

# THE FIRST AMENDMENT AND THE SOCIALIZATION OF CHILDREN: COMPULSORY PUBLIC EDUCATION AND VOUCHERS

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INTRODUCTION

Criticism of American public schools has been a cottage industry since the Nineteenth Century.<sup>1</sup> In recent years the criticism has gone to the roots.<sup>2</sup> Critics charge that to leave children imprisoned in the public school monopoly<sup>3</sup> is to risk the standardization of our children;<sup>4</sup> it is to socialize them in the preferred views of the State. They argue that it would be better to adopt a system of vouchers or private scholarships to support a multiplicity of private schools. A multiplicity of such schools, it is said, would enhance parental choice,<sup>5</sup> would foster competition,<sup>6</sup> and would promote a diversity of views,<sup>7</sup> which in turn would bring the kind of independent perspective needed for the sort of robust private and pub-

<sup>1</sup> For a mid-Nineteenth Century defense by one of its most important supporters, see THE REPUBLIC AND THE SCHOOL: HORACE MANN ON THE EDUCATION OF FREE MEN 79–112 (Lawrence A. Cremin ed., 1957). For a rebuttal of some of the most prominent criticisms, see KEVIN B. SMITH & KENNETH J. MEIER, THE CASE AGAINST SCHOOL CHOICE: POLITICS, MARKETS, AND FOOLS 16–19 (1995).

<sup>2</sup> Despite the increased public criticism, 64% of a national sample of parents grade the public schools as A or B. Statistics such as these have not significantly changed in a generation. Robert C. Bulman & David L. Kirp, *The Shifting Politics of School Choice*, in SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND THE LAW 38 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999) [hereinafter SCHOOL CHOICE].

<sup>3</sup> For debate about the degree of monopolization of the public schools, compare Paul E. Peterson, *Monopoly and Competition in American Education*, in CHOICE AND CONTROL IN AMERICAN EDUCATION 47 (William H. Clune & John F. Witte eds., 1990) [hereinafter CHOICE & CONTROL] (emphasizing the monopolistic aspects) with John F. Witte, *Introduction*, in CHOICE & CONTROL, *supra*, at 1 (emphasizing the diverse aspects of the public schools) and David B. Tyack, *The Public Schools: A Monopoly or a Contested Public Domain*, in CHOICE & CONTROL, *supra*, at 86 (arguing that monopoly is too murky a concept to be of assistance in analyzing school politics).

<sup>4</sup> Even supporters of the public schools express concerns along this line. See MARK YUDOF, WHEN GOVERNMENTS SPEAK 229–30 (1983); Sanford Levinson, *Some Reflections on Multiculturalism, “Equal Concern and Respect,” and the Establishment Clause of the First Amendment*, 27 U. RICH. L. REV. 989 (1993).

<sup>5</sup> JOHN E. COONS & STEPHEN D. SUGARMAN, EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL (1978).

<sup>6</sup> MILTON FRIEDMAN, CAPITALISM AND FREEDOM 93 (1962); John E. Brandl, “Governance and Educational Quality,” in LEARNING FROM SCHOOL CHOICE 55, 65–67 (Paul E. Peterson & Bryan E. Hassell eds., 1998). Ironically, many who argue from microeconomic models to support vouchers rely for support on the quality of private Catholic schools that are themselves non-market actors. See Jeffrey R. Henig, *School Choice Outcomes*, in SCHOOL CHOICE, *supra* note 2, at 81.

<sup>7</sup> Michael W. McConnell, *Governments, Families, and Power: A Defense of Educational Choice*, 31 CONN. L. REV. 847, 849 (1999).

lic debate needed in our constitutional democracy.<sup>8</sup> Arguments such as these are ordinarily associated with conservatives; but they are also attractive to some liberals,<sup>9</sup> particularly to those concerned about the state of public education in many of the central cities.<sup>10</sup>

The debate about public and private education raises important questions about the role of the state in promoting a certain kind of person and citizen, which has implications for liberal and democratic theory, the respective rights of children and parents, and the nature of religious freedom in a democratic society. In addressing these issues, I will argue that the debate about compulsory public education has been oversimplified. Too often the argument has been that compulsory public education is always unconstitutional or, less frequently, that it is always constitutional. Similarly, much of the debate about vouchers contends that they are always good or always bad or that vouchers to religious schools either always do or always do not violate the Establishment Clause. I will argue that the interests of children and the state in public education have been underestimated and that government should in many circumstances be able to *compel* adolescents of high school age, but not pre-adolescents, to attend public schools. No U.S. government is likely to engage in such compulsion, and there are good political reasons not to do so, but analysis of the case for compulsory public education leads to support of a strong presumption *against* vouchers, at least at the high school level. This presumption, however, is more difficult to defend when public schools are relatively homogeneous or are providing inadequate education to poor children. Even if vouchers could generally be supported, vouchers to religious schools raise serious concerns about the appropriate principles of church-state relations in the American constitutional order. But these concerns might be overcome in certain circumstances.

In short, I argue that compulsory public education is sometimes constitutional and sometimes not, that vouchers are generally to be resisted, but sometimes not, and that vouchers to religious schools should

<sup>8</sup> See COONS & SUGARMAN, *supra* note 5, at 97. For an extended argument that vouchers best serve democratic values, see Michael W. McConnell, *Education Disestablishment: Why Democratic Values Are Ill-Served by Democratic Control of Schooling*, in NOMOS XLIII: MORAL AND POLITICAL EDUCATION 87 (Stephen Macedo & Yael Tamir eds., 2002). For replies, see Amy Gutmann, *Can Publicly Funded Schools Legitimately Teach Values in a Constitutional Democracy?*, in NOMOS XLIII: MORAL AND POLITICAL EDUCATION, *supra*, at 170; Nancy L. Rosenblum, *Pluralism and Democratic Education: Stopping Short by Stopping at Schools*, in NOMOS XLIII: MORAL AND POLITICAL EDUCATION, *supra*, at 147.

<sup>9</sup> COONS & SUGARMAN, *supra* note 5. So too, John Stuart Mill was suspicious of government schools. JOHN STUART MILL, ON LIBERTY 98 (David Spitz ed., W.W. Norton & Co. 1975) (1859). For commentary on this aspect of Mill, see E.G. WEST, EDUCATION AND THE INDUSTRIAL REVOLUTION (1975).

<sup>10</sup> JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY (1999).

ordinarily be considered unconstitutional, but sometimes not. In making these arguments, I do not purport to make claims about what the Rehnquist Court would do; to the contrary, I make arguments about how the Constitution should be interpreted.

Part I of this essay criticizes the reasoning in *Pierce v. Society of Sisters*,<sup>11</sup> the first case to consider compulsory public education. Part II presents the strong purposes supporting public education, weighs those interests against the claim that parents have the right to direct the upbringing and education of their children, and concludes that compulsory public high school education should be constitutional in many circumstances; although, it posits that parents should have the right to send their children to private schools in the years prior to high school. Part III argues that the same conclusions follow in the face of First Amendment speech, association, and religion claims, but that they might be vulnerable in some circumstances against a claim for a right to a good education. Part IV argues that vouchers should not be constitutionally required even if it is conceded that parents have a constitutional right to send their children to private schools in the pre-high school years and that serious Establishment Clause concerns arise in the context of vouchers, concerns that should be overcome only in limited circumstances. Finally, Part V contains a brief conclusion.

## I. PIERCE v. SOCIETY OF SISTERS

*Pierce v. Society of Sisters* stands for the general proposition that children may not be forced to attend public schools.<sup>12</sup> *Pierce* involved an Oregon law, the Compulsory Education Act<sup>13</sup> of 1922.<sup>14</sup> The law required virtually all children to attend public schools through the eighth grade.<sup>15</sup> Two operators of private schools, the Society of the Sisters of the Holy Names of Jesus and Mary and the Hill Military Academy, sought and secured injunctions against the act's enforcement.<sup>16</sup> *Pierce*, the governor of Oregon, ultimately appealed to the Supreme Court. The Supreme Court struck down the specific Oregon law,<sup>17</sup> and *Pierce* is routinely read to support the right of parents to send their children to

<sup>11</sup> 268 U.S. 510 (1925).

<sup>12</sup> *Id.* at 531.

<sup>13</sup> *Id.*

<sup>14</sup> Although the law was enacted by initiative in 1922, its proposed effective date was September 1926. *An Act to Propose by Initiative Petition to Amend Section 5259, Oregon Law*, in OREGON SCHOOL CASES: COMPLETE RECORD 10 (1925).

<sup>15</sup> *Id.* at 9.

<sup>16</sup> *Pierce*, 268 U.S. at 531.

<sup>17</sup> *Id.* at 534–35.

private schools throughout the adolescent years.<sup>18</sup> In the voucher debate, most scholars have taken *Pierce* for granted. A few have raised serious questions about it.<sup>19</sup> My position is that *Pierce* as generally read is half right; it is right for the pre-high school years (which I will refer to as the pre-adolescent years even though pre-high school students include early adolescents), but typically wrong for the high school adolescent years.

*Pierce* may be half-right, but its analysis is shallow. The Court primarily relied on two arguments: first, that the Oregon law interfered with the right of parents and guardians to direct the upbringing of their children;<sup>20</sup> second, that the “fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children<sup>21</sup> by forcing them to accept instruction from public teachers only.”<sup>22</sup>

Both of these contentions are overblown. Of course, parents and guardians have a right to direct the upbringing and education of children under their control, but even the *Pierce* Court recognized that any such right was not unqualified. It referred to parental obligations toward their children, and it suggested that the right of parents to send their children to private schools was qualified by the power of the state to require compulsory education<sup>23</sup> and to regulate private schools, requiring that some

<sup>18</sup> See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1184 n.38 (2d ed., 1988) (“Parents . . . have the right to educate their children privately.”); ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 654–55 (1997).

<sup>19</sup> For a thorough historical and perceptive analytical treatment, see Barbara Bennett Woodhouse, “*Who Owns the Child?*”: *Meyer and Pierce and the Child as Property*, 33 *WM. & MARY L. REV.* 995 (1992). In the end, despite cogent criticism, Woodhouse believes that *Pierce* reached the right result. Barbara Bennett Woodhouse, *Child Abuse, the Constitution, and the Legacy of Pierce v. Society of Sisters*, 78 *U. DET. MERCY L. REV.* 479, 484 (2001). Others take the criticism further. See, e.g., MEIRA LEVINSON, *THE DEMANDS OF LIBERAL EDUCATION* 158, 161–63 (1999) (arguing for education within common schools and requiring heavy regulation of private schools to reach liberal public school ideals, including the prohibition of religious private schools); Abner S. Greene, *Civil Society and Multiple Repositories of Power*, 75 *CHI.-KENT. L. REV.* 477, 489–92 (2000); Abner S. Greene, *Why Vouchers Are Unconstitutional and Why They Are Not*, 13 *NOTRE DAME J.L. ETHICS & PUB. POL’Y* 397 (1999). For defenses, see, e.g., Martha Minow, *Before and After Pierce*, 78 *U. DET. MERCY L. REV.* 407, 415 (2001); William G. Ross, *Pierce After Seventy-Five Years: Reasons to Celebrate*, 78 *U. DET. MERCY L. REV.* 443 (2001).

Conservative scholars, who generally criticize decisions based on substantive due process, praise *Pierce* as it applies to the *Society of Sisters* but fall silent about the case’s application to the Hill Military Academy. See, e.g., Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 *HARV. L. REV.* 989, 992 n.11. (1991) (excluding the substantive due process aspect of *Pierce* from the scope of article).

<sup>20</sup> *Pierce*, 268 U.S. at 534–35.

<sup>21</sup> Is this a slip of the pen? Could the *Pierce* Court possibly believe that children belong to the state? See Minow *supra* note 19, at 415.

<sup>22</sup> *Id.*

<sup>23</sup> *Pierce*, 284 U.S. at 534. But see Chandran Kukathas, *Are There Any Cultural Rights?*, 20 *POL. THEORY* 105, 126 (1992) (suggesting that the Amish have a freedom of association right not to send their children to public schools at any time).

things be taught, that some things not be taught, and that teachers be of good moral character and patriotic disposition.<sup>24</sup>

If those qualifications of parental rights are acceptable, and assuming parents have at least a limited right to send their children to private schools, it is fair to ask whether the scope of that right should extend through the high school, adolescent, years. Consider the question in even more loaded terms: Should parents have a constitutional right to hermetically seal off their children from the views of others through their adolescent years? Do children have a right to be exposed to alternative points of view? It is one thing to say that parents have a right to direct the upbringing and education of their children; it is quite another to say that they have a right to monopolize their children.<sup>25</sup> Mandatory public education in the high school years would not erase the right of parents to raise their children. By the time of high school age, parents and their agents will have devoted tens of thousands of hours in communicating values to their children,<sup>26</sup> and public schools do not preclude continuing parental input. Even assuming that *Pierce* itself is rightly decided — as I do — when we focus instead on the high school years, the Court’s assertion that it is “entirely plain that [compulsory public education] unreasonably interferes with the liberty of parents and guardians”<sup>27</sup> is open to serious question.

<sup>24</sup> *Pierce*, 268 U.S. at 534. For criticism of the teacher requirements, see Stephen L. Carter, *Parents, Religion, and the Schools: Reflections on Pierce, 70 Years Later*, 27 SETON HALL L. REV. 1194, 1195 (1997).

<sup>25</sup> Although scholars typically do not distinguish on the basis of age, and although they arrive at different conclusions, many have suggested that there are problems with permitting parents to have a monopoly regarding the education of children. See, e.g., AMY GUTMANN, *DEMOCRATIC EDUCATION* 30 (1999) (“[N]either parents nor a centralized state have a right to exclusive authority over the education of children.”); BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 160 (1980) (“The problem with the public schools is *not* that they are insufficiently responsive to parental views, but that they are *already* overly concerned with reinforcing, rather than questioning, the child’s primary culture.”); HARRY BRIGHOUSE, *SCHOOL CHOICE AND SOCIAL JUSTICE* 17 (2000); Richard J. Arneson & Ian Shapiro, *Democratic Autonomy and Religious Freedom: A Critique of Wisconsin v. Yoder*, in *NOMOS XXXVIII: POLITICAL ORDER* 365, 366, 379–82, 388–403 (Ian Shapiro & Russell Hardin eds., 1996); Greene, *Why Vouchers Are Unconstitutional and Why They Are Not*, *supra* note 19, at 406–07; STEPHEN MACEDO, *DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY* 52–53 (2000). *But see* Stephen Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 93 (1996). For the suggestion that parents should be able to determine the religious complexion of the primary school, but not in the later years, see Deborah Fitzmaurice, *Liberal Neutrality, Traditional Minorities and Education*, in *LIBERALISM, MULTICULTURALISM AND TOLERATION* 50, 68 (John Horton ed., 1993); *see also* WILL KYMLICKA, *POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM AND CITIZENSHIP* 305 (2001).

<sup>26</sup> Regrettably, their agents include television programmers. Children watch nearly 100 hours per month of television, and most of that programming is decidedly not designed for them. See EDWARD L. PALMER, *TELEVISION AND AMERICA’S CHILDREN: A CRISIS OF NEGLECT* 12 (1988).

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

But what about the Court's companion pronouncement: "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."<sup>28</sup> Would mandatory public education for high school adolescents entail the standardization of our children?<sup>29</sup> The picture called up by this argument is that of an efficient monolithic government armed with a goal of homogenizing children coupled with a means of achieving this objective. But this picture ignores the multilayered character of the educational system. It does not take into account the federal system, the thousands of school boards, the different administrators of school districts, and, most important, the hundreds of thousands of teachers whose capacity for passive aggressive behavior in the face of administrative mandates should never be underestimated. The notion that the message in public schools is monolithic from Holly Springs, Mississippi, to San Francisco, California, is really quite preposterous.<sup>30</sup>

Of course, there are exceptions. Despite the pleas of some liberal philosophers to be neutral about the good life,<sup>31</sup> public and private schools routinely take positions about the good life. They uniformly reject the view of living life to the fullest in terms of immediate sensory gratification. They teach our children not to take drugs (even marijuana — despite those who believe that the taking of marijuana is a valuable part of the good life), not to drink too much alcohol (despite those whose

<sup>28</sup> *Id.* at 535.

<sup>29</sup> *Cf.* McConnell, *supra* note 7, at 850–51 (arguing that public education indoctrinates children).

<sup>30</sup> For some of the difficulties of achieving uniformity in an educational bureaucracy, see YUDOF, *supra* note 4, at 116–21. *See also* Rosenblum, *supra* note 8, at 152–53:

[I]n public education, the tug-of-war between federal and state, and state and local "control" (itself an abstraction that must be broken down into an array of legal requirements, funding schemes, curricular decisions, classroom organization, assessment, and so on) is a part of a larger field of competing authorities that includes professional educators' groups, teachers' unions, textbook publishers, and parenting (organized and disorganized). Localism, unionism, and housing patterns dilute unitary government "control." So do the many arrangements for student opt-outs, parental vetoes over aspects of the curriculum, charter schools, and so on. Even if there is one authoritative curriculum in each public school jurisdiction, every parent and student knows that variability from classroom to classroom is the rule. To say nothing of the fact that the substantive content of democratic education is a moving target.

<sup>31</sup> CHARLES E. LARMORE, *PATTERNS OF MORAL COMPLEXITY* 42–47 (1987); BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 11, 57–58, 166 n.10 (1980); Ronald Dworkin, *Liberalism, in PUBLIC AND PRIVATE MORALITY* 113, 127 (Stuart Hampshire ed., 1978). *But cf.* Ronald Dworkin, *Is There a Right to Pornography?*, 1 *OXFORD J. LEGAL STUD.* 177, 210–11 (1981) (qualifying his view). For criticism, see JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986); WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* (1991); Steven Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 *UCLA L. REV.* 1103 (1983).

lifestyle includes guzzling large amounts of beer while watching football games),<sup>32</sup> not to smoke cigarettes (despite an army of smokers),<sup>33</sup> and, although the message varies, not to have sex<sup>34</sup> or, alternatively, not to have sex without a condom. Despite these teachings, teenagers, and sometimes young children, use drugs (including tobacco),<sup>35</sup> abuse alcohol,<sup>36</sup> and engage in unprotected sex in massive numbers.<sup>37</sup> Of course, millions of children do not do these things. The health curriculum is not wholly ineffective.

The picture of the standardized child, however, is hard to take seriously. Nearly 90% of American children already attend public schools.<sup>38</sup> They attend these schools at the same time the popular press is full of talk about the dangers, challenges, or opportunities posed by the nation's diversity.<sup>39</sup> American children are wildly different from each other in ways that escape the imagination of most school boards and superintendents. Indeed, the frequent claim that public schools discourage religion with their secular message<sup>40</sup> is hard to reconcile with the reality that

<sup>32</sup> The National Institute on Alcohol Abuse and Alcoholism estimates that one in thirteen adult Americans abuses alcohol or is an alcoholic. *The National Institute on Alcohol Abuse and Alcoholism: Getting the Facts*, at <http://www.hia.nih.gov/publications/booklet/html> (last visited Nov. 22, 2002).

<sup>33</sup> A 1995 study estimated that sixty-one million Americans were in the smoking ranks. CENTERS FOR DISEASE CONTROL, *1995 National Household Survey on Drug Abuse, Tobacco Related Statistics, SAMHSA*, at [http://www.cdc.gov/tobacco/research\\_data/survey/samhsa.html](http://www.cdc.gov/tobacco/research_data/survey/samhsa.html) (last visited Nov. 22, 2002). The Surgeon General reports that the vast majority of smokers want to quit, but only 2% succeed each year. *Id.*

<sup>34</sup> For the contention that many abstinence-only programs have emerged in contexts that violate the Establishment Clause, see Gary J. Simson & Erika A. Sussman, *Keeping the Sex in Sex Education: The First Amendment's Religion Clauses and the Sex Education Debate*, 9 S. CAL. REV. L. & WOMEN'S STUD. 265 (2000).

<sup>35</sup> According to the National Center for Chronic Disease Prevention and Health Promotion, nearly 3,000 young people a day under the age of eighteen become regular smokers. NAT'L CTR. FOR DISEASE PREVENTION AND HEALTH PROMOTION, *Tobacco Information and Prevention source*, at <http://www.cdc.gov/tobacco/issue.htm> (last visited Aug. 16, 2001).

<sup>36</sup> The National Institute on Alcohol Abuse and Alcoholism reports that 21% of all eighth graders state that they have used alcohol within the last thirty days; more than 100,000 12- to 13-year-olds binge drink on a monthly basis; three million 14- to 17-year-olds are regular drinkers. Leadership to Keep Children Alcohol Free, *Statistics*, at <http://www.alcoholfreechildren.org/gs/stats/index.cfm> (last visited Nov. 23, 2002).

<sup>37</sup> The Alan Guttmacher Institute estimates that some 900,000 teenagers become pregnant each year. More than 75% of these pregnancies were not intended. ALAN GUTTMACHER INST., *Why Is Teenage Pregnancy Declining? The Roles of Abstinence, Sexual Activity and Contraceptive Use*, at [http://www.agi-usa.org/pubs/or\\_teen\\_preg\\_decline.html](http://www.agi-usa.org/pubs/or_teen_preg_decline.html) (last visited Nov. 23, 2002).

<sup>38</sup> NAT'L CTR. FOR EDUC. STATISTICS, *Public and Private School Enrollment*, at <http://nces.ed.gov/fastfacts/display.asp?id=65> (last visited Nov. 23, 2002) (1999 statistics).

<sup>39</sup> Nonetheless, the American consumer culture has become more homogenized. Paul Van Slambrouck, *There's more diversity but less . . . diversity*, CHRISTIAN SCI. MONITOR, Feb. 8, 2000, at 1.

<sup>40</sup> See Richard A. Baer, Jr., *The Supreme Court's Discriminatory Use of the Term "Secularian"*, 6 J.L. & POL. 449, 465-66 (1990).

Americans are among the most religious people in the western world,<sup>41</sup> this despite massive public school attendance.<sup>42</sup> Even if public schools wanted to produce a standardized child, they would have had no prospect of success.

This is not to deny the socializing effects of education and the wider culture. Americans are successfully socialized to believe in the greatness of their country and are steered toward a narrower political spectrum than Europeans. Effects such as these, regrettable or not, are promoted in public and private schools and the broader culture. They warrant no special indictment of compulsory *public* education. The public school system is not bereft of other socializing tendencies. I shall argue that public education tends to produce some important socializing effects, but these effects do not properly call up a picture of a totalitarian state or a standardized child. For example, I will argue that some of the socializing effects include the promotion of autonomy, empathy, creativity, imagination, respect, and tolerance. If it is standardization to promote autonomy,

<sup>41</sup> Ironically, some of the same people who worry that public schools turn people from religion point to the religious character of the American people. *See id.* at 463 (describing Americans as “incurably religious”; noting that 90% of Americans profess belief in God; church attendance approaches 50% of the population). Estimates differ as to the depths of religious conviction of American citizens, but religious beliefs are clearly more widespread and deep than is generally the case in Western Europe. *See* RICHARD BOOTH FOWLER & ALLEN D. HERTZKE, *RELIGION AND POLITICS IN AMERICA* 28–29 (1995); ALAN WOLFE, *ONE NATION AFTER ALL* 44–45 (1998); *cf.* JOHN CORNWELL, *BREAKING FAITH* 2, 3 (2001) (describing European Catholic practice as in “terminal decline”; in France, only 7% of the young ever attend church). This makes it all the more disturbing that this wealthy country filled with “incurably religious” people would house the largest percentage of poor children in the western world. I think it an interesting question whether a commitment to religion on an institutional level is more likely to exhibit a correlation with moral behavior, however that might plausibly be defined, and to what extent and in which ways, than would be the case with persons who maintain no such commitment. For evidence that religious commitment makes a difference in some ways, *see* EASTWOOD ATWATER, *ADOLESCENCE* 296–99 (3d ed. 1992). Those who maintain no institutional religious commitment, of course, includes those who see themselves as religious, *see generally* ROBERT WUTHNOW, *AFTER HEAVEN: SPIRITUALITY IN AMERICA SINCE THE 1950’S* (1988), and those who do not. In one sense, however, it might be difficult to make a sharp distinction between the two categories because many of the non-religious have been influenced by cultural values strongly influenced by religious traditions. HANS KUNG, *ON BEING A CHRISTIAN* 30–31 (1978).

<sup>42</sup> One might wonder whether Supreme Court decisions removing prayer and Bible readings from the public schools have had a significant impact in secularizing the schools. I am dubious. It seems unlikely that brief ceremonies of that character had any significant religious influence. Indeed, surprisingly, the historical evidence is that such ceremonies were far from universal in the Nineteenth Century and non-existent in many states. Many in the Nineteenth Century argued that such ceremonies where they did exist were of doubtful value. Yet religious commitments were strong. R. Laurence Moore strongly argues that the “importance of religion to intellectual development in the Nineteenth Century had almost nothing to do with what happened in public school classrooms.” R. Laurence Moore, *Bible Reading and Nonsectarian Schooling: The Failure of Religious Instruction in Nineteenth-Century Public Education*, 86 *J. AM. HIST.* 1581, 1598 (2000).

empathy, creativity, imagination, respect, and tolerance, we need to know what is wrong with standardization.

The standardization language — with all of its negative implications — in *Pierce* is understandable, however, because the dreadful briefs submitted by the Governor of Oregon and its Attorney General opened themselves up to just such a response. The briefs expressed concern over “ignorant foreigners, unacquainted with and lacking in sympathy with, American institutions and ideals.”<sup>43</sup> The briefs worried that private schools might emerge that were hostile to American ideals. Governor Pierce argued that if the Oregon law were declared unconstitutional, “[O]ur country will be dotted with elementary schools which instead of being red on the outside will be red on the inside.”<sup>44</sup> The briefs declared war on difference and emphasized the need to produce American patriots.<sup>45</sup> They were truly susceptible to the interpretation that Oregon was trying to produce a homogenized public — built upon standardized children.

In this respect, Oregon mirrored the dark side of the movement to establish the public schools. Moreover, Oregon’s motivation included a pungent dose of anti-Catholicism. The major private schools were Catholic,<sup>46</sup> and anti-Catholic sentiment was rampant.<sup>47</sup> The Oregon initiative was strongly supported by the Ku Klux Klan,<sup>48</sup> at a time when the Klan

<sup>43</sup> Walter M. Pierce, *Brief of Appellant*, in OREGON SCHOOL CASES: COMPLETE RECORD, *supra* note 14, at 98.

<sup>44</sup> *Id.* at 103. “Redbaiting” was not confined to the proponents of the initiative. The *Portland Telegram* published a cartoon showing Lenin and a hooded Ku Klux Klansman holding a placard with the message: “State Monopoly of Schools is an Absolute Success in Russia.” DAVID TYACK ET AL., *LAW AND THE SHAPING OF PUBLIC EDUCATION 1785–1954*, 184 (1987).

<sup>45</sup> TYACK ET AL., *supra* note 44 at 115–16.

<sup>46</sup> Seven percent of elementary students attended private schools in Oregon. *Id.* at 179. 7,300 of the estimated 12,031 students enrolled in such schools were in Catholic schools. M. Paul Holsinger, *The Oregon School Controversy 1922–1925*, 37 PAC. HIST. REV. 327, at 330 n.14.

<sup>47</sup> Woodhouse, “*Who Owns the Child?*”, *supra* note 19, at 998, 1026, 1032.

<sup>48</sup> The Scottish rite Masons was the official sponsor of the initiative, but Tyack maintains that “there is much evidence that the KKK was using the Scottish Rite as a front.” TYACK ET AL., *supra* note 44, at 180. In any event, the Klan, though not an official sponsor, was a prominent public supporter of the initiative. Holsinger, *supra* note 46, at 330. A Klan publicist made it clear that “the public schools were to replace immigrant cultures with 100% Americanism and wanted to Protestantize the Catholics by requiring ‘their priests to marry and live normal lives’ and by forcing Catholics to ‘abolish the parochial grade school and join with other Americans in building up the Public School.’” *Id.* at 182. After the *Pierce* decision, *The New York Times* editorialized that the initiative was “born of prejudice.” Although it “professed to be one of equality, [it] was one of the most hateful by-products of the Ku Klux Klan movement.” *E.g.*, Lloyd B. Jorgenson, *The Oregon School Law of 1922: Passage and Sequel*, 54 CATH. HIST. REV. 455, 464 (1968).

exerted substantial power in the Oregon legislature,<sup>49</sup> and Governor Pierce was a nativist who thought that Catholics should not be able to hold public office.<sup>50</sup> Barbara Woodhouse's brilliant rendition of the *Pierce* case insightfully argues that anti-Catholicism alone could not account for the Oregon law,<sup>51</sup> but even Woodhouse does not deny that anti-Catholicism played an important role.<sup>52</sup> Despite the overwrought rhetoric of the *Pierce* decision, the Court had good reason to strike down the Oregon law, but compulsory public education should not invariably be deemed unconstitutional in all contexts.

## II. THE PURPOSES OF PUBLIC EDUCATION

Public education is supported by a number of strong purposes, including interests in democratic education, autonomy, empathy, creativity and imagination, respect and tolerance, social skills, equality, and justice.

### A. DEMOCRATIC EDUCATION

One approach, of course, is to recognize that a major purpose of public education is to promote democratic values.<sup>53</sup> Although most would admit that this suggestion could form a part of the case for compulsory public education, it can be maintained that the argument cannot stand by itself. Thus, it would not do to tell children that they will be compelled to attend public school simply because it would be good for the society, as if it were appropriate to use them as mere instruments to a social end.<sup>54</sup> Even if it were appropriate, it would take a strong theory of democracy to show that compulsory education could make a significant democratic difference. Such an argument would have to show that it is not enough to educate 90% of the nation's children — that the last 10% is important to democratic success. If we can figure out how to produce

<sup>49</sup> Holsinger reports that Klan-supported candidates carried both houses of the Oregon legislature in 1922. Holsinger, *supra* note 46, at 335. Tyack reports that Klan-supported candidates had the "potential deciding vote" in the legislature. TYACK ET AL., *supra* note 44, at 180.

<sup>50</sup> Woodhouse, "Who Owns the Child?", *supra* note 19, at 1032.

<sup>51</sup> *Id.* at 1016–17.

<sup>52</sup> *Id.* at 998, 1000, 1019.

<sup>53</sup> GUTMANN, *supra* note 25, emphasizes this perspective, but she does not support compulsory education.

<sup>54</sup> BRIGHOUSE, *supra* note 25, at 61. It might be argued that democratic education is good for the child wholly apart from any social consequences. For many, it may be an important part of the good life that they recognize and appreciate the just aspects of the society of which they are a part. On the other hand, many individuals live apparently full and rich lives without any such recognition or appreciation.

democratic citizens, we will have a rich supply without compelling the rest to attend public schools.<sup>55</sup>

Nonetheless, citizens have an obligation to participate in the process of combating the injustices of the society of which they are a part. To do this requires an understanding of the character of the society, with appreciation for its just aspects and concern about those aspects that cannot be defended. Moreover, persons have no right to be free riders on the work of others in a well-functioning democracy. They too have an obligation to play a role.<sup>56</sup> Thus, democratic education need not consider children as pawns in the process of social reproduction; democratic education honors the moral obligations of its citizenry.

Yet another obstacle to the success of this argument remains. The argument assumes that public education is democratic education and that private education is not.<sup>57</sup> In one sense that is tautological. The content of public education is controlled by democratic processes to a far greater extent than is the case in private schools.<sup>58</sup> The issue, however, is whether the democratic content of public education is substantially different from that of private education, regardless of the process of arriving at the content. There are grounds for believing this to be true, but it should not simply be assumed. We will return to this issue at the end of the next section.

## B. A DIVERSE STUDENT BODY

A hallmark of public education is its commitment to educate children of all classes, races, and religions together.<sup>59</sup> This commitment to integrated education fosters autonomy, empathy, creativity and imagination, equality, respect and tolerance, social skills, justice, and democratic education.

<sup>55</sup> *Cf. id.* at 44 (maintaining that civic stability requires educating a large critical mass of citizens, but not more).

<sup>56</sup> Even if they did not have obligations, citizens have rights of participation and need to be educated to exercise such rights, if they choose to do so. Arneson & Shapiro, *supra* note 25, at 379.

<sup>57</sup> *But see* McConnell, *supra* note 8; VITERITTI, *supra* note 10, at 19 (“There is nothing inherent in a religious education that is anathema to the ethos of democracy, whether it is paid for by parents or with the assistance of public funding.”).

<sup>58</sup> For the claim that community control of schools is vital, see MICHAEL ENGEL, *THE STRUGGLE FOR CONTROL OF PUBLIC EDUCATION* (2000); GUTMANN, *supra* note 25, at 70 (“[The] problem with voucher plans is not that they leave too much room for parental choice but that they leave too little room for democratic deliberation”). Of course, even substantial voucher programs would leave plenty of room for democratic deliberation both about the remaining public schools and about the conditions that should be placed upon the voucher schools.

<sup>59</sup> This was one of the main goals of the common school movement. MACEDO, *supra* note 25, at 52–54.

### 1. *Autonomy and Liberal Education*

Everyone has autonomy in a narrow sense. That is, everyone makes choices about some things from the trivial — deciding which part of an item of food to eat first or deciding which foot to put forward — to the substantial — e.g., whom to befriend. But schools promote a thicker conception of autonomy.<sup>60</sup> A liberal education provides children with an understanding of the physical and social environment of which they are a part. Such an understanding is fundamental to a rich human life. Such an understanding (which is never complete) also assists children in making choices and in determining the range of choices to be made.<sup>61</sup> Bringing children of different backgrounds together fosters autonomy in the same way that the study of history and anthropology fosters autonomy. Exposure to people of different backgrounds and lifestyles makes vivid alternative conceptions of how to lead a life. If one of the purposes of education is to show children the range of choices that might be available to them and to teach the skills and habits of mind in making choices,<sup>62</sup> public education's commitment to integrated education makes a valuable contribution. The alternative of being educated with people of similar backgrounds and perspectives masks the available choices and encourages the view that the backgrounds and perspectives one was in a sense "born into" are given (natural).<sup>63</sup>

Some argue, however, that it is not the business of the state to promote autonomy. A standard line of argument maintains that promoting autonomy violates the respect that should be shown to alternative ways of life.<sup>64</sup> Another line of argument, put forward by William Galston,

<sup>60</sup> For a deep discussion of the nature of autonomy and its connection to liberal education, see LEVINSON, *supra* note 19, at 14–41. On the connection between common education and autonomy, see *id.* at 100–69. For an argument that education for autonomy is consistent with education into a particular culture, see ACKERMAN, *supra* note 31, at 139–67. For the claim that toleration is more important than autonomy, see Kukathas, *supra* note 23, at 124–23.

<sup>61</sup> I would not suggest that understanding of the social and physical environment is exclusively important for its promotion of autonomy or for its contribution to democratic education. Contrary to the implications of some liberal and democratic theorists, a good education has value independent of autonomy and democracy. See, e.g., BRIAN BARRY, *LIBERAL EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM* 221–22 (2001).

<sup>62</sup> On the importance of these skills and habits to liberal theory — whether or not labeled as autonomy, see Will Kymlicka, *Two Models of Pluralism and Tolerance*, in *TOLERATION: AN ELUSIVE VIRTUE* 81–105 (David Heyd ed., 1996). For a similar perspective, see Arneson & Shapiro, *supra* note 25, at 388–403 (contending that an integrated education is a helpful but not sufficient condition for teaching such skills).

<sup>63</sup> Exposure to different lifestyles constrains autonomy at the same time that it enables it. If the parent of a child wishes to raise a child to be an illiterate farmer, compulsory reading instruction will forever foreclose that possibility, even though it opens many other possibilities at the same time. Public education is neutral about many forms of the good life, but it is not and cannot be neutral about them all.

<sup>64</sup> Cf. JOHN RAWLS, *POLITICAL LIBERALISM* 199–200 (1996).

concedes that the state has interests in toleration and “in developing citizens with at least the minimal conditions of reasonable public judgment. But neither of these civic requirements entails a need for public authority to take an interest in how children think about different ways of life.”<sup>65</sup> Galston argues that there is a right to live unexamined as well as examined lives<sup>66</sup> and that the greatest threat to modern liberal societies is “not that [children] will believe in something too deeply, but that they will believe in nothing very deeply at all.”<sup>67</sup>

The argument from respect has considerable merit in contexts where the state tells consenting adults that they cannot engage in otherwise harmless behavior because the state disapproves of the conduct, e.g., same-sex sexual relations.<sup>68</sup> In the educational context, however, the state is not prohibiting conduct but encouraging it; the child is free to reject the values promoted by the state. More important, the child is forming values, so that to encourage the value of autonomy may disrespect the views of some parents<sup>69</sup> (indeed, the very point may be to offer an alternative to the views of the parents), but it does not disrespect the child. Finally, it is impossible to run a school without offending the beliefs of some. Individual teachers by their comportment endorse one model of a way to live. Coaches of athletic teams and drama directors explicitly endorse attitudes toward competition and cooperation and the relationship between them. The curriculum will invariably teach that racism is wrong, much to the chagrin of white supremacists. A value-free educational institution is not feasible;<sup>70</sup> it is neither necessary nor desirable.<sup>71</sup>

<sup>65</sup> GALSTON, *supra* note 31, at 253.

<sup>66</sup> *Id.* at 254.

<sup>67</sup> *Id.* at 255.

<sup>68</sup> Even in that context, the argument that the state displays insufficient respect for the autonomous choices made by consenting adults is not a conversation stopper. The state could say, “We are required to respect you as persons, and we do, but we are not required to respect the choices you make, and we do not.” Gays or lesbians could respond that “choices about sexual orientation, if they are choices, are choices about identity. Not to respect these choices or, alternatively, not to respect the way we are, is not to respect us as persons.” The state could respond that, if so, the state is not required to respect them as persons in that respect. State attempts to prohibit same-sex sexual conduct can be appropriately condemned as iniquitous without walking into the respect quagmire. But whatever the merits of the respect argument in contexts of behaviors that are harmless to the state and important to the lives of individuals, it is out of place in the educational context.

<sup>69</sup> Surely, the overwhelming majority of parents value autonomy. Not to encourage autonomy because some parents are opposed would amount to accepting a “heckler’s veto.”

<sup>70</sup> See DONALD ARSTINE, *DEMOCRACY AND THE ARTS OF SCHOOLING* 31 (1995) (emphasizing the choices made even in the teaching of reading and writing); David C. Paris, *Moral Education and the “Tie That Binds” in Liberal Political Theory*, 85 *AM. POL. SCI. REV.* 875, 883–90 (1991).

<sup>71</sup> Brighouse argues that schools should facilitate autonomy, but possibly should not promote it. BRIGHOUSE, *supra* note 25, at 64, 82. It is hard to see how one could effectively facilitate autonomy without promoting it.

Even if everyone in an educational institution could be squeaky-clean neutral about the importance of values like autonomy, Galston's view that fostering autonomy is not important to democratic education is both contestable and beside the point. A citizen in a vigorous democracy needs more than minimal conditions of public judgment. Citizens, if they are not to be free riders, need to be able to contest public attempts at manipulation. They need to be independent, critical thinkers, capable of autonomous thinking.

Of course, citizens have a right to live unexamined lives; but if they are to be good citizens, they will not live a life in which their society goes unexamined. Perhaps it is possible to train citizens who would examine society closely but not their own lives; but that kind of compartmentalization has little to recommend it. Wholly apart from democratic justifications, a child who in the parental lottery draws parents opposed to the development of autonomy inherits limited choices. Autonomous development promises liberation from the parental monopoly, which in turn produces broadened choices. Of course, to broaden choice may be to forego the choice of blind acceptance, but the state reasonably makes the judgment that the child will be better off when presented with the choice to choose.

Finally, autonomous development is not inconsistent with deep beliefs (Galston himself has those), nor is it inconsistent with deeply held religious beliefs.<sup>72</sup> But, "when believing 'deeply' is just a function of believing ignorantly,"<sup>73</sup> it is hard to endorse such beliefs as protective of a liberal society.

## 2. *Empathy, Creativity, and Imagination*

One of the features of literature is to introduce students to characters they might not otherwise encounter. Meeting such characters opens one to new worlds. These worlds reflect back on one's own. It not only opens one to new possibilities, but the making of new connections sparks the imagination and ignites the creative process.<sup>74</sup> Similarly, literature forces one to empathize with the problems and lives of others.<sup>75</sup> Inte-

<sup>72</sup> See T.H. McLaughlin, *Parental Rights and the Religious Upbringing of Children*, 18 J. PHIL. EDUC. 75 (1984).

<sup>73</sup> EAMONN CALLON, *CREATING CITIZENS: POLITICAL EDUCATION AND LIBERAL DEMOCRACY* 134 (1997).

<sup>74</sup> WAYNE C. BOOTH, *THE COMPANY WE KEEP: AN ETHICS OF FICTION* 17 (1988) ("Each narrative, fictional or historical, provides an alternative story set in a created 'world' that is a itself a fresh alternative to the 'world' or 'worlds' previously serving as boundaries of the reader's imagination.").

<sup>75</sup> See generally MARTHA C. NUSSBAUM, *CULTIVATING HUMANITY* (1997); see also BENJAMIN R. BARBER, *AN ARISTOCRACY OF EVERYONE: THE POLITICS OF EDUCATION AND THE FUTURE OF AMERICA* 5 (1992) ("Human association depends on imagination: the capacity to see in others beings like ourselves. It is thus through imagination that we render them suffi-

grated education also forces one to bump up against the other, to imagine what their lives are like, and to explore the connections between their lives and one's own, to empathize with others.<sup>76</sup> Education is not just the stuff of books; the varied character of the students one encounters is a rich source of enlargement and understanding.<sup>77</sup>

### 3. *Respect and Tolerance*

Segregated education breeds fear of those who are different. It is all too easy to believe that those outside one's circle are different, strange, and even evil.<sup>78</sup> This was one of the many evils of racially segregated education. Although integrated education is not a panacea, it combats the fear of difference. It gives a human face to the other. It demagnetizes the strangeness. The possibilities of respect and toleration are thereby increased.<sup>79</sup> The lived experience of diversity presents a broader understanding of the culture in which one participates and encourages the student to feel at home in a pluralistic world.<sup>80</sup> When Governor Pierce spoke in favor of the Oregon law, he combined the themes of equality and toleration: "Every one of our six children was educated in the public schools from the primary to the college and university . . . e I believe we would have a better generation of American free from snobbery and big-

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ciently like ourselves for them to become subjects of tolerance and respect, sometimes even of affection.").

<sup>76</sup> Considerations such as these form a strong part of the case for multicultural education. See BHIKHU PAREKH, *RETHINKING MULTICULTURALISM: CULTURAL DIVERSITY AND POLITICAL THEORY* 226–27 (2000). Cf. Callon, *supra* note 73, at 8, 43; Terence H. McLaughlin, *Liberalism, Education and the Common School*, 29 J. PHIL. EDUC. 239,t250 (1995) ("[N]eed for the development in pupils of imaginative engagement, understanding and sympathy with views with which they disagree").

<sup>77</sup> Cf. ARSTINE, *supra* note 70, at 11 ("Socialization requires firsthand experience . . . you don't get socialized by reading about what others believe.").

<sup>78</sup> "Separatism denies the value, even the possibility, of such a dialogue. It rejects exchange. It is multiculturalism gone sour . . ." ROBERT HUGHES, *THE CULTURE OF COMPLAINT* 84 (1993). But see Michael W. McConnell, *Multiculturalism, Majoritarianism, and Educational Choice: What Does Our Constitutional Tradition Have to Say?*, 1991 U. CHI. LEGAL F. 123, 150–51 (1991) (recommending separate education and calling it multicultural).

<sup>79</sup> Cf. LEVINSON, *supra* note 19, at 65:

[E]mphasis on common education, mutual toleration, and critical engagement ensures the development and maintenance of an interactive and mutually responsive plural society, as opposed to a society composed of separate, insular, and self-protective communities which, while formally part of a diverse and multicultural whole, are internally homogeneous and disengaged from other groups in their midst.

For criticism of separatist education in England, see *id.* at 110–16.

<sup>80</sup> Cf. ALAN RYAN, *LIBERAL ANXIETIES AND LIBERAL EDUCATION* 181 (1988):

One of the central purposes of education is to overcome the sense of being thrown into a 'meaningless' world. Anyone who wants to connect liberalism as a set of cultural and political ambitions with liberal education as a commitment to a humanist and historical understanding of human culture hopes that the second will sustain the first and that the first will provide a proper shelter for the second.

otry if all children . . . were educated in the free public schools of America.”<sup>81</sup> The idea was that respect and toleration would be encouraged if children of all races, classes, and religions were educated in the same common school.<sup>82</sup>

To tolerate, however, is not to abandon contrary beliefs. Nor should toleration be absolute. Toleration need not involve respect for the oppressive or discriminatory aspects of a culture.<sup>83</sup> In the end, toleration is based on respect for the humanity of persons, not on respect for the equality of all views.<sup>84</sup>

#### 4. *Social Skills*

Autonomy, empathy, creativity and imagination, and respect and tolerance are skills or virtues that are valuable for individuals in a variety

<sup>81</sup> Holsinger, *supra* note 46, at 334–35.

<sup>82</sup> One might think that John Dewey would be persuaded by this argument. Not so. Dewey opposed the initiative on the ground that it struck at the “root of American toleration and trust and good faith between various elements of the population and in each other.” *See, e.g.,* Jorgenson, *supra* note 48, at 460–61. *But cf.* VITERITTI, *supra* note 10, at 158–59 (discussing Dewey’s hostility to religion in general and to Catholicism in particular). Nonetheless, many, including Dewey, have subscribed to the view that integrated classrooms support toleration and respect. *See, e.g.,* RUPERT BROWN, *PREJUDICE: ITS SOCIAL PSYCHOLOGY* 236–69 (1995); Ronald Dworkin, *Affirming Affirmative Action*, *N.Y. REV.*, Oct. 22, 1998, at 99–100. This contention was a major part of the argument for the initiation of the public schools. MACEDO, *supra* note 25, at 52–54. That toleration is encouraged by integration is supported by evidence from the racial context. Blacks and whites who attended desegregated schools are less likely to express negative views about members of the other race, are more comfortable in integrated work and social situations, are more likely to live in integrated neighborhoods, and are more likely to have personal relationships with persons of the other race. James S. Liebman, *Desegregating Politics: “All-Out” School Desegregation Explained*, 90 *COLUM. L. REV.* 1463, 1626–27 (1990); Jennifer Hochschild, *Public Schools and the American Dream*, *DISSENT* 35, 38 (Fall 2001). *Cf.* GUTMANN, *supra* note 25, at 163 (pointing to reduction of prejudice in settings with cooperative learning and absence of tracking when integration is fully and carefully carried out). The experience with heterogeneous grouping discussed in the literature about tracking also supports this view. ARSTINE, *supra* note 70, at 142. *See also* Henry M. Levin, *The Theory of Choice Applied to Education*, in *CHOICE AND CONTROL*, *supra* note 3, at 247, 268 (“Research on political socialization has shown that tolerance for diversity is related to the degree to which different children are exposed to different viewpoints on controversial subjects in both the home and school.”).

<sup>83</sup> *See* WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* 196–97 (1989); SUSAN MULLER OKUN, *IS MULTICULTURALISM BAD FOR WOMEN?* 9–24, 117–31 (Joshua Cohen et al. eds., 1999); Joseph Raz, *Multiculturalism: A Liberal Perspective*, *DISSENT* 67, 74–75 (1994) (contending that respect for cultures does not include oppressive aspects); Peter Gardner, *Tolerance and Education*, in *LIBERALISM, MULTICULTURALISM, AND TOLERATION* 83, 94 (John Horton ed., 1993) (maintaining that dispositional tolerance does not lead people to care less about hunger, racism, or torture). *Cf.* GUTMANN, *supra* note 25, at 44–45 (pointing to nonrepression and nondiscrimination limits on the democratic process). Lack of respect for the internal oppressive actions of groups, however, need not justify state intervention. *See* NANCY L. ROSENBLUM, *MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA* (1998). *See also* Kukathas, *supra* note 23, at 133–34 (arguing for freedom of association, but demanding that the state assure exit rights).

<sup>84</sup> David Heyd, *Introduction to TOLERATION: AN ELUSIVE VIRTUE* 15, *supra* note 62.

of contexts as well as important traits for democratic citizens. But they are also valuable for the ability of different children to relate to each other. Segregated education limits the exposure of children to other children that are different. Of course, segregated education does not entirely rob children of the ability to develop social skills. But integrated education affords broader exposure and greater opportunities.

### 5. *Justice*

A good education nourishes a sense of justice and a commitment to playing a role in making a better world. Yet students are exposed to many clashing views about justice in the public schools. The effect of this for many will be to open their minds; some will change their minds; perhaps most will cling to previously considered views, but few will be entirely unaffected by the interpersonal dynamics of the common school. The public school's promotion of autonomy will itself promote critical reflection upon the various perspectives. And this is also important from the perspective of encouraging lively dissent.<sup>85</sup> John Stuart Mill rightly contends that the most effective dissenters are those who understand the perspective of their opposition and have engaged with it in a serious way.<sup>86</sup> There is a place for dogmatic dissenters, but a system committed to social justice needs savvy dissenters. Sealing off children from the views of others is a prescription for insularity, not a method for cultivating a robust democratic citizenry.<sup>87</sup>

### 6. *Class Equality*

Integrated education promotes class equality.<sup>88</sup> When the wealthy are permitted to enroll their children in private schools, the schools suffer

<sup>85</sup> Cf. CALLON, *supra* note 73, at 5, 51 (arguing that a pluralistic society depends upon the cultivation of independent criticism). As Callon observes, "there can be no oppression in the molding of a character that would refuse to resort to domination or manipulation in dealing with fellow citizens and would resist those measures when others use them. In fact, a more promising corrective to oppression is hard to imagine." *Id.* at 51.

<sup>86</sup> MILL, *supra* note 9, at 44. BRIGHOUSE, *supra* note 25, at 75–76. Cf. CALLON, *supra* note 73, at 177 ("[I]maginary interlocutors are a pallid substitute for the real thing.").

<sup>87</sup> Cf. Levin, *supra* note 3, at 268:

It would be unrealistic to expect that Catholic schools will expose their students to both sides of the abortion issue; that evangelical schools would provide a disinterested comparison of creation and evolution; that military academies would debate the value of disarmament and peace movements; that leftist schools would provide a balanced presentation of the positive and negative aspects of capitalism; or that white academies would explore different views toward race in the United States. Their curriculum and faculty would be selected in order to make them efficient competitors in a differentiated market for students in which the views of parents would be reinforced and others excluded or derided.

<sup>88</sup> Oregon had a particular interest in this argument. See Woodhouse, "Who Owns the Child?," *supra* note 19, at 1016–36.

in many ways. They lose typically well-prepared students; they lose important parental involvement; and they lose vital political activity and support for the financial resources needed to sustain high quality schools.<sup>89</sup> The children of the wealthy lose the opportunity to socialize and learn from people in a more diverse setting. If parents were assured that similarly situated parents would be required to send their children to public schools, many of them might feel less of a need to send their children to private schools. Whether or not that be the case, the proponents of the Oregon law considered in *Pierce* had a point when they submitted this argument to the voters: "When every parent in our land has a child in our public school, then and only then will there be united interest in the growth and higher efficiency of our public schools."<sup>90</sup> Or as one of the slogans of the universal common schooling movement put it, "Free Public Schools — Open to All, Good enough for All, *Attended* by All, All for the Public School and the Public School for All."<sup>91</sup>

### 7. *Democratic Education*

Conservatives complain that education in the public schools is liberal and multicultural.<sup>92</sup> This is by no means universally true, but, from a liberal perspective, a commitment to educating the children of all classes, races, and religions tends to press the schools in salutary directions. Such a commitment not only inclines the schools to denounce racial prejudice, but also leads them to celebrate the contributions of individuals from diverse cultures.<sup>93</sup> Similarly, that commitment inclines the schools in a direction that is far less patriarchal than might be expected in many of the nation's private schools. Girls may be taught in many pri-

<sup>89</sup> The median income of parents with children in private schools exceeds that of those with children in public schools, and, of course, a substantial number of those parents are quite wealthy. But the distribution of income among private school parents is surprisingly broad, though less so if Catholic schools are excluded. See GUTMANN, *supra* note 25, at 117.

<sup>90</sup> *Official Pamphlet Distributed Among Voters Prior to Election November 7, 1922*, OREGON SCHOOL CASES: SCHOOL CASES: COMPLETE RECORD, *supra* note 14, at 733.

<sup>91</sup> Holsinger, *supra* note 46, at 332; Woodhouse, "Who Owns the Child?", *supra* note 19, at 1016.

<sup>92</sup> See, e.g., McCONNELL, *supra* note 7, at 850 (speaking of a "leftist stew" in the public school, including race and gender egalitarianism among other things). Elsewhere, however, McConnell maintains that public schools teach our children to be "value-less, culture-less, root-less, and religion-less." McConnell, *supra* note 78, at 150. It is hard to recognize American children in this description, living as we do in an age of multiculturalism and persistent adherence to religion. See also *supra* notes 28–41 and accompanying text.

<sup>93</sup> On the importance of this, see, e.g., WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995); Charles Taylor, *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* (Amy Gutmann ed., 1994). For concerns about essentialism, see K. Anthony Appiah, *Culture, Subculture, Multiculturalism: Educational Options*, in *PUBLIC EDUCATION IN A MULTICULTURAL SOCIETY* 65–89 (Robert K. Fullinwider ed., 1996) [hereinafter *PUBLIC EDUCATION*]; Jeremy Waldron, *Multiculturalism and Mélange*, in *PUBLIC EDUCATION*, *supra*, at 90–108.

vate schools that a woman's place is in the home,<sup>94</sup> and they may ultimately decide that is best for them, but few public schools would suggest it as a given.

Many private schools will condemn homosexuality, and though they may tell students to hate the sin and not the sinner, homophobia is a serious problem. Breaking it down requires effort. Only the rare public school would teach that heterosexuality, homosexuality, and bisexuality are on a par (the politics of the public school environment would not permit it). But the public schools are far more likely than the private schools to stress the importance of toleration and respect regardless of sexual orientation. Of course, a commitment to educating all students is not a guarantee of a multicultural approach. Oregon sought to solve the "problem" of immigration and diversity by homogenizing its students,<sup>95</sup> but today most public schools castigate discrimination and salute diversity<sup>96</sup> while recognizing our common humanity and our common constitutional heritage.<sup>97</sup>

I conclude that very substantial interests underlie the interest in public school attendance. If *Pierce* is made to stand for the proposition that

<sup>94</sup> There is some evidence to suggest that Catholic girls in Catholic schools are less likely than their counterparts in public schools to have restricted views of the roles of women. See ANDREW M. GREELEY, *CATHOLIC HIGH SCHOOLS AND MINORITY STUDENTS* 55 (1982).

<sup>95</sup> This homogenization included a religious emphasis that sought to inspire or teach in ways that would offend no Christian religion. This did not succeed. Catholic objections to the reading of the Bible without commentary, for example, were deeper than objections to the particular Bible chosen. Reading without commentary suggested that it was up to the individual to interpret the scripture, but the Catholic Church taught that its hierarchy was to guide believers in the interpretation. Proponents of public schools thought the Catholics were unreasonable. The Catholics thought the Protestants were hostile (they were). The Catholic decision to maintain a private school system followed. See e.g., MACEDO, *supra* note 25, at 56–59, 64–76. Obviously, the "ecumenical" character of the public schools did not sit well with other more sectarian religions and was not well tailored to meet the values of non-Christian religions in general, though the numbers of the latter were not substantial enough to make for a political problem. In addition to the Catholic political problem, the objections of those who argued that the religious content of the schools was too thin to make a difference were not easily dismissed. See Moore, *supra* note 42.

<sup>96</sup> Some schools recognize that saluting diversity is not enough. Building from the lived experience of poor people and people of color is necessary both from the perspective of self-respect and from the perspective of effective education. See SONIA NIETO, *THE LIGHT IN THEIR EYES: CREATING MULTICULTURAL LEARNING COMMUNITIES* 1–18 (1999). Cf. ARSTINE, *supra* note 70, at 14 (arguing that effective education requires proceeding from the learner's perspective). Progressive criticism of multiculturalism typically tries to privilege class considerations or universalism without exhibiting any understanding of the pedagogical considerations relevant to the socialization of children. See, e.g., TODD GITLIN, *TWILIGHT OF OUR COMMON DREAMS* (1995). For pointed responses, attacking the critics on their own terms, see Judith Butler, *Merely Cultural*, 15 *SOCIAL TEXT* 52 (1997); Henry A. Giroux, *Counter-Public Spheres and the Role of Educators as Public Intellectuals: Paulo Freire's Cultural Politics*, in *MASSSES, CLASSES, AND THE PUBLIC SPHERE* 251 (2000); Iris Marion Young, *Iris Young Responds to Todd Gitlin*, *DISSENT*, Spring 1997.

<sup>97</sup> See MACEDO, *supra* note 25, at 122–23, 276.

no level of government can require children in their adolescent years to attend public schools, and if the constitutional basis for that proposition is the right of parents to direct the upbringing and education of their children, *Pierce* just goes too far.

One might argue, however, that the due process right to choose where to go to school might properly belong to the adolescent child, particularly if vouchers accompanied that right of choice.<sup>98</sup> Let us assume for purposes of argument that the right of the child should supersede that of the parent in those years. There are, nonetheless, strong grounds to believe that the parents would successfully pressure the child to attend the private school of the parent's choice. Alternatively, if the child chose to reject the parents' advice and decided to attend public school, the conferring of the choice upon the child would end up throwing a dagger in the middle of the family. In most cases, however, adolescents will want to go to school where their friends go, and this would cause them to stay where they are, though some of their friends might leave for the public school. A system of compulsory public education will ordinarily assure that adolescents could stay with their friends while assuring the benefits of integrated education.

### C. THE LIMITS OF COMPULSORY EDUCATION

The distinction between high school adolescents and pre-adolescents, however, is crucial. Parental expectations of a right to control the upbringing of their children are strongest in the pre-adolescent years. It is one thing to say that high school children can be forced to attend public high schools and quite another to tell parents that their little first-graders must attend schools run by the state. Pre-adolescents generally have a substantial need to live in a coherent world.<sup>99</sup> If the value systems of the parents and the school are in conflict, the pre-adolescent child will be caught in the middle. This could be an extremely difficult situation for the pre-adolescent child.<sup>100</sup> We know enough about the importance of parental support in the educational process to recognize that

<sup>98</sup> COONS & SUGARMAN, *supra* note 5, at 22–23, suggest that a mature child should prevail over the parents if he or she should want to attend a public high school.

<sup>99</sup> *Id.* at 84–85. Fitzmaurice, *supra* note 25, at 68.

<sup>100</sup> *Cf.* Callon, *supra* note 73, at 158 (arguing that a premature understanding of ethical diversity could be harmful to the child). At the symposium, commentators argued that granting a constitutional right at the pre-adolescent level to send children to private schools implied that resources should be given to poor parents to make this possible. As I subsequently argue, granting a negative right does not invariably support a positive right; moreover, I believe that we should encourage parents to send their children to public schools. When parents of pre-adolescent children are so uncomfortable with public schools that they are willing to buy their way out, however, the Constitution should not stand in their way.

Also, contrary to some of the comments at the symposium, I do not believe parents of pre-adolescent children should have absolute control over their children. I support the power

such a conflict could be deleterious to the child's educational and emotional development. By contrast, adolescents have begun the process of separating from their parents; they are notoriously skeptical. They have acquired and are acquiring not only critical skills and problem solving skills,<sup>101</sup> but also greater empathic abilities<sup>102</sup> and increased tolerance.<sup>103</sup> In short, they are ready to be challenged with diverse perspectives.<sup>104</sup>

On the other hand, some might argue that the case for compulsory public schools is even stronger in the pre-adolescent years. These are the formative years, the years in which children are most easily influenced. Some would say that if you do not get to children in these years you never will. Of course, the formative years are important, and much that is learned then persists for a lifetime. But adolescents also use their growing cognitive and empathic abilities to reflect upon, adjust, and change their views.<sup>105</sup>

Similarly, although an important goal of public schools is to teach democratic values, private schools meet this need to a substantial degree. Such schools typically address issues of justice from a particular perspective. With some exceptions, there is time enough for the public perspective of justice to be introduced in the adolescent years. In the exceptional cases, either private schools can be regulated to provide the needed perspective or alternative arrangements can be made to educate the children in particular areas. Moreover, to the extent the goal of the state is merely to *expose* children to alternative views, the adolescent years suffice just as well as the pre-adolescent years. Although the state interests are all present in the pre-adolescent years, I conclude that the state should not be able to mandate compulsory public education at that time.

of the state to regulate private schools and would support very strict regulation of home schooling; I might even support its abolition.

<sup>101</sup> Paris, *supra* note 70, at 887, 893; COONS & SUGARMAN, *supra* note 5, at 85–86; JOHN JANEWAY CONGER & NANCY L. GALAMBOS, *ADOLESCENCE AND YOUTH* 103–05 (5th ed. 1997); Joseph Adelson, *The Development of Ideology in Adolescence*, in *ADOLESCENCE IN THE LIFE CYCLE* 66–77 (Sigmund E. Dragastin & Glen H. Elder eds., 1973); Raymond Montemayor & Daniel J. Flannery, *Making the Transition from Childhood to Early Adolescence*, in *FROM CHILDHOOD TO ADOLESCENCE* 293 (Raymond Montemayor et al. eds., 1990). Cf. COONS & SUGARMAN, *supra* note 5, at 32, 63 (maintaining that as children gain maturity, they should be able to decide what school to attend).

<sup>102</sup> ATWATER, *supra* note 41, at 285–87; Nancy Eisenberg, *Prosocial Development in Early and Mid-Adolescence*, in *FROM CHILDHOOD TO ADOLESCENCE*, *supra* note 101, at 243; CONGER & GALAMBOS, *supra* note 101, at 105–06.

<sup>103</sup> CONGER & GALAMBOS, *supra* note 101, at 280–81.

<sup>104</sup> ATWATER, *supra* note 41, at 139–40 (stating that adolescents show increased ability to make autonomous decisions largely because of stronger cognitive abilities including ability to formalize, to consider different views simultaneously, and to “consider divergent views in light of other person’s perspectives”); J. ROY HOPKINS, *ADOLESCENCE: THE TRANSITIONAL YEARS* 245 (1983) (“[A]dolescents show increasing autonomy with age; they become somewhat less likely to conform to either parents or to peers as they grow older.”).

<sup>105</sup> See Adelson, *supra* note 101, at 67.

Finally, I do not contend that compulsory public high school education should invariably be immune from constitutional attacks. The case for compulsory high school education rests to a large extent on the existence of a population more diverse than that which is present in private education.<sup>106</sup> Although a substantial goal of public education is to bring children of all races, classes, and religions together, the flight to the suburbs has often undercut this goal in substantial ways. Certainly, racial diversity has been substantially compromised. Class diversity is often undercut and, in some areas, religious diversity as well. One should not exaggerate the degree of homogeneity in the suburbs, however. Political diversity by American standards is ordinarily present, and in most areas religious backgrounds are diverse as well. Even class diversity in the suburbs is greater than commonly realized. For example, 36% of the poor live in the suburbs.<sup>107</sup> Moreover, many school districts are quite diverse, certainly offering more diversity than that afforded to the growing number of children in home schooling.<sup>108</sup> I conclude that the argument for the constitutionality of compulsory public high school education, when pitted against a due process attack, must overcome a defense that in particular areas private school options are more diverse than the public schools.<sup>109</sup>

### III. FIRST AMENDMENT AND EQUALITY CLAIMS

The constitutional case against compulsory high school public education is not confined to the right of parents and guardians to direct the

<sup>106</sup> Because the case for public education rests on the ideal of bringing children of all races, classes, and religions together, to the extent that privately-operated schools are open to all, while requiring tuition payments no greater than the average per pupil expenditure in their school district (with modifications for special education students, see BARRY, *supra* note 61, at 206), providing free transportation and the like, and operating with the kind of curriculum that would be acceptable in a public school (for example, not teaching from a favored religious perspective that could skew the demographics of the students), it could be argued that they should be considered "public" schools for purposes of my analysis and for purposes of government funding. I do not see sufficient reason to favor state-operated schools just because they are embedded in an allegedly "democratic" framework, and certainly not because they are part of the state bureaucracy. Although such an exception might, therefore, be appropriate in some circumstances, I would not conclude that such an exception is constitutionally required. For policy discussion suggesting the treatment of some private schools as common schools, see LEVINSON, *supra* note 19, at 144-45.

<sup>107</sup> ALAN WOLFE, *supra* note 41, at 19.

<sup>108</sup> Cf. BARRY, *supra* note 61, at 211 ("Home schooling . . . is bound to be weak in developing the ability to cope with treatment as an equal among others and in fostering the realization that others do not share the beliefs and norms in which one has been raised.").

<sup>109</sup> Some might argue that courts could not handle this sort of inquiry even on a case-by-case basis. I recognize the difficulties but do not think that it is different in kind or degree from numerous other inquiries that courts handle on a case-by-case basis. In any event, as I have already mentioned, I do not believe any government is likely to enact a system of compulsory education, so this is unlikely to be a real world problem. I do think it is important to indicate the limits of the argument.

upbringing of their children. Claims of freedom of speech and association, of equality, and of free exercise of religion also need to be considered.

#### A. FREEDOM OF SPEECH AND ASSOCIATION

The freedom of speech argument can be framed in two ways. First, parents may want to send their adolescent child to the Hill Military Academy because they are ideologically opposed to the messages communicated by the school district. The parents might believe in strong allegiance to authority and might be committed to unswerving and uncritical patriotism. We can suppose they are right in thinking such values are promoted by the military academy. Second, parents may claim that they have an unqualified right to speak to their children or that they have a right to select the agents who will speak to their children.<sup>110</sup>

The freedom of association argument is similar. It claims a right of family association. It extols the virtues that follow from being a part of an intimate association of the like-minded. Included in this might be a sense of comfort and security, and the concomitant ability to try out new intellectual efforts in an atmosphere of relative safety. Intervention from this perspective intrudes the state into the middle of the family.<sup>111</sup>

Each of these objections, however, depends upon the rights of parents to direct the upbringing of their children. If the parents had no such right, they would have no legal claim against anything the state did to their children. Thus, if the parents' right to direct the upbringing of their children is not absolute, if they have no right to seal their children off from opposing perspectives, then their free speech or association rights are not infringed by compulsory public education.

Yet a different free speech argument does not trade on a personal or natural right of parents to raise their children. Instead, the argument posits that we are better off placing decision-making power in the hands of parents because it will produce diversity and encourage the robust dissent needed in a democratic society.<sup>112</sup> But the easy assumption that diversity yields dissent deserves to be qualified. Despite enormous publicity about the Christian right, it has been true for most of our history and it remains true today that most conservative Christians believe "My Kingdom is not of this world," and are not active dissenters, at least in the political realm. Similarly, the Amish exhibit dissent, but are not engaged in the political process. Diversity is not an end in itself, though Mark Yudof has rightfully argued that alternatives to public education might employ different methods of education that could influence public

<sup>110</sup> Gilles, *supra* note 25.

<sup>111</sup> Thanks to Seana Shiffrin for this argument.

<sup>112</sup> Cf. YUDOF, *supra* note 4, at 229 (arguing that *Pierce* promotes educational dissent).

schools and vice versa. As an abstract proposition, this makes sense, but the empirical extent of the cross-fertilization is speculative and the dependence of new pedagogy on private administration is also unclear.<sup>113</sup> Conceding that there is substance to this view, producing such diversity and competition is achieved by compromising not only the interest of the state in democratic education but also the interest of children in being exposed to differing perspectives which in turn would compromise the cultivation of their imagination and undermine the quality of their dissent.

## B. THE RIGHT TO A GOOD EDUCATION

Even if children might be compelled to attend public high schools in some circumstances, it might not be constitutionally permissible to require children to attend such schools in all circumstances. This might especially be the case when the public school does not provide a good education, as is certainly true of many public schools. In those circumstances, compulsory education might well be regarded as constitutionally and morally objectionable.<sup>114</sup> Nor does this argument depend on an overbroad conception of parental rights. Indeed, the right claimed in this context is not the right of parents to direct the upbringing of their children; it is the right of children to a good education.

One difficulty with this argument is that of definition. It requires determining the constitutional content of bad education. Assuming that this difficulty can be overcome (as I do), the objection may prove too much. It may violate the Constitution to force children to attend bad schools instead of better private schools, but the maintenance by the state of bad schools should itself be regarded as a violation not only of equality of opportunity, but of the minimum requirements of due process. Allowing children to attend private schools (if their parents can afford it) does not solve the basic constitutional difficulty. All children attending such schools should be afforded a public remedy.<sup>115</sup>

<sup>113</sup> Alternative forms of public education can achieve many of the same benefits. The school district where I was a board member has an alternative middle and high school (that to a large extent is democratically operated by the students), and the district has considered two other alternative schools.

<sup>114</sup> Principle Seven of the United Nations Declaration of the Rights of the Child states:

The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture, and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgment and his sense of moral and social responsibility, and to become a useful member of society.

United Nations Resolution 1386, Principle 7 (1959). For commentary, see Lee E. Teitelbaum, *Children's and Parents' Rights and Relationships* (forthcoming).

<sup>115</sup> Whether that remedy should include vouchers is discussed in Part IV. B, *infra*.

## C. FREE EXERCISE OF RELIGION

Because of the anti-religious purpose present in *Pierce*, the legislation as applied to religious schools should also have been invalidated on religious grounds.<sup>116</sup> But suppose that no anti-religious purpose is present, and parents who, for example, want to send their children to Catholic schools say that the compulsory school law violates their free exercise of religion. Beyond this argument from personal freedom, there is arguably a group right, the interest of the Catholic religious community. Compulsory public school laws would have an adverse and disproportionate impact on religious schools in general and Catholic schools in particular.

The first question about the personal right set forth is whether it is vulnerable to the retort employed against the liberty right and the freedom of speech and association rights, i.e., it seemed unreasonable to maintain that liberty, speech, and association rights were relatively absolute and unqualified throughout the adolescent years of the child.<sup>117</sup> Stephen Carter, no opponent of religious rights, himself questions the scope of the personal religious right: "Compulsory attendance laws bind the parents, but it is the children who are most directly affected. The parents remain free to be Catholic (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 parent's religion."<sup>118</sup> Carter's comments speak to the degree of the religious burden, but they cannot support the position that no burden exists. Parents may maintain their religion even if their children do not; nonetheless, parents may believe they have a religious obligation to raise their children in a particular religious faith, that such an obligation includes sending their children to religious schools, and that compulsory public education would make it impossible to fulfill that obligation.

Compulsory public education, however, would not prevent parents from continuing to educate children in a religious tradition. Indeed, 80%

<sup>116</sup> This argument should make the so-called Blaine amendments (prohibiting aid to religious schools) somewhat vulnerable because anti-Catholic motivation played a strong role in their passage. VITERITTI, *supra* note 10, at 152-54.

<sup>117</sup> Some might argue that serious administrative problems would be presented in implementing this argument. The free speech and freedom of religion arguments rest on the assumption that parental determinations to send their children to private schools are ideologically motivated, and in many cases no such motivation exists. But case-by-case determinations of whether parents are sincere in claiming ideological reasons for sending their children to private schools would be unreliable and unseemly. By the same token, many parents send their children to Catholic schools for non-religious reasons, but I think case-by-case determinations of religious motivation would also be unreliable and even more unseemly because of the need to adjudicate the sincerity of allegedly sudden parental religious conversions. Unseemly case-by-case determinations might be the best alternative in some circumstances. Such determinations were probably justified in the Selective Service context.

<sup>118</sup> Carter, *supra* note 24, at 1204.

of Catholic children do not attend Catholic schools at any point of their elementary or secondary education, yet religious education outside the public schools seems to have been effective.<sup>119</sup> Indeed, only 29% of a child's waking hours take place in school.<sup>120</sup> Moreover, the picture of the public school as a space where religion is excluded ignores the thousands of religious clubs in school districts across the country.<sup>121</sup> This is not meant to deny the existence of a free exercise interest but rather to suggest that the burden is in most circumstances less than substantial. On the other hand, the interests of the state in exposing children to different perspectives and to an integrated environment are at their highest when the children have previously been educated in a relatively sheltered environment.

Here, again, it seems appropriate to distinguish between the pre-adolescent and the adolescent years. In the pre-adolescent years I think the parental upbringing argument, the free speech argument, and the religion arguments interpenetrate. In those years, where children are less independent, parents are particularly entitled to direct the upbringing of their children; moreover, because the tie between parents and children is stronger in the pre-adolescent years, the concern about children being exposed to ideologies that their parents are attempting to combat is more salient, and this seems especially true of religious views. Even if the impact on the Catholic religion would be insubstantial if all Catholic children could be forced to attend public schools in their elementary years, parents should have a religious right to send their children to religious schools in the pre-adolescent years.

Such a right should not extend to the adolescent years, where the adverse impact on religion would be less substantial and the state interests greater. With respect to Catholics, the major problem would not be the curriculum. With the exception of the health curriculum, secular public school curricula are unlikely to contradict Catholic doctrine, and to the extent they did, it would be unlikely to undo years of Catholic schooling. Certainly a major cause of loss of faith in the Church in the adolescent years is the adolescent's confrontation with Catholic views on

<sup>119</sup> David P. Baker & Cornelius Riordan, *The 'Eliting' of the Common American School and the National Education Crisis*, PHI DELTA KAPPA 18, 22, Sept. 1998. Twenty-six percent of the American population is Catholic despite the relatively small percentage of those who attend Catholic schools. ADHERENTS, *U.S. Demographics*, available at [http://www.adherents.com/adh\\_dem.html](http://www.adherents.com/adh_dem.html) (Sept. 9, 2001).

<sup>120</sup> James G. Dwyer, *School Vouchers: Inviting the Public into the Religious Square*, 42 WM. & MARY L. REV. 963, 1002 (2001) (estimating 15%). I assume nine hours of sleep per night and six hours of school per weekday. As students grow older, more time is spent in school, but those hours are not compulsory. Even if those hours are included, the percentage of time spent in school is a minority of the child's waking hours.

<sup>121</sup> Neal Devins, *Social Meaning and School Vouchers*, 42 WM. & MARY L. REV. 919, 943-44 (2001).

non-marital sexuality.<sup>122</sup> That confrontation will take place whether the child attends Catholic or non-Catholic schools. For many children, if the Church's position on sexuality is emphasized in the private school, the prospects for long term allegiance to the Church might in fact diminish.<sup>123</sup>

The incursion on religion of compulsory public education is somewhat greater for fundamentalist Christians. Some fundamentalist Christians object to their children interacting with non-fundamentalists; some object to teaching critical thinking and to other aspects of the curriculum. Their objections could be handled by excusing their children from some forms of objectionable instruction, though I do not think that is constitutionally required in the high school years.<sup>124</sup> But I see no room for compromise on their insistence on separating their children on grounds of intolerance or for depriving their child of critical thinking skills, skills that are necessary for democratic citizenship and for adaptability in a changing marketplace.<sup>125</sup> Parents have no general right to monopolize their children through the adolescent years, even when they wish to do so for religious reasons. A religious desire to deny the basic interests of children by attempting to rob them of the ability to choose between ways of life should not be enforced by the law.<sup>126</sup>

<sup>122</sup> Some aspects of Catholic doctrine regarding sexuality are widely disbelieved among Catholics. See, e.g., CONGER & GALAMBOS, *supra* note 101, at 284:

[R]ightly or wrongly, approximately half of all adolescents believe that churches are not doing their best to understand young people's ideas about sex. Contemporary adolescents are more likely to state that God has understanding attitudes about sex than to attribute such attitudes to institutionalized religion . . . A majority of Catholic youth disagrees with their church's position on birth control, annulment and divorce, and the right of priests to marry.

<sup>123</sup> For evidence that the Church hierarchy's position on various issues regarding sexuality is widely rejected by Catholics throughout the world and that this rejection has led to a general renunciation of church authority, including widespread defections from the clergy, see generally CORNWELL, *supra* note 41. In particular, see *id.* at 117–45.

<sup>124</sup> In most circumstances, excusing such children seems the pragmatic course as well. In the pre-high school years, I would contend that excusing children from objectionable instruction should be constitutionally required on free speech or religion grounds, unless the material is central to the educational enterprise.

<sup>125</sup> Most fundamentalists would forthrightly maintain that reason and science are on their side and that they are afraid of neither one. See HARVEY COX, *RELIGION IN THE SECULAR CITY* 50–51 (1984). On the other hand, it is common for fundamentalists to want to keep their children away from views that they believe are contrary to those in the Bible. See STEPHEN BATES, *BATTLEGROUNDS: ONE MOTHER'S CRUSADE, THE RELIGIOUS RIGHT, AND THE STRUGGLE FOR CONTROL OF OUR CLASSROOMS* (1993).

<sup>126</sup> For an excellent discussion, see Arneson & Shapiro, *supra* note 25. For elaboration of the concept of basic interests, see IAN SHAPIRO, *DEMOCRATIC JUSTICE* 85–90, 92–96, 98–99, 104–09 (2000). For a brief critique, see Steven H. Shiffrin, *Liberal Theory and the "Loyal Opposition" in Democratic Justice*, in *THE GOOD SOCIETY* (2002).

On this principle, the Amish should have lost in their effort to resist compulsory high school education.<sup>127</sup> This conclusion applies particularly strongly to Amish girls who are locked into a patriarchal tradition and, at least, need to be exposed to other options. Once again, compulsory public education would not prevent the child from living in the Amish community while attending school or remaining in it thereafter. Compulsory public education opens doors to a world that the Amish child may or may not choose to enter.<sup>128</sup> Even assuming, however, that such policies would enormously damage the Amish as a group, their freedom of association cannot rightfully be maintained by denying their children an adequate education.<sup>129</sup>

In the end, my position on *Pierce*, in the absence of an anti-religious purpose, is that government should ordinarily be permitted to compel children to attend public schools, except that parents should have a right to send their children to private schools in the pre-adolescent years.

#### IV. VOUCHERS

Although government should be permitted to compel public high school attendance, it might still be a bad policy for government to enact in many jurisdictions. For example, the existence of private schools is financially advantageous to public schools in many areas. Public schools are in a financial crisis that promises to get worse. As the population ages, taxpayer opposition to generous funding of public schools is likely to grow, and higher salaries are needed to attract talented people into a market lacking enough certified teachers. To close the private schools and cast their students into the public schools could be financially catastrophic in many localities.

More important, compulsory high school public education is not a politically practical proposal. There is no constituency for it, and no state or locality anywhere is likely to adopt it. Even if there were a locality that tried to adopt it, strong political reasons counsel against it. If a locality succeeded in imposing compulsory public education against constitutional challenge, conservatives would have a strong vehicle for organizing against the public schools. They already have a strong

<sup>127</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In defense of *Yoder*, see Shelley Burtt, *In Defense of Yoder: Parental Authority and the Public Schools*, in NOMOS XXXVIII: POLITICAL ORDER, *supra* note 25, at 412 (Ian Shapiro & Russell Hardin eds., 1996); Steven D. Smith, *Wisconsin v. Yoder and the Unprincipled Approach to Religious Freedom*, 25 CAP. U. L. REV. 805 (1996).

<sup>128</sup> *Cf.* BARRY, *supra* note 61, at 240 (“The education (or rather non-education) of a gypsy child fits it for nothing except to be a gypsy, whereas a conventional education opens up a potentially limitless range of occupations and ways of life.”). *But cf.* Ameson & Shapiro, *supra* note 25, at 391–92 (criticizing conceptions of autonomy based on maximizing options).

<sup>129</sup> Ameson & Shapiro, *supra* note 25, at 385.

motivation. Conservatives strongly believe that contemporary society is in serious decay, and, given their belief system, it is not surprising that they do. At least since the inception of the distribution of birth control pills in 1960, gender roles and sexuality practices have profoundly changed. Shortly after the pill became available, childbirths dropped significantly.<sup>130</sup> Women entered college and the workforce in vastly accelerated numbers.<sup>131</sup> Premarital sex rose significantly.<sup>132</sup> The number of unmarried couples who lived together increased eightfold in the 1960's.<sup>133</sup> The 1960's brought a sea of change in attitudes toward sex, gender roles, and the family that flies in the face of traditional religious values.<sup>134</sup> If change challenged the faith of many, it strengthened the faith of others.<sup>135</sup> Traditional conservatives look on the current social scene with horror, and it is not surprising that they believe a greater emphasis on religion is necessary. It is understandable that they would regard the Supreme Court's decision in the 1960's authorizing the removal of prayer in the schools with dismay, that they would press for vouchers, and that they would participate in a movement for home schooling. A decision upholding compulsory public education would unleash a firestorm. Whether or not it is appropriate to take such consequences into account as a constitutional matter, it is surely appropriate to consider them as a policy matter. Although I believe that compulsory public high school education would be desirable in the absence of such a backlash, the prospect of such a political reaction makes a proposal for compulsory public education a noble thought experiment, but a political non-starter.

Thought experiments are not worthless, however. Recognition of the strong purposes supporting public education and the interests of children should ordinarily lead us to a presumption *against* vouchers, at least in the high school years.

Although the system of educational organization in the United States does not compel attendance at public schools, it does leverage attendance in powerful ways. Simply put the United States has a

<sup>130</sup> ROBERT WUTHNOW, *AFTER HEAVEN: SPIRITUALITY IN AMERICA SINCE THE 1950's*, 67-68 (1998) (stating that fertility rate of 3.8 per woman in 1958 dropped to 1.9 in 1973).

<sup>131</sup> College enrollments increased from 3.6 million to 8.6 million students. *Id.* at 68. The number of women tripled. *Id.*

<sup>132</sup> ATWATER, *supra* note 41, at 247-48; CONGER & GALAMBOS, *supra* note 101, at 156 ("Twice as many teenage women now engage in *premarital* sexual intercourse as in the 1950's . . .").

<sup>133</sup> CONGER & GALAMBOS, *supra* note 101, at 156.

<sup>134</sup> On the place of the family in the so-called culture wars, see JAMES DAVISON HUNTER, *CULTURE WARS* 176-96 (1991).

<sup>135</sup> "[I]nformation now besieges people from all parts of the world, making particular religious traditions seem increasingly local and historically contingent." *Id.* at 11. At the same time this encourages many people toward postmodernism or, more narrowly, toward broader exploration of religious traditions; it threatens others and causes them to dig in their heels.

predominantly socialized system of education, and the idea of dismantling that system is not popular. Understand, it would be possible to compel education without having state run schools. It would also be possible, while compelling education, to refuse to pay for the education of rich and middle class children.<sup>136</sup> Not even the Republicans favor any such approach. The live issue is whether the state should pay for tuition for children to attend private schools.

Given the case for public education I have already outlined, my contention is that vouchers at the high school level should generally be resisted. The advantages of public education for children and the extent to which its quality is enhanced by widespread attendance is underappreciated. Below, I consider the argument that vouchers should be constitutionally required, the argument for vouchers in the pre-adolescent years, and the church-state implications.

#### A. ARE VOUCHERS CONSTITUTIONALLY REQUIRED?

Alternatively, some argue that vouchers are constitutionally required because the public schools themselves violate the Establishment Clause. The claim is that the public schools adopt the religion of secular humanism, and that this turns children away from more traditional religions. As we have already seen, the latter claim is unsupportable. Moreover, assuming that secular humanism were a religion, it is doubtful that the public schools have adopted it. Secular humanism denies the existence of God and maintains that ethical standards derive exclusively from the human condition. No public school denies the existence of God. Indeed, the overwhelming majority of schoolteachers themselves believe in the existence of God. They are not secular humanists, and they do not teach secular humanism. On the other hand, they do not teach that ethical standards derive from God either. Some believers maintain that the failure explicitly to acknowledge the importance of God in education is itself a violation of biblical teachings. In this respect public education is contrary to the religious beliefs of some.

But that is not all. The health programs of public schools are contrary to the views of Christian Scientists, and particular aspects of it may be contrary to Catholics, religious fundamentalists, and many others. Teachings on evolution are contrary to the views of Christian fundamentalists and some others. Teachings about gender equality are religiously controversial. Whatever the free exercise implications of these practices, it does not follow that the public schools violate the Establishment Clause. To allow religious minorities to dictate what the public schools would teach or not teach would itself raise serious Establishment Clause

<sup>136</sup> FRIEDMAN, *supra* note 6, at 87.

questions. For example, acknowledging God in the public school context is theologically required by some religions and theologically prohibited by others; vouchers as an alternative run into theological objections as well. Indeed, the founding of the American government involved a theological battle between the Presbyterians and the Congregationalists as to how a government should be organized,<sup>137</sup> and, of course, the proper relationship between church and state is itself theologically disputed.

Setting aside free exercise implications, in a religiously pluralistic society, governmental activity cannot run afoul of the Establishment Clause merely because its activities are contrary to one or more religions. If that were the standard, government could not function. Indeed, it could not even be organized. Although some believers regard the absence of references to God in the public school day as itself an establishment of religion, most regard it as an application of the separation of church and state, and not itself a statement about religion. It seems inevitable that Establishment Clause analysis will ultimately turn on what most people consider to be a religious belief or practice.<sup>138</sup> The secular character of the public schools does not justify the claim that it violates the Establishment Clause and, therefore, cannot by itself justify the view that vouchers are constitutionally required.

Perhaps, however, the fact that the state funds some views but not others can be used to justify a constitutional obligation to fund vouchers. Some argue that if *Pierce* was properly decided, then vouchers should not merely be embraced as good policy, but also as constitutionally required.<sup>139</sup> For example, the argument goes that if progressives believe that the right to an abortion entails the conclusion that states may not subsidize child birth without subsidizing abortions, then the right of parents to send children to private schools entails the judgment that the state may not subsidize public education without subsidizing private education.<sup>140</sup> It is hard to justify denying poor women the funds to secure an abortion, particularly when abortion is generally permitted. But there is a difference between criminalizing abortion and refusing to subsidize it. One is a negative liberty; the other is a positive liberty. The state may

<sup>137</sup> Marci A. Hamilton, *The Calvinist Paradox of Distrust and Hope at the Constitutional Convention*, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* 293 (Michael W. McConnell et al. eds., 2001).

<sup>138</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1187 (2d ed. 1978).

<sup>139</sup> For a thorough analysis of the issues surrounding this contention, see Michael McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 *HARV. L. REV.* 989 (1991). In the end, McConnell does not conclude that *Pierce* requires vouchers. See *id.* at 1038.

<sup>140</sup> For a powerful argument along these lines, influenced by McConnell, but taking a step beyond, see Levinson, *supra* note 4.

not criminalize the making of a movie, but it need not subsidize everyone who wants to make one.<sup>141</sup>

The case for subsidizing abortions need not deny the distinction between negative and positive liberty, and that case need not lead to support of vouchers.<sup>142</sup> The case for subsidizing abortions best rests upon the assumption that all people have a right to the resources that meet their basic needs: food, clothing, child care, housing, employment, a good education, and medical care, including abortions.<sup>143</sup> But the ability to send a child to private schools is not a basic need<sup>144</sup> unless the public schools are failing and will not be fixed, and it is the case that poor children's education overall will be improved by the existence of vouchers. In those circumstances, it should be especially troublesome for progressives when rich people have a constitutional right to send their children to private schools, but poor people do not have an effective right to do so. Even in those circumstances, however, it does not necessarily follow that the solution should come in the form of vouchers any more than the right to food necessitates food stamps. The solution may simply be to provide the poor with sufficient income to permit them to secure adequate food, clothing, childcare, housing, and the rest of it, including

<sup>141</sup> Jon Elster, *Self-Realization in Work and Politics: The Marxist Conception of the Good Life*, in ALTERNATIVES TO CAPITALISM 132 (Jon Elster & Karl Ove Moene eds., 1989) (referring to epic Technicolor films).

<sup>142</sup> As will be clear, although I subscribe to the distinction between negative and positive liberty, I do not treat positive liberty with the fear expressed by some liberals. See ISAJAH BERLIN, *FOUR ESSAYS ON LIBERTY* 173–206 (1969).

<sup>143</sup> I do not contend that the current Court supports such rights. For scholarship supporting such rights, see ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* 111, 265–66 (1994); Erwin Chemerinsky, *Making the Right Case for a Constitutional Right to Minimum Entitlements*, 44 *MERCER L. REV.* 525 (1993); Peter Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 *HASTINGS L.J.* 1 (1987); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 *WASH. U. L.Q.* 659.

<sup>144</sup> One might argue that every child has a right to equal educational resources. This principle is overbroad. For example, children with disabilities might need more resources to get the same education. But it is hard to see why the children of the rich should get more educational resources than others. A program of compulsory public education speaks to this issue, but the equality of resources concern does not seem to justify vouchers. Money spent for vouchers could be spent improving the public school system, and one of the criticisms of vouchers is that it drains the public schools of needed resources. For rich discussion of the equality of resources issue, without reaching a conclusion on the voucher issue, see BRIGHOUSE, *supra* note 25.

A stronger argument might be founded by invoking an equal right to educate a child in the religion of the parent's choice, but that argument, at a minimum, runs into serious Establishment Clause problems. More generally, one might argue for the right to raise a child in the ideology of one's choice. Then, however, every parent could demand a voucher claiming ideological objections to the public schools, and, absent unseemly and unworkable administrative hearings about sincerity, the narrow right would amount to a universal offer of vouchers. More important, although there is unquestionably a right to raise a child in the ideology of one's choice, it does not follow that such a right extends to state funded schooling.

the ability to send their children to private schools. Indeed, progressive principles mandate even greater redistribution.<sup>145</sup>

## B. WISE POLICY FOR PRE-ADOLESCENTS?

Although vouchers in most circumstances should be resisted in most cases for adolescents, the question of vouchers for pre-adolescents is more difficult.<sup>146</sup> A substantial part of the difficulty is that the evidence of the academic impact of vouchers is not easy to untangle. Some scholars maintain that vouchers yield significant academic benefits for children,<sup>147</sup> particularly for disadvantaged children.<sup>148</sup> Others maintain that there is no substantial evidence to support this contention.<sup>149</sup> In particular, they typically argue that the data are confounded by selection

<sup>145</sup> See, e.g., G.A. COHEN, *IF YOU'RE AN EGALITARIAN, HOW COME YOU'RE SO RICH?* (2000).

<sup>146</sup> To a large extent in this brief discussion, I pass over most of the details of the voucher programs, but the arrangements for financing, regulating, and providing information about the voucher schools can trigger quite different impacts. See Levin, *supra* note 82, at 256–60. But, for purposes of this argument, I assume, for example, that voucher schools could not refuse to admit special needs children; would, when oversubscribed, admit on the basis of a lottery; could not expel children in circumstances where public schools would be disabled from doing so; and could not charge tuition beyond the voucher. In the absence of these conditions, the existence of vouchers would intensify some concerns or create new ones.

<sup>147</sup> See Nicole Stelle Garnett & Richard W. Garnett, *School Choice, the First Amendment and Social Justice*, 4 TEX. REV. L. & POL. 301 (2000) (reviewing evidence of favorable academic effects); VITERITTI, *supra* note 10, at 82–86, 216; Paul E. Peterson, *School Choice: A Report Card*, in LEARNING FROM SCHOOL CHOICE, *supra* note 6, at 3; see also R. Kenneth Godwin et al., *Comparing Public Choice and Private Voucher Programs in San Antonio*, in LEARNING FROM SCHOOL CHOICE, *supra*, at 275–392; JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* (1990).

<sup>148</sup> The claim that vouchers particularly benefit disadvantaged children is contested on the grounds that parents and children tend to focus on nonacademic factors in making choices and low income families tend to make decisions on less information than wealthier parents. Amy Stuart Wells, *The Sociology of School Choice*, in SCHOOL CHOICE, *supra* note 2, at 29, 31. See also Angela G. Smith, *Public School Choice and Open Enrollment: Implications for Education, Desegregation, and Equity*, 74 NEB. L. REV. 255 (1995) (maintaining that there is a relative lack of information by low income families and less educated families, though parents of all backgrounds confront obstacles in making informed decisions); Levin, *supra* note 82, at 269 (attempting to provide information does not bridge the gap). *But cf.* David J. Armor & Brett M. Peiser, *Interdistrict Choice in Massachusetts*, in LEARNING FROM SCHOOL CHOICE, *supra* note 6, at 182 (arguing that choice decisions are primarily based on academics, but choice families are “whiter, have higher SES, and score higher on achievement tests than the nonchoice population in the sending districts.”). Moreover, low-income families tend to make choices that reinforce the class position of their children. Smith, *supra*, at 269–70 (concluding that vouchers are favorable to more advantaged families). These contentions are not necessarily in tension with the claim that those low-income families that do take advantage of voucher programs are particularly benefited, though that claim is also disputed.

<sup>149</sup> Richard Rothstein, *Introduction* in SCHOOL CHOICE: EXAMINING THE EVIDENCE, 25 (1993) (“[A]s the evidence of this volume shows, there is no evidence that private schools do a better job of educating students than public schools do.”); Henig, *supra* note 6, at 95 (stating that evidence is inconclusive).

problems.<sup>150</sup> Others concede that there is statistically significant evidence that children attending choice schools show academic gains but contend that the size of the gains is not significant enough to justify policy change.<sup>151</sup> Still others maintain that the evidence of significant gains is largely confined to Catholic schools and that other private schools do not share the successful ingredients that apply in the Catholic school context.<sup>152</sup> Finally, there are grounds to suspect that the present Catholic schools are sufficiently different from prior Catholic schools as to cast doubt on the continuing relevance of the previous studies showing a “Catholic school effect.”<sup>153</sup>

My assessment of the studies is that there is good reason to believe that choice students have some academic gains from vouchers and that sometimes these gains are significant, particularly in the Catholic schools. At a minimum it seems clear that the parents of choice students are typically pleased with the choice schools.<sup>154</sup> On the other hand, it is not clear whether children overall benefit from vouchers — taking into

<sup>150</sup> *E.g.*, Henig, *supra* note 6, at 90:

The thorniest problem plaguing efforts to empirically determine the educational consequences of school choice, however, concerns selection bias . . . Those who choose to choose likely differ from those who fail to take advantage of choice opportunities, in such factors as motivation, ambition, and capacity. These factors, rather than choice and its consequences, may account for any higher levels of academic achievement that choice students subsequently reveal, and standard statistical controls for family background may not be sufficient to take this into account.

<sup>151</sup> *E.g.*, MACEDO, *supra* note 25, at 23 (stating that academic advantages of private schools over public schools “appear to be modest, perhaps even trivial”); Levin, *supra* note 82, at 275 (stating that differential academic effects are small).

<sup>152</sup> ANTHONY S. BRYK ET AL., *CATHOLIC SCHOOLS AND THE COMMON GOOD* 312 (1993) (finding advantages in Catholic schools but warning that these advantages do not obtain in other private schools, thus raising “doubts about any blanket claim that a move toward greater privatization will ensure better consequences for students”). *Cf.* JAMES S. COLEMAN ET AL., *HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC, AND PRIVATE SCHOOLS COMPARED* 179 (1982) (arguing that conclusions about private schools’ effect may not hold for non-Catholic private schools); GREELEY, *supra* note 94, at 122 (maintaining that the academic advantage of Catholic schools over public schools, particularly for low income and African American students, is in substantial part because such schools have long been organized to help lower class children, originally immigrants). On the other hand, Greeley indicates that more research is needed on the extent to which the success of Catholic schools is based on its ability not to admit or to expel students who present substantial disciplinary problems. *Id.* at 109. *Cf.* COLEMAN ET AL., *supra*, at 193 (discussing whether public schools might find structures permitting greater discipline).

<sup>153</sup> Baker & Riordan, *supra* note 119, at 17 (changing demographics and the different message in Catholic schools throw doubt on the continuing relevance of the studies). *Cf.* Devins, *supra* note 121, at 940–43 (describing changes in Catholic schools without reference to possible implications for the studies).

<sup>154</sup> Satisfaction with public schools is surprisingly high, though not as high as with choice schools. Rebecca E. Lawrence, *The Future of School Vouchers in Light of the Past Chaos of Establishment Jurisprudence*, 55 U. MIAMI L. REV. 419, 422 (2001).

account the resources lost to the public schools when students leave.<sup>155</sup> If children leaving the public schools are benefited to some extent, but children left behind are damaged, it would be hard to claim that a voucher program was successful. It is also not clear whether quality claims on behalf of choice students can be sustained as more schools are created to meet the increased demand for choice schools. The extent to which Catholic schools could expand while maintaining quality is unclear.<sup>156</sup>

What is clearly unacceptable is the maintenance of bad public schools in the central cities.<sup>157</sup> Even assuming that vouchers were a part of the answer to this problem, it would seem a major mistake to imagine that it is a panacea. Certainly the unequal distribution of financial resources, the downsizing of the gargantuan urban districts,<sup>158</sup> and the modification of teacher assignment policies need to be addressed in the public schools. Nonetheless, a voucher program with details sensitive to the problems of the students left behind in the public schools might yield academic gains in some circumstances.

Beyond the academic issues, an advantage of vouchers for pre-adolescents is that attendance at schools with a point of view different than the public schools and more in keeping with the views of the parents might assist the child in acquiring a secure sense of identity. In addition, a program of vouchers would promote a diverse marketplace of ideas developed in settings where like-minded people work together. Assuming it were available to all, it would afford parents greater opportunities to educate their children as they think best.

One concern about the voucher alternative is its potential cost.<sup>159</sup> Ten percent of children currently attend private schools. Although there

<sup>155</sup> See Helen Hershkoff & Adam S. Cohen, *School Choice and the Lessons of Choctaw County*, 10 YALE L. & POL'Y REV. 1, 19–22 (1992) (explaining that children left behind in the public schools are harmed). Accord Raquel Aldana, *When the Free-Market Visits Public Schools: Answering the Roll Call for Disadvantaged Students*, 15 NAT'L BLACK L.J. 26, 36 (1997–98); Richard D. Kahlberg, *The Voucher Wars*, THE NATION 30, 32, Nov. 26, 2001, at 30, 32 (drawing on the experiences in Sweden, Chile, and New Zealand).

<sup>156</sup> Aside from problems of declining clergy in teaching positions, 70% of Catholic schools have admission tests. Most voucher programs would require something close to open admissions. The experience in Florida and Milwaukee shows that “the more regulations placed on schools to qualify for vouchers, the fewer the number of schools that will participate.” Kahlberg, *supra* note 155, at 31.

<sup>157</sup> See, e.g., Minow, *supra* note 21, at 419.

<sup>158</sup> GUTMANN, *supra* note 25, at 70.

<sup>159</sup> Concerns that the cost of vouchers would take needed funds from the public schools played a role in the defeat of vouchers in California. See Bulman & Kirp, *supra* note 2, at 47. A difficult dilemma confronts vouchers on this score. On the one hand, children might be permitted to attend schools with greater resources than their public schools. If so, financial incentives are in place for them to leave the public schools rather than providing more support for such schools. Alternatively, one might limit tuition payments to no greater than the average per pupil expenditure in their school district, with modifications for special education

are offsetting considerations,<sup>160</sup> providing vouchers for all would increase the cost of education because government would be paying the costs of educating substantially more children at a time when dollars are scarce and when any increase in funding might be put to better use, for example, for salaries to attract more teachers into the profession. This objection would have less force if vouchers were confined to the poor or the relatively poor, but, if it were so confined, the identity and diversity advantages of vouchers might reach fewer children.<sup>161</sup>

Another concern relates to the funding of schools that do not adequately promote democratic values. Take, for example, schools that teach racist ideology. Racist speech is protected under the First Amendment, but, ideally, the state could refuse to issue vouchers for schools that taught racism.<sup>162</sup> Racism is not the only example, however. One might question whether tax dollars should support the teaching of sexism, homophobia, and various other forms of intolerance. Assuming the absence of a First Amendment problem in refusing to fund such schools, a political problem remains. There are grounds to question the political will and the political skill of the state in its regulation of the content of education. The state has a sorry record in its regulation of private education.<sup>163</sup> Many fundamentalist schools have no certified teachers. Instead children are taught from workbooks with precious little social interac-

students, *see* BARRY, *supra* note 61, at 206. If so, however, students in wealthier school districts would receive greater voucher funding than those in poorer school districts. Hershkoff & Cohen, *supra* note 155, at 19. This alternative also seems perverse.

<sup>160</sup> Private schools cost less per child than public schools. This in part is due to lower teacher salaries and donated time. Beyond costs, tuition fees are subsidized in most private schools in large part by donations from a wide variety of sources, including foundations. Caroline M. Hoxby, *Analyzing School Choice Reforms That Use America's Traditional Forms of Parental Choice*, in *LEARNING FROM SCHOOL CHOICE*, *supra* note 6, at 133. Many of these contributions would dry up in an expanded voucher program. Assuming, however, that the state gains significantly from these offsets, because of the economies of scale, the public schools could be severely damaged if they lost revenue from children leaving public schools to attend private school. It might be possible to determine the true losses involved in particular cases, but confidence that a state accounting department would pull this off should be difficult to muster. If one assures that districts below the state average do not financially lose because of students leaving for private schools, incentives to change are diminished.

<sup>161</sup> On the other hand, since middle class and upper class parents pick neighborhoods based in part on the quality of the public schools, they already have the advantage of choice to a large extent. McConnell, *supra* note 7, at 851.

<sup>162</sup> COONS & SUGARMAN, *supra* note 5, at 107 (predicting that such a refusal would withstand constitutional challenge); Dwyer, *supra* note 120, at 1000. *See* Devins, *supra* note 121, at 958 (stating that the Cleveland voucher system prohibits the teaching of hatred on religious grounds). *But cf.* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (protecting racist speech in circumstances not involving state subsidies).

<sup>163</sup> *See* COONS & SUGARMAN, *supra* note 5, at 41 (maintaining that state regulation of private schools is minimal, accomplishing little in educational terms); Dwyer, *supra* note 120 (arguing that the state's regulation of religious social service organizations and religious colleges and universities is haphazard); STEPHEN MONSMA, *WHEN SACRED AND SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC MONEY* 63–108 (1996).

tion.<sup>164</sup> A state interested in not offending a group that knows how to make noise ignores the failure to adequately educate these children. A similar scandal applies to home schooling where the state looks the other way as many children are deprived of an adequate academic and social education.

An additional concern is that vouchers could aggravate racial segregation in education.<sup>165</sup> Although racial segregation is already a substantial problem in the United States, racially integrated schools are more prevalent than is commonly appreciated. The standard stereotype pictures Blacks in the central cities and whites in surrounding suburbs. But 69% of African American students attend schools outside the central cities, and 44% of those enrolled in central city public schools are neither Black nor Hispanic. Nonetheless, one-third of minority children attend segregated schools. Vouchers will aggravate this situation because parents tend to choose schools that are close to home, that do not include a majority of another race,<sup>166</sup> and that are religious.<sup>167</sup> To the extent vouchers offer incentives for new schools to be created, organized churches would have both the motivation and the organizational resources to respond. From an integration perspective this is problematic because churches are notoriously segregated. What Martin Luther King, Jr., said many years ago remains true today: the most segregated hour in America is eleven o'clock on Sunday. Millions of children raised in racially segregated churches and families attend racially integrated schools. Vouchers would make the segregation complete for all too many chil-

<sup>164</sup> Dwyer, *supra* note 120.

<sup>165</sup> The statistics in this paragraph can be found in Robert K. Vischer, *Racial Segregation in American Churches and Its Implications for School Vouchers*, 53 FLA. L. REV. 193, 196–97, 204–05 (2001). In addition to racial segregation, there are strong grounds to believe that vouchers would increase class segregation. Hershkoff & Cohen, *supra* note 155. *But see* Garnett & Garnett, *supra* note 147, at 353–54 (arguing that vouchers would lead to racial and economic integration); COLEMAN ET AL., *supra* note 152, at 182–83 (questioning the extent to which private schools currently contribute to racial or ethnic discrimination, at least with respect to Hispanics).

<sup>166</sup> Stephen Eisdorfer, *Public School Choice and Racial Integration*, 24 SETON HALL L. REV. 937, 944 (1993); Molly Townes O'Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 TENN. L. REV. 359, 399 (1997). Indeed, "many — probably most — of the natural constituents of the Republican Party oppose any voucher experiment that would bring poor urban students of color into 'their' schools." Hochschild, *supra* note 82, at 41.

<sup>167</sup> Richard Elmore, *Choice as an Instrument of Public Policy*, in CHOICE & CONTROL, *supra* note 3, at 285, 306; VITERITTI, *supra* note 10, at 117; Godwin et al., *supra* note 147, at 279.

dren.<sup>168</sup> Beyond racial segregation (and class segregation),<sup>169</sup> funding for vouchers would obviously enhance religious segregation in the United States, hardly a boon for toleration.

A fourth concern is that vouchers entrenched at the pre-adolescent level could create a strong political constituency to expand them to the high school level. The analysis I have offered suggests that any such expansion would be bad for children and bad for the promotion of democratic education. Even if the best world included vouchers at the pre-adolescent level and compulsory or financially leveraged public education at the adolescent level, it might not be possible to have vouchers at the pre-adolescent level without threatening the system of public education at the adolescent level.

Finally, any large-scale system of vouchers could entail a significant gamble. Ninety percent of children currently attend public schools, and similar percentages have been the rule for decades. If such attendance plays a strong role in holding a pluralistic society together and promoting civic values, a radical shift in enrollments to less ecumenical schools could aggravate societal tensions in substantial ways. Concerns such as these have prompted even strong proponents of vouchers to call for them only on a limited basis.<sup>170</sup> I remain open to the view that vouchers might be worth trying on a limited basis in particular contexts. Vouchers to religious schools, however, raise independent constitutional questions.

### C. ARE VOUCHERS CONSTITUTIONALLY PERMITTED FOR RELIGIOUS SCHOOLS?

Assuming that vouchers are appropriate in limited circumstances or are adopted in circumstances that are appropriate, should vouchers to

<sup>168</sup> I concede the possibility that this may be a good thing for many Black children because of the racism they might confront at an early age, though I remain persuaded that segregation is bad for Anglos and for most African American children. For doubts about the value of integration for Black children, see Robin D. Barnes, *Black America and School Choice: Charting a New Course*, 106 *YALE L.J.* 2375 (1997). One way to mitigate the segregation concern might be to require voucher schools to meet certain racially required mixtures. Aside from the practical difficulties with this approach, there may be constitutional difficulties as well. Michael Heise, *An Empirical and Constitutional Analysis of Racial Ceilings and Public Schools*, 24 *SETON HALL L. REV.* 921 (1993).

<sup>169</sup> See Baer, *supra* note 40.

<sup>170</sup> COONS & SUGARMAN, *supra* note 5; McConnell, *supra* note 8; Godwin et al., *supra* note 147, at 9:

Caution is recommended before suddenly dismantling a system that has been established over the course of 150 years. The very size of the public school system — over \$300 billion a year[ — ] . . . stands as a warning against immediate, wholesale alterations . . . [B]efore dramatically restructuring American education, school choice reformers need to remember that the first rule is to do no harm. Reforms should be taken gradually, experimentally, focusing on the places of greatest need and urgency.

religious schools be permitted under the Establishment Clause?<sup>171</sup> Doctrinal discussion of this issue, however sophisticated it may be, for years ended up guessing about what Justice O'Connor is likely to do (if she is on the Court) when the issue is presented.<sup>172</sup> My focus is not a forecast of the Court's likely action, but an analysis of how I think the question should be approached. In the end, I will argue that Establishment Clause analysis has been unduly narrow. I will suggest that Establishment Clause analysis would better proceed if it took a page from the methodology employed in free speech cases. That is, it should evaluate the challenged state action against the full range of Establishment Clause concerns. Nor should it stop there. It should proceed to determine if the state's promotion of particular interests sufficiently justifies the impingement on Establishment Clause concerns.<sup>173</sup>

The standard argument for the constitutionality of vouchers does not take into account the full range of Establishment Clause concerns. Proponents of religious vouchers argue that vouchers are constitutional because the Constitution does not permit government to discriminate against religion. They maintain that aid to religious and non-religious private schools through the form of vouchers is permissible so long as it is dispensed in a neutral way.<sup>174</sup> Moreover, the legitimacy of dispensing aid in a neutral way can be read against the backdrop of religion clauses that plainly favor religion over non-religion. To be sure, our Constitution does not tolerate governmental discrimination against the non-religious. The Free Speech Clause, Article VI, section [3], prohibiting religious test oaths for public office and the Free Exercise of Religion Clause all speak to that point. But the Establishment Clause is not designed to be anti-religious or neutral about the importance of religion. It was initially designed to make sure, among other things, that the federal

<sup>171</sup> The question is of substantial practical importance. In 1977, 78% of private schools were religious. Lawrence, *supra* note 154, at 432 n.108.

<sup>172</sup> On the importance of Justice O'Connor's vote (or her successor), see Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 *CATH. LAW.* 25, 48–54 (2000); Jesse H. Choper, *Federal Constitutional Issues*, in *SCHOOL CHOICE*, *supra* note 2, at 235, 259. The answer was provided, after this article was written, in *Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002) (upholding the Ohio voucher program).

<sup>173</sup> Most Establishment Clause scholars do not allow for explicit balancing. My colleague Gary Simson, however, explicitly argues for a form of balancing, albeit more restricted than what I recommend. Gary Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 *CORNELL L. REV.* 905, 922–32 (1987) (proposing a necessary-to-serve-a-substantial-governmental-interest-test for a part of Establishment Clause analysis). The debate on whether to balance and, if so, how open-ended the balancing should be is, of course, well developed in the free speech context. See, e.g., Steven H. Shiffrin & Jesse H. Choper, *THE FIRST AMENDMENT: CASES—COMMENTS—QUESTIONS* 149 n.b (3d ed. 2001) (citing sources).

<sup>174</sup> See, e.g., Mark E. Chopko, *Vouchers Can Be Constitutional*, 31 *CONN. L. REV.* 945 (1999); Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 341 (1999).

government did not interfere with the then reigning state establishments of religion.<sup>175</sup> In addition, supporters of vouchers can point to the many ways in which government has supported religion on an allegedly non-denominational basis. Thus, government asks us to trust God on our coins, to pledge allegiance to a nation under God, to join in a national day of prayer, and government asks God to “save this honorable Court.” Indeed, for much of our history, many, if not most, courts upheld Bible readings in the public schools on the ground that such practices were non-sectarian in character.

Nonetheless, until recent years, it has long been understood that compulsory support of religious instruction by taxation was unlawful under principles of religious freedom. In commenting on state limitations protecting religious freedom in the Nineteenth Century, Thomas M. Cooley observed that the prohibition on any such funding was nearly universal.<sup>176</sup> In approaching this issue under the Establishment Clause, it is appropriate to consider a broader range of concerns than are typically addressed by those who discuss the constitutionality of vouchers. The Establishment Clause serves multiple functions: it is a prophylactic measure that protects religious liberty;<sup>177</sup> it stands for equal citizenship without regard to religion;<sup>178</sup> it protects churches from the corrupting influences of the state;<sup>179</sup> it protects the autonomy of the state to protect

<sup>175</sup> See, e.g., Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1132–35 (1988). *But cf.* STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 17–18 (1995) (arguing that was the exclusive purpose of the Establishment Clause); *accord* Akhil Reed Amar, *Some Notes on the Establishment Clause*, 2 ROGER WILLIAMS U. L. REV. 1, 3 (1996).

<sup>176</sup> THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS* 967 (Walter Carrington ed., 8th ed. 1927). See Steven K. Green, *Private School Vouchers and the Confusion over Direct Aid*, 10 GEO. MASON U. CIV. RTS. L.J. 47, 50 (2000) (describing how, from the second half of the Nineteenth Century into the Twentieth, state courts consistently invalidated financial aid to religious schools).

<sup>177</sup> Jesse Choper and Michael McConnell emphasize this aspect of the Establishment Clause. See JESSE CHOPER, *SECURING RELIGIOUS LIBERTY* (1995), and Michael McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1985–1986).

<sup>178</sup> This follows from the position articulated by Justice O’Connor that any endorsement of religion is invalid because it “sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.” *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O’Connor, J., concurring); see also *Alleghany County v. ACLU*, 492 U.S. 573 (1989) (Blackmun, J., joined by O’Connor & Stevens, JJ.). See also William W. Van Alstyne, *What Is “an Establishment of Religion”?*, 65 N.C. L. REV. 909, 914 (1987). *Cf.* Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994) (applying an equality analysis to free exercise issues).

<sup>179</sup> This concern is ordinarily attributed to Roger Williams. See, e.g., ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION* 46–66 (1996); EDMUND S. MORGAN, *ROGER WILLIAMS: THE CHURCH AND THE STATE* (1967). See also Conkle, *supra* note 175, at 1181–82; Van Alstyne, *supra* note 178, at 914. But some contest this reading of his views.

the public interest;<sup>180</sup> it protects taxpayers from being forced to support religious ideologies to which they are opposed;<sup>181</sup> it promotes religion in the private sphere;<sup>182</sup> and it also protects against the destabilizing influence of having the polity divided along religious lines.

### 1. *Taxpayer Protection*

Although some argue to the contrary, I do not believe that giving aid to religious schools threatens free exercise or that taxpayer concerns are as significant as most proponents of religious liberty argue. Many progressives argue (citing James Madison) that taxpayers should not be forced to support religious institutions to which they are opposed because it impinges upon their freedom of conscience.<sup>183</sup> But I have been forced to support wars to which I was religiously opposed without any constitutional recourse. If vouchers were public policy, I would be forced to support some religions I deplore. But if I could be forced to support what I regarded as murder by my government, I do not think it obvious that an alleged right not to support religious education should have a more privileged position.<sup>184</sup> In addition, since when did it become the position of progressives to attach their identity to their money? If the evil of vouchers were harm to dissenting taxpayers, the appropriate remedy would be refunds, not voucher prohibitions.

Nonetheless, however easy it may be to exaggerate the issue, it seems clear that taxpayer compulsion presents an Establishment Clause concern. People do feel some identity with the uses to which their money is put, and when it is used for uses that contradict their freedom

See TIMOTHY L. HALL, *SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY* (1998); Steven D. Smith, *Separation and the Fanatic*, 85 VA. L. REV. 213 (1999).

<sup>180</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 623 (1971). See Marci A. Hamilton, *Power, The Establishment Clause, and Vouchers*, 31 CONN. L. REV. 807 (1999); Marci A. Hamilton, *The Constitution's Pragmatic Balance of Power Between Church and State*, SD02 A.L.I.-A.B.A. 501 (1998). But see Ira C. Lupu, *Threading Between the Religion Clauses*, LAW & CONTEMP. PROBS. 439 (2000).

<sup>181</sup> See LEONARD LEVY, *THE ESTABLISHMENT CLAUSE* (1994); Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373, 374 (1992).

<sup>182</sup> This has been an effect of the clause, see FOWLER & HERTZKE, *supra* note 41, at 10–11, but I doubt the workings of this aspect were foreseen, though the Framers generally would have welcomed it. See also JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* (1996) (arguing that religious freedom is protected because religion is a good thing); Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 153–56 (1991).

<sup>183</sup> For criticism of the view that Madison's opinions are necessarily contrary to the constitutionality of vouchers, see Ira C. Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 375 (1999); Vincent Blasi, *School Vouchers and Religious Liberty: Seven Questions from Madison's Memorial and Remonstrance*, 87 CORNELL L. REV. 783 (2002).

<sup>184</sup> But cf. Bryan C. Hassel, *The Case for Charter Schools*, in *LEARNING FROM SCHOOL CHOICE*, *supra* note 6, at 45.

of conscience, that usage is more problematic than uses that present mere policy disagreements. The war example in that respect underscores the point. If my opposition to war is moral, rather than strategic, it takes on a religious dimension. It might be administratively impractical to separate the conscientious from the pragmatic objecting taxpayer, but support for religion presents a brighter line. Taxpayer compulsion then seems to be a legitimate concern.

Even more fundamental is the question whether it is within the appropriate jurisdiction of government to provide funds to religious schools either directly or indirectly by giving the money to parents who then give it to the schools.<sup>185</sup> Liberty is not the paramount issue.

## 2. *Equality*

Vouchers do not constitute a formal violation of the conception of equal citizenship. Nonetheless, a serious equality concern is implicated because vouchers in many, if not most, jurisdictions would have a substantial disproportionate impact in favor of some religions. It is no answer to point to the neutrality of form in which the voucher program might be cast. Politicians are not blind to the impact of a voucher system, nor were politicians blind to the impact of state establishments at the outset of our history. As Leonard Levy points out in his excellent history of the Establishment Clause, “[T]he American establishments were non-preferential in law and theory but not necessarily in fact. In the four New England states that maintained establishments, the Congregationalists dominated overwhelmingly, as was expected when they adopted the system of tax-supported nonpreferential aid.”<sup>186</sup>

<sup>185</sup> Proponents of vouchers and some justices argue that if parents are given money, and then give it to the schools, the constitutional connection between the state and the schools is broken. But it is hard to see why “the fact that money is laundered through ‘private choice’ under a state voucher plan” should make a constitutional difference. Laura S. Underkuffler, *The Price of Vouchers for Religious Freedom*, 78 U. DET. MERCY L. REV. 463, 473 (2001); Laura S. Underkuffler, *Vouchers and Beyond: The Individual as Causative Agent in Establishment Clause Jurisprudence*, 75 IND. L.J. 463 (2000); Green, *supra* note 176. On the other hand, I do not believe that financial aid to a religious school makes the message of the school a government message. *But see* Kathleen M. Sullivan, *Parades, Public Squares and Voucher Payments: Problems of Government Neutrality*, 28 CONN. L. REV. 243, 256–57 (1996). It has been argued, *see, e.g.*, Volokh, *supra* note 174, that voucher programs should be upheld by analogy to the GI Bill, which permits veterans to use government funds to attend the college of their choice whether religious or secular. Voucher programs at the K–12 level would disproportionately go to religious schools, however. In addition, they would be employed at a stage of life in which children are more impressionable. These factors raise the stakes substantially, heightening the church-state concerns developed *infra*. *See* Frank R. Kemerer, *State Constitutions and School Vouchers*, 120 ED. L. RPTR. 1, 1 (1997) (stating that some 85% of private schools receiving vouchers are religious).

<sup>186</sup> LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE* 77 (2d ed., rev. 1994). *See also id.* at 135; Douglas Laycock, “*Nonpreferential*” *Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 878 (1986) (stating that disproportionate impact was the

### 3. *Preserving Church-State Autonomy*

Equally important, vouchers abuse the precept that religions are better off if government stays out of their affairs. Vouchers threaten a serious form of entanglement. For example, about half of the children who attend private schools are in Catholic schools,<sup>187</sup> and those schools exist primarily to maintain or to increase the membership of the Church.<sup>188</sup> If vouchers are constitutional, the Church would have an interest in lobbying and making campaign contributions to make sure they are enacted, to maintain their existence after enactment, and to affect the nature of the voucher program. Similarly, politicians would have an interest in extracting contributions with respect to the same issues. This just cannot be the kind of relationship between church and state that is appropriate under the Establishment Clause. Of course, churches have lobbied politicians for many decades on issues like poverty, nuclear weapons, civil rights, and abortion. The state inevitably will be involved in issues upon which churches take a stand.<sup>189</sup> But church-state negotiations about the money that will go to help churches propagate theological doctrines in their schools seems quite different.<sup>190</sup> Negotiations about state money for proselytizing purposes involve substantial intrusion into the domain of religion<sup>191</sup> and improper use of the state for religious ends.<sup>192</sup>

### 4. *Churches and Public Debate*

Vouchers risk compromising the independence of churches. Churches play an important role in political debate, and it is important that their moral voices not be silenced or compromised.<sup>193</sup> Understand-

source of "bitter religious strife"). Cf. Alan E. Brownstein, *Constitutional Questions About Vouchers*, in 57 N.Y.U. ANN. SURV. AM. L. 119, 126 (2000) ("Facial neutrality of government action does not guarantee religious equality . . .").

<sup>187</sup> The percentage has declined substantially over the years. Catholics previously accounted for 87% of private school enrollment, but that percentage dropped to 64% in 1982. VIGERITTI, *supra* note 10, at 81.

<sup>188</sup> The Court has frequently maintained that such schools are "pervasively sectarian." For criticism of the use of the term "sectarian" to mean religious, see Baer, *supra* note 40, at 449–60.

<sup>189</sup> For an expression of concern about the power of religious lobbies from a Madisonian perspective, see Hamilton, *supra* note 180, at 816–21. Though the power of religious lobbies is to be regretted in many contexts, I believe that religious lobbying has historically benefited progressive politics. Steven H. Shiffrin, *Religion and Democracy*, 74 NOTRE DAME L. REV. 1631, 1646–52 (1999).

<sup>190</sup> Cf. Douglas Laycock, *supra* note 181, at 381 (1992) (arguing that religion is always part of politics, but theology, worship, and ritual, are beyond the scope of government); Daniel O. Conkle, *God Loveth Adverbs*, 42 DEPAUL L. REV. 339, 345–46 (1992) (distinguishing between worldly and spiritual matters in terms of the political role of religions).

<sup>191</sup> See sources cited *supra* note 179.

<sup>192</sup> See Hamilton, *supra* note 137.

<sup>193</sup> See MACEDO, *supra* note 25, at 119 ("The unavailability of many forms of state aid reduces the incentives for religious schools to tailor their convictions in order to qualify for

ing this requires rejection of the idea that a significant purpose of the Establishment Clause is to assure that the polity is not divided politically along religious lines. Often accompanying this claim is the view that religious reasons should not be given in public life. Of course, pandering by politicians on religious lines is regrettable. Moreover, it is an unqualified outrage that George W. Bush's inauguration "for all the people" featured two ministers praying to Jesus Christ. But the stability of our country does not depend upon keeping religious arguments out of public life. William Brennan famously wrote in *New York Times v. Sullivan* that our nation has a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open. It mocks that commitment to say that we believe that debate on public issues should be uninhibited, robust, and wide-open except when it comes to religious speech. The Speech Clause does not contradict the Religion Clause. The First Amendment is not at war with itself.

On the other hand, the existence of stability concerns in the Establishment Clause need not contradict the Speech Clause in all circumstances. The Establishment Clause should not be read to limit the role of religion in public debate, but the concern that religious divisions can lead to violent conflicts should not be entirely read out of the Establishment Clause. It may well be that the religious division in our country has been substantially less violent than that in other countries because of the religious integration of our public schools.<sup>194</sup> For the state to encourage religious balkanization of our schools speaks not only against a tradition of supporting public schools, but also against a longstanding concern of the First Amendment.

Although the Establishment Clause should ordinarily not be read to keep religion out of public debate, one can be legitimately concerned that voucher dispute threatens to corrupt our political debate, corrupt in the sense that illegitimate purposes will inevitably be implicated on both sides. Consider this argument: Our children are being socialized by the mass media, socialized into becoming consumers, not citizens, socialized to believe that the good life depends on acquiring a bewildering variety

state aid.""). One prominent religious leader maintains that the proposed charitable choice program in the current Bush administration is calculated to co-opt the Black church and, to some extent, has already done so. Amos C. Brown, Sr., *African American Political Empowerment*, Panel Discussion, Cornell University (Feb. 6, 2002). For a tracing of shift by churches regarding their positions on financial aid to private schools and the role of religion in the public schools as guided by their perceived self interest, see John C. Jeffries Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001). The history of church complicity with the state may be the most significant reason for the decline of religious commitment in much of Western Europe. See JOSE CASANOVA, *PUBLIC RELIGIONS IN THE MODERN WORLD* 29 (1994).

<sup>194</sup> It is still too early to know what the issues lying behind the events of September 11th, 2001 might ultimately augur for religious divisions within this country.

of products. Education in a faith-based tradition is a better way of combating this socialization than the secular emphasis of the public schools. This argument is surely right for many children, but it is inappropriate under the Establishment Clause for the state to advance religion in order to serve even secular ends.<sup>195</sup> Yet there is no way to keep this argument out of the debate over vouchers, and it would be difficult to show that this illegitimate purpose was decisive in the passage of legislation.

There is also no way to keep anti-religious considerations out of the debate. Those who think that religion is a superstitious security blanket or think that particular religions are crazy or dangerous might balk at vouchers for just these reasons.<sup>196</sup> Nonetheless, some anti-religious purposes appropriately play a role in the voucher debate. James Madison argued in his remonstrance that support of all religions would inevitably lead to the support of false religions. From a religious perspective this is indefensible. False religions need to be driven from the marketplace on the merits, not artificially supported by governments. To support all religions preferring none is to endorse a form of religious relativism. It is odd that proponents of vouchers who know how to play dark chamber music about the dangers of relativism should join happy hands singing in favor of a proposal that rings of relativism from start to finish. The framers took religion seriously; supporting all religions trivializes religious difference. Alternatively, many religious people believe that there are many paths to the same God. But supporting ecumenical religious views over anti-ecumenical views is obviously not the legal answer. The way out is well known; it's called the Establishment Clause. In any event, anti- and pro-religious considerations permeate the voucher debate, but it might be difficult to show that particular religious considerations either caused vouchers to be passed or not to be passed or caused them to be withdrawn or restricted in some way.

##### 5. *Establishment Clause Dilemmas Associated with Voucher Conditions*

Issues surrounding the conditions of a voucher program are independently problematic.<sup>197</sup> For example, should a state be able to limit

<sup>195</sup> See Mark E. Chopko, *Religious Access to Public Programs and Governmental Funding*, 60 GEO. WASH. L. REV. 645, 653 n.33 (1992).

<sup>196</sup> For a brief period in the 1850's, California subsidized private schools, including Catholic schools. Nonetheless, religious books (except for the Bible) were banned from publicly funded schools. The Archbishop of San Francisco "declared independence from the religious prohibitions in the law." TYACK ET AL., *supra* note 44, at 90. Funding was withdrawn because of anti-Catholic protests. "The controversy over the funding of religious schools demonstrated how the state could seek to enlist religious groups as allies in garnering support for public education but then exclude them from benefits when protest arose." *Id.* at 90-91.

<sup>197</sup> For problems in the application of conditions to religious institutions, see MONSMA, *supra* note 163, at 63-108.

vouchers to schools that do not discriminate on the basis of religion in their admissions policy or that require students to participate in religious exercises against their will?<sup>198</sup> If not, the state would be prevented from assuring that governmentally funded schools operate in accordance with basic principles of equality and freedom.<sup>199</sup> If these conditions were permitted, however, religious schools would be offered a state-backed financial incentive to compromise the religious integrity of their institutions.<sup>200</sup> Similarly, should a restriction that recipients of public funds not be permitted to discriminate on the basis of religion, for example, be applicable to religious schools? If so, freedom of association and religion are both impinged upon. If not, and if a voucher program is extensive, teachers who otherwise would have free access to jobs in the public sector will be denied access to publicly funded positions on the basis of their religion.<sup>201</sup> Could the state require that democratic values be taught at all schools receiving vouchers even when the state's conception of democratic values, e.g., a position on gender equality, is counter to the religious beliefs of a school?<sup>202</sup> None of the positions associated with conditions to voucher schools is attractive — which again suggests

<sup>198</sup> For examples of voucher programs that do this, see Devins, *supra* note 121, at 958; Marc D. Stern, *School Vouchers: The Church-State Debate that Really Isn't*, 31 CONN. L. REV. 977 (1999) (maintaining that such rules, if enforced, would have “a substantial impact on the character of the schools”).

<sup>199</sup> Gutmann, *supra* note 8 (“Private religious schools are permitted to discriminate on grounds of religion precisely because they are not publicly funded.”). Many proponents of vouchers argue that conditions should not apply to religious schools at the same time they are arguing that subsidies for education should flow neutrally to religious and to non-religious institutions. Thus they favor neutrality — except when they don't. See Steven K. Green, *The Ambiguity of Neutrality*, 86 CORNELL L. REV. 692, 715–16 (2001). *But see* MONSMA, *supra* note 163, at 173–99 (abstaining from applying conditions is “positive neutrality”). For arguments that a wide variety of conditions are constitutional, see Dwyer, *supra* note 120, at 980–1006. See also Stephen Macedo, *Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations, and Liberal Public Values*, 75 CHI.-KENT L. REV. 417, 433–42 (2000).

<sup>200</sup> Cf. Elliot Minberg, *Vouchers, the Constitution and the Court*, 10 GEO. MASON U. CIV. RTS. L.J. 155, 158 (1999–2000) (claiming that subsidies to religious schools have diminished the autonomy of those schools).

<sup>201</sup> Alan E. Brownstein, *Evaluating School Voucher Programs Through A Liberty, Equality, and Free Speech Matrix*, 31 CONN. L. REV. 871, 894–99, 908 (1999).

<sup>202</sup> Cf. John H. Garvey, *What Does the Constitution Say About Vouchers*, 44 B.B.J. 14 (2000) (supporting the constitutionality of vouchers, but, nonetheless, concerned that schools “will be tempted to adjust their teaching in order to attract the maximum degree of public support”). Whatever state impositions on the content of education at religious schools — with or without vouchers — enforcing those impositions implicates concerns about entanglement. Cf. Rosenblum, *supra* note 8, at 153 (“We know that in democracies where the establishment question is resolved in favor of government support for religious schools, the question of the *civic content* of religious education remains unresolved and produces fierce political conflict.”). See also *id.* at 156 (“We can predict that the instability of public opinion would be amplified in the face of public funding for the wild array of private schools devoted to some secular ideology, schools established by and for ethnic and cultural groups, ideologues of many stripes, vegetarians, weird pedagogic experimentalists, and so on.”).

that the Framers of the Establishment Clause might have been on to something.

#### 6. *State Interests*

Vouchers to religious schools seem to seriously impinge on important Establishment Clause concerns. Under conventional analysis this would complete the case against them. Nonetheless, I would argue that vouchers might nonetheless be upheld if the state were able to show that vouchers promoted a sufficiently substantial interest. What the state would need to show is that the public schools were failing poor children, that measures less restrictive of Establishment Clause values would not be effective, that vouchers would substantially help children overall (or that vouchers offered a reasonable prospect of success), and that some impingement on Establishment Clause values was justified at least for a trial period. I believe that such a showing might be made in some circumstances, but I do not believe the evidence can support any wholesale abandonment of the public schools.

### CONCLUSION

Justice Jackson once wrote that if there is any fixed star in our constitutional constellation, it is that no official high or petty can prescribe what shall be orthodox in politics or nationalism.<sup>203</sup> Justice Jackson's rhetoric was formulated in the service of a worthy cause. But, in an important sense, Justice Jackson's star does not belong in our constitutional sky. We have a national orthodoxy. The First Amendment is a major part of it along with many other features of our Constitution. People are free to challenge the existence of the First Amendment, of course, and they need not salute the flag, but our schools daily socialize our children into accepting the principles of our Constitution from the Bill of Rights to the Equal Protection Clause. Our schools celebrate the birthday of Martin Luther King, Jr., and in the process they create and nurture what shall be considered orthodox in politics. The irony is that in nurturing the orthodox they nurture dissent. In part, this is because dissent is a major part of our orthodoxy. Moreover, the gap between our constitutional ideals and the country in which we live is stark, and the recognition of that gap promotes dissent. Finally, public school children are exposed to a diversity of perspectives. Such exposure promotes independence, and independence promotes dissent.

Our law reflects this commitment to dissent. Although there is substantial room for improvement, United States law compared with the law

<sup>203</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that a schoolchild cannot be forced to salute the flag).

of European countries is far more tolerant of speech that criticizes existing customs, habits, traditions, and authorities. Unlike European countries, U.S. law goes so far as to protect the advocacy of illegal action unless it is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. So too, U.S. law protects even grossly negligent defamation of public figures.<sup>204</sup> One might worry that a free-wheeling approach to the protection of freedom of speech could produce problems of national instability, particularly in a country as diverse as the United States. Yet the United States is widely respected for the degree of national stability it has consistently shown in the past century and more.

It is not so everywhere. Religious violence, for example, has plagued Northern Ireland for many years, and the spillover of that violence has plagued England as well. Many reasons might account for the relative stability of the United States, but public schools ought to weigh heavily in the stability balance. It probably makes a difference that 90% of U.S. children grow up attending school together in the public schools; and it probably makes a difference that 94% of Catholic and Protestant children attend *separate* schools in Northern Ireland.<sup>205</sup>

Public schools perform the important task of affirming community and dissent both at the same time. The public school commitment to integrated education recognizes that the tension between these values can be accommodated in a productive way. And that is the heart of why I believe the commitments to dissent and a stable and respectful community should lead us to tilt away from enclaves of separation and towards a strengthened and revitalized system of public education.

<sup>204</sup> Speech published in reckless disregard of the truth may be sanctioned. But proving reckless disregard of the truth requires a showing of a high awareness of probable falsity or a showing that the publisher entertained serious doubt about the truth and proceeded anyway. Gross negligence may be established without any showing of subjective awareness.

<sup>205</sup> The number of children attending schools that are designed to address the collective needs of Protestants, Catholics, and other children has grown to slightly in excess of 5%. N. IRELAND COUNCIL FOR INTEGRATED EDUC., A BACKGROUND TO THE DEVELOPMENT OF INTEGRATED EDUCATION IN NORTHERN IRELAND 3 (Sept. 2002). Even this small number of children attending integrated schools is a relatively new development. The first significant move to press for integrated education came in the late 1980's. *Id.* at 2. Although these figures do not take into account the number of Catholic children attending Protestant secondary schools, religious segregation has been and continues to be the norm. LAURA LUNDY, EDUCATION LAW, POLICY AND PRACTICE IN NORTHERN IRELAND 6-7 (2000). I do not mean to suggest that integrated education would be or would have been a cure-all in Northern Ireland. A history of colonialism and persecution against Catholics is not easily undone by sitting children in school together anymore than racial problems in the United States are easily solved by integration. The extent to which integrated schools are good for civic purposes, good for Catholics, and good for Protestants in Northern Ireland turns out to be quite complicated. But, at least one civic goal in Northern Ireland should be to reduce the palpable hostility and continuing violence between largely poor Protestants and Catholics, and, if that were the only issue, moves toward integrated education would seem to be constructive.

