BYU Law Review

Volume 2008 | Issue 2 Article 14

5-1-2008

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Peter J. Jenkins

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Suppose culturally conservative parents living in a culturally liberal community discover that the local public elementary school is teaching their children that same-sex unions are just as acceptable as traditional marriage. May the parents prevent the school from teaching a message they find undesirable to their children? Consider also culturally liberal parents in a culturally conservative community. Suppose the school teaches evolution and intelligent design side by side as possible explanations for the origin of life. Do objecting parents have any recourse?

What if a parent objects to a school's geography requirement? Must the student still learn geography?[1] How about a requirement that each student learn music?[2] May a parent opt his child out of any subject, or stop the school from teaching the objectionable material entirely?

The Supreme Court has held that the Due Process Clause of the Fourteenth Amendment protects a parent's right to supervise the education and upbringing of his child, including the right to teach certain subjects that the parent wants the child to learn,[3] or to send the child to private school if the parent desires.[4] However, allowing this right to give parents a freewheeling line-item veto over a school board's curricular choices is impractical and can lead to absurd results.[5] Rather, the major protections of parents' constitutional right

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1. No, according to the Supreme Court of Wisconsin in 1874. *See* Morrow v. Wood, 35 Wis. 59 (1874).

2. Yes, according to the Supreme Court of Indiana in 1886. *See* Andrews v. Webber, 8 N.E. 708, 711–13 (Ind. 1886).

3. *See* Meyer v. Nebraska, 262 U.S. 390, 402–03 (1923) (holding a law forbidding the teaching of German unconstitutional).

4. *See* Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 535–36 (1925) (holding a law that forbade parents to enroll their children in private school unconstitutional).

5. *See, e.g.*, CONNIE WILLIS, *Ado*, *in* IMPOSSIBLE THINGS 115 (1993) (satirical story in which curriculum can be censored by almost anyone, yet parents can still opt their students out of lessons at will, resulting in an utterly ineffectual educational experience).

to direct the upbringing of their children are the parents' option to enroll their children in private school[6] or to home school.[7]

For children whose parents choose to enroll them in the public schools, school districts and communities (through their school boards) should be given considerable freedom to select curriculum, including moral or value-laden messages. School boards are democratic bodies that are entitled to make decisions that reflect the values of the community, even if a minority objects.

A public school's control over its curriculum is not without limits. School districts, like all government entities, must obey the Constitution. This includes following the Establishment Clause of the First Amendment. Further, schools violate the First Amendment if they suppress student speech in some circumstances, or if they force a student to espouse a moral position. These constitutional limits should not, however, restrict a school's freedom to craft its curriculum in light of community values, regardless of objections by students or parents. So long as communities respect explicit constitutional limits, they should be free to use the public schools to teach the moral principles of the community.

Part I explores the idea that schools should be free to make moral decisions in curriculum choices, argues that courts are poor fora in which to resolve challenges to curriculum, and analyzes the doctrinal underpinnings of some of the major constitutional exceptions to this rule. Part II then explores how this thesis applies in practice, examining and critiquing significant controversies and court opinions in selected areas, including schools' positions on human sexuality and their positions on library book selection. While these areas are fraught with controversy, the rule of the majority (within proper constitutional constraints) leads to better outcomes.

6. *See Pierce*, 268 U.S. at 534–35 (holding that a law forbidding private school attendance "unreasonably" interfered with a protected constitutional right).

7. *See* KERN ALEXANDER & M. DAVID ALEXANDER, AMERICAN PUBLIC SCHOOL LAW 272 (6th ed. 2005) (noting that, while a parent's interest in home schooling his child has not been protected as a constitutional right, "all states recognize home schooling by statute"); *see also* Null v. Bd. of Educ. of the County of Jackson, 815 F. Supp. 937, 940 (S.D.W. Va. 1993) (holding that parent's interest in home schooling is not a fundamental right).

I. PUBLIC SCHOOLS' FREEDOM TO TEACH VALUE-LADEN CURRICULUM

Curriculum will always contain value choices of educators. Because morality will inevitably inform curricular choices, communities should be free to decide what moral messages they wish to send, so long as they respect constitutional constraints, such as those forbidding establishment of religion, interference with protected speech rights, or interfering with freedom of conscience.

A. The Inevitability of Morality in Curriculum

A superficially appealing solution to the problem of controversial subjects in public schools would be to avoid controversy altogether by forbidding schools to take a moral or value-laden position on any subject. However, such a suggestion is not only impractical, but impossible to implement. Any curricular choice will involve moral choices and invite criticism on moral grounds.

Much of the reason that society values public education comes from its transmission of moral values. The Supreme Court, over a few pages of one opinion, praised public education for promoting "preservation of a democratic system of government," "the values on which our society rests," the preservation of "freedom" and "independence," individuals' living of "economically productive lives," "self-relian[ce] and self-sufficien[ce]," "shared values," and "social order and stability."[8] While each of these normative concepts enjoys broad popularity, none is self-evidently morally correct, and none is above criticism.

Even the selection of facts to emphasize or ignore itself carries moral weight. In teaching about the American Revolution, a teacher could discuss or omit mention of George Washington's ownership of slaves, his views about women, his opinions about religion, his views of the proper role of government, his understanding of property and social class, or his opinions about justice and morality. Requiring a student to learn that Washington owned slaves but not that he was a Freemason, or vice versa, implies a moral judgment about the importance of those two facts. Even teaching both facts to the exclusion of a discussion of the facts available about a landless

8. Plyler v. Doe, 457 U.S. 202, 220 n.20, 221–22 (1982) (citations omitted).

peasant in his army implies something about the importance of Washington compared to his soldiers.

Classroom time is a scarce resource, meaning at some point someone must decide what should be taught and what should be ignored or deemed unworthy of a student's time. For instance, spending a high school English class discussing *To Kill a Mockingbird* instead of *The Da Vinci Code* necessarily implies that the school considers one a more valuable subject of study than the other. A government class's discussion of major political parties at the expense of minor political parties also implies a value judgment. Even if the class moves beyond Republicans and Democrats to Libertarians and Greens, the teacher will probably draw the line before reaching, say, the Marijuana Party.[9]

Ultimately, curricular choices of necessity involve value judgments.[10] Furthermore, the teaching of certain values, such as the value of individual rights and democracy, is likely to remain popular and desirable even if a minority objects.

B. The Desirability of Democratic Selection of Curriculum

School boards and state legislatures are better vehicles for selecting the curriculum to be taught in public schools than are federal courts.[11] School boards and legislatures are democratically

9. *See* Richard Rawlings, *Who Is the USMJParty?*, http://www.usmjparty.com/ (last visited Mar. 29, 2008).

10. *See* Zykan v. Warsaw Cmty. Sch. Corp., 631 F.2d 1300, 1303 (7th Cir. 1980).

> [T]he function of school officials is not constitutionally restricted to determining the most efficient method of exposing students to as many facts and opinions as possible; rather, it is legitimate for school officials to develop an opinion about what type of citizens are good citizens, to determine what curriculum and material will best develop good citizens, and to prohibit the use of texts, remove library books, and delete courses from the curriculum as a part of the effort to shape students into good citizens. And there is no way for school officials to make the determinations involved except on the basis of personal moral beliefs. To allege that school officials have made decisions regarding classroom texts, library books, and curriculum courses solely on the basis of personal 'social, political, and moral' beliefs is insufficient to allege a violation of constitutionally protected 'academic freedom.'

Id. (citations omitted).

11. While state courts are also empowered to protect federal constitutional rights, federal courts (and ultimately the U.S. Supreme Court) are specially charged with protecting these rights. *See, e.g.*, 42 U.S.C. § 1983 (2006). Furthermore, due to the diversity of state court systems, as well as the role state courts play in interpreting state law and state constitutions, making generalizations about state courts is more difficult than making generalizations about federal courts. Therefore, this analysis will focus on federal courts.

elected, and thus represent the public and respond to its desires. They are legislative bodies, well-equipped to conduct investigations and research and to make difficult trade-offs in setting policy. Further, democratic bodies tend to be self-correcting if they make serious mistakes—either the incumbents will react to public disapproval of their conduct, or new members will be elected to take the place of incumbents who did not adequately represent the public's desires.

Federal courts, on the other hand, are only democratically accountable in a limited sense. They are not well-equipped to conduct research or make policy tradeoffs. Further, while federal judges may have specialized training in the law, this does not automatically make them better-equipped to make policy decisions about education (or any other field) than any other person.[12] Federal courts also have limited resources with which to manage their already-busy dockets. Insofar as is possible, it is genetally undesirable for federal courts to interfere with state conttol of public education. However, certain circumstances do require such interference.

C. The Establishment Clause as a Limit on Educators

Even if public schools and educators may espouse moral positions, the First Amendment forbids them from taking moral positions insofar as those positions would amount to the establishmenr of religion. In broad terms, the Establishment Clause means that a public school cannot send a message, through its curriculum or otherwise, with the intention of advancing (or inhibiting) any religious denomination (or the concept of religion generally). Though the Supreme Court does not use it with complete consistency,[13] for many Establishment Clause issues the

12. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943) (noting that in safeguarding the Bill of Rights the courts act "not by authority of our competence but by force of our commissions").

13. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring); *see also* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45 n.1 (2004) (Thomas, J., concurring) ("Our [Establishment Clause] jurisprudential confusion has led to results that can only be described as silly."). While the Supreme Court's Establishment Clause jurisprudence can fairly be described as in disarray, the *Lemon* test provides as good a place to start as any until a working majority of the Court consistently endorses another approach. For purposes of this Comment, religious problems will be analyzed under the *Lemon* test.

Lemon[14] test is the basic framework. The *Lemon* test analyzes potential Establishment Clause issues by looking at whether or not a government action has a secular purpose, whether it primarily advances or inhibits religion, and whether it leads to excessive government entanglement with religion. However, foundational religion-in-schools cases, such as *Engel* and *Schempp*, were decided before *Lemon*.

The Supreme Court used the Establishment Clause to strike down a school-board created policy of nondenominational volunrary prayer in *Engel v. Vitale*.[15] The "daily classroom invocation of God's blessings" was unconstitutional because "in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."[16] The Court held that even in the absence of direct coercion, such official actions amount to an establishment of religion by the state and are thus unconstitutional.[17] The nondenominational voluntary prayer would fail the *Lemon* test because it would have the primary effect of advancing religion, as well as potentially failing the secular purpose and excessive entanglement prongs of the test. Although the *Lemon* test has not been universally applied by the Court, it does provide a useful heuristic for determining how the modern Court analyzes Establishment Clause cases—thus, it appears that under today's jurisprudence the facts of *Engel* would yield the same result.

One year later, the Court used the Establishment Clause to strike down a policy of voluntary devotional Bible reading and recitation of the Lord's Prayer in the public schools in *School District of Abington Township v. Schempp*.[18] The Court held, as in *Engel*, that the "religious character of the exercises" made state sponsorship impermissible.[19] The Court, recognizing its decision would draw criticism, noted that it was not acting out of hostility to religion.[20] Ir held that it would be equally unconstitutional for the government to "establish a 'religion of secularism' in the sense of affirmatively

14. Named for *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
15. 370 U.S. 421 (1962).
16. *Id.* at 424–25.
17. *Id.* at 430.
18. 374 U.S. 203 (1963).
19. *Id.* at 223.
20. *Id.*

opposing or showing hostility to religion," and noted that study of religion in public schools is permissible "when presented objectively as part of a secular program of education."[21] However, it distinguished such permissible activities from state sponsorship of reading Bible verses as a religious exercise, noting that the Free Exercise Clause "never meant that a majority could use the machinery of the State to practice its beliefs."[22] The *Lemon* test also compels this result—the reading of Bible verses as a religious exercise likely has a primary effect of advancing religion.

The Establishment Clause serves several important purposes: it protects the consciences of taxpayers who do not wish to fund religious messages with which they disagree,[23] protects religion itself from corruption by being enmeshed with the state,[24] and prevents social conflict over religion and over which religious sects or beliefs will benefit from state establishment.[25] Regardless of how much a majority may wish to use the public schools to send an overtly religious message, the Constitution puts that possibility out of bounds, for wise reasons.

D. The Free Speech Clause as a Limit on Educators: Nondisruptive Student Speech

While a public school is free to present its own message, it cannot censor students' speech without limit. Students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[26] The Supreme Court has defined the bounds of student speech rights in a trio of important cases: *Tinker*, *Fraser*, and *Kuhlmeier*.

In *Tinker*, the Supreme Court held that "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views."[27] While school officials could regulate speech if they could

21. *Id.* at 225 (citation omitted).

22. *Id.* at 226.

23 *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 711 (2002) (Souter, J., dissenting).

24. *See, e.g.*, *id.* at 711–14.

25. *See, e.g.*, *id.* at 715–17.

26. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

27. *Id.* at 511.

"forecast substantial disruption of or material interference with school activities," the black armbands that students wore to school to prorest the Vietnam conflict did not disrupt or interfere with school activities, and were thus protected symbolic speech.[28]

The Supreme Court limited the reach of *Tinker* in *Fraser*, holding that a school could, in a viewpoint-neutral manner, regulate vulgar and lewd speech.[29] It further clarified in *Kuhlmeier* that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsoted expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[30] Rather, a school can "refuse to lend its name and resources to the dissemination of student expression,"[31] so long as it does so for a reason relating to pedagogical concerns.

The student speech cases together stand for the proposition that, while a school may deliver its own message, it generally may not prevent students from hearing and expressing alternative messages. "[S]tudents may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved."[32]

E. The Free Speech Clause as a Limit on Educators: No Coerced Speech

In addition to protecting students from censorship, the Free Speech Clause of the First Amendment protects students from being compelled to subscribe to an opinion. The seminal Supreme Court opinion on this issue, *Barnette*, dealt with a compelled recitation of the Pledge of Allegiance in elementary schools, objected to on religious grounds by Jehovah's Witnesses.[33] The case stands for the idea that "a compulsion of students to declare a belief" is

28. *Id.* at 514.

29. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

30. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

31. *Id.* at 272–73.

32. *Tinker*, 393 U.S. at 511.

33. At the time *Barnette* was decided, during World War II, Congress had not added the phrase "under God" to the Pledge, so the case "was limited to the political ideals contained in the Pledge." Newdow v. U.S. Congress, 328 F.3d 466, 487 n.4 (9th Cir. 2003), *rev'd*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 18 (2004).

unconstitutional.[34] The Court famously held that "[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 of opinion or force citizens to confess by word or act their faith therein."[35]

While *Barnette* is often cited in the context of challenges in which the plaintiff claims an infringement on her religion, the Court did not limit its holding to only religious cases. It held that "one's possession of particular religious views or the sincerity with which they are held" was irrelevant to the constitutional question.[36] Rather, *Barnette* stands for the broad principle that although the school may present its message, complete with values (such as patriotism) and opinions (that the Union is "indivisible" and provides "liberty and justice for all"), the school may not force students to declare a belief in its values or opinions. A school may expose students to its opinions, it may even grade them on their understanding of them, but it may not require students to subscribe to them.

F. Other Constitutional Constraints

Other clauses of the Constitution also operate to constrain permissible school actions. For instance, the Equal Protection Clause (almost always) requires the govetnment to not make decisions on racial grounds.[37] The Equal Protection Clause (or the First Amendment) also likely would prevent a school from overtly favoring one major political party over another.[38] Other constitutional clauses also can constrain schools' actions, though discussion of them is largely beyond the scope of the topic of schools' speech.[39] However, so long as majorities respect the

34. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 631 (1943).

35. *Id.* at 642.

36. *Id.* at 634.

37. *See* U.S. CONST. amend. XIV, §1; Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2751–52 (2007).

38. *But see* Vieth v. Jubelirer, 541 U.S. 267, 314–15 (2004) (Kennedy, J., concurring in the judgment) (arguing that an equal protection analysis is inappropriate in analyzing a partisan claim, but that a First Amendment representation claim may be appropriate).

39. For instance, the Fourth Amendment's constraint on searches and seizures does apply to schools, *see* New Jersey v. T.L.O., 469 U.S. 325, 336–37 (1985), but is largely unrelated to school speech. On the other hand, art. I § 10 ("No state shall . . . grant any title of nobility."), while arguably implicating a school's message in crowning a Homecoming King and Queen, unfortunately has not generated a substantial body of case law.

constitutional rights of students and parents, they should be free to craft educational curricula in light of community values.

II. APPLICATION

The foregoing Part has set forth a general framework with which to analyze school speech issues: a majority in a state may direct schools to teach a curriculum incorporating values and morality, regardless of opposition, so long as the state does not violate specific constitutional prohibitions such as the First Amendment's prohibitions on establishing religion, censoring nondisruptive student speech, or requiring a profession of belief in any values. This is not to say that states would always be wise to take full advantage of this power—parental opt-out programs, general respect for minority viewpoints, and avoiding counterproductive controversy are often prudent. However, they are not mandated by the Constitution.

This Part analyzes various controversies in light of these principles. Topics treated include teaching about human sexuality and the expression of community values through books selected for a school's library, which has sparked controversies as heated as those dealing with sexuality.

A. Human Sexuality

Perhaps no subject demonstrates the disputes that can arise over curricula as well as the teaching about human sexuality in schools. On one hand are numerous parents who have strong feelings about the proper way to teach human sexuality to their children, many of whom would prefer that the school avoid the subject entirely so as to avoid interference with the parent's planned course of teaching. On the other hand, many argue that numerous social problems (including sexually transmitted diseases) can arise when students do not receive adequate sex education. Thus, many view sex education in public schools as necessary for public health and welfare.[40]

Further, attitudes about human sexuality are frequently inextricably shaped by moral attitudes.[41] Teaching anything less than

40. *E.g.*, Press Release, Am. Psychological Ass'n, Comprehensive Sex Education Is More Effective at Stopping the Spread of HIV Infection (Feb. 23, 2005), http://www.apa.org/releases/sexeducation.html.

41. See, for example, the famous passage:

These matters, involving the most intimate and personal choices a person may make

one's preferred position is often seen as (immoral) hostility to that position. Some advocates of traditional marriage see any portrayal of nonmarital sexual relationships as hostile to marriage; meanwhile, many advocates of same-sex sexual relations insist thar any curriculum that does not present same-sex relations as normal is biased. The situation is thus ripe for conflict.

1. Curricular portrayal of homosexuality

A recent controversy in California illustrates the high emotions that can surround schools' approach to sexual issues. Governor Schwarzenegger recently signed Senate Bill 777, which added to the law a requirement that "no teacher shall give instruction nor shall a school district sponsor any activity that promotes a discriminatory bias" against people based on sexual orientation.[42]

Supporters of the bill claim it merely "'clarifies and reinforces existing laws that protect students' against harassment and discrimination."[43] The California Superintendent of Public Schools does not "think it's going to have a substantive effect" on California curriculum.[44]

However, opponents of the measure characterize the bill in different terms. The California State Assembly Republican Caucus claimed the bill "has nothing to do with protecting students and everything to do with imposing politics in the classroom."[45] Republican Assemblyman Anthony Adams called the bill "a terrible idea" that is "advancing a homosexual agenda in a way that further

> in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (O'Connor, J., plurality opinion).

42. Cal. Educ. Code § 51500 (West 2007); *see also id.* § 220.

43. Bill Ainsworth, *Groups Jousting over Gay Rights in California*, SAN DIEGO UNION-TRIB., Nov. 12, 2007, http://www.signonsandiego.com/uniontrib/20071112/news_1n12gayright.html

44. Jim Sanders, *Gay Rights Measure Targeted*, SACRAMENTO BEE, Oct. 20, 2007, at A3.

45. Press Release, California State Assembly Republican Caucus, Democrats Undermine Academic Freedom, (June 26, 2007), *available at* http://republican.assembly.ca.gov/members/a68/Index.aspx?page=PR&pr=3998.

polarizes our schools."[46] Others go still further and claim the bill will have dramatic effects, requiring schools to "positively portray transsexuality, bisexuality, and homosexuality to children as young as kindergarten," banning curricular materials that "portray marriage as only between a man and a woman," and banning "Homecoming king and queen contests that allow only boys to run for king and only girls to run for queen."[47]

However, regardless of which interpretation of the legislation is correct, the bill, as portrayed in media accounts, does not seem to have any constitutional defects. The bill does not promote a particular religious viewpoint or work an establishment of religion. It does not appear to censor student speech or require students to adhere to the official view of sexuality. Rather, it merely requires public schools in the state to present the state's preferred message on sexuality. That many disagree with that message does not mean that presenting the message is unconstitutional.

Ultimately, California public schools should be free to present the people's preferred message on sexuality. If a majority, through its legislative representatives, selects a message with which the minority does not agree, it does not violate the Constitution. However, what message the majority prefers is not entirely clear—opponents of the legislation are attempting to overturn it through a referendum.[48] Allowing the political process to work out this sort of issue is preferable to enmeshing the courts in difficult policy disputes, absent a violation of constitutional rights.

2. Student speech on homosexuality

While allowing a school to present an official message on sexuality is constitutionally permissible, allowing a school to censor nondisruptive student speech that disagrees with the official position is constitutionally troubling under *Tinker*. Yet a divided panel of the Ninth Circuit reached just such a result in a recent case, *Harper v.*

46. Ryan Orr, *New Bill Creates Controversy*, DAILY PRESS (Victorville, CA), Oct. 19, 2007, at A1.

47. Arnold Schwarzenegger Signs Bill Forcing Schools To Promote Transsexuality, Bisexuality, and Homosexuality to Five Year Olds, CHRISTIAN NEWSWIRE, Oct. 12, 2007, *available at* http://christiannewswire.com/news/ 508064481.html.

48. *See* Sanders, *supra* note 44, at A3; Ryan Orr, *supra* note 46.

Poway Unified School District.[49] While the Supreme Court subsequently eliminated the precedential value of the *Harper* decision by vacating the case as moot,[50] the Ninth Circuit's decision is still an interesting example of the difficulties inherent in this sort of conflict, as well as of the sorts of mistakes schools (and courts) can make in dealing with such situations.[51]

In *Harper*, the Gay-Straight alliance of Poway High School sponsored, with the assistance of the school administration, a "Day of Silence" to promote tolerance of "those of a different sexual orientation."[52] Tyler Harper, then a sophomore, on the day after the Day of Silence wore a T-shirt to school that said on the front "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED," and on the back "HOMOSEXUALITY IS SHAMEFUL Romans 1:27."[53] One of Harper's teachers told him to remove the shirt, and, when he refused, sent him to talk to school administrators.[54] The principal of the school told Harper that he could not wear the shirt on campus, and required him to spend the rest of the day in the front office of the school.[55] Harper was not otherwise punished for his actions.[56]

A divided panel of the Ninth Circuit upheld the school's actions. Judge Reinhardt wrote an opinion for himself and Judge Thomas, while Judge Kozinski dissented. Judge Reinhart's majority opinion, relying on language in *Tinker* that a school can regulate student speech that would "impinge upon the rights of other students,"[57] went on to hold that under that language, schools could censor speech that involved "verbal assaults on the basis of a core

49. 445 F.3d 1166 (9th Cir. 2006), *vacated by* Harper v. Poway Unified Sch. Dist., 127 S. Ct. 1484 (2007).

50. Harper v. Poway Unified Sch. Dist., 127 S. Ct. 1484 (2007).

51. While the original *Harper* case has no precedential value, similar litigation has continued, with Harper's sister as one of the parties. *See, e.g.*, Greg Morar, *Student's Rights Not Violated, Judge Rules*, SAN DIEGO UNION-TRIB., Feb. 13, 2008, at B1.

52. *Harper*, 445 F.3d at 1171.

53. *Id.* at 1171. Romans 1:27 (King James) reads: "And likewise also the men, leaving the natural use of the woman, burned in their lust one toward another; men with men working that which is unseemly, and receiving in themselves that recompence of their error which was meet."

54. *Harper*, 445 F.3d at 1171–72.

55. *Id.* at 1172–73.

56. *Id.* at 1173.

57. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

identifying characteristic, such as race, religion, or sexual orientation."[58] Notably, the majority did not rely on the "substantial disruption" test from *Tinker*.[59]

The language from *Tinker* on which the majority relied does not clearly support its opinion. While the *Tinker* majority opinion does refer to the permissibility of regulating certain speech under a theory that some speech causes a "collision with the rights of other students to be secure and to be let alone,"[60] it is far from clear that such a right to be let alone extends beyond traditional protection from battery, defamation, and such individualized intrusions[61] to a general right to be free from offensive messages. A right to be free from offensive messages, if upheld, would be a novel innovation in First Amendment jurisprudence. The Supreme Court has generally rejected the idea that a hostile audience can use a "heckler's veto" to silence speech it finds distasteful.[62]

Another puzzling aspect of the majority opinion is why sexual orientation is a "core identifying characteristic." The Supreme Court has not squarely held that sexual orientation is a protected characteristic that gives rise to heightened scrutiny under the Equal Protection Clause.[63] While the Supreme Court has treated homosexuality favorably in some recent cases,[64] it has not elevated it to the same status as race or religion. Racial classifications are subject to strict scrutiny under the Equal Protection Clause,[65] while religion is protected under the Free Exercise Clause. However, constitutional

58. *Harper*, 445 F.3d at 1178.

59. *Id.* at 1177 n.17.

60. *Tinker*, 393 U.S. at 508.

61. *See Harper*, 445 F.3d at 1198 (Kozinski, J., dissenting) ("The 'rights of others' language in *Tinker* can only refer to traditional rights, such as those against assault, defamation, invasion of privacy, extortion and blackmail, whose interplay with the First Amendment is well established.").

62. *See* Forsyth County, Ga. v. Nat'list Movement, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation.").

63 *See* Lawrence v. Texas, 539 U.S. 558, 600–01 (2003) (Scalia, J., dissenting) (discussing lack of cases suggesting any heightened scrutiny under the Equal Protection Clause for legislation affecting same-sex conduct). *But see Lawrence*, 539 U.S. 558 (majority opinion) (finding substantive due process right to adult consensual private sexual activity); Romer v. Evans, 517 U.S. 620 (1996) (finding no rational basis for Colorado's constitutional amendment barring municipal antidiscrimination laws based on homosexuality).

64. *See Lawrence*, 539 U.S. 558 and *Romer*, 517 U.S. 620.

65. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2751–52 (2007).

law does not presently contain any precedents giving such a high degree of protection to homosexuality. Thus, the *Harper* majority's treatment of the three under equivalent levels of scrutiny is surprising and does not seem to be grounded in constitutional precedent.

A more troubling aspect of the majority's opinion improperly inserts the court into social questions. The majority argues: "Perhaps our dissenting colleague believes that one can condemn homosexuality without condemning homosexuals. If so, he is wrong. To say that homosexuality is shameful is to say, necessarily, that gays and lesbians are shameful."[66] While this statement is arguably dicta, it illustrates the problems wirh the majority's approach. As a factual matter, the statement is simply wrong.[67] If meant not as a descriptive statement but a normative one, it serves as judicial denigration of the beliefs of a significant number of Americans, with little support in law.[68] Such a statement shows the difficulties with the majority's approach.

The Court held that the phrase "Homosexuality is shameful" is not a permissible message because it is a "verbal assault" likely to offend.[69] Under its approach, arguably any of the following phrases are impermissible because they are as "likely to offend":

"Gay sex is bad"

"Homosexual marriage is an abomination"

"Homosexual marriage should not be legalized"

"Romans 1:27"

"Support traditional marriage"

66. *Harper*, 445 F.3d at 1181.

67. *See, e.g.*, Jeffrey R. Holland, *Helping Those Who Struggle with Same-Gender Attraction*, ENSIGN, Oct. 2007, 42, 42 (noting that from a Latter-day Saint perspective, "same-gender attraction is not a sin, but acting on those feelings is").

68. The phrase 'love the sinner, hate the sin' may be a cliché, but many Americans sincerely believe such an attitude is possible. *See, e.g.*, Gotquestions.org, *Are We to Love the Sinner but Hate the Sin?*, http://www.gotquestions.org/love-sinner-hate-sin.html (last visited Mar. 29, 2008).

69. *Harper*, 445 F.3d at 1181.

None of these messages appear to be meaningfully distinguishable from "Homosexuality is shameful," yet some of them are clearly protected political or religious speech. While messages that unambiguously single out particular students for criticism are likely censorable, generalized political, social or moral statements cannot be censored without trampling on First Amendment freedoms.

Since *Tinker*'s core holding is that students do have constitutional speech rights, the *Harper* majority's opinion seems to inevitably conflict with *Tinker*. The *Tinker* Court's language suggests this as well:

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. . . . Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.[70]

The *Harper* majority is wrong because its reasoning, if adopted, can easily work to "define the First Amendment rights of students out of existence by giving others the right not to hear [their] speech."[71] However, the ultimate problem with the *Harper* majority's opinion is that the overall result appears to be viewpoint discrimination by the government, which is impermissible.[72] Whatever the ultimate moral truth about homosexuality, it is not the place of the government to silence opposition to its preferred position. "Under the First Amendment, there is no such thing as a false idea."[73] Or, to quote the *Harper* dissent in the context of criticizing viewpoint discrimination, "no matter how well-

70. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509, 511 (1969).

71. *Harper*, 445 F.3d at 1198 (Kozinski, J., dissenting).

72. *See* Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. . . . Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."); *see also* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

73. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

intentioned the stated objective, once schools get into the business of actively promoting one political or religious viewpoint over another, there is no end to the mischief that can be done in the name of good intentions."[74]

Problematic as the *Harper* majority's position on speech is, it did properly deal with the plaintiff's Establishment and Free Exercise Clause challenges to the school's actions. While the plaintiff tried to characterize the school's promotion of its message on homosexuality as a violation of his religious freedom, the panel properly upheld the dismissal of this claim. "[T]he teaching of secular democratic values does not violate the First Amendmenr, even if rhat teaching conflicts in some respect with a sincerely held [religious] view."[75] A student does not have the right to force a school to edir its message to conform to his religious views.[76]

3. Mandatory sex education

Parents often do not want public schools inrerfering with their teachings about sexuality by teaching the school's own message (which may not only conflict with, but implicitly condemn, the parent's position). Regardless of the strength of the parent's belief, and putting aside the desirability of parental opt-out provisions, the parent's interest is not constitutionally protected. It is impossible to draw a constitutional line between a parental veto of sexual

74. *Harper*, 445 F.3d at 1197 (Kozinski, J., dissenting) (*quoting* Hansen v. Ann Arbor Public Sch., 293 F. Supp. 2d 780, 803 (E.D. Mich. 2003)). *See also* Eugene Volokh, *Sorry, Your Viewpoint Is Excluded from First Amendment Protection*, THE VOLOKH CONSPIRACY, Apr. 20, 2006, *available at* http://www.volokh.com/posts/1145577196.shtml.

75. *Harper*, 445 F.3d at 1191 (majority opinion). *See also* Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1069 (6th Cir. 1987) (rejecting a claim that exposure to a curriculum to which the plaintiff had religious objections violated the Constitution, and noting that "[w]hat is absent from this case is the critical element of compulsion to affirm or deny a religious belief or to engage or refrain from engaging in a practice forbidden or required in the exercise of a plaintiff's religion").

76. A more interesting Establishment Clause question arises when a judge attempts to rule on the validity of a religious belief or the interpretation of a religious text. *See* Harper v. Poway Unified Sch. Dist., 455 F.3d 1052, 1053–54 (9th Cir. 2006) (Gould, J., concurring in the order denying the petition for rehearing en banc) (claiming Harper's "tee shirt misus[ed] biblical text to hold gay students to scorn"). Regardless of the merits of his opinion on other grounds, a judge using his ability to state the law to interpret a religious text and condemn others' interpretations of it seems like a clear Establishment Clause violation, albeit one that is almost certainly nonjusticiable.

curriculum and a parental veto of other curriculum, and courts generally are not sympathetic to parents who make the attempt.

One landmark case in this area is *Brown v. Hot, Sexy and Safer Productions*.[77] *Brown*'s facts are compelling because they show that the school's actions were much more objectionable than those of a more typical case. The plaintiffs alleged that in the course of a Massachusetts high school's mandatory assembly designed to raise awareness of AIDS, the speaker

> used profane, lewd, and lascivious language to describe body parts and excretory functions . . . advocated and approved oral sex, masturbation, homosexual sexual activity, and condom use during promiscuous premarital sex . . . simulated masturbation . . . characterized the loose pants worn by one minor as "erection wear" . . . referred to being in "deep sh—" after anal sex . . . had a male minor lick an oversized condom with her, after which she had a female minor pull it over the male minor's entire head and blow it up . . . encouraged a male minor to display his "orgasm face" with her for the camera . . . informed a male minor that he was not having enough orgasms . . . [and] closely inspected a minor and told him he had a "nice butt."[78]

The complaining plaintiffs did not participate in the presentation, and were not "the direct objects of any of [the presenter's] comments."[79] The plaintiffs sued, asserting federal claims on various theories under the First and Fourteenth Amendments.[80]

In analyzing the plaintiffs' claim that the school had interfered with the parents' right to rear their children, as established by *Meyer* and *Pierce*, the court held that the right did not establish a "fundamental constitutional right to dictate the curriculum" at a public school.[81] The court noted, "We think it is fundamentally different for the state to say to a parent, 'You can't teach your child German or send him to a parochial school,' than for the parent to say to the state, 'You can't teach my child subjects that are morally offensive to me.'"[82] One situation involved the state "proscribing

77. 68 F.3d 525 (1st Cir. 1995).
78. *Id.* at 529.
79. *Id.*
80. *Id.* at 530.
81. *Id.* at 533.
82. *Id.* at 533–34.

parents from educating their children," while the other involved "parents prescribing what the state shall teach their children."[83] Such a right would require schools "to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter."[84] The court did not find such a requirement plausibly implied by the Constitution.[85]

The plaintiffs also attempted a theory that they had the "right to be free from 'exposure to vulgar and offensive language,'"[86] citing to *Bethel*'s language stating that a "high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students."[87] However, the court made the obvious argument that *Bethel* empowers the school to "regulate or discipline speech to protect minors from offensive or vulgar speech," but it does not create a private right of action against the school for "exposure" to such speech.[88]

The plaintiffs also asserted a claim that the assembly "imping[ed] on their sincerely held religious values regarding chastity and morality" in violation of the Free Exercise Clause.[89] The Court dismissed this claim under the standard post-*Smith* Free Exercise doctrine that a "neutral requirement that applied generally" does not pose Free Exercise problems.[90]

Ultimately, despite the severity of the school's misconduct, all of the plaintiffs' constitutional claims failed because the school did not violate the Constitution. The school presented its (unorthodox) message, but did not violate the Establishment Clause, censor student speech, or compel student affirmations of belief. Thus, nothing about the school's message was inherently unconstitutional, no matter how undesirable it was, or how desirable a parental opt-out provision would have been.

Other courts have reached results similar to the *Brown* Court. Another such case, though with less extreme facts, is *Leebaert v.*

83. *Id.* at 534.
84. *Id.*
85. *Id.* at 533–34.
86. *Id.* at 534.
87. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).
88. *Brown*, 68 F.3d at 534.
89. *Id.* at 537.
90. *Id.* at 539.

Harrington.[91] In *Leebaert*, the plaintiff father asserted religious and fundamental rights claims that he should be able to excuse his seventh-grade son from a mandatory health education class at his Connecticut public school.[92] The health education class covered topics such as "health and safety, alcohol, tobacco and drugs, and family life."[93] The school allowed parents to opt their children out of six classes, each of which discussed AIDS or family life; however, it required students to attend the remainder of the classes.[94]

The plaintiff father explained his position to the school in a letter:

> Corky and I are exercising our Fourteenth Amendment rights in this matter as we both prefer him to be home schooled regarding health, morals, ethical and personal behavior. I believe health, sex, and character development education are all necessary in the course of an individual's life and I have been teaching these things successfully to my children since they were toilet trained, without the need of government assistance. I am sure your health educators are capable teachers and their ability to instruct their students is not in question here. I, however, as the father, and being sufficiently educated in health, sex, and behavioral issues, feel it is more appropriate that as they enter adolescence I handle this facet of my children's personal growth at home.[95]

He later stated in an affidavit:

> My objection to the subjects taught in Health, to which I sought to opt my son Corky out of in the last part of his 7th grade, is that I believe that God has empowered human beings with the right to bring their children up with correct moral principles in dealing with the issues taught in this course, not the school system. I claim the right, and responsibility, to impart those religious values which I have been taught to my children to develop their moral, ethical and religious character.
>
> I believe that the way the school system teaches the subjects to which I sought to opt my son out of, is anti-religion. For one example, it doesn't support a married man and woman together as

91. 332 F.3d 134 (2d Cir. 2003).
92. *Id.* at 135.
93. *Id.* at 136.
94. *Id.*
95. *Id.* at 136–37.

> the basic unit of the family. The school teaches that this unit can be comprised of anything or anyone, that anything you say can be a family. This contradicts my religious beliefs.[96]

After the student did not attend the class, the school gave him a failing grade.[97]

In analyzing the plaintiff's constitutional claims, the Second Circuit noted its agreement with *Brown*. "*Meyer*, *Pierce*, and their progeny do not begin to suggest the existence of a fundamental right of every parent to tell a public school what his or her child will and will not be taught." It argued that "recognition of such a fundamental right . . . would make it difficult or impossible for any public school authority to administer school curricula responsive to the overall educational needs of the community and its children."[98] The Court also rejected the plaintiff's Free Exercise Clause claims on grounds similar to the *Brown* Court, noting that religion could not provide an opt out to such a generally applicable provision.[99]

However sympathetic the plight of a parent who does not want his child exposed to a school's mandatory sexual education program, the Constitution does nor, and should not, provide the parent a right to opt his child out of a mandatory part of public school curriculum short of removing his child from the public schools. While public schools would generally be wise to provide parental opt-out provisions in such cases,[100] the Constitution does not mandate this result. Rather, a community is free to make a value-based decision as to the degree of sexual education it will provide to students in the public schools. Under this approach, a parent may still circumvent mandatory school requirements, but that attempt will carry consequences because the community's values determine the curriculum, not the whims of dissenting parents.

B. Library Book Selection

Arguments about appropriate curricular materials, from textbooks to school libraries, also lead to significant controversy.

96. *Id.* at 137–38.

97. *Id.* at 137.

98. *Id.* at 141.

99. *Id.* at 143.

100. *See, e.g.*, CAL. EDUC. CODE § 51938 (West 2006); UTAH CODE ANN. § 53A-13-101(3) (2007).

While the courts generally support schools' curricular choices, the Supreme Court's jurisprudence in this area is not entirely consistent or free from confusion. In its 1982 *Pico* decision, the Supreme Court read the First Amendment so broadly as to unjustifiably constrain schools' actions, inviting confusion and needless litigation over trivial supposed violations of First Amendment rights.

1. Library book removal—Pico

In *Pico*,[101] a plurality of the Supreme Court created an unusual First Amendment right—the right to not allow local school boards to remove books from school libraries out of distaste for the message of the book.[102] The fact that *Pico* is so influential is unusual in that the constitutional issue was decided by a vote of 4-4. Justice White concurred with the plurality because he thought the factual issues were sufficiently contested to justify a remand on that ground alone, explicitly reserving any decision on the constitutional issues.[103] Nevertheless, the questionable right created by the *Pico* plurality is still enforced by the lower courts.

The essential action challenged in *Pico* was the school board's removal of nine books from a high school library.[104] The district court summarized the school board's reasons for removing the books: "[T]he board acted not on religious principles but on its conservative educational philosophy, and on its belief that the nine books removed from the school library and curriculum were irrelevant, vulgar, immoral, and in bad taste, making them educationally unsuitable for the district's junior and senior high school students."[105] The school board's actions were hardly above criticism, since it acted after being influenced by a politically conservative interest group, ignored the district's existing policy for dealing with objections to books, ignored the protests of the

101. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982).

102. *Id.* at 872 (plurality opinion of Brennan, J.).

103. *See id.* at 883 (White, J., concurring in the judgment).

104. *See id.* at 858–59 (plurality opinion). The nine books were *The Fixer*, *Go Ask Alice*, *Best Short Stories by Negro Writers*, *The Naked Ape*, *Down These Mean Streets*, *Soul on Ice*, *A Hero Ain't Nothin' but a Sandwich*, *Slaughter House Five*, and *A Reader for Writers*. *Id.*

105. *Id.* at 859 (quoting Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 474 F. Supp. 387, 392 (E.D.N.Y. 1979)).

district's Superintendent, and did not follow the recommendation of an ad hoc committee appointed to examine the challenged books.[106]

The plurality agreed with the school board that "local school boards must be permitted 'to establish and apply their curriculum in such a way as to transmit community values.'"[107] However, it cited various cases dealing with a right to receive information (in a non-public education context) to argue that a student can claim a First Amendment right in her use of a school's library.[108] It went on to cite *Barnette*'s language that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[109] The plurality also cited a case dealing with university professors' classroom speech that notes that "the First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom,"[110] as well as a case holding that the First Amendment could protect a teacher from retaliation for speech unrelated to his classroom duties.[111]

With a backdrop of those precedents, the plurality set out its core holding:

> [T]he message of these precedents is clear. Petitioners rightly possess significant discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner. If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books. The same conclusion would surely apply if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration. Our Constitution does not permit the official suppression of *ideas*. Thus whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners *intended* by their removal

106. *See id.* at 856–58 & 857 n.4.

107. *Id.* at 864 (quoting Brief of Petitioner at 10, *Pico*, 457 U.S. 853 (No. 80-2043)).

108. *See id.* at 865–69.

109. *Id.* at 870 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

110. *Id.* at 870 (quoting Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 603 (1967)).

111. *See id.* (discussing Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)).

> decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution. To permit such intentions to control official actions would be to encourage the precise sort of officially prescribed orthodoxy unequivocally condemned in *Barnette* . . . .
>
> As noted earlier, nothing in our decision today affects in any way the discretion of a local school board to choose books to *add* to the libraries of their schools. Because we are concerned in this case with the suppression of ideas, our holding today affects only the discretion to *remove* books. In brief, we hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books . . . ."[112]

The plurality's holding is troubling for several reasons. It fails to distinguish between government suppression of private speech and government discretion to choose its own message when the government is the speaker. While the First Amendment generally prevents the government from punishing expression by private citizens, it hardly requires the government itself to express ideas. The prescription of orthodoxy warned of in *Barnette* was not a state's refusal to endorse an idea, but the state's affirmative compulsion of a student to express the idea—analytically, a different (and much more troubling) concept. While forcing a student to adhere to an idea and punishing him for expressing a different idea are clearly forbidden, it is not clear why the First Amendment would require the school to provide materials discussing any particular idea.

The hypotheticals cited by the plurality (concerning political or racial prejudice) also do not directly support its holding. Partisan claims can be dealt with under the political representation aspect of the First Amendment,[113] while claims of racial animus can be presented under the Equal Protection Clause.[114] Neither hypothetical requires expanding the First Amendment's protection of freedom of

112. *Id.* at 870–72 (citations omitted).

113. *See supra* note 38 and accompanying text.

114. *See supra* note 37 and accompanying text; *see also* Loewen v. Turnipseed, 488 F. Supp. 1138, 1154–55 (N.D. Miss. 1980) (finding, among other things, a constitutional violation in a state's rejection of one history textbook and selection of another for racially motivated reasons).

speech to constrain a school board's discretion in selecting which community values and ideas it wishes to make available to students.

The plurality also does not clearly explain why the decision to remove a book can be treated separately from a decision to add a book. A school board that directed library personnel not to purchase any books with favorable treatment of Catholicism (because it favored Protestantism) or any books with favorable treatment of Asians (because it favored Latinos), would violate the Establishment Clause or the Equal Protection Clause just as much as if it ordered the removal of books on those grounds. However, under the plurality's holding, a school board's directive to *not* purchase the nine contested books would not implicate the First Amendment, while its directive to remove them would.[115]

It is certainly true that many decisions by government actors to remove library books would be unwise and likely do more harm than good. However, the "harm" to a student of not having a book in his school library (when the same book is likely available at a public library) seems minimal,[116] while the constraints imposed by the plurality's concept of the First Amendment are more troubling. Under the *Pico* plurality's approach, in the aftermath of a school shooting, a school board could not decide to remove books celebrating violence.[117] Faced with escalating illegal drug use, a school board could not remove books celebrating drug use (or even remove the literature of the Marijuana Party,[118] should it have found its way onto the library shelves).[119] It seems bizarre that the Constitution (according to the plurality's logic) *requires* a school library to retain a Communist, Fascist, or Baathist tract, or a book arguing the Holocaust did not occur, or a book celebrating white supremacist serial killers, simply because some library acquisitions

115. *See Pico*, 457 U.S. at 892–93 (Burger, C.J., dissenting) (elaborating on this argument and asking, "Why does the coincidence of timing become the basis of a constitutional holding?").

116. *See id.* at 891–92 (Burger, C.J., dissenting) (noting this and other alternatives).

117. *See id.* at 896–97 (Powell, J., dissenting) ("Books may not be removed because they . . . extol violence.").

118. *See supra* note 9 and accompanying text.

119. *See* Morse v. Frederick, 127 S. Ct. 2618, 2636 (2007) (Alito, J., concurring) (noting the holding that "a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use").

director, at some point, thought the work had enough educational value to merit shelf space.[120]

Notwithstanding the *Pico* plurality's reasoning, communities should be free to send a moral message with all aspects of their schools' curriculum, including the school library. So long as they do nor violate clearly established Constitutional rights, the community should be free to offer (or not offer) whatever library books it desires. The *Pico* plurality's opinion and its progeny illustrate the harms that flow from violating this principle.

2. Library book removal—subsequent cases

Some of the problems with the rationale of *Pico* are illustrated by subsequent cases. For instance, a school board's inadvisable decision to remove J.K. Rowling's *Harry Potter* series exposed the school district to significant litigation costs over a fairly trivial issue in *Counts v. Cedarville School District.*[121]

In *Counts*, a five-member school board voted 3-2 to restrict access to, and require parental approval for student checkout of, the then-published four books in the *Harry Potter* series.[122] The board acted after a parental complaint about *Harry Potter and the Sorcerer's Stone*, and after a special committee consisting of principals, librarians, teachers, students, and parents had unanimously recommended keeping the book's status unchanged.[123] Of the three board members who voted to restrict access to the books, only one had read *Sorcerer's Stone*, and none had read the other *Potter*

120. *See* Cary v. Bd. of Educ. of Adams-Arapahoe Sch. Dist. 28-J, 598 F.2d 535, 542 (10th Cir. 1979) ("Since we are dealing not with the collection of a public book store but with the library of a public junior high school, evidently some authorized person or body has to make a determination as to what the library collection will be. It is predictable that no matter what choice of books may be made by whatever segment of academe, some other person or group may well dissent. The ensuing shouts of book burning, witch hunting and violation of academic freedom hardly elevate this intramural strife to first amendment constitutional proportions. If it did, there would be a constant intrusion of the judiciary into the internal affairs of the school. Academic freedom is scarcely fostered by the intrusion of three or even nine federal jurists making curriculum or library choices for the community of scholars. When the court has intervened, the circumstances have been rare and extreme and the issues presented totally distinct from those we have here." (quoting Presidents Council v. Cmty. Sch. Bd., No. 25, 457 F.2d 289, 291–92 (2d Cir. 1979))).

121. 295 F. Supp. 2d 996 (W.D. Ark. 2003).

122. *Id.* at 1001.

123. *Id.* at 1000–01.

books.[124] The district court judge characterized the board members' rationales as based on "their concern that the books might promote disobedience and disrespect for authority" and "the fact that the books deal with 'witchcraft' and 'the occult.'"[125] After parents of a student who wanted access to the books in the library sued, the court found a violation of the First Amendment under the theory articulated in *Pico*, granted plaintiffs' motion for summary judgment, and ordered the school district to pay the plaintiffs' attorneys' fees.[126]

While the most charitable description of the school board's actions is probably "ill-advised," the claimed constitutional harms found by the *Counts* court seem unpersuasive. The court noted burdens the plaintiffs' daughter faced that it thought amounted to a constitutional violation: (1) that she had to have a parental consent form signed, (2) that should she wish to check out or even peruse one of the affected books she would have to wait for the assistance of a librarian, and (3) that the books in question were "stigmatized," "with resulting 'stigmatization' of those who choose ro read them."[127] The first two claimed burdens are fairly trivial. As for "stigmatization," that argument may prove too much—if a school board violates the Constitution by "stigmatizing" a book through restricting access to it, it would seem to also violate the Constitution if it made its disapproval known in some other way, such as passing a symbolic resolution condemning the book, or through a majority of individual board members speaking out against the book at a board meeting. Similarly, a student's speech in favor of legalizing drugs is almost certainly protected, but is also almost certainly "stigmatized" by a litany of counterspeech from school officials.[128]

The board members' motives in restricting access to the book would certainly not allow suppression of student speech, but their motives seem fairly harmless when dealing with what speech the school will sponsor in its library. The argument that the board members impermissibly acted from religious motivations suggests a possible Establishment Clause claim, excepr that the board's actions

124. *Id.* at 1001.

125. *Id.* at 1002.

126. *Id.* at 1005.

127. *Id.* at 999.

128. *See* Morse v. Frederick, 127 S. Ct. 2618, 2636 (2007) (Alito, J., concurring) (noting that the Court's holding did not reach suppression of student speech on political issues relating to illegal drugs).

do not seem to have amounted to an official establishment of their preferred religion, as no other religion seems to have been disestablished (a liking for Harry Potter does not seem to be a religion[129]). The board's actions can certainly be characterized as unwise, and arguably would have done more to hurt their cause than help it even if the issue had never led to a lawsuit.[130] Moreover, the board's decision would likely have been reversed eventually, as the popularity of the *Harry Potter* series grew and ridicule increased toward those who disapproved of the books so strongly.

The constitutional harm of the board's decision that the court intervened to forestall, if any constitutional violation existed at all, seems minimal at best. On the other hand, the school district was exposed to liability for attorneys' fees, it had to deal with the expense and hassle of litigating the case, school board members had to give lengthy depositions about their actions, and the district court had to expend its resources on deciding the case.[131] *Counts* thus demonstrates how *Pico*'s reasoning leads to unpalatable results.

Cases decided under the *Pico* rationale do not all involve school boards with motives as extreme as the board in *Counts*. While still controversial, some such decisions appear more defensible. For instance, a Florida school board voted to remove early elementary school books that it believed misleadingly characterized life under the Castro regime in Cuba, but lost a *Pico* challenge.[132] A Kansas school board voted to remove a lesbian romance novel from high school libraries, but lost a lawsuit under the *Pico* rationale, and was liable for an award of attorneys' fees.[133] While both decisions involve matters of opinion, they also both clearly implicate community

129. "Jedi," on the other hand, may be gaining traction as an official religion. *See, e.g.*, *May the Farce Be With You*, SYDNEY MORNING HERALD, Aug. 27, 2007, *available at* http://www.smh.com.au/articles/2002/08/27/1030053053578.html ("More than 70,000 Australians identified their religion as Jedi, Jedi Knight or Jedi-related in last year's national census."); *see also* THE JEDIISM WAY, http://www.thejediismway.org/. Exhaustive research has failed to discover an equivalent phenomenon with respect to Harry Potter.

130. *See* J.K. ROWLING, HARRY POTTER AND THE ORDER OF THE PHOENIX 582 (2003) ("'Oh Harry, don't you see?' Hermione breathed. 'If she could have done one thing to make absolutely sure that every single person in this school will read your interview, it was banning it!'").

131. *Counts*, 295 F. Supp. 2d at 1002, 1005.

132. Am. Civil Liberties Union of Fla. v. Miami-Dade County Sch. Bd., 439 F. Supp. 2d 1242, 1257–60, 1281–82, 1294 (S.D. Fla. 2006).

133. *See* Case v. Unified Sch. Dist. No. 233, 908 F. Supp. 864, 875–77 (D. Kan. 1995).

values. Cultural liberals will likely oppose the Kansas school board's decision, but should remember that under the logic of that decision, a different school board could not remove books that negatively portray homosexual relationships.

Ultimately, *Pico* and its progeny imply that communities cannot take steps to ensure that public school libraries reflect community values and expose school districts to significant financial liability when they try. Such a result does not seem mandated by the Constitution. A community should be free to express moral opinions in its curricular choices, including its library stocking decisions, so long as it does not violate the Constitution. Removing a book from a school library usually does not establish religion, does not censor student speech, and does not coerce a student to express a belief. Rather, it merely allows the school to decline to endorse the message of the book. Such an action is often unwise, but is not a clear constitutional violation.

III. CONCLUSION

Apart from constitutional constraints on state action, communities should be free to communicate their values through the public schools. Schools should be able to teach the community's preferred message on human sexuality, so long as they respect students' First Amendment right to speak in response to the school's message. Likewise, schools should be free to incorporate values into their curricula and libraries, so long as they respect applicable provisions of the Constitution. Striking the proper balance can be difficult, but absent a constitutional violation, courts should respect, not interfere with, communities' and school boards' actions. Courts should refrain from using the Constitution to constrain legitimate value-based messages, even when the community makes (possibly unwise) decisions with which the judge may disagree. Parents' rights are still legally protected by the Supreme Court's holdings that they may send their children to private schools, as well as by the parents' ability to participate in the political community. With regard to controversial school speech, democracy and constitutional values are best served when judges strictly enforce established constitutional rights while otherwise allowing communities to teach their preferred messages.

Peter J. Jenkins