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Freedom and Public Education: The Need for New Standards

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FREEDOM AND PUBLIC EDUCATION: THE NEED FOR NEW STANDARDS

In recent years the courts have been flooded with cases testing the constitutional limits of compelled public education. This flood has been encouraged by the Supreme Court's recent conviction that the fourteenth amendment's due process clause applies the Bill of Rights to children.[1] Previously, school law had been largely a matter of legislative discretion, unfettered by any grave concern for student rights.[2] Today the due process clause is understood to require that any interference with student liberties both bear a reasonable relation to some compelling state purpose and be the sole appropriate means to achieve that purpose.[3]

The problem, however, is that the very line of cases which have established student rights under the fourteenth amendment has eroded the traditional justification for compulsory education. While courts continue to appeal to a general state interest in education, their understanding of that interest leaves grossly uncertain what the state's real interest is,[4] much less whether that interest is compelling. Recent cases[5] have attempted to exploit that uncertainty by demanding that the Supreme Court eliminate all significant restraints imposed by the public schools on free speech and free exercise of religion. These radical demands derive their force from the Court's own opinions. The first school cases decided relatively narrow factual controversies, but they did so by means of a broadly stated understanding of the fourteenth amendment's impact upon the schools. Later cases have used that broad conceptual statement as a tool to expand the fourteenth amendment's application to increasingly diverse and far-reaching factual situations. Thus, although in the first cases the Court dealt with narrow particulars of school discipline, in the later cases the Court has been told that its reasoning demands the elimination or severe restriction, not only of particular school disciplinary procedures but also of school discipline simply and indeed of compelled school attendance. To such radical demands the Court has responded with a resistance rooted in an inarticulate feeling that educational compulsion is necessary, and indeed necessary in a way that does not accord with the established constitutional limits on education. This resistance to the logical consequences of its own revolutionary conceptual demands has created a confusion in the Court's opinions which it must soon resolve if it is to sustain the state's role in education.

This article attempts to discover the state's interest in compulsory education through an examination of the traditional understanding of the school's purpose as the educator of enlightened, self-governing citizens, the reason the school was

1 *See, e.g.*, In re Gault, 387 U.S. 1, 13 (1967); Ginsberg v. New York, 390 U.S. 629, 638 (1968); Tinker v. Des Moines Board of Education, 393 U.S. 503, 511 (1969).

2 *See, e.g.*, State v. Clottu, 33 Ind. 409, 412 (1870): "How far this interference should extend is a question, not of constitutional power for the courts, but of expediency and propriety, which it is the sole province of the legislature to determine."

3 Wisconsin v. Yoder, 406 U.S. 205, 236 (1972); Sherbert v. Verner, 374 U.S. 398, 406-7 (1963).

4 *See, e.g.*, Casad, *Compulsory Education and Individual Rights*, 5 RELIGION AND THE PUBLIC ORDER 51, 79 (1969).

5 *See, e.g.*, Tinker v. Des Moines Board of Education, 393 U.S. 503 (1969), and Wisconsin v. Yoder, 406 U.S. 205 (1972).

given this essentially political purpose, the challenge to this purpose by the modern understanding of the fourteenth amendment's scope and purpose, and the problems which this new understanding of the fourteenth amendment has created in the areas of school discipline and compelled school attendance. This attempt proceeds principally by means of a close analysis of the conceptual foundation of the Court's opinions. This method assumes that the Court's opinions reflect serious attempts to resolve and clarify conceptually the problems presented by the cases it decides. Though this attention to the Court's concepts may seem inordinate, it in fact reflects the actual development of the case law which can be understood as the Court's response to demands that it act consistently and extend the application of its concepts to their logical limits. Only by carefully considering those concepts can their proper scope be understood.

I. Traditional, Political Education

Contemporary public education poses constitutional problems only because the state both defines school programs and compels school attendance. Both those state activities are essential for fourteenth amendment purposes, but neither seems required by any dictate of natural reason or even history. Blackstone, for example, noted that in his time the laws of most countries, including England, made no provision for education because education was principally a family concern. Indeed, Blackstone discussed education as a part of the law of domestic relations.[6] Where there was a common schoolteacher, he functioned as a delegate of the parent, serving ends which the parent defined.[7] Even in Blackstone's time, however, the state preserved a right to intervene in the educational process, based on the state's extraordinary power as *parens patriae* to protect children from parental abuse.[8] But the *parens patriae* power only affirms the fact that the state really had no ordinary interest in education; it acted only when the parents abused their natural right to educate.

Today this view of the proper place of education has been radically changed. Indeed, education poses a constitutional problem because it has become (and was intended to become) a uniquely state activity: the state not only formally educates through the public school system but it also defines the ends of education through its control over the curriculum and the certification of both public and private schools. The transformation of the earlier view that education is a domestic concern is reflected in the fact that every state constitution requires the legislature to promote the education of children and in the more important fact that every state legislature but one[9] has enacted compulsory school attendance laws as a means towards this end.

6 I Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND *451 (Lewis ed. 1897).

7 *Id.* at *453. *See also* Rulison v. Post, 79 Ill. 567, 573 (1875), and Lander v. Seaver, 32 Vt. 114 (1859). This is the origin of the view that the teacher has authority over the child because he stands *in loco parentis*.

8 Ex parte Crouse, 4 Whart. 9, 11 (Pa. 1838): "[T]he natural parents, when unequal to the task of education, or unworthy of it, [may] be superceded by the *parens patriae*, or common guardian of the community. . . ." *See also* Lippincott v. Lippincott, 97 N.J.Eq. 517, 128 A. 254 (1925); Prince v. Massachusetts, 321 U.S. 158 (1944); Wisconsin v. Yoder, 406 U.S. 205, 229-34 (1972).

9 Only Mississippi has no compulsory education law. *See* Wisconsin v. Yoder, 406 U.S. 206, 226 n. 15 (1972).

The reason for this transformation is expressly stated in many of the state constitutions. They are not concerned with narrow vocational education, that is, the basic skills necessary for economic survival in the modern world, nor even with the pursuit of truth generally; rather, they express a fundamental political concern: the moral and civic education of their citizens.[10] This concern was first expressed in the Northwest Ordinance of 1787 which served as the model for many of the state constitutions: "Religion, morality, and knowledge being essential to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[11]

The insistence that religion and morality are essential to good government and that education is a principal means to ensure those virtues suggests an understanding of the basis and demands of democratic government alien to the secular, pluralistic polity which contemporary courts have come to presume normal.[12] But it is only because education was understood as moral or civic that the state's intervention into a previously domestic matter was justified. Since state governments have limited, delegated powers,[13] the constitutionality of state involvement in education depends upon education being a proper object of the state's police powers, which embody the state's ability to make all manner of reasonable laws to protect its citizens, provide for their welfare, and ensure the common good of the community.[14] The police power was extended beyond its original limits to include the regulation of education because it was believed that in a democratic society the public welfare of the community depended upon the intelligence and moral virtues of its citizens. This is illustrated by the initial challenges to compulsory attendance statutes by parents who complained that the statutes unconstitutionally infringed upon the parents' right to educate their children.[15] These challenges were based on the belief that the things which the child needed to learn could be learned best at home. They were unsuccessful principally because the state claimed that education was not primarily vocational, but rather

10 The explicit constitutional provisions can be catalogued in accordance with their stated ends:

(1) The Northwest Ordinance, *e.g.*, MICH. CONST. art. 8, § 1; N.C. CONST. art. 9, § 1; OHIO CONST. art. 1, § 7.

(2) Preservation of republican institutions, *e.g.*, IDAHO CONST. art. 9, § 1; MINN. CONST. art. 8, § 1; S.D. CONST. art. 8, § 1; TENN. CONST. art. 11, § 12.

(3) Preservation of the rights and liberties of the people, e.g., CAL. CONST. art. 9, § 1; ME. CONST. art. 8; MASS. CONST. ch. 5, § 2; MO. CONST. art. 9, § 1; R.I. CONST. art. 12, § 1; TEX. CONST. art. 7, § 1.

(4) Preservation of free government, e.g. ARK. CONST. art. 14, § 1; IND. CONST. art. 8, § 1; N.D. CONST. art. 8, § 147.

(5) Encouragement of virtue and prevention of vice and immorality, VT. CONST. ch. 2, § 64.

11 Ordinance of 1787, July 13, 1787, art. 3, in DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF AMERICAN STATES 52 (1927).

12 *See, e.g.*, Abington School Dist. v. Schempp, 374 U.S. 203, 241-42 (1963); McCollum v. Board of Education, 333 U.S. 203, 217, 231 (1948); Everson v. Board of Education, 330 U.S. 1, 23-24 (1947).

13 Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 209-12 (1824).

14 Holden v. Hardy, 169 U.S. 366 (1898); Jacobsen v. Massachusetts, 197 U.S. 11 (1905); Muller v. Oregon, 208 U.S. 412 (1908); McLean v. Arkansas, 211 U.S. 539 (1909).

15 *See, e.g.*, State v. Bailey, 157 Ind. 324, 61 N.E. 730 (1901); State v. Jackson, 71 N.H. 552, 53 A. 1021 (1902); School Board Dist. No. 18 v. Thompson, 24 Okla. 1, 103 P. 578 (1909).

moral and civic.[16] Therefore, since the legislature alone was constitutionally empowered to define the public good, the state, not the parent, could best define the education necessary for a good citizen.[17]

These early cases, however, were decided before it was generally accepted that the fourteenth amendment applied the Bill of Rights to the states, and, therefore, they do not address the principal contemporary challenge to state-compelled education. Today school laws and regulations are attacked because they violate not the parent's natural rights but rather the parent's or child's civil rights as guaranteed by the Bill of Rights.[18] When considering this challenge, however, it is important to remember that the first cases to discuss the fourteenth amendment's effect on state education did not substantially limit the state's control over the schools. Although both *Meyer v. Nebraska*[19] and *Pierce v. Society of Sisters*[20] struck down state school regulations, each did so on relatively narrow property grounds.[21] *Meyer* declared unconstitutional a statute forbidding the teaching of German in grade schools. The Court held that, because teaching German was not harmful, the statute unreasonably deprived the German teacher of his vocation without due process of law. The Court, however, refused to question the state's ability to created enlightened citizens "in sympathy with the principles and ideals of this country. . . ."[22] *Pierce* involved a statute compelling attendance at public schools only. The Sisters argued that the statute effectively abolished their private schools and hence deprived them of their property right to carry on their schools without due process of law because there was no compelling state interest in such an extreme measure. The state had claimed that public school education was necessary if all pupils were to have a common civic education. The Court recognized that the state had the power "reasonably to regulate all schools, to inspect, to supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare."[23] Only because the state had not shown that the public schools could "inculcate and foster patriotism" better than private schools,[24] did the Court find that the legislation had no reasonable relation to any state purpose.

16 Consider also the cases on whether education in the home satisfies the attendance statutes. The difference between the cases which allow home education and those which do not is almost completely explained by whether or not the courts see education as fundamentally moral or vocational. *Compare* Stephens v. Bongart, 15 N.J. Misc. 80, 189 A. 131 (1937) *with* State v. Massa, 95 N.J. Super. 382, 231 A.2d 252 (1967).

17 *See, e.g.*, State v. Clottu, 33 Ind. 409 (1870).

18 *See, e.g.*, Tinker v. Des Moines Board of Education, 393 U.S. 503, 506 (1969). The earliest cases almost always assert only the parent's civil rights, but only for tactical reasons: it was not until *In re Gault*, 387 U.S. 1 (1967), that children could effectively assert first amendment rights.

19 262 U.S. 390 (1923).

20 268 U.S. 510 (1925).

21 Thus parents who attempted to use those cases to have compulsory attendance laws declared unconstitutional were unsuccessful. *See, e.g.*, Stephens v. Bongart, 15 N.J. Misc. 80, 189 A. 131 (1937); State v. Williams, 56 S.D. 370, 228 N.W. 470 (1929); State v. Hoyt, 84 N.H. 38, 146 A. 170 (1929).

22 262 U.S. at 394.

23 268 U.S. at 534; *see also* Everson v. Board of Education, 330 U.S. 1, 7 (1947).

24 268 U.S. at 517.

Because the Court refused to hold that the fourteenth amendment substantially limited the state's control over education, *Meyer* and *Pierce* point to the real roots of the present confusion in school law. The problem is not the fourteenth amendment but the meaning of the fourteenth amendment for the society which the schools reflect and serve. The Court could hold as it did in *Meyer* and *Pierce* because it still believed that schools served a fundamental political purpose. The cases since that time have attempted to discover whether that purpose is any longer proper or compelling, given the kind of society that the fourteenth amendment seems to require today. The dimensions of this difficulty have been most clearly articulated in the Jehovah's Witness flag salute cases, *Minersville School District v. Gobitis*[25] and *West Virginia Board of Education v. Barnette*.[26] These cases still represent the most searching inquiry into the nature of the state's interest in education and the place and limits of compelled public education in contemporary democratic society.

II. The Foundation of Political Education: *Gobitis*

Justice Frankfurter's majority opinion in *Minersville School District v. Gobitis*[27] raises to the level of conceptual clarity the reason behind the traditional refusal to read the fourteenth amendment as a significant limit on the state's authority to compel and define education. At issue in *Gobitis* was a state statute compelling all public school pupils to participate in a flag salute ceremony as a condition of attending school. The state had justified the statute as an exercise in patriotism which it claimed was a proper function of education. This was challenged by the Jehovah's Witnesses as an unconstitutional infringement of their right to free exercise of religion. The Witnesses insisted that because the fourteenth amendment applied the first amendment to the states, compulsory school programs must be limited by the emerging first amendment "clear and present danger" test. Under that test, the state could restrain conduct controlled by religious convictions only if compelled by "an overriding public necessity which properly required the exercise of the police power."[28] In short, because of the expansion of the fourteenth amendment's scope, the state could no longer do what was reasonably related to the public welfare; it could act only when the public welfare was gravely endangered and the defense of the public welfare compelled action.

Faced with this view of the fourteenth amendment, Frankfurter could uphold the compelled flag salute only by showing both that (1) it was a necessary exercise of the police power and (2) its purpose could be fulfilled by the state alone.

25 310 U.S. 586 (1940).
26 319 U.S. 624 (1943).
27 310 U.S. 586 (1940).
28 Gobitis v. Minersville School Dist., 21 F. Supp. 581, 585 (E.D.Pa. 1937), aff'd 108 F.2d 683 (3rd Cir. 1939).

A. *The State's Interest: Civic Education*

Frankfurter's definition of the issue suggested his solution of the first part of his problem: The Court had to reconcile the conflicting claims of "liberty of conscience" and "the authority to safeguard the nation's fellowship."[29] By presuming that there was some "national fellowship" and that its promotion and defense was a proper end of authority, Frankfurter expanded the notion of danger to include not only physical danger but also moral danger. To illustrate the moral danger, Frankfurter referred to Lincoln's statement of "the profoundest problem confronting a democracy": "Must a government of necessity to be too *strong* for the liberties of its people, or too *weak* to maintain its existence."[30] Because democratic society is dedicated to liberty, its preeminent problem is moral: how to keep liberty from becoming destructive license. This is the task of political education which creates in the people a moral sense or agreement about the limits and ends of liberty. This "binding tie of cohesive sentiment"—as Frankfurter called it—is the true foundation of democratic society.[31] Without that tie civil society dissolves into a state of civil war. Thus, by promoting national cohesion through education, the state provides for national security. Not only is this a legislative exercise, it is in fact "an interest inferior to none in the hierarchy of legal values."[32]

B. *Education Is a Uniquely State Function*

Even if education fulfills a public purpose, it need not be fulfilled by the state; the family as well can educate. Thus compelled state education can be justified only if it serves a function which transcends the family's limits or competence such that only the state can fulfill it. The specific need for publicly ordered education, Frankfurter contended, is inherent in the very nature of democratic government which is dedicated to the protection of the independence and authority of private communities, especially the family.[33] But the family can destroy the binding tie of cohesive sentiment which is the foundation of democratic society. The family educates in private values, values often contrary or hostile to public values. For example, in *Gobitis,* the family educated its child to reject the important American values symbolized by the flag. Because the family educates so well in private values and cannot be trusted to foster public values, public education is necessary.[34] The state, "in self-protection," utilizes the public schools to inculcate the public values which "bind men together in a

29 310 U.S. at 591.

30 310 U.S. at 596. *See also,* West Virginia Board of Education v. Barnette, 319 U.S. 624, 653 (1943): "Jefferson and the others . . . knew that minorities may disrupt society. It never would have occurred to them to write into the Constitution the subordination of the general authority of the state to sectarian scruples."

31 310 U.S. at 596.

32 *Id.* at 595.

33 Compare Frankfurter dissenting in West Virginia Board of Education v. Barnette, 319 U.S. 624, 664 (1943): "It is not even remotely suggested that the requirement for saluting the flag involves the slightest restriction against the fullest opportunity on the part both of the children and of their parents to disavow as publicly as they choose to do so the meaning that others attach to the gesture of the salute."

34 310 U.S. at 599.

comprehending loyalty, whatever may be their lesser differences and difficulties."[35] This compulsion is the necessary condition of a regime which recognizes public limits on private liberty.

By asserting the superiority of the public good to private notions of the good, even private notions founded on religion, Frankfurter followed the constitutional tradition most dramatically represented by the Mormon polygamy cases.[36] There the Court outlawed "religious" or "celestial marriage" because it was inimical to the peace, good order, and morals of society. The Court insisted that "religion" as used in the first amendment referred only to "one's views of his relations to his Creator," not to "the *cultus* or form of worship of a particular sect."[37] Religiously ordered actions must be subordinate to the majority's understanding, as reflected by the legislature, of what is appropriate to the common good.[38] Mormon polygamy was abolished precisely because it "shock[ed] the moral judgment of the community" and therefore endangered the moral foundation of the community.[39]

The root of Frankfurter's defense of compelled public education, then, was his belief that the fourteenth amendment protects only a limited freedom to speak and believe because private liberty must be limited by the moral sentiment of the community. Only this moral sentiment made possible the civil society which guarantees private civil rights. That understanding of the fourteenth amendment, however, was soon challenged.

III. Freedom as the New Foundation: *Barnette*

Only six years after *Gobitis,* the Supreme Court in *West Virigina Board of Education v. Barnette*[40] suddenly reversed itself and destroyed the traditional, political justification for compelled education. On facts almost identical to *Gobitis,* the Court held that the fourteenth amendment must be understood to forbid the states from compelling the flag salute as a condition of public school attendance. The flag salute required "affirmation of a belief and an attitude of mind"[41] and therefore significantly interfered with the student's first amendment rights. But an interference with those rights could be justified only as a defense against some clear and present, that is, direct, danger to the public welfare. Since the flag salute only indirectly influenced the public welfare, it could not be compelled, even as an exercise in patriotism.

By subjecting school programs to the clear and present danger test and by defining danger in direct or physical terms, Justice Jackson's opinion for the Court radically transformed the Court's attitude to education. While the state may require instruction in the American way of life, it may not compel students

35 *Id.* at 600.
36 Mormon Church v. United States, 136 U.S. 1, 49-50 (1890); Davis v. Beason, 133 U.S. 333, 344-45 (1890); Reynolds v. United States, 98 U.S. 145, 166-67 (1878).
37 Davis v. Beason, 133 U.S. 333, 342 (1890).
38 *Id.* at 343-45.
39 *Id.* at 341.
40 319 U.S. 624 (1943).
41 *Id.* at 633. Compare Frankfurter's dissent cited *supra* note 33.

"to declare a belief."[42] Educational exercises such as the flag salute cannot be compelled because they do not directly effect the public welfare. This means that, though it may be desirable, education in civic virtue is not necessary for the promotion and defense of democracy and therefore cannot be compelled. The foundation of this new attitude is the belief that "[f]ree public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction."[43] In short, democracy is not defined, as Frankfurter claimed, by some binding tie of cohesive sentiment whose promotion is the fundamental purpose of public education.

This is not to say that Jackson did not appeal to a binding tie of cohesive sentiment which orders the public school; he did. In fact, the ideal of secular instruction and political neutrality which he espoused depends upon a common belief in secular, liberal democracy.[44]

> If there is a fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[45]

Because this is the fixed star of American democracy which the public school system reflects, any compulsion in education is necessarily unconstitutional. Public fellowship is an end which officials, including educators, may foster only by "persuasion and example," never by "compulsion."[46]

Jackson believed in this fixed star because he no longer feared the Lincolnian problem which informed Frankfurter's concern for democratic politics and raised education to the level of a formative political force. Jackson had "no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization."[47] There need not be, then, any education in the moral limits of freedom. Only because there was no longer any fear that liberty could destroy democratic society, could the Court, as Frankfurter noted in dissent, allow "the subordination of the general civil authority of the state to sectarian scruples."[48] This revolutionary respect for sectarian scruples followed from the view that only physical danger presents a "clear and present danger" to democratic society. Sectarian scruples are no longer a threat because democracy no longer needs defense: democracy itself is the cohesive sentiment.

Still, there is a qualification to Jackson's claim and this qualification makes *Barnette* a problem rather than a solution. While the state may not compel students to "declare a belief," it may require instruction in the American way

42 319 U.S. at 631 and 637.
43 *Id.* at 637.
44 That this belief must needs be secular, and that secular means nonreligious, was not openly stated until the school prayer cases. *See, e.g.,* Abington School Dist. v. Schempp, 374 U.S. 203, 216-17, 222 (1963).
45 319 U.S. at 642.
46 *Id.* at 640-41.
47 *Id.* at 641. But compare Jackson's dissent in Terminello v. Chicago, 337 U.S. 1, 37 (1949): "There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."
48 319 U.S. at 653.

of life.[49] The qualification presumes that there are some actions, for example, the salute, which manifest a belief,[50] and others, for example, school attendance, which do not. The constitutionality of such a distinction depends upon the distinction drawn in the Mormon cases between belief which cannot be coerced and conduct which can be coerced. *Barnette* destroys the foundation of that distinction, however, because it protects some conduct as if it were a belief. This becomes a problem because Jackson's opinion provides no test to determine which actions are protected. That failure suggests the practical difficulty which courts have had with the *Barnette* doctrine and why school law remains so conceptually confusing.

Unqualified, *Barnette* leads inexorably to the abolition not only of the compulsory flag salute but also of compulsory education: school officials are permitted to educate only by persuasion, never by compulsion. Yet the Court has never contemplated abolishing compulsory school attendance.[51] This refusal to follow *Barnette* to its logical conclusion has imposed upon the Court a particularly difficult conceptual problem: justifying compelled school attendance or discipline while refusing to accept the fact that the legislature can define common obligations of citizenship to which private actions—even those founded on "religion"—can be ordered. How, then, does the Court justify the compulsions which, as Frankfurter noted, "necessarily pervade so much of the educational process"?[52]

IV. The Contemporary Problems

At the present the Court's solution to *Barnette* depends upon the kind of compulsion it is called upon to justify. Practically, there are really two different problems: the most common is compelling the child to behave correctly once he has willingly come to school; the other is compelling the unwilling child to attend school. Although on the basis of *Barnette* both pose the same conceptual problem, the Court has used different practical tests for the compulsion of manners, or school discipline, than for the compulsion of attendance.

The Court has found it easiest to decide cases involving school discipline. The Court starts from Jackson's premise that in a free society, education must be by persuasion, not by compulsion. Therefore, any discipline must be judged by the tests ordinarily used to control free speech and the free exercise of religion. There cannot be fundamentally different standards for the classroom than for the marketplace. Practically, this means that only physically dangerous conduct can be disciplined. Thus, although there is no reason within the *Barnette* doctrine for deciding, for example, whether students should be able to display some political symbols but not others in contradiction of school regulations, the Court has found a reason based upon the probability that such symbols, or associated student activities, would "materially and substantially disrupt the work and dis-

49 *Id.* at 631; *see also id.* at 642.
50 *Id.* at 633: The compulsory flag salute is unconstitutional because it requires "affirmation of a belief and an attitude of mind." *Compare* Frankfurter's dissent cited *supra* note 33.
51 *See* Board of Education v. Allen, 392 U.S. 236, 245-46 (1968).
52 Minersville School Dist. v. Gobitis, 310 U.S. 586, 598 (1940).

cipline of the school."[53] Therefore, black armbands protesting the Vietnam War[54] or political buttons protesting racial discrimination[55] cannot be outlawed by school officials because they do not substantially threaten to disrupt the school's physical order. But a Confederate flag and assorted Rebel symbols do pose a substantial threat and, therefore, can be prohibited.[56] On the other hand, the same black armband will not be protected in a school where more than one-third of the students are children of military personnel.[57]

This substantial threat test, however, has obvious limits. Practically, since the courts have found it almost impossible to define a substantial threat except in terms of what irritates a majority of students, the test fails to provide protection for a minority, even a racist minority; but that was the protection which Jackson claimed to provide in his *Barnette* opinion.[58] Furthermore, the physical danger test merely avoids the real problem because it is impossible to know when education is disrupted unless it is known what is being disrupted, that is, what education really is. The discipline cases avoid this problem only because they assume that education can be devoted to sufficiently limited, that is, narrowly vocational, ends such that only physical danger can disrupt the educational process.[59] Most importantly, the test works only on the assumption that what is being restricted or disciplined is someone's right to education. All of the discipline cases involve students intent upon attending school. Even the Jehovah's Witnesses posed a constitutional problem only because they wanted to profit from state-provided education. The test does not, however, answer the challenge that the best way not to disrupt the educational process is to stay home. That is the challenge posed by sects such as the Amish who claim that, under the *Barnette* doctrine, they should not be compelled to attend school at all and that, in effect, they are being punished only because they are not sufficiently disruptive; in short, that the only way they can avoid attending school is by attending school in order to disturb the peace and then be expelled. *Barnette*'s attempt to conform the public schools to the first amendment leads, then, to a radical attack on the constitutionality of public schools.

At this point the Court must show why compelled attendance itself justifies such a substantial infringement of first amendment freedoms, as those freedoms

53 *See* Tinker v. Des Moines Board of Education, 393 U.S. 503, 513 (1969).
54 *Id.*
55 *See, e.g.*, Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).
56 Augustus v. School Board of Escambia County, 361 F. Supp. 383 (N.D.Fla. 1973) (Confederate symbols prohibited because they were a source of irritation to black students); *see also* Melton v. Young, 328 F. Supp. 88 (E.D.Tenn. 1971).
57 Hill v. Lewis, 323 F. Supp. 55, 58 (E.D.N.C. 1971).
58 West Virginia Board of Education v. Barnette, 319 U.S. 624, 638 (1940): "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials." *See also* 319 U.S. at 641-42.
59 This statement is qualified by the case law in one important way. The court in Augustus v. School Board of Escambia County, 361 F. Supp. 383, 387 (N.D.Fla. 1973), was encouraged to eliminate Confederate symbols because the Supreme Court in Green v. County School Board, 391 U.S. 430, 437-38 (1968), mandated schools to "take whatever steps might be necessary" to eliminate racial discrimination "root and branch." *Green* involved a school board's "freedom-of-choice" plan which allowed a student to choose his own public school. The Court held that this plan violated the clear mandates of the school desegregation cases since Brown v. Board of Education, 347 U.S. 483 (1954), which intended the public school system to serve as a principal means of fostering racial equality.

have been defined by the school discipline cases since *Barnette*. Here the Court must shed its apparent dedication to freedom and make clear exactly what it supports: not freedom from being compelled to declare a belief, but only freedom from being compelled to declare certain beliefs. This has been repeatedly emphasized by the cases testing compelled attendance statutes because they violated religious beliefs.[60] For example, in *People v. Donner*,[61] certain Hasidic Jews claimed that their refusal to attend public schools was constitutionally protected because their religion absolutely prohibited them from participating in secular education. They did in fact educate their children in schools organized by their sect; but they educated them only in the things necessary to their salvation, not in the secular subjects required by statute.[62] The court rejected their claim in a way that revealed the roots of the contemporary attendance laws. Those laws were held to serve a compelling state interest because they provided the equal opportunity for all children which is essential for the well-being of a society dedicated to the democratic ideal. Without equality of opportunity in education, there could be no equality among the children in democratic society.[63] The court's position assumes, however, that modern secular education provides such equality of opportunity. The court made that assumption principally because it saw opportunity in terms of competing for success in modern secular society. That, however, is not something self-evident to everyone, certainly not to the Hasidic Jews who claimed that, precisely because it was secular, the equality provided by the public schools deprived them of their opportunity to be Hasidic, that is, nonsecular, Jews.

Donner justifies compelling the Hasidic Jews to attend public schools because the private schools those Jews wished to attend rejected the value of modern secular education and thereby challenged the fundamental faith of democratic society. Secular society tolerates all sects, but only if the sects accept the limits of secular society and grant that any rights which they have are civil rights. Civil rights, however, are subordinate to the preservation of civil society. But the foundation of secular society is a belief in the desirability of secular society. Because they reject the desirability of secular society and insist that their rights are not subject to the limits of secular society, the Hasidic Jews pose a direct threat to secular society. Education serves to remove that threat by teaching all sects that their separate existence depends upon, and therefore must be subordinate to, the existence of secular society. For this reason the sects can be compelled to participate in secular education. Thus *Barnette*, which attempted to reverse *Gobitis* and remove compulsion in education in order to conform education to the ideal of secular society, demands, in the end, compelled school attendance as the means of preserving secular society. *Barnette*'s rejection of com-

60 *See, e.g.*, State ex rel. Shoreline School Dist. v. Superior Court for King County, 55 Wash.2d 177, 346 P.2d 999 (1959) (Seventh Elect Church In Spiritual Israel); Commonwealth v. Renfrew, 332 Mass. 492, 126 N.E.2d 109 (1955) (Buddhist); Commonwealth v. Beiler, 168 Pa. Super. 462, 79 A.2d 134 (1951) (Amish); Commonwealth v. Bey, 166 Pa. Super. 136 70 A.2d 693 (1950) (Muslim); People v. Donner, 199 Misc. 643, *sub nom.* Shapiro v. Dorin, 99 N.Y.S.2d 830 (1950) (Hasidic Jews).

61 People v. Donner, 199 Misc. 643, 99 N.Y.S.2d 830 (1950).

62 *Id.* at 645, 99 N.Y.S.2d at 832.

63 *Id.* at 648, 99 N.Y.S.2d at 834.

pulsion, or school discipline, for civic ends is possible only because it depends upon an even more drastic compulsion of education or compelled attendance at school.

The Supreme Court has only recently come to appreciate this problem. As late as 1967, at a time when it was everywhere expanding the liberties guaranteed by the Bill of Rights, the Supreme Court refused to grant *certiorari* to hear cases challenging the constitutionality of compulsory education statutes.[64] Only in *Wisconsin v. Yoder*[65] did the Court begin to face the problem. *Yoder*, however, is only a starting point; it does not radically test the compulsory attendance statutes. The Amish challenged Wisconsin's statute only because it compelled secondary school attendance. That fact allowed the Court to do more balancing and less thinking than it would have had to do in a radical challenge to compelled education. Nonetheless, *Yoder* does attempt to resolve the problem.

The Amish were exempted from Wisconsin's compelled secondary school atendance statute primarily because they forced the Court to accept their challenge on their terms. They achieved this by having both sides stipulate that "the value of all education must be assessed in terms of its capacity to prepare the child for life."[66] On that basis, the only important question before the Court was: What life? Implicit in accepting this view of the problem was a recognition that the goal of education need not be "the preparation of the child for life in modern society as the majority live" but it could be, for example, "the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith."[67]

However, once preparation for Amish life becomes a permissible end of education, the last compelling state justification for compelled education vanishes. The state can no longer compel secular education because any state compulsion infringing a first amendment right must be justified as the only possible alternative or means of accomplishing a legitimate state interest.[68] But if the state's interest is only that children be educated, not that they be educated to live in modern society as the majority live, then that interest can be accomplished in ways other than attendance at public schools. Thus, to exempt themselves from the statute, the Amish needed to demonstrate only that compelled education did infringe their first amendment rights. The Amish did so in *Yoder* by showing that "the values and programs of the modern secondary school are in sharp conflict with the fundamental mode of life mandated by the Amish religion" and, therefore, that such education "carries with it a very real threat of undermining the Amish community and religious practice as they exist today. . . ."[69]

Although the conceptual foundation of *Yoder* would seem to invalidate all compulsory education statutes which infringe legitimate exercises of first amendment rights, the Court refused to go so far. The Court attempted to qualify

64 *See, e.g.*, State v. Garber, 197 Kan. 567, 419 P.2d 896 (1966), appeal dismissed and cert. denied, 389 U.S. 51 (1967). *See also* the cases cited *supra* note 60.
65 406 U.S. 205 (1972).
66 *Id.* at 222.
67 *Id.*
68 *Id.* at 236; Sherbert v. Verner, 374 U.S. 398, 407 (1963); Braunfeld v. Brown, 366 U.S. 599, 607 (1961).
69 406 U.S. at 217-18.

its opinion in two important ways. First, it claimed that although the state does not have an interest in secondary education sufficient to justify compelling attendance, it does have such an interest in primary education. Second, it attempted to exempt only traditional, organized religious communities like the Amish. Neither qualification seems constitutionally sound.

If only secondary education cannot be compelled, what in principle distinguishes secondary from primary education? The Court emphasized that primary education was acceptable to the Amish because it did not "significantly expose [Amish] children to worldly values or interfere with their development in the Amish community."[70] But expose and interfere it does; and surely the Amish acceptance of elementary education is merely a tactical device.[71] If integration into the Amish community is a constitutionally acceptable practice, why not allow the Amish, unfettered by secular educational requirements, to teach children the basic skills in the "three R's"[72] which seem to be the purpose of elementary education as understood by the Court? This question is especially relevant since the Court quoted with approval Jefferson's suggestion that the education necessary for the welfare and liberty of the citizens could be satisfied by an ability to "read readily in some tongue, native or acquired."[73] If this rudimentary knowledge is sufficient for a citizen, there is hardly any state interest in compelled public education, elementary or secondary; it can hardly be claimed that the state can teach the three R's better than Amish parents or selected Amish teachers, whether or not certified by the state.[74]

Secondly, the Court emphasized that it exempted the Amish only because they had a legitimate first amendment objection to compelled education; their rejection of secular education was "not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living."[75] Only that qualification would allow an exemption. For that reason, the Court suggested, someone like Thoreau could not be exempted because his objection would merely be a matter of personal preference. But any judicial category which requires membership in an organized, traditional group as a condition for exercise of first amendment rights is constitutionally suspect. The Court's test obviously contradicts the test used to determine whether an individual can be exempted from the Selective Service laws on the grounds of "religious" convictions; yet there is no sound reason why religious exemption from Selective Service laws should be decided any differently than religious

70 *Id.* at 211.

71 *Compare* Wisconsin v. Yoder, 406 U.S. 205, 211-12 (1972), *with* Littell, *Sectarian Protestantism and the Pursuit of Wisdom: Must Technological Objective Prevail* in PUBLIC CONTROLS AND NONPUBLIC SCHOOLS (D. Erickson ed. 1969). Even if the Amish might finally accept primary education, the Court's qualification surely does not resolve the problem posed by, for example, the Jews in People v. Donner, 199 Misc. 643, 99 N.Y.S.2d 830 (1950).

72 406 U.S. at 225-26.

73 *Id.* at 226 n. 14. Jefferson's test of an ability to read may well be a drastically more selective test than completion of a prescribed number of years' attendance in today's public schools.

74 Even at this point there would remain a practical problem of deciding whose choice should determine whether to attend the public schools. *Compare* 406 U.S. at 231, 237 (majority opinion) *with* 406 U.S. at 241 (Douglas, J., dissenting). But that is not a problem of freedom versus compulsion.

75 406 U.S. at 216.

exemption from compulsory attendance laws.[76] In the Selective Service cases,[77] the Court exempted all those who conscientiously objected because of "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption. . . ."[78] As Justice Douglas reminded the *Yoder* court, the expansion of "religion" in the Selective Service context was required precisely because the United States is a nation of many diverse religions and sects; and, more importantly, because the Court is constitutionally incapable of distinguishing good religions from bad religions.[79] But, on that basis, how can the Court not exempt from compulsory attendance laws anyone with a sincere and meaningful belief that those laws contradict his conscience? Why should the Hippie commune or the Native American Church[80] or even the Ku Klux Klan not be equally exempt from state interference with their beliefs and way of life? And if any sincere belief will exempt a school age child from compulsory education laws, what purpose can those laws have?

V. Conclusion

By frankly and directly confronting the Amish challenge in *Yoder,* the Court has forced itself to consider anew the state interest in education and the effect of the presently used tests of due process and free speech on that state interest. The choices open to the Court are basically two. If *Barnette* continues to govern the decisions, clearly any effort to respect "religious" conviction must finally abolish compulsory education laws as an unconstitutional infringement of first amendment rights. Any less drastic measure would require the Court to attempt a definition of religion so that it could distinguish spurious from genuine religious claims for exemption. The Court did just that in the Mormon polygamy cases, but the modern Court has found itself uncomfortable with such tasks.

The practical effect on the public school system of an abolition of compulsory school attendance would not necessarily be severe. Attendance at the first public schools was not compelled. Those schools served as a state-provided means to assist parents in the education of their children; for that reason the school programs were subject to the approval of the parents.[81] Today's public school system could be reconstituted to this end. Parents could choose to educate their children at home or at a public school, dependent upon their own needs

76 *See* 406 U.S. at 248 (Douglas, J., dissenting). *Compare* 406 U.S. at 215-16 (majority opinion).

77 Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965).

78 United States v. Seeger, 380 U.S. 163, 176 (1965).

79 Wisconsin v. Yoder, 406 U.S. 205, 249 (1972). *See also* United States v. Seeger, 380 U.S. 163, 192 (1965). *Compare* Wisconsin v. Yoder, 406 U.S. 205, 246 (1972): "A religion is a religion irrespective of what the misdemeanor or felony records of its members might be. . . ." (Douglas, J., dissenting) *with* Davis v. Beason, 133 U.S. 333, 345 (1890): "Crime is not less odious because sanctioned by what any particular sect may designate as religion."

80 People v. Woody, 40 Cal. Rptr. 69, 74, 394 P.2d 813, 818 (1964): "We know of no doctrine that the state, in its asserted omniscience, should undertake to deny to defendants the observance of their religion in order to free them from the suppositious 'shackles' of their 'unenlightened' and 'primitive condition.' "

81 This was the rule of the early cases, *e.g.,* Rulison v. Post, 79 Ill. 567, 573 (1875).

and resources. Such a reconstitution would, no doubt, drastically restrict the public school curriculum. To meet the needs of parents in our diverse society, but not infringe those parents' private convictions about what society represents, would surely limit the schools, as the Amish expected, to instruction in the three R's and other similarly nonpolitical vocational skills. Other courses could be offered as electives, subject to the approval of parents or students. On this basis the public schools would in fact reflect *Barnette*'s ideal of political neutrality.[82]

Yoder, however, suggests that the Court will continue to resist such a literal reading of *Barnette*. Yet it can reasonably do so only if it more clearly states the permissible end of public education. This need not be as difficult as Justice Jackson in *Barnette* wanted us to believe. In fact, the Court itself has begun such a statement, though only indirectly, in the school desegregation cases since *Brown v. Board of Education.*[83] Those cases have justified compulsion in the schools because the schools are understood to serve a fundamental political purpose by forming the kind of citizens necessary for a democratic society founded on the equal dignity of all men. But a public school system dedicated to the destruction of racism hardly conforms to *Barnette*'s demand that education not prescribe what is orthodox in politics or manners.[84]

The problem inherent in *Barnette,* then, requires the Court to reinvestigate the meaning of the first amendment as the supposed constitutive force of public education. Such an inquiry, however, will be successful only if the Court frees itself from a narrow investigation into the literal meaning of the first amendment. Surely *Yoder* makes abundantly clear what the drafters of the Constitution well knew: The first amendment by itself resolves no problems and protects no liberties[85]; certainly it did not protect the liberties of either the Hasidic Jews or the Mormons. Reflecting on this fact and on the confusion generated by *Barnette*'s attempt to remove compulsion from education, the Court might well come to realize that the future of public education depends upon a thoughtful redefinition of the possible public ends of education.

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82 *See* text accompanying notes 42-46 *supra.*
83 347 U.S. 483 (1954).
84 319 U.S. at 642. *See* text accompanying note 45 *supra.*
85 THE FEDERALIST, No. 84, at 535 (Wright ed. 1961): "[Freedom's] security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend upon public opinion, and on the general spirit of the people and of the government."