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THE CONSTITUTIONAL IMPERATIVE OF REALITY IN PUBLIC SCHOOL CURRICULA: UNTRUTHS ABOUT HOMOSEXUALITY AS A VIOLATION OF THE FIRST AMENDMENT

INTRODUCTION

American public schools¹ instruct our nation's youth in reading, writing and arithmetic, and, inevitably, in the values and perspectives that shape each school's curriculum.² Because of the role schools play in teaching students, controversial topics in society often become mirrored in debates about what schools should teach.³ This is particularly true regarding topics that relate to sexuality.⁴ Thus, as gay men and lesbians

¹ For the purposes of this Note, the term "public schools" refers to both elementary and secondary schools that are operated by a government entity, typically a local school board.

² Board of Educ. v. Pico, 457 U.S. 853, 879 (1982) (Blackmun, J., concurring) (public schools "inevitably . . . inculcate ways of thought and outlooks"). Some state legislatures have drafted "core value curricula" in an effort to directly define the values taught in their schools. See Tracy M. Lorenz, *Value Training: Education or Indoctrination? A Constitutional Analysis*, 34 ARIZ. L. REV. 593, 594-95 (1992) (discussing potential constitutional challenges to implementation of Arizona's core values curriculum based on the First Amendment's protection of the right to form one's own beliefs and opinions and concluding that "the most effective curriculum [and the program most likely to survive constitutional attack] is one that fosters decision-making skills").

³ For example, the cold war mentality was reflected in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (invalidating statute that required public university professors to sign a loyalty pledge). Public divide over the United States' involvement in Vietnam set the context for *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969) (striking down school's prohibition on black armbands worn to express disagreement with the American presence in Vietnam). Presently, communities are debating the proper scope of AIDS-education curricula. See, e.g., *Board of Educ. v. Sobol*, 161 Misc. 2d 393, 613 N.Y.S.2d 792 (Sup. Ct. Albany County 1993) (upholding decision of New York State's Board of Regents, which struck down resolution that required New York City public schools to emphasize abstinence in all AIDS-education instruction).

⁴ As the Ninth Circuit expressed, "few things are so significant to our society, or reflect such deeply held and widely divergent views crying out for expression, as . . . sex education." *Planned Parenthood v. Clark County Sch. Dist.*, 941 F.2d 817, 819 (9th Cir. 1991) (upholding exclusion of advertisements relating to family planning in school publications because ban preserved school's neutrality).

have gained greater visibility in society and politics during the last few decades, debate over the presentation of, or the silence about, homosexuality in the public schools not surprisingly has increased. Although many adults have come to view homosexuality as an important topic for schools to address accurately,⁵ others advocate that teachers explicitly condemn the "gay lifestyle."⁶ Similarly, the reality of AIDS in the lives of many children and teenagers has contributed to the re-assessment of curricula on topics such as sexuality, family composition and discrimination.⁷

Moreover, widening enactment of minimal legal protections against discrimination, as well as other signs of public recognition that gay people face unfair prejudice, recently have been the catalyst for virulent anti-gay initiative campaigns.⁸ The powerful 1990s backlash against non-discrimina-

⁵ A few school systems have adopted curricula designed to teach about gay men and lesbians in a fact-based, respectful way. Fairfax County, Virginia, Broward County, Florida, Houston, Texas, and San Francisco, California now discuss lesbian and gay parents along with other families starting in the middle grades. William Celis 3d, *Schools Across U.S. Cautiously Adding Lessons on Gay Life*, N.Y. TIMES, Jan. 6, 1993, at A19; see also Don Aucoin, *Weld Is Set to Sign Gay Student Rights Bill; Advocates Hail First-in-Nation Legislation*, BOSTON GLOBE, Dec. 10, 1993, at 37 (discussing Massachusetts bill that outlaws discrimination against gay and lesbian students in public schools); Chris Bull, *Safety Net: The Massachusetts State Board of Education Moves to Make High Schools Safe for Gay and Lesbian Youth*, ADVOCATE, Sept. 7, 1993, 52, 52-53 (reporting that Massachusetts is implementing broad state-wide support systems for gay and lesbian youth primarily in response to high abuse rate of gay youth).

In addition, New York City has a small public high school for gay students forced out of mainstream schools by anti-gay violence and Los Angeles, Minneapolis-St. Paul, and Seattle have special counseling or AIDS-education programs for gay teens that operate in the schools. Gary Putka, *Uncharted Course: Efforts to Teach Teens About Homosexuality Advances in Schools*, WALL ST. J., June 12, 1990, at A1 (noting that although there are few services tailored to gay and lesbian youth, some parents nonetheless see these as unfair, special rights serving only "a very small segment of the population").

⁶ Kevin Cranston, Director of the HIV/AIDS program for the Massachusetts Department of Health, has observed that "[w]ith more and more gay and lesbian students coming out, it's been very hard for school districts to completely deny their existence." Bull, *supra* note 5, at 52.

⁷ By 1990, 33 states and 80% of large school districts required AIDS prevention education. See Putka, *supra* note 5, at A1; see also Mary B. Tabor, *For Gay High-School Seniors, Nightmare Is Almost Over*, N.Y. TIMES, June 14, 1992, at 41 ("[s]chools across the country are revisiting curriculums" in response to the AIDS epidemic and anti-gay violence).

⁸ In the past two decades, over 100 municipalities and eight states have amended their civil rights laws to ban discrimination on the basis of sexual orien-

tion protection for gay men and lesbians includes efforts to remove or slant discussions of homosexuality in public education.⁹ Ballot initiatives in many states and municipalities have sought to forbid any legal protections or "special rights" based on sexual orientation¹⁰ and, in many instances, to impose re-

tation. Note, *Constitutional Limits on Anti-Gay-Rights Initiatives*, 106 HARV. L. REV. 1905, 1923-25 (1993) (discussing legislation passed in the early 1970s and subsequent repeal efforts).

⁹ This backlash phenomenon dates back to the 1970s when, after the lesbian and gay community first attained civil rights protection in some municipalities, the religious right organized campaigns to repeal the protective legislation and began seeking to bar the issue of homosexuality from public school systems. Note, *supra* note 8, at 1908. In 1977 and 1978, voters eliminated civil rights protections based on sexual orientation in cities in Florida, Minnesota, Kansas and Oregon. Kristina Campbell & Lyn Stoesen, *19 Years of Ballot Battles*, WASH. BLADE, Nov. 12, 1993, at 24; see also Note, *supra* note 8, at 1908.

In 1978, a California ballot referendum popularly known as the Briggs Initiative sought to grant schools the right to fire any public school employee who engaged in "advocating, soliciting, imposing, encouraging or promoting private or public homosexual activity." See Nan D. Hunter, *Speech, Identity and Equality*, 79 VA. L. REV. 1695, 1703 (1993) (citing California Proposition 6, § 3(b)(2) (1978)). The initiative was designed and understood as a referendum on whether the state should fire gay teachers so as to remove them from any contact with children. *Id.* Although the Briggs Initiative was defeated in California, Oklahoma legislators, reacting to a campaign led by religious right crusader Anita Bryant, enacted its language into law the following year. See *National Gay Task Force v. Board of Educ.*, 729 F.2d 1270 (10th Cir. 1984) (statutory provision that forbade "public homosexual conduct" defined as "advocating, soliciting, imposing, encouraging or promoting" homosexuality, was struck down as overbroad because it punished protected, out-of-the-classroom speech), *aff'd*, 470 U.S. 903 (1985) (per curiam).

¹⁰ In the 1993 elections, for example, voters in Cincinnati, Ohio endorsed measures to rescind and ban anti-discrimination protections based on sexual orientation and, in the case of Portsmouth, New Hampshire, to bar any type of "protected" status for gay men and lesbians. *The 1993 Elections: Propositions*, N.Y. TIMES, Nov. 3, 1993, at A24. *But see* *Equality Found. v. Cincinnati*, 860 F. Supp. 417 (S.D. Ohio 1994) (permanently enjoining implementation and enforcement of the initiative amendment to that city's charter). For the 1994 elections, groups in "Florida, Idaho, Maine, Michigan, Missouri, Oregon, Texas, and Washington . . . organiz[ed] efforts for such legislation in their states." Tamar Lewin, *Sights Are Set on Other Anti-Gay Measures*, N.Y. TIMES, Dec. 15, 1993, at A22. Idaho and Oregon had the only statewide initiatives with enough support to appear on the November 1994 ballot, but both initiatives were defeated at the polls. Robert Pear, *The 1994 Election: States Ballot Measures*, N.Y. TIMES, Nov. 10, 1994, at B7.

The most significant legal dispute to date has involved the Colorado anti-gay ballot initiative known as Amendment 2. Approved by the Colorado electorate on November 3, 1992, Amendment 2 revised the Colorado Constitution to prevent gay, lesbian, or bisexual orientation from ever serving as the basis for a "claim [of] minority status . . . [or] claim of discrimination." COLO. CONST. art. II, § 30b (1992). The amendment, however, has since been struck down as a violation of the Equal Protection Clause because it uniquely hampers the ability of those who be-

strictions on any teaching or mention of homosexuality in public schools.¹¹

In many parts of the country, such efforts to exclude a positive view (or any view) of homosexuality from public school curricula are just one aspect of a broader campaign to influence local school curricula on a number of related topics, including sexual abstinence until marriage and abortion.¹² These campaigns are organized and financed by national conservative and far-right religious organizations¹³ that employ

lieve in non-discrimination for lesbians and gay men to participate in the political process. *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994) (affirming permanent injunction), *cert. granted*, 115 S. Ct. 1092 (1995).

¹¹ See, e.g., Oregon Ballot Measure 9 (1992). This measure sought to require "the State Department of Higher Education and the public schools [to] assist in setting a standard for Oregon's youth that recognizes homosexuality, pedophilia, sadism and masochism as abnormal, wrong, unnatural, and perverse and that these behaviors are to be discouraged and avoided." Although this state-wide measure was defeated in the November 1992 elections, anti-gay initiatives reflecting this language continued to be filed in cities and counties across Oregon, which were "targeted because a majority of voters in those communities supported" Measure 9 in the 1992 election. See ACLU, *Anti-Lesbian/Gay Ballot Initiatives*, DOCKET, Jan. 1, 1994, at 9.

¹² See, e.g., Mimi Hill, *Debating How Far to Go on Sex Ed*, USA TODAY, Oct. 7, 1993, at 12 (discussing nationwide debates on abstinence-based curricula that teach that "abortion is not the right choice"); Connie Langeland, *Teachers Wince at Board Plan Listing Taboos*, PHIL. INQUIRER, June 6, 1993, at B1, B4 (writing that a Pennsylvania school district's proposal to prohibit instruction on sexual behavior outside the context of family values "reflects complaints . . . made by many conservative Christians, particularly Christians for Excellence in Education"); Seth Mydans, *Evangelicals Gain with Cover Candidates*, N.Y. TIMES, Oct. 17, 1992, at A1 (reporting the agenda of the religious right in schools centering on teaching abstinence and eliminating mention of abortion and homosexuality).

¹³ The extreme religious right encompasses a number of conservative groups, primarily fundamentalist or evangelical Protestant in orientation, that emerged in the 1970s and "coalesced with the political right in 1979-80." Some of the most well-known conservative groups that make up the [religious right] are Jerry Falwell's Liberty Foundation, (formerly [the] Moral Majority), Phyllis Schlafly's Eagle Forum . . . Tim LaHaye's American Coalition for Traditional Values, Beverly LaHaye's Concerned Women for America, and Mel and Norma Gabler's Educational Research Analysts. Among other national groups are the National Christian Action Coalition, the Concerned Coalition of Parents, the National Association of Christian Educators, and Citizens for Excellence in Education.

Martha M. McCarthy, *Secular Humanism and Education*, 19 J.L. & EDUC. 467, 470 (1990) (footnote omitted).

In addition, the far religious right movement has spawned a number of national legal organizations dedicated to promoting and protecting its agenda. Such organizations include the Rutherford Institute, Concerned Women for America's

an array of carefully designed tactics to influence local school boards. One common tactic is to run "stealth" candidates—individuals who mask their religious affiliations and agenda until elected—for school board seats.¹⁴

As a result, school curricula have become a battleground on which issues of homosexuality are debated. Some state legislatures and local school boards already have adopted restrictions mandating that teachers stress that homosexuality is unacceptable and unhealthy,¹⁵ or have banned the topic of homosexuality altogether.¹⁶ Several other localities and states

Education and Legal Defense Foundation, and the National Legal Foundation established by Pat Robertson. See Keith Waldman, *Appealing to a Higher Law: Conservative Christian Legal Action Groups Bring Suit to Challenge Public School Curricula and Reading Materials*, 18 RUTGERS L.J. 437, 439-40 (1987).

¹⁴ See, e.g., Note, *supra* note 8, at 1909 (noting that religious right groups "frequently distort the true nature of their organizations, rely on discredited experts and facts, and conceal from voters the true purpose of their legislation"); David Hill, *Christian Soldier*, TEACHER MAG., Nov./Dec. 1992, at 18 (discussing grass-root tactics by conservative Christians to infiltrate public school boards by concealing religious agenda until after elections); Mydans, *supra* note 12, at A17 (same); Jill Smolowe, *Crusade for the Classroom*, TIME, Nov. 1, 1993, at 34 (quoting Ralph Reed, executive director of the Christian Coalition, who explained the strategy of "fly[ing] under the radar of the media . . . so they don't know what hit them until it's too late"). One commentator has noted that the religious right's "greatest potential to achieve political success is through the local school board." McCarthy, *supra* note 13, at 488-89.

¹⁵ ALA. CODE § 16-40A-2 (Supp. 1992) (requiring emphasis in sexual education instruction that "homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense"); ARIZ. REV. STAT. ANN. § 15-716 (Supp. 1994) (prohibiting any information in AIDS-education curriculum that "[p]romotes a homosexual lifestyle [or] portrays homosexuality as a positive alternative life-style"); TEX. HEALTH & SAFETY CODE ANN. § 163.002 (West 1992) (providing restrictions identical to Alabama statute cited *supra*); see also Memorandum from Steve Mecham, Associate Superintendent, Utah State Office of Education, to Members of the Utah State Board of Education 2 (Apr. 2, 1993) (stating that the Utah State Textbook Commission had approved banning "[t]he advocacy of homosexuality as a desirable or healthy sexual adjustment or lifestyle" throughout Utah public school textbooks) [hereinafter Mecham Memorandum]. On June 15, 1993 the Utah State Board of Education formally adopted this policy. Telephone Interview with Shauna Stewart, Instructional Materials Specialist, Utah State Office of Education (Apr. 20, 1995). For a further discussion of these statutes, see discussion *infra* part IV.

¹⁶ New York City School District 24 "has mandated that any reference to . . . homosexuality . . . be eliminated from the curriculum." Letter from Joseph F. Quinn, Community Superintendent of Community School District 24, to All Parents and Guardians of Children Enrolled in District 24 Schools (seeking parental permission for students to participate in AIDS instruction for the 1991-92 school year) (on file with author) [hereinafter Quinn Letter]; see also Steven L. Myers, *Queens*

continue to consider similar policies.¹⁷ A ballot initiative recently rejected by voters in Idaho, for example, sought to require that "[n]o employee, representative, or agent of any public elementary or secondary school shall, in connection with school activities, promote, sanction, or endorse homosexuality as a healthy, approved or acceptable behavior."¹⁸

The laws enacted to date and current proposals to limit teaching about homosexuality fall into three categories. These regulations either completely ban the topic of homosexuality,¹⁹ ban the view that homosexuality is acceptable,²⁰ or require teachers affirmatively to emphasize the view that homosexuality is unacceptable.²¹ Meanwhile, those schools that lack any formal policy continue the longstanding practice of attempting to ignore the existence of gay and lesbian people in their curricula.²² Such inaction not only produces many of the same

School Board Suspended in Fight on Gay-Life Curriculum, N.Y. TIMES, Dec. 2, 1992, at A1 (reporting that "District 24 has steadfastly refused to accept any references [to homosexuality] at all"); Liz Willen, *Gay Life a Taboo Subject*, NEWSDAY, Apr. 23, 1992, at 3 (discussing resolution). See *infra* part IV.

¹⁷ A similar method of restricting discussions of homosexuality in public schools recently appeared at the national level. See Katherine Q. Seelye, *Senate Backs Cuts for Schools that Endorse Homosexuality*, N.Y. TIMES, Aug. 2, 1994, at A16. In 1994, the United States Senate passed a bill that eliminated federal funds to any school that "encouraged or supported homosexuality 'as a positive life style alternative' or that distributed materials that did so or that referred a student 'to an organization that affirms a homosexual life style.'" *Id.* The effect of this measure was neutralized by a subsequent bill that suspended funding to schools that encouraged any type of sexual activity. *Id.* Nonetheless, the initial measure indicates growing political concern over these issues.

¹⁸ Proposition One, Public Schools § 67-8004 (establishing state policies regarding homosexuality); see also *ICA Plans New Anti-Gay Initiative*, IDAHO STATESMAN, Apr. 20, 1995, 1B (Idaho Citizens Alliance planning similar initiatives for the November 1996 ballot dealing with the treatment of homosexuality in the schools).

¹⁹ See *infra* notes 220-21 and accompanying text.

²⁰ See *infra* notes 222-23 and accompanying text.

²¹ See *infra* notes 224-25 and accompanying text.

²² The majority of American school districts do not include gay and lesbian issues in their curricula and have no special counseling programs for gay youth. SEX INFO. & EDUC. COUNCIL OF THE U.S., UNFINISHED BUSINESS: A SEICUS ASSESSMENT OF STATE SEXUALITY EDUCATION PROGRAMS 9 (1994) (study of 28 state sex-education curricula found that the majority of states "do not fully address—or omit entirely—such topics as sexual identity and orientation"); see also Patrick Welsh, *Gays in School: Fear and Isolation Leave Homosexual Kids in Hiding*, WASH. POST, Mar. 4, 1990, at C1.

Solnitz v. Maine Sch. Admin., 495 A.2d 812 (Me. 1985), documents one school district's reaction to the assault and drowning of a local gay man by three area high school students. *Id.* at 815. When a teacher proposed "Tolerance Day" to

harms that result from explicitly anti-gay policies,²³ but also is more difficult to challenge constitutionally.

This Note argues that regulations and statutes designed to impose an anti-gay slant to the entire curriculum of a public school or to a particular course (such as a sex- or AIDS-education class) impermissibly violate students' first amendment right to receive information. Part I articulates the goals and functions of public schools in the United States, including the critical one of instilling democratic and constitutional values. It specifically demonstrates the need for schools to provide accurate and balanced information about sexual orientation to give gay youth an equal and safe opportunity for a public education. Accurate information about sexual orientation, in fact, benefits all students by diminishing their fear of sexual differences and exposing them to the complexity of the real world.

Part II then examines the general principles of first amendment law that relate to curricula and to other speech in the school context. Because the Supreme Court never has considered a first amendment right-to-receive-information challenge to a curriculum restriction, Part III draws on the precedents discussed in Part II to explore such an approach. This section proposes a balancing test involving six factors that courts should employ when evaluating first amendment challenges to laws restricting the content of public school curricula. Finally, Part IV describes in detail the anti-gay curriculum restrictions enacted to date and concludes that these restrictions are unconstitutional under the proposed balancing test.

Although courts defer a great deal to local school officials in the operation of public schools, local autonomy is not absolute. Perpetuating prejudice and misinforming youth are not appropriate goals for schools. As this nation learned in *Brown v. Board of Education*²⁴ and its aftermath, the Constitution

address the prejudices amongst students by inviting members of various minority groups to speak at the school, the school balked at allowing a lesbian to be among the included speakers. *Id.* After some parents expressed concern, the school officials canceled the entire event—a decision upheld by the court. *Id.* at 816. Allowing something of a heckler's veto, the court found that the school's decision was justified because "Tolerance Day" was potentially disruptive. *Id.* at 818; see also ARTHUR S. LEONARD, *SEXUALITY AND THE LAW: AN ENCYCLOPEDIA OF MAJOR LEGAL CASES* 617-21 (1993).

²³ See discussion *infra* part I.B.

²⁴ 347 U.S. 483 (1954) (mandating desegregation in public schools, despite com-

and the courts cannot tolerate public educational systems that defy central principles of the Bill of Rights.

I. THE FUNCTION OF PUBLIC SCHOOLS IN PREPARING ALL CHILDREN FOR ADULTHOOD

The most effective antidote to the poison of mindless orthodoxy is ready access to a broad sweep of ideas and philosophies. There is no danger in such exposure. The danger is in mind control.²⁵

Government-provided, compulsory education plays a vital role in preparing American children to function effectively and independently in their autonomous adult lives. Public schools exist to teach children information as well as to provide them with the background training they will need to participate meaningfully in our democratic form of government.²⁶ These general functions of schools inform the contours of the First Amendment in that arena and must similarly inform constitutional review of restrictions on the content of school curricula. These goals also demonstrate the special importance of equal public education for young people who grow up to be gay or lesbian, and emphasize the important role schools can play in helping to prevent anti-gay violence and other acts of hatred.

A. *The Goals of Public Education*

As the Supreme Court has recognized, schools play a crucial role in democracy because education "is the very foundation of good citizenship."²⁷ The functions of the public schools range from the very practical to the more sophisticated. For example, schools not only strive to ensure that every child becomes literate, but attempt to prepare future citizens for informed, thoughtful participation in government. The central

munity resistance, because of the importance of equal educational opportunity).

²⁵ *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 715 (D. Mass. 1978) (invalidating school board decision to remove book containing controversial poem from the school library).

²⁶ See, e.g., *Bethel v. Fraser*, 478 U.S. 675, 681 (1986) ("public education must prepare pupils for citizenship in the Republic"); *Ambach v. Norwick*, 441 U.S. 68, 77 (1979) ("public schools . . . inculcat[e] fundamental values necessary to the maintenance of a democratic political system").

²⁷ *Brown*, 347 U.S. at 493.

functions of government-sponsored schools include teaching basic skills, such as communication, critical thinking and decisionmaking, that will help the child in every aspect of adult life.²⁸ In addition, students learn in school how to co-exist with others, which serves to ensure social calm as they grow older.²⁹ Schools also impart basic knowledge that facilitates informed individual decisionmaking about their sexuality, health and family life.³⁰ "In sum, education has a fundamental role in maintaining the fabric of our society."³¹

Democratic principles, while a distinct teaching goal themselves, actually imbue all of these public school functions.³² For example, the teaching of tolerance and mutual respect is

²⁸ See ARVAL A. MORRIS, *THE CONSTITUTION AND AMERICAN PUBLIC EDUCATION* 115 (1989) ("By sympathetically developing all students' abilities . . . to measure their opinions by reason, logic, or fact, public schools in America can contribute to democracy by helping students become the type of ideal citizen envisioned by the First Amendment."); see also Walter A. Kariat, *State Indoctrination and the Protection of Non-State Voices in the Schools: Justifying a Prohibition of School Library Censorship*, 35 STAN. L. REV. 497, 523 (1983) (noting that legitimate goals include "promoting student appreciation for diverse views, independent inquiry, critical thought, and public debate").

²⁹ See, e.g., *Bethel*, 478 U.S. at 681 (holding that "fundamental values . . . include tolerance of divergent political and religious views, even when the views expressed may be unpopular"); *Ambach*, 441 U.S. at 77 (finding that "authorities have perceived public schools as an 'assimilative force' by which diverse and conflicting elements in our society are brought together on a broad but common ground").

³⁰ For instance, parental objections to sex education in schools have consistently been rejected because of the overriding state interest in providing essential health information in schools. See, e.g., *Cornwell v. State Bd. of Educ.*, 314 F. Supp. 340 (Md. 1969), *aff'd*, 428 F.2d 471 (4th Cir.), *cert. denied*, 400 U.S. 942 (1970); *Citizen's v. San Mateo County Bd. of Educ.*, 51 Cal. App. 3d 1 (Ct. App. 1975) (dismissing parents' challenges to sex education in public schools); see also KERN ALEXANDER & M. DAVID ALEXANDER, *AMERICAN PUBLIC SCHOOL LAW* 168 (1992) (stating that schools "train students in ways of behaving that will stand them in good stead as they go on to higher education and jobs").

³¹ *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

³² For example, "[c]ommunication skills promote mature and healthy consideration of community issues through both formal and informal discussion." Allen W. Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law*, 18 J.L. & EDUC. 93, 96 (1989). Indeed, "among our most important democratic values are the disabling of government from acting arbitrarily and from suppressing dissenting viewpoints and ideas." Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1680 (1986); see also *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) ("Teachers and students must always remain free . . . to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.").

important not only for social peace, but also to reinforce the constitutional ideal of protecting minorities against tyranny of the majority.³³ As the National Education Association has emphasized:

[P]ublic schools are the agency of society most essential in bringing about appreciation for diversity and respect for the rights of all. Yet it is plain that the schools will not be able to persuade students of these fundamental values if the State asserts . . . that discrimination against one particular minority group is acceptable.³⁴

Ideally, public schools encourage an atmosphere of free inquiry and the free exchange of ideas, since censorship and other limitations "hardly teach[] children to respect the diversity of ideas that is fundamental to the American system."³⁵ The Supreme Court has declared that we "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."³⁶

Thus, courts have stressed the importance of broadening the spectrum of knowledge within schools to expose students to a full educational experience, with the goal of "creating a culturally pluralistic society, where general knowledge is the right of all and not the privilege of a few."³⁷ In contrast, legal scholar Alexander Meiklejohn emphasized that where the government takes an "interest in inculcating values for the purpose of influencing the outcome of future debates," such action rises to the level of indoctrination and is an abuse of state power.³⁸

³³ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1942) ("The very purpose of the Bill of Rights was to . . . place [certain freedoms] beyond the reach of majorities and officials.").

³⁴ *Amici Curiae Brief for the National Education Association et al.*, at 20, *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993) (No. 93SA17) (arguing to uphold preliminary injunction of Colorado Amendment 2), *cert. denied*, 114 U.S. 419 (1993) [hereinafter *Amici Curiae Brief*].

³⁵ *Board of Educ. v. Pico*, 457 U.S. 853, 880 (1982) (Blackmun, J., concurring); *Keyishian*, 385 U.S. at 603 ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'").

³⁶ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

³⁷ *Davis v. Page*, 385 F. Supp. 395, 400 (D.N.H. 1974) (holding that the First Amendment does not require schools to excuse children from all school activities that parents deem offensive).

³⁸ *Kamiat*, *supra* note 23, at 519 (discussing Meiklejohn's self-government theo-

There is clear consensus that open access to ideas and skills, as well as co-existence with diverse fellow students "prepares students for active and effective participation in the pluralistic society in which they will soon be adult members."³⁹

B. *The Need for Accurate Information About Homosexuality*

The gay teenage population in American public schools is substantial.⁴⁰ School, however, often is a difficult environment for gay youth. In addition to facing the usual difficulties associated with growing up, gay youth must try to come to terms with their sexual identity in a school environment that often implicitly or explicitly condemns homosexuality. Studies have shown that teachers frequently offer no support to gay youth and often are "reluctant to stop harassment or rebut homophobic remarks for fear of being seen as undesirable role models."⁴¹ Silence from teachers and administrators implicitly condones homophobic attitudes and violence. Furthermore, gay youth typically receive little or no accurate information about homosexuality and generally lack positive gay or lesbian role models.⁴² Public education's failure to reach its goals of com-

ry that supports "a government interest in inculcating values that would promote the community's continued capacity to govern itself through critical [thinking] . . . and independent intellectual inquiry" but would disallow efforts to "predetermine the outcome of future debates" (citing ALEXANDER MEIKLEJOHN, *TEACHER OF FREEDOM*, 160 (1981)). Professor Meiklejohn's views have significantly influenced scholarly thought on the First Amendment and public education. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 26 (1971); Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 *U. CHI. L. REV.* 20, 24 (1975).

³⁹ *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

⁴⁰ Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 *L. & SEXUALITY* 133, 140 n.23 (1991) ("A common assumption today is that 10% of the United States population is gay."). While the precise number of gay and lesbian adolescents is difficult to determine, the size of the adult lesbian and gay population makes clear that a large group of students in the public schools have started to realize that they are gay or will do so in the few years after they leave school. See Gary Remafedi, *Homosexual Youth: A Challenge to Contemporary Society*, 258 *JAMA* 222, 223 (1987) (reporting that most studies find sexual orientation well-established by early childhood).

⁴¹ Paul Gibson, *Gay Male and Lesbian Youth Suicide*, in *REPORT OF THE SECRETARY'S TASK FORCE ON YOUTH SUICIDE* 3-110, 3-128 (1989).

⁴² *Id.* at 3-133; see also A. Damien Martin & Emery S. Hetrick, *The Stigmatization of the Gay and Lesbian Adolescent*, 15 *J. HOMOSEXUALITY* 163, 167 (1988) ("There is little or no opportunity for the homosexually oriented adolescent to

munication, mutual respect, accurate information and a robust exchange of ideas thus has particular significance for gay youth.

The hostility directed toward gay youth by their peers may be attributed to the fact that young people still are forming a base identity during adolescence and feel threatened by those perceived to be different.⁴³ Students' fears of and prejudice toward their gay classmates have led to a high incidence of violence directed at gay adolescents in schools.⁴⁴ One study, for example, found that forty-five percent of gay males and twenty percent of lesbians had experienced verbal or physical assault in secondary school.⁴⁵ This study also indicated that some gay youth even "become involved in verbal and physical attacks against other homosexuals as a way of defending against their own fears."⁴⁶ This violence and harassment prevents many gay teens from forming a supportive peer group at school.⁴⁷

In addition to the alienation they face at school, gay youth

discover what it means to be homosexual. Therefore, they cannot plan or sometimes even conceive of a future for themselves."); Tabor, *supra* note 7, at 41 ("Physical and emotional changes are complicated by general adolescent awkwardness. Being a run-of-the-mill Wally Cleaver is hard enough. Being openly homosexual in high school can seem next to impossible.").

⁴³ Harvard law professor William N. Eskridge, Jr. has described how stereotypes contribute to anti-homosexual attitudes and violence in his review, *A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333 (1992) (book review).

According to [a recently released Kinsey Institute study], even positive or neutral stereotypes ("homosexuals are artistic") . . . which distance a group of people from the perceived norm, easily become the basis for negative emotional reactions based upon the group's deviation ("homosexuals are distorted heterosexuals"). These negative feelings have behavioral consequences ("avoid homosexuals") and create a mindset that is prone to . . . harm.

Id. at 364-65; see also MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 21 (1990) (discussing how the concept of "difference grows from the ways in which this society assigns individuals to categories and, on that basis, determines whom to include in and whom to exclude").

⁴⁴ Arthur Lipkin, *Project 10*, TEACHING TOLERANCE, Fall 1992, at 25 ("Of all the minorities in American school populations, young gays and lesbians are among the most frequently ridiculed, victimized and shunned.").

⁴⁵ Gibson, *supra* note 41, at 3-112 (citing study by NATIONAL GAY TASK FORCE, ANTI-GAY/LESBIAN VICTIMIZATION (1984)); see also Joyce Hunter, *Violence Against Lesbian and Gay Male Youths*, 5 J. INTERPERSONAL VIOLENCE 295, 297 (1990) (study of 500 gay youth found that 40% experienced "violent physical attacks").

⁴⁶ Gibson, *supra* note 41, at 3-118.

⁴⁷ Gibson, *supra* note 41, at 3-122.

often are rejected by their family members.⁴⁸ Many families that are members of racial or ethnic minorities prepare their children for the harassment they may face in the world and provide support when their children encounter oppressive treatment.⁴⁹ In contrast, once a gay youth's family suspects or discovers their child's sexual orientation they frequently add to the child's mistreatment.⁵⁰ The result is that "gay and lesbian youth report[] a higher incidence of verbal and physical abuse from parents and siblings than other youth. They [are] more often forced to leave their homes as 'pushaways' or 'throwaways' rather than running away on their own."⁵¹

Adding to the isolation gay youth experience at home and in school, many gay and lesbian advocates and educators are reluctant to become involved with the problems faced by gay youth.⁵² This hesitancy stems from the erroneous stereotype that adult gay men and lesbians are a threat to children,⁵³ as

⁴⁸ Gibson, *supra* note 41, at 3-112; *see also* Hunter, *supra* note 45, at 297 (61% of violence against gay youth occurs within the family); Emery S. Hetrick & A. Damien Martin, *Developmental Issues and Their Resolution for Gay and Lesbian Adolescents*, 14 J. HOMOSEXUALITY 25, 29 (1987).

⁴⁹ Hetrick & Martin, *supra* note 42, at 166 (citation omitted).

⁵⁰ Gary Remafedi et al., *Risk Factors for Attempted Suicide in Gay and Bisexual Youth*, 87 PEDIATRICS 869, 874 (1991) (reporting that a study of gay youth who attempted suicide found "[f]amily problems were the most frequently cited reason for [suicide] attempts"); *see also* Bull, *supra* note 5, at 53 (recounting story of gay youth forcibly removed from his home by police after school guidance counselor told boy's parents that their son might be gay).

⁵¹ Gibson, *supra* note 41, at 3-112. For this reason, some psychologists who work with gay youth "strongly recommend to clients who are still in high school that they think very carefully before coming out to their parents . . . hav[ing] seen several instances where a young person, confident of the love of his or her parents, reveals his or her homosexuality and then ends up on the street." Hetrick & Martin, *supra* note 48, at 35. Indeed, it is estimated that 30 to 50% of New York City's homeless youth are gay or lesbian. *See* Jesse Green, *This School Is Out*, N.Y. TIMES, Oct. 13, 1991, § 6 (Magazine), at 32.

⁵² Jesse Green, *Out and Organized*, N.Y. TIMES, June 13, 1993, § 9, at 1 (reporting that national lesbian and gay rights movement often is reluctant to address youth issues).

⁵³ Two prevalent stereotypes involve recruitment and pedophilia. *See, e.g.*, Cole v. Board of Educ., No. 22349/93 (N.Y. Sup. Ct. filed Oct. 22, 1993) (complaint alleging that Hetrick-Martin Institute for Lesbian and Gay Youth, which developed informational materials on sexual identity and AIDS issues for New York City public schools, encourages and facilitates pedophilia). Recruitment arguments ignore the data demonstrating that sexual identity is well-formed by an early age and thus exposure to gay and lesbian people will not alter a person's sexual orientation. Herek, *supra* note 40, at 148-52 ("the assertion that homosexuality is a choice that can be changed is erroneous for the vast majority of lesbians and gay

well as the risk of dismissal should school officials discover that a teacher is gay or lesbian.⁵⁴ Even gay and lesbian teachers who advise support groups for gay students may conceal their sexual orientation.⁵⁵ This hesitancy to be truthful further reinforces the idea that there is something wrong and shameful about being gay.⁵⁶

Compounding these problems is the fact that gay adolescents face hostility in a range of institutional settings. Parents and teachers concerned that the adolescent is expressing an attraction to members of the same sex or is failing to conform to stereotypical gender roles often coerce gay youth into psychiatric treatment.⁵⁷ These interventions can worsen conditions

men"); see also Chandler Burr, *Homosexuality and Biology*, ATLANTIC MONTHLY, Mar. 1993, at 47 (summarizing recent scientific developments regarding the possible genetic basis for homosexual orientation).

The pedophilia myth is similarly one with no basis in fact. Statistics repeatedly demonstrate that it is overwhelmingly heterosexual men, and usually family members, who are responsible for child molestation. See Herek, *supra* note 40, at 152-56 (reviewing literature relating to the sexual orientation of child molesters); Carole Jenny et al., *Are Children at Risk for Sexual Abuse by Homosexuals?*, 94 PEDIATRICS 41 (1994) (reviewing records in a child sexual abuse clinic that revealed that children were far more likely to be abused by a close relative's heterosexual partner than by a homosexual).

⁵⁴ Under current but questionable equal protection law, "school boards can dismiss teachers upon discovery of their sexual orientation or the acknowledgement by teachers that they are gay." Donna I. Dennis & Ruth E. Harlow, *Gay Youth and the Right to Education*, 4 YALE L. & POL'Y REV. 446, 472 (1986) (citing *Gaylord v. Tacoma Sch. Dist.*, 559 P.2d 1340 (Wash.), *cert. denied*, 434 U.S. 879 (1977), and *Rowland v. Mad River Local Sch. Dist.*, 730 F.2d 444 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009 (1985), both upholding dismissals of schoolteachers for being homosexual).

⁵⁵ Zsa Zsa Gershick, *Virginia Is for Students*, ADVOCATE, Sept. 7, 1993, at 57 (interviewing Virginia Uribe of Los Angeles' Project 10, which provides counseling for gay and lesbian youth); see also Dennis & Harlow, *supra* note 54, at 473 ("teachers conceal their identity even from gay students, fearing discovery and retaliation from school authorities").

⁵⁶ Gershick, *supra* note 55, at 57; see also Dennis & Harlow, *supra* note 54, at 473 ("[g]ay students are made to feel inferior when they know that gay teachers must lie about their identities"); Martin & Hetrick, *supra* note 42, at 173.

⁵⁷ Hetrick & Martin, *supra* note 42, at 169 ("adolescents whose [sexual identity is] discovered are often pushed by parents, counselors, [or] health professionals . . . into attempts to change or deny their orientation, despite evidence that such efforts are useless and dangerous"); Joyce Hunter & Robert Schaecher, *Stresses on Lesbian and Gay Adolescents in Schools*, 9 SOC. WORK IN EDUC. 180, 185 (1987) (writing that "parental reactions to the revelation of an adolescent's homosexuality can include . . . insistence on therapy to 'change' the young person"); Eve K. Sedgwick, *How to Bring Your Kids Up Gay*, 29 SOCIAL TEXT 18 (1991) (examining experience of children forced into therapy due to their lack of conformity

for gay youth who encounter therapists and social workers who are unwilling to acknowledge or support an adolescent's gay or lesbian identity.⁵⁸ Furthermore, many youth are themselves reluctant to reveal their sexual identity issues and therefore never resolve their conflicts.⁵⁹

The result of all these factors is great alienation among gay youth.⁶⁰ Schools that allow abuse and harassment of these students or fail to provide accurate information about homosexuality, ultimately deny gay and lesbian students an equal, welcoming environment for learning. The end result for gay youth is that the "shame of ridicule and the fear of attack makes school a fearful place to go, resulting in frequent absences and sometimes academic failure."⁶¹ Many gay youth feel compelled to drop out altogether.⁶²

An even greater problem resulting from systematic lack of support is that a significant number of gay teenagers attempt to take their own lives. One study in the Report of the Secretary of Health and Human Services Task Force on Youth Suicide reported that "gay youth are 2 to 3 times more likely to attempt suicide than other young people. . . . [and] may comprise up to 30 percent of completed youth suicides annually."⁶³ Indeed, suicide remains the leading cause of death among gay youth.⁶⁴ Rather than reflecting an innate propensi-

to gender roles).

⁵⁸ Gibson, *supra* note 41, at 3-113.

⁵⁹ Gibson, *supra* note 41, at 3-114.

⁶⁰ See generally AARON FRICKE, REFLECTIONS OF A ROCK LOBSTER: A STORY ABOUT GROWING UP GAY (1981) (autobiographical account of gay high school student who successfully sued his school for the right to bring a male date to the prom).

⁶¹ Gibson, *supra* note 41, at 3-112 to 3-113.

⁶² Gibson, *supra* note 41, at 3-113 (reporting that 28% of gay male high school students in the study were forced to drop out of school due to conflicts related to their sexual orientation) (citing Gary Remafedi, Male Homosexuality: The Adolescent's Perspective (1985) (unpublished manuscript on file with the Adolescent Health Program, University of Minnesota)); see also Green, *supra* note 51, at 32.

⁶³ Gibson, *supra* note 41, at 3-110. This study was released in the summer of 1989 by the Department of Health and Human Services ("DHHS"). Within months, Dr. Louis W. Sullivan, Secretary of DHHS under President Bush, repudiated the section of the report that recommended ending discrimination against youths on the basis of sexual orientation. In a written statement, Dr. Sullivan attacked not the accuracy of the report, but its anti-discriminatory views. He stated: "I am strongly committed to advancing traditional family values. . . . In my opinion, the views expressed in the paper run contrary to that aim." Sedgwick, *supra* note 57, at 18. Because of Sullivan's discomfort, the report was not widely circulated. *Id.*

⁶⁴ Gibson, *supra* note 41, at 3-110; see also Joyce Murdoch, *Gay Youths' Deadly*

ty for self-destructiveness, gay youth suicide is the result of a society that discriminates against and stigmatizes homosexuals while failing to recognize or support the substantial number of youth who face issues of sexual orientation.⁶⁵ Many commentators, therefore, have urged school systems to include comprehensive information on sexual orientation issues to combat the high suicide rate and other problems confronting gay youth.⁶⁶

An education system that openly and accurately addresses homosexuality benefits all students, not only those who may be gay. Such education is not only necessary for the effective education and development of gay youth but reinforces critical democratic values in those other students who may otherwise view homosexuals as a group to be ridiculed and attacked.⁶⁷ By including a full range of perspectives about homosexuality where the topic arises in the curriculum, schools would encourage students to develop their own views and opinions. In addition, providing accurate information helps students to understand and respect people who may seem "different," an essential lesson for ensuring stability in our diverse society.

II. FIRST AMENDMENT PRECEDENT IN THE PUBLIC SCHOOL CONTEXT

Numerous Supreme Court opinions have addressed conflicts between school officials' decisions and the first amendment rights of students and teachers.⁶⁸ The Court repeatedly

Despair: High Rate of Suicide Attempts Tracked, WASH. POST, Oct. 24, 1988, at A1.

⁶⁵ Gibson, *supra* note 41, at 3-126 (noting that there is nothing inherently self-destructive about homosexuality, but that in addition to the absence of support for gay youth in schools, popular culture reinforces negative images, including suicide).

⁶⁶ See, e.g., Amici Curiae Brief, *supra* note 34, at 14; Gibson, *supra* note 41, at 3-128; Hunter, *supra* note 45, at 299; Remafedi, *supra* note 40, at 225; see also Dennis & Harlow, *supra* note 54, at 459-60 (arguing that states should be required to ensure equal educational opportunity for gay youth under state constitutional right to education).

⁶⁷ Allowing anti-gay behavior "calls into question one of the most important values the schools attempt to teach their students—tolerance and respect for those who are different." Amici Curiae Brief, *supra* note 34, at 19. In addition, the high rate of anti-gay attacks perpetuated by teens provides concrete evidence of the harmful effects of homophobic attitudes. See NEW YORK CITY GAY & LESBIAN ANTI-VIOLENCE PROJECT, 1992 ANNUAL REPORT 7 (in New York City, 70% of anti-gay/lesbian bias crimes are committed by persons under the age of 25).

⁶⁸ See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Tinker v.*

has recognized that school officials require a degree of operational autonomy to carry out their role of educating students, and therefore has stated that first amendment conflicts must be analyzed "in light of the special characteristics of the school environment."⁶⁹ The First Amendment, however, prevents school officials from infringing upon the rights of students by trying to advance majoritarian "community values" so zealously that they violate essential democratic ideals.⁷⁰ Thus, despite this special context, inevitable curriculum choices cannot be employed to brainwash students.

Courts have attempted to afford local public school officials autonomy in determining a course of instruction and operating their educational system while also preserving students' first amendment rights of free expression and inquiry. Courts generally allow schools to make decisions regarding curriculum content⁷¹ and to restrict how members of the school community may express their personal views. The schools' actions, however, must be necessary to prevent substantial disruption with the schools' educational mission⁷² or must be related to legitimate educational concerns.⁷³ Because students' right to receive information also must be preserved, school-imposed restrictions on teachers' or students' speech are unconstitutional if they eliminate access to a particular idea,⁷⁴ compel adherence to a single view by shortcutting the educational process,⁷⁵ or present inaccurate or misleading information.⁷⁶ The First Amendment permits schools to educate, not to indoctrinate.

Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969).

⁶⁹ Board of Educ. v. Pico, 457 U.S. 853, 868 (1982) (quoting *Tinker*, 393 U.S. at 506 and *Hazelwood*, 484 U.S. at 266).

⁷⁰ "[T]he Court, therefore, has acknowledged the force of the principle that schools, like other enterprises operated by the State, may not be run in such a manner as to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'" *Pico*, 457 U.S. at 876 (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

⁷¹ *Steirer ex rel. Steirer v. Bethlehem Area Sch. Dist.*, 987 F.2d 989 (3d Cir.), cert. denied, 114 S. Ct. 85 (1993).

⁷² *Tinker*, 393 U.S. at 509.

⁷³ *Hazelwood*, 484 U.S. at 273.

⁷⁴ *Pico*, 457 U.S. at 872.

⁷⁵ *Barnette*, 319 U.S. at 631.

⁷⁶ *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968) (although decided on establishment clause grounds, discusses how schools should not favor one doctrine where many are valid because it may be misleading to students); see also discussion *infra* notes 177-84 and accompanying text.

nate, and courts, therefore, at times will restrict schools' autonomy.

A. *The Schools' Interests*

Courts traditionally are reluctant to involve themselves in disputes regarding public school educational policies. The Supreme Court has stressed that "[c]ourts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."⁷⁷ Thus, courts afford state and local school officials considerable discretion in operating public schools.⁷⁸ This discretion entitles schools not only to decide the general subjects to be taught but also to regulate speakers who seriously disrupt the functioning of the school or whose views erroneously might be attributed to the school itself.

This enhanced level of deference has led some courts to uphold schools' right to make content-based restrictions. Nearly all government regulations that restrict speech on the basis of its subject-matter or content violate the First Amendment.⁷⁹ Due to the unique nature of the state's role in running the schools, however, school authorities are allowed greater discretion than other government regulators.⁸⁰ Courts recognize that school officials necessarily must make content-based decisions in determining what students will learn.⁸¹ Thus, for example, school boards constitutionally may establish mandatory subject-matter requirements for students, even where these standards ultimately are based upon favoring one

⁷⁷ *Epperson*, 393 U.S. at 104.

⁷⁸ *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

⁷⁹ Content-based regulations restrict speech on the basis of the subject matter expressed. Such restrictions warrant strict judicial scrutiny; i.e., the state must demonstrate that the regulation is narrowly tailored to serve a compelling interest and infringes upon constitutional rights no greater than necessary. See *Police Dep't v. Mosley*, 408 U.S. 92, 98-99, 102 (1972) (striking down an ordinance that allowed peaceful labor picketing near schools as impermissibly content-based and not narrowly tailored to serve a substantial governmental interest). The application of this standard is nearly always fatal to state regulations. *Id.*

⁸⁰ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

⁸¹ See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 281 (1981) (Stevens, J., concurring) (striking down university's ban on use of its facilities by religious groups as viewpoint-based discrimination).

subject or activity over another.⁸²

Indeed, local school boards, as popularly-elected bodies, are expected to represent the concerns of their constituents to ensure that the curriculum reflects local needs.⁸³ Nonetheless, this authority must be confined to instilling values in a manner that comports with the Constitution.⁸⁴ Thus, some decisions about school curricula content are unconstitutional because the school board intends to suppress a particular viewpoint.⁸⁵

Many recent cases involving first amendment claims in the public school context have considered the constitutionality of barring students' and teachers' access to school forums to promote their personal views. The schools' actions in these cases were prompted by the need to prevent the disruption of school activities or the expression of views that could be erroneously attributed to the school.⁸⁶ In analyzing these cases, courts have applied public forum standards in the public school context. A challenge to curriculum bans, however, is different from schools' interest in regulating outsiders whose speech might disrupt or be attributed to the schools since the schools themselves formulate the curricula.⁸⁷ Thus, while public forum cas-

⁸² *Steirer ex rel. Steirer v. Bethlehem Area Sch. Dist.*, 987 F.2d 989, 993 (3d Cir.) ("The gamut of courses in a school's curriculum necessarily reflects the value judgements of those responsible for its development, yet requiring students to study course materials, write papers on the subjects, and take the examinations is not prohibited by the First Amendment."), *cert. denied*, 114 S. Ct. 85 (1993).

⁸³ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

⁸⁴ *Board of Educ. v. Pico*, 457 U.S. 853, 864 (1982).

⁸⁵ *Id.* at 864-65; see also *infra* part II.B.

⁸⁶ *Hazelwood*, 484 U.S. at 270-71.

⁸⁷ School curricula have been described as a paradigmatic example of governmental speech. See, e.g., Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 874-75 (1979). Although the First Amendment requires that "the government must regulate expressive activity with an even hand if it regulates," where the government acts in a capacity other than as a regulator it need not always be ideologically neutral. LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 814 (2d ed. 1988); see also Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CAL. L. REV. 1104, 1104 (1979) (stating that the "freedom of speech clause contains no express prohibition against political establishment—the advocacy of political viewpoints by or with the assistance of government"). Thus, many functions of government "such as schools, prisons, hospitals and military installations serve legitimate governmental purposes, yet they possess a considerable capability to shape the attitudes and beliefs of those they serve." Yudof, *supra*, at 864.

es provide insight into how courts should weigh schools' and students' competing interests under the First Amendment, the public forum approach is not definitive in determining the constitutionality of curricular mandates.

In a traditional public forum, such as a public park or street, or a "created" public forum, where the government intentionally designates a place of communication as open to the public, the government may enforce content-based restrictions only if necessary to serve a compelling state interest and if the regulation is narrowly tailored to serve that interest.⁸⁸ In articulating public forum standards for first amendment claims in school settings, the Supreme Court has set forth two related tests. The first is a general test for speech occurring on school premises that allows regulation only where the speech actually causes material and substantial interference with the school's educational function.⁸⁹ The second test involves a more lenient standard for restrictions on "school-sponsored" speech by students and allows restrictions if the state's actions are reasonably related to legitimate pedagogical concerns.⁹⁰ Under

While the First Amendment restricts schools and their curricula, courts recognize the government's special interest in favoring certain ideological goals within the schools. *See, e.g., Pico*, 457 U.S. at 861 (articulating "constitutional limits upon the power of the State to control even the curriculum"); *id.* at 910 (Rehnquist, J., dissenting) (arguing that "actions by the government as educator do not raise the same First Amendment concerns as actions by the government as sovereign"). To deter abuse of this role, "some diversity of viewpoints must be ensured, not by limiting the spectrum of views that the school system may communicate, . . . but by providing genuine opportunities for more speech." *TRIBE, supra*, at 814; *see also Levin, supra* note 32, at 1654 (pointing out that "if educational institutions are not subject to the same constitutional constraints as other governmental agencies, students will not come to an understanding of the value of a democratic, participatory society").

⁸⁸ *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802 (1985); *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45-49 (1983) (union not representing school teachers had no right of access to teachers' school mailboxes because school had not opened the boxes for indiscriminate use by the public). In non-public forums, however, where the government has limited public access due to the need to carry on business, speech "may be restricted by government regulation as long as the regulation is reasonable and not an effort to suppress expression merely because officials oppose the speaker's view." *Perry*, 460 U.S. at 46. Most school cases fall under the non-public forum category because, in order to fulfill its educational goals, the school cannot allow indiscriminate public access to the schools and classrooms. *See, e.g., Hazelwood*, 484 U.S. at 267.

⁸⁹ *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 511 (1969).

⁹⁰ *Hazelwood*, 484 U.S. at 273.

either test, restrictions may limit speech that materially interferes with schools' educational mission but cannot be intended to suppress a particular viewpoint.⁹¹

One line of Supreme Court cases defines the standard of review for restrictions of student expression on school grounds. In *Tinker v. Des Moines Independent School Community District*,⁹² the Court articulated the governing test for such restrictions. The Court stated that a regulation is proper only when the speech actually causes "material and substantial interference" with the school's educational mission and is not aimed at suppressing a particular viewpoint.⁹³ The material and substantial interference standard requires more than "a mere desire to avoid the discomfort that always accompanies an unpopular viewpoint."⁹⁴ To censor expression, school officials must demonstrate a verifiable, non-hypothetical disruption. As the Court stated:

in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. . . . Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk.⁹⁵

Thus, unless a genuine, substantial interference can be proven, schools' authority to restrict school ground speech is limited.

In contrast to the standard of review articulated in *Tinker*, which involved student speech that "happen[ed] to occur on the school premises,"⁹⁶ *Hazelwood v. Kuhlmeier* applied a more lenient standard of review to restrictions on students' or teachers' personal expression that might be perceived as

⁹¹ See, e.g., *Searcey v. Harris*, 888 F.2d 1314, 1324 (11th Cir. 1989) (finding regulation invalid because viewpoint-based, even though the forum was non-public); see also Gail P. Sorenson, *The Public Forum Doctrine and Its Application in School and College Cases*, 20 J.L. & EDUC. 445, 458-59 (1991) (discussing prohibition on viewpoint discrimination in all forums).

⁹² 393 U.S. 503 (1969).

⁹³ *Id.* at 511.

⁹⁴ *Id.* at 509.

⁹⁵ *Id.* at 508; see also *Brooks v. Auburn*, 412 F.2d 1171, 1173 (5th Cir. 1969) (allowing convict to speak at school because officials failed to show speaker would cause actual disruption).

⁹⁶ *Hazelwood*, 484 U.S. at 271.

"school-sponsored" speech.⁹⁷ Although *Hazelwood* at times refers to the curriculum generally, a more logical reading of the case limits the application of its standard to "curriculum-related activities."⁹⁸ Such activities were defined as encompassing "school-sponsored publications, theatrical productions and other expressive activities that students, parents, and members of the community might reasonably perceive to bear the imprimatur of the school."⁹⁹ Under this standard a school could justify its regulation of such speech by demonstrating legitimate pedagogical concerns that are not viewpoint-based.¹⁰⁰

Although the *Hazelwood* standard for restrictions on "school-sponsored" speech is more lenient than the *Tinker* standard for speech on school property, the requirement of legitimate pedagogical concerns is more burdensome than a mere rational basis standard. Schools must substantiate a nexus between the speech restricted and the asserted educational concerns.¹⁰¹ For example, one court rejected increased regulations on speech where the school failed to demonstrate that it had experienced any problems with its prior policies.¹⁰² Similarly, courts presume that severe restrictions,

⁹⁷ *Id.* at 272-73.

⁹⁸ *Id.* at 271. The concern addressed by the *Hazelwood* public forum standard is that others might perceive an individual's speech or views as being advocated by the school. *Id.* The curriculum, however, is created by the school and thus there is no risk of erroneous attribution.

⁹⁹ *Id.*; see also *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 776 (10th Cir. 1991) (allowing punishment for teacher's classroom expression of his personal views as "school-sponsored" speech). This category includes outside organizations attempting to use school programs to publicize their own beliefs and agendas. See *Planned Parenthood v. Clark County Sch. Dist.*, 941 F.2d 817 (9th Cir. 1991) (school publications); *Searcey v. Harris*, 888 F.2d 1314 (11th Cir. 1989) (school-sponsored career-day program).

¹⁰⁰ *Hazelwood*, 484 U.S. at 273 ("educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored activities so long as their actions are reasonably related to legitimate pedagogical concerns").

¹⁰¹ *Searcey*, 888 F.2d at 1321 (rejecting school's argument that it need only offer any reasonable justification as "overstat[ing] the deference a court must pay to School Board decisions"); *Desilets v. Clearview*, 630 A.2d 333, (N.J. Super. Ct. App. Div. 1993) (rejecting educational justifications offered by school as insufficient to justify removing student articles from school-sponsored newspaper).

¹⁰² *Searcey*, 888 F.2d at 1322 (striking down newly enacted restriction where "[t]here is no evidence which even arguably explains the Board's change in position").

such as banning a group from the school, are unreasonable because such regulations diminish students' access to information and thus conflict with the very purpose of the educational setting.¹⁰³

Under the *Hazelwood* standard, however, schools not only may regulate speech that substantially interferes with their educational function (as articulated in *Tinker*), but also may justify the manner in which "school-sponsored" speech is presented on the basis of legitimate pedagogical concerns. Courts have ruled that the range of valid concerns includes the audience's level of maturity,¹⁰⁴ the goal of maintaining high academic standards,¹⁰⁵ the quality and fairness of the presentation,¹⁰⁶ the desire to protect all students' participation in school activities,¹⁰⁷ and the preservation of the school's neutrality on issues of public debate.¹⁰⁸

School's concerns for regulating speech to maintain an age-appropriate presentation clearly serves a legitimate educational interest. In *Bethel v. Fraser*,¹⁰⁹ for example, school authorities punished a student for presenting a vulgar speech at a mandatory assembly before the entire school. The Court found that school officials were not attempting to restrict the viewpoint expressed in the speech but rather legitimately had objected to the student's obscene manner of presentation.¹¹⁰ The Court held that the school had acted within its discretion because it had required all students, even the youngest, to attend this assembly and thus had a responsibility to ensure that the speech was educationally suitable for its audience.¹¹¹

Hazelwood provides an example of how schools may limit student speech to preserve schools' educational integrity.¹¹² In *Hazelwood*, the school principal removed two student arti-

¹⁰³ *Id.* ("It is the total banning of a group from the forum—rather than limiting what a group can say—that we find to be unreasonable.")

¹⁰⁴ See *Bethel v. Fraser*, 478 U.S. 675, 686 (1986).

¹⁰⁵ See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 276 (1988).

¹⁰⁶ *Id.*; *Miles v. Denver Pub. High Sch.*, 944 F.2d 773, 778 (10th Cir. 1991).

¹⁰⁷ See *Crosby ex rel. Crosby v. Holsinger*, 852 F.2d 801, 802 (4th Cir. 1988).

¹⁰⁸ See *Planned Parenthood v. Clark County Sch. Dist.*, 941 F.2d 817, 830 (9th Cir. 1991).

¹⁰⁹ 478 U.S. 675 (1986).

¹¹⁰ *Id.* at 685.

¹¹¹ *Id.*

¹¹² 484 U.S. 260 (1988).

cles from a school newspaper that had been written as part of a journalism class.¹¹³ The censored articles addressed teen pregnancy within the high school and the impact of divorce on students.¹¹⁴ Student members of the newspapers' staff challenged the principal's action, alleging that he had censored the articles because he disagreed with the controversial viewpoints.¹¹⁵ The Court agreed with the school's assertion that the removed articles failed to meet the educational standards of the journalism class. In particular, the Court found that the anonymity of the pregnant students mentioned in the article on teen pregnancy had not been adequately protected and that the school's actions were motivated by a desire to safeguard the students' privacy.¹¹⁶ Similarly, the school showed that the article concerning divorce contained unverified incriminating statements regarding the behavior of certain parents.¹¹⁷ The Supreme Court, therefore, found that the school's reasons for removing the articles were both educationally sound and non-viewpoint-based.¹¹⁸

In addition, courts have allowed schools to proscribe student speech to preserve educational opportunity for other students. In *Crosby ex rel. Crosby v. Holsinger*,¹¹⁹ for example, the Fourth Circuit allowed school officials to remove a racially offensive school mascot, "Johnny Reb."¹²⁰ The court found that the first amendment interests of the students who had chosen the mascot to represent their image of the school were outweighed by the fact that the symbol "offended black [students] and limited [their] participation in school activities."¹²¹ Thus, the school officials' efforts to ensure the equal participation of all its students was a sufficient educational goal which could only be achieved by completely removing the symbol.¹²²

¹¹³ *Id.* at 263-64.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 264.

¹¹⁶ *Id.* at 274-75.

¹¹⁷ *Id.* at 275; see also *Miles v. Denver Pub. High Sch.*, 944 F.2d 773 (10th Cir. 1991) (upholding reprimand of teacher who repeated a non-verified rumor in class that implicated privacy of two students).

¹¹⁸ *Hazelwood*, 484 U.S. at 276.

¹¹⁹ 852 F.2d 801 (4th Cir. 1988).

¹²⁰ *Id.* at 803.

¹²¹ *Id.* at 802.

¹²² *Id.* Similarly, schools may validly restrict student speech to calm racial ten-

Finally, in situations where a school has remained neutral in an ongoing public debate, the court will not force it to disseminate a citizen's one-sided views if such an action would appear to bear the school's approval. In *Planned Parenthood v. Clark County School Board*, the Ninth Circuit upheld a high school's ban on any advertising related to issues surrounding birth control in its publications.¹²³ Because the school yearbook, sports programs and newspapers had rejected advertisements both for and against the use of birth control, the school was immune from allegations of partisanship in this contentious debate.¹²⁴ The court reasoned that the prohibition did not limit students' access to this important information because other, more reliable sources could provide such information and, furthermore, students were unlikely to seek out family planning information in these particular publications.¹²⁵ The court made clear, however, that if the school previously had taken a position on this issue, its claim of "neutrality" would have been rejected.¹²⁶

Thus, courts grant local school officials considerable autonomy in the daily operation of public schools, including decisions about course selection and the needs of the local community. Although schools also may regulate students' and teachers' speech that disrupts the schools' educational mission or erroneously will be attributed to the school, such power is not unlimited.

sions or prevent disruptions. *See, e.g., Augustus v. School Bd.*, 507 F.2d 156 (5th Cir. 1975) (upholding court order banning use of the name "Rebels" and Confederate Flag as a school symbol because they contributed to racial tension and disruption); *Melton v. Young*, 465 F.2d 1332 (6th Cir.) (upholding student's suspension for refusing to remove Confederate flag patch which increased racial tensions), *cert. denied*, 411 U.S. 951 (1972).

¹²³ 941 F.2d 817 (9th Cir. 1991).

¹²⁴ *Id.* at 829.

¹²⁵ *Id.*

¹²⁶ *Id.* at 828-29; *see also San Diego Committee Against Registration and the Draft (CARD) v. Governing Bd. of Grossmont Union High Sch. Dist.*, 790 F.2d 1471, 1481 (9th Cir. 1986) (holding that by allowing ads regarding military service in school paper, school could not then reject ads by those opposed to the military under a rationale of maintaining neutrality).

B. *The Students' Interests*

Despite giving broad deference to school authorities' discretion in governing public schools, the Supreme Court never has considered this power to be absolute. As the Court has declared, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."¹²⁷ First amendment protection against improper indoctrination is among the rights that young people in school maintain. This protection falls within the general right to receive information and ideas freely,¹²⁸ and specifically includes three subsidiary rights: the right to be exposed to all sides of controversial issues;¹²⁹ the right not to be compelled to hold a particular belief;¹³⁰ and the right not to be misled in the school setting.¹³¹

1. The Overarching Right to Receive Information

The overarching right to receive information under the First Amendment exists in a variety of contexts,¹³² including public schools.¹³³ Students' right to receive information precludes schools from imposing its ideas via the classroom or otherwise intentionally suppressing access to ideas. As the Supreme Court stated: "In our system, students may not be regarded as closed-circuit recipients of only that which the

¹²⁷ *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969) ("This has been the unmistakable holding of this court for nearly 50 years."); see also *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("[O]ur courts . . . have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry.").

¹²⁸ See *Board of Educ. v. Pico*, 457 U.S. 853, 868 (1982).

¹²⁹ See *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

¹³⁰ See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

¹³¹ See *Epperson*, 393 U.S. at 107.

¹³² See, e.g., *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (upholding right to receive advertising because essential to effective decisionmaking); *Kleindienst v. Mandel*, 408 U.S. 753, 762-3 (1972) (upholding right to receive information and ideas); *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (upholding right to receive political publications from abroad); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (upholding right to "receive information about abortion").

¹³³ *Pico*, 457 U.S. at 866-67; *Zykan v. Warsaw Community Sch. Corp.*, 631 F.2d 1300, 1304 (7th Cir. 1980); *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 583 (6th Cir. 1976).

State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved."¹³⁴

In the 1967 decision, *Keyishian v. Board of Regents*,¹³⁵ the Supreme Court articulated the first amendment prohibition against "laws that cast a pall of orthodoxy over the classroom."¹³⁶ In *Keyishian*, the Court struck down as unconstitutional a New York statute that permitted firing public university professors for "seditious utterances or distributing material advocating overthrow of the government."¹³⁷ The *Keyishian* Court recognized that students should not be placed in an artificial atmosphere that "protects" them from challenging ideas.¹³⁸ Rather, the Court noted that the role of education is to expose students to diverse viewpoints to teach them to assess competing ideas in preparation for their full participation in a democratic society.¹³⁹

In 1982, the Supreme Court, in *Board of Education v. Pico*,¹⁴⁰ further clarified the scope of students' right to receive information. *Pico* involved students' challenge to a school board's removal of selected books from its elementary and secondary school libraries. In its analysis of the school's actions, the Court stressed the importance of the school's motivation for curtailing information. The Supreme Court found first amendment values directly implicated because the local school board had impermissibly "contract[ed] the spectrum of available knowledge" and infringed upon the students' right to receive information and ideas.¹⁴¹

The Court was particularly disturbed by the fact that the school board had been motivated by a list of "inappropriate" books it had received from a national conservative parents'

¹³⁴ *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 511 (1969).

¹³⁵ 385 U.S. 589 (1967).

¹³⁶ *Id.* at 603.

¹³⁷ *Id.* Although the statute was challenged by state university professors, the prohibition on imposing orthodoxy has been interpreted to apply to all levels of public education. See, e.g., *Pico*, 457 U.S. at 870 (elementary and secondary schools); *Tinker*, 393 U.S. at 512 (high schools).

¹³⁸ *Keyishian v. Board of Regents*, 385 U.S. 385, 603 (1967).

¹³⁹ *Id.* at 603 ("The classroom is particularly the market place of ideas.").

¹⁴⁰ 457 U.S. 853 (1982).

¹⁴¹ *Id.* at 866-67.

organization. The board had removed the books from its shelves without conducting any independent review of the banned books.¹⁴² The Court held that a school board cannot intend to bar access to controversial ideas, concluding that "purposeful suppression of ideas" is unconstitutional because the "imposition of ideological discipline is not a proper undertaking for school authorities."¹⁴³

Pico, therefore, established that courts must consider the underlying motivation for school policies that restrict speech. An "abrupt change in policy" or other action that "supports an inference that the [state] intended to suppress . . . views" will render the school's policy unconstitutional.¹⁴⁴ Even when school officials offer educational justifications for suppressing information, courts will consider whether they are "merely a facade for viewpoint-based discrimination."¹⁴⁵ In addition, courts presume that restricting knowledge in an educational setting is improper because presenting only positive or negative information defeats the school's educational purpose of "providing [students] with an optimum level of informa-

¹⁴² *Id.* at 857-58 (finding school board described the banned books as "un-American" and "just plain filthy").

¹⁴³ *Id.* at 877 (Blackmun, J., concurring). The plurality asserts that the school board "might well defend their claim of absolute discretion in matters of curriculum by reliance on their duty to inculcate community values." *Id.* at 862. Thus, a literal reading of the plurality opinion suggests applying this principle more leniently to curriculum restrictions. As reaffirmed earlier in the opinion, however, the Supreme Court has "long recognized certain constitutional limits upon the power of the State to control even the curriculum." *Id.* at 861. Moreover, the claim that students' interest in preventing indoctrination in the mandatory curriculum might be weaker than in a voluntarily utilized library simply defies common sense; curriculum restrictions systematically constrict *all* students' spectrum of knowledge. *See id.* at 878 (Blackmun, J., concurring) (declaring distinction between library and classroom irrelevant to constitutional analysis because both inculcate knowledge); *id.* at 892 (Burger, J., dissenting) (critical of distinction); *id.* at 914 (Rehnquist, J., dissenting) (same).

¹⁴⁴ *Searcey v. Harris*, 888 F.2d 1314, 1325 (11th Cir. 1989) (finding abrupt change in policy adopted after unpopular group requested access to school forum "supports an inference that the Board intended to suppress" the group's views); *see also* *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 712 (D. Mass. 1978) (rejecting school officials' resolution, created in response to parental complaints of censorship, as "a self-serving document that rewrote history in an effort to meet the issues of this litigation. In simple terms, it was pretext.").

¹⁴⁵ *Searcey*, 888 F.2d at 1324 (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 811 (1985)); *see also* *Virgil v. School Bd.*, 862 F.2d 1517, 1522-23 (11th Cir. 1989); *Student Coalition for Peace v. Lower Merion Sch.*, 776 F.2d 431, 437 (3d Cir. 1985).

tion."¹⁴⁶

2. The Right to Be Exposed to All Sides of Controversial Issues

Thus, *Pico* relies upon the first amendment right of students to freely receive information in the schools to prohibit regulations intended to suppress one side of a debate.¹⁴⁷ Under this rationale, courts prohibit restrictions on speech in the curriculum where they are based on school officials' disagreement with the political views of the speech,¹⁴⁸ where the restriction seeks to further a biased agenda,¹⁴⁹ or where the only offered justification is that certain parents in the community find the speech offensive.¹⁵⁰

Courts have held that schools cannot ban or restrict speech merely because it conflicts with parents' or school officials' political views.¹⁵¹ For instance, in *Salvail v. Nashua Board of Education*,¹⁵² a New Hampshire district court refused to allow a school library to remove *Ms. Magazine* from its shelves where its only proffered reason for doing so was that certain school officials found the political slant of the magazine

¹⁴⁶ *Searcey*, 888 F.2d at 1322.

¹⁴⁷ *Pico*, 457 U.S. at 871 ("Our Constitution does not permit the official suppression of ideas."); *Pratt v. Independent Sch. Dist.* 670 F.2d 771, 776 (8th Cir. 1982) ("At the very least, the First Amendment precludes local authorities from imposing a 'pall of orthodoxy' on classroom instruction which implicates the state in the propagation of a particular religious or ideological viewpoint."); *Bell v. U-2 Bd. of Educ.*, 630 F. Supp. 939, 994 (D. Vt. 1986) ("School boards . . . may not deny access to ideas in a way that prescribes an orthodoxy in matters of opinion."); see also SORENSON, *supra* note 91, at 458-59 (viewpoint discrimination never allowed).

¹⁴⁸ *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 510-11 (1969) (singling out one particular political opinion for prohibition unconstitutional); *Minarcini v. Strongville City Sch. Dist.*, 541 F.2d 577, 582 (6th Cir. 1976) (removal of library books based solely on political tastes of school board was unconstitutional).

¹⁴⁹ *Loewen v. Turnipseed*, 488 F. Supp. 1138 (N.D. Miss. 1980).

¹⁵⁰ See *Dean v. Timpson Indep. Sch. Dist.*, 486 F. Supp. 302, 308 (E.D. Tex. 1979) ("[t]o exclude a subject from the public school curriculum because it offends the community . . . runs counter to the spirit of the First Amendment"); see also *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987) (dismissing challenge to schoolbook series that offended parent's values); *Keefe v. Geanokos*, 418 F.2d 359, 361-62 (1st Cir. 1969); *Parducci v. Rutland*, 316 F. Supp. 352, 354 (M.D. Ala. 1970) (finding parents' offense not controlling).

¹⁵¹ *Tinker*, 393 U.S. at 510-11; *Minarcini*, 541 F.2d at 582.

¹⁵² 469 F. Supp. 1269 (D.N.H. 1979).

inappropriate for the students.¹⁵³ The *Salvail* court declared that the school board improperly had attempted to impose the school authorities' own political views on the students.¹⁵⁴

Bans motivated by school authorities' bias against a minority within the school likewise are impermissible.¹⁵⁵ The court in *Loewen v. Turnipseed*,¹⁵⁶ for example, ruled that a Mississippi school district's textbook committee had violated the First Amendment by selecting books that sought to perpetuate the committee's racial bias. The court's finding was based on evidence that the committee had refused to even consider less-biased textbooks presented to it.¹⁵⁷ Thus, although the court acknowledged that textbook selection generally is a matter of local concern, the judge found that the selected textbooks improperly furthered the committee's own ideas of segregation and racism.¹⁵⁸ The court's opinion emphasized that school officials cannot commandeer the curriculum to perpetuate their own prejudiced or harmful political agenda.

Courts also thwart parents who attempt to control the curriculum as a means of validating their own viewpoint.¹⁵⁹ In *Right to Read Defense Committee v. School Committee*,¹⁶⁰ a school banned a library book in response to a parent's complaint that the theme and language of a poem in the book was offensive. In response, the court described the poem about a young girl's experience as "challenging and thought-provoking," finding its explicit language a fitting depiction of the poem's harsh theme.¹⁶¹ The court reminded the parents who had ob-

¹⁵³ *Id.* at 1275-76.

¹⁵⁴ *Id.* at 1274.

¹⁵⁵ Board of Educ. v. Pico, 457 U.S. 853, 871 (1982) (finding that a racially motivated, all-white school board who decided "to remove all books authored by blacks or advocating racial equality" would violate the constitutional rights of the students denied access to those books).

¹⁵⁶ 488 F. Supp. 1138 (N.D. Miss. 1980).

¹⁵⁷ *Id.* at 1154-55.

¹⁵⁸ *Id.* at 1154.

¹⁵⁹ See, e.g., Dean v. Timpson Indep. Sch. Dist., 486 F. Supp. 302, 308 (E.D. Tex. 1979) (determining that the material and substantial interference test is not based on whether the speech disrupts the community because otherwise "no subject which differed from the majoritarian view could be taught in the public schools"); see also *Mozert v. Hawkins*, 827 F.2d 1058 (6th Cir. 1987) (rejecting parents' claim that certain textbooks should be removed because they were repugnant to their religious and family values).

¹⁶⁰ 454 F. Supp. 703, 711 (D. Mass. 1978).

¹⁶¹ *Id.* at 714.

jected to the poem that "their sensibilities are not the full measure of what is proper education."¹⁶²

3. The Right to Not Be Compelled to Hold a Particular Belief

The First Amendment also ensures students' rights to form and hold personal beliefs, and prevents school authorities from compelling students to accept state-sanctioned views within the classroom.¹⁶³ While schools may attempt to instill students with certain "community values," they must maintain an objective educational process consistent with democratic ideals. As the Supreme Court has emphasized, "[t]he fundamental notion underlying the First Amendment is that citizens, free to speak and hear, will be able to form judgements concerning matters affecting their lives, independent of any governmental suasion or propaganda."¹⁶⁴

Students, like adults, must remain free to form their own opinions through unimpeded access to views and information. The Supreme Court case, *West Virginia State Board of Education v. Barnette*,¹⁶⁵ provides a dramatic example of a school that unconstitutionally forced acceptance of its views through its curriculum. The Court held that a school could not force a child who disagreed with the political underpinnings of the pledge of allegiance to recite the pledge.¹⁶⁶ Although it com-

¹⁶² *Id.* at 713; see also *Keefe v. Geanokos*, 418 F.2d 359, 362 (1st Cir. 1969) ("thought-provoking" article containing vulgar word could not be removed from classroom solely based on parents' objections).

¹⁶³ Commentators have articulated this as the right to *formation* of belief and opinion as an adjunct to the First Amendment's protection of the *expression* of belief and opinion. See Stephen Arons & Charles Lawrence III, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, HARV. C.R.-C.L. L. REV. 309, 312 (1980) (noting "[i]f the government were to regulate the development of ideas and opinions . . . freedom of expression would become a meaningless right").

¹⁶⁴ *Right To Read Defense Comm.*, 454 F. Supp. at 710.

¹⁶⁵ 319 U.S. 623 (1943).

¹⁶⁶ *Id.* at 642. This means that students and teachers cannot be excluded or treated differently for refusing to participate in the pledge of allegiance for reasons of conscience. See *Goetz v. Ansell*, 477 F.2d 636 (2d Cir. 1973); *Banks v. Board of Pub. Educ.*, 314 F. Supp. 285 (S.D. Fla. 1970), *vacated*, 401 U.S. 988 (1971); *Frain v. Baron*, 307 F. Supp. 27 (E.D.N.Y. 1969) (precluding expulsion of a student who refused to stand silently during the pledge of allegiance); see also *Russo v. Central Sch. Dist.*, 469 F.2d 623 (2d Cir.) (finding decision to fire teacher for refusing to

mended the school's desire to foster an appreciation of constitutional democracy, the Court reasoned that the mandatory flag salute actually contradicted this goal by violating the student's first amendment rights.¹⁶⁷ The Court refused to allow the school to bypass teaching an appreciation of constitutional values by simply enforcing "the compulsory unification of opinion."¹⁶⁸ In sum, although the state may validly define the parameters of the curriculum and even seek to instill democratic values, schools officials may not achieve their goals in a manner that violates the Constitution.¹⁶⁹

One method of instilling some types of "community values" in students without shortcutting the educational process was upheld by the Third Circuit in *Steirer ex rel. Steirer v. Bethlehem Area School District*.¹⁷⁰ *Steirer* involved a high school graduation requirement that students perform community service.¹⁷¹ The court rejected the students' claim that forcing participation in this program compelled a belief in altruism.¹⁷² Because this curricular program simply required students to experience such service and did not restrict them to

recite the pledge of allegiance unconstitutional), *cert. denied*, 411 U.S. 932 (1972); *Sheldon v. Fannin*, 221 F. Supp. 766 (D. Ariz. 1963) (forbidding expulsion of student who refused to stand during singing of the national anthem).

¹⁶⁷ *Barnette*, 319 U.S. at 646 (concurring opinion) ("Any spark of love for country which may be generated in a child . . . by forcing him to . . . recite words wrung from him contrary to his . . . beliefs is overshadowed by the desirability of preserving freedom of conscience to the full. It is in that freedom and the example of persuasion, not in force and compulsion, that the real unity of America lies.").

¹⁶⁸ *Id.* at 641. As the Court declared, "the State may 'require teaching by instruction and study of all in our history and in the structure an organization of our government, including guarantees of civil liberty which tend to inspire patriotism and love of country.'" *Id.* at 631 (quoting *Minerville Sch. Dist. v. Gobitis*, 310 U.S. 586, 604 (1940)). It may not, however, "shortcut [this process] by substitution of a compulsory salute and slogan." *Id.*

¹⁶⁹ For an argument that forced acceptance of the "dominant school ideology" implicates all children's first amendment rights, see Arons & Lawrence, *supra* note 163, at 328 (recounting personal story of Professor Lawrence of University of San Francisco: "In the fourth grade I was one of two blacks in my class. Each week we began the school assembly by singing *Old Black Joe* and *The Caisson* song. . . . I recall feeling acutely embarrassed and ashamed as we sang these songs, but I sang along with my friends because they were enjoying it and I did not want to be different. Were the ritualistic singing of songs that demeaned my race . . . any less acts of confession than the flag salute in *Barnette*?").

¹⁷⁰ 987 F.2d 989 (3d Cir.), *cert. denied*, 114 S. Ct. 85 (1993).

¹⁷¹ *Id.* at 997.

¹⁷² *Id.*

saying only positive things about performing community service, the court found that the students remained free to develop their own opinions about the program.¹⁷³

4. The Right to Be Free from Misleading Information

Students' first amendment right to receive information gives youth the right not to be exposed to misleading information, and as such ensures that they are exposed to a free and open educational system that provides for the acquisition of useful knowledge. This constitutional guarantee prevents schools from promulgating inaccurate or misleading information in the classroom. Courts have not addressed directly the theory that inaccurate or misleading information violates the freedom of speech and the right to receive information. Nonetheless, the role of public schools in educating students to participate in democracy¹⁷⁴ and the underlying rationale in many of the free expression cases in the public school context make clear the imperative of providing students with useful and thus accurate knowledge.

An analysis of Supreme Court establishment clause cases facilitates an understanding of a student's right to be free from misleading information.¹⁷⁵ The Court in these cases struck down statutes that forbade or disadvantaged evolutionary theory in public schools.¹⁷⁶ In *Epperson v. Arkansas*,¹⁷⁷ for example, the Court invalidated a state law that precluded teachers from discussing evolutionary theory within the public school curriculum. Because evolutionary theory was the prevailing scientific view regarding human development, Justice Stewart's concurrence noted that prohibiting students' exposure to this knowledge "impinge[d] upon the guarantees of free

¹⁷³ *Id.* (finding students not confined to the expression of "officially approved" sentiments).

¹⁷⁴ See *supra* part I.A.

¹⁷⁵ The Establishment Clause of the First Amendment preserves individual free exercise of religion and prohibits government furtherance of a particular religion. See U.S. CONST. amend I. It strictly forbids any school activity or policy that furthers a religious purpose. See, e.g., *Lee v. Weisman*, 112 S. Ct. 2649 (1992) (disallowing non-denominational prayer at school graduation ceremony).

¹⁷⁶ See, e.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Epperson v. Arkansas*, 393 U.S. 97 (1968).

¹⁷⁷ 393 U.S. 97 (1968).

communication contained in the First Amendment" by denying access to an "entire system of respected human thought."¹⁷⁸ Thus, although *Epperson* arose under the Establishment Clause, it also declared that students were entitled to hear relevant theories and views within the fields of inquiry addressed by the schools.¹⁷⁹

Likewise, in *Edwards v. Aguillard*,¹⁸⁰ the Court struck down an act that required schools teaching evolutionary theory to teach the theory of creationism as well. The Court found the statute unconstitutional because it sought to alter the science curriculum of public schools to advantage a particular religious doctrine that "rejects the factual basis of evolution in its entirety."¹⁸¹ Again, although the Court invoked the Establishment Clause because of the religious foundation of creationism, it noted that obstructing the prevailing scientifically supported view from the school curriculum was itself improper.¹⁸²

¹⁷⁸ *Epperson*, 393 U.S. at 116 (Stewart, J., concurring) (concluding that, because public schools address human development, teaching creationism as the only legitimate theory infringed on students' first amendment rights because it mandated an inaccurate and misleading representation of the discipline); see *id.* at 111 (Black, J., concurring) ("It is plain that a state law prohibiting all teaching of human development or biology is constitutionally quite different from a law that compels a teacher to teach as true only one theory of a given doctrine.")

¹⁷⁹ *Id.* at 107 ("The State's undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit, on pain of criminal penalty, the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment."). Even where the school does not directly discuss a subject, it may not eliminate reference to the existence of other objective information. Justice Stewart's concurrence offered the example that, while a State can validly choose to teach only the Spanish language, "a State [could not] constitutionally . . . punish a teacher for letting his students know that other languages are also spoken in the world." *Id.* at 116 (Stewart, J., concurring).

¹⁸⁰ 482 U.S. 578 (1987).

¹⁸¹ *Id.* at 592. Although the statute merely required equal time to creationism if evolution were taught, the court recognized that this scheme "does not serve to protect academic freedom, but has the distinctly different purpose of discrediting 'evolution by counterbalancing its teaching at every turn with the teaching of creationism.'" *Id.* at 589 (quoting *Edwards v. Aguillard*, 765 F.2d 1251, 1257 (5th Cir. 1985)).

¹⁸² *Id.* 482 U.S. at 588 (noting that if the "Legislature's purpose was solely to maximize the comprehensiveness and effectiveness of science instruction, it would have encouraged the teaching of all scientific theories about the origins of human-kind").

In *Coleman v. Caddo Parish Sch. Board*, No. 385,230 (1st Jud. Dist. Mar. 18, 1993), *aff'd in part and amended in part*, 635 So. 2d 1238 (La. Ct. App. 1994), the court enjoined the use of a textbook and curriculum guide entitled "Sex Respect"

In summary, students' first amendment right to receive information guarantees that school curricula will not be used to impose school officials' own political views or prejudices. In addition, school curricula cannot be used as a mechanism to remove from students' consideration all ideas that some parents might find offensive. Likewise, the right to receive objective information protects students' first amendment right to form and retain their own beliefs. This right also prevents students from being misled by school curricula that present incomplete and thus distorted information. These components of the First Amendment's protections are critical for analyzing curricular bans on certain forms of teaching.

III. THE PROPOSED FIRST AMENDMENT TEST FOR CURRICULUM BANS

The case law discussed above reveals that first amendment challenges to content-based curriculum restrictions will not be analyzed under the strict scrutiny standard of review.¹⁸³ School officials' legitimate concerns and curriculum decisions compete with students' rights to receive and discuss all kinds of information. Because of the special setting of the school, regulations that limit curriculum content should be subjected to a balancing test. Building on existing Supreme Court case law, none of which has involved precisely this kind of restriction, it is possible to create a six-factored balancing analysis based upon first amendment principles.

Such a balancing test is analogous to the standard for

that contained medically inaccurate and misleading information. Although the decision was based on a Louisiana statute that required factual information in sex-education curricula, the opinion underscored the necessity of useful knowledge, particularly in areas of the curriculum that affect personal life decisions. *Id.* at 15-17. One passage referring to AIDS, for example, was struck down because the court found that it reflected the "moral belief that AIDS affects those who have, in the writers opinion, committed some immoral act. . . . It ignores that [HIV] is a disease transmitted by a variety of circumstances, and suggests that a 'moral landscape' rather than pathology explains the spread of this disease." *Id.* at 16. Again, while the court struck down these passages because they "fail[ed] to comply with the statute's mandate of disseminating *factual* pathological information," and because the role of public schools is to provide students with access to useful knowledge, mis-information that directly impedes this goal should be eliminated as a constitutional matter. *See id.*

¹⁸³ *See supra* notes 79-81 and accompanying text.

evaluating first amendment speech claims by public employees, another special setting where similar interests are at stake. Courts reviewing public employees' first amendment claims balance the interests of the state, as an employer, in promoting the efficiency of public services against employees' interests in commenting upon matters of public concern in their capacity as citizens.¹⁸⁴ This analysis considers the state employer's administrative needs as well as the importance of the employee's participation in public debate.¹⁸⁵ Courts should follow a similar model when evaluating curriculum restrictions.

In assessing a curriculum restriction, courts should balance schools' administrative and educational concerns with students' constitutional rights to be informed and prepared for their future roles in society. To guide this balancing process, courts should consider the following six factors: (1) whether the school officials were motivated by a desire to suppress a particular "dangerous" idea;¹⁸⁶ (2) whether the topic or view being restricted is part of an ongoing public controversy;¹⁸⁷ (3) whether the school is presenting inaccurate or misleading information to students;¹⁸⁸ (4) whether restricting information will have a substantial impact on students;¹⁸⁹ (5)

¹⁸⁴ *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968) (holding unconstitutional the termination of a public school teacher for submitting letter to the editor of local paper critical of school board funding plan because it chilled informed public debate). The public employee test clearly takes into consideration the importance of maintaining the "free and open debate vital to informed decision-making." *Id.* at 571-72. It should be noted, however, that while public employment is essential to an employee's livelihood, non-public employment also is an option. Attendance at public school, however, other than for the limited population that can afford private education, remains compulsory. See *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) (states may require all children of proper age to attend some form of schooling).

¹⁸⁵ *Pickering*, 391 U.S. at 568.

¹⁸⁶ See *Board of Educ. v. Pico*, 457 U.S. 853, 871 (1982); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 514 (1969).

¹⁸⁷ See *Tinker*, 393 U.S. at 510 (noting that "the action of the school authorities appears to have been based upon an urgent wish to avoid the controversy [surrounding] . . . this Nation's part in the conflagration in Vietnam").

¹⁸⁸ See *Edwards v. Aquillard*, 482 U.S. 578, 588 (1987); *Epperson v. Arkansas*, 393 U.S. 97, 116 (1968) (Stewart, J., concurring).

¹⁸⁹ See *Hazelwood Sch. Dist., v. Kuhlmeier*, 484 U.S. 260, 275 (1988) (decision to excise only two pages of school paper reasonable); *Planned Parenthood v. Clark County Sch. Dist.*, 941 F.2d 817, 830 (9th Cir. 1991) (school officials "could reasonably choose to have the family planning debate take place in the classroom rather than in the advertising pages of its school-sponsored publications").

whether a nexus exists between the regulation and a substantial educational or operational goal;¹⁹⁰ and (6) whether the topic sought to be regulated is encompassed by the course of study already offered by the school.¹⁹¹ Essentially, schools can impose values, so long as these values are consistent with, and implemented in line with, the Constitution.

1. Did School Officials Intend to Suppress a Particular Idea?

When evaluating curriculum restrictions, courts first should determine school officials' motivation for curtailing access to particular curricular content. Although often difficult to establish, school authorities' attempts to distort the curricula to favor certain views should be exceedingly difficult to justify because such a policy contradicts fundamental first amendment principles.¹⁹² Indeed, students depend on a free and open education system to learn to evaluate competing views.¹⁹³

Courts must prohibit school officials who commandeer the curriculum in an effort to impose their political or social views on students, particularly when they act to simply eliminate conflicting perspectives.¹⁹⁴ Absent explicit evidence, courts have determined motivation by considering whether the school followed established procedures,¹⁹⁵ examining the atmosphere surrounding the decision,¹⁹⁶ and looking at the language of

¹⁹⁰ See *Hazelwood*, 484 U.S. at 271.

¹⁹¹ See *Epperson*, 393 U.S. at 116 (Stewart, J., concurring).

¹⁹² *Board of Educ. v. Pico*, 457 U.S. 853, 871 (1982) (decisions intended to deny access to ideas with which school authorities disagree violate the Constitution).

¹⁹³ *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); see also MORRIS, *supra* note 28, at 116 ("An indispensable function of the curriculum of the American public school is to . . . produc[e] a mentality in all students such that they can . . . critically evaluate values and rationally choose their own.").

¹⁹⁴ See, e.g., *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269 (D.N.H. 1979); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703 (D. Mass. 1978).

¹⁹⁵ See, e.g., *Pico*, 457 U.S. at 866-67 (failure to read banned books); *Scheck v. Baileyville Sch. Comm.*, 530 F. Supp. 679, 691-92 (D. Me. 1982) (criticizing "utter absence of procedural ground rules or minutes memorializing the Committee rationale").

¹⁹⁶ See *Searcey v. Harris*, 888 F.2d 1314, 1325 (11th Cir. 1989) (finding that abrupt change in policy after unpopular groups requested access to school supported inference that school intended to suppress unpopular the groups' views).

the restriction itself.¹⁹⁷ Where a school designates a particular perspective as the "correct" view, this exclusion of all other views is likely to be found unconstitutional.¹⁹⁸ Thus, this first factor should weigh heavily in the balancing analysis.

Moreover, established first amendment case law teaches that although community needs are a relevant consideration in some school policies, a local majority's view should never be imposed to exclude all minority views.¹⁹⁹ Because school boards are popularly elected entities "they are likely to be highly responsive to the demands of the majority that elected them. The political process thus affords scant protection to the community's ideological minorities."²⁰⁰ As a result, courts should give particular scrutiny to claims by historically mistreated or unpopular minorities that their perspectives are being suppressed by a local school board.²⁰¹

2. Is the Topic Being Restricted Part of an Ongoing Public Controversy?

Another related consideration is whether the restricted speech reflects an ongoing public controversy. Where the school favors a particular side in an obvious societal debate, courts should scrutinize the regulation especially rigorously. A governmental entity that attempts to directly influence the outcome of debate violates the First Amendment. Whether the issue may actually be considered a debate, however, must be measured on a national scale, not just by looking at the particular community involved.²⁰² While community values are rel-

¹⁹⁷ See *Sheck*, 530 F. Supp. at 692 n.18 (ruling that evidence of intent to suppress ideas could be inferred from "the overbreadth of the ban itself").

¹⁹⁸ See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 511 (1969).

¹⁹⁹ Stanley Ingber, *Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in the Public School*, 1987 U. ILL. L. REV. 15, 70-71.

²⁰⁰ Although it may be argued that the local school boards are best able to represent the views of the community, "[t]he representative nature of school boards militates in favor of, not against, imposing restrictions on curricular decisions . . . [s]ince the preponderance . . . of school boards are elected." Nat Stern, *Challenging Ideological Exclusion of Curriculum Material: Rights of Students and Parents*, 14 HARV. C.R.-C.L. L. REV. 485, 486 (1979).

²⁰¹ See, e.g., *Loewen v. Turnipseed*, 488 F. Supp. 1138, 1154 (N.D. Miss. 1980) (finding textbook selection committee's prior history of racially motivated decisions relevant).

²⁰² Ingber, *supra* note 199, at 70-71 ("Judgments of a local elite that conflict

evant, they cannot override the Constitution. Indeed, if there was a need for only local consensus, doctrines such as evolutionary theory might never have been discussed in certain areas of the country.²⁰³

To determine whether the regulated speech is part of a broader political debate, courts might craft a standard similar to the Federal Communications Commission's "fairness doctrine."²⁰⁴ The fairness doctrine requires broadcasters to present alternative points of view once a "controversial issue of public importance" is discussed on the air.²⁰⁵ When analyzing what constitutes an important "controversial issue," courts consider "the degree of attention paid to [the] issue by government officials, [other] leaders, and the media," as well as the importance of the issue to the public.²⁰⁶ Under such a test, most issues relating to current social or political debates would fall within the scope of a "controversial issue."²⁰⁷ Students must be exposed to these controversial issues as they will con-

with national perspectives are no more likely to receive judicial deference simply because the elite is a school board using the rhetoric of 'educational suitability.'"). First amendment values, with the exception of obscenity standards, are always measured on a national scale. *Miller v. California*, 413 U.S. 15, 30 (1973) (holding that "[u]nder a national Constitution, fundamental First Amendment limitations on the power of the states do not vary from community to community").

²⁰³ *Epperson v. Arkansas*, 393 U.S. 97, 112 (1968) (finding clear legislative and popular support for statute proscribing evolutionary theory in schools).

²⁰⁴ Kamenshine, *supra* note 87, at 1113 (suggesting use of this doctrine for invoking his proposed "implied establishment clause" requiring government neutrality in government speech settings); see also Stephen Gottlieb, *In the Name of Patriotism: The Constitutionality of "Bending" History in Public Secondary Schools*, 62 N.Y.U. L. REV. 497 (1987) (arguing for application of a fairness test based on the FCC's fairness doctrine to history textbook selection in public schools). Although the FCC discontinued enforcement of this doctrine in 1987, it continues to provide guidance for first amendment thought. See *id.* at 500 n.17.

²⁰⁵ Kamenshine, *supra* note 87, at 1113; see also *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (upholding constitutionality of the fairness doctrine). For the application of a similar test in the school setting see *Bonner-Lyons v. School Comm.*, 480 F.2d 442, 442-43 (1st Cir. 1973) (enjoining school officials from distributing leaflets opposing involuntary bussing to achieve racially integrated schools "unless fair and reasonabl[y] timely opportunit[ies] . . . were afforded to those with differing views" to use the same channels).

²⁰⁶ Kamenshine, *supra* note 87, at 1113-14.

²⁰⁷ Kamenshine, *supra* note 87, at 1113-14. In *Red Lion Broadcasting*, the Supreme Court acknowledged that this is a broad definition but, because the goal of the fairness doctrine is to increase speech and foster public debate for the listeners, a permissive definition here actually furthers first amendment goals. 395 U.S. at 392.

tinue to grapple with such issues in their adult lives.

3. Is the Information Presented to Students Inaccurate or Misleading?

Courts also should consider whether the curriculum restriction results in erroneous or misleading information being presented to students.²⁰⁸ Misinformation fails to further educational goals and contravenes schools' purpose.²⁰⁹ Outside the context of schools, the First Amendment generally prohibits the state from "correcting" ideas, preferring that false notions be remedied in the free marketplace of ideas.²¹⁰ In the case of a state-run, compulsory school, however, there is little opportunity to "correct" false information emanating from school curricula.²¹¹ Thus, misinformation directly undermines students' ability to think clearly about policy issues and government. Public schools should not be allowed to use their discretionary power to evade constitutional principles.

4. Does the Restriction Directly Harm Students?

Whether a speech restriction has some concrete, harmful impact on students' lives also should be part of analyzing its

²⁰⁸ See *Epperson v. Arkansas*, 393 U.S. 97, 107 (1969).

²⁰⁹ Yudof, *supra* note 87, at 864.

²¹⁰ See, e.g., *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (striking down strict liability standard for libel laws as applied to public figures to preserve the free marketplace of ideas); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market"); see also John S. Mill, *On Liberty* (1859), reprinted in MORRIS, *supra* note 28, at 117-19 (describing concept of marketplace of ideas).

²¹¹ Yudof, *supra* note 87, at 875 ("public schools are a communication theorist's dream: the audience is captive and immature, the messages are labeled as educational; . . . the audience may hold the adult communicator in high esteem; and a system of rewards and punishments is available to reinforce the messages"). This is not to say that the "marketplace of ideas" should not exist in the curriculum, but rather that courts should recognize that where teachers are required to promulgate a specific view, a child does not have equal resources to combat that perspective. *Id.* at 900-01 (implying that in the context of schools, the traditional notion of information correcting itself in the marketplace of ideas is inapplicable); see also Gottlieb, *supra* note 204, at 550-51 ("[w]hen government captures and monopolizes an audience, it has a correlative obligation to present material in a way that furthers rather than hampers the discussion of public issues").

constitutionality. While it is never beneficial to restrict information in the public schools, omission of facts regarding trivial topics has a minimal impact on students. In contrast, information concerning certain topics has a direct influence on students' lives and decisions. The balance and accuracy of this relevant information is particularly important where a defined group of students would be harmed by its omission or biased slant.

For instance, students not exposed to information regarding family planning will be directly affected in making life-altering decisions, such as how to handle an unwanted pregnancy.²¹² Moreover, this impact is not merely speculative because all schools (at least after certain grade levels) have sexually active students who need such information.²¹³ When sexually active students lack access to this knowledge they may experience tangible harms such as misunderstanding medical options or experiencing personal trauma. Thus, schools will have difficulty justifying curriculum decisions that curtail or eliminate information to the detriment of a significant group of students. This type of concrete harm elevates students' rights beyond their basic freedom of belief and expression and entitles them to an even greater level of protection against government-imposed injury.

5. Is There a Nexus Between the Restriction and a Substantial Goal of the School?

A related concern that courts should evaluate is whether schools have proven a nexus between the educational interest they assert and the curricula.²¹⁴ In addition to a strong corre-

²¹² Janet Benshoof, *The Chastity Act: Government Manipulation of Abortion Information and the First Amendment*, 101 HARV. L. REV. 1916, 1925-26 (1988) ("[d]ue to the scarcity of health care services for adolescents and the necessity to decide quickly whether to have an abortion, pregnant teenagers do not shop around for counseling on abortion services" and thus the information they do receive becomes very important).

²¹³ See Centers for Disease Control, *Guidelines for Effective School Health Education to Prevent the Spread of AIDS*, 37 MMWR 12 (1988) (finding 70% of high school students sexually active).

²¹⁴ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988) (concluding that speech restrictions on school sponsored speech must be reasonably related to the asserted educational interests offered by the school); *Steirer ex rel. Steirer v.*

lation between the schools' asserted objective and the curtailment of the curricula, schools should be required to show that a significant educational interest is at stake. Carefully drafted restrictions on curricula content that assure lessons are appropriate for students' maturity level, for example, are more likely to be constitutional than broad regulations that ban entire concepts from the school.²¹⁵ Moreover, courts should weigh how much a particular regulation intrudes into classroom teaching. As one commentator has stated: "[t]he greater the ability of the school system to control what goes on in every classroom, the greater the danger of its promulgating a uniform message to its captive listeners."²¹⁶

Here, it also is important for courts to examine the relationship of the regulating body to the classroom. While local school boards generally are given broad power to define curricula to meet the individual community's educational needs, statewide regulations may demand specific classroom practices to "increase [the state's] capacity to indoctrinate a single ideological point of view."²¹⁷ Such motivations are less likely to create curricula that meet valid educational needs.

6. Is the Topic Sought to Be Restricted Encompassed By Subjects Taught in the School?

Finally, courts should consider to what extent a school's curriculum already encompasses the topic sought to be regulated.²¹⁸ Obviously, because of time and other practical limita-

Bethlehem Area Sch. Dist., 987 F.2d 989, 994 (3d Cir.) (providing educational justification does not make school program "ipso facto constitutional"), *cert. denied*, 114 S. Ct. 85 (1993); *Searcey v. Harris*, 888 F.2d 1314, 1324 (11th Cir. 1989) (ruling that school must show that educational goals are furthered by restricting speech).

²¹⁵ See *Sheck v. Baileyville Sch. Comm.*, 530 F. Supp. 679, 691 (D. Me. 1982) ("Although a rational demonstration that harm might result to some students may be possible in these circumstances, . . . it is not an acceptable assumption that all students, regardless of their age or maturity, might be harmed by exposure to such language."); *cf. Bethel v. Fraser*, 478 U.S. 675, 685 (1986) (maintaining order by punishing vulgar speech allowed); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 511 (1969) (banning one idea from school invalid).

²¹⁶ *Yudof, supra note 87*, at 876 (discussing need for teachers to retain some degree of autonomy over what is taught in the classroom to maintain pluralism).

²¹⁷ *Yudof, supra note 87*, at 876-77.

²¹⁸ "It is a familiar constitutional principle that a state, though having acted

tions, public school curricula cannot cover every topic. For those subjects that schools do address, however, certain viewpoints and information are vital to providing a basic and balanced understanding of the topics.²¹⁹ Requirements discussed above—such as the school officials' ability to demonstrate a rational basis for restricting information—should be more difficult to meet if the subject already is included in the curriculum. Thus, while students have no protected interest in hearing information that is totally detached from the school's curriculum, it will be difficult for schools to justify limiting relevant material in those subjects they do address.

In evaluating curriculum restrictions, courts therefore should determine the extent of students' interests in receiving the prohibited information and should weigh this against the factors that may favor the schools' interests. Again, the school's motivation for the restriction should weigh especially heavily in the balance because the state should not be allowed simply to suppress a disfavored viewpoint. Other factors that tend to favor the student rather than the school are where restrictions relate to a matter of significant public controversy, result in inaccurate or misleading information, risk harming students, serve no legitimate educational goals, or relate to topics already covered by the curriculum.

IV. A CONSTITUTIONAL ANALYSIS OF ANTI-GAY CURRICULAR RESTRICTIONS UNDER THE PROPOSED BALANCING TEST

As discussed above, restrictions on the acceptance of homosexuality within public schools fit into three categories. To date, the types of statutes and regulations enacted that constrict discussion of homosexuality within public schools' curric-

when not compelled, may consequentially create a constitutionally protected interest." *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 711-12 (D. Mass. 1978) (holding relevancy of poem to students' experiences favored its inclusion in the literature curriculum); *see also Zykan v. Board of Educ.*, 631 F.2d 1300, 1306 (7th Cir. 1980) (ruling schools cannot prohibit "the mention of certain relevant topics in the classroom because that "impair[s] permanently the students' ability to investigate matters that arise in the natural course of intellectual inquiry"); *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 581-82 (6th Cir. 1976) (considering relevancy of censored material).

²¹⁹ *See, e.g., Epperson v. Arkansas*, 393 U.S. 97 (1968) (removing prevailing scientific view from consideration of human development was impermissible).

ula include: restrictions that ban the topic of homosexuality; restrictions that ban the view that homosexuality is acceptable; and restrictions that require teachers to emphasize the view that homosexuality is unacceptable. The constitutional balancing test described above would find each of these restrictions unconstitutional.

The first category of restriction totally bans the topic of homosexuality within the school curriculum. An example of this type of regulation is a New York City School District resolution that "mandate[s] that any reference to . . . homosexuality . . . be eliminated from [the] curriculum."²²⁰ Similarly, a statute in South Carolina precludes all discussion of "homosexual relationships."²²¹ These broad regulations chill discussion on any topic that might relate to or "make reference to" homosexuality. Thus, teachers in these jurisdictions might even abstain from topics relating to sexual identity or family composition to avoid the students raising questions the teacher must refuse to answer.

The second type of regulation prohibits the viewpoint that homosexuality is acceptable. The Utah State Board of Education, for example, excludes from its textbooks the "acceptance of homosexuality as a desirable or healthy sexual adjustment or lifestyle."²²² Like the New York City topic ban, the Utah textbook guidelines apply to all areas of the curricula. Similarly, an Arizona statute prohibits any statement in its AIDS-education curriculum that might be construed as condoning homosexuality. The statute prohibits any course of instruction in AIDS education that "(1) promotes a homosexual lifestyle; (2) portrays homosexuality as a positive alternative lifestyle; [or] (3) suggests that some methods of sex are safe methods of homosexual sex."²²³ This statute requires schools to avoid any positive references to gay men and lesbians and prohibits any mention of methods of safer sex practices that might be important for gay students. The statute even forbids neutral mention that such practices exist because a neutral statement could be

²²⁰ Quinn Letter, *supra* note 16 (parental permission form for 1991-92 school year); *see also* Myers, *supra* note 16, at B1; Willen, *supra* note 16, at 3.

²²¹ S.C. CODE ANN. § 59-32-30(A)(5) (Law. Co-op. 1991). The law does provide for one exception—in instruction on sexually transmitted diseases.

²²² Mecham Memorandum, *supra* note 15.

²²³ ARIZ. REV. STAT. ANN. § 15-716 (Supp. 1992).

construed as "promoting" homosexual sex.

The final category of restrictions, those requiring that homosexuality be emphasized as an unacceptable lifestyle, typically focus on sex-education programs. Statutes in Alabama and Texas, for example, require that sex education emphasize, "in a factual manner and from a public health perspective, that homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense under the [state penal code]."²²⁴ Moreover, the Alabama and Texas laws seem to require constant references to popular opinion and the state's criminal law in the event of any discussion. A regulation in Prince William County, Virginia, likewise requires teachers to emphasize the viewpoint that homosexuality is unacceptable.²²⁵ To obey these curriculum restrictions, teachers in these school systems either must avoid any positive or neutral reference to homosexuality, or constantly must re-focus discussions to stress negative views.

A first amendment challenge to these statutes and regulations, based on students' right to receive information, results in the conclusion that all three types of restrictions are unconstitutional. Each factor of the appropriate balancing test favors students' right to information over schools' interests. Although a range of views exist regarding the social acceptance of homosexuality, all of the curriculum restrictions and statutes require schools to enforce only one side of this controversy. Both the text of the restrictions themselves, as well as the social controversy surrounding their adoption, demonstrate that schools are enforcing a preferred view and by doing so are shielding students from a full understanding of the controversy surrounding sexual orientation.²²⁶

²²⁴ ALA. CODE § 16-40A-2 (Supp. 1992); TEX. HEALTH & SAFETY CODE ANN. § 15-716 (West 1992).

²²⁵ Maria E. Odum, *Topic of Homosexuality Shows Diversity in Sex Education*, WASH. POST, Dec. 27, 1992, at B1 (reporting that Prince William County's curriculum restriction requires that homosexuality "not be taught as an acceptable lifestyle as homosexual acts are a violation of state law").

²²⁶ See *supra* notes 8-11 and accompanying text. The religious right has been forthright about their mission to remove positive references to homosexuality from school curricula as part of their larger political campaign. See Alan Edwards, *Gay Lifestyle Won't Be Called "Healthy"*, DESERET NEWS, June 16, 1993, at B1; Langland, *supra* note 12, at B4 (reporting Octorara School District in Pennsylvania voting on a proposal that "reflects complaints . . . made by many conservative

While such "viewpoint ban"²²⁷ restrictions are the most obvious viewpoint discrimination (because they expressly proscribe *any* positive viewpoint of homosexuality) the other two categories of regulations also constitute viewpoint bans. The regulations that simply ban the topic of homosexuality²²⁸ at first blush appear to be of the more permissible, subject-matter variety. Banning "any reference to homosexuality" in the context of present school curricula in fact bans a viewpoint, however.²²⁹ Forbidding the mention of homosexuality restricts any discussion involving sexual identity, family composition, and sexual behavior. Such a ban does not allow a teacher to express that homosexuality is wrong or immoral any more than it allows a teacher to encourage respect of gay people. This mandated invisibility, however, reinforces the societal oppression and anti-gay attitudes that already are prevalent and experienced by gay youth in the schools despite such a "neutral" curriculum.²³⁰ Because heterosexuality undoubtedly will be discussed, and sanctioned, this inescapably enforces the viewpoint that being gay is wrong.²³¹

Similarly, the "viewpoint emphasis" restrictions²³² function as viewpoint prohibitions. The text of the statutes and regulations require teachers to "emphasize" the view that homosexuality generally is considered unhealthy and unacceptable.²³³ Because teachers cannot gauge the precise "empha-

Christians, particularly Christians for Excellence in Education"); Tracey McCartney, MONTGOMERY ADVERTISER, July 14, 1992, at 19 (noting that the Utah and the Alabama anti-gay curriculum restrictions were passed with heavy lobbying by the conservative Eagle Forum); Smolowe, *supra* note 14, at 34.

²²⁷ See *supra* notes 222-23 and accompanying text; see also Idaho Att'y Gen. Opinion 19, No. 93-11, at 19 (Nov. 3, 1993) (finding Idaho's proposed viewpoint-ban initiative unconstitutional in part because evidence showed that the school intended to suppress a "viewpoint with which the state disagrees."). The opinion provides the example that, although "a teacher [could] raise, in a high school civics class, gays in the military as a topic for discussion . . . [the initiative would] prohibit[] one viewpoint on this topic from being addressed"). *Id.*

²²⁸ See *supra* notes 220-21 and accompanying text.

²²⁹ Here, the curriculum restrictions function like the unconstitutional anti-evolution statute in *Epperson* because they deny access to "an entire system of . . . human thought." See *Epperson v. Arkansas*, 393 U.S. 97 (1968).

²³⁰ See discussion *supra* at part I.B.

²³¹ See Gershick, *supra* note 55, at 56 (stating that invisibility of homosexuality makes gay students feel inferior).

²³² See *supra* notes 224-25 and accompanying text.

²³³ See, e.g., ALA. CODE § 16-40A-2 (Supp. 1992) (requiring "emphasis . . . from

sis" of their discussion if both positive and negative views are mentioned, most teachers will avoid making any statement condoning homosexuality.²³⁴ Even teachers who allow a degree of open discussion ultimately are forced to maintain a negative emphasis at the expense of a candid discussion.²³⁵ The severe chilling effect of these restrictions effectively eliminates any positive view of homosexuality.

These types of statutes all attempt to convince students that homosexuality is wrong. These statutes employ the most efficient, albeit unconstitutional means to achieve their goal: restricting classroom discussion and textbooks to reflect a singular, negative view. The statutes shortcut the educational process by restricting students' consideration of homosexuality to the states' preferred view, thus unconstitutionally interfering with the formation of belief and opinion on a matter of public controversy.

The second factor, that the restricted speech is related to an ongoing public debate, clearly is germane to an assessment of such statutes. The social position of gay men and lesbians is currently a matter of national social and political debate.²³⁶ As gay and lesbian people have heightened the visibility of their issues over the past decades, the result has been both increased acceptance as well as continued violence and discrimination.²³⁷ Although gay men and lesbians have organized po-

a public health perspective, that homosexuality is not a lifestyle acceptable to the general public").

²³⁴ *Knowledge v. Board of Educ.*, Decision by the Commissioner of Education 8 (Feb. 8, 1993) (striking down resolution that required emphasizing abstinence in all AIDS-education classes as ineffective, "stop-watch" education), *aff'd*, *Board of Educ. v. Sobol*, 161 Misc. 2d 393, 613 N.Y.S.2d 792 (Sup. Ct. Albany County 1993).

²³⁵ The statutes function like the equal time statute struck down in *Edwards v. Aguillard*, 482 U.S. 578, 582 (1987) (mandating that equal time be given to creationism where evolution was taught compelled teachers to "discredit evolution by counterbalancing its teaching at every turn with the teaching of creationism").

²³⁶ This is perhaps most obviously exemplified by the differences between the Democratic and Republican presidential platforms in 1992. Mary Jordan, *Voters Decry GOP "Gay Bashing,"* WASH. POST, Aug. 21, 1992, at A27 (noting Republican National Convention espoused "no special rights" for gay men and lesbians while the Democratic party "expressed unequivocal support for the protection of gays' civil rights").

²³⁷ See, e.g., Peter Applebome, *Military People Split Over Ban on Homosexuals*, N.Y. TIMES, Jan. 28, 1993, at A16 (controversy over whether gay men and lesbians should be able to serve openly in the military reveals spectrum of attitudes to-

litically and fought for increased legal protections, the religious right and other groups continue to pass anti-gay initiatives.²³⁸ Despite competing views of the acceptability of homosexuality, all of the anti-gay education restrictions have opted to enforce a negative view of homosexuality.²³⁹

Furthermore, all of the anti-gay education statutes mandate inaccurate or distorted information to be disseminated in the classroom. First, the topic bans omit an entire field of knowledge that is relevant to many areas addressed by the school.²⁴⁰ This lack of information misleads students as to the very existence of gay people. In addition, the Arizona statute distorts the discussion of many issues by eliminating any positive view of homosexuality and also requiring teachers to inaccurately espouse that all methods of homosexual sex create a risk of HIV transmission.²⁴¹ This information is both false and misleading. Just as with heterosexual sex, many forms of homosexual sex are risk-free, while other sexual conduct is considered safe when precautions are taken.²⁴² The effect of this type of restriction is that, even if a gay student is fortunate enough to receive information from an outside source regarding how to practice safe sex, having been taught in school that *no* method is safe for her or him, the student may

ward homosexuality in society); John Leland, *Homophobia*, NEWSWEEK, Feb. 14, 1994, at 42, 42 ("gays are finding that increased visibility is a double-edged sword. They have greater political clout and social acceptance, but their newfound confidence has energized the far right, and anti-gay harassment and violence have doubled in the last few years."); *School District Allows Gay Students To Meet*, N.Y. TIMES, Jan. 15, 1994, at 8 (discussing a California high school's decision to allow a gay student group to meet on its premises despite community controversy).

²³⁸ See *supra* notes 8-11 and accompanying text; see also Steven A. Holmes, *Gay Rights Advocates Brace for Ballot Fights*, N.Y. TIMES, Jan. 12, 1994, at A17 (noting that "a record number of state ballot initiatives . . . that would forbid laws specifically protecting homosexuals from discrimination" are planned); Note, *supra* note 8, at 1905 ("rallying against the establishment of 'special rights,' some right-wing, fundamentalist Christian groups have embarked on extensive campaigns to curtail the civil rights of lesbians and gay men").

²³⁹ See Idaho Att'y Gen. Opinion, *supra* note 227, at 19 (noting that the proposed viewpoint ban would be unconstitutional because the state is "officially dictating the outcome" of discussions ranging from homosexuals in the military to AIDS).

²⁴⁰ See *infra* notes 224-25 and accompanying text.

²⁴¹ ARIZ. REV. STAT. ANN. § 15-716 (Supp. 1992) (no instruction may suggest "that some methods of sex are safe methods of homosexual sex").

²⁴² See Gerald H. Friedland & Robert S. Klein, *Transmission of the Human Immunodeficiency Virus*, 317 NEW ENG. J. MED. 1125, 1128-30 (1987).

either disregard the accurate information or unnecessarily be worried about transmission where it is unfounded.²⁴³

In addition, statutes like those in Alabama and Texas that require teachers to emphasize the idea that "homosexual conduct" is illegal are erroneous and misleading. By failing to define "homosexual conduct," the statutes conflate homosexuality with sodomy. Sodomy may be illegal under Alabama and Texas state law, but being gay is not, nor is much of the activity that could be termed "homosexual conduct."²⁴⁴ Moreover, the information required to be taught by these statutes misleads students by portraying certain sexual behavior between persons of the same gender as illegal but failing to mention that many states also outlaw the same conduct between persons of opposite genders. For example, although Texas' sodomy law only applies to same-sex couples, Alabama prohibits all sodomy regardless of the gender or sexual orientation of those engaged in the act.²⁴⁵ Thus, the statute requires instructors

²⁴³ The Arizona statute hinders the already difficult task of getting youth to practice safer sex. See generally Centers for Disease Control, *supra* note 213, at 12 (study of 860 teenagers aged 16-19 revealed that while 70% were sexually active, only 15% changed their behavior out of concern of contracting HIV and, of that 15%, only 20% selected effective preventive methods).

²⁴⁴ ALA. CODE §§ 13A-6-65(a)(3), 13A-6-60 (1982 & Supp. 1993) (oral and anal sex illegal); TEX. PENAL CODE ANN. § 21.06 (West 1991) (oral and anal sex between persons of the same gender illegal). But see Patricia Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1564 (1993) (quoting *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 166 (4th Cir. 1976)) ("It has never been illegal to be gay."); *id.* at 1564 n.84 ("While Virginia law proscribes the practice of certain forms of homosexuality . . . Virginia law does not make it a crime to be a homosexual. Indeed, a statute criminalizing status and prescribing punishment therefore would be invalid.").

Nonetheless, the homosexual status/conduct distinction is confused in many areas of the law. See, e.g., Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531, 543-46 (1992) (discussing some courts' perception of sodomy as "the totality of homosexuality" in evaluating equal protection claims by gay and lesbian plaintiffs). By conflating sodomy with gay and lesbian identity, states use sodomy laws less to prosecute consenting adults for sexual behavior than to lend ideological legitimacy to homophobic attitudes. See Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1435, 1469-92 (1992) (arguing that homosexual sodomy statutes "violate the right to be free from state-legitimated violence at the hands of private and public actors"). Laws singling out same-sex sodomy for negative reinforcement in the classroom are consistent with this paradigm.

²⁴⁵ ALA. CODE § 13A-6-65(3) (consensual sodomy statute is gender neutral); see also Idaho Att'y Gen. Opinion, *supra* note 227, at 5 n.2 (noting that both homosexual and heterosexual sodomy is a crime in Idaho).

to falsely give the impression that sodomy laws are applicable only to sexual behavior among persons of the same gender.

By undertaking to teach students about sex education and AIDS, schools accept an obligation to provide accurate and comprehensive information.²⁴⁶ Instead, the anti-gay restrictions instill misleading views and waste an opportunity to combat anti-gay stereotypes that are prevalent among teens.²⁴⁷ Such practices have a tangible impact on the gay-student population in these schools. These teachings harm all students by perpetuating intolerance and hostility and, ultimately, condoning violence.²⁴⁸ The misinformation mandated by the statutes also hurts students who rely on the information presented in AIDS-education and sex-education classes to make important personal and often potentially life-threatening decisions.²⁴⁹ In addition, the statutes that impose such misleading views imply to children that it is acceptable to dislike

In addition, teaching that homosexuality is unhealthy based on "a public health perspective," as required by the Alabama and Texas statutes, is similarly unsound. *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. § 163.002(8). The vast majority of public health literature does not support defining homosexuality as "unhealthy." *See generally* Herek, *supra* note 40 (reviewing public health literature regarding homosexuality).

²⁴⁶ Leslie M. Kantor, *Scared Chaste?: Fear-Based Educational Curricula*, 21 SEICUS REP. 1 (Dec. 1992/Jan. 1993) (describing how fear-based sexuality education curricula "are in direct opposition to the goals of comprehensive sexuality education curricula, which seek to assist young people in developing a healthy understanding about their sexuality so that they can make responsible decisions throughout their lives").

²⁴⁷ In New York City in 1992, 70% of the anti-gay/lesbian bias crimes were committed by persons 25 years of age or younger. NEW YORK CITY GAY & LESBIAN ANTI-VIOLENCE PROJECT, *supra* note 67, at 6-7 (observing that "[t]he age of the perpetrators of anti-gay/lesbian crimes is significantly lower than persons arrested for other kinds of crime in New York City").

²⁴⁸ *See* Thomas, *supra* note 244, at 1490-91 ("[g]overnment inaction toward incidents of homophobic violence effectively [means that] . . . the private citizens who commit acts of . . . violence against gays and lesbians can be said to do so under color, or more precisely, under cover of law").

²⁴⁹ Adolescents' decisions regarding sexuality have been recognized as important and worthy of protection. *See, e.g.*, *Planned Parenthood v. Danforth*, 428 U.S. 52, 74-75 (1976) ("Minors . . . are protected by the Constitution and possess constitutional rights."); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 694 (1977) (same). In addition, courts have upheld AIDS-education curricula against parental challenges because such information serves the compelling state interest in preserving the health of the community. *See, e.g.*, *Ware v. Valley Stream High Sch. Dist.*, 150 A.D.2d 14, 21, 545 N.Y.S.2d 316, 321 (2d. Dep't 1989) (holding "the very real and dangerous health crisis which this curriculum was designed to address compels its dissemination to all students").

gay people and even to act violently against them.

Furthermore, no reasonable nexus exists between the anti-gay curriculum restrictions and any legitimate educational goal. The restrictions apply to all grades and age levels and therefore fail to ensure that discussions are age-appropriate.²⁵⁰ Thus, while "there is clearly no constitutional problem with [a] requirement that any discussion of homosexuality within public schools be 'age-appropriate,'" the wording of these statutes goes well beyond this requirement.²⁵¹ While some statutes apply to the entire curriculum, others apply only to sex- or AIDS-education classes—the areas in which the forbidden information is most relevant.²⁵² In addition, while particular local school boards may be assumed to understand the values and educational needs of their communities, when a state legislature imposes its viewpoint this suggests that the statutes are simply an attempt to indoctrinate, rather than to react to a specific educational need.²⁵³ Thus, the breadth of the language in these statutes further undermines any argument that they serve legitimate goals.

Finally, the information banned by the statutes is encompassed by most school curricula since AIDS- and sex-education programs discuss such topics. Even though public schools

²⁵⁰ See *supra* notes 220-25 and accompanying text.

²⁵¹ Idaho Atty Gen. Opinion, *supra* note 227, at 18-19; see also *Sheck v. Baileyville Sch. Comm.*, 530 F. Supp. 679, 692 (D. Me. 1982) (holding book ban unconstitutional because applies to "mature as well as immature students, regardless of their age or sophistication").

²⁵² The Texas and Alabama emphasis statutes specifically apply to "course materials and instruction relating to sexual education or sexually transmitted diseases," see *supra* note 226, while the Arizona viewpoint ban applies to "instruction on acquired immune deficiency syndrome." ARIZ. REV. STAT. ANN. § 1515-716. Other statutes and regulations cover the entire curricula. For example, New York City School District 24 has removed "any reference to . . . homosexuality . . . from the curriculum." Quinn Letter, *supra* note 16 (parental permission form for the 1991-92 school year).

²⁵³ See Yudof, *supra* note 87, at 876-77. Furthermore, the nexus between the schools purported interest and the need to ban speech is questionable based on the broad-sweeping nature of the restrictions. The Court in *Pico*, for example, found it necessary to protect students from local authorities' attempts to limit the spectrum of knowledge within a voluntarily utilized library. *Board of Educ. v. Pico*, 457 U.S. 853, 867 (1982). These anti-gay education statutes and regulations, in contrast, are enforced against all students, often state-wide, as part of the mandatory curriculum. See, e.g., ALA. CODE § 16-40A-2 (mandating state-wide restriction on sexuality education). This poses a much more immediate and systematic threat of indoctrination.

might not discuss homosexuality directly, they do undertake sex education, family composition and AIDS education. Therefore, schools may not claim neutrality, or irrelevance, nor disallow one prominent view within the public debate.

CONCLUSION

Under the proposed balancing test drawn from First Amendment precedent, prohibitions that forbid or negatively slant teaching about homosexuality should be found unconstitutional. All three types of statutes not only restrict teachers from discussing the full range of issues and opinions regarding homosexuality, but prohibit even a limited, balanced discussion of clearly relevant material. Instead, the restrictions enforce a single, state-selected point of view that distorts and restricts students' understanding of important health and social issues.²⁵⁴ In addition to stifling discussion, the restrictions affirmatively harm students by presenting inaccurate and misleading information regarding issues crucial to adolescents' well-being (such as sexual identity and the transmission of the AIDS virus). This misinformation harms the entire student population by perpetuating ignorance and anti-gay stereotypes already prevalent among youth. Thus, any operational or educational interest asserted by schools in these cases is outweighed by students' interests. Indeed, these statutes contravene schools' basic educational functions—in particular, the goal of enabling all youth to acquire the knowledge and skills necessary to participate as full, equal and informed members of society.

Although courts have yet to directly address first amendment challenges to curricular restrictions based on students' right to receive information, a balancing test would provide the proper standard of analysis. The factors that courts should use to balance the interests at stake in challenges to

²⁵⁴ Although none of the restrictions enacted to date specify the sanction if violated, teachers can be disciplined or fired for failing to follow established curriculum guidelines. See, e.g., *Epperson v. Arkansas*, 393 U.S. 97, 113-14 (1968) (Black, J., concurring); *Mercer v. Michigan State Bd. of Educ.*, 379 F. Supp. 580, 585 (E.D. Mich.) (holding "[t]here is nothing in the First Amendment that gives a person employed to teach the constitutional right to teach beyond the scope of the established curriculum"), *aff'd mem.*, 419 U.S. 1081 (1974).

curriculum restrictions appropriately are based on existing case law. Anti-gay curriculum restrictions should be declared unconstitutional because they far exceed schools' permissible authority to establish the curriculum content and severely impede all students' need for information regarding homosexuality. If schools are unwilling to affirmatively address the particular educational needs of gay youth and to teach respect for difference, at a minimum they must avoid affirmatively misleading students by way of viewpoint-biased programs.

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