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## Conflicting Images of Children in First Amendment Jurisprudence

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# Conflicting Images of Children in First Amendment Jurisprudence

David L. Tubbs\*

*The corruption of the public mind, in general, and debauching the manners of youth, in particular, by lewd and obscene pictures exhibited to view, must necessarily be attended with the most injurious consequences, and in such instances, courts of justice are, or ought to be, the schools of morals.<sup>1</sup>*

*[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. . . . [T]he burden normally falls upon the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes."<sup>2</sup>*

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1. *Commonwealth v. Sharpless*, 2 Serg. & Rawle 91, 103 (Pa. 1815) (Yeates, J., concurring).  
2. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210-11 (1975) (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)) (alterations in original).

## I. INTRODUCTION

For much of American history, it has been a commonplace that children have distinct needs vis-à-vis adults. Owing to their impressionability and dependence on others, children are still thought to be vulnerable in ways that most adults are not. In different ways, the law continues to take account of this vulnerability.<sup>3</sup>

The main features of childhood and adolescence are identical across time and place. That is, despite considerable differences among individuals, the physical, intellectual, and moral development that ordinarily occurs in the young follows a pattern. Because of these regular stages of development, one might suppose that it would be easy or straightforward to characterize the needs and vulnerabilities of children for legal analysis. But in at least one branch of the law, the record suggests something else. Instead of finding consistent characterizations of those needs and vulnerabilities, we find some puzzling differences. Taken together, those differences add up to a large inconsistency.

The main purpose of this Article is to document that inconsistency as it has emerged in the judicial record of the Supreme Court of the United States. The inconsistency has manifested itself in some controversial First Amendment cases involving different interests of children. A second purpose of this Article is to probe the historical and philosophic sources of the inconsistency and to comment on its deeper meanings.

The inconsistency may be stated as follows. For reasons that are historically intelligible—though, in the end, difficult to justify—the Court in some circumstances characterizes children as morally and psychologically fragile, while in other circumstances it assumes that they are, for all intents and purposes, indistinguishable from adults. It is quite likely that these characterizations have affected the outcomes in important cases.<sup>4</sup> These points will soon become clear, but an overview of the relevant constitutional issues is first necessary.

In recent decades, some critics have faulted the Court for mandating “strict separation” between church and state and for promulgating a highly permissive standard for obscenity. The decisions in *Engel v. Vitale*,<sup>5</sup> *Lemon*

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3. Public recognition of the vulnerability of children is especially evident in laws relating to their sexuality. For different reasons, our society rejects the idea that children and young adolescents have the capacity to choose intelligently with respect to such matters. Thus, sexual relations with young persons and pornography involving children are routinely criminalized. On these two subjects, see the discussions and statutes in RICHARD A. POSNER & KATHARINE B. SILBAUGH, *A GUIDE TO AMERICA'S SEX LAWS* chs. 3, 9 (Richard A. Posner ed., Univ. of Chi. Press 1998) (1996).

4. See *infra* Sections III, IV.

5. 370 U.S. 421 (1962) (holding that the daily recitation of a twenty-two-word nondenominational prayer in the public schools of New Hyde Park, New York violated the

*v. Kurtzman*,<sup>6</sup> and *Miller v. California*<sup>7</sup> have provoked much debate, but unlike the controversial jurisprudence of the right to privacy,<sup>8</sup> these cases involve explicit constitutional provisions, rather than unenumerated rights. Those provisions are found in the First Amendment, which reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . .”<sup>9</sup>

It is no exaggeration to say that the rulings in some First Amendment cases have directly affected millions of children in the United States. In *School District v. Schempp*,<sup>10</sup> the Warren Court held that the daily reading of ten biblical verses in the Pennsylvania public schools was unconstitutional. More recently, in *Reno v. ACLU*,<sup>11</sup> the Rehnquist Court invalidated the Communications Decency Act, which had criminalized the “knowing transmission” of indecent stimuli to a minor over the Internet.

Anyone who wishes to understand these controversies must recall the origins and history of the First Amendment. Despite their differences on basic matters of constitutional interpretation, nearly all scholars agree that the words “shall make no law” were originally meant to bind only Congress. State legislatures were free to restrict speech and “establish” a religion, provided that such actions were consistent with their own constitutions.<sup>12</sup> In

Establishment Clause).

6. 403 U.S. 602 (1971) (invalidating programs in Pennsylvania and Rhode Island that used state funds to reimburse parochial schools for the cost of teachers' salaries, textbooks, and instructional materials in secular subjects).

7. 413 U.S. 15 (1973) (setting forth a new test for obscenity prosecutions and sustaining a conviction in California for the unsolicited mailing of “adult” materials, including pictures of men and women displaying their genitals and engaged in sexual acts).

8. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (holding that the right of personal privacy articulated in *Griswold* and *Eisenstadt* also encompasses a woman's decision to have even a nontherapeutic abortion, at least until the point of “fetal viability”); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (striking down, as violative of constitutional privacy, a Massachusetts law forbidding the distribution of contraceptives to unmarried persons); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that a Connecticut statute categorically proscribing the use of contraceptives violates an unenumerated constitutional right to marital privacy).

9. U.S. CONST. amend. I.

10. 374 U.S. 203 (1963). In *Murray v. Curlett*, the companion case to *School District v. Schempp*, the Court struck down a rule by the Baltimore Board of Education requiring the recitation of the Lord's Prayer at the start of each school day. *Id.* at 203 (citing *Murray v. Curlett*, 179 A.2d 698, *rev'd*, *Schempp*, 374 U.S. at 203).

11. 521 U.S. 844 (1997). Although the majority opinion casts some doubt on the notion, it appears that in this case “indecent” was understood by the sponsors of the legislation to mean depictions or descriptions of sexual or excretory activities or organs “in terms patently offensive as measured by contemporary community standards.” *Id.* at 860.

12. See, e.g., LEO PFEFFER, *CHURCH, STATE, AND FREEDOM 141* (Oceana Publ'n 1989) (1967).

fact, at least four states had established religions when the Bill of Rights was ratified in 1791,<sup>13</sup> and obscenity prosecutions occurred regularly in state courts for much of the nineteenth and twentieth centuries.<sup>14</sup>

That the Bill of Rights was meant to apply only to actions undertaken by the federal government was confirmed by the Supreme Court in the nineteenth century. Cases such as *Barron v. Mayor of Baltimore*<sup>15</sup> and *Permoli v. Municipality No. 1*<sup>16</sup> underscored the limited applicability of the first eight amendments. A central theme of these decisions involves the basic structure of our federal system: the government of the United States is one of delegated or enumerated powers, whereas each individual state retains all powers not delegated to the federal government or prohibited to the states. Thus, the Bill of Rights was understood as a statement of principles about the freedom of individual citizens in relation to the newly created national government.<sup>17</sup>

In the decades following the Civil War, the common understanding of the Bill of Rights gradually changed, and the Supreme Court affirmed that most of the provisions were binding on the states. According to the most influential historical interpretation, this change was effected by the passage of the Fourteenth Amendment, whose framers and ratifiers wished to “nationalize” the Bill of Rights (i.e., to make its provisions binding on the states). This theory of nationalization, also known as “incorporation,” is accepted by most, but not all, constitutional scholars. Disagreements concern the precise intentions of the authors of the Fourteenth Amendment,

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13. *Id.*

14. See, e.g., DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS, 1870-1920* (Cambridge Univ. Press 1999) (1997); Leo M. Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40 (1938); see also cases cited and discussion *infra* Section II.

15. 32 U.S. (7 Pet.) 243 (1833).

16. 44 U.S. (3 How.) 589 (1845).

17. *Barron v. Mayor of Baltimore* involved a wharf owner’s suit against the city government after it had channelled deposits of sand and gravel into the harbor, thereby making the wharf unuseable. In considering the plaintiff’s claim that the city’s action violated the Due Process Clause of the Fifth Amendment, Chief Justice Marshall wrote:

The [C]onstitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. . . . If these propositions be correct, the [F]ifth [A]mendment must be understood as restraining the power of the general government, not as applicable to the states.

32 U.S. (7 Pet.) at 247.

The words of Justice Catron in *Permoli* were just as direct: “The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states.” 44 U.S. (3 How.) at 609. Still, one must remember that the original (unamended) Constitution did contain important prohibitions on the states. See, e.g., U.S. CONST. art. I, § 10 (“No State shall . . . pass any Bill of Attainder . . . or grant any Title of Nobility.”).

the soundness of subsequent decisions, and the binding force of *stare decisis*.<sup>18</sup>

Despite this continuing debate, almost all of the provisions of the Bill of Rights had been nationalized by the 1950s. That development helps to explain some of the disputes relating to the Establishment, Free Speech, and Free Press Clauses, but the most heated arguments are due to the abandonment of the traditional interpretations of their provisions. Those matters will now be summarized.

Since the late 1940s, the central question of Establishment Clause jurisprudence has been that of “nonpreferentialism.” This theory holds that the Clause prohibits a state religion (or a privileged status for any religion or sect), while permitting government aid to religion on a nonpreferential basis. Proponents of nonpreferentialism believe that the government has legitimate reasons for promoting religion. They often cite its role in fostering personal rectitude and argue that the state should lessen the “double burden” on parents who believe (often as a matter of conscience) that they are obliged to send their children to religious schools while still being required to support public schools through local taxes.<sup>19</sup>

18. Leading contributions to the debate on the nationalization of the Bill of Rights include RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (Liberty Fund, Inc. 1997) (1977); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (Duke Univ. Press 1990) (1986); William W. Crosskey, *Charles Fairman, “Legislative History,” and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949); Howard J. Graham, *The “Conspiracy Theory” of the Fourteenth Amendment*, 47 YALE L.J. 371 (1938).

19. Two early statements in defense of nonpreferentialism are Edward S. Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROBS. 3 (1949), and John Courtney Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROBS. 23 (1949). See also WALTER BERNS, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* 1-32 (Regnery Publ’g, Inc. 1985) (1976). For present purposes, it is unnecessary to take a position on the question of whether the Fourteenth Amendment was intended to nationalize the Bill of Rights. Although this Article accepts nationalization as a historical fact, readers should still think about what the notion means with respect to the Establishment Clause. That is, if the Clause is essentially a jurisdictional statement—meant to define the relationship concerning religion between the federal government and the states—then one could argue that the Establishment Clause could not be nationalized. Edward Corwin understood the Clause in this way, writing that:

the Fourteenth Amendment does not authorize the Court to substitute the word “state” for “Congress” in the ban imposed by the First Amendment on laws “respecting an establishment of religion.” *So far as the Fourteenth Amendment is concerned, states are entirely free to establish religions, provided they do not deprive anyone of religious liberty.* It is only *liberty* that the Fourteenth Amendment protects. And in this connection it should not be overlooked that contemporary England manages to maintain as complete freedom of religion as exists in this country alongside an establishment of religion . . .

The alternative reading of the Establishment Clause is known as “high-wall separation.” It is based on the account found in *Everson v. Board of Education*,<sup>20</sup> a case involving the constitutionality of bus fare reimbursements for parents of children attending private schools (all of which were not-for-profit parochial schools). In the majority opinion in *Everson*, Justice Black cited Thomas Jefferson’s letter to the Danbury Baptist Association (1802) as support for the following propositions:

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between church and State.”<sup>21</sup>

The substance of these remarks and the Court’s reliance on Jefferson’s letter have been the subject of intense scholarly disagreement, but the interpretation of the Establishment Clause put forth in *Everson* has had an enormous influence in subsequent cases.<sup>22</sup>

With respect to the Free Speech and Free Press Clauses, the debates regarding obscenity jurisprudence have been equally intense. In a period of just over one hundred years, the Supreme Court discarded the common-law test in *The Queen v. Hicklin*<sup>23</sup>—“whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall”<sup>24</sup>—and then tinkered with several other formulations before settling on a new standard in *Miller v. California*. That standard, still valid today, adjudges materials obscene if three conditions obtain:

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Corwin, *supra*, at 17.

20. 330 U.S. 1 (1947).

21. *Id.* at 15-16 (quoting *Reynolds v. United States*, 98 U.S. 145, 162 (1878)).

22. On the influence of the *Everson* decision and its reliance on Jefferson’s letter, see the opinions in *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985).

23. *The Queen v. Hicklin*, 3 L.R.Q.B. 360 (1868).

24. *Id.* at 371.

(a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>25</sup>

Defenders of the *Miller* test believe that it is a cogent standard because of the categorical words in the First Amendment (“shall make no law”) and the nationalization of the Bill of Rights. Those words and that historical development now require the protection of words, images, and publications that many persons find offensive or revolting. For different reasons, most scholars who adhere to this view believe that courts are mainly responsible for offering such protection.

Many readers are sure to say that these developments in First Amendment jurisprudence have contributed to the enlargement of individual freedom for American citizens. Democratic power has been scaled back, and the range of individual choice—in literature, film, and less elevated media—is much greater now than in the first half of the twentieth century. Something similar might be said about the disappearance of religious activities in public schools. If freedom is understood as the exercise of unhindered choice among alternatives, then the absence of organized prayer or Bible readings in public schools could be thought to make a child or an

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25. *Miller v. California*, 413 U.S. 15, 24 (1973). *Hicklin* was officially repudiated in 1957 in *Butler v. Michigan*, 352 U.S. 380 (1957), and *Roth v. United States*, 354 U.S. 476 (1957). Although *Hicklin* is unmentioned in *Butler v. Michigan*, the Michigan statute that was struck down had similar language to the *Hicklin* test. The effect, according to Justice Felix Frankfurter’s majority opinion, was to “reduce the adult population [of the state] to reading only what is fit for children.” *Butler*, 352 U.S. at 383. *Roth* expressly mentioned *Hicklin* and left no doubt that it was being overruled. In *Roth*, and its companion case *Alberts v. California*, the Court was required to decide whether obscene materials fall within the area of constitutionally protected speech and press. It answered that question in the negative, while remarking that “[a]ll ideas having even the slightest redeeming social importance . . . have the full protection of the guaranties . . .” *Roth*, 354 U.S. at 484. Elsewhere in Justice Brennan’s majority opinion, the test for obscenity was defined as “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest.” *Id.* at 489. Brennan nonetheless emphasized that:

[s]ex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, *e.g.*, in art, literature, and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.

*Id.* at 487.



entire community more receptive to other faiths (as well as agnosticism) and, thus, lead to an increase in religious liberty.<sup>26</sup>

To refer to freedom as the exercise of unhindered choice among alternatives might seem to be uncontroversial. Indeed, this definition so closely corresponds to the moral and political intuitions of many Americans that we are likely to forget about the existence of an older concept of freedom. This older understanding of freedom is of great relevance to the matters under review, and it complicates the analysis in the preceding paragraph considerably.

The concept of freedom associated with the exercise of unhindered or unimpeded choice is sometimes referred to as “negative” freedom. It takes its name from Isaiah Berlin’s celebrated and influential essay, *Two Concepts of Liberty*.<sup>27</sup> In Berlin’s formulation, negative freedom is “the area within which a man can act unobstructed,”<sup>28</sup> or, more precisely, “the absence of obstacles to possible choices and activities.”<sup>29</sup>

The counterpart to negative liberty is the idea (or ideal) of freedom as self-governance, which Berlin designates “positive” freedom. This notion of freedom reflects the seemingly perennial human desires to be independent of the wills of others and capable of resisting external stimuli and inner passions. To the extent that a person attains this independence or self-governance, he is free; to the extent that he remains prey to forces and passions that he cannot control—even if he lives in a society that protects many individual rights—he is, at least to many proponents of the positive concept of liberty, unfree.<sup>30</sup>

Perhaps this admittedly abstract idea can be better understood by a few examples. A person who accepts the negative concept of freedom would define liberty as having a wide range of choices in the different pursuits that make up our lives. Many parents would reject that definition as inadequate, since there are activities that give pleasure or amusement to the young, and that they would choose of their own accord, even though such activities are detrimental to their long-term moral, emotional, and intellectual growth. If a child or adolescent becomes preoccupied with such an activity and will not

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26. To argue that the absence of religious exercises from public schools promotes religious liberty, it seems that one must assume that children have some capacity to make informed choices and that their freedom is violated or curtailed if there is any pressure to choose to participate in such exercises. According to one perspective, the pressure need not be overt, and the Supreme Court’s view has been that if a sufficiently large number of a student’s classmates elect to participate in the exercise, he or she may feel “coerced” to join in. See discussion *infra* Section IV.

27. ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 121 (Oxford Univ. Press 1992) (1969). Berlin uses the terms “freedom” and “liberty” interchangeably, *id.* at 121, and that usage is followed here.

28. *Id.* at 122.

29. *Id.* at xxxix.

30. *Id.* at 131-34.

desist from it, the parent might say that the child is not exercising liberty, but is in a state of unfreedom. The parent might therefore reject the “negative” definition of liberty given above and embrace the idea of freedom as self-governance, which would encompass the development of some identifiable capacities.<sup>31</sup>

The last point should be stressed: one does not become free in the positive sense simply by being born or attaining majority status. To have such freedom might be best understood as a long-term project or an endeavor, requiring the exercise or realization of certain capacities and more than a modicum of self-discipline.

How, then, do people become free in the positive sense? In *Two Concepts of Liberty*, Berlin identified two principal ways. Each will be discussed in turn.

The first way might be called the method of self-abnegation. Common to several different religious and philosophic traditions (including Buddhism and Stoicism), it entails eliminating desires as a way of eliminating dependency and thereby becoming “free.” This approach is largely a mental or psychological effort, sometimes involving prodigious inner struggles and personal valor amidst political or social turmoil.<sup>32</sup>

Berlin is critical of this whole strategy of self-abnegation, asking whether freedom could be more fully realized by the *tangible* elimination or conquest of whatever frustrates the attainment of one’s goals and desires. His final word on this subject appears in the section titled “The Retreat to the Inner Citadel”:

Ascetic self-denial may be a source of integrity or serenity and spiritual strength, but it is difficult to see how it can be called an enlargement of liberty. If I save myself from an adversary by retreating indoors and locking every entrance and exit, I may remain freer than if I had been captured by him, but am I freer than if I had defeated or captured him?<sup>33</sup>

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31. Consider, in this context, the perspective of G. W. F. Hegel, a leading proponent of the positive concept of freedom: “The final purpose of education . . . is liberation and the struggle for a higher liberation still. . . . In the individual subject, this liberation is the hard struggle against pure subjectivity of demeanour, against the immediacy of desire, against the empty subjectivity of feeling and the caprice of inclination.” G. W. F. HEGEL, *PHILOSOPHY OF RIGHT* 125 (T. M. Knox trans., Oxford Univ. Press 1967) (1821).

32. BERLIN, *supra* note 27, at 135-36.

33. *Id.* at 140.

The second way of achieving freedom in the positive sense involves identifying oneself with a specific principle, doctrine, or institution as a means of transcending impulse and caprice.<sup>34</sup> Of this second method cited by Berlin, religious observance is a well-known example. Thus, for example, when an observant Jew rests on the Sabbath and says that the Law spares him from becoming a slave to the human desire for material gain, he is claiming to be liberated from temptations that beset us all. He believes that he is self-directed in a way that his neighbor, who works ceaselessly to amass more wealth than he could ever need, is not. This notion of freedom has relevance to many other pursuits, as one survey of the teachings of Judaism shows:

So many of the rules and rituals of the Jewish way of life are spiritual calisthenics, designed to teach us to control the most basic instincts of our lives—hunger, sex, acquisitiveness, and so on. We are not directed to deny or stifle them, but to control them, to rule them rather than let them rule us, and to sanctify them by dedicating our living of them to God’s purposes. The freedom the Torah offers us is the freedom to say no to appetite. . . . Think of it this way: There may come a time in your life when your future happiness will depend on your being able to say no to something tempting: a shady business deal, a compromise of your own principles, an illicit sexual adventure. If you have had virtually no experience saying no, if the message from parents and salesmen has consistently been, “If you want it, we can work something out,” what are the chances of your acting properly at that moment? But if all your life you have practiced the control of instinct, saying no to food, to sexual opportunities, to other temptations, how much better will your chances be?<sup>35</sup>

Of course, there are other ways for a person to become “self-governing” in this sense; individual men and women (or groups of them) could order their lives by living in accordance with the Categorical Imperative or the General Will or by seeking to promote some other secular doctrine.<sup>36</sup>

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34. *Id.* at 131-34.

35. HAROLD S. KUSHNER, *TO LIFE!: A CELEBRATION OF JEWISH BEING AND THINKING* 51-52 (Warner Books 1994) (1993).

36. *See, e.g.*, BERLIN, *supra* note 27, at 131-32; HEGEL, *supra* note 31, at §§ 257-58, 260-61; IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* (Allen W. Wood ed. & trans., Yale Univ. Press 2002) (1785); JEAN-JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT* (Hackett Publ’g Co. 1988) (1762). As texts such as these illustrate, the idea of positive freedom finds expression in both democratic theory (*e.g.*, Rousseau’s General Will) and moral philosophy (*e.g.*, Kant’s notion of autonomy).

As these examples suggest, the concept of positive liberty is cognate with a certain understanding of human nature. Traditionally, the idea of freedom as self-governance has evoked an image of a divided self—a “higher” self associated with the faculty of reason, and a “lower” self associated with certain appetites and passions.<sup>37</sup> Self-governance in this sense means that the reasoning faculty holds sway: that the passions are in check or have been directed to worthy purposes.<sup>38</sup>

This picture of the divided self, it should be noted, was a source of anxiety for Berlin. Based on his reading of different events in modern history, he worried that the imagery was sometimes put to bad or egregious use. By identifying the “higher self” with “reason” or an institution said to embody reason—a religion, a directorate, or a party vanguard—political theorists and their acolytes had in some circumstances gained unthinking obedience to these entities, with grave penalties for those who resisted their directives.<sup>39</sup> This historical tendency was one reason that Berlin argued that the negative concept of freedom was, on the whole, more humane than the positive concept.<sup>40</sup>

Berlin’s defense of the negative concept becomes even more understandable if one recalls the international political milieu when *Two Concepts of Liberty* was first presented at the University of Oxford.<sup>41</sup> The ideological battles of the Cold War help us to grasp Berlin’s overriding philosophic and rhetorical objectives. As several observers have noted, the essay may be read as an anti-communist manifesto and a sustained effort to vindicate the main tenets of classical liberalism.<sup>42</sup>

One must nonetheless be cautious in interpreting Berlin’s endorsement of the negative concept of freedom. Contrary to the suggestion of some scholars, Berlin was not saying that the positive concept of freedom was inherently bad or disreputable,<sup>43</sup> nor was he saying that the negative concept

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37. BERLIN, *supra* note 27, at 131-32.

38. *See also* ROUSSEAU, *supra* note 36, at bk. I, ch. 8 (containing one famous statement of this idea).

39. BERLIN, *supra* note 27, at 133-34.

40. *Id.* at xliv-xlv, 171-72. In *Two Concepts of Liberty*, Berlin makes this argument with few concrete references, but the political theories of Rousseau and Marx are singled out.

41. ISAJAH BERLIN, *TWO CONCEPTS OF LIBERTY: AN INAUGURAL LECTURE DELIVERED BEFORE THE UNIVERSITY OF OXFORD ON 31 OCTOBER 1958* (Clarendon Press 1958).

42. *See, e.g.*, Marshall Cohen, *Berlin and the Liberal Tradition*, 10 PHIL. Q. 216 (1960); MICHAEL IGNATIEFF, *ISAJAH BERLIN: A LIFE* chs. 11, 15 (Vintage UK 2000) (1998).

43. For such misreadings, *see* Leon Wieseltier, *When a Sage Dies, All Are His Kin*, NEW REPUBLIC, Dec. 1, 1997, at 29; and RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 21-26 (Replica Books 1997) (1996).

of freedom has wholly superseded the positive concept.<sup>44</sup> In fact, notwithstanding his own identification with the liberal tradition, Berlin stated that the human desire to be free in the positive sense is “a valid universal goal.”<sup>45</sup> Furthermore, it was in connection with education—and by extension, children—that Berlin recognized the limitations of the negative concept of freedom.<sup>46</sup>

These nuances in Berlin’s position are often missed, but it is easy to understand why. First, because of the length of the Cold War, Berlin often had occasion to write on the subject of liberty, and he regularly asserted or intimated that a spurious conception of freedom was central to the Soviet system of political values.<sup>47</sup> Thus, in championing “negative” freedom in this particular conflict of ideas, Berlin might have given some persons the impression that freedom in the positive sense is wholly discreditable.<sup>48</sup>

One should not underestimate the likely influence of Berlin’s writings. Ronald Dworkin, for example, referred to “Two Concepts of Liberty” as “the most famous modern essay on liberty.”<sup>49</sup> Moreover, because he was widely admired as a political theorist, literary critic, and historian of ideas, Berlin had a large academic audience in the United States for at least thirty years. His reputation grew steadily, and his public stature among educated Americans was confirmed by the front-page obituary in the *New York Times* on 7 November 1997.<sup>50</sup>

If the analysis thus far is sound, one implication should be clear. While proponents of the negative concept of freedom usually regard the greater

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44. BERLIN, *supra* note 27, at lviii & n.1.

45. *Id.* at xlvi. For an extended statement on Berlin’s identification with the liberal tradition, see ISAIAH BERLIN, *John Stuart Mill and the Ends of Life*, in *FOUR ESSAYS ON LIBERTY*, *supra* note 27.

46. *See, e.g.*, BERLIN, *supra* note 27, at 169.

47. *Id.* at 171; *see also* ISAIAH BERLIN, *RUSSIAN THINKERS* (Henry Hardy & Aileen Kelly eds., Viking Press 1978) (writing two essays on the political ideas of Alexander Herzen).

48. If one needs further evidence that freedom in the positive sense is not wholly discreditable, consider the following. The positive concept of freedom is reflected in some public policies that seek to prevent adults from acting on potentially dangerous impulses or being careless with respect to personal safety. Examples of such policies include categorical bans on the use of addictive drugs and laws requiring persons in a car or on a motorcycle to wear a seatbelt or helmet. That such laws are sometimes called “paternalistic” is an acknowledgment that adults share some susceptibilities with children. Note, too, that by itself the adjective “paternalistic” does not establish the illegitimacy of those policies, especially in a representative democracy, where those who make the laws for their constituents must also obey them.

49. RONALD DWORKIN, *What Rights Do We Have?*, in *TAKING RIGHTS SERIOUSLY* 267 (Harvard Univ. Press 1978) (1977). By this phrase, Dworkin seems to have meant the most famous twentieth-century essay on the topic.

50. Marilyn Berger, *Isaiah Berlin, Philosopher and Pluralist, Is Dead at 88*, *N.Y. TIMES*, Nov. 7, 1997, at A1. Berlin’s scholarship won him many tributes and engaged some of the most distinguished minds in political theory and other disciplines in the humanities. *See, e.g.*, ISAIAH BERLIN: A CELEBRATION (Edna Margalit et al. eds., Univ. of Chi. Press 1991); *THE IDEA OF FREEDOM: ESSAYS IN HONOUR OF ISAIAH BERLIN* (Alan Ryan ed., Oxford Univ. Press 1992) (1979); *THE LEGACY OF ISAIAH BERLIN* (Mark Lilla et al. eds., N.Y. Review of Books 2002) (2001).

number of choices as evidence of greater freedom, those who endorse the positive concept see things differently. They would suggest that, in at least some circumstances, the expansion of choice might lead to a loss of freedom. To this way of thinking, much depends on the nature of the choices involved, the nature of the persons making the choices, and the correct understanding of "freedom."

These ideas may be applied to the constitutional issues identified above. Today, many of the allegedly private pursuits subsumed under the Free Speech and Free Press Clauses implicate interests of children. Boundaries have been set up to keep these pursuits, involving words and images, beyond the reach of the law and, at the same time, outside the purview of the young. Those boundaries, however, seem less and less secure. The evidence for this thesis will soon be considered,<sup>51</sup> but it is first necessary to ask what risks are incurred if children are exposed to such stimuli.

In *Two Concepts of Liberty*, Berlin wrote that "conceptions of freedom directly derive from views of what constitutes a self, a person, a man."<sup>52</sup> Various texts in Western political theory could be cited in support of this idea, and many canonical texts draw a fundamental distinction between adults and children. The distinction reflects judgments embodied in law, political theory, and everyday life about the capacities and susceptibilities of children vis-à-vis adults. Amidst the deep differences that characterize Western political thought, the amount of agreement on this complex of issues is surprising.

To simplify, it could be said that rationality and self-control must be carefully cultivated in children since they are driven by appetites, including a large appetite for prompt gratification. Being so inclined, they are often blind to other concerns, such as a proper regard for the welfare of others, their own latent rationality, and their own long-term interests. None of these concerns can be given their due unless children acquire a measure of self-control and reflectiveness, allowing them to see beyond their immediate wants and inclinations.

What texts support these ideas? In book one of the *Nicomachean Ethics*, Aristotle characterizes the young as "living and pursuing each successive object as passion directs."<sup>53</sup> A similar idea is found in book four of *The Republic*, where Plato observes that some young persons never

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51. See *infra* Section III.

52. BERLIN, *supra* note 27, at 134.

53. ARISTOTLE, *Nicomachean Ethics*, in THE COMPLETE WORKS OF ARISTOTLE, 1095a (W. D. Ross trans. 1985).

become sufficiently rational (in relation to the spirited part of the soul), while the majority “do so quite late.”<sup>54</sup> Centuries later, John Locke warned that giving a child “an unrestrain’d Liberty” before the faculty of reason is properly developed is “to thrust him out amongst brutes, and abandon him to a state as wretched, and as much beneath that of a man, as theirs.”<sup>55</sup> William Blackstone echoes Locke, predicting that the child who is denied education and culture will “grow up like a mere beast . . . [and] lead a life useless to others, and shameful to himself.”<sup>56</sup>

These ideas can be further specified, as illustrated by Aristotle’s remarks on the virtue of temperance in book three of the *Nicomachean Ethics*:

[C]hildren in fact live at the beck and call of appetite, and it is in them that the desire for what is pleasant is strongest. If, then, it is not going to be obedient and subject to the ruling principle, it will go to great lengths; for in an irrational being the desire for pleasure is insatiable and tries every source of gratification, and the exercise of appetite increases its innate force, and if appetites are strong and violent they even expel the power of calculation. Hence they should be moderate and few, and . . . [just] as the child should live according to the direction of his tutor, so the appetitive element should live according to reason.<sup>57</sup>

The specific pleasures Aristotle had in mind are those of taste and touch, which, because they are shared by other animals, “appear slavish and brutish.”<sup>58</sup>

Aristotle’s approach to moral pedagogy was favorably received by Hegel more than 2,000 years later. For Hegel, “[c]hildren are *potentially* free, and their life directly embodies nothing save potential freedom.”<sup>59</sup> Education must therefore aim to raise children “out of the instinctive, physical level on which they are originally, to self-subsistence and . . . to the level on which they have power to leave the natural unity of the family.”<sup>60</sup> Elsewhere, Hegel defines two pedagogical tasks as breaking down the child’s “self-will” and eradicating “his purely natural and sensuous self.”<sup>61</sup>

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54. THE REPUBLIC OF PLATO 441a-b (Allan Bloom ed., Basic Books 1991).

55. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT ch. 6, § 63 (Hackett Publ’g Co. 1980) (1690).

56. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND bk. I ch. 16 (Univ. of Chi. Press 1979) (1899).

57. ARISTOTLE, *supra* note 53, at 1119b.

58. *Id.* at 1118(b).

59. HEGEL, *supra* note 31, at § 175 (emphasis added).

60. *Id.*

61. *Id.* at “Addition” to § 174.

Given the Hegelian and Aristotelian accounts of children as sensuous, pleasure-seeking beings—accounts which are, in important ways, congruent with the views of Plato, Locke, and Blackstone—how is one to understand a child's interest in being spared exposure to pornography and much indecent stimuli? What is at stake? A cogent answer to this question is found in Immanuel Kant's essay *Conjectural Beginning of Human History*.

In this essay, Kant reads the Genesis narrative philosophically, in an effort to understand different aspects of human nature and to discern the real meaning of the "forbidden fruit" and the fig leaf. One of Kant's provocative claims is that covering the genitals was not so much a sign of shame (after an act of disobedience) as a manifestation of reason over impulse. On this basis, it can be argued that all persons—children and adults, but especially the former—have an interest in being spared exposure to pornography:

In the case of animals, sexual attraction is merely a matter of transient, mostly periodic impulse. But man soon discovered that for him this attraction can be prolonged and even increased by means of the imagination—a power which carries on its business, to be sure, the more moderately, but at once also the more constantly and uniformly, the more its object is removed from the senses. By means of the imagination, he discovered, the surfeit was avoided which goes with the satisfaction of mere animal desire. The fig leaf (3:7), then, was a far greater manifestation of reason than that shown in the earlier stage of development [when humans consumed the "forbidden fruit," representing the first action not urged upon them by instinct]. For the one shows merely a power to choose the extent to which to serve impulse; but the other—rendering an inclination more inward [*inniglich*] and constant by removing its object from the senses—already reflects consciousness of a certain degree of mastery of reason over impulse. *Refusal* was the feat which brought about the passage from merely sensual [*empfundenen*] to spiritual [*idealischen*] attractions, from mere animal desire gradually to love, and along with this from the feeling of the merely agreeable to a taste for beauty . . . .<sup>62</sup>

If Kant is correct, then modern societies have good reason to be wary of pornography, and the adult who regularly consumes it is jeopardizing a host

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62. IMMANUEL KANT, *Conjectural Beginning of Human History*, in *ON HISTORY 57* (Lewis White Beck trans., Prentice Hall Coll. Div. 1963).



of goods. The consequences with respect to the young are likely to be graver still, since such stimuli seem to confirm or validate their innate tendencies, thus making it harder for them to develop their distinctly human faculties (because pornography valorizes impulse as it disparages reason and jeopardizes “spiritual attractions”) and to develop truly human relationships with the other sex (because its members are mainly perceived as potential sources of physical gratification).<sup>63</sup>

The anxiety of the philosophers quoted above is real. Their worry is, that without proper education, persons may remain indefinitely in that state of unfreedom that characterizes childhood in our species. The anxiety is all the more striking when one recalls that none of these thinkers had to worry about such stimuli as are found in the United States today. Lest any reader think that their concerns have had no bearing on public policy, similar language may be found in leading obscenity cases during the late nineteenth century.<sup>64</sup>

There is another matter relevant to the theme of freedom and human nature, and it has implications for recent debates about the Establishment Clause. Many adults regard religious observance as vital to their efforts to lead morally upright lives and it is easy to understand why they want their children to share such observance. In *Two Concepts of Liberty*, Berlin acknowledges that many people regard religion as a source of freedom, at times identifying it with their “higher” and more rational selves.<sup>65</sup> Berlin, as

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63. What Kant is saying about the fig leaf, heterosexual desire, and the development of culture might be usefully compared with the following statement by Harry M. Clor:

Productions deserving to be called pornographic are characterized by graphic and detailed portrayal of sex acts without love or affection and with the result that the erotic life is reduced to its grosser physical or animal elements. The passion depicted and solicited is a thoroughly *depersonalized* sexuality, a desire for possession of bodies without regard for the personalities inhabiting them. Human beings, women especially, are vividly portrayed as objects to be used. The life depicted and celebrated in the pornographic world is devoted to uninhibited accumulation of a mass of pleasurable sensations.

Harry M. Clor, *The Death of Public Morality?*, 45 AM. J. JURIS. 33, 36 (2000); see also HARRY M. CLOR, *OBSCENITY AND PUBLIC MORALITY: CENSORSHIP IN A LIBERAL SOCIETY* ch. 6 (Univ. of Chi. Press 1985) (1969) (offering “[d]efinitions of [o]bscenity and the [n]ature of the [o]bscene”). To the preceding, one might add that pornography rarely, if ever, makes persons mindful of the responsibilities attendant upon sexual relations. Thus, when viewed by young persons, pornography is apt to make them forget that the sexual act is often fraught with consequences (*e.g.*, the creation of new life, the transmission of disease).

64. See discussion *infra* Section II. This is not to say that the views of Plato and the others are indisputably correct and that the old standard for obscenity prosecutions (*i.e.*, the *Hicklin* test) should therefore be restored. For one thing, the differences among these thinkers—*e.g.*, on the morality of slavery, including the question of “natural-born” slaves, and the question of the status of women and girls—tend to overshadow the agreement identified here. Nevertheless, these similarities in the characterizations of children can help one make sense of the bases for state and federal legislation and the judiciary’s adherence to the *Hicklin* test.

65. BERLIN, *supra* note 27, at xlv.

noted, is wary of this tendency, but his acknowledgement is important, and not least because he recognizes the limitations of the negative concept of freedom when certain interests of children are considered.

Many liberals will accept Berlin's view that equating religious observance with any kind of freedom is potentially perilous and perhaps dishonest. Yet the same liberals would eschew the negative concept of freedom when other interests of children are at stake. If, for example, children in a society were at liberty to skip school or to remain wholly unschooled—like the youths who frolicked in the Land of Toys in Collodi's *Pinocchio*—then most liberals would say that a spurious notion of freedom had become accepted. Such “freedom,” they would point out, invariably leads to a harsh servitude, as Pinocchio and Lampwick discovered after they began to bray like asses. Because of such scenarios, liberals are likely to agree with Hegel in thinking that compulsory schooling is often a form of liberation.

If this response is correct, then liberals should be able to extrapolate from the example. At a minimum, they should be able to understand why some parents resist the idea that the public school should be a “religion-free” zone. From diverse religious perspectives, a purely secular moral code may prove feasible for adults who have acquired habits of self-discipline and are mindful of various boundaries in their lives. Yet the same secular morality may not only clash with the tenets of the parents' religion (or religions), it may also harm children. The latter possibility seems strong if this moral code aims to maximize personal freedom, with freedom understood in the negative sense.

There is more to consider. The idea of achieving freedom through religious devotion or obedience to religious law has a long history in the West. This is freedom in the positive sense, a notion that has been expressed in sacred texts (“If ye continue in my word, then are ye my disciples indeed; And ye shall know the truth, and the truth shall make you free”),<sup>66</sup> poetry (John Donne's “Batter My Heart”), and hymns (“In the Lord's Service There Is Perfect Freedom”). Given this heritage, it is unsurprising that some parents believe that voluntary religious exercises in public schools may have a morally “freeing” effect on children.<sup>67</sup>

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66. *John* 8:31-32.

67. It would be an error to suppose (on the basis of the excerpts here) that the idea of becoming free through religious devotion or obedience to religious law is an exclusively Christian notion. See, e.g., KUSHNER, *supra* note 35 and accompanying text. Kushner's remarks seem to have a foundation in classical Judaism. See, e.g., *Babylonian Talmud* (Isadora Epstein ed., 1952) (commenting on *Exodus* 32:16, regarding the word of God being engraved (*harut*) on the tablets). In

Although the Supreme Court of the United States does not use the terms “negative” and “positive” freedom, it has been required to characterize some widely perceived needs of children as a way of defining their interests in constitutional cases. The Court has also found it necessary to describe the moral propensities of children. Such requirements help to explain some common judicial distinctions. Thus, the Court distinguishes between children and adults, remarking in one case that “the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.”<sup>68</sup> As evidence of that greater authority, one could cite the cases *Ginsberg v. New York*<sup>69</sup> and *New York v. Ferber*.<sup>70</sup> In the former, the Court sustained a prohibition on the sale of pornographic materials to minors even though adults were free to purchase the same items;<sup>71</sup> in the latter, it designated child pornography a category of expression unprotected by the First Amendment.<sup>72</sup>

As a general matter, the Supreme Court has maintained that a state’s interest in protecting “the physical and psychological well-being of a minor” is “compelling.”<sup>73</sup> Despite the gravity of these words and the holdings in the *Ginsberg* and *Ferber* cases, the Court has sometimes failed to take concern for children to heart. By recognizing a host of new and controversial First Amendment rights for adults, its solicitude toward the young has demonstrably waned.

This imbalance is reflected in an odd inconsistency in some leading First Amendment cases. The inconsistency, which appears to have gone unnoticed, may now be described more fully. When deciding a case in which children are likely to be “incidentally” exposed to pornography or indecent stimuli,<sup>74</sup> the Court sometimes assumes that young persons are morally resilient beings whose welfare is not going to be unduly affected by

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the commentary, the word “engraved” is revocalized to read “freedom” (*herut*), thus making the point that only those who keep God’s law are truly free. The author of this Article is indebted to Professor David Novak of the University of Toronto for sharing his knowledge of these texts.

68. *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

69. 390 U.S. 629 (1967).

70. 458 U.S. 747 (1982).

71. See *Ginsberg*, 390 U.S. at 633.

72. See *Ferber*, 458 U.S. at 765-66. In *Ginsberg*, the Court ruled that it was constitutionally permissible for the State of New York to employ “variable concepts” of obscenity. *Ginsberg*, 390 U.S. at 635-36. The statute in question adjusted the definition of obscenity to minors, taking account of their susceptibilities and the appeal of certain materials to them. In the majority opinion, Justice Brennan wrote that “we cannot say that the statute invades the area of freedom of expression constitutionally secured to minors.” *Id.* at 637. The Court further remarked that the legislation was rationally related to the objective of safeguarding minors from harm. *Id.* at 642-43.

73. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982).

74. For the purposes of this Article, “incidental exposure” to pornography and other indecent stimuli means the exposure that is likely to occur (and often does occur) when adults are consumers or “producers” of such stimuli and children are in the general or immediate vicinity.

coarse language, gratuitous nudity, or hard-core pornography. In places, the Court even seems to assume that children are little Stoics and just as adept as adults at “managing their impressions” and “averting their eyes.”<sup>75</sup> Yet when deciding cases involving young persons and a state-sponsored religious exercise, the Court tends to characterize children very differently, depicting them as frail, impressionable, and likely to suffer real (though unspecified) psychological damage from the “peer pressure” to participate in the exercise.

This is *not* to say that the Court deems religion more harmful to children than the various indecencies they might encounter in our society. Instead, the inconsistency reveals the extent to which the Court wants to affirm the negative concept of freedom and shun the positive concept. The inconsistency is telling, and it suggests that the Court is confused about some crucial matters relating to the development of children.

Documenting this inconsistency will show the Supreme Court’s growing indifference to what were long considered vital interests of children. It shall also be argued that the Court’s recent obscenity jurisprudence is hard to defend on both constitutional and philosophic grounds. Some readers might think that the critique of the new obscenity jurisprudence (culminating in the three-part test of *Miller v. California*) requires this Article to offer its own judicial standard for obscenity. Without accepting that obligation, it can be said that a good standard would leave a high degree of authority to determine obscenity to legislatures and the ordinary workings of courts and juries.

The rest of this Article is organized as follows. Section II provides a historical summary of federal obscenity jurisprudence until the middle of the twentieth century. This summary will show the judiciary’s acceptance of the traditional understanding of the vulnerability of children when the *Hicklin* test was the constitutional standard for obscenity. During those years, various federal (and state) judges relied on the traditional account as a way of justifying the *Hicklin* test. The end of Section II will offer a brief look at

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75. See, e.g., *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803 (2000) (striking down Section 505 of the Telecommunications Act of 1996, which required cable television operators “primarily dedicated to sexually-oriented programming” to ensure that portions of this programming did not appear on the television sets of nonsubscribers); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (invalidating a municipal ordinance that prohibited drive-in movie theaters from showing films that contained nudity and that were visible from public areas); *Cohen v. California*, 403 U.S. 15 (1971) (holding that, in the absence of “a more particularized and compelling reason,” a state law criminalizing the public display of four-letter expletives violated the First and Fourteenth Amendments). The fact or likelihood of incidental exposure was acknowledged in all three of these cases.

the changes in judicial thinking that led to the new standard for obscenity in *Miller v. California*. In Section III, the phenomenon of “incidental exposure” as defined above will be documented.

Section IV focuses on the Court’s psychological and moral characterization of children in a series of well-known school prayer cases. Though this Article says less about school prayer than obscenity as a constitutional issue, it is hoped that even those who oppose religious exercises in public schools on constitutional grounds will see the importance of the inconsistency described above. Section V concludes with some remarks on the Supreme Court’s practice of judicial review and the likely sources of the curious inconsistency documented within.

## II. OBSCENITY JURISPRUDENCE FROM 1868 TO 1957: AN OVERVIEW

From any standpoint, the *Hicklin* test was highly restrictive. When the test was being repudiated by the Supreme Court in 1957, Justice Felix Frankfurter wrote that it had the effect of reducing “the adult population . . . to reading only what is fit for children.”<sup>76</sup> Justice Frankfurter failed to ask whether this may have been the purpose of the test, and, if that were so, his remark would seem to lose some of its force.

This is raised as a question, and not as a criticism of Frankfurter, because some elements of the *Hicklin* test remain unclear. Although a bill passed in Parliament in 1857 was said to be the basis of the test, doubts remain about whether Lord Chief Justice Cockburn’s criteria for adjudging materials obscene were faithful to that legislation. Known as “An Act for more effectually preventing the Sale of Obscene Books, Pictures, Prints, and other Articles,”<sup>77</sup> the legislation empowered magistrates and justices of the peace to issue special warrants for the seizure and destruction of obscene materials. The term “obscene,” however, was nowhere defined in the legislation.<sup>78</sup>

In *Hicklin*, Lord Chief Justice Cockburn referred to the Parliamentary Act of 1857 and then gave his “test” for obscenity: “whether the tendency of the matter . . . is to deprave and corrupt those whose minds are open to such

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76. *Butler v. Michigan*, 352 U.S. 380, 383 (1957); *see also* *Roth v. United States*, 354 U.S. 476 (1957).

77. An Act for more effectually preventing the Sale of Obscene Books, Pictures, Prints, and other Articles, 1857, 20 & 21 Vict., c. 83 (Eng.).

78. Questions also remain about whether Lord Chancellor Campbell, the bill’s sponsor in Parliament, was being forthright in endorsing it. According to some sources, the Lord Chancellor was a strong opponent of censorship, especially literary censorship, yet he may have felt that the legislation was necessary to stem the circulation of pornographic prints and postcards. For a summary of these matters, *see* Alpert, *supra* note 14, at 50-52. *See also* Sidney S. Grant & S. E. Angoff, *Massachusetts and Censorship*, 10 B.U. L. REV. 36, 52-56 (1930).

immoral influences, and into whose hands a publication of this sort may fall.”<sup>79</sup> Viewed in historical context, *Hicklin* may seem novel for singling out the most vulnerable members of society, since most obscenity cases in the United Kingdom and various American states had simply referred to the corruption of public morals (or to the corruption of youth *as well as* “divers other citizens”). Nevertheless, as early as 1699, a British court had characterized obscenity as that which tends to corrupt youth, and even before *Hicklin* was decided in 1868, that notion found expression in the statutes of at least two American states.<sup>80</sup>

79. *The Queen v. Hicklin*, 3 L.R.-Q.B. 360, 371 (1868).

80. In *Commonwealth v. Sharpless*, 2 Serg. & Rawle 91 (Pa. 1815), the Supreme Court of Pennsylvania affirmed the validity of an indictment in Philadelphia for debauching and corrupting the morals “as well of youth as of divers other citizens of this commonwealth.” Sharpless and others had exhibited and charged admission to see “a certain lewd, wicked, scandalous, infamous, and obscene painting, representing a man in an obscene, impudent, and indecent posture with a woman.” In *Commonwealth v. Holmes*, 17 Mass. (1 Tyng) 336 (1821), portions of the indictment were expressed in nearly identical language. For publishing and delivering a copy of *Memoirs of a Woman of Pleasure*, Holmes was charged with “intending, the morals as well of youth as of other good citizens of said Commonwealth to debauch and corrupt.” Other state cases in which obscenity was understood as the corruption of public morals (and hence indictable at common law) include *Knowles v. State*, 3 Day 103 (Conn. 1808), *State v. Appling*, 25 Mo. 315 (1857), and *Willis v. Warren*, 1 Hilton 590 (N.Y. 1859).

In England, the first reported obscenity case appears to have been *The King v. Sir Charles Sedley*, 1 Keble 620 (K.B. 1663). While drunk, Sedley had exhibited himself on a London balcony overlooking Covent Garden and thrown down bottles filled with urine on the people gathered below. In *The Queen v. Read*, 11 Mod. 205 (Q.B. 1708), the court ruled that writing an obscene book was punishable only in the ecclesiastical courts. This judgment was overruled in *Rex v. Curl*, 2 Strange 789 (K.B. 1727), which contained a reference to *Rex v. Hill*, Mich. 10 W. 3 (1699). In the latter case, the defendant was indicted for “printing some obscene poems of . . . Lord Rochester’s, tending to the corruption of youth.” Though *Rex v. Hill* was omitted from the published law reports, it is prominently cited and summarized in *Rex v. Curl*, and for that reason this Article rejects Leo Alpert’s assertion that “up to this point [in 1727, when *Rex v. Curl* was decided], obscenity in literature had not been the subject of the courts.” Alpert, *supra* note 14, at 44.

As a result of the movement to enact comprehensive penal codes in the American states, the concept of a “common-law crime” gradually began to disappear in this country in the nineteenth century. One implication of the movement to enact such codes in the states was that anything unmentioned in them was “simply not a crime.” (Although it was established long ago that there is no such thing as a federal common-law crime—see *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812)—some common-law crimes remain actionable in various states.) On these matters, see LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 63-65 (Basic Books 1994) (1993). Legislation passed in Massachusetts in 1835 made it a crime to import or distribute indecent writings, prints, pictures, and figures. See Grant & Angoff, *supra* note 78, at 147-48. The test for indecency in this statute was “manifestly tending to the corruption of the morals of youth.” *Id.*; see also *Commonwealth v. Tarbox*, 55 Mass. (1 Cush.) 66 (Mass. 1848). A Texas statute, also passed before the *Hicklin* decision, was nearly the same as the 1835 Massachusetts law. See *State v. Hanson*, 23 Tex. 233 (Tex. 1859).

Within ten years of the decision, *Hicklin* was being cited by federal judges in the United States in a series of cases concerning congressional power to ban obscene materials from the mails. In some of these cases, the test was used to clarify the meaning of the word “obscene” in congressional legislation such as the Comstock Act of 1873. That law made it a crime to mail any “obscene, lewd, or lascivious” writing, picture, or instrument. Contraceptives and abortifacients, and information about their procurement and manufacture, were included in this prohibition.<sup>81</sup>

During the era of the Comstock Act, most of the judicial proceedings involving printed matter were uncomplicated. The central question—whether certain materials were obscene—was one of fact, not law. Juries were expected to decide whether something was obscene, lewd, lascivious, or indecent in the ordinary sense of these words. Because of the similarity in the meaning of these words, judges sometimes provided dictionary definitions to the jury.<sup>82</sup>

Some readers may wonder how this federal legislation was able to survive constitutional challenge. Granting that Congress has the power to establish and regulate a postal system (under Article I, Section 8 of the Constitution), readers might ask how this legislation could be reconciled with the First Amendment. The answer to this question adds another

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81. Federal cases that refer to the *Hicklin* test include *United States v. Harmon*, 45 F. 414 (D. Kan. 1891), *United States v. Clarke*, 38 F. 732 (E.D. Mo. 1889), *United States v. Bebout*, 28 F. 522 (N.D. Ohio 1886), *United States v. Britton*, 17 F. 731 (S.D. Ohio 1883), *United States v. Williams*, 3 F. 484 (E.D.N.Y. 1880), and *United States v. Bennett*, 24 F. Cas 1093 (S.D.N.Y. 1879) (No. 14,571). This is not a complete list. Because of its importance for this Section, the essentials of the Comstock Act are reproduced here:

Every obscene, lewd or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, and every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and every . . . notice of any kind giving information directly or indirectly, where, or how, or of whom, or by what means any of the hereinbefore mentioned matters, articles or things may be obtained or made . . . is hereby declared to be non-mailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Whoever shall knowingly deposit or cause to be deposited for mailing or delivery, anything declared by this section to be non-mailable, or shall knowingly take, or cause the same to be taken, from the mails for the purpose of circulating or disposition thereof, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.

Comstock Act, 18 U.S.C. § 334 (1873) (current version at 18 U.S.C. § 1461 (2002)). The legislation, which was prefigured in the Tariff Act of 1842, was regularly amended after 1873. See Act of Mar. 4, 1911, ch. 241, 36 Stat. 1339 (1911); Conspiracy Act, 321, 35 Stat. 1129 (1909); Act of May 27, 1908, ch. 206, 35 Stat. 416 (1908); Act of Sept. 26, 1888, ch. 1039, 25 Stat. 496 (1888); Act of July 12, 1876, ch. 186, 19 Stat. 90 (1876).

82. See, e.g., *Clarke*, 38 F. at 733; *Bebout*, 28 F. at 524; *Britton*, 17 F. at 733.

complexity to the history and philosophy of personal freedom in the United States.

Before the twentieth century, the Free Speech and Free Press Clauses were understood only as prohibitions on the *prior restraint* or censorship of speech and the press. This was the common-law understanding of freedom of speech and the press, and penalties could be assigned to persons who used these freedoms in ways contrary to the public interest. The core issue was the “tendency” of one’s spoken or written words; if the tendency or overall effect was deemed detrimental to the public interest or common good, a prosecution might ensue. The law distinguished between the responsible and the irresponsible exercise of freedom, with persons being held accountable for their words as well as their deeds.<sup>83</sup>

This history has gained nearly universal acceptance. Even contemporary scholars who are inclined to follow Justices Douglas and Black in their readings of the Free Speech and Free Press Clauses concede that the “no prior restraint” doctrine and the “bad tendency” test had long lives in American constitutional law.<sup>84</sup>

The use of the “bad tendency” standard, including the *Hicklin* test, helps to explain the greater legislative and judicial solicitude afforded to children from roughly 1875 to 1930. Several cases illustrate the greater solicitude, though many persons today may have difficulty in identifying the “bad tendency” in various controversies. The aims of the defendants might even seem praiseworthy—as they did to a minority of persons a century ago.

To construct a defense on that basis was, however, a risky strategy, as *Hicklin* itself shows. In this case, the defendant was convicted for distributing copies of an obscene pamphlet, despite his professed desire to advance the public weal.<sup>85</sup> Containing extracts from Roman Catholic theologians on the practice of auricular confession, the pamphlet also attacked the practice for its alleged immorality.<sup>86</sup> The full title conveyed the author’s grievance: *The Confessional Unmasked; shewing the depravity of*

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83. One case involving a prosecution under the Comstock Act in which the “bad tendency” test was invoked is *United States v. Harmon*, 45 F. 414 (D. Kan. 1891). Two cases involving other legislation in which this test was used are *Schenck v. United States*, 249 U.S. 47 (1919), and *Abrams v. United States*, 250 U.S. 616 (1919). The use of the “bad tendency” test is discussed in several places in RABBAN, *supra* note 14.

84. To repeat: in our federal system, the question of the scope of the Free Speech and Free Press Clauses is distinct from the question of which entities are bound by them—including the related question of whether the Fourteenth Amendment was meant to “nationalize” or “incorporate” those clauses and make them binding on the states.

85. *The Queen v. Hicklin*, 3 L.R.-Q.B. 360, 360 (1868).

86. *Id.*



*the Romish priesthood, the iniquity of the Confessional, and the questions put to females in confession.*<sup>87</sup> The pamphlet was published by a group called “The Protestant Electoral Union,” whose aims were “to protest against those teachings and practices which are un-English, immoral, and blasphemous, [and] to maintain the Protestantism of the Bible and the liberty of England.”<sup>88</sup>

In upholding this conviction, Lord Chief Justice Cockburn pointed out that the pamphleteer’s rhetoric was self-undermining.<sup>89</sup> That is, if the author believed that some questions in auricular confession were immoral, he should have realized that reproducing them in a pamphlet would be equally odious.<sup>90</sup> And even assuming that the defendant had a commendable purpose in view (an assumption made by the Lord Chief Justice solely for the purpose of argument), the court concluded that “the old sound and honest maxim, that you shall not do evil that good may come, is applicable in law as well as in morals.”<sup>91</sup>

After *Hicklin*, this “sound and honest maxim” was followed in federal obscenity cases in the United States. Courts had different reasons for adhering to this principle, but one important reason was the fear that dissemination of such materials would corrupt the young.

Since a philosophic summary of this idea was given above, it is now appropriate to show the place of the idea in the judicial mindset between the 1860s and the 1930s. By focusing on the application of the *Hicklin* standard in various federal cases, this Section aims to illustrate society’s solicitude toward children. Again, this solicitude came at a high cost, and even before *Hicklin* was repudiated, some judges thought it was an intolerably high cost. But unless one is to assume that children have *no* interest in being spared exposure to such stimuli, and that today’s jural thinking on the subject is indubitably correct, a review of these matters seems imperative.

Three of the more important federal cases involving the Comstock Act were *United States v. Bennett*,<sup>92</sup> *United States v. Clarke*,<sup>93</sup> and *United States v. Harmon*.<sup>94</sup> Each of these cases was often cited in other jurisdictions, and each contains important statements about the nature of obscenity and the social interests at stake.

In the first of the three cases, Deboigne M. Bennett had been convicted for mailing a copy of *Cupid’s Yokes, or The Binding Forces of Conjugal*

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87. *Id.*

88. *Id.* at 362.

89. *Id.* at 371.

90. *Id.*

91. *Id.* at 372.

92. 24 F. Cas. 1093 (S.D.N.Y. 1879) (No. 14,571).

93. 38 F. 732 (E.D. Mo. 1889).

94. 45 F. 414 (D. Kan. 1891).

*Life*, a pamphlet written by Ezra Heywood.<sup>95</sup> The text advocated sexual freedom while polemicizing against “scandal-begetting clergymen and bribe-taking statesmen.”<sup>96</sup> It provided information about different methods of birth control and contained reports of sexual misconduct, though, according to one scholar, articles on the theme of sexual freedom were more common than instances of sexual muckraking.<sup>97</sup>

After being convicted, Bennett appealed, requesting a new trial and asking that the verdict be set aside.<sup>98</sup> He averred that the statute was unconstitutional, that the indictment was defective because it lacked specificity, and that an acquittal was warranted because he did not know that the pamphlet was obscene when he mailed it.<sup>99</sup> In denying Bennett’s requests, Judge Blatchford responded to each of the preceding points.

On the constitutionality of the Comstock Act, Judge Blatchford cited the Supreme Court’s decision in *Ex parte Jackson* as controlling.<sup>100</sup> *Jackson* concerned the scope of congressional power to establish a postal system under Article I, Section 8 of the Constitution.<sup>101</sup> In upholding Section 3894 of the Revised Statutes—which made it a crime to advertise illegal lotteries in the mail—the Court ruled that congressional power embraces regulation of the entire postal system.<sup>102</sup> Accordingly, “[t]he right to designate what shall be carried necessarily involves the right to determine what shall be excluded.”<sup>103</sup> Near the end of its opinion, the Court likened the legislation under review to the Comstock Act, saying that it had “no doubt” about the constitutionality of either.<sup>104</sup> In *Bennett*, Judge Blatchford said that the Supreme Court’s views in *Ex parte Jackson* “appl[ie]d fully to the present case.”<sup>105</sup>

Most of Judge Blatchford’s opinion in *Bennett* concerned the alleged defects of the indictment. Bennett had contended that the publication said to be obscene—or at least those sections singled out as obscene—should have

95. *Bennett*, 24 Cas. at 1094.

96. ROCHELLE GURSTEIN, *THE REPEAL OF RETICENCE: A HISTORY OF AMERICA’S CULTURAL AND LEGAL STRUGGLES OVER FREE SPEECH, OBSCENITY, SEXUAL LIBERATION, AND MODERN ART* 66-67 (Hill & Wang Publ’g 1998) (1996).

97. The *Bennett* case is discussed in GURSTEIN, *supra* note 96, at 66-67.

98. *United States v. Bennett*, 24 F. Cas. 1093, 1094 (S.D.N.Y. 1879) (No. 14,571).

99. *Id.* at 1094-95.

100. *Id.* at 1095 (citing *Ex parte Jackson*, 96 U.S. 727 (1877)).

101. *See Ex parte Jackson*, 96 U.S. at 732.

102. *Id.*

103. *Id.*

104. *Id.* at 736-37.

105. *Bennett*, 24 F. Cas. at 1095 (citing *Ex parte Jackson*, 96 U.S. at 737).

been set forth *in haec verba* (i.e., verbatim) in the indictment.<sup>106</sup> This contention was based on the right of the accused to be presented with a precise statement of the alleged offense.<sup>107</sup>

After analyzing more than a dozen obscenity cases from different states, Judge Blatchford concluded that “[n]o case in the United States has been cited where an indictment in form like the one in this case . . . has been held defective.”<sup>108</sup> Because of the nature of the charges, Bennett’s complaint was baseless:

The indictment proceeds on the ground, that, if . . . the publication of an indecent character is so indecent, that the same would be offensive to the court and improper to be placed on the records thereof, and that, therefore, the jurors do not set forth the same in the indictment, it is not necessary to set forth in haec verba the book or publication or the obscene or indecent parts of it relied on, provided the book or publication is otherwise sufficiently identified in the indictment for the defendant to know what book or publication is intended.<sup>109</sup>

Regarding the last of Bennett’s three claims—that he should be acquitted because he did not know the publication was obscene—Judge Blatchford hinted that Bennett was trying to obscure basic concepts.<sup>110</sup> The statute made it a crime for a person to “knowingly deposit” into the mail any material that had been designated “non-mailable.”<sup>111</sup> This last term referred to pamphlets, pictures, prints, and writings that were “obscene, lewd, or lascivious.”<sup>112</sup> But it was for *the jury* to determine whether something was “non-mailable”—again, in the ordinary sense of “obscene, lewd, or lascivious.”<sup>113</sup>

Perhaps the most important aspect of the *Bennett* case, at least for the purposes of this Article, concerned the trial judge’s instructions to the jury on the test for obscenity. Judge Blatchford saw “no error” in those

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106. *Id.*

107. *Id.*

108. *Id.* at 1097.

109. *Id.* at 1095. The Supreme Court of the United States affirmed the soundness of this view in *Rosen v. United States*, 161 U.S. 29 (1896). The majority opinion, written by the first Justice John Marshall Harlan, relied heavily on Judge Blatchford’s analysis in *Bennett*. *Id.* at 34, 39.

110. *Bennett*, 24 F. Cas. at 1105.

111. *Id.* at 1095.

112. *Id.*

113. “If the defendant knew what the book was which he was depositing . . . it is of no consequence that he may not have known or thought it to be obscene and so non-mailable . . .” *Id.* at 1098. That Bennett mailed the book in question was not contested in the trial court, *id.* at 1101, but in other cases from this era, juries also had to determine whether the defendant knowingly mailed the matter alleged to be “non-mailable.”

instructions:

Now, gentlemen, I have given you the test; it is not a question whether it would corrupt the morals, tend to deprave your minds or the minds of every person; it is a question whether it tends to deprave the minds of those open to such influences and into whose hands a publication of this character might come. It is within the law if it would suggest impure and libidinous thoughts to the young and the inexperienced. There has been some comment on the fact, that, in many libraries you may find books which contain more objectionable matter, it is said, than this book contains. It may be so; it is not material here. When such books are brought before you, you will be able to determine whether it is lawful to mail them or not.<sup>114</sup>

A similar and equally important statement is found in *United States v. Clarke*.<sup>115</sup> In this case, the defendant admitted that he had mailed multiple copies of a brochure and other papers on the causes and treatment of venereal diseases.<sup>116</sup> The opinion in the case, written by Judge Thayer, cast doubt on the defendant's status as a duly licensed physician, even though he identified himself as one.<sup>117</sup> During the trial, Judge Thayer informed the jury that both standard medical works and a doctor's diagnosis of symptoms, offered in response to a patient's letter, would be exempt from prosecution, though neither of those conditions had been met here.<sup>118</sup>

In instructing the jury on the requirements for a conviction, Judge Thayer first explained the notion of obscenity in its ordinary sense.<sup>119</sup> He then invoked the *Hicklin* test as a way of clarifying the purpose of the statute:

There is to be found in every community a class of people who are so intelligent or so mature that their minds are not liable to be affected by reading matter, however obscene, lewd, or indecent it may be. Then there is another large class to be found in every community—the young and immature, the ignorant, and those who

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114. *Id.* at 1102.

115. 38 F. 732 (E.D. Mo. 1889).

116. The title of the brochure was "Dr. Clarke's Treatise on Venereal, Sexual, Nervous, and Special Diseases." *Id.* at 733.

117. *See id.* at 734-35.

118. *Id.* at 735.

119. *Id.* at 733.

are sensually inclined—who are liable to be influenced to their harm by reading indecent and obscene publications. The statute under which this indictment [was] framed was designed to protect the latter class from harm . . . Hence, in judging of the tendency of the publications to deprave and corrupt the mind, or to excite lustful or sensual desires, (which are the tests of obscenity and lewdness), you should consider the effect that the publications would have on the minds of that class of persons whom the statute aims to protect, and the liability of the publications to get into the hands of that class of persons, rather than the effect such publications would have on people of a high order of intelligence, and those who have reached mature years, who by reason of their intelligence or years are steeled against such influences.<sup>120</sup>

Judge Thayer also touched on another matter relevant to prosecutions under the Comstock Act. To show that the pamphlets in question were neither obscene nor lewd, the defendant's attorney tried to draw comparisons by reading aloud selections from Shakespeare, Suetonius, and the Bible.<sup>121</sup> Judge Thayer later instructed the jury that it was not being asked to determine whether any of those works are obscene or whether they would be excluded from the mails if the defendant were found guilty.<sup>122</sup> Such works, he told the jury:

[T]aken in connection with their context, may be, or may not be, obscene or indecent. . . . Of course, so far as your experience goes of [sic] the effect that Shakespeare's writings, or any other author's writings, have had on the world, notwithstanding certain passages that they contain, you have the right to resort to that experience in determining what will be the probable effect of the publications involved in this case . . . .<sup>123</sup>

Most of the themes in *Clarke* were also treated in *United States v. Harmon* [sic],<sup>124</sup> a case of some notoriety. Moses Harman was the editor and publisher of a newspaper known as *Lucifer, the Light Bearer*.<sup>125</sup> Printed

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120. *Id.* at 734.

121. *Id.* at 735.

122. *See id.*

123. *Id.* at 735-36. In response to a question from the jury foreman, Judge Thayer answered that, if the effect of the material "as a whole would be to deprave and corrupt the minds of those into whose hands [it might fall] and whose minds are open to such influences," the material should be adjudged obscene. *Id.* at 736. It was immaterial whether such effect "[was] produced by single passages or portions of the pamphlets and circulars, or by many passages or portions." *Id.*

124. 45 F. 414 (D. Kan. 1891).

125. *Id.* at 414. The defendant's last name was "Harman," though the case was incorrectly reported as *United States v. Harmon*.

in Valley Falls, Kansas, the newspaper had about 1,500 subscribers throughout the United States.<sup>126</sup> The edition of the newspaper dated 14 February 1890 included an article purportedly written by “Richard V. O’Neill, M. D.” of New York City.<sup>127</sup> According to recent scholarship, the article was an account of dark pathologies in family life, such as spousal abuse, homosexual incest, and bestiality, “each described with an aura of scientific detachment though replete with sensational details.”<sup>128</sup>

In his opinion in *Harmon*, Judge Phillips cited the *Hicklin* test while giving signs of his dissatisfaction with it.<sup>129</sup> The following passage, for example, acknowledged the presence of children in society, but the principle implied below is at some distance from *Hicklin*:

Laws of this character are made for society in the aggregate, and not in particular. So, while there may be individuals and societies of men and women of peculiar notions or idiosyncrasies, whose moral sense would neither be depraved nor offended by the publication now under consideration, yet the exceptional sensibility, or want of sensibility, of such cannot be allowed as a standard by which its obscenity or indecency is to be tested. Rather[,] . . . the test . . . [is:] What is its probable, reasonable effect on the sense of decency . . . of society, extending to the family, made up of men and women, young boys and girls . . . ?<sup>130</sup>

Even with this less restrictive standard, the article was found to be grossly offensive to public decency and modesty.<sup>131</sup> Judge Phillips added that:

[I]t is not too much to say that no ordinary mind can subject itself to the repeated reading and contemplation of such subjects and language without the risk of becoming indurated to all sense of modesty in speech and chastity in thought. The appetite for such literature increases with the feeding. The more it is pandered to, the

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126. *Id.* at 415.

127. *Id.* at 414.

128. GURSTEIN, *supra* note 96, at 75.

129. *Harmon*, 45 F. at 417.

130. *Id.*

131. *See id.* at 418.

more insatiable its craving for something yet more vicious in taste.<sup>132</sup>

Judge Phillips also had to decide whether Harman's motives should be grounds for exonerating him or mitigating his punishment.<sup>133</sup> He answered this question in the negative, reasoning that, for certain offenses, the intention could be inferred from the act.<sup>134</sup> Thus, although Harman may have published the article to direct attention to genuine social problems (as a precondition to solving them), its coarse language and prurient tone revealed other, discreditable motives.<sup>135</sup>

Even if Harman was acting in good faith and considered himself a social reformer, his views had some disturbing implications:

In short, the proposition is that a man can do no public wrong who believes that what he does is for the ultimate public good. The underlying vice of all this character of argument is that it leaves out of view the existence of the social compact, and the idea of government by law. If . . . there were no arbiter but the individual conscience of the actor to determine the fact whether the means are justifiable, homicide, infanticide, pillage, and incontinence might run riot . . . .<sup>136</sup>

Judge Phillips was surely not the first American to express such a fear, and other federal judges responded similarly when defendants asserted the purity of their motives and argued that they were heeding the demands of "conscience" in these matters.<sup>137</sup>

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132. *Id.* As noted above, Judge Phillips gave signs of his dissatisfaction with the Hicklin test. *Id.* Such signs are found in a few places in Judge Phillips's opinion, but the less restrictive standard that was apparently applied in *Harmon* might have been due to another factor. *Id.* By mutual agreement, the federal government and the defendant chose not to have a jury trial, leaving Judge Phillips to try all the relevant matters of fact and law. *See id.* Because of that development, Judge Phillips felt that "the court" should not evaluate the facts "as a judge, but should try to reflect in its findings the common experience, observation, and judgment of the jury of average intelligence." *Id.*

133. *Id.* at 419.

134. *Id.* at 420.

135. *Id.* at 423.

136. *Id.* at 422.

137. Despite being the sole trier of law and fact in the case, Judge Phillips expressed much confidence in the institution of the jury. *Id.* His perspective should be kept in mind, given subsequent developments in obscenity jurisprudence:

[A]sserted violations of this statute, like other criminal statutes, must be left to the final arbiter under our system of government—the courts. The jury, the legally constituted triers of the [sic] fact under the Constitution, is to pass upon the question of fact. Under our institutions of government the panel of 12 are assumed to be the best and truest exponents of the public judgment of the common sense. Their selection and constitution proceed upon the theory that they mostly [sic] nearly represent the average intelligence, the common experience and sense, of the vicinage; and these qualifications they are

It was previously stated that *Bennett*, *Clarke*, and *Harmon* were important federal cases. In different respects, they were also representative cases. Defendants in at least six prosecutions under the Comstock Act charged that the indictment was defective because it lacked specificity.<sup>138</sup> Other defendants claimed that they did not know the material in question was obscene and they should therefore be acquitted.<sup>139</sup> Finally, despite the decision of a unanimous Supreme Court in *Ex parte Jackson*, still others attacked the constitutionality of the Comstock Act.<sup>140</sup>

Although these commonalities in federal litigation have been noted, this Article is not meant to be a comprehensive history of obscenity jurisprudence. Thus, readers who are interested in the many factors—social, political, and intellectual—that contributed to the repudiation of the *Hicklin* test by the Supreme Court in 1957 will have to look elsewhere for the full story. Nevertheless, a few comments about developments in the federal courts from 1910 to 1957 are in order.<sup>141</sup>

As the opinion by Judge Phillips in *Harmon* suggests, some federal judges were critical of the *Hicklin* standard.<sup>142</sup> One important critique was developed by Judge Learned Hand in *United States v. Kennerley* in 1913.<sup>143</sup> The case involved a prosecution against Mitchell Kennerley, a publisher, for sending the novel *Hagar Revelly* through the mail.<sup>144</sup> Kennerley was convicted, and Judge Hand overruled Kennerley's demurrer to the indictment (*i.e.*, the sufficiency of the indictment was upheld).<sup>145</sup>

In his opinion, Judge Hand wrote that the *Hicklin* test had been "accepted by the lower federal courts until it would be no longer proper for

presumed to carry with them into the jury-box, and apply this average judgment to the law and the facts.

*Id.* at 418.

138. See also *Price v. United States*, 165 U.S. 311 (1897); *Rosen v. United States*, 161 U.S. 29 (1896); *Grimm v. United States*, 156 U.S. 604 (1895); *Tyomies Publ'g Co. v. United States*, 211 F. 385 (6th Cir. 1914); *United States v. Foote*, 25 F. Cas. 1140 (S.D.N.Y. 1876) (No. 15,128).

139. See, e.g., *Price*, 165 U.S. at 312; *Rosen*, 161 U.S. at 30-31. The "good motives" argument and variations thereof were also made in other cases. See, e.g., *Lynch v. United States*, 285 F. 162 (7th Cir. 1922); *Knowles v. United States*, 170 F. 409 (8th Cir. 1909).

140. See, e.g., *Tyomies Publ'g Co.*, 211 F. at 387-88; *Knowles*, 170 F. at 411.

141. A concise history of obscenity jurisprudence from *Hicklin* to *Roth* is found in CLOR, *supra* note 63, at ch. 1. For a fuller account, see GURSTEIN, *supra* note 96.

142. *United States v. Harmon*, 45 F. 414, 417, 420 (D. Kan. 1891).

143. 209 F. 119 (S.D.N.Y. 1913).

144. See *id.* at 120.

145. *Id.* at 120-21.



me to disregard it.”<sup>146</sup> But Judge Hand regretted that he was obliged to apply *Hicklin*, asking:

[S]hould not the word “obscene” be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now? If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a jury should in each case establish the standard much as they do in cases of negligence. To put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy.<sup>147</sup>

Within twenty years, the effects of this criticism began to be seen. In 1930, the United States Court of Appeals for the Second Circuit ruled that Mary Dennett’s pamphlet *The Sex Side of Life* could not be banned from the mails.<sup>148</sup> The defendant, a mother of two boys, had written the pamphlet because she found existing treatments of the subject inadequate.<sup>149</sup> She then received orders for the pamphlet from organizations such as the YMCA and the YWCA and from the public health departments of different states.<sup>150</sup>

In overruling Dennett’s conviction, Judge Augustus Hand voiced no doubts about the constitutionality of the Comstock Act.<sup>151</sup> But he held that it was not intended to interfere with “serious instruction” regarding human sexuality, unless “the terms in which the information is conveyed are clearly indecent.”<sup>152</sup> Judge Hand saw the possibility that the work “might arouse sex impulses” in its intended audience, but that was not its “general object.”<sup>153</sup>

These developments within the Second Circuit reached their culmination in 1936. That year, in *United States v. Levine*,<sup>154</sup> Judge Learned Hand declared that *Hicklin* was no longer valid within that circuit. He

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146. *Id.* at 120.

147. *Id.* at 121.

148. *United States v. Dennett*, 39 F.2d 564 (2d Cir. 1930).

149. *Id.*

150. *Id.*

151. *See id.* at 569.

152. *Id.*

153. *Id.*

The statute we have to construe was never thought to bar from the mails everything which *might* stimulate sex impulses. If so, much chaste poetry and fiction, as well as many useful medical works would be under the ban. Like everything else, this law must be construed reasonably with a view to the general objects aimed at.

*Id.* at 568-69. According to Harry Clor, the first sentence in the passage just quoted is the origin of the “dominant theme” requirement later adopted by the Supreme Court. CLOR, *supra* note 63, at 20.

154. 83 F.2d 156 (2d Cir. 1936).

wrote: “The standard must be the likelihood that the work will so much arouse the salacity of the reader to whom it is sent as to outweigh any literary, scientific, or other merits it may have in the reader’s hands; of this the jury is the arbiter.”<sup>155</sup>

The developments just described all took place within the federal courts. Readers should recall that before the Free Speech and Free Press Clauses were “incorporated,” each individual state had the authority to pass its own laws relating to obscenity, consistent with its own constitution. *Hicklin* was cited in state obscenity trials, and according to Leo Alpert, a modified version of the test was applied in New York and Massachusetts, the only two states in which prosecutions for obscene *literature* occurred.<sup>156</sup> Such prosecutions—for Dreiser’s *American Tragedy*, Lawrence’s *Lady Chatterly’s Lover*, and Flaubert’s *November*, among others—are now infamous. But it was only after the *Roth v. United States* decision in 1957 that something approaching a national obscenity standard—for both state and federal prosecutions—emerged.<sup>157</sup>

### III. CRACKS IN THE SHIELD: THE NEW OBSCENITY JURISPRUDENCE AND THE PROBLEM OF “INCIDENTAL EXPOSURE”

Having already described the leading cases in the new obscenity jurisprudence (specifically, *Butler v. Michigan*, *Roth v. United States*, and *Miller v. California*),<sup>158</sup> this Article will now discuss three cases in which the Supreme Court vindicated Free Speech claims for adults, while acknowledging the fact (or strong likelihood) of children being “incidentally” exposed to pornographic or indecent stimuli. It is argued that the three cases were wrongly decided, and the interests of children in each controversy became progressively higher. Despite the rulings, some consolation is derived from the spirited dissents produced in each case.<sup>159</sup>

155. *Id.* at 158. This case involved a prosecution for sending obscene advertisements through the mail. *Id.* at 156. The advertisements were for books such as *Secret Museum of Anthropology* (containing photos of nude females in remote corners of the world), *Crossways of Sex* (allegedly a scientific treatise on sexual pathologies), and *Black Lust* (an erotic novel about an English girl captured at the fall of Khartoum and then kept in a harem). *Id.* at 158.

156. Alpert, *supra* note 14, at 53.

157. Public concern about obscenity, including obscenity in literature, was shared by many persons during the years between the *Hicklin* and *Roth* decisions, including the presidents of some of the nation’s best universities and colleges. See generally GURSTEIN, *supra* note 96.

158. See *supra* Section I.

159. The main purpose of this Section is to document the phenomenon of “incidental exposure.”

In *Cohen v. California*,<sup>160</sup> the Court reviewed a prosecution under a broad “disturbing-the-peace” statute.<sup>161</sup> Paul Robert Cohen was arrested on 26 April 1968 for wearing a jacket bearing the words “F\*\*k the Draft.”<sup>162</sup> At the time of his arrest, Cohen was in a corridor in the Los Angeles County Courthouse.<sup>163</sup> According to the opinion of the Court of Appeals of California (Second Appellate District), the words on Cohen’s jacket were “plainly visible,” and women and children were present in the corridor when Cohen was arrested.<sup>164</sup> He was convicted for violating Section 415 of the California Penal Code and sentenced to thirty days’ imprisonment.<sup>165</sup>

Under the statute, it was a misdemeanor to disturb “the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct.”<sup>166</sup> The statute also made it a crime to use “vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner.”<sup>167</sup> Cohen’s conviction was based on the “offensive conduct” provision, and, in affirming his conviction, the California appellate court interpreted that phrase to mean “behavior which has a tendency to provoke *others* to acts of violence or to in turn disturb the peace.”<sup>168</sup> The same court added that it was “foreseeable” that Cohen’s conduct might have led to acts of violence against him or to attempts by others to remove his jacket.<sup>169</sup> Cohen appealed, arguing that the statute violated his rights to freedom of expression under the First and Fourteenth Amendments.<sup>170</sup>

The key premise in the Supreme Court’s analysis was that Cohen’s conviction rested exclusively on speech.<sup>171</sup> According to Justice John Marshall Harlan’s majority opinion, the “conduct” was “the fact of communication.”<sup>172</sup> The Court then asked whether Cohen could be punished for the content of his message or for the manner in which he exercised his freedom.<sup>173</sup>

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This Section offers some explanatory and critical remarks on the relevant cases, but more general comments on the “new” obscenity jurisprudence appear in the conclusion to this Article. *See infra* Section V.

160. 403 U.S. 15 (1971).

161. *Id.* at 16.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 16 n.1.

167. *Id.*

168. *Id.* at 17 (quoting *People v. Cohen*, 81 Cal. Rptr. 503, 506 (Cal. Ct. App. 1969)).

169. *Id.*

170. *Id.* at 18.

171. *Id.*

172. *Id.* Of course, this was the second Justice Harlan.

173. *Id.* at 18-19.

For several reasons, the Court answered this question in the negative.<sup>174</sup> First, Cohen was not attempting to incite disobedience or disrupt the draft.<sup>175</sup> Second, his message was altogether lacking in erotic content, so the case could not be designated an obscenity prosecution.<sup>176</sup> Third, the words on Cohen's jacket were not "fighting words," since no individual could have regarded them as a personal insult and no group could have taken them as a direct provocation.<sup>177</sup>

Having resolved these matters, the Court still had one substantial question to face:

Against this background, the issue flushed by this case stands out in bold relief. It is whether California can excise, as "offensive conduct," one particular scurrilous epithet from the public discourse, either upon the theory of the court below that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary.<sup>178</sup>

Because the Court had already held that the words on the jacket were not "fighting words," it brusquely rejected the lower court's view that those words were "inherently likely to cause violent reaction."<sup>179</sup> The Court was thus left to decide whether the state could criminalize the public use of this "scurrilous epithet."<sup>180</sup>

The Court's willingness to consider this question was itself unusual. The Justices were, as always, required to accept the statutory construction rendered by the state court of last resort. This requirement should have confined the Supreme Court's analysis to the "offensive conduct" portion of

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174. *Id.* at 19-20.

175. *Id.* at 20.

176. *Id.*

177. *Id.* at 20. Moreover, the Court dismissed the idea (presumably put forth by the state's attorney during oral argument) that the statute was meant to preserve decorum in the courthouse, since the statute was applicable throughout the state. *See id.* at 19. If the message on Cohen's jacket had been characterized as an obscene communication or as fighting words, the Court would have probably upheld his conviction, since both of those categories of speech are constitutionally unprotected, according to *Roth v. United States*, 354 U.S. 476 (1957), and *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

178. *Cohen*, 403 U.S. at 22-23.

179. *Id.* at 22-23.

180. *Id.* at 22.

the statute.<sup>181</sup> Why the Court went beyond that point was explained by Justice Harlan:

The *amicus* urges, with some force, that this issue [*i.e.*, the state's authority to purge the scurrilous epithet from public discourse] is not properly before us since the statute, as construed, punishes only conduct that might cause others to react violently. However, because the opinion below appears to erect a virtually irrebuttable presumption that use of this word will produce such results, the statute as thus construed appears to impose, in effect, a flat ban on the public utterance of this word. With the case in this posture, it does not seem inappropriate to inquire whether any other rationale might properly support this result.<sup>182</sup>

In finding that no other rationale supported Cohen's conviction, Justice Harlan offered his views on freedom of expression in contemporary society.<sup>183</sup> A few of his remarks are now regularly quoted by scholars and activists, and those remarks conveyed the basis of the Court's decision: "The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. . . . That the air may at times seem filled with verbal cacophony is . . . not a sign of weakness but of strength. . . . [I]t is . . . often true that one man's vulgarity is another's lyric."<sup>184</sup>

Besides the preceding questions, the majority decided one other constitutional issue of importance. In oral argument, the state's attorney had maintained that California enjoyed the authority to spare sensitive persons exposure to Cohen's "crude" and "distasteful" mode of expression (the adjectives are Harlan's).<sup>185</sup> The Court rejected this claim as well. It conceded that government may act to prevent unwelcome ideas and stimuli from intruding into one's *home*, while noting that we are often "captives" to offensive speech and stimuli outside that "sanctuary."<sup>186</sup>

This point is hard to dispute, but in view of the facts of the case and the Court's willingness to ask whether the state had the authority to eliminate one profane word from public discourse, the Court's response was unsatisfactory:

[P]ersons confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound

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181. *Id.* at 22 n.4.

182. *Id.* at 23-24 n.5.

183. *Id.* at 24.

184. *Id.* at 24-25.

185. *Id.* at 21-22.

186. *Id.*

trucks blaring outside their residences [an allusion to *Kovacs v. Cooper*]. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes.<sup>187</sup>

Recalling that the statute penalized the use of coarse language (albeit in a “loud and boisterous manner”), and further recalling that children were in the same corridor as Cohen, it is difficult to accept the two sentences above as a serious answer to a genuine constitutional question. Even if many young persons in the corridor were unable to read or comprehend the message on Cohen’s jacket, some surely could understand it.

What, if anything, follows? It would be easy to say that nothing follows. The erotic content of this message was nil, and the likelihood of the message provoking a minor to violence was just above nil. Still, one cannot deny the ugliness of that verb (even today), especially when it is used in public. Here some readers might wish to retreat to the notion that “words are often chosen as much for their emotive as their cognitive force,”<sup>188</sup> but only the most precocious adolescents could be expected to reflect on Cohen’s “choice” of words.

To continue in this vein is to invite certain risks—charges of squeamishness, prudery, even neurosis. So perhaps it will suffice to say that Harlan’s expectation in the passage above was simply unrealistic. But one can only speculate as to how greater realism on Harlan’s part might have affected the decision in the case.<sup>189</sup>

Some persons, including three of the dissenters (Chief Justice Warren and Justices Black and Blackmun), would hold that the correct decision in *Cohen v. California* depended on whether Cohen’s method of communicating his sentiments was “speech” or “conduct.” The distinction was important here, and for these dissenters it was dispositive, but in subsequent cases involving similar prosecutions it had little significance.<sup>190</sup> The same cannot be said of the Court’s expectation that all persons, young and old alike, will “avert their eyes” to protect their sensibilities. In the

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187. *Id.* at 21.

188. *Id.* at 26.

189. Because the Supreme Court did not accept the California appellate court’s interpretation of the statutory provision, the Court could have sustained Cohen’s conviction on the ground that he had violated the “offensive conduct” provision of the statute through the use of his indecent language. Assuming the Court was warranted in ignoring the California court’s construction of the statute, it can be argued that the Court should have upheld the conviction on this ground.

190. *See, e.g., Rosenfeld v. New Jersey*, 408 U.S. 901 (1972); *Lewis v. New Orleans*, 408 U.S. 913 (1972); *Brown v. Oklahoma*, 408 U.S. 914 (1972).

context of Cohen's constitutional challenge, this was a curious, though decidedly secondary or tertiary issue. In the context of *Erznoznik v. City of Jacksonville*,<sup>191</sup> however, it became a more conspicuous and more worrisome matter.

*Erznoznik* concerned an ordinance that prohibited drive-in movie theaters from showing any films containing nudity when the screen could be seen from a public place.<sup>192</sup> On 13 March 1972, Richard Erznoznik, manager of the University Drive-In Theatre in Jacksonville, Florida, was charged with violating the ordinance for showing the movie *Class of '74*.<sup>193</sup> Against Erznoznik's contention that the ordinance violated his First Amendment rights, the trial court upheld the ordinance as a legitimate exercise of the city's police power, a ruling that was upheld by a Florida appellate court.<sup>194</sup> The Supreme Court of the United States agreed to hear the case after the Florida Supreme Court denied certiorari.<sup>195</sup>

The City of Jacksonville admitted that its ordinance banned the showing of films that were not obscene according to the criteria of *Miller v. California*.<sup>196</sup> The ordinance had designated as a "nuisance" any movie containing nudity that could be seen from a public place.<sup>197</sup> The City defended its designation primarily on two grounds: that it could protect all citizens against unwilling exposure to potentially offensive stimuli, and that it could more specifically protect minors against a certain type of stimulus.<sup>198</sup>

Regarding the first of these two grounds, the Court concluded that the ordinance was a "content-based" restriction, since it prohibited only a certain class of movies from being shown at drive-in theatres. That characteristic distinguished it from valid "time, place, and manner regulations," which apply to all speech, regardless of content.<sup>199</sup> Only in narrowly defined circumstances had the Court upheld content-based restrictions.<sup>200</sup>

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191. 422 U.S. 205 (1975).

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 205, 206-07. According to the ordinance, "nudity" meant depictions of "the human male or female bare buttocks, human female bare breasts, [and] human bare pubic areas." *Id.* at 207.

196. *Id.* at 208.

197. *Id.*

198. *Id.* at 208-15.

199. *Id.*

200. The "narrowly defined circumstances" included when "the speaker intrudes on the privacy of the home," *id.* at 209 (citing *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970)), and when "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure," *id.* (citing *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)). In *Rowan*, the Court upheld a federal statute allowing persons who received "pandering" advertisements to instruct the Postmaster General to notify the sender that such mail should stop being sent. *Rowan*, 397 U.S. at 737-38. In *Lehman*, the Court sustained a city's policy of forbidding political advertisements while

As it had done in *Ginsberg v. New York*, the Court stressed that citizens in our society are often “captive audiences.”<sup>201</sup> In the majority opinion by Justice Lewis Powell, the Court also affirmed, in three separate places, that citizens are free to “look away.”<sup>202</sup> Here is one such affirmation, a statement that captures the drift of the majority’s thinking:

The plain, if at times disquieting, truth is that in our pluralistic society, [because of] constantly proliferating new and ingenious forms of expression, “we are inescapably captive audiences for many purposes.”<sup>203</sup> Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent the narrow circumstances described above, the burden normally falls upon the viewer to “avoid further bombardment of [his] sensibilities simply by averting [his] eyes.”<sup>204</sup>

Read in isolation, this passage seems uncontroversial, perhaps platitudinous, at least with respect to most things that adults see and hear on the street. But the Jacksonville ordinance was concerned with something that adults rarely, if ever, encounter there.

Another problem in the majority opinion is the Court’s analysis of the ordinance as a measure to protect children. The Court first noted that a state or municipality had greater authority to restrict certain “communicative materials” to children than to adults.<sup>205</sup> But the Court quickly changed direction by citing *Tinker v. Des Moines Independent Community School District*<sup>206</sup> and asserting that “minors are entitled to a significant measure of First Amendment protection.”<sup>207</sup>

permitting nonpolitical ads on local buses. *Lehman*, 418 U.S. at 304. The “degree of captivity” for a person on the bus was thought to be considerably greater than that of a person on the street. *Id.* at 302-03.

201. *Erznoznik*, 422 U.S. at 214 n.11.

202. *Id.* at 212.

203. *Id.* at 210 (quoting *Rowan*, 397 U.S. at 736).

204. *Id.* at 210-11 (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)) (alterations in original).

205. *Id.* at 212.

206. 393 U.S. 503 (1969).

207. *Erznoznik*, 422 U.S. at 212-13. In *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), the Court recognized the right of three teenagers to wear black armbands in public school as a protest against the Vietnam war. *Id.* at 505-06. The students had been suspended for violating a school board ordinance forbidding students from wearing such armbands. *Id.* at 504.



The Court then concluded that the ordinance was overbroad as it pertained to children.<sup>208</sup> Because it categorically forbade nudity, it barred films that might contain “a picture of a baby’s buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous.”<sup>209</sup> In making this point, the Court referred to *Ginsberg v. New York*, where it ruled that not all nudity is obscene, even with respect to minors.<sup>210</sup>

The problems with the majority’s interpretation may be grasped through Chief Justice Burger’s dissenting opinion. Also signed by Justice Rehnquist, Chief Justice Burger’s dissent focused solely on the first justification for the ordinance—*i.e.*, sparing adults exposure to potentially offensive stimuli.<sup>211</sup> The analysis began with the proposition, taken from Justice Robert Jackson, that “every medium of communication ‘is a law unto itself.’”<sup>212</sup> The uniqueness of the medium in the instant case made it distinguishable from *Cohen v. California*:

Whatever validity the notion that passersby may protect their sensibilities by averting their eyes may have when applied to words printed on an individual’s jacket, . . . it distorts reality to apply that notion to the outsize screen of a drive-in movie theater. Such screens are invariably huge; indeed, photographs . . . show that the screen of petitioner’s theater dominated the view from public places including nearby residences and adjacent highways. Moreover, when films are projected on such screens the combination of color and animation against a necessarily dark background is designed to, and results in, attracting and holding the attention of all observers.<sup>213</sup>

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The school board had passed the ordinance because it feared the armbands would be disruptive, but the Court ruled that the students’ protest enjoyed the protection of the First Amendment’s Free Speech Clause. *Id.* at 508, 514.

208. *Erznoznik*, 422 U.S. at 213.

209. *Id.*

210. *Id.* at 213 n.10. For a discussion of *Ginsberg v. New York*, see *supra* note 69 and accompanying text. Readers should reflect on the overbreadth analysis here and the likelihood of an official prosecuting *Erznoznik* for showing a movie with a scene of a baby’s (exposed) buttocks, or a dead soldier lying naked on the ground. Readers might also wish to reflect on the likelihood of scenes such as those mentioned by the Court appearing on drive-in screens in the United States. These remarks are prompted in part by the Court’s decision in *New York v. Ferber*, 458 U.S. 747 (1982), in which the Court sustained a prosecution for the sale of child pornography. In denying that the First Amendment protects this class of materials, the Court asked whether some such materials might have redeeming social value (*e.g.*, in clinical or psychiatric texts). *Id.* at 773. The Court answered that the likelihood of that occurrence was extremely small, and it upheld the New York statute even though a state court had voided the statute for overbreadth on the ground just mentioned. *Id.*

211. *Erznoznik*, 422 U.S. at 222 (Burger, C.J., dissenting).

212. *Id.* at 220 (quoting *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring)).

213. *Id.* at 220-21.

Chief Justice Burger then evaluated the First Amendment interests in the case, which he deemed “trivial at best.”<sup>214</sup> He contested the majority’s view that the ordinance restricted the dissemination of ideas, because *Erznoznik* remained free to show (nonobscene) films containing nudity, provided that he shielded the screen from public view.<sup>215</sup> Furthermore, persons outside the drive-in had no real First Amendment interests at stake because they usually saw only fragments of a film and they invariably heard none of the dialogue.<sup>216</sup> The “communicative value” of the films to such persons was therefore slight.<sup>217</sup>

Chief Justice Burger then drew an analogy with ordinances and statutes regulating nudity in public.<sup>218</sup> If a serious drama or musical containing nudity were performed in a theatre, a state or municipality would still have the authority, as a straightforward exercise of the police power, to forbid its staging in a public park.<sup>219</sup> The City of Jacksonville therefore had the authority to ban images of nude people projected onto oversized screens and visible from different vantage points.<sup>220</sup>

As mentioned, Chief Justice Burger said nothing in his dissent about the City’s interest in protecting children through the ordinance. All of the preceding points, however, could easily be extended to that theme. The communicative value of these films to youths outside the drive-in was less than it was to adults inside because young persons are generally less capable of mentally assembling fragments of a film into a coherent whole. Finally, if Burger’s assessment of the unique qualities of a drive-in theater is correct, and if the traditional account of the susceptibilities of children is also correct, then it was folly for the Court to expect them to look away from movie scenes containing nudity on *Erznoznik*’s screen.

Apart from the same charges of prudery, puritanism, and the like, some readers might say that the stakes in this controversy were only slightly greater than in *Cohen*. The heyday of the drive-in theatre seems to have been in the 1950s, and this peculiarly American institution is unknown in many cities and various states. Furthermore, by the 1980s some persons

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214. *Id.* at 223.

215. *Id.* at 222-23.

216. *Id.* at 222.

217. *Id.* at 222-23.

218. *Id.* at 223.

219. *Id.*

220. *Id.* at 223. Justice White wrote a separate dissenting opinion in *Erznoznik* on this ground. See *id.* at 224 (White, J., dissenting).

were going to movies much less than before, preferring to stay at home with the VCR (or later, the DVD player).

Even if only a modest percentage of American youths were directly affected by the ruling in *Erznoznik*, readers should be mindful of the implicit meanings sometimes contained in a Supreme Court opinion. Such messages may sometimes be more significant than the ruling itself. The message of *Erznoznik*—that it is not unrealistic to expect children to look away from salacious images, or that their exposure to such images should be a matter of slight public concern—has surely gained currency in American society. How much currency? An answer to that question can be hazarded on the basis of the Court’s ruling in *United States v. Playboy Entertainment Group, Inc.*<sup>221</sup>

Decided on 22 May 2000, this case is far more complex than either *Cohen* or *Erznoznik*. The case is included here because it vividly shows the Court’s willingness to countenance children’s incidental exposure to indecent and possibly obscene stimuli, even when the First Amendment rights of adults are secure.

*United States v. Playboy Entertainment Group, Inc.* concerned the constitutionality of Section 505 of the Telecommunications Act of 1996.<sup>222</sup> Because the Justices disagreed among themselves about what Section 505 entailed, the relevant portions are reproduced here:

(a) Requirement

In providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it.

(b) Implementation

Until a multichannel video programming distributor complies with the requirement set forth in subsection (a) of this section, the distributor shall limit the access of children to the programming referred to in that subsection by not providing such programming during the hours of the day (as determined by the Commission) when a significant number of children are likely to view it. [The

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221. 529 U.S. 803 (2000).

222. *Id.* at 806-07.

allowable broadcasting hours were set by administrative regulation between 10 p.m. and 6 a.m.<sup>223</sup>]

(c) Scramble [D]efined

As used in this section, the term “scramble” means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.<sup>224</sup>

As this excerpt suggests, Section 505 was intended to stop the problem known in the cable television industry as “signal bleed.”<sup>225</sup> More specifically, the law was to prevent children from seeing images or hearing dialogue from sexually explicit programs resulting from signal bleed.<sup>226</sup>

Channel “scrambling” was in use before the enactment of Section 505 because cable operators wanted to limit nonpaying customers’ access to channels they might wish to see.<sup>227</sup> The statute was enacted, however, because of the imperfections of scrambling technology.<sup>228</sup> Owing to such imperfections, nonsubscribers were encountering sexually explicit images on their televisions, though the frequency of this occurrence was a matter of debate.<sup>229</sup>

To comply with the statute, and because of the cost of better scrambling technology, most cable operators offering sexually explicit programming restricted their broadcasts from 10 p.m. to 6 a.m.<sup>230</sup> Thus, in the words of the majority opinion, “for two-thirds of the day no household in those

223. *Id.* at 806.

224. 47 U.S.C. § 561 (2002). These portions of Section 505 are also included as an appendix to the majority opinion. *Playboy Entm’t Group Inc.*, 529 U.S. at 826-27. Notice that subsection “a” is referred to as a “requirement” and that subsection “b” begins with the word “[u]ntil.” Despite the plainness of this language, the majority opinion sometimes suggests (incorrectly) that cable operators had a choice of *either* scrambling or blocking (which is in fact the requirement of subsection “a”) or “time channeling” (which is enjoined upon cable operators by subsection “b” until they fulfill the requirement of subsection “a”). See, e.g., *id.* at 812 (arguing that “the only reasonable way for a substantial number of cable operators to comply . . . is to time channel”) (emphasis added); *id.* at 821 (noting “a significant percentage of cable operators *felt it necessary* to time channel”) (emphasis added); *id.* at 826 (referencing the “two alternatives”).

225. *Playboy Entm’t Group Inc.*, 529 U.S. at 806.

226. *Id.*

227. *Id.*

228. *Id.* at 807.

229. *Id.* at 808.

230. *Id.* at 807.

service areas could receive the programming, whether or not the household or the viewer wanted to do so.”<sup>231</sup> Playboy Entertainment Group, Inc. brought suit in federal district court, charging that Section 505 was a needlessly restrictive, content-based statute that violated the First Amendment.<sup>232</sup>

The district court held a trial in March of 1998.<sup>233</sup> It ruled that the government’s interests were “compelling,” but that those interests could be advanced in less restrictive ways.<sup>234</sup> The district court singled out, as a plausible alternative to Section 505, Section 504 of the Telecommunications Act of 1996.<sup>235</sup> Section 504 requires cable operators “[u]pon request by a cable service subscriber . . . without charge, [to] fully scramble or otherwise fully block’ any channel the subscriber does not wish to receive.”<sup>236</sup>

The district court ruled that, if sufficiently publicized, Section 504 would provide the same level of protection as Section 505.<sup>237</sup> Section 504 also had the advantages of being “content-neutral” and “less restrictive of Playboy’s First Amendment rights.”<sup>238</sup> The district court required Playboy to notify cable television subscribers about the problem of signal bleed and the remedy afforded by Section 504.<sup>239</sup> The means of providing adequate notice included “inserts in monthly billing statements,” announcements on

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231. *Id.*

232. *Id.* Section 505 was to become effective on 9 March 1996, thirty days after the Telecommunications Act was signed by the President. *Id.* at 808. On 7 March 1996, “Playboy Entertainment obtained a temporary restraining order . . . and brought suit in a three-judge [d]istrict [c]ourt [United States District Court for the District of Delaware].” *Id.* at 809. In the suit, “Playboy sought a declaration that Section 505 violate[d] the Constitution and an injunction [prohibiting the enforcement of the law].” *Id.* “The [d]istrict [c]ourt denied Playboy a preliminary injunction, a judgment that was summarily affirmed” by the Supreme Court. *Id.* The temporary restraining order was lifted the following year, and “the Federal Communications Commission said that it would begin enforcement of Section 505 [on 18 May 1997].” *Id.* Playboy Entertainment Group owns, produces, and distributes programs “for adult television networks, including Playboy Television and [the] Spice [Channel].” *Id.* at 807. Playboy retransmits its programs to cable television operators, who in turn transmit it to their subscribers, either through monthly subscriptions or “pay-per-view.” *Id.* Playboy conceded that almost all of its programming consists of sexually explicit material. *Id.*; see also *id.* at 834 (Scalia, J., dissenting) (describing this material). For the purpose of litigation, the programming was described as “indecent” and not “obscene,” though in his concurring opinion, Justice Clarence Thomas remarked that “under the standards applicable in many communities,” some of the material might well be adjudged “obscene” according to the criteria in *Miller v. California*. *Id.* at 829 (Thomas, J., concurring).

233. *Id.* at 809.

234. *Id.*

235. *Id.*

236. *Id.* at 809-10 (quoting 47 U.S.C. § 560 (1994)) (alterations and omission in original).

237. *Id.* at 810.

238. *Id.*

239. *Id.*

preview or “barker” channels, and advertisements on cable channels other than the one carrying the sexually explicit programs.<sup>240</sup>

On appeal, the Supreme Court affirmed the district court’s decision.<sup>241</sup> Because Section 505 was a content-based restriction, the Court applied the standard of “strict scrutiny.”<sup>242</sup> The application of that standard meant that even if the government’s interest was “compelling,” a less restrictive alternative would be obligatory if that alternative would serve the government’s purpose(s).<sup>243</sup> Much of the Court’s majority opinion, written by Justice Anthony Kennedy, concerned the feasibility and effectiveness of Section 504 as an alternative to Section 505.<sup>244</sup>

Would Section 504 be an effective and feasible alternative? Here is how Justice Kennedy saw the situation:

When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government’s obligation to prove that the alternative will be ineffective to achieve its goals. The Government has not met that burden here. In support of its position, the Government cites empirical evidence showing that Section 504, as promulgated and implemented before trial, generated few requests for household-by-household blocking. Between March 1996 and May 1997, while the Government was enjoined from enforcing Section 505, Section 504 remained in operation. A survey of cable operators determined that fewer than

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240. *Id.*

241. *Id.* at 807.

242. *Id.* at 813.

243. *Id.*

244. *See generally id.* at 811-15. Section 505 was a content-based restriction because it was concerned with signal bleed only from sexually explicit cable programming. *Id.* at 813. Two key premises in the majority opinion (uncontested by either party) were that Playboy’s programming has First Amendment protection, and that many adults would find such programming highly offensive. *Id.* at 829. It is important to point out that Justice Kennedy and the majority characterized the operation of Section 505 as a “prohibition” of speech. *Id.* at 812. Justice Kennedy sought to justify that characterization in this way. Since most cable operators were complying with Section 505 by “time channeling,” it meant that constitutionally protected speech was being “silenced” for two-thirds of the day, “regardless of the presence or likely presence of children or the wishes of the viewers.” *Id.* at 812. Justice Kennedy also cited the district court’s finding that thirty to fifty percent of all “adult” programming is viewed by households before 10 p.m. *Id.* Thus, Section 505 was “a significant restriction of communication between speakers and willing adult listeners.” *Id.* As a final point, Justice Kennedy contended that it mattered little that Section 505 did not impose a complete prohibition, since the “distinction between laws burdening and laws banning speech was merely a matter of degree.” *Id.* Content-based “burdens” must be subjected to the same scrutiny as content-based prohibitions. *Id.*

0.5% of cable subscribers requested full blocking during that time.<sup>245</sup>

This datum could be interpreted in several ways. Justice Kennedy first suggested that cable subscribers were indifferent to the problem of signal bleed and responded to Section 504 as a possible solution “with a collective yawn.”<sup>246</sup> A few pages later, he acknowledged three other plausible explanations for the lack of individual blocking requests: (1) “individual blocking might not be an effective alternative” because of technological shortcomings; (2) Section 504 had been insufficiently publicized between March 1996 and May 1997; and (3) the actual incidence of signal bleed might be less common than the Government initially supposed.<sup>247</sup>

Justice Kennedy and the majority ruled that Section 505 could be sustained, as the government urged, only if the first of these three possibilities was true.<sup>248</sup> But that condition seemingly did not obtain.<sup>249</sup> According to the district court’s opinion, which Justice Kennedy cited, “the first and third possibilities were ‘equally consistent’ with the record.”<sup>250</sup> As for the second possibility, it was unclear whether the remedy afforded by Section 504 had been sufficiently publicized.<sup>251</sup> “The case,” Justice Kennedy concluded, seemed to be “a draw,” and unless the district court had badly erred, “the tie goes to free expression.”<sup>252</sup>

The remainder of the majority opinion considered whether the district court had badly erred.<sup>253</sup> In attempting to answer that question, the Supreme Court canvassed each of the three possible explanations for the lack of individual blocking requests between March 1996 and May 1997.<sup>254</sup> The majority and the dissenters disagreed about basic facts and their larger meaning.

How widespread is the problem of signal bleed? The district court had ruled that the federal government had failed to show its pervasiveness, a ruling that Justice Kennedy and the majority accepted.<sup>255</sup> Although both parties to the dispute had submitted videotapes to the Court—some of which showed static or “snow,” and some of which showed explicit signal bleed—

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245. *Id.* at 816.

246. *Id.*

247. *Id.* at 818-19.

248. *Id.* at 819.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* at 819-27.

254. *Id.*

255. *Id.* at 819-21.

Justice Kennedy found it difficult to generalize from this evidence.<sup>256</sup> Using spreadsheets, one expert estimated that 39 million homes with 29.5 million children were potentially exposed to signal bleed, but Justice Kennedy faulted the Government for not verifying this information through surveys or field tests.<sup>257</sup> Justice Kennedy also found the legislative record unhelpful,<sup>258</sup> and he expected a much larger number of complaints to have been filed if signal bleed was as common as alleged.<sup>259</sup> Finally, Kennedy emphasized that signal bleed was itself an amorphous term, encompassing fuzzy and fleeting images as well as clear and uninterrupted programming (and many points between these two poles).<sup>260</sup>

Was there any basis for opposing Section 504 as a less restrictive alternative to Section 505? In presenting its case to the Supreme Court, the attorneys for the United States expressed skepticism about the success of the proposed solution.<sup>261</sup> The attorneys challenged the district court's recommendation of a "hypothetical, enhanced version of Section 504" as a way of meeting the federal government's interests.<sup>262</sup> To this complaint, the Supreme Court replied that the district court was not obliged to repair the statute fully or to predict the success of the proposed alternative. "It was for the Government," Justice Kennedy wrote, "presented with a plausible, less restrictive alternative, to prove the alternative to be ineffective, and [Section] 505 to be the least restrictive available means."<sup>263</sup>

The attorneys for the United States also submitted that if Section 504 were sufficiently publicized, the cost to Playboy of installing "blocking devices" (in response to individual requests) would exceed the revenues from distributing its programming and lead to the company's insolvency.<sup>264</sup> The Court's response was that the record failed to support the (unstated) assumption here, *viz*, that "a sufficient percentage of households, informed of the potential for signal bleed, would consider it enough of a problem to order blocking devices."<sup>265</sup>

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256. *Id.* at 819.

257. *Id.* at 820.

258. *Id.* at 822.

259. *Id.*

260. *Id.* at 819-22.

261. *Id.* at 823.

262. *Id.* (quoting Appellants' Brief at 32).

263. *Id.*

264. *Id.* at 824.

265. *Id.*



Finally, what of technology? Would Section 504 eliminate signal bleed? Or would it, at the very least, be as effective as the arrangements mandated by Section 505? Even Justice Kennedy's defenders would have to admit that he did not face this issue squarely. He seemed to be saying that, in theory, Section 504 could work better than Section 505, since the former would allow any parents troubled by signal bleed to have it wholly eliminated<sup>266</sup> (whereas under Section 505, signal bleed might still occur between 10 p.m. and 6 a.m., the "safe harbor" period).<sup>267</sup> But Justice Kennedy was aware of the gap between theory and practice, while adding, significantly, that "[i]t is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time."<sup>268</sup>

Further complexities in Justice Kennedy's opinion should be noted. He acknowledged that exposure to sexually explicit images could have an adverse effect on a young child,<sup>269</sup> but he also repeated those familiar words from *Cohen v. California*—that all persons in our polity are expected to "avert their eyes" when they encounter offensive stimuli.<sup>270</sup> Lastly, as already mentioned, Justice Kennedy stressed the indefiniteness of the term "signal bleed."<sup>271</sup>

Notwithstanding these complexities, Justice Kennedy and the majority concluded that the district court was not seriously in error.<sup>272</sup> Accordingly, the Supreme Court affirmed the lower court's ruling.<sup>273</sup>

The dissenting opinion, written by Justice Stephen Breyer and joined by Chief Justice Rehnquist and Justices O'Connor and Scalia, took issue with the two principal theses of the majority opinion. The dissenters argued first, that the record before the Court revealed that signal bleed is a significant, nationwide problem, and second, that the Government had succeeded in showing that Section 504 was not an equally effective alternative to Section 505.<sup>274</sup>

On the significance of the problem, Justice Breyer declared that the majority was "flat-out wrong."<sup>275</sup> To substantiate this, he cited evidence not discussed in the majority opinion, while building on points contained therein. Justice Breyer first mentioned that both parties to the dispute

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266. *Id.*

267. *Id.* at 825-26.

268. *Id.* at 824.

269. *Id.* at 811.

270. *Id.* at 813 (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)).

271. *Id.* at 819.

272. *Id.* at 827.

273. *Id.*

274. *Id.* at 839-41 (Breyer, J., dissenting).

275. *Id.* at 839.

admitted that the basic scrambling technology does not scramble the audio portion of the program.<sup>276</sup> Perhaps because of this shortcoming, Playboy Entertainment conducted a survey to establish what percentage of cable operators were in full compliance with Section 505 (meaning no discernible audio or video bleed).<sup>277</sup> Only twenty-five percent of the operators indicated their full compliance.<sup>278</sup>

Taking this datum, Justice Breyer applied it to the estimate given by the government expert on the number of American children likely to be affected by signal bleed from adult programming.<sup>279</sup> The revised figure was 22 million children.<sup>280</sup>

Justice Breyer also tried to show that the majority opinion suffered from illogic.<sup>281</sup> He posed a question: If most cable operators had switched to night-time hours to comply with Section 505—a point granted by the majority—how could anyone say that signal bleed was not a pervasive problem?<sup>282</sup> Economic factors were also at work, but Justice Breyer reasoned that if daytime signal bleed had made cable operators “skittish” about a prosecution, then large numbers of children were being exposed to sexually explicit images.<sup>283</sup>

After defining the scope of the problem, Justice Breyer weighed the likely effectiveness of Section 504 as an alternative to Section 505.<sup>284</sup> His analysis began by noting the different objectives of these two sections:

Section 504 gives parents the power to tell cable operators to keep any channel out of their home. Section 505 does more. Unless parents explicitly consent, it inhibits the transmission of adult cable channels to children whose parents may be unaware of what they are watching, whose parents cannot easily supervise television viewing habits, whose parents do not know of their [Section] 504 “opt-out” rights, or whose parents are simply unavailable at critical times.<sup>285</sup>

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276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* at 839-40.

281. *Id.* at 840.

282. *Id.*

283. *Id.*

284. *See id.* at 840-45.

285. *Id.* at 841-42. Justice Breyer likened Section 505 to policies that prohibit children from

Justice Breyer then discussed some social realities unmentioned in the majority opinion. According to the United States Department of Education, “28 million school-age children have both parents or their only parent in the work force, where at least 5 million children are left alone at home without supervision each week.”<sup>286</sup> Section 505 thus served a valuable purpose: it helped parents by preventing minors from being exposed to sexually explicit materials in the absence of parental supervision.<sup>287</sup>

By contrast, Section 504 did nothing to promote the same goal, unless parents initiated the process.<sup>288</sup> Here again Justice Breyer took account of social realities. He wrote that the “opt-out” rights in Section 504 work:

- (1) only when parents become aware of their [Section] 504 rights,
- (2) discover that their children are watching sexually explicit signal “bleed,” (3) reach their cable operator and ask that it block the sending of its signal to their home, (4) await installation of an individual blocking device, and, perhaps (5) (where the block fails or the channel number changes) make a new request.<sup>289</sup>

Better publicity, as required by the district court, might help with respect to number one, but the district court’s solution would be of no help to parents with respect to numbers two through five.<sup>290</sup>

Justice Breyer’s considered judgment was that Section 505 was a *burden* on adult speech: it was not a prohibition.<sup>291</sup> Men and women remained free to watch Playboy’s programming, even if “time channeling” created some inconveniences for them.<sup>292</sup> Those inconveniences might require them to watch this programming at night, record it with a VCR, or subscribe to digital cable with better blocking systems, but they were still free to watch it.<sup>293</sup>

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seeing X-rated movies and attending cabarets. *Id.* at 842. This seems slightly wrong, since under Section 505, it was possible that unsupervised children might still see images and hear audio resulting from signal bleed between 10 p.m. and 6 a.m. Nevertheless, under the original statutory scheme, conscientious parents (if a child is lucky enough to have them) could take advantage of Section 504 to prohibit signal bleed even from 10 p.m. to 6 a.m. This task might, admittedly, require much persistence on the parents’ part.

286. *Id.*

287. *Id.* at 842-43.

288. *Id.* at 843.

289. *Id.*

290. *Id.* Justice Breyer also took issue with the conclusion regarding the costs associated with Section 504 as an alternative to Section 505. Citing the district court’s opinion, he wrote: “Even if better notice did adequately inform viewers of their [Section] 504 rights, exercise of those rights by more than 6% of the subscriber base would itself raise Playboy’s costs to the point that Playboy would be forced off the air entirely . . . .” *Id.* at 844.

291. *Id.* at 838.

292. *Id.*

293. *Id.* at 845. Although in *Erznoznik* Chief Justice Burger did not draw a distinction between a

Near the end of his opinion, Justice Breyer remarked that the Court's decision was difficult to reconcile with "foundational cases" such as *Ginsberg v. New York*.<sup>294</sup> The remark has some truth to it, but the decision in *United States v. Playboy Entertainment Group, Inc.* provides further evidence that the Court is disinclined to take account of the distinct needs of the young when adults are asserting their own free speech rights. As a general matter, this development may seem acceptable to most people today, since few persons want to live in a society where adults may view only programs appropriate for children. But if Justice Breyer was correct about the distinction between a burden on speech and a ban on speech (as this Article contends he was), then even civil libertarians should pause to think about the larger meaning of this case.<sup>295</sup>

Perhaps the most distressing thing about the majority opinion in *Playboy Entertainment Group, Inc.* is its insouciance: its casual, almost thoughtless repetition of that phrase from *Cohen* ("avert their eyes") and its sometimes cavalier indifference toward the vulnerability of the young. (Justice Kennedy's line from above—"It is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time"—stands out.)<sup>296</sup> The disturbing prospect is that the Court will more often assume that the moral faculties of children are indistinguishable from those of adults. This prospect should not come as a complete surprise. While the realism of Justice Breyer's dissent is to be applauded, it is also anomalous during the contemporary era.

Consider the following. Whatever criticisms one may have of the *Hicklin* standard, it at least took account of the *possibility* that the free circulation of indecent and pornographic materials among adults might lead to such materials falling into the hands of the young.<sup>297</sup> Such realism is absent in the standards of *Roth* and *Miller*. The unstated assumption in those

burden and a prohibition on speech, his dissent in that case seems to be based on such a distinction, and his acceptance of it is evident in his comment that *Erznoznik* was still free to show films containing nudity, provided that he erected a shield to prevent passersby from seeing the screen. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 222-23 (1975) (Burger, C.J., dissenting).

294. *Playboy Entm't Group, Inc.*, 529 U.S. at 847 (upholding a similar law).

295. As previously noted, the social interests at stake in *Playboy Entertainment Group, Inc.* were much greater than those in *Erznoznik* or *Cohen*, mainly because of the pervasiveness of the medium and the stimuli being purveyed. In the early to mid-1990s, roughly 59 million households had cable television, and more than 60% of all households with television subscribed to cable. *Action for Children's Television v. FCC*, 58 F.3d 654, 671 n.4 (D.C. Cir. 1995). Clearly, many persons today regard cable television as a necessity.

296. *Playboy Entm't Group, Inc.*, 529 U.S. at 824.

297. *The Queen v. Hicklin*, 3 L.R.-Q.B. 360, 372 (1868).

two cases (and many subsequent cases) is that all adults will act “responsibly”: that the magazines and movies will be kept out of harm’s way, and that they will always find their way to the trash when the buyer is finished with them. The reality has been rather different, and given the proliferation of indecent stimuli in recent decades, it has become easier for the Court to think that children will be unaffected by stimuli like that shown on the Spice Channel. By itself, this criticism cannot fully account for the decision in *United States v. Playboy Entertainment Group, Inc.*, but it may help one to understand the intellectual and social context better.

#### IV. COERCING THE COERCIBLE?: CHILDREN AND STATE-SPONSORED RELIGIOUS EXERCISES

In view of the developments just described, the Supreme Court’s Establishment Clause jurisprudence contains a surprise. Instead of positing moral self-sufficiency or moral resiliency in the young, the Court has often assumed that young persons are psychologically and morally fragile. That assumption has typically meant that they are thought to be incapable of deciding whether they truly wish to take part in a religious exercise on school grounds. Considered in isolation, the Court’s thinking on this subject is plausible, but the picture of the psychologically fragile child is hard to reconcile with that of the morally self-sufficient child.<sup>298</sup>

The image of the psychologically fragile child has its origins in *Minersville School District v. Gobitis*<sup>299</sup> and *West Virginia State Board of Education v. Barnette*,<sup>300</sup> two cases involving the constitutionality of a mandatory flag salute in the public schools. As a civic exercise, the flag salute was genuinely compulsory, with students facing expulsion if they refused to participate. *Gobitis* and *Barnette* are thus important reference points because the notion of “compulsion” in cases involving school prayer has been so contestable.

In both *Gobitis* and *Barnette*, children affiliated with Jehovah’s Witnesses had refused to salute the flag on the ground that such a gesture is forbidden by Scripture (Exodus 20: 3-5). In *Gobitis*, Lillian and William Gobitis of Minersville, Pennsylvania had been removed from the public school to avoid expulsion, but the children’s father objected to the financial burden of private schooling.<sup>301</sup> He therefore sued on his own behalf and on behalf of his children, contending that the compulsory salute violated his

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298. This Section is more concerned with the overall image of children presented by the Court than with the soundness of its decisions in these controversies. The decisions themselves will be discussed in the conclusion to this Article.

299. 310 U.S. 586 (1940).

300. 319 U.S. 624 (1943).

301. *Gobitis*, 310 U.S. at 592.

children's freedom of conscience.<sup>302</sup> In *Barnette*, children had been expelled from public schools and their parents had been prosecuted for causing delinquency.<sup>303</sup> A group of parents then sought to restrain enforcement of the relevant laws.<sup>304</sup> As constitutional controversies, both cases turned on the First Amendment, but the Justices disagreed about how certain provisions of that amendment were to be interpreted.

In *Gobitis*, a seven-member majority held that Lillian and William Gobitis (aged twelve and ten, respectively) could not be relieved from "obedience to a general law not aimed at the promotion or restriction of religious beliefs."<sup>305</sup> In the majority opinion, Justice Felix Frankfurter wrote that the purpose of the ordinance was to promote national unity, a governmental interest "inferior to none in the hierarchy of legal values."<sup>306</sup> As the sole dissenter in the case, Justice Stone argued that the compulsory salute violated both the Free Speech and the Free Exercise Clauses of the First Amendment.<sup>307</sup>

Justice Frankfurter at one point designated the flag salute a form of "conduct."<sup>308</sup> This designation seemed to have made it easier for the majority to uphold the ordinance. Citing cases and historical sources, Justice Frankfurter aimed to show that the Free Exercise Clause did not allow the judiciary to exempt an individual from conduct required by a law of general applicability not targeted at a specific faith or sect.<sup>309</sup> Justice Frankfurter acknowledged public hostility toward Jehovah's Witnesses, yet he emphasized the purely civic character of the flag salute and the limited competence of the judiciary to invalidate legislation.<sup>310</sup> He wrote:

The wisdom of training children in patriotic impulses by those compulsions which necessarily pervade so much of the educational process is not for our independent judgment. Even were we convinced of the folly of such a measure, such belief would be no proof of its unconstitutionality. . . . Perhaps it is best, even from the

302. *Id.* at 592-93.

303. *Barnette*, 319 U.S. at 629.

304. *Id.*

305. *Gobitis*, 310 U.S. at 594.

306. *Id.* at 595.

307. *Id.* at 601 (Stone, J., dissenting). Justice McReynolds concurred in the result but did not write a separate opinion in *Gobitis*. *Id.*

308. *Id.* at 595.

309. *Id.* at 594-95.

310. *Id.* at 597-98.

standpoint of those interests which ordinances like the one under review seek to promote, to give to the least popular sect leave from conformities like those here in issue. But the courtroom is not the arena for debating issues of educational policy. It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy . . . . So to hold would in effect make us the school board for the country. That authority has not been given to this Court, nor should we assume it.<sup>311</sup>

Throughout his dissenting opinion, Justice Stone referred to the flag salute as a form of speech or expression.<sup>312</sup> His formulations were roughly the same: “coerc[ing] a sentiment”; “compel[ling] belief”; “bear[ing] false witness to . . . religion”; and “compel[ling] public affirmations which violate . . . religious conscience.”<sup>313</sup> Unlike Justice Frankfurter, Justice Stone said little about the governmental interest in the case, but he denied that any such interest could justify a mandatory flag salute.<sup>314</sup>

Justice Stone’s dissent contains a few historical remarks worthy of mention. He wrote that the ordinance sustained by the majority was unique in Anglo-American legislation because it both suppressed speech and forced the children to express a sentiment alien to them.<sup>315</sup> About halfway through his opinion, he took a broader view of the subject: “History teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been directed, as they are now, at politically helpless minorities.”<sup>316</sup>

Ruminations such as these are even more prominent in *Barnette*. Decided in the middle of the Second World War, *Barnette* was essentially the same constitutional controversy as *Gobitis*. This time, however, the decision was favorable to the Jehovah’s Witnesses.<sup>317</sup>

The lingering and still pivotal question in *Barnette* was whether the flag salute should be characterized mainly as speech or mainly as conduct.<sup>318</sup> Justice Frankfurter stuck to the latter view,<sup>319</sup> whereas Justices Black and

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311. *Id.* at 598. Justice Frankfurter could justifiably refer to the flag salute as “purely civic” because the Pledge of Allegiance at this time contained no reference to our nation being “under God.” That phrase was added in 1954. See Act of June 14, 1954, ch. 297, 68 Stat. 249 (1954).

312. *Id.* at 602 (Stone, J., dissenting).

313. *Id.* at 602, 604-05 (Stone, J., dissenting).

314. *Id.* at 604 (Stone, J., dissenting).

315. *Id.* at 601 (Stone, J., dissenting).

316. *Id.* at 604 (Stone, J., dissenting).

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

318. *Id.* at 633.

319. *Id.* at 654-55 (Frankfurter, J., dissenting).

Douglas, who signed the majority opinion in *Gobitis*, abandoned that view and wrote a concurring opinion.<sup>320</sup> (They likened the salute to a test oath and held that it violated the Free Exercise Clause.<sup>321</sup>) Justices Roberts and Reed, dissenting in *Barnette*, announced that they adhered to the views in the majority opinion in *Gobitis*, but they did not join Justice Frankfurter's dissenting opinion.<sup>322</sup>

Like Justice Stone in *Gobitis*, Justice Robert Jackson, writing for the majority in *Barnette*, injected historical themes into his opinion.<sup>323</sup> References to "governmental pressure toward unity," "officially disciplined uniformity," and "the coercive elimination of dissent," remind us of the intellectual concerns of a generation at war, concerns that have persisted well beyond 1945.<sup>324</sup>

Some will complain that Justice Jackson's historical judgments are pat or superficial, but his opinion must be deemed a rhetorical success. Passages such as the one below were something of a novelty in constitutional law, and they must have caused at least some Americans to think about their attitudes toward different minorities in their midst:

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men . . . Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.<sup>325</sup>

It was noted above that the image of the psychologically fragile child had its origins in *Gobitis* and *Barnette*. The solicitude shown to the children of Jehovah's Witnesses in *Barnette* set a precedent. In time, the Court was

320. *Id.* at 643 (Black, J. & Douglas, J., concurring).

321. *Id.* at 643-44 (Black, J. & Douglas, J., concurring).

322. *Id.* at 642 (Roberts, J. & Reed, J., dissenting).

323. *See id.* at 640.

324. *Id.* at 637, 641.

325. *Id.* at 640-41. For a brief account of popular prejudices against Jehovah's Witnesses at this time, see ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 525-32, 599-605 (Viking Press 1956).



asked to decide the constitutionality of exercises that could in no way be described as “purely civic.” And in later declaring Bible readings and nondenominational prayers repugnant to the Establishment Clause, the Court tried to adopt the perspective of the outsider, the boy or girl who, for any number of reasons, might be a minority within the classroom.<sup>326</sup>

To mention this is different from saying that the Court was authorized to make the outsider’s perspective dispositive in resolving those cases. The school prayer decisions have been controversial for many reasons, and some would say that the Court’s sympathy for the outsider became an integral element of a dubious constitutional doctrine.

Whatever the truth of that matter, the majority opinion in *Barnette* revealed that the Court’s self-perception was rapidly changing. Justice Frankfurter’s words in both *Gobitis* and *Barnette* were pleas for judicial self-restraint, made rhetorically more effective by his opposition to compulsory flag salutes as a matter of policy.<sup>327</sup> Justice Jackson’s arguments in *Barnette* for a broader understanding of the judicial function were no doubt necessary to overrule *Gobitis*, but the opinion went well beyond the requirements of that task. According to Justice Jackson, the purpose of the Bill of Rights was “to withdraw certain subjects from the vicissitudes of political controversy,” and it was the judiciary’s duty to take the “majestic generalities” of the first eight amendments, and “establish them as legal principles.”<sup>328</sup>

Apart from the school prayer cases—which shall be considered shortly—two other Establishment Clause cases helped to promote the image of the psychologically fragile child. In *Illinois ex rel. McCollum v. Board of Education* and *Zorach v. Clauson*, the Court assessed the constitutionality of “released-time” programs in the public schools. Such programs, affecting roughly two million American students around 1950, involved releasing students from regular classes to receive religious education. Parents who wanted their children to participate in the program notified the public school, after which students were required to attend the religious education class.

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326. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985); *School District v. Schempp*, 374 U.S. 203, 221 (1963).

327. As Justice Frankfurter wrote at the beginning of his dissent in *Barnette*:

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court’s opinion, representing as they do the thought and action of a lifetime.

*Barnette*, 319 U.S. at 646-47 (Frankfurter, J., dissenting).

328. *Id.* at 638. Moreover, in Justice Jackson’s words, “we act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.” *Id.* at 640.

In *McCollum*, the Court invalidated the released-time program of School District Number 71 in Champaign, Illinois.<sup>329</sup> In the majority opinion, Justice Black wrote that the tax-supported public school system was being used to aid the spread of various faiths.<sup>330</sup> The use of school property for the classes and the close cooperation between the school authorities and a local religious council violated the Establishment Clause.<sup>331</sup>

Despite the appellant's claim that the very existence of the released-time program put pressure on students to enroll in it, the majority opinion says nothing in response to the claim.<sup>332</sup> But the issue was explored in a long concurring opinion written by Justice Frankfurter and signed by Justices Jackson, Rutledge, and Burton.<sup>333</sup>

Justice Frankfurter also discussed the earliest version of released time, developed in Gary, Indiana in 1914.<sup>334</sup> In the Gary program, the religious instruction was held on church property during a recess period in the public school.<sup>335</sup> Administrators in the public school had no supervisory role in the program; only the children's parents and religious instructors were responsible for disciplining students for nonattendance.<sup>336</sup>

Those features distinguished the program in Gary from the one in Champaign. In Champaign, the superintendent of schools had the authority to decide whether it was practical for a new religious group to offer instruction in the program.<sup>337</sup> Religious education was offered in classrooms in the public school while other students received instruction in secular subjects. (The instructors for the religious education classes were paid by the religious council and were not employees of the public school.<sup>338</sup>) Finally, in Champaign, public school officials assumed some responsibility for student truancy from the religious education classes.<sup>339</sup>

329. Illinois *ex rel.* *McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948).

330. *Id.*

331. *Id.* at 209-10. The local religious council was made up of representatives of the Catholic, Protestant, and Jewish faiths. *Id.* at 207. In the penultimate paragraph of the majority opinion, Justice Black wrote: "The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery." *Id.* at 212. The issue raised here reappeared in each of the dissenting opinions in *Zorach v. Clauson*.

332. *See id.* at 207 n.1.

333. *Id.* at 212 (Frankfurter, J., concurring).

334. *Id.* at 223-24 (Frankfurter, J., concurring).

335. *Id.* at 224 (Frankfurter, J., concurring).

336. *See id.* (Frankfurter, J., concurring).

337. *Id.* at 226-27 (Frankfurter, J., concurring).

338. *Id.* at 226 (Frankfurter, J., concurring).

339. *See id.* at 227 (Frankfurter, J., concurring).

Taking those factors into account, Justice Frankfurter concluded that students were under pressure to participate in the released-time program:

Religious education so conducted on school time and property [was] patently woven into the working scheme of the school. The Champaign arrangement thus present[ed] powerful elements of inherent pressure by the school system in the interest of religious sects. The fact that this power [had] not been used to discriminate is beside the point. Separation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally. That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children.<sup>340</sup>

From Justice Frankfurter's perspective, there was a further problem. The Champaign program was almost certain to promote a "feeling of separatism" among some students.<sup>341</sup> This was simply a matter of demographics, because not all of the sects in Champaign were willing or able to provide teachers for the program.<sup>342</sup>

Just more than five years after *McCullum*, the Supreme Court examined another released-time program in *Zorach v. Clauson*.<sup>343</sup> The most conspicuous difference between the New York City program upheld in *Zorach* and the Champaign program concerned the location of the religion classes: in the New York program, students left the grounds of the public school.<sup>344</sup> Beyond that difference, the New York and Champaign programs had much in common. Students in New York were released for one hour a week (and only on the written request of their parents), during which time other students remained in their regular classes.<sup>345</sup> The religious institutions made weekly attendance reports to the schools, but the *Zorach* opinion

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340. *Id.* (Frankfurter, J., concurring).

341. *Id.* (Frankfurter, J., concurring).

342. *Id.* (Frankfurter, J., concurring). In the end, Justice Frankfurter found the Champaign program unconstitutional because it was "sponsoring and effectively furthering religious beliefs by its educational arrangement." *Id.* at 231 (Frankfurter, J., concurring). The sole dissenter in *McCullum* was Justice Reed, who, in a lengthy opinion, worried that a rule of law was being derived from a figure of speech (*i.e.*, the "wall of separation"), *id.* at 247 (Reed, J., dissenting), and that the other Justices were ignoring long-standing conventions and traditions. *See id.* at 255 (Reed, J., dissenting). Along these lines, he urged the other Justices not to "bar every friendly gesture between church and state." *Id.* at 256 (Reed, J., dissenting).

343. *Zorach v. Clauson*, 343 U.S. 306 (1951).

344. *Id.* at 308-09.

345. *Id.* at 308 & n.1.

lacked a clear statement on what disciplinary role (if any) the public school played in the event of truancy.<sup>346</sup>

Writing for the majority in *Zorach*, Justice Douglas held that the New York City public schools “do no more than accommodate their schedules to a program of outside religious instruction.”<sup>347</sup> He dismissed the notion that the program itself or the school authorities put any kind of pressure on students to enroll in released time.<sup>348</sup> And since no “claim of coercion” was present, there was no basis for saying that the program violated either the Establishment Clause or the Free Exercise Clause.<sup>349</sup>

To the three dissenters—Justices Black, Frankfurter, and Jackson, each of whom wrote a separate opinion—Justice Douglas’s analysis was unpersuasive. The key issue, as they saw it, was that students were required to be in an academic setting. This requirement had the effect of “channeling” students into the released-time program.<sup>350</sup> The dissenters apparently believed (though without directly saying so) that some students would take part in the released-time program just to do something different or just to get out of school for an hour. Based on the dissenters’ reading of the Establishment Clause—which, in their eyes, has always demanded strict neutrality between “religion” and “irreligion”—this situation gave “religion” an unfair advantage.<sup>351</sup> Justice Jackson also worried that the classes in the public school were coming to a standstill while the religious classes were

346. *Id.* at 308-09, 308 n.1.

347. *Id.* at 315.

348. *Id.* at 311.

349. *Id.* at 311-12. In footnote seven of the majority opinion, Justice Douglas wrote:

Appellants contend that they should have been allowed to prove that the system is in fact administered in a coercive manner. The New York Court of Appeals declined to grant a trial on this issue, noting, *inter alia*, that appellants had not properly raised their claim in the manner required by state practice. This independent state ground for decision precludes appellants from raising the issue of maladministration in this proceeding.

*Id.* at 311 n.7 (citation omitted).

In a dissenting opinion, Justice Frankfurter criticized the way the majority handled this matter, writing, “the Court disregards the fact that as the case comes to us, there could be no proof of coercion, for the appellants were not allowed to make proof of it.” *Id.* at 321 (Frankfurter, J., dissenting). Despite criticizing the majority opinion for this gap, Justice Frankfurter (and the other dissenters in *Zorach*) managed to delineate this theme.

350. *Id.* at 317 (Black, J., dissenting).

351. See *id.* at 319 (Black, J., dissenting) (referring to the Court’s “exaltation of the orthodox and its derogation of unbelievers”). In some places, Justice Black and the other dissenters in *Zorach* seemed to forget that children could participate in the released-time program only with parental permission.

going on.<sup>352</sup> He seemed to take this as a sign that participation in the released-time program was the “default” position.<sup>353</sup>

Looking at the opinions in *Gobitis*, *Barnette*, *McCollum*, and *Zorach*, one might say that the Supreme Court’s decisions in the school prayer cases came as no surprise. Because of the holding in *Barnette* and the ideas about indirect coercion put forth in *McCollum* and *Zorach*, the outcomes in *Engel v. Vitale* and *School District v. Schempp* may, in retrospect, have seemed inevitable. Nevertheless, despite solid majorities in those two cases, the decisions were controversial, and the controversy over religious exercises in public schools has persisted to this day.

In *Engel v. Vitale*, the Court held that the daily recitation of a “denominationally neutral” prayer in New Hyde Park, New York violated the Establishment Clause.<sup>354</sup> Composed by the State Board of Regents, the prayer was read at the beginning of the school day by a teacher or a pupil chosen by the teacher.<sup>355</sup> Students could be excused from saying the prayer by obtaining a written request from their parents.<sup>356</sup>

A majority of the Court concluded that the recitation of the daily prayer amounted to a “religious program” carried out by the government.<sup>357</sup> In Justice Black’s words:

[W]e think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite. . . . It is a matter of history that this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America. The Book of Common Prayer, which was created under governmental direction and which was approved by Acts of Parliament in 1548 and 1549, set out in minute detail the accepted form and content of prayer and other religious ceremonies to be used in the established, tax-supported Church of England. The controversies over the Book and what should be its content repeatedly threatened to disrupt the peace of that country as the accepted forms of prayer in the established

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352. *Id.* at 324 (Jackson, J., dissenting).

353. *See id.* at 324-25 (Jackson, J., dissenting).

354. 370 U.S. 421, 424 (1962).

355. *Id.* at 422.

356. *Id.* at 423 n.2. The prayer consisted of twenty-two words: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.” *Id.* at 430.

357. *Id.* at 425.

church changed with the views of the particular ruler that happened to be in control at the time. Powerful groups representing some of the varying religious views of the people struggled among themselves to impress their particular views upon the Government and obtain amendments of the Book more suitable to their respective notions of how religious services should be conducted . . . .<sup>358</sup>

To Justice Black and the majority, it mattered little that students could be exempted from saying the prayer, because the Establishment Clause, unlike the Free Exercise Clause, does not depend on showing “direct governmental compulsion.”<sup>359</sup> And regarding the main theme of this Section, Justice Black left no uncertainty about his position: “When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.”<sup>360</sup>

Near the end of Justice Black’s opinion, he asserted that nothing in the majority’s view called into question the constitutionality of civic exercises that contained references to God or Providence, such as reciting the Declaration of Independence and singing the national anthem.<sup>361</sup> To Justice Black, those patriotic or ceremonial occasions were easily distinguished from “the unquestioned religious exercise” that the State of New York was sponsoring. Furthermore, no constitutional problems arose if students and other persons were “officially encouraged” to participate in those civic exercises.<sup>362</sup>

As the lone dissenter in *Engel v. Vitale*, Justice Potter Stewart questioned the soundness of Justice Black’s distinction and the relevance of disputes about the content of the Book of Common Prayer.<sup>363</sup> Because England has had an established church for several centuries, references to

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358. *Id.* at 425-27.

359. *Id.* at 430.

360. *Id.* at 431. In his concurring opinion, Justice Douglas wrote that “there [was] no element of compulsion or coercion” in the recitation of the prayer, *id.* at 438 (Douglas, J., concurring), but the exercise was unconstitutional because the government was financing it. *Id.* at 443-44 (Douglas, J., concurring). He adhered to these two views in *School District v. Schempp*, where he again wrote a separate concurring opinion. 374 U.S. 203, 227-30 (1962) (Douglas, J., concurring).

361. *Engel*, 370 U.S. at 435 n.21.

362. *Id.* at 435 n.21.

363. *Id.* at 445 (Stewart, J., dissenting).

those disputes were “unenlightening.”<sup>364</sup> In a manner that today might seem either folksy or ingenuous, Justice Stewart asked how an official religion could be established by allowing children to say a prayer that they freely chose to recite.<sup>365</sup> To take away that choice from them was “to deny them the opportunity of sharing in the spiritual heritage of our Nation.”<sup>366</sup>

What did Justice Stewart mean by this phrase? His dissent concluded with a sizable list of public pronouncements and ceremonies that include divine invocations.<sup>367</sup> Most of these ceremonies and proclamations involved national political offices, prompting Justice Stewart to ask whether:

the Court [means] to say that the First Amendment imposes a lesser restriction upon the Federal Government than does the Fourteenth Amendment upon the States. Or is the Court suggesting that the Constitution permits judges and Congressmen and Presidents to join in prayer, but prohibits school children from doing so?<sup>368</sup>

To some scholars, Justice Stewart’s questions have never been satisfactorily answered.<sup>369</sup>

Because of its similarity to *Engel v. Vitale* and the length of the opinions in the case, there is little reason to provide a full summary of *School District v. Schempp*. Instead, this Article shall describe the controversy and then discuss those aspects of the decision most relevant to this Section.

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364. *Id.* (Stewart, J., dissenting).

365. *Id.* (Stewart, J., dissenting).

366. *Id.* (Stewart, J., dissenting).

367. *See id.* (Stewart, J., dissenting).

368. *Id.* at 450 n.9 (Stewart, J., dissenting).

369. To have his perspective available for the rest of this Section, it makes sense to quote from Justice Stewart’s dissent:

At the opening of each day’s Session of this Court we stand, while one of our officials invokes the protection of God. Since the days of John Marshall our Crier has said, “God save the United States and this Honorable Court.” Both the Senate and the House of Representatives open their daily Sessions with prayer. Each of our Presidents, from George Washington to John F. Kennedy, has upon assuming his Office asked the protection and help of God.

. . . .

. . . In 1952 Congress enacted legislation calling upon the President each year to proclaim a National Day of Prayer. Since 1865 the words “IN GOD WE TRUST” have been impressed on our coins. Countless similar examples could be listed, but there is no need to belabor the obvious. It was all summed up by this Court just ten years ago in a single sentence: “We are a religious people whose institutions presuppose a Supreme Being.”

*Id.* at 6, 449-50 (Stewart, J., dissenting) (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)). Responding to the argument in Justice Douglas’s concurring opinion that the daily prayer in New Hyde Park was unconstitutional because the state was financing a religious exercise, Justice Stewart pointed out that public monies are used to pay the chaplains of the military, the Congress, and the federal and state prisons. *Id.* at 449 n.4 (Stewart, J., dissenting).

The case known as *School District v. Schempp* actually involved disputes in two states.<sup>370</sup> A Pennsylvania statute required that at least ten verses from the Bible be read, without comment, at the opening of the school day.<sup>371</sup> In Maryland, the City of Baltimore had adopted a rule pursuant to state legislation that was similar to Pennsylvania's.<sup>372</sup> The local rule provided that the school day begin with the "reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer."<sup>373</sup> In both Pennsylvania and Baltimore, any child could be excused from attending or participating in these exercises upon the written request of his or her parents.<sup>374</sup>

The constitutionality of the Pennsylvania statute and the Baltimore rule had been challenged by both parents and children.<sup>375</sup> Roger and Donna Schempp were students at the Abington Senior High School in Pennsylvania.<sup>376</sup> With their parents, they attended a Unitarian Church in Germantown, a section of Philadelphia.<sup>377</sup> William J. Murray, III went to a public school in Baltimore and his mother was a taxpayer therein.<sup>378</sup> Both William and his mother were professed atheists.<sup>379</sup>

In striking down the Pennsylvania statute and the Baltimore rule, the Court returned to familiar themes. Citing *Everson*, it reminded readers that "this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another."<sup>380</sup> And citing *Engel v. Vitale*, the Court maintained that "the fact that individual students may absent themselves upon parental request . . . furnishes no defense to a claim of unconstitutionality under the Establishment Clause."<sup>381</sup>

370. 374 U.S. 203, 205, 211 (1963).

371. *Id.* at 205.

372. *Id.* at 211.

373. *Id.*

374. *Id.* at 205-07, 211-12. According to Justice Tom Clark's majority opinion, four versions of the Bible were used in Abington Senior High School, including the Hebrew Bible. *Id.* at 207. In Baltimore, students could use either the King James or Douay version of the Christian Bible. *Id.* at 211 & n.4.

375. *Id.* at 206-08, 211-12.

376. *Id.* at 206.

377. *Id.*

378. *Id.* at 211.

379. *Id.* According to the district court opinion, William Murray was fourteen years old. *Murray v. Curlett*, 179 A.2d 698, 699 (1962).

380. *Schempp*, 374 U.S. at 216.

381. *Id.* at 224-25.



Because the Court relied on these familiar notions to resolve the case, one might wonder why *School District v. Schempp* runs on for so many pages. The case is noteworthy for several developments, three of which help to explain its unusual length: (1) In the majority opinion, the Court reproduced “expert testimony” (given in the first trial) on different aspects of the Pennsylvania exercises.<sup>382</sup> On a related note, in his long concurring opinion, Justice Brennan cited nearly a dozen studies by social scientists on social conformity in groups and “peer-group norms” among children and adolescents.<sup>383</sup> These studies were said to attest to the likelihood of indirect coercion in voluntary religious exercises in the public schools;<sup>384</sup> (2) Perhaps because of public controversy over *McCullum* and subsequent cases, the Court developed a two-prong test to determine whether legislation violates the Establishment Clause (*viz.*, “to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion”).<sup>385</sup> To the argument that the exercises had important secular purposes—*e.g.*, “the promotion of moral values [and] the contradiction to the materialistic trends of our times”—the Court responded that the “place of the Bible as an instrument of religion cannot be gainsaid;”<sup>386</sup> (3) In his concurring opinion, Justice Brennan provided a history of devotional exercises in American schools (both public and private), in an effort to clarify the constitutional problem facing the Court.<sup>387</sup> Justice Brennan also responded to criticisms of recent Establishment Clause decisions (by both scholars and dissenting Justices) and tried to anticipate future legal controversies in this area.<sup>388</sup>

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382. *Id.* at 209-10.

383. *Id.* at 290 (Brennan, J., concurring).

384. *Id.* at 209-10. The majority opinion includes the testimony of Dr. Solomon Grayzel and Dr. Luther A. Weigle, but the opinion nowhere explains why either of these men were asked to testify. *Id.* In the federal district court, Dr. Grayzel was identified as an ordained rabbi and an editor at the Jewish Publication Society in Philadelphia. *Schempp v. School District*, 177 F. Supp. 398, 408 n.13 (E.D. Pa. 1959). Dr. Weigle was identified as Dean Emeritus of the Yale Divinity School and an ordained Lutheran minister. *Id.* at 408 n.15. For the social science research cited by Justice Brennan, see *Schempp*, 374 U.S. at 287-92, 290 n.68 (Brennan, J., concurring). For Justice Brennan’s other remarks on the susceptibility of children to peer pressure, see *id.* at 261-64 (Brennan, J., concurring), which includes his views on *McCullum* and *Zorach*. In note 28, Justice Brennan quoted from Justice Frankfurter’s concurring opinion in *McCullum*. *Id.* at 263 n.28 (Brennan, J., concurring).

385. *Schempp*, 374 U.S. at 222.

386. *Id.* at 223-24. The Court reasoned that if the secular purposes were the principal goals of the legislation, then students should not have been able to obtain an exemption from the exercises. *Id.*

387. *Id.* at 268 (Brennan, J., concurring).

388. Owing to the dearth of public schools when the First Amendment was framed and ratified, Justice Brennan wrote that “on our precise problem the historical record is at best ambiguous.” *Id.* at 237 (Brennan, J., concurring). The central question for him thus became: Did the practices here challenged threaten those consequences which the Framers deeply feared? *Id.* at 236 (Brennan, J., concurring). Justice Brennan’s opinion in *Schempp* is searching and fair-minded, but a question like the one just posed could easily serve as a pretext for all kinds of judicial activism.

Despite its apparent inability to persuade any other members of the Court, Justice Stewart's dissenting opinion in *Schempp* cannot be ignored. Justice Stewart believed that the existing judicial record contained gaps and they precluded the Court from making a responsible decision.<sup>389</sup> He therefore proposed that the two discrete cases be remanded to obtain additional evidence.<sup>390</sup> This proposal was based on Justice Stewart's view that the Court had a duty to interpret the provisions "so as to render them constitutional if reasonably possible."<sup>391</sup>

Such a comment might suggest that Justice Stewart was imputing bad motives to his brethren. He was not, but he disagreed with them about the correct meaning of state neutrality toward religion. As he did in *Engel v. Vitale*, Justice Stewart criticized the "wall of separation" metaphor, while pointing out that in some situations "a doctrinaire reading of the Establishment Clause leads to irreconcilable conflict with the Free Exercise Clause."<sup>392</sup> This was one such situation, and Justice Stewart held, contrary to the other Justices, that the central religious value in the First Amendment is "the safeguarding of an individual's right to free exercise of his religion."<sup>393</sup> Accordingly, he recognized a "substantial" free exercise claim on the part of those who desired to have their children's school day open with the reading of select passages from the Bible.<sup>394</sup>

Justice Stewart acknowledged the possibility of coercion in both controversies, though he had difficulty finding any evidence of it in the judicial record.<sup>395</sup> His candor on this point amounted to a criticism of the other Justices for concluding that "indirect" coercion was present in the classroom:

It is clear that the dangers of coercion involved in the holding of religious exercises in a schoolroom differ qualitatively from those

389. *Id.* at 319 (Stewart, J., dissenting).

390. *Id.* at 308-09, 318-20 (Stewart, J., dissenting).

391. *Id.* at 315 (Stewart, J., dissenting).

392. *Id.* at 309 (Stewart, J., dissenting).

393. *Id.* at 312 (Stewart J., dissenting).

394. *Id.* (Stewart, J., dissenting). Justice Stewart was also sensitive to economic considerations that might affect the exercise of this freedom:

It might be argued here that parents who wanted their children to be exposed to religious influences in school could . . . send their children to private or parochial schools. But the consideration which renders this contention too facile to be determinative has already been recognized by the Court: "Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way."

*Id.* at 312-13 (Stewart, J., dissenting) (quoting *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943)).

395. *Id.* at 316-17 (Stewart, J., dissenting).

presented by the use of similar exercises or affirmations in ceremonies attended by adults. Even as to children, however, the duty laid upon government in connection with religious exercises in the public schools is that of refraining from so structuring the school environment as to put any pressure on a child to participate in those exercises; it is not that of providing an atmosphere in which children are kept scrupulously insulated from any awareness that some of their fellows may want to open the school day with prayer, or of the fact that there exist in our pluralistic society differences of religious belief.<sup>396</sup>

In concluding, Justice Stewart repeated that the Constitution protects the freedom of everyone, “Jew or Agnostic, Christian or Atheist, Buddhist or Freethinker, to believe or disbelieve, to worship or not worship, to pray or keep silent, . . . uncoerced and unrestrained by government.”<sup>397</sup> Concretely, this meant that public schools should have wide latitude in their efforts to accommodate students who felt the need or desire to pray during the school day. Allowing for the goodwill and resourcefulness of the relevant parties, Justice Stewart expressed his hope that such accommodation could take place without any type of coercion, thereby minimizing the need for judicial involvement.<sup>398</sup>

After *School District v. Schempp*, almost thirty years passed before the Supreme Court again considered the constitutionality of an indisputably religious exercise in a public school. During those three decades, the Court was engaged with other Establishment Clause controversies, and its rulings in a few of those cases shaped the opinions in *Lee v. Weisman*, decided in 1992.<sup>399</sup>

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396. *Id.* (Stewart, J., dissenting). As noted, Justice Stewart saw no evidence in either case that students were being coerced to participate in the religious exercises. *Id.* at 319 (Stewart, J., dissenting). No evidence had been put forth in *Murray* because of the nature of the pleading (a technical issue), and in *Schempp* the judicial record showed only that the father *feared* that his children would be shunned if they were excused from the exercise. *Id.* at 319 (Stewart, J., dissenting). Furthermore, in both Abington Township and Baltimore, different versions of Scripture could be used—suggesting, to Justice Stewart, public awareness of the religious pluralism of each community—and the readings were unaccompanied by commentary that might amount to religious instruction. *Id.* at 314-15. Despite seeing no evidence that students were being coerced, Justice Stewart felt that the only responsible way for the Court to discharge its duties was to remand the cases in an effort to learn whether coercion had occurred. *Id.* at 320 (Stewart, J., dissenting).

397. *Id.* at 319-20 (Stewart, J., dissenting).

398. *Id.* at 318 (Stewart, J., dissenting). Justice Stewart acknowledged that there were situations which would amount to coercion, such as denying students an opportunity to be excused from the religious exercise or scheduling the exercise so that it was a far more attractive option than any of the other alternatives facing the students. *Id.* (Stewart, J., dissenting).

399. Establishment Clause cases decided after *Schempp* and relevant to the main themes of this Section or the decision in *Lee v. Weisman* include: *Wallace v. Jaffree*, 472 U.S. 38, 40 (1985) (striking down an Alabama law authorizing a one-minute period of silence in all public schools “for

It is fitting to end this Section with a discussion of *Lee v. Weisman* because the case touches on nearly every issue considered thus far. The image of the psychologically fragile child is again present, though the dissenters argued that the image was wholly inappropriate in this context.<sup>400</sup>

The controversy began to take shape a few days before Deborah Weisman's graduation in June 1989 from the Nathan Bishop Middle School in Providence, Rhode Island.<sup>401</sup> Acting for himself and his daughter, Deborah's father sought a temporary restraining order in district court.<sup>402</sup> Daniel Weisman wanted the court "to prohibit school officials from including an invocation or benediction in the graduation ceremony."<sup>403</sup> The court denied the motion because it lacked time to consider the issues.<sup>404</sup> One month later, Daniel Weisman filed an amended complaint, seeking a permanent injunction that would bar school officials from inviting clergy to deliver invocations and benedictions at future graduations, including Deborah's high school graduation.<sup>405</sup>

The invocation and benediction at the ceremony at Nathan Bishop Middle School were given by Rabbi Leslie Gutterman, who had been invited by the school's principal, Robert E. Lee.<sup>406</sup> Before the ceremony, the principal gave Rabbi Gutterman a pamphlet titled "Guidelines for Civic Occasions," prepared by the National Conference of Christians and Jews.<sup>407</sup> The principal also advised Rabbi Gutterman that the invocation and benediction should be nonsectarian.<sup>408</sup> The majority opinion in *Lee v.*

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meditation or voluntary prayer"); *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding the Nebraska Legislature's practice of beginning each of its sessions with a prayer by a chaplain who was remunerated with state funds); and *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam) (invalidating a Kentucky statute that required the posting of a copy of the Ten Commandments in each public school classroom). The controversy in *Wallace v. Jaffree* is less pertinent to this Section than a reader might suppose, but the opinions in that case contain important statements on the historical meaning of the Establishment Clause. The Court's decision in *Marsh v. Chambers* was clearly relevant to the controversy in *Lee v. Weisman*, as will be seen momentarily.

400. See *Lee v. Weisman*, 505 U.S. 577, 638-39 (1992) (Scalia, J., dissenting).

401. *Id.* at 581.

402. *Id.* at 584.

403. *Id.*

404. *Id.*

405. *Id.* The Supreme Court of the United States heard oral argument in *Lee v. Weisman* on 6 November 1991; the case was decided on 24 June 1992. *Id.* at 577. At that time, Deborah Weisman was enrolled as a student at Classical High School in Providence. *Id.* at 583. According to the Court, it appeared "likely, if not certain, that an invocation and benediction [would] be conducted at her high school graduation." *Id.* at 584.

406. *Id.* at 581.

407. *Id.*

408. *Id.*

*Weisman* suggested that Rabbi Gutterman's prayers might reasonably be designated "nonsectarian."<sup>409</sup>

In ruling in favor of Daniel Weisman and his daughter, the Supreme Court again stated that the Establishment Clause may be violated even without direct coercion.<sup>410</sup> According to Justice Anthony Kennedy's majority opinion, the state's involvement in religion in this case was "pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school."<sup>411</sup> By meeting with Rabbi Gutterman, supplying him with the pamphlet, and advising him that the invocation and benediction should be nonsectarian, the principal "directed and controlled the content of the prayers."<sup>412</sup>

Justice Kennedy's opinion also noted that graduation ceremonies are widely recognized as an important rite of passage and, for that reason, are "in a fair and real sense obligatory."<sup>413</sup> Because students so rarely absent themselves from these ceremonies, the school was placing them in an untenable position.<sup>414</sup> On this subject, Justice Kennedy tried to impart historical insight to his readers:

The lessons of the First Amendment are as urgent in the modern world as in the 18th century when it was written. One timeless lesson is that if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people. To compromise that principle today would be to deny our own tradition and forfeit our standing to urge others to secure the protections of that tradition for themselves.<sup>415</sup>

Justice Kennedy realized that some readers might take issue with the idea that citizens were being "subjected" to a state-sponsored religious exercise, so he tried to describe the dynamics of what took place.<sup>416</sup> By supervising the graduation ceremony, the school district put pressure on students to become participants in the invocation and benediction.<sup>417</sup> That pressure was compounded by adolescent peer pressure, which is said to promote conformity, especially in "matters of social convention."<sup>418</sup> Both

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409. *See id.* at 589.

410. *Id.* at 587.

411. *Id.*

412. *Id.* at 588.

413. *Id.* at 586.

414. *Id.* at 595.

415. *Id.* at 592.

416. *Id.* at 593.

417. *Id.*

418. *Id.*

types of pressure, wrote Justice Kennedy, “can be as real as any overt compulsion.”<sup>419</sup>

Justice Kennedy also tried to spell out the choices facing the student who could not endorse or embrace what Rabbi Gutterman was saying.<sup>420</sup> Such a student could “stand . . . or . . . maintain respectful silence.”<sup>421</sup> Justice Kennedy, however, worried that either gesture might be taken as an endorsement of the prayers or a sign of participation in the exercise.<sup>422</sup> “A reasonable dissenter,” he mused, might have grounds for thinking that his or her classmates would (mis)interpret standing or maintaining a respectful silence as an endorsement of Rabbi Gutterman’s prayers.<sup>423</sup>

The dissenting opinion in *Lee v. Weisman* challenged all of these points. Written by Justice Antonin Scalia and signed by Chief Justice Rehnquist and Justice Clarence Thomas, it attacked the theory of “indirect coercion” and argued that American history and tradition “are replete with public ceremonies featuring prayers of thanksgiving and petition.”<sup>424</sup> Since the latter theme has been sufficiently discussed here, remarks will be confined to Justice Scalia’s ideas about indirect coercion.<sup>425</sup>

To Justice Scalia, the majority had erred when it tried to explain the choices facing the “dissenting” student.<sup>426</sup> More precisely, the Court’s errors arose when the majority tried to explain the *meaning* of those choices.

Through his reading of the majority opinion, Justice Scalia tried to clear up a few matters. The dissenting student had the option of *sitting* in “respectful silence,” a point which the Court seemed willing to concede, though it did not expressly say as much.<sup>427</sup> But if this choice were expressly

419. *Id.* Justice Kennedy wrote that “research in psychology” shows the influence of adolescent peer pressure, and he cited four studies to that effect. *See id.* He also sought to distinguish prayer at the opening of a state legislative session (the constitutionality of which was affirmed in *Marsh v. Chambers*) from prayer in a public school graduation ceremony. In the former, adults are “free to enter and leave with little comment and for any number of reasons.” *Id.* at 597. Furthermore, the “influence and force of a formal exercise in a school graduation are far greater than the prayer exercise . . . condoned in *Marsh*.” *Id.*; *see also id.* at 585-86.

420. *Id.* at 593.

421. *Id.*

422. *Id.*

423. *Id.*

424. *Id.* at 633 (Scalia, J., dissenting).

425. Like Justice Stewart in *Engel v. Vitale*, Justice Scalia gave examples of a “general tradition of prayer at public ceremonies.” *Id.* at 635 (Scalia, J., dissenting). Justice Scalia also tried to show that “there exists a more specific tradition of invocations and benedictions at public school graduation exercises.” *Id.* at 635-36.

426. *Id.* at 638 (Scalia, J., dissenting).

427. *See id.* at 638 (Scalia, J., dissenting).

acknowledged, the cogency of the majority's analysis would be called into question:

[The] notion that a student who simply *sits* in “respectful silence” during the invocation and benediction (when all others are standing) has somehow joined—or would somehow be perceived as having joined—in the prayers is nothing short of ludicrous. We indeed live in a vulgar age. But surely “our social conventions” . . . have not coarsened to the point that anyone who does not stand on his chair and shout obscenities can reasonably be deemed to have assented to everything said in his presence.<sup>428</sup>

This passage should be read in conjunction with Justice Scalia's views on the second “option” for the dissenting student. Here Justice Scalia drew a similar conclusion. Quoting the majority opinion, he wrote that standing could mean “adherence to a view or simple respect for the views of others.”<sup>429</sup> Justice Scalia held that the latter is much more common than the former in our society.<sup>430</sup> On that basis, he concluded that the analysis in the majority opinion was wrong: the dissenter who chose to stand had little reason to believe that this action “signified her own participation [in] or approval [of]” the group exercise.<sup>431</sup>

The more general problem, as these comments suggest, was the Court's theory of psychological or indirect coercion. Justice Scalia proposed that the concept of “coercion” be restricted to acts “backed by the threat of penalty.”<sup>432</sup> In the present context, such threats were nonexistent, and he found it curious that the majority would apply the theory of indirect coercion to high school seniors.<sup>433</sup>

To strengthen his argument, Justice Scalia was willing to concede that some element of coercion may have been present in *Engel v. Vitale* and *School District v. Schempp*.<sup>434</sup> But he did not regard those cases as controlling for two reasons: first, school instruction is different from a public ceremony, even when that ceremony relates to schooling; and second,

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428. *Id.* at 637 (Scalia, J., dissenting).

429. *Id.* at 638 (Scalia, J., dissenting) (quoting the majority opinion, *id.* at 593).

430. *Id.* (Scalia, J., dissenting).

431. *Id.* (Scalia, J., dissenting).

432. *Id.* at 642-43 (Scalia, J., dissenting).

433. *Id.* at 639 (Scalia, J., dissenting).

I had thought the reason graduation from high school is regarded as so significant an event is that it is generally associated with transition from adolescence to young adulthood. Many graduating seniors, of course, are old enough to vote. Why, then, does the Court treat them as though they were first-graders?

*Id.* at 639 (Scalia, J., dissenting); *see also id.* at 641 (Scalia, J., dissenting).

434. *Id.* at 643 (Scalia, J., dissenting).

students are required to go to school, whereas attendance at this graduation ceremony was truly optional (notwithstanding the majority's view to the contrary).<sup>435</sup>

In sum, Justice Scalia believed that the majority had uncritically accepted and extended the idea of indirect coercion.<sup>436</sup> In places, his dissent mocks the Court's "psycho-journey," asserting that the relevant distinctions on the subject of coercion should be plain to those "who have made a career of reading the disciples of Blackstone rather than of Freud."<sup>437</sup> Whatever one thinks of Justice Scalia's critique, it seems correct in supposing that the decision in *Lee v. Weisman* depended crucially on the theory of indirect coercion.<sup>438</sup>

This completes this Article's attempt to document the picture of the psychologically fragile child. Apart from the comment on *Lee v. Weisman* just offered, the reader must determine for himself or herself the importance of this imagery in resolving each of the cases considered here. Beyond those discrete queries, the imagery presents other questions pertinent to this study, and as a final exercise, this Article will assay some answers to them.

#### V. CHILDREN, MORAL AGENCY, AND FREEDOM: SOME QUESTIONS FOR CONSTITUTIONAL THEORISTS

At this point, the inconsistency described above should be clear. On the one hand, the Supreme Court asserts that children are morally and

435. *Id.* (Scalia, J., dissenting). Justice Scalia also chided the majority for its view that school officials were directing a religious exercise and were in effect composing prayers: "The Court identifies nothing in the record remotely suggesting that school officials have ever drafted, edited, screened, or censored graduation prayers, or that Rabbi Gutterman was a mouthpiece of . . . school officials." *Id.* at 640 (Scalia, J., dissenting).

436. *Id.* at 642-46 (Scalia, J., dissenting).

437. *Id.* at 642-43 (Scalia, J., dissenting).

438. Concurring opinions in *Lee v. Weisman* were written by Justice Blackmun (signed by Justice Stevens and Justice O'Connor) and by Justice Souter (also signed by Justice Stevens and Justice O'Connor). Both Justice Blackmun and Justice Souter accepted the grounds for judgment in the majority opinion. *See id.* at 604, 609. Justice Souter's opinion addresses some basic questions about interpreting the Establishment Clause, and in places it reads like a response to Justice Rehnquist's dissent in *Wallace v. Jaffree*. *See id.* at 609-31 (Souter, J., concurring).

Some readers will have noticed that this Section lacks a discussion of *Santa Fe Independent School District v. Doe*. 530 U.S. 290 (2000) (holding that a Texas locality's policy of permitting student-led and student-initiated prayers before high school football games violated the Establishment Clause). While *Santa Fe Independent School District v. Doe* is a significant case, the opinions in it break little new ground (at least with respect to the main themes of the Article), and much of the Court's analysis concerns the school district's modifications of the policy under review and the question whether student-led prayers constitute "private speech." *See id.* at 302.



psychologically vulnerable and highly susceptible to peer pressure and “indirect” coercion. On the other hand, the Court believes that it is not unrealistic to expect children to “avert their eyes” from stimuli commonly referred to as “adult” entertainment. This is a large inconsistency, and one wonders whether it can somehow be justified.

One justification that suggests itself is surprisingly direct. It takes issue with the analysis presented in Section I and contends that the only real freedom is freedom in the “negative” sense. This position, as noted, is sometimes attributed to Isaiah Berlin, though he did not hold it. Yet certain passages in Berlin’s writings, such as the following one, seem to lend support to it:

To threaten a man with persecution unless he submits to a life in which he exercises no choices of his goals; to block before him every door but one, no matter how noble the prospect upon which it opens, or how benevolent the motives of those who arrange this, is to sin against the truth that he is a man, a being with a life of his own to live. This is liberty as it has been conceived by liberals in the modern world from the days of Erasmus (some would say Occam) to our own. Every plea for civil liberties and individual rights, every protest against exploitation and humiliation, against the encroachment of public authority, or the mass hypnosis of custom or organized propaganda, springs from this individualistic . . . conception of man.<sup>439</sup>

If one subscribes to this account of the human person—call it the liberal-individualist account—the inconsistency documented here might be easier to accept.

When the Supreme Court expresses its worries about the pressure children might feel to participate in the recitation of a prayer, it is making a judgment about the indignity of compulsion in matters of conscience. As Berlin’s words and several of the cases from Section IV suggest, such anxieties have a long history in the liberal tradition, stretching back to the wars of religion in the sixteenth and seventeenth centuries.<sup>440</sup> From this perspective, motives count for little. Even if one deems personal salvation the highest good in this world, and one wants to secure this good for others, the claims of individual conscience demand respect.

This point may be amplified. Though we rarely speak of minors undergoing religious “conversions,” young persons sometimes take an

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439. BERLIN, *supra* note 27, at 127-28.

440. Establishment Clause cases discussed in Section IV, in which claims of religious conscience were explicitly raised, include *Minersville School District v. Gobitis*, *West Virginia State Board of Education v. Barnette*, and *Lee v. Weisman*.

interest in religion and then affiliate with a particular faith. From the standpoint of most liberal theory, such occurrences seem unproblematic. Consider, for example, a young boy or girl growing up in a family indifferent to religion, with neither favorable nor unfavorable views toward any faith. Most liberals would find it unobjectionable if this person took an interest in a friend's religion and became involved in it—say, by regularly attending services with the friend. This example suggests that liberal opposition to religious exercises on school property is mainly based on the possibility of compulsion or coercion in that setting, rather than opposition to religion *per se*.<sup>441</sup>

As sketched here, the liberal position on the free exercise of religion seems to have two views implicit in it: (1) a religious exercise conducted under the auspices of the state in some sense means that the state is endorsing the ideas of that religion; (2) the state's endorsement is likely to diminish "free choice" and perhaps be more influential than any other endorsement of the same religious practice or set of ideas within society. At the very least, these two views are plausible, and as a descriptive statement, the second view may hold true in many different settings. A child who grew up in a religiously nonobservant family, for example, might be much more influenced by a daily religious exercise in the public school than by sporadic encounters with religiously devout neighbors.<sup>442</sup>

What about the phenomenon of "incidental exposure"? Does the liberal-individualist account of the human person help us to understand why the Court has countenanced it? While the connection might be difficult to see at first glance, the answer to the second question also seems to be "yes."

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441. For the most part, liberals accept the right of adults to practice a faith, abandon it, or convert to another. In the example above, it is assumed that none of the parents have exerted any pressure on the religiously unaffiliated child. Naturally, few persons would say that the personal convictions (or "conscience") of a child should always be accorded the same respect as the personal convictions and conscience of an adult. At the same time, the religious beliefs (or lack thereof) of a minor should count for something, whether those beliefs are identical to or different from those of his or her parents.

442. Conceding the plausibility of these two views does not imply that an endorsement by the state is always more influential than an endorsement originating in society. It might be easy to think as much (especially for someone who believes that the only real freedom is "negative" freedom), but upon reflection, the notion should be seen as an error. Consider the controversies examined here. Is one supposed to believe that Rabbi Gutterman's two short prayers (in *Lee v. Weisman*) would necessarily have a greater influence on most of the students at Nathan Bishop Middle School than would a few minutes of the Spice Channel "bleeding" into the living room when a student's parents are at work (as in *United States v. Playboy Entertainment Group, Inc.*)? Again, one might be aware of the symbolic message(s) that may be conveyed by a religious exercise in public school. Such symbolism may amount to an endorsement. But it would be prudent to keep the issue of endorsement separate from the issue of influence.

Like the cases relating to religious exercises in public schools, the key variable here seems to be the notion of “conscience.” Although this Article has not had occasion to probe the topic deeply, the domain of “conscience” has been broadly extended in the last seventy-five years. Today, “conscience” seems to encompass not only religion as traditionally understood but also a score of matters related to intimate or private life, including the production and consumption of a wide range of pornographic and indecent stimuli.<sup>443</sup>

The significance of this development should be clear. If the notion of conscience is understood so broadly, liberal anxiety about “compulsion” could be invoked to oppose almost any stricture pertaining to the regulation of pornographic or indecent stimuli, including those strictures essential to the “shielding” of children. Over time, such opposition might have resulted in a growing indifference toward children’s incidental exposure to pornographic and indecent stimuli. More than a few sources attest to this historical interpretation.<sup>444</sup>

There are many good reasons for concluding that these newer claims of “conscience” do not merit the same solicitude as the older claims. But numerous scholars and jurists have endorsed the development just described, and the endorsement could explain why the odd inconsistency documented here has not been recognized as problematic.<sup>445</sup>

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443. The expanded notion of conscience was put forth (and rejected) as the basis of an unenumerated right in *United States v. Harmon*, 45 F. 414 (D. Kan. 1891), and *State v. Nelson*, 11 A.2d 856 (1940) (upholding the State of Connecticut’s authority, as a valid exercise of the police power, to proscribe the use of contraceptives for the prevention of conception). After many unsuccessful challenges at both the state and federal level, the decision in *State v. Nelson* was effectively invalidated by the decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965). The expanded notion of conscience also seemed to be an important component of the right to privacy in *Eisenstadt v. Baird*, 405 U.S. 438 (1972). Recall Justice Brennan’s formulation of the right to privacy:

[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional [endowment]. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

*Id.* at 453. Along the same lines, see *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (reaffirming *Roe* and stating that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”). The expanded notion of conscience also finds expression in *Roth v. United States*, 354 U.S. 476 (1957), and, more significantly, in *Stanley v. Georgia*, 394 U.S. 557 (1969) (holding that the First and Fourteenth Amendments prohibit states from criminalizing the private possession of obscene materials in one’s home). See also *Bowers v. Hardwick*, 478 U.S. 186, 199-214 (1986) (Blackmun, J., dissenting).

444. See e.g., GURSTEIN, *supra* note 96.

445. Some readers may wonder about the historical sources of the expanded notion of conscience. As Rochelle Gurstein’s study demonstrates, the expanded notion has affinities with the traditional notion, since both are deeply concerned with the realm of private life, the realm which, historically, sheltered activities pertaining to the body. *Id.* Anyone who doubts the importance of this realm to

Some readers might consider these theoretical and historical matters a distraction. They might simply want to know: Can the inconsistency described herein be justified on constitutional grounds? That is, does the Constitution, correctly interpreted, yield this inconsistency or double standard?

As Section I attempted to show, the First Amendment issues are difficult. The questions just raised might be approached in several ways, but to make a stronger case in favor of the inconsistency or double standard, it shall be assumed that all of the Establishment Clause cases discussed herein were correctly decided. It shall also be assumed that the overall characterization of children in those cases is correct. This Article is thus left to consider the general direction of obscenity and indecency jurisprudence since 1957.<sup>446</sup>

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the traditional notion of conscience—and, by extension, its importance to religions such as Judaism and Christianity—should reflect on the conspicuous place this realm occupies in the foundational texts of those religions, e.g., the creation narrative in the book of Genesis, the birth of Isaac to Sarah, and the birth of Jesus to Mary. Recall, too, the numerous strictures in each of these religions relating to diet and sexuality. Relying on works by Hannah Arendt and the anthropologist Mary Douglas, Gurstein argues that the private realm, as the realm of biological necessity, was regarded with contempt in the ancient world, a judgment that also seems to prevail in some “traditional” societies. *Id.* at 9-10. At the same time (at least in antiquity), the private realm was “a sanctuary for deeply venerated mysteries,” because it was the locus of birth, sustenance, and death, processes that have never been fully comprehensible to ordinary men and women. *Id.* at 10. The central aim of Gurstein’s study is to show how, in the last 150 years in the United States, the status of private life was transformed and elevated from the sphere “in which people are least individuated” to “the locus of freedom and individuality.” *Id.* at 14. A second, though clearly related aim is to explain why a society that professes to value “privacy” so much has permitted so much of intimate life to be put on public display. *See id.* at 14-19. Gurstein’s book documents the long struggle between the “party of reticence” and the “party of exposure,” a struggle ultimately (and spectacularly) won by the latter. *See id.* She describes the efforts of many self-professed reformers—an odd assortment of doctors and public health officials, birth-control advocates and sexual liberationists, and journalists and authors—who sought to “uncover” aspects of human life that were for centuries deliberately concealed. *See id.* Some of these reformers were supremely confident that their grand project, by dispelling ignorance and superstition, would lead to greater happiness and pleasure for all. *See id.* The reformers, to be sure, won some important victories. But Gurstein convincingly argues that the society we now inhabit is very different from the one they envisaged and that not all of their designs for social reform were beyond reproach. *See id.*

446. Before moving on to obscenity jurisprudence, a few final comments on the Establishment Clause cases considered above should be made. Someone could plausibly argue that the Court’s characterization of children in the Establishment Clause cases is correct, while insisting that the decisions in cases such as *Engel v. Vitale*, 370 U.S. 421 (1962), *School District v. Schempp*, 374 U.S. 203 (1963), and *Lee v. Weisman*, 505 U.S. 577 (1992), were wrong, owing to the Court’s (mistaken) reliance on the theory of indirect coercion. In all likelihood, a defender of this view would have to take account of the same interpretive complexities as an opponent of this view, namely: the question of “incorporation”; the existence of two religious “values” in the First Amendment (i.e., “free exercise” and “(dis)establishment”); the relevant conception of freedom (i.e., positive or negative); and the related question of whether permitting voluntary religious exercises in the public school has

To begin with the obvious, this Article's dissatisfaction with the rulings in *Cohen*, *Erzoznik*, and *Playboy Entertainment* has already been expressed. But it is understandable why some persons think that the new obscenity jurisprudence has brought us closer to the "plain" or "real" or "true" meaning of the relevant clauses. Accordingly, it is easy to see why some persons are now so quick to say that state and federal legislators are barred from passing any law that restricts freedom of expression. Given the developments of the last forty or fifty years and the present Court's libertarian views on these issues, Free Speech and Free Press "absolutism" has probably never looked so attractive to so many people.

To understand why this doctrine should be resisted, consider what it presupposes. As noted above, the words in the Free Speech and Free Press Clauses were long interpreted to mean only that government was forbidden to put "prior restraints" on speech and the press. For more than 150 years, the key variable was the "tendency" of one's words, spoken or written. Is that a defensible interpretation of the two Clauses? To say that it was an indefensible interpretation would be bold, inasmuch as it held sway for the *first* 150 years of the nation's history. (Thus, this legal doctrine is distinguishable from that of the now-discredited "liberty of contract," in that the latter emerged roughly a century after the Constitution was ratified.)<sup>447</sup>

But suppose a reader rejects the preceding and continues to point to the "plain words" of the Clauses. Hard questions remain because almost everyone acknowledges at least a few unprotected categories of speech. What are those categories? Disagreement persists, but the list of many scholars would still include fighting words, group libel, obscenity, and child pornography (as a separate category from obscenity).<sup>448</sup>

Ardent libertarians might challenge some of these categories, but it is doubtful whether any commentator would challenge all of them. But to acknowledge the existence of unprotected categories of speech is a large

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an indirectly coercive effect or whether it may have a morally "freeing" effect.

447. It should be noted that the "bad tendency" standard was still being applied as late as 1948. In *Winters v. New York*, the Court invalidated a New York statute that penalized the distribution of printed matter "made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or pictures, or stories of deeds of bloodshed, lust, or crime." 333 U.S. 507, 508 (1948). In his dissenting opinion, which was signed by Justices Jackson and Burton, Justice Felix Frankfurter argued that statutes like the one being invalidated were indispensable to democratic self-government, since the very purpose of instituting government is to avoid conditions of lawlessness and violence. *Id.* at 520-40 (Frankfurter, J., dissenting). Roughly twenty states in 1948 had statutes like the one that was struck down in *Winters*. *Id.* at 522-23 (Frankfurter, J., dissenting). *Winters*, incidentally, appears to be the only case the Supreme Court has ever decided regarding the regulation of media violence.

448. See, e.g., David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test*, 28 GA. L. REV. 1, 46 (1994) (noting that fighting words, obscenity, child pornography, and defamation are placed beyond the full protection of speech).

concession. It makes the “majestic generalities” of the Bill of Rights a bit less majestic.

Moreover, the existence of unprotected categories means, in an important sense, that the bad tendency standard has not been wholly repudiated. We can still make moral judgments about what people say, print, and write, and in some circumstances, depending on how personal freedom is exercised, law may have a role in promoting important social interests. But if this point is granted, we are entitled to question the wholesale revision of obscenity law undertaken by the Supreme Court in the last fifty years.

Is such questioning necessary? The decision in *United States v. Playboy Entertainment Group, Inc.* suggests that it is. To put the matter plainly: if the long-standing views on the vulnerability of children and the effects of pornography even roughly correspond to the truth, then the phenomenon of “incidental exposure” ought to be regarded with much concern. Such concern is trivialized by Justice Kennedy’s remark that all persons, including the young, are free to look askance when they encounter sexually explicit images on television.<sup>449</sup> Quite simply, Justice Kennedy was attributing to young persons a capacity that they cannot be expected to have.<sup>450</sup>

Once again, these criticisms of the new obscenity jurisprudence should not be taken as an endorsement of the *Hicklin* standard or any other standard mentioned here. The most that will be conceded is this: if the categories of unprotected speech are really an extension of the “bad tendency” test, then a wider application of that test than it currently has would be welcome.<sup>451</sup>

By way of conclusion, a misconception must be corrected. There is a widespread notion, perhaps traceable to Justice Jackson’s opinion in *West Virginia State Board of Education v. Barnette*, that the Bill of Rights was supposed to “withdraw certain subjects from the vicissitudes of political controversies.”<sup>452</sup> The related notion is that the amendments represent the (supra-democratic) will of the people, and that when the Court strikes down a law, the people, in a sense, have authorized the Court’s action. Thus, with respect to pornography, indecent stimuli, and the problem of “incidental

449. *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000).

450. If the Court revisits *Lee v. Weisman* or decides a similar controversy anytime soon, one wonders whether Justice Kennedy will—in the interest of consistency—advise the aggrieved students to look askance (and block their ears) during the invocation and benediction.

451. The different judicial standards for obscenity can have much value, as Harry M. Clor’s work shows. See, e.g., CLOR, *supra* note 63.

452. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

exposure,” one might be tempted to say that the nation chose to put these matters beyond the reach of ordinary politics.

In fact, history reveals something else. For more than a century, the question as to how the unprotected category of obscenity relates to the Free Speech and Free Press Clauses has largely been answered by the Justices of the Supreme Court. Consider the record. This Article has taken note of the adoption of the *Hicklin* test by the federal judiciary in the 1870s, its subsequent abandonment in 1957, and the adoption of a new standard in *Miller v. California*. Many persons in the United States are happy with the way this jurisprudence has evolved, while many others decry the evolution. Whatever one’s position, it is a fiction to say that the current law of obscenity somehow reflects the will of the people.

So what is to be done? Should critics of the status quo aim to restore the “bad tendency” test in full? Should the disaffected propose a constitutional amendment that speaks directly to the issues of obscenity and indecency?

Because it is sometimes advisable merely to describe a problem, this Article offers no solutions. Different concerns have been set forth at length, and at least some of them have been shared by the dissenting Justices identified above. Quite possibly, they, and others, would take solace in these words by Dickens: “It is a world of disappointment: often to the hopes we most cherish, and hopes that do our nature the greatest honour.”<sup>453</sup>

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453. CHARLES DICKENS, *OLIVER TWIST* 302 (Penguin USA 2002) (1837).