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ARTICLES

THE PRISONER'S DILEMMA AND EDUCATION POLICY

TYLL VAN GEEL*

INTRODUCTION

The belief in the constitutional right of parents to control the upbringing of their children and a right to academic freedom for public school teachers persistently remains a part of American education thought. Yet there appears to have developed no fully agreed upon theory to explain these twin rights, and they have occasionally come under severe attack. Oregon in the 1920s sought to abolish the right of parents to send their children to private schools, an effort successfully resisted in the Supreme Court.¹ Though this opinion was to have settled the issue, the controversy continues for two important reasons. The approach to constitutional interpretation used in the opinion—a noninterpretist approach²—has been attacked and the opinion criticized as wrongly decided.³ Furthermore, the Court has rejected its use of the due process clause of the fourteenth amendment in that and other opinions of the era.⁴ As for academic freedom, the Supreme Court has not recognized a constitutional right that protects the public school teacher's discretion to control the content of the curriculum contrary to the preferences of superiors.⁵

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2. See infra text accompanying note 196.
5. See text accompanying note 257 infra.
Furthermore, Professor Goldstein has argued that if the function of public schools is to inculcate, it follows that public school teachers should not be afforded the right to academic freedom. Recognition of such a right could frustrate the state's interest in providing the inculcation of pupils in the values and ideals preferred by the state.\(^6\)

It is necessary to address the question of whether the Constitution protects the right of parents to control the upbringing of their children and the right of academic freedom for public elementary and secondary school teachers. To the extent these rights are protected and given a broad interpretation, the authority of the government is limited in controlling the upbringing of children.\(^7\)

To support a new rationale for a parental right to educate and a teacher's right to academic freedom, this paper examines the American public education tradition, the functioning of public schools and the role of government in education. The second section examines constitutional doctrine and the authority of the state to inculcate pupils in secular values. Although the Supreme Court has never ruled on the constitutionality of the American theory of public schooling, the Court would likely uphold the traditional function assigned to public schools. The third section analyzes the American education tradition using the prisoner's dilemma game.\(^8\) These insights are used in the fourth section to argue for the moral rights of parents to educate and of academic freedom for public school teachers. Fifth, this moral argument supports the proposition that the Constitution supports a parental right to educate and a teacher's right of limited academic freedom.

This article seeks to establish a right of both parents and public school teachers to educate subversively. My conception of a subversive education will become clearer after having gone through the analysis, but I do want to emphasize I use the word "subversive" seriously; it is not just a metaphorical phrase. For example, there is a constitutional right of parents and teachers to discuss with children the rationality of disobeying the law. Some might object that this proposal makes the Constitution a suicide pact. Yet other rights are protected

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8. See text accompanying notes 149-164 infra.
Despite their arguably subversive effects. For example, freedom of speech is protected despite its often unsettling and disturbing consequences. Moreover, the government has ample constitutional means to protect itself. The Constitution contains conflicting and constraining rights and powers, and in part it is this complexity which makes the document so viable. We should recognize these internal contradictions while seeking to assume that one element of the complex structure does not overbalance the others.

I. THE AMERICAN EDUCATION TRADITION

Over the centuries a persistent duality of purpose has characterized American educational policy. Education, especially public schooling, has been advanced as the best means for shaping and molding the beliefs, values and character of youth. At the same time, education has been seen as the route to develop critical thinking and the capacity for reasoned value and moral choices. Occasionally this duality is manifested in political conflict between contending educational philosophers, but the duality is often found within the thinking of individual proponents of public education and educational theorists. Educational reformer Theodore Sizer has written:

While there may be a certain, theoretical contradiction between a state which asserts that it exists at the pleasure of the governed, who have important rights as autonomous individuals, and a state which requires that all individuals understand and believe certain things and act in certain ways, it is fanciful to argue that the state has no claims on the minds and actions of its citizens. The real issue is what claims and how they are to be met.

To better understand the tension between these two poles in American education, it is important to capture some of the richness of argument supporting each part of the dual vision. Some see education as primarily concerned with shaping values and beliefs, other thinkers have included both inculcation and critical thinking in their educational prescrip-

tions, and others have advocated education as an engine of liberation.

A. The Tradition of Inculcation

One of the foremost historians of American education has written:

The original intent in creating a system of universal, free, compulsory, and secular public schools was thus a political purpose. It was to enable peoples who came from diverse national, religious, and cultural backgrounds to achieve a sense of community and to acquire the common values of a democratic polity. It was to do this by promoting the knowledge, the understanding and the sentiments or attitudes necessary for exercising the responsibilities of democratic citizenship. In order to enable all persons in the population to acquire the requisite knowledge and disposition essential for the social cohesion of a democratic republic, it was essential to build a system of schools that would not only be public in purpose but also public in control, public in support, and public in access.11

Even before the great wave of immigrants in the nineteenth and twentieth centuries, it was argued that education to promote virtue was essential if the republic was to survive. In the "seedtime of the republic" most who thought about education viewed humanity as "a composite of good and evil, of ennobling excellencies and degrading imperfections."12 Given this decidedly mixed human nature, one of the chief purposes of community was to help people pursue their better natures by establishing religions and political institutions to give virtue free play while controlling vice, and by educating people to recognize the "sweet harvest of the one and the better fruits of the other."13 Education was necessary not only for personal good, but also for the maintenance of liberty. As Samuel Adams wrote "We may look up to Armies for our Defense, but Virtue is our best Security. It is not possible that any State should long remain free, where Virtue is not supremely honored."14 The need for general devotion to

13. Id.
virtue — virtue consisting of a willing sacrifice of self-interest for the public good and willing obedience to the law — grew out of the belief that popularly elected rulers could be effective only if the populace was public-spirited and self-sacrificing.\textsuperscript{15} Even the Federalist Papers, a work noted for its view of human nature as the pursuit of narrow self-interest, contains several essays arguing for virtue as the necessary basis for republican government.\textsuperscript{16} Jefferson also argued that education of the populace was necessary to protect the republican form of government and the natural rights of individuals.\textsuperscript{17} To this end he suggested, among other things, that the capacity for moral judgment could be improved by memorizing correct moral judgments presented by the teacher.\textsuperscript{18}

The defining characteristics of colonial education were that it was private, religiously based, and vocationally oriented.\textsuperscript{19} Because educating children in the proper religious beliefs was central to education, teachers enjoyed virtually no academic freedom to teach according to their own ideas. During the revolutionary period, strong political pressures, including loyalty oaths, were used to assure that teachers loyal to England kept silent.\textsuperscript{20} Teachers expressing loyalty to England suffered financial disaster or were driven out of the


\textsuperscript{17} A. Koch, \textit{The Philosophy of Thomas Jefferson} 168 (1943).

\textsuperscript{18} R. D. Heslep, \textit{Thomas Jefferson and Education} 93-95 (1969).

\textsuperscript{19} H. Beale, \textit{A History of Freedom of Teaching in American Schools} 22, 25, 29, 51, 56 (1941).

\textsuperscript{20} Id. at 59-61.
country, "as was President Cooper of Columbia, who fled over the college fence, half-dressed, finally to escape to a British sloop."  

Moving forward in time to the 1830s and 1840s and the start of the public school system, we find similar themes in the justifications offered for a public school system articulated by Horace Mann. Mann, a lawyer turned educator, saw education as a better means of social control than the law. Mann argued that a common belief in a political creed must be fostered if the republic was to be maintained. Intelligence constrained by virtue and a belief in the truths of politics and morals would make the country free, prosperous, moral and republican. Similarly, Henry Barnard, another national figure in education of the same period, urged the indoctrination of pupils in capitalism, the cultivation of patriotism, and religious and moral instruction. The strong religious basis of the schools once gain worked to limit the freedom of teachers.

Toward the end of the century and following the First World War the effort to inculcate pupils in certain values was given a name — Americanization. As defined by its advocates, Americanization was the assimilation of millions of immigrants to the American way of life to promote loyalty to the government, to prevent crime, and to prevent the importation of radical ideologies, such as socialism and communism. The central features of this program to melt down ethnic differences were required instruction in English, health and personal hygiene, creating a shame of being "foreign," and promoting patriotism. So fervent was the concern with Americanizing immigrants that Oregon adopted a law requiring all pupils to attend public schools. This was to prevent immigrant students from attending the unAmerican and possibly subversive private schools that seemed to abound. As one Klansman noted, "Somehow these mongrel

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21. Id. at 60.
23. Welter, supra note 22, at 117.
hordes must be Americanized; failing that, deportation is the only remedy."

The same interest in inculcating youth is currently found in commentators from both the right and the left. Former Secretary of Education T.H. Bell has said, "Citizenship education cannot and should not be divorced from moral education." Our schools, he continued, were "grounded on a concern for transferring our basic values to our children, in short, in educating them in these values." Milton Friedman, a free market advocate, and Henry Levin, a liberal economist, both advocate governmental efforts to assure pupils are properly inculcated. James P. Shaver and William Strong,


30. Id.

31. Friedman writes, "A stable and democratic society is impossible without a minimum degree of literacy and knowledge on the part of most citizens and without widespread acceptance of some common set of values. Education can contribute to both." M. FRIEDMAN, CAPITALISM AND FREEDOM 86 (1962). Elsewhere Friedman writes, "[P]roviding for the common social values required for a stable society, on the one hand, and indoctrination inhibiting freedom of thought and belief, on the other hand is another of those vague boundaries that is easier to mention than to define." Id. at 90. Friedman would strike his balance by abolishing public schooling, establishing a system of vouchers to help parents pay for the private schooling they wish to send their children to, and imposing on those private schools regulations that require them to provide all pupils a minimum amount of school of a specified kind. Id. at 86, 89. Henry Levin argues, however, that even regulated private schools cannot provide the kind of enculturation needed in a democracy. According to Levin,

[ ]f effective participation in a democracy requires a willingness to tolerate diversity. This process must acknowledge the existence of different views on a subject and accept a set of procedures for resolving differences among those views in reaching social decisions. This requirement suggests that schooling for democracy must ensure exposure to different views in controversial areas, a discourse among those views, and the acceptance of a mechanism for reconciling the debate. Research on political socialization has shown that tolerance for diversity is related to the degree to which different children are exposed to different viewpoints on controversial subjects in both the home and the school.

Levin, Education as Public and Private Good, 6 J. POL'Y ANAL. AND MGM'T 628, 636 (1987) (footnote omitted). Levin continues by noting that it seems unlikely that private schools with narrow political and religious sponsorship would promote this exposure to a diversity of ideas.
professors of education, state that schools and teachers have an obligation "to encourage emotive commitment to the basic values of society, as well as growth in the cognitive process of value identification, value clarification, and value conflict resolution." A position statement issued by the National Council for the Social Studies states that it is the ethical responsibility of social studies professionals to provide every student with the knowledge, skills, and attitudes necessary to function as an effective citizen. This duty was interpreted to mean, among other things, that "social studies professionals have an obligation to provide instruction which instills commitment to democratic values and faith in the dignity and worth of the individual." Other principles stress the ethical responsibility of the professional to foster a critical assessment of principles and values as well as the free contest of ideas. An obvious and unresolved tension has been built into the code.

The sentiments supporting inculcation may be found in legislation. Most states today require such things as the study of United States history and the Constitution and patriotic exercises including the display of flags, a daily flag salute, and the singing of the national anthem. National holidays must be observed, and some states require readings from the biographies of American statesmen and patriots on these occasions. "Americanism" is a required part of the curriculum of some states as is instruction to teach students the duty to defend the country against infiltration. It is also not uncommon for statutes to require the fostering of an appreciation of the U.S. government, its ideals, and the duties of citizenship.

Additional requirements impose on students a duty to study the "benefits of the free enterprise system" and the "evils," "fallacies," and "false doctrines" of Communism. In conjunction with these requirements states have imposed

34. Id.
restrictions on what may be taught in the public schools. Some states prohibit the use of "subversive" materials, the advocacy of Communism, or the teaching of materials which undermine patriotism.\textsuperscript{37} Alabama requires its pupils to learn the "principles of patriotism."\textsuperscript{38} The sheer quantity of required political education in the United States is impressive, perhaps even greater than what is required in the Soviet Union.\textsuperscript{39}

The strong pressures to have patriotic virtues taught have been translated into pressures on teachers to be patriotic citizens. These pressures have taken the form of loyalty oaths, pressure to teach the "correct" version of sensitive historical events, and dismissals for not participating in a flag salute ceremony, for teaching the value of "peace," for holding radical political or economic beliefs, for discussing Russia in the classroom, for supporting the fledgling labor movement in the country, and for teaching about evolution.\textsuperscript{40} Political pressures to ban books have also been common.\textsuperscript{41}

**B. Inculcation Which Accommodates Critical Thinking**

The tradition of inculcation has been subject to criticism, and professional educators would be loath to argue that inculcation is the only good of education. The quotation from Professor Sizer reflects the ambivalence shared by many philosophers of education.\textsuperscript{42} The nature of this ambivalence is explored further, as are suggestions to overcome the seeming contradiction between inculcation and instruction in critical thinking.

In a report on American public schools John Goodlad\textsuperscript{43} offers approximately six pages of goals for schooling,
including:

2.2 Develop the ability to use and evaluate knowledge, i.e., critical and independent thinking that enables one to make judgments and decisions in a wide variety of life roles — citizen, consumer, worker, etc. — as well as intellectual activities . . . .

4.1 Develop a knowledge of opposing value systems and their influence on the individual and society . . . .

5.4 Develop a commitment to the values of liberty, government by consent of the governed, representative government, and one’s responsibility for the welfare of all . . . .

5.6 Exercise the democratic right to dissent in accordance with personal conscience.

6.4 Understand and adopt the norms, values, and traditions of the groups of which one is a member . . . .

7.2 Develop a commitment to truth and values . . . .

7.4 Develop moral integrity . . . .

9.2 Develop the ability to be tolerant of new ideas . . . .

10.3 Develop the ability to be flexible and to consider different points of view.  

Unfortunately Goodlad fails to discuss the potential conflict between these goals, such as encouraging students to be independent thinkers while developing in them a commitment to certain basic values. Nevertheless Goodlad’s list represents the duality in goals of many educational thinkers. Two other educators, however, have developed a curriculum which accounts for both educational goals.

Donald Oliver and James Shaver base their proposal for teaching social studies on two premises: (a) all societies and especially the American society should promote the dignity and worth of each individual; and (b) human fulfillment depends upon “the interdependence of [people] and groups within a societal setting.” Because they accept premise (a), Oliver and Shaver state that they must be concerned with the perpetuation of that value. Freedom of choice among alternative ways of life is seen as necessary for the perpetuation of the value of dignity. It follows, in their view, that there

44. Id. at 51-54.
46. Id. at 10.
47. Id.
must be "a multiplicity of groups — subsocieties — to support alternative solutions to the problems men must face in their dealings with the world . . . . A plurality of active groups — i.e., pluralism — is a necessary ingredient of a free society, because it is the only natural mechanism which can insure some freedom of choice." 49 By accepting premise (b) Oliver and Shaver argue that cohesion of these groups within a societal setting must also be pursued by recognizing three points:

(1) Despite an inevitable degree of isolation among groups within the society, there must be recognition that many problems have to handled by the community as a whole. (2) The members of all the subgroups must to some extent share value commitments and a normative vocabulary as a framework within which to deal with these common problems. And (3) this normative framework must include procedures for the mediation of interpersonal and intergroup conflict, especially as necessary to solve the societal problems. 49

They conclude that a governmental policy devoted to both human dignity and a national society must protect the autonomy of individual groups and develop a common standard which can be applied to conflict within the nation. 50

The American solution to protect dignity, to develop common standards to resolve disputes, and to mediate intergroup conflict is the American Creed. 51 The Creed, according to Oliver and Shaver, embodies a number of principles such as the rule of law, a right to welfare, and protection of

48. Id.
49. Id. at 11.
50. Id.
51. Id. at 12. Oliver and Shaver apparently view the American Creed as something different from Christianity and Communism, both of which they call an ideology, and which they reject as a basis upon which to build the curriculum in the public schools. Id. at 12-13. These ideologies define truth in too unequivocal terms and the principle of human dignity and freedom of choice "assumes there is usually more than one legitimate alternative from which to choose in matters of public decision." Id. at 13. Oliver and Shaver underscore their position by taking a skeptical stand toward moral truth saying "there is no revealed truth." Id. Yet if they accept this position then the American Creed must also be subjected to the same corrosive acid bath, something they do not do. Instead they take the position that the American Creed is in fact accepted by our society and that it is a "useful political and social framework." Id. at 11-12, 13.
individual rights of religion and free speech. Given this Creed the American government is in a difficult position: it is obligated to protect rights of individuals and groups although this protection fosters social and political conflict. The paradox facing the American government is one of fostering dispute while at the same time being required to resolve it.

Central to the solution of this paradox is the public school. To help assure the formation of a national society and the resolution of conflicts that will emerge in a pluralistic society, the schools should ensure that students are “committed to basic ideals of American society emerging from the democratic traditions of Western civilization.” This commitment helps assure societal cohesion while at the same time avoiding indoctrination and “unthinking obedience.”

52. They also note the Creed includes the following principles: consent and representation; a guarantee of the equal protection of the laws; private property; a prohibition against arbitrary action thus a right to proper prior notice of impending governmental action, restrictions used on the obtaining of evidence and confessions, hearings prior to governmental action and restrictions on governmental invasion of personal rights; a faith in reason as a method of dealing with conflict; the principle of separation of powers and checks and balances; the principle of federalism; adherence to a principle that government is to see that some people are not downtrodden and/or exploited; and insurance of domestic tranquility and provision for a common defense Id. at 12, 15, 70-81.

53. Id. at 12.

54. Id. at 14.

55. Id. Oliver and Shaver have not defined their use of the word “indoctrination,” a word about which many have argued as to its meaning. These disputes have largely turned on whether the word should be defined in terms of the intention of the teacher, the content of what is being taught, or the method of teaching, or perhaps some combination of these elements. The arguments usually proceed by one philosopher pointing out how the definition of another philosopher seems to label some activity as “indoctrination” when in ordinary usage we would not so label the activity. For example, under a definition of indoctrination which emphasizes teaching methods which do not rely on critical thinking and the use of reason, a teacher who makes his class memorize the multiplication tables is indoctrinating. The critics of this position argue that we do not normally label the memorization of such material indoctrination and, if it is indoctrination, then the normally bad connotation associated with the word needs to be dispelled. Thus, it is argued, it would be preferable to emphasize in the definition of the term the nature of the materials to be learned, i.e., you can only have indoctrination if the materials involved constitute “doctrines,” and there is no publicly accepted evidence for proving these doctrines. Of course a definition which stresses only this feature of the learning situation leads to the labeling of much of what goes on in schools as indoctrination regardless of whether rote memorization is involved. Any teaching about political and moral beliefs could thus become indoctrina-
is avoided because students are only expected to hold "general values." Students would not be expected to translate "these values into specific policy decisions about which there must be disagreement." Oliver and Shaver recognize the translation of these general and sometimes conflicting values into specific solutions is a real problem. They call the procedure our society has adopted for resolving disputes "rational consent." The word rational emphasizes commitment to reason and thoughtful reflection. Consent emphasizes the principle that each person involved in the dispute should have a chance to express his opinion before being bound by a decision affecting him. Their proposal is to teach students some of the skills needed for the rational consent process. Teaching these skills also promotes freedom of choice.

Thus Oliver and Shaver propose that students be exposed to public problems involving complex factual issues and value conflicts, in which different people have taken different positions. Students would be asked to think about these problems in a way familiar to anyone who has attended law school. In fact, Oliver and Shaver call their approach "jurisprudential teaching," and expect the teacher to play a "socratic role" in helping the students to identify and differentiate definitional, factual and value issues; to deal with these issues; to learn the use of logic and analogy; and generally to

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57. Id. at 24, 25, 59.
58. Id. at 60.
59. Id. at 61 (emphasis in original).
60. Id. at 88-89; see generally ch. VI, 88-113.
learn to clarify disputes and perhaps even resolve them. In sum, the student is to learn "the legal, ethical, and factual substance of the issues under discussion, the way this information relates to his own personal knowledge and values, and sensitivity to the general processes by which the issues might be clarified."

To conclude, it would be useful to list the basic principles of those who seek to combine inculcation with instruction in critical thinking. First, it is assumed that certain basic moral and political principles are true, at least for this society. A corollary is that these principles are good, and thus truth and goodness coincide. Second, it is assumed that these principles are discoverable and known. Third, it is important for a variety of different reasons — cohesion, formation of community, the avoidance of violence, the maintenance of a democratic form of government — that these basic moral and political principles are accepted by a significant portion of the population. A corollary of the third proposition is that a good person leads to a good society and to a good state. Fourth, legitimate educational methods can teach children to believe in these principles. Fifth, people are malleable and an expressed belief in these principles does change their behavior in beneficial ways for all concerned. The corollaries of this principle are that ideas do shape people's behavior; that ideas, values and principles are not merely epiphenomena — a superstructure erected to rationalize and legitimize underlying economic and political power structures; and that people and individual behavior do make a historical difference; that is, we are not in the iron grip of historical forces that are pushing us toward a destiny we cannot resist. Sixth, those same discoverable principles limit the methods and extent to which the state may seek to inculcate the youth. However, those same limitations do not so limit the inculcation enterprise as to block it. Seventh, it is assumed that respecting individual autonomy of belief formation as required by principle six, and even instructing in the skills of critical analysis and thinking will not turn-back upon and undermine the whole enterprise of obtaining the children's acceptance of the basic principles noted in the first principle.

61. Id. at 115; see generally ch. VI, 88-113.
63. See M. Walzer, Spheres of Justice (1983).
C. Rejection of Inculcation

Accommodationist proposals, such as those of Oliver and Shaver, are not the only form of opposition to a pure program of inculcation. Some groups and advocates have placed greater emphasis upon the need for education to assure continued respect for private property and capitalism, others have worked for an educational program that would produce good workers. Others advocated educational programs aimed toward improving equality of opportunity and helping workers protect themselves from economic and political exploitation. While the social thought of American educators has been rich in many themes, I want to emphasize one particular melody — the concern with educating for critical thought.

John Dewey sought to move education away from the rote learning of prescriptions toward a more active enterprise in which students worked together to solve problems. The school was to avoid teaching abstract ideas, but was to provide a laboratory in which students could test their own moral and social judgments, and adopt and adapt those ideas and values that worked best in particular social circumstances. Students were no longer expected to conform their thought and behavior to an external source, whether it be the Bible or a conception of social justice and democracy. Dewey, relying on a biological model, believed that if children were merely fitted to live in a particular environment, they would not be prepared to survive in a changing and progressive social environment.

A.S. Neill in England and John Holt in the United States advocated an even more radical program of instruction which can best be described as child-controlled and child-driven. Based on the assumption that children are naturally curious, they argue adults need only provide a rich environment for children, whether it be to play or to undertake intellectually demanding projects of study and creation. Students are even free to decide if and when they learn to read, to do mathematics, and to learn about science, history, and literature.

64. See generally Curti, supra note 22; Welter, supra note 22; Spring, supra note 22.
65. Spring, supra note 22, at 172-73.
Neill and Holt accept the possibility that a given child will never, or perhaps only in adulthood, have the motivation and desire to learn to read. They believe that the natural human drive to learn, combined with the example of seeing others, will quickly and almost inevitably lead children to seek assistance to engage themselves in the whole range of subjects which comprise the school curriculum.

Professor Israel Scheffler begins his prescription for education by asking, "What should be the purpose and content of an educational system in a democratic society, in so far as it relates to moral concerns?" He answers this by positing a central principle of democratic society: "It aims to structure the arrangements of society so as to rest them upon the consent of its members." This aim requires reasoned procedures for the critical review of policy by all members of society. The society sustains itself not by indoctrination, "but by the reasoned choices of its citizens." The democratic faith consists in a reasonable trust that unfettered inquiry and free choice will be valued by a free and informed people.

Since all people are expected to participate in the formation of policy, education becomes a condition of the survival of such a society. The function of education must be to "liberate the mind, strengthen its critical powers, inform it with knowledge and the capacity for independent inquiry, engage its human sympathies, and illuminate its moral and practical choices." As if his point was not clear, Scheffler states that "[T]o choose the democratic ideal for society is wholly to reject the conception of education as an instrument of rule; it is to surrender the idea of shaping or molding the mind of the pupil." The purpose of education should be to cultivate "reasonableness," and

[t]o cultivate this trait is to liberate the mind from dogmatic adherence to prevalent ideological fashions, as well as from the dictates of authority. For the rational mind is encouraged to go beyond such fashions and dictates and to ask for their justifications, whether the issue be factual or

69. Id. at 137.
70. Id.
71. Id.
72. Id. at 139.
73. Id.
practical.\textsuperscript{74}

That Scheffler fully understands the implications of his argument is clear from the following:

Such a direction in schooling is fraught with risk, for it means entrusting our current conceptions to the judgment of our pupils. In exposing these conceptions to their rational evaluation we are inviting them to see for themselves whether our conceptions are adequate, proper, fair. Such a risk is central to scientific education, where we deliberately subject our current theories to the test of continuous evaluation by future generations of our student-scientists. It is central also to our moral code, \textit{in so far as} we ourselves take the moral point of view toward this code. And, finally, it is central to the democratic commitment which holds social policies to be continually open to free and public review. In sum, rationality liberates, but there is no liberty without risk.\textsuperscript{75}

The heart of American political tradition shares at least this much with Plato — a belief in the importance and value of education for building the good society and overcoming conflict and division.\textsuperscript{76} But, whereas Plato's ideal state was to be ruled by an elite educated according to certain principles, the American state is to be ruled by "the people" who also must be properly educated. This vision of society, government, and politics departs drastically from those other visions which assume peace and prosperity must basically be either a function of power or a function of a properly constructed machinery of government that would, despite human nature, run itself.\textsuperscript{77} This tradition values inculcation but sometimes

\textsuperscript{74} \textit{Id.} at 142-43.

\textsuperscript{75} \textit{Id.} at 143. \textit{See also}, van Geel, \textit{The Search for Constitutional Limits on Governmental Authority to Inculcate Youth,} 62 \textit{Tex. L. Rev.} 197 (1983). The suggestion is made there that a school's educational program ought to be designed to assure that students will be able to arrive at their own beliefs autonomously. This goal could be advanced if the school's curriculum had to adhere to a principle of fairness:

1. When a school provides instruction on matters of a political or moral nature, it must adequately and objectively cover the issues explicitly and implicitly touched upon by the materials; (2) The coverage must be fair in that it accurately and objectively reflects the opposing view on the issues; and (3) The instruction must devote reasonable attention to the major opposing views. \textit{Id.} at 290 (footnotes elaborating key terms in the principle are omitted).

\textsuperscript{76} \textsc{Plato, The Republic,} Book IV, iii.

\textsuperscript{77} \textsc{T. Hobbes, The Leviathan} 80-84 (M. Oakeshott ed. 1946); \textit{see M.}
attempts to accommodate the radical critics by structuring a program of both inculcation and training in critical thinking. The accommodation is only partially complete because the concept of critical thinking accepted by many educators and philosophers is but a weak version of the kind of radical analysis that, for example, Scheffler calls for. Thus, despite the tensions and conflicts within American education thought, it is a tradition that seeks social control and social ends through inculcation of the young.

II. THE SUPREME COURT AND THE AUTHORITY TO INCULCATE

The same tensions observed in the American education tradition regarding the proper role of public schools in providing civic education are replicated in the opinions of the Supreme Court. A plausible reading of this body of precedent suggests three points. First, the Court appears to be predisposed to permit states to forge a curriculum designed to inculcate those values the state considers to be fundamental for the maintenance of democracy. Second, the language of the opinions also reflects a continuing judicial ambivalence toward the basic authority of the state to inculcate. Third, the Court has established safeguards to check or constrain the exercise of the state’s power.

A. Disposition to Permit Inculcation

It should be understood that there has been no direct challenge of the state’s authority to provide a program of secular inculcation in the classrooms of public schools. The cases that have touched on the question of inculcation have done so only tangentially, for example, Board of Education v. Pico, in which the Court ruled on the constitutionality of a school’s decision to remove books from the school library. (The case will be discussed at greater length below.) Nevertheless, the Court seems likely to hold that a deliberate program of inculcation would be found constitutional.

The history of these constitutional complexities begins with the ruling in Meyer v. Nebraska which struck down a state law severely limiting the language curriculum of private schools. The Court wrote:

KAMMEN, A MACHINE THAT WOULD GO OF ITSELF 17-19 (1986).
79. 262 U.S. 390 (1923).
For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: "That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent . . . . The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, known place, as they should be." In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and instructed their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both the letter and spirit of the Constitution.  

But while the Court was guarding against the formation of a Platonic Republic, the Court also stated its ruling was not meant to preclude a state from making reasonable regulations for all schools. "Nor has challenge been made of the State's power to prescribe a curriculum for institutions which it supports." The Court seemed to support an educational system in which students and their parents would be able to choose between a private school, judicially protected against unreasonable regulations, and a public school with a state-controlled program of inculcation. While the private school

80. 262 U.S. 390, 401-02 (1923). The statute struck down in this case under the fourteenth amendment's due process clause made it a misdemeanor to teach a subject in any language other than English in any private or public school or to teach any language other than English to students who had successfully passed the eighth grade. Id. at 397. The Nebraska Supreme Court had upheld the statute on the ground that to educate the children of foreigners in their mother tongue was "to educate them so that they must always think in that language, and, as a consequence, naturally inculcate them in the ideas and sentiments foreign to the best interests of the country." Id. at 397-98. The Supreme Court in striking the law down stated that it appreciated the state's "desire . . . to foster a homogeneous people with American ideals" but that the means adopted exceeded the state's power and conflicted with the rights of the teacher, the parents and students affected by the law. Id. at 401-402.
81. Id. at 402.
82. Id.
curriculum could only be subject to "reasonable regulations," the public school's curriculum could be regulated as the state chose.

In *Pierce v. Society of Sisters* the Court indicated it might not accept such a model. Two private schools challenged an Oregon statute compelling all students to attend only the public schools. In upholding the claim that the statute violated the rights of parents to control the upbringing of their children as protected by the Fourteenth Amendment, the Court wrote:

[W]e think it entirely plain that the Act ... unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public school teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

The Court, consistent with its opinion in *Meyer*, explicitly protected the right of parents to send their children to private schools. But the Court also made clear in *Pierce* that private schools could be regulated to assure that "certain studies plainly essential to good citizenship" be taught and nothing "be taught which is manifestly inimical to the public welfare." The ambivalence of the Court was obvious — it specifically struck down standardization, while allowing for continued state authority to require that education "essential to good citizenship" be provided in the private schools.

The central question to emerge from *Pierce* was whether the state's authority to regulate private education was so extensive as to permit the state to require the private school to offer a program of instruction identical to that offered in the public schools — a curriculum which could be wholly indoctrinating. One year later the Court answered this question

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84. *Id.* at 534-35.
85. *Id.* at 534.
negatively. With the Court's attitude toward state regulation of private schools somewhat clearer, the central question became how far the state could go in its own schools to inculcate pupils.

In the first of two decisions, in 1940 the Supreme Court rejected the claim by a group of students that a requirement to join in a flag salute ceremony violated their right to the free exercise of religion. Following this decision "the West Virginia legislature amended its statutes to require all schools therein to conduct courses of instruction in history, civics, and in the Constitutions of the United States and of the State 'for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of government.' " The State Board of Education adopted a resolution in 1942 containing quotations from the Court's 1940 decision and ordered the flag salute to become a mandatory part of the school program. Failure to participate in the ceremony was deemed to be insubordination and punished by expulsion. Further, an expelled child was "unlawfully absent" and could be prosecuted as a delinquent. The parents or guardian were also liable to prosecution.

A group of Jehovah's Witnesses brought suit seeking to restrain enforcement of the compelled participation in the flag salute on the grounds that their religious beliefs forbade them from saluting the flag since it was a "graven image." The Supreme Court reversed course and concluded that compelled participation in a flag ceremony violated the students' rights of freedom of speech under the first amendment. The precise holding and rule of this case is difficult to determine.

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86. Farrington v. Tokushige, 273 U.S. 284 (1927). In this case the Court struck down under the Fourteenth Amendment's due process clause a regulatory scheme that prohibited students from: (1) attending private schools until after they had completed the second grade in the public schools, and (2) attending them for more than one hour each day, after the public schools had closed, and then for not more than six hours each week. To further guarantee that these schools, largely attended by Japanese children, could not foster disloyalty, complete control of the curriculum was given over to the state's department of education.


89. Id. at 629.

90. T. Van Geel, supra note 7, at 189.
That is, attempting to foster patriotism by exposing a person to criminal penalties for failure to participate in a flag salute ceremony violates the first amendment right not to be forced publicly to express sentiments with which they disagree. This interpretation is underscored by the Court:

[T]he State may "require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guarantees of civil liberty, which tend to inspire patriotism and love of country." Here, however, we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. The issue here is whether this slow and easily neglected route to arousing loyalties may constitutionally be short-cut by substituting a compulsory salute or slogan.92

A cautious approach to the interpretation of precedent would favor a narrow interpretation, but as shall be demonstrated later other language in the opinion suggests a more sweeping rule.93

In subsequent cases the Court forcefully announced its belief that the public schools may seek to inculcate youth in fundamental values, while at the same time limiting the effective use of the state's power. In Board of Education v. Pico,94 some students challenged the school board's removal of ten books from a high school library. The board failed to follow its own established procedures for handling books challenged as objectionable95 and proceeded with the removal of the

91. Id.
92. 319 U.S. at 631 (footnotes and citation omitted) (quoting Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 604 (1940) (Stone, J., dissenting)).
93. See infra text accompanying notes 117-20. Perhaps the decision stands for the broader proposition that the government cannot compel one to use any time, energy, or property to support the expression of ideas with which one disagrees. Cf. Wooley v. Maynard, 430 U.S. 705 (1977); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977). Or perhaps Barnette supports the proposition that the constitution protects a right to personhood and that a compelled flag salute represents an invasion of the sphere of the intellect. L. Tribe, American Constitutional Law § 15-2, at 1304, § 15-5, at 1315 (2d ed. 1988). In other words, the decision might stand for the proposition that the public schools may not seek to inculcate their pupils.
books which a study committee, staffed by parents and school personnel, had recommended be retained.\textsuperscript{96} The board gave no reason for rejecting the study committee's recommendations. But, in the course of the dispute, it issued several news releases in which the books in question were said to be "anti-American, anti-Christian, anti-Semitic [sic], and just plain filthy."\textsuperscript{97} The district court granted summary judgment for the school board and the Second Circuit reversed.\textsuperscript{88} A fragmented majority of the Supreme Court affirmed on different grounds and remanded the case for trial.\textsuperscript{99} The plurality opinion signed by three justices embraced a notion of a student's right to hear. This right was used as a First Amendment-based limitation on the authority of the school board to use the school library as an additional instrument of incultation.\textsuperscript{100} Relying on this principle these justices held that the school boards could not remove books if intending to deny students access to ideas merely because of disagreement with the ideas.\textsuperscript{101} In a concurring opinion, Justice Blackmun em-

\textsuperscript{96} Id. at 411.
\textsuperscript{97} Id. at 410. That same news release also stated that the objectionable books "contain material which is offensive to Christians, Jews, Blacks, and Americans in general." Id. A later issue of the board's newsletter expressed similar concerns. Id. In a deposition commenting on one book which noted that George Washington was a slaveholder, one of the petitioners said, "I believe it is anti-American to present one of the nation's heroes, the first President, . . . in such a negative and obviously one-sided life. [Sic] That is one example of what I would consider anti-American." 457 U.S. at 873 n.25. And in the litigation five board members stated under oath that the books were removed because "they contained obscenities, were irrelevant to our curriculum, were inappropriate and were in bad taste. They contained foul language, gross sexual allusions and language that just wasn't necessary to the story line. . . . [W]e feel we represented the basic values of the community in our actions . . . ." 638 F.2d at 424.

\textsuperscript{99} 457 U.S. 853 (1982). The case never did go back to trial since the board agreed to return the offending books back to the library shelves.
\textsuperscript{100} Justice Brennan wrote,

\textquotedblleft The right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom. . . . Just as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.\textquotedblright

Id. at 867-68 (emphasis in original).
\textsuperscript{101} Id. at 870-71.
braced the notion that the school board may not "deny access to an idea simply because state officials disapprove of that idea for partisan or political reasons."\textsuperscript{102} He would apply this principle to the classroom as well as the library. Justice White concurred only in the decision to remand, refusing to endorse either Justice Brennan's or Justice Blackmun's interpretation of the free speech clause.\textsuperscript{103} The four dissenters, Chief Justice Burger and Justices O'Connor, Powell, and Rehnquist each wrote separately, to further underscore the fragmentation of the Court.\textsuperscript{104}

The Justices' attitudes toward inculcation can be illuminated by closely examining the individual opinions. The plurality opinion written by Justice Brennan openly embraced the possibility that the free speech clause imposes no restrictions on the authority of a school to inculcate in the classroom.\textsuperscript{105} In fact, Justice Brennan wrote, "Petitioners [the school board] might well defend their claim of absolute discretion in matters of curriculum by reliance on their duty to inculcate community values."\textsuperscript{106} Justice Brennan also seemed

\begin{footnotes}
\item[102.] Id. at 879 (Blackmun, J., concurring) (footnote omitted).
\item[103.] Id. at 883 (White, J., concurring).
\item[104.] Justices O'Connor and Powell wrote opinions in which no other Justice joined; the Chief Justice was joined in his opinion by Justices Powell, Rehnquist, and O'Connor; and Justice Rehnquist was joined in his opinion by the Chief Justice and Justice Powell.
\item[105.] 457 U.S. at 862. Justice Brennan specifically took note of the fact that the plaintiffs did not seek to impose limits on the authority of the board to control the curriculum. \textit{Id.}
\item[106.] \textit{Id.} at 869 (emphasis in original). Justice Brennan attempted to distinguish the library from the classroom by noting that "the special characteristics of the school library make the environment especially appropriate for the recognition of the First Amendment rights of students." \textit{Id.} at 868 (emphasis in original). He also noted that library books "by their nature are optional rather than required reading." \textit{Id.} at 862. And he said, A school library, no less than any other public library, is "a place dedicated to quiet, to knowledge, and to beauty. . . ." [We] observed that "students must always remain free to inquire, to study, and to evaluate, to gain new maturity and understanding." The school library is the principal locus of such freedom. \textit{Id.} at 868-69 (citations and footnote omitted). Justice Brennan went on to say that the claim of an unfettered authority to inculcate overlooks the unique role of the school library. It appears from the record that use of the Island Trees school libraries is completely voluntary on the part of students. Their selection of books from these libraries is entirely a matter of free choice; the libraries afford them an opportunity at self-education and individual enrichment that is wholly optional. Petitioners might well defend their claim of absolute discretion in matters of curriculum by reli-
\end{footnotes}
to be willing to consider the possibility that the first amendment did not address the acquisition of books for the library, only the removal of books from the library.\textsuperscript{107} As to the narrow issue of school board discretion to remove books from the library, Justice Brennan recognized, on the one hand, the authority of the school board to inculcate by controlling the content of the school library and, on the other hand, a student's first amendment-based right to receive ideas.\textsuperscript{108} In attempting to reconcile these competing principles Justice Brennan adopted the motivational test noted earlier. He moved towards the reconciliation of these competing principles by saying that the discretion to control the content of the library “may not be exercised in a narrowly partisan or political manner.”\textsuperscript{109} If a board intended by its removal of books to deny access to ideas merely because of disagreement with the ideas, then the free speech rights of students have been violated. Justice Brennan also noted that the student-plaintiffs had implicitly conceded that this motivation test would not be violated if the board had removed the books because they were “pervasively vulgar” or if the decision were “based solely upon the ‘educational suitability’ of the books.”\textsuperscript{110} By seeming to endorse the power to remove books because of “educational suitability,” Justice Brennan reopened the door to inculcation through control of books made available in the library. In any event, this carefully circumscribed opinion leaves the signers ostensibly on the side of those who accept the public schools as an engine for inculcation and socialization. However, in reaching the decision as to the rules that govern the removal of books from a library, Justice Brennan embraced a notion of a right that is not easily contained—the right to receive ideas. Although he tried to offer a rationale why this right would be limited to the library, it takes little imagination to see how it could easily be extended to the classroom itself with the potential effect of

\begin{itemize}
  \item Id. at 869 (emphasis in original).
  \item Id. at 862.
  \item Id. at 864, 866-67.
  \item Id. at 870.
  \item Id. at 871.
\end{itemize}
undermining the principle he accepted—the authority of the school to inculcate.

Justice Blackmun’s concurrence appears to be the most liberal opinion, but it is profoundly at odds with itself. He also accepted the proposition that public schools may inculcate fundamental values. But he also embraced a principle of no-discrimination-against-ideas which would extend to the classroom as well as the library. It is unclear how he would reconcile these two principles, and the confusion is compounded when he writes,

School officials must be able to choose one book over another, without outside interference, when the first book is deemed more relevant to the curriculum, or better written, or when one of a host of other politically neutral reasons is present. . . . And even absent space or financial limitations, First Amendment principles would allow a school board to refuse to make a book available to students because it contains offensive language . . . or because it is psychologically or intellectually inappropriate for the age group, or even, perhaps, because the ideas it advances are “manifestly inimical to the public welfare. . . .” And, of course, school officials may choose one book over another because they believe that one subject is more important, or is more deserving of emphasis.¹¹¹

Finally, the dissenting opinion of Justice Rehnquist also strongly endorses the principle that public schools should inculcate youth in fundamental values. He seems to avoid the inconsistencies of the Brennan and Blackmun opinions when he writes that if the school board is to effectively carry out this function, it must have unfettered discretion to choose the books made available to students both in the classroom and the library. As he stated it, when the government acts as educator, as compared to government as sovereign, its “actions . . . do not raise the same First Amendment concerns as actions by the government as sovereign.”¹¹² In response to Justice Brennan’s opinion, Justice Rehnquist writes that “[t]he idea that such students have a right of access, in the school, to information other than that thought by their educators to be necessary is contrary to the very nature of an inculcative education. Education consists of the selective presentation and

¹¹¹. Id. at 880 (Blackmun, J., concurring) (citations omitted).
¹¹². Id. at 910 (Rehnquist, J., dissenting).
explanation of ideas." But having said this Justice Rehnquist also "cheerfully" agrees with Justice Brennan that the First Amendment would be violated if a Democratic school board motivated by partisan sentiments ordered the removal of all books written by Republicans or "if an all-white school board, motivated by racial animus," removed all books written by black authors or books advocating racial equality and integration. Justice Rehnquist does not explain the inconsistency between his view that the First Amendment has no bearing on the school board's control of the curriculum and his willingness to block partisan and racist motivations in the shaping of that same curriculum.

Despite these complexities, the one message that emerges with clarity from these many opinions is that a strong majority, perhaps even all, of the Justices, accept inculcation in the classroom. This view is expressed in two other modern cases. In the first of these the Court used this principle in reaching the conclusion that states may refuse to employ as elementary and secondary school teachers legal aliens who are eligible to apply for citizenship but who refuse to do so. The state's interest in seeing to the inculcation of youth justifies discrimination against people who may not faithfully carry out the state's educational program. In Plyler v. Doe, a decision striking down a Texas policy of excluding illegal alien children from free public schooling, the Court pointed out that this policy not only had an impact on these students by hurting their chances of becoming economically self-sufficient, but it also denied them the opportunity to be inculcated in traditional values. This denial would have an impact both upon the children themselves and upon the fabric of society.

B. Judicial Ambivalence

Despite the Court's language in recent opinions supporting state authority to inculcate, there is evidence in the opinions of continuing discomfort with a school program of inculcation. This is most clearly seen in the following passages taken from the majority opinion in the flag salute case.

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of

113. Id. at 914 (Rehnquist, J., dissenting) (emphasis in original).
114. Id. at 907 (Rehnquist, J., dissenting).
its creatures—Board of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.\footnote{West Virginia State Bd. of Education v. Barnette, 319 U.S. 624, 637 (1943).}

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial, territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing.\footnote{Id. at 640-41.}

\footnote{Id. at 641.}

[W]e apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds.\footnote{Id. at 641.}

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

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.\(^{120}\)

In addition to these earlier passages, more recent opinions sing the praises of freedom of conscience.

Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought this right merely prescribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Mohammedanism or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects — or even intolerance among "religions" — to encompass intolerance of the disbeliever and the uncertain.\(^{121}\)

Passages in *Tinker v. Des Moines Independent Community School District* also suggest that the Court is willing directly to limit the authority of the school board to provide a curriculum designed to inculcate.\(^{122}\) The Court wrote, in an opinion protecting the right of a student to protest the Vietnam War by wearing a black armband to school, that the school must remain a marketplace of ideas and that students "may not be

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120. *Id.* at 642 (footnote omitted).
regarded as the closed-circuit recipients of only that which
the State chooses to communicate. They may not be confined
to the expression of those sentiments that are officially ap-
proved.\textsuperscript{1}\textsuperscript{123} While suggesting the possibility that the Court
would not approve of a curriculum which is designed to in-
culcate, these passages could also be read as embracing that
very possibility so long as the school protected alternative
ideas through the protection of the free speech rights of stu-
dents. In a second student free speech case the Court seemed
to affirm a narrow view of \textit{Tinker}.\textsuperscript{124} The Court once again
espoused the importance of public school for inculcating
pupils in fundamental values and, more specifically, inculc-
ating pupils in "habits and manners of civility."\textsuperscript{125}

\textbf{C. Safeguards Limiting State Authority}

Besides singing the praises of freedom of conscience the
Court has taken several steps towards limiting the power of
the state to inculcate youth. First, the Court recognized a

\begin{itemize}
  \item [123.] \textit{Id.} at 511. The Court concluded in this case that: (i) the free
speech clause did apply to students in public schools; (ii) the wearing of a
black armband in protest to the Vietnam War was akin to pure speech; (iii)
free speech rights of students could be limited if either the school officials
might reasonably forecast that the speech activity would cause material and
substantial disruption and/or interfere with the rights of others, or that in
fact the speech activity did cause material and substantial disruption and/
or did interfere with the rights of others; (iv) and that in this case the wear-
ing of the black armband did not cause material and substantial disruption
nor did it interfere with the rights of others.

  \item [124.] Bethel Sch. Dist. No. 403 v. Fraser, 106 S.Ct. 3159, 3164
(1986).

  \item [125.] \textit{Id.} In this case the Court upheld the school's punishment of a
pupil who delivered a speech that involved the use of an elaborate sexual
metaphor nominating a fellow student for elective office at a high school
assembly. The Court purported to distinguish \textit{Tinker} on the grounds that
the speech in \textit{Tinker} was political speech whereas the speech involved here
had a sexual content. But \textit{Fraser}'s speech was a \textit{nominating} speech which
would seem to be the essence of a political speech. And while \textit{Tinker} and
\textit{Bethel} are factually distinguishable on a number of other grounds — there
was a captive audience in \textit{Bethel}, the metaphor used did involve sexual in-
nuendo — it is also possible the Court may have in \textit{Bethel} overruled or
modified \textit{Tinker}'s material and disruption standard. The kind of impact
\textit{Fraser}'s speech had would not seem to amount to material and substantial
disruption, i.e. the speech was greeted with some hooting, yelling and a few
with gestures of simulated sexual activities. This combined with the expres-
sion of a different underlying theory of public education points toward the
possibility the Court is moving today toward a different approach to stu-
dent free speech cases.
\end{itemize}
right of parents to send their children to private schools. Second, the Court limited the authority of the state to regulate private schools and make them offer a program of instruction identical to that in public schools. Third, the Court has recognized a right of public school students to freedom of speech, assuring that the "school's voice" is not the only voice broadcasting to students. Finally, four Justices have expressed a willingness to shield the school library with the First Amendment so that it cannot be used by the school board as one more tool in its program of inculcation. The Court has not recognized, however, a right of public school teachers to academic freedom in the classroom — a step that would arguably be the most effective in checking an overreaching inculcation effort by the state.

It seems fair to say that the same tensions detected in the American education tradition are found in Supreme Court opinions. The Court has supported state authority to inculcate while at the same time praising freedom of conscience, pointing out the dangers of state efforts to control opinion, and erecting safeguards to limit the effectiveness of state efforts to inculcate. The ambiguities of this record point to the need to press the analysis further by asking hypothetically how the Court might rule on a direct challenge to a state effort of inculcation.

D. Would the Court Prohibit Governmental Efforts to Inculcate?

The precedents reviewed above provide one important basis for predicting how the Court would rule on a constitutional challenge seeking either to bar a public school curriculum designed to inculcate or to impose limits on such an exercise of state authority. To make such a prediction more

127. Farrington v. Tokushige, 273 U.S. 284 (1927). In another case the Court wrote that "parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions." Runyon v. McCrary, 427 U.S. 160, 176 (1976) (upholding the use of 42 U.S.C. § 1981 to prohibit private schools from denying admission to qualified children solely on the basis of race).
secure it is necessary to discuss other materials that would be
taken into account: The Constitutional text, the intent of the
framers, the Constitutional structure, Constitutional theory,
tradition, values and social philosophy, and judicial
competence.  

To carry out this hypothetical examination three assump-
tions are needed. First, it is assumed that a state and/or
school board sought to inculcate its pupils in such values as
patriotism, loyalty, virtue, toleration, the democratic form of
government, obedience to law, and respect among the races.
To promote these values the curriculum materials were care-
fully selected and edited. For example, inconvenient facts,
such as that George Washington and Thomas Jefferson were
slave holders, are either omitted or relegated to footnotes.
Social problems were downplayed except that the harm of ra-
cism is discussed, and much evidence is presented to show
that the United States has made great advances in overcom-
ing the problem. Traditional American heroes received ex-
tensive coverage and the devotion of those who volunteered
for military duty is examined. Glowing assessments of the op-
portunities offered to immigrants were provided; and dissent
and rebellion was addressed only to discuss the necessity for
law and order and the dangers of chaos. Second, it is assumed
this challenge claimed the program of instruction imposed a
"pall of orthodoxy" on the school and chills the exercise of
freedom of speech. Third, it is assumed that four conserva-
tive justices adopt an "interpretist" or "original intent" ap-
proach to constitutional interpretation and are prepared to
rule that there is no constitutional right placing a restraint on
the state to shape its curriculum as it wishes. The crucial
question then becomes whether a "moderate" or "liberal"
justice, taking something other than an interpretist approach,
could be persuaded to vote with the conservatives in defeat-
ing this constitutional challenge.

It seems reasonable to assume that our fifth justice would
begin deliberations by examining the Constitutional text. A
quick review of the text yields a fast answer — it would ap-
pear the state has acted constitutionally. The Tenth Amend-
ment’s broad language reserving all powers to the states not

130. Cf., Fallon, A Constructivist Coherence Theory of Constitutional In-
132. See infra text accompanying notes 186-193 for a discussion of
interpretism.
delegated to the federal government or prohibited to the states suggests that states have inherent plenary authority over the educational system within their borders. Our Justice now asks whether an "external" check on the authority of the state might be found, such as an individual constitutional right. A further search of the text brings our justice to the first amendment and the free speech clause. Education seems related to freedom of speech, so this clause may check the state's authority. However, the language of the amendment does not address the specific question. Up to this point there would seem to be no constitutional infirmity in what the state has done.

It seems doubtful that either party could marshal conclusive evidence as to the intent of the framers. The central difficulty is the nonexistence at the time of the adoption of the first, tenth or fourteenth Amendments, of anything similar to our current system of public education, which is attended by 90% of all students. Because the framers did not contemplate our problem, it is unclear whether they meant to include authority to inculcate as part of the state's basic police power or whether the framers intended to prohibit the exercise of such authority as a violation of an individual right. To the extent there is any historical evidence, it suggests that the framers would have included a significant degree of inculcation in an education system. The Constitution was adopted during a period of strong religious conviction and civic republicanism, and even the Federalist papers expressed the importance of "virtue" for making the proposed constitution work. But perhaps when stated in a suitably abstract and general way, the intent of the framers can be understood as being opposed to a public school system which inculcates.

133. U.S. Const. amend. X.
134. It is assumed that the first amendment has been made applicable, through the incorporation doctrine, to the states and its subsidiaries. See Wallace v. Jaffree, 472 U.S. 38 (1985) (striking down an Alabama statute that authorized a period of silence for meditation or prayer).
135. Laurence Tribe describes an external check on legislative authority as a limit which derives from the constitutional structure as a whole or from a specific constraint such as those in the Bill of Rights. L. Tribe, supra note 93, § 5-1, at 297.
137. See supra text accompanying notes 13-21.
139. The question of at how abstract or general a level the original intent of the framers and/or the purpose of a constitutional provision is to
For example, the First Amendment may have been intended to protect both freedom of expression and freedom of belief formation since freedom of expression without freedom of belief formation becomes meaningless. As Justice Jackson wrote, it should be public opinion which controls the government and not government which controls public opinion.

Perhaps additional light could be shed on the question by examining the structure of the Constitution. Here again the evidence suggests that the state acted properly. The Constitution established a federal system of government in which the branches of the federal government — including the judiciary — were to have a limited role in the shaping of educational policy as compared to the states. If the federal judiciary were to have an important role, it would be to enforce those individual rights which check the state’s authority, such as the First Amendment.

Having examined the text, original intent, and structure of the Constitution, our justice now turns to precedent for guidance. As already suggested, the justice would find much evidence that earlier decisions generally accepted the state’s authority to offer a program of inculcation in public schools. Based on precedents, our justice might favor rejecting the challenge and upholding the state’s authority.

Our justice might also consult materials that some, especially interpretists, might not consider to be “legal.” The first of these is tradition. Our justice will not find a definitive answer, since the American education tradition is conflicted concerning state authority to inculcate. Nevertheless, the justice may reasonably conclude that tradition would suggest that authority to inculcate should be upheld.

Finally, the justice might turn to contemporary political and social philosophy. Assuming these materials may properly be used in reaching a constitutional decision — a point be phrased is at the heart of modern-day jurisprudential disputes. See R. Dworkin, Laws Empire (1986); M.J. Perry, The Constitution, the Courts, and Human Rights (1982); Berger, New Theories of “Interpretation”: The Activist Flight from the Constitution, 47 Ohio State L.J. 1 (1986).

140. See infra text accompanying notes 224-230 and 268 for a discussion of additional purposes that might be said to be served by the First Amendment — purposes suggested by modern-day commentators.


143. See supra text accompanying notes 79-125.

144. See supra text accompanying notes 53-77.
subject to considerable modern debate\textsuperscript{146} — the justice will find such a range of viewpoints as to throw into doubt what is the best view of the matter.\textsuperscript{146} Given the diversity of opinion and the deep conflicts in these materials it would not be surprising for our justice to eschew reliance on these materials.

In sum, having considered text, original intent, the structure of the Constitution, precedent, tradition, and political and social philosophy, it seems likely that a moderate or liberal justice would vote with the interpretists in upholding the state's basic authority to inculcate. Perhaps the Court would step in only if the state attempted to inculcate with racist or purely partisan motivations, or used methods of instruction such as brainwashing or psychological conditioning, or used forced participation in political ceremonies or actively sought to prevent students from expressing in school ideas contrary to those in the official curriculum.\textsuperscript{147} Stated differently, it seems safe to say that the Supreme Court would accept the proposition that state authority in the classroom is plenary, that states have virtually unfettered authority to prescribe a curriculum which is purposefully designed to inculcate.

This concluding observation is only a prediction and not a statement of approval or approbation. Indeed, the Constitution ought to be interpreted as providing strong protection for a student's right to freedom of belief and belief formation.\textsuperscript{148} If such an argument were presented to the Court today, however, it would not succeed. But the Court will also continue to protect the right of parents to send their children to private schools and a limited right of free speech for students.

III. A NEW VIEW OF THE AMERICAN EDUCATION TRADITION

The American tradition of inculcation, and the various
ways it has been compromised or resisted, is examined from a new perspective taken from game theory and economics. A game called the prisoner's dilemma will be described and used to re-examine our education tradition. Based on this re-examination a moral argument is made for the right of parents to educate their children privately and for public school teachers to enjoy a right of academic freedom.

A. The Prisoner's Dilemma and Public Goods

Sometimes efforts to achieve individual interests actually preclude their achievement. Cooperation is needed to achieve these individual interests, but achieving cooperation is often difficult if not impossible. Robert Axelrod asks:

Under what conditions will cooperation emerge in a world of egoists without central authority? This question has intrigued people for a long time. And for good reason. We all know that people are not angels, and that they tend to look after themselves and their own first. Yet we also know that cooperation does occur and that our civilization is based upon it. But, in situations where each individual has an incentive to be selfish, how can cooperation ever develop?  

The difficulties of obtaining cooperation are illustrated by the prisoner's dilemma involving two players. Each player may choose to cooperate or defect. And each makes this choice without knowing what the other player will do. The dilemma the players face is if they cooperate they both do well, but if they both defect their position is worse. Yet either player faces disaster if he is the "sucker" who cooperates while the other defects. This is illustrated in Figure 1.

In the game one player, Jones, chooses either to cooperate or defect, while the other player, Smith, simultaneously chooses to cooperate or defect. These choices result in one of the four outcomes shown in the matrix. If Jones and Smith cooperate they get the reward of mutual cooperation. If one player defects and the other cooperates, the defector gets the temptation payoff, while the other gets the sucker’s payoff. If they both defect they both receive the same punishment.

To illustrate this game, assume Smith and Jones have been arrested and they face the choice of cooperating with each other by keeping silent or defecting by confessing. The temptation is to confess and implicate the other prisoner to obtain a light punishment. If the other does not confess he is the sucker who faces the full force of the law. When consultation between Smith and Jones is not possible the rational prisoner would confess. Both Smith and Jones would confess and face the punishment associated with mutual defection.

The prisoner’s dilemma explains a wide range of social ills and the need for government. To take one homely example, assume everyone desires nice grass in the park, hence all should refrain from walking on the grass. “A” decides he would save time by taking a short-cut across the grass. If only A defects from this pattern, little harm is done. A is tempted to break the convention, for he can save time and enjoy a nice park, so long as everybody else continues to conform. But all other park-users face the same temptation and soon the grass is destroyed. The prisoner’s dilemma illustrates many problems, including making government work, preventing crime, limiting pollution, protecting whales, estab-

150. Id. at 8.
lishing arms control, and keeping the peace. Cooperation is difficult and the pursuit of self-interest leads to an undesirable outcome. This situation could be described as the "back of the invisible hand."  

Introducing the concept of a public good illuminates the explanatory power of the prisoner's dilemma game. A public good is characterized by "jointness of supply" and the "impossibility of exclusion." A good is jointly supplied if everybody automatically gets some benefit and one person's enjoyment of the good does not diminish the availability of the good for someone else. One loaf of bread is not in joint supply since my eating it precludes your enjoyment of it. A good is characterized by impossibility of exclusion if it is technically or economically infeasible to prevent persons from enjoying it. For example, the good of national defense benefits all, and it is virtually impossible to exclude someone from enjoying these benefits.

With the concept of a public good in mind, assume the problem is developing cooperation to contribute or to pay a fee. This is not difficult if failure to pay means one does not receive something in return. For example, if one fails to pay the price for bread, one cannot enjoy the bread. But for public goods the problem of cooperation becomes severe. Why should the rational individual pay for a public good when the benefits could be obtained without payment, by being a free rider. Unions, for example, have pressed hard for laws requiring employees to pay union dues. Without such a provision the union faces a self-interested individual who avoids paying union dues, becoming a free rider, yet enjoys the efforts of the union in raising the salaries of all workers. Obviously a sufficient number of such people will destroy the union effort.

Russell Hardin has demonstrated that the underlying logic of the free rider problem is the same as that of the pris-

151. Adam Smith wrote that every individual pursuing his own interests "intends only his own gain, and he is this, as in many other cases led by an invisible hand to promote an end which was not part of his intention . . . . By pursuing his own interest he frequently promotes that of society more effectually than when he really intends to promote it." A. SMITH, WEALTH OF NATIONS vol. II, bk 4., chap. 2, 423 (1869). The phrase quoted in the text is taken from R. HARDIN, COLLECTIVE ACTION 6 (1982).

152. HARDIN, supra note 151 at 17. Some such goods are, however, crowded goods if the ratio of individual benefit to total cost declines as more people use or enjoy the good. Id. at 44.

153. Id. at 17.
oner's dilemma. This is accomplished with a similar matrix involving an individual, John, and everyone except John, called the Collective. For the sake of simplicity assume the Collective contains 9 people.) The payoffs in the matrix are calculated in terms of benefits less cost. There are four possible results: (1) both John and Collective pay for the good; (2) John pays, but Collective does not; (3) John does not pay, but Collective does; (4) neither John nor the collective pay. If John and every member of the Collective pay 1 unit the total amount paid for the public good would be 10 units, which shall be called the cost of the good. The benefit to each member will be 2 units, for a total collective good of 20 units. These assumptions produce these four situations.

<table>
<thead>
<tr>
<th>Situation</th>
<th>Costs</th>
<th>Gross Benefits Per Person</th>
<th>Net Benefits Per Person</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. John pays</td>
<td>1</td>
<td>20÷10=2</td>
<td>John nets: 2−1=1</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Collective:** 2−1=1</td>
</tr>
<tr>
<td>Collective pays*</td>
<td>9</td>
<td></td>
<td>Total: 10</td>
</tr>
<tr>
<td>2. John pays</td>
<td>1</td>
<td>2÷10=.2</td>
<td>John nets: .2−1=−.8</td>
</tr>
<tr>
<td>Collective does not pay</td>
<td>0</td>
<td></td>
<td>Collective: .2−0=.2</td>
</tr>
<tr>
<td>Total: 1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3. John does not pay</td>
<td>0</td>
<td>18÷10=1.8</td>
<td>John nets: 1.8−0=1.8</td>
</tr>
<tr>
<td>Collective pays</td>
<td>9</td>
<td></td>
<td>Collective: 1.8−1=.8</td>
</tr>
<tr>
<td>Total: 9</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4. John does not pay</td>
<td>0</td>
<td>0÷0=0</td>
<td>John nets: 0−0=0</td>
</tr>
<tr>
<td>Collective does not pay</td>
<td>0</td>
<td></td>
<td>Collective: 0−0=0</td>
</tr>
<tr>
<td>Total: 0</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*"Collective pays" means each person in the collective pays 1 unit for a total of 9.

**"Collective" means the net benefits for each individual in the collective.

These results can now be placed in the familiar prisoner's dilemma matrix.

**Figure 2**

<table>
<thead>
<tr>
<th></th>
<th>Pay</th>
<th>Not Pay</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pay</td>
<td>1,1</td>
<td>−0.8, 0.2</td>
</tr>
<tr>
<td>John</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not Pay</td>
<td>1.8, 0.8</td>
<td>0, 0</td>
</tr>
</tbody>
</table>

154. Id. at 25.
In this situation the temptation is for the individual not to pay, while hoping the members of the Collective continue to pay. Since it is likely that all 10 people will make the same calculation, the pursuit of individual interest results in the failure to purchase the collective good which would benefit all. As Hardin writes, "Since it is individuals who decide on actions, and since each member of the group sees the game matrix from the vantage of Individual [John], we can assume that Collective's strategy will finally be whatever Individual's strategy is, irrespective of what Collective's payoffs suggest."\(^{155}\) Clearly an enforcement mechanism, such as, government, is necessary to enforce payments from each member of the society if the potential public good is to be realized.

**B. The Prisoner's Dilemma and Education**

The prisoner's dilemma game can be extended further to education. Assuming that a certain kind of education is a public good, or that all education is partially a public good, then one can predict that this educational program would not be provided unless self-interested people could be encouraged to pay their share its costs.\(^{156}\) The government could easily provide this by imposing a tax to pay for the education program which could be publicly or privately provided.\(^{157}\)

It has been argued that education is a public good that cannot be provided through the private market — that private educational services are unlikely to produce the kind of educational program which includes the public good dimension. Henry Levin has stated that private education, even if funded with public money and properly regulated would not promote the value of toleration. This public good, he argues can only be produced in a publicly operated school system.\(^{158}\)

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155. *Id.* at 26.

156. That a good is a public good provides only a necessary, not a necessary and sufficient condition for governmental involvement in the provision of the good. Other considerations may point to the undesirability of governmental involvement in the provision of a particular good, the kind of governmental activity needed may be itself especially costly thus there may be a net loss rather than net gain from provision of the good.

157. Milton Friedman has proposed just such a system for providing education. Money to pay for the education system would be raised through the tax system. Then parents would be provided with a "voucher" to cover at least part of the cost of purchasing educational services for their child in the private market. *Friedman, supra* note 31 at 89.

158. *Levin, supra* note 31 at 635-36.
Apart from questions of delivering education services, the characteristics that can make a public school education program a public good should be explored. With basic skills such as reading, writing, and the ability to do arithmetic, it can be argued that learning these skills is primarily a private good, and the benefits of this redound only to the individual child. Yet a "literate" society may be itself a public good, so even skills which have a direct personal pay-off might be considered to have a public good dimension. Americans traditionally have supported an education program marked with strong public good characteristics: The Constitution and democratic government can be conceived of as a public good — that is, democratic government is jointly supplied and efforts to exclude residents from participation face difficulties. A general belief by the populace in the Constitution is also a public good. Hence, promoting through education a belief in the Constitution, and democracy is promotion of a public good and the provision of a public good. A climate of trust in government and governmental officials is a public good. A climate of equal respect for differing races and religions is also a public good. The republican notions of virtue and patriotism are public goods whose benefits redound to the benefit of others. A populace composed of people willing to sacrifice self-interest for collective interests is another form of public good. Even voting may involve a personal sacrifice of time and effort for a larger public good; hence the rational individual may not be predisposed to vote. The educational effort to inculcate students so they believe they have a moral duty to vote is another example of how education seeks to promote a collective good. In sum, education to promote the constitution, trust in government, racial respect, virtue, patriotism and the duty to vote involves the provision of several public goods.

But the public education program may be interpreted as involving other elements which directly confront the problem of the social prisoner's dilemma. A first way is to hold up notorious defectors — traitors — for condemnation. Certainly every school-age child has learned of Benedict Arnold. Standard American slogans such as "hang together or hang separately" are taught. In this way instruction may be designed to show the serious consequences of mutual defection. By em-

159. The attempt to exclude people from citizenship predictably precipitates a political crisis. Cf., Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1856).
phasizing, or exaggerating, the costs associated with non-cooperation, the education program discourages this choice. By exaggerating the benefits of "a more perfect union" — domestic tranquility, the common defense, the general welfare and the blessings of liberty — education encourages the strategy of mutual cooperation.160 Extra-curricular activities encourage actual cooperation among pupils. Next, to discourage defection schools will stress that "crime does not pay," and that criminals are indeed caught. This instruction encourages cooperation in two ways: first, it suggests that one cannot successfully be a free rider; second, it builds trust by telling students they can rely on others because they cannot effectively defect.

Finally, teaching American history encourages cooperation and the avoidance of defection in more subtle ways. Research utilizing a computer-based prisoner dilemma game has shown that when the game is played repeatedly with the same players that the most "successful" strategy is Tit for Tat.161 A Tit for Tat strategy involves starting with a cooperative choice for the game; thereafter the player does whatever the opponent did the previous game.162 If the opponent defects in the first game, the Tit for Tat player defects in the second game. With many reiterations of the game involving a variety of other sophisticated strategies, the computer simulation shows that Tit for Tat, a very cooperative strategy, wins the tournament every time. Instruction in American history carries the implicit message that a reasonably permanent population and a permanent government will both be repeat players in a society-wide prisoner dilemma game. Given this fact, the implicit message is clear: cooperation is to the individual's self-advantage.

The public goods discussed in this section are paid for in two basic ways. Most obvious are the tax dollars raised to support the public education system. In addition, families pay for the public good by sending their children to public schools, where their personalities are shaped by public school officials. Choices that children might otherwise have made are particularly unattractive, so a price in freedom of choice, or through deliberate socialization is paid as well.

It follows that if education is a public good for which people are paying tangibly and intangibly, then the logic of

160. U.S. Const. preamble.
161. AXELROD, supra note 149.
162. Id. at 13, 31.
the prisoner’s dilemma comes into play. Some families will want to defect and become free-riders. They can seek to do this in two ways. The first is tax avoidance. The second method of defection would be providing what might be described as an education of defection, a subversive education. This alternative education will take place by sending the child to a private school or by enrolling the child in the public school but then providing a counter-education program at home. In both cases parents choosing these routes will hope that other children will continue to be educated, law abiding and self-sacrificing, but that their own children will be taught values and beliefs different from those offered in the public schools. In this way parents and their children can benefit from the “virtue” and patriotic sacrifice of others while taking steps to avoid their children becoming a prisoner dilemma “sucker.”

What might such an education program of self-defense look like? It involves among other things, warning the child not to be too trusting. Parents provide instruction of this kind early on when they instruct their children to be wary of “Mr. Danger-Stranger,” that seemingly nice man who offers candy and a ride home. Daughters are warned of the blandishments and entreaties of their male dates. Such messages will unavoidably have wider implications for children as they are also instructed to be wary of advertising and of the rhetoric of politicians who promise anything before election and never deliver. Children will not be encouraged to sacrifice their individual self-interest for the public good. They will not be encouraged to take on republican “virtue” nor be patriotic. The private program might not instruct in racial respect. Children in minority ethnic communities — whether religious or racial — will be provided instruction in the history of their group, usually with an emphasis upon the persecution and discrimination they have suffered, to warn the child that this could happen again in overt and covert forms. Children educated to have ethnic pride will in effect be told that there is nothing worse than being a prisoner dilemma “sucker.” Similarly, too much trust of governmental officials or an absolute commitment to obedience to law could lead to the same bitter end. For example, those who always play by the “rules of the game” can expect to be taken advantage of by less-honorable players. Consider the person who pays every jit and jot of tax arguably owed to the government, while another arranges his or her income so it is never reported to the government. In brief, this education in subver-
sion might introduce many students to the prisoner's dilemma itself, warning them of the dangers they face if they are, for example, too trusting. Students will be educated to be critical and analytical — to question the promises of politicians and the demands of government. But while parents may also inform their children that the Tit for Tat strategy is best in a reiterated game, these same parents may also warn their children of two important points: First, the prisoner's dilemma game is not always reiterated with the same people, hence playing Tit for Tat may simply leave one as the "sucker." (In a single episode of a prisoner's dilemma game the overriding temptation remains defection.) Second, being a one time loser in some prisoner's dilemma games can be a personal disaster from which the individual may never recover, for example, trusting someone in a business deal involving your life-fortune.

A moral argument will be advanced to justify the right of parents to provide their children with an education for defection. Such behavior is easily understood — the parent wants to protect the child. Another implication of this effort is parental resistance to state regulations which might prevent this program of instruction.

In addition to parents, some public school teachers may also want to defect in this societal prisoner's dilemma game. The most obvious example may be found among those who are both public school teachers and parents. Such people may follow the prescribed curriculum designed to inculcate pupils but send their own children to private schools or counter-educate them at home. More radical teachers may go further by interjecting their counter-culture voice into the classroom. These teachers may feel a kinship with classroom children, thus treating them as if they were their own children. For example, teachers who share the same minority ethnic background as their pupils may feel a need to instruct them, despite the formal curriculum, not to become the "suckers" of society's prisoner's dilemma game. The effort to introduce black studies into the education program can be seen as a concrete example of this concern.


164. See infra text accompanying notes 179-83.
In summary, the desire to inculcate and resistance to this may be understood as a manifestation of a prisoner's dilemma game involving a public good. Interpreting the American educational tradition in these terms provides a better understanding of both features of the tradition: the effort to inculcate and to instruct in critical thinking. It also makes possible the realization that, so long as the desire for the public good remains politically salient, there will be a demand for a subversive education. These two dimensions of the tradition are inextricably bound together.

C. The Moral Right to Educate for Defection

Can there be a moral right to instruct children subversively? One approach to answering this question is to examine the duties parents owe to their children. If it could be established that parents owe a duty to provide a subversive education, then it would seem to follow that parents have the moral right to provide that education. This conclusion is based on the assumption that a moral duty entails the moral right to fulfill the duty. In the argument that follows it is assumed that subversive education serves the child by helping the child not to become the "sucker" in a prisoner's dilemma game. This form of education helps the child protect him or herself from risks and harms.

That parents may have a moral obligation to provide their children with a subversive education is seen by first examining the duties a landowner owes guests. People who are specifically invited to enter the property are owed the duty of being warned of dangers on the property.\(^{165}\) This legal duty coincides with the moral duty not to harm people by luring them into danger without fair warning. Parents are in a similar situation for they have invited, so to speak, the child into this world. Parents have brought the child involuntarily into this economic, political and social system, so it is morally incumbent upon them to provide the child with fair notice of the dangers into which he or she has been thrust.\(^{166}\) Stating the point differently, we all share in the moral duty not to harm.\(^{167}\) Parents who fail to alert the child of dangers expose the child to risks that could be avoided through education. If

\(^{165}\) W.P. Keeton, Prosser and Keeton on Torts 419 (5th ed. 1984).
\(^{166}\) Cf. Olafson, Rights and Duties in Education, in Doyle, supra note 42 at 173.
a risk were to materialize and the child were injured, it would be proper to say, because of the special relationship between parent and child, that the failure to educate was the cause of the harm. The parent violated the principle of not harming by not educating.  

I need to consider at this point an important argument which seems to rebut the conclusions that parents have a duty not to harm, thus also the right to provide a subversive education. The rebuttal is that no one, including parents, has a right to behave in a way that avoids harm to one individual at the expense of the public good. Various answers might be constructed to respond to this claim involving calculations balancing individual harms and that damage to the public good. I want to avoid this sort of answer to suggest a response that is more intuitive and perhaps will resonate with more people.

It has been stated that a person acts within morality when he acts with something less than impartiality toward himself.  

> [N]o reasonable morality asks us to look upon ourselves as merely plausible candidates for the distribution of the attention and resources which we command, plausible candidates whose entitlements to our own concern is no greater in principle than that of any other human being. Such a doctrine may seem edifying, but on reflection it strikes us as merely fanatical.  

The logical extension of this is that we are “authorized to prefer identified persons standing” close to us above the interests of humanity in general. “One who provides an expensive education for his children surely cannot be blamed for not using these resources to alleviate famine in some distant land.”

Therefore, it is not only consonant with, but also required by, an ethics for human beings that one be entitled first of all to reserve an area of concern for oneself and then to move out freely from that area if one wishes to lavish that

170. Id. at 1066-67.
171. Id. at 1066.
172. Id.
concern on others to whom one stands in concrete, personal relations.173

Thus, "we recognize an authorization to take the interests of particular concrete persons more seriously and to give them priority over the interest of the wider collectivity."174 Such a priority would certainly include taking steps to protect the child from harm by warning the child of the dangers of uncritical acceptance of the official program of inculcation offered in the public schools.

These points can be illuminated by stating them from a different perspective. A child who had not been educated subversively would, upon reaching maturity and having suffered the pain of being a prisoner's dilemma "sucker," fault the parent for not having been more subversive ("You should have told me. Why didn't you warn me?") The child who has not been educated subversively has not been provided with the information and analytical skills needed for self-defense. Self-defense is an interest so strong it has been recognized as a moral right.178 It would thus seem that a parental effort to prepare a child to defend him or herself is itself a legitimate activity.

Even assuming there are moral reasons for granting individuals discretion to use their resources first on those closest to them, the difficult issue is who, in what ways, and how much.179 "[A]lmost no one believes that totally individualistic selfishness is 'good' either."177 This point may be conceded but nothing suggests that a subversive education is a form of "totally individualistic selfishness," nor that the effect of such an education is so destructive of the interests of others as to make such education immoral. Subversive education is an education in cautions, in warning notices. Children are not taught to always be selfish, to always deceive and defect. They are taught that others may be deceptive and may defect. And they are instructed that in certain circumstances, when there is a strong likelihood of others defecting, it may be irrational not to defect yourself. Parents may instruct their children in Tit-for-Tat, a not wholly selfish form of education. Furthermore, warning the child of the dangers associated with being in a prisoner's dilemma game is only deliver-
ing a message about reality. To blame the parent for being socially destructive for delivering this message is to “shoot the messenger.” Besides, preparation for self-defense is generally acknowledged to be morally permissible, despite the fact that actually defending oneself can have adverse consequences for others — particularly an aggressor.\textsuperscript{178}

Though some may concede that parents are authorized to protect their children from harm, these people may object that the public school teacher is not so authorized. The teacher was hired to inculcate the pupils, and defection from that task is insubordination and a breach of contract. It makes little sense to authorize teachers to educate subversively when hired by a school whose purpose it is to inculcate.\textsuperscript{179} This argument is difficult to answer. Nevertheless there are reasons for recognizing a limited right to academic freedom, a right to introduce materials intended to provide protection for the pupil.

Again, a duty implies a right. In this case the teacher has a duty not to harm. Both principles are at risk when a curriculum is taught that will set that child up to be a prisoner dilemma “sucker.” It might be argued that if the school program is successful there will be no defectors, hence no trusting “suckers.” But there is no guarantee that the curriculum will be successful with all pupils, some people will be educated for defection and subversion in a private school or at home, and adult immigrants will not have been educated in the American public school. Thus a teacher who insists on inculcating without adding the “warning label” that “unthinking acceptance of the school program may be dangerous to your well-being” is directing the pupils toward harm. Furthermore, a teacher who does not believe in the principles and values being taught is engaged in professional mendacity and violates another moral principle, the duty not to lie.\textsuperscript{180} At a minimum, the teacher who teaches only the official syllabus rents out his or her reputation in support of morally uncertain propositions. Consider for example the teacher who, consistent with the course syllabus, instructs pupils that they have a duty to sacrifice personal interests for the state. This teacher would use his or her moral force to perpetuate a doc-


trine whose truth is far from certain. In sum, these considerations support the conclusion that public school teachers have a duty not merely to inculcate as the state prescribes, and the existence of this duty implies the right not to do so.

But it may be asked, how can a teacher be permitted to instruct pupils in a way that harms the realization of public goods? If a teacher is viewed as a professional with students as clients, an answer becomes clearer. Teachers, like lawyers, morally must on occasion do things for the people they serve even if this means harming the interests of others. But perhaps this claim is too strong. It may be that teachers are not required to teach subversively, but that, if they decide they should because of moral principle, they are morally authorized to do so. Teachers may come to view their pupils as their "children," or as friends. A reasonable human morality permits people to give the interests of particular persons priority over the interests of the wider collectivity. Thus, if teachers are permitted to become friends with their pupils they also should be permitted to teach them subversively.

Finally, the very concept of a "teacher" entails the possibility of subversive teaching. Great teaching opens the mind and frees the spirit. A liberal education is intended to liberate the mind for new possibilities. Because this is so much a part of the western tradition, public schools misrepresent the function of their employees by using the title "teacher" while seeking to deny the possibility of subversive instruction. This is a form of fraud, since people employed to read strictly from a prepared text are best called actors, press secretaries, pitchmen, or agents of a propaganda ministry, not "teacher."

IV. A NEW CONSTITUTIONAL ARGUMENT FOR PARENTAL AND TEACHER RIGHTS

The previous section supported the moral wisdom of recognizing parental and public school teacher rights to provide children with a subversive education. These moral rights should also be constitutional rights. After justifying a

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183. Getting students to love learning for its own sake and encouraging students to think on their own are among the central purposes teachers say they pursue. D.C. Lortie, Schoolteacher 114 (1975).
noninterpretist approach to constitutional interpretation, an argument is made for constitutional recognition of the right of parents and teachers to educate subversively.

A. Interpretism and Noninterpretism

Developing an interpretation of the Constitution in a particular controversy is a three stage process. First, a general theory of interpretation needs to be adopted; second, that theory is used to decide what method of constitutional interpretation is required or permitted by the Constitution for use by the Supreme Court; and, third, that approach to interpretation is used to resolve the particular conflict.

In the first stage a choice must be made between the interpretist and noninterpretist approach to constitutional interpretation. At this stage one cannot turn to the Constitution to choose a theory of interpretation because the whole process would become circular: one cannot use the Constitution to choose a method of interpretation, for one needs a method of interpretation to decide what the Constitution means in the first place. The process of choosing a theory of constitutional interpretation must begin outside the Constitution, — and is itself a form of noninterpretism.

Having chosen approach x, one moves to the second stage by asking the following question: what method of interpretation may the Supreme Court use in interpreting the Constitution? The Court was created by the Constitution and its operation, including its mode of constitutional interpretation, is to be determined by the Constitution. Thus, approach x is used to determine the correct method of constitutional interpretation. Hence, it is possible that at stage one noninterpretism is the correct approach, and in applying this approach to stage two, it is concluded that the Constitution permits or requires the Supreme Court to use interpretism. Thus, in stage three interpretism might be used to resolve particular controversies.

Where does one turn in stage one to select a method of interpretation? There are a limited number of possibilities: the theory of language, the theory of texts in general, the theory of legal and constitutional texts, and political and social philosophy. Using such materials, which is the better position — interpretism or noninterpretism?

184. The distinctive characteristics of each of these approaches is discussed, infra at text accompanying notes 190-96.

185. See Dworkin, supra note 139.
A definitional problem must be addressed before choosing between interpretism and noninterpretism. Table 4 categorizes theories of constitutional interpretation, first, in terms of the sources of the materials and, second, in terms of the theory's attitude toward the possibility of arriving at a determinate answer. The theories in the column marked external are those which describe or prescribe that judicial discretion should be constrained by laws, principles, or policies which are external to the justice's own will, or found in an authoritative text. “Internal theories” would not confine judicial discretion to materials external to the justice's own will. Thus, internal theories admit of the possibility that the justice's own values will or should be decisive in reaching a decision, especially in those cases where the external materials are unclear. Turning to the first row, these theories hold out the possibility that a justice can find a single right answer. In the second row are the theories which state that a justice may not find a single right answer in all cases, as well as those theories which argue that the law is radically indeterminate, that even in the “easiest” of cases there is no single clear answer.

**Figure 3**

<table>
<thead>
<tr>
<th>Right Answer</th>
<th>External</th>
<th>Internal</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(1) Bork</td>
<td>(2) Perry</td>
</tr>
<tr>
<td></td>
<td>Dworkin</td>
<td>Fishkin</td>
</tr>
<tr>
<td>Indeterminacy</td>
<td>(3) Wellington</td>
<td>(4) Critical Legal</td>
</tr>
<tr>
<td></td>
<td>Monaghan</td>
<td>Studies</td>
</tr>
</tbody>
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A more complete comparison of the work of theorists such as Bork and Perry will be provided. Theorists in cell 1 believe that justices are and should be bound by constitutional materials external to them and that using those materials makes possible the finding of a right answer in virtually all cases. However, these theorists disagree as to what materials a judge may use in reaching a decision. For example, Robert Bork insists that the justices should primarily seek guidance from the original intent of the framers, whereas Ronald Dworkin rejects this approach and would have the justices refer to principles of justice and philosophy not explicitly embodied in the Constitution.¹⁸⁶ Theorists in cell 2 accept the

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reality that judges may use their own values in reaching a decision. But they also believe that using the power of reason can yield answers which are more than mere subjective preferences. The theorists in cell 3 require a justice to use external materials, but because of the difficulties of working with these materials admit the possibility that there may be no single right answer to a particular case. Finally, in cell 4 are those theorists who argue that legal texts, precedent, and tradition are so internally conflicted, and riddled with such general value incoherence, that justices must unavoidably fall back onto their own values. When they do so the resulting choice is a sheer matter of arbitrary will, an exercise of power.

Interpretist legal theorists are found primarily in cell 1, with softer versions in cell 2. Noninterpretists are found in cell 3.

Interpretism in the harder version stresses reliance on the original intent of the framers and employs a distinctive theory of language and legal texts. Advocates of original intent reject the idea that the words of the Constitution can be understood independently of the intent of the framers. To the extent there is a conflict between the apparent meaning of the words and the intent of the framers, the intent of the framers is supreme. Furthermore, the intent of the framers is expressed in specific examples of what must be permitted to the legislatures and what the legislatures must not do. For example, the intent of the free speech clause of the first amendment is understood to prohibit certain governmental


190. The comments which follow in the text are based on R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (1977); Bork supra note 3; Berger, New Theories of "Interpretation": The Activist Flight from the Constitution, 47 Ohio St. L.J. 1 (1986); Morris, Interpretive and Noninterpretive Constitutional Theory, 94 Ethics 501 (1984).

practices such as the prior restraint of political speech. The framers' intent is not understood to further general purposes or values, nor is the framers' intent to be broadened with the use of loosely drawn analogies. And if the framers were silent as to a particular individual right, then the legislature is free to act. Hence, it is impermissible to ask hypothetical questions as to what the framers would have done had they considered a particular issue. An important conclusion derived from this approach is that the framers intended to prohibit very few things to the legislatures. "[C]onservatives like Bork treat rights as islands surrounded by a sea of government powers . . . ."\textsuperscript{193} Crucial for the interpretists is that original intent is to be followed regardless of the social consequences of doing so. If silence in the history of the drafting of the Constitution points towards the conclusion that the legislature may, for example, impose racial segregation, then the Court must permit the legislation to stand regardless of its adverse consequences or immorality. It would be impermissible for a justice to turn to principles of justice and morality to decide a case contrary to the original intent of the framers. In brief, interpretivism is a special form of positivism that employs a narrow notion of a rule of recognition,\textsuperscript{193} namely, that only the legislature and the people acting through proper Constitutional amendment procedures can make law. Individual rights are only those found in the Constitution, and are interpreted with the use of historical materials defining the intent of the framers. While there may be other general moral and human rights, unless embodied in the Constitution they are not capable of judicial enforcement.

The softer versions of interpretivism analogize constitutional interpretation to statutory interpretation. They consider the possibility that a constitutional provision may have a broad and general purpose and they are more willing to place weight upon the text itself as evidence of original intent.\textsuperscript{194} These interpretists accept a notion of language that admits of the possibility that words can and do carry a meaning somewhat independent of the intent of the author.\textsuperscript{195}

Noninterpretism shares with the soft version of inte-


pretism a belief that words can often carry a meaning apart from the intent of the author. But noninterpretists also consider the social consequences of alternative interpretations of the constitution, tradition, morality, and political and social philosophy. Noninterpretists reject the notion that the meaning of the Constitution was frozen the moment the words sprung from the pens of the framers. They seek to adapt the Constitution to contemporary circumstances. Noninterpretists assume the Constitution protects the rights expressly mentioned in the text as well as many rights not mentioned. To the extent noninterpretists rely on the intent of the framers they state that intent in general terms. By using analogy, counterfactual analysis, and other techniques of analysis found in the common law, they expand the intent of the framers to new situations. Silence in the constitutional text does not create a presumption favoring the permissibility of legislation. Vagueness allows for judicial discretion to clarify. Just as interpretists conclude that noninterpretists flee from the authoritative constraints of the Constitution, noninterpretists accuse interpretists of an irrational flight from inevitable and desirable judicial discretion.

Unfortunately, neither the interpretists nor noninterpretists have spent much effort developing the needed "stage one" arguments for their positions. Developing these arguments is based on inferences from their published writings. Interpretists seem to rely on four arguments to support their view that an interpretist approach should be used at stage one (an approach which they also use at stage two to conclude that the Constitution requires the Court to use interpretism.) These four arguments are (1) language of a text cannot be understood apart from understanding the intent of the author, (2) the Constitution is a contract and contracts must be interpreted in reliance upon the intent of the authors, (3) not turning to the intent of the authors invites the interpreter to sail upon the sea of morality without direction since moral conclusions are inevitably open to challenge, and

(4) "the people" who framed the Constitution and those who ratified it simultaneously decreed that the Constitution should be approached using the interpretist mode of analysis and that this decision should be respected. Each of these arguments is open to serious question.

The first argument flies in the face of the reality that people communicate by assuming that language has certain conventional meanings. The meaning of words is not totally dependent upon the particular psychology of the speaker. Second, to call the Constitution a contract is but a poor metaphor. Contracts are adopted and bind only the parties to the contract, not third parties and future generations. Third, the radical subjectivity towards morality embodied in the third argument is not widely shared either among the general public or philosophers. Fourth, there is no evidence available directly supporting the conclusion that those who ratified the Constitution also adopted an authoritative approach to its interpretation. In any event, the fourth argument embraces the value of majoritarian rule, as if it were not open to the corrosive attack of moral skepticism embraced in the third argument.

Finally, it can be argued that people operating at stage one would not pick interpretism as the authoritative method for constitutional interpretation because of its many difficulties. For example, a standard criticism of interpretism is that it does not adequately specify whose intent is original and authoritative — who were the framers? How can a single intent have been formed by the large and disparate group involved in drafting and ratifying the Constitution? What is properly evidence of intent — only the official reports of proceedings or private letters, or speeches, or essays published in newspapers? Why should this intent be interpreted only

197. Simon, supra note 196, at 1496-1499.
198. Macedo, supra note 192 at 17. There were, of course, traditional practices for interpreting legal documents at the time of the adoption of the Constitution. Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885 (1985). But the conclusion which the interpretists do not provide support for is that these traditions were adopted by a majority vote as the appropriate methods for interpreting the Constitution.
199. Macedo, supra note 192 at 11.
200. Id.
201. Id. at 12.
with respect to specific examples of what is prohibited, instead of interpreted in broad terms.\textsuperscript{202}

Assuming, however, that it is reasonable to use an interpretist approach at stage one, this approach must be employed to determine, in stage two, the method of interpretation the Constitution requires of the Supreme Court. One must rely on the original intent of the framers to learn what they intended for the Supreme Court. Interpretists offer a long list of stage two arguments to support the conclusion that the Court must follow interpretism: (1) historical evidence supports a constitutional requirement that the Court use interpretism;\textsuperscript{208} (2) the framers embodied in the Constitution an ideology of majoritarianism, hence, the Court has a limited role in protecting individual rights; (3) the framers embraced a notion of the rule of law which limits the judiciary in developing new rights; in this tradition the courts must only discover the law, not make law; and, (4) there is evidence in the Constitution that interpretism is to be used. The method for amending the Constitution is offered to support an original intent that the Constitution is to be reformed in only this way, and not by the judiciary. Article VI contains the provision that "[a]ll Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation."\textsuperscript{204} This provision, it can be argued, should be interpreted in light of its plain meaning, because it would be unfair and socially harmful to disappoint the expectations of people who acted in reliance on such a commitment.\textsuperscript{205}

These "stage two" arguments for interpretism can be rebutted. First, Berger's evidence for an original intent to require interpretism is weak. Though he quotes James Wilson as saying at the constitutional convention that law may be destructive or dangerous and yet not be unconstitutional,\textsuperscript{206} Berger fails to give sufficient weight to Federalist Paper Number 78 in which Hamilton says that the Court will rule unconstitutional laws which are contrary to the "tenor," or "manifest tenor" of the Constitution.\textsuperscript{207} Second, the fact that the

\textsuperscript{202} Id. at 14-15.
\textsuperscript{203} R. BERGER, CONGRESS V. THE SUPREME COURT 359-367 (1969). See also supra cites in note 190.
\textsuperscript{204} U.S. CONST. art. VI, cl. 1.
\textsuperscript{205} Simon, supra note 196, at 1502.
\textsuperscript{206} R. BERGER, supra note 190.
\textsuperscript{207} MADISON, JAY, HAMILTON, THE FEDERALIST: A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES, No 78, 505 (1865).
Constitution embraces a Supreme Court and a Bill of Rights is evidence the framers did not write into the Constitution the majoritarian ideology embraced by interpretists.\textsuperscript{208} Third, the theory of law which the interpretists claim the framers embraced is inconsistent with a tradition the framers lived with, the common law. In this tradition principles of law are changed over time by the judiciary.\textsuperscript{209} Four, contrary to the claims of the interpretists, the Constitution suggests the need for noninterpretism more than for interpretism. The Ninth Amendment recognizes that people retain rights not expressly mentioned in the Constitution.\textsuperscript{210} And the broad language of the due process and equal protection clauses invite a latitudinarian construction.\textsuperscript{211}

In sum, the “stage one” arguments fail to establish that interpretism is the appropriate approach to constitutional interpretation. Even if these arguments were convincing, using interpretism to establish that the Constitution requires the Court to follow interpretism also fails. Thus, by default, noninterpretism emerges as the correct conclusion of both the “stage one” and “stage two” analysis. There are, however, additional reasons for accepting noninterpretism. At “stage one” noninterpretism is more likely to assure results that square with widely shared notions of justice; a method of interpretation that produces just conclusions is to be preferred. It could also be argued that noninterpretism better fits with our experience with language as having meaning not solely determined by the author’s intent. Authors must live and die by the words they have chosen, so they take pains to speak and write carefully. At “stage two” noninterpretism must be deployed to reach the method of analysis permitted or required of the Supreme Court. A noninterpretist interpretation of Article III suggests the Court is given permission to use noninterpretism. The Court is granted the authority to exercise “judicial power,” a phrase of great sweep that can be understood to embrace noninterpretist authority.\textsuperscript{212} The fact the Constitution opens with a preamble outlining general purposes suggests the desire to have the document read

\textsuperscript{208} S. Macedo, supra note 192, at 22, 25.
\textsuperscript{209} Simon, supra note 196 at 1527.
\textsuperscript{210} “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. Const. amend. IX.
\textsuperscript{211} U.S. Const. amend. V, XIV.
\textsuperscript{212} “The judicial power of the United States, shall be vested in one supreme Court,...” U.S. Const. art. III, sec. 1.
broadly. Finally, the existence at the time of the writing of the Constitution and today of a tradition of a "higher law" further supports finding a constitutional authorization for the Supreme Court to use noninterpretism.

B. Stage Three — Parental Rights

In stage three a new rationale for the recognized right of parents to control the upbringing of their children is offered using noninterpretist techniques. This argument considers the constitutional text, original intent, precedent, practical considerations, and moral theory.

The right of a parent to educate the child is not expressly mentioned in the Constitution. An interpretist would turn to the historical record to learn if any of the expressly mentioned rights in the Constitution were intended to protect parents from state interference in the upbringing of their children. Lack of such evidence suggests to interpretists complete legislative authority to enter the area of state control of private education. But a noninterpretist need not ground individual rights in a specific historical example. A noninterpretist can begin counterfactually by asking whether the framers would agree that the First and Fourteenth Amendments provide protection against certain forms of state intrusion between parent and child. The answer would most certainly be "yes," for these amendments were adopted against a background in which the family was a pillar of American society. Education was in both the colonial period and far into the nineteenth-century primarily a family affair.

In rebuttal it might be argued that the Constitution was drafted in an age of compulsory education laws and nothing in the text or in original intent suggests the Constitution was written to abolish these laws. But such laws addressed total

213. "We the People of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." U.S. CONST. preamble.


215. See supra text accompanying notes 165-78.

216. Bork, supra note 3 at 11.


parental neglect of the formal education of their children. Their acceptance cannot be seen as endorsement of state authority to redirect the ideological direction of a program already being provided by the parent.\textsuperscript{219} Certainly the framers would not have approved of state regulation of the religious content of parental education. Thus it would seem, by analogy, that the framers would also at least cast a skeptical eye toward regulation of the ideological content of that education program. They would embrace a strong presumption against such state regulation.\textsuperscript{220} Modern-day precedent also supports continued recognition of parental rights and a strong presumption against state interference with those rights.\textsuperscript{221}

Our earlier discussion of the prisoner’s dilemma and education can support a recognition of the parental right. Parents have not merely an interest in transmitting their culture and vision to their children, they also have a strong desire and legitimate interest to protect them from harm. So strong is this interest that no matter what the state may do to regulate the parental effort to educate the child for survival, parents would “defect” and find a way to educate subversively. Provision of a subversive education is not a matter of parental taste and personal predilection. It is at the center of what it means to be a parent. Continued constitutional protection of the status of parent and parenting unavoidably entails admitting to the continued provision of an education for defection, whether it be done legally or not. Just as the attempt to prohibit the manufacture and sale of intoxicating beverages proved impossible, an attempt to block subversive education,

\textsuperscript{219} Yudof makes a misleading comparison when he writes that a state compulsory education law “interferes more significantly with parental autonomy” than a law as in the Pierce case which requires pupils to attend public schools. Yudof, infra note 230, at 889. State interference with a parent’s decision wholly not to educate the child is a different kind of interference with parental autonomy from interference to control the ideological content of the program the parent is in fact providing.


as long as parents are allowed to act as parents, would prove to be impossible.  

But practical considerations are not the only ones supporting recognition of a right to educate subversively. It is morally wrong to allow legislatures to interfere with a parental effort to protect the child from harm when those efforts have no immediate harmful consequences. Protecting a child from harm is a parent's moral right. And should not the Constitution be read to protect the moral right of parents to educate subversively? If the parental right is not to be similarly protected, a case would have to be made to distinguish between protection for these moral rights but not for the moral right of the parent. The parental right is no less important to the individual parent than the rights of free speech and individual conscience. If the parental right is no less well-grounded in the due process clause of the fourteenth amendment.  

The parental right may also be considered from the perspective of the child. The child who has not been educated subversively has not been provided with the information and analytical skills needed for self-defense, a moral right. It follows that interference with acquiring the tools for self-defense frustrates a moral right and is presumptively immoral. Since there are no good reasons to deny a child the opportunity to learn self-defense, the conclusion also follows that a law that seeks to block subversive education is itself immoral. Furthermore, the notion of self-defense—the defense of life, liberty, and property—is certainly a constitutionally rooted interest. The very notion of a "right" to life, liberty, and property entails a right to defend these inter-

222. U.S. Const. amends. XVIII and XXI.
223. See supra text accompanying notes 165-78.
225. See supra text accompanying notes 79-86.
226. See supra text accompanying notes 163-66.
227. An education for self-defense has, of course, consequences which may seem to provide the justification for a law blocking such an education program. But other forms of self-defense, e.g., killing an assailant, also have consequences yet traditional morality and law continues to recognize the right to defend oneself and, what is more relevant for these purposes, the right to acquire the skills and weapons necessary for acting in self-defense if the need should arise. See Wasserman, supra note 178.
The right to these things is drained of meaning if the act of preparing to defend oneself is denied. Preparation for self-defense is a constitutionally fundamental interest, and recognition of the parental right to educate subversively serves to protect that interest.

This analysis of the parental right to educate privately helps support the Court’s decision in Pierce, a case which has been questioned because of the Court’s repudiation of its use of the due process clause of the fourteenth amendment in that case. Commentators have provided useful ways of supporting this opinion, but these are incomplete. Professor Arons has argued that the parental right can be justified as a form of speech protected by the first amendment. Dean Yudof rejects this argument and claims that Pierce can be defended only as a way of checking the otherwise overweening power of the state to reach all students with a program of state-directed inculcation. Arons was correct in recognizing an individual parental interest in the right to re-educate his or her child. Because he did not fully explore those interests, he could not demonstrate that those interests go far beyond what we traditionally think of as an interest in freedom of speech. Yudof was also correct in pointing to the dangers of a state monopoly of education, but his analysis also did not go far enough in recognizing the child’s interest in the capacity for self-defense. A parental right to educate subversively is rooted in all these concerns, but especially in the interest to protect the child from harm. Perhaps this is why the right is generally accepted as fundamental and has been traditionally recognized in law and morality.

C. Stage Three — A Teacher’s Right to Limited Academic Freedom

Developing a constitutional argument for a limited right to academic freedom for public school teachers is a more difficult task. Unlike the case of parental rights, the Supreme

228. Cf. id. at 361-62.
229. Arons writes that, “Reading Pierce as a First Amendment case and taking account of the nature of schooling suggests that Pierce principles reach the basic value choices on which school policy and practices are based. The result of such a reading is that it is the family and not the political majority which the Constitution empowers to make such schooling decisions.” Arons, The Separation of School and State: Pierce Reconsidered, 46 Harv. Educ. Rev. 76, 78 (1976).
Court has never announced that public school teachers have a right of academic freedom, and there exists a powerful argument for not recognizing such a right. Professor Goldstein made the case against academic freedom by arguing that, if the public schools are vehicles for the inculcation of the young, it makes little sense to recognize a right of those hired to inculcate to subvert the required curriculum by teaching something different. Nevertheless, a plausible case can be made for a public school teacher's limited right to academic freedom.

Although the Constitution does not explicitly recognize a right to academic freedom, the framers of the free speech clause may have intended to protect academic freedom. There appears, however, to be no evidence to support such a conclusion. First, during the colonial period the notion of academic freedom was unknown at the elementary-secondary level. Second, when the first amendment was drafted American colleges were only beginning to move away from a wholly sectarian education toward the provision of a secular education and the acceptance of professors preaching something other than the prescribed orthodoxy. A strong notion of academic freedom protecting the professor's freedom to teach, Lehrfreiheit, only came to the United States from Germany later in the nineteenth-century. Third, there was no public school system to which the right could be extended, and the notion of a public school teacher's right to academic freedom could not have been considered by the framers. But while the framers may not have intended to protect academic freedom, there is no evidence that they intended the Court should withhold constitutional recognition.

Given the inconclusive nature of these basic constitutional materials, precedent gains importance. The relevant cases may be divided into four categories representing four different dimensions of academic freedom for the individual teacher. The first two categories include (1) those cases

231. Goldstein, supra note 6.
232. H. Beale, supra notes 19 and 40.
dealing with classroom expression of the teacher’s personal views and (2) those dealing with the introduction of controversial teaching methods, subjects, and reading materials. The two other categories include, (3) opinions addressing the exclusion of teachers merely because of their beliefs and not because of what they said or did in the classroom, and (4) those opinions addressing dismissals because of the teacher’s political activities outside the school or the teacher’s public expression of criticism of other school personnel and school policies. It is the opinions in the first two categories which are of relevance to this discussion.

236. In the third category are those cases which deal with the question, among other things, of whether a Communist may be a public school teacher. The Court’s answer has been that teachers may not be barred from the classroom for even active membership in the Communist party unaccompanied by proof of a specific intent to further the unlawful goals of the organization. Keyishian v. Board of Regents, 385 U.S. 589 (1967). See also, Shelton v. Tucker, 364 U.S. 479 (1960). Cf., Ambach v. Norwick, 441 U.S. 68 (1979). In a series of other decisions the Court struck down for vagueness the “disclaimer oath” which required the oath taker to swear that he or she was not or ever had been a member of the Communist party or otherwise lent his or her aid, advice, counsel, support, or influence to it. Elfbrandt v. Russell, 384 U.S. 11 (1966); Baggett v. Bullitt, 377 U.S. 360 (1964); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961). Oaths requiring the oath taker to uphold the Constitution remain constitutionally permissible. Cole v. Richardson, 405 U.S. 676 (1972); Connell v. Higgenbotham, 403 U.S. 207 (1971). Similarly mere political affiliation with a party different from that to which a majority of the board belongs is also an impermissible basis for dismissal. Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976).

237. Open participation in civil rights activities or the advocacy of gay rights has been protected. National Gay Task Force v. Board of Education of City of Oklahoma City, 729 F.2d 1270 (10th Cir. 1984), aff’d by an equally divided court, 105 S.Ct. 1858 (1985); Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966) cert. denied, 385 U.S. 1003 (1967). Cf., McMullen v. Carons, 754 F.2d 936 (11th Cir. 1985). Public employees in general and school teachers in particular have been protected against dismissal even if they publicly criticize the school board, their superiors, or co-workers so long as certain conditions have been met. Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Board of Education, 391 U.S. 563 (1968). See also, Mt. Healthy City School Board of Education v. Doyle, 429 U.S. 274 (1977). The conditions, roughly speaking, are: (1) the speech must be about a matter of “public concern” and, on balance, considering a variety of factors, e.g., impact of the speech on working the relationship between teacher and supervisor, it has not had a sufficiently adverse effect to justify saying it not “protected speech”; and (2) the speech must not be false nor spoken knowing it was false or in reckless disregard of the truth or falsity of the claim. For a detailed exploration of these conditions see, van Geel, supra note 7 at 82-88.
No Supreme Court decision has dealt directly with the problems raised in the first two categories. The justices have, however, thrown a bouquet at academic freedom by describing teachers as the "priests of our democracy." Similarly, in striking down loyalty oaths for teachers in institutions of higher education the Court said the classroom must remain a marketplace of ideas and that the First Amendment does not tolerate laws which cast a pall of orthodoxy over the classroom.

In the first category of cases teachers have expressed in the classroom their personal opinions as individuals and not as the teacher. Courts generally will protect teachers against dismissal for merely expressing a personal viewpoint in the classroom, so long as that expression is not the occasion for material and substantial disruption of the school program, is not truly inappropriate for classroom comment, and is not part of a deliberate program of proselytization. Thus a teacher was permitted to wear a black armband in his English classes to protest against the Vietnam War. In another case a teacher was protected from dismissal for refusing to participate in the flag salute ceremony opening the school day. In that case another teacher in the classroom did lead the tenth-grade class in the ceremony, so there was no disruption of the school's curriculum. In addition, the age of the pupils helped assure their comprehension of the situation. An Arkansas federal district court upheld the right of a college teacher to inform his class of his Communistic beliefs but stressed there was no right to proselytize. However, a biology teacher was not protected from dismissal after speaking in class about his experiences with prostitutes in Japan, after he used a class to criticize in strong language his superintendent, the school board, the school system, and to complain

about teacher salaries. Denial of tenure was upheld in another case in which the teacher used the classroom as "his personal forum to promote union activities, to sanction polygamy, to attack marriage, to criticize other teachers, and to sway and influence the mind of young people without full proper explanation of both sides of the issues." Inveterate use of profane language in a college class — "hell," "damn," "bullshit," "God damn," and "sucks" — which was sometimes directed in the form of ridicule at students was a proper basis for dismissal. And a federal district court sustained the dismissal of a fifth-grade teacher who violated a board rule against classroom discussion of "any aspect of the recent labor dispute."

A note of caution needs to be introduced at this point. In a potentially far-reaching opinion the Sixth Circuit in Rowland v. Mad River Local School District, Montgomery County, Ohio, upheld the dismissal of a teacher who told a secretary, an assistant principal, and several teachers that she was bisexual and had a female lover. The disclosure of her sexual preference was not occasioned by any disruption. Nevertheless, the court held that since these comments were not a matter of public concern, the First Amendment provided her no protection. According to this court privately communicated and nondisruptive speech not touching on a matter of public concern receives no protection in the school context.

248. 730 F.2d 444 (6th Cir. 1984), cert. denied, 105 S.Ct. 1373 (1985). See, Terrell v. University of Texas System Police, 792 F.2d 1360 (5th Cir. 1986) in which dismissal of campus police officer was upheld on the basis of his writing critical comments about his superior in a private diary the contents of which, without the employee's knowledge, were turned over to his superiors. The employee kept the diary after having been relieved of his patrol duties and at a time when his supervisor was being pressured to improve the deficiencies in his department. The court assumed without deciding that the diary was "speech" for First Amendment purposes, but ruled that in the diary the employee was speaking as an employee, not as a citizen, and the content of the diary was not a matter of public concern. The fact the employee had not attempted to communicate the contents of his diary to others underscored for the Court the fact that this was a matter of personal concern only.
249. See supra note 248.
Assuming the case represents current constitutional doctrine, it suggests that teachers expressing personal views in the classroom will only receive First Amendment protection if their comments are not disruptive and are directed to matters of public concern. Putting aside the difficult question of what constitutes material and substantial disruption, it becomes important to define the notion of "public concern." Is a teacher who refuses to participate in the flag salute expressing himself on a matter of public concern? Is informing the class of attitudes toward patriotism a matter of public concern? The answer would seem to be "yes" to both questions, under a reasonably broad definition of the term. But if "public concern" is narrowed to include, for example, only issues under active discussion in some deliberative body, then these teachers would not be protected.

The Sixth Circuit also demonstrated its conservatism in *Fowler v. Board of Education of Lincoln County, Kentucky.* The teacher arranged to have her class, comprised of students aged fourteen through seventeen, see a movie, *Pink Floyd — The Wall,* on a non-instruction day used for grading. The movie contained a scene with some nudity, vulgar language, an animated section depicting flowers turned to sex organs engaging in an act of intercourse, and other segments involving rape, suggestions of oral sex, and a naked couple engaging in foreplay and intercourse. The teacher had not prescreened the movie, but having learned from a student that one scene involved nudity, arranged to have something held over the screen at that point in the film. Some students claimed they saw some nudity at that point anyway. During the showing of the film the teacher left the room for brief period of time. She was dismissed from her job for insubordination and conduct unbecoming a teacher. She filed suit claiming that her dismissal violated her First Amendment rights. She testified that she thought the film had significant value because it "portrayed the dangers of alienation between people and of repressive educational systems," but she did not discuss the film with her pupils for lack of time. She also stated she showed the film because this day was the students’ "treat-type of day." The district court concluded

251. *Id.* at 658.
252. *Id.* at 659-660.
253. *Id.* at 663.
that the teacher's conduct was protected by the First Amendment, but the Sixth Circuit reversed.

Although it seems obvious from the opinion that the Sixth Circuit was concerned about the content of the film, it did not explicitly base its decision on the impermissibility of showing obscenity to minors in the class. Instead, the Court found the First Amendment afforded no protection because the teacher did not intend to convey a message with the showing of the film, that this was not an act of expression.\(^254\) Supporting the conclusion were the facts that she did not review the film, left the class during the showing, did not discuss the film with the class, and showed it merely as a treat. Precedent, said the Court, made clear the First Amendment applied only when the activity was intended to express a message that was likely to be understood.\(^255\) The Court also concluded that reliance on academic freedom was misplaced because the teacher's conduct "was unrelated to the educational process."\(^256\) The court apparently drew a distinction between a teacher's desire to entertain the pupils, and a teacher who has a "serious" educational purpose in conveying ideas. According to this court the First Amendment protects only the latter purpose. Hence the teacher's intent must be examined before considering the applicability of the First Amendment and academic freedom. Whether this distinction can be made and whether it should be made are questions put aside here. It seems unlikely, however, that even if it agreed the film had an instructional purpose, the Sixth Circuit would have protected her from dismissal given the sexually explicit content of the film.

Cases in the second category address the disciplining of a teacher for using methods or introducing materials that the teacher intended to be part of the official curriculum. These cases do not involve the expression of personal opinion, but rather involve the teacher acting in an official capacity. To the extent courts have recognized this dimension of academic freedom, they have carefully circumscribed its scope. Academic freedom does not include control over the selection of basic texts, selection of the method of instruction, authority to change course content, or discretion to introduce obscenity or near-obscenity into elementary-secondary classrooms.\(^257\) To the extent teachers receive constitutional pro-

\(^{254}\) Id. at 662.
\(^{255}\) Id. at 663.
\(^{256}\) Id. at 663 n. 6.
\(^{257}\) Kelleher v. Flawn, 761 F.2d 1079 (5th Cir. 1985); Johnson v.
tection in deciding whether to introduce a controversial novel or to adopt a controversial teaching method, courts have given general guidelines limiting this discretion. The board may discipline a teacher if it can establish that the materials caused a material and substantial disruption, were not relevant, were shocking or inappropriate, or did not serve a serious educational purpose. The board would also be justified in acting if the teacher employed these supplementary materials in a personal program of indoctrination. Using such guidelines the courts have protected a teacher who discussed the word "fuck" in class; assigned a serious article on youth counter-culture using the word "motherfucker"; assigned Kurt Vonnegut's book *Welcome to the Monkey House* that contained arguably vulgar material; used role playing to teach about Reconstruction; assigned balanced materials in civics class, including the teacher's personal views on the Vietnam War and race relations; and showed films on human sexuality objected to by some parents. In contrast, dismissals were upheld when teachers introduced various articles, poems and pictures dealing with the 1969 rock festival "Woodstock" which talked about drugs, sex, and used vulgar language.

These opinions supporting a teacher's limited right to control what students read gain support from another line of Supreme Court opinions. In these opinions the Court upheld the right of individuals not to disseminate messages with


which they disagreed. Thus the Court has shown a sensitivity to government using its monopoly of coercive force to require individuals to breach their own values and sense of integrity. Again a cautionary note should be added. Some cases suggest strong protection of a limited degree of teacher discretion to shape the classroom curriculum. A few straws in the wind, however, suggest a more conservative trend in the law. One such sign is the virtual unanimity of the justices in *Pico* on the proposition that the state and school board has complete discretion to shape the official curriculum. Another sign is found in cases narrowing the scope of academic freedom by excluding from it the authority to select the basic textbook. And a recent state court upheld the dismissal of a teacher who assigned the book *The Front Runner* for a unit on homosexual rights in a course on American minorities when the teacher did not follow a policy requiring prior approval of the Superintendent. The court found federal constitutional law placed control of instructional materials in the hands of the school board. The court also noted that the board could not “force racial bias or partisan political preference into the classroom” nor “exclude an entire system of respected human thought.”

The basic categories of cases support the idea that public school teachers may introduce subversive ideas into their classrooms. Cases in the first category clearly support the rule that teachers may, within certain limits, express their personal opinions on the ideas and values that they have been hired to teach. Applying this rule leads to the further conclusion that teachers may, for example, express their doubts about the rationality of always obeying the law. A teacher might express a view that waiters and waitresses would be foolish to report every tip or that it is irrational to drive the


261. See supra text accompanying notes 105-14.


264. Id. at 217.

265. Id.
speed limit. Even on a sensitive issue, such as avoiding the draft during the Vietnam War, a teacher would be protected in expressing his opinions. (The expression of racist opinions, however, would probably not be protected speech, since this form of expression would arguably violate the equal protection clause of the Fourteenth Amendment, so the board would have a compelling interest to prevent the violation.) A teacher would cross the boundary of permissible behavior if such comments were made as part of an effort to proselytize. To proselytize, strictly speaking, is to seek to convert someone to a religion, or more broadly, to a systematic body of thought. In the classroom proselytizing might be viewed as an effort to establish a certain orthodoxy the teacher preferred. But doing this is a far cry from a teacher personally commenting on the school’s official orthodoxy merely to raise doubts or to warn pupils not to accept the school’s own orthodoxy without subjecting it to critical examination. Hence, teaching subversively is neither proselytizing nor attempting to capture the students for an alternative orthodoxy; it is liberating. The teacher remains within constitutional boundaries by merely suggesting to pupils that they have freedom to choose what to believe and that sometimes the “patriotic” or “virtuous” response is not the rational response.

The opinions in the second category also support a teacher’s right, within certain limits, to introduce supplementary materials with subversive themes as a formal part of the curriculum. Thus, a teacher of a “problems of democracy” course would be within a constitutionally protected sphere of discretion to assign an article sympathetically discussing the perspective of the Vietnam draft avoider. Again, however, the introduction of racist materials would provide a basis for dismissal, and the prohibition against proselytization would have to be followed.

Lower court precedent supports a teacher’s right to be subversive. But it is important to push further with the analysis because the opinions are only those of lower courts, they are not unanimous on this point, and they do not adequately explore the reasons for acknowledging a constitutional right to academic freedom. Goldstein argues that no such rationale

is available. Dean Yudof responds to the challenge by arguing in connection with parental rights, that the concept of academic freedom can be justified as a way of curbing government overreaching — as a functional way of limiting government’s capacity, as operator of a near-monopoly in educational services, to indoctrinate pupils and ultimately falsify the consent upon which the democratic system of government rests.\textsuperscript{268}

As important as Dean Yudof’s point is, it downplays the individual interests of both pupil and teacher in academic freedom. Academic freedom’s value in a public school context does lie in limiting government power, but it also serves the pupil’s interest in self-defense. Learning to question, to develop a healthy skepticism, indeed, learning to be wary and distrustful is important for survival. Learning that sometimes it is rational to defect can be crucial. This distrust should properly extend not only to the enticements of demagogues but also to any claims that a particular governmental or economic system is the best, that “political obligation” requires Y, or that obedience to law is always required. The child’s interest in self-defense is entailed in the constitutionally protected notions of life, liberty and property. And, just as recognizing a parental right to educate subversively protects the child’s fundamental interest in self-defense, so does recognizing a teacher’s interest in educating subversively.

In addition, the teacher also has a personal stake in the right to academic freedom. In seeking to fulfill the noble ideal of what it means to be a teacher, teachers will seek to act as a friend toward their pupils, will want to avoid harming their pupils, will want to avoid the lie associated with presenting materials in a way as though they agreed with the propositions being presented, and will want to maintain their own integrity.\textsuperscript{269} These are interests at the heart, not just of the role of teacher, of what it means to be a person who relates in a humane and giving way to other people, especially those who are vulnerable and dependent. Dealing with students in these terms is no mere product of adherence to some abstract intellectual ideal. To reach out to protect the vulnerable or to warn the gullible is a strong human instinct, part of the human personality.

It might be objected that the subversive teacher may


\textsuperscript{269} See supra text accompanying notes 180-83.
have no such humanitarian motives, indeed may have no real interest in the well-being of the child, but acts only to achieve some other political agenda. That may be true in some instances, but it is also probably true that this teacher will serve, perhaps unintentionally, the interests of the child in survival. Hence, for reasons of child-protection per se, as opposed to protecting the interests of the teacher, academic freedom is well-grounded.

The teacher's own interests are grounded in the Constitution in several ways. First, the teacher's interest is clearly a species of liberty — the liberty to be oneself and to realize one's personality. As Professor Tribe has written, "[t]he Constitution's is not a totalitarian design, depending for its success upon the homogenization or depersonalization of humanity." The due process clause of the Fourteenth Amendment is an obvious anchor for this interest, as is the Ninth Amendment and as is the basic constitutional structure which reflect a commitment to limited government, democracy, and the right of people to live independent and private lives. Second, the interest of the teacher to speak his own views rather than being a mere mouthpiece of official views falls within the ambit of the First Amendment's free speech clause. Third, for some teachers, speaking subversively will be religiously motivated. Thus, the free exercise clause of the First Amendment may also offer protection. Fourth, one can look generally to the "emanations" and "penumbras" and "shadows" of the First, Third, Fourth and Fifth Amendments as elaborations of the blessings of liberty the Constitution was established to secure.

It could be argued that no matter how well-grounded in the Constitution the teacher's interests are, no interests are infringed when teacher and board consent to a contract that a specific subject be taught in a specific way. But the prevailing view is that government may not condition receipt of a benefit, such as being hired to teach, upon waiver of constitutional rights. And in this case attaching conditions to the

270. Tribe, supra note 93 at 1308.


job — waiver of constitutional interests — imposes the consequence that those who may best know the flaws in the school's official program are denied the only meaningful opportunity they would have to convey that message to those who are most likely to be hurt by those flaws. In terms of a lost opportunity, permission to impose the condition of waiver of constitutional interests may be more harmful than would be a direct imposition of restrictions on the exercise of constitutional rights by those not connected with government. Stated differently, restricting citizens in general — in violation of their clear First Amendment rights — from seeking to convey to children the errors in the public school's curriculum is not likely to have any real practical effect as to what children learn; but conditioning access to teaching jobs on the basis of the waiver of the same constitutional interest will. It is doubtful children would be hearing what citizens would be saying anyway, but gagging the teacher shuts off one of the child's more important sources of information and insights.

An opponent to this line of argument might concede that teachers bring constitutionally protected interests into the classroom yet argue that the state's interests in controlling teachers are so strong as to warrant infringement of those interests. Yet what are these state interests? An interest in total control of every word that passes the teacher's lips? An interest in writing an all-governing script which tolerates no deviations? Or is the state interest less controlling and more one of assuring that its point of view is conveyed, even conveyed with force? It would be difficult to maintain that a democratic state may legitimately adopt as its purposes the first two formulations. Democratic governments, resting on the consent of the governed, do not have an interest which permits its voice to dominate the conversation in the classroom. Thus only the third formulation of the state's purpose is legitimate. And this purpose, taken on its own terms, leaves room for alternative voices to enter the dialogue. When this purpose is considered in the context of the teacher's and the student's constitutional interests, it becomes

273. C.f., van Geel, supra note 7 at 211-260. The argument is made there that there is no empirically supported governmental interest in inculcating youth. Stated differently, the article demonstrates that social science research does not support any of the state's arguments for a thoroughgoing program of inculcation.

274. Tribe, supra note 93 at 804-814; Yudof, supra note 268.
even clearer that room must be left for the subversive teacher's voice in the classroom. Accommodating a properly understood state interest with the interests of teacher and student means nothing less than subversion must be permitted in the public school classrooms.

**CONCLUSION**

In sum, the public education program is governed by the logic of the prisoner's dilemma and the nature of public goods. A certain form of education may be a public good, and a governmental effort to provide this is justified. Yet given the nature of the prisoner's dilemma, it is rational for people to defect, and thus it is predictable that some people will defect. One form of this defection is the provision of a subversive education. Children have a need to know about the reality of the prisoner's dilemma and parents and teachers will seek to protect their children and pupils against the possibility of becoming a prisoner's dilemma "sucker." The child's interest in being protected and the parents' and teachers' interests in protecting the child are moral rights. These are constitutionally anchored and should receive constitutional protection. One way to provide this protection is to recognize the right of parents to educate their children privately and subversively and to recognize a limited right of academic freedom for public school teachers to introduce the cautions associated with a subversive education into the public school classroom.