

**THE CONTEMPORARY SIGNIFICANCE OF *MEYER* AND *PIERCE*
FOR PARENTAL RIGHTS ISSUES INVOLVING EDUCATION**

by

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The appropriate relationship between government and parents in the education of children is an issue that has created recorded controversy since Plato advocated the communal rearing of children. The U.S. Supreme Court first addressed this issue in two landmark decisions during the 1920s in which the Court forcefully declared that the Due Process Clause of the Fourteenth Amendment protects the right of parents to direct the education of their offspring.¹

In the first case, *Meyer v. Nebraska* in 1923, the Court held that several state statutes prohibiting the teaching of German to elementary school children interfered with “the power of parents to control the education of their own.”² The statutes, enacted in the wake of the First World War for the stated purpose of ensuring the assimilation of German-Americans who lived in isolated ethnic enclaves, were motivated in large measure by the nativism and xenophobia that swept the nation in the years immediately following the war.³

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¹ *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925).

² *Meyer*, 262 U.S. at 401.

³ See WILLIAM G. ROSS, *FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE*

The Court's opinion observed that the Platonic guardianship of children was at odds with American concepts of liberty.⁴ In its earliest recognition that due process embraces human rights as well as economic rights, the Court in *Meyer* observed in *dictum* that "the individual has certain fundamental rights which must be respected."⁵ Although the Court explained that the meaning of liberty within the Fourteenth Amendment cannot be defined "with exactness," the Court declared that these liberties include, but are not necessarily limited to, "the right to marry, establish a home, and bring up children."⁶ These are moving words – among the most eloquent in the Court's canon. Their meaning, however, remains enigmatic.

In the second case, *Pierce v. Society of the Sisters* in 1925, the Court struck down an Oregon statute that required all children to attend public elementary school. The law, which was part of a national campaign for compulsory public elementary education, was animated by anti-Catholicism and probably would have resulted in the closing of all comprehensive non-public schools since few parents would have sent their children to both full-time public and private schools.⁷ The Court held that the statute "unreasonably

CONSTITUTION, 1917-1927, at 57-95 (1994).

⁴ 262 U.S. at 401-02.

⁵ *Id.* at 401.

⁶ *Id.* at 399.

⁷ *See* ROSS, *supra* note 3, at 134-59.

interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control.”⁸ The Court explained that:

[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.⁹

Despite their ringing declarations about human rights, *Meyer* and *Pierce* were both formally decided largely on the basis of property rights -- the liberty of the schools to conduct a business, the right of private school teachers to follow their occupation, and the freedom of the schools and the parents to enter into contracts.¹⁰ Although the Court easily could have decided the cases on the bases of freedom of religion or freedom of speech,¹¹ the Court had not yet incorporated any part of the Bill of Rights into state law, and it was not prepared to begin the process of incorporation in these cases.¹²

⁸ 268 U.S. at 534-35.

⁹ *Id.* at 535.

¹⁰ See ROSS, *supra* note 3, at 186-87.

¹¹ As Justice Kennedy recently observed, “*Pierce* and *Meyer*, had they been decided in recent times, may well have been grounded upon First Amendment principles protecting freedom of speech, belief, and religion.” *Troxel v. Granville*, 120 S. Ct. 2054, 2076 (2000) (Kennedy, J., dissenting).

¹² ROSS, *supra* note 3, at 189-91. *Meyer* and *Pierce* may be seen as a bridge to incorporation, however, insofar as they were, for all practical purposes, the first decisions in which the Court struck down state legislation that interfered with personal liberties. The Court began the process of incorporation only seven days after it decided *Pierce* when it stated in dictum in *Gitlow v. New York*, 268 U.S. 652 (1925), that the First Amendment’s protection of free speech and the press is

The Court's reliance upon substantive due process was consistent with its suspicion of social and economic regulatory legislation. But while the Court rejected the arguments of the states that only public education could instill democratic values in children, the Court did not deny that the states had a compelling need to foster such values in youth. This accommodation of the rights of the parents and the needs of the state seemed to strike an appropriate balance at the time, and the decisions received widespread popular approval, for they seemed to offer something to everyone.¹³ Ethnic Americans hailed the decision as a strike against nativism,¹⁴ liberals welcomed the Court's defense of human rights,¹⁵ and economic conservatives correctly perceived that the decisions would discourage growing efforts by progressives to curb the Court's power.¹⁶ Coming at a time when the nativism that had motivated the statutes was waning, the decisions abruptly terminated a widespread compulsory public education movement.

incorporated into state law. *See* ROSS, *supra* note 3, at 191-97.

¹³ Although *Pierce* was unanimously decided, Oliver Wendell Holmes, Jr., and George Sutherland dissented in *Meyer* on the ground that the statutes did not unduly restrict the freedom of either the teachers or the students because the laws were a reasonable and perhaps necessary means of achieving the desirable state interest of having citizens use a common language. *Meyer v. Nebraska*, 262 U.S. 399, 412-13 (1923). For a discussion of these dissents, see ROSS, *supra* note 3, at 130-32.

¹⁴ *See* ROSS, *supra* note 3, at 172-73.

¹⁵ *Id.* at 195-96.

¹⁶ *Id.* at 193-95. *See also* WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937*, at 246-49, 286-87 (1994).

The decisions may therefore be more controversial today than they were 75 years ago. Like many other judicial decisions, *Meyer* and *Pierce* have had unforeseen and indeed strange doctrinal consequences. Beginning almost immediately after *Pierce*, the Court suspended its use of substantive due process in personal liberties cases in favor of selective incorporation of the Bill of Rights. Although, after 1937, the Court rejected even in economic cases the substantive due process theory upon which *Meyer* and *Pierce* are based, the decisions provided the cornerstone for the Court's revival of substantive due process in the context of personal liberties during the 1960s and 1970s.¹⁷ The conservative Lutherans and Roman Catholics who challenged the laws that the Court struck down in *Meyer* and *Pierce* might not have hailed the Court so heartily for saving their schools if they could have known that these decisions would provide the foundation for the Court's enunciation of a right to privacy that culminated in *Roe v. Wade*. Cultural conservatives today may disdain the use of these decisions in support of abortion rights, but they hail *Meyer* and *Pierce* as the cornerstone of parental rights.¹⁸ Meanwhile, many

¹⁷ See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (invalidating anti-abortion statute); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating statute that prohibited use of contraceptives).

¹⁸ For example, while this paper was being revised after the conference, courts relied upon *Pierce* in two major decisions involving parental rights. In *Troxel v. Granville*, 120 S. Ct. 2054 (2000), the U.S. Supreme Court cited *Meyer* and *Pierce* to support its decision to invalidate a state law that allowed a court to permit grandparents to visit a grandchild more than the parent wished to authorize. See also *infra* note 72 and accompanying text. In another recent decision, the Eleventh Circuit cited *Pierce's* recognition of the importance of the parent-child relationship in support of its decision affirming the dismissal of a claim that the Immigration and Naturalization Service denied due process to a six-year-old alien by dismissing his asylum application as void on the ground that the minor lacked the capacity to seek asylum without his father's consent. *Gonzalez v. Reno*, 212 F.3d 1338

liberals who may approve of the privacy doctrines for which *Meyer* and *Pierce* provide the foundation believe that the decisions unduly diminish the rights of children. From a feminist perspective, some scholars have criticized the decisions for reinforcing patriarchy.¹⁹

Few critics of *Meyer* and *Pierce* today are motivated by the antagonism against ethnic Americans and Roman Catholicism that animated the legislation that *Meyer* and *Pierce* nullified. Like the proponents of that legislation, however, some people today continue to view non-public schooling with suspicion because they believe that non-public education tends to promote racial, economic, and cultural divisiveness that contravenes the interest of both the state and the child.

Some critics of private education have even gone so far as to revive the prospect of compulsory public education. These critics point out that the decisions were based in part upon a now-discredited theory of economic due process. Moreover, they remind us that there may have been more latitude for parental control over education during the 1920s, when education was less important than it is today. Stricter enforcement of truancy laws, racial integration of schools, and abolition of child labor are all expressions of changed attitudes toward education's importance. Mark Tushnet has suggested that the shaky

(11th Cir. 2000), *cert. denied*, 120 S. Ct. 2737 (2000). See also PHILIP BOBBITT, CONSTITUTIONAL FATE 239-40 (1982); ROSS, *supra* note 3, at 190-91.

¹⁹ See, e.g., Barbara Bennett Woodhouse, “*Who Owns the Child?*”: *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 996-1001, 1112-22 (1992). Professor Woodhouse has argued that the decisions aggrandize private rights at the expense of community values and constitutionalized “a patriarchal notion of parental rights” that “interrupted the trend of family law moving toward children’s rights.” *Id.* at 1113.

substantive due process grounds on which *Pierce* is based might permit Congress, pursuant to Section Five of the Fourteenth Amendment, to prohibit private schools on the ground that they unduly interfere with “society’s ability to reach a point of integration where judgments about people’s worth are made solely on the basis of individual merit.”²⁰

Similarly, Abner Greene has stated that compulsory public education “would ensure that all children are exposed to multiple sources of authority and knowledge” and “would free up funds used for private schooling and would direct parental energies at improving the public schools.”²¹ And James S. Liebman has suggested that public education be compulsory to the extent that parents who have religious objections could elect to remove their children.²²

These criticisms of *Pierce* are part of a broader assault on parental rights.

Professor James G. Dwyer has argued that parental child-rearing rights are illegitimate

²⁰ Mark Tushnet, *Public and Private Education: Is There a Constitutional Difference?*, 1991 U. CHI. LEGAL F. 43, 54 (1991). Professor Tushnet contends that “[t]hat justification is more substantial than the one offered in *Pierce*, and it might be sufficient to overcome the weakened protection given substantive due process rights by the Court’s analysis” in *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding state statute prohibiting sodomy).

²¹ Abner S. Greene, *Why Vouchers are Unconstitutional, and Why They’re Not*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 397, 407 (1999).

²² James S. Liebman, *Voice Not Choice*, 101 YALE L.J. 259, 307 (1991) (reviewing JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA’S SCHOOLS* (1990)). Professor Liebman explains that “[b]y curtailing exit from public schools except by the few citizens whose religious beliefs require them to exit organized society, the states could stem enough . . . escape to promote genuine voice-activated educational reform and simultaneously extend a civic education to all young people whose coming participation in the larger society requires it.” *Id.*

and that parents should enjoy only a “legal privilege to care for and make decisions on behalf of children in ways that are not contrary to the children’s best interests.”²³

Contemporary criticisms of *Meyer* and *Pierce*, however, do not diminish the enduring significance of the decisions for human rights. Even though the Court abandoned economic due process after 1937, the Court’s growing solicitude for personal liberties indicates that the Court would reach the same result today. Now, however, a court would probably hold that the First Amendment’s Free Exercise Clause compels the state to permit parents to have the option to send their children to a sectarian school. To the extent that the right of parents to prefer a sectarian school to a public school is now presumably guaranteed by the Free Exercise Clause, that right is probably more secure than it was at the time of *Pierce*. Insofar as a parent’s right to send his child to a private, non-sectarian school must remain grounded in generic due process, however, the right is vulnerable to complaints against the non-textual vagueness of substantive due process. In contrast to Meyer’s attorney, who in his autobiography hailed the *Meyer* decision for its vision of a “fenceless land of liberty,”²⁴ many critics of the opinion would prefer to confine liberty within at least some fences, particularly if the Supreme Court is going to be the ultimate surveyor of liberty’s terrain.

²³ James G. Dwyer, *Parents’ Religion and Children’s Welfare: Debunking the Doctrine of Parents’ Rights*, 82 CAL. L. REV. 1371, 1447 (1994). See also JAMES G. DWYER, RELIGIOUS SCHOOLS V. CHILDREN’S RIGHTS (1998).

²⁴ ROSS, *supra* note 3, at 192 (citing ARTHUR F. MULLEN, WESTERN DEMOCRAT 226 (1940)).

Although substantive due process invites excessive judicial activism, and even though courts during the past twenty years have exhibited little willingness to expand the parameters of substantive due process, the doctrine that there are certain rights that are not specifically mentioned in the Constitution seems likely to remain secure because there are certain unwritten rights that most Americans believe to exist. If indeed there are any fundamental rights that are not spelled out in the Constitution, then many persons – myself included – would count among these the right of a parent to exercise a high level of control over a child's education, for child-rearing involves the most intimate aspects of one's life and is a critical expression of personal autonomy.

The Supreme Court recently re-affirmed the vitality of *Meyer* and *Pierce* in its decision in *Troxel v. Granville*, which nullified a Washington statute that permitted state courts to exercise broad discretion to override parental decisions concerning the visits of third parties with their children.²⁵ Citing *Meyer* and *Pierce*, Justice O'Connor's plurality opinion declared that “[t]he liberty interest at issue in this case – the interest of parents in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court.”²⁶

But while *Troxel* demonstrates the continuing significance of *Meyer* and *Pierce*, it also illustrates the continuing enigma of those decisions. Although Justice Kennedy correctly pointed out in his dissent that all of the Justices seemed to agree that a “custodial

²⁵ *Troxel v. Granville*, 120 S. Ct. 2054, 2060 (2000).

²⁶ *Id.*

parent has a constitutional right to determine, without undue interference by the state, how best to raise, nurture and educate the child,”²⁷ various members of the Court interpreted this right in different ways. Both the four-justice plurality opinion and Justice Souter’s concurring opinion relied heavily upon *Meyer* and *Pierce* to argue that parents have a powerful interest in controlling their children’s personal associations.²⁸ As Justice Souter acknowledged in his concurring opinion, however, the Court’s decisions “have not set out exact metes and bounds to the protected interest of a parent in the relationship with his child.”²⁹ Therefore, it is not surprising, as Justice Thomas pointed out in his concurrence, in which he argued in favor of strict scrutiny, that the opinions of the Court and of Justice Souter did not articulate a standard of review for legislation that interferes with the parental rights enunciated by *Meyer* and *Pierce*.³⁰

²⁷ *Id.* at 2076 (Kennedy, J., dissenting).

²⁸ *Id.* at 2060; *id.* at 2066 (Souter, J., concurring). As Justice Souter stated:

Meyer’s repeatedly recognized right of upbringing would be a sham if it failed to encompass the right to be free of judicially compelled visitation by “any party” at “any time” a judge believed he “could make a ‘better’ decision” than the objecting parent had done. The strength of a parent’s interest in controlling a child’s associates is as obvious as the influence of personal associations on the development of the child’s social and moral character.

Id. at 2066-67. Souter also concluded that *Pierce* implied that “parental choice in such matters is not merely a default rule in the absence of either governmental choice or the government’s designation of an official with the power to choose for whatever reason and in whatever circumstances.” *Troxel*, 120 S. Ct. at 2067.

²⁹ *Id.* at 2066 (Souter, J., concurring).

³⁰ *Id.* at 2068 (Thomas, J., concurring).

Although Justice Scalia's dissent acknowledges that parents have fundamental rights to "direct the upbringing of their children," Justice Scalia contends that the Court lacks power to nullify legislation that infringes on those rights.³¹ Pointing out that *Meyer*, *Pierce*, and *Wisconsin v. Yoder*³² are the only decisions in which the Court had relied "in whole or in part upon a substantive constitutional right of parents to direct the upbringing of their children," Justice Scalia contends that the "sheer diversity" of the opinions in *Troxel* persuaded him that "the theory of unenumerated parental rights underlying [*Meyer*, *Pierce*, and *Yoder*] has small claim to stare decisis protection. A legal principle that can be thought to produce such diverse outcomes in the relatively simple case before us here is not a legal principle that has induced substantial reliance."³³ Similarly, Justice Kennedy's dissent argues that, while the principle of parental rights as articulated by *Meyer* and *Pierce* exists "in broad formulation," the "courts must use considerable restraint, including careful adherence to the incremental instruction given by the precise facts of particular cases, as they seek to give further and more precise definition to the right."³⁴

While *Pierce* therefore clearly provides a constitutional foundation for some type of parental rights, the scope of those rights remains unclear. Certainly parental rights are far

³¹ *Id.* at 2074 (Scalia, J., dissenting).

³² 406 U.S. 205 (1972) (holding that enforcement of state law requiring school attendance past the eighth grade violated the free exercise rights of the Amish).

³³ *Troxel*, 120 S. Ct. at 2074 (Scalia, J., dissenting). Scalia also observed that *Meyer* and *Pierce* were "from an era rich in substantive due process holdings that have since been repudiated." *Id.*

³⁴ *Id.* at 2076.

from absolute. Clearly there are some limits on a parent's right to control a child's education, or else, as one court has observed, "a truant's parent could plausibly proclaim that he or she was exercising his or her right while 'home-schooling' the child to be a safe-cracker or prostitute."³⁵ Moreover, the language in *Pierce* stating that "the child is not the mere creature of the state"³⁶ may withhold more parental autonomy than it confers, for the use of the word "mere" could be read to suggest that the child is primarily the creature of the state. If the Court had believed that parental powers were generally paramount to governmental powers, the Court might have stated that "the child is not primarily the creature of the state."³⁷ The Court's decision in *Pierce* also declared that the state had the right to regulate non-public schools,³⁸ a right that the non-public schools that opposed

³⁵ *Hubbard v. Buffalo Indep. Sch. Dist.*, 20 F. Supp. 2d 1012, 1015 (W.D. Tex. 1998) (holding that a school district's policy of requiring students who transferred from non-accredited or home schools to pass proficiency tests at their own expense did not burden free exercise of religion).

³⁶ *Pierce v. Society of the Sisters*, 268 U.S. 510, 535 (1925).

³⁷ If the Court had regarded the rights of the parent as paramount, the Court likewise might have stated that "the child is not the mere creature of the parent," although there would have been little point in using this language since the decision was directed against the power of the state rather than the power of the parent. The Court's use of the word "mere," however, must be read in the context of the Court's seemingly broad declaration of parental rights: "those who nurture [the child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U.S. at 535.

³⁸ The Court stated that:

[n]o question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship be taught, and that nothing be taught which is

compulsory education had acknowledged and indeed emphasized in support of their position.³⁹

Furthermore, the U.S. Supreme Court has never specifically stated that the right of parents to direct the education of their children is actually a “fundamental” right that would trigger strict judicial scrutiny of legislation that affects that right. The determination of the scope of the parental right to educate children is further complicated because the Court has refused to categorize education itself as a fundamental right.⁴⁰ Accordingly, there is no clear standard of review that a federal court must apply in reviewing legislation that affects the rights of parents to direct the education of their children.⁴¹ The First Circuit has recently pointed out that the Supreme Court “has yet to decide whether the right to direct the upbringing and education of one’s children is among those fundamental rights whose infringement merits heightened scrutiny.”⁴² Accordingly, the Second Circuit has held that

manifestly inimical to the public welfare.

268 U.S. at 534.

³⁹ ROSS, *supra* note 3, at 163 (citing oral argument in the *Pierce* case). Opponents of a compulsory public education movement in Michigan during the early 1920s tried to discourage campaigns against non-public schools by promoting legislation to require closer state supervision of non-public schools. *Id.* at 140-41.

⁴⁰ See *Plyler v. Doe*, 457 U.S. 202, 221 (1982); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

⁴¹ As one commentator recently observed, “[c]onfusion and inconsistency reign as to the proper standards for judicial review.” Eric W. Schulze, *The Constitutional Right of Parents to Direct the Education of Their Children*, 138 EDUC. L. REP. 583, 587 (1999).

⁴² *Brown v. Hot, Sexy, and Safer Productions, Inc.*, 68 F.3d 525, 533 (1st Cir. 1995).

parents lack a fundamental right to direct their children’s education and that “rational basis review is appropriate” in cases in which parents seek to exempt their children from educational procedures.⁴³ Although legislation presumably is subject to a heightened standard of review when parents claim that public school practices infringe upon their religious rights as well as their parental rights, the level of scrutiny even here is unclear.⁴⁴ The situation is further complicated by a number of state court decisions that indicate that education is a fundamental right under state constitutions.⁴⁵

Since both federal and state courts have generally refused to read *Pierce* as conferring a fundamental right upon parents that would trigger strict scrutiny of legislation affecting parental rights, parental rights advocates recently have unsuccessfully sponsored parental-rights amendments in Congress and in numerous states. A parental-rights amendment was defeated in a 1996 initiative in Colorado by a margin of 58 to 42 percent.⁴⁶ These proposed amendments typically track the language of *Pierce* by asserting the liberty of parents and guardians to direct the upbringing and education of children under their control. Although advocates of amendments based on the language of

⁴³ *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 461 (2d Cir. 1996).

⁴⁴ As one commentator has pointed out, when courts are “faced with hybrid claims asserting violations of both parental and religious constitutional rights, another layer of inconsistency and confusion is added to the judicial mix.” Schulze, *supra* note 41, at 596.

⁴⁵ See Kelly Thompson Cochran, Comment, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. REV. 399, 401-02 (2000).

⁴⁶ Jean Hellwege, *Parents Seek Control Over Children’s Lives in Legislatures, Courts*, TRIAL, May 1999, at 15.

Pierce contend that an amendment would merely codify *Pierce*, such amendments would interfere with the subtle balance between parental rights and the rights of the state which have been worked out since *Pierce* by impeding efforts to curtail child abuse and providing more impetus for school vouchers.⁴⁷ A parental-rights amendment also would be superfluous since many statutes already contain parental-rights provisions.⁴⁸

Moreover, such amendments might unduly interfere with the power of school officials to make curriculum decisions and provide parents with a virtual veto over curriculum that they find objectionable. This would allow a minority of parents the power to overrule the decisions of elected officials, thereby substituting a crude form of direct democracy for republican government. Such a veto power would interfere with the curricular preferences of a majority of parents, thereby interfering with their right to direct their children's education

⁴⁷ Judith Schaeffer, Deputy Legal Director for People for the American Way, has stated that “[a] blanket constitutional amendment that says parents have a constitutional right to direct the upbringing of their children sounds innocuous, but it’s a wolf in sheep’s clothing. Good parents don’t need it, and bad parents would abuse it.” *Id.* at 13-14.

⁴⁸ For example, Texas law provides specific rights to parents, including the right to review all teaching materials used in the classroom, the right to file a grievance to be heard by the school board, and a limited right of prior consent before a child may be videotaped by a school employee. TEX. EDUC. CODE ANN. § 26.001-26.012 (West 1995).

by sending them to public schools.⁴⁹ These amendments also might violate the constitutional rights of teachers to teach and students to learn.⁵⁰

Similarly, the amendments would pose a perennial threat of litigation that would tend to encourage school administrators to dilute the curriculum, reaching for the lowest common denominator of public sensibilities.⁵¹ The danger of more litigation might be particularly potent because a parental-rights amendment might shift the standard of judicial scrutiny of governmental interference with parental rights from the “rational basis” standard that is presently used in most cases to an intermediate standard, or even to a compelling-interest test.

In the absence of a more compelling standard of review of government action that affects parental rights, *Pierce* has generally not enabled public school parents to persuade courts to permit them to remove their children from practices and programs to which they object.⁵² The Supreme Court’s anomalous decision in *Wisconsin v. Yoder* is the only

⁴⁹ See Jennifer L. Sabourin, Note, *Parental Rights Amendments: Will a Statutory Right to Parent Force Children to “Shed Their Constitutional Rights’ at the Schoolhouse Door?”*, 44 WAYNE L. REV. 1899, 1917, 1920, (1999). As Ms. Sabourin has pointed out, “[p]arents only have a constitutional right in directing their own children and not the children of other parents.” *Id.* at 1920.

⁵⁰ *Id.* at 1923.

⁵¹ *Id.* at 1920.

⁵² As one commentator has observed, “[t]he federal courts narrowly have restricted *Meyer*, *Pierce*, and *Yoder* to the facts of those cases. The courts are unwilling to grant parents any general power to select the educational requirements with which they will or will not comply, under the rubric of the constitutional right of parents to direct the education of their children.” Schulze, *supra* note 41, at 596.

education decision in which *Pierce* has been successfully invoked. In one much publicized case in which parents objected to a sexually-explicit AIDS awareness assembly that their children were required to attend, the First Circuit stated that *Pierce* does not provide “a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school’s choice of subject matter.”⁵³ In other similar decisions, federal courts have held that parents of public school children had no constitutional basis for objecting to the administration of psychological counseling to a third grader;⁵⁴ the imposition of corporal punishment on a sixth grader;⁵⁵ a mandatory sex education program;⁵⁶ a compulsory community service program;⁵⁷ mandatory academic achievement testing;⁵⁸ and a period for silent meditation or prayer not exceeding one minute.⁵⁹

⁵³ *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525, 533-34 (1st Cir. 1995). The Court declared that “[w]e cannot see that the Constitution imposes such a burden on state educational systems, and accordingly find that the rights of parents as described by *Meyer* and *Pierce* do not encompass a broad-based right to restrict the flow of information in the public schools.” *Id.* at 534.

⁵⁴ *Newkirk v. East Lansing Pub. Sch.*, 57 F.3d 1070 (6th Cir. 1995).

⁵⁵ *Baker v. Owen*, 395 F.Supp. 294, 299 (M.D.N.C. 1975), *aff’d without opinion*, 423 U.S. 907 (1975).

⁵⁶ *Cornwell v. State Bd. of Educ.*, 314 F.Supp. 340, 344 (D.C. Md. 1969), *aff’d*, 428 F.2d 471, 472 (4th Cir. 1970) (per curiam).

⁵⁷ *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 461-62 (2d Cir. 1996).

Courts also have rejected parental objections to public school practices and curriculum even in cases in which parents have relied both on parental rights and the free exercise of religion. In its controversial decision in *Mozert v. Hawkins County Board of Education*, the Sixth Circuit, for example, rejected efforts by parents to have their children opt out of reading a textbook that contained passages that were deeply offensive to fundamentalist Christians. The Court held that mere exposure to this curriculum did not unconstitutionally burden the free exercise of religion.⁶⁰

One of the most troubling aspects of *Mozert* is that the curriculum that the parents challenged may have marginalized the religious beliefs of the parents because its numerous references to religion virtually ignored Christianity, particularly Protestantism. Two of the judges on the panel aptly expressed regret that the school board could not have done more to accommodate the needs of the parents who objected to the curriculum. Nevertheless, they rather ruefully acknowledged that the parents' remedy was political rather than judicial. As one of the judges explained, "[a] constitutional challenge to the content of instruction . . . is a challenge to the notion of a politically-controlled school system."⁶¹

⁵⁸ *Hubbard v. Buffalo Indep. Sch. Dist.*, 20 F.Supp. 2d 1012, 1017 (W.D. Tex. 1998).

⁵⁹ *Gaines v. Anderson*, 421 F.Supp. 337, 346 (D. Mass. 1976).

⁶⁰ *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1058 (6th Cir. 1987).

⁶¹ *Id.* at 1079 (Boggs, J., concurring).

It is not difficult to collect examples of public school curricula to which reasonable parents might object. To one degree or another, many schools have succumbed to the latest trends in political correctness and/or to promoting sexual license. All too many criticisms of the public schools, however, begin with an anecdote about a loony curriculum and conclude with the *non sequitur* that public schools as a class are irredeemably depraved. Curricular abuses are inevitable when tens of millions of children attend tens of thousands of public schools. While many parents clearly have legitimate objections to public school curriculum, the ability of the political system to accommodate parental concerns about public school curriculum is demonstrated by the fact that the percentage of students enrolled in private schools has decreased among all economic groups during the past twenty years. As one commentator recently observed, “[i]f Americans now vote with their feet, they typically do so by moving toward public schools, not away from them.”⁶² The continued strength of the public school is all the more remarkable since the burgeoning prosperity of the past two decades has made parents more capable than ever before of paying for non-public education.

In some ways, the public schools have been the victims of their own success, for their increasing ability to draw and hold children of all abilities and social classes has created cultural tensions. As Professor Minow has observed, “the disillusionment with the public schools began at just about the same time that these schools took on the task of

⁶² Richard Rothstein, *Lessons; An Allegiance to Public Schools*, N.Y. TIMES, Mar. 15, 2000, at B11.

educating all children, including those with disabilities and limited English proficiency, non-citizens, the homeless, and migrants.”⁶³ Critics of the public schools should beware the danger of succumbing to the “Miniver Cheevy syndrome” by romanticizing a golden age of public education that never existed. The public schools of yore were not necessarily more orderly or educationally efficient than are today’s institutions, and their classrooms were segregated by race and were devoid of the physically and mentally challenged as well as many of the poor, particularly those children who sacrificed formal education to labor in factories, farms, and mines.

The argument that parents lack sufficient control over the education that their children receive in public schools is quite ironic since the public school is probably more amenable to grassroots democracy than is any other arm of government. Parents obviously could assert more control over the public schools if they became more involved in parent-teacher organizations or school board elections. At the very least they could vote in school board elections – a right that only approximately ten percent of all parents now exercise.⁶⁴ Since parents constitute a numerically large and generally prosperous segment of the electorate, they obviously are no discrete and insular minority. Although parents therefore have the power to influence political decisions concerning school

⁶³ Martha Minow, *Choice or Commonality: Welfare and Schooling After the End of Welfare as We Knew It*, 49 DUKE L.J. 493, 503 (1999).

⁶⁴ Hellwege, *supra* note 45, at 15.

curriculum, they also have vast ability to influence legal proceedings involving curricular issues.⁶⁵

Moreover, the ability of parents to influence the schools that their children attend may be expanding. Educators have long since rejected the model of centralization in the hands of educational experts, the so-called “one best system.” Some schools are now using so-called school-based management initiatives, which delegate decision-making authority over budget, personnel, and curriculum to councils of teachers, parents, and administrators at the local level.⁶⁶ Other reformers have suggested the creation of a so-called community engagement dialogic model, analogous to the process of alternative dispute resolution, in which a mediator would attempt to engage parents in a deliberative process that would work out compromises that would be broadly acceptable to various competing factions of parents, administrators, teachers, and students.⁶⁷ Throughout the nation, local school districts seem increasingly willing to hear and, when possible, accommodate the needs and concerns of parents. Charter schools, despite some drawbacks, also offer exciting possibilities for improving public education through initiatives that allow parents to exercise more control over their childrens’ education.⁶⁸

⁶⁵ Stephen E. Gottlieb, *The Passing of the Cardozo Generations*, 34 AKRON L. REV. (in this volume).

⁶⁶ Michael A. Rebell & Robert L. Hughes, *Schools, Communities, and the Courts: A Dialogic Approach to Education Reform*, 14 YALE L. & POL’Y REV. 99, 102 (1996).

⁶⁷ *Id.* at 114-68.

⁶⁸ See Molly O’Brien, *Free at Last? Charter Schools and the “Deregulated” Curriculum*, 34 AKRON L. REV. (in this volume).

Indeed, the ability of parents to influence public school boards may, in many instances, actually provide parents with more control over their children's education than they would have if they sent their children to private schools. The burgeoning of the home-school movement suggests in part that many parents believe that even private schools do not provide parents with sufficient control over their children's education. At the very minimum, parents who send children to private schools must acquiesce at least in part to practices or curricula of which they do not wholly approve. To the extent that parents are not able to effect changes in the public schools, they retain the right under *Pierce* to remove their children from the public schools even though the exercise of this right has obvious costs.

In addition to ignoring the political rights of parents, discussions of parental rights to direct their children's education also tend to overlook the rather obvious fact that parents have a vast opportunity to educate their children when school is out of session – as it is most of the time. American children attend school only approximately six hours per day, five days per week, 36 weeks per year. This means that more than 80 percent of a child's waking hours is spent away from school. During this time, parents have almost complete control over the company in which their children will spend their time and the type of influences to which the child will be exposed. Moreover, parents have full control of a child's education during the first five years of a child's life – the years that presumably are the most formative in a child's life. It is a misnomer to equate education with institutional schooling; most schooling is home schooling. The home especially provides a forum for

transmitting cultural values that is at least as effective as the school, since so much of the time of public and non-public schools is taken up with technical learning that lacks any specific value content – for example, phonics and arithmetic. To the extent that parents object to the public school curriculum (without objecting so much that they wish to remove their children from public school), they have ample opportunity to provide antidotes at home and in their religious institutions during evenings, weekends, holidays, and summers.

The opportunities of parents to instill values in their children at home and in their religious institutions has long been recognized by persons who have defended the Supreme Court’s decision prohibiting prayer in the public schools⁶⁹ against critics who alleged that it would subvert the religious and moral training of youth. As President John F. Kennedy stated in defense of that decision, “we can pray a good deal more at home, we can attend our churches with a good deal more fidelity, and we can make the true meaning of prayer much more important in the lives of our children. That power is very much open to us. And I hope that, as a result of this decision, . . . all American parents will intensify their efforts at home.”⁷⁰

One cannot, of course, deny that schools have a very powerful influence in shaping the values of children. Students obviously react to peer pressure, and they naturally tend to respect their teachers. Even though public school children spend most of their time outside of school, they obviously spend a very significant amount of their time in the custody of the

⁶⁹ Engel v. Vitale, 370 U.S. 421 (1962).

⁷⁰ JOHN HERBERT LAUBACH, SCHOOL PRAYERS: CONGRESS, THE COURTS, AND THE PUBLIC 2

state. The power of the state to communicate its values to public school children has influenced Stephen Gilles's interesting argument that public school instruction is a form of parental speech that is protected by the First Amendment and that the laws that the Court nullified in *Meyer* and *Pierce* constituted restrictions on such speech.⁷¹ Although *Meyer* and *Pierce* obviously recognize that parents have constitutional rights to exercise control over the content of their childrens' education, these decisions do not support the theory that parents do not delegate some of their autonomy to the state when they send their children to public school. Because it is impossible for the public schools to accommodate all parental opinions, a theory that the schools are direct agents of the state would permit parents to interfere with public school curricula in a manner that might create a chaotic cacophony in public school classrooms.

Although some parents might argue that they are unable to counter the baneful influence of teachers and peers in the public schools, I suspect that most objections to public school curricula involve what is *omitted* rather than what is *taught*. In other words,

(1969).

⁷¹ Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 1016-22 (1996). Professor Gilles argues that “[p]arents are no less ‘speakers’ for First Amendment purposes when they communicate indirectly with their children through the speech of schools, teachers, home tutors, or other educational intermediaries.” *Id.* at 1016. Professor Gilles points out that while “[p]arents remain free to teach what they like when their child is in school . . . there are only so many hours in the day. Six hours a day, five days a week, nine months a year, only the public school’s values may be communicated to one’s child” *Id.* at 1022. He believes that “[t]his de facto prohibition unquestionably constitutes a major curtailment of dissenting parental . . . speech.” *Id.* Gilles cites *Meyer* and *Pierce* in support of his argument. *Id.* at 1020-23. For discussions of other theories on how these decisions can be interpreted in terms of free speech, see *supra*, note 18.

the principal objection of parents is not that their children are learning anything harmful, but that they are not sufficiently exposed to much that is helpful and healthy.

For example, I have heard some parents complain that the American history curriculum of many public schools devotes so much attention to women and racial minorities that it ignores many of the white men who once virtually monopolized the curriculum. Not one of these persons, however, has expressed any objection to having children learn about the contributions of women and racial minorities to American history. Indeed, they are happy that the schools are finally teaching about the contributions of persons and groups whom the public schools unfairly ignored for so long. Their quarrel is strictly one of emphasis. They do not feel that their children are learning too much about George Washington Carver, but they wish that they would learn more about George Washington. To the extent that these parents are unwilling or unable to persuade the school boards to effect the balance that they prefer, they have a rather easy remedy: provide instruction at home that fills in the gaps left by the public school curriculum. I suspect, however, that many of the parents who complain the most vociferously about the deficiencies of the public schools fail to provide their children with salubrious supplements when their children are at home. Several months ago, the Arts and Entertainment Network aired a splendid new film, *The Crossing*, about Washington's crossing of the Delaware River to fight the battle that turned the tide of the American Revolution. The film celebrated patriotic values in a manner that would warm the most conservative of hearts. But I would

guess that the number of children who were tuned into smutty and vacuous TV and video programs was greater than the number who watched *The Crossing*.

Moreover, the lamentable decline in the standards of instruction for youth at many religious institutions during recent decades provides an example of how many religious parents fail to take advantage of opportunities to educate their children outside of the public schools. It is difficult to sympathize with complaints about the cultural deficiencies of the public schools when all too many religious institutions fail to adequately instruct young people in the morals, doctrines, history, and liturgies of their faith.

The abundant opportunities for education at home and in private religious institutions may explain why many public schools seem to emphasize multi-culturalism rather than the cultures of the numerically dominant groups in the community. The schools naturally expect the parents to teach the children about their own traditions at home. If the child does not learn about other cultures at school however, she probably will not learn about them at home. For example, the parents in *Mozert* presumably had considerable opportunity to expose their children at home and at church to their Protestant heritage, if they had been willing to take the time and make the effort. It is unlikely, however, that the parents would have taught the children much about other traditions if the children had not been exposed to these at school. Although the school's neglect of the children's own religion may have made the children feel marginalized, the parents presumably could have made their children understand that the schools were emphasizing the culture of other groups because it was the duty of the parents to instill in them knowledge and pride about

their own heritage, while the schools had the ability to teach about cultures with which their parents were unfamiliar.

Indeed, the ability of schools to teach students about a wide spectrum of cultures was at the heart of *Meyer* and *Pierce*, for the proponents of the nativistic legislation in both of those cases argued that the parochial schools instilled impressionable youth with alien values. The Court's decision in *Meyer* explicitly held that the teaching of German in parochial schools did not necessarily promote political subversion or exclude instruction in "American" values.⁷² Similarly, the Court in *Pierce* implicitly found that religion-based schools did not necessarily fail to provide a sound education in secular subjects or neglect the inculcation of patriotism.⁷³ As a Nebraska judge quipped at Robert T. Meyer's trial when the state's attorney asked a pastor whether parochial school graduates could recite the national anthem, bilingual children "probably beat us in that. They can repeat it in two languages."⁷⁴

Contrary to the widespread popular assumption that parents surrender to the schools most control over children, courts have recognized that parents retain primary control over their children in decisions that have refused to find that public schools have an

⁷² *Meyer v. Nebraska* 262 U.S. 390, 400, 402 (1923).

⁷³ *Pierce v. Society of the Sisters* 268 U.S. 510, 534 (1925).

⁷⁴ Ross, *supra* note 3, at 133 (citing *Transcript of Proceedings, Nebraska District v. Evangelical Lutheran Synod, et al., District Court of Dodge County, Sept. 1, 1921*).

affirmative duty to protect children from harm.⁷⁵ As the court explained in one decision that the parents of public schoolchildren:

still retain primary responsibility for feeding, clothing, sheltering, and caring for the child. By mandating school attendance for children under the age of sixteen, the state of Illinois has not assumed responsibility for their entire personal lives; these children and their parents retain substantial freedom to act. The analogy of a school yard as a prison may be a popular one for school-age children, but we cannot recognize constitutional duties on a child's lament.⁷⁶

In addition to their relevance to current struggles over parental rights amendments and curriculum issues, *Meyer* and *Pierce* also may be germane to the present controversy over school vouchers. Voucher advocates appear eager to bring vouchers within the umbrella of the parental rights enunciated by *Meyer* and *Pierce*.⁷⁷ For example, the Milwaukee school voucher program that was recently sustained by a Wisconsin court⁷⁸ is formally called “the Milwaukee Parental Choice program,” thereby perhaps suggesting that vouchers permit parents to exercise a constitutional right to choose the school that their child attends. Some voucher proponents argue that economically disadvantaged parents

⁷⁵ *D.R. v. Middle Bucks Area Vocational Technical Sch.*, Nos. 91-1136, 91-1137, 1991 WL 276292, at *6 (3rd Cir. Dec. 31, 1991), *vacated*, 972 F.2d 1364 (3rd Cir. 1992); *J.O. v. Alton Community Unit Sch. Dist. 11*, 909 F.2d 267, 272 (7th Cir. 1990). Courts in both decisions dismissed lawsuits by parents whose children allegedly suffered sexual abuse in a public school.

⁷⁶ 909 F.2d at 272. Accordingly, the court concluded that “[s]choolchildren are not like mental patients and prisoners such that the state has an affirmative duty to protect them.” *Id.* at 272-73.

⁷⁷ As one commentator has argued, *Pierce* “clearly recognizes the right of choice implicit in the school vouchers system.” Jill Jasperson, *Renaissance in Education: The Constitutionality and Viability of an Educational Choice or Voucher System*, 1993 B.Y.U. EDUC. & L.J. 126, 130.

⁷⁸ *Jackson v. Benson*, 578 N.W.2d 602 (Wis.), *cert. denied*, 525 U.S. 997 (1998).

are unable to avail themselves of the right to direct their childrens' education insofar as they cannot afford to send their children to a parochial school.⁷⁹ But while *Pierce* indeed permits parents to choose where to send their children to school, the Constitution does not compel the state to pay for any form of private education, and it may actually prohibit the state from paying for parochial education.

Although the Supreme Court has, in several instances, removed financial impediments to the exercise of rights,⁸⁰ the Court has held that the government has no obligation to provide funding to facilitate the exercise of a fundamental right.⁸¹ Similarly, the Court has established that the failure to subsidize a fundamental right does not constitute a penalty on the exercise of that right.⁸²

In particular, the Supreme Court has repeatedly held that there is no right to abortion funding.⁸³ The constitutional argument in favor of vouchers for private education is weaker

⁷⁹ As one commentator has argued, the only parents “who have a meaningful capacity to exercise their right of choice are those who have the financial means to afford private schooling (or the time to invest in home schooling) The public education system thus poses a great danger of infringing on the liberty of parents to direct the religious upbringing of their children.” Andrew A. Cheng, *The Inherent Hostility of Secular Public Education Toward Religion: Why Parental Choice Best Serves the Core Values of the Religion Clauses*, 19 U. HAW. L. REV. 697, 733-34 (1997).

⁸⁰ See, e.g., *Boddie v. Connecticut*, 401 U.S. 371 (1971) (invalidating fee for filing divorce petition).

⁸¹ *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 545 (1983).

⁸² *Rust v. Sullivan*, 500 U.S. 173, 193 (1991); *Harris v. McRae*, 448 U.S. 297, 317-18 & n.19 (1980).

⁸³ See 500 U.S. 173; *Webster v. Reproductive Health Serv.*, 492 U.S. 490 (1989); 448 U.S.

than any argument in favor of public funding of abortion insofar as the Court has denied (however unfortunately) that education is a fundamental right.⁸⁴ Moreover, a parent who receives no funds for private schooling is nevertheless able to secure public schooling for her child, while denial of public funding for a woman's abortion may completely foreclose the exercise of her right.

Vouchers have only an attenuated connection to the parental rights and interests that *Meyer* and *Pierce* – and *Yoder* – were intended to protect. Even though *Meyer* and *Pierce* did not directly address the free exercise implications of these cases, the laws that the Court nullified in those decisions interfered with the freedom of parents to provide a religious education for their children.⁸⁵ Since religious education was inextricably tied to ethnic heritage, the statutes struck at the very heart of parental efforts to preserve their

297; *Maier v. Roe*, 432 U.S. 464 (1977).

⁸⁴ See *Plyler v. Doe*, 457 U.S. 202 (1982); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

⁸⁵ In *Meyer* and its companion cases, the parents challenged the constitutionality of the statutes because instruction in the German language was necessary to enable children to participate in German-language Lutheran services. See *Ross*, *supra* note 3, at 4, 62, 100. The opponents of the laws based their challenges in state court largely on the ground of religious freedom, *id.* at 100-01, but largely ignored religious issues in their arguments before the U.S. Supreme Court, presumably because they held little hope for the success of these arguments in the absence of the incorporation of the First Amendment into state law. See *id.* at 117-19. Similarly, the Roman Catholic opponents of the Oregon compulsory public education statute did not emphasize religious freedom issues in their argument before the Court, even though religious liberty was the issue that animated most Catholic opposition to the statute. *Id.* at 169. Like the opponents of the language laws in *Meyer*, the Catholics correctly perceived that the Court would have little sympathy for religiously-based arguments. *Id.* at 169, 189-91.

cultural identity.⁸⁶ Indeed, the compelling desire of Lutheran and Roman Catholic parents to educate their children in schools that propagated their religious faith was what motivated the parents to establish those schools and to challenge the statutes. Likewise, this is what sustained them in their long, difficult, and expensive struggle to overturn the laws. The Court's ruling that parents had a fundamental right to choose the schools that their children attended and the subjects that they studied constituted a critical landmark in judicial respect for religious freedom and cultural pluralism.

In contrast, the so-called "choice" that the voucher movement is ostensibly intended to promote has no apparent direct relation to the protection of any religious beliefs or the preservation of any cultural identity. Indeed, many parents who are using vouchers insist that they would much prefer to send their children to neighborhood public schools.⁸⁷ Rather, the announced goal of the voucher movement is to enable parents whose children attend sub-standard schools to obtain a better education for their children by providing them with the option to transfer to a non-public school. In other words, vouchers are intended to provide economic relief rather than to protect religion or culture.

Of course, it is not always possible to neatly distinguish between economic and non-economic issues. Indeed, the *Meyer* and *Pierce* decisions themselves nicely illustrate this

⁸⁶ *See id.* at 1-5, *passim*. Robert T. Meyer explained to his attorney that he had openly defied the Nebraska statute prohibiting the teaching of German because he had a "duty to uphold my religion. Teaching the children the religion of their fathers in the language of their fathers is part of that religion." ROSS, *supra* note 3 at 4 (citing MULLEN, *supra* note 24, at 218).

⁸⁷ Lynette Clemetson & Joan Raymond, *A Ticket to Private School*, NEWSWEEK, Mar. 27, 2000, at 32.

point by blurring the distinction between the economic and the non-economic rights of the plaintiffs.⁸⁸ The economic desire of parents to provide a quality education for their children has a moral component that perhaps permits it in part to transcend economics. One might even argue that the goal of parents to provide a quality education for their children is morally equivalent to the desire of parents to educate their children in a school that will properly transmit their religious and cultural heritage. One also might argue that the violence and lewdness that presumably pervade some public schools grossly offend the cultural and spiritual traditions of many of the parents whose children attend these schools. Moreover, school vouchers may help to promote the type of individual autonomy that *Pierce* facilitated.⁸⁹ Constitutionally, however, there is a gaping difference between affirmatively forcing parents to send a child to a public school to which the parents have religious objections and merely denying economically impoverished parents public funds to send their children to a non-public school when the doors of the public school house are wide open and welcoming.

Although the non-sectarian schools that were saved by *Pierce* may not have served as similar conduits for cultural identity, the abolition of non-public schools would have given the state a complete monopoly over elementary education, thereby truly depriving parents of a significant choice about how to educate their children. In contrast, parents who seek to

⁸⁸ See ROSS, *supra* note 3, at 186-88.

⁸⁹ See Michael Heise, *Equal Educational Opportunity and Constitutional Theory: Preliminary Thoughts on the Role of School Choice and the Autonomy Principle*, 14 J. L. & POL. 411, 451-58 (1998).

rescue their children from sub-standard schools and who cannot pay for private schools have a number of public options, such as inter-district transfers, charter schools, and political reform. Moreover, parents whose children attend under-funded schools may obtain relief through equity funding lawsuits.

Because school vouchers involve economic issues rather than the questions of religious freedom that were at least tacitly present in *Meyer* and *Pierce*, advocates of school vouchers cannot avail themselves of any of the free exercise elements that are implicit in those decisions and on which the Court might have based its rulings if it had been ready to incorporate the First Amendment into state law.⁹⁰ Moreover, since some commentators have argued that prohibitions against public funding of sectarian schools violates the Equal Protection Clause,⁹¹ it might not be wholly implausible to argue that vouchers interfere with the free exercise of religion since parental disapproval of the religious practices of parochial schools might present a wrenching dilemma for parents whose children attend poor schools and are eligible for school vouchers. In such a situation, the parent could face the cruel choice of leaving her child in a materially inferior public school or sending the child to a spiritually objectionable parochial school.⁹²

⁹⁰ See *supra* note 12 and accompanying text.

⁹¹ Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 140-52 (2000); Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 660-61 (1998).

⁹² See Minow, *supra* note 63, at 536. In discussing contracts between government and religious organizations for the provision of welfare services pursuant to 42 U.S.C. § 604(a), Professor Minow observes that “[v]oucher programs may directly burden the right of the destitute and desperate

Moreover, vouchers for sectarian schools would also impose disadvantages for parents and children who resided in communities in which their own religion did not maintain a sectarian school.⁹³

In addition to interference with free exercise of religion by the persons for whom vouchers were intended to assist, vouchers also could have a deleterious impact on the religious organizations that received vouchers insofar as vouchers might enable the government to increase its regulation of private and sectarian schools. The fear of increased public control of private education has caused the Home School Legal Defense Association to oppose government payments for private education. As an attorney for the Association has explained, “vouchers have a terrible potential to disrupt existing free market education.”⁹⁴ The availability of government funds also might diminish the willingness of parents to support private and parochial schools.⁹⁵ Proponents of parochial education should not permit vouchers to debilitate the schools that parents and churches of the 1920s fought so valiantly to protect in *Meyer and Pierce*.

individuals to exercise freely their own religion or nonreligion, as the case may be.” *Id.*

⁹³ See Kimberly M. DeShano, Note, *Educational Vouchers and the Religion Clauses Under Agostini: Resurrection, Insurrection and a New Direction*, 49 CASE W. RES. L. REV. 747, 784 (1999). As Ms. DeShano points out, exclusion of sectarian schools from a voucher program would enable the state to remain religiously neutral “as not all religions have community support to operate their own schools.” *Id.* at 795.

⁹⁴ Scott W. Somerville, *The History and the Politics of School Choice*, 10 GEO. MASON U. CIV. RTS. L.J. 121, 124 (1999-2000).

⁹⁵ See Marci A. Hamilton, *Power, the Establishment Clause, and Vouchers*, 31 CONN. L. REV. 807, 840-41 (1999).

Vouchers also may violate the First Amendment's Establishment Clause.⁹⁶ In particular, vouchers seem vulnerable under the second prong of the Supreme Court's so-called "*Lemon* test," which requires that legislation challenged under the Establishment Clause have "a primary or principal effect . . . that neither advances nor inhibits religion."⁹⁷ The Court's recent relaxation of the *Lemon* test in decisions involving aid to parochial education⁹⁸ have caused some commentators to suggest that the Court might be sympathetic toward vouchers for attendance at sectarian schools.⁹⁹ Other commentators believe that the adherence to the Court's existing doctrines would make vouchers for sectarian schools unconstitutional.¹⁰⁰ The situation is further complicated because the

⁹⁶ See generally, Lisa H. Thureau-Gray, *Trojan Ponies: Undermining the Establishment Clause in the Name of 'Child Benefit Theory,'* 27 J.L. & EDUC. 435 (1998).

⁹⁷ *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The other prongs of the *Lemon* test require that the legislation have a secular purpose and that it not create excessive entanglement between government and religion. *Id.*

⁹⁸ See *Mitchell v. Helms*, 120 S. Ct. 2530 (2000) (permitting state and federal school aid programs to provide material and equipment to parochial schools); *Agostini v. Felton*, 521 U.S. 203 (1997) (allowing public school teachers to provide remedial education to parochial school students pursuant to federal statute); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (allowing public school district to provide sign-language interpreter to deaf student in parochial school); *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481 (1984) (permitting state to aid blind students at sectarian college); *Mueller v. Allen*, 463 U.S. 388 (1983) (sustaining state statute providing tax deduction to parents for parochial school tuition, textbooks, and transportation).

⁹⁹ See Ira C. Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 375, 392-97 (1999); Minow, *supra* note 63, at 518; Greg Todd, *Fully Participating Voucher Programs and the Wisconsin Template: A Brick or a Breach in the Wall of Church-State Separation?*, 2 U. PA. J. CONST. L. 710, 729-39 (2000).

¹⁰⁰ See Hamilton, *supra* note 95; Danielle Jess Latham, Note, *Wall of Separation or Path to Interaction: The Uncertain Constitutional Future of School Vouchers in Light of Inconsistent*

Court has been closely divided in recent decisions in which it has upheld aid to parochial schools, with four justices adhering to a strict interpretation of the second prong of the *Lemon* test. The voucher issue hinges in part upon the precise manner in which voucher plans are framed, particularly since this could determine whether the Court would regard vouchers as a form of direct aid to parochial schools or as indirect aid to the extent that parents had the discretion to decide whether to use the voucher for a sectarian or a non-sectarian school.¹⁰¹

Although the Supreme Court of Wisconsin held in 1998 that Milwaukee's voucher program did not violate the Establishment Clause,¹⁰² a federal court in 1999 held that Ohio's voucher program contravened the Establishment Clause,¹⁰³ and the Supreme

Developments in Judicial Neutrality Between Church and State, 48 DRAKE L. REV. 403, 432 (2000).

¹⁰¹ See David S. Petron, Note, *Finding Direction in Indirection: The Direct/Indirect Aid Distinction in Establishment Clause Jurisprudence*, 75 NOTRE DAME L. REV. 1233, 1257-68 (2000); Laura S. Underkuffler, *Vouchers and Beyond: The Individual as Causative Agent in Establishment Clause Jurisprudence*, 75 IND. L.J. 167, 185-91 (2000); Martha McCarthy, *Religion and Education: Whither the Establishment Clause?*, 75 IND. L.J. 123, 160 (2000).

¹⁰² *Jackson v. Benson*, 578 N.W.2d 602 (Wis.), *cert. denied*, 525 U.S. 997 (1998).

¹⁰³ *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834 (N.D. Ohio 1999). In its decision, the court rejected several of the arguments that voucher proponents commonly make in support of the constitutionality of vouchers. First, the court found that the program was not unconstitutional merely because the program did not directly fund schools, but rather because it merely provided vouchers to parents for use mainly at sectarian schools. *Id.* at 863. The court explained that students had "no meaningful choice" between religious or secular schools because 82 percent of the schools that participated in the voucher program were sectarian. *Id.* The court stated that it had not been influenced in this conclusion by the fact that 96 percent of participating students had enrolled in religious schools. *Id.* at 865. The court distinguished *Witters*, 474 U.S. 484, on the ground that "nearly all state aid under the Voucher program will flow to religious institutions. It cannot be said that this aid flows to

Judicial Court of Maine in 1999 sustained Maine's exclusion of religious schools from a voucher program on the ground that their inclusion would violate the Establishment Clause.¹⁰⁴

Even if vouchers are found to be constitutional under the Establishment Clause, many state constitutions present impediments to vouchers. The Supreme Court of Vermont has held that a state voucher program violated the state's equivalent of the Establishment Clause.¹⁰⁵ A Florida court recently held that Florida's voucher plan violated a state constitutional provision that requires the state to provide "a uniform, efficient, safe, secure and high quality system of free public schools that allows students to obtain a high quality education."¹⁰⁶ According to the Florida decision, the voucher program "supplants the system of free public schools mandated by the constitution."¹⁰⁷ Other state

those institutions as a result of the choice of the Program beneficiaries since nearly all the schools participating are religious." 72 F. Supp. 2d at 855-56.

The court in *Zelman* also distinguished the Supreme Court's 1992 decisions in *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), and *Agostini v. Felton*, 521 U.S. 203 (1997), on the ground that the Ohio program, unlike the federal programs in *Agostini* and *Zobrest*, resulted in the receipt of actual funds by the sectarian schools. 72 F. Supp. 2d at 857-60. Moreover, the court emphasized that the Ohio program imposed no limits on the manner in which the funds were to be used. *Id.*

¹⁰⁴ *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127 (Me. 1999), *cert. denied*, 120 S. Ct. 364 (1999).

¹⁰⁵ *Chittenden Town Sch. Dist. v. Department of Educ.*, 738 A.2d 539 (Vt. 1999), *cert. denied sub nom. Andrews v. Vermont Dep't of Educ.*, 120 S. Ct. 626 (1999).

¹⁰⁶ *Holmes v. Bush*, No. CV99-3370, 2000 WL 526364 at *1 (Fla. Cir. Ct. Mar. 14, 2000) (citing to FLA. CONST. art. IX § 1).

¹⁰⁷ *Id.* at *7.

constitutions contain significant prohibitions against public funding of sectarian schools,¹⁰⁸ and many states enforce their own establishment clauses more restrictively than the federal clause is enforced by the federal courts.¹⁰⁹ One study has concluded that the states are roughly equally divided into three groups: those that have a supportive constitutional environment for school vouchers, those that have an unsupportive climate, and those in which the outcome would be uncertain.¹¹⁰ The Supreme Court's growing emphasis on federalism indicates that the Court would defer to state prohibitions on vouchers if the issue were framed primarily in terms of the Establishment Clause rather than the Free Exercise Clause.¹¹¹

A state could, of course, exclude sectarian schools from a voucher program. Although some commentators have suggested that such an exclusion might run afoul of the Equal Protection or Free Exercise Clauses,¹¹² the invalidation of such a statute on either

¹⁰⁸ Frank R. Kemerer, *The Constitutional Dimension of School Vouchers*, 3 TEX. F. ON CIV. LIB. & CIV. RTS. 137, 162-71 (1998). For example, most state constitutions require that all "public mon[ey] . . . be spent for a public purpose," and several state constitutions specifically require that only public schools receive public money. *Id.* at 169; 168. *See also* Deshano, *supra* note 93, at 778.

¹⁰⁹*See* Deshano, *supra* note 93; Kemerer, *supra* note 108.

¹¹⁰ Kemerer, *supra* note 108, at 179.

¹¹¹ *Id.* at 151-53.

¹¹² *See* Stephen L. Carter, *Oliver Wendell Holmes Lecture: Parents, Religion, and Schools: Reflections on Pierce, 70 Years Later*, 27 SETON HALL L. REV. 1194, 1218 (1997) ("if the state decides to give aid to any private schools at all, to exclude religious schools would be to do just what *Pierce* does not allow: to pressure parents (through the device of a financial penalty) to send their children to the religion-destroying schools rather than the religion-affirming ones."); Heytens, *supra* note

ground “would reverse a trend by the present U.S. Supreme Court to give greater deference to state authority.”¹¹³ Moreover, the exclusion of sectarian schools from a voucher program would enable the state to avoid favoring those denominations that have community support for sectarian schools at the expense of those which lack such support.¹¹⁴ In its recent decision striking down Cleveland’s voucher program, the U.S. District Court for the Northern District of Ohio refused to address the state’s contention that it would be unconstitutional to exclude religious schools from a voucher program.¹¹⁵ Congress might try to circumvent such state impediments by enacting a federal school voucher statute. Such a statute might “trump the application of state constitutional anti-establishment provisions in state court under the federal Supremacy Clause.”¹¹⁶

Vouchers are antithetical to the spirit of *Pierce* insofar as they interfere with the delicate balance between public and private education that lies at the core of that decision. The Court in *Pierce* tacitly rejected the contention of proponents of compulsory public

91 at 153-61 (arguing that exclusion of religious schools from a voucher system would violate equal protection); Mark Tushnet, *supra* note 20, at 51 (“[s]uch an exclusion appears to violate the fundamental principle of the religion clauses that a government may not discriminate in favor of or against religion in its provision of benefits.”).

¹¹³ Kemerer, *supra* note 108, at 152. Professor Kemerer believes that “past decisions suggest that the U.S. Supreme Court may allow states to apply their own constitutional provisions to challenged voucher programs in the interest of federalism.” *Id.* at 179.

¹¹⁴ See DeShano, *supra* note 93, at 795.

¹¹⁵ *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, 860-61 (1999).

¹¹⁶ Kemerer, *supra* note 108, at 152.

education that private schools threatened the viability of public education. As opponents of compulsory public education pointed out during the school wars of the early 1920s, non-public schools helped the public schools insofar as they relieved the state from finding extra funds to educate large numbers of students.¹¹⁷ Although *Pierce* implicitly recognized that the private and parochial schools posed no threat to the state that would justify the state's exercise of its police power to destroy these schools, the Court's opinion in no way denigrated public education. Indeed, even opponents of compulsory public education seemed to assume that public education represented the norm and non-public education the exception – a constitutionally protected and healthy exception, but an exception nonetheless.

In contrast, many proponents of vouchers seem hostile to the very concept of public education,¹¹⁸ just as the advocates of the compulsory public education law that the Court nullified in *Pierce* were hostile to any form of private elementary education. Many voucher advocates accept the highly questionable premises that public schools tend to be inferior to private ones,¹¹⁹ that poor public schools cannot be improved, and that vouchers would

¹¹⁷ ROSS, *supra* note 3, at 144, 156. Opponents of the Oregon school law, for example, variously estimated that the state would need between 3.6 and 6 million dollars to construct new schools if the statute were upheld, and that the annual cost of educating the 12,000 new pupils would exceed one million dollars (about 30 million dollars in today's money). *Id.* at 156.

¹¹⁸ See Molly Townes O'Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 TENN. L. REV. 359, 406-07, *passim* (1997).

¹¹⁹ See, e.g., DAVID C. BERLINER & BRUCE J. BIDDLE, *THE MANUFACTURED CRISIS: MYTHS, FRAUDS, AND THE ATTACK ON AMERICA'S PUBLIC SCHOOLS* 26 (1995); KEVIN B. SMITH & KENNETH J. MEIER, *THE CASE AGAINST SCHOOL CHOICE: POLITICS, MARKETS, AND FOOLS* 15-16

help raise educational standards.¹²⁰ In its decisions in *Meyer* and *Pierce*, the Court tacitly rejected similar arguments about private schools, for antagonists of the parochial schools had complained about low standards in such schools. Although some of these complaints were justified,¹²¹ others were wildly exaggerated,¹²² just as many of the criticisms of today's public schools may be overwrought. By emphasizing that the state had the power to regulate private education in order to require the maintenance of certain standards, the Court in *Pierce* implied that any deficiencies in private schools did not alone permit the state to require compulsory public education.

(1995).

¹²⁰ Lynn Olson, *New Studies on Private Choice Fan the Flames*, EDUC. WK., Sept. 4, 1996, at 1, 20 (citing conflicting studies regarding performance of students who used vouchers in Milwaukee program); Adam Cohen, *A First Report Card on Vouchers*, TIME, Apr. 26, 1999, at 36 (discussing Indiana University study that concluded that students who used vouchers to attend established private schools slightly outperformed comparable public school students, while students who attended schools that had been established for the purpose of accepting vouchers had performance levels inferior to public school counterparts).

¹²¹ ROSS, *supra* note 3, at 48, 78, 102, 140-41. In Michigan, for example, where voters in 1920 and 1924 rejected compulsory public education laws, “[t]he Roman Catholic schools had no superintendent until 1918, and administration continued to be weak for many years thereafter since the superintendent had no office or staff and served also as a parish priest.” *Id.* at 141. Deploring the deficiencies in some of the Lutheran schools in Michigan in 1918, a Lutheran “pastor remarked that it was ‘small wonder’ that public school officials were ‘not always friendly towards our school system.’” *Id.* (quoting H. Grueber to Theodore Graebner, Oct. 2, 1918, Graebner Papers, Box 122, Concordia Historical Institute, Clayton Missouri).

¹²² In advocating compulsory public education during the early 1920s, a Florida public school teacher argued that any public savings produced by parochial schools were “more than counterbalanced by increased public spending for ‘the children’s homes, . . . charity hospitals, insane asylums, courts of justice and prisons’ that were needed to accommodate parochial school alumni.” ROSS, *supra* note 3, at 70 (quoting Walter B. Jernigan, *Public Schools in Florida*, NEW AGE, Jan. 1923, at 16).

Moreover, some advocates of vouchers argue that public schools are presently so stratified by race and income that they no longer effectively transmit the civic values that the advocates of the common school movement foresaw during the nineteenth century. Analogous arguments about private schools were made before *Pierce* by advocates of compulsory public education, who argued that non-public schools created deleterious racial, religious, and economic stratifications.¹²³

Despite the diversity of an increasingly heterogeneous society, it is still possible to identify core values to which the overwhelming majority of parents appear willing to subscribe.¹²⁴ To the extent that Americans disagree about values, they are more likely to disagree about the manner in which core values should be applied in specific situations rather than about the values themselves. For example, while nearly everyone would agree that children should respect their parents, there is considerable disagreement about the methods by which parents may discipline children who fail to respect their parents.

¹²³ ROSS, *supra* note 3, at 71.

¹²⁴ Rosemary C. Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 YALE L. & POL'Y REV. 169, 225 (1996). As Professor Salomone has explained:

[a]lthough not intended to be exhaustive, a listing of common values might include a mix of character traits such as honesty, integrity, responsibility, delayed gratification, hard work, respect for authority, and civic virtue combined with more fundamental political principles, particularly justice and fairness, political and religious tolerance, and equality in the sense of equal dignity for all. As a source of these “shared values,” we should look to our common history and particularly to the United States Constitution, as interpreted by the Supreme Court, and to federal statutory law with supporting administrative regulations as statements of majority consensus.

Id.

Similarly, while nearly everyone values the virtue of hard work, reasonable persons may differ about the extent to which food stamps given to the poor or inheritance taxes imposed on the rich encourage or discourage this virtue.

Some critics of public education also contend that the public schools fail to instill virtues, even to the extent that it remains possible to identify such virtues. Notwithstanding their shortcomings, however, public schools still help to transmit basic values and to promote social cohesion.¹²⁵ Any deficiencies in fulfilling this mission does not mean that public schools are incapable of improvement. As one commentator has aptly stated: “The cry of ‘Fire!’ has been heard in the institution of public education. Exit should not be the only option. Instead of devoting all resources to finding an exit, the public should find a way to extinguish the fire and to preserve a worthy and venerable structure.”¹²⁶

¹²⁵ As Professor Dupre argued recently:

[o]ne of the great strengths of the public school institution is its ability to encourage social integration. Indeed, this nation may have no other institution with the same potential of integrating rich and poor on a daily basis and inculcating our commitment to representative democracy while children are young and before they become set in their views. Learning to deal with, and perhaps even be friends with, children of a different economic, racial, or religious background can be an enriching experience for children.

Anne Proffitt Dupre, *A Study in Double Standards, Discipline, and the Disabled Student*, 75 WASH. L. REV. 1, 84 (2000).

¹²⁶ Note, *The Hazards of Making Public Schools a Private Business*, 112 HARV. L. REV. 695, 712 (1999). This commentator has likewise aptly pointed out that the possibility that “the public schools are not meeting the ideal” does not necessarily mean “that the ideal is a bad one.” *Id.* at 710.

Although advocates of vouchers contend that the transfer of money away from supposedly inferior public schools will encourage public schools to raise their standards, vouchers could have precisely the opposite effect. Vouchers could relieve public officials of political pressure to improve sub-standard schools since they would reduce the number of students attending substandard schools and remove from the public schools the very students whose parents would be the most likely to seek public school reform.¹²⁷ Moreover, the competition argument is flawed insofar as private schools enjoy certain competitive advantages over public schools, particularly their far more arbitrary power over the selection and retention of students.¹²⁸

¹²⁷ As Professor Minow has pointed out, “[t]he immediate consequence of school-choice programs will most likely leave the most vulnerable children from the least-engaged and least-solid families in the worst schools.” Minow, *supra* note 63, at 528. Likewise, one opponent of school vouchers has aptly expressed fear that public schools would be “left only with children with disabilities, children of parents who do not care if, or where, their children attend and children who have been kicked out of all the private schools.” Jennifer A. Hendrikson, Comment, *Jackson v. Benson: School Vouchers – Offering an Apple to Private Schools; Creating a Serpent for Public Schools*, 75 CHI.-KENT L. REV. 259, 277 (1999) (quoting an opponent of an Oklahoma voucher proposal). See also James S. Liebman, *Voice, Not Choice*, 101 YALE L.J. 259, 277-93 (1991) (reviewing JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICAN SCHOOLS* (1990)).

¹²⁸ As one commentator has pointed out, the public choice theory is flawed because:

the public and private schools are not equal in terms of public accountability. The public schools must not only adhere to curriculum standards and anti-discrimination practices, but public schools must also admit every student that wishes to attend. On the other hand, private schools are less accountable to the community. Thus, they have more power to choose who to educate.

Hendrikson, *supra* note 127, at 277.

Advocates of vouchers have also failed to explain what will become of public school systems that have lost the support of the parents who presumably care most about their children's education. As one leading sociologist of education has predicted, "In any choice plan, the families who have the least resources in terms of information, energy and money will be left behind."¹²⁹ Moreover, it is unlikely that states will have the means to fund vouchers for every parent who wishes to receive one.¹³⁰

The slogan of the opponents of compulsory public education during the early 1920s was "Whose is the Child?," a question to which the Court in *Pierce* provided an answer that struck a somewhat ambiguous balance between the rights of the parents and the rights of the state. Perhaps the rallying cry of opponents of school vouchers should be "Education is not a commodity." It is erroneous to assume that education is amenable to normal market forces. As Professor Liebman has explained, "[o]ne thing markets are *not* good for is allocating public goods, and an educated public is just that. Accordingly, exit and choice will never work well to allocate that good – unless working well means warehousing the poor, the less gifted, and the academically disinclined in educational facilities that make existing public schools look like the Institute for Advanced Studies."¹³¹

¹²⁹ Jill Jaspersen, *Renaissance in Education: The Constitutionality and Viability of an Educational Choice or Voucher System*, 1993 B.Y.U EDUC. & L.J. 126, 146 (1993) (quoting Robert L. Crain, a professor of sociology and education at Columbia University Teachers College).

¹³⁰ See Timothy D. Lynch, Note, *Education as a Fundamental Right: Challenging the Supreme Court's Jurisprudence*, 26 HOFSTRA L. REV. 953, 969 (1998).

¹³¹ Liebman, *supra* note 127, at 313. Decrying school vouchers as "recipe for disaster," Professor Liebman argues that voucher plans, regardless of how they are designed, "inevitably will turn

The use of *Meyer* and *Pierce* by both the proponents and opponents of school vouchers illustrates again that these decisions remain enigmatic, controversial, and vital. Both decisions compel significant restrictions on the power of the state to interfere with the autonomy of parents over the education of their children. Both decisions also recognize that the state has significant power to regulate the manner in which children are educated. The decisions therefore must remain controversial in the absence of pure communism or pure libertarianism, for there is no obvious or perfect way to balance the competing interests of the parents and the state in matters of education in a free, but statist, society. In trying to achieve this balance, one might recall W.H. Auden's observation that civilization is a function of "the degree of diversity attained and the degree of unity retained."¹³² Parental rights involving the education of their children help to promote a diversity that is essential to a free society, but the retention of governmental authority in this process helps to assure a unity that is no less essential.

the schools into new and more efficient machines for sorting educational consumers into numerous homogenized pools of parents and children with the same levels of wealth, intellectual ability, consumer sophistication, academic orientation, and ethnicity. That, after all, is what markets are good for." *Id.*

¹³² W.H. AUDEN, FOREWARDS AND AFTERWARDS 9 (1973).