THE INTEREST OF THE STATE:
A VIEW FROM THE JUDICIARY

by

Geralene Mills Sutton

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APPROVED:

A. P. Johnston, Chairman

M. David Alexander

James F. Herndon

Sheila A. Slaughter

Wayne M. Worner

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(ABSTRACT)

The problem of this research study was to analyze decisions of the Supreme Court regarding expressions of The State's interest in education. The study focused on decisions of the Supreme Court which have been based on the Constitutional guarantee of freedom of speech involving elementary and secondary schools so as to determine the nature and scope of The State's interest in the education of the individual. The research questions focused on specific decisions of the Supreme Court which have dealt with the issue of freedom of speech as this Constitutional guarantee has been applied to elementary and secondary schools, the purpose(s) or goal(s) of education as stated in the decisions, the judicial standard applied in each decision, the rationale or justification for the intervention of The State in the education of the individual as delineated in the decision, and the nature of a congruency or a pattern for The State's interest in education. The methodology of the study was historical. The LEXIS computer analysis was used in conjunction with the analysis of legal indices in the identification and selection of data.

Six cases were identified for analysis in the study. The

cases included: West Virginia v. Barnette (1943), Pickering v. Board of Education (1968), Tinker v. Des Moines Community School District (1969), City of Madison v. Wisconsin Employment Relations Commission (1976), Mt. Healthy v. Doyle (1977), and Givhan v. Western Line Consolidated School District (1979).

The review of literature focused on the Constitutional basis for freedom of speech, political theory and The State, and the views of contemporary critics concerning the interest of The State in education. Within the United States, The State maintains a system of social control and the elementary and secondary schools are an important part of that social control. Outside of the family, the school is regarded as the major socializing institution. A major challenge for the educator is that of formulating a conceptual framework that achieves a harmonious relationship between what is deemed to be the interest of The State and the needs as well as rights of individual persons. The institutions of a society rest on a foundation of beliefs, principles, values, norms, and arrangements which establish, in part, the interests of The State and the rights of the individual. The relationship which exists between The State and the individual is a major component of the social system and influences and is influenced by the school as an institution. The findings of the study indicate that there is not consistent use of the term, The State, within the relevant literature and within decisions of

the Supreme Court, that the power and authority of The State through the arm of the Supreme Court may be seen as a mechanism for the maintenance of order, stability, and consensus within the social system, and that the procedural and substantive issues within the decisions of the Supreme Court have had an important influence on educational institutions. The interest of The State, the limits of the power of The State, and the prerogatives of The State are defined and determined by The State itself.

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Chapter 1

INTRODUCTION TO THE STUDY

A major challenge for the educator is that of understanding the ideological basis for education and formulating a conception of education that achieves some harmony between what is deemed to be the interests of society and/or the interests of The State[1] and the needs of individual persons. The institutions of a society rest on a foundation of beliefs, principles, values, norms, and arrangements which establish, in part, the interests of The State and the rights of the individual. The relationship which exists between The State and the individual is a major component within the social system. How the delicate balance between the individual and The State came to be, how it is maintained, and how it is expressed is a perplexing problem, as it involves political processes that hold institutions together, the social

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[1]Note: The use of the term "The State" is defined for this study as the organized government and agencies of government exercising sovereign powers. The State has been defined as a people permanently occupying a fixed territory bound together by common-law habits and custom into one body politic exercising, through the medium of an organized government, independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace or of entering into international relations with other communities of the globe. United States v. Kusche, D. C. Cal., 56 F. Supp. 201, 207, 208. The State has also been defined as the organization of social life which exercises sovereign power in behalf of the people. Delany v. Moraitis, C.C. A. Md., 136 F.2d 129, 130.

foundations of the body politic, and the economic tenets which surround a system of production and distribution.

Within society the issues of liberty and authority, rights and duties, security and dissent all focus on the relationship of the individual to The State. The issues may center around public and private enterprise, self-reliance and social welfare, civil rights and individual determination, civil order and civil disobedience, national security and public protest, national defense and pacifism, public service and the right to strike, public sensibility and the right to publish, prosecution and the protection of the accused, criminal investigation and the right of privacy, crime in the streets and the police power, and the invasion of private and public property by break-in.[2] As John Dewey observed in Democracy and Education, there will always be constant tension and even conflict in a developed society between individuality and community, a constant struggle to determine the things that belong to the one and those that belong to the other.[3]

Within the United States, The State maintains a system of social control and the schools as institutional settings are an important part of that social control. Formal educa-

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[2]Milton Mayer, On Liberty: Man v. The State (Santa Barbara, California: The Center For The Study of Democratic Institutions, 1969), pp. 8-9.

[3]John Dewey, Democracy and Education: An Introduction To The Philosophy of Education (New York: Macmillan, 1916).

tion is at the center of the social environment. Outside of the family, the school is regarded as the major socializing institution. The philosophy which one holds of education as a reasoned and coherent statement of aims and possibilities for the individual is dependent, in part, on the assumptions which are held concerning an ideological basis for education and a conceptualization of the individual, society, and the relationship which exists between the individual and The State.

Regarding such a conceptualization, Milton Mayer has observed:

> The tenor of our lives under ordinary conditions does not require us to note (much less examine) the tension between man and The State.[4]

The State has maintained an interest in the formal schooling of the individual since the earliest days of the republic. The State's interest in education has been manifested in the establishment, development, and maintenance of a system of elementary and secondary schools. Formal education in the United States has developed and continues to operate within a well-defined structure.

The power to establish and maintain schools, to raise money for that purpose, and to govern, control, and regulate

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[4]Mayer, op. cit., p. 12.

such schools is one of the powers not delegated to the federal government, or prohibited by the Constitution to the several states, but is reserved to the states respectively or to the people. The people through the state constitutions and the state legislatures have the right to control and prescribe the limits which they will establish in supplying education at public expense. Therefore, in accordance with the 10th amendment to the Constitution, the organization of an educational system is reserved to the several states respectively or to the people. In each state, the people, through a state constitution, legislative enactments, administrative agencies, and court decisions have established a mechanism to control and to regulate elementary and secondary schools. Elementary and secondary schools, therefore, have emerged as a subject of governmental concern and activity, a proper subject of legislation, and a matter for review by the courts at all levels of government--local, state, and federal.

Education is the expression of social institutions attempting to serve two masters--the individual and The State. The power and authority to control the education of citizens have emerged through complex processes organized and directed by The State. In the early days of the republic, the education of the individual was primarily directed by the family unit when there was an absence of public schools. In the development of a system of public schools

regulated by The State, legitimacy for The State's authority has been established, in part, by the constitutions of the several states and by judicial decisions and legislative enactments both at the state and local levels as well as at the federal level.

While the power and authority of The State have continued to dominate education, how have the expressions of The State's interest provided a viable rationale for the citizenry? What are the expressions of The State's interest? Has the growth of The State's interest in education been arbitrary or has it been linked to a rationale or justification that has had its foundation in the political processes, social institutions, and the economic bonds of society? Does The State define for the citizenry a purpose or a goal concerning The State's control of the education of citizens? Is there a point beyond which the interest of The State cannot proceed or are the prerogatives of The State defined and limited only by The State itself?

In attempting to enunciate specific issues regarding The State's interest, the illusive nature of the concept is apparent. While there is much popular and even legal thinking on the subject, with considerable analysis having been done by sociologists, anthropologists, and political scientists, educators do not often become embroiled in the rationale supporting The State's control of education and The State's intervention in the education of the individual.

With each policy formulation by the bureaucracy, each piece of legislation enacted, each decision by a court, and each action by a government agency there is an expression of the interest of The State. It is the expression of The State's interest in selected decisions of the Supreme Court in matters relating to education in the elementary and secondary school that is the focus of this study.

Statement of the Problem

The problem of this research study was to analyze decisions of the Supreme Court regarding expressions of The State's interest. The study focused on decisions of the Supreme Court which have been based on the Constitutional guarantee of freedom of speech as this First Amendment right has been applied to cases involving elementary and secondary education so as to determine the nature and the scope of expressions of The State's interest in education.

In order to investigate the problem on which this study focused, the following research questions were addressed:

1. What are the specific cases for which the Supreme Court has rendered a decision which have dealt with the issue of freedom of speech, as this Constitutional guarantee has been applied to education, specifically elementary and secondary schools?

2. What do each of these decisions of the Supreme Court specifically state concerning a purpose or goal for the education of citizens?

3. What judicial standard or "test" is applied in each decision by the Supreme Court as a measure for determining the position of the Court?

4. What is the nature and scope of The State's interest in education as revealed by the language of the decision? Is a rationale or justification stated in the decision for the intervention of The State in matters relating to education of the individual?

5. Is there a discernible pattern revealed in the decisions through the stated purpose(s) and/or goal(s) for the education of individuals and the stated rationale or justification for The State's interest in education? What is the nature of the congruency, if components of a congruency can be identified from the data?

Significance of the Study

Formal public education is being assailed from various segment of the population. Until recently, few people questioned the beneficence of public education, for the schools were seen as the vehicles of social progress, democratic expression, and as a means for ensuring all citizens equality in the economy and the polity. A canon of prevailing American social thought was that The State provided schools for the benefit of all citizens, thus adding to the enhancement of the "common wealth" and the "common good" and the interest of The State was rarely questioned. Public schools were thought to be the cornerstone of the democratic experiment and an open road toward social justice. The responsibility of The State was thought to be that of "administering" justice, "insuring" rights, and "providing" for the common

welfare.

Today, the debate in the educational community concerning governance of the schools centers on who controls the schools, by what means, and to what ends. Within a constitutional framework, the judiciary has come to serve as interpreter of The State's interest when there has been a confrontation between the individual and The State. Each opinion of the Supreme Court speaks to the issue of the interest of The State. For some observers the Supreme Court's role as the arbiter of American political and social development is the most distinguishing characteristic of American jurisprudence. There is a growing awareness that the judicial system is assuming a new role vis-a-vis the adjudication of political and ethical issues not easily resolved elsewhere. The exercise of the power of judicial review by the Supreme Court has had clear social implications for a number of institutions including elementary and secondary schools.

The concepts embodied in the relationship between the individual and The State are at the heart of political and social theory. The reasoning or lack of it in the decisions of the Supreme Court is a major undercurrent beneath the surface of case law. An analysis of the reasoning of the Supreme Court is illusive in some aspects but so are the ideas and ideals one will encounter such as justice, equality,

and due process. There is a facade of rhetoric in every decision--but the rhetoric is the essence of the communication; therein lies its greatest strength and its most perplexing questions.

Judicial review has provided for the courts to interpret the meaning of the actions of the legislative branch and the executive branch. The process of judicial review has been closely associated with the longevity of the Constitution. The expansion of the Constitution has been accomplished only in small measure by formal amendments. Adjustments made necessary by changes in American life have been accomplished largely by the courts and the final interpreter has been the Supreme Court. The impact of the decisions of the Supreme Court, according to Benjamin F. Wright, have had far reaching effects on the institutions of society and the Supreme Court has molded the governmental processes, the social and economic practices, as well as, the very folkways of the country.[5]

The purpose of this study was to ferret out the issue of The State's interest within the context of a single Constitutional guarantee--freedom of speech--and within one social institution, the American elementary and

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[5]Benjamin F. Wright, The Growth of American Constitutional Law (Chicago: University of Chicago Press, 1942), p. 242.

secondary school. The significance of this study was to illuminate the nature and scope of The State's interest in the education of the individual.

It is of great importance to educators to be able to ascertain ways in which The State has defined its own role in matters regarding education and the definitive limits for the exercise of The State's power. A major task for the educator is the development of an understanding of the ideological basis for education and the conceptual framework that supports a harmonious relationship between the interests of The State and the rights of the individual. The nature and scope of governmental regulation of schools, or in the terminology of this investigator--the interest of The State--may arise within a legal context but has far reaching implications for the social system and the way in which individuals live their lives. While complex social, legal, and ethical issues may be involved in the establishment of boundaries for the intervention of The State in the education of the individual, a series of very important practical questions are involved in the decision making process surrounding the selection of textbooks for the schools, the process of teacher certification, the requirements for a high school diploma, the determination of curriculum programs, competency requirements for students, the nature of student discipline, formulas for the financing of educational programs, the extent of academic freedom for

a teacher, censorship of library materials, and a variety of other day-to-day issues of the elementary and secondary school. The framework for these practical questions is directly related to an identification of The State's interest in the education of the individual.

Assumptions of the Study

For the purpose of this study, it was assumed that:

1. The decisions of the Supreme Court provide an important historical record of primary source material of a valid nature on the legal issues which have had to be resolved involving the individual and The State.

2. The Supreme Court of the United States, the highest tribunal in the nation, serves as the arbiter of social, economic, and political issues which arise in cases being heard by the Court and, therefore, the Court expresses views on the matters in question which are accepted by citizens as the "law of the land."

3. The legal issues before the Supreme Court involve a confrontation between the liberties and rights of the individual or individuals acting collectively and responsibilities or "interests" which have been assumed by The State or delegated to The State by the Constitution or by other means such as legislation by Congress.

4. The Supreme Court interprets issues and presents decisions with regard to the provisions of the United States Constitution.

Limitations of the Study

This study was limited in the following ways:

1. A single issue, the Constitutional guarantee of freedom of speech, was the issue researched in relationship to one institutional setting, the elementary and secondary school. Decisions of the Supreme Court which dealt with freedom of speech were focused upon in order to pursue a methodology which would allow the analysis of The State's interest in a specific and identifiable framework. The issue of freedom of speech was one of the many issues that could have been identified and researched, using the methodology of this study. While the parameters of the methodology limited the research effort, it also provided a microcosm, a view of a specific set of Supreme Court decisions. Therefore, issues such as freedom of religion, equal protection, and due process, while offering excellent opportunities for study, were not analyzed.

2. The area of elementary and secondary education (kindergarten through twelve) was the area of the formal educational structure to be examined when the review and analysis of Supreme Court decisions were made.

3. While important decisions have been rendered by the federal circuit courts, the federal district courts, and the various state courts with regard to the issue of freedom of speech in elementary and secondary schools, only the decisions of the Supreme Court were used in the study.

4. Acknowledging that the relationship of the individual to The State offers an opportunity to pursue philosophical statements from a variety of ideological positions, this study focused on the decisions of the Supreme Court as expressions of The State from a level of power and authority that establishes rules of procedure that control and regulate the daily lives of all citizens. The philosophical writings which might be relevant to such an inquiry were not considered in a direct and systematic manner.

A Definition For Terminology Used In The Study

The State. The use of the term "The State" is defined for this study as the organized government and agencies of government exercising sovereign powers. The State has been defined as a people permanently occupying a fixed territory bound together by common-law habits and custom into one body politic exercising, through the medium of an organized government, independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace or of entering into international relations with other communities of the globe (United States v. Kusche, D.C. Cal., 56 F.Supp. 201, 207, 208). The State has also been defined as the organization of social life which exercises sovereign power in behalf of the people (Delany v. Moraitis, C.C. A. Md., 136 F.2d 129, 130).

The term "The State" represents to some degree an abstract idea. By definition the term may be considered inclusive in that it embraces the multi-faceted political, social, and economic dimensions of society. With a turn of the lens, the term may be considered exclusive in that the popular use of the term generally implies the legitimate forms of authority and power associated with the maintenance and control of the social system. The use of terms such as The Welfare State or The Industrial State imply specificity and a set of values associated with the scholarship which

utilizes these terms. Political theorists generally associate The State with organized forms of government. The term is defined for this study as organized government exercising sovereign powers.

Within the boundaries of this research endeavor, the political, social, and economic actions of The State were referred to as "interests" and actions of the individual referred to as "rights" or "liberties." The decisions of the Supreme Court were considered to be expressions of the interest of The State.

Chapter 2

A REVIEW OF LITERATURE RELATED TO THE STUDY

A review of literature related to the study centered on three areas:

Constitutional Basis For Freedom of Speech

Political Theory and The State

The Interest of The State in Education: Views of Contemporary Critics

The review of literature served as a basis for analyzing the decisions of the Supreme Court regarding expressions of The State's interest in education.

Constitutional Basis For Freedom of Speech

The first ten amendments to the Constitution of the United States constitute the Bill of Rights. These amendments were submitted to the several states by the First Congress in response to expressions of concern for guarantees of individual rights. The framers of the Constitution did not include in the original document a provision expressly directed toward freedom of speech as an individual right. Popular pressure and concern by the several states demanded a delineation of the guarantee of freedom of expression. The Bill of Rights was adopted in 1791 and the First Amendment stated:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. [1]

There is little historical evidence available in primary source material which can be reviewed concerning the debates within the House of Representatives,[2] the Senate[3] and the several states with regard to the ratification of the Bill of Rights. To a significant degree, therefore, the intent of the framers[4] of the Constitution with regard to freedom of speech remains obscure within the literature.

The Constitutional basis for freedom of speech includes decisions of the Supreme Court which deal, directly or by implication from the due process clause of the Fourteenth Amendment, with the provisions of the First Amendment to the

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[1] Constitution of the United States.

[2] Constitution of the United States: Analysis and Interpretation, 92d Cong., 2d Sess. (Washington: Government Printing Office, 1973).

[3] Ibid.

[4] Note: There has been much concern by the courts with the intent of the framers of the Constitution when issues relating to freedom of speech have been reviewed. The Bill of Rights: A Documentary History, Vols. I-II, by Bernard Schwartz offers excellent primary source material on English antecedents, colonial charters and laws, revolutionary declarations and constitutions, Northwest Ordinance, Journals of Congress for the House of Representatives and Senate, state ratifying conventions, and other selected documents concerning the individual's right of freedom of speech within a historical framework.

Constitution that Congress shall make no law abridging the freedom of speech. The due process clause of the Fourteenth Amendment protects freedom of speech of individuals against abridgement by state action. Freedom of speech is a preferred right of the Constitution and the First Amendment's ban against Congress abridging freedom of speech is a preserve where the rights of the individual are made inviolate.[5] The right of free speech is one of the most important liberties accorded to individuals and bears a direct relationship to the structure and stability of the social system.

The First Amendment requires that debate on public issues be uninhibited, robust, and wide open, just as erroneous statements must be protected to give freedom of expression the breathing space that it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected.[6] The guarantee of free speech does not relate only to political expressions and/or ideological expression but extends to all arenas of individual expression. Freedom of speech must embrace all issues about which information is needed or appropriate to enable

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[5]Schneider v. Smith, 390 U.S. 17, 88 S.Ct. 682, 19 L. Ed. 2d 799 (1968).

[6]Bond v. Floyd, 385 U.S. 116, 87 S.Ct. 339, 17 L.Ed. 2d 235 (1966); Whitehill v. Elkins, 389 U.S. 54, 88 S.Ct. 184, 19 L.Ed. 2d 228 (1967); Watts v. United States, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed. 2d 664 (1969).

the members of society to make decisions and no suggestions can be found in the Constitution that the freedom guaranteed to the individual for speech bears an inverse ratio to the timeliness and importance of the ideas seeking expression.[7]

The right to freedom of speech applies to matters of state and local concern as well as matters of federal concern and to secular as well as political causes, thereby this important Constitutional guarantee is not confined to any particular field of human interest.[8] It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the government itself or by a private licensee.[9]

Freedom of speech has come to be considered as one of the preeminent rights of Western democratic theory, a foundation for individual liberty, and a cornerstone of individual freedom. In Palko v. Connecticut, Judge Cardozo said that freedom of speech was "... the matrix, the indispensable condition of nearly every other form of freedom."[10] Professor Thomas Emerson has viewed the right of the individual

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[7]Time, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed. 2d 456 (1967).

[8]Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed. 2d 371 (1969).

[9]Id.

[10]Palko v. Connecticut, 302 U.S. 319, 327 (1937).

to freedom of expression as a product of the development of the constitutional state and as a part of the intellectual and social movement beginning with the Renaissance which placed emphasis on the dignity, reason, and freedom of the individual.[11] The theory for freedom of expression in its modern form is supported, according to Emerson, by values which can be grouped in four categories:

1) assuring individual self-fulfillment

2) means of attaining the truth

3) method of securing participation by the members of the society in social, including political, decision-making

4) maintaining the balance between stability and change in society. [12]

Freedom of expression may be considered as an end in itself, as a private right of an individual, but not the only end. In its social and political aspects, freedom of expression is primarily a method for reaching other goals. Freedom of expression is a basic element of the democratic legacy--but not the only element. A conception of freedom of speech must take into account other values and concerns of the society such as public order, justice, equality, progress, and the relationship of the individual to The State.

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[11]Thomas I. Emerson, "Toward A General Theory of the First Amendment," The Yale Law Journal, 72 (November, 1962), 878.

[12]Ibid., p. 879.

Substantive measures, designed to promote values such as justice, equality, and public order often have to be reconciled with freedom of expression. All institutions of society, and certainly the elementary and secondary schools are concerned with the process of reconciliation of the rights of the individual and the interest of The State. The principle of reconciliation is expressed or is an underlying consideration at least in the various decisions of the Supreme Court which have dealt with freedom of speech. Therefore, when a freedom of speech issue collides in the courts with an issue such as justice or public order, a legal doctrine which reconciles the two issues may emerge. The legal doctrine which reconciles the issue of freedom of speech as it relates to other individual freedoms and/or goals of society in the interest of The State must seek to determine the nature of freedom of speech both as "expression" and "action."

Concerning this important issue, Professor Emerson has written:

> ... the essence of a system of freedom of expression lies in the distinction between expression and action. The whole theory rests upon the general proposition that expression must be free and unrestrained, that [T]he [S]tate may not seek to achieve other social objectives through control of expression, and that attainment of such objectives can and must be secured through regulation of action. The dynamics of the system require that this line be carefully drawn and strictly adhered to. [13]

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[13] Ibid., p. 955.

In developing judicial doctrine for the reconciliation of issues and of competing concerns relating to freedom of speech, the Supreme Court has developed some basic tests/or standards to apply in the decisions of the Court. These tests/or standards include:

1) Balancing v. Absolutism
2) Overbreadth Doctrine
3) Void-for-Vagueness Doctrine
4) The Least Restrictive Means Test
5) Clear and Present Danger Test
6) Prior Restraint

Balancing v. Absolutism. The First Amendment appears to speak in absolutist terms: "Congress shall make no law ... abridging the freedom of speech...." An absolute right, by definition, is not subject to balancing or reconciliation. In approaching the significant problem of interpreting the meaning of freedom of speech, an initial concern must be to determine the strength of First Amendment rights in relation to other individual rights and whether it is appropriate for the judiciary to balance free speech with legitimate governmental objectives reflecting the interest of The State. The absolutist view at the Supreme Court level has been championed and most closely associated with Justice Black and Justice Douglas but it has never been the view of the Court in a majority opinion. In Konigsberg v. State Bar of California, Justice Black in a dissenting opinion summarized the view of the absolutist position:

> The recognition (that a State) has subjected "speech and association to the deterrence of subsequent disclosure" is, under the First Amendment, sufficient in itself to render the action of the State unconstitutional unless one subscribes to the doctrine that permits constitutionally protected rights to be "balanced" away whenever a majority of this Court thinks that a State might have interest sufficient to justify abridgement of those freedoms.... I do not subscribe to that doctrine for I believe that the First Amendment's unequivocal command that there shall be no abridgement of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the "balancing" that was to be done in this field.... [T]he very object of adopting the First Amendment ... was to put the freedoms protected there completely out of the area of any congressional control that may be attempted through the exercise of precisely those powers that are now being used to "balance" the Bill of Rights out of existence.... I fear that the creation of "tests" by which speech is left unprotected under certain circumstances is a standing invitation to abridge it.... [T]he Court's "absolute" statement that there are no "absolutes" under the First Amendment must be an exaggeration of its own views. [14]

In the Konigsberg decision, Justice Harlan wrote for the Court, and presented a justification for judicial balancing:

> [W]e reject the view that freedom of speech and association ... as protected by the First and Fourteenth Amendments, are "absolutes," not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment. Throughout its

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[14] Konigsberg v. State Bar of California, 366 U.S. 36, 60-61, 63, 68 (1961).

> history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection.... On the other hand, general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved.... [15]

Freedom of speech, therefore, can be seen from the view of "absolutism" or as a "balanced" right of the individual. The Supreme Court has consistently leaned toward freedom of speech as a "balanced" right in the majority opinions.

Professor Alexander Meiklejohn has developed a theory of freedom of speech that is designed to give a preferred status to freedom of speech and unequivocal protection when speech is related to self-government.[16] Meiklejohn would relegate speech not in this protective circle to the due process safeguards. It would appear this view might offer a middle ground between the "absolutists" and the "balancers" but it has not held a significant place in the opinions of the

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[15] Id. at 49-51.

[16] Alexander Meiklejohn, Free Speech and Its Relations to Self Government (New York: Harper, 1948).

Court. Could it be that the definition of self-government is as perplexing as the language of the First Amendment? The views of the absolutists speak forcefully for the rights of the individual in a confrontation with the interest of The State. Proponents of the "absolute" or "literal" interpretation of the First Amendment have often failed to define the bounds of their position or to account for such apparent exceptions to the absolutist views as the law of libel, the regulation of election campaigns, and pornographic literature for children. The views of the absolutists have often been dismissed, therefore, as impractical, illogical, or both. On the other hand, the "balancing" test has tended to reduce the First Amendment to a search for a middle ground that accommodates competing interests of the individual citizen and The State. The issues of the use of government power to encourage freedom of expression and actual participation by government or The State itself in the realm of expression have not been resolved by the Supreme Court.

Overbreadth Doctrine. The overbreadth doctrine as a standard for judicial review refers to an action by a legislative body that passes a statute, very broad in nature, that includes a wide variety of activities. For example, the statute or regulation may have been designed for a purpose and in the execution of the statute or regulation it is found that a wide variety of actions can be prohibited, including First Amendment guarantees.

The Supreme Court in Broadrick v. Oklahoma[17] noted that the overbreadth doctrine is of particular concern when speech is joined with action or conduct. The opinion of the Court stated:

> (The function of the overbreadth doctrine is) a limited one at the outset, (and) attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct--even if expressive--falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.... To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. [18]

Because of the importance of the free speech guarantee, even when The State does have the power to regulate actions of individuals and general areas of society, the regulations even when supported by worthy goals must not infringe on freedom of speech. An overbroad statute or regulation is one that is designed to prohibit or even to punish an individual who participates in an activity which is not Constitutionally protected, but the statute or regulation includes within its scope, activities which are protected by the First Amendment. The language or the implementation of the language of the statute may be "overbroad."

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[17] Broadrick v. Oklahoma, 413 U.S. 601 (1973).

[18] Id. at 615.

The Void-For-Vagueness Doctrine. Closely related to the overbreadth doctrine is the void-for-vagueness doctrine. The problem of vagueness in statutes regulating speech activities is based on the same rationale as the overbreadth doctrine and the Supreme Court often speaks of them together.[19]

The language of a statute must be clear in its beginning. Ascertainable standards must be clearly presented or the statute may be considered vague. As a result of the void-for-vagueness doctrine, the Supreme Court has struck down statutes which burden speech in terms that are very vague and which do not provide clear guidelines as to the nature of speech which can be punished.

The Least Restrictive Means Test. Even when the legislative purpose may be considered a legitimate one of substantial governmental interest, "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose."[20] The least restrictive means test is particularly important to the free speech area.

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[19]Dombrowski v. Pfister, 380 U.S. 479, 486 (1965); Keyishian v. Board of Regents, 385 U.S. 589, 609 (1967).

[20]Shelton v. Tucker, 364 U.S. 479, 488 (1960); Schneider v. State, 308 U.S. 147, 161, 165 (1939); American Communications Association v. Douds, 339 U.S. 382 (1950); Louisiana ex rel. Gremillion v. NAACP 366 U.S. 293 (1961); NAACP v. Alabama, 377 U.S. 288, 307-08 (1963); Talley v. California, 362 U.S. 60 (1960).

Shelton v. Tucker[21] is an important case illustrating the doctrine of least restrictive means. Each Arkansas teacher was required by statute to file an annual affidavit listing all organizations to which the teacher belonged or contributed in the last five years. Petitioner Shelton and others refused to file an affidavit and the teaching contract was not renewed. The trial showed that Petitioner Shelton was not a member of the Communist Party or any organization advocating the overthrow by force of the Government, but he was a member of the NAACP. The trial court found the information requested in the affidavit relevant. The Supreme Court agreed that the State of Arkansas had an interest in investigating the competence and fitness of its teachers[22] but the Arkansas statute went well beyond its legitimate purposes.[23] The information filed under the statute was kept confidential, allowing public exposure and risks of offending superiors by belonging to an unpopular group. Moreover the state disclosure requirement was "completely unlimited."[24] The teacher was required to list any associational tie--social, professional, religious, avocational--and financial support, even though many such relationships had

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[21] 364 U.S. 479 (1960).

[22] Id.

[23] Note: "Legitimate Purpose" is often used as a term by the courts to focus on the interest of The State.

[24] Id.

no possible bearing on the teacher's occupational fitness. The "unlimited and indiscriminate sweep of the statute" went "far beyond what might be justified in the exercise of the state's legitimate inquiry into the fitness and competence of its teachers"[25] and thus it was struck down.[26] The Supreme Court's decision upheld the view that the least restrictive means should be used by government when seeking to achieve an objective.

Clear and Present Danger. The First Amendment guarantee of freedom of speech has never been considered an absolute by the Supreme Court. Instead, the Court has maintained that in certain situations an individual's right to freely express views or beliefs must be subordinated to other interests of society.[27] Yet a willingness to balance First Amendment rights against other interests has not diminished the importance of the First Amendment, for the prevailing view is that the Constitution has placed the burden of reconciling the conflicting interests of the individual and society on the Court.[28] One of the standards the Supreme

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[25] Id. at 490.

[26] Another example of a recent case employing the least restrictive means test is Virginia State Board of Pharmacy v. Virginia Citizens Council, Inc., 425 U.S. 748 (1976).

[27] Whitney v. United States, 274 U.S. 357, 375-376 (1927).

[28] Emerson, op. cit., pp. 877-905.

Court first developed to justify abridgement of freedom of expression for the benefit of The State was the "clear and present danger" test.

There are three phases in the development of the "clear and present danger" doctrine. The test originated in a number of opinions and dissents written by Justice Holmes and Justice Brandeis dealing primarily with the Espionage and Sedition Acts of World War I. In the second phase, when the Cold War was at its height, a later generation of Supreme Court Justices and federal judges applied the "clear and present danger" doctrine in a manner restricting First Amendment rights more severely. This restrictive approach influenced the Court to develop a "balancing test" for protecting freedom of expression.[29] In the 1960's and the 1970's the Supreme Court developed opinions around the "clear and present danger" doctrine that were more protective of freedom of speech. The flexibility in the application of the "clear and present danger" standard and the interpretation applied by the Court indicates that a judicial standard does vary and change with time.

Prior Restraint. Prior restraint is a method whereby government or The State can prohibit an action before it occurs. In modern times, prior restraint has often taken

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[29]Ibid.

the form of court injunctions. Prior restraint refers to official actions of The State whereby expression may be denied on individual or group before such action is expressed. If speech is to be prohibited or if an individual is to be punished for speaking, then the individual is not permitted to speak even when the contents of speech are not known. Prior restraint, therefore, limits public debate and knowledge more severely than subsequent punishment.

A Summary Statement. The Supreme Court has used a number of judicial doctrines for issues relating to freedom of speech and these doctrines have included balance of interests, overbreadth, void-for-vagueness, least restrictive means, clear and present danger, and prior restraint.

The traditional judicial doctrine(s) used by the Supreme Court for freedom of expression embodies a theory of social control.[30] There must be a reconciliation of freedom of speech and/or freedom of expression with the interests of The State. The interests of The State have been identified[31] as the promotion of national unity or consensus, preservation of internal order, safeguarding external security, the direction of gradual orderly change, and the maintenance

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[30]Ibid., p. 884.

[31]Ibid., pp. 928-929.

of general efficiency in government operations. The interests of The State are not often explicitly stated. Nevertheless, these areas of The State's interest are implicit in much popular as well as legal thinking on the subject.[32] The interests of The State, as identified by Emerson, with regard to the decisions of the Supreme Court concerning freedom of speech continue to be the subject of scholarly interest and debate.

Political Theory and The State

For what purposes does The State exist? This question is a fundamental question of political theory. The nature and scope of The State's interest focus on those decisions that are to be made privately by individual citizens and those decisions which are to be made by The State. Theorists often agree that the purposes of The State may be to establish and maintain order, to promote individual welfare, and to promote the general welfare but they differ in their views on the functions or activities of The State to accomplish these purposes.

Of primary substantive concern to this study was the establishment of a context for the use of the term, The

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[32]Ibid., pp. 929-940.

State. This problem was much more than definitional as it involved acceptance of a theoretical context that would have a direct relationship to the analysis of data within the study. Alternative theoretical frameworks for viewing The State were considered:

1) a juristic view whereby The State represents the national legal order,

2) a duality view of The State and the law--one of the cornerstones of modern political science and jurisprudence whereby The State is presupposed as an underlying social reality. The State and the law are two different objects and,

3) a sociological view whereby The State is a social reality whereby individuals belonging to the same State form a unity and this unity is not constituted by the legal order and is an element which has nothing to do with the law.[33]

Under the juristic view The State can be seen as a legal phenomenon. The State is the community created by a national legal order. Positive law appears empirically in the form of national legal orders. There is no absolute law but only a system of legal norms. The nature of the limits for the empirical manifestations of positive law is the problem which The State as a legal phenomenon presents.

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[33]Hans Kelsen, General Theory of Law and State (New York: Russell and Russell, 1945).

Second, under the duality view of The State and the law it is not possible to comprehend the national legal order unless The State is presupposed as an underlying social reality. The relation between law and The State is the same as would be between law and the individual. Law, although created by The State is assumed to regulate the behavior of The State. The State as social reality falls under the category of society. The State and the law are two <u>different</u> objects. However, since there is no reason to assume that there exists two different normative orders, the order of The State and its legal order, we must acknowledge that what we call <u>The State is its legal order</u>.

Third, The State can be viewed as a sociological unity whereby The State would be a social reality existing independent of its legal order. The existence of such a possibility is remote in modern social systems.

The State was defined for this study as organized government and agencies of government exercising sovereign powers.

A primary end of The State is to insure freedom from invasion and to secure domestic tranquility and justice for the citizenry. The maintenance of The State is related in part to the success of The State in securing a degree of order and stability consistent with the liberties

of individuals and groups within the society.

The word 'State' in its present usage is comparatively modern, not more than three or four hundred years old. The word or its equivalent in other languages such as etat in French existed earlier, but suggested something much nearer to what we might now call 'status.'[34] While the term The State implies an institutional approach to the study of the political and social system, it is the institution in the form of the Supreme Court which establishes and maintains a relationship between The State and the individual that is manifested, in part, through the schools. This study was an attempt to look at the allocation of power by an institution. J. D. Mabbott in The State and The Citizen: An Introduction to Political Philosophy views The State as an association distinguished by territorial limits, inclusiveness within these limits, the power of its officers to exercise force and the fear of force as instruments of policy, and the possession by its officers of ultimate legal authority. The ends of The State, according to Mabbott, are security of life, settlement of disputes, maintenance of social conduct and provision of services The State deems to to be important such as health, education, and roads.[35]

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[34]G. C. Field, Political Theory (Bristol, England: Western Printing Services, 1965), p. 54.

[35]J. D. Mabbott, The State and The Citizen: An Introduction To Political Philosophy (London: Hutchinson University Library, 1948).

R. M. MacIver in The Modern State views The State as an association that acts through law as established by a government to maintain a social order. The main difference, according to MacIver, between The State and other associations is that The State has a specific function--to maintain the social order. The State acts through its agent the government, which speaks through judicial decisions and statutory provisions.[36]

To the average citizen "politics" and "government" are synonymous. Politics and government are what go on in Congress, the Supreme Court, the office of the President, state legislatures, and mayor's offices. Alfred de Grazia says that politics is what happens around the decision making centers of government.[37] Charles Hyneman is more specific and contends that most political scientists have assumed that "legal" government is the primary subject matter of their discipline.[38] Government is usually thought to be the legally based institutions of a society which

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[36]R. M. MacIver, The Modern State (London: Oxford University Press, 1926).

[37]Alfred de Grazia, Political Behavior (New York: Free Press, 1965).

[38]Charles Hyneman, The Study of Politics (Urbana: University of Illinois Press, 1956).

make legally binding decisions. Easton advances the idea that while The State has been an important concept that orients political sciences and much political research it is a most confusing term. He asks what is The State? and proceeds to answer the inquiry:

> Seldom have men disagreed so markedly about a term. The confusion and variety of meanings is so vast that it is almost unbelievable that over the last twenty-five hundred years in which the question has recurringly been discussed in one form or another, some kind of uniformity has not been achieved. [39]

The concept of The State is inextricably bound in political theory and political science research to the allocation of power, or as Easton emphasizes, "how are values authoritatively allocated for a society?" [40]

Political science has often been characterized as having many divisions which are held together by their mutual concern with The State.[41] The term, The State, may bring to mind economic regulation, exploitation of one class by another, all the people working together for the common good, the government, or combinations of power elites.

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[39]David Easton, The Political System: An Inquiry Into The State of Political Science (New York: Alfred A. Knopf, 1967), pp. 107-08.

[40]Ibid., p. 106.

[41]Ibid., p. 107.

In political theory one of the most important questions is probably "who holds the power and how is it used." Easton contends that a "minimum condition for the existence of any society is the establishment of some mechanisms ... for arriving at authoritative social decisions about how goods, both spiritual and material are to be distributed ...."[42] Easton calls this authoritative allocation of values and his premise is that there is a discernible process whereby values are authoritatively allocated for the whole society.[43]

Whether we use governing body, supreme authority, or government, we generally mean the same thing--the legal authority to control the actions of citizens. Legal and political theorists have long developed the habit of referring to the governing body of a nation as The State. It is territorial with specific boundaries and it exercises authority over its citizens. The goal of social control is acknowledged as a concern of a majority of political scientists, as they study the nature of The State.

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[42]Ibid., 135.

[43]Ibid., 141.

> The modern (S)tate, then represents an attempt to maintain an effective integrating order in a relatively large, diversified, and dynamic community through the establishment of centralized control. Such an order cannot be created and maintained by sheer force alone. [44]

Social control to what end is usually the domain of the critics and this literature is found in education as the critics ask: Why does The State control education? What is The State's interest in education? Does The State identify its interests in the education of citizen? Does The State define the limits of its power? Do educators, students, and parents of students understand the nature and scope of The State's control of education?

The Interest of The State In Education: Views of Contemporary Critics

The maintenance and operation of a formal system of education has come to be one of the major public enterprises in the United States. Formal education in the United States operates within a well-defined legal structure and specific functions are the province of the federal government, the state government, and local governmental units.[45] The

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[44]Dell Gillette Hitchner and William Henry Harbold, Modern Government (3d ed.; New York: Harper, 1972), p. 40.

[45]Leroy Peterson, Richard A. Rossmiller, and Marlin M. Volz, The Law and Public School Operation (New York: Harper, 1978), p. 2.

nature and scope of The State's interest in formal education is a continuing matter of interest and concern as Tyll van Geel points out in his analysis of control of the curriculum of the school:

> Who does and who should control the curriculum of the public and private schools are ancient issues that still have the capacity for stirring angry debate. That this should be so is not surprising, as determining who controls the curriculum also determines what shall be taught in the schools, and the issue of what shall be taught has roots in such fundamental controversies as what kind of society and political system we are to live within. When we discuss who controls the curriculum, we discuss who has the authority to control one of the important instruments for shaping the future of the society and nation. [46]

There has been continuing debate on who should control the education of the young since the time of Plato, and we have yet to reach agreement.[47]

The American public school was seen in the nineteenth century as the best vehicle for ensuring all citizens social mobility, equality of opportunity in the economic system, and the opportunity to attain the necessary knowledge and skills for participation in the political system. The unity of the democratic experiment was thought somehow to be rooted in the common experiences of schooling. The State emerged as the guardian of the educational enterprise

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[46]Tyll van Geel, Authority To Control The School Program (Lexington, Mass.: D.C. Heath, 1976), p. ix.

[47]Peterson, op. cit., p. 7.

and continued into the twentieth century to control the institution of schooling primarily through a legal framework such as constitutions, statutory provisions, judicial decisions, funding, and the development of a bureaucratic structure for the administration of the schools. While critics of the schools have always been present to voice their concerns, the period since World War II has seen the most vocal of the critics receive widespread acclaim. For one group of critics, the reform of educational practices and methods has often taken the form of "innovations"--team teaching, open classrooms, instructional television, nongraded instruction, computer-assisted instruction, the new math, the new science, or the new social studies, compensatory education, interdisciplinary units, community-based experience, and individualized instruction. These "innovations" were undertaken in most schools in the United States during the 1950's and 1960's. They were not based on new ideas about the role of education in society, the nature of the child, the place of culture in a democratic society, the control of educational policy, governance of the schools, or The State's interest in education. These "innovations" focused on practical methods of achieving the traditional end of schooling--the mastery of basic skills and subject matter. Even as many of these innovations relieved the rigidity of classrooms, a new and different wave of critics was beginning to emerge. During the 1950's and 1960's

educators had focused on instructional innovations, more flexibility for the curriculum, and enrichment opportunities for students. The majority of educators had not perceived the relevance of the change in social forces in the United States and the emerging group of critics that would call into question in the 1970's the entire enterprise of formal education. During the 1950's and 1960's, criticism of the schools had focused on "what to teach," "how to teach" and "when to teach." The question of The State's control of schools, or The State's interest in the education of the individual were not topics of general concern for educators.

The call for reform in American education has taken many forms. Critics such as Paul Goodman, Kenneth Clark, Edgar Friedenberg and Marshall McLuhan[48] are not critics of the schools in the usual sense. They are less interested in teaching and learning as pedagogical concerns and more interested in individual choice, dignity, autonomy, freedom, and the development of human potential. The radical critics all start with some kind of radical criticism of America as a sick society. They come at it from many angles; its competitive ethos, its cultural vulgarity, its neglect

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[48]Note: Paul Goodman's works include Growing Up Absurd (1960) and Compulsory Mis-Education (1964). Kenneth Clark wrote Dark Ghetto (1965) and Edgar Friedenberg wrote Coming of Age in America (1963). Marshall McLuhan wrote The Medium Is The Massage (1969).

or suppression of minority groups, its inherent racism and imperialism, its failures in compassion, let alone enterprise, in regard to the wretched within its own boundaries and throughout the rest of the world. Their critique of the schools derives from this questioning of society, for they see the schools as mere agents of society.[49] Many of the critics from the 1960's sought a dismantlement of the educational enterprise along radically different lines.

Beatrice and Ronald Gross wrote in 1969:

> We have bungled badly in education. Not merely in the ways noted by most school critics: too little money for education, outdated curricula, poorly trained teachers. But in more fundamental ways. It isn't just that our schools fail to achieve their stated purposes, that they are not the exalted places their proponents claim. Rather, many are not even decent places for our children to be. They damage, they thwart, they stifle children's natural capacity to learn and grow healthily. [50]

Studies such as Herbert Marcuse's One Dimensional Man: Studies in the Ideology of Advanced Industrial Society (1964)[51] stated that The State moves toward a totalitarian

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[49]Beatrice Gross and Ronald Gross, eds., Radical School Reform (New York: Simon and Schuster, 1969), pp. 16-17.

[50]Ibid., p. 13.

[51]Herbert Marcuse, One Dimensional Man: Studies In The Ideology of Advanced Industrial Society (Boston: Beacon, 1964).

organization in an advanced industrialized society and the means of production and distribution comes under the totalitarian frame. The technical apparatus he claims determines not only the socially necessary occupations, skills, attitudes, and values but also individual needs and aspirations. It thus eliminates the distinctions between private and public existence, between individual and social needs, and between what Marcuse calls "false needs" and "true needs." Critics such as Marcuse who offered an analysis of the social structure with regard to the political and economic systems established a framework for many critics who would emerge during the 1970's as opponents of The State's control of the social order, including the schools.

The critics of the 1960's, James Herndon, Jonathan Kozol, John Holt, Paul Goodman, George Leonard, Marshall McLuhan, Kenneth Clark, Edgar Friedenberg, Neil Postman, Sylvia Aston-Warner, Mario I. Fantini, Gerald Weinstein, Charles Weingartner, Herbert Kohl, and George Dennison, did not analyze specifically the governance of schools as operated and controlled by The State. A theoretical framework was implicit, however, in their writings that saw social control as a manipulative force of The State. These critics of the 1960's analyzed the operation of the schools as part of the social system and in terms related to control by The State.

Charles E. Silberman published Crisis in the Classroom:

The Remaking of American Education in 1970 as a result of a three-and-a-half year study commissioned by the Carnegie Corporation. As an observer of American education, Silberman joined forces with the critics and prepared a review of education that was censorious. In the Foreword of his work, while not specifically addressing the concept of The State, Silberman did write of the impact of the American political system and its relationship to the "crisis" in education. He stated:

> The crisis in the classroom--the public school classroom, the national "classroom" created by the mass media and by the operation of the American political system--is both a reflection of and a contributor to the larger, crisis of American society.[52]

The observations which would follow presented a long parade of "crises in the classroom" that would establish Silberman as a major critic of the American educational system.

> It is not possible to spend any prolonged period visiting public school classrooms without being appalled by the mutilation visible everywhere--mutilation of spontaneity, of joy in learning, of pleasure in creating, of sense of self. The public schools ... are the kind of institution one cannot really dislike until one gets to know them well. Because adults take the schools so much for granted, they fail to appreciate what grim, joyless places most American schools are,

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[52]Charles E. Silberman, Crisis in the Classroom: The Remaking of American Education (New York: Random House, 1970), p. vii.

> how oppressive and petty are the rules by which they are governed, how intellectually sterile and esthetically barren the atmosphere, what an appalling lack of civility obtains on the part of teachers and principals, what contempt they unconsciously display for children as children. [53]

In 1970, Ivan Illich published Deschooling Society in which he advocated abolition of schools themselves and total decentralization of educational resources. Illich's criticism of the educational system stems from his bias concerning The State and his theory that society has become over-institutionalized and that schools are at the center of the "over-institutionalization." What schools do, according to Illich, is as follows:

> Many students ... intuitively know what the schools do for them. They school them to confuse process with substance. Once these become blurred, a new logic is assumed: the more treatment there is, the better are the results; or escalation leads to success. The pupil is thereby 'schooled' to confuse teaching with learning, grade advancement with education, a diploma with competence, and fluency with the ability to say something new. His imagination is 'schooled' to accept service in place of value. Medical treatment is mistaken for health care, social work for the improvement of community life, police protection for safety, military pose for national security, the rat race for productive work. Health, learning, dignity, independence, and creative endeavor are defined as little more

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[53] Ibid., p. 10.

> than the performance of the institutions which claim to serve these ends, and their improvement is made to depend on allocating more resources to the management of hospitals, schools, and other agencies in question.[54]

Illich is opposed to schooling which is controlled by The State. Illich is concerned with the "hidden curriculum" of the schools which he believes serves to preserve privilege and power for the schooled. This hidden curriculum teaches all children that economically valuable knowledge is the result of professional teaching and that social entitlements depend on the rank achieved in a bureaucratic process. The hidden curriculum transforms the explicit curriculum into a commodity and makes its acquisition the securest form of wealth, as school is universally accepted as the avenue to greater power, to greater success, and to greater influence.

In 1971 Michael B. Katz wrote Class, Bureaucracy and Schools and became one of the most important scholars of the 1970's to analyze the relationship of ideology to education. Discussing educational history he writes:

> My thesis is that by about 1880 American education had acquired its fundamental structural characteristics, and that they have not altered since.... The model that emerged victorious was the one I call incipient bureaucracy.... Bureaucracy came about because men confronted particular kinds of social problems with particular social purposes. These purposes reflected class attitudes and class

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[54]Ivan Illich, Deschooling Society (New York: Harper, 1970), p. 1.

> interests. Modern bureaucracy is a bourgeois invention; it represents a crystallization of bourgeois social attitudes. To its founders ... the purposes of the school system and its structure were clearly interrelated. They understood that part of the message they wished to have transmitted, the attitudes they wished to be formed, would inhere in the structural arrangements themselves rather than in explicit didactic procedures. What they did not admit, although it is hard to see how they could have failed to realize it, was that the bureaucratic structure, apparently so equitable and favorable to the poor, would in fact give differential advantage to the affluent and their children, thereby reinforcing rather than altering existing patterns of social structure. Through bureaucracy, the myth of equal opportunity has been fostered, while the amount of social mobility has been strictly regulated.[55]

In 1972 Greer Colin in The Great School Legend: A Revisionist Interpretation of American Public Education[56] challenged the standard histories of ethnic groups in American public schools. His main argument was that schools were designed to fail the poor. Carl Beretier's position in 1973 in Must We Educate? is that it would be very desirable for all citizens, including the critics of State control of formal education, to be fully aware of the way in which The State has defined its own role and what rationale, if any, had been given for The State's interest in education and the resulting course of action. Beretier wrote:

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[55]Michael B. Katz, Class, Bureaucracy and Schools (expanded ed.; New York: Praeger, 1971), pp. xix-xxi.

[56]Greer Collin, The Great School Legend: A Revisionist Interpretation of American Public Education (New York: Basic Books, 1972).

> ... the question is whether The State has a duty, and consequently a right, to infringe upon the liberty of its citizens in order to insure that no children grow up in ignorance. The right of governments to intervene in education seems to be taken for granted everywhere, as if it were as natural a function of a government as maintaining roads. But a little examination will show that there is something fishy about the right of The State to educate. [57]

Beretier believed that there were alternatives to education which was controlled by The State and that such alternatives could preserve individual liberties and prepare individuals to function competently in society. His primary focus was an alternative educational programs for elementary and secondary schools. John Holt in his book Instead of Education: Ways To Help People Do Things Better, does not seek to improve education but to do away with it. Education, in the view of Holt, is supported by compulsory schooling and competitive frameworks and is one of the most authoritarian and dangerous of man's social inventions. Accordingly, Hold characterizes education as the "deepest foundation of the modern and worldwide slave state, in which most people feel themselves to be nothing but producers, consumers, spectators, and "fans," driven more and more, in all parts of their lives, by greed, envy, and fear."[58] John Holt's

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[57]Carl Beretier, Must We Educate? (Englewood Cliffs, N.J.: Prentice-Hall, 1973), p. 39.

[58]John Holt, Instead of Education: Ways To Help People Do Things Better (New York: E. P. Dutton & Co., 1976), p. 4.

previous works which, included How Children Learn, How Children Fail, What Do I Do On Monday?, Freedom and Beyond, and Escape From Childhood, all challenge the purpose and the programs of public education.

In 1976 Samuel Bowles and Herbert Gintis published Schooling in Capitalist America: Educational Reform And The Contradictions of Economic Life which was an analysis of the political economy of schooling. They attempted to show that education had contributed in the past and continued in the present to contribute to the stability of a capitalist economy. The Bowles and Gintis study of America education attempted to show the ways in which education reproduces both the capitalist economy and class relations. The authors' main argument was that socio-economic reproduction occurs and the organization of the schools, established and regulated by The State, reflects the organization of the economic system.

> ... analysis of the repressiveness, inequality, and contradictory objectives of contemporary education in America is not only a critique of schools and educators, but also of the social order of which they are a part. [59]

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[59] Samuel Bowles and Herbert Gintis. Schooling In Capitalist America: Educational Reform and the Contradictions of Economic Life (New York: Basic Books, 1976), p. vii.

Bowles and Gintis propose socialist democracy and call for the elimination of class rule and material dependency through the extension of democracy to the governance of economic affairs. Only in such a revolutionary framework, according to the authors, can the schools foster social equality, promote the full development of youth, and integrate new generations into the social order.[60]

In 1978 with the publication of Education By Choice: The Case For Family Control by John E. Coons and Stephen D. Sugarman, the control of education by The State was being severely questioned. In the Foreword written by James S. Coleman, The State's authority is challenged and educational choice is championed:

> For a number of years, the possibility of an alternative to the present system of public education--an alternative in which (T)he (S)tate is no longer the sole provider of publicly supported education, and in which children are no longer assigned to particular schools--has been discussed and debated. The plans for such an alternative have been referred to by a number of terms: vouchers, entitlements, education stamps. The plans, in all their variations, involve giving parents and children a choice of the school the child will attend, with drawing that authority from the school officials who, acting as agents of (T)he (S)tate exercise it now. In most of the variations, this choice may extend beyond the public school, to private schools as well. The premise underlying all these

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[60]Ibid., p. ix.

> plans is that better education would result if parents and children had a greater opportunity for educational choice than is now available to them.
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> The poplarization of opinion about such plans reflects a division on very deeply held values, involving beliefs about the proper division of authority between (T)he (S)tate and the family, beliefs about the dangers to social cohesion of deviant doctrines, beliefs about the relative abilities of professionals and their clients to decide what is best, and beliefs in the importance of maintaining the existing institutional order. [61]

By 1980, those critics operating from a Marxist framework, as well as those within a libertarian ideology, joined with individuals and groups classified as liberals, conservatives, egalitarians, and elitists in criticizing The State's control and regulation of the schools. In a unique attempt to look at The State as political, social, and economic entity, Miriam E. David of the University of Bristol in England published The State, The Family and Education providing a provocative study of the relationship of The State to the family. Using England as the case study, she attempts to show how The State through its educational policies regulates family relationships with schools and within the schools. She writes from a feminist viewpoint and argues that to fully understand social relationships

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[61] James S. Coleman, Foreword in Education By Choice: The Case For Family Control by John E. Coons and Stephen D. Sugarman (Berkeley, California: University of California Press, 1978), pp. xi-xiv.

in contemporary capitalism, it is essential to look at The State's use of both the family and the schools. Her conclusion is that the family and the schools are used by The State to reproduce the social and sexual division of labor. This socialist-feminist perspective in an historical analysis of educational policies in England is a study both in the politics of education and the sociology of education.[62]

Joel Spring, author of The Sorting Machine, American Education, Education and the Rise of the Corporate State and A Primer of Libertarian Education believes that the major role of the school in modern society is to serve the needs of the corporate State and therefore the system of production and distribution. The schools, as a dominant part of the social order, have an important role to play, according to Spring. In his work, Educating The Worker-Citizen: The Social, Economic, and Political Foundations of Education, Spring stated:

> The role of education as it relates to political control and the modern (S)tate is ambiguous and often contradictory. On one hand systems of schooling provide the knowledge and skills that will give the individual the means to control the political system. On the other hand, the political system uses education to control the individual. The degree to which either role is emphasized in an educational system varies with the political system.[63]

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[62]Miriam E. David, The State, The Family and Education (London: Routledge and Kegan Paul, 1980).

[63]Joel Spring, Educating The Worker-Citizen: The Social, Economic, and Political Foundations of Education (New York: Longman, 1980), p. 1.

Spring's analysis includes the political goals for schooling which he identifies as the development of patriotism, nationalism,and good citizenship. These political goals, he argues, have become secondary in importance to the economic goals of schooling. Spring's analysis focuses on the ideological nature of schooling and advances the idea of separating the school from control by The State:

> But more important is the role of the school in controlling the ideological content of society. This, after all, was the major purpose of schools when public systems of education were expanded in the nineteenth century. The importance of this function of schooling has not declined in the twentieth century but has become hidden in an ideology of equality of opportunity that ... supports a particular form of political control. Both control and ideology intersect in the modern school. The political structure of schooling determines its political content, and if the school does influence the ideology of its students, then the political structure of schooling influences the political ideology of society.
>
> If the above is true, then the next most important step in advancing the liberal revolutions of the past is to separate the control of ideology from the political structure. This means separating the school from government and allowing for complete freedom of expression and conscience. It may be that only in this manner will society be able to advance its thinking and solve what seem to be unsolvable economic and social problems in the modern world. Government control of schooling not only means control of ideology but also a stifling of the development of new political and social ideas. Intellectual growth depends on freedom of thought.

> The discussion of the economics of education demonstrates the feasibility of separating the school from government. In fact, it may be to the advantage of the poor and the middle class to pay directly for education rather than indirectly through an expensive system of taxation. If people can choose their own food, they can certainly choose their own education. The next most important step society can take in the interest of social improvement and freedom is to separate school and government by eliminating public systems of education. [64]

Spring's argument is that the primary purpose of the school is social control for a corporate State and for an economy which has as its goal the efficient production and disciplined consumption of goods and services. Spring's thesis strikes a blow at the foundation of the democratic legacy and the commitment it claims on behalf of social justice. If the citizen is a pawn in the hands of The State and corporate enterprise, as Spring envisions, then what of the democratic legacy? The critics of contemporary education agree that the education of the individual as controlled by The State is in serious trouble, but they fail to analyze what The State has indicated concerning its own interests. If The State does have an interest in the education of the individual, what is that interest and how and where is it defined?

The 1985 Committee of the National Conference of Professors of Educational Administration in 1971 issued a

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[64]Ibid. p. 203.

publication entitled Educational Futurism 1985 whereby members of the Committee leveled a strong attack on traditional education as controlled by The State:

> The character of education organization has been shaped by traditional understandings of the relationship between the individual and (S)tate. In brief, schools and school administrators have inherited concepts of education organizations designed to perpetuate the ideology of an ominiscient (S)tate providing for docile and mindless students. It is obvious that education has been the province of the (S)tate for at least a century, and one is compelled (or condemned) to be educated in our society. [65]

The criticism of the Committee members in the section of the report entitled "Organization for Education in 1985" was directed at school administrators who had "adopted the view that the individual and education are functionaries of the (S)tate" and called for an examination of the failings which were inherent in that view.[66] The nature and scope of legitimate government interest has been defined in limited measure. David L. Kirp and Mark G. Yudof have recognized the important link between educational governance and the structure of the law. Commenting on legitimate governmental interest and the relationship of educational policy to law, they have written:

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[65] Educational Futurism 1985 (Berkeley, California: McCutchan Publishing Corporation, 1971), p. 79.

[66] Ibid.

> Less generally understood are such matters as how this pattern (of American schooling) came to be; its implications for children, educators, and society; the nature and scope of legitimate governmental interest; and most significantly for our purposes, the constitutional and statutory bases of the structure. Consideration of such questions is essential to intelligent comprehension of the relationship between educational policy and law. [67]

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[67] David L. Kirp and Mark G. Yudof, Educational Policy and the Law: Cases and Materials (Berkeley, California: McCutchan Publishing Corporation, 1974), p. 1.

Chapter 3

THE PROCESS OF RESEARCH: METHODOLOGY AND DESIGN OF THE STUDY

Research is a process for determining a solution to a problem through the orderly and systematic collection, analysis, and interpretation of data. It is oriented toward the discovery of relationships existing between and among phenomena and is an important tool for advancing knowledge, for enabling individuals to deal effectively with the environment, to accomplish specific goals, and to resolve conflicts. Educational research, therefore, may be considered as the systematic and scholarly application of structured inquiry into educational problems and/or issues and may reveal the nature of relationships existing between education as an institution and other observable phenomena within the social system.

The primary goals of science are to understand and to explain. The process of seeking ways to understand and to explain the human condition and the nature of the universe is a dynamic process wherein there is a continuous revision of explanations. The scientific approach generates explanations which are tentative but which serve as guideposts for the correction of misinterpretations and the formulations of new theories and new explanations. Order

is assumed in the universe and the scientific approach seeks to uncover that order. The scientific method is a structured approach to asking questions and seeking answers about "what was," and "what is," and "what might be." In educational research, the scientific approach rests on certain procedures. Charles D. Hopkins in Understanding Educational Research: An Inquiry Approach[1] delineates the process of educational research as structured inquiry.

In a form of inquiry which focuses on the nature of the relationship between the individual and the social system or the relationship between education as an institution and other observable phenomena in the social system, the researcher confronts procedural and/or methodological issues and is directed by paradigms for methods of inquiry which may be generally accepted by a community of scholars. However, the research effort that focuses on education as an institution in the social system, the individual and the social system, the behavior of individuals, and the regulation or control of the behavior of individuals, does not operate within a set of paradigms that have been generally agreed upon. In fact, in some cases, the paradigms associated with such substantive inquiry as that related to the individual within the social system have not even been

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[1]Charles D. Hopkins, Understanding Educational Research: An Inquiry Approach (Columbus, Ohio: Charles E. Merrill Publishing Company, 1980), p. 14.

explored by researchers. Commenting on educational research, the scientific approach, and the nature of substantive inquiry, Hopkins states:

> Using the scientific approach to study educational problems is not necessarily evidence that education is a true science nor that the teaching/learning process is a science. However, the study of educational problems can be approached scientifically. Researchers of educational problems are directed by clearly accepted paradigms for methods of inquiry into questions in education, even though the human sciences lack paradigms for the substance of their inquiry. The accepted methods of inquiry lend coherence to researchers' efforts. Paradigms on the substance of inquiry in human sciences will come only when our ability to explain and predict behavior has increased greatly. The relative immaturity of the human sciences compared to the natural sciences often leads the educational researcher into areas where theory about education is, at best, confusing, sometimes conflicting, and occasionally totally lacking.[2]

Substantive inquiry as part of the human sciences or social sciences may very well be the most challenging aspect of the research effort, even though it may be illusive.[3] Richard J. Bernstein acknowledges that many critics believe that objective scientific knowledge is in fact a disguised form of ideology that supports the status quo/ and that the most striking characteristic of the

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[2]Ibid., 14.

[3]Note: Thomas S. Kuhn's The Structure of Scientific Revolutions presents a general model for understanding scientific progress and the social order. His work focuses on the nature of substantive inquiry as procedure or process as content. "Paradigms," "normal science," "anomaly," "crisis," and "paradigm shifts," according to Kuhn, offer an alternative way to view changes in the social sciences.

social sciences has not been their ability to illuminate existing social and political reality, but their inability to provide any critical perspective on what was happening; that the thinking exhibited in these disciplines has given a false legitimacy to the social technical control and manipulation that touch all aspects of human life. Bernstein's view is that an increased and systematic understanding of how society and politics work might lead to that point in time where society can ameliorate social inequities and injustices and solve the problems of society. It is in this vein that Bernstein encourages the researcher to:

1) ask primary questions about the nature of human beings,

2) determine new measures of knowledge about society and politics,

3) inquire as to how this knowledge affects our lives, and

4) seek to understand what is and what ought to be the relation of theory and practice.[4]

Methodology of The Study

The methodology of this research study was historical. The study attempted to reconstruct judicial proceedings of the past systematically and objectively. Educational research using the historical approach seeks to obtain data

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[4]Richard J. Bernstein, The Restructuring of Social and Political Theory (New York: Harcourt Brace Jovanovich, 1976). pp. xi-xiii.

with historical authenticity, to derive conclusions regarding certain questions with relevance to education, and to make interpretations based on the conclusions. When the researcher initiates a series of questions about the past, historical research methodology is appropriate for seeking out answers. Historical research, therefore, as a structured approach to inquiry, is an orderly and systematic process whereby data can be collected, categorized, and analyzed. The historical method of research uses procedures to validate the data under study, to establish relationships, and, if possible, to explore the direction and potential impact of cause and effect. Carter V. Good writes:

> Viewed as research, history may be defined as an integrated narrative or description of past events or facts, written in the spirit of critical inquiry.... [5]

Historical research, not being in the mainstream of empirical data collection, may be termed analytic research which includes linguistic, historical, and philosophical analysis. Historical research may focus on a deductive system of analysis that can be used to derive relationships not necessarily of an empirical nature. Historical research, using the methods and principles of structured inquiry, utilizes the procedures and methods of the scientific method and is

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[5]Carter V. Good, Essentials of Educational Research (2d ed.; New York: Appleton-Century Crofts, 1966), p. 148.

dependent on available data sources and acceptable methodological principles and practices. Historical criticism, as a result of research allows the researcher to arrive at conclusions and develop interpretations. Historical research, using methods and procedures identified with scientific inquiry and a structured process, will most often follow certain procedures such as identifying a problem, developing research questions and/or a research hypothesis, collecting data, categorizing data, and developing conclusions.

Hopkins believes that the goal of historical research in education is to clarify present-day practices and problems by providing a historical knowledge base. With regard to methodology Hopkins writes:

> The key to valid historical research in education is the use of acceptable procedures in deducing the answers to educational questions from vast amounts of potential data for some questions and very limited information about other questions.[6]

The selection of educational questions which focus on present-day practices and contemporary concerns encourages the researcher to develop a perspective on the present. A significant purpose of historical research is to provide a perspective on the present, with attention being directed

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[6]Hopkins, op. cit., p. 250.

toward the factors that shape perspective. Concerning how present perspective also shapes inquiry into the past and frames the researcher's view, Michael B. Katz writes:

> No historian can entirely divorce the categories with which he approaches the contemporary world from those with which he studies the past. Our concerns shape the questions that we ask and, as a consequence, determine what we select from the virtually unlimited supply of "fact." That state of affairs remains submerged and implicit in most historical work.[7]

Historical research can provide insight into the nature of man, a sense of human values, and a greater understanding of culture and of the role the social sciences are to play in society. Historical research may include subcategories of legal research and documentary research[8] and encompasses a wide range of research techniques, including attention to epistemology, logic, and theory. Good states:

> ... historical composition is the work of synthesis that follows the evaluation and criticism of sources, including the mechanical problem of documentation, the logical problem of relative importance and arrangement of topics, and the theoretical or philosophical problem of interpretation.[9]

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[7]Michael B. Katz, Class, Bureaucracy and Schools (New York: Praeger, 1971), p. ix.

[8]George J. Mouly, Educational Research: The Art and Science of Investigation (Boston: Allyn and Bacon, Inc., 1978), pp. 159-60.

[9]Carter V. Good, Introduction to Educational Research: Methodology of Design In The Behavioral and Social Sciences (2d ed.; New York: Appleton Century-Crofts, 1963), p. 220.

Within the framework of structured inquiry, the methodology and design of this study focused primarily on historical research through an analysis of selected Supreme Court decisions. Since the decisions of the Supreme Court represent historical data of an objective nature as well as a subjective nature, the study included components of a historical case study and a policy study and touched upon the concerns of history of education and philosophy of the law. This study sought a particular order--a linguistic strain, an ideological basis, and a theoretical framework that would give depth and breadth as well as the outlines for the position of The State with regard to the education of the individual as identified by the language of the Court's decisions. It could be said that various cameras were focused on the subject; each aperture slightly different so that the order that was assumed to be inherent would emerge in a discernible pattern.

The problem selected for this study might be properly termed a historical case study in that the search for data was not for a random sample from some specified population, but for a case that was a relatively pure example (cases of the U.S. Supreme Court dealing with elementary and secondary education with regard to freedom of speech) of the phenomenon (The State's interest) under investigation.

The research problem of this study is directly related, in part, to the body of knowledge known as history

of education. Writers of recent works on the history of education have repudiated those traditions of scholarship which viewed the history of education as the progressive and triumphant evolution of the public school in a democratic society.[10] Writers of recent works on the history of education have indicated a determination to prove underlying motives and interests, to relate ideas to social and institutional structures, to consider how theory is transformed into practice, and to see education in relationship to economic and political structures. The nature of the current debate in educational scholarship will find critics at various points along the ideological fence, with regard to the interest of The State in the education of the individual.

The type of research conducted in this study furthermore bears a direct relationship to the philosophy of law or as it is often termed, legal philosophy. In legal philosophy, philosophical problems are raised by the existence and practice of the law. In this research study,

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[10]Note: A significant body of scholarship exists which has viewed the history of the development of the elementary and secondary school as the embodiment of the "American dream of democracy." The fulfillment of the promise of democracy, is seen in this literature as the road to personal happiness, individual success, social mobility, and the opportunity to pursue a variety of economic choices. The schools are seen, therefore, as involved in a partnership with The State in the struggle toward social justice, economic well-being, and political efficacy.

the issue concerns the stated goal(s) and purpose(s) for intervention by The State in matters relating to the body politic and the nature and extent of a rationale or a justification which is used by the Supreme Court in decisions which relate to the education of the citizenry. Legal philosophy has no central core of philosophical problems distinct to itself but is dependent upon the philosophy of ethics, social theory, and political theory.[11] Legal philosophy has as its center legal reasoning. It is legal reasoning and a deductive system that can be used to derive relationships not necessarily of an empirical nature concerning selected decisions of the Supreme Court toward which this historical case study aims. Such an endeavor is the proper concern of jurisprudence and of legal philosophy.

Collection of Data

The purpose of the data collection was to identify cases in which the Supreme Court had issued an opinion relating to the Constitutional guarantee of freedom of speech within elementary and secondary schools. Educational issues are not matters which, by their own virtue warrant an opportunity to be heard by the Supreme Court. Cases are heard

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[11] R. M. Dworkin, ed., The Philosophy of Law (Oxford: Oxford University Press, 1977).

by the Supreme Court only if they involve a Constitutional issue. Freedom of speech was selected as the Constitutional issue for this study because of its importance to the interest of The State in the maintenance of the social system. Therefore, a single Constitutional issue within a single institutional setting provided a method for selecting an inclusive number of cases to be analyzed for the study. The process of identification of the cases involved a review of bibliographies and indices which reference freedom of speech as well as education. A central source for the combined reference for freedom of speech within elementary and secondary schools does not exist in the legal indices. Therefore, the researcher consulted the following sources so as to cross reference both topics simultaneously:

United States Reports

Digest of United States Supreme Court Reports, Lawyers' Edition

United States Supreme Court Reports, Lawyers' Edition - Desk Book

United States Supreme Court Reports, Lawyers' Edition

American Jurisprudence 2d

Corpus Juris Secundum

Commerce Clearing House, United States Supreme Court Bulletin

United States Supreme Court Digest Annotated

United States Supreme Court Reports, Lawyers' Edition, Index To Annotations

American Law Reports Annotated

American Law Reports Annotated, Second Series

American Law Reports Annotated, Third Series

American Law Reports Annotated, Federal

Federal Digest

Modern Federal Practice Digest

Federal Practice Digest, 2nd

The Lawyers Reports Annotated, First Series

The Lawyers Reports Annotated, New Series

The Lawyers Reports Annotated, Dated Series

United States Law Week

Supreme Court Reporter

Landmark Briefs and Arguments of The Supreme Court of the United States: Constitutional Law

The methodology employed was to read, analyze, and categorize the Supreme Court decisions which were referenced as entries for the following nine topics in each legal index:

Constitutional Law

Bill of Rights

Freedom of Speech

First Amendment

Education

Schools

School Districts

Students

Teachers

Since each legal index utilizes a different system of referencing cases it was necessary to analyze the entries under each of the nine research headings in order to develop a reliable method for identifying and selecting the specific Supreme Court decisions which dealt with the Constitutional issue of freedom of speech within the elementary and secondary school. The six cases which were used in this study were selected through this methodological framework.[12] The cases which were selected were:

West Virginia v. Barnette (1943)

Pickering v. Board of Education (1968)

Tinker v. Des Moines Community School District (1969)

City of Madison v. Wisconsin Employment Relations Commission (1976)

Mt. Healthy v. Doyle (1977)

Givhan v. Western Line Consolidated School District (1979)

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[12]Note: While a large number of decisions of the Supreme Court reference freedom of speech at some place in the body of the opinion, usually in terms of introducing material or in the review of previous decisions of the Court, this limited textual reference within the body of the decision did not permit the inclusion of such a case in this study. The decisions which were selected for this study were decisions whereby the Supreme Court decided the case on a judicial standard which related the issue of freedom of speech to the elementary and secondary school setting. All six cases involved either students or teachers in an elementary or secondary school who believed that they had been denied the Constitutional guarantee of freedom of speech.

LEXIS Computer Analysis

The LEXIS computer analysis which was conducted as part of this research study was able to review all Supreme Court decisions since 1925. The full text of all Supreme Court cases in the computer system, LEXIS, has been converted into computer-readable form. When the converted decisions are placed into the computer's memory, the computer creates a concordance of cases. This concordance is an alphabetical listing setting forth the location of words in a particular decision. The LEXIS concordance, therefore, contains all the words in a file of Supreme Court decisions. The majority opinion is included as well as minority opinions. The entry for each word in the concordance is followed by a set of references, indicating where each occurrence of each word is found in the decision.[13]

LEXIS operates on the assumption that legal research is based on ideas expressed by words. Supreme Court decisions express ideas through one word or a combination of words. If an idea can be expressed with one word, a LEXIS search of Supreme Court decisions can consist of the one word. However, as in the case of this research study which focused on freedom of speech in elementary and secondary

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[13] LEXIS Handbook (New York: Mead Data Central, 1980), p. 6.

schools, more than one word was required to express the idea under consideration. Therefore, the LEXIS search for this research study was designed to review combinations of words.[14] The phrase "freedom of speech" is the relationship of two ideas "freedom" and "speech" held together in a specific relationship. The relationship of freedom of speech to education in elementary and secondary schools was the specific focus on the LEXIS computer analysis for this study. The LEXIS computer analysis depends on the use of connectors for ideas that are expressed by two or more words. The LEXIS connectors are in the form of one disjunctive, four conjunctive, and three which are exclusionary. The use of these connectors make it possible to express a variety of ideas. The first LEXIS search performed in this research study used the connector or so that the computer was required to search Supreme Court decisions where either the word "freedom" or the word "speech" could be retrieved when either word appeared in the decision or in decisions where both words appeared. This initial search did not assume that there was any relationship between the two words but only focused on Supreme Court decisions where either word appeared or where both words appeared. The exclusionary connectors, and not, not within a selected number of words, and not within the selected segment, allowed the

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[14] Ibid., p. 8.

researcher to identify decisions where a word did not appear in a manner as determined by specific connectors. The second LEXIS search was made of cases where the word speech but not the word freedom appeared and where the word freedom appeared but not the word speech. This search also involved the retrieval of cases where the word elementary, the word secondary, or the word school appeared in the opinion.

This research study focused on freedom of speech as this Constitutional guarantee has been applied to elementary and secondary schools. It was the relationship of freedom of speech to elementary and secondary schools that was the focus on the third LEXIS search design.

The third LEXIS search revealed 3,007 cases of the Supreme Court since 1925 which have had the word education or school in the decision of the Court, including the majority opinion and the minority or dissenting opinions.[15] Level two of this third LEXIS search revealed that the word freedom occurred within 3 words of the word speech in 572 of these 3,007 cases, thereby developing a proximity relationship between the word speech and the word freedom. From these 572 cases, the LEXIS search revealed in level three that the word student or the word teacher appeared

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[15] Note: A LEXIS computer search of Supreme Court decisions includes the majority opinion and all minority opinions.

in 351 of the 572 cases. In level four of the LEXIS search, in 57 of the 351 cases freedom of speech appeared within 10 words of the word elementary, the word secondary or the word high. Therefore, in accordance with the LEXIS computer analysis, in 57 decisions of the Supreme Court since 1925 the word freedom occurred within three words of the word speech and within 10 words of elementary, secondary, or high as related to education, school, teacher, or student. These 57 cases are as follows:

1. CAREY, STATE'S ATTORNEY OF COOK COUNTY v. BROWN ET AL., No. 79-703. 1980.
2. PRUNEYARD SHOPPING CENTER ET AL. v. ROBINS ET AL., No. 79-289. 1980.
3. UNITED STATES v. MENDENHALL, No. 78-1821. 1980.
4. SMITH, JUDGE, ET AL. v. DAILY MAIL PUBLISHING CO. ET AL., No. 78-482. 1979.
5. AMBACH, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, ET AL. v. NORWICK ET AL., No. 76-808. 1979.
6. GIVHAN v. WESTERN LINE CONSOLIDATED SCHOOL DISTRICT ET AL., No. 77-1051. 1979.
7. MONELL ET AL. v. DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK ET AL., No. 75-1914. 1978.
8. OHRALIK v. OHIO STATE BAR ASSN., No. 76-1650. 1978.
9. CAREY ET AL. v. PIPHUS ET AL., No. 76-1149. 1978.
10. ZABLOCKI, MILWAUKEE COUNTY CLERK v. REDHAIL, No. 76-879. 1978.
11. MAHER, COMMISSIONER OF SOCIAL SERVICES OF CONNECTICUT v. ROE ET AL., No. 75-1440. 1977.
12. ABOOD ET AL. v. DETROIT BOARD OF EDUCATION ET AL., No. 75-1153. 1977.

13. ELROD, SHERIFF, ET AL. v. BURNS ET AL., No. 74-1520. 1976.
14. COX BROADCASTING CORP. ET AL. v. COHN, No. 73-938. 1975.
15. BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS ET AL. v. JACOBS ET AL., No. 73-1347. 1975.
16. RAYMOND K. PROCUNIER, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS ET AL., APPELLANTS, v. ROBERT MARTINEZ ET AL., No. 72-1465. 1974.
17. No. 73-459 NEW RIDER ET AL. v. BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT No. 1, PAWNEE COUNTY, OKLAHOMA, ET AL. 1973.
18. No. 72-6979. MEINHOLD v. TAYLOR ET AL. 1973.
19. DOE ET AL. v. McMILLAN ET AL., No. 71-6356. 1973.
20. SAN ANTONIO INDEPENDENT SCHOOL DISTRICT ET AL. v. RODRIGUEZ ET AL., No. 71-1332. 1973.
21. PAPISH v. BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI ET AL., No. 72-794. 1973.
22. POLICE DEPARTMENT OF THE CITY OF CHICAGO ET AL. v. MOSLEY, No. 70-87. 1972.
23. GRAYNED v. CITY OF ROCKFORD, No. 70-5106. 1972.
24. No. 71-498. OLFF v. EAST SIDE UNION HIGH SCHOOL DISTRICT. 1972.
25. LEMON ET AL. v. KURTZMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF PENNSYLVANIA, ET AL., No. 89. 1971.
26. McGAUTHA v. CALIFORNIA, No. 203. 1971.
27. GILLETTE v. UNITED STATES, No. 85. 1971.
28. WYMAN, COMMISSIONER OF NEW YORK DEPARTMENT OF SOCIAL SERVICES, ET AL. v. JAMES, No. 69. 1971.
29. OREGON v. MITCHELL, ATTORNEY GENERAL, No. 43. 1970.
30. No. 1011. NORTON ET AL. v. DISCIPLINE COMMITTEE OF EAST TENNESSEE STATE UNIVERSITY ET AL. 1970.
31. ADICKES v. S. H. KRESS & CO., No. 79. 1970.

32. GREENBELT COOPERATIVE PUBLISHING ASSN., INC. ET AL. v. BRESLER, No. 413. 1970.

33. WALZ v. TAX COMMISSION OF THE CITY OF NEW YORK, No. 135. 1970.

34. DANDRIDGE, CHAIRMAN, MARYLAND BOARD OF PUBLIC WELFARE, ET AL. v. WILLIAMS ET AL., No. 131. 1970.

35. TINKER ET AL. v. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT ET AL., No. 21. 1969.

36. EPPERSON ET AL. v. ARKANSAS., No. 7. 1968.

37. PICKERING v. BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT 205, WILL COUNTY, No. 510. 1968.

38. RANEY ET AL. v. BOARD OF EDUCATION OF THE GOULD SCHOOL DISTRICT ET AL., No. 805. 1968.

39. DUNCAN v. LOUISIANA, No. 410. 1968.

40. GINSBERG v. NEW YORK, No. 47. 1968.

41. WALKER ET AL. v. CITY OF BIRMINGHAM, No. 249. 1967.

42. KATZENBACH, ATTORNEY GENERAL, ET AL. v. MORGAN, ET UX., No. 847. 1966.

43. SHEPPARD v. MAXWELL, WARDEN, No. 490. 1966.

44. NATIONAL LABOR RELATIONS BOARD v. FRUIT & VEGETABLE PACKERS & WAREHOUSEMEN, LOCAL 760, ET AL., No. 88. 1964.

45. SCHOOL DISTRICT OF ABINGTON TOWNSHIP, PENNSYLVANIA, ET AL. v. SCHEMPP ET AL., No. 142. 1963.

46. EDWARDS ET AL. v. SOUTH CAROLINA, No. 86. 1963.

47. SCALES v. UNITED STATES, No. 1. 1961.

48. NOTO v. UNITED STATES, No. 9. 1961.

49. SHELTON ET AL. v. TUCKER ET AL., No. 14. 1960.

50. KINGSLEY INTERNATIONAL PICTURES CORP. v. REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, No. 394. 1959.

51. THOMAS v. ARIZONA, No. 88. 1958.

52. KONIGSBERG v. STATE BAR OF CALIFORNIA ET AL., No. 5. 1957.

53. ADLER ET AL. v. BOARD OF EDUCATION OF THE CITY OF NEW YORK, No. 8. 1952.

54. ILLINOIS EX REL. McCOLLUM v. BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 71, CHAMPAIGN COUNTY, ILLINOIS, ET AL., No. 90. 1948.

55. BAUMGARTNER v. UNITED STATES, No. 493. 1944.

56. SCHNEIDERMAN v. UNITED STATES, No. 2. 1943.

57. WEST VIRGINIA STATE BOARD OF EDUCATION ET AL. v. BARNETTE ET AL., No. 591. 1943. [16]

The LEXIS computer search was used as a technique for the verification of data identified through the analysis of the legal indices. The 57 cases identified by the LEXIS computer analysis represented a grouping of cases by the computer with regard only to proximity of words. The computer analysis served to supplement and complement the analysis of the legal indices.

The six decisions of the Supreme Court used as the basis for this study were selected as a result of an analysis of nine topics[17] in the legal indices. LEXIS was used as a cross-check and as a verification for the selection of

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[16]Note: These 57 cases are cited as they appeared on the computer print-out from the LEXIS search.

[17]Note: The nine topics which were cross-referenced in the legal indices were: Constitutional law, Bill of Rights, Freedom of Speech, First Amendment, Education, Schools, School Districts, Students, and Teachers.

data from the legal indices. The computer search was an additional method employed to determine if cases had been missed or overlooked in the analysis of legal indices. Two of the six cases (City of Madison v. Wisconsin Employment Relations Commission (1976) and Mt. Healthy v. Doyle (1977) did not appear in the LEXIS search. Four of the six cases (West Virginia v. Barnette (1943), Pickering v. Board of Education (1968), Tinker v. Des Moines Community School District (1969), and Givhan v. Western Line Consolidated School District (1979)) did appear in the LEXIS search. While the analysis of the legal indices was time consuming and tedious, it appeared that this was a more accurate and comprehensive methodology for answering the research questions addressed in this study. LEXIS, an analysis of the proximity of words, was limited by the nature of the data system while a cross-referencing of the legal indices lead the researcher toward a more comprehensive analysis. Since this study was attempting to establish a basis for The State's interest, through the language of the Court's decision, it was necessary to engage in a thorough and comprehensive analysis of the language of the decision rather than a delineation of the occurrences of selected words and/or phrases. The content analysis represented by LEXIS was an examination of words and their contextual occurrence. LEXIS cannot analyze the relationship of ideas, the various shades of meaning in language, and the complexity involved in the expression of ideas within Supreme Court decisions.

Chapter 4

PRESENTATION AND ANALYSIS OF DATA

The Supreme Court has delivered decisions in six cases which have dealt with the Constitutional guarantee of freedom of speech in the First Amendment as this guarantee has been applied within an elementary and secondary setting. The decisions have involved students, teachers, and administrators in a local school district, a school board in a local school district, and a state board of education. The six cases which were decided on the basis of a freedom of speech issue within the framework of elementary and secondary education were:

West Virginia v. Barnette (1943)

Pickering v. Board of Education (1968)

Tinker v. Des Moines Community School District (1969)

City of Madison v. Wisconsin Employment Relations Commission (1976)

Mt. Healthy v. Doyle (1977)

Givhan v. Western Line Consolidated School District (1979)

Each of the six cases were analyzed for the study in terms of four components: a general description of the decision, the purpose or goal for education as stated in the decision, the judicial standard applied by the Court,

and the nature and scope of The State's interest in the education of individuals as delineated in the decision.

West Virginia v. Barnette (1943)

In West Virginia v. Barnette,[1] the West Virginia State Board of Education adopted a resolution[2] which required that the salute to the flag of the United States become a regular part of the program of activities in the public schools of West Virginia and that all teachers and students be required to participate in the salute honoring the Nation represented by the flag. The refusal to salute the flag by students would be regarded as an act of insubordination and the students would be expelled from school, in accordance with the resolution of the West Virginia State Board of Education.

A Description of the Supreme Court Decision. Appellees, citizens of the United States and of West Virginia, brought suit against the West Virginia Board of Education in the United States District Court for themselves and others similarly situated asking the Court's injunction to restrain

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[1]West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

[2]Note: The resolution in question was adopted by the West Virginia State Board of Education on January 9, 1942 and was included in the opinion of the Supreme Court as a footnote. The complete text of the resolution is provided on page 83 of this study.

enforcement of the laws and regulations against Jehovah's Witnesses. The case was argued before the Supreme Court on March 11, 1943 and decided on June 14, 1943. The Supreme Court ruled that the required flag salute denied students who were Jehovah's Witnesses First Amendment guarantees.

The Jehovah's Witnesses were an unincorporated body teaching that the obligation imposed by law of God was superior to that of laws enacted by temporal government. Their religious beliefs included a literal version of Exodus, Chapter 20, verses 4 and 5, which stated: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them."[3] The Witnesses considered that the flag was an "image" within this command and for this reason they refused to salute the Flag in the public schools, in accordance with the resulotion adopted by the West Virginia State Board of Education.

The First Amendment, in the guarantee of freedom of religion, states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free

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[3] Id. at 629.

exercise thereof."[4] The Establishment Clause of the First Amendment requires that government must allow individuals to have their own beliefs and values, in accordance with their conscience. This guarantee of the First Amendment provides protection to the citizen for the practice of any religion. It prohibits the proscription of any religious belief by the government. The Free Exercise Clause of the First Amendment protects an individual's right to act in accordance with religious convictions, but this is not an unlimited or absolute right as it is subject to control by the government. Citizens, therefore, have a right, under the Free Exercise Clause to practice their religion according to their conscience.

An individual has the right, under the Free Exercise Clause to practice his religion according to his conscience, so long as his acts do not harm others or the community as a whole. In keeping with the decisions of the Supreme Court, the government may restrict the individual in religious practices if certain acts violate the individual's obligations to society or if they may cause injury to society.

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[4]Note: The First Amendment to the Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The issue of the extent to which a citizen may freely exercise religious beliefs was illustrated by the refusal of Jehovah's Witnesses to salute the flag. The parents who were Jehovah's Witnesses instructed their children not to take part in the pledge of allegiance and the flag ceremony, even though they would be in violation of a policy of the West Virginia Board of Education.

The Jehovah's Witnesses had pursued the issue of the salute to the flag to the Supreme Court because of their religious objections to the flag salute and because of their concern for the Constitutional guarantees of freedom of religion and the right to the free exercise of religious beliefs. The Establishment Clause as well as the Free Exercise Clause of the First Amendment were important in the issues of West Virginia v. Barnette. The religious freedom envisioned by the Supreme Court, therefore, had two aspects. It did not permit compulsion by law of a particular religious belief or creed or the practice of a specific kind of worship and conversely the Constitution was a safeguard for the free exercise of a chosen form of religion.[5] In the decision of West Virginia State Board of Education v. Barnette, the Court overruled a decision rendered in 1940.[6]

The opinion of the Supreme Court in West Virginia v.

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[5]Cantwell v. Connecticut, 310 U.S. 296 at 303 (1940).

[6]Minersville School District v. Gobitis, 310 U.S. 586 (1940).

Barnette revealed that the Court believed an important relationship existed between a flag salute and freedom of speech as guaranteed by the First Amendment. The relationship of the flag salute required by the West Virginia State Board of Education to the Constitutional guarantee of freedom of speech in the First Amendment was specifically developed in the opinion:

> ... the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment of our Constitution to reserve from all official control.[7]
>
> There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.[8]
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> Here it is the State that employs a flag as a symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks. Objection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights. It is also to be noted that the

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[7] Id. at 642.

[8] Id. at 632-633.

> compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning. [9]

The opinion of the Court, therefore, established the relationship between freedom of speech as a First Amendment right and a salute to a flag by an individual. With this relationship defined, the Court attempted to develop the conditions necessary for the State Board of Education, an agency for the State of West Virginia, to establish policies and regulations.

The Purpose or Goal For the Education of Citizens as Stated in the Decision. In West Virginia v. Barnette, the Supreme Court did not state a purpose for education or a goal for education. The West Virginia State Board of Education required, through a resolution, that the salute to the flag of the United States be a regular part of the program of activities in the public schools of West Virginia and that all teachers and students be required to participate in the salute honoring the Nation represented by the flag. The West Virginia State Board of Education adopted a resolution that became official policy for the schools of West

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[9] Id. at 633.

Virginia in accordance with certain purposes and goals. The policy to require teachers and students to participate in the salute to the flag, therefore, would further the purposes and goals of the schools of West Virginia. The nature of such purposes or goals for education and the legitimacy of such purposes or goals were not revealed in the decision of the Supreme Court. The decision of the Court stated:

> Following the decision by this Court on June 3, 1940, in Minersville School District v. Gobitis, 310 U.S. 586, the West Virginia legislature amended its statutes to require all schools therein to conduct courses of instruction in history, civics, and in the Constitutions of the United States and of the State "for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government." Appellant Board of Education was directed, with advice of the State Superintendent of Schools, to "prescribe the courses of study covering these subjects" for public schools. The Act made it the duty of private, parochial and denominational schools to prescribe courses of study "similar to those required for the public schools." [10]

The legislative mandate from the West Virginia Legislature concerning the relationship of "instruction in courses in history, civics, and in the Constitutions of the United States and of the State for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery

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[10] Id. at 625-626.

of the government," to the purposes or goals of the schools of West Virginia was not reviewed in the opinion.

The resolution of the West Virginia State Board of Education was adopted on January 9, 1942. The text of the resolution stated:

> "WHEREAS, The West Virginia State Board of Education holds in highest regard those rights and privileges guaranteed by the Bill of Rights in the Constitution of the United States of America and in the Constitution of West Virginia, specifically, the first amendment to the Constitution of the United States as restated in the fourteenth amendment to the same document and in the guarantee of religious freedom in Article III of the Constitution of this State, and
>
> "WHEREAS, The West Virginia State Board of Education honors the broad principle that one's convictions about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of law; that the propagation of belief is protected whether in church or chapel, mosque or synagogue, tabernacle or meeting house; that the Constitutions of the United States and of the State of West Virginia assure generous immunity to the individual from imposition of penalty for offending, in the course of his own religious activities, the religious views of others, be they a minority or those who are dominant in the government, but
>
> "WHEREAS, The West Virginia State Board of Education recognizes that the manifold character of man's relations may bring his conception of religious duty into conflict with the secular interests of his fellowman; that conscientious scruples have not in the course of the long struggle for religious toleration relieved the individual from obedience to the general law not aimed at the promotion or restriction of the religious beliefs; that the mere possession of convictions which contradict the relevant concerns of political society does not relieve the citizen from the discharge of political responsibility, and

"WHEREAS, The West Virginia State Board of Education holds that national unity is the basis of national security; that the flag of our Nation is the symbol of our National Unity transcending all internal differences, however large within the framework of the Constitution; that the Flag is the symbol of the Nation's power; that emblem of freedom in its truest, best sense; that it signifies government rest on the consent of the governed, liberty regulated by law, protection of the weak against the strong, security against the exercise of arbitrary power, and absolute safety for free institutions against foreign aggression, and

"WHEREAS, The West Virginia State Board of Education maintains that the public schools, established by the legislature of the State of West Virginia under the authority of the Constitution of the State of West Virginia and supported by taxes imposed by legally constituted measures, are dealing with the formative period in the development in citizenship that the Flag is an allowable portion of the program of schools thus publicly supported.

"Therefore, be it RESOLVED, That the West Virginia Board of Education does hereby recognize and order that the commonly accepted salute to the Flag of the United States - the right hand is placed upon the breast and the following pledge repeated in unison: 'I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all'--now becomes a regular part of the program of activities in the public schools, supported in whole or in part by public funds, and that all teachers as defined by law in West Virginia and pupils in such schools shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly." [11]

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[11] Id, at 525-28.

The decision of the Court did not address in a comprehensive manner the reasons why the resolution in question was adopted by the West Virginia State Board of Education. The opinion of the Court did not deal with the purposes of education or the goals of education in West Virginia as a general matter or the purposes or goals of education as adopted by the West Virginia State Board of Education.

The Judicial Standard Applied by the Supreme Court in the Decision. The decision of the Supreme Court in West Virginia v. Barnette offered two instances whereby the State of West Virginia could assert its interest:

> ... State may "require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty which tend to inspire patriotism and love of country." 310 U.S. at 604.[12]

> It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. But here the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.[13]

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[12] Id. at 631.

[13] Id. at 633-634.

In the first assertion, the State of West Virginia could require a curriculum in the elementary and secondary schools whereby students would be required to learn the structure and organization of government as well as the history of the country. In the second assertion, the judicial standard of "clear and present danger" was used a guideline for measuring the interest of the State of West Virginia in matters regarding expression of opinion. The "clear and present danger standard" was used as a judicial yardstick and as a test for determining the boundaries of the power of the State of West Virginia. The interest of The State would be determined in the years after 1943 by the various interpretations of "clear and present danger." The judicial standard of "clear and present danger" has been used as a measure to determine when The State may intervene to limit freedom of speech and freedom of expression of individuals. The State must ascertain that such freedom of speech or freedom of expression is a "clear and present danger."

The Nature and Scope of The State's Interest in Education as Stated in the Decision. The State Board of Education, as an agency of government in the State of West Virginia, represented authority and/or official power. In one of the Court's most important statements on the interest of The State, the opinion focused clearly on the pivotal

issue concerning the interest of The State versus the rights of the individual. In the words of the opinion: the sole conflict is between authority and rights of the individual.

> The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude. [14]

In attempts to clarify the abstract principles of authority and the foundation for authority, the Court attempted to explain the relationship of authority and/or official power to The State in four separate statements in the decision.

> There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority. [15]

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[14] Id. at 630-631.

[15] Id. at 641.

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures - Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they 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.[16]

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us. [17]

> Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good, bad or merely innocuous. Any credo of nationalism is likely to include what some disapprove or to omit what others think essential, and to give off different overtones as it takes on different accents or interpretations. If official power exists to coerce acceptance of any patriotic creed, what it shall contain cannot be decided by courts, but must be largely discretionary with the ordaining authority, whose power to prescribe would no doubt include power to amend. Hence validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question.[18]

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[16] Id. at 637.

[17] Id. at 642.

[18] Id. at 634.

The interest of The State, as manifested through actions of the West Virginia Board of Education, focused on the authority of a state agency in the State of West Virginia, the State Board of Education, and the official power of such a governmental agency. The issues could have been easily clouded by attention to patriotism and love of country but the Court maintained that the central issue was the authority and power of the State of West Virginia to control an individual's behavior and the right of the individual "to differ as to things that touch the heart of the existing order."

> The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.[19]

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[19] Id. at 641-642.

In an expansion of the basis for the interest of The State, the Court assumed that a relationship existed between The State's interest and a government of limited power:

> Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.[20]

> The subject now before us exemplifies this principle. Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction. If it is to impose any ideological discipline, however, each party or denomination must seek to control, or failing that, to weaken the influence of the educational system. Observance of the limitations of the Constitution will not weaken government in the field appropriate for its exercise.[21]

The opinion by the Supreme Court in West Virginia v. Barnette specifically defined the interest of The State in matters relating to education which affect Constitutional

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[20] Id. at 636-637.

[21] Id. at 637.

guarantees. The interest of The State, therefore, was to insure freedom of speech to the Jehovah's Witnesses. The Supreme Court established a basis for asserting that The State could decide, through the judiciary, when a Constitutional guarantee would be interpreted as such and upheld within a school setting. The prerogative of the Supreme Court to decide matters of The State's interest was established. The opinion in West Virginia v. Barnette did not address the issue of "why" The State has an interest in the education of citizens or what that interest is except to guarantee to all citizens, regardless of the setting, the guarantees of the Constitution. The interest of The State in the education of citizens, therefore is not delineated in the opinion with regard to purpose(s) of education, and goal(s) of education, and a rationale for intervention by The State in the control and regulation of schools is not given.

Pickering v. Board of Education (1968)

In Pickering v. Board of Education,[22] appellant Marvin L. Pickering, a teacher in Township High School District 205,

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[22]Pickering v. Board of Education, 391 U.S. 563 (1968), 20 L. Ed. 2d 811, 88 S. Ct. 1731.

Will County, Illinois, was dismissed from his position by The Will County Board of Education for sending a letter to a local newspaper in connection with a proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled proposals to raise new revenue for the schools. The appellant claimed that the writing of the letter was protected by the First Amendment. The Supreme Court agreed with the appellant that his right to freedom of speech had been violated. The Supreme Court noted proper jurisdiction for appellant's claim that the Illinois Statute permitting his dismissal of the facts of the case was unconstitutional as applied under the First and Fourteenth Amendments of the Constitution. The case was argued before the Supreme Court on March 27, 1968 and decided on June 3, 1968.

A Description of the Supreme Court Decision. The opinion of the Court delivered by Justice Marshall addressed the issue of freedom of speech for teachers.

> The Illinois courts reviewed the proceedings solely to determine whether the Board's findings were supported by substantial evidence and whether, on the facts as found, the Board could reasonably conclude that appellant's publication of the letter was "detrimental to the best interests of the schools." Pickering's claim that his letter was protected by the First Amendment was rejected on the ground that his acceptance of a teaching position in the public schools obliged him to refrain from making statements about the

> operation of the schools "which in the absence of such position he would have an undoubted right to engage in." [23]
>
> To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court. "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." Keyishian v. Board of Regents, supra. At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. [24]

The opinion of the Supreme Court addressed the issue of public employment and the conditions of such employment including the right of a public employee such as a teacher to express ideas or concerns on matters of public interest.

The Purpose or Goal For the Education of Citizens as Stated in the Decision. The purpose(s) or goal(s) for education were not reviewed in Pickering v. Board of Education. The case focused primarily on the dismissal of a

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[23] Id. at 567.

[24] Id. at 568.

teacher. Indirectly, however, the opinion of the Court did focus on the purpose of a school as an institution where teachers associated with the institution could express their views on certain matters without fear of punishment and/or dismissal. The Court indirectly addressed the issue of the purpose of the school as related to the free expression of ideas by those associated with the school, even when those thoughts or ideas are not popular. The opinion of the Court focused on free expression as a constitutional right and a line of reasoning that was in keeping with previous opinions of the Court.

The Judicial Standard Applied by the Supreme Court in the Decision. Concerning the application of a judicial standard to this case, the decision stated:

> Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superior, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged. However, in the course of evaluating the conflicting claims of First Amendment protection and the need for orderly school administration in the context of this case, we shall indicate some of the general lines along which an analysis of the controlling interests should run. [25]

The Supreme Court recognized the "need for orderly school

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[25] Id. at 569.

administration" and expressed in the opinion the nature of "controlling interests," in the absence of terminology which referred to a judicial standard. The opinion stated six guidelines for determining "controlling interests":

> ... free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.[26]
>
> What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.[27]
>
> The public interest in having free and unhindered debate on matters of public importance--the core value of the Free Speech Clause of the First Amendment--is so great that it has been held that a State cannot authorize the recovery of damages by a public official for defamatory statements directed at him except when such statements are shown to have been made either with knowledge of their falsity or with reckless disregard for their truth or falsity. The same test has been applied to suits for invasion of privacy based on false statements where a "matter of public interest" is involved. It is therefore perfectly clear that,

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[26] Id. at 571-572.

[27] Id. at 572-573.

were appellant a member of the general public, the State's power to afford the appellee Board of Education or its members any legal right to sue him for writing the letter at issue here would be limited by the requirement that the letter be judged by the standard laid down in New York Times. [28]

This Court has also indicated, in more general terms, that statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors. Garrison v. Louisiana, 379 U.S. 64 (1964); Wood v. Georgia, 370 U.S. 375 (1962). [29]

While criminal sanctions and damage awards have a somewhat different impact on the exercise of the right to freedom of speech from dismissal from employment, it is apparent that the threat of dismissal from public employment, is nonetheless a potent means of inhibiting speech. However, in a case such as the present one, in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher, we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be. [30]

... in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment. [31]

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[28] Id. at 573.

[29] Id. at 574.

[30] Id.

[31] Id.

The Nature and Scope of The State's Interest in Education as Stated in the Decision. The Court developed language which established controlling interests as a measure for determining the reasoning of the Court and as guidelines for lower courts. In Pickering v. Board of Education the interest of The State in the education of citizens is not addressed in a comprehensive manner. The interest of The State as an employer is manifested in the actions of the Will County Board of Education representing the State of Illinois. The actions of the employer may, therefore, be considered as explicit expressions of The State's interest with regard to the employee, in this case a public school teacher. In four statements of the opinion the interest of the State of Illinois is explicitly addressed:

> ... and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. [32]
>
> ... the need for orderly school administration.[33]
>
> ... the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public. [34]
>
> ... the State's power to afford the appellee Board of Education or its members any legal right to sue him for writing the letter at issue.... [35]

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[32] Id. at 568.

[33] Id. at 569.

[34] Id. at 573.

[35] Id.

The expressions of The State's interest in Pickering v. Board of Education are, therefore, statements which concern the State of Illinois to control and/or regulate the actions of a teacher employed by the public schools. The Supreme Court does not address in a comprehensive manner the issue of what is the interest of the State of Illinois in the regulation of the behavior of a state employee except to delineate two areas:

efficiency of public services

orderly administration

The opinion of the Supreme Court is unmistakable in its assertion that the State of Illinois could regulate the behavior of teachers but the Court does not establish comprehensive guidelines for determining what is the interest of the State of Illinois in general matters relating to the education of citizens. The summary statement of the opinion leaves one with the impression, however, that if the State of Illinois had been able to show that "false statements had been knowingly or recklessly made by the teacher," then the interest of the State of Illinois would have been clear and substantial, in the dispute in question.

The problem of the opinion as so stated was to "arrive at a balance between the interests of a citizen ... and the interest of the State...." The opinion delivered was the Court's perception of that balance. The "balance" of

interests as asserted by the Supreme Court would be determined by lower courts using this judicial yardstick. The interest of the State of Illinois, in that balance, as stated in the opinion of Pickering v. Board of Education is not delineated so as to determine the exact nature of boundaries for the interest of the State of Illinois in matters regarding the education of individuals in elementary and secondary schools. The interest of The State in the education of citizens, therefore, is not delineated in the decision with regard to purpose(s) of education, and goal(s) of education, and a rationale for intervention of The State in the control and regulation of schools is not provided.

Tinker v. Des Moines Community School District (1969)

In Tinker v. Des Moines Community School District[36] the petitioners were John F. Tinker, 15 years old, Christopher Eckhardt, 16 years old, and Mary Beth Tinker, 13 years old. These three students attended schools in Des Moines, Iowa. The three students were suspended from school for wearing black armbands to publicize their objections to the hostilities in Vietnam and their support for a truce, as they were in violation of a school policy which prohibited the wearing of armbands by students. The students

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[36]Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), 21 L. Ed. 2d 731, 89 S. Ct. 733.

were aware that the school authorities had adopted a policy that any student wearing an armband to school would be asked to remove it, and if the student refused then the student would be suspended until he returned without the armband. As a result of their suspension, the three students, through their fathers filed a complaint in the United States District Court for the Southern District of Iowa. After an evidentiary hearing, the District Court dismissed the complaint, upholding the constitutionality of the school authorities' action on the ground that it was reasonable in order to prevent disturbance of school discipline. On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the decision of the District Court without an opinion being issued. On certiorari, the Supreme Court reversed and remanded. The case was argued on November 12, 1968 and decided on February 24, 1969.

A Description of the Supreme Court Decision. The Supreme Court opinion was delivered by Justice Fortas and stated:

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years. [37]

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[37] Id. at 506.

In an attempt to clarify the type of student behavior which might be protected by the First Amendment the Court stated:

> The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students. [38]

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. [39]

Therefore, in the case of Tinker v. Des Moines Community School District the rights of students with regard to the First Amendment were affirmed and clarified.

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[38] Id. at 508.

[39] Id. at 511.

The Purpose or Goal For the Education of Citizens as Stated in the Decision. Tinker v. Des Moines Community School District does not deal directly with the purpose(s) and goal(s) of education. The opinion of the Supreme Court reviewed previous cases of the Court so as to develop a relationship between the First Amendment, rights of students, and the operation of elementary and secondary schools:

> In Meyer v. Nebraska, supra, at 402, Mr. Justice McReynolds expressed this Nation's repudiation of the principle that a State might so conduct its schools as to "foster a homogeneous people." He said:
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> > "In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a [S]tate without doing violence to both letter and spirit of the Constitution."
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> This principle has been repeated by this Court on numerous occasions during the intervening years. In Keyishian v. Board of Regents, 385 U.S. 589, 603, Mr. Justice Brennan, speaking for the Court, said:
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> > "'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' Shelton v. Tucker, [364 U.S. 479], at 487. The classroom is peculiarly the 'market place of ideas.' The Nation's future depends upon leaders trained through wide

> exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"

The opinion indicates that the purpose of the school is not to "foster a homogeneous people." The opinion indicates that American schools have as purposes the "vigilant protection of constitutional freedoms," and the encouragement of "classrooms as the market place of ideas." These statements quoted by the Supreme Court from previous cases concerning the purposes and goals of American elementary and secondary education represent an important element in the decision of Tinker v. Des Moines Community School District.

The Judicial Standard Applied by the Supreme Court in the Decision. The Court was explicit in statements concerning student rights. In acknowledging the importance of balancing rights of the individual with the interests of The State, the Court gave attention to the interests of The State. Adhering to an assumption that order must be maintained in the schools, the Court gave its support to school regulations and policies that insure order. In an attempt to establish a judicial standard by which to judge

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Id. at 511-512.

actions of school officials as representatives of The State, the Court applied the standard of "material and substantial interference."

> ... the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred.[41]

> A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others. Burnside v. Byars, supra, at 749. But conduct by the student, in class or out of it, which for any reason--whether it stems from time, place, or type of behavior--materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. Cf. Blackwell v. Issaquena County Board of Education, 363 F.2d 749 (CA 5th Cir. 1966).[42]

> Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.[43]

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[41] Id. at 514.

[42] Id. at 512-513.

[43] Id. at 511.

In the case of Tinker v. Des Moines Community School District, it is reasonable to assume that if "substantial disruption or material interference" had occurred, then school officials would have been acting with the safeguards of the interest of the Des Moines Community School District in the prohibition of armbands. The action of the officials of the school, therefore, might have been sanctioned under different circumstances.

The Nature and Scope of The State's Interest in Education as Stated in the Decision. The nature of the balancing of individual rights and interests of The State, with the Constitution and interpretations by the judiciary as the fulcrum, was not precise in the decision. In an attempt to clarify the position of the State as manifested in the school officials of Iowa, the Court stated:

> ... the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. See Epperson v. Arkansas, supra, at 104, Meyer v. Nebraska, supra, at 402. Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.[44]

The Court had provided a rationale for freedom of speech by students and at the same time provided a rationale for the development of rules by school authorities which might limit

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[44] Id. at 507.

the speech and/or expression of students. The duality of rationales provided a basis for interest of The State as well as the rights of the individual within the same opinion. The interest of The State in the education of citizens, therefore, was not delineated in the opinion with regard to a comprehensive analysis of the purpose(s) and goal(s) of education and an explicit rationale for intervention by The State in the control and regulation of schools was not provided.

City of Madison v. Wisconsin Employment Relations Commission (1976)

In City of Madison v. Wisconsin Employment Relations Commission[45] the issue was whether the State of Wisconsin could constitutionally require that an elected Board of Education prohibit teachers, other than union representatives, from speaking at open meetings, at which public participation was permitted, if such speech was addressed to the subject of pending collective-bargaining negotiations. While negotiations were taking place for renewal of a collective-bargaining agreement between the Board of Education for the City of Madison and a union which was the certified majority collective-bargaining representative of teachers in the school district, the Board held a public

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[45] City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission, 429 U.S. 167 (1976), 50 L. Ed. 2d 376, 97 S. Ct. 421.

meeting. At the public meeting, the Board permitted a teacher, who was not a member of the union, to speak for approximately two and one-half minutes on the subject of the union's "fair share" clause proposal for the agreement whereby all teachers, whether or not they were union members, would pay union dues to defray the cost of collective-bargaining. Shortly thereafter, an agreement was signed by the Board of Education and the union which did not include the "fair share" clause, and the union filed a complaint with the Wisconsin Employment Relations Commission. The complaint alleged that the Board, by allowing the nonunion teacher to speak at its meeting, had engaged in negotiations with a member of a bargaining unit other than the exclusive collective bargaining representative in violation of a Wisconsin statute. Finding that the Board was guilty of the prohibited practice, the Commission ordered that the Board cease from permitting employees, other than representatives of the union, to appear and speak at meetings of the Board, on matters subject to collective-bargaining between the Board and the union. The Circuit Court of Dane County, Wisconsin, affirmed the Commission's action, as did the Supreme Court of Wisconsin, which held that the right to freedom of speech and the right to petition the government could be abridged in the face of a clear and present danger. The abridgment of teachers' speech, according to the Supreme Court of Wisconsin, was

justified in order to avoid problems with labor-management relations. The Supreme Court of Wisconsin recognized that both the federal and state Constitutions protect freedom of speech and the right to petition the government, but noted that these rights may be abridged in the face of a clear and present danger. The Supreme Court of Wisconsin held that abridgment of the speech in this case was justified in order "to avoid the dangers attendant upon relative chaos in labor management relations."

The Supreme Court of Wisconsin perceived a clear and present danger based upon its conclusion that the speech in question before the Board constituted negotiation with the Board. Permitting negotiation, the court reasoned, would undermine the bargaining exclusivity guaranteed the majority union under Wisconsin Statute §111.70(3)(a)4 (1973). From the premise the Wisconsin court concluded that teachers' First Amendment rights could be limited. The City of Madison Joint School District appealed the decision.

A Description of the Supreme Court Decision. The Supreme Court opinion was delivered by Chief Justice Burger. The case was argued on October 12, 1976 and decided on December 8, 1976. The opinion held that the speech of the non-union teacher at the open meeting of the Board of Education did not constitute negotiations for purposes of the Wisconsin Law, and, thus did not constitute a clear and present danger to

labor-management relations justifying the limitation on teachers' speech, assuming that such a "danger" might in some circumstances justify a limitation on First Amendment rights. The non-union teacher, who had not sought to bargain or to offer to enter into any bargain with the Board, did not appear to be authorized by any other teachers to enter into any agreement on their behalf, and communicating views inconsistent with those of the union did not change the fact that the union alone was authorized to negotiate and contract with the Board. The non-union teacher, having been permitted to speak at a meeting open to the public, had spoken not merely as one of the Board's employees, but also as a concerned citizen on an important decision of government. The Employment Relations Commission's order constituted an improper prior restraint upon the First Amendment rights of teachers, according to the opinion of the Court. In the opinion, the Court held:

> We have held that teachers may not be "compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work." Pickering v. Board of Education, 391 U.S. 563, 568 (1968).[46]
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> Where the State has opened a forum for direct citizen involvement, it is difficult to find justification for excluding teachers who make up the overwhelming proportion of school employees and who are most vitally concerned with the proceedings. It is conceded that

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[46] Id. at 175.

> any citizen could have presented precisely the same points and provided the board with the same information.... [47]

The Supreme Court in delineating the rights of public employees with regard to freedom of speech stated:

> Regardless of the extent to which true contract negotiations between a public body and its employees may be regulated--an issue we need not consider at this time--the participation in public discussion of public business cannot be confined to one category of interested individuals. To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees. Whatever its duties as an employer, when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment. [48]

Therefore, the opinion concerning freedom of speech for teachers was important in establishing whether or not a local school board could prohibit certain teachers from speaking to the school board, depending on the topic they were addressing. The Court addressed the relationship which existed between the guaranteed right of freedom of speech for teachers and the "forum" operated by a school board in a public setting.

The Purpose or Goal For the Education of Citizens as Stated in the Decision. In City of Madison v. Wisconsin

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[47] Id.

[48] Id.

Employment Relations Commission, the Supreme Court did not state a purpose(s) for education or a goal(s) for education. The case focused on the decision of a local Board of Education to hear a teacher speak at a public hearing. Indirectly, however, the opinion of the Court did focus on the purpose of a school as an institution where employees such as teachers associated with the institution could express views on certain matters. The Court indirectly, therefore, addressed the issue of the purpose of the school as related to the free expression of ideas by those associated with the school, whether those individuals are union members or non-union members. The opinion stated:

> Teachers not only constitute the overwhelming bulk of employees of the school system, but they are the very core of that system; restraining teachers' expressions of the board on matters involving the operation of the schools would seriously impair the boards ability to govern the district.[49]

The Judicial Standard Applied by the Supreme Court in the Decision. The Supreme Court did apply a judicial standard in City of Madison v. Wisconsin Employment Relations Commission. The Court concluded the opinion with a reference to the judicial standard of prior restraint. The opinion stated:

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[49] Id. at 177.

> The challenged portion of the order is designed to govern speech and conduct in the future, not to punish past conduct, and as such it is the essence of prior restraint.[50]

Therefore, an order of a state employment relations commission prohibiting a school board from allowing employees other than union representatives from speaking at meetings of the Board on matters subject to collective bargaining between the Board and the union constituted an improper prior restraint upon the First Amendment rights of the teachers.

The standard of prior restraint focused on power exercised by The State which would determine that an individual could not speak, even before the individual had spoken or the subject of the speech in question was known. The Supreme Court has held that prior restraints are particularly burdensome on free speech. When an agency of The State restrains free speech prior to the actual act thereby impeding speech in advance, the individual's freedom of expression has been denied.

The Nature and Scope of The State's Interest in Education as Stated in the Decision. The interest of the State of Wisconsin was made explicit in City of Madison v. Wisconsin Employment Relations Commission in one specific instance in the language of the decision:

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[50] Id.

> Whatever its duties as an employer, when the Board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment.[51]

The interest of the State of Wisconsin was to hear all sides of a public issue and to hear the views of citizens. The interest of The State in the education of citizens was not addressed in a comprehensive manner in the opinion in that there are not specific excerpts delineating the interest of The State which can be analyzed. The interest of The State was most important to review in City of Madison v. Wisconsin Employment Relations Commission for both parties in the case represent an agency or arm of The State. The local Board of Education represented the State of Wisconsin and the Wisconsin Employment Relations Commission also represented the State of Wisconsin. In essence there were two agencies of The State seeking legitimacy for particular actions. The Supreme Court in the opinion did focus on the actions of the two agencies but delineated in a more specific manner a rationale for the position of the Board of Education for permitting all teachers, union and non-union, to speak before the Board at a public hearing. The interest of The State in the form of a Board of Education for a local school district was that "it may not be required to discriminate between speakers on the basis of their employment." The interest of The State, therefore, was to uphold those individual rights protected by the Constitution and to insure

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[51] Id. at 176.

the safeguard of those rights. The interest of The State in the education of citizens, therefore, was not delineated in the opinion with regard to purpose(s) of education and goal(s) of education, and a rationale for intervention by The State in the control and regulation of schools was not provided.

Mt. Healthy v. Doyle (1977)

In Mt. Healthy v. Doyle,[52] Fred Doyle brought suit against Mt. Healthy Board of Education in the United States District Court for the Southern District of Ohio. Doyle claimed that the Board's refusal to renew his contract violated his rights under the First Amendment and the Fourteenth Amendment. Doyle was an untenured teacher who had been involved in several incidents such as an argument with another teacher, arguments with other school employees, obscene gestures to female students, and he had communicated the substance of a memorandum from a principal to a local radio station which used the information in a newscast. The Board, in refusing to renew Doyle's contract, cited specifically the radio station incident and the obscene gesture incidents. Doyle instituted an action for reinstatement and

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[52]Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), 50 L. Ed. 2d 471, 97 S. Ct. 568.

damages in the District Court. The District Court held that the First Amendment rights of Doyle had been violated and that Doyle was entitled to reinstatement and back pay. The United States Court of Appeals for the Sixth Circuit affirmed the decision of the District Court. On certiorari, the Supreme Court vacated the Court of Appeals judgment and remanded the case.

A Description of the Supreme Court Decision. Mt. Healthy v. Doyle was argued on November 3, 1976 and decided in January 11, 1977 by the Supreme Court. Justice Rehnquist delivered the opinion of the Court and addressed the issue of whether or not Doyle would have failed to have his contract renewed by the Mt. Healthy Board of Education regardless of the incident involving the radio station and the relationship of the First Amendment protection to the incident in question.

> There is no suggestion by the Board that Doyle violated any established policy, or that its reaction to his communication to the radio station was anything more than an ad hoc response to Doyle's action in making the memorandum public. We therefore accept the District Court's finding that the communication was protected by the First and Fourteenth Amendments. [53]

> We are thus brought to the issue whether, even if that were the case, the fact that the protected conduct played a "substantial part"

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[53] Id. at 284.

> in the actual decision not to renew would necessarily amount to a constitutional violation justifying remedial action. We think that it would not.[54]
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> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing.[55]
>
> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"--or, to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him.[56]

The Court, while acknowledging that freedom of speech for teachers was "protected conduct," also asserted that freedom of speech was relative to other factors and could be measured as "substantial" in matters regarding an individual such as employment matters. It was this measurement and the determination of such measurement that was important. The State, as represented by the Supreme Court, therefore, had acknowledged the individual's right to freedom of speech but it had also been able to establish a continuum of relationships and

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[54] Id. at 285.

[55] Id.

[56] Id. at 287.

the Court decided at which point it would place freedom of speech, depending on the other issues relevant to the dispute.

Freedom of speech was not viewed as an absolute by the Court but was viewed as a right of the individual, guaranteed by the Constitution, which must be "balanced" against other interests relevant to the issue in question.

The Purpose or Goal for the Education of Citizens As Stated in the Decision. In Mt. Healthy v. Doyle, the Supreme Court did not state a purpose(s) for education or a goal(s) for education. The case focused on the specific renewal of a contract for an untenured teacher. The Court indirectly addressed the issue of the purpose of a school as an institution where employees such as teachers associated with the school should be able to express their ideas or concerns, and that such expressions would be considered as "protected conduct" under the Constitution.

The Judicial Standard Applied by the Supreme Court in the Decision. The Court applied the "balance of interest" test as a judicial standard in Mt. Healthy v. Doyle. The opinion stated:

> That question of whether speech of a government employee is constitutionally protected expression necessarily entails striking "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern

> and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Board of Education, 391 U.S. 563, 568 (1968).[57]

The Court's opinion, therefore, emphasized the importance of establishing a "balance" between the rights of the individual and the interests of The State.

The Nature and Scope of The State's Interest in Education as Stated in the Decision. The Supreme Court's opinion in this case indicated that the local school board had an important responsibility for deciding the degree to which First Amendment protection of conduct of an employee would result in a "substantial part" of the reasoning of the Board to dismiss an employee. An inference that might be drawn from this opinion is that a school board wishing to dismiss an employee should consider a variety of charges, some of which might not be under the protection of the First Amendment so that the Board could assign various degrees of importance to each charge in order that the Board might ascertain the nature of "substantial" since this was the major guideline established for the action of a school board in the opinion of Mt. Healthy v. Doyle. This opinion indicated that The State could define its own position and establish its own measure for defining the interest of The

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[57] Id. at 284.

State in applying a "balance of interest" standard. The State also determined the interest or right of the individual. The interest of The State in education of citizens, therefore, was not delineated in the opinion with regard to purpose(s) of education and goal(s) of education and a rationale for intervention by The State in the control and regulation of schools not provided.

Givhan v. Western Line Consolidated School District (1979)

In Givhan v. Western Line Consolidated School District,[58] Petitioner Bessie Givhan was dismissed from her employment as a junior high English teacher in the Western Line Consolidated School District in Mississippi. At the time of Bessie Givhan's termination, the Western Line Consolidated School District was the subject of a desegragation order entered by the United States District Court for the Northern District of Mississippi. Bessie Givhan intervened in the desegregation action against Western Line Consolidated School District and filed a complaint in the District Court seeking reinstatement on the grounds that nonrenewal of her contract infringed on her right of free speech secured by the First Amendment and the Fourteenth Amendment. As justification for its action, the school district introduced evidence of

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[58]Bessie B. Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979), 58 L. Ed. 2d 619, 99 S. Ct. 693.

a series of private encounters between Bessie Givhan and the school principal during which she allegedly made petty and unreasonable demands in a manner described by the principal as "insulting," "hostile," and "loud." The District Court concluded that the main reason for the teacher's dismissal was her criticism of the school district's policies, which she believed to be racially discriminatory. Accordingly, the District Court held that the dismissal violated the teacher's First Amendment rights and ordered her reinstatement. The United States Court of Appeals for the Fifth Circuit reversed the decision of the District Court concluding that the teacher had spoken privately with the principal and that her expression was not protected by the First Amendment. On certiorari, the Supreme Court heard the case.

A Description of the Supreme Court Decision. Justice Rehnquist in delivering the opinion of the Supreme Court stated:

> This Court's decisions in Pickering, Perry, and Mt. Healthy do not support the conclusion that a public employee forfeits his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly. While those cases each arose in the context of a public employee's public expression, the rule to be derived from them is not dependent on that largely coincidental fact.[59]

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[59] Id. at 414.

> The First Amendment forbids abridgment of the "freedom of speech." Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public. We decline to adopt such a view of the First Amendment.[60]

The teacher had a series of private encounters with the principal in his office to express her views on a variety of matters. At issue was whether or not a private discussion with a principal was considered protected conduct under the First Amendment's guarantee of freedom of speech. The United States Court of Appeals for the Fifth Circuit had concluded that because the teacher had spoken privately with the principal, her expression was not protected by the First Amendment and furthermore there was no Constitutional right to "press even good ideas on an unwilling recipient." The Supreme Court held that the teacher's criticism and/or private discussion with the principal was subject to protection of the First Amendment and that since the principal willingly opened his door to the teacher he was not an "unwilling recipient." The Supreme Court held that the private expression of views was not beyond Constitutional protection.

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[60] Id. at 415.

The Purpose or Goal For The Education of Citizens as Stated in the Decision. Givhan v. Western Line Consolidated School District does not delineate a purpose(s) or goal(s) for the education of citizens. Indirectly, the opinion of the Court supported the view that the school is an institution where employees such as teachers associated with the institution can express views on certain matters. The Court indirectly, therefore, addressed the issue of the purpose of the school as related to the free expression of ideas by those associated with the school, whether the views be expressed in private or in a public forum.

The Judicial Standard Applied by the Supreme Court in the Decision. The judicial standard applied in Givhan v. Western Line Consolidated School District was a balance of interest test, balancing the rights of the individual against the interest of The State. The Court stated:

> In Pickering a teacher was discharged for publicly criticising, in a letter published in a local newspaper, the school board's handling of prior bond issue proposals and its subsequent allocation of financial resources between the schools' educational and athletic programs. Noting that the free speech rights of public employees are not absolute, the Court held that in determining whether a government employee's speech is constitutionally protected, "the interests of the [employee], as a citizen, in commenting upon matters of public concern" must be balanced against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S., at 568. The Court concluded that under the

> circumstances of that case "the interest of the school administration in limiting teachers' opportunities to contribute to public debate [was] not significantly greater than its interest in limiting a similar contribution by any member of the general public." Id., at 573. Here the opinion of the Court of Appeals may be read to turn in part on its view that the working relationship between principal and teacher is significantly different from the relationship between the parties in Pickering, as is evidenced by its reference to its own opinion in Abbott v. Thetford, 534 F.2d 1101 (1976) (en banc), cert denied, 430 U.S. 954 (1977). But we do not feel confident that the Court of Appeals' decision would have been placed on that ground notwithstanding its view that the First Amendment does not require the same sort of Pickering balancing for the private expression of a public employee as it does for public expression. [61]

The Nature and Scope of The State's Interest in Education As Stated in the Decision. The interest of The State, as manifested in the actions of the school board as a public employer, was to hear all views expressed publicly or privately by employees, according to the opinion of Givhan v. Western Line Consolidated School District. The State or an agency of The State was obligated to hear complaints and/or opinions of employees in a private setting as well as in a public forum. The interest of The State in the education of citizens, therefore, was not delineated in the opinion with regard to purpose(s) of education and goal(s) of education and a rationale for intervention by The State in the control and regulation of schools was not provided.

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[61] Id. at 414-415.

An Analysis of Selected Decisions of the Supreme Court

This study focused on an analysis of six decisions of the Supreme Court which have been based on the Constitutional guarantee of freedom of speech as this First Amendment right has been applied to cases involving elementary and secondary schools. The purpose of the analysis of the six decisions was to determine the nature and scope of The State's interest in education. The six decisions of the Supreme Court which were analyzed included: West Virginia v. Barnette (1943), Pickering v. Board of Education (1968), Tinker v. Des Moines Community School District (1969), City of Madison v. Wisconsin Employment Relations Commission (1976), Mt. Healthy v. Doyle (1977), and Givhan v. Western Line Consolidated School District (1979). These six decisions revealed that there was not a consistent basis for the use of the term, The State, by the Supreme Court. While a theoretical framework which supports a conception of The State is implicit in each decision, the concept of The State was not specifically delineated. The six cases did not reveal the nature and scope of The State's interest in terms of purpose(s) of education, goal(s) of education, or a rationale for the intervention of The State in the education of citizens. It should be noted, however, that while the research questions of this study focused on an attempt to identify and define The State's interest in terms of stated goals and purposes for the education of the individual, there was no apparent reason for the

selected decisions of the Court analyzed in this study to address the issue in question. The purpose(s) or goal(s) for education were not the issue, but rather the Constitutional guarantee of freedom of speech. The Supreme Court had no apparent cause, therefore, to state a goal or purpose for education in the selected decisions. A judicial standard or "test" was applied by the Supreme Court in each of the six decisions as a measure for determining the position of the Court, regarding the Constitutional guarantee of freedom of speech as this guarantee was applied to students and teachers within the elementary and secondary school setting.

In the six cases reviewed in this study, the opinions of the Supreme Court focused on the Constitutional issue of freedom of speech within the institutional setting of the elementary and secondary school. The interest of The State in maintaining the Constitutional guarantee of freedom of speech was an important override in each of the six cases. The State's interest with regard to freedom of speech was clear. The delineation of that interest in terms of a specific identification of the balance to be achieved between The State and the individual and the theoretical basis that supports the legal theory of the Court was not clear, however. The State's interest in arbitrating disputes between the individual and The State was implicit as well as the Courts prerogative in interpreting what are the interests of The State and what are the rights of the individual.

Chapter 5

SUMMARY, CONCLUSIONS, IMPLICATIONS, AND RECOMMENDATIONS FOR FURTHER RESEARCH

Summary

A major challenge for the educator is that of formulating a conception of education and developing programs and activities for education that focus on the interests of The State and the needs and rights of individuals. The relationship which exists between The State and the individual is a major component of the social structure and the political system and has emerged as the foundation of the democratic legacy in the United States. The struggle for social justice has often centered on this important relationship. The development and organization of the schools have reflected this relationship between the individual and The State. The State has maintained an interest in the education of the individual since the earliest days of the republic; an interest manifested in the establishment, development, and maintenance of a system of elementary and secondary schools.

The United States Supreme Court is an arm of The State. The Supreme Court, as the highest tribunal in the United States serves, within a Constitutional framework, as interpreter of The State's interest when there is a confron-

tation between the individual and The State. Each opinion of the Supreme Court is an expression of The State's interest. The exercise of the power of judicial review in matters relating to education by the Supreme Court has had far reaching implications for elementary and secondary schools as the Supreme Court has emerged as the arbiter of important issues relating to education.

Education is the expression of a social institution, the school, attempting to serve both the individual and The State. The power and authority to control the education of individuals have emerged through complex processes organized and directed by The State. While recognizing that the power and authority of The State have continued to dominate education, this study focused on the nature of the justification for that power and authority. An important inquiry for this study could be stated as: How have the expressions of The State's interest provided a rationale for the citizenry as to the interest of The State in the education of individuals?

A major purpose of this study was to ferret out the matter of The State's interest within the context of a single Constitutional issue--freedom of speech--and within one social institution, the American elementary and secondary school. A second purpose was to determine the nature and scope of The State's interest in education, as expressed in selected decisions of the Supreme Court. Finally, this study attempted

to ascertain ways in which The State has defined its own role in matters regarding education and the nature of the definitive limits for the exercise of The State's power.

The methodology of the research was historical in that the study attempted to reconstruct judicial proceedings of the past systematically and objectively. The decisions of the Supreme Court represented primary source material that was readily available. The purpose of the data collection was to identify those cases in which the Supreme Court had issued an opinion relating to the Constitutional guarantee of freedom of speech within an elementary and/or secondary school setting. Educational issues are not matters which, by their own virtue, warrant an opportunity to be heard by the Supreme Court. Cases are heard by the Court only if they involve a Constitutional issue. Freedom of speech was selected as the Constitutional issue for this study because of its importance to the interest of The State in the maintenance of the social system.

The methodology which was used to explore the freedom of speech issue could easily be used to analyze issues relating to freedom of religion, equal protection, due process, and many other issues. The freedom of speech issue was an exemplary case study focusing on The State's interest as expressed in selected Supreme Court decisions. Therefore, a single Constitutional issue within a single institutional setting provided a method for selecting an inclusive number

of cases to be analyzed for the study. A variety of legal indices were used during the study as well as the computer system LEXIS in order to identify decisions of the Supreme Court which focused on matters regarding the Constitutional guarantee of freedom of speech within an elementary and secondary school setting. From a review of decisions of the Supreme Court which dealt with elementary and secondary schools, six cases were selected for this study:

West Virginia v. Barnette (1943)

Pickering v. Board of Education (1968)

Tinker v. Des Moines Community School District (1969)

City of Madison v. Wisconsin Employment Relations Commission (1976)

Mt. Healthy v. Doyle (1977)

Givhan v. Western Line Consolidated School District (1979)

The review of literature of the research study focused on three areas:

Constitutional Basis For Freedom of Speech

Political Theory and The State

The Interest of The State in Education: Views of Contemporary Critics

The literature revealed a supportive and definitive base for freedom of speech as this Constitutional guarantee has been applied to the individual in the United States. There has been and continues to be a strong Constitutional basis for freedom of speech in the United States. Political theory supports a conception of The State as organized government exercising sovereign powers. The use of the term "The State" is not found as a major topic of scholarship in current educational theory, publications on educational governance, or activities associated with elementary and secondary schools but is found in studies which focus on philosophy, sociology, anthropology, economics, and political science. Contemporary critics of education most often focus on government regulation of schools, government control of schools, and governance of schools. Critics who have chosen to use the term, The State, are in a minority, but a very vocal minority that appears to be growing.

The review of literature pertaining to the study, which was related to the Constitutional basis of freedom of speech, political theory and The State, and contemporary critics of The State's interest in education, did not reveal consistency in the use of the term, The State. The scholarship which was reviewed indicated that there was little agreement on a conceptual framework for use of the term and an ideological basis was not delineated with regard to The State's interest in the education of individuals. While the review of literature

related to the Constitutional basis for freedom of speech involved an understanding that the Supreme Court as an arm of The State, does interpret the Constitution on behalf of The State, there was not a delineation within this body of literature concerning the term. The literature which focused on political theory and The State acknowledged that traditionally political science has focused on The State as a major component of the discipline. However, in recent years, political science research has focused on the concepts of power, authority, and political structures rather than an analysis of The State per se. Furthermore, political science research has not focused on the nature and scope of The State's interest in education, to any significant degree.

The contemporary critics of The State's interest in education and The State's control of education have been growing since the 1960's. However, the term, The State has not been well defined by the critics. It should be noted, however, that some of the critics do delineate, in a rather systematic fashion, the interest of The State in the education of individuals in their attempt to develop a thesis which supports the idea that the schools have been organized and maintained so as to support inequalities in the social and economic system. The critics do not discuss, to any significant degree, the positive attributes of an educational system controlled by The State or possible benefits to be gained from a system where schools are controlled by The State.

In the six cases reviewed in this study, the opinions of the Supreme Court focused on the Constitutional issue of freedom of speech within the institutional setting of the elementary and secondary school. The interest of The State in maintaining the Constitutional guarantee of freedom of speech was an important override in each of the six cases. The State's interest with regard to freedom of speech was clear. The delineation of that interest in terms of a specific identification of the balance to be achieved between The State and the individual and the theoretical basis that supports the legal theory of the Court was not clear, however. The State's interest in arbitrating disputes between the individual and The State was implicit as well as the Court's prerogative in interpreting what are the interests of The State and what are the rights of the individual.

The six decisions analyzed in the study focused on two particular groups of individuals, students and teachers. In two of the cases the rights of students were of issue and in four cases the rights of teachers were in question. The judicial implication that students and teachers have rights within the institutional setting have thus had an important effect on the schools. While the Court did emphasize that students and teachers do have rights and that such rights are guarded by the Constitution, the Court also pointed out that school authorities do have the right to control the activities and programs within the school setting.

Therefore, the authority and power of the school was reaffirmed and strengthened. This "middle of the road" approach reinforced the social control exercised by the school in general and at the same time allowed the petitioner(s) in the case before the Court to have the opportunity for a specific redress of a grievance, in keeping with Constitutional provisions.

In the six cases reviewed, the power and authority of The State, through the arm of the Supreme Court, may be seen as a mechanism for the maintenance of order and stability within the social system. The Court, in its deliberating and decision-making process reinforces the concepts of order, stability, and consensus. The Court's opinion in the cases reviewed in this study revealed both procedural as well as substantive implications for the interest of The State in the education of individuals. In each of the six cases, the Court used a judicial standard or judicial test as a device for arriving at a decision in the case. For example, in Tinker v. Des Moines Community School District, the judicial standard was "substantial disruption and material interference" and this judicial standard served as a measure whereby local school districts and local schools could evaluate activities and programs. Therefore, the judicial standard developed and/or used by the Court has served to impact upon the school as an institution. The judicial standard applied by the Court has been applied by teachers, principals, and superin-

tendents in local school districts. Substantively, there are also implications for the schools from the decisions of the Court. For instance, the Court became involved in a substantive issue in West Virginia v. Barnette, when the issue of the flag salute was raised as to the substance of values and beliefs held by citizens. Therefore, the procedure used by the Court, with regard to both the development of judicial standards, the nature of the process of judicial review, and the substance of an opinion have had an impact on the institution of the elementary and secondary school. The six cases of this study revealed, therefore, that there is a specific procedure followed by the Court as it arrives at an opinion and that the procedure and the substance of the opinion have far reaching effects.

From the literature which was reviewed and the six cases which were analyzed in this study, the inference can also be made that the interest of The State is determined and defined by The State itself through its agencies such as the Supreme Court. The prerogatives of The State are, it seemed clear, determined by The State and, therefore, the limits of The State's power have been set by The State itself. The Supreme Court, as an arm of The State, has interpreted the interest of The State with regard to specific Constitutional issues. Neither the six cases nor the literature reviewed in this study, however, revealed in a definitive manner the nature and scope of The State's interest in the

education of the individual. This lack of definition and the limited delineation of the parameters of the issues in question may have lead to a current malaise within the educational community concerning the governance of education as to who should govern and to what end. Since The State's interest in education has not been defined in the relevant literature and has not been defined in the selected decisions of the Court, as reviewed and analyzed in this study, where must the educator turn for answers regarding contemporary issues facing the schools with regard to the interest of The State in the education of individuals? The decision making process surrounding the selection of textbooks for schools, the process of teacher certification, the regulation of student behavior, the requirements for a high school diploma, the determination of curriculum programs, competency requirements for students, formulas for the financing of educational programs, the extent of academic freedom for a teacher, and a variety of other day-to-day issues of the elementary and secondary school has become the domain of the bureaucracy. The interest of The State in education, therefore, is being determined, to a significant degree, by the bureaucratic structures of local governments, state governments, and the federal government. The majority of the policies which regulate education are decided in agencies of the bureaucracy where government experts and professionals direct the growth and expansion of The State's interest. One of the character-

istics of the modern State is reliance on the expertise of the specialist. For example, when members of Congress and state legislatures draft legislation dealing with education they often turn to the bureaucracy for the advice of experts. Once the law has passed the particular legislative body, the administration of the statutory requirement is directed by the professionals within the bureaucracy. Likewise in the courts, broad guidelines for policy are established and the bureaucracy gives specific direction to the policy.

The decisions of the Supreme Court confirm the power of the bureaucracy. For example, in Tinker v. Des Moines Community School District the Supreme Court maintained that the basic judicial guideline for determining the appropriate and/or acceptable nature of student behavior in schools was the judicial standard of "substantial disruption or material interference." From this broad judicial guideline which was provided by the Court, professional educators in state departments of education and in local school districts established specific regulations governing student behavior. It was a matter for professional educators to determine the scope of "substantial disruption of material interference." Students who might disagree with specific regulations established by the bureaucratic structures could initiate litigation through the courts in order to seek a redress of grievances. While the general guideline for student behavior in schools might center around freedom of speech and/or freedom of expression which would not lead to "substantial disruption or material interference" within schools, principals, and teachers might

well interpret this guideline to mean compliance, obedience, and orderliness.

It is important to note, therefore, that ultimately it is the bureaucratic structure and the professional educator that interpret the broad guidelines and/or judicial standards of the Supreme Court and give depth and breadth to the language of the Court. Thus, it may well be that the interest of The State as expressed in a Supreme Court decision may be interpreted differently in various states and local school districts throughout the nation. A most important element of this analysis, however, is that the bureaucracy plays an extremely important role in determining the nature and scope of The State's interest in the education of the individual.

Court decisions, at all levels of government, have resulted in an expanded role for state departments of education in areas such as developing plans for the financing of education and the development of programs which are designed to ensure equality of educational opportunity. From the selected decisions of this study, state departments of education as well as local school districts have a basis for expanding their control and regulation of student behavior and teacher behavior. Therefore, major decision making has increasingly centered in the hands of professionals in bureaucratic structures. The public schools are not controlled by elected representatives but by bureaucratic structures dominated by professional experts.

The Supreme Court decides major Constitutional issues where the elementary and secondary school has been involved as the setting for the dispute. Within this Constitutional framework, therefore, the Court establishes a judicial standard as a measure for determining the interest of The State and the rights of the individual and as a balance in the reconciliation of competing and/or conflicting interests. The Court establishes the judicial standard in terms of Constitutional provisions and the bureaucratic structures are ultimately the agencies that develop policies and regulations on issues such as student behavior and teacher employment practices. These policies and regulations serve as a major expression of The State's interest.

The State's interest and a major purpose for which governments have been instituted is the maintenance of social order, along with the protection of the citizenry from external dangers. The promotion of the internal order and provision for the general welfare of the citizenry leads to assumptions both about the nature of freedom of speech and the place of the schools within the social system. Given the general interests of The State, including promotion of national unity or consensus, preservation of internal order and external security, the direction of gradual and orderly change, and the maintenance of general efficiency in bureaucratic structures, then the findings of this study revealed that The State's interest in the education of

individuals was directly related to the position of the schools within the social system. The selected decisions of the Supreme Court analyzed in this study do not address goal(s) or purpose(s) of the schools or delineate a rationale for the intervention of The State in the education of the individual. Since the decisions of the Supreme Court do not address these issues in a specific and/or comprehensive fashion, interferences which have been drawn are very small windows on a very large universe. This study was an attempt to analyze the enigmatic nature of expressions of The State's interest in education. The interest of The State is often defined by the critics of existing social and political structures and by philosophers and/or those seeking answers to normative questions. The State, through selected decisions of the Supreme Court, does not define, in a specific and precise manner, its own interest in the education of the individual even though it exercises considerable control over the entire educational enterprise. Certainly the inference can be drawn that The State assumes education to be good and worthwhile and an enterprise to be regulated. It seems warranted that the interest of The State centers on the development of a citizenry that supports the existing political, social, and economic system and adheres to those principles associated with the Constitution. The interest of The State, therefore, is in citizenship training supported by a rationale of the "good of the

community." Stability, harmony, order, and consensus are inevitable as desirable ends as The State seeks to perpetuate its own existence. When conflict surfaces it is resolved most often by the judiciary in keeping with interpretations of the Constitution. Therefore, the interest of The State, the limits of the power of The State, and the prerogatives of The State are defined and determined by The State itself in keeping with the desirable ends.

Vouchers, tuition tax credits, educational finance reform, and the growth of independent schools which are church-related are indicative of a growing debate that is emerging concerning the interest of The State in the education of the individual. These issues clearly focus on the interest of The State and the political control which The State exercises over the individual. In the United States, public systems of schooling have been associated with popular sovereignty, individual freedom, a community of interest, and the development of a political constituency which supports the ideology of The State and have been used by politicians and the bureaucratic structure to maintain systems of political control. The interest of The State in education cannot long remain the concern of only philosophers and social theorists. Parents, students, and teachers have already begun asking, in large numbers, who should control education, for what reasons, and to what extent. The interest of The State in the education of citizens and the relationship of the individual to The State have emerged as the crucial centers of a variety of contemporary educational issues.

Conclusions

From the research of this study, the following conclusions were warranted:

1. The Supreme Court has decided a significant number of cases which have dealt with the Constitutional guarantee of freedom of speech. Six of those decisions dealt specifically with this Constitutional guarantee as it was applied to elementary and secondary schools. These six decisions were West Virginia v. Barnette (1943), Pickering v. Board of Education (1968), Tinker v. Des Moines Community School District (1969), City of Madison v. Wisconsin Employment Relations Commission (1976), Mt. Healthy v. Doyle (1977), Givhan v. Western Line Consolidated School District (1979).

2. The six decisions of the Supreme Court which dealt with the Constitutional guarantee of freedom of speech as applied to elementary and secondary schools did not specifically state a purpose(s) or a goal(s) for the education of citizens.

3. The six decisions of the Supreme Court which were selected for this study applied specific judicial standards as a measure for determining the position of the Court. In West Virginia v. Barnette the "clear and present danger" standard was applied, in Pickering v. Board of Education the standard was focused on "controlling interests" and a "balance of interests", in Tinker v. Des Moines Community School District the standard was "material and substantial

interference", in City of Madison v. Wisconsin Employment Relations Commission the standard was "prior restraint", in Mt. Healthy v. Doyle the standard was a "balance of interests", and in Givhan v. Western Line Consolidated School District the standard applied by the Court was a "balance of interests" standard.

4. In the six decisions of the Supreme Court which were identified for this study, a rationale or justification was not delineated for the intervention of The State in matters relating to the education of the individual.

5. The nature and scope of The State's interest is not definitive. The boundaries of The State's interest are unclear with regard to the goal(s) of education, the purpose(s) of education, and a rationale for the intervention of The State in matters regarding the education of individuals. Implicit, however, in the six decisions analyzed in this study is the view that The State's interest in education is determined by The State's concern for order, stability, harmony, consensus, and national unity. A congruency which exists between the six decisions, therefore, focuses on the assumption that inherent in the opinions of the Court are these concerns which serve as priorities for the prevailing order.

6. Schools which are controlled by The State are the targets of increasing criticism and debate regarding the questions of who should control education, for what reasons, and to what extent.

7. The literature related to The State's interest in matters regarding education was not definitive in the use of the term The State. Most often the literature referred to terms such as government policy, government regulation, government control, governance and policy, government interests, allocation and use of power, authority, and political structures. The literature revealed that the interest of The State was to maintain order, stability, national unity, consensus, and to provide for orderly change, external security, and efficiency in government operations.

Implications

The implications of this research study focused primarily on elementary and secondary schools.

Elementary and secondary schools within the United States are controlled and regulated by The State. The leadership of these schools should have a comprehensive understanding of The State's interest in the education of the individual particularly regarding the legal bases involving court decisions, state constitutions, the federal Constitution, and statutory provisions which provide a framework for The State's interest. The conclusion of this study was that the decisions of the Supreme Court which relate to freedom of speech, as this Constitutional guarantee has been applied to elementary and secondary schools, did not delineate the

nature and scope of The State's interest with regard to the goal(s) of education, the purpose(s) of education, and a rationale for The State's interest in education was not provided. Implicit, however, in the Supreme Court decisions regarding education was the matter of The State's interest with regard to order, stability, consensus, and national unity.

While it can be acknowledged that The State does have an interest in the education of citizens, the nature and scope[1] of that interest was not identifiable from the opinions of the Supreme Court analyzed in this study. Though the Constitution serves as a major determinant of The State's interest, and the decisions of the Supreme Court are based on Constitutional principles, educators will not find definitive statements in either the Constitution or Supreme Court decisions which give guidance or direction to the inquiry--why does The State control the education of individuals and what is the interest of The State in the education of individuals? The ways in which the social sciences identify and analyze the interests of The State are most important for educational research which focuses on the schools. The identification of the expressions of The State's interests,

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[1]Note: Nature and scope of The State's interest involves: (1) purpose(s) of education, (2) goal(s) of education, (3) rationale(s) for The State's interest in education.

the relative importance assigned to such expressions, the relationship of The State to the individual, and the documentation of changes in The State's interest might well reveal important changes in the social structure and the political system. Educators, at all levels, need to have an understanding of The State's interest in education and participate in the debate which focuses on decisions which are to be made publicly and those which are to be made privately.

Recommendations For Further Research

The following recommendations are made for further research with regard to the issue of The State's interest in the education of the individual:

1. Research studies which would focus on various Constitutional issues, substantive as well as procedural, such as freedom of press, freedom of religion, equal protection, and due process might be important in determining the nature and scope of The State's interest in areas other than freedom of speech with emphasis on Supreme Court opinions relating to elementary and secondary schools.

2. Research studies which would focus on various Constitutional issues so as to ascertain the nature and scope of The State's interest as expressed in opinions of the Supreme Court could focus on college and universities.

3. Research studies which would focus on opinions

of the United States District Courts as well as the United States Courts of Appeal with regard to various Constitutional issues and the nature and scope of The State's interest, with regard to education, would provide an informative data base as these courts have decided matters relating to The State's interest in the education of the individual. Substantive issues as well as procedural issues might well be studied.

4. Research studies which would focus on opinions of the Supreme Courts of the several states would provide additional insights into the nature of The State's interest as these opinions have focused on matters of regulation and control of education by the several states. Opinions regarding compulsory attendance laws would be particularly relevant for an analysis of the decisions in the Supreme Courts of the several states.

5. Research studies which would attempt to define and delineate formal expressions of The State's interest would be most helpful in establishing a framework for defining the scope of The State's interest. How do we determine the expressions of The State? How are expressions of The State's interest made other than through the courts? While this research study focused on the legal expressions of The State's interest through the Supreme Court, what are other formal expressions of The State's interest and how can research be conducted of these expressions?

6. Research studies that would focus on the informal expressions of The State's interest with regard to education would be very useful. Court opinions are formal expressions of The State's interest, but additional research in the area of informal systems of political and social behavior might yield important data on The State's interest.

7. Research studies which would focus on the perceptions held by citizens concerning The State would be most informative. How do citizens perceive The State? How do citizens perceive The State's interest and control by The State of the education of the individual?

8. Research studies that could focus on landmark cases in education which have been decided by the Supreme Court, which cut across procedural as well as substantive issues, and involve elementary and secondary schools as well as colleges and universities, could be conducted so as to ascertain the nature and scope of The State's interest in the education of individuals. Supreme Court decisions which might be considered in such a study would include:

Meyer v. Nebraska[2]

Pierce v. Society of Sisters[3]

Brown v. Board of Education[4]

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[2]262 U.S. 390, 43 S. Ct. 625 (1923).

[3]268 U.S. 510, 45 S. Ct. 510 (1925).

[4]349 U.S. 294, 75 S. Ct. 753 (1955).

Epperson v. State of Arkansas[5]

Wisconsin v. Yoder[6]

San Antonio Independent School District v. Rodriquez [7]

Milliken v. Bradley[8]

Ambach v. Norwick[9]

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[5]393 U.S. 97, 89 S. Ct. 266 (1968).

[6]406 U.S. 205, 92 S. Ct. 1526 (1972).

[7]411 U.S. 1, 93 S. Ct. 1278 (1973).

[8]433 U.S. 267, 97 S. Ct. 2749 (1977).

[9]411 U.S. 68, 99 S. Ct. 1589 (1979).

BIBLIOGRAPHY

Abbot, Grace. The Child And The State. 2 vols. Chicago: University of Chicago Press, 1938.

Ashton-Warner, Sylvia. Teacher. New York: Simon and Schuster, 1963.

Bailyn, Bernard. Education in the Forming of American Society: Needs and Opportunities For Study. Chapel Hill: University of North Carolina Press, 1960.

Barrow, Robin. Radical Education: A Critique of Freeschooling and Deschooling. London: Martin Robertson, 1978.

Barzun, J., and H. F. Graff. The Modern Researcher. 3rd ed. New York: Harcourt Brace and World, 1977.

Beretier, Carl. Must We Educate? Englewood Cliffs, N.J.: Prentice-Hall, 1973.

Bernstein, Richard J. The Restructuring of Social and Political Theory. New York: Harcourt Brace Jovanovich, 1976.

Black, Henry Campbell. Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern. 4th ed., rev. St. Paul, Minn.: West, 1968.

Bolmeier, E. C. Landmark Supreme Court Decisions on Public School Issues. Charlottesville, Va.: Michie, 1973.

_____. Legal Issues in Education, Abridged: Duke Doctoral Dissertations. Charlottesville, Va.: Michie, 1970.

Bowles, Samuel, and Herbert Gintis. Schooling in Capitalist America: Educational Reform and the Contradictions of Economic Life. New York: Basic Books, 1976.

Clark, Kenneth. Dark Ghetto. New York: Harper, 1965.

Cohen, Felix S. Ethical Systems and Legal Ideals: An Essay on the Foundations of Legal Criticism. Westport, Conn.: Greenwood Press, 1933.

Collin, Greer. The Great School Legend: A Revisionist Interpretation of American Public Education. New York: Basic Books, 1972.

Constitution of the United States.

Coons, John E. and Stephen D. Sugarman. Education By Choice: The Case For Family Control. Berkeley: University of California Press, 1978.

Curti, Merle, ed. Theory and Practice in Historical Study: A Report of the Committee on Historiography. Social Science Research Council Bulletin, No. 54. New York: Social Science Research Council, 1946.

David, Miriam E. The State, The Family and Education. London: Routledge and Kegan Paul, 1980.

de Grazia, Alfred. Political Behavior. New York: Free Press, 1965.

Dennison, George. The Lives of Children. New York: Random House, 1969.

Dewey, John. Democracy and Education: An Introduction To The Philosophy of Education. New York: Macmillan, 1916.

_____. How We Think. Boston: Heath, 1910.

_____. The Quest For Certainty. New York: Minton, Balch, 1929.

Dickerson, Reed. The Fundamentals of Legal Drafting. Boston: Little, Brown, 1965.

Dworkin, R. M., ed. The Philosophy of Law. Oxford: Oxford University Press, 1977.

Easton, David. The Political System: An Inquiry Into The State of Political Science. New York: Alfred A. Knopf, 1967.

Educational Futurism 1985. Berkeley: McCutchan, 1971.

Emerson, Thomas I. "Toward A General Theory of the First Amendment." The Yale Law Journal, 72 (November, 1962), 877-956.

Erickson, Erik. Childhood and Society. New York: W. W. Norton, 1950.

Fantini, Mario, and Gerald Weinstein. The Disadvantaged: Challenge to Education. New York: Harper, 1968.

Fellman, David, ed. The Supreme Court and Education. Rev. and enl. New York: Teachers College, Columbia University, teachers College Press, 1969.

Field, G. C. Political Theory. Bristol, England: Western Printing, 1965.

Forkosch, Morris D. Constitutional Law. 2nd ed. Mineola, N.Y.: Foundation Press, 1969.

Frankel, Charles. The Case For Modern Man. Boston: Beacon, 1959.

Friedenberg, Edgar. Coming of Age in America. New York: Random House, 1963.

Friedman, Milton. Capitalism and Freedom. Chicago: University of Chicago Press, 1962.

Good, Carter V. Essentials of Educational Research. New York: Appleton-Century Crofts, 1966.

_____. Introduction To Educational Research: Methodology of Design In The Behavioral and Social Sciences. 2nd ed. New York: Appleton Century-Crofts, 1963.

Goodman, Paul. Compulsory Mis-Education. New York: Horizon Press, 1964.

_____. Growing Up Absurd. New York: Random House, 1960.

Gottschalk, Louis R. Understanding History: A Primer of Historical Method. New York: Alfred A. Knopf, 1950.

Gross, Beatrice, and Ronald Gross, eds. Radical School Reform. New York: Simon and Schuster, 1969.

Hansen, Judith Friedman. Sociocultural Perspectives on Human Learning: An Introduction To Educational Anthropology. Englewood Cliffs, N.J.: Prentice-Hall, 1979.

Haubrich, Vernon F., and Michael W. Apple, eds. Schooling and the Rights of Children. Berkeley: McCutchan, 1975.

Herndon, James. The Way It Spozed To Be. New York: Simon and Schuster, 1968.

Hitchner, Dell Gillette, and William Henry Harbold. Modern Government. 3rd ed. New York: Harper, 1972.

Hogan, John C. The Schools, the Courts, and the Public Interest. Lexington, Mass.: Heath, 1974.

Holt, John. How Children Fail. New York: Pitman, 1964.

_____. How Children Learn. New York: Pitman, 1967.

_____. Instead of Education: Ways To Help People Do Things Better. New York: E. P. Dutton, 1976.

_____. The Underachieving School. New York: Pitman, 1969.

Hopkins, Charles D. Understanding Educational Research: An Inquiry Approach. Columbus, Ohio: Merrill, 1980.

Hutchins, Robert M. The Conflict In Education In A Democratic Society. Westport, Conn.: Greenwood Press, 1953.

Hyneman, Charles. The Study of Politics. Urbana: University of Illinois Press, 1956.

Illich, Ivan. Deschooling Society. New York: Harper, 1970.

Jacobstein, J. Myron, and Roy M. Mersky. Fundamentals of Legal Research. Mineola, N.Y.: Foundation Press, 1977.

Jencks, Christopher. Inequality. New York: Basic Books, 1972.

Jones, Ralph H. Methods and Techniques of Educational Research. Danville, Ill.: Interstate Printers and Publishers, 1973.

Katz, Michael B. Class, Bureaucracy, and Schools. New York: Praeger, 1971.

Kelsen, Hans. General Theory of Law and State, trans. Anders Wedberg. New York: Russell and Russell, 1945.

Kerlinger, F. N. Foundations of Behavioral Research. 2nd ed. New York: Holt, Rinehart, and Winston, 1973.

Kirp, David L., and Mark G. Yudof. Educational Policy and The Law: Cases and Materials. Berkley: McCutchan, 1974.

Kohl, Herbert. 36 Children. New York: New American Library, 1967.

Kotin, Lawrence, and William F. Aikman. Legal Foundations of Compulsory School Attendance. Port Washington, New York: National University Publications, Kennikat Press, 1980.

Kozol, Jonathan. Death at an Early Age. Boston: Houghton Mifflin, 1967.

Krug, Edward A. Charles W. Eliot and Popular Education. New York: Teachers College, Columbia University, Teachers College Press, 1961.

Kuhn, Thomas S. The Structure of Scientific Revolutions. Chicago: University of Chicago Press, 1962.

Kurland, Philip B., ed. Free Speech and Association: The Supreme Court and the First Amendment. Chicago: University of Chicago Press, 1975.

Leonard, George. Education and Ecstasy. New York: Delacorte, 1968.

Levi, Edward H. An Introduction To Legal Reasoning. Chicago: University of Chicago Press, 1949.

LEXIS Handbook. New York: Mead Data Central, 1980.

Mabbot, J. D. The State and The Citizen: An Introduction To Political Philosophy. London: Hutchinson University Library, 1948.

MacIver, R. M. The Modern State. London: Oxford University Press, 1926.

Marcuse, Herbert. One Dimensional Man: Studies In The Ideology of Advanced Industrial Society. Boston: Beacon, 1964.

Mayer, Milton. On Liberty: Man v. The State. Santa Barbara: California, The Center For The Study of Democratic Institutions, 1969.

McLuhan, Marshall. The Medium Is The Massage. New York: Delacorte, 1969.

Meiklejohn, Alexander. Free Speech and Its Relations To Self-Government. New York: Harper, 1948.

Moore, Sally Falk. Law As Process: An Anthropological Approach. London: Routledge, Kegan Paul, 1978.

Mouly, George J. Educational Research: The Art and Science of Investigation. Boston: Allyn, Bacon, 1978.

Peterson, Leroy, Richard A. Rossmiller, and Marlin M. Volz. The Law and Public School Operation. New York: Harper, 1978.

Postman, Neil, and Charles Weingartner. Teaching as a Subversive Activity. New York: Delacorte, 1969.

Rist, Ray C., and Ronald J. Anson, eds. Education, Social Science, and the Judicial Process. New York: Teachers College, Columbia University, Teachers College Press, 1977.

Sax, Gilbert. Foundations of Educational Research. Englewood Cliffs, N.J.: Prentice-Hall, 1979.

Schwartz, Bernard. The Bill of Rights: A Documentary History. 2 vols. New York: McGraw Hill, 1971.

Silberman, Charles E. Crisis in the Classroom: The Remaking of American Education. New York: Random House, 1970.

Spring, Joel. Educating The Worker-Citizen: The Social, Economic, and Political Foundations of Education. New York: Longman, 1980.

Spurlock, Clark. Education and the Supreme Court. Westport, Conn.: Greenwood, 1955.

Strahan, Richard Dobbs. The Courts and the Schools. Lincoln, Nebraska: Professional Educators Publications, 1973.

Tribe, Laurence H. American Constitutional Law. Mineola, N.Y.: Foundation Press, 1978.

Tyack, David B., ed. Turning Points in American Educational History. Waltham, Mass.: Blaisdell, 1967.

U.S. Congress. 92nd Cong., 2d Sess., Constitution of the United States: Analysis And Interpretation. Washington: Government Printing Office, 1973.

Van Dyle, Vernon. Political Science: A Philosophical Analysis. Stanford: Stanford University Press, 1960.

van Geel, Tyll. Authority To Control The School Program. Lexington, Mass.: Heath, 1976.

Weihofen, Henry. Legal Writing Style. St. Paul, Minn.: West, 1961.

Whitehead, Alfred North. The Aims of Education. Glencoe: Free Press, 1929.

Wiersma, William. Research Methods in Education: An Introduction. Philadelphia: Lippincott, 1969.

Zeigler, Harmon, and M. Kent Jennings. Governing American Schools. North Scituate, Mass.: Duxbury Press, 1974.

TABLE OF CASES

Gillette v. United States, 401 U.S. 437 (1971).

Ginsberg v. New York, 390 U.S. 629 (1968).

Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979).

Grayned v. City of Rockford, 408 U.S. 104 (1972).

Greenbelt v. Bresler, 398 U.S. 6 (1970).

Katzenbach v. Morgan, 384 U.S. 641 (1966).

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

Kingsley v. New York, 360 U.S. 684 (1959).

Konigsberg v. California, 353 U.S. 252 (1957).

Lemon v. Kurtzman, 403 U.S. 602 (1971).

Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293 (1961).

Maher v. Roe, 432 U.S. 464 (1977).

Meinhold v. Taylor, 414 U.S. 943 (1973).

McCollum v. Board of Education.

McGautha v. California, 402 U.S. 183 (1971).

Monell v. New York, 436 U.S. 658 (1978).

Mt. Healthy v. Doyle, 429 U.S. 274 (1977).

NAACP v. Alabama, 377 U.S. 288 (1963).

National Labor Relations Board v. Packers and Warehousemen, 377 U.S. 58 (1964).

New Rider v. Board of Education, Pawnee County, Oklahoma, 414 U.S. 1097 (1973).

Norton v. East Tennessee State University, 399 U.S. 906 (1970).

Noto v. United States, 367 U.S. 290 (1961).

Ohralik v. Ohio 436 U.S. 447 (1978).

Olff v. East Side Union High School District, 404 U.S. 1042 (1972).

Oregon v. Mitchell, 400 U.S. 112 (1970).

Palko v. Connecticut, 302 U.S. 319 (1937).

Papish v. University of Missouri, 410 U.S. 667 (1973).

Pickering v. Board of Education, 391 U.S. 563 (1968).

Police Department of the City of Chicago v. Mosley, 408 U.S. 92 (1972).

Procunier v. Martinez, 416 U.S. 396 (1974).

Pruneyard v. Robins (1980).

Raney v. Board of Education.

Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367 (1969).

San Antonio Independent School District v. Rodriquez, 411 U.S. 1 (1973).

Scales v. United States, 367 U.S. 203 (1961).

Schneider v. Smith, 390 U.S. 17 (1968).

Schneiderman v. United States, 320 U.S. 118 (1943).

School District of Abington Township v. Schempp, 374 U.S. 203 (1963).

Shelton v. Tucker, 364 U.S. 479 (1960).

Sheppard v. Maxwell, Warden, 384 U.S. 333 (1966).

Smith v. Daily Mail, 443 U.S. 97 (1979).

Talley v. California, 362 U.S. 60 (1960).

Thomas v. Arizona, 356 U.S. 390 (1958).

Time, Inc. v. Hill, 385 U.S. 374 (1967).

Tinker v. Des Moines, 393 U.S. 503 (1969).

United States v. Kusche, D.C. Cal., 56 F.Supp. 201.

United States v. Mendenhall, 446 U.S. 544 (1980).

Virginia State Board of Pharmacy v. Virginia Citizens Council, Inc., 425 U.S. 748 (1976).

Walker v. City of Birmingham, 388 U.S. 307 (1967).

Walz v. New York, 397 U.S. 664 (1970).

Watts v. United States, 394 U.S. 705 (1969).

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

Whitehill v. Elkins, 389 U.S. 54 (1967).

Whitney v. United States, 274 U.S. 357 (1927).

Wyman v. James, 400 U.S. 309 (1971).

Zablocki v. Redhail, 434 U.S. 374 (1978).

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THE INTEREST OF THE STATE: A VIEW FROM THE JUDICIARY

by

Geralene Mills Sutton

(ABSTRACT)

The problem of this research study was to analyze decisions of the Supreme Court regarding expressions of The State's interest in education. The study focused on decisions of the Supreme Court which have been based on the Constitutional guarantee of freedom of speech involving elementary and secondary schools so as to determine the nature and scope of The State's interest in the education of the individual. The research questions focused on specific decisions of the Supreme Court which have dealt with the issue of freedom of speech as this Constitutional guarantee has been applied to elementary and secondary schools, the purpose(s) or goal(s) of education as stated in the decisions, the judicial standard applied in each decision, the rationale or justification for the intervention of The State in the education of the individual as delineated in the decision, and the nature of a congruency or a pattern for The State's interest in education. The methodology of the study was historical. The LEXIS computer analysis was used in conjunction with the analysis of legal indices in the identification and selection of data.

Six cases were identified for analysis in the study. The

cases included: West Virginia v. Barnette (1943), Pickering v. Board of Education (1968), Tinker v. Des Moines Community School District (1969), City of Madison v. Wisconsin Employment Relations Commission (1976), Mt. Healthy v. Doyle (1977), and Givhan v. Western Line Consolidated School District (1979).

The review of literature focused on the Constitutional basis for freedom of speech, political theory and The State, and the views of contemporary critics concerning the interest of The State in education. Within the United States, The State maintains a system of social control and the elementary and secondary schools are an important part of that social control. Outside of the family, the school is regarded as the major socializing institution. A major challenge for the educator is that of formulating a conceptual framework that achieves a harmonious relationship between what is deemed to be the interest of The State and the needs as well as rights of individual persons. The institutions of a society rest on a foundation of beliefs, principles, values, norms, and arrangements which establish, in part, the interests of The State and the rights of the individual. The relationship which exists between The State and the individual is a major component of the social system and influences and is influenced by the school as an institution. The findings of the study indicate that there is not consistent use of the term, The State, within the relevant literature and within decisions of

the Supreme Court, that the power and authority of The State through the arm of the Supreme Court may be seen as a mechanism for the maintenance of order, stability, and consensus within the social system, and that the procedural and substantive issues within the decisions of the Supreme Court have had an important influence on educational institutions. The interest of The State, the limits of the power of The State, and the prerogatives of The State are defined and determined by The State itself.