Competency Testing and Potential Constitutional Challenges of "Everystudent"

Monique Weston Clague
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Mandatory minimum competency testing programs that would deny secondary students a high school diploma for failure to demonstrate a designated level of skills in reading, writing, and mathematics have been proposed or implemented at the state or local level in approximately one-third of the states.¹ Congress has recently entered the scene as a support player.²


² See Education Amendments of 1978, Pub. L. No. 95-561, 92 Stat. 2143 (codified at 20 U.S.C.A. §§ 2701-3389, (West Supp. 1979)) (extending and amending the Elementary and Secondary Education Act of 1965, 79 Stat. 27 (codified in scattered sections of 20 U.S.C.)). Title II of the amendments purports to assist state and local educational agencies to improve the basic skills of all children. 20 U.S.C. § 2881 (Supp. III 1979). The definition of basic skills includes not only reading and mathematics, but also "effective communication, both written and oral." Id. Title IX, Part B, empowers the Commissioner of Education to make grants to any state educational agency (or local agency if the state has not submitted an
Some of the more ambitious programs look beyond testing for basic skills and functional literacy\(^3\) and may attempt to assess certain activities and attitudes implicating highly value-charged notions of what constitutes a minimally competent adult. Assessment of attitudes and skills that have been suggested or are under development include appreciation of "beauty" and "cooperation,"\(^4\) "personal development, social responsibility, and career development,,"\(^5\) "citizenship," "leisure skills," "parenting," "the world of work,"\(^6\) the "ability to pursue higher education or to gain employment,"\(^7\) and "lifelong learning and attitudes toward school."\(^8\)

Considerable attention has focused on the equal protection implications of competency testing for racial and linguistic minorities\(^9\) and to some ex-
tent for handicapped students. This article examines instead alternative constitutional bases for challenges by “everystudent”; that is, challenges in which questions of fairness on the basis of race, sex, national origin and handicap are not central issues. Part I focuses first on threats posed by value-oriented testing to the constitutionally-protected freedom of expression, including the right to remain silent. Next it examines the threat which such testing may pose to the judicially-recognized right of personal privacy. Part I concludes with a discussion of the appropriate remedies for first amendment and privacy violations. Part II considers the likelihood of successful legal challenges by “everystudent” to the basic skills or functional literacy and mathematics exams that are arguably arbitrary, capricious, or fundamentally unfair, and thus violative of substantive due process rights.

I. How Much Shall be Rendered to the Educational Caesar?

Assessing Attitudes and Beliefs

A. First Amendment Questions

In the celebrated decision of Tinker v. Des Moines Independent School District, the Supreme Court held that high school students could not be suspended from school for wearing emblems of protest, absent a showing that their mode of expression “would substantially interfere with the work of the school or impinge on the rights of other students.” Students, the Court emphasized, do not shed their first amendment rights of expression.


11. Both the first amendment and privacy claims discussed in Part I highlight points of tension between liberalism and the legal traditions. See J. Shklar, Legalism 1 (1964). If legalism is defined as the social ethos which prizes adherence to preexisting rules and the establishment of rights and obligations under rules, liberalism challenges, in the interest of personal freedom, undue repressiveness which may be embodied in duly enacted rules or laws. The substantive due process claims discussed in Part II, on the other hand, highlight the tension between legalism—the foe of unregulated arbitrariness—and the counterclaims made for reposing judicial trust in the discretion of educators.


13. Id. at 509. This loosely formulated standard governing suppression of student expression is more restrictive of expression than the “imminent lawless action” test, the Supreme Court’s most recent first amendment standard governing suppression of speech by members of the public in public forums. See Brandenburg v. Ohio, 395 U.S. 444, 447
at the schoolhouse gate;\textsuperscript{14} they "may not be confined to the expression of those sentiments that are officially approved."\textsuperscript{15} Hence, if students may not be suspended for affirmative, though silent, nondisruptive protest, may they be downgraded or possibly even denied a high school diploma for expressing views on high school graduation tests which deviate from specific attitudes and values that state testing authorities assume to be correct? Individual responses to value-oriented questions implicate numerous political, cultural, vocational, and interpersonal values. Absent the possibility of validation, no one answer should be satisfactory. A student's expression on competency tests of personal sentiments that are not officially approved can hardly be regarded as an interference with the rights of other students. Furthermore, the educational goals of the school system should never justify downgrading expression of unapproved sentiments, in violation of a student's first amendment rights.\textsuperscript{16}

In January, 1977, the Maryland State Department of Education expressed an official philosophy of education in two brochures entitled \textit{The Mission of Schooling}\textsuperscript{17} and \textit{Project Basic}.\textsuperscript{18} These policy statements broaden the concept of minimum adult competence far beyond mastery of "basic skills"—"the ability to read, write and calculate"—and include competence in four other "areas of human activity" ("citizenship," "the world of leisure," "survival skills,"—including "inter-personal skills" and "parenting,"—and "the world of work") and have served as the point of departure for a process of developing "competency-based prerequisites for graduation" in Maryland by 1982.\textsuperscript{19} In the fall of 1977, a draft list of approximately 600 competencies was generated by advisory panels of professional educators and laypersons at the initiative of Maryland's Project Basic staff. Grouped and identified with each of the five human activity areas, the competencies expressed as "behaviors" were then winnowed down to 321 "possible prerequisites for graduation" and distributed in early 1978 to a stratified sample of over 22,000 Maryland residents for con-

\footnotesize{(1969). As the \textit{Tinker} Court stated, first amendment rights of students are to be "applied in light of the special characteristics of the school environment." 393 U.S. at 506.}

\textsuperscript{14} \textit{Id.} at 506.

\textsuperscript{15} \textit{Id.} at 511.

\textsuperscript{16} In \textit{Givhan v. Western Line Consol. School Dist.}, 99 S. Ct. 693 (1979), the Supreme Court held that a public school teacher has a first amendment right to criticize school district practices in private conversations with the school principal. If the private expression of a public employee is protected by the first amendment, then the private expression of student views on examinations should arguably receive similar first amendment protection.

\textsuperscript{17} \textit{MARYLAND STATE DEPT OF EDUCATION, THE MISSION OF SCHOOLING} (1977).

\textsuperscript{18} \textit{MARYLAND STATE DEPT OF EDUCATION, PROJECT BASIC} (1977).

\textsuperscript{19} \textit{Id.}
sensual validation. Numerous items on the draft list probed the highly sensitive areas of feeling and opinion, although none of these items may survive the next stages in the development of the state's competency tests. In late July of 1978, the Maryland State Board of Education approved a "Declared Competency Index" rejecting the "world of leisure," one of the five areas previously projected in the Maryland plan establishing competency-based prerequisites for graduation. Although many of the value-loaded items on the draft list distributed for public validation have or may be discarded, they nonetheless serve as useful illustrations of the kinds of competencies which, if transformed into mandatory test questions, may raise first and fourteenth amendment challenges.

Among the "possible requirements for graduation" listed on response forms distributed by Project Basic for consensual validation are the following: "justify decisions made about leisure"; "define personal qualities needed for work success (loyalty, responsibility, dependability)"; "describe the limitations of government"; "translate into action feelings and
thoughts about the arts”;° identify results of exercising individual rights”; “recognize ways to manage stress in one’s life.” A list of possible competencies distributed to school guidance personnel contains the following items: “demonstrates appropriate heterosexual behavior”; “resolves conflicts with family”; “recognizes consequences of one’s sexual behavior”; and “controls undesirable impulses.”° One may ask how educators can assess student responses on questions derived from “competencies” of this description without penalizing expressions of opinion.

Suppose, for example, that students were asked to define personal qualities needed for work success and that loyalty, responsibility and dependability were the only answers to be marked correct. A student might respond with equal legitimacy that one must possess the ability to protest unfair working conditions or employer policies, or have the courage to confront situations in which conscience would require resignation under protest. Suppose further that under the heading of the rights and responsibilities of parenthood, expression of student attitudes toward contraception, premarital sex, homosexuality, or the choice of parenthood itself were subject to grading, not for the literary proficiency or analytical skill displayed by the responses, but for the state-determined appropriateness of the values expressed. Only an ideologically committed testing authority would venture to designate correct answers to questions of this character.

A challenge based on Tinker presupposes that the student has answered freely and has received a lowered score as a result. Alternative challenges to mandatory, value-oriented test questions might contest the validity of compelling students to express opinions that are considered appropriate by fiat of the testing authority but conflict with personal convictions of the student. To object conscientiously to the authority of the state to command these responses is to challenge not the grading of particular answers, but rather the authority of the state to require that expression be subject to any grading at all.

This second type of first amendment claim finds its strongest support in West Virginia State Board of Education v. Barnette.°° In the middle of World War Two, the Supreme Court held that a compulsory flag salute violated the first and fourteenth amendment rights of high school students who were Jehovah’s Witnesses. The Court included their right to remain silent—to refuse to profess a patriotic allegiance that violated their per-

24. Id. at No. 006-04 PG 13, Response Nos. 1, 13 and 18.
25. Id. at No. 006-04 PG 14, Reponse Nos. 15 and 22.
26. The last four items are contained on a mimeographed list distributed by Project Basic.
27. 319 U.S. 624 (1943).
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sonal convictions—within their constitutionally protected right of freedom of expression. While the students were motivated by the religious belief that Exodus prohibited them from saluting the flag because it was a “graven image,” the Court upheld their claim on grounds of the first amendment’s protection of expression in general, rather than on the more narrow ground of freedom of religious expression.

In scrutinizing West Virginia’s power to command an involuntary affirmation of belief, the Barnette Court suggested a stricter constitutional standard than that governing suppression of the expression of opinion. “It would seem,” the Court reasoned, “that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence.” Because the mandatory flag salute ceremony was at best self-defeating in accomplishing its goal of national unity, the Court held it did not remotely demonstrate the requisite immediacy or urgency.

Barnette is particularly significant because it portended a change in the Court’s attitude towards imposing the substantive limitations of the first amendment on the action of state educational authorities. Only three years earlier, in Minersville School District v. Gobitis, the Court, speaking through Justice Frankfurter, upheld a compulsory flag salute required by the local board of education on the theory that the Court should defer to the judgment of elected political majorities, and further, that courts lacked competence to adjudicate disputes over educational policy. The Barnette

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28. Id. at 629.

29. The Court noted that “[w]hile religion supplies appellees’ motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite [the flag salute] to infringe constitutional liberty of the individual.” Id. at 634-35. The Court did not reach the question of whether nonconformist beliefs may furnish an exemption from a requirement to salute, since it found that the first amendment precluded the state from even creating such a requirement. Id. at 641.

30. The Barnette Court expressed the first amendment standard governing suppression of expression in terms of the clear and present danger test, id. at 639, a formulation that has been supplanted by the “imminent lawless action” test. See note 13 supra. Barnette, unlike Tinker, did not attempt to articulate a standard for the school environment different from that for other public forums.

31. 319 U.S. at 633. In Wooley v. Maynard, 430 U.S. 705 (1977), the Supreme Court, relying extensively on Barnette, reformulated the standard governing a state’s attempt to force unwilling individuals to disseminate ideological mottoes: the state must demonstrate a compelling countervailing interest that could not be achieved by a less drastic alternative means. Id. at 716. At issue in Wooley was New Hampshire’s requirement that individuals use their cars as “mobile billboards” for display of the motto “Live Free or Die” that is embossed on the state’s license plates. The Court recognized that the “right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’” Id. at 714.

32. 319 U.S. at 640-41.

33. 310 U.S. 586, 597-98 (1940). The Court stated that “[t]o stigmatize legislative judg-
opinion, in contrast, resolutely affirmed the Court’s responsibility for applying the Bill of Rights to the field of education. Although the Court volunteered a pedagogical judgment about the “ultimate futility”\textsuperscript{34} of coerced expressions of belief, the \textit{Barnette} holding did not rely on an affirmation of superior judicial competence to evaluate the educational merits of coercing expression.\textsuperscript{35} Rather, the holding was based on the view that coerced expression of patriotic values, whether or not an exercise in pedagogical futility, normally lies beyond the constitutional competence of the educators.\textsuperscript{36} In setting constitutional limits on what public educational authorities may do in the name of pedagogy, the Court advanced some of its most striking libertarian rhetoric: “If there is any fixed star on 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.”\textsuperscript{37}

No other Supreme Court case dealing with state prescribed educational activities matches \textit{Barnette}’s strong stance against the state’s authority to coerce a demonstration of belief against the personal convictions of recalcitrant students.\textsuperscript{38} But while \textit{Barnette} stands in isolation, it has prompted

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\item 34. 319 U.S. at 641.
\item 35. The Court explained: “But we act in these matters not by authority of our competence but by force of our commissions.” \textit{Id}. at 640.
\item 36. \textit{Id}. at 642.
\item 37. \textit{Id}.
\item 38. In two earlier parental rights cases, \textit{Meyer} v. Nebraska, 262 U.S. 390 (1923) and \textit{Pierce} v. Society of Sisters, 268 U.S. 510 (1924), the Court held that unreasonable interferences with “the liberty of parents and guardians to direct the upbringing and education of children under their control” exceeded the state’s authority. \textit{Pierce} v. Society of Sisters, 268 U.S. at 534-35. Neither case, however, involved a challenge to the authority of state school officials to coerce the declaration of belief. Rather, both cases dealt with the conflict between the liberty of parents to seek private education for their children and the asserted authority of the state to require or ban specific activity. Compare \textit{Meyer}, 262 U.S. 390 (state proscription against offering foreign language in private schools) \textit{with} \textit{Pierce}, 268 U.S. 510 (compelling attendance exclusively at public schools). \textit{See also} Wisconsin v. \textit{Yoder}, 406 U.S. 205, 213-14 (1972). \textit{See generally} Goldstein, The Asserted Constitutional Right of Public School Teachers to Determine What They Teach, 124 U. Pa. L. Rev., 1293, 1305-16 (1976). Supreme Court cases after \textit{Barnette} have involved first amendment challenges to the constitutional validity of particular curricular offerings either mandated or prohibited for the public schools, but not to the state’s power to coerce the expression of belief. Such challenges have jointly invoked the free exercise and establishment clauses rather than the free expression guarantees contained in the first amendment. These establishment clause/free exercise hybrids have successfully attacked required Bible reading, (School Dist. of Abington Township v. \textit{Schempp}, 374 U.S. 203 (1963)), official prayers (Engel v. \textit{Vitale}, 370 U.S. 421 (1962)),
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a variety of victorious constitutional challenges to mandated forms of expression both within and without the field of education.

released time for in-school religious exercises (McCollum v. Board of Educ., 333 U.S. 203 (1948)), and a biology curriculum putatively motivated by fundamentalist religious interests (Epperson v. Arkansas, 393 U.S. 97 (1968)). From a remedial point of view, these cases sweep further than *Barnette* because in finding violations of the establishment clause, the Court has not only exempted the complaining parties but has also invalidated the activities. It should further be noted that in *Epperson*, the Court invalidated the biology curriculum at issue by basing its holding on the “narrower grounds” of the free exercise and establishment clauses rather than on the free expression clause. 393 U.S. at 106.

39. See, e.g., *Lipp v. Morris*, 579 F.2d 834 (3rd Cir. 1978) (*Barnette*’s prohibition on compelled participation in flag salute ceremony protects right not to be forced to stand at attention during ceremony); *Goetz v. Ansell*, 477 F.2d 636 (2d Cir. 1973) (school child cannot be compelled to stand or leave the classroom during the pledge of allegiance); *Russo v. Central School Dist.*, 469 F.2d 623 (2d Cir. 1972), cert. denied, 411 U.S. 932 (1973) (teacher’s first amendment rights violated when discharged for standing at silent attention during recitation of pledge in violation of school regulation requiring participation); *Frain v. Baron*, 307 F. Supp. 27 (E.D.N.Y. 1969) (reliance on *Tinker* and *Barnette* to uphold student right to refuse to stand or to leave classroom during flag salute ceremony).

A broad reading of *Barnette* has been most clearly articulated by the Maryland Court of Appeals in State v. Lundquist, 262 Md. 534, 278 A.2d 263 (1971), in which it emphasized *Barnette*’s comprehensive free expression rationale. The Maryland Court of Appeals noted that the joint concurring opinion of Justices Black and Douglas in *Barnette* expressed substantial agreement with Justice Jackson’s opinion, while, at the same time, separately emphasized the religious liberty theme at issue. 262 Md. at 551, 278 A.2d at 272 (citing 319 U.S. at 643-44). The Maryland Court of Appeals treated the Black-Douglas “religious liberty note,” as supplementary to, rather than as a rejection of, the free expression rationale. *Id.* Also noting *Tinker*’s reliance on *Barnette*, the Maryland court concluded that “*Barnette* was unequivocally decided as a question of free speech. . . .” 262 Md. at 552, 278 A.2d at 273. Thus, the court invalidated the Maryland statute requiring all teachers and students, except those objecting for religious reasons, to salute and pledge allegiance to the flag. The court apparently accepted the teacher-plaintiff’s objection to the mandatory flag salute ceremony not only because it violated his right of free expression, but also because it violated his conscientious objection to forcing patriotism on his classes. *See* 262 Md. at 539, 278 A.2d at 266. Though Mr. Lundquist did not clearly base his challenge on a particular constitutional provision, he presumably viewed his right to refrain from compelling others to salute the flag as derived from the first amendment’s prohibition on the compulsory flag salute. *See* Statement by August Lundquist, 262 Md. at 555-56 (app.), 278 A.2d at 274-75 (app.). Applying *Lundquist* to the area of values testing, arguably teachers and school administrators have standing to challenge a state requirement to administer test questions forcing students to profess opinions in which they do not believe. Mr. Lundquist, who willingly taught patriotic and democratic ideas in his history classes, impliedly drew the important distinction between persuasive, value-oriented teaching and the coerced expression of beliefs. *See* text accompanying notes 49-51 infra.

If state and local educational authorities may not ‘condition access to public education’ on such a visible and symbolic statement of belief as the flag salute, may they condition exit from public high school with a conventional diploma—the ticket of entry to most employment and further educational opportunities—upon response to questions that probe attitudes and beliefs? By recognizing only one correct answer to a test question, would the school system not then be prescribing orthodoxies in opinion? If a high school student anticipates and therefore writes the “correct” answer, even if contrary to his personal beliefs, value-oriented graduation test requirements would arguably force him to confess by word or act “what is not in his mind,” and might invite first amendment challenges that less visible if pervasive classroom requirements have not.

To be sure, *Barnette* must be read subject to qualifying exceptions. The *Barnette* Court itself anticipated the possibility of “circumstances which permit an exception” but it ventured no suggestions applicable to educational settings. Nevertheless, in certifying graduates as at least minimally competent to practice a profession, professional schools do prescribe, at least indirectly, certain orthodoxies in the domain of attitudes. The practicums and clinical components of training for a variety of service professions, e.g., medicine, nursing, teaching, law, social work, personnel, and student counseling, often entail evaluations of student-trainee attitudes toward work and clients, at least as they are manifested in behavior. Insofar as assessments of students are related to criteria of professional ethics, competence, and client relationships, first amendment questions

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42. *Id.* at 634.
43. *Id.* at 642.
44. The Court did, however, suggest an exception for persons subject to military discipline who may not claim many of the inviolable freedoms of civilian life. *Id.* at 642 n.19.
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have not arisen and are not likely to do so. Students attending professional schools do so as a matter of personal choice, with adequate notice that norms of the profession exist. Students matriculating through primary and secondary schools, on the other hand, are subject to the states' compulsory education laws, a factor which the Barnette decision emphasized. Their competency to enter adult life, as measured by the feelings, attitudes, or beliefs they possess on matters of politics, use of leisure time, interpersonal relationships, parenting, or the arts should be a function of each individual's maturing self-definition, not the function of a score on a test. It is one thing to certify that a student has demonstrated a capacity to read, write, and calculate at some defined level. It is quite another matter for the Testing Caesar to certify competence on matters of personal opinion. The "freedom to be intellectually and spiritually diverse or even contrary," is a freedom that Barnette placed "beyond the reach of majorities and officials" and, by logical extension, beyond consensual validation.

In holding the compulsory flag salute unconstitutional, the Barnette Court noted that state efforts to foster certain values "by persuasion and example" were not at issue in the case. Yet the Court commended this "slow and easily neglected route." It is only when the state has attempted to foster religious beliefs, breaching the first amendment's prohibition on the establishment of religion, that the Supreme Court has invalidated attempts by public educational authorities to inculcate particular values through persuasion and example. Thus, the right of public educational institutions to engage in tutelage in values, short of offending the establishment clause, appears to be beyond constitutional challenge. Nevertheless, the courts have conceded a limited right to be exempted from exposure to secular pedagogy. In its 1972 decision of Wisconsin v. Yoder, the Supreme Court introduced a carefully circumscribed qualification on the right of the state to compel exposure to exemplary and persuasive secular pedagogy.

45. See Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1978); text accompanying notes 145-53 infra.
46. 319 U.S. at 632.
47. Id. at 641.
48. Id. at 638.
49. Id. at 640.
50. Id. at 631.
51. See cases cited in note 38 supra.
52. 406 U.S. 205 (1972). Unlike the free exercise/establishment clause cases cited in note 38 supra, Yoder was the first education case in which the Supreme Court addressed a free exercise claim apart from an establishment clause claim. The Amish objected, in the name of religious freedom, to the secular orientation characterizing the culture and curriculum of secondary schools.
A parental rights and free exercise hybrid, *Yoder* focused on the coercive elements inherent in the legally mandated exposure of children to values objectionable to the complaining parents. Members of the Old Amish Order alleged that Wisconsin's compulsory school attendance law forcibly exposed their children to the secular values of modern secondary schools in violation of both the rights protected under the free exercise clause of the first amendment and the traditional interest of parents in the religious upbringing of their children. The Supreme Court agreed. The issue was not, as it had been in *Barnette*, the direct compulsion of belief, but rather the indirect but potent destroyer of distinctive cultures—contemporary society's "hydraulic insistence on conformity to majoritarian standards." In this unique case, the Court acknowledged the cultural relativism inherent in the abstract notion of adult competence, at least beyond the "basic skills" in "reading, writing and elementary math." Education in formal secondary schools, with its emphasis on competitiveness, on intellectual, technological, and scientific achievement, and on worldly success and social life with worldly peers would ill-prepare the Amish child for competent adulthood in the separatist, Amish church community. Consequently, the Court granted the Amish the extraordinary relief of absolute exemption from exposure to secular, secondary schooling. *Yoder*'s bow to cultural relativism is carefully qualified, however, not only by its linkage to the free exercise clause of the first amendment, but also by its insistence on the unique characteristics of the centuries-tested, separatist Amish religious culture. Nevertheless, by setting some limits upon state-compelled exposure to secular curricula, *Yoder* implicitly acknowledged the legitimately diverse ways to function as a competent adult in our complex, differentiated society. *Yoder* has also led to a number of successful

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53. *See id.* at 209. The Amish did not raise objections to formal education through the eighth grade "because they agree[d] that their children must have basic skills in the "three R's. . . ." *406 U.S.* at 212.

54. *Id.* at 217.

55. *Id.* at 211-12.

56. *Id.* at 211-13.

57. Justice Douglas dissented from *Yoder* in part because the majority gave preference to religious over secular conscience. *406 U.S.* at 247 (Douglas, J., dissenting). He also dissented because the majority assumed an identity of interest between parents and children. *Id.* at 243-46.

58. One commentator has interpreted the *Yoder-Pierce-Barnette* theory as a source of broad first amendment protections based upon the "preservation of individual consciousness from government coercion." *Arons, The Separation of School and State, 46 Harv. Educ. Rev. 76, 96* (1976). Under this view, the principle of religious neutrality analogously insulates an individual from government sanction with regard to beliefs about basic contemporary issues of conscience. *Id.* at 99. Such an interpretation of freedom of religion protections would limit the state's power to coerce the expression of belief.
religiously grounded claims for selective exemption from particular public school curriculum requirements, primarily in the area of sex education. Logically and practically, exemptions granted to free exercise claimants from exposure to objectionable curricula and related testing would undermine the authority to test any student in these areas. To carve out exceptions to mandatory, value-oriented tests purporting to establish a uniform minimum measure of adult competence contradicts the reason for their existence.

B. Privacy Questions

Most Supreme Court decisions dealing with governmental inquiry into individual beliefs and associational ties are based on the first amendment's protection of speech and freedom of association.60 Value testing of a particularly intrusive nature might also be vulnerable to attack as an invasion of the constitutionally protected right of privacy.

The Supreme Court's explicit recognition of a constitutional right to privacy is of fairly recent vintage.61 While early decisions found a zone of privacy within the penumbra cast by the Bill of Rights,62 the Court has since identified the source of the privacy right as the concept of personal liberty protected by the due process clause of the fourteenth amendment.63

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61. The first Supreme Court decision to acknowledge an individual's constitutional right of privacy was Griswold v. Connecticut, 381 U.S. 479 (1965) (law forbidding use of contraceptives by married couple invades constitutionally protected zone of privacy).

62. Id. at 484-85.

Gradually, the Court has expanded the right of privacy to encompass those personal activities deemed "fundamental." 64

In its 1977 decision in Whalen v. Roe, 65 the Court identified two kinds of interests protected by the constitutional concept of privacy: "the individual interest in avoiding disclosure of personal matters," 66 and the interest in making fundamentally important decisions without governmental intrusion. 67 These "important decisions," summarized by the Court as those "relating to marriage, procreation, contraception, family relationships, child rearing, and education," 68 may justify "limitations on the States' power to substantively regulate conduct." 69

No Supreme Court case has specifically considered the boundaries of a student's constitutionally protected right of privacy. 70 Within the framework of the "important decision" interest articulated in Whalen, the Court has, however, expressly recognized that minors have a constitutional right of privacy. At the same time the Court has also indicated that the privacy right of minors is more circumscribed than that of adults. In 1976, in Planned Parenthood of Central Missouri v. Danforth, 71 the Court invalidated a blanket statutory requirement which provided that unmarried minors must obtain parental consent in order to obtain an abortion. 72
Although it upheld the minor's privacy claim in *Danforth*, the Court also underscored the state's "somewhat broader authority to regulate the activities of children than adults."\(^7\)

One year later in *Carey v. Population Services International*,\(^7\) the Court again considered the degree of constitutional protection afforded to minors' privacy rights. In so doing, the plurality opinion—accompanied by numerous separate opinions—highlighted the difficulty of defining the right and failed to muster sufficient support to set forth a clear standard of review. Striking down a New York law which, among other things, prohibited minors from having access to contraceptives,\(^7\) a plurality of four Justices announced that "the right to privacy in connection with decisions affecting procreation extends to minors as well as adults."\(^7\) The plurality recognized the right as fundamental.\(^7\) Nonetheless, rather than requiring the state to demonstrate a compelling state interest furthered by the statute, as it had when considering an adult's fundamental right to privacy,\(^7\) the plurality invoked *Danforth*'s "significant state interest" requirement as

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\(^7\) Id. at 74-75. The Court based its decision, in part, on the principle that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Id.* at 74. For one critical commentary on the Court's approach, see Hafen, *Puberty, Privacy and Protection: The Risks of Children's Rights*, 63 A.B.A.J. 1383 (1977).

\(^7\) 431 U.S. 678 (1977).

\(^7\) Under N.Y. Educ. Law § 6811(8) (McKinney 1972), it was a crime:

1. for any person to sell or distribute any contraceptive of any kind to a minor under the age of 16 years,
2. for anyone other than a licensed pharmacist to distribute contraceptives to persons 16 or older.

431 U.S. at 681. An exception was provided which allowed physicians to dispense contraceptives to patients of any age if he deemed it "proper in connection with his practice." *Id.* § 6807(b). The statute also prohibited the advertising and displaying of contraceptives, *id.*, a prohibition that the Court unanimously found to violate the first amendment. 431 U.S. at 700-02.

\(^7\) Id. at 693. The plurality consisted of Justices Brennan, Stewart, Marshall, and Blackmun.

\(^7\) *Id.* at 696 n.22.

\(^7\) See *id.* at 686. Thus, if the state action concerns either a suspect classification such as race or a fundamental right such as voting or privacy, then the state must demonstrate a compelling interest for its action. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).
the appropriate standard governing the review of state action that infringes upon the privacy rights of minors.79 This lesser standard was justified on the basis of the state's traditionally greater interest in regulating the activities of minors and on the common law presumption that minors possess a "lesser capability for making important decisions."80 The remaining Justices, filing separate opinions, disagreed over the scope of the minors' right and would have imposed an even less rigorous standard of review.81 Thus a clear majority of Justices would subject invasions of privacy of minors to a less rigorous review than the "compelling state interest" test applied to similar invasions of the privacy rights of adults.82

While the two types of protected privacy rights enunciated in Whalen would presumably apply to minor students, an infringement of their rights would undoubtedly be justified by a less important state interest than would be required for adults. What state interest would suffice in a partic-

79. The Court stated that "state restrictions inhibiting privacy rights of minors are valid only if they serve 'any significant state interest . . . that is not present in the case of an adult.'" Id. at 693 (quoting Planned Parenthood of Central Missouri v. Danforth, 428 U.S. at 75).

80. Id. at 693 n.15.

81. Justice Powell agreed with the outcome but asserted that the validity of state laws restricting the freedom of minors in sexual matters should be controlled by whether the restriction rationally served valid state interests, not by a "significant state interest" standard. Id. at 704-05 (Powell, J., concurring in part). Moreover, he argued that the "significant state interest" standard was equivalent to the compelling state interest standard for all practical purposes. Id. at 706.

Justice Stevens flatly rejected as "frivolous" the argument that a minor has the constitutional right to use contraceptives in spite of the objection of parents and state. Id. at 713 (Stevens, J., concurring in part). He agreed that the law in question was invalid, however, because of the unfairness of subjecting minors to a "greater risk of irreparable harm [venereal disease and premarital pregnancy] than adults." Id. at 714.

Justice White agreed with Justice Stevens that minors had no constitutional right to use contraceptives. Id. at 702-03 (White, J., concurring in part). He concurred with the judgment, however, "primarily because the State has not demonstrated that the prohibition . . . measurably contributes to the deterrent purposes which the State advances as justification for the restriction." Id. at 702-03. Justice Rehnquist, dissenting, argued that the state should be able to use its "police power to legislate in the interests of its concept of the public morality as it pertains to minors." Id. at 719 (Rehnquist, J., dissenting). Justice Burger also dissented but filed no opinion.

82. This may indicate that the Court has not fully determined whether minors should be afforded only qualified fundamental rights or full scale fundamental rights subject to a diluted compelling interest standard. See Privacy's Problem Child, supra note 63, at 756 n.32. In Carey, Justice Brennan characterized the question of the state's authority to regulate minors in areas in which it cannot regulate adults as a "vexing" one for which there may be no precise answer. 431 U.S. at 692. One commentator has suggested that a uniform compelling state interest test should be applied to any state action affecting fundamental rights. The state may, however, possess additional compelling interests when regulating the activities of minors. See Note, The Minor's Right of Privacy: Limitations on State Action after Danforth and Carey, 77 COLUM. L. REV. 1216, 1232 n.88 (1977).
ular case is unclear, however, in view of the current Court's lack of cohe-
sion on this issue.

Both Danforth and Carey were concerned only with the second type of
interest specified in Whalen—the interest in making important decisions
regarding such matters as procreation and contraception—rather than the
"interest in avoiding disclosure of personal matters." If competency test-
ing were to include questions or behavioral assessments that probe atti-
tudes toward marriage and parenting, procreation or contraception, the
school system would not directly intrude upon the decisions students have
made, or may make, in their private lives beyond the schoolhouse gate.
Thus, a privacy challenge would more likely rest on the student's interest
in avoiding disclosure of personal information.

While the interest in avoiding such disclosure may be protected by the
constitutional right of privacy, that interest is not absolute. Governmental
compulsion to disclose personal information is a commonplace exercise of
a state's police powers. Whalen v. Roe, for example, upheld a provision of
New York's Controlled Substances Act of 1972, which required that the

83. 429 U.S. at 599-600.
84. Examples of school regulations that arguably do directly intrude upon students' per-
sonal decisions are school dress codes and hair regulations. The Supreme Court has de-
clined, however, to review lower court cases that have addressed, with conflicting
conclusions, the constitutionality of these regulations. Compare, e.g., Holsapple v. Woods,
500 F.2d 49 (7th Cir.), cert. denied, 419 U.S. 901 (1974) and Richards v. Thurston, 424 F.2d
1281 (1st Cir. 1970) (right to wear hair in desired length or manner is an ingredient of per-
sonal freedom or liberty protected by the constitution) with Karr v. Schmidt, 460 F.2d 609
(5th Cir.), cert. denied, 409 U.S. 989 (1972); King v. Saddleback Junior College Dist., 445
F.2d 932 (9th Cir.), cert. denied, 404 U.S. 979 (1971); and Jackson v. Dorrier, 424 F.2d 213
(6th Cir.), cert. denied, 400 U.S. 850 (1970) (hair length regulations do not violate first
amendment, right to privacy, due process or equal protection).

Although these cases were decided prior to Carey and Danforth, the standards enunciated
in them are of interest, particularly because of their wide variation. The Seventh Circuit
held that the right to wear hair as the student pleases is a fundamental right and therefore
the state has a "substantial burden of justification," including the showing that the regula-
tion furthers an important state interest and is no greater than is essential to further that
interest. Holsapple v. Woods, 500 F.2d at 52 (citing United States v. O'Brien, 391 U.S. 367,
377 (1968)). Although the First Circuit does not view choice of hair length as "so fundamen-
tal as to require a compelling state interest," it nonetheless views it as within the sphere of a
personal liberty, therefore requiring that the state show an "outweighing state interest justi-
fying the intrusion." Richards v. Thurston, 424 F.2d at 1284-85. The Fifth, Sixth and Ninth
Circuits, however, have concluded that a student's hair length choice is not a constitutionally
protected right, in part because of the strong policy of allowing schools wide discretion in
making decisions that theoretically may impinge on a student's liberty. Thus, the appropri-
ate standard of judicial review in those circuits is much more deferential to the state. See,
e.g., Karr v. Schmidt, 460 F.2d at 615-16 (5th Cir.), cert. denied, 409 U.S. 989 (1972) (citing
Williams v. Lee Optical of Okla., Inc., 348 U.S. 483, 491 (1955) (appropriate standard is
whether the regulation is reasonably intended to accomplish a constitutionally permissible
state objective).
names and addresses of persons obtaining certain drugs, pursuant to a doctor's prescription, be recorded in a centralized computer file. Unanimously rejecting the claim that this requirement constituted an unconstitutional invasion of privacy, the Court balanced the "[s]tate's vital interest in controlling the distribution of dangerous drugs" against the limited intrusion on personal privacy entailed by the patient-identification provision. Since the statute contained several safeguards limiting access to the information to personnel involved in the implementation of the program and since there was no evidence that these safeguards were ineffective, the state had only to satisfy the Court that the identification requirement was a reasonable, rather than a necessary, experimental means of effectuating the goal of controlling drug abuse.

Whalen indicated that the right of privacy concerning disclosure of personal information, at least when a vital state interest is involved, is a function of the extent to which personal information becomes public. In light of the more relaxed standard of constitutional review accorded minors, it is unclear whether coercive disclosure of student views on matters of personal concern as a component part of competency testing would amount to a constitutional violation in the absence of public disclosure. Moreover, assuming school authorities respect recent statutory and administrative restraints on access to information with some exceptions, student records could not be disclosed to third parties without prior student and parental

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86. 429 U.S. at 598. While the Court in Whalen unequivocally stated that neither first nor fourth amendment protections were involved, id. at 604 n.32, one commentator noted that the Court nevertheless invoked the same standard used in fourth amendment case analysis. See Comment, Constitutional Law—Right of Privacy—Drug Abuse Control—Whalen v. Roe, 24 N.Y.L.S.L.R. 260, 273 (1978).
87. 429 U.S. at 600-03. In a concurring opinion, however, Justice Brennan warned that any statutory deprivation of the protected liberty interest in privacy, (i.e. broad dissemination of the information) would survive only if necessary to promote a compelling state interest. 429 U.S. at 607 (Brennan, J., concurring).
88. Two members of the Court's majority disagreed over whether broad disclosure would invade a constitutionally protected privacy right. Justice Stewart, in a concurring opinion, took issue with Justice Brennan's view that broad dissemination by state officials of such information would clearly implicate constitutionally protected privacy rights, justified only by a compelling state interest. In contrast, he refused to acknowledge a "general interest in freedom from disclosure of private information," pointing out that the Court had in the past recognized a constitutionally protected privacy interest in avoiding disclosure only when marriage, privacy in the home, and contraception were involved. Id. at 608-09 (Stewart, J., concurring).
89. See notes 78-82 and accompanying text supra.
Assuming that test responses bearing on personal values are kept confidential, the most feasible privacy challenge would be to attack the legitimacy of the state’s right even to ask the questions. In this situation, the student would argue that no vital state interest is involved or, that the objectives of such questioning are constitutionally impermissible. *Merriken v. Cressman,* the only case pertinent to privacy attacks on the questioning of students, does not directly address this issue. In *Merriken,* a federal district court invalidated a nonmandatory questionnaire that asked highly personal questions of junior high school children about their relationship with members of their family. In condemning the questionnaire for invading the privacy of the relationship between parent and child, the court found that disclosure and the resulting labeling of children undermined the legitimacy of the program’s stated goal of drug prevention. Hence, the court’s willingness to prevent the state from asking questions probing personal information may provide little precedential value to a court examining such questions when disclosure is not at issue.

This factor, along with the absence of relevant cases, does not necessarily mean that challenges to the constitutional validity of the questions

91. 20 U.S.C. § 1232g(b)(3) (1976). Furthermore, these records would not necessarily reflect information that a student would not wish disclosed. Since the Family Privacy Act guarantees student and parental access to the student’s school records, *id.* § 1232g(a)(1)(A), one can envisage a student’s or parent’s addition of statements to the student’s files, *see id.* § 1232(a)(1)(C)(2), supplementing or contradicting the personal information acquired under a compulsory testing program.


93. Each student was asked to answer whether his parents “hugged and kissed him good-night when he was small,” whether they told him “how much they loved him or her,” whether the parents “seemed to know what the student’s needs or wants are,” and whether the student “feels that he is loved by his parents.” *Id.* at 918. It also asked teachers and students to identify “other students . . . who make unusual or odd remarks, get into fights or quarrels with other students, make unusual or inappropriate responses during normal school activities, or have to be coerced or forced to work with other pupils.” *Id.* at 916. Furthermore, the court noted, no standards defining “odd,” “unusual,” or “inappropriate” were provided. *Id.*

94. Unlike the program in *Whalen,* the questionnaire in *Merriken* contained no safeguards against indiscriminate public disclosure. Confidentiality in the use of the results was precluded by a goal of the program—identification of potential drug abusers—in which the questionnaire played a critical part. The court stressed the “insurmountable harm” that could occur to a labeled child. *Id.* at 920. Children identified by the results as potential drug abusers were to be subject to remedial intervention at the hand of “teachers, guidance counselors and others who [had] had little training in the area of psychological therapy.” *Id.* Labeling also carried the risk of creating a self-fulfilling prophecy. *See id.* at 915. Such damage to even one child was apparently sufficient to question the whole program. *Id.* at 920. Thus the Court struck the balance between the invasion of privacy and the public need for a drug abuse program in favor of the child and parent. *Id.* at 920-21.
themselves will prove unsuccessful. *Whalen* did not go so far as to hold that governmental compulsion to disclose personal matters is beyond constitutional challenge. Rather, it held that compulsory disclosure is justified when access is limited to personnel involved in the administration of a constitutionally legitimate, vital governmental program. If the state's reason for requiring disclosure of personal information is not of such a vital nature, however, a lesser intrusion on privacy might be viewed as constitutionally impermissible.

This kind of balancing is suggested in Judge Skelly Wright's dissent from the disposition of the District of Columbia Circuit Court in *Doe v. McMillan*. In addressing the privacy issue involved in the case—public dissemination of derogatory information about named children in a congressional report describing conditions in the District of Columbia schools—Judge Wright argued that the "compelled exposure" of students' private affairs "in itself constitutes a severe intrusion" upon their right to privacy, although it may be justified by "the state's overriding interest in educating its citizens."

The question then becomes what overriding interest in the education of its children would justify a state requirement that students reveal matters of personal concern. The claim that the information is necessary to certify the student as a competent adult is the rationale underlying competency testing. Yet, *Tinker* and *Barnette* remain vital legal authority warning that public school students "stand on [the] right of self-determination in matters that touch individual opinion and personal attitudes." In addition, *Yoder's* radical support of an unconventional lifestyle implies that the goal of certifying a student as a competent adult on various dimensions of personality may be beyond the province of state educational authorities.

**C. Remedies for First Amendment and Privacy Violations**

If state or local educational authorities do introduce value-oriented test questions that coerce or penalize student opinion on matters of personal concern or that encroach upon privacy, it is important to examine the remedies available to a student asserting a constitutional violation. A student who refuses to respond to questions calling for disclosures of beliefs or personal matters, or who is downgraded because of values expressed would not be suspended from school as were the students in *Tinker*.  

95. 459 F.2d 1304, 1319-29 (D.C. Cir. 1972) (Wright, J., dissenting).
96. Id. at 1308.
97. Id. at 1326.
98. 319 U.S. at 631.
Constitutional Challenges of “Everystudent”

Neither would he be subject to the more draconian sanction of expulsion, with concurrent designation as a “delinquent” as were the students in Barnette; nor would his parents be subject to prosecution, as the Jehovah’s Witnesses were under the West Virginia law. Moreover, if the responses are not widely disclosed, he would not suffer from the effects of labeling as were the students identified as potential drug abusers in Merriken. The student’s test scores would be lowered, however, perhaps jeopardizing his academic status. Whether the downgrading of answers or nonresponses to constitutionally impermissible questions would result in the denial of a diploma cannot be determined in the abstract. The answer would depend on the particular grading scheme chosen by a given state or locality, and, presumably, on the student’s overall responses to both constitutionally permissible as well as constitutionally impermissible questions. Thus, where the harm in Tinker, Barnette, and Merriken unequivocally resulted from the constitutional violations, the denial of a high school diploma may result from other reasons. Moreover, absent the unlawful disclosure of test results, a student who either passed the exam in spite of the impermissible questions, or would have failed the test anyway, regardless of those questions would suffer no concrete harm. Accordingly, it is doubtful that the student in either of these two situations could successfully assert a claim for significant money damages or for the granting of a diploma. Only the student who failed the test solely as a result of impermissible questions would have a clear chance of obtaining such relief.

Two recent Supreme Court decisions have addressed the question of relief available to plaintiffs who are unable to establish a causal link between a constitutional violation and a remediable injury. In the first, Mt. Healthy City School District Board of Education v. Doyle, the Court considered a claim for reinstatement and back pay by an untenured teacher whose contract had not been renewed for both constitutionally permissible and impermissible reasons.

In dealing with the teacher’s contention that the nonrenewal decision had violated his first amendment rights, Justice Rehnquist, speaking for a unanimous Court, applied “a test of causation which distinguishes be-

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100. 319 U.S. at 629. See also text accompanying notes 27-32 supra.
101. Id.
102. 364 F. Supp. at 920.
104. The teacher had been involved in several disruptive incidents at school such as arguing with school employees and making obscene gestures to female students. He also had notified a local radio station of the substance of a school memorandum concerning teacher dress and appearance. All of these incidents played a part in the Board’s decision not to rehire him. See id. at 281-83.
tween a result caused by a constitutional violation and one not so caused.”105 Even if the teacher successfully meets the initial burden of proving that his conduct was both constitutionally protected and a "substantial factor" in the decision to terminate his employment,106 the school board's action "would [not] necessarily amount to a constitutional violation justifying remedial action."107 Only if the employer subsequently fails to show that the same decision would have been made in the absence of the protected conduct would the plaintiff be entitled to reinstatement and back pay.108 In other words, the Mt. Healthy test allows the employer to terminate an employee for cause even though the employee engages in protected activity, if the employer proves, by a preponderance of the evidence,109 that constitutionally permissible reasons were sufficient grounds for the decision.110 In the Court's words, "the constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct."111

After Mount Healthy, it is uncertain whether a constitutional violation can exist if the employer carries his burden of proof, or whether, given the same circumstances, the constitutional violation will not justify the remedies of reinstatement and back pay. Viewing the phrase "justifying remedial action" as a restrictive clause modifying "constitutional violation" supports the second interpretation.

Under either interpretation a student denied a high school diploma because of his failure to pass a competency test would first have to show that his answers or refusals to answer were constitutionally protected and were a substantial factor in the denial of the diploma.112 The burden would

105. Id. at 286.
106. Id. at 287.
107. Id. at 285. The Court accepted the district court's finding that the conduct in question was protected. Id. at 284. It disagreed, however, with the district court's decision that if protected conduct played a substantial part in the Board's decision, the plaintiff would necessarily prevail. Id. at 285.
108. Id. at 287.
109. Id. It thus remanded the case for the district court's determination of whether the Board had shown that it would have reached the same employment decision even in the absence of the protected conduct. Id. at 287.
110. The Court noted that a "borderline or marginal candidate" should not lose his job because of the constitutionally protected conduct. Id. at 286. It went on to state, however, that such a candidate: "ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision." Id.
111. Id. at 285-86.
112. How the Court defines the term "substantial" is not clear. If the student would not have passed the exam on the basis of the permissible questions, it is difficult to see how the
then shift to the school to prove the complaining student would have failed the competency test anyway, regardless of the impermissible questions. Should the state satisfy this burden, the student would not be entitled to a judicially awarded diploma.\(^{113}\)

*Mt. Healthy* appears to indicate that a plaintiff failing to meet the prescribed causation test would not be entitled to compensatory damages or to a mandatory injunction. But a subsequent decision, *Carey v. Piphus*,\(^ {114}\) may sanction nominal damages for those who fail to prove the factual injury resulted from a proven constitutional violation. *Piphus* involved an action for damages under the Civil Rights Act of 1871,\(^ {115}\) brought by students suspended from public school without due process.\(^ {116}\) While rejecting the students' claim for compensatory damages absent proof of actual injury resulting from the constitutional violation, the Court nevertheless held that the students would be entitled to nominal damages.\(^ {117}\)

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answers to impermissible questions could be viewed as a "substantial factor" in the ultimate denial of a diploma. Thus it would seem that these plaintiffs could not meet their burden of proof.

\(^{113}\) Although the *Mt. Healthy* test was articulated in the context of an untenured teacher's rights, it is also presumably the appropriate test for deciding students' first amendment and privacy challenges to competency tests. On the same day the Court decided *Mt. Healthy*, it applied the test to an equal protection challenge to a denial of a rezoning request. See *Arlington Heights v. Metropolitan Hous. Corp.*, 429 U.S. 252, 270 n.21 (1977). See also DuRoss, *Toward Rationality in Discriminatory Discharge Cases: the Impact of Mount Healthy v. Doyle Upon the NLRA*, 66 GEO. L.J. 1109, 1121 n.66 (1978).


\(^{115}\) The Civil Rights Act of 1871, codified at 42 U.S.C. § 1983 (1976), provides a private right of action for individuals deprived of constitutional rights. The statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

For a fuller discussion of the purposes of § 1983, see 435 U.S. at 253-59.

\(^{116}\) In *Piphus*, no finding was made by the district court as to whether the students would have been suspended had they been accorded prior due process hearings. 435 U.S. at 252. The Supreme Court agreed with the court of appeals that if the student's suspensions were proved on remand to be warranted, an award of compensatory damages for the school's violation of their due process rights would be a "windfall" rather than a compensation. 435 U.S. at 260. This part of *Piphus* supports the view that *Mt. Healthy* did not state that no constitutional violation exists if, in the case of mixed-motive dismissals, the employer can justify the nonrenewal decision with constitutionally permissible reasons.

\(^{117}\) The plaintiffs in *Carey v. Piphus* argued that regardless of whether they proved that actual damage flowed from the constitutional violation, such damage should be "presumed" because the plaintiffs suffered mental and emotional distress resulting from the denial of a "feeling of just treatment." 435 U.S. at 261. Although the Court recognized that such distress could be caused by the denial of procedural due process, it refused to go so far as to
making the denial of procedural due process actionable for nominal damages, the Court recognized that when "absolute" constitutional rights have been infringed, no proof of actual injury need be demonstrated.

Whether a cause of action for nominal damages would lie for a deprivation of nonprocedural rights was not explicitly discussed in Piphus. Nor did the Court define what rights, other than procedural ones, qualify as "absolute." Yet, among the seven lower court cases cited by the Court in support of its holding, three expressed approval of nominal damages when the deprivation of other rights had not been directly linked to actual injury. Arguably the right to refuse to answer test questions, which either encourage the parroting of orthodoxies or probe personal beliefs, could be characterized as an absolute right, whether based on the first amendment, which has been termed "the matrix, the indispensable condition of nearly every form of freedom" or on the right of privacy, now recognized as a protected liberty interest under the fourteenth amendment. Assuming, therefore, that Carey v. Piphus is not limited to deprivation of procedural rights, a student who successfully establishes that such questions violate first amendment rights or the right to privacy could—without proving actual injury—recover nominal damages and prohibitory injunctive relief forbidding further use of such questions on

assume that "every departure from procedural due process" would necessarily cause such injury. Id. at 263.

118. Id. at 266.

119. Id. The Court acknowledged the tradition followed by common law courts in vindicating certain "absolute rights":

By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury, or . . . to deter or punish malicious deprivations of rights.

Id. The Court found that procedural due process was an "absolute right" in the sense that it did not depend on the merits of the plaintiffs' substantive assertions, and because society has such a strong interest in seeing that procedural due process rights are enforced. Id.

120. Id. at 266-67 n.24.

121. Magnett v. Pelletier, 488 F.2d 33, 35 (lst Cir. 1973) (unreasonable search by police officer); Basista v. Weir, 340 F.2d 74, 87-88 (3d Cir. 1965) (unreasonable arrest); Berry v. Macon County Bd. of Educ., 380 F. Supp. 1244, 1248 (M.D. Ala. 1971) (right of board of education employees to send their children to private segregated schools).


124. The plaintiff might also try to prove emotional or mental distress resulting from being forced to think about and respond to such sensitive questions.
future tests.\(^\text{125}\) Thus relief would be possible even if lowered test scores did not result in the denial of a diploma or if mental and emotional distress could not be proved. Unlike a judicially awarded diploma or compensatory damages, such nominal damages and prohibitory injunctive relief would protect against invasion of first amendment and privacy rights without conferring an unearned “windfall” on the student.\(^\text{126}\) In Piphus, the Court also noted that a defendant’s potential liability for attorney’s fees under the Civil Rights Attorney’s Fees Awards Act of 1976,\(^\text{127}\) “provides additional—and by no means inconsequential—assurance that agents of the State will not deliberately ignore due process rights.”\(^\text{128}\) Although this caveat is limited to the discussion of procedural rights, the 1976 Act clearly does not restrict discretionary awards of attorney’s fees to prevailing parties in cases that deal solely with procedural rights.\(^\text{129}\)

II. SUBSTANTIVE DUE PROCESS CHALLENGES TO BASIC SKILLS AND FUNCTIONAL LITERACY TESTING

In substantive due process challenges to basic skills and functional literacy testing, claimants contend that such tests are arbitrary and capricious\(^\text{130}\) or fundamentally unfair,\(^\text{131}\) rather than violative of other specific

\(^{\text{125}}\) Unlike mandatory injunctions, such as the relief requested in the Mt. Healthy case, prohibitory injunctions are designed to retain the status quo. Generally courts are less reluctant to issue prohibitory injunctions than they are to issue mandatory injunctions, which require a showing of very serious injury. See Clune v. Publishers’ Ass’n, 214 F. Supp. 520 (S.D.N.Y. 1963), aff’d, 314 F.2d 343 (2d Cir. 1963); Costello v. Wainwright, 539 F.2d 547 (5th Cir. 1976).

\(^{\text{126}}\) 435 U.S. at 260.


\(^{\text{128}}\) 435 U.S. at 257 n.11.

\(^{\text{129}}\) The Act provides, in relevant part:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, . . . or in any civil action or proceedings, by or on behalf of the United States of America, to enforce . . . title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs.

\(^{\text{130}}\) The phrase “arbitrary and capricious” is a critical concept in administrative law, see, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971), and is explicitly included in the Administrative Procedure Act as a standard for judicial review of agency action. 5 U.S.C. § 706(2)(A) (1976).

\(^{\text{131}}\) The standard of review applied to substantive due process cases of this genre has not been clearly enunciated. Competency Testing, supra note 9, at 444 n.56. The phrases “arbitrary and capricious,” and “fundamentally unfair” appear to be the most frequently used. Regardless of the exact wording of the test under substantive due process, the general standard is that state action cannot be unreasonable, with unreasonableness being construed narrowly. Id.
constitutional rights. Under the rubric of the arbitrary and capricious or fundamental unfairness tests, this variation of substantive due process subsumes a variety of nonprocedural but traditional legal values protected by the principle of justice in criminal law; that is, the principle that demands that there be no crime without a law defining the crime, and no punishment without an act that falls within the definition of the crime. Transposed into the language of civil actions, this maxim can be restated as follows: no infraction can exist without a rule predefining required behavior and no disciplinary penalty can be imposed in the absence of an act or deficiency that falls within the definition of the preexisting rule.

Two kinds of challenges to basic skills and functional literacy testing have been formulated on substantive due process grounds. The first arises if there is a rule or norm established by educators, but no act or deficiency on the part of the student. This type of challenge is exemplified by St. Ann v. Palisi, a case dealing with nonacademic disciplinary matters. In

132. The umbrella of substantive due process has historically protected those rights recognized by the judiciary as fundamental but not expressly delineated in the Constitution. Perry, supra note 63, at 419. Although for a time the doctrine was scuttled from the vocabulary of modern civil liberties cases, e.g. Ferguson v. Skrupa, 372 U.S. 726 (1963), the Supreme Court has recently reaffirmed the vitality of the doctrine for use in the privacy area as one expressing the “concept of personal liberty.” Roe v. Wade, 410 U.S. 113, 153 (1973). See also Whalen v. Roe, 429 U.S. 589, 598-99 n.23 (1977); Griswold v. Connecticut, 381 U.S. 479, 500 (Harlan, J., concurring) (“[t]he Due Process Clause of the Fourteenth Amendment stands . . . on its own bottom . . . . While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations.”)

133. Within this meaning of substantive due process, the word “substantive” is sometimes but not always retained, an inconsistency which leads to confusion as to whether the issue in the case is really substantive or procedural. Compare Esteban v. Central Missouri State College, 415 F.2d 1077, 1087 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970) with Soglin v. Kauffman, 418 F.2d 163, 167 (7th Cir. 1969). Nonetheless in the words of Justice Harlan,

 Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three. . . .

Poe v. Ullman, 367 U.S. 497, 541 (1961)(Harlan, J., dissenting, emphasis added). Accordingly, because the concept of substantive due process clearly protects the rights discussed in this article, the term substantive due process will be used for purposes of this discussion.


135. The idea of casting this variation of substantive due process into the framework of a civil analog of the principle of legality in criminal law is that of the author, although the Fifth Circuit, in St. Ann v. Palisi, came close to doing so. 495 F.2d 423 (5th Cir. 1974). See text accompanying notes 136-38 infra.

136. 495 F.2d 423 (5th Cir. 1974).
1974, the Fifth Circuit held that the suspension of children from school, pursuant to a school board regulation authorizing suspension when parents of the children reproved teachers in an offensive manner, violated the substantive due process rights of the children. In *Palisi*, there was a rule, but there was no act or dereliction on the part of the children penalized by suspension. This, the court stated, violated the cardinal notion of liberty that individuals cannot be punished without personal guilt.\(^{137}\) To justify such a significant encroachment upon a basic due process guarantee, the state must satisfy the "substantial burden" of showing a compelling state interest that was furthered by the regulation.\(^{138}\)

Reasoning by analogy to the type of violation exemplified by *Palisi*, one commentator has argued that certain competency tests may be vulnerable to constitutional attack on substantive due process grounds if a failure to score at the required levels of reading and reading comprehension becomes the basis for the denial of a diploma.\(^{139}\) If a plaintiff could sustain the burden of proving that the test instrument lacked instructional validity\(^ {140}\)—that it measured what in fact was never taught in the schools—then

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137. *Id.* at 426-27. The court noted that "freedom from punishment in the absence of personal guilt is a fundamental concept in the American scheme of justice." *Id.* at 425 (emphasis in original). *See also* Cook v. Edwards, 341 F. Supp. 307 (D.N.H. 1972), in which the district court referred to the fundamental unfairness of indefinitely expelling a fifteen year old from high school because of difficulty between the student and her parents. The difficulty had led to the student's appearance at school in an intoxicated state, but did not manifest itself in disruptive behavior. While the court approved of the idea of a definite, temporary suspension for the offense of appearing drunk on school premises, it suggested that the severity of indefinite expulsion raised "a serious question of substantive due process." 341 F. Supp. at 311. It is not clear whether it was the severity of the penalty for the offense of appearing drunk or the school punishment for difficulties at home that raised the substantive due process question. While the two problems need not be treated in isolation, a severe punishment, such as an indefinite expulsion, meted out for a minor transgression may imply that part of the penalty has no reference to any specific acts.

138. 495 F.2d at 427 (emphasis in original). This burden included proof that reasonable alternative means were not available to meet the declared goal of the regulation. *Id.* at 428. For a fuller discussion of the various standards used in substantive due process cases, see McClung, *The Problem of the Due Process Exclusion: Do Schools Have a Continuing Responsibility to Educate Children with Behavior Problems?*, 3 J. LAW & EDUC. 491 (1974).

139. *Competency Testing*, *supra* note 9, at 446-47. McClung was referring to Palm Beach Florida's Adult Performance Level Test of reading and comprehension levels and to applications of "acquired learning in 'real life' situations." *Id.* at 439 and n.1.

140. *Id.* at 447. McClung's analysis is based on the concept of "instructional validity," and measures whether schools actually provide students with instruction in the types of knowledge and skills that the competency test is designed to measure. *Id.* at 446 n.70. It is not, as McClung notes, a concept included within the American Psychological Association's Standards for Education and Psychological Tests (1971). Furthermore, his concept of instructional validity is more exigent than the notion of curriculum validity, "a measure of how well test items represent the objectives of the curriculum to which the test takers have been exposed." *Id.* (emphasis added).
the denial of the diploma could be said to inflict punishment without culpable shortcomings on the part of the student. As the children in Palisi were punished for the guilt of the parents, so a number of high school seniors would be punished, if not for the guilt of the schools, then at least for the contributory deficiencies of the educational system as measured against the prescribed goals of the competency testing program.

A second type of substantive due process challenge arises when there is an act or deficiency on the part of the student, but there is allegedly inadequate prior notice of the standard that the student is required to meet. In contrast to the timely notice requirement which features so prominently in procedural due process, the notice inquiry in substantive due process challenges is concerned with whether there is any preexisting rule or norm

141. In its strictly procedural sense timely notice refers to notice of charges of violations of an acceptably clear, preexisting rule or law, and it is required not only to apprise the accused of what it is he must defend himself against, but to afford adequate time to prepare a defense for disciplinary hearings or for a criminal trial. As Professor Fuller once put it, “the first desideratum of a system for subjecting human conduct to the governance of rules is an obvious one: there must be rules.” L. FULLER, LAW AND MORALITY 46 (1965).

The immediate corollary of Professor Fuller’s statement is that criminal laws that are so vague that they do not indicate any ascertainable standard of conduct may be specious laws. Accordingly, they may be vulnerable to constitutional attack under the “void for vagueness” doctrine. See, e.g., Giaccio v. Pennsylvania, 382 U.S. 399, 404 (1966) (“some misconduct” as part of a jury instruction is too vague); United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921) (statute penalizing “any unjust or unreasonable rate or charge in handling or dealing in or with necessaries” is void for vagueness). One purpose of this due process doctrine is to prevent arbitrary and capricious state action by subjecting disciplinary and law enforcement officials to reasonably clear guidelines. See generally Grayned v. City of Rockford, 408 U.S. 104, 108 (1974); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972). The requirement of clarity also affords individuals fair notice and warning of the civil or penal consequences of their conduct.

One court explicitly referred to the void for vagueness doctrine as a substantive due process concept. Esteban v. Central Missouri State College, 415 F.2d 1077, 1087 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970). It has also been depicted simply as a due process concept. See, e.g., Smith v. Goguen, 415 U.S. 566, 572-73 (1973); Giaccio v. Pennsylvania, 382 U.S. at 404 (1968). But see also Young v. American Mini Theaters, 427 U.S. 50, 59 (1976), categorizing a vague statute’s inadequacy of notice as a matter of procedural due process. If the vagueness doctrine is viewed as a facet of procedural due process it is because it shares the fair warning rationale that underpins the notice requirements for a fair hearing. It is the emphasis on preventing unbridled penal or disciplinary discretion that would seem to give it its substantive due process flavor. When the vagueness doctrine is invoked in first amendment free expression challenges, however, the statute can be invalidated merely because of its chilling effect on constitutionally protected activity. Compare NAACP v. Button, 371 U.S. 415, 432-33 (1963) (if first amendment context requires an examination of a statute’s possible applications to situations other than the case at bar to determine whether void for vagueness applies) with United States v. National Dairy Prod. Corp., 372 U.S. 29, 36 (1963) (in nonfirst amendment contexts, the Court will only examine the specific conduct to which a statute is being applied in determining whether the provision is void for vagueness). For a further discussion of this doctrine’s relation to school disciplinary actions, see note 183 infra.
in light of which one can adjust one’s behavior. In *Mahavongsanan v. Hall*, for example, a graduate student in the College of Education at Georgia State University sued for the award of her master’s degree claiming, among other things, that the addition of a comprehensive examination as a degree requirement following her enrollment was “inherently unfair” because she had not received timely notice of the requirement prior to commencing her graduate studies. This notice demanded by substantive due process has been used to challenge competency prerequisites for a high school diploma when such prerequisites are introduced without a phase-in strategy affording both students and teachers adequate lead-time to orient learning and teaching to the objectives of the tests.

Challenges to basic skills competency testing brought under the banner of substantive due process may nonetheless encounter an inhospitable judiciary. Case law, especially the recent Supreme Court decision of *Board of Curators of the University of Missouri v. Horowitz*, suggests that it may be very difficult for “every student” to carry these two kinds of substantive due process claims across the imprecise conceptual frontier separating disciplinary from academic affairs. The primary focus of *Horowitz*, the first Supreme Court decision to address constitutional challenges to academic evaluations of students, dealt with the plaintiff’s claim that her dismissal from medical school for poor performance in her clinical work violated her right to procedural due process. Assuming that Horowitz had the prerequisite liberty or property interest in pursuing a medical career, a unanimous Court held that because she had been “fully informed” that her continued enrollment was in jeopardy and because the decision to dismiss her was “careful and deliberate,” she received all the process she was due. Consequently, Horowitz was not entitled to any kind of academic-administrative hearing.

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142. 401 F. Supp. 381 (N.D. Ga. 1975), rev’d, 529 F.2d 448 (5th Cir. 1976). For a further discussion of this case, see notes 163 and accompanying text infra.
143. 401 F. Supp. at 383.
144. *Competency Testing, supra* note 9, at 444. The failure of the state to provide students with sufficient notice to prepare for Florida’s test is included among the charges in Debra P. v. Turlington, No. 78-892 (M.D. Fla., filed Oct. 16, 1978).
146. *Id.* at 84-85. The Supreme Court has indicated conclusively, however, that high school students do have a property interest in education. See *Goss v. Lopez*, 419 U.S. 565, 574 (1975).
147. 435 U.S. at 85.
148. In a footnote, the Court concluded “that considering all relevant factors, including the evaluative nature of the inquiry and the significant and historically supported interest of the school in preserving its present framework for academic evaluations, a hearing is not required by the Due Process Clause of the Fourteenth Amendment.” *Id.* at 86 n.3.
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...tion of misconduct from an inquiry into the quality of academic performance, the Court invoked the language of a vintage 1913 Massachusetts case involving the formulation and application of scholastic standards to a ninth grade student: "A public hearing may be regarded as helpful to the ascertainment of misconduct and useless or harmful in finding out the truth as to scholarship." 149

The Supreme Court's opinion did not deal exclusively with Horowitz's claim that she was entitled to an adversary hearing under the auspices of the University. Additionally, six justices specifically rejected Horowitz's substantive due process claim that her dismissal was "arbitrary and capricious." 150 The Court noted that even if the arbitrary and capricious test were the proper standard for judicial review of an academic decision, an issue not before the Court, no such showing had been made. 151 What is more, the Court emphatically stated that "[c]ourts are particularly ill-equipped to evaluate academic performance," 152 and, in concluding, warned against "any such judicial intrusion into academic decisionmaking." 153

The forceful treatment of Horowitz's substantive due process claim can be read as sapping the potential of most, if not all, due process challenges to academic evaluations of students. The issue was not, as it would be in a first amendment challenge, whether the medical school faculty and administrators had violated, in the name of academic decisionmaking, a specific...
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right contained in or read into the Bill of Rights. Rather, the issue was whether a professional academic judgment was arbitrary and capricious as measured against professional norms, and concurrently, whether a courtroom is a proper forum for resolving such disputes. In drawing a sharp line between "academic evaluations" and disciplinary determinations, the Horowitz Court cited with approval the Barnard holding that courts should generally refrain from scrutinizing the formulation and application of academic standards. In disposing of Horowitz's substantive due

154. 435 U.S. at 87, 91 n.6.

155. Id. at 87, 90 (citing Barnard v. Inhabitants of Shelbourne, 216 Mass. 19, 102 N.E. 1095 (1913)). Although this case was quoted in the Court's discussion of Horowitz's procedural claim, its authority apparently carried over to the discussion of her substantive due process claim as well. The Court observed that "the factors discussed . . . with respect to procedural due process speak a fortiori" to claims of arbitrary and capricious evaluations of academic performance. 435 U.S. at 92. The Court's reliance on Barnard, which involved secondary students, indicates the Court's deference to the professional judgment of educators was not confined to those in higher professional education.

In the Barnard case, the plaintiff brought an unsuccessful state common law tort claim for damages for wrongful exclusion from the public high school of Shelbourne. The Massachusetts Supreme Court adopted the position that courts must refrain from scrutinizing the formulation and application of academic standards unless the plaintiff can make a clear showing of bad faith on the part of school officials. 216 Mass. at 21, 102 N.E. at 1096. Accord, Gaspar v. Bruton, 513 F.2d 843, 850 (10th Cir. 1975). The Horowitz opinion made no reference to this standard. In Wood v. Strickland, 420 U.S. 308 (1975), however, the Supreme Court enunciated the standard of qualified good faith immunity of individuals from damages under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976), which affords a private cause of action for violations of the fourteenth amendment. See note 115 supra.

The Court concluded, in part, that the defendants would be liable if they had either "malicious intention to cause a deprivation of constitutional rights or other injury to the student" or had acted with "such disregard" of students' clearly established constitutional rights that their actions could not "reasonably be characterized as being in good faith." 420 U.S. at 322. For a fuller discussion of Wood and its implications concerning an official's qualified immunity in § 1983 actions, see Yudof, Liability for Constitutional Torts and the Risks - Averse Public School Official, 49 S. CAL. L. REV. 1332 (1976); Comment, Constitutional Law—Qualified School Board Immunity, 6 MEMPHIS ST. UNIV. L. REV. 125 (1975); The Supreme Court, 1974 Term 89 HARV. L. REV. 47, 219 (1975); Note, Government Immunity—Qualified Immunity for School Board Members—A Standard for Determining Good Faith Under 42 U.S.C. Section 1983, II WAKE FOREST L. REV. 720 (1975).

In the later decision of Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978), the Supreme Court overruled its earlier decision of Monroe v. Pape, 365 U.S. 167 (1961), and held that local governing bodies, including local school boards and local officials sued in their official capacities, are "persons" within the meaning of § 1983 and can therefore be sued directly for monetary, declaratory, or injunctive relief. Thus, plaintiffs contesting competency examinations may sue a local school board as an entity, rather than suing individual board members. In ruling that local governments and local officials are not absolutely immune from suit when official policy "of some nature," is allegedly responsible for deprivation of constitutional rights, the Court refused to discuss the scope of a qualified municipal immunity. 436 U.S. at 691. Therefore the Court did not decide whether the
process claim, the Court suggested in effect that courts lack even minimal competence to evaluate the academic judgments of educators.

If it is a fair reading of *Horowitz* that federal courts have very little business taking their constitutional in territory which educators have traditionally staked out for the exercise of their sovereign professional discretion, then "everystudent's" claim that basic skills and functional literacy tests are arbitrary and capricious because they lack instructional validity is not likely to prevail. Although neither *Horowitz* nor the lower court cases cited by the *Horowitz* Court involved challenges to the use of standardized tests, the Court's expressed reluctance to evaluate the academic judgment of educators would presumably extend to educational determinations that skills tested had been adequately taught in school.\(^{157}\)

\(^{156}\) Qualified good faith immunity test announced in Wood v. Strickland is applicable to suits against school boards rather than individual members.

\(^{157}\) It should be noted that since *Monell* limited its holding to local government units, which are not part of the state for eleventh amendment purposes, state boards of education continue to enjoy immunity from § 1983 suits. For a discussion of the relationship between § 1983 and eleventh amendment immunity of state universities and state agencies, see Clague, *Suing the University "Black Box" under the Civil Rights Act of 1871*, 62 Iowa L. Rev. 337, 361-79 (1976).

\(^{158}\) See, e.g., Gaspar v. Bruton, 513 F.2d 843 (10th Cir. 1975); Mustell v. Rose, 282 Ala. 358, 211 So. 2d 489, *cert. denied* 393 U.S. 936 (1968).


But when standardized tests have been attacked, the plaintiffs generally have not been "everystudent." Rather, they have been litigants who, typically as a judicially recognized "class" in class action lawsuits, share certain racial, linguistic, ethnic or sexual attributes. They have challenged the differential and allegedly discriminatory impact that these tests have on their class, basing their challenge either on equal protection or the federal civil rights laws. See generally Trachtenburg & Jacoby, *Pupil Testing: A Legal View*, 59 Phi Delta Kappan 249 (1977).

In January, 1978, the Supreme Court summarily affirmed the district court's opinion in United States v. South Carolina, 434 U.S. 1026 (1978), *aff'd*, 445 F. Supp. 1094 (D.S.C. 1977). The district court had held the state's use of the National Teacher Examination (NTE), used to certify teachers as minimally competent, satisfied both the fourteenth amendment's equal protection clause and the statutory standard under Title VII of the Civil
 Thus, "everystudent" is likely to find himself on the same footing as the public school teacher who challenges the fairness of assessments made of his professional competence. For example, in *Scheelhaase v. Woodbury Central Community School District*,¹⁵⁸ the Eighth Circuit upheld the firing of an Iowa teacher, dismissed because of the relatively low test scores her students received in the Iowa Tests of Basic Skills and Basic Development. The district court had ordered her reinstatement, concluding that a teacher's competence could not be determined solely on the basis of such scores, and thus that her termination was arbitrary and capricious.¹⁵⁹ On appeal the Eighth Circuit reversed, stating that "[s]uch matters as the competency of teachers, and the standards of its measurement are not, without more, matters of constitutional dimensions."¹⁶⁰

Rights Act of 1964, 42 U.S.C. 2000e-2 (1976), in the absence of proof of intent to discriminate and in spite of the disproportionate impact on blacks. While the district court found that the NTE had met the requirements of "a professionally designed and executed validity study," 445 F. Supp. at 1109, it did not mandate this kind of validation as a defense against an equal protection challenge. *Id.* The NTE case deals with professional certification rather than graduation from high school. It seems reasonable to infer, however, that if the courts do not require a "validity study" to demonstrate "the relationship between a challenged use of a test and the governmental objective for which it is being used," *id.*, in the sensitive area of racial discrimination, they are not very likely to respond to the constitutional challenges of "everystudent."

¹⁵⁸. 349 F. Supp. 988 (N.D. Iowa 1972), rev'd, 488 F.2d 237 (8th Cir. 1973), cert. denied, 417 U.S. 969 (1975). No issue of procedural due process was involved since the plaintiff had been given a hearing.

¹⁵⁹. 349 F. Supp. at 990.

¹⁶⁰. 488 F.2d at 244. The court went on to note that "[t]hey are peculiarly appropriate to state and local administration." *Id.* Although the analysis was not entirely clear, the court apparently refused to apply the arbitrary and capricious standard to cases in which the school board lacked a factual basis for its decision unless the school board had first subjected the teacher to public charges. *Id.* at 242 and n.8. The opinion began by deferring to the discretion of the Board, even if it had "been exercised with a lack of wisdom." *Id.* at 237.

The rest of the majority's opinion focused on the concept that "absent contractual, legislative or constitutional provisions . . ., government employment can be revoked at the will of the appointing officer." *Id.* at 244 (quoting Harnett v. Ulett, 466 F.2d 113, 117 (8th Cir. 1972)). The *Scheelhaase* court apparently was guided by the position in Board of Regents v. Roth, 408 U.S. 564 (1972), holding that terminated untenured teachers have no procedural due process right to either a hearing or even a statement of the reasons not to rehire. Under *Roth*, even if the untenured teacher is entitled to a hearing, as when reasons have been made public that are damaging to his reputation, the only purpose of the hearing is to clear his name. The employer is still free to deny him employment. *Id.* at 572 and n.12. See also Perry v. Sinderman, 408 U.S. 593 (1972) (proof of a property interest in a job derived from state law entitles a teacher to a hearing at which he would be informed of the reasons for nonretention, but does not require reinstatement). Apparently the court in *Scheelhaase* concluded from *Roth* that since no reasons need be given for termination, a court is not free to determine if such reasons are arbitrary and capricious in the absence of public stigma. See 488 F.2d at 242 and n.8. See also Bishop v. Wood, 426 U.S. 341 (1976) (no right to a hearing
The other type of substantive due process claim—that students must receive adequate notice requiring them to pass a basic skills test before receiving a diploma—remains the most viable substantive due process challenge not foreclosed by Horowitz. The Court's warning in Horowitz against "any such judicial intrusion into academic decision-making" followed its declaration that courts lack the special expertise necessary to evaluate "academic performance."161 The neat verbal dichotomy between disciplinary actions and academic decisions that provided the framework for the Court's noninterventionist philosophy blurs if a distinction is drawn, within the category of academic decisions, between evaluations of student performance and evaluations of academic regulations.

In dismissing Horowitz's substantive due process claim, the Court referred to dicta in lower court cases implying that courts enjoy some limited prerogative to enjoin academic dismissals from public institutions when the dismissals are clearly arbitrary and capricious.162 Mahavongsanan v. Hall, for example, challenged the arbitrary timing of an academic regulation, rather than the educational evaluation of student performance.163

to clear name when reasons for discharge not made in public, notwithstanding claim that reasons were false and potentially damaging to reputation).

The Court's position regarding teachers may well be different from its position regarding students. Failure to graduate from high school is arguably sufficient public stigma to warrant the use of the arbitrary and capricious standard. Unlike terminated teachers, who are not "foreclosed" from taking "other employment opportunities," Roth, 408 U.S. at 573, students failing to get high school diplomas are clearly precluded from many types of jobs. Moreover, unlike the untenured teachers in Roth and Scheelhaase, students clearly have a property interest in public education and when suspended for disciplinary actions, must be given notice of the charges and an opportunity to rebut them. Goss v. Lopez, 419 U.S. 565 (1975).

161. 435 U.S. at 92 (emphasis added).
162. Id. at 91 (citing Mahavongsan v. Hall, 529 F.2d 448, 449 (5th Cir. 1976) and Gaspar v. Bruton, 513 F.2d 843, 850 (10th Cir. 1975)). In Gaspar, a nursing student alleged that her dismissal from school for academic deficiencies was "unreasonable, arbitrary and capricious, and that she was deprived of a property right. . . ." 513 F.2d at 846 (emphasis in original.) The Tenth Circuit, rejecting her claim, concluded that "when presented with a challenge that the school authorities suspended or dismissed a student for failure re (sic) academic standards, the court may grant relief, as a practical matter, only in those cases where the student presents positive evidence of ill will or bad motive." Id. at 851. Thus, although the court recognized that it may apply the arbitrary and capricious standard to academic dismissals, id. at 850, it apparently limited the standard to "ill will" or "bad motive."

163. 529 F.2d 448 (5th Cir. 1976). See text accompanying notes 142-43 supra. The Fifth Circuit found, on the particular facts, that revised academic requirements for a masters degree did provide sufficient notice to permit the plaintiff to prepare herself intellectually for the challenge of a comprehensive evaluation. The court found that she had been given "timely notice" that she would be required to take a comprehensive examination and "ample notice" to prepare for the second examination following her failure of the first. Moreover, she was given a "reasonable opportunity to complete additional course work in lieu of
Although the plaintiff's claim was defeated on the merits, the court did not abjure all judicial consideration of the fairness of academic regulations as beyond the competence of the federal courts. Nor does Horowitz's elusive treatment of the distinction between judicial evaluation of student academic performance and judicial assessment of the fundamental fairness of academic regulation unequivocally foreclose substantive due process challenges to the adequacy of notice for which a number of competency testing programs might be constitutionally faulted. As previously indicated, suddenly conditioning the granting of a high school diploma upon the passage of a competency test could arguably fail a "timely notice" requirement without some phase-in strategy, affording both students and teachers adequate lead-time to orient learning and teaching to the objectives of the tests. Challenging the fairness of the timing of academic requirements would not drag the courts into evaluations of student academic performance. Rather, adequate prior notice necessarily implicates legal values of which the courts are traditional guardians outside the educational arena. Whether the present Supreme Court would endorse a limited judicial incursion into academic decisionmaking and require that high school exit tests be grandfathered is not answered by the language of the Horowitz opinion, since a clear distinction between academic requirements and academic performance was neither drawn or disavowed. The dicta of lower courts that dismissals from public educational institutions can be overturned if "shown to be clearly arbitrary or capricious" was neither endorsed nor repudiated.  

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164. See text accompanying note 144 supra. The decision in Florida State Bd. of Educ. v. Brady, 368 So. 2d 661 (Dist. Ct. App. 1979), upholding the scoring criterion adopted by the State Commissioner of Education, was based on an interpretation of Florida statutes. See note 9 supra. But the state court also noted the relevance of the Horowitz decision's emphasis on judicial nonintervention in matters of academic evaluations of students for circumstances presented by the Brady case: failure of an "evenly administered" competency test by an 11th grade student who was afforded ample opportunity to correct his deficiencies before any determination would be made as to his entitlement to graduate. 368 So. 2d at 663. Under these conditions the court added, "[h]e should appreciate rather than complain about the education system in Florida . . . ." Id.  

165. If the courts were to require that exit tests be "grandfathered," the grade levels affected would presumably depend on the nature of the skills tested.  

166. See 435 U.S. at 91. See note 151 supra. As one commentator has noted, lower courts "could foreseeably transform the 'careful and deliberate' procedural due process standard in Horowitz into a disguised substantive due process test by holding that a 'grossly inequitable' academic dismissal could not have resulted from a 'careful and deliberate' consideration of a student's scholastic performance." Pavela, Judicial Review of Academic Decisionmaking After Horowitz, 8 NOLPE SCHOOL L.J. 55, 60 (1979). As Pavela also points out,
Although Horowitz does not definitively preclude judicial review of high school exit test requirements allegedly introduced without “timely notice,” nonetheless, other Supreme Court decisions suggest that judicial scrutiny at the behest of “every student” is problematic. The Court's concern with the limits of judicial competence is not the only factor accounting for its reluctance to intervene in academic affairs. In several recent education decisions, the Court has repeatedly acknowledged that legal proceedings are not always appropriate for resolving conflicts peculiar to educational settings. Even in territory clearly identified as disciplinary, in which the educator’s discretion has been subjected to constitutional restraints, the Court has tread lightly.

In Goss v. Lopez, the leading decision addressing the extent of procedural protections required in short-term disciplinary suspensions, the Court imposed only the most “rudimentary” notice and hearing requirements to safeguard against “unfair or mistaken” findings of misconduct. In requiring these procedural guarantees, the majority sought to limit them to, and equate them with, what it believed would be sound educational practice. The Horowitz majority appeared even less willing to impose procedural restraints on the exercise of educator’s academic judgments. Quoting from Justice Powell's dissenting opinion in Goss, the Horowitz Court emphasized the nonadversarial and informal nature of faculty-student relationships, stressing the multitude of roles necessarily played by a teacher. Moreover, in a more recent decision, the Court refused to limit

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state court decisions which have examined the fairness of academic decisions under several other legal theories, were not invalidated by the Horowitz opinion. Id. at 55.


168. Id. at 581. For suspensions up to ten days, the Court required only that a student be given written or oral notice of the charges, with an explanation of the evidence, and an opportunity to “present his side of the story.” Id.

169. In requiring informal, rudimentary due process procedures, the Court stated: “we do not believe that we have imposed procedures on school disciplinarians which are inappropriate in a classroom setting. Instead we have imposed requirements which are, if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions.” 419 U.S. at 583.

170. Justice Powell, with whom Justices Burger, Blackmun and Rehnquist joined, dissented vigorously from the Court's imposition of a requirement of a notice and hearing prior to or immediately after a suspension. They argued that whatever infringement occurred did not “justify imposition of a constitutional rule.” Id. at 586. They warned that the decision would “sweep within the protected interest in education a multitude of discretionary decisions in the educational process,” including academic evaluations. Id. at 597. The Horowitz decision, written by Justice Rehnquist, apparently adopted the dissenters' position in Goss that judicial intrusion into school policy should be limited.

171. The Court stated that a teacher “must occupy many roles—educator, advisor, friend, and at times, parent-substitute.” 435 U.S. at 90 (quoting Goss v. Lopez, 419 U.S. 565, 594 (Powell, J. dissenting)). Justice Powell noted in Goss that courts have "relied for genera-
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the school disciplinarian's discretionary infliction of corporal punishment by constitutionally required prior procedural precautions. Thus the Court has refused to impede the flexibility essential to the educational process by imposing stringent procedural requirements in school settings.

If the Supreme Court has been modest in its imposition of constitutionally-guaranteed procedural rights in school disciplinary cases, it has been openly reluctant to entertain substantive due process claims alleging the absence of a preexisting rule governing the unlawful act. Indeed, in Wood v. Strickland, the Court came very close to precluding all judicial review of the meaning of school disciplinary rules. In Strickland, two girls were expelled from high school for the admitted deed of adding malt liquor to a punch served at a school-related activity. They later claimed that their substantive due process rights had been violated because the malt liquor did not qualify an intoxicating beverage under state law. Satisfied that the liquor nevertheless came within the school board's nontechnical definition of intoxicating beverage, the Supreme Court reversed the Eighth Circuit's finding of a substantive due process violation. It warned federal courts against setting aside "decisions of school administrators which the court may view as lacking a basis in wisdom or compassion." The Court further stated that the Civil Rights Act of 1871 "does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations." A policy of little or no judicial intervention in disputes over the

172. Ingraham v. Wright, 430 U.S. 651, 683 (1977). The Court also found that the eighth amendment's prohibition against cruel and unusual punishment is not applicable to corporal punishment in the schools. Id. at 682.


174. The Eighth Circuit had held that the girls were denied substantive due process because the school board failed to determine whether "Right-Time" was an intoxicating beverage. Strickland v. Inlow, 485 F.2d 186, 190 (8th Cir. 1973), rev'd sub nom. Wood v. Strickland, 420 U.S. 308 (1975).

175. 420 U.S. at 326.


177. 42 U.S.C. at 326. (emphasis added). Furthermore, it is not clear to what degree the Supreme Court would require that school regulations satisfy the specificity standard of the criminal law's void for vagueness doctrine in dealing with disciplinary problems that do not involve first amendment considerations. See note 141 supra. The circuit courts are split. Some take the position that college conduct regulations are part of an educational process and are not required to meet the standards of specificity demanded of the criminal code. See, e.g., Esteban v. Central Mo. State College, 415 F.2d 1077 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970). Others view disciplinary regulations as punitive and therefore analogous to criminal statutes that must meet constitutional standards of specificity. See, e.g., Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969). See generally Note, Vagueness Doctrine in
proper construction of school disciplinary regulations would be likely to extend, a fortiori, to academic regulations.

Thus, in spite of the expanded policymaking role laid upon or assumed by the federal courts, challenges raised under the banner of substantive due process to both disciplinary and academic assessments of "every-student" may encounter the traditional judicial deference to educator discretion.

*Federal Courts: A Focus on the Military, Prison, and Campus Contexts,* 26 *Stan. L. Rev.* 855, 879-82 and n.138 [hereinafter cited as Vagueness Doctrine]. The Supreme Court has not directly addressed the question of the application of this version of the vagueness doctrine to school contexts. In *Healy v. James,* however, it quoted with approval that portion of Justice Blackmun's *Esteban* opinion, written while he served on the Eighth Circuit, holding that a college has the "inherent power" to "properly" discipline its students. 408 U.S. 169, 192 (1972) (quoting *Esteban v. Central Mo. State College,* 415 F.2d 1077, 1089) (8th Cir. 1969)). One commentator has suggested that the *Esteban* court's affirmation of an inherent power to discipline "seems to mean that not only is there no need for precise rules on the campus, but it is not necessary to make known in advance any rules at all—certainly the ultimate in vagueness." Vagueness Doctrine, supra, at 879 n.138. Since *Healy* is a first amendment case, it should not necessarily be read to imply that the Supreme Court endorsed this commentator's extreme interpretation. Blackmun's statement was cited in *Healy* to support the proposition that students may not flout reasonable campus regulations governing speech-related activity. Since the existence of a valid rule governing applications for official recognition of campus organizations was assumed, the Court did not have to "decide whether any particular formulation would or would not prove constitutionally acceptable." 408 U.S. at 193-94. Although the Court permitted the students to advocate "doing away with any and all campus regulations," *id.* at 192, it did not imply that the academic institution could do away with rules in areas having nothing to do with first amendment concerns. The opinion of the Court in *Horowitz,* however, contains a very significant footnote. It stated that the principle that agencies must follow their own rules, enunciated in *Service v. Dulles,* 354 U.S. 363 (1957), is a principle of federal administrative law and not of constitutional law binding upon the states. 435 U.S. at 92 n.8. One could interpret this footnote to imply that although state agencies may create rules of conduct, they are not constitutionally bound to follow them once created. Thus, they may not be required to establish any disciplinary rules with any degree of specificity.


179. To speculate on the particular constitutional questions covered in Part II of this article isolates, of course, one piece of the larger puzzle of accountability for educational outcomes. Substantive due process claims, raised by students who are denied a high school diploma because they fail basic skills and functional literacy tests, seek to establish a balance of responsibility between the educational system and the student. Alternative legal claims, raised by functionally illiterate students who are graduated with rather than denied a high school diploma, attempt to place the burden of financial accountability either on the educators and the school system, or on the diagnostic specialists and their employers. "Educational malpractice" claims, which allege negligent failure and breach of statutory duty to teach have not been successful thus far. See, e.g., Donohue v. Copiague Union Free School Dist., 64 App. Div. 2d 29, 407 N.Y.S. 2d 874 (1978); Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976). In both of these cases the state courts refused to recognize a duty of instructional care because of the absence of a demonstrable science of pedagogy which would provide criteria to assess and comprehend the al-
III. CONCLUSION

Now that the litigation syndrome has invaded the once autonomous domain of education, a wide range of issues of educational policy have been converted into legally framed questions for judicial resolution. So it is with minimum competency testing.

How receptive the federal courts might be to "everystudent's" constitutional challenge will depend in part on their assessment of judicial competence to evaluate the particular issues that are presented as well as their concern with the excessive intrusion of legalism into the domain of education. Possible first amendment challenges may arise if comprehensive views of the mission of education are linked to student accountability and translated into test items designed to assess the appropriateness or correctness of attitudes, opinions or even behavior. The state's interest in scoring student values on matters of politics, beauty, parenting, interpersonal skills, cooperation, attitudes toward school and work, and sexual orientation has been rendered constitutionally suspect by *Barnette* and *Tinker*, and possibly by *Yoder*. A judicial veto of compulsory value-testing would not only further sound first amendment case law, it would also be consonant with sensible educational policy. *Barnette* suggested the plausible hypothesis that if testing invades the realm of individual attitudes and beliefs, what the testers would most likely actually measure is the student's competence to "simulate assent by words without belief and by a gesture barren of meaning."  

Judicial support for privacy claims against intrusive value testing or assessments would also be consonant with sound educational policy. *Merriken's* support for student and parental privacy was coupled with a well-founded concern about the potentially dangerous consequences to students presented by the schools' drug program. The Supreme Court has never considered the boundaries of a student's constitutionally protected right of privacy. As Judge Wright emphasized, however, in his dissent in *McMillan*, the compulsory nature of school attendance which diminishes the freedom of students, combined with the "inherent nature of the teacher-student relationship," demands careful judicial scrutiny of intrusions on

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180. 319 U.S. at 633.
181. 459 F.2d at 1325.
the privacy of students. Thus even though the Horowitz opinion stressed that the special relationship of faculty and students should counsel hesitation in imposing overly legalistic, adversarial procedures on the educational process, we may need an activist judiciary to protect the faculty-student relationship, which is enhanced by an atmosphere of trust, from mandates that infringe upon fundamental personal rights.

It is possible that a reticent judiciary might invoke Horowitz to recast any free speech and privacy issues that competency testing might pose into the framework that Justice Frankfurter had established in Gobitis. That is, the courts could avoid the constitutional issue by treating value-oriented questions or assessments as part of the process of evaluating academic performance, hence as a matter on which they must defer to the superior expertise of educators. But such an artful dodge would subvert Barnette and Tinker and distort Horowitz. The Horowitz majority did not renounce the Court's authority to play the role of constitutional pedagogue to educators when fundamental personal rights are violated by educational programs and practices. While this role interjects the courts into issues of educational policy, the criteria that guide and limit judicial involvement are derived from constitutional concepts. This was implicit in the Barnette Court's justification for its application of the Bill of Rights to education. The diffidence, on the other hand, with which the Horowitz opinion treated Charlotte Horowitz's substantive due process complaint can be interpreted as reluctance to engage in an evaluation of educators' assessment of student academic performance using intellectual and behavioral criteria internal to the educators' discipline. Having rejected the contention that her dismissal was premised on irrelevant personal characteristics rather than on her academic performance, this is the unwelcome consequence that Justice Rehnquist, and those who joined in his majority opinion, apparently envisaged.

This article is a speculative piece. As two commentators have stated, "[f]orecasting the future of minimum-competency testing is as uncertain as reading tea leaves." State programs are in various stages of development and reevaluation. Critics from the field of education have been vocal and state legislatures may be showing signs of disenchantment.

182. Id.
183. Haney & Madaus, supra note 1, at 477.
advice has been solicited and lawsuits have been filed that have attuned program developers to possible legal danger points. The weight to be accorded to value-oriented components, to the extent that they are implemented, is not yet determined. Although the requirements of substantive due process are neither carefully articulated nor clearly applicable to educational settings, the legal concept of timely notice has already influenced state planners, retroactively as well as prospectively. Minimum-competency testing is not a dead horse, but it may become, during the course of its grooming, a horse of a different and more healthy color.

185. See note 9 supra.
186. Ralph Turlington, Florida's new Commissioner of Education, the named defendant in the case of Debra P. v. Turlington, No. 78-892 (M.D. Fla., filed Oct. 16, 1978), was quoted in late December as saying that a state cabinet-level task force "recommends holding off on a plan to withhold high school diplomas" this coming June. Report on Educ. Research, December 27, 1978, at 3. The task force has also been quoted as saying that Florida's functional literacy test was "too hastily constructed" and that the state can "cannot morally justify" denying regular diplomas to this year's high school seniors. Id. In early spring, however, the Florida legislature voted decisively not to delay the requirement that this year's graduating seniors must have passed the 1978 competency test. Report on Educ. Research, April 18, 1979, at 10. In May 1979, the Florida legislature reportedly passed a bill that would provide a 13th year of remedial schooling for students who fail the statewide competency test, coupled with two added chances to pass the test. Report on Educ. Research, May 30, 1979, at 2.
187. The position taken by the task force appointed by Florida's Commissioner of Education is a prime example. See notes 9 and 186 supra.
188. Maryland's testing scheme is illustrative. In light of legal challenges spawned by Florida's hasty introduction of functional literacy and mathematics exams, see note 9 supra, Maryland is delaying the addition of the math component to its testing program. Telephone interview with Dr. Richard Petre, Director of Project Basic (Dec. 15, 1978).