



11-1-2000

# Taking Pierce Seriously: The Family, Religious Education, and Harm to Children

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## Recommended Citation

Richard W. Garnett, *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children*, 76 Notre Dame L. Rev. 87 (2000).  
Available at: <http://scholarship.law.nd.edu/ndlr/vol76/iss1/3>

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## SYMPOSIUM

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### TAKING *PIERCE* SERIOUSLY: THE FAMILY, RELIGIOUS EDUCATION, AND HARM TO CHILDREN

*Richard W. Garnett*\*

Most people believe in the power of prayer, and many try to orient and direct their lives in accord with this and other religious beliefs.<sup>1</sup> To many scholars and theorists, this persistence of faith and piety is a bit mysterious; to some, it is even cause for concern.<sup>2</sup> True, many of those who pray likely think of what they are doing in New Age, psycho-oncological, therapeutic, “power of positive thinking” terms and so are less worrisome.<sup>3</sup> For many others, though, prayer is more than “having a good thought” about something or participating

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1 See, e.g., David Whitman, *More Moral*, THE NEW REPUBLIC, Feb. 22, 1999, at 18, 18 (citing a 1997 Gallup Poll showing that ninety percent of Americans pray).

2 As Michael Paulsen has noted, many in the academy “believe that religious faith is crazy (or . . . put more gently, ‘irrational’) and its adherents are the functional equivalent of lunatics.” Michael Stokes Paulsen, *God Is Great, Garvey Is Good: Making Sense of Religious Freedom*, 72 NOTRE DAME L. REV. 1597, 1613 (1997) (book review); see, e.g., Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L.J. 453 (1996).

3 See James G. Dwyer, *Spiritual Treatment Exemptions to Child Medical Neglect Laws: What We Outsiders Should Think*, 76 NOTRE DAME L. REV. 147, 149 (2000) (discussing “the usefulness of positive thinking, . . . the ability of the mind to support physical

in a moment of warm or hopeful feeling at the invitation of a politician. It is, instead, a mysterious, yet miraculously efficacious, form of participation in and cooperation with God's creative activity, His providence, and "His plan of love for men."<sup>4</sup> Indeed, for many, prayer is not optional; they regard themselves as called—as *commanded*—to pray "in everything"<sup>5</sup> and "without ceasing."<sup>6</sup>

Moreover, many people believe that prayer is a perfectly appropriate response to physical illness, pain, and injury.<sup>7</sup> They have no problem with medical science, hospitals, drugs, and doctors, but they also believe that God hears and answers prayers. They know that He cures the sick, comforts the suffering, and heals the injured. To paraphrase the old saying, these believers pray as if everything depends on God, but are quite willing to act as if everything depends on medicine.

For still others—Christian Scientists, for example—prayer is, in times of sickness, not only appropriate, it is the response *required* by their faith.<sup>8</sup> Those under such religious obligations often refuse conventional and even emergency medical treatment for themselves and—more controversially—for their children. But for their religious motivation, these refusals could be viewed as culpably negligent, as abusive, or perhaps even as criminal.<sup>9</sup>

responses to disease and injury, and . . . the possibility of using prayer and religious teaching as one form of such positive thinking").

4 U.S. CATHOLIC CONFERENCE, CATECHISM OF THE CATHOLIC CHURCH §§ 2565, 2738 (2000) (relating prayer to "the living relationship of the children of God with their Father who is good beyond measure" and to our "cooperation with [God's] providence [and] his plan of love for men"); *see id.* § 2568 ("Prayer is bound up with human history, for it is the relationship with God in historical events.").

5 *Philippians* 4:6 ("Do not be anxious about anything, but in everything, by prayer and petition, with thanksgiving, present your requests to God.").

6 1 *Thessalonians* 5:16–18 ("Rejoice always, pray without ceasing, give thanks in all circumstances; for this is the will of God in Christ Jesus for you.").

7 *See, e.g., James* 5:15–16 ("And the prayer offered in faith will make the sick person well; the Lord will raise him up . . . Therefore confess your sins to each other and pray for each other so that you may be healed. The prayer of a righteous man is powerful and effective.").

8 *See, e.g., Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084, 1088 (8th Cir. 2000) (noting that Christian Scientists "object to medical care and embrace prayer as the sole means of healing"). *See generally* MARY BAKER EDDY, SCIENCE AND HEALTH WITH KEY TO THE SCRIPTURES (First Church of Christ, Scientist 1994) (1875). For a discussion of other religious groups that opt for spiritual healing over medical treatment, *see, for example, Jennifer L. Hartsell, Comment, Mother May I . . . Live? Parental Refusal of Life-Sustaining Medical Treatment for Children Based on Religious Objections*, 66 TENN. L. REV. 499, 503–06 (1999).

9 *See, e.g., State v. Williams*, 484 P.2d 1167 (Wash. Ct. App. 1971) (affirming manslaughter conviction where husband and wife failed to supply their young child with necessary medical attention).

Most states, however, exempt religious parents from prosecution, or limit their exposure to criminal liability, when their failure to seek medical care for their sick or injured children is motivated by religious belief.<sup>10</sup> These spiritual-healing exemptions are both common and controversial, and they raise important questions, including: How ought we to reconcile what sometimes appear to be the competing demands of a Constitution that protects religious liberty and family integrity by disabling government,<sup>11</sup> our moral commitments to the full personhood and equal dignity of children,<sup>12</sup> and a *parens patriae* tradition in which the health and welfare of children are thought to be the proper objects of government concern and activity?<sup>13</sup>

Although the topic for this symposium is "Children, Spiritual Healing, and Religious Exercise," I am not going to discuss whether spiritual-healing exemptions from otherwise generally applicable child-welfare and criminal laws are constitutional, sensible, or morally justifiable.<sup>14</sup> Instead, I will ask what, if anything, the debate about

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10 On spiritual-treatment exemptions generally, see James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321 (1996); Eric W. Treene, *Prayer-Treatment Exemptions to Child Abuse and Neglect Statutes, Manslaughter Prosecutions, and Due Process of Law*, 30 HARV. J. ON LEGIS. 135 (1993).

11 This is *precisely why* the Framers disabled—or refused to enable—the federal government. See, e.g., *United States v. Lopez*, 514 U.S. 549, 552 (1995).

12 See, e.g., POPE JOHN PAUL II, THE APOSTOLIC EXHORTATION ON THE ROLE OF THE CHRISTIAN FAMILY IN THE MODERN WORLD [*Familiaris consortio*] No. 26 (St. Paul Editions 1981) ("[S]pecial attention must be devoted to the children by developing a profound esteem for their personal dignity, and a great respect and generous concern for their rights."); James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371, 1446 (1994) ("[T]he child is . . . not the mere creature of the parent . . . [but is rather] his or her own person.").

13 *Parens patriae*—"parent of the country"—is the "principle that the state must care for those who cannot take care of themselves." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990). As one court has observed, "[I]t is well-settled that the State as *parens patriae* has a special duty to protect minors and, if necessary, make vital decisions as to whether to submit a minor to necessary treatment where the condition is life threatening, as wrenching and distasteful as such actions may be." *In re E.G.*, 549 N.E.2d 322, 327 (Ill. 1989) (internal quotation marks and citation omitted). See generally Douglas R. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C. L. REV. 205 (1971).

14 I believe that spiritual-treatment exemptions *can* be crafted to be both constitutional and morally justified and that such exemptions are not inconsistent with court-ordered medical care over parents' religion-based objections when such care is likely to succeed and is clearly necessary to avoid death or serious physical harm to a young child. See JOSEPH GOLDSTEIN ET AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 128–38 (1996) (discussing situations where court-ordered medical care over parents' objections is appropriate).

these exemptions says about the State's authority to override parents' decisions about education, particularly religious education.<sup>15</sup> What can the questions surrounding spiritual-treatment exemptions tell us about who should decide what, where, for what purpose, and from whom children will learn? If we accept, for example, that the State may in some cases require medical treatment for a child, over her parents' objections, to avoid serious injury or death, should it follow that it may regulate, or even forbid, a child's religious training or religious-school education to prevent an analogous, though perhaps less tangible, "harm"? What is the extent of the Government's power to interfere—whether to protect children's "temporal well-being,"<sup>16</sup> to inculcate majoritarian values, or to "bolster the preconditions of liberal democracy"<sup>17</sup>—with parents' education-related decisions and, in particular, with their decisions to provide religious training to their children and to send them to authentically religious schools?<sup>18</sup> The Supreme Court has said, over and over again, in a long line of cases from *Pierce v. Society of Sisters*<sup>19</sup> to last summer's *Troxel v. Granville*,<sup>20</sup> that parents enjoy a "fundamental" right to direct and control the education of their children, but do we *really* accept, or even understand, the premises, foundations, and implications of these repeated pronouncements?<sup>21</sup>

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15 My fellow contributor, Professor James Dwyer, has highlighted the connection between the medical-treatment and education issues. See JAMES G. DWYER, RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS (1998); Dwyer, *supra* note 3, at 168–70, 172–73; Dwyer, *supra* note 10, at 1329–53.

16 Dwyer, *supra* note 10, at 1407 ("The state itself must determine what children's fundamental interests are and, in doing so, may only consider children's temporal well-being.").

17 William A. Galston, *Expressive Liberty, Moral Pluralism, Political Pluralism: Three Sources of Liberal Theory*, 40 WM. & MARY L. REV. 869, 869 (1999).

18 By "authentically" religious schools, I mean simply schools whose religiosity goes beyond mere institutional affiliation or historical tradition, schools whose "overriding religious mission . . . permeates their teaching," *Mitchell v. Helms*, 120 S. Ct. 2530, 2582 (2000) (Souter, J., dissenting), schools that the Supreme Court has until recently too often branded disapprovingly as "pervasively sectarian," *id.* at 2552 (plurality opinion) (rejecting the Court's "pervasively sectarian" test as a doctrine "born of bigotry").

19 268 U.S. 510, 535 (1925).

20 120 S. Ct. 2054, 2060 (2000).

21 Some think the Court has yet to come up with a good *theory* to explain its holding in *Pierce* and to make it cohere with the autonomy-centered individualism that seems generally to animate its constitutional jurisprudence. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). As a result, parents' educational rights "are both ill defined and vulnerable to unduly deferential judicial review of state educational regulation." Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 938 (1996).

Now, it has been argued powerfully that parents in a liberal state do not and should not have a "right" to control their children's education—after all, it is said, no one has a *right* to control anyone.<sup>22</sup> Children are not slaves; they are no one's property.<sup>23</sup> It follows, then, that decisions about children's education should, like all child-related decisions, be "child centered"; they should be guided entirely by children's interests, *as determined by the State*, and not by appeals to the liberties, rights, interests, or preferences of parents.<sup>24</sup> But again, the Supreme Court said in *Pierce*, and still purports to believe,<sup>25</sup> that our Constitution guarantees the "liberty of parents and guardians to direct the upbringing and education of children."<sup>26</sup> Can this statement be defended?

I think so.<sup>27</sup> I certainly *hope* so. Recent calls for a "thicker" liberalism and for the harnessing of education to create truly liberal citizens make it all the more important that we take *Pierce* seriously. And

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22 See, e.g., Dwyer, *supra* note 12, at 1405 ("[A]s a general rule, our legal system does not recognize or bestow on individuals rights to control the lives of other persons."). But see Stephen G. Gilles, *Hey, Christians, Leave Your Kids Alone!*, 16 CONST. COMMENT. 149, 187–90 (1999) (arguing that there is nothing "anomalous" about permitting parents, rather than the State, to balance children's spiritual and temporal interests).

23 See, e.g., Barbara Bennett Woodhouse, "Who Owns the Child?" *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992).

24 See, e.g., Dwyer, *supra* note 3, at 160–61; Dwyer, *supra* note 12, at 1374 ("I propose that children's rights, rather than parents' rights, be the legal basis for protecting the interests of children."). Then again, many who endorse parental control do so *precisely* because they think it well serves the best interests of children. See, e.g., *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (noting that the concept of the "family as a unit with broad parental authority over minor children" is rooted in the recognition that the "natural bonds of affection lead parents to act in the best interests of their children"); Gilles, *supra* note 22, at 951 n.53 (1996) ("The human flourishing of adult parents, which is highly bound up with the education of their children, matters too, as does society's interest in good citizens. Nonetheless, no justification is persuasive if it fails to give great weight to the child's best interest.").

25 See *Troxel*, 120 S. Ct. at 2060 (plurality opinion) ("[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) ("[T]he 'liberty' specially protected by the Due Process Clause includes the right . . . to direct the education and upbringing of one's children . . .").

26 *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925).

27 See Stephen L. Carter, *Parents, Religion, and Schools: Reflections on Pierce, 70 Years Later*, 27 SETON HALL L. REV. 1194, 1195 (1997) ("I want to speculate . . . on the possibility that *Pierce* is both rightly decided and rightly reasoned, and thus that parents really do possess a fundamental constitutional right to direct the upbringing of their children."). See generally, e.g., Stephen G. Gilles, *Liberal Parentalism and Children's Educational Rights*, 26 CAP. U. L. REV. 9 (1997); Gilles, *supra* note 22.

so, I will try to outline some reasons why it *does* make sense to talk in *Pierce*-like terms, not only about parental control over education, but also about the intrinsic dignity of the family—the “first and vital cell of society”<sup>28</sup>—and its role in civil society. Given the nature and format of this symposium, my suggestions and thoughts on these matters are unavoidably preliminary. I will not be able in this Article to flesh out completely my own arguments or to respond fully to other and opposing views. Still, I will suggest that, if we *do* resolve to take *Pierce* seriously, we should then say that state functionaries, guided and restrained by a proper humility about their authority and competence, should meddle with parents’ educational decisions only to prevent *harm*, very carefully defined, to a child. That is, they should *not* intervene simply whenever they think intrusion or oversight would serve the Government’s notion of the child’s “best interests” or its own perceived need and claimed prerogative to create a certain kind of citizen.<sup>29</sup>

The problem is, how do we define “harm.” We have a good idea what physical abuse and medical neglect look like, but when are parents’ educational decisions, and particularly their decisions about religious training, “harmful”? This is a difficult question, but I will propose, as a start, that the content of religious instruction, traditions, or beliefs should not be viewed as harmful in the sense necessary to justify government second-guessing or “supervention”<sup>30</sup> of parents’ decisions about such instruction. In a free society, one that values religious freedom, the State should not entertain, let alone enforce, a belief that children would be better off without religious faith.

## II. THE QUESTION PRESENTED—WHY WE OUTSIDERS AGREE

Almost every state exempts religious parents who opt for prayer over medical treatment for their children from criminal prosecution

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28 POPE JOHN PAUL II, *supra* note 12, No. 42, at 67 (quoting SECOND VATICAN ECUMENICAL COUNCIL, DECREE ON THE APOSTOLATE OF THE LAITY [*Apostolicam actuositatem*] No. 11 (1965)).

29 In my view, government “intervention” in the family *is* intervention. *But see* Dwyer, *supra* note 3, at 167 (“[T]he reality is that the family is not a separate, primordial sphere that is or can be cordoned off from the power of the state. Quite the opposite. The law creates the family, and things could not be otherwise.”); Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 838 (1985). But this is *not* “the reality.” The law no more “creates” the family than the Rule Against Perpetuities “creates” dirt.

30 Joseph Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645, 647 (1977).

and from liability under neglect, abuse, and endangerment laws.<sup>31</sup> These exemptions, and the conflict between religious views and children's healthcare generally, have been examined thoroughly in the law reviews,<sup>32</sup> the courts,<sup>33</sup> and the public square.<sup>34</sup> And it is safe to say, as my co-panelist Professor James Dwyer observes, that we "outsiders"—"we who are not members of a religious group with beliefs opposed to medical care and who therefore have no personal stake in the issue"<sup>35</sup>—disagree among ourselves about the wisdom, constitutionality, and morality of such exemptions. Some take the position that exemptions reflect attempts to balance free-exercise values and the State's interest in protecting children, that it is appropriate to balance these interests, and that while blanket exemptions might reflect excessive deference to the religious beliefs of parents, some limitation

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31 See *Hermanson v. State*, 604 So. 2d 775, 776–77 n.1 (Fla. 1992) (listing statutes); Hartsell, *supra* note 8, at 509–10.

32 See generally, e.g., Dwyer, *supra* note 10; Ann MacLean Massie, *The Religion Clauses and Parental Healthcare Decisionmaking for Children: Suggestions for a New Approach*, 21 HASTINGS CONST. L.Q. 725 (1994); Rita Swan, *On Statutes Depriving a Class of Children of Rights to Medical Care: Can This Discrimination Be Litigated?*, 2 QUINNIPIAC HEALTH L.J. 73 (1998); LaDonna DiCamillo, Comment, *Caught Between the Clauses and the Branches: When Parents Deny Their Child Non-emergency Medical Treatment for Religious Reasons*, 19 J. JUV. L. 123 (1998); Hartsell, *supra* note 8; Anne D. Lederman, Note, *Understanding Faith: When Religious Parents Decline Conventional Medical Treatment for Their Children*, 45 CASE W. RES. L. REV. 891 (1995).

33 See, e.g., *Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084, 1088 (8th Cir. 2000); *Lybarger v. People*, 807 P.2d 570, 571 (Colo. 1991); *Hermanson*, 604 So. 2d at 776; *Commonwealth v. Twitchell*, 617 N.E.2d 609, 612 (Mass. 1993); *State v. McKown*, 475 N.W.2d 63, 64 (Minn. 1991); *State v. Hays*, 964 P.2d 1042, 1044 (Or. Ct. App. 1998); *Commonwealth v. Nixon*, 718 A.2d 311, 312 (Pa. Super. Ct. 1998).

34 See, e.g., Ellen Barry & Elisa Crouch, *Probe Asks if Faith Put Children at Risk*, BOSTON GLOBE, Nov. 16, 1999, at B1; Mark Larabee, *Balancing Rights Makes Faith-Healing Bills Thorny*, PORTLAND OREGONIAN, June 28, 1999, at E8; Mark Larabee, *Christian Scientists Promote Legal Shields for Faith Healers*, CLEVELAND PLAIN DEALER, Jan. 9, 1999, at 3F; Nancy Lofholm, *A Matter of Faith, Justice: Is Withholding Care a Crime?*, DENVER POST, Mar. 15, 1999, at A1; Patricia G. Miller, *Parents Hold Major Role in Minors' Decisions*, PITTSBURGH POST-GAZETTE, Apr. 20, 2000, at B2. For more information on religion-based exemptions from neglect and abuse statutes, from an advocacy group that opposes such exemptions, see <http://www.childrenshealthcare.org/legal.htm> (last visited Aug. 31, 2000).

35 Dwyer, *supra* note 3, at 148. I disagree with the claim that those of us "outsiders" who are not required by our faith to rely solely on spiritual healing therefore "have no personal stake" in questions about spiritual-healing exemptions. The exemptions debate implicates broader questions about religious freedom, family integrity, and parental control, questions in whose correct resolution a great many "outsiders" have a significant "stake."



on exposure to criminal liability is probably appropriate.<sup>36</sup> Others insist, though, that any appropriate balancing of interests must weigh heavily against spiritual-healing exemptions, or that it is simply wrong to “balance” children’s health against parents’ faith.<sup>37</sup> Professor Dwyer, for example, objects to exemptions because they privilege the religious views and interests of parents over the Government’s view of children’s temporal interests.<sup>38</sup> Although “extremely limited” exemptions might be justified by reasons “tied to the interests of the children of insiders, as the State sees them” and by “general principles regarding treatment of individuals in light of their personhood,” the sweeping provisions that exist in many states are, he thinks, unconstitutional, illiberal, and—put bluntly—“immoral.”<sup>39</sup>

I am not entirely sure how we should strike the balance between parents’ religion-based preferences for prayer over doctors’ and the Government’s interest in protecting the physical well-being of chil-

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36 See, e.g., DiCamillo, *supra* note 32, at 124; Hartsell, *supra* note 8, at 528–30; Lederman, *supra* note 32, at 894–95. Professor David Steinberg, for example, offers such a moderate view. He recognizes both the First Amendment right of religious parents to follow the dictates of their faith when treating a child’s illness and the State’s interest in protecting the health and welfare of its citizens, particularly children, who, he observes, cannot care for themselves. Given these competing values, he concludes that the Government may require parents to obtain medical care, and punish them for not obtaining such care, only when the failure to seek treatment poses a serious threat of permanent harm to a child’s health. See David E. Steinberg, *Children and Spiritual Healing: Having Faith in Free Exercise*, 76 NOTRE DAME L. REV. 179, 207 (2000).

37 See, e.g., Janna C. Merrick, *Christian Science Healing of Minor Children: Spiritual Exemption Statutes, First Amendment Rights, and Fair Notice*, 10 ISSUES L. & MED. 321, 341 (1994); Jennifer L. Rosato, *Putting Square Pegs in a Round Hole: Procedural Due Process and the Effect of Faith Healing Exemptions on the Prosecution of Faith Healing Parents*, 29 U.S.F. L. REV. 43, 116 (1994); Elizabeth A. Lingle, Comment, *Treating Children by Faith: Colliding Constitutional Issues*, 17 J. LEGAL MED. 301, 329 (1996).

38 See Dwyer, *supra* note 3, at 166–68. Professor Dwyer has developed his “child centered” approach to child rearing, his arguments against *Pierce*-style notions of parents’ rights, and his criticisms of religious education in a number of books and articles, including DWYER, *supra* note 15; James G. Dwyer, *Children’s Interests in a Family Context—A Cautionary Note*, 39 SANTA CLARA L. REV. 1053 (1999); Dwyer, *supra* note 10; Dwyer, *supra* note 12.

39 Dwyer, *supra* note 3, at 166. The latter charge—that spiritual-treatment exemptions are “immoral to the extent they cannot be justified in terms of what is best, from the state’s perspective, for the children whose welfare is at stake”—seems too harsh, at least with respect to exemptions from criminal prosecution. Even accepting child-centered premises—that is, that children’s interests, not parents’ wishes, control and that the State’s views about children’s temporal best interests are privileged—we might morally still refuse to treat a religious parent’s state of mind as sufficiently blameworthy to merit criminal punishment.

dren.<sup>40</sup> It should be noted that, exemptions from prosecution aside, courts often order medical treatment for children, on a case-by-case basis, even over those children's parents' religion-based objections. These orders implicate First Amendment and religious-freedom values, but I think most of us would agree that they can be, if done right, consistent with a proper respect for parental prerogatives, religious freedom, and limited government.<sup>41</sup>

This is because we generally *agree*—insiders and outsiders with each other, and outsiders among themselves—that the “harm” to the

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40 A careful examination of the constitutionality of spiritual-treatment exemptions and a response to the claim that they violate the Establishment Clause because they privilege the religious beliefs of “insiders” are beyond the scope of this Article. See Dwyer, *supra* note 3, at 152 (“[S]upporters of exemptions cannot appeal to religious beliefs, since the State may not assume that any particular religious beliefs are true. . . . [A]lso . . . [they] cannot expect the State itself to *adopt* the insiders’ perspective, insofar as it is based on religious beliefs.”). Assuming, though, that exemptions are denomination-neutral, see *Larson v. Valente*, 456 U.S. 228, 244–47 (1982), why should they be regarded as anything other than run-of-the-mill “accommodations” of religion? See generally *Children’s Healthcare Is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084 (8th Cir. 2000) (upholding certain Medicare-related exemptions for Christian Science facilities); Treene, *supra* note 10, at 160–64 (analyzing spiritual-healing exemptions in light of the Establishment Clause). The First Amendment permits the Government to pursue the valid secular purpose of accommodating religious belief and practice. See, e.g., *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (“Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”); *Zorach v. Clauson*, 343 U.S. 306, 315 (1952) (rejecting argument that “public institutions can make no adjustments . . . to accommodate the religious needs of the people”). See generally William K. Kelley, *The Primacy of Political Actors in Accommodation of Religion*, 22 U. HAW. L. REV. (forthcoming 2000); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 695–96 (1992). The claim that exemptions are unconstitutional because they take account of religious belief, recognize that insiders have religious interests, or respond to those beliefs by lifting a government-imposed burden is simply wrong. All accommodations take account of religious beliefs. That is why they exist. It is not true that government may only accommodate religion by accident. See, e.g., *Amos*, 483 U.S. at 338 (“[This Court] has never indicated that statutes that give special consideration to religious groups are *per se* invalid. That would run contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause.”).

41 But see Dwyer, *supra* note 3, at 166.

Curiously, though, most proponents of this sort of “spheres of authority” position allow for state control over child rearing at the margins. The State may step in to prevent death. But they provide no real explanation for this qualification of the separate spheres position, for ceding some authority to the State.

child that is used to justify supervision of parents' religion-based health-care decisions *really is* a harm. We know what physical or medical harm looks like. And, whoever we think is the best decision-maker when it comes to children's health-care, and whether or not we think the religious beliefs of parents and children may be considered by that decision-maker, and whatever our general views about the competing claims of religious believers and governments, *none of us* wants a child to die or to suffer serious physical harm. Certainly, few spiritual-healing believers are oblivious of or indifferent to their children's temporal well-being.<sup>42</sup> They simply believe that prayer, religious faith, and spiritual-healing practices are more likely to avert that harm, and to do so via more acceptable (to them, and to God) means, than is medical treatment.

This helps to explain why outsiders who disagree strongly about the power of the State and the child-rearing rights of parents actually *agree* as much as they do about the propriety of court-ordered emergency medical treatment. It is not because parents' moral claims evaporate in the health-care context, but rather because, *first*, no one thinks these claims include an entitlement to do or cause real harm to a child; *second*, we all agree that death or physical injury is a real harm; and *third*, we are less worried, because of this agreement, than we might be in other contested contexts about the dangers of statist second-guessing.

Can this point of consensus be put to any use in the education debate? Again, the Court tells us that part of the "liberty" protected by the Fourteenth Amendment is parents' "fundamental" right to direct their children's education<sup>43</sup> and, in particular, given the First Amendment's religious-freedom guarantee, to control their children's *religious* training.<sup>44</sup> Still, the debate goes on. On one side, there are those who contend that the State has the duty and right to regulate children's education, to decide what they must and should not be

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42 Cf. Dwyer, *supra* note 3, at 150 ("I doubt that members of the Church of Christ Scientist watch their children suffer and die with equanimity, and the children themselves might be terrified, in addition to suffering physical pain.").

43 See *Troxel v. Granville*, 120 S. Ct. 2054, 2060 (2000) (plurality opinion) ("In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.").

44 See *Wisconsin v. Yoder*, 406 U.S. 205, 229 (1972). Indeed, the Court in *Yoder* seemed to think that *only* those educational decisions that are rooted in religious belief enjoy the protection afforded "fundamental" rights. See *id.* at 215-16; see also Steven D. Smith, *Wisconsin v. Yoder and the Unprincipled Approach to Religious Freedom*, 25 CAP. U. L. REV. 805, 807 (1996).

taught in schools,<sup>45</sup> and to do so solely on the basis of its *own* assessment of the child's best interests. On the other side are those who maintain that parents are not only entitled but obligated to make these decisions, based on their *own* assessments of the competing values, informed perhaps by their faith, subject to state second-guessing only to prevent clear harm to a child.

So far, it looks like the education debate maps fairly closely onto the health-care debate, and it appears that there is agreement at least on the point that the State may justifiably override parents' education-related decisions to prevent "harm" to a child. But when, if ever, is education "harmful"? What about *religious* education and instruction? Again, in the health-care context, notwithstanding important disagreements, we agree, by and large, that the State may override parents' wishes in order to prevent harm, that physical injury or death *is* a harm, and that the purpose of medical care is to avoid such harm. But when it comes to government regulation of education, the disagreement between statist and "parentalist"<sup>46</sup> turns not only on the rights/privileges distinction, the scope of the State's *parens patriae* and police powers, and the relevance of religion to decision-makers' calcu-

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45 Less common, I think, is the bolder claim that the *parens patriae* power of the liberal state permits or requires it to regulate what is "taught" to children *outside* school—say, at the dinner table. See, e.g., DWYER, *supra* note 15, at 158 ("[P]arents . . . may be required to give up some measure of their personal liberty as a condition for enjoying the privilege of participating in the children's upbringing . . . . For example, they might justifiably be proscribed from expressing sexist views in the presence of children in a way that damages children's self-esteem . . . ."). This is a remarkable—and, to many, repellent—assertion. See, e.g., Bowen v. Gilliard, 483 U.S. 587, 632 (1987) (Brennan, J., dissenting).

In *The Republic* and in *The Laws*, Plato offered a vision of a unified society, where the needs of children are met not by parents but by the government, and where no intermediate forms of association stand between the individual and the state. The vision is a brilliant one, *but it is not our own*.

*Id.* (emphasis added) (citations omitted). Then again, if the State is authorized, and perhaps obligated, to look after the best temporal interests of children as it sees them, and if parents' authority to direct and control their children's education is more in the nature of a privilege than a right, and if the liberal state believes that it is *not* in the best interests of children to be taught certain views, opinions, and beliefs, then I am not sure what principled basis there is for liberal statist to assure us that the dinner table, car pool, and bedtime story, unlike the traditional school day, are teaching moments beyond the State's power. As Rousseau once recommended, the "newly-born infant, upon first opening his eyes, must gaze upon the fatherland, and until his dying day should behold nothing else." J. ROUSSEAU, *THE GOVERNMENT OF POLAND* 21 (W. Kendall trans., 1972), quoted in Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539, 1572 (1988).

46 See generally Gilles, *supra* note 27, at 11 (defending "liberal parentalism").

lations, but also on the basic problem of identifying "harm."<sup>47</sup> If the State may, in some cases, require medical treatment to prevent serious physical harm, may it also protect children from the "harm" of being taught, for example, that Genesis is true, that extra-marital sexual activity is a sin, or that unbelievers are damned? Are such teachings harmful? Some say "yes"; many say "no." But it is precisely this kind of inevitable and intractable disagreement that makes it all the more important to examine carefully, and to cabin closely, the Government's asserted authority to second-guess parents and supervise their educational choices.

### III. TAKING *PIERCE* SERIOUSLY

Here, one might object: "You say that the Government must stay its hand, because 'harm' is hard to define when it comes to education. So what if it is? Your standard is too demanding, and it is inconsistent with the importance of education to the public good and with the State's *parens patriae* obligations. It is enough if the experts decide that a particular course of study is or is not, all (non-religious) things considered, in the best interests of children and the community." No, it is not—not if we take *Pierce* seriously.

We have probably all heard the story about Benjamin Franklin being asked by a Philadelphia woman during the Constitutional Convention, "Well, Doctor, what have we got?," and responding, "A republic, if you can keep it."<sup>48</sup> I suspect that many political theorists wish that a colonial Chris Matthews or Tim Russert had been there to ask the now-obvious follow-up question, "And *how* exactly do we keep it?"

Today, some argue that one of the things we have to do to "keep" our republic (or, our liberal democracy) is to quite self-consciously create—specifically, to educate—republicans (or, liberal democrats).<sup>49</sup> After all, citizens capable of self-government do not just *happen*; "[L]iberal democratic citizens are made, not born . . ."<sup>50</sup> As George Will puts it, statecraft, properly understood, is soulcraft: "[M]en and women are biological facts, but . . . ladies and gentlemen

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47 See Dwyer, *supra* note 3, at 150–51 (listing reasons for disagreement).

48 See 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 85 (Max Farrand ed., 1966).

49 Cf. Galston, *supra* note 17, at 872 ("Within the civic republican tradition, state intrusion to foster good citizens poses no threshold issues; not so for liberal democracy, whose core commitments place limits on the measures the state legitimately may employ."). The lines between today's "neo-republicans," "republican revivalists," and civil-society liberals are often hard to identify, and I will not try to find them here.

50 Galston, *supra* note 17, at 870.

fit for self-government are social artifacts, creations of the law.”<sup>51</sup> And so, Amy Gutmann argues, “conscious social reproduction”—citizen creation—is both a “core value” of, and a requirement for, “deliberative democracy.”<sup>52</sup> Even liberal societies, if they hope to thrive and survive, must inculcate values and promote “contested views of the good”; they must orient their governments and citizen-shaping processes in a way likely to produce agreement on those views.<sup>53</sup> A society that aspires to meaningful democracy, the argument goes, must take care that it makes—again, that it *educates*—citizens capable of valuing and achieving that end.<sup>54</sup>

In other words, it looks like the emerging consensus in political theory is that the poet, William Ross Wallace, was right (as was the creepy movie): The hand that rocks the cradle rules the world. In other words, those who decide what children may and should learn thereby shape, if not determine, those children’s character and commitments, as well as those of the community.<sup>55</sup> This is why many political theorists have answered the “who should decide” question by “subordinating the authority of individual parents to overriding conceptions of liberal democratic values or to the decisions of political majorities.”<sup>56</sup> This is why leading liberal statist<sup>57</sup> like Gutmann and, more recently, Stephen Macedo insist candidly that “public schools

51 GEORGE F. WILL, *STATECRAFT AS SOULCRAFT: WHAT GOVERNMENT DOES* 90–91 (1983).

52 AMY GUTMANN, *DEMOCRATIC EDUCATION* 39, 42 (1987) (“We are committed to collectively re-creating the society that we share . . . . The substance of this core commitment is conscious social reproduction.”).

53 Abner S. Greene, *Government of the Good*, 53 *VAND. L. REV.* 1, 2 (2000).

54 See GUTMANN, *supra* note 52, at 39 (“[A] society that supports conscious social reproduction must educate all educable children to be capable of participating in collectively shaping their society.”).

55 See Scott W. Somerville, *Education Reform at the Crossroads: The History and Politics of School Choice*, 10 *GEO. MASON U. CIV. RTS. L.J.* 121, 123 (1999/2000) (“It slowly dawned on me that schools are the most powerful possible instruments for gaining long-term control over a democracy.”).

56 Gilles, *supra* note 22, at 937.

57 “Liberal statism” is, for present purposes, the view that the needs of liberal democracy and the demands of liberal citizenship authorize or require the State to supervise, regulate, and dictate the content of education. See Stephen L. Carter, *Religious Freedom as if Religion Matters: A Tribute to Justice Brennan*, 87 *CAL. L. REV.* 1059, 1065 (1999) (“When I say statism, . . . I have in mind a sense of the state’s rightness, or goodness—an empirical belief that the state is less likely than the individual to make a moral error. Since the Enlightenment, the entire liberal political project has rested on this idea.”); Dwyer, *supra* note 3, at 172–73 (rejecting “liberal statism” and insisting that “only children themselves have any moral claim or entitlement in connection with their upbringing”); Gilles, *supra* note 27, at 10 (“The main alternative to liberal parentalism is what I call liberal statism—the view that parental educational authority

are instruments for the most basic and controversial of civic ends," the "project of forming citizens . . ." <sup>58</sup> And this is why, more than seventy-five years ago, Oregon voters enacted by initiative the Compulsory Education Act, making it a crime to send one's child to a Catholic school. <sup>59</sup>

It is clear that this Act, and others like it, were animated largely by substantive opposition to and suspicion toward the teachings and institution of the Roman Catholic Church. <sup>60</sup> In this sense, of course, the Act was nothing new: anti-Catholicism is, some say, our nation's oldest prejudice, <sup>61</sup> and the early history of American public education, starting in the early-mid-nineteenth century, is in large part the story of the efforts of America's "*de facto* [Protestant] establishment," <sup>62</sup> and later the self-styled Progressive vanguard, to respond to perceived threats to the national character posed by massive immigration and by the religion of the immigrants. <sup>63</sup> After the Civil War, wild-eyed de-

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must ordinarily yield to the state's authority to define what constitutes children's best interests and its interest in educating children to be good citizens." )

58 STEPHEN MACEDO, *DIVERSITY AND DISTRUST*, at ix (2000). Macedo claims that while "[o]ur central aims are the protection of individual freedom and preservation of stable, limited, and orderly government, . . . to plan for these great political goods we need to think very broadly about how liberal citizens become capable of their great office." *Id.* at 275. See generally Amy Gutmann, *Religious Freedom and Civic Responsibility*, 56 WASH. & LEE L. REV. 907 (1999); Stephen Macedo, *Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations, and Liberal Public Values*, 75 CHI-KENT L. REV. 417 (2000). For a powerful critique of such and similar claims, see Michael W. McConnell, *The New Establishmentarianism*, 75 CHI-KENT L. REV. 453 (2000).

59 See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 530-31 (1925). The Act "require[d] every . . . person having control or charge or custody of a child between 8 and 16 years to send him 'to a public school' . . . and failure to do so [was] declared a misdemeanor." *Id.* at 530 (citing the Compulsory Education Act, 1922 Or. Laws 5259).

60 See Carter, *supra* note 27, at 1203 ("[*Pierce*] must be understood in a historical context in which the Justices knew as well as anybody that the Oregon law was, in large part, an effort to destroy Roman Catholicism."). For a "revisionist"—and, in my judgment, mistaken—reading of *Pierce* and its context, see MACEDO, *supra* note 58, at 99 ("We should . . . also take account of legitimate considerations advanced on behalf of the Oregon law, for it was not simply motivated by anti-Catholic prejudice."); *id.* at 303 n.38.

61 See JOHN TRACY ELLIS, *AMERICAN CATHOLICISM* 151 (2d ed. 1969) (quoting Arthur Schlesinger, Sr.).

62 MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS* 31 (1965). As Henry Adams observed, in the elite society of his boyhood, "[s]ocial perfection was . . . sure, because human nature worked for Good, and three instruments were all she asked—Suffrage, Common Schools, and Press. On these points doubt was forbidden." *THE EDUCATION OF HENRY ADAMS* 33 (Modern Library ed. 1996).

63 Thomas Jefferson once expressed his hope that a system of public schools would bring about "a quiet euthanasia of the heresies of bigotry and fanaticism which have so long triumphed over human reason . . ." Letter from Thomas Jefferson to

nunciations of the "sectarian" schools were a regular staple in Republican organs like *Harper's Weekly* and in the illustrations of Thomas Nast. "It must be remembered," *Harper's* warned, "that the primary object of the Roman party is not the education of the children, but the maintenance and extension of the Roman sect. The plan is to make the schools nurseries of Roman Catholicism—a plan which every good citizen should strenuously oppose."<sup>64</sup>

In a similar vein, for the evidently quite progressive majority of Oregon citizens, egged on by the Ku Klux Klan and other anti-Catholic organizations,<sup>65</sup> the tasks of "social reproduction" and assimilation demanded that students attend public, not "sectarian," schools. These tasks required that children receive what Macedo calls a "civic education"<sup>66</sup> consistent with common American values and that they be protected from the influence of foreign superstition or authoritarian religion.<sup>67</sup> In other words, Oregon's law appears to have been

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William Short (Oct. 31, 1819), in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 694 (Adrienne Koch & William Peden eds., 1972). See generally CHARLES LESLIE GLENN, JR., *THE MYTH OF THE COMMON SCHOOL* (1988); LLOYD P. JORGENSEN, *THE STATE AND THE NON-PUBLIC SCHOOL 1825-1925* (1987); JOSEPH P. VITERITI, *CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY* 145-79 (1999); John T. McGreevy, *Thinking on One's Own: Catholicism in the American Intellectual Imagination, 1928-1960*, 84 J. AM. HIST. 97 (1997).

64 *The Parochial Schools*, HARPER'S WKLY., Apr. 10, 1875, at 294.

65 See MACEDO, *supra* note 58, at 98-103 (noting, for instance, that "the Oregon mandatory public school attendance law . . . had gained substantial support in other states . . . [and] was supported by populists"); Jay S. Bybee, *Substantive Due Process and Free Exercise of Religion: Meyer, Pierce, and the Origins of Wisconsin v. Yoder*, 25 CAP. U. L. REV. 887, 891 (1996) (noting that the Oregon Act was "the result of complex forces, uniting groups as disparate as the Ku Klux Klan and the progressives, both of which advocated the 'Americanization' of the state's young people"); McConnell, *supra* note 58, at 461 ("Who would guess that this argument was made on behalf of a hateful law passed at the urging of the Ku Klux Klan for the purpose of closing Catholic schools?" (citing David B. Tyack, *The Perils of Pluralism: The Background of the Pierce Case*, 74 AMER. HIST. REV. 74 (1968))).

66 MACEDO, *supra* note 58, at 149-228.

67 See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 526 (1925) (arguments of counsel) ("It would . . . be both unjust and unreasonable to prevent [the states] from taking the steps which each may deem necessary and proper for Americanizing its new immigrants and developing them into patriotic and law-abiding citizens."); *id.* at 525 (arguments of counsel) (contending that "religious suspicions" in America were attributable to "the separation of children along religious lines during the most susceptible years of their lives, with the inevitable awakening of a consciousness of separation, and a distrust and suspicion of those from whom they were so carefully guarded"). See generally MACEDO, *supra* note 58, at 88-109; Carter, *supra* note 27, at 1200-03 (describing *Pierce's* historical context).



motivated less by a desire to do right by poor children than by a fear that Catholic schools would *do wrong* to them.<sup>68</sup>

Given that the Compulsory Education Act was comfortably consonant with the smart-set views of the day,<sup>69</sup> it is perhaps surprising that the Supreme Court, without dissent, struck down the law. The Court relied on its earlier decision in *Meyer v. Nebraska*,<sup>70</sup> where it had struck down a nativist but not uncommon law against teaching in any language other than English, insisting, in *Lochner*-esque terms, that the Constitution protects, “[w]ithout doubt, . . . not merely freedom from bodily restraint but also . . . those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”<sup>71</sup> The *Meyer* Court closed by emphasizing: “That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally, is clear; but the individual has certain fundamental rights which must be respected.”<sup>72</sup>

Two years later, turning back Oregon’s aggressively assimilationist effort to homogenize children’s values, the *Pierce* Court insisted that, notwithstanding the “power of the state reasonably to regulate all schools,”<sup>73</sup>

the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The fundamental theory of liberty upon which all governments in this Union repose excludes any general

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68 Oregon was also concerned, apparently, that, just as surely as pool leads to Trouble, Catholic schools could lead to schools run by “bolshevists, syndicalists, and communists.” *Pierce*, 268 U.S. at 526 (arguments of counsel). Interestingly, although he seems embarrassed by the Klannish underbelly of the arguments for the Oregon Act, Stephen Macedo nonetheless insists that the Act’s supporters were on to something.

Reasonable measures to promote civic virtues are to be distinguished from the extremism of those who tried to force Catholic children to read the Protestant Bible . . . and the Klan. Prejudice against Catholics is also to be distinguished from perhaps reasonable fears that those educated in relatively authoritarian religious doctrines may be more prone than others to reject liberal democratic political norms and institutions.

MACEDO, *supra* note 58, at 130.

69 John Dewey, for example, insisted that parents should not be permitted to “inoculate” their children with the outdated and useless religious beliefs that they “happen[ed] to have found serviceable to themselves.” STEVEN C. ROCKEFELLER, JOHN DEWEY: RELIGIOUS FAITH AND DEMOCRATIC HUMANISM 260 (1991); *see also* JOHN DEWEY, A COMMON FAITH (1934).

70 262 U.S. 390 (1923).

71 *Id.* at 399.

72 *Id.* at 401.

73 *Pierce*, 268 U.S. at 534.

power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.<sup>74</sup>

I suspect that many law professors and political philosophers do not like this passage.<sup>75</sup> And although the Supreme Court keeps re-affirming that the “primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition,”<sup>76</sup> the federal courts tend generally to treat *Pierce* like a

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74 *Id.* at 534–35; cf. SECOND VATICAN COUNCIL, DECLARATION ON CHRISTIAN EDUCATION, at No. 3 (1965) (“[S]ince parents have conferred life on their children, they have a most solemn obligation to educate their offspring. Hence, parents must be acknowledged as the first and foremost educators of their children.”).

75 See Carter, *supra* note 27, at 1194 (“When scholars meet to discuss the great pantheon of constitutional rights, . . . we are not much concerned with the right to direct the upbringing of children; indeed, I suspect that many scholars disbelieve in it . . . .”); see also Dwyer, *supra* note 12, at 1447 (concluding that “[c]ourts should acknowledge the illegitimacy of the parents’ rights doctrine and decline to recognize claims of parents rights in the future” and that “[t]he evolution of our social attitudes [provides sufficient ground] for overruling . . . *Pierce*”); Abner S. Greene, *Why Vouchers Are Unconstitutional, and Why They’re Not*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 397, 406–08 (1999) (arguing that *Pierce* be “reconsidered” and for “requir[ing] public schooling, ensuring that children are exposed to multiple sources of value”); cf. MACEDO, *supra* note 58, at 101 (“I do not . . . want to go so far as to argue that *Meyer* and *Pierce* were wrongly decided . . . .”).

76 *Wisconsin v. Yoder*, 406 U.S. 202, 232 (1972); see also *Troxel v. Granville*, 120 S. Ct. 2054, 2060 (2000) (citing cases); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (affirming “[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child”); *Smith v. Org. of Foster Families for Equal. and Reform*, 431 U.S. 816, 845 (1977) (holding that parents’ child-rearing rights are “intrinsic human rights, as they have been understood in this Nation’s history and tradition”); *Yoder*, 406 U.S. at 232 (affirming the “fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children”). In *Prince v. Massachusetts*, 321 U.S. 158 (1944), the court noted:

It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . . And it is in recognition of this that . . . decisions have respected the private realm of family life which the state cannot enter.

*Id.* at 166. True, the Court has, from the beginning, hedged its pronouncements on parental control. Even in *Pierce*, the Court was careful to acknowledge the “power of the State reasonably to regulate all schools.” *Pierce*, 268 U.S. at 534. And, in *Prince*, the Court insisted that neither parents’ prerogatives nor “the family itself” is beyond all police-power regulation. 321 U.S. at 166 (“[T]he family itself is not beyond regulation in the public interest. . . . [The] rights of parenthood are [not] beyond limitation.”); see also, e.g., *Stanley v. Illinois*, 405 U.S. 645, 649 (1972) (“The State’s right—

quirky aged relative who, although she is still invited to Thanksgiving dinner, is watched nervously for fear she will embarrass the family and start tossing mashed potatoes.<sup>77</sup>

In my view, though, the above-quoted passage from *Pierce* is no dusty anachronism but is instead one of the more inspiring and truly liberating statements in the *United States Reports*. The “fundamental theory of liberty” it endorses is, rightly understood, all the more to be embraced for being today so widely challenged.<sup>78</sup> And *Pierce* is widely challenged, despite having been (sort of) re-affirmed just last summer in *Troxel*.<sup>79</sup> In *Troxel*, the Supreme Court of Washington had struck down, as a violation of fundamental *Pierce* rights, a “breathhtakingly

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indeed, duty—to protect minor children through a judicial determination of their interests in a neglect proceeding is not challenged here.”).

77 The *Pierce* Court’s reference to “reasonable regulation,” 268 U.S. at 534, has caused many courts to treat the freedom vindicated in that case as a “poor relation” which must ride piggy-back on some *other* right in order to enjoy meaningful constitutional protection. See *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) (“We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.”). These courts have failed to employ the “strict scrutiny” usually required in “fundamental rights” cases. See *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174, 179 (4th Cir. 1996) (concluding that because parents’ “interest is not religious, . . . we must reject their position if the [challenged regulation] bear[s] some rational relationship to legitimate state purposes”); *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 462 (2d Cir. 1996) (“[W]here, as here, parents seek for secular reasons to exempt their child from an educational requirement and the basis is a claimed right to direct the ‘up-bringing’ of their child, rational basis review applies.”); *Ohio Ass’n of Indep. Sch. v. Goff*, 92 F.3d 419, 423 (6th Cir. 1996) (stating that “rational basis review, not strict scrutiny,” governs “wholly secular limitations on private school education”); *Brown v. Hot, Sexy, and Safer Prods., Inc.*, 68 F.3d 525, 533 (1st Cir. 1995) (“We need not decide here whether the right to rear one’s children is fundamental . . .”).

78 Which is not necessarily to endorse the opinion’s substantive-due-process reasoning. See *Troxel*, 120 S. Ct. at 2074 (Scalia, J., dissenting) (noting that *Pierce* was decided in “an era rich in substantive due process holdings that have since been repudiated”); MACEDO, *supra* note 58, at 98–103 (discussing connections between *Pierce* and *Lochner*-style substantive due process).

79 120 S. Ct. at 2060 (plurality opinion). I say that *Pierce* was “sort of” re-affirmed in *Troxel* because the Court did not appear to apply, nor did it give any indication that it would apply in the future, the kind of strict scrutiny that laws touching “fundamental” rights are usually thought to require. See *id.* at 2068 (Thomas, J., concurring).

Our decision in [*Pierce*] holds that parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them. The opinions of the plurality, Justice Kennedy, and Justice Souter recognize such a right, but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights.

broad"<sup>80</sup> third-party-visitation law, which authorized courts to award visitation rights to third parties, over parents' objections, whenever visitation is in the child's best interests. Although the four-Justice plurality opinion was careful to avoid prejudicing the case of third-party-visitation laws generally,<sup>81</sup> it objected strongly to the fact that, under the Washington statute, "a parent's decision that visitation would not be in the child's best interest is accorded no deference"—that, "should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails."<sup>82</sup> Because "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made,"<sup>83</sup> the Court invalidated the application of the visitation law.<sup>84</sup>

*Troxel* and the Supreme Court aside, the challenges to *Pierce* come on (at least) two fronts.<sup>85</sup> First, there are those who insist that parents' educational preferences must yield to the public need to produce citizens of a certain ideological cast and deliberative temperament and that both children and society are harmed if parents transmit misguided illiberal views and beliefs to their children. Stephen Macedo in particular has grown impatient with what he regards as hand-wring-

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*Id.* I should add that I drafted *amicus curiae* briefs for the Society of Catholic Social Scientists and the Christian Legal Society in support of the respondents in the *Troxel* case.

80 120 S. Ct. at 2061 (plurality opinion) ("[The] language effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review.")

81 *See id.* at 2064 (plurality opinion) ("Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter."). *See generally* Joan C. Bohl, *Grandparent Visitation Law Grows Up: The Trend Toward Awarding Visitation Only When the Child Would Otherwise Suffer Harm*, 48 *DRAKE L. REV.* 279 (2000); Joan C. Bohl, *The "Unprecedented Intrusion": A Survey and Analysis of Selected Grandparent Visitation Cases*, 49 *OKLA. L. REV.* 29 (1996). For a recent state-court decision involving a more carefully crafted grandparent-visitation statute in which the court nonetheless insisted that the Constitution limits states' power to authorize visitation over parents' objections, see generally *Hampton v. Hampton*, 17 S.W.3d 599 (Mo. Ct. App. 2000).

82 120 S. Ct. at 2061 (plurality opinion).

83 *Id.* at 2064 (plurality opinion).

84 *See id.* at 2065 (plurality opinion) ("We therefore hold that the application of [the visitation law] to Granville and her family violated her due process right to make decisions concerning the care, custody, and control of her daughters.")

85 There is at least one more line of attack—the argument that, whatever we think about parental liberty as a moral matter, the Due Process Clause of the Fourteenth Amendment simply does not confer on federal judges the power to strike down duly enacted state laws that restrict that liberty. *See, e.g., id.* at 2074–75 (Scalia, J., dissenting).

ing versions of liberalism, versions whose ability to justify using government to shape civic life and public values—in *Pierce's* words, to “standardize” children—is, he thinks, hamstrung by their undue focus on “the boundaries and limits of individual rights.”<sup>86</sup> As Michael McConnell has observed, “it is difficult or impossible for a liberal state to engage in the direct inculcation of public virtue without compromising its liberal commitment to neutrality among the different and competing reasonable worldviews of the society.”<sup>87</sup> Macedo responds to this difficulty by calling unabashedly for a “more judgmental liberalism,” one that is wary of and aggressive in opposing “religious enthusiasm” and that—*Pierce* notwithstanding—uses not only the public schools, but “all of the instruments of public policy,” to “shape [the] social norms and meanings that mold individual choices and character.”<sup>88</sup>

There are also those who claim that *Pierce*-style notions of parental control are inconsistent with a proper focus on the present and future interests of children and who contend that children have a right to be exposed to a sufficiently wide range of ideas and ways of life and to be assisted in developing the capacities necessary to exercise and enjoy meaningful autonomy.<sup>89</sup> Professor Dwyer argues, for example, that parents’ child-rearing rights—as opposed to their legal

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86 MACEDO, *supra* note 58, at 278.

87 McConnell, *supra* note 58, at 455.

88 MACEDO, *supra* note 58, at 278, 276, 277. *But see, e.g.,* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox . . .”). Professor Abner Greene has suggested a related, but distinct, critique of *Pierce*. In Greene’s view, “[o]ur constitutional structure is one of multiple repositories of power . . .” *Pierce’s* “assumption that parents must have the right to school their children as they wish” violates this key structural principle, because it “ensures that children will get their basic education not from multiple sources, but rather from their parents or their parents’ agents alone . . .” Greene, *supra* note 75, at 406–07. It seems unlikely that even the most robust reading and vigorous implementation of *Pierce* could, in today’s society, do anything to prevent children from being influenced substantially by a wide variety of sources other than their parents. Nor am I convinced that our constitutional strategy of protecting liberty by dividing and limiting state power points toward *restrictions* on parents’ traditional authority to educate their children.

89 *See generally* Joel Feinberg, *The Child’s Right to an Open Future, in* WHOSE CHILD? CHILDREN’S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER 124 (William Aiken & Hugh LaFollette eds., 1980); Goldstein, *supra* note 30, at 645 (“The law is designed to assure for each child an opportunity to meet and master the developmental crises on the way to adulthood—to that critical age when he or she is presumed by the state to be qualified to determine what is ‘best’ for oneself.”); Laurence D. Houlgate, *Three Concepts of Children’s Constitutional Rights: Reflections on the Enjoyment Theory*, 2 U. PA. J. CONST. L. 77 (1999).

*privilege* to act in accord with their own moral duties and their children's rights<sup>90</sup>—are unjustifiable, but not so much because parental control of education compromises the task of social reproduction or undermines the workings of civic education. Rather, he views *Pierce* rights as inconsistent with bedrock liberal commitments to the individual autonomy and self-determination rights of children. After all, he insists, “no one is *entitled* to control the life of another person in accord with their own preferences . . . .”<sup>91</sup>

These are serious objections, but I will stick with *Pierce* and try to take it seriously.<sup>92</sup> As I will try to show next, neither the perceived demands of political soulcraft, nor an appropriate respect for the dignity and personhood of children, undermines *Pierce* or supplies the liberal state with the legal power or moral right to standardize the thoughts and values of children over the objection of their parents.

First, the liberal-statist objection: According to “judgmental liberalism,”<sup>93</sup> liberal citizens are made, not born, and they are made carefully, through a certain kind of civic education. Parents have a role to play, but they should not determine the fundamental values and ideals toward which a child should be trained to aspire. And so, the objection from this camp to *Pierce* is its lack of fit with the State's need to engage in the kind of values inculcation it requires to maintain itself. After all, if given free rein, parents could obstruct or garble the State's messages, or perhaps even convey contrary ones.

This argument is as old as *The Republic*. It will not likely be settled any time soon, and I cannot do justice to it here. I am tempted to say, with the Supreme Court in *Meyer*, only that while the Spartans might

90 See Dwyer, *supra* note 10, at 1374–76 (contrasting “rights” with “privileges” and arguing that parents enjoy the privilege, but not the right, of making child-rearing decisions). Although I share many of Professor Glendon's reservations about the atomizing tendencies of “rights talk,” I am confident that parents enjoy more than a mere positive-law “privilege” to decide how best to raise and educate their children. See generally MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

91 Dwyer, *supra* note 3, at 173.

In my view, neither parents *nor* the State have any moral claim on their own behalf, any *entitlement* to decide what the ends of a child's life are. Rather, only children themselves have any moral claim or entitlement in connection with their upbringing, and we adults should be deliberating about how best to fulfill our obligation to them, not about which adults are entitled to determine how children's lives will go.

*Id.*

92 See Carter, *supra* note 27, at 1195 (“I want to speculate . . . on the possibility that *Pierce* is both rightly decided and rightly reasoned . . . .”).

93 MACEDO, *supra* note 58, at 278.

well have seen fit to “submerge the individual and develop ideal citizens, . . . their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest.”<sup>94</sup> Or, as Justice Brennan put it, “Plato offered a vision of a unified society, where the needs of children are not met by parents but by the government, and where no intermediate forms of association stand between the individual and the State. The vision is a brilliant one, *but it is not our own.*”<sup>95</sup> Perhaps not. Still, as Oregon’s Compulsory Education Act and the common-school movement vividly illustrate, when it comes to educating children and forming citizens, “our own” tradition has often been tempted by the ideals of the “Spartans.” And in failing to reject these ideals, our tradition has, at times, fallen short.<sup>96</sup>

This is not to say that we should ignore the dangers of an overly atomistic public philosophy or an uncritical celebration of pluralism in morality.<sup>97</sup> It is true, we cannot take for granted the cultural conditions of democracy and self-government.<sup>98</sup> But as Professor McConnell has pointed out, “a liberal society is always at risk. One can hope that the free institutions of civil society will produce virtuous citizens, each in its own way . . . . But there is no guarantee.”<sup>99</sup> By humbling government, and by respecting parents, families, and other “free institutions of civil society,” we take a chance. And we tie our own hands<sup>100</sup> when we swear off using government to indoctrinate other

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

95 *Bowen v. Gilliard*, 483 U.S. 587, 632 (1987) (Brennan, J., dissenting) (emphasis added).

96 See generally, e.g., McConnell, *supra* note 58.

97 See generally GLENDON, *supra* note 90; MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* (1996).

98 See MACEDO, *supra* note 58, at 279 (“Our good fortune in having developed institutions that foster . . . shared civic values must neither lull us into complacency nor encourage reforms that rashly overlook the advantages of the system we have.”). Still, as Michael McConnell has reminded us, “in the liberal tradition, it is thought that citizens of a political community need not share common values regarding the nature of the good life . . . . All must agree to live and let live. We need not agree on much more than that.” McConnell, *supra* note 58, at 454.

99 McConnell, *supra* note 58, at 457.

100 See Richard W. Garnett, *Why Informed Consent? Human Experimentation and the Ethics of Autonomy*, 36 CATH. LAW. 455, 499–502 (1996) (discussing the “self-paternalism” inherent in our Constitution); Michael W. McConnell, *Why Is Religious Liberty the “First Freedom”?*, 21 CARDOZO L. REV. 1243, 1254 (2000) (“Disestablishment of religion meant that democratic politics in America was deprived of a key instrument for social reproduction.”).

people's children—and they are *other people's* children<sup>101</sup>—in those contested views of the good that a particular majority happens to find most conducive to the development of judgmental liberalism's values.<sup>102</sup>

The second, child-centered, critique of *Pierce* concedes that children are not the mere creatures of the State, but insists that they are not the mere creatures of their parents, either.<sup>103</sup> According to this view, *Pierce*-style child-rearing rights are inconsistent with the dignity and personhood of children because they, in effect, reduce children to property.<sup>104</sup> And it is said that the parental-control idea is inconsistent with the best interests of children, both because it rests on the dubious presumption that parents will always perceive and act in accord with the best interests of their children,<sup>105</sup> and because it limits the ability of state officials and other experts to correctly identify and advance those interests. What is more, parental control over education is said to be inconsistent with children's *future* best interests, that is, in their interests in growing up to have certain capacities, experiences, and dispositions that are, in the State's view, associated with autonomy and necessary for flourishing.<sup>106</sup>

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101 As Justice Scalia remarked during oral argument in *Troxel*, "The child does not belong to the courts. The child belongs to the parents." *Visitation Rights Challenged*, CHI. SUN-TIMES, Jan. 13, 2000, at 22. *But see, e.g.*, Jessica C. Cox, *Parental Rights and Responsibilities of Control Over Children's Education*, 26 J.L. & EDUC. 179, 179 (1997) ("In the debate over who controls the education of our nation's children, it is the lives of these natural resources that are at stake . . .").

102 *But see* Greene, *supra* note 53, at 2. It is worth noting here that many believe that parental control in education and, more particularly, religious education, serves quite well the civic needs of liberalism. *See, e.g.*, James W. Caeser & Patrick J. McGuinn, *Civic Education Reconsidered*, 133 THE PUB. INT. 84 (1998) (arguing that religious schools are teaching the values upon which civic education is based); McConnell, *supra* note 58, at 473 (citing research showing that "religious Americans are more democratically engaged than most of their fellow citizens"); Christian Smith & David Sikkink, *Is Private School Privatizing?*, 92 FIRST THINGS 16 (1999) (noting that families whose children attend home schools or private religious or private non-religious schools are more likely to participate in civic life); Richard Boyd, *Including Us Out*, COMMONWEALTH, Sept. 22, 2000, at 25, 26 (noting that "ostensibly 'illiberal' institutions like the family, church, and parochial schools may offer just the values that liberal democratic institutions themselves are incapable of providing").

103 *See* Dwyer, *supra* note 12, at 1446 ("[T]he child is . . . not the mere creature of the parent . . . [but is rather] his or her own person.").

104 *See* MACEDO, *supra* note 58, at 100 (discussing connection between *Pierce* and opposition to child-labor laws). *See generally* Woodhouse, *supra* note 23, at 1059-63.

105 *See* Dwyer, *supra* note 3, at 169-70.

106 *See generally* DWYER, *supra* note 15, at 148-77 (arguing that regulation of religious schools is required in order to insure that children in those schools are given equal opportunity to develop self-esteem, self-respect, and self-determination).



These objections are misplaced. It is not enough—though it is surely right—to affirm the human dignity of children. There is still no avoiding the fact that *someone* is going to make decisions about children's lives, their education, and their religious training; saying it should be parents rather than bureaucrats or activists in no way makes chattel out of children, and saying it should be the State rather than parents shows no greater respect for children's dignity and autonomy.<sup>107</sup> Thus, *Pierce* and parental control in education generally are grounded not on archaic and patriarchal prejudices, but on the common-sense, *truly* child-centered belief that, in Professor Stephen Gilles's words, "parents are more likely to pursue the child's best interest as they define it than is the State to pursue the child's best interest as the state defines it."<sup>108</sup>

And there is more to *Pierce* than Gilles's hard-to-dispute predictive judgment. Surely, the attitude toward a child that best reflects an appreciation for her dignity as a human person is not the disembodied paternalism of a government functionary, or even the genuine concern of a well-meaning case-worker, but the *love* of a parent. A parent loves *this child*; the Government, its experts, and well-meaning third parties, try as they might, most likely do not. A parent has a moral obligation to nurture and protect *this child*,<sup>109</sup> this child who can only be, to the Government, simply a particular manifestation of an abstraction—"children"—whose best interests the State has charged itself with advancing. Parental control is a *this-child-centered*, truly personalist, value, while state control, it seems to me, respects the personhood of children only if one believes that there is something dignified about being regarded by a hubristic state as a policy datum to be manipulated by third parties in accord with best-interests generalities.<sup>110</sup>

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107 See, e.g., U.S. CATHOLIC CONFERENCE, *supra* note 4, §§ 2221–22 (noting both that "the right and the duty of parents to educate their children are primordial and inalienable" and that "parents must regard their children as children of God and respect them as human persons").

108 Gilles, *supra* note 21, at 940. See generally *id.* at 951–60; Goldstein, *supra* note 30, at 654 ("No one has a greater right or responsibility and no one can be presumed to be in a better position . . . than a child's parents to decide.").

109 See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("[T]he custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) ("[T]hose who nurture [the child] and direct his destiny have the right, *coupled with the high duty*, to recognize and prepare him for additional obligations." (emphasis added)).

110 See C.S. Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 224, 228 (1952) ("Of all tyrannies a tyranny sincerely exercised for the good of its victims may

As I read the decision, *Pierce* is not really about the power of parents *over* children but about the State's lack of power over its citizens generally.<sup>111</sup> *Pierce* is a rejection of state omnipotence, not children's personhood.<sup>112</sup> *Pierce* affirms, not that the child is the property of the parent, but that the child is *not* the property of the State.<sup>113</sup> On this reading, child-rearing authority and family integrity are not anachronistically despotic licenses to control the lives of others, but rather illustrate "first principles" of limited, liberal government.<sup>114</sup> And nothing in *Pierce*, so read, at all undermines the human dignity of the child, nor contravenes her moral right to be assisted in her human development and to be the focus of any debate about her treatment.<sup>115</sup>

In fact, the parental authority and family integrity recognized and defended in *Pierce* are genuinely *liberating* for children. After all, we think of ourselves as free when, among other things, decisions about our best interests are made by us or our agents and not by the Government. What reason is there for thinking that, in contested matters of education, values, and faith, a child's dignity is more respected, and her autonomy better served, when her "best interests" in those matters are determined by the State, rather than by her family? *Pierce* promises children that decisions about their best interests will be made by those who, generally speaking, are most likely to work conscientiously, motivated by love and moral obligation, to advance their

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be the most oppressive. . . . [T]hose who torment us for our own good will torment us without end for they do so with the approval of their own conscience.").

111 See *In re Custody of Smith*, 969 P.2d 21, 28 (Wash. 1998) ("In answering whether the state visitation statutes at issue serve a compelling state interest we must understand the sources of state power to intrude on family life."), *aff'd sub nom. Troxel v. Granville*, 120 S. Ct. 2054 (2000).

112 Cf. McConnell, *supra* note 100, at 1247 ("If the state does not have power over the church, it follows that the power of the state is limited.").

113 Thus, *Pierce* seems to be in accord with Professor Dwyer's claim that "the child is . . . not the mere creature of the parent . . . [; rather, the child is] his or her own person." Dwyer, *supra* note 12, at 1446; see also Dwyer, *supra* note 3, at 177 ("There are widely shared moral beliefs and legal rules about how we should treat people simply by virtue of their personhood.").

114 *United States v. Lopez*, 514 U.S. 549, 552 (1995) (emphasizing "first principles" of constitutionally limited government). As William Galston put it, the *Pierce* line establishes and stands for two propositions. "First, in a liberal democracy, there is . . . a division of authority between parents and the state. . . . Second, there are some things the liberal state *may not do*, even in the name of forming good citizens." Galston, *supra* note 17, at 874 (emphasis added).

115 See *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) ("Properly understood . . . the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter.").

best interests.<sup>116</sup> Dean John Garvey has shown that this is a promise of real *freedom* to children, a promise to respect their liberty by respecting the decisions of their best agents, rather than by taking them into government wardship.<sup>117</sup> It appears that to the extent the child-centered critique rejects *Pierce* rights as inconsistent with the personhood and dignity of children, it fails to appreciate the best rationale for that decision.

In sum, *Pierce* makes moral sense. We need not apologize for talking about and defending parents' rights to control their children's education. Such talk is appropriately child-centered; it is personalist, not statist. *Pierce* does not mean parents have *dominion* over their children and their children's education; it *does* mean that popular majorities and well-meaning third parties—however confident they might be in their own virtue or powers of perception—lack the moral authority to override parents' child-rearing decisions on the basis of what they believe to be the "best interests" of other people's children.<sup>118</sup>

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116 Cf. *Calabretta v. Floyd*, 189 F.3d 808, 820 (9th Cir. 1999) ("The government's interest in the welfare of children embraces not only protecting children from physical abuse, but also protecting children's interest in the privacy and dignity of their homes and in the lawfully exercised authority of their parents.").

117 See JOHN GARVEY, *WHAT ARE FREEDOMS FOR?* 97–122 (1996). Garvey notes, *inter alia*, that the "problem" with "allow[ing] the government to override a parent's choice about her child's proper education . . . is that, in the effort to make children more free vis-à-vis their parents, the government makes children less free in their relations with the state." *Id.* at 122. Although the child-centered critique of *Pierce* aims at creating and protecting children's self-determination, children "are not free when the government represents them . . . [T]heir actions are not free because they are directed by the government." *Id.* at 121. It is worth adding, with respect to the autonomy-based objections to *Pierce*, Garvey's observations, *first*, that, even if the point of state supervision of parental educational control is to "keep choices open" for children, so that they can "self-determine" when they grow up, the choices those children make will be "guided by values, talents, and propensities that are themselves largely the result of parental influences"; and *second*, that,

[e]ven if parents could promote self-determination by offering [their children] a smorgasbord, it is not objectively clear that they should. Autonomy is an ideal just as knowledge, power, virtue, and the service of God are ideals. Each states a certain view of what people ought to be like, of how they can best live their lives. Adults do not all subscribe to the same ideal, and courts should not require children to.

*Id.* at 117.

118 See *In re Custody of Smith*, 969 P.2d 21, 30–31 (Wash. 1998).

Short of preventing harm to the child, the standard of "best interest of the child" is insufficient to serve as a compelling state interest overruling a parent's fundamental rights . . . . It is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a "better" decision.

## IV. RELIGION AND (AS?) HARM TO CHILDREN

If we take *Pierce* seriously, state supervision of parents' educational authority is justified only to prevent *harm* to a child and not to inculcate those values that the State believes will best serve its own, or the child's, "best interests."<sup>119</sup> The Supreme Court had a chance in *Troxel* to emphasize this point, but it dropped the ball.<sup>120</sup> The Washington Supreme Court, though, put it at the center of its decision. That court's objection to the third-party-visitation statute was not merely that it was applied heavy-handedly, but that it permitted visitation orders, over parents' objection, *whenever* "visitation may serve the best interest of the child . . ."<sup>121</sup> Because "it is undisputed that parents have a fundamental right to autonomy in child rearing decisions,"<sup>122</sup> interference with those decisions "is justified only if the state can show that it has a compelling interest and such interference is narrowly drawn to meet only the compelling state interest involved."<sup>123</sup>

In that court's view, pursuing the "best interests" of children, as seen by particular trial-court judges and in opposition to the parents' wishes, is *not* a compelling state interest. Rather, traditional police and *parens patriae* powers authorize the State to "intrude on a family's autonomy" only "where a child has been harmed or where there is a threat of harm to a child."<sup>124</sup> Of course, there are all kinds of situations where children might be better off, in a third party's view, or perhaps even in fact, if a particular parental decision—say, to encourage or permit the child to play soccer rather than baseball, prefer Britney Spears to Willie Dixon, or read law-review articles rather than the Narnia chronicles—were overridden. But then, as the court ob-

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*Id.*

119 This statement is consistent with the "minimum state intervention" model set out in GOLDSTEIN ET AL., *supra* note 14. See also Goldstein, *supra* note 30, at 648–51.

120 See *Troxel v. Granville*, 120 S. Ct. 2054, 2064 (2000).

Because we rest our decision on the sweeping breadth of [the statute] and the application of that broad, unlimited power in this case, we do not consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not, and need not, define today the precise scope of the parental due process right in the visitation context.

*Id.*

121 969 P.2d at 24.

122 *Id.* at 27.

123 *Id.* at 28; cf. *Troxel*, 120 S. Ct. at 2068 (Thomas, J., concurring).

124 969 P.2d at 28.

served, "the authority to raise the child as the parents see fit, except when the State thinks another choice would be better, is . . . no authority at all."<sup>125</sup> And, moving from visitation orders to decisions about education and religious training, a right to direct the education of one's children that is subject to best-interests ratification or veto by the State is an empty and ineffectual right.<sup>126</sup>

Am I suggesting that we should be cavalier about children's best interests? Of course not. Still, taking *Pierce* seriously does require us to tolerate the fact that some parents will, in the opinion of most "outsiders," incorrectly perceive and inadequately promote their children's best interests. But the world is full of second-bests. We tolerate imperfection and imprecision all the time, because the "costs" of eliminating them—here, the costs of statist perfectionism—are too great.<sup>127</sup> A demanding harm requirement reflects a trade-off; we *risk* the chance that some parents, sometimes, will fail to act in their child's best interests to insure that the State does not simply intervene to re-educate children whenever parents' (or children's) decisions

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125 *Id.* at 30 (quoting Kathleen Bean, *Grandparent Visitation: Can the Parent Refuse?*, 24 U. LOUISVILLE J. FAM. L. 393, 441 (1985-86)); see also *Hawk v. Hawk*, 855 S.W.2d 573, 580 (Tenn. 1993) ("The requirement of harm is the sole protection that parents have against pervasive state interference in the parenting process."); Bean, *supra*, at 31 ("Short of preventing harm to the child, the standard of 'best interest of the child' is insufficient to serve as a compelling state interest overruling a parent's fundamental rights.").

126 None of this calls into question the black-letter family-law rule that courts assign custody on the basis of the "best interests of the child." This is what courts called to adjudicate family and custodial disputes *should* do. But the question, "what is in the best interests of [some other person's] child?" is *not* the right standard for identifying those situations when the Government may, as an *initial matter*, interfere with or intrude upon the family. Custody cases leave courts with little choice other than to engage in fantastically elaborate balancing exercises in order to identify that elusive arrangement that will serve the child's "best interests." See Carl E. Schneider, *Religion and Child Custody*, 25 U. MICH. J.L. REFORM 879, 904 (1992) ("Courts *have* to make custody decisions, and to make them as well as possible. . . . Courts must do what courts must do; they should avoid doing what they can do only badly."). In the educational context, unlike the child-custody context, the "costs" of intervention in the family—and these *are* costs—are not already sunk.

127 See Goldstein, *supra* note 30, at 670 ("[I]t is the absence of a substantial societal consensus about the legitimacy of state intrusion on parental autonomy . . . which is the best evidence for holding in check the use of state power to impose highly personal values on those who do not share them."); Schneider, *supra* note 126, at 904 ("Children will sometimes suffer because of their parents' disputes over religion. But we live with such disputes . . . all the time.").

conflict with the ideological commitments, or "rescue fantasies," of government functionaries.<sup>128</sup>

So, what "counts" as "harm"? I suggested earlier that the required-medical-treatment cases and questions about spiritual-treatment exemptions are made somewhat less difficult (though certainly not easy) by the fact that everyone agrees that the harm in question really is a harm.<sup>129</sup> People might strike differently the balance between the competing interests, in keeping with their different philosophical commitments, but there is still this agreement. What children should be taught to believe, however, is simply not a question of fact; it is an inescapably ideological, political, moral, and religious question. Reasonable pluralism is a given which, as I have tried to show, directs us in the debate over educational control away from a "best interests" focus and toward a "prevent harm" standard. But the education debate is not like the spiritual-treatment controversies in that people disagree not only about "best interests," but about "harm," too.

One way to reduce the range of possible disagreements about educational harm is to rule out of court the perspectives of insiders, opinions based on religious commitments, or otherwise illiberal views. If we stipulate that the State may not privilege religious views, and should not privilege illiberal ones, we can limit the permissible range of disagreement about harm to those disagreements that persist among those who subscribe to the secular ideology of the current political majority.<sup>130</sup> Coming at the problem another way, rather than limiting the kinds of interests and beliefs that may be considered, and ruling out religious or illiberal ones, we could narrow *ex ante* the kinds of things that can "count" as harm justifying government intervention.

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128 Goldstein, *supra* note 30, at 651; see also Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487, 513 (1973) (noting that the best-interests standard is "a rationalization by decision-makers justifying their judgments about a child's future, like an empty vessel into which adult perceptions and prejudices are poured").

129 If someone were to assert, though, that serious physical injury or death to a child were *not* a harm to be avoided (as opposed to claiming that, even though harmful, it must be accepted reluctantly), that view could, I think, be ruled out of the conversation as simply unreasonable. But again, it is not that religious objectors, generally speaking, do not think that death is a "harm" to be avoided. They simply disagree, in some cases, with the State about the best way to avoid that harm and about the morally permissible ways to avoid that harm. After all, even those "outsiders" who disagree with spiritual-healing advocates would concede, I suppose, that not *all* means of avoiding medical harm to children are permitted. Cf. Galston, *supra* note 17, at 872 (noting that, in the liberal tradition, not all means of achieving desirable ends are at a state's disposal).

130 See generally Dwyer, *supra* note 3, at 148.

For example, we might say that only *physical* harm counts, effectively ruling out all government supervision of education-related decisions.<sup>131</sup> After all, what conduct is “abusive” is, outside the physical-harm context, unavoidably contested.<sup>132</sup> But a physical-abuse-only limitation would likely unduly restrict the State’s ability to respond to serious psychological and emotional abuse, abuse that is real notwithstanding the difficulty of defining it precisely. Are there any other categorical limits that we can place on what counts as “harm” to children?

I submit the (fairly modest) suggestion that religious education, the transmission of religious beliefs and traditions, and the religious or religion-based content of education should not be a permissible basis for government intervention or second-guessing. That is, the Government should neither come to nor act on the conclusion that religious teaching (as opposed to religiously inspired conduct) or religious education is harmful, at least not in a sense analogous to the physical harm that we all agree the Government may act to prevent. It does not matter if a child’s best interests, as the State sees them, are ill-served by a particular religious teaching or set of beliefs, nor does it matter if the State thinks that a child would be a better liberal citizen, or that the preconditions of liberal democracy would be better served, or that liberalism generally would, in Gutmann’s words, be better “re-produced,” if the child were not exposed to that teaching or those beliefs.

Is such a rule defensible? I think so, and I have tried to outline such a defense here, inspired by the Court’s warning that “[t]hose who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only

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131 See, e.g., GOLDSTEIN ET AL., *supra* note 14, at 111–27.

132 Compare DWYER, *supra* note 15, at 7–44 (arguing that many children are abused by traditional religious education), and Greene, *supra* note 75, at 406 (“Parental choice regarding their children is subject to state intervention when the parent abuses or neglects the child, and this can involve . . . educational abuse or neglect.”), with GOLDSTEIN ET AL., *supra* note 14, at 114 (“In the face of . . . uncertainties and imprecise definitions of ‘emotional neglect’ and ‘serious emotional damage,’ neither concept should be used as a ground for modifying parent-child relationships.”), and Mich. Ass’n Special Educ. Admin. v. Dep’t Soc. Servs., 526 N.W.2d 36, 37, 39 (Mich. Ct. App. 1994) (refusing, for purposes of the State’s abuse and neglect laws, to treat “parents’ failure to act in conformity with petitioners’ opinions regarding . . . children’s educational needs” with abuse or “mental injury”). See generally Natalie Abrams, *Problems in Defining Child Abuse and Neglect*, in WHOSE CHILD? CHILDREN’S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER 289 (William Aiken & Hugh LaFollette eds., 1980) (arguing that child abuse may be defined as a failure to respect children as autonomous individuals).

the unanimity of the graveyard. . . . If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox . . . ."<sup>133</sup> "But seriously," one might complain, "is there *really* any danger of religious education, or the passing on of religious faith, being treated as sufficiently harmful to justify government intervention?"

Of course there is. The view that traditional or minority religious beliefs, religious beliefs not adequately re-formed by the premises of modernity, or religious beliefs that are taken seriously and not treated as a hobby, are "harmful" to children, both in their personal development and in their development as citizens, has been around and influential for a long time. It was, as I noted earlier, the view of many in the common-school movement and of many right-thinking twentieth century "progressives." *Harper's* was not alone in wondering "whether cruelty is not taught or necessarily infused in the doctrines of the Romish Church; whether the triumph of the Jesuits has not condemned the great body of its adherents to become the blind instruments of a persecuting creed. . . . [It cannot] be doubted that such inhuman teaching must fill with savage aspirations the ignorant and fanatical—must arouse the worst instincts of man."<sup>134</sup>

The "religion can be harmful to children" argument has at times even enjoyed a respectful hearing in at least some of the chambers of the United States Supreme Court. Justice Douglas, for example, dissenting in *Wisconsin v. Yoder*, complained that a child "harnessed to the Amish way of life" could suffer great harm; her "entire life may be stunted and deformed," and she could "be forever barred from entry into the new and amazing world of diversity that we have today."<sup>135</sup> If the child is not equipped to "break from the Amish tradition," Justice Douglas asked, how will she "be a pianist or an astronaut or an oceanographer[?]"<sup>136</sup>

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133 *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641–42 (1943); see also *Lee v. Weisman*, 505 U.S. 577, 594 (1992) ("[T]he government may no more use social pressure to enforce orthodoxy than it may use more direct means.").

134 Eugene Lawrence, *Hunter's Point—Compulsory Education*, *HARPER'S WKLY.*, Dec. 23, 1871, at 1197.

135 *Wisconsin v. Yoder*, 406 U.S. 205, 245–46 (Douglas, J., dissenting).

136 *Id.* It seems unlikely that Justice Douglas was concerned that most children educated in public schools are poorly equipped by their education to "break from the [modernist] tradition" and become devout Amish believers. Similarly, Justice Stevens, in his *Kiryas Joel* concurrence, questioned the value of "a religious sect's interest in segregating itself and preventing its children from associating with their neighbors" and was concerned that the state law at issue in that case—which authorized an all-Hasidic village to have its own public-school district—"unquestionably increased the likelihood that they would remain within the fold, faithful adherents of their parents'



At times, some Justices' hostility toward religious instruction has degenerated from concerns about children's future opportunities to ugly assertions about the nature and aims of Catholic education. Recall the concurring opinion of Justices Black and Douglas in *Lemon v. Kurtzman*,<sup>137</sup> where they observed, quoting from a once-popular anti-Catholic tract:

In the parochial schools Roman Catholic indoctrination is included in every subject. History, literature, geography, civics, and science are given a Roman Catholic slant. The whole education of the child is filled with propaganda. That, of course, is the very purpose of such schools, the very reason for going to all of the work and expense of maintaining a dual school system. Their purpose is not so much to educate, but to indoctrinate and train, not to teach Scripture truths and Americanism, but to make loyal Roman Catholics. The children are regimented, and are told what to wear, what to do, and what to think.<sup>138</sup>

Even today, there are those who echo such sentiments and who believe that Catholic schools—or, more generally, traditional religious education—are, or can be, harmful to children, both as citizens and in their development, and that this purported harm warrants govern-

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religious faith." Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 711 (1994) (Stevens, J., concurring). Why, one wonders, is this a bad thing—that children should "remain within the fold"? Does Justice Stevens believe it a proper function of the liberal State to *decrease* the likelihood that children remain "faithful adherents of their parents' religious faith"? Maybe so. Michael McConnell describes a University of Nebraska study that reported—evidently approvingly—that on-campus residency reduces the likelihood that college students will retain religious preferences. "Apparently, the University viewed abandonment of moral and religious upbringing as a liberating and enlightening development in the lives of students." McConnell, *supra* note 58, at 463 (discussing Rader v. Johnson, 924 F. Supp. 1540 (D. Neb. 1996)).

137 403 U.S. 602 (1971).

138 *Id.* at 635 (Douglas, J., concurring) (quoting LORAINÉ BOETTNER, ROMAN CATHOLICISM 360 (1962)). Justice Douglas continued, "One can imagine what a religious zealot, as contrasted to a civil libertarian, can do with the Reformation or with the Inquisition." *Id.* at 635–36. And in Justice Black's mind, Catholic schools posed more than a danger of slanted curricula.

The same powerful sectarian religious propagandists who have succeeded in securing passage of the present law to help religious schools carry on their sectarian religious purposes can and doubtless will continue their propaganda, looking toward complete domination and supremacy of their particular brand of religion. And it nearly always is by insidious approaches that the citadels of liberty are most successfully attacked.

Bd. of Educ. v. Allen, 392 U.S. 236, 251–52 (1968) (Black, J., dissenting).

ment action and restrictions.<sup>139</sup> This is reason enough, it seems to me, for concern, and for retrieving and re-affirming *Pierce*.

Another cause for reasonable concern is the mountain of cases dealing with the treatment of religious beliefs in the context of child-custody disputes, cases where courts must decide whether and how the religious beliefs of parents (and children) should be factored into the "best interests" inquiry employed in custody matters.<sup>140</sup> Now, these

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139 In Professor Dwyer's view, for example, the world of evangelical Christian, Catholic, Orthodox Jewish, and other traditional religious schools is heavily populated by neglected and abused children, who are being harmed as a result of their parents' decisions and the State's inaction just as surely as a child who is injured or dies because her parent refuses medical care on religious grounds. See DWYER, *supra* note 15, at 62–101 (exploring parents' rights to determine medical treatment for children, among other aspects of child-rearing). My own view, though, is that Professor Dwyer's claims about the harm to children from religious education reflect more his disagreement with Catholic, Orthodox Jewish, and evangelical Christian doctrine than a demonstration of "harm" sufficient to justify the kind of regulation he proposes. Although Professor Dwyer's arguments against parents' rights and his defense of children's welfare, as he sees it, are passionate and powerful, his tendentious portrait of Catholic schools, and his claim that these schools—and, evidently, Catholicism generally—are often harmful to children are seriously undermined by his reliance on highly polemical accounts of Catholic education and the Catholic Church. See JOANNE H. MEEHL, *THE RECOVERING CATHOLIC: PERSONAL JOURNEYS OF WOMEN WHO LEFT THE CHURCH* 69–98 (1995); see also Carter, *supra* note 27, at 1209 ("[S]uch arguments as these rest on questionable empirical propositions about what values children learn, and where, supported principally by anti-religious stereotypes rather than by any hard analysis of how religions operate."). For a detailed and, in my view, convincing response to Professor Dwyer's claim about the "sexist" and otherwise damaging nature of Catholic and other traditional religious schools, see Gilles, *supra* note 21, at 199–210.

140 For a *small* sampling of these cases, see, for example, *In re Marriage of Short*, 698 P.2d 1310, 1313 (Colo. 1985) (noting that unless religious beliefs are likely to result in physical or emotional harm, they are not relevant to custody); *Osteraas v. Osteraas*, 859 P.2d 948 (Idaho 1993) (pointing out that absent compelling reasons, custody proceedings may not favor religion over non-religion); *Osier v. Osier*, 410 A.2d 1027, 1031–32 (Me. 1980) (vacating custody order on the ground that the trial court granted custody to the father after giving undue weight to the mother's religious beliefs as a Jehovah's Witness); *Kendall v. Kendall*, 687 N.E.2d 1228 (Mass. 1997) (holding that a divorce judgment limiting defendant from sharing certain aspects of his "fundamentalist" Christian faith with child is constitutional); *Harris v. Harris*, 343 So. 2d 762, 763 (Miss. 1977) (commenting that the court has no authority to dictate what religion a parent teaches her child, unless it involves exposing him to physical danger or to "immoral" practices); *Zummo v. Zummo*, 574 A.2d 1130, 1157 (Pa. Super. Ct. 1990) (holding that an order prohibiting parent from taking children to non-Jewish religious services was unconstitutional); *Burrows v. Brady*, 605 A.2d 1312, 1316–17 (R.I. 1992) (holding that consideration of religious beliefs or disbeliefs are appropriate when determining what is in the best interests of the child); *Larson v. Larson*, 888 P.2d 719, 723–25 (Utah Ct. App. 1994) (holding that a parent's "religious compatibility"

are *custody* cases, cases where, generally speaking, the State has been called in, most likely by the parents, to adjudicate custody questions and has not intruded into the sphere of family association. A demanding threshold “harm” standard is probably not necessary to protect family integrity or to act as a check on government overreaching, because the family has, in effect, submitted itself to the Government for supervision and adjustment.<sup>141</sup> Still, courts in these cases often engage in “weighing the relative value” of parents’ religious beliefs (or lack of beliefs) in light of their own sense of what is best for the parents’ children.<sup>142</sup> This kind of weighing strikes me as a task for which courts are dangerously unsuited, and these custody cases caution strongly against endorsing, in the education context, a government prerogative to police for “harmful” elements the content of religious training.<sup>143</sup>

I cannot emphasize enough that my claim here is *not* that religion absolves parents who actually harm their children or that the Constitu-

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with a child is an appropriate factor for a court to consider in determining custody); *Varnum v. Varnum*, 586 A.2d 1107, 1111–12 (Vt. 1990) (holding that religious practice must have a direct impact on a child’s mental or physical health to be relevant to custody determination). See also *Walker v. Johnson*, 891 F. Supp. 1040, 1045–51 (M.D. Pa. 1995) (discussing limits on parents’ control over a child’s religious training generally). For more detailed discussions of the religion-and-custody issue, and of the many cases in which it arises, see generally Donald L. Beschle, *God Bless the Child?: The Use of Religion as a Factor in Child Custody and Adoption Proceedings*, 58 FORDHAM L. REV. 383 (1989); Barbara Handschu & Mary Kay Kisthardt, *Religion as a Custody Issue*, NAT’L L.J., Feb. 21, 2000, at A17 (examining “parameters for consideration of religious factors in both custody and visitation disputes”); Rebecca Korzec, *A Tale of Two Religions: A Contractual Approach to Religion as a Factor in Child Custody and Visitation Disputes*, 25 NEW ENG. L. REV. 1121 (1991); Schneider, *supra* note 126, at 879, 879–906 (surveying recent child custody decisions involving parents’ religious disputes); Jennifer Benning, Note, *A Guide for Lower Courts in Factoring Religion into Child Custody Disputes*, 45 DRAKE L. REV. 733 (1997); Jennifer Ann Drobac, Note, *For the Sake of the Children: Court Consideration of Religion in Child Custody Cases*, 50 STAN. L. REV. 1609 (1998) (including survey of “over fifty state child custody cases since 1988”); Note, *The Establishment Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interest Equation*, 82 MICH. L. REV. 1702 (1984); Robyn E. Blumner, *Custody Rulings on Religion Flawed*, CLEVELAND PLAIN DEALER, Oct. 30, 1999, at 1F.

141 That said, “[t]o balance the competing rights of parents and children” in custody cases, “many courts have adopted a ‘harm’ standard. . . . [This] allows a court to examine parental religious practices in determining custody only if the practice causes the child a threshold level of harm.” Lauren D. Freeman, *The Child’s Best Interests vs. The Parent’s Free Exercise of Religion*, 32 COLUM. J.L. & SOC. PROBS. 73, 78 (1998).

142 Beschle, *supra* note 140, at 400.

143 See Schneider, *supra* note 126, at 904 (“Courts *have* to make custody decisions, and to make them as well as possible. . . . Courts must do what courts must do; they should avoid doing what they can only do badly.”).

tion entitles them to do so (though it certainly protects their liberty in a manner that enables parents, sometimes, to do badly by their children), but only that we should resist the temptation to treat as harmful the transmission of unpopular or illiberal religious beliefs. And I agree, as I hope I have made clear, that children's best interests are, in the end, the moral criteria for evaluating legal rules in this area. I am claiming, though, that children's best interests, and freedom generally, are best served when the State's ability to second-guess parents' decisions—especially in areas involving religion and education—is carefully limited, as it was in *Pierce*, to prevent those who happen to hold power and whose views happen to hold sway from imposing their own orthodoxy on other people's children in the name of advancing those children's best interests.<sup>144</sup>

Maybe traditional religious education, or a particular brand of religion itself, really does harm children by undermining their future capacities for choice, their future freedom and options and opportunities in life, their future autonomy. Maybe these children are deprived of the required grounding in shared values and deliberative skills and habits that being a good citizen in a liberal society requires. But I doubt it. In any event, in the face of uncertainty, it seems to me that we ought to require the Government to stay its hand and defer to parents' incentives, obligations, and love when it comes to deciding what children should learn, especially what they should learn, if anything, about faith. And who knows? Perhaps constraining the State, and clearing out space for families and for the "little platoons" of civil society to do their work,<sup>145</sup> would have the happy effect of encouraging and nurturing the development of precisely those other-regarding virtues that we are told liberal democracies cannot do without.

#### CONCLUSION: FAMILIES, SUBSIDIARITY, AND SUBVERSION

There is no avoiding the fact that the Supreme Court's statements, in *Pierce* and elsewhere, about parental *control*, and about parents' *rights* to *direct* their children's upbringing and education, are jarring to many modern ears. It is easy to hear in such statements outdated and unappealing assertions of ownership and dominion over children. But this is not how we should read *Pierce* today. We should regard the case as a ringing endorsement of religious freedom and of limited government dominion over citizens. The French Revolution-

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144 See Goldstein, *supra* note 30, at 664 ("[A] prime function of law is to prevent one person's truth . . . from becoming another person's tyranny.")

145 See EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 41 (J.G.A. Pocock ed., Hackett Pub. Co. 1987) (1790).

aries asserted the “right” not to be free from any authority that did *not* emanate from the State,<sup>146</sup> but we have learned to be wary of such atomizing freedoms. In *A Man for All Seasons*, Thomas More warns his son-in-law Will Roper—who boasts that he would “cut down every law in England” to “get after the Devil”—that “when the last law was down, and the Devil turned round,” few of us “could stand upright in the winds that would blow.”<sup>147</sup> Substitute the liberal state for the Devil, and mediating institutions, like the family, for the laws of England.

We can defend *Pierce* and at the same time recognize that parents are blessed with the opportunity to raise, nurture, and educate their children more than they are “entitled” to “control” them. Parents’ rights and obligations flow from their *vocation*, not from their store of individual entitlements.<sup>148</sup> We are called to nurture, love, and educate children; we are not merely required or privileged by law to do so. In so doing, we participate, in a sense, in the creation of a human person whose dignity, I think we all agree, is inestimable.

I wonder, though, if *Pierce* is unavoidably anomalous in an intellectual and legal culture that views families more as contractual arrangements between autonomous individuals, or as dangerous seedbeds of oppression, inequality, and patriarchy—as “school[s] of despotism”<sup>149</sup>—instead of as the “first and vital cell[s] of society.”<sup>150</sup> Perhaps *Pierce* and the cluster of values and maxims for which it is thought to stand are best defended not in terms of parents’ individual “rights” against government, and certainly not in terms of ownership and property, but instead in terms of subsidiarity.<sup>151</sup> Maybe we should

146 See DECLARATION OF THE RIGHTS OF MAN AND CITIZEN, art. 3 (Fr. 1789).

147 Robert Bolt, *A Man for All Seasons* (1960), reprinted in *PLAYS OF OUR TIME* 631, 669 (Bennet Cerf ed., 1967).

148 This notion of parenthood as “vocation” is emphasized in my own religious tradition. See POPE JOHN PAUL II, LETTER TO FAMILIES, at No. 16 (U.S. Catholic Conference Pub’g Servs. 1994) (“Parents are the first and most important educators of their own children, and they also possess a *fundamental competence* in this area: they are educators because they are parents.” (emphasis added)); POPE JOHN PAUL II, *supra* note 12, at No. 36 (“The task of giving education is rooted in the primary vocation of married couples to participate in God’s creative activity . . .”).

149 John Stuart Mill, *The Subjection of Women in A VINDICATION OF THE RIGHTS OF WOMEN* 217, 217 (Neill H. Alford, Jr. et al. eds., 1993).

150 POPE JOHN PAUL II, *supra* note 12, at No. 42 (quoting SECOND VATICAN ECUMENICAL COUNCIL, APOSTOLICAM ACTUOSITATEM [DECREE ON THE APOSTOLATE OF THE LAYTY], at No. 11 (1965)); cf. *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (“Our jurisprudence historically has reflected Western civilization concepts of *the family as a unit* with broad parental authority over minor children.” (emphasis added) (citations omitted)).

151 Subsidiarity is, in twentieth-century Catholic social thought, the principle according to which

think of the family, as it appears in *Pierce* and in contemporary debates about civic education, parental authority, and religious freedom, as the original "mediating institution." On this view, the State properly refrains from second-guessing families on matters of education and the transmission of religious tradition not only out of respect for the religious freedom and parental authority of the individuals situated within those families, but also out of wise regard for those families' integrity and health, precisely because the integrity and freedom of these "vital cells" is important to the common good.<sup>152</sup>

On the other hand, not only are families constitutive elements of civil society, supporting the entirely legitimate "higher" associations, including the State, they are also, and should be, *subversive*. Like the Church, the family is an organic "community of persons"<sup>153</sup> and an independent (from the State) source of meaning and value.<sup>154</sup> At their best, families can provide, for their members, their neighbors, and society, a prophetic counter-weight to the State, just as, at its best, religious faith challenges and subverts the State's claims to virtue and competence. This is precisely why statist understandably seek to atomize the family and to minimize religion's influence through perse-

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a community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to co-ordinate its activity with the activities of the rest of society, always with a view to the common good.

U.S. CATHOLIC CONFERENCE, *supra* note 4, § 1883; see also Mary Ann Glendon, *Civil Service*, THE NEW REPUBLIC, Apr. 1, 1996, at 39, 40 (describing "subsidiarity" as "the principle of leaving social tasks to the smallest social unit that can perform them adequately"). "Subsidiarity" is also a more technical term in international and European Community law. See generally George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331 (1994).

152 See, e.g., Pope Pius XI, *Quadragesimo anno* [On Reconstructing the Social Order] ¶ 79, in CONTEMPORARY CATHOLIC SOCIAL TEACHING 47, 71 (National Conference of Catholic Bishops ed., 1991) ("[I]t is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do.").

153 POPE JOHN PAUL II, *supra* note 12, at Nos. 18, 26; see also SECOND VATICAN ECUMENICAL COUNCIL, DECLARATION ON RELIGIOUS LIBERTY [*Dignitatis humanae*], at No. 5, in VATICAN COUNCIL II 803 (Austin Flannery, O.P. ed., rev. ed. 1992) ("Every family . . . is a society with its own basic right.").

154 See Greene, *supra* note 75, at 406-07; see also Marci Hamilton, *Power, The Establishment Clause, and Vouchers*, 31 CONN. L. REV. 807, 808 (1999) ("[T]he entire Constitution is governed by the overarching principle that society is best served when centers of power are kept separate.").

cution, suppression, or co-option,<sup>155</sup> or perhaps through the milder methods of civic education.<sup>156</sup>

I have argued that *Pierce* points to ideals that should be taken seriously, that do not conflict with personalist ideals regarding children's dignity, and that are—especially in the context of education and religious training—worth defending vigorously. In *Pierce*, the integrity of the family, the educational rights of parents, the limits on the State's power to standardize thought, and the rightful demands of the common good are all grounded firmly, as child-centered liberals would insist they must be, in the dignity of the human person.<sup>157</sup> Still, it could be that defenses of *Pierce* that fail to move beyond parents'-rights terms to discussions about the family *as a society*, and about its supportive and subversive role *in society*, will not be able to respond as powerfully as they must to the increasingly confident claims made for government intervention in the name of civic education.

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155 George Weigel provides a wonderful account of communist Poland's efforts in this regard in his recent biography of Pope John Paul II. See GEORGE WEIGEL, WITNESS TO HOPE: THE BIOGRAPHY OF POPE JOHN PAUL II 140–41, 300–25 (1999).

156 As Stephen Carter has observed, “[q]uite simply, religion in its subversive mode provides the believer with a transcendent reason to question the power of the state. That is the reason that the state will always try to domesticate religion: to avoid being subverted.” Carter, *supra* note 57, at 1060; see also *id.* (“Often the willingness of the religious to be subversive in the face of official and unofficial pressures has made the nation better.”).

157 See, e.g., Dwyer, *supra* note 3, at 177 (“There are widely shared moral beliefs and legal rules about how we should treat people simply by virtue of their personhood.”).