Common Schools, Uncommon Values: Listening to the Voices of Dissent

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> Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of substance is the right to differ as to things that touch the heart of the existing order.
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> Justice Robert H. Jackson
> *West Virginia State Board of Education v. Barnette*
> 319 U.S. 624, 642 (1943)

Education in America as we know it today draws its origins from the philosophical perspectives and political objectives of the common school reformers over a century ago. For them, mass education was a primary vehicle for defining ourselves as a nation. Schools would develop civic virtue and a national character through a shared set of values reflected in the school curriculum. The common school experience, offered to all regardless of social class or ethnic background, would assimilate the hordes of immigrants coming to our shores and meet the emerging needs of industrialization. Individuals across the economic spectrum, afforded education at public expense, would both realize their own potential and support civic purposes through their enhanced participation as informed citizens sharing a common public philosophy. In other words, education would serve individual interests founded in liberal philosophy as well as communitarian goals founded in both democratic and republican theory.

As we approach the end of the twentieth century, this model of education has come under increasing attack. Schools have become battlegrounds in what

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has been termed a national "culture war."[1] The public school curriculum has served as the most visible target in these battles. Issues such as abortion, AIDS education, sex education, multicultural education, equality for women, and homosexual rights—the values of "tolerance" and "individual choice" themselves—are now tearing communities apart. While some of these challenges are founded in non-spiritual value-based belief systems, most are religion-based.[2] Organized efforts to promote prayer or a moment of silence in the public schools have caught Congress[3] and state legislatures[4] in endless political maneuvering and have captured the attention of the media.[5] Attempts by individual students to engage in private religious speech on school grounds during the school day have forced school officials and the courts to take a fresh

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1. The term as originally used referred to the dispute between Protestants and Catholics at the end of the nineteenth century over the religious content of public education in Germany. *See* JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA xii (1991).

2. In its 1994-95 annual report, People for the American Way documented 458 incidents in 49 states of attempted "censorship," including 338 attempts to censor educational materials such as children's books and classics of literature; health and sexuality curricula; and student plays, speeches, publications, and programs. The remaining 120 incidents included state legislative efforts to enact voucher initiatives, attempts to present creationism in science classes, and efforts to introduce state-sanctioned prayer in public school classrooms. These figures represent the first time in the organization's 13-year history of reporting such attempts to influence the public school curriculum where the success rate had reached the 50 percent mark. PEOPLE FOR THE AMERICAN WAY, ATTACKS ON THE FREEDOM TO LEARN, 1994-95 REPORT 9-16 (1995).

3. Since the Supreme Court's school prayer decisions of the 1960s, Engel v. Vitale, 370 U.S. 421 (1962) (holding that recitation of prayer composed by New York Board of Regents violated Establishment Clause of the First Amendment), and Abington v. Schempp, 374 U.S. 203 (1963) (declaring Bible reading and recitation of the Lord's Prayer in public schools to be unconstitutional), numerous proposals have come before Congress to amend the Constitution to permit organized prayer or a moment of silence in public schools. The school prayer debate escalated following the Supreme Court's 1992 decision in Lee v. Weisman, 505 U.S. 577 (1992) (holding that public school's inclusion of "nonsectarian" prayer in a school graduation ceremony violated the Establishment Clause).

4. During the first six months of 1995 alone, school prayer legislation was enacted in Tennessee, Louisiana, and Utah. *See* Bown v. Gwinnett County School District, 895 F. Supp. 1564 (N.D. Ga. 1995) (upholding constitutionality of Georgia's Moment of Quiet Reflection in Schools Act). Bills were proposed in Florida, Georgia, Mississippi, Oklahoma, Pennsylvania, and Virginia permitting student-initiated or voluntary prayers at graduations and other noncompulsory school events in response to a ruling by the Fifth Circuit Court of Appeals, Jones v. Clear Creek Indep. School Dist., 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993), which approved student-led nonsectarian prayers at a Texas high school graduation. Mark Walsh, *Bills in Six States Address Student-Led Prayers*, EDUC. WK., Feb. 23, 1994, at 10.

5. *See, e.g.*, Peter Applebome, *Prayer in Public Schools? It's Nothing New for Many*, N.Y. TIMES, Nov. 22, 1994, at A1 (noting that according to People for the American Way, "60 to 70 percent of Americans respond favorably to the idea of prayer in the school"); Richard L. Berke, *White House Tries to Clarify Stand on School Prayer*, N.Y. TIMES, Nov. 18, 1994, at A1 (noting calls by newly elected Republican leadership in the House for vote on constitutional amendment allowing individual and group prayer in public schools and further clarifying that President Clinton preferred passage of federal law to constitutional amendment establishing "moment of silence" during school day); Mark Walsh, *Prayer Proposal Echoes Earlier Debates Over Religion in School*, EDUC. WK., Dec. 14, 1994, at 6 (noting that "while many surveys show a majority of Americans favoring a return of organized prayers to public schools, opposition to such proposals has evolved into a core position of many civil-liberties groups, Jewish organizations, and main-line Protestant churches, including Baptists, Presbyterians, and Lutherans"); Pamela Coyle, *The Prayer Pendulum*, A.B.A. J., Jan. 1995, at 62 (citing Gallup Poll finding that 76 percent of public high schools in South were planning prayers delivered by students at their graduation ceremonies).

look at the line where religion and personal expression intersect.[6]

The First Amendment has served as the linchpin for much of the ideological controversy over American education.[7] Specifically for religious claimants, the inherent tension between the Free Exercise and Free Speech Clauses on the one hand and the Establishment Clause on the other has driven the legal debate and framed the range of policy alternatives. While courts have been less receptive to non-religion-based claims, arguments supporting both have drawn in part from "the individual's freedom of conscience"[8] as the central liberty unifying the First Amendment clauses and in part from parental rights stemming from the Fourteenth Amendment Due Process Clause.[9] The federal courts have become key players in this drama alongside Congress, state legislatures and judiciaries, and local school boards.

Both Supreme Court and lower court decisions have helped shape the framework and provide a certain terminology within which the current debate over educational values, parental autonomy, and the role of the state has been carried out in the broader arena of policy and politics. Courts have weighed competing claims on the scale of constitutional norms and developed broad standards to guide official discretion.

But the concerns over school curricula and expressive rights are merely symptomatic of more fundamental problems plaguing education in American society. These debates have called into question the inherently indoctrinative function of schooling and brought under critical scrutiny the very concept of government funded and controlled schools.[10] This Article attempts to resolve this constitutional and political dilemma by charting a middle course whereby the relationship between education and the state can be redefined and structurally reconfigured, but not totally severed. From this perspective, schooling can foster a national ethos while at the same time promoting community or group values and accommodating individual parental interests in guiding the upbringing of their children.

Part I critically examines the origins and purposes of the common school movement on which contemporary education is based and questions whether the "common school" concept has continued applicability, given dramatic changes in the political, social, and demographic landscape over the past century. Part II lays the constitutional foundation for the discussion. It

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6. *See infra* notes 204-219 and accompanying text.

7. The First Amendment states in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ." U.S. CONST. amend. I. The first two clauses, covering religion, are commonly referred to as the Establishment and Free Exercise Clauses respectively. The last is referred to as the Free Speech Clause.

8. Wallace v. Jaffree, 472 U.S. 38, 50 (1985).

9. The Fourteenth Amendment states in part that "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

10. This concept has been referred to as the "public school monopoly." *See* THE PUBLIC SCHOOL MONOPOLY (Robert B. Everhart ed., 1982).

examines the Supreme Court's evolving ideology of schooling, from individual rights to a values-inculcation model, and discusses how that shift has shaped the Court's views on community control and parental decision-making. Part III analyzes the perspective of the lower courts on specific value-laden issues brought before them as constitutional claims. Part IV responds to concerns raised in recent scholarship as to educational values and parental autonomy, identifies the strengths as well as the misunderstandings in those arguments, and debunks some of the myths surrounding both the current system of common schooling and the implications of radical reform proposals. Finally, this Article offers an illustrative framework that broadly defines the parameters of a contemporary concept of education that preserves both our common and diverse values. It suggests that the curricula of government-supported schools should reflect a core of common values—including character traits such as honesty and respect for authority as well as political principles such as equality and religious tolerance—in order to maintain our national identity and thereby preserve the Republic. However, the Article also suggests that the monolithic view of state operated schools should be set aside in order to provide government supported and loosely regulated alternatives, so that parents of all socioeconomic levels can join together in choosing curricula, materials, and pedagogical techniques which reflect diverse non-core values according to their own preferences, whether religion-based or not.

I. ORIGINS AND PURPOSES OF THE COMMON SCHOOL

Throughout the twentieth century, the concept of a government supported and controlled educational system has garnered significant appeal for both its benefits to society and to the individual. However, in a democratic society, particularly where education is compulsory, the relationship between the schools and the state is a complicated one. Schools serve as mediating institutions interpreting the popular culture and managing the tensions among competing values while simultaneously supporting the state. Education is both a practical engine and a symbol for preserving national unity and identity.

This ambitious model functions most effectively and smoothly in an idealized society whose members share a common core of values and beliefs. While historically we have prided ourselves on our ability to cope with cultural conflict through our simultaneous commitment to pluralism and consensus, circumstances have changed dramatically since the days of the American Founders. Successive waves of immigration from all parts of the globe have rendered us increasingly more diverse in our world views while industrialization has significantly weakened family ties and church influence. As a result, the traditional mechanisms for defining and reaching moral consensus no longer work in the face of an ever expanding and centerless notion of moral pluralism.

Schools have served as the lightning rod in this struggle for the heart and

soul of America. The governance structure has rendered public education highly political and accountable to the local electorate. While ultimate responsibility for education resides at the state level, the daily operation of schools is delegated to local communities with funding primarily through local property taxes.[11] As a result, schools not only reproduce a national identity, but also help define community identity.

As we have grown more diverse, these two identities have clashed with increasing frequency. And so, added to the balance of national and individual concerns, community preferences play a key role in shaping the debate over educational values. In fact, driving the debate over values in the schools is the clash between individual rights to freedom of conscience and belief, including the right of parents to control the education of their children, and the authority of school officials to make curricular decisions that arguably reflect the preferences and values of the community majority. Underlying this tension is the American passion for both liberty and community, the quest for meeting individual and collective interests that Alexis de Tocqueville noted more than a century ago.[12]

A. *Historical Foundations*

Despite his keen observations, Tocqueville was unaware of the profound and lasting impact this dual passion would have on American schooling as conceptualized by his contemporaries. These mid-nineteenth century reformers had a vision of schooling whose purpose and structure have remarkably endured dramatic social and political changes. A retrospective look at their aspirations and philosophical beliefs along with the climate in which they instituted reforms provides a framework for understanding and examining the current controversies surrounding education in the United States.

Influenced by the works of nineteenth-century European educators, particularly the Swiss educator Johann Heinrich Pestalozzi,[13] the American architects of the common school had a clear societal purpose. For Horace

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11. The federal Constitution makes no mention of education, while 49 of the 50 state constitutions (Mississippi being the exception) contain variously worded education clauses, some more explicitly rights-based than others. *See* William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision*, 35 B.C. L. REV. 597, 602 n.29 (1994). Some merely mandate a system of "free public schools," such as Article 11 of the New York State Constitution which states that, "The legislature shall provide for the maintenance and support of a system of free common schools wherein all children of this state may be educated." N.Y. CONST. art. XI, § 1. Others such as the New Jersey Constitution state that "[t]he Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools." N.J. CONST. art. VIII, § 4. Still others mandate a stronger commitment to education. *See, e.g.*, WASH. CONST. art. IX, § 1 (stating that "the paramount duty of the state to make ample provision for the education of all children residing within its borders without distinction or preference on account of race, color, caste, or sex.").

12. *See generally* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Phillip Bradley ed., A.A. Knopf 1945) (1835).

13. *See* FREDERICK M. BINDER, THE AGE OF THE COMMON SCHOOL, 1830-1865, at 24 (1974).

Mann, the primary force behind the common school movement, schooling was necessary to preserve republican institutions and to create a political community.[14] The school was to prepare the children of all religions, classes, and ethnic backgrounds (particularly the foreign-born) for the intelligent and responsible exercise of citizenship. The communal isolation of newly arrived immigrants, their low economic status, and their high rates of illiteracy posed a threat to the vitality of the republic. The school would teach the newcomers the proper attitudes and values of American democracy and foster an understanding and appreciation for American social institutions.[15] The school would be common in the sense that it would be open to all free of charge, and it would inculcate a common core of values, a "public philosophy" which intermingled religion, politics and economics in a vision of a "redeemer nation."[16] Only through public control could the public define this philosophy and avoid the dangers of partisanship.[17]

The goals of the common school included moral training, discipline, patriotism, mutual understanding, formal equality and cultural assimilation.[18] In fact, the values reflected in the curriculum were those of mainstream Protestantism. In his now famous *Twelfth Annual Report* in 1848, Mann himself advised teachers to teach the "principles of piety, justice, and sacred regard to truth, love to their country, humanity and universal benevolence, sobriety, industry, frugality, chastity, moderation, and temperance, and those other virtues which are the ornament of human society, and the basis upon which a republican constitution is founded."[19] This purportedly non-denomi-

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14. *See Preface* to THE REPUBLIC AND THE SCHOOL 8 (Lawrence A. Cremin ed., 1957); LAWRENCE A. CREMIN, THE AMERICAN COMMON SCHOOL 33 (1951). The connection between an educated citizenry and the success of a republican form of government is reflected in the language of clauses addressing the purposes of public education as contained in many of the initial constitutions of states admitted between 1798 (Kentucky) and 1912 (New Mexico). DAVID TYACK, THOMAS JAMES & AARON BENAVOT, LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785-1954, at 55 (1987).

15. CREMIN, *supra* note 14, at 44-47. It has been argued that common schooling, rather than merely creating cultural transformation and assimilation for the poor, also had a dark side, creating communal and intergenerational alienation. For children of the disadvantaged, schooling was "designed to stamp out differences among students, to secure conformity to rules and regulations as defined by teachers . . . and to disconnect students from networks of personal communication. Drawn out of communities built on emotional bonds, shared loyalties, religious affiliations, ethnic styles, and expressive idiosyncrasies, children were then immersed in a world of alternative structures and human processes." Barbara Finkelstein, *Exploring Community in Urban Educational History*, *in* SCHOOLS IN CITIES: CONSENSUS AND CONFLICT IN AMERICAN EDUCATIONAL HISTORY 309 (Donald K. Goodenow & Diane Ravitch eds., 1983).

16. DAVID TYACK & ELISABETH HANSOT, MANAGERS OF VIRTUE: PUBLIC SCHOOL LEADERSHIP IN AMERICA, 1820-1980, at 20 (1982).

17. CREMIN, *supra* note 14, at 19.

18. *See* CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860, at 116 (1983).

19. THE REPUBLIC AND THE SCHOOL, *supra* note 14, at 106. This Protestant-republican ideology was clearly represented in the McGuffey Readers which were first published in 1836 and used by some 200 million school children between 1900 and 1940. These were "frankly moralistic. . . . Honesty and industry . . . [were] the leading values, closely followed by courage, kindness, obedience, and courtesy. The Readers supported the temperance movement but were silent about the movements to abolish slavery

national ethic, along with Bible readings "without comment,"—readings that relied on individual interpretation rather than on the Catholic practice of looking to the Church for understanding of the scriptures—provided the necessary moral grounding. At the same time, the schools would avoid controversial topics that would prove emotionally and intellectually divisive.[20]

The reformers understood well the political limits of transposing any form of standardization or state-imposed ideology onto the individualistic American culture. And so they attempted to strike a tolerable balance between individual and collective goals while meeting their own nationalistic objectives. State government would maintain final authority over education by providing minimum standards and assuring equal educational opportunity.[21] By 1850, the majority of state legislatures had established the office of the state superintendent of education. This office became significant in future years as a mechanism for expanding state regulatory authority.[22] On the other hand, the reformers also addressed the inherent threat they perceived in homogeneity. As a bulwark against state encroachment on individual rights and liberties, they attempted to inculcate a sense of community that would function not as a deterrent to individualism but as a setting within which individuality might be preserved.[23] Recognizing the widespread concern over who would establish the dominant ideology to be promoted in the schools, the reformers emphasized local control over education. This political structure would maintain the transmission of political, economic, and social knowledge in the hands of each community.[24]

In its early days, the common school in concept and in practice met its strongest opposition from the Catholic Church. Prior to its inception, many charity schools for the poor run by religious groups had received government funds. Such schools were operated by Methodists, Catholics, Episcopalians and other denominations in New York City until 1825, in Lowell, Massachusetts through the 1830s and 1840s, in Milwaukee, Wisconsin through the 1840s, and

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and to establish trade unions." MICHAEL W. KIRST, WHO CONTROLS THE SCHOOLS? AMERICAN VALUES IN CONFLICT 28 (1984).

20. CREMIN, *supra* note 14, at 219. The historian Carl Kaestle argues that this avoidance of controversy or alternatives to the moral world of the school would last through the mid-twentieth century where a "rather standard and uncontroversial moral education existed in most tax-supported schools. . . . The strategy was to be inclusive by being uncontroversial. . . . Yet [this strategy] contained the seeds of major discontent." It both alienated those who believed that school morality should be "more central and more anchored in a distinctive religious view" while never escaping its roots in a "white, middle-class, Anglo-American, Protestant tradition." Carl F. Kaestle, *Moral Education and Common Schools in America: A Historian's View*, 13 J. MORAL EDUC. 101, 107-08 (May 1984).

21. CREMIN, *supra* note 14, at 81.

22. *Id.* at 176-77.

23. Joel Spring, *The Evolving Political Structure of American Schooling*, *in* THE PUBLIC SCHOOL MONOPOLY 84 (Robert B. Everhart & Clarence J. Karier eds., 1982).

24. *Id.* at 88.

in Hartford, Connecticut as late as the 1860s.[25] But as the numbers of Catholics migrating to the United States in the 1830s and 1840s swelled, the divergence in viewpoints on education between Catholics and Protestants became manifest.[26] The Philadelphia Bible Riots of 1844[27] along with the unsuccessful attempts of the Catholic clergy in New York City to obtain a portion of the common school fund for the maintenance of a separate system of Catholic schools[28] directly challenged the "pan-Protestant hegemony" over American culture.[29]

The New York experience sheds light on the irreconcilability of Catholic and Protestant perspectives. Catholic leaders argued that the nonsectarian or common religion taught in the public schools was actually "sectarianism in disguise."[30] They maintained that the reading of the Protestant version of the Bible in the schools coupled with objectionable remarks directed toward Catholics in school textbooks created a situation in which Catholics' rights of conscience were being "wantonly violated."[31] Merely purging books of "missionary Protestantism" masked as general morality would not suffice. Ultimately, the "incidental hidden curriculum" would surface in the attitudes of teachers and peers.[32] Catholics were warned that "evils of the gravest kind are likely to result from the so-called public schools."[33] The most outspoken separatists among them, including Archbishop Hughes of New York, challenged the very premise underlying the common school movement, that moral education could be separated from religious beliefs.[34] Catholics aligned with other localists in arguing that the common school infringed on parental responsibility and was an "inefficient and improper monopoly."[35] These arguments which supported the importance of parental authority in education

25. KAESTLE, *supra* note 18, at 166.

26. HUNTER, *supra* note 1, at 69. During the 1830s, 600,000 Catholics migrated to the United States, followed by 1,700,000 in the 1840s and 2,600,000 more in the 1850s. Of these, 43 percent were from Ireland, 26 percent from Germany, 17 percent from England, Scotland, and Wales, and the remainder from Italy and Eastern Europe. By the late 1880s, the number of Catholics in the United States had reached over 6 million.

27. LLOYD P. JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL 76 (1987).

28. *See* CREMIN, *supra* note 14, at 165-75.

29. During this same period, Protestant clergy played a key role in the formation of the common school. In Massachusetts, five of the eight members of the State Board of Education under Horace Mann's leadership were ministers. Mann's successor was the Reverend Barnas Sears, President of the Newton Theological Institution. Protestant ministers served as school superintendents throughout the country. In Kentucky, of the first eleven superintendents during the periods from 1838 to 1879, all but one were Protestant clergymen. In the West, school classes were often held in church buildings or church services were held in school buildings. JORGENSON, *supra* note 27, at 31-54.

30. ROBERT MICHAELSON, PIETY IN THE PUBLIC SCHOOL 87 (1970).

31. CREMIN, *supra* note 14, at 166.

32. CARL F. KAESTLE, THE EVOLUTION OF AN URBAN SCHOOL SYSTEM: NEW YORK CITY, 1750-1850, at 154 (1973).

33. HUNTER, *supra* note 1, at 200.

34. KAESTLE, *supra* note 18, at 168.

35. *Id.* at 169.

and the salutary effects of competition would be echoed over a century later by modern-day reformers from the political left to the religious right.

But Catholic efforts in New York to diversify the public school curriculum or to obtain public funding for an alternative system of Catholic schools failed in the face of strident opposition mounted not only by the anti-Catholic Know-Nothing Party but also by the mainstream Protestant press.[36] This raging controversy between Catholics and Protestants resulted in state legislation enacted in 1842 which expressly prohibited the granting of public funds to any school in which "any religious sectarian doctrine or tenet shall be taught, inculcated, or practiced."[37] Anti-Catholic sentiment continued in 1894 with the adoption of a state constitutional amendment which prohibited public aid to any school "wholly or in part under the control or direction of any religious denomination or in which any denominational tenet or doctrine is taught."[38] As a result, the dissenters of the time decided to opt out of the public school system entirely rather than to compromise their own beliefs.

The issue of government aid to religiously affiliated schools continued to percolate beneath the surface of political debate with periodic eruptions in state legislatures and federal courts depending on the direction of the political winds. Nevertheless, the "cosmopolitan solution" that was based on a common Anglo-American Protestant culture[39] combined with the splintering of dissident religious groups laid to rest any direct challenges to the common school for that time. In fact, by 1920 nearly six thousand parochial Catholic schools were educating 1,700,000 students; more than a thousand Lutheran schools, six hundred Seventh-Day Adventist schools, and hundreds of other sectarian schools representing various denominations were educating hundreds of thousands more.[40] Yet unlike modern-day religious dissenters, even those who rejected the public schools did not object on moral grounds, as they essentially shared the values promoted in the public schools. Their objections were founded more directly in blatant bias against them and in a difference in theological perspective that was unrelated to the question of morals per se.

Despite this distinction, according to the historian Diane Ravitch, the

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36. *See* HUNTER, *supra* note 1, at 199. According to *The Watchman*, a Baptist weekly, "If the children of Papists are really in danger of being corrupted in the Protestant schools of enlightened, free and happy America, it may be well of their conscientious parents and still more conscientious priests, to return them to the privileges of their ancestral homes, among the half-tamed boors of Germany." JORGENSON, *supra* note 27, at 107 (quoting *The Watchman*). The common school movement was inextricably bound up with the "nativism" movement of the 1830s and 1840s. The latter movement was imbued with an anti-foreign and specifically anti-Catholic spirit, culminating in the Know-Nothing campaigns of the 1850s. *Id.* at 28.

37. WILLIAM KAILER DUNN, WHAT HAPPENED TO RELIGIOUS EDUCATION? 253-54 (1958).

38. N.Y. CONST. art. XI, § 3; *see also* MICHAELSON, *supra* note 30, at 88-89.

39. Kaestle, *supra* note 20, at 101, 105.

40. Charles L. Glenn, *'Molding' Citizens*, *in* DEMOCRACY AND THE RENEWAL OF PUBLIC EDUCATION 25, 53 (Richard John Neuhaus ed., 1987).

Catholic controversy in New York City bears contemporary applicability, representing a tension between competing visions of the common school that would recur again and again over the years, especially in the form of litigation. As Ravitch describes it, on the one hand there is a vision of schooling in which the public school belongs to the community, whose majority can determine the purpose and content of education—including sectarianism. That was the view espoused by the Catholic Church during the New York City common school struggle. On the other hand, there is the vision espoused by Horace Mann and the common school reformers whereby the public school belongs to the state. Here the role of the school is to "encourage inquiry, not to impose interpretations." The school must avoid promoting any particular religious or political view, but instead teach only commonly held values.[41]

After the turn of the century and through the mid-1900s, a competing view of education, different from both of these visions, took hold. This view was more genuinely secular and child-centered. Under the American pragmatists, led by John Dewey, the primary locus of education in America shifted from the church and the family to the public school. Gradually, "the religious function shaded into the patriotic and the achievement of a broad objective of moral goodness into the nurturing of good citizens."[42] Dewey considered the school to be a social and transformative institution. The object of education was not to reproduce a static culture through the teaching of morals in an authoritarian sense as espoused by the common school reformers. On the contrary, he viewed education as serving a "cultural revision" function[43] where the moral was synonymous with the social and could be learned by doing rather than through direct instruction. For Dewey and his followers, the common experience of the school would develop a common faith that would transcend individual and group differences without negating the latter. Schooling would promote a sense of community awareness and further community progress.[44] Incorporated into their notion of community was a recognition of cultural differences, including language, literature, cultural ideals, moral and spiritual outlook, and religion, although Dewey disagreed with efforts to infuse religion per se into the public school.[45]

Despite its widespread appeal over the course of decades, by the mid-1900s, progressive education began to fall into cyclical disfavor alternating with more traditional approaches to education. The first shift took place in the late 1950s with the launching of Sputnik by the U.S.S.R. and the race to compete on every front with the Soviet Union. Here educators moved from

41. DIANE RAVITCH, THE GREAT SCHOOL WARS: NEW YORK CITY, 1805-1973, at 61-62 (1974).
42. MICHAELSON, *supra* note 30, at 62-63.
43. TONI MARIE MASSARO, CONSTITUTIONAL LITERACY 25-26 (1993).
44. MICHAELSON, *supra* note 30, at 144.
45. *Id.* at 146-48.

teaching the whole child to a decided emphasis on excellence.[46] Economists began to talk about education as investment in human capital for the good of society.[47] By the mid-1960s, the pendulum swung back again to progressivism with the civil rights and anti-war movements and the War on Poverty which challenged both traditional assumptions of life and society and the apparent competitiveness and achievement orientation that had crept into schooling.[48] By the mid-1970s, however, declining scores on standardized achievement tests, increasing dropout rates, and student violence—all the perceived ills of American education—were laid again at Dewey's door, blaming his theories for the permissiveness, valuelessness, and lack of academic standards in the public schools.[49] Progressive teaching methods such as the New Math and the New Social Studies together with the open classroom and unconventional elective courses generated a backlash and ushered in the Back to Basics movement. By the late-1970s, the influence of that movement, supported by a rising tide of religious fundamentalism, became manifest in textbooks and curricula across the country.[50] Thus began the present era in which, on an academic level, school officials combine the best lessons learned from the two competing philosophies. However, on a philosophical and political level, they must constantly readjust to the cultural dissonance in the larger society and to the shifting political and constitutional views on the purposes, governance structure, and substance of education.

B. *The Contemporary Landscape*

While Mann and Dewey espoused very different visions of schooling, they shared the belief that education would develop a common faith, albeit through markedly different processes, one imposed by the school and the other through interaction and rational thought. However, each drew his vision on a landscape far different from that of contemporary America. In their day, a narrow range of socially and politically acceptable values rendered consensus within the realm of possibility. In recent decades, as the United States has become more diverse in composition, controversy has developed over the values reflected in the curriculum and permitted to be voiced in the public school context. At no other time in our history have we witnessed such a direct challenge to the very

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46. DIANE RAVITCH, THE SCHOOLS WE DESERVE: REFLECTIONS ON THE EDUCATIONAL CRISES OF OUR TIMES 82-83 (1985).

47. *See, e.g.*, Theodore W. Schultz, *Investment in Human Capital*, 51 AM. ECON. REV. 1, 13 (1961) (maintaining that human skills and knowledge are form of capital in which society ought to invest for general welfare).

48. RAVITCH, *supra* note 46, at 84-85.

49. *Id.* at 88-89.

50. FRANCES FITZGERALD, AMERICA REVISED: HISTORY SCHOOLBOOKS IN THE TWENTIETH CENTURY 192-94 (1979). Some historians maintain that the indictments leveled against Dewey in the 1950s and again in the 1970s misrepresented Dewey's philosophy and further exaggerated its impact on schooling. *See* Kaestle, *supra* note 20, at 107.

premise underlying what has been called the "myth of the common school," that is, that the values promoted through public education are in fact "neutral, nonsectarian, and indeed obvious to any reasonable person."[51]

In fact, for many the concept of non-sectarian morality is itself an oxymoron. It is widely believed, although hotly disputed, that moral principles must be grounded in some cultural tradition and some transcendent values. The real dilemma for the United States is how to adapt this idea to the schools of a pluralist society in which the Constitution, the fundamental social contract, prohibits an established church but also protects dissent.

Today, critics across the political spectrum decry the "valuelessness" of public schooling.[52] They argue that without consensus on how children and youth can be shaped into adulthood, schools cannot tend to moral education.[53] In an effort to remain value-neutral and thus avoid the controversies engendered by diversity, schools have ceased to provide us with a "moral compass" as a nation. The rising rate of juvenile crime and a perceived decline in public values as evidenced by scandals from Washington to Wall Street have fanned the flames of discontent. Educators across the nation are working their way through the political and pedagogical minefields that surround "values education" to create programs that will affect character. From the Character Education Partnership launched in 1992[54] to a White House Conference on moral education,[55] to congressional action funding character education pilot projects,[56] to state legislation mandating values education,[57] there is a

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51. CHARLES L. GLENN, JR., THE MYTH OF THE COMMON SCHOOL 12 (1988).

52. Most commentators accept the view that education is inherently indoctrinative and value-laden, irrespective of whether they support the recognition of First Amendment freedoms in the public school setting. *See infra* notes 72-82 and accompanying text.

53. James S. Coleman, *Changes in the Family and Implications for the Common School*, 1991 U. CHI. LEGAL F. 153, 158-59.

54. Members of the partnership include the American Association of School Administrators, the American Federation of Teachers, the National Association of Secondary School Principals, the National Education Association and the National School Boards Association. According to their Mission Statement their purpose is to develop "civic virtue and moral character in American youth for a more compassionate and responsible society." They define "civic virtue" as "living by the guiding principles of our nation's framing documents, the rights and responsibilities that are at the heart of our common compact as citizens," and they define "moral character" as "living by core values widely held in our society such as honesty, fairness, integrity and respect." Mission Statement of The Character Education Partnership, Inc. (adopted by C.E.P. Board of Directors on Feb. 6, 1993) (on file with author).

55. *See* Millicent Lawton, *Values Education: A Moral Obligation or Dilemma?*, EDUC. WK., May 17, 1995, at 1. The conference, held in May 1995, was sponsored by the Communitarian Network and George Washington University.

56. The Improving America's Schools Act of 1994, Pub. L. No.103-382, § 10103, authorized up to ten grants of as much as $1 million each to state agencies to join into a partnership with at least one local school district in implementing a character education pilot project. Section 103-382(d) (1) of the Act requires that projects funded under the Act must incorporate at least the following elements of character: caring, civic virtue and citizenship, justice and fairness, respect, responsibility, and trustworthiness.

57. *See, e.g.*, ARK. CODE ANN. § 6-16-111 (Michie 1993) ("Curricula in morals, manners, patriotism, and business and professional integrity shall be included in the course of study for the state public schools."); IND. STAT. ANN. § 20-10.1-4-4 (Burns 1995) ("Each public and nonpublic school

groundswell of support for consciously developing character in the public schools.[58]

These efforts reject the moral relativism and the emphasis on the individual found in the values clarification movement of the 1960s[59] and the cognitive moral development movement of the 1970s[60] in favor of more direct teaching of common "core" values. Obviously, the difficult question remains: "Whose values?" Adding to the tensions are the debates surrounding efforts to break what some perceive as the "Eurocentric bias" of the traditional curriculum as well as issues raised by those who equate traditional values with certain religious beliefs.

Critics on the political left oppose any suggestion of religion or religious speech in the public schools, yet argue for a broader range of secular values and perspectives, some more controversial than others, to be reflected in the curriculum. Critics on the political right argue that schools cannot teach virtue without relating moral values to a particular worldview,[61] and that the values currently represented in the curriculum are so secular as to convey a message of hostility toward religion and, in certain cases, directly offend religious beliefs.[62]

Religious dissenters in particular have raised their voices to a feverish pitch seeking accommodation to their religious beliefs both inside and outside of the public school system. From inside, they challenge the pervasive secularism of the curriculum, the traditional exclusion of religious rationales from the public

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teacher, employed to instruct in the regular courses of the first twelve (12) grades, shall present his instruction with special emphasis on honesty, morality, courtesy, obedience to law, respect for the national flag, the constitutions of the United States and of Indiana, respect for parents and the home, the dignity and necessity of honest labor and other lessons of a steadying influence, which tend to promote and develop an upright and desirable citizenry.").

58. *See* THOMAS LICKONA, EDUCATING FOR CHARACTER 51 (1991).

59. The purpose of values clarification was to help students clarify their own values rather than to teach them fixed notions of right and wrong. *See* SIDNEY B. SIMON ET AL., VALUES CLARIFICATION: HANDBOOK OF PRACTICAL STRATEGIES FOR TEACHERS AND STUDENTS 16 (1972) (suggesting that there is no consistency concerning what constitutes "desirable" values given various influences on students' lives—parents, teachers, the church, peer groups, the media—and implying that these influences and values that young people assimilate from them are of equal value).

60. A similar theory that gained popularity in the 1970s was based on six successive stages through which individuals arguably pass in moral development. Students are presented with "moral dilemmas" which they evaluate from what are defined within the underlying theory as progressively more advanced perspectives. The six stages from the lowest to the highest are: punishment and obedience; individual instrumental purpose and exchange; mutual interpersonal expectations, relationships, and conformity; social system and conscience maintenance; prior rights and social contract utility; and universal ethical principles. *See generally* LAWRENCE KOHLBERG, THE PHILOSOPHY OF MORAL DEVELOPMENT (1981). Lawrence Kohlberg, the architect of this movement, estimated that only five percent of the American population reaches the highest developmental stage, indicating that moral development is not "inevitable" but depends on experience. *Id.* at 88. Similar to values clarification, this "cognitive-developmental" approach rejects moralizing and focuses on the process of moral reasoning rather than on a particular product.

61. Richard A. Baer, Jr., *American Public Education and the Myth of Value Neutrality*, *in* DEMOCRACY AND THE RENEWAL OF PUBLIC EDUCATION 1, 9 (Richard John Neuhaus ed., 1987).

62. *See infra* note 82 and accompanying text.

school experience, and the widespread intolerance or fear of even private religious expression on public school grounds. From outside, they join in a chorus with other parental rights advocates to press for enhanced choice in the form of government vouchers to support alternatives to the public school.

On the national level, religious and social conservatives are calling for an amendment to the federal Constitution which they argue will restore religious equality. The purpose of such an amendment is to allow non-denominational or citizen-initiated prayer in non-compulsory settings.[63] Religious conservatives have further introduced legislation providing tuition vouchers to be used at private schools, including those that are religiously affiliated,[64] and even a "parental rights act" that would clarify the "right of parents to direct the upbringing of their children," which includes overseeing their education.[65] At the state level, a number of state legislatures are considering a "parents' rights" amendment to their state constitutions. Supporters maintain that such an amendment would insure that the values taught in school are not in conflict with values taught in the home.[66] In recent years, interest groups on both

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63. S.J. Res. 24, 104th Cong., 1st Sess. (1995). The amendment provides that "[t]he right of citizens of the United States to the free exercise of religion shall not be denied or abridged by the United States or by any State." *Id.*

64. H.R. 1640, 104th Cong., 1st Sess. (1995), the Low-Income School Choice Demonstration Act of 1995, authorizes the appropriation of $30 million for fiscal year 1996 to create demonstration projects that would provide "financial assistance to low-income parents to select the public or private schools their children will attend."

65. S. 984, 104th Cong., 1st Sess. (1995), the Parental Rights and Responsibilities Act of 1995, provides that: "No Federal, State, or local government, or any official of such a government acting under color of law, shall interfere with or usurp the right of a parent to direct the upbringing of the child of the parent."

Under the proposal, once a parent initially demonstrates that the government has interfered with or usurped the right of the parent to direct the upbringing of a child, the burdens of production and persuasion shift to the government to demonstrate that the method of intervention or usurpation is the "least restrictive means" of accomplishing a "compelling governmental interest." The proposal further notes that parents have rights but also have responsibilities to "see that their children are educated, for the purposes of literacy and self-sufficiency," citing the Supreme Court's decision in Wisconsin v. Yoder, 406 U.S. 205 (1972). See also H.R. 1946, 104th Cong., 1st Sess. (1995), for a similar proposal noting that "the Supreme Court has regarded the right of parents to direct the upbringing of their children as a fundamental right implicit in the concept of ordered liberty within the 14th amendment to the Constitution of the United States, as specified in Meyer v. Nebraska, 262 U.S. 390 (1923), and Pierce v. Society of Sisters, 268 U.S. 510 (1925)." *See infra* notes 83-93 and accompanying text for a discussion of these decisions.

66. Mark Walsh, *Conservative Group Backs Parent-Rights Amendment*, EDUC. WK., Mar. 22, 1995, at 13. A Virginia-based organization, Of the People, has developed a model amendment and found sponsors in 24 states. The amendment states that "[t]he right of parents to direct the upbringing and education of their children shall not be infringed" and that "the legislature shall have power to enforce, by appropriate legislation, the provisions of this article." *Id.* According to materials distributed by the group, the amendment "will make public schools more accountable by giving parents a greater role in shaping public school curriculum, providing consistency with mainstream values, and greater access to textbooks, materials and records" and will strengthen "efforts to enact public school choice." OF THE PEOPLE, THE PARENTAL RIGHTS AMENDMENT TO STATE CONSTITUTIONS (March 1995). Elliot Mincberg, the legal director of People for the American Way, looks more critically at the amendment, arguing that it "is either unnecessary or it would seriously conflict with the current legal notion of parental rights and responsibilities" creating confusion about the validity of laws such as those prohibiting child abuse or requiring child vaccinations. Walsh, *supra*, at 13.

sides of this contentious debate have mobilized to spread their views to public school authorities through bulletins, letters, and even videotapes.[67] As parents and religious groups have increasingly come to use the political and legal processes to gain control over the education of their children, they lay bare the inherent conflict between the presumed homogeneity in values underlying the "common school" as originally conceived and the reality of our "uncommon values" a hundred years later.

At the heart of this debate over values is the indoctrinative function of schooling, a complicated and controversial concept in itself. Undeniably, both the overt and the hidden curriculum affect the transmission of culture as well as the formation of student beliefs and world views. Whether it is the textbooks used; the governance structure of the school (hierarchical or democratic); the extra-curricular activities offered (from karate, hockey, or chess to ballet); the role models that teachers provide including their mode of dress and affect; the importance, substance, and use of exams; the behavior and demeanor that is rewarded or punished; the layout of the classrooms (lecture or seminar style)—these factors are all value-laden.

The permissible scope of the state's indoctrinative power raises several fundamental questions of political and constitutional magnitude: Which values *should* be inculcated? Which values *must* be inculcated? Which values *must not* be inculcated? And who should make those decisions? Much of this debate turns on the compulsory nature of schooling[68] and the related notion that students are a "captive audience."[69] As Mark Yudof has noted, "In some

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67. In December 1993, The American Center for Law and Justice, the legal advocacy group founded by Pat Robertson, disseminated a letter on religious-freedom issues to 15,000 school superintendents across the country. The American Civil Liberties Union countered with a bulletin distributed to superintendents across the country clarifying its legal views on issues such as graduation prayer and religious-holiday parties. The ACLU has also produced a video-tape for educators, entitled "America's Constitutional Heritage," in response to a similar tape produced by fundamentalist Christian organizations, entitled "America's Godly Heritage." Mark Walsh, *Schools Get Free 'Legal Advice' on Religious-Freedom Issues*, EDUC. WK., Dec. 15, 1993, at 9.

68. *See* Stanley Ingber, *Socialization, Indoctrination, or the "Pall of Orthodoxy:" Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 30 ("Classroom instruction reflects value judgments. These judgments in turn significantly affect the child's self-image and view of society. The very fact of compulsory education compromises a child's autonomy. . . . We must . . . distinguish between, on the one hand, the need to make educational choices, and the danger of indoctrination, propaganda, and censorship on the other."); Stanley Ingber, *Religious Children and the Inevitable Compulsion of Public Schools*, CASE W. RES. L. REV. 773, 786 (1993) ("The entire concept of compulsory education is based upon the assumption that there are times when the state, rather than the parent, may decide which perspectives the child ought to confront. . . . [C]ompulsory education traditionally has been justified as a mechanism to expose children to ideas that will enable them to advance beyond the home and transcend the prejudices of the past.").

69. *See* MARK G. YUDOF, WHEN GOVERNMENT SPEAKS 213 (1983) ("[S]ome aspects of communication in public schools, particularly the existence of a captive audience, should make courts solicitous of individual First Amendment rights that reduce the power of government to persuade without seriously compromising its affirmative obligation to promote liberty.") (footnotes omitted); Mary-Michelle Upson Hirschoff, *Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused from Objectionable Instruction?*, 50 S. CAL. L. REV. 871, 906 (1977) ("For at least ten years, most children spend a significant part of each weekday in public schools. They are likely to be

ways, public schools are a communications theorist's dream: the audience is captive and immature . . . the messages are labeled as educational (and not as advertising) . . . and a system of rewards and punishments is available to reinforce the messages."[70] These factors must be weighed against the judicial deference afforded local school officials in the name of federalism, judicial restraint, and lack of judicial expertise.[71] Commentators have analyzed the inculcative nature of schooling from two diametrically opposed perspectives, one focusing on student rights to freedom of conscience and the other on school governance. According to the first, students must be protected from state indoctrination and the establishment of uniform values especially of a religious[72] or political nature.[73] The formation and expression of beliefs are intertwined and so both should be free from government coercion.[74] Rather, individual students and parents should determine the values taught in the schools.[75] A broad state indoctrinative interest in using schools as the vehicle for inculcating values chosen by the local community and reflecting majoritarian preferences is inconsistent with the "constitutional ideal of citizen self-government."[76]

The second view, although representing a range of deference to school decision-making, generally shifts the balance in favor of school authority to inculcate values that reflect those of the local community and/or the larger society. One approach suggests that schools may promote broad values considered essential to a democratic constitutional system such as tolerance of

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far more susceptible to indoctrination than adults, since most adults have formed attitudes and views of their own which give them a better basis upon which to resist indoctrination.").

70. YUDOF, *supra* note 69, at 213 (footnote omitted).

71. *See* Brian A. Freeman, *The Supreme Court and First Amendment Rights of Students in the Public School Classroom: A Proposed Model of Analysis*, 12 HASTINGS CONST. L.Q. 1, 70 (1984) (arguing that judicial intervention in school cases is permissible only in rare cases as courts lack democratic accountability and educational expertise).

72. George W. Dent, Jr., *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 863, 911 (1988) (maintaining that, while education by nature promotes some values while denying others, in absence of societal consensus concerning values, teaching of values per se cannot override religious freedom).

73. Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CAL. L. REV. 1104, 1134 (1979) (arguing that there is no societal interest in schools inculcating "political" values, as "uniformly acceptable" political values do not exist; groups outside school (family, religious organizations) are more capable of inculcating values in young people); *see also* Tyll van Geel, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197, 297 (1983) (arguing on basis of empirical social science evidence that state has no compelling interest in value inculcation, as such inculcation does not promote compelling governmental goals, and further suggesting a "fairness principle" whereby whenever school curriculum presents political or moral issue in curriculum, both sides must be adequately presented).

74. *See* STEPHEN ARONS, COMPELLING BELIEF: THE CULTURE OF AMERICAN SCHOOLING 205-06 (1983).

75. *See* Stephen Arons & Charles Lawrence III, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 HARV. C.R.-C.L. L. REV. 309, 313 (1980).

76. Walter A. Kamiat, Note, *State Indoctrination and the Protection of Non-State Voices in the Schools: Justifying a Prohibition of School Library Censorship*, 35 STAN. L. REV. 497, 502 (1983).

religious differences.[77] Commentators embracing a more comprehensive approach maintain that education is in fact a legitimate governmental presence in the "sphere of the intellect and spirit,"[78] that historically we have accepted that presence,[79] and that schools as unique "mediating structures" linking the young to the local community and larger society make curricular decisions that should be upheld as long as they are rational.[80] Some even suggest that neither students nor teachers enjoy a First Amendment presumptive right to use the schools as a forum for personal expression.[81] A related view ascribes a more affirmative duty on the part of schools to inculcate certain ethical, moral, or religious values, suggesting that the schools' failure to do so is, in fact, value-laden in itself, promoting a secularistic ideology.[82]

These opposing arguments touch the very essence of schooling as it has come to be known over the past century. When raised in the political arena, they often rise to a feverish pitch, so as to illustrate that the battle lines are increasingly drawn on irreconcilable world views and issues of cultural identity. Whether tied to religion and concepts of "ultimacy" or based in moral or philosophical beliefs, these conflicts center on issues about which people feel profoundly and disagree sharply. As such, they are not amenable to political compromise and so they ultimately seek a constitutional resolution in the federal courts.

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77. Nadine Strossen, *"Secular Humanism" and "Scientific Creationism": Proposed Standards for Reviewing Curricular Decisions Affecting Students' Religious Freedom*, 47 OHIO ST. L.J. 333, 375-76 (1986).

78. JOSEPH TUSSMAN, GOVERNMENT AND THE MIND 85 (1977).

79. Stephen R. Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293, 1350 (1976).

80. Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 OHIO ST. L.J. 663, 670 (1987).

81. Malcolm Stewart, *The First Amendment, the Public Schools, and the Inculcation of Community Values*, 18 J. L. & EDUC. 23, 29 (1989).

82. *See* Michael W. McConnell, *Multiculturalism, Majoritarianism, and Educational Choice: What Does Our Constitutional Tradition Have to Say?*, 1991 U. CHI. LEGAL F. 123, 142 (arguing that "public values" inculcated through public school curriculum do not reflect values shared by majority of American public but are rather values held by "secular minority"); Mary Harter Mitchell, *Secularism in Public Education: The Constitutional Issues*, 67 B.U. L. REV. 603 (1987) (exploring various theories through which parents can challenge indoctrinative function of public schools, using secular humanism as focus of discussion); Paul James Toscano, *A Dubious Neutrality: The Establishment of Secularism in the Public Schools*, 1979 B.Y.U. L. REV. 177, 203 (arguing that religious neutrality, as required by Supreme Court doctrine, is not possible in educational setting and that this approach has created "base for ideological discrimination that tends toward contracted, compelled, and conformist secular world view"); Warren A. Ward, *Rethinking Indoctrination*, EDUC. WK., May 25, 1995, at 44 (arguing that public education is form of secular indoctrination in that it excludes religious ways of thinking by failing to provide intellectual and emotional resources needed for students to learn to give religion serious consideration, thus making religious accounts of the world appear "implausible, even inconceivable"); Paul Vitz, *Religion and Traditional Values in Public School Textbooks*, 84 PUB. INTEREST 79, 82-84 (1986) (arguing that several widely used textbooks downgraded traditional family values by defining family as "'a group of people,'" failing to emphasize marriage as foundation of family, and considering one-parent family as no better or worse than any other family structure, while at same time totally excluding any discussion of importance of religion in American history).

II. A VIEW FROM THE COURT

In the past three decades, the Supreme Court has played a key role in shaping educational policy through constitutional interpretation. Again and again, the Court has attempted to resolve the tensions among liberty, community, and equality in schooling and to balance the interests of individual students and families against those of the local community and the larger society. The Court's evolving views on these issues have created the backdrop against which lower courts, policy makers, school officials, litigators, and interest groups have attempted to fill in the details in understanding freedom of conscience in the modern-day "common school."

Over the years, the Supreme Court has selectively drawn from the legacy of Mann and Dewey in attempting to reconcile the conflicting goals and expectations of public education. Rather than developing a coherent and stable theory of schooling, however, the Court has articulated a general view of education which has shifted emphasis from a rights-based to a values-based ideology over time. In particular, the focus has shifted from parental and student rights based in the First and Fourteenth Amendments, to the authority of school officials to make curricular and administrative determinations that reflect community and societal values. That shift has reflected in part a changing Court membership and in part changing social pressures and popular attitudes.

A. *Parental Rights*

The modern day parents-rights movement draws from a trilogy of Supreme Court decisions that provide the foundation for contemporary claims by parents to control the education of their children free from state intrusion. Despite significant rulings and powerful dicta that are frequently cited by both claimants and lower courts, recent history has proven these cases to be of limited applicability. Two cases dating from the 1920s are based on Fourteenth Amendment substantive due process doctrine;[83] yet, in recent years, the doctrine's balancing test has frequently weighed in favor of school authority and against parental discretion. The third relevant Court decision, based on the Free Exercise Clause of the First Amendment, has been swallowed up by its

83. U.S. CONST. amend. XIV, § 1 states in part that, "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." The concept of substantive due process permits the courts to review the substance of governmental actions regardless of the process by which the decision was made. Developed by the Court in the late nineteenth century to overturn economic legislation, substantive due process has its philosophical roots in natural law theory maintaining that certain rights exist in every society, whether through social contract or divine right, and the state cannot impair these without a compelling justification. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.1, at 361 (5th ed. 1995).

exceptions.

The first decision in this trilogy is *Meyer v. Nebraska*.[84] In that case, the Court invalidated a state law making it a criminal offense to teach a subject in a language other than English to any student attending a public or private school who had not completed the eighth grade. The statute, one of 37 similar laws enacted during and immediately following World War I, was symptomatic of deeper feelings of nativism, hysteria, and suspicion of foreigners.[85] These negative feelings worked their way into governmental policies directed particularly toward the German-speaking population which had clung to its language and culture perhaps more tenaciously than other immigrant groups. Lutheran-sponsored schools where classes were often taught in German were viewed as a threat to progressive reform and to the acculturative purposes of the common school movement.[86]

While *Meyer* specifically addressed the right of teachers to pursue their profession, the Court also discussed the interest of parents and the interest of the children themselves. Among the liberty interests included in the Fourteenth Amendment Due Process Clause, the Court noted the right "to acquire useful knowledge" and the right to "establish a home and bring up children."[87] Recognizing these rights, the Court determined that the Nebraska legislature had attempted to interfere with the right of parents to control the education of their children.[88]

The Court returned to the liberty interest of substantive due process two years later in *Pierce v. Society of Sisters*,[89] striking down a state law that declared it a misdemeanor for a parent or guardian to send a child between the ages of eight and sixteen to a school other than the public school in the district

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84. 262 U.S. 390 (1923).

85. *See* WILLIAM G. ROSS, FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917-1927, at 61 (1994). During 1919 alone, nineteen states enacted laws that restricted the teaching of foreign languages. Most of these statutes merely required that all basic subjects be taught in English. All of them, except the New Hampshire law, applied to public schools as well as private and parochial schools. The Ohio and Indiana statutes specifically prohibited the teaching of German in the elementary grades. The most extreme legislation, a Louisiana statute, prohibited the teaching of the German language in any institution including private schools and universities. *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1319-20 (2d ed. 1988) (arguing that in *Meyer* and later in *Pierce* the Court demonstrated solicitude for Germans in Nebraska and Catholics in Oregon (against whom the statutes had been directed), thus illustrating general technique of "assessing alleged invasions of personhood in their historical and social context").

86. Barbara Bennett Woodhouse, *"Who Owns the Child?:"* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 1004-05 (1992). Using *Meyer* and *Pierce* to critically examine family law and policy, Woodhouse argues that "property-based notion of the private child" used in these two cases has stifled "more fruitful consideration of the rights of all children to safety, nurture, and stability, to a voice, and to membership in the national family." *Id.* at 1002.

87. 262 U.S. at 399.

88. *Id.* at 401.

89. 268 U.S. 510 (1925). The Parental Rights and Responsibilities Act has been hailed by its supporters as a means of giving constitutional permanence to the parental rights rulings of *Meyer* and *Pierce*. S. 984, 104th Cong., 1st Sess. (1995). *See also supra* note 65 and accompanying text.

where the child resided. Two private schools challenged the law. While the Court recognized all three interests asserted by the plaintiffs—the right of parents to choose their children's school, the right of children to influence that choice, and the right of schools and teachers to engage in a business or profession[90]—the language and focus of *Pierce* clearly render it a parental rights case. In an oft-quoted statement, the Court maintained that "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."[91]

Nevertheless, in a nod to state regulation of both public and private schools and to the inculcative function of schooling, the Court acknowledged the "power of the State reasonably to regulate all schools" and "to require that . . . teachers shall be of good moral character and patriotic citizenship, and that certain studies plainly essential to good citizenship *must* be taught, and nothing be taught which is essentially inimical to the public welfare."[92] While surprisingly overlooked by commentators, this language carries clear implications for mapping out the contours of the state's permissible role in curriculum determinations.[93]

A half century later, in *Wisconsin v. Yoder*,[94] the Court again addressed parental autonomy, but this time based on religious beliefs under the First Amendment Free Exercise Clause.[95] The Court referred to *Pierce* as "a

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90. *Id.* at 532.

91. *Id.* at 535.

92. *Id.* at 534 (emphasis added).

93. For a more recent acknowledgement of parental rights to direct the upbringing of their children under substantive due process, see *infra* notes 192-203 and accompanying text.

94. 406 U.S. 205 (1973).

95. In resolving Free Exercise claims, courts apply the Supreme Court's three-part test as articulated in Sherbert v. Verner, 374 U.S. 398, 406 (1963) to determine: (1) whether the state action burdens a sincerely held religious belief; (2) whether a compelling interest for the state action exists; and (3) whether the state action is necessary to achieve a compelling state interest. The *Sherbert* test has been called into question by Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990), where Justice Scalia, writing for the majority, held that a compelling interest need not be shown where the claimant is seeking an exemption from a neutral law of general applicability. However, the Court drew an exception for "hybrid" cases such as *Yoder* where claimants are seeking an exemption not on Free Exercise grounds alone but in combination with other constitutionally protected rights such as the right of parents to direct their children's education. *Smith*, 494 U.S. at 881-82. Legal scholars on both sides of the Free Exercise accommodation debate have criticized the reasoning of *Smith* including the Court's interpretation of *Yoder*. *See, e.g.*, William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 309 n.3 (1991) (arguing that claim that *Yoder* "was decided on the basis of a 'hybrid' constitutional right . . . is particularly illustrative of poetic license"); Michael McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1121 (1991) (arguing that "the opinion in *Yoder* expressly stated that parents do *not* have the right to violate compulsory education laws for nonreligious reasons"). A wide coalition of religious and public policy groups from both liberal and conservative camps subsequently pressed for passage of the Religious Freedom Restoration Act, Pub. L. No. 103-141 (1993), which states that "[the] Government shall not substantially burden a person's free exercise of religion even if the burden results from a rule of general applicability." The Act restores the "least restrictive means" and the "compelling interest" tests to Free Exercise jurisprudence by writing them into federal law.

charter of the rights of parents to direct the religious upbringing of their children."[96] In *Yoder*, the Court upheld a challenge by Amish parents to a state law requiring all children under the age of sixteen to attend public or private school. Chief Justice Burger, writing for the majority, relied heavily upon the concept of community, here the religious or moral community[97] and not the secular political community as in other Court decisions. He also touched on the significant issues that arise when educational purposes and values inculcation collide with values grounded in religious beliefs. The Amish maintained that high school education would teach their children values different from their own and would lead to the disintegration of their unique and insular community.

The Court concluded that the education that Amish children receive from their parents beyond the eighth grade prepared them adequately to function both in their own agrarian society and as good citizens in the larger society. The Court further noted that Amish education exemplified the diversity that "we profess to admire and encourage."[98] The Court acknowledged that the purpose of education was to prepare children for life. However, it distinguished between preparing the child for life in modern society where education for an additional year or two beyond eighth grade may be necessary and preparing the child for life in the separated agrarian community as required by the Amish faith.[99] The Court seemed to suggest here that, at least in certain circumstances, the fundamental purposes of education may vary according to the needs or lifestyle of a particular community. The Court also appeared to acknowledge the qualified autonomy of religious subgroups and the role they play in American society.[100]

Relying on the First Amendment right to freedom of religion, the Court held that the state lacked a sufficiently compelling justification for imposing such a burden upon the exercise of the sincerely held religious beliefs of the Amish. In powerful language, the Court noted, "[T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children . . . . This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[101] Nevertheless, the Court made clear that its holding turned on the religious foundation and the unique facts

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96. *Yoder*, 406 U.S. at 233.

97. Robert Douglas Chesler, *Imagery of Community, Ideology of Authority: The Moral Reasoning of Chief Justice Burger*, 18 HARV. C.R.-C.L. L. REV. 457, 458 (1983) (defining "moral community" as "a group of people who have chosen to live together because they share a unitary conception of the Good").

98. *Yoder*, 406 U.S. at 226.

99. *Id.* at 222.

100. Howard H. Friedman, *Rethinking Free Exercise: Rediscovering Religious Community and Ritual*, 24 SETON HALL L. REV. 1800, 1821 (1994).

101. *Yoder*, 406 U.S. at 232.

surrounding the claims of the Amish. For example, it would not apply to "a way of life and a mode of education by a group claiming to have discovered some 'progressive' or more enlightened process for rearing children for modern life."[102] In particular, the Court noted the long history of the Amish as a successful and self-sufficient society, the sincerity of their religious beliefs, the interrelationship of belief with their way of life, the dangers presented by the statute as applied to the Amish, and the minimal difference between the state's requirements and those that the Amish already accepted.

Given this very narrow contextual analysis, *Yoder* would come to operate in future years on two levels of constitutional significance. While its holding would continue to form the core of parental autonomy arguments in litigation raising religious claims, the courts would repeatedly confine its applicability to its unique facts. On the heels of *Yoder* came a cultural revolution already in the making, a backlash to the perceived excesses of the changes wrought by that revolution in general and progressivism in particular, and the revival and politicization of religious fundamentalism. This sequence of social trends brought parental rights to the fore of political and legal debate, testing the continued vitality of *Yoder*. But by this time, the Court had already shifted ground from an ideology of schooling based in individual rights to one founded in school governance and values inculcation.

B. *Student Rights*

The *Meyer*, *Pierce*, *Yoder* trilogy represents one perspective on freedom of conscience and belief: the right to direct the upbringing of one's children. Implicit in these cases is a minimalization of the school's inculcative function. A second line of Court decisions from the 1940s to the 1970s more explicitly raises the issues of indoctrination and values inculcation to support student rights of freedom of thought and expression. Underlying the Court's educational opinions during these years was a progressive child-centeredness that rested specifically on the rights of students, not of parents. Here the Court maintained that schooling should open the intellect to new options and new possibilities beyond those encountered in the home.[103] Schools should be "embryonic communities," as Dewey called them, teaching students the principles of democracy through practice and example.[104]

Several cases from this period are particularly significant not only for their grounding in freedom of speech but also for their broad dicta generally

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102. *Id.* at 235-36.

103. LAWRENCE A. CREMIN, TRADITIONS OF AMERICAN EDUCATION 36-37 (1977) (describing progressive education).

104. Theodore R. Mitchell, *The High Court and* Hazelwood*: Chipping Away at Rights*, CHRISTIAN SCIENCE MONITOR, Jan. 25, 1988, at 12 (discussing the Court's apparent turnaround in philosophy in Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988)).

supporting the constitutional rights of students. In *West Virginia State Board of Education v. Barnette*,[105] the Court struck down a state statute requiring all public school students to salute the American flag. Jehovah's Witnesses sought release from enforcement of the law because their literal interpretation of the Bible prohibited them from saluting the flag, which they considered a "graven image."[106] While the Court acknowledged the role played by schools in preparing young people for democratic participation,[107] the indoctrinative function of public schooling apparently played a minor role in the Court's overall analysis. On the other hand, in powerful language with almost limitless potential for expansion,[108] the Court laid the foundation for the student's right to freedom of conscience[109] or belief in an oft-quoted statement: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[110] The Court acknowledged the importance of education as the vehicle of formation for democratic citizenship and the necessity for "scrupulous" constitutional protection in that setting. In other words, individual freedom of conscience is a precondition for democracy.[111]

In *Barnette* the Court first articulated a theory of "negative First Amendment protection" whereby the Amendment protects not only the right to engage in speech but also the right to refrain from government-compelled speech.[112]

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105. 319 U.S. 624 (1943).

106. *Exodus* 20:4-5 states:

> Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them.

107. "[T]he State [may] 'require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty which tend to inspire patriotism and love of country.'" *Barnette*, 319 U.S. at 631 (quoting Minersville School Dist. v. Gobitis, 310 U.S. 586, 604 (1940) (Stone, C.J., dissenting)).

108. *See* Arons & Lawrence, *supra* note 75, at 319 (noting that "*Barnette* remains a powerful formulation of the unconstitutionality of state-imposed orthodoxy and of the intimate relationship between holding and expressing beliefs").

109. For a thorough analysis of the origins of the phrase "freedom of conscience" and the Supreme Court's articulation of this interest, see Harrop A. Freeman, *A Remonstrance for Conscience*, 106 U. PA. L. REV. 806 (1958).

110. *Barnette*, 319 U.S. at 642.

111. *Id.* at 631-32 n.12. In a case decided almost three decades after *Barnette*, Wooley v. Maynard, 430 U.S. 705 (1977), the Court moved beyond its concern in *Barnette* with the instrumental values served by a prohibition against coerced expression, and considered the protection of "individual personality" as an end in itself. Leora Harpaz, *Justice Jackson's Flag Salute Legacy: The Supreme Court Struggles to Protect Intellectual Individualism*, 64 TEX. L. REV. 817, 855 (1986). While the facts of *Wooley* were unrelated to education, the Court's broad dicta bears significantly on the right to freedom of conscience. Recognizing a challenge by Jehovah's Witnesses to a New Hampshire requirement that all license plates placed on noncommercial vehicles bear the state motto, "Live Free or Die," the Court upheld the "right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Id.* at 715.

112. *See, e.g.*, David B. Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C. L. REV. 995, 1023 (1982) (arguing that "compelled expression

While the plaintiffs had relied on religious as well as speech grounds in their claims, the plurality based its decision more generally on constitutional limitations on governmental power to "invade the sphere of intellect and spirit which is the purpose of the First Amendment."[113] The Court seemed to acknowledge the values of diversity and tolerance for the unusual or "eccentric" as a benefit to society, as well as the potentially adverse consequences that flow from coerced speech.[114]

Some commentators have referred to this model of education as the "marketplace of ideas";[115] others refer to it as the "discursive or analytical" approach.[116] The Court reaffirmed this position in the late 1960s in a First Amendment decision that represents the high-water mark of the students' rights movement and the Court's implicit endorsement of Dewey's view that schools should encourage students to participate in the learning process. In *Tinker v. Des Moines Independent Community School District*,[117] the Court struck down a school's prohibition against students' wearing black arm bands to protest the Vietnam War. The Court affirmed that students enjoy not only constitutional rights to freedom of speech or expression in the school setting,[118] but broader fundamental rights guaranteed under the Constitution as well.[119] Drawing on the marketplace imagery, the Court stated that students may not be confined to the expression of "officially approved" sentiments.[120] In other words, the relationship between the student and the

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may infringe on negative First Amendment interests in at least two ways: first, by forcing an individual to speak . . . he may be deprived of control over the personality he projects to the world; [and] second, by compelling an individual to affirm belief contrary to his own he may be deprived of freedom of conscience").

113. *Barnette*, 319 U.S. at 641.

114. "[W]e apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. . . . We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes." *Id.* at 642.

115. Goldstein, *supra* note 79, at 1350; ARONS, *supra* note 74, at 46 (referring specifically to relationship between teachers and students as they approach high school years where "the image of the teacher's role is perceived to mean that students should be exposed to a variety of ideas and values"). The image of competing ideas generating robust debate can be found as far back as John Stuart Mill. *See* John Stuart Mill, *On Liberty*, *in* ON LIBERTY AND CONSIDERATIONS OF REPRESENTATIVE GOVERNMENT 1, 13-48 (R.B. McCallum ed., 1948). The concept was first introduced into American jurisprudence in Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting) ("[T]he best test of the truth is the power of thought to get itself accepted in the competition of the market.").

116. Robert M. Gordon, *Freedom of Expression and Values Inculcation in the Public School Curriculum*, 13 J.L. & EDUC. 523, 531 (1984) (characterizing this approach as including "active examination of data by both teacher and student" as well as "[r]eason and dialogue . . . which minimizes . . . coercion and indoctrination").

117. 393 U.S. 503 (1969).

118. *Id.* at 506.

119. *Id.*

120. *Id.* at 511. During this period, the Court drew on the same imagery to support the societal benefits of free speech in a case invalidating as vague and overbroad New York's loyalty requirements for teachers, Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967). While the facts of this case arose in the context of higher education, the following dicta in *Keyishian* is often quoted in cases

state should be "reciprocal rather than inculcative," again suggesting a Deweyian dialectal learning process.[121]

C. *The Values Inculcation Model*

Progressive education later fell into disrepute as culturally relativist and overly permissive. It was also abandoned in the 1970s as the Warren Court turned into the Burger Court and adopted a "cultural transmission" or "values inculcation" model of schooling which has continued into the Rehnquist Court. This view has historical roots as far back as the 1647 Massachusetts Education Act that had an explicit purpose to "'thwart 'Satan' by teaching children to read the Bible and to educate youths not only in good literature, but in sound doctrine.'"[122] Court decisions reflecting this perspective emphasize the inculcative or indoctrinative nature of schooling for a given purpose, maintaining that public schools not only *may* but *should* "influence their students to adopt particular beliefs, attitudes, and values."[123]

This is not to suggest that the concept of schools as socializing agents was newly conceived in the 1970s. The progressives had also recognized and fostered the socialization function of schooling. However, they focused on student interests as reflected in cases such as *Barnette* and *Tinker.* In contrast, the current Court, particularly where there are First Amendment interests at stake, looks to socialization as a mechanism both to preserve community interests and preferences, as reflected in the decisions of elected or appointed school officials, and to prepare students for citizenship in the larger society. Where the Justices discuss values, they view them from two perspectives, reaffirming the authority of school officials to uphold the values of the *community* as well as the mission of schooling to promote the fundamental values of a democratic *society.* This distinction bears significant implications for rights-based challenges to the public school curriculum.[124] Elsewhere, particularly in school desegregation and finance cases which more directly raise governance issues, the Court has used the concept of local control over public education to further implicitly community interests, if not values per se.[125]

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addressing student rights at the elementary and secondary levels:

> The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritarian selection."

121. William B. Senhauser, Note, *Education and the Court: The Supreme Court's Educational Ideology*, 40 VAND. L. REV. 939, 956 n.95 (1987).

122. Goldstein, *supra* note 79, at 1350 (quoting from Charters & Laws of Massachusetts Bay, ch. 88, § 3 (1814) (originally enacted in 1671)).

123. Mitchell, *supra* note 82, at 700.

124. *See infra* Part IV.

125. *See, e.g.*, Keyes v. School Dist. No. 1, 413 U.S. 189, 246 (1973) ("Neighborhood school systems . . . reflect the deeply felt desire of citizens for a sense of community in their public education. . . . Many citizens sense . . . a decline in the intimacy of our institutions—home, church, and school—which has caused a concomitant decline in the unity and communal spirit of our people.")

The first line of cases based on expressive rights emphasizes the moral community, while the second based on equality concerns appears to emphasize the political community. However, the two concepts share a common thread in that they both imagine a group of individuals bound together by common experiences, values, ideals, and goals.

This more recent ideology clearly emerges in three decisions from the 1980s. These decisions represent two facets of First Amendment freedom of conscience grounded in expressive rights: the right to receive information through the "speech" of others (e.g. published authors) and the right to express oneself free of government constraints. The first case in this trilogy is a transitional case between a rights-based and a values inculcation model of schooling; the second two cases stand in stark contrast to principles articulated in *Barnette* and *Tinker*.

Board of Education v. Pico[126] is a studied lesson in Court confusion and ambivalence. None of the seven opinions garnered majority support and the majority vote was swayed by only one Justice.[127] Struggling to strike a balance between students' rights and school governance without overturning the substance of educational decisions, the Court found consensus in a procedural resolution.

The plurality opinion written by Justice Brennan established the "right to receive information and ideas" in the context of the school library,[128] where the school board had limited discretion to remove books based on educationally relevant criteria but not based on partisan politics.[129] At the same time, the plurality recognized the state's broad interest in indoctrinative education. Not only are schools "vitally important 'in the preparation of individuals for

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(Powell, J., concurring in part and dissenting in part); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 51-52 n.108 (1973) (upholding state system of financing schools in Texas on grounds that local control guarantees "the greatest participation by those most directly concerned"). Milliken v. Bradley, 418 U.S. 717, 741-42 (1974) (in striking down court-ordered metropolitan desegregation plan, court stated that "local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process").

126. 457 U.S. 853 (1982).

127. Rosemary C. Salomone, *Free Speech and School Governance in the Wake of* Hazelwood, 26 GA. L. REV. 253, 264 (1992). Several courts have noted the weak precedential value of *Pico's* "no-clear-majority" yet have relied on the *Pico* plurality as providing useful guidance in determining the constitutional limits of removing books from a public school library. *See* Campbell v. St. Tammany Parish School Bd., 64 F.3d 184, 189 (5th Cir. 1995); Case v. Unified School Dist. No. 233, 895 F. Supp. 1463, 1469 (D. Kan. 1995).

128. *Pico*, 457 U.S. at 867 (citing Stanley v. Georgia, 394 U.S. 557, 564 (1969)). The School board removed nine books from a high school library, one from a junior high school library, and one from the curriculum of a 12th grade literature class after having received a list of "objectionable" books compiled by a statewide organization of politically conservative parents and disseminated at a statewide conference. The board justified the book removal on the basis that they were "anti-American, anti-Christian, anti-Semitic, and just plain filthy." *Id.* at 857.

129. *Id.* at 870-71. The plurality explained that if such impermissible motivation were a "decisive factor," that is, a "'substantial factor' in the absence of which the opposite decision would have been reached," then school officials would have acted unconstitutionally. *Id.*

participation as citizens' and . . . for 'inculcating fundamental values necessary to the maintenance of a democratic political system,'"[130] but at least in curricular matters, school boards "might well defend their claim of absolute discretion" to transmit community values.[131] In other words, the state's broad indoctrinative interest prevails in curricular cases, while a broad individual right to receive information prevails in the library context. None of the other six opinions generated in *Pico* accepted either this confused dichotomy or the principle of an affirmative "right to receive information."[132] Nevertheless, all seven *Pico* opinions stress in varying degrees the importance of values inculcation, signaling a return to a more protectionist concept of state authority that harkens back to the early twentieth century.[133]

Two cases decided in the mid-to-late 1980s brought the Court's values-based ideology into sharper focus and more forcefully tipped the balance away from student rights and in the direction of school governance and community standards. In *Bethel School District v. Fraser*,[134] the Court upheld the authority of school officials to suspend a secondary school student for engaging in lewd or indecent speech. In a direct retreat from *Tinker*, the Court affirmed that students' constitutional rights at least in the public school setting are not as broadly defined as those of adults in other settings.[135] School officials may limit not only certain forms of speech that they deem "threatening to others,"[136] as in *Tinker*, but also speech that is "inappropriate" and contrary to our "shared values."[137] The Court noted the objectives of public education to be the "inculca[tion of] fundamental values necessary to the maintenance of a democratic political system."[138] While the Court recognized that these fundamental values include tolerance of diverse political and religious views, even unpopular ones, such views must be balanced against the interests of

130. *Id.* at 864 (quoting Ambach v. Norwick, 442 U.S. 68, 76-77 (1979)).

131. *Id.* at 869.

132. In a separate concurring opinion, Justice Blackmun rejected the plurality's suggestion that the First Amendment imposes on the State an "affirmative obligation" to provide students with information or ideas. He defined the right more narrowly, maintaining that the State cannot single out an idea and deny access to it based on partisan or political motivation. *Id.* at 878-79 (Blackmun, J., concurring).

133. Rosemary C. Salomone, *Children Versus the State: The Status of Students' Constitutional Rights*, *in* CARING FOR AMERICA'S CHILDREN 182 (Frank J. Macchiarola & Alan Gartner eds., 1989).

134. 478 U.S. 675 (1986). In *Fraser*, a 17-year-old senior delivered a speech nominating a fellow student for elective office. The speech, given before a voluntary assembly of students ranging in age from 14 years and up, began with the words, "I know a man who is firm—he's firm in his pants . . ." *Id.* at 687 (Brennan, J., concurring). The speech continued with additional sexual innuendo. The day after the speech, Fraser was suspended for three days for having violated the school's disruptive conduct rule and was removed from a list of candidates for graduation speakers. He was permitted to return to school after the second day of suspension and was eventually permitted to speak at the graduation. *Id.* at 690 n.3 (Brennan, J., concurring).

135. *Id.* at 682 (citing New Jersey v. T.L.O., 469 U.S. 325, 340-42 (1985)).

136. *Id.* at 683.

137. *Id.*

138. *Id.* at 681 (quoting Ambach v. Norwick, 441 U.S. at 76-77).

society in teaching the bounds of "socially appropriate behavior."[139] In other words, the Court reaffirmed the position implicit in *Pico* that public school officials play a key role as arbiters and protectors of community values or preferences. In a separate opinion, Justice Brennan made clear that there was no suggestion here that school officials were motivated to regulate the student's speech because they disagreed with the views expressed.[140] This concept of "viewpoint discrimination" later takes center stage in the Court's jurisprudence of the 1990s, particularly in defining the limits of state authority to restrict religious speech.[141]

Two years later, in *Hazelwood School District v. Kuhlmeier*,[142] the Court again set aside the expressive rights of students, this time in the context of a school-sponsored newspaper, thus reaffirming the function of schooling as values inculcation. However, the Court recognized broad societal values to support the concept of local control as an end in itself rather than as a means to promote community interests, as found in the cases of the 1970s. Here the Court upheld the authority of school officials to control the "style and content" of "school-sponsored" speech based upon "legitimate pedagogical concerns."[143] According to the *Hazelwood* majority, schools are the primary vehicle for transmitting "cultural values."[144] As such, they may "refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with 'the shared values of a civilized social order.'"[145]

Hazelwood clearly stands as the Court's most definitive statement on public schooling as the primary vehicle for transmitting our "shared values." Underlying this view are two assumptions: first, that there in fact exists an ascertainable body of common values shared throughout society and in a particular community, and second, that the school curriculum should be standardized according to both those broader societal values and the more particular values of the community as defined by local school officials. In recent years, these assumptions have come under critical attack from dissenters across the political spectrum, but most forcefully and visibly from religious fundamentalists.

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139. *Id.*
140. *Id.* at 689 (Brennan, J., concurring).
141. *See infra* notes 203-219 and accompanying text.
142. 484 U.S. 260 (1988). Former high school students who had been members of the school's newspaper which was also part of a journalism program alleged that their free speech rights had been violated when the principal deleted two objectionable articles from an issue. One article addressed student experiences with pregnancy while the other discussed the impact of parental divorce on several students who attended the school.
143. *Id.* at 273.
144. *Id.* at 272 (quoting Brown v. Board of Educ., 347 U.S. 483, 493 (1954)).
145. *Id.* (quoting *Fraser*, 478 U.S. at 683).

III. THE VOICES OF DISSENT

Despite this decided shift in the Court's ideology over the past two decades, litigation challenging both curricular and non-curricular decisions of school officials has escalated, rendering the federal courts mediators in the national culture war over values in the schools. Parents increasingly draw upon the arsenal of rights developed in the Court's earlier decisions—from *Meyer*[146] to *Yoder*[147]—pressuring schools to reflect, or at a minimum to accommodate, their particular moral values within the public school setting. This barrage of litigation has proceeded primarily under the direction of organized groups,[148] testing various legal theories to support the underlying proposition that parents and not the schools have precedence in controlling the upbringing of their children. These theories are grounded in the First Amendment Establishment and Free Exercise Clauses, in Fourteenth Amendment substantive due process, and most recently in the Free Speech Clause itself, dividing the litigation into four categories for purposes of discussion and analysis.

Religious dissenters specifically have relied on a line of legal argument asserting the *right to be free from government speech* that offends their religious beliefs. This argument represents two litigation strategies. The first, based on the Establishment Clause of the First Amendment and the concept of "secular humanism," challenges the use of certain books or materials for all students. The second, based on the Free Exercise Clause and the "opting-out" principle, seeks individual exemptions from certain aspects of the curriculum to avoid exposure to religiously offensive ideas.

A third strategy which has gained momentum in recent years focuses on secular beliefs. Here dissenters assert a parental right to control the education of one's children founded in Fourteenth Amendment substantive due process. Raised alone, or in conjunction with a Free Exercise claim, these arguments have met marginal success in the courts. However, religious minorities have also begun to utilize a fourth litigation strategy, which has earned increasing credence in the lower courts and recently in the Supreme Court. This strategy, which may hold the greatest potential for changing the role of religion in education, is based on the concept of "religion as viewpoint." Here individuals assert the *right to engage in religious speech*, that is, to express religious views

146. 262 U.S. 390 (1923) (upholding in dicta right of parents to direct upbringing of their children as liberty interest protected under Fourteenth Amendment substantive due process).

147. 406 U.S. 205 (1973) (upholding right of Amish to exemption from compulsory education laws beyond eighth grade as protected under First Amendment Free Exercise Clause).

148. Groups representing plaintiffs in these cases include the Center for Law and Religious Freedom, the Catholic League for Religious and Civil Rights, the Christian Legal Society, Concerned Women for America, the American Family Association Law Center, and Pat Robertson's American Center for Law and Justice which has taken a lead role in a number of recent high-profile cases. People for the American Way has taken a lead role in representing defendant school districts.

based not on the religion clauses but on the Free Speech Clause of the First Amendment.

The following discussion examines and contrasts recent litigation pursuing these four strategies. The court decisions, with few exceptions, expressly or implicitly reflect an ideology of schooling centered on the authority of school officials to inculcate the shared values of the communities they represent and of the society at large. These cases crystallize the competing legal and policy interests at stake and provide an excellent framework for reconsidering the concept of the common school as originally conceived.

A. *The Right to Be Free from Government Speech*

1. *Secular Humanism and the Establishment Clause*

The public schools have come under increasing attack in recent years as promoting a secularist ideology, linked to such evils as premarital sex, drug abuse, rock music, materialism, violence, alienation, pornography, and communism,[149] as well as "the present anti-intellectual . . . climate" of schooling which has led to grade inflation and declining S.A.T. scores.[150] In the legal arena, this argument has been transformed into the claim that public schools are teaching a religion of "secular humanism" in violation of the First Amendment Establishment Clause.[151] This argument has received scant recognition in the courts due to the ambiguity surrounding the concept. Legal scholars have struggled to define religion in general[152] and have disagreed as to whether secular humanism is in fact a religion,[153] while the Supreme Court

149. *See, e.g.*, TIM LAHAYE, THE BATTLE FOR THE MIND 135-40 (1980).

150. TIM LAHAYE, THE BATTLE FOR THE PUBLIC SCHOOLS 258 (1983).

151. *Id.* at 71 ("Secular humanism, the official doctrine of public education, has all the markings of a religion . . . [and] monopolizes the minds of our nation's 43 million public-school children.").

152. *See, e.g.*, Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 597-601 (limiting definition of religion to views with "extratemporal consequences"); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV., 753, 762-76 (1984) (identifying certain features of religion as customary yet rejecting view that any particular single feature is necessary if enough other features are present); Donald A. Giannella, *Religious Liberty, Non-Establishment, and Doctrinal Development*, 80 HARV. L. REV. 1381, 1386 (1967) ("[T]he Court must adopt some elementary natural theology when presented with a claim that does not rest on an articulated body of doctrine fitting into traditional categories of what is religious."); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1072-75 (1978) (suggesting that in defining religion, courts "must proceed at a level of inquiry that does not discriminate among creeds on the basis of content, [and must] not circumscribe the very choices which the Constitution renders inviolate").

153. *See* Mitchell, *supra* note 82, at 662-63 (arguing that secularism "should be considered a religion for establishment purposes because it is a belief system that offers truly competitive answers to the same ultimate questions that are addressed by traditional religions"). *But see* Dent, *supra* note 72, at 878 (arguing that public schools do not "advance a religion of Secular Humanism" because "they teach no specific creed identifiable as such . . . no detailed dogma or rituals . . . no specific 'faith, to which all else is subordinate'").

has rarely addressed the definitional issue at all.[154] Much of the argument in support of secular humanism is grounded in a 1933 publication of the American Humanist Association entitled *A Humanist Manifesto*,[155] signed by 34 individuals including John Dewey, and an oft-quoted but judicially ignored footnote from *Torcaso v. Watkins*,[156] where the Court stated that, "among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."[157]

Numerous cases grounded in secular humanism have been brought before the courts without any success.[158] None of these, save one, has attracted much attention outside the particular community in which the controversy arose. The case of *Smith v. Board of School Commissioners*,[159] however, struck a sensitive nerve within the public education establishment and among various public interest groups. By the mid-1980s, the religious attack on public schools had reached a feverish pitch[160] with strong support from the White

154. *See, e.g.*, United States v. Seeger, 380 U.S. 163, 176 (1965) (maintaining that religion is "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those" who are admittedly religious). *But see* Edwards v. Aguillard, 482 U.S. 578, 635 n.6 (1987) (Scalia, J., dissenting) (acknowledging that Court referred to secular humanism as a religion in Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961))

155. *A Humanist Manifesto*, NEW HUMANIST May-June 1933, *reprinted in* AMERICAN HUMANIST ASSOCIATION, 1973 (defining "religious humanism" as alternative to traditional theism, based in modern man's "understanding of the universe, his scientific achievements, and his deeper appreciation of brotherhood."); *see also Humanist Manifesto II*, 33 THE HUMANIST Sept.-Oct. 1973, *reprinted in* AMERICAN HUMANIST ASSOCIATION, 1973. For a discussion of organized secular humanism and secularist ideology, see Mitchell, *supra* note 82, at 622-27.

156. 367 U.S. 488 (1961) (holding unconstitutional Maryland's requirement that state officers declare belief in existence of God).

157. *Id.* at 495 n.11. Subsequently the Court in Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (prohibiting official prayer and Bible reading in public schools), noted that public schools "may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion." *Id.* at 225.

158. *See, e.g.*, Grove v. Mead School Dist., 753 F.2d 1528 (9th Cir. 1985) (rejecting argument that book used in high school English classes promoted religion of secular humanism); Smith v. Ricci, 446 A.2d 501 (N.J. 1982), *appeal dismissed*, 459 U.S. 962 (1982) (rejecting argument that public school program in family life education established secularism); Citizens for Parental Rights v. San Mateo County Bd. of Educ., 51 Cal. App. 3d 1, 124 Cal. Rptr. 68 (1975), *appeal dismissed*, 425 U.S. 908, *reh'g denied*, 425 U.S. 1000 (1975) (rejecting argument that public school's family life and sex education program established religion hostile to parents' theistic religion); Wright v. Houston Indep. School Dist., 366 F. Supp. 1208 (S.D. Tex. 1972), *aff'd*, 486 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974) (rejecting argument that public schools' teaching evolution established secularism).

159. 827 F.2d 684 (11th Cir. 1987).

160. In 1986-87, People for the American Way documented 103 censorship attempts of school materials. This was a 20 percent increase over the previous year and a 168 percent increase since the group's first report in 1981-82. The success rate for removing, restricting or modifying educational materials had also increased during this period from 26 percent to 37 percent. In addition, the number of challenges supported by organized groups had increased from 22 incidents to 54, with groups such as Citizens for Excellence in Education gaining visibility and voice in local communities across the country, organizing local chapters and running candidates in school board elections. PEOPLE FOR THE AMERICAN WAY, ATTACKS ON THE FREEDOM TO LEARN 1986-87, at 3.

House and growing support within Congress.[161] The Supreme Court was moving toward a more accommodationist perspective on religion, leaving Establishment Clause jurisprudence in a state of flux among Court members. Perhaps most significantly, *Smith* raised the dangerous issue of censorship in the minds of many educators, policy makers, and civil rights advocates.[162]

In *Smith,* the federal appeals court reversed a district court decision which had removed 44 books from schools on charges of promoting a religion of secular humanism. The district court had found that the challenged home economics, history, and social studies textbooks advanced secular humanism and inhibited theistic religion. The appeals court, assuming arguendo that secular humanism constitutes a religion, applied the standard established in *Lemon v. Kurtzman*[163] as refined by Justice O'Connor. The three-part *Lemon* test for determining whether the Establishment Clause had been violated requires that: (1) the statute must have a secular legislative purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) the statute must not foster an excessive entanglement with religion.[164] Given that the parties agreed that there was no question of a religious purpose or of excessive entanglement, the appeals court focused on the effect prong of *Lemon.* The court concluded that the materials did not have the effect of conveying a message of endorsement of secular humanism or any religion, but rather represented an attempt by school officials to "instill . . . such values as independent thought, tolerance of diverse views, self-respect, maturity, self-reliance and logical decision-making."[165] The court further concluded that the books' omission of certain historical facts for non-religious

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161. *See* Rosemary C. Salomone, *From* Widmar *to* Mergens*: The Winding Road of First Amendment Analysis*, 18 HASTINGS CONST. L.Q. 295, 299-301 (1991) (discussing Reagan Administration's support for constitutional amendment to permit organized prayer in public schools and efforts within Congress to remove school prayer cases from federal courts' subject matter jurisdiction).

162. A total of 26 groups filed *amicus curiae* briefs in the circuit court of appeals urging reversal of the district court decision that upheld the parents' challenges. Included among the groups were the National Education Association, the American Library Association, the American Jewish Congress, the National Association of Laity (Catholic), the Association of American Publishers, the National School Boards Association, the American Federation of Teachers, the American Humanist Association, and the Fellowship of Religious Humanists.

163. 403 U.S. 602 (1971).

164. *Id.* at 612-13. In a series of opinions dating from the mid-1980s, Justice O'Connor has refined the three-part test originally articulated in *Lemon* into a two-part inquiry: "whether government's purpose is to endorse religion and whether the statute [or action] actually conveys a message of endorsement." Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring). The test is "whether an objective observer, acquainted with the text, legislative history, and implementation of the [challenged action] would perceive it as a state endorsement of [religion]." *Id.* at 76. Justice Kennedy has articulated a narrower inquiry based on two principles. The first principle precludes the government from giving "direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or, religious faith or tends to do so.'" Mergens v. Westside Community Bd. of Educ., 496 U.S. 226, 260 (1989) (Kennedy, J., concurring). The second principle is that "government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" Lee v. Weisman, 505 U.S. 577, 583 (1992).

165. 827 F.2d at 692.

reasons did not convey "a message of governmental disapproval of theistic religions."[166]

Implicit in the appeals court decision are points that bear significantly on the question of values inculcation in the schools. The court implies that independent thought, i.e., critical thinking, is a permissible mode of analysis, and tolerance is a permissible value to be inculcated through the school curriculum, even when these offend the religious beliefs of some students and parents in the school. The court seems to suggest further that religious views need not be afforded equal time in the curriculum.

Federal courts have cited *Smith* in a more recent line of cases raising similar issues. The courts have rejected challenges brought by fundamentalist Christian parents to a widely used elementary reading series, *Impressions*.[167] The courts have held that the challenged selections, asking children to discuss witches or to pretend they are witches in a role-play situation, have neither the purpose nor the effect of endorsing an amorphous religion called "Wicca."[168]

Similar to *Smith,* these cases involved situations in which parents sought to remove materials from the curriculum and impose their religious views on the entire school community. Such controversies place school officials in a double-bind, faced with the threat of litigation whichever way they turn. Particularly where curricula materials meet valid pedagogical objectives, and school officials offer no legitimate pedagogical reason for their removal, schools run the risk of collateral constitutional attacks from the larger school population. A school's acceding to the demands of religious dissenters could be interpreted as an advancement or endorsement of a particular religious view that eliminates opposing views.[169] Such an accession could also be viewed as an attempt to deny students access to ideas based on a non-pedagogical, or impermissible, motivation in violation of free speech rights even under *Hazelwood's* loosely defined standard of "legitimate pedagogical concerns."[170] In the absence of

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166. *Id.* at 694.

167. The series contains more than 800 literary selections organized in 50 books, including works of critically renowned authors such as Rudyard Kipling, Dr. Seuss, and C.S. Lewis. Brief of Amicus Curiae, National Ass'n of the Laity et al. at 2, Brown v. Woodland Joint Unified School Dist. 200, 27 F.3d 1373 (9th Cir. 1994). For a discussion of the controversy surrounding the books within the educational establishment, see Debra Viadero, *Panels in Ga., N.C. Reject Controversial Textbooks*, EDUC. WK., Oct. 10, 1990, at 13.

168. Fleischfresser v. Directors of School 200, 15 F.3d 680, 688 (7th Cir. 1994); *see also* Brown v. Woodland Joint Unified School Dist. 200, 27 F.3d 1373 (9th Cir. 1994). Conservative religious groups further argue that the series is filled with "fear, violence, and negativism . . . [promoting] a real hopelessness and depression." Glenn Ruffenach, *Critics Try to Cast Bad Spell on* Harcourt, WALL ST. J., Nov. 16, 1990, at B1.

169. *See* Epperson v. Arkansas, 393 U.S. 97, 106 (1968) (invalidating state statute which made it unlawful for teachers in state schools to teach theory of human evolution on grounds of religious purpose; for state to tailor its curriculum to satisfy principles or prohibitions of any religion would violate the Establishment Clause).

170. *Hazelwood*, 484 U.S. at 273; *cf.* Virgil v. School Board, 862 F.2d 1517 (11th Cir. 1989) (upholding school board's removal of humanities textbook that included English translation of

any secular educational reason for modifying the curriculum, there is no basis for the court to defer to local decision makers.

2. *Mere Exposure, Opting Out, and the Free Exercise of Religion*

As *Smith* and its progeny demonstrate, religious parents have been unsuccessful in their attempts to obtain broad relief under the Establishment Clause through values-based curricular challenges. Nevertheless, others have pursued an alternate course seeking a narrower remedy under the Free Exercise Clause. Here claimants have relied on the principles articulated in *Yoder*, seeking individualized accommodation through exemptions or partial opting-out of a particular aspect of the curriculum.

During the 1970s and 1980s, claimants used the Free Exercise Clause to challenge sex education or family life education programs.[171] Since most of the state statutes mandating such programs already provided an opt-out provision, courts generally refused the broad remedies sought.[172] These cases have received minimal attention outside the local press. However, *Mozert v. Hawkins County Board of Education*,[173] a case decided by the Sixth Circuit Court of Appeals just two days prior to the *Smith* decision, has shaped the legal and political framework for subsequent discussion and debate on religious accommodation in the public schools.

The *Mozert* litigation was initiated by fourteen Christian fundamentalists and seventeen children who maintained that the basic reading series mandated

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Aristophane's *Lysistrata* and Chaucer's *The Miller's Tale* based on "sexuality and vulgarity" contained in works as reasonably related to legitimate pedagogical concern under *Hazelwood*).

171. *See* Citizens for Parental Rights v. San Mateo County Bd. of Educ., 51 Cal. Rptr. 1 (Cal. Ct. App. 1975), *appeal dismissed*, 425 U.S. 908 (1976) (holding that sex education and family living courses did not impair free exercise of religion nor represent an establishment of religion as statute provided for parental right to remove children from instruction); Smith v. Ricci, 446 A. 2d 501 (N.J. 1982), *appeal dismissed*, 459 U.S. 962 (1982) (upholding state regulation requiring school districts to develop and implement family life education program in public schools as not violative of Free Exercise or Establishment clauses). *But see* Moody v. Cronin, 484 F. Supp. 270 (C.D.Ill. 1979) (holding that state burdened free exercise of religion by requiring students to participate in coeducational physical education classes for which "immodest apparel" was worn).

172. *See, e.g.*, CAL. EDUC. CODE § 51240 (West 1996) which provides that:

> Whenever any part of the instruction in health, family life education, and sex education conflicts with the religious training and beliefs of the parent or guardian of any pupil, the pupil, on written request of the parent or guardian, shall be excused from the part of the training which conflicts with such religious training and beliefs.

See also N.J. ANN. STAT. § 18A: 35-4.7 (West 1989) which provides that:

> Any child whose parent or guardian presents to the school principal a signed statement that any part of the instruction in health, family life education or sex education is in conflict with his conscience, or sincerely held moral or religious beliefs shall be excused from that portion of the course where such instruction is being given and no penalties as to credit or graduation shall result therefrom.

173. 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988). In addition to this final decision by the Sixth Circuit Court of Appeals, four other published opinions comprise the body of the *Mozert* litigation, all bearing the name Mozert v. Hawkins County Pub. Schs.: 579 F. Supp. 1051 (E.D. Tenn. 1984); 582 F.2d 201 (E.D. Tenn. 1984); 765 F.2d 75 (6th Cir. 1985); 647 F. Supp. 1194 (E.D. Tenn. 1986).

by the Hawkins County School Board violated their religious beliefs.[174] Children who refused to participate in the program would be suspended. The objectionable materials fell into seventeen categories including "secular humanism," "pacificism," "futuristic supernaturalism," "magic and false views of death."[175] The district court held that the plaintiffs' religious beliefs mandated that they refrain from *exposure* to the Holt reading series, and, therefore, forced participation placed a burden on their free exercise rights. According to the district court, the school board had effectively placed students in the position of either reading the offensive books or relinquishing their right to free public schooling.[176] Absent court intervention, the plaintiffs would have been forced to forfeit a public benefit available to all, i.e., public education, in order to exercise their constitutionally protected right to freedom of conscience and belief.

The appeals court reversed in three separate opinions, demonstrating the complexity of the legal and policy issues raised in the case.[177] Chief Judge Lively, writing for the court, held that mere exposure to these materials without any attempt by the school to indoctrinate the children with any particular value or religion did not place a burden on the free exercise of their religious beliefs.[178] Free exercise is not violated in the absence of compulsion; that is, there is no violation unless one is "required to affirm or deny a belief or engage or refrain from engaging in a practice prohibited or required by [one's] religion."[179] Judge Lively distinguished the case from *Yoder* where it was impossible to reconcile the goals of public education with the religious requirements of Amish agrarian society. In *Mozert*, the parents wanted their children to have the benefit of an education that would prepare them for life in the modern world but requested that they be exempt from exposure to some ideas that they found religiously offensive. While the Amish had no choice but to abandon their beliefs or violate the law, the plaintiffs in *Mozert* had the

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174. Prior to the litigation, several school principals had agreed to accommodate the plaintiffs' religious beliefs with alternative materials. The school board subsequently voted unanimously to eliminate alternative reading programs and require all students in the district's schools to use the Holt, Rinehart and Winston series. The litigation stemmed from this mandate.

175. 827 F.2d at 1062. More specifically, as summarized by the trial court, the plaintiffs maintained that the books violated their religious beliefs because they:

> 1) depict witchcraft and other forms of magic and occult activities; 2) teach that some values are relative and vary from situation to situation; 3) teach attitudes, values, and concepts of disrespect and disobedience to parents; 4) depict prayer to an idol; 5) teach that one does not need to believe in God in a specific way but that any type of faith in the supernatural is an acceptable method of salvation; 6) depict a child who is disrespectful of his mother's Bible study; 7) imply that Jesus was illiterate; 8) teach that man and apes evolved from a common ancestor; 9) teach various humanistic values.

Mozert I, 579 F. Supp. at 1051-52.

176. Mozert v. Hawkins County Public Schools, 647 F. Supp. at 1200.

177. 827 F.2d at 1062.

178. *Id.* at 1063.

179. *Id.* at 1070.

option to send their children to private schools or to engage in home schooling.[180] The opinion went on to recognize the role that public schools play in inculcating values, including those values that are fundamental to democratic government, such as the tolerance of diverse political and religious views.[181]

Judge Kennedy, in a separate opinion, provided the most forceful argument in support of cultural uniformity; while she agreed with Judge Lively's analysis and concurred in his opinion, she maintained that even if the court of appeals were to find a burden on the plaintiffs' exercise of their religious beliefs in this or a similar case, the school district had three compelling interests that justified its imposition of curricular uniformity: (1) an interest in avoiding classroom disruption (the opt-out remedy would fragment the curriculum); (2) an interest in avoiding "religious divisiveness"; and (3) an interest in developing in students the skills necessary for citizenship and self-government through the improvement of critical thinking skills. For Judge Kennedy, education in a democracy must provide students with the opportunity to develop independently their own ideas and to form their own judgments on "complex and controversial social and moral issues."[182]

Judge Boggs, on the other hand, focused on the governance question, viewing this case as not about religious beliefs but as about the Establishment Clause "limits on school boards to prescribe a curriculum."[183] While Judge Boggs did not preclude school officials from accommodating religious beliefs as a matter of administrative decision making, he did not require accommodation by law. In other words, while the Supreme Court has not authorized federal courts to require that school officials justify their decisions each time they fail to address students' religiously compelled objections, nothing in the Constitution precludes local authorities from voluntarily providing such accommodation.[184]

Taken together, the three opinions raise several complex issues: (1) whether

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180. *Id.* at 1067. A subsequent case decided by the New York Court of Appeals, Ware v. Valley Stream High School, 550 N.E.2d 320 (N.Y. 1989), more clearly defines the limits of *Yoder*. Here the plaintiffs, members of the Plymouth Brethren, challenged state regulations requiring that all primary and secondary students in the state receive instruction on the AIDS virus as violating their free exercise rights. They maintained that *Yoder* created an exception to the rule that mere exposure to religiously offensive ideas is not protected by the Constitution. Upon summary judgment, the case was appealed and the Court of Appeals remanded it to the trial court for further fact-finding, particularly on the question as to whether the compulsory AIDS curriculum burdened the exercise of their religious beliefs. The court noted that plaintiffs, unlike the Amish, were so thoroughly integrated into the larger society that the state requirement imposed at most only a limited burden. *Id.* at 121-22.

181. 827 F.2d at 1068 (citing *Fraser*, 478 U.S. at 681). Judge Lively noted that the tolerance "referred to by the Supreme Court is a civil tolerance, not a religious one. It does not require a person to accept any other religion as the equal of the one to which that person adheres. It merely requires a recognition that in a pluralistic society, we must 'live and let live.'" *Id.* at 1069.

182. *Id.* at 1071 (Kennedy, J., concurring).

183. *Id.* at 1080 (Boggs, J., concurring).

184. *Id.* at 1079-80.

neutral exposure constitutes indoctrination; (2) if so, whether such indoctrination necessarily burdens the exercise of one's religious beliefs, thereby rising to the level of a free exercise violation; and (3) if such a burden is found, whether there exist sufficiently compelling pedagogical justifications to override free exercise interests. Put conversely, the third issue is whether the opt-out remedy is sufficiently narrow as to override the dangers of educational fragmentation, religious divisiveness, and political instability. These immediate questions beg for resolution.

Many of the tensions beneath contemporary schooling in America seem to erupt in the claims and arguments advanced on both sides in *Mozert*. The case strikes at the heart of values inculcation, the political purposes of the common school, parental discretion, and the tension between cultural pluralism and assimilation. Nevertheless, *Mozert* may not have presented the ideal fact pattern for a winning test case. It appears that the school board may have been motivated by a certain bias against the group, while the plaintiffs may have had a broader agenda than their claims would indicate at first blush.[185]

None of the *Mozert* opinions offers definitive or wholly satisfactory answers to the opting-out debate. However, their different rationales have triggered an explosion of legal commentary which has dissected the issues for future courts to address.[186] While the case has no precedential value beyond the Sixth

185. For a detailed discussion of the *Mozert* litigation, see STEPHEN BATES, BATTLEGROUND: ONE MOTHER'S CRUSADE, THE RELIGIOUS RIGHT, AND THE STRUGGLE FOR CONTROL OF OUR CLASSROOMS 303-07 (1993) (questioning motives on both sides of case and suggesting that interest groups representing defendant school board may have been driven partially by hostility or at least suspicion of Christian fundamentalists and might have accepted district court's opt-out decision had plaintiffs been of another religion, while plaintiffs and their lawyers may have been pursuing a broader transformation in public schooling and schooling in general than merely "alternative readers for a handful of children") *Id.* at 306.

186. *See, e.g.*, Nomi Maya Stolzenburg, *"He Drew a Circle That Shut Me Out:" Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581 (1993) (arguing that neither liberal individualism, communitarianism, nor civic republicanism adequately addresses question of whether teaching of toleration and rationality in public schools constitutes harmful indoctrination); William Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 IND. L. REV. 351, 373 (1991) (arguing that underlying Establishment and Free Exercise Clauses is concern for tolerance and that therefore "a 'right' to be free from offense is fundamentally antithetical to the First Amendment"); Shelley Burtt, *Religious Parents, Secular Schools: A Liberal Defense of an Illiberal Education*, 56 REV. POLITICS 51, 65-66 (Winter 1994) (arguing that even if the Constitution grants school boards authority to insist on curriculum uniformity in face of parental religious objections, as matter of public policy, opting-out does not necessarily compromise democratic citizenship or liberal autonomy; merely because one rejects secular reasoning, this alone does not necessarily deny one capability to engage in rational deliberation about the good life); Amy Gutmann, *Undemocratic Education*, *in* LIBERALISM AND THE MORAL LIFE 84-85 (Nancy Rosenblum, ed., 1989) (arguing that plaintiff parents in *Mozert* demanded education that is inconsistent with development of rational inquiry skills and mutual understanding as required in religiously diverse society). One commentator has argued that exposing children in a school setting to religiously offensive doctrine constitutes a Free Exercise violation for several reasons: education is compulsory; the audience is a captive and impressionable one; the intensive atmosphere makes the coercive nature more severe; the alternative of foregoing education altogether places an economic burden on those students whose religious beliefs prohibit them from participating in certain school programs; and furthermore, for the courts to determine whether mere exposure is indoctrination would permit the courts to project the judges' own values on to schools. Dent,

Circuit, lower courts continue to draw on the rationale of Judge Lively's opinion holding that mere exposure does not rise to the level of a cognizable free exercise claim. Unless and until courts are persuaded otherwise or adopt an alternative rationale for recognizing a free exercise violation, parents who seek exemption for their children from any curricular requirement, whether based on religious or secular beliefs, must revert to the fragile concept of parental rights under Fourteenth Amendment substantive due process.

B. *Parental Autonomy and Substantive Due Process*

This brings us to a third strategy used particularly by parents who challenge certain aspects of the school program based on secular beliefs. Here parents assert the right to control the education and upbringing of their children under Fourteenth Amendment substantive due process as developed by the Court in *Meyer*[187] and *Pierce*.[188] In some cases they also draw on *Yoder*[189] as philosophical support for the concept of parental autonomy even where the claim is not religion-based.

While there has developed over the past several decades a substantial body of litigation based on religious challenges to the curriculum, it is only in recent years that parents have increasingly begun to mount secular challenges.[190] This change undoubtedly reflects both the heightened controversy over values in the schools and the complexity of social issues that schools now address. Two issues that have come before the courts in recent years underscore the constitutional limitations of a secular challenge. The first concerns school programs related to AIDS prevention, including condom distribution; the second concerns community service requirements for graduation.[191]

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supra note 72, at 891-93 (1988).

187. 262 U.S. 390 (1923).

188. 268 U.S. 510 (1925).

189. 406 U.S. 205 (1972). In a concurring opinion in *Yoder*, Justice White noted the limited scope of *Pierce*, pointing out that it lent "no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society." *Id.* at 239 (White, J., concurring).

190. One other period in recent decades witnessed a temporary increase in secular challenges to school requirements based on student, and not parental, rights. During the early 1970s, at the height of the students' rights movement, courts consistently found that hair and dress codes did not infringe on First Amendment free speech rights in the absence of any showing that the student's appearance was intended as the symbolic expression of ideas. *See, e.g.*, Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971); Karr v. Schmidt, 460 F.2d 609 (5th Cir.), *cert. denied*, 409 U.S. 989 (1972); New Rider v. Bd. of Educ., 480 F.2d 693 (10th Cir.), *cert. denied*, 414 U.S. 1097 (1973).

191. In a third set of cases concerning "home schooling," parents have sought to completely opt-out of institutional schooling and educate their children at home, challenging certain state regulations such as teacher certification requirements that often preclude them from doing so. Courts have consistently held that absent a claim based on religious beliefs, parents have no fundamental right to educate their children free from reasonable governmental regulation. *See* People v. Bennett, 501 N.W.2d 106, 115 (Mich. 1993).

In *Alfonso v. Fernandez*,[192] parents challenged a component of an HIV/AIDS education program which called for high schools to make condoms available to students upon request without prior parental consent or the opportunity for parental opting-out. The state appellate court, citing *Meyer*, *Pierce*, and *Yoder*, held that the program violated the parents' liberty interest in rearing and educating their children according to their own views. The court specifically declared that parents have the right to regulate the sexual activity of their children without state interference absent a showing that the policy is essential to serving a compelling state interest.[193] While the state has a compelling interest in preventing the spread of AIDS, there exist alternative sources from which minors can obtain condoms. Distinguishing the facts from *Mozert*, the court noted that the program did not merely expose students to "talk or literature on sexual behavior . . . [but] offered the means to engage in sexual activity . . . interfering with parental decisionmaking in a particularly sensitive area."[194] On its face, *Alfonso* firmly supports the parental right to raise secular objections to the public school curriculum. However, subsequent state and federal court decisions have qualified its holding and, in some cases, rejected its rationale entirely.

In a case involving identical facts and legal claims, *Curtis v. School Committee of Falmouth*,[195] the Massachusetts court, also citing *Meyer*, *Pierce*, and *Yoder*, recognized a fundamental liberty interest to rear one's children free of governmental intrusion but only where there is present the element of coercion or compulsion. Here, the parents had failed to demonstrate that the condom distribution program had a coercive effect on their parental liberties. According to the court, participation in the program was voluntary; there was no penalty or disciplinary action attached to a refusal to participate.[196]

In *Brown v. Hot, Sexy and Safer Productions, Inc.*,[197] the First Circuit rejected a claim by parents of high school students that their children's compelled attendance at a sexually explicit AIDS awareness assembly violated their privacy right to direct the upbringing of their children. Discussing the history of parental rights, the court noted that the Supreme Court has yet to

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192. 606 N.Y.S.2d 259 (A.D. 2 Dept. 1993), *appeal dismissed without op.*, 637 N.E.2d 279 (1994).

193. *Id.* at 265.

194. *Id.* at 266. However, the court also held that the program did not violate the Free Exercise Clause merely because the parents found the program "objectionable" as parents do not have the right to tailor public school programs to individual religious preferences. *Id.* at 268.

195. 652 N.E.2d 580 (Mass. 1995), *cert. denied*, 116 S. Ct. 753 (1996).

196. *Id.* at 585-86. The court also rejected the plaintiffs' free exercise claim on the basis of their having failed to demonstrate a "substantial burden," i.e., one that is coercive or compulsory in nature. *Id.* at 587.

197. 68 F.3d 525 (1st Cir. 1995), *cert. denied*, 64 U.S.L.W. 3591 (U.S. Mar. 4, 1996) (No. 95-1158).

decide whether the right to rear and educate one's child is among those fundamental rights that merit heightened scrutiny. Not only were *Meyer* and *Pierce* decided long before current developments in right to privacy jurisprudence, but the cases themselves used the language of "reasonable relation" indicating that the Court was applying something less than a compelling interest standard.[198] Nevertheless, the appeals court concluded that even setting aside this question, the liberty interest upheld in *Meyer* and *Pierce* for parents to choose their children's education free of governmental interference does not include the right to "dictate the curriculum" and thereby "restrict the flow of information" at the public school to which they have chosen to send them.[199] The court here noted that even the *Alfonso* decision had drawn a distinction between action (to engage in sexual activity) in contravention of parental values and mere exposure (through a sexually explicit program).

The Second Circuit was apparently unwilling to draw that distinction in *Immediato v. Rye Neck School Dist.*[200] Here parents challenged the school district's requirement of forty hours of mandatory community service as a condition to high school graduation. While the court recognized a parental liberty interest in child rearing under the Fourteenth Amendment, it unequivocally interpreted *Meyer* and *Pierce* as requiring nothing more than rational basis review.[201] Citing *Yoder*, the court noted that while the Constitution distinguishes between religious and secular objections, affording higher protection to the former, it does not distinguish among secular objections based on values or morals, as was the case here, or other firmly held beliefs. Secular objections to the school program of any nature do not rise to the level of a fundamental constitutional right.[202] The court further refused to "ratchet up" the standard of review merely because the program forced the students to "act" in contravention of their parents' values as compared with simply exposing them to information that conflicted with those values. According to the court, the exposure/action distinction is "somewhat chimerical."[203]

These cases underscore the confused state of substantive due process jurisprudence. They also reveal a decided reluctance on the part of the federal judiciary to recognize a fundamental parental right to challenge the public school curriculum on purely secular grounds, even where the objections

198. *Id.* at 535, citing *Meyer*, 262 U.S. at 403 and *Pierce*, 268 U.S. at 535. See Griswold v. Connecticut, 381 U.S. 479 (1965), for a contemporary revival of substantive due process in the non-economic sphere with more exacting judicial scrutiny than the "reasonableness" standard.

199. *Id.* at 533-34.

200. No. 189, 95-7237, 1996 WL 5547 (2nd Cir. Jan. 2, 1996).

201. *Id.* at *5.

202. *Id.* at *6.

203. *Id.* at *6; *see also* Herndon v. Chapel Hill-Carboro City Bd. of Educ., 899 F. Supp. 1443, 1450 (M.D.N.C. 1995) (rejecting "parental rights" challenge to mandatory community service program on grounds that the Constitution does not provide fundamental right of individual parents to "exert preemptive control" over public school curriculum and upholding program under rational basis review).

support widely-held moral beliefs. With the exception of the state appeals court decision in *Alfonso,* these cases join those discussed in the previous sections in a seamless web of judicial perspective on the question of values inculcation in the schools. The clear trend in the state and federal courts is to avoid the intrusiveness of parental attempts to shape the curriculum to their own individualistic values in favor of school officials and their authority to make curriculum determinations that reflect broader community and societal values.

C. *The Right to Engage in Religious Speech as Viewpoint*

In addition to asserting their children's right to be free from government speech or indoctrination and their own right to control their children's education, dissenting parents have also asserted their children's right to engage in speech of a religious nature. Religious speech in the public schools can take several forms, from school-organized or student-led prayer, to religious group meetings, to the distribution of religious literature, to the expression of religious perspectives by individual students in the course of classroom activities or as part of a class assignment. The litigation in this area has been grounded in two principles: that religious speech is speech protected under the Free Speech Clause of the First Amendment and that religious speech demands equal treatment as afforded other forms of speech. Courts must weigh these claims against the limitations of the Establishment Clause.

For many years following the Supreme Court's controversial rulings on school prayer and Bible reading in the 1960s,[204] school districts and many lower courts interpreted these decisions as prohibiting any form of religious speech in the public schools. The religious revival of the 1980s, however, pushed the school prayer issue to the fore of the public policy debate. The 1984 federal Equal Access Act,[205] a bipartisan congressional attempt to provide legal protection for student-initiated religious speech while avoiding the constitutional pitfalls of school-sponsored prayer,[206] opened the schoolhouse door to religious expression within specific guidelines. More recently, the issue of graduation prayers has attracted national attention and caused turmoil in school districts across the country.[207]

As the religious speech debate has broadened beyond the school prayer

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204. *See supra* note 3.

205. Equal Access Act of 1984, 20 U.S.C. §§ 4071-74 (1994). The Act states:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

206. For a discussion of the politics surrounding passage of the act, see Salomone, *supra* note 161, at 298-305.

207. The debate has escalated since the Supreme Court's 1992 decision in Lee v. Weisman, 505 U.S. 577 (1992).

issue per se, the concept of religious speech as viewpoint has taken center stage. In this debate, "viewpoint" is synonymous with "perspective."[208] Religious perspective, rather than being relegated to a distinct excludable category, can represent a separate viewpoint on apparently secular subject matter. Legal strategies to support this concept draw doctrinally from three principles. The first is a principle of "viewpoint neutrality" under public forum doctrine[209] requiring that government restrictions on speech be fully "viewpoint neutral" even where the property is not public. In other words, even in the non-public forum,[210] government cannot prohibit speech based on its religious perspective where speakers have been permitted to speak on the same subject from a non-religious or secular perspective.

The second principle that bears on the jurisprudence of religious speech is the distinction between government speech and private speech. According to this principle, the Establishment Clause does not provide a sufficiently compelling justification for restricting private religious expression merely because it is religious. As the Court has stated, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[211] A related third principle distinguishes between

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208. Good New/Good Sports Club v. School Dist. of Ladue, 28 F.3d 1501, 1506, 1507 (8th Cir. 1994).

209. Public forum doctrine is a framework developed by the Supreme Court for analyzing the permissibility of speech on public property as weighed against the government's interest in limiting the use of its property. The doctrine divides public property into three categories: the traditional public forum or localities which by long tradition or by government fiat have been devoted to assembly or debate; the designated or limited public forum, created when government has by policy or practice opened the property for use by certain speakers or for the discussion of certain topics (government is not required to create or maintain access to this limited public forum; however, once it does it must afford the same protection as in the traditional public forum but only as to the same character of speech that was originally designated for protection by the government); and the non-public forum which includes speakers and topics not designated by government for inclusion or access in the designated public forum and which is not considered a traditional public forum. In the first two categories, government cannot restrict speech based on its content absent a compelling justification. In the third category, content restrictions on speech are permissible as long as they are "reasonable" when viewed in light of the purpose served by the forum and are "viewpoint-neutral." Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 806 (1984).

210. Since the *Hazelwood* decision, lower courts have struggled to determine if various aspects of the public school constitute a designated public forum where government cannot restrict speech based on its content without a compelling reason, or a non-public forum as the Court found with the school newspaper in *Hazelwood* where restriction on speech need only be reasonable. *See, e.g.*, Hemry v. School Bd. of Colorado Springs Sch. Dist., 760 F. Supp. 856 (D. Colo. 1991) (school hallways were neither public forum nor limited public forum because school had not designated them to be used indiscriminately by public); Hedges v. Wauconda Community Unit School District 118, 9 F.3d 1295 (7th Cir. 1993) (junior high school was non-public forum). *But see* Clark v. Dallas Indep. Sch. Dist., 806 F. Supp. 116 (N.D. Tex. 1992); Slotterback v. Interboro Sch. Dist., 766 F. Supp. 280 (E.D. Pa. 1991); Rivera v. East Otero Sch. Dist., 721 F. Supp. 1189 (D. Colo. 1989) (all rejecting applicability of public forum doctrine to non school-sponsored religious speech).

211. Board of Educ. of the Westside Community Sch. v. Mergens, 496 U.S. 226, 250 (1989). For a sympathetic discussion of religious speech in the schools, see Jay Alan Sekulow, James Henderson, & John Tuskey, *Proposed Guidelines for Student Religious Speech and Observance in Public Schools*,

official *toleration* and *promotion* of student speech. As the Court noted in *Hazelwood*,[212] unlike the symbolic speech upheld in *Tinker*,[213] publication of student articles required the school not merely to tolerate speech, but to "lend its name and resources" to the dissemination of student speech. In cases where the public might perceive school sponsorship, *Tinker's* standard of material disruption is replaced by *Hazelwood's* mere reasonableness.[214]

Two recent Supreme Court decisions clearly apply principles drawn from this area of First Amendment free speech jurisprudence to develop the concept of "religious viewpoint." In *Lamb's Chapel v. Center Moriches Union Free School District*,[215] the Court unanimously upheld the right of an outside religious group to use public school facilities after school hours to show a film series on the family. Officials had previously granted access to similar speakers and subjects. According to the Court, there was no indication that "the particular film involved here would have been denied for any reason other than the fact that the presentation would have been from a religious perspective."[216]

More recently in *Rosenberger v. Rector and Visitors of University of Virginia*,[217] a clear descendent of *Lamb's Chapel*, a deeply divided Court held that the denial of funds to a student-run newspaper with a Christian editorial viewpoint by a state university amounted to viewpoint discrimination. Government funding of religious activities was obviously a more sensitive and politically consequential issue for the Court to address than that in *Lamb's Chapel*. Nevertheless, in *Rosenberger* the Court majority approached the denial of funding as "viewpoint discrimination," stating that "government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[218] According to the majority, religion may provide "a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed

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46 MERCER L. REV. 1017 (1995).

212. *Hazelwood*, 484 U.S. 260 (1988).

213. *Tinker*, 393 U.S. 503 (1969).

214. *Hazelwood*, 484 U.S. at 273 (holding that school officials may exercise editorial control over "style and content" of school-sponsored activities "so long as their actions are reasonably related to legitimate pedagogical concerns").

215. 113 S. Ct. 2141 (1993).

216. *Id.* at 2147. The concept of religious speech as viewpoint or perspective from *Lamb's Chapel* was drawn upon subsequently in Good News/Good Sports Club v. School Dist. of Ladue, 28 F.3d 1501, 1506 (8th Cir. 1994), where the appeals court held that denial of access to school district property immediately after school hours on the same basis as a secular organization on a similar subject, i.e., the moral development of young people, impermissibly discriminated on the basis of viewpoint in violation of the First Amendment. The court noted that "'Viewpoint' is not limited to whether a speaker supports or opposes a particular resolution of an issue; rather, viewpoint is synonymous with perspective." The court further noted that the issue of the school district's motive, that is, whether the school district opposed the viewpoint, was irrelevant. *Id.* at 1507, citing *Lamb's Chapel*, 113 S. Ct. at 2147-48.

217. 115 S. Ct. 2510 (1995).

218. *Id.* at 2516.

and considered."[219]

This emerging approach differs dramatically from the ideology of past decades which advocated that public education steer clear of any religious content. Of all the legal strategies used by religious conservatives to exercise their religious beliefs in the educational arena, the concept of religious speech as viewpoint carries the most potential for expanding the role of religion in the public schools. Not only has it received support from the Supreme Court, but as the following discussion notes, it has come to serve as a cautious point of consensus among groups traditionally thought to be at polar extremes on the church-state question.

IV. A SEARCH FOR COMMON GROUND

This Article began with a historical look at schooling in America followed by a measured progression to the present, charting the constitutional issues arising throughout. Viewing that evolution through the lens of court decisions, we see the interconnection between law and policy. Viewing that evolution through the eyes of the common school reformers, we understand the importance of our shared traditions and the role that education plays in conveying these traditions to succeeding generations.

We must recognize, however, that we can remain true to the idea of regeneration without our history necessarily binding our destiny. American society has not remained static since the days of the common school reformers. Sociological and psychological developments in teaching and learning theory have left us with an understanding of pedagogy unforeseen in the mid-1800s. Concepts of individual rights and liberties, the rise of the administrative state and government regulation of schooling, even mass compulsory state-controlled education itself, were far from the consciousness of the common school reformers, much less the constitutional framers of the previous century. High literacy rates generated largely through mass schooling, together with the rapid development of mass media and the technological explosion of recent decades, have left parents far more knowledgeable and capable to advocate on behalf of their children's educational interests. The transformations of the last four decades have further altered the context in which educational processes should be considered, from the civil rights and women's movements of the sixties and seventies, to the religious revivalism and political mobilization of religious groups of the eighties, to the racial backlash and religious conciliation of the nineties.

The hard questions raised in the most visible litigation have attracted significant scholarly attention in recent years and have generated serious

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219. *Id.* at 2517.

attempts at resolution. Nevertheless, the discussion seems to be caught in a time warp, fixated on a system of education that was designed more than a century ago to meet the political and economic goals of a young and uncertain nation at the onset of a grand experiment. Those basic goals were cultural assimilation and industrialization. Thus, the ghost of Horace Mann continues to hover over us as we prepare to enter yet another century.

The escalating controversy over parental rights and educational values, however, may be a sign that the time has come to unload this historical baggage, to lay bare some of the myths surrounding both the necessity of government controlled common schooling and the motives and aspirations of dissenting parents, and to re-examine critically the purposes and structure of education in America.

A. *Breaking Down the Myths*

Driving the values debate is the fundamental question of how to preserve basic freedoms in a pluralist society governed by majority consent and founded on democratic principles. The underlying policy issues seem to defy resolution, raising legitimate but nonetheless conflicting individual (parental), local (community), and national (societal) interests. Whether addressed in the judicial or policy arena, attempts to work through these complexities inevitably lead to a tangled web of thorny concepts such as curriculum fragmentation, religious centrality, critical inquiry, rational deliberation, tolerance, and religious viewpoint.

For example, in considering the constitutional rights of dissenting parents, we must not lose sight of the constitutional rights of the wider school community and principles of sound pedagogy. Parents may raise valid concerns that the curriculum or materials used may contradict their world view, whether based in religious beliefs or moral philosophy. Yet, if schools were to yield to their demands by removing objectionable materials from the curriculum, this would create a climate of censorship. Even more modest accommodations could prove problematic. If schools were to permit parents the absolute right to opt-out of certain classes or programs, they may run the risk of fragmenting the curriculum and sacrificing the cohesiveness that a sound educational program, integrated across subject areas, should strive to attain.[220] In this regard, the particular aspect of the curriculum in which the accommodation is made may prove significant. For instance, permitting dissenting parents to opt their children out of a reading program that is central to the instructional program in the elementary grades may undermine the school's overall educational objectives to a greater degree than, perhaps, opting-out of community service or physical education or even AIDS education, although the

220. *See supra* note 182 and accompanying text.

state arguably has compelling public welfare reasons for mandating such programs as AIDS education. In other words, the resolution of the parental rights question is highly contextual.

If the right to opt-out, then, is not absolute, we must consider where schools should draw the line on accommodation. What would happen to the overall instructional program if a school were confronted with an onslaught of opt-out requests, each demanding an idiosyncratic form of accommodation? How many reading programs can one school reasonably implement at one time? Requests for accommodation which become too particularized could prove to be an administrative nightmare, unless standards are set to limit the accommodation of such requests. One solution is to follow the narrow standards set forth in *Yoder*[221] under the Free Exercise Clause, which focuses on a group's insularity from the larger society, the centrality of their objection to their religious beliefs, and the impact of the exemption on the child's overall education in citizenship and self-sufficiency.

The *Yoder* standards are sufficiently narrow to exclude claims such as those advanced by the parents in *Mozert*.[222] However, the claims advanced by the parents in *Ware*[223] against AIDS education may approximate the *Yoder* standards closely enough to have survived at least a motion for summary judgment.[224] Furthermore, given the Court's emphasis on the group characteristics of the Amish, the *Yoder* standards exclude individual spiritual claims not founded in group-based beliefs. The centrality factor also places school officials, and subsequently the courts, in the questionable position of making discretionary value judgments concerning the relative importance of certain beliefs to the continued exercise of the claimant's faith. Such an examination of religious beliefs creates problems under the Establishment Clause.[225]

The Court in *Yoder* specifically limited its holding to challenges grounded

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221. 406 U.S. 205 (1973).

222. 827 F.2d 1058 (6th Cir. 1987). According to Judge Lively, unlike the Amish in *Yoder* who were unable to reconcile the goals of public education with the religious requirements of the Amish faith and the needs of their separate agrarian society, the plaintiffs in *Mozert* did not have to abandon their beliefs to comply with the law but could instead attend private schools or engage in home schooling. *Id.* at 1067.

223. 550 N.E.2d 420 (N.Y. 1989). The New York Court of Appeals remanded the case to the trial court for further fact finding as to whether the AIDS curriculum burdened the exercise of the plaintiffs' religious beliefs given their apparent integration into the larger society.

224. *See* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 934 (1989) (noting disparity between protective constitutional standard of Free Exercise Clause and failure of courts to apply it rigorously).

225. *See supra* note 164 and accompanying text. The continued vitality of the centrality factor is questionable. In Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872 (1990), the Court rejected the idea that judges should consider "centrality," while the Religious Freedom Restoration Act, P.L. 103-142 (1993), *supra* note 95, does not resurrect the concept. *But see* Battles v. Anne Arundel County Bd of Educ., 904 F. Supp. 471, 477 (D. Md. 1995) (distinguishing facts from *Yoder* in that parent challenging state home schooling requirements did not allege that separation from modern society was central tenet of her religion).

in religious as opposed to philosophical or other secular beliefs. The Supreme Court and lower courts continue to reaffirm the religious/secular distinction laid out in *Yoder*.[226] This distinction raises the same concerns as the centrality factor, calling upon school officials and ultimately the courts to define what is a bona fide religious objection and what is merely secular. Furthermore, a compelling argument can be made that the accommodation of only religious objections privileges religious beliefs over secular values in the hierarchy of constitutional protections, thereby denying religious and secular beliefs "equal constitutional dignity."[227]

The concepts of critical inquiry and rational deliberation also bear on this discussion. In recent years, a wealth of scholarly commentary has emerged on the importance of these two concepts as vital to the preservation of liberal democracy and republicanism.[228] This leads to the question as to whether accommodating religious views in the curriculum would necessarily compromise liberal autonomy, democratic citizenship, or republican deliberation. However, we cannot assume that all parents who seek accommodation are inherently hostile to the concept of individual autonomy. In fact, it is exactly such autonomy that these dissenting parents are asserting for themselves. Of course it can be argued that these same parents are denying autonomy to their children. It can further be argued that parents do not always represent the best

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226. *See supra* notes 189-203 and accompanying text discussing recent claims brought under Fourteenth Amendment substantive due process.

227. *See* William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 393-94 (1989-90) (arguing that religious belief "cannot and should not be segregated from its political effect" and that favoring of religious ideas runs counter to both Establishment Clause concerns as to religious domination of the political process and Free Speech Clause concerns as to the need for equality in the marketplace of ideas); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1248, 1283 (1994) (arguing that it is distinct vulnerability to discrimination and not distinct value of religious practices that motivates constitutional solicitude and that, therefore, religious beliefs should be afforded equal regard rather than greater privilege in constitutional law).

228. *See, e.g.*, AMY GUTMAN, DEMOCRATIC EDUCATION 51 (1987) ("Children must learn to *behave* not in accordance with authority but to *think* critically about authority if they are to live up to the democratic ideal of sharing political sovereignty as citizens."); MASSARO, *supra* note 43, at 147 ("[A] public school teacher who took it upon herself to resolve . . . constitutional ambiguities for her students . . . [or] who took [the parents'] side on all constitutional issues . . . would thereby be subordinating the strong First Amendment interest in dissent and critical inquiry . . . in favor of either an amorphous and highly qualified parental right to control the upbringing of the child or of a vaguer still community right to promote a particular viewpoint."); Susanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 172 (1995) ("[I]n a diverse republic, where citizenship consists in rational deliberation and dialogue about the good life for individuals and the nation as a whole, . . . cultural literacy is not enough . . . . Without the ability to think critically . . . [r]epublican deliberation will be impossible because there will be neither the capacity to deliberate nor anything about which to deliberate."); *see also* Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1070-1071 (noting that "a principal educational objective is to teach the students how to think critically about complex and controversial subjects and to develop their own ideas and make judgments about these subjects. . . . Mandatory participation in reading classes using the Holt series or some similar reading is essential to accomplish this compelling interest.") (Kennedy, J., concurring).

interests of their children and that there are times when the state should usurp parental rights. But such an argument suggests that the state, as represented in the school context by elected and appointed officials ostensibly promoting the majoritarian values or preferences of the community, can determine what is best for the child. This presumption is highly debatable where the rights of families holding minority views are involved, while it is much less controversial in extreme cases of parental neglect or abuse.

Although it seems evident that critical thinking skills are key to democratic government, we cannot assume that all religiously inclined parents who challenge certain instructional programs or materials prefer their children to think any less critically. Some may merely want their children, as most parents do, to reach a conclusion regarding certain values or scientific phenomena that is similar to their own. If by "critical thinking skills" we mean the ability to examine information presented objectively by the teacher and to reach an independent conclusion, must that conclusion be free of parental influence?

We cannot assume that parents and children who reject secular teaching are incapable of rational thought simply because they ground their views of worldly phenomena in transcendental norms rather than in what we conventionally consider "objective" scientific inquiry. The assertion that their religious orientation impairs their ability to participate effectively in the democratic process or to engage in republican deliberation is purely speculative.[229] Both democracy and republicanism depend for their sustenance on a mix of diverse views that generate civil debate and dialogue. If the concern here rests on evidence that religiously inclined individuals form their political views based upon those of their religious leaders, this concern demonstrates a suspicion of, and perhaps a hostility toward, religious views.[230] Citizens of every stripe are influenced in their politics by group identification, whether it be membership in a political party, a union, a professional organization, or any interest group.

On a related point, we cannot assume that public schools teach children to think critically in the sense of reaching independent conclusions. Schooling is

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229. *See* Mark Fischer, *The Sacred and the Secular: An Examination of the "Wall of Separation" and Its Impact on the Religious World View*, 54 U. PITT. L. REV. 325, 342 (1992) (arguing that democracy is not based on "scientifically proven ideas" but rather on understanding of social good as arrived at by consensus of citizens provided that consensus falls within constitutional bounds). *But see* Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 79 (1990) (arguing that religion is fundamentally incompatible with intellectual cornerstone of modern democratic state because religious claims are based on absolute truths which are unprovable and therefore insulated from political examination).

230. STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 24 (1993) (arguing that contemporary culture conveys message that "people who take their religion seriously, who rely on their understanding of God for motive force in their public and political personalities . . . [are] scary . . . [and] maybe irrational").

inherently indoctrinative. Both the formal and informal curriculum, established by those in authority in accordance with their own views or those of the majority in the community, are value-laden—from the textbooks selected, to the methods of teaching, to extra-curricular offerings. School officials may believe that students are developing critical thinking skills in order to form their own conclusions. However, the curriculum may in fact lead students to certain school/teacher-directed conclusions. While at least two judges in *Mozert* agreed that "mere exposure" to certain instructional materials does not require students to affirm or deny their beliefs,[231] this position overlooks the indoctrinative power that the values reflected throughout the school experience may have over the formation or transformation of beliefs, particularly in young students. In other words, while school officials may not "intend" to influence values in this way, exposure can have the "effect" of affirmation or denial, leading students to adopt values, such as those supporting abortion rights or the theory of evolution, that directly contradict those espoused by their family. Indoctrination, while often quite subtle, is nonetheless powerful.

Nor can we assume that curricular challenges mounted by dissenting parents are necessarily a manifestation of intolerance toward the presentation of all other views, if by "tolerant" we mean the dictionary definition of "showing understanding or leniency for conduct or ideas . . . conflicting with one's own."[232] Arguably, parents who seek individualized accommodation by opting-out are in fact demonstrating tolerance for the views of others by not seeking the broader remedy of completely eliminating the offensive program or materials.[233] One can be tolerant of diverse views without adopting them or foregoing one's own convictions. The harm that some parents may fear is that exposure to views antithetical to their religious or moral beliefs may lead their impressionable children to adopt "false beliefs" and act in conformity with those beliefs, committing "moral error."[234] For conservative Jews in New York City, for example, the distribution of condoms in the public schools without a parental opt-out provision could cause their children to act in violation of a basic tenet of their faith requiring sexual abstinence outside of

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231. 827 F.2d 1058, 1066 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988); *id.* at 1070 (Kennedy, J., concurring).

232. *See* Bethel School Dist. v. Fraser, 478 U.S. 675, 681 (1986) (supporting "tolerance of diverse . . . religious views" as a value fundamental to democratic government and to be inculcated through public schooling); *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (1986).

233. Burtt, *supra* note 186, at 64 (arguing that parents object to their child being exposed to materials that "offend their religious beliefs not because of some reflexive intolerance to the presentation of other views, but because they do not want their child corrupted by a premature or improperly mediated introduction to other forms of religion and to the feelings, attitudes and values of other students") (internal citation omitted).

234. John H. Garvey, *Cover Your Ears*, 43 CASE W. RES. L. REV. 761, 766 (1993) (discussing types of harm that students can suffer due to school prayer as compared to curriculum exposure).

marriage. This is not to deny that some religious parents, as the facts in *Mozert* indicate, may object to an idea of religious tolerance that respects religious diversity.[235] However, we cannot assume that all parents who raise religious objections to the curriculum are as extreme or non-mainstream in their views as the *Mozert* parents.

There is undoubtedly a paradox in the value of tolerance itself. True tolerance requires accommodation of or at least respect for other points of view, including opposing views whose commitments preclude tolerance.[236] Dissenting parents can reasonably argue that a curriculum neutrally required of all, yet fashioned according to majority views or values, is threatening and therefore intolerant of their culture or values. In fact, there is no neutral ground between these opposing positions.[237]

Finally, we must consider the concept of religious speech as viewpoint. The Supreme Court appears to have set upon a course of expanding the right to private or individual religious expression on school property. Over the past thirty years many schools have prohibited any expression of religious belief on school grounds.[238] However, the notion of religion as a defining experience in the lives of many children is gaining broader public recognition.[239] To

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235. *See* Mozert v. Hawkins County Public Schools, 582 F. Supp. at 202. One of the selections challenged by the parents in *Mozert* was *The Diary of Anne Frank* where Anne explains to her friend Peter Van Doan what religion means to her. "I don't mean you have to be Orthodox . . . or believe in heaven and hell and purgatory and things . . . I just mean some religion . . . it doesn't matter what. Just to believe in something!" From the plaintiffs' viewpoint, this passage was objectionable because it encourages tolerance for religious diversity. For a discussion of the specific claims made by the plaintiffs in *Mozert* and supported by their expert witnesses, see JOAN DEL FATTORE, WHAT JOHNNY SHOULDN'T READ: TEXTBOOK CENSORSHIP IN AMERICA 61-75 (1992).

236. Martha Minow, *Putting Up and Putting Down: Tolerance Reconsidered, in* COMPARATIVE CONSTITUTIONAL FEDERALISM 77, 92 (Mark Tushnet ed., 1990) (suggesting that concept of tolerance be replaced by substantive theory of oppression which raises issue of "power implicit in the competition between points of view about tolerance"); *see also* Stolzenburg, *supra* note 186, at 584 (noting "paradox of tolerance for the intolerant" in context of fundamentalists' calls in *Mozert* to eliminate tolerance from public schools).

237. Minow, *supra* note 236.

238. *See* Fischer, *supra* note 229, at 347 (arguing that Supreme Court cases have been misinterpreted; the Court has only found Establishment Clause violations in situations involving "state-directed religious activity" and never with regard to individual student acting on her own) (citing Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203 (1948) (striking down on-premises religious training); Engle v. Vitale, 370 U.S. 431 (1962) (striking down required school prayer); School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963) (striking down required Bible reading); Stone v. Graham, 449 U.S. 39 (1980) (striking down required posting of the Ten Commandments); Wallace v. Jaffree, 472 U.S. 39 (1985) (striking down required moment-of-silence for meditation or voluntary prayer); Edwards v. Aguillard, 482 U.S. 578 (1986) (striking down required teaching of creation science); Lee v. Weisman, 505 U.S. 577, 583 (1992) (striking down state-directed graduation prayer)). Conversely, many school districts have violated the Supreme Court's proscription against organized prayer. *See* KENNETH M. DOLBEARE & PHILLIP E. HAMMOND, THE SCHOOL PRAYER DECISIONS (1971) (documenting widespread violations in five communities within Midwestern state in late 1960s); PEOPLE FOR THE AMERICAN WAY, RELIGION IN NORTH CAROLINA'S PUBLIC SCHOOLS (1983) (finding similar violations throughout North Carolina).

239. *See infra* notes 250-254 and accompanying text (discussing recent efforts to achieve consensus on role of religion in public schools).

deny them the opportunity to express a religious perspective in the course of their educational experience forces them to repress a fundamental part of their existence.[240] For example, should an elementary school student be permitted to select a topic such as "The Power of God" for an independent research project and make an oral presentation to the class?[241] Should a second grade student be permitted to show a videotape to her classmates during "show and tell" that presents her singing a religious song?[242] Should a junior high school student be permitted to select "The Life of Christ" as the topic of a research paper?[243] Lower courts in recent years have answered negatively to all three questions, finding no violation of free speech rights. These decisions reflect a widely held view that there is something fundamentally different about religious topics that distinguishes them markedly from politically charged secular topics such as communism, capitalism, immigration policies, gay rights, and even abortion. These too are topics on which individuals may have sharply divergent and deeply held views; yet they are commonly addressed in the school setting, particularly by secondary school students.[244]

Nevertheless, let us assume that the courts are constitutionally correct in protecting school children from potential religious, as opposed to political, indoctrination by their peers. Then the nature and the context of the expression are most significant. Key factors to be considered include the degree of state official involvement or direction, the age of the students, and whether the religious expression demands a response from a captive student audience. It may be permissible for students to proselytize their religious views during non-class hours such as at lunchtime in the cafeteria or in the schoolyard.[245] The question inevitably arises, however, as to whether religious speech by students in the course of classroom activities where students are constructively "captive" may have a proselytizing effect on other students.

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240. An analogy can be drawn here with the manner in which schools in the late nineteenth through the mid-twentieth century not only failed to acknowledge the ethnic heritage of foreign-born students, but forced them to affirmatively reject it.

241. *See* Duran *ex. rel.* Duran v. Nitsche, 780 F. Supp 1048 (E.D. Pa. 1991) (upholding teacher's decision that student give oral presentation only before her and not in presence of other students).

242. *See* DeNooyer v. Livonia Public Schools, 799 F. Supp. 744 (E.D. Mich. 1992) (restricting second grader's presentation to classmates).

243. *See* Settle v. Dickson County School Bd., 53 F.2d 152 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 518 (1996) (upholding grade of zero awarded to student paper on life of Jesus Christ).

244. *See* Kamenshine, *supra* note 73, at 1137 (suggesting that implicit in First Amendment Free Speech Clause is political establishment prohibition closely analogous to religious establishment prohibition requiring that schools provide balanced treatment of various political viewpoints).

245. *See* Sekulow, Henderson, & Tuskey, *supra* note 211, at 1023 (arguing that "[p]rotected religious speech also includes speech designed to persuade or to win converts to one's religious beliefs--so called 'proselytizing' speech."); John W. Whitehead, *Avoiding Religious Apartheid: Affording Equal Treatment for Student-Initiated Religious Expression in Public Schools*, 16 PEPP. L. REV. 229, 245-46 (1989) (arguing that "[a] great deal of First Amendment jurisprudence was formed through individual attempts, notwithstanding governmental restrictions, to persuade, recruit, or proselytize others to a particular political, social, or religious view").

The Supreme Court has noted the potentially coercive environment of the school setting.[246] To be sure, the dangers of coercion progressively decrease as one moves up the grades from elementary through middle school and high school. Older students are more secure in their own views and less susceptible to influence. Even at the high school level where students respond to peer pressure, they are unlikely to be influenced by an isolated expression of religion by an individual classmate. However, where a group of classmates joins together to express a religious perspective on an otherwise secular topic, there is a risk of peer pressure which may lead to school endorsement. Such student-organized, as compared with individual, religious speech need not necessarily induce non-adherents to change their beliefs. The harm, as Justice O'Connor has aptly noted, is that it creates a dichotomy between insiders and outsiders within the political community of the school.[247] This concern arises particularly where the religious speakers are in the majority and the expression is made in a school-sponsored activity under the direction of a member of the school staff. For example, while it may be permissible for one or several students to present independent reports on the life of Christ to fulfill a course requirement, a similar presentation made by a group of students, particularly where they represent the dominant religious view, may prove coercive. One can also draw a clear distinction between an independent research project or oral presentation on a religious theme which merely represents the expression of personal views and a student survey of religious views. The latter may cause students to engage in religious soul-searching and to question their own family-directed religious beliefs.

B. *Moving Toward Consensus*

The many nuances of the religious speech question have created confusion and inconsistency among school districts across the country. Over the past decade, the concept of "equal access" for religious speech[248] together with

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246. *See* Lee v. Weisman, 505 U.S. 577 (1992). In *Weisman*, the Court struck down a public school's inclusion of "nonsectarian" prayer in a school graduation ceremony as violating the Establishment Clause, noting that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. . . . What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." *Id.* at 586.

247. Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J. concurring) ("Endorsement sends a message to non-adherents that they or outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."); *see* Nadine Strossen, *A Discussion of Religion's Role in the Classroom*, 4 WM. & MARY BILL RTS. J. 607, 624 (1995) (citing statement made by plaintiff in phone interview subsequent to Supreme Court decision in Lee v. Weisman, 505 U.S. 557 (1992), that "When I am forced to participate in a ritual . . . it's an attempt to make me different from what I am—to change my identity to make me conform.").

248. *See supra* note 205 and accompanying text discussing the Equal Access Act of 1984.

the Court's more recently defined approach to religious speech as viewpoint or perspective[249] have opened this ongoing debate to wide reconsideration. Broad-based coalitions of religious leaders, educational organizations, and advocacy groups are now joining together to find a common ground on the role of religion and religious speech in the public schools.

In the summer of 1994, Protestant and Jewish leaders issued a four-page document on church-state issues which was presented to Vice President Al Gore in a White House ceremony. While this manifesto clearly declares a commitment to separation of church and state and denounces organized prayer in the schools, it also supports voluntary private prayer and religious expression such as Bible reading and discussion of religious faith among students. In other words, public schools "may not promote a religious perspective but may protect the religious exercise of students."[250]

In March 1994, eighteen organizations ranging from the Christian Coalition to People for the American Way adopted a statement of six principles on "Religious Liberty, Public Education, and the Future of American Democracy," pledging to "soften the tone of their rhetoric and demonstrate respect for one another's views."[251] The following month, a more substantive statement was issued by a diverse group of organizations in an attempt to clarify the current state of the law.[252] The statement confirms the right of students to "express their religious beliefs in the form of reports, homework and artwork," to make "religious or anti-religious remarks in the ordinary course of classroom discussions or student presentations," and to "distribute religious literature to their classmates" on an equal basis as non-religious literature. The statement also allows that schools can teach sexual abstinence and contraception, but this is subject to a qualified legally protected right of students to be excused from objectionable aspects of the curriculum. It further permits the teaching of specific values including "the dual virtues of moral

249. *See supra* Part III.C.

250. *A Shared Vision: Religious Liberty in the Twenty-First Century*, LIBERTY, Mar./Apr. 1995, at 18.

251. The six principles included the following: (1) Religious Liberty for All; (2) The Meaning of Citizenship; (3) Public Schools Belong to All Citizens; (4) Religious Liberty and Public Schools; (5) The Relationship Between Parents and Schools; and (6) Conduct of Public Disputes. Noticeably absent from the list of endorsers were groups that have played an active role in litigation on these issues including the American Civil Liberties Union, Americans United for Separation of Church and State, the American Jewish Committee, the American Jewish Congress and such conservative groups as the American Family Foundation, Focus on Family, and the Rutherford Institute. Representatives of some of these groups "found the principles so noncontroversial as to be worth little in reducing real conflicts." Mark Walsh, *Truce Sought in School Wars Over Religion*, EDUC. WK., Mar. 29, 1995, at 1, 10.

252. While not intended as a statement of consensus on these issues, the document addresses some of the more controversial topics in an even-handed way. Such conciliation would ordinarily prove troublesome to various members of the signatory group who have asserted contrary positions in litigation before the courts.

conviction and tolerance."[253] Again, this is not a statement of consensus on what the law should be but rather what the law currently is. Still, the dialogue from which this statement emerged represents a significant step toward the possibility of ultimately reaching some common understanding of the role of religion in the schools. It also represents a decided shift in the debate from the bipolar views of strict separationists and conservative accommodationists toward a middle ground that leans more toward the accommodationist end than would have been politically predictable even two years ago.

That shift was confirmed by Executive action when President Clinton endorsed the foregoing manifesto, calling on the Secretary of Education and the Attorney General to develop guidelines on religion in the schools to be distributed to the nation's 15,000 school districts. This memorandum represents a stronger endorsement of religious expression in the schools—stopping short of organized prayer—than perhaps any official statement in recent history. The President noted that "nothing in the First Amendment converts our public schools into religion-free zones or requires all religious expression to be left at the schoolhouse door."[254]

C. *Preserving Our Common and Uncommon Values*

These efforts to find a common ground on the role of religious speech in public schools are a significant first step toward recognizing diverse values in the schools. Nevertheless, they address only a narrow aspect of the educational values dilemma, an aspect that is relatively easy to resolve when viewed against the broad spectrum of values-based controversies. The acceptance of

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253. RELIGION IN THE PUBLIC SCHOOLS: A JOINT STATEMENT OF CURRENT LAW, Apr. 1995, was drafted by the American Jewish Congress, the American Civil Liberties Union, the American Jewish Committee, the American Muslim Council, the Anti-Defamation League, the Baptist Joint Committee, the Christian Legal Society, the General Conference of Seventh-Day Adventists, the National Association of Evangelicals, the National Council of Churches, People for the American Way, and the Union of American Hebrew Congregations and endorsed by 23 additional organizations.

Noticeably absent from the endorsers were groups most closely aligned with the religious right, including the Christian Coalition and the American Center for Law and Justice. Intended as a "statement of consensus on current law as an aid to parents, educators and students" despite adverse positions taken by some of these organizations in litigation, the statement covers student prayers, graduation prayer and baccalaureates, official participation or encouragement of religious activity, teaching about religion, student assignments and religion, distribution of religious literature, religious persuasion versus religious harassment, the Equal Access Act, religious holidays, excusal from religiously-objectionable lessons, teaching values, student garb, and released time.

254. *Text of President Clinton's Memorandum on Religion in Schools*, N.Y. TIMES, July 13, 1995, at B10. According to the *Wall Street Journal*, "[T]his was a large statement by a U.S. President, and it got very close to the heart of what ails the nation. . . . If Ronald Reagan had said [the same thing] about the social worth of simple religious belief in 1982, they would have laughed him off the TV screens. This is 1995, and no one's laughing anymore." Editorial, *Nihilism, Religion and the President*, WALL ST. J., July 14, 1995, at A12; *see also* Letter from Richard W. Riley, U.S. Secretary of Education, to Superintendents of Schools (Aug. 10, 1995) (letter sent on directive of President Clinton in consultation with Attorney General to superintendent of every school district in America, providing statement of principles that addresses extent to which religious expression and activity are permitted in American public schools) (on file with the *Yale Law & Policy Review*).

individual non-school-sponsored religious speech in the public schools demands a change in attitudes, albeit a significant change given pervasive views on religion in the schools. Questions addressing the school curriculum per se, however, not only demand attitudinal changes and institutional acquiescence but further suggest affirmative steps toward broad-based structural reform. These are the hard questions facing educational reformers, legal and political commentators, and the courts.

This carries the analysis back to the fundamental question posed at the beginning of this discussion. In a pluralist society that recognizes rights to freedom of conscience and belief (and also prohibits an established church), how can education promote a national identity while at the same time preserve community and individual interests? The proposed framework for developing a response is directed at balancing individual rights to autonomy, the collective interests of the larger society, and community culture, while simultaneously recognizing contemporary political and demographic realities. Two approaches are considered. The first examines the question of parental accommodation in the current system of state-operated and funded schools. The second examines the concept of parental autonomy and choice through non-traditional proposals which are gaining political support—proposals that radically restructure educational governance in America.

1. *Fundamental Premises*

Each proposal is based on certain fundamental premises. The first recognizes that society publicly funds education for two primary purposes: national definition and national perpetuation. These collective purposes depend upon a common set of core values, public aspirations, culture, and tradition that bind the citizens together despite peripheral differences. The second premise recognizes that, despite assertions to the contrary from the "multicultural" and "values clarification" camps, such a shared set of core values is not only ascertainable but can be inculcated, along with values that represent the culture of a given community, through both direct instruction and the "hidden curriculum" that pervades the educational process. While our traditions draw on the contributions of our multicultural past, we are not a nation of diverse disconnected cultures. We share a certain "cultural tradition," along with its history, ideals, and symbols, that holds us together in our diversity.[255] The third premise is that, given the current educational structure of government funding, public schools should maintain a position of "neutrality" toward religion, neither directly inculcating religious values per se nor

255. Diane Ravitch, *Multiculturalism: E Pluribus Plures*, 59 AM. SCHOLAR 337, 340 (1990) (arguing that presentation of history, for example, must not become so particularized as to negate common culture that binds us together).

denying their existence and their fundamental role in the moral and psychological lives of certain students. Fourth is a recognition of community and the key role that schools play in articulating community values so long as those values do not conflict with certain core values which give us common purpose as a nation.[256]

2. *Accommodation Within the Current System: A Modest Proposal*

As litigation over educational dissent illustrates, calls for accommodation spring from clashes in values. Before evaluating accommodation as a mechanism for resolving such conflict, however, the scope, limitations, and potential misinterpretations of this project must be explained. The proposal set forth below distinguishes between national or core values that reflect a nationwide consensus, and local or community values that reflect a consensus within a given community. This is not to confuse core values with the concept of a national curriculum or nationally defined subject-area standards, the latter being the topic of intense debate within and beyond educational circles nationwide.[257] A curriculum presents defined subject matter, based on certain pedagogical goals and underlying values. When imposed as a national standard or requirement, such a curriculum inevitably evokes criticism across the political spectrum as an impermissible intrusion into state and community control over education. Values, on the other hand, as Pierre Schlag defines them, are "abstract idealizations cast as context-transcendent, regulative grounds. . . . [Values] establish the shared identities and self-definitions [within a community] that make dialogue and deliberation possible. . . . [They] serve to identify and circumscribe the . . . decisions that can be reached by a community or its members."[258] In the following analysis, values are viewed as shared ideals or political and social commitments to be reflected throughout the school experience and particularly through the formal curriculum. Common values emerge through consensus in policy choices, rather than from being imposed and enforced by an outside authority, e.g., the state or the federal government, as in the case of uniform curriculum standards.

Any attempt to identify a core of shared values runs the risk of appearing as no more than an abstract, subjective, feel-good "bag of virtues." However, in order to develop the concept of accommodation while maintaining the

256. *See* AMITAI ETZIONI, THE SPIRIT OF COMMUNITY 135 (1993) (arguing that institutions such as schools, local churches and museums "are important for communities above and beyond the services they provide. Communities congeal around such institutions."); ROBERT N. BELLAH, HABITS OF THE HEART 282 (1985) (noting that schools, among other institutions, "communicate a form of life, a *paideia*, in the sense of growing up in a morally and intellectually intelligible world").

257. *See* MASSARO, *supra* note 43, at 153 (suggesting that national curriculum should stress knowledge for citizenship, including baseline literacy and historical knowledge and also "a rich appreciation of our conflicts and pluralism").

258. Pierre Schlag, *Values*, 6 YALE J.L. & HUMAN. 219, 220-21 (1994).

fundamental purposes of the educational enterprise, one has to identify some bottom line of commonalities below which the recognition of idiosyncratic views cannot fall.[259] Although not intended to be exhaustive, a listing of common values might include a mix of character traits such honesty, integrity, responsibility, delayed gratification, hard work, respect for authority, and civic virtue combined with more fundamental political principles, particularly justice and fairness, political and religious tolerance, and equality in the sense of equal dignity for all. As a source of these "shared values," we should look to our common history and particularly to the United States Constitution, as interpreted by the Supreme Court, and to federal statutory law with supporting administrative regulations as statements of majority consensus.[260]

The equality principle is a good example from which to draw some insights into the nuances of, and potential stumbling blocks within, this approach. The most consistent justification for equality as a moral precept has rested on the belief of *humans qua humans*, from the Stoics who based their egalitarian principles on the natural equality of humans as rational beings, to the New Testament doctrine of equality of all souls in the sight of God, to the Declaration of Independence proclamation "that all men are created Equal, that they are endowed by their Creator with certain inalienable Rights."[261] As a result, there is an anti-discrimination principle within equality that transcends culture. Nevertheless, despite the general consensus that individuals should treat other individuals with equal dignity and respect, there is less agreement as to the degree to which equal treatment should be required and enforced as a matter of law, and whether the government should take affirmative steps to achieve substantive, and not just formal, equality for certain groups in society.

Few would disagree that racial equality in the sense of formal equality or equal treatment (as compared with substantive equality, which may require affirmative action and preferential treatment) is a principle upon which majority consensus exists as reflected in legal doctrine. The Supreme Court has articulated a higher level of judicial scrutiny for examining classifications based on race under the Fourteenth Amendment Equal Protection Clause.[262] Con-

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259. *See* Sherry, *supra* note 228, at 177 (suggesting that moral character, which is conducive to republican citizenship, includes inclination to act in accordance with relatively uncontested "cultural norms" such as individual responsibility, honesty, hard work, tolerance, and similar values, while "contested norms on such things as sexuality, religious beliefs, or gender roles" would be left to republican deliberation).

260. For a similar line of reasoning drawing on statutes, regulations, and executive orders as sources of national public policy and as evidence of the nation's fundamental commitment to the principle of racial equality, see Bob Jones University v. United States, 461 U.S. 574, 592-95 (1983).

261. ROSEMARY C. SALOMONE, EQUAL EDUCATION UNDER LAW 17 (1986) (citing *Equality, Moral and Social, in* THE ENCYCLOPEDIA OF PHILOSOPHY 39 (Paul Edwards ed., 1972)).

262. This heightened level of scrutiny requires that the classification be narrowly tailored to promote a compelling governmental interest. The Court has applied this standard of review in two categories of cases brought under the Equal Protection Clause of the Fourteenth Amendment: first, when a fundamental right is at stake; and second, when the government classifies persons upon some suspect

gress has enacted a comprehensive body of statutory law prohibiting racial discrimination in a vast array of human endeavors, including education,[263] employment,[264] and public accommodations.[265] These laws are supported by the administrative regulations of various federal agencies.[266] Finally, need we remind ourselves, this country fought a civil war over racial equality.

In contrast, the national consensus on equality for women is more culturally complex. Numerous federal statutes and regulations promoting gender equality in education[267] and employment exist.[268] The Supreme Court has defined a more exacting level of scrutiny under the Fourteenth Amendment's Equal Protection Clause for state actions that classify individuals on the basis of gender, albeit a somewhat lower standard than applied to racial classifications.[269] Furthermore, most Americans would agree to an anti-discrimination principle with regard to women's rights, and so this principle might be placed within our common "core" values.

Nevertheless, gender equality, unlike racial equality or equality for the disabled, raises the more controversial issue of gender roles and lifestyle choices. There is ambiguous evidence of a national consensus to replace traditional roles for men and women with gender-neutral roles or roles freely adopted as a matter of individual choice. The distinction between women as professionals in traditional male-dominated careers and women as homemakers

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basis, such as race. CONSTITUTIONAL LAW § 14.3 (John E.Nowak & Ronald D. Rotunda eds., 5th ed. 1995); *see, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (striking down state anti-miscegenation statute).

263. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

264. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e states:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

265. Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a states: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."

266. *E.g.*, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1, grants rulemaking and enforcement powers to federal administrative agencies empowered to extend financial assistance to any program or activity. The former Department of Health, Education and Welfare subsequently promulgated regulations pursuant to the Act which are now enforced by the Department of Education. 34 C.F.R. §100.8(a) (1995).

267. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 states:

> (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

Title IX protects both students and employees of covered educational institutions. North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1996).

268. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *supra* note 264.

269. *See* Craig v. Boren, 429 U.S. 190, 197 (1976) (applying intermediate standard of judicial review to gender classifications, whereby "[c]lassifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives").

and caretakers, as well as the notion of free choice between the two, are subject to considerable debate. Much of the debate takes place among certain conservative religious groups who consider the traditional dichotomy between male and female spheres as critical to the preservation of family life. Disagreement on this issue in the school setting has arisen in the context of role models, particularly of women, presented in curricular materials. The acceptability of this aspect of the gender equality value, therefore, may work more effectively as a local value, rather than a national one.

There is even less evidence of consensus over homosexual rights. The Supreme Court has been unwilling to extend privacy rights under the Constitution to homosexual acts,[270] nor are there federal statutory or administrative protections for homosexuals. Various states[271] and municipalities[272] have enacted anti-discrimination statutes protecting homosexual rights, but these are a manifestation not of national but of state or local consensus.

This is not to deny the operation here of the anti-discrimination aspect of

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270. Bowers v. Hardwick, 478 U.S. 186 (1986).

271. *See, e.g.*, CAL. CIV. CODE §51.7 (West 1995), Freedom from Violence or Intimidation, which states:

> (a) All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute, or because another person perceives them to have one or more of those characteristics.

But see COLO. CONST. art. II, § 30b (West 1995), No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation, which states:

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt, or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

See Evans v. Romer, 882 P.2d 1335 (Colo. 1994), *cert. granted*, 115 S. Ct. 1092 (1995) (challenging constitutionality of Article II § 30b of the Colorado Constitution which the Colorado voters adopted through the initiative process in 1994).

272. *See, e.g.*, LOS ANGELES, CAL., MUNICIPAL CODE ch. IV. art.12, §§ 49.70-49.80 (1979) which states:

> It shall be an unlawful employment practice for an employer to fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions or privileges of employment on the basis (in whole or in part) of such individual's sexual orientation.

See also NEW YORK CITY ADMIN. CODE, Title 8, § 8-107 which states:

> It shall be an unlawful employment practice:
>
> (a) For an employer or an employee or agent thereof, because of the actual or perceived age, race, national origin, gender, disability, marital status, sexual orientation or alienage or citizenship status of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

For a listing of statutes, ordinances, and executive orders prohibiting discrimination based on sexual orientation, see NAN D. HUNTER, SHERRYL E. MICHAELSON & THOMAS B. STODDARD, THE RIGHTS OF LESBIANS AND GAY MEN, AN AMERICAN CIVIL LIBERTIES UNION HANDBOOK, App. C, 205-208 (1992).

equality in terms of respecting the equal dignity of all individuals regardless of personal characteristics. Nor is it suggested that tolerance for non-traditional lifestyles should never be incorporated into the public school curriculum. However, the discussion of controversial issues such as alternative lifestyles should be left to community discretion as determined by a locally-based process of reasoned deliberation and dialogue, whereby community members, including parents and educators, join together to define those local values to be reflected in the curriculum.[273] If individual parents find the chosen perspective objectionable, one alternative is to allow students to "opt-out" of the challenged instruction either by exempting them entirely, as some districts have done with regard to AIDS education and sex education, sometimes under mandate of state law, or by providing them with alternative instruction or materials as the school district had originally done in *Mozert*. Obviously, the closer the challenged program in which the non-core value is presented is to basic skill development, such as reading, the greater the school's interest in providing alternative instruction and not complete exemption. Conversely, the closer the program is to matters traditionally addressed within the family, such as sex education, the greater the family's interest in obtaining a complete exemption as opposed to alternative instruction.

Courts have drawn a clear distinction between religious and secular claims, deferring to the discretion of school officials in the face of parental challenges based on secular beliefs. But even in the case of religious beliefs, accommodation is constitutionally required only within the narrow set of circumstances as set forth in *Yoder*,[274] and depends on the particular points of objection and the delicate balancing of religious and administrative burdens. However, a compelling argument can be made to broaden and more clearly define the class of cases in which accommodation would be constitutionally mandated, drawing on First Amendment free exercise with regard to religious claims and First Amendment freedom of expression and Fourteenth Amendment substantive due process in the case of both religious and secular claims. The first would broaden *Yoder's* applicability to support the proposition that mere exposure to offensive materials in some circumstances can burden the free exercise of religious beliefs. The second would draw on the student's freedom of conscience or belief implicit in *Barnette*[275] along with parental rights to

273. *See* Michael A. Rebell, *Schools, Values, and the Courts*, 7 YALE L. & POL'Y REV. 275, 338-42 (1989) (arguing that communities should engage in pluralistic dialogue to determine values to be reflected in school curriculum); NATIONAL SCHOOL BOARD ASS'N, CENSORSHIP: MANAGING THE CONTROVERSY 63-80 (1989) (outlining suggestions and model school policies for resolving censorship controversies); CHARLES C. HAYNES, FINDING COMMON GROUND B1-14 (1994) (providing sample approaches and guidelines developed by various communities to address religion in the curriculum).

274. 406 U.S. 205 (1973).

275. 319 U.S. 624 (1943) (striking down a compulsory flag salute statute under First Amendment freedom of expression); *see also* Stephen Arons, *Educational Choice as a Civil Rights Strategy*, *in* PUBLIC VALUES, PRIVATE SCHOOLS 70 (Neal E. Devins ed., 1989) (arguing that *Barnette* reinforces

control the education of their children implicit in *Meyer*[276] and *Pierce*.[277] Once student or parental rights were established under any of these theories, the burden would shift to school officials to justify their refusal to accommodate for reasons other than mere administrative inconvenience.[278]

If the objection is related to a core value such as racial or religious equality, then clearly there should be no constitutional right to accommodation. Core values are so central to the preservation of democratic government and so basic to the constitutional enterprise that they do not lend themselves to governmental accommodation. On the other hand, what about dissenting parents who raise curricular challenges to non-core values based on either religious or philosophical grounds, such as parents who espouse a modern-day view of a woman's role in a community wherein the majority has chosen a more traditional perspective to be reflected in the curriculum? Or parents who want their children taught tolerance for gays and lesbians in a community where the majority has voted such tolerance down? Or parents who object to family life programs? Do they have a constitutional right to accommodation? If the objection is to a non-core local community value which by definition is peripheral and discretionary, the school should make every effort to accommodate the parents within the bounds of reasonable administrative capabilities and sound pedagogy. If the challenged instruction or materials do not merely expose children to ideas that their parents find offensive or disagreeable but could potentially induce children to engage in behavior that has serious social, psychological, or physical consequences as in the case of condom distribution, then the justification for accommodation becomes even more compelling.[279]

Another alternative would be to remove the offensive materials completely from the curriculum. However, as *Smith*[280] and other similar cases demonstrate, federal courts are justifiably reluctant to extract religious and moral implications from materials and practices that are widely accepted as secular by the larger society and by popular culture. An example would be objections to the celebration of Halloween as promoting witchcraft in violation of the

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principle articulated in *Pierce* that the First Amendment protects "the unencumbered communication of individual and subcultural values"); Wooley v. Maynard, 430 U.S. 705, 715 (1977) (holding that the "First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable").

276. 262 U.S. 390 (1923).

277. 268 U.S. 510 (1925).

278. The Parental Rights and Responsibilities Act, *supra* note 65, now working its way through Congress, would provide parents with statutory rights to direct the upbringing of their children.

279. *See* Alfonso v. Fernandez, 606 N.Y.S.2d 259 (A.D. 2d Dept. 1993), *appeal dismissed without op.*, 637 N.E.2d 279 (1994) (holding that condom distribution program that did not include opt-out provision violated parents' substantive due process rights because it offered students means to engage in action that contravened parental values).

280. 827 F.2d 684 (11th Cir. 1987).

Establishment Clause.[281] In such cases, accommodation is not constitutionally required. In fact, if materials are removed or practices discontinued for partisan political reasons, this may raise the specter of censorship in violation of the First Amendment Free Speech Clause. School officials who remove educational materials from the curriculum or modify the school program based on politically or religiously motivated opposition to the ideas expressed, and not based on legitimate pedagogical concerns, may violate the First Amendment rights of other students.[282]

3. *Restructuring for Parental Choice: A More Radical Proposal*

As the foregoing discussion demonstrates, accommodating individual parental values within the current educational structure merely permits accommodation of parental objections on the margins. Constrained by the very purposes of common schooling itself, this modest approach fails to resolve the layers of conceptual, constitutional, and administrative conflicts that emerge from attempts to unfold and resolve the educational values question.

An alternative approach is offered here not as a definitive model for immediate and complete dismantling of the current educational system, but as a suggested framework for guiding policy analysis and debate toward a more effective resolution of these conflicts. This approach examines the educational values question within the broader policy discussion of parental autonomy and school choice. In the policy arena, these two discussions typically take place in parallel fashion, intersecting only occasionally and peripherally. Yet the connection between the two is almost self-evident. In fact, proposals for dramatically restructuring educational governance in this country may provide the most effective mechanism for balancing individual, community, and societal interests inherent in the values debate.

There are many permutations on the "choice" theme. However, a wave of state and local initiatives designed to free public schools from burdensome regulations, combined with national debate over educational vouchers to be granted to parents of private school students, are presently leading us slowly toward a radical reconfiguration of schooling in America. Both ultimately view parental choice as a means to improving the quality of the educational program and thereby enhancing student performance. If we carry this movement to an extreme yet logical conclusion, one illustrative model for preserving a richer

281. Guyer v. School Bd. of Alachua County, 634 So. 2d. 806 (1st Dist. Fla. 1994) (rejecting claim that depiction of witches, cauldrons, and brooms included in public school decorations as part of Halloween celebration were religious symbols and therefore had effect of endorsing or promoting religion in violation of the Establishment Clause).

282. *Hazelwood*, 484 U.S. at 273 (holding that school officials may control school-sponsored speech if based on "legitimate pedagogical concerns"); *Epperson*, 393 U.S. 97 (1968) (holding that state statute forbidding teaching of evolution in public schools and colleges violated the Free Exercise Clause).

sense of liberty of conscience and belief through schooling might include a mix of three formats to be permitted under operable state education statutes: publicly funded and operated government schools in their current form; what has come to be known as "charter" schools[283] funded directly by the state but under the management of outside groups; and private schools, including religiously affiliated institutions, funded through a combination of private tuition and voucher payments provided by the state to parents who demonstrate economic need.[284] In other words, the state would grant "scholarships to the poor" in the form of tuition vouchers that could be redeemed at participating private schools if accepted as full tuition payment. An alternate approach might provide vouchers to parents on a sliding scale of economic need with the result that parents at the extreme low end of the economic continuum might pay no tuition while others might pay varying differential amounts between a partial voucher award and the full tuition cost.

Under this model, all participating schools, whether receiving direct or indirect state aid, would be bound to incorporate into their curriculum core values as set forth above. While the development of "character traits" such as honesty and civic virtue admittedly are difficult to enforce, "political principles" such as equality are already enforceable as a matter of law, against schools that are directly and completely funded by the state, under federal constitutional norms.[285] Participating schools that accept federal funds would have to comply further with federal anti-discrimination statutes, prohibiting

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283. Charter schools are autonomous public institutions, authorized under state legislation, that are established under a contract between a group that manages a school and a sponsoring authority that oversees it. The contractor might be a group of parents or teachers, a labor union, a college or university or other nonprofit organization. The sponsor might be a school board, a state education department, a state university campus, or a government agency. Typically charter schools are exempt from significant state regulations or local rules that inhibit flexible management of public schools. They exclude sectarian schools from participation and generally select students on the basis of a lottery. To date, twenty states have enacted charter school legislation. *See* ALASKA STAT. § 140.03.250 (1995); ARIZ. REV. STAT. ANN. § 15-181 (1995); ARK. CODE ANN. § 6-10-116 (Michie 1995); CAL. EDUC. CODE § T. 2, D. 4, Pt. (West 1995); COLO. REV. STAT. ANN. § 22-30.5-101 (1996); DEL. CODE ANN. tit. 14, Pt. I, Ch. 5 (1995); GA CODE ANN. § 20-2-255 (Michie 1995); HAW. REV. STAT. D. 1, T. 18, Ch. 296, Pt. VIII (1995); KAN. STAT. ANN. Ch. 72, Art. 19 (1994); LA. REV. STAT. ANN. § 3971 (1995); MASS. GEN. LAWS ANN. ch. 71, § 89 (West 1996); MICH. COMP. LAWS ANN. § 380.511 (1995); MINN. STAT. § 120.064 (1995); 1995 N.H. LAWS 260; 1996 N.J. LAWS 426; N.M. STAT. ANN. § 22-8A-1 (1995); R.I. GEN. LAWS § 16-77-4 (1995); TEX. EDUC. CODE ANN. § 12.101 (West 1996); WIS. STAT. ANN. § 118.40 (West 1995); WYO. STAT. § 21-3-201 (1995). At the federal level, the Improving America's Schools Act of 1994, P.L. 103-382, § 10301 (1994), appropriated $15,000,000 for fiscal year 1995 to award grants to state educational agencies to conduct charter school programs where allowed by state law.

284. For a general discussion of parental choice models, see Diane Ravitch & Joseph Viteritti, *A New Vision for City Schools*, 122 PUB. INTEREST 3 (1996).

285. This is not to suggest that schools that merely receive "indirect" state aid through vouchers awarded to parents should be considered "state actors" and thereby subject to federal constitutional claims brought by students or employees under the First and Fourteenth Amendments. Such an extension of state action doctrine would serve as a disincentive for private schools to participate in a voucher program. It is merely suggested that the curriculum of all participating schools reflect certain "core" constitutional values or principles.

discrimination on the basis of race,[286] gender,[287] and disabilities.[288] Non-core values could be interpreted and applied according to the philosophy of the particular school community. Student performance would be monitored by the state, through standardized tests administered annually or at designated benchmark periods to assure that schools were providing an adequate and effective educational program. The state would provide transportation to all three categories of schools within a radius of perhaps ten miles.

The option of privately funded schools would exist as it is now so long as schools adhere to reasonable governmental regulations. Private schools choosing not to participate in this comprehensive system of state supported schools, perhaps to avoid regulation or because they reject a core value such as religious equality, could continue to do so but without state funding beyond that which is currently provided under federal and state programs, e.g., student transportation and textbooks,[289] and educational services to educationally disadvantaged students.[290] Parents obviously would be bound by geography. If parents find unacceptable all the publicly funded options available within their defined radius, as well as available non-state funded private alternatives, they could engage in home schooling, educating their children at home, as long as they comply with applicable state regulations, including teacher certification requirements.

Such a diverse system resolves several of the problems that arise in the more modest "accommodationist" proposal described in the previous subsection. It permits parents to choose, from a variety of alternatives, the school that best conveys their own value preferences whether religious or philosophical, and thus largely avoids the value controversies that now exist in the public schools. By removing the target for curricular challenges, litigation would decrease, which in turn would disengage the courts from determining education policy. The proposed system also promotes community interests,

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286. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (Supp. 1994), *supra* note 263.

287. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (Supp. 1994), *supra* note 267.

288. § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 Supp. 1994); Individuals With Disabilities Education Act, 20 U.S.C. §§ 1400-1500 (Supp. 1994) (originally enacted as the Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 175 (1970)).

289. According to a survey taken in the mid 1980s, 30 states provide assistance in the form of transportation and/or textbooks and materials to students attending non-public schools, including religiously affiliated schools. JOSEPH E. BRYSON & SAMUEL H. HOUSTON, THE SUPREME COURT AND PUBLIC FUNDS FOR RELIGIOUS SCHOOLS: THE BURGER YEARS, 1969-1986, at 59.

290. *See, e.g.*, Improving America's Schools Act of 1994, Pub. l. No. 103-382 (amending the Elementary and Secondary Education Act of 1965, 20. U.S.C. §2701, and providing federal funds to state and local educational agencies for educating disadvantaged children). Sec. 1120 of the Act provides for the participation of children enrolled in private elementary and secondary schools requiring that:

> [a] local educational agency shall . . . provide such children, on an equitable basis, special educational services or other benefits . . . such as dual enrollment, educational radio and television, computer equipment and materials, other technology, and mobile educational services and equipment.

where community is not necessarily defined geographically but religiously or philosophically, whereby individuals can coalesce in groups to create mediating institutions of education based on a shared world view.

This approach would provide true cultural diversity for individuals and groups across the political and economic spectrum: for religious conservatives who challenge the pervasively "secular" nature of public schooling, for "multiculturalists" who challenge the pervasively "Eurocentric" nature of the curriculum, and for others who embrace controversial perspectives such as homosexual lifestyles or abortion rights. By providing vouchers for the economically disadvantaged, the proposal inherently promotes the core value of equality, permitting poor parents the discretion to direct the education and upbringing of their children now available only to those of greater economic means and further promotes the value of religious tolerance by permitting the participation of religiously affiliated schools that agree to comply with certain principles and standards.

This tripartite system further permits school officials to develop a comprehensive curriculum including core and selected non-core values reflecting a "coherent moral-cultural perspective."[291] This not only avoids the curricular fragmentation arguably created by attempts at accommodation under the present approach but also prevents the psychological fragmentation of students whose fundamental religious and moral values must now be left at the schoolhouse door. On the other hand, by requiring that all three categories of participating schools present core values throughout the instructional process as well as the "hidden curriculum," the proposed model assures that we preserve certain democratic principles and cultural commitments which bind us together as a nation.

The various voucher proposals currently under consideration at the national[292] and state[293] levels indicate that the concept of educational choice

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291. *See* McConnell, *supra* note 82, at 151 (arguing for "genuine multicultural approach to education, based on parental choice and control"); *see also* Stephen D. Sugarman, *Using Private Schools to Promote Public Values*, 1991 U. CHI. LEGAL F. 171 (supporting vouchers for poor and minority students). *But see* David Futterman, *School Choice and the Religion Clauses: The Law and Politics of Public Aid to Private Schools*, 81 GEO. L.J. 711 (1993) (arguing that while tuition vouchers are likely to be found constitutional by the Supreme Court, they violate the fundamental principles of the Establishment Clause).

292. *See supra* note 64 (discussing proposed Low-Income School Choice Demonstration Act of 1995).

293. In June 1995, Ohio and Wisconsin were the first states to enact legislation approving vouchers for children who attend religious schools. The Ohio statute authorizes the allocation of vouchers of up to $2,500 to students from mostly low-income families in Cleveland beginning with the 1996-97 school year. OHIO REV. CODE ANN. § 3313.975 (Anderson 1995). The Wisconsin law expands Milwaukee's five-year old program of private-school choice, providing vouchers of $3,600, to include religiously affiliated schools and increases the number of participating students to 15,000 in 1996-97. To qualify for the program, families must have an annual income of less than $26,000. WIS. STAT. ANN. § 119.23 (West 1990), as amended by 1995 WIS. LAWS § 4002. Similar programs have been under legislative consideration in other states, including Pennsylvania (defeated in June 1995), Illinois, Indiana, and

is slowly and incrementally becoming a reality. Yet it is not without its detractors. Opponents voice concerns that choice programs will foster further racial segregation and economic stratification in the schools, promote fraud and waste in a proliferation of poorly managed and educationally inadequate private and charter schools, and create overregulation of private schools, thereby eroding their distinctive nature and even threatening the religious integrity of sectarian schools.[294] However, as noted by Stephen Sugarman, one of the original architects of the concept of vouchers for the poor,[295] these criticisms merely affirm the safeguards that must be built into a choice plan, including guaranteed access to all students, parent outreach and information programs, and consumer protections, rather than the desirability of choice itself.[296] Besides, if religious schools in particular were to lose their distinction by compromising their religious values in order to benefit from government funding, that loss would be a matter of institutional choice rather than one imposed upon them by government. Undoubtedly, some private religious schools would continue to refuse government aid, even indirect aid such as that offered through voucher payments, in order to preserve their distinctly religious values.

Choice proposals fly directly in the face of the common school emphasis on homogeneity and governmental control. They further extricate us from the time warp of conventional attempts to resolve the curriculum-values dilemma through a patchwork of grudging accommodations. While these are highly

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Arizona. *See* Drew Lindsay, *Wisconsin, Ohio Back Vouchers for Religious Schools*, EDUC. WK., July 12, 1995 at 1; Ravitch & Viteritti, *supra* note 284, at 9-10.

In March 1995, the federal court in Wisconsin upheld the original Wisconsin Choice Program against a challenge brought by low-income parents and school-children claiming that the plan's failure to include religiously affiliated schools denied those who preferred such schools their rights under the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. The court held that the inclusion of religious schools with "unrestricted payments flowing directly to [such] schools" would violate the Establishment Clause. Miller v. Benson, 878 F. Supp. 1209, 1214 (E.D. Wis. 1995), *vacated and remanded*, 68 F.3d 163 (1995) (citing Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973)). The Seventh Circuit vacated and remanded the judgment with instructions to dismiss the litigation as moot based on the subsequent statute including religious school students in the program and the plaintiffs' intervention in the state case challenging the inclusion. In enacting the expanded statute, the Wisconsin legislature provided for vouchers to be awarded directly to parents who would then use them to defray the cost of tuition at private schools of their choice, similar to the Minnesota tax deduction program upheld in Mueller v. Allen, 463 U.S. 388 (1983), thereby hoping to avoid the constitutional impediment of direct payments to religious schools noted by the district court several months previously in *Miller*. In a subsequent round of litigation challenging the expanded program on federal and state constitutional grounds, the Wisconsin Supreme Court enjoined implementation of those portions of the Milwaukee Parental Choice Program that expanded the existing program to include sectarian schools, pending further order of the court. Thompson v. Jackson, 95-2153-OA (Wis. Sup. Ct. Aug. 25, 1995) (order granting preliminary injunction).

294. For a compelling argument opposing public aid to religiously affiliated schools, from a policy and Establishment Clause perspective, see Steven K. Green, *The Legal Argument Against Private School Choice*, 62 U. CINN. L. REV. 37 (1993).

295. *See* JOHN E. COONS & STEPHEN D. SUGARMAN, EDUCATION BY CHOICE (1978).

296. Sugarman, *supra* note 291, at 178-81.

controversial proposals, they are gaining increased interest in the public policy arena and may well shape the future of educational reform in this country. Depending on the momentum these alternatives achieve and sustain in Congress and particularly in state legislatures, as well as the response in the courts, the concept of parental choice, if permitted to evolve incrementally over time through trial and error, can potentially sound the death knell for the common school as it has come to be known over the past century and a half. Whether America can successfully regenerate and self-perpetuate without the mediating structure of the common school, and continue to develop a common identity and common aspirations, remains to be seen. That could be this nation's grand experiment for the next millennium.

V. Conclusion

For the past century and a half, education in this country has operated within the concept of the common school. In recent years, social, political, and demographic factors have placed into serious question the continued vitality of that concept. Dissenting parents have challenged with increasing frequency various aspects of the school curriculum, taking their claims to court when political and administrative processes have failed. The courts in turn have struggled to balance individual rights and freedom of conscience against collective interests in preserving democratic government and national identity. Attempts to resolve this controversy through parental accommodation have proven limited, and at times counterproductive. The time has come to stretch beyond widely held over-generalizations regarding parental dissent and obsolete notions of education and society inherited from the common school reformers in order to explore alternative models of schooling that more effectively accommodate individual and community preferences within the framework of a shared common culture.