5-2020

Is the Establishment Clause Asymmetrical?

Sam Foer
samuel4foer@my.uri.edu

Is the Establishment Clause Asymmetrical?

Analyzing the First Amendment's Prohibition on Religious, but not Political or Ideological Instruction in Public Education.

By Sam Foer[1]

[1] A special thanks to Shanna Pearson-Merkowitz for being a fantastic Honors Project advisor!

Religion, Politics, and Ideology as Coequal within the Public Educational Setting

It does not require a stretch of the imagination or philosophical gymnastics to group religion, politics, and ideological beliefs and values together with respect to their proper and improper places in public education. These concepts, especially religion and ideology, are extremely elusive constructs,[2] making it difficult to arrive at a perfect and comprehensive definition of either. My thesis rests on the premise that because religion, politics, and ideology are interwoven and acted upon through values and morals, they all ultimately concern matters of conscience, personal conviction, and the private sphere. This is apparent for religion, which deals with articles of faith, belief, worship, and divinity, and is ultimately, according to one of the Oxford definitions, "a pursuit or interest to which someone ascribes supreme importance." Even though the Supreme Court has no codified definition of religion,[3] nor has it ever, it has grounded much of the application of the Religion Clauses[4] within the protection of freedom of conscience. The Court views freedom of conscience as one of the most important if not *the* most important pillars for justifying the constitutional protection of religious freedom and separation of Church and State. It conceives of freedom of conscience as the individual right to not be subject to harm by an external imposition or invasion of another's conscience which has become, for the Court, a near absolute right.[5]

'Politics' is defined as "the activities associated with the governance of a country or other area, especially the debate or conflict among individuals or parties having or hoping to achieve power" and "a particular set of political beliefs or principles,"[6] which in this paper will encompass policy, preference for policies, preferences for political actors, and any kind of

---

[2] JOST, J. T. ET. AL SOCIAL AND PSYCHOLOGICAL BASES OF IDEOLOGY AND SYSTEM JUSTIFICATION 4 (2015).

[3] Ben Clements, *Defining Religion in the First Amendment: A Functional Approach,* 74 Cornell L. Rev. 532 (1989).

[4] The Religion Clauses consist of the Establishment Clause (Congress Shall Make no Law Respecting an Establishment of Religion), and the Free Exercise Clause, which immediately follows with (or Prohibiting the Free Exercise Thereof).

[5] Patrick Weil, *Freedom of Conscience, But Which One? In Search of Coherence In The U.S. Supreme Court's Religion Jurisprudence*, 318.

[6] Oxford English Dictionary 2020.

support for political parties. While ideology and politics can and for many people do become pursuits or interests to which someone ascribes supreme importance, it is not this specific potential or characteristic alone that makes them coequal to religion with respect to their proper place in public education. Instead, as it concerns my thesis, politics and ideology, just like religion, are forms of value structures and systems that help to constitute the individual's belief-based personal identity, which guide their religious, political, and ideological activities and engagements - the beliefs that govern not just how the world works, but the values that govern how it *should* work. At its deepest level ideology is "the underlying set of values, myths, ideas, attitudes, beliefs and doctrine that shape the behavioural approach to political, economic, social, cultural and/or ecological activities of an individual or organisation,"[7] and particular ideologies such as Liberalism and Marxism, Communism, Fascism, among others, sprout from these depths.

At the heart of an individual's personal ideological makeup are subjective convictions that ultimately revolve around values and morals which become nested in different layers of the psychological operating system, from unconscious to conscious,[8] and manifest in different ways such as attitude, opinion, political and social affiliation, etc. Whether or not the individual has a sophisticated belief system with a perfectly coherent personal philosophy is not important to the fact that at the center of their religious, ideological, and political actions and convictions are values and morals. Political, religious, and ideological beliefs and action presuppose personal adherence to value and moral systems.

The axis and residence of any value and moral is the realm of mind, or 'conscience,' as the Court has termed it with respect to the Religion Clauses's protection of religious activity and beliefs. Religious beliefs, values, and activities can come from different sources, ranging from parental and communal upbringing and inculcation to conscious wrestling with one's personal articles of faith. The same is true for ideology and politics because they ultimately concern matters of conscience - values and morals. Thus, religious beliefs and values, and those that

---

[7] Robert J. Burrowes, *The Psychology of Ideology and Religion,* http://www.ipsnews.net/2016/07/the-psychology-of-ideology-and-religion/ (last visited April 15th 2020).
[8] JOST, J. T. ET. AL SOCIAL AND PSYCHOLOGICAL BASES OF IDEOLOGY AND SYSTEM JUSTIFICATION xiv (2015).

concern ideology and politics, whether or not each specific one comes from the same source, are coequal in terms of the significance of the faculty of mind that houses them.

Issues of facts, data and science cannot bludgeon the ideological (in the broadest sense of the term) *values* and *morals* that undergird religious, political, and ideological activity and belief. No amount of convincing data presented to argue that the right to own guns is the cause of mass shootings can collide with what is viewed as the intrinsic value or moral of a right to self-defense that manifests politically as support for policies and politicians that affirm and advocate for this [perceived] right. Values and facts exist in two fundamentally different camps. Data can implicate the question of what the best methods are to achieve a value-driven goal, such as understanding how the government works in order to advocate for a given policy, but it cannot implicate the value itself, or the type of policy that stems from and coincides with the value. Information and data cannot collide with values, even when they conflict with beliefs about facts. The Logical Positivist axiom, derived from David Hume's *naturalistic fallacy* (Hume's Razor, Is/Ought distinction fallacy) that science can help explain why someone values something, but it cannot explain that someone should or should not value it,[9] will be one of the guiding philosophical forces of this thesis for the purpose of separating what can be taught in public schools and what cannot be per the Supreme Court's interpretation of the Establishment Clause. In other words, we must presuppose that facts and values exist in different domains if we are to agree that teachers have the ability to separate them, which is further presupposed if we think teachers *should* separate them during instruction.

Along the ideological spectrum, "conservatives" and "liberals" have more than just different beliefs. The structure of their beliefs rests on different views of the world and different morality derived reasoning.[10] Even if the scientific community reaches consensus that life or personhood begins at conception, or that it does not begin until a later time, liberals and conservatives will almost invariably continue to approach the abortion debate and its associated policies and politics from their respective value lenses. Liberals would likely continue to value bodily autonomy over the status of the fetus, and vice versa for conservatives. Thus, even if the

---

[9] KWAME ANTHONY APPIAH, COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS 20 (2006).

[10] JOST, J. T. ET. AL SOCIAL AND PSYCHOLOGICAL BASES OF IDEOLOGY AND SYSTEM JUSTIFICATION 387 (2015).

scientific community reaches consensus on the topic, the politics and policies that orbit this subject remain up for philosophical debate. Support for politicians and policies are typically, if not invariably catalyzed by ideological values and morals that form worldviews in the same meaningful way religion does as explained above. Indeed, the abortion debate is often framed in terms of fulfilling divinely commanded moral obligations vs. the liberal (as in liberalism) value of bodily autonomy.

Even if scientific consensus were reached on matters implicating abortion, public schools would still be expected to instruct the science, remaining incapable of legitimately instructing any related normative morality or politics. Government and civics teachers would continue to be responsible for instructing the facts of the debate, and maybe facilitate class discussion surrounding the issue, without pushing students to adopt the value and its corresponding policy prescriptions for either side. Their job would not shift from remaining impartial to the values to inculcating students with the morality that they believe corresponds to the relevant science.

Similarly, a Marxist and a capitalist have fundamentally different underlying philosophies which implicate fundamental values and morals that guide their subscription to their political economics. Likewise, fascists and liberals have fundamentally different views about the role of the State.[11] It is impossible to prove fascism, or any role of the State for that matter, because its existence is predicated on values, not facts. Whether equality or liberty, two frequently conflicting liberal political and ideological values, is "better" or "more important" than the other ultimately comes down to matters of personal conviction grounded in values and morals that return to their home of conscience. Thus the politics and policies that circles around them do not exist within the realm of fact and must not be taught as such. While values and morals do catalyze sociological activity (religious, political, ideological involvement), they are ultimately private matters, distinct from the realm of facts, which enables them to exist in what can legally be considered a private sphere - the sphere of conscience.[12]

---

[11] I am not claiming that all politics are metaphysically relativistic (equally valid). It may be the case that certain values are superior to others. This paper claims neither position. Rather, for the sake of proper public education, values must be treated as relative. The paradox here is that educators must adhere to teaching methods that treat values and ideas as equal without explicitly advancing the idea that all values are equal, for doing so would negate the method itself.

[12] Alberto Giubilini, 3.2 Conscience As a Faculty for Direct Moral Knowledge, *Conscience*, Stanford Encyclopedia of Philosophy (last visited April 15th 2020).

Values fundamentally color the way people view the world and reason about it, which is largely what makes competing politics and differing religious and ideological beliefs so divisive.[13] Fundamental values and morals make it extremely difficult to see eye to eye with someone who has a fundamentally different view of how the world works and *should* work. Thus, I argue that if religious, political, and ideological convictions stem from the same substrate and consist of the same dimension - values - which are housed in the (private) realm of conscience, they are equally deserving of conscientious and neutral treatment in publicly funded schools.

It is important to note that I am not claiming that religion, politics, and ideology are meaningfully the same. Rather, what is common among them with respect to *at least* the K-12 public educational setting per the Court's language and arguments organically coalesces to demonstrate that there is no meaningful difference between *why* religion, and politics and ideology should not be advanced or denigrated in public schools in at least the same way that the Constitution prohibits religion from being advanced or denigrated. The mechanics of this premise will be further uncovered in the analysis section of this article, wherein the language in the relevant cases will be analyzed to illustrate the coequality of these areas within the public educational setting.

The moral egregiousness and unconstitutionality of public educators advancing their religion in the classroom have for the most part been absorbed into the public consciousness. It is also generally accepted that when a public school teacher attempts to inculcate their students with particular political views, or proselytize ideological or political ideals and positions in the classroom, they are behaving unprofessionally. The student is not attending public school to become a political agent of the teacher or school, or to have their fundamental values altered. When personal views stemming from these areas are imposed on students by teachers, we say that someone is being instructed *what to think* rather than *how to think*, constituting an attempt at indoctrination. Indeed, the National Education Association,[14] the Association of American

---

[13] JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION (2013).

[14] According to the National Education Association's Code of Ethics, http://www.nea.org/home/30442.htm the educator "Shall not unreasonably deny the student's access to varying points of view" and "Shall not on the basis of race, color, creed, sex, national origin, marital status, political or religious beliefs, family, social or cultural background, or sexual orientation, unfairly--

1. Exclude any student from participation in any program

Educators,[15] among other national, local, and state K-12 associations and departments have made explicit in their teacher code of ethics variations that it is the responsibility of the educator to *understand* the values and beliefs of their students and not to inject prejudice and bias into instruction or the teaching of fact.[16] This reflects what is generally agreed upon societally: that the inculcation of religious, political, and ideological values should be either left up to the parents or a parochial school or both - the private sphere of the domain of education, corresponding to the private sphere of conscience. However, the Court has only applied the Religion Clauses to religion, even though, upon examination, the arguments the Court uses to justify the Establishment Clause prohibition on public schools instructing or advancing religion are extricable from religion, and can apply in equal philosophical force to politics, and ideology. This is the asymmetry that I am working to reveal.

The Evolution of the Supreme Court's Interpretation of the Establishment Clause: A Review of the Cases

Before an analysis of the relevant Court language and arguments can be conducted to draw an equivalence between the Court's reasoning concerning the constitutional prohibition on the advancement of religion in public educational settings and politics and ideology, a review of the relevant cases must be performed. In this section, I provide a review of the most relevant Court cases to this thesis - the ones that govern the very problem of asymmetry that I analyze. The majority of the relevant cases that build the asymmetry fall within the jurisdiction of the Establishment Clause, as they concern the constitutional limitations on the State's religious

2. Deny benefits to any student
3. Grant any advantage to any student

[15] According to the Association of American Educators' Code of Ethics for Educators, https://www.aaeteachers.org/index.php/about-us/aae-code-of-ethics "The professional educator endeavors to present facts without distortion, bias, or personal prejudice," and "The professional educator does not use institutional or professional privileges for personal or partisan advantage."

[16] It is important to note that I am not not reducing the public educational setting to the instruction of mere fact, nor claiming that it should be reduced to such instruction.

activity and involvement within the public educational setting. This includes relevant cases that seem to explicitly create the asymmetry, fortifying, at least for the time being, a wall between politics and religion within the boundaries of the clause that animates the constitutional prohibition of religious proselytization in public schools. I first review *West Virginia Board of Education v. Barnette*, because it is the only Free Speech Clause case that is specifically relevant to understanding the asymmetry argument. Next, I review the relevant Establishment Clause cases.

Minersville School District v. Gobitis (1940) and *West Virginia Board of Education v. Barnette (1943)*

In *Minersville School District v. Gobitis,*[17] decided in 1940 just three years prior to *West Virginia Board of Education v. Barnette*, the Supreme Court upheld a Pennsylvania law that compelled public school students to salute the United States flag during the school's daily recitation of the Pledge of Allegiance. In *Minersville*, the Court claimed that the State's interest in "national cohesion," being the "basis for national security" was categorically superior to all other legal values in the legal "hierarchy." Thus, the First and Fourteenth Amendments did not protect the individual against the compulsion of speech and personal performance when the bases of national security were at all implicated, no matter to what degree. Justice Stone's lone dissent, however, paved the way for the reversal of *Minersville* in *Barnette*, in which he wrote that "the very essence of liberty is the freedom of the individual from compulsion as to what he shall think and what he shall say."[18]

In a rare and amazingly quick reversal, the 1943 Court overturned *Minersville* with a conception of the scope of the First Amendment that has led the Court through decades of First Amendment cases with proclamations and language that resonate with the nation's understanding of the First Amendment. As in *Minersville*, the Court was faced with another instance of a state compelling public school students to salute the flag. The children in a family

[17] Minersville School District v. Gobitis, 310 U.S. 586, 595, 604 (Stone, Harlan dissenting) (1940).
[18] West Virginia State Board of Education v. Barnette*,* 319 U.S. 624 629 (Justice Jackson reviewing the facts of the penalties for not conforming to the compelled Pledge recitation policy), 641, 642, 637, 640 (1943).

of Jehova's Witnesses refused to comply with the West Virginia Board of Education policy. They were sent home as punishment and threatened with mandatory transfers to schools for criminally active children, while their parents faced charges for causing juvenile delinquency. To strike this policy down and overturn the notion that First Amendment concerns are categorically inferior to national security, and can legitimately be curtailed by simply raising the concern of "national cohesion," the Court articulated the anti-authoritarian importance of the "freedom to differ" and deemed it violative for public opinion to be "controlled" by "authority." It established that compelled expression concerning opinion for the purpose of national unity "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." Importantly, the Court took special note of the responsibility of free public education to "not be partisan or enemy of any class, creed, party, or faction" if it is to remain "faithful to the ideal of secular instruction and political neutrality." The Court also cited the responsibility of public education to educate "the young for citizenship," which calls for "scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source." This is one of many instances of the Court's examination and articulation of the purposes and responsibilities of public education and public educators. However, the Court explicitly discredited an otherwise possible contention: that "national unity, as an end which officials may foster by persuasion and example, is" "in question."

McCollum v. Board of Education (1948)

Five years after *Barnette*, the Court ruled on *McCollum v. Board of Education*, in which an Illinois county board of education authorized a "released time" program wherein public schools deliberately carved out time during school hours for religious instruction. The religious instructors were hired by private third parties, and provided non-mandatory classes once per week. Claiming that the religious instruction violated the Fourteenth Amendment's Equal Protection Clause and the Establishment Clause, McCollum, a parent of a student, sued the school board.[19]

[19] McCollum v. Board of Education, 333 U.S. 203 *see* 206, 207, 209, 210, 211, 217, 216, 231 (1948).

Justice Black's opinion reasoned that the "tax supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education" "assists in and is integrated with" the sectarian religious instruction taking place. Justice Black claimed that because students are "compelled by law to go to school for secular education," non-mandatory religious instruction releases them "in part from their legal duty upon the condition that they attend the religious classes." According to the Court, this undoubtedly utilized "the tax-established and tax-supported public school system to aid religious groups to spread their faith, thereby" violating the Establishment Clause's "wall of separation between Church and State," found in *Everson v. Board of Education,* which was decided only one term prior.[20]

Reinforcing the "wall of separation" finding, the *McCollum* decision further articulated the purposes and responsibilities of public education as it concerns the Establishment Clause, expanding and expounding upon the Constitution's implications in this realm of public life in a manner highly consistent with the language concerning public education expressed in *Barnette*. In the context of the Establishment Clause, the Court discussed the responsibility of secular public education to "serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people." Effectively, this meant that "the public school must keep scrupulously free from entanglement in the strife of sects," which requires "strict confinement of the State to instruction other than religious" in order to preserve "the community from divisive conflicts." In *McCollum,* the Court advanced the notion that schools are uniquely situated in our democracy as public facilities tasked with fostering democratic citizenship, which requires that they do not participate in activities, especially and particularly tax-utilized, that jeopardize the very cohesion between disagreeing people that schools are responsible for fostering. "In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart."

Wieman v. Updegraff (1952)

[20] Everson v. Board of Education, 330 U.S. 1 (1947).

Four years following the *McCollum* decision, the Court expounded on its conception of public education and the responsibility of public educators, this time under a Fourteenth Amendment Due Process Clause claim in *Wieman v. Updegraff*.[21] An Oklahoma law required that, as a condition of employment, state workers must swear by oath that they were not nor had been for the last five years members of any organization deemed 'subversive' by the United States Attorney General. Individuals could be excluded from employment regardless of whether the members knew about the activities or purposes of the organization to which they belonged. Employees of a public college failed to take the oath within the required timeframe, and were subject to a loss of compensation, upon which they filed a lawsuit against the state officials tasked with delivering payment. The Court unanimously struck the Oklahoma law down, reversing the State Supreme Court's decision. Justice Clark's majority opinion ruled that the Act violated the Due Process Clause of the Fourteenth Amendment when it excluded "persons solely on the basis of organizational membership, regardless of their knowledge concerning the organizations to which they had belonged" thereby "presuming disloyalty" of those who failed to complete the oath.

While the Court determined that the Act violated the Due Process Clause, Justices concurring in the ruling decided to use the case's relationship to public education as an opportunity to elaborate on the purposes of public schooling and the conditions necessary to fulfill its roles and responsibilities. Justice Frankfurter delivered a concurring opinion emphasizing that "democracy ultimately rests on" "disciplined and responsible" "public opinion" which requires that public schools cultivate "habits of open-mindedness and" "critical inquiry" in "the formative years of [our] citizens ." Justice Frankfurter was so convinced that the perdurance of democracy depends on properly performing the responsibilities of public education that he regarded teachers "in our entire educational system, from the primary grades to the university" as the "priests of our democracy," bound to the responsibility to "fulfill their function" of fostering "habits of open-mindedness and critical inquiry which alone make for responsible citizens." "By

[21] Wieman v. Updegraff, 344 U.S. 183 190, 196 (Justice Frankfurter's concurring opinion expounding on the purposes of public education and the responsibilities of the educator), (1952).

the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry" themselves.

Indeed, in order for teachers to generate that most crucial atmosphere to the persistence of democracy and carry out their noble responsibilities, they themselves "must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma" and to "sift evanescent doctrine" so that they can cultivate in their pupils the same abilities, which make for responsible citizens. To Justice Frankfurter, it was the student and the responsibility and function of public education to cultivate the psychological and intellectual conditions for the persistence of democracy that based the public educator's right to associate freely without consequential government disapproval.

School District of Abington Township, Pennsylvania v. Schempp (1963)

With *McCollum* affirming *Everson's* ruling that taxes are not to be used to aid or denigrate religion,[22] and *Wieman* elaborating on the purposes and responsibilities of public education, the Court took up another Establishment Clause case concerning religion in schools, namely, *School District of Abington Township, Pennsylvania v. Schempp*.[23] A Pennsylvania law required that public schools read from the bible at the start of every school day, and the school district of Abington attempted to enforce the statute. Even after the statute was amended to allow students to excuse themselves from bible readings, a district court ruled that the law violated the Establishment Clause. When the Supreme Court took the Pennsylvania case, it included a similar case that challenged a Maryland city rule that provided for bible readings during school hours.

The Court reaffirmed and honed-in on the particulars and import of the separation of Church and State, especially as it concerns public education. The majority opinion, authored by Justice Clark, concluded that because the laws in question required religious exercises, they violated the Establishment Clause. The concurring Justices again delivered opinions that

---

[22] Everson v. Board of Education, 330 U.S. 1 (1947) (Holding that "Although the Establishment Clause does require governments to avoid excessive entanglement with religion, it is permissible for a state to reimburse the costs of transportation for students in parochial schools.")

[23] School Dist. of Abington Tp. v. Schempp, 374 U.S. 203, 230 (Justice Douglas, concurring), (1963)

expanded upon the majority opinion to further elaborate on the responsibilities of institutions of public education with respect to the Establishment Clause. Advancing the lineage of *Everson,* Justice Douglas exclaimed that "What may not be done directly may not be done indirectly" without the "Establishment Clause becoming a mockery." Therefore, public funds may not be contributed for the purposes of religious instruction "even in a minor degree without violating the Establishment Clause."

Justice Brennan, echoing Justice Frankfurter's concurring opinion in *Wieman,*[24] wrote that "Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government. It is therefore understandable that the constitutional prohibitions encounter their severest test when they are sought to be applied in the school classroom." Additionally, Justice Brennan concluded that the Free Exercise Clause mandates that the freedom of conscience is a right not to be interfered with even by "the gentlest touch of government hand," and as such, articles of faith and worship are to be "left to the conscience of the citizen." Further echoing Justice Frankfurter in *Wieman,* Justice Brennan remarked that because "public schools serve a uniquely public function," they must be free of "parochial, divisive, or separatist influences of any sort" so that "an atmosphere in which children may assimilate a heritage common to all American groups and religions" can be facilitated. With respect to children, choices of faith and worship, per the Constitution, are left "to the individual parent." Indeed, Justice Brennan remarked that the "system of free public education forfeits its unique contribution to the growth of democratic citizenship when" choices of faith and worship "cease[s] to be freely available to each parent." To ensure that public schools could still instruct students about religion without violating the Establishment Clause, Justice Goldberg distinguished between the "teaching *of* religion and teaching *about* religion,"[25] and cited "religious and political harmony" as one of the primary functions of the separation of Church and State.

Lemon v. Kurtzman (1971)

[24] *Abington*, 374 U.S. at 230-31, 241-42 (Justice Brennan, concurring)
[25] *Abington*, 374 U.S. at 305-06 (Justice Goldberg and Justice Harlan concurring)

While *Abington* established that indirect entanglements of State and religion are as equally violative of the Establishment Clause as direct entanglements, the Court did not specify or define the parameters of violative indirect Church-State activity. The question of whether teachers, acting on their own accord without the imprimatur of the State, can advance their own religion in the classroom was yet to be explicitly answered. While Justice Brennan's concurrence in *Abington* probably would have answered this question in the negative, his opinion was not binding. *Lemon v. Kurtzman* made it official.[26] In order to pass the Lemon test, a law must have legitimate secular purpose, not have the primary effect of either advancing or inhibiting religion, and not result in an excessive entanglement of government and religion.

Pennsylvania and Rhode Island both had statutes that provided their respective states to pay for non-secular, non-public education, in which private elementary school teachers' salaries and instructional material including textbooks came from Pennsylvanian taxpayer dollars, while Rhode Island supplemented 15% of private school teachers' salaries. The Court ruled that the laws clearly violated the Establishment Clause on the basis that it failed the 'excessive entanglement' prong of the Court's newly devised Lemon test.

Chief Justice Burger, writing the majority opinion, cited the potential for any entanglement of State with religion to foment political divisions along religious lines. However, he acknowledged that "ordinarily, political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."[27] Further, although the case in question emanated from state laws, Justice Burger made explicit what was merely implicit in preceding cases; that "the State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion." Thus, the Court established that because public educators are the recipients of taxpayer dollars and are functionaries of the State, they violate the Establishment Clause when they inculcate or proselytize religion even without the imprimatur of a statute. By virtue of being a State functionary, public teachers indirectly entangle the State with religion when they act in

[26] Lemon v. Kurtzman, 403 U.S. 602 (1971)

[27] *Lemon*, 403 U.S. 622-23, 619.

ways that the State itself is likewise prohibited. Per Justice Douglas in *Abington*, indirect involvements with religion are just as violative as direct involvements.[28]

Lynch v. Donnelly (1984)

With the Court developing its conception of the Establishment Clause public education in *Lemon*, *Lynch v. Donnelly* provided an opening for the Court to further articulate the responsibilities of the State when dealing with religious content.[29] The Court ruled that Rhode Island's nativity scene display, erected in the city of Pawtucket's shopping district, did not violate the Establishment Clause. In a 5-4 decision, Chief Justice Burger concluded that the display had "legitimate secular purposes," and within the context of the holiday season, did not purposefully or effectively advocate a particular religious message, nor pose a threat of establishing a religion, thereby passing the three prongs of the Lemon test. Justice O'Connor, as part of her concurring opinion and in proposing a new Establishment Clause test to resolve the Lemon test's lack of clarity, elaborated on the crucial considerations of the State when it finds itself involved in matters wherein religion is implicated.[30] She argued that

> "The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." "The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."[31]

Justice O'Connor expanded her synthesis of the political concerns of the Establishment Clause, explaining that political divisiveness "may be evidence that institutional entanglement is excessive or that a government practice is perceived as an endorsement of religion. But the constitutional inquiry should focus ultimately on the character of the government activity that might cause such divisiveness, not on the divisiveness itself," thereby reorienting the 'effect' prong of the Lemon Test to apply to any government activities that "intentionally or

---

[28] *Abington*, 374 U.S. 230.
[29] Lynch v. Donnelly, 465 U.S. 668, 681, 680, (1984)

[30] Patrick Weil, *Freedom of Conscience, But Which One? In Search of Coherence In The U.S. Supreme Court's Religion Jurisprudence*, 323.
[31] *Id*. at 687–92,

unintentionally" "make religion relevant, in reality or public perception, to status in the political community."[32] Justice O'Connor, echoing the importance of keeping the community free from divisive conflicts as articulated in *McCollum,* advanced the idea noted in *Abington* and *Lemon* that one of the purposes and primary interests of the Establishment Clause is to prevent political divisions along religious lines. It was not long after *Lynch* that Justice O'Connor's endorsement test was put to use in another Supreme Court case.

Wallace v. Jaffree 1985

Just one year after Justice O'Connor proposed the endorsement test in *Lynch*, the Court took up *Wallace v. Jaffree,* a case in which an Alabama statute permitted public school teachers to run religious prayer services during school hours.[33] To strike down the law in question, Justice Stevens focused on the right and freedom of the individual "to choose his own creed" which he claimed "is the counterpart of his right to refrain from accepting the creed established by the majority." "The individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all,"[34] and religious prayer during school hours clearly endorses the religion that the prayer is centered around, thereby coercing impressionable minds to adopt religious beliefs. Justice Stevens cited Justice O'Connor's concurrence in *Lynch* to argue that the law in question made adherence to religion relevant to the complainant's standing in the political community.[35] Meanwhile, Justice O'Connor reaffirmed the Court's longstanding intolerance towards "government-sponsored religious exercises" that "are directed at impressionable children who are required to attend school" since this type of "endorsement is much more likely to result in coerced religious beliefs."[36] Justice Stevens' and Justice O'Connor's opinions brought freedom of conscience to the center stage of Establishment Clause concerns with respect to public education.

---

[32] *Id.* at 689-92
[33] Wallace v. Jaffree, 472 U.S. 38 (1985).
[34] *Id.* at 52.
[35] *Id.* at 69.
[36] *Id.* at 81.

Grand Rapids School District v. Ball 1985

In the same year as *Wallace*, the Court took up *Grand Rapids School District v. Ball*, a case in which residents of Grand Rapids, Michigan sued the school district and state officials for implementing two programs that provided private school students secular instruction using public funds, one called "Shared Time" and the other "Community Learning."[37] Shared Time program teachers were full-time public school educators, while Community Learning instructors were part-time public school employees, and many also had part-time positions at private schools. Classes offered by both programs were leased by private schools. The plaintiff's alleged that the programs violated the Establishment Clause by using taxpayer dollars to pay for private instruction.

In a 5-4 decision, the Court ruled that the programs failed to pass the Lemon test, concluding that they had the effect of advancing religion and entangling the State with religion. Justice Brennan's majority opinion reasoned that the programs alone symbolically linked State and religion,[38] which is "likely to influence children of tender years,"[39] echoing Justice Stevens and Justice O'Connor's central point in *Wallace.* This furthered the notion that the Court has the utmost responsibility to continue to apply its recognition of one of the purposes of the Establishment Clause in protecting impressionable minds. It also upheld the majority opinion writer's own remark in *Abington* that "constitutional prohibitions encounter their severest test when they are sought to be applied in the school classroom."[40] To Justice Brennan, the impressionable nature of school children was reason enough to conclude that the programs generate the effect of making religion relevant in public perception, thereby failing Justice O'Connor's endorsement test. Justice Brennan recapitulated that religious indoctrination "would have devastating effects on the right of each individual voluntarily to determine what to believe (and what not to believe) free of any coercive pressures from the State,"[41] which unequivocally

[37] Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1985)

[38] *Id.* at 385.
[39] *Id*. at 390.
[40] *Abington*, 374 U.S. 203, *see* 231.
[41] *Grand Rapids*, 473 U.S. 373, *see* 385.

violates the Establishment Clause's protection of freedom of conscience and prohibition on coercion of religion.

Edwards v. Aguillard (1987)

Two years after the Court struck down laws that permitted public funds to support religious instruction in *Ball*, the Court struck down a Louisiana law that required public schools to teach the Biblical theory of creation science if the school decided to instruct the theory of evolution. In *Edwards v. Aguillard*, the law in question, called the "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act," did not force schools to teach either theory, but did require that if one was taught, the other must be as well.[42] Justice Brennan again delivered the majority opinion, and wrote that "the State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure."[43] In this one sentence, Justice Brennan condensed two of the Court's longstanding considerations when assessing the introduction of religion into public schools, further articulated the reasoning of Justice Burger's declaration in *Lemon* "that subsidized teachers do not inculcate religion,"[44] and introduced a concern for the effects of peer pressure. According to Brennan and echoing past rulings, it is not merely the fact that subsidized teachers are State functionaries which bars them from inculcating religion. It is additionally because of their position's relationship to impressionable minds that enables teachers to easily become forces of coercion, which is especially egregious in an environment that is mandatory for students to attend. Further reiterating the Court's concern for protecting the right of the student and parents to arrive at their own religious beliefs without the influence or interference of the State, Justice Brennan wrote,

> "the Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but

[42] Edwards v. Aguillard, 482 U.S. 578 (1987).

[43] *Id.* at 584 (citing *Bethel School Dist. No. 403 v. Fraser, supra,* at 478 U. S. 683; *Wallace v. Jaffree, supra,* at 472 U. S. 81 (O'CONNOR, J., concurring in judgment).

[44] *Lemon*, 403 U.S. 602, *see* 619 (1971).

> condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family."[45]

Justice Brennan's opinion captured what the Court had been finding throughout the 20th Century in cases that concern the Establishment Clause in public schools.

Lee v. Weisman (1992)

In *Aguillard*, Justice Brennan introduced another argument to the mix of why it is especially violative of the Establishment Clause to advance religion in public schools: peer pressure. With vehement disagreement, this argument was officially added to the list in *Lee v. Weisman*, wherein the father of a student at a Rhode Island middle school filed for a permanent injunction barring Providence school officials from inviting clergy to deliver religiously infused speeches at graduation ceremonies.[46] This action was inspired by his daughter's school inviting a rabbi to speak at her graduation. The principal of the school appealed to the Supreme Court after the Appeals Court affirmed a District Court's ruling against the school.

In a 5-4 decision, Justice Kennedy's majority opinion advanced Justice Brennan's 'peer pressure' concerns voiced in *Aguillard*, writing that "the State may not place the student dissenter in the dilemma of participating or protesting" because "adolescents are often susceptible to peer pressure, especially in matters of social convention."[47] Therefore, the State would be using "social pressure to enforce orthodoxy"[48] when putting students in such a dilemma, which is as violative of the Establishment Clause as using direct means. The Court reinforced its notion that primary and secondary school students can reasonably perceive that the State is forcing her "to pray in a manner her conscience will not allow" thereby violating both her freedom of conscience, and advancing religion in public perception.[49] "What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it."[50] Peer pressure to conform to

---

[45] *Edwards*, 482 U.S. 578, *see* 583-84 (1987).
[46] Lee v. Weisman, 505 U.S. 577 (1992).
[47] *Id.* at 593.
[48] *Id.* at 594.
[49] *Id*. at 593.
[50] *Id*. at 593

participate in activities that one's conscience does not permit, alongside the reasonable perception that the State is forcing the student to participate, had the combined force of violating the Establishment Clause. According to the concurring Justices, "Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion."[51] The concurring Justices furthered Justice Kennedy's majority opinion, writing that "even subtle pressure diminishes the right of each individual to choose voluntarily what to believe,"[52] returning to the primary importance of freedom of conscience and declaring that these pressures constituted government coercion.

Analysis of the Arguments that Create the Asymmetry

The cases in the preceding section each contribute to the creation of the asymmetry within the Court's interpretation of the Establishment Clause's application. This section will analyze how the arguments and ideas formulated in those cases satisfy and affirm the notion that religion, politics, and ideology are coequal when it comes to their proper and improper place in the public educational setting. While this section will argue that the Court has implicitly affirmed the coequality of these areas with respect to their proper and improper place in public education, it will not make a *legal* case for the extension of the Establishment Clause or the First Amendment to politics and ideology. Rather, it will demonstrate that the language, ideas, and arguments that the Court uses to establish the unconstitutionality of advancing religion in the public educational setting also applies to politics and ideology. Taken together, the Court's relevant language, ideas, and arguments collect as ingredients to form an apparent and decisive conclusion that these areas are indeed coequal in this setting. These arguments include but are not limited to: freedom of conscience, the purposes and responsibilities of public education and educators, mandatory attendance, etc. To illuminate this conclusion, this section will expose the coequality of the areas by analyzing each core argument articulated by the Court that contributes to the asymmetry.

---

[51] *Id.* at 604, (Justice Blackmun, along with Justice Stevens and Justice O'Connor, concurring).
[52] *Id.* at 605.

The Purposes and Responsibilities of Public Education

As this section will demonstrate, the purposes of public education according to the Court, intersect with and partially consist of many other constitutive arguments. However, the significance of the Court's conception of public education's purposes and responsibilities must first be analyzed independently of the other arguments that affirm the coequality of the relevant areas in order to provide an understanding of the setting in question.

West Virginia Board of Education v. Barnette (1943) introduced a brief but highly important responsibility of public education. "Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction,"[53] implies that, embedded in the institution of public education is an eternal ideal of secular instruction and political neutrality. The first clause of this statement outlines the responsibility, while the second clause lists the non-religious categories to which public education must remain impartial. The Court declared this responsibility outside of the holding, and as such, it is not legally binding, which is an early indication that public education is incredibly important to the Court beyond what the Constitution can apply to legally. Without elaborating on this responsibility, the Court remarked on something profoundly important: politically relevant areas off limits to the partiality of public education includes *creed* - the ideological equivalent to religious belief. Creed is defined as 'a set of beliefs or aims which guide someone's actions.'[54] Per the context, the Court is referring to non-religious creed.

"That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual."[55] The Court here articulates that one of the most important functions and ends of public education is the cultivation of citizenship, one that necessitates constitutional protections on individual freedoms. If the Court recognizes that public education has a responsibility to remain impartial to politics due to its very structure, while also cultivating citizenship, it would appear that the Court is making an implicit connection between

---

[53] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).
[54] Oxford English Dictionary 2020.
[55] *Id.* at 637.

fostering citizenship and remaining impartial to politics. *McCollum* weaves them into inseparability.

In *McCollum*, the Court began explicitly articulating the purposes of public education. "Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects."[56] According to the *McCollum* Court, not only does public education develop "the young for citizenship,"[57] it is *designed* for the purpose of generating cohesion among innumerable differences between people for the end of preserving democracy. It is because of this purpose, and its power to fulfill it, that public education must not become entangled in sectarian issues, for cohesion among heterogeneous groups is undermined by partiality.

The premise upon which the *McCollum* Court concluded the need for public education to remain free from sectarian entanglement employs the same reasoning that the Court used in *Barnette*. Because public schools are agents for promoting and preserving democracy, they have a responsibility to remain impartial to that which causes division. The only difference is that *McCollum* could only apply to religion due to its Establishment Clause jurisdiction, and therefore uses language that ignores non-religious areas of divisiveness. However, that religion, politics, and ideology each share the characteristic of being potentially highly divisive areas needs no elaboration. Indeed, these areas undergird and constitute much of the heterogeneity that create the responsibilities and purposes of public education to promote cohesion in order for the perdurance of democracy to occur according to the *McCollum* Court.

In *Wieman* the Court began articulating the function, purpose, and responsibilities of public school teachers. "To regard teachers -- in our entire educational system, from the primary grades to the university -- as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion."[58] Again, the Court returns to the vitally essential role of public

---

[56] *McCollum*, 333 U.S. 203, *see* 216 (1948).
[57] *Barnette*, 319 U.S. 624, *see* 637 (1943).
[58] *Wieman*, 344 U.S. 183, *see* 196, (1952).

education in the preservation of democracy. According to the Court, it is not just the institutions themselves that play this role, but their functionaries - the *teachers* - who are responsible for cultivating responsible citizens that perpetuate democracy.

While democracy remains the essential point of concern and ultimate end for the Court's conception of the responsibilities of public education, a new mechanism for achieving its perdurance is clarified and introduced. "Habits of open-mindedness and critical inquiry" "alone make for responsible citizens," which must be "acquired in the formative years of our citizens." "Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry."[59] According to the Court, therefore, when a teacher behaves in a way that disrupts or prevents open-mindedness, they are responsible for the degradation of democracy and have violated what is perhaps their most crucial role as a functionary of the State in the capacity of their profession.

As Justice Clark remarked, "The functions of educational institutions in our national life and the conditions under which alone they can adequately perform them are at the basis of these limitations upon State and national power."[60] The Court implies that the student and his relationship to the continuation of democracy predicates the responsibilities and functions of public educators, thereby grounding the right of the teacher to perform activities that are essential to cultivating habits of open-mindedness in their students, one of which is the ability to freely associate. Because it is the cultivation of the citizen during formative years that requires limitations on State restrictions of teacher opinion, the Court implies that student needs, at least when they concern the perdurance of democracy, are primary to teacher needs. The teacher's rights are inextricable to their responsibility to facilitate democratic citizenship in their students. Thus, teacher rights presuppose responsibility, meaning that they do not have a right to undermine their obligations. This not only placed the needs of the educator in a secondary position to the student's, but implied that the teacher's in-class behavior must not conflict with the democratic responsibilities that ground their own right to freedom of thought.

It seems, therefore, that the noble function of public education that relies on placing limitations on State and national power would also rely on placing restrictions on teacher

---

[59] *Id.* at 196.
[60] *Id.* at 197.

behavior that contravenes the most vital purpose and function of the teaching profession. The fact that *Wieman's* legal context does not concern the Establishment Clause nor place limitations on teachers does not degrade the vitality of the Court's conception of the responsibilities of public educators when considering the coequality of religion, politics, and ideology. Rather, it enhances them.

Returning to the Establishment Clause, in *Abington,* the Court reaffirmed the purpose of public education articulated in *McCollum* and *Wieman*, expressing that "Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government. It is therefore understandable that the constitutional prohibitions encounter their severest test when they are sought to be applied in the school classroom."[61] According to the *Abington* Court, the primary purpose and function of public education requires an additional layer of scrutiny and possibly protection for students.

Furthermore, "it is implicit in the history and character of American public education that the public schools serve a uniquely public function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort -- an atmosphere in which children may assimilate a heritage common to all American groups and religions."[62] In this statement, the Court combined what *Barnette* and *McCollum* had previously articulated separately, namely, that the purpose of public education in preserving and promoting democracy requires public schools to not become involved or entangled in *any sort* of divisive influences. Although *Abington* only binds to religion, it is unequivocal that the Court's language recognizes that the purposes of public school exact a responsibility to refrain from partiality even in ways that the Court cannot regulate.

From *Barnette* to *Abington* the Court clearly conceived of the primary purpose and function of public education, from which it grounded the emanating responsibilities of public educators and schools. The Court regards public schools as almost holy institutions to our democracy, labeling educators as 'priests' and implying that teacher rights come secondary to student needs because of the vital role that educators play in preserving and promoting democracy. In invoking the importance and purpose of public schools in preserving and

---

[61] *Abington*, 374 U.S. 203, *see* 230, (1963).
[62] *Id.* at 242.

promoting democracy, the Court highlighted the significance of remaining impartial to all divisive matters, implying that institutions of public education contribute to the degradation of democracy when they do not refrain from impartiality, undermining their very purpose.

According to the Court, simply failing to cultivate democratic citizens is a dereliction of duty on behalf of schools and teachers. Failure, however, exists in the negative. The positive act of engaging in unnecessary divisive activities is of utmost egregiousness and deleteriousness. From the outset of the analysis, it already appears clear that the Court acknowledges the coequality of religion, politics, and ideology with respect to their proper and improper place in public education. For if it is the case that politics and ideology are as divisive as religion, or are considered divisive to the Court, then the Court sees them as equal in terms of how they should and should not be engaged by schools and educators.

The Impressionability of Students and Mandatory Attendance

That the "formative years of our citizens"[63] occurs in primary and secondary education according to the Court is not the only reason to be concerned with the rights, needs, and traits of students in public school. That students are impressionable is part and parcel of what makes these years formative. The Court seems to recognize that, because of the impressionability of students in their formative years, it is especially egregious for educators and the State to inculcate or indoctrinate religion. It is difficult to separate the Court's concern for the impressionability of students from the right of students to form their own beliefs. I argue that these are two distinct, yet embedded points of contention for why the State is forbidden from being involved in religion and religious indoctrination in the public educational setting.

Having established that public schools have an obligation to refrain from partiality to divisive issues for the purpose of executing their own purposes, the Court focuses on the impressionable nature of students. To the *Grand Rapids* Court, "the symbolism of a union between Church and state is most likely to influence children of tender years whose experience is limited and whose beliefs consequently are the function of environment as much as of free and

[63] *Wieman*, 344 U.S. 183, *see* 196, (1952).

voluntary choice."[64] If teachers take advantage of the susceptibility of students, they are disrupting the very ability to become free and responsible citizens due to the interference with the student's not yet fully developed sphere of conscience. A connection can be drawn between two separate concerns of the Court, namely, the impressionable nature of students, and the purpose of public education. If schools have the responsibility of cultivating habits of open-mindedness and free inquiry, inducing students to beliefs and values that are not yet their own has the potential to weaken the formation and cultivation of their free minds. It can be argued that respecting the impressionability of students and the purposes of public education, according to the Court, are two sides of the same coin. Further, the Court notes that a student's *beliefs* are partly a 'function of environment.' While the Court was limited to using the term 'belief' in relation to religion due to the case's Establishment Clause jurisdiction, it is unequivocal that beliefs that concern matters of conscience are not limited to religion. If students' religious beliefs are susceptible to being influenced by their environment, so too are their political and ideological beliefs. Thus, the Court implicitly recognizes that the obligation of teachers and public schools to refrain from creating a symbolic union with religion extends to politics and ideology as well.

The *Jaffree* Court concisely articulated its position on the matter, explaining that "this Court's decisions have recognized a distinction when government-sponsored religious exercises are directed at impressionable children who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs."[65] For the *Jaffree* Court, mandatory attendance combined with the susceptibility of students makes State coercion easier and more dangerous.

The *Aguillard* Court reinforced this position by saying that "the State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." [66] The very position of being a teacher, according to the Court, is one that exerts influence over the beliefs of the student. The emulation of teachers highlights the degree of impressionability

---

[64] *Grand Rapids*, 473 U.S. 373, *see* 390, (1985).
[65] *Wallace,* 472 U.S. 38, *see* 81, (1985).
[66] *Edwards,* 482 U.S. 578, *see* 584, (1987).

that students possess, as well as the authorial and powerful position of the educator in relation to the student trait of susceptibility. Thus, according to the Court's logic, when public schools or educators advance politics or ideology in a way that would otherwise constitute prohibited religious coercion, the State is still coercing students, taking advantage of mandatory attendance requirements and student susceptibility to teachers and peers. That the Establishment Clause only applies to religion does not vitiate the Court's logic that extends to areas and actions not legally covered by the Constitution.

The *Lee* Court reinforced the concerns voiced in *Jaffree* and *Aguillard* and focused on the aspect of student susceptibility to peer pressure. "Since adolescents are often susceptible to peer pressure, especially in matters of social convention, the State may no more use social pressure to enforce orthodoxy than it may use direct means."[67] Thus, even when teachers are not themselves advancing a particular belief, putting students in a school-created or sponsored situation in which they reasonably feel pressured by their peers to conform to a worldview or belief(s) satisfies indirect State coercion, offensive to the First Amendment and no less abhorrent to the Court than direct enforcement of orthodoxy.

Student susceptibility made its way into the collection of arguments that create the asymmetry by demonstrating the power relationship between teachers and pupils. However, this alone cannot stand as the reason to forbid educators from taking advantage of the impressionable nature of students. There must be something crucially important and valuable about the sphere that houses beliefs which justifies limitations on religious instruction.

The Sphere of Conscience, Mind and Intellect

As mentioned in the section on the coequality of religion, politics, and ideology at the beginning of the article, values and beliefs are housed in the sphere of conscience, (or intellect). The Court, however, has conceived of 'freedom of conscience' as only pertaining to and

[67] *Lee*, 505 U.S. 577, *see* 578, (1992).

covering religion.[68] This section will analyze how the Court's usage of terms like 'freedom of conscience' in the relevant cases extends to politics and ideology given the Court's own language. If it is accepted that religious, political, and ideological values and beliefs are all ultimately housed in the same sphere of mind, it will be apparent that the Court is forced to use language that affirms this reality. If it is not accepted that values and beliefs within these respective areas are housed in the same sphere of mind, an analysis of the Court's language will help to illuminate this truth.

One of the most famous lines in Supreme Court history comes from *Barnette*. While the context of the case concerned *compelled* student speech, the Court exclaimed, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein" and that such activity "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[69] This places "politics, nationalism, religion, or other matters of opinion which "no official, high or petty, can prescribe" into the same sphere; that "of intellect and spirit."[70] Furthermore, the use of the term 'other' between 'religion' and 'opinion' implies that the areas listed are not the only matters that fall into the same category that protects them from State control. In employing the disjunct 'or' immediately following 'prescribe,' the Court implies that there is a difference between prescribing matters of opinion, and compelling the expression of certain opinions. While the holding only applies to compelled speech regarding matters of opinion, the Court's language acknowledges the importance of protecting matters of opinion from official control, which also requires that public officials refrain from prescribing such matters due to what would constitute an invasion of such a sacred, personal sphere. The language used extends far beyond the limitations of the holding.

Abington advances what *Barnette* commented on, but with language limited in legal application to religion.

---

[68] Although, in *Barnette*, the Court groups religious beliefs into the 'sphere of intellect', which includes political views among other value-based areas.
[69] *Barnette*, 319 U.S. 624, *see* 642, (1943).
[70] *Id.* at 642.

> "The constitutional mandate expresses a deliberate and considered judgment that such matters are to be left to the conscience of the citizen, and declares as a basic postulate of the relation between the citizen and his government that "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand."[71]

Indeed, the quality of susceptibility and freedom of conscience combined to empower the Court to declare in *Grand Rapids* that religious "indoctrination, if permitted to occur, would have devastating effects on the right of each individual voluntarily to determine what to believe (and what not to believe) free of any coercive pressures from the State."[72] Indoctrination, according to this Court, takes the character of "invading the sphere of intellect and spirit" that *Barnette* condemned, and manifests as petty officials "prescribing what shall be orthodox."[73] This marks the Court's continuing and progressing legacy of protecting freedom of conscience in a manner that allows the individual, and importantly the public school student, to "voluntarily determine what to believe (and what not to believe)."[74] This ability is an essential aspect of freedom of conscience. I need not elaborate on the fact that beliefs are not limited to the area of religion.

Wallace v. Jaffree reinforced *Grand Rapids's* articulation of the Religion Clause's protection of freedom of conscience, especially as it applies to public education. "The individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. Moreover, the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all." [75] Again, creed, as defined by the dictionary, is not limited to religion, and has a definition almost synonymous with the definition of 'ideology' used in this article. This, of course, does not extend the holding to all non-religious creeds. However, this word choice should illustrate the untenability of distinguishing between values and beliefs covered by freedom of conscience, and those that are not legally covered. The only distinction is between what the Establishment Clause can cover and what is philosophically *coverable*. While the Court does subsequently qualify that the freedom to choose one's own creed pertains to religion,[76] it is apparently preposterous that

---

[71] *Abington*, 374 U.S. 203, *see* 231, (1963).
[72] *Grand Rapids,* 473 U.S. 373, *see* 385, (1985).
[73] *Barnette*, 319 U.S. 624, *see* 642, (1943).
[74] *Grand Rapids,* 473 U.S. 373, *see* 385, (1985).
[75] *Wallace*, 472 U.S. 38 (1985).
[76] *Id.*

'creed' has a strictly religious nature. Indeed, *Barnette* used the term 'creed' when grouping together the various areas that it demanded public education remain impartial to.

Further, in *Lee*, the Court reaffirmed its "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."[77] Indeed, "There is no doubt that attempts to aid religion through government coercion jeopardize freedom of conscience. Even subtle pressure diminishes the right of each individual to choose voluntarily what to believe."[78] As established in the preceding section on impressionability, if children are susceptible to being influenced by their environment in all matters of opinion and not just religious belief, then according to the *Lee* Court's specific language, subtle pressures diminish not only what is currently protected by freedom of conscience, but the 'right of each individual to choose voluntarily what to believe' about any matter of opinion. This further vitiates any potential relevant categorical distinction between religion, politics, and ideology in terms of their theoretical coverability by the same doctrine or protective category, such as freedom of conscience. Returning to the purposes of public education as it relates to freedom of conscience, according to the Court's logic, educators have a responsibility to remain vigilant about refraining from even subtly pressuring students to adopt beliefs that are not their own. They must instill habits of critical inquiry and open-mindedness without treading into the territory of 'subtle pressure.'[79]

While public educators are *obligated* to not take advantage of their pupil's susceptibility to the teacher's authority in such a way that alters the development and contents of their conscience, parents therefore reserve a *right* to do exactly that. Indeed, the right of the parent to indoctrinate religion into their children is the other side of the coin of the prohibition on public educators performing the same act.

The Right of Parents to Indoctrinate Children

[77] *Lee*, 505 U.S. 577, *see* 592, (1992).
[78] *Id.* at 605.
[79] I am not arguing that public educators should necessarily refrain entirely from sharing their own opinions in the classroom, or from encouraging students to consider values, beliefs, ideas, etc. that are different from their own.

It is generally agreed upon in society that the inculcation of religious, political, and ideological values should be either left up to the parents or a parochial school or both. The private sphere of the domain of education, corresponding to the private sphere of conscience. While the parental right to indoctrinate children with religion may appear contradictory to the Court's concern for the susceptibility of children of primary and secondary school years, parents would not be able to send their children to private schools for the purpose of religious instruction, nor would parents be free to raise their children as they see fit without this seeming inconsistency. Regardless of this seeming contradiction, reserving a parental *right* to indoctrinate children blocks the *ability* of educators to indoctrinate.

In *McCollum,* the Court articulated this very point, expressing that the need for "strict confinement of the State to instruction other than religious," leaves "the individual's Church and home indoctrination in the faith of his choice."[80] The Court also acknowledges that public schools perform the job of the private school when they inculcate religion. Since private and public education is a choice "very much like the choice of whether or not to worship -- which our Constitution leaves to the individual parent;" "it is no proper function of the state or local government to influence or restrict that election."[81] To allow public schools to inculcate religion would strip parents of the right to raise their children as they see fit, and would collapse the wall between the private world of child rearing regarding (perceived) proper religious and ideological upbringing and the public world of educating for citizenship. Reserving a parental right to inculcate children with religious ideas helps to bridge the Establishment Clause and the Free Exercise Clause, with both complementing and securing the other's essentiality in a symbiotic relationship.

The Establishment Clause prohibits the State from using schools to inculcate religion, while the Free Exercise Clause prohibits the State from interfering in the religious affairs of citizens. The ability of the citizen to exercise religion freely depends on prohibiting the State from exercising what is reserved to private life, otherwise the State would be establishing religion and interfering with the religious affairs of its citizens. Further, it is a glaring truism to say that, if public schools had the ability to perform the specific purposes and functions that are

---

[80] *McCollum*, 333 U.S. 203, *see* 217, (1948).
[81] *Abington*, 374 U.S. 203, *see* 242, (1963).

reserved for private schools, there would be no need for a complete partition between the two, as there would be no distinct purpose to either. The right of parents to indoctrinate their children is another argument that the Court regards as necessary to fulfill its own conception of the purposes of public education. Indeed, "The lesson of history -- drawn more from the experiences of other countries than from our own -- is that a system of free public education forfeits its unique contribution to the growth of democratic citizenship when that choice ceases to be freely available to each parent."[82]

As the *Aguillard* Court notes, because of the partition between private and public education, parents need to feel like they can "entrust public schools with the education of their children, and condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family."[83] It is the responsibility of the State to fulfill this trust, thereby also satisfying the partition that demands the trust in the first place. If there is any reason why parents would reasonably condition their trust of public schools "on the understanding that the classroom will not purposely be used to advance religious" but not political or ideological "views that may conflict with the private beliefs of the student and his or her family," it does not now occur to me.

Therefore, in this vein, and according to the analysis of the Religion Clauses in the above paragraph, parents do not reserve a First Amendment right to inculcate their children with ideology or politics. Since the Free Exercise Clause only applies to religion, it does not necessitate the Establishment Clause to prohibit the State from indoctrinating students with non-religious beliefs. It is patently absurd that politically or ideologically active parents would not consider it a breach of trust and a violation of a felt parental right for their child's public school to inculcate ideological and political values and ideas contrary to the ones the parents work to instill at home. People intuit that the symbiotic relationship of the Religion Clauses described above clearly applies philosophically to areas where it cannot legally be applied.

---

[82] *Id.*
[83] *Aguillard,* 482 U.S. 578, *see* 584 (1987).

The Free Exercise right of the parent to indoctrinate their children is the flip side of the Establishment Clause prohibition on the State advancing or denigrating religion. Interestingly, this symbiosis is further necessitated by yet another Establishment Clause interest, namely, the prevention of divisiveness and discord. This is also closely related to the purposes of public education, however, but can be understood as a distinct, albeit entwined concern.

Divisive Conflict

It appears that the Court's interpretation of the Establishment Clause has a fundamental concern about the divisive nature of religion. The Court has repeatedly commented on the importance of the State to refrain from becoming entangled with religion due to its power to transform the religious into the political, as well as foment resentment towards the State for making religion at all relevant to the individual's standing in the political community.

The *McCollum* Court articulated the potential for State involvement with religion to cause unnecessary conflicts in the very community which the government has a responsibility to preserve. The Court connected this constitutional interest to the private right of the parents to partake in the religious instruction that public schools are prohibited from. "The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups" "however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's Church and home indoctrination in the faith of his choice."[84] Once again, the Religion Clauses are wedded in symbiosis. Due to the nature of symbiotic relationships, its sustenance comes from both Clauses, and in this case it begins with the Establishment Clause.

The *McCollum* Court grounds the Free Exercise right to private religious instruction and upbringing in the necessity for preserving the community by prohibiting the State from becoming involved in religion - the cause of divisive conflicts. Notice how the justification for prohibiting the State from entanglements with religion is the potential for an undesirable *effect* - divisive conflict and the preservation of the community. Using this reasoning, substituting

[84] *McCollum*, 333 U.S. 203, *see* 217, (1948).

ideology or politics for religion in the context of public education with respect to instruction is no different in terms of its potential to foment conflict within the community. Indeed, "In no activity of the State is it more vital to keep out divisive forces than in its schools."[85] Furthermore, this substitution is entirely consistent with all of the other arguments.

Lynch advanced the notion that the Establishment Clause is partially designed to preserve the community from divisive conflict, and centered its language around the *political* community. "The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." "Endorsement sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[86] State neutrality towards membership in the political community is thus the ground upon which the Establishment Clause prohibits the State from endorsing religion.

Substituting politics or ideology for religion, at least in the public-school setting, succeeds in capturing the fact that standing in the political community is not limited to religion. If it is truly a concern for an individual's membership in the political community that controls the Court's reasoning in *Lynch*, it cannot be denied that if the Establishment Clause could extend beyond religion, the Court would have used the same reasoning to restrict public schools from advancing or denigrating politics and ideology. As such, the Court stated that "the constitutional inquiry should focus ultimately on the character of the government activity that might cause such divisiveness, not on the divisiveness itself."[87] That the foregoing quote was subsequently qualified with respect to its religious application affirms the notion articulated in this section that the potential for the State to foment division and conflict is not limited to religion. Indeed, qualifying anything implies that what is being qualified is extricable from the thing that qualifies. As such, read without religion as the qualifier of divisiveness, this quote illuminates the breadth of potentially divisive State activity beyond the area of religion. *Grand Rapids* and *Wallace* both affirm the reasoning used in *Lynch* concerning the endorsement test.[88]

---

[85] *Id.* at 231.
[86] *Lynch*, 465 U.S. 668, *see* 687-88, (1984).
[87] *Id.* at 689.
[88] *Grand Rapids*, 473 U.S. 373, *see* 389, (1985). And *Wallace*, 472 U.S. 38, *see* 61, (1985).

Public Funds

The fact that public schools are, by definition, funded by the State is what enables their application to the Establishment Clause. Thus far, I have attempted to demonstrate that each of the arguments the Court has made to prohibit public schools from instructing or advancing (or denigrating) religion apply in equal philosophical force to politics and ideology.

To the *Abington* Court, State "contributions to" religious proselytization "may not be made" "even in a minor degree without violating the Establishment Clause. It is not the amount of public funds expended; as this case illustrates, it is the use to which public funds are put that is controlling." Just as *any* coercion used to induce public school students to religious beliefs is a violation of the Establishment Clause, any taxpayer dollars put towards such activities is violative as well. The two are inextricable, since government money is necessarily being used, albeit indirectly, when a teacher proselytizes students without the imprimatur of the State. Assuming that religion, politics, and ideology are coequal with respect to their place in public education, any public funds put towards political or ideological proselytization or advancement is an egregious misuse and abuse of taxpayer dollars, only constitutional due to the asymmetry. This circles back to the need to continue to satisfy the trust in public schools that families' condition on the understanding that their children will not be proselytized. The reason why parents entrust the public school to refrain from religious instruction and promotion is because it is publicly funded. As stated above, there is no known reason why parents would entrust schools to remain neutral with respect to religion, but not politics or ideology.

A properly executed analysis should have compellingly demonstrated:

1. The existence of the asymmetry.
2. The coequal nature of religion, politics, and ideology in the public educational setting.
3. The arguments that the Court used to prohibit religious activities and instruction in

public education are not intrinsically tethered to religion, and appear to have inherent independent value.

However, the relevant cases in no way suggest that the Establishment Clause can be interpreted in such a way as to seal the asymmetry, which would thereby extend the constitutional prohibitions on public schools to politics and ideology. In fact, due to their strict application to religion, the relevant cases suggest the opposite. Yet, these cases did not produce holdings that explicitly deny any possibility of extending the Establishment Clause to the other areas. Such cases would undeniably shut any opening in the Establishment Clause to seal the asymmetry. While the Supreme Court has yet to rule on such a case, two circuit courts have indeed nullified this possibility. This section will provide an overview of these cases, and an analysis of how they fit into the present schema.

Sherman v. Community Consol. Dist. 21 (1992)

In 1992, the appeals court for the 7th Circuit ruled on *Sherman v. Community Consol. Dist. 21*, a case in which a student and his father challenged the ability of states to require schools to recite the Pledge of Allegiance, claiming that the utterance of the words "under God" in public educational settings violated both Religion Clauses.[89] The recitation of the Pledge was not compelled, nor were students punished for leaving the room if they wished to not participate, but was merely included in the schools' curriculum. The plaintiffs alleged that the very recitation of the Pledge during school hours created an environment that pressured and even coerced students to recite, thereby offending *Lee*. The court concluded that the case ultimately had no bearing on the Religion Clauses, due to the controlling feature being political and not religious in nature.

To reach this determination, the court first concluded that the Pledge is a patriotic, and not a religious exercise. It then turned to an essential point: that "Separation of church from state does not imply separation of state from state."[90] The intrinsic value of the arguments presented above that create the asymmetry therefore have no bearing on the Establishment Clause's

---

[89] *Sherman v. Community Consol Dist. 21*. 980 F.2d 437 (7th Cir. 1992)
[90] *Id.* at 444.

jurisdiction, according to this court. Just because the Establishment Clause has been interpreted in such a way as to create the asymmetry, does not mean that it can be interpreted to resolve it. In fact, because of the nature of the Religion Clauses, according to this court, the Establishment Clause cannot be interpreted to resolve the asymmetry. Whether State-sponsored coercion did actually occur in this case as alleged, is irrelevant to the applicability of the Establishment Clause. As such, "Schools are entitled to hold their causes and values out as worthy subjects of approval and adoption, to persuade even though they cannot compel, and even though those who resist persuasion may feel at odds with those who embrace the values they are taught." This is because "Patriotism is an effort by the state to promote its own survival, and along the way to teach those virtues that justify its survival. Public schools help to transmit those virtues and values."[91]

According to the court, it seems as though public schools have a responsibility to promote patriotism for the perdurance of democracy, thereby satisfying, at least in theory, the purpose of public education according to the Supreme Court. However, whether advancing doctrines and administering specific ideologically significant patriotic practices is necessary to satisfy this purpose is a worthy question for investigation, and is something that the Supreme Court has pointed to in some of the cases reviewed above. This is not a question that interests the legal applicability of the Constitution. The court did not mandate the non-compelled recitation of the Pledge or other patriotic exercises in public schools in this case, but rather upheld the state law.

Meyers v. Loudoun County (2005)

In *Meyers*, the appeals court for the 4th Circuit affirmed *Sherman*, wherein the plaintiff had the same complaint and allegation of its predecessor.[92] Loudon County had a policy that required each school within its district to recite the Pledge of Allegiance every day in each classroom. Just like in *Sherman*, recitation was not compulsory. Following in the footsteps of the 7th Circuit court in 1992, the 4th Circuit ruled that because the policy in question had no

---

[91] *Id.*
[92] *Myers v. Loudoun County Public Schools*, 418 F.3d 395, (4th Cir. 2005)

connection to religion, it could not violate the Establishment Clause. Indeed, "The indirect coercion analysis discussed in Lee, Schempp, and Engel, simply is not relevant in cases, like this one, challenging non-religious activities," because "it was the religious nature of" the activities that animated *Lee, Schempp, and Engel* "that gave rise to the concern that non-participating students would be indirectly coerced into accepting a religious message."[93] Just like *Sherman*, even if "the recitation of the Pledge contains a risk of indirect coercion, the indirect coercion is not threatening to establish religion, but patriotism." "Thus, the fact that indirect coercion may result from voluntary recitation of the Pledge in school classrooms is of no moment under the Establishment Clause."[94] Coercing young minds itself is not an animating factor. Rather, the coercion of young minds with respect to religion animates the Court's concern and triggers the application of the Establishment Clause.

While the Supreme Court has not ruled on such a case that animates the question of whether the asymmetry can be resolved using the Establishment Clause, these circuit court decisions are entirely consistent with each other, and appear consistent with every relevant Supreme Court Establishment Clause case concerning the asymmetry. These circuit court cases clarify the inability for non-religious qualities to animate the Establishment Clause, even when the arguments the Court used to prohibit religious activities in public schools are satisfied with respect to other areas. The quality of religion is controlling, not the arguments themselves.

However, while these circuit court cases establish that the Establishment Clause strictly applies to religion in relation to the educational setting, they do not, nor does the Supreme Court in the cases that create the asymmetry, expressly prohibit the State from proscribing public educators from proselytizing politics and ideology. In theory, the arguments the Court used to justify the Establishment Clause's prohibition on religious instruction and activities in public schools are extricable from the quality of religion. As the analysis attempted to demonstrate, these arguments overlay to politics and ideology, even though the holdings bind no such extension. If this is true, to maintain consistency with the intrinsic value and importance of the arguments, the Court would need to allow the State to prohibit what the Constitution cannot. In other words, if the

[93] *Id.* at 404.
[94] *Id.* at 408.

arguments are themselves valuable to the Court, (and therefore have any worth in prohibiting educators from advancing religion) independent of the applicability of the Establishment Clause, the Court should affirm the right of the State to recognize:

1. That the arguments are intrinsically valuable and worthy of adhering to.

2. That therefore, because the Court is limited to applying the arguments to religion, the State has both a right and a *responsibility* to complete what the Court cannot.

Otherwise, the Court would affirm that, even on a theoretical level, the responsibility of teachers to 'foster habits of open-mindedness' is compatible with political and ideological inculcation, that cohesion among heterogeneous groups is exclusive to religion, that the political community is reducible to the areas of religion, that students are only susceptible to the inculcation of religious content and ideas, that religious creeds are the only creeds that exist, that it is perfectly fine ethically for the State to coerce and induce students to political and ideological beliefs at all as well as those that are contrary to the beliefs instilled by parents, and that it is perfectly fine ethically for public funds to be used to teach politics and ideology as distinct from teaching *about* them. Indeed, if the Court disallowed the State from applying the same standards and arguments the Court used to the coequal areas of politics and ideology, *Barnette's* "Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction"[95] would be nullified as a point of conviction. Therefore, in order for internal consistency to exist within this topic of law, the Court *must* allow for other bodies of government to implement what the Court cannot. If not, the Court denies that any asymmetry exists at all, and therefore, *Sherman* and *Meyers* would not have needed to comment on how the nature of the Establishment Clause creates an inability to respond to instances of coercion that have no connection to religion. This would simply be an absurd position for the Court to find itself in.

[95] *Barnette*, 319 U.S. 624, 637 (1943).

The Constitutional Opening for a Non-Judicial Closing of the Asymmetry

As explained in the preceding section, the Court needs to allow non-judicial government bodies to close the asymmetry in order for the Court to maintain consistency regarding the intrinsic value and importance of the arguments that contributed to the creation of the asymmetry. Implementing this consistency would require government officials to prohibit public educators from political and ideological activity and instruction while acting in their professional capacity. Because the Free Speech Clause prohibits the State from restricting expression, especially regarding political views, limitations on teacher expression concerning the broad area of politics triggers Free Speech Clause concerns. Thus, consistently implementing the Establishment Clause's prohibition on certain teacher expression could potentially conflict with the Free Speech Clause right to speak on matters that fall within the broad category of political expression. This section will examine the relevant cases concerning the ability of government officials to implement policies that resolve the asymmetry, analyze the language used in relation to the cases that create the asymmetry, and analyze their implications.

While *Pickering v. Board of Education (1968)* determined that public educators have a First Amendment right to make public comments that implicate the reputation of the school in which they are employed, its context was limited to expression exercised *outside* of the schoolhouse gates. Even so, "The teacher's interest as a citizen in making public comment" regarding "matters of public concern" must be balanced against the State's interest in promoting the efficiency of its employees' public services."[96] In ruling that the complainant did have a First Amendment right to make public comments about his public workplace that might have affected the "efficient operations and administration,"[97] the Supreme Court did not grant the complainant absolute free speech rights, and remarked on the importance of balancing First Amendment interests with the efficiency interests of the public employer.

---

[96] Pickering v. Board of Education, 391 U.S. 563 (1968).
[97] *Id.* at 564.

Connick v. Myers (1983) followed up on *Pickering*. However, unlike *Pickering*, *Connick* concerned expression that was exercised in the workplace setting. The Court even advanced the "matters of public concern" doctrine established in *Pickering*, clarifying that it covers "any matter of political, social or other concern to the community"[98] but ruled that because the case's context "concerned only internal office matters" and not matters that concerned the electorate, the complainant's expression was not protected.[99] Unlike *Pickering,* the complainant's First Amendment rights were not violated when she was terminated from her job for distributing a self-made survey to her co-workers inquiring about workplace morale, confidence in supervisors, and office policies in response to being transferred to another worksite. Instead, she spoke on "matters only of personal interest" as distinguished from matters of public concern.

The circuit courts had difficulty agreeing on how to integrate this determination when public educator expression was implicated. In 1993, the Court of Appeals for the First Circuit ruled on *Ward v. Hickey,* a case in which a teacher sued her school committee for not renewing her contract after a dispute occurred as a result of an in-class discussion she facilitated on the topic of abortion.[100] The court concluded that "A teacher's classroom speech is part of the curriculum." Because "a teacher's principal classroom role is to teach students the school curriculum," "schools may reasonably limit teachers' speech in that setting."[101] The school "may regulate a teacher's classroom speech if: (1) the regulation is reasonably related to a legitimate pedagogical concern; and (2) the school provided the teacher with notice of what conduct was prohibited."[102] However, three years later, the 4th Circuit Court of Appeals arrived at the opposite conclusion, resulting in a split.

In 1996, the 4th Circuit ruled on *Boring v. The Buncombe County Board of Education*. The court ruled that "The fact is, in most instances, the essence of a teacher's role in the classroom, and therefore as an employee, is to discuss with students issues of public concern." "Accordingly, most teacher comments fall within the Supreme Court's broad definition of

---

[98] Connick v. Myers, 461 U.S. 138, *see* 146, (1983).
[99] *Id.* at 143.
[100] Ward v. Hickey, 996 F.2d 448 (1993).
[101] *Id.* at 453.
[102] *Id.* at 452.

"public concern."[103] While *Ward* concluded that teacher in-class speech is inextricable from their professional duties, but is not always a proper function of their responsibilities, *Boring* found that such expression usually *is* a proper function. On these conclusions, derived from the "matters of public concern" doctrine clarified in *Connick,* political and ideological promotion would likely have been defended as a teacher's right. *Boring* recognized the public educator as acting as a citizen *because* of her professional role, and thereby granted her broad free speech protections. While this case was unconnected to indoctrination, pressure, or coercion, it is likely that, under this ruling, politically or ideologically inculcative content or expression would fall within the "broad" 'matters of public concern' standard, as they concern topics related to matters "of political, social or other concern to the community,"[104] and therefore be viewed as consistent with the *Boring* court's conception of the "essence of a teacher's role in the classroom."

Adding to the split, in 1996, a California appeals court ruled in *California Teachers Association v. Governing Board of San Diego Unified School District* that "public school authorities may reasonably conclude it is not possible to both permit instructors to engage in classroom political advocacy and at the same time successfully dissociate the school from such advocacy."[105] The "very attributes of a successful teacher/student relationship make it reasonable for school authorities to conclude the only practical means of dissociating a school from political controversy is to prohibit teachers from engaging in political advocacy during instructional activities." The court sided with the school authorities' desire to ensure that political conflict and controversy did not enter and contaminate the operations of the school, consistent with the Supreme Court's position in *Barnette, McCollum*, and *Lynch* that public schools should remain impartial to politics and creed in order to prevent divisions in the community. Further, the appeals court sympathized with the school district's desire to not "become involved in sponsoring or subsidizing political activities," reflecting the concerns about subsidizing partiality voiced in *Abington*. The court upheld a ban on wearing political buttons within instructional

---

[103] Boring v. Buncombe County Bd. of Education, 98 F.3d 1474, *see* 1480, (4th Cir. 1996).
[104] The *Boring* court cited Blum v. Schlegel, 18 F.3d 1005 (2d Cir.1994) in which a teacher's comments, including use of hypotheticals in class advocating drug legalization, constituted speech of "public concern."
[105] https://caselaw.findlaw.com/ca-court-of-appeal/1846922.html in the absence of a means of citing this case.

settings, and held that these limitations on teacher expression did not extend to non-instructional settings.

Boring and the entire 'matters of public concern doctrine' changed in 2006, when the Supreme Court ruled on *Garcetti v. Ceballos.* The question came down to whether an employee, speaking on matters purely related to his job and strictly pertaining to the duties of his employment was protected by the First Amendment even though he was not speaking as a citizen.[106] The Court determined that a public employee is no longer speaking as a citizen for "First Amendment purposes" when they speak on matters pertaining to their "official duties," and as such, "the Constitution does not insulate their communications from employer discipline." This is because "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." Therefore, "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."[107]

This opened up the ability for places of public employment to adopt policies that limit expression so long as it pertains to employees' official duties. Accordingly, this allowed the State to restrict public educator expression that is pursuant to their official duties, and unrelated to their essential responsibilities as a teacher - speech that causes inefficiency and is either a cause or product of irresponsibility. No longer could courts view matters of public concern as necessarily relating to the essential role of the teacher in the classroom, and could now permit for the essential roles of the teacher to supersede matters of public concern expressed within their official capacity.

Indeed, one year after *Garcetti* changed the nature of constitutional protections on public employee speech, the 7th Circuit Court of Appeals ruled on *Mayer v. Monroe,* a case in which a probationary elementary school teacher filed suit after her contract was not renewed for a second consecutive year, which she claimed was because she took a political position during a discussion that she facilitated in her current-events class.[108] Citing two 7th Circuit cases

---

[106] Garcetti v. Ceballos, 547 U.S. 410 (2006).
[107] *Id.*
[108] https://caselaw.findlaw.com/us-7th-circuit/1233551.html

concerning a teacher's ability to alter the prescribed curriculum, the court ruled that "The school system does not regulate [that] speech, as much as it *hires* it. Expression is a teacher's stock in trade, the commodity she sells to her employer in exchange for a salary." "Children who attend school because they must ought not be subject to teachers' idiosyncratic perspectives." While the court could have kept its language to what the legal question demanded, the judges decided to expand the ruling to make a declarative statement about teacher ethics given the power dynamic between educator and pupil. Indeed, this denunciation embraces the demands of the asymmetry, as it remains consistent with the 7th Circuit's previous ruling in *Sherman*, and acknowledges that what the courts cannot prohibit themselves with respect to this issue should be condemned if the arguments in the relevant Court cases are to retain any non-binding validity.

The court's reasoning for condemning such expression reflected the Supreme Court's mandatory attendance argument, used in *Jaffree* and *Augillard*. In fact, the 7th Circuit even used the legally loaded phrase "captive audience" to refer to the subjects of wrongful teacher expression when concluding that "It is enough to hold that the first amendment does not entitle primary and secondary teachers, when conducting the education of" students "to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system." Furthermore, the court invoked the term 'indoctrination' when referring to the potential for such teacher expression, using the same type of language that the Supreme Court used to prohibit religious instruction in *McCollum* and *Grand Rapids*.

Since *Mayer,* multiple higher court cases have arrived at the same conclusion, ruling that teacher perspectives or curriculum instruction that deviate from the authorized or prescribed content does not fall within their First Amendment rights. The reasoning used in these affirming cases extends beyond *Mayer's* concerns about 'indoctrination' and 'captive audiences.' Indeed, they consist of sympathizing with the school's fears of generating perceptions of entanglement with partisan politics,[109] and the impressionability of students,[110] consistent with Supreme Court

[109] Weingarten v. Board of Education, 591 F. Supp. 2d 511 (S.D.N.Y. 2008) upheld the ability of a public school to prohibit teachers from wearing political buttons.
[110] *Johnson v. Poway* (9th Cir. 2011) ruled that neither the Free Speech Clause nor the Free Exercise Clause were violated when a school fired a teacher for speaking about his religious views during math class.

arguments. These cases that invoked additional reasoning to affirm *Mayer* have not been the only ones keeping consistent with its holding.[111]

Currently, the decision in *Mayer* derived from *Garcetti* dominates the landscape of in-class teacher expression. According to *Mayer* and its affirming cases, in-class speech is pursuant to the official duties of public educators, and can thus be limited to the prescribed curriculum content, which stands at the heart of the teacher's essential role and responsibilities. While these cases do not prohibit teachers from speaking on matters that deviate from the prescribed content, they open up the ability of (in one case even encouraging) the State to implement policies that regulate the potential for indoctrination, and the expression of content that is equivalent to what the Court has prohibited within the area of religion. These rulings, including and especially *Mayer's* condemnation of subjecting students to 'idiosyncratic perspectives,' are entirely consistent with the demands of the asymmetry, and unsurprisingly use arguments that contributed to the asymmetry to open up the path to resolving it.

Conclusion

While the application of the Establishment Clause has created an asymmetry between constitutional prohibitions on religious, and political and ideological instruction and promotion in public schools, the court system has affirmed the ability of non-judicial State authorities to proscribe what the Constitution cannot with respect to politics and ideology. While *Sherman* and *Myers* close the possibility of sealing the asymmetry using the Establishment Clause, their holdings do not govern all potential judicial routes for prohibiting public educators from political or ideological instruction. Indeed, a growing body of research suggests that the 'captive audience' doctrine can be used to proscribe primary and secondary school educators from compelling students to listen to a particular non-curricular viewpoint.[112] However, it is unclear to what extent the asymmetry would be effectively resolved even if this approach becomes

[111] Shelley Evans-Marshall v. Board of Education of the Tipp et al, No. 09-3775 (6th Cir. 2010) and Brown v. Chicago Bd. of Educ., No. 15-1857 (7th Cir. 2016) both arrived at the same conclusion, consistent with the circuit court decisions listed above, ruling that teachers do not have a right to dictate their curriculum and instructional content.

[112] Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 997.

successful, as some teacher and school-sponsored expression that falls within the bounds of the asymmetry might not be prohibited by this doctrine, such as what the Court would otherwise consider 'subtle pressures.' This requires further research.

While the asymmetry demands to be resolved, the proper means of sealing it remains up for discussion. Is it more respectful to the demands of the asymmetry and proper to Federalism to attempt to seal it using First Amendment mechanisms and doctrines that could deliver a determinate blow to the type of expression in question? Or, is the better route to work within the legislative and school systems in an effort to adopt laws and policies that effectively resolve the problems that the asymmetry created? Due to lack of clarity regarding what precisely constitutes political and ideological expression that is coequal with religion with respect to the asymmetry, it is unclear what the exact policies and laws that could effectively resolve it would look like, and what the exact definitions of politics and ideology would need to be.[113] This poses an additional problem in answering the question raised above, as it would remain up for discussion the extent to which the Court would effectively resolve the asymmetry if the captive audience doctrine proved successful at all. While both routes can be taken concurrently, it is unclear how one would inform the other to its benefit.

Also up for discussion is the extent to which the asymmetry applies to non-educational issues and settings. Does the asymmetry demand that the State not advance any and all ideological values and ideas aside from patriotism? If not, does the asymmetry define or even demand limits to State-sponsored patriotism? The State is by definition an ideological actor, and it cannot escape the necessity to perform its duties, which are undergirded and guided by a patriotic creed and mission. However, for example, while the FBI consists of individual actors who may subscribe to a political party, it is certainly unnecessary for the agency to promote any political party or ideology other than what its mission calls for.[114] Indeed, the Hatch Act of 1939 already seals at least some of the asymmetry's political component outside of public education.[115] The Hatch Act even prohibits the wearing and distribution of political paraphernalia and

---

[113] This requires significant research.
[114] Assuming that any organizational mission depends on a form of 'creed' in order to inform its activities and operations.
[115] U.S. Office of the Special Counsel, Hatch Act of 1939, https://www.doi.gov/ethics/political-activity. Who Is Not Covered? https://osc.gov/Services/Pages/HatchAct-StateLocal.aspx#tabGroup12.

propaganda among other activities that the Establishment Clause proscribes public educators from engaging in while operating in their official capacity with respect to religion.[116] However, the Hatch Act does not expressly restrict government employees from promoting ideology, as distinct from politics, on the job.

Another question is whether prohibiting ideology from being instructed in public schools would require schools to forego the recitation of the Pledge and other patriotic activities that the court system has not only upheld but remarked on having positive and even potentially necessary value. This implicates another problem: to what extent can 'ideology' be scrubbed from the contents of public education? Certainly, limiting the ability of teachers to personally promote Marxism, Fascism, or Capitalism would prove easier than mandating the use of non-ideological textbooks.[117] Can legislation even legitimately prevent political and ideological instruction in all areas of public education, including approved curriculum content? If so, how would the relevant authorities and actors be held accountable? Even if it is not legislatively possible to prohibit the use of political or ideological curriculum content, it is still incumbent upon authorities to prevent illegitimate political and ideological expression within the public educational setting wherever it can be legitimately regulated.

---

[116] While the Supreme Court has not weighed in on a case that concerns the right of the State to prohibit educators from wearing religious garb in their official capacities, the Oregon Supreme Court has upheld such laws, and the 3rd Circuit has as well. https://www.freedomforuminstitute.org/about/faq/can-a-teacher-wear-religious-garb-to-school-provided-the-teacher-does-not-proselytize-to-the-students/. Religious garb, however, is not the only religious act that the Establishment Clause may prohibit teachers from engaging in that is equivalent to the Hatch Act's prohibition of political expression and advocacy.

[117] It is a philosophical question whether it is even possible to produce textbooks that are free of ideological content due to them having frameworks for what content is included and/or maximized, and what content is excluded and/or minimized, as well as how the content is framed. However, this should not stop researchers from working to produce viable criteria that can be used to determine what textbook content contains prohibited material under laws that seek to restrict political or ideological instruction. For example, using textbooks that promote or denigrate religion violate the Establishment Clause. This should theoretically apply equally to politics and religion.