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## Textbook Adoption Laws, Precensorship, and the First Amendment: The Case against Statewide Selection of Classroom Materials, 17 J. Marshall L. Rev. 167 (1984)

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## TEXTBOOK ADOPTION LAWS, PRECENSORSHIP, AND THE FIRST AMENDMENT: THE CASE AGAINST STATEWIDE SELECTION OF CLASSROOM MATERIALS

*In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.*<sup>1</sup>

Textbooks<sup>2</sup> are the single most important instructional tool used in public education today.<sup>3</sup> Experts estimate that as much as eighty per cent of the instruction presented to public school students comes from a textbook.<sup>4</sup> A textbook represents not only the bulk of a student's assigned educational reading; it also serves as the teacher's lesson plan and study guide.<sup>5</sup> Accordingly, the knowledge students glean from their textbooks significantly influences the perspectives they carry with them into their adult lives.<sup>6</sup> This is especially true in subjects dominated by divergent viewpoints, discussion, and debate where it is impossible to separate factual and ideological content.<sup>7</sup> Selecting a textbook is an important decision because the textbook chosen often represents the student's only source of interpretation in these subjects. Consequently, the method of selecting a textbook must be closely scrutinized.<sup>8</sup>

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1. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 511 (1969).

2. "Textbooks are generally defined as the principal book or set of materials, the subject matter of which is designed to support a course of study." M. Kamhi, *Limiting What Students Shall Read*, 25 (1981) (Summary report on the survey "Books and Materials Selection for School Libraries and Classrooms: Procedures, Challenges, and Responses," available from, Office for Intellectual Freedom, American Library Association, 50 E. Huron St., Chicago, IL 60611).

3. See English, *The Politics of Textbook Adoption*, PHI DELTA KAPPAN, Dec. 1980 275, 278; Sallis, *A Textbook Case*, 14 BILL RTS. J. 7 (Dec. 1981).

4. English, *supra* note 3, at 275.

5. *Id.*

6. See Sallis, *A Textbook Case*, 14 BILL RTS. J. 7 (Dec. 1981); English, *supra* note 3, at 278.

7. For example, history, political science, economics and literature. English, *supra* note 3, at 278.

8. *Id.* The choice to reject or use a textbook based on the book's content actually amounts to a political decision since, as George Orwell put it, "[t]here is no such thing as genuinely nonpolitical literature, and least of all in an age like our own when fears, hatreds, and loyalties of a directly political kind are near to the surface of everyone's consciousness." Orwell, *The Prevention of Literature*, in 4 THE COLLECTED ESSAYS, JOURNALISM AND LET-

In most states, textbooks are selected by local school boards.<sup>9</sup> Twenty-two states, however, adopt public school texts on a statewide basis.<sup>10</sup> Local school boards in these "adoption" states<sup>11</sup> may not purchase textbooks unless those texts are on the state approved list.<sup>12</sup> The far-reaching impact of this limitation on local school board authority compels us to examine in greater detail the criteria used by "adoption" states to compile their textbook lists.

State legislators enacted the first textbook adoption laws almost a century ago in an effort to reduce the price parents were paying for their children's textbooks.<sup>13</sup> But the issue in statewide textbook adoption is no longer cost; it is ideology.<sup>14</sup> Prompted by dissatisfaction with the way textbooks treat controversial topics and events,<sup>15</sup> political and religious conserva-

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TERS OF GEORGE ORWELL 59, 65 (S. Orwell & I. Angus eds. 1968) (quoted in, Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 523 (1981)).

9. Needham, *Textbooks Under Fire*, NEA TODAY, Dec. 1982, at 4.

10. Kamhi, *supra* note 2, at 15. See also ALA. CODE §§ 16-36-1 to 16-36-39 (1975); ARIZ. REV. STAT. ANN. § 15-1101 (1981); ARK. STAT. ANN. §§ 80-1701 to 80-1717 (1980); CAL. EDUC. CODE § 60001 (West 1978); FLA. STAT. ANN. §§ 233.07-233.25 (West 1977 & Supp. 1982); GA. CODE ANN. §§ 20-2-1010, 1011, 32-707 to 724 (1981); HAWAII REV. STAT. § 61-2(7) (1977); IDAHO CODE § 33-118 (1949); IND. CODE ANN. §§ 10-33.5-05 to 26(a) (Burns 1975); KY. REV. STAT. ANN. §§ 156.400 to 476 (Bobbs-Merrill 1981); LA. REV. STAT. ANN. §§ 17-7, 17-415.1 (West 1974); MISS. CODE ANN. §§ 37-43-1 to 37-43-27 (1972 & Supp. 1978); NEV. REV. STAT. §§ 390.140, 390.220, 390.230, 390.260, 393.170 (1982); N.M. STAT. ANN. §§ 22-15-1 to 14 (1978); OKLA. STAT. ANN. tit. 70 §§ 16-101 to 124 (West 1972); OR. REV. STAT. §§ 337.071-337.260 (1970); S.C. CODE ANN. §§ 59-3-10 to 59-31-410 (Law. Co-op. 1976 & Supp. 1982); TENN. CODE ANN. §§ 49-2001 to 49-2021 (1977 & Supp. 1983); TEX. EDUC. CODE ANN. §§ 12.01-12.65 (Vernon 1972 & Supp. 1982); UTAH CODE ANN. §§ 53.13-1 to 53-13a-7 (1981); VA. CODE ANN. §§ 22.1-238 to 22.1-253 (1950 & Supp. 1983); W. VA. CODE §§ 18-2A-1 to 18-2A-9 (1977 & Supp. 1983).

11. States which select textbooks for use statewide are called adoption states. Those which leave textbook selections to local school boards are called open states.

12. Needham, *supra* note 9, at 5.

13. *Id.* Adoption states, acting through the state board of education or a state textbook selection committee, select a single or limited number of titles for each course. The state then enters into a contract with the publisher to supply the selected text or texts for a fixed price over a fixed period of time. *Id.* The period of time covered by the purchase contract is called the adoption period. *Id.* Adoption procedures vary considerably from state to state. See, e.g., *infra* notes 22, 107 and accompanying text.

14. Needham, *supra* note 9, at 5; see also *infra* notes 92-98, 112-129 and accompanying text.

15. Textbooks have changed radically over the past fifteen years, particularly in the way they portray women, minorities, and alternative lifestyles. Current textbooks must confront controversial topics like the civil rights movement, the Viet Nam War, Watergate, feminism, and other subjects likely to arouse strong feelings among students and parents. Needham, *supra* note 9, at 5. See Sallis, *supra* note 3, at 8; see generally, Cohon, *What's Taboo in Textbooks*, HIGHWIRE 30-32 (Spring 1982).

tives<sup>16</sup> have leveled unprecedented challenges to textbook content.<sup>17</sup>

The increasing number of challenges to textbook content has become an issue of national concern<sup>18</sup> in the publishing and academic communities.<sup>19</sup> This concern has focused on the disproportionate influence of conservative groups on statewide textbook adoption proceedings and the nationwide impact of that influence.<sup>20</sup> Conservative groups, such as Mel Gabler's Ed-

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16. *Id.* The National Council of Teachers of English (NCTE) lists twenty conservative state, national, and local organizations and periodicals concerned with school textbooks and teaching methods. Rhode, *Is Secular Humanism the Religion of the Public Schools*, in *DEALING WITH CENSORSHIP* 117-19 (J. Davis ed. 1979). Challenges in adoption states reveal the influence of national "New Right" groups more often than in open states. Kamhi, *supra* note 2, at 19. A 1980 nationwide survey conducted jointly by the Association of American Publishers (AAP), the American Library Association (ALA), and the Association for Supervision and Curriculum Development (ASCD), found that in ten out of fourteen state-level challenges, respondents indicated the challengers had referred to arguments or viewpoints developed by groups or individuals outside the state. *Id.* at 17. All the state-level respondents who reported that their recent rate of challenges was higher than the rate in the preceding two-year period (five out of twenty-one) attributed the increase to the activities of Mel and Norma Gabler's Educational Research Analysts and other New Right Groups. *Id.* Parents, educators, and more liberal organizations, representing feminist, racial, or ethnic groups, have also urged changes in textbook content. *Id.* at 1. Butler, *Adopting Textbooks in Texas: Facts and Fancies*, 11 *COUNCIL ON INTERRACIAL BOOKS FOR CHILDREN BULL.* No. 8 at 7, 9 (1980). See *infra* notes 21, 22, 112-21 and accompanying text.

17. In the joint AAP-ALA-ASCD survey (joint survey), half the respondents reported that the rate of instructional material challenges remained unchanged between the 1976-78 and the 1978-80 periods. One in four indicated the rate of challenges was higher in the more recent period. Only 9.1% of the respondents indicated that the rate had decreased. Kamhi, *supra* note 2, at 3. With the 1980 Reagan presidential victory and increased national attention on the conservative movement, the rate of challenges has increased dramatically. See Comment, *What Will We Tell The Children? A Discussion of Current Judicial Opinion on the Scope of Ideas Acceptable for Presentation in Primary and Secondary Education*, 56 *TUL. L. REV.* 960, 960-61 (1982) [hereinafter cited as *Judicial Opinion*]. Dorothy Massie, inquiry specialist for the NEA Human and Civil Rights Division, estimates that challenges to instructional materials tripled between 1978 and 1982. Massie, *Of Mice and Men, a Huckleberry and Harrassment*, in *TODAY'S EDUCATION* 1982-83 *ANNUAL* at 110.

18. Kamhi, *supra* note 2, at 1. See generally, Jenkinson, *Dirty Dictionaries, Obscene Nursery Rhymes and Burned Books*, in *DEALING WITH CENSORSHIP* 2013 (J. Davis ed. 1979).

19. The NCTE lists twenty-four states and national organizations concerned with intellectual freedom in general or academic censorship in particular. See Shugert, *A Body of Well-instructed Men and Women: Organizations Active for Intellectual Freedom*, in *DEALING WITH CENSORSHIP* 218, 221 (J. Davis ed. 1979). The AAP employs a full-time legislative lobbyist in Texas and two other states. Weissman, *Building the Tower of Babel*, *TEXAS OUTLOOK*, Winter 1981-82 at 29.

20. Needham, *supra* note 9, at 4; English, *supra* note 3, at 275; Kamhi, *supra* note 2, at 15.

ucation Research Analysts,<sup>21</sup> have used the selection and editing phases of the adoption process to pressure textbook selection committee members into eliminating textbooks from state approved lists and textbook publishers into deleting objectionable passages before the textbooks are adopted.<sup>22</sup> Publish-

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21. Mel Gabler, a retired oil company executive, and his wife, Norma, are the two most noted textbook critics in the United States. Dahlin, *A Tough Time for Textbooks*, PUBLISHER'S WEEKLY, Aug. 7, 1981 at 30. In twenty-one years of textbook monitoring, the couple has built their two-person home operation into a \$120,000 per year non-profit corporation, called Educational Research Analysts, with eight full-time employees and a national following. Their research is used by such prominent new right groups as Jerry Falwell's Moral Majority, Phyllis Schaffly's Eagle Forum, the Heritage Foundation, and others. *Texas Textbook Selection Under Fire*, 31 NEWSLETTER ON INTELLECTUAL FREEDOM 199 (1982) [hereinafter cited as *Texas Selection*].

The Gablers publish a newsletter containing their evaluations of specific texts and listing the thirty-five ways that questionable views are most likely to be introduced and how best to protest them. Weissman *supra* note 19, at 13. The Gablers propose a two-pronged attack: insisting on a return to basic academic skills and eliminating the "religion" of secular humanism from the classroom. *Id.* See *infra* notes 112-121 and accompanying text. Some observers feel that the effect of the Gablers has been over-estimated. Needham, *supra* note 9, at 5; *Texas Selection, supra* at 199. However, approximately half of all state-level joint survey respondents felt that the Gablers' activities had influenced recent textbook adoption proceedings in their state. Kamhi *supra* note 2, at 14; Dahlin, *supra* at 30, 31. The chairman of NCTE's committee against censorship called Mel and Norma Gabler "the two most powerful people in education today." Weissman, *supra* note 19, at 14. See generally, Jenkinson, *How the Mel Gablers Have Put Textbooks on Trial*, in DEALING WITH CENSORSHIP 108 (J. Davis ed. 1979).

22. The Texas textbook adoption process gives protesters ready access to the adoption process. In March of each year, the Texas State Board of Education issues a proclamation calling for publishers to submit textbooks for certain subjects to be considered for adoption in the fall of the following year. The proclamation sets specific content and format requirements and provided the schedule for the adoption sequence. Copies of books offered for adoption are received in late April and placed in twenty regional service centers throughout the state for public examination.

In May, the Board appoints a fifteen-member State Textbook Committee, consisting of educators, administrators, and laypersons to conduct a two-and-one-half-month evaluation of the textbooks submitted. The committee members examine the books and consult with experts, publishers, and educators. The general public, as individuals or as representatives of organizations, may file formal protests, called bills of particulars, against adopting specific books. These bills of particulars are the Gablers' primary protest tool. In 1982, they were responsible for 1060 of the 2928 pages of protesters' bills of particulars, or six out of ten volumes. Weissmann, *supra* note 19, at 15. Bills of particulars may not praise or defend books; they may only criticize. The bills of particulars are then mailed to the publishers for formal response.

In August, the board conducts a week-long public hearing where petitioners present their bills of particulars and the publishers present responses to a hearing officer who represents the Commissioner of Education. This is the second point in the sequence where protesters may influence the Committee. State rules prohibit testifiers, other than publishers, from praising or defending books under consideration. Nevertheless, in 1982, representatives of People for the American Way convinced the Commis-

ers have responded to this pressure, often reluctantly, either by reducing the coverage given controversial topics or by giving them equivocal treatment.<sup>23</sup> The elimination of controversial textbooks and textbook content prior to adoption, and in some instances prior to publication, is called precensorship.<sup>24</sup>

Precensorship has attracted national attention from educators, publishers, and civil rights organizations because the effect of precensorship is not limited to the state in which it occurs.<sup>25</sup> The statewide choice of textbooks in populous adoption states, particularly Texas,<sup>26</sup> exerts a powerful influence on textbook content in "open" states.<sup>27</sup> Because these populous adoption states purchase massive quantities of textbooks, publishers de-

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sioner to allow supporters to file written defenses of criticized books, despite the Gablers' strenuous objections. Needham, *supra* note 9, at 5.

In September, the State Textbook Committee selects a list of textbooks to recommend officially to the State Board of Education. No fewer than two, nor more than five, may be selected in any one category. If the commissioner believes one or more of the selections violate the board's original proclamation, he may delete them. This is the third point in the sequence where protesters may influence the selection process and, arguably, where they have been most effective.

In 1981 the commissioner removed one of the five recommended basal reading programs, reconvened the committee, and ordered them to seek a program more intensive in phonics. Weissmann, *supra* note 19, at 15. The Gablers claim that intensive phonics is the only proper method for teaching reading. Programs incorporating additional theories are labelled "phony phonics." *Id.* In 1982, the commissioner deleted one of the two dictionaries recommended because it contained "vulgar" language. Because state rules require at least two dictionaries to be recommended, no dictionary was recommended for adoption. The commissioner deleted the dictionary despite a proclamation provision exempting dictionaries from rules prohibiting adoption of texts which contain vulgar language. The Gablers were one of five groups who objected to the deleted dictionary.

The adoption process concludes in November, when the State Board of Education votes on final adoptions from the Textbook Committee's recommended list. It may remove, but not add, books to the Committee's list. See Weissmann, *supra* note 19, at 13-15; Needham, *supra* note 9, at 5; *Texas Selection*, *supra* note 21, at 198; Butler, *Adopting Textbooks in Texas: Facts and Fancies*, 11 COUNCIL ON INTERRACIAL BOOKS FOR CHILDREN BULL 7 (1981).

23. See Needham, *supra* note 9, at 5; Dahlin, *supra* note 21, at 31; Weissmann, *supra* note 19, at 31.

24. Needham, *supra* note 9, at 5; Kamhi, *supra* note 3, at 18.

25. Needham, *supra* note 9, at 4-5.

26. Adoption by Texas is critical to textbook publishers. Texas will spend over 27 million dollars on newly adopted texts in 1983 and the sales will be split among only 32 companies. An additional 17 million dollars will be spent to reorder previously adopted texts. Consequently, if a book is successful in Texas, the publisher can recover the entire development cost in a single year. Texas' six-year adoption period further guarantees the profitability of a Texas adoption. On the other hand, a textbook rejected by the Texas selection committee will probably realize a 100% loss. See Weissman, *supra* note 19, at 29-30; *Texas Selection*, *supra* note 21, at 198.

27. See Needham, *supra* note 9, at 5; Dahlin, *supra* note 21, at 29-30; English, *supra* note 3, at 275-77; Kamhi, *supra* note 2, at 15.

velop textbooks which are likely to gain adoption in those states.<sup>28</sup> Textbook development is expensive and time consuming, so publishers rarely develop more than one edition.<sup>29</sup> Thus, the textbook developed for the most populous adoption state often becomes the *only* textbook available nationwide.<sup>30</sup> If, through economic and political pressure, conservative textbook critics manage to delete material from a single textbook edition, then the precensorship effect will be felt nationwide.<sup>31</sup>

Educators, publishers, and textbook critics agree that precensorship occurs and that textbook adoption laws exacerbate its impact.<sup>32</sup> Moreover, the elimination of objectionable textbooks and textbook content during the adoption process is likely to be based on opposition to the ideas which the textbooks express.<sup>33</sup> The resulting precensorship constitutes a suppres-

28. See Needham, *supra* note 9, at 5. Simple economics render adoption states vital to publishers because the money for textbooks in open states usually comes from a general fund that may be eroded before textbooks are purchased. The adoption states allocate funds specifically for the purchase of textbooks. See Dahlin, *supra* note 21, at 29-30.

One expert calls Texas, California, and Florida the "super states." English, *supra* note 3, at 276-77. The Texas Educational Agency is the largest purchaser of textbooks in the nation. Weissmann, *supra* note 19, at 29. It is followed closely by California and Florida. English, *supra* note 3, at 277. Texas is the most sought after adoption state because the Texas Educational Agency not only buys the most textbooks; the agency also pays the purchase money directly to the publisher. Since the publisher gets the money up front, he does not have the expense of billing each school district individually and receiving his payments piecemeal. Weissmann, *supra* note 19, at 29.

29. See Needham, *supra* note 9, at 5; Kamhi, *supra* note 2, at 15.

30. See English, *supra* note 3, at 277; Kamhi, *supra* note 2, at 15.

31. Needham, *supra* note 9, at 5. Publishers edit with protestors and state adoption firmly in mind. See Weissmann, *supra* note 19, at 31. One of the Gablers' protest categories, evolution, provides an example. See Dahlin, *supra* note 21, at 31. As one publisher commented, "As the evolutionism versus creationism controversy heats up, publishers take the soft approach. We'll say a little about everything and not a lot about anything, to make it as inoffensive to as many states as possible . . . . If you avoid the word evolution, you can avoid creationism." *Id.* As a result, the most widely used high school biology text had twenty-five percent fewer words on evolution in the 1981 edition than the 1973 edition. Needham, *supra* note 9, at 5; Cohon, *supra* note 15, at 32. And in June 1982, New York City school officials rejected three biology texts because they did not adequately address the Darwinian theory of evolution. Needham, *supra* note 9, at 5; N.Y. Times, June 24, 1982, at A1, col. 1. See *infra* notes 130-39, 155-62 and accompanying text.

32. Needham, *supra* note 9, at 5; English, *supra* note 1, at 275; Kamhi, *supra* note 2, at 18-19.

33. Kamhi, *supra* note 2, at 18.

Whereas narrower objections related to language and sexuality were most often cited at the local level, state-level challenges were reported to focus on ideological concerns. The issues most often cited were the following: "secular humanism," Darwinism and Evolution, scientific theories, criticism of U.S. history, values clarification, "undermining the traditional family," atheistic or agnostic views, antitradi-

sion of ideas prior to publication and, in effect, a prior restraint.<sup>34</sup> This manipulation of textbook adoption laws to accomplish ideological suppression raises serious first amendment<sup>35</sup> questions concerning the constitutionality of statewide textbook adoption. Indeed, this comment suggests that textbook adoption laws unreasonably interfere with students' first amendment right to be free from state prescribed orthodoxy and their first amendment right to receive information, and concludes that no legitimate need exists for that interference. Further, this comment proposes that to strike the proper balance between state interests and student rights in the textbook selection process, the states should return control of textbook selection to local school boards.

#### FIRST AMENDMENT CONSTRAINTS ON STATE CONTROL OF PUBLIC EDUCATION

Any discussion of the constitutionality of a state's chosen method of regulating its public schools must begin with the fundamental axiom that the states enjoy broad discretionary powers in the field of public education.<sup>36</sup> Included in these powers is the authority to establish public school curricula which accomplishes the states' legitimate educational objectives.<sup>37</sup> Courts and commentators generally agree that public education fulfills two objectives: development of the basic academic skills necessary to function in society and the "inculcation of values deemed essential for a cohesive, harmonious, and law-abiding

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tional/antiestablishment views, negative or pessimistic views, and moral relativism or situation ethics.

*Id.*; *Cf. infra* notes 112-121 and accompanying text (Gabler's objections based on eight categories of ideas).

34. A system of prior restraint is a system which allows public officials to deny a speaker or a communication access to a forum in advance of actual expression, publication, or dissemination. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). *See also* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 724-25 (1978). The first amendment prohibits even facially valid government actions where, in effect, they amount to prior restraints. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963), *Near v. Minnesota*, 283 U.S. 697, 713 (1931).

35. The relevant language of the amendment states, "Congress shall make no law . . . abridging the freedom of speech or, of the press . . ." U.S. CONST. amend. I. The first amendment applies to the states by virtue of the fourteenth amendment. *Stromberg v. California*, 283 U.S. 359, 368 (1931); *Gitlow v. New York*, 268 U.S. 652, 666 (1925). *See* Wellington, *On Freedom of Expression*, 88 *YALE L.J.* 1105, 1109 (1979).

36. *See* *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853 (1982); *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503, 507 (1969); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

37. *Board of Educ. v. Pico*, 457 U.S. 853, 864 (1982); *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979).



society."<sup>38</sup>

Equally fundamental, though, is the proposition that, to accomplish these objectives, the state must exercise its power within the constraints set by the United States Constitution in general and the first amendment in particular.<sup>39</sup> One of the primary purposes of the first amendment is to facilitate the free and open interchange of information and ideas.<sup>40</sup> Under this "marketplace of ideas" approach to the first amendment, the state "has no power to restrict expression because of its message, its ideas, its subject matter, or its content."<sup>41</sup>

In selecting textbooks which will transmit and foster essential social values, these first amendment constraints present the states with a dilemma. The first amendment proscribes the states from basing their decision to acquire or reject textbooks on ideological content.<sup>42</sup> Yet, to accomplish its goal of inculcating proper values, the states must select those books which they believe best accomplish that goal and reject those which do not. Inevitably these decisions must be based on content, because the effectiveness of a textbook in teaching proper values will depend on the text's ideological content.<sup>43</sup>

In inculcating sound values, the state may take actions which, outside of the school environment, would constitute a denial of first amendment rights.<sup>44</sup> As previously discussed, the state may designate the content of instructional material.<sup>45</sup> It may, with certain limitations, require, prohibit, or permit instruction in certain subjects.<sup>46</sup> The state may set standards for achievement by enacting compulsory education requirements.<sup>47</sup> It may shield students from psychologically or intellectually in-

38. See Project, *Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373 (1976) [hereinafter cited as *Project Education*].

39. Board of Educ. v. Pico, 457 U.S. 853, 864 (1982); Tinker v. Des Moines Community School Dist., 393 U.S. 503, 507 (1969); Epperson v. Arkansas, 393 U.S. 97, 104-05 (1968); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

40. Board of Educ. v. Pico, 457 U.S. 853, 866 (1982); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978); Cohen v. California, 403 U.S. 15, 24 (1971).

41. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

42. See *supra* notes 38-40 and accompanying text.

43. See Comment, *Schoolbooks, Schoolboards, and the Constitution*, 80 COLUM. L. REV. 1092, 1108-09 (1980) [hereinafter cited as *Schoolbooks*]. See Board of Educ. v. Pico, 457 U.S. 853, 880 (1982) (Blackmun, J., concurring). See also *supra* notes 37, 38 and accompanying text.

44. See Board of Educ. v. Pico, 457 U.S. at 880 (Blackmun, J., concurring); Diamond, *supra* note 8, at 487.

45. See *supra* note 43 and accompanying text.

46. See *Project Education*, *supra* note 38, at 1423-24.

47. See Diamond, *supra* note 8, at 497.

appropriate materials or materials which promote ideas "manifestly inimical to the public welfare."<sup>48</sup> Finally, the state may, through licensing requirements, allow only those who meet certain character and educational requirements to teach in the public schools.<sup>49</sup>

*The Students' Right to be Free from Prescribed Orthodoxy*

The state may not, under the aegis of value inculcation, "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,"<sup>50</sup> or operate its schools so as to "foster a homogenous people"<sup>51</sup> without violating the students' first amendment rights. In *Keyishian v. Board of Regents*,<sup>52</sup> the Supreme Court voiced its unequivocal opposition to state prescriptions of orthodoxy and coerced homogeneity in education:

Our Nation is deeply committed to safeguarding academic freedom,<sup>53</sup> which is of transcendent value to all of us and not merely to the teachers concerned over the classroom . . . . The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through a 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.<sup>54</sup>

In *Tinker v. Des Moines Independent Community School Dist.*,<sup>55</sup> the Court reaffirmed teachers' and students' first amendment rights to be free from coerced homogeneity, declaring that "in our system, state operated schools may not be enclaves of totalitarianism" where students are exposed "only to that which the state chooses to communicate."<sup>56</sup> In practice, this means

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48. *Board of Educ. v. Pico*, 457 U.S. 853, 880 (1982) (Blackmun, J., concurring); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925). See *Project Education*, *supra* note 38, at 1424.

49. See *Project Education*, *supra* note 38, at 1378-79.

50. *Board of Educ. v. Pico*, 457 U.S. 853, 872 (1982) (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

51. *Board of Educ. v. Pico*, 457 U.S. 853, 877 (1982) (Blackmun, J., concurring); *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503, 511 (1969), *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

52. 385 U.S. 589 (1967).

53. Academic freedom refers to the right of educators to speak freely without fear of legal or administrative reprisal. *Developments in the Law: Academic Freedom*, 81 HARV. L. REV. 1045, 1048 (1968). In America, the definition of academic freedom is commonly understood to include freedom from government intervention in the schools. See *Schoolbooks*, *supra* note 43, at 1099, n.54. Academic freedom also includes the right of the academic community to be free from ideological coercion. *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1304 (7th Cir. 1980).

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

55. 393 U.S. 503 (1969).

56. *Id.* at 511.

that the state cannot, consistent with the first amendment, enact laws designed to "foster a homogeneous people"<sup>57</sup> or coerce conformity of belief.<sup>58</sup> At the very least, the state cannot attempt to impose homogeneity through classroom materials and instruction which propagate a particular religious,<sup>59</sup> political, or nationalistic belief or seek to dictate some other matter of opinion.<sup>60</sup>

A state's attempt to impermissibly impose beliefs need not constitute affirmative indoctrination to fall with the proscriptions of the first amendment. Systematic efforts to exclude a particular type of thought or ideological preference are also forbidden.<sup>61</sup> For example, if the state excluded all materials or instruction which implicitly or explicitly favored nuclear disarmament, the students, through their parents, could challenge the constitutionality of that exclusion as an impermissible state attempt to inculcate a political belief disfavoring nuclear disarmament.<sup>62</sup>

### *The Students' Right to Receive Information*

Closely related to the students' first amendment right to be free from state-prescribed orthodoxy and coerced homogeneity is the students' right to receive information.<sup>63</sup> In *Board of Education v. Pico*,<sup>64</sup> the Supreme Court determined that the right to receive information<sup>65</sup> extended to public secondary school stu-

57. *Board of Educ. v. Pico*, 457 U.S. 853, 877 (1982) (Blackmun, J., concurring); *Tinker v. Des Moines Community School Dist.*, 393 U.S. at 511; *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

58. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). See *Schoolbooks*, *supra* note 47, at 1100; Comment, *Challenging Ideological Exclusion of Curriculum Material: Rights of Students and Parents*, 14 HARV. C.R.-C.L. L. REV. 493-95 (1979) [hereinafter cited as *Ideological Exclusion*].

59. The Establishment Clause proscribes public schools from propagating a particular religious belief. U.S. CONST. amend. 1; *Everson v. Board of Education*, 330 U.S. 1, 16 (1947).

60. *Board of Educ. v. Pico*, 457 U.S. 853, 872, 876 (1982) (Blackmun, J., concurring); *Id.* at 906-0 (Rehnquist, J., dissenting); *Epperson v. Arkansas*, 393 U.S. 97, 104-07 (1968). See *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642; *Ideological Exclusion*, *supra* note 58 at 497-98; *Project Education*, *supra* note 38, at 1446.

61. *Board of Educ. v. Pico*, 457 U.S. 853, 879-80 (1982) (Blackmun, J., concurring); *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1304 (7th Cir. 1980).

62. See *Board of Educ. v. Pico*, 457 U.S. 853, 870-71 (1982) (removal of all books written by Republicans would clearly violate students' constitutional rights by indirectly favoring policies of the Democratic Party).

63. See *Ideological Exclusion*, *supra* note 58, at 485, 491-503, 513-17.

64. 457 U.S. 853 (1982).

65. *Virginia State Board of Pharmacy v. Virginia Citizens Council, Inc.*, 425 U.S. 748 (1976). In *Virginia Board of Pharmacy*, the Court concluded that "[A] State may [not] completely suppress the dissemination of con-

dents and limited the states' discretion in removing books from school libraries.<sup>66</sup> Justice Brennan, writing for a plurality, concluded that students have a right to receive the information necessary to prepare them "for active and effective participation in the pluralistic, often contentious society in which they will soon become adult members."<sup>67</sup>

The students' right to receive information, however, is not absolute. The right to receive information is primarily a means to an end—preparing the student to exercise his freedom of expression and participate in the democratic political process.<sup>68</sup> Parental prerogatives, the student's lack of intellectual and emotional maturity, and the responsibility of the schools to fulfill their inculcative purpose, all tend to limit the students' right to receive information.<sup>69</sup>

Admittedly, a conflict exists between state interests and student rights in the textbook selection process. On the one hand, the state has broad discretion to select instructional materials which subserve the inculcative purpose of education and to select those materials based on content.<sup>70</sup> On the other hand, the first amendment protects students from prescriptions of orthodoxy and the impairment of their ability to obtain relevant edu-

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cededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and recipients." *Id.* at 773. The thrust of the Court's reasoning is that where there is a willing speaker, first amendment protection extends to the communication, to its source, and to its recipients. *Id.* at 756-57. In the case of state attempts to censor textbooks, then, the first amendment protects the content, the publisher, and the student. The Court's reasoning in *Virginia Board of Pharmacy* indicates that publishers are entitled to protection despite the fact that their claim is based on commercial speech. As the court concluded in *Virginia Bd. of Pharmacy*, "the notion of unprotected 'commercial speech' [has] all but passed from the scene." *Id.* at 759.

66. *Board of Educ. v. Pico*, 457 U.S. 853, 871-72 (1982).

67. *Id.* at 868. Although the *Pico* rationale is specifically limited to the issue of removal of books from a school library and "does not involve textbooks," the language is sufficiently broad to permit some analogies to textbook selection. *Id.* at 861-62. The court did not consider the acquisition of library books or interference with the teachers' right to use certain books as part of their curriculum because the respondents did not seek review of the District Court's decision on that issue. *Id.* at 862 n.18. Moreover, the analysis is relevant since, as Chief Justice Burger pointed out in his dissent, required reading and textbooks are more likely to impose a "pall of orthodoxy" than optional reading materials. *Id.* at 892 (Burger, C.J., dissenting).

68. See *Schoolbooks*, *supra* note 43, at 1103.

69. *Board of Educ. v. Pico*, 457 U.S. 853, 880-81 (1982) (Blackmun) J., concurring); *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1304 (7th Cir. 1980); *Schoolbooks*, *supra* note 43, at 1104.

70. See *Board of Educ. v. Pico*, 457 U.S. 853, 881-82 (1982). *Schoolbooks*, *supra* note 43, at 1092.

cational information.<sup>71</sup> The tension between state interests and student rights is greatest in areas such as textbook selection, which involve state control of classroom activity. The states have broader discretion to control classroom activity and establish curriculum than in any other area of educational decision-making.<sup>72</sup> But, because classroom students constitute a captive audience for the states' selected message, control of classroom activity also has the greatest potential for abuse.<sup>73</sup> Accordingly, in evaluating the first amendment limitations on textbook selection, a proper balance should be reached between the necessary state regulation of public schools and unnecessary restrictions and impositions on students' first amendment rights.<sup>74</sup>

JUDICIAL RESOLUTION OF THE CONFLICT BETWEEN STATE AND  
STUDENT RIGHTS

*Prescriptive Theory of Education v. Analytic Theory of  
Education*

Judicial resolutions of the conflict between state regulation of public education and student rights generally turn on the courts' preference for one of two educational theories:<sup>75</sup> the prescriptive theory of education<sup>76</sup> or the analytic theory of education.<sup>77</sup> Under the prescriptive model, the child must be sheltered from hostile ideology and controversial issues. Instead, information and accepted truths are presented to a passive absorbent student. Proponents of the prescriptive theory argue that if the schools instill the students with "proper" values when they are young, the students will be better able to resist inconsistent values later on.<sup>78</sup> Prescriptive theorists contend that the schools' value inculcation function takes prece-

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71. *Id.*

72. See *Project Education*, supra note 38, at 1423.

73. Board of Educ. v. Pico, 457 U.S. 842, 853 (1982) (Burger, C.J., dissenting); *Ideological Exclusion*, supra note 58, at 497-98.

74. See Board of Educ. v. Pico, 457 U.S. 853, 879-80 (1982). (Blackmun, J., concurring); Comment, *First Amendment Limitations on the Power of School Boards to Select and Remove High School Text and Library Books*, 52 ST. JOHN'S L. REV. 457, 476 (1978) [hereinafter cited as *Selection Limitations*].

75. *Judicial Opinion*, supra note 17, at 962-68.

76. *Pico and the Challenge to Books in Schools*, 31 NEWSLETTER ON INTELLECTUAL FREEDOM 195, 222-23 [hereinafter cited as *Pico Challenge*]. This theory is also called the indoctrinative theory. *Id.*; *Judicial Opinion*, supra note 17, at 963.

77. *Pico Challenge*, supra note 76, at 222-23. This theory is also called the open classroom theory. *Judicial Opinion*, supra note 17, at 963.

78. *Judicial Opinion*, supra note 17, at 963; *Pico Challenge*, supra note 76, at 222-23.

dence over the students' first amendment rights,<sup>79</sup> and that resort to the political process is the remedy for abuse of state discretion in choosing suitable curricula.<sup>80</sup>

Under the analytic theory, the student is presented with objective conceptions of divergent viewpoints and theories and is given the opportunity to determine, with appropriate guidance from teachers and parents, the validity of the various points of view.<sup>81</sup> Proponents of the analytic model argue that forcing students to choose among diverse views stimulates the students' reasoning abilities and better prepares them to make similar choices in adult life. Because making choices from among diverse viewpoints is inevitable in our society, the analytic theorists contend that students should learn to choose from among these divergent viewpoints in the controlled atmosphere of the classroom where students enjoy the benefit of objective guidance from teachers and parents.<sup>82</sup> In contrast to the prescriptive theory, the students' reciprocal rights to be free from state-imposed orthodoxy and to receive information take precedence over the states' interest in regulating curriculum.<sup>83</sup>

Past decisions of the Supreme Court seem to favor the analytic method as the best method for preparing students for adult citizenship.<sup>84</sup> The Court's recent decision in *Pico*, however, indicates a fundamental division between two factions of the court over the nature and function of American education.<sup>85</sup> One faction, led by Chief Justice Burger, clearly favors the prescriptive theory; the other, led by Justice Brennan, favors the analytic

79. See *Judicial Opinion*, *supra* note 17, at 963; *Diamond*, *supra* note 8, at 499-502; *Pico Challenge*, *supra* note 76, at 222-23. But see *infra* notes 82-92 and accompanying text.

80. *Board of Educ. v. Pico*, 457 U.S. 853, 890-91 (1982) (Burger, C.J., dissenting); *Diamond*, *supra* note 8, at 499-502.

81. *Judicial Opinion*, *supra* note 17, at 963-964; *Pico Challenge*, *supra* note 76, at 223.

82. *Board of Educ. v. Pico*, 457 U.S. 853, 866-69 (1982); *Judicial Opinion*, *supra* note 17, at 963-64.

83. *Board of Educ. v. Pico*, 457 U.S. 853, 869 (1982); See *Epperson v. Arkansas*, 393 U.S. 97, 105 (1968).

84. *Judicial Opinion*, *supra* note 17, at 968.

85. *Pico Challenge*, *supra* note 76, at 195, 222, 223. In *Pico*, four justices, led by Justice Brennan, concluded that the first amendment imposes limitations on a local school board's discretion to remove books from the school library. *Board of Educ. v. Pico*, 457 U.S. 853, 867-868 (1982). Four justices, led by Chief Justice Burger, concluded that the plurality decision was an impermissible interference with local control of education. *Id.* at 891-92 (Burger, C.J., dissenting). Justice White cast the deciding vote, agreeing the case should be remanded for trial, but refusing to consider the first amendment question prior to trial. *Id.* at 883-84 (White, J., concurring). Following the decision, Board of Education voted 6-1 to return all but one of the books to the library. *VICTORY! Island Trees Board Throws in the Towel*, 31 NEWSLETTER ON INTELLECTUAL FREEDOM 197 (1982).

theory.<sup>86</sup>

*The Balancing Approach to State Regulation  
of the Public Schools*

In his concurring opinion in *Pico*,<sup>87</sup> Justice Blackmun suggests a more sophisticated analysis for reviewing state regulation of the public schools.<sup>88</sup> Under Justice Blackmun's approach, school officials may not purposefully restrict access to political ideas or social perspectives simply because the officials disapprove of the ideas involved.<sup>89</sup> Teaching children to respect the diversity of ideas that is fundamental to the American system is too important to allow school officials such broad power to restrict the students' access to ideas.<sup>90</sup> In Justice Blackmun's view, school officials must show that actions which constrict the free flow of information are motivated by "something more than mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."<sup>91</sup>

This reasoning yields the general principle that the state may not suppress ideas, even in the classroom where the state exercises its greatest control, unless legitimate objective educational considerations justify the suppression.<sup>92</sup> By embracing this principle, Justice Blackmun's "balancing" approach recognizes the validity of both the prescriptive and analytic theories while ensuring that legitimate state interests and student rights are protected.<sup>93</sup>

Prescriptive theory adherents argue that this approach requires impermissible judicial review of state regulation of public education, an area where the courts lack expertise and experience.<sup>94</sup> This argument lacks merit. The courts are the tradi-

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86. *Pico Challenge*, *supra* note 76, at 222-23.

87. *Board of Educ. v. Pico*, 457 U.S. 853, 875 (1982) (Blackmun, J., concurring).

88. *Id.* at 879-80. This approach has been used in a handful of cases involving state regulation of public schools. *See, e.g.*, *James v. Board of Educ. of Central Dist. No. 1 of the Towns of Addison*, 461 F.2d 566 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972); *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970).

89. *Board of Educ. v. Pico*, 457 U.S. 853, 879 (1982) (Blackmun, J., concurring).

90. *Id.*

91. *Id.* at 879-80, *quoting*, *Tinker v. Des Moines School Dist.*, 393 U.S. —, 509.

92. *Board of Educ. v. Pico*, 457 U.S. 853, 877, 879-80 (1982).

93. *See Judicial Opinion*, *supra* note 17, at 1005.

94. *Presidents Council, Dist. 25 v. Community School Bd.*, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972). *See generally* *Diamond*, *supra* note 8.

tional arbiters of first amendment claims.<sup>95</sup> The courts, not the states themselves, must ultimately determine the first amendment limitations on majoritarian control of public education.<sup>96</sup>

Lack of expertise in curriculum selection should not deter judicial intervention where intervention is necessary to hold school authorities accountable to the first amendment. The courts and commentators have established a long list of permissible and impermissible reasons for ideological exclusion.<sup>97</sup> Judicial review of curriculum decisions does not represent an impermissible interference with majoritarian control of education. It simply reflects the realization that school authorities must comply with those mandates of the Bill of Rights which place some decisions beyond the will of the majority.<sup>98</sup>

The balancing approach also comports with traditional first amendment analysis of government actions which, though not specifically aimed at regulating speech, constrict the free flow of information and ideas.<sup>99</sup> Where such government actions indirectly abridge free speech interests, the courts must strike a balance between individual first amendment rights and competing government interests on a case-by-case basis.<sup>100</sup> Further, when the state takes action which indirectly interferes with individual first amendment rights, it must do so in the manner which least restricts those rights.<sup>101</sup> In applying this traditional test to the classroom setting, the courts must weigh the states' legitimate educational concerns against the students' first amendment rights to ensure that the states' actions do not *unduly* interfere with students' rights.<sup>102</sup> Because it is consistent with both constitutional<sup>103</sup> and educational<sup>104</sup> principles, Justice Blackmun's balancing approach represents the best standard of review for a first amendment analysis of textbook adoption laws.

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95. See *Freedman v. Maryland*, 380 U.S. 51, 58 (1965). See *Board of Educ. v. Pico*, 457 U.S. 853, 866 (1982). See also, *infra* notes 162-68 and accompanying text.

96. See *Freedman v. Maryland*, 380 U.S. 51, 58 (1965); *Schoolbooks*, *supra* note 43, at 1113.

97. See *infra* notes 152-54 and accompanying text.

98. See *Board of Educ. v. Pico*, 457 U.S. 853, 882 (1982) (Blackmun, J., concurring); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943); *Selection Limitations*, *supra* note 74, at 480.

99. See *TRIBE*, *supra* note 34, at 580-84 (1978).

100. *Id.*

101. *Wooley v. Maynard*, 430 U.S. 705, 716-17 (1977); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Schneider v. California*, 308 U.S. 147, 160-63 (1939). See also, *TRIBE*, *supra* note 34, at 682-84.

102. *Schoolbooks*, *supra* note 43, at 1115.

103. See *supra* notes 99-101 and accompanying text.

104. See *supra* notes 75-93 and accompanying text.



## A FIRST AMENDMENT ANALYSIS OF TEXTBOOK ADOPTION LAWS

Before considering whether textbook adoption laws exceed first amendment constraints on state regulation of the public schools, it should be noted that textbook adoption laws have withstood constitutional challenges on other grounds.<sup>105</sup> To date no one has directly challenged the constitutionality of textbook adoption laws on first amendment grounds. In *Loewen v. Turnipseed*,<sup>106</sup> however, a group of authors, local school board members, teachers, parents, and students challenged the Mississippi State Textbook Purchasing Board's decision to exclude an award-winning history text from the state approved list.<sup>107</sup> The *Loewen* plaintiffs argued that the Board's exclusion of the book deprived them of their first, thirteenth, and fourteenth amendment rights in violation of 42 U.S.C. § 1983.<sup>108</sup> The district

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105. *Charles Scribner's Sons v. Board of Educ. of Dist. No. 102 of Cook County*, 278 F. 366 (7th Cir. 1921) (held not unconstitutional interference with the right to contract); *Macmillan Co. v. Johnson*, 269 F. 28, 30 (E.D. Mich. 1920) (held not improper regulation of commerce or interference with publishers' property rights).

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

107. The textbook, *Mississippi: Conflict and Change*, received the 1975 Lillian Smith award from the Southern Educational Conference as best new work of non-fiction. Cohon, *supra* note 15, at 31.

Under the Mississippi adoption procedures, the State Textbook Purchasing Board appoints a seven member subcommittee to examine texts submitted for each of several subject areas. Books the subcommittee approves are recommended to the Purchasing Board for adoption. Books the subcommittee rejects are dropped from further consideration. The subcommittee may select up to five books in the Mississippi history category. *Loewen v. Turnipseed*, 488 F. Supp. at 1142-1145. In September 1974, the textbook, *Mississippi: Conflict and Change*, was submitted to the Textbook Purchasing Board for adoption. *Sallis, supra* note 3, at 8. *Mississippi: Conflict and Change* was one of two books submitted in the Mississippi history category. The other book, *Your Mississippi*, was a "traditional" Mississippi history textbook. *Mississippi: Conflict and Change* presented a realistic treatment of slavery, the Reconstruction, and the civil rights movement, including lynchings, the killing of Medgar Evers, and the killings at Jackson State University in 1970. *Id.* at 8-9. Both books could have been recommended; however, in October 1974, the subcommittee rejected *Mississippi: Conflict and Change*. *Loewen v. Turnipseed*, 488 F. Supp. 1138, 1148 (N.D. Miss. 1980). The vote was five to two. The two black members voted to recommend the book; the five white members did not.

In November 1974, pursuant to the subcommittee's recommendations, the Mississippi Textbook Purchasing Board adopted the more traditional, conservative, *Your Mississippi*, as the only high school history text approved for use in the Mississippi public schools. *Loewen v. Turnipseed*, 488 F. Supp. at 1145, 1146. Under the provisions of Mississippi law, the Board could not consider *Mississippi: Conflict and Change* because it failed to receive a recommendation from a majority of the subcommittee members. *Id.* at 1145.

108. *Loewen v. Turnipseed*, 488 F. Supp. 1138, 1142 (N.D. Miss. 1980). Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or of the District of Colum-

court held that the textbook rejection was invalid because:

- (a) it was racially motivated;<sup>109</sup>
- (b) the plaintiffs, though adversely affected by the rejection, had no voice in the board's decision;<sup>110</sup> and
- (c) the rejection deprived Mississippi schools and school students of the use of the textbook for instruction in Mississippi history.<sup>111</sup>

Although the *Loewen* decision involved a section 1983 action regarding a particular textbook decision, and not a direct first amendment challenge to the Mississippi law,<sup>112</sup> the decision indicates that textbook adoption laws may be vulnerable to a first amendment attack.

Under the balancing approach discussed earlier, analysis of a first amendment challenge to textbook adoption laws requires weighing the students' first amendment rights against the states' interest in subordinating those rights to state educational goals. Accordingly, it is important to examine at the outset how, and to what extent, the adoption laws interfere with the students' first amendment rights.

#### *Infringement of the Right to be Free from Prescribed Orthodoxy*

Textbook adoption laws impinge upon the students' first amendment right to be free from prescriptions of orthodoxy by allowing political and religious groups to indirectly prescribe textbook content. Given their pervasive influence in the classroom, textbooks have tremendous potential for either directly or indirectly indoctrinating classroom students. "New Right"

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bia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1976).

109. *Loewen v. Turnipseed*, 488 F. Supp. at 1154.

110. *Id.* at 1153. The only parties to a textbook adoption proceeding in Mississippi are:

- (a) the members of the various rating committees;
- (b) the publisher or his certified representative; and
- (c) the Mississippi Office of the State Textbook Purchasing Board.

*Id.* at 1143-45.

111. *Id.* at 1148. Based on its conclusions, the district court enjoined the defendants to place *Mississippi: Conflict and Change* on the state approved list for purchase and distribution to eligible schools. *Id.* at 1155. The defendants did not appeal. Sallis, *supra* note 3, at 10.

112. The *Loewen* plaintiffs abandoned their original request for a judgment declaring the Mississippi adoption law unconstitutional. *Loewen v. Turnipseed*, 488 F. Supp. 1138, 1142 n.3 (N.D. Miss. 1980).

groups have recognized this potential. These groups seek to impose their own political and religious beliefs on students by using the textbook adoption laws to exclude eight categories of ideas with which they disagree:<sup>113</sup> statements reflecting negatively on the free enterprise system;<sup>114</sup> open-ended questions requiring students to draw conclusions;<sup>115</sup> statements about religions other than Christianity;<sup>116</sup> statements reflecting positive aspects of socialist or communist countries;<sup>117</sup> statements discussing "any aspect of sex education other than promotion of abstinence;"<sup>118</sup> statements emphasizing contributions by blacks, native Americans, hispanics, or women;<sup>119</sup> statements sympathizing with American slaves or condemning their masters;<sup>120</sup>

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113. Weissmann, *supra* note 19, at 13; *see also supra* note 21. The Gablers' objections specifically identify paragraphs and page numbers in the student's or teacher's editions and give the reasons they find the passage or text objectionable. Jenkinson, *How the Mel Gablers Have Put Textbooks on Trial*, in *DEALING WITH CENSORSHIP* 109, 110 (J. Davis ed. 1979). For example, the objection concerning the book *Awakenings*:

P. 67, par. 2, last sent., "School was such a bore."

Objection: Depreciates (sic) school

*Id.* at 110.

114. Weissman, *supra* note 19, at 13.

115. *Id.* For example, regarding the book *Conflicts*:

P. 77, question 3, "What are some other commonplace experiences that cause fear in people? How might people deal with them? Choose one of these experiences and tell how you think you would deal with it?"

Objection: Invasion of privacy

Jenkinson, *supra* note 113, at 110.

116. Weissmann, *supra* note 19, at 13. For example:

There is a passage in the social studies book *People and Culture* which states, . . . The Koran recognizes Abraham, Moses and Jesus and others as prophets. But it says Mohammad was the last and greatest of these." The Gablers' objection: "By including this comment, the text undermines the significance of Jesus Christ. The text has succeeded in implying that Islam is as valid as Christianity. To include an Islamic judgment or appraisal of Jesus Christ in an American text, read by students who are largely Christian, is ridiculous.

*Id.* at 14.

117. *Id.* at 13. For example, "that the Soviet Union is the largest producer in the world of certain grains." *Id.*

118. *Id.*

119. *Id.* For example:

*Questions*

P. 57, first teacher's note: The title (Luther) has allusive force, recalling Martin Luther and Martin Luther King, Jr., both reformers.

*Objection:* These two men should not be put in the same category. Martin Luther was a religiously dedicated, non-violent man.

Jenkinson, *supra* note 113, at 111. *See also* Dahlin, *supra* note 21, at 28, 29.

120. Weissman, *supra* note 19, at 13. *Cf.*, *supra* note 107 (textbook containing realistic portrayal of slavery system rejected by Mississippi Textbook Purchasing Board).

and statements supporting the theory of evolution.<sup>121</sup>

121. Weissman, *supra* note 19, at 13; Dahlin, *supra* note 21, at 31, 32. Mel Gabler freely admits that his efforts are an attempt to exclude ideas repugnant to his own political and religious beliefs from textbooks. Often, in the same document in which he condemns including certain material, he promotes his own standard of belief. Weissmann, *supra* note 19, at 13, 14.

A substantial number of the Gablers' and other new rights groups' complaints center around the theory that the public school system is promoting a religion called secular humanism. As they see it, the schools are government seminaries promoting the no-God religion of secular humanism. They claim that secular humanism teaches there are no absolutes, people are not accountable to a supernatural authority, biblical standards do not apply, and that value systems supplement biblical standards. Dahlin, *supra* note 21, at 31.

The conservative textbook critics base much of their argument on a footnote in a Supreme Court case concerning a Maryland citizen who wanted to be a notary public who was denied his commission because he refused to declare his belief in God. The Court upheld the citizen's right not to take the oath and in a footnote to its exposition on freedom of religion stated:

Among [those] religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.

Torcaso v. Watkins, 367 U.S. 488, 495, n.11 (1961); Weissmann, *supra* note 19, at 12.

Armed with this Supreme Court "holding" that secular humanism is a religion, they contend that including sex education, sociology, values clarification, science fiction, evolution, human relations, situation ethics, family life, the humanities, or any other subject which emphasizes the individual development of human reason and values is a violation of the Establishment Clause. See RHODE, *Is Secular Humanism the Religion of the Public Schools?* in DEALING WITH CENSORSHIP 117-120 (J. Davis ed. 1979).

Their arguments have no merit. The Secular Humanist Church in the Torcaso footnote has one congregation in California. Doctrinally, it is similar to the Unitarian Church. It does not deny the existence of God. It simply focuses on the human life at the present moment and does not address God in an overt way. *Id.* at 122. It certainly does not espouse the anti-Christian, anti-democratic, anti-family beliefs attributed to it by the New Right Fundamentalists.

The conservatives confuse the religion of secular humanism with the humanistic theory of education and education in the humanities. *Id.* at 117. The humanistic theory of education is an educational model based on the philosophical system of classicism. It emphasizes learning through the development of the individual ability to make rational choices. It is religiously neutral and dates back to the Renaissance. See M. BIGGE, LEARNING THEORIES FOR TEACHERS, 22-29 (3d ed. 1976). The humanities are those "branches of learning having primarily a cultural character", such as sociology, psychology, anthropology, and literature. WEBSTER'S NEW COLLEGIATE DICTIONARY, 552 (1981) (dictionary rejected by the Texas textbook selection committee). *Cf. supra* note 7 and accompanying text. Using a neutral theory to teach neutral subjects does not amount to propagation of a religion.

Even if we accept that Secular Humanism is a religion with the characteristics ascribed to it by the New Right, merely presenting ideas which coincide with certain tenets of its doctrines does not violate the Establishment Clause. For example, teaching public school children not to steal coincides with a basic tenet of Judeo-Christianity, the Eighth Commandment. See *Exodus* 20:16 (Thou shalt not steal). It does not advocate Judeo-Christianity as a religious belief. In the same way, teaching a child to

These textbook critics often succeed in eliminating "objectionable" passages from textbooks; because defending against textbook challenges is expensive and, in some states, not provided for expressly.<sup>122</sup> Conversely, advances in publishing technology have made it easy and inexpensive to edit and delete challenged content.<sup>123</sup> Publishers must choose either to defend against the critics' challenge or capitulate to their challenges. Capitulation represents the logical economic choice and publishers, out of business necessity, are likely to accede to the textbook critics' objections. When they do, the result is nationwide ideological suppression because there are no alternate editions.<sup>124</sup>

Statewide textbook adoption laws provide the vehicle for this nationwide ideological exclusion. The adoption states, through those laws, are allowing political and religious groups to exploit the textbook selection process for their own ends. By doing so, the adoption states are sanctioning a systematic effort to exclude viewpoints and ideas with which those groups disagree. This exclusion of particular kinds of thought and ideological preferences contributes to the homogenization of textbooks and lends state support to the ideas propounded by political and religious groups who successfully challenge textbook content.<sup>125</sup> Precensorship expands the effect of this exclusion and casts a "pall of orthodoxy"<sup>126</sup> over textbook content nationwide. This is precisely the type of "authoritative selection"<sup>127</sup> which the Court so vigorously condemned in *Keyishian*.<sup>128</sup> Consequently, the states' administration of their textbook adoption laws violates students' first amendment right to be free from prescribed orthodoxy and coerced homogeneity.<sup>129</sup>

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value the dignity of individuals is not a propagation of the religion of secular humanism.

122. Seven of nineteen respondents to the joint survey "indicated that no provisions are made for authors, publishers, or producers to defend materials challenged during the adoption process." Kamhi, *supra* note 2, at 17.

123. Weissmann, *supra* note 19, at 31.

124. See, *supra* notes 25-31 and accompanying text. In 1974, 26 of 163 passages found objectionable by the Gablers were deleted. Jenkinson, *supra* note 113, at 111.

125. The United States Court of Appeals for the Seventh Circuit implied that a systematic effort to exclude a particular type of thought or ideological preference would not be permitted. *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1306 (7th Cir. 1980). See *supra* notes 61-62 and accompanying text.

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

127. *Id.* (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

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

129. See *supra* notes 58-63 and accompanying text. See also English, *supra* note 3, at 278.

*Impairment of the Students' Right to Receive Information*

In the same way, textbook adoption laws impair the students' first amendment right to receive information. Practically speaking, the students' right to receive information prevents the state from restricting classroom material so as to "impair the student's ability to investigate matters that arise in the natural course of intellectual inquiry."<sup>130</sup> Because textbooks contain the bulk of information presented to students in school,<sup>131</sup> any exclusion of relevant material on a particular subject will tend to impair the student's ability to investigate that subject thoroughly.

In his dissent in *Pico*, Chief Justice Burger suggested that removal of books from a school library did not impair the students' right to receive information because the students could acquire the same book from book stores, public libraries, or other sources.<sup>132</sup> This argument does not apply to textbook adoption for several reasons. First, the availability of alternative sources is generally irrelevant in determining whether state action unduly restricts individual first amendment rights.<sup>133</sup> Second, textbooks are generally only available in school.<sup>134</sup> They are sold in bulk and rarely distributed to bookstores or public libraries. Finally, even if the student obtains a copy of an excluded textbook, precensorship during the adoption process may have resulted in the elimination of relevant material.<sup>135</sup> Because publishers do not develop and publish alternate editions, the information excluded from the textbook is not available to the student from any source.<sup>136</sup> Thus, textbook adoption is factually distinguishable from school library book removal because of the lack of alternative sources of books and information eliminated by the adoption process.

By providing a means for political and religious groups to prevent adoption of certain textbooks and eliminate relevant information from textbooks finally adopted, the adoption states are "contracting the spectrum of . . . knowledge" available to

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130. *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1306 (7th Cir. 1980).

131. See *supra* notes 3-8 and accompanying text.

132. *Board of Educ. v. Pico*, 457 U.S. 853, 891-92 (1982) (Burger, C.J., dissenting).

133. *Schneider v. California*, 308 U.S. 147, 163 (1939). As the Supreme Court has noted, "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Id.*

134. English, *supra* note 3, at 278.

135. See *supra* notes 21-31 and accompanying text.

136. *Id.*

public school students.<sup>137</sup> Their actions substantially impair the students' ability to obtain relevant educational material. Consequently, textbook adoption laws not only infringe upon the students' right to be free from state-prescribed orthodoxy,<sup>138</sup> they infringe upon the students' right to receive information.<sup>139</sup>

Nevertheless, the states may exclude material from the classroom where it is necessary to accomplish legitimate educational objectives.<sup>140</sup> To withstand first amendment review, however, under the balancing approach, the states must base their exclusion on permissible educational reasons which outweigh the students' countervailing rights to acquire the material. The courts and commentators have noted that the states can permissibly exclude material from the classroom for reasons based on pragmatic educational concerns as well as reasons related to teaching proper values.<sup>141</sup> To teach students proper values, the state may permissibly exclude material which is psychologically inappropriate, contains offensive language, or promotes ideas "manifestly inimical to the public welfare."<sup>142</sup> But, the states cannot legitimately exclude material for reasons of patriotism, fear of potential disturbance, suppression of partisan, unpleasant, unpopular, or controversial views, or representation of minority views.<sup>143</sup>

The distinction between the impermissible rejection or modification of a textbook based on discomfort with a controversial topic and the permissible rejection of a textbook for promoting manifestly improper values may be a fine one, but the pervasive influence of textbooks on students' lives requires us to make the distinction. In distinguishing proper value inculcation from improper ideological indoctrination, it must be kept in mind that the purpose of value inculcation is to prepare students for the responsibilities of adult citizenship and, above all, the exercise of political choice.<sup>144</sup> To that end, the states should

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137. Board of Educ. v. Pico, 457 U.S. 853, 866 (1982).

138. See *supra* notes 112-29 and accompanying text.

139. See *supra* notes 130-36 and accompanying text.

140. See Shelton v. Tucker, 364 U.S. 479, 488 (1960). *Schoolbooks, supra* note 43, at 1115. See also, *supra* note 101 and accompanying text.

141. Pragmatic educational concerns include financial constraints, space limitations, curricular priorities, duplication of resources, relevance and timeliness of subject matter, scholarship, relative educational impact, and appropriateness to the age of the student body. Board of Educ. v. Pico, 457 U.S. 853, 888 (1982); *Schoolbooks, supra* note 43, at 1115. See, *supra* notes 44-49 and accompanying text.

142. Board of Educ. v. Pico, 457 U.S. at 880; *Schoolbooks, supra* note 43, at 1115.

143. Board of Educ. v. Pico, 457 U.S. 853, 869-71, 874-75 (1982); *Id.* at 880 (Blackmun, J., concurring).

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

provide students with access to as many viewpoints as possible, because access to ideas best prepares students to take their place in American society. An analogy to teacher autonomy in conducting classroom discussion helps illustrate this point. Like textbooks, teachers exert a powerful influence over their students' intellectual and psychological development. This influence carries with it a corresponding danger of abuse should teachers decide to take advantage of the power inherent in their position to indoctrinate their students with their own beliefs.<sup>145</sup> Nevertheless, under the first amendment, school authorities cannot discipline teachers for conducting classroom discussion of controversial topics merely because they disagree with teachers' opinions and beliefs.<sup>146</sup>

The first amendment protects classroom discussion unless its detrimental effect clearly outweighs its usefulness in illuminating the subject matter.<sup>147</sup> The rationale behind this proposition is that teacher autonomy in classroom discussion shields the student from state prescribed orthodoxy and that the value gained by allowing a teacher to present divergent views outweighs the danger that the teacher will take advantage of his position to indoctrinate students with his own political or sociological beliefs.<sup>148</sup> Similarly, textbooks should not be excluded or modified because of controversial content unless the damage done by exposing the students to the material outweighs its instructional value. As long as teachers and textbooks may present independent views in the classroom, the state will be prevented from speaking with a single voice.<sup>149</sup>

Thus, determining whether the states' interest in selecting textbooks which teach proper values outweighs the students' right to learn through divergent viewpoints requires determining whether the characteristics of textbook content render textbooks susceptible to traditional value inculcation objections. Generally, they do not. Unlike publications written for the public at large, textbooks are relatively non-controversial.<sup>150</sup> They

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145. *James v. Board of Educ.*, 461 F.2d 566, 573-74 (2d Cir. 1972).

146. *Id.* at 573.

147. *Kingsville Independent School Dist. v. Cooper*, 611 F.2d 1109, 1113 (5th Cir. 1980) quoting *Kaprelian v. Texas Women's Univ.*, 509 F.2d 113, 139 (5th Cir. 1975). See *James v. Board of Educ.*, 461 F.2d 566, 574 (2d Cir.), cert. denied, 409 U.S. 1042 (teacher's classroom conduct protected by the first amendment unless it threatens to impair legitimate educational interests).

148. *Schoolbooks*, supra note 43, at 1112. See Yudof, *When Government Speaks: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 874-75 (1979).

149. *Schoolbooks*, supra note 43, at 1112.

150. See generally, *Cohon*, supra note 15; *English*, supra note 3.



are unlikely to contain vulgar language<sup>151</sup> and, because they are written to accord with guidelines established by publishing executives for particular subjects and age groups, they are unlikely to be intellectually and psychologically inappropriate or educationally irrelevant.<sup>152</sup> Consequently, textbooks containing divergent viewpoints pose little or no threat to, and may enhance, the states' ability to teach students essential social and political values. It follows, then, that the students' first amendment rights, which require exposure to divergent viewpoints outweigh the states' interest in excluding divergent viewpoints, from the classroom. Therefore, the adoption states cannot, consistent with the balancing approach, advance legitimate educational concerns which justify infringing upon the students' right to be free from prescribed orthodoxy and their right to receive information.

#### THE LEAST RESTRICTIVE MEANS: LOCAL CONTROL

Even if the states could advance legitimate educational concerns justifying the censorship that may result from adoption laws, the students' rights would outweigh the states' interests because statewide adoption is not the method which least restricts the students' first amendment rights. Return of the textbook selection process to local school boards would eliminate many of the first amendment problems associated with textbook adoption laws,<sup>153</sup> while better serving the value inculcation function.<sup>154</sup> As one commentator has noted, "[e]ducation originally was vested in the control of local authorities because it was thought that the formulation of policy at the local level would be freer of partisan politics than was possible at the state legislative level."<sup>155</sup>

The most important benefit of returning control of textbook selection to the local community would be the elimination of nationwide precensorship. At the local level, challenges to textbook use occur after the book is in use and published.<sup>156</sup> Censorship efforts, even if successful, would not have the serious economic impact on the publishers inflicted by rejection at the state level, so the publisher would be less likely to capitulate

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151. Literature anthologies are a notable exception. See Board of Educ. v. Pico, 457 U.S. 853, 897-903 (1982) (Powell, J., dissenting).

152. Cohon, *supra* note 15, at 30.

153. See, *supra* notes 32-35, 132-39 and accompanying text.

154. See, *supra* notes 44-49 and accompanying text.

155. *Selection Limitations*, *supra* note 74, at 475. See *Developments in the Law: Academic Freedom*, 81 HARV. L. REV. 1045, 1149 (1982).

156. Needham, *supra* note 9, at 4.

by excluding material.<sup>157</sup> Return of the textbook selection process to the local school boards would also mitigate the influence of pressure groups by diffusing the censorship efforts. Challenges at the local level are more likely to be related to offensive language, a legitimate value inculcation concern,<sup>158</sup> and less likely to be based on ideological concerns.<sup>159</sup> When challenges do occur, local school boards are more likely than a statewide selection committee to respond to the needs of all concerned: parents, teachers, administrators, publishers, and students.<sup>160</sup>

Finally, local control of textbook selection would better accomplish the states' goal of inculcating proper values than statewide adoption.<sup>161</sup> Textbooks selected at the local level would more adequately reflect local community values, not the imposed values of the editions of a few adoption states. Local control of textbook selection would allow a community to retain its local character and expose students to the values revered by the

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157. See, *supra* notes 32-35, 122-29 and accompanying text.

158. On the level, more than 77% of 390 challenges specified by respondents to the joint survey were initiated by an individual (teacher, parent, community resident, school board member, administrator) representing his or her own interest. Less than 17% of the respondents indicated challenges referring to arguments or viewpoints developed by individuals or groups outside the community. In contrast, at the state level, 17 out of 23 state-level challenges were initiated by a group or an individual representing a group. Ten out of 14 respondents indicated that the challenges had referred to arguments or viewpoints developed by individuals outside the state. Kamhi, *supra* note 2, at 5, 16-17.

159. *Id.* at 18. See, *supra* text accompanying note 148.

160. See Kamhi, *supra* note 2, at 18-19.

161. [L]ocal control fo education involves democracy in a microcosm. In most public schools . . . the *parents* have a large voice in running the school. Through participation in the election of school board members, the parents influence, if not control, the direction of their children's education. A school board is not a giant bureaucracy far removed from accountability for its actions . . . . A school board reflects its constituency in a very real sense and thus could not long exercise unchecked discretion in its choice to acquire or remove books.

*Board of Education v. Pico*, 457 U.S. 853, 891-92 (1982) (Burger, C.J., dissenting) (emphasis in original). The Supreme Court has indicated that local school board autonomy is necessary to maintain community interest in and support for any public school system and for the quality of the education it provides. *Milliken v. Bradley*, 418 U.S. 717, 741-742 (1974) (Burger, C.J., writing for the majority).

This does not mean that local school boards are free from constitutional constraint. The Bill of Rights puts certain values beyond the will of the majority. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). The courts, as traditional arbiters of first amendment rights, should intercede when a local board's abuse of discretion threatens those rights. See *Board of Educ. v. Pico*, 457 U.S. 853, 866 (1982); *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503, 507 (1969); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). The courts should accord local school board decisions great deference, but they must not hesitate to remedy clear abuses of discretion. *James v. Board of Educ.*, 461 F.2d 566, 575 (2d Cir.), *cert. denied*, 409 U.S. 1042; *Selection Limitations*, *supra* note 79, at 480-84.

local community while allowing other communities to do the same.<sup>162</sup>

#### FIRST AMENDMENT DUE PROCESS

The final consideration necessary to strike a proper balance between the state and student rights in the textbook selection process is the notion of first amendment due process.<sup>163</sup> As discussed earlier,<sup>164</sup> textbook adoption laws may foster precensorship, a type of prior restraint on freedom of speech and the press.<sup>165</sup> To protect first amendment rights the Supreme Court has developed a system of "procedural safeguards designed to obviate the dangers of a censorship system."<sup>166</sup> To withstand judicial scrutiny, a procedure affecting first amendment rights must show the "necessary sensitivity to freedom of expression. . . ."<sup>167</sup> To show the necessary sensitivity, due process in the first amendment context requires that those adversely affected by decisions concerning their rights to free speech and freedom of the press have an adequate voice in the determination and that those determinations be subjected to prompt and adequate judicial review.<sup>168</sup> Additionally, since textbook adoption laws are, in effect, a prior restraint, they "bear a heavy presumption against [their] constitutional validity."<sup>169</sup>

Textbook adoption laws do not provide adequate first amendment due process protection to those adversely affected by their administration for two reasons. First, although nearly all adoption states inform parents and state residents about their adoption policies and procedures, a substantial number do not make provisions for authors, publishers, or producers to de-

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162. See, *supra* notes 44-49 and accompanying text.

163. See *Schoolbooks*, *supra* note 43, at 1097.

164. In resolving first amendment claims, the Supreme Court has turned directly to the first amendment for due process requirements, rather than relying on the fifth and fourteenth amendments. Monaghan, *First Amendment Due Process*, 83 HARV. L. REV. 518-519 (1970).

165. See, *supra* notes 32-35, 122-29 and accompanying text.

166. *Freedman v. Maryland*, 380 U.S. 51, 58 (1965); Monaghan, *supra* note 164, at 518.

167. *Freedman v. Maryland*, 380 U.S. 51, 58 (1965); Monaghan, *supra* note 164, at 519.

168. *Freedman v. Maryland*, 380 U.S. 51, 58 (1965).

The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint.

*Id.*; see generally, Monaghan, *supra* note 164. See also TRIBE, *supra* note 34, at 732.

169. *Freedman v. Maryland*, 380 U.S. 51, 57 (1965), quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

fend materials challenged during the adoption process.<sup>170</sup> For example, Texas, the state generally acknowledged as having the most fair and open adoption process,<sup>171</sup> limits written criticism of materials proposed for adoption to negative comments and allows only publishers and their representatives to present oral defenses of materials.<sup>172</sup> Further, in *Loewen v. Turnipseed*, a Mississippi district court concluded that the Mississippi adoption laws interfered with the plaintiffs' first and fourteenth amendment rights in violation of 42 U.S.C. § 1983.<sup>173</sup> The *Loewen* court emphasized that one reason for their decision was that Mississippi allowed only state officials and publishers' representatives ready access to the adoption process.<sup>174</sup>

Second, textbook adoption laws do not provide for prompt judicial review of textbook adoption decisions. The *Loewen* court concluded that the Mississippi textbook adoption law denied the plaintiffs due process because it "foreclose[d] the [textbook purchasing] committee's decision from further review."<sup>175</sup> Nor is Mississippi alone in this regard. An examination of the twenty-two adoption statutes reveals that no state provides for automatic judicial review of textbook committee decisions.<sup>176</sup> Statewide textbook adoption laws foreclose textbook decisions from adequate judicial review, while denying those ad-

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170. Kamhi, *supra* note 2, at 17.

171. Weissmann, *supra* note 19, at 29.

172. See, *supra* note 22. On August 5, Pamela Bonnell, a Dallas librarian and member of the ALA's Intellectual Freedom Roundtable, filed suit in a Texas county district court seeking to have Texas' adoption statute struck down as repugnant to the Texas and Federal constitutions. See *Texas Selection*, *supra* note 21, at 198. One of the attorneys for the plaintiff, Mr. Frank Shor of the Law Offices of Mike Aronson, stated,

We see three basic flaws with the selection procedure in the State of Texas. The first is that it does not allow an interested person to speak in favor of any proposed textbook. We believe this to be in violation of the Texas Constitution. Secondly, we believe the standards by which the Textbook Committee and the Commissioner decide which books are to be selected are unduly vague. Therefore they do not provide sufficient standards, and are an unconstitutional delegation of authority from the legislative body to these officials. Lastly, the review cycle is unduly lengthy with respect to some subjects.

Letter from Frank Shor to M. David Bieber (Feb. 15, 1983). See also plaintiff's Original Petition, *Bonnell v. Texas State Bd. of Education* (98th Dist. Ct., Travis County, TX, No. 337,986, filed Aug. 5, 1982). The defendants have filed a plea in abatement contesting the plaintiff's standing on which the court has not ruled. Letter from Frank Shor to M. David Bieber (Feb. 15, 1983).

173. *Loewen v. Turnipseed*, 488 F. Supp. 1138, 1153-54 (N.D. Miss. 1980).

174. *Id.* at 1153. The *Loewen* court concluded that the "defendants have provided no method by which the plaintiffs may safeguard their academic freedoms." *Id.*

175. *Id.* at 1153.

176. See *supra* note 10.

versely affected by the decisions adequate access to the adoption process. Consequently, statewide textbook adoption laws do not provide the "necessary sensitivity to freedom of expression" required by first amendment due process.<sup>177</sup>

#### CONCLUSION

Textbook adoption laws fail to properly balance state interests and student rights in the textbook selection process. By allowing the adoption states virtually unlimited discretion to prescribe textbook content, the adoption laws foster ideological censorship which violates the first amendment rights of public school students without legitimate educational justification. The adoption laws' original laudable purpose has been vitiated by their susceptibility to political manipulation by pressure groups seeking to suppress religious and political ideas that are inconsistent with their own beliefs.

By legitimizing this censorship, the adoption states have failed in their responsibility to instill in public school students an essential American value—tolerance of differing beliefs and opinions. Students will not learn to respect divergent viewpoints if they hear only those ideas that filter through the textbook adoption process.

The precensorship inherent in statewide textbook adoption has upset the constitutionally mandated balance by shielding students from educationally relevant ideas simply because particular segments of our society find those ideas objectionable. The balance between state interests and student rights must be restored if the states are to fulfill their duty to teach students that "our Constitution is a living reality, not merely parchment preserved under glass."<sup>178</sup>

*M. David Bieber*

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177. *See supra* notes 164-70 and accompanying text.

178. *Shanley v. Northeast Indep. School Dist.*, 462 F.2d 960 (5th Cir. 1972) (emphasizing that school authorities must respect the constitutional rights of students).