IN THE COURT OF APPEALS OF VIRGINIA

Record No. 0951-22-2
Circuit Court Case No. CL21001737-00

CARLOS and TATIANA IBAÑEZ; R.I. and V.I., minors, by and through their parents, Carlos and Tatiana Ibañez, as the minors' next friends; MATTHEW and MARIE MIERZEJEWSKI; P.M., a minor, by and through the minor's parents, Matthew and Marie Mierzejewski, as the minor's next friends; KEMAL and MARGARET GOKTURK; T.G. and N.G., minors, by and through their parents, Kemal and Margaret Gokturk, as the minors' next friends; ERIN and TRENT D. TALIAFERRO; D.T. and H.T., minors, by and through their parents, Erin and Daniel Taliaferro, as the minors' next friends; MELISSA RILEY; and L.R., a minor, by and through the minor's parent, Melissa Riley, as the minor's next friend,

Plaintiffs-Appellants

v.

ALBEMARLE COUNTY SCHOOL BOARD; MATTHEW S. HAAS, Superintendent, in his official capacity; and BERNARD HAIRSTON, Assistant Superintendent for School Community Empowerment, in his official capacity,

***Defendants-Appellees*.**

BRIEF OF *AMICUS CURIAE* MELISSA MOSCHELLA, Ph.D. IN SUPPORT OF APPELLANT

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INTERESTS OF *AMICA*

Melissa Moschella (Ph.D., Princeton University; A.B. Harvard University) is Associate Professor of Philosophy at the Catholic University of America and McDonald Distinguished Fellow in the Center for Law and Religion at Emory University School of Law. (Affiliations are for identification purposes.) Dr. Moschella's curriculum vitae is available here: https://philosophy.catholic.edu/faculty-and-research/faculty-profiles/moschella-melissa/moschella-cv-2022.pdf, last visited October 22, 2022, at 17:20.

Amica is a scholar of jurisprudence and constitutional law, particularly with regard to the issues of parental rights in education and religious freedom. She is the author of *To Whom Do Children Belong? Parental Rights, Civic Education and Children's Autonomy*, Cambridge University Press (2016), and of *Beyond Equal Liberty: Religion as a Distinct Human Good and the Implications for Religious Freedom*, Journal of Law and Religion 32 (2017) 123-146, as well as of numerous other scholarly publications on moral and legal questions regarding parental rights and religious freedom.

STATEMENT OF THE NATURE OF THE CASE AND OF THE MATERIAL PROCEEDINGS IN THE TRIAL COURT

I. STATEMENT OF FACTS.

Acknowledging that the Rules of the Court of Appeals of Virginia require that, "A brief amicus curiae must comply with the rules applicable to the brief of

the party supported" (5:A:23(b)), *amica* will provide a brief statement of facts, but defers to the Parties to best inform the Court of the relevant facts.

The Albemarle County School Board adopted an "Anti-Racism Policy" that imposes the teaching of Critical Race Theory on students in the public schools of Albemarle County. *Complaint* at Record (*hereinafter* "R.") 6-7, ¶¶ 6-7. Plaintiffs, parents and their children of the Christian faith/religion, object to the Policy and the teaching that it forces upon them in violation of the beliefs and morals they hold by virtue of being adherents to Christianity. *Id. at* R.10-7, ¶¶ 18-67. Plaintiffs sued to stop the teaching of the Policy in Albemarle County's public schools. *Id*. at R.9, ¶¶ 15-6.

II. MATERIAL PROCEEDINGS IN THE TRIAL COURT.

Plaintiffs filed suit on December 22, 2021. Defendants demurred, moved to dismiss, and filed a plea in bar. The Albemarle County Circuit Court dismissed the action with prejudice, by Order entered June 1, 2022, holding that the "Plaintiffs lack standing to bring their claims, and that Plaintiffs have not stated a cause of action arising under Virginia law because their claims under the Constitution of Virginia are not self-executing and the statute on which they rely does not create a private cause of action." R.1373, *Order*. Plaintiffs appealed.

ASSIGNMENTS OF ERROR

I. Plaintiffs/Appellants have standing to sue: the fundamental rights of parents limit the State's sphere of competence in the educational arena.

II. The Anti-Racism Policy goes beyond the limits on State educational authority and violates parental rights.

III. The Policy constitutes unconstitutional indoctrination, not education.

STANDARD OF REVIEW

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487, 81 S. Ct. 247, 251 (1960). Among these freedoms is "the fundamental right of parents to make decisions concerning the care, custody, and control of their children" which the United States Supreme Court in *Troxel v. Granville* referred to as "perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 66, 65, 120 S. Ct. 2054, 2060 (2000). This fundamental right of parents attains even greater constitutional weight when it implicates parents' free exercise claims. As the court noted in *Prince v. Massachusetts*, "The parent's conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters." *Prince v. Massachusetts*, 321 U.S. 158, 165, 64 S. Ct. 438, 441 (1944). Given the Court's repeated affirmation of parental rights as fundamental, laws burdening parental

rights already warrant the highest level of judicial scrutiny. The need to apply strict scrutiny becomes absolutely incontrovertible, however, "when the interests of parenthood are combined with a free exercise claim." *Wisconsin v. Yoder*, 406 U.S. 205, 233, 92 S. Ct. 1526, 1542 (1972). The case currently before the court clearly falls into this category.

ARGUMENT

The Plaintiffs in this case are Christian families (parents and their children who are students in the schools of the Albemarle County School Board) who believe that all persons are equal before God, and that treating people differently based on race is contrary to their moral and religious beliefs. They also seek to help their children develop a sense of their own identity that is in line with their family values and religious beliefs. The Albemarle County School Board's Anti-Racism Policy (the "Anti-Racism Policy" or "Policy") inculcates in children a set of beliefs and sense of their own identity that is directly at odds with the Plaintiffs' values and religious beliefs.

This inculcation of beliefs is not a reasonable exercise of the state's educational authority, but rather constitutes unconstitutional indoctrination that violates the fundamental rights of parents to direct the education and upbringing of their children, and to fulfill their religious obligations. The Policy involves teaching content that is outside the realm of the basic skills, academic

competencies, and civic knowledge that constitute the traditional aims of public education, and that justify the State's exercise of coercive authority in this realm. Indeed, the curriculum goes beyond teaching content and skills to forming students' sense of their own identity, thus entering into deeply personal territory that belongs to the family realm.

Second, the content being taught is based neither on facts nor on widely-shared, uncontroversial values essential to good citizenship, such as honesty, fairness, and mutual respect, but rather on highly controversial and contested theories contrary to the philosophical and religious beliefs of many Americans, and even to conceptions of good citizenship articulated by the Supreme Court: "Classifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Shaw v. Reno*, 509 U.S. 630, 643, 113 S. Ct. 2816, 2824 (1993), *quoting Hirabayashi v. United States*, 320 U.S. 81, 100, 87 L. Ed. 1774, 63 S. Ct. 1375 (1943), *accord Loving v. Virginia*, 388 U.S. 1, 11, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967). "Government action dividing us by race is inherently suspect because such classifications promote 'notions of racial inferiority and lead to a politics of racial hostility, ….'" *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746, 127 S. Ct. 2738, 2767 (2007), *quoting Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493, 109 S. Ct. 706, 722 (1989) (plurality).

Third, students are not merely exposed to this controversial theory about race and identity but required to voice their affirmation of it and hide their disagreement under threat of punishment. Fourth, the curriculum is neither politically nor religiously neutral, but rather promotes and requires students to affirm particular political programs (*Complaint* at R.32-3, ¶¶ 149-50), and teaches that Christianity (but not other religions), is part of the "dominant culture" that is inherently oppressive and racist, and that students must seek to "oppose" and "dismantle." *Id.* at R.32, ¶ 148. For the government, via school officials, to engage in indoctrination of this sort is a violation of Plaintiffs' fundamental right to direct the education and upbringing of their children, and their right to the free exercise of religion.

This Brief will, first, explain how the fundamental rights of parents limit the State's sphere of competence in the educational arena, drawing on *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 626 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 45 S. Ct. 571 (1925); and the common law tradition upon which these decisions are built. The standard set by *Pierce* implies that the State may not coercively impose any studies that are not "plainly essential to good citizenship." Section II explains how the Anti-Racism Policy goes beyond the limits on State educational authority and violates parental rights, and Section III by demonstrates that the Policy constitutes unconstitutional indoctrination, not education.

I. *MEYER, PIERCE*, AND THE COMMON LAW LIMITS OF STATE EDUCATIONAL AUTHORITY.

Drawing on a well-established common law tradition recognizing the natural rights and duties of parents to control the custody, care, and education of their children, the Supreme Court of the United States in *Meyer v. Nebraska* explicitly affirmed this right as encompassed within the liberty protected by the Fourteenth Amendment's Due Process Clause. *Meyer*, 262 U.S. at 399, 43 S. Ct. at 626. The court wrote: "Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life, and nearly all the States … enforce this obligation by compulsory laws." *Id*., 262 U.S. at 400. Notably, the *Meyer* court spoke of education as the *parents' "*duty" and "obligation." *Id.* Establishment of public schools by the state assists parents in satisfying this duty and obligation.

While the *Meyer* court stated that "[t]he power of the state to compel attendance at some school and to make reasonable regulations for all schools … is not questioned" – noting that "those matters are not within the present controversy" – it is clear that the court did not have an expansive and deferential view of what fits into the category of "reasonable regulations." *Id.*, 262 U.S. at 402. Indeed, the court explicitly recognized that the law being challenged, *i.e.,* the prohibition of teaching the German language in elementary schools, had a clear relation to a legitimate state interest. *Id.*, 262 U.S. at 398. The court stated that "it

would be highly advantageous if all had ready understanding of our ordinary speech" (*Id.*, 262 U.S. at 401), and that "[t]he desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate." *Id.*, 262 U.S. at 402. The court, nonetheless, found that that this "desirable end cannot be promoted by prohibited means" (*Id.*, 262 U.S. at 401), and that the means adopted "exceed the limitations upon the power of the State and conflict with rights assured to plaintiff." *Id.*, 262 U.S. at 402. The court concluded that the statute "as applied is arbitrary and without reasonable relation to any end within the competency of the State." *Id.*, 262 U.S. at 403. The qualifier "within the competency of the State" is crucial here, for the court already acknowledged the relationship between the statute and a legitimate state interest. Thus, the court's conclusion must rest on the judgment that the state's competency in educational matters is limited by the rights of parents to control their children's education, and that the statute in question trespasses on this parental sphere of authority.

The limitations on state educational authority are even clearer in *Pierce v. Society of Sisters*, in which the Court famously stated:

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

Pierce, 268 U.S. at 535, 45 S. Ct. at 573. While the *Pierce* court, in the context of a case regarding compulsory public school attendance, stated that it is unconstitutional for "the State to standardize its children by forcing them to accept instruction from public teachers only" (*Id.*, 268 U.S. at 535), the state certainly may seek to "standardize its children" and thereby overstep its constitutional bounds in other ways. Of course, as in *Meyer*, the *Pierce* court recognized "the power of the State reasonably to regulate" education. *Id*., 268 U.S. at 534. Yet, as law professor Stephen Gilles points out, "in *Pierce*, the realm within which the state wielded this authority was limited and secondary, because primary authority over education vested in parents as a matter of substantive due process liberty." *Liberal Parentalism and Children's Educational Rights* (*hereinafter "Liberal Parentalism"*), Stephen Gilles ("Gilles"), 26 Cap. U.L. Rev., *25-6 (1997) (*attached hereto*).

Echoing *Meyer*, this sphere of parental authority "entails sharp limits on what counts as a 'purpose within the competency of the State' in the realm of education." *Liberal Parentalism*, at 26, *quoting Pierce*, 258 U.S. at 534-35. The same principle that rules out forcing children to attend public schools "should rule out government attempts to standardize children by any means absent a showing of parental abuse or other demonstrable harms." *Id.*

Gilles goes on to point out that *Pierce*'s language about "the power of the State to reasonably regulate all schools" is completely consonant with this view of state educational authority as secondary to and limited by parental educational authority. *Id*., *quoting Pierce,* 268 U.S. at 534. For *Pierce* specifies only a few, relatively narrow areas with regard to which "no question is raised" about the State's regulatory power: "to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare" *Pierce,* 268 U.S. at 534. Gilles asserts that "[t]he *Pierce* court's specific formulations speak volumes about how limited the scope of 'reasonable' regulation of education is: the state may require only 'plainly essential' studies, and it may forbid only 'manifestly inimical' ones." *Liberal Parentalism*, at 26, *Pierce*, 258 U.S. at 534.

Gilles's analysis is further supported by looking at state court decisions in the years prior to *Meyer,* for these decisions reflect the common law understanding of parental rights that were the basis for the United States Supreme Court's recognition of parental rights as among "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer*, 262 U.S. at 399. In *State ex rel. Kelley v. Ferguson*, 95 Neb. 63, 144 N.W. 1039

(1914), the Nebraska Supreme Court held that, despite the importance of public schools,

> we should be careful to avoid permitting our love for this noble institution to cause us to regard it as 'all in all' and destroy both the God-given and constitutional right of a parent to have some voice in the bringing up and education of his children …. [F]or, after all is said and done, the prime factor in our scheme of government is the American home.

Id., 95 Neb. at 73-74, 144 N.W. at 1043. The court went on to say that "the school authorities should be upheld in their control and regulation of our school system; but their power and authority should not be unlimited" *Id*., 95 Neb. at 74, 1044 N.W. at 1044. In particular, school authorities "should exercise their authority … with a due regard for the desires and inborn solicitude of the parents …. If a reasonable request be made by a parent, it should be heeded." *Id*. Following this reasoning, the Nebraska Supreme Court ruled in favor of a parent who wanted his daughter to be exempted from attending the domestic science class because it encroached on the time she needed for her other studies, holding that "the parent has a right to make such selection" from among the prescribed studies. *Id*. 95 Neb. at 75.

This decision was not an isolated one, but rather a reaffirmation of the decision made in *State ex rel. Sheibley v. School District*, which held that students attending public schools cannot "be compelled to study any prescribed branch against the protest of the parent that the child not study such branch …." *State ex*

rel. Sheibley v. School District, 31 Neb. 552, 557, 48 N.W. 393, 395 (1891). In arguing for this conclusion, the court asks:

> Now who is to determine what studies she shall pursue in school: a teacher who has a mere temporary interest in her welfare, or her father, who may reasonably be supposed to be desirous of pursuing such course as will best promote the happiness of his child? The father certainly possesses superior opportunities of knowing the physical and mental capabilities of his child. [] The right of the parent, therefore, to *determine* what studies his child shall pursue, is paramount to that of the trustees or teacher.

Id. (*emphasis added*). The only limits on this right are the requirements of "proper discipline, efficiency, and well-being of the school." *Id*.

These Nebraska Supreme Court rulings are consistent with the judgments of other state courts, including *Morrow v. Wood*, 35 Wis. 59 (1874); *Rulison v. Post*, 79 Ill. 567, 1875 WL8690 (Ill.) (1875); *Trustees of Schools v. People*, 87 Ill. 303, 1877 WL9862 (Ill.) (1877); and *School Board District. No 18 v. Thompson*, 24 Okla. 1, 103 P. 578 (1909). In the latter case, the Supreme Court of Oklahoma stated:

> Our laws pertaining to the school system of the state are so framed that the parent may exercise the fullest authority over the child without in any wise impairing the efficiency of the system. The only decided departure from the common-law rule is the section of our Constitution providing for the compulsory attendance at some public or other school, unless other means of education are provided, of all children of the state who are sound in mind and body, between the ages of 8 and 16 years, for at least three months each year.

Thompson, 24 Okla. at 9, 103 P. at 581. The court went on to emphasize the strength of parents' rights under common law: "Under our form of government,

and at common law, the home is considered the keystone of the governmental structure. In this empire parents rule supreme during the minority of their children." *Id*. Rejecting the view that "the mere act of sending the children to school amounts to a delegation of the parental authority which the law of the land places in the hands of the parent," the court quotes Justice Cole in *Morrow v. Wood, supra*, who asks:

> "Whence … did the teacher derive this exclusive and paramount authority over the child, and the right to direct his studies contrary to the wish of the father? It seems to us it is idle to say the parent, by sending his child to school, impliedly clothes the teacher with that power, in a case where the parent expressly reserves the right to himself, and refuses to submit to the judgment of the teacher the question as to what studies his boy should pursue."

Id. at 24 Okla. at 10, 103 P. at 581.

It is therefore quite clear, particularly in light of the common law tradition and its interpretation by state courts, that the United States Supreme Court rulings in *Meyer* and *Pierce* should be interpreted as recognizing a sphere of parental educational authority that takes precedence over and sets limits on the educational authority of the state. This analysis leads to two conclusions that are of particular relevance to the current case.

First, while it is clear that the state has authority to regulate education, and that officials at the appropriate level have the authority to establish school curriculum, this curricular authority is limited to the establishment of "studies

plainly essential to good citizenship" (and, conversely, to the prohibition of studies "manifestly inimical to the public welfare"). *Pierce*, 268 U.S. at 534, 45 S. Ct. at 573. This means that when school officials *mandate* studies beyond those that are "plainly essential to good citizenship," they act outside their competency and trespass upon parents' sphere of educational authority. *Id*.

Second, the pre-*Meyer* rulings leave no room to doubt that the common law rights of parents – which *Meyer* and *Pierce* explicitly recognized as within the sphere of liberty guaranteed by the Due Process Clause – are not exhausted by their right to choose where to send their children to school, but rather include the right to determine what their children will learn *within the public school*, to the extent that this is feasible and does not undermine the discipline of the school or the well-being of other students.

II. ALBEMARLE COUNTY SCHOOL BOARD'S ANTI-RACISM POLICY GOES BEYOND THE LIMITS OF STATE EDUCATIONAL AUTHORITY AND VIOLATES THE CONSTITUTIONAL RIGHTS OF PARENTS.

The previous section established that, under *Meyer* and *Pierce*, the sphere of legitimate state educational authority needs to be understood as limited by the parents' prior right to control the education and upbringing of their children. The State has the authority to ensure that parents fulfill their educational duty through compulsory education laws, can assist parents in their task through the establishment of public schools, can mandate "studies plainly essential to good

citizenship," and can forbid studies "manifestly inimical to the public welfare." *Pierce*, 268 U.S. 510 at 534, 45 S.Ct. at 573. When the state exercises coercive educational power outside these bounds, it trespasses on the parents' sphere of educational authority, violating their fundamental natural and constitutional rights.

The adoption of a district-wide policy like Albemarle County's Anti-Racism Policy, which extends across the curriculum and is mandatory for all students, is an exercise of coercive state educational power. To understand why this is the case, it must be recognized that, although parents have the constitutional right to send their children to private rather than public school, for many if not most parents, financial and other limitations mean that the only way they can comply with compulsory education laws is to send their children to a public school. In other words, while public schooling is not legally compulsory, it is *de facto* compulsory for many families. Further, even parents with the financial means to send their children to private school effectively will pay a steep financial penalty for doing so. In the current case, for instance, the Taliaferro family found that, as a result of the Anti-Racism Policy, fulfilling their duty to educate their children in accord with their moral and religious values required sending their two oldest children to private school, which costs them about $30,000 a year. *Complaint* at R.14, ¶ 45. As the Policy is implemented in earlier grades, they may have to do the same with their

two younger children. *Id*. This is clearly a substantial burden on their parental and free exercise rights.

Thus, the fact that public schools have a monopoly on public educational funding means that the mandatory aspects of the public school curriculum – such as the Policy at issue in this case – are to some extent coercive on all families in Albemarle County with school-age children. For those parents without the means to send their children to a private school, homeschool them, or move to another district, such policies are absolutely coercive – the parents have no choice but to allow their children to be exposed to the mandatory aspects of the curriculum. And for parents with the means to pay for private school, the policies are coercive insofar as they can only avoid exposing their children to the mandatory aspects of the public school curriculum by paying a significant financial penalty.

Especially because the Policy is coercive, the *Pierce* standard indicates that it will fall outside the proper competence of the State – and thus violate the rights of parents – unless the curricular content mandated by the Policy can be construed as "plainly essential to good citizenship." *Pierce*, 268 U.S. at 534, 45 S. Ct. at 573. The *Pierce* Court's use of the word "plainly" sets a very high bar. Surely, any curricular content that a significant number of citizens believe to be *non*-essential or even *harmful* to good citizenship fails to meet that bar. Yet this clearly describes the Policy, which includes highly controversial material that many (including the

Plaintiffs) believe to be harmful, divisive, and contrary to American values by treating students differently solely on the basis of race and teaching students to do the same. *See, e.g. Complaint* at R.22-3, 29-32, 33-4, ¶¶ 99, 133-145, and 151-159, *and see* poll data about CRT in schools, referred to in section III of this brief at 24-5. Indeed, the curricular content mandated by the Policy is so far from being "plainly essential to good citizenship" that many states have even passed laws banning its teaching. *See e.g.*, Idaho HB 377 (2021), Iowa HF 802 (2021), New Hampshire HB 2 (2021), North Dakota HB 1508 (2021), Oklahoma HB 1775 (2021), South Carolina H.4100 (2021), Tennessee HB 580 (2021), Texas SB 3 (2021).

Consider, by contrast, curricular content that the public schools could mandate without running afoul of parental rights as articulated in *Meyer* and *Pierce*. There are no serious disputes about whether schools should teach students math, science, reading, writing, geography, and history, as well as instruct them about our system of government and about their rights and duties as citizens. This includes teaching children about the grave injustices in our history, including slavery and Jim Crow, and about ongoing racial discrimination in the present day. It also includes teaching children essential, non-controversial civic values, such as honesty, diligence, fairness and mutual respect.

However, there is a world of difference between, on the one hand, teaching facts or even widely shared, essential civic values, and, on the other hand, teaching highly controversial theories and value systems as if they were fact, and requiring students to affirm them and speak and act in accordance with them under threat of punishment. The former is education; the latter is indoctrination. Under *Meyer* and *Pierce*, mandatory indoctrination of students into highly controversial ideas far outside the bounds of what is "plainly essential to good citizenship" is an unconstitutional violation of parental rights. Yet this is precisely what the Albemarle Policy is doing.

III. THE DISTRICT POLICY IS UNCONSTITUTIONAL INDOCTRINATION, NOT EDUCATION.

Consider the following common definitions of "educate":

- Merriam-Webster Dictionary: "to provide schooling for;" "to train by formal instruction and supervised practice especially in a skill, trade, or profession;" "to develop mentally, morally, or aesthetically especially by instruction;" "to provide with information." Merriam-Webster, https://www.merriam-webster.com/dictionary/educate, last visited October 15, 2022, at 15:12.
- Cambridge Dictionary: "to teach someone, especially using the formal system of a school, college, or university." Cambridge dictionary, https://dictionary.cambridge.org/us/dictionary/english/educate, last visited October 15, 2022, at 15:15.

- Britannica Dictionary: “to give (someone) information about something;” “to train (someone) to do something.” The Britannica Dictionary, https://www.britannica.com/dictionary/educate, last visited October 15, 2022, 15:13.
- Oxford Learner’s Dictionary: “to teach somebody about something or how to do something” Oxford Learner’s dictionary, https://www.oxfordlearnersdictionaries.com/us/definition/english/educate?q=educate, last visited October 15, 2022, at 15:16.

Consider, by contrast, these common definitions of “indoctrinate”:

- Merriam-Webster Dictionary: “to imbue with a usually partisan or sectarian opinion, point of view, or principle.” Merriam-Webster, https://www.merriam-webster.com/dictionary/indoctrinate, last visited October 15, 2022, at 15:17.
- Cambridge Dictionary: “the process of repeating an idea or belief to someone until they accept it without criticism or question.” Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/indoctrination, last visited October 15, 022, at 15:18.
- Britannica Dictionary: “to teach (someone) to fully accept the ideas, opinions, and beliefs of a particular group and to not consider other ideas,

opinions, and beliefs." The Britannica Dictionary, https://www.britannica.com/dictionary/indoctrinate, last visited October 15, 2022, at 15:18.

- Oxford Learner's Dictionary: "the act or process of forcing somebody to accept a particular belief or set of beliefs and not allowing them to consider any others." Oxford Learner's Dictionary, https://www.oxfordlearnersdictionaries.com/us/definition/english/indoctrination#:~:text=%2F%C9%AAn%CB%8Cd%C9%91%CB%90ktr%C9%AA%CB%88ne%C9%AA%CA%83n%2F,them%20to%20consider%20any%20others, last visited October 15, 2022, at 15:19.

While the term "educate" is general enough that it is not always easy to sharply distinguish education from indoctrination, there are three (3) key differences that can be distilled from these definitions. First, education typically involves providing information or teaching someone *about* something, whereas indoctrination goes a step further, seeking not just to inform but to induce *adherence* to a particular viewpoint. Second, indoctrination is distinct because the *type* of viewpoint being inculcated in the student is one that is contested, partisan or sectarian. (Thus, requiring that students "adhere" to the belief that 2+2=4, or even to the belief that we have an obligation to treat others fairly, is not indoctrination because these claims are neither contested nor sectarian.) Finally,

indoctrination is distinguished by the *mode* of teaching: it involves "repeating an idea or belief to someone until they accept it without criticism or question" (Cambridge Dictionary, *supra*, definition of "indoctrinate"); and teaching a contested viewpoint without acknowledging that it is contested, without presenting criticisms or alternative perspectives, and/or foreclosing genuine consideration of competing viewpoints by presenting them as illegitimate.

The Albemarle Policy clearly exhibits all three (3) of these characteristics that are distinctive of indoctrination. First, the Policy does not just teach *about* the existence of racism past and present, or even *about* various proposals for overcoming racism individually and societally. Rather, it tells students that they must adopt a controversially-defined "Anti-Racist" perspective. White students are required to "acknowledge and understand their privilege," and all are required to commit to "help to dismantle the structures and practices that intentionally and/or unintentionally disadvantage historically marginalized people." *Complaint* at R.22-3, ¶ 99.b (*quoting National Museum of African American History & Culture, Being Antiracist, Smithsonian, https://s.si.edu/3GYalFw (last visited Dec. 20, 2021))*.

The Policy goes so far as to require that students oppose the "privileged" or "dominant culture," which is characterized as "white," "Christian," "able-bodied," "male," "hetero-sexual," and "cisgender." *Complaint* at R.44, ¶ 226. Students are instructed to make daily choices to oppose these "dominant" "identities."

Complaint at R.53, ¶ 303. They are required to state what they will do to "look," "think," "sound," and "act" "more anti-racist." *Complaint* at R.46, ¶ 245 (*citing* Exhibit 8 to the *Complaint* at 27-30). And they are told that they must embrace and advocate controversial political positions on issues such as immigration, affirmative action, criminal justice, and school funding. *Complaint* at R.32-3, ¶ 149. Failure to affirm and state their commitment to any of these "Anti-Racist" tenets and practices is labeled "racist," and such supposedly "racist" acts are subject to various disciplinary measures, including detention, in-school suspension with "restorative practice," and even expulsion. *Complaint* at R.44, ¶ 227.

Second, the "Anti-Racist" perspective to which students are being required to affirm and commit is highly contested and partisan in nature. The materials provided either come directly from or are based on the works of critical race theorists such as Ibram Kendi and Jason Reynolds, whose book is assigned to 11th graders not as a theory to be debated, but as something to be unquestioningly affirmed and followed. Complaint at R.38, ¶ 179. Critical race theory (CRT) is rooted in the Critical Theory of the neo-Marxist Frankfurt School, which questions the value and possibility of objective knowledge, and views claims to universal truth as oppressive. "Critical Theory," *Stanford Encyclopedia of Philosophy*, Bohman, James, Edward N. Zalta (ed.) (Spring 2021 Edition), https://plato.stanford.edu/entries/critical-theory/, last viewed on October 18, 2022,

at 09:35. The Critical Legal Studies movement applied Critical Theory to law, arguing that while law claims to be impartial, it is actually a tool for the maintenance of elite privilege. *A Counter-Culture of Law: Jurisprudential Change and the Intellectual Origins of the Critical Legal Studies Movement* (*hereinafter, "A Counter-Culture"*), Juhana Salojarvi, 59 Am. J. Legal Hist. 409 (2019).

Critical race theorists drew on this approach, arguing that racism in the U.S. is pervasive and systemic, hidden under the guise of values like legal neutrality, objectivity, color-blindness, and meritocracy, which are viewed as a means of perpetuating racist legal, social, and economic systems. *Critical Race Theory: An Introduction*, Second Edition, Richard Delgado and Jean Stefancic, New York: New York University Press (2012). As critical race theorists Richard Delgado and Jean Stefancic write, "critical race theory questions the very foundations of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law," *Id*. at 3. Even within the legal academy, CRT and the broader Critical Legal Studies movement are highly controversial theories associated with the political Left. *See A Counter-Culture*, *supra*.

Within the broader culture, CRT – and especially its place in schools – is one of the nation's most hotly contested issues. One poll of Virginians in 2021, conducted by Change Research, found that 44% of respondents viewed "the

teaching of critical race theory in schools" as a "very big threat" to Virginia (with another 16% thinking it was a "medium-sized" or "small" threat): indeed, more respondents saw this as a "very big threat" than any of the other items on the list, including violent crime, climate change, white supremacy, and socialism. Change Research, https://changeresearch.com/wp-content/uploads/2021/08/Virginia-Crooked-Toplines-August-2021.pdf, at 7 (Q18), last visited October 15, 2022, at 15:38. An American Principles Project Poll of Virginia voters in 2021 found that a two-to-one majority (58% to 26%) were opposed to CRT being taught in schools. American Principles Project, https://americanprinciplesproject.org/wp-content/uploads/2021/07/VA_Statewide_APP-Survey_Results-Smart_Charts_071621.pdf , at 14 (Q14), last visited October 15, 2022, at 15:37.

These sentiments are echoed on the national level. A 2021 Manhattan Institute poll showed the 54% of voters supported removing "lessons based on critical race theory about concepts such as white privilege and systemic racism from public school curriculum." Notably, however, that number rose to 66% when the question was asked of *parents*, with over half of every demographic group agreeing. Manhattan Institute, https://www.manhattan-institute.org/metropolitan-majority-poll-costs-crime-classrooms, at 12 (Figure 9), last visited October 15, 022, at 15:39. Clearly, Albemarle's Anti-Racism Policy is requiring students to

adopt and affirm a highly controversial theory that a significant majority Americans not only disagree with but believe to be a threat to society.

Third, the Anti-Racism Policy involves a mode of teaching that is typical of indoctrination. It is repetitive, with the tenets of CRT being taught and reinforced across the curriculum, not just in a single class. *Complaint* at R.38-9, ¶¶ 183-189. It presents the view as if it were uncontested truth. No alternative perspectives about the nature of racism or the best ways to combat racism are offered. Further, the Policy seeks to make students accept the contested "Anti-Racist" perspective unquestioningly and de-legitimizes any opposing viewpoints, thus foreclosing any serious consideration of them. It does this by stipulating that anyone who does not wholeheartedly embrace the "Anti-Racist" program – by, for instance, saying that "we all belong to the human race," supporting immigration control, or recognizing that there "two sides to every story" – is racist. *Complaint* at R.32-3, 42-4, ¶¶ 146-150, 215-226. The Policy also forecloses consideration of opposing views by threatening disciplinary measures for those who voice their disagreement.

The Policy, therefore, clearly exhibits all of the distinctive characteristics of indoctrination. It seeks not just to inform but to induce adherence to a particular viewpoint. That viewpoint is highly contested and partisan. And that viewpoint is taught as if it were uncontested truth, with the aim of uncritical affirmation by students. Alternative perspectives are not offered, and consideration of them is

foreclosed by labeling disagreement as racist and threatening disciplinary measures. This indoctrination is unconstitutional because, as argued above, the content being taught is obviously not "plainly essential to good citizenship," which is the standard that *Pierce* sets for the exercise of coercive educational authority by the State.

Moreover, the evidence cited above clearly shows that what the Albemarle County School Board is doing goes beyond mere exposure to viewpoints contrary to the family's beliefs, but rather involves "compulsion either to do an act that was prohibited by the plaintiff's religion or to modify his or her behavior and violate religious beliefs" by affirming views contrary to those beliefs and committing to "dismantling" the Christian religion as part of the oppressive dominant culture, thus distinguishing this case from *Mozert v. Hawkins*, and engaging in government action that the *Mozert* Court indicates would have been prohibited. *Mozert v. Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058, 1065 (6th Cir. 1987).

This overreach on the part of the State is not just a theoretical encroachment on parents' sphere of educational authority, but, as is clear from the Plaintiffs' declarations, actually impedes Plaintiffs' ability to educate their children and form their identities in line with their moral and religious beliefs.

CONCLUSION AND PRAYER FOR RELIEF

The State exceeds its authority and violates parental rights – often, as in this case, together with free exercise rights – when it mandates a curriculum that is not "plainly essential to good citizenship." *Pierce*, 268 U.S. 510 at 534, 45 S.Ct. at 573. The Albemarle County School Board Policy is such a curriculum, for it involves indoctrinating children into highly controversial views that many Americans believe to be not only non-essential, but positively harmful. This Policy also is effectively mandatory on all parents of school age children in the County, for in order to comply with compulsory education laws they must either expose their children to this controversial curriculum in the public schools, or pay a severe financial penalty (which some may not be able to afford). Plaintiffs already have suffered significant harms from the Policy, which is encroaching on their sphere of educational authority and actively undermining their ability to educate their children and shape their identities in line with their values and in accordance with their religious obligations. The Policy is therefore an unconstitutional violation of Plaintiffs' rights, and the Court has a duty to protect these rights: *amica*, therefore prays this Court will order the Albemarle County School Board to cease its implementation.

RESPECTFULLY SUBMITTED,
MELISSA MOSCHELLA, Ph.D.

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Of counsel

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CERTIFICATE OF WORD COUNT COMPLIANCE

The foregoing brief complies with the type-volume limitation set forth in Rule 5A:19 of the Rules of the Court of Appeals of Virginia, exclusive of the exempted portions: this brief contains 6,218 words.

/s/ Melvin E. Williams
Of Counsel

CERTIFICATE OF SERVICE

On this 27th day of October 2022, the foregoing AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT was filed electronically with the Clerk via the Virginia Appellate Courts Electronic System (VACES) and, pursuant to Rule 5A:1(c)(4) of the Rules of the Court of Appeals of Virginia, was served via electronic mail on the following counsel for the Parties:

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Written Consent of Counsel for *Amica* to File *Amicus Curiae* Brief

Wednesday, October 19, 2022 at 05:55:19 Eastern Daylight Time

Subject: RE: Albemarle Amicus - checking in
Date: Tuesday, October 18, 2022 at 5:57:03 PM Eastern Daylight Time
From: Vincent Wagner
To: Mel Williams
CC: Chris Schandevel
Attachments: image001.png, image002.png, image003.png, image004.png, image005.png, logo_abdfb0ec-e06e-407a-a721-cd0e4f742400.png

Yes, Mel, Appellants consent to this brief's filing. Thanks.

Vincent

From: Mel Williams <mel@williamsstrickler.com>
Sent: Monday, October 17, 2022 6:35 PM
To: Vincent Wagner <vwagner@adflegal.org>
Cc: Chris Schandevel <CSchandevel@adflegal.org>
Subject: Re: Albemarle Amicus - checking in

EXTERNAL

Vincent:

Would you send me a short email consenting on behalf of appellant's counsel to the filing of Dr. Moschella's amicus brief, as required by Rule 5A:23. Thanks!

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Subject: RE: Ibanez, et al. v. Albemarle County School Board, et al., Court of Appeals of Virginia, record no. 095122
Date: Tuesday, October 18, 2022 at 9:44:39 AM Eastern Daylight Time
From: Jeremy Capps
To: Mel Williams
CC: Vincent Wagner, Chris Schandevel, David Corrigan, Missy York, Blaire O'Brien
Attachments: image002.jpg, image003.png, image004.png, image005.png, image009.jpg, image010.jpg

Yes.

Thanks.

Jeremy

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Mel,

You have our consent to file an amicus brief.

Thank you.

Jeremy

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Celebrating 30 years

From: Mel Williams [mailto:mel@williamsstrickler.com]
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Subject: Ibanez, et al. v. Albemarle County School Board, et al., Court of Appeals of Virginia, record no. 095122

Mr. Corrigan, Mr. Capps, Ms. York, and Ms. O'Brien:

Melissa Moschella, a professor at The Catholic University of America, has retained me to file an amicus brief in support of Appellants in the *Ibanez, et al. v. Albemarle County School Board, et al.* matter.

Dr. Moschella's teaching and research focus on natural law, biomedical ethics, and the moral and political status of the family. *See* https://philosophy.catholic.edu/faculty-and-research/faculty-profiles/moschella-melissa/index.html, last visited October 15, 2022, at 12:29 PM. Her cv is attached, but as you can discern merely from the title of one of her writings, *To Whom Do Children Belong? Parental Rights, Civic Education and Children's* Autonomy, Cambridge University Press (2016), she has a particular expertise and interest in the issues present in the *Ibanez* matter.

Pursuant to Rule 5A:23 of the Rules of Supreme Court of Virginia, an amicus brief must be "accompanied by the written consent of all counsel." Counsel for Appellants consents. Respectfully, therefore, we request your consent for Dr. Moschella to file an amicus brief.

Thank you for your consideration.

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CITED AUTHORITY

Liberal Parentalism and Children's Educational Rights, 26 Cap. U.L. Rev. 9, Gilles (1997)

ARTICLE: LIBERAL PARENTALISM AND CHILDREN'S EDUCATIONAL RIGHTS

1997

Reporter
26 Cap. U.L. Rev. 9 *

Length: 15126 words

Author: STEPHEN G. ***GILLES*** *

 Professor of Law, Quinnipiac College School of Law. I thank Scott Altman, Brian Bix, John E. Coons, Neal Devins, James Dwyer, Laurie Feldman, Gregory Loken, Michael McConnell, Linda Ross Meyer, and the participants in Capital University Law School's Wisconsin v. Yoder Symposium for helpful comments.

Text

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"The most serious threat to the autonomy of humans is not in the vagaries of individual judgments by families but in the calculated political commitments of whole peoples." [1]

INTRODUCTION

My main goal in this article is to evaluate the issues and opinions in Wisconsin v. Yoder [2] from the standpoint of what I call ***liberal parentalism***. It seems best to begin with a brief description of the parentalist approach to allocating educational authority between individual parents and the liberal democratic state. The central tenet of ***liberal parentalism***, as I conceive it, is that as a matter of liberal political theory states should defer to parents' educational choices unless they are plainly unreasonable. [3] This is parentalism because it gives parents primary authority over and responsibility for their own children, while relegating government to the important but secondary role of backstop against parental wrongdoing. It is liberal both because it sharply limits the state's role in the upbringing of children, and because it limits parents' educational and custodial authority over them. Parents may not abuse or neglect their children, or deprive them of a basic education; and de jure parental control ends when the child becomes an adult.

Within these limits, however, ***liberal parentalism*** holds that custodial parents are more likely than the state or its agents faithfully to discover

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[1] JOHN E. COONS & STEPHEN D. SUGARMAN, EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL 87 (1978).

[2] *406 U.S. 205 (1972).*

[3] For a fuller account, see Stephen G. ***Gilles***, On Educating Children: A Parentalist Manifesto, *63 U. CHI. L. REV. 937 (1996).* See also Shelley Burtt, Religious Parents, Secular Schools: A Liberal Defense of an Illiberal Education, 56 REV. POL. 51 (1993).

and pursue the child's welfare, defined by reference to some reasonable view of the good life and of the child's interest in living such a life. Liberalism's commitment to toleration ordinarily forbids the majority to impose its conception of the good life on persons who live by a different, but likewise reasonable, understanding of what is best for them. [4] So too, the majority ought not substitute its educational judgment for that of the child's custodial parents merely because it disagrees with their reasonable conception of the child's educational good. [5] States may override parental choices that subvert the child's basic interests (educational or otherwise), but when it comes to disagreements over what constitutes the child's best interests, the parents' judgment should prevail. As the Supreme Court said in Parham v. J.R., "absent a finding of neglect or abuse . . . the traditional presumption that the parents act in the best interests of their child should apply." [6] In line with that presumption, parentalism would give full meaning to Meyer v. Nebraska [7] and Pierce v. Society of Sisters, [8] which held that the "liberty of parents . . . to direct the upbringing and education of children under their control" is protected against state action that "unreasonably interferes" with it. [9] Specifically, it would hold that state interference with parents' educational decisions is in general unjustifiable unless the parents' view of their child's best interests is plainly unreasonable.

The main alternative to ***liberal parentalism*** is what I call liberal statism-the view that parental educational authority 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. Many liberal academics subscribe to one version or another of statism in education (though they generally call it by other names). Most, like Amy Gutmann, do not seek to displace parental educational authority altogether. [10] Rather, they envision the home as the realm of parental authority and the school as

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the realm of public authority. [11] Nevertheless, the contrast is clear, for whereas ***liberal parentalism*** affirms parents' traditional authority to direct the education of their children, liberal statism rejects that authority within the ever-expanding realm of formal schooling. The result is some mixture of majoritarian, constitutional, and governmental control of institutionalized education.

As the description above implies, ***liberal parentalism*** takes the best interests of the child as its central benchmark-though not its only one; the interests of parents and society matter too. [12] Liberal statists, however, tend to

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[4] See JOHN RAWLS, POLITICAL LIBERALISM 61 (1993).

[5] See ***Gilles***, supra note 3.

[6] *442 U.S. 584, 604 (1979).*

[7] *262 U.S. 390 (1923)* (invalidating Nebraska law prohibiting private schools from teaching modern languages other than English).

[8] *268 U.S. 510 (1925)* (striking down Oregon law requiring all students to attend public schools).

[9] See *id. at 534-35.* See also *Meyer, 262 U.S. at 400-01* (discussing "the power of parents to control the education of their own").

[10] See AMY GUTMANN, DEMOCRATIC EDUCATION 41-43 (1987).

[11] See, e.g., id. at 69-70; see generally Ira C. Lupu, The Separation of Powers and the Protection of Children, *61 U. CHI. L. REV. 1317 (1994).*

[12] I cannot give full consideration here to the difficult questions that arise when the interests of a particular child diverge from those of other family members. I think Elizabeth Scott and Robert Scott are on the right track, however, both in suggesting that we think of parents as fiduciaries for their children and in describing the fiduciary's obligations as requiring "an amount of diligence and effort that maximizes the joint utility of beneficiary and fiduciary." Elizabeth S. Scott & Robert E. Scott, Parents as Fiduciaries, *81 VA. L. REV. 2401, 2426 (1995).*

assume that liberal parentalists are opposed to giving children rights, and that this opposition to empowering children is what distinguishes us from the more enlightened people who favor "children's rights." [13] Using Yoder as an example, I will argue in Section I that this is a misunderstanding. Parentalists and statists agree that young children should not have rights to control their own educations or their own lives, because they lack the maturity to exercise such rights in ways consistent with their long-run self-interest. Rather, we think that children should have certain inalienable rights (for example, the right not to be deprived of life by parents, state, or third parties), and that among these rights is the right to have their best interests be the primary benchmark in decisions affecting their welfare. The point of disagreement concerns whose judgment regarding the child's best interests should be controlling when parents and the state disagree.

In Section II, I present a liberal parentalist analysis of Yoder on the assumption that adolescents should be treated as older children, rather than

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as young adults entitled to direct their own educations. So framed, the question is whether the Amish parents' choice to provide their children with an informal Amish education in lieu of conventional high schooling is plainly harmful to the children. The result in Yoder was resoundingly correct, I argue, because Wisconsin failed to establish any overall harm to Amish children. In Section III, however, I criticize the Yoder Court for its timidity in articulating and applying the general principle for which Yoder ought to stand-that parents have the right to determine the religious upbringing of their children unless their choices occasion serious, demonstrable net harm to the child. Section III also argues that the opinions in Yoder, because they employ a conceptual framework that is highly deferential to state authority over education, help explain why several federal courts have recently ruled that interference with parents' general Pierce rights merits only rational basis review. I then show, however, that the more recent decision in Planned Parenthood v. Casey [14] leaves no doubt that the current Supreme Court regards Pierce rights as "fundamental," and as such protected by some form of heightened scrutiny.

Section IV presents a liberal parentalist analysis of the issue raised by Justice Douglas in Yoder- whether adolescent children should have a constitutional right to influence or direct their own religious educations that can override the contrary preferences of their parents. I argue that there is no persuasive basis for constitutional rights of this kind. Nevertheless, I go on in Section V to consider, from the standpoint of policy and political theory, the pros and cons of the various forms adolescent educational rights might take. Though it is obviously not what Justice Douglas had in mind, I conclude that the most defensible version of adolescent educational rights would be a state-financed educational voucher legally controlled by the adolescent child.

I.

If by children's rights we mean rights over which children themselves have formal legal control, then Yoder is only tangentially about children's rights. The immediate controversy was between Amish parents opting for informal, community-based, religious education for their children after eighth grade, and the state of Wisconsin, which refused to recognize Amish education as adequate to satisfy its compulsory schooling laws. [15]

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[13] See, e.g., James G. Dwyer, Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights, *82 CAL. L. REV. 1371, 1374 (1994)* (proposing that "children's rights, rather than parents' rights, be the legal basis for protecting the interests of children"); Barbara Bennett Woodhouse, A Public Role in the Private Family: The Parental Rights and Responsibilities Act and the Politics of Child Protection and Education, *57 OHIO ST. L.J. 393, 417 (1996)* (citation omitted) (arguing that conservative supporters of parental rights "have always viewed children's rights as inimical to parental authority").

[14] *505 U.S. 833 (1992).*

[15] See *Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).*

Also potentially present, however, was the question whether and in what way the preferences of Amish children should affect the clash between their parents and the state. Justice Douglas thought this was the central issue in the case. He argued that the state could insist that the "mature" Amish adolescent who "desires to attend high school" be allowed to do so notwithstanding "the parents' religiously motivated objections." [16]

In ruling that Amish parents could insist on Amish education over the state's objection, Chief Justice Burger's majority opinion pushed Douglas's question to the periphery by reserving it for future decision. (The majority did hint, however, that states may not ordinarily authorize adolescent children to reject parentally-chosen religious education.) [17] We thus have two quite different visions of what Yoder was about. For the majority, the decisive question was the extent of parental authority over religious education; for Justice Douglas, it was the extent of the adolescent's authority to determine his or her own religious views.

I will consider Justice Douglas's way of looking at Yoder in more depth in Sections IV and V of this essay. What I wish to discuss now is the fact that the State of Wisconsin in Yoder forthrightly disavowed children's rights of the kind Douglas had in mind-and the fact that many of today's liberal statists would side with Wisconsin on this score. [18]

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Although Wisconsin was at pains in Yoder to portray itself as defending children's rights, [19] its argument did not depend on disagreement between Amish children and their parents. Rather, Wisconsin claimed that an Amish exemption from its compulsory-education law would "allow some parents to act contrary to the best interests of their children by foreclosing their opportunity to make an intelligent choice between the Amish way of life and that of the outside world." [20] Consistent with the logic of this argument, the state maintained that it was "empowered to apply its compulsory-attendance law to Amish parents in the same manner as to other parents-that is, without regard to the wishes of the child." [21]

The Yoder Court, of course, rejected Wisconsin's argument. [22] But the present point is not about precedent but about the rhetoric of children's rights. In effect, Wisconsin asserted not only that children are entitled to a

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[16] *406 U.S. at 242* (Douglas, J., dissenting in part).

[17] See *id. at 231-32* (citation omitted). Our holding in no way determines the proper resolution of possible competing interests of parents, children, and the State in an appropriate state court proceeding in which the power of the State is asserted on the theory that Amish parents are preventing their minor children from attending high school despite their expressed desires to the contrary. Recognition of the claim of the State in such a proceeding would, of course, call into question traditional concepts of parental control over the religious upbringing and education of their minor children recognized in this Court's past decisions. It is clear that such an intrusion by a State into family decisions in the area of religious training would give rise to grave questions of religious freedom comparable to those raised here and those presented in Pierce v. Society of Sisters. On this record we neither reach nor decide those issues. Id. See also *Parham v. J.R., 442 U.S. 584, 603* ("We cannot assume that the result in Meyer v. Nebraska, and Pierce v. Society of Sisters would have been different if the children there had announced a preference to learn only English or a preference to go to a public, rather than a church, school.").

[18] See, e.g., Dwyer, supra note 13, at 1447 (advocating that Yoder be overruled, that parental child-rearing rights be abolished, and that disputes over the child's education be decided on the basis of the child's "temporal well-being" as defined by the state).

[19] For example, Wisconsin's brief in the Supreme Court charged that "[i]n failing to provide for secondary education for their children, the Amish are neglecting a parental duty and obligation to their children . . . ." Brief for Petitioner, No. 70-110, at 19-20, reprinted in 71 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 553, 579-80 (Phillip B. Kurkland & Gerhard Casper eds. 1975).

[20] *406 U.S. at 232.*

[21] *Id. at 231.*

[22] See id.

conventional high-school education but that this entitlement is an inalienable right. [23] That is, neither child nor parents (nor both together) may waive the educational benefits the state has decided children ought to enjoy as a matter of right.

Wisconsin's position seems at least as popular in liberal academic circles as Justice Douglas's. Some see in Douglas's dissent an attractive compromise between excessive parental authority and potential state intolerance that provides for adolescent autonomy in the cases where it is most needed. [24] To others, however, that compromise is at best a halfway

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house. The child's right to a formal education through high school ideally ought to be recognized as an entitlement that does not depend on the child's preferences. [25]

In highlighting the tendency of liberal statists to favor inalienable children's rights, I intend no implication that such rights are fictitious or inherently bad. Quite the contrary, as a liberal parentalist, I agree with Locke that parental authority over children is in large measure grounded in parental obligations to children n26- obligatio[s] that can be seen as entitlements and that are not ordinarily contingent on the child's preferences. For example, it would be wrong for parents to abuse or neglect a child even if the child agreed that these harmful practices were appropriate. The child has an inalienable right to freedom from parental abuse.

Yet the fact remains that inalienable children's rights necessarily entail adult control over children's lives. Liberal statists tend to downplay that control when it rests with the government, while decrying its potential for abuse in parental hands. But clear thinking about these issues depends on accurately perceiving the extent of control over children wherever it lies. Thus, if Wisconsin's position had prevailed in Yoder, the state would to that extent have seized for itself control over the religious education of Amish children. Amish parents would no longer have enjoyed in full measure the traditional "rights of parents to direct the religious upbringing of their children." [27] But Amish children would have been no less subject to adult control than they are under Yoder. The locus of adult control merely would have shifted from the family to the collective.

This point may seem too obvious to deserve extended treatment. Consider, however, some of the arguments offered by James Dwyer in his important recent critique of parental rights. According to Dwyer,

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[23] Cf. Barbara Bennett Woodhouse, "Out of Children's Needs, Children's Rights": The Child's Voice in Defining the Family, 8 BYU J. PUB. L. 321, 322 (1994) (noting that "children's rights" sometimes "refers to a collective social claim to protection based on children's essential dependence," and sometimes to "the individual child's claim to autonomy").

[24] See, e.g., Melinda A. Roberts, Parent and Child in Conflict: Between Liberty and Responsibility, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 485, 523 (1996) (arguing that older children should have fundamental constitutional rights to determine their own education and religion); Kenneth Ward, The Allure and Danger of Community Values: A Criticism of Liberal Republican Constitutional Theory, 24 HASTINGS CONST. L.Q. 171, 212 n.184 (1996) (suggesting that the state should intervene only "when a child seeks assistance in continuing his or her education"); Ann MacLean Massie, The Religion Clauses and Parental Health Care Decision Making for Children: Suggestions for a New Approach, 21 HASTINGS CONST. L.Q. 725, 769-70 (1994) (endorsing Justice Douglas's position and suggesting that it applies with even greater force to religiously-grounded parental denials of children's medical care).

[25] See, e.g., GUTMANN, supra note 10, at 70 (describing public schooling as "as essential welfare good for children"); see also id. at 49 n.6 ("Today . . . a high-school education is clearly necessary to prepare children adequately for citizenship.").

[s] See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT reprinted in JOHN LOCKE: TWO TREATISES OF GOVERNMENT 56 (Peter Laslett ed., Student ed. 1988) (stating that parents' authority over their children is derived from the natural law that places them "under an obligation to preserve, nourish, and educate the Children, they had begotten").

[27] *406 U.S. at 233.*

"parental rights today appear to rest on an assumption of ownership or on a denial of the child's separate existence." [28] As such, he argues, parental rights violate the principle that "as a general rule, our legal system does not recognize or bestow on individuals rights to control the lives of other persons." [29] Strikingly, however, Dwyer's desire to abolish parental rights does not lead him to favor allowing young children to control their own lives. [30] Instead, he urges that where parents and the state disagree about the child's best interests, courts should adopt a "substituted-judgment procedure for imputing preferences to children." [31] Under this approach, parents and the state would join issue on "what the child would choose for herself if rationally able to do so, given the child's existing desires, values, inclinations, and needs, as well as her likely future interests." [32] The court-that is, an arm of the state-would arbitrate this dispute and decide whose view of the child's hypothetical choice was more nearly correct.

At first blush, the phrase "substituted judgment" might lead one to think that Dwyer's proposal somehow gives children more autonomy than the traditional best interests of the child standard. [33] But the overwhelming effect of abolishing parental rights would be a massive shift of control away from parents to state courts and agencies, who would be authorized to review all parental decisions (rather than only those in which parents arguably were acting outside the scope of their parental rights), and to do

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so de novo (rather than subject to a presumption that the parents are acting in their child's best interest). Moreover, Dwyer's version of a substituted judgment approach would require courts to impute to all children "a hypothetical preference that they receive certain basic forms of care," including "an education that develops in them independence of thought, keeps open for them a substantial range of alternative careers, lifestyles, and conceptions of the good, and is sensitive to their developing, individual inclinations as they gain maturity." [34] This is to say that children's lives and educations would be controlled by Dwyer's conception of what is good for them, as interpreted and enforced by courts and government agencies. [35]

Nor is Dwyer outside the mainstream in these respects. To take the most influential example, Amy Gutmann, while less radical than Dwyer in cutting down parental rights and multiplying parental duties, is no less insistent that each

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[28] Dwyer, supra note 13, at 1416.

[29] Id. at 1405; See also Barbara Bennett Woodhouse, Who Owns the Child?: Meyer and Pierce and the Child as Property, *33 WM. & MARY L. REV. 995, 997, 1001 (1992)* (criticizing Meyer and Pierce for constitutionalizing "a narrow, tradition-bound vision of the child as essentially private property" that confers on parents the dubious "right to control another human being").

[30] Dwyer does suggest that "as children approach adulthood, they are free to adopt whatever conception of the good they like." Dwyer, supra note 13, at 1434. But by far the greater part of childhood precedes the years when the child "approaches adulthood."

[31] Id. at 1430.

[32] Id.

[33] In theory, a substituted judgment standard would seem to give greater weight to the child's present and likely future preferences than they usually receive under the best interests standard. As I explain in text, however, Dwyer's version of a substituted judgment approach mainly relies on preferences he imputes to children, much as certain interests traditionally have been imputed to children under the best interests of the child approach. In any event, the question of who decides is analytically independent of the question of what standard is to be applied. We could, for example, adopt a new norm (that parents would act in accord with their best judgment about their child's hypothetical preferences) and a parallel presumption (that parents' decisions presumptively reflect their child's hypothetical choices). Whether that reform would be desirable is beyond the scope of this article.

[34] Dwyer, supra note 13, at 1433.

[35] Dwyer does not say whether his scheme requires the child's parents to provide for such an education, or merely to refrain from interfering with the state's provision of it (presumably in the form of public education).

child must receive a value-laden education that will instill certain "democratic" values, develop the capacity for critical reasoning, and expose the child to diverse ways of life. [36] Indeed, to ensure that parents could not prevent their children from obtaining a suitably democratic education, Gutmann would ban home schooling and require private schools to abide by her major prescriptions. [37] Though her conception of the one best education differs from Dwyer's, she is equally willing to resort to what we might call "coercive constitutionalism" to achieve it. [38]

As between ***liberal parentalism*** and this sort of liberal statism, the real choice is between parental control and collective control. There may be nuances of difference when it comes to children's educational rights of the

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ordinary, alienable sort. In the main, however, both parentalists and statists think the educational rights of children (especially young children) should be inalienable. We agree, that is, that the child's best interests-not the child's wishes-should supply the basic standard for decisionmaking on the child's behalf. We disagree, however, about whether the parents' or the government's understanding of the child's best interest should be controlling. Thus, what divides us is who decides what content to give to the child's inalienable rights. [39]

This analysis, of course, does not prove that I am right and Dwyer, Gutmann and like-minded scholars are wrong. [40] But it does demonstrate

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[36] See GUTMANN, supra note 10, at 63 (suggesting that schools can teach "respect among races, religious toleration, patriotism and political judgment").

[37] See id. at 234, 115-23.

[38] Statism cannot be equated with majoritarianism, although some statists might leave it up to the majority to decide whether to supervise parents closely or loosely. The term "coercive constitutionalism" refers to the tendency of theorists such as Dwyer and Gutmann to propose quasi- constitutional norms that would oblige the majority, and the several branches of government, to superintend parents to make sure that children receive the theorist's preferred version of a good education. Because these theoretical standards would be backed by the coercive power of the state, and would be interpreted and enforced by courts and other agents of the state, they appropriately are classified as statist although their connection to democratic self-government is tenuous at best.

[39] I anticipate the objection that liberal parentalists endorse parental rights rather than inalienable rights for children. This objection dissolves once we see that parental rights against the state are a corollary of the child's inalienable rights to parental care and nurturing. Consider the following parentalist interpretation of Pierce: the child has the inalienable right to be educated in accordance with his or her best interest as the child's parents understand it, unless the parents' understanding is demonstrably unreasonable. Cf. Dwyer, supra note 13, at 1429. All of the important interests one might attribute to children can give rise to a right of one kind or another residing in the child. For example, we could attribute to children a positive claim-right to the exclusive and continuous care, protection, and guidance of a single set of parents . . . . We could also grant children a negative claim-right against any interference by the State in the parent-child relationship that would do more harm than good to the child. Id. There are, to be sure, hard questions about how to enforce these sorts of children's rights against the subset of parents who violate them. But that is hardly unusual in this context. There are equally hard questions about how to enforce children's rights to a decent education against the subset of public schools that offer them nothing of the kind. See, e.g., *Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854 (Cal. App. 1976)* (holding that student who alleged inadequate education has no cause of action in tort against public school authorities).

[40] Although I have lumped them together for the sake of exposition, there is a fundamental difference between Gutmann's version of coercive constitutionalism and Dwyer's. Whereas Gutmann places great weight on society's interest in mandating democratic education for the sake of democratic polity, Dwyer argues that decisions about children's welfare should be based solely on the best interests of the child, rather than the interests of either parents or society. See Dwyer, supra note 13, at 1378 (arguing that decisions about childrearing "based on parents' interests or on societal interests, such as pluralism and the preservation of traditional communities, are morally flawed because they implicitly adopt an instrumental view of children, treating them as mere means to the furtherance of other persons' ends"). Dwyer's stance merits a fuller critique than I can give it here, but two brief comments are in order. First, in considering their own values and interests along with the interests of their children, parents and societies do not thereby treat children as "mere means." On the contrary, good parents make decisions based on the common good of the family as a community shaped by the parents values, but in which the interests of all its

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that statists cannot consistently object to parentalism on the grounds that rights to control another person are objectionable and aberrant. If it is anomalous from the standpoint of liberal political theory for parents to control the lives of their own children, why is it not at least equally anomalous for the state-in any of its manifestations, from the voting public to the legislature to the schools and agencies to the state courts-to control the lives of "our" children? In fact there is no anomaly: neither parentalists nor statists believe that young children should control their own educations.

The question we ought to be debating, therefore, is which type of control-private and familial, or public and governmental-is more likely to be in the educational best interests of young children. The liberal parentalist answer is that parental control should be presumed superior unless the parents' choices are clearly unreasonable. The basis for that presumption is not the naive belief that parents unfailingly do what is good for their children. Rather, it is the comparative judgment that the fallible human agents through whom government must act are less likely to do what is good for other people's children than fallible individual parents are to do what is good for their own.

This judgment rests on a number of considerations and arguments. [41] Although I cannot do more than briefly allude to them here, there are good reasons why parents have better incentives to be faithful agents for children than public officials do, and why routinely overriding parental educational authority at the behest of the state would harm, more often than help, children. Unlike teachers, social workers, and bureaucrats, who deal with large numbers of children for relatively short times, most parents are linked to their children both by nature and by a long-run custodial relationship. Consequently, as everyday experience confirms, parents normally identify strongly with the interests of their children, and that identification is reinforced by powerful social norms about good parenting. To be sure, there are many caring people in the caring

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professions, both in and out of the public sector. But how many of them care more about their clients than about their own children-and what would we think of those who do?

Moreover, we have every reason to think that stable, loving, custodial parenting makes a huge difference in helping children become stable, loving, responsible adults. This parental nurturing encompasses the whole of a child's life; it cannot be confined arbitrarily to the sphere of home education as distinguished from democratically-controlled formal schooling. That is why parents seek schooling that meshes with and reinforces what they are trying to do at home. To require parents to accept schooling that contradicts and undermines their own values, teaching, and example would jeopardize the foundational, paradigmatic loving relationships in a child's life. It also would disrupt what many parents regard as the most important and rewarding thing they will ever do-raise their children, by their own best lights, to become flourishing human beings. In a society in which it increasingly seems that both good parents and good substitutes for parents are in short supply, undermining parental authority is an exceedingly peculiar strategy for advancing the well-being of children.

II.

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members are given appropriate weight; mutatis mutandis, good societies do much the same. Second, although Dwyer's child-welfare-only standard may sometimes be important for analytical purposes, it is both practically unattainable and (not coincidentally) morally unjustifiable. See generally Scott Altman, Should Child Custody Rules be Fair? 35 J. FAM. L. 325 (1997) (arguing against a wholly child-centered family law). It is safe to predict that the supply of perfectly altruistic caretakers for children will always be far, far smaller than the supply of children; and Dwyer fails to explain-let alone establish- the startling proposition that the interests of parents and society always must be subordinated to those of individual children.

[41] See ***Gilles***, supra note 3, at 945-72.

Let us now approach Yoder as the Supreme Court majority did-that is, by treating the adolescent child like a young child rather than (as Justice Douglas urged) like a young adult. [42] So framed, and analyzed in terms of the parentalist standards I have described, Yoder is an easy case controlled by a broad general principle. The majority and concurring opinions in Yoder, which take pains to portray the case as close, exceptional, and all but confined to its own facts, reach the right result but timidly compromise the principle.

After their children completed eight years of conventional schooling, the Amish parents in Yoder wanted them to receive a traditional vocational and religious education in the Amish community, rather than to attend public or private high schools. [43] The State of Wisconsin refused to recognize this alternative education as an acceptable substitute for high school. [44] The state's objection was that a traditional Amish education deprives Amish adolescents of the knowledge and skills needed to "make

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an intelligent choice between the Amish way of life and that of the outside world," and to flourish should they choose the latter. [45] At bottom, this is an objection to any way of life that requires immersion in a tradition, a culture, or a faith that stands outside the secular mainstream. The objection fails because Amish and other traditionalist ways of life enable their adherents to flourish in ordinary human terms-that is, to live meaningful, worthwhile, decent lives. Directing one's child toward such a life is not unreasonable. [46]

Some may object to this judgment on the grounds that we cannot reach consensus on who is happiest or how to rank ways of life. But surely there is a large measure of common ground in our informed, considered judgments about whether a person (or a community) is miserable or thriving. The fact that our judgments will differ in some particulars should not prevent us from recognizing that traditionalists are at least as likely as the rest of us to be decent, hardworking, law-abiding, promise-keeping people living in stable, loving families-and, conversely, that practicing members of traditionalist faiths are at least as unlikely as the rest of us to lead violent, predatory, irresponsible, or self-destructive lives. [47]

Granted, traditionalist ways of life are not for everyone raised by traditionalist parents. The record in Yoder, however, confirmed what ordinary experience suggests: young people retain ample liberty to reject traditionalist ways of life as they move into adulthood. Critics of Yoder tend to exaggerate the barriers to entry faced by an Amish youth who wishes to encounter the secular mainstream. (It can, after all, be found in any book store and on any movie screen.) They also tend to employ a double standard. Children who have received a conventional secular

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[42] See *Wisconsin v. Yoder, 406 U.S. 205, 242* (Douglas, J., dissenting in part).

[43] See generally *id. at 209-12* (discussing the history of the Amish sect and the Amish objection to formal education beyond the eighth grade) (citations omitted).

[44] See *id. at 208 n.3.*

[45] See *id. at 232.*

[46] See Shelley Burtt, In Defense of Yoder: Parental Authority and the Public Schools, in 38 NOMOS, POLITICAL ORDER 412 (Ian Shapiro & Russell Hardin eds. 1996).

[47] For evidence that devoutly religious persons are more likely to lead lives we can agree are good in secular terms, see GUENTER LEWY, WHY AMERICA NEEDS RELIGION 87-115 (1996). As Lewy summarizes it, the available social-scientific research . . . shows that the minority of Christians who take their religion seriously are different from nominal members of the Christian churches. Whether it be juvenile delinquency, adult crime, prejudice, out-of-wedlock births, or marital conflict and divorce, there is a significantly lower rate of such indicators of moral failure and social ills among believing Christians. Id. at 112.

education often know little or nothing about faith-centered ways or about what it means to live within a traditionalist community. Yet in academic circles, one does not hear their parents condemned for keeping them in ignorance and foreclosing their future options. As for the claim that Amish youth will face difficulty pursuing careers that require higher education, the short answer is that millions of early school-leavers, some of them formerly Amish, have subsequently obtained General Educational Development ("GED") certificates and then gone on to college. [48] No serious, irreparable harm inheres in not receiving an ordinary high school education between the ages of 13 and 16-particularly if the alternative education one receives helps develop traits such as "the Amish qualities of reliability, self-reliance, and dedication to work." [49] On this point, at least, Chief Justice Burger's opinion got it right: an Amish education "is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred." [50]

If the reasonableness of an Amish education is an easy call in favor of the parents, are there any cases the state should clearly win? And what would constitute a hard case under this liberal parentalist analysis? A first easy case would be a parental decision to prevent a child from learning to speak. [51] Even if (as scarcely seems credible) the parents believed in good faith that this deprivation was in the child's best interest, the enormous denial of human capacity entailed in the inability to speak, coupled with the powerful evidence that this capacity will be stunted if not developed early in life, makes this the educational analogue to crippling, irreparable physical injury. The state should prevail no matter what values, religious or otherwise, the parents invoke. [52]

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As a less extreme example in which state interference is warranted, consider a family in which parents who cannot read and write forbid their children to be taught these skills on the grounds that they are unnecessary and would divide children from parents. This judgment seems plainly unreasonable. The question is not whether the children can survive (or even prosper) despite the lack of skills most people in our society are glad they possess; it is whether there are sufficiently good reasons to justify or offset a deprivation of this magnitude. The parents' goal of ensuring that their children do not surpass or look down on them, while understandable, seems far too slight to support the deliberate imposition of illiteracy.

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[48] In 1995 alone, more than 500,000 adults earned GED certificates, and 64% of those of who took the GED tests planned to go on to post-secondary education. See Dennis Kelly, 50-year Peak for GED Diplomas, USA TODAY, July 27, 1996, at 5B. For some contemporary examples of former Amish who have gone on to business and professional careers, see Tracy Wheeler, To Go or Stay, Akron Beacon Journal Feb. 17, 1997, at A1.

[49] *Wisconsin v. Yoder, 406 U.S. 205, 224 (1972).*

[50] *Id. at 230* (citation omitted).

[51] The astonishing and universal ability of children to acquire language appears to stem from natural processes of cognitive development that will succeed unless deliberately frustrated. See E.D. HIRSH, JR., THE SCHOOLS WE NEED AND WHY WE DON'T HAVE THEM 25, 220 (1996).

[52] This analysis is not meant to imply that the state may (or must) interfere whenever parents, for religious reasons, refuse to authorize medical care that might save their child from serious bodily harm or death. (For arguments to that effect, 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)).* To deprive a child of exposure to language and the ability to acquire it is like deliberate starvation or mutilation. By contrast, religiously-motivated refusal of certain forms of medical treatment on the child's behalf typically is either accompanied by a claim that prayer is a more efficient method of healing (the Christian Science position) or that other medical interventions can achieve the same end without infringing on a religious prohibition (the Jehovah's Witness position concerning blood transfusions). See Dena S. Davis, Does "No" Mean "Yes"? The Continuing Problem of Jehovah's Witnesses and Refusal of Blood Products, 19 SECOND OPINION 37 (Jan. 1994). Moreover, there is no reason to doubt that parents holding these religious beliefs would refuse medical treatment for themselves under the same circumstances. This combination of plausible reasons and consistency across persons makes for hard cases, and I take no stand here on how they should be decided.

Now for a hard case: imagine a sect whose members adhere to an oral religious tradition and believe that even basic literacy endangers salvation. There is a serious risk that children raised in this manner will never be able to acquire a basic education later in life (or will only be able to acquire a basic education as adults). [53] Moreover, there is a societal consensus that the basic abilities to read and write yield large benefits throughout life and should thus be part of every child's education. These considerations strongly suggest that the parents' decision is prima facie unreasonable.

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Yet there are factors that cut in favor of deferring to the parents' values. The presence of a durable tradition and of a community of believers suggests that the resources internal to this way of life may be substantial. A fuller contextual account of the life-chances of persons raised in this way conceivably could overcome the initial inference of unreasonableness. Moreover, the presence of a justification for the educational deprivation in terms of the child's future good commands some measure of respect as well. But how much? One would want to know more about the reasons why even basic literacy is believed to endanger salvation. A naked assertion to that effect should count for much less than a narrative account that explained why literacy jeopardized living a life that would merit salvation. Although the case is close, the parents probably should lose unless their way of life has distinctive strengths that literacy would threaten to eliminate.

As these examples illustrate, ***liberal parentalism*** neither eliminates line-drawing problems nor leaves children at the mercy of disastrously mistaken parental choices. It does, however, draw the line in a very different place than the Yoder Court. And while it may be awkward for federal courts to sit in judgment on the adequacy of the religiously-grounded reasons given by parents who make dramatically unconventional educational choices for their children, [54] there will at least be far fewer occasions for second-guessing parents than there are under present law. [55] Which brings me to my next task: a brief critique of the statist lapses that enfeeble the majority and concurring opinions in Yoder.

III.

With the benefit of hindsight, we can describe the holding in Yoder as follows: when a generally applicable state law coercively interferes with parents' religiously based educational choices, it violates the Free Exercise Clause unless it is the least restrictive means of advancing a compelling state interest. As such, Yoder is an example of the free exercise test the

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[53] Not a certainty: some illiterate adults (many of whom spent years in public schools) eventually get the help needed to learn basic reading skills. One important source of such help is Literacy Volunteers of America, Inc., ("LVA"), a national non-profit organization that provides individual tutoring by trained volunteers, with special emphasis on adults who read below the fifth grade level. LVA supervises almost 400 programs in 44 states, in which more than 150,000 students and tutors participate. See Prepared Testimony of Evelyn Renner, Literacy Volunteers of America, Inc. Before the House Education and Workforce Committee; Postsecondary Education, Training and Lifelong Learning Subcommittee, Federal News Service, Feb. 25, 1997, available in LEXIS, Nexis Library, ALLNEWS file.

[54] See *United States v. Ballard, 322 U.S. 78, 87 (1944)* (holding that the Religious Clauses forbid courts to inquire into the truth or falsity-as distinguished from the sincerity-of religious beliefs); see also *Hernandez v. Commissioner, 490 U.S. 680, 699 (1989)* ("[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith").

[55] The analysis I have presented does not address situations in which the state might invoke a societal interest-quite apart from children's welfare-in preventing children from being taught certain beliefs (for example, doctrines of racial supremacy). Although cases of that kind might in some circumstances warrant overriding parental educational choices, the beliefs at issue in Yoder do not raise this issue.

Supreme Court employed from Sherbert v. Verner [56] in 1963 until Employment Division v. Smith [57] in 1990. Smith held that free exercise challenges to neutral, generally applicable state laws do not receive heightened scrutiny. Last term, the Court also struck down Congress' attempt, in the Religious Freedom Restoration Act ("RFRA"), [58] to restore the Sherbert test to state laws burdening religious freedom. [59] Nevertheless, because Smith expressly created an exception for cases that, like Yoder, present "hybrid" claims involving both parental rights and free exercise rights, parental religious-education claims still trigger heightened scrutiny. [60] Others have ably addressed the general strengths and weaknesses of this mode of constitutional analysis. [61] I will confine myself to its application in Yoder.

The Yoder Court thought it obvious that compulsory education laws advance a compelling state interest: "There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. Providing public schools ranks at the very apex of the function of a state." [62] Although superficially consistent with Pierce, these statements in fact retreat from it. For all its reliance on Pierce, the Yoder Court erected a conceptual framework that seriously undermines the Pierce principle.

To see why, it is necessary to take a careful look at Pierce. The Pierce Court acknowledged "the power of the State reasonably to regulate" [63] the duration and content of basic education. But in Pierce, the realm within

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which the state wielded this authority was limited and secondary, because primary authority over education vested in parents as a matter of substantive due process liberty: "The child is not the mere creature of the State," and the child's parents "nurture him and direct his destiny." [64] As the Court said in Meyer, the Constitution protects "the power of parents to control the education of their own." [65] And as Pierce implies, the existence of this parental authority entails sharp limits on what counts as a "purpose within the competency of the State" [66] in the realm of

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[56] *374 U.S. 398 (1963).*

[57] *494 U.S. 872 (1990)* (holding that generally applicable state laws should not be subjected to heightened scrutiny on free exercise grounds unless intended to burden religion).

[58] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, ***107 Stat. 1488*** (codified as amended at *42 U.S.C. 2000bb* (1994)).

[59] *City of Boerne v. Flores, 117 S. Ct. 2157, 2172 (1997),* rev'g *83 F.3d 1352 (5th Cir. 1996).* The ruling in City of Boerne, however, does not invalidate RFRA as applied to federal law.

[60] *494 U.S. at 881-82.*

[61] See, e.g., Eugene Volokh, Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny, *144 U. PA. L. REV. 2417 (1996);* Sanford Levinson, Identifying the Compelling State Interest: On 'Due Process of Lawmaking' and the Professional Responsibility of the Public Lawyer, *45 HASTINGS L.J. 1035 (1994);* Stephen E. Gottlieb, Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication, *68 B.U. L. REV. 917 (1988).*

[62] *Wisconsin v. Yoder, 406 U.S. 205, 213 (1972)* (citing *Pierce v. Society of Sisters, 268 U.S. 510 (1925)).*

[63] *Pierce, 268 U.S. at 534.*

[64] *Id. at 535.*

[65] *Meyer v. Nebraska, 262 U.S. 390, 401 (1923).*

[66] *268 U.S. at 534-35.*

education. In particular, it "excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only." [67] The same principle should rule out government attempts to standardize children by any means absent a showing of parental abuse or other demonstrable harms.

The language of the so-called "Pierce compromise" [68] (which, as a technical matter, merely specifies that certain questions are not before the Court) is entirely consistent with this analysis. The famous dictum endorses "the power of the State reasonably to regulate all schools, . . . to require that all children of proper age attend some school, . . . that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare." [69] The Pierce Court's specific formulations speak volumes about how limited the scope of "reasonable" regulation of education is: the state may require only "plainly essential" studies, and it may forbid only "manifestly inimical" ones. [70] Had the Yoder Court simply applied this language to Amish education, the outcome would have been straightforward. As the Yoder Court's own description of Amish vocational education makes plain, Amish children are deprived of no "plainly essential" studies, and

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learn nothing "manifestly inimical to the public welfare." The only arguable difficulty would have been the Pierce dictum's suggestion that states may require all children to attend "some school." But to read "some school" as excluding home- and community-based vocational and religious education is neither necessary nor desirable. Indeed, well before the decision in Pierce, some state courts had ruled that the purpose of compulsory education laws is to ensure that children are educated, not that they are educated in a particular institutional setting, and that home education should accordingly be treated as within the meaning of the word "school." [71] Other state courts disagreed. [72] But given the general tenor of the opinion in Pierce it would be remarkable if the words "some school" were intended to signify that a flat ban on home schooling would constitute reasonable state regulation of education. [73]

In fairness to the Yoder Court, however, it must be stressed that the Amish parents raised only a free exercise defense to the criminal charges against them, rather than invoking their substantive due process rights under Pierce. [74] Nonetheless, by declaring that state educational authority is "paramount," [75] the Yoder Court did more

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[67] *Id. at 535.* The quoted language is preceded by the phrase "The fundamental theory of liberty upon which all governments in this Union repose," id., and this might seem an odd way to refer to the tradition of parental authority. The oddity disappears, however, once one recognizes that the theory of liberty to which the Court refers is presumably the substantive due process liberty described in Meyer, which specifically includes "the right of the individual to . . . establish a home and bring up children." *262 U.S. at 399.*

[68] See, e.g., MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW 1 (3d ed. 1992).

[69] *268 U.S. at 534.*

[70] Whether these content-based categories would be suspect under current first amendment jurisprudence is a question I shall not pursue here.

[71] See, e.g., ***Commonwealth v. Roberts, 34 N.E. 402 (Mass. 1893);*** *State v. Peterman, 70 N.E. 550 (Ind. App. 1904).*

[72] See, e.g., *State v. Counort, 124 P. 910 (Wash. 1912).*

[73] But see *Board of Educ. v. Allen, 392 U.S. 236, 246 (1968)* (citing ***People v. Turner, 263 P.2d 685 (Cal. App. 1953),*** for the proposition that "the State's interest in assuring that these [educational] standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes," and describing that proposition as "a sensible corollary of Pierce v. Society of Sisters").

[74] See *Wisconsin v. Yoder, 406 U.S. 205, 208-09 (1972);* *State v. Yoder, 49 Wis. 2d 430, 433 (1970).* The Supreme Court may have been especially concerned about using the language of substantive due process because *Roe v. Wade, 410 U.S. 113 (1973),* was first argued eight days after Yoder and, while Yoder was still pending, was set for reargument the following *Term.*

than just fail to apply Pierce. If public education is "at the very apex of the function of a state," [76] and if "the control and duration of basic education" lies with the state unless its regulatory judgments are shown to be unreasonable, [77] then what-apart from its bare holding, reaffirmed in Yoder-is left of Pierce?

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This question calls for a two-part answer. The first and more depressing part involves general Pierce rights. As I argued above, Pierce and Meyer contemplated a fairly stringent reasonableness test under which the government bears the burden of showing that parental educational choices are unreasonable and harmful to the child. [78] Yoder's implicit message is that something a good deal closer to rational basis scrutiny suffices "where nothing more than the general interest of the parent in the nurture and education of his children is involved." [79] In such cases, Yoder backhandedly suggests that "merely a 'reasonable relation to some purpose within the competency of the State' is required." [80] A standard of mere (that is, minimal) reasonableness is a far cry from the version of reasonableness review contemplated in Pierce, under which the state must show that its regulations do not "unreasonably interfere with the liberty of parents" to direct the education of their children.

Indeed, if a reasonable relation to a legitimate state purpose is enough, and if we take seriously Yoder's discussion of the state's general educational authority, it is difficult to see why Pierce was decided correctly. According to the Yoder Court, the state has paramount responsibility for defining and providing basic education. Surely there is a reasonable relation between that putatively legitimate (indeed, putatively compelling) state purpose and a mandatory public schooling law such as the one struck down in Pierce. The judgment that children in general are more likely to receive an appropriate basic education as defined by the state if they attend a school operated by the state is hardly implausible or irrational. (Depending on how the state defines basic education, it may even be right.) In the final analysis, Yoder's conception of state educational authority and Pierce's conception of general parental educational authority cannot both be right. [81]

See 410 U.S. at 113 (Roe argued Dec. 13, 1971, and reargued Oct. 11, 1972); *406 U.S. at 205* (Yoder argued Dec. 8, 1971, and decided May 15, 1972).

[75] *406 U.S. at 213.*

[76] Id.

[77] See id.

[78] See also ***Gilles***, supra note 3, at 1005-06.

[79] *406 U.S. at 233* (emphasis added). Because we normally entrust interest-balancing to majoritarian resolution, the Yoder Court invites deference to the state by speaking of parental interests rather than parental rights.

[80] Id. (emphasis added). For bringing home to me the significance of this phrase, which undermines Pierce while quoting approvingly from it, I am indebted to Patricia R. Beauregard, Who Decides What's Best For My Child? A Discussion of the Constitutional Rights of Parents Through the Examination of Pierce Cases 43-45 (Feb. 7, 1997) (unpublished student paper on file with the author).

[81] Another way to make this same point is to focus on the question, what are the limits on the state's power to set educational standards with which even private schools must comply? Obviously the Pierce exit option has actual substance only to the extent that private schools may deviate from their public counterparts. Yet according to Justice White's concurrence (which Justices Stewart and Brennan joined), Pierce lends no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society; in Pierce, both the parochial and military schools were in compliance with all the educational standards that the State had set, and the Court held simply that while a state may posit such standards, it may not pre-empt the educational process by requiring children to attend public schools. *406 U.S. at 239* (White, J., concurring) (citation omitted). Cf. *406 U.S. at 213* (opinion of the Court) (describing Pierce as recognizing "the right of parents to provide an equivalent education in a privately operated system"). On this view, states may largely undo the Pierce compromise by the simple expedient of requiring private schools to meet comprehensive educational standards. (The qualification is necessary because Meyer would still entitle private schools to supplement the state-mandated curriculum). But see *Farrington v. Tokushige, 273 U.S. 284, 298 (1927)* (striking down intrusive

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It is no wonder that several recent federal appellate decisions-some of which rely in part on Yoder-have declined to treat general Pierce rights as fundamental and employed the deferential rational basis version of reasonableness review. [82] These decisions, however, misread the current

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state of the Supreme Court's substantive due process jurisprudence. The line of post-Yoder substantive due process cases, beginning with Roe v. Wade and culminating in Planned Parenthood v. Casey, [83] clearly indicates that Pierce rights, like other substantive due process rights involving "a person's most basic decisions about family and

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parenthood," [84] are fundamental rights protected by some form of heightened scrutiny.

Despite the deep divisions over abortion rights evident in the various opinions in Casey, all the Justices agreed that substantive due process protects rights that are fundamental to personal liberty, that laws interfering with these fundamental rights are therefore subject to heightened scrutiny, and that Pierce rights are among the rights so protected. The four dissenting Justices argued that "the Court in Roe reached too far when it analogized the right to abort a fetus to the rights involved in Pierce, Meyer, Loving, and Griswold," and thereby "classified a woman's decision to terminate her pregnancy as a 'fundamental right' that could be abridged only in a manner which

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regulations of supplemental private schools because they "deny both owners and patrons reasonable choice and discretion in respect of teachers, curriculum and text-books"). Indeed, for Justice White the result in Yoder seemed to depend on the fact that, as he put it, "[t]he statutory minimum school attendance age set by the State is, after all, only 16." *406 U.S. at 240* (White, J., concurring). Had Wisconsin set the school-leaving age at 18, an Amish exemption would-according to Justice White's reasoning-have a much more serious impact on the state's interest. Thus, his "delicate balancing of important but conflicting interests," *id. at 237,* might well have come out the other way.

[82] See, e.g., *Immediato v. Rye Neck Sch. Dist., 73 F.3d 454, 462 (2nd Cir. 1996),* cert. denied, ***117 S. Ct. 60 (1996)*** ("where, 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 'upbringing' of their child, rational basis review applies"); *Ohio Ass'n of Indep. Sch. v. Goff, 92 F.3d 419, 422 (6th Cir. 1996),* cert. denied, ***117 S. Ct. 1107 (1997)*** ("rational basis review, not strict scrutiny," governs "wholly secular limitations on private school education"); *Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 89 F.3d 174 (4th Cir. 1996),* cert. denied, ***117 S. Ct. 949 (1997)*** (parents' "interest is not religious, so we must reject their position if the [challenged regulation] bear[s] some rational relationship to legitimate state purposes"); *Walker v. City of Kansas City, 911 F.2d 80 (8th Cir. 1990),* aff'g in part, rev'g in part, *691 F. Supp. 1243 (W. D. Mo. 1988),* reh'g denied, *919 F.2d 1339 (8th Cir. 1990);* cf. *Brown v. Hot, Sexy and Safer Prod., Inc., 68 F.3d 525, 533 (1st Cir. 1995),* cert. denied, ***116 S. Ct. 1044 (1996)*** ("We need not decide here whether the right to rear one's children is fundamental because we find that, even if it were, the plaintiffs have failed to demonstrate an intrusion of constitutional magnitude on this right."). But see *Peterson v. Minidoka City Sch. Dist., 118 F.3d 1351, 1358 (9th Cir. 1997)* (opinion of Noonan, J.) (applying heightened scrutiny to the parents' Pierce claim). Ironically, state courts have been more receptive to parents' federal Pierce rights. See, e.g., *Care and Protection of Charles, 504 N.E.2d 592, 598 (Mass. 1987)* (stating that under Pierce, it is "clear that the liberty interests protected by the Fourteenth Amendment extend to activities involving child rearing and education," and that parents "possess a basic right in directing the education of their children"); *State v. Whisner, 351 N.E.2d 750, 769 (Ohio 1976)* ("the right of a parent to direct the education, religious or secular, of his or her children [is a] fundamental right guaranteed by the due process clause of the Fourteenth Amendment").

[83] *505 U.S. 833 (1992).*

[84] *Id. at 849.*

withstood 'strict scrutiny.'" [85] This argument obviously presumes that interference with the rights declared in any of those cases triggers some version of strict scrutiny.

The five Justices in the Casey majority reaffirmed that abortion rights are subject to heightened scrutiny and expressly based those rights on the "substantive component" of the Due Process Clause, which includes the "aspect[s] of liberty protected against state interference" by Loving, Griswold, Pierce, and Meyer (among others). [86] This line of cases already had settled before Roe that "the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood." [87] Among these are "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education . . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." [88] State regulation that interferes with these choices consequently receives heightened scrutiny because the "conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other" does not apply to laws that intrude upon a protected liberty. [89] Plainly, then, Pierce rights are "fundamental" in the sense that they call for more than rational basis review. [90]

To be sure, neither Casey nor any of the Court's previous abortion cases squarely consider what level of scrutiny state laws that interfere with general Pierce educational rights should receive. But that issue was not squarely considered in Yoder either-nor in any of the other cases in which the Supreme Court described state educational authority in overbroad and unduly deferential terms. [91] In such circumstances, the lower federal courts ordinarily piece together whatever clues can be gleaned from the Court's cases. Yet the recent federal decisions asserting

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that Pierce rights receive only rational basis scrutiny completely ignore the contrary evidence from Casey.

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[85] *505 U.S. at 953* (Rehnquist, C.J., concurring in part and dissenting in part). Consequently, the dissenters would have ruled that "States may regulate abortion procedures in ways rationally related to a legitimate state interest." Id. (citation omitted). This, of course, is the very standard some courts now claim applies to "the rights involved in Pierce [and] Meyer" (though not, oddly enough, to "the rights involved in . . . Loving, and Griswold"). Id.

[86] Id. at 847 (citation omitted).

[87] Id. at 849 (citation omitted).

[88] Id. (emphasis added) (citation omitted).

[89] Id. (citation omitted).

[90] Heightened scrutiny, of course, comes in different versions, and the analysis in text does not purport to decide which of them applies to laws that interfere with Pierce rights. The Casey majority split on the parallel question of which version of heightened scrutiny applies to abortion rights. See *505 U.S. at 871-77* (joint plurality opinion of Justices O'Connor, Kennedy, and Souter) (arguing that regulation of abortion rights should be governed by the less restrictive "undue burden" standard rather than by strict scrutiny); *505 U.S. at 920-22* (Stevens, J., concurring in part and dissenting in part) (applying the "undue burden" standard but arguing that the plurality's application of it was too deferential to state regulation of abortion); *505 U.S. at 926* (Blackmun, J., concurring in part, concurring in the judgment, and dissenting in part) (arguing that regulation of abortion rights must satisfy strict scrutiny). For a discussion of the possibility that the Court might apply the undue burden standard in the context of Pierce rights, see Jon S. Lerner, Comment, Protecting Home Schooling through the Casey Undue Burden Standard, *62 U. CHI. L. REV. 363 (1995).* Justice Souter has expressed the view that general Pierce rights are protected by a less demanding form of scrutiny than Yoder's compelling state interest test. See *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah, 508 U.S. 520, 566-67 n.4 (1993)* (Souter, J., concurring in part). But that position is quite compatible with intermediate versions of heightened scrutiny (which is what the undue burden standard appears to be).

[91] See, e.g., *Board of Educ. v. Allen, 392 U.S. 236, 245-46 (1968).*

The second half of the answer to the question of Yoder's impact on Pierce rights concerns parental authority over religious education. Here, Yoder takes Pierce as its point of departure: "[T]he Court's holding in Pierce stands as a charter of the rights of parents to direct the religious upbringing of their children." [92] Free exercise rights plus the interests of parenthood equal a more demanding standard of review. The basic rule is that the state must accommodate the parents' religious objections unless "it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." [93] This formulation leaves many questions unanswered, but it at least makes clear that courts must determine that there is harm to the child or to society by their own lights, rather than deferring to the judgments of the political branches on that issue. In this respect, too, Yoder resembles Pierce and Meyer, both of which turned on the Court's willingness to make independent judgments that the practices declared unlawful by the legislature were not plainly harmful. [94]

Thus, although Yoder may have weakened Pierce as a substantive due process principle, it simultaneously gave the Pierce principle a new home in the Free Exercise Clause. [95] Parents whose educational choices are based in religious belief are consequently able to avoid some state educational regulations with which non-religious parents (or parents whose preferences are not religious in character) must comply. [96] Given

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Yoder's ungenerous interpretation of what constitutes "religion," [97] many parents gain nothing from its recognition of free exercise based Pierce rights. On the other hand, it seems clear that most controversial forms of educational regulation will collide with somebody's religiously-grounded values. [98] Moreover, casual observation suggests that most families who strongly object to various aspects of state intervention in education do so on grounds linked to their religious beliefs. For these reasons, vigorously enforced Yoder rights might do almost as much good as an

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[92] *Wisconsin v. Yoder, 406 U.S. 205, 233 (1972).*

[93] *Id. at 234.*

[94] See *Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925)* (describing private schools as "a kind of undertaking not inherently harmful, but long regarded as useful and meritorious"); *Meyer v. Nebraska, 262 U.S. 390, 403 (1923)* (stating that knowledge of modern foreign languages cannot be said to be "clearly harmful").

[95] Smith points in the opposite direction in both respects: By treating Yoder itself as a "hybrid" of free exercise rights and the independent constitutional "right of parents . . . to direct the education of their children," Smith suggests that it is substantive due process and not the Free Exercise Clause that justifies heightened scrutiny of state interference with parents' religiously-based educational choices. *Employment Div. v. Smith, 494 U.S. 872, 881-82 (1990).* For criticism of Smith's treatment of Yoder, see *Church of the Lukumi Babalu Aye, 508 U.S. at 566-67 (1993)* (Souter, J., concurring in part, concurring in the judgment). For criticism of the Smith opinion, see Douglas Laycock, The Remnants of Free Exercise, 1990 SUP. CT. REV. 1; Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, *57 U. CHI. L. REV. 1109 (1990).*

[96] Compare, e.g., *People v. Bennett, 501 N.W.2d 106 (Mich. 1993),* vacating *449 N.W.2d 889 (Mich. App. 1989)* (rejecting a substantive due process challenge to Michigan's teacher certification requirement as applied to home schooling parents) with *People v. DeJonge, 501 N.W.2d 127 (Mich. 1993),* rev'g *449 N.W.2d 889 (Mich. App. 1989)* (holding that Michigan's teacher certification requirement violates the Free Exercise Clause as applied to home schooling parents who object to certification on religious grounds).

[97] See *406 U.S. at 215-16* (indicating that deeply held philosophical or personal beliefs, if secular, are not protected by the Free Exercise Clause). See also *Frazee v. Illinois Dept. of Employment Security, 489 U.S. 829, 833 (1989)* (expressing similarly restrictive interpretation).

[98] Of course, public officials might sometimes elect to accommodate only families with strong free exercise claims. Often, however, one suspects they will find it administratively easier to offer a blanket opt-out to all parents who object to a particular educational regulation or requirement (such as a sex-education course) whether their objections are religious, conscientious, or pedagogical.

explicit declaration by the Court that, as Casey implies, interference with Pierce rights triggers some form of heightened scrutiny.

Vigorous enforcement, however, is hardly what Part V of the majority opinion in Yoder demands. The Court signals that "courts must move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exemption from generally applicable educational requirements" [99] (why should free exercise rights be treated with such suspicion?); it suggests that "probably few other religious groups or sects" convincingly could show that their alternative modes of education are adequate in terms of the state's asserted interests [100] (why should this burden fall on free exercise claimants?); and finally, it reassures anxious statists and majoritarians that reasonable state standards can be "established concerning the content of the continuing vocational education of Amish children under parental guidance" [101] (what justification is there for any state regulation of the content of an education the Court has already determined to be adequate in terms of the state's interests?). It

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would be hard to compose a more ignominious retreat from the free exercise rights recognized earlier in the Court's opinion.

IV.

The foregoing analysis of Yoder simply does not address the quite distinct question of educational emancipation. At what age may states declare that a young person has become an adult, either generally or for purposes of choosing an education? What, if anything, do the principles of ***liberal parentalism*** have to say about issues of this kind?

It is never safe to claim complete consensus in our society. Nevertheless, almost everyone agrees that young children are better off when caring adults make major choices on their behalf, and that the balance tips the other way by "twenty-something." But consensus ends there. Reasonable people differ over whether the optimal age of general (or educational) emancipation lies in early, middle or late adolescence-and nothing about ***liberal parentalism*** requires (or supplies) an a priori answer to that question. Ultimately, the issue is an empirical one, and I will not try to in this essay to do justice to its complexity. I shall, however, tentatively venture a few reasons for denying 14- or 16-year-olds final authority over what type of education they receive.

Begin with the evidence of experience: the traditional age of emancipation at common law was 21, [102] and even the revised version draws the line at 18, not 16 or 14. [103] The implicit, long-standing social judgment is that the first turbulent years of adolescence is not the best time to emancipate children legally. That judgment is supported

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[99] *406 U.S. at 435.*

[100] *Id. at 436.*

[101] Id.

[102] See Wallace J. Mlyniec, A Judge's Ethical Dilemma: Assessing A Child's Capacity to Choose, *64 FORDHAM L. REV. 1873, 1876-77 (1996).*

[103] In the aftermath of the Twenty-Sixth Amendment, which guaranteed 18-year-olds the right to vote in state and federal elections, a number of states lowered the general age of emancipation from 21 to 18. See, e.g., *New Jersey State Policemen's Benev. Assoc. v. Morristown, 320 A.2d 465, 471 (N.J. 1974),* rev'g *307 A.2d 129 (N.J. Super. Ct. Ch. Div. 1973)* (citations omitted) (discussing the New Jersey statute). The shift to age 18 also has been explained on the ground that "maturity is now reached at earlier stages of growth than at the time that the common law recognized the age of majority at 21 years." *Cardwell v. Bechtol, 724 S.W.2d 739, 745 (Tenn. 1987).* It is also worth noting that average life expectancy in the United States has vaulted from 49 in 1900 to 76 today. See Jack Rosenthal, The Age Boom, N.Y. TIMES, Mar. 9, 1997, 6, at 39. Measured as a percentage of a child's life expectancy, the period of de jure parental control would have diminished enormously even if the age of emancipation had remained constant at 21 rather than (in many states) being lowered to 18.

by recent social scientific evidence that adolescents lack self-control, underestimate risks, and make decisions without due regard for their long-run self-interest. [104]

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Assuming that this pattern of unreliable decisionmaking extends to educational choices as well as, say, sexual and substance-abusing ones, we have a powerful argument for keeping educational authority in parents' hands. [105]

In reflecting on this topic, it may also be helpful to look at it over an individual's entire life span. The overwhelming majority of persons will be raised by custodial parents, and will themselves be custodial parents. Against the autonomy we would gain as adolescents entitled to choose our own education, we must offset the authority we would lose as parents seeking to do what is best for our own children. If we give equal weight to each era of our lives, and if the choices we make as parents tend to be better than the choices we make as adolescents, greater parental authority would be in our enlightened self-interest.

It is also important to remember that adolescents retain voice within the family even if they lack legal authority to decide for themselves. [106] The family is a small community, and in most families the child's preferences and opinions carry increasing weight as the child matures. We can look at parental authority as a way of reserving the question of emancipation to parents within the pre-set limits of the mandatory emancipation age. From this perspective, the child can try to persuade his or her parents either of the merits of a particular choice, or that the child is mature enough that the parents should allow the child to make the choice even if they disagree with it. This dynamic goes on all the time in millions of families. It is intra-familial bargaining in the shadow of the law. Adolescents lack authority, yet have influence.

This argument, however, runs both ways-which helps explain why the question is close. Even apart from de jure parental authority, an

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adolescent child has strong reasons, ranging from parental financial leverage to family ties and affection, to give great weight to parental preferences. Thus, if adolescents had authority over their own education, parents still would have ample means and opportunity to convince the child that their view of the merits is correct or that the child should defer to their judgment. (Though they often might face powerful competition in the forms of peer pressure and adolescent rebelliousness.)

If liberal political theory supplies no clear-cut answer to the ages of educational and general emancipation, why would we think that federal constitutional law restricts the states to a narrow range of choices? The Constitution affords no express protection to the right of children to attain their majority at any particular age. Perhaps substantive due process would forbid states to defer majority much beyond the traditional age of 21. Because many reasonable people think that adolescent emancipation would disserve the long-run interests of adolescents themselves, however, the claim that substantive due process requires states to lower the age of general or

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[104] See, e.g., Elizabeth S. Scott et al., Evaluating Adolescent Decision Making in Legal Contexts, 19 LAW & HUM. BEHAV. 221 (1995); Elizabeth S. Scott, Judgment and Reasoning in Adolescent Decisionmaking, 37 VILL. L. REV. 1607, 1632 (1992); Jeffrey Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 DEVELOPMENTAL REV. 339 (1992). The argument is not that adolescents lack the cognitive capacity to make decisions as adults do, but rather that they lack emotional maturity and a long-run perspective. See Mlyniec, supra note 102, at 1882-83. But see *Yoder, 406 U.S. at 245 n.3* (Douglas, J., dissenting in part) (collecting sources for the proposition that "there is substantial agreement among child psychologists and sociologists that the moral and intellectual maturity of the 14- year-old approaches that of the adult").

[105] On the importance of context in assessing the competence of adolescents, see Gregory A. Loken, "Thrownaway" Children and Throwaway Parenthood, *68 TEMP. L. REV. 1715, 1733-34 (1995).*

[106] For the classic development of this point see, COONS & SUGARMAN supra note 1, at 48-61 (1978).

educational majority is untenable. To be at all plausible, such a contention would need to be quite modest-for example, to argue for eighteen or nineteen as the maximum permissible age of majority.

Conversely, if a state decided to lower the general (or educational) age of majority to 16 or even

14, it seems difficult to argue that parents' Pierce rights stand in the way. But Wisconsin had done nothing of the kind. Why, then, would anyone take seriously Justice Douglas's assertion that "if an Amish child desires to attend high school, and is mature enough to have that desire respected, the State may well be able to override the parents' religiously motivated objections"? [107] Douglas seems to think the explanation for his position lies in "the religious liberty . . . of the children." [108] The Free Exercise Clause, however, applies to state action, not to the conduct of private individuals such as parents. Douglas's implicit answer to this objection seems to be that accommodating parents' free exercise rights by allowing a religious exemption does constitute state action, and that "the inevitable effect is to impose the parents' notions of religious duty upon their children." [109] But why should the Free Exercise Clause be construed to guard against private interference with the practice of religion? Even-handed accommodation of the religiously-grounded educational choices of parents does not enable the government to impose

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its own religious views. A practice that protects minority religions rather than entrenching majoritarian ones should pose no free exercise problem.

Justice Douglas offers another argument that might support a substantive due process right similar to the free exercise right he proposes to give adolescents. He suggests that allowing parents to control their child's education on religious grounds will cause irreparable harm to the child. "If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today." [110] Were this premise true, one could argue against parental educational authority on the traditional liberal grounds that parents ought not be allowed to bind their children to choices the child cannot repudiate in adulthood. But the premise is not true-it is a rhetorical flourish. As the Wisconsin Supreme Court said, "[w]hen a child reaches the age of judgment, he can choose for himself his religion . . . ." [111] (and, of course, can also choose to pursue additional education). To this Douglas replied that 14-year-olds often are already mature enough to make that choice. [112] That, however, is simply a quarrel with the state's judgment about the appropriate age of majority for determining one's religion. As we have seen, reasonable people can and do differ on what age is appropriate. Consequently, even accepting substantive due process reasonableness as a legitimate mode of constitutional discourse, [113] Douglas's argument is based on policy, not constitutional law.

A final possibility is that parents' religious educational authority should be seen as a delegation of authority by the state that must, for that reason, be exercised in compliance with the strictures of the Religion Clauses. This theory

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[107] *Wisconsin v. Yoder, 406 U.S. 205, 242 (1972)* (Douglas, J., dissenting in part).

[108] *Id. at 241.*

[109] *Id. at 242.*

[110] *Id. at 245.*

[111] *State v. Yoder, 182 N.W. 2d 539, 543 (Wisc. 1971).*

[112] See *406 U.S. at 245 n.3* (Douglas, J., dissenting in part).

[113] Justice Scalia, for example, is of the view that the Due Process Clause of the Fourteenth Amendment protects only procedural (and incorporated) rights. See *TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 470-71 (1993)* (Scalia, J., concurring in the judgment).

is deeply problematic because when the state authorizes individual parents to make decisions about their children's welfare, the result is invariably a diverse array of choices-some of which the government (or the majority) would in fact oppose on the merits. Nevertheless, a delegation-to-parents theory is not unheard of in constitutional law: the Supreme Court has used it to prevent states from requiring parental consent before a minor daughter may obtain an

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abortion. [114] Perhaps this result can be defended on the narrow ground that the Constitution forbids states to authorize parents to inflict major, irreparable harm on their adolescent children. [115] A parental right to forbid a minor daughter to have an abortion arguably meets that standard. As we have already seen, a parental right to choose an adolescent's religious education does not. And any broader delegation theory must be rejected out of hand, for it would entail spectacularly untoward results. To apply the Supreme Court's establishment clause jurisprudence to parents' actions vis-a-vis their adolescent children, for example, would turn religious homes into little enclaves of public-school secularism. Whatever one thinks of prayer in the schools, surely the Establishment Clause does not forbid it in the homes.

V.

As we have just seen, there are serious (if not insurmountable) problems with Justice Douglas's suggestion that adolescents have a constitutional right to some degree of de jure influence over their religious educations. Nevertheless, because ***liberal parentalism*** also is concerned with issues of policy and liberal theory affecting educational authority, it seems appropriate to inquire more closely into what rights of this kind would entail, whether it would make any sense to create them, and what constitutional obstacles they might face given parents' rights under Pierce and Yoder.

Justice Douglas never explained precisely what rights the "constitutionally protectible [liberty] interests" [116] of Amish adolescents should give them over their own educations. At times, Douglas used the low-key rhetoric of procedural due process. ("On this important and vital matter of education, I think the children should be entitled to be heard.") [117] He also argued, however, that the Amish child's preferences should sometimes determine the outcome of the dispute between Amish parents and the state: [118] But the extent and contours of this right remain obscure.

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Suppose, for example, that Catholic parents wish to send their child to a parochial high school over his or her objections. May the state override their objections too? Justice Douglas might well have said 'No,' but what distinguishes the rights of the Catholic child from the rights of the Amish one? Perhaps the answer lies in the contrast between Wisconsin's treatment of Catholic high schools and its treatment of informal Amish education. Although Wisconsin in some sense preferred public to parochial schooling, the state acknowledged that a conventional Catholic high school education was an acceptable or 'equivalent' substitute for the public-school norm. By contrast, Wisconsin refused to accept informal Amish education as a substitute because the state believed it would deprive children of the skills and knowledge needed to flourish in modern society. [119] Thus, if we think of

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[114] See *Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 73-74 (1976).*

[115] But cf. *DeShaney v. Winnebago Cty. Dept. of Social Serv., 489 U.S. 189 (1989)* (holding that a state's failure to protect a child from an abusive custodial parent does not violate the Due Process Clause).

[116] *406 U.S. at 243* (Douglas, J., dissenting in part).

[117] Id.

[118] See supra text accompanying note 107.

[119] See *406 U.S. at 224.*

the child's right as a "tiebreaker" that applies only when state and parents directly clash over the child's interest, there is no "tie" to be broken in the case of Catholic education: the state implicitly acquiesces in the parents' judgment about what is best for their child.

So interpreted, Douglas's position carves out a narrow exception to parental authority that arguably helps protect the child's best interests. The child may veto parentally-chosen religious education only if the state has made a reasoned judgment, based on facially neutral secular grounds, that the particular type of education at issue is seriously inadequate. When the state strongly objects, and the adolescent does too, it seems reasonable to drop the presumption that parental decisions are in the child's best interest, and allow a neutral arbiter to decide on a case-by-case basis where the child's best interest lies.

Yet there are problems with this proposal. Not the least is its dubious assumption that judges typically will be neutral arbiters in a dispute between religious-minority parents and the state. Although judges are socialized to aspire to neutrality-and although some no doubt succeed-they are drawn from an elite professional class, constitute one branch of the government, and in most cases are vulnerable to majoritarian sanctions of one kind or another. Private arbitration or some other form of alternative dispute resolution might provide something approaching a neutral forum. State family court would not.

Moreover, the narrowness of this exception may be more apparent than real. It would arm state education bureaucrats with a potent weapon to interfere with forms of private and religious education they disliked by

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declaring them deficient under the already objectionably vague provisions of state compulsory education laws. [120] The history of persecution of Amish families under these laws hardly gives one confidence that officialdom would exercise this discretion in the best interests of children from religious-minority families.

Finally, where is the demonstrated need for an exception of this kind? Interestingly, despite the Yoder Court's statements reserving the question of whether a state could give decisive weight to the objections of an Amish adolescent, no such case has arisen. I am not suggesting that Amish (and other religious-minority) teenagers never object to the religious education their parents want them to receive. But it does not follow that a legal remedy would make such teenagers better off.

Assume now a broader proposal under which an individual adolescent could veto conventional, religious high schooling even if it passed muster under the state's equivalency laws. [121] On its face, this would give adolescents the right to cut off their parents' Pierce exit option from public education-but only when the exit took the form of religious schooling. Even apart from constitutional problems, it is difficult to justify singling out religious schooling for disfavored treatment in this way. Suppose, therefore, that we expand the child's notional veto power to cover secular schooling as well. We then run into a different set of problems. Imagine an adolescent who prefers religious schooling but whose parents object to it. If adolescents should have a right to religious liberty in the matter of

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[120] Recently, advocates of home schooling have successfully challenged the compulsory attendance laws of six states on vagueness grounds." Lisa M. Lukasik, Comment, The Latest Home Education Challenge: The Relationship Between Home Schools and Public Schools, *74 N.C. L. REV. 1913, 1929 (1996)* (citations omitted). Of course, states could not act on grounds overtly hostile to a religion or religions in general. But the courts might well allow states to insist that various secular values be taught, on the grounds that the state is primarily promoting these values and only incidentally penalizing religions that happen to disagree with them. Cf. *Smith v. Board of Sch. Comm'rs of Mobile County, 827 F.2d 684 (11th Cir. 1987)* (rejecting establishment clause challenge to textbooks that allegedly taught the values of secular humanism on the grounds that the state may attempt to instill the specific secular values in question).

[121] Some European countries, including Germany, have given adolescents the right to elect religious (or secular) schooling over parental objection. See JOHN E. COONS, THE RELIGIOUS RIGHT OF CHILDREN, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE 157, 160 n.13 (J. Witte & J.D. Van der Vyker eds. 1996).

education, why should that right be given effect when the child prefers secular public schooling but not when the child prefers religious schooling?

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Some may think the answer lies in ability to pay: the adolescent is entitled to the education of his or her choice provided someone can be convinced to finance it. The state offers free public education; parents may offer to pay for religious education or private education. Within these constrained choices, the adolescent may opt for the most attractive one, but is not entitled to stray outside them. Logically, however, this should mean that the child of secular parents would be entitled to choose, say, a religious education provided the religious school will waive tuition and fees. [122]

At this point in the argument, one suspects that some of Justice Douglas's secular admirers would begin to have second thoughts. They might object, however, that under the proposal we are evaluating, the child's right is still a "tiebreaker" and, thus, inapplicable when parents agree with the state that public schooling is appropriate. We are entitled to know, however, why the child's right should be conceived in this partial fashion. It would not be surprising, for example, if some adolescents, sick of the materialistic culture in which their parents are immersed, would seek out a religious education if they had a choice. If, in the judgment of the religious community in question, that interest is sufficiently serious to warrant financing the child's religious schooling, the "tiebreaker" condition should be deemed satisfied. Our concern at this point, recall, is the child's best interest, understood to include an autonomy interest in matters of religion and belief. Why is the judgment of a religious school (and the faith community that supports it) entitled to less evidentiary force in support of the adolescent's choice than the judgment of a state-run school (and the political majority that supports it)?

Indeed, the problem with "tiebreaker" rights goes even deeper. Our current system of selective educational funding-in which free education is offered only at public schools-makes it very costly for parents to exercise their Pierce exit rights. Nevertheless, millions of parents make the financial sacrifices needed to provide their children with the private (and usually religious) schooling of their choice. Obviously, however, very few adolescents are in a position to pay for (or otherwise finance) their own high school education. Were we to take seriously the proposition that adolescents should have control over their own education, we would have to give them the financial wherewithal they lack.

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There are two ways to empower adolescents to choose their preferred education. Parents could be forced to pay for the education of their adolescent's choice (with the state chipping in if the parents are indigent). Or the state could give adolescents educational vouchers to be spent at the high school of their choice. The latter option seems vastly preferable to the former. To require some parents to pay for an education that runs counter to their deepest values massively infringes their religious liberty and subjects their families to enormously divisive strain. By contrast, to require the state to fund educational vouchers for adolescents would merely mean that most taxpayers would object to how some of their dollars were being spent. But we already have a system in which many taxpayers object to the values and messages taught in our majority-controlled, state-run public schools. And the establishment clause objection to a system of educational vouchers legally controlled by the individual adolescent is exceedingly frail. [123] Once we grant the primacy of the adolescent's self-direction over religious education, there is no apparent reason why political majorities should be allowed to use financial leverage to coerce adolescents in their choice of

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[122] Similarly, an adolescent whose parents adhere to one faith ought to be able to elect religious schooling in a different faith if it is made freely available.

[123] Supreme Court precedent strongly implies that the Establishment Clause permits states to provide neutral educational vouchers that parents could spend at public schools, secular private schools, or religious schools. See Michael W. McConnell, Multiculturalism, Majoritarianism, and Educational Choice: What Does Our Constitutional Tradition Have to Say?, 1991 U. CHI. LEGAL F. 123, 143-49. Shifting control from parents to adolescents should not matter in principle, because in either case the decision to spend the voucher rests with a private individual, not the state.

educations. A genuine commitment to educational autonomy for adolescents, then, would require some form of adolescent-controlled vouchers to ensure that all children have a real choice.For the reasons suggested in Section IV, I have grave doubts that giving adolescents control over their own educations would, on average, be in their long-run best interests. Moreover, although a scheme of adolescent-controlled vouchers would not force parents to pay for an education to which they objected, it still would place enormous stress on family relationships in the subset of cases where parents and child strongly disagree. [124] The parents would retain general custodial authority, along

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with their obligations to support and provide for their adolescent child. Yet that child would leave home each day to receive an education counter to the parents' values and in defiance of their wishes. Adolescent educational rights in such situations would come at a high price for the family as a whole.

Nevertheless, because most adolescents have good reasons to consider their parents' preferences, and because self-interest is a powerful aid to the decisionmaking of adolescents as well as adults, I would be willing to consider an experiment along these lines. Provide every 14- and 15-year-old in the experimenting jurisdiction-for irony's sake, let us pretend it is Wisconsin-with a voucher approximating the average per capita expenditures in the public schools the child is eligible to attend, and let the child decide at which school to spend the voucher. Allow unfettered choice of public, private, secular, religious and experimental schools, subject to the usual restrictions on frauds and charlatans. To top it off, furnish each adolescent, on request, with a few hours of counseling from independent educational consultants as well.

/ suspect an experiment of this kind would help a good many adolescents and their families- especially those in which parents and child agree in wanting a private education that is currently beyond their means. [125] I fear it would also occasion serious harm to some of the families in which parents and child disagreed. But these are empirical questions, and perhaps the risks would be worth running. [126] (The risks also could be reduced, if that were thought necessary, by initially limiting the experiment to 16- and 17-year-olds). Certainly the goal of giving the individual adolescent child the means of pursuing his or her educational best interest is a worthy one. The abiding issue, as I have stressed throughout this article, is whose conception of the adolescent's best interest should be controlling: the adolescent's, the parent's, or the state's. The parentalist conviction that parents' judgments ordinarily should be dispositive is at its most tentative and revisable in the case of adolescents, because these children are well on their way to becoming adults entitled to the full measure of liberal autonomy. On these grounds (and also because it might teach us a good deal), I would endorse an experiment of this kind

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on a modest scale. For all their talk about children's rights, how many liberal statists, I wonder, would join me in advocating that real rights to educational choice for adolescents actually be tried?

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[124] There will be some stress under any rule, given that the parents and child disagree. Still, the novel exercise of power by an adolescent seems likely to be much more disruptive than the continued exercise of power by parents. One might also speculate that the shift of authority would engender an increase in the frequency of parent-child disagreements.

[125] Adolescents who are prematurely emancipated (because they have left their parents or were abandoned by them) would constitute another important class of beneficiaries.

[126] We already subsidize the choices of older teenagers, of course, in the form of student loans and government grants for post-high school education.

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