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Deconstitutionalizing Dewey

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DECONSTITUTIONALIZING DEWEY

Aaron Saiger*

I.	To Be a School Is to Compel Speech	767
	A. Schools Establish Orthodoxies	768
	B. Schools Compel Assent to Their Orthodoxies	771
	C. Schools Compel Attendance.....	774
II.	A Progressive Pedagogy for the Teaching of Civics	777
	A. <i>Barnette</i> Relies upon a Teleological Theory of Free Expression in Schools	777
	B. Civic Education in the Progressive Tradition.....	784
III.	Should We Continue to Constitutionalize Educational Progressivism?	788

A West Virginia statute requires students in public schools regularly to salute the flag of the United States. Marie and Gathie Barnette, faithful Jehovah's Witnesses, refuse to comply. They are expelled from school. The children challenge the sanction, ultimately prevailing in the Supreme Court. The Court concludes its opinion with a rousing peroration: "[N]o official, high or petty, can prescribe what shall be orthodox in politics, religion, nationalism, or other matters of opinion or force citizens to confess by word or act their faith therein."¹ This statement is now famous. But it has a curious feature: It sheds nearly no light on how to resolve claims like the Barnettes'.

This is because public schools are places where government "officials"—chiefly public schoolteachers—articulate orthodoxies every day. This is true even in schools that purport to emphasize intellectual skills over content. Two plus two is four, not five.² The earth rotates about the sun.³

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¹ W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

² See Thomas A. Romberg, *Problematic Features of the School Mathematics Curriculum*, in HANDBOOK OF RESEARCH ON CURRICULUM 749, 764 (Philip W. Jackson ed., 1992).

³ See Stacy Palen & AmyJo Proctor, *Astronomy in the K–8 Core Curriculum: A Survey of State Requirements Nationwide*, 5 ASTRONOMY EDUC. REV. 23, 25 (2006).

Human beings, who evolved from apes,⁴ today act to warm the Earth.⁵ Democracy is preferable to dictatorship.⁶ Martin Luther King, Jr., is a heroic figure.⁷ Teachers not only systematically articulate such claims, moreover, but routinely demand their pupils' assent. Indeed, it is hard to imagine how teaching and learning could proceed without teachers making truth claims that they expect children both to absorb and to acknowledge.

One therefore cannot demur to the constitutionality of governmentally established public schools and still claim that government may neither define nor compel assent to *any* orthodoxy. As Nikolas Bowie argues, First Amendment absolutes,⁸ like the famous no-compulsion rule of *Barnette*,⁹ necessarily give way when their application would undermine "society's ability to self-govern."¹⁰ Public schools are the wellspring of the social capacity for self-government.¹¹ Their quotidian, ubiquitous, and unavoidable compulsions therefore offer an excellent example of what Bowie calls the "government-could-not-work doctrine," which, he argues, is and must be "the baseline for interpreting the First Amendment's terms."¹²

Therefore, parties like the *Barnettes* must argue that the forced Pledge constitutes a particular kind of orthodoxy, or a particular form of assent, that may not be enforced.¹³ Such an argument demands a theory of compelled speech *in school*, one that indicates under which circumstances teachers may

⁴ See Bertha Vazquez, *A State-By-State Comparison of Middle School Science Standards on Evolution in the United States*, 10 EVOLUTION: EDUC. & OUTREACH 1, 4 (2017).

⁵ See M.V. Rajeev Gowda, Jeffrey C. Fox & Robin D. Magelky, *Students' Understanding of Climate Change: Insights for Scientists and Educators*, 78 BULL. AM. METEOROLOGICAL SOC'Y 2232, 2239 (1997) (discussing the development of "educational modules that correct students' misconceptions about climate-related concepts"); Julie Andrzejewski, *The Social Justice, Peace, and Environmental Education Standards Project*, 7 MULTICULTURAL PERSP. 8, 9–10 (2005) (reporting that "educational standards" with respect to teaching climate change "are strenuously contested in the struggle to control the perception of reality by children and youth").

⁶ See Gerald Marker & Howard Mehlinger, *Social Studies*, in HANDBOOK OF RESEARCH ON CURRICULUM, *supra* note 2, at 830, 832; Warren A. Nord, *Moral Disagreement, Moral Education, Common Ground*, in MAKING GOOD CITIZENS: EDUCATION AND CIVIL SOCIETY 142, 142 (Diane Ravitch & Joseph P. Viteritti eds., 2001).

⁷ See John S. Wills, 'Some People Even Died': *Martin Luther King, Jr, the Civil Rights Movement and the Politics of Remembrance in Elementary Classrooms*, 18 INT'L J. QUALITATIVE STUD. IN EDUC. 109, 113–15, 125–26 (2005).

⁸ *Barnette* describes its rule as a "fixed star in our constitutional constellation." W. Va. State Bd. of Educ. v. *Barnette*, 319 U.S. 624, 642 (1943).

⁹ See Nikolas Bowie, *The Government-Could-Not-Work Doctrine*, 105 VA. L. REV. 1, 20 (2019) (*Barnette*'s "peroration was never literally true").

¹⁰ *Id.* at 39.

¹¹ See *infra* notes 74–75, 95 and accompanying text.

¹² Bowie, *supra* note 9, at 40.

¹³ See Brief for Appellee at 46–48, W. Va. State Bd. of Educ. v. *Barnette*, 319 U.S. 624 (1943) (No. 591), 1943 WL 71856, at *46–48.

tell students what to say, and under which they must not. *Barnette* does in fact articulate such a theory. It appears in the context of Justice Jackson's explanation of why it is proper for the Court to interfere in the practices of local schools. "That they," *i.e.*, schools, "are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."¹⁴ This, I argue, reflects a Progressive theory of civics education: In order to teach students about their rights, one must allow them to practice those rights, in the context of a school community. This theory tracks the experiential pedagogy advocated by educational thinkers and advocates contemporary to *Barnette*, of whom John Dewey is the most prominent exemplar.

This Essay develops these two descriptive claims and then makes a normative argument. Part I elaborates the first claim, that public schools are, and must be, routine sites of compelled speech. Part II argues that *Barnette* understands what kinds of in-school speech may be compelled and what kinds may not in ways congruent with the roughly contemporaneous thinking of Progressive educators, Dewey in particular.

Part III then considers the implications of these observations for how we understand the constitutional law governing student expression today. *Barnette* constitutionalized an educational Deweyian Progressivism at a time when the American public school system was hegemonically Progressive in its deep structure. Today, however, American education is fairly far along in abandoning its Progressive roots. In a post-Progressive era, it is appropriate to reject the elevation of Progressive educational theory to the level of constitutional requirement.

I. TO BE A SCHOOL IS TO COMPEL SPEECH

Barnette declares that "no official, high or petty," may compel citizens to assent to government "orthodox[ies]."¹⁵ But public schools, which are agencies of the state, and public schoolteachers, who are the state's paid agents,¹⁶ ubiquitously compel students to do just that. Justice Frankfurter was factually accurate when he wrote in *Minersville v. Gobitis*—the case that would be overruled within a few short years by *Barnette*—that "compulsions

¹⁴ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

¹⁵ *Id.* at 642.

¹⁶ *See Ambach v. Norwick*, 441 U.S. 68, 80 (1979).

. . . necessarily pervade . . . much of the educational process.”¹⁷ This was true in the 1940s, and it is true today.

There are three elements to that compulsion, each basic to American educational practice. First, public schools confront students with a state-established curriculum and state-provided teachers who assert the truth and rightness of numerous claims. Second, students must, in order to avoid sometimes serious penalties, explicitly agree with such assertions, or disagree only in ways that the school permits. And, finally, students are required to attend school; they cannot escape school’s compulsions without violating the law.

A. *Schools Establish Orthodoxies*

“Orthodoxy”—that thing which *Barnette* forbids government officials to “prescribe” and to which it prohibits them from compelling citizens’ assent—means “true belief.”¹⁸ But among the chief goals of public schooling is to inculcate in the young beliefs that are true. Certainly, a school fails in its task if it produces pupils who believe things that are false.

In this context, moreover, truth bears a fairly capacious meaning. We care that students be taught to believe not only facts that are objectively true, such as the truths of arithmetic, or that are empirically true, like the truths of chemistry. As Malcolm Redish and Kevin Finnerty observe, schools seek also to instill

certain substantive values deemed by government to be morally fundamental and certain facts deemed to be indisputable: That the United States is the greatest nation on earth, for example; that all humans are created equal; that George Washington and Abraham Lincoln were true American heroes; and a variety of other empirical or normative precepts that have been so ingrained in Americans that one hardly notices them.¹⁹

They do so, moreover, notwithstanding that determining such moral, ethical, historical, and political truths requires normative judgment, including

17 *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 598 (1940).

18 From the Greek *orthos* (straight, correct) and *doxa* (belief).

19 Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 64 (2002); see also *Ambach*, 441 U.S. at 80 (“[A] State properly may regard all teachers as having an obligation to promote civic virtues and understanding in their classes . . .”); Kelly Sarabyn, *Prescribing Orthodoxy*, 8 CARDOZO PUB. L. POL’Y & ETHICS J. 367, 374 (2010) (“Prescribing orthodoxy has occurred most notably in public grade schools.”).

many judgments that are not only contestable but that are actively contested in society:

Agents of the state—whether they be government bureaucrats, school principals, or the individual teachers—determine ... whether students will be taught that Columbus was a hero or that he was a genocidal murderer, how Huckleberry Finn’s moral dilemma about the conflict between property rights and human dignity should have been resolved, and whether the United States treated Native Americans fairly in the course of the nation’s western expansion. State officials will determine whether the New Deal will be presented as a legitimate political and economic advance, whether women have been mistreated throughout American history, whether the House Un-American Activities Committee functioned as an effective protector of American society against the threat of external communism, and whether students will be required to read the works of Toni Morrison instead of those of Ernest Hemingway.²⁰

Moreover, “teachers often do not present the informational and normative content as being merely one of a number of conceivable alternative views of an issue or question. Rather, the authoritarian figure in the classroom will usually determine which viewpoint is ‘correct.’”²¹ Public schools, in short, undertake a program of indoctrination in state orthodoxy that would, if applied to adults, be egregiously unconstitutional.²²

It is possible to imagine schools that genuinely subscribe to no orthodoxies. The premier example is the famous (and nonpublic) Summerhill

²⁰ Redish & Finnerty, *supra* note 19, at 65; see also E. Wayne Ross, *Diverting Democracy: The Curriculum Standards Movement and Social Studies Education*, 11 INT’L J. SOC. EDUC. 18, 25–28 (1996) (alleging and critiquing disproportionate “neo-conservative” and “neo-nativist” influence in the development of American social studies curricula that seeks to “raise up future generations of citizens who will guarantee cultural survival rather than to use social science techniques of reflective inquiry to develop social critiques”) (internal quotation marks and citation omitted); Steven Siegel, *Ethnocentric Public School Curriculum in a Multicultural Nation: Proposed Standards for Judicial Review*, 40 N.Y.L. SCH. L. REV. 311, 316–19 (1996) (documenting debates in the education profession and in the public sphere regarding the inclusion in public school curricula of “material about the roles and contributions of women and minority racial and ethnic groups to the history of the United States”); Stephen Sawchuk, *How History Class Divides Us*, EDUC. WK. (Oct. 23, 2018), <https://www.edweek.org/ew/projects/how-history-class-divides-us.html> (documenting debate on whether the defenders of the Alamo should be described as “heroic” in the Texas history curriculum, and noting that “[w]hat was truly at stake were the underlying values proponents felt it signaled: What defines American thought and action? What can students take pride in?”). On state power to make curricular choices, see, e.g., *Epperson v. Arkansas*, 393 U.S. 97, 111 (1968) (Black, J., concurring) (“It would be difficult to make a First Amendment case out of a state law eliminating the subject of higher mathematics, or astronomy, or biology from its curriculum.”).

²¹ Redish & Finnerty, *supra* note 19, at 65.

²² See Sarabyn, *supra* note 19, at 374.

School founded by A.S. Neill, organized on a principle of absolute student autonomy.²³ At Summerhill, no activity is required and all learning is self-directed.²⁴ Analogues to Summerhill can be found among contemporary practitioners of “unschooling” and “deschooling.”²⁵ But these models are worlds away from any public school today existing. Indeed, a public school structured like Summerhill would violate numerous provisions of any state education code, which set out minimal curricular requirements, even if it did not compel patriotic recitations. And it is impossible to believe that *Barnette* contemplated requiring public schools entirely to remake themselves as kingdoms of fully autonomous students, free always to do entirely as they please.

A substantial literature, more closely tied to public schools as they are, seeks to limit the class of what constitutes “orthodoxies,” hoping by so doing to establish workable distinctions between varieties of “truth” public schools may seek to inculcate and those they may not. The two proposals most grounded in *Barnette* itself would distinguish between matters of fact and matters of opinion—*Barnette*’s famous prohibition on the promulgation of orthodoxy limits itself to “politics, religion, nationalism, or other matters of opinion”²⁶—and between matters of legitimate truth-seeking judgment and matters of partisanship or ideology—because *Barnette* declares that “[f]ree public education, if faithful to the idea of secular instruction and political neutrality, will not be partisan or the enemy of any class, creed, party, or faction,” and so will not “impose any ideological discipline.”²⁷ Whatever work these distinctions might do, however, they fail to distinguish “orthodoxies” from some other genus of claim.

Fact and opinion cannot be clearly and uncontroversially distinguished in classrooms—at least once one gets past the teaching of mathematics and logic.²⁸ A preeminent example is the way that the teaching of several scientific topics — evolution and anthropogenic climate change being the preeminent examples — deeply divides the polity, one group perceiving

²³ A.S. NEILL, SUMMERHILL: A RADICAL APPROACH TO CHILDRearing 13, 25 (1960).

²⁴ See Judith G. McMullen, *Behind Closed Doors: Should States Regulate Homeschooling?*, 54 S.C. L. REV. 75, 80–81 (2002).

²⁵ See IVAN ILLICH, DESCHOOLING SOCIETY 11 (1970) (proposing the principle that “[t]he State shall make no law with respect to the establishment of education”); John E. Petrovic & Kellie Rolstad, *Educating for Autonomy: Reading Rousseau and Freire Toward a Philosophy of Unschooling*, 15 FUTURES IN EDUC. 817, 820–22 (2017).

²⁶ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (emphasis added).

²⁷ *Id.* at 637.

²⁸ Cases that arise in contexts other than school sometimes do distinguish between fact and opinion, permitting “pure compulsions to state facts to the government” when the speech compelled is untethered from any “ideological point of view.” Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 379, 381 (2018). This position has proved difficult to maintain consistently. *Id.* at 380–82.

matters of indisputable fact and the other seeing eminently contestable theorizing.²⁹ And once one arrives at the teaching of social science, history, ethics, or patriotism, the distinction has barely any bite at all.³⁰

Similarly, and for similar reasons, efforts to distinguish between instruction and indoctrination fail.³¹ Whether a claim being taught is “secular” or partisan depends upon where one sits.³² Teaching is never ideologically neutral.

Nearly every “truth” that a school might seek to teach is an “orthodoxy,” a belief regarding what is true. And these orthodoxies include not only those formally communicated in the classroom but “normative claims that schools inevitably reinforce across all subjects, routines, and curricula.”³³ These “routines” include a school’s “atmosphere and priorities, its traditions, the management of student discipline, the curriculum and how it is taught, [and] the way adults relate to one another.”³⁴ As Ashley Rogers Berner argues, all of these are “potentially instructive about the human person, the good society, the nature of authority, and the purpose of life itself.”³⁵ A fortiori, “truths” that are central to specifically American citizenship—the equality of the races, the superiority of democracy, the importance of the franchise, the centrality of the Bill of Rights—are orthodoxies. But teaching children that these are true beliefs has been a central goal of public schools since their beginnings in the common school movement, as Part II describes.

B. *Schools Compel Assent to Their Orthodoxies*

Since *Barnette* was decided, the Court has promulgated a doctrine of government speech, which permits governments in many cases to speak on

²⁹ See Nomi Maya Stolzenberg, “*He Drew a Circle That Shut Me Out*”: *Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581, 612–15 (1993). For evolution specifically, see *Edwards v. Aguillard*, 482 U.S. 578, 592–93 (1987); *Freiler v. Tangipahoa Par. Bd. of Educ.*, 185 F.3d 337, 341 (5th Cir. 1999); BRIAN J. ALTERS & SANDRA ALTERS, *DEFENDING EVOLUTION IN THE CLASSROOM: A GUIDE TO THE CREATION/EVOLUTION CONTROVERSY* 13–16 (2001); Randy Moore, *Creationism in the United States: Banning Evolution from the Classroom*, 60 AM. BIOLOGY TCHR. 486, 486–87 (1998). For climate change, see Aaron M. McCright & Riley E. Dunlap, *The Politicization of Climate Change and Polarization in the American Public’s Views of Global Warming, 2001–2010*, 52 SOC. Q. 155, 175–78 (2011); Sara Reardon, *Climate Change Sparks Battles in Classroom*, 333 SCI. 688, 688–89 (2011).

³⁰ Marker & Mehlinger, *supra* note 6, at 836; Ross, *supra* note 20, at 25–26.

³¹ This approach is advocated by Redish & Finnerty, *supra* note 19, at 102–04.

³² See Stolzenberg, *supra* note 29, at 612–13.

³³ ASHLEY ROGERS BERNER, *PLURALISM AND AMERICAN PUBLIC EDUCATION: NO ONE WAY TO SCHOOL* 13 (2017).

³⁴ *Id.* at 7.

³⁵ *Id.* at 7–8.

their own behalf.³⁶ This development encourages one to read *Barnette* not to prohibit state establishment of orthodoxies *per se*, but to prohibit the state from “forc[ing] citizens to confess by word or act their faith therein.”³⁷ This is a fine reading of *Barnette*,³⁸ but it does not help with the schools problem. When schools articulate their ubiquitous orthodoxies, they nearly always do so in preparation for, or at least in the expectation of, efforts to compel students to agree.³⁹

The modalities of such compulsion are well known. There is the examination, whether written or oral.⁴⁰ There is the forced recital, which was at issue in *Barnette*, and which occurs in a somewhat different form every time a teacher calls upon a student who has not volunteered to speak in class.⁴¹ There is a wide range of required classroom activities, exhibitions, and presentations. In each case, students are expected to assent to at least some of the claims that the schools have chosen to present to them as true. Failure to do so will not usually result in expulsion, as it did for the *Barnette* children, or in other school discipline. But it will often result in punishment, most obviously low marks.⁴² A pattern of poor or mediocre grades brings substantial and enduring consequences for children, especially with respect to future educational opportunity. Enough failing grades result in the withholding of the diploma, depriving students of a property right.⁴³ Behavioral expectations, which also reflect the value judgments of a school’s orthodoxies, can bring sanctions up to and including expulsion.⁴⁴

An important strain in contemporary pedagogy would claim that enlightened teachers do not demand assent to their ideas; they are teaching the skills of inquiry, not particular conclusions.⁴⁵ Student performance is

³⁶ See, e.g., Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 2–4 (2000).

³⁷ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

³⁸ See Bowie, *supra* note 9, at 21; Steven D. Smith, “*Fixed Star*” or *Twin Star*? *The Ambiguity of Barnette*, 13 FIU L. REV. 801 (2019).

³⁹ See MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 213 (1983) (“[A] system of rewards and punishments is available to reinforce the messages” of the school).

⁴⁰ See Bowie, *supra* note 9, at 6 (“the government [may] . . . require a student to take an objectionable math test”).

⁴¹ See *id.* at 40 (“Teachers force students to recite poetry.”).

⁴² Redish & Finnerty, *supra* note 19, at 64.

⁴³ See *Debra P. v. Turlington*, 644 F.2d 397, 404 (5th Cir. 1981).

⁴⁴ Rosemary C. Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 YALE L. & POL’Y REV. 169, 183 (1996).

⁴⁵ See Diane Ravitch, *Celebrating America*, in PLEDGING ALLEGIANCE: THE POLITICS OF PATRIOTISM IN AMERICA’S SCHOOLS 91, 92 (Joel Westheimer ed., 2007) (arguing that to teach patriotism “narrowly, as jingoistic, uncritical self-praise of our nation . . . would be indoctrination rather than education.”); Hugh Sockett, *The Moral Aspects of the Curriculum*, in HANDBOOK OF RESEARCH ON CURRICULUM, *supra* note 2, at 543, 550–51 (describing and critiquing the practice of “values clarification”

assessed not based upon what opinions students articulate, but whether they can back those opinions with open-mindedness, logic, and well-marshalled fact and argument. This kind of claim, however, should not be taken at face value. It may be true, especially in the teaching of history and social studies, that teachers do not demand student assent to *all* their claims; but there will almost always exist some claims to which assent *is* required. Some orthodoxies, after all, are deeply held, and those who hold them may believe that there are no good arguments to the contrary. The reality of evolution is such an orthodoxy, in most quarters; so is antiracism. If logic and evidence compel these beliefs, then students who refuse to assent will face negative consequences.

Like the articulation of orthodoxies, compelled assent is not a *necessary* feature of schools; it is merely a ubiquitous one. Neill's Summerhill did not give grades, nor did it assess student work in any other fashion.⁴⁶

But we have also come to understand that assessment and fear of negative consequences are not the only possible mechanism of compelled assent. Fifty years after *Barnette*, in the case of *Lee v. Weisman*,⁴⁷ the Court held that a school that had arranged for the delivery of short prayers at its graduation ceremony had unconstitutionally established religion—even though all that was asked of students was respectful silence, with no participation in the prayer requested or demanded. This arrangement was nevertheless judged to be deficient because it created “subtle coercive pressure”—pressure of a sort that it is unreasonable to expect schoolchildren to resist, even though we might expect adults to resist it.⁴⁸ “This pressure, though subtle and indirect, can be as real as any overt compulsion.”⁴⁹ Putting students in a position where silence will be understood to be assent, so that dissent must be actively articulated in order to be observed, is a coercive act, the Court found. “Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.”⁵⁰

as a method of moral instruction that focuses upon helping children to identify their values rather than upon the content of those values, in order to avoiding “coerc[ing]” students in this area “by grades or punishments”); Sawchuk, *supra* note 20 (quoting educational expert Jonathan Zimmerman: “Our goal should not be to get anyone to have a certain view of America, but that is in fact what most history tries to do. . . . The problem is the contradiction between a lot of the democratic rhetoric many of us use in class, and the actual practice, which tends to be flag-waving.”).

⁴⁶ See NEILL, *supra* note 23, at 25.

⁴⁷ 505 U.S. 577, 599 (1992).

⁴⁸ *Id.* at 592.

⁴⁹ *Id.* at 593.

⁵⁰ *Id.*

To be sure, *Weisman* is an Establishment Clause case, and the coercion at issue was religious coercion. But to the extent that coerced assent to any orthodoxy is prohibited, the reasoning of *Weisman* applies to any orthodoxy presented in a fashion that makes silence likely be read as assent. As Abner Greene has ably argued, “the majority opinion in *Weisman* does not rely primarily on the structural Establishment Clause argument. It rests instead on equating psychological coercion with legal coercion in the public school setting.”⁵¹ Therefore, Greene concludes, *Weisman* plus the orthodoxy prohibition of *Barnette* should prohibit teacher-led group recitations of the Pledge of Allegiance in public schools, even if opting out is explicitly allowed.⁵² Likewise, any claim for which there is no unanimity, but for which there is nevertheless strong local consensus and a social expectation of conformity, might count as compelled speech as soon as it is presented as true by a school. This would be so even if no test, no grade, no recommendation letter depends upon a student’s articulated agreement.

Moreover, *Weisman*’s understanding of compulsion applies even more strongly to the many unarticulated ideological positions that shape school life than to those messages which schools communicate formally. A school’s “[i]ndoctrination can be explicit or tacit.”⁵³

C. Schools Compel Attendance

Compulsory schooling is a policy considerably younger than the Republic, but one that was fully entrenched in American educational practice by the time of *Barnette*. “By 1916, . . . compulsory attendance had become effectively a national policy despite the absence of a federal government role.”⁵⁴ Although early compulsory attendance laws were ill-enforced and aspirational in character, enforcement was generally strong by the 1920s and “by the 1950s secondary-school attendance had become so customary that school-leavers were routinely seen as ‘dropouts.’”⁵⁵ Indeed, compulsory schooling was one of the key policy planks of the Progressive education movement discussed in Part II. Elementary and secondary education, urged the Progressives, should not be the province of the rich, or dependent upon

⁵¹ Abner S. Greene, *The Pledge of Allegiance Problem*, 64 *FORDHAM L. REV.* 451, 454 (1995).

⁵² *Id.* at 452–53.

⁵³ BERNER, *supra* note 33, at 8.

⁵⁴ TRACY STEFFES, *SCHOOL, SOCIETY, AND STATE: A NEW EDUCATION TO GOVERN MODERN AMERICA, 1890–1940*, 3–4 (2012). It is common to date fully nationwide compulsory education to 1918. *E.g.*, Adriana Lleras-Muney, *Were Compulsory Attendance and Child Labor Laws Effective? An Analysis from 1915 to 1939*, 45 *J. L. & ECON.* 401, 403 (2002).

⁵⁵ Lleras-Muney, *supra* note 54, at 403; David Tyack, *Ways of Seeing: An Essay on the History of Compulsory Schooling*, 46 *HARV. EDUC. REV.* 355, 359 (1976).

the elective choices of parents who might value it; it should be the common birthright of all children, and therefore compulsory.⁵⁶ Americans retain fealty to this principle today.⁵⁷

The institution of compulsory schooling means that speech that schools compel is compelled particularly forcefully: the state not only requires people to listen and then speak in particular ways in a given setting, but compels them to be present in that setting.⁵⁸ Students forced to speak in school experience compulsion in a context where their autonomy has already been sacrificed to state interests.

The military is the only other major American institution similarly structured. Military service can be compelled, and military personnel are then subject to codes of conduct and behavior that require not only substantive but ritualized speech, such as the salute of officers.⁵⁹ But most individuals have never been drafted. Nearly everyone who was a child in the United States, by contrast, was a schoolchild, and the overwhelming majority attended public schools. Compulsory schooling also occupies many years, a great deal longer than most servicepersons' military terms. Public school is the site of Americans' shared experience of the government, with the force of law, demanding that they spend long periods attending institutions where they will then be told what to say.

One should not be misled, as Justice Frankfurter is in his *Barnette* dissent, into claiming that public school students are not compelled to speak

⁵⁶ BOB PEPPERMAN TAYLOR, HORACE MANN'S TROUBLING LEGACY: THE EDUCATION OF DEMOCRATIC CITIZENS 33–34 (2010); Tyack, *supra* note 55, at 363.

⁵⁷ *E.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.”).

⁵⁸ *See* YUDOF, *supra* note 34, at 213 (arguing that First Amendment concerns are heightened in schools because of the “existence of a captive audience”).

⁵⁹ There are several other instances where individuals other than students and soldiers are forced to participate in a government institution which then requires them to speak. These include compulsions applied to persons under the jurisdiction of the penal system, requirements that persons seeking licenses to drive provide information about themselves, demands that persons disclose personal information to tax and census authorities, obligations imposed upon public companies publicly to file financial statements, and duties to report some types of criminal activity to the state. Volokh, *supra* note 28, at 357, 359 n.29, 380; Bowie, *supra* note 9, at 24, 40 (“The list is endless.”). Courts also compel people to present themselves, and there to speak as directed—often notwithstanding their strong preference to remain silent regarding the topics they are asked to address. And when they do speak, they are required to tell the truth. But they are not required in so doing to endorse an idea or principle that has been chosen by government. *See* Bowie, *supra* note 9, at 40.

Professor Volokh properly distinguishes these cases from those where the state has “extra power” to compel speech from persons who have entered into voluntary relationships with it. His examples are tenants leasing government property, state employees, and broadcasters. Volokh, *supra* note 28, at 359; *see also* Bowie, *supra* note 9, at 30–31.

because they have a right to opt out.⁶⁰ Frankfurter appears to have thought that, because students have the right to exit public schools in favor of private ones that do not and cannot be forced to subscribe to any given government orthodoxy, public school students expected to endorse any such orthodoxy are not in fact compelled. Rather, having chosen to attend a public school rather than a private one, they should be understood voluntarily to have accepted its rules.⁶¹

To the contemporary eye, this is clearly wrong. Frankfurter is unmoved by the obvious fact that public schools are free to students while private schools must be privately paid.⁶² To him, such a student still “takes advantage” of the school’s “opportunities” and therefore should not be allowed to “refuse compliance with its conditions.”⁶³ Today’s law, however, treats free, public education as a right of the individual and its provision as a constitutional duty of the state.⁶⁴ For us moderns, therefore, a student who exercises his right to obtain free state-supported education and is then told he must therefore waive First Amendment rights faces a straightforwardly unconstitutional condition. Similarly, Frankfurter does not consider the likelihood that for some dissenters, the market will provide no private option. If one’s views are idiosyncratic, the market will not generally make available a private school that reflects those views. To require such a person nevertheless to attend some school and follow its speech rules is, again, an unconstitutional condition.

A deeper problem with Frankfurter’s view of choice and compulsion is that the state may require private as well as public schools to teach nationalist principles and to inculcate patriotic feeling. To be sure, West Virginia’s Pledge requirement applied only to its public schools.⁶⁵ But decades before *Barnette*, the Court had made it clear that West Virginia could have applied it to its private schools as well. In *Pierce v. Society of Sisters*, the Court had set aside an Oregon statute requiring all students to attend public rather than private school.⁶⁶ “No question is raised,” says the Court in that case, “concerning the power of the state reasonably to regulate all schools, . . . [or]

⁶⁰ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 656, 657–58 (1943) (Frankfurter, J., dissenting) (quoting *Farrington v. Tokushige*, 273 U.S. 284 (1927); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925)).

⁶¹ *Id.* at 656 (citing *Pierce*, 268 U.S. at 535). For further discussion of Frankfurter’s use of *Pierce* in his *Barnette* dissent, see *infra* Part III.

⁶² *Barnette*, 319 U.S. at 657 (Frankfurter, J., dissenting). That attendance is not optional is noted by the majority. *Id.* at 632.

⁶³ *Id.* at 656.

⁶⁴ See Joshua E. Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 915, 936–38 (2016).

⁶⁵ *Barnette*, 319 U.S. at 626 n.2.

⁶⁶ *Pierce*, 268 U.S. at 535.

to require . . . that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.”⁶⁷ To require the Pledge or some similar exercise in private schools would therefore not have then seemed to qualify as an “unreasonable restrictio[n]” imposed upon a private school program.⁶⁸ If the West Virginia statute may compel the Pledge in public schools, it is hard to see why a different statute could not similarly compel it in private ones.

II. A PROGRESSIVE PEDAGOGY FOR THE TEACHING OF CIVICS

A. *Barnette Relies upon a Teleological Theory of Free Expression in Schools*

Part I establishes that it does plaintiffs like the Barnettes little good to say that the state may not establish orthodoxies or compel assent thereto. Such establishments and such compulsions are the bread and butter of every public school that either party and any contemporaneous court might have known or imagined. Schoolchildren who are forced to speak need instead a theory of compelled speech *specific to school*. Given that the public school has both a teaching mission and is an organ of the state, we need to know what kinds of speech schools may compel. Another way to state this question is to ask: Given that schools by their nature must violate what the First Amendment would otherwise require regarding compelled speech, how far does that exception extend?

Barnette offers an answer. It appears in Justice Jackson’s rebuttal to Justice Frankfurter’s argument that for the Court to specify what kinds of educational exercises schools may and may not compel “would in effect make us [the Court] the school board for the country.”⁶⁹ Not so, responds Jackson. “Boards of Education . . . have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights.”⁷⁰ Moreover, Jackson continues, “[t]hat they [the boards] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to

⁶⁷ *Id.* at 534. It is possible to read the phrase “no question is raised” as one that limits the scope of the holding, rather than as dictum that permits the regulation of private schools for patriotic purposes. This is neither the stronger nor the conventional reading.

⁶⁸ *Farrington v. Tokushige*, 273 U.S. 284, 298 (1927).

⁶⁹ *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 598 (1940). Justin Driver reports that “no single passage in *Gobitis* drew more ire” from the public than this one. JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* 7 (2018).

⁷⁰ *Barnette*, 319 U.S. at 637 (1943).

strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”⁷¹

The first of these two sentences is properly read as a straightforward declaration that students have constitutional rights even in school.⁷² But, as we have seen, this claim does little work for pupils like the *Barnettes*, given that schools will routinely find themselves unable to honor students’ preference not to speak. So what is the extent of the right to free expression that students enjoy? Which compulsions must they obey and which do they have the right to refuse? It is the second sentence that offers a reply. It suggests that a school may compel speech only when doing so is consistent with the *purpose* of school. That purpose is to “educat[e] the young for citizenship” in a democracy that honors constitutional values. The forced salute and declaration of allegiance that West Virginia sought to compel undermines that purpose: it teaches youth a lesson diametrically opposed to the one that should be taught.

Part of the problem is hypocrisy, a vice to which children everywhere are keenly sensitive. A democratic school, in order effectively to train students to be fair and just, must treat them justly and fairly; an American school, seeking effectively to teach students that the Constitution is the highest legal authority, must respect it. If the flag of the United States stands for a Republic that honors the freedom of religion and of expression, it is paradoxical and hypocritical for the government to force someone to pledge allegiance to it unwillingly (especially, though not only, when her objections are religious). This paradox and hypocrisy naturally would lead students to conclude that the principles that the flag symbolizes are not taken seriously by those who would require them to venerate it. The Third Circuit Court of Appeals, in its opinion in the *Gobitis* case, includes a long string citation to what it calls “students of educational psychology” who make precisely this point.⁷³ A compelled Pledge is not just a violation of rights, but a pedagogical failure. And educationally, it is not merely ineffective, “strangl[ing] the free mind,” but counterproductive, “teach[ing] youth to discount important principles of our government as mere platitudes.”⁷⁴

⁷¹ *Id.*

⁷² For an account of *Barnette* that focuses on this holding, see DRIVER, *supra* note 62, at 67 (describing *Barnette* as holding that “it was essential that schools honor the constitutional rights of their students.”).

⁷³ See *Minersville Sch. Dist. v. Gobitis*, 108 F.2d 683, 691 (3d Cir. 1939). On the credibility of these “students,” see *infra* note 183 and accompanying text.

⁷⁴ *Barnette*, 319 U.S. at 637. Several of the sources that the Third Circuit’s opinion in *Gobitis* quotes make the point pithily. For example:

[C]ompelling a child to salute the flag . . . generates resentment, and is calculated to produce a precisely antithetical result to that which was planned by the authors of the flag-saluting ceremony. A salute to the flag under such circumstances is an affront to the principles for which the flag stands.

A rule that rejects government hypocrisy when compelling student speech, moreover, does not extend to the vast catalogue of compelled assents to beliefs that the state has determined to be true, compulsions that are part of schools' educational mission. The Third Circuit's *Gobitis* opinion makes this distinction, between the Pledge and other kinds of school-compelled assent, whether curricular or normative, explicit:

The abstract problem postulated concerns the effectiveness of teaching love (of country) by force emanating from the would-be beloved (an administrative instrumentality of that country). *We do not doubt that children can and have been forced to learn Latin or eat spinach and so eventually to love them.* But this pedagogical victory has more often than not been won at the price of resentment towards the disciplinarian. In our particular circumstance, then, that resentment clashes with and cancels the very affection sought to be instilled.⁷⁵

But it reads *Barnette* too narrowly to understand its rule to allow public schools to compel speech in any instance that does not involve civic hypocrisy. For one thing, such a rule fails to reach varieties of compelled speech that ought clearly to be seen as out of bounds. It may be hypocritical to compel an unwilling student to "pledge allegiance to the flag," but there is no hypocrisy in commanding a student, for example, to sing the praises of the sitting president. The latter compulsion is baldly partisan, but not hypocritical. It is on account of its partisanship that it ought to join the forced Pledge in the set of compulsions from which students are protected.

More basically, *Barnette* means to do much more than simply inveigh against hypocrisy. It presents a teleological account of the public school.⁷⁶

Minersville Sch. Dist. v. *Gobitis*, 108 F.2d 683, 691 (3d Cir. 1939) (quoting William N. Hensley, *The Constitutional Aspects of Compulsory Pledges of Allegiance and Salutes to the American Flag*, THE LAWYER, Nov. 1939, at 5, 10).

⁷⁵ *Gobitis*, 108 F.2d at 691 (emphasis added). To be sure, eating spinach is a less apt example than learning Latin; eating is conduct, not speech.

⁷⁶ The *Barnettes*' brief urged that the purpose of schooling be a key factor in the Court's analysis. Notably, the brief deployed purpose as the best way to distinguish schools from the military, which, as I note *supra* in the text accompanying note 59, is the other primary government space where people are simultaneously compelled to be present and to speak:

[Appellants] may suggest that the necessities of discipline require universal enforcement even if this means driving the children out of school. Such a position is, of course, familiar in military life. There coercion is often reasonable and necessary, since the very function of a military unit requires implicit and uniform obedience; and to obtain this, all non-compliance with orders, reasonable or unreasonable, must be firmly dealt with in furtherance of the very purpose for which the unit exists. The fallacy of attempting to apply this analogy to school life lies in the difference between the purposes of school education and the purposes of an army. The function of an army is to fight, and for that very reason to achieve a disciplined and regimented organization. But the purpose of

What is the purpose of the public school? To create good citizens. What are good citizens like? They have “free minds,” to be sure. Equally important, however, is that they understand that “important principles of our government” are *not* “mere platitudes”; rather, they are the sacred commitments of every member of the polity. Why, then, can a public school not compel the Pledge? Because such a compulsion is bad education for citizenship. This is not just because such a compulsion undermines the likelihood that citizens-in-training will come to believe that this nation takes freedom of expression seriously. It is also because the job of the school is to create adults who are capable, as citizens, of effectively and freely expressing their views. To reach these goals, schools cannot merely tell students *about* free expression; they must provide some scope for students to *exercise*, or, more precisely, to practice exercising, their expressive rights. They must proceed “by persuasion and example.”⁷⁷ Civic education, to be effective, must in substantial part involve learning by doing.

The aggregation of students perforce creates communities. Indeed, the school is very often its students’ primary social community. *Barnette* is proposing that a common school community must operate, at least some of the time, as a miniature state with respect to student rights.⁷⁸ Such a community still has license often to be authoritarian—more authoritarian, surely, than the state itself—because it is teaching.⁷⁹ But, as part of that teaching, and in part to counteract its inherent authoritarianism,⁸⁰ the school must simultaneously function as a democratic site where free expression is modeled and practiced. Schooling in the United States must mean *enacting* constitutional rights in the miniature society of the school, so as to teach children how to be citizens of that larger society. Students learn about their

American schools is primarily to impart knowledge and to prepare for life under free institutions. The purpose is not to turn out a regimented group seasoned to coercive methods.

Brief for Appellee at 51, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (No. 591), 1943 WL 71856, at *51.

⁷⁷ *Barnette*, 319 U.S. at 640; *see also* R. FREEMAN BUTTS, *THE CIVIC MISSION IN EDUCATIONAL REFORM: PERSPECTIVES FOR THE PUBLIC AND THE PROFESSION* 155 (1989) (Good citizenship must “come about by persuasion and example but not by imposition of any ideological discipline nor by a compulsion that ‘invades the sphere of intellect and spirit.’ Such study is a proper and necessary means of maintaining political cohesion, loyalty, and patriotism.”).

⁷⁸ Whether schools should also allow students to participate in school governance is a more complex question. *See* Karen Seashore Louis, *Democratic Values, Democratic Schools*, in *DEMOCRATIC LEARNING: THE CHALLENGE TO SCHOOL EFFECTIVENESS* 74, 82–83 (John MacBeath & Lejf Moos eds., 2004).

⁷⁹ *See* AMY GUTMANN, *DEMOCRATIC EDUCATION* 94 (rev. ed. 1999) (“The most democratic schools . . . do not look like miniature societies, at least not like miniature democratic societies: teachers have much more authority, both formal and informal, than democratic legislators have, or ideally should have.”).

⁸⁰ John Merrow, *Youth, Media, and Citizenship*, in *INSTITUTIONS OF AMERICAN DEMOCRACY: THE PUBLIC SCHOOLS* 188, 201 (Susan Fuhrman & Marvin Lazerson eds., 2005).

rights by being members of a community where those rights can be and are exercised. They learn about freedom to dissent because their community allows them to practice dissent.

This teleological approach, focused upon the pedagogy of rights rather than upon rights themselves, makes it possible to distinguish between speech that schools may compel and speech that they may not. Compulsion is permitted if it serves the creation of good citizens, but not otherwise. Thus, students must be given room to refuse to agree that the flag deserves their allegiance. To do otherwise not only undermines the teaching of the value of free expression, but deprives them of the learning opportunity to choose dissent. Likewise, for the same reasons, assent cannot be compelled to partisan, political, religious, or nationalistic claims.⁸¹ On the other hand, students may and should be expected to agree to facts and widely accepted theories, or at least to dissent in ways that respect argument and evidence. That is because an effective citizen is educated, informed, and analytical. Furthermore, students may also be expected to assent, and to conform their behavior, to ethical and even political maxims widely held in society: that good citizens are honest, tolerant of others, and respectful of their persons and of their rights.

The principle of learning citizenship by doing echoes in American legal history from *Barnette* in both directions through time. Dean Martha Minow has traced it back to at least the mid-nineteenth century. She describes the suit of a black man against Massachusetts, filed in order to obtain integrated education:

His lawyers, including a leading white anti-slavery advocate, frame[d] a challenge to the legislated segregation and made the radical argument to the Massachusetts Supreme Court: “The school is the little world where the child is trained for the larger world of life, and therefore it must cherish and develop the virtues and the sympathies needed in the larger world.”⁸²

The school, these advocates already understood, is a “little world,” one which should be composed based upon the same values that we would expect in composing a larger, adult polity, including the values of equality and equal opportunity.

The most direct expression in the United States Reports of the learning-by-doing principle of civic education appears in *Tinker v. Des Moines School District*, decided a quarter-century after *Barnette*. *Tinker* concerns several

⁸¹ See *Barnette*, 319 U.S. at 642.

⁸² Martha Minow, *After Brown: What Would Martin Luther King Say?*, 12 LEWIS & CLARK L. REV. 599, 610 (2008).

teenagers who refused the demand of their school principal that they remove black armbands that they had worn to protest American military involvement in Vietnam.⁸³ Their subsequent experience tracked that of the *Barnette* children: suspension from school, litigation, and ultimate arrival at the Supreme Court of the United States.⁸⁴ *Barnette* is thus a counterpart as well as a forerunner of *Tinker*: *Barnette* concerns which varieties of speech schools may not compel, and *Tinker* which varieties of speech schools must permit.

It is therefore unsurprising that the two opinions are quite similar. *Tinker*, like *Barnette*, is famous for a ringing declaration: “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁸⁵ *Tinker* also includes the oft-quoted maxim that “state-operated schools may not be enclaves of totalitarianism.”⁸⁶ Again like *Barnette*, these ringing declarations do little to help decide the case, beyond saying that schools’ authority is not absolute. So *Tinker* provides a rule: school officials may restrict or punish student speech, said the Court, only if they reasonably forecast that the speech would “materially and substantially interfer[e] with the requirements of appropriate discipline in the operation of the school” or “collid[e] with the rights of others.”⁸⁷ The interference or collision must be substantial; it cannot be a pretext for school officials’ desire to “avoid . . . controversy which might result” from the speech.⁸⁸

The effect of this rule, the Justices understood well, was to create a zone in which students would learn about their rights by practicing their exercise—the same tactic the Court used in *Barnette*. It might be that nearly all verbal speech undesired by teachers could be prohibited in classrooms during “classroom hours.”⁸⁹ Such speech is a “substantia[l] interfer[ence]” with schools’ pedagogical mission.⁹⁰ But speech “in the cafeteria, or on the playing field, or on the campus during the authorized hours” when class is not in session must be permitted, so long as it is not likely seriously to disrupt.⁹¹

⁸³ See *Tinker v. Des Moines Indep. Cmty. Sch. Bd.*, 393 U.S. 503, 504 (1969).

⁸⁴ See *id.* at 504–05.

⁸⁵ *Id.* at 506.

⁸⁶ *Id.* at 511.

⁸⁷ *Id.* at 513 (internal citation omitted).

⁸⁸ *Id.* at 510.

⁸⁹ *Id.* at 512. Passive speech, such as the *Tinkers*’ armbands, must be permitted even during class if not disruptive.

⁹⁰ *Id.* at 513.

⁹¹ *Id.* at 512–13.

As in *Barnette*, this zone of expression is necessary not so much because it prevents rights from being violated—such an argument is circular—but because effective education for citizenship requires learning by doing. The Court itself has noted that a pedagogical imperative lies behind its treatment of student expression in school: “The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach *by example* the shared values of a civilized social order.”⁹² And both observers contemporary to *Tinker* and those today understand *Tinker* to require such an experiential civic pedagogy.⁹³ As the editors of the *Harvard Law Review* summarized the case in 1969:

The holding in *Tinker* established a principle of educational philosophy based on the first amendment.... The Court stressed that personal intercommunication among students outside the classroom is one of the activities to which the schools are dedicated.... In short, the Court adopted the view that the process of education in a democracy must be democratic.⁹⁴

The *Review's* editors were perspicacious. They not only understood that *Tinker* relied upon a theory of democratic education, but recognized that theory as the same one that drove the holding of *Barnette*, decided “over twenty-five years ago.”⁹⁵ They also correctly identified the pedagogical roots of that theory. For the principle that “the process of education in a democracy must be democratic,” the editors cited John Dewey.⁹⁶

⁹² Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986) (emphasis added).

⁹³ For an example in the current literature, see Erwin Chemerinsky, *Students Do Leave their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?*, 48 DRAKE L. REV. 527, 532 (2000) (“Instead of seeing protecting student expression as in tension with the mission of schools, Justice Fortas [writing for the Court in *Tinker*] regards safeguarding speech as a crucial part of educating students about the Constitution.”). Dean Chemerinsky’s article also exemplifies the contemporary trend in the literature to treat *Tinker* as implicitly overruled, or at least cabined beyond utility. This argument relies on the fact that all subsequent student speech cases to reach the Court have been decided in favor of censorious school districts, even though they involve school officials who can often seem both reflexively authoritarian and remarkably thin-skinned. See *Morse v. Frederick*, 551 U.S. 393, 401–02 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Fraser*, 478 U.S. at 675. But I read these cases’ efforts to distinguish *Tinker* as genuine. *Tinker's* core holding, that non-disruptive political speech in school is not an empty set, and can neither be banned nor punished, retains its vitality.

⁹⁴ *Political Protest in Public Schools*, 83 HARV. L. REV. 154, 159 (1969).

⁹⁵ *Id.* at 159 n.32.

⁹⁶ *Id.* at 159 & n.32 (citing JOHN DEWEY, DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION 343–47 (1916)).

B. Civic Education in the Progressive Tradition

The two ideas central to *Barnette*—that the fundamental goal of schools is educate children for responsible citizenship, and that schools should do so using an experiential pedagogy—are very much of their time. The principle that educating citizens is the task, even the primary task, of public schools was foundational for the common school movement, whose ambitious campaign to remake American primary and secondary education began in the middle of the nineteenth century and had enjoyed remarkable success by the time the *Barnettes* confronted their school’s principal. This idea was shared by and expanded upon by John Dewey, whose influential thinking was part of the intellectual culture of America in the first half of the twentieth century. Dewey also became the leading expositor of *Barnette*’s second idea: that democratic education should involve not only teaching about democracy but the experience of democracy.

Since before the founding of the Republic, American schools have understood their role as teaching good citizenship. But the dominant understanding in those early years was that good citizenship flowed straightforwardly from good morals.⁹⁷ Moreover, the schools of the era were hyperlocal, haphazard, and discretionary.⁹⁸ “During the middle decades of the nineteenth century,” write David Tyack and Elisabeth Hansot, a movement arose to urge a system of common schools that would upend these realities. These schools would be “free, financed by local and state government, controlled by lay boards of education, mixing all social groups under one roof, and offering education of such quality that no parent would desire private schooling.”⁹⁹

Reformers’ dedication to public governance, universal availability, no fees, compulsory education, and the mixing of social groups within a single institution all reflect a genuine commitment to equality in educational opportunity—at least relative to the system they sought to change.¹⁰⁰ But

⁹⁷ Julie Reuben, *Patriotic Purposes: Public Schools and the Education of Citizens*, in INSTITUTIONS OF AMERICAN DEMOCRACY: THE PUBLIC SCHOOLS 1, 5 (Susan Fuhrman & Marvin Lazerson eds., 2005).

⁹⁸ *Id.*; STEFFES, *supra* note 54, at 122–23.

⁹⁹ DAVID TYACK & ELISABETH HANSOT, MANAGERS OF VIRTUE: PUBLIC SCHOOL LEADERSHIP IN AMERICA, 1820–1980, at 30 (1st ed. 1982); accord Diane Ravitch, *Education and Democracy*, in MAKING GOOD CITIZENS: EDUCATION AND CIVIL SOCIETY 15, 15 (Diane Ravitch & Joseph P. Viteritti eds., 2001).

¹⁰⁰ STEFFES, *supra* note 54, at 2; Salomone, *supra* note 44, at 174. Dewey shared these commitments. See JOHN DEWEY, DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION 87 (1916). Regarding the very real limits of the Progressives’ egalitarianism, see, e.g., DAVID TYACK & LARRY CUBAN, TINKERING TOWARD UTOPIA: A CENTURY OF PUBLIC SCHOOL REFORM 24–25 (1st ed. 1995); CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780–1860, at 137 (1st ed. 1983) (“Public common schooling was indeed devoted to moral

these commitments flowed equally from deep springs of paternalistic and authoritarian attitudes. Advocates of the common school understood themselves to be involved in an explicitly political undertaking. Common schools were above all a political necessity, advocated “both among those who pointed out the dangers of an uneducated mob and among those who argued that political equality demanded trained intelligence.”¹⁰¹ A state governed by its citizens faced failure if those citizens lacked correct intellectual and moral predispositions, if they could be bought, or if they were unaware of “what the citizen of a free republic ought to know.”¹⁰²

Common schools, therefore, sought to create a particular kind of citizen: informed, loyal, and patriotic, but also homogenized, complaisant, and tractable.¹⁰³ Proponents of common schooling like Horace Mann explicitly sought to manufacture citizens who despite class differences would be politically similar to one another, and would share a single patriotic loyalty.¹⁰⁴ The poor, and the potential moral failings that might arise in impoverished environments if unchecked, particularly worried Mann and his contemporaries.¹⁰⁵ Later, as the twentieth century began, similar concerns were expressed with respect to the large number of immigrant children, including many Catholics, whose families and church schools elites suspected were neither willing nor able to teach children to be good Americans.¹⁰⁶

The idea that the common schools, by creating the right kind of citizens, could “safeguard [both] the democratic freedom of the individual and the stability of the democratic state” “came to the forefront of public discussion during and after World War I.”¹⁰⁷ The war itself had made vivid the need for stability. Concerns about immigration and partisanship only increased in the lead-up to World War II. The required recitals of the Pledge of Allegiance

education and discipline. Textbooks glorified American politics and social relations, and they often perpetuated demeaning ideas about immigrants and racist ideas about nonwhites.”).

¹⁰¹ TYACK & HANSOT, *supra* note 99, at 54; TAYLOR, *supra* note 56, at 7, 34.

¹⁰² TYACK & HANSOT, *supra* note 99, at 54; TAYLOR, *supra* note 56, at 26; MARIS A. VINKOVIS, *EDUCATION, SOCIETY, AND ECONOMIC OPPORTUNITY: A HISTORICAL PERSPECTIVE ON PERSISTENT ISSUES* 92–103 (1995).

¹⁰³ See DAVID NASAW, *SCHOOLED TO ORDER: A SOCIAL HISTORY OF PUBLIC SCHOOLING IN THE UNITED STATES* 41 (1st ed. 1979) (“The republicanism represented . . . was a republicanism that emphasized the need for public obedience rather than public participation.”).

¹⁰⁴ TAYLOR, *supra* note 56, at 61–62.

¹⁰⁵ See WILLIAM J. REESE, *POWER AND THE PROMISE OF SCHOOL REFORM: GRASSROOTS MOVEMENTS DURING THE PROGRESSIVE ERA* 11 (1986).

¹⁰⁶ Reuben, *supra* note 97, at 9, 11; Phillip Buckley, *Conceptions of Childhood, Student Rights, and the Citizenship Crusade: Meyer, Pierce, and the Pledge of Allegiance Cases*, 8 *J. HISTORY CHILDHOOD & YOUTH* 254, 256–57 (2015).

¹⁰⁷ STEFFES, *supra* note 54, at 5.

that began to pop up between the world wars were unequivocally part of this program.¹⁰⁸

Although *Barnette* of course rejects the compelled Pledge, it embraces unequivocally the common-school principle that the purpose of public schools is to educate the public citizen, with respect both to knowledge and to values. “National unity as an end which officials may foster by persuasion and example is not in question.”¹⁰⁹ *Barnette* bases its entire approach upon the mission of schools being to “educat[e] the young for citizenship”; that is the “reason for scrupulous protection of Constitutional freedoms of the individual.”¹¹⁰

It is important to recognize that *Gobitis*, the decision that *Barnette* so roundly overruled, shares with *Barnette* its understanding of the centrality of the civic purpose of education. Justice Frankfurter writes in *Gobitis* that the compelled Pledge occurs during “the formative period in the development of citizenship.”¹¹¹ When school authorities compel the recital of Pledge, what they “are really asserting is the right to awaken in the child’s mind considerations as to the significance of the flag contrary to those implanted by the parent.”¹¹² *Gobitis* framed the issue it was to decide as whether schools may provide “for this universal gesture of respect for the symbol of our national life in the setting of the common school.”¹¹³ To Frankfurter, it is “in the setting of the common school” where civic duty must be taught. The *Barnette* opinion endorses this view. Indeed, *Barnette* explicitly notes the commonality, quoting the *Gobitis* dissent on the principles it shared with the *Gobitis* majority:

As the present CHIEF JUSTICE said in dissent in the *Gobitis* case, the State may “require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty, which tend to inspire patriotism and love of country.”¹¹⁴

Where *Gobitis* and *Barnette* part ways is whether means matter, or only ends. *Gobitis* argues that the scope of permissible compulsions in schools should be determined by the weight of the public goals for the achievement

¹⁰⁸ Buckley, *supra* note 106, at 257 (“Starting in 1919, in response to increasing calls for the teaching of citizenship and patriotism, the number of schools implementing” compelled patriotic recitals rapidly increased).

¹⁰⁹ W. Va. State Bd. of Educ. v. *Barnette*, 319 U.S. 624, 640 (1943).

¹¹⁰ *Id.* at 637 (emphasis added).

¹¹¹ *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 598 (1940).

¹¹² *Id.* at 599 (echoing Progressive concerns over leaving civic education to individual families).

¹¹³ *Id.* at 597 (emphasis added).

¹¹⁴ *Barnette*, 319 U.S. at 631.

of which the state had enlisted the school system. In the midst of a second world war, into which the United States was imminently to be drawn, Justice Frankfurter and his colleagues saw social cohesion as a paramount need of the nation.¹¹⁵ The issue posed by the compulsory flag salute is “whether the legislatures of the various states and the authorities in a thousand counties and school districts of this country are barred from determining the appropriateness of various means to evoke that unifying sentiment without which there can ultimately be no liberties, civil or religious.”¹¹⁶ Given the importance of the goal, Frankfurter concluded, these officials must be trusted as to technique.

For the *Barnette* Court, and the *Tinker* Court as well, method matters as much as goal, and learning by doing is the only appropriate method of civic education. The two cases insist that the goal of creating citizens requires public schools to define arenas in which students are permitted to exercise their rights as citizens. This is a Progressive idea, but one that arose somewhat later in the history of the movement. It is closely associated with John Dewey, whose long career of writing and advocacy spanned the period from before World War I through the *Barnette* decision.

Dewey urged that education of democratic citizens could be accomplished only by organizing schools along democratic lines. His program, as refracted through educators under his influence, was to give students genuine agency and power over their own learning and within their school communities. The key passage in Dewey’s writings, quoted and requoted in the literature, calls for the school to be “a miniature community, an embryonic society.”¹¹⁷ “When the school introduces and trains each child of society into membership within such a little community,” Dewey continues, “providing him with the instruments of effective self-direction, we shall have the deepest and best guarantee of a larger society which is worthy, lovely, and harmonious.”¹¹⁸

Dewey’s idea is simultaneously political and pedagogical. To him, genuine pedagogy required active learning. Students do not learn passively,

¹¹⁵ *Gobitis*, 310 U.S. at 596 (“The ultimate foundation of a free society is the binding tie of cohesive sentiment.”). See also *The Gobitis Case in Retrospect*, 1 BILL RTS. REV. 267, 267 (1941) (The *Gobitis* “decision came at a time of exceptional emotion when the world staggered under the shock of the impending fall of France, with the vast implications of that event.”). But see Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1952 (2016) (suggesting that Frankfurter in *Gobitis* was less focused upon national security than is commonly assumed); *id.* at 1962, 1964 (noting that Justice Jackson and other anti-authoritarian voices understood protection of free expression to be in support of the “nascent war effort”).

¹¹⁶ *Gobitis*, 310 U.S. at 597.

¹¹⁷ JOHN DEWEY, *THE SCHOOL AND SOCIETY* 32 (1907). For quotations, see TYACK & HANSOT, *supra* note 99, at 202; LAWRENCE A. CREMIN, *TRADITIONS OF AMERICAN EDUCATION* 94 (1977); STEFFES, *supra* note 54, at 169.

¹¹⁸ DEWEY, *supra* note 117, at 44.

by taking in information they are given, but through engaging in activity that allows them to construct knowledge. This is true in every field of inquiry.¹¹⁹ But for Dewey, learning by doing embodied a political imperative as well.¹²⁰ Only a school structured as a society in miniature can “foster democratic and moral values through their overall organization and pedagogy.”¹²¹ In Dewey’s vision, writes Tracy Steffes, “[t]raining of democratic citizens would not come from abstract study of government or political obligations but must be rooted in the social relations and experience of the school itself.”¹²² David Tyack, the eminent educational historian, states that for Dewey “[t]op-down management of a ‘democratic’ school system [is] . . . a contradiction in terms. The processes of schooling,” Dewey thought, “should be congruent with the character of the cooperative society Dewey sought to achieve.”¹²³

Barnette does not reference Dewey, nor does it make an explicit reference to his ideas. But its conception of the school—restated for the subsequent generation in *Tinker*—is right in line both with Dewey’s notion of the embryonic community and his devotion to active learning. *Barnette* and *Tinker* insist that schools must make room within their communities for the exercise of expressive rights.¹²⁴ That exercise is how students, actively, will learn what their rights entail and why they are valuable. In that exercise, in that experience, students will learn what it is to be democratic citizens.

III. SHOULD WE CONTINUE TO CONSTITUTIONALIZE EDUCATIONAL PROGRESSIVISM?

In the decades since *Barnette* and *Tinker*, Progressivism in general, and the Progressive pedagogy of Dewey in particular, have waxed and waned in their centrality to the educational visions of both educators and of the courts.¹²⁵ In periods of conflict, most notably that of the Cold War, the idea of learning by doing has been overshadowed by more traditional pedagogies of frontal instruction and one-way knowledge transmission from teachers to pupils.¹²⁶ The experientialist classroom endorsed by Dewey has come to be associated more with the schools of the privileged than with the understaffed schools of the cities with whose students the early Progressives were so

¹¹⁹ *Id.* at 51–52.

¹²⁰ Salomone, *supra* note 44, at 178.

¹²¹ STEFFES, *supra* note 54, at 169.

¹²² *Id.*

¹²³ TYACK & HANSOT, *supra* note 99, at 203.

¹²⁴ See *supra* notes 94–96 and accompanying text.

¹²⁵ See NEL NODDINGS, *PHILOSOPHY OF EDUCATION* 24 (4th ed. 2016).

¹²⁶ Salomone, *supra* note 44, at 178–79.

concerned. Likewise, as noted above, the Supreme Court has retreated in its experiential commitments since *Barnette* and *Tinker*, toward a much more authoritarian vision of the ways that children and adults should relate to one another in schools.¹²⁷

These trends should not, however, eclipse the extent to which the core tenets of the common school movement continued for decades after *Barnette*, through *Tinker* and its progeny, and into today, to function as the underlying ideology of American public schooling. Their influence is so widely and deeply incorporated into the structure of American schools that it was (and remains) often unnoticed; they are the enthymemes, too obvious to state, of American schooling. The Progressive convictions that schools should be universally accessible, free of charge, professionally run, and nonsectarian have remained for a very long time the understood baseline of any educational policy debate. The understanding that schools' mission prominently includes the creation of good citizens remains widely held.¹²⁸ And Dewey's claim that learning by doing is central to effective civic education has also been widely internalized.¹²⁹

In 1996, Professor Rosemary Salomone, noting these features of American education, asked "whether the 'common school' concept has continued applicability, given dramatic changes in the political, social, and demographic landscape over the past century."¹³⁰ Salomone was concerned with what she saw as an avulsive erosion of social consensus over values, ideology, and morality within the polity. This erosion undermined the notion, central to the common-school program, that there existed some set of "neutral, nonsectarian" values and traits that should be taught and that would then form the basis of citizenship.¹³¹

However beleaguered the "common school' concept" was in 1996, it seems positively endangered today. Social and civic disagreement has only intensified. And interest in engaging those disagreements has declined: In the contemporary educational scene, there seems to be less disagreement about

¹²⁷ See sources cited *supra* note 93.

¹²⁸ LAWRENCE CREMIN, PUBLIC EDUCATION 58 (1976) ("The public school has labored mightily over the years to nurture certain common values and commitments . . .").

¹²⁹ See GUTMANN, *supra* note 79, at 88–94; see generally THOMAS SERGIOVANNI, BUILDING COMMUNITY IN SCHOOLS (1994). The claim also finds adherents among pedagogues outside of the United States. See, e.g., Mats Ekholm, *Learning Democracy by Sharing Power: The Student Role in Effectiveness and Improvement*, in DEMOCRATIC LEARNING, *supra* note 78, at 95, 97. It is likewise embraced by the American private school sector, notwithstanding that private institutions, unconstrained by the First Amendment, are free to be as authoritarian as they like. See, e.g., CHARLES L. GLENN, MUSLIM EDUCATORS IN AMERICAN COMMUNITIES 141 (2018).

¹³⁰ Salomone, *supra* note 44, at 171.

¹³¹ *Id.* at 179–80. For a similar framing of the educational implications of social division, see Nathan Glazer, *Some Problems in Acknowledging Diversity*, in MAKING GOOD CITIZENS 168, 168–69 (Diane Ravitch & Joseph P. Viteritti eds., 2001).

how to teach civics, or about what the content of civics education should be, than whether to teach it at all.¹³² A lot of schools don't bother.¹³³

Even more dramatic, common schooling today is vulnerable for reasons far removed from the erosion of consensus about the meaning of the good and the elements of good citizenship. The United States is well along in a process of abandoning the entire institutional scheme of common schooling, the "conventional wisdom" that public schools should be common to all, free of charge, and secular. The organizing principle of schooling in common is being displaced by an ethic founded in markets and consumer sovereignty.¹³⁴

At the organizational level, the most talked-about reforms of the past two decades are school choice in general and charter schools in particular.¹³⁵ Charter schools are precisely the opposite of common schools. The banner of common schools is commonality: All students, regardless of background, were to be schooled together and in the same way. The creed of charter schools is consumerism: because students want and require different things, there should be different institutions than can meet those multifarious needs.¹³⁶ Common schools, with a homogenizing mission, are naturally best provided by government. Charter schools, letting a thousand flowers bloom, can be provided only in a marketplace. The goal of the common schools is good citizenship; the organizing principle of the charter movement is free choice.¹³⁷

Even with respect to public schools, traditionally organized and publicly provided, the ideals of commonality are in retreat. The vision of Mann, Dewey, and their many contemporaries was tainted by paternalism, contaminated by religious prejudice, corrupted by nativism, and befouled by racism. Nevertheless, they envisioned public schools that would undertake to

¹³² See Sawchuk, *supra* note 20.

¹³³ See SARAH M. STITZLEIN, TEACHING FOR DISSENT: CITIZENSHIP EDUCATION AND POLITICAL ACTIVISM 166–67 (2014).

¹³⁴ See David F. Labaree, *Consuming the Public School*, 61 EDUC. THEORY 381, 391 (2011) ("The American school system was a deliberate creation of the common school movement, but once the system was set in motion, consumers rather than reformers became its driving force."); Louis, *supra* note 78, at 78 ("Even relatively homogenous countries, such as Sweden, have enacted legislation supporting alternatives to the previously unassailable 'common school.'").

¹³⁵ Contemporary reforms other than charters also challenge the conventions of common schooling. These notably include publicly funded vouchers for private school attendance, see *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), and tax benefits for private payments that defer the tuition expenses of K–12 students attending private schools. See Internal Revenue Code, 26 U.S.C. § 529(c)(7) (2019); Hillel Y. Levin, *Tax Credit Scholarship Programs and the Changing Ecology of Public Education*, 5 ARIZ. ST. L.J. 1033, 1048 (2013).

¹³⁶ See Julian R. Betts, *The Economic Theory of School Choice*, in GETTING CHOICE RIGHT: ENSURING EQUITY AND EFFICIENCY IN EDUCATION POLICY 14, 20–21 (Julian R. Betts & Tom Loveless eds., 2005).

¹³⁷ See Aaron Saiger, *Charter Schools, the Establishment Clause, and the Neoliberal Turn in Public Education*, 34 CARDOZO L. REV. 1163, 1173–74 (2013).

increase equality and fellow-feeling in the United States. The common school was to tamp down the effects of the diversity of origins and of families, counteract the potential for tribalism, and create a unifying influence. Today, the dominant understanding of American public schools is that they reinscribe and intensify, rather than mitigate, tribalism and inequality. Public schools, in both the academic and the popular consciousness, are the central institution that allows a deeply unequal system to replicate itself. They divide children into educational castes, to the systematic advantage of the children of those the system already favors.¹³⁸

In short, Americans today believe less in common schooling than they ever have. Prominent voices in the educational community reject it nearly point by point. Living in such a reality, how should we read cases like *Barnette* and *Tinker*, which not only treat Progressive education as a desideratum but transform it into a constitutional requirement?

One approach is to double down on *Barnette*'s move as one needed more than ever in a time when Progressivism is in deep disfavor. The First Amendment, after all, by its text properly applies to all persons, including schoolchildren. If we must carve out public schools as a glaring exception, a zone in which freedom of expression is necessarily severely attenuated, we need both a justification and a limiting principle. The Progressives generally, and Dewey in particular, offer both. They offer not just any justification, but one supported by a rich democratic (and distinctively American) theory. They offer not just any principle, but one designed to be democracy-enhancing even as it is pedagogically sound. "The educational standard dictated by democratic values," writes Amy Gutmann, is to "democratize schools to the extent necessary to cultivate the . . . virtues of democratic character."¹³⁹ It is to Dewey, Gutmann attests, that we owe our understanding that a "substantial degree of democracy within schools will be useful, probably even necessary . . . to creating democratic citizens."¹⁴⁰

The educational theory of the Progressives is, in short, smart, theoretically compelling, full of practical wisdom, and an instantiation of constitutional values. These many virtues—given that we need some way to enforce the First Amendment in the unusual circumstances of public schools—offer a constitutional line that is reasonable and right-thinking.

To articulate this view differently: *Barnette* is valuable today because both Dewey and Jackson were right. Dewey articulated a theory grounded in the constitutional values of liberty, freedom, and ordered government.

138 MARTHA MINOW, IN *BROWN'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK* 23–26 (2010); JAMES E. RYAN, *FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA* 104–05 (2010).

139 GUTMANN, *supra* note 79, at 94.

140 *Id.*

Jackson recognized that the application of the Bill of Rights in public schools required such a theory. Civic developments that move American schooling away from the ideals of the Progressives are, like the heavy-handed imposition of patriotic ritual by the legislature in West Virginia, deviations from constitutional principle which it is the task of constitutional law to correct.

But this argument falters. Even if Dewey was right in his time, perhaps he was not right for all time. Dewey himself noted that the program of Progressive education was in large part determined by the technological and economic realities that characterized the polity it sought to educate.¹⁴¹ Today, we again live in a period of very rapid technological change. In particular, the move of education (along with everything else) to the internet is more compatible with organizations based upon consumer sovereignty than upon common schools.¹⁴²

Even in his own time, Dewey's views stemmed from his various philosophical and political commitments; they were, in other words, ideological. And perhaps ideology ought not be constitutionalized.

The first voice to advance this argument is Justice Frankfurter's, dissenting in *Barnette*. In *Gobitis*, writing for a majority, Frankfurter could purport to maintain judicial agnosticism regarding how best to teach "loyalty to . . . democracy."¹⁴³ But, transformed into a dissenter a few years later, he found it necessary but insufficient to argue that pedagogical technique should be left to legislatures. Frankfurter sought in addition to demonstrate that Progressive ideology was contingent, and that it conflicted with other important values. His dissent therefore emphasizes students' power to choose whether to attend public or private schools. Frankfurter argues that any compulsion to which students are subject in state schools is constitutionally unproblematic, because students have freely chosen to subject themselves to it.¹⁴⁴

As noted above, this particular claim jars contemporary ears, insensible as it is to the fact that private schools are neither universally available nor free of charge.¹⁴⁵ But Frankfurter's broader claim, that Progressive educational thought and liberty are at odds, resonates today. Indeed, Frankfurter's arguments bear striking similarities to contemporary

¹⁴¹ See DEWEY, *supra* note 117, at 44 (noting the importance of technological change).

¹⁴² See PAUL E. PETERSON, SAVING SCHOOLS: FROM HORACE MANN TO VIRTUAL LEARNING 253–54 (2010).

¹⁴³ *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 598 (1940).

¹⁴⁴ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 656–57 (1943) (Frankfurter, J., dissenting).

¹⁴⁵ See *supra* notes 60–68 and accompanying text.

jurisprudence, scholarship, and advocacy regarding school choice.¹⁴⁶ Frankfurter recognizes the reality that public and private education are substitute goods.¹⁴⁷ He anticipates the modern observation that families who choose private schools are burdened by having to pay twice: once with their taxes in support of public schools they do not use, and again with their tuition to support the alternative which, having rejected the public system, the state requires them to fund.¹⁴⁸ More basically, Frankfurter relies¹⁴⁹ heavily upon *Pierce v. Society of Sisters*, in which the Court held that liberty “excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only.”¹⁵⁰ The right to exit public schools in favor of private alternatives, says *Pierce*, is protected as a matter of “the fundamental theory of liberty upon which all governments in this Union repose.”¹⁵¹

Pierce’s claim that school choice is a central component of liberty—a view shared by many school choice advocates today¹⁵²—is in tension with the agenda of Progressives in Mann’s tradition, who sought to make all schooling “common.”¹⁵³ By relying heavily upon it, Frankfurter implies that

¹⁴⁶ See *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) (noting that the use of state funds by religious schools does not violate First Amendment if government funds arrive at those schools “wholly as a result of [private families’] own genuine and independent private choice”); Stephen D. Sugarman, *Using Private Schools to Promote Public Values*, 1991 U. CHI. LEGAL F. 171, 176–77 (associating compulsion with having no educational choices other than public school).

¹⁴⁷ See *Barnette*, 319 U.S. at 656–57.

¹⁴⁸ *Id.* at 657 (Frankfurter, J., dissenting); see Sugarman, *supra* note 146, at 181 (arguing that private school parents “pay twice” for school and then relieve the public schools of the duty to educate them). Frankfurter deploys this observation differently than us moderns. Today, the argument is about the unfairness of the financial burden parents face entirely because they choose to exercise a constitutional right.

¹⁴⁹ *Barnette*, 319 U.S. at 657–58 (Frankfurter, J., dissenting).

¹⁵⁰ *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925). Frankfurter likewise notes *Farrington v. Tokushige*, 273 U.S. 284 (1927), in which the Court invalidated Hawaii’s deeply intrusive regulation of private schools that taught in languages other than English. *Barnette*, 319 U.S. at 656–58 (Frankfurter, J., dissenting). *Farrington* stands for the right of parents to choose private schools that enjoy “reasonable choice and discretion in respect of teachers, curriculum and text-books.” *Farrington*, 273 U.S. at 298.

¹⁵¹ *Pierce*, 268 U.S. at 535.

¹⁵² Cf. James Forman, Jr., *The Secret History of School Choice: How Progressives Got There First*, 93 GEO. L.J. 1287, 1289 (2004) (arguing that “progressives” did support school choice at various important historical junctures, but using the term in its contemporary political sense of “left-wing” rather than to denote the capital-P “Progressives,” like Mann and Dewey, of the Progressive Era).

¹⁵³ Although Mann and Dewey both opposed private schooling, neither supported its legal prohibition. See Barbara Bennett Woodhouse, “*Who Owns the Child?*”: Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 1020–21 (1991). Dewey is on record having opposed the Oregon statute struck down by *Pierce*. See *id.* at 1020 n.101. The constellations of ideological and political opposition to the institution of private schooling during this period were complex, combining Progressive common-school ideology, populist appeals to class conflict, and the imperturbable racism and anti-Catholicism of the Ku Klux Klan and similar groups. See *id.* at 1017–19.

the Court should avoid taking sides, elevating the ideological preference of one camp to the level of constitutional principle.

Frankfurter's argument had, and continues to have, particular force, because it resonates with concerns about the unwarranted constitutionalization of trendy social-scientific theories. Such concerns, of course, are ones we associate with the jurisprudence of *Barnette's* era.¹⁵⁴ When *Barnette* elevates schooling in common and of learning by doing to the level of constitutional principles—principles, moreover, purported to be justified by a Constitution which itself nowhere mentions education or articulates its purposes—it is hard not to hear echoes of *Lochner v. New York*.¹⁵⁵ *Lochner* stands for the dangers of a jurisprudence that adopts “a moralized view of economic life.”¹⁵⁶ It is hard to see how it is any less dangerous for a jurisprudence to adopt a particular, “moralized view” of the education of children. To indulge in the latter, no less than in the former, improperly constitutionalizes a fashionable social-science theory that should be understood to be contingent.

This concern is different from the worry that contemporary scholars refer to as “First Amendment *Lochnerism*.”¹⁵⁷ By this they mean efforts to deploy the First Amendment in place of Spencerian laissez-faire capitalism to justify the invalidation of economic regulation preferred by majorities. Justice Jackson shared this fear, warning against First Amendment “transcendentalism” in cases about Jehovah's Witnesses contemporary to *Barnette*.¹⁵⁸ Jackson distinguished *Barnette* from these cases because *Barnette* was about civil rather economic liberties, involving no balancing of rights and therefore no improper elevation of the First Amendment.¹⁵⁹ This move tracks the modern lawyer's instinct to assert that the right to contract is distinct from, and more contingent than, expressive rights.¹⁶⁰

But, as I have argued, compelled speech in school is not a straightforward First Amendment violation whose analysis requires no balancing. Freedom of expression in public school is not generally protected. To resolve disputes about compelled expression in school requires a *pedagogical* theory. And pedagogy in general, and citizenship education in

¹⁵⁴ See generally Kessler, *supra* note 115, at 1916.

¹⁵⁵ See generally *Lochner v. New York*, 198 U.S. 45 (1905).

¹⁵⁶ Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 L. & CONTEMP. PROBS. 195, 197 (2014).

¹⁵⁷ See generally Kessler, *supra* note 115.

¹⁵⁸ *Id.* at 1970 (quoting and discussing *Jones v. City of Opelika*, 319 U.S. 103, 117 (1943)).

¹⁵⁹ See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 630 (1943); Kessler, *supra* note 115, at 1970.

¹⁶⁰ See Kessler, *supra* note 115, at 1970.

particular, are complex pieces of social engineering. Their “public regulation” requires trade-offs and balancing at every turn.¹⁶¹

In rejecting *Lochner*, Justice Harlan wrote in dissent: “[I]et the State alone in the management of its purely domestic affairs, so long as it does not appear beyond all question that it has violated the Federal Constitution.”¹⁶² Certainly with respect to a question among “the most debatable and difficult questions of social science,” judges should disregard their own views of which side “presents the sounder theory” and defer to the legislature.¹⁶³ Education is a “debatable and difficult question of social science.” Schools are the epitome of states’ “purely domestic affairs.” The Constitution may be vague with respect to the freedom of contract,¹⁶⁴ but it is entirely silent with respect to schooling.

The core argument against *Lochner* thus tracks the argument of *Gobitis* and of Justice Frankfurter’s *Barnette* dissent:¹⁶⁵ When it comes to deciding the proper manner of achieving a legitimate government goal, legislative officials deserve substantial judicial deference.¹⁶⁶ If “[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer’s *Social Statics*,”¹⁶⁷ how can the First Amendment properly be read to enact Mr. John Dewey’s *The School and Society*?

This question is particularly pointed because Herbert Spencer’s *Social Statics* itself enjoyed enormous influence in American educational circles.¹⁶⁸ Spencer’s 1860 work, *Education, Intellectual, Moral, and Physical*, was even more popular with the educated public, and was read ubiquitously among

¹⁶¹ *Cf. id.* at 1978 (“Making clear that *Barnette* had not signaled a departure from his more general approach to the relationship between public regulation and civil liberty, Jackson reiterated the analysis of the First Amendment he had first outlined in his *Douglas v. City of Jeanette* concurrence: ‘I think the limits [on religious freedom] begin to operate whenever activities begin to affect or collide with liberties of others or of the public.’”) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 177 (1944) (Jackson, J., dissenting)).

¹⁶² *Lochner v. New York*, 198 U.S. 45, 73 (1905) (Harlan, J., dissenting) (citations and internal quotation marks omitted).

¹⁶³ *Id.* at 72 (Harlan, J., dissenting) (citations and internal quotation marks omitted).

¹⁶⁴ *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937).

¹⁶⁵ Professor Bowie also notes the congruence of *Lochner* and *Barnette*. Both, he points out, rejected compulsions imposed by the state upon private individuals. And both, he argues, were ultimately “rein[ed] in” by the Court as incompatible with “workable government.” Bowie, *supra* note 9, at 19–25.

¹⁶⁶ *See* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 647 (1943) (Frankfurter, J., dissenting); *see also* Kessler, *supra* note 115, at 1952–53.

¹⁶⁷ *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting). Interestingly, Holmes lists “school laws” along with Sunday laws, usury laws, and lotteries as examples of widely accepted interference with the liberty of contract as understood by the *Lochner* majority. *Id.*

¹⁶⁸ *See* LAWRENCE A. CREMIN, *THE TRANSFORMATION OF THE SCHOOL: PROGRESSIVISM IN AMERICAN EDUCATION 1876–1957*, at 91, 93 (1969); Brian Holmes, *Herbert Spencer*, 24 *PROSPECTS* 533, 535 (1994), <https://doi.org/10.1007/BF02195287>.

professional educators.¹⁶⁹ As Kieran Egan writes, “Spencer’s name is so rarely mentioned in educational circles today that it is easy to forget how avidly his book was read and reread by pretty well everyone involved in making the new state schools. This was especially the case in the United States.”¹⁷⁰

The ideas expressed in these volumes, moreover, place Spencer squarely among the earliest educational “Progressives.”¹⁷¹ In particular, Spencer not only anticipates but directly influences many fundamental features of Dewey’s thought.¹⁷² These include ideas ultimately reflected in the Deweyian Progressivism of *Barnette* and *Tinker*: that education should be child-centered, that it should be founded in children’s process of discovery rather than direct instruction by adults, and that active inquiry is vital to learning.¹⁷³ In other ways, Spencer’s educational thinking diverged from the agenda ultimately associated with educational Progressives, including Dewey: Spencer endorsed white supremacy, favored private education, was suspicious of public schooling, and thought that schools should focus upon fields like languages, mathematics, and the sciences.¹⁷⁴ Regardless whether one focuses upon the points of agreement or disagreement between Dewey and Spencer, if Spencer’s “moralized” economic theorizing ought not be constitutionally enacted, it is hard to see why his proto-Progressive educational thinking, or that of other Progressives in dialogue with it, merits elevation to the level of constitutional principle.

It is also difficult not to hear in *Barnette* echoes of the problematic doll studies cited in *Brown v. Board of Education*. Footnote 11 in *Brown* famously supports its conclusion that segregated education teaches African American children to understand themselves as inferior by citing “modern authority” in the field of “psychological knowledge.”¹⁷⁵ The footnote cites the work of Mamie and Kenneth Clark, who had presented children with dolls of different

¹⁶⁹ See CREMIN, *supra* note 168, at 91–92 (citing HERBERT SPENCER, EDUCATION: INTELLECTUAL, MORAL, AND PHYSICAL (1860)); Stephen Tomlinson, *From Rousseau to Evolutionism: Herbert Spencer on the Science of Education*, 25 HIST. EDUC. 235, 236 (1996) (“*Education* soon became Spencer’s best selling book, and may well have been the most popular text of its kind during the nineteenth century.”).

¹⁷⁰ See KIERAN EGAN, GETTING IT WRONG FROM THE BEGINNING: OUR PROGRESSIVIST INHERITANCE FROM HERBERT SPENCER, JOHN DEWEY, AND JEAN PIAGET 12 (2002); see also *id.* at 3–4 (providing a publication history of Spencer’s educational writing).

¹⁷¹ See Holmes, *supra* note 168, at 535; Tomlinson, *supra* note 169, at 249.

¹⁷² See EGAN, *supra* note 170, at 4, 7; *id.* at 48 (finding in Dewey a “significant amount of echoing” of Spencer); *id.* at 142 (noting “how strongly the fundamental principles of [Dewey’s] work repeat ideas articulated by Spencer.”).

¹⁷³ See *id.* at 15–19.

¹⁷⁴ See CREMIN, *supra* note 168, at 92, 94; EGAN, *supra* note 170, at 23, 27–28 (noting various departures from Spencer in Dewey’s thought).

¹⁷⁵ *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.11 (1954).

colors and recorded their responses.¹⁷⁶ In the 1930s and 1940s as today, there were many doubts about the scientific quality of empirical psychology in general.¹⁷⁷ Certainly since *Brown* many have pointed out the Clark studies' particular methodological and interpretive lapses;¹⁷⁸ and plenty of psychological studies were available at the time of *Brown* which reached conclusions different from the Clarks'.¹⁷⁹ Research of this kind seems a slim reed upon which to hang an important principle of constitutional law. The *Brown* Court would have done better, many have argued, to justify its holding on doctrinal and ideological grounds.¹⁸⁰

Justice Jackson himself is reported to have been uncomfortable with the decision to ground *Brown* in social science, worrying that it might be a mistake to rely upon "elusive psychological and subjective factors" that "are not determinable with satisfactory objectivity or measurable with reasonable certainty."¹⁸¹ How then must he have reacted when the Barnettes' brief urged upon him consideration of "the statements of authorities on educational psychology which are noticed in the opinion of the United States Third Circuit Court of Appeals in the *Gobitis* case"?¹⁸² Whatever concerns are raised by the Clark studies are multiplied manifold in the Circuit's *Gobitis* opinion, with its citation to a gallimaufry of "students of educational psychology," many of whose sole "psychological" qualifications appear to be that they had opinions about how children learn that they were willing to express in public.¹⁸³ Although Jackson does not cite any of those experts, he assentes to their assertions in his endorsement of learning by doing.¹⁸⁴

¹⁷⁶ *Id.* at 494 n.11.

¹⁷⁷ Ludy T. Benjamin, Jr. & Ellen M. Crouse, *The American Psychological Association's Response to Brown v. Board of Education: The Case of Kenneth B. Clark*, 57 AMER. PSYCHOL. 38, 40–41 (2002).

¹⁷⁸ See James E. Ryan, *The Limited Influence of Social Science Evidence in Modern Desegregation Cases*, 81 N.C. L. REV. 1659, 1661 (2003) (noting "the endless debate regarding the significance of footnote eleven"); *id.* at 1660 n.3 (surveying the debate over the studies' quality and influence); Jack B. Weinstein, *Brown v. Board of Education After Fifty Years*, 26 CARDOZO L. REV. 289, 291 n.8 (2004) (same).

¹⁷⁹ Benjamin & Crouse, *supra* note 177, at 45.

¹⁸⁰ See JACK M. BALKIN, WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID 51–52 (2001).

¹⁸¹ RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 689 (1975).

¹⁸² Brief for Appellee at 49, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (No. 591), 1943 WL 71856, at *49 (citing *Minersville Sch. Dist. v. Gobitis*, 108 F.2d 683, 691 (3d Cir. 1939)).

¹⁸³ *Gobitis*, 108 F.2d at 691; see sources cited *supra* notes 73–74 and accompanying text. Holmes argues that Herbert Spencer was similarly an educational "amateur." Holmes, *supra* note 168, at 552.

¹⁸⁴ See *Barnette*, 319 U.S. at 640–41. Cf. Sanjay Mody, Note, *Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy*, 54 STAN. L. REV. 793, 814–15 (2002) ("The Court's failure to cite empirical support for its findings of fact is particularly

Barnette, in sum, may fairly be read to represent an educational Lochnerism that ought to be repudiated—as applied to schoolchildren.

To reject the constitutionalization of Deweyian progressivism would pose not the slightest challenge to the principle that “no official, high or petty, can prescribe what shall be orthodox in politics, religion, nationalism, or other matters of opinion or force citizens to confess by word or act their faith therein”¹⁸⁵—for ordinary citizens not in public school. Indeed, public school students, when not present in school, are and would remain fully entitled to this protection. Nor would it alter the conclusion that many varieties of compelled religious expression are unconstitutional, within schools at least as much as without.¹⁸⁶

But, with respect to the regulation of secular student speech in public school, it is hard to see, especially given today’s radically changing technological circumstances and social beliefs, why Mann and Dewey (and Spencer) should determine how much compelled expression can be constitutionally tolerated. To be sure, no obvious substitute rule commends itself. As noted in Part I, all pedagogy is ideological, undermining any hope that the law could draw reasonable distinctions between fact and opinion, or between instruction and indoctrination.¹⁸⁷ The temptation to withdraw the Constitution entirely from the field, though it offers intellectually consistency, also seems false to the First Amendment and to the principle that it must apply, somehow, within the schoolhouse gate.¹⁸⁸

Perhaps what is necessary is a jurisprudential modesty that simply draws the constitutional line at politically motivated restrictions of student expression and compulsion of egregiously political or nakedly partisan speech.¹⁸⁹ Thus, students could not be forbidden to express *any* political view in school settings where free conversation is otherwise allowed. Likewise, schools would not be allowed to require pupils to recite, say, partisan platforms as if they were catechisms, or to sing litanies in praise of the sitting school board. It would also be consistent with a modest approach to student expression to find within the First Amendment a rule that prohibits schools

conspicuous in early twentieth-century cases involving the states’ power to pass economic and social welfare legislation.”).

¹⁸⁵ *Barnette*, 319 U.S. at 642.

¹⁸⁶ *Engel v. Vitale*, 370 U.S. 421, 430 (1962) (forbidding religious establishment “whether those laws operate directly to coerce nonobserving individuals or not”); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963) (recognizing in the Free Exercise Clause “the right of every person to freely choose his own course with reference [to religion], free of any compulsion from the state.”).

¹⁸⁷ *See supra* Part I.A.

¹⁸⁸ *See Redish & Finnerty, supra* note 19, at 95–96.

¹⁸⁹ *See Barnette*, 319 U.S. at 637.

from requiring students to *pledge allegiance* to anything.¹⁹⁰ That intuition—that the fundamental wrongness of what was done to Marie and Gathie Barnette was not to require them to speak, but to require them publicly to confess their loyalty—is likely the reason that *Barnette* continues to command allegiance among both lawyers and educators.¹⁹¹ At the same time, with respect to schoolhouse restrictions and compulsions less egregious, less naked, the time may have come to acknowledge that the First Amendment has limited purchase.

Modesty does not mean turning our backs upon the practical wisdom that Dewey articulated and *Barnette* and *Tinker* then codified. Educators would be wise, as a matter of policy, to heed Dewey's suggestion that democratic education requires schools that are in some important measure democratic, and to check whatever authoritarian impulses they might harbor.¹⁹² Private schools as well as public schools would benefit from this practice.

In addition, the constitutionalization of educational progressivism as applied to student speech, however unwarranted with respect to the First Amendment, might be justifiable under some state constitutions. Where the federal constitution is silent with respect to education, every state extends to students a right to receive a free, public education, and imposes a constitutional duty upon itself to provide it.¹⁹³ Many of the provisions that impose this duty were drafted and ratified in explicitly Progressive contexts. This is clear from their timing, their history, and sometimes their vocabulary.¹⁹⁴ I have written elsewhere to oppose reading state education clauses as constitutionalizing Progressive education theory in its entirety.¹⁹⁵ But in this instance, where state constitutional guarantees of free expression intersect with state constitutional educational rights and duties, it can be appropriate to understand states' constitutional guarantees of expression in

¹⁹⁰ Cf. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) (suggesting that requiring speakers to endorse “a Government-mandated pledge or motto” is a particularly egregious violation of the First Amendment).

¹⁹¹ Professor Bowie reads *Barnette* to endorse a “misattribution” principle, which bars only compulsions of expression that might “make others think that a person compelled to do something is doing it voluntarily.” Bowie, *supra* note 9, at 9, 42. But see Abner Greene, *(Mis)Attribution*, 87 DENV. U. L. REV. 833, 840 (2010) (“*Barnette* did not discuss misattribution.”). A misattribution approach would likely still render public schools “unworkable,” because schoolhouse pedagogy consistently intermingles compulsion and voluntarism. See *supra* note 41 and accompanying text.

¹⁹² See *supra* notes 139–140 and accompanying text.

¹⁹³ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973); Scott R. Bauries, *The Education Duty*, 47 WAKE FOREST L. REV. 705, 719–25 (2012).

¹⁹⁴ See Aaron Jay Saiger, *School Choice and States' Duty to Support “Public” Schools*, 48 B.C. L. REV. 909, 932–33 (2007) (reviewing case law and related secondary literature).

¹⁹⁵ See *id.*

school in terms of Progressive pedagogical theory.¹⁹⁶ Under many states' constitutional law, therefore, the approach of *Barnette* and *Tinker* might find solid ground.¹⁹⁷

But today, with *Barnette* seventy-five years old, with Dewey even further in the past, with public schools in privileged communities walled off literally as well as figuratively from those of the poor, with charter schools proliferating, and with an explosion of personalized and differentiated online educational options visible on the horizon, Frankfurter's argument in favor of judicial deference to state schools resounds with new force. Civic learning by doing likely remains, today at least as much as seventy-five years ago, a fine idea. But the First Amendment does not guarantee it.

¹⁹⁶ Cf. *Emp't Div. v. Smith*, 494 U.S. 872, 882 (1990) (arguing that cases that present "hybrid" intersections of constitutional rights justify departures from otherwise appropriate First Amendment analysis). Student expression cases are quintessential examples of such an intersection at the state level.

¹⁹⁷ Indeed, a more modest federal jurisprudence would facilitate the analysis of state constitutional law along the lines suggested here.