Constitutionalism and the Education of American-Indian Children: 
A Critique of Civic Education
by Mark E. Brandon∗

[DRAFT: Not for Citation or Quotation Without Permission]

I. Contemporary Arguments for Civic Education
   A. Amy Gutmann
   B. Stephen Macedo
   C. Suzanna Sherry
   D. Quibbles and Questions

II. The Education of Indians in North America
   A. The Europeans
   B. The Americans Through the Nineteenth Century

III. A Constitutionalist Critique of Civic Education
   A. Structural Similarities
   B. Consistency with Constitutionalism
   C. Inconsistency with Constitutionalism
   D. Constitutionalist Solutions?

The point of this essay is to probe a version of the following question: To what extent may a constitutionalist order regulate education so as to (re-)produce its own citizens? The paper proceeds in three parts. First, it reviews three present-day arguments for a strong program of civic education. Second, it examines the history of policies aimed at educating American-Indian children in North America through the nineteenth century. Third, in light of the American-Indian experience, it considers justifications for and possible objections to muscular programs for civic education in a constitutionalist order.

I. Contemporary Arguments for Civic Education

   It is impossible for a constitutionalist order to persist without institutions capable of
inculcating the virtues and abilities of a citizenry whose members are attached to the order.¹ In the past two decades, prominent American scholars of law and politics have championed a program of civic (or “democratic” or “liberal” or “republican”) education for children, including especially students in public schools. Notable contributions have come from Jean Bethke Elshtain,² Amy Gutmann,³ Stephen Macedo,⁴ Linda C. McClain,⁵ and Suzanna Sherry.⁶ Because I won’t be discussing in detail the theories of Elshtain and McClain, I might say a few words about their respective positions.

Elshtain (like Sherry) is reacting explicitly to what she perceives to be the consequences of a pernicious combination of liberalism and multiculturalism: a culture of irresponsible and dissolute individualism, the incubation of political identities that tend to be tied to ethnicity or group, and an ethos of victimization, entitlement, and sentimentalism. Although Elshtain urges that her approach is not statist, she wants to use government’s authority over education to build a common, national, civic culture. McClain, in contrast, is concerned specifically with “sex equality,” a value that she


notes is inconsistent with the practices (and values) of some families but central to the constitution of a good liberal society. How to instill in children a respect for sexual equality when families fail (refuse even) to do so? She argues that state-sponsored education is a useful, non-coercive way to inculcate the value.

Both Elshtain’s and McClain’s arguments are interesting and important. For now, however, I want to focus on Gutmann, Macedo, and Sherry. Their theories are comprehensive and systematic, which is helpful. And they permit us to evaluate terminology and concepts that, on the surface at least, appear to diverge. But although they use different labels – liberal, democratic, republican – we’ll see that their denominations veil a basic kinship.

A. Amy Gutmann

Gutmann’s theory is explicitly “democratic.” John Dewey had posited that the proper aim of democratic education was this: “what the best and wisest parent wants for his own child, that must the community want for all of its children.” On this point, Gutmann parts company with Dewey, because, she says, it misunderstands both the proper function of education in a democracy and the proper agents of democratic education. The most important function of education in a democracy, she argues, is not to mirror the preferences of parents or the community. Education’s most important function is “conscious social reproduction in its most inclusive form.” Let’s defer the question of what the phrase “most inclusive form” might entail. The notion of “conscious social reproduction,” she says, distinguishes democratic education from “political socialization.” The latter is largely concerned with the unconscious transmission of “political values, attitudes, and modes of behavior.” The former, in contrast, both is (self)conscious and aspires to enable children
to become fully functional democratic citizens.\textsuperscript{7}

But “who should have authority to shape the education of future citizens” in a democratic order? Gutmann’s answer is an argument for a trinitarian separation of powers. First, she retains the parents, but minimizes their role in formal education. Second, she expands the scope of “community” beyond local community to national society. But even these modifications can’t achieve democracy’s aims, for “[c]itizens and public officials can use democratic processes to destroy democracy.” Democracy, she urges, must survive. In order for it to survive, the democratic citizens who adopt educational policy must simultaneously be empowered and constrained. They must be empowered, that is, to rise above parochial interests, sectarian values, and familial prejudice. They must be constrained from reproducing those interests, values, and prejudices. But how properly to empower and constrain? Gutmann’s answer extends the domain of authority to include professional educators, who have expertise in “critical deliberation.” The capacity for critical deliberation is the constitutive capacity of democratic citizens.\textsuperscript{8}

Expanding the number of authorities, however, cannot alone achieve the proper balance of empowerment and restraint. Thus, all educational actors are obliged to adhere to two principles. The first is the principle of nonrepression. This principle posits that neither groups – whether familial, religious, or other – nor the state may use “education to restrict rational deliberation or consideration of different ways of life.” (Emphasis in original.) All ways of life (except for

\textsuperscript{7} Gutmann, at 10-5, 42. The notion that the role of education is “social reproduction” belongs originally to Pierre Bourdieu. See Bourdieu, “Cultural Reproduction and Social Reproduction,” in Richard Brown ed., \textit{Knowledge, Education, and Cultural Change}, (London: Tavistock, 1973). Bourdieu’s study spoke to the transmission of knowledge and capacities related to the preservation of relations tied to socio-economic class. Gutmann’s theory concerns knowledge and capacities related to the preservation of a (liberal-democratic) political order.

\textsuperscript{8} Gutmann, at 14, 30-1, 34, 41-5.
democracy or the state itself) must be subject to scrutiny and the possibility of rejection. Thus, parents may not use “their present deliberative freedom to undermine the future deliberative freedom of children.” The second is the principle of nondiscrimination. In short, “all educable children must be educated.” Put somewhat differently, “[n]o educable child may be excluded from an education adequate to participating in the political processes that structure choice among good lives.” The two principles promote two fundamental values: deliberative freedom (for the individual citizen) and communal self-determination (at the level of society, not local community).

What ways of life are compatible with these values? One answer is this: “[T]he objectively good life for us . . . must be a life that can fulfill us by our best moral lights.” Gutmann gives added content to this formulation, but in doing so flirts with circularity. The aim of education, she says, must be to “predispos[e] children to accept those ways of life that are consistent with sharing the rights and responsibilities of citizenship in a democratic society.” As already suggested, these ways may be deeply inconsistent with the ways of families or of other nomic communities. Families, religious associations, and other “subcommunities” are facts of life in a (complex) democracy, says Gutmann, but democratic citizens must be “free to choose a way of life compatible with their larger communal identity.” Moreover, “all citizens must be educated so as to have a chance to share in self-consciously shaping the structure of their society.” The ways of life consistent with this education will include two elements: “mutual respect among persons” (a norm against prejudice)

---

9 Gutmann, at 44-5.

10 Gutmann, at 28, 42.

and “rational deliberation” (a norm for the possibility of rejecting the ways of one’s family).\textsuperscript{12}

But what of the argument that respect for families – even illiberal or anti-democratic families – might be a source for plurality or diversity? Gutmann, after all, embraces social reproduction “in its most inclusive form.” Might inclusion extend to such families? Gutmann argues that the pluralism of the “state of families” – a state, that is, in which familial autonomy is constitutive of social order – is a sham. Social diversity is beneficial, she argues, only if children are “exposed to ways of life different from their parents and – in the course of their exposure – . . . embrace certain values, such as mutual respect among persons.” The end of education, then, is to “cultivat[e] the kind of character conducive to democratic sovereignty.”\textsuperscript{13}

\textit{B. Stephen Macedo}

Stephen Macedo’s primary concern is precisely the problem of plurality. His premise is that too much “social diversity” (indeed, too much preoccupation with diversity) can be problematic. This is so for both moral and political reasons. Morally, some forms of diversity are valuable and worthy of celebration, but some are not. Politically, even a pluralistic regime depends upon social convergence on basic values. The moral point requires making hard choices about the sorts of diversity an order will permit, encourage, discourage, or prohibit. The political point entails the need for civic education; for attachment to values required for civic sustenance doesn’t just happen – it must be fostered.\textsuperscript{14}

By what criteria or theory shall we make these choices and guide education of the young? If

\begin{itemize}
\item \textsuperscript{12}Gutmann, at 30-4, 45-6, 50-2.
\item \textsuperscript{13}Gutmann, at 33-41.
\item \textsuperscript{14}Macedo, \textit{Diversity and Distrust}, supra note 4, at 2-4. All citations hereafter to Macedo’s work are to \textit{Diversity and Distrust}.
\end{itemize}
Gutmann’s theory is democratic, Macedo’s is unabashedly liberal. The liberalism Macedo espouses is not, on his description, a 1960s version of profligacy and sanctimony, nor the kind of liberalism that is “neutral[] with respect to conceptions of the good life.” He argues instead for what he calls “a tough-minded version of liberalism” or “liberalism with a spine.” In a phrase, he wants “civic liberalism.”\textsuperscript{15} This presupposes two sets of goods, which some have talked about as ancient and modern liberty (or, in tandem, constitutionalism).\textsuperscript{16} One, which Macedo adapts from Isaiah Berlin, is “negative constitutionalism” – a commitment to basic liberties and institutional checks on abuses of power. The second, which borrows from Constant, involves “collective freedom” – the promotion of “civic dimensions of public life,” including “participation in self government.” These goods, drawing on Walter Murphy, combine to form a “constitution” larger than the text; it is “a ‘way of life’ that is conducive to constitutional democracy.”\textsuperscript{17}

Maintaining this way of life, which is Macedo’s ultimate goal, presupposes the presence of “good liberal citizens.” As suggested above, however, one doesn’t simply find such citizens; they must be manufactured. In Macedo’s terms, children must be “transformed” into liberal citizens. They must acquire the basic virtues of liberal citizenship: “freedom, productivity, equality, and critical individuality.”\textsuperscript{18} Among the most important institutions for realizing this transformation are schools. And the historical model in the United States is the common school, open to all and run by the state. Part of the genius of the common school was that it explicitly provided education for a

\textsuperscript{15} Macedo, at 5, 8.


\textsuperscript{17} Macedo, at 8, 11.

\textsuperscript{18} Macedo, at 16, 27.
public purpose: the integration of children into the community. In the beginning, this community was local, but the integrative properties of common schooling were comprehensive – embracing academic, technical, and moral aspects of education.\textsuperscript{19}

On Macedo’s account, one of the biggest challenges to the effective transformation of children is orthodox or fundamentalist religion, which poses at least two problems. One is that fundamentalist or orthodox religion can be “hostile to republican attitudes and aspirations.” Many fundamentalist families, moreover, believe that the best way to preserve their (illiberal) faith is to insulate their children in fundamentalist schools. Macedo does not aim to abolish such schools, but he does hope to civilize them – or, failing that, to marginalize them. “\textit{[S]ome groups have been pushed to the margins of society for good reason, and the last thing we want is a politics of indiscriminate inclusion.}\textsuperscript{20}”

This is not to say that, as an historical matter, common schools abjured religion. In fact, the early common schools of the nineteenth century embraced religion as the foundation for moral education. In formal terms at least, they were not sectarian, but in practice they exhibited a notable affinity for Protestant sources and values. Macedo argues, however, that they gradually gravitated toward recognition of any “tolerant and ‘charitable’ forms of religious and ethical belief,” which is to say any religions whose tenets were compatible with civic liberalism. By the beginning of the twentieth century, he notes, the religious foundation for moral education became increasingly problematic – a stumbling block to inculcating civic values and integrating students into liberal society.\textsuperscript{21} Thus began the long, and only partially successful, process of secularizing public

\textsuperscript{19} Macedo, at 45-87

\textsuperscript{20} Macedo, at 20, 24, 63.

\textsuperscript{21} Macedo, at 63-87.
education. But if public education became increasingly secular, it was nonetheless the most important institution involved in the civic education of American children, perhaps becoming the equivalent of Sunday schools for American civil religion.\(^{22}\)

Macedo observes that the twentieth century witnessed a decline in Americans’ attachment to the ideal of the common school. The sources of this decline were at least twofold. One came from religious fundamentalists who objected to aspects of the secular-scientific orientation of public schools. Another came from others who criticized the dissipation of the moral purpose in public education; in short, they worried that public schools were providing an education for diversity and little more. Macedo is sympathetic to the latter critique, but not to the former objection. That is, he wants to revive the moral content of education in the public school, but does not want moral education held hostage to fundamentalist parents.\(^{23}\) With these corrections (and others), common schools can again be vital places for (1) transmitting civic liberalism’s virtues (mutual respect, toleration, and cooperation), (2) for teaching an aversion to vices (bigotry and prejudice), and (3) for instilling appropriate intellectual faculties (critical thinking).\(^{24}\)

Although he does not embrace what he characterizes as the democratic totalism of John Dewey, Macedo affirms that Dewey, as interpreted by Steven C. Rockefeller, had a point: “religious life and social life must not only be reconstructed, they must also be fully integrated.”\(^{25}\) Still, the

\(^{22}\) For a general discussion of the Constitution in American civil religion, see Levinson, supra note 1, at 9-53.

\(^{23}\) Macedo, at 110-130.

\(^{24}\) Macedo, at 238-9.

\(^{25}\) Macedo, at 143.
liberal order should concede that civic morality does not exhaust morality.26 In short, religious parents have their place. In recognition of parents’ place, Macedo seems to adopt Gutmann’s trinitarian allocation of authority. But it is not clear that this allocation can halt the slide to a kind of totalism.

The first reason this might be so involves his approach to reason in the liberal order. Following John Rawls’s political liberalism, Macedo insists that public deliberation and policy be guided only by “mutually accessible reasons.” These exclude “ultimate commitments” of a religious type, for “[c]ivic liberalism . . . disallows the use of political power to directly promote anyone’s contestable comprehensive ideals.” Instead, “good liberal citizens should justify basic political principles in terms they can share not only with members of their own sects, but with their reasonable fellow citizens.”27 Second, although he urges that no single educational authority – as among parents, community, and professional educators – should predominate, the purpose for his allocation skews decisively in favor of liberal values. “[N]o authority,” he argues, may “impose[ ] an intellectual tyranny on children, which would thwart their right to freedom.” Consistent with Gutmann, Macedo claims that the threat to this right comes mainly from families. “[T]he freedom to choose,” he urges, “is the birthright of every citizen of a liberal political community.” Citizens “are rights holders, and . . . as adults they may leave oppressive associations and relations without losing their status as equal citizens.”28 The end of education, then, is to prepare children to leave – not to leave liberal society, which is overarching and (presumably) permanent, but to leave families and subcommunities, which are parochial and transitory.

---

26 Macedo, at 144-5.
27 Macedo, at 180-6.
28 Macedo, at 238
C. Suzanna Sherry

Although Suzanna Sherry denominates her approach as “republican,” it shares much with Gutmann’s and Macedo’s. Sherry is concerned at bottom with the problem of virtue, or rather the suppression of virtue in a liberal regime that’s preoccupied with individual rights and ethnic “particularism.” What specifically is suppressed, she argues, is a practical ethic of responsibility: respect for hard work, honesty, careful thought, and treating others with tolerance. This ethic and its elements are objective goods. Stifling them threatens to undermine a basic capacity for or prerequisite of republican citizenship: rational, responsible deliberation. How to instill this capacity? Civic education, “a national education for citizenship.”

Neither parents nor (local) democratic processes can be trusted to promote, much less to achieve, this mission. Distrust of parents and the people entails governmental control of the scholastic curriculum. (Whether ultimate authority is vested in states or the national government is not clear on Sherry’s account.) Government’s methods will include coercion, indoctrination, and the exclusion of values and subjects that are inconsistent with citizenship. The curriculum will consist of three elements: cultural literacy, critical thinking, and moral character. In short, Sherry wants to make children American (in the nationalist sense), rational (in the sense of critical rationality), and virtuous (in the civic sense).

I want to focus here on the first, for it is central to Sherry’s program; and it is here that Sherry, to her credit, is more explicit than Gutmann or Macedo about the implications of civic education. Cultural literacy is not merely mastery of facts that are relevant to participating in the American political institutions. It is also a device for indoctrination – for inculcating “emotional

---

29 Sherry, at 133-56, 160.

30 Sherry, at 156-69.
attachment to the polity and one’s fellow citizens.” How to engender this attachment? One way is to communicate knowledge about the “common culture” that constitutes “American civic identity.” But attachment is not merely about conveying knowledge; it is also about assimilation. Assimilation, Sherry says, is the heart of American culture. “Part of the American common culture is the act of assimilation itself.” Assimilation is crucial for social progress. But more, it is the only way to stave off a dangerous force in a diverse society: relativism. The cost of relativism, she says, is high. With respect to educational policy, relativism produces indeterminacy, incites “a futile cacophony of conflicting claims,” prevents children from developing their potential, and establishes conditions for a “war of all against all.” This last claim is not merely rhetorical flourish, for Sherry urges that a kind of multiculturalism produces not only Balkanization but also dissolution or even civil war, as in the former Yugoslavia. Sherry concedes the pluralist proposition that there is a “multiplicity of good lives” from which reasonable people might choose. But people should choose only “one of the good lives valued by and valuable in their society.”

“Families can, and do, promote the values of their own subculture,” but the business of schools, as institutions for the transmission of civic culture, is larger (and more important) than the conservation of familial values. In cases of conflict between the two, Sherry “resolv[es] that particular conflict in favor of the state.” In fact, she flirts with a policy permitting the state to take control of a child’s education – even removing the child from the home – if parents make bad educational choices.

D. Quibbles and Questions

I have quibbles with aspects of each of these theories. For example, Gutmann’s assumption

---

31 Sherry, at 157-73.

32 Sherry, at 171, 204.
that families are problematic because they tend to promote prejudice, while professional educators are desirable because they promote rational deliberation, is simplistic, reductionist, and in many cases incorrect. Moreover, Gutmann’s version of the claim that children must be free to choose paths consistent with their larger (i.e., nationalist) identity is largely unjustified – especially against possible alternative identities as citizens of localities, as members of humanity, or as children of divinity. (Sherry defends a similar position; but, as I discuss below, I believe that both her and Gutmann’s positions are unpersuasive.) Depending on one’s conception of divinity, the last identity (children of divinity) is potentially universalist, which, in a way of thinking, makes them “larger” still than the nation; but religious identity is inherently suspicious (for Gutmann and Sherry, perhaps not for Macedo), because religion is presumptively parochial and productive of prejudice. Even if we’re prepared to concede that all religion is merely parochial, Blackstone notes ways in which the nation-state can attempt to inculcate “larger” communal values that Gutmann and Sherry might consider objectionable. 33 And Bourdieu’s study of French education shows how a national system, run by professional educators, prepares children to “reproduce” their class-status. 34 Finally, all three policies will predictably (even purposefully) lead to the extinction of cultural groups. Sherry is explicit about this point, but it follows also from the project of assimilation that all three, implicitly or explicitly, embrace. As I’ll discuss more fully below, I’m concerned about about the moral and political costs of that project. 35

33 See William Blackstone, I Commentaries on the Law of England (1765), at 437 (observing that if Jewish or “papist” parents refused to maintain their Protestant children, the state could order the parents to do so).


35 In Part III, below, I’ll return to the project (and problem) of assimilation.
These concerns aside, however, Gutmann, Macedo, and Sherry present powerful arguments. Indeed, many of their claims are consistent with some of the very values and institutions that constitutionalism requires. And even a coercively assimilationist education looks favorable compared with antebellum legal prohibitions against educating slaves and postbellum obstructions to educating free blacks. Against these considerations, why worry? One wedge into that question may be the various uses of education in the American-Indian encounters with Europeans and, eventually, with the people and government of the United States. Let me be clear: I do not aim to paint Gutmann, Macedo, or Sherry as a proponent of American or European treatment of the tribes or an advocate of cultural extermination \textit{per se}. Hence, I want neither to place them anachronistically where they do not belong nor unfairly to impose on their theories positions that are inapt. I do want to claim, however, that the justification for the liberal-democratic-republican project of education is structurally similar to the European and American justification for Indian education, that the liberal-democratic program of education is in tension with certain constitutionalist values, that an assimilationist educative program can engender other unhappy consequences, and that we should therefore exercise restraint in pursuing such a program in our own time and place.

\textbf{III. The Education of Indians in North America}

\textit{A. The Europeans}

The Europeans who first arrived in what came to be known as North America faced a basic question: What to do with the various tribes of people who already lived here? As arrival morphed into invasion and settlement, the question became all the more acute, even as its possible answers multiplied. Plainly, military conquest was a basic element of the European strategy – especially for the Spanish, but also for the English, French, and Dutch. Where conquest stopped short of physical annihilation, however, the question persisted. One answer was education.
The viability of this answer, of course, assumed that Indians were both educable and worthy of education, assumptions that many Europeans contested. In truth, the image of the Indian in the European mind was conflicted – vacillating between felicity and debasement. Some of the felicitous images were imaginary, antedating Columbus’s expeditions. But others drew on evidence available from European contact. The image was of people who lived in harmony with both nature and one another – an idyllic life, as if uncorrupted by the biblical fall from grace. The debased images, which became equally potent, depicted Indians as not only untutored, but positively treacherous, amoral, barbaric, and savage. In short, on this view, Indians lacked the capacity for civilized discourse, intercourse, and life.

Fairly early, however, those who mattered, for purposes of policy in European nations, decided that members of the tribes were capable at least of education even if they remained culturally or otherwise inferior. From the beginning, and regardless of the identity of the colonizing nation, education included at least three elements: religious, linguistic, and economic. From Europeans’ perspectives, native education served several purposes: salvation, ethical correction, social control, pacification, integration, and commercial advantage. The relative primacy of these purposes varied, depending on temporal, geographic, social, and military contexts. But it is possible to summarize all in a single word: civilization. Education could illuminate and elevate. In the

---

36 Howard Munford Jones, *O Strange New World* (New York: Viking Press, 1964), at 1-34. In Britain, John Locke would invoke this image in the service of a political theory to challenge Thomas Hobbes’s state of nature, and to promote instead the notion of self-limiting human beings for whom limited government was appropriate. Locke, *Second Treatise of Government*, C. B. Macpherson ed. (1690, 1980), § 49: “[I]n the beginning all the world was America . . . .”

37 See Jones, *supra* note 36, at 40-70.
process, it might enable Indians to learn to coexist with civilized peoples and nations.\textsuperscript{38}

Religion – specifically, instruction in Christianity – was central, for reasons metaphysical, ethical, and political. It is clear that their religions were important to the tribes. For some, religion suffused almost every aspect of daily life – from hunting, planting, and harvesting food, to the passage of members to adulthood, to responsibilities across generations, to tribal identification. In short, religion was the foundation for a tribe’s view of itself, its members, and the rest of the world. It is clear also that the cosmology, metaphysics, and rites of tribal religions differed from those of Christianity (or, if not of Christianity \textit{per se}, then of European norms). It has been reported, for example, that, in at least one native language, there was no word for “sin.” And it is clear that some of the ethical relations, obligations, and constraints of tribal religions differed from those of Christianity. Europeans were struck, for example, by aspects of Indians’ familial lives. Matrilinearity was typical (and, from a European perspective, problematic). Extended familial relations and norms of inheritance struck Europeans as odd. In some tribes, divorce was common. Some permitted polygamy. Christian missionaries worried that Indian girls had an inadequately developed sense of sexual inhibition. And, outside the realm of familial ethics, missionaries worried about the civility of certain groups who practiced cannibalism or torture.\textsuperscript{39}

With respect to politics, much of the early impetus for education came from religious

\textsuperscript{38} For now, we needn’t pause over the word “civilization,” other than to note that the term was, and remains, ironic in its various usages. Nor need we resolve definitively the question of European (or white American) motive in dealing with the Indians – whether, to put it too simply, it was (merely) crassly self-interested or was (also) other-regarding. Human motivation is often a combination of these two motives (and more). Hence, although it is often safe to assume that self-interest is dominant (albeit complex), its dominance does not eliminate the possibility of altruism. The presence of altruistic motive, on the other hand, does not preclude perverse or unintended effects or self-interested outcomes.

\textsuperscript{39} Ronald Howard, “Native Americans (1600-1754),” in \textit{American Eras}, 8 vol. (2003); Jones, \textit{supra} note 36, at \_\_.

institutions – the Catholic Church in the case of territories claimed by Spain (and, soon after, those claimed by France), and the Anglican Church in the case of most of the eastern territory that would become the United States. Although the Dutch tended to have more overtly secular motives, the Dutch Reformed Church did perform projects of education in New Netherland. In the eighteenth century, Presbyterians, Moravians, and Quakers would also get involved in Indian education in the English colonies.

The Catholic history is in some respects the most vivid, as it was the genesis of European religious proselytizing of the tribes, was documented, and was formally traceable to a single source of authority. Even before Columbus’s first voyage, Pope Innocent VIII designated King Ferdinand of Spain the official purveyor of Catholicism beyond Europe, in exchange for Ferdinand’s promise not to tolerate other religions. A series of papal bulls issued between 1493 and 1537 decreed that Indians “were capable of understanding the Catholic faith” and could therefore be converted to Christianity. It was decreed also that the Crown had a duty to “preach the word of God, convert the . . . infidels and barbarous peoples, [and] instruct and teach the converts in the true faith.” These fateful decrees would likely save the lives of many Indians (though perhaps not most), even as they laid the foundation for demolishing tribal cultures.

With financial and military backing from the Spanish government, the Catholic Church commenced a serious effort to educate Indians in territories held by Spain. The Church did so by establishing missions throughout much of Spanish North America, including areas that would come to be parts of the American southwest, Texas, and Florida. This effort was not entirely systematic, however, as Franciscans and Jesuits disagreed over how best to effect their calling.

---

40 James Carson, “New World Colonies (Early American Civilizations and Exploration to 1600),” in American Eras, 8 vol. (2003).
The Franciscan aim was radical: to transform Indians from savage pagans into civilized Christians. To achieve this aim, the Order posited that it was necessary to destroy all remnants of existing tribal religions. Methods included not only instruction in Catholic doctrine, but also the prohibition of native rites, appropriation of ritual objects and clothes, and punishment of tribal religious leaders who publicly opposed indoctrination. The aim and methods frequently provoked reaction, including resistance, flight, and outright rebellion. In 1680, for example, the Pueblo drove out the Spanish from a large part of what is now New Mexico. Twelve years later, however, the Spanish returned, re-conquering the Pueblo and inflicting extravagant retribution in the process. Following this military solution, relations between Spanish and Pueblo grew easier, partly out of the Indians’ submission to necessity, and partly because of shared antagonism toward two even more incorrigible tribes, the Apache and Comanche.41

Jesuits tended to pursue a gentler course in their dealings with Indians near their missions. The Society of Jesus established missions among the Pima and Papago tribes in the area that is now northern Mexico and southern Arizona. The Society was also active farther north and east, as papal promises of monopoly to Spain did not inhibit the Church from supporting efforts to civilize the tribes in territories held by the French. Hence, the Jesuits were a major presence in Quebec (among the Huron), the lands abutting the Great Lakes (especially among the Ojibwe), and later in the Mississippi Valley (among the Illinois). Jesuits even established missions among the Muskogee in French territory along the Gulf of Mexico, though these efforts were not as long-lived as those to the north or the west.42

Unlike the Franciscans, who tried to supplant native religions root and branch, the Jesuits

41 Howard, supra note 39.

42 Howard, supra note 39.
aimed, in the main, to graft Catholicism onto existing tribal beliefs and practices. (Jesuits in Quebec did establish a school for Indian children, but parents resisted it.) Also in contrast with the Franciscans, who rotated out of a mission after a few years, Jesuit fathers (especially those from France) tended to spend their entire missionary lives in one geographic area. Some even lived among the Indians, learned native languages and cultures, administered medical care, and actively helped with farming. The school in Quebec aside, Jesuits’ techniques tended to incite less opposition than did those of Franciscans.  

Although the Dutch succeeded in forging economic relations and military alliances among the Iroquois in New Netherland, they failed spectacularly in “bringing the Indians to Christ,” as the Articles for the Dutch West India Company had directed in 1624. Part of the reason may have been that Dutch troops were preoccupied with matters other than enforcing the faith. (The British eventually defeated them, establishing English control of New Netherland, in 1664.) But another likely reason had to do with the particular representatives the Dutch Reformed Church sent to the territory. Father Jonas Michelius set the tone, calling the Indians “entirely savage and wild, strangers to all decency, yea, uncivil and stupid as garden poles, proficient in all wickedness and godlessness.” The solution, he insisted, was to remove Indian young from their parents and tribes, teach them the Dutch language, and then impart the principles of Christianity. This solution had the virtue of presuming that Indians (at least the young) were educable, but it failed to appreciate the irrational attachment that native parents had for their children. Father Michelius’s successors were less rigid – one even learned the Mohawk language – but they were little more successful in converting “the Heathen.”

---

43 Carson, supra note 40.

44 Howard, supra note 39.
Like the Spanish and French, the British assumed that Christianity was the key to civilizing the Indians. In contrast with the systematic work of the Catholic Church, however, religious efforts in the British colonies were models of disorganization. In New England in the mid-seventeenth century, the Puritans found Indians on the whole to be an unreceptive audience for Christianity. This did not deter some ministers in Massachusetts from attempting to proselytize among the tribes or from establishing towns for “praying Indians.” With financial support from the Society for the Propagation of the Gospel and its successors (all chartered by Parliament), colonists distributed books that were translated into Algonquian, including an Algonquian edition of the Bible. These efforts met but limited success, however, and the British decided that the best way to civilize Indians was not only to Christianize them but also to Anglicize them.\(^{45}\) The British employed two methods to attempt to accomplish this. One was to conquer the tribes. The other was to found special schools for Indians.

In the final decade of the seventeenth century, the charter for the College of William & Mary provided for the establishment of an Indian school, with one teacher, whose duty was to teach English language, mathematics, and religion. The school attracted few students until the mid-eighteenth century, when young hostages from the military campaigns against the Cherokee and Shawnee were brought to Williamsburg to study. Despite having a (literally) captive audience, the school fell short of its founders’ vision, as many students died from disease, others resisted the course of instruction, and still others “relapsed” into Indian ways when they returned to their tribes.\(^{46}\)

\(^{45}\) Howard, supra note 39.

Schools for Indians were established in the early eighteenth century in New England, too. Probably the most famous was Moor’s Indian Charity School, founded in Connecticut by Congregationalist minister Eleazer Wheelock. He eventually moved the school to New Hampshire as Dartmouth College. Like William and Mary, Harvard College made provision for the education of Indian boys. Some New Englanders decided that educating native children would be even more effective under conditions that encouraged the creation of families on the English model. One strategy, which Cotton Mather and Joseph Talcott proposed, was to remove Indian children from their tribes and apprentice them to “English and Godly families.” This proposal failed when the tribes refused to cede their children. Another strategy was to establish boarding schools for boys and girls. The boys, after all, would eventually need proper wives if they were to become (part of) families that were self-sustaining and could resist the allure of uncivilized tribal ways.

B. The Americans Through the Nineteenth Century

The aims of the United States’ strategy for dealing with the tribes varied with time and circumstance. On the whole, however, as concerned the treatment of Indians, the new republic was not substantially new; it was in many respects a continuation of practices originating in the first European presence on the continent. The effectiveness of policies may have changed. But the means and goals, for the most part, did not.

Initially, “American” policy aimed at pacification (whose immediate motive was domestic security) and at regulating trade with Indians. There was consequently a geo-strategic aspect to

47 Howard, supra note 39; Fischbacher, supra note 46, at 64-6.

48 Howard, supra note 39.

49 See Constitution of the United States, art. I, sec. 8 (delegating to Congress the power to regulate commerce with the Indian tribes); Fischbacher, supra note 46, at 99.
United States policy, playing friendly tribes against less friendly ones and against competing powers – the French, Spanish, and British. This was especially the case around the time of the Revolutionary War, as the Continental Congress attempted to appease the tribes either to keep them neutral in conflicts with European powers or simply to maintain good relations with friendly tribes.\(^{50}\) But this quasi-military aim continued well into the nineteenth century.

As early as the constitutional founding, however, the United States began aggressively to chase another aim that would alter the new nation’s approach to the tribes: territorial expansion. To pursue this aim the Americans adopted the device that the Spanish had used so effectively: military conquest.\(^{51}\) But the United States used a second device that the Europeans had lacked the means to employ in a rigorous way: geographic displacement or, as it came to be called, removal.

If, by the mid-nineteenth century, the United States’ approach to “the Indian question” was systematically vicious, there were nonetheless ethical and practical limits to the new nation’s ability to answer it. To put it coldly, it was not possible nor politically expedient to kill all the Indians. Hence, the old question: What to do with those who survived? Before the twentieth century, citizenship was not a comprehensive option.\(^{52}\) Because of this and other barriers, robust economic integration was unlikely, even if it had been desirable. For reasons both altruistic and self-interested,

\(^{50}\) Fischbacher, *supra* note 46, at 69-73.

\(^{51}\) In the early decades of the republic, through the first half of the nineteenth century, the job of supervising and implementing relations with the tribes was the delegated responsibility of the Department of War. This jurisdiction was transferred in 1849 to the Department of Interior’s Office of Indian Affairs. Fischbacher, *supra* note 46, at 43-5.

\(^{52}\) For legal and constitutional purposes, the presumption was that citizenship was prohibited. See Constitution, art. I, sec. 2 (excluding from representation “Indians not taxed”); 14th Amendment (also excluding from representation “Indians not taxed”). Treaties and statutes awarded citizenship in limited cases, but did not recognize citizenship for Indians generally. The Citizenship Act removed the legal impediment. H.R. 6355, 43 Stat. 253, 68th Cong., 1st sess. (June 2, 1924).
white America espoused education as part of its strategy for dealing with the tribes. Education could promote pacification, secure social control, underwrite an alternative form of economic survival, and encourage acculturation.

In the early years, the United States considered the tribes to be distinct peoples and independent nations. The new republic, therefore, tended to conduct political relations through treaties with specific tribes. Well into the nineteenth century, it was not uncommon for treaties to include provisions for educating Indian children.\(^{53}\) The first general statutory policy (if it can be called a policy) of education, however, was adopted in 1819. Its unsurprising title was the Civilization Act. Its stated purposes were to inhibit “the further decline and final extinction of the Indian tribes” and, of course, to “introduc[e] among them the habits and arts of civilization.” To these ends, the Act provided an annual appropriation of $10,000 for education. By its terms, the statute provided for instruction in agricultural production and for more traditionally academic schooling in reading, writing, and arithmetic.\(^{54}\)

It is possible to read these purposes as being benignly motivated, even if misguided; but President Monroe’s message to Congress four months prior to passage revealed a slightly different spirit:

Experience has clearly demonstrated that independent savage communities cannot long exist within the limits of a civilized population. . . . To civilize [the Indians], and even to prevent their extinction, it seems to be indispensable that their independence as communities should cease, and that the control of the United States over them should be complete and undisputed. The hunter state will then be more easily abandoned, and recourse will be had

\(^{53}\) Fischbacher, supra note 46, at 102-3.

\(^{54}\) 3 Stat. 516 (March 3, 1819).
to the acquisition and culture of land, and to other pursuits tending to dissolve the ties which connect them together as a savage community, and to give a new character to every individual.\textsuperscript{55}

Just as Europeans before had imagined that the road to civilization must run through England (or Spain, France, or the Netherlands, or a particular brand of religion), President Monroe’s declarations were an early step toward the notion that “civilized” meant Americanized. This entailed at least three things: basic minimal schooling in the 3 Rs, training in a manual or petit-bourgeois occupation, and (profession of) commitment to an approved system of religious ethics. Communal property was anathema. Identification with tribe was discouraged. Polygamy was scorned. And promiscuity was condemned (as a matter of public rhetoric, if not as a matter of consistent social practice). The American ideal was individualist monogamous Christian restraint and self-sufficiency.

In implementing the Civilization Act, officials amplified it in significant ways. John C. Calhoun, who was the first Secretary of War to administer the Act, committed to using the appropriations to finance the efforts of “benevolent associations” that worked or proposed to work among the tribes. This term was restricted to religious organizations. Calhoun expanded the program of study to embrace (for boys) “such of the mechanic arts [as] are suited to the condition of the Indians” and (for girls) “spinning, weaving, and sewing.” He also specified that organizations or schools receiving funds teach patriotism (to the United States) – in order “to impress on the minds of the Indians the friendly and benevolent views of the Government toward them, and the advantage to them in yielding to the policy of Government, and co-operating with it.”\textsuperscript{56}

\textsuperscript{55} James Monroe, Second Annual Message to Congress (November 17, 1818), in Richardson ed., \textit{A Compilation of the Messages and Papers of the Presidents, 1789-1897}, vol. II, at 16.

\textsuperscript{56} Fischbacher, \textit{supra} note 46, at 111-4.
Benevolent or not, the Congress in 1830 enacted a statute to “remove” eastern tribes to reserved land west of the Mississippi River.\textsuperscript{57} Although removal had been practiced repeatedly “in a haphazard manner for many years,” the Removal Act committed the United States systematically and comprehensively to the policy.\textsuperscript{58} For the tribes, the consequence of removal was catastrophic. This included the impact on programs of Indian education. Tribes that had invested in the conversion to agriculture – attempting to root themselves in cultivated soil – saw their investment vanish. By the end of Andrew Jackson’s presidency, almost all tribal Indians in the southeastern states were driven under military supervision to the region that would become Oklahoma.\textsuperscript{59}

In the wake of removal, the American approach to Indian education altered subtly. One change was a shift in “curricular” emphasis. In the 1840s, officials began to encourage the religious groups that ran Indian schools to de-emphasize scholastic and religious instruction and to stress manual training. The reasons were both practical (to encourage economically viable occupations) and racist (that, as savages, manual occupations were the only ones within the Indians’ grasp). It is doubtful that ministers and missionaries ever forsook religious instruction, which they viewed as the primary purpose of their mission; but there is some evidence that a greater emphasis on manual training, as against scholastic instruction, was real.\textsuperscript{60} Another change concerned the type of school that certain commissioners of Indian Affairs preferred.\textsuperscript{61} By the 1860s, at least one commissioner

\begin{itemize}
  \item \textsuperscript{57} Indian Removal Act, 4 Stat. 411-12 (May 28, 1830).
  \item \textsuperscript{58} Lucille Griffith, \textit{Alabama: A Documentary History to 1900}, rev. ed. (University, AL: Univ. of Alabama Press, 1972), at 118.
  \item \textsuperscript{59} Fischbacher, \textit{supra} note 46, at 119-20.
  \item \textsuperscript{60} Fischbacher, \textit{supra} note 46, at 121, 137.
  \item \textsuperscript{61} Congress created the office of Commissioner of Indian Affairs in 1832, to preside over the Office (later, the Department) of Indian Affairs. Indian Affairs was initially placed in the
\end{itemize}
expressed disdain for day schools maintained in tribal “neighborhoods” and a strong partiality to boarding schools. The reason was similar to the reasons offered for boarding at the end of the colonial period: Indians could not be properly acculturated – civilized – if not uprooted from their tribes. Each of these changes was more a shift in sensibility than of direction, but both would become dominant aspects of policy after the Civil War.

From the first day of his presidency, Ulysses S. Grant acknowledged that United States policies toward the tribes had produced an unhappy history of predation and carnage (mostly by whites) that had steadily transformed relations between government and Indians. No longer were the latter sovereign peoples. No longer were relations to be managed by treaties. Now the Indians were “wards of the nation.” This status called for governmental responsibility – to place Indians on the path to “their civilization.” What civilization amounted to, however, had changed. Pacification was no longer its principal aspect. To be sure, there were still bands or tribes at war with the United States, but these tended to be few and relatively small. By 1870, almost all the tribes had been subdued, defeated, or decimated. (General Custer would realize in 1876, however, that the Sioux and Cheyenne had not been.) The primary aim of civilization, according to Grant, was now citizenship. And citizenship entailed or presupposed assimilation.

Schools were essential to assimilation, but only if they were effective. In truth, most Indian schools were a travesty. White indifference aside, part of the reason for this was that schools were

---

62 Fischbacher, supra note 46, at 128.

63 Congress had formally recognized the death of treaty in 1871. 16 Stat. 544 (March 3, 1871).

inadequately funded, and the process for supervising them, vested in Indian agents, was susceptible to breath-taking corruption. In an effort to clean up the process for appointing agents, Grant delegated this authority wholesale to Christian organizations (both Protestant and Catholic), which as late as 1870 continued to receive almost all appropriations for operating Indian schools. President Grant also attempted to achieve administrative efficiencies in the management and supervision of schools. And in 1870 Congress began appropriating unprecedented sums for education.65

What made these efforts both feasible and desirable was that most tribal Indians were now confined (or were in the process of being sent) to reservations. Confinement undoubtedly made it easier to implement Grant’s administrative efficiencies. It also focused attention on government’s legal responsibility for these “wards.” This is not to suggest that the United States became more benevolent in all respects. It is only to say that government became more attentive. From the standpoint of the tribes, however, attention was a double-edged sword; for, having sequestered most of the tribes, the United States now tried to demolish them. The assault was two-pronged. One involved property (and its relation to citizenship), the other a distinct shift in the character of and control over Indian education.

The General Allotment Act (also known as the Dawes Severalty Act) authorized the President to order that any reservation be surveyed, divided into lots, and allotted among the Indians living there, with the largest parcels going to heads of families, smaller ones to various “single person[s].” Congress amended the Act two years later, to permit non-reservation Indians, too, to

65 Fischbacher, supra note 46, at 153-8. The appropriation in 1870 was $100,000. Appropriations after 1870 continued to be comparatively large. Because these amounts dwarfed the $10,000 annual appropriations provided in the Civilization Act, that Act was repealed in 1873. 17 Stat. 461 (February 14, 1873).
select parcels. At the time the allottee took possession of his parcel, he became a citizen. This status was merely inchoate, however, as the allottee lacked full privileges of citizenship. In fact, he lacked also full rights to the parcel, for the United States held it in trust for twenty-five years. After this period, the allottee would ascend to full citizenship, and the government would convey title to the land, unless the President decided to lengthen the period of trust.66

In its own way, the Dawes Act was designed to be an educational enactment. Its aim was to provide individual Indians a powerful set of incentives. In the immediate term, the allottee would be impelled to assume responsibility for his and his family’s material welfare. Over time, the allottee would begin to acquire values of the “Protestant ethic” – thrift, energy, and productivity. In short, the allottee would learn to become an individual, not a tribal member. The lessons of responsibility for property would also transmit a capacity for citizenship, and the twenty-five year trust would provide time for Indians to practice (or imagine practicing) citizenship. In this way, the ownership (or possession at least) of property united liberalism and democracy. From the standpoint of the United States, allotment would generate ancillary benefits, too, for the subdivision of property into individual parcels would dismantle the communal property that was the reservation. Having destroyed the material base supporting communist ethical conceptions, which were in turn the foundation for tribal ways of life, the government aimed to destroy the tribes’ capacity to sustain themselves as tribes. In their place would arise a new, American way of life for Indians.67

Hiram Price, the Commissioner of Indian Affairs, affirmed this belief in his Annual Report in 1881:

There is no one who has been a close observer of Indian history and the effect of contact of

66 24 Stat. 388-91 (February 8, 1887); 25 Stat. 890.

67 Fischbacher, supra note 46, at 235-8.
Indians with civilization, who is not well satisfied that one of two things must eventually take place, to wit, either civilization or extermination of the Indian. Savage and civilized life cannot live and prosper on the same ground. One of the two must die. If the Indians are to be civilized and become a happy and prosperous people, . . . they must learn our language and adopt our modes of life. . . . The few must yield to the many.  

Allotment, he said, would tend to civilize the tribes. It “tends to break up tribal relations. It has the effect of creating individuality, responsibility, and a desire to accumulate property. It teaches the Indian habits of industry and frugality, and stimulates them to look forward to a more useful life, and, in the end, it will relieve the government of large annual appropriations.”  

The Annual Report of the Board of Indian Commissioners in 1881, agreed: Allotment would “secure to [the Indian] the integrity of the family and the home[,] . . . the unit of Christian civilization.”

Merrill Gates, president of Rutgers College and a member of the United States Board of Indian Commissioners, reiterated some of these themes and gave them a gendered cast, in a speech in 1885. The tribe, he said, has perverse effects on its members. “The highest right of man is the right to be a man, with all that this involves. The tendency of the tribal organization is constantly to interfere with and frustrate the attainment of this highest manhood.” How so? The answer implicated family and property.

---


69 Id., at 311.

70 Fischbacher, supra note 46, at 241.

The family is God’s unit of society. On the integrity of the family depends that of the State. There is no civilization deserving of the name where family is not the unit in civil government. Even the most extreme advocates of individualism must admit that the highest and most perfect personality is developed through those relations which the family renders possible and fosters. And from the point of view of land and law, students are generally at one with Sir Henry Maine when he says, in his latest work, “I believe I state the inference suggested by all known legal history when I say there can be no material advance in civilization unless landed property is held by groups at least as small as families.”

The tribal conception of property – specifically, the institution of communal property – “cuts the nerve of all that manful effort which political economy teaches us proceeds from the desire for wealth.” It makes people lazy. And it inhibits the accumulation of wealth that might have been used “for the benefit of children.”

The solution, said Gates, was law, propagated by the (nation-)state. Law should work toward family and property. It can do so by promoting private property, “punish[ing] offenses against purity, and . . . abolish[ing] polygamy. . . . These laws enforced will help still further to develop true family feeling. Family feeling growing stronger and stronger as all the members of the family work on their own homestead for the welfare of the home, will itself incline all toward

---

72 Id., at 17 (quoting from Maine, Early History of Institutions, p.126)

73 Id., at 17.

74 Id., at 18. As an example of the lethargic effects of communism, Gates notes the absence of theft in tribes: “The fact that robbery is said to be almost unknown among Indians within the tribe is largely explained by the fact that property, too, . . . is almost unknown. There is an utter barbarism in which property has almost no existence.” Id., at 17.

75 Id., at 18-9.
welcoming the reign of law, and will increase the desire of all for systematic education.” But perhaps it was too much to expect that all would desire education. “We must as rapidly as possible break up the tribal organization and give them law, with the family and land in severalty as its central idea. We must not only give them law – we must *force* law upon them. We must not only offer them education – we must force education upon them!” And so, through the law of severality, “the family and a homestead prove the salvation of those whom the tribal organization and the reservation were debasing.”

The Dawes Act was terribly effective in wresting land from the tribes. It did more than this, however, for it also led to the loss of land from allottees. In short, law was an instrument for defeating legal rights. It is estimated that, before the Act, Indians held 138 million acres of land, either as individuals or through tribes. By the end of the period of allotment forty-five years later, they had lost more than sixty percent of those tracts. One reason is that initial allotments were either too isolated or too small to support productive grazing. Another is that laws of inheritance frequently worked to break up holdings. Still another reason has to do with white settlers and agents. Unscrupulous or coercive bargaining was commonplace; but it was also not uncommon for whites who coveted desirable Indian land to have the allottee declared incompetent and so to force the sale of his land. All of these consequences were traceable to the Dawes Act. This experience, in itself, was a kind of civic education for Indians, though not the precise lesson intended by the Act’s most benevolent proponents.

76 *Id.*, at 21. (Emphasis in original.)


78 Fischbacher, *supra* note 46, at 250.
In the schools, the United States made two significant changes. One was the gradual move away from federally funded sectarian schools, toward schools that government both funded and ran. Sentiment for secular schools had begun to surface in the mid 1870s, especially among governmental administrators in Indian affairs, and gathered momentum in the following decade. It is difficult to know whether the dominant motive for this change was a belief that government-run schools would be more effective, an unreflective succumbing to the rising tide of common schools, a principled objection to the use of public money to support sectarian activities, or a desire to draw more responsibility (or power) under a bureaucratic umbrella. Whatever the motive, secularization happened. In 1889, the new Commissioner of Indian Affairs Thomas Morgan announced his intention to terminate federal contracts with religious schools. Most religious organizations responded by getting out of the business of educating Indians. One exception was the Catholic Church, which, indignant, fought the policy intensely on several fronts. In the end, however, the Church conceded the inevitable and severed ties with governmental programs.79

Regardless of who ran the schools, there was still a question about their character. One possibility, long practiced especially by the churches, was the day school, located on the reservation. In the 1870s, as indicated above, commissioners of Indian Affairs grew disenchanted with these schools, and not merely because they were run by religious organizations. Truancy was rampant, partly because of parental resistance. The quality of instruction was generally low. And officials (and others) worried that the environment to which students returned at the end of the day were subverting the lessons of school.80

Another possibility resurrected an approach with which Europeans and Anglo-Americans

---

79 Id., at 276-81.

80 Id., at 199-203.
had flirted in colonial times: the boarding school. The idea was to have children take up residence at the school. The earliest versions of this sort of school were located on reservations. One challenge, of course, was getting students. If some Indian parents resisted day schools, wouldn’t they be even more reluctant to send their children to boarding schools? The answer is that they were. Frequently, agents and officials who ran the schools resorted to deceit, coercion, and (sometimes) kidnaping to generate a clientele. But even when parents voluntarily sent their children, many parents would not stay away. They visited frequently and expected their progeny to come home at every available holiday. Almost immediately, therefore, critics argued that these schools suffered from some of the same limitations as day schools.

Some critics advocated and began to experiment with boarding schools located far from the reservation. As proponents of off-reservation schools saw it, this approach had several advantages. With students unable to return home, it would be much easier to compel attendance and enforce discipline. Learning, therefore, could be more rapid. Schools could require all English all the time. And they could more effectively de-emphasize academic subjects in favor of a more systematic exposure to “industrial” training. As we’ve already seen, for boys this training was in agriculture and mechanical trades; for girls it was in domestic pursuits like sewing, cooking, and cleaning. The aim at bottom was to ensure that students acquired the “habits of civilized life.”


83 Fischbacher, supra note 46, at 203-8.
Morgan was specific about what this life entailed:

When we speak of the education of the Indian, we mean that comprehensive system of training and instruction which will convert them into American citizens. . . . Education is the medium through which the rising generation of Indians are to be brought into fraternal and harmonious relationships with their white fellow-citizens, and with them enjoy the sweets of refined homes, the delight of social intercourse, the emoluments of commerce and trade, the advantages of travel, together with the pleasures that come from literature, science, and philosophy, and the solace and stimulus afforded by a true religion.  

The prototype for and most famous of the off-reservation industrial boarding schools was the school in Carlisle, Pennsylvania. The Carlisle School was established in 1879 by a former Indian fighter, Capt. Richard Henry Pratt, in vacant army barracks.  

Pratt was a committed assimilationist. He believed that, as individuals, Indians were plainly educable; their disability was their culture, which was, in a word, “savage.” The aim of a civilizing education, then, was to kill the savage person. “We accept the watch-word. There is no good Indian but a dead Indian. Let us by education and patient effort kill the Indian in him, and save the man!”  

Removal – this time removal from the reservation – was essential to education. 

---


86 Adams, supra note 82, at 51-5.

87 Quoted in Gates, supra note 71, at 14-5. (Emphasis in original.)

88 Adams, supra note 82, at 51-5.
The Carlisle School’s program combined systematic acculturation with formal learning, with every aspect of the program aimed at killing the Indian. Acculturation commenced as soon as students arrived on campus. The School cut their hair, gave them “civilized” clothing, and renamed them. The most immediate purpose for renaming was that it enabled (white) teachers to become more familiar with students more quickly, which promoted both pedagogy and discipline. But it served, too, as a general device for the transmission of culture. And it was also the case that, if students were to become owners of property someday, they would have to have proper surnames. Exposing students to Western food played a (universally despised) role in acculturation. But perhaps the most thoroughgoing effort at acculturation was the militarist, Spartan regimentation imposed throughout the day – from waking, to taking meals, to studying, to working, to sitting in the classroom, to sleeping, to participating in regular marching drills. The justification for this regimen was essentially this: Military regimentation cultivated the ability to follow orders; following orders was a necessary condition for personal discipline; discipline was a fundamental prerequisite to life under law.\footnote{Id., at 117-24. In some off-reservation schools, marching drills were a daily, lengthy, and punitive ritual.} The curriculum reinforced these norms. Much of the curriculum, of course, covered the standard academic and vocational subjects whose aim was “self-reliance.” But a significant part of the training was in citizenship, inculcating a patriotic respect for the American nation and its values, and suppressing the history of conflict between whites and Indians.\footnote{Id., at 142-56.}

No matter how rigorous the discipline or refined the instruction, the school was in its way still separated from white society. Thus, if Pratt criticized reservations for their inherent segregation, the school was susceptible to a similar criticism. Pratt recognized this tension. The best system, he
believed, would be to take every Indian child on the continent and place him/her permanently with a white family, who would send the child to public school, teach by example the requisites and regularities of a civilized life, and prepare the child for a lifetime of productive labor. This would be consistent with the child’s best interest as a human being, not an Indian.\footnote{Id., at 52-4.} In most cases, Pratt acknowledged, permanent placement wasn’t possible. But there was a “second-best” alternative that borrowed from the eighteenth-century fantasy of transforming Indian children by apprenticing them with “English and Godly families” in New England.\footnote{Id., at 156-63.}

Pratt adopted a version of this vision. He called it “outing.” Although outing was voluntary, it was thoroughly integrated into the rhetoric and operation of the program. The school extolled and encouraged it (for the right students). Holding to Jeffersonian notions of the republican virtue of agrarian life, Pratt preferred to place his students on farms with white Christian middle-class English-speaking families. There, students would have an opportunity to participate in the daily lives of host families, attend local schools, work on farms (for a wage), and go to church – all the while immersed in English. The typical outing was for the summer months only; but Pratt favored, where possible, placing his students for one or two years.\footnote{Id., at 57.}

The Carlisle School was a model for similar schools across the country. By 1902, there were twenty-five off-reservation schools\footnote{Id., at 57.} and even more boarding schools located on reservations. As early as 1887, 76\% of Indian children who attended school were in boarding schools; and 94\% of...
The boarding schools operated with varying degrees of success. At many, even the most basic of buildings, sanitation, and food were inadequate. The level of instruction at some was quite low. And more than a few schools were poorly managed and maintained. At some schools in the west, the outing program was essentially a device for farming out cheap, pliable labor to locals. These operational deficiencies aside, it is also the case that boarding schools ultimately failed to achieve the results their most ardent proponents had predicted. Pratt had urged, “To civilize the Indian, get him into civilization. To keep him civilized, let him stay.” As it happened, most students did not stay. For a variety of reasons, they went home after their time at school had ended. (In the parlance of the day, they “returned to the blanket.”) On going home, many graduates, again for a variety of reasons, did not practice the bourgeois lives for which their education had ostensibly prepared them. This fact was a source of bitter disappointment for Pratt and others who had proclaimed boarding schools to be effective vehicles for assimilation.

In part because of these failures, the United States would eventually rescind the program of allotment, retreat from using boarding schools, move to community day schools, and renounce

---

94 Fischbacher, supra note 46, at 128-9.


96 Adams, supra note 82, at 162-3. Pratt had insisted that outing could not work on the frontier, where the amenities, institutions, and ethos of civilization were scarce.

97 There is reason to believe, however, that Carlisle was more successful in this regard than were most of the other schools. Id., at 288-9, 298.

98 Id., at 55.

99 Id., at 273-306; Pratt, supra note 85, at xvi.
assimilation as a goal. By then, however, United States policy had decimated tribal ways of life.

IV. A Constitutionalist Critique of Civic Education

What can American-Indian history teach us about civic education? What, specifically, can it teach that would render civic education problematic from a constitutionalist perspective? I can imagine at least two bases for skepticism. One is that the Indians are an exceptional case. They were indigenous, having established distinct communities or nations that antedated European settlement. These facts, and the post-European history, make Indians incomparable to the orthodox or fundamentalist religious adherents (or even non-religious radicals) who today may find themselves at odds with common schools. The second is that we today are different from the Europeans and Americans who preceded us. Specifically, our government – liberal, democratic, and/or republican – is the most just form of government available. To be sure, that government maintains itself in part through coercive educational policies, but coercion is justified by the special legitimacy of this government. Moreover, coercion in this state is limited. Thus, if education even now is a form of coercive indoctrination, it is carried out under law and within bounds of human, political, and civil rights that our forebears did not respect.

There is something to these claims. Indians’ experience in America since the coming of the Europeans is special and, in some respects, unique. And, if the system of government that we practice is not the most just imaginable (or achievable), it is more respectful of some rights than the governments of our predecessors. Even so, with respect to civic education, American Indians were not *sui generis*, but are an especially illuminating example of the manner in which the authority of government is brought to bear on objectors and dissenters, whether they are religiously motivated or not. Understood in this way, American Indians are not merely an example of what (not) to do with

---

100 All of these changes became official policy by the mid 1930s.
indigenous tribal groups that persist in a modern nation-state. For Indians’ experience is a useful case for considering the more general and pervasive problem of what constitutions (should) do in the face of fundamental disagreement.

And even if we’re different now – our state, for example, does not typically take children physically from families without legal authorization and is formally secular not religious – the differences are not dispositive. Certainly, adherence to legal formality alone is not distinguishing. For one thing, nineteenth-century Anglo-Americans frequently (not always) adhered to legal forms in their dealings with the tribes and with individual Indians. For another, as suggested in Part I, even unfailing adherence to law (or the rule of law) is not the end of the matter from the standpoint of constitutionalism. But there’s more at work than respect for law or rights. For despite such respect, there is reason to believe that, in significant ways, we are our ancestors. This is neither a claim that history repeats itself nor a brief for the genetic or cultural determination of human behavior. It is merely to contend that the imperatives of maintaining or extending a political order are potent, especially if the order is imperial, and regardless of whether it is monarchic, liberal, democratic, or republican.

In the discussion that follows, I want to consider certain implications of Parts I and II of this essay. First, I argue that the structure of today’s justifications for the civic education of children is substantially similar to that of arguments by Europeans and Anglo-Americans for educating Indians. A critical element of both the historical and contemporary justifications involves assimilation (or civilization). Second, I observe that aspects of these justifications are consistent with constitutionalism. Third, however, I argue that aspects of the justifications are inconsistent with constitutionalism. Fourth, I consider possible solutions to this constitutionalist tension.
A. Structural Similarities

What do contemporary proponents of civic education share with policies of Indian education prior to the twentieth century? First, they acknowledge that education is a device for exercising power or control over persons. At first blush, the three contemporary formulations seem significantly different from one another. Gutmann’s “conscious social reproduction,” for example, seems conservative in ways that Macedo’s “transformation” does not, and both sound slightly different from Sherry’s “responsible republican citizenship.” But all three presume that to educate is to exert power over persons in ways that preserve or maintain a regime. (Sherry is explicit that the state’s method entails coercive indoctrination.) Controlling for regime, these three formulations are quite similar not only to one another but also to European and American antecedents.

Second, the way of maintaining is not confined to the teaching of skills of expression (reading and writing) or analysis (arithmetic). It also concerns the transmission of values and culture. The values and culture to be transmitted are “civilizing,” within a particular meaning of the word. That is, they aim to cultivate the basic elements or characteristics of what the regime takes to be a civilized life. For the Europeans (including the British) and eventually for the early United States, those elements were religious, linguistic, and economic in character. After the constitutional founding, the economic element became forthrightly liberal in ways it was not (could not have been) in colonial times. And over time, explicit commitment to religion gave way to ostensibly secular values.101 By the end of the nineteenth century, the United States would adopt a fourth civilizing

---

101 I say “ostensibly” for two reasons. One is that the Protestant roots of American educational policy were persistent. The other is that it is possible to view the (secular) project of the Enlightenment either as an extension of certain religious foundations or, conversely, as a quasi-religious surrogate. On the latter possibility, see Henry F. May, *The Enlightenment in America* (New York: Oxford Univ. Press, 1976). My analysis here does not depend on either characterization of the Enlightenment.
element, which was political in character, related specifically to citizenship. This new purpose concurred with several disparate trends in American history, consistent with the clarification and intensification of nationalism: a tendency toward increasingly democratic norms, the suppression of the Confederate secessions, the conquest and containment of the tribes, and the rise of secularization in common schools. Consequently, overtly religious expressions of value gave way to a language of “civic” values, which encompassed two competing sets of commitments: democracy and liberalism. These are the values that contemporary proponents of civic education espouse.\textsuperscript{102}

Perhaps ironically, then, adding citizenship as an element of civilization intensified and expanded the state’s control over persons.

Third is a suspicion of non-conforming associations (sexual, familial, religious, or tribal). In this context, “non-conforming” connotes associations whose values and practices – ways of life – are perceived to contradict in some substantial way the prevailing commitments of the regime. In the beginning, these commitments were monarchic, colonial, mercantile, and Christian. By the nineteenth century, they became liberal-democratic, imperial, capitalist, and formally secular. Despite their differences, however, each regime attempted to suppress non-conforming associations. The Jesuits were a moderating exception to this tendency in the early years. Contemporary proponents of civic education are, too, though their moderation has limits.

Fourth, and following from the rest, the function of education is essentially assimilative. That is, it aims to render children productive members of society, or at least to prevent their being threats to or drags upon it. The assimilative character of education was limited for the Europeans and early Americans, for they focused primarily on moral instruction and economic integration. For

\textsuperscript{102} Sherry’s republicanism is not an exception to the observation that the modern order combines democracy and liberalism.
that reason, they spoke of their aim in terms of civilization, not outright assimilation. (In the early years, there was doubt about Indians’ ability to become, for example, proper Englishmen or Americans.) The present-day United States is nationalist (and controlling) in ways that even the early authoritarian nation-states were not. As I suggested above, the construction of citizenship is part of this control. The state depends on education to produce integrated citizens. Hence, it matters that critical or analytic skills are designed to enable children to question (and separate from) family or other parochial sources of identity, not to criticize the foundations of the national order.

B. Consistency with Constitutionalism

Demonstrating commonalities, however, is not sufficient to condemn them. For one thing, some people might argue that the Indians were actually better off being discovered and educated in Western ways. For another, there are important ways in which these five characteristics are consistent with constitutionalism. I’ll defer discussion of the former claim, but the latter is worth our present attention.

Constitutionalism is a political theory concerned with the architectural structure and basic values of society and of government. Historically, it is preoccupied with the problem of power, particularly the power of those who would rule others, particularly when that rule might be arbitrary. To solve this problem, constitutionalism has three sets of needs or requirements.

First, in substantive terms, it requires institutions that span three dimensions of human experience. One dimension is political, implicating the allocation of benefits and burdens among people in society, the articulation of norms for human behavior, and the processes by which formal decisions are made. Another is economic. This dimension is concerned with the production, distribution, and exchange of material goods and materially consequential services. The third dimension is moral. It pertains to the norms by which people evaluate the substantive value or

104 A democratic polity can display any number of institutional forms – direct or representative, unitary or divided (vertically and/or horizontally), majoritarian or consensus, and so forth. It’s also the case that the term “collective” needs to be specified. For now, however, I’m content to leave forms and terms unspecified.

105 “Liberalism” has been much tossed about in recent years, and not merely as “the L word.” It can refer to a muscular theory of the good, which liberal government may coercively enforce. It can refer to a general libertarian theory that posits a thin conception of the good and a highly limited role for government. As a subset of this definition, it can refer to a libertarian theory that’s largely “economic,” with government constrained from taxing and/or regulating enterprise or
accommodates interests of collective and individual without extinguishing either.

Third, in terms of method, it aims at authorizing and constraining power through what Alexander Hamilton called “reflection and choice.” This aim suggests the primacy of principle and the deficiency of mere force as bases for political action, and it implies the importance of authority and respect for limits. “Authority” connotes the justified exercise of power. “Limits” may entail the exercise of power through established, rational procedures, through the rational pursuit of specified ends, or through respect for rights; it may also make institutional balance desirable. The preoccupation with authority and limits makes law an attractive, perhaps necessary, element of any constitutionalist regime. But constitutionalism and rule of law are not coextensive, for reasons that Vladimir Putin’s proclaimed aspiration for a “dictatorship of law” may help clarify.

Gutmann, Macedo, and Sherry speak to all three of these sets of needs or requirements: substance, function, and method. By way of method, their theories aim to produce civic persons who have a capacity for critical deliberation, which is relevant to a kind of “reflection and choice.” These citizens may exercise this capacity with respect to debates about matters of policy, choices from among allowable ways of life, and decisions about staying in or leaving intermediary associations. To this extent, the concern for critical deliberation is consistent with constitutionalism, but the scope of permissible deliberation is narrow.

By way of substance, the theories speak to all three dimensions of human experience – political, economic, and moral. To understand how they do so in constitutionalist terms, we may

property. It can sometimes refer to pluralist theories that permit a number of differentiated group-based ways of life, under the umbrella of a larger protective regime. For purposes of understanding American constitutionalism, I’m content to rest with a generic emphasis on individuals – leaving open the time, place, and manner of the state’s relation to individuals. The discussion of civic education, below, will focus on the first (muscular) version of liberalism.

look to Brown v. Board of Education,\textsuperscript{107} with which the theories are largely harmonious.\textsuperscript{108} The Supreme Court noted that “education is perhaps the most important function of state and local governments.” The Court justified this claim across the three dimensions:

\begin{quote}
[Education] is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.\textsuperscript{109}
\end{quote}

The Court’s conclusion, of course, was that, “where the state has undertaken to provide” the opportunity for an education, it must do so without segregating by race. In short, states that provide a common education must make it “available to all on equal terms.”\textsuperscript{110} Although the extent of the application of the Court’s opinion to a larger way of life (beyond the sphere of education) was not clear at the time the case was decided, it is now apparent that Brown stood for a general proposition: The coerced separation of (prospective) citizens in public fora on the basis of (traits like) race is prohibited.

By way of function, the basic theories of the American order – liberalism and democracy –

\begin{itemize}
\item[\textsuperscript{107}] 347 U.S. 483 (1954).
\item[\textsuperscript{108}] I say this recognizing that the basic meaning of Brown is contestable. Compare Gutmann and Macedo with Derrick A. Bell, And We Are Not Saved: The Elusive Quest for Racial Justice (New York: Basic Books, 1989), at __.
\item[\textsuperscript{109}] Brown v. Board, at __.
\item[\textsuperscript{110}] Brown v. Board, at __.
\end{itemize}
are plainly present in Gutmann, Macedo, and Sherry.\textsuperscript{111} In fact, despite their disparate nomenclature, each embraces both liberalism and democracy in ways consistent with the excerpt from \textit{Brown}. In doing so, they are committed to maintaining a liberal-democratic order. Again we see the extent of this commitment in their treatment of critical deliberation, which encompasses an intermediate range of choices about policy and life, but does not include matters that go to a fundamental alteration of the character of the order, and especially not matters that might entail rejecting it. For Macedo, Gutmann, and Sherry there is no exit from the liberal-democratic (or republican) order.

\textit{C. Inconsistency with Constitutionalism}\textsuperscript{\textsuperscript{112}}

Herein lies the source of a problem, for a genuinely constitutionalist order must be willing to die – or, less dramatically, to accede to fundamental change.\textsuperscript{112} This requirement can conflict with the imperative that a constitutionalist order maintain itself. We have, therefore, a tension at the heart of a constitutionalist order, and the question is how to resolve it. With respect to civic education, we can see the tension in opposing opinions in \textit{Minersville School District v. Gobitis}\textsuperscript{113} and \textit{West Virginia v. Barnette}.\textsuperscript{114} Both cases involved the refusal of young Jehovah’s Witnesses, with the support of their parents, to participate in a civic ritual at their public school: a formal pledge of allegiance to the flag of the United States.

\begin{flushleft}\textsuperscript{111} Again, Sherry’s use of “republicanism” is not inconsistent with liberal democracy.\end{flushleft}

\begin{flushleft}\textsuperscript{112} In the human species – in almost all species of life that we know – death is an evolutionary advantage, depending on when it tends to occur within a population. The same may well be the case for political orders, but my argument ultimately does not rest on its being the case. It is enough that constitutionalism’s values and principles require that constitutionalist orders be willing to give way to fundamental change.\end{flushleft}

\begin{flushleft}\textsuperscript{113} 310 U.S. 586 (1940).\end{flushleft}

\begin{flushleft}\textsuperscript{114} 319 U.S. 624 (1943).\end{flushleft}
Justice Frankfurter’s opinion of the Court in *Minersville* invoked the conditions necessary for sustaining the “security” (i.e., the continuation) of a “free government.” Government, he said, “presuppose[s] the existence of an organized political society.” That society, in turn, rests on “the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization.” Rituals and symbols serve an educative and unifying function in the conservation of civilization. They engender, in a word, “loyalty,” on which free societies depend for the perpetuation. Therefore, government may coerce participation in civic rituals in a public school, even if they are incompatible with deeply and sincerely held beliefs. If parents disagree, the state may compel obedience. “A society which is dedicated to the preservation of [the] ultimate values of civilization may in self-protection utilize the educational process for inculcating those almost unconscious feelings which bind men together in a comprehending loyalty, whatever may be their lesser differences and difficulties.” Government, that is, may actively shape not only the mind but the heart of the citizen.\footnote{Minersville, at __.}

Regardless of whether Gutmann, Macedo, and Sherry would agree with Frankfurter’s conclusion in *Minersville*—or despite the fact that they purport to disagree with it—the logic of his opinion is identical to that of their arguments. It also maps the repeated justifications offered for various regimes across American history for educating Indian children. Again, this fact alone is not sufficient to dismiss Frankfurter’s position. As I indicated above, there is much to it. The challenge is that it conflicts with a similarly powerful countervailing intuition, with respect not only to the Jehovah’s Witnesses but also to American Indians—indeed to social non-conformists and
Dissenting in *Minersville*, Justice Stone objected to the compulsory salute and recitation.

“The Constitution may well elicit expressions of loyalty to it and to the government which it created, but it does not command such expressions or otherwise give any indication that compulsory expressions of loyalty play any . . . part in our scheme of government.”¹¹⁶ Much of Stone’s opinion rested on a doctrinal discussion of the Witnesses as a “discrete and insular minority,” deserving of special protection under paragraph 3 of footnote 4 of *Carolene Products*.¹¹⁷ This discussion implicitly touched on the value of plurality. But also implicit in Stone’s dissent were two additional considerations relevant to a constitutionalist critique of Frankfurter’s position: the recognition that education is an assertion of power and the notion that the Constitution is logically prior to government.

Justice Jackson expanded on all three – plurality, power, and priority – in his opinion for the Court in *Barnette*, overruling the decision in *Minersville*. His commitment to plurality included even subversive communities,¹¹⁸ even children in public schools:

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. . . .

Probably no deeper division of our people could proceed from any provocation than from

---

¹¹⁶ *Minersville*, at __ (Stone, dissenting).


¹¹⁸ One frequently quoted line from Jackson’s opinion is: “[F]reedom to differ is not limited to things that do not matter much. . . . The test of [freedom’s] substance is the right to differ as to things that touch the heart of the existing order.” *Barnette*, at __.
finding it necessary to choose what doctrine and whose program public educational officials
shall compel youth to unite in embracing.\textsuperscript{119}

Free government, therefore, depends not on loyalty but on “consent of the governed.” To be of
value, that consent must be freely given. “Authority here is to be controlled by public opinion, not
public opinion by authority.” The foundational requirement for free government, then, is the
unfettered citizen, whose “conscience” is prior to, and not a creation of, government. If
government controls to too great a degree the modes by which citizens attach to the order,
therefore, it undermines its own authority.\textsuperscript{120} Put somewhat differently, aggressive and coercive
efforts at assimilation may be constitutionally dangerous.

John Locke helps us see how and why this might be.\textsuperscript{121} Locke understood that one of the
basic and enduring problems of politics was constraining and directing political power. Specifically,
in his terms, power should be constrained against arbitrariness and directed to the common good.\textsuperscript{122}
His solution to this problem was complex, involving natural rights, majoritarianism, and rule of law,
among other things. We need not pause over these particulars, nor need we worry now about the
merits of Lockean liberalism in general. The more pertinent concern is Locke’s notion that the
people possess residual powers to declare government dissolved and to replace it with a new one
more consistent with their needs. By maintaining the threat of dissolution – and, of course, by
implementing it – the people’s residual powers could help sustain limits. And, to the extent that

\begin{footnotesize}
\begin{footnotes}
\item[119] Barnette, at ___.
\item[120] Barnette, at ___.
\item[121] The remaining discussion in this and the following sections borrows from Brandon, “Family at the Birth of American Constitutional Order,” 77 Tex. L. Rev. 1195 (1999).
\item[122] See Locke, Second Treatise, at §§ 123-31.
\end{footnotes}
\end{footnotesize}
attentive and self-interested people presided over the rites of dissolution and replacement, they could help direct political power toward the common good.

From the standpoint of constitutionalism, the powers to destroy and create are essential. In practical terms, if people are to exercise these powers, they must, at a minimum, be able to imagine new ways – both normative and institutional – of ordering their political world(s). This capacity in turn presumes that people possess, at a minimum, intellectual and ethical resources independent from the ruler or state. In other words, people must be able to be not merely good citizens but also anti-citizens – or, more accurately, anti-statists – when circumstance justifies. They must be able to dismantle existing arrangements and replace them, perhaps with something radically new, perhaps with something that attempts to recapture or reinforce values or institutions that are lost or waning. Finally, in order to perform these roles, people must be able to occupy meaningful spaces that are partially autonomous from the state.

Of course, Jackson’s unfettered citizen is a mythological creature. For, if conservative (or post-modern) thought has taught anything, it is that human beings, including liberal-democratic citizens, are constituted by a multitude of relations and forces that ground their social existence. They are, in short, embedded. This means that Jackson’s citizen is sensible primarily as a conceptual construct or heuristic, not an empirical reality. The most we can make of Jackson’s construct is that we should act as if citizens were unfettered, without presuming that they exist in the world in this way. Even so, we’re left with something of a dilemma: Jackson’s is a constitutionally sound position, but so too is Frankfurter’s. Each promotes a constitutionally significant function. The problem is that the functions collide. Again, what is to be done?

D. Constitutionalist Solutions?

It might be tempting to conclude that nothing need be done, and not merely because the
tension I’ve described exists in any constitutionalist society. There’s an even more concrete temptation: To conclude that there’s not a genuine problem in the case of American Indians, because civic education was so ineffectual on so many fronts. I believe this conclusion is misguided for at least two reasons. One is that it’s a double-edged sword. On one side, if we can generalize beyond the case at hand, the conclusion might suggest abandoning civic education altogether. On the other side, it may merely argue for more (or more extreme or insidious means of) indoctrination. The strategy of more indoctrination might address the problem of ineffectuality, but would also intensify constitutionalist objections – assuming that I’ve properly classified Justice Jackson’s position. The second reason the conclusion is misguided is this: To say the policies were ineffectual is not to say they had no effect. It is only to say their effects, in the main, were not consistently attuned to their purpose of assimilation. Though they failed to produce integrated and indoctrinated citizens, they succeeded in furthering tribal disintegration and in manufacturing large numbers of children who had a home in neither the world of their parents nor the world of the state.

It is difficult to measure the psychic and social costs of this alienation, unintended though it might have been. Some such costs may simply be the human price that’s paid for maintaining in muscular fashion a constitutional order. If so, they may justify reconsidering the value of maintenance, or at least of muscularity. This consideration aside, I believe the costs help to clarify that aggressive assimilation is a constitutional problem. Is there a constitutionally sensible way to mitigate it?

A possible solution exploits a value Justice Jackson invoked in *Barnette*: plurality. James Madison famously noted plurality’s contribution to stability and liberty. Both constitutional text and relatively uncontroversial aspects of constitutional doctrine embrace forms of plurality.

---

Federalism, committing aspects of policy to the states, is an example that’s embedded in the formal institutional structure of the polity. Valuable as states are, however, there may be reasons to doubt their sufficiency for matters like the one at hand, for states’ control of (civic) education can just as easily inhibit plurality as secure it. An auxiliary source might be intermediary associations, whose presence promotes plurality in and among social groups. But which groups should be protected, for what purposes? The First Amendment’s commitment to the free exercise of religion is exemplary. So too are freedoms of association and of economic enterprise, even if we can’t find them in so many words in the constitutional text. Still, none of these seems to address the problem of United States policy in dealing with the Indians. Another – family – might.

*Meyer v. Nebraska* and *Pierce v. Society of Sisters* posited a protected sphere for family in the domain of children’s education. *Meyer* located the source for this sphere in the common law. Its antithesis, however, had roots even more ancient. Writing for the Court in *Meyer*, Justice McReynolds noted that Plato extolled a Spartan regime in which the state leveled the family (at least for one class of citizens) and controlled the education of children. The Court’s conclusion was essentially that the state’s alienation of children from parents was inconsistent with basic values and institutions of the Constitution. *Pierce* affirmed this position, again through McReynolds: “The fundamental theory upon which all governments in this Union repose excludes any general power of

124 Admittedly, the prohibition against establishment of religion removes certain normative and institutional options for the purpose of organizing government. But even this removal may be justified in the interest of pluralism, as long as free exercise of religion (or more expansively, freedom of conscience) is respected.

125 262 U.S. 390 (1923).

126 268 U.S. 510 (1925).

127 *Meyer*, at ___.
the state to standardize its children” through the regulation of their education. It’s not uncommon to hear these decisions dismissed as relics of an outmoded jurisprudence. If they are old-fashioned, however, they continue to find lively expression in more recent decisions. In *Wisconsin v. Yoder*, for example, the Court permitted Amish parents to opt out of the state’s law compelling education up to 16 years.

The Court explicitly connected family with plurality in *Skinner v. Oklahoma*, a case involving the constitutionality of a penal statute requiring that persons convicted thrice of crimes of moral turpitude be sterilized. In striking down the statute, Justice Douglas invoked a right of “marriage and procreation.” The functional foundations for the right were twofold. One was that procreation is (or was at one time) essential to the propagation of the species. The other, which is closer to my point, was the potential impact of sterilization on distinct groups. “The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear.” Disappearance implicates two types of plurality – genetic and cultural. Genetic diversity is an evolutionary advantage, in that it enhances the adaptability of the species and therefore the probability of survival (of the species, not necessarily of individuals). Cultural plurality also may produce species-related benefits, albeit subtle and indirect. For constitutional purposes, if Madison is correct, its primary contribution is to the stability and vitality of the polity. And, if Locke has a

---

128 *Pierce*, at ___.

129 406 U.S. 205 (1972)

130 See also *Troxel v. Granville*, . . . upholding parental autonomy outside the realm of education.

131 316 U.S. 535 (1942).
point, there is potential danger in government’s controlling too tightly “the ethical and intellectual DNA of civil society.”

The ability to use family for these purposes (and on behalf of the Indians), however, faces several obstacles. One is the historical irony that family was used as a weapon against the children of the tribes. Just as McReynolds derided Plato’s Spartan family, in which “wives are to be common, and their children are to be common,” proponents of severalty and of boarding schools invoked the dissimilarity between tribal families and the bourgeois nuclear model as a justification for dissolving tribal relations and assuming a degree of control over Indian children. Hence, if family were to be viable as a shield against assimilation, the conception of family historically venerated in American culture and instantiated in law and policy would need to be expanded beyond conventional boundaries.

The second obstacle is doctrinal. Without denying the importance of a kind of family, for example, Frankfurter flatly rejected its constitutional utility in this realm.

The preciousness of the family relation, the authority and independence which give dignity to parenthood, indeed the enjoyment of all freedom, presuppose the kind of ordered society which is summarized by our flag. A society which is dedicated to the preservation of these ultimate values of civilization may in self-protection utilize the educational process for inculcating those almost unconscious feelings which bind men together in a comprehending loyalty, whatever may be their lesser differences and difficulties.\footnote{Quotation from Brandon, supra note 121, at __. Genetic and cultural diversity may help reinforce the constitutional fibre of \textit{Loving v. Virginia}, 388 U.S. 1 (1967), Minersville, at __.} This opinion, of course, was part of a dissent. But even \textit{Meyer} and \textit{Pierce} presumed a circumscribed
parental role, both in degree and with respect to circumstance. *Meyer*, for example, approved of state regulations compelling attendance at school, requiring general instruction in English, and prescribing a curriculum of study. Doubtless, one reason for the Court’s doctrinal tentativeness has been the importance of government’s interest in education. But another likely reason is pragmatic. It is difficult to specify the practical limits to familial autonomy, especially when there are so many circumstances in which the state reserves the power to intercede to protect children and other members of families from serious, even acute and critical, harms.

These considerations give rise to a third obstacle, which is theoretical. Put simply, the logic of liberal democracy tends to be uncongenial to an expansive place for family. Thus, whatever the viability of the “libertarian” decisions as a matter of doctrine, it is certainly the case that Gutmann, Macedo, and Sherry want to confine their reach. Although Macedo believes the two cases were decided correctly on their facts (involving a state’s prohibition on teaching foreign language in a private school in *Meyer* and a state’s prohibition on private education in the primary years in *Pierce*), he is suspicious of extending the principle beyond the facts. Gutmann wants to resist reading the decisions as a commitment to a “state of families.” Family-based plurality is not desirable, she argues; and a muscular place for parental control in education is inconsistent with the perpetuation of the democratic regime. Sherry, too, suspects that evidence of the capacity of many parents to make decisions in their children’s interest is not favorable. Hence, in the context of education, where there’s a conflict between parent and state, the state should prevail.\(^{134}\)

This supremacy of the “statist quo,” as I’ve argued, is precisely the point from the perspective of constitutionalism, which is suspicious of perpetuities and which seeks to preserve the

\(^{134}\) As I read them, Gutmann, Macedo, and Sherry disagree in principle with the Court’s decision in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), cited above. Justice Douglas’s dissent, essentially constitutionalizing the best interest of the child, captures their theories.
possibility of dissolution or of basic change. We should acknowledge, however, the quaint fragility of these considerations. For the impetus to maintain a nation-state is powerful, perhaps inexorable. Indeed, it may be quixotic to expect a political order not to try to sustain conditions for its own continuation. And there are many good reasons for wanting to maintain an order that has at its foundation tenets of liberalism, democracy, or republicanism.

But even an order that wants to maintain itself may have a constitutionalist incentive to preserve plurality and to resist the lure of assimilation. Suzanna Sherry urged that the price of not assimilating is chaos or even civil war. I suggested above that James Madison may have thought differently. But we needn’t resort to a crusty framer to affirm the intuition that a program of assimilation can be counterproductive. To support her claim on behalf of assimilation, Sherry cited the case of the former Yugoslavia. This case, I believe, is inapt. Yugoslavia was an authoritarian regime that held together a multicultural society predominately by coercion and force, not to mention a substantial dose of indoctrination. A constitutionalist society may be different, at least in terms of aspiration, if not always in practice. For one thing, it presents a different face to the world, an expression of reflection and choice, not coercion and force. For another (and consequently), the dynamics of stability and change may simply work differently in such a society.

Working out the details of these dynamics is beyond my present purpose, but my hunch is this: A culturally heterogeneous constitutionalist society may actually run the risk of instability if it attempts aggressively to assimilate. Present-day France may be an apt example. It is a strongly nationalist society with a singular conception of citizenship that is enforced through policies of assimilation. In schools and other public forums, French policy positively suppresses expressions of deviations from nationalist identity – especially deviations of a religious or ethnic character. It is possible that a recent cost of this policy has been dramatic civil unrest. Doubtless, the causes and
characteristics of this unrest are complex and deserve more analysis than I can give them here. But I suspect that a more pluralist approach might have engendered a more stable multicultural environment.

These pragmatic, regime-centered questions aside, there are also considerations of humanity and humility. The history of Indians in America may commend humility, if not in the effort to maintain the order, then in imposing a regime of civilizing education on unwilling peoples. That history – not to mention the histories of other nations at other times – is replete with policies that were, from the standpoint of the regime, perfectly rational. Proponents, moreover, were often benignly motivated and always confident in the correctness of their programs. In hindsight, however, the policies proved to be reprehensible – not merely because of the stupefying ineptitude with which they were carried out, but also (and more) because of the stunning human cost they exacted. If in the end, we ourselves were to entertain some humble self-doubt, and if that humility engendered a bit of restraint in dealing with non-conforming persons or peoples, history might judge us more kindly. This may not be a constitutionalist requirement. But it is a humanist imprecation.