

**SHAKING THE FOUNDATION OF GOOD CITIZENSHIP: CAN A U.S. PUBLIC SCHOOL OPT OUT OF  
PREPARING ITS STUDENTS TO BE ADULT CITIZENS?**

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Consider this: a public school district states it recognizes no duty to educate for citizenship,<sup>1</sup> and declines to prepare its students for their roles as adult U.S. citizens. Perhaps the district serves a predominantly immigrant community, and it has determined that it would prefer not to pressure its students to be “Americanized.” Or perhaps the district has decided that its proper role is academic education, not preparation for citizenship in a particular polity. Can such a school system be forced to educate its students for U.S. citizenship? As a practical matter, this conflict seems unlikely to arise - would a school system ever overtly deny that an aspect of its function is to prepare its students to discharge their roles as political citizens? Yet developing an answer to the question of whether any level of government might compel a school system to educate for citizenship forces an analysis of what a government school can teach when that government is both animated and restrained by U.S. Constitutional protections of freedom of intellect and conscience.

Education for citizenship may properly be a concern of private schools as well as public schools, but the manner in which this issue is handled is uniquely significant in public schools because of the close relationships between federal, state, and local governments; citizens who fund public education with tax dollars; and public school funding and programs. While private schools enjoy considerable autonomy in selecting their missions and curricula,<sup>2</sup> public schools

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<sup>1</sup> The term “citizenship” is used here to denote U.S. citizenship. This is in contrast to more relational notions of citizenship, which might include interpersonal dynamics such as respect, responsibility, and honesty. See Mark Holmes, *Educating for Citizenship in an Age of Pluralism* in MAKING GOOD CITIZENS 196 (Diane Ravitch & Joseph P. Viteritti eds., 2001) (describing a proposed Florida statewide citizenship curriculum which would teach values such as honesty and respect).

<sup>2</sup> *E.g.*, *Farrington v. Tokushige*, 273 U.S. 284, 298 (1927) (affirming private schools’ freedom to select teachers and educational materials without close government supervision).

are more immediately subject to political influence.<sup>3</sup> In a sense, public schools model political values; most immediately, to their students, but also to the community as a whole.<sup>4</sup> What is taught in government-operated public schools appears to represent what the political society believes its young should learn.<sup>5</sup>

Out of a range of possible purposes for public education, Americans rank “prepar[ing] people to become responsible citizens” highest, of equal importance as “help[ing] people to become economically self-sufficient.”<sup>6</sup> The Supreme Court has long given voice to this popular conviction that a function of public education is to prepare America’s children for participation as adult citizens in American public life. The Court’s opinion in the watershed *Brown v. Board of Education* was expressly informed by its understanding of the relationship between education and citizenship:

Education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities. . . It is the very foundation of good citizenship.<sup>7</sup>

Put more stridently, the American people “have recognized ‘the public schools as a most vital civic institution for the preservation of a democratic system of government,’ and as the primary vehicle for transmitting ‘the values on which our society rests.’”<sup>8</sup> By its very nature, as accepted in American society, public education must be oriented toward developing citizens.

Or must it? Is preparation for citizenship a requirement for public schools, or might a school system opt not to pursue developing its students in this manner? Is it possible that the

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<sup>3</sup> MARK G. YUDOF ET AL., *EDUCATIONAL POLICY AND THE LAW* 857 (4<sup>th</sup> ed. 2002)(discussing legislative control of educational decision-making.)

<sup>4</sup> See, e.g., STEPHEN ARONS, *COMPELLING BELIEF* 3-13 (1983) (describing local political agitation for the burning of books that expressed values rejected by the community).

<sup>5</sup> See JENNIFER L. HOCHSCHILD & NATHAN SCOVRONICK, *THE AMERICAN DREAM AND PUBLIC SCHOOLS* 11 (2003) “The intensity of conflicts over how to balance shared but competing goals [the individual versus the collective good] is a good barometer of how much Americans care about public education.” *Id.* at 19.

<sup>6</sup> *Id.* at 11.

<sup>7</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

<sup>8</sup> *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

federal, state, or local government might violate the Bill of Rights by mandating that public schools intentionally prepare their students for U.S. political citizenship? This paper examines, first, how education for citizenship might be defined. Second, the Supreme Court's treatment of education for citizenship is briefly reviewed. Third, the question of whether a school system can be compelled to educate for citizenship is considered: can the federal government so compel either a state or local school system? Can a state so compel a local school district? Does a student hold a private right to education for citizenship as against either the federal or state government such that the student could enjoin a school system for failing to provide this education? Finally, policy arguments favoring and criticizing a requirement that public schools educate for citizenship are presented.

### **I. What is "Education for Citizenship"?**

Numerous scholars, politicians, and judges have asserted that education for democratic citizenship has distinctive characteristics, although the specifics vary. General education for a student's personal betterment, both intellectual and economic, has an impact on that student's capacity to live as a participating citizen which may in turn affect the entire community. As educational philosopher Amy Gutmann explains, "[d]emocratic politics puts a high premium on citizens being both knowledgeable and articulate"<sup>9</sup> in a variety of subjects, such that they can engage meaningfully in political dialogue on those issues. Politics aside, the capacity of individuals to provide materially for themselves and contribute to the U.S. economy and global presence of course impacts the entire nation.<sup>10</sup>

While "education for citizenship" cannot be neatly isolated from a broader notion of education, it has the identifying characteristic of directly concerning itself with teaching children "enough to participate intelligently as adults in the political processes that shape their society."<sup>11</sup> While education for citizenship may be integrated with the teaching of disciplines such as history,

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<sup>9</sup> AMY GUTMANN, *DEMOCRATIC EDUCATION* 285 (1987).

<sup>10</sup> See *Plyler v. Doe*, 457 U.S. 202, 221 (stating that "education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all." *Id.*)

<sup>11</sup> AMY GUTMANN, *DEMOCRATIC EDUCATION* (preface), xi (1987).

government, and civics, it has the unique goal of preparing students to assume duties in a specific political community. Here in the U.S., a student who is educated for citizenship learns that he or she is a member of the U.S. political community (although perhaps not exclusively), and that there are rights and responsibilities inherent in his or her identity as U.S. citizen and/or resident.<sup>12</sup> The subject matter that meets this minimum standard remains a topic of debate,<sup>13</sup> but the basic principles that Thomas Jefferson promoted in 1818 toward developing a free public school system in Virginia provide a starting point. Jefferson intended to educate young people for their lives as adults in a community of citizens.<sup>14</sup> To that end, he stated that students must learn to “understand [their] duties to [their] neighbors and country, and to discharge with competence the functions confided in him by either.”<sup>15</sup> To appreciate the interplay in democratic society between exercising individual rights and acting responsibly to protect the rights of others, a student should also be educated “to know his rights; to exercise with order and justice those he retains; to choose with discretion the fiduciary of those he delegates; and to notice their conduct with discipline, candor, and judgment.”<sup>16</sup> Education for citizenship in a libertarian society such as the U.S. “must prepare children to become responsible and deliberative citizens in a diverse republic of rights.”<sup>17</sup> Not only are the protected rights diverse, but in the contemporary U.S. the body of citizens to which these rights accrue is racially, ethnically, religiously, and sexually

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<sup>12</sup> See Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 133-57 (1995)(arguing that stressing responsibility in educating for citizenship will improve students’ sense of political ownership without devaluing individual rights).

<sup>13</sup> *E.g.*, HOCHSCHILD & SCOVONICK, *supra* note 5, at 14-15 (stating that to “turn students into democratic citizens, educators must provide students with a common core of knowledge”...and a “common set of democratic values and practices.”); Sherry, *supra* note 12, at 157 (To become responsible citizens, student must learn “three things: moral character, critical thinking, and cultural literacy (that is, a knowledge of and attachment to their own culture.)”); GUTMANN 287 (defining “political education” as “the cultivation of virtues, knowledge, and skills necessary for political participation.”).

<sup>14</sup> HOCHSCHILD & SCOVONICK, *supra* note 5, at 17 (citing Thomas Jefferson, *Report of the Commissioners Appointed to Fix the Site of the University of Virginia &c.* (1856) in EARLY HISTORY OF THE UNIVERSITY OF VIRGINIA, AS CONTAINED IN THE LETTERS OF THOMAS JEFFERSON AND JOSEPH CABELL 434(J.W. Randolph ed.).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See Sherry, *supra* note 12, at 157.

diverse as well. This reality may mandate another dimension to education for citizenship, which is “help[ing] students acquire the ability to deal with diverse others in the public arena.”<sup>18</sup>

One point at which these aspects of education for citizenship crystallize is perhaps the most familiar of the civil duties allotted to adult citizens: voting. In casting a vote, a citizen is called to “be informed of the qualifications the various candidates have for looking after the state’s interests and of the significances any referenda have for its interests; and this in turn implies that they have to be cognizant of the relevant principles, ideals, laws, and existential conditions that shape the state’s interests.”<sup>19</sup> Education for voting “must concern itself ultimately with students’ identifying and appreciating their society’s public interest.”<sup>20</sup> Meaningful voting in the U.S. requires not just knowledge, but an understanding of the structure and values of this democratic state and a way of considering how a given candidate or measure is appropriate for the state and its citizens.<sup>21</sup>

Education for citizenship is not limited to education for voting, however. Voting is just one exercise of a more general citizen’s duty of “democratic deliberation,”<sup>22</sup> which is “essential to conscious social reproduction.”<sup>23</sup> Simply put, a democracy relies on its citizens to direct its future.<sup>24</sup> As President Bill Clinton asserted in a 1993 speech, “[W]e believe in individual responsibility and mutual obligation; that government must offer opportunity to all and expect something from all, and that whether we like it or not, we are all in this battle for the future

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<sup>18</sup> HOCHSCHILD & SCOVRONICK, *supra* note 5, at 14.

<sup>19</sup> ROBERT D. HESLEP, *EDUCATION IN DEMOCRACY: EDUCATION’S ROLE IN THE DEMOCRATIC STATE* 108 (1989).

<sup>20</sup> *Id.* The fact that voters voting with insufficient knowledge may be damaging to the polity supports the assertion that preparing students to vote is a function of education for citizenship. See Ilya Somin, *When Ignorance Isn’t Bliss: How Political Ignorance Threatens Democracy* (2004) available at [www.cato.org](http://www.cato.org).

<sup>21</sup> *E.g.* AMY GUTMANN, *supra* note 9, at 282-91(1987); HESLEP, *supra* note 19, at 105-22.

<sup>22</sup> GUTMANN, *supra* note 9, AT 288.

<sup>23</sup> *Id.*

<sup>24</sup> HOCHSCHILD & SCOVRONICK, *supra* note 5, at 10 (2003).

together.”<sup>25</sup> The demand for a citizenry capable of political participation may be largely uncontested,<sup>26</sup> but the question remains: *must* all public schools undertake this education?

## II. The Supreme Court’s Perception of Education for Citizenship

While the Supreme Court has historically recognized preparation for citizenship as a function of education, its opinions reflect the enduring paradox that the scope of government-directed education for citizenship in a libertarian democracy is limited by the very liberties about which it teaches.<sup>27</sup> These privately held liberties include the First Amendment enumerated freedoms such as religion and speech, as well as extra-Constitutional liberties such as parental autonomy<sup>28</sup> and intellectual freedom.<sup>29</sup> In *Pierce v. Society of Sisters*, in which the Court affirmed parental rights to control the education of their children, the Court stated that “the fundamental theory of liberty. . .excludes any general power of the state to standardize its children. . ..”<sup>30</sup> While the Court here was specifically holding that the State could not require that children be educated in public schools, it recognizes a basic tension between personal liberty and education standardized by the government.<sup>31</sup>

As early as *Meyer v. Nebraska* in 1923, the Court recognized the government’s interest in intentionally developing its citizens, stating that “the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally”<sup>32</sup> through public education. The Court also acknowledged the relationship between education and a functioning government, citing the Northwest Ordinance of 1787 for the proposition that the teaching of

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<sup>25</sup> *Id.* at 10 (quoting Bill Clinton, Remarks by the President to the Annual Conference of the Democratic Leadership Council, Dec. 3, 1993).

<sup>26</sup> *But see* Sherry, *supra* note 12, at 138 (noting that one might accept that “the vast majority of Americans are neither inclined nor equipped to engaged in...sustained, reasoned deliberation” preferred for political participation, and that as a result only those few who are prepared for and interested in political engagement will shape policy).

<sup>27</sup> *E.g.*, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>28</sup> *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

<sup>29</sup> *See infra* Part III.B.; *see, e.g.*, *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

<sup>30</sup> *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

<sup>31</sup> Stephen Arons, *The Separation of School and State: Pierce Reconsidered*, 46 HARV. EDUC. LAW. REV. 76, 80 (1976).

<sup>32</sup> *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

“[r]eligion, morality, and knowledge is necessary to good government. . .”<sup>33</sup> The Court has reiterated the education-governance link over the decades, describing, for example, “the importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests. . .”<sup>34</sup>

However, the Court recognizes that the government’s ability to regulate or mandate aspects of education is limited where it collides with privately held First Amendment rights and parents’ implicit Constitutional right to raise their children without undue interference from the government.<sup>35</sup> The inquiry as to whether education for citizenship can be made universally mandatory in every public school system must take these limitations into account. However, the Supreme Court has regularly recognized a state interest in educating students not merely for private gain but for the common good, and where a state pursues education for citizenship in a manner that properly respects federal Constitutional concerns, the state may be able to compel some form of education for citizenship through statewide curriculum requirements or subject matter testing.<sup>36</sup>

### **III. Can a State or Local School System be Compelled to Educate for Citizenship?**

This Part considers whether the federal government may compel state or local school systems to educate for citizenship; whether a state may compel its school systems to educate for citizenship; and whether a student whose school system does not educate for citizenship may have a private right of action against either the federal or state governments. Of these, as discussed below, the state is the entity most likely to have the power to compel education for citizenship within its school systems.

Although the legislative, executive, and judicial branches of the federal government have actively influenced aspects of public education across the nation, education is predominantly

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<sup>33</sup> *Id.* Public schools are prohibited from teaching devotional religion. *E.g.* *School Dist. of Abingdon v. Schempp*, 374 U.S. 203 (1963).

<sup>34</sup> *Ambach v. Norwich*, 441 U.S. 68, 76 (1979).

<sup>35</sup> *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

<sup>36</sup> *See infra* Part III.A.

controlled by state and local government agencies.<sup>37</sup> The Supreme Court has repeatedly asserted that “public education in our Nation is committed to the control of state and local governments,”<sup>38</sup> and that federal courts should generally avoid intervening in the routine administrative decisions of schools.<sup>39</sup>

To state its commitments and aspirations regarding public education, each state has a constitutional provision regarding education. The states may delegate the authority to regulate education to subordinate agencies, and every state has established a state board of education and a supervising officer of schools to that end.<sup>40</sup> Also, every state except Hawaii has created local school boards, each of which has authority over its own school district.<sup>41</sup> Members of these boards are usually elected by those citizens residing in the relevant school district.<sup>42</sup> However, these local boards operate with varying degrees of autonomy from the state that grants their authority.<sup>43</sup> Depending on the state, curriculum and policy decisions are made at either the state or local level. Standards for statewide performance testing of public school students are determined by the state.<sup>44</sup> The close control of schools traditionally allotted to the states suggest that states may be able to require that their schools include preparation for citizenship among their missions.

#### **A. Can the Federal Government Compel State or Local Systems to Educate for Citizenship?**

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<sup>37</sup> MARK G. YUDOF, ET AL., EDUCATIONAL POLICY AND THE LAW 857 (4<sup>th</sup> ed. 2002).

<sup>38</sup> *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 507 (1969).

<sup>39</sup> *Bd. of Educ., Island Trees Union Free School Dist. v. Pico*, 457 U.S. 853, 864 (1982).

<sup>40</sup> YUDOF, *supra* note 37, at 869.

<sup>41</sup> *Id.* at 870.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* For example, Colorado tends to allow broad local autonomy, while Florida maintains control of many educational details at the state level. *Id.*

<sup>44</sup> U.S. DEPT. OF EDUC., *Charting the Course: States Decide Major Provisions under No Child Left Behind* (2004), available at <http://www.ed.gov/nclb>. Follow hyperlink to “More Local Control,” then follow hyperlink to “Local Control and Flexibility.”

Despite the federal government's interest in national education initiatives over the past two decades,<sup>45</sup> the federal government is constrained by the Tenth Amendment of the Constitution from compelling state or local school districts from adopting any particular curriculum or educational purpose such as those encompassed by "education for citizenship."<sup>46</sup> The U.S. Constitution does not mention "education," therefore reserving education as a matter for the states in accordance with the Tenth Amendment.<sup>47</sup> However, the federal government has relied on its Article I<sup>48</sup> capacity to condition federal financial benefits on particular state activity as a means of encouraging a particular state behavior.<sup>49</sup> The federal Congress' most recent exercise of this power with respect to education is the No Child Left Behind Act, passed in 2002.<sup>50</sup> School districts that have accepted federal funding under this Act must test all students in grades 3-8 in reading and mathematics, and by school year 2007-2008 must conduct science tests at certain grade levels.<sup>51</sup> The federal government exerts only minimal curriculum control by requiring that the school systems' "curricula and teaching practices [must] be validated by 'scientifically based

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<sup>45</sup> Jack Jennings, *What to Expect from the No Child Left Behind Act 25-26*, NATIONAL ASSOCIATION OF STATE BOARDS OF EDUCATION (2002) (describing federal government efforts to improve academics nationwide, led by U.S. Presidents George H.W. Bush, Bill Clinton, and George W. Bush).

<sup>46</sup> U.S. CONST. amend. X. ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.")

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

<sup>48</sup> U.S. CONST. art. I, § 8, cl. 1. Colloquially termed the "Spending Power," this clause states that "[t]he Congress shall have power to lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States. . ."

<sup>49</sup> *E.g.*, *South Dakota v. Dole*, 483 U.S. 206 (1987).

<sup>50</sup> Kathryn McDermott & Laura S. Jensen, *Dubious Sovereignty: Federal Conditions of Aid and the No Child Left Behind Act*, 80 PEABODY J. OF EDUC. 39, 39-41 (2005).

<sup>51</sup> <http://www.ed.gov/nclb> "No Child Left Behind requires that, by the 2005-06 school year, each state must measure every child's progress in reading and math in each of grades 3 through 8 and at least once during grades 10 through 12. . . By school year 2007-2008, states must also have in place science assessments to be administered at least once during grades 3-5; grades 6-9; and grades 10-12. Further, states must ensure that districts administer tests of English proficiency--to measure oral language, reading and writing skills in English--to all limited English proficient students, as of the 2002-03 school year. Students may still undergo state assessments in other subject areas (i.e., history, geography and writing skills), if and when the state requires it. *No Child Left Behind*, however, requires assessments only in the areas of reading/language arts, math and science."

research.”<sup>52</sup> Even if the federal government wanted to use No Child Left Behind to push education for citizenship, it could not do so with the Act as written. Section 6301 of the Act, under the heading “Prohibition Against Federal Mandates, Direction, or Control,” states:

Nothing in this title shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's specific instructional content, academic achievement standards and assessments, curriculum, or program of instruction, as a condition of eligibility to receive funds under this Act.<sup>53</sup>

Neither could the federal government obliquely force education for citizenship under NCLB, because the Act does not require state accountability in a citizenship-related testable subject area such as civics or in any other aspect of citizenship preparation.

Most importantly, a school system or entire state could decline to accept federal funding and therefore not be bound by any aspect of NCLB or similar legislation.<sup>54</sup> As of 2004, no state had declined federal funding under NCLB, so this alternative may seem merely a chimera.<sup>55</sup> States may view the financial incentives of NCLB as indispensable funding for their education budgets, and Congress is not constitutionally permitted to offer funding that is “so coercive as to pass the point at which pressure turns into compulsion.”<sup>56</sup> However, “NCLB funds account for only a small proportion of total educational expenditures,”<sup>57</sup> and the Act is “fairly benign compared to conditional spending enactments in other areas of public policy such as social welfare, transportation, and criminal justice.”<sup>58</sup> As the federal government is not constitutionally prohibited from offering funding as an incentive for “the indirect achievement of objectives which Congress

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<sup>52</sup> McDermott & Jensen, *supra* note 50, at 45.

<sup>53</sup> 20 U.S.C. § 7371 (2002).

<sup>54</sup> McDermott & Jensen, *supra* note 50, at 49 (“Although no cut is insignificant when budgets are tight, a state conceivably could decide that being free of NCLB conditions is worth either reducing spending by 2% or 3% or making up the shortfall from state revenue.” *Id.*).

<sup>55</sup> James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 937 (2004).

<sup>56</sup> *South Dakota v. Dole*, 483 U.S. 203, 210 (1987).

<sup>57</sup> McDermott & Jensen, *supra* note 50, at 44.

<sup>58</sup> *Id.*

is not empowered to achieve directly,<sup>59</sup> Congress could add a state accountability requirement for citizenship preparation. As with the subjects currently tested under NCLB, each state would set its own standards and administer its own subject matter tests. Even if the federal government were to implement its own citizenship curriculum under NCLB, as long as the available federal funding comprised only a small percentage of school budgets the federal government would likely not be in violation of the Spending Power.<sup>60</sup> However, if the Supreme Court determines that the amount of funding really does coerce state compliance in violation of the Constitution, the federal government would be prohibited from enforcing a nationwide curriculum.<sup>61</sup> Even if Congress did develop a national program of education for citizenship, it could not unequivocally mandate that public schools educate their students for citizenship, because states would be Constitutionally free to opt out, however practically difficult this might be.

## **B. Can a State Compel “Education for Citizenship”?**

Although states have considerable control over their school systems, their power is limited by the federal Constitution. In this section, possible restrictions on a state’s capacity to compel education for citizenship are discussed in light of the limits on first, the state’s ability to control private school curricula; second, the state’s power to require particular school activities in the service of national security and cohesion; and finally, the restriction on state educational control found in the Constitutional protection of intellectual freedom.

### **1. The Private School Exception & Limits on States’ Ability to Control Education**

Since the 1920’s, no state has maintained absolute control over the education of every student within its borders.<sup>62</sup> States may generally require<sup>63</sup> and “reasonably regulate”<sup>64</sup> some

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<sup>59</sup> *South Dakota v. Dole*, 483 U.S. 203, 210 (1987).

<sup>60</sup> See *South Dakota v. Dole*, 483 U.S. 203, 210 (1987)(Congress violates Spending Power only where the financial incentive is coercive to the States).

<sup>61</sup> See *id.*(internal quotations omitted).

<sup>62</sup> *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Farrington v. Tokushige*, 273 U.S. 284 (1927).

<sup>63</sup> TYLL VAN GEEL, *THE COURTS AND AMERICAN EDUCATION LAW* 18 (1987)(noting that all states have compulsory education laws).

form of structured education for its children. As to private schools, the Supreme Court in *Farrington v. Tokushige* held that such “reasonable regulation” does not include “affirmative direction concerning the intimate and essential details of such schools. . . [denying] owners and patrons reasonable choice and discretion in respect of teachers, curriculum, and textbooks.”<sup>65</sup> In this case, the state of Hawaii sought to closely control the curricula taught in private foreign-language schools.<sup>66</sup> The government’s stated goal in these Chinese, Korean, and Japanese schools was “to fully and effectively regulate the conducting of foreign language schools and the teaching of foreign languages, in order that the Americanism of the pupils may be promoted.”<sup>67</sup> The state also required that foreign-language school staff members apply to the state for a permit and sign a pledge asserting that he or she would “so direct the minds and studies of pupils in such schools as will tend to make them good and loyal American citizens, and will not permit such students to receive instructions in any way inconsistent therewith.”<sup>68</sup> The Court held that Hawaii’s program was a “deliberate plan to bring foreign language schools under a strict governmental control for which the record discloses no adequate reason,” and determined that it violated parental rights under the Fourteenth Amendment to manage their children’s education.<sup>69</sup>

Although the Court has acknowledged the state’s interest in educating the young, its unwillingness to permit a state to control the details of private education hints at a “set of positive parental rights which might be vindicated within the public school system.”<sup>70</sup> Specifically, the logic the Court uses to prohibit the State from dictating private school educational programs might also be applied to prohibit the State from mandating public school educational programs, such as education for citizenship, where these programs include inculcation of particular values.

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<sup>64</sup> *Pierce*, 268 U.S. at 534.

<sup>65</sup> *Farrington v. Tokushige*, 273 U.S. 284, 298 (1927).

<sup>66</sup> *Id.* at 293.

<sup>67</sup> *Id.* at 293.

<sup>68</sup> *Id.* at 293-94.

<sup>69</sup> *Id.* at 299.

<sup>70</sup> Stephen Arons, *The Separation of School and State: Pierce Reconsidered*, 46 HARV. EDUC. LAW REV. 76, 87 (1976).

In *Pierce v. Society of Sisters*, the Supreme Court checked the State's power to monopolize the education of minors in its review of the State of Oregon's Compulsory Education Act of 1922, which required that all children between the ages of eight and sixteen attend an Oregon public school.<sup>71</sup> The Act was passed during the significant wave of post-World War I immigration into the U.S., in response to the practice of immigrant families' educating their children in private schools.<sup>72</sup> A Ku Klux Klan member expressed the popular concern: "Somehow these mongrel hordes must be Americanized; failing that, deportation is the only remedy."<sup>73</sup> The Supreme Court did not explicitly address whether Oregon's apparent interest in "Americanization" was compelling enough to permit the state to infringe on Constitutionally protected liberties. However, the Court held that the Act was unconstitutional, explaining that "the fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."<sup>74</sup> *Pierce* affirmed an extra-Constitutional right of parents to control their children's education.

The Court has cited *Pierce* primarily to uphold the superiority of parental rights in child-rearing decisions as against the State.<sup>75</sup> However, the Court in *Pierce* did not confine its opinion to Constitutional protection of parental authority. The Court also circumscribed the role of the State in molding children, asserting that "the child is not the mere creature of the State."<sup>76</sup> The *Pierce* understanding of the State-child relationship in the educational context suggests that this case:

. . . may also be understood as a case that protects private schooling as a way of limiting the capacity of the government to indoctrinate the young; providing those

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<sup>71</sup> *Pierce v. Society of Sisters*, 268 U.S. 510, 531 (1925).

<sup>72</sup> VAN GEEL, *supra* note 63, at 21.

<sup>73</sup> VAN GEEL, *supra* note 63, at 21 (citing David Tyack, *The Perils of Pluralism: The Background of the Pierce Case*, 74 AM. HIST. REV. 74, 79 (1968)).

<sup>74</sup> *Pierce*, 268 U.S. at 535.

<sup>75</sup> *E.g.*, *Norwood v. Harrison*, 413 U.S. 455, 461 (1973) (citing *Pierce* in asserting that "[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."); see also TYLL VAN GEEL, *THE COURTS AND AMERICAN EDUCATION LAW 21-22* (1987).

<sup>76</sup> *Pierce*, 268 U.S. at 535.

who disagree with the curriculum of the publicly operated schools an option. . .the *Pierce* decision clearly seems to reject the view that government has sufficiently strong interests in seeing that all children are inculcated with the same governmentally prescribed values and viewpoints.<sup>77</sup>

Public school curricula and goals are selected by “majoritarian political control,” whether the decision is made “in a school-board election, an administrator’s office, or a state legislature.”<sup>78</sup> All schools, whether public or private, are inescapably “value-inculcating.”<sup>79</sup> Therefore, where public school education for citizenship includes value-laden language of duties of citizenship and national identity, the majority has chosen these values. However, “*Pierce* represents the most significant protection of the right to opt out of the majority on issues of child rearing.”<sup>80</sup> *Pierce* suggests, at a minimum, that if a local school board represents aggregated parental interests in opting out of a state program of education for citizenship, the state could not compel that school system to override what amounts to a group decision by the parents. More broadly interpreted, *Pierce* may indicate that regardless of whether or which parental interests are at stake, “the Constitution protects the child against state efforts to indoctrinate.”<sup>81</sup> Under this reading, a school system that honors the Constitution by prohibiting education for citizenship as impermissible indoctrination could hardly be compelled to violate the Constitution by doing otherwise.<sup>82</sup>

## **2. Education for Citizenship as Public Safety Measure?**

If a program of education for citizenship involves apparent indoctrination or homogenization of youth, the Court is likely to find the State has impermissibly violated the federal Constitution’s liberty guarantees.<sup>83</sup> Where the content of a State’s program of education

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<sup>77</sup> VAN GEEL, *supra* note 63, at 22; see also Stephen Arons, *The Separation of School and State: Pierce Reconsidered*, 46 Harv. Educ. Law Rev. 76 (1976).

<sup>78</sup> Stephen Arons, *supra* note 70, at 77.

<sup>79</sup> *Id.* at 97-98; see *Wisconsin v. Yoder*, 406 U.S. 205, 210-11 (1972) (upholding excusal of Amish students from state compulsory secondary school education because “the values it teaches are in marked variance with Amish values.” *Id.* at 211.).

<sup>80</sup> Arons, *supra* note 70, at 77.

<sup>81</sup> VAN GEEL, *supra* note 63; see also Tyll van Geel, *The Search for Constitutional Limits on Government Authority to Inculcate Youth*, in CHILDREN’S INTELLECTUAL RIGHTS (David Moshman ed., 1986).

<sup>82</sup> Whether “education for citizenship” triggers Constitutional concern depends on the specifics of each such program. See *supra* Parts II & III.

<sup>83</sup> *Meyer v. Nebraska*, 262 U.S. 390 (1923); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

for citizenship violates any federal Constitutional rights, the Supreme Court is unlikely to accept that a State may mandate such a program as a legitimate exercise of the State's police power to ensure public safety, even where the state articulates national security as its concern.<sup>84</sup> The Court has not considered a case where a local school or district refuses to educate for citizenship. The logic applied in cases where the State invokes national security, however, suggests that if the Court recognized the local school board as an aggregation of the private liberty interests of parents and students, the Court might decline to permit the State to exert its police power to encroach on a local exercise of liberty.

In *Meyer v. Nebraska*, the Court faced a Nebraska state statute that prohibited any school, public or private, from teaching a contemporary language other than English<sup>85</sup> to students in the eighth grade or below.<sup>86</sup> In this case, a parochial school faculty member had taught reading in the German language to a ten-year-old.<sup>87</sup> The statute imposed criminal penalties on the teacher, but the Court found the law raised Constitutional questions regarding the "opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own."<sup>88</sup> The State contended that it was ensuring public safety by "foster[ing] a homogenous people with American ideals prepared readily to understand current discussions of civic matters,"<sup>89</sup> especially in light of post-World War I hostilities and immigration into the U.S.<sup>90</sup> The Court in *Meyer* noted that education was related to good governance, such that the State had a legitimate interest in the manner in which its young people were educated. However, the Court held that Nebraska's statute was an unconstitutional violation of the state's police power<sup>91</sup>

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<sup>84</sup> *Meyer v. Nebraska*, 262 U.S. 390 (1923); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

<sup>85</sup> *Meyer*, 262 U.S. at 400. The statute permitted the teaching of "ancient or dead languages" such as Hebrew, Greek, and Latin. *Id.*

<sup>86</sup> *Meyer*, 262 U.S. at 397.

<sup>87</sup> *Id.* at 396-97.

<sup>88</sup> *Id.* at 401.

<sup>89</sup> *Meyer*, 262 U.S. at 402.

<sup>90</sup> *Id.* at 401.

<sup>91</sup> *E.g.*, *Commonwealth v. Alger*, 61 Mass. 53, 57 (Mass. 1851)(The court affirmed the right of the state legislature to regulate under "the police power vested in them by the Constitution of the commonwealth. . .for the preventing of injuries to the rights of others and the security of the public health and welfare.")

regardless of the law's purpose of "promoting civic development"<sup>92</sup> by removing any obstacle to the students' acquisition of "American ideals."<sup>93</sup> The Court observed that while it might be "highly advantageous" for the polity if every citizen spoke English fluently, "a desirable end cannot be promoted by [Constitutionally] prohibited means."<sup>94</sup> The Court then unfavorably compared Nebraska's statute to Plato's suggestion that ancient Sparta "submerge the individual and develop ideal citizens" by corralling male children at age seven and keeping them exclusively under the care of government officials.<sup>95</sup> The Court noted that the State's desire to develop "a homogeneous people with American ideals prepared readily to understand current discussion of civic matters,"<sup>96</sup> while "easy to appreciate," had also been exacerbated by "[u]nfortunate experiences during the late war and aversion toward every characteristic of truculent adversaries."<sup>97</sup> The Court suggested that the State could override individual liberties with strict education regulations in the event of an "emergency" that would be mitigated by a rigid education policy, but did not find that teaching German to a child was "so clearly harmful" that it justified the State's trumping the teacher's, students' or parents' rights to shape education.<sup>98</sup>

In *Minersville School District Board of Education vs. Gobitis*, argued in 1940, the Court briefly approved a state's mandating the pledge of allegiance in public schools, even if students objected on religious grounds.<sup>99</sup> Here, two students, aged ten and twelve, had been expelled from public school for refusing to say the Pledge of Allegiance because such a pledge violated

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<sup>92</sup> *Meyer*, 262 U.S. at 401.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Meyer*, 262 U.S. at 401-02.

<sup>96</sup> *Id.* at 402.

<sup>97</sup> *Id.* at 402.

<sup>98</sup> *Id.* at 403.

<sup>99</sup> *Minersville Sch. Dist. Bd. of Educ. v. Gobitis*, 310 U.S. 586 (1940). At the time this case was brought, the Pledge of Allegiance did not include the words "under God." The plaintiffs, Jehovah's Witnesses, asserted that taking an oath before a flag violated the Biblical commandments of Exodus 20 which prohibit worship of idols. *Id.* at 591, 592 n.1. In 2004, the Court reviewed a similar case in which an atheist parent challenged his daughter's school's policy of saying the Pledge of Allegiance each day. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004). The school permitted students who objected to the pledge, on religious or any other grounds, not to participate. *Id.* The Court dismissed the case for lack of standing and never reached the merits. *Id.*

the tenets of the Jehovah's Witness faith tradition.<sup>100</sup> The Court held that a school did not violate the children's freedom of religion by mandating participation in the pledge, stating that "[n]ational unity is the basis of national security,"<sup>101</sup> and declared that it dared not question a state's choice of educational policy regarding students "the formative period in the development of citizenship."<sup>102</sup> The Court suggested that the State was exercising an essentially supra-Constitutional power to maintain the "ultimate foundation of free society [which is] the binding tie of cohesive sentiment." Securing "an organized political society"<sup>103</sup> was "an interest inferior to none in the hierarchy of legal values,"<sup>104</sup> including those guaranteed by the Bill of Rights. Had *Gobitis* endured as good law, a state could invoke national security as a reason to compel education for citizenship in subordinate school districts, just as it once compelled students to swear oaths to the American flag. However, the Court ultimately abandoned *Gobitis*, ranking intellectual liberty over national security in the hierarchy of educational and constitutional values.

### **3. Intellectual Freedom as Constitutional Liberty**

The Court reversed its position in *Gobitis* three years later in *West Virginia State Board of Education v. Barnette*. The facts were essentially the same as those in *Gobitis*, and concerned State infringement on freedom of religion. However, the Court suggested that an even more far-reaching Constitutional protection was at stake, stating that "many citizens who do not share [the plaintiffs'] religious views hold such a compulsory rite to infringe constitutional liberty of the individual."<sup>105</sup> The Court asserted, as it had in *Meyer* and *Gobitis*, that the State could certainly control curriculum, and may require the "study of all in our history and in the structure and organization of government, including the guaranties of civil liberty, which tend to inspire

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<sup>100</sup> *Gobitis*, 310 U.S. 586.

<sup>101</sup> *Id.* at 595.

<sup>102</sup> *Id.* at 598.

<sup>103</sup> *Id.* at 596.

<sup>104</sup> *Id.* at 595.

<sup>105</sup> *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 635 (1943).

patriotism and love of country.”<sup>106</sup> Also as it did in *Meyer* and *Gobitis*, the Court recognized that a wartime political environment had probably impacted state policy.<sup>107</sup> The Court recognized “[n]ational unity as an end which officials may foster by persuasion and example,”<sup>108</sup> but asserted that “we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization.”<sup>109</sup>

The Court has valued intellectual liberty at a premium, suggesting that it might protect a school’s refusal to educate for citizenship where that refusal could be characterized as an act to preserve freedom of thought. In *Barnette*, the Court overruled *Gobitis* in holding that the State may not condition public education on a student’s participation in saying the Pledge of Allegiance.<sup>110</sup> The Court stated, “We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes.”<sup>111</sup> A *Barnette* concurrence went so far as to recognize “freedom of thought” as an independent Constitutionally protected liberty.<sup>112</sup> The principle that a State cannot restrict intellectual freedom as a means of “maintain[ing] effective government and orderly society,”<sup>113</sup> read broadly, might indicate a state would be unable to compel a local school or district to educate for citizenship if that school were seeking to maximize student intellectual freedom by avoiding citizenship-oriented programs.

Finally, the Court held that the self-governing nature of democracy itself precluded the State from compelling a citizenship ritual: “[T]he Bill of Rights denies those in power any legal opportunity to coerce that consent [of the governed]. Authority here is to be controlled by public

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<sup>106</sup> *Barnette*, 319 U.S. at 631 (quoting *Gobitis*, 310 U.S. at 604); see also *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) (“Nor has challenge been made of the State’s power to prescribe a curriculum for institutions which it supports.” *Id.*).

<sup>107</sup> *Barnette*, 319 U.S. at 645 (“A reluctance to interfere with considered state action, the fact that the end sought is a desirable one, the emotion aroused by the flag as a symbol for which we have fought and are now fighting again – all of these are understandable.” *Id.*)

<sup>108</sup> *Barnette*, 319 U.S. at 640.

<sup>109</sup> *Id.* at 641.

<sup>110</sup> *Barnette*, 319 U.S. at 641.

<sup>111</sup> *Id.* at 642.

<sup>112</sup> *Id.* at 645 (Murphy, J., concurring).

<sup>113</sup> *Barnette*, 319 U.S. at 645.

opinion, not public opinion by authority.”<sup>114</sup> In dicta, the Court evaluated the efficacy of State efforts to force rather than merely encourage national unity, concluding that “[c]ompulsory unification of opinion achieves only the unanimity of the graveyard.”<sup>115</sup> If the people exercise their democratic power through school board election, for example, and that school board represents the people’s interest in rejecting “education for citizenship” as part of the school’s purpose, then the local public voice has spoken and the state may not drown it out.

The *Barnette* case dealt with a citizenship ritual that involved forcing children to speak certain words and pledge allegiance to a national symbol.<sup>116</sup> Perhaps the *Barnette* case does not set precedent regarding education for citizenship that takes forms other than compelled speech or similar ceremonies.<sup>117</sup> Decades earlier in *Pierce v. Society of Sisters*, the Court specifically stated that the State could require “that certain studies plainly essential to good citizenship must be taught.”<sup>118</sup> However, the Court created an opportunity in *Barnette* to express its intention to shield freedom of thought from any form of State compulsion to conformity, although it could readily have limited its opinion to protection of freedom of religion.<sup>119</sup>

While intellectual freedom is not an enumerated Constitutional right, the Court regularly protects rights, such as the privacy right<sup>120</sup> and the right of parents to control their children’s upbringing<sup>121</sup> that it recognizes as inherent, if unwritten, in the Bill of Rights. More recently, the

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<sup>114</sup> *Id.* at 641. As one scholar writes, “The revolutionary intent of the First Amendment. . . is to deny all subordinate agencies authority to abridge the freedom of the electoral power of the people.” Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245 (quoted in Stephen Arons, *The Separation of School and State: Pierce Reconsidered*, 46 HARV. EDUC. LAW. REV. 76, 92 (1976)).

<sup>115</sup> *Barnette*, 319 U.S. at 641.

<sup>116</sup> *Id.* at 635-36 (“The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution.” *Id.*).

<sup>117</sup> VAN GEEL, *supra* note 63, at 189 (1987) (explaining that the Supreme Court has not unequivocally asserted that a government effort to produce “uniformity of sentiment” in its students is a constitutionally impermissible “infringement on the right of freedom of mind.” *Id.*)

<sup>118</sup> *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925).

<sup>119</sup> Arons, *supra* note 70, at 88.

<sup>120</sup> *E.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1973) (recognizing a right to privacy in the penumbra of the Constitutional protections); see also Arons, *supra* note 70, at 90.

<sup>121</sup> *Pierce v. Society of Sisters*, 268 U.S. 510 (1921).

Court has continued to identify such silent rights, such as the student's right to "political freedom" mentioned in *Board of Education v. Pico* in 1982.<sup>122</sup> One scholar describes such opinions as affirming "the notion that a conglomeration of particular rights in the First Amendment is held together by a core of meaning that can be called the spirit of the First Amendment or its central meaning."<sup>123</sup>

The broad interpretation of Constitutional protections embraced in *Barnette* bolsters the argument that where a local school system opts not to educate for citizenship, the State can compel the teaching of particular subject matter but may not compel the teaching of particular values or modes of thought associated with U.S. political participation. For example, a state could require a U.S. history course, but could not mandate that the course be taught in a way that particularly reveres U.S. democracy. A school system may choose to educate for citizenship, and under *Barnette* may do so up to the point of forcing a ritual performance, but a school system cannot be forced to educate for citizenship without potentially infringing on the freedom of thought of those individuals involved in the school.

A court may decline to adopt the broadest "conglomeration of rights" reading of the First Amendment, finding instead that compulsory education for citizenship does not infringe on any Constitutionally protected freedoms. However, where a state has delegated the details of curriculum control to the local government or a local school board, a court may still uphold a local school system's freedom from state compulsion to educate for citizenship on the grounds that the state has assigned power of self-determination to a local government body.<sup>124</sup> A federal court will

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<sup>122</sup> *Bd. of Educ., Island Trees Union Free School Dist. v. Pico*, 457 U.S. 853, 867 (1982).

<sup>123</sup> Arons, *supra* note 70, at 92. Arguably, political freedom and freedom of thought may exist in the penumbra of the Fourth Amendment or elsewhere in the Bill of Rights, rather than only than in the First Amendment.

<sup>124</sup> If a state wanted to mandate education for citizenship statewide, it might simply decline to delegate curriculum control to local entities.

not intervene in the local government's decisions unless these choices violate the federal Constitution.<sup>125</sup>

### **C. Private Rights of Action: Can Students and Parents Compel Education for Citizenship?**

Imagine you are a student in a school system that has opted out of educating for citizenship. Is there anyone you can sue? Are you entitled to an education that is in some manner designed to imbue you with an understanding of what it means to be a U.S. citizen and prepare you to engage in the political community? Here, a student's options for bringing suit against either the federal or state government are considered.

#### **1. No Federal Right to Education for Citizenship**

Neither the U.S. Constitution nor any federal statutory scheme establishes any right to education for citizenship. However, both the Supreme Court and the federal legislature have at times implied that some modicum of education may be a fundamental right. For example, Congress passed the McKinney-Vento Homeless Assistance Act, one provision of which requires that "[e]ach State educational agency shall ensure that each child of a homeless individual and each homeless youth has equal access to the same free, appropriate public education. . . provided to other children and youths."<sup>126</sup> The Act directs states that require students be residents of the state in order to access public education to adjust their regulations to allow homeless students to be educated regardless of residency.<sup>127</sup> Although education is a benefit offered by the states,<sup>128</sup> Congress creates an entitlement to this education for students who have no state of residence. This entitlement hints at a "right" to an education that transcends individual state legislation. Similarly, while the Supreme Court has stopped short of asserting that a right to a

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<sup>125</sup> See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (asserting that school authorities have broad discretion to formulate educational policies, and the federal court will not regulate these choices absent a Constitutional violation).

<sup>126</sup> 42 U.S.C. §11431 (2002).

<sup>127</sup> *Id.*

<sup>128</sup> See *supra* Part III.

basic education exists and that this minimum education included education for citizenship,<sup>129</sup> its holdings reveal a reluctance to absolutely and finally concede the lack of a federal right to some measure of education.<sup>130</sup>

Ironically, the Supreme Court opened the door to a potential Constitutional right to at least a minimal education in *San Antonio Independent School District v. Rodriguez*, a 1973 case in which the court determined there was no Constitutional right to an education.<sup>131</sup> The Court held that a Texas public school financing system that distributed resources inequitably among its school districts did not violate the Equal Protection clause of the Fourteenth Amendment because it did not completely deprive any class of persons from receiving the benefit of public education.<sup>132</sup> To reach this result, the Court assessed “whether there is a right to education explicitly or implicitly guaranteed by the Constitution.”<sup>133</sup> The Court declined to accept the plaintiffs’ argument that education was a fundamental Constitutional right “because it bears a peculiarly close relationship to other rights and liberties accorded protection under the Constitution. . .it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote.”<sup>134</sup> However, the Court later hedged that it might be “conceded that some identifiable quantum of education is a constitutionally protected right. . .,” suggesting that the Court was unwilling to unequivocally deny some form of right to an undefined minimum education.<sup>135</sup>

Seven years later in *Plyler v. Doe*, the Court overlooked the equivocation in *Rodriguez* and relied on that case to flatly reject a Constitutional right to education: “Public education is not a ‘right’ granted to individuals by the Constitution.”<sup>136</sup> Here, the Court held that under the Equal

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<sup>129</sup> See VAN GEEL, *supra* note 63, at 273 (1987) (observing that various state courts have “taken the position that judicial involvement in such a complex field as. . .educational policy was ill-advised.” *Id.*)

<sup>130</sup> See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982).

<sup>131</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 441 U.S. 1, 34-36 (1973).

<sup>132</sup> *Rodriguez*, 441 U.S. at 38.

<sup>133</sup> *Id.* at 33.

<sup>134</sup> *Id.* at 35.

<sup>135</sup> *Id.* at 36.

<sup>136</sup> *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

Protection clause, the state of Texas could not deny the generally available benefit of free public education to undocumented alien children.<sup>137</sup> Yet the Court's declaration that "[w]e cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests"<sup>138</sup> rings hollow if the Court honestly meant that any education, regardless of quality or content, would fulfill education's "fundamental role in maintaining the fabric of our society."<sup>139</sup> The Court rejected the *Rodriguez* suggestion that a right to education might be as basic in a democracy as the also-unwritten right to vote, even as it observed that education was uniquely important to students as individuals and as citizens charged with "maintaining our basic institutions."<sup>140</sup> However, the Court's passionate language about the critical significance of education to the whole of U.S. society and about the injustice of disadvantaging children<sup>141</sup> suggests that the Court perhaps wished it could have held otherwise.

Both *Rodriguez* and *Plyler* were equal protection cases. Where the Court discussed education in terms of "fundamental right," the Court was referring to *fundamental rights in the equal protection context*, meaning that where such a right is denied to a group of persons the Court must apply strict scrutiny to assess the constitutionality of the denial.<sup>142</sup> While the Court has broadly affirmed the importance of education to individuals, the Court has never treated education as a fundamental *extra-Constitutional right* similar to parental rights to control the upbringing of children.<sup>143</sup>

The Court's Equal Protection analyses may in fact effect a subtle protection of a right to education after all. The Court waffled as recently as 1986 on whether education might be a fundamental right, stating that "[a]s *Plyler* and *Rodriguez* indicate, this Court has not yet

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<sup>137</sup> *Plyler*, 457 U.S. at 202.

<sup>138</sup> *Id.* at 221.

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

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

<sup>141</sup> *Id.* at 220 (quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972) ("[V]isiting] . . . condemnation on the head of an infant is illogical and unjust." *Id.*).

<sup>142</sup> *E.g.*, *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (holding that courts must apply strict scrutiny to racial classifications made at any level of government.)

<sup>143</sup> *E.g.*, *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925).

definitively settled the questions whether a minimally adequate education is a fundamental right. .  
.”<sup>144</sup> However, both of these cases can easily be read to reject education as a fundamental right,  
at least for equal protection purposes.

Education need not be a fundamental right to be protected under the Equal Protection clause; the federal Constitution can sustain a right to education in those situations where a state has made the benefit generally available yet has withheld it from a group of people classified by suspect characteristics.<sup>145</sup> Ironically, it is the strenuous manner in which the Court has applied the equal protection analysis where education is *not* treated as a fundamental right that suggests the Court may in fact perceive it as such. As one scholar argues, “the stronger this form of protection [Equal Protection], the more the Court may be understood as indirectly and implicitly supporting the notion of a right to an education.”<sup>146</sup> For example, a court that tends to strike down policies that disproportionately render education less accessible to classes covered by the Equal Protection clause may be implicitly recognizing a right to education that should be equally available to all students.<sup>147</sup>

Similarly, the more details the Court includes about specific qualities of education in these equal protection cases, the more the Court hints at a right to a particular sort of education. In *Brown v. Board of Education*, for example, the Court held that black students had an equal protection right not to an education in which facilities, teachers, and all other measurable factors were equal to those available to white students, but to an education in a non-segregated environment.<sup>148</sup> The Court believed that the “importance of education in democratic society,” among other factors, dictated its holding.<sup>149</sup> The Court described the substance of a right to

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<sup>144</sup> *Papasan v. Allain*, 478 U.S. 265, 283 (1986).

<sup>145</sup> *See, e.g., Loving v. Virginia*, 388 U.S. 1 (1967)(Court applies strict scrutiny where government classifies persons based on race).

<sup>146</sup> VAN GEEL, *supra* note 63, at 127.

<sup>147</sup> *See id.*, 135 n. 72. However, equal protection approaches to opening access to education does not address situations where that education is inequitably distributed based on categories that are not suspect for equal protection purposes, nor does it act as a corrective where the available education is of a uniformly poor quality.

<sup>148</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>149</sup> *Brown*, 347 U.S. at 493.

education by explaining the nature and purpose of the education to which the protected class of students was entitled. *Brown* is just one of many opinions in which the Court emphasizes the role of public education as the “most vital civic institution for the preservation of a democratic system of government,”<sup>150</sup> tasked with developing responsible citizens. This indicates that if there is any right to education, the Court would hold that right includes education geared toward preparing students to participate as adult citizens in the nation’s political structures.

Despite the Court’s intimations of a right to education for citizenship, this argument remains tenuous as a matter of federal Constitutional law. As the Constitution does not speak directly to the matter, the Court will likely honor federalist principles in declining to recognize a basic right to any sort of education.<sup>151</sup> State constitutions have been far more explicit in their educational commitments, and a student’s argument for a right to education for citizenship may have traction depending on a given state’s constitutional language and related state court jurisprudence.

## **2. State Constitutional Provisions**

A student may seek to compel a school district or entire state school system to educate for citizenship if such education would be necessary for compliance with that state’s constitutional education provisions. The student would be most likely to prevail where the state constitution explicitly commits to providing education for citizenship, because in that case the state would have created a private right for the student.<sup>152</sup> The student may attempt an equal protection argument in a state that treats education as a fundamental right<sup>153</sup> for equal protection purposes,

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<sup>150</sup> *Abingdon Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring).

<sup>151</sup> See *Sherry*, *supra* note 12, at 131.

<sup>152</sup> However, even if the state constitution commits a state to providing education for citizenship, a court could avoid ruling on the issue by treating the area of education for citizenship as a nonjusticiable political question.

<sup>153</sup> *E.g.*, *McDaniel v. Thomas*, 248 Ga. 632, 647 (1981) (“While the determination of the U.S. Supreme Court that education is not a ‘fundamental right’ does not bind state courts to make the same determination, the fact that education is not a ‘fundamental right’ under the U.S. Constitution provides some guidance to the states.” (internal quotations omitted) *Id.*).

but the student would have to establish that he or she is a member of a protected class.<sup>154</sup> The obvious class in need of protection would be the students in the school system that has opted out of teaching for citizenship, but the state court would have to be open to an equal protection class other than race or wealth.<sup>155</sup>

The student may also be successful where a state court identifies specific guarantees in a state constitution's vague assurances of an "adequate" or "thorough" education. Traditional challenges of educational inadequacy concern financing and distribution of financial resources.<sup>156</sup> As financing is controlled at the state level, these claims are brought against the state, not against a local school board. A local school district is granted its power by the state, and is bound by the state constitution. Therefore, if the state court determined that the state constitution mandated education for citizenship through an adequacy or similar provision, the local school districts would be constitutionally required to provide such an education. A student or the student's parents or legal guardians would have standing to go to court to enforce this.<sup>157</sup>

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<sup>154</sup> *E.g.*, *Serrano v. Priest*, 487 P. 2d 1241, 1258 (Cal. 1971) ("We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a fundamental right." *Id.*).

<sup>155</sup> See *VAN GEEL*, *supra* note 63, at 270 (suggesting that "children per se" ought to be considered a suspect class for federal equal protection purposes.). State courts may be willing to flex their equal protection class definitions beyond federal court standards. For example, the California Supreme Court in *Serrano II* stated that California's equal protection provisions were essentially the same as those recognized in the federal Constitution, they "are possessed of an independent vitality which, in a given case, may demand an analysis different from that which would obtain if only the federal standards were applicable." *Serrano v. Priest*, 557 P.2d 929, 950 (Cal. 1976).

<sup>156</sup> *E.g.*, *Robinson v. Cahill*, 62 N.J. 473 (1973) (evaluating whether a school financing system satisfied the state constitutional promise of a "thorough and efficient" education); *McDaniel v. Thomas*, 248 Ga. 632 (1981) (examining school financing under the constitutional "adequacy" provision); *Campaign for Fiscal Equity, Inc., v. State of New York*, 100 N.Y.2d 893 (N.Y. Ct. App. 2003) (examining school financing under a constitutional commitment to a "sound basic education.")

<sup>157</sup> For example, students brought suit against Washington state seeking a declaratory judgment requiring the state to fulfill its state constitutional requirement to "make ample provision" for the "education of all children residing within its borders." *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 82 (1978). The State argued that the students lacked standing to bring the case. See *id.* The Washington Supreme Court replied, "Appellants do not seriously challenge the standing of those respondents who are voter-taxpayers. . .all of whom are parents of minor children attending public schools within the District. . .Clearly all respondent children fall within the zone of interest to be protected by the foregoing constitutional classification." *Id.* at 83. Possibly, a voter-taxpayer in the district would

The outcome in such a suit will depend on the clarity of the state constitutional language and the state court's approach to constitutional interpretation. If the state court defers to the legislature to give meaning to undefined constitutional terms, then the state constitution must state an explicit commitment to education for citizenship for the plaintiff to succeed. In contrast, if the state court interprets constitutional language that is not so obscure as to require legislative explanation, the court might find a constitutional duty to educate for citizenship even if such obligation is not precisely set forth in the constitution.

California, given its constitution and state court precedent, is an example of a state that might be plaintiff-friendly in a student's legal action against a school district for failure to educate for citizenship. Article IX, section 1 articulates that "a general diffusion of knowledge and intelligence [is] essential to the preservation of the rights and liberties of the people. . ."<sup>158</sup> The California Supreme Court drew on the California Constitution's connection of education to a functional social order to establish that education *is* a fundamental right for equal protection purposes. In the 1971 *Serrano v. Priest* opinion,<sup>159</sup> the California Supreme Court explained that education was "crucial to participation in, and the functioning of, a democracy."<sup>160</sup> In *Serrano*, the Court held that education was a fundamental right for equal protection purposes, and its availability could not be predicated on the wealth of a student's "parents and neighbors." The Court concluded that California's property-tax driven school funding system was so inequitable as to be unconstitutional. Unlike the U.S. Supreme Court in *Rodriguez*,<sup>161</sup> the California Supreme Court looked at the societal significance of education to assess whether it was a fundamental

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have standing to bring suit as well, given the potential harm to the political system in that locality.

*See id.*

<sup>158</sup> CA. CONSTITUTION art. IX, § 1.

<sup>159</sup> *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) (overruled by statute on other grounds).

<sup>160</sup> *Serrano*, 487 P.2d at 1258 (stating that voting and education were equally important to democracy, and as voting is a fundamental right under equal protection than education must be as well.)

<sup>161</sup> *See supra* notes 129-133 and accompanying text.

right.<sup>162</sup> Under *Serrano*, the combination of detailed constitutional language indicating a relationship between education to the student's role in democratic society and a court willing to define how that language should be enforced create a legal environment that might be favorable to a student's claim that a local school district must educate for citizenship.<sup>163</sup>

The state of New York may also find for a student plaintiff in this matter, but the combination of constitutional vagueness and court caution render the outcome very unpredictable. The New York constitution is not particularly detailed on the point of education for citizenship, and the New York Court of Appeals is wary of adding unwritten requirements to the state constitution's Education Article.<sup>164</sup> The New York Supreme Court has, however, suggested it recognizes a constitutional assurance of education for citizenship in the constitution's guarantee of a "sound basic education" to its children. This court determined that a "sound basic education" was equivalent to a "minimally adequate education." The court found that New York was constitutionally obligated to provide an education that consists "of the skills necessary to obtain employment, and to competently discharge one's civic responsibilities," such as voting and jury duty.<sup>165</sup> The evidence presented at trial showed what skill levels were required for a student to understand jury charges (eighth grade education) or to comprehend ballot initiatives or political campaign-related newspaper articles (between sixth grade and eleventh grade education), but did not examine whether students were actually taught to apply these skills in a civic-participation

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<sup>162</sup> *Serrano v. Priest*, 487 P.2d 1241, 1256 (Cal. 1971) (The California Supreme Court stated, "education is a unique influence on a child's development as a citizen and his participation in political and community life." *Id.*)

<sup>163</sup> A court may be reluctant to hear a student's claim of a right to a particular aspect of education because other students might view this as an invitation to claim rights to a variety of educational options such as physical education, art, or other potential course offerings.

<sup>164</sup> *E.g.*, *Campaign for Fiscal Equity v. State*, 295 A.D.2d 1 (N.Y. 2002). This case overturned a New York appellate court's holding that the State's school funding program was unconstitutional. The appeals court based its holding on its interpretation that the phrase "sound basic education" included study of literacy, math, and verbal skills to enable students to "function productively as civic participants capable of voting and serving on a jury." *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661 (N.Y. Ct. App. 1995). The New York Supreme Court rejected the lower court's holding, stating that the New York constitution "requires the State to provide a minimally adequate educational opportunity, but not to guarantee some higher, largely unspecified level of education, as laudable as that goal might be." 295 A.2d at 3.

<sup>165</sup> *Campaign for Fiscal Equity*, 295 A.2d at 15.

context.<sup>166</sup> Under this precedent, a New York court might find that the State has discharged its constitutional obligation as long as a student has attained the level of education necessary to be *capable* of participating in civic society; the State need not go so far as to prepare the students for such civic involvement. Or, the court might hold that a school system must intentionally prepare each of its students to “competently discharge one’s civic responsibilities.” The Court of Appeals of New York would likely push for the latter, as it has tried repeatedly to read specific educational requirements into the Education Article.<sup>167</sup> The question is whether the New York Supreme Court would reject the lower court’s interpretation, as it has in the past, or would it agree that education for citizenship is inherent in the phrase “sound basic education.”

Finally, a court in a state such as Georgia would be unlikely to find for a student claiming a school’s failure to educate for citizenship violated the state constitution. The Georgia constitution makes no commitment to education as a means of preparation for civic participation, and the Georgia Supreme Court prefers to leave defining the terms in the Georgia constitution’s education clause to the state legislature.<sup>168</sup>

#### **IV. What’s the Harm in Opting Out?**

Or, stated conversely: what is so significant about educating students to assume an active roles as citizens that the various levels of government might care to compel it? A school’s opting out of educating its students for citizenship does not necessarily precipitate a slide into anarchy. A school that expressly declines to prepare its students for citizenship is still subject to the federal<sup>169</sup> and state constitutions,<sup>170</sup> as well as state curriculum requirements.<sup>171</sup>

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<sup>166</sup> *See id.*

<sup>167</sup> *E.g.*, Campaign for Fiscal Equity, Inc. v. State, 801 N.E. 2d 326, 330 (N.Y. 2003).

<sup>168</sup> *See* McDaniel v. Thomas, 285 S.E.2d 156, 165-66 (1981).

<sup>169</sup> A school system that opts out of education for citizenship is still subject to Constitutional equal protection requirements, even though courts have acknowledged that an aspect of the policy driving equal protection enforcement in schools is the school’s mission to prepare its students to function in and contribute to the policy. *See, e.g.*, Brown v. Bd of Educ., 347 U.S. 483 (1954).

<sup>170</sup> *See supra* Part III.D.2.

<sup>171</sup> *See supra* Part III.A. & Part III.B.

In fact, some scholars maintain that certain forms of education for citizenship are not appropriate for public education. One criticism of teaching for citizenship is that it draws limited resources away from foundational studies such as reading and mathematics.<sup>172</sup> For example, schools have been criticized for requiring community service as a means of teaching their students to be active citizens in their communities. A 1994 Committee for Economic Development report “proposed that schools should concentrate on teaching basic skills ‘at the expense of social goals and services. . . school programs remain diluted, distracted and diffused from the basic mission of education.’”<sup>173</sup> A more philosophical critique of education for citizenship, which comes closer to the constitutional argument that education for citizenship infringes on liberty of conscience, is that teaching young people about the rights and responsibilities of U.S. citizenship will result in their identifying too strongly with the U.S., when they should view themselves as citizens of the world.<sup>174</sup> One scholar observes that this skepticism of education that could be construed as patriotic or nationalistic is “widely shared by teachers in the ranks of our public and private schools. . . in my own informal observations, they set the tone for much of what is taught in social studies curricula across the United States.”<sup>175</sup> The educators’ concern is that lessons geared toward preparing students for citizenship run the risk of “tak[ing] national boundaries as morally salient”<sup>176</sup> and “lending to what is an accident of history [the students’ nation of residence] a false air of moral weight and glory.”<sup>177</sup>

However, teaching students with the goal of preparing them to be active political citizens in the communities in which they find themselves need not disintegrate into nationalist indoctrination. For example, the European Union’s “Europe for Citizens” initiative, scheduled for

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<sup>172</sup> See *infra* note 170 and accompanying text.

<sup>173</sup> Daniel M. Stefaniuk, *Mandatory Community Service: No Service, No Diploma*, 14 T.M. COOLEY L. REV. 149, 174 n. 270 (1997). This critique is less relevant where education for citizenship is integrated into the curriculum, requiring minimal diversion of resources and teacher time.

<sup>174</sup> William Damon, *To Not Fade Away: Restoring Civil Identity Among the Young*, in MAKING GOOD CITIZENS 134-35 (Diane Ravitch & Joseph Viteritti eds., 2001).

<sup>175</sup> *Id.* at 134.

<sup>176</sup> *Id.*; see also MARTHA NUSSBAUM, FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM 11 (1996).

<sup>177</sup> Damon, *supra* note 171, at 134.

the years 2007-2013, might prove a model for how students might be guided in developing their identity as citizens of a particular locality without the potentially attendant xenophobia. The EU program, which includes programs such as partnership among sports teams from different countries and the respectful study of the history and experience of the numerous cultures represented within the EU, is designed to “respond to the need to improve citizen’s [sic] participation in the construction of Europe and encourage cooperation between citizens and their organizations from different countries in order to meet, act together and develop their own ideas in a European environment which goes beyond a national vision, respecting their diversity.”<sup>178</sup> The EU is addressing the practical reality that global stability and productivity will be enhanced where citizens can expand their sense of civic duty beyond national boundaries; U.S. students are certainly capable of participating in a similar endeavor. That said, students in the U.S. can be taught specifically about the U.S. experience of democracy without running afoul of any constitutional protections for intellectual liberty. As one professor wrote in the *Chronicle of Higher Education*, “ Students need to develop a feeling for the preciousness of human freedom and self-determination, and the responsibility of citizens to act for the good of their country and not only in their personal self-interest. In college, they should learn how America’s foundational ideas, or liberty and equality under the law, apply to the difficult problems with which it is struggling today. They need to learn that as citizens we have no one but ourselves to blame for our elected officials and their actions.”<sup>179</sup> Teaching students the ideals that were and are at play in the founding and sustenance of the U.S. does not necessitate forcing students to adopt any ideology - in fact, the principles of individual liberty preclude such mandates. Similarly, teaching students that the nation relies on their involvement is not a demonstration of patriotism, which arguably infringes on intellectual liberty; it merely communicates the fact that the U.S. governmental structures and all of their constituents rely on the discerning participation of citizens.

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<sup>178</sup> *Europe for Citizens Programme 2007-2013*, available at <http://ec.europa.eu/citizenship>.

<sup>179</sup> Harry R. Lewis, *A Core Curriculum for Tomorrow’s Citizen*, *THE CHRONICLE OF HIGHER EDUCATION* (Sept. 7. 2007).

Intentional education for citizenship in the public schools may facilitate students' ability to realize the benefits inherent in U.S. citizenship, such as political voice.<sup>180</sup> Public school students may "sit at the center of four or more nested structures of inequality and separation" based on factors such as social class and state and district of residence.<sup>181</sup> In theory, as adults these students will have the political power to agitate for systemic improvements in education, but they are less likely to exercise that power if they do not understand first, how U.S. politics operates,<sup>182</sup> and second, that as citizens they are enfranchised in the political process. U.S. citizenship is conferred to all citizens equally, but this reality is meaningless if individuals do not know how to function as citizens of the polity. If a school opts out of educating its students for citizenship, it puts those students at a disadvantage in their capacity as U.S. citizens unless the students learn what they need to know about citizenship from another source.

Education for citizenship is advantageous not only to the students as individuals, but to the communities in which they will participate as adult citizens.<sup>183</sup> One scholar writes, "For full participatory citizenship in a democratic society, a student needs to develop a love for the particular society, including its historical legacy and cultural traditions."<sup>184</sup> Without a positive identity as a U.S. citizen, a student is likely to lack commitment to sustaining or improving the political community.<sup>185</sup> In the U.S., "the relationship between education and the likelihood of engaging in political activity is, in fact, closer in the United States than in almost all other

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<sup>180</sup> See *supra* Part I.

<sup>181</sup> HOCHSCHILD & SCOVRONIK, *supra* note 6, at 23.

<sup>182</sup> See *id.* at 24 (observing that better-educated citizens are more likely to vote than high-school dropouts.) These authors are referring to education generally, as opposed to education specifically tailored to U.S. citizenship, but their statements that well-educated citizens "show greater understanding of the principles of democratic government than others" and "pay much closer attention to political life and are much more tolerant of those with unpopular political views" suggest that by "well-educated" they mean students versed in U.S. democracy and its particular commitments to and political debate diversity in the public square. *Id.* This sort of education seems to be more than just U.S. history.

<sup>183</sup> HOCHSCHILD & SCOVRONIK, *supra* note 6, at 12-14 (2003) (discussing public education as a means to both individual and collective good in U.S. society).

<sup>184</sup> Damon, *supra* note 171, at 135.

<sup>185</sup> *Id.* "My argument is that consistent moral action requires commitment; commitment is a function of identity. . . Hence the importance of fostering a positive emotional attachment to a community. . . if we are to expect sustained moral action on its behalf." *Id.*

industrialized democracies.”<sup>186</sup> This may be true even where the education at issue does not specifically include education for citizenship, but a student is more likely to be motivated to participate politically where that student has “acquire[d] a love of their society, a sense of pride in its best traditions, an emotional affiliation with the broader community of the state, [and] a sense of patriotism in the benevolent and inclusive senses of that word. . .”<sup>187</sup> This sort of education, which bears on the future of the U.S., is a proper duty of the public schools.<sup>188</sup>

A tension remains between teaching the principles of U.S. libertarian democracy by attempting to ensure each public school educates for citizenship or by demonstrating national commitments to intellectual liberty and local autonomy by permitting schools to opt out of educating for citizenship. As one scholar writes of the U.S. tradition of patriotism and national identity, while patriotism has been implicated in:

. . .the worst of American history, it has also had no small role in the best. The struggle against slavery, the Civil Rights movement, and even oppositions to the Vietnam war were animated by a commitment to universal justice. But the commitment was commonly mediated by a love of American democracy and its founding principles.<sup>189</sup>

The “task of perpetuating that love from one generation to the next” should be the “central mission of civic education.”<sup>190</sup>

But ultimately, the U.S. and its several states may have enough confidence in the commitment of its people to preserving its democratic ideals and practices that a public school system can be free to opt out of education for citizenship. One study indicated that at least seventy percent of Americans want public schools to teach students not only the mechanics of democratic government, but that democracy is the “best form” of government.<sup>191</sup> This figure suggests that only a minority of public schools would have the support of their student bodies in

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<sup>186</sup> Sidney Verba, *Political Equality: What Is It? Why Do We Want It?* (Harvard Univ., Dept of Government 2001) (quoted in HOCHSCHILD & SCOVRONIK, *supra* note 6, at 24).

<sup>187</sup> Damon, *supra* note 171, at 137.

<sup>188</sup> Damon, *supra* note 171, at 136.

<sup>189</sup> Eamon Callan, *Reply*, *STUDIES IN PHILOSOPHY AND EDUCATION* 18 (1999).

<sup>190</sup> Damon, *supra* note 171, at 137 (internal quotation omitted).

<sup>191</sup> HOCHSCHILD & SCOVRONIK, *supra* note 6, at 14-15.

opting out of citizenship. The U.S. need not give up its commitments to locally controlled schools<sup>192</sup> and freedom of thought to protect its democracy. As the Supreme Court asserted in *West Virginia Board of Education v. Barnette*:

We apply the limits of the Constitution with no fear that the freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. . . [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.<sup>193</sup>

The U.S. claims a tradition of pushing past fear of difference and of nurturing pride in diversity. Should the situation described here become more than mere hypothetical, this history of willingness to embrace the consequences of liberty in a diverse society ought allow the nation to accept a school system that opts out of educating students for citizenship.

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<sup>192</sup> See *id.* at 20.

<sup>193</sup> *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 641-42 (1943).

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