

THE CLASH BETWEEN SAFETY AND FREEDOM OF ASSOCIATION IN THE REGULATION OF PROM DATES

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The prom is an important and iconic event¹ that has long been a staple of the high school experience.² Each year students look forward to this rite of passage. In fact, many students consider the prom to be one of the most important events of their lives.³ Therefore, it is imperative that they find the

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1. “Images of the prom as a coming-of-age rite permeate our culture.” AMY L. BEST, *PROM NIGHT: YOUTH, SCHOOLS AND POPULAR CULTURE 2* (Routledge 2000) (1970). Vast numbers of popular books and movies attest to the importance of the prom in a high school student’s life. There are at least two magazines, *Prom* and *Teen Prom*, which are devoted to this event, as well as romance novels, websites and fashion shows. *Id.* at 4. Perhaps the most impressive display of the importance of the prom in our culture is the vast number of popular movies that center on the prom or feature it as a major part of the storyline. *See, e.g.*, *CINDERELLA STORY* (Warner Brothers Pictures 2004), *MEAN GIRLS* (Paramount Pictures 2004), *10 THINGS I HATE ABOUT YOU* (Buena Vista Pictures 1999), *AMERICAN PIE* (Universal Pictures 1999), *NEVER BEEN KISSED* (20th Century Fox 1999), *SHE’S ALL THAT* (Miramax Films 1999), *PRETTY IN PINK* (Paramount Pictures 1986), *BACK TO THE FUTURE* (Universal Pictures 1985), *JUST ONE OF THE GUYS* (Columbia Pictures 1985), *TEEN WOLF* (Atlantic Releasing Corporation 1985), *FOOTLOOSE* (Paramount Pictures 1984), *VALLEY GIRL* (Atlantic Releasing Corporation 1983), *FAST TIMES AT RIDGEMONT HIGH* (Universal Pictures 1982), *GREASE* (Paramount Pictures 1978), *CARRIE* (United Artists 1976).

The significance of the prom is further highlighted by the great amount of money spent on this event, and the vast number of students who attend. Alexandra Polier, *Teens Spending Billions for Prom Magic*, *FORT WAYNE J. GAZETTE*, May 24, 2003, at 4, available at 2003 WLNR 13336850 (“Almost 20 million students will attend proms this year, with the average [attendee] spending \$638, or more than \$1,200 per couple. . .”).

2. Proms began occurring early in the twentieth century. BEST, *supra* note 1, at 5. By 1930, they had become increasingly popular. *Id.* at 6. Since then, proms have remained an important part of the high school experience. *Id.* Today, each year most public schools organize a junior prom, senior prom, or both. *Id.* at 18.

3. BEST, *supra* note 1, at 2 (conducting a study of the social implications of the prom and concluding that “the prom is . . . one of the most important experiences . . . of all adolescence”). Meghan Reese & Gary Strauss, *Proms Cost How Much?*, *USA TODAY*, Apr. 29, 2004, at 7D

right dress or tuxedo, sit at the right table, and vote for the right individuals for prom queen and king. However, by far the most significant prom-related decision is a student's choice of whom to take as his or her date,⁴ as for many students the prom represents the first formal event at which they can demonstrate their affection for someone who is important to them.⁵ The choice not only allows students to define who is important to them and what they value in another person,⁶ but it also allows them to express these sentiments to their community of classmates, parents, and teachers.⁷

Today, however, for a growing number of students the opportunity to choose a prom date is being severely restricted.⁸ For example, a growing number of schools are performing criminal and informal background checks on potential prom dates.⁹ Recently in Cape Cod, Massachusetts, a school official tried to ban potential prom dates with minor drug or alcohol offenses on their record.¹⁰ In Boca Raton, Florida, prom dates are banned if officials think they

("For millions of high-schoolers, prom night is the biggest event of their young lives.").

4. BEST, *supra* note 1, at 68 (conducting a study of prom experiences and finding that the choice of a prom date "carries tremendous importance . . . [as] this was a theme that pervaded the written narratives collected and emerged over and over in interviews").

5. John A. Russ, *Shall We Dance? Gay Equality and Religious Exemptions at Private California High School Proms*, 42 N.Y.L. SCH. L. REV. 71, 78 (1998) ("Proms allow . . . couples to indicate their commitment and affection for one another.").

6. See BEST, *supra* note 1, at 3 ("Located at the intersection of school, commercial, and youth cultures, proms are contentious spaces wherein kids work through central issues surrounding questions of . . . diversity, sexuality and romance.").

7. See BEST, *supra* note 1, at 18 ("[P]roms tend to take on a larger-than-life importance for many students, parents and communities.").

8. See, e.g., Alexa Aguilar, *Prom-Date Dispute Shows How Schools Screen Guests*, ST. LOUIS POST-DISPATCH, April 30, 2004, at B1 ("[S]trict policing over who shows up at high school proms is becoming the norm.").

9. Lois K. Solomon, *School Bars Questionable Prom Dates*, SUN-SENTINEL (Fort Lauderdale, Fla.), May 5, 2000, at 1A, available at 2000 WLNR 8550761. In Spokane, high schools screen non-students who come to dances as guests in order to "weed out criminals and troublemakers." *Spokane School Says No to Prom Date*, OREGONIAN (Portland, Or.), May 9, 1997, at C02. The process first involves the school looking at the list of potential guests. If the name of a "known troublemaker appears" the school interviews that person. *Id.*

A principal at another local school said that checks on prom dates are not uncommon these days, and that the school wanted to ensure "a good, safe prom." Aguilar, *supra* note 8.

See also Anna Scott, *Schools: Same-sex Prom Dates are OK*, THE HERALD TRIBUNE (Sarasota, Fla.), Apr. 22, 2006, available at <http://www.heraldtribune.com/apps/pbcs.dll/article?AID=/20060422/NEWS/604220474> (illustrating the school's admissions policy of conducting background checks before allowing any outside dates); Sharon Cotliar, *Suburb Schools Check Prom Dates' Rap Sheets*, CHICAGO SUN-TIMES, May 6, 1996, at 1 (explaining that at least seven Chicago area high schools have police review the potential guest list to see if any of the listed dates have records).

10. Jessica Fargen, *Prom-ising Ending: School Backs off Ban on Dates Amid Probe*, BOSTON HERALD, May 11, 2006, at 005, available at 2006 WLNR 8122236. The school chief banned a handful of non-students from the prom when criminal background checks revealed past misdeeds, including such misdemeanors as underage drinking and possession of marijuana. *Id.* Officials eventually reversed the rulings after the ACLU spoke out about the possible illegality of such checks. *Id.*

pose a potential threat because of past disciplinary problems or a criminal record.¹¹ In Palm Beach County, Florida, the reasons for rejection include, among other things, “insubordination and being trouble makers.”¹²

Schools are also denying potential prom dates on the basis of their age. In Minnesota, an eighteen-year-old senior was prohibited from attending the prom with her twenty-two-year-old fiancé,¹³ whose deployment to Iraq had prevented them from attending previous proms together.¹⁴ The couple had been together for years, and already had a one-year-old child.¹⁵ The fiancé was prohibited from attending the prom with his future wife because, according to the school’s prom date policy, he was too old.¹⁶ The student’s parents pleaded with the superintendent and principal to let their daughter’s fiancé attend, but their efforts were unsuccessful.¹⁷ State school officials have stated that these restrictions “guard against access to alcohol and other adult activities that an older date might enable.”¹⁸

Finally, some schools refuse to allow students to attend the prom with a same-sex date.¹⁹ This issue has only been addressed once by a court, almost

11. Solomon, *supra* note 9. One former Spanish River High School student who wished to attend as a current student’s guest was initially rejected because of a “problematic disciplinary record,” but was allowed to attend after a “dean agreed to keep an eye on him during the prom.” *Id.*

12. *Id.* Potential dates are also rejected for “drug use [and] stealing cars.” *Id.* It was estimated that the regulations accounted for about eight guests being rejected that year. *Id.* The police department checks the school district records of former students. *Id.* If the guest does not attend a Palm Beach County School, the police call the guest’s local police department or “find someone who knows the guest.” *Id.* At some high schools, guests who come from other schools must be “vouched for” by their principals. Lee-St. John, *supra* note 10. Similarly, at Crete-Monee High School in Illinois dates from other high schools are required to get a letter from their dean that states the student is in good standing. Cotliar, *supra* note 10. In St. Louis, most area high school students have to fill out forms identifying basic information about their guests. Aguilar, *supra* note 8. Some of the schools also require the signature of parents or the principal of the school the guest attends. *Id.*

13. Darlene Prois, *Some Schools are Carding Senior Prom Dates*, STAR TRIBUNE (Minneapolis), May 7, 2006, at 1B, available at 2006 WLNR 7942165.

14. *Id.*

15. *Id.*

16. *Id.* The biggest fear in letting in guests over the age of twenty-one seems to be that they will provide alcohol for their minor dates. See, e.g., Lindsay, *supra* note 10.

17. Prois, *supra* note 13. Likewise at another Minnesota high school, a female student and her boyfriend were kicked out of the prom after fifteen minutes when officials learned that the young man was twenty-one-years-old. *Id.*

A similar situation occurred recently in Mississippi. A twenty-one-year-old marine who had taken leave to escort his eighteen-year-old girlfriend to the prom was denied entrance. Lee-St. John, *supra* note 10. The school would not make any exceptions to its rule of barring guests over the age of twenty. *Id.*

18. Prois, *supra* note 13. Similarly, a junior class adviser at another Minnesota high school commented, “[w]e heard about drinking afterwards with older dates, and we decided we needed to draw a line somewhere . . . we drew it at twenty and younger.” *Id.* A prom advisor at Eden Prairie High School in Minnesota explained “[i]f they’re over twenty-one, they have to follow high school standards – no smoking, no drinking, no drugs.” *Id.*

19. While this paper looks at restrictions on prom dates as a violation of an associational

three decades ago. In *Fricke v. Lynch*, a school refused to allow a male student to attend the prom with a male date.²⁰ The federal district court for the District of Rhode Island held that the school had violated the student's First Amendment rights by preventing him from making a political statement advocating equal rights for homosexuals.²¹ However, no court has since addressed the issue, and the ability of gay and lesbian students to attend the prom with the date of their choice remains an important and divisive issue, as schools across the country continue to deny students the right to attend the prom with a same-sex date.²² This was evidenced recently in Utah when a female student attempted to bring a female date to the prom, and was immediately asked to leave after a teacher observed the student and her date dancing together.²³

High school is the time when teenagers transform into young adults.²⁴ In just a short time, these students will be out in the world and free to make important choices that will affect their lives and the lives of those around them. Precisely when many young adults are defining their self-identity, schools are taking away their opportunity to make an important, expressive, and very personal choice: with whom to undertake this rite of passage.²⁵ While schools have a serious interest in maintaining safety and ensuring that those attending the prom are not committing unlawful acts, many prom regulations are unnecessary or overly broad, severely infringing upon students' constitutional

right, same-sex couples have an additional argument regarding their constitutional rights in this context. Prohibiting students from bringing a same-sex date is arguably discrimination on the basis of sex, violating the Equal Protection Clause. For more information on this theory, see Russ, *supra* note 5.

20. 491 F. Supp. 381, 382 (D.R.I. 1980).

21. *Id.* at 385.

22. Until May 2004 there was a rule at a Central Texas High School prohibiting same-sex prom dates. Press Release, People for the American Way, *Texas School "Suspends" Policy Prohibiting Same-Sex Prom Dates* (May 7, 2004), available at <http://www.pfaw.org/pfaw/general/default.aspx?oid=15376>. After being pressured by civil liberties groups, the school finally suspended the policy. *Id.* However, one school in Florida recently made the decision to allow same-sex couples. In Manatee County, Florida, the decisions regarding this policy are left up to the individual principals. Scott, *supra* note 9. In 2006, Okeechobee High School, located in south-central Florida, banned same-sex prom dates. Terry Aguayo, *Judge Orders a Florida School to Allow a Gay Tolerance Club*, N.Y. TIMES, Apr. 7, 2007, at A11, available at 2007 WLNR 6669830; see also Jay Tokasz, *Gay Student Hits Snag Over Date to Villa Prom*, BUFFALO NEWS, Mar. 26, 2006, at B1, available at 2006 WLNR 5152294 (explaining that "[e]ach year...the issue [of same-sex prom dates] gets raised in different parts of the country").

23. Julie Scelfo, *Out at the Prom*, NEWSWEEK.COM, June 9, 2003, <http://www.msnbc.msn.com/id/3068938>.

24. One researcher who conducted a study of the prom noted that it is one of the last and most memorable events in a student's high school experience. BEST, *supra* note 1, at 32. As a result, "[t]he imminent departure from high school and entrance into an adult world is crystallized [through] the prom." *Id.*

25. See *supra* notes 8-18 and accompanying text. The prom is "a space in which teens make sense of what it means to be young in culture today . . . solidify their social identities, and struggle against the structural limits in which they find themselves." BEST, *supra* note 1, at 2.

rights of association.²⁶ The Supreme Court has recognized the importance of such rights, urging “[t]hat [schools] 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 government as mere platitudes.”²⁷ It is therefore essential that students’ constitutional freedoms are not restricted any more than is absolutely necessary to maintain a safe environment at the prom.²⁸

This Article argues that the Constitution’s guarantee of freedom of association gives students the right to bring the date of their choice to the prom, and thus schools must choose regulations that do not infringe upon this right any more than is necessary to maintain a safe environment. Section I examines the constitutional right to free association and the current status of the law. Section II argues that a student’s ability to attend the prom with the date of his or her choice falls under the First Amendment’s right to free association. Section III explores the differing treatment of First and Fourth Amendment rights within schools and identifies relevant constitutional principles. Section IV argues that these constitutional principles are met when schools allow students the right to choose their own prom date and that schools have no countervailing special regulatory need. Finally, Section V proposes a decision-making process through which schools can maintain a safe environment at the prom without unnecessarily infringing on the constitutional rights of students.

I. THE RIGHT OF ASSOCIATION

A. *The Roberts Formulation of Association*

The Supreme Court has established that, “[w]hile the freedom of association is not explicitly set out in the [First] Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition.”²⁹ The leading case defining the right to association is *Roberts v. United States*

26. See *infra* note 29 and accompanying text.

27. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). In another decision, the Supreme Court stated that the “[v]igilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

28. As the Seventh Circuit stated, “[t]he strength of our democracy depends on a citizenry that knows and understands its freedoms, exercises them responsibly, and guards them vigilantly.” *Hodgkins v. Peterson*, 355 F.3d 1048, 1055 (7th Cir. 2004). Instead, “[w]e not only permit but expect youths to exercise those liberties – to learn to think for themselves, give voice to their opinions, to hear and evaluate competing points of view. . . .” *Id.* (citing *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001)). Therefore, “a juvenile’s ability to worship, *associate*, and speak freely is . . . not simply a privilege that benefits her as an individual, but a necessary means of allowing her to become a fully enfranchised member of democratic society.” *Id.* (emphasis added).

29. *Healy v. James*, 408 U.S. 169, 181 (1972).

Jaycees, in which the Court upheld the constitutionality of legislation that prohibited gender discrimination in places of public accommodation.³⁰ In *Roberts*, male members of the Jaycees claimed that the legislation in question, which forced them to allow women to have full membership in their organization, violated their constitutional right to association.³¹ The Court divided freedom of association into two categories, expressive association and intimate association.³² The Court explained, however, that the two types of association may coincide, especially when the state interferes with an individual's selection of those with whom they "wish to join in a common endeavor."³³

The right of expressive association is implicated when individuals come together to engage in activities protected under the First Amendment.³⁴ The Court held that implicit in the right to engage in protected activities is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends."³⁵ However, the Court specifically noted that this right is not absolute.³⁶ Instead, restrictions may be imposed to further a compelling State interest if the interest cannot be accomplished through any lesser restrictive means.³⁷ The Court ultimately held that the Jaycees' right to expressive association was not violated by the legislation because the State had a compelling interest in eradicating sex-based discrimination.³⁸

Intimate association is a "fundamental element of personal liberty" and consists of individual choices to "enter into and maintain certain relationships."³⁹ In its discussion of intimate association, the Court emphasized that, "protecting these relationships from unwarranted state interference . . . safeguards the ability independently to define one's identity

30. 468 U.S. 609, 631 (1984).

31. *Id.* at 616. The purpose of the Jaycees organization is to pursue "such educational and charitable purposes as will promote and foster the growth and development of young men's civic organizations in the United States . . . and as a supplementary educational institution to provide them with opportunity for personal development and achievement." *Id.* at 612-13. Women were only allowed to hold associate memberships, which meant that they could not vote or hold office within the organization. *Id.*

32. *Id.* at 618.

33. *Id.* at 618. The Court noted that certain types of relationships "have played a critical role in the culture and traditions of the Nation . . . thereby fostering diversity and act[ing] as critical buffers between the individual and power of the state." *Id.* at 618-19.

34. *Id.*

35. *Id.* at 622. The Court also explained that "according protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Id.*

36. *Id.* at 623.

37. *Id.*

38. *Id.* at 626. Here, the State had a compelling interest of "the highest order" in eliminating discrimination and ensuring that its citizens had "equal access to publicly available goods and services." *Id.* at 624. The regulation was not related to the suppression of ideas and the State advanced its interest through the least restrictive means. *See id.*

39. *Id.* at 617-18.

that is central to any concept of liberty.”⁴⁰ The Court suggested that the types of intimate associations receiving the highest protection are those that attend the creation and sustenance of family.⁴¹ At the other end of the spectrum would be business relationships, which probably would not be entitled to protection.⁴² In between these two kinds of relationships “lies a broad range of human relationships that may make greater or lesser claims to constitutional protection.”⁴³ The Court did, however, further explain that factors potentially relevant to the inquiry into whether a relationship is protected include size, purpose, policies, selectivity, congeniality, and other factors that may be pertinent in a particular case.⁴⁴ Specifically, protected relationships are “distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship.”⁴⁵ The Court ultimately held that the Jaycees’ right to intimate association was not violated because the Jaycees are a large, non-selective group and “much of the activity central to the formation and maintenance of the association involves the participation of strangers to that relationship.”⁴⁶

B. The Court’s Treatment of Association After Roberts

The Supreme Court has only spoken in limited contexts as to the protections afforded associations that involve intimate aspects under *Roberts*.⁴⁷ In *Board of Directors of Rotary International v. Rotary Club of Duarte*,⁴⁸ the Supreme Court again upheld a state statute that prohibited sex-based discrimination.⁴⁹ The Court first noted that rotary clubs are not selective in membership and often have hundreds of members.⁵⁰ Applying the standards set forth in *Roberts*, the Court held that this association lacked the necessary intimate and private characteristics that would entitle it to First Amendment protection.⁵¹ In dicta, however, the Court stated that constitutional protection

40. *Id.* at 619.

41. *Id.* These include relationships like marriage, childbirth, the raising and education of children, and cohabitation with one’s relatives. *Id.*

42. *Id.* at 620.

43. *Id.* The Court explained that determining the degree to which a state can interfere with an individual’s freedom of this kind of association “therefore unavoidably entails a careful assessment of where that relationship’s objective characteristics locate it on the spectrum from the most intimate to the most attenuated of personal attachments.” *Id.*

44. *Id.* at 620.

45. *See id.*

46. *Id.* at 621. The Court explained that the Jaycees were largely unselective because “[a]part from age and sex, neither the national organization nor the local chapters employ any criteria for judging applicants for membership, and new members are routinely recruited and admitted with no inquiry into their backgrounds.” *Id.*

47. *See infra* notes 48-62 and accompanying text.

48. 481 U.S. 537 (1987).

49. *Id.* at 547.

50. *Id.* at 546.

51. *Id.* at 546-47.

is not restricted to relationships among family members.⁵² In *City of Dallas v. Stanglin*,⁵³ the Court upheld an ordinance prohibiting adults from using a number of dancehalls during specific hours.⁵⁴ The ordinance was created in response to requests for dancehalls that were only open to teenagers.⁵⁵ The Court held that the “chance encounters” that occur in dancehalls are not the kind of associations that are constitutionally protected.⁵⁶ It noted that “dancehall patrons, who may number 1000 in any given night, are not engaged in the sort of intimate human relationships referred to in *Roberts*.”⁵⁷

In *FW/PBS, Inc. v. City of Dallas*⁵⁸ the Court upheld an ordinance imposing a ten hour limitation on rented motel rooms.⁵⁹ The Court reasoned that the bonds formed in hotel rooms are not worthy of the associational protections provided by the Constitution.⁶⁰ Finally, in *Boy Scouts of America v. Dale*,⁶¹ the Court held that a New Jersey law prohibiting discrimination against homosexuals infringed upon the Boy Scouts’ right to expressive association.⁶² As to the Boy Scouts’ claim that their right to intimate association had been violated, the Court simply dismissed the claim in a footnote by explaining that the doctrine was inapplicable because of the non-selectivity and large size of the association.⁶³

As the above cases demonstrate, the Supreme Court has only dealt with the right to engage in associations involving intimate characteristics in limited contexts, and has thus left lower courts considerable latitude in applying the principles set out in the *Roberts* decision. Although the Supreme Court has

52. *Id.* at 545.

53. 490 U.S. 19 (1989).

54. *Id.* at 28. The Court stated that “[w]hile the First Amendment does not in terms protect a ‘right of association,’ our cases have recognized that it embraces such a right in certain circumstances.” *Id.* at 23-24.

55. *Id.* at 21.

56. *Id.* at 25.

57. *Id.* at 24. The Court also noted that this was not expressive conduct protected by the First Amendment, as most of these people are strangers to one another who just happen to be patrons of the same establishment. *Id.* at 24-25. Their coming together to dance recreationally is not an expression protected by the First Amendment. *Id.* at 25.

58. 493 U.S. 215 (1990).

59. *Id.* at 237.

60. *Id.* On this issue the Court simply stated that “[a]ny ‘personal bonds’ that are formed from the use of a motel room for fewer than 10 hours are not those that have ‘played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs.’” *Id.* (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618-19 (1984)).

61. 530 U.S. 640 (2000).

62. *Id.* at 656. The Court explained that although like in *Roberts* and *Duarte* the State had a compelling interest in eradicating discrimination, the cases were distinguishable because here the statute materially interfered with the message that the organization was trying to express. *Id.*

63. *Id.* at 698 n.26. The Court also spoke briefly as to the issue of intimate association in *Overton v. Bazzetta*, 539 U.S. 126 (2003); however, the discussion in that case is irrelevant here because the Court was only addressing this right within the special context of incarceration. The Court stated that “[F]reedom of association is among the rights least compatible with incarceration. . . . Some curtailment of that freedom must be expected in the prison context.” *Id.* at 131.

stated what is not protected under *Roberts*, it has spoken very little about what the doctrine does protect.⁶⁴ In the lower courts, this has led to a great deal of confusion about what types of associations are protected. Lower courts have very rarely dealt with questions involving whether there is a right to associations that are similar to that of a prom date, such as dating relationships and friendships.⁶⁵ In the few instances where these issues have been addressed, the lower courts have reached inconsistent conclusions.⁶⁶

64. See *supra* notes 48-63 and accompanying text.

65. The few courts that have considered the issue have reached differing conclusions as to whether there is a constitutional right to friendship. Compare *Sawyer v. Sandstrom*, 615 F.2d 311, 313 (5th Cir. 1980) (considering whether someone could be punished for having the “wrong kinds of friends” and ultimately invalidating an ordinance that made it a crime to “knowingly loiter in any place with one or more persons knowing that a narcotic or dangerous drug is being unlawfully used or possessed” because it violated the plaintiff’s First Amendment right of association), and *O’Leary v. Luongo*, 692 F. Supp. 893, 900 (N.D. Ill. 1988) (holding that while the plaintiff’s “relationship with his neighbors and friends might very well be the kind of relationship protected by the First Amendment[,]” the claim failed because no evidence was introduced regarding the level of intimacy of these relationships), with *Rode v. Dellarciprete*, 845 F.2d 1195, 1205 (3d Cir. 1988) (holding that the fact that the plaintiff and her brother-in-law were “good friends” did not entitle the relationship to receive First Amendment protection because the relationship was not based on the “creation and sustenance of a family”), and *Flaskamp v. Dearborn Pub. Sch.*, 232 F. Supp. 2d 730, 739-40 (E.D. Mich. 2002) (refusing to extend the right of intimate association to a friendship between a teacher and former student and noting that while the Supreme Court “has left the possibility open, it has yet to extend the right to intimate associations beyond familial relationships”). See also, Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 626 (1980) (“Any view of intimate association focused on associational values must . . . include friendship.”).

66. As with friendships, see *supra* note 65, there also has been confusion among lower courts as to whether dating is an association protected under *Roberts*. In *Wilson v. Taylor*, the Eleventh Circuit held that dating was an associational activity protected by the First Amendment. 733 F.2d 1539, 1544 (11th Cir. 1984). The court explained that the First Amendment’s guarantee of free association extends to all associations, including social and personal relationships. *Id.* Some courts have held that *Roberts* overruled this decision. *Swank v. Smart*, 898 F.2d 1247, 1252 (7th Cir. 1990) (“*Wilson* was decided three weeks before *Roberts* and did not survive it.”); *Piscottano v. Murphy*, 317 F. Supp. 2d 97, 111 (D. Conn. 2004) (“*Wilson* was decided before the Supreme Court decided *Roberts*, and a number of courts have rightly held that *Wilson* did not survive *Roberts*.”).

Other courts, however, have cited it as good law. *Rode v. Dellarciprete*, 845 F.2d 1197, 1205 (3d Cir. 1988) (applying the principles of intimate association and finding that the plaintiff’s relationship with her brother-in-law was not protected because, unlike the relationship in *Wilson*, it was not “selected”); *City of Dothan v. Brackin*, No. CV-05-5144, 2006 WL 2050558, at *8-9 (Ala. Civ. App. Dec. 8, 2006) (citing *Wilson* for the proposition that social relationships like dating are constitutionally protected and distinguishing the facts of the case at hand from those of *Wilson*). The Eleventh Circuit has not only declined to overrule the case, it has cited it as good law as recently as 2001 (over fifteen years after the *Roberts* decision was handed down). *Chesser v. Sparks*, 248 F.3d 1117, 1125 (11th Cir. 2001).

**II. PROM DATES AND SIMILAR RELATIONSHIPS ARE PERSONAL
ASSOCIATIONS ENTITLED TO CONSTITUTIONAL PROTECTION UNDER THE
ROBERTS DOCTRINE**

The choice of a prom date involves the kinds of interests that the Court has recognized as worthy of constitutional protection. The *Roberts* Court set out a variety of characteristics which would make a relationship more likely to receive constitutional protection.⁶⁷ Many of these factors are directly relevant when considering the freedom to choose a prom date:

- (1) The relative smallness of the relationship – the size of the association in question here is indisputably small and always includes only two people.
- (2) A high degree of selectivity – as its small size implies, this relationship is also one that is very selective. In fact, it is so selective that only one individual is allowed to be a particular student's prom date. Thus, unlike even a dating relationship, the rules surrounding this association ensure that it only includes two people.
- (3) Policies and principles – the underlying policies and principles behind the ability to choose a date imply that a student's choice of a prom date is undertaken with thought and care. The prom is structured as an event at which students are formally able to show their community who is important to them.
- (4) Other pertinent factors – The prom is a milestone event that occurs at a point in an individual's life when he or she is likely beginning to search for and define his or her distinctive identity. Therefore, for many students the choice of whom to bring necessarily implicates "the ability independently to define one's identity,"⁶⁸ a right that the *Roberts* Court explicitly recognized as a fundamental rationale for protecting certain relationships.⁶⁹

Thus, while this relationship may not involve the creation and sustenance of a family (which the *Roberts* Court identified as being entitled to the highest degree of protection),⁷⁰ it embodies the fundamental characteristics identified by the Court that entitle it to significantly more protection than a mere business relationship, which the Court in *Roberts* stated would receive little or no protection.⁷¹

In addition to implicating many of the characteristics of an intimate association, the choice of a prom date directly embodies aspects of expressive association specifically identified by the *Roberts* Court.⁷² The school is a

67. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984).

68. See BEST, *supra* note 1, at 17 ("The analysis I provide suggests . . . [that] proms are key sites at which the politics of youth is formed, where identities are fashioned and cultural struggles waged.").

69. *Roberts*, 468 U.S. at 619.

70. *Id.* at 619-20.

71. *Id.* at 620.

72. *Id.* at 622 ("[There is] a corresponding right to associate with others in pursuit of a wide

closely knit community in which everyone usually knows one another. Through their choice of a prom date, students express to their community whom they consider to be the one person important enough to bring to this event.⁷³ Furthermore, the prom is a purely social event and this relationship logically falls within the *Roberts* criteria of an expressive association “formed to further . . . social ends.”⁷⁴

Furthermore, this is not the kind of association that the Supreme Court has found to be unprotected under the *Roberts* doctrine. Unlike the dancehall association in *Stranglin*, the association formed here is in no way a chance encounter that occurs in an unselective environment where anyone who pays the cover may form the association in question. Instead, it is a student’s distinctive selection of only one person. Proms are further distinguishable from the associations in *Stranglin*, which involved thousands of people, while the choice of a prom date involves only two individuals. Nor is the prom-date relationship similar to the associations the Court has found to be unprotected under *Roberts*, *Duarte*, or *Dale*, because the association between a student and his or her prom date does not involve an association like the Jaycees, Rotary Club, or Boy Scouts that is large and primarily unselective in membership. Finally, the association discussed in *FW/PBS* is absolutely distinct from the choice of a prom date. The association of persons in a hotel room is an association that a person can choose to form at any time, as many times as he or she wants, and with whatever number of people they choose. However, the choice of a prom date can only happen for this one event and a student can only choose one individual to be his or her date.

Beyond the fact that this type of relationship falls within the *Roberts* spectrum,⁷⁵ it is clear that the American conception of liberty and fundamental

variety of political, *social*, economic, educational, religious and cultural ends.”) (emphasis added).

73. See *supra* note 7 and accompanying text.

74. *Roberts*, 468 U.S. at 622.

75. Because the basis of the right to intimate association was not explicitly stated in *Roberts*, there is confusion among lower courts as to whether this right is protected by the First Amendment, the Fourteenth Amendment, or both. See *Sanitation and Recycling Indus. v. City of New York*, 107 F.3d 985, 996 (2d. Cir. 1997) (recognizing that courts differ in their views as to whether the right to intimate association is based in the First or Fourteenth Amendment, but refusing to address the issue). In its most recent mention of the right, the Court stated that “[o]ur cases recognize a substantive due process right “to enter into and carry on certain intimate or private relationships.” *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 698 n. 26 (2000).

However, the right to associate and form personal relationships with whom we choose implicates notions of self-expression, self-realization, diversity of ideas, and the search for truth, concepts which are often seen as being protected under First Amendment doctrine. See GEOFFREY R. STONE ET AL., *THE FIRST AMENDMENT* 9-15 (2d ed. 2003). Consequently, the Court in multiple decisions has explicitly referred to the right as grounded in the First Amendment. See *City of Dallas v. Stranglin*, 490 U.S. 19, 23-24 (1989) (“While the First Amendment does not in terms protect a right of association our cases have recognized that it embraces such a right in certain circumstances. In *Roberts v. United States Jaycees* we noted two different sorts of freedom of association that are protected.”) (citation omitted); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 at 545 (1987) (“The

freedom would be destroyed if institutions began telling people with whom they could spend their free time. This is because we do not live in a totalitarian society. America is a country where people have the freedom to choose with whom to spend time, share ideas, and generally associate. The ability to make such choices is fundamental to the formation of identity,⁷⁶ the notions of autonomy and freedom,⁷⁷ and the functioning of our society as a marketplace of views and ideas. These are among the essential freedoms that the First Amendment was created to protect.⁷⁸

III. THE UNIQUE RIGHTS OF THE SCHOOL AND THE PRINCIPLES THAT EMERGE FROM THE COURT'S DIFFERING TREATMENT OF FIRST AND FOURTH AMENDMENT RIGHTS WITHIN THE SCHOOL SETTING

Even assuming *arguendo* that government may not dictate with whom individuals may associate, the issue remains as to whether or not the unique school environment justifies infringement upon these rights because of a compelling interest. Although the Supreme Court has not specifically spoken about the *Roberts* right to form personal relationships among students, it has repeatedly considered the First Amendment rights of students.⁷⁹ In the school context, the Court has been much more willing to infringe upon students' First and Fourth Amendment rights (the most litigated rights within the student context) than in other contexts. The principles that emerge in relation to these Amendments are at risk with prom date regulations.⁸⁰

A. General First Amendment Principles

First Amendment legislation has, with limited exceptions, consistently

First Amendment protects those relationships, including family relationships, that presuppose 'deep . . . commitments to the necessarily few other individuals . . .'" (quoting *Roberts*, 468 U.S. at 619-620).

Because (1) the Supreme Court has referred to this type of right as both protected under the First Amendment and substantive due process doctrine, and (2) the choice of a prom date implicates expressive (which is grounded in the First Amendment), as well as intimate, association, the ability to choose a prom date or form similar relationships should be considered hybrid rights protected under the First Amendment as well as the liberty guarantee of the Fourteenth Amendment. This Article, however, focuses primarily on the First Amendment implications of the right.

76. See Karst, *supra* note 65, at 637. An individual's intimate associations, including friendships and dating relationships, have a "great deal to do with the formation and shaping of an individual's sense of his own identity." *Id.* at 635. These relationships "influence how individuals see themselves and how they are perceived by others." *Id.* at 636. When individuals enter into such relationships, "they take on expressive dimensions as statements defining [the individual]." *Id.* at 637.

77. *Id.* at 692 ("The freedom to choose our intimates and to govern our day-to-day relations with them is more than an opportunity for the pleasures of self expression; it is the foundation for the one responsibility among all others that most clearly defines our humanity.").

78. See Stone, *supra* note 75, at 9-15.

79. See *infra* notes 95-113 and accompanying text.

80. See *infra* notes 140-148 and accompanying text.

been struck down both (1) when it imposes a prior restraint on First Amendment activity,⁸¹ and (2) when it attempts to regulate protected activity based on the theory that such activity could possibly influence persons to make bad decisions or engage in unlawful conduct.⁸² The Supreme Court has declared that “prior restraints . . . are the most serious and the least tolerable infringement on First Amendment rights.”⁸³ Prior restraints occur when the government attempts to prevent the future dissemination of First Amendment activity.⁸⁴ Throughout history the Court has consistently maintained the heavy presumption against prior restraints.⁸⁵ As First Amendment scholar Thomas Emerson, has explained:

A system of prior restraint is in many ways more inhibiting than a system of subsequent punishment: It is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place; suppression by a stroke of the pen is more likely to be applied than suppression through a criminal process; . . . the system allows less opportunity for public appraisal and criticism; the dynamics of the system drive toward excesses as the history of all censorship shows.⁸⁶

First Amendment activity is so valuable because it embodies the notions of liberty that are essential for a truly free and democratic society: freedom of thoughts and viewpoints, discussion, self-realization, autonomy, and diversity.⁸⁷ Prior restraints suppress First Amendment activity before it occurs and thus deprive citizens of any opportunity to further the values essential to a democratic society. As the Supreme Court has maintained, “[a] free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand.”⁸⁸

81. See *infra* notes 83-88 and accompanying text.

82. See *infra* notes 89-94 and accompanying text.

83. *Neb. Press Ass’n. v. Stuart*, 427 U.S. 539, 559 (1976).

84. 16B C.J.S. *Constitutional Law* § 808 (2006).

85. In *New York Times Co. v. United States* the Court noted that, “[a]ny system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity.” 403 U.S. 713, 714 (1971) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)). See also 16A AM. JUR. 2D. *Constitutional Law* § 455 (2006).

Legislation that is found to be a prior restraint has been generally, except in limited circumstances, struck down by courts. 16B C.J.S. *Constitutional Law* § 809 (2006). (“Notwithstanding the extreme disfavor in which prior restraints of speech are held, the constitutional protection against them is not absolute.”). *But see* Richard Favata, *Filling the Void in First Amendment Jurisprudence: Is There a Solution for Replacing the Impotent System of Prior Restraints*, 72 FORDHAM L. REV. 169, 192 (2003) (“In light of the decisions that have been handed down over the years and the rhetoric of the Court, it seems very unlikely that a case could ever spur the Court to uphold a prior restraint on protected [First Amendment Activity].”).

86. THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 506 (1970).

87. STONE ET AL., *supra* note 75. The marketplace of ideas theory for the protection of First Amendment activity is based on the idea that “when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas.” *Id.* at 9 (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

88. *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 559 (1975). Because of the

Another category of now prohibited speech regulation is the bad tendency test, which prohibits otherwise protected First Amendment activity that manifests any possibility, however remote, to influence persons to engage in unlawful activity.⁸⁹ In 1937, the Court explicitly rejected the test because its lenient standards enabled the government to take away fundamental democratic freedoms by suppressing expression with which it was in disagreement.⁹⁰ In rejecting the bad tendency test, the Court adopted the *Brandenburg* test.⁹¹ Under this test, speech may only be regulated if the speaker expressly advocates unlawful activity and such unlawful activity is both imminent and likely.⁹² The *Brandenburg* test is highly protective of First Amendment activity.⁹³ Under this test, courts have consistently rejected governmental attempts to regulate First Amendment activity on the possibility that it may cause people to engage in unlawful conduct or make unwise decisions.⁹⁴

inherent value of First Amendment activity both to the person undertaking it and to society as a whole, the Supreme Court has held that it must not be suppressed before it is undertaken unless there is an imminent and likely danger that harm will occur from the activity. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

89. See, e.g., *Frohwerk v. United States*, 249 U.S. 204, 209 (1919) (upholding the conviction of two newspaper publishers who had written articles criticizing the war and stating that although there was no evidence that the articles had any adverse effect on the war effort, “it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame.”); *Debs v. United States*, 249 U.S. 211, 214-15, 217 (1919) (affirming the conviction of a socialist leader who criticized the draft because speech was punishable if “one purpose of the speech, whether incidental or not . . . was to oppose . . . [the] war . . . and if, in all the circumstances, that would be its probable effect”); *Shaffer v. United States*, 255 F. 886, 887-89 (9th Cir. 1919) (upholding a conviction for the mailing of a disloyal book because the words in it had a “natural and probable tendency and effect of” causing obstruction of the war by influencing others not to enlist in the army).

90. For examples of arguable suppression of unpopular speech, see *United States ex rel. Turner v. Williams*, 194 U.S. 279, 294 (1904) (upholding the conviction and deportation of John Turner, a visiting English anarchist, because “the tendency of the general exploitation of such views is so dangerous to the public weal [sic] that aliens who hold and advocate them would be undesirable additions to out [sic] population.”); *Ex parte Jackson*, 96 U.S. 727, 736-37 (1877) (upholding a federal statute that prohibited the mailing of lottery advertisements and observing that lotteries “are supposed to have a demoralizing influence upon the people”); *Commonwealth v. Karvonen*, 219 Mass. 30, 31-33 (1914) (upholding a conviction for the public display of a red flag and explaining that statutes designed to preserve the public safety “cannot be stricken down as unconstitutional unless they manifestly have no tendency to produce that result”).

91. *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969).

92. *Id.* at 447.

93. Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 755 (1975) (“*Brandenburg* is the most speech-protective standard yet evolved by the Supreme Court.”).

94. See, e.g., *Hess v. Indiana*, 414 U.S. 105, 107-09 (1973) (overturning a conviction for disorderly conduct by reasoning that the defendant’s statements that “we’ll take the fucking streets later,” were, “at best . . . counsel for present moderation; at worst, nothing more than advocacy of illegal action at some indefinite time in the future”); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 at 508-09 (1969) (holding that as a state actor, the school could not regulate First Amendment activity absent a showing that it would “materially and substantially interfere . . . with the operation of the school” and that mere

B. The Application of General First Amendment Principles in Schools

The leading case involving the First Amendment rights of students is *Tinker v. Des Moines Independent Community School District*,⁹⁵ which upheld students' First Amendment right to wear black armbands to school in protest of the Vietnam War.⁹⁶ The Court maintained that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"⁹⁷ and that "students in, as well as out, of school are persons under our Constitution."⁹⁸ In rejecting the bad tendency test, Justice Fortas emphasized that although the school has the right and responsibility to control conduct in schools in the maintenance of an orderly learning environment for learning, mere "undifferentiated fear of disturbance is not enough to overcome the right to free expression."⁹⁹ Using language that paralleled the *Brandenburg* test,¹⁰⁰ the Court held that the school could not regulate students' protected First Amendment activity unless there was a showing that such activity would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."¹⁰¹

In *Bethel School District No. 403 v. Fraser*,¹⁰² a student made a lewd and indecent speech during an assembly that was part of a school-sponsored educational program in self-government.¹⁰³ The student was punished for

"undifferentiated fear of disturbance is not enough to overcome the right to free expression"); *Gay Students Org. of the Univ. of N.H. v. Bonner*, 509 F.2d 652, 662 (1st Cir. 1974) (quoting *Tinker*, 393 U.S. at 508) (noting that "[m]ere 'undifferentiated fear or apprehension' of illegal conduct is not enough to overcome First Amendment rights, and speculation that individuals might at some time engage in illegal activity is insufficient to justify regulation by the state" (citation omitted)).

Even in regards to commercial speech, which the Supreme Court has never explicitly held is entitled to full constitutional protection, the Court recently held that it will not regulate such speech on the grounds that it could cause people to make bad decisions. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002) (refusing to restrict the First Amendment activity in question because the government's concern "amounts to a fear that people would make bad decisions if given truthful information about compounded drugs" and the Court has already "rejected the notion that the government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information.").

95. 393 U.S. 503 (1969).

96. *Id.* at 514.

97. *Id.* at 506.

98. *Id.* at 511.

99. *Id.* at 508.

100. *See supra* notes 91-94 and accompanying text.

101. *Tinker*, 393 U.S. at 509. The Court stated that in the instant case "[t]here is no indication that . . . any class was disrupted." *Id.* at 508.

102. 478 U.S. 675 (1986).

103. The student was making the speech to nominate a classmate for a position on the school's student government. *Id.* at 677. He discussed the speech in advance with two teachers, who advised him that he probably would get into trouble if he delivered it. *Id.* at 678. The student delivered the speech at a school assembly and "referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor." *Id.* at 677-78. During the speech some students "hooted" and made "sexual gestures," while others were confused or embarrassed. *Id.* at

violating a school rule that prohibited “[c]onduct which materially and substantially interferes with the educational process . . . including the use of obscene, profane language or gestures.”¹⁰⁴ The Supreme Court upheld the punishment as constitutional.¹⁰⁵ The Court deferred to the school’s determination that the student’s speech seriously disrupted the school’s educational activities¹⁰⁶ and stated that “[t]he First Amendment does not prevent school officials from determining that to permit a vulgar and lewd speech . . . would undermine the school’s basic educational mission.”¹⁰⁷

In *Hazelwood School District v. Kuhlmeier*,¹⁰⁸ the Supreme Court held that the principal did not violate students’ First Amendment rights by refusing to allow newspaper stories about pregnancy and divorce to appear in the school newspaper.¹⁰⁹ The newspaper was published as a part of the curriculum for a journalism class.¹¹⁰ The Court held that the school’s action, which amounted to a prior restraint, was lawful student writing because it was a segment of the curriculum and could therefore be taken as representing the school’s viewpoint.¹¹¹ The Court did, however, specifically distinguish the type of speech here from speech which happened to occur on school grounds but was unrelated to the curriculum.¹¹² The Court emphasized that the holding of the case was limited to speech that could be attributed to the school and that, whether “in the cafeteria, or on the playing field, or on the campus during the authorized hours,” schools cannot punish or restrain students from expressing their personal views on school grounds in the absence of a material disruption.¹¹³

678.

104. *Id.* at 678.

105. *Id.* at 687. The Court further stated that speech, especially sexually explicit speech, is not necessarily protected for students as for adults. *Id.* at 682.

106. *Id.* at 683. One teacher stated that on the day following the speech, she had to use a significant portion of class-time to discuss the speech in question. *Id.* at 678.

107. *Id.* at 685.

108. 484 U.S. 260 (1988).

109. *Id.* at 276.

110. *Id.* at 262.

111. *Id.* at 270-71. The Court explained that, because the paper was published as part of the curriculum and could be seen as representing the viewpoint of the school, the *Tinker* standard did not apply. *Id.* at 272-73. The Court then explained that judicial intervention would be justified only when a “decision to censor a school sponsored . . . vehicle of student expression has no valid educational purpose.” *Id.* at 273.

112. *Id.* at 271. The Court distinguished the speech in *Tinker*, 393 U.S. 503 (1969), from the speech here by noting that in *Tinker* the students were expressing their personal views, and it just happened that this expression occurred on school property. *Id.* Here, however, speech was involved in a curricular context and could be taken as representing the views of the school and not just the personal views of the students. *Id.* Thus, the Court held that the *Tinker* standard would not be applied to those kinds of activities such as school newspapers and theatrical productions that “students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.” *Id.*

113. *Id.* at 266 (quoting *Tinker*, 393 U.S. at 512-13).

Finally, in *Morse v. Frederick*¹¹⁴ the Court held that a student's First Amendment rights were not violated when he was suspended by the school for displaying a banner that read "BONG HITS 4 JESUS" at a school-approved activity during school hours.¹¹⁵ The Court stated that "at least two interpretations of the words on the banner demonstrate that the sign *advocated* the use of illegal drugs."¹¹⁶ After discussing the widespread drug use among children today and the serious consequences of such activity, the Court held that because "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use . . . the school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending the student."¹¹⁷

C. Fourth Amendment Rights of Students

Although it has granted significant protection to core First Amendment principles within the school setting, the Court has allowed schools to infringe upon students' Fourth Amendment rights to a much greater degree.¹¹⁸ The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause."¹¹⁹ In general, a search violates the Fourth Amendment if it conducted without probable cause, or in an otherwise reasonable manner.¹²⁰ However, in *New Jersey v. T.L.O.*,¹²¹ the Court first recognized the "special needs" exception to this rule.¹²² *T.L.O.* involved a search by school officials of a student's purse.¹²³ In upholding the constitutionality of the search, the Court held that in the school setting, a showing of probable cause for the search was not necessary because of the "substantial need of teachers and administrators for freedom to maintain order in the schools."¹²⁴ Lower courts have used this special needs exception to uphold, among other things, searches of every student upon his or her entry into the school,¹²⁵ drug sweeps that involve searching every student locker,¹²⁶ and strip searches undertaken by school

114. 127 S. Ct. 2618 (2007).

115. *Id.* at 2622.

116. *Id.* at 2625 (emphasis added).

117. *Id.* at 2622.

118. *See infra* notes 121-133 and accompanying text.

119. U.S. CONST. amend. IV.

120. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 624 (1989).

121. 469 U.S. 325 (1985).

122. *Id.* at 351 (Blackmun, J., concurring).

123. *Id.* at 328.

124. *Id.* at 341. Thus, searches are reasonable if they were designed to further special needs beyond that of normal law enforcement. *See, e.g., Ferguson v. City of Charleston*, 532 U.S. 67, 81 (2001); *Chandler v. Miller*, 520 U.S. 305, 317-22 (1997); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66 (1989).

125. *See In re F.B.*, 726 A.2d 361, 368 (Pa. 1999).

126. *Commonwealth v. Cass*, 709 A.2d 350, 358 (Pa. 1998).

officials in an attempt to locate drugs.¹²⁷

The Supreme Court again confronted the issue of students' Fourth Amendment rights in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*.¹²⁸ In *Earls*, the school district adopted a drug policy under which all students participating in extra-curricular activities had to sign a form agreeing to be tested before the season began and randomly throughout the season.¹²⁹ The Court used a framework¹³⁰ under which it weighed the intrusion into student Fourth Amendment rights against the promotion of legitimate governmental interests.¹³¹ The Court upheld the school's policy as constitutional, noting that "[s]ecuring order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults."¹³² The Court further explained the notion set forth in its earlier decisions that "[w]ithout first establishing discipline and maintaining order, teachers cannot begin to educate their students."¹³³

127. *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1324 (7th Cir. 1993).

128. 536 U.S. 822 (2002).

129. *Id.* at 826.

130. This framework was introduced by the Supreme Court a few years earlier in *Veronia School District 47J v. Acton*, 515 U.S. 646 (1995). In *Veronia*, the school implemented a program that required those who participated in high school athletics to submit to random drug testing throughout the year. *Id.* at 650. When evaluating school drug testing programs that do not require a showing of probable cause, the Supreme Court held that it must undertake a "fact specific balancing of the intrusion on the children's Fourth Amendment rights against the promotion of legitimate governmental interests." The Court identified three factors that would be considered in this analysis: (1) the "nature of the privacy interest" allegedly violated by the search; (2) the "character of the intrusion that is complained of;" and (3) "the nature and immediacy" of the school's concerns, as well as the "efficacy" of the policy in addressing the concerns. *Id.* at 654-60.

131. *Earls*, 536 U.S. at 830. Specifically, the Court weighed the privacy interest being compromised and the level of the intrusion upon students, against the nature and immediacy of the government's interests and the "efficacy of the policy in meeting them." *Id.* at 830. (citing *Veronia*, 515 U.S. at 660). In terms of the privacy interest intruded upon, the Court explained that students within the school setting have a limited expectation of privacy. *Id.* at 830. In addition, because extracurricular activities are governed by additional state-wide rules, the students' privacy interest is further diminished. *Id.* at 832. The nature of the drug testing was minimally intrusive because students were able to urinate "behind a closed stall" and the results of the tests were kept confidential. *Id.* at 832-33. Finally, as for the "nature and immediacy" of the government's concerns, the Court held that the "nationwide drug epidemic makes the war against drugs a pressing concern in every school." *Id.* at 834. The Court stated at a finding of reasonable suspicion is not necessary in this context for the search to be constitutional. *Id.* As a result of these findings, the Court held that the testing was a reasonable means of furthering the school's legitimate interest and was thus constitutional. *Id.*

132. *Id.* at 831.

133. *Id.* at 831 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 350 (1985) (Powell, J., concurring)).

IV. THE UNIQUE CHARACTERISTICS OF A SCHOOL DO NOT GIVE IT A GREATER POWER TO REGULATE STUDENTS' RIGHT TO BRING THEIR DATE OF CHOICE TO THE PROM

Although the Supreme Court has allowed more infringement of student First Amendment rights within the school context, those limitations do not apply to the choice of a prom date. Unlike the newspaper articles in *Hazelwood*, which were published as a part of the curriculum for a certain class, the choice of a prom date is an extra-curricular and personal decision. The student's choice could not be reasonably viewed as representing the views of the school.¹³⁴ The prom is a purely social event usually organized by a committee of students, and has nothing to do with school curriculum. While many proms are "school-sponsored" events, the choice of a prom date is akin to the type of speech specifically distinguished in *Hazelwood*, which is private speech that happens to take place on school grounds.¹³⁵ Furthermore, these activities do not meet the criteria set forth by the Supreme Court in *Tinker* of causing a material disruption to the educational process.¹³⁶ Not only does the prom not occur during school hours, but it also usually does not even occur on school grounds. It has nothing at all to do with the curriculum, educational process, or operation of the school. Finally, the First Amendment activity here does not involve the type of lewd and offensive school speech that was at issue in *Fraser*,¹³⁷ and unlike the activity in *Morse*, bringing one's date of choice to the prom is not an expression that on its face advocates illegal activity during school hours.

Taken together, *Tinker*, *Hazelwood*, *Fraser*, and *Morse* hold that a school can only regulate a student's protected First Amendment conduct if the conduct materially disrupts the educational process, is attributable to the school's viewpoint, is lewd or plainly offensive, or expressly advocates illegal activity within the school setting.¹³⁸ The Court's failure to further extend the

134. See *Demmon v. Loudoun County Pub. Sch.*, 342 F. Supp. 2d 474, 489-90 (E.D. Va. 2004) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988)) (holding that decorated bricks designed by students in commemoration of past accomplishments, even if organized by faculty and technically sponsored by the school, could not reasonably be understood as representative of the school's view because they were not "designed to impart particular knowledge or skills to student participants and audiences" and thus were not "school-sponsored" under *Hazelwood*).

135. In *Hazelwood*, the Court emphasized that while schools can punish expression that could be reasonably seen as representing the school's viewpoint, "schools cannot punish or restrain students from expressing their personal views on school grounds in the absence of a material disruption." *Hazelwood*, 484 U.S. at 266. The choice of a prom date is the kind of expression that the Court was distinguishing with this statement because it is a personal and private expression that happens to be displayed on the grounds of a school-sponsored event.

136. See *supra* notes 99, 101.

137. The *Hazelwood* Court explained that the difference between the analyses in *Fraser* and *Tinker* was that "[t]he decision in *Fraser* rested on the 'vulgar,' 'lewd,' and 'plainly offensive' character of a speech delivered at a school assembly." 484 U.S. at 271 n.4 (quoting *Tinker*, 393 U.S. at 513).

138. See *supra* notes 95-117 and accompanying text.

schools' right to infringe upon student rights shows the importance of First Amendment protection, even within the school setting. In contrast, the Court has held that all students, even in the context of non-academic extra-curricular activities, have greatly restricted Fourth Amendment rights.¹³⁹ These principles implicated in both Amendments are at risk for direct implication in school regulations of prom dates.

This Article now considers the context of the First Amendment. First, banning a class of persons from prom out of fear of the occurrence of unlawful acts constitutes a prior restraint because the school effectively paralyzes a student's choice of prom date before the choice of association is taken. Even in the school setting, prior restraints are strongly disfavored. This was demonstrated in *Hazelwood*, when the Court made it clear that prior restraints would only be allowed in the school setting in the unique situation where the activity in question could reasonably be understood as representing the school's viewpoint.¹⁴⁰ Prior restraints have been largely prohibited because they are so dangerous to our way of life and the idea of freedom of thoughts, viewpoints, discussion, debates, self-realization and diversity.¹⁴¹ Each of these principles is furthered by allowing students to choose their own prom date. By banning classes of individuals from attending the prom, the school is necessarily infringing on discussion and communications between these individuals and their potential student dates. Furthermore, through this action, the school is only allowing one narrow viewpoint to be presented to students: the viewpoint that those who have a criminal record, are over a certain age, or are of the same sex as their date are not worthy of this association. The school's actions also have a detrimental effect on diversity, by only permitting individuals who fit a certain mold to attend the prom. Finally, by not allowing students to make this important and personal choice for themselves, the school is infringing upon students' ability to realize and define themselves through their associations with others.¹⁴²

Second, courts have consistently rejected regulation of First Amendment regulations prohibiting conduct with the potential to cause poor decision-making.¹⁴³ In *Tinker*, the Court rejected the bad tendency test,¹⁴⁴ instead applying a test similar to the *Brandenburg* test, requiring that the school could only regulate activity that caused or was likely to cause a substantial and material disruption in the school setting.¹⁴⁵ In the regulation of prom dates, however, many schools are not adhering to this standard and are instead employing the bad tendency test.¹⁴⁶ The possibility, no matter how small, of a

139. See *supra* notes 121-133 and accompanying text.

140. See *supra* notes 108-113 and accompanying text.

141. See *supra* notes 83-99 and accompanying text.

142. See *supra* notes 65, 75, 76 and accompanying text.

143. See *supra* note 94 and accompanying text.

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

145. *Tinker*, 393 U.S. at 509.

146. In other words, the school is banning potential dates or classes of potential dates based on the idea that these types of people have a tendency to engage in unlawful conduct or influence

prom attendee making, or being influenced to make, an unwise decision causes schools to ban entire classes of potential prom dates solely based on age, background, or sex.¹⁴⁷ The fact that restrictions are imposed before an unlawful activity has even occurred contradicts fundamental notions of freedom.¹⁴⁸

Even though there is an argument that the Court retreated to a form of the bad tendency test in *Morse* by allowing the school to punish speech that encouraged illegal behavior, that argument is irrelevant here. When it rejected the bad tendency test, the Court was careful to note the danger of speech that expressly advocates unlawful behavior, and the important distinction between this type of expression (which is not entitled to protection) and that which merely has the possibility of advocating such illegal activity at some point in the future (which is entitled to protection).¹⁴⁹ In the context of prom date restrictions the school is not, as it did in *Morse*, punishing *actual* speech that advocates illegal behavior. Instead, the school is restricting First Amendment activity based on the *possibility* that this type of expression will occur in the future, and thus employing the type of test that has been consistently rejected by the Court.¹⁵⁰

Moreover, it is hard to ignore the conclusion that schools are employing the bad tendency test not only to prevent unlawful acts from occurring at the prom, but also largely to control students' activities completely outside the prom or school context. As the Fourth Amendment cases evidence, schools have the knowledge to effectively and properly restrict unlawful activities during school and school-sponsored extra-curricular activities.¹⁵¹ However, this knowledge has not carried over into the school's regulation of prom dates. For example, some schools have explicitly admitted that they ban potential dates due to concerns about what students might do with these individuals

their student date to engage in unlawful conduct. *See* Prois, *supra* note 13 (explaining that school officials have stated that banning prom dates that are over twenty-years-old "guard[s] against access to alcohol and other adult activities that an older date might enable").

147. *See* Prois, *supra* note 13 (explaining that one school official justified the school's decision to ban prom dates over the age of twenty because they had heard about students drinking with older dates after previous proms).

148. *See* DAVID RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 132, 200 (1997) (quoting THEODORE SCHROEDER, *FREE SPEECH FOR RADICALS* 92-93 (enlarged ed. 1916)) (explaining that "the due process clauses of the Fifth and Fourteenth Amendments . . . require 'absolute certainty in the criteria of guilt' as a check 'against arbitrary power' and that rejection of the bad tendency test was "the only way to 'coordinate' freedom of expression with due process of law.").

149. *See* *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that speech may only be regulated based on a fear that it could cause people to engage in illegal activity if the speaker expressly advocates unlawful activity and such unlawful activity is both imminent and likely).

150. *See supra* note 94 and accompanying text.

151. Schools successfully use a variety of methods to ensure safety within the school and extra-curricular settings. Such methods include, among other things, metal detectors, random searches of lockers and persons, and drug testing. *See supra* notes 125-127 and accompanying text.

before or after the prom.¹⁵² In this situation, the school's interest in maintaining student safety is no different than it would be at any other time of the year, and is therefore unwarranted. If prom restrictions based on this kind of reasoning are allowed, schools might also prohibit students from ever associating with certain types of individuals; for example those over the age of nineteen or those who have criminal records. School control such as this, seriously undermines the basic notions of freedom to which each individual is entitled in a democratic society. As the Court stated in *Tinker*, "schools may not be enclaves of totalitarianism."¹⁵³

These fundamental principles, however, are not implicated in the Fourth Amendment context. Violations of Fourth Amendment rights, such as drug testing, security checks, and locker searches (without probable cause) are undertaken to identify, punish, and/or help those who have already committed an unlawful act.¹⁵⁴ The State's goal in undertaking these measures is to punish those who have already made the decision to undertake unlawful activity, not to take away an individual's ability to make the decision in the first place.¹⁵⁵ These permissible school security actions are facially and directly tied to maintaining safety by seeking to punish *actual* violations of the law.¹⁵⁶

Therefore, if a school is afraid, for example, that a student is going to use alcohol because he or she is attending the prom with someone who is older or who has a criminal record, or that a date who possesses these characteristics might engage in this activity, the answer is not to impose a restriction based on the chance that either individual may decide in the future to commit an unlawful act. Likewise, if the school is concerned that other students will act unlawfully in response to a same-sex couple, the answer is not to ban the couple based on a fear of what someone else's response may entail. Instead, in these situations, the proper way to handle the potential problem is through the use of various security measures to maintain a safe prom environment and to ensure that students and their guests have not broken the law or rules of the prom.¹⁵⁷

152. See Prois, *supra* note 13.

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

154. The school is not requiring that those participating in extra-curricular activities not associate with certain people out of a fear that the student may be influenced by such individuals to engage in unlawful activity. This is because the only constitutional rights the school needs to infringe upon to meet its purpose are Fourth Amendment rights. It does not follow that because of the greater power schools have to infringe upon students' Fourth Amendment rights, the school can also violate other constitutional rights that have no direct relation to discovering if someone has in fact committed an unlawful act. See *infra* note 177.

155. See *supra* notes 118-133 and accompanying text. For example, drug testing is done to identify those individuals who have *already* made the decision to undertake illegal activity through the use of drugs. Likewise, locker searches are done to identify those individuals who have *already* violated the law by bringing illegal contraband into school.

156. See *supra* note 155.

157. This kind of reasoning was utilized in *Fricke v. Lynch*, which involved the right of a male student to bring another male student as his prom date. 491 F. Supp. 381 (D.R.I. 1980). The court stressed that there were security measures besides banning the potential same-sex date

Our country maintains safety by punishing and deterring those who act unlawfully, not by controlling peoples' lives to the point of eliminating everything that could possibly influence them to make a bad decision. A school should not be able to ban an entire class of potential prom dates based upon undifferentiated fear of what might happen. The school undoubtedly has a compelling interest in student safety and as a consequence, the courts have provided schools with ample ways to constitutionally meet this compelling interest.¹⁵⁸

V. HOW SCHOOLS CAN RESPECT STUDENT RIGHTS WHILE STILL MAINTAINING A SAFE PROM ENVIRONMENT

Schools should have the ability to maintain a safe environment at the prom but should nonetheless be required do so in a constitutional manner. Depending on the classification of the particular right, courts apply varying levels of scrutiny in determining if legislation infringing upon a right is constitutional. The standard most protective of constitutional rights is the strict scrutiny test.¹⁵⁹ It requires that the State must (1) have a compelling interest and (2) employ means of regulation that are narrowly tailored to meet the compelling interest.¹⁶⁰ Under intermediate scrutiny, legislation (1) must be related to a substantial governmental purpose and (2) have no substantially less restrictive ways of furthering the governmental purpose.¹⁶¹ The least

that the school could to "critically reduce the likelihood of any disturbance." *Id.* at 385. The court emphasized that "[a]ppropriate security measures coupled with a firm, clearly communicated attitude by the administration that any disturbance will not be tolerated appear to be a realistic, and less restrictive, alternative to prohibiting the student from attending the dance with the date of his choice." *Id.* Finally, in acknowledging the unique circumstances of the school setting, the court quoted *Tinker* for the proposition that the school may not regulate First Amendment activity unless there is a showing that such activity would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Id.* at 386 (quoting *Tinker*, 393 U.S. at 509). In deciding whether such a showing had been made, the court considered that "[t]here ha[d] been no disruption at the school; classes ha[d] not been cancelled, suspended, or interrupted." The court ultimately held that "while the defendants have perhaps shown more of a basis for fear of harm than there was in *Tinker*, they have failed to make a showing that [the student's] conduct would materially and substantially interfere with school discipline." *Id.*

158. *See supra* notes 118-133.

159. 16B AM. JUR. 2D *Constitutional Law* § 815 (2007).

160. 16A AM. JUR. 2D *Constitutional Law* § 387 (2007).

161. Intermediate scrutiny is used in commercial speech cases. *See supra* note 94 and accompanying text. In *Central Hudson Gas v. Public Service Commission of New York*, the Court articulated the elements of an intermediate scrutiny standard of review. 447 U.S. 557, 566 (1980). Under *Central Hudson*, the relevant inquiry for legislation that infringes upon protected First Amendment activity is "[whether] the asserted government interest is substantial." *Id.* If the answer to this is no, the legislation is struck down. *Id.* However, even if the government's interest is substantial, "if the governmental interest could be served as well by a more limited restriction . . . the excessive restrictions cannot survive." *Id.* More recently, the Supreme Court described the intermediate scrutiny standard, when used for First Amendment purposes, as providing that "the government may employ a means of its own choosing, so long as the

protective test of constitutional rights is the rational basis test, whereby legislation is constitutional if the State has (1) a legitimate interest and (2) the legislation is rationally related to the furtherance of the interest.¹⁶²

Regulations restricting relationships outside of the school context, especially those analogous to that between a student and prom date, should be subject to strict scrutiny because they concern a constitutional right under the First Amendment. However, because of the uniquely important interests schools have in keeping students safe,¹⁶³ the regulation of prom dates should receive a level of scrutiny that is more deferential to the schools. An intermediate scrutiny test would ensure that schools put a significant amount of thought into their regulations and show the proper amount of respect for students' constitutional rights. A school could only infringe upon student rights when necessary to meet important safety interests.

Under intermediate scrutiny, prior to banning individuals, the school would have to prove that that it could not effectively regulate safety at the prom in a substantially less restrictive manner. Potentially less restrictive means might include the use of police officers, searches at the door, the signing of contracts, breathalyzers, and perhaps parental consent to a student's choice of prom date.¹⁶⁴ Schools across the country routinely use these security measures to ensure safety within the school setting and at school-sponsored events.¹⁶⁵ Therefore, schools should have to make a specific showing as to why these measures would be ineffective in ensuring safety if a particular individual were allowed to attend the prom.

To better formulate fair and constitutional regulations, schools should set up a panel of three or more individuals to deal specifically with this issue. The presence of more than one administrator on the panel would ensure that no individual or group would be denied admission to the prom based solely on the

regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation and does not burden substantially more speech than is necessary to further that interest." 16A AM. JUR. 2D *Constitutional Law* § 461 (2007) (citing *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 185 (1997)).

162. 16B AM. JUR. 2D *Constitutional Law* § 813 (2007). See also *City of Dallas v. Stranglin*, 490 U.S. 19, 26 (1989) (explaining that the rational basis test is the "most relaxed and tolerant form of judicial scrutiny.").

163. See *supra* notes 122-127 and accompanying text.

164. See *Fricke v. Lynch*, 491 F. Supp. 381 (explaining that having police officers present had proven successful at dances in maintaining control and preventing unlawful student activity, like drinking); C. Eugene Emery Jr., *Breathalyzer Could Be Newest Prom Tradition*, PROVIDENCE J. BULLETIN, Jan. 10, 2007, available at 2007 WLNR 542622 (explaining that many schools require students to take a breathalyzer before entering the prom); Prois, *supra* note 13 (noting that some schools allow students to bring their choice of a prom date if the student's parents consent, and that other schools require students and potential dates to sign sobriety contracts before attending the prom); Lini S. Kadaba & Rita Giordano, *Oh and Have Fun at the Prom*, PHILADELPHIA INQUIRER, May 8, 2005, available at 2005 WLNR 22986773 (explaining that prom safety measures include drug-dog searches and educational assemblies concerning the danger of drinking or doing drugs on prom night).

165. See *supra* notes 121-133, 164 and accompanying text.

particular administrator's feeling of ill will toward them. A balanced panel might include the principal or a lower level administrator, a member of the school or local community's security team/police force, and someone more in touch with the students, such as a well-respected teacher or student leader.

The panel should consider the characteristics of each potential guest and determine what kind of threat the individual poses. Before any decisions are made, panel members should be fully educated on the various safety options for prom night so that they can determine whether there are means of ensuring safety at the prom that are less restrictive than banning an individual or class of individuals.¹⁶⁶ Finally, because of the panel's knowledge of each student's guest and their relevant characteristics, panel members should be part of the committee that makes final decisions as to how much and what type of security and screening processes will be used on prom night.

Not only would a system like this be more likely to produce fair regulations, the level of student and parent satisfaction would also be raised. Members of the school community would know that these decisions were carefully considered and well reasoned, instead of just a denial based on the whim of one or two administrators.¹⁶⁷ Each side would win, as the school would avoid costly litigation and unrest among students, parents and potential dates, while students would feel that their important and personal decisions had been given proper consideration by the school administration.

VI. CONCLUSION

The selection of a prom date is an extremely important decision for many students. It is a personal choice in which the student decides who deserves to be given the opportunity to join him or her in undertaking a milestone event.¹⁶⁸ It is also a demonstration of affection between two individuals; a demonstration that is uniquely on display to the student's community. This choice, as well as the ensuing relationship, implicates notions of autonomy, self-fulfillment, and expression.¹⁶⁹ The Supreme Court has explicitly recognized that relationships which embody these fundamental characteristics are entitled to constitutional protection.¹⁷⁰ The decision to enter into and

166. This type of education has more benefits than simply allowing officials to make a more knowledgeable decision about who to allow into the prom. School officials who are educated about the various security measures available and what such measures entail will make more informed decisions regarding all aspects of prom night security. Furthermore, this knowledge will be essential in maintaining safety within the school and at other school sponsored-events.

167. If a potential date is denied, the school should provide the student who wanted to bring that individual with a brief but specific list of reasons for the denial. The school should set a deadline for the submission of potential dates so that if one is denied, the student has adequate time to find another date (if he or she still wants to attend the prom with someone).

168. See BEST *supra* note 1, at 2 ("Images of the prom as a coming-of-age rite permeate our culture.").

169. See *supra* note 87 and accompanying text.

170. The *Roberts* Court described freedom of association as a "fundamental element of

maintain relationships with those whom we choose is a fundamental aspect of individual freedom.¹⁷¹

The school indisputably has a compelling interest in keeping its students safe. The Court has recognized this and provided schools with various means of ensuring safety in the school's daily activities and at school-sponsored events, even if outside the school context use of such means would violate the Fourth Amendment.¹⁷² Everyday, schools throughout the country are employing these various security measures to ensure safety within the school setting.¹⁷³ While granting schools extended rights under the Fourth Amendment, the Court has consistently refused to allow schools to infringe upon fundamental First Amendment principles.¹⁷⁴ This is because such principles are essential to individual freedom, and should not be restricted in order to reach a result that can be obtained through alternative means.

The way to teach the importance of constitutional rights and freedoms to the country's future leaders is through the example of those who lead and govern them.¹⁷⁵ The relationships that individuals form with each other define not only each individual's personal identity, but also the way in which our government and overall society function as a whole. Every person in our society, student or otherwise, deserves to live free from unnecessary governmental interference with liberties as fundamental as the choices involving with whom to associate.

personal liberty" and emphasized that "protecting these [intimate] relationships from unwarranted state interference . . . safeguards the ability independently to define one's identity." 468 U.S. at 617, 619. The Court further noted that "the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others." *Id.* at 619. As to the protection of expressive association, the Court stated that "according protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Id.* at 622.

171. See Karst, *supra* note 65, at 692.

172. See *supra* notes 118-133 and accompanying text.

173. See *supra* notes 118-133, 164 and accompanying text.

174. See *supra* notes 140-148 and accompanying text.

175. See Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1654 (1986) (arguing that "if educational institutions are not subject to the same constitutional constraints as other government agencies, students will not come to an understanding of the value of a democratic, participatory society, but instead will become a passive, alienated citizenry that believes that government is arbitrary.").