

## PARENTS, RELIGION, AND SCHOOLS: REFLECTIONS ON *PIERCE*, 70 YEARS LATER

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My title is "Parents, Religion, and Schools." You will notice—and, I suspect, you will initially be alarmed by—my omission of "children" from a title that, it would seem, should quite obviously include them. But, as we will see, there is purpose to my pedagogy or, if you prefer, method to my madness.

I want to begin with a simple proposition. I do not plan to argue for it. I will simply assert it. I am not insisting that it is correct. I am wondering at the implications if it is correct. The proposition is the one that guided the Supreme Court in its 1925 decision in *Pierce v. Society of Sisters*,<sup>1</sup> which struck down an Oregon law requiring all children to attend public schools. The law was unconstitutional, the Justices explained, because it interfered with the "liberty of parents and guardians to direct the upbringing and education of children under their control."<sup>2</sup> For a moment, let us take the words of *Pierce* at their face value, that the right of parents to direct the upbringing of children is fundamental, suggesting that it rivals in importance such rights as the freedom of speech, the liberty from unreasonable searches and seizures, or the privilege to be free of state-sponsored racial discrimination.

When scholars meet to discuss the great pantheon of constitutional rights, we talk about speech and equality and perhaps privacy, but we are not much concerned with the right to direct the upbringing of children; indeed, I suspect that many scholars disbelieve in it, just as many scholars think the individual is fundamental and the family contingent. But I also suspect that most parents (even some parents who are legal scholars) still think the right exists, or at least that it should. In fact, I suspect many and perhaps most parents view the family unit as more fundamental

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<sup>1</sup> 268 U.S. 510 (1925).

<sup>2</sup> *Id.* at 534-35.

than the individual. Perhaps the best evidence of this consensus is the popularity of the proposed Parental Rights Amendment to the Constitution, which would prohibit the state from interfering with the upbringing of children, absent a compelling interest. Most parents seem to like the Amendment, the pollsters tell us, no matter how many clever journalists take swipes at it by raising the silly specter of a state unable to interfere with child abuse.<sup>3</sup>

This lecture is not, however, a brief for the Parental Rights Amendment. I am not a fan of amending the Constitution, even in the worst of times, and we are very far from the worst of times. Parents as a group are neither endangered nor oppressed, although, it must be said, parents are often ignored. Although I share some of the parental concerns that make the amendment popular, I have a broader interest. I want to speculate, as I said, on the possibility that *Pierce* is both rightly decided and rightly reasoned, and thus that parents really do possess a fundamental constitutional right to direct the upbringing of their children. I want to ponder the implication of that right, particularly with respect to education.

*Pierce* has lately generated a bit of literature, with some scholars arguing that we have not paid it sufficient attention,<sup>4</sup> and others dismissing it as a dangerous aberration.<sup>5</sup> I am far more in the first camp than in the second, although I hardly consider the case a shining example of judicial reasoning. At a smidgen over seven decades in age, the Court's opinion may be looking a bit long in the tooth, written as it was by the racist Justice McReynolds,<sup>6</sup> and conceding as it does, for example, the power of the state to ensure that all teachers in public and private schools are "of good moral character and patriotic disposition."<sup>7</sup> Morality? Patriotism? Doubtless this would sound good to most American citizens, but between what sounds good and what is allowed, there is often a vast and irritating gulf. Nowadays, any constitutional lawyer worth her mettle would shoot down so silly a notion in five minutes before any competent judge. Is

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<sup>3</sup> In Colorado, which in November of 1996 defeated a proposed Parental Rights Amendment to the state constitution, even the *Denver Post*, which strongly opposed the amendment, took other opponents to task for talking about child abuse, which would have been no harder to prosecute under the amendment than it is now.

<sup>4</sup> See, e.g., Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 93 U. CHI. L. REV. 937 (1996). For an earlier treatment with similar themes, see generally STEPHEN ARONS, *COMPELLING BELIEF: THE CULTURE OF AMERICAN SCHOOLING* (1983).

<sup>5</sup> See, e.g., Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131 (1995); Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992).

<sup>6</sup> Readers who think I am being unfair to poor Justice McReynolds with what must appear to be a fearsome ad hominem should peruse any biography of Brandeis.

<sup>7</sup> See *Pierce*, 268 U.S. at 40.

what the decision says about parents and children equally out-of-date?

I think not, but, in this Lecture, I hope to provoke more than to persuade; that is, I hope to get all of us thinking about the question of parental authority in historical as well as constitutional terms. Consequently, I will begin my provocation by setting *Pierce* against its rarely remarked historical background, explaining the climate that generated the laws in question, and thus outlining the genuine threat to religious freedom that the Court was staving off with its remarkable ruling. Along the way, I will suggest that in the eyes of millions of parents, the same threat (albeit in a different guise) continues to exist today, which is what explains the support for both classroom prayer and the Parental Rights Amendment. Second, I will point to some ways in which the constitutional rules governing education and religion might be different were we to take *Pierce* seriously as the law of the land. The basic classroom prayer cases, as we shall see, are more easily defended under the *Pierce* model than under any of the other rationales the courts have offered—but a number of other cases might reach somewhat different results. I will also try to explain why the liberal vision of public schooling, for all of its classroom appeal, is so threatening to so many perfectly reasonable people. My overall purpose is to begin—but only begin—a reflection on the principle itself, searching not so much for its constitutional basis as for its basis in a sensitive understanding of the concept of religion itself.

## I.

*Pierce* is one of those decisions that is more cited than read, and that is almost never discussed or taught against the background of its historical moment. Yet to understand *Pierce*, we must understand the era in which it arose, and the era can be summarized simply: a time of broad and relentless hostility to the European immigrants whose labor the nation needed but whose religions were seen as alien and un-American. These religions were often punished through a variety of discriminations, in the hope that they would disappear. And the law—especially the compulsory education law—was intended to play a part. But the religions refused to go, and *Pierce* is a part of the reason.

Let me offer two interpretive historical propositions, both of which I think are correct, but neither of which is uncontroversial.

First, why, as a matter of history, do we have compulsory school attendance laws? It is easy to explain the theory behind them. The common school was designed to answer Horace Mann's famous challenge, that it is an easy thing to make a republic, but no easy thing to make republicans (small "r"). Thus the purpose of the early public schools was, quite plainly, to train children to be good citizens—to teach

them the values of the American idea. In contemporary political theory, we continue to make the same argument: education is crucial in helping children to gain the skills and the virtues they will need to be public-spirited adults. In the language of modern politics, in which nothing is real unless it is a right, we say that everybody is entitled to an education, a somewhat different proposition. This notion, current through much of the twentieth century, has less to do with the needs of democracy than with the needs of capital: the schools are the place where the work force acquires the skills it needs, which means the skills that capitalism needs it to have.

But these are only theories; the practice has a history. In fact, compulsory schooling, no matter what its theoretical basis, did not become common in America until the nation found itself confronting significant numbers of European immigrants in the middle to late nineteenth century, who brought with them strange languages, strange customs, and, most of all, strange religions. Roman Catholicism and, to a lesser extent, Judaism, were widely viewed as threats to America, which was self-consciously a Protestant country.<sup>8</sup> Books full of anti-Catholic sentiment, and stern nativist warnings, were best-sellers. Compulsory education laws were designed in this era with the unapologetic goal of weaning the immigrant children away from their parents' religions, to replace faith in a foreign God with faith in America—Protestantism masquerading as patriotism.<sup>9</sup> Protestant clergy were quite explicit in their view that the schools were to be a tool for evangelization; support for public education became a virtual article of faith. Politicians and school officials agreed.<sup>10</sup>

The public schools that emerged from this debate held classes five, sometimes six days a week. It was in this era that the schools were gradually purged of formal religious instruction.<sup>11</sup> (At the turn of the century, few Americans considered prayers religious instruction.) The schools came to reflect a vision of religion as something that happens on weekends and perhaps evenings, but not during the weekday, which was, once again, nothing more than Protestantism masquerading as principle. One of the reasons the Catholic schools were established was that Prot-

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<sup>8</sup> Indeed, there is strong evidence that the anti-Catholicism of the Framers themselves led them to conclude that freedom of worship for Catholics constituted a *threat* to the religious freedom of others. See WILLIAM LEE MILLER, *THE FIRST LIBERTY* 280-82 (1985).

<sup>9</sup> See WARREN A. NORD, *RELIGION AND AMERICAN EDUCATION: RETHINKING A NATIONAL DILEMMA* 67-76 (1995).

<sup>10</sup> See JAY P. DOLAN, *THE AMERICAN CATHOLIC EXPERIENCE: A HISTORY FROM COLONIAL TIMES TO THE PRESENT* 269 (1985); JAMES T. HANDY, *UNDERMINED ESTABLISHMENT: CHURCH-STATE RELATIONS IN AMERICA, 1880-1920* (1991).

<sup>11</sup> See NORD, *supra* note 9, at 71-79.

estant America believed that children could learn religion in Sunday schools, and so designed the common school program to fit in a week that left Sunday free. (Our public schools still follow both the Protestant schooling schedule and the Protestant vision of formal religious instruction as confined to the weekend.) In Catholic Europe, education was deemed the responsibility of the family and the church, and was pervasively religious. Concerned about the survival of their faith in a Protestant world, American Catholics moved from the informal but encompassing religious instruction of the Old World to more formal, classroom-style religious instruction in the New World.<sup>12</sup>

The second controversial historical proposition relates to the separation of church and state. Nowadays, it is a commonplace of constitutional rhetoric that state monies cannot be used to support religious education. But that idea is only about a century old. Nobody seemed troubled by the practice in the eighteenth century, a point admitted even by such staunch disestablishmentarians as Leonard Levy.<sup>13</sup> Contemporary opponents of vouchers or tax relief for parents whose children attend religious schools sometimes cite James Madison's *Memorial and Remonstrance*, in which he objected to Patrick Henry's bill for the assessment of a general tax on residents of Virginia that would support, among others, "teachers of the Gospel." But one who wants to do history must take history seriously, and serious students of history understand that this eighteenth century reference means *pastors*, not teachers as we now understand the term. In other words, it was support of preachers—not teachers—that drew Madison's ire.

Besides, if that is what Madison meant, everybody in the new nation immediately set about ignoring him. The Congress itself—the only part of the government expressly mentioned in the First Amendment—wasted little time before authorizing funds for church schools in the Northwest Ordinance. Elsewhere in the new nation, as the eighteenth century turned to the nineteenth, state money aplenty supported religious education—distinctly Protestant, of course—in the public schools. Many states supported church-based schools as well. William Seward, during his two decades as governor of New York, proposed state-supported parochial schools for Catholic and Jewish children, on the theory that their parents surely would not want them to attend the fledgling public schools, where everybody hated them. (The same theory was often used to support racially segregated schools: it was for the black children's own good.) Nobody suggested that Seward's plan was unconstitutional. Opponents

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<sup>12</sup> See DOLAN, *supra* note 10, at 275-86.

<sup>13</sup> See generally LEONARD LEVY, *THE ESTABLISHMENT CLAUSE* (1986).

didn't like it, first, because it was too expensive and, second, because it might allow the immigrant faiths to survive.

None of this history is new: most of it is, I hope, well-known. Sometimes, the religious nativism of the 1800s is dismissed as a century-long misreading of the First Amendment. But the more history I read, the more I am convinced that the immigration question has always been central to the question of state support for parochial schools: the project of denying public money to religious schools, and the larger project of discouraging private religious education, were born not of constitutional principle but of religious bigotry. The common school, which was sold to the public on expressly religious grounds, simply cannot be understood except as an effort to Protestantize the immigrant children.<sup>14</sup> As far as I have been able to determine, the notion that public funds could not support religious schools became a popular argument only when the European immigrants—who understood quite well what the public schools were trying to do to their children and, thus, to their religions—actually began to establish parochial schools. When the Catholics went to the states for money (they went to Congress too), a suddenly pure America, citing the separation of church and state after supporting Protestant education for a century, sent them packing.<sup>15</sup>

The common schools, which purported to be for everyone, were relentlessly ideological and intolerant. As one historian has written of the late nineteenth century, "[F]or Indians, blacks, Jews, Catholics, Mormons, and people of other religious heritages, the culture of the public school was alien and its benefits questionable."<sup>16</sup> The Ku Klux Klan, re-born amidst the nativist ferment, announced that at least some European Catholics—they seemed to have in mind mainly Italians—had Black blood, a claim that would have portended goodness-knows-what had the Catholic parents kept their children in the Southern public schools. (We cannot, however, indulge the pleasant revisionist fantasy that only White Americans were anti-Catholic. Black Americans, heavily Baptist and clinging to the threatened lower rungs of the economic ladder, joined in the nativist assault with some vigor.<sup>17</sup>)

Some Catholics tried to compromise, proposing the removal of Protestant values—and the Protestant Bible—from the public schools. Protestants treated the proposals as an attack on the foundations of the

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<sup>14</sup> See NORD, *supra* note 9, at 71-79. See generally DOLAN, *supra* note 10; HANDY, *supra* note 10; Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841 (1992).

<sup>15</sup> See *id.*

<sup>16</sup> DOLAN, *supra* note 10, at 267.

<sup>17</sup> See THOMAS MULLER, IMMIGRANTS AND THE AMERICAN CITY 33-36 (1993).

Republic. Politicians gave furious speeches. Newspapers wrote furious editorials. There were heroes, such as the Cincinnati school board, which fought a politically unpopular, and ultimately successful, battle to take the Bible out of the classroom altogether. But there were far more villains, such as the mob that rampaged through the Catholic neighborhoods of Philadelphia, burning and murdering, because of rumors (that turned out to be false) that the Protestant Bible was about to be removed from the schools. Small wonder, then, that by the end of the nineteenth century, there were Catholic schools everywhere there were Catholics.

The story gets worse. By creating religious schools for their children, the immigrants effectively circumvented the compulsory school attendance laws that were supposed to turn potential Roman Catholics and Jews into good American Protestants. Furious at this thwarting of the legislative will, several states considered—and Oregon, by ballot initiative, actually adopted—legislation that prohibited parents from sending their children to private schools of any kind without the explicit permission of the state. Some supporters described the new laws as merely clarifying the intention of the original laws: compulsory attendance, they explained, had always meant public school attendance. The religious schools, then, resulted from a misreading of the statutes. Obviously, they could not be allowed, because the immigrant children might then grow up with the same un-American religions as their parents. John Dewey, the twentieth century's great apostle of educating for democracy, huffed that parents should not be allowed to "inoculate" their children with beliefs that they "happen to have found serviceable to themselves."<sup>18</sup> Religious education, he wrote at this moment when many states were deciding whether to outlaw it, was simply a form of segregation.<sup>19</sup>

## II.

This was the mess that the Supreme Court faced in 1925 when *Pierce v. Society of Sisters*<sup>20</sup> came before the bench. *Pierce* involved a challenge to Oregon's amended compulsory education law—amended, that is, to make plain that sending children to private schools did not satisfy the state's interest. Challenging the law were two schools, one Catholic, one a non-religious military academy. The district court overturned the law on the ground that it impaired the liberty of contract—the livelihood of the private schools the statute effectively outlawed—the

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<sup>18</sup> STEVEN C. ROCKEFELLER, JOHN DEWEY: RELIGIOUS FAITH AND DEMOCRATIC HUMANISM 250 (1991) (quoting Dewey).

<sup>19</sup> See *id.* at 267.

<sup>20</sup> 268 U.S. 510 (1925).

state appealed, and so America's nativists at last had their day in the Supreme Court.

You may think I exaggerate by calling the supporters of the law nativist, but before the high court, the State of Oregon made the nativist argument directly, and without evident shame:

The subject of immigration is one which is exclusively under the control of the Central Government. The States have nothing to say as to the number or class of the immigrants who may be permitted to settle within their limits. It would therefore appear to be both unjust and unreasonable to prevent them from taking the steps which each may deem necessary and proper for Americanizing its new immigrants and developing them into patriotic and law-abiding citizens.<sup>21</sup>

If students are in private rather than public school, this argument suggests, they are less likely to be "patriotic and law-abiding." Why? Plainly, because they are missing something good—or learning something bad. This, of course, is precisely the anti-Catholic vision that led to broad evangelical support for the public schools. But the argument gets worse:

At present, the vast majority of the private schools in the country are conducted by members of some particular religious belief. They may be followed, however, by those organized and controlled by believers in certain economic doctrines entirely destructive of the fundamentals of our government. Can it be contended that there is no way in which a State can prevent the entire education of a considerable portion of its future citizens being controlled and conducted by bolshevists, syndicalists and communists?<sup>22</sup>

In other words, today Catholicism, tomorrow communism—piling one un-American idea onto the next. And the state warned of the consequences of striking down its law by offering a hypothetical. Suppose, the brief asked, that a private school were to teach "disloyalty to the United States" or (what was evidently considered just as wicked) "the theory of the moral duty to refuse to aid the United States even in the case of a defensive war"—that is, pacifism.<sup>23</sup> The point, evidently, was that the state had to control the education of children, lest their parents arrange for them to learn something the state disliked. The project of education, as Oregon understood it, was to produce lots of children incapable of thinking a thought the state disapproved.

And, just in case the scare argument failed, Oregon tried another tack. The law would "bring about a greater equality" in the schools, by

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<sup>21</sup> *Pierce v. Society of Sisters*, 268 U.S. 510, 526 (1924) (arguments of counsel).

<sup>22</sup> *Id.* (arguments of counsel).

<sup>23</sup> *Id.* at 528 (arguments of counsel).



repairing an earlier omission. Now the compulsory attendance laws would apply to all children, not merely those not attending public schools.<sup>24</sup> The previous law, it seems, unfairly excepted from its reach students at private and parochial schools. And if the state had the power to compel some students to attend public schools, counsel contended, it had the power to compel all.<sup>25</sup> Besides, the brief went on, as though this was not the main point, the voters of Oregon could reasonably have believed that "religious suspicions" in America were caused by "the separation of children along religious lines during the most susceptible years of their lives, with the inevitable awakening of a consciousness of separation, and a distrust and suspicion of those from whom they were so carefully guarded."<sup>26</sup> That is, the *children in religious schools* might distrust others. (This was consistent with, and perhaps suggested by, John Dewey's theory that religious education was a form of segregation, as objectionable as separation of the races.)

The Supreme Court, perhaps remarkably, given the era, was unimpressed with this nativist cant. Indeed, the Court disposed of virtually the entire case in a single, sharply worded paragraph:

[W]e think it entirely plain that the [Oregon compulsory attendance law] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.<sup>27</sup>

This language, routinely dismissed by contemporary scholars as raising the hoary specter of substantive due process—and for treating children as property besides—actually suggests a rather subtle theory of the state and its relation to religion. The point is less about liberty than it is about state power: government is bottomed, for the Court, on the as-

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<sup>24</sup> This construction of argument is itself quite instructive. It suggests that students attending religious schools are in some sense not really attending school—that only the public schools are real schools. Thus, in the State's view, the compulsory school attendance law is being expanded to apply to everybody; previously, it did not apply to children attending non-public schools.

<sup>25</sup> See *id.* (arguments of counsel).

<sup>26</sup> *Id.* at 525 (arguments of counsel).

<sup>27</sup> *Pierce*, 268 U.S. at 534-35.

sumption that it will not interfere with this parental choice. So the Court seems to be making, really, an argument about social contract. In effect, the state cannot interfere because the state was never delegated any power to interfere.

This vision is obviously informed by the nineteenth century vision of society as a combination not of atomistic individuals but of mutually dependent families—or, more to the point, of sets of parents speaking and acting on behalf of their families. And, within this vision, the Justices chose their words with care. They wrote of the liberty of parents and guardians, but although some critics have argued that the Justices were treating the children as their parents' property,<sup>28</sup> there is no such suggestion in the case; instead, they referred to children "under their control," suggesting perhaps a hierarchy but at best a temporary one: today the parents "control" their children, but those children are, tomorrow, adults. When they are adults, what values will they hold? Nothing in the Court's analysis suggests any clear predictability, except for one tantalizing and often overlooked line: the State lacks the authority "to standardize its children by forcing them to accept instruction from public teachers only." This language suggests a normative claim that the state should not try to ensure that all citizens have a common view of the world—rejecting the very argument the state of Oregon pressed in its brief. Children (and, implicitly, adults) evidently are to come in all varieties; the state lacks power to "standardize" them. Thus the Justices, perhaps without realizing it, were actually writing in the language of pluralism: there is inherent value, *Pierce* suggests, in diversity.

But the language further suggests an empirical understanding that requiring public instruction would indeed lead to a common vision of the world, which was evidently conceded on both sides. Put otherwise, *Pierce* admitted the heart of the nativist argument, a proposition that remains common ground today: that values are inculcated in large part through the educational process. Consequently, by holding that parents could not be required to send their children to public schools, the Court was holding that parents can decide what values should be inculcated in their children. If you believe, as I do, that democracy rests in part on a broadly shared moral vision, this holding thus raises the prospect of anarchy; but it may be that here, as so often, the risk of anarchy is the price of freedom. Moreover, the decision must be understood in a historical context in which the Justices knew as well as anybody that the Oregon law was, in large part, an effort to destroy Roman Catholicism.

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<sup>28</sup> See, e.g., the unfortunate misreading of *Pierce* in Woodhouse, *supra* note 5. For effective criticism of Woodhouse's argument, see Gilles, *supra* note 4, at 1009 n.256.

Armed with that understanding, *Pierce* becomes a case as much about religious freedom as about liberty of contract. (It was not possible to decide the case under the Free Exercise Clause, because the Court had not yet held it applicable to the states.) Using the history, the *Pierce* holding can be rewritten thus: the state may not use its power to compel education as a tool for destroying a religion. Phrased this way, the *Pierce* rule is one, presumably, that all of us can stand up and cheer.

But even if this is so, there is a missing step in the Court's analysis—not so much ignored as assumed. Compulsory attendance laws bind the parents, but it is the children who are most directly affected. The parents remain free to be Catholics (or anything else) no matter what the state does to the children. In other words, if the children are weaned from the religion of their parents, that does not change the parents' religion. Why, then, does the Oregon law interfere with freedom of religion?

The answer must surely be that the Court accepted what we would nowadays describe as a "narrative" theory of religion: that a religious tradition represents a story extended over time, or, more properly, across the generations. A religion, then, is not a static thing, existing at a particular place and time. It is, or rather, it aspires to be at once elusive and evolutionary, existing in more than one time. A religion, in this view, is a story that a people (not a person) tells itself about its historical relationship to God. One reason our contemporary constitutional law tends to miss this point is that it tends to view religion as a matter of individual choice rather than as a community activity; but serious religions revolve around the group, not the individual. And serious religions develop traditions, which in turn help to preserve the narrative. As the late legal scholar Robert Cover pointed out, this narrative aspect is what makes religion dangerous (for the story the religion tells may not be the same one that the dominant forces in society tell), but it is also what makes the religion special (for the story is about God and is believed to be true).<sup>29</sup> The theologian David Tracy refers to this as the "subversive" aspect of religion: for if a religion centrally involves a narrative about the relationship of people to God, and if the narrative is believed, the people who believe it might act in ways that the rest of their society condemns.<sup>30</sup> They might, like the nineteenth century Mormons, engage in polygamous marriages; or they might, like the more committed abolitionists, take active measures to free the slaves. This subversive nature of religion is of

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<sup>29</sup> See generally Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV L. REV. 4 (1983).

<sup>30</sup> See generally DAVID TRACY, *PLURALITY AND AMBIGUITY: HERMENEUTICS, RELIGION, HOPE* (1989).

course the reason that state power is so often used to try to destroy it; but it is also one of the reasons for its importance to democracy. Religion creates centers of different meanings and thus, potentially, of the radical dissent that provokes dialogue and, through democratic conversation, may lead to social change.<sup>31</sup>

Alasdair MacIntyre has written with some power about the possibility that a self who grows up in a strong religious tradition may nevertheless be a free self—indeed, may in some ways be freer than the self who grows up, as we now like to say, unsituated.<sup>32</sup> The unsituated life, after all, can be more lonely than liberating. But I am, for the moment, more interested in MacIntyre's vision of tradition as argument extended over time. Certainly what MacIntyre describes must be what the *Pierce* Court believed. A religion survives through tradition, and tradition is multi-generational. A religion that fails to extend itself over time is, in this vision, not a religion at all. It might be a set of moral beliefs or a collection of folk tales or a nifty theological idea or a list of interesting rules, but, if it does not exist in this timeless, evolutionary fashion, the one thing it is not is a religion. So if religious believers are helpless (because of state action) to extend their narrative over time, then the one thing they are not enjoying is religious freedom. And that is what happened in *Pierce*: the state had decided to make it difficult for Roman Catholic parents to extend their narrative into the future. Had the Oregon law been allowed to stand, the State would have been free to decide which religions should survive and which ones should not. In language common to constitutional decisions of the early twentieth century, the Court called the statute an unreasonable interference with the parents' liberty; nowadays, we would call it a violation of the First Amendment.

This explains how *Pierce* applies the religious freedom of the parents to decisions about the rearing of children "under their control" without falling into the trap of supposing that the parents own the children; it does not say whether the *Pierce* result is right, for the explanation may be insufficient. But the approach I have sketched surely must be what the Justices had in mind, or the result makes no sense. So what *Pierce* ultimately represents is the judgment that in order to take religious freedom seriously, we must take the ability of parents to raise their children in their religion seriously. If we fail to do so, our claim that we cherish freedom of religion is reduced to a claim that we cherish religions unthreatening to the existing order. Of course, as we shall see, many

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<sup>31</sup> I discuss this aspect of religion in STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993) [hereinafter CARTER, *CULTURE OF DISBELIEF*].

<sup>32</sup> See ALASDAIR MACINTYRE, *AFTER VIRTUE* (2d ed. 1984).

academics of the current era are quite willing to dismiss threatening religions, perhaps because they are willing to indulge another revisionist fantasy, namely, that we have found all the moral answers and thus are not in need of any centers of dissent. One reason for reviewing all this history is to make plain that this same certainty has been the possession of every era.

### III.

But history marches on. Some forty years after *Pierce* was decided, Justice William Douglas, writing for the Court in *Griswold v. Connecticut*,<sup>33</sup> would put his own intriguing spin on the *Pierce* result: “[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.”<sup>34</sup> This reading seems correct but incomplete. What the State may not contract under *Pierce* is the knowledge, including the religious knowledge, that the *parents* choose to teach their children. And if the parents, in order to teach what they think their children should learn, must reject the Protestant common schools that the nation has established, it would be unconstitutional for the state to interfere. The fact that we now call our more secular common schools public schools should not distract us from understanding how they are built, still, on the Protestant model—and how little has actually changed. The schools were designed to wean children away from religions deemed threatening to the existing order, and many parents believe the schools play the same function today. *Pierce* proposes that the state lacks the authority to use the educational process to enforce its choices among religions.<sup>35</sup> And so, if we try to draw from *Pierce* a kind of constitutional law of education, we would probably put it this way: *Parents have a fundamental right to protect their children from religion-destroying educational programs.*

Very well: what counts as a religion-destroying educational program? The paradigm case is that of the public school student whose parents believe that exposure to a particular piece of the curriculum—not the entire curriculum, and not enough to warrant withdrawing her from school and seeking an alternative education, but just a piece—will greatly interfere with their effort to exercise their religion freely by extending its reach into the future. If we take *Pierce* seriously to mean what I have suggested it means, we must surely conclude that the state does a great

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<sup>33</sup> 381 U.S. 479 (1965).

<sup>34</sup> *Id.* at 482.

<sup>35</sup> Similar readings of *Pierce* have led some writers on the subject to question the constitutionality of public schools. See, e.g., ARONS, *supra* note 4. Let me make clear that I do not press that view here, and, indeed, do not agree with it.

wrong when it uses its schools, at which children's attendance is compelled, to destroy a religious tradition by making it difficult or perhaps impossible for its adherents to project it across generations. Consequently, if we take *Pierce* to mean what I suggest, the student must be excused from the objectionable instruction. Nothing could be simpler.

This, of course, is the very situation the Sixth Circuit faced in its controversial decision in *Mozert v. Hawkins County Public Schools*.<sup>36</sup> There, the court rejected the claim of parents who wanted to exempt their children, on religious grounds, from a course of instruction intended to teach what the school board, and the court, called "tolerance." The exposure to the tolerance curriculum ("critical reading" was the official title), the parents insisted, would run contrary to their religious beliefs, which did not encourage toleration of everything. The court sputtered in response that tolerance was good, a non sequitur, but at least an honest one. As Nomi Maya Stolzenberg has pointed out in a perceptive article, the judges were neither neutral nor accommodating: they treated the parents' claims as false. They disbelieved the proposition that teaching tolerance could be religiously objectionable.<sup>37</sup>

I have no trouble at all concluding that *Mozert* is wrong, for reasons I have detailed elsewhere.<sup>38</sup> Indeed, if *Pierce* means what I have suggested, the ability of parents to exempt their children from courses of instruction to which they object on religious grounds would seem to be a rather obvious concomitant of the ability to take them out of the public schools entirely. (The *Mozert* majority's suggestion that this would be an administrative nightmare is unpersuasive). Of course, as it can do with any other constitutional right, the state should be able to overcome this one by showing a compelling interest, but it is difficult to imagine how the state could demonstrate the compellingness of a particular week or two of subject matter within a single course that is just one of the dozens that a student will take over twelve years of formal schooling. I certainly do not deny that the state could leap this hurdle—I merely suggest that if we take *Pierce* seriously, the bar should be set fairly high.

But working out the contours of this right is a distraction. More to the present point, under our careful reading of *Pierce*, the *Mozert* decision is not only wrong, but potentially dangerous. For *Mozert* suggests that the state can indeed interfere with, and perhaps destroy, the ability of parents to project their religious tradition over the generations, as long as

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<sup>36</sup> 827 F.2d 1058 (6th Cir. 1987).

<sup>37</sup> See generally Nomi Maya Stolzenberg, "He Drew a Circle that Shut Me Out": Assimilation, Indoctrination, and the Paradox of Liberal Education," 106 HARV. L. REV. 581 (1993).

<sup>38</sup> See CARTER, CULTURE OF DISBELIEF, *supra* note 31, at 168-76, 191-92.

the state believes that doing so is necessary to construct citizens of the sort that it wants.<sup>39</sup> This is precisely the argument pressed by the State of Oregon, and rejected by the Supreme Court, in *Pierce*: if the state believes that a particular curriculum will help create adults of the right kind, then it may justifiably limit the ability of the parents to project their religious tradition into the future.

Remarkably, contemporary liberalism is unable to come to grips with the totalizing implications of this analysis: it turns out that the state does after all have the power to stifle the construction of centers of dissent from its preferred meanings, as long as it gets to the potential dissenters while they are children. And some liberal theorists not only applaud the effort but wish the state would do more. For example, Amy Gutmann argues that the state should require public and private schools alike to teach a set of basic values on which liberal citizenship rests.<sup>40</sup> Bruce Ackerman implies (although he does not actually say) that parents should be required to send their children to the "liberal schools" he wants the state to fund in order to inculcate the ability to think critically.<sup>41</sup> Many other liberal theorists have made similar arguments.<sup>42</sup> And all of them share a common starting point: that the state is likely to make wise decisions and parents are likely to make bad ones.

Often the argument is explicit. For example, Suzanna Sherry, in an otherwise quite sensitive effort to balance competing positions, lets slip this unfortunate claim: "leaving most educational choices to parents or the democratic process . . . assumes, probably erroneously, that parents, whether individually or as a voting majority, will not make serious, virtue-threatening, education-stifling mistakes."<sup>43</sup> The implication is that if we follow instead her reasoning about the values that education should inculcate, we will avoid these serious mistakes.<sup>44</sup> One sees similar

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<sup>39</sup> Stephen Gilles argues that *Mozert*, properly understood, is not about the problem of a compulsory curriculum, but about the problem of religious parents being forced to fund (and thus pressured to use) schools that interfere with their ability to raise their children in their religion. Gilles, *supra* note 4, at 994-95. This is a version of the "selective funding" accusation, introduced into the present dialogue by Michael McConnell in his influential article, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989 (1991). Although I mention the selective-funding problem in Part VI, it is beyond the scope of this lecture. I should add that I have always considered it more a thought experiment than a doctrine on which it is possible to build actual constitutional law; for that task, I fear, it would be unworkable. (McConnell would respond that in that case, the state should not be compelled to fund abortion services if it funds childbirth. I agree.)

<sup>40</sup> See generally AMY GUTMANN, *DEMOCRATIC EDUCATION* (1987).

<sup>41</sup> See generally BRUCE ACKERMAN, *SOCIAL JUSTICE AND THE LIBERAL STATE* (1980).

<sup>42</sup> See, e.g., WILLIAM A. GALSTON, *LIBERAL PURPOSES* (1991); Sherry, *supra* note 5.

<sup>43</sup> Sherry, *supra* note 5, at 160-61.

<sup>44</sup> To Sherry's credit, she does conclude that vouchers of some kind might be neces-

claims—if anything, more forcefully put—in the work of Ackerman, Gutmann, and others.<sup>45</sup>

Now this, already, is a bias sufficiently substantial to call the argument into question—particularly in light of the history suggesting that the state has often made bad decisions, not good ones, about how and why to run its compulsory schools. The deeper problem is that the family becomes, in this liberal vision, not a fundamental institution on which the society itself rests, but a little citizen-making factory, existing by sufferance of the state and principally to do the work the state requires. If the state decides to standardize its citizens through the device of standardizing its children, it is the responsibility of the parents not to resist that effort, but to assist it—or to get out of the way. Nothing else can explain, for example, the decision by the New York Court of Appeals allowing parents to withdraw their children from an objectionable sex education curriculum only if the parents agree to make sure that the children receive all the information that the curriculum contains.<sup>46</sup>

I have voiced my disagreement with these propositions elsewhere.<sup>47</sup> For present purposes, let it suffice to say, as Stephen Gilles has recently pointed out, that such arguments as these rest on questionable empirical propositions about what values children learn, and where, supported principally by anti-religious stereotypes rather than by any hard analysis of how religions operate.<sup>48</sup> How do the authors know, as they tend to assume, that religious parents are more likely than public schools to teach intolerance? Or that religious ways of knowing place less emphasis on rationality than other ways? Or that a belief that your neighbor is a sinner equals a belief that your neighbor is not entitled to respect? (Or, for that matter, that values not taught in schools will not be learned?) For the most part, these points are asserted, rather than proved, to be true. The fact that the same stereotypes of religion are prevalent in our politics and our popular culture is no evidence of their truth; it is, if anything, an additional reason for caution. Certainly we should not allow fundamental decisions about law and social structure to rest on them.

Let me now return to my earlier concern: that the arguments for compulsory schooling in liberal values further suppose that the state pos-

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sary as a protection for exit rights—a proposition that most theorists of liberal education heatedly reject.

<sup>45</sup> Ackerman worries about parents who will “force-feed their children without restraint.” ACKERMAN, *supra* note 41, at 160. Gutmann insists that many religious parents teach their children “disrespect for people who are different.” GUTMANN, *supra* note 40, at 31.

<sup>46</sup> See *Ware v. Valley Stream High Sch.*, 550 N.E.2d 420 (N.Y. 1989).

<sup>47</sup> See generally CARTER, *CULTURE OF DISBELIEF*, *supra* note 31, especially ch. 9.

<sup>48</sup> See generally Gilles, *supra* note 4.



sesses a monopoly on wisdom about precisely what children should be raised to believe, and that this wisdom is so apparent that there is no need for dissenting space. This strikes me as a decidedly illiberal (perhaps even intolerant) stance. In other writing, I have proposed that the ultimate judgment on the justice of a political community should perhaps turn not on how it provides for its loyal citizens but on how it treats its dissenters.<sup>49</sup> It is the habit of every group that attains power everywhere to prove Nat Hentoff's adage that the strongest human instinct is the instinct to censor; our status as a liberal democracy hardly makes us immune. Indeed, it may be that the enormous authority we have bequeathed to the government puts us keenly at risk, which is why, whenever dissent is discouraged, all of us should worry.<sup>50</sup>

I emphasize this problem because most liberal accounts of compulsory schooling as education for citizenship rest on the supposition that the values the schools are to inculcate are better than the alternatives—which is why such theorists as Gutmann and Stephen Macedo partly reject the view, associated with John Rawls, that the state must be entirely neutral among competing comprehensive conceptions of the good. They would answer that the state must hold at least some “minimal” commitment, sufficient to enable its citizens to function in a liberal state. And this functioning includes not only respect for such liberal values as equality but also the ability to act autonomously, to choose for oneself among the available conceptions of what the good life entails. Gutmann is particularly clear that compulsory liberal education may, and often should, cause children to reject the religious traditions of their parents—at least if those traditions are illiberal. Liberal education, in her view, effectively substitutes useful values for the dangerous and illiberal ones she seems to think children learn from their parents.<sup>51</sup> And, in liberal theory, this view is far from unusual. Even William Galston, despite his respect for the family, would permit the state to act to ensure that every child acquires what he calls “a basic civic education,” by which he means a set of beliefs that “support the polity” and equip the adult that child will become “to function competently in public affairs.”<sup>52</sup>

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<sup>49</sup> See generally STEPHEN L. CARTER, *THE DISSENT OF THE GOVERNED: A MEDIATION ON LAW, RELIGION, AND LOYALTY* (forthcoming 1998) [hereinafter CARTER, *DISSENT OF THE GOVERNED*].

<sup>50</sup> Of course, one might respond (and some of the theorists do) that the idea is not to limit dissent but to provide for its expression in a common language. But the proposal for indoctrination in liberal values is not merely a limitation on the way we talk—it is a limitation on the way we think. I do not like illiberal dissent either, but I am terrified at the idea of designing people to make it impossible.

<sup>51</sup> See generally GUTMANN, *supra* note 40.

<sup>52</sup> GALSTON, *supra* note 42, at 252.

We could readily rewrite Oregon's argument before the Supreme Court in *Pierce* to fit this model:

The States have nothing to say as to the number or class of the [religious believers] who may be permitted to settle within their limits. It would therefore appear to be both unjust and unreasonable to prevent them from taking the steps which each may deem necessary and proper for Americanizing its [religious believers] and developing them into patriotic and law-abiding citizens.

This, after all, is what Oregon almost certainly meant in the first place. It was not that the immigrants *qua* immigrants were troublesome; the immigrants were troublesome mainly because they were Catholics. And, like the voters of Oregon who adopted the ballot initiative that the Court struck down in *Pierce*, the theorists of compulsory schooling for citizenship presumably believe that if their project makes it harder for the parents to project their religion across the generations, that is the fault of the parents, for selecting so illiberal a religion, not the fault of the schools, which are only giving children the civic tools their parents are trying to deny them.

Besides, if a point of liberal education is to give children the tools they will need to choose among competing conceptions of the good, one might offer a rather spirited defense of organized classroom prayer in the liberal schools. Religion—particularly the belief in and the love for God—is a choice that the overwhelming majority of citizens continue to make, despite decades of academic discourse about its evils. Non-sectarian prayer, then, might prepare children for a vital aspect of the lives of most adults; in particular, it will assist the children of non-religious parents in making better choices when the time comes. This strikes me as no less plausible than the claim that liberal schools will help the children of religious parents to make better choices when the time comes. If the answer is that religion is no part of liberalism, then liberalism is theory that is simply irrelevant to the lives of most Americans, and we had best forget about it. If the answer is that prayer cannot possibly be non-sectarian, I would probably agree; but I also think that educating for democracy cannot possibly be neutral among competing conceptions of the good.

This is not to say that today's movement for "character education" is a bad thing. On the contrary, it represents an effort to discover (or perhaps establish) the moral consensus on which democracy rests. But it differs from the liberal education model in two important ways. First, it is addressed to democracy: unlike Gutmann, Macedo, and Galston, it takes the view that the values the public schools should teach are the values on which consensus *already exists*. This, at least, gives the religious parent a democratically interesting reason to pay attention. Second, it

allows exceptions: the character education movement does not believe it is the business of the state to dictate to religious schools what values they should teach. This not only respects genuine religious freedom, but it also allows for the preservation of pockets, perhaps large ones, of potential dissent.

#### IV.

The unruly children of *Pierce v. Society of Sisters* are the classroom prayer cases,<sup>53</sup> which, under our rereading of *Pierce*, are clearly right, although they try very hard not to be. Indeed, I think a sensitive understanding of *Pierce* (along with a page of inspiration from *Brown v. Board of Education*<sup>54</sup>) may be necessary in order to construct a defense of the ban on formal prayer, led by a teacher, in the public school classroom, because the justifications ordinarily offered wind up proving too little—or too much.

If one invokes traditional Establishment Clause arguments, the classroom prayer cases are not as easily supportable as most scholars tend to assume. For example, if beginning the school day with a prayer is unconstitutional because it prefers religion over non-religion, then why is not a curriculum devoid of any religious observance unconstitutional because it prefers non-religion over religion? After all, public education is full of material that the state deems important; by compelling school attendance, on pain of jailing dissenting parents, the state as much as announces that what occurs in its schools is of vital importance. So if none of the material is religious, children will receive the message that the state deems religion unimportant.<sup>55</sup> Kathleen Sullivan offers the fascinating argument that vouchers for religious schools are forbidden religious speech by the government.<sup>56</sup> If they are, then surely the money spent on religion-free public schools is anti-religious speech by the gov-

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<sup>53</sup> I am including as classroom prayer cases the following: *Engel v. Vitale*, 370 U.S. 421 (1962) (state may not draft prayer); *Abington School District v. Schempp*, 374 U.S. 203 (1963) (school may not organize readings from Bible and other religious texts to open school day); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (state may not require moment of silence as subterfuge for prayer); and *Lee v. Weisman*, 112 S. Ct. 2649 (1992) (school may not sponsor spoken prayer at high school graduation). By listing these cases together, I am not suggesting that all of them are correct. In particular, I believe that *Wallace v. Jaffree* is certainly wrong and *Lee v. Weisman* is probably wrong.

<sup>54</sup> 347 U.S. 483 (1954).

<sup>55</sup> This might be avoided were the children sometimes reminded by their teachers that religion is very important but is omitted from the curriculum in order to leave the matter to their parents. I doubt, however, that a teacher who told children that religion was important could avoid public punishment and private litigation.

<sup>56</sup> See generally Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195 (1992).

ernment. Sullivan would respond (as would Ira Lupu, Bruce Ackerman, and many others) that the Establishment Clause should be read to create a non-religious public sphere, in which case the unimportance of religion might be acceptable. But aside from the small difficulty that this is precisely the opposite of what the Framers envisioned—we show the value of religion by keeping it away from what is important?!—and therefore a stretch even for a non-originalist interpreter, it also sends the same anti-religious message as the contemporary political philosophy we have been discussing. Such a message is profoundly anti-democratic, and possibly unconstitutional.

The same may be said of the related argument that the state should not be allowed to endorse religiosity. If indeed the inclusion of a prayer in the curriculum is an endorsement of religiosity, then the absence of one might well, for the same reasons that we have just seen, serve as an endorsement of irreligiosity. That the state may do the second and not the first is, at best, a tortured reading of the First Amendment. Besides, the state might reach a rational and carefully considered judgment that students will be better off as adults if they are religious. For example, the state might credit the controversial studies purporting to show that the religious are less likely to use drugs, commit crimes, become pregnant outside of marriage, or wind up receiving welfare. If the state believes all of this, then it has a secular reason—indeed, what would appear to be a *liberal* reason—for encouraging religiosity, namely, that the religious are better citizens. If the state nevertheless cannot encourage students to be religious (which may indeed be correct), then it will be interesting to figure out the reason.

Some scholars and (unfortunately) some judges defend the classroom prayer cases on the argument that dissenting students will feel pressured to conform. Although the case went off on other grounds, there are intimations of this concern in some scholarly defenses of the Supreme Court's shaky opinion in *Wallace v. Jaffree*,<sup>57</sup> which struck down Alabama's moment-of-silence law.<sup>58</sup> This "heckler's veto" argument is not accepted in any other first amendment context. In fact, the courts have been at pains to strike down state efforts to restrict speech because it might upset members of the audience.<sup>59</sup> Besides, the heckler's veto ar-

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<sup>57</sup> 472 U.S. 38 (1985).

<sup>58</sup> I refer to Justice Stevens's majority opinion as shaky because it rests, entirely, on the proposition that the principal sponsor and perhaps some of the other supporters hoped that the moment of silence would be used by students for prayer. This is a bit like releasing a felony suspect because the reason the sheriff went into the crime-prevention business was that God told him to.

<sup>59</sup> The most recent and infamous examples (although I believe they are correctly decided) are *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), and *Texas v. Johnson*, 491

gument against organized classroom prayer cuts two ways: there are many topics in the curriculum that pressure dissenting students to conform, and, sometimes, these pressures will directly oppose the children's religious beliefs. Although, as we have seen, we might want to excuse the children from the room, we would not want, presumably, to ban all these topics from the classroom.

One might respond that prayer is religious and other topics are not. But this notion that there is an identifiably religious sphere of activity from which the rest of life may be readily excluded is simply a Protestant way of looking at the world, a linguistic holdover from our country's "Christian Nation" era. Many religious traditions take a broader view of the aspects of life that are religious. In the American experience, this is true, for example, of traditional Roman Catholicism and Orthodox Judaism, which is one of the reasons the nativists so hated them. But it is also true of such recently burgeoning religions as Hinduism and Islam. Thus, the claim that prayer is different from, say, sex education because one is religious and the other is not is religious is neither obviously correct nor religiously neutral, and so cannot distinguish the rest of the curriculum in a religiously neutral way. It simply adopts one nineteenth-century (Protestant) view of what is religious and what is not and calls it a matter of constitutional law.

In other work, I have defended the proposition that school prayer is distinct from other forms of classroom activity to which parents might raise religious objection, but, given my new starting point, I am no longer persuaded that a useful distinction is possible. The fact (which I and others have emphasized) that one "looks" religious and the other does not is no more than an artifact of the American religion: we understand, and thus assume, the religiousness of prayer, but cannot see, and are not even willing to entertain, the religiousness of, say, trees (as in *Lyng v. Northwest Indian Cemetery Protective Ass'n*<sup>60</sup>)—or of a biology curriculum. Consequently, when parents in the 1970s raised religious objections to the proposed widespread public school use of MACOS (for *Man: A Course of Study*), emphasizing particularly its effort to draw parallels between the behavior of human beings and the behavior of other animals, most observers discerned nothing more than censorship.<sup>61</sup> But the motivation of parents who believed that MACOS would interfere with their ability to raise their children in the religion of the family's choice was every bit as pure as the motivation of parents who raise the same

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U.S. 397 (1989).

<sup>60</sup> 485 U.S. 439 (1988).

<sup>61</sup> For discussions of the battle over MACOS, see GARRY WILLS, *UNDER GOD: RELIGION AND AMERICAN POLITICS* 118-20 (1990) and see generally DOROTHY NELKIN, *THE CREATION CONTROVERSY: SCIENCE OR SCRIPTURE IN THE SCHOOLS* (1982).

protest against classroom prayer; and if, as I suggest, the classroom prayer cases are properly hung on the mooring of *Pierce*, then the constitutional argument was just as good as well.

Besides, even if it is possible to find a way to characterize prayer as religious in a way that sex education is not, why should the constitutional ban (if there is a ban) be limited to what Laurence Tribe once referred to as the plausibly religious?<sup>62</sup> (He has since altered his view.) The imposition of religious orthodoxy by the state matters not because religion is bad but because religion is good. It is that goodness, the value of religion, that leads to the proposition that the state should not interfere with religious choice. If religion is good, then the ban on prayer must be intended to help individuals to make up their own minds (with or without the help of their parents—one's view on that point is irrelevant here) about what religions to follow. But prayer and other formal religious instruction are hardly the only things that can do that. Consequently, if our concern is for state interference with religious choice, we would surely want to take a hard look at the curriculum and rid it of the other topics of instruction that make it difficult for individuals to make up their own minds about what religions to follow.

What is left? We can dismiss, I hope, both the judicial opinions and the scholarship suggesting that exposure to prayer is itself an evil against which the Constitution zealously guards. Similarly, I hope we need spend no time on the suggestion that the knowledge that one's classmates are praying is the difficulty, because of the pressures it creates to conform—an argument not unlike the assertion that freedom of speech for students is bad, for the same reason. And when all of this is done, what remains is *Pierce*.

Under *Pierce* as we have been reading it, the case against organized classroom prayer is both straightforward and wide-ranging: the state cannot compel attendance at schools that begin the day with prayer because doing so profoundly interferes with the religious liberty of *parents*—the ability to project their religious tradition into the future by raising their children in their religion.<sup>63</sup> We have already hypothesized that parents should be able to shield their children from religion-destroying curricula; state-mandated prayer services are about as religion-destroying as one can imagine.<sup>64</sup>

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<sup>62</sup> See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1179-88 (2d ed. 1988).

<sup>63</sup> For similar arguments, see generally McConnell, *supra* note 39.

<sup>64</sup> This line of argument has led some scholars to ask why, if classroom prayer's tendency to interfere with religion means that it cannot exist at all (as opposed to prayers from which dissenters are excused), the tendency of other aspects of the curriculum to interfere with religion does not suggest that they, too, should be banned altogether. See,

If this is so, however, one might ask why organized classroom prayer has such broad and deep public support, support that has barely slipped at all in the thirty-five years since the Supreme Court first held the practice unconstitutional. The easy answer is that this majority and the theorists of liberal education are up to the same mischief, trying to capture the school curriculum as a tool for furthering moral propositions they are unable to win in democratic politics. Doubtless this accusation contains a grain of truth (in both cases). But a richer answer is that the parents who support prayer are thinking mainly of their own children, not others; and that they believe that a school day that begins with prayer will reinforce rather than interfere with the religious training they are trying to give their children at home. I do not think that reason sufficient to override the objections to classroom prayer by parents who view the practice as potentially religion-destroying; but I do not think that reason pernicious either. Indeed, if *Pierce* means that the state may not use its schools to destroy a religion, and if some parents believe that prayerless schools do so almost by their nature, it may seem that we are very nearly in equipoise.

Here is where *Brown v. Board of Education*<sup>65</sup> helps put the classroom prayer cases in a useful historical perspective. Indeed, I have often thought it no accident that the two most dramatic constitutional developments of the century—the ban on racially segregated education and the ban on organized religious observances in the classroom—occurred less than a decade apart. Each decision represented a forceful and even wrenching insistence to a nation wanting to be just white, just Protestant, that there are, after all, Americans of other kinds. Education, where so much of the energy of our society is focused, became the focus of these reminders too. No, said the *Brown* Court, you may not run the schools as though white children are privileged. No, said the *Engel* and *Abington* Courts, you may not run the schools as though Protestant children are privileged. Viewed this way, *Brown*, too, may even be part of the legacy of *Pierce*, broadening that decision to encompass other ways in which the schools are used as a tool for indoctrination against the wishes of parents: in the case of racial segregation, indoctrination in the proposition of racial supremacy.

But there is no need to pursue today the tantalizing possibility of tracing a link from *Pierce* to *Brown*. (Anyway, others have done it.) For the present moment, let it suffice to conclude that the prayer cases

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e.g., ARONS, *supra* note 4; Gilles, *supra* note 4. The short answer is that I have no answer. So I will limit myself to saying that I have not yet given the matter sufficient thought to propose a solution, and thus must save it for some future lecture.

<sup>65</sup> 347 U.S. 483 (1954).

are more readily explainable under our rereading of *Pierce* to encompass the ability of religious parents to project their traditions across the generations than under the classic anti-Establishment rubric on which they are ordinarily justified. Not all the decisions are explainable this way, of course. *Pierce* cannot, for example, clarify *Lee v. Weisman*<sup>66</sup>, in which the Justices struck down a graduation prayer led by a rabbi. But a single prayer recited on the very last day of public school is significantly less likely to be religion-destroying than a regular, school-sponsored religious observance. (I do not say that nobody would object; I only suggest that the objections are unlikely to rise to the level of those in *Engel* or *Abington* . . . or *Pierce* itself.) I wrote in 1993 that *Lee v. Weisman* strikes me as "about as close a case for school prayer as one is likely to see."<sup>67</sup> I think it is time I retracted those words. I think *Lee v. Weisman* is wrongly decided.

Then there is the question of the moment of silence. I have already mentioned the shakiness of the result in *Wallace v. Jaffree*<sup>68</sup>, which struck down Alabama's requirement of a moment of "meditation or voluntary prayer" to open the school day.<sup>69</sup> The majority held that the statute was simply a subterfuge to allow students to pray, without ever quite explaining why that mattered. Nothing in *Pierce* leads inexorably to the *Wallace* result; in fact, one might argue that the moment of silence, during which children are free to pray if they wish, might ameliorate the religion-destroying nature that, some parents believe, inheres in the curriculum of the public schools for which they are forced to pay, whether they use them or not.

## V.

I have gone on a good deal too long, but have one more subject about which I should say a brief word before I close. I refer to the never-ending controversy over public funding for private religious education.

Nobody knows whether, and to what extent, the state may use tax dollars for the support of religious education. Nobody knows because the Supreme Court has carefully provided as little information as possible, holding, for example, that the state may provide textbooks for religious schools, but that it may not provide maps. Decisions on aid to religious schools are, in fact, all over the map: vouchers for private

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<sup>66</sup> 505 U.S. 577 (1992).

<sup>67</sup> CARTER, CULTURE OF DISBELIEF, *supra* note 31, at 188.

<sup>68</sup> 472 U.S. 38 (1985).

<sup>69</sup> *Id.* at 61.



education, the Court has explained with care, are constitutionally acceptable except when they are not. To adjudicate such controversies as these, the Justices have adopted, then seemingly abandoned, then perhaps reaffirmed, the confusing and contradictory test from *Lemon v. Kurtzman*.<sup>70</sup> But it is not my purpose today to add to the assault on the *Lemon* test, which is already tottering and bound, soon, to fall.<sup>71</sup>

Rather, I simply wish to make the simple point that the reading of *Pierce* that I have proposed makes the *Lemon* test unnecessary. Consider the paradigm case of the parent who believes the public school experience, taken as a whole, to be religion-destroying. Kathleen Sullivan writes, "[T]he solution for those whose religion clashes with a Dick and Jane who appear nothing like Adam and Eve is to leave the public school."<sup>72</sup> Exactly. Yet, if the state may not compel children's attendance at schools featuring what parents believe to be religion-destroying educational programs, it is difficult to see where the state gains the power to exact financial penalties on parents who choose not to use them. Some scholars believe, for this reason, that the state has an obligation to fund religious schools.<sup>73</sup> I would make a milder claim: if the state decides to give aid to any private schools at all, to exclude religious schools would be to do just what *Pierce* does not allow: to pressure parents (through the device of a financial penalty) to send their children to the religion-destroying schools rather than the religion-affirming ones.

But one does not even need our rereading of *Pierce* to reach this milder result, because, if the truth is told, the constitutional rule (if there is one) against public aid to parochial schools never made much logical sense either. It is not a rule dictated by neutrality. Neutrality proposes that the state can neither assist nor penalize religion. But if the state is able to aid all private schools other than parochial schools, and does so, it is penalizing parents who choose religious rather than secular forms of private education. Neutrality surely requires that the state treat religious groups no worse than it treats anybody else—indeed, under neutrality, the state cannot take into account at all the fact that a person, or an entity, is religious in nature. Thus, under a neutral regime, the state cannot refuse to grant aid on the ground that a school is religious.

The constitutional rule is also not dictated by anti-establishment

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<sup>70</sup> 403 U.S. 602 (1971). On *Lemon's* tortured history, see, e.g., Michael S. Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795 (1993).

<sup>71</sup> Besides, I have assaulted it already. See CARTER, CULTURE OF DISBELIEF, *supra* note 31, at 109-15.

<sup>72</sup> Sullivan, *supra* note 56, at 214.

<sup>73</sup> See, e.g., ARONS, *supra* note 4; Gilles, *supra* note 4; cf. McConnell, *supra* note 39.

concerns. The anti-establishment argument holds that the state cannot elevate any religion (or any set of religions) to an official or quasi-official status. But tax relief for families who send their children to religious schools is no more an establishment of religion than is tax relief for families who make contributions to their churches or synagogues, which, despite a few cranky critics, is treated by most Americans as an entitlement.<sup>74</sup> (To distinguish the two cases on the ground that providing education is a public function only assumes the conclusion: part of the point of the history I reviewed in the first part of the lecture is that the belief in public rather than parochial education is deeply linked to the Protestant nativism of the nineteenth century. Moreover, this principle became widely shared only when anti-Catholic prejudice decreed it necessary to overcome the power of religions that believed education to be a religious function.)

Nor can the rule be explained on the ground that religion is sufficiently controversial that aid to parochial schools would be deeply divisive. As Alan Schwarz pointed out years ago, if aid to religion is bad (or unconstitutional) policy because it tends to cause strife, then we must surely say the same of fair housing laws and other tools of racial integration, which have led to massive and occasionally violent resistance.<sup>75</sup>

For the growing number of legal scholars who believe not in neutrality but in accommodation, the case is even easier. The accommodationist fears that a state that is neutral will wind up protecting politically powerful religions—those that do not need the protection of the Free Exercise Clause—and will ignore, and thus allow to wither, religions that are less powerful, less known, or less liked. For example, although the Supreme Court in its infamous decision in *Employment Division v. Smith*<sup>76</sup> refused to carve out a constitutional right for Native Americans to use peyote in a ritual older than the anti-drug laws, the Congress of the Prohibition Era did not have any problem exempting the religious use of wine from the prohibitions of the Volstead Act. Why not? Because the mainstream Christian and Jewish faiths that would otherwise have been hampered possessed sufficient political power to persuade the Congress to craft an exemption that nowhere appeared in the Eighteenth Amend-

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<sup>74</sup> I do not here insist on the constitutionality of the tax deductibility of contributions to religious organizations; nor do I endorse the common justification that the organizations provide charitable services that the state would otherwise be required to provide at its own expense; for the moment, I only point out that the deductions exist, and should be just as troubling as (or no more acceptable than) the similar (proposed) deductions for schools.

<sup>75</sup> See generally Alan Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692 (1968).

<sup>76</sup> 494 U.S. 872 (1990).

ment, which the Act was supposed to enforce. The Native American Church—the church involved in the *Smith* case—had no such clout. This comparative lack of power is a principal reason cited by accommodationist scholars who argue that the Justices should have required the state to demonstrate a compelling interest before punishing what was, after all, an act of religious worship; otherwise, the diversity of religion in America could be snuffed out.

The application of this principle to public funding of religious schools could hardly be clearer. As the late Robert Cover put the point, freedom of religion requires “limits to the state’s prerogative to provide interpretive meaning when it exercises its educative function.” Otherwise, “[t]he state might become committed to its own meaning and destroy the personal and educative bond that is the germ of meanings alternative to those of the power wielders.”<sup>77</sup> The fact that the power wielders do not like the alternative meanings created by some among the society’s diverse religious communities is not, by itself, reason enough to justify their destruction.<sup>78</sup>

## VI.

There are other matters that might be addressed through this analysis. One that comes to mind is the problem, addressed but not resolved by the Supreme Court in *Wisconsin v. Yoder*,<sup>79</sup> of how to deal with parental objections, not to particular parts of an educational program, but to the very idea of extensive formal education. Our discussion of school prayer did not even scratch the issue of prayers organized and led by students. And, of course, there is the question that has enjoyed a remarkable popularity in recent years of whether the public schools themselves might be constitutionally suspect. But those questions I will leave for another day. Instead, I will briefly deal with what I think are the two most important objections to the reading of *Pierce* that I have been exploring.

The first objection is that *Pierce* ignores the rights of children. I have been relatively quiet, to this point, about the children, and I want at last to give them their due. So, let us consider: Does not all the talk in *Pierce* about the rights of parents to direct their children omit the possi-

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<sup>77</sup> Cover, *supra* note 29, at 61-62.

<sup>78</sup> I should add that even if aid to religious education is constitutional, I am not at all persuaded that religious parents, or religious schools, should accept it. There is a tremendous risk to religions when they rely on the state for part of their funding, even if, as here, the funding is in effect a rebate of money that the parents earned and would otherwise be paying through taxes to support a public education system they do not use.

<sup>79</sup> 406 U.S. 205 (1972).

bility that the children themselves have a right not to be directed if they prefer? This was at the heart of Justice William Douglas's 1972 dissent in *Wisconsin v. Yoder*, where he warned that the majority, by allowing the Old Order Amish to keep their children home from school after the eighth grade, was ignoring the right of the children themselves to seek further education in the face of the wishes of their parents.

Justice Douglas had a point—not because of some abstract notion that children who do not like the rules their parents set should be free to disobey them, but because at the heart of the American idea is the proposition that universal education is both necessary and good. With this sentiment few would disagree, although we would of course have sharp disputes over how to honor this proposition. Still, most staunch advocates of religious freedom would surely concede the value of education, which means that there is a difference between telling children they must go to church on Sunday and telling them they may not go to school on Monday.

But how big a difference? We must not make the error of supposing that education, even education for citizenship, is obviously *more important* than religious training. Earlier I quoted the estimable John Dewey for the proposition, which he articulated often, that parents should not, through religious education, “inoculate” their children with the parents’ own religious beliefs. Dewey was not writing about state-sponsored religious education; his reference was to *all* religious education. Dewey, a follower of the trendy anti-religious psychology of his day, simply believed that religion was bad for children. (He also thought it was silly for, if usually harmless to, adults.) As Robert Coles has persuasively shown, contemporary psychology (and, to some extent, psychiatry) continues to take a basically negative view of religion—and, in particular, seems to share Dewey’s fears about the religious inoculation of children.<sup>80</sup> In this vision, the religious parents are seen as the enemies of the children’s proper development.

Scholars often fall into the trap of assuming an opposition between the religious interests of parents and the educational interests of children, which is why they sometimes refer to the “right” of a child to gain the tools of critical analysis that are necessary for the evaluation of the parents’ religious claims. This argument is not particularly persuasive. As Stephen Gilles has pointed out, the presumed opposition overlooks the affective ties that most Americans deem vital to their being. When we begin with the proposition that the interests of parents and children are not the same, we will naturally find ways of inserting the state between

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<sup>80</sup> See generally ROBERT COLES, *THE SPIRITUAL LIFE OF CHILDREN* (1990).

the two. It would surely be much cleaner to begin with the proposition that the interests of parents and children are not in conflict, and so insert the state only when there is reason to think that something may be amiss.<sup>81</sup>

I do not dispute, in principle, the notion that children possess rights. I do dispute, both in principle and in practice, the notion that these rights include the freedom to evade the religious training, and concomitant religious responsibility, that their parents choose to place upon them. The decision by a parent to send a child to a religious school does not seem to me materially different from the decision by a parent to send a child to a religious church. To the objection that the child somehow "needs" secular education, I can only say that such an answer mocks the value of the religious life, and also supposes, wrongly, that we are in greater need of smart adults than good ones.

Moreover, the decision by a parent to send a child to a religious school does not seem to me materially different from the decision by a parent to send a child to any other private school that the child might not want to attend. Of course, the parent may select a wicked private school, whether religious or not, training the child, for example, in the skills of shooting Black people and Jews from ambush. This leads to the second objection—that parents, granted a broad right to raise their children in their religion, might cause their children to grow up with horrible values of all sorts.

Parents, of course, may do wicked things. Despite our occasional inability to agree on what constitutes child abuse, we do know that some mothers and fathers beat their children within an inch of their lives—or beyond. We do know that some mothers and fathers will raise their children to be vicious racists. We do know that some mothers and fathers will train their children to mock the religions of others. We do know that some mothers and fathers will teach their children (through example) that nothing is more important in life than the pursuit of wealth, power, and position.

But are such possibilities reason enough to reject the parental power

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<sup>81</sup> One interesting line of articles ponders whether providing children, against their desires, with these critical tools might infringe the children's rights. See, e.g., Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49 (1996); Stanley Ingber, *Liberty and Authority: Two Facets of the Inculcation of Virtue*, 69 ST. JOHN'S L. REV. 421 (1995); Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647 (1986). For a fascinating but very different perspective on a related issue, see generally Stephen Arons & Charles Lawrence, III, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 HARV. C.R.-C.L. L. REV. 309 (1980).

that the Court discovered in *Pierce*? I would suggest not. After all, the state, too, might do many wicked things, and often has. And the evil that the state does affects far more people than the evil done by any particular parent. Yet the theorists of liberal education, perhaps thinking that the era of state evil is behind us, do not cite that possibility of state evil as reason enough to reject the power of the state to compel attendance at religion-destroying educational programs. Consequently, they must be assuming that the net harm that is avoided by forcing parents to let government educational programs destroy their religion is less than the net harm that is avoided by letting parents remove their children from those programs. I would be delighted to see the data, or even the argument, to back up that assumption; thus far, I have not seen it, and thus I side with the family.

I am not at all anti-government. But I worry about the automatic assumption that the state will make wiser decisions than parents. I remember my own experience in the public schools of Washington, D.C., in the late 1960s, during which time I was taught that the slaves were basically happy and only a few hotheads actually wanted to be free; most of the slaves, we were taught, wanted kind masters. Perhaps this personal anecdote unfairly colors my perception of the relatively likelihood of state versus parental error. But I doubt that it colors my perception any more than the relative placidity of somebody else's education colors theirs. Indeed, I suspect it is no accident that black parents, many of whom can cite similar experiences when facing the state's power to force education on their children, are among the most likely to support both classroom prayer and voucher programs . . . or that many Native American parents, who have long historical experience of state power, encourage their children to drop out of the public schools ("the white man's schools," some call them) as soon as they are old enough.

This skepticism of state power does not mean the state is more likely than the parents to make bad curricular choices. But the experience of history certainly teaches that the state is at least as likely as the parents to make them. When we combine that possibility with the certainty that public education can interfere with the ability of religious believers to project their narratives into the future, what remains is this: *Pierce* got it right.

## VII.

Viewed in historical perspective, then, our war over epistemology continues to display all the characteristics that made it so bitter a century ago. The group in power believes that the purpose of schools is to persuade the children of the other side that the other side is wrong. The

purpose is clothed in the gentle language of preparing young people to be adult citizens of the republic, but the clothing should not distract us from the argument underneath: good adults are, by definition, those who think the way the dominant group does, and this truth is the same whether the dominant group is nativist Protestants in the nineteenth century, progressive intellectuals at the beginning of the twentieth, anti-Communist populists in the middle of this century, or theorists of liberalism today. Each group knew from the start of the battle that it was right, and each group was entirely sincere in its insistence that it was only providing tools, and each group, astonished at the vehemence of the opposition, assumed that the only reason could be that the opposition was evil. Whereas the truth, in each case, was that the opposition loved its children, and would not easily allow them to be sacrificed to somebody else's comprehensive view.

The conclusion may seem harsh, but it is, I believe, also accurate: the effort to make sure that all children are educated in the same way is just as totalitarian now as it was in the nineteenth century when Protestant nativists were doing it. It is simply a means of limiting the range of diversity and, thus, the range of possible dissent. It is in that sense deeply Lockean, for Locke, at his most offensive, defended religious tolerance as a tolerance for all the right ideas about God. Theorists like Gutmann and Macedo seem to want to tolerate all the right ideas about justice, training children from their early years not to hold the wrong ones. The fact they and I might largely agree on what those right ideas are should not obscure the painful facts: too many of today's theorists of liberalism, like yesterday's nativists, seem determined to use "public" education to create a nation where everybody thinks the same way.

Of course, one could say that the history does not matter, that today's theorists of liberalism are wise enough to avoid using the schools as a totalizing force to destroy the religions we do not like. But this business of using one side's ideal against the other side's reality is a very old analytical error. It is a bit like today's theocrats insisting that if only they have their way and transform the United States into a Christian nation, they are wise enough to avoid the oppression and intolerance that have characterized religious government in the past. History provides no reason to trust either side.

Which is why, in the end, we may have little choice but to trust families to decide which tools their children will need.