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ARTICLE

A Contemporary Proposal For Reconciling the Free Speech Clause With Curricular Values Inculcation in the Public Schools

*Susan H. Bitensky**

"The Child is father of the Man;
And I could wish my days to be
Bound each to each by natural piety."
—— William Wordsworth¹

That we cannot be adults without first having been children is, by nature, the human condition; that we are blessed with Wordsworth's "natural piety" is far less certain. The world has seen no great surplusage of piety or, more laicallly, moral conscience. Barbaric historical phenomena such as slavery, the holocaust and the murderous nationalism of the 1990s,² as well as less horrific travesties such as Watergate and insider trading, stand as grim testaments that morality has hardly been a consistent feature of history. Yet, as scarce a commodity as moral uprightness often appears to be, and as dim as its prospects may seem for gaining

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The author dedicates this Article to her father, the late Dr. Reuben Bitensky, who, by his example no less than his word, taught those around him the value of human dignity and compassion, and to her husband, Dr. Elliott L. Meyrowitz, who first acquainted the author with the notion that law can play a catalytic role in popular norm formation.

1 William Wordsworth, *My Heart Leaps Up When I Behold*, in *MAGIC CASEMENTS* 640-41 (George S. Carhart & Paul A. McGhee eds., The Macmillan Co. 1933).

2 For a description of the fratricidal nationalism that has recently plagued many areas of the globe, see Kenneth Auchincloss, *A Fratricidal Year*, *NEWSWEEK*, Jan. 4, 1993, at 24-29.

the day, Americans have long been preoccupied with and, periodically, quite agitated over the treatment of morality and values in their children's education.³ There is a rather touching optimism in this preoccupation, as if the adult psyche cannot relinquish hope that moral quality will prevail, in spite of the historical testaments, if only the children can be properly taught.

This preoccupation is especially warranted now and demands heightened attention in light not only of whole countries in search of their respective identities after the end of the Cold War, but also due to "accumulating evidence of a moral decline" permeating all levels of society within the United States during recent years.⁴ Government officials, business leaders, and ordinary adults have accepted rule-breaking and selfishness as a way of life in increasing numbers.⁵ Worse still, "general youth trends present a darker picture";⁶ the nation's youth have exhibited a disturbing tendency toward violence, vandalism, stealing, cheating, peer cruelty and diminishing civic responsibility, among other antisocial and amoral behaviors.⁷

While a common concern for children's moral education has persisted even in an atmosphere where adults are not necessarily setting the best example, there has hardly been a public consensus on how to go about achieving the next generations' moral improvement. This Article identifies the basic pedagogical conflict that underlies much of the dissension and examines its manifestation as a tension within American constitutional law under the First Amendment's Free Speech Clause.⁸ Specifically, the Article examines the pedagogical dilemma over whether children's moral education, through elementary and secondary level curricula,

3 Kenneth L. Woodward, *What Is Virtue?*, NEWSWEEK, June 13, 1994, at 38. See *infra* notes 21-22, 24-54, 121-283 and accompanying text.

4 THOMAS LICKONA, EDUCATING FOR CHARACTER: HOW OUR SCHOOLS CAN TEACH RESPECT AND RESPONSIBILITY 12 (1991); Howard Fineman, *The Virtuecrats*, NEWSWEEK, June 13, 1994, at 31.

5 LICKONA, *supra* note 4, at 12.

6 *Id.* at 13.

7 *Id.* at 13-19. See also WILLIAM KILPATRICK, WHY JOHNNY CAN'T TELL RIGHT FROM WRONG: MORAL ILLITERACY AND THE CASE FOR CHARACTER EDUCATION 14-15, 100 (1992) (describing the high incidence of serious crimes perpetrated in public high schools and a rise in teenage suicides, drug and alcohol use, and sexual activity); Melinda Henneberger with Michael Marriott, *For Some, Youthful Courting Has Become a Game of Abuse*, N.Y. TIMES, June 11, 1993, at A1, A14; Barbara Kantrowitz, *Wild in the Streets*, NEWSWEEK, Aug. 2, 1993, at 40 (describing a national epidemic of teen violence).

8 The Free Speech Clause states that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

should be accomplished by inculcating selected values or, instead, by teaching processes of reasoning about values while avoiding the transmission of any definite moral content.⁹ The latter technique has generally been spared accusations of constitutional infirmity¹⁰ since it does not require that children consciously learn a preference for one value over another and, therefore, ostensibly leaves students free to believe in and propound whatever moral code they choose.¹¹ Values inculcation, in contrast, does require that children learn a preference for one value over another¹² and has drawn criticism as potentially violating children's First Amendment rights to believe in and express their own views.¹³ For those, like this author, who conclude that values transmission is an indispensable part of morals education at these stages of schooling, the legal question arises as to whether values inculcation can satisfy the mandate of the Free Speech Clause or whether the less pedagogically effective noninculcative approach, that conceives of the school as an unbiased "marketplace of ideas,"¹⁴ is the only constitutional means of moral education.¹⁵

9 See *infra* notes 41-113 and accompanying text.

10 DAVID MOSHMAN, CHILDREN, EDUCATION, AND THE FIRST AMENDMENT: A PSYCHOLEGAL ANALYSIS 164-65 (1989). Cf. Stanley Ingber, *Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 66-67, 72-73 (assuming that value neutral education is consistent with free speech principles and arguing that, therefore, schools should at least create the illusion that this type of education is being provided); Nat Stern, *Challenging Ideological Exclusion of Curriculum Material: Rights of Students and Parents*, 14 HARV. C.R.-C.L. L. REV. 485, 487 (1979) (positing that the First Amendment tenet of maintaining society as a marketplace of ideas is applicable to the nation's classrooms). But see R. George Wright, *Free Speech Values, Public Schools, and the Role of Judicial Deference*, 22 NEW ENG. L. REV. 59, 74 (1987) (suggesting that insofar as a value-neutral education or a marketplace of ideas school environment may leave students "without any coherent standpoint at all," such pedagogical techniques may be objectionable as resulting in student's "free speech capacity impairment").

11 See *infra* notes 41-48, 50-51 and accompanying text.

12 See *infra* note 52 and accompanying text.

13 See *infra* notes 53-54, 161, 163-64, 170, 201-02 and accompanying text.

14 The "marketplace of ideas" metaphor became part of common legal discourse after it was invoked by Justice Holmes in his dissenting opinion in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting and joined by Brandeis, J.). See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1, at 785-86 (2d ed. 1988) (referring to Justice Holmes' *Abrams* dissent as the source of the metaphor in American constitutional jurisprudence). The phrase has frequently been used to describe a pedagogical approach akin to values clarification or cognitive moral development, where all relevant viewpoints are entertained with equal seriousness as part of the education process. See *infra* text accompanying notes 41-48, 50-51.

15 See *infra* notes 114-361 and accompanying text. As a general matter, whenever government supports or promotes some speech but not other speech, the government's action "can be analyzed under equal protection as well as first amendment principles." 4

This Article takes the position that counterposing the inculcative and noninculcative approaches as mutually exclusive and irreconcilable options creates a false and educationally detrimental dichotomy.¹⁶ Public elementary and secondary schools can teach value preferences that are essential to the formation of a moral human being and use reasoning as part of the inculcative process; moreover, the inculcative function need not preclude the schools from providing a marketplace of ideas in the sense of exposing children to a broad range of conceptual and factual material.¹⁷ Although this pedagogical approach involves values inculcation in a significant way, the premise of this Article is that the inculcative element¹⁸ will not violate the Free Speech Clause

RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.11 (2d ed. 1992). The Fourteenth Amendment's Equal Protection Clause declares that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Thus, if the Court finds that such governmental discrimination among speakers or would be speakers violates the Free Speech Clause, it could also hold that the discrimination violates the Equal Protection Clause. 4 NOWAK & ROTUNDA, *supra*, § 20.11.

Yet, as Justice Rehnquist has aptly remarked, the schools are "the one public institution which, by its very nature, is a place for selective conveyance of ideas." Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 915 (1982) (Rehnquist, J., dissenting). The accuracy of these remarks is confirmed by even the routine decisions which schools must make in prescribing curriculum and textbooks. Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 568 (1980). In addition, as Part III of this Article demonstrates, the Supreme Court has, in the final analysis, given the schools considerable latitude under the Free Speech Clause to inculcate values in students. See *infra* text accompanying notes 114-283. These circumstances make a requirement that there be some "constitutional equality of status" as between the government as educator and all other contending voices inappropriate at precollege levels. Shiffrin, *supra*, at 572, 578-79, 581. But see Tyll van Geel, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197, 289-92 (1983) (rejecting the proposition that public schools should inculcate values and arguing that inculcation should be supplanted by a "fairness principle" such that opposing views are presented to students). Due to these considerations and because the precedent relevant to values inculcation has arisen in relation to the Free Speech Clause rather than the Equal Protection Clause, this Article is confined to analysis only under the former provision.

16 See *infra* notes 359-61 and accompanying text.

17 See *infra* note 361 and accompanying text.

18 It may be that, in this context, the term "inculcative" does not do justice to the pedagogical model advocated by this author. The dictionary defines "inculcation" as the pedagogical technique of "teach[ing] and impress[ing] by frequent repetitions or admonitions." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 611 (9th ed. 1988). Values inculcation, then, literally means the teaching and impressing of values upon students by frequent repetitions or admonitions.

It is true that the educational model advanced here shares with the dictionary definition of values inculcation the same basic goal — imparting definite values preferences to children. It is also true that both the suggested educational model and values inculcation share the same pedagogical technique of requiring the teacher to express values

if the values transmitted are those which will further the maintenance of a civilized social order and promote democracy.¹⁹ The Free Speech Clause will not be violated because such values transcend the status of debatable values and have effectively become "ideational prerequisites" to collective human existence, analogous to life's material prerequisites.²⁰ Those values may be found in the U.S. Constitution and other domestic laws. However, ideational prerequisites find their fullest expression in international human rights laws.

The Article is divided into four parts that elaborate and develop these themes. Part I provides an historical backdrop of the American morals education experience as it relates to the legal system. Part II examines the nature of children's mental operations and describes the conflict among education and child psychology experts over the most efficacious pedagogical techniques for transmitting lessons in morality to elementary and secondary school students. Part III identifies the jurisprudential counterpart to this pedagogical conflict under the Free Speech Clause and analyzes United States Supreme Court precedent pertinent to the constitutionality of morals education under the clause. Finally, Part IV proposes a solution to pedagogical and constitutional tensions that would have public schools, in their curricula, provide for reasoned inculcation of ideational prerequisites at the elementary and

preferences to children. See, e.g., *Ambach v. Norwick*, 441 U.S. 68, 77-80 (1979) (stating that teachers inculcate values by presenting, explaining, and promoting values and by serving as role models). However, the model envisions that the teacher's expression of a values preference should be accompanied by rational and informed argumentation supportive of the preference. Repetition and exhortation, if any, would play no more than a secondary role.

Nevertheless, the phrase "values inculcation" and variations thereon will be used throughout this Article in referring to the model of morals education proposed herein. The reason for adhering to this imprecise usage is, ironically, to maintain clarity by employing the same terminology as is found in pertinent judicial opinions. The Supreme Court commonly uses "inculcation" to denote the teacher's communication of value preferences to children; in these opinions there is no discussion of whether the educational goal should be accomplished by repetition and admonition. E.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986); *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 869 (1982); *Ambach*, 441 U.S. at 77-80. Indeed, the inference sometimes goes the other way, in that the Court frowns upon coercive pedagogical techniques even while accepting transmission of preferred values in the classroom. See *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640 (1943) (stating that schools may foster the value of national unity by "persuasion and example," but not by a compulsory flag salute).

19 See *infra* notes 272, 278-80 and accompanying text.

20 See *infra* notes 348-49 and accompanying text.

secondary levels while still acquainting schoolchildren with the multifaceted stores of data and thinking that constitute human knowledge. The inculcation of ideational prerequisites should give to the children of today the wherewithal on the morrow to preserve civilization, and, indeed, life itself, in an age of intensifying international interdependency and technological invasiveness.

I. THE HISTORICAL BACKDROP OF AMERICAN MORALS EDUCATION IN RELATION TO THE LEGAL SYSTEM

As early as 1647, the colony of Massachusetts enacted a law requiring that children be taught such virtues as would enable them to escape the clutches of "the old deluder Satan."²¹ The statute is representative of the predominating colonial attitude that linked children's moral development with their religious indoctrination.²² The American revolution and formation of the new republic gave rise to the constitutionally mandated separation of church and state²³ and a concomitant perception of the need for values education which would also serve the purposes of the federal Constitution and the republic.²⁴ Prominent Founding Fathers and early political leaders became proponents of molding a republican character in the nation's youth as a way of assuring the perpetuation of democracy and its governmental institutionalization.²⁵ Noah Webster, for example, devised a "Federal Catechism" to teach children republican values.²⁶ Benjamin Rush went so far as to advocate that future generations be turned into veritable "republican machines."²⁷ Thomas Jefferson envisioned a people en-

21 Massachusetts Education Law of 1647, *reprinted in* READINGS IN PUBLIC EDUCATION IN THE UNITED STATES: A COLLECTION OF SOURCES AND READINGS TO ILLUSTRATE THE HISTORY OF EDUCATIONAL PRACTICE AND PROGRESS IN THE UNITED STATES 18-19 (Edward P. Cubberley ed., 1934) (citing II RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 203 (1853)).

22 Charles R. Kesler, *Education and Politics: Lessons from the American Founding*, 1991 U. CHI. LEGAL F. 101, 112; Joel S. Moskowitz, *The Making of the Moral Child: Legal Implications of Values Education*, 6 PEPP. L. REV. 105, 108 (1978); Michael A. Rebell, *Overview: Education and the Law: Schools, Values, and the Courts*, 7 YALE L. & POL'Y REV. 275, 279 (1989).

23 The federal Bill of Rights provides that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I.

24 Kesler, *supra* note 22, at 112; Rebell, *supra* note 22, at 279.

25 LAWRENCE A. CREMIN, *AMERICAN EDUCATION: THE NATIONAL EXPERIENCE 1783-1876* 2-5 (1980).

26 DAVID TYACK ET AL., *LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785-1954* 23-24 (1987).

27 Benjamin Rush, *A Plan For The Establishment of Public Schools and The Diffusion of*

lightened by those values essential to safeguard democracy.²⁸ George Washington believed that education should convey "that virtue or morality [which] is a necessary spring of popular government."²⁹ Nearly a century later, and in accord with the views of the Founders, Abraham Lincoln beseeched education's devotees to prosteletize a "political religion" adulating the country's Constitution and other laws.³⁰

The educational philosophy of the nation's forefathers may, in retrospect, be deemed prophetic. Geographic expansion, industrialization and the flow of immigrants to the United States impressed upon later education leaders the need for imbuing children with the brand of republican values touted at the founding as essential to forging a distinctly American identity.³¹ The common school movement was a response to the growing need for a republican credo and national persona that would unify an increasingly diverse and scattered population.³²

In the nineteenth century, the common schools embarked upon the mission of teaching children values thought to foster republican character. A values curriculum evolved that included teaching honesty, generosity, charity, individualism, self-reliance, discipline, self-control, industriousness, obedience, patriotism, democracy and/or civic responsibility.³³ The endeavor was considered relatively benign and uncontroversial, at least insofar as it did not stray into religious content.³⁴

Nevertheless, while generations of American schoolchildren gathered at the common schools to sing in unison the praises of republican virtues and memorize the pledge that we are "one

Knowledge in Pennsylvania; To Which Are Added, Thoughts Upon the Mode of Education, Proper in a Republic. Addressed to the Legislature and Citizens of the State, reprinted in ESSAYS ON EDUCATION IN THE EARLY REPUBLIC 1, 17 (Frederick Rudolph ed., 1965) (1786).

28 Thomas Jefferson, *A Bill For The More General Diffusion of Knowledge*, reprinted in THOMAS JEFFERSON: WRITINGS 365 (Merrill D. Peterson ed., 1984) (1779).

29 George Washington, *Farewell Address*, reprinted in GEORGE WASHINGTON: A COLLECTION 512, 521-22 (W.B. Allen ed., 1988) (1796).

30 Abraham Lincoln, *Address To The Young Men's Lyceum of Springfield, Illinois: The Perpetuation of Our Political Institutions*, reprinted in I THE COLLECTED WORKS OF ABRAHAM LINCOLN 1824-1848, 108, 112 (Roy P. Basler ed., 1953) (1838).

31 Rebell, *supra* note 22, at 279-80.

32 *Id.* at 280.

33 *Id.*

34 *Id.* at 279-82. The common school movement of the late nineteenth and early twentieth centuries injected religion, especially Protestantism, into the curriculum. Not surprisingly, this aspect of the common school agenda did meet with considerable controversy. *Id.*

nation indivisible," the unfolding history of public schooling also began to tell a different tale. This counterpoint has resounded dramatically in the courts, where litigants have engaged in an ongoing dispute over the values that should be taught in the public elementary and secondary schools. Although the basic controversy has remained constant, the subject matter pitting the parties against each other has frequently shifted over time.³⁵ For instance, during the two world wars, the values of patriotism and national identity became the center of controversy and a focal point for litigation.³⁶ More recently, the courts have been drawn into the debate over whether schools should give children access to books that contain profanity or sexual references.³⁷

A recurrent and volatile theme of the values debate has been engendered by the inclusion of evolution in the curriculum.³⁸ In the earlier part of this century, the evolution controversy burst upon the scene with a theatrical flourish in the famous "monkey" trial of John Thomas Scopes for the "crime" of teaching evolution in Tennessee's public schools.³⁹ Since that time, the controversy over evolution in the public schools has persisted, producing two U.S. Supreme Court decisions as recently as the 1980s.⁴⁰

Despite the shifting focus of the subject matter of the litiga-

35 See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Board of Educ. Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982); *Ambach v. Norwick*, 441 U.S. 68 (1979); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969); *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

36 See *Barnette*, 319 U.S. at 624 (invalidating under the Free Speech Clause a compulsory flag salute intended to instill feelings of national unity); *Meyer*, 262 U.S. at 390 (invalidating, pursuant to substantive due process doctrine, a prohibition on teaching foreign languages intended to discourage foreign ideas).

37 See *Pico*, 457 U.S. at 853 (ruling under the Free Speech Clause that books containing profanity and sexual references could not be removed from public school libraries if the purpose of the removal was to limit access to ideas with which school authorities disagreed, but that the books could be removed in order to protect children from materials educationally unsuitable to their age).

38 CHARLES DARWIN, *ON THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION* *passim* (Gryphon Editions, Inc. 1987) (1859).

39 *Scopes v. State*, 289 S.W. 363 (Tenn. 1927).

40 See *Edwards v. Aguillard*, 482 U.S. 578 (1987) (holding that a state could not, in keeping with the Establishment Clause, insist on teaching the creationist view of the origins of life whenever evolutionary theory was taught in the public schools); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (holding invalid under the Establishment Clause a statute that banned from use in public schools any textbooks advocating that mankind evolved from a lower order species).

tion, the parties in these cases have all raised essentially the same fundamental question: should public elementary and secondary schools teach values and, if so, whose values should be taught? Expressed in their own jargons and conceptual frameworks, this same question has fractionalized and vexed education and child psychology experts and legal scholars alike.

II. THE CONFLICT OVER TEACHING VALUES AMONG PEDAGOGICAL AND PSYCHOLOGY EXPERTS

This pedagogical question has given rise to markedly disparate schools of thought among education and child psychology experts concerned with children's morality. At one end of the spectrum, advocates of values clarification emphasize the procedures by which a child comes to adopt his or her own values. The teacher is not to teach right from wrong, but, rather, to educate the child to a *process* for deciding right from wrong without intentional adult normative input.⁴¹ In a similar vein, advocates of cognitive moral development hold that by reasoning through certain hypothetical dilemmas, children will pass through six stages of moral development, learning in each stage to reason in ways ethically superior to the preceding stage.⁴² Values clarification and cognitive moral development theories, which have been influential during the past three decades,⁴³ maintain that there is and can be no one set of

41 The first widely disseminated exposition of values clarification came with the publication of L. RATHS ET AL., *VALUES AND TEACHING: WORKING WITH VALUES IN THE CLASSROOM* (1966). Values clarification has been generally understood to promote a value-free or relativistic values education. AMY GUTMANN, *DEMOCRATIC EDUCATION* 55-56 (1987); KILPATRICK, *supra* note 7, at 15-17, 22, 80-82; LICKONA, *supra* note 4, at 10-11; MOSHMAN, *supra* note 10, at 158-59; Moskowitz, *supra* note 22, at 115-16; Andrew Oldenquist, "Indoctrination" and *Societal Suicide*, 63 *THE PUBLIC INTEREST* 81, 82 (1981); Rebell, *supra* note 22, at 285-86; Ben Wildavsky, *Moral Education: Can You Not Teach Morality in Public Schools?*, 2 *THE RESPONSIVE COMMUNITY* 46, 46-47 (1991/1992). But see HOWARD KIRSCHENBAUM, *ADVANCED VALUE CLARIFICATION* 12-13 (1977) (arguing that values clarification has been unfairly criticized as encouraging amorality since, under his interpretation, values clarification reasoning implicitly conveys the values of justice, equality, and freedom).

42 Lawrence Kohlberg & Rochelle Mayer, *Development as the Aim of Education*, 42 *HARV. EDUC. REV.* 449, 483-94 (1972). See also Moskowitz, *supra* note 22, at 116, 117 & n.62; Rebell, *supra* note 22, at 286-87.

43 Both values clarification and cognitive moral development initially "came into vogue in the nation's public schools in the 1960s and 1970s." Wildavsky, *supra* note 41, at 46-47. See also KILPATRICK, *supra* note 7, at 15, 78-80. Professor Amy Gutmann, in 1987, described values clarification as "enjoy[ing] widespread use in schools throughout the United States." GUTMANN, *supra* note 41, at 55. But see Rebell, *supra* note 22, at 287 (asserting that since 1989, American schools have not been widely adopting values clarifi-

"right" values for the schools to pass on to their charges.⁴⁴ The underlying message is that all values may be seriously entertained as long as the child reasons in accordance with the approved process of thinking about moral problems.⁴⁵ There is, admittedly, a certain appeal in these approaches: they appear to be faultlessly democratic,⁴⁶ respectful of juvenile dignity and autonomy,⁴⁷ and conducive to the development of reasoning capacities in relation to moral issues.⁴⁸

Nevertheless, for many, the values clarification and cognitive moral development approaches are troubling. First, it remains questionable whether it is even humanly possible to teach without at least unconsciously transmitting the values of the teacher or school.⁴⁹ Second, values clarification and cognitive moral development may encourage in children a false subjectivism or relativism, giving rise to the logical inference that no one set of values can

cation or cognitive moral development).

44 With respect to values clarification theorists' disapproval of telling children that some values are better than others, see GUTMANN, *supra* note 41, at 55-56; KILPATRICK, *supra* note 7, at 80-82; LICKONA, *supra* note 4, at 10-11; MOSHMAN, *supra* note 10, at 158-59; Moskowitz, *supra* note 22, at 115-16; Oldenquist, *supra* note 41, at 82; Rebell, *supra* note 22, at 285-86; Wildavsky, *supra* note 41, at 46-47. For a depiction of cognitive moral development adherents as holding the same attitude, see KILPATRICK, *supra* note 7, at 82-85; LICKONA, *supra* note 4, at 12; MOSHMAN, *supra* note 10, at 158-59, 164; Moskowitz, *supra* note 22, at 117 & n.62; Oldenquist, *supra* note 41, at 82; Rebell, *supra* note 22, at 286-87; Wildavsky, *supra* note 41, at 47. *But see* GUTMANN, *supra* note 41, at 60-64 (contending that the cognitive moral development approach can at least further "morality of association").

45 LICKONA, *supra* note 4, at 11; MOSHMAN, *supra* note 10, at 164; Moskowitz, *supra* note 22, at 118-19. *See also* GUTMANN, *supra* note 41, at 55-56 (acknowledging that values clarification, but not cognitive moral development, instructs children that all values may be equally valid). *But see* Ingber, *supra* note 10, at 28-29 (arguing that value neutrality itself promotes a bias, *i.e.*, a liberal bias that all values are equally valid).

46 van Geel, *supra* note 15, at 290-91.

47 *Id.* at 253. *See also* JOSEPH TUSSMAN, GOVERNMENT AND THE MIND 67 (1977) (describing the variety of views which hold that "student-centered voluntarism" is necessary for the preservation of "the autonomous child").

48 RATHS ET AL., VALUES AND TEACHING: WORKING WITH VALUES IN THE CLASSROOM 249-64, 325 (2d ed. 1978); Kohlberg & Mayer, *supra* note 42, at 486-94. *But see* LICKONA, *supra* note 4, at 238-48 (pointing out that although cognitive moral development advances children's ability to reason morally, values clarification does not have the same potential).

49 MICHAEL W. APPLE, IDEOLOGY AND CURRICULUM 1-2 (2d ed. 1990); GUTMANN, *supra* note 41, at 55; Ingber, *supra* note 10, at 28-30; MOSHMAN, *supra* note 10, at 160. *See also* MORRIS JANOWITZ, THE RECONSTRUCTION OF PATRIOTISM 163 (1983) (observing that the very organization and operation of the schools is viewed by some as a "hidden curriculum"); Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1654 (1986) (noting that it has been argued in litigation that a value-free education is not possible).

be right.⁵⁰ Such a viewpoint presumably would allow the child to conclude that apartheid is as acceptable as racial equality and integration, or that fascism is an acceptable alternative to democracy.⁵¹

On the other side of the spectrum from the purely process-oriented pedagogical techniques is the inculcative substantive approach that teachers should express a preference for certain values and attempt to transmit those preferred values to their students.⁵² While preferred values inculcation aims at avoiding the moral relativism that values clarification and cognitive moral development are likely to cause, the idea of government imposing a "right" set of values also raises the spectre of abandoning our children to tyrannical indoctrination and docile uniformity.⁵³ Moreover, values inculcation necessarily poses that seemingly unsolvable conundrum of whose values shall be taught; for, doubtless, virtually every value is objectionable to someone.⁵⁴

Is the values debate as it relates to the teaching of elementary and secondary level children a quandary that defies human wisdom and leaves schools with a nightmarish choice between turning out process-minded, amoral relativists or unreflecting, opinionated automatons? This Article takes the position, in common with a number of education and child psychology experts, that while values clarification and cognitive moral development theories may

50 See *supra* notes 44-45 and accompanying text.

51 Professor Gutmann points out in this regard:

Treating every moral opinion as equally worthy encourages children in the false subjectivism that "I have my opinion and you have yours and who's to say who's right?" . . . The toleration and mutual respect that values clarification teaches is too indiscriminate for even the most ardent democratic to embrace. If children come to school believing that "blacks, Jews, Catholics, and/or homosexuals are inferior beings who shouldn't have the same rights as the rest of us," then it is criticism, not just clarification, of children's values that is needed.

GUTMANN, *supra* note 41, at 56.

52 WILLIAM J. BENNETT, *OUR CHILDREN AND OUR COUNTRY* 71, 75, 78-85 (1988); KILPATRICK, *supra* note 7, at 15-16, 86, 239-43; LICKONA, *supra* note 4, at 38-39, 43-48, 162-84; DAVID E. PURPEL, *THE MORAL & SPIRITUAL CRISIS IN EDUCATION* 113-39 (1989); Gerald Grant, *Schools that Make an Imprint: Creating a Strong Positive Ethos*, in *CHALLENGE TO AMERICAN SCHOOLS* 127, 142-43 (1985); Wildavsky, *supra* note 41, at 54.

53 See KILPATRICK, *supra* note 7, at 113 (conceding that character education by means of morals transference carries the danger of "serving totalitarian causes"); TUSSMAN, *supra* note 47, at 80-83 (noting the potential of the state as teaching zealot to "dutifully warp the mind to its decrees").

54 Robert M. Gordon, *Freedom of Expression and Values Inculcation in the Public School Curriculum*, 13 J.L. & EDUC. 523, 555 (1984).

contribute to improving children's processes of moral reasoning, educating elementary and secondary level schoolchildren toward meaningful moral maturity cannot take place without values inculcation.⁵⁵

This position arises from several considerations. As discussed above, values clarification and cognitive moral development, without values inculcation, may not be possible to effectuate as a practical matter and, even if it were possible, may tend dangerously toward creating relativistic attitudes in children.⁵⁶ Once created, a relativistic mindset does not operate in a vacuum, but to the contrary, is strongly suspected of contributing to a deterioration in moral behavior.⁵⁷

However, it is not simply the inadequacies of values clarification or cognitive moral development that, by default, make values inculcation an essential element of morals education. Rather, values inculcation at the elementary and secondary school levels has inherently positive benefits. Perhaps the foremost positive reason recommending values inculcation at these levels is that it is children to whom the schools are trying to give an education in morals. The poetic truism that "[t]he Child is father of the Man"⁵⁸ signifies neither children's superiority nor equivalence to adults; children are not pint-size replicas of adults.⁵⁹ Rather, children begin life in a state of almost helpless physical and intellectual incapacity and are ever in the process of evolving to the capacity and self-sufficiency that comes with normal adulthood.⁶⁰ They

55 *E.g.*, KILPATRICK, *supra* note 7, at 15-16, 86, 239-43; LICKONA, *supra* note 4, at 238-67, 326-31; James J. Digiacomo, *Schools and Moral Development*, in *CARING FOR AMERICA'S CHILDREN* 159, 165-69 (Frank J. Macchiarola & Alan Gartner eds., 1989); Moskowitz, *supra* note 22, at 136-37; *see* GUTMANN, *supra* note 41, at 50-64 (suggesting that cognitive moral development may make a limited contribution to children's moral maturation in conjunction with the transmission of certain values); MOSHMAN, *supra* note 10, at 162-64 (observing that the stages of a child's cognitive moral development are facilitated and actualized by some values inculcation); *cf.* KIRSCHENBAUM, *supra* note 41, at 12-13 (advancing the thesis that the methodology of values clarification must and should have the effect of inculcating certain values).

56 *See supra* notes 50-51 and accompanying text.

57 LICKONA, *supra* note 4, at 9-21.

58 *See supra* note 1 and accompanying text.

59 HERBERT GINSBURG & SYLVIA OPPER, *PIAGET'S THEORY OF INTELLECTUAL DEVELOPMENT* 237-38 (3d ed. 1988); Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights"*, 1976 B.Y.U. L. REV. 605, 651 (citing to J. GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 13 (1973)).

60 HANS G. FURTH, *PIAGET AND KNOWLEDGE: THEORETICAL FOUNDATIONS* 43-143 (2d ed. 1981); Hafen, *supra* note 59, at 648; Wright, *supra* note 10, at 69. *See* GINSBURG &

remain vulnerable and dependent upon adult direction for their welfare during childhood. The U.S. Supreme Court has been sensitive to this weakness, recognizing that children, simply by virtue of being children, are susceptible to dangers which adults do not risk and may therefore deserve special solicitude from the law.⁶¹

The most significant consideration for purposes of this discussion is that children's thought processes and cognitive perspectives are qualitatively different from those of an adult, thereby limiting children's ability to comprehend and judge.⁶² The confines of this Article make it impossible to undertake a comprehensive survey of all those characteristics which distinguish the childish intellect; however, discussion of a representative sampling of them reveals that there is an empirical basis for the conclusion that values inculcation must be a part of effective morals education.

Jean Piaget, a leading authority on children's mental development,⁶³ has identified an extensive catalogue of such character-

OPPER, *supra* note 59, at 26-207; THE PSYCHOLOGY OF PRESCHOOL CHILDREN *passim* (A.V. Zaporozhets & D.B. Elkonin eds. and John Shybut & Seymore Simon trans., 1971).

61 See, e.g., FCC v. Pacifica Found., 438 U.S. 726, 747-50 (1978) (holding that an FCC order regulating a radio program which contained pervasively sexual and excretory language did not violate the First Amendment's Free Speech Clause because, although adults might have a constitutionally protected right to read such materials, the broadcast was accessible in private homes and especially to children); Ginsberg v. New York, 390 U.S. 629, 637-43 (1968) (upholding constitutionality of a New York statute prohibiting sale of "girlie" magazines to minors based upon the theory that children's freedom of expression is not coextensive with that of adults); Prince v. Massachusetts, 321 U.S. 158, 168-170 (1944) (ruling that Massachusetts laws may constitutionally proscribe children's proselytizing on the street without violating their right to free exercise of religion or to equal protection because "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults").

62 JEAN PIAGET, JUDGMENT AND REASONING IN THE CHILD *passim* (Marjorie Warden trans., Littlefield, Adams & Co. 1976) (1928) [hereinafter PIAGET, JUDGMENT AND REASONING]; JEAN PIAGET, THE CHILD'S CONCEPTION OF THE WORLD *passim* (Joan Tomlinson & Andrew Tomlinson trans., Littlefield, Adams & Co. 1979) (1929) [hereinafter PIAGET, CONCEPTION OF THE WORLD]; JEAN PIAGET, THE LANGUAGE AND THOUGHT OF THE CHILD *passim* (Marjorie Gabain and Ruth Gabain trans., New American Library, Inc. 1974) (2d ed. 1930) [hereinafter PIAGET, LANGUAGE AND THOUGHT]. See also FURTH, *supra* note 60, at 17-18, 246-48, 250; GINSBURG & OPFER, *supra* note 59, at 6, 20-23, 26-207, 213-33. But see DAVID WOOD, HOW CHILDREN THINK & LEARN 25, 33, 44-54, 72-74 (1988) (theorizing that it is not the inherent qualitative level of the child's mental operations that distinguish childhood intellect, but, rather, the child's lack of expertise and exposure to cultural influences).

63 Although much of Jean Piaget's seminal work on children's mental structure was published in the 1920s, his theory of cognitive development is still viewed as a "particularly important theoretical guide to a child's thinking processes . . ." and as the "foundation for much of the recent work in the field . . ." COMMITTEE ON CHILD PSYCHIATRY, GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, HOW OLD IS OLD ENOUGH? 20

istics and discovered that they tend to manifest themselves within certain age ranges. For example, children's very notion of what thinking is changes dramatically as they mature. At about six years of age children exhibit what Piaget termed "realism" — the attribution of human intention and psychical life to physical reality, resulting in children's inability even to recognize thought as their own inner voice separate and apart from the external world.⁶⁴ At around eight years of age, although adult influences may cause the child to learn that people think with their brains, previous convictions persist so that the child continues to materialize thought as existing in his or her surroundings.⁶⁵ Generally speaking, it is not before the age of eleven that children are able to move beyond realism and to reliably distinguish thought from things.⁶⁶

Realism, in turn, distorts the child's perceptions and data base

(1989). In particular, those of his findings discussed in this Article are still widely regarded as valid by psychologists. Telephone Interview with Dr. Milton V. Kline (Sept. 17, 1994). This is not to say, however, that all of Piaget's ideas have been universally accepted. See, e.g., MARGARET DONALDSON, CHILDREN'S MINDS 11-25 (1978); LEV VYGOTSKY, THOUGHT AND LANGUAGE 12-57 (Alex Kozulin ed. & trans., 1986); WOOD, *supra* note 62, at 37-85, 147-80; see generally JEAN PIAGET: CONSENSUS AND CONTROVERSY *passim* (Sohan Modgil & Celia Modgil eds., 1982) (providing critical as well as laudatory assessments of Piaget's theories).

64 PIAGET, CONCEPTION OF THE WORLD, *supra* note 62, at 38-47.

65 *Id.* at 38, 49-54. Intrigued by Piaget's findings, but somewhat reluctant to believe that my son, at the age of eight years and ten months, could be so unsophisticated as to project his thoughts and feelings onto outside objects, I asked him a few questions of the type posed by Piaget to the children he was studying. E.g., *id.* at 174-87. The following exchange resulted:

AUTHOR: If I prick a dog, does the dog feel it?

WILLIAM: Yes.

AUTHOR: Well, how about if I prick a cloud?

WILLIAM: No. A cloud is not living.

AUTHOR: Can the cloud feel the wind or not?

WILLIAM: Yes, it can.

AUTHOR: Can a bench feel anything?

WILLIAM: No.

AUTHOR: If someone burned the bench, would the bench feel that?

WILLIAM: Yes. The bench would hurt. [Pause] No. The bench isn't alive.

Interview with William Meyrowitz, in Birmingham, Mich. (Mar. 4, 1993). Incidentally, at the time of this interview, William was in the third grade and receiving grades no lower than Bs on his report card. Thus, the questions revealed continued exteriorization of thoughts and feelings by a good student. Although William was able to correct himself about the bench, he did not see the need to do so in relation to the cloud feeling the wind. Perhaps this inconsistency reflects that he had begun the transition away from attributing his inner mental life to outer objects.

66 PIAGET, CONCEPTION OF THE WORLD, *supra* note 62, at 54-55.

and constrains reasoning power. Piaget found that, among other things, realism gives rise to the following phenomena in children: the conviction that they possess magical power enabling them to command the external world;⁶⁷ an inability to reason by means of logical relationships, i.e., by generalization and deduction;⁶⁸ the illusion that their own subjectivity is the only conceivable viewpoint, requiring neither introspection nor proof;⁶⁹ and animism such that children regard many inert objects⁷⁰ as living and conscious and endow those objects with a purpose that is obedient to mankind's needs and wishes.⁷¹

Of particular interest here is children's incapacity for logical thinking. Piaget traced this incapacity not only to realism and animism, but also to the narrow field of attention upon which preteenage children⁷² base their perceptions of the environment. By narrow field of attention, Piaget meant that children perceive things "in light of the moment, without order"⁷³ and experience difficulty in thinking of more than one thing at a time.⁷⁴ The result is syncretism and transduction: "By the mere fact of not being considered in their internal relations, but only as presented by immediate perception, things are either conglomerated into a confused whole (syncretism), or else considered one by one in a

67 *Id.* at 154-58, 166-68.

68 *Id.* at 158-59, 166-68.

69 *Id.* at 167, 239-40; PIAGET, JUDGMENT AND REASONING, *supra* note 62, at 216-17.

70 PIAGET, CONCEPTION OF THE WORLD, *supra* note 62, at 169. *See supra* note 65 (reporting my eight year old son's view that a cloud can "feel" the wind). Again experiencing some disbelief that Piaget's discoveries in the 1920s could hold true for modern day children, I asked my eight year old son whether he thinks the sun is alive or not. I fully expected a negative answer since William prides himself on his interest and academic achievement in science. Indeed, he has studied the solar system in school and he and I have spent many hours together poring over books about astronomy. William, however, stated with great certainty and some disdain for the stupidity of my question that the sun is alive. When I inquired as to his reasons for this conclusion, he replied, "The sun is alive because stars die; also, the sun has heat." Interview with William Meyrowitz, in Birmingham, Mich. (Mar. 2, 1993). It is interesting to note that although William has been exposed to a wealth of age-appropriate scientific information about the sun, he has apparently absorbed that information—stars die and the sun has heat—through the lens of animism and therefore reached a distorted, animistic understanding of what the sun is.

71 PIAGET, CONCEPTION OF THE WORLD, *supra* note 62, at 222-32.

72 PIAGET, JUDGMENT AND REASONING, *supra* note 62, at 191. It should be clarified that Piaget did not regard the intellect as static between infancy and adolescence. On the contrary, he viewed this period as one of gradual development toward the capacity for logical thinking or formal mental operations, with some preconditions for that capacity beginning to manifest themselves as early as seven or eight years old. *Id.* at 191, 243-44.

73 *Id.* at 221.

74 *Id.* at 215-21.

fragmentary manner devoid of synthesis [transduction]."⁷⁵

Syncretism is "completely unanalytic,"⁷⁶ predisposing the child to rely upon comprehensive subjective schemata in which everything is fused with everything else, without causation or analogy as justification.⁷⁷ Transduction is an equally unanalytic substitution for deduction and induction. This means that the child reasons "by inferences from particular to particular, . . . without . . . [the] logical rigour"⁷⁸ that accompanies adult reasoning from the general to the particular (deduction) or from the particular to the general (induction).⁷⁹ The dominance of transduction in childhood thinking tends to preclude the child from forming general propositions or laws and from employing assumed hypotheses in his or her mental operations.⁸⁰

It may be objected at this point that these characteristics of children's mental processes are of somewhat limited relevance in deciding whether values inculcation is a necessary part of morals education for children in high school since Piaget addressed the characteristics predominantly in children who were twelve years old or younger.⁸¹ In anticipation of such an objection, let it first be noted that Piaget often referred to eleven or twelve years as the approximate⁸² age at which these characteristics begin to diminish.⁸³

⁷⁵ *Id.* at 220.

⁷⁶ *Id.* at 228.

⁷⁷ *Id.* at 227-28, 230; GINSBURG & OPPER, *supra* note 59, at 106, 108-09.

⁷⁸ PIAGET, JUDGMENT AND REASONING, *supra* note 62, at 183.

⁷⁹ GINSBURG & OPPER, *supra* note 59, at 81.

⁸⁰ PIAGET, JUDGMENT AND REASONING, *supra* note 62, at 184, 233, 238-39.

⁸¹ GINSBURG & OPPER, *supra* note 59, at 180. For example, Piaget ascertained that, generally speaking, adolescents can reason from hypotheses by deduction and can theorize possible determinants of the results of experiments, behaviors manifesting the ability to engage in the formal mental operations of an adult. *Id.* at 187-88, 201-02, 206.

⁸² In those of Piaget's works cited in this Article, he frequently shows a reluctance to definitively pinpoint the onset of the teenage years as the inception of logical reasoning capacities. The following quotations are representative. The ability to deduce appears at "about the age of 11-12." PIAGET, JUDGMENT AND REASONING, *supra* note 62, at 69. At "the age of about 11-12" the child becomes capable of giving bona fide definitions. *Id.* at 149. It is "not until about the age of 11-12 that we can really talk of 'logical experiment.'" *Id.* at 243. Thought is no longer materialized at "the average age of . . . 11-12." PIAGET, CONCEPTION OF THE WORLD, *supra* note 62, at 39. It is at "about 11" that the child understands that a dream is not a material image. *Id.* at 121. Up to "about the ages of 11-12" children believe that certain objects obey moral laws. *Id.* at 228.

⁸³ Piaget often referred to the elements of logical reasoning as appearing gradually, rather than in full-blown form, from the ages of eleven or twelve. "As the years increased [after age eleven], there was a . . . diminution of syncretism." PIAGET, LANGUAGE AND THOUGHT, *supra* note 62, at 170. The "possibility" of formal reasoning exists at eleven or

This flexibility about age in the context of demarcating stages of intellectual development is consistent with his view that "[t]he evolution of intelligence is . . . not . . . continuous, but rhythmical; it seems at times to go back upon itself, it is subject to waves, to interferences, and to 'periods' of variable length."⁸⁴ Room is therefore left for assuming that teenagers may possess childish pre-logical intellectual characteristics, albeit in lessening degree as the teenager grows older.⁸⁵ Such an assumption seems a particularly safe one in light of the fact that Piaget also suggested that normal adolescents can reach the stage of logical thought as late as between the ages of fifteen and twenty years.⁸⁶ Hence, if Piaget is correct about the development of adolescent intelligence, then teenagers in high school may be expected to retain varying aspects and incidences of childhood pre-logical thinking.⁸⁷

Furthermore, it should be noted that adolescent intelligence may be subject to dynamics which are common to neither younger children nor most adults. It is thought that once adolescents ac-

twelve years of age. PIAGET, JUDGMENT AND REASONING, *supra* note 62, at 72. The ability to classify planes of reality into a hierarchy "begins" at the age of twelve. *Id.* at 246, 251. After the ages of eleven or twelve, the child's "mental structure is becoming that of the adult." PIAGET, CONCEPTION OF THE WORLD, *supra* note 62, at 32. The "beginnings" of the stage when children can distinguish thought from things is approximately at eleven years old. *Id.* at 55.

84 PIAGET, JUDGMENT AND REASONING, *supra* note 62, at 215. *Accord* COMMITTEE ON CHILD PSYCHIATRY, *supra* note 63, at 21.

85 GINSBURG & OPPER, *supra* note 59, at 202, 204.

86 *Id.* at 204. *See also* COMMITTEE ON CHILD PSYCHIATRY, *supra* note 63, at 28-29 (referring to a study that indicates that up until the twelfth grade children tend to lack certain decision-making skills and suggesting that even twelfth graders may possess savvy rather than formal thought).

87 Herbert Ginsburg and Sylvia Oppen, experts on Piaget, remark with respect to the applicability of his developmental theories to adolescents:

First, . . . Piaget does not mean to say that the typical adolescent of the formal stage *always* employs all or some of the formal operations in scientific problem solving, but rather that he is *capable* of doing so. Various factors may prevent their use. Under conditions of fatigue or boredom, for instance, the adolescent may not fully display the organization of thought available to him. Piaget's model of formal operations describes the adolescent's optimum level of functioning, and not necessarily his typical performance.

Second, we can inquire into the generality of the formal operations. Are all adolescents capable of them? Are the formal operations universal? The evidence seems to show that they are not. In western cultures, some adolescents do not seem capable of the formal operations; in some nonwestern cultures, the formal operations seem to be completely absent, even in adults.

GINSBURG & OPPER, *supra* note 59, at 203. *Contra* MOSHMAN, *supra* note 10, at 72-73, 76-78.

quire some capability of logical thinking, they have a tendency to become overly engrossed in metaphysical, political and philosophical doctrines.⁸⁸ They may even lose touch with reality in the process and believe that their thoughts make them omnipotent.⁸⁹ On an emotional plane, adolescents are also beset with sexual and aggressive urges, fears, fantasies and emotional storms that can interfere with their growing ability to engage in abstract and formal thought.⁹⁰

As superficial as this foray into the field of child psychology may be, it shows that an accepted scientific foundation exists for concluding that the characteristics of juvenile cognition distort the way children, even well into their teenage years, digest and utilize new information in comparison to adults.⁹¹ This conclusion

88 GINSBURG & OPPER, *supra* note 59, at 202-03; Anna Freud, *Insight: Its Presence and Absence as a Factor in Normal Development*, in *PSYCHOANALYTIC PSYCHOLOGY OF NORMAL DEVELOPMENT 1970-1980* 137, 146 (1982). *But cf.* ROBERT COLES, *THE MORAL LIFE OF CHILDREN* 198 (1986) (contending that youthful idealism is not necessarily an excess of adolescence, but, rather, "has its roots in all the emotional, moral, and social complexities this life can present to anyone").

89 GINSBURG & OPPER, *supra* note 59, at 203. In 1940, Jean Piaget wrote:

Adolescent egocentricity is manifested by belief in the omnipotence of reflection, as though the world should submit itself to idealistic schemes rather than to systems of reality. It is the metaphysical age *par excellence*, the self is strong enough to reconstruct the universe and big enough to incorporate it.

WOOD, *supra* note 62, at 155 (quoting Jean Piaget).

90 COMMITTEE ON CHILD PSYCHIATRY, *supra* note 63, at 32. *Cf.* FREUD, *supra* note 88, at 305 (observing that adolescents also undergo a "crisis of identity"). *But cf.* MOSHMAN, *supra* note 10, at 85-86 (stating that adolescents are not measurably different from adults in terms of achieving socioemotional autonomy). Nor should it be overlooked that preteenage children may experience an emotional life that is, in some respects, peculiar to their age group and apt to color cognition. For example, the libidinal stages which Sigmund Freud attributed to normal early childhood may cause younger children to be especially inner-directed and prone to body-related fantasies. COMMITTEE ON CHILD PSYCHIATRY, *supra* note 63, at 31, 35-36.

91 See *supra* notes 41-90 and accompanying text; see also GINSBURG & OPPER, *supra* note 59, at 237-39 (summarizing some of Piaget's findings concerning the distortions inherent in childhood cognition and suggesting that these findings require reassessment of educational approaches). Interestingly, Piaget's basic conclusion that children's cognition is qualitatively different from and inferior to adult cognition is supported, in general, by the independent research of other psychologists showing that as children grow older there is a corresponding development in their ability to perceive and process information. See, e.g., MOSHMAN, *supra* note 10, at 68-78 (asserting that children begin with a limited capacity for rationality which improves as they mature); LEV VYGOTSKY, *MIND IN SOCIETY: THE DEVELOPMENT OF HIGHER PSYCHOLOGICAL PROCESSES* 28-29, 45-46, 49-51, 55-57 (Michael Cole et al. eds., 1978) (proposing that the child's embryonic reasoning ability gradually develops through the mediation of language, tool use, and interactions with other people).

Lest the reader receive the impression that Piaget regarded children's cognitive

should be no less supportable when the information at issue concerns morals or values.⁹² Without adult normative input, what sort of data base about morals can a child acquire on his or her own when the child spontaneously imbues inert objects with consciousness; perceives things as fragmentary and momentary; believes that he or she has magical powers over the external world; or is caught up in the emotional turmoil that can accompany puberty? Indeed, Piaget observed that up until the age of eight many children even believe in an automatic justice emanating from physical nature and inanimate objects.⁹³ In considering children's unique cognitive attributes, it thus becomes evident that conveying mere pro-

stages as simply biologically predetermined, it should be noted that he also regarded the progression from one stage to another as subject to the influence of children's interactions with their environment, including social interactions. See, e.g., PIAGET, JUDGMENT AND REASONING, *supra* note 62, at 72-73, 180; see GINSBURG & OPPER, *supra* note 59, at 218-28.

92 Jean Piaget analyzed, albeit somewhat summarily, the effects of childhood egocentrism, realism, and animism upon youngsters' capacity to reason about morals. He concluded that such cognitive dynamics cause children to make moral judgments on the basis of qualitatively different criteria than adults use. JEAN PIAGET, *THE MORAL JUDGMENT OF THE CHILD* 145, 163-65, 316 (Marjorie Gabain trans., 1966) (1932). Curiously, in this volume Piaget neglects to analyze the effects on moral reasoning of other childhood cognitive characteristics that seem particularly relevant. For example, the book contains no discussion and no explanation for the absence of any discussion regarding the effects of the child's syncretism, transduction, inability to utilize hypothetical premises, inability to conceive of general propositions, or belief in magical power. PIAGET, *supra passim*. Instead, the book's main focus is on the influence of two formative and loosely sequential processes: the child's unilateral respect for adults and older children (which leads to heteronomy) followed by the child's cooperation with other people (which leads to autonomy). *Id.* at 194-95.

One commentator has remarked about this lack of follow-through and the change of emphasis exhibited in *THE MORAL JUDGMENT OF THE CHILD*:

Instead of pursuing the precise developmental analysis which he began, and for which he undoubtedly had the data and material available, he returned to invoking his vaguer and more limited social-psychological perspective In contrast, in a brief analysis of the egocentrism of the child's early rule conception, he did not invoke the parental variable, instead he concentrated on the processes of the child's thinking, and this analysis has a clarity and richness which is provocatively brief - a mere couple of pages.

Helen Weinreich-Haste, *Piaget on Morality: A Critical Perspective*, in PIAGET, *supra*, at 189. See also JAMES R. REST, *DEVELOPMENT IN JUDGING MORAL ISSUES* 6 (1979) (mentioning that Piaget's study of children's moral judgment "only provides a limited characterization of the cognitive structures underlying . . . verbalizations" about moral issues).

Incidentally, it is interesting to note that Lawrence Kohlberg originated the pedagogy of cognitive moral development in large measure based upon and in reaction to the schema of children's moral evolution advanced by Piaget. 2 LAWRENCE KOHLBERG, *ESSAYS ON MORAL DEVELOPMENT: THE NATURE AND VALIDITY OF MORAL STAGES* xviii-xix, xxviii-xxix (1984). See PIAGET, *supra*, at 203; cf. MOSHMAN, *supra* note 10, at 79.

93 PIAGET, *supra* note 92, at 316.

cesses of thinking about right and wrong, without transmission of any content as to what is right or wrong, does nothing to expand and make more accurate the deficient and distorted values data base which children are predisposed to create.⁹⁴

Even assuming that the child could amass and retain a morals data base founded upon realistic perceptions, is it likely that the child could utilize the information so as to make meaningful decisions about moral issues if all that is taught on the subject is processes of reasoning that are predicated upon adult logic? How can a youngster reason in any productive way about the moral dilemmas offered as instructive fare by proponents of values clarification⁹⁵ and cognitive moral development⁹⁶ when the child is not

94 Cf. KILPATRICK, *supra* note 7, at 27, 86-89, 94, 116-17 (contending that teaching children only reasoning processes is insufficient morals education since the children will be reasoning about matters of which they are ignorant); LICKONA, *supra* note 4, at 11 (noting that values clarification erred by "treating kids like grown-ups who only needed to clarify values that were already sound" and by failing to take into account that children "need a good deal of help in developing sound values in the first place"); Wright, *supra* note 10, at 63-64, 68-70, 74, 78 (suggesting that schoolchildren cannot possess the information essential to exercising free speech unless values are first transferred from adults to the children).

95 A typical exercise used by values clarification adherents is called "The Fallout Shelter" in which the teacher asks students to assume that there has been a nuclear war and that the future of mankind depends upon who is allowed into a fallout shelter. The teacher tells students that the shelter can accommodate only six people and then requests students to decide which six of ten people clamoring for entry should be saved. The ten possible survivors include a retarded girl, a violent police officer, a prostitute, a drug pusher, a racist, and a person recently released from a mental institution. LICKONA, *supra* note 4, at 236.

One critic has observed that "the fallout shelter exercise, with its forced-choice format, is structured to lead students to ignore a basic ethical principle: All persons, as human beings, have equal worth and an equal right to live. The shelter activity invites students to rank human lives on a crass, utilitarian basis . . ." *Id.* at 236.

Even more to the point here, notice how resolution of "The Fallout Shelter" necessitates thinking processes of which most children are not capable until the age of thirteen and of which many teenagers will be, in some respects, incapable as well. "The Fallout Shelter" requires the student to reason from multiple assumed hypotheses. As the text above explains, children cannot reason from assumed premises and have difficulty juggling more than one concept at a time. See *supra* text accompanying notes 62-92. Children's inability to break free from their subjectivity will also minimize the possibility of their even considering classmates' opinions and experiencing meaningful dialogue. See *supra* text accompanying note 69. Certainly the inability to engage in induction and deduction or to form general propositions will make children's reasoning about who best can perpetuate the human race well near irrational. See *supra* text accompanying notes 68, 72-80. Finally, children's belief in their own magical power to command the world and especially adolescents' delusions of omnipotence through thought are likely to hamper logical or realistic consideration of the exercise's solution. See *supra* text accompanying notes 67, 71, 88-89.

96 Illustrative of the cognitive moral development approach is the following problem,

able even to conceive of his or her thought as a phenomenon purely internal to the self; is deluded by the notion that his or her subjective reactions are the only possible viewpoint; is unable to understand what a hypothesis or general law is; and/or thinks by means of transduction and syncretism rather than by processes of deduction and induction?⁹⁷

considered suitable for consumption by eight-year olds:

During recess on the playground, you see a big fourth-grader bullying a smaller kid, a second-grader. He's pushing him around, punching him in the arm, just being mean. You don't really know the kid who's getting picked on. What would you do if you saw this happening? What should you do? Why?

LICKONA, *supra* note 4, at 239-40. A problem considered appropriate for first-graders under this approach is "Mark and the Movies":

Mark was on the way to the movies when he met his friend Steven. Steven said he really wanted to see this movie too, but he spent all his allowance and wouldn't be getting any more until after the movie left town. Both Mark and Steven were 12 but could easily pass for younger. If they lied about their age, they could both get in on the money Mark had. Mark didn't know, though, if he should lie about his age. Steven said, "It's your money, so it's your decision." What should Mark do?

Id. at 246 (paraphrasing from Dennis Adams, *Building Moral Dilemma Activities*, LEARNING, Mar. 1977, at 46).

Although presented to children under thirteen years old, both problems require the formal logical operations of an adult in order for any morally defensible resolution to be reached. Both problems pose multiple assumed hypotheses. Yet, children cannot easily work from theoretical hypotheses or conceptualize several ideas simultaneously. See *supra* text accompanying notes 74, 80. Children's exaggerated subjectivity will hinder meaningful exchange of ideas about the dilemmas with their peers and, in the children's eyes, make reasoned justification seem superfluous. See *supra* text accompanying notes 93. Children's resistance to induction and deduction will impede factually-based, logical judgment about what the children would or should do when faced with the scenarios of the bullying problem or of "Mark and the Movies." See *supra* text accompanying notes 68, 72-80. How, too, can children decide upon a moral course of action in response to these dilemmas when the children cannot conceive of the general laws that might govern and when they believe that their childish wishes can magically control events? See *supra* text accompanying notes 67, 71, 80. Even if all of these general cognitive limitations did not exist, moral realism would, in all likelihood, interfere with children's evaluation of moral answers to such dilemmas. Jean Piaget used the term "moral realism" to denote the phenomenon whereby children evaluate moral questions by the criteria of objective harm done rather than the intentions that prompted the harm. PIAGET, *supra* note 92, at 124-33, 160-62. It is noteworthy that moral realism persists for a longer time in relation to the child's evaluation of other people's conduct than in relation to evaluation of his or her own conduct. *Id.* at 183. Thus, moral realism could well be a factor distorting the moral judgment of even an older child asked to assess whether Mark should lie so as to get Steven into the cinema.

97 See Derék Graham, *Moral Development: The Cognitive-Developmental Approach*, in COGNITIVE DEVELOPMENT IN THE SCHOOL YEARS 112, 115-19 (Ann Floyd ed., 1979) (surveying research, predicated upon Jean Piaget's work, in support of the proposition that development of moral principles is dependent on concomitant development of cognitive ability).

The educational implications of children's distorted data base and illogical reasoning are manifold and subject to debate.⁹⁸ Yet, this much may be distilled with some confidence from Piaget's discoveries: children do not have the mental structure or life experiences to make sound moral choices on the basis of reasoning skills alone. Indeed, although this Article has gone to some lengths to establish a scientific foundation for such a distillation, this aspect of children's intellect has not uncommonly been treated by legal commentators almost as a matter of common sense.⁹⁹ Justice Stewart seems instinctively to have credited this phenomenon when he stated as a given that children do not have the capacity for individual choice which is the presupposition of Free Speech Clause freedoms.¹⁰⁰

If Justice Stewart and the scientific evidence described above are correct, then the conclusion is inescapable that children's moral education cannot take place simply by exposing them to a melange of values and after some honing of reasoning techniques through values clarification methods or the like, requesting the children to choose whatever value they prefer. If the public elementary and secondary schools are to educate children about

But see WOOD, *supra* note 62, at 149 (arguing that morality does not rest upon use of logic). *See also* KILPATRICK, *supra* note 7, at 132-43 (observing that emotions also play a role in how children learn morals); MICHAEL SIEGAL, FAIRNESS IN CHILDREN: A SOCIAL-COGNITIVE APPROACH TO THE STUDY OF MORAL DEVELOPMENT 72, 85, 178-79 (1982) (asserting that while cognitive maturation is an important part of morals comprehension, children's identification with their parents is "a possible, pervasive process in moral development").

98 Compare PIAGET, *supra* note 92, at 319, 364, 366, 369, 370-71, 404-06 (favoring education by cooperative efforts with children involving the latter's active role rather than through adult constraint of children) and WOOD, *supra* note 62, at 140-43 (proposing that children need first to listen to adult discourse in order to learn) and GINSBURG & OPPER, *supra* note 59, at 241, 253-54 (asserting that learning different types of knowledge necessitates different types of teaching techniques and that social knowledge calls for didactic methods while physical knowledge calls for manipulation and exploration) and KILPATRICK, *supra* note 7, at 24, 26-27, 78, 88-94 (taking the position that values transmission from adults to children is essential to morally educating the children) with LICKONA, *supra* note 4, at 68-70, 76, 162-63 (offering a range of pedagogical techniques for transmitting morals such as having teachers act as moral role models, using moral discipline, creating a democratic classroom environment, and conveying values through curriculum).

99 *See, e.g.*, TUSSMAN, *supra* note 47, at 53, 64-65; David A. Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 488-95 (1981); Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 OHIO ST. L.J. 663, 701, 703 (1987); Wright, *supra* note 10, at 69, 78.

100 *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring).

morals, the schools must also transmit to their students some minimum core of values with the editorialization that such values are preferred or "better" and a full explanation for the preferred status.¹⁰¹

Aside from the fact that it is the distinctive population of children who are taught in the elementary and secondary schools, there is another circumstance militating in favor of a substantive values inculcation pedagogy. Children in the United States typically are bombarded with an array of value judgments emanating from their parents,¹⁰² peers,¹⁰³ religious affiliations¹⁰⁴ and, of course, an omnipresent media.¹⁰⁵ With the exception of the latter, none of these people or institutions are under the control of

101 See *supra* notes 91-99 and accompanying text. Indeed, even the father of the cognitive moral development approach, Lawrence Kohlberg, came to the conclusion that inculcation is a necessary part of morals education:

Some years of active involvement with the practice of moral education at Cluster School has led me to realize that my notion . . . was mistaken . . . the educator must be a socializer teaching value content and behavior, and not only a Socratic or Roguian process-facilitator of development . . . I no longer hold these negative views of indoctrinative moral education and I believe that the concepts guiding moral education must be partly "indoctrinative." This is true, by necessity, in a world in which children engage in stealing, cheating and aggression.

KILPATRICK, *supra* note 7, at 92 (quoting Lawrence Kohlberg's writings in 1978 in *THE HUMANIST*). But see Richard L. Roe, *Valuing Student Speech: The Work of the Schools as Conceptual Development*, 79 CAL. L. REV. 1269, 1296-99 (1991) (maintaining that students learn values through interactive processes and critical thinking rather than through inculcative methods); van Geel, *supra* note 15, at 263-71 (arguing that there is no empirical basis for concluding that inculcation is an essential means of value formation in schoolchildren).

102 JAMES D. HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* 182, 195 (1991); BENJAMIN SPOCK, *RAISING CHILDREN IN A DIFFICULT TIME* 63 (1985); Gene H. Brody & David R. Shaffer, *Contributions of Parents and Peers to Children's Moral Socialization*, 2 DEV. 31, 59 (1982). But see KILPATRICK, *supra* note 7, at 246 (observing that many parents are either too stressed or self-absorbed to pay much heed to their children). The U.S. Supreme Court has long acknowledged the pivotal role of parents in directing the upbringing of their children. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

103 JOHN I. GOODLAD, *A PLACE CALLED SCHOOL: PROSPECTS FOR THE FUTURE* 42 (1984). See Thomas J. Berndt, *Contributions of Peer Relationships to Children's Development*, in *PEER RELATIONSHIPS IN CHILD DEVELOPMENT* 407, 415 (Thomas J. Berndt & Gary W. Ladd eds., 1989); Brody & Shaffer, *supra* note 102, at 59-66; Jacqueline Mize et al., *Promoting Positive Peer Relations with Young Children: Rationales and Strategies*, 14 CHILD CARE Q. 221, 222 (1985); Michele Ingrassia et al., *Life Means Nothing*, *NEWSWEEK*, July 19, 1993, at 16-17; Barbara Kantrowitz, *Wild in the Streets*, *NEWSWEEK*, Aug. 2, 1993, at 40, 44.

104 KILPATRICK, *supra* note 7, at 261-63.

105 ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* 58-59 (1987); KILPATRICK, *supra* note 7, at 171, 175, 181-83, 264-65; LICKONA, *supra* note 4, at 4-5, 406-07; Joshua C. Ramo, *Have Fun, But Keep Your Head*, *NEWSWEEK*, Sept. 27, 1993, at 65; Megan Rosenfeld, *Warning: TV Violence Is Harmful, Networks Acknowledge*, *WASH. POST*, July 1, 1993, at A1.

the government vis-a-vis values transmission.¹⁰⁶

Indeed, the U.S. Supreme Court has repeatedly deferred to the right of parents to direct the upbringing of their offspring.¹⁰⁷ This parental prerogative is magnified by the fact that children are dependent upon parents and, especially at younger ages, seek parental approval.¹⁰⁸ Under this balance of forces, the parent has free rein over values inculcation in the home; there is little to prevent a parental dictatorship over children's early moral development if the parent is so inclined.¹⁰⁹ Still, there may be some comfort in the clichéd expectation that parents will have the best interests of their children at heart. There is considerably less comfort in the spectacle of the media engulfing young minds without restraint. For example, the television programming, movies, rock music, and video games to which many children are exposed are riddled with glamorized and depersonalized violence, among other disturbing images.¹¹⁰ Although there have been societal pressures

106 *E.g.*, Children's Television Act of 1990, 47 U.S.C.A. §§ 303a-303b (West 1991 & Supp. 1994); National Endowment for Children's Educational Television Act of 1990, 47 U.S.C.A. § 394 (West 1991 & Supp. 1994). *See also* FCC v. Pacifica Found., 438 U.S. 726, 747-50 (1978) (upholding sanctions imposed on a radio broadcaster for violating regulations prohibiting the use of certain language because of the likelihood that children might be in the listening audience).

107 *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-402 (1923). *But see* *Wisconsin v. Yoder*, 406 U.S. 205, 241-46 (1972) (Douglas, J., dissenting) (criticizing the majority opinion for taking into account only Amish parents' interest in educating their young the Amish way without regard to the children's desires).

108 ALICE MILLER, *THE DRAMA OF THE GIFTED CHILD: THE SEARCH FOR THE TRUE SELF* xviii, 8 (1981).

109 Wright, *supra* note 10, at 74. *Cf.* Mary Kohler, *To What Are Children Entitled?*, in *THE CHILDREN'S RIGHTS MOVEMENT* 217, 218 (Beatrice Gross & Ronald Gross eds., 1977) (noting that legal concepts of parental control leave children with little opportunity for self-determination).

110 Network television recently acknowledged that its violent programming is readily accessible to children and contributes to the latter's antisocial behavior. Rosenfeld, *supra* note 105, at A1; Harry F. Waters et al., *Networks Under the Gun*, *NEWSWEEK*, July 12, 1993, at 64. The film industry is equally culpable in producing "decades of movies from 'A Clockwork Orange' to 'Menace II Society'" that adulate youth violence. Kantrowitz, *supra* note 103, at 42. Rock music has been accused of fostering violent attitudes as well, particularly toward women. KILPATRICK, *supra* note 7, at 175-76, 181-82. Even toys, and especially video games, convey the idea that "[f]ighting is cool." Ramo, *supra* note 105, at 65 (quoting a 16-year-old's reaction to the video game *Mortal Kombat*). *See* Esther B. Fein, *Troubled by Playthings of Violence, Parents Ponder Choices for Holidays*, *N.Y. TIMES*, Dec. 23, 1993, at A14.

Enjoyment of violence, however, is but one of the destructive values that the media conveys. For instance, some rock music is thought to encourage egocentrism in children and alienation from the older generation. KILPATRICK, *supra* note 7, at 175, 183. Video games may desensitize children to the difference between high art and pop culture and

on the media to exercise more responsibility in selecting the values content of children's entertainment, the industry has resisted and remains largely unchecked.¹¹¹

These generators of values operate upon children in relatively uncontrolled venues; the public school system is the one continuous significant conduit by which government can control and transmit values reflecting the interests of its constituency, "We the People."¹¹² If the governmental viewpoint is not to be lost among the barrage of values messages emanating from the private sector, that viewpoint must stand for something, morally speaking.¹¹³ While not presuming to reject values clarification or cognitive moral development as devoid of any redeeming pedagogical merit, this writer finds persuasive that the very condition of being a child and of being a child in modern American society makes substantive values inculcation a virtual imperative for effective morals education at the elementary and secondary levels.

promote consumerist values. MARSHA KINDER, *PLAYING WITH POWER IN MOVIES, TELEVISION, AND VIDEO GAMES* 119 (1991).

111 "Many in Congress, roused by the soaring tide of prime-time gore, have been threatening federally imposed reforms." Waters et al., *supra* note 110, at 64. In order to avoid legislative action, the networks agreed to broadcast parental advisories before airing excessively violent programs, without taking any measures to alter program content. *Id.* Indeed, even such scanty legislative restraints as currently govern children's television programming are honored more in the breach than otherwise by broadcasters. A flagrant example is television's response to the requirement in the Children's Television Act of 1990 that broadcasters must demonstrate their commitment to the educational needs of children as a condition of renewing their licenses. Children's Television Act of 1990, 47 U.S.C.A. § 303b(a)(2) (West 1991 & Supp. 1994). Some television stations have argued that they have fulfilled this requirement with the likes of "G.I. Joe," "Superboy," "The Flintstones," and reruns of "Leave It to Beaver" — an argument that was accepted under President Bush but which has been rejected by the Clinton administration. Edmund L. Andrews, *'Flintstones' and Programs Like It Aren't 'Educational,' F.C.C. Says*, N.Y. TIMES, Mar. 4, 1993, at A1.

112 U.S. CONST. pmbl. As one commentator has noted, "Americans actually have a common core of social morality to conserve . . . [and] this core ought to be conserved with the help of the public schools." Andrew Oldenquist, "Indoctrination" and Societal Suicide, 63 PUB. 81, 84 (1981). See also ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 287, 304-08 (J.P. Mayer ed. and George Lawrence trans., Garden City, New York, Anchor Books, 1969) (1850) (ascribing the success of early American democracy to the moral condition of the people). Indeed, the U.S. Supreme Court has recognized the public schools "as the primary vehicle for transmitting 'the values on which our society rests.'" *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (quoting *Ambach v. Norwick*, 441 U.S. 68, 76 (1979)). See also Gordon, *supra* note 55 at 553 (describing government's compelling interest in conveying, through the public schools, society's fundamental values).

113 See KILPATRICK, *supra* note 7, at 122.

III. THE JURISPRUDENTIAL CONFLICT OVER TEACHING VALUES

Although data about children's intellectual capacities and the societal influences brought to bear on them lead logically to the pedagogical conclusion that values inculcation is essential, the First Amendment may yet make moot what logic and pedagogy dictate. The problem is that what is essential from an educational standpoint is not necessarily constitutionally tolerable. If it is the case that the Constitution cannot countenance effective morals education, then a great paradox would ensue. Free speech law would become a substantial impediment, not only to children's well-being during childhood, but to their chance of maturing into principled adults who can safeguard constitutional guarantees that require citizen participation, including the free speech guarantee itself.¹¹⁴ It is not only children's sense of right and wrong that would be affected by a constitutional prohibition of values inculcation; the very credibility of the Constitution would be undermined by the sorry spectacle of Free Speech Clause law undermining free speech objectives and the moral tone of American life. With so much at stake, the possibility that this scenario has or may become a national reality warrants close examination of the pertinent judicial precedents.¹¹⁵

114 For a discussion of the need for an enlightened citizenry to make constitutional guarantees of free speech and democratic participation meaningful, see Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 550, 596-606 (1992).

115 The exegesis of pertinent judicial precedents undertaken in Part III of this Article is intentionally confined to U.S. Supreme Court decisions addressing the constitutionality of values inculcation by elementary and secondary schools. The rationale for excluding cases dealing with the issue at the university level is that the more mature student population enrolled in college allows professors to utilize different pedagogical techniques that entail increased reliance on broad ranging inquiry and debate. This difference between precollege and college education has significant ramifications for the applicability of Free Speech Clause protections, resulting in heightened protection in the university context as compared to elementary and secondary schools. Brian A. Freeman, *The Supreme Court and First Amendment Rights of Students in the Public School Classroom: A Proposed Model of Analysis*, 12 HASTINGS CONST. L.Q. 1, 15-16, 52 (1984); Stephen R. Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293, 1342-44 (1976); Hafen, *supra* note 99, at 717-18; William B. Senhauser, Note, *Education and the Court: The Supreme Court's Educational Ideology*, 40 VAND. L. REV. 939, 952-54, 959, 962-65, 971, 974-75 (1987). But cf. C. Thomas Dienes & Annemargaret Connolly, *When Students Speak: Judicial Review in the Academic Marketplace*, 7 YALE L. & POL'Y REV. 343, 384 & n.150 (1989) (citing a case addressing free speech issues in the university as support for the proposition that there should be no censorship of beliefs and values in precollege schooling).

Even though this Article deals with the constitutionality of values inculcation only in public schools and only under the Free Speech Clause, it is instructive to begin this survey with the U.S. Supreme Court's earliest pronouncements on the subject of values inculcation in private settings and under the Fourteenth Amendment's Due Process Clause.¹¹⁶ The cases, *Meyer v. Nebraska*¹¹⁷ and *Pierce v. Society of Sisters*,¹¹⁸ are of interest because at the time they were decided, the Court did not yet understand the First Amendment to apply to the states.¹¹⁹ Thus, *Meyer's* and *Pierce's* treatment of values inculcation may be loosely regarded as the precursor of subsequent decisions interpreting the Free Speech Clause.¹²⁰

In *Meyer v. Nebraska*, the Court heard a challenge by a parochial school teacher to a Nebraska statute prohibiting the teaching of foreign languages to students who had not yet passed the eighth grade.¹²¹ The main purpose of the statute, which governed all schools in the state, was "to promote civic development by inhibiting . . . education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals."¹²² The Court did not quibble with the notion that Nebraska could require educators to inculcate values:

That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear The desire of the legislature to foster a homogenous people with American ideals prepared readily to understand current discussions of civic matters is easy to appre-

116 The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

117 262 U.S. 390 (1923).

118 268 U.S. 510 (1925).

119 Subsequent to *Meyer* and *Pierce*, the U.S. Supreme Court approved the application to the states of the First Amendment's protection of free speech through the Fourteenth Amendment's Due Process Clause. *Fiske v. Kansas*, 274 U.S. 380 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 11-2, at 772 (2d ed. 1988); Howard O. Hunter, *Curriculum, Pedagogy, and the Constitutional Rights of Teachers in Secondary Schools*, 25 WM. & MARY L. REV. 1, 5 n.13 (1983).

120 See MOSHMAN, *supra* note 10, at 13; van Geel, *supra* note 15, at 240-47; Norman B. Lichtenstein, *Children, the Schools, and the Right to Know: Some Thoughts at the Schoolhouse Gate*, 19 U.S.F. L. REV. 91, 100 (1985); Stern *supra* note 10, at 494-96. But see Freeman, *supra* note 115, at 8-9 (arguing that neither *Meyer* nor *Pierce* are in any way related to students' free speech rights).

121 *Meyer*, 262 U.S. at 396-97.

122 *Id.* at 401.

ciate.¹²³

However, the Court found that Nebraska's particular prohibition, as applied to this teacher, took its inculcative agenda too far by violating the substantive due process doctrine that held sway at the time.¹²⁴ The Court found that the statute ran afoul of the doctrine by interfering with the student's freedom to acquire useful knowledge, the parents' right to direct the upbringing of their offspring, the teacher's right to teach, and the parents' and teacher's right to contract with each other for the latter's instructional services.¹²⁵ The Court indicated that such interference with due process rights could only pass constitutional muster if the interference were reasonably related to some legitimate governmental end.¹²⁶ The Court held that the statute served no such end since Nebraska could show no emergency necessitating that its residents have a ready comprehension of political issues and since the statute served no other real purpose.¹²⁷ Cast in broader terms, *Meyer* stands for the proposition that while state governments may "go very far, indeed"¹²⁸ to improve the moral quality of its younger citizenry, they may not go so far as to stand in the way of children's acquisition of knowledge from private providers.¹²⁹

123 *Id.* at 401-02. It is interesting to note that the Court expressed dismay, not with Nebraska's aim of conforming its children into "a homogenous people," but only with the "means adopted" to that end. *Id.* at 402. See Leora Harpaz, *A Paradigm of First Amendment Dilemmas: Resolving Public School Library Censorship Disputes*, 4 W. NEW ENG. L. REV. 1, 35 (1981).

124 In brief, substantive due process, as it was understood when *Meyer* was decided, is a theory fashioned by the Supreme Court to protect mainly economic liberty rights, such as the right to contract. Under the theory, states could not curtail protected economic rights unless the curtailment represented an exercise of state police power in the interest of the general welfare. TRIBE, *supra* note 119, at §§ 8-2 to 8-4. The theory was in vogue during the so-called *Lochner* era spanning 1897 to 1937. *Lochner v. New York*, 198 U.S. 45 (1904), for which the era was named, typifies the Court's application of substantive due process at the time. In *Lochner*, the Court struck down a state statute which prohibited bakers from working more than sixty hours per week. The Court's rationale was that the law interfered with the liberty of bakers and their employers to contract under the Fourteenth Amendment's Due Process Clause. Both *Meyer* and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), involved infringements of traditional economic liberty rights as well as a more unusual substantive due process liberty right to be free of government impediments in the acquisition of education from private providers. *Meyer*, 262 U.S. at 399-400, 403; *Pierce*, 268 U.S. at 534-36. See also Bitensky, *supra* note 114, at 580-81.

125 *Meyer*, 262 U.S. at 399-403.

126 *Id.* at 399-400.

127 *Id.* at 401-03.

128 *Id.* at 401.

129 Harpaz, *supra* note 123, at 34-35; David Schuman, Comment, *The Political Community, The Individual, and Control of Public School Curriculum*, 63 OR. L. REV. 309, 311

Two years later, in *Pierce*, the Court relied upon substantive due process to invalidate an Oregon law that required most school-age children to attend public, rather than private schools.¹³⁰ Again, the Court showed receptivity to values inculcation in the schools: "No question is raised concerning the power of the State reasonably to regulate all schools, . . . to require . . . that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught . . ." ¹³¹ But even as the Justices acknowledged the state's legitimate interest in values inculcation in the schools, the Court cautioned that "[t]he child is not the mere creature of the State"¹³² and predicated its holding on the lack of a reasonable relation between legitimate state ends and a law that would "standardize its children by forcing them to accept instruction from public teachers only."¹³³

In other words, the state may direct that both public and private schools inculcate their students with certain state-approved values relating to patriotism and good citizenship so long as students are allowed to repudiate public schools altogether and obtain education in private schools where, presumably, additional values and outlooks might also be taught.¹³⁴ In *Meyer* and *Pierce* the Court assumed that "to inculcate or not to inculcate" is really not the question; rather, the question, reduced to its essentials, is how "to inculcate constitutionally and not to inculcate unconstitutionally" at the same time.¹³⁵

(1984). Cf. Hunter, *supra* note 119, at 6-7 (observing that the *Meyer* Court recognized the authority of the state to regulate curriculum).

130 *Pierce v. Society of Sisters*, 268 U.S. 510, 530-31, 534-36 (1925).

131 *Id.* at 534.

132 *Id.* at 535.

133 *Id.* at 535.

134 Levin, *supra* note 49, at 1651-53; Schuman, *supra* note 129, at 311. But see Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 888-91 (1979) (theorizing that *Pierce* should be interpreted to limit rather than legitimize governmental authority to inculcate elementary and secondary level students).

135 See Stephen Arons & Charles Lawrence, III, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 HARV. C.R.-C.L. L. REV. 309, 317-20 (1980); Senhauser, *supra* note 115, at 950, 952; van Geel, *supra* note 15, at 240-42; cf. John H. Robinson, *Why Schooling Is So Controversial in America Today*, 3 NOTRE DAME J.L. ETHICS & PUB. POL'Y 519, 524 (1988) (noting that even though *Meyer* and *Pierce* placed limits on the government's inculcative function in the schools, both cases recognized the fact that states retain considerable discretion to shape curriculum). But see Freeman, *supra* note 115, at 6-8 (opining that *Meyer* and *Pierce* concern only the economic rights of private schools or teachers under early substantive due process doctrine).

While *Meyer* and *Pierce* recognized in dicta that public schools should have authority to inculcate values, the factual posture of the cases did not allow for instruction concerning the constitutional parameters of that authority. The opportunity for such a disquisition came with the litigation of *West Virginia State Board of Education v. Barnette*,¹³⁶ after the Court had inaugurated two doctrinal shifts that significantly altered constitutional jurisprudence from what it had been when *Meyer* and *Pierce* were decided. First, the Court repudiated the brand of substantive due process which had served as the analytical framework for the two earlier decisions.¹³⁷ Second, the Court made the First Amendment applicable to the states by means of "incorporation" through the Fourteenth Amendment's Due Process Clause.¹³⁸ This undoubtedly accounts for the fact that, unlike *Meyer* and *Pierce*, the *Barnette* decision is expressly predicated upon Free Speech Clause principles.¹³⁹

The challenge in *Barnette* was to West Virginia statutes that required all schools to provide courses of study instilling Americanism and that authorized punishment for children's noncompliance with implementing regulations issued by boards of education.¹⁴⁰ Plaintiffs also challenged one such regulation that required public school children to salute the American flag or else suffer penalties, including expulsion.¹⁴¹ According to the regulation, the purpose of the compelled salute was to create a proclivity toward "national unity"¹⁴² during children's "formative period in the development in citizenship."¹⁴³ While agreeing that national unity is a legitimate value for public school officials to foster by persuasion or example, the Court rejected compulsion as a means to this end

136 319 U.S. 624 (1943) (overruling *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940)).

137 *Lochner* era substantive due process ended in 1937. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). See also TRIBE, *supra* note 14, § 8-2.

138 *Fiske v. Kansas*, 274 U.S. 380 (1927); *Gitlow v. New York*, 268 U.S. 652, 666 (1925); 2 ROTUNDA & NOWAK, *supra* note 15, § 15.6. *Gitlow* was decided on June 8, 1925 and *Pierce* was decided on June 1, 1925.

139 *Barnette*, 319 U.S. at 639.

140 *Id.* at 625, 626 & n.1, 629 & n.5.

141 *Id.* at 626 & n.2, 627-29. The plaintiffs refused to salute the flag because it contravened their religious beliefs as Jehovah's Witnesses. *Id.* at 629. School officials expelled students of this faith for their refusal and threatened to send the children to reformatories. School officials also prosecuted the parents of the students for causing delinquency. *Id.* at 630.

142 *Id.* at 627 n.2.

143 *Id.* at 627-28 n.2.

in the school context and struck down the requirement as a violation of the First Amendment's Free Speech Clause.¹⁴⁴ The Court's rationale was that officially compelling the salute was the equivalent of officially compelling speech and just as constitutionally defective under the clause as governmental silencing of speech.¹⁴⁵ The Court also reasoned that freedom of thought, as the fount of free speech, comes within the ambit of the clause's protection and is unconstitutionally stifled by a compelled salute as well.¹⁴⁶

Unlike later cases,¹⁴⁷ the Court did not predicate its analysis upon a classification of the salute as either curricular or noncurricular;¹⁴⁸ that point is left vague in Justice Jackson's majority opinion. Because the distinction plays a significant role in modern free speech jurisprudence,¹⁴⁹ commentators have attempted to classify the salute retrospectively despite the Court's silence on the matter. The commentators who take the position that the salute was not part of the curriculum¹⁵⁰ do, in fact, have some support for their interpretation in the *Barnette* majority opin-

144 *Id.* at 640-42.

145 *Id.* at 631-34, 642.

146 *Id.* at 637, 640. The Court expressed concern for the preservation of "freedom of mind" and cautioned that schools must not "strangle the free mind at its source." *Id.* at 637. See Yudof, *supra* note 134, at 891; see also Stern, *supra* note 10, at 496.

147 *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 262, 266, 271 (1988) (upholding school's restriction of student expression that occurred as part of the journalism curriculum and that was incompatible with the school's educational mission); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 677, 685 (1986) (upholding school's punishment of student expression that occurred as "part of a school-sponsored educational program" and that undermined the school's educational mission); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 508 (1969) (predicating analysis on the Court's finding that the case did not concern expression intruding upon "the work of the schools").

148 The word "curriculum" has two definitions relevant here: "1: the whole body of courses offered by an educational institution or one of its branches" and "3: all planned school activities including besides courses of study organized play, athletics, dramatics, clubs, and home-room program." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 557 (3d ed. 1971) [hereinafter WEBSTER'S THIRD]. Some lower federal courts have recognized that even nonclassroom activities can be part of the school curriculum. See, e.g., *Seyfried v. Walton*, 668 F.2d 214, 216 (3d Cir. 1981) (finding that a school play is part of the curriculum); *ABC League v. Missouri State High Sch. Activities Ass'n*, 530 F. Supp. 1033, 1040 (E.D. Mo. 1981) (deciding that an interscholastic athletics program is curricular), *rev'd on other grounds*, 682 F.2d 147 (8th Cir. 1982); *Matute v. Carson Long Inst.*, 160 F. Supp. 827, 828 (M.D. Pa. 1958) (classifying a varsity football program as curricular).

149 See, e.g., cases cited *supra* note 147.

150 Stern, *supra* note 10, at 497. See Robert D. Kamenshine, *The First Amendment's Implicated Political Establishment Clause*, 67 CAL. L. REV. 1104, 1135 (1979); Sheldon H. Nahmod, *First Amendment Protection for Learning and Teaching: The Scope of Judicial Review*, 18 WAYNE L. REV. 1479, 1504 (1972).

ion:¹ Justice Jackson expressly noted that the board of education did not adopt the salute because it was thought to have educational worth.¹⁵¹ Those commentators who accept the salute as an element of a curricular program¹⁵² probably have the better argument, though. The salute was a mandatory, school-sponsored exercise, integrated into the school day, and intended to implement West Virginia's legislatively proclaimed pedagogical goals of furthering appreciation of Americanism and developing sentiments supportive of national unity.¹⁵³ The Court itself refers to national unity as a proper lesson for public schools to teach their pupils, as long as the methodology is not offensive to the Free Speech Clause.¹⁵⁴ The salute, therefore, was certainly not extracurricular¹⁵⁵ and probably not cocurricular.¹⁵⁶ Were the *Barnette* suit to arise today, there is every reason to believe that the salute would fall under the rubrics of "the work of the schools"¹⁵⁷ or "the schools['] basic educational mission,"¹⁵⁸ phrases used by the Court in more modern decisions to denote curricular or formal schooling activities.¹⁵⁹

That the *Barnette* Court perceived no need to distinctly categorize the salute is understandable in light of the fact that this was

151 *Barnette*, 319 U.S. at 631 n.12.

152 Hunter, *supra* note 119, at 12. Cf. Goldstein, *supra* note 115, at 1350-51 (treating the flag salute as impermissible methodology for achieving that part of the curricular agenda conveying love of country); Rebell, *supra* note 22, at 300-02 (dealing with the salute as a device for accomplishing part of the academic program); Shuman, *supra* note 129, at 316 (assuming that *Barnette* permits teaching Americanism through techniques other than a compulsory flag salute).

153 *Barnette*, 319 U.S. at 625, 626 & nn.1-2, 627-628, 629 & n.5.

154 *Id.* at 640.

155 "Extracurricular" is defined as "1: outside a regular curriculum: not falling within the scope of a regular curriculum; *specif.* of or relating to officially or semi-officially approved and usu. organized student activities . . . connected with the students' school and usu. carrying no academic credit." WEBSTER'S THIRD, *supra* note 148, at 806. The salute is undoubtedly less akin to student activities merely "connected" with the school and more an aspect of a curricular program to which the school assigns academic credit (i.e., a program in American studies).

156 "Cocurricular" is defined as being "outside of but usu. complementing the regular curriculum — usu. contrasted with *extracurricular*." WEBSTER'S THIRD, *supra* note 148, at 437. It is a closer question whether the flag salute at issue in *Barnette* was curricular or cocurricular. In light of the fact that the resolution instituting the salute was intended to implement a state-wide educational program, it is not unreasonable to conclude that the salute was an element of West Virginia's required curriculum in Americanism.

157 *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 508 (1969).

158 *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986)).

159 See *Roe*, *supra* note 101, at 1272 n.4 (referring to these phrases as the Court's description of the schools' work or operations).

an early encounter with the constitutionality of values inculcation under the Free Speech Clause.¹⁶⁰ As it turns out, the absence of such analytical refinements is consistent with Justice Jackson's articulation of a general concern about the evils of government indoctrination, regardless of the setting in which the indoctrination may be imposed. Justice Jackson warned: "[i]f 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"¹⁶¹ In hindsight it may be wondered whether with these words, eloquent and inspiring though they are, Justice Jackson went too far in embellishing the holding. *Barnette* clearly stands for the proposition that states may not force public school children to salute the American flag.¹⁶² Does it also stand for the much broader proposition that public schools must be neutral on all subjects where a difference of opinion is possible? In the Supreme Court's view, is nonneutrality always tantamount to orthodoxy? That this may have been exactly what the warning was meant to convey is also suggested by the *Barnette* Court's stated vision of ideal public schooling: "Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction."¹⁶³

The logic of these embellishments, read literally, does seem to be that in order for the public schools to avoid orthodoxy, they must maintain painstaking neutrality with respect to all "matters of opinion"¹⁶⁴—matters which may, incidentally, be found throughout the curriculum at the elementary and secondary levels.¹⁶⁵ Yet,

160 See Freeman, *supra* note 115, at 9. The Court had previously dealt with the constitutionality of the compelled flag salute in public schools in *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940). *Gobitis*, in upholding the flag salute, reaffirmed several prior per curiam dispositions of the same issue by the Supreme Court. *Gobitis*, 310 U.S. at 592 n.2 (affirming *Johnson v. Deerfield*, 306 U.S. 621 (1938); *Gabrielli v. Knickerbocker*, 306 U.S. 621 (1938); *Hering v. State Bd. of Educ.*, 303 U.S. 624 (1937); *Leoles v. Landers*, 302 U.S. 656 (1937)). *Barnette* had the effect of overruling *Gobitis* and the per curiam decisions. *Barnette*, 319 U.S. at 642.

161 *Barnette*, 319 U.S. at 642.

162 "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." *Id.* See Harpaz, *supra* note 123, at 36.

163 *Barnette*, 319 U.S. at 637.

164 Arons & Lawrence, *supra* note 135, at 318-19; Mary Harter Mitchell, *Secularism in Public Education: The Constitutional Issues*, 67 B.U. L. REV. 603, 708 (1987); Rebell, *supra* note 22, at 300-01. See Stern, *supra* note 10, at 496-97.

165 Subjects involving "matters of opinion" are common fare for students in public

if neutrality is the only alternative to orthodoxy, how is it possible that in the space of the same opinion Justice Jackson could also write that "[n]ational unity as an end which officials may foster by persuasion and example is not in question"?¹⁶⁶ Surely national unity is not a values-neutral idea; its worth and wisdom, while accepted by most Americans, is a matter upon which other Americans may conceivably differ.¹⁶⁷ Nor does the fact that persuasion and example are used in lieu of a compelled flag salute allay the concerns raised by the Court's proscription of official orthodoxy in politics and its abhorrence of public schools that would be partisan. It may be safely ventured that as students we have all been taught by persuasion and example—with the concomitant expectation that we would absorb and retain our lessons so as to be able to repeat them on examinations.¹⁶⁸ This common pedagogical

elementary and secondary schools. For example, many states require their public schools to teach citizen education courses that cover such debatable topics as the dangers of Communism and the benefits of a free enterprise system. Gordon, *supra* note 54, at 561, 564, 566. Nor is it unusual for public schools to include controversial offerings in sex education as part of their curricula. *Id.* at 561, 566-69. Even the teaching of seemingly innocuous, traditional courses may involve highly sensitive "matters of opinion." The study of literature has provided much fertile soil for disputes over values. *See, e.g.*, Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982) (plurality opinion); JOAN DELFATTORE, WHAT JOHNNY SHOULDN'T READ 1-2, 49 (1992) (observing that high school literary anthologies routinely delete material pertaining to sex and critical of religion from Shakespeare's plays and noting that poetry written for an elementary school level audience has been a focus of parental protest). According to some, even the study of arithmetic may be value-laden. MARK G. YUDOF, WHEN GOVERNMENT SPEAKS 232 (1983); Wright, *supra* note 10, at 77 n.98. Moreover, there is always the possibility that a hidden ideological curriculum, rife with "matters of opinion," operates implicitly, on a subconscious level, upon students. *See, e.g.*, APPLE, *supra* note 49, at 61-64 (contending that there is a hidden curriculum in the schools meant to perpetuate society's class structure); Levin, *supra* note 49, at 1668 (noting that school rules and regulations implicitly transmit certain values and thereby create a passive mindset in students); *see also* JANOWITZ, *supra* note 49, at 163-66 (asserting that if there is a hidden curriculum in the schools, it is probably in the outlook of social studies and civics teachers).

166 *Barnette*, 319 U.S. at 640.

167 Historically, the concept of national unity has not always predominated in the United States. The Civil War is, of course, the most vivid illustration of the phenomenon. One century later, in the 1960s and 1970s, national unity succumbed to widespread disension over the United States role in the war in Vietnam. *See, e.g.*, *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 510 n.4 (1969); JANOWITZ, *supra* note 49, at 107. Likewise, certain groups within the United States have pursued a separatist ideology or life style. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 210 (1972) (describing Amish adherence to a "life aloof from the world"); JANOWITZ, *supra* note 49, at 112-14 (analyzing the movement for black nationalism).

168 Stephen E. Gottlieb, *In the Name of Patriotism: The Constitutionality of "Bending" History in Public Secondary Schools*, 62 N.Y.U. L. REV. 497, 551 (1987). *See also* Arons & Lawrence, *supra* note 135, at 334, 336 (criticizing standardized testing as forcing the test taker to express agreement with "the values and world view of the tester").

approach arguably may do more violence to freedom of thought and expression than a compelled salute insofar as the materials which must be internalized and mastered are more voluminous and complex and require more of a mental commitment than a simple salute.¹⁶⁹

Perhaps the internal inconsistencies of *Barnette* can be minimized if the holding is narrowly construed, i.e., if the majority opinion is read merely to invalidate, under the Free Speech Clause, compelled flag salutes in the public elementary and secondary schools, and nothing more. This explanation does not, however, seem very satisfactory. If *Barnette* is to be taken with the same seriousness with which it apparently was rendered, then it must be the state's compulsion of public school students to articulate the official line on a matter of opinion that is constitutionally objectionable—not just the particular compulsion to demonstrate love of country through a flag salute.¹⁷⁰ A more plausible explanation may be that *Barnette* perpetuates under the Free Speech Clause the duality first identified in *Meyer* and *Pierce* under the Due Process Clause: the public schools must both inculcate and not inculcate, by inculcating constitutionally and not inculcating unconstitutionally.¹⁷¹ Understood in this sense, *Barnette* signifies that neutrality is not the only alternative to orthodoxy inasmuch as some values inculcation, such as the promotion of patriotism by techniques other than a forced flag salute, is permissible under the Free Speech Clause.¹⁷²

That this analysis does not mistake the meaning of *Barnette* as tolerant of some values inculcation is born out by the Court's subsequent decisions. For example, if neutrality were the only

169 Arons & Lawrence, *supra* note 135, at 334, 336-37; Gordon, *supra* note 54, at 556; Gottlieb, *supra* note 168, at 551-52.

170 Freeman, *supra* note 115, at 10; Hunter, *supra* note 119, at 12; Schuman, *supra* note 129, at 316; Senhauser, *supra* note 115, at 952; Shiffrin, *supra* note 15, at 566-68; Malcolm Stewart, *The First Amendment, the Public Schools, and The Inculcation of Community Values*, 18 J.L. & EDUC. 23, 74 (1989). But see van Geel, *supra* note 15, at 244.

171 Freeman, *supra* note 115, at 10; Levin, *supra* note 49, at 1649 & n.8; Mitchell, *supra* note 164, at 708; Senhauser, *supra* note 115, at 951; van Geel, *supra* note 15, at 244; Yudof, *supra* note 134, at 891; Walter A. Kamiat, Note, *State Indoctrination and the Protection of Non-State Voices in the Schools: Justifying a Prohibition of School Library Censorship*, 35 STAN. L. REV. 497, 521 (1983).

172 Freeman, *supra* note 115, at 10; Goldstein, *supra* note 115, at 1351; Levin, *supra* note 49, at 1652-53, 1657-58; Rebell, *supra* note 22, at 301; Shiffrin, *supra* note 15, at 567-68; Stewart, *supra* note 170, at 73-74; van Geel, *supra* note 15, at 244; Yudof, *supra* note 134, at 891. See Schuman, *supra* note 129, at 316.

alternative to orthodoxy, how is it possible that in *Brown v. Board of Education*¹⁷³ the Court could mandate, pursuant to the Fourteenth Amendment's Equal Protection Clause,¹⁷⁴ an end to racially segregated public schooling¹⁷⁵ without simultaneously casting a "pall of orthodoxy"¹⁷⁶ upon the classroom? Although the case did not involve a free speech claim, *Brown* is of interest here because it is unquestionably a values-laden mandate to the public schools, compelling active adherence by students and school personnel to a nonneutral message about race relations.¹⁷⁷ That the values lesson of their decision was not far from the Justices' minds in *Brown* is apparent from the express language of the Court's opinion: "It [education] is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values"¹⁷⁸ The *Brown* Court did not allude to any First Amendment obstacles in rendering its decision.¹⁷⁹

*Ambach v. Norwick*¹⁸⁰ is even more to the point. At issue in this case was the claim that New York contravened the Equal Protection and Free Speech Clauses by prohibiting the employment in public elementary and secondary schools of teachers who were aliens and who refused to seek U.S. citizenship.¹⁸¹ The assumption underlying the prohibition was that such aliens would not teach acceptable values.¹⁸² The Court upheld the statute as against the equal protection claim because New York had a legitimate interest, to which the employment ban was rationally related,¹⁸³ in developing students' "perceptions and values"¹⁸⁴ and in molding "the attitudes of students toward government, the political

173 347 U.S. 483 (1954).

174 The Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, §1.

175 *Brown*, 347 U.S. at 493-96.

176 The phrase comes from the majority opinion in *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), stating that "the First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom."

177 Bruce C. Hafen, *Schools as Intellectual and Moral Associations*, 1993 B.Y.U. L. REV. 605, 609-10. See Arons & Lawrence, *supra* note 135, at 323, 349; cf. STEPHEN ARONS, *COMPPELLING BELIEF* 213-14 (1983) (discussing government regulation against racism in the schools as conveying values).

178 *Brown*, 347 U.S. at 493.

179 *Id. passim*.

180 441 U.S. 68 (1979).

181 *Id.* at 69.

182 *Id.* at 81 n.14.

183 *Id.* at 79-81.

184 *Id.* at 78-79.

process, and a citizen's social responsibilities."¹⁸⁵ Furthermore, "a State properly may regard all teachers as having an obligation to promote civic virtues and understanding in their classes, regardless of the subject taught,"¹⁸⁶ especially "values necessary to the maintenance of a democratic political system"¹⁸⁷

The *Ambach* majority did not raise the spectre of government imposed orthodoxy and betrayed no anxiety whatsoever that the employment prohibition might contravene free speech principles. Indeed, the Court characterized the alien teachers' free speech claim as "wide of the mark"¹⁸⁸ because, if given credence, it "would bar any effort by the State to promote particular values and attitudes toward government."¹⁸⁹ Even Justice Blackmun, in dissent, took pains to make clear "that the inculcation of fundamental values by our public schools is necessary to the maintenance of a democratic political system."¹⁹⁰

While *Brown* and *Ambach* generally reinforce the constitutional legitimacy of values inculcation in public elementary and secondary schools, neither case called upon the Court to decide the constitutionality of a curricular decision to inculcate values. In that sense, *Brown* and *Ambach* are somewhat attenuated from the precise issue presented in this Article and, arguably, in *Barnette* of whether public schools may validly marshal their curricula to the task of values inculcation under the Free Speech Clause. The Court would reach that issue at a later date.¹⁹¹ In the interim, however, it decided two more cases which also concern the constitutionality under the Free Speech Clause of values inculcation in the public schools, albeit in a noncurricular context, and which contribute to understanding the evolution of the Court's thinking in this area. As in *Barnette*, the Court in these cases, *Tinker v. Des Moines Independent Community School District*¹⁹² and *Board of Education, Island Trees Union Free School District No. 26 v. Pico*,¹⁹³ continued the dichotomous approach to analyzing the constitutionality

185 *Id.* at 79.

186 *Id.* at 80.

187 *Id.* at 77.

188 *Id.* at 79 n.10.

189 *Id.* at 79 n.10.

190 *Id.* at 86 n.6 (Blackmun, J., dissenting).

191 *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986). See *infra* text accompanying notes 232-80.

192 393 U.S. 503 (1969).

193 457 U.S. 853 (1982) (plurality opinion).

of values inculcation under the Free Speech Clause and ruled so as to give freer play to that part of the analysis solicitous of students' free expression rights.

Tinker had its genesis when principals of Des Moines' public schools suspended three students for wearing black armbands to school for the purpose of protesting American prosecution of the war in Vietnam.¹⁹⁴ The students claimed that the suspensions violated the Free Speech Clause. The U.S. Supreme Court sided with the students, observing that students do not "shed their constitutional rights to freedom of speech or expression at the school-house gate."¹⁹⁵ The Court reasoned that the students' wearing of the armbands was their "silent, passive expression of opinion,"¹⁹⁶ a form of expression protected by the clause. The Court ruled that such protected student expression could only be curtailed by the schools if, at the very least, the expression could reasonably have led school authorities to anticipate substantial disruption of the work of the school or interference with the rights of other students.¹⁹⁷ Since the record contained no facts demonstrating that the principals might reasonably have forecast that wearing armbands would cause such disruption or interference and since no disruption or interference actually occurred, the Court held

194 *Tinker*, 393 U.S. at 504.

195 *Id.* at 506.

196 *Id.* at 508.

197 *Id.* at 509, 514; Diamond, *supra* note 99, at 480; Thomas C. Fischer, "Whatever Happened to Mary Beth Tinker" and Other Sagas in the Academic "Marketplace of Ideas", 23 GOLDEN GATE U. L. REV. 351, 355 (1993); Hafen, *supra* note 99, at 691. Professor Sheldon Nahmod opines that the *Tinker* test of the constitutionality of public school regulation of student speech consists of two different tests, one focusing on the rule-making function of the schools and the other pertaining to school officials' adjudication of student behavior. Nahmod, *supra* note 150, at 1483-84. According to Professor Nahmod's interpretation, a challenge to rule-making in this context is a facial challenge to a school speech regulation and, under *Tinker*, the constitutionality of the rule should turn on whether school officials could have reasonably forecast that the student speech would disrupt the work of the schools or interfere with the rights of others. A challenge to a school adjudication that student speech should be punished is a challenge to a school speech regulation as applied and, under *Tinker*, the constitutionality of the adjudication should hinge on whether the speech disrupted the work of the schools or interfered with the rights of others. Nahmod, *supra* note 150, at 1483-84. Professor Thomas C. Fischer analyzes *Tinker* in a somewhat similar vein, equating a challenge to rule-making to a challenge to the school's prior restraint of student speech and requiring application of "the *Tinker* 'forecast' rule." Fischer, *supra*, at 352 n.6. Nevertheless, some commentators assume that *Tinker* posits only one test of the constitutionality of public school regulation of student speech, which is simply whether the speech actually disrupts school operations or intrudes upon the rights of others. Dienes & Connolly, *supra* note 115, at 357; Rebell, *supra* note 22, at 304.

that the suspensions were an unconstitutional contraction of student rights under the First Amendment.¹⁹⁸

Chief Justice Burger's opinion for the Court offered some reflections that, taken out of context, would seem to augur a Court less disposed to accept the constitutionality of values inculcation. The opinion's quotes from *Keyishian v. Board of Regents*¹⁹⁹ stress that the classroom is uniquely a "marketplace of ideas"²⁰⁰ in which students should be exposed to a "robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"²⁰¹ Moreover, in this ideational marketplace that is school, "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."²⁰²

Although these are strong words, they have ultimately had a limited impact on curricular values inculcation. *Tinker*, considered as a whole and in historical context, cannot fairly be taken to repudiate the proposition that some values inculcation by public elementary and secondary schools is permissible under the Free Speech Clause.²⁰³ The reason for the limited reach of *Tinker* relates to the factual basis upon which that case was decided. *Tinker* does not involve any attempt by school officials to inculcate values through the curriculum. Rather, *Tinker* concerns student expression initiated by students on school premises but outside "the work of the schools."²⁰⁴ The accuracy of this interpretation is

198 *Tinker*, 393 U.S. at 514.

199 385 U.S. 589 (1967). *Keyishian* concerned issues of academic freedom in the university setting. See *supra* note 115 for a discussion as to why cases dealing with higher education are not included among the precedents considered pertinent to this article.

200 *Tinker*, 393 U.S. at 512 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

201 *Id.*

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

203 Diamond, *supra* note 99, at 528; Gottlieb, *supra* note 168, at 516; Harpaz, *supra* note 123, at 36; Roe, *supra* note 101, at 1278 & n.36; Senhauser, *supra* note 115, at 959. See Stewart, *supra* note 170, at 30-32; cf. Freeman, *supra* note 115, at 14 (asserting that *Tinker* supports the idea that school officials may engage in values inculcation as long as they steer clear of "narrow political, partisan, or religious indoctrination"); Goldstein, *supra* note 115, at 1351-55 (arguing that *Tinker* has no bearing on teacher control of curriculum and that *Tinker* is incorrect if it does affect teacher control of curriculum); Hafen, *supra* note 99, at 691 (noting that student expression at issue in *Tinker* was unconnected to curriculum or even to extracurricular activities); van Geel, *supra* note 15, at 244, 245 & n.232 (suggesting that *Tinker* signifies that schools may inculcate values but may not interfere with students' opportunity to hear alternative views from their peers). But see Ingber, *supra* note 10, at 48 & n.192.

204 *Tinker*, 393 U.S. at 508.

confirmed by the circumstance that *Tinker* preceded not only *Ambach v. Norwick*²⁰⁵ but also *Bethel School District No. 403 v. Fraser*²⁰⁶ and *Hazelwood School District v. Kuhlmeier*,²⁰⁷ the latter two decisions upholding curricular values inculcation against student Free Speech Clause claims.

Three years after *Tinker*, in *Board of Education, Island Trees Union Free School District No. 26 v. Pico*,²⁰⁸ the Supreme Court had occasion to decide the constitutionality, under the Free Speech Clause, of public schools' removal from their libraries of certain books which school officials considered "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy" as well as a "moral danger" to schoolchildren.²⁰⁹ An uncertain Court responded with a plurality decision and seven separate opinions. Although the disposition of the case, set forth in Justice Brennan's opinion for the Court, was expressly limited to values inculcation controversies that arise in connection with public school libraries and, even then, only with regard to the removal of books from those libraries,²¹⁰ *Pico* is worthy of study. In their various opinions, the Justices write at some length in dicta about public schools' authority to engage in values inculcation in general. It is especially illuminating to compare the opinion of Justice Brennan with those of Justice Rehnquist and Chief Justice Burger,²¹¹ for the three opinions disclose a Court divided only with respect to the methodology of identifying what type of values inculcation is constitutional;²¹² there is no disagreement with the proposition that some values inculcation in the public elementary and secondary schools is constitutional and desirable.²¹³

205 441 U.S. 68 (1979).

206 478 U.S. 675 (1986).

207 484 U.S. 260 (1988).

208 457 U.S. 853 (1982) (plurality opinion).

209 *Id.* at 857 (quoting *Pico v. Board of Educ., Island Trees Union Free Sch. Dist.*, 474 F. Supp. 387, 390 (E.D.N.Y. 1979)).

210 *Id.* at 862-63, 871-72.

211 Justice Blackmun's concurring opinion does not differ substantially from the approach adopted by Justice Brennan. *Pico*, 457 U.S. at 875-82 (Blackmun, J., concurring). Justice White agrees with the lower appellate court that the case should not have been decided on a motion for summary judgment. *Id.* at 883-84 (White, J., concurring). Justice Powell's dissenting opinion views the plurality decision as an unwise intrusion of judicial oversight into educational policy and rejects Justice Brennan's recognition of a First Amendment right to receive ideas. *Id.* at 893-97 (Powell, J., dissenting). Finally, Justice O'Connor's short dissenting opinion essentially echoes the Rehnquist dissent. *Id.* at 921 (O'Connor, J., dissenting).

212 See *infra* notes 214-31 and accompanying text.

213 See *infra* notes 214-31 and accompanying text.

Justice Brennan's opinion adjudged that if the school board were removing the library books in order to limit access to ideas with which the board disagreed, the removal would violate the Free Speech Clause; if, however, the purpose of the removal were merely to protect children from materials that were vulgar or otherwise educationally unsuitable to their age, the removal would be constitutional.²¹⁴ In reaching this result, Justice Brennan invoked the proposition that students should benefit from a qualified First Amendment right to receive information and ideas from existing public school library collections.²¹⁵ Whether Justice Brennan would extend that right beyond the library is unclear,²¹⁶ especially since he acknowledges that outside the library the public schools have a responsibility to inculcate certain values—a responsibility that necessitates selectivity in conveying information to students.²¹⁷

Such ambiguity is characteristic of the dicta in Justice Brennan's opinion concerning the broader school setting. For example, in some departure from *Barnette*, he wrote approvingly of public schools' obligation to teach political values in the classroom:

We are therefore in full agreement with petitioners that local school boards must be permitted "to establish and apply their curriculum in such a way as to transmit community values," and that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political."²¹⁸

Justice Brennan opines that in contrast to the school library,

214 *Pico*, 457 U.S. at 871-72.

215 *Id.* at 866-68.

216 The ambiguity of Justice Brennan's opinion on this score is readily apparent. He refers to the "special characteristics of the school library" as making it an "especially appropriate" place for recognition of students' right to receive information and ideas. *Id.* at 868. One possible implication of these words, which, incidentally, Justice Rehnquist refused to draw, is that since the library is "especially" conducive to such recognition, other places and/or activities in the schools might also serve as a locus for the right even though they present a less appropriate milieu for exercise of the right. *Id.* at 910 (Rehnquist, J., dissenting). Yet, this implication is rendered dubious by Justice Brennan's own caveat that "[p]etitioners might well defend their claim of absolute discretion in matters of curriculum by reliance upon their duty to inculcate community values." *Id.* at 869. School officials' "absolute discretion" vis-a-vis curricular inculcation is difficult, if not impossible, to reconcile with students' right to receive whatever information they want through the curriculum.

217 *Id.* at 864, 869.

218 *Id.* at 864 (quoting Brief for Petitioners at 10).

where the purported First Amendment right to receive information and ideas must be respected, "[p]etitioners might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values."²¹⁹ Yet, in the very same opinion Justice Brennan also makes the general observation that "[o]ur Constitution does not permit the official suppression of *ideas*"²²⁰ and repeats the refrain that the Free Speech Clause does not permit schools to "cast a pall of orthodoxy over the classroom."²²¹ Justice Brennan's opinion evinces that he both accepted and repudiated values inculcation, without explanation as to how these positions can be reconciled. The latitude afforded by dicta may account for the inconclusive self-contradiction. Nevertheless, the result is that in *Pico*, Justice Brennan articulates a dichotomous approach that verges on the unintelligible.²²²

Chief Justice Burger's dissenting opinion parts company with the plurality opinion on the grounds that "virtually all educational decisions necessarily involve 'political' determinations"²²³ and that those determinations are part and parcel of schools' broad discretion to inculcate values integral to safeguarding a democratic political system.²²⁴ Based on this assumption, the Chief Justice is emphatic that the Court should not recognize children's free speech right to receive all information and ideas from the public schools which children desire;²²⁵ at the same time, he agrees with the proposition laid down in *Tinker* that children do not abdicate their First Amendment rights simply because they find themselves in the custody of the public schools.²²⁶ Thus, although the Chief Justice does not repudiate the dichotomous approach, he strikes a balance that, at least in tone, is favorably inclined toward upholding values inculcation.

219 *Id.* at 869.

220 *Id.* at 871.

221 *Id.* at 870 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

222 *Kamiat*, *supra* note 171, at 510; *Levin*, *supra* note 49, at 1659 & n.61, 1660. *See* *Gottlieb*, *supra* note 168, at 514-15; *Ingber*, *supra* note 10, at 54-55; *van Geel*, *supra* note 15, at 238-39; *cf. Roe*, *supra* note 101, at 1281 (observing that Justice Brennan's *Pico* opinion accepts the notion that public schools should inculcate those values that are essential to a democratic society, but also warns the schools to refrain from exercising their inculcative powers in a political or partisan way).

223 *Pico*, 457 U.S. at 890 (Burger, C.J., dissenting).

224 *Id.* at 889-90.

225 *Id.* at 888-89.

226 *Id.* at 886.

Justice Rehnquist's dissenting opinion also accepts the general proposition that children are not bereft of all free speech rights while at school.²²⁷ However, in *Pico*, Justice Rehnquist comes close to abandoning the dichotomous approach. He would substitute an approach that applies the Free Speech Clause less stringently when the government acts as an educator rather than as a sovereign.²²⁸ This approach acknowledges that when government plays the role of educator at the elementary and secondary levels, it necessarily and ideally inculcates values and engages in "the selective conveyance of ideas."²²⁹ Justice Rehnquist asserts that under the First Amendment, schooling at these levels cannot be held to "any constitutionally required eclecticism in public education," whether in the library or through the curriculum.²³⁰

Justice Rehnquist's dissent represents an innovation in the analysis of values inculcation. In lieu of the Court's dichotomous approach that may, after all, be a futile attempt to reconcile the irreconcilable, Justice Rehnquist offers the simplicity of a two-part test. Specifically, the constitutionality of values-laden, government-imposed speech regulations depends first, on whether they are imposed by the government acting as educator and, second, on whether the government is regulating speech at the elementary and secondary levels. If the answer to both of these questions is affirmative, there is a strong inference that the values inculcation achieved by the restraint is constitutional.²³¹ In spite of the simplicity of this analysis and the predictability which it would ostensibly bring to determining the constitutionality of the schools' inculcative functions, the Court has not opted to employ this test in subsequent cases.

Indeed, soon after *Pico*, the Court resorted to the dichotomous approach in *Bethel School District No. 403 v. Fraser*,²³² a case directly addressing the status under the Free Speech Clause of *curricular* values inculcation by the public schools. In *Fraser*, a public high school student was disciplined for making a lewd speech nominating one of his peers for student elective office. The speech, which described the nominee's qualifications by the use of

227 *Id.* at 910 (Rehnquist, J., dissenting).

228 *Id.* at 920.

229 *Id.* at 915.

230 *Id.* at 914.

231 See *supra* text accompanying notes 227-31.

232 478 U.S. 675 (1986).

an explicit sexual metaphor, was delivered during an assembly that was part of a school-sponsored educational program in self-government.²³³ As such, the nominating speech was a curricular exercise²³⁴ or, to use the terminology from *Tinker*, "the work of the schools."²³⁵

The speech was not without effect. Some of the six hundred children in the audience hooted and yelled, others used gestures to mimic the sexual acts represented in the metaphor and others seemed bewildered.²³⁶ Because school authorities considered the speech to be in violation of a school rule against "obscene, profane language or gestures,"²³⁷ the student was suspended for several days and his name was deleted from a list of potential commencement day speakers.²³⁸

He filed suit in federal district court, arguing, among other things, that these disciplinary measures impinged upon his First Amendment free speech rights.²³⁹ The U.S. Court of Appeals for the Ninth Circuit, affirming the judgment of the district court in favor of the student, held that his speech was indistinguishable from the protest armband in *Tinker*.²⁴⁰ The Court of Appeals rejected the school district's contention that, incident to its authority over the curriculum, the school also had the power to regulate the language used by students during a school-sponsored event.²⁴¹

The U.S. Supreme Court, in what has become almost a ritual in values inculcation cases, acknowledged that students do not "shed their constitutional rights to freedom of speech . . . at the schoolhouse gate."²⁴² But, the Court refused to apply *Tinker's*

233 *Id.* at 677-78.

234 The majority opinion repeatedly refers to Fraser's nominating speech as part of the formal educational program or curriculum. "The assembly was part of a school-sponsored educational program in self-government." *Id.* at 677. Fraser's utterances were made "before an official high school assembly." *Id.* at 681. The First Amendment does not prevent schools from punishing student speech that would "undermine the school's basic educational mission." *Id.* at 685.

235 *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 508 (1969).

236 *Fraser*, 478 U.S. at 678. *But see* Traci B. Edwards, Comment, *First Amendment Rights in Public Schools: Bethel School District v. Fraser*, 12 OKLA. CITY U. L. REV. 907, 926-27 (1987) (contending that the hoots and yells were merely appreciative outpourings and that very few students simulated the sexual activities alluded to by Fraser).

237 *Fraser*, 478 U.S. at 678 (quoting the applicable Bethel High School disciplinary rule).

238 *Id.* at 678.

239 *Id.* at 679.

240 *Id.*

241 *Id.* at 680.

242 *Id.* at 680 (quoting *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S.

standard for assessing the constitutionality of public school limitations on student expression under the Free Speech Clause to *Fraser*.²⁴³ In his opinion for the Court, Chief Justice Burger distinguishes *Tinker* from *Fraser* on two grounds. First, the penalties imposed in *Fraser* had no relation to any political viewpoint whereas the punishment meted out in *Tinker* was in reaction to a protest against American military involvement in Vietnam.²⁴⁴ Second, the nominating speech in *Fraser* was part of the school's academic program while the armband incident in *Tinker* was not part of the "work of the schools."²⁴⁵

Fraser thus develops further the dichotomous approach that the Court initiated in *Meyer*, *Pierce* and *Barnette*. In *Fraser* the Court makes the customary bow of obeisance to students' individual free speech rights while holding that the school district's regulation of that speech survives a Free Speech Clause challenge.²⁴⁶ This represents a development of the Court's prior analysis in the sense that *Fraser* gleans from *Barnette* and *Tinker* a general rule of thumb that is implicit in the three cases read together: public schools may regulate nonpolitical student speech that is part of the curriculum provided the regulation is directed at inculcating values other than political ones;²⁴⁷ public schools may restrict student speech that is not part of the curriculum if school officials reasonably foresee that the speech will substantially disrupt school activities or interfere with the rights of others.²⁴⁸ That the *Fraser* Court thought it was validating the constitutionality of nonpolitical values inculcation is made clear not only by the Court's contrast of the off-color nominating speech with the politically charged antiwar protest,²⁴⁹ but also by the Court's characterization of the sanc-

503, 506 (1969)).

243 *Id.* at 685-86. See Edwards, *supra* note 236, at 920; Roe, *supra* note 101, at 1283-84; Senhauser, *supra* note 115, at 973, 976. But see Royal C. Gardner, III, Note, *Protecting a School's Interest in Value Inculcation to the Detriment of Student's Free Expression Rights: Bethel School District v. Fraser*, 28 B.C. L. REV. 595, 598 (1987) (contending that *Fraser* "expands the *Tinker* concept of substantial disruption of the educational process to include speech which disrupts the school's value inculcation purpose").

244 *Fraser*, 478 U.S. at 680.

245 *Id.* at 680.

246 *Id.* at 685.

247 *Id.* at 680, 685.

248 *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 509, 514 (1969).

249 "The marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of respondent's speech in this case seems to have been given little weight by the Court of Appeals." *Fraser*, 478 U.S. at 680.

tions imposed on the student orator.²⁵⁰ According to the Court, these sanctions, rather than suppressing a political viewpoint, served the purportedly nonpolitical purpose of inculcating civility and consideration for the sensibilities of other people.²⁵¹

While *Fraser* brings some closure to the issue of whether public schools may inculcate nonpolitical values by controlling school-sponsored or curricular student speech, the decision also creates many new ambiguities and leaves many preexisting questions unanswered.²⁵² May public schools always regulate nonpolitical student speech that is part of the curriculum so as to inculcate nonpolitical values? If not, what are the factual circumstances that would cause such regulation to run afoul of the Free Speech Clause? Must the student speech contain sexual references for it to be so regulated?²⁵³ May the public schools never regulate political student speech that is part of the curriculum so as to inculcate political values, and, if not, what is the standard for defining constitutional regulation of political expression in the schools? Finally, how should "political values" be defined?

The *Fraser* majority plainly regarded civility, understood as an absence of sexual references, to be a nonpolitical value. Yet, the appellate court below had been concerned that preservation of such civility would "increase the risk of cementing white, middle-class standards"²⁵⁴ This concern highlights the elusiveness

250 "Unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint." *Id.* at 685.

251 *Id.* at 681, 683, 685. The Court emphasized that in the public schools consideration for the sensibilities of others is a particularly strong justification for upholding school control of sexually explicit student speech that "could well be seriously damaging to its less mature audience." *Id.* at 683-84. See Gardner, *supra* note 243, at 597.

252 See, e.g., Dienes & Connolly, *supra* note 115, at 370-71 (pointing out that the *Fraser* Court did not indicate whether "judicial deference toward suppression of 'indecent speech' will be limited to sexual offensiveness in academic settings"); Bruce C. Hafen, Comment, *Hazelwood School District and the Role of First Amendment Institutions*, 1988 DUKE L. J. 685, 690-91 (seeing *Fraser* as a "potentially significant departure from *Tinker*" or, in the alternative, as adding "little to the *Tinker*-era standards"); see also Edwards, *supra* note 236, at 929 (asserting that the *Fraser* Court may be understood to have objected to the content of the student's speech without a constitutional rationale or, in the alternative, to the time, place and manner of the student's speech); Gardner, *supra* note 243, at 616 (characterizing *Fraser* as propounding a vague values inculcation standard for ascertaining the constitutionality of public school restrictions on student speech).

253 E.g., Dienes & Connolly, *supra* note 115, at 370; Roe, *supra* note 101, at 1285 n.83. One commentator has conjured up the "ideal test case" after *Fraser*: it "would involve non-lewd, non-indecent, non-vulgar speech . . . that could reasonably be thought to detectably undermine the school's basic and legitimate educational mission, while at the same time not posing a substantial threat of an actual physical disruption." Wright, *supra* note 10, at 74.

254 *Fraser*, 478 U.S. at 680 (quoting *Fraser v. Bethel Sch. Dist. No. 403*, 755 F.2d

of separating that which is political from that which is nonpolitical. In equating political expression with antiwar protests but not with a bawdy nominating speech the *Fraser* Court tacitly adopted a narrow conception of the term "political."²⁵⁵ That the conception is so narrow as to be unworkable is manifested by the Court's own discourse on civility as a value essential to maintaining a "democratic political system"²⁵⁶ and a "civilized social order."²⁵⁷ Taking the Court at its word, then, public schools may constitutionally teach the nonpolitical value of civility so as to prepare the citizenry to perpetuate the two political values of democracy and social order.²⁵⁸ The contradictary nature of this formulation cannot help but raise doubts about the soundness of the Court's attempt under the Free Speech Clause to distinguish political from nonpolitical curricular speech by students. In *Fraser* the Court has arguably misstepped in applying its dichotomous analysis²⁵⁹ by relying on false distinctions in order to determine how educators are to inculcate constitutionally and not inculcate unconstitutionally at the same time.

Nor do the Supreme Court's most recent pronouncements on the subject, in *Hazelwood School District v. Kuhlmeier*,²⁶⁰ resolve the questions left dangling in *Fraser*. In *Kuhlmeier* three former students at Hazelwood East High School who also had been staff members of the school newspaper brought suit against the school district and various school personnel. The gravamen of the com-

1356, 1363 (9th Cir. 1985)).

255 There is a certain anomaly in the fact that although the *Fraser* Court categorized the student's speech in that case as not involving any political viewpoint, the speech was, in fact, given "in the context of a student election campaign." Fischer, *supra* note 197, at 377.

256 *Fraser*, 478 U.S. at 681, 683.

257 *Id.* at 683.

258 As one commentator puts it, "the school board's attempt to inculcate the standards of 'decency' and 'civility' was seen [by the Court] not only as transmitting legitimate character values, but also as supporting the political value of respect for the rights of others in a democratic society." Rebell, *supra* note 22, at 307.

259 Some legal scholars have described the *Fraser* approach as a balancing test. Dienes & Connolly, *supra* note 115, at 364; Edwards, *supra* note 236, at 919. See *The Supreme Court — Leading Cases*, 102 HARV. L. REV. 143, 276 (1988). Because this balancing attempts to reconcile the tension between students' free speech rights and the public schools' inculcative enterprise, the test incorporates and is a manifestation of the dichotomous approach referred to in the text above. In an interesting twist, some commentators have likened the *Fraser* balancing test to that used in *Tinker* on the theory that *Fraser* characterizes "interference with inculcation of values as itself a material disruption of the school's educational mission." *The Supreme Court — Leading Cases, supra*, at 276.

260 484 U.S. 260 (1988).

plaint was that school authorities violated the students' free speech rights by deleting articles from the May 13, 1983 issue of the newspaper.²⁶¹

The newspaper was produced as part of the school's journalism curriculum.²⁶² In keeping with past practice, the journalism teacher submitted page proofs of the May 13th edition to the school principal for his review.²⁶³ The principal prohibited publication of two of the newspaper's six pages by withholding two articles. One of the articles explored the impact of divorce on students at the school and the other described three Hazelwood East students' pregnancies.²⁶⁴ The principal's reasons for this censorship were to protect the privacy of the pregnant students who might be identifiable from the text, shield the school's younger students from inappropriate descriptions of sexual activity and birth control, and maintain the privacy of a student's father who was disparagingly portrayed in the article on divorce.²⁶⁵

The Court reasoned that the question before it was not whether the Free Speech Clause requires public schools to tolerate student speech unrelated to the curriculum, as in *Tinker*, but, rather, whether the clause requires schools to tolerate student speech that is part of the curriculum and thereby give the impression that the school endorses the contents of such speech.²⁶⁶ Because the school newspaper was curricular student speech, the Court reasoned that *Tinker's* standard for judging the constitutionality of speech regulations did not govern.²⁶⁷ The *Kuhlmeier* majority instead held "that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as

261 *Id.* at 262.

262 "This case concerns the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum." *Id.* "Spectrum [the school newspaper] was written and edited by the Journalism II class at Hazelwood East." *Id.* "The policy of school officials toward Spectrum was reflected in Hazelwood School Board Policy 348.51 and the Hazelwood East Curriculum Guide. Board Policy 348.51 provided that '[s]chool sponsored publications are developed within the adopted curriculum and its educational implications in regular classroom activities.'" *Id.* at 268. "School officials did not deviate in practice from their policy that production of Spectrum was to be part of the educational curriculum and a 'regular classroom activit[y]'" *Id.*

263 *Id.* at 263.

264 *Id.* at 263-64.

265 *Id.* at 263.

266 *Id.* at 270-73.

267 *Id.* at 272-73.

their actions are reasonably related to legitimate pedagogical concerns."²⁶⁸

With this holding, *Kuhlmeier* may have improved upon *Fraser* by elucidating with more precision²⁶⁹ the applicable standard for

268 *Id.* at 273. The *Kuhlmeier* Court also relied upon a nonpublic forum analysis in reaching the holding. *Id.* at 267-71.

Under the forum doctrine, the courts assess the constitutionality, under the Free Speech Clause, of governmental content-based regulations of expression by classifying the type of forum in which the expression takes place and applying a standard of assessment that varies with the classification. Public fora are places, such as the streets and parks, "which by long tradition or by government fiat have been devoted to assembly and debate." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Semi-public fora are opened up by the government to the public for "expressive activity." *Id.* at 45. Nonpublic fora are "not by tradition or designation a forum for public communication" and are not opened up for public expressive interchange. *Id.* at 46. Generally speaking, the government must have a compelling interest in order to impose content-based regulations on expression in public and semi-public fora; in nonpublic fora, such government regulation need only be rational and viewpoint-neutral. *Id.* at 45-46; *Dienes & Connolly*, *supra* note 115, at 372 n.108; Gail Paulus Sorenson, *The 'Public Forum Doctrine' and its Application in School and College Cases*, 20 J.L. & EDUC. 445, 446-49 (1991). See generally *TRIBE*, *supra* note 14, § 12-24.

The nature of public schools, by itself, does not suffice to make them into either public or semi-public fora. Sorenson, *supra*, at 455. But see *Hafen*, *supra* note 99, at 725 (arguing that the forum analysis should not apply at all to the schooling of immature children). Indeed, Justice White's opinion for the Court in *Kuhlmeier* effectively equated a nonpublic forum classification with public school activities that are school-sponsored or curricular. *Kuhlmeier*, 484 U.S. at 268-70. But see *The Supreme Court — Leading Cases*, *supra* note 259, at 276 (contending that *Kuhlmeier* does not make clear "whether school sponsorship is somehow equated with nonpublic forum status"). The Court understandably concluded, therefore, that the school could properly impose regulations meeting a reasonableness standard on the content of student expression occurring as part of such school activities. *Kuhlmeier*, 484 U.S. at 268-70.

Justice White's *Kuhlmeier* opinion has been interpreted to offer, in actuality, two possible reasonableness standards, i.e., that in a nonpublic school forum government may regulate speech content "in any reasonable manner," *Kuhlmeier*, 484 U.S. at 270, or in any manner "reasonably related to legitimate pedagogical concerns." 484 U.S. at 273. *The Supreme Court — Leading Cases*, *supra* note 259, at 276 n.50. See also *Hafen*, *supra* note 252, at 695 (noting that the majority opinion "was not entirely consistent" in explaining the reasonableness standard). Professor Bruce Hafen proposes that "the larger [factual] context of *Hazelwood*" suggests a rational basis standard that is not necessarily keyed to educational justifications. *Hafen*, *supra* note 252, at 695-96. However, Justice White's opinion in its entirety can lead to the opposite conclusion. Since the Court's holding is grounded upon the fact that the school was regulating student speech so as to inculcate certain values, it is just as logical to surmise that Justice White meant that such regulation will be considered reasonable under nonpublic forum analysis only if it is "reasonably related to legitimate pedagogical concerns." *Kuhlmeier*, 484 U.S. at 273 (emphasis added). See Sorenson, *supra* note 268, at 453.

269 Those less confident about *Kuhlmeier*'s improving effect have remarked: "[w]hereas the *Fraser* opinion was disjointed and opaque, Justice White's opinion for the Court in *Hazelwood* is painfully clear." *Dienes & Connolly*, *supra* note 115, at 371. See also J. Marc Abrams & S. Mark Goodman, *End of an Era? The Decline of Student Press Rights in the Wake*

determining the constitutionality, under the Free Speech Clause, of school restraints on curriculum-related student speech. Even so, the devil is in the details. What sorts of "legitimate pedagogical concerns" justify schools in controlling such speech? In the context of *Kuhlmeier*, the phrase "legitimate pedagogical concerns" appears to be a euphemism for values inculcation since, according to the Court, the principal could excise the troublesome articles not only to protect privacy and immature sensibilities, but also to inculcate, by the excision, the opposite of those values expressed in the offending articles.²⁷⁰ And what values may a public school properly inculcate through its curriculum under the Free Speech Clause? The *Kuhlmeier* decision offers an illustrative list which seems to further obfuscate the dividing line between constitutional and unconstitutional values inculcation. The Court states that public schools may regulate curricular student speech so as to disassociate themselves "from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences."²⁷¹ Moreover,

[a] school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with 'the shared values of a civilized social order' . . . or to associate the school with any position other than neutrality on matters of political controversy.²⁷²

As in *Barnette*²⁷³ and *Fraser*,²⁷⁴ the Court advises the schools both to strive for neutrality on political matters and to ignore that advice—by teaching, for example, that students should shun prejudice or conduct inconsistent with civilized social order. It is easily imagined that a bigot would take exception to the former value and an anarchist would do the same with respect to the latter as

of *Hazelwood School District v. Kuhlmeier*, 1988 DUKE L.J. 706, 719-28, 732; Colleen M. Arnott, Comment, *Constitutional Law — Public School Students' First Amendment Right of Expression Subject to Standard of Reasonableness — Hazelwood School District v. Kuhlmeier*, 108 S. Ct. 562 (1988), 22 SUFFOLK U. L. REV. 851, 858-59 (1988); Eileen Libby, Note, *The Supreme Court Further Restricts Student First Amendment Rights in Public Schools: The Future of "Free Trade in Ideas" After Hazelwood School District v. Kuhlmeier*, 20 LOY. U. CHI. L.J. 145, 163-70 (1988).

270 *Kuhlmeier*, 484 U.S. at 270-73.

271 *Id.* at 271.

272 *Id.* at 272.

273 See *supra* notes 161-72 and accompanying text.

274 See *supra* notes 247-59 and accompanying text.

being contrary to their moral codes and political views. In short, *Kuhlmeier* reiterates the problem that plagued the Court in *Barnette* and *Fraser*—how to make sense of the Court's dichotomous approach by making an understandable demarcation between constitutional and unconstitutional values inculcation in public elementary and secondary school curricula. The Court in *Kuhlmeier* dodges the problem by again offering guidance that, at least on its face, is contradictory and confusing.

It remains to be seen whether the Court's dichotomous approach is a sophisticated, flexible response to a highly complex problem or mere haphazard inconsistency—a failure by the Court to enunciate a workable, reasoned standard. Whether because of or in spite of the dichotomous approach, *Fraser* and *Kuhlmeier* do, however, represent some doctrinal progress. They provide a definitive answer to the question first raised in *Barnette* as to whether it is possible for public elementary and secondary schools to inculcate values through the curriculum without violating the Free Speech Clause. The *Fraser* and *Kuhlmeier* Courts' affirmative answer additionally makes some limited headway in clarifying which values the schools may constitutionally inculcate. Certainly *Fraser* establishes that schools may use curricular activities to inculcate civility, especially as that value relates to avoidance of profanity, vulgarity and lewdness.²⁷⁵ *Kuhlmeier* makes equally clear that schools may curricularly inculcate the value of respect for the privacy of others.²⁷⁶ *Fraser* and *Kuhlmeier*, particularly when read in light of *Pico*, also leave no doubt that schools may deny students exposure to values that are inappropriate to their age group.²⁷⁷

This progress is somewhat tempered by the fact that the Court's holdings in *Fraser* and *Kuhlmeier* reveal only a few of the values that may be constitutionally inculcated. The Court's reticence is, of course, appropriate since federal court holdings should not cover more ground than the dispute in each case requires. Nor is it feasible for the Court to identify every such value. Nevertheless, the abbreviated list yielded by the *Fraser* and *Kuhlmeier* holdings leaves a large grey area as to which other values may be constitutionally acceptable for inculcative purposes. The Court's more expansive dicta concerning the acceptability of a variety of ambiguous and inconsistent values deepens rather than

275 See *supra* text accompanying notes 251, 253, 258.

276 See *supra* text accompanying note 270.

277 See *supra* text accompanying notes 214, 250-51, 271.

dispels the haze. The reader need only refer back to the Court's uneven treatment of political values to illustrate the difficulty: as a general matter public schools are to avoid inculcating political values while they are also expected to inculcate specific political values such as a belief in the American political system.

In spite of these problems, the Court may, in the final analysis, have exercised considerable wisdom in crafting the *Fraser* and *Kuhlmeier* holdings and the lists of judicially approved values that appear in the various cases. For there is a unifying and edifying principle undergirding these judicial pronouncements: that values which serve the purpose of maintaining a civilized social order and/or democratic political system are constitutionally acceptable under the Free Speech Clause (although they are not necessarily the only constitutionally acceptable values under the Clause).²⁷⁸ In *Fraser* and perhaps in *Kuhlmeier* this principle is arguably not more ruminative dicta, but an integral part of the holdings and a key element of the emergent standard for measuring the constitutionality of values inculcation in the public schools.²⁷⁹ At the very

278 *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681, 683 (1986). Indeed, even prior to *Kuhlmeier* and *Fraser*, the Court has frequently returned with enthusiasm to the theme that one of the public schools' most crucial tasks is to inculcate values that will enable the continuation of a civilized social order and/or democratic political system. Levin, *supra* note 49, at 1648; Nomi M. Stolzenberg, "He Drew a Circle that Shut Me Out": *Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 582, 642-45 (1993). See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (reciting that the public schools are the symbol of democracy and "the most pervasive means" of perpetuating our common destiny); *New Jersey v. T.L.O.*, 469 U.S. 325, 373 (1985) (Stevens, J., concurring in part and dissenting in part) (explaining that "[s]chools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry"); *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982) (asserting that public schooling inculcates the values essential to preserving a democratic political system); *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (stating that education is "a most vital civic institution" for the preservation of democracy); *Ambach v. Norwick*, 441 U.S. 68, 77, 79 (1979) (reiterating that public schools inculcate values needed to sustain democratic government); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973); (referring to the vital role of education in a free society); *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (opining that some degree of education is necessary to prepare citizens to participate in an open political system so as to preserve "freedom and independence"); *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (remarking upon "the importance of education to our democratic society"); *West Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 640 (1943) (noting that national unity is a goal which public schools may nurture by persuasion and example).

279 This is an admittedly broad reading of the holdings in *Fraser* and *Kuhlmeier*. Nevertheless, it is a reading that is analytically supportable. That this principle is part of the holding in *Fraser* is evidenced by the Court's equation of the school's "basic educational mission," which justifies curtailment of school-sponsored student speech, with teaching

least, the principle may be treated as a favored precatory standard to which the Court has repeatedly returned in deciding these types of cases and to which it is likely to return in the future.²⁸⁰ By this standard, curricularly inculcated values, which serve the goals of maintaining a civilized social order and democratic political system should survive a Free Speech Clause challenge because such values are reasonably related to a "legitimate pedagogical concern." Curricularly inculcated values which do not serve these goals may or may not survive such a challenge in accordance with ad hoc judicial assessments of the constitutionality of such values.

While this standard has the potential for progressively contracting the troublesome grey area of whose values may be taught, this is a measure of constitutionality that will necessarily engender further perplexity. It still leaves unanswered the crucial question of what other values, besides those named in the Court's opinions, serve such broadly defined ends as civilized order and democracy.²⁸¹ The continuing debate over that question is, in essence,

"the 'fundamental values' of public school education." *Fraser*, 478 U.S. at 685-86. These fundamental values, in turn, are described by the Court as those "values necessary to the maintenance of a democratic political system" and the "shared values of a civilized social order." *Id.* at 683 (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)). See Mitchell, *supra* note 164, at 702; *Rebell*, *supra* note 22, at 306-07. Arguably, the Court also relied on this principle in reaching a holding in *Kuhlmeier*. *Kuhlmeier*, 484 U.S. 260. In *Kuhlmeier*, the Court held "that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273. The Court found "legitimate pedagogical concerns" to encompass, among other things, teaching of "the shared values of a civilized social order." *Id.* at 272. It was essentially because the school principal excised articles from the school-sponsored newspaper in order to disassociate the school from values inconsistent with the decorum, privacy and ethics of our social order that the Court rejected *Kuhlmeier*'s Free Speech Clause claim. *Id.* at 271-76. See *Rebell*, *supra* note 22, at 310.

280 See *supra* notes 278-79 and accompanying text.

281 There is no dearth of proposals in the scholarly literature as to how to identify those values which public elementary and secondary schools may constitutionally inculcate under the Free Speech Clause. *E.g.*, George Z. Bereday, *Values, Education and the Law*, 48 Miss. L.J. 585, 609-15 (1977) (theorizing that schools have a duty to teach those values imbedded in the law); Diamond, *supra* note 99, at 526-29 (positing that schools should inculcate local community values); Freeman, *supra* note 115, at 42, 54-57 (listing domestic laws as well as ethical views not contrary to legally based values as sources of values appropriate for school inculcation); Gordon, *supra* note 54, at 549, 555-58 (suggesting that public schools should teach values that will lead to better understanding of reality and improvement of rational decisionmaking and recommending that a discursive method of teaching should be used to convey nonconstitutional values while a discursive or directive method should be used to transmit constitutional values); Hafen, *supra* note 177, at 605-07, 615-16 (proposing that schools should teach universal values such as honesty, tolerance, civic loyalty, personal responsibility, plus First Amendment values); Ingber, *supra*

the jurisprudential counterpart in the post-*Kuhlmeier* era to the pedagogical conflict over morals education.²⁸²

note 10, at 67-71 (contending that schools should derive values for inculcative purposes from the "community agenda of alternatives" consistent with the dominant culture and from those rational values enunciated by the federal courts); Levin, *supra* note 49, at 1654 (stating that schools should teach the values inherent in a democratic, participatory society by observance of the same constitutional constraints placed on other governmental agencies); Moskowitz, *supra* note 22, at 136 (arguing that schools may inculcate universally accepted values, such as justice, property rights, respect for law and authority, and brotherhood, so as to preserve the modern state and democracy); Rebell, *supra* note 22, at 289-91 (maintaining that the content of schools' values inculcation should be determined by "a broad participatory process" in the local school community); Stolzenberg, *supra* note 278, at 666-67 (concluding that, regardless of their respective inadequacies, the ideologies of liberal individualism, communitarianism, and civic republicanism will continue to influence the values which schools inculcate); Wright, *supra* note 10, at 65, 72-73 (opining that schools should inculcate values so as not to violate a "significant impairment of relevant capacity" standard and so as to achieve "rights-exercise preparation").

282 No discussion of the post-*Kuhlmeier* era would be complete without some consideration of *Rust v. Sullivan*, 500 U.S. 173 (1991) and *R.A.V. v. City of St. Paul, Minnesota*, 112 S. Ct. 2538 (1992), free speech cases outside the education context but potentially bearing upon it in relation to values inculcation.

The *Rust* litigation was brought, among other reasons, to test the constitutionality under the Free Speech Clause of federal regulations prohibiting recipients of funds under Title X of the Public Health Service Act from discussing abortion as an option with patients. *Rust*, 500 U.S. at 192. Petitioners contended that the regulations constituted viewpoint-discriminatory conditions on the Title X subsidies in violation of the First Amendment. *Id.* In ruling for respondents, the Supreme Court held that the federal government is constitutionally empowered to fund selectively a program encouraging certain activities in the public interest, while not encouraging other activities, and to curtail fund recipients' speech so that it does not go beyond implementation of the encouraged activities. *Id.* at 192-200. The *Rust* Court limited the holding, however, with the caveat that the mere fact that expression occurs on government property does not justify government viewpoint-discriminatory restrictions of speech in public or semi-public fora or in universities—a "traditional sphere of free expression." *Id.* at 199-200. Interestingly, the Court did not exempt public schooling at the elementary and secondary levels from the reach of *Rust's* holding. A reasonable implication of this omission is that since public elementary and secondary schools receive federal funding, the federal government may condition its grants on content-based regulation of the messages purveyed by the schools. Cf. Michael Fitzpatrick, Note, *Rust Corrodes: The First Amendment Implications of Rust v. Sullivan*, 45 STAN. L. REV. 185, 200-01 (1992) (inquiring "how far can *Rust* spread" in light of the fact that federal monies help support education); Karen Hilmoie, Note, *Rust v. Sullivan: Free Speech Is "Significantly Impinged" by Title X Regulations*, 37 S.D. L. REV. 600, 619 (1992) (hypothesizing that if *Rust* had preceded the *Barnette* case, the schoolchildren's free speech claims in *Barnette* would not have prevailed); Ann B. Weeks, Note, *The Pregnant Silence: Rust v. Sullivan, Abortion Rights, and Publicly Funded Speech*, 70 N.C. L. REV. 1623, 1667 (1992) (expressing concern that federal grants to the arts and libraries "are but two" of the federal subsidies that could trigger *Rust's* "loosened standards for analysis of governmental restrictions on subsidized speech"). The implication is a sound one based on the U.S. Supreme Court's repeated recognition of the uniquely inculcative role of the public elementary and secondary schools. See *supra* text accompanying note 278; David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government - Funded Speech*, 67 N.Y.U. L. REV. 675, 706, 728-30, 738 (1992) (observing that

In sum, the Court, like the psychologists and educators, has concluded that values inculcation is an integral part of effective schooling at the elementary and secondary levels. The Court also has concluded that some values inculcation by the public schools is permissible under the Free Speech Clause.²⁸³ The latter con-

a mandate of strict neutrality in government-subsidized speech is not only rejected by *Rust*, but also incompatible with the responsibilities of public elementary and secondary schools). Thus, *Rust's* impact, if any, on public elementary and secondary education would be to lend further support to the constitutionality, under the Free Speech Clause, of the schools' inculcative work.

The *R.A.V.* case arose out of charges brought against petitioner, a teenager, who, in concert with several other youths, burned a cross in the yard of an African-American family residing in the city of St. Paul. Petitioner was charged under the city's criminal ordinance prohibiting expression which "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *R.A.V.*, 112 S. Ct. at 2541 (quoting the St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., MINN. LEGIS. CODE §292.02 (1990)). The Supreme Court, assuming arguendo that the cross burning was constitutionally unprotected "fighting words," held that the ordinance still violated the Free Speech Clause because the law proscribed a subset of "fighting words" singled out for its underlying message. 112 S. Ct. at 2542-49.

In the aftermath of *R.A.V.*, questions have been raised about whether the Free Speech Clause permits public colleges and universities to promulgate "hate speech" codes analogous to the St. Paul ordinance. See, e.g., Lauri A. Ebel, *University Anti-Discrimination Codes v. Free Speech*, 23 N.M. L. REV. 169 (1993); Daniel A. Farber, *Foreword: Hate Speech After R.A.V.*, 18 WM. MITCHELL L. REV. 889 (1992); Rhonda G. Hartman, *Hateful Expression and First Amendment Values: Toward a Theory of Constitutional Constraint on Hate Speech at Colleges and Universities After R.A.V. v. St. Paul*, 19 J.C. & U.L. 343 (1993); William A. Kaplin, "Hate Speech" on the College Campus: *Freedom of Speech and Equality at the Crossroads*, 27 LAND & WATER L. REV. 243 (1992). In contrast, it is doubtful that *R.A.V.* has any potential to interfere with values inculcation in the public elementary and secondary schools. See Ebel, *supra*, at 171, 177; Fischer, *supra* note 197, at 379-81. *R.A.V.*, after all, involved a criminal ordinance applicable to "hate speech" city-wide. Values inculcation in public elementary and secondary schools is carried out only in relation to minors and is an accepted, traditional function of those schools. See *supra* text accompanying note 278; Fischer, *supra* note 197, at 380. Indeed, fifty years of precedents recognizing the constitutionality of values inculcation in the schools would be overturned were *R.A.V.* to be extended to precollege public education. See *supra* text accompanying notes 116-283. It is unlikely that in rendering *R.A.V.*, the Court looked ahead to any such wholesale revamping of American education.

283 For commentary in accord with the Supreme Court's position that some teaching of preferred values is constitutional under the Free Speech Clause, see, for example YUDOF, *supra* note 165, at 53-54; Diamond, *supra* note 99, at 498, 526-28; Freeman, *supra* note 115 at 24; Hafen, *supra* note 177, at 605-07, 615; Levin, *supra* note 49, at 1648, 1653-54; Mitchell, *supra* note 164, at 692; Moskowitz, *supra* note 22, at 133-36; Rebell, *supra* note 22, at 298, 338-42; Stewart, *supra* note 170, at 25-29; Wright, *supra* note 10, at 68, 73. However, some legal scholars advance the notion that any values inculcation is indoctrination incompatible with free speech principles. E.g., ARONS, *supra* note 177, at 189-213; Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CAL. L. REV. 1104, 1134-35 (1979); van Geel, *supra* note 15, at 239, 253, 261, 289-91; see Roe, *supra* note 101, at 1330-35.

clusion is most fortunate since it places constitutional law in the position of furthering rather than undermining Free Speech Clause objectives and the public schools' mission. It is less fortunate, however, that some eighty years after deciding *Meyer v. Nebraska*, the Court's conclusions still fall short of fully resolving the jurisprudential dilemma. The formidable task remains of distinguishing those values which may be constitutionally inculcated through the curriculum because they are reasonably related to the "legitimate pedagogical concern" of preparing the nation's children to carry on a civilized social order and democratic political system.

IV. PROPOSED SOLUTION TO THE PEDAGOGICAL AND CONSTITUTIONAL DILEMMA: REASONED INCULCATION OF IDEATIONAL PREREQUISITES

The U.S. Supreme Court's decisions in *Fraser* and *Kuhlmeier*, if not a clarion call to action, are at least authoritative reassurance that the nation's public elementary and secondary schools may, and indeed are expected to, take full advantage of a considerable latitude for inculcation afforded them under the Free Speech Clause. Yet, latitude so broadly and imprecisely bestowed—allowing the schools to teach values supportive of a democratic political system and civilized social order—is still perilous terrain for educators to traverse without running the risk of inadvertently overstepping constitutional bounds.²⁸⁴ We are a populace that has, as a legal and philosophical matter, agreed to tolerate disagreement. Diversity of opinion and belief is a veritable hallmark of the American way of life as well as a phenomenon traditionally protected by free speech principles in society at large.²⁸⁵ It would be preposterous to assume that there exists any one value of which all 261 million Americans²⁸⁶ unanimously approve.²⁸⁷ The issue which emerges from *Fraser* and *Kuhlmeier*, considered in light of these

284 See Ann M. Gill, *In the Wake of Fraser and Hazelwood*, 20 J.L. & EDUC. 253, 257-58 (1991).

285 Board of Educ., Island Trees. Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 880 (1982) (Blackmun, J., concurring in part and concurring in the judgment). See THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 4-5, 14-15 (1970); Charles R. Kesler, *Education and Politics: Lessons from the American Founding*, 1991 U. CHI. LEGAL F. 101, 117.

286 In 1990, the population of the United States was 248,709,873 people and was projected to grow at a rate of approximately 3,000,000 people per year. THE WORLD ALMANAC AND BOOK OF FACTS 1994 358-62 (Robert Famighetti ed., 1993).

287 See *supra* note 54 and accompanying text.

societal realities, is how to identify the core values which the schools may inculcate, despite individuals' varying subjective preferences, because those values objectively serve the causes of civilization and democracy. *Fraser* and *Kuhlmeier*, in effect, presuppose that there are such values and that they transcend the free speech claims of dissenters.²⁸⁸

The Supreme Court's tacit acceptance of this presupposition may best be conceptualized and justified by analogy to international human rights law. By recognizing the existence of such a core of transcending values, the Court has created a sort of domestic *jus cogens* for American public schools. *Jus cogens* is an international law doctrine which is commonly translated into English to mean peremptory norms, i.e., a body of norms or values that are absolute, paramount, and nonderogable.²⁸⁹ The content of *jus cogens*—the particular norms which qualify for this transcending status—is constantly evolving as the interests of the international community change.²⁹⁰ One expert has summarized *jus cogens* as

288 Cf. Dienes & Connolly, *supra* note 115, at 345 (noting that *Kuhlmeier* makes restraint of dissenting student speech occurring in a curricular context virtually immune from judicial scrutiny); Fischer, *supra* note 197, at 386 (remarking that *Kuhlmeier* accords to students only those free speech rights that the school administration will allow); Hafen, *supra* note 252, at 701 (interpreting *Kuhlmeier* as upholding under the Free Speech Clause the schools' institutional authority to inculcate values unimpeded); Hafen, *supra* note 177, at 614-18 (theorizing that *Kuhlmeier* reads into the Free Speech Clause institutional academic freedom to inculcate values); Rebell, *supra* note 22, at 309 (asserting that, after *Kuhlmeier*, students' expression of divergent views will only receive significant Free Speech Clause protection if the expression takes place outside of the curriculum); Roe, *supra* note 101, at 1285, 1287-88 (asserting that the *Fraser* Court exhibited a willingness to defer to the schools' inculcative agenda and uphold under the Free Speech Clause school regulations of student speech countering that agenda).

289 The Vienna Convention on the Law of Treaties, in force Jan. 27, 1980, art. 53, 1155 U.N.T.S. 331, 334 [hereinafter Vienna Convention]; IAN BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 512-15 (4th ed. 1990); MYRES S. MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER 342-45 (1980); Joan F. Hartman, "Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty, 52 U. CIN. L. REV. 655, 677 n.80 (1983); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1138-42 (1985); Karen Parker & Lyn B. Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 415 (1989); Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT'L L. 55, 58 (1966); Christopher P. Cline, Note, *Pursuing Native American Rights in International Law Venues: A Jus Cogens Strategy After Lying v. Northwest Indian Cemetery Protective Association*, 42 HASTINGS L.J. 591, 593, 598-99 (1991). But see ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 178-79 (1986) (contending that, at least theoretically, there are circumstances that would permit a nation to override *jus cogens*).

290 Gordon A. Christenson, *The World Court and Jus Cogens*, 81 AM. J. INT'L L. 93, 97-98 (1987); Parker & Neylon, *supra* note 289, at 427-29; Marjorie M. Whiteman, *Jus Cogens*

"those rules which [are] derived from principles that the legal conscience of mankind deem[s] absolutely essential to coexistence."²⁹¹ Over time, international law scholars have compiled lists of enduring *jus cogens* norms including the prohibition of slavery, genocide, piracy, crimes against humanity, etc.²⁹² The analogy of *jus cogens* to the *Fraser/Kuhlmeier* concept of a core of transcending values is thus almost perfect, not in the sense of a norm for norm concordance, but in the basic idea that nonderogable values can and do exist by law and by law reign virtually supreme in the face of objection and recalcitrance. This is not to imply that the Justices intentionally looked to *jus cogens* in rendering *Fraser* and *Kuhlmeier*. But, such a coincidence is most fitting in that values supportive of the democratic and civilized conduct of a nation's affairs would also seem to be values that, in some degree, spring from a concern for human rights.²⁹³

The prospect of identifying a core of such transcending values that public schools may constitutionally inculcate has tantalized a number of legal scholars. The resulting proposals have displayed a varied inventiveness, including recommendations that schools should inculcate local community values,²⁹⁴ values that attune the child to reality,²⁹⁵ universal values,²⁹⁶ and values that enhance

in *International Law, with a Projected List*, 7 GA. J. INT'L & COMP. L. 609, 625 (1977).

291 U. N. Conf. on the Law of Treaties, U. N. GAOR, 1st Sess., 52d mtg. at 294, U.N. (Doc.) A/Conf. 39/11, U.N. Sales No. E68.V.7 (1969) (statement of Mr. Suarez, Mexican delegate to the United Nations Conference on the Law of Treaties).

292 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987); BROWNLIE, *supra* note 289, at 513; MCDUGAL ET AL., *supra* note 289, at 345-50; Parker & Neylon, *supra* note 289, at 428-43.

293 Richard B. Lillich, *The Constitution and International Human Rights*, 83 AM. J. INT'L L. 851, 852-60 (1989); Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 HOW. L.J. 145, 210-22 (1984); Vaclav Havel, *The New Measure of Man*, N.Y. TIMES, July 8, 1994, at A27. See Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3, 12, 36-37 (1983); Justice Harry A. Blackmun, *The Supreme Court and the Law of Nations: Owing a Decent Respect to the Opinions of Mankind*, Address at the 1994 Annual Meeting of American Society of International Law (April, 1994), in ASIL NEWSLETTER, March-May 1994, at 1, 7-9.

294 E.g., Diamond, *supra* note 99, at 526-29; Ingber, *supra* note 10, at 64-71; Stewart, *supra* note 170, at 27-28; see Rebell, *supra* note 22, at 289-91; Shiffrin, *supra* note 15, at 651-53.

295 E.g., Gordon, *supra* note 54, at 549, 555-58.

296 Professor Bruce Hafen urges inculcation in "universal values that all citizens must understand and accept as conditions of social survival in a free society, such as honesty, tolerance, civic loyalty, and some degree of personal responsibility." Hafen, *supra* note 177, at 606-607, 615-16. See also Moskowitz, *supra* note 22, at 136 (suggesting that there are universally acceptable values appropriate for inculcation including justice, property

rationality and decision-making capabilities.²⁹⁷ One writer, with apparent resignation, has noted that no matter what the experts wish, dominant ideologies of liberal individualism, communitarianism, and civic republicanism will continue to influence which values the schools inculcate.²⁹⁸ A review of the literature on the subject discloses that probably the most pervasively held view is that a core of transcending values may be found in the U.S. Constitution, state constitutions and/or other domestic laws.²⁹⁹ The wisdom of this recommendation is obvious inasmuch as the federal Constitution and many other American laws are predicated upon democratic tenets or aspirations for a civilizing social structure or both.³⁰⁰ Indeed, perusal of a few of the more popularly known provisions of the U.S. Constitution evince the generally humanizing thrust that American law has had over time in spite of episodic lapses.³⁰¹

rights, respect for authority, and brotherhood).

297 *E.g.*, Gordon, *supra* note 54, at 549, 555-58; *see* Wright, *supra* note 10, at 65, 72-73.

298 Stolzenberg, *supra* note 278, at 666-67.

299 *E.g.*, Bereday, *supra* note 281, at 609-15; Freeman, *supra* note 115, at 42, 54-57; Hafen, *supra* note 177, at 615; Wright, *supra* note 10, at 65, 67, 72-73; *see* David L. Gregory, *Teaching Moral Values in Public Schools*, 31 CATH. LAW. 173, 174-75 (1987); Ingber, *supra* note 10, at 64-71; Kesler, *supra* note 22, at 113, 121-22; Levin, *supra* note 49, at 1654; Shiffirin, *supra* note 15, at 652; *cf.* Oldenquist, *supra* note 112, at 86 (remarking that it would be preposterous if public schools could not teach the values implicit in the nation's criminal codes); Senhauser, *supra* note 115, at 979-80 (acknowledging that public schools may encourage "an awareness of justice—principles of liberty, equality and reciprocity").

300 It is beyond cavil that the Constitution has made a major contribution toward the realization of political democracy. BRUCE ACKERMAN, *WE THE PEOPLE* 32-33 (1991); WALTER BERNS, *TAKING THE CONSTITUTION SERIOUSLY* 136-44 (1987). *But see* ARTHUR S. MILLER, *DEMOCRATIC DICTATORSHIP* 111-22 (1981) (arguing that democracy in the United States is something of a sham and is increasingly taking on the attributes of totalitarianism); JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP* 1-23 (1991) (contending that "America . . . has in principle always been democratic, but only in principle," inasmuch as slavery and disparities in earning power have undercut the implementation of such principles). Likewise, the U.S. Constitution is thought to have had a civilizing effect. *See infra* notes 302-09, 334-35 and accompanying text.

301 Perhaps one of the most egregious lapses occurred when the Supreme Court decided, in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856), to recognize a substantive due process "right" to slavery. *Dred Scott* was, of course, effectively overturned. *See e.g.*, U.S. CONST. amend. XIII, § 1 (prohibiting slavery); *Id.* amend. XIV, § 1 (guaranteeing that states shall not deny any person equal protection of the laws); *Id.* amend. XV, § 1 (protecting against denial of the right to vote on account of race or previous servitude); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (holding that racially segregated public schooling violates the Fourteenth Amendment's Equal Protection Clause); *Strauder v. West Virginia*, 100 U.S. 303, 305-08 (1880) (denouncing racial subjugation as counter to equal protection principles). Yet, no amount of repudiation can alter the fact that *Dred*

The Fourteenth Amendment's Equal Protection Clause is directly on point. On its face the clause's injunction that no state may "deny to any person within its jurisdiction the equal protection of the laws,"³⁰² bespeaks a commitment to the dignity and relative empowerment of each person in relation to every other person.³⁰³ Historically, the Equal Protection Clause has been a significant impetus to democracy and fairness by providing a vehicle for promoting more equalized opportunities to participate in the political and economic life of the country.³⁰⁴ The Fourteenth Amendment's Due Process Clause likewise reveals in its promise that no "State [shall] deprive any person of life, liberty, or property, without due process of law,"³⁰⁵ a bulwark against governmental arbitrariness³⁰⁶ as the Eighth Amendment's ban on "cruel and unusual punishments"³⁰⁷ erects barriers to barbarism.³⁰⁸

Scott was rendered, leaving an indelible stain upon the nation's history. Other infamous moments in American legal history include *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding congressionally authorized detention and relocation of persons of Japanese ancestry in the western United States during World War II); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (ruling that the Fourteenth Amendment's Equal Protection Clause does not prohibit racially segregated train accommodations); and Congress' enactment of the Sedition Act of 1798 which, among other things, provided for the criminal liability of persons who engaged in expression inspiring hatred against certain federal governmental officials or exciting movements in opposition to federal laws. Sedition Act of 1798, 1 Stat. 596, at § 2. The Sedition Act has been characterized as "one of the most blatant violations of the First Amendment's guarantee of free speech that ever became law." MILLER, *supra* note 108, at 53. *Accord* BERNIS, *supra* note 301, at 144.

302 U.S. CONST. amend. XIV, § 1.

303 *Plyler v. Doe*, 457 U.S. 202, 221-22 (1982); *TRIBE*, *supra* note 14, § 16-1, at 1437-38.

304 The classic case in which the Equal Protection Clause was relied upon to enable enhanced and more equalized opportunities for the nation's minorities in comparison to the Caucasian majority is *Brown v. Board of Educ.*, 347 U.S. 483 (1954). In holding that so-called separate but equal public schooling for black children violates the clause, the court observed that without equal educational opportunities "it is doubtful that any child may reasonably be expected to succeed in life." *Id.* at 493. Indeed, Martin Luther King, Jr. has credited the *Brown* decision as an impetus to the civil rights movement that followed on the heels of the decision. *See* MARTIN LUTHER KING, JR., *STRIDE TOWARD FREEDOM* 195, 198-99 (1958). Other cases interpreting the Equal Protection Clause to the same general purpose include *Plyler v. Doe*, 457 U.S. 202 (1982), striking down Texas' ban on the free public education of illegal alien children, and *Shelley v. Kraemer*, 334 U.S. 1 (1948), prohibiting state courts from granting injunctions to plaintiffs seeking to enforce privately negotiated racially restrictive covenants.

305 U.S. CONST. amend. XIV, § 1.

306 *TRIBE*, *supra* note 14, § 10-7, at 663-64.

307 U.S. CONST. amend. VIII.

308 For example, in *Hudson v. McMillan*, 112 S. Ct. 995 (1992), the Court held that use of excessive physical force against a prisoner may constitute a violation of the Eighth Amendment even though the prisoner is not seriously injured. In her opinion for the Court, Justice O'Connor describes the Amendment's ban on cruel and unusual punish-

Since these and other provisions of the U.S. Constitution set standards which less paramount laws may not legally contravene,³⁰⁹ it is not surprising that commentators have looked to domestic law as a rich source of values appropriate for inculcation by the public schools. These are values that, once learned, should enable children to appreciate the importance of a civilized social order and democratic political system.

Were *Fraser* and *Kuhlmeier* decided during the early republic or even during the first half of the twentieth century, relying upon American law as the main repository of values content for school-children would probably be a satisfyingly complete answer to the question of whose values should be taught, especially if law-related values were supplemented by traditional homilies about courage, honesty and other republican virtues.³¹⁰ The fact is, though, that *Fraser's* and *Kuhlmeier's* formula for locating values suitable for constitutional inculcation may make exclusive reliance on domestic law or other domestic sources of values an inadequate, if not antique, notion in this era.

It is trite but no less true to say that the world has become a global village.³¹¹ The development of sophisticated, new means of communicating and doing business means that Americans are called upon to interact on the international scene more immediately and more frequently than ever before.³¹² Increasingly, the

ment as drawing its meaning from evolving or contemporary standards of decency. 112 S. Ct. at 1000. *Accord* *Helling v. McKinney*, 113 S. Ct. 2475, 2482 (1993). Even more recently, the Court has referred to the Eighth Amendment as forbidding the denial of "humane conditions of confinement." *Farmer v. Brennan*, 114 S. Ct. 1970, 1984 (1994).

309 The Supremacy Clause instructs that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof" are the "supreme Law of the Land" such that the "Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, § 2. This provision has been interpreted by the Supreme Court to signify that state laws which contravene the federal Constitution are invalid. *E.g.*, *Brown v. Board of Educ.*, 347 U.S. 483 (1954). The Court is empowered and obligated, in the cases and controversies that come before it, also to invalidate federal legislation that flouts the U.S. Constitution. *E.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

310 See *supra* notes 24-33 and accompanying text.

311 Saul Mendlovitz, *Introduction* to RICHARD A. FALK, *A STUDY OF FUTURE WORLDS* xxvi (1975); Pico Iyer, *The Global Village Finally Arrives*, TIME, Fall 1993, at 86; Lance Morrow, *Welcome to the Global Village*, TIME, May 29, 1989, at 96.

312 Andrew Kupfer, *Managing Now for the 1990s*, FORTUNE, Sept. 26, 1988, at 44; Daniel J. Meckstroth, *Reengineering U.S. Manufacturing: Implications of Structural Changes in the U.S. Economy*, BUS. ECON., July, 1994, at 43; James H. Potter, *Survival of the Leaders*, FIN. WORLD, July 28, 1987, at 37; Martin M. Wooster, *As the One World Turns*, REASON, June, 1994, at 55. See also Christenson, *supra* note 293, at 6 (observing that "global telecommu-

United States has found itself operating in an inextricable web of economic and political interdependence with other nations.³¹³ Contemporary events manifest that American economic, political, and national security interests arise in every corner of the globe. For example, this country's 1991 war against Iraq, as well as American involvement in overseeing the peace process between Israel and various Arab states, demonstrate the view of U.S. political leaders that stability in the Middle East is integral to the economic and security interests of the United States.³¹⁴ Similarly, the developing nuclear weapons capability of North Korea and unrelenting fighting in former Yugoslavia have prompted energetic American diplomatic efforts since both developments, although half a world away, are potential threats to international peace.³¹⁵ Even tyranny in little Haiti has ramifications internal to the United States and to relations among the nations of the western hemisphere.³¹⁶ In

nications make us aware of global interdependence with respect to almost every aspect of our daily lives").

313 RICHARD A. FALK, *THIS ENDANGERED PLANET: PROJECTS AND PROPOSALS FOR HUMAN SURVIVAL* 98 (1971); Christenson, *supra* note 293, at 6; Cline, *supra* note 289, at 591; Kenneth L. Woodward, *More Than Ourselves*, *NEWSWEEK*, July 18, 1994, at 66.

314 One reason for the United States' war against Iraq was economic, *i.e.*, to prevent disruption of the flow of oil from the Persian Gulf and the domestic recessionary effects that could result. Walter Isaacson, *Sometimes, Right Makes Might*, *TIME*, Dec. 21, 1992, at 82; Matthew L. Wald, *The Ground War and the American Economy: Further Drop Seen in the Price of Oil*, *N.Y. TIMES*, Feb. 25, 1991, at D1. Another reason prompting the war was American political revulsion at Saddam Hussein's dictatorship. Patrick, E. Tyler, *War in the Gulf: The Overview*, *N.Y. TIMES*, Feb. 16, 1991, at A1. *But see* Isaacson, *supra*, at 82 (suggesting that American objections to Saddam Hussein's rule on moral grounds were superficial). Although the Persian Gulf War is one of the more dramatic instances of the United States defending its interests in the Middle East, recent years have seen a flurry of American diplomatic activities aimed at achieving peaceful relations between Israelis and Arabs. Steven Greenhouse, *Christopher Sees Progress, Not Breakthrough, in Syria*, *N.Y. TIMES*, Aug. 8, 1994, at A4; J.F.O. McAllister, *Bridging the Divide*, *TIME*, July 25, 1994, at 37.

315 The United States has been engaged in continuing direct negotiations with North Korea over the latter's compliance with the Nuclear Non-Proliferation Treaty and other related matters. J.F.O. McAllister, *Pyeongyang's Dangerous Game*, *TIME*, Apr. 4, 1994, at 60. The United States has also been a key player in pressuring the warring factions in former Yugoslavia to agree to peace. Alan Riding, *Western Nations to Add Sanctions After Serbs Balk*, *N.Y. TIMES*, July 31, 1994, at A1.

316 President Clinton has stated that the American stake in Haiti includes "Americans living and working there, . . . a million Haitian-Americans in this country who have family and friends there, . . . an interest in promoting democracy in our hemisphere, . . . [and] a strong and democratic Latin America and Central America and Caribbean with which to trade and grow." *Excerpts from President Clinton's News Conference at White House*, *N.Y. TIMES*, Aug. 4, 1994, at A10. It might be added that American interests also include stemming the influx of Haitian refugees into the United States. Kevin Fedarko, *Policy at Sea*, *TIME*, July 18, 1994, at 20.

short, the shrinking globe has made the United States acutely sensitive to a geopolitical butterfly effect³¹⁷—that disturbances in distant places, no matter how small, may well have unpredictable and serious reverberations at home.

Moreover, the very nature of American interests and how they are implemented is undergoing transformation. The most salient example is that of the United States' armed forces being deployed with mounting frequency in other countries primarily, if not exclusively, for humanitarian purposes. In recent years, the United States has intervened militarily in Somalia and Rwanda, not to rout an ideological enemy or influence political developments in those nations, but to alleviate human suffering occurring on a catastrophic scale.³¹⁸

In the meantime, this century has seen a momentous proliferation of major human rights declarations and treaties protecting individuals' rights.³¹⁹ The United States is a party to some of these treaties;³²⁰ other treaty provisions and nontreaty human

317 The concept of the butterfly effect originated in the work of meteorologist Edward Lorenz and contributed to the development of chaos theory in the physical sciences. JAMES GLEICK, *CHAOS* 11-31 (1987).

318 Lara M. Baidoa, *Somalia: The Gift of Hope*, *TIME*, Dec. 28, 1992, at 20; Nancy Gibbs, *Rwanda: Destination Unknown*, *TIME*, Aug. 8, 1994, at 38; Nancy Gibbs, *Rwanda: Cry the Forsaken Country*, *TIME*, Aug. 1, 1994, at 30; Charles Krauthammer, *The Immaculate Intervention*, *TIME*, July 26, 1993, at 78; Jill Smolowe, *Great Expectations*, *TIME*, Dec. 21, 1992, at 32. The military's growing involvement in humanitarian missions has caused some consternation about the United States' preparedness to conduct war. Eric Schmitt, *Pentagon Worries About Cost of Aid Missions*, *N.Y. TIMES*, Aug. 5, 1994, at A4; Eric Schmitt, *Military's Growing Role in Relief Missions Prompts Concerns*, *N.Y. TIMES*, July 31, 1994, at A3.

319 Although international human rights law can be traced back for centuries, its modern incarnation took place during the 1940's in reaction to Nazi atrocities. Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 *AM. U. L. REV.* 1, 11 (1982); Louis Henkin, *Rights: American and Human*, 79 *COLUM. L. REV.* 405, 407-08 (1979); Cline, *supra* note 289, at 597-98.

320 *E.g.*, U.N. CHARTER; Protocol of Amendment to the Charter of the Organization of American States, Feb. 27, 1967, 21 U.S.T. 607 (entered into force for the United States, Feb. 27, 1970) [hereinafter Protocol of Buenos Aires]; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3 (entered into force Apr. 30, 1957); Protocol to the Slavery Convention, December 7, 1953, 7 U.S.T. 479, 182 U.N.T.S. 51 & 212 U.N.T.S. 17 (entered into force Dec. 7, 1953); Convention on the Political Rights of Women, *opened for signature* Mar. 31, 1953, 27 U.S.T. 1909, 193 U.N.T.S. 135 (entered into force July 7, 1954); Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85

rights instruments have come to bind the United States as customary international law.³²¹ Many of the human rights covenants to

(entered into force Oct. 21, 1950); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950); Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, S. EXEC. DOC. NO. O, 81st Cong., 1st Sess. (1949) [hereinafter Genocide Convention]; Inter-American Convention on the Granting of Political Rights of Women, May 2, 1948, 27 U.S.T. 3301, O.A.S.T.S. No. 3 (entered into force Apr. 22, 1949); The Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 48 (entered into force for the United States, Dec. 13, 1951); The Slavery Convention, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253, *as amended* July 7, 1955, 7 U.S.T. 479, 182 U.N.T.S. 51 (entered into force Mar. 9, 1927). One commentator has observed that, in actuality, "the United States has ratified only a handful" of the major international human rights instruments in existence. Lillich, *supra* note 293, at 855. Accord Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 810-11 (1990). What is more, the lower federal courts tend to hold that the human rights provisions of ratified treaties are non-self-executing and therefore "not the source of enforceable rights." Lillich, *supra* note 293, at 855 & n.19; Strossen, *supra*, at 813.

However, the United States may also have some legal obligations in relation to international human rights instruments that it has signed but not yet ratified. Article 18 of the Vienna Convention on the Law of Treaties provides that, "[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty . . . or (b) expressed its consent to be bound by the treaty." Vienna Convention, *supra* note 289, at art. 18; Strossen, *supra*, at 810, n.19. The United States has signed but not ratified either the Vienna Convention or a number of international human rights agreements. *E.g.*, International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter Civil and Political Rights Covenant]; International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter Economic, Etc. Rights Covenant]; International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter Elimination of Racial Discrimination Convention]; Strossen, *supra*, at 810 nn.19-20.

321 Sources of customary international law include "general and consistent practice of states followed by them from a sense of legal obligation" and international agreements "when such agreements are intended for adherence by states generally and are in fact widely accepted." 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 102(1)-(3) (1987). Thus, nontreaty instruments, and even treaties to which this country is not a party may, under certain circumstances, constitute customary international law. McDOUGAL ET AL., *supra* note 289, at 266-71. The Universal Declaration of Human Rights, a United Nations General Assembly resolution and non-treaty instrument, is widely accepted as customary international law. *Universal Declaration of Human Rights*, 43 AM. J. INT'L L. 127 (Supp. 1949) [hereinafter Universal Declaration]; McDOUGAL ET AL., *supra* note 289, at 272; Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 393-95 (1985). Economic, Etc., Rights Covenant, *supra* note 320, and Civil and Political Rights Covenant, *supra* note 320, are two long-standing human rights covenants which the United States has not yet ratified, but which are regarded by eminent international law scholars as having attained the status of cus-

which the United States is not a party or which have not attained the status of customary international law are of such prestige and influence as to shape opinion spontaneously, without the sanction of law.³²² The point is that just as technological developments in communications, in the means of doing business and in the conduct of warfare have made isolationism impossible, the development of international human rights law and the international opinion actuated thereby have become phenomena with which the United States cannot fail to reckon.

Under these conditions, the question naturally arises as to whether the democratic political system and civilized social order that children are expected to someday preserve can be understood only in terms of the values embedded in American laws. Perhaps the time has come to acknowledge that, although American law values, republican virtues, and the like should continue to figure as part of the schools' inculcative fare, the concepts of democracy and of a civilized social order have larger dimensions than these

tomary international law. MCDUGAL ET AL., *supra* note 289, at 327. It should be noted that customary international law is treated as binding federal common law. The Paquete Habana, 175 U.S. 677, 700 (1900); Lillich, *supra* note 293, at 856-57; Lillich, *supra*, at 393; Parker & Neylon, *supra* note 289, at 417. But see Lobel, *supra* note 289, at 1072 (pointing out that although customary international law is, as a theoretical matter, the law of the land, domestic courts have held that Congress has authority to disregard such law). The following human rights are generally accepted, as of 1987, as part of customary international law: freedom from genocide; from slavery or the slave trade; from murder or causing the disappearance of individuals; from torture or other cruel, inhuman, or degrading treatment or punishment; from prolonged arbitrary detention; from systematic racial discrimination; and from a consistent pattern of gross violations of internationally recognized human rights. 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

322 The inherent pedagogical effect of laws in general upon the populace has been recognized for centuries. Aristotle, *Nicomachean Ethics*, in THE BASIC WORKS OF ARISTOTLE 952, 1105 (Richard McKeon ed., 1941); Plato, *Laws VII*, in THE COLLECTED DIALOGUES OF PLATO, INCLUDING THE LETTERS 1418-19, 1502 (Edith Hamilton & Huntington Cairns eds., 1969) (A.E. Taylor trans. 1934); Anne Norton, *Transubstantiation: The Dialectic of Constitutional Authority*, 55 U. CHI. L. REV. 458, 459, 469 (1988); Philip Soper, *The Moral Value of Law*, 84 MICH. L. REV. 63, 85 (1985). International law plays this role as well. ELLIOTT L. MEYROWITZ, PROHIBITION OF NUCLEAR WEAPONS: THE RELEVANCE OF INTERNATIONAL LAW xvi (1990). See FRANCIS A. BOYLE, THE FUTURE OF INTERNATIONAL LAW AND AMERICAN FOREIGN POLICY 417-19 (1989). A recent instance of this dynamic may be observed in connection with the U. N. Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448 (1989) [hereinafter Convention of the Child]. See Cynthia P. Cohen & Howard A. Davidson, CHILDREN'S RIGHTS IN AMERICA iv (Cynthia P. Cohen & Howard A. Davidson eds., 1990). On an anecdotal note, this author can report that the Convention on the Rights of the Child has inspired and served as a guide for a grassroots effort in Michigan to amend the state constitution so as to add positive rights exclusively for children.

values presently encompass.³²³ This realization should cause no surprise. It seems inevitable that an expanding frame of reference would be the conceptual by-product of global village dynamics — dynamics that respect no borders and that have the potential to profoundly damage further political and social progress in the United States.

For example, in an age when weapons of mass destruction may instantly wipe out entire cities and make life on earth impossible, war becomes a threat not merely to a democratic political system and civilized social order, but to the very continuation of the human race.³²⁴ This threat emanates from the possibility of another world war, as well as from regional armed conflicts which may expand beyond the initial theatres of war.³²⁵ Such circumstances create the need for public elementary and secondary schools to inculcate children with those values that are likely to be instrumental in preventing or restraining war—values such as a preference for peace; a tolerance of other peoples and other cultures; an abhorrence of genocide and of other forms of invidious discrimination; and acceptance of the rule of law and of the United Nations as mechanisms for maintaining international order.³²⁶

323 See *infra* notes 324-61 and accompanying text.

324 Patricia J. Lindop & J. Rotblat, *Consequences of Radioactive Fallout*, in THE FINAL EPIDEMIC 117, 149-50 (Ruth Adams & Susan Cullens eds., 1981); JONATHAN SCHELL, THE FATE OF THE EARTH 93-96 (1982); MARTIN VAN CREVELD, TECHNOLOGY AND WAR 257 (1989).

325 GEOFFREY BLAINEY, THE CAUSES OF WAR 228-42 (3d ed. 1988).

326 Obviously, people educated to cherish peaceful coexistence and to abhor genocide will be inclined to shun armed conflict. The connection between peace and values such as tolerance of others is perhaps not as direct, but it is a connection that is just as real. Indeed, the connection has become all too vivid in a decade that has witnessed merciless tribal warfare in Rwanda and savage battles in the Balkans among ethnic and religious groups. See *supra* note 318. Nor is the present decade an anomaly. This century has witnessed Iraqis killing Kurds in Iraq, tall northern Sudanese massacring stocky southern Sudanese, Pakistanis murdering Bengalis en masse in Bangladesh, Chinese executing Tibetans, and so on. ISRAEL W. CHARNY, HOW CAN WE COMMIT THE UNTHINKABLE? GENOCIDE 3 (1982). Of course, World War II, which convulsed the entire world, was stoked by intolerance, i.e., by German anti-Semitism. DAVID S. WYMAN, THE ABANDONMENT OF THE JEWS 1941-45, 3-5 (1984). It is true that rules of law and institutions dedicated to preserving world peace, such as the United Nations, have failed to put an end to the carnage. RICHARD A. FALK, REVITALIZING INTERNATIONAL LAW 85, 96-97 (1989); JULIUS STONE, VISIONS OF WORLD ORDER 37, 40 (1984). However, it is impossible to calculate whether the incidence of warfare would have been greater without these laws and organizations in place. Respected international law scholars have, in fact, identified significant contributions of international legal regimes in mediating and defusing strife among nations. BOYLE, *supra* note 322, at 16-18, 31-33, 74-75; William J. Bruce, *The United States and the Law of Mankind: Some Inconsistencies in American Observance of the Rule of Law*, in POWER AND LAW: AMERICAN DILEMMA IN WORLD AFFAIRS 85, 108-09 (Charles A. Barker ed.,

Warfare is not the only menace to human existence and its incumbent democratic and civilized social structures. The past decade has witnessed environmental destruction of harrowing magnitude. Depletion of the ozone layer and aggravation of the greenhouse effect have damaged the atmosphere and, if allowed to continue, could ultimately make the earth uninhabitable.³²⁷ The nuclear accident at Chernobyl,³²⁸ the chemical explosion at Bhopal,³²⁹ the Exxon Valdez oil spill,³³⁰ and the ongoing razing of the rain forests³³¹ are ominous indications that the human species has not yet become adept at conserving its only habitat.³³² If the inculcative ends appointed by the Court in *Fraser* and *Kuhlmeier* are to be fulfilled, the public schools should also be imbuing their students with the values of respect and concern for the environment.

Still, it is not material existence alone which is a precondition to maintaining a democratic political system and a civilized social order. Material existence that leaves behind the brutish and embraces conscience, empathy and decency is the pulse of a genuine democratic and civilized social order evolving in international interdependence.³³³ This means that if the public schools are to

1971); Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, in *INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE* 389, 389-94 (Richard A. Falk et al. eds., 1985).

327 Michael D. Lemonick, *The Ozone Vanishes*, *TIME*, Feb. 17, 1992, at 60; Michael Oppenheimer, *Climate Catastrophe, the Rerun*, *N.Y. TIMES*, Apr. 27, 1991, at A25. See also John H. Cushman, Jr., *Clinton Wants to Strengthen Global Pact on Air Pollution*, *N.Y. TIMES*, Aug. 16, 1994, at A10; Warren E. Leary, *Satellite Finds Growing Threat to Ozone*, *N.Y. TIMES*, Apr. 15, 1993, at B7.

328 Colin Norman & David Dickson, *The Aftermath of Chernobyl*, *SCI.*, Sept. 12, 1986, at 1141; Charles Perrow, *Risky Systems: The Habit of Courting Disaster*, *NATION*, Oct. 11, 1986, at 329; *What Chernobyl Did*, *ECONOMIST*, Apr. 27, 1991, at 19.

329 Philip Elmer-DeWitt, *What Happened at Bhopal: Union Carbide Blames the Tragedy on Mishaps and Oversights*, *TIME*, Apr. 1, 1985, at 71; Perrow, *supra* note 328, at 329.

330 Janet Raloff, *Valdez Spill Leaves Lasting Oil Impacts*, *SCI. NEWS*, Feb. 13, 1993, at 102.

331 Cline, *supra* note 289, at 591; Philip Shabecoff, *U.N. Gets Rescue Plan for Tropical Forests*, *N.Y. TIMES*, Oct. 29, 1985, at C9.

332 See FALK, *supra* note 313, at 9-11; *Resources and Responsibilities in a World of States*, in *INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE* 519, 523-24 (Richard Falk et al. eds., 1985).

333 Tamas Foldesi, *The Right to Move and Its Achilles Heel, The Right to Asylum*, 8 *CONN. J. INT'L L.* 289, 307 (1993); Fernando R. Teson, *International Abductions, Low-Intensity Conflicts and State Sovereignty: A Moral Inquiry*, 31 *COLUM. J. TRANSNAT'L L.* 551, 570 (1994). See Louis Henkin, *Constitutional Rights and Human Rights*, 13 *HARV. C.R.-C.L. L. REV.* 593, 630-32 (1978); Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 *HOW. L.J.* 145, 201-12, 223 (1984).

produce young adults capable of upholding enlightened social edifices, the schools would be well advised to instill in children a revulsion toward torture, genocide, slavery and other transgressions betokening a hardened disregard of human suffering.

Just as oxygen, water, and food are the material prerequisites to life, the types of values described above are ideational prerequisites to mankind's collective survival, not as mere organisms, but, rather, as beings evolved to the higher destiny of a common humanity. It is the thesis of this Article that it is "ideational prerequisites to mankind's collective survival and humanity" that constitute the core of transcending values, the domestic equivalent of *jus cogens*, without which the population cannot long sustain a true democratic and civilized social order responsive to the exigencies of the late twentieth century. That is not to say, of course, that only ideational prerequisites are appropriate for inculcation by the public schools. Other values may be critically important in molding citizens dedicated to upholding democracy and civilization or to serving other constitutionally acceptable ends. But, ideational prerequisites are nonderogable in that they are values that, being generally above dissenters' claims, the schools may inculcate without running a significant risk of impinging upon students' Free Speech Clause rights.

It will be recalled that commentators have typically looked to American laws as the repository of a core of transcending values that may be constitutionally inculcated and that that repository has been aptly selected as embodying certain traditional principles of democracy and civilized order. In fact, there is considerable overlap between such principles and ideational prerequisites. The Fourteenth Amendment's Equal Protection Clause comes to mind because of its express repugnance to racial and other invidious discrimination.³³⁴ Of course, abhorrence of slavery is the essence of the Thirteenth Amendment's prohibition of that institution.³³⁵ Protectiveness toward the environment is manifest in myriad statutes and court decisions.³³⁶

334 U.S. CONST. amend. XIV, § 1. See *supra* notes 15 & 305 and accompanying text.

335 The Thirteenth Amendment provides that, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

336 E.g., National Parks and Recreation Act of 1978, 16 U.S.C.A. §§ 1-460j-5 (West 1992 & Supp. 1994); Federal Water Pollution Control Act, 33 U.S.C.A. §§ 1251-1387 (West 1986 & Supp. 1994); Organotin Antifouling Paint Control Act of 1988, 33 U.S.C.A.

Indeed, with the enactment of the Improving America's Schools Act of 1994,³³⁷ federal education law has effectively embraced some ideational prerequisites as officially sanctioned curricular fare in the nation's elementary and secondary schools. This statute, among other things, authorizes funding for curricula that enhance student understanding of the values underlying the United States' system of government, of the rights and responsibilities of citizenship, and of the role of law in American constitutional democracy.³³⁸ The statute specifically includes under the last topic curricula that foster respect for cultural diversity and dedicate the student to nonviolent means of conflict resolution such as arbitration, mediation, and the like.³³⁹

Clearly, many American law values are also ideational prerequisites; however, the overlap is by no means complete or sufficient. More than a few values referred to in the U.S. Constitution "have far wider scope as declared in the international [human rights] instruments."³⁴⁰ For example, the International Covenant on Civil and Political Rights outlaws torture and cruel, inhuman or degrading treatment or punishment³⁴¹ while the federal Constitution only prohibits "cruel and unusual punishments."³⁴² Likewise, many articles of the United Nations Charter provide measures for maintaining international peace³⁴³ while the preamble of the Constitution merely notes that one of the overarching purposes motivating establishment of the Constitution is to "insure domestic Tranquility."³⁴⁴ Nor does the Improving America's Schools Act necessarily fill the void since its authorization of funds for teaching schoolchildren about nonviolent dispute resolution is not expressly linked to promoting a concern for peace in the interna-

§§ 2401-2410 (West Supp. 1994); Lake Ontario Protection Act of 1976, 33 U.S.C.A. § 4261 (West 1986); Clean Air Act, 42 U.S.C.A. §§ 7401-7671q (West 1983 & Supp. 1994); California Wildlife Protection Act of 1990, CAL. FISH & GAME CODE §§ 2780-2799.6 (West Supp. 1995); Pesticide Control Act, MICH. COMP. LAWS ANN. §§ 286.551-581 (West 1979 & Supp. 1994); *Train v. City of New York*, 420 U.S. 35 (1975); *P.F.Z. Properties, Inc. v. Train*, 393 F. Supp. 1370 (D.D.C. 1975).

337 Improving America's Schools Act of 1994, 20 U.S.C.A. §§ 6301-8962 (West Supp. 1995).

338 *Id.* § 8142 (b)(1)(A)-(C).

339 *Id.* § 8142(b)(1)(B)(ii)-(iii).

340 See Lillich, *supra* note 293, at 852; accord, Henkin, *supra* note 319, at 416-19.

341 Civil and Political Rights Covenant, *supra* note 320, art. 7.

342 U.S. CONST. amend. VIII.

343 E.g., U.N. CHARTER art. 1, para. 1, art. 2, paras. 3-4, arts. 33-38, arts. 39-51.

344 U.S. CONST. pmb.

tional arena.³⁴⁵ Finally, other values simply do not exist in American laws (although they may accord with American sentiment or policy) but are articulated specifically and unequivocally in international law instruments.³⁴⁶ Many international human rights documents, for instance, direct the pursuit of international cultural and educational cooperation.³⁴⁷ Neither Congress nor state legislatures have commonly given legal status to this type of cooperation. In sum, in an increasingly interactive global network, certain values that are relevant to maintaining and updating the American political system and social order must be described in international human rights law. It is these laws that currently provide perhaps the richest and most relevant source of norms with which to supplement and build upon traditional American values.

It is beyond the scope of this Article to provide an enumeration of all conceivable ideational prerequisites or their international law sources. However, the ideational prerequisites described in the discussion above—a commitment to peaceful coexistence, environmental conservation, the United Nations, the rule of law, and tolerance toward other people; and an abhorrence of genocide, invidious discrimination, torture and other inhuman punishments³⁴⁸—should serve as a good starting point for schools in preparing their students to maintain democracy and civilized order in the twenty-first century. For, as has been shown, these are values that are the conceptual precondition to our collective survival and humanity.³⁴⁹ It is fortuitous that these values, appearing repeatedly in international human rights instruments,³⁵⁰ also have

345 Improving America's Schools Act of 1994, 20 U.S.C.A. § 8142(b)(1)(B)(ii) (West Supp. 1995).

346 See Lillich, *supra* note 293, at 852; Henkin, *supra* note 319, at 417-19.

347 E.g., U.N. CHARTER art. 55(b); Economic, Etc. Rights Covenant, *supra* note 320, art. 2, para. 1, art. 15, para. 4; Protocol of Buenos Aires, *supra* note 320, arts. 46, 49-50, 99-101.

348 See *supra* notes 324-33 and accompanying text.

349 See *supra* notes 324-33 and accompanying text.

350 E.g., U.N. Charter, art. 1, para. 1, art. 2, paras. 3-4, arts. 33-51 (setting forth a commitment to peaceful coexistence); *Id. passim* (manifesting a commitment to the United Nations and an international legal regime); Convention of the Child, *supra* note 322, art. 29, para. 1(b) (demonstrating respect for principles of the U.N. Charter); Convention of the Child, *supra* note 322, art. 29, para. 1 (c)-(d) (embracing tolerance and understanding toward other people); Convention of the Child, *supra* note 322, art. 29, para. 1(e) (manifesting respect for the natural environment); Genocide Convention, *supra* note 320, arts. I-IV (showing abhorrence of genocide); Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment, Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984), *draft reprinted in* 23 I.L.M. 1027, *with final changes in* 24 I.L.M. 535 (entered into force June 26, 1987) (banning

the enhanced legitimacy and prestige that world consensus necessarily lends to them.

Lest the idea of public schools inculcating the nation's youth with international law norms raise fears of undermining American identity and allegiance, it should be remembered that the United States has played a significant role in developing many international laws and that international laws have long affected domestic policy.³⁵¹ The most obvious example of this interplay is the federal government's exercise of its constitutional treaty power.³⁵² The United States is also bound by customary international law, which is considered to be federal common law.³⁵³ Thus, the United States is legally obligated to uphold those ideational prerequisites embedded in customary international law.

International law has the potential to affect the internal affairs of the United States in more subtle ways as well. On occasion international law has been used as a means of informing or infusing open-ended or cryptic provisions of the federal Constitution.³⁵⁴ A significant number of international law scholars have urged this

torture and other inhuman punishments); Civil and Political Rights Covenant, *supra* note 320, art. 2, para. 1, arts. 3-4 (evinced repugnance toward invidious discrimination); Civil and Political Rights Covenant, *supra* note 320, art. 4, para. 1 (expressing commitment to the rule of law); Civil and Political Rights Covenant, *supra* note 320, art. 7 (asserting the unacceptability of torture and other inhuman punishments); Elimination of Racial Discrimination Convention, *supra* note 320, art. 2, para. 1(e) (discouraging barriers among people on the basis of race); Universal Declaration, *supra* note 321, art. 1 (encouraging a spirit of brotherhood); Universal Declaration, *supra* note 321, arts. 1-2, 4, 7 (repudiating invidious discrimination). Concern for the environment is apparent in other types of international law instruments. *E.g.*, THE LAW OF THE SEA: OFFICIAL TEXT OF THE U.N. CONFERENCE ON THE LAW OF THE SEA WITH ANNEXES AND INDEX at 70-85, U.N. Sales No. E.83.V.5 (1983) (containing provisions for the protection and preservation of the marine environment).

351 The United States has played a substantial part in the development of international human rights law. Henkin, *supra* note 319, at 415; Lillich, *supra* note 293, at 852-55. Ironically, international human rights law has thus far impacted upon the United States only on an occasional basis. Lillich, *supra* note 293, at 855-60. *Cf.* Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1110 (1990) (describing the principle that federal statutes should not be interpreted to violate international law if any other viable construction is possible). *But see* Henkin, *supra* note 319, at 421 (arguing that "we have not accepted international human rights for ourselves").

352 "He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . ." U.S. CONST. art. II, § 2, cl. 2.

353 *See supra* note 321.

354 *E.g.*, *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981) (referring to international law as an aide in defining due process).

general informing role of international human rights instruments vis-a-vis the Constitution.³⁵⁵ The informing role also received an approving nod from the four concurring Supreme Court Justices in *Oyama v. California*,³⁵⁶ when they looked to the United Nations Charter to define constitutional norms under the Fourteenth Amendment.³⁵⁷ Indeed, some scholars are of the view that international human rights instruments may serve to inform the Constitution even though they are not part of customary international law.³⁵⁸ Be that as it may, the acceptance of the informing or infusing role of international human rights law by respected quarters in the legal community should allay any apprehension that inculcation with ideational prerequisites of international origin will subvert the next generation. After all, if such ideational prerequisites are fit to develop the Constitution's meaning, they are no less fit to develop schoolchildren's moral sense. This is especially the case since ideational prerequisites, as they have been conceived here, necessarily are values that comport with a democratic political system and civilized social order.

Ideational prerequisites offer a modern solution to the old constitutional dilemma of whose values may be taught in the pub-

355 Richard B. Bilder, *Integrating International Human Rights Law into Domestic Law — U.S. Experience*, 4 HOUS. J. INT'L L. 1, 2, 7 (1981); Christenson, *supra* note 293, at 4, 15-18, 36; Hans A. Linde, *Comments*, 18 INT'L LAW. 77, 77-78, 80-81 (1984); Bert B. Lockwood, Jr., *The United Nations Charter and United States Civil Rights Litigation: 1946-1955*, 69 IOWA L. REV. 901, 902, 916, 932, 936, 948-49 (1984); Robert J. Martineau, Jr., *Interpreting the Constitution: The Use of International Human Rights Norms*, 5 HUM. RTS. Q. 87, 103, 105-07 (1983).

356 332 U.S. 633 (1948).

357 *Id.* at 649-50, 673 (1948) (Black, J., Douglas, J., Murphy, J., & Rutledge, J., concurring). See also *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988) (plurality opinion) (relying upon, among other things, the standards of other nations prohibiting the execution of a person who was a minor at the time of his or her offense); Justice Harry Blackmun, *supra* note 293, at 8-9 (stating that "[i]nternational human rights conventions . . . have created for nations mutual obligations that are accepted throughout the world" and that "I look forward to the day when the Supreme Court, too, will inform its opinions almost all the time with a decent respect to the opinions of mankind").

358 Lillich, *supra* note 321, at 411-12. See also Martineau, *supra* note 355, at 107 (maintaining that "[t]he [informing] approach is free from the concerns . . . of determining whether international norms are so widely accepted as to be deemed binding on the court"); cf. Bilder, *supra* note 355, at 7 (asserting that the judiciary will use international standards to inform the Constitution even though they are not regarded "as customary law to be considered as 'the law of the land'"). But see Christenson, *supra* note 293, at 17 (remarking that "[t]hese [international human rights] norms supply a context, guide interpretation, and fill gaps in the positive law, but their use requires convincing technical presentation of the positive sources of customary international law before they are contextually persuasive").

lic schools without violating First Amendment precepts. The schools may inculcate ideational prerequisites whether everyone agrees with them or not. In effect, the *Fraser/Kuhlmeier* standard gives ideational prerequisites the imprimatur of constitutionality under the Free Speech Clause, because they are the values that will prepare citizens to perpetuate a democratic political system and civilized social order, in the context of intensified international interdependence and technologically induced dangers.

The answer to the constitutional question offers the public schools a way out of the pedagogical dilemma. As a constitutional matter, the schools are not forced to avoid preferred values inculcation; they are not consigned to rely exclusively upon pedagogically less effective approaches such as values clarification or cognitive moral development. Instead, public school educators may use optimal pedagogical techniques to transmit ideational prerequisites secure in the knowledge that there will be no likely legal repercussions. It is true, of course, that even after *Fraser* and *Kuhlmeier*, public schools may not go to extremes in selecting the means to inculcate this core of transcending values. Implicit in *Kuhlmeier* is the thought that the means of inculcation, as well as the values inculcated, should be reasonably related to a legitimate pedagogical concern.³⁵⁹ Presumably, in light of the precedents, a compelled flag salute would not be a constitutional means of inculcating even ideational prerequisites.³⁶⁰ But since *Fraser* and *Kuhlmeier* make plain that inculcation, as a technique, is not forbidden by the Free Speech Clause, it may be anticipated with some confidence that reasoned inculcation, where a full exploration and explanation of the preferred status of the ideational prerequisite is offered, should pass constitutional muster. Indeed, there is a paradox in this proposal that may hearten the most uncompromising civil libertarians. Because the inculcation urged here is predicated on exploration and explanation, as well as ex-

359 "[W]e hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). In *Kuhlmeier*, editorial control, through excision of articles from the school newspaper, was the means selected to inculcate values. Therefore, in upholding the school's conduct the Court was not only upholding the principle that public schools may inculcate values different from those conveyed by the offending student expression, but also that the means selected to that end were acceptable as well.

360 *Id.* at 273. *West Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (striking down a compelled flag salute as unconstitutional under the Free Speech Clause).

pression of a preference, children would still be exposed to a range of viewpoints and data. The marketplace of ideas would not atrophy from nonuse in the public elementary and secondary schools but would simply be transformed into a means furthering constitutional inculcative ends.³⁶¹

As history unfolds, technology advances and human intelligence reaches new levels of understanding, both the nature of particular ideational prerequisites and the sources of these values may change. Evolving notions of what constitutes a democratic political system or a civilized social order make some such changes inevitable. For now, it is hoped that the ideational prerequisites identified here will serve as the first step in forming a values data base upon which the schools may draw. Indeed, this Article's main purpose is not so much to identify particular ideational prerequisites as it is to discover a meaningful standard for ascertaining which values may be taught at the elementary and secondary levels within the strictures of the Free Speech Clause. The standard proposed here, ideational prerequisites to mankind's collective survival and humanity, is intended to take cognizance of the fact that our children will someday be called upon to participate in decision-making that affects every community. The U.S. Constitution and other domestic laws are sources of at least some ideational prerequisites. Without implying any limitation on the possibility that there are a multiplicity of sources in which ideational prerequisites exist, this Article offers international human rights law as an additional repository that has particular credibility and promise.

V. CONCLUSION

When William Wordsworth wrote that "[t]he Child is father of the Man,"³⁶² he did not merely invoke poetic license to conjure up a fanciful image at the expense of meaning. While the words are capable of varying interpretation, the coupling of this image with his wish for a life of "natural piety" suggests a yearning to retain in maturity some of the innocence of early childhood. Perhaps there is implicit in this vision the idea that each child presents a new opportunity to effectuate a rejuvenation of "Man"—an

361 Robert B. Keiter, *Judicial Review of Student First Amendment Claims: Assessing the Legitimacy-Competency Debate*, 50 MO. L. REV. 25, 52-53 (1985). Cf. Mitchell, *supra* note 164, at 705-06 (proposing that schools inculcate certain fundamental values and provide a marketplace of ideas with respect to other values).

362 See *supra* note 1 and accompanying text.

opportunity to recast his moral nature for the better and improve the common lot. Whether or not this was Wordsworth's meaning, it appears to have been the intent of the U.S. Supreme Court when, in *Fraser* and *Kuhlmeier*, the Justices put the public schools on notice that the Free Speech Clause permits the inculcation of values that enable the preservation of a democratic political system and civilized social order. The Court's assumption is that, at a minimum, moral education must enable, not simply the moral individual, but the moral society as well. Inculcation of ideational prerequisites to mankind's collective survival and humanity is consonant with and a means to effectuating this indispensable but nonetheless noble aspiration.

