimacy. Roberto Unger and Lon Fuller have written that "formal law" is unable to govern the full spectrum of human interaction. As personal relationships approach the realm of "intimacy," the less structured role of "customary law" begins to govern the interaction. This limited ability of formal law is best illustrated by the family, the "organization" and "consciousness" of which is "undermined by the use of legal rules and by the attempt to view relations among persons as relationships of entitlement and duty."[272] If formal law intrudes excessively into family relationships, it can destroy the continuity without which there are no family relationships. Customary law, by contrast, regulates intimate

267. *See supra* section I.A.2.
268. *See supra* section I.C.2.
269. *See* Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159, 3165 (1986).
270. 106 S. Ct. 507, 514 n.12 (1985).
271. *See supra* section I.C.3.
272. R. UNGER, LAW IN MODERN SOCIETY 55 (1976).

associations in informal ways, including expectations about "roles and functions," that contribute to "stable interactional expectancies."[273]

As we saw in Part II, a primary purpose of constitutional protection for mediating institutions is to encourage this same pattern in any long term or institutional relationship involved in stimulating the growth of first amendment values.[274] Much of what family members "owe" one another, for example, cannot be enforced in a court of law. Yet a traditional sense of family duty has long demonstrated an incredible power to produce obedience to the unenforceable. In this way, the commitments of marriage and kinship have taught parents and children significant personal and social values that are learned in depth only through truly "belonging" to a larger order. The very nature of these values requires that they develop voluntarily.

For similar reasons related to the development of the minds of children, "Of necessity, teachers have a degree of familiarity with, and authority over, their students that is unparalleled except perhaps in the relationship between parent and child."[275] Thus, the formal law tends generally to stop at the threshold of mediating institutions, not only because it *should not* regulate developmental or intellectual intimacy, but because it *cannot* regulate such delicate processes without impairing their existence. The momentum of the formal law since the 1960s has been toward ever increasing intrusions into the intimate realm of mediating institutions, including schools.[276] However, the Court's emerging recognition of institutional autonomy for academic institutions in the name of first amendment values shows its willingness to draw upon a potent doctrinal concept to shore up the boundary between intimacy and the formal law—not to shield educational institutions from meeting their obligations, but to make them more able to do so.[277]

This does not mean, of course, that the Court is returning to the child saver era when the discretion of school officials was, as a practical matter, beyond judicial review. The Court clearly rejected that extreme position in deciding that the actions of school officials are limited at the outer edges of discretionary judgment by the specialized constitutional rights of their students in such areas as procedural due process,[278] fourth amendment protection against unreasonable searches and seizures,[279] and freedom of expression.[280] The spirit of these cases seems designed not to supervise a school's performance of its curricular and extracurricular educational

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273. Fuller, *Human Interaction and the Law*, 14 AM. J. JURIS. 1, 33 (1969).

274. *See supra* sections II.A.–II.B.

275. New Jersey v. T.L.O., 469 U.S. 325, 348 (1985) (Powell, J., concurring).

276. *See supra* section I.B.1.

277. As stated by James Perkins, former president of Cornell University:

> Institutional autonomy is the surest guardian of academic freedom. To shift from the rules and procedures that academic institutions have evolved as central to the teaching-learning process and to put academic discipline, appointment, grading, and all manner of educational requirements at the mercy of the courts would mean, quite simply, that civil jurisdiction over intellectual inquiry would be complete . . . .

Perkins, *The University and Due Process*, 62 AM. LIB. BULL. 977, 981 (1968), *quoted in Private Universities: The Right to Be Different*, 11 TULSA L.J. 58, 60 (1975).

278. Goss v. Lopez, 419 U.S. 565 (1975).

279. New Jersey v. T.L.O., 469 U.S. 325 (1985).

280. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969).

mission, but to ask for the most basic level of fairness in managing the school's operational affairs.[281] Thus, the scope of an educational institution's first amendment autonomy is likely to be affected by (1) its adherance to a threshold level of fairness, (2) "the extent to which constitutionally protected values are inherent in the internal processes of the institution, and [3] the likelihood that [judicial] intrusion will disrupt such processes."[282]

When a school is appreciated as an instrumentality whose most essential purpose is to promote the underlying values of the first amendment, one is less likely to assume that the only way to assert first amendment values is to limit the discretion of teachers and school administrators.

C. Fraser *Builds a* Tinker*'s Dam:*[283] *Regulation of Student Expression that Implicates Educational Policy*

Guided by the perspective of recent educational history, the concept of schools as mediating institutions, and the constitutional doctrine that schools are entitled to some form of educational autonomy, I turn finally to the matter of a school's control of student expression in co-curricular and extracurricular activities. Such a specific application of the more general material that precedes this Section is in large part illustrative. It may also lend perspective to the issues in *Kuhlmeier v. Hazelwood School District*, which the Court will decide during its 1987 Term.

By applying the heavy constitutional weights that anchor the concept of freedom of expression, many lower court decisions since *Tinker* have accepted as their major analytical premise a substantial presumption against a school's controlling its own overall environment and at least some of its own educational policies. Despite acknowledgements in *Tinker* (and in most lower courts since then) that stress the "special circumstances of the school environment" and "emphasize the comprehensive authority of . . . school officials,"[284] and despite attempts by Justice Fortas' majority opinion to confine the holding to "personal intercommunication" that is unrelated to "the work of the schools,"[285] the reality is that most post-*Tinker* decisions begin with the assumption that any student expression is protected unless it "materially disrupts *classwork* or involves substantial disorder or invasion of the rights of others."[286] Thus, when students have chosen to express themselves, the burden is placed on school personnel to justify any limitations with convincing affirmative proof that the expression invades the curriculum, is seriously disruptive, or inflicts apparent harm on other persons.

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281. *See* Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159, 3169 (1986) (Stevens, J., dissenting).

282. Durham & Oaks, *Constitutional Protections for Independent Higher Education: Limited Powers and Institutional Rights*, in CHURCH AND COLLEGE: A VITAL PARTNERSHIP 69 (1980).

283. For additional comparison of the *Fraser* and *Tinker* cases, see *supra* section I.C.4.

284. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506-07 (1969).

285. *Id.* at 512, 508. The wearing of the armbands was "a silent, passive expression of opinion" that did not rise to the level of a "group demonstration." *Id.* at 508.

286. *Id.* at 513, *quoted in* Kuhlmeier v. Hazelwood School Dist., 795 F.2d 1368, 1371 (8th Cir. 1986) (emphasis added).

This was the essential approach of the Eighth Circuit in *Kuhlmeier*, which construed each significant issue of law or fact in favor of the constitutional presumption against regulation. The court of appeals held that a high school principal's refusal to publish stories authored by student members of the school paper staff violated their first amendment rights. It overturned the trial court's finding that the paper was part of the curriculum[287] as well as its findings concerning the principal's basis for believing that publication of the disputed stories could harm members of the student body or other persons. The court concluded that legal tort liability was the only "invasion of the rights of others" that would justify non-publication. The court saw no basis for believing that the school incurred a risk of liability for invasion of privacy from the families implicated in the stories, because the parents were not named and their children who were identified "fully consented."[288]

The Ninth Circuit had taken a similar approach in upholding the free speech rights of Matthew Fraser, concluding that a student body assembly which all "students were required to attend . . . or report to study hall"[289] was not part of the high school's curriculum and that there was insufficient proof of material disruption or harm.

But the Supreme Court approached *Fraser* with a different set of attitudes,[290] finding that "*the process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class.*" Citing a phrase from *Tinker*, the Court described the values taught in the conduct of a student body assembly as "truly *the 'work of the schools,'*" because what happens in such a setting implicates the educational mission of a school, teaching its students "by example" through the actions of "teachers—and indeed . . . older students" who are "role models" for teaching "civil, mature conduct."[291]

By looking to the inculcation of "the habits and manners of civility as values . . . conducive to happiness and . . . indispensable to the practice of self-government"[292] as a basis for regulating the expression of students, the *Fraser* Court introduced a major element that has been missing through much of the post-*Tinker* era: the first amendment interests of both students and society in sustaining the institutional authority of a school in fulfilling the broad educational goals of the public school system. While the Court did not use the language of institutional academic freedom, its opinion reflects that spirit. Moreover, the Court's references to "the part of parents, and school authorities acting *in loco parentis*" as "role

287. The paper was produced by a regular journalism class taught by a faculty member for credit "within the adopted curriculum," according to school board policy. However, the appellate court was persauded by the paper's tradition of student editorial discretion, its status as a "student newspaper," and its publicly stated commitment to the principles of responsible journalism and the first amendment. 795 F.2d 1368, 1372 & n.3 (1986).

288. *Id.* at 1376. The court did not address whether minor children could legally provide such consent in ways that immunize against tort liability. The court was also unimpressed that the students whose stories were not published in the paper were not disciplined for distributing photocopies of the stories on the campus. *Id.* at 1371.

289. 106 S. Ct. 3159, 3162 (1986).

290. *See supra* section I.C.4.

291. 106 S. Ct. 3159, 3165 (1986) (emphasis added).

292. *Id.* at 3164.

models''[293] carries distinct echoes of the concept of public schools as unique mediating institutions, whose combined nurturing and educational roles for school-age children draws upon the most fundamental First Amendment values.[294] A school is thus responsible not just to teach a narrow academic curriculum, but is to promote the ''shared values of a civilized order'' according to its professional judgment.

Even in the unusually fractured opinions in *Board of Education v. Pico*, where the three-member plurality distinguished between a school board's ''absolute discretion in matters of *curriculum*'' and its reduced discretion in the school library as the ''regime of voluntary inquiry,''[295] the Court had unanimously acknowledged the board's discretionary right to order text books, library books, and even to remove library books—if dictated by the board's judgment regarding pervasive vulgarity or ''*educational suitability*.''[296] The plurality's example of an inappropriate use of discretion in the library was the removal of all books written by members of one political party or one race, which suggests that the standard of educational suitability would necessarily be as broad as it is subjective.

This standard for review of alleged ''official suppression of ideas'' based on *non-educational motives* is not far removed from the test expressed by the Court in *Ewing*, which upheld the institutional freedom of a university in making academic judgments, so long as the institution relies on ''reasoned academic decision-making'': ''This narrow avenue for judicial review precludes any conclusion that the decision . . . was such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment.''[297]

When *Fraser* and the overtones of *Pico* are combined with *Ewing*, the Court seems to view a school's educational policy decisions with a strong, even constitutional, presumption of validity. Because *Ewing* dealt with a relatively specialized academic judgment, its standard may not apply outside a narrow definition of the curriculum. However, given the broad educational mission of public schools described in *Fraser*, given the immaturity of the students, and given the unique commitment of the schools to the affirmative fostering of first amendment values in its total educational program, judicial deference toward the exercise of institutional discretion is appropriate in a public school's curricular and extracurricular matters.[298]

The significance of recognizing institutional academic freedom in such cases is that this right establishes ''a countervailing constitutional interest, that of the First Amendment,''[299] which gives constitutional status to the institution's educational—not merely curricular—judgments, thereby balancing the scales that had been weighted against institutional judgment by the prevailing interpretations of *Tinker*.

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293. *Id.* at 3165.

294. *See supra* section II.B.

295. 457 U.S. 853, 869 (1982).

296. *Id.* at 871 (emphasis added).

297. 106 S. Ct. 507, 515, 514 (1985).

298. The standard established in *Ewing* actually allows more room for judicial review than the *Pico* plurality seemed willing to accept regarding curriculum-based decisions—''absolute discretion.'' 457 U.S. 853, 869 (1982).

299. University of Cal. Regents v. Bakke, 438 U.S. 265, 313 (1978).

Applied in student expression claims, this constitutional position places the burden on the student to show a clear abuse of discretion. This analytical posture bears close resemblance to the careful position Justice Harlan took in dissenting from the holding in *Tinker*:

> I certainly agree that state public school authorities in the discharge of their responsibilities are not wholly exempt from the requirements of the Fourteenth Amendment respecting the freedoms of expression and association. At the same time I . . . believe . . . that school officials should be accorded the widest authority in maintaining discipline and good order in their institutions. To translate that proposition into a workable constitutional rule, I would, in cases like this, cast upon those complaining the burden of showing that a particular school measure was motivated by other than *legitimate school concerns* . . . [I find] nothing in the record which impugns the good faith of [the school board] in promulgating the armband regulation . . . .[300]

Such a formulation would reverse the anti-institutional presumption created by most readings of *Tinker*. It would strongly discourage the courts from second-guessing even "unwise" educational judgments and would encourage courts to resolve questions of fact or law in favor of educational policy makers, while still providing for protection at the extremes against decisions that go "beyond the pale of reasoned academic decision-making."[301]

The application of institutional academic freedom to the extracurricular context was clarified by Justice Stevens' opinion in *Fraser*, even though Justice Stevens dissented from the result because he concluded that the student had not been given adequate warning of the consequences of his speech. He

> assume[d] that high school administrators could prohibit [even mild profanity] in classroom discussion and even in extracurricular activities that are sponsored by the school and held on school premises. For I believe a school faculty must regulate the *content as well as the style* of student speech in carrying out its *educational mission*.[302]

He amplified this view by quoting his earlier opinion in *Widmar v. Vincent*, which favored the right of a university to exercise educational judgment in allocating the uses of its facilities for extracurricular activities.[303]

The logic of this deference to a school's educational policy choices naturally extends to the purchase of library books, the selection of school plays, the content of student assemblies, the nature of student activities, and the content of campus newspapers. That such activities are "for students" and frequently involve student leadership and participation does not remove them from the overall educational program—the "work of the school." Decisions regarding the use of column inches in a newspaper or yearbook or the air time on a school radio station necessarily

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300. 393 U.S. 503, 526 (1969) (Harlan, J., dissenting) (emphasis added).

301. Regents of Univ. of Mich. v. Ewing, 106 S. Ct. 507, 515 (1985).

302. 106 S. Ct. 3159, 3169 (1986) (Stevens, J., dissenting) (emphasis added).

303. In *Widmar*, Justice Stevens focused on the limited resources of universities, which necessitate constant judgments about "the use of the time and space that is available for extracurricular activities." Judgments about whether to use a school stage for Mickey Mouse cartoons or to rehearse Hamlet "should be made by academicians, not by federal judges, and their standards for decision should not be encumbered with ambiguous phrases like 'compelling state interest.'" 454 U.S. 263, 278–79 (1981).

involve educational judgment, not only regarding the use of school resources, but also regarding educational suitability.

The argument that school officials should not in such circumstances "circumscribe the range of ideas" to which students may be exposed is simply naive about the very nature of decisions affecting every facet of a school's curricular and extracurricular program. Every decision made by a faculty member or administrator in these areas may limit or expand the range of ideas or opportunities for student expression—that is the very nature of applying educational philosophy and methodology to educational matters.

To assume that students' views should control such decisions because a school looks like a public forum overlooks the analytical prerequisite that the "marketplace of ideas" concept is inapplicable in its traditional sense to public schools.[304] It also overlooks the extent to which deference to institutional judgments of this kind actually promotes rather than inhibits the educational and other first amendment interests of students, because the judgments are being made by educators whose training and highest obligations are directed toward the educational interests of their students.[305]

This does not mean that the range of ideas presented through extracurricular forums is of no constitutional conseqence; rather, it means that the relevant judgment calls are matters of educational policy within the framework of a school's own first amendment interests in institutional academic freedom, not matters requiring ongoing judicial supervision. If either a student or her parents wish she could express herself in ways not within the choices offered by the extracurricular policy framework or if she wishes to have access to ideas not contained in the school paper or the school library, she still has the entire off-campus world in which to explore her interests in the same way as do other citizens of her age. In addition, as noted below, the on-campus expression of her personal beliefs in ways that do not depend upon access to curricular or extracurricular educational policy forums is still assured by the continued viability of *Tinker*.

Consider the application of this perspective to student newspapers. The decision to establish a high school paper, followed by decisions about academic credit, funding, advertising, faculty supervision, and student editorial autonomy, all involve a public school directly in determining "on academic grounds . . . what may be taught [and] how it shall be taught."[306] The educational objectives of such decisions could include the teaching of writing ability, the value of interchanging ideas in a free society, and the development of editorial judgment. They could also include a concern for educating the social and intellectual understanding of the general student body—an educational policy issue not unrelated to the values of citizenship and public discourse recognized by the Court in *Fraser*. The extent to which the paper operates as an open public forum or a conduit for student expression in this context is a matter of educational policy, subject to correction based on experience.

304. *See supra* section II.C.1.

305. *See supra* section II.B.

306. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

Courts that view school newspapers in terms of adult civil liberties approaches to public forums are typically myopic about this large and significant educational context. Whether a school wishes to expand or contract editorial responsibility at a given time calls for educational judgments, depending upon the school's educational objectives and the responses of its students. Only when a school's decision not to print a student story goes beyond the realm of professional educational judgment is it appropriate for a court to accept a challenge to the school's institutional academic freedom. Whether the story would cause a disturbance or would risk harm to other persons are also relevant considerations, but they are only two among many other factors calling for broad professional judgment. Only by careful review of students' proposed publication projects can faculty members teach them; only by exerting some influence over the taste, the academic quality, and the normative impact of material distributed throughout a school can the faculty discharge their responsibility to teach the general studentbody "*by example* the shared values of a civilized social order."[307]

This seems especially true given the school's ultimate responsibility—as the publisher—for what is published, whether that responsibility is viewed as the risk of tort liability or the risk of the school's reputation among parents and members of the public. It is a strange theory of first amendment rights for minor children that gives student reporters more discretion than their "real world" counterparts enjoy: editorial discretion regarding publication has itself been deemed a publisher's protected right under the first amendment.[308]

A major weakness in typical interpretations of *Tinker* is linked to the reasons why a school newspaper is not a "public forum" in the traditional free speech sense. The public forum concept should not ordinarily apply to children under the age of mature capacity, because they lack the rationality that is prerequisite to participation in the marketplace of ideas—both for a speaker to assume responsibility for her expression and for a listener to evaluate what is said.[309] Therefore, school officials must be concerned about the effect of official publications on readers who assume—whether correctly or not—that anything printed in a school-sponsored publication enjoys school endorsement. By analogy, the establishment clause prohibits public, group prayers in schools even though similar prayers are permitted in governmentally sponsored gatherings of adults.[310] Special sensitivity exists in public schools because young students are incapable of evaluating whether public prayer constitutes official endorsement of religion. These same concerns dictate that student editors should not have discretion over the content of a school paper, because widely-publicized views that appear to an inexperienced student to have school sanction can so easily take on

307. Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159, 3165 (1986) (emphasis added).

308. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256 (1974) (unconstitutional to force a publisher to publish that which "reason" tells him should not be published). It could be argued that students who have been given delegated editorial functions in a campus paper should have similar discretion, but final authority about the exercise of editorial discretion typically rests with those who have ultimate responsibility for a publication. In a commercial publication, that is the publisher; in a school, it is the school officials.

309. *See supra* section II.C.1.

310. *See supra* note 203.

a norm-establishing quality.[311] The potential for creating an appearance of official endorsement through the printed word is high enough that even if not all students read the school paper, those who do can be a psychologically captive audience.

In addition, the school paper and its impact necessarily implicate educational policy judgments, if not judgments about curriculum. In evaluting such issues as the likely psychological impact, the degree of offensiveness, the educational suitability, or the potential for harm or disruption that might be caused by a story in a school paper, educators must weigh an enormous number of empirical and judgmental factors. These factors relate to assessments of a school's environment for learning, the educational readiness of its students, and the pedagogical effects of alternative decisions on both reporters for the paper and the student audience. Such complexities make a public school a far different place from the typical "public forum" of the first amendment tradition, because the potential for harm or disruption in a school is not objectively knowable.[312] Therefore, the *Tinker* concern with "substantial disruption" and "material interference," which should be considered "in light of the special characteristics of the school environment"[313] may be impossible to apply to most public student expression, unless judges assume the educator's judgmental role of evaluating empirical and pedogogical imponderables. For such reasons, Professor David Diamond argues that *Tinker* was "fundamentally incorrect" and that to avoid a transfer of pedagogical responsibility to the judiciary, courts should apply a deferential minimum rationality standard to the decisions of educators affecting student expression.[314]

Even accepting this recommendation in the case of expression in the extracurriculum, a need remains to protect more private forms of student expression. First, the constitutional test proposed above[315] shifts the burden to a student who believes his expression is excluded from extracurricular forums for reasons unrelated to good faith judgments concerning educational policy or the use of school resources. Analytically, both the educational institution and the student have rights grounded in academic freedom interests that are pitted against one another in such a case. The burden is on the student because of the presumption in favor of institutional direction of "the work of the schools,"[316] which takes place pursuant to the overall judgment of our system that school-directed education is our best response to the educational

311. For similar reasons, a school was allowed to bar student paper reporters from distributing a school-wide student survey regarding sexual attitudes and practices, because it created a risk of "significant psychological harm" to immature students who were asked to crystallize their views prematurely on such an intimate and personal subject. Trachtman v. Anker, 426 F. Supp. 198 (S.D.N.Y. 1976), *rev'd in part*, 563 F.2d 512 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978).

312. In other first amendment situations, such as the distribution of literature on a street corner, the ability of the audience—passers-by, shoppers, and vehicular traffic—to function in the vicinity of the event is readily ascertainable by objective observation. . . . However, in the public school context, perhaps no one, but certainly not the judiciary, can readily ascertain the mental or emotional state that is necessary, appropriate, or desirable for learning to take place.

Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 486 (1981).

313. 393 U.S. 503, 514, 506 (1969).

314. *See* Diamond, *supra* note 312, at 477–78.

315. *See supra* notes 299–301 and accompanying text.

316. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 508 (1969).

rights of students below the age of majority.[317] The student would carry his burden by showing that the school's decision was "such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment"[318] or that the decision was based on the arbitrary suppression of ideas with no rational basis related to educational suitability[319] or to "habits and manners of civility."[320]

Second, the kind of "personal intercommunication"[321] protected in *Tinker* is entitled to first amendment protection because it neither involves, depends upon, nor adversely affects educational policy or the "captive audience" of a public school's curricular and extracurricular forums. Protection for such student expression arises not from traditional free speech theories that presuppose mature rationality,[322] but from notions about the coercion of belief originating in *West Virginia State Board of Education v. Barnette*.[323]

As a case involving a school's refusal to permit the "silent, passive expression" of a serious, political, parent-supported belief, *Tinker* is thus the flip-side of *Barnette*. Just as a school may not require a student's personal affirmation of belief, so it is prevented from punishing a student for open affirmation of a belief. Coercive effects of either kind run the risk of "strang[ling] the free mind at its source."[324] Despite its broader rhetorical flourishes in some portions of the majority opinion, the *Tinker* Court did not dispute the school's right to control a political demonstration. Rather, it disputed the school's characterization of the armbands, concluding that they were not "even group demonstrations."[325] In the Court's view, the armbands were "entirely divorced from actually or potentially disruptive conduct,"[326] suggesting that the actions of the school officials were akin to a regulation prohibiting students from engaging in personal conversations with their classmates in criticism of the Vietnam War. Suppression of a non-disruptive, private conversation implicates the same coercive elements as arose in *Barnette*, especially when a particular belief or viewpoint is singled out for proscription under circumstances where no use is made of a curricular or extracurricular forum in any way that carries the potential appearance of school sanction.

This interpretation of *Tinker* is arguably too narrow, because the students wore their armbands in school classrooms, thereby bringing their expression from the purely personal realm into a public forum. However, this fact alone falls short of access to the mass communication channels of a school's curriculum or extracurriculum. The student forums mentioned in *Tinker* included such things as "in the

317. *See supra* section III.C.
318. Regents of Univ. of Mich. v. Ewing, 106 S. Ct. 507, 514 (1985).
319. *See* Board of Educ. v. Pico, 457 U.S. 853, 871 (1982).
320. Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159, 3164 (1986).
321. 393 U.S. 503, 512 (1969).
322. *See supra* section II.C.1.
323. 319 U.S. 624 (1943).
324. *Id.* at 637.
325. 393 U.S. 503, 508 (1969).
326. *Id.* at 505.

cafeteria, or on the playing field, or on the campus during the authorized hours."[327] Moreover, the outcome in *Tinker* could well have been otherwise had the record demonstrated "*any* facts which might *reasonably* have led school authorities to forecast substantial disruption."[328]

Tinker can be understood as belonging to the tradition of *Barnette* and the school prayer cases, which—in part precisely because young students lack rational capacity—seeks to maintain freedom of conscience and belief. Within this tradition, a student's right of freedom of expression should, for example, protect her from attempts by school personnel to require that she salute the American flag or to prevent her personal, private prayer.[329]

There is, then, a continuum of activity in a public school within which free speech issues for students could arise. This continuum would place the classroom curriculum at one extreme and private, personal intercommunication at the other. Closely akin to the curriculum is the school library, followed by extracurricular activities having strong educational content—such as student publications, election assemblies, and performing arts programs. School-sponsored activities of a strictly social kind are a step further removed from the curriculum, but can still have a relationship to the broad educational mission of public schools. Routine administrative concerns that do not implicate a school's educational mission, such as operation of the physical plant or internal management of non-faculty employees, would fall outside the protected sphere of institutional academic autonomy. The content of private student interpersonal communication in such places as school grounds and the cafeteria—the sphere protected by *Tinker*—would also lie beyond the reach of institutional academic freedom, but would remain subject to *Tinker*'s concerns with disruption or harm. Acceptance of this perspective subjects institutional decisions within the educationally protected area to only rational basis scrutiny.

CONCLUSION

Eva Brann wrote that American education "embodies certain *root dilemmas*" that originate "in the very foundation of this country." She described these paradoxes as "a dilemma in the thing itself, . . . a grave difficulty that enhances rather than degrades its matter."[330] Our system of public education was established to mediate and facilitate the perpetual tensions within these dilemmas. A school aspires to be a bridge between the private world of the individual and the public world of society, helping each individual to realize his own autonomous sense of self while simultaneously inducting him into membership in the democratic community. He thus learns to give as well as to take from the wellsprings of a free culture. To fulfill such contradictory but lofty purposes, the school as mediating institution must itself be a paradoxical construct, belonging both to the private world of the family and to the

327. *Id.* at 513–14.
328. *Id.* at 514 (emphasis added).
329. *See supra* note 223 and accompanying text.
330. BRANN, *supra* note 20, at 1.

public world of the state. Thus a school must reflect *both* institutional authority and personal autonomy, private values and public virtues, excellence and equality, neutrality and advocacy.[331]

When functioning properly, schools can address these "grave difficulties" in ways that enhance rather than degrade our personal and collective aspirations. It is in school that a child has her first full opportunity to see society's plurality and to learn by experience that she can live with others significantly different from herself without ultimately yielding her own particularity. Indeed, her own particularity can itself be enhanced by an ongoing process of self-definition that both shares and distinguishes itself through the intimacy of life found in a tiny community of learning. From this foundation springs our ability as a people to respect and sustain one another in our larger communities of living. This was the vision that inspired not only Thomas Jefferson, but *Brown v. Board of Education*, and the vision has been realized at least enough to become a source of ongoing hope.

Even amid this hopefulness, however, the binding forces that hold the elements of paradox in productive equilibrium have proven increasingly vulnerable over the past generation. A complex variety of influences, including the possibility that our sense of community was being too much imposed on an increasingly heterogeneous culture, provoked a forceful reaction toward the individual side of the paradox, re-creating both within and outside the schools Tocqueville's fear that our potent individualism "might eventually isolate Americans one from another and thereby undermine the conditions of freedom."[332]

The origins of this development are by no means confined to recent conditions in our legal and educational institutions. The entire history of Western civilization since the medieval era represents a general movement toward individual liberation from communitarian forces, a movement so broad that Robert Nisbet called it "history as the decline of community."[333] While that process was long since underway beneath the surface, it has erupted for all to see in our own day, as ontological individualism has produced a "culture of separation."[334]

This cultural fragmentation has both personal and institutional dimensions, but has become especially visible in its impact on society's primary institutions, including the schools. "Every major institution found itself dealing with people unwilling to blindly accept customary responses."[335] In reaction, our social institutions heightened the rhetoric of their public promises (including the rhetoric of education in the early 1970s), only to create an irreconcilable gap between expectations and fulfillment that led to "a lessening of institutional authority which,

331. For additional discussion on the theme of educational paradoxes, see *supra* notes 19–25 and accompanying text.

332. BELLAH, *supra* note 190, at vii.

333. NISBET, *supra* note 162, chapter 4.

334. BELLAH, *supra* note 190, at 277.

335. Darrow, *Changing Values: Implications for Major Social Institutions*, in CURRENT ISSUES IN HIGHER EDUCATION, AMERICAN ASSOCIATION FOR HIGHER EDUCATION 13 (1979).

in turn, caused increased institutional fragmentation under the stresses of . . . greater complexity. . . .''[336]

Within the root dilemmas of education, the effect of this trend has been a kind of prying apart of the productive paradoxes, creating ever greater distance between the opposing links that must interact to sustain both educational and social processes. As a result, we now sense increasing yet opposite pressures from the extreme edges of the paradoxical concepts. From the schools' private heritage comes the instinct to abandon the public school experiment and let each child and each family pursue its own particularity, independent of the community as a whole. From the schools' public heritage comes the urge to review every action within a school in federal and constitutional terms, lest the spectre of discretionary autonomy mask the now distrusted agendas of school personnel in positions of authority. Each of these opposing fears works on the other, loosening the centers where they were once tightly intertwined. As the schools try to contain this unraveling process, they can easily be stretched beyond their capacity for meaningful response.

We can refresh our perspective on this unfolding pattern by asking once more about the mediating nature of public schools. This not only clears our vision about educational dilemmas, it also reminds us of the general place of intermediate institutions as a crucial force in holding together the core paradoxes of the Republic. The recently declining influence of these institutions in the overall constitutional and policy framework suggests that the implications of this question in the educational context extend to the larger process of working out our understanding of democratic theory.

The ''intellectual and moral associations'' of democracy, so important to Tocqueville that ''nothing . . . more deserves attention,''[337] protect both society and individuals from the destructive extremes of anarchy and totalitarianism by combining personal liberty and social duty experientially into the lives of those who inhabit the associations. Liberty and order are, after all, but opposite poles along a single construct. Ultimately, neither is meaningful without the other. But in a world inhabited only by the individual and the state, the choice is presented in mutually exclusive terms: to submit to the social order seems to yield personal liberty to the state. Hence the skittishness of recent lower court decisions unwilling to limit the expression rights of school age children. It is precisely because of a school's dual heritage, deeply rooted in both the public and private spheres, that it can innoculate its members against the extreme of living out only one side of the paradoxes between liberty and order, individual and community.

A strong degree of institutional autonomy is a crucial ingredient in empowering the school's mediating role. Its governmental sponsorship keeps the school at a desirable distance from the private sphere, imposing both affirmative and negative constitutional obligations on the school as an arm of government in dealing with people while providing a sustenance drawn from the larger republic itself. Yet its own

336. *Id.*

337. TOCQUEVILLE, *supra* note 166, at 517.

enjoyment of a constitutional right of institutional academic autonomy keeps the school at a desirable distance from the state, causing regulatory or judicial power to "trail off as soon as it enters an area pervaded by first amendment values."[338] Surrounded by these buffer zones, the institution has room to do its work, holding the root dilemmas together against pressures that would unravel them from either side. This is an important form of containment, because when the core paradoxes are disengaged at their intermediate center points, they begin to undo the ties that bind the remaining social and political fabric together.

A school's mediating role and its distinctively blended character, quasi-person and quasi-state, thus forge "a small republic of the intellect within the political community."[339] As a center point in the long term relationship between liberty and order, it is a "small republic" worth sustaining in an age when the risk increases that the center cannot hold.[340]

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338. Durham & Oaks, *supra* note 282, at 75.

339. BRANN, *supra* note 20, at 146.

340. Turning and turning in the widening gyre
The falcon cannot hear the falconer;
Things fall apart; the center cannot hold;
Mere anarchy is loosed upon the world,
The blood-dimmed tide is loosed, and everywhere
The ceremony of innocence is drowned;
The best lack all conviction, while the worst
Are full of passionate intensity.
. . . .

W. Yeats, The Second Coming.