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Education and the Court: The Supreme Court's Educational Ideology

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Education and the Court: The Supreme Court's Educational Ideology

> The basic moral problem . . . is inherent in education itself. If you are engaged in an effort to influence the course of children's development . . . . [it] is to determine, in part, what kinds of people they turn out to be. It is to create human beings. It is, therefore, to play God.*

I. INTRODUCTION

The need for a definition of the functions and goals of public education is a pressing problem in our society. American society is characterized by increasing alienation,[1] weakening family ties,[2] and waning church influence.[3] The result is that education will play a greater role as one of the remaining institutions to help reach societal consensus and ensure the continued vitality of American democracy.[4] Increasing controversy and litigation over students' and parents' rights in the educational process demonstrate widespread concern with the role of public education.[5] As the complexities of

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* Bereiter, *Moral Alternatives to Education*, 3 INTERCHANGE, Jan.-Mar. 1972, at 25, 27.

1. *See generally* A. MONTAGUE & F. MATSON, THE DEHUMANIZATION OF MAN (1983); D. REGIN, SOURCES OF CULTURAL ESTRANGEMENT (1969); A. SCHAFF, ALIENATION AS A SOCIAL PHENOMENON (1980).

2. The divorce rate in the United States more than doubled between 1965 and 1979. Price-Bonham & Balswick, *The Noninstitutions: Divorce, Desertion, and Remarriage*, 42 J. MARRIAGE & FAMILY 959 (1980). In a 1979 Gallup Poll of American families nearly one-half of the respondents felt that family life had deteriorated in the past 15 years. *See* WHITE HOUSE CONFERENCE ON FAMILIES, LISTENING TO AMERICA'S FAMILIES 180 (1980).

3. Purpel & Ryan, *Moral Education: Where Sages Fear to Tread*, 56 PHI DELTA KAPPAN 659, 660 (1975). Today, roughly 40% of Americans have virtually no contact with congregations as worshipping entities. Roof, *American Religion in Transition: A Review and Interpretation of Recent Trends*, 31 SOCIAL COMPASS 173, 284 (1984).

4. *See* Brown v. Board of Educ., 347 U.S. 483, 493 (1954). The Court stated in *Brown:*

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

Id. Justice Powell, in his dissent, also noted that "[i]n an age when the home and church play a diminishing role in shaping the character and value judgments of the young, a heavier responsibility falls upon the schools." Goss v. Lopez, 419 U.S. 565, 593 (1975) (Powell, J., dissenting).

5. *See, e.g.*, Bender v. Williamsport Area School Dist., 106 S. Ct. 1326 (1986) (challenging a school district's refusal to permit prayer cluh meetings during activity periods); Kuhlmeier v. Hazelwood School Dist., 795 F.2d 1368 (8th Cir. 1986) (challenging a deletion of two full pages from student newspaper), *cert. granted*, 107 S. Ct. 926 (1987); San Diego Comm. Against Registration and the Draft v. Governing Bd., 790 F.2d 1471 (9th Cir. 1986) (challenging a school hoard's exclusion of anti-draft advertisement in school newspaper); Klein v. Smith, 635 F. Supp. 1440 (D. Me. 1986) (challenging a student's suspension for

modern society increase and the public begins to believe American cultural values have become dysfunctional, school authorities and dissenting families come into conflict in their attempts to create order out of the apparent chaos.[6] As a result, the judiciary has become involved in determining the rights of the various actors in the educational arena.

United States Supreme Court cases over the last sixty-five years have defined the rights of school authorities, parents, and students.[7] In many of these cases the Court either explicitly or implicitly developed and applied its own concept of the proper role of education in society. Beginning in the 1920s and continuing through the Court's 1969 decision in *Tinker v. Des Moines Community School District*,[8] the Court effectively applied a "progressive" model of education that emphasized a participatory educational process with maximum student interaction and independent thought.[9] Six years later, however, the Court was sharply divided in *Goss v. Lopez*[10] over the proper function of education. Subsequent decisions indicated further shifts away from a progressive model to a greater emphasis on a school's function as the inculcator of fundamental values under what educators label the "cultural transmission ideology."[11] In the 1986 *Bethel School District No. 403 v. Fraser*[12] decision the Court's concept of education heavily emphasized the inculcative aspects of the public school. The Court apparently now has adopted the cultural transmission ideology, a decision that may curtail the expansive participatory student rights granted in *Tinker* under the progressive ideology.[13]

This Note traces the Court's development of a philosophy of

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making a vulgar gesture to a teacher off school grounds); Student Coalition for Peace v. Lower Merion School Dist. Bd. of School Directors, 633 F. Supp. 1040 (E.D. Pa. 1986) (seeking an injunction to stop school board from banning student antinuclear and peace exposition on school grounds); *see also* D. KIRP & M. YUDOF, EDUCATIONAL POLICY AND THE LAW (1974).

6. S. ARONS, COMPELLING BELIEF 196 (1983); *cf.* T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 39 (1966) (promoting the need for increased protection of freedom of expression because complexity of political issues and mass democracy have made the public more susceptible to manipulation).

7. *See infra* notes 54-167 and accompanying text.

8. 393 U.S. 503 (1969).

9. For a discussion of the progressive ideology, see *infra* notes 43-53 and accompanying text.

10. 419 U.S. 565 (1975).

11. For a discussion of the cultural transmission ideology, see *infra* notes 19-34 and accompanying text.

12. 106 S. Ct. 3159 (1986).

13. For a discussion of *Tinker*, see *infra* notes 85-113 and accompanying text.

education and the impact of that philosophy on students' participation in the educational process. Part II outlines three basic streams of educational thought and their impact on the roles of the school and student. Part III examines the Court's changing position on the proper function of education. Part IV analyzes *Fraser* and the Court's adoption of the cultural transmission model for education. Finally, Part V argues that the Court should have resolved *Fraser* by applying the *Tinker* disruption standard, which properly allows maximum student involvement in the educational process without significantly hindering the socializing function of the public schools.

II. THE THREE STREAMS OF EDUCATIONAL IDEOLOGY

Education serves an essential and unique role in our culture. Education is essential because it is the process through which children are inducted into society to become leaders and productive societal members. The school environment "alters the child's concept of reality and, therefore, his perception of and reaction to all things."[14] Adult attitudes stem, at least in part, from childhood experiences, a major part of which occur within the school setting.[15] Public education is a unique societal institution because education, although it is supposed to transmit widely accepted cultural norms and values to children,[16] is a process through which the child develops as an individual and grows into a mature and discerning adult.[17]

These two requirements of public education—the need to integrate children into society and the need to allow them to develop as individuals—often conflict. To effectively impart cultural values, educators may stifle individualism through direct suppression of diverse ideas or through indirect discouragement of diversity. Educators may employ a system of rewards and punishments or any number of techniques to ensure that students "learn" the habits and knowledge deemed essential to productive lives. If the state

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14. Arons & Lawrence, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 HARV. C.R.-C.L.L. REV. 309, 317 (1980).

15. *Cf.* H. HYMAN, POLITICAL SOCIALIZATION 21 (1959) (arguing totality of childhood experiences is partly responsible for adult political patterns).

16. *See infra* notes 26-29 and accompanying text.

17. One goal of education is to "enable children to develop the skills, attitudes, and opportunities to become literate, happy, independent, and successful adults." Gordon, *Freedom of Expression and Values Inculcation in the Public School Curriculum*, 13 J.L. & EDUC. 523, 579 (1984).

heavily emphasizes the socializing function, the state may create children unable to exercise fully the freedom of choice essential to a democracy. If the state, however, overemphasizes individualism, the child's development may be inadequate for him to integrate into society. Society's definition of the role of education and the proper methods to fulfill that role determine the extent to which individualism and student expression are tolerated or even encouraged. The three following ideologies categorize societal definitions of the proper function of education: the cultural transmission ideology, the romantic ideology, and the progressive ideology.[18]

A. Cultural Transmission

The cultural transmission ideology defines education as the transmission of knowledge, skills, morals, and social rules to the student.[19] This ideology assumes that children internalize learned material through explicit instruction and a system of rewards and punishments.[20] The cultural transmission ideology employs an associationist-learning theory[21] best explained by the metaphor of a machine. The school environment provides "inputs" of information that the student/machine stores and then "outputs" as behavior.[22] Because the child's internal thought processes merely reflect physical and social inputs, cultural transmissionists see the educational process as a guided acquisition of knowledge that reinforces desirable responses and eliminates undesirable ones.[23]

The cultural transmission ideology deflnes educational objectives using a prediction of success or an "industrial psychology" strategy. The immediate objective of education is the acquisition of knowledge and skills, measured in the short term by grades on report cards and in the long term by social status and power.[24] In a pure form the learning of culturally accepted values is not based

18. Although many articles and hooks address the proper purposes and theories of education, *see, e.g.*, R. DERR, A TAXONOMY OF SOCIAL PURPOSES OF PUBLIC SCHOOLS: A HANDBOOK (1973); W. FRANKENA, PHILOSOPHY OF EDUCATION (1965), this Note applies the three ideologies outlined by Lawrence Kohlberg and Rochelle Mayer. *See* Kohlberg & Mayer, *Development as the Aim of Education*, 42 HARV. EDUC. REV. 449 (1972). These ideologies, although highly simplified, reflect the general philosophical scheme of education. *See generally* T. BRAMELD, PATTERNS OF EDUCATIONAL PHILOSOPHY: DIVERGENCE AND CONVERGENCE IN CULTUROLOGICAL PERSPECTIVE (1971); J. STRAIN, MODERN PHILOSOPHIES OF EDUCATION (1971).

19. Kohlberg & Mayer, *supra* note 18, at 452-53.

20. *Id.*

21. *See* B. SKINNER, BEYOND FREEDOM AND DIGNITY (1971).

22. Kohlberg & Mayer, *supra* note 18, at 456.

23. *Id.*

24. *Id.* at 460-61.

on principles of knowledge or development, but is simply the acquisition of material at the child's present level of thought. Thus, the purpose of education is not to encourage individual growth, but to assure the internalization of established norms, with the child's need to learn societal discipline receiving particular emphasis.[25]

The cultural transmission theory is rooted in the tradition of American education. Religious institutions, whose primary purpose was to inculcate orthodoxy, operated American schools during the colonial period.[26] Even after the acceptance of separation of church and state in this country,[27] public educators emphasized inculcation in response to the huge influx of immigrants in the late nineteenth and early twentieth centuries.[28] One commentator expressed an historical truism, stating that "[v]alue inculcation, rather than value neutrality, has been the tradition of public education since the beginning of the American Republic."[29]

The cultural transmission ideology seriously overvalues inculcation in education and threatens the desirable presence of diverse thought and expression in public schools.[30] This ideology reduces the child's expressive rights because the child does not contribute to the acquisition process; the child passively receives societal values. Although the precise effects of the cultural transmission ideology are difficult to identify[31] and commentators differ over the

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25. *Id.* at 454.

26. R. BUTTS & L. CREMIN, A HISTORY OF EDUCATION IN AMERICAN CULTURE 98, 120, 191 (1953). *See generally* R. HOFSTADTER & W. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 261-412 (1955). An example of this value inculcation is the "Old Deluder Satan Act" of the Massachusetts Bay Colony, which required education to keep Satan at hay. *See* A. MEYER, AN EDUCATIONAL HISTORY OF THE WESTERN WORLD 189 (1965) (tracing the emphasis on inculcation in Massachusetts schools).

27. *See* R. BUTTS & L. CREMIN, *supra* note 26, at 215.

28. Douglas, *Parental Rights in Public Schools*, LIBERTY, Sept.-Oct. 1976, at 19, 19-20. Society saw value inculcation as necessary either to help assimilate immigrants into their new society or to protect the American way of life. *See* L. CREMIN, THE AMERICAN COMMON SCHOOL, AN HISTORIC CONCEPTION 22-23, 44-47 (1951).

29. Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 499 (1981).

30. For an analysis of the benefits of student expression in education, see the discussion of the progressive ideology *infra* notes 43-53 and accompanying text.

31. Official prescription of proper behavior and acceptable morals and beliefs has never risen to a level at which dissenting students could prove a conspiracy to mold them into homogeneous citizens. A major problem to legal redress against majoritarian indoctrination is the difficulty of defining public school orthodoxy. S. ARONS, *supra* note 6, at x-xi, 70. Nevertheless, increasing controversy over curriculum content and free speech in public schools indicates that the socializing function of public schools has hindered some families in their efforts to preserve unorthodox beliefs and minority values. *Id.* at x-xi.

proper response to such inculcation,[32] the Supreme Court limited the cultural transmission ideology beginning in the early 1920s[33] and has continued to struggle with the problem.[34]

B. Romanticism

The romantic ideology centers on the child as an individual and the child's discovery of an inner self.[35] The romantic views education as the unfolding of an innate pattern of development facilitated by the proper environment.[36] The metaphor of the physical growth of a plant or animal best represents the romantic philosophy. The educational environment simply aids the child's prepatterned development by providing nourishment for natural growth.[37] Romantics believe that the child's realization of an inner self is the most important aspect of education; therefore, the school environment should provide sufficient freedom to allow the child's inner abilities and social virtues to control the child's antisocial behavior.[38] A heavily inculcative education is unacceptable to the romanticist because meaningless mechanical learning drills suppress the child's inner "good."

The romantic ideology defines educational objectives in terms of a "bag of virtues," a set of traits constituting the ideal healthy individual.[39] The child realizes innate capacities if left to follow a native bent under this maturationist theory of development.[40] Stu-

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32. *Compare* S. ARONS, *supra* note 6, at 189 (calling for complete separation of school and state to halt value conflicts and condemning the undermining of individual freedom of belief in public schools) *with* J. TUSSMAN, GOVERNMENT AND THE MIND 85 (1977) (calling government education a legitimate presence in the sphere of the mind).

A comprehensive treatment of the legitimacy of governmental participation in the marketplace of ideas is beyond the scope of this Note; however, for detailed discussions of the "government speech" doctrine, see Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104 (1979); Shiffrin, *Government Speech*, 27 U.C.L.A. L. REV. 565 (1980); Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863 (1979).

33. *See infra* notes 54-66 and accompanying text.

34. A specific example is the six separate opinions filed in *Board of Education v. Pico*, 457 U.S. 853 (1982). *See infra* notes 144-67 and accompanying text.

35. Kohlberg & Mayer, *supra* note 18, at 45-52. Although this ideology originated with Rousseau, its current advocates are the followers of Freud and Gesell. *Id.* at 451. *See* J.J. ROUSSEAU, EMILE OU DE L'EDUCATION (1762); A. FREUD, THE EGO AND THE MECHANISMS OF DEFENSE (1946).

36. Kohlberg & Mayer, *supra* note 18, at 451-52.

37. *Id.* at 455.

38. *Id.* at 451-52.

39. *Id.* at 476.

40. *See generally* J. LANGER, THEORIES OF DEVELOPMENT (1969).

dent interaction and expression are part of the permissive environment, but such activity is not directed or encouraged.[41] Thus, romantics undervalue any inculcative or directive presence in the educational process.

Although implicitly present in only one Supreme Court opinion,[42] the romantic philosophy is important because it represents the antithesis of the cultural transmission ideology and a possible response to excessive inculcation in the public schools. Whereas cultural transmission centers on society and molds the child in conformity to cultural norms, the romantic ideology stresses the child's unique aspects and allows the child absolute freedom to develop. The progressivist ideology represents a balance between these two ideologies.

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41. *Cf.* J. DEWEY, DEMOCRACY AND EDUCATION 112-14 (1916) (calling unsupervised development "random and capricious").

42. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), both the majority and concurring opinions endorsed a limited application of the romantic ideology. Wisconsin sought to enforce its compulsory education laws against Amish parents for refusing to send their children to public school after the eighth grade. The Court held that both the first and fourteenth amendments prevented the state from compelling the Amish children to attend a formal high school through age 16.

Although, strictly speaking, *Yoder* rests on establishment clause grounds and the rights of parents to direct the upbringing of their children, 406 U.S. at 233-34, the Court's analysis relies on the notion that the Amish view education as the "preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith." *Id.* at 222. This suggests that, at least in this instance, the Court adopted as a goal of education the preparation of children for the kind of life their parents and subculture intend for them to live.

Yoder implicitly rejected both the cultural transmission and progressivist ideologies. If the Court strictly applied the cultural transmission ideology, no exemption would be allowed because the greater good of society would dictate that Amish children receive maximum exposure to majoritarian values. On the other hand, if the Court applied a progressivist ideology, the children's *own* preferences and beliefs would be a major factor because their lives might be destroyed by a denial of education. For a discussion of progressivism, see *infra* notes 43-53 and accompanying text. Justice Douglas applied this progressivist position in his dissent. *See* 406 U.S. at 245 (Douglas, J., dissenting in part).

Under the romantic ideology, the state's only interest in *Yoder* is providing the proper environment for the child's personal growth. This interest pales in comparison to the parental right to direct the upbringing of children. Under a progressive or cultural transmission ideology, the state's interest is bolstered by the interests of the children themselves or society's interest in socialization—either of which may outweigh parental rights.

The relationship between the interests of parents, their children, and the state in the educational process is beyond the scope of this Note. For a discussion of these interrelationships, see Burt, *Developing Constitutional Rights Of, In, and For Children*, 39 LAW & CONTEMP. PROBS. 118 (1975); Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321 (1979).

C. *Progressivism*

The progressivist ideology builds on the works of John Dewey[43] and maintains that the touchstone of education is continued growth. For the progressivist, education's primary goal is to develop the child's thought processes. The child acquires developed thought, not through strict maturation (romantic ideology) or direct learning (cultural transmission ideology), but through student-environment interaction that causes a reorganization of psychological patterns.[44] According to the progressivist, the driving force of education is the child's active thinking, stimulated by cognitive conflict;[45] therefore, the educational environment should maximize the students' active role.

Progressivism is an intangible, dialectical process[46] in which the child is not viewed as a plant or a machine, but as a philosopher developing ideas through discourse.[47] The objective of this process is not to stimulate behavior, but to reorganize and redefine the child's thought processes through confrontational discourse.[48] Unlike both the romantic's concept of development through nurturing and the cultural transmissionist's concept of development through static acquisition of knowledge, the progressivist encourages discoursive development by actively stimulating the child to reach higher levels of thought through a presentation of resolvable conflicts.[49] Thus, the progressivist strives to ensure the child's progression toward a more developed psychological state.[50]

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43. *See, e.g.*, J. DEWEY, DEMOCRACY AND EDUCATION (1916); EXPERIENCE AND EDUCATION (1938); THE CHILD AND THE CURRICULUM (1902); MORAL PRINCIPLES IN EDUCATION (1909).

44. Kohlberg & Mayer, *supra* note 18, at 457.

45. *Id.* at 454.

46. *Id.* at 455. John Dewey and Jean Piaget molded the dialectical metaphor, first developed hy Plato, into a psychological method. *See* J. PIAGET, JUDGMENT AND REASONING IN THE CHILD (1928); THE LANGUAGE AND THOUGHT OF THE CHILD (1926).

47. Kohlberg & Mayer, *supra* note 18, at 457.

48. *Id.* John Dewey rejected the concept that growth or development is movement toward a fixed goal; the adult environment is not a standard against which children are measured. According to Dewey, if growth is regarded as *being* an end rather than *having* an end, then educators may abandon the view that instruction supplies adult knowledge by pouring facts into a hole. *See* J. DEWEY, *supra* note 41, at 50-51.

49. Kohlberg & Mayer, *supra* note 18, at 454. John Dewey was the first to fully formulate this approach to education known as the cognitive-developmental approach. Dewey's approach is cognitive because it emphasizes active change in the child's patterns of thought rather than learning a set of culturally accepted rules. *See* J. DEWEY, *What Psychology Can Do for the Teacher*, in JOHN DEWEY ON EDUCATION: SELECTED WRITINGS 195 (R. Archamhault ed. 1964).

50. *But cf.* Bereiter, *Educational Implications of Kohlberg's Cognitive-Developmental View*, 1 INTERCHANGE 25-30 (1970) (stating that the determination of whether a behavior

The progressive ideology, which emphasizes progression through stages of development,[51] highly values student expression and independent thought. Child development must include exposure to more sophisticated thought requiring resolution of cognitive conflicts by active participation in the education process.[52] The greater the stimulation, the faster the advancement. Progressivists encourage student expression and diversity because expressive behavior of students contributes to the learning environment. Children at more advanced cognitive levels challenge and influence less developed children to move to higher levels of thought. Although the progressivist educator moderates or guides this dialectical process, the structure of the learning process itself minimizes value inculcation.[53]

Supreme Court opinions over the last half century represent each of the above ideologies, and a pattern of development emerges upon closer inspection. The Court's attitudes toward education have changed over time and continue to evolve. Implicit support of a particular ideology in a case may be result-oriented, a more conservative Court, hoping to restrict student rights, may change ideologies to accommodate that restriction. The ideologies,

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change is development is a theoretical matter and too vague for practical use); Peters, *A Reply to Kohlberg*, 56 PHI DELTA KAPPAN 678 (1975)(identifying weaknesses in cognitive-developmental theory).

51. The foundation of the cognitive-developmental theory underlying the progressive ideology is the doctrine of cognitive stages forming an invariant sequence of development. Kohlberg & Mayer, *supra* note 18, at 457-58. Each stage represents a more sophisticated level of thought, stems from the previous one, and paves the way for the next higher stage. If a child remains too long at one level of development, it becomes increasingly difficult to stimulate upward movement. *Id* at 489-90. Therefore, continued and vigorous interaction among students tempered only by the *Tinker* disruption standard, *see infra* note 94 and accompanying text, appears to maximize opportunities for continued growth.

52. The benefits of this type of progressive technique have been demonstrated in an empirical study employing classroom discussion modeled after Kohlberg's cognitive-developmental theory. *See* Kohlberg, *The Cognitive-Developmental Approach to Moral Education*, 56 PHI DELTA KAPPAN 670, 677 n.11 (1975).

53. Kohlberg states that the educator's stimulation of movement to higher levels of thought is not indoctrinative for four reasons:

> 1. Change is in the way of reasoning rather than in the particular beliefs involved.
>
> 2. Students in a class are at different stages; the aim is to aid movement of each to the next stage, not convergence on a common pattern.
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> 3. The teacher's own opinion is neither stressed nor invoked as authoritative. It enters only as one of many opinions, hopefully one of those at a next higher stage.
>
> 4. The notion that some judgments are more adequate than others is communicated. Fundamentally, however, this means that the student is encouraged to articulate a position which seems most adequate to him and to judge the adequacy of the reasoning of others

Kohlberg, *supra* note 52, at 674.

nevertheless, provide a framework for analysis of the Court's opinions in the educational sphere.

III. The Supreme Court's Changing Educational Ideology

A. *The Early Cases:* Meyer, Pierce, *and* Barnette

In 1923 the Court first recognized limitations on state indoctrinative interests and implicitly restricted the traditional cultural transmission ideology in *Meyer v. Nebraska.*[54] In *Meyer* the Court struck down a statute prohibiting the teaching of foreign languages to children who had not completed the eighth grade, finding the statute to be an unconstitutional interference with "the calling of modern language teachers . . . and with the power of parents to control the education of their own [children]."[55] Although recognizing the state's inculcative interests,[56] the Court disapproved of any state power to proscribe the study of certain disfavored subjects. The *Meyer* Court rejected a Platonic model of education,[57] under which the state controls all the inputs and outputs in the educational process, and found that the means chosen to advance the state's interest in homogeneity infringed on the rights of teachers, children, and parents.

Two years later, in *Pierce v. Society of Sisters,*[58] the Court invalidated an Oregon law requiring all children to attend public school by applying the principle in *Meyer* that parents are free to supervise their children's education.[59] The *Pierce* Court explicitly rejected the pure cultural transmission theory, finding no "general power of the State to standardize its children."[60] Although the

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54. 262 U.S. 390 (1923).

55. *Id.* at 401; *see also* Bartels v. Iowa, 262 U.S. 404 (1923) (companion case).

56. "The desire of the Legislature to foster a homogenous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate . . . . The power of the state to . . . prescribe a curriculum . . . [is] not within the present controversy." *Meyer,* 262 U.S. at 402.

57. Plato had recommended a law for his Ideal Commonwealth which provided " '[t]hat the wives of our guardians are to be common . . . and no parent is to know his own child, nor any child his parent . . . . The proper officers will take the offspring of the good parents to the pen or fold, and . . . deposit them with certain nurses.' " 262 U.S. at 401-02. This Platonic model is cultural transmission carried to its logical extreme. The Court does not reject Plato's goal of training children to reach their full potential in order to optimize social gain; however, the Court's rejection of the Platonic model demonstrates that democracy is incompatible with the full force of Plato's theory. *See* J. Dewey, *supra* note 41, at 309.

58. 268 U.S. 510 (1925).

59. *Id.* at 534-35.

60. *Id.* at 535. The Court stated: "The fundamental theory of liberty upon which all

Court decided *Meyer* and *Pierce* under the old substantive due process standard,[61] and the continued relevance of the two decisions has been questioned,[62] modern courts accept their pronouncements concerning parental rights.[63]

The Court in *Meyer* and *Pierce* did not explicitly mention the proper role of education in society; nevertheless, in these cases the Court began to accommodate the rights of students and parents and the inculcative interests of school authorities. Both the state's inculcative interest and a progressivist interest in exposing children to a wider range of ideas and experiences than were available at home justify a general compulsory education requirement. A compulsory education statute mandating *public* school attendance, however, creates a dangerous state monopoly on education under which the state might limit children's exposure to controversial subjects.[64] The *Pierce* Court checked the indoctrinative power of the state by assuring that some children may have a private education relatively free from state control.[65] *Meyer* and *Pierce* demonstrate the Court's willingness to limit the state's inculcative power over children,[66] but do not signal adoption of any educational ideology by the Court.

The Court did not address the question of limits on the state's inculcative role and, more specifically, the proper role of education in society again until the 1943 decision of *West Virginia Board of*

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governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only." *Id.* at 535.

61. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905). *See generally* G. GUNTHER, CONSTITUTIONAL LAW 441-585 (11th ed. 1985); L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 15-1 to 15-21 (1978).

62. *See, e.g.*, Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 519 (1969) (Black, J., dissenting) (criticizing majority for its reliance on the substantive due process cases of *Meyer* and *Bartels*).

63. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622, 637-38 (1979) (plurality opinion); Wisconsin v. Yoder, 406 U.S. 205, 232-33 (1972); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969); Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

64. 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, 529-30 (1983).

65. *Id.* at 530. The protections of *Pierce* are limited, however, because most people do not have the financial resources to exercise the private school option. *See* Yudof, *supra* note 32, at 890 n.101.

66. The Court decided both cases during the post-World War I period when states were under political pressures to use their schools to create a more ideologically homogeneous people. This historical setting supports the theory that the Court's major concern was limiting the state's indoctrinative power. *See* Moskowitz, *The Making of the Moral Child: Legal Implications of Values Education*, 6 PEPPERDINE L. REV. 105, 110-12 (1978).

Education v. *Barnette*.[67] *Barnette* concerned the constitutionality of a mandatory flag salute statute requiring all children in the public school system to salute the American flag.[68] In striking down the statute as violative of the first amendment, the Court simultaneously approved and disapproved of state indoctrinative goals. Speaking through Justice Jackson, the Court acknowledged the cultural transmission ideology and the constitutional validity of value inculcation in public secondary education by stating that "the State may 'require teaching by instruction and study of all in our history . . . which tend to inspire patriotism and love of country.' "[69] Although recognizing the legitimacy of teaching by persuasion and example, Justice Jackson also declared, "[i]f 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."[70]

The Court viewed the compulsory flag salute statute as compelling students to declare a belief and found that the statute subverted the slow and constitutionally permissible route of informing students about the flag and its meaning.[71] According to the Court, the institution of education is not based on a coercive elimination of dissent, but on education by persuasion and example.[72] Furthermore, the *Barnette* Court recognized the importance of education

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67. 319 U.S. 624 (1943).

68. The statute defined a failure to salute as "insubordination," remedied by expulsion without possibility of readmission until compliance. Jehovah's Witnesses challenged the statute after the school expelled their children for failing to salute the American flag; subsequently, the state instituted delinquency proceedings. *Id.* at 629-30.

69. *Id.* at 631 (quoting Minersville School Dist. v. Gobitis, 310 U.S. 586, 604 (1940)(Stone, J., dissenting)). The *Barnette* Court explicitly reversed *Gobitis* only three years after it was decided.

70. *Id.* at 642.

71. *Id.* at 631.

72. "To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds." *Id.* at 641. The Court also noted that any attempt to impose ideological discipline through public education would force each societal faction to seek control of the process and, failing that, attempt to weaken it. *Id.* at 637.

However, Justice Powell's concept of local control implicitly adopted in *Fraser* involves just such factional conflict. *See infra* note 207. Under a system of local majoritarian control, those groups with sufficient funds but insufficient political power either place their children in private schools, thereby weakening the public school system, or relocate to areas where local political powers reflect their beliefs. Those with neither funds nor influence must either renounce their own values and let the system co-opt them or retain those values and be labelled "different," "insubordinate," or "underachievers." *See* Arons & Lawrence, *supra* note 14, at 328-32. The *Fraser* Court appears to dismiss the problem of factional conflict over the proper values to be inculcated—a problem recognized by the *Barnette* Court.

as a forum for introducing students to first amendment values.[73]

Some commentators have used the Court's seemingly contradictory adoption of both indoctrinative and individualistic aspects of education to discount the Court's condemnation of indoctrination.[74] The two aspects, however, need not be inconsistent. Cultivating appreciation for the meaning of the flag and the Constitution not only serves the broad inculcative goals of preparing children for citizenship and transmitting basic cultural values, but also exposes students to diverse views and requires them to think critically. The prohibition against coercion prevents the children's mindless memorization of less consensual topics. Although recognizing the dual nature of public schools, the Court simply drew a general boundary beyond which indoctrinative efforts are impermissible rather than define permissible indoctrinative goals or methods in an ideologically consistent framework of education.

Thus, the Court began developing an educational ideology in *Meyer, Pierce,* and *Barnette.* With *Meyer* and *Pierce* in the early 1920s, the Court examined the interests of parents, students, and the state in public education without fully rejecting the historically accepted cultural transmission model of education and without precisely defining the extent to which free inquiry and progressivism must prevail. In *Barnette* the Court differentiated between acceptable "encouragement" and unacceptable "coercion" by the state, but failed to establish an educational ideology to govern the Court's decisionmaking.

B. *The Court's Adoption of an Educational Ideology:* Sweezy, Keyishian, *and* Tinker

1. Higher Public Education

In contrast to the Court's earlier approval of state indoctrination—and,impliedly, the cultural transmission theory—in primary and secondary public education cases, the Court rejected strict state indoctrination in higher education. The Court first advocated a progressive ideology at the university level in *Sweezy v. New*

73. "That [the schools] are educating the young for citizenship is reason for scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." 319 U.S. at 637.

74. *See, e.g.,* Shiffrin, *supra* note 32, at 567 (asserting that *Barnette* had nothing to do with official prescription of orthodoxy, but was concerned only with the rights of nonconformists).

Hampshire.[75] *Sweezy* concerned a college professor's contempt conviction for his failure to answer questions propounded by the Attorney General of New Hampshire acting pursuant to legislative authority to investigate subversive activities.[76] Although *Sweezy* technically was a due process case,[77] in dicta the Court recognized a broader concept of education at the university level—one that stressed education's value to the individual student.

Emphasizing academic freedom, *Sweezy* evinced the Court's initial adoption of an "analytical" model—closely paralleling the progressive model—for higher education that focused on student growth and development through wide exposure to diverse ideas and beliefs.[78] The plurality recognized that academic freedom in American universities was necessary to ensure an active, vital culture.[79] The Court reaffirmed the progressive ideology for higher education in *Keyishian v. Board of Regents*.[80] In *Keyishian* the Court stated that academic freedom is "a special concern of the first amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the 'marketplace of ideas.' "[81]

The inculcative mission of primary and secondary public education—to instill in children society's values—directly conflicts

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75. 354 U.S. 234 (1957). *But see* Adler v. Board of Educ., 342 U.S. 485 (1952) (upholding loyalty oath requirement for teachers in New York puhlic schools and colleges).

76. The post-World War II anticommunist movement in the United States precipitated the passage of loyalty oath statutes at hoth the federal and state levels. Legislatures designed these oath requirements to purge public agencies and private associations of all "subversive influences." *See generally* R. BROWN, LOYALTY AND SECURITY (1972).

77. 354 U.S. at 254-55. The Court reversed the contempt conviction because the attorney general had no authority to elicit the information from the professor, thereby violating due process.

78. *See* Keiter, *Judicial Review of Student First Amendment Claims: Assessing the Legitimacy-Competency Debate*, 50 Mo. L. REV. 25, 50 (1985).

79. 354 U.S. at 250. Justice Frankfurter's concurrence posited an explicitly progressive ideology that characterized the university by its "spirit of free inquiry, its ideal being the ideal of Socrates . . . . This implies the right to examine, question, modify or reject traditional ideas and beliefs." *Id.* at 262 (Frankfurter, J., concurring) (quoting T.H. Huxley). Justice Frankfurter was the principal advocate of academic freedom in the cases in which he participated. *See, e.g.*, Wieman v. Updegraff, 344 U.S. 183, 194 (Frankfurter, J., concurring).

80. 385 U.S. 589 (1967). In *Keyishian* the Court invalidated on vagueness grounds a New York loyalty oath requirement for university professors that required them to certify that they were neither teaching "subversive ideas" nor memhers of any subversive group. In contrast to the progressive ideological dicta in the majority opinion, Justice Clark's dissenting opinion stressed the state's duty to screen teachers because they "shape[] the attitude of young minds towards the society in which they live." *Id.* at 624 (Clark, J., dissenting) (quoting Adler v. Board of Educ., 342 U.S. 485, 493 (1952)).

81. 385 U.S. at 603.

with higher education's notion of academic freedom as the true marketplace of ideas where students are exposed to diverse influences. Historically, the inculcation of values plays a much less important role in higher education.[82] This traditional dicotomy between primary and secondary public education and higher public education results from the perceived goals of each level and the differing characteristics of the pupils. Courts generally view high school students as less mature than their university counterparts and, therefore, less capable of coping with a progressive marketplace of ideas.[83] Despite these differences, in the aftermath of the *Sweezy* and *Keyishian* decisions, the Court soon began to apply the progressive ideology to primary and secondary public education.

2. Primary and Secondary Public Education: Adoption of the Progressive Ideology

Although earlier opinions foreshadowed the adoption of the progressive ideology for primary and secondary public education,[84] the Court did not implicitly embrace this ideology until the 1968 decision of *Tinker v. Des Moines School District.*[85] In *Tinker* a

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82. *See* Goldstein, *Reflections on Developing Trends in the Law of Student Rights*, 118 U. PA. L. REV. 612, 614 (1970). The Court accepted the constitutional validity of inculcation in lower public education in *Barnette* by contrasting the impermissible compulsory flag salute statute with the valid means of "teaching by instruction and study" to achieve the same end. *Barnette*, 319 U.S. at 631 (quoting with approval Minersville School Dist. v. Gobitis, 310 U.S. 586, 604 (1940) (Stone, C.J., dissenting)).

83. The Court has relied on the assertedly greater impressionability and vulnerability of secondary pupils, as compared to university students, to justify dissimilar treatment of the two groups. *See, e.g.*, Tilton v. Richardson, 403 U.S. 672 (1971) (relying on difference in susceptibility to indoctrination between pupils at lower and higher levels to uphold governmental grants to sectarian colleges while striking grants to sectarian lower schools).

Generally, the Court has identified and relied on the following characteristics of children to conclude that children's constitutional rights are not coextensive with those of adults: (1) "the peculiar vulnerability of children; [(2)] their inability to make critical decisions in an informed, mature manner; and [(3)] the importance of the parental role in child rearing." Bellotti v. Baird, 443 U.S. 622, 634 (1979). The Court, however, is equally capable of assuming away these differences when the decision at hand requires. *See infra* note 199. Moreover, high school students are in many ways politically well-developed and capable of handling sensitive subjects. *See generally* H. HYMAN, POLITICAL SOCIALIZATION (1959); F. GREENSTEIN, CHILDREN AND POLITICS (1969); R. HESS & J. TORNEY, THE DEVELOPMENT OF POLITICAL ATTITUDES IN CHILDREN (1967).

84. In the loyalty oath cases the Court began to include dicta treating the interest of teachers in free inquiry and debate at both the high school and college levels as identical. *See, e.g.*, Wieman v. Updegraff, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring); Shelton v. Tucker, 364 U.S. 479, 487 (1960).

85. 393 U.S. 503 (1969).

group of students and parents decided to publicize their objections to the Vietnam War by wearing black armbands. The principals of the Des Moines schools discovered the plan and adopted a policy mandating suspension for any student continuing to wear an armband after a request to remove it. The school suspended three students for wearing the prohibited armbands; the students brought a Section 1983 action seeking nominal damages and an injunction restraining school officials from enforcing their policy.

The Court concluded that the regulation unconstitutionally denied the students' rights of expression.[86] The majority opinion[87] stated that teachers and students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"[88] and cited many higher education precedents as authority.[89] The *Tinker* Court, however, did not balance the speech interests involved against an indoctrinative interest, sacrificing one to protect the other. Instead, the Court viewed the protection of student speech as important *because* of its educational value.[90] The Court saw communication among students and the accompanying controversy as an important aspect of the educational process worthy of protection. This view implicitly endorsed John Dewey's progressivist philosophy of education,[91] which states that school authorities should encourage students to participate in the learning process.[92] Under the progressive ideology, conflict generated through student-environment interaction is essential to continued growth.[93] To this end, the *Tinker* Court enunciated a "noninterference principle," allowing limitation of student expression only if the expression interfered significantly with the school's operation.[94]

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86. According to Professor Diamond, one problem with the *Tinker* decision is that the Court's acknowledgement of the constitutional rights of children was actually the end of its analysis rather than a starting point upon which the Court could graft limitations. This resulted in an undervaluation of the inculcative purposes behind the public school system. Diamond, *supra* note 29, at 491, 498.

87. Justice Fortas' majority opinion was joined by Chief Justice Warren and Justices Douglas, Brennan, and Marshall. Justices White and Stewart each filed separate concurring opinions and Justices Black and Harlan filed separate dissents.

88. *Tinker*, 393 U.S. at 506.

89. *See id.* at 506-07.

90. *See* Note, *supra* note 64, at 531-32; *see also supra* note 13 and accompanying text.

91. Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321, 340 (1979).

92. *See* J. DEWEY, *supra* note 41, at 41-53.

93. *See* Kohlberg & Mayer, *supra* note 18, at 454-55.

94. *See* Note, *supra* note 64, at 532. A student "may express his opinions . . . if he does so without 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others." *Tinker*, 393 U.S. at 513 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir.

In implicitly applying Dewey's progressive ideology to primary and secondary public education, the Court discounted both the inculcative interest of the state and the alleged immaturity of students at the secondary educational level—factors that support a disparate treatment between higher and lower public education. The *Tinker* Court described the relationship between the student and the state as reciprocal rather than inculcative,[95] and as a relationship characterized by a robust exchange of ideas extending to all aspects of the school environment[96] and serving both individual students' interests and broader societal interests.[97] By imposing no age or maturity limitations on the exercise of student expression,[98] the majority assumed that all students may benefit from and contribute to this exchange of ideas without also assuming that children have a full capacity for individual choice.[99] Furthermore, by

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1966)). This principle would make little sense if the *Tinker* Court viewed the inculcation of community values and beliefs as an important goal of education. Note, *supra* note 64, at 532.

95. "Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." 393 U.S. at 511. This is suggestive of the dialectical process of learning under the progressive ideology.

96. The *Tinker* Court stated:

> "The principle of these cases [*Meyer, Keyishian,* and *Shelton*] is not confined to the supervised and ordained discussion which takes place in the classroom. . . . A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria . . . or on the campus during authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam . . . ."

Id. at 512. For the antithesis of this statement, see the discussion of *Fraser, infra* notes 169-206 and accompanying text, in which the Court held that the *inculcative* mission of the school extends beyond the classroom.

The plurality opinion in *Board of Education v. Pico*, 451 U.S. 853 (1982), represents a compromise between these two positions. *See infra* notes 154-60 and accompanying text.

97. Exposure to diverse ideas and cognitive conflict encourages maximum individual growth and also better prepares students for the problems they face as adults in a democratic society. *See* Keiter, *supra* note 78, at 51-52.

98. Although the petitioners in the *Tinker* case were children aged 13, 15, and 16 years old, the Court was aware that students as young as 8 and 11 years old were involved in the armband protest. *See Tinker*, 393 U.S. at 516 (Black, J., dissenting).

99. Justice Stewart included the caveat that the state may, "at least in some precisely delineated areas," deny children some first amendment rights because of their lack of full capacity for individual choice. *Id.* at 515 (Stewart, J., concurring) (quoting Ginsberg v. New York, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring)). This demonstrates that the Court could prohibit school authorities from stopping the armband protest without also stating that children have this full capacity. *See* Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their Rights*, 1976 B.Y.U. L. REV. 605, 645. Therefore, the immaturity of secondary school students lends little support to the cultural transmission ideology at that level and may in fact be a justification for

imposing the noninterference principle and accepting the value of maximum student discourse, the majority implicitly rejected discipline in and of itself as one of the goals of education.[100]

This rejection of discipline particularly bothered Justice Black who, in dissent, disagreed with the majority's discussion of every issue in the case, fearing the decision transferred control of the public schools from elected officials to the Supreme Court.[101] Justice Black espoused the cultural transmission theory implemented through local control. According to Justice Black, student speech played no role in the educational process[102] because that process consisted of the passive intake of knowledge by immature children.[103] Student speech simply distracted from the true learning process; therefore, local school authorities should have the power to determine the scope of student speech rights.[104] Justice Black argued that learning discipline is an important part of a child's education.[105] Moreover, he realized that any implicit rejection of the discipline goal might lead to the corollary decision that students are capable of self-governance.[106]

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restrictions on government inculcation (*i.e.*, government speech). *Cf.* Shiffrin, *supra* note 32, at 647 (arguing that academic freedom should be strongest at lower educational levels); Yudof, *supra* note 32, at 874-82 (proposing dispersal of the power over curriculum).

100. Berkman, *Students in Court: Free Speech and the Functions of Schooling in America*, 40 HARV. EDUC. REV. 567, 580-81 (1970); Garvey, *supra* note 91, at 340.

101. *Tinker*, 393 U.S. at 515 (Black, J., dissenting).

102. "[P]ublic schools . . . are operated to give students an opportunity to learn, not to talk politics by actual speech, or by 'symbolic' speech." *Id.* at 523-24 (Black, J., dissenting). Under Justice Black's view "learning" and student speech are mutually exclusive.

103. Justice Black stated that children are not sent to school to state their views because they bave "not yet reached the point of experience and wisdom which [would enable] them to teach all of their elders. . . . [T]axpayers send children to school on the premise that at their age they need to learn, not teach." *Id.* at 522.

Under the majority's progressive ideology, the speech activities of students are not valuable because they enlighten the public or educate adults; instead, student speech and student-environment interaction are valuable because they aid students in developing their *own* formations of opinion and belief and expose them to the more sophisticated ideas of students at higher developmental stages, thereby stimulating their own ascention to those levels. *See supra* note 52 and accompanying text.

The majority in *Fraser* later recognized the effects of this interaction between more sophisticated older students and younger ones from an inculcative perspective. Older students serve as role models, which means that their speech should be strictly controlled to ensure inculcation of the proper behavior in younger students. *See infra* notes 192-93 and accompanying text.

104. *Tinker*, 393 U.S. at 524 (Black, J., dissenting).

105. Justice Black maintained: "School discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens." *Id.*

106. "I wish . . . wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control

Justice Harlan's dissent in *Tinker* also focused on the need for discipline to answer the broader questions of the Court's role in reviewing the decisions of school officials, the first amendment rights of schoolchildren, and the value of student contribution to the educational process. Justice Harlan would allow school officials great discretion to maintain discipline and would place the burden on complaining parties to demonstrate that a particular action by those officials was "motivated by other than legitimate school concerns."[107] The Court later adopted, in its retreat from *Tinker*, the *Tinker* dissenters' emphasis on discipline as a goal of education and their deferential standard of review.[108]

The *Tinker* Court's implicit adoption of the progressive ideology[109] and its imposition of the substantial disruption requirement struck a realistic balance between indoctrinative and individualistic interests in the school environment. By preserving the rights of students to express their views on controversial subjects, the Court ensured an interactive school environment with an appropriate amount of conflict and discussion.[110] The *Tinker* Court banned government suppression of student expression because interaction among students, as long as no disruption results, is part of the edu-

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of the American public school system to public school students." *Id.* at 526. The implicit assertion in *Tinker* that students are self-governing undermines the immaturity of children as a rationale for the disparate treatment between students in higher and secondary puhlic education.

107. *Id.* at 526 (Harlan, J., dissenting). Nonlegitimate motivations include "a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion." *Id.* Justice Harlan's dissent exemplified the deferential stance traditionally taken by the Court to review local school decisions under a standard of reasonableness in light of educational purposes. *Tinker*, however, implies that these decisions must now satisfy national constitutional standards. Diamond, *supra* note 29, at 500.

108. *See infra* notes 201-03 and accompanying text.

109. *But cf.* 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, 12-13 (1984). Freeman states that, dicta to the contrary aside, the *Tinker* majority protected only speech that did not affect classroom activity. Therefore, "[i]f the speech becomes controversial and initiates debate in the classroom [as would be expected under a marketplace of ideas model], it loses its First Amendment protection." *Id.* at 12.

Justice Fortas' opinion, however, emphasized student interaction and expression as a component of the educational process and allowed such expression maximum fiexibility by tying its denial to a physical *disruption* standard, *see Tinker*, 393 U.S. at 508-09 (citing Terminiello v. Chicago, 337 U.S. 1 (1949)), rather than tying it to a *diversion* standard as advocated by Justice Black, *see* 393 U.S. at 518 (Black, J., dissenting). Although a "pure" progressive ideology would require total freedom of inquiry in the classroom and, therefore, exceed the rights identified in *Tinker*, such a directionless "palm-tree" system of education is neither practical nor desirable. *See* J. DEWEY, *supra* note 41, at 23-40.

110. Under the progressive ideology such conflict is essential for growth. *See* Kohlberg & Mayer, *supra* note 18, at 454.

cational process and enhances the growth potential of students.[111] The Court, however, did not abandon local control[112] and inculcative interests altogether; the state's power to prescribe the curriculum and hire teachers remained intact. *Tinker* accepted the progressive ideology, with the caveat of limited curricular value inculcation,[113] and laid down a bright-line progressive model for public education from which the Court has steadily retreated.[114]

C. *The Retreat from* Tinker *to a "Rough Accommodation" Between Inculcation and Individualism:* Goss, Ambach, Plyler, *and* Pico

1. *Goss'* Split of Opinion

Within three years of the 1969 *Tinker* decision, four seats on the Court changed.[115] As a result of these changes, the Court's attitude began to shift from progressivism to cultural transmission. The five to four decision in *Goss v. Lopez*[116] demonstrated the court's sharp division over the proper role of education in society.[117]

In *Goss* the Court extended due process protections to school suspension decisions and implicitly endorsed the participatory rights of students.[118] Students' constitutional rights could not be denied, according to the majority, absent due process protections

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111. No justification exists, other than the contribution of free speech to the child's development and growth, for the Court's recognition of children's greater free speech rights. Garvey, *supra* note 91, at 338.

112. *But see* Diamond, *supra* note 29, at 507.

113. *See* Freeman, *supra* note 109, at 14.

114. *See infra* notes 115-206 and accompanying text; *see also* Diamond, *supra* note 29, at 525.

115. Justice Burger replaced Chief Justice Warren, Justice Powell replaced Justice Black, Justice Blackmun replaced Justice Fortas, and Justice Rehnquist replaced Justice Harlan.

116. 419 U.S. 565 (1975).

117. Chief Justice Warren was a member of the *Tinker* majority while his replacement, Chief Justice Burger, was among the dissenters in *Goss* who advocated a cultural transmission ideology; Justice Fortas was the author of the *Tinker* majority opinion while his successor, Justice Blackmun, also joined the dissenters in *Goss*. Justice Black's replacement by Justice Powell and Justice Harlan's replacement by Justice Rehnquist did not bring new stances on education to the Court because the successors dissented in *Goss* as their predecessors had dissented in *Tinker*.

118. *Goss* was a class action suit brought by a number of Columbus, Ohio public school students for review of their suspensions imposed under an Ohio statute that permitted student suspensions for misconduct for up to 10 days without a hearing. The students claimed that their suspensions without hearings violated due process. *Goss*, 419 U.S. at 567.

such as prior notice and opportunity for a hearing.[119] The majority opinion did not address directly the role of education, but upheld the interactive rights of students and endorsed the belief that truth best will be discovered if the student is given an opportunity to meet the charges.[120] Thus, the *Goss* majority adhered to the progressive interactional process of education by refusing to stress the inculcative nature of public education.

Unlike the majority, Justice Powell's dissent, which was joined by three other Justices,[121] did not "analogize" the rights of minors to those of adults.[122] Instead, the dissent emphasized cultural transmission[123] to support its position that students were not entitled to a hearing. Justice Powell, once a school board member himself,[124] placed great weight on the benefits of local control and the traditionally inculcative nature of public education.[125] For Justice Powell, who saw teaching obedience to students as a meaningful part of the educational process,[126] the individual student's interest and need for discipline justified greater restraint on student rights. Regardless of his justifications, Justice Powell's opinion repre-

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119. Notwithstanding the fact that public education is not constitutionally mandated, Justice White's majority opinion stated that a statutory grant of a right to public education is a protected "property" interest under the due process clause. Due process, therefore, must be observed whenever a school suspends a student for whatever reason. *Id.* at 574.

120. *Id.* at 580.

121. Chief Justice Burger and Justices Blackmun and Rehnquist joined Justice Powell's opinion.

122. *Goss*, 419 U.S. at 591 (Powell, J., dissenting). The constitutional status of minors is linked closely to the Court's view of the role of education in society and, in fact, may be an antecedent question. If the Court sees minors as autonomous and sufficiently mature to handle significant responsibility, the school environment can be less inculcative. Conversely, if the Court sees children as incompetent and in need of protection, their rights can be greatly circumscribed in a highly inculcative educational environment. Justice Stewart raised this question in his *Tinker* concurrence. 393 U.S. at 514-15 (Stewart, J., concurring). *See generally* Hafen, *supra* note 99, at 605.

123. *See supra* notes 19-34 and accompanying text.

124. Justice Powell served as president of both the Richmond School Board and the State Board of Education of Virginia during the period when Virginia was undergoing desegregation. Urofsky, *Mr. Justice Powell and Education: The Balancing of Competing Values*, 13 J.L. & EDUC. 581, 582 (1984).

125. Justice Powell consistently has stressed value inculcation as the primary goal of education. *See* Board of Educ. v. Pico, 457 U.S. 853, 896 (1982) (Powell, J., dissenting); Plyler v. Doe, 457 U.S. 202, 236-41 (1982) (Powell, J., concurring); Ambach v. Norwick, 441 U.S. 68, 80-81 (1979); Goss v. Lopez, 419 U.S. 565, 593 (1975) (Powell, J., dissenting).

126. *Goss*, 419 U.S. at 593 (Powell, J., dissenting). Justice Powell stated:

> The lesson of discipline is not merely a matter of the student's self-interest in the shaping of his own character and personality. It provides an early understanding of the relevance to the social compact of respect for the rights of others. The classroom is the laboratory in which this lesson of life is hest learned.

Id.

sented a renewed adherence by four members of the Court to a cultural transmission theory of education,[127] at least when student speech rights were not involved directly and the students were still in high school.[128] The *Goss* five to four split began a retreat from

127. Three of the four *Goss* dissenters, Justices Powell, Burger, and Rehnquist, continued to uphold the cultural transmission ideology through their dissents in *Ambach v. Norwick*, 441 U.S. 68 (1979), and *Board of Education v. Pico*, 457 U.S. 853 (1982), and their membership in the *Fraser* majority. *See infra* notes 179-203 and accompanying text.

Although this Note examines the Court's attitude toward education, the cases used to demonstrate this attitude implicate different constitutional interests that might influence the Court to find one way or the other regardless of the educational ideology most supportive of a particular decision. The dicta concerning the proper role of education may change with the issues presented in the underlying case. For example, *Tinker* concerned the expressive rights of children supported by parental authority in circumstances that did not threaten the state's interest in classroom inculcation. This situation allowed Justice Fortas to emphasize the progressive aspects of the case. *See* Freeman, *supra* note 109, at 12-13. On the other hand, *Ambach* concerned primarily the state's ability to select those through whom it would inculcate children and did not present an issue of suppression of ideas or student expression. These facts enabled Justice Powell to include a fair amount of dicta concerning the importance of inculcation. *See infra* notes 131-36 and accompanying text.

The facts of the recent *Fraser* case raise two issues simultaneously: the speech interest of a student and the exposure of a minor to indecent or profane language. Thus, the Court's emphasis on inculcation simply could be a response to this situation involving indecent material. The Court in *Fraser*, however, appeared to have gone beyond the necessary rationale for the decision and intentionally commented on the indoctrinative nature of education as a rationale for its decision. *See infra* notes 179-203 and accompanying text.

128. While adopting primarily a cultural transmission ideology at the secondary level, Justice Powell at the same time adhered to a progressive ideology for higher public education, as did the Court as a whole. In his majority opinion in *Healy v. James*, 408 U.S. 169 (1972), Justice Powell refused to allow a college to deny recognition to a student organization when that decision was based solely upon a disagreement with the group's philosophy and an unsupported fear of disruption. Justice Powell stated that "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom." *Id.* at 180-81 (citing *Keyishian* and *Sweezy*).

Justice Douglas joined the majority in *Healy* but wrote a separate opinion that upheld a progressive model for higher education and lamented the placid life of college campuses as indicative of the "sickness of our academic world." *Id.* at 197 (Douglas, J., joining opinion of the Court). He rejected the traditional concept of education that "conceive[s] of the minds of students as receptacles for the information which the faculty have garnered over the years. . . .[where] [e]ducation is commonly thought of as the process of filling the receptacles with what the faculty in its wisdom deems fit and proper." *Id.* at 196.

The *Healy* Court's critique of higher education as "placid" supports the notion that the cultural transmission ideology should not be a basis for the Court's decisions at the secondary level. Children who are subjected to heavy value inculcation and associationist learning in an unchallenging atmosphere at the secondary level will not suddenly challenge their professors and stir up controversy upon reaching college. Furthermore, students who were not encouraged to articulate their views on controversial subjects at the secondary level will have little to say when they reach college and actually engage in the marketplace of ideas. If academic inquiry at the level of higher education is to be productive, the secondary school needs to provide the student with tools to take advantage of higher education's "marketplace."

the progressive ideology that characterized the Court's *Tinker* opinion.

2. *Ambach* and *Plyler* Embrace Inculcation

In *Ambach v. Norwick*,[129] an equal protection case, the Court explicitly embraced the value-laden nature of public school education under the cultural transmission ideology. Justice Powell's majority opinion stressed the inculcative nature of public education as a ground for upholding a New York education law forbidding certification of a public schoolteacher who had not manifested an intent to apply for citizenship.[130] Justice Powell found that public schools prepare individuals for participation as citizens and preserve societal values.[131] He neglected to mention, however, any self-fulfillment or growth-enhancing functions of education beyond those necessary to effectuate preparation for participation in democratic society. Furthermore, according to Justice Powell, numerous "authorities" have found public schools to be an "assimilative force,"[132] bringing together diverse elements of society.[133] Justice Powell relied on social scientists to confirm this recognition of the inculcative functions of public schools.[134]

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129. 441 U.S. 68 (1979).

130. This equal protection challenge to the citizenship requirement for teachers hinged upon whether the job of a public schoolteacher came within the "governmental function" principle. Under this principle, the state may impose a citizenship requirement on persons carrying out a governmental function only if a rational relationship exists between the requirement and a legitimate state interest. *See* Sugarman v. Dougall, 413 U.S. 634, 647 (1973) (holding citizenship requirement appropriate to positions that "go to the heart of representative government"); *see also* Foley v. Connelie, 435 U.S. 291, 297 (1978). Previously, the Court had held classifications based on alienage inherently suspect and subject to close judicial scrutiny. Graham v. Richardson, 403 U.S. 365, 372 (1971). Justice Powell looked to the role of public education to determine whether teaching constituted a governmental function. *Ambach*, 441 U.S. at 75.

131. *Ambach*, 441 U.S. at 76.

132. *Id.* at 77. Contrast this with the language of *Tinker*: "[S]tate-operated schools may not be enclaves of totalitarianism. . . . [S]tudents may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. . . . [T]his Nation [has repudiated] the principle that a State might so conduct its schools as to 'foster a homogeneous people.' " 393 U.S. at 511 (citations omitted).

133. In support of this proposition Justice Powell cited John Dewey's *Democracy and Education*. Dewey recognized the need for a *directive* force in education in order to ensure the active participation and cognitive development of the student. Dewey, however, advocated only a guiding force to ensure growth, not an inculcative force to promote associationist learning. *See* J. DEWEY, *supra* note 41, at 49-53; *cf.* Kohlberg & Mayer, *supra* note 18, at 472-476 (stating progressive ideology is nonindoctrinative).

134. For a discussion of the social science data relied upon hy the majority to support the role of political socialization and inculcation in the public schools, see Note, *Aliens' Right to Teach: Political Socialization and the Public Schools*, 85 YALE L. J. 90 (1975).

Teachers transmit fundamental values and influence attitudes of children toward government, falling within the governmental function of an inculcative system of education. Therefore, according to Justice Powell, the state legitimately could exclude noncitizens from serving as teachers/role models hecause they are not members in the franchise. Although commentators differ over the significance of Justice Powell's emphasis on inculcation and cultural transmission in *Ambach*,[135] none of the Justices in the decision expressed any doubt that education should serve to inculcate citizenship values.[136]

In *Plyler v. Doe*,[137] another equal protection case, the Court invalidated a Texas law denying free public education to children of illegal aliens.[138] The *Plyler* plurality opinion echoed much of the *Ambach* language in which the Court characterized schools as a "socializing institution"[139] for "transmitting 'the values on which our society rests.' "[140] Political socialization through education was so important to the *Plyler* Court that the popular majority could not deny its value.[141]

Ambach and *Plyler* are the Court's most enthusiastic acceptances of state indoctrinative goals; neither decision, however, presented questions of direct inculcation of values or beliefs under the cultural transmission ideology. *Ambach* did not concern direct suppression of student ideas or expression and may be viewed as upholding the right of the state to select those persons it feels best advocate citizenship values while leaving the progressive educational process intact.[142] Similarly, *Plyler* simply upheld the right of illegal alien children to attend school. Notwithstanding these possible limitations, the Court specifically embraced the methodology of

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135. Professor Diamond categorizes *Ambach* as an endorsement by the Court of an all-encompassing inculcative role of education, "cast[ing] serious doubt on the appropriateness of extending *Tinker* beyond its facts." Diamond, *supra* note 29, at 528. In contrast, the author of a student note sees *Ambach* as an acceptance of only those indoctrinative goals that are "general . . . system-supporting . . . [and] consistent with the self-government ideal" and, therefore, not inconsistent with *Tinker*. Note, *supra* note 64, at 524.

136. *Ambach*, 441 U.S. at 85-86 & n.6 (Blackmun, J., dissenting).

137. 457 U.S. 202 (1982).

138. *Id.* at 230.

139. *Id.* at 222 n.20.

140. *Id.* at 221 (quoting *Ambach*, 441 U.S. at 76).

141. *See* Note, *supra* note 64, at 524-25. Although accused of applying a "quasi-fundamental-rights" analysis by the dissent, *see* 457 U.S. at 244 (Burger, C.J., dissenting), Justice Brennan and the plurality firmly denied that public education was a fundamental right. *Id.* at 221 (citing San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35 (1933)).

142. *Cf.* Note, *supra* note 64, at 524 n.95 (advocating a citizenship requirement but deploring ideological tests for teachers because of benefits from diversity).

"inculcation," which is the trademark of cultural transmission. Furthermore, the Court's emphasis on the teacher as a role model[143] implies that students should not be taught by noncitizens because children learn by example and association rather tban by open presentation of conflicting viewpoints and ideas.

3. *Pico's* Rough Accommodation

In *Board of Education v. Pico*[144] the Court faced, for the first time since *Tinker*, the question of direct inculcation and suppression of ideas in the public school environment. The *Pico* decision illustrates the Court's disagreement over the proper role of education[145] and its pre-*Fraser* rough accommodation between individualistic and indoctrinative aspects of education. In *Pico*, five New York high school students challenged a suburban New York school board's decision to remove certain "objectionable" books from its schools' libraries.[146] The Court's opinion reflects the divergence of opinion on this issue in the lower court decisions.[147] The *Pico* case

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143. The Court again employs the concept of the role model in the *Fraser* case as a justification for greater restrictions on the speech of older students. *See infra* notes 192-93 and accompanying text.

144. 457 U.S. 853 (1982).

145. The *Tinker* decision spawned an avalanche of first amendment student rights suits whose reasoning demonstrated the lower courts' inability to develop a coherent analytical framework as well. *See* Note, *supra* note 64, at 498 n.7.

146. Three school board members obtained lists of books described as "objectionable" and "improper fare for students" at a conference sponsored by a politically conservative organization. Acting on the advice of these members, the board directed that school libraries remove and deliver any listed books to the board for review. Nine books were removed from a high school library, one from a junior high library, and one from the curriculum of a twelfth grade literature class. *Pico*, 457 U.S. at 856 & n.3. The board justified its decision to remove "anti-American, anti-Christian, anti-sem[i]tic, and just plain filthy" books based on its duty to protect the children from "this moral danger." *Id.* at 857. After appointing a book review committee whose recommendations were largely ignored, the board returned only one book to the high school library without restriction.

147. The district court opinion, *Pico v. Board of Education*, 474 F. Supp. 387 (E.D.N.Y. 1979), *rev'd*, 638 F.2d 404 (2d Cir. 1980), *aff'd*, 457 U.S. 853 (1982), stressed the primarily indoctrinative role of public education and the impropriety of judicial intervention infringing on the elected school board's discretion. 474 F. Supp. at 396. The court found that the school board's action "did not sharply and directly implicate basic first amendment values." *Id.* at 398.

This language derives from *Epperson v. Arkansas*, 393 U.S. 97 (1968), in which the Supreme Court held unconstitutional an Arkansas statute that forbade the teaching of evolution in public schools and colleges. The Court, per Justice Fortas (the author of the *Tinker* majority opinion), stated that courts should intervene in the daily conflicts of public education only when basic constitutional values are directly involved because "public education in our Nation is committed to the control of state and local authorities." *Id.* at 104. The Court recognized, however, the importance of "vigilant protection of constitutional freedoms" in the public schools, but declined to enter the "difficult terrain" of *Meyer* and re-

presented two state interests that conflicted with the first amendment rights of students under the progressive ideology: (1) the inculcative interest of public educators and the school board's proper role in determining which values will be part of the curriculum; and (2) the school authority's interest in protecting children from vulgar and indecent—and therefore educationally worthless—materials.[148] As evidenced by the six opinions in the case,[149] and the fact that the prevailing side in *Pico* won by a single vote with no majority opinion,[150] the Court itself was unable to define the scope of state indoctrinative powers.[151]

Notwithstanding this confusion and the Justices' differing perceptions of public education, every Justice implicitly adopted, in varying degrees, the cultural transmission ideology.[152] The differ-

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lated cases because the Court resolved the case on establishment clause grounds. *Id.* at 104-05 (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

In contrast, the court of appeals split two to one in *Pico*. Judge Sifton, writing for the court, found the school board's actions suspiciously irregular, indicating the possibility that board members had acted to suppress free speech. 638 F.2d at 417-18. Judge Newman concurred in the result because he determined a trial was necessary to resolve the factual question of the school board's motives for the removal decision. *Id.* at 436-37 (Newman, J., concurring). Judge Mansfield dissented, confidently stating that the board removed the books because of their vulgar and sexually explicit contents. *Id.* at 427-29 (Mansfield, J., dissenting).

148. For a discussion of minors' exposure to indecent material, see *infra* note 165.

149. Chief Justice Burger and Justices Brennan, Blackmun, White, Powell, and Rehnquist all filed separate opinions. Justice O'Connor wrote a separate two paragraph opinion in which she joined the Chief Justice's dissent.

150. Justice Brennan wrote the plurality opinion and was joined by Justices Marshall and Stevens. Justice Blackmun filed a separate opinion concurring in part and concurring in the judgment. Justice White also filed an opinion concurring in the judgment.

151. One commentator stated that "the Supreme Court had the opportunity to adopt the . . . view that freedom of expression imposes substantive constitutional limitations on the public schools' inculcative function. Unfortunately, it failed to do so." Gordon, *supra* note 17, at 576.

152. Justice Brennan, writing for the plurality, stated "that public schools are vitally important . . . as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system.'" 457 U.S. at 864 (quoting *Ambach*, 441 U.S. at 76-77). Justice Blackmun stated in his concurrence that "[i]t . . . seems entirely appropriate that the State use 'public schools [to] . . . inculcat[e] fundamental values necessary to the maintenance of a democratic political system.'" *Id.* at 876 (Blackmun, J., concurring)(quoting *Ambach*, 441 U.S. at 77). Chief Justice Burger asked the question "[h]ow are 'fundamental values' to be inculcated except by having school boards make content-based decisions about the appropriateness of retaining materials in the school library and curriculum[?]" *Id.* at 889 (Burger, C.J., dissenting). Justice Powell emphasized local control in objecting to the plurality's acceptance of inculcation and "[y]et when a school board, as in this case, takes its responsibilities seriously and seeks to decide what the fundamental values are that should be imparted, the plurality finds a constitutional violation." *Id.* at 896 (Powell, J., dissenting). Finally, Justice Rehnquist, in his dissent, drew a distinction between the government acting as an educator and the government acting as a sovereign: "When it acts as an educa-

ences in opinion arose over the scope and means of defining the state indoctrinative interest. This adoption of value inculcation became more explicit and all encompassing in the *Fraser* opinion.[153]

The plurality created a dilemma from which it extricated itself only by reaching a tortured accommodation between cultural transmission and progressivism. The plurality recognized both a broad right of the school to inculcate values[154] and an equally broad individualistic interest in free inquiry referred to as the "right to receive information and ideas."[155] To resolve this conflict, the plurality posited that the school library serves a different educational goal than the rest of the school.[156] Although the school board "might well defend their claim of absolute discretion in matters of *curriculum* by reliance on their duty to inculcate community values,"[157] the library, as a place for the student "to test or expand upon ideas presented to him, in or out of the classroom,"[158] serves a unique role as "the principal locus of . . . freedom . . .

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tor, at least at the elementary and secondary school level, the government is engaged in inculcating social values and knowledge. . . ." *Id.* at 909 (Rehnquist, J., dissenting).

153. *See infra* notes 179-93 and accompanying text.

154. *See supra* note 103.

155. *Pico*, 457 U.S. at 867 (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969)). The Court first recognized the "right to receive information and ideas" outside the educational field and then developed it to protect the flow of knowledge and ideas to recipients of communications. *See* M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.09[B] (student ed. 1984); Recent Development, *Removal of Public School Library Books: The First Amendment Versus the Local School Board*, 34 VAND. L. REV. 1407, 1412-15 (1981); *see also* Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1.

Justice Brennan's plurality opinion in *Pico* argued that this right to receive ideas is particularly applicable to the school environment because access to ideas "prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members." 457 U.S. at 868.

156. *See generally* Note, *supra* note 64, at 510-11 (identifying plurality's "difficult position").

157. *Pico*, 457 U.S. at 869 (emphasis in original). *But cf. Tinker*, 393 U.S. at 512 (quoting *Keyishian*, 385 U.S. at 603) (public school classroom is "marketplace of ideas").

Brennan was careful to limit the breadth of the *Pico* decision by specifically excluding inquiry into the school board's discretion to prescribe the curriculum, the school's control of the classroom and compulsory courses, and any decisions involving the *acquisition* of books. *Pico*, 457 U.S. at 862. Although preserving the progressive ideology in the library, Justice Brennan's opinion does not curtail the extensive inculcation occurring in all other areas of the school environment. *See* Note, *supra* note 64, at 511. The principles articulated in the *Pico* plurality opinion are not limited to book removal and Justice Brennan's distinction between removal and acquisition has been criticized. *See, e.g., Pico*, 457 U.S. at 916 (Rehnquist, J., dissenting); Diamond, *supra* note 29, at 524. Moreover, it is difficult to accept the proposition that the school's relationship to the student changes simply because the student enters the library.

158. 457 U.S. at 869 (quoting Right to Read Defense Comm. v. School Comm., 454 F. Supp. 703, 715 (D. Mass. 1978)).

and the regime of voluntary inquiry that there holds sway."[159] The plurality, therefore, split the school environment into distinct areas of cultural transmission and progressivism.

According to the plurality, the library's nonindoctrinative role dictated that the school board could not remove books with the intent to limit student access to information and ideas. The validity of book removal decisions, therefore, turned on the board's motivation. If the board removed the books solely because of pervasively vulgar content or educational unsuitability, removal would be permissible. If, however, the school board removed the books to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,"[160] their actions would violate the students' first amendment rights. The plurality remanded the case because the evidence did not indicate the board's motivation for removal.

While the plurality, at least concerning the school library, protected the pure progressive ideology with its "right to receive," the dissenting Justices implicitly rejected this model and sought to define the outermost limits of permissible state indoctrination under the cultural transmission ideology. In his dissent, Chief Justice Burger articulated a fear that any recognition of a "right to receive ideas" would allow children and the federal courts to determine the content of education rather than parents and teachers acting through the politically accountable school board.[161] The only situa-

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159. *Id.* at 868-69. Justice Brennan tied the library to first amendment concerns using the rationale of student access to information and ideas. *Accord* Brown v. Louisiana, 383 U.S. 131 (1966).

160. *Pico*, 457 U.S. at 872 (quoting West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

161. Traditionally, the Court has been hesitant to intervene in educational disputes because it viewed the educational process as a local matter. The cultural transmission ideology supports this position and its corollary that if values and beliefs are to be inculcated, the appropriate body to carry out this function is the local school board. Therefore, the aggrieved student or parent should challenge unacceptable policies through the local political process rather than in the federal courts. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 104 (1968); *cf.* Keiter, *supra* note 78, at 55 (positing judicial nonintervention primarily upon cultural transmission ideology).

The assumption that school boards are truly representative of community values and are politically accountable to the community at large is questionable given the low voter turnout at most elections, the disproportionate influence of affluent voters and interest groups, and the low level of knowledge about educational matters in the community at large. *See* F. WIRT & M. KIRST, THE POLITICAL WEB OF AMERICAN SCHOOLS (1972); L. ZEIGLER & M. JENNINGS, GOVERNING AMERICAN SCHOOLS: POLITICAL INTERACTION IN LOCAL SCHOOL DISTRICTS (1974); Mann, *Participation, Representation and Control*, in THE POLITICS OF EDUCATION 74 (J. Scribner ed. 1977).

Further undermining the legitimacy of local control as a justification for judicial nonin-

tion in which Chief Justice Burger limited the school board's discretion in choosing values to transmit is an action by the board that places "direct external control on the students' ability to express themselves."[162] According to Justice Powell, the *Pico* decision would invite student challenges to educational decisions, result in further judicial intrusion into the operation of schools, and undermine schools as the primary vehicles for transmitting social values.[163] Justice Rehnquist articulated his acceptance of cultural transmission by characterizing any right of access as "contrary to

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tervention under the cultural transmission theory is the increasing state and federal involvement in educational matters traditionally handled at the local level. Keiter, *supra* note 78, at 57-58.

162. *Pico*, 457 U.S. at 886. The distinction Chief Justice Burger draws between direct suppression of student expression and refusal to convey information ignores the importance of access to ideas in the formation of belief and expression. Chief Justice Burger's position appears to allow the school board effectively to foreclose any meaningful student expression or discussion of controversial subjects by simply not providing the students with the information necessary to stimulate or conduct such discussion. The board could indirectly achieve the suppression of student expression by removing the "ammunition of discourse"—information and ideas. *Cf.* Gordon, *supra* note 17, at 540 (arguing that "[g]overnment's decision to halt access to information and ideas with which it disagrees implicitly imposes its own understanding of reality on children just as surely as does explicit communication of the government's point of view").

In response to this problem a numher of commentators have called for an expansion of first amendment theory to cover the *formation* of belief as well as its expression. *See, e.g.*, T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 3, 21 (1970) (stating that the present day concept of free expression includes the "right to form and hold beliefs and opinions"); Arons & Lawrence, *supra* note 14, at 312; *cf.* Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255-57 (emphasizing the importance of protecting the formation of belief).

Chief Justice Burger later abandons this dicotomy between impermissible inculcation through direct suppression of expression and acceptable inculcation through denial of access in his majority opinion in *Fraser* when the expressive rights of a student are also at issue. *See infra* note 185.

163. 457 U.S. at 896 (Powell, J., dissenting). *But cf. Barnette*, 319 U.S. at 641 (stating that "[p]robably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing").

Although the context of *Pico* was the removal of library books and not, as in *Barnette*, compulsion to adopt a particular belief, Justice Powell and the other dissenter's strong endorsements of local control and cultural transmission overlook the use of the books as a foil for values that the school should encourage by persuasion and example rather than by suppression of ideas. Under a progressive ideology the presentation of genuine value confiict results in growth of the child; therefore, exposure should not be restricted. *Cf.* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (stating that "if there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence"). *But cf.* Ginsberg v. New York, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring) (justifying limitation on speech because children are a captive audience); FCC v. Pacifica Found., 438 U.S. 726 (1978).

the very nature of an inculcative education."[164]

In contrast to the majority's application of the progressive ideology in the school library and the dissenting Justices' endorsement of the cultural transmission ideology, Justice Blackmun attempted to achieve a rough accommodation between ideologies by refusing to accept either total inculcation or complete freedom of inquiry. He recognized, and attempted to reconcile, the tension between legitimate socializing functions of education and the first amendment's bar against "prescriptions of orthodoxy."

According to Justice Blackmun, *Pico* set forth the narrow principle that school officials should be allowed to make a choice between books for "a host of other politically neutral reasons," including offensive language.[165] School officials, however, are prohib-

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164. *Pico*, 457 U.S. at 914-915 (Rehnquist, J., dissenting).

165. *Id.* at 880 (Blackmun, J., concurring). All memhers of the *Pico* Court acknowledged the school hoard's authority to remove books that are vulgar. *Id.* at 871-72 (plurality opinion); *id.* at 918-20 (Rehnquist, J., dissenting).

In contrast to the *Meyer-Tinker* line of cases extending constitutional protection to minors in the exercise of their first amendment rights stands a line of cases dating back to *Prince v. Massachusetts*, 321 U.S. 158 (1944), and including *Ginsberg v. New York*, 390 U.S. 629 (1968), *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), and *New York v. Ferber*, 458 U.S. 747 (1982), in which the Court was disinclined to extend such constitutional protection. In this line of cases the Court gave greater weight to the *Bellotti* factors, *see supra* note 83, the state's interest in educating its future citizens, and the rights of parents to control the communications their children receive.

Particularly in the area of obscene or vulgar communications the Court has upheld the states' efforts to regulate children's access to such materials. In *Ginsberg* the Court upheld a New York statute forbidding the sale to children under 17 of "girlie" magazines that were not obscene for adults. The Court approved a variable standard of obscenity for children based on the state's independent interest in assuring the growth of children into well-developed, productive citizens and parental efforts to ensure the child's well-being. 390 U.S. at 640, 639. Using these factors, the Court concluded that it was reasonable for the state to adopt a lower standard of obscenity for children who are less able to "determine for themselves what sex material they may read or see." *Id.* at 637.

More recently, the *Pacifica* Court upheld a restrictive regulation of vulgar speech likely to reach children. The *Pacifica* Court held that the FCC could impose sanctions on a radio broadcaster who transmitted George Carlin's "Filthy Words" monologue on the radio one afternoon. The Court's two-fold rationale was that broadcasting seriously intrudes upon the privacy of the home and routinely reaches impressionable young children. 438 U.S. at 748-49. Notwithstanding the fact that the language involved was not obscene, *id.* at 742, the Court rejected the defendant's argument that the first amendment protected the right to broadcast this material and based its decision in part upon concern for the possible presence of children in the audience. *Id.* at 749-50. The Court reiterated the government's interest in protecting the welfare of children and the government's ability to regulate speech directed toward children under the more fiexible *Ginsberg* standard. *Id.*

The *Ginsberg* line of cases, however, does not undercut the rationale of *Tinker* and its progeny. Because obscene material has no social value for adults and, therefore, is not entitled to first amendment protection, *see* Miller v. California, 413 U.S. 15, 26, 36 (1973), the Court correspondingly can treat it as having no value for children either. Vulgar or profane

ited from denying access to books "for the *purpose* of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials' disapproval of the ideas involved."[166] Justice Blackmun used *Barnette* to distinguish between teaching by example and its antithesis, which is "an intentional attempt to shield students from certain ideas that officials find politically distasteful."[167] Thus, Justice Blackmun attempted to harmonize the cultural transmission and progressive ideologies in an analysis applicable to the entire school environment.

In *Pico* the Court struggled to reconcile the cultural transmission and progressive ideologies. Justice Brennan recognized a student right to receive information in the progressive setting of the school library. The dissenters emphasized the inculcative nature of

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speech contributes little to a child's growth or potential for future contribution to society. The Court, therefore, can restrict such speech consistent with the progressivist and first amendment concepts of growth and development. Keiter, *supra* note 78, at 43.

While *Pico* concerned books that arguably were vulgar, the Justices chose not to emphasize the *Ginsberg* line of cases in their reasoning. *But cf.* Keiter, *supra* note 78, at 45-46 (arguing that *Pico* achieved an accommodation between the *Tinker* and *Ginsberg* principles). Likewise, the majority in *Fraser,* rather than rely exclusively on the offensive nature of the speech involved, built its analysis around cultural transmission and tbe inculcative notion of education. *Fraser,* however, expands this inculcative presence considerably. *See infra* notes 190-91 and accompanying text.

Furthermore, the Court has employed the first amendment's "captive audience" doctrine in these situations involving minors and obscene or vulgar speech. This doctrine embodies the notion that the first amendment interests of the audience are implicated if they are subjected to speech from which they are unable to escape. If the members of an audience are unwilling to be exposed to certain ideas or, in the case of children, are insufficiently mature to cope with the ideas conveyed and cannot remove themselves, the enlightenment function of free speech is vitiated. *See* M. NIMMER, *supra* note 155, § 1.02[F][2][a]. *Compare* Cohen v. California, 403 U.S. 15, 21-22 (1977) *with* Lehman v. City of Shaker Heights, 418 U.S. 298, 302-04 (1974) *and* Public Util. Comm'n v. Pollak, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting).

The Court has recoguized that in some circumstances children may be a captive audience per se. *See, e.g., Ginsberg,* 390 U.S. at 649-50 (Stewart, J., concurring) (noting that "at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees") (footnote omitted); *see also* Erznoznik v. Jacksonville, 422 U.S. 205, 214 n.11 (1975). The Court has not attempted to define precisely when children are a captive audience, but the Court's decisions appear to limit its application to sexually explicit speecb. M. NIMMER, *supra* note 155, § 1.02[F][2][g]. *See generally id.* § 1.02[F][2][a]-[g].

Even though *Fraser* concerned a speech given to a high school assembly, the Court placed little emphasis on either the captive audience doctrine or the vulgarity of the remarks and relied primarily on the role of education to justify its decision. *See infra* note 197 and accompanying text.

166. 457 U.S. at 879-880 (Blackmun, J., concurring) (emphasis in original).

167. *Id.* at 882.

education limited only by *Tinker*'s prohibition against direct suppression of nondisruptive student expression; and Justice Blackmun, somewhere in between, advocated a synthesis of the two. Against this background, the Court rendered its 1986 decision in *Bethel School District No. 403 v. Fraser*.[168] The *Fraser* decision marks a renewed emphasis on the cultural transmission ideology and perhaps the end to the Court's limited acceptance of the progressive ideology.

IV. CULTURAL TRANSMISSION REVITALIZED: THE *FRASER* DECISION

Matthew Fraser, a high school student, delivered a speech at a school assembly nominating a fellow classmate for a student elective office. Students at Fraser's high school were required either to attend the assembly or to report to study hall. In the speech Fraser referred to his candidate using an explicit sexual metaphor.[169] The day after the assembly school officials notified Fraser that his speech violated a high school disciplinary rule,[170] suspended him for three days, and removed his name from a list of candidates for graduation speaker.[171]

After unsuccessfully pursuing review of this disciplinary action through the school's grievance procedures, Fraser brought a Section 1983 action in the United States District Court for the Western District of Washington alleging that the school had violated his first amendment rights. The district court, relying on *Tinker's* disruption standard, awarded Fraser damages, litigation costs, and enjoined the school district from not allowing him to speak at the graduation ceremonies.[172] The United States Court of Appeals for

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168. 106 S. Ct. 3159 (1986).

169. *Id.* at 3162. The following is the entire text of Fraser's speech:

> I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm.
>
> Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.
>
> Jeff is a man who will go to the very end—even the climax, for each and every one of you.
>
> So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be.

106 S. Ct. at 3167 (Brennan, J., concurring).

170. The rule, prohibiting the use of obscene language in the school, provided: "Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." *Id.* at 3162.

171. *Id.* at 3162.

172. Fraser v. Bethel School Dist., No. c83-306T (W.D. Wash. June 8, 1983), *aff'd*, 755 F.2d 1356 (9th Cir. 1985), *rev'd*, 106 S. Ct. 3159 (1986).

the Ninth Circuit affirmed the lower court in an opinion that followed prior case law and reflected the Supreme Court's general attitude toward the role of education prior to the Court's retreat from *Tinker*. The circuit court held that Fraser's speech was not disruptive because the *Tinker* standard required a high threshold before limitations could be imposed on student expression,[173] not merely "inappropriateness."[174] The Ninth Circuit also found that Fraser's speech was not part of the school curriculum under *Pico*'s rough accommodation between curricular activities and independent inquiry.[175] Finally, the circuit court did not extend the *Ginsberg* and *Pacifica* considerations for indecent material in the broadcasting context to limit Fraser's colorful remarks.[176] The dissent, however, argued that several factors make the school environment unique for first amendment purposes.[177] The Supreme Court

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173. *See supra* note 94 and accompanying text.

174. 755 F.2d at 1361. The dissent, on the other hand, stated that *Tinker* was inapplicable to Fraser's situation. *See infra* note 177 and accompanying text.

175. *See supra* notes 154-59 and accompanying text. Although the Ninth Circuit found the school district's reliance on *Pico* "puzzling," the school district may have heen on firmer ground than the court realized. In order to distinguish *Pico*, the circuit court made the assumption that the student assemhly was at least as removed from the classroom environment as the school library. *Fraser*, 755 F.2d at 1364. This assertion is of dubious merit given the difference between a student who voluntarily goes to the library to read a book containing vulgar material and the student who attends an assembly without any warning of a vulgar presentation. Unlike the library, the assembly also was a part of teaching the specific skills of rhetoric and leadership through the student government process and, therefore, was closely akin to curricular material. *See* Note, Tinker *Revisited*: Fraser v. Bethel School District *and Regulation of Speech in the Public Schools*, 1985 DUKE L.J. 1164, 1171 n.61, 1184.

The Supreme Court's analysis in *Fraser* rejected the *Pico* distinction and for the first time stated that the state's inculcative function extends to all aspects of the school environment. *See infra* notes 190-91 and accompanying text.

176. *See supra* note 165.

177. *Fraser*, 755 F.2d at 1367 (Wright, J., dissenting). In his dissent, Judge Wright accused the majority of misapplying the *Tinker* standard in the context of indecent expression and ignoring the factors that make the school environment unique for first amendment purposes. He noted that the majority did not take the following into account: (1) the "physically confining nature of schools" that effectively makes the children a captive audience; (2) the limited nature of minors' rights and the school's role acting *in loco parentis;* (3) the greater limitations that may be imposed on ohscene or indecent communications directed at children; and (4) the special inculcative function of schools in society and the expectation that schools instill "citizenship, discipline, and acceptable morals." *Id.*

The dissent expanded upon this notion of the school's inculcative role by stating that school authorities have the right to punish language that falls below local definitions of decency because the decision to condemn or tolerate such language will impact on the future growth of the students. *Id.* at 1368. Furthermore, the dissent posited that one of the functions of education might be the discouragement of obscene or vulgar language. *Id.* The Supreme Court expanded further on this notion by stating affirmatively that one of the purposes of education is to control the use of vulgar language as well as to inculcate manners.

singled out one of the dissent's factors, the school's unique role as the inculcator of societal values, as the linchpin of its *Fraser* opinion.[178]

The Supreme Court reversed the Ninth Circuit and reaffirmed the traditional notion of education as an inculcative process under the cultural transmission theory.[179] The majority noted that *Tinker* did not address a situation in which speech or action "intrudes upon the work of the schools."[180] The Court defined this "work" to be an inculcative, indoctrinative process that imparts "habits and manners of civility,"[181] directly contradicting *Tinker's* implicit adoption of the progressive model[182] and signaling a return to the ideas advocated in the dissenting opinions in *Tinker, Goss,* and *Pico.*

The majority opinion, without explanation, included "society's . . . interest in teaching students the boundaries of socially appropriate behavior"[183] among those fundamental values the Court previously had recognized as "necessary to the maintenance of a democratic political system."[184] The Court propounded an analysis that

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See infra notes 187-88 and accompanying text.

Judge Wright also stated that the *Tinker* analysis was totally inapplicable to a regulation that "prescribes only the indecent manner in which an idea is expressed." 755 F.2d at 1368. He argued that the Supreme Court formulated the *Tinker* standard in the context of pure political speech, an issue on which schools must remain neutral. Thus, the Court required substantial disruption if schools were to regulate such speech. *Id.* In contrast, the dissent pointed out that the Court has allowed regulation of the time and place of expression when ideas are communicated in an indecent manner. *Cf.* Note, *supra* note 175, at 1178-92 (analyzing Ninth Circuit opinion in terms of the time, place, manner regulation doctrine). Therefore, the indecent *manner* of expression may be regulated exclusive of the *Tinker* disruption standard. Rather than distinguish *Tinker* in this fashion, the Supreme Court chose to distinguish it as a situation in which the speech did not intrude upon the work of the schools. This allowed the Court to expound upon the importance of value inculcation. *See infra* notes 180-82 and accompanying text.

178. *See infra* notes 182-84 and accompanying text.

179. Justices White, Powell, Rehnquist, and O'Connor joined Chief Justice Burger's opinion. Thus, in addition to Justice White, who concurred in *Pico* because of the unresolved factual controversy, all the *Pico* dissenters joined the *Fraser* majority. Justice Brennan, the author of the *Pico* plurality opinion, concurred in the judgment, Justice Blackmun concurred in the result without opinion, and Justices Marshall and Stevens filed dissenting opinions.

180. *Fraser,* 106 S. Ct. at 3162. While this is true, *Tinker* did not question the importance of student expression and interaction in the educational process. Chief Justice Burger's emphasis on the "work of the schools" allowed him to expand or contract the *Tinker* holding simply by redefining the role of student participation in education.

181. *Id.* at 3164 (quoting C. BEARD & M. BEARD, NEW HISTORY OF THE UNITED STATES 228 (1968)).

182. *See supra* notes 91-93 and accompanying text.

183. *Fraser,* 106 S. Ct. at 3164.

184. Ambach v. Norwick, 441 U.S. 68, 76-77 (1979); *see also* Board of Educ. v. Pico,

balanced the rights of those who advocate unpopular views and the school's interest in inculcating habits and manners.[185] The majority drew an analogy to the procedural rules of legislatures that prohibit the use of offensive expressions, stating that if the United States Congress may ban offensive expression, then public schools need not tolerate such expressions.[186] In addition to identifying the inculcation of habits and manners of civility as a fundamental value, the majority went beyond the tentative assertion of the Ninth Circuit dissenter[187] and explicitly stated that one function of public education is "to prohibit the use of vulgar and offensive terms in public discourse."[188]

The majority repeatedly emphasized the work of the schools as being an inculcative mission, in which the local school board is in the best position to determine the *appropriateness* of student expression.[189] This inculcative mission, stated the Court, "is not confined to books, the curriculum, and the civics class,"[190] but extends to all aspects of the school environment[191] and should be

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457 U.S. 853, 870-72 (1982) (plurality opinion); Plyler v. Doe, 457 U.S. 202, 221 (1982).

185. *Fraser*, 106 S. Ct. at 3164. If such a general interest as teaching socially appropriate behavior can prevail against the nonobscene and arguably nondisruptive speech given by Fraser, however, one must question the validity of the balancing.

Additionally, the school district in *Fraser* engaged in the direct suppression of student expression, while in *Pico* the school board placed no direct restraints on the students. Chief Justice Burger found the lack of direct external control on the students' ability to express themselves an important factor in his *Pico* dissent that would have upheld the school board's power to remove library books. *See Pico*, 457 U.S. at 885 (Burger, C.J., dissenting). In *Fraser* direct suppression of expression appears to elicit no closer scrutiny by Chief Justice Burger.

186. 106 S. Ct. at 3164. This analogy is not entirely accurate given the rationale behind the *Fraser* opinion and the nature of education. One purpose of the legislature's rules is to ensure the maintenance of order and control in the legislature. The majority opinion neither mentioned such a purpose nor suggested that Fraser's speech was materially disruptive. The sanction approved by the *Fraser* Court was not motivated by a concern for order or control. Moreover, the special environment of the school may dictate that colorful expression be allowed because it stimulates student interaction as a part of the educational process. In the legislative setting, colorful expression may be prohibited because it does not educate anyone.

187. *See supra* note 177.

188. *Fraser*, 106 S. Ct. at 3165.

189. *Id.* The Court makes no mention of the *Tinker* disruption standard that appears to be the logical grounds upon which to decide the case. The Court simply could have said, as Justice Brennan did in his concurrence, that Fraser's speech was sufficiently disruptive of the educational process to justify sanction. Instead, the Court expounded upon the role of the state as inculcator and the task of the local officials to determine whether student speech is *appropriate*—not disruptive.

190. *Id.*

191. The Court's statement is an implicit rejection of the *Pico* plurality's assertion that the state's inculcative interests are strongest in the classroom and diminish to nothing

taught by example. Because the Court sees inculcation as extending outside the formal instruction of the classroom, both teachers and older students serve as role models and must teach by example.[192] The Court effectively held that because older students function as role models, the state may limit their expression as part of the inculcative process.[193] Thus, in the space of two pages, the Court refused to apply the *Tinker* analysis, emphasized primarily the inculcative nature of education, expanded inculcative goals to include fostering "habits and manners of civility," and extended the state's indoctrinative reach throughout the entire school environment.

The majority also relied on the indecent nature of Fraser's speech to uphold the school board's decision. The majority, citing *Ginsberg*,[194] *Pico*,[195] and *Pacifica*,[196] held that the state has an interest in protecting minors from exposure to sexually explicit or

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within the sphere of the school library. *See* Board of Educ. v. Pico, 457 U.S. 853, 868-69 (1982) (plurality opinion). The Court, by extending the inculcative reach of the state into all areas of the school, rejects the Ninth Circuit's attempt to identify the questioned activity or speech as curricular or not. *See supra* notes 156-59 and accompanying text.

192. *Fraser*, 106 S. Ct. 3165. This assertion is consistent with the progressive ideology and *Barnette's* language concerning teaching by example because the role model would demonstrate the proper or desired behavior without directly imposing this behavior on the students. When direct suppression of expression is used to create proper role models, however, the system is closer to cultural transmission. This emphasis on teaching by example is similar to tbe associationist theory of learning under the cultural transmission ideology. *See supra* notes 21-23 and accompanying text.

193. The Court's assertion effectively makes the older students couriers for the government's inculcation of habits and manners of civility. Under a *Fraser*-type model intensive inculcation in public schools could make students vehicles for government sponsored opinions and beliefs. *Cf.* Wooley v. Maynard, 430 U.S. 705, 717 (1977) (holding individual cannot be required to display state motto on vehicle license plates).

Another rationale used by Chief Justice Burger to justify his majority opinion is the risk that unless the school took some action against Fraser, students would view the school's inaction as condoning such language. *Fraser*, 106 S. Ct. at 3166 (stating that "it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech . . . is wholly inconsistent with the 'fundamental values' of public school education"); *see also Pico*, 457 U.S. at 890 (Burger, C.J., dissenting) (retaining books is an implicit endorsement of contents).

In *Bender v. Williamsport Area School District*, 106 S. Ct. 1326 (1986), however, the dissenters, including Cbief Justice Burger, felt that high school students were sufficiently mature to differentiate between state established religion and individual participation in religion; tberefore, the dissenters would have allowed the students in *Bender* to conduct prayer meetings during student activity periods. *Id.* at 1336, 1338 (dissenting opinions). Chief Justice Burger appears to consider the ability of students to differentiate school acquiescence from affirmative support as one that varies with the issues presented.

194. 390 U.S. 629 (1968); *see supra* note 165.

195. 457 U.S. 853 (1982); *see supra* notes 144-67 and accompanying text.

196. 438 U.S. 762 (1978); *see supra* note 165.

indecent materials because the public schools act *in loco parentis* to protect a captive audience.[197] The majority, however, overlooked both the Ninth Circuit majority's treatment of *Pacifica*,[198] a case that concerned a much younger group of children,[199] and the difference between a *Pico*-type failure to provide information and a direct suppression of student expression.[200] While either the *Ginsberg* line of cases or *Tinker's* disruption standard supports restricting indecent student speech, the majority's primary reliance on the inculcative nature of education signals a shift in its attitude toward education.

At the end of its analysis, the *Fraser* majority quoted Justice Black's *Tinker* dissent for the proposition that permitting a speech such as Fraser's would be tantamount to turning control of the school over to the students.[201] This quotation is significant because it implicitly reinstates discipline as a goal of education—a goal that the *Tinker* majority impliedly had rejected.[202] The *Fraser* Court effectively held that secondary students are not sufficiently mature to engage in an extensive self-governing system. The Court also backed away from John Dewey's philosophy of progressive education under which student participation and interaction are so vitally important.[203] Because the *Fraser* opinion implied that secondary students are not sufficiently mature to be self-governing and their contributions to the educational process are slight, the Court gave itself the flexibility to move toward a curtailment of

197. *Fraser*, 106 S. Ct. 3165; *see supra* note 165. The Court chose not to expound upon this rationale and simply mentioned it in passing.

198. *See* Bethel School Dist. v. Fraser, 755 F.2d 1356, 1362 (9th Cir. 1985) (refusing to extend the *Pacifica* rational, *see supra* note 165, from the broadcasting context to the high school assembly because the students were voluntarily present, which meant they had less expectation of privacy than in their homes).

199. Throughout the majority opinion, Chief Justice Burger refers to the high school audience as "children." *See Fraser*, 106 S. Ct. at 3164-65. Justice Powell, also a member of the *Fraser* majority, previously referred to high school students in *Pico* as children. *See Pico*, 457 U.S. at 897 (Powell, J., dissenting). As Justice Stevens points out in his *Fraser* dissent, 106 S. Ct. at 3169 n.2, however, four members of the *Fraser* majority—Chief Justice Burger and Justices White, Rehnquist, and Powell—would treat high school students like college students when a more orthodox message is being conveyed. *See* Bender v. Williamsport Area School Dist., 106 S. Ct. 1326, 1336, 1338 (1986) (dissenting opinions).

200. *See supra* note 185.

201. *Fraser*, 106 S. Ct. at 3166. In *Tinker* Justice Black stated: "I wish therefore . . . to disclaim any purpose . . . to hold that the federal Constitution compels the teachers, parents and elected school officials to surrender control of the American public school system to public school students." *Tinker*, 393 U.S. at 522 (Black, J., dissenting).

202. *See supra* note 100 and accompanying text.

203. *See supra* notes 51-53 and accompanying text.

student expressive and participatory rights. At a minimum, the Court articulated an educational philosophy supporting a low tolerance level for less than orthodox forms of student expression.

In his concurrence, Justice Brennan specifically rejected the implications of the majority opinion by limiting the breadth of the Court's holding[204] and applying the traditional *Tinker* analysis. Justice Brennan found Fraser's speech disruptive of the educational process under the *Tinker* disruption standard[205] without including any dicta on the proper inculcative role of the school or the need for older students to teach by example. Furthermore, he pointed out that suppression in this case was not motivated by any disagreement with Fraser's views nor was it an attempt to ban written materials the faculty considered inappropriate.[206]

V. THE *TINKER* ANALYSIS: A WORKABLE ACCOMMODATION

The adoption of a particular educational ideology determines, in part, the relationship between the state as teacher and the child as student. The cultural transmission ideology requires the child to internalize cultural knowledge through a system of explicit instruction. This theory limits the child's expressive freedom because expression of the child's ideas receives little importance. The romantic ideology posits that the child, as a unique individual, must be placed in an sufficiently free environment to allow development through innate patterns. Freedoms are not as important to the child's active development because the child matures on his own without forced interaction with his environment. The progressive ideology stresses child development through active stimulation and interaction. Under this theory the child's expressive behavior and ideas assume primary importance. Depending upon the educational ideology, the child's rights of free expression and thought assume lesser or greater importance.

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204. *Fraser*, 106 S. Ct. at 3167 (Brennan, J., concurring).

205. *Id.* at 3168. Justice Brennan, relying on his plurality opinion in *Board of Education v. Pico*, 457 U.S. 853, 855-75 (1982), *see supra* notes 154-160 and accompanying text, emphasized that the school's interests in teaching proper discourse vary within the different parts of the school. Justice Brennan felt that Fraser's speech, if given under different circumstances, might have been protected "where the school's legitimate interests in teaching and maintaining civil discourse were less weighty." *Fraser*, 106 S. Ct. at 3168 (Brennan, J., concurring).

Justice Marshall also applied the disruption test, but dissented because the school had failed, in his opinion, to demonstrate that Fraser's speech was in fact disruptive. *Id.* at 3168-69 (Marshall, J., dissenting).

206. *Id.* at 3167 (Brennan, J., concurring).

Neither the romantic nor cultural transmission ideologies recognize the public school's dual role as the inculcator of societal values and the cultivator of independent, free thinking citizens. The romantic ideology undermines the socializing function of public education by permitting students to develop without sufficient guidance. The state does not require public school attendance to provide a place where students may do whatever they please. The cultural transmission ideology, however, undermines the individualistic aspects of education by requiring students to passively absorb without critical examination. Although the school serves a socializing role, the student must grow into an independent and active citizen capable of full and informed participation in society. The student must be actively involved in the educational process and free to express individual opinions in order accomplish this growth.

Notwithstanding the inadequacy of the cultural transmission ideology, the Supreme Court applied a strict cultural transmission analysis in the *Fraser* decision. The Court chose to emphasize the school's extensive inculcative role, local control, and teaching by example rather than the *Tinker* disruption standard or the indecent nature of the student's speech. This emphasis indicates the Court's evolving preference for the cultural transmission ideology in secondary education and a belief that wide-ranging expressive rights of students defeat the inculcative functions of the public high school. Because the majority apparently endorses inculcation through direct suppression of student expression, *Fraser* allows increased restrictions on student diversity and unorthodoxy. At a minimum, *Fraser* provides the proper ideology for decreased judicial intervention in the public schools.

If *Fraser* signals a change in the Court's ideological perspective, the Court will manifest this change through a selective application of accepted constitutional law doctrines. Because the Court does not phrase its opinions in terms of educational philosophy, the constitutional principles chosen to support its decisions reflect the Court's conception of the proper role of education. Constitutional doctrines such as freedom of speech and the compelling state interest test are the vehicles through which the Court applies its educational philosophy. To the extent the Supreme Court has an unarticulated belief about the proper role of education in society, the Court applies these doctrines to effect that belief.

The Court's choice of a particular doctrine either will support or undercut one of the educational ideologies discussed above. If

the Court believes the cultural transmission ideology most accurately describes the ideal role of public education, the Court will serve that goal by emphasizing the limited constitutional status of schoolchildren and the state's compelling interest in public education as rationales for its decisions. If, however, the Court concludes that the progressive or romantic ideologies best describe the proper role of education, the Court will apply freedom of speech, the right to receive, the right to academic freedom, or the rights of dissenting parents and teachers, to restrict excessive state indoctrination in the public schools. Constitutional doctrines not only manifest the Court's attitude toward education, but are the threads that bind its entire case-by-case development into a unified whole.

Given the complex and often antagonistic relationship between the educational ideologies, the constitutional doctrines, and the rights of parents, teachers, and students discussed above, the Court's difficulty in formulating a coherent educational ideology is understandable. *Fraser* may be an attempt by the Court to take a firm stand favoring the cultural transmission ideology. The Court, however, has ignored the *Tinker* analysis—the analysis most consistent with a realistic and ideologically sound accommodation between cultural transmission and progressivism.

The *Tinker* disruption analysis recognizes the importance of student expression and independent thought to the educational process while maintaining a limited curricular inculcative presence in the school. *Tinker* provides for maximum student expression, ensuring continued individualized growth of students. If education is expected to prepare children to participate in a democratic society and encourage their growth and development into mature and rational adults, the school environment must place a premium on student expression and interaction. Encouraging cognitive conflict and expressive behavior in the school not only forces students to express their own judgments or opinions, but also serves the first amendment goals of self-fulfillment, enlightenment, and preparation of children for participation in a democratic society.

On the other hand, *Tinker* allows an "inculcative" interest of sorts in the school as well. School authorities do not inculcate values directly to children. Curriculum content and teacher role models are strong voices in the marketplace, emphasizing that some judgments are more adequate than others. School authorities have the power to encourage an awareness of justice—principles of lib-

erty, equality, and reciprocity[207]—but not the right to suppress student speech and ideas in order to inculcate community values. Under *Tinker* the school's right to sanction student participation in the dialectical process of education arises only when student speech threatens this core inculcative interest. For example, this threat may occur when student speech interferes with the orderly operation of the school. The disruption standard provides courts with a concrete construct to resolve these questions rather than the illusive concept of the proper "habits and manners" schools are supposed to inculcate.

Although the *Tinker* standard is no panacea[208] and some commentators question the applicability of a progressivist or analytical presence at the secondary level,[209] *Tinker* represents a realistic attempt to harmonize cultural transmission and progressivist ideologies, both of which play important roles in secondary education. If the Court is not to "strangle the free mind at its source," it must recognize and emphasize the importance of student speech and interaction at the secondary level—exactly what it failed to do in *Fraser* by choosing not to apply the *Tinker* analysis.

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207. Many commentators have approved the inculcation of these general principles. *See, e.g.*, Gordon, *supra* note 17, at 556-57 (allowing only inculcation of those values explicit or implicit in the Constitution); Freeman, *supra* note 109, at 56-57 (examining learned material's proximity to constitutionally or legally based values); Kohlberg & Mayer, *supra* note 18, at 473-76 (basing progressivist education on ethical principles, not rules or values).

Although prior to *Fraser* the Supreme Court had approved only state efforts to inculcate "general and system-supporting values," Note, *supra* note 64, at 523, the Court implicitly abandoned such a limitation in *Fraser*. The *Fraser* Court's approval of the inculcation of "habits and manners of civility," though arguably system-supporting, permits government inculcation of specific traits of the individual in which the government has no interest under *Tinker* except when acting to prevent disruption.

If the Court allows the inculcation of specific "manners," the *Barnette* problem resurfaces—societal conflict over selection of specific values. *See supra* note 72. Justice Powell's cherished concept of local control directly implicates such a problem.

208. The *Tinker* disruption standard fails to address those situations in which student speech is nondisruptive, but nevertheless incompatible with the school's functions. Racially or religiously inflammatory speeches are examples of such situations that probably should be subject to sanction. *See* Berkman, *Students in Court: Free Speech and the Functions of Schooling in America*, 40 HARV. EDUC. REV. 567, 592-93 (1970); Diamond, *supra* note 29, at 502; Garvey, *supra* note 91, at 363-64.

209. *See, e.g.*, Diamond, *supra* note 29, at 498-502 (asserting that the *Tinker* analysis undercuts the inculcative purpose of public secondary education); Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV., 1293, 1350-55 (1976) (arguing progressivist model not constitutionally mandated); Van den Haag, *Academic Freedom in the United States*, 28 LAW & CONTEMP. PROBS. 515, 516 (1963).

VI. CONCLUSION

The foregoing discussion tracks the Supreme Court's changing attitude toward education from *Tinker's* progressivism through *Pico's* rough accommodation between inculcation and individualism to the Court's implicit application of the cultural transmission ideology in *Fraser*. This Note demonstrates that the Court's conception of the proper role of education in society, as manifested by application of conventional constitutional doctrines, impacts directly on the roles of both the school and student. Finally, this Note advances the *Tinker* analysis as the best and most workable framework to resolve the conflicting demands of educational theory while preserving both student freedom and limited socialization.

Only future cases will disclose whether the Court continues to apply the cultural transmission ideology. One case in which the Court may clarify its educational philosophy is *Mozert v. Hawkins County Public Schools*.[210] The United States District Court for the Eastern District of Tennessee applied a romantic ideology to allow fundamentalist children to opt out of a reading program in the public schools.[211] The district court found that the burden placed on the fundamentalists outweighed the government's interest in educating children.[212] If the Supreme Court hears *Mozert* and

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210. 647 F. Supp. 1194 (E.D. Tenn. 1986).

211. *Mozert* concerns a free exercise challenge by fundamentalist students and parents to the Hawkins County School District's selection of certain textbooks. This case directly implicates the state's interest in public education and the proper weight to be accorded that interest. The district court's opinion reflects a romantic ideology that the Supreme Court may reject as inconsistent with *Fraser's* role of education. For a discussion of the romantic ideology, see *supra* notes 35-42 and accompanying text. By allowing the fundamentalist children to opt out of the reading program, the district court minimized both the state's inculcative interest in achieving uniformity and the state's progressive interest in exposing children to a broad spectrum of knowledge and ideas. A strict application of either the progressive or cultural transmissions ideologies would implicate a much stronger state interest that might outweigh the apparently minimal burden placed on the fundamentalists.

212. The district court, in essentially a two-step analysis, held that the compulsory use of the Holt, Rhinehart, and Winston basic reading series impermissibly burdened plaintiffs' free exercise of religion and that the state's interest in literacy and good citizenship, although compelling, could be achieved without forcing the students to read the Holt series. In balancing the burden placed on the fundamentalists against the government's interest in educating children, the court found opting out to be a less restrictive means of accommodating the litigants' interests.

The district court reasoned that because Tennessee already had provided a total opt out in its home schooling statute, TENN. CODE ANN. § 49-6-3050 (Supp. 1986), this alternative also would work for a single subject. According to the court, proof at trial demonstrated that such an opt out was possible without disrupting the educational process. The court also noted that "such an accommodation might . . . impress upon the student body the high regard this society has for religious freedom." *Mozert*, 647 F. Supp. at 1202. Furthermore,

adopts a progressive ideology, the Court would reverse and compel the children's attendance because progressivism emphasizes interaction and exposure to diverse ideas.[213] A more likely scenario would be for the Court to hear this case and apply a cultural transmission ideology.[214] Under these circumstances, the Court would reverse because the state's interest in uniformity and socialization would outweigh the burden placed on the fundamentalists.[215] If the Court accepts the substantially inculcative nature of public education, as it appears to have done in *Fraser*, the Court would face the problem of factions vying for control of the school curricula.[216] Given the dangers of cultural transmission and the importance of individualism in American democracy, one can only hope that *Fraser* is not the beginning of the end for the progressivist presence in secondary education.

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the district court stressed that its opinion would not require the school system to make the option available to any other persons or to these plaintiffs in any other subject area. *Id.* at 1203.

213. For a discussion of the progressive ideology, see *supra* notes 43-53 and accompanying text. By reading the Holt series, children would be exposed to a multitude of ideas, thereby stimulating cognitive conflict, active discussion, and intellectual growth. These benefits to the fundamentalist's children might provide a state interest counterbalancing the parents' interest in sheltering their children from exposure to material arguably violative of their religious values.

214. Justice Powell's retirement, however, may affect the future development of the Supreme Court's implicit educational ideology. As the cultural transmission ideology's most ardent supporter, Justice Powell influenced his fellow Justices' views on the proper role of education in society. If Justice Powell's successor is less supportive of the cultural transmission ideology the Court may be more inclined to halt or reverse its retreat from *Tinker*.

215. For a discussion of the cultural transmission ideology, see *supra* notes 19-34 and accompanying text. If the state allows children to opt out in any significant numbers, the socializing function of the public schools, stressed by the Supreme Court in its opinion in Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159 (1986), *see supra* notes 212-16 and accompanying text, would be reduced substantially or even destroyed.

216. *See supra* note 72 (quoting the majority opinion in *Barnette* as warning of factional conflict for control of which programs the state will compel children to embrace).

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