substantial protection under the law, notwithstanding the *New York Times*'s cavalier reference to a shopping mall as "nominally private property." As the dissent observed, "Under the majority's theory, private property becomes municipal land and private-property owners become the government."

Of course, it would be a serious misapprehension to assume that this case reflects a principled devotion to free speech. On the contrary, rarely has a court been more vigilant than the Wilentz court in scrutinizing the political correctness of speech before adjudicating the issue of whether it can be allowed. Recently, for instance, a New Jersey Supreme Court decision was summarily vacated by the U.S. Supreme Court for its unconstitutional overreaching in placing restrictions on law-abiding pro-life picketers. One wonders how the leafletting case would have come out had the leaflets conveyed a pro-life message.

The *New Jersey Coalition* case illustrates how subversive a results-driven jurist is with respect to the real policy preferences of New Jersey residents. Wilentz has shown again and again throughout his tenure that *his* vision of the good society must prevail, with or without constitutional sanction. Whether in circumscribing zoning practices to compel the construction of low-income housing, restructuring school funding to destroy local control and to waste more money on schools that resemble war zones, or effectively nullifying the death penalty by creating labyrinthine standards for its application, Wilentz has shown an utter disregard for the text and history of the state constitution and supplanted that document with his own leftist (and race-obsessed) views.

To be sure, Wilentz inherited a court with well-developed activist inclinations. It was in New Jersey, after all, that a "right to die" for Karen Ann Quinlan was fashioned out of the misbegotten federal privacy cases. Still, Wilentz has pushed well beyond anything that preceded him. Indeed, given his role in promulgating policy from the bench, it is certainly no overstatement to say that for the past 15 years or so, Wilentz has easily been the most powerful *politician* in the state.

Fortunately, all New Jersey judges face mandatory retirement at age 70, and Wilentz must go in 1997. Governor Christine Whitman will appoint his successor, and she should not use the opportunity to show her sensitivity to clamorous minorities or women's groups. Rather, she should select a chief justice who will construe the state constitution reasonably and not treat it as a Rorschach test into which a revolutionary agenda can be read. New Jersey has had enough of what Judge Learned Hand once called Platonic Guardians.

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The Ultimate Tax Protest

by Douglass H. Bartley

In *Suzanne M. Bartley et al* v. *United States*, a class-action suit filed on April 17, 1995, in federal district court in Milwaukee, my wife, on behalf of herself and all others who paid federal taxes for the years 1991-93, has sued for a refund of approximately 70 percent of the revenue collected during those years. For fiscal year 1993 alone, the total amount of the refund approximates $808 billion. If the pattern of overcollection for fiscal year 1993 holds true for fiscal year 1991-1992, the grand total of the refund would be a staggering $2.4 trillion.

Unlike the usual "tax protest" cases, the general basis for this suit is that the government, with its various tax statutes and regulations, has far exceeded its lawful taxing authority under Article One, Section 8 of the Constitution. That provision names almost all of the government's lawful spending powers and strictly limits it to raising taxes to carry out the enumerated functions and those alone. The government has *no general power of taxation*.

The Constitution's strict limitation on federal taxing power is made clear in the *Federalist* papers by both James Madison and Alexander Hamilton. Madison, in *Federalist 41*, said:

> It has been urged and echoed that the [taxing power] amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense and general welfare. No stronger proof could be given of the distress under which these writers labor for objections, than their stooping to such a misconstruction.

Hamilton agreed in *Federalist 83*: "This specification [of enumerated powers] evidently excludes all pretension to a general legislative authority, because an affirmative grant of special powers would be absurd, as well as useless, if a general authority was intended."

As the Constitution makes clear, the federal taxing power is limited to funding national defense; postal operations; federal courts; coining and borrowing operations; the administration of laws on bankruptcy, naturalization, patents, trademarks, counterfeiting, weights and measures; the punishment for crimes on the high seas and violations of international law; the District of Columbia and the management of other federal properties; and the regulation of commerce with foreign nations, with Indian tribes, and among the states. For 1993, about 70 percent of all federal expenditures

LIBERAL ARTS

ON *BROWN* v. *BOARD OF EDUCATION*

"The whole matter revolves around the self-respect of my people. How much satisfaction can I get from a court order for somebody to associate with me who does not wish me near them?. . . I regard the ruling of the U.S. Supreme Court as insulting rather than honoring my race. . . . I have no sympathy nor respect for the . . . pressure group concerned in this court ruling."

—*from Zora Neale Hurston's* Folklore, Memoirs, and Other Writings, *published by the Library of America*

were for purposes not within these enumerated powers. Thus 70 percent of all taxes collected for that year are unconstitutional.

The suit also debunks the myth that Congress has power under the Commerce Clause to tax in order to fund programs not otherwise within the enumerated powers, such as many of today's social welfare programs. To the Framers, "commerce among the states" meant *trade among* the states, not manufacturing, mining, agriculture, retailing, or other activities *within* states—activities that all *precede* trade *among* the states. As Professor Richard Epstein of the University of Chicago Law School has shown, it makes no sense textually to say that "commerce" means manufacturing, agriculture, or any other activity that precedes trade:

> One should assume that the word commerce . . . bears the same meaning with respect to each of its objects. . . . What possible sense does it make as a matter of ordinary English to say that Congress can regulate 'manufacturing with foreign nations, or with Indian tribes' or for that matter 'manufacturing among the several states'?

Only if "trade" is substituted for "commerce" does the Commerce Clause make sense: "Congress shall have power . . . to regulate trade with foreign nations and trade among the states, and trade with Indian tribes."

The tax refund suit got a big boost from a recent decision of the Supreme Court. About ten days after the suit was filed, the Court declared in *United States* v. *Lopez* that there actually are limits on the commerce power. Perhaps the most important statement in the case came in Justice Clarence Thomas's concurrence, where he complained, "The [Commerce Clause] power we have accorded Congress has swallowed Article One, Section 8."

Justice Holmes once said, "Great cases, like hard cases, make bad law." The tax refund case is at once both a great and a hard case. It is a great case not just because the amount of money in question is astronomical, higher than any other in legal history, and because it involves a question common to all federal taxpayers, but because it seeks to reverse more than 60 years of federally mandated social engineering and to revitalize the simple, founding principle that the government has no more power than that specifically given it in the Constitution.

Douglass H. Bartley is a tax lawyer in Milwaukee. Contributions toward defraying the expenses of this suit are welcome (757 North Broadway, Suite 500, Milwaukee, Wisconsin, 53202), as is help from interested counsel.

LITERATURE

Kiddy Lit for the 90's

by Herb London

Children's books used to relate tales of heroes and villains. They presented a Manichaean world in which good triumphed over evil. Children might be scared, but they were assured that the forces of light could easily be distinguished from the forces of evil. Well, that scenario of yesteryear has been replaced by a very different condition today.

The 1994 Newberry medal for the "best" children's book went to Lois Lowry for *The Giver*. This is a tale about a hypothetical community in which issues of suicide, euthanasia, and mental telepathy are emphasized. Characters in this novel reside in a controlled community with narrowly defined roles of birthmothers, caretakers, nurturers, laborers, and givers. The government determines the number of children per family. In the House of the Old, leaders decide when a person is to be released (read: put to death). At the Ceremony of Release, there is a toast, and a goodbye speech given by the person released. When twins are born, only one is allowed to live. Invariably, the smaller twin is "released" with a lethal injection. On one occasion, a 12-year-old objects to the practice, but he is mollified by a Giver who points out that her daughter asked to be released ten years earlier and was given a syringe to inject herself.

In one California school system, several parents complained about the use of this book in an elementary school, charging that it was insensitive to the value of life. These parents were told that "public education may not be the best choice for them." I agree. What conceivable benefit is there for youngsters in a book of this kind? Are ten-year-olds prepared to make judgments about euthanasia?

Clearly, what once inspired, now inflames. What was once the axial standard for moral behavior in Horatio Alger, *Toodle, The Little Engine That Could*, has been converted into amorality. After all, teachers and librarians now ask whether, in this complicated world, we even have a *right* to tell children how to conduct themselves.

My reply is that you have a right and an *obligation* to do so. Teachers have an obligation to select books that provide a moral basis for good behavior. Homer is a better guide for the future than Ms. Lowry, and no matter what the rationalizers say, virtue must be cultivated. The good must defend itself not merely against the bad, but against the indifferent, the complacent, and the relative.

If the myths in our culture are derived merely from the pragmatic, then "anything goes" is the lyric for social discourse. Children cannot be expected to make philosophical judgments without a grounding in what is right and what is wrong, what is good and what is bad. To assume, as contemporary pedagogues do, that students can arrive at sensible judgments through the exchange of opinions about controversial issues is wrongheaded. Critical-mindedness does not occur in a vacuum. Students must have a knowledge of morality in order to make moral decisions.

Unfortunately, the democratic idea that the free exchange of opinion will inevitably yield truth is betrayed by a different reality. The free exchange of *intelligent* opinion may lead inexorably to truth, but *only* if the opinions have value. In our era, we have debased this notion with a belief in all opinions and a reliance on the pedagogical idea that any controversial notion should be the subject of class discussion. Is it any wonder Johnny can't read, Mary can't add, and neither can distinguish between right and wrong?

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