

# The 1978 Hatch Amendment: Attempted Applications Are Failing to Protect Pupil Rights

## I. INTRODUCTION

Numerous courtroom battles have been waged recently over school curriculum and textbook selection,<sup>1</sup> the removal of books from school libraries,<sup>2</sup> and the censorship of student activities.<sup>3</sup> The proper role of public schools as an inculcator of community values or as a "marketplace of ideas" is also in debate.<sup>4</sup> In these legal disputes, parents,<sup>5</sup> students,<sup>6</sup> teachers,<sup>7</sup> and even school boards<sup>8</sup> are asserting their constitutional rights.

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<sup>1</sup>See, e.g., *Pratt v. Independent School Dist.*, 670 F.2d 771 (8th Cir. 1982) (banning of film used in high school English course, "The Lottery," enjoined); *McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. 1255 (E.D. Ark. 1982) (board of education enjoined from implementing a state statute mandating balanced treatment of creation and evolution sciences), *aff'd*, 723 F.2d 45 (8th Cir. 1983); *Todd v. Rochester Community Schools*, 41 Mich.App. 320, 200 N.W.2d 90 (1972) (parents' challenges to assigning the book *Slaughterhouse Five* in a high school literature class dismissed); see also Lichtenstein, *Children, The Schools, and The Right to Know: Some Thoughts at the Schoolhouse Gate*, 19 U.S.F.L. REV. 91, 91-92 nn.2 & 4 (1985).

<sup>2</sup>See, e.g., *Bicknell v. Vergennes Union High School Bd. of Directors*, 638 F.2d 438 (2d Cir. 1980) (suit challenging the removal of *Dog Day Afternoon* and *The Wanderers* from school library dismissed); *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1330 (7th Cir. 1980) (challenging the removal of *Go Ask Alice*, *The Bell Jar*, and *The Stepford Wives* from a high school library); *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577 (6th Cir. 1976) (removal of *Cats Cradle* and *Catch 22* from high school library enjoined); see also Lichtenstein, *supra* note 1, at 92 n.3.

<sup>3</sup>See, e.g., *Seyfried v. Walton*, 668 F.2d 214 (3d Cir. 1981) (banning of high school student production of "Pippin" upheld); *Trachtman v. Anker*, 563 F.2d 512 (2d Cir. 1977) (school administrator's suppression of high school students' plans to distribute and publish in the school newspaper a survey of the student body's sexual attitudes upheld); *Baughman v. Freienmuth*, 478 F.2d 1345 (4th Cir. 1973) (parents' first amendment challenge to a regulation allowing a high school principal to prohibit distribution on school grounds of certain materials denied); see also Lichtenstein, *supra* note 1, at 92-93 n.5.

<sup>4</sup>See Comment, *What Will We Tell the Children? A Discussion Of Current Judicial Opinion On The Scope Of Ideas Acceptable For Presentation in Primary and Secondary Education*, 56 TULANE L. REV. 960 (1982) [hereinafter cited as Comment, *Discussion*]; see also *infra* notes 43-56 and accompanying text.

<sup>5</sup>See *Board of Educ. v. Pico*, 457 U.S. 853 (1982); *Minarcini v. Strongsville School Dist.*, 541 F.2d 577; *Loewen v. Turnipseed*, 488 F. Supp. 1138 (N.D. Miss. 1980).

<sup>6</sup>See, e.g., *Pratt v. Independent School Dist.*, 670 F.2d 771; *Bicknell v. Vergennes Union High School Bd. of Directors*, 638 F.2d 438; *Minarcini v. Strongsville School Dist.*, 541 F.2d 577; *Loewen v. Turnipseed*, 488 F. Supp. 1138.

<sup>7</sup>See, e.g., *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969); *Wilson v. Chancellor*, 418 F. Supp. 1358 (D. Or. 1976); *Sterzing v. Fort Bend Indep. School Dist.*, 376 F. Supp. 657 (S.D. Texas 1972).

<sup>8</sup>See, e.g., *Board of Educ. v. Pico*, 457 U.S. 853 (1982); *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300.

Another battle involving the education of school children has developed as a result of some final regulations issued by the Department of Education in 1984.<sup>9</sup> These regulations, which became effective in November, 1984, implemented the 1978 "Protection of Pupil Rights Act,"<sup>10</sup> more commonly known as the Hatch Amendment. The first provision of the Hatch Amendment requires that under most programs funded by the Department of Education, schools must make available for parental inspection all instructional materials to be used in any research or experimentation program or project in which their children participate.<sup>11</sup> The second provision of the Hatch Amendment requires that schools obtain written parental consent prior to a student's participation in federally funded psychiatric or psychological examination, testing, or treatment, if the primary purpose is to reveal information concerning: (1) "political affiliations"; (2) "mental and psychological problems potentially embarrassing to the student or his family"; (3) "sex behavior and attitudes"; (4) "illegal, anti-social, self-incriminating and demeaning behavior"; (5) "critical appraisals of other individuals with whom respondents have close family relationships"; (6) "legally recognized privileged and analogous relationships, such as those with lawyers, physicians, and ministers"; or (7) "income."<sup>12</sup> The Department of Education's 1984 regulations define psychiatric and psychological examination, testing, and treatment<sup>13</sup> and also explain the procedure for filing a complaint under the Hatch Amendment.<sup>14</sup>

The proponents of the Hatch Amendment were certain parent and "concerned citizen" groups who have a traditional view of how and what students should be taught in school.<sup>15</sup> Various teaching methods

<sup>9</sup>34 C.F.R. §§ 98.1-98.10 (1985).

<sup>10</sup>20 U.S.C. § 1232h (Supp. 1985).

<sup>11</sup>20 U.S.C. § 1232h(a) (Supp. 1985). *Inspection by Parents or Guardians of Instructional Material:*

All instructional material, including teacher's manuals, films, tapes, or other supplementary instructional material which will be used in connection with any research or experimentation program or project shall be available for inspection by the parents or guardians of the children engaged in such program or project. For the purpose of this section "research or experimentation program or project" means any program or project in any applicable program designated to develop new or unproven teaching methods or techniques.

In this Note, the use of the word "parents" or "parental" also includes the rights of a "guardian" of a child.

<sup>12</sup>20 U.S.C. § 1232h(b) (Supp. 1985).

<sup>13</sup>34 C.F.R. §§ 98.3-98.4 (Supp. 1985).

<sup>14</sup>34 C.F.R. § 98.7 (Supp. 1985).

<sup>15</sup>Proponents include, among others, the Eagle Forum, American Education Coalition, National Council for Better Education, Maryland Coalition of Concerned Parents for Privacy Rights in Public Schools, Guardians of Education for Maine, The American Coalition for Traditional Values, and other "pro-family" organizations. The Hatch Amendment

developed during the 1970's, sex education, and school textbooks that emphasize evolution rather than divine creation are all considered objectionable.<sup>16</sup> Proponents claim the Hatch Amendment and the regulations protect students from "psychiatric meddling"<sup>17</sup> and "psychological abuse,"<sup>18</sup> "federal thought control,"<sup>19</sup> "mind-bending" surveys,<sup>20</sup> and also prevent invasions into the students' personal and family matters.<sup>21</sup> The opponents of the Hatch Amendment include various professional education groups, scientific associations, and civil rights groups.<sup>22</sup> Opponents claim the Hatch Amendment and the regulations affect curriculum, restrict teachers' and students' academic freedom, and curtail the school's function as a marketplace of ideas.<sup>23</sup>

This Note will examine the background of the Hatch Amendment and the regulations issued by the Department of Education to implement the Hatch Amendment. This Note will also discuss the constitutionality of the Hatch Amendment and the regulations both on their face and as applied to various groups attempting to use them throughout the nation's schools. Finally, this Note will propose some solutions to the Hatch Amendment controversy.

## II. A DUAL BACKGROUND

The Hatch Amendment is best understood if one has some knowledge of the background surrounding the amendment. The first part of this section concerns research and experimentation in public schools. The

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Coalition, *THE HATCH AMENDMENT REGULATIONS: A GUIDELINES DOCUMENT* 15-18 (June 1985) (available from American Association of School Administrators) [hereinafter cited as *GUIDELINES*].

<sup>16</sup>Richburg, *Secular Humanists Challenged in Schools by Fundamentalists*, *The Indianapolis Star*, January 5, 1986, at 25, col. 1 [hereinafter cited as *Challenged in Schools*].

<sup>17</sup>Donahue Transcript No. 02275, Multimedia Entertainment Inc., 1 (1984) (transcript of the Phil Donahue show) [hereinafter cited as *Transcript*].

<sup>18</sup>B. Lynn, *Growing Threats to Academic Freedom: "The Hatch Amendments,"* 2 (May 30, 1985) (available from American Civil Liberties Union, Washington, D.C.).

<sup>19</sup>Lewis, *Little Used Amendment Becomes Divisive, Disruptive Issue*, *PHI DELTA KAP-PAN* 667, 668 (June 1985) (citing P. Schlafly).

<sup>20</sup>124 CONG. REC. 27,423 (1978).

<sup>21</sup>*Id.*; see also W. Riley, U.S. Department of Education, *Comments to Statewide Meeting of Student Personnel*, Tallahassee, Florida (September 18, 1985).

<sup>22</sup>*GUIDELINES*, *supra* note 15, at 1 (Opponents include, among others, American Civil Liberties Union, American Association of School Administrators, National Parent Teachers Association, American Association of Colleges of Teachers Education Association for the Advancement of Psychology, Council for Education and Development, Federation of Behavioral Psychological and Cognitive Science, National Association of School Psychologists, and People for the American Way).

<sup>23</sup>Lynn, *supra* note 18, at 7-9; see also *infra* notes 163-83 and accompanying text.

second part of this section examines the roles of public schools in our society and the concept of academic freedom in the classroom.

#### A. Prior Research in the Schools: An Open Door Policy

Since the 1950's, American schools have welcomed researchers conducting various psychological studies.<sup>24</sup> Researchers recognized schools as having "boundless laboratory opportunities" and "tremendous potential" for child-related studies.<sup>25</sup> Encouraged by school administrators, researchers took full advantage of their opportunities.<sup>26</sup> For example, at the 1969 national convention of the American Educational Researchers Association, only three of the sixty-six researchers making presentations of their studies had at any time in their careers been denied permission to conduct research in public schools.<sup>27</sup>

In the late 1950's and throughout the 1960's, however, some parents expressed concern about the extent of the research being conducted in public schools.<sup>28</sup> These parents believed that much of this research was nonacademic in nature. In 1959, the Houston School District Governing Board ordered the burning of the answer sheets to six "socio-psychometric" tests administered to five thousand ninth graders in the city's school system.<sup>29</sup> Parents objected to questions concerning the students' perceptions of themselves and their relationships with families, peers, and teachers.<sup>30</sup>

In 1966, in New York, a similar incident occurred after the New York City Board of Education permitted researchers to administer a personality test to 350 ninth-grade students without any prior parental

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<sup>24</sup>Dellinger, *Experimentation in the Classroom: Use of Public School Students as Research Subjects*, 12 J. LAW & EDUC. 347, 349 (1983).

<sup>25</sup>*Id.* (citing Mullen, *The School as a Psychological Laboratory*, 14 AM. PSYCHOLOGIST 53 (1959)).

<sup>26</sup>*Id.*

<sup>27</sup>*Id.* at 349-50 (citing Clasen et al., *Access to Do Research in Public Schools*, 38 J. EXPER. EDUC. 16 (1969))

<sup>28</sup>*Id.* at 350. See also *Special Inquiry on Invasion of Privacy: Hearing of Subcomm. on Invasion of Privacy of House Governmental Operations Comm.*, 89th Cong., 1st Sess. 301-02 (1965) [hereinafter cited as *Special Inquiry*].

<sup>29</sup>Dellinger, *supra* note 24, at 350 (citing Nettler, *Test Burning in Texas*, 14 AM. PSYCHOLOGIST 682 (1959)). The socio-psychometric tests consisted of a Vocabulary-Information profile test, an Interest Bank, a high school personality test, a student information bank, a "sociometric rating device," and the Youth Attitude Scales. *Id.* at 350 n.11.

<sup>30</sup>Nettler, *Test Burning in Texas*, 14 AM. PSYCHOLOGIST 682 (1959). Objectionable questions included: "I enjoy soaking in the bathtub"; "A girl who gets into trouble on a date has no one to blame but herself"; "If you don't drink in our gang, they make you feel like a sissy"; "Sometimes I tell dirty jokes when I would rather not"; "Dad always seems too busy to pal around with me." The objectionable questions were taken from an earlier survey of 13,000 school children in Texas that had evoked no parental objections. *Id.*

consent.<sup>31</sup> The test included numerous questions about personal attitudes and practices relating to sex and religion.<sup>32</sup>

In 1973, in *Merriken v. Cressman*,<sup>33</sup> the only reported court case involving psychological research in a public school, an eighth-grade student and his mother brought an action against the school principal and other members of the local school board. The school was planning to use a psychological questionnaire in the school district as part of a "Critical Period of Intervention" program designed to identify potential drug abusers.<sup>34</sup> The plaintiffs alleged that the questionnaire and the entire program violated their constitutional rights to privacy.<sup>35</sup> The questionnaire asked such questions as the family religion, the family composition, including the reason for the absence of one or both parents, and whether one or both parents "hugged and kissed me good night when I was small," "tell me how much they love me," "enjoy talking about current events with me," and "make me feel unloved."<sup>36</sup>

The federal district court agreed with the Merrikenes and permanently enjoined the school district from implementing the entire drug prevention program.<sup>37</sup> The court stated: "'Students are persons under the Constitution; they have the same rights and enjoy the same privileges as adults. Children are not second class citizens.'"<sup>38</sup> After balancing individual privacy rights against state rights to invade that privacy for the sake of public interest, the court concluded that, based on these facts, the student would lose more than society could gain.<sup>39</sup>

Parental concern about the education and privacy rights of their children and disapproval of psychological research programs and questionnaires in schools led to congressional involvement.<sup>40</sup> In 1962, Representative John Ashbrook of Ohio introduced a bill requiring parental knowledge of, and consent for, their children's participation in federally funded research relating to students' personalities, home life, family

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<sup>31</sup>Dellinger, *supra* note 24, at 350. The test was the Minneapolis Multiphasic Personality Inventory.

<sup>32</sup>Some of the true-false questions were: my sex life is satisfactory; evil spirits possess me at times; I am very strongly attracted by members of my own sex; I believe in a life hereafter; I have never indulged in any unusual sex practices; I believe my sins are pardonable; many of my dreams are about sex matters; I am a special agent of God; I pray several times a week; there is something wrong with my sex organs; I like movie love scenes. 112 CONG. REC. 7,733 (1966).

<sup>33</sup>364 F. Supp. 913 (E.D. Pa. 1973).

<sup>34</sup>*Id.* at 914.

<sup>35</sup>*Id.* at 917.

<sup>36</sup>*Id.* at 916.

<sup>37</sup>*Id.* at 922.

<sup>38</sup>*Id.* at 919 (quoting *Miller v. Gillis*, 315 F. Supp. 94 (N.D. Ill. 1969)).

<sup>39</sup>*Id.* at 921.

<sup>40</sup>Dellinger, *supra* note 24, at 350.

relationships, sexual behaviors, and religious beliefs.<sup>41</sup> Congress did not pass Ashbrook's bill.

In 1966, Representative Benjamin S. Rosenthal of New York introduced a bill similar to Ashbrook's.<sup>42</sup> Rosenthal's bill prohibited the use of federal funds to support research involving the involuntary administration of personality tests in public schools.<sup>43</sup> The bill also required that if the student was under eighteen, the personality test could not be given without the prior consent of the child's parent. Rosenthal's bill did not pass either.

Rosenthal's bill, however, along with an earlier congressional subcommittee report,<sup>44</sup> alerted Congress to the seriousness of the problem.<sup>45</sup> The congressional subcommittee had examined, among others things, the role of psychological testing of school children in federally sponsored programs.<sup>46</sup> Legislators questioned the value of many of the studies, particularly those with questionnaires examining the student's self-image, family relationships, sexual experience, religious views, personal values, and facts about the student's parents.<sup>47</sup> The subcommittee recommended that parents have an opportunity to inspect questionnaires and give their permission before their children participate in such programs.<sup>48</sup> Eight years passed, however, before Congress enacted an amendment affecting student rights.

In 1974, Representative Jack Kemp of New York introduced an amendment to the General Education Provisions Act (GEPA).<sup>49</sup> This amendment, which passed, required recipients of federal funds to make available to parents of participating students instructional materials used in any program or project designed to explore or develop new or unproven

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<sup>41</sup>See R. Holland, *Analysis of the Protection of Pupil Rights Amendment — "The Hatch Amendment" — and the Department of Education's Final Regulations Regarding Students' Rights in Research, Experimental Activities and Testing* at 4 (June 1985) reprinted in GUIDELINES, *supra* note 15, at 4-11.

<sup>42</sup>Dellinger, *supra* note 24, at 350. Rosenthal's bill was partially in response to the New York City Board of Education's allowing researchers to administer personality tests to ninth-grade students without first obtaining parental consent. See *supra* notes 31-32 and accompanying text.

<sup>43</sup>*Id.*

<sup>44</sup>*Special Inquiry*, *supra* note 28.

<sup>45</sup>Dellinger, *supra* note 24, at 350-51.

<sup>46</sup>*Id.* at 351.

<sup>47</sup>*Id.*

<sup>48</sup>*Id.*

<sup>49</sup>Pub. L. No. 90-247, as amended 92 Stat. 2355 (1978). Two months after Congress passed the Kemp Amendment, Senator James Buckley of New York introduced an amendment designed, among other things, to protect the rights and privacy of parents and students. Senator Buckley's amendment passed. The provision, requiring parental consent prior to their children's participation in certain forms of experimental or attitude-affecting programs, however, was dropped from the enacted bill. Holland, *supra* note 41, at 4.

teaching methods or techniques supported by the federal government.<sup>50</sup> The Kemp Amendment also required that no child participate in any such program if his or her parents objected in writing. In 1978, Senator Orrin Hatch of Utah sponsored an amendment to the 1974 GEPA amendment.<sup>51</sup> The Hatch Amendment moved the parental consent requirement from the experimental programs provision to a new section. Schools were now required to obtain the prior written consent of a child's parents before the child could participate in any federally funded psychiatric or psychological examination, testing, or treatment in which the primary purpose was to reveal personal information concerning: (1) "political affiliations"; (2) "potentially embarrassing mental and psychological problems"; (3) "sex behavior and attitudes"; (4) "self-incriminating and demeaning behavior"; (5) "critical appraisals of family members"; (6) "legally recognized relationships, such as those with lawyers, physicians, and ministers"; or (7) "income."

The current regulations implementing the Hatch Amendment were issued by the Department of Education in 1984. These regulations define psychiatric and psychological examination, testing, and treatment and also explain how to resolve a complaint under the Hatch Amendment.<sup>52</sup>

### *B. Judicial Protection of Education*

The second part of the background to the Hatch Amendment did not directly influence the drafting of the amendment but is necessary to understand it. In addition to protecting students' privacy rights, courts acknowledge the vital role of public schools in our society<sup>53</sup> and the guarantee of academic freedom in the classroom.<sup>54</sup> Education is designed to develop a student's intellectual capacity, morals, and other faculties necessary for effective participation in an open society.<sup>55</sup> Depending on

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<sup>50</sup>120 CONG. REC. 8,505 (1974).

<sup>51</sup>124 CONG. REC. 27,423 (1978).

<sup>52</sup>34 C.F.R. §§ 98.3-98.4, 98.7 (1985): "Psychiatric or psychological examination or test" means a method of obtaining information, including a group activity, that is not related to academic instruction and that is designed to elicit information about attitudes, habits, traits, opinions, beliefs or feelings; and "psychiatric or psychological treatment" means an activity involving the planned, systematic use of methods or techniques that are not directly related to academic instruction and that is designed to affect behavioral, emotional, or attitudinal characteristics of an individual or group.

<sup>53</sup>See, e.g., *Board of Educ. v. Pico*, 457 U.S. 853, 864 ("schools are vitally important 'in the preparation of individuals as citizens' ") (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)).

<sup>54</sup>See, e.g., *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (academic freedom is a special concern of the first amendment).

<sup>55</sup>Smalls, *A Legal Framework for Academic Freedom in Public Secondary Schools*, 12 J. LAW & EDUC. 529, 538 n.59 (1983) ("The function of education is to help the

the age and maturity of the students, various teaching methods are used to achieve these goals. At the primary school level,<sup>56</sup> education is generally indoctrinative because children are young and impressionable.<sup>57</sup> Schools inculcate students with those community values determined to be " 'necessary to the maintenance of a democratic political system.' " <sup>58</sup> Primary school children, because they are young and still developing their analytical ability, tend to be more passive in the classroom setting.<sup>59</sup>

A different situation often occurs at the secondary school level. Students in junior and senior high school<sup>60</sup> are more mature, less impressionable, and more capable of comparing and evaluating differing ideas and viewpoints.<sup>61</sup> By this time in their lives, students usually have been exposed to controversial ideas and differing viewpoints.<sup>62</sup> Young men and women between fourteen and sixteen years old are beginning to form their own judgments and "readily perceive the existence of conflicts in the world around them."<sup>63</sup> As the federal district court stated in *Wilson v. Chancellor*,<sup>64</sup> a case involving a high school teacher's right to invite a Communist to speak to a political science class, "[T]oday's high school students are surprisingly sophisticated, intelligent, and discerning . . . and are far from easy prey for even the most forcefully expressed, cogent, and persuasive words."<sup>65</sup> Because secondary students are more developed intellectually and more mature, schools may act less as an inculcator of community values and more as a marketplace of ideas.<sup>66</sup>

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growing of a helpless young animal into a happy, moral and efficient human being.") (quoting J. DEWEY, *DICTIONARY OF EDUCATION* 28 (R.B. Winn ed. 1959)); see also Bennett, *The Failure to Address Moral Responsibility*, *The Indianapolis Star*, February 11, 1985, at 8, col. 2.

<sup>56</sup>As used in this Note, primary school refers to the first through sixth grades.

<sup>57</sup>Comment, *Discussion*, *supra* note 4, at 962-63.

<sup>58</sup>*Board of Educ. v. Pico*, 457 U.S. at 864 (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)).

<sup>59</sup>Comment, *Discussion*, *supra* note 4, at 963, 971.

<sup>60</sup>As used in this Note, junior high school refers to the seventh, eighth, and ninth grades; senior high school refers to the tenth, eleventh, and twelfth grades.

<sup>61</sup>Comment, *Discussion*, *supra* note 4, at 970.

<sup>62</sup>For example, in *Russo v. Central School Dist. No. 1*, 469 F.2d 623, 633 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973), a case involving a high school teacher's silent participation in the class pledge of allegiance, the court noted that students in the tenth grade "were not fresh out of their cradles."

<sup>63</sup>*Id.*

<sup>64</sup>418 F. Supp. 1358 (D. Or. 1976).

<sup>65</sup>*Id.* at 1368.

<sup>66</sup>Comment, *Discussion*, *supra* note 4, at 963, 970-71. The marketplace of ideas concept was brought into first amendment jurisprudence in Justice Holmes' dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919), where he stated that the "ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ." Although *Abrams* involved a



The goal under the marketplace of ideas model of education is to expose students to a wide variety of different ideas and viewpoints in order to stimulate the student's reasoning ability.<sup>67</sup> Some of these ideas and viewpoints may be controversial, sensitive, or have no correct answer. The acquisition of knowledge, and learning in general, however, assumes that people may differ in their views on any particular topic.<sup>68</sup> Exposure to a wide variety of ideas helps students prepare for "active and effective participation in the pluralistic, often contentious society in which they will soon be adult members."<sup>69</sup>

Academic freedom in the classroom supports the marketplace of ideas concept and the goals of education. In *Meyer v. Nebraska*,<sup>70</sup> the United States Supreme Court held unconstitutional a statute prohibiting the teaching of foreign languages to students who had not yet completed the eighth grade. Rejecting the Nebraska legislature's attempt to interfere with the opportunities of pupils to acquire knowledge, the Court stated, "The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted."<sup>71</sup> In another Supreme Court decision, *Keyishian v. Board of Regents*,<sup>72</sup> involving the freedom of speech, inquiry, and association of university faculty members, Justice Brennan, speaking for the Court, said:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us . . . . That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the "marketplace of ideas." 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."<sup>73</sup>

Although the Hatch Amendment was drafted amidst the concern over protecting students' privacy rights from intrusive psychological research in public schools, the amendment must function alongside the

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conspiracy to violate the Espionage Act, Justice Holmes' marketplace of ideas concept has since been applied in other opinions recognizing first amendment rights in the schools. See, e.g., *Board of Educ. v. Pico*, 457 U.S. 853, 877 (1982); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

<sup>67</sup>Comment, *Discussion, supra* note 4, at 963-64.

<sup>68</sup>See *Wieman v. Updegraff*, 344 U.S. 183, 196-97 (1952) (Frankfurter, J., concurring).

<sup>69</sup>*Board of Educ. v. Pico*, 457 U.S. at 868.

<sup>70</sup>262 U.S. 390 (1923).

<sup>71</sup>*Id.* at 400.

<sup>72</sup>385 U.S. 589 (1967).

<sup>73</sup>*Id.* at 603.

courts' recognition of the roles of public schools and of academic freedom in the classroom.

### III. CONSTITUTIONALITY OF THE HATCH AMENDMENT

The stated purpose of the Hatch Amendment was to prohibit federally funded nonscholastic testing and research of students without prior written consent by their parents.<sup>74</sup> One court has recognized a constitutional right to privacy that protects students' relationships with their families.<sup>75</sup> Occasionally, nonscholastic testing and research has violated this right to privacy.<sup>76</sup> The Hatch Amendment was drafted to protect students' privacy rights by requiring parental consent. Although this purpose of the Hatch Amendment is constitutional, the amendment could be drafted or applied in an unconstitutional manner.

#### A. A Facial Examination

An examination of a piece of legislation on its face requires an analysis of the written language for vagueness and overbreadth. In *Grayned v. City of Rockford*,<sup>77</sup> the United States Supreme Court stated that a law "is void for vagueness if its prohibitions are not clearly defined."<sup>78</sup> The void-for-vagueness doctrine, however, is usually invoked only to invalidate criminal statutes<sup>79</sup> and the Hatch Amendment imposes no criminal sanctions for a violation.

The Hatch Amendment, apart from the Department of Education regulations, is not unconstitutionally vague on its face. The first provision specifically states that the Amendment applies only to research or experimentation programs or projects, funded wholly or in part by the Department of Education, primarily designed to explore new or unproven teaching methods or techniques.<sup>80</sup> Thus, the Hatch Amendment is not applicable to any program supported by local, state, or other federal agency funds. Although "new or unproven teaching methods or techniques" is not defined in the amendment or regulations, a Department of Education official explained the phrase to mean "[a method or

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<sup>74</sup>124 CONG. REC. 27,423 (1978). See also 131 CONG. REC. S1390 (daily ed. Feb. 19, 1985) (statement of Sen. Hatch).

<sup>75</sup>*Merriken v. Cressman*, 364 F. Supp. at 917-18. The court stated: "[T]here probably is no more private a relationship, excepting marriage, which the Constitution safeguards than that between parent and child." *Id.* at 918.

<sup>76</sup>*Riley*, *supra* note 21, at 14.

<sup>77</sup>408 U.S. 104 (1972).

<sup>78</sup>*Id.* at 108.

<sup>79</sup>See *Wilson v. Chancellor*, 418 F. Supp. 1358, 1365 (D. Or. 1976). Vagueness challenges may occur in quasi-criminal legislation also. See *American Booksellers Ass'n v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 106 S. Ct. 1172, *reh'g denied*, 106 S. Ct. 1664 (1986).

<sup>80</sup>See *supra* note 11.

technique] which is new to the respective local education agency.”<sup>81</sup> If certain instructional materials have not been used in a school system previously, the teaching method is “new or unproven.” The first provision also states specifically that the authority granted to parents is the right to inspect all instructional materials used in the project.

The language in the second provision of the Hatch Amendment also is not vague. The second provision requires schools to obtain prior written consent from a student’s parents only if a child will participate in a nonscholastic, psychiatric, or psychological research program funded by the Department of Education.<sup>82</sup> Further, the primary purpose of the examination or test must be to reveal information in any of the seven personal areas. The language in the Hatch Amendment is specific enough for its requirements to be understood. Thus, a court probably would not declare this provision unconstitutional because of vagueness.

Overbreadth, however, could still render the Hatch Amendment unconstitutional. Overbroad statutes, like vague ones, are objectionable because they deter constitutionally protected activity.<sup>83</sup> Recently, courts have been less willing to invalidate legislation because of overbreadth.<sup>84</sup> Unless the overbreadth is both real and substantial, a court will construe

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<sup>81</sup>GUIDELINES, *supra* note 15, at 31.

<sup>82</sup>20 U.S.C. § 1232h(b) (Supp. 1985) provides:

*Psychiatric or psychological examinations, testing, or treatment:*

No student shall be required, as part of any applicable program, to submit to psychiatric examination, testing, or treatment, in which the primary purpose is to reveal information concerning:

- (1) political affiliations;
- (2) mental and psychological problems potentially embarrassing to the student or his family;
- (3) sex behavior and attitudes
- (4) illegal, anti-social, self-incriminating and demeaning behavior;
- (5) critical appraisals of other individuals with whom respondents have close family relationships;
- (6) legally recognized privileged and analogous relationships, such as those of lawyers, physicians, and ministers; or
- (7) income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program), without the prior consent of the student (if the student is an adult or emancipated minor), or in the case of an unemancipated minor, without the prior written consent of the parent.

<sup>83</sup>*Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972). An overbroad statute includes within its scope conduct or activities that are constitutionally protected. J. NOWAK, R. ROTUNDA, & J. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 868 (1983).

<sup>84</sup>Torke, *The Future of First Amendment Overbreadth*, 27 *VAND. L. REV.* 289, 299-308 (1974).

the legislation to save it.<sup>85</sup> The Hatch Amendment's language is not overbroad because it does not interfere with any protected right of students or parents. Parents routinely have the right to inspect instructional materials used in school programs<sup>86</sup> and the Hatch Amendment does not affect this right. The amendment simply requires schools to make available certain instructional materials. Parents still have the choice whether to inspect the materials.

Furthermore, the Hatch Amendment does not affect parents' right to control their children's education.<sup>87</sup> The amendment permits parents to excuse their children from participation in any applicable research program. Parents generally have had this right in the past.<sup>88</sup>

The Hatch Amendment has its limits also. Parents of children participating in the particular research programs, or even the Department of Education, have no right to "remove, revise or otherwise affect any curricula."<sup>89</sup> This power remains vested firmly in the states and local school boards.<sup>90</sup>

The Hatch Amendment is constitutional on its face, therefore, because the language is not vague or overbroad. The amendment may also protect the health and well-being of children.<sup>91</sup> The Hatch Amendment regulations, however, may not be constitutional as they are written. In an address to Congress to clarify the intent of the amendment, Senator

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<sup>85</sup>*Id.* at 300 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)); *see also id.* at 301 n.64 (citing *Gooding v. Wilson*, 405 U.S. 518, 528 (1972) (Burger, C.J., dissenting)); *id.* at 302 n.75 (citing, *inter alia*, *Schneider v. Smith*, 390 U.S. 17 (1968)).

<sup>86</sup>National Education Association Human and Civil Rights, *The Hatch Amendment*, 2 (February 1985) [hereinafter cited as *Civil Rights*].

<sup>87</sup>*See, e.g.*, *Prince v. Commonwealth of Mass.* 321 U.S. 158, 165-66 (1944) (citing *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); and *Meyer v. State of Nebraska*, 262 U.S. 390, 401 (1923)).

<sup>88</sup>Comment, *Discussion, supra* note 4, at 988 n.114 (commenting on public school "excusal system" giving parents the option of withdrawing their children from sex education).

<sup>89</sup>Department of Education, *Fact Sheet, Student Rights in Research, Experimental Activities and Testing* [hereinafter cited as *Fact Sheet*]. Section 432 of the General Education Provisions Act, 20 U.S.C. § 1232a, prohibits any federal officer from exercising any control over curriculum. The issue of enforcement of the Hatch Amendment is beyond the scope of this Note.

<sup>90</sup>*See Board of Educ. v. Pico*, 457 U.S. 853, 864 (1982); *Russo v. Central School Dist. No. 1*, 469 F.2d 623, 633 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973) (citing *James v. Board of Educ.*, 461 F.2d 566, 573 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972)).

<sup>91</sup>In *Merriken v. Cressman*, 364 F. Supp. 913 (E.D. Pa. 1973), two child psychologists gave uncontradicted testimony as to potentially harmful aspects of a psychological questionnaire used in a drug prevention program. Severe loyalty conflicts may result from the types of personal questions asked concerning the family relationship. Another harm is scapegoating in which a student is unpleasantly treated by his peers either because of a refusal to take the test or because of the test results. *See also supra* notes 33-39 and accompanying text.

Hatch admitted that "there are some ambiguities and some vague definitions" in the regulations.<sup>92</sup> The section of the regulations to which Senator Hatch referred defines "psychiatric or psychological examination or test" as a "means of obtaining information, including a group activity, that is not directly related to academic instruction and that is designed to elicit information about attitudes, habits, traits, opinions, beliefs, or feelings."<sup>93</sup> The controversy has resulted from expansive interpretations of the regulations.<sup>94</sup> Various groups are attempting to apply the Hatch Amendment restrictions to curriculum and classroom materials and activities which are outside the scope of the statute.<sup>95</sup> As Senator Hatch explained to Congress in 1985:

[S]ome parent groups have interpreted both the statute and the regulations so broadly that they would have them apply to all curriculum materials, library books, teacher guides, et cetera, paid for with State or local money. [Some parent groups] would have all tests used by teachers in such nonfederally funded courses as physical education, health, sociology, literature, et cetera, reviewed by parents before they could be administered to students.<sup>96</sup>

The Department of Education also acknowledges that the regulations "lend themselves to various interpretations."<sup>97</sup> Some school officials have alleged that the "sloppily drafted"<sup>98</sup> regulations have "invited misrepresentation"<sup>99</sup> and have led to a misuse of the Hatch Amendment.

The regulations' definitions of psychiatric and psychological examination, testing, and treatment are much broader than the professional scientific community's idea of this type of activity.<sup>100</sup> The professional scientific community uses psychiatric or psychological tests as educational tools.<sup>101</sup> These tests are usually taken individually to gather certain information from the student. This information is then used by a professional counselor to help a child adjust to the school environment or possibly improve academic performance. Traditionally, psychiatric or psychological testing methods have included cognitive reasoning tests,

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<sup>92</sup>131 CONG. REC. S1390 (daily ed. Feb. 19, 1985) (statement of Sen. Hatch).

<sup>93</sup>34 C.F.R. § 98.4(c)(1) (1985); *see also supra* note 73.

<sup>94</sup>131 CONG. REC. S1389 (daily ed. Feb. 19, 1985) (statement of Sen. Hatch).

<sup>95</sup>*Id.*

<sup>96</sup>*Id.*

<sup>97</sup>*Id.* at 1390.

<sup>98</sup>Fiske, *The Hatch Act Comes Alive*, N.Y. Times, July 7, 1985, § 4, at E7, col. 2.

<sup>99</sup>N.E.A. on Hatch Amendment and Regulations, National Education Association, 1 [hereinafter cited as N.E.A.].

<sup>100</sup>GUIDELINES, *supra* note 15, at 32.

<sup>101</sup>*Id.* at 32-33.

personality and interest inventories, situational tests, and various educational achievement tests.<sup>102</sup>

In contrast, the "loose and imprecise"<sup>103</sup> definitions in the regulations may include normal classroom discussions and activities unrelated to any type of psychiatric or psychological testing.<sup>104</sup> One Department of Education official suggested that classroom exercises in which students have to write about their attitudes on "single-parent families" or discuss their views on nuclear war, could, under certain circumstances, require prior written consent.<sup>105</sup> The head of the Department of Education Department's Office of Management that deals with complaints under the Hatch Amendment said that teachers can talk about nuclear war, abortion, and alcohol or drug abuse, but the teacher cannot ask a student what he or she feels about these topics.<sup>106</sup> Under this type of classroom environment, however, the students' ability to question or challenge the teacher's view, and consequently, develop or change their own positions, is denied. Students probably learn better when education is more of a dialogue than a one-way lecture.

The regulations' definitions are also flawed because they fail to explain what activities are "not directly related to academic instruction." The Department of Education has said that Hatch Amendment complaints will be handled on a case-by-case basis with the Department acting as factfinder.<sup>107</sup> Under this scheme, a teacher is unable to know for sure if an activity violates the amendment. Forcing a teacher to guess about the nature of an activity is not conducive to a proper academic environment. If a teacher is not sure whether a certain classroom activity or material "directly relates to academic instruction," then the teacher may decide to use something more traditional rather than obtain parental consent from the entire class or risk government intervention.<sup>108</sup>

In *Parducci v. Rutland*,<sup>109</sup> a case involving the dismissal of a high school teacher for assigning a controversial short story to her eleventh grade English class,<sup>110</sup> the federal district court stated:

When a teacher is forced to speculate as to what conduct is permissible and what conduct is proscribed, he is apt to be overly cautious and reserved in the classroom. Such a reluctance on

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<sup>102</sup>*Id.* at 32.

<sup>103</sup>N.E.A., *supra* note 99, at 1.

<sup>104</sup>Lynn, *supra* note 18, at 7.

<sup>105</sup>*Id.*

<sup>106</sup>Lewis, *supra* note 19, at 668.

<sup>107</sup>*Id.*

<sup>108</sup>Lynn, *supra* note 18, at 8.

<sup>109</sup>316 F. Supp. 352 (M.D. Ala. 1970).

<sup>110</sup>The short story was *Welcome to the Monkey House* by Kurt Vonnegut. *Id.* at 353.

the part of the teacher to investigate and experiment with new and different ideas is anathema to the entire concept of academic freedom.<sup>111</sup>

Vague regulations force an instructor to guess which activities, teaching methods, or materials are proper for use in class. Teachers should encourage openmindedness and free inquiry in the classroom. Consequently, restrictions on a teacher's freedom in the classroom should be clear and precise.

In addition to requiring clear and precise restrictions, courts may also consider the potential penalties of a statute or regulation in determining whether legislation is vague.<sup>112</sup> A violation of the Hatch Amendment which remains unresolved at the local or state level may ultimately result in the Secretary of Education terminating or withholding federal funds to a school.<sup>113</sup> Such potentially severe penalties should be imposed upon a school only when narrowly defined regulations, clearly describing the prohibited conduct, are understood by all of the teachers. The Hatch Amendment regulations do not clearly describe the activities that require prior parental consent.

The Hatch Amendment regulations provide no guidance to teachers concerning activities that are not related to academic instruction and thus require parental consent.<sup>114</sup> Therefore, teachers must choose between a creative activity that carries the risk of federal intervention and a traditional activity that carries the risk of not stimulating or intellectually challenging students. Neither situation is desirable from an educational perspective. Further, the breadth of the regulations' definitions of psychiatric and psychological examination, testing, and treatment may include normal classroom discussion and activities.

These defects of vagueness and overbreadth raise serious doubts as to the constitutionality of the Hatch Amendment regulations on their face. Courts would probably not strike the regulations for vagueness, however, because no criminal penalties are at stake and federal funds are withdrawn only in extreme situations.<sup>115</sup> Additionally, courts probably would not strike the Hatch Amendment regulations for overbreadth because of a reluctance to raise hypotheticals to test the scope of legislation.<sup>116</sup> Therefore, the Hatch Amendment regulations, although

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<sup>111</sup>*Id.* at 357.

<sup>112</sup>*Wilson v. Chancellor*, 418 F. Supp. 1358, 1365 (D. Or. 1976).

<sup>113</sup>34 C.F.R. § 98.10(1) (1985).

<sup>114</sup>*See supra* notes 107-08 and accompanying text.

<sup>115</sup>Of the six complaints reviewed by the Department of Education as of September 1985, not one had resulted in a termination or withholding of Department of Education funds. *Riley, supra* note 21, at 8.

<sup>116</sup>*See Torke, supra* note 84, at 294 nn. 34 & 35.

“loose and imprecise,”<sup>117</sup> subject to various interpretations,<sup>118</sup> “sloppily drafted,”<sup>119</sup> and containing “some vague definitions,”<sup>120</sup> would probably survive a facial examination.

### *B. Misapplying the Hatch Amendment and Regulations*

Even if the Hatch Amendment and the regulations are constitutional on their face, they may be unconstitutional as applied. In *Mercer v. Michigan State Board of Education*,<sup>121</sup> a federal district court upheld a statute prohibiting discussion of birth control in public schools, but stated, “There is no question but that a Constitutional statute may be applied in an unconstitutional manner.”<sup>122</sup> In *Shuttlesworth v. City of Birmingham*,<sup>123</sup> the United States Supreme Court stated, “As so construed, we cannot say that the [loitering] ordinance is unconstitutional [on its face], though it requires no great feat of imagination to envisage situations in which such an ordinance might be unconstitutionally applied.”<sup>124</sup>

No great feat is required to imagine unconstitutional applications of the Hatch Amendment. Such applications are occurring throughout the nation’s public schools.<sup>125</sup> The Hatch Amendment was designed to prevent invasions of students’ privacy. Since the new regulations were issued by the Education Department in 1984, however, certain parent and “concerned citizen” groups have attempted to misapply the statute. These groups are trying to remove entire courses of studies or are protesting the use of materials, activities, and tests in non-federally funded courses such as health and physical education, sociology, and literature.<sup>126</sup> The Hatch Amendment was intended to apply only to specific activities.<sup>127</sup>

In Hillsboro, Missouri, a group called Parents Who Care for Basic Skills, Inc. was using a state law providing that Missouri will comply

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<sup>117</sup>See *supra* note 103 and accompanying text.

<sup>118</sup>See *supra* note 97 and accompanying text.

<sup>119</sup>See *supra* note 98 and accompanying text.

<sup>120</sup>See *supra* note 92 and accompanying text.

<sup>121</sup>379 F. Supp. 580 (E.D. Mich.), *aff'd*, 419 U.S. 1081 (1974).

<sup>122</sup>*Id.* at 586.

<sup>123</sup>382 U.S. 87 (1965).

<sup>124</sup>*Id.* at 91.

<sup>125</sup>See *infra* notes 127-34 and accompanying text.

<sup>126</sup>See, e.g., Fiske, *supra* note 97; *Walt Disney a Menace? NEA Today* (April 7, 1985) at 6, col. 2 [hereinafter cited as *Walt Disney*]; Wall, *A New Right Tool Distorts Regulations* (editorial) *Christian Century* (April 24, 1985) at 403, col. 1; People for the American Way, *Hatch Amendment Fact Sheet*, Washington D.C. [hereinafter cited as *Hatch Amendment Fact Sheet*].

<sup>127</sup>See *supra* notes 11, 52 and 82.



with the federal Hatch Amendment, to protest state-mandated sex education courses, writing exercises, counseling programs, and some books and movies, including "Romeo and Juliet" and Walt Disney's PG-rated "Never Cry Wolf."<sup>128</sup> The suit petitioned for a declaratory judgment as to whether the Missouri statute, incorporating the Hatch Amendment by reference though not expanding its substance, extended to activities in the Hillsboro school district that were not federally funded. The Jefferson County Circuit Court dismissed the suit without deciding the case on its merits.<sup>129</sup>

The Hatch Amendment would not have applied in the Hillsboro situation for numerous reasons. First, the counseling programs, the showing of the Walt Disney film, and the sex education course were not federally funded.<sup>130</sup> The Hatch Amendment only applies to activities funded by the Department of Education. Second, the sex education courses were state-mandated,<sup>131</sup> and only state or local authorities may determine public school curriculum.<sup>132</sup> Third, the Walt Disney film was shown after school as an extracurricular activity,<sup>133</sup> and thus, students were not to required to attend.

Similar misapplications of the Hatch Amendment have occurred throughout the country:

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<sup>128</sup>The Missouri statute is MO. ANN. STAT. §167.113 (Supp. 1985-86) which provides: "The State of Missouri shall comply with all the provisions of the federal law relating to the protection of pupil rights, as contained in section 1232h(b) of Title 20 United States Code." "Never Cry Wolf" is a 1973 Walt Disney film focusing on a young biologist, wolves, and Inuits. *Walt Disney, supra* note 126. See also Fiske, *supra* note 97; Chollett, *Parents Group in Hillsboro Sues School District Over Curriculum*, St. Louis Post-Dispatch (May 11, 1985) at 4A, col. 2.

<sup>129</sup>Parents Who Care for Basic Skills, Inc., v. Walker, No. CU 185-1745 (Jefferson County Cir. Ct., Missouri) (dismissed Nov. 20, 1985); see also Bridgeman, *Bills Patterned After Federal Hatch Act Pressed in States to Spur Discussion*, EDUCATION WEEK, 1 (May 29, 1985).

<sup>130</sup>See Condon, *Hillsboro School Board Ends Dispute*, St. Louis Globe Democrat (March 12, 1985) at 6A, col. 2; see also Cholett, *supra* note 128.

<sup>131</sup>Condon, *supra* note 130; Bridgeman, *supra* note 129. at 19.

<sup>132</sup>See, e.g., Board of Educ. v. Pico, 457 U.S. 853, 864 (1982); Russo v. Central School Dist. No. 1, 469 F.2d 623, 633 (2d Cir. 1972), cert. denied, 411 U.S. 932 (1973); see also 20 U.S.C. § 1232a (Supp. 1985).

<sup>133</sup>*Walt Disney, supra* note 126. As a result of objections to Shakespeare's "Romeo & Juliet," one major publisher recently printed an edition without any reference to the couple's love affair and suicide. This was in response to pressure from parents who claim that such literature may be partially responsible for the increased rate of suicide in school-age children. Senator Hatch disapproved of this "emasculating of Shakespeare" because students could watch murder, rape, suicide, and infidelity on television at almost any time. 131 CONG. REC. S1390 (daily ed. Feb. 19, 1985) (statement of Sen. Hatch).

- *Grand Island, New York* — The Hatch Amendment was used to prevent adding a citizenship program to the curriculum.<sup>134</sup>
- *Arlington, Virginia* — A “pressure” group has alleged that classroom discussions of sex and nuclear war violate the Hatch Amendment.<sup>135</sup>
- *Lincoln County, Oregon* — The entire guidance and counseling program was removed because of allegations that it violated the Hatch Amendment.<sup>136</sup>
- *Gallipolis, Ohio* — Parents objected to a voluntary drug and alcohol abuse course which allegedly “teaches values clarification”<sup>137</sup> in violation of the Hatch Amendment.<sup>138</sup>
- *Manchester, Connecticut* — A parent group, Concerned Citizens of Manchester, is using the Hatch Amendment to protest mandatory health courses in junior high schools because topics covered in the class include sex, birth control, suicide, and abortion.<sup>139</sup>
- *Boonville, Indiana* — In a junior high school physical education class, there were objections to the showing of a film describing yoga as a form of exercise. “Spiritual awareness” and “promotion of Hinduism” supposedly violates the Hatch Amendment.<sup>140</sup>
- *Glendive, Montana* — Concerned Parents for Children objected to sex education, abortion, and values discussed in textbooks and home economics courses in high school.<sup>141</sup>

Another group in Chevy Chase, Maryland, the Maryland Coalition of Concerned Parents for Privacy Rights in Public Schools, has distributed about 250,000 copies of a form letter to parents throughout the country urging them to write to their local school boards.<sup>142</sup> The form letter demands that schools obtain parental consent in accordance with the Hatch Amendment before children participate in *any of thirty-four class-*

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<sup>134</sup>Fiske, *supra* note 97.

<sup>135</sup>*Hatch Amendment Fact Sheet*, *supra* note 126, at 2.

<sup>136</sup>*Id.*

<sup>137</sup>Values clarification is supposedly a form of psychological treatment. Chollett, *supra* note 128.

<sup>138</sup>*Hatch Amendment Fact Sheet*, *supra* note 126, at 2.

<sup>139</sup>*Id.* at 3.

<sup>140</sup>*Id.*

<sup>141</sup>*Id.*

<sup>142</sup>Walt Disney, *supra* note 126; Tugend, *Bennett Clarifies Intent of Hatch Amendment*, EDUCATION WEEK, 19 (May 8, 1985).

*room activities* including: discussions of abortion, nuclear war, suicide, and the roles of men and women.<sup>143</sup> These examples illustrate how groups are attempting to apply the Hatch Amendment in ways quite distinct from its stated purpose. Such misapplications lead to constitutional problems because they disregard academic freedom in the schools,<sup>144</sup> affect curriculum,<sup>145</sup> restrict teachers' and students' rights to disseminate and receive information,<sup>146</sup> and curtail the school's function as a "marketplace of ideas."<sup>147</sup>

Academic freedom is a "special concern of the First Amendment"<sup>148</sup> and furthers the educational goal of developing students' thinking ability. Although the Supreme Court in *Keyishian v. Board of Regents*<sup>149</sup> discussed academic freedom in the university or college setting, lower courts have subsequently applied the rationale to secondary education.<sup>150</sup> In *Albaum v. Carey*,<sup>151</sup> the federal district court supported academic freedom in secondary schools and stated, "[E]ven those who go on to higher education will have acquired most of their working and thinking habits in grade and high school."<sup>152</sup> In a case involving high school teachers' rights to select teaching materials for elective courses in the eleventh and twelfth grades,<sup>153</sup> the court stated:

For many people, the formal educational experience ends with high school. To restrict the opportunity for involvement in an open forum for the free exchange of ideas to higher education would not only foster an unacceptable elitism, it would also fail to complete the development of those not going on to college, contrary to our constitutional commitment to equal opportunity. . . . [I]t would be inappropriate to conclude that academic freedom is required only in the colleges and universities.<sup>154</sup>

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<sup>143</sup>Eagle Forum, *Eagle Forum Newsletter* (January 1985).

<sup>144</sup>See *infra* notes 148-55 and accompanying text.

<sup>145</sup>See *infra* notes 156-63 and accompanying text.

<sup>146</sup>See *infra* notes 164-75 and accompanying text.

<sup>147</sup>See *infra* notes 176-84 and accompanying text.

<sup>148</sup>See *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967).

<sup>149</sup>385 U.S. 589 (1967).

<sup>150</sup>See, e.g., *Cary v. Board of Educ.*, 427 F. Supp. 945, 953 (D. Supp. Colo. 1977), *aff'd on other grounds*, 598 F.2d 535 (10th Cir. 1979); see also *Webb v. Lake Mills Community School Dist.*, 344 F. Supp. 791, 799 (N.D. Iowa 1972) (*Keyishian* rationale of academic freedom extends to high school and elementary school teachers).

<sup>151</sup>283 F. Supp. 3 (E.D. N.Y. 1968) (high school teacher's challenge to the constitutionality of a New York education law giving the school superintendent complete discretion in recommending probationary teachers for tenure).

<sup>152</sup>*Id.* at 10.

<sup>153</sup>*Cary v. Board of Educ.*, 427 F. Supp. 945.

<sup>154</sup>*Id.* at 953.

Applying the Hatch Amendment to preclude classroom discussion of controversial topics such as sex, birth control, suicide, abortion, or nuclear war is contrary to the Supreme Court position that "students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding."<sup>155</sup> Denying students the opportunity to consider sensitive or unsettled issues in supervised classroom discussion may restrain the students' intellectual development.<sup>156</sup> By discussing controversial or unsettled topics in a supervised classroom environment, teachers have the opportunity to help students analyze, investigate, and consider the various merits of each issue.<sup>157</sup> Teachers may also help the students to keep an open mind about differing positions and to draw thoughtful conclusions.<sup>158</sup>

Using the Hatch Amendment to protest various courses or classroom discussion of controversial topics is harmful to education in another aspect. Constant fear that a certain discussion or activity might violate the Hatch Amendment or the regulations may eventually chill a teacher's desire to try new and different ideas.<sup>159</sup> As a result, traditional and probably less stimulating discussions and activities will replace more imaginative or creative and probably intellectually more challenging ones.<sup>160</sup>

In a case in which the Supreme Court prohibited the use of loyalty oaths by an Oklahoma college,<sup>161</sup> Justice Frankfurter described teachers from primary grades to the university, as "priests of our democracy."<sup>162</sup> Justice Frankfurter believed teachers should not be forced to teach in an atmosphere un conducive to openmindedness and free inquiry. Repeated attempts to invoke the Hatch Amendment to remove or protest various courses or classroom discussions create such an undesirable atmosphere.

Using the Hatch Amendment to remove certain courses or topics of discussion from classes also infringes on students' first amendment rights. In *Tinker v. Des Moines Independent Community School District*,<sup>163</sup> a case involving high school students who were suspended for

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<sup>155</sup>Keyishian, 385 U.S. at 603 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).

<sup>156</sup>Nahmod, *Controversy in the Classroom: The High School Teacher and Freedom of Expression*, 39 GEO. WASH. L. REV. 1032 (1971). Nahmod also suggests the possibility of harmful emotional impact later when the student encounters the controversial or sensitive ideas in an uncontrolled environment. *Id.* at 1054.

<sup>157</sup>*Id.* at 1054 n.94 (citing American Civil Liberties Union, *Academic Freedom in the Secondary Schools* 8 (1968)).

<sup>158</sup>*Id.*

<sup>159</sup>See *supra* notes 110-11 and accompanying text.

<sup>160</sup>Lynn, *supra* note 18, at 8.

<sup>161</sup>*Wieman v. Updegraff*, 344 U.S. 183, 195 (1952).

<sup>162</sup>*Id.* at 196.

<sup>163</sup>393 U.S. 503 (1969).

wearing black armbands to school to protest the Vietnam War, the Supreme Court stated that students and teachers have first amendment rights to freedom of speech and expression which they do not “shed at the schoolhouse gate.”<sup>164</sup> That has been the “unmistakable holding” of the Supreme Court for more than sixty years.<sup>165</sup> In a plurality opinion, the Supreme Court acknowledged that the first amendment not only fosters individual self expression, but also plays a role “ ‘in affording the public access to discussion, debate, and the dissemination of information and ideas.’ ”<sup>166</sup>

The first amendment guarantees to students the right to receive information in two ways. First, the receiver’s right to receive flows directly from the sender’s right to send.<sup>167</sup> Students have a first amendment right to receive information because their teachers’ freedom of expression is protected.<sup>168</sup> The Supreme Court has recognized that “[t]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.”<sup>169</sup> Second, students are guaranteed the right to receive information because this right is a “necessary predicate” to the students’ own constitutional right of free speech and expression.<sup>170</sup> Therefore, students’ first amendment rights should prevent the application of the Hatch Amendment to limit classroom discussion.

In *Keefe v. Geanakos*,<sup>171</sup> some parents were offended when a high school teacher used a slang term for an incestuous son during a classroom discussion.<sup>172</sup> The United States Court of Appeals for the First Circuit acknowledged that the word was known to many students in their last year of high school but that some parents were still offended. The Court of Appeals upheld the use of the word by the teacher and stated, “[W]ith the greatest of respect to [the offended] parents, their sensibilities are not the full measure of what is proper education.”<sup>173</sup> High school students are not “devoid of all discrimination or resistance.”<sup>174</sup>

Closely connected to students’ first amendment rights is the concept

<sup>164</sup>*Id.* at 506.

<sup>165</sup>*Id.*

<sup>166</sup>*Board of Educ. v. Pico*, 457 U.S. at 866 (quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)).

<sup>167</sup>*Id.* at 867 (citing *Martin v. Struthers*, 319 U.S. 141 (1943)).

<sup>168</sup>*See Tinker*, 393 U.S. at 506.

<sup>169</sup>*Board of Educ. v. Pico*, 457 U.S. at 867 (quoting *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965)).

<sup>170</sup>*Id.*

<sup>171</sup>*Id.* at 361-62.

<sup>172</sup>The word was “motherfucker.” *Id.* at 361.

<sup>173</sup>*Id.* at 361-362.

<sup>174</sup>*Id.* at 362.

of secondary schools as marketplaces of ideas.<sup>175</sup> Exposure to different ideas and viewpoints stimulates, challenges, and develops a student's intellectual ability. In *Right to Read Defense Committee v. School Committee*,<sup>176</sup> a Massachusetts school board had removed an anthology from a high school library because of offensive language and the theme of one poem. The federal district court recognized the right to read and to be exposed to controversial thoughts and language as "a valuable right subject to First Amendment protection"<sup>177</sup> and enjoined the school board's removal of the book.

In a more recent case involving the removal of nine books from a high school library, *Board of Education v. Pico*,<sup>178</sup> the Supreme Court stated that access to a wide variety of ideas "prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members."<sup>179</sup> In *Pico*, the Court looked to the underlying motives for the removal of the books and said the school board could not remove the books simply because its members dislike the ideas contained in them.<sup>180</sup> The Constitution does not permit the official suppression of ideas.<sup>181</sup> Even Chief Justice Burger, dissenting from the plurality opinion, agreed that "as a matter of *educational policy* students should have wide access to information and ideas."<sup>182</sup>

If the Hatch Amendment is applied to limit discussions of sex education, health courses covering birth control and abortion, curricula pertaining to drugs and alcohol, or discussions of death and suicide, then the amendment would be used to prescribe orthodoxy in education. The first amendment "'does not tolerate laws that cast a pall of orthodoxy over the classroom.'" <sup>183</sup>

Parent groups attempting to restrict classroom discussion of certain controversial subjects conflict not only with the rights and interests of students and teachers, but also with the rights and interests of other

<sup>175</sup>See *supra* notes 53-60 and accompanying text.

<sup>176</sup>454 F. Supp. 703 (D. Mass. 1978).

<sup>177</sup>*Id.* at 714.

<sup>178</sup>457 U.S. 853 (1982). The nine books were: *Slaughter House Five*, by Kurt Vonnegut, Jr.; *The Naked Ape*, by Desmond Morris; *Down These Mean Streets*, by Piri Thomas; *Best Short Stories of Negro Writers*, edited by Langston Hughes; *Go Ask Alice*, of anonymous authorship; *Laughing Boy*, by Oliver LaFarge; *Black Boy*, by Richard Wright; *A Hero Ain't Nothin But A Sandwich*, by Alice Childress; and *Soul On Ice*, by Eldridge Cleaver. *Id.* at 856, n.3. The school board characterized the books as "'anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy.'" *Id.* at 857.

<sup>179</sup>*Id.* at 868.

<sup>180</sup>*Id.* at 872.

<sup>181</sup>*Id.*

<sup>182</sup>*Id.* at 891.

<sup>183</sup>*Board of Educ. v. Pico*, 457 U.S. at 870 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

parents.<sup>184</sup> When a parent or a parent group attempts to control the education of its own children, this action indirectly affects the education of other students. The parents of these other students may want their children to have exposure to these ideas. Consequently, parents or parent groups usually are more successful when they seek to excuse a child from participation in a discussion or activity rather than attempt to change the curriculum.<sup>185</sup> State and local school boards, alone, and not parents or parent groups, have the authority to choose the curricula and academic materials used in the public schools.<sup>186</sup> Parent groups should not "torture the intent"<sup>187</sup> of the Hatch Amendment and Education Department regulations by attempting to apply them unconstitutionally to protest various school curricula.

#### IV. RESOLVING THE CONTROVERSY

There are three possible solutions to the controversy concerning the scope and applicability of the Hatch Amendment and the regulations. The most logical and desirable solution is to repeal the amendment. Congress passed the Hatch Amendment because the Department of Education was funding controversial psychological research and testing programs in schools and parents expressed concern about their children's education. The Hatch Amendment is no longer necessary because most school districts have formal guidelines allowing parents to examine materials and procedures to resolve complaints about the instructional program.<sup>188</sup> Schools now also routinely obtain parental permission before administering any type of psychological test to students.<sup>189</sup> These procedures safeguard both students' and parents' rights.

Repealing the Hatch Amendment would return control of the schools to state and local school authorities where such control properly belongs. The Supreme Court has long recognized that the states and local school boards have broad discretion and authority in managing school affairs and controlling conduct in the schools.<sup>190</sup> Forcing the Department of

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<sup>184</sup>Comment, *Discussion*, *supra* note 4, at 975.

<sup>185</sup>*Id.* at 976.

<sup>186</sup>*Id.* at 976. Even the State and local school boards must exercise this authority within limits of the first amendment. *Id.* at 967; *see also* *Tinker v. Des Moines Indep. Community School Dist.* 393 U.S. 503, 511 (1969).

<sup>187</sup>131 CONG. REC. S1390 (daily ed. Feb. 19, 1985) (statement of Sen. Hatch).

<sup>188</sup>Lewis, *supra* note 19 at 668; Bridgeman, *supra* note 128, at 19; *see also Transcript*, *supra* note 17, at 9 (Sam Sava, Ph.D., Executive Director of National Association of Elementary School Principals, agrees that Hatch Amendment is not needed because "due processes established at the local level [are able] to deal with the issues.").

<sup>189</sup>Civil Rights, *supra* note 86, at 2.

<sup>190</sup>*Board of Educ. v. Pico*, 457 U.S. 853, 863-64; *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 507; *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

Education to resolve local school disputes promotes neither the best interests of education nor government efficiency. Good education or an effective school system starts at the bottom and requires local guidance and community support rather than federal intervention.<sup>191</sup>

If the Hatch Amendment is not repealed, then issuing new regulations to prevent future abuse of the amendment is the next best solution. The controversy surrounding the Hatch Amendment resulted from the vague 1984 regulations which enabled various groups to attempt to affect local school curricula. One group's leader has admitted that her group is trying to extend the law beyond its letter.<sup>192</sup>

Between 1980 and 1984, when the original regulations were in effect, only twelve to fourteen complaints were filed with the Department of Education.<sup>193</sup> In less than one year after the 1984 regulations became effective, the Department of Education had already reviewed six complaints and had received four other letters stating the intent to file a complaint.<sup>194</sup> New regulations could clarify the intent of the Hatch Amendment.

Furthermore, the Department of Education could narrow the definitions of psychiatric and psychological examination, testing, and treatment to bring them more in line with the professional educational community's understanding of these terms — meaning the standard personality, reasoning, and achievement tests. A new set of regulations could also explain how to determine the "primary purpose" of a psychiatric or psychological activity, whether a classroom activity is "directly related to academic instruction," and whether the teacher, the local school board, or the Department of Education will determine the nature of a school program. Tighter regulations would keep federal involvement in local disputes to a necessary minimum and prevent much of the "widespread misunderstanding"<sup>195</sup> and attempted abuse of the Hatch Amendment.

The third and least desirable solution, favored by Senator Hatch,<sup>196</sup> is to let the courts decide the applicability of the amendment and the regulations to various school activities and curricula. Court intervention is undesirable because establishing and maintaining a curriculum appropriate to a particular community's values is best entrusted to local school authorities.<sup>197</sup> The United States Supreme Court acknowledges that "fed-

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<sup>191</sup>See Doyle and Hartle, *The White House in The School House*, *The Washington Post*, (May 20, 1985) at 13A, col. 3.

<sup>192</sup>Fiske, *supra* note 98.

<sup>193</sup>GUIDELINES, *supra* note 15, at 26.

<sup>194</sup>Riley, *supra* note 21, at 5, 7.

<sup>195</sup>Tugend, *supra* note 142, at 12.

<sup>196</sup>Fiske, *supra* note 98.

<sup>197</sup>*Board of Educ. v. Pico*, 457 U.S. at 864.



eral courts should not ordinarily 'intervene in the resolution of conflicts which arise in the daily operation of school systems.'<sup>198</sup> Local school boards by their very nature and relationship with the community are best suited to resolve local education disputes in a timely and equitable manner. The courts' task never has been, nor ever will be, to plan daily lessons or approve curriculum in the schools.

#### V. CONCLUSION

Attempted misapplications of the Hatch Amendment and its regulations have harmed the entire educational system. Valuable time, energy, and resources of both teachers and local school boards, which should have been spent improving the education offered to students, instead have been wasted battling meritless claims of violations of vague regulations to an unnecessary federal amendment. Teachers and school officials alike admit that the very presence in the community of groups threatening to run to the Department of Education with an alleged violation of the Hatch Amendment has forced a change in school curriculum and teaching methods used.<sup>199</sup> The ultimate harm of the abuse of the Hatch Amendment is to the education of school children who no longer are allowed to discuss their opinions or make judgments about controversial or unsettled issues in the classroom.

The time has come to halt the attack on the nation's schools resulting from the Education Department's 1984 regulations implementing the Hatch Amendment, and, as Senator Hatch himself stated, "let the rule of commonsense prevail."<sup>200</sup>

PAUL D. FREDRICK

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<sup>198</sup>*Id.* (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

<sup>199</sup>Richburg, *supra* note 16.

<sup>200</sup>131 CONG. REC. S1390 (daily ed. Feb. 19, 1985) (statement of Sen. Hatch).

