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READING, WRITING, AND RADICALISM: THE LIMITS ON GOVERNMENT CONTROL OVER PRIVATE SCHOOLING IN AN AGE OF TERRORISM

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I. INTRODUCTION

The terrorists who attacked the United States on September 11, 2001 were armed not only with box cutters, but with a murderous ideology inspired by radical Islam that served as the motivating force behind their actions. Thus, any comprehensive attempt to win the "War on Terror"[1] must focus not only on military and investigative tactics, but on ideas as well, addressing the sources and dissemination of ideologies that propagate terrorism.[2] A major

1. *See* President George W. Bush, President Addresses Nation, Discusses Iraq, War on Terror (June 28, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/06/20050628-7.html (describing the global war on terror as necessary to defend the nation's freedoms from terrorist enemies who "murder in the name of a totalitarian ideology").

2. This Article focuses on the threat posed by a radical Islamist ideology. This is not to suggest that radical Islam is the only ideological group that promotes or encourages terrorist activities. However, as the 9/11 Commission noted, "[T]he enemy is not just 'terrorism,' some generic evil. This vagueness blurs the strategy. The catastrophic threat at this moment in history is more specific. It is the threat posed by *Islamist* terrorism—especially the al Qaeda network, its affiliates, and its ideology." NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 362 (2004), *available at* http://www.9-11commission.gov/report/911Report.pdf (endnotes omitted).

source of the ideology of radical Islam is the worldwide network of Islamic religious schools, or *madrasas*.[3]

Although the teaching of radical Islam to a new generation of possible terrorist recruits within the Muslim world has a variety of implications for the War on Terror,[4] the existence of schools that teach radical Islam in Western, liberal democracies raises a weighty set of issues. To what extent can a society that rests on principles of free speech, the free exercise of religion, and family privacy limit and regulate what is being taught to its citizens? How can security be preserved without infringing on fundamental rights and freedoms? Is the threat caused by a system of education that may inspire acts of terrorism sufficiently concrete, and sufficiently imminent, to justify departure from ordinary norms opposing prior restraints on speech and expression?

This Article considers possible approaches to the problem of radical Islam in schools and evaluates the constitutional limitations that govern attempts to regulate the teaching of terrorism-encouraging ideologies. Part II discusses the existence of radical Islamist schools in Western Europe and the United States and contemplates possible approaches to prevent these schools from becoming conduits for terrorism. Part III reflects on the specific role that Saudi Arabia has played in promoting radicalism and intolerance in Muslim schools worldwide, and suggests both diplomatic and legal

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3. *See* FEBE ARMANIOS, ISLAMIC RELIGIOUS SCHOOLS, *Madrasas*: Background 1, 3-5 (Cong. Research Serv., CRS Report for Congress, Order Code RS21654, Oct. 29, 2003), *available at* http://fpc.state.gov/documents/organization/26014.pdf (explaining the role of *madrasas*, or *madrassas*, in the Muslim world and the financial support connected with the governments of Saudi Arabia, Pakistan, and other Southeast Asian countries).

4. Concern that *madrasas* in Muslim countries are breeding grounds for al Qaeda recruits has led the United States to urge its putative Muslim allies such as Saudi Arabia and Pakistan to reform their educational systems. *See* H.R. Con. Res. 242, 108th Cong. (2003), 2003 CONG US HCON 242 (Westlaw) (urging the government of Saudi Arabia to reform its educational curriculum to promote tolerance); S. Con. Res. 14, 108th Cong. (2003), 2003 CONG US SCON 14 (Westlaw) (stating the same proposition as House Concurrent Resolution 242). Additionally, *The 9/11 Commission Report* commented: "Education that teaches tolerance, the dignity and value of each individual, and respect for different beliefs is a key element in any global strategy to eliminate Islamist terrorism." NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 362 (2004), *available at* http://www.9-11commission.gov/report/911Report.pdf. Thus far, such efforts have been met with only limited results. *See* Massoud Ansari, *Clerics Resist Musharraf's War on Madrassas*, SUNDAY TELEGRAPH (London), Sept. 5, 2004, at 27, *available at* 2004 WLNR 4190216 (reporting criticism that President Pervez Musharraf and the Pakistani government's "clampdown [on the curriculum taught in madrassas] is too little too late").

means that the United States might take to effect a change in the Saudi role. Part IV considers the state's role in regulating private education, as it relates to the teaching of radicalism and intolerance, by addressing related constitutional questions with regard to the war power, freedom of speech, the free exercise of religion, parental rights, and equal protection. Finally, Part V suggests steps the government can take to reduce the teaching of radical Islamist ideology after balancing individual freedoms with the nation's security needs.

II. AN EDUCATION FOR TERRORISM?

A. *The European Example*

In Western Europe, a growing and partially radicalized Muslim population is posing a serious challenge to the status quo with regard to issues of immigration, assimilation, and multiculturalism.[5] Because of lenient European immigration policies and tolerance towards minority groups, many Muslims have immigrated to Western Europe from the Middle East and North Africa.[6] However, because their actions have gone largely unmonitored, radical Islamists have taken advantage of this openness to recruit followers and incite anti-Western sentiments.[7] As David Pryce-Jones notes:

> Does this crisis amount to a "clash of civilizations"? Many people reject that notion as too sweeping or downright misleading. Yet whether or not it applies to, say, the situation in Iraq, or to the war on terror, the phrase has much to recommend it as a description of what is going on inside Europe today. As Yves Charles Zarka, a French philosopher and analyst, has written: "there is taking place in France a central phase of the more general and mutually conflicting

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5. *See generally* Robert S. Leiken, *Europe's Angry Muslims*, FOREIGN AFF., July 1, 2005, at 120, *available at* 2005 WLNR 12587515 (detailing the problems facing Western Europe, and the United States indirectly, as a result of European immigration policies).

6. *See All Things Considered: An Islamic Journey Inside Europe* (NPR radio broadcast Feb. 24-28, 2003), http://www.npr.org/programs/atc/features/2003/feb/europe_muslims/index.html (summarizing a five-part radio broadcast and reporting that "Europe's Muslim population has doubled in the last decade, and an estimated half a million new immigrants—most of the[m] from Muslim nations—arrive every year") (on file with the *St. Mary's Law Journal*).

7. *See* Claude Salhani, *Analysis: Europe's Tolerance Under Stress*, WASH. TIMES (UPI), Dec. 9, 2004, http://www.washtimes.com/upi-breaking/20041209-075512-8449r.htm (pointing to "Europe's traditional lenient immigration policies" as a main cause for the proliferation of radical Muslim recruitment) (on file with the *St. Mary's Law Journal*).

> encounter between the West and Islam, which only someone completely blind or of radical bad faith, or possibly of disconcerting naiveté, could fail to recognize." In the opinion of Bassam Tibi, an academic of Syrian origins who lives in Germany, Europeans are facing a stark alternative: "Either Islam gets Europeanized, or Europe gets Islamized." Going still farther [sic], the eminent historian Bernard Lewis has speculated that the clash may well be over by the end of this century, at which time, if present demographic trends continue, Europe itself will *be* Muslim.[8]

Even if the picture is not as stark as Pryce-Jones supposes, the sense that Europe has a "radical Islam problem" is becoming more common. "It is increasingly common for mainstream European politicians to call for much tougher measures against Islamic radicals and a more aggressive insistence on [W]estern liberal values."[9]

Disagreements over the role of education in advancing or discouraging radical Islam throughout Western Europe showcase this clash of values. If Europe's immigrant Muslim populations assimilate and adopt norms that can coexist with Europe's liberal values, then the predicted crisis, it is supposed, will be averted.[10] On the other hand, if radical Islam continues to expand, some fear that Europe will experience increasing violence, terrorism, and the suppression of liberal ideals. This concern has played itself out in different ways across Europe. In France, the government has sought to use the public education system to impose secularization on French Muslims, barring students in public schools from wearing Muslim headscarves and other "conspicuous" religious apparel.[11] While some have argued that the French headscarf ban will be counterproductive—noting that because children affected by the ban may "drop out of the public school system and go to private

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8. David Pryce-Jones, *The Islamization of Europe?*, COMMENT., Dec. 1, 2004, at 29, 29, *available at* 2004 WLNR 13442029 (emphasis added).

9. *A Civil War on Terrorism*, ECONOMIST, Nov. 27, 2004, at 56; *accord* Don Van Natta Jr. & Lowell Bergman, *The Conflict in Iraq: Foreign Fighters; Militant Imams Under Scrutiny Across Europe; Calls to Back 'Global Jihad' Are Cited*, N.Y. TIMES, Jan. 25, 2005, at A9, *available at* 2005 WLNR 1014782 (discussing some of the tighter measures taken by European countries against militant imams, including increased "surveillance of militant Muslim clerics and mosques in their countries").

10. *Cf.* Robert S. Leiken, *Europe's Angry Muslims*, FOREIGN AFF., July 1, 2005, at 120, 133, *available at* 2005 WLNR 12587515 (concluding that "[o]ne thing is certain: . . . Europe needs to develop an integration policy that works").

11. *Nightline: Article of Faith* (ABC television broadcast Feb. 9, 2004) (statement of Richard Gizbert, ABC News) (transcript on file with the *St. Mary's Law Journal*).

schools," some of which "were set up by . . . the very fundamentalists that the French government claims to be fighting"[12]—the ban has been strictly enforced, even resulting in some expulsions.[13]

Other countries have focused instead on regulating the curriculum in private Islamic schools. In England, the Chief Inspector of Schools, David Bell, has called on Muslim schools to reform their curriculum so that students "acquire an appreciation of and respect for other cultures in a way that promotes tolerance and harmony," and suggested that the government monitor faith schools "to ensure that pupils receive an understanding of not only their own faith but of other faiths and the wider tenets of British society."[14] Bell's remarks sparked a controversy, as he was accused of Islamophobia for singling out Muslim schools.[15] In the Netherlands, a report by intelligence services concluded that Dutch Muslim schools "are partially funded by donations from Libya and Saudi Arabia, indoctrinate students, and advocate doctrines that are so extremist that they 'might be harmful to the democratic legal order.'"[16] Islamic schools in the Netherlands have also become a target of anti-Muslim backlash, with one such school being firebombed in the aftermath of filmmaker Theo van Gogh's murder by Muslim extremists.[17] And in Germany, after a journalistic investigation discovered that the King Fahd Academy in Bonn was inciting holy war and instructing young students in the use of martial arts and crossbows, officials announced their intention to shut

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12. *Id.* (statement of Mona Eltahawy). According to Nightline host Chris Bury, Mona Eltahawy is the "managing editor of *Arabic Women's eNews*, a non-profit web-site." *Id.*

13. Carol Eisenberg, *Standoff over Head Scarfs*, NEWSDAY (N.Y.), Dec. 13, 2004, at A20.

14. Tony Halpin, *Islamic Schools Are Threat to National Identity, Says Ofsted*, TIMES (London), Jan. 18, 2005, at 11, *available at* 2005 WLNR 671290.

15. *See* Sean Coughlan, *Muslim Schools 'Deeply Upset,'* BBC NEWS (U.K.), http://news.bbc.co.uk/2/hi/uk_news/education/4184319.stm (last visited Mar. 20, 2006) (discussing Muslim educators' negative reactions to Bell's remarks) (on file with the *St. Mary's Law Journal*).

16. Sharon Sadeh, *Dutch Tolerance May Benefit Muslim Extremists*, HA'ARETZ (Israel), *available at* http://www.religionnewsblog.com/333-.html (follow "http://www.haaretzdaily.com/" hyperlink) (last visited Jan. 27, 2006) (quoting a report by Holland's General Intelligence and Security Service on Muslim schools in the Netherlands) (on file with the *St. Mary's Law Journal*).

17. Charles M. Sennott, *Killing Fuels Dutch Clash of Cultures*, BOSTON GLOBE, Nov. 20, 2004, at A1, *available at* 2004 WLNR 12094312.

the school down.[18] Although the school was supposed to be open only to children of diplomats exempt from German laws requiring children to attend schools that teach a state-approved curriculum, German Muslims had been granted exemptions and permitted to attend.[19] Recently, local officials concerned about the radical curriculum have begun clamping down on these exemptions; however, Saudi diplomatic pressure has kept the school open, and a legal battle may be brewing over whether German Muslims will be permitted to attend the school.[20] While these examples suggest that any attempt to regulate Islamic schools in the United States is sure to be fraught with controversy, the European experience does not completely reflect American constitutional commitments, experience, and values, and thus cannot be viewed as a precise roadmap for any attempt to reconsider U.S. policies.

B. *Islamist Schooling in the United States*

The United States, thus far, has not confronted the issue of radical Islamist schools within its borders. According to a 1999–2000 study by the National Center of Education Statistics, there are just 152 full-time Islamic schools in the United States, schooling fewer than 19,000 students.[21] Others have estimated that there are approximately 200 Muslim schools nationwide, and that they are attended by approximately 25% of the children of Muslim immigrants.[22] It is difficult to ascertain what percentage of these schools teach or adhere to a radical form of Islam, but anecdotal

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18. *See* Michael Isikoff & Mark Hosenball, *Terror 101: Are the Saudis Funding Schools Devoted to Fomenting Radical Islamic Ideology?*, NEWSWEEK Web Exclusive, Dec. 3, 2005, http://msnbc.msn.com/id/3660811/ (last visited Jan. 27, 2006) (discussing the school's situation but explaining that the German government eventually decided not to close the school) (on file with the *St. Mary's Law Journal*).

19. *See* David Crawford, *German Hosts Are Furious As Militant Islam Is Taught at Saudi Diplomatic School*, WALL ST. J., Dec. 7, 2004, at A12 (giving the initial reason for the King Fahd Academy's opening, quoting the individual in charge of overseeing curricula development in German public schools, and explaining why the German government allowed children of non-diplomats to attend).

20. *See id.* (reporting that some parents have "hired lawyers to challenge the order requiring their children to attend a licensed public school").

21. STEPHEN P. BROUGHMAN & LENORE A. COLACIELLO, U.S. DEP'T OF EDUC., PRIVATE SCHOOL UNIVERSE SURVEY: 1999–2000, at 6 (2001), *available at* http://nces.ed.gov/pubs2001/2001330.pdf (on file with the *St. Mary's Law Journal*).

22. ASMA GULL HASAN, AMERICAN MUSLIMS 145 (2001).

reporting suggests that at least some are providing instruction that is intolerant, anti-Semitic, and an apologia for terrorism.

When *The Washington Post*'s Marc Fisher visited the Muslim Community School in Potomac, Maryland, shortly after September 11, 2001, he was repeatedly told by students and faculty alike that the United States should not focus on al Qaeda, but rather should turn its focus to "'the real terrorists,' which is [the students'] code for Israel, which they refer to as 'the illegitimate Zionist regime.'"[23] Another investigation discovered that textbooks being used in several Islamic private schools in the New York area teach that Jews and Christians are decadent and immoral and that Jews are deceitful by nature.[24] Other journalists found that although some Islamist schools claim to promote tolerance, they have erased the State of Israel from world maps and use textbooks that promote hatred of non-Muslims.[25]

It is worth noting that these schools are not extremist *madrasas* of the type found in the Muslim world. "Rather, these schools appear to be American-style religious elementary, secondary, and college-level educational institutions teaching a full range of academic subjects."[26] Nonetheless, "the views they propagate are just as conducive to political extremism and even terrorism as those taught in the extremist madrasas of Pakistan or Saudi Arabia itself."[27] For example, reporters who visited one such school noted:

> Eleventh-graders at the elite Islamic Saudi Academy . . . study energy and matter in physics, write out differential equations in precalculus and read stories about slavery and the Puritans in English.

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23. *See* Marc Fisher, *Muslim Students Weigh Questions of Allegiance*, WASH. POST, Oct. 16, 2001, at B01, *available at* http://www.washingtonpost.com/ac2/wp-dyn/A63884-2001Oct15? (quoting the students' sentiments about Israel and implying that the faculty has the same sentiments).

24. Larry Cohler-Esses, *Sowing Seeds of Hatred: Islamic Textbooks Scapegoat Jews, Christians*, DAILY NEWS (N.Y.), Mar. 30, 2003, at 22, *available at* http://www.nydailynews.com/news/local/story/71199p-66134c.html.

25. Valerie Strauss & Emily Wax, *Where Two Worlds Collide: Muslim Schools Face Tension of Islamic, U.S. Views*, WASH. POST, Feb. 25, 2002, at A01, *available at* http://www.washingtonpost.com/ac2/wp-dyn/A61834-2002Feb24?.

26. Stephen Schwartz, *Reading, Writing, and Extremism: What They Are Teaching in Saudi-Financed American Schools*, WKLY. STANDARD, June 2, 2003, at 17, *available at* 2003 WLNR 13328021.

27. *Id.*

> Then they file into their Islamic studies class, where the textbooks tell them the Day of Judgment can't come until Jesus Christ returns to Earth, breaks the cross and converts everyone to Islam, and until Muslims start attacking Jews.[28]

The Islamic Saudi Academy (ISA), located in northern Virginia, has been a source of particular concern because of its particular links to terrorist activities. A former valedictorian was recently convicted on charges that he participated in a terrorist plot to assassinate President George W. Bush.[29] Another ISA graduate, Mohammad Osman Idris, was charged with lying to a grand jury investigating whether he planned to engage in terrorist activities against Israel, and the school's former comptroller was arrested "while videotaping the Chesapeake Bay Bridge and has been implicated" in terrorist-financing activities.[30] As a result, Senator Charles Schumer has called for a Justice Department investigation of the school's funding[31] and urged the Saudi government to disclose its involvement in the school's curriculum and to remedy the intolerant aspects of the curriculum.[32]

Much of the material taught in these schools can be traced to the influence of Wahhabi beliefs and the Saudi-financed organizations that have sought to propagate radical Islam worldwide.[33] A Free-

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28. Valerie Strauss & Emily Wax, *Where Two Worlds Collide: Muslim Schools Face Tension of Islamic, U.S. Views*, WASH. POST, Feb. 25, 2002, at A01, *available at* http://www.washingtonpost.com/ac2/wp-dyn/A61834-2002Feb24?.

29. David Stout, *Student from Virginia Is Convicted of Plotting with al Qaeda to Assassinate Bush*, N.Y. TIMES, Nov. 23, 2005, at A20, *available at* 2005 WLNR 18900813; *see also* Jerry Markon & Dana Priest, *Terrorist Plot to Kill Bush Alleged*, WASH. POST, Feb. 23, 2005, at A01, *available at* http://www.washingtonpost.com/ac2/wp-dyn/A43940-2005Feb22? (detailing the upbringing and schooling of the man convicted, in a newspaper article published after his indictment).

30. Press Release, Sen. Charles E. Schumer, Schumer: Is Saudi Academy in Virginia Another Madrassa? (Feb. 23, 2005), http://schumer.senate.gov/SchumerWebsite/pressroom/press_releases/2005/PR41490.VAIslamicSchool.022305.html (on file with the *St. Mary's Law Journal*).

31. Letter from Sen. Charles E. Schumer to Att'y Gen. Alberto Gonzales (Feb. 22, 2005), *available at* http://schumer.senate.gov/SchumerWebsite/pressroom/Letters/2005/Gonzalez%20Ltr%2002.22.05.pdf (on file with the *St. Mary's Law Journal*).

32. *Id.*

33. *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 52, 372 (2004), *available at* http://www.9-11commission.gov/report/911Report.pdf (representing "Wahhabism" as a "Sunni fundamentalist interpretation of Islam" and linking the growth of Wahhabism, "nurtured by Saudi-funded institutions," to al Qaeda's resurgence in Afghanistan from 1996 to 1998).

dom House Report on Saudi influence of American Muslim institutions found that a book for high school students, provided by Saudi sources, teaches students "to prepare for *jihad* in the sense of war against Islam's enemies, and to strive to attain military self-sufficiency."[34] In testimony before the Senate Judiciary Committee, Saudi expert Simon Henderson commented:

> Saudi Arabia has set up other organisations [sic] which it claims are non-official. They are a conduit for Saudi government purposes and the Islamic charitable donations of Saudi individuals. They include:
>
> World Association of Muslim Youth (WAMY) . . . .
>
> . . . .
>
> WAMY operations in the United States include disseminating hateful literature and Wahhabist propaganda to Islamic schools and [c]enters.[35]

The 9/11 Commission Report similarly noted that the Saudi Ministry of Islamic Affairs uses government funds "to spread Wahhabi beliefs throughout the world, including in mosques and schools."[36] Furthermore, "even in affluent countries, Saudi-funded Wahhabi schools are often the only Islamic schools."[37]

Government officials have recognized that home-grown terrorists influenced by radical ideologies have the potential to pose a significant threat. For example, FBI Director Robert Mueller recently commented:

> [W]e remain concerned about the potential for al-Qa'ida to leverage extremist groups with peripheral or historical connections to al-Qa'ida, particularly its ability to exploit radical American converts and other indigenous extremists. While we still believe the most serious threat to the Homeland originates from al-Qa'ida members located overseas, the bombings in Madrid last March have heightened

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34. FREEDOM HOUSE, CTR. FOR RELIGIOUS FREEDOM, SAUDI PUBLICATIONS ON HATE IDEOLOGY FILL AMERICAN MOSQUES 15 (2005), http://www.freedomhouse.org/religion/pdfdocs/FINAL%20FINAL.pdf (on file with the *St. Mary's Law Journal*).

35. *Terrorism: Two Years After 9/11, Connecting the Dots: Hearing on Institutionalized Islam: Saudi Arabia's Islamic Policies and the Threat They Pose Before the Subcomm. on Terrorism, Technology and Homeland Security of the S. Comm. on the Judiciary*, 108th Cong. 7 (2003) (statement of Simon Henderson, Founder, Saudi Strategies), *available at* http://judiciary.senate.gov/hearing.cfm?id=910 (follow "Mr. Simon Henderson" hyperlink).

36. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 372 (2004), *available at* http://www.9-11commission.gov/report/911Report.pdf.

37. *Id.*

> our concern regarding the possible role that indigenous Islamic extremists, already in the U.S., may play in future terrorist plots . . . .
>
> . . . .
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> Extremist recruitment at schools and universities inside the United States also poses a particularly difficult problem. Because the environment on campuses is so open and isolated, schools provide a particularly impressionable and captive audience for extremists to target.[38]

Given the ideology that is being propagated in some Islamic schools within the United States, the possibility that some of the children educated in these schools will grow up to espouse Islamic radicalism and participate in the funding, support, or commission of terrorism is a viable concern.

C. *Possible Approaches*

The United States could address the problem of a radicalized schoolhouse in a number of ways. First, recognizing the prominent role the Saudi government plays in disseminating the ideology of radical Islam, the United States could use diplomatic and legal means to restrict the flow of Saudi propaganda within its borders. Second, the government could harness its educational policies to address this issue in a number of ways. Most dramatically, the government could end the practice of private schooling altogether, requiring all children to attend public schools where they would be subject to a secular education and social integration with students of other religions. Alternatively, the government could regulate the content of the material private schools teach. This regulation has two possible forms: (1) content-based restrictions on what can be taught, such as barring the use of textbooks that teach hatred of other religions; and (2) content-based mandatory curriculum elements, such as a requirement that students be instructed in civics, patriotism, and tolerance.

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38. *Current and Projected National Security Threats to the United States: Hearing Before the S. Select Comm. on Intelligence*, 109th Cong. 24-25 (2005) (prepared statement of Robert S. Mueller, III, Director of the Federal Bureau of Investigation).

III. Reducing the Saudi Influence

A. *Diplomatic Efforts*

One way to reduce the teaching of radical Islamist ideologies within the United States is to curb Saudi Arabia's role in providing support to private schools that teach radical Islam and incite hatred against non-Muslims. Much of this effort would presumably be undertaken through diplomatic measures, rather than the imposition of legal controls.[39] Recently, some policymakers have called for greater diplomatic pressure to curb Saudi distribution of propaganda to Muslim institutions in the United States. For example, in a hearing before the Senate Appropriations Committee, Senator Kit Bond questioned Secretary of State Condoleeza Rice as to whether the State Department was taking sufficient action to curb the spread of Saudi propaganda materials to schools and other Islamic institutions in the United States.[40] Secretary Rice responded:

> [W]e are working with the Saudi Government on activities that may be funded, particularly through nongovernmental organizations and so-called charitable organizations that have the effect of spreading hateful propaganda or training people or even funding terrorism. It's a very active program on the financing of terrorism. We've made some progress. The Saudis listed, for instance, one of the big charitable organizations, al Haramain, which has been active in this way. And we're going to continue to work with them on it, because there can't be support for radical extremist activities in other countries. I think the Saudis understand that, and we're working very actively with them.[41]

In response to a similar question on this issue, FBI Director Robert Mueller suggested that the Saudis have become more receptive to

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39. *See, e.g., Saudi Government Propaganda in the United States: Avowed Ally or Secret Enemy?* (Am. Enterprise Inst. Internet webcast Feb. 16, 2005), http://www.aei.org/events/eventID.1007,filter.foreign/event_detail.asp (comments of R. James Woolsey, former director of the Central Intelligence Agency, and Nina Shea, Director, Center for Religious Freedom, during a panel discussion) (indicating that the American government must do something about the dissemination of anti-Western material, and explaining that since Saudi Arabia is an ally, asking for cooperation is a more strategic policy than an outright ban on the material because of potential First Amendment issues) (on file with the *St. Mary's Law Journal*).

40. *Emergency Supplemental Appropriations for Fiscal Year 2005: Hearing Before the S. Comm. on Appropriations*, 109th Cong. 142 (2005) (question from Sen. Kit Bond).

41. *Id.* (testimony by Secretary of State Condoleeza Rice).

diplomatic pressures to curb the exportation of extremist materials, commenting:

> [T]here has been a shift in the attitude of Saudi Arabia in the wake of the May 2003 bombings—a substantial shift, and an understanding and a recognition of the threat not only to Saudi Arabia, but to Saudi Arabia's interests around the world from those elements who have been radicalized.[42]

While there have been some efforts to pressure the Saudi government into ceasing its radical proselytizing, some politicians have argued that the United States should take a harder line. Congressman Anthony Weiner, for example, recently introduced a bill calling for an end to all foreign aid for Saudi Arabia, citing in part the fact that "Saudi Arabian Government-funded textbooks used both in Saudi Arabia and also in North American Islamic schools and mosques have been found to encourage incitement to violence against non-Muslims."[43] However, while diplomatic pressure may be able to effect some changes in Saudi behavior, it is worth considering whether there may be tactics beyond mere diplomatic pressure that could be directed against the spread of Saudi-funded radical propaganda.

B. *Legal Restrictions on the Importation and Dissemination of Ideological Materials*

Could the United States government enact legal measures barring Saudi Arabia from importing and distributing ideological materials to private schools without violating the Constitution?[44]

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42. *Current and Projected National Security Threats to the United States: Hearing Before the S. Select Comm. on Intelligence*, 109th Cong. 57 (2005) (statement of Robert S. Mueller, III, Director of the Federal Bureau of Investigation) (responding to a question from Sen. Kit Bond).

43. H.R. 505, 109th Cong. § 2 (2005).

44. A related question is to what extent the government may employ immigration policies that exclude aliens from the United States based on concerns they will advocate or teach radical Islam. Although a broader examination of the role of immigration policy in the War on Terror is beyond the scope of this paper, it is notable that the Supreme Court has long held that Congress has plenary power over immigration, including the power to exclude aliens on ideological grounds. *See, e.g.*, Kleindeist v. Mandel, 408 U.S. 753, 769-70 (1972) (summarizing its holding that the First Amendment does not provide a basis for challenging the plenary exclusion of a nonresident alien); Turner v. Williams, 194 U.S. 279, 294 (1904) (holding that the exclusion of an alien, on the grounds that he is an anarchist, did not violate the First Amendment). The only constitutional limit on this plenary exclusion power is that "[c]itizens who show injury to their [F]irst [A]mendment interests from

the exclusion of aliens may obtain judicial review of exclusions, but the standard of review will be far more deferential to the government than is usual in [F]irst [A]mendment cases." Steven J. Burr, Comment, *Immigration and the First Amendment*, 73 CAL. L. REV. 1889, 1889 (1985). Congress has moved away from employing broad ideological exclusions, and has expressed that:

> An alien . . . shall not be excludable or subject to restrictions or conditions on entry into the United States . . . because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States, unless the Secretary of State personally determines that the alien's admission would compromise a compelling United States foreign policy interest.

8 U.S.C. § 1182(a)(3)(C)(iii) (2000). However, Congress has provided an exception to this general policy for acts of advocacy of terrorism or association with terrorist organizations. *See id.* § 1182(a)(3)(B)(i) (2000 & Supp. II 2002) (excluding aliens involved in "terrorist activities" from entry into the United States).

> In the deportation context, the Supreme Court has at times suggested that resident aliens may challenge deportation on First Amendment grounds. For example, in one of its opinions, Justice Frank Murphy stated:
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> [O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments . . . .
>
> Since resident aliens have constitutional rights it follows that Congress may not ignore them in the exercise of its "plenary" power of deportation.

Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Murphy, J., concurring). Notwithstanding this statement, the ability to challenge deportations on First Amendment grounds now appears to be seriously limited by Congress's jurisdiction-stripping provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. *See* Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 482 (1999) (holding that federal courts have no jurisdiction to review the Attorney General's decisions to "*commence* proceedings, *adjudicate* cases, or *execute* removal orders" for deportation, even though the respondent-resident aliens were claiming that the Attorney General selectively enforced their deportation based on their political beliefs and membership in a certain political organization (quoting Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, 8 U.S.C. § 1252(g) (1994 & Supp. III 1998))). However, "in nonexclusion and nondeportation contexts, U.S. law has generally protected aliens' speech from criminal punishment using the same standards that apply to citizens." Maryam Kamali Miyamoto, *The First Amendment After* Reno v. American-Arab Discrimination Committee*: A Different Bill of Rights for Aliens?*, 35 HARV. C.R.-C.L. L. REV. 183, 193 (2000). Under its constitutional power to "establish a uniform rule of naturalization," U.S. CONST. art. I, § 8, Congress also has the authority to deny naturalization to aliens who have engaged in certain types of advocacy. *See* 8 U.S.C. § 1424(a) (2000) (describing the types of activity that may cause a person to be denied naturalization); *cf.* Price v. U.S. Immigration & Naturalization Serv., 962 F.2d 836, 843-44 (9th Cir. 1992) (declaring that an inquiry into the petitioner's involvement in certain organizations, and a subsequent denial of his naturalization as a result of possible affiliation with these organizations, is not a violation of his First Amendment associational rights). The Court has suggested at times that it will construe the imposition of ideological restrictions narrowly, "in accord with[ ] the theory and practice of our Government in relation to freedom of conscience," *Schneiderman v. United States*, 320 U.S. 118, 132 (1943), and that aliens who do not seek to be naturalized are not governed by these broader

The question of whether foreign sovereigns can assert constitutional rights has not been conclusively resolved. Louis Henkin has claimed that foreign governments do not have constitutional rights.[45] Although the Supreme Court has not definitively ruled on this issue, Lori Fisler Damrosch has suggested that:

> [I]n the absence of an explicit indication from the political branches, courts will not discriminate against foreign sovereigns in circumstances where the rights of other legal persons have already been established. When one or both of the political branches has clearly expressed its will in the field of foreign affairs, however, the Supreme Court usually either validates the action explicitly, or achieves the same effect by invoking one of the several doctrines militating against judicial interference in the conduct of foreign affairs.[46]

This suggests that if the U.S. government took action to restrict the importation of ideological materials from Saudi Arabia into the United States, the Saudi government itself would not be able to sustain a First Amendment challenge to that action.

In fact, the Supreme Court has upheld some regulations concerning the dissemination of speech by foreign countries and their agents. For example, the Foreign Agents Registration Act of 1938 (FARA) imposes registration, reporting, and disclosure requirements on persons acting as agents of a foreign principal, and requires that informational materials distributed on behalf of foreign principals be labeled as such.[47] In *Meese v. Keene*,[48] the Court upheld the labeling requirement, noting that:

> Congress did not prohibit, edit, or restrain the distribution of advocacy materials in an ostensible effort to protect the public from conversion, confusion, or deceit.

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speech restrictions. *See* Note, *Constitutional Limitations on the Naturalization Power*, 80 YALE L.J. 769, 769-70 (1971) (describing the concept of unfettered congressional power over naturalization of resident aliens). This overall picture suggests that speech-based restrictions on immigration are more likely to pass constitutional muster than other types of restrictions aimed at curbing radical Islamist advocacy.

45. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 285 n.* (2d ed. 1996).

46. Lori Fisler Damrosch, *Foreign States and the Constitution*, 73 VA. L. REV. 483, 490 (1987) (footnotes omitted).

47. *See* Foreign Agents Registration Act of 1938, 22 U.S.C. §§ 612, 614 (2000) (imposing certain requirements for registration statements that foreign agents must file, and placing restrictions on any political propaganda that the agent may propagate).

48. 481 U.S. 465 (1987).

> To the contrary, Congress simply required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda.[49]

It is unclear whether the distribution of Saudi educational materials would fall under this Act. Teachers at Saudi-funded academies, even those who are paid directly by the Saudi government, would probably be considered exempt from the registration requirement.[50] However, individuals considered foreign agents on behalf of the Saudi government who disseminate educational materials may be required to file and label the materials in accordance with the statute.[51] Although FARA has rarely been enforced, "Justice [Department] spokesman [Bryan] Sierra said a growing number of FARA cases are arising out of terrorism-related investigations. The Patriot Act also enhanced criminal penalties (up to [ten] years in prison) for FARA violations."[52] It also remains unclear whether greater enforcement of FARA would reduce the dissemination of Saudi materials because a great deal of Saudi-funded educational material is already labeled as such, but perhaps greater enforcement of the requirement that such materials be filed with the Attorney General would force the Saudis to take greater accountability for the information being disseminated with their support, and thereby might encourage them to alter the content of those materials.[53]

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49. Meese v. Keene, 481 U.S. 465, 480 (1987). At the time the case was litigated, the statute referred to the materials at issue as "political propaganda"; although this terminology was upheld by the Court, the statute was subsequently amended to use the less pejorative term "informational materials." *See* Pub. L. No. 104-65, § 9(4)(A), 109 Stat. 691, 670 (1995) (codified as amended at 22 U.S.C. § 614(a) (2000)) (amending the text of subsection A, but not changing the title of § 614, "Filing and labeling of political propaganda").

50. *See* 22 U.S.C. § 613(e) (2000) (providing for an exemption for "[a]ny person engaging or agreeing to engage only in activities in furtherance of bona fide religious, scholastic, academic, or scientific pursuits or of the fine arts").

51. *See id.* § 614 (listing the requirements for the "[f]iling and labeling of political propaganda" for individuals designated as foreign agents).

52. Michael Isikoff & Mark Hosenball, *Did Saudis Deceptively Finance Ad Campaign?*, NEWSWEEK Web Exclusive, Dec. 15, 2004, http://www.msnbc.msn.com/id/6719895/site/newsweek/ (last visited Jan. 31, 2006) (on file with the *St. Mary's Law Journal*).

53. *Cf.* FREEDOM HOUSE, CTR. FOR RELIGIOUS FREEDOM, SAUDI PUBLICATIONS ON HATE IDEOLOGY FILL AMERICAN MOSQUES 16-17 (2005), *available at* http://www.freedomhouse.org/religion/pdfdocs/FINAL%20FINAL.pdf (outlining a strategy to prevent the spread of hate-filled publications sponsored, at least in part, by the Saudi government) (on file with the *St. Mary's Law Journal*).

Another statute that historically has been used to regulate the importation of informational materials into the United States is the Trading with the Enemy Act (TWEA).[54] In *Teague v. Regional Commissioner of Customs*,[55] the Second Circuit upheld a provision of TWEA that required persons seeking to import publications from certain designated nations to obtain a license from the Director of Foreign Assets Control.[56] Applying intermediate scrutiny under the *O'Brien* test,[57] Judge Hays concluded that the government's substantial interest in preventing the flow of money to enemy states justified this infringement on First Amendment freedoms.[58] However, in a dissent from the Supreme Court's denial of certiorari, Justice Black suggested that TWEA and related regulations raised a serious First Amendment issue.[59] In 1977, Congress transferred the President's peacetime authority to embargo to the International Emergency Economic Powers Act (IEEPA), but excluded the right to bar the importation of various

54. *See* Trading with the Enemy Act, 50 U.S.C. app. § 5(b)(1) (2000) (giving the President the authority to regulate transactions benefiting foreign countries during wartime); *cf.* Regan v. Wald, 468 U.S. 222, 232-36 (1984) (discussing 50 U.S.C. app. § 5(b) with regard to the United States's trade embargo against Cuba).

55. 404 F.2d 441 (2d Cir. 1968).

56. *See* Teague v. Reg'l Comm'r of Customs, 404 F.2d 441, 445-46 (2d Cir. 1968) (explaining that the restraint on obtaining publications from hostile nations was for the purpose of preventing cash flow to those nations, and that therefore any First Amendment freedom restrictions were only incidental to that proper purpose).

57. *See* United States v. O'Brien, 391 U.S. 367, 381-82 (1968) (applying intermediate scrutiny to governmental actions that have incidental effects on free speech). Under the *O'Brien* test, the Court will uphold a government regulation if it complies with the following factors:

> [I]f it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

58. *See Teague*, 404 F.2d at 445-46 (asserting the general purpose behind the regulation and stating, "Applying the Supreme Court's [*O'Brien*] test here we conclude that the infringement of [F]irst [A]mendment freedoms is permissible as incidental to the proper, important, and substantial general purpose of the regulations"); *see also* Veterans & Reservists for Peace in Vietnam v. Reg'l Comm'r of Customs, 459 F.2d 676, 682, 684 (3d Cir. 1972) (upholding the TWEA against a First Amendment challenge because of the government's "compelling interest in regulating the flow of money to certain countries").

59. Teague v. Reg'l Comm'r of Customs, 394 U.S. 977, 979-80 (1969) (mem.) (Black, J., dissenting), *denying cert. to* 404 F.2d 441 (2d Cir. 1968).

informational materials.[60] In 1988, Congress amended the TWEA itself, denying the President the authority to bar the importation of informational material even during wartime, with the legislative history reflecting the notion that "no prohibitions should exist on imports to the United States of ideas and information if their circulation is protected by the First Amendment."[61] Thus, under the current statutory scheme, there is no provision for restricting the importation of informational materials, and it is possible that a scheme that required licensing to import informational materials would raise potential constitutional questions.[62]

Certainly, a scheme more restrictive of the ability to receive informational materials from a foreign country than the licensing requirement upheld in *Teague* would be subject to a serious constitutional challenge. In *Lamont v. Postmaster General*,[63] the Court held that a statute requiring the U.S. Postal Service to detain and destroy any unsealed mail designated as communist political propaganda from foreign countries, unless the recipients returned a reply card indicating willingness to receive such mail, was a violation of the addressees' First Amendment rights.[64] In a concurrence, Justice Brennan emphasized that the rights being protected were those of the Americans who had the right to receive the infor-

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60. *Compare* Act of Dec. 28, 1977, Pub. L. No. 95-223, § 101(a), 91 Stat. 1625, 1625 (codified as amended at 50 U.S.C. app. § 5(b)(1) (2000)) (making the TWEA applicable only during wartime by deleting the provision that previously allowed the President to follow the Act "during any other period of national emergency declared by the President"), *with* International Emergency Economic Powers Act, Pub. L. No. 95-223, § 202, 91 Stat. 1626, 1626 (codified at 50 U.S.C. § 1701 (2000)) (giving the President specific authority to act in the event that an "unusual and extraordinary threat" exists and "the President declares a national emergency with respect to such threat"), *and id.* § 203(a)(1), 91 Stat. at 1626 (codified at 50 U.S.C. § 1702(a)(1) (2000 & Supp. II 2002)) (providing the authority to restrict trade with foreign countries during a national emergency), *and* Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 525(c), 108 Stat. 382, 474-75 (codified as amended at 50 U.S.C. § 1702(b)(3) (2000)) (amending the IEEPA by adding a paragraph that specifically limits the President's powers to regulate "informational materials").

61. Cernuda v. Heavey, 720 F. Supp. 1544, 1549 (S.D. Fla. 1989) (quoting H.R. REP. No. 100-40, pt. 3, at 113 (1987)). *Cernuda* construed the "informational materials" exception to the TWEA to include paintings from Cuba, thus avoiding questions about the Act's constitutionality with regard to the First Amendment. *Id.* at 1553.

62. *But cf.* 50 U.S.C. § 1702(b)(3) (2000) (divesting the President of authority to regulate the export of "informational materials," *except* "to the extent that such controls promote the nonproliferation or antiterrorism policies of the United States").

63. 381 U.S. 301 (1965).

64. Lamont v. Postmaster Gen., 381 U.S. 301, 305 (1965).

mation, not those of foreign countries or foreigners to disseminate the information.[65] Therefore, while the government of Saudi Arabia itself might not be able to assert a violation of its First Amendment rights if the United States government sought to restrict its dissemination of radical educational materials such as textbooks, persons within the United States seeking to obtain materials from Saudi Arabia may have a valid First Amendment claim if the government restricted their access to such materials. Nonetheless, this example highlights the point that as long as there are individuals within the United States who want to access, disseminate, or teach radical Islam, simply cutting off Saudi support will not end their ability to do so. Furthermore, reducing the dissemination of Saudi propaganda alone will not prevent some people from teaching radical Islamist ideologies to children. Thus, in order to address this problem in its entirety, one must consider the relationship between the United States educational system and the promotion or inhibition of certain civic or ideological commitments and assess whether the regulation of education can properly play a role in the War on Terror. However, any discussion about whether to regulate private, religious schools requires a consideration of the normative as well as the constitutional principles that underlie the respective rights and interests of parents, children, and the state in determining the sources of authority and values that control educational decision-making.

IV. REGULATING THE EDUCATIONAL SYSTEM

A. *Theoretical Framework*

Our current jurisprudence concerning control over education is influenced by different theories about the role of education in society, but is wedded to none of them. Amy Gutmann suggests a theoretical framework for considering competing theories regarding the role of education in society, proposing three categories of theories: the *family state*, the *state of families*, and the *state of individuals*.[66] These categories reflect both the sources of authority and the

65. *See id.* at 307-08 (Brennan, J., concurring) (characterizing the right to receive publications as a fundamental right and discussing the addressees' standing as receivers of the information, as opposed to the unlikely to succeed First Amendment claim of the foreign senders to disseminate the information).

66. AMY GUTMANN, DEMOCRATIC EDUCATION 22 (1987).

purposes of education that each of these theories proposes. The theory of the family state proposes that the state should, in fulfillment of its own interests in social harmony and political cohesion, educate children into believing that the state is the best guarantor of the good life.[67] In the state of families theory, by contrast, parents have a natural right to determine the nature of their children's education.[68] This right is presupposed on the dual grounds that parents are presumed to be the best protectors of children's interests, and that the individual rights and freedoms of parents include the right to engage in activities for the benefit of their children.[69] Finally, the state of individuals theory supposes that neither the state nor the family have the right to fully impose its values on children through the educational system.[70] Rather, the state of individuals ascribes to a principle of neutrality; in order to provide the greatest range of freedom, children must be exposed to and given the opportunity to choose between different conceptions of the good life.[71] The influences of these different theories can be seen, respectively, in discussions of *state interests*, *parents' rights*, and *best interests of the child/children's rights*. Most of the time, these three interests are in unison, and there is no need to determine which rights and interests are dominant over the others.

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67. *See id.* at 23-24 (explaining Plato's argument for the family state). Under Plato's theory, the state cannot justify its educational claims unless "its conception of the good life for every person [is] the *right* one." *Id.* at 24. Gutmann concludes that the family state theory is not the proper way to educate because what constitutes the "good life" is a subjective determination, based upon personal opinions and moral convictions regarding the good life. *Id.* at 28.

68. *See id.* at 28-29 (characterizing the state of families as "[r]adically opposed to the family state," and citing to others, such as John Locke and Thomas Aquinas, for justification of putting educational choices solely in the hands of parents). Gutmann criticizes this theory of education for two reasons. First, parents' tendency "to insulate their children from exposure to ways of life or thinking that conflict with their own" deprives children of "the intellectual skills necessary for rational deliberation." *Id.* at 29. The second and more important reason, according to Gutmann, is that children, as "members of both families and states," should not have exclusive educational power vested within a single authority. *Id.* at 30.

69. *See id.* at 29 (asserting the modern-day argument supporting the state of families theory and citing to Charles Fried's justification of this theory).

70. *See id.* at 33-34 (discussing the birth of the state of individuals theory). According to Gutmann, this theory stems from criticism that the state and families bias children to choose certain ways of life and discourage them from choosing other ways. *Id.*

71. AMY GUTMANN, DEMOCRATIC EDUCATION 34 (1987).

However, in the difficult cases, the courts have had to apportion rights, interests, and liberties among all three.

B. *The Schooling Cases*

The question of whether, and if so to what extent, societies should seek to control the education and inculcation of values of its citizens is one of the fundamental problems of social organization. Are there any basic values or beliefs which all members of society must share in order to preserve social order, or does the invisible hand also guide the marketplace of ideas in such a way as to promote the common good? Totalitarian regimes from ancient Sparta to the Soviet Union viewed monopolistic control over education as a crucial means of maintaining social order, but it does not necessarily follow that a completely laissez-faire approach to education is the only appropriate response of liberal democratic societies.

Education and the maintenance of civil society have always been closely entwined in American thinking. For the Founders, "[t]he most obvious republican instrument for eliminating . . . prejudices and inculcating virtue in a people was education."[72] This tradition has carried itself on throughout American history; as Diane Ravitch notes, "From Noah Webster to Thomas Jefferson to Horace Mann to John Dewey to Robert Hutchins, American education has been offered many definitions of the ways in which education and democracy are connected, the ways in which one might promote the other."[73] Yet, perhaps because of this connection between education and civic participation, times of stark social division have seen an appeal to common, public schooling as a balm to ensure that such divisions are not carried on to a new generation. The emergence of the Common School Movement in the mid-nineteenth century, which sought to assimilate Catholic immigrants,[74] the English-only and compulsory public schooling laws that accom-

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72. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 426 (1969).

73. Diane Ravitch, *Education and Democracy*, *in* MAKING GOOD CITIZENS: EDUCATION AND CIVIL SOCIETY 26 (Diane Ravitch & Joseph P. Viteritti eds., 2001).

74. *See* Lloyd P. Jorgenson, The State and the Non-Public School 1825–1925, at 20-30 (1987) (discussing the Common School Movement and its effects on nineteenth century Catholics).

panied a wave of nativism and anti-communism in the 1920s,[75] and the school desegregation fights that went hand-in-hand with the Civil Rights Movement all reflected concern about the consequences of too-sharp divisions among citizens. In recent years, the terrorist attacks of 9/11 have also led to renewed calls for a common civic education.[76]

When the ideal of a common civic culture has clashed with individual freedoms, the Supreme Court has had to serve as arbiter of these competing interests. The major constitutional law cases delineating the limits of parental and state rights with regard to education are *Meyer v. Nebraska*,[77] *Pierce v. Society of Sisters*,[78] and *Wisconsin v. Yoder*.[79]

Meyer involved a state law barring the teaching of modern languages in public and private schools to students below the eighth grade; a law expressly designed to facilitate the assimilation of various immigrant groups.[80] The Court held that such a restriction violated the due process liberty interests "long recognized at common law as essential to the orderly pursuit of happiness by free men" by infringing on the rights of parents to control the education of their children, and the rights of teachers to instruct.[81]

In *Pierce*, which followed shortly after *Meyer*, the Court struck down an Oregon law requiring all students to attend public

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75. *See* Paula Abrams, *The Little Red Schoolhouse:* Pierce, *State Monopoly of Education and the Politics of Intolerance*, 20 CONST. COMMENT. 61, 61-62 (2004) (describing the American psyche after World War I and its effect on the educational environment). Somewhat ironically, opponents of Oregon's compulsory public schooling law were able to critique the national security arguments supporting compulsory public education by noting that state monopoly over education was typical of the Soviet Union. *See id.* at 68-70 (discussing the strategy that opponents of the law utilized).

76. *See, e.g.*, William J. Bennett, *Teaching September 11*, WALL ST. J., Sept. 10, 2002, at A12 (asserting lessons that parents and schools should teach children in the wake of the September 11, 2001 attacks, and criticizing the curriculum designed by the National Education Association); Thomas Friedman, Op-Ed., *9/11 Lesson Plan*, N.Y. TIMES, Sept. 4, 2002, at A21, *available at* 2002 WLNR 4029968 (setting forth a lesson plan for teachers in the aftermath of the September 11 attacks).

77. 262 U.S. 390 (1923).

78. 268 U.S. 510 (1925).

79. 406 U.S. 205 (1972).

80. *See* Meyer v. Nebraska, 262 U.S. 390, 397-98 (1923) (providing the text of the act that created the law, and setting forth the legislative purpose behind the act).

81. *See id.* at 399-400 (asserting that these rights are within the ambit of the Fourteenth Amendment).

schools.[82] In that case, the Court delineated which spheres of control properly belonged to the state and which spheres of control were reserved to parents to control their children's education. In this regard, the Court stated:

> No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.
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> . . . [However,] [t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[83]

Thus, while there is a sphere for parents to control their children's education and ensure that they are free from "standardization," the Court acknowledges the significant state interests in reasonable regulation over private education.

Finally, in *Yoder*, the Supreme Court held that where Wisconsin's compulsory schooling laws conflicted with the fundamental free exercise and parental rights of parents with respect to their children's religious upbringing—as applied to the Old Order Amish—the state's interests should yield.[84] In that case, the Court stated that because the state's primary interests in promoting universal education—ensuring that its citizens are able to participate in an open political system and preparing individuals to be economically independent and self-reliant[85]—were sufficiently met by

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82. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 533-34, 536 (1925) (affirming the lower court's decision to prevent the State of Oregon from enforcing the law).

83. *Id.* at 534-35.

84. *See* Wisconsin v. Yoder, 406 U.S. 205, 233-34 (1972) (holding that the Free Exercise Clause of the First Amendment and the Fourteenth Amendment due process right of parents to direct the religious upbringing of their children prevail over the state's interest).

85. *See id.* at 219 (accepting the state's argument for its compulsory education system).

the Amish lifestyle, the state's interest in universal education was not sufficiently compelling to serve as a basis for permitting interference with fundamental religious and parental rights.[86]

While *Meyer, Pierce*, and *Yoder* represent broad statements of principle asserting fundamental parental rights over their children's education, other cases have attempted to distinguish between those regulations that represent encroachments on parental rights and those that properly fall under the purview of reasonable state regulation of private schooling. In *Farrington v. Tokushige*,[87] the Supreme Court held that a comprehensive set of state regulations over foreign-language schools that gave "affirmative direction concerning the intimate and essential details of such schools, intrust[ed] [sic] their control to public officers, and den[ied] both owners and patrons reasonable choice and discretion in respect of teachers, curriculum and text-books" was a violation of the fundamental rights of school owners, parents, and children.[88] Following this case, lower courts have struck down state laws as applied to private religious schools that purport to comprehensively regulate aspects of private school curriculum such as the content and manner of teaching particular subjects, the educational policies intended to be achieved, and the textbooks to be used.[89] However, courts have upheld requirements mandating school attendance, requiring parochial schools to report attendance to the state, mandating that private school teachers be certified by the state's board of

86. *See id.* at 228-29, 233-34 (discussing the Amish lifestyle and holding that the First and Fourteenth Amendments prevented Wisconsin from enforcing its law).

87. 273 U.S. 284 (1927).

88. *See* Farrington v. Tokushige, 273 U.S. 284, 298-99 (1927) (explaining that the federal government deprived Fifth Amendment fundamental rights through the enforcement of regulations that compelled "foreign language schools"—schools that did not teach courses in the English or Hawaiian languages—to obtain permits from the "department of public instruction" to operate). In *Farrington*, the law at issue was an act of the Hawaiian Legislature, which was a United States territorial legislature, due to the fact that Hawaii was not part of the Union at that time. *Id.* at 299. Resultantly, the Court construed the fundamental rights as guaranteed by the Fifth Amendment, as opposed to the Fourteenth Amendment. *See id.* (equating Fourteenth Amendment fundamental rights guaranteed to state citizens with the Fifth Amendment fundamental rights guaranteed to citizens of U.S. territories).

89. *See, e.g.*, State v. Whisner, 351 N.E.2d 750, 770-71 (Ohio 1976) (striking down state educational "minimum standards" that were found to be an "absolute suffocation of independent thought and educational policy, and the effective retardation of religious philosophy engendered by application of these 'minimum standards' to non-public educational institutions").

education, and obliging private schools to comply with minimum curriculum standards as reasonable regulations that do not overly burden the rights established in *Meyer*, *Pierce*, and *Yoder*.[90]

This line of cases would seem to suggest the current constitutional limits of any attempt to regulate schools promoting radical religious beliefs.[91] Ostensibly, the state cannot compel public school attendance.[92] While the state may apply content-neutral

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90. *See, e.g.*, State *ex rel.* Douglas v. Faith Baptist Church, 301 N.W.2d 571, 572-73 (Neb. 1981) (noting in the court's syllabus that "[a]lthough parents have a right to send their children to schools other than public institutions, they do not have the right to be completely unfettered by reasonable government regulations as to the quality of the education furnished"); State v. DeLaBruere, 577 A.2d 254, 263-64 (Vt. 1990) (upholding the private school attendance reporting requirement against a claim that such laws burden free exercise rights). The courts have not addressed, under *Pierce*, what instruction might be considered "manifestly inimical to the public welfare." Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925). *But see* People v. Am. Socialist Soc'y, 195 N.Y.S. 801, 805, 810 (N.Y. App. Div. 1922) (upholding a state education law denying licensure to schools teaching "the doctrine that organized government should be overthrown by force, violence or unlawful means" (quoting a 1921 amendment that added section 79 to the New York Education Code)). *See generally* Eric A. DeGroff, *State Regulation of Private Schools: Does the Tie Still Bind?*, 2003 BYU EDUC. & L.J. 363 (2003) (detailing the changing status of state regulation of nonpublic schools across the United States over time).

91. *See* Eric A. DeGroff, *State Regulation of Private Schools: Does the Tie Still Bind?*, 2003 BYU EDUC. & L.J. 363, 368-80 (2003) (providing an overview for the cases that have ruled on constitutional issues involving the regulation by states of non-public schools). To the extent federalism places any limits on federal regulation of local private schools, *see* United States v. Lopez, 514 U.S. 549, 565-66 (1995) (noting that Congress's power under the Commerce Clause "does not include the authority to regulate each and every aspect of local schools"), or on state intrusion into foreign affairs, *see, e.g.*, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 413-14, 420 (2003) (invalidating a state law relating to the compensation of Holocaust victims on the grounds that it was preempted by federal law), this Article assumes that any of the regulation discussed herein would be enacted by whichever government body was appropriate, given the limits of the Commerce Clause, the limits of the federal government's foreign affairs and spending powers, or the limits of both.

92. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) (invalidating an Oregon education law that mandated public school attendance). Although the issue of state regulation of public school curriculum in order to promote civic values is beyond the scope of this Article, it is worth pointing out that while the government necessarily has the power to regulate the content of public school curriculum, *see* Bd. of Educ. v. Pico, 457 U.S. 853, 864 (1982) (noting that "local school boards must be permitted 'to establish and apply their curriculum in such a way as to transmit community values'"), the First Amendment also places some limits on public schools' control over students. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505, 510-11 (1969) (deciding that the Free Speech Clause protected students' right to wear black armbands protesting the Vietnam War); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that the Free Exercise Clause requires that a public school cannot compel students to recite the Pledge of Allegiance). These cases would suggest, for example, that attempts to impose a headscarf ban similar to the one imposed in France would be unconstitutional. Particularly, it is worth

regulations requiring school attendance, teacher certification, or general subject matter curriculum requirements, it cannot constitutionally bar the establishment of radical religious schools, dictate what is to be taught in such schools, or prohibit the teaching of radical forms of Islam within those schools. Notwithstanding these restrictions, the issue of whether it is possible to preempt the education of a terrorist implicates, on the one hand, the government's compelling interest in preventing terrorist attacks, and on the other hand, the limits of free speech, the free exercise of religion, and family privacy. The following sections address the normative and constitutional aspects of those issues with respect to the possibility of regulating private schools in order to prevent the inculcation of ideologies that lead to terrorism.

C. *The War Power*

The government's plenary power to preserve order and wage war has always been considered a necessary component of the social contract. As James Madison noted, "Security against foreign danger is one of the primitive objects of civil society."[93] Nevertheless, the Founders drafted the Constitution in such a way that sought to balance the legitimate concern for security with the desire to create a system that would protect liberty even in wartime.[94]

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noting that the right to cover one's head as a religious obligation was specifically contemplated by the drafters of the First Amendment. *See* DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 235-36 (1990) (restating the debate over a certain provision of the Bill of Rights where the Framers argued over the value of enumerating self-evident rights such as a man's right to wear a hat if he so chooses). *But see* Goldman v. Weinberger, 475 U.S. 503, 509-10 (1986) (holding that the military could restrict the wearing of headgear even though it was required by religious beliefs).

93. THE FEDERALIST NO. 41, at 269 (James Madison) (Jacob E. Cooke ed., 1961).

94. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 11, art. II, § 2, cl. 1 (separating the war powers between the Legislative and Executive branches); *id.* art. I, § 8, cl. 12 (prohibiting the Legislature from making Army appropriations for a term longer than two years); *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 579 (2004) (Scalia, J., dissenting) (arguing that the Court should adhere to the constitutional strictures provided for in wartime). According to Justice Scalia:

> Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis—that, at the extremes of military exigency, *inter arma silent leges.* Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it.

Id.

In practice, though, it has often been supposed that the expediencies of war and threats to national security justify certain infringements on rights that would not otherwise be justified by the Constitution. For example, the enactment of the Sedition Act of 1798,[95] despite its seemingly obvious contravention of the First Amendment, was justified under an implied national security power of Congress.[96] Although the Alien and Sedition Acts were severely criticized at the time of their enactment, since that time Congress and the President have asserted, and the courts have sometimes sanctioned, that the implied government powers to protect national security sometimes supersede ordinary constitutional protections.[97]

During World War II, the Supreme Court extended extremely broad deference to Congress in reviewing matters concerning the war power. In *Hirabayashi v. United States*,[98] the Court noted:

> The war power of the national government is "the power to wage war successfully". [sic] It extends to every matter and activity so related to war as substantially to affect its conduct and progress. . . . Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for

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95. *See* Act of July 14, 1798, ch. 74, 1 Stat. 596 (expired Mar. 3, 1801) (enacting legislation entitled "An act for the punishment of certain crimes against the United States").

96. *See* William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 123-26 (1984) (discussing the circumstances leading to the passage of the Sedition Act of 1798 and the Federalist Party's erroneous reliance on Blackstone as its main support for the Act against First Amendment challenges).

97. Some critics have argued that the U.S. government has been insufficiently protective of constitutional rights in nearly all wartime eras. *See, e.g.*, GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 13 (2004) (discussing the U.S. government's tendency to suppress personal liberties during wartime). Stone argues that:

> In each of these episodes [of wartime], the nation faced extraordinary pressures—and temptations—to suppress dissent. In some of these eras, national leaders cynically exploited public fears for partisan political gain; in some, they fomented public hysteria in an effort to unite the nation in common cause; and in others, they simply caved in to public demands for the repression of "disloyal" individuals. Although each of these episodes presented a unique challenge, in each the United States went too far in sacrificing civil liberties—particularly the freedom of speech.

Id.

98. 320 U.S. 81 (1943).

> resisting it. Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.[99]

Another World War II-era case involving the constitutionality of Japanese internment, *Korematsu v. United States*,[100] provides an interesting exchange between Justices Frankfurter and Jackson as to the place of the war power within constitutional jurisprudence. In his concurring opinion upholding the internment, Justice Frankfurter argued that the war power should be understood as within the framework of the Constitution, rather than as superseding the peacetime Constitution. As such, he contended:

> [T]he validity of action under the war power must be judged wholly in the context of war. That action is not to be stigmatized as lawless because like action in times of peace would be lawless. . . . To recognize that military orders are "reasonably expedient military precautions" in time of war and yet to deny them constitutional legitimacy makes of the Constitution an instrument for dialectic subtleties not reasonably to be attributed to the hard-headed Framers, of whom a majority had had actual participation in war.[101]

Rejecting this view in his dissent, Justice Jackson argued that while military commanders operating under the war power cannot be expected at all times to comply with constitutional requirements, courts should not grant those actions an imprimatur of constitutionality, noting that "if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient."[102]

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99. Hirabayashi v. United States, 320 U.S. 81, 93 (1943) (citations omitted) (upholding the conviction of an American citizen of Japanese origin for failure to comply with a curfew order).

100. 323 U.S. 214 (1944).

101. Korematsu v. United States, 323 U.S. 214, 224-25 (1944) (Frankfurter, J., concurring).

102. *Id.* at 244 (Jackson, J., dissenting). Some modern commentators have endorsed Jackson's preference for treating the exercise of emergency war powers as extra-constitutional, rather than incorporating into constitutional doctrine decisions that undermine civil liberties. *See, e.g.*, Oren Gross, *Chaos and Crisis: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1099 (2003) (arguing that in times of crisis, political leaders should take actions that they explicitly and publicly acknowledge to be

While the Japanese internment cases are now often viewed as cautionary tales suggesting that in wartime the Supreme Court may not be a reliable guardian of civil liberties,[103] they should neither be viewed as a dispositive example that individuals cannot rely upon the Court to strike a proper balance between liberty and security in a time of war. In more recent cases, the Court has made it clear that the government cannot prevail simply by shouting "War" in a crowded courtroom. In *United States v. Robel*,[104] a case involving the denial of employment at defense facilities to individuals who had been members of the Communist Party,[105] the Court held that while Congress had significant interests in preventing subversion, "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. '[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.'"[106] Suggesting that courts must continue to play a role in evaluating the constitutionality of government actions under the war power, the late Chief Justice Rehnquist commented:

> It is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime. [However,] it is both desirable and likely that more careful attention

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extra-legal, which will have the effect of providing a check whereby those actions can either be retrospectively critiqued or ratified through the political process); Mark Tushnet, *Defending* Korematsu*?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 306-07 (2003) (advancing the notion of extra-constitutional action during times of emergency). Accordingly, Tushnet argues:

> [I]t is better to have emergency powers exercised in an extra[-]constitutional way, so that everyone understands that the actions are extraordinary, than to have the actions rationalized away as consistent with the Constitution and thereby normalized. . . .
>
> Decision-makers can then understand that they should regret that they find themselves compelled to invoke emergency powers. Once the emergency has passed they should not only revert to the norms of legality that were suspended during the emergency, but should do what they can to make reparation for the actions they took.

Id. (footnotes omitted).

103. *See, e.g.*, Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 491-92 (1945) (criticizing the United States Supreme Court decisions upholding the constitutionality of the internment of Japanese-Americans as a weakening of basic civil rights).

104. 389 U.S. 258 (1967).

105. United States v. Robel, 389 U.S. 258, 259-61 (1967).

106. *Id.* at 263-64 (alteration in original) (quoting Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934)).

> will be paid by the courts to the basis for the government's claims of necessity as a basis for curtailing civil liberty.[107]

Regarding the current War on Terror, the Court has signaled it will not give unfettered discretion to Congress and the Executive Branch in taking action under the war power, and will check the political branches when it concludes they are taking action that violates essential liberties.[108] It is true that the level of scrutiny applied to governmental actions in the War on Terror has at times been more deferential, reflecting the view that "[i]t is within the role of the executive to acquire and exercise the expertise of protecting national security. It is not within the role of the courts to second-guess executive judgments made in furtherance of that branch's proper role."[109] Nonetheless, the courts have applied the normal balancing of state interests and individual rights to assess the constitutionality of anti-terrorism legislation, rather than treating all War on Terror actions as being granted a constitutional seal of approval by virtue of the war power. As Mark Tushnet points out, the Court's treatment of the war power is formally no different than the ordinary sorts of balancing tests under which the Court generally weighs the constitutionality of government action. In this regard, he states:

> Judges will test government actions against the Constitution. They may often find that the actions do not violate the Constitution, either because the judges place the wartime circumstances in the balance as they define constitutional rights or because they formulate categorical rules that take the fact of war as relevant to triggering one or another rule. It is not, then, that law is silent in wartime. Rather, it is that sometimes it speaks in tones that advocates of particular posi-

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107. WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 224-25 (1998).

108. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 535 (2004) (granting a U.S. citizen captured as an enemy combatant in Afghanistan the right to limited judicial inquiry into the legality of his detention); Rasul v. Bush, 542 U.S. 466, 483-84 (2004) (holding that aliens being held at Guantanamo Bay, Cuba, are entitled to petition for a writ of habeas corpus).

109. Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 932 (D.C. Cir. 2003) (rejecting the claim that the First Amendment compelled government disclosure of the names of detainees being held in connection with the September 11 investigation); *see also* David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2578 (2003) (expressing the view that, in post-September 11 cases, "a surprising number of judicial decisions initially upheld claims of constitutional rights against official antiterrorist measures").

tions do not like. But, after all, how is that different from any other time?[110]

Given the nature of the Supreme Court's approach to the war power, it is unlikely that an act regulating private schools would be given sanction by the Court simply because the government claimed to be exercising war powers. Thus, it would be more useful to evaluate the constitutionality of any such actions under the general ambit of balancing state interests and individual liberties as they occur under free speech, free exercise, parental rights, and equal protection doctrines.

D. *Freedom of Speech*

1. The Philosophical Basis for Freedom of Speech

Throughout American history, the inclination to restrict speech often has reached its apex in times of unrest. When threats to the social order loom larger, it may be natural to seek to restrict the promulgation of ideas that are thought to pose a threat to that order. And yet, our First Amendment jurisprudence has developed a theory of free speech that will protect troubling speech in troubling times.[111] The United States, to a greater extent than most other liberal democracies, has a particularly strong commitment to free speech principles, viewing this commitment as outweighing all but the most grievous harms caused by a robust marketplace of ideas. This societal commitment may lead us to consider freedom of speech as a good in and of itself, yet when it comes to weighing the relative merits of protecting unfettered freedom of speech and preventing catastrophic terrorism, it is worth considering whether the philosophical basis for freedom of speech is sufficient to support even the protection of speech that is aimed at the destruction of liberal democratic societies altogether.

Some commentators have suggested that the purpose of broad freedom of expression is to protect individual rights such as liberty

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110. Mark Tushnet, *Defending* Korematsu*?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 283 (2003).

111. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (per curiam) (protecting racially derogatory speech during a time of civil rights turmoil by using the First and Fourteenth Amendments to deem the Ohio Criminal Syndicalism Act unconstitutional).

and autonomy.[112] Under this conception, free speech ought to be protected not because of some social benefit that it provides, but rather because speech is an area of individual conduct upon which the state cannot intrude. The autonomy-promoting benefit of free speech may, on some level, be a self-evident extrapolation from general Western notions of the individual, but, as Robert Bork has argued, the benefits of autonomy "do not distinguish speech from any other human activity."[113] Or, to put it another way, the values of autonomy and self-actualization may not provide any rationale for distinguishing between exercising one's autonomy by urging someone else to engage in suicide terrorism and exercising one's autonomy by engaging in an act of suicide terrorism oneself. Edwin Baker provides a response to this concern:

> The [F]irst [A]mendment could not possibly protect all the manifold activities, some of which involve violence or coercion, that further self-fulfillment or contribute to change. . . .
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> . . . .
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> . . . The key aspect distinguishing harms caused by protected speech acts from most other methods of causing harms is that speech harms occur only to the extent people "mentally" adopt perceptions or attitudes. Two factors deserve emphasis. First, the speech act does not interfere with another's legitimate decision authority, assuming that the other has no right to decide what the speaker should say or believe. This assumption is a necessary consequence of our respecting people's autonomy. Second, outlawing acts of the speaker in order to protect people from harms that result because the listener adopts certain perceptions or attitudes disrespects the responsibility and freedom of the listener.[114]

While Baker's defense of the autonomy-protecting value of free speech suggests why, in the absence of a strong countervailing societal interest, there should be a presumption in favor of free expression, it fails to explain why, if countervailing societal needs sometimes justify restricting autonomy outside of the speech con-

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112. *See, e.g.*, Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (commenting that "the constitutional guarantee of free speech ultimately serves only one true value . . . 'individual self-realization'").

113. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 25 (1971).

114. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 997-98 (1978).

text, the same cannot, at times, hold true in the speech context. A defense of free speech that would include the right to advocate extremist speech that poses real risks to the autonomy of others, it seems, cannot be justified purely by an appeal to individualism. Thus, it may be necessary to consider the social role of freedom of expression.

One such rationale argues that freedom of expression plays an important role in the social discovery of truth. In one of the earliest arguments calling for freedom of speech, given in an address before Parliament calling for unlicensed printing, John Milton commented:

> And though all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and falsehood grapple; who ever knew truth put to the worse, in a free and open encounter.[115]

Milton's theory supposed that allowing a broad range of ideas to compete would lead to the adoption of ideas and norms that were better and truer than those considered and rejected in an open exchange. John Stuart Mill echoed this justification for freedom of expression, commenting:

> There is the greatest difference between presuming an opinion to be true, because, with every opportunity for contesting it, it has not been refuted, and assuming its truth for the purpose of not permitting its refutation. Complete liberty of contradicting and disproving our opinion, is the very condition which justifies us in assuming its truth for purposes of action; and on no other terms can a being with human faculties have any rational assurance of being right.[116]

Mill's view that the rightness of one's ideas can only be ascertained by testing them against conflicting ideas has influenced the development of First Amendment jurisprudence. Justice Holmes, dissenting in *Abrams v. United States*,[117] relied on this reasoning in his articulation of the marketplace of ideas theory of the First Amendment:

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115. JOHN MILTON, AREOPAGITICA, *reprinted in* 3 THE HARVARD CLASSICS 189, 227 (Charles W. Eliot ed., P.F. Collier & Son Corp. 1937) (1644).

116. JOHN STUART MILL, *On Liberty* (1859), *reprinted in* THREE ESSAYS 5, 26 (The World's Classics, No. 170, 1966) (1912).

117. 250 U.S. 616 (1919).

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[118]

As Justice Holmes recognized, embracing the idea of free speech does not require accepting the notion that there are no dangerous ideas. Rather, it supposes that the best way to disarm those dangerous ideas is not to silence them, but to allow them to compete in the marketplace of ideas, wherein those dangerous ideas will ultimately be rejected.[119]

Some commentators have critiqued this approach to freedom of expression, questioning whether, as an empirical matter, good and truthful ideas always triumph in the marketplace of ideas, and querying, as a normative matter, whether the truth-seeking value of freedom of expression must always supersede other values, such as the prevention of harm. For example, as Frederick Schauer has noted:

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118. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

119. *Cf.* James Brandon, *Koranic Duels Ease Terror*, CHRISTIAN SCI. MONITOR, Feb. 4, 2005, at 1, *available at* 2005 WLNR 1516016 (proposing an interesting example of the use of a "marketplace of ideas" approach to dissuading terrorists). The article discusses a Yemeni cleric who has debated al Qaeda members over whether the Koran sanctions terrorism and has had success in reforming Islamic militants. *Id.* The cleric, Hamoud al-Hitar, commented, "If you study terrorism in the world, you will see that it has an intellectual theory behind it . . . . And any kind of intellectual idea can be defeated by intellect." *Id.*

> Perhaps freedom of contradiction is an important consideration in assuming the truth of any proposition. But that does not transform freedom to contradict into a sufficient condition, or even a necessary condition, for truth. We presuppose, at the very least, independent criteria of verifiability and falsifiability. . . .
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> . . . .
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> . . . If the expression of an opinion possibly causes harm, allowing that expression involves some probability of harm. If the suppression of that opinion entails the possible suppression of truth, then suppression also entails some probability of harm. Suppression is necessarily wrong only if the former harm is ignored. Therefore a rule absolutely prohibiting suppression is justified only if speech can never cause harm, or if the search for truth is elevated to a position of priority over all other values.[120]

Schauer's argument suggests that the truth-seeking value of freedom of expression ought not be elevated above all other societal concerns. Particularly, Schauer's concern is that if the marketplace of ideas is not about truth, but is only about process, the validation of false and harmful ideas through democratic processes may have catastrophic results.[121]

The problem, however, of trying to balance freedom of expression and the mitigation of social harms caused by speech, is that, as Alexander Meiklejohn has argued, the marketplace of ideas is necessary to facilitate democratic self-government. Accordingly:

> When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American. . . . The principle of the freedom of speech springs from the necessities of the program of self-government. It is

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120. Frederick Schauer, *Free Speech: A Philosophical Enquiry* 19-29 (1982), *reprinted in* THE FIRST AMENDMENT: A READER 65, 67-71 (John H. Garvey & Frederick Schauer eds., 1992).

121. *See id.* at 71 (preaching the harms that public acceptance of false views causes and using race relations as an example of the magnified risk when people are disposed to accept an unsound idea). In this regard, Schauer states:

> The predominant risk is that false views may, despite their falsity, be accepted by the public, who will then act in accordance with those false views. . . . History has shown us that people unfortunately are much more inclined to be persuaded of the rectitude of oppressing certain races or certain religions than they are likely to accept other unsound and no less palpably wrong views.

Id.

> not a Law of Nature or Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.[122]

Meiklejohn's claims about the value of free expression are parallel to, if less expansive than, those originally advanced by Milton and Mill. Both theories suggest a sorting function for freedom of speech, advancing the notion that a wide range of ideas, good and bad, must be given a full hearing. Meiklejohn, unlike Milton and Mill, does not suppose that this sorting will necessarily result in truth, but supposes that inasmuch as democratic deliberation in and of itself is a positive value, democracy, and its coefficient reasoned decision-making, will be best protected by wide open debate. Without a climate of free expression that permits democratic deliberation, there is, paradoxically, no legitimate body that can decide which harms ought, in Schauer's conception, to outweigh truth-seeking free speech norms.

Perhaps a way to reconcile this paradox is to suggest that, while broad freedom of expression is necessary to enable democratic institutions to flourish, democratic institutions may in some instances not be able to emerge in the first place in the absence of restrictions on certain types of hate speech or anti-democratic advocacy that risk persuading a majority to reject self-government altogether.[123] However, when democratic self-governance norms are

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122. Alexander Meiklejohn, *Political Freedom* 24-28 (1960), *reprinted in* THE FIRST AMENDMENT: A READER 101, 103 (John H. Garvey & Frederick Schauer eds., 1992).

123. For example, in post-World War II Germany, adoption of certain hate speech restrictions was based on the view that the government was needed to restrict speech that would threaten the democratic social order. *See* Edward J. Eberle, *Public Discourse in Contemporary Germany*, 47 CASE W. RES. L. REV. 797, 900 (1997) (commenting that the differences in German and American free speech law might "simply reflect the contrasting confidence and maturity of the two societies. Never having truly faced undemocratic or totalitarian regimes and being relatively well acclimated to a multi-cultural, pluralistic society, the United States may simply exude more confidence in individuals' ability to perceive their own best interests and govern themselves."). However, as David E. Weiss has noted:

> [Today, t]he German government's attempt to combat Nazism through the invocation of specific laws has had the unanticipated effect of promoting the message the government seeks to suppress. Instead of eradicating the message of the neo-Nazis, the German government has simply compelled them to convey their ideas through different channels and by different means.

David E. Weiss, Note, *Striking a Difficult Balance: Combatting the Threat of Neo-Nazism in Germany While Preserving Individual Liberties*, 27 VAND. J. TRANSNAT'L L. 889, 936 (1994). Similar concerns may need to be addressed in facilitating the emergence of democratic structures in the Middle East. *See, e.g.*, ALAN DERSHOWITZ, THE CASE FOR PEACE:

widely accepted within society, the benefits of a robust marketplace of ideas may outweigh the risks posed by the introduction of harmful ideas into that marketplace. Radical Islamist terrorism does provide a stark contrary vision to the society envisioned by liberal democrats. But perhaps, in order to reject that vision and confirm a preference for liberal democracy, it is necessary to obtain a clear, unobstructed vision of what the alternatives are.

In *Whitney v. California*,[124] Justice Brandeis suggested that another reason to avoid suppressing harmful speech is that attempts to suppress harmful speech may only give that speech undeserved power:

> Those who won our independence . . . knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.[125]

Brandeis's argument suggests that allowing broad freedom of expression may actually promote social stability. Zechariah Chafee echoed this argument when he commented:

> The great strength of our argument against violent-talking radicals in the past has been that we could say to them: "It is true that in the countries that you came from you naturally resorted to violence because you had no vote and could not abolish the abuses to which you

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HOW THE ARAB-ISRAELI CONFLICT CAN BE RESOLVED 85-87 (2005) (calling for a ban on incitement against Jews in any newly established Palestinian State); PUB. INT'L LAW & POLICY GROUP AND THE CENTURY FOUND., ESTABLISHING A STABLE DEMOCRATIC CONSTITUTIONAL STRUCTURE IN IRAQ: SOME BASIC CONSIDERATIONS 55 (2003), *reprinted in* 39 NEW ENG. L. REV. 53, 104 (2004) (arguing that "[g]iven the special circumstances of Iraq and the recent use of religious schools in other states as recruitment centers for radical Islamists, it may be necessary to restrict substantially the operation of private religious schooling in the near term").

124. 274 U.S. 357 (1927).

125. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled in part on other grounds by* Brandenburg v. Ohio, 395 U.S. 444 (1969); *cf.* STAR WARS EPISODE I: THE PHANTOM MENACE (20th Century Fox 1999), *available at* http://www.scifiscripts.com/scripts/StarWars-Episode1.txt (last visited Feb. 7, 2006) (providing Master Yoda's statement that "fear leads to anger; anger leads to hate; hate leads to suffering") (on file with the *St. Mary's Law Journal*).

> objected. It is not so in this country. If you want a change, go and vote for it . . . ."[126]

Thomas Emerson describes the mechanism of this "safety valve" function for free speech, noting that "[t]he principle of open discussion is a method of achieving a more adaptable and at the same time more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus."[127] This more pragmatic defense of freedom of expression recognizes that attempts to suppress harmful speech may often be counterproductive, driving harmful expression out of clear view while doing little to mitigate its potential harms.[128]

The sum of these arguments suggests that, as a general principle, the American inclination towards a broad policy of freedom of expression is well founded. Nonetheless, even a system that favors broad deference to free expression must ultimately approach some limits as the countervailing interests and concerns become more and more compelling. The Supreme Court's free speech jurisprudence reflects an attempt to engage in that sort of balancing, recognizing the state's interests in protecting its citizens from speech that may be harmful, while at the same time acting as a counter-

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126. ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES 281-82 (1941). The view that a lack of such open and democratic mechanisms for airing grievances throughout the Muslim world is a root cause of terrorism, though controversial, has played a role in informing American foreign policy in the War on Terrorism. In his second inaugural address, President George W. Bush said:

> [A]s long as whole regions of the world simmer in resentment and tyranny—prone to ideologies that feed hatred and excuse murder—violence will gather, and multiply in destructive power, and cross the most defended borders, and raise a mortal threat. There is only one force of history that can break the reign of hatred and resentment, and expose the pretensions of tyrants, and reward the hopes of the decent and tolerant, and that is the force of human freedom.
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> . . ..
>
> So it is the policy of the United States to seek and support the growth of democratic movements and institutions in every nation and culture, with the ultimate goal of ending tyranny in our world.

George W. Bush, President of the United States, Second Inaugural Address (Jan. 20, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/01/20050120-1.html.

127. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 884 (1963).

128. *Cf.* ROBERT F. LADENSON, A PHILOSOPHY OF FREE EXPRESSION AND ITS CONSTITUTIONAL APPLICATIONS 34 (1983) ("Unregulated expression of attitudes and beliefs occasionally leads to serious trouble. Total regulation, by contrast, virtually guarantees it.").

majoritarian bulwark against attempts to subvert First Amendment principles.

2. Advocacy and Incitement

Under current First Amendment doctrine as articulated in *Brandenburg v. Ohio*,[129] speech advocating violence and law-breaking cannot be banned unless the speech is a clear and present danger—that is, if the speech is likely to incite imminent violence.[130] The Supreme Court has made it clear that "the teaching of the moral propriety or even moral necessity for a resort to force and violence" alone, without some additional element of "preparing a group for violent action and steeling it to such action," cannot be prohibited under the First Amendment.[131]

How would the Court's standards for protecting free speech apply to the teaching of radical Islam to students in private schools? Teaching, by its nature, involves an exercise of freedom of speech. As such, any attempts to regulate what is taught in private schools would seem to implicate free speech concerns. While *Pierce* does proclaim a government interest in prohibiting the teaching of doctrines "inimical to the public welfare,"[132] courts have not relied upon this statement as a basis for upholding any restrictions on materials to be taught in private schools, and this dicta may simply be a relic of an earlier constitutional era with regard to the restriction of speech promoting law-breaking.

If a school were to teach a curriculum that did constitute a clear and present danger under the *Brandenburg* standard, it seems evident that the state could prohibit that sort of instruction. However,

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129. 395 U.S. 444 (1969).

130. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (advocating that "constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

131. *See* Noto v. United States, 367 U.S. 290, 297-98 (1961) (reiterating that mere teaching of communist theory, alone, is not enough constitute incitement); *cf.* Scales v. United States, 367 U.S. 203, 227-28 (1961) (upholding the so-called membership clause of the Smith Act to criminalize "active" membership in an organization—the Communist Party in this case—that actively advocates the overthrow of the American government, when the membership is coupled with knowledge and specific intent to act).

132. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925).

does mere advocacy of terrorism constitute a clear and present danger? Andrew McCarthy has argued:

> The point of a market is a free exchange. Terrorism perverts the very concept: seeking to compel acceptance not by persuasion but by fear, it is an exchange at the point of a gun. When it fails to win such acceptance, it does not go back to the drawing board to develop a better message or write a better book. It kills, massively. Why then should government hesitate . . . to use every legal tool in its arsenal, including criminal prosecution, to convey in the strongest terms that the advocacy of terrorism in this day and age is entitled to no First Amendment protection?[133]

McCarthy does not advocate discarding the clear and present danger standard. Rather, in applying the standard, he suggests the gravity of the threat of terrorism should weigh more heavily in finding imminence.[134] However, while McCarthy suggests banning speech that advocates terrorism, much of the speech that he contemplates restricting might be considered incitement under *Brandenburg*. For example, he cites the *fatwa*, issued by Omar Abdel Rahman, declaring of Americans that "Muslims everywhere [should] dismember their nation, tear them apart, ruin their economy, provoke their corporations, destroy their embassies, attack their interests, sink their ships, . . . shoot down their planes, [and] kill them on land, at sea, and in the air. Kill them wherever you find them."[135] Alan Dershowitz has suggested:

> If an actual fatwa case were to come before our courts, it would probably be decided on the basis of the particular facts of the case, including how close in time the terrorism followed the fatwa, how specific the religious command was, and how free the potential terrorists felt to reject it.[136]

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133. Andrew C. McCarthy, *Free Speech for Terrorists?*, COMMENT., Mar. 1, 2005, at 27, 36, *available at* 2005 WLNR 3519639.

134. *See id.* (citing Judge Learned Hand's formula to advance the argument for a favorability of imminence). According to McCarthy:

> To the extent that we need to factor in the imminence of a threat, Learned Hand's formula, "the gravity of the 'evil' discounted by its improbability," should serve us well. The evil here could not be graver, and it is beyond calculations of probability—this enemy has killed repeatedly, and promises to kill anew.

Id.

135. *Id.* at 27 (alterations and omission in original).

136. ALAN M. DERSHOWITZ, WHY TERRORISM WORKS 112 (2002).

However, even if we could contemplate some teaching that rises to the level of incitement, much of the speech contemplated by this Article does not suffice as incitement under the *Brandenburg* standard.[137] The primary concern is not that children will be instructed to immediately engage in terrorist acts, but that the teaching of a radical Islamist ideology will predispose them, over time, to join radical Islamist terrorist movements and engage in violence.[138]

3. Restrictions on Speech Directed Towards Minors

Would the fact that in-school radical Islamist speech is directed at minors rather than adults alter the ordinary First Amendment calculus laid out in *Brandenburg*? Under certain circumstances, courts have upheld restrictions on speech directed at minors that would have been constitutionally impermissible if imposed on speech directed towards adults. For example, in *Ginsberg v. New York*[139] the Supreme Court, upholding a law that barred the sale of magazines depicting nudity to minors, noted:

> [M]aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. . . . Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults.[140]

In *Ginsberg*, the Court recognized two separate justifications for such restrictions. First, "[t]he legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the sup-

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137. *See supra* Part II(B) (discussing the curriculum of some Islamic schools). While teaching that Israel is an illegitimate regime or criticizing the moral characteristics and religious beliefs of non-Muslims may be offensive, the teaching, in and of itself, does not constitute a clear and present danger.

138. Although the issue of a "terrorist training-camp" school that engages in terrorism-facilitating speech, such as instruction in use of weapons, bomb construction, or chemical and biological weapons development, is outside the scope of this Article, see Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095 (2005), for a discussion of terrorism-facilitating speech as part of the broader constitutional problem of crime-facilitating speech.

139. 390 U.S. 629 (1968).

140. Ginsberg v. New York, 390 U.S. 629, 636 (1968) (alteration in original) (quoting Bookcase, Inc. v. Broderick, 218 N.E.2d 668, 671 (N.Y. 1966)).

port of laws designed to aid discharge of that responsibility."[141] And second, the Court recognized the state "has an independent interest in the well-being of its youth."[142] In areas where restrictions on speech are generally subject to intermediate scrutiny, such as in the broadcasting and commercial speech contexts, the Court has similarly held that governmental interests in assisting parents in preventing their children from being exposed to harmful speech and the state's independent interest in protecting children do justify some such restrictions.[143]

However, courts have been reluctant to apply this principle broadly, limiting its scope when laws designed to protect children from harmful speech have spillover effects burdening adult speech rights.[144] Even in contexts not involving spillover effects that burden adult speech, courts have applied strict scrutiny review to restrictions on minors' access to speech. In *Interactive Digital Software Ass'n v. St. Louis County*,[145] the Eighth Circuit struck down an ordinance making the distribution of graphically violent video games to minors unlawful, distinguishing *Ginsberg* on the

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141. *Id.* at 639.

142. *Id.* at 640.

143. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 749-50 (1978) (summarizing the concerns that *Ginsberg* addressed as "the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household,'" and upholding regulations restricting the broadcasting of indecent material on the grounds that "[t]he ease with which children may obtain access to broadcast material, coupled with the[se] concerns . . . , amply justify special treatment of indecent broadcasting" (quoting *Ginsberg*, 390 U.S. at 639-40)). However, even in intermediate scrutiny cases, the Court has struck down speech restrictions designed to protect children when the infringements on childrens' access to speech have a spillover effect that burdens adult speech rights. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 556, 565-67, 570 (2001) (applying intermediate scrutiny to uphold sales practices regulations for tobacco products that were narrowly tailored to prevent access to tobacco products by minors, but striking down other advertising restrictions as overbroad); *see also* Yabo Lin, Note, *Put a Rein on That Unruly Horse: Balancing the Freedom of Commercial Speech and the Protection of Children in Cigarette Advertising*, 52 WASH. U. J. URB. & CONTEMP. L. 307, 331-32 (1997) (indicating that courts have applied different interpretations of the "reasonable fit" standard, such that one line of cases invalidated advertising restrictions under an enhanced scrutiny, while a second line of cases upheld advertising regulations by employing a more lenient intermediate scrutiny analysis).

144. *See, e.g.*, Ashcroft v. Free Speech Coal., 535 U.S. 234, 252-53 (2002) (stating that "[t]he Government cannot ban speech fit for adults simply because it may fall into the hands of children"); Butler v. Michigan, 352 U.S. 380, 383-84 (1957) (holding that the Michigan enactment reduced the state's adult population "to reading only what is fit for children").

145. 329 F.3d 954 (8th Cir. 2003).

grounds that while *Ginsberg* rested on the proposition that indecent speech was obscene for minors and thus not constitutionally protected speech, violent speech cannot be considered obscene for minors, and thus restrictions on access to violent speech are subject to strict scrutiny, rather than the rational basis review applied in *Ginsberg*.[146] In another case involving a ban on minors' access to violent video games, Judge Posner, noting that the government's interest in such restrictions must be "compelling,"[147] rejected both the parental assistance and independent state interest grounds for such a ban.[148] Posner stated:

> The murderous fanaticism displayed by young German soldiers in World War II, alumni of the Hitler Jugend, illustrates the danger of allowing government to control the access of children to information and opinion. Now that eighteen-year-olds have the right to vote, it is obvious that they must be allowed the freedom to form their political views on the basis of uncensored speech *before* they turn eighteen, so that their minds are not a blank when they first exercise the franchise. And since an eighteen-year-old's right to vote is a right personal to him rather than a right that is to be exercised on his behalf by his parents, the right of parents to enlist the aid of the state to shield their children from ideas of which the parents disapprove cannot be plenary either. People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.[149]

Some commentators have critiqued this approach, suggesting several bases for concluding that restrictions on speech to minors should be subject to a more deferential standard of review. For example, William Galston argues that restrictions on children's access to harmful speech should be subject to a lower level of constitutional scrutiny, citing the Supreme Court's holding in *Prince v.*

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146. *See* Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954, 959 (8th Cir. 2003) (concluding that graphic violence in video games is not obscene and, thus, a content-based restriction on this type of speech must overcome strict scrutiny analysis); *see also* Video Software Dealers Ass'n v. Webster, 968 F.2d 684, 690 (8th Cir. 1992) (striking down on similar grounds a statute restricting the sale or rental to minors of videocassettes depicting violence).

147. Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 576 (7th Cir. 2001).

148. *See id.* at 578-79 (discounting the argument by the City of Indianapolis that minors can gain access to "whatever contribution to the marketplace of ideas" the games offer, through the specific (as opposed to blanket) consent of the minors' parents, and finding the state interest argument "implausible").

149. *Id.* at 577.

Massachusetts[150] as suggesting "that it is enough for the state to show a rational relationship between some important aspect of children's well-being and its proposed restraints on their liberties."[151] Additionally, Amitai Etzioni has argued that since social science evidence indicates that exposure to violent speech in fact causes more harm to minors than exposure to sexually explicit speech, "the current preoccupation with curbing pornographic material and not violent material should be reversed."[152] Kevin W. Saunders has argued that the Court should recognize that violent materials constitute obscenity for minors and thus subject them to the same standard as prurient materials under *Ginsberg*.[153] Saunders has also suggested that the state's interest in "limiting the inculcation of racist, sexist and other hate-based values" is sufficiently compelling to justify restrictions on children's access to hate speech materials.[154] However, as long as courts continue to treat the free speech rights of minors as subject to generally the same standards of review that would be applicable to the exercise of those speech rights generally, it seems any attempts to bar the teaching or distribution of materials that glorify terrorist violence or promote hate speech to minors but do not rise to the level of incitement would not survive constitutional scrutiny.[155]

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150. *See generally* Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding, against a Free Exercise Clause claim, a child labor law as applied to minors distributing religious literature).

151. *See* William Galston, *When Well-Being Trumps Liberty: Political Theory, Jurisprudence, and Children's Rights*, 79 CHI.-KENT L. REV. 279, 291 (2004) (explaining that the *Prince* Court said that children and adults are different and that this difference affects the balance to be struck between liberty and welfare). However, the lower level of scrutiny applied in *Prince* may be attributable to the fact that the case was argued exclusively as a free exercise claim rather than as a free speech claim. *See Prince*, 321 U.S. at 164 (stating that the appellant does not stand on freedom of press, but rather relies on freedom of religion); *see also infra* Part IV(E) (discussing the standard of review applicable to free exercise claims).

152. Amitai Etzioni, *On Protecting Children from Speech*, 79 CHI.-KENT L. REV. 3, 39 (2004) (emphasis omitted).

153. Kevin W. Saunders, *The Need for a Two (or More) Tiered First Amendment to Provide for the Protection of Children*, 79 CHI.-KENT L. REV. 257, 267 (2004).

154. KEVIN W. SAUNDERS, SAVING OUR CHILDREN FROM THE FIRST AMENDMENT 197 (2003).

155. Nonetheless, in applying *Brandenburg* to minors, the Court could conclude that certain speech that might not be likely to incite imminent violence for adults would be likely to have such an effect when directed at minors, and create an "incitement for minors" standard that, like "obscenity for minors," falls outside of the First Amendment's ambit of protection.

4. Teaching Tolerance and the Compelled Speech Problem

Free speech concerns are also implicated if the government requires private schools to teach specific values, such as promoting patriotism or tolerance, in order to counter the possibly harmful messages being presented. Generally, content-based, government-compelled speech is subject to strict scrutiny.[156] While courts have held that comprehensive, content-based curriculum regulation of private schools is unconstitutional, such decisions have tended to rest on free exercise or parental rights doctrines, rather than on compelled speech grounds.[157] As Stephen Arons has argued, "the point at which state regulation of private schooling crosses the line of constitutional permissibility has remained ill marked. This is due in part to the Court's failure to address the First Amendment consequences of government control of the value content of schooling."[158]

Nonetheless, if we are going to take the compelled speech doctrine seriously, it may raise questions about the constitutionality of requiring, as Amy Gutmann has suggested, that private schools teach their students a common democratic morality that promotes religious toleration and racial equality.[159] While Gutmann is right to identify the promulgation of religious toleration and racial equality as important values for inculcating children to participate in a liberal democratic society,[160] the importance of these values does not necessarily overcome the compelled speech objection. In

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156. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 715-17 (1977) (holding that an individual could not be compelled to display the New Hampshire motto "Live Free or Die" on a license plate); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (striking down a law compelling student recital of the Pledge of Allegiance).

157. *See supra* Part IV(B) (discussing the schooling cases); *infra* Part IV(F) (discussing parental rights doctrines).

158. STEPHEN ARONS, COMPELLING BELIEF: THE CULTURE OF AMERICAN SCHOOLING 208 (1983).

159. *See* AMY GUTMANN, DEMOCRATIC EDUCATION 118 (1987) (asserting that private school teachers have more leeway to teach what they want because private schools are not "constrained by those national and state [educational] standards" that limit public school teachers).

160. *See also* Martha Minow, *Education for Co-Existence*, 44 ARIZ. L. REV. 1, 4-5 (2002) (discussing the role that various educational programs can play in working to alleviate ethnic and religious strife after asking, "What kinds of education led nineteen young men to aspire to hijack American planes, and convert them into weapons of mass destruction, suicide, and political assault?").

Miami Herald Publishing Co. v. Tornillo,[161] the Supreme Court held that the important democratic value of having a free and open debate about candidates in political elections did not justify a requirement that newspapers be compelled to give speech access to candidates with whom they disagreed.[162] Similarly, it goes to reason that private schools could not be compelled to provide access for content-based speech with which they disagree. However, content-neutral curriculum requirements probably would not violate the compelled speech doctrine.[163]

5. Freedom of Expressive Association

Alexis de Tocqueville first recognized the importance of broad associational rights to American democracy in the nineteenth century, noting that Americans enjoy unlimited freedom of association.[164] As Michael Stokes Paulsen explains, freedom of association is merely freedom of speech for groups:

> [I]f the freedom of speech can be a group freedom, that group freedom means that *the group* gets to decide *what* messages the group wishes to express, *who* is in the group that is deciding what the group "says" *as* a group, *how* the group will operate to decide these things, and *how* and *through whom* it will communicate the messages it chooses.[165]

In the context of free speech for groups, freedom of association should protect the expressive activities of private schools. In *Roberts v. United States Jaycees*,[166] the Supreme Court noted that "implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational,

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161. 418 U.S. 241 (1974).

162. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (explaining that the choice of materials and content, as well as the treatment of public issues, that go into a newspaper constitute the exercise of editorial control, and that governmental regulation of this process is inconsistent with the First Amendment guarantees of a free press).

163. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 661-62 (1994) (holding that laws which compel speech in a content-neutral manner are subject only to intermediate scrutiny).

164. 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA pt. 2, ch. VII, at 604 (Arthur Goldhammer trans., Liberty of America 2004) (1840).

165. Michael Stokes Paulsen, *Scouts, Families, and Schools*, 85 MINN. L. REV. 1917, 1922 (2001).

166. 468 U.S. 609, 622 (1984).

religious, and cultural ends."[167] As such, there may be an associational basis for the Court's conclusion in *Pierce* that prohibiting private schooling altogether would be unconstitutional, because schools would almost certainly be considered expressive associations.[168] Furthermore, as expressive associations, private schools would have the right to define their own views, and "it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent."[169] In other words, the expressive associational rights of educational institutions will likely receive significant constitutional protection. As Richard Garnett commented:

> Education is the process and vocation of shaping souls. Now more than ever, though, the shape our souls ought to take, and the ends toward which they ought to be directed, are contested matters. Education is, therefore, in many ways a contest that the liberal state, no less than any other, wants to win and is invariably tempted to "fix." But associations and their expression get in the way.

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167. Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984).

168. *See, e.g.*, Forum for Acad. & Inst'l Rights v. Rumsfeld, 390 F.3d 219, 231 (3d Cir. 2004) (noting that law schools, as educational institutions, are expressive associations), *rev'd*, No. 04-1152, slip op. at 19 (Mar. 6, 2006) (holding that the Solomon Amendment does not unconstitutionally interfere with law schools' expressive associational rights, but nonetheless acknowledging that law schools are expressive associations); Circle Sch. v. Pappert, 381 F.3d 172, 182 (3d Cir. 2004) (commenting that "[b]y nature, educational institutions are highly expressive organizations, as their philosophy and values are directly inculcated in their students"); *see also* Robert K. Vischer, *The Good, the Bad and the Ugly: Rethinking the Value of Associations*, 79 NOTRE DAME L. REV. 949, 976 (2004) (commenting that "educational choices are undeniably expressive, and often central to a family's view of themselves and the broader world"). In the recently decided *Rumsfeld* case, the Supreme Court concluded that merely allowing military recruiters onto law school campuses is not the type of activity that affects the schools' associational rights. *See Rumsfeld*, No. 04-1152, slip op. at 20 ("A military recruiter's mere presence on campus does not violate a law school's right to associate, regardless of how repugnant the law school considers the recruiter's message.") As a result, "[b]ecause Congress could require law schools to provide equal access to military recruiters without violating the schools' freedoms of speech or association," the Court upheld the Solomon Amendment. *Id.* at 20-21.

169. Boy Scouts of Am. v. Dale, 530 U.S. 640, 651 (2000); *see also* Runyon v. McCrary, 427 U.S. 160, 176 (1976) (noting that the freedom of association doctrine supposes that "parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions").

> . . . We ought also to be on guard . . . against the state's efforts to silence the potentially subversive expression of its educational rivals, and thereby to control the debate by standardizing the debaters.[170]

Thus, any of the limitations on the regulation of private schooling imposed by the Free Speech Clause would equally implicate expressive associational rights.

6. Conditions on Publicly Subsidized Speech

If the government cannot constitutionally ban radical Islamist teachings from schools, or cannot seek to counter such ideologies by compelling the teaching of racial and religious tolerance, could the government encourage schools to alter the content of their curriculum either by denying them tax-exempt status or by granting them subsidies? In *Zelman v. Simmons-Harris*,[171] the Court suggested that it is acceptable for states to condition government aid to private schools upon compliance with content-based curriculum regulations.[172] While upholding the constitutionality of Cleveland's school vouchers program from an Establishment Clause challenge, the Court noted that "[p]articipating private schools must agree not to discriminate on the basis of race, religion, or ethnic background, or to 'advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion.'"[173] Under other circumstances, the Court has held that the application of nondiscrimination conditions to government funding of private schools does not violate the First Amendment.[174] However, the *Zelman* Court did not directly ad-

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170. Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1882-83 (2001).

171. 536 U.S. 639 (2002).

172. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 645, 662-63 (2002) (upholding an Ohio tuition aid program, against an Establishment Clause challenge, that provided financial assistance for children of low-income families to attend private schools, as long as the particular school met statewide standards).

173. *Id.* at 645 (quoting OHIO REV. CODE ANN. § 3313.976(A)(6) (Anderson 1999 & Supp. 2000)).

174. *See* Grove City Coll. v. Bell, 465 U.S. 555, 575 (1984) (upholding the requirement that schools comply with Title IX in order to receive federal funding, and noting that "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept").

dress whether the non-advocacy provisions would violate the Free Speech or Free Exercise Clauses.[175]

The Supreme Court's jurisprudence with regard to funding conditions related to speech has sought to distinguish between penalties on speech and non-subsidies of speech. In *Speiser v. Randall*,[176] the Court held that the government could not distribute subsidies (in the form of tax exemptions) in such a way that is "aimed at the suppression of dangerous ideas," because to do so would be an unconstitutional content-based penalty on speech.[177] But in *Rust v. Sullivan*[178] the Court upheld the constitutionality of selective funding of speech, arguing that it did not constitute a suppression of dangerous ideas to prohibit government grantees from engaging in speech outside of the scope of their grants.[179] These cases have not depended wholly upon the difference between denials of tax exemptions and denials of government grants as a direct proxy for this penalty versus non-subsidy distinction. Rather, an arguably more important distinction is whether the government's financial subsidization of an entity is for the purpose of enlisting private parties to convey the government's message, or for the purpose of enabling nongovernmental parties to participate in the public discourse.[180]

Government support of private schools would seem to fall under the former category. *Rust* suggests that if the government created a program that granted aid to private schools to engage in civics and tolerance education, the government could control the content of that program and could issue a gag rule that intolerance and

175. Kathleen M. Sullivan, *The New Religion and the Constitution*, 116 HARV. L. REV. 1397, 1399 (2003).

176. 357 U.S. 513 (1958).

177. Speiser v. Randall, 357 U.S. 513, 518-19 (1958) (quoting Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 402 (1950)).

178. 500 U.S. 173 (1991).

179. *See* Rust v. Sullivan, 500 U.S. 173, 193 (1991) (preventing government-subsidized family planning services from counseling, referring, or otherwise providing information for abortion as an alternative option in family planning).

180. *See* Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 155 (1996) (citing Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833-34 (1995)) (differentiating between the state speaking and the state attempting to restrict certain types of speech meant to contribute to public discourse). For another approach to the selective funding problem, see Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989 (1991).

hatred not be taught as a condition of receipt of those funds.[181] The more difficult question arises when the government provides more generalized grants of support to private schools. Are such grants for the purpose of engaging schools to promote the government's ends, and therefore can be constitutionally subject to speech-related funding conditions, or are such grants for the purpose of facilitating public discourse, and thus cannot be subject to content-based restrictions? When the government provides support to private, religious schools, in order to avoid an Establishment Clause problem, such grants have been construed as engaging schools to promote the government's ends.[182] Even when government funds are channeled to private schools as a result of private choices, the Court has viewed those private schools as providing services for the benefit of the public.[183] In other instances, the Court has suggested that tax exemptions for private schools are similarly designed to advance public purposes.[184]

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181. *See Rust*, 500 U.S. at 194 (stating that "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program").

182. *See* Lemon v. Kurtzman, 403 U.S. 602, 618-19 (1971) (implying that if such aid goes to private sectarian schools, such valid public ("secular") purpose is *required* so as not to implicate the Establishment Clause); *see also* Douglas Laycock, Comment, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 198 (2004) (commenting that "any [government] funding program must insist that grantees achieve the program's secular goals. A voucher plan could not exclude Islamic schools that taught the Koran and the secular curriculum, but it could exclude schools that taught only the Koran and not the secular curriculum.").

183. *See* Locke v. Davey, 540 U.S. 712, 721 (2004) (noting that the purpose of a scholarship program was to assist families with the cost of post-secondary education, not to provide a forum for speech, and thus concluding that the state could opt not to fund students pursuing devotional degrees); Zelman v. Simmons-Harris, 536 U.S. 639, 640 (2002) (noting that a school voucher program was "enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system"); Mueller v. Allen, 463 U.S. 388, 395 (1983) (holding that tax exemptions for parents who sent their children to private schools served several public purposes, including ensuring the political and economic benefits of an educated citizenry, relieving some of the financial burden on public schools that would be incurred if there were no operating private schools, and serving as a benchmark to assess the quality of public schooling); *cf.* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 86 (1962) (arguing that education not only benefits children and parents but also society as a whole, by promoting stability and democracy).

184. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 588-92 (1983) (holding that Congress's purpose in giving tax exemptions to private schools was "to encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind," and thus that such an exemption could be denied if those purposes were not being served); Nina J. Crimm, *High Alert: The Govern-*

Therefore, if the purpose of these types of government support for education is to engage private schools' assistance in educating good citizens, it seems that the government would be justified in making receipt of that assistance conditional on complying with certain content-based requirements or restrictions on curriculum.[185] This option holds some promise for reducing the spread of radical Islam in private Muslim schools. If, in fact, the prevalence of Saudi funding for Muslim schools has resulted in the ceding of control over some curricular elements to Wahhabist influence, providing an alternative source of funding to parents and schools that would prefer to teach a more moderate form of Islam may be beneficial.[186] Increased government funding might enable moderate

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ment's War on the Financing of Terrorism and Its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy, 45 WM. & MARY L. REV. 1341, 1389-90 (2004) (noting that "[i]f an organization is wholly or partially organized or operated contrary to public policy or to support or engage in illegal activities, the government clearly has the right to deny tax-exempt status and to impose other appropriate sanctions against that organization") (footnote omitted); *see also* Knight v. Bd. of Regents, 269 F. Supp. 339, 341-42 (S.D.N.Y. 1967) (upholding a state law requiring teachers in private schools receiving a tax exemption to execute an oath to uphold the Constitution), *aff'd mem. per curiam*, 390 U.S. 36 (1968); *cf.* Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 675 (1970) (noting that "[n]o one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees 'on the public payroll,'" but not mentioning the status of private schools). *But see* Gabriel J. Chin & Saira Rao, *Pledging Allegiance to the Constitution: The First Amendment and Loyalty Oaths for Faculty at Private Universities*, 64 U. PITT. L. REV. 431, 459 (2003) (arguing that *Knight* should be overruled because tax exemptions for private schools are designed to promote private speech rather than to facilitate public purposes).

185. *See* Ira C. Lupu & Robert W. Tuttle, Zelman*'s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 977 (2003) (asserting that "[t]he state has considerable—though not infinite—leeway to impose limits on state-benefited schools that the First Amendment would not tolerate if applied coercively to all expressive organizations"); Stephen Macedo, *The Constitution, Civic Virtue, and Civil Society: Social Capital As Substantive Morality*, 69 FORDHAM L. REV. 1573, 1592 (2001) (commenting that, "[a]s a matter of principle it is important that the strings that come attached to public dollars flowing to religious non-profits are voluntarily accepted, and justified in terms of valid and important public purposes, such as equity, fairness, and the promotion of broad forms of social cooperation among citizens"). *But see* Thomas R. McCoy, Quo Vadis*: Is the Establishment Clause Undergoing Metamorphosis?*, 41 BRANDEIS L.J. 547, 559 (2003) (arguing that speech-related conditions on funding to private schools are unconstitutional).

186. Richard Garnett notes that despite Justice Brennan's assertion in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969), that the development of religious doctrine is a matter of purely ecclesiastical concern that secular courts should avoid intervening upon, *id.* at 449, the government does have significant interests in the development of religious beliefs, including "a 'secular' interest in the

Muslim schools to develop a curriculum free of Saudi influence, to purchase textbooks that do not contain intolerant teachings, and to hire teachers who are not supported by the Saudi government, thus lessening the possibility that ideologies promoting terrorism will influence their students.

E. *Free Exercise of Religion*

Because religious beliefs can be a powerful catalyst for violence and terrorism, allowing the free exercise of religion does create certain risks for any society. Thomas Hobbes, for example, argued that the state's need to ensure security justified control over religious education. He noted, "[M]en that are once possessed of an opinion, that their obedience to the Soveraign Power, will bee more hurtfull to them, that their disobedience, will disobey the Laws, and thereby overthrow the Common-wealth, and introduce confusion, and Civill war."[187] Hobbes feared that those who believed in heavenly rewards could not be deterred by secular authorities from inciting religious violence, a problem that remains salient in the age of suicide terrorism. For Hobbes, the only way to deter religious violence was to inculcate citizens with religious beliefs that were compatible with civil laws. John Locke disagreed, arguing conversely that because religious beliefs could not be enforced by secular authorities, the state should not attempt to coerce belief but rather should extend toleration to different religious views.[188] For their part, the Founders chose not to concern them-

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content and development of Muslim teaching, both as a means of shaping the behavior and dispositions of those who receive, accept, and profess Islam, and as a way of coaxing the content of a rival *nomos* in a more America-friendly direction." Richard W. Garnett, *Assimilation, Toleration, and the State's Interest in the Development of Religious Doctrine*, 51 UCLA L. REV. 1645, 1681 (2004).

187. THOMAS HOBBES, LEVIATHAN pt. 3, ch. XLII, at *295.

188. *See* JOHN LOCKE, *A Letter Concerning Toleration* (1689), *reprinted in* TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 211, 219-20 (Ian Shapiro ed., Yale Univ. Press 2003), *available at* http://www.constitution.org/jl/tolerati.htm (arguing that penalties to force a particular faith will not convince people, but rather, that toleration of all beliefs is the key to peace). In this regard, Locke stated the following:

> I affirm, that the magistrate's power extends not to the establishing of any articles of faith, or forms of worship, by the force of his laws. For laws are of no force at all without penalties, and penalties in this case are absolutely impertinent; because they are not proper to convince the mind.

Id.

selves with the metaphysics of deterring religious conflict, relying on the multiplicity of factions to serve as a more earthly check.[189]

However, if the Constitution's provision for free exercise of religion was a means of avoiding religious violence, it also meant that the Framers limited the extent to which a common civic culture would govern the United States.[190] As Judge Michael McConnell argues, "[T]he moral-cultural role of primary and secondary schools today closely resembles that of churches at the time of the founding," because "it is the schools to which society looks as the principal instruments for inculcation of public virtue—for solutions to problems such as drug use, racism, poor self-esteem, imprudent sexual conduct, and the like."[191] Accordingly, it is not surprising that disagreements about the limits and boundaries of the free exercise right often arise in the context of educational policy.[192]

Being educated as to particular religious beliefs is obviously a necessary component of the free exercise of religion and, as such, is entitled to constitutional protection. In *Yoder*, the Supreme Court noted that "a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment."[193] Yet, while *Yoder* perhaps represents a high mark of the Court's deference to the asserted free exercise rights of parents to provide their children with a religious education,[194] under some cir-

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189. *See* THE FEDERALIST NO. 10, at 64-65 (James Madison) (Jacob E. Cooke ed., 1961) (stating that "a religious sect, may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it, must secure the national Councils against any danger from that source").

190. *See* Michael W. McConnell, *Multiculturalism, Majoritarianism, and Educational Choice: What Does Our Constitutional Tradition Have to Say?*, 1991 U. CHI. LEGAL F. 123, 133 (1991) (claiming that the First Amendment's religion clauses ensure that society does not have a common civic culture).

191. *Id.* at 134.

192. *See id.* (equating the modern-day argument over public education curricula with the past argument concerning the content of religion during the Framers' time period).

193. Wisconsin v. Yoder, 406 U.S. 205, 214 (1972); *see also* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 788 (1973) (noting that "a state law interfering with a parent's right to have his child educated in a sectarian school would run afoul of the Free Exercise Clause").

194. *See* Elizabeth Harmer-Dionne, Note, *Once a Peculiar People: Cognitive Dissonance and the Suppression of Mormon Polygamy As a Case Study Negating the Belief-Action Distinction*, 50 STAN. L. REV. 1295, 1304 (1998) (referring to *Yoder* as "the pinnacle of judicial recognition of free exercise exemptions").

cumstances the Court has drawn limits around parents' ability to assert their children's free exercise rights. For example, in *Prince*, the Court held that free exercise rights did not outweigh a state's interest in enforcing child labor laws.[195] As such, the Court noted:

> Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience.[196]

This recognition of the state's power to protect children, possibly against the wishes of their parents, suggests that if a school were engaging in practices that threatened the health and safety of students, the state's prohibition of those practices could not be overcome by an appeal to the Free Exercise Clause.

In addition to the state's ability to act in *parens patriae*, the Court, in *Employment Division v. Smith*,[197] placed another significant restriction on free exercise rights, holding that the Free Exercise Clause does not provide an exemption from the obligation to comply with laws of general applicability.[198] A school, or any other religious institution, could not claim, for example, that the Free Exercise Clause should exempt it from laws prohibiting the material support of terrorist organizations or any other anti-terrorism or general criminal statute.[199] However, the Court specifically limited *Smith*'s application to cases that involve free exercise rights alone, noting that the Court's previous decisions using the First Amendment to bar application of neutral, generally applicable laws to religiously motivated activity was only in cases where the Free Exercise Clause was implicated in conjunction with other rights such as freedom of speech and parental rights.[200] Thus, a law of

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195. *See* Prince v. Massachusetts, 321 U.S. 158, 170-71 (1944) (holding that neither the right of religion nor the rights of parenthood were superior to the public's interest in enforcing child labor laws).

196. *Id.* at 166 (footnotes omitted).

197. 494 U.S. 872 (1990).

198. *See* Employment Div. v. Smith, 494 U.S. 872, 878 (1990) (rejecting the argument that using illegal drugs for religious purposes places the user beyond the reach of the criminal law).

199. *See* Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 167 (D.C. Cir. 2003) (declaring that "[t]here is no free exercise right to fund terrorists").

200. *Smith*, 494 U.S. at 881.

general applicability prohibiting private schooling altogether, or regulating private school curriculum in such a way as to infringe on the free exercise of religion, would be evaluated not under the more restrictive *Smith* test but would be considered on the basis of the free speech and parental rights interests, in conjunction with the Free Exercise Clause. Nonetheless, a law purportedly of general applicability, but enacted with the purpose of discriminating against a particular religion, would violate the Free Exercise Clause.[201]

Some have questioned whether parents' free exercise interests are always aligned with those of their children, and whether under certain circumstances the Court should consider the child's religious interests as distinct from their parents. In a partial dissent in *Yoder*, Justice Douglas argued that the Court should have looked at whether the children, as opposed to their parents, wanted to protect their free exercise rights.[202] Where the record suggested that one of the petitioners had, in fact, stated her desire not to attend high school, Douglas concurred that her free exercise rights ought to allow her not to attend.[203] However, as to the other petitioners, for whom there was no record as to their own religious preferences, Douglas stated:

> It is the future of the student, not the future of the parents, that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. The child may decide that that is the preferred course, or he may rebel. It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny. If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may

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201. *See* Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 547 (1993) (stating that legislators cannot "devise mechanisms . . . designed to persecute or oppress a religion or its practices," and holding that a city ordinance that regulated the sacrifice of animals violated the Free Exercise Clause).

202. *See* Wisconsin v. Yoder, 406 U.S. 205, 242 (1972) (Douglas, J., dissenting in part) (noting that children mature enough to have differing views from their parents should be allowed to express those desires).

203. *See id.* at 242-43 (recognizing that an Amish child, who is mature enough to decide, should have the choice whether to attend public high school or the traditional Amish schools).

> be stunted and deformed. The child, therefore, should be given an opportunity to be heard before the State gives the exemption which we honor today.[204]

Other commentators have taken a stronger position, arguing that in order to secure children's religious liberty, the government should compel children's exposure to other religious beliefs, giving them the opportunity to question their beliefs and make more fully informed religious decisions. James Dwyer has argued that children's religious interests should be understood "not as a need for a religious upbringing, but rather as an interest in religious liberty,"[205] and thus, "[a]ny substantive legal protections for children in relation to their education should apply to all children, including those whose parents have religious objections to those protections."[206] However, a majority of the Court has never adopted this more expansive view of children's free exercise rights, and has in all but extraordinary circumstances permitted parents to determine their children's religious interests.

F. *Parental Rights*

1. The Theoretical Basis for Parental Rights

While it might be an exaggeration to say that the notion of parental rights has a thousand fathers, there have been several distinct normative justifications for the idea of parental rights. Parental rights can be seen as emerging from parental obligations; in fact, the Bible's command that parents inculcate their children with values and traditions suggests that parents must have the right to do so.[207] Immanuel Kant similarly viewed parental duty as the source of parental rights:

> [F]rom the fact of *Procreation* in the union thus constituted, there follows the Duty of preserving and rearing *Children* as the Products of this Union. . . .

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204. *Id.* at 245-46 (footnote omitted).

205. JAMES DWYER, RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS 143 (1998).

206. *Id.* at 147.

207. *See Deuteronomy* 6:6-7 (Tanakh, A New Translation of the Holy Scriptures According to the Traditional Hebrew Text, Jewish Publ'n Soc'y 1985) ("Take to heart these instructions with which I charge you this day. Impress them upon your children. Recite them when you stay at home and when you are away, when you lie down and when you get up.").

. . . .

> From the Duty thus indicated, there further necessarily arises the Right of the Parents to the Management and Training of the Child, so long as it is itself incapable of making proper use of its body as an Organism, and of its mind as an Understanding. This involves its nourishment and the care of its Education.[208]

Alternatively, parental rights could arise out of an implied contract between parents and children. Hobbes, for example, commented that "[t]he title to dominion over a child, proceedeth not from the generation, but from the preservation of it; . . . it is to be presumed, that he which giveth sustenance to another, whereby to strengthen him, hath received a promise of obedience in consideration thereof."[209] More modern contractarian thinkers have justified parental rights on the basis of retrospective agreement or future-oriented consent.[210]

A third view of parental rights arises out of the view that parental control over children is preferable to state control. John Locke supposed that parents were naturally the best guarantors of their children's future interests.[211] John Stuart Mill was fairly critical of the notion of parental rights,[212] but nonetheless viewed parents as the preferable educational decision maker to the state, arguing that

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208. IMMANUEL KANT, THE PHILOSOPHY OF LAW 114-16 (W. Hastie trans., T & T Clark 1887) (1796–97), *available at* http://oll.libertyfund.org/ToC/0139.php.

209. THOMAS HOBBES, THE ELEMENTS OF LAW pt. 2, ch. 4, No. 3, at 132 (Ferdinand Tonnies ed., Simpkin, Marshall & Co. 1859) (1640), *available at* http://www.thomas-hobbes.com/works/elements/.

210. DAVID WILLIAM ARCHARD, CHILDREN, FAMILY AND THE STATE 98-99 (2003).

211. *See* JOHN LOCKE, *Two Treatises of Government* (1698), *reprinted in* TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 7, bk. II, ch. VI, § 67, at 128 (Ian Shapiro ed., Yale Univ. Press 2003) ("God hath woven into the principles of human nature such a tenderness for their offspring, that there is little fear that parents should use their power with too much rigour, the excess is seldom on the severe side, the strong bias of nature drawing the other way."). Locke's political theory required that there be parental power over children, because children could not enter the social contract until they came of age; "'a child is born a subject of no country or government.' He is under his father's tuition and authority till [sic] he come to age of discretion; and then he is a freeman, at liberty what government he will put himself under, what body politic he will unite himself to." *Id.* bk. II, ch. VIII, § 118, at 152.

212. *See* JOHN STUART MILL, *On Liberty* (1859), *reprinted in* THREE ESSAYS 5, 128 (The World's Classics, No. 170, 1966) (1912) ("One would almost think that a man's children were supposed to be literally, and not metaphorically, a part of himself, so jealous is opinion of the smallest interference of law with his absolute and exclusive control over them . . . .").

while the state should enforce universal education as a general, content-neutral proposition, only by allowing parents to determine education could there be protection from state suppression of free thought.[213] Charles Fried has argued that the notion of parental rights can be better understood as a hybrid right emerging out of parents' freedoms, parents' obligations, and the state's lack of claim of right to control children:

> The guiding conception, I suggest, is that the right to form one's child's values, one's child's life plan and the right to lavish attention on that child are extensions of the basic right not to be interfered with in doing these things for oneself. . . .
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> . . . [T]he sense of possession of oneself, which negative rights protect, extends to possession of one's function. And this extends quite naturally to reproduction. But a baby is not, of course, just like the love or pleasure associated with sexual relations. It is an independent person (or will be one—I do not enter that debate) with rights of its own. This independent status is sufficiently recognized by obliging the parents to care for and educate the child in the child's best interests. The child's most intimate values and determinants, however, must come from somewhere. The child cannot choose them—rather, they choose the child. And society has no special right to choose them, since society, after all, is only the hypostasis of individual, choosing persons.[214]

Perhaps because parental rights are not analogous to the standard model of individual rights, their place within the constitutional order, while recognized, is somewhat murky.

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213. *Id.* at 129-30 (advocating a different role for the government with regard to the provision of education). Mill proposes the following:

> If the government would make up its mind to *require* for every child a good education, it might save itself the trouble of *providing* one. It might leave to parents to obtain the education where and how they pleased, and content itself with helping to pay the school fees of the poorer classes of children . . . . All that has been said of the importance of individuality of character, and diversity in opinions and modes of conduct, involves, as of the same unspeakable importance, diversity of education.

Id.

214. CHARLES FRIED, RIGHT AND WRONG 152-54 (1978).

2. Parental Rights and the Constitution

a. Due Process

The parental right to raise children was first applied as a fundamental liberty due process right in *Meyer v. Nebraska*.[215] In that case, the Supreme Court stated:

> [The term "liberty"] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[216]

In providing this broad statement of liberty rights, the *Meyer* Court relied upon a series of since-disfavored substantive due process economic rights cases, including *Lochner v. New York*.[217] To date, the doctrine of parental rights has largely been rescued from the Lochnerism label by its incorporation into the realm of personal liberty due process rights.[218] However, the extent to which the Court will recognize parental rights may depend on which approach it adopts to address the liberty interest at stake. A more tradition-based view of the liberty interest, recognizing only "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed,"[219] considers among those rights the right to direct the education and upbringing of one's children.[220]

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215. 262 U.S. 390 (1923).

216. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

217. 198 U.S. 45 (1905); *see Meyer*, 262 U.S. at 399 (citing Lochner v. New York, 198 U.S. 45 (1905)) (reviewing *Lochner*, along with thirteen other cases, for the Court's definition of "liberty").

218. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 66, 75 (2000) (finding that the Due Process Clause encompasses parents' decisions regarding the custody, control, or care of their children, and holding invalid a state statute from Washington which, as applied, forced a mother to give her children's paternal grandparents visitation access to their grandchildren).

219. Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (citations and internal quotation marks omitted).

220. *But see Troxel*, 530 U.S. at 92 (Scalia, J., dissenting) (arguing that "the theory of unenumerated parental rights underlying [*Meyer*, *Pierce*, and *Yoder*] has small claim to

To the contrary, a more liberal interpretation of the liberty interest, one that "includes a freedom from all substantial arbitrary impositions and purposeless restraints," might actually be less deferential to parental rights than a more tradition-based conception of the liberty interest.[221] Although the Supreme Court, in deciding cases on these broad liberty interest grounds, has thus far continued to cite *Meyer* and *Pierce* favorably,[222] there is certainly an argument that the Court should not be bound by the historical recognition of parental rights. Ultimately, the Supreme Court could conclude certain limitations on parental rights are not in fact arbitrary and purposeless, but rather are protecting important state interests or children's rights.[223]

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stare decisis protection," and arguing against judicially vindicating a right that the Constitution does not specifically guarantee). At the very least, the assumption that the common law granted parents unfettered control over their children's education is shaky. While the common law may have recognized a natural parental duty to give children "an *education* suitable to their station in life," WILLIAM BLACKSTONE, 1 COMMENTARIES *450, it also placed significant restrictions on parental control over their children's education. Blackstone wrote:

> [I]t is provided, that if any person sends any child under his government beyond the seas, either to prevent its good education in England, or in order to enter into or reside in any popish college, or to be instructed, persuaded, or strengthened in the popish religion; in such case, besides the disabilities incurred by the child so sent, the parent or person sending, shall forfeit 100l., which shall go to the sole use and benefit of him that shall discover the offence. And if any parent, or other, shall send or convey any person beyond sea, to enter into, or be resident in, or trained up in, any priory, abbey, nunnery, popish university, college, or school, or house of jesuits, or priests, or in any private popish family, in order to be instructed, persuaded, or confirmed in the popish religion, or shall contribute anything towards their maintenance when abroad by any pretext whatever, the person both sending and sent shall be disabled to sue in law or equity, or to be executor or administrator to any person, or to enjoy any legacy or deed of gift, or to bear any office in the realm, and shall forfeit all his goods and chattels and likewise all his real estate for life.

Id. at *451-52.

221. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 848 (1992) (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

222. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 564 (2003) (stating that *Meyer* and *Pierce* are examples of cases that make "broad statements of the substantive reach of liberty under the Due Process Clause"); *Casey*, 505 U.S. at 849 (asserting that the Constitution limits a state's right to interfere with the basic decisions about family and parenthood).

223. *See* JAMES G. DWYER, RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS 80-81 (1998) (arguing that a rebuttable presumption in favor of a traditional social practice or legal rule should not be required when a well-founded challenge is presented, and asserting that "most legal scholars reject the tradition-based approach to determining fundamental rights"); Francis Barry McCarthy, *The Confused Constitutional Status and Meaning of Pa-*

b. Parental Educational Rights As Free Speech

Recognizing that state regulation of private schools raises free speech concerns for schools, teachers, and students,[224] such regulation may also violate the free speech rights of parents. Stephen G. Gilles has argued that "[t]he substantive due process rulings in *Pierce* and *Meyer* have tended to obscure the serious free speech problems associated with state regulation of education."[225] Gilles further asserts that, because parents communicate values and educate their children through the exercise of speech, such speech should be subject to the same protection afforded to core political speech.[226] Even when the Court has generally upheld bans on the distribution of indecent speech to minors, this ban has not been extended to prohibit parents from exposing their children to harmful speech if they wish to do so.[227] Gilles would extend this one step further, arguing that parentally chosen schools should be viewed as agents of parents' educative speech, and as such, viewpoint-based restrictions on school speech should be viewed as un-

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rental Rights, 22 GA. L. REV. 975, 984 (1988) (giving a two-fold argument against using tradition-based analysis to find fundamental rights).

224. *See supra* Part IV(D) (discussing potential free speech challenges to the teaching of radical ideologies in private schools).

225. Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 1013 (1996).

226. *Id.* at 1016.

227. *See* Ginsberg v. New York, 390 U.S. 629, 639 (1968) (adding that a New York statute prohibiting the sale of obscene materials to minors does not prevent parents from purchasing the prohibited materials for their children); Fabulous Assocs., Inc. v. Pa. Pub. Util. Comm'n, 896 F.2d 780, 788 (3d Cir. 1990) (equating parents' responsibility to hide sexually explicit materials they choose to view from their children with the responsibility of preventing their children from calling adult-oriented phone message services, and therefore invalidating a statute that required adults, wishing to call such services, to obtain an access code prior to calling); *see also* Ashutosh Bhagwat, *What If I Want My Kids to Watch Pornography?: Protecting Children from "Indecent" Speech*, 11 WM. & MARY BILL RTS. J. 671, 694-95 (2003) (arguing that restrictions of minors' access to speech can only be justified by state interests in assisting parents who wish to control their children's access to speech, not by an independent state interest in regulating children's speech access without regard to their parents' wishes). While some courts have relied upon parents exposing their children to speech that is indecent or ideologically harmful as a basis for denying custody, most restrictions on parental speech cannot be justified under the First Amendment. *See* Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 80 N.Y.U. L. REV. (forthcoming 2006) (manuscript at 32-61, on file with the *St. Mary's Law Journal*), *available at* http://www1.law.ucla.edu/~volokh/custody.pdf (comparing free speech protections for intact families with free speech protections for those families that have undergone a divorce).

constitutional infringements on parents' free speech rights.[228] The end result of Gilles's argument is not that different from the results reached by the Court through the standard due process parental rights analysis—compulsory public schooling or viewpoint-discriminatory bans on the teaching of certain subjects would be unconstitutional, while compulsory schooling laws would not.[229] However, Gilles's analysis provides an alternative basis for the Court's decisions that does not suffer from a possible substantive-due-process rights critique.

G. *Equal Protection for Children*

The previous sections, concerning free speech, the free exercise of religion, and parental rights, suppose that the Constitution imposes limits on the extent to which the state may regulate private schools. However, constitutional decisions about education do not merely concern the rights of schools, parents, or children, to be left alone by the government to dictate the course of education as they see fit. Rather, education is also recognized as an important positive right that is needed in order to function as a full-fledged citizen in a democracy, and that must be apportioned in a way that does not violate principles of equal protection. Arguably, a child that is taught radicalism and intolerance may not acquire the skills necessary to function as a citizen of a diverse, multicultural society. The need to assure that all students acquire these skills might justify greater regulation of the educational system in order to ensure that some minimal prerequisite values are transmitted to all.

In *Brown v. Board of Education*,[230] the Supreme Court established the principle that there is a right to equal protection in the dispersal of educational resources.[231] Some commentators have argued that such an equal protection rationale would justify greater

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228. Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 1016-17 (1996); *see also* Troxel v. Granville, 530 U.S. 57, 95 (2000) (Kennedy, J., dissenting) (commenting that "*Pierce* and *Meyer*, had they been decided in recent times, may well have been grounded upon First Amendment principles protecting freedom of speech, belief, and religion").

229. *See* Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 1019-24 (1996) (comparing different types of state regulation of schools as such regulations affect parental educative speech).

230. 347 U.S. 483 (1954).

231. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (proclaiming that education "is a right which must be made available to all on equal terms").

interference with private schools than the Court has previously recognized. For example, Mark Tushnet suggests that private schools could be abolished altogether if Congress, acting pursuant to Section Five of the Fourteenth Amendment, concluded that "the availability of private schools interfered with society's ability to reach a point of social integration where judgments about people's worth are made solely on the basis of individual merit."[232] Tushnet's supposition that the enforcement power under Section Five might supersede a right to private schooling rests on what he views as the relatively weak position of countervailing constitutional rights.[233] Tushnet relies on the Court's antipathy to substantive due process rights in *Bowers v. Hardwick*[234] to suggest the weakness of *Pierce*'s holding.[235] Although the more recent case *Lawrence v. Texas*[236] may represent a strengthening of substantive due process,[237] the strength of this doctrine with regard to private schooling may be somewhat of an open question at this date, particularly if there is a

232. *See* Mark Tushnet, *Public and Private Education: Is There a Constitutional Difference?*, 1991 U. CHI. LEGAL F. 43, 53-54 (1991) (analyzing the question of whether Congress could abolish privatized schooling altogether, and proposing a scenario where Congress could implement such an abolition under Section Five of the Fourteenth Amendment); *see also* Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461, 1475 (2003) (arguing that mandatory public schooling is necessary to achieve equal educational opportunity).

233. *See* Mark Tushnet, *Public and Private Education: Is There a Constitutional Difference?*, 1991 U. CHI. LEGAL F. 43, 54 (1991) (asserting that his scenario—where Congress concludes privatized schooling prevents total social integration—is a more substantial justification to prohibit privatized schooling than the *Pierce* reasoning that Fourteenth Amendment due process guarantees such schooling).

234. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

235. *See* Mark Tushnet, *Public and Private Education: Is There a Constitutional Difference?*, 1991 U. CHI. LEGAL F. 43, 53 (1991) (using the *Bowers* Court's cautioning that "[t]here should be . . . great resistance to expand the substantive reach of [the Fourteenth Amendment Due Process Clause]" to attack *Pierce*'s expansive reading of the Due Process Clause (first alteration and omission in original) (quoting Bowers v. Hardwick, 478 U.S. 186, 195 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558, 577-79 (2003))). In *Bowers*, the Court upheld a Georgia anti-sodomy statute by refusing to recognize a fundamental right to engage in homosexual activity in the privacy of one's home. *Bowers*, 478 U.S. at 195. In doing so, the Court struck down Mr. Hardwick's argument that the due process clauses of the Fifth and Fourteenth Amendments guaranteed such a right. *Id.*

236. 539 U.S. 558 (2003).

237. *See* Lawrence v. Texas, 539 U.S. 558, 577-79 (2003) (holding that a Texas anti-sodomy statute directed at homosexuals was invalid under the due process clauses of the Fourteenth and Fifth Amendments, and specifically overruling *Bowers*).

countervailing equal protection argument.[238] Additionally, the Court has made clear that at least in the realm of racial discrimination in private, nonsectarian schools, Congress's Section Five power supersedes any associational, privacy, or parental rights that might be asserted.[239] However, given the Supreme Court's strong affirmance of expressive associational rights in recent cases such as *Boy Scouts of America v. Dale*,[240] the prospect that an equal protection claim would supersede the expressive associational or free exercise-based right not to attend a compulsory public school, particularly in the absence of a racial segregation concern, seems much less likely.[241]

Taking a stronger position, James Dwyer argues that the state is sanctioning the unequal treatment of children in violation of their equal protection rights by allowing private religious schools to function.[242] Dwyer presupposes that much of the education provided for in private, religious schools is inherently harmful, particularly the inculcation of sexist attitudes and the provision of education that "endeavor[s] to stifle rather than nurture students' critical thinking capacities."[243] Stephen Carter rejects this view:

> I do not dispute, in principle, the notion that children possess rights. I do dispute, both in principle and in practice, the notion that these rights include the freedom to evade the religious training, and concomitant religious responsibility, that their parents choose to place upon them. The decision by a parent to send a child to a religious school does not seem to me materially different from the deci-

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238. Tushnet does not address whether there may be alternative constitutional bases for the Court's holding in *Pierce*, such as free speech, associational, or free exercise grounds.

239. *Cf.* Runyon v. McCrary, 427 U.S. 160, 179 (1976) (affirming the congressional exercise of legislative power to prohibit racial discrimination in private education under Section Two of the Thirteenth Amendment).

240. 530 U.S. 640 (2000).

241. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 659 (2000) (holding that the application of a New Jersey antidiscrimination statute to require the Boy Scouts to retain a homosexual scoutmaster is an intrusion on the group's organizational First Amendment right to express its opposition to homosexuality).

242. *See* James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws As Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321, 1464 (1996) (concluding that religious exemptions to educational laws would not survive an equal protection challenge, regardless of whether a court analyzed a law in question under heightened scrutiny or a rational basis review).

243. *Id.* at 1341.

> sion by a parent to send a child to a religious church. To the objection that the child somehow "needs" secular education, I can only say that such an answer mocks the value of the religious life, and also supposes, wrongly, that we are in greater need of smart adults than good ones.[244]

Nonetheless, although Dwyer's view of private religious schools in general is highly contestable, even accepting his premise that private religious schools are inherently unequal and harmful, it is not clear that those types of educational inequalities implicate the Equal Protection Clause. In *Plyler v. Doe*,[245] the Court stated that an "absolute deprivation of education should trigger strict judicial scrutiny."[246] However, the Court has never held that the Equal Protection Clause demands that all schools provide precisely comparable education, just that uneven dispersal of educational resources must not be made on the basis of suspect classifications. In this regard, the Court in *San Antonio Independent School District v. Rodriguez*,[247] noted that "the Equal Protection Clause does not require absolute equality or precisely equal advantages. Nor indeed, in view of the infinite variables affecting the educational process, can any system assure equal quality of education except in the most relative sense."[248]

Even if the education provided in private religious schools is a sufficient deprivation to be considered unequal treatment under the Equal Protection Clause, in order to have a constitutionally cognizable claim based on Dwyer's argument, state action must be implicated. One possible source of state action is that a state, by empowering parents to make educational choices, facilitates the denial of equal educational opportunities. However, in *DeShaney v. Winnebago County Department of Social Services*,[249] the Court held that a state's failure to prevent a father from abusing his child was not a violation of the child's Fourteenth Amendment due pro-

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244. Stephen L. Carter, *Parents, Religion, and Schools: Reflections on* Pierce, *70 Years Later*, 27 SETON HALL L. REV. 1194, 1222 (1997).

245. 457 U.S. 202 (1982).

246. Plyler v. Doe, 457 U.S. 202, 209 (1982) (quoting *In re* Alien Children Educ. Litig., 501 F. Supp. 544, 582 (S.D. Tex. 1980)) (restating a holding from a lower court case that was consolidated with *Plyler* on appeal to the Supreme Court).

247. 411 U.S. 1 (1973).

248. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 24 (1973) (footnote omitted).

249. 489 U.S. 189 (1989).

cess rights.[250] This holding suggests that the delegation of parental authority to parents, even when doing so results in harm to the child, does not constitute state action. Arguably, state action might also be implicated if the state exempts religious schools or parents from otherwise generally applicable laws. However, in *Corporation of Presiding Bishop v. Amos*,[251] the Court upheld an exemption from anti-discrimination provisions for religious employers, noting that laws providing a uniform benefit to all religions were not subject to strict scrutiny, but rather should be examined under rational basis review.[252] Because the exemptions served the purpose of avoiding government entanglement with religious institutions, they passed rational basis review and did not violate the Equal Protection Clause.[253] Additionally, the fact that a private school is regulated to some degree by the state does not convert the school's every action into state action.[254] On the other hand, when the state provides support to private schools that engage in discrimination, state action may be triggered.[255] Yet, unlike discriminatory admissions policies that may violate the Equal Protection Clause, the claim of an equal protection violation is much more tenuous when the issue is state encouragement of the school's continued functioning and the children's continued attendance at religious private schools that provide a substandard education. To make this case, the Court would have to treat the children attending these schools as a suspect or quasi-suspect class, triggering a heightened standard of review. The influential Footnote Four of *United States v. Carolene Products Co.*[256] suggests that a heightened standard of review may be necessary when a law burdens a "discrete and insular minority" for whom the operation of ordinary

250. Deshaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 202 (1989).

251. 483 U.S. 327 (1987).

252. *See* Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 339 (1987) (holding that the statute easily passes muster under the *Lemon* test and therefore does not need to be strictly scrutinized).

253. *Id.*

254. *See* Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968) (holding that "the fact that [a state] has exercised some regulatory powers over the standard of education offered by [a private university] does not implicate it generally in [the university's] policies").

255. *See* Norwood v. Harrison, 413 U.S. 455, 464-65 (1973) (holding that the State of Mississippi could not lend textbooks to students in private, racially segregated schools).

256. 304 U.S. 144 (1938).

political processes cannot be expected to work.[257] In order to conclude that these children were such a discrete and insular minority, the Court would have to conclude that a whole class of parents could not be relied upon to represent the interests of their children.[258] While Dwyer would support this position, he acknowledges that it would require a conclusion "that the entire body of judicial decisions upholding parental free exercise rights is illegitimate."[259] Thus, an argument that private religious schooling should end or be subject to much greater state regulation on equal protection grounds is unlikely to prevail.

V. CONCLUSION

Benjamin Franklin once remarked that "[t]hose who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety."[260] Preserving liberty, of course, does not require us to ignore the threat posed by radical Islamist terrorism, or to react as if every attempt to combat the threat is a step on the road to totalitarianism. Rather, the liberty protected by the Constitution requires a balancing of individual rights with the security needs of the state. This balancing is not an evasion of a full-fledged defense of liberty—after all, the victims of terrorism have been denied their liberty too. Considering the constitutional doctrine, it may be that the Free Exercise Clause and parental rights doctrine might not by themselves bar the state from interfering in private education to prevent the teaching of radicalism and intolerance. However, the constitutional protection of freedom of speech resolves the issue in favor of private schools' ultimate autonomy to teach what they want, even if what they want is repugnant and dangerous.

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257. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

258. *But see* City of Cleburne, Tex. v. Cleburne Living Ctr., Inc., 473 U.S. 432, 472 n.24 (1985) (Marshall, J., concurring in part and dissenting in part) (negating minor children from the discrete and insular minority classification). Justice Marshall implies that legislators would act in the best interest of children because "[they] were once themselves young, typically have children of their own, and certainly interact regularly with minors." *Id.*

259. James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws As Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321, 1429 (1996).

260. BENJAMIN FRANKLIN, *Pennsylvania Assembly: Reply to the Governor* (Nov. 11, 1755), *reprinted in* 6 THE PAPERS OF BENJAMIN FRANKLIN 238, 242 (Leonard W. Labaree ed., 1963).

That being said, those who think that the government must play a role in the war of ideas that is part of the War on Terror need not throw their hands up in despair. While the government cannot coerce parents and private schools to accept any particular educational plan, it can take certain steps to reduce the teaching of radical Islamist ideology in the United States. First of all, it is clearly within the government's diplomatic powers to take all efforts to ensure that the prime mover in funding and disseminating radical Islamist ideology, the government of Saudi Arabia, ceases its behavior and changes its ways. Second, through the use of selective, conditional funding, the government can exert greater curricular control over private schools and encourage the development of moderate Muslim schools. Even if these options are followed, some schools may still fall through the cracks, and some students may still be inculcated with an ideology that will ultimately lead them to terrorism. For those individuals, when ideology turns to incitement, or preparation for action, it may be necessary and appropriate to preempt those actions through a whole spate of coercive law enforcement or even military tactics. But unless that threshold is crossed, while the government may seek to persuade its citizens to teach their children values of freedom and tolerance, it cannot force them to do so.