SOCIAL REPRODUCTION AND RELIGIOUS REPRODUCTION: A DEMOCRATIC-COMMUNITARIAN ANALYSIS OF THE *YODER* PROBLEM

[This is an unedited draft of an article forthcoming at
15 WM. & MARY BILL RTS. J. ___ (forthcoming fall 2006).]

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INTRODUCTION

In 1968, Jonas Yoder, Wallace Miller, and Adin Yutzy refused to enroll their children in high school. The parents were tried and convicted of violating Wisconsin's compulsory attendance law, which required schooling until age sixteen, and were fined $5 each. They appealed on the grounds that the compulsory attendance law, as applied, violated their right to the free exercise of their religion. The parents were members of conservative Amish denominations (the Old Order Amish and the Conservative Amish Mennonite Church[1]), and they insisted that education beyond the eighth grade was contrary to their religion and way of life. The Wisconsin Supreme Court found this infringement impermissible and overturned their conviction.[2] On appeal, the United States Supreme Court affirmed.[3]

The Court, per Chief Justice Burger, found that "Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. This concept of life aloof from the world and its values is central to their faith."[4] The Court balanced this belief against the state's interest in secondary education[5] and concluded that the educational interests of the state were outweighed by the religious beliefs of the parents. It thus held that "the First and Fourteenth Amendments prevent the State from compelling [the parents] to cause their children to attend formal high school to age 16."[6]

Wisconsin v. Yoder presented the Court with a sharp clash between the state's interest in social reproduction through education—that is, society's interest in using the educational system to perpetuate its collective way of life among the next generation—and the parents' interest in religious reproduction—that is, their interest in passing their religious beliefs on to their children. This Article will take up the challenge of that clash. I shall throughout refer to the question of when, if ever, parents have a religious

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[1] There seems to be some confusion as to which parents belonged to which denomination. *Compare* Wisconsin v. Yoder, 406 U.S. 205, 207 (1972) ("Respondents Jonas Yoder and Wallace Miller are members of the Old Order Amish religion, and respondent Adin Yutzy is a member of the Conservative Amish Mennonite Church."), *with* State v. Yoder, 182 N.W.2d 539, 539 (Wis. 1971) ("The appellants Jonas Yoder, Adin Yutzy, members of the Old Order Amish religion, and Wallace Miller, a member of the Conservative Amish Mennonite Church ....").

[2] State v. Yoder, 182 N.W.2d 539 (Wis. 1971).

[3] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[4] *Id.* at 210.

[5] *Id.* at 214.

[6] *Id.* at 234.

freedom-based claim to exempt their children from part or all of a state-mandated educational requirement as "the *Yoder* question," but the inquiry is not focused on the facts of the case itself. Rather, I shall engage with the competing theories put forward by scholars and judges who believe in a broad right of religious reproduction, trumping the state's interest in social reproduction ("*Yoder* supporters") and scholars and judges who believe that the interest in social reproduction should trump contrary claims by insular religious groups ("*Yoder* opponents"). I will suggest that each of the major competing theories is fundamentally flawed, and I will offer an alternative analysis based on communitarian and democratic values.

It is especially important that we continue to think through these issues because *Yoder* by no means settled the *Yoder* question. As debates continue to rage about issues like the teaching of evolution, creationism, or intelligent design in public schools,[7] it remains clear that our society continues to struggle with the proper line between societal and parental control over education. It should also be noted that this is an area of constitutional law in which originalist methodologies give scant guidance—education was not seen as a state function in the early republic.[8] Prior to the passage of the Fourteenth Amendment, the religion clauses of the First Amendment applied only to the federal government,[9] and education was certainly not seen as a federal function. Our analysis will thus have to rely on other interpretive methodologies, including a consideration of the political values underlying our conceptions of religious freedom and education.

The democratic-communitarian analysis of the *Yoder* problem offered in this Article begins with the communitarian intuition that social subjects are constituted by multiple sources of value—everything from low-level value sources like families and churches to higher-level sources like political parties and nations—and that a rich diversity of value sources is important and worth fostering. Totalitarianism, however, can result when high-level value sources (i.e., those value sources further away from the individual—for example, political parties, states, nations, and the international community) become too thick and squeeze out the possibility

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[7] *See, e.g.*, Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707 (M.D. Pa. 2005); Gertrude Himmelfarb, *Monkeys and Morals*, NEW REPUBLIC, Dec. 12, 2005, at 33; Jodi Rudoren, *Ohio Board Undoes Stand on Evolution*, N.Y. TIMES, Feb. 15, 2006, at A14.

[8] *See* Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 YALE L. & POL'Y REV. 113, 117-27 (1996) (noting that, because it was not expected that the federal government would play a role in education, founding history gives little guidance on the appropriate application of the First Amendment to schooling).

[9] *See generally* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 32-45 (noting the federalist contours of the religion clauses).

of diversity among individual citizens. A proper communitarian theory will therefore take into account the various competences of different social institutions to promote the diversity of values that are constitutive of our subjectivity, while simultaneously bearing in mind that these value sources ought to be thickest at the lowest levels. This analysis will conclude that schools are uniquely well situated to promote those values held at the society-wide level. This will combine with the democratic intuition that, in a democratic society, decisions about the inculcation of social values can only legitimately be made by democratic means. The conclusion will be that parents and courts are unjustified in interfering with social reproduction through schooling.[10]

However, the democratic-communitarian analysis produces a second, equally important conclusion. When making democratic decisions, the conscientious citizen and legislator are bound to resist totalitarian tendencies by imposing the minimum restraints necessary to ensure the transmission of important communal values at each level. In other words, voters should very seriously consider enacting the kinds of exemptions sought by Jonas Yoder and his co-defendants, and they should only decide not to enact those exemptions if they come to the conclusion that the exemptions will interfere with instruction necessary for the education of democratic citizens.

This democratic-communitarian theory is best explored against the background of the competing analyses of the *Yoder* problem heretofore offered by scholars. These competing analyses have raised problems and concerns that must be addressed by any new entrant into the field. This Article thus begins by responding to each of the four main lines of existing scholarship on the *Yoder* question. In Part I, I examine the case from liberal neutrality against *Yoder* and the case from liberal neutrality in favor of *Yoder*. I conclude that each of these positions is inadequate. The *Yoder*

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[10] This conclusion may appear odd to those who see *Yoder* as a fundamentally communitarian decision. *See, e.g.*, Andrew A. Cheng, *The Inherent Hostility of Secular Public Education Toward Religion: Why Parental Choice Best Serves the Core Values of the Religion Clauses*, 19 U. HAW. L. REV. 697, 749 (1997); James D. Gordon III, Wisconsin v. Yoder *and Religious Liberty*, 74 TEX. L. REV. 1237, 1239 (1996); Robert Justin Lipkin, *Religious Justification in the American Communitarian Republic*, 25 CAP. U.L. REV. 765 (1996); L. Scott Smith, *"Religion-Neutral" Jurisprudence: An Examination of Its Meanings and End*, 13 WM. & MARY BILL RTS. J. 841, 871-72 (2005); Nomi Maya Stolzenberg, *"He Drew A Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581, 648, 663 (1993). However, I understand the central insight of communitarianism to be the recognition that individuals are constituted by multiple value sources and that this diversity of value sources is worth fostering. On this understanding, communitarianism does not privilege the local over the global; rather, it recognizes an important place for each. *See infra* Section IV.A.

opponent cannot escape the fact that there is no value-neutral curriculum, and the *Yoder* supporter cannot abide the logical consequences of his position—that *all* laws, not merely educational ones, should be neutral among competing conceptions of the good. The arguments from liberal neutrality are inadequate because they both import other, non-neutral values *sub rosa*, in an attempt to make it appear that neutral reflection leads to their preferred outcome. In Part II, I consider the parentalist case in favor of *Yoder*. I reject the parentalist case as incomplete because it fails to consider the complex web of social relations that constitutes a child's value set. It is only by misunderstanding the complexity of social relations that parentalist theorists can conclude that the parents are the only legitimate source of values for the child, or that compulsory public schooling will stifle social dissent. In Part III, I turn to the republican case against *Yoder*. I conclude that the republican argument creates unjustified impositions on democratic decision-making. What it masks as curricular conditions necessary for democracy are, in fact, simply the entrenchment of the republican's own curricular preferences.

With the ground thus cleared and the necessary ideas and objections on the table, I turn in Part IV to an explication of the democratic-communitarian alternative. This Part will lay out the communitarian and democratic insights discussed above and show how they combine to provide an answer to the *Yoder* problem. It will then consider objections and conclude that they do not seriously threaten the democratic-communitarian analysis.

I. THE INADEQUACY OF LIBERAL NEUTRALITY

Advocates of liberal neutrality—the idea that the state must be neutral among competing conceptions of the good—have come down on both sides of the *Yoder* debate. In this Part, I shall demonstrate that liberal neutrality simply does not work as a grounding for either position. It is impossible as a grounding for *Yoder* opponents because there is no value-neutral curriculum. It is impossible for *Yoder* supporters because, taken seriously, it would require that religious believers be exempt from all laws which conflict with their religious beliefs, a position which is incompatible with any conception of a functioning society under law. Attempts to limit the principle to a requirement of neutrality among *reasonable* conceptions of the good fail because they rely upon thick conceptions of reasonableness—that is, conceptions based on dominant social norms. "Reasonableness" thus serves primarily to disguise the underlying judgment that some conceptions of the good are better than others. This judgment may be correct, but it is not neutral.

A. The Inadequacy of Liberal Neutrality for Yoder *Opponents*

In 1983, the Hawkins County, Tennessee Board of Education adopted a set of texts published by Holt, Rinehart and Winston designed to encourage "critical reading." Soon thereafter, Vicki Frost, a born again Christian, noticed a short story involving mental telepathy in her daughter's sixth grade textbook. At the request of Frost and other parents with religious objections to the texts, the principals of one middle school and two elementary schools allowed their children to opt for an alternative reading program. These students would leave the classroom during reading time and work in other rooms from older textbooks. However, the School Board quickly put a stop to this practice and voted unanimously to require all students to use the Holt texts. Shortly thereafter, fourteen parents and seventeen children filed suit in federal court, asserting that the School Board's action violated their First Amendment right to the free exercise of their religion.[11] The district court held for the plaintiffs and entered an injunction prohibiting the School Board from requiring the students to read from the Holt texts and ordering that objecting students be excused from the normal reading class and given space elsewhere to read alternative texts.[12]

In *Mozert v. Hawkins County Board of Education*, the Sixth Circuit thus faced the question of "whether a governmental requirement that a person be exposed to ideas he or she finds objectionable on religious grounds constitutes a burden on the free exercise of that person's religion as forbidden by the First Amendment."[13] Chief Judge Lively, for the court, held that it did not. The court emphasized that "exposure to objectionable material is what the plaintiffs objected to,"[14] because they had not presented any evidence that students were required to affirm their belief or disbelief of any ideas or practices mentioned in the texts. The court held that, "The requirement that students read the assigned materials and attend reading classes, in the absence of a showing that this participation entailed affirmation or denial of a religious belief, or performance or non-performance of a religious exercise or practice, does not place an unconstitutional burden on the students' free exercise of religion."[15] It went on to quote approvingly from a Ninth Circuit opinion to the effect that, "governmental actions that merely offend or cast doubt on religious beliefs

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[11] Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1059-61 (6th Cir. 1987).

[12] Mozert v. Hawkins County Pub. Schs., 647 F.Supp. 1194 (E.D. Tenn. 1986).

[13] *Mozert*, 827 F.2d at 1063.

[14] *Id.*

[15] *Id.* at 1065.

do not on that account violate free exercise. An actual burden on the profession or exercise of religion is required. In short, distinctions must be drawn between those governmental actions that actually interfere with the exercise of religion, and those that merely require or result in exposure to attitudes and outlooks at odds with perspectives prompted by religion."[16] In essence, mere exposure to ideas cannot possibly "burden" or "interfere with" the free exercise of religion in the way that forcing a child to engage in practices inconsistent with her religious belief does.

In a perceptive article, Nomi Maya Stolzenberg has demonstrated the untenability of this position.[17] "Critical reading" and "critical reasoning" are *themselves* practices—practices which may conflict with religious beliefs. Critical reasoning teaches children to weigh different points of view and to use their cognitive faculties to choose the best one. The fundamentalist parent might well reply that reasoning about certain questions is an offensive practice—certain religious commands are meant to be obeyed, not weighed. The *Mozert* court argued that there was no burden on the child's religious belief because the child "would be free to give the Biblical interpretation" of material when called on in class.[18] As Stolzenberg aptly retorted, this is "no answer to the parents' concern that the students should not be free, but rather should be trained in correct biblical interpretation."[19] If one's religious beliefs demand unquestioned obedience to authority, then critical thinking is clearly a practice which burdens those beliefs. Having been forced to participate in the activity of critical thinking, children can no longer offer unquestioned obedience. Even if they come to the same conclusion, they will have come via a different route, and that surely has theological implications. The *Mozert* court thus "missed the essential point that, to its opponents, the objective study of religion, and objective approaches to knowledge in general, are quintessentially secular humanist activities."[20] In short, the idea that there is such a thing as neutral exposure to an idea is fundamentally incoherent. All exposure is value-laden, if only with the value that exposure to ideas is good.

The *Mozert* case is especially important because one of the leading liberal opponents of educational religious reproduction makes substantially similar arguments. In Bruce Ackerman's theory, the goal of liberal education is "to provide the child with access to the wide range of cultural

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[16] *Id.* at 1068 (quoting Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528, 1544 (9th Cir. 1985)).

[17] Stolzenberg, *supra* note 10.

[18] *Mozert*, 827 F.2d at 1069.

[19] Stolzenberg, *supra* note 10, at 613.

[20] *Id.* at 614.

materials that he may find useful in developing his own moral ideals and patterns of life."[21] No one has a right consciously to attempt to instill beliefs in children.[22] First and foremost, this means that we must reject "*any* effort by *any* power holder to inculcate an uncritical acceptance of *any* conception of the good life."[23] Instead, "what is required is a cultural environment in which the child may define his own ideals with a recognition of the full range of his moral freedom."[24] The confrontation set up between children and their parents' way of life is not only to be accepted; it is to be relished:

> It is only by questioning the seeming certainties of his early moral environment that the child can begin to glimpse the larger world of value that may be his for the asking. More generally, the liberal educator's methods of doubt, imagination, and independence must necessarily come in conflict with whatever moral ideals happen to dominate society at large. It is this unending conflict that makes the institutionalization of liberal education—in "schools" relatively insulated from the rest of society—a matter of the first practical importance.[25]

Ackerman insists that his vision truly is a neutral one: "the liberal state is not committed to a system of liberal education because it wishes to indoctrinate children in one vision of the good rather than another."[26]

Just as the *Mozert* court's claim to neutrality was a façade hiding value-laden choices, so too is Ackerman's. His liberal education rules out conceptions of the good life that involve unquestioning acceptance of moral truths. It immerses the child in a universe in which "doubt, imagination, and independence" are inculcated at every turn—indeed, parents are expressly forbidden from working at counter-purposes to the liberal educator.[27] That means that the values of obedience to authority,

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[21] BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 155-56 (1980).

[22] *See id.* at 139 ("Such horticultural imagery has no place in a liberal theory of education. We have no right to look upon future citizens as if we were master gardners who can tell the difference between a pernicious weed and a beautiful flower. A system of liberal education provides children with a sense of the very different lives that could be theirs—so that, as they approach maturity, they have the cultural materials available to build lives equal to their evolving conceptions of the good.").

[23] *Id.* at 163.

[24] *Id.* at 162.

[25] *Id.*

[26] *Id.* at 159.

[27] *Id.* at 156.

unimaginativeness, and dependence are heavily burdened. Ackerman disguises his value choices behind the language of procedure—his liberal educator is only teaching children *how* to think, not *what* to think. But methodologies inevitably come laden with substantive implications. Ackerman cannot escape the fact that his liberal education indoctrinates children in one vision of the good rather than another.[28]

Many will no doubt agree with Ackerman's value choices—that doubt, imagination, and independence are *better* values to inculcate than their opposites. But that is neither here nor there. What is important for our purposes is that Ackerman's claim that an education based on these principles is somehow value-neutral is false. Ackerman's vision is not neutral between competing conceptions of the good. Indeed, the lesson to be drawn from our analysis of *Mozert* and Ackerman is that no educational system which aims to curtail parental religious reproduction can truly be neutral between competing conceptions of the good. Liberal neutrality is an inadequate basis upon which to attack *Yoder*. In the next Section, we will consider whether liberal neutrality can be an adequate basis upon which to sustain *Yoder*.

B. The Inadequacy of Liberal Neutrality for Yoder *Supporters*

Liberal neutrality is inadequate for *Yoder* supporters because, if taken seriously, neutrality would require religious exemptions from state laws against physical abuse—a conclusion even the most staunch advocates of a neutrality-based approach have been unwilling to embrace. An example will prove helpful: Female genital mutilation is a horrific practice.[29] Under federal law, the performance of female circumcision on a minor can result in a prison sentence of up to five years,[30] in addition to whatever penalties apply under state law.[31] The federal law explicitly

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[28] For similar critiques of Ackerman's claim to educational neutrality, see Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 947-51 (1996); Michael W. McConnell, *"God is Dead and We Have Killed Him!": Freedom of Religion in the Post-Modern Age*, 1993 B.Y.U. L. REV. 163, 179-80.

[29] *See, e.g.*, Mohammed v. Gonzales, 400 F.3d 785, 789 (9th Cir. 2005) (holding that female genital mutilation of minors constitutes "past persecution" for the purposes of asylum laws).

[30] 18 U.S.C. § 116(a) (2000).

[31] State assault and child abuse statutes would clearly apply. Additionally, many states have rough counterparts to the federal law discussed here. *See, e.g.*, CAL. PENAL CODE § 273.4 (West 1999); DEL. CODE ANN. tit. 11, § 780 (2005); GA. CODE ANN. § 16-5-27 (2005); 720 ILL. COMP. STAT. ANN. 5/12-34 (West 2005); MD. CODE ANN., HEALTH-GEN. § 20-601 (West 2005); MINN. STAT. ANN. § 609.2245 (West 2003); N.Y. PENAL LAW § 130.85 (McKinney 2004); N.D. CENT. CODE § 12.1-36-01 (2005); OR. REV. STAT. ANN. § 163.207 (West 2003); TENN. CODE ANN. § 39-13-110 (West 2005); TEX. HEALTH &

provides that, "no account shall be taken of the effect on the person on whom the operation is to be performed of any belief on the part of that person, or any other person, that the operation is required as a matter of custom or ritual."[32] Plainly, this law is constitutional—indeed, a database search suggests that it has never even been challenged on the grounds that it restricts religious liberty.

Richard Garnett suggests that religiously motivated physical abuse presents an easy case: "We know what physical or medical harm looks like," he writes.[33] Indeed, "[i]f someone were to assert ... that serious physical injury or death to a child were not a harm to be avoided (as opposed to claiming that, even though harmful, it must be accepted reluctantly), that view could, I think, be ruled out of the conversation as simply unreasonable."[34] By distinguishing it as an easy case, Garnett attempts to draw a distinction between physical abuse and fuzzier claims of civic or educational harm. These latter types of harm are "unavoidably contested," according to Garnett, and therefore "should not be a permissible basis for government intervention or second-guessing."[35] Much will therefore turn on whether or not Garnett's distinction holds water.

When Garnett writes that the assertion that physical injury to a child is not a harm is "simply unreasonable," he cannot have in mind a standard "thin" conception of rationality, under which any action which efficiently conduces to the actor's desired goal is rational. After all, one can perfectly plausibly conceive of a situation in which parents believe that circumcising their daughter (or, for that matter, sacrificing her life) is an affirmative good because it brings her closer to God. Indeed, one presumes that such parents would insist that they were not "mutilating," "injuring," or "harming" their daughter—they were enabling her to reach her full potential by fulfilling her religious roles and duties. Circumcising their daughter may be the most efficient, or even the only, means of accomplishing this goal—that is, it may be thinly rational. Garnett, then, must be relying on a thicker conception of reasonableness, one that implicitly relies on dominant social norms. Indeed, Garnett's reliance on the language of reason is obfuscatory—religiously motivated physical abuse presents not irrational desire for ill fortune to befall one's child, but rather a collision between two

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SAFETY CODE ANN. § 167.001 (Vernon 2005); W. VA. CODE ANN. § 61-8D-3a (West 2005); WIS. STAT. ANN. § 146.35 (West 2005). None of these laws allows an exception for religiously motivated mutilation.

[32] 18 U.S.C. § 116(c) (2000).

[33] Richard W. Garnett, *Taking* Pierce *Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109, 118 (2000).

[34] *Id.* at 137 n.129.

[35] *Id.* at 138.

incompatible nomoi.[36] In the nomos of society at large, genital mutilation is unacceptable; in the nomos of the insular religious community, it is desirable, perhaps mandatory. In denying the reasonableness of the claim that the physical abuse of the child should be celebrated, Garnett simply privileges the dominant social nomos over the insular religious nomos. Put differently, Garnett has not *discovered* unanimity on the question of religiously motivated physical abuse—no such unanimity exists, because one person's "abuse" is another person's "ritual," "practice," or "duty."[37] Instead, Garnett has *created* such unanimity by fiat—anyone who disagrees is "unreasonable" and therefore can be "ruled out of the conversation."[38]

This is not to suggest that Garnett is wrong. Indeed, I believe that he is quite right, and I take it for granted that laws prohibiting religiously motivated physical abuse do not violate religious freedom. We must, however, be clear about what we are doing. To repeat: in refusing to allow religiously motivated physical abuse, we are privileging the norms of society at large over the conflicting norms of an insular religious community. That is, we are rejecting the political liberal conception of absolute state neutrality between competing conceptions of the good.[39] This

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[36] *See generally* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

[37] For a rich literary account of the clash between incompatible nomoi—one of which affirmatively celebrates a death and the other of which is aghast—see WOLE SOYINKA, DEATH AND THE KING'S HORSEMAN (1975).

[38] Garnett, *supra* note 33, at 137 n.129.

[39] The supporter of liberal neutrality may be tempted to reply simply that violence is different—that a monopoly on the use of violence is precisely what *defines* the state, and therefore, of course, remains the exclusive preserve of the state. In contrast, the advocate of neutrality might assert, education may, but need not, be a state function, and the state must be neutral among competing conceptions of the good in areas that do not cut to the very essence of what a state is.

This argument fails on two levels. First, it begs the question: the parents who circumcise their daughters would insist that they are not employing *violence* at all. They are performing a medical procedure and a socio-religious ritual. Of course, the procedure may cause some pain, but that does not differentiate it from myriad other medical procedures (e.g., surgery) or social rituals (e.g., playing sports) that we allow parents to force their children to undergo. To assert that female circumcision is different from education because female circumcision is *violent* (as opposed to painful) is to deny that female circumcision is beneficial to the child, and that denial is already non-neutral.

Second, most liberals are willing to suspend neutrality in some clearly non-violent cases, as well. For example, few liberals argue that the state has an obligation to be neutral between racists and non-racists. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (upholding a denial of tax exempt status under the Internal Revenue Code to a school because of its racially discriminatory admissions standards). *See also* Stephen L. Carter, *The Free Exercise Thereof*, 38 WM. & MARY L. REV. 1627, 1647-52 (1997) (suggesting that our acceptance of *Bob Jones* represents a very non-neutral "shared

is hardly a radical conclusion; a number of liberal theorists have argued against a strict political liberalism. Waldron has insisted that, "[o]ne does not, as it were, have to be neutral all the way down."[40] That is, he regards neutrality "not only as a value that legislators ought to be constrained by, but also as a value that they ought to enforce (on other people attempting to exercise power in a nonneutral way). Another way of putting this is to say simply: in his own behavior but also in regard to the behavior of the people under him, the legislator is not to be neutral about neutrality."[41] Dworkin has argued along similar lines: "Liberalism cannot be based on skepticism. Its constitutive morality provides that human beings must be treated as equals by their government, not because there is no right and wrong in political morality, but because that is what is right."[42] Even Rawls limited political liberalism's agnosticism between comprehensive doctrines to *reasonable* comprehensive doctrines.[43] Indeed, Abner Greene criticizes Rawls for advancing a comprehensive liberalism in the guise of political liberalism.[44] Greene professes to prefer a true political liberalism, which "acknowledges the equal moral capacity of citizens to pursue their conceptions of the good .... even those citizens whose theories of the good are not themselves agnostic in this way ...."[45] The devil, however, is in the footnotes, where Greene acknowledges that, "[o]bviously, we cannot grant exemptions [from generally applicable laws] in all cases—for example, we would not exempt someone from murder laws so that she might engage in the human sacrifice that her religion commands."[46] It is unclear how Greene can claim to acknowledge the equal moral capacity of the person who is unable to carry out the demands of her religion because they involve murder. Clearly, the blanket prohibition of murder, without exception for religious sacrifice, is a claim that conceptions of the good which do not involve human sacrifice are *better* than those which do. Greene's liberalism thus may be thinner than Rawls', but it is not a true political liberalism—that is, it is not neutral between all competing conceptions of

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conclusion that God—this real, extant, and transcendent Creator-God—does not in fact will racial prejudice").

[40] JEREMY WALDRON, LIBERAL RIGHTS 147 (1993).

[41] *Id.* at 157.

[42] RONALD DWORKIN, A MATTER OF PRINCIPLE 203 (1985).

[43] JOHN RAWLS, POLITICAL LIBERALISM 44 (1996). Rawls has an expansive, but by no means unbounded, conception of which comprehensive doctrines are reasonable. *See id.* at 58-66.

[44] Abner S. Greene, *Uncommon Ground*, 62 GEO. WASH. L. REV. 646, 667-71 (1994) (reviewing RAWLS, *supra* note 43, and RONALD DWORKIN, LIFE'S DOMINION (1993)).

[45] *Id.* at 671.

[46] *Id.* at 672 n.135.

the good. It draws content from some value other than neutrality—and this other value remains unidentified and undefended.

Put differently, Greene and Garnett both encounter the same problem. They both want to avoid privileging the nomos of society at large over the nomos of the insular religious community. But each is uncomfortable with some of the implications of that position—specifically, with the fact that it means that religiously motivated physical abuse cannot be punished under generally applicable laws. Each, therefore, attempts to solve this problem by fiat—Garnett attempts to rule the justification of physical abuse "out of the conversation as simply unreasonable,"[47] while Greene simply notes that, "[o]bviously," exceptions cannot be made for human sacrifice.[48] Both statements are tucked away in footnotes, and both are attempts to sidestep the inevitable conclusion. The state must privilege some conceptions of the good over others. The state must tell some insular religious communities that some of their practices—practices like female genital mutilation or human sacrifice—are bad and must be stopped. This cannot be justified on the grounds of neutrality, and Garnett and Greene have failed to articulate a non-neutral principle which allows them to disfavor the practices of some of these communities. Moreover, they have failed to articulate a principled dividing line between physical harm and other types of harm. Garnett appeals to consensus on the harmfulness of physical harm, but, as we have seen, that consensus is manufactured by Garnett's "reasonableness" test. Greene simply appeals to the "obviousness" of punishing human sacrificers, without attempting to articulate an underlying principle. The language of "compelling state interests" cannot rescue Garnett and Greene—like the language of "reasonableness," it serves only to disguise an underlying (non-neutral) preference for one conception of the good (the "compelling state interest" in the bodily integrity of those within the state's jurisdiction) over another (the insular religious or cultural interest—no doubt seen by its practitioners as compelling—in performing their rituals). We may agree or disagree with the preference, but we should recognize that neutrality has nothing to do with it.

Having seen that liberal neutrality fails both opponents of *Yoder* (like Ackerman and the *Mozert* court) and supporters of *Yoder* (like Garnett and Greene), it remains to consider non-neutral arguments. In the next two Parts, we will consider the parentalist argument used by *Yoder* supporters and the republican arguments put forward by *Yoder* opponents.

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[47] Garnett, *supra* note 33, at 137 n.129.
[48] Greene, *supra* note 44, at 672 n.135

II. THE INCOMPLETENESS OF PARENTALISM

Those who support *Yoder* on non-neutral grounds fall into the camp that I will broadly refer to as parentalists. These thinkers assert that it is better for parents to control their children's education, not because parental control means that the state is neutral between competing conceptions of the good, but rather because parental control leads to better outcomes than state control. Parentalist thinkers frequently draw inspiration from the Supreme Court's decision in *Pierce v. Society of Sisters*.[49] This Part will thus begin by examining *Pierce* and suggesting that a different grounding for the decision could assuage parentalists' worries without asserting a sweeping new fundamental right, as the actual decision did. I will then analyze the arguments of two leading parentalist thinkers—Stephen Gilles and Stephen Carter—and suggest that they are incomplete because they fail to take into account the complexity of the web of social value sources.

A. An Alternative Pierce

Pierce involved a challenge brought by two private schools—one secular, one Catholic—to Oregon's Compulsory Education Act, which was enacted by ballot initiative in 1922 and was to go into effect in 1926. The Act made it a misdemeanor for any parent or guardian to keep his child out of public school. Its purpose was to "compel general attendance at public schools by normal children, between eight and sixteen, who have not completed the eighth grade."[50] The Court, per Justice McReynolds, struck down the law, holding that it

> unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.... The fundamental theory of liberty upon which all governments in this Union repose excludes any general 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.[51]

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[49] 268 U.S. 510 (1925).
[50] *Id.* at 531.
[51] *Id.* at 534-35.

Pierce was, of course, handed down at the height of the *Lochner* era, and one might be tempted to think that its sweeping assertion of a "fundamental" right of parents to direct the upbringing of their children is as tenuous as other substantive due process cases of the time. Parentalist defenders of the case, however, point to the history of the Oregon law at issue as evidence of the decision's wisdom.

As Professor Carter has persuasively demonstrated, the compulsory education laws of the mid-nineteenth century were a reaction to an influx of immigrants from Europe. These immigrants brought with them "what were routinely referred to as foreign religions, a term that included, basically, Roman Catholicism and Judaism."[52] Compulsory education laws were designed to "Protestantize" the children of these immigrants: "Many states established their schools with the clear and often openly stated intention of wiping out the 'foreign religions.'"[53] The compulsory schooling laws had a "decidedly anti-Catholic and anti-Semitic bias."[54] When many Catholic parents responded by exiting the public school system and putting their children in parochial schools, the voters of Oregon adopted the Compulsory Education Act "with a clear intention of making it impossible for the Catholic schools to exist."[55] Carter concludes that, "Using the history, the *Pierce* holding can be rewritten thus: the state may not use its power to compel education as a tool for destroying a religion. Phrased this way, the *Pierce* rule is one, presumably, that all of us can stand up and cheer."[56]

Indeed, one might go even further than Carter and think that the proper holding in the case would simply have been this: the state may not target a religion. A law animated by hostility toward a certain religious group or groups cannot stand. Phrased this way, *Pierce* starts to look at lot like *Church of the Lukumi Babalu Aye v. City of Hialeah*.[57] In that case, the city of Hialeah, Florida passed a number of ordinances which prohibited animal sacrifice. The Church of the Lukumi Babalu Aye asserted that these ordinances were clearly directed at its Santeria religious practices and therefore violated its free exercise rights. The Court, per Justice Kennedy, held that,

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[52] Stephen L. Carter, *Religious Freedom as if Family Matters*, 78 U. DET. MERCY L. REV. 1, 4 (2000).

[53] *Id.* at 4-5.

[54] *Id.* at 5.

[55] *Id.* at 6. *See also* Stephen L. Carter, *Parents, Religion, and Schools: Reflections on* Pierce*, 70 Years Later*, 27 SETON HALL L. REV. 1194, 1200-02 (1997).

[56] Carter, *supra* note 55, at 1204.

[57] 508 U.S. 520 (1993).

> if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest. There are, of course, many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct. To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context. Petitioners contend that three of the ordinances fail this test of facial neutrality because they use the words "sacrifice" and "ritual," words with strong religious connotations. We agree that these words are consistent with the claim of facial discrimination, but the argument is not conclusive. The words "sacrifice" and "ritual" have a religious origin, but current use admits also of secular meanings.
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> We reject the contention advanced by the city that our inquiry must end with the text of the laws at issue. Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination.... Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt.[58]

The Court looked at the structure of the entire set of ordinances, the circumstances surrounding their adoption, and their overbreadth for achieving their purported legitimate state interests[59] to conclude that "[t]he ordinances had as their object the suppression of religion."[60] Four Members of the Court also looked to the ordinances' legislative history and found evidence of religious antagonism.[61] Because the ordinances "had an

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[58] *Id*. at 533-34 (internal citations omitted). The "neutrality" referred to by the Court is not the liberal neutrality rejected above. *See supra* Part I. It is instead the requirement that a law prohibiting conduct cannot prohibit that conduct *because* it is a religious practice. The justification for the law cannot make reference to the conduct's religious significance. *See* Employment Div. v. Smith, 494 U.S. 872 (1990). This "neutrality" does not give rise to the same problems as the liberal neutrality rejected above.

[59] *Church of the Lukumi Babalu Aye*, 508 U.S. at 534-40.

[60] *Id*. at 542.

[61] *Id*. at 540-42.

impermissible object," were not generally applicable, and were not narrowly tailored to advance a compelling state interest,[62] the Court struck them down. In essence, the lesson of *Church of the Lukumi Babalu Aye* is that the state may not pass laws motivated by antagonism toward a religious group, and the courts may go behind the text of a law to discover whether that antagonism is present.

I submit (albeit anachronistically) that *Pierce* should have been decided under the *Church of the Lukumi Babalu Aye* standard. What is compelling in Carter's account of the background of *Pierce* is that the law was motivated by religiously antagonistic motives: the voters of Oregon were hostile to Catholics and therefore passed a law intended to make it harder for Catholics to practice their faith. It is the animus—the intent—that was impermissible, not the effect.[63] A 1925 Court applying the *Church of the Lukumi Babalu Aye* standard could have gone behind the facial neutrality of the Compulsory Education Act, found the religious animus underlying it, and struck down the law on that ground. In short, the disturbing facts behind *Pierce* give us every reason to cheer the principles relied upon in *Church of the Lukumi Babalu Aye*, but they do not justify the sweeping parentalist rights announced in *Pierce* itself. It will take more than just those facts to lead us to the parentalist conclusion. In the next two Sections, we shall examine the arguments of two leading parentalist theorists to see if there are arguments, independent of *Pierce*, that prove more persuasive.

B. Stephen Gilles' Monism

In his "Parentalist Manifesto," Stephen Gilles makes three basic arguments for parentalism. First, the state's interest in curricular specifics is sharply limited, and beyond those limits, the fact of religious pluralism "obliges society to rely on persuasive means to achieve its educational aims."[64] Second, "parents are more likely to pursue the child's best interest as they define it than is the state to pursue the child's best interest as the state defines it."[65] And third, "individuals have ... [a] fundamental interest

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[62] *Id.* at 524.

[63] In this regard, the appeal by four Justices to equal protection-based reasoning in *Church of the Lukumi Babalu Aye* was especially appropriate. *See id.* at 540-42. It is a bedrock principle of constitutional equal protection jurisprudence that the inquiry focuses on racially discriminatory intent, not racially disparate impact. Washington v. Davis, 426 U.S. 229 (1976). *See also* Akhil Reed Amar, *Attainder and Amendment 2:* Romer*'s Rightness*, 95 MICH. L. REV. 203 (1996) (arguing that laws which single out a group for disfavored treatment violate the principles of the Attainder Clause).

[64] Gilles, *supra* note 28, at 940.

[65] *Id.*

in nurturing their children and in being nurtured by their parents."[66] None of these arguments is persuasive.

Gilles' first argument sounds in the ideal of liberal neutrality rejected above.[67] He seeks a "minimalist understanding of liberal education on which reasonable people would reach consensus."[68] Again, reasonableness does all of the work here. He asserts that "[s]urely a consensus exists in our society that a way of life is unreasonable if it denies that health, speech, or reason are human goods under ordinary circumstances."[69] Does any such consensus really exist? We might command widespread support for the proposition that "health is better than unhealth under 'ordinary circumstances,'" but any attempt to define "ordinary circumstances" would lead to significant trouble. The parent whose religious beliefs demand that his young daughter be circumcised may prefer to subject his daughter to serious health risks rather than the risk of God's anger.[70] The terminally ill cancer patient may prefer a more rapid deterioration of health to undergoing painful chemotherapy. Still others might prefer to run serious health risks (or to allow their children to run such risks) rather than make use of modern medical science.[71] Those in the Deaf movement disagree that "speech"—at least, as we normally use the word—is better than the alternative.[72] There may, likewise, be those who believe that reason is antithetical to faith and therefore should play no part or a sharply limited part in education. Gilles achieves "consensus" on these issues only by ruling out those who opt for the alternative as "unreasonable." But his conception of reasonableness appears to be free-floating—it cannot be grounded in neutrality, for neutrality is not meant to have a substantive component. It cannot be grounded in consensus, for, as we have seen, its role in Gilles' theory is to prevent some voices from counting—this would be the height of question-begging. Where, then, does

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[66] *Id.*

[67] *See supra* Section I.B.

[68] Gilles, *supra* note 28, at 984.

[69] *Id.* at 985.

[70] *See* Mohammed v. Gonzales, 400 F.3d 785, 789 (9th Cir. 2005) (noting the health risks frequently attendant on female genital mutilation).

[71] *See* Walker v. Superior Court, 763 P.2d 852 (Cal. 1988) (denying a mother's motion to dismiss charges of criminally negligent involuntary manslaughter, felony child endangerment, and child neglect because she treated her daughter's acute meningitis with prayer rather than seeking medical help).

[72] *See* Liza Mundy, *A World of Their Own: In the Eyes of His Parents, If Gauvin Hughes McCullough Turns Out to be Deaf, That Will be Just Perfect*, WASH. POST MAG., Mar. 31, 2002, at W22 (reporting the story of deaf parents who want their children to be deaf as well).

it come from?[73] If no satisfactory answer can be given—and none is forthcoming from Gilles' article—then even the "minimalist" educational requirements must be dispensed with. And, as we have seen above, once one takes this position, then one cannot argue in a principled way for enforcing laws against religiously motivated physical abuse, either.[74] Gilles, like Garnett and Greene, appears unwilling to go down this road.

Gilles' second and third arguments depart from liberal neutrality and attempt to provide non-neutral arguments for parentalism. The first of these arguments is that parents are more likely to pursue the child's best interest as they define it than the state is to pursue it as it defines it.[75] It is unclear, however, why the child's best interest is the sole criterion of a good education. Is it not an equally plausible position that education should aim at producing a good society, and when the social interests clash with the individual interest of the child, the social interests should (at least sometimes) prevail? Gilles replies that the "revealed priorities of most people in liberal societies ... [are] family first, citizenship second.... History teaches that conscious familial reproduction, not ... conscious social reproduction, is a basic human need for most people in most societies."[76] Gilles presents no empirical evidence for this claim, but, even assuming that it is correct, it ignores a significant collective action problem. Suppose a citizen believes that the goal of education should be civic first, individual second. But this citizen also recognizes that educating her own child for citizenship will not lead to a good society unless a critical mass of other parents also educate their children for citizenship. This is a classic prisoner's dilemma, and the rational citizen-parent may opt to educate her own child in the child's best interest because she recognizes the irrationality of harming her child in exchange for no social gain at all. Her "revealed priorities" would appear to be: child first, society second. But if she could

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[73] The arbitrariness of Gilles' view is highlighted by the fact that he considers "views calling for the oppression and subordination of women" to be evidently unreasonable, *see* Gilles, *supra* note 28, at 987, but views which merely regard women as "unequal helpers of men" are not, *see id.* at 998. It is left unexplained what principles allow him to draw such fine distinctions.

[74] *See supra* Section I.B.

[75] Gilles claims that the best interest of the child is, in fact, a "neutral principle." Gilles, *supra* note 28, at 951-53. However, he makes no attempt to prove this assertion, and it cannot be taken seriously. Clearly, the best interest of the child standard is not neutral as between a position that asserts that the child should be educated to be the best possible citizen and the position that the child should be educated in his own best interests. These two positions might sometimes conflict, and it is simply not credible to claim that the best interests of the child standard is neutral between them. I shall therefore assume that Gilles meant simply to advocate the best interests of the child as the *best* standard, rather than as a neutral one.

[76] *Id.* at 995-97.

vote on the issue with the result of the vote to be binding society-wide, she would vote for civic education first, even if it meant some harm to her child. By and large, this *is* how parents vote—local school boards are not rife with parentalist members promising to allow full parental autonomy over education. In any case, the "revealed preferences" of parents in their everyday lives are more evidence of what parents *can* do (individual parents can act in the child's best interests; they cannot singlehandedly act to reproduce the culture) than what they *want* done.

This leads to a related critique of Gilles' second argument. Even if he is correct that the best interest of the child is the right standard, and even if he is correct that parents have the stronger incentive to act in the child's best interests, incentives are only half of the story. The other half is resources, most importantly the resource of knowledge. Parents may want more desperately than teachers to act in their child's best interests, but teachers may be better than parents at knowing what those interests are and how to act in pursuance of them. Gilles cannot claim to promote the best interests of the child while refusing to consider which actor has the best access to the resources necessary for promoting that interest.[77]

Gilles' third argument might be seen as an indirect response to this critique. By arguing that there is something fundamental to human dignity in the transmission of values from parent to child, Gilles might implicitly be undermining the premise of the resource objection. That is, he might be saying that it is incomprehensible to talk about the state being better than parents at knowing or pursuing the child's best interests, because part of the child's best interests lies precisely in receiving that education chosen by her parents. Gilles argues that the nurturing relationship between parents and children is central to our human flourishing and that shaping the child's values is central to this nurturing relationship.[78] Parents "wish our children to share in the good life as we (diversely) conceive it, to flourish as we understand human flourishing. To these ends, we seek to pass on to them

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[77] Gilles concludes that "liberalism treats adults as self-governing in part because they have the best incentives to act in their own best interests. Consequently, because individual parents have the best incentives to act in their children's perceived best interests, they have a claim to govern their children (and their children's education) that is closely analogous to their claim to govern themselves." *Id.* at 959-60. By ignoring the question of resources, Gilles has left the best interests of the child standard behind. Suppose we agree that parents have the best incentives to act in the child's best interests but, because of resource differentials, we think that the state actually *does* further the child's interests better than the parent does. In this scenario, Gilles' conclusion amounts simply to a claim that parents ought to have the same dominion over their children as they do over themselves. Gilles presents no argument for this claim, and it is certainly highly contested. After all, adults have the right to mutilate themselves.

[78] *Id.* at 962-67.

not only our fundamental values and beliefs, but also the character to live in accordance with them."[79] Moreover, parents want their educational authority to be absolute: "conscientious parents conceive their educational obligations completely."[80] Noting that it would restrict free speech rights specifically and liberal toleration generally for the state to forbid parents from attempting to pass on certain values to their children,[81] Gilles asserts that *any* state interference in parental value transmission presents the same problem: "the paradigm of the state battling with minority parents to win the child's allegiance is both subversive of parental nurturing and authority, and counter to the widely held and reasonable judgment ... that the child needs to receive a coherent education shaped by some controlling conception of the good."[82]

Gilles' leap from the value of the parent-child nurturing relationship to the illegitimacy of anything subversive of that relationship is a long one. Our values result from myriad sources and relationships, and it is unrealistic to think that one of those sources—albeit a very important one—could shut out the rest even if it wanted to.[83] Moreover, Gilles does not seem to consider the possibility that there can be conflicting goods—that is, that the parent-child nurturing relationship can be a good, but so can the relationship between the child and other sources of value. Gilles' value monism stands in stark contrast to our experience of everyday life, where we are constantly forced to choose between incompatible and incommensurable goods.[84] Perhaps the parent-child nurturing relationship is a good that should be fostered by some means, while other relationships are goods that should be fostered by other means.[85] Neither will completely predominate over the other, but the mere fact that conscientious *parents* conceive their educational obligations completely does not mean that conscientious *citizens* might not opt for some sort of compromise.

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[79] *Id.* at 965.

[80] *Id.* at 966.

[81] *Id.* at 967-68.

[82] *Id.* at 969.

[83] Children must leave the house *sometime*, and this means, at the very least, exposing them to billboards, the front pages of newspapers in newspaper boxes, and the behavior of others in public spaces.

[84] *See* ISAIAH BERLIN, *The Pursuit of the Ideal*, *in* THE CROOKED TIMBER OF HUMANITY 1, 13 (Henry Hardy ed., 1990) ("The notion of the perfect whole, the ultimate solution, in which all good things coexist, seems to me to be not merely unattainable—that is a truism—but conceptually incoherent; I do not know what is meant by a harmony of this kind. Some among the Great Goods cannot live together. That is a conceptual truth. We are doomed to choose, and every choice may entail an irreparable loss.").

[85] *See infra* Section IV.A.

In short, once Gilles finishes his argument from liberal neutrality, he turns to arguments based on the child's best interest and the parents' interest in nurturing the child. He treats these interests as absolutes, admitting of no compromise with alternative values, but his reasons for so thoroughly privileging them are unpersuasive. He gives us no reason to think that there might not be a broader social interest which would justify curtailing strong parentalist rights.

C. Stephen Carter's Dissentism

Stephen Carter offers an alternative parentalist rationale that avoids the particular monism which plagues Gilles' account. Carter acknowledges that there is a strong social interest in the education of children, and he suggests that this social interest is best served by allowing children to grow up in dissenting traditions. As he writes, "there are important societal reasons to allow [parents] a degree of control over what their own children learn. The courts should not cooperate in efforts to make the family, in effect, an extension of state policy ...."[86] An alternative conclusion would have "totalizing implications," for it would imply "that the state does after all have the power to stifle the construction of centers of dissent from its preferred meanings, as long as it gets to the potential dissenters while they are children."[87] As an illustration, Carter offers a disturbing story from his childhood: "I remember my own experience in the public schools of Washington, D.C., in the late 1960s, during which time I was taught that the slaves were basically happy and only a few hotheads actually wanted to be free; most of the slaves, we were taught, wanted kind masters."[88] Carter's parents "did not want their children taught that only a few of the slaves wanted to be free because it was not true."[89] Surely, not only the Carter family, but society at large would have benefited from wider diffusion of the truth about slavery.

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[86] STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 174 (1993).

[87] Carter, *supra* note 55, at 1208.

[88] *Id*. at 1223.

[89] CARTER, *supra* note 86, at 181. The thesis that most slaves were basically happy was propounded by, among others, Samuel Eliot Morison, one of the preeminent historians of his day and co-author of a widely read college textbook on American history. The thesis was known to be false by the 1950s. *See* Kenneth M. Stampp, *The Historian and Southern Negro Slavery*, 57 AM. HIST. REV. 613, 616-18 (1952). Morison removed references to this thesis from the 1962 edition of his textbook. *See* I.A. Newby, *Historians and Negroes*, 54 J. NEGRO HIST. 32, 41 (1969). However, it is not surprising that there would be some lag between the removal of an incorrect thesis from college texts and the time it stopped being taught at the primary and secondary level.

We can, presumably, all agree that the schools should not have been teaching this doctrine. It is, after all, false, and I presume that almost no one thinks that the schools should be teaching falsehoods. The question is, given that the schools *did* teach that slaves were happy, what options should have been open to Carter's parents? Carter's own answer is that "parents, as part of the exercise of their religious liberty, should have a broad freedom to exclude their children from objectionable programs and teaching in the schools."[90] Carter thus avoids the monism that plagues Gilles' theory—he does not ignore the social benefit in education or subsume it entirely to the benefits to the child and parents. Rather, Carter argues that a focus on the social benefits of education leads one to appreciate the virtue of dissent[91] and thus to support parentalism, which enables dissent.

But the story of the young Stephen Carter might well suggest a different answer. After all, Carter's parents *did* teach him that the happy slaves thesis was wrong, and they did not have to pull him out of school to do so. As Carter writes, "[i]f one dislikes a teaching, one can argue against it, as my parents did when I was taught in junior high school that slaves were essentially happy in the antebellum South."[92] Indeed, in responding to critics who assert the need for civic virtues to be taught in mandatory schools, Carter asks how they know "that values not taught in schools will not be learned?"[93] The same question may be turned on Carter: how can he assert that children will not learn to dissent outside of school hours? In fact, the evidence suggests that they do. After all, as Carter notes, surveys show that forty-four percent of American adults claim to accept the Genesis account of creation and another thirty-eight percent believe that God guided evolution.[94] It has been held unconstitutional for public schools to teach either of those positions,[95] and about eighty-eight percent of American school children are in public schools.[96] The conclusion is inevitable: a lot of school kids are learning about creationism despite the fact that it was not taught to them in school. In fact, since most public schools teach Darwinian evolution, one can go further: a lot of school kids are learning to believe in

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[90] Carter, *supra* note 52, at 10-11. *See also* Carter, *supra* note 55, at 1207 (arguing that *Mozert* was wrongly decided).

[91] *See generally* STEPHEN L. CARTER, THE DISSENT OF THE GOVERNED (1998) (advocating the social value of dissent).

[92] CARTER, *supra* note 86, at 181.

[93] Carter, *supra* note 55, at 1209.

[94] CARTER, *supra* note 86, at 159-60.

[95] *See* Edwards v. Aguillard, 482 U.S. 578 (1987) (striking down a requirement that "creation science" be given equal time with evolution in public schools); Epperson v. Arkansas, 393 U.S. 97 (1968) (striking down a state law prohibiting the teaching of evolution in public schools).

[96] CARTER, *supra* note 86, at 195.

creationism *despite* what they are taught in public school. Whether one sees this as worrisome or welcome, it is impossible to see it as evidence that the public school curriculum stifles dissent. Children are surrounded by sources of value—parents, churches, civic groups, popular culture, friends, school, etc. School is undoubtedly a major influence, but it is not so pervasive as to prevent dissent from arising. In this light, it is hard to see the necessity of Carter's opt-out provision, unless his position is that parents should be able to pass on their values without having to worry about any conflicting sources of value. This is not only unrealistic,[97] it also does not follow from Carter's argument about the social importance of dissent.

Carter's position would moreover make it impossible for the state to present children with a coherent message.[98] That is, it would make conscious social reproduction harder, if not impossible. As we have seen, the presentation of a coherent message by the state does not mean that children will not learn to dissent from it. But the state's inability to present a coherent message may make it difficult to attempt to perpetuate the values underlying democratic self-government. In the next Part, we will examine the republican argument against *Yoder*, which focuses intently on attempts at conscious social reproduction through education.

III. THE IMPOSITIONS OF REPUBLICANISM

Amy Gutmann has presented the strongest non-neutral argument against *Yoder*. I shall term her argument "republican," because it advocates "that social and political institutions be shaped and modified so as to encourage individuals to acquire the civic virtue which will ensure that they conscientiously fulfil their duties of political participation."[99] For Gutmann, "[w]ere students ready for citizenship, compulsory schooling—along with

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[97] *See supra* note 83 and accompanying text.

[98] The importance of such a message will be defended at *infra* Part IV.

[99] Alan Patten, *The Republican Critique of Liberalism*, 26 BRIT. J. POL. SCI. 25, 30 (1996). *See also* Suzanna Sherry, *Republican Citizenship in a Democratic Society*, 66 TEX. L. REV. 1229, 1229 (1988) ("Amy Gutmann's *Democratic Education* might equally well be entitled *Republican Education* ...."). Other thinkers, including William Galston and Stephen Macedo, present a republican vision of education similar to Gutmann's (although it should be noted that both Galston and Macedo call themselves liberals). *See* WILLIAM A. GALSTON, LIBERAL PURPOSES 241-56 (1991); STEPHEN MACEDO, DIVERSITY AND DISTRUST (2000); Stephen Macedo, *Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations, and Liberal Public Values*, 75 CHI.-KENT L. REV. 417 (2000). Although these theorists disagree as to what the content of a civic education should be, they all agree that students should be educated to be liberal democratic citizens and that this education requires constraints on democratic decisionmaking. As I show in this Part, that position is fundamentally untenable. For ease of presentation, I focus here on the arguments as Gutmann presents them.

many other educational practices that deny students the same rights as citizens—would be unjustifiable."[100] The primary purpose of compulsory education in a democratic society is thus clearly readying students for democratic citizenship. Of what is this education to consist? Democratic education must inculcate democratic virtue, which Gutmann understands to be "the ability to deliberate, and hence to participate in conscious social reproduction."[101] Because the society for which the students are being educated is a democratic one (and because an authoritarian method of setting educational policy would surely undermine the democratic virtues that education seeks to inculcate), Gutmann argues that high-level[102] educational policy should be set democratically. There are, however, two very important substantive restraints on majoritarian decisionmaking: the principles of non-repression and non-discrimination. Non-repression "prevents the state, and any group within it, from using education to restrict rational deliberation of competing conceptions of the good life and the good society."[103] Because the focus is on *rational* deliberation, non-repression allows the inculcation of character traits, "such as honesty, religious toleration, and mutual respect for persons, that serve as foundations for rational deliberation of differing ways of life."[104] Because "[t]he effect of discrimination is often to repress, at least temporarily, the capacity and even the desire of these groups to participate in the processes that structure choice among good lives," non-discrimination is the second constraint on majoritarianism.[105] It must be emphasized that Gutmann does not conceive of these principles as a restraint on the democratic nature of education;

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[100] AMY GUTMANN, DEMOCRATIC EDUCATION 94 (rev. ed. 1999).

[101] *Id*. at 46.

[102] "Although a school board may establish the curriculum, it must not dictate how teachers choose to teach the established curriculum, as long as they do not discriminate against any student or repress reasonable points of view. Although a school board may control the textbooks teachers use, it may not control how teachers use those textbooks (within the same principled constraints). The rationale for so limiting democratic authority is straightforward: if primary school teachers cannot exercise intellectual independence in their classrooms, they cannot teach students to be intellectually independent." *Id*. at 82 (internal footnote omitted). It is unclear where the dividing line is between the curriculum and the means by which that curriculum is taught. It is, moreover, unclear that Gutmann's "rationale" holds up—is it not equally plausible that a teacher constrained to teach in ways known to foster intellectual independence would have more success in fostering that independence than a teacher whose own intellectual independence leads him to be an authoritarian in the classroom?

[103] *Id*. at 44.

[104] *Id*. Because Gutmann does not claim to value neutrality for its own sake, *see id*. at 46, this use of rationality is not as problematic as the use of the same concept by political liberals. *See supra* Part I.

[105] GUTMANN, *supra* note 100, at 45.

rather, she sees them as putting *democratic* constraints on *majority* rule.[106] Indeed, for Gutmann, it is precisely the democratic nature of these constraints that justifies them.

We may better understand these constraints by seeing how they function in practice. An analysis of Gutmann's discussion of the teaching of creationism in schools will prove instructive. Gutmann argues that creationism may not be taught in public schools because it violates the principle of non-repression: "The distinctly democratic problem with teaching creationism stems from the fact that it ... is believable only on the basis of a sectarian religious faith. Teaching creationism as science—even as one among several reasonable scientific theories—violates the principle of nonrepression in indirectly imposing a sectarian religious view on all children in the guise of science."[107] It seems safe to assume that Gutmann's objection is not predicated on the fact that creationism cannot properly be called science (i.e., the evidence for creationism[108] does not flow from the scientific method)—if that were her only concern, then the public schools could drop the name "science" and teach creationism in a class on "explanations for the natural world." It seems unlikely that Gutmann would be satisfied with this merely cosmetic change. Her objection seems to rest on her claim that teaching creationism imposes a sectarian religious view on all of the children rather than on her claim that it does so in the name of science. Indeed, Gutmann writes that, "[i]f democratic majorities in a religiously diverse society refuse to differentiate between a sectarian and a secular curriculum, they will unintentionally thwart the development of shared intellectual standards among citizens, and discredit public schools in the eyes of citizens whose religious beliefs are not reflected in the established curriculum."[109] But this cannot be right. As we have already seen, a large majority of Americans believe either in creationism or in "guided" evolution.[110] Surely, requiring schools to tell the majority that it is

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[106] *See id.* at 95 ("The principles of nonrepression and nondiscrimination limit democratic authority in the name of democracy itself. A society is undemocratic—it cannot engage in conscious social reproduction—if it restricts rational deliberation or excludes some educable citizens from an adequate education.").

[107] *Id.* at 103.

[108] Contrary to the belief of some secularists, acceptance of creationism does rest on evidence. The appeal to Biblical text, for example, is an appeal to evidence, although the secularist would presumably insist that it is not an appeal to *good* evidence. Part of the dispute, then, is a dispute over hermeneutics. *See* CARTER, *supra* note 86, at 167. To the secularist tempted to reply that only scientific evidence is externally verifiable, one must ask: verifiable by whom? Certainly, a person disinclined to trust his sensory perceptions would fail to be persuaded by much scientific evidence.

[109] GUTMANN, *supra* note 100, at 104.

[110] *See supra* text accompanying note 94.

wrong discredits public schools in the eyes of many members of the majority. And surely the promotion of shared intellectual standards is accomplished at least as easily—if not more so—by teaching what most of them are already inclined to believe, rather than by teaching its opposite. At bottom, Gutmann's objection to teaching creationism seems to rest on her intuition that secular reasoning is non-sectarian and open to all, whereas religious reasoning is sectarian and exclusive. But she does not explain how she has come to this conclusion. Each relies on its own hermeneutic.[111] Each requires a bedrock faith in that hermeneutic.[112] We can all think of cases of believers in the religious hermeneutic convincing believers in the secular hermeneutic (we call this "conversion" or "finding salvation") and vice-versa ("losing the faith"). How, then, can Gutmann claim that the secular is non-sectarian and open, while the religious is sectarian and exclusive? Surely, the person who believes that the creation account in Genesis is literally true would find nothing inclusive about a rule forbidding the use of his hermeneutic and requiring the use of a competing one. Gutmann has not shown that teaching creationism is any more repressive than teaching evolution. It is unclear, then, how Gutmann can assert that banning creationism from the classroom even if the democratic majority wants it to be taught is consistent with a commitment to democracy.

I have discussed the evolution example at length because it illustrates what many would no doubt suspect about a theory like Gutmann's: although she claims that her limits on majoritarianism serve only as procedural mechanisms to promote democracy, they in fact serve to privilege Gutmann's beliefs about what should be taught, even in the face of contrary beliefs by the democratic majority. Indeed, the problem is not unique to creationism. Whether the curricular topic under analysis is sex education, critical reasoning, literature, civics, or character education, any curricular choice will result in the privileging of one hermeneutic over others, with the corresponding sense by those adhering to the disfavored hermeneutics that they are being excluded or imposed upon. The principles of non-repression and non-discrimination, if applied honestly, provide no guidance with respect to curricular choices. Gutmann's democratic restraints on majoritarianism thus fade away, and the principle we are left with is majority rule in matters of education. This conclusion is

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[111] *See supra* note 108.

[112] *See* DAVID HUME, *An Enquiry Concerning Human Understanding*, *in* ENQUIRIES CONCERNING HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS 1, 25-45 (L.A. Selby-Bigge & P.H. Nidditch eds., Oxford Univ. Press 3d ed. 1975) (arguing that the principle of causal regularity—upon which all science is based—rests simply upon a habit of human thought and cannot itself be justified).

unappealing to Gutmann,[113] but in the next Part we shall inquire whether it is really so bad.

IV. THE DEMOCRATIC-COMMUNITARIAN ALTERNATIVE

In this Part, I shall offer an alternative analysis of the *Yoder* problem. I have termed this approach democratic-communitarian because it incorporates elements from communitarian political theory to advocate a democratic answer to the *Yoder* problem. I shall argue that this approach can address many of the legitimate concerns raised by the alternative theories discussed above.

A. The Communitarian Intuition

I begin with a principle to which I have made oblique reference several times above:[114] each of us is the product of multiple sources of value.[115] These sources sometimes work in concert; they sometimes work in tension; and they sometimes work toward completely different ends. As Michael Sandel has put it, "Each of us moves in an indefinite number of communities, some more inclusive than others, each making different claims on our allegiance, and there is no saying in advance which is *the* society or community whose purposes should govern the disposition of any particular set of our attributes and endowments."[116] Indeed, we might well characterize the human subject as that being which exists at the intersection of communal sources of value; to the extent that human subjectivity is characterized by freedom, that freedom may be said to consist in manipulating the various value sources into a coherent social identity.[117] To a large extent, of course, human subjectivity is not characterized by freedom—many of our values are not chosen but are rather taken as given

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[113] *See* GUTMANN, *supra* note 100, at 95-96.

[114] *See supra* text accompanying notes 83-85, 92-97.

[115] I understand this principle to be the central insight of communitarian political theory. However, it should be noted that there is not widespread agreement—even among communitarian theorists themselves—as to what constitutes their common core. *See* STEPHEN MULHALL & ADAM SWIFT, LIBERALS AND COMMUNITARIANS, at xiv-xv (2d ed. 1996) (noting the lack of consensus among communitarian theorists and their resulting reluctance to self-identify as communitarians).

[116] MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 146 (2d ed. 1998).

[117] In this, I am indebted to Hannah Arendt's similar analysis of the present as the space in which the individual exercises freedom by taking the given past and creating the heretofore undetermined future. *See* HANNAH ARENDT, BETWEEN PAST AND FUTURE 3-15 (1968).

from one (or more) of our sources of value. Thus, many religious people would insist that they did not choose their religion—they were born into it or called to it. Moreover, their religious identity is not something added on top of their personhood; rather, it is an integral part of their subjectivity. Certain values cannot be divorced from the subject without destroying that subject.[118] This is true not only of religious believers—many secularists would insist that their attachment to their family, for example, is both unchosen and constitutive of their very subjectivity.

Civil and political society are an essential part of this picture. Indeed, sources of value come in all sizes, from the supra-national to the individual. In general, it is and should be the case that lower-level sources of value are thicker than higher-level sources. That is, those sources closer to the individual (family, church, local community, etc.) present the individual with a more comprehensive set of values than those further away (political party, state, nation, international community, etc.).

This understanding that human values have multiple sources which radiate outward in concentric circles from the individual allows us to address Stephen Carter's concern about the totalizing implications of state educational requirements.[119] Hannah Arendt famously analogized totalitarianism to a "band of iron which holds [its subjects] so tightly together that it is as though their plurality has disappeared into One Man of gigantic dimensions."[120] We can understand this to mean that totalitarianism is what happens when a high-level source of value gets too thick—its increasing thickness pushes subjects together until their permissible value set is wholly determined by this single value source.[121] It viciously represses any and all competing value sources and thereby seeks to destroy diversity. With only one source of value, there can be no space in which to manipulate values, and any possibility for human freedom vanishes.[122] Because higher-level sources of value tend to have greater

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[118] That Rawls' original position attempts to draw a sharp distinction between the self and its ends, circumstances, and sources of value is one of the primary communitarian objections to it. *See* SANDEL, *supra* note 116, at 15-65. *See also* MULHALL & SWIFT, *supra* note 115, at 50-59.

[119] *See supra* text accompanying note 87.

[120] HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 465-66 (new ed. 1976).

[121] Václav Havel has written perhaps the most haunting account of how totalitarian ideology destroys competing value systems. *See* Václav Havel, *The Power of the Powerless*, *in* THE POWER OF THE POWERLESS: CITIZENS AGAINST THE STATE IN CENTRAL-EASTERN EUROPE 23, 27-29 (John Keane ed., 1985).

[122] *See* ARENDT, *supra* note 120, at 466 (Totalitarianism "destroys the one essential prerequisite of all freedom which is simply the capacity of motion which cannot exist without space."). *See also* Havel, *supra* note 121, at 79 (noting that the only possibility of freedom for a subject living under totalitarianism lies in the creation of a "parallel *polis*," an "area where a different life can be lived, a life that is in harmony with

access to the instruments of physical coercion, we more plausibly fear totalitarianism from them than from lower-level value sources.

However, our fear of totalitarianism must not lead us to restrict the powers of high-level value sources too tightly. For one thing, their greater coercive power can act to prevent totalitarian behavior at lower levels (as when the state takes a child away from an abusive parent or when a coalition of states removes a totalitarian dictator from power). For another thing, although danger results when high-level value sources are too thick, it must be remembered that they are, nonetheless, sources of value. It cannot be doubted that many Americans consider their Americanness to be central to their identity and to contribute materially to their values and ideals. No doubt the same can be said of citizens of other nations. No doubt the same can be said of many Americans' state citizenship—plenty of Texans, Californians, and Vermonters would insist that their state has a distinct ethos which forms a part of its citizens' identities.

In order to maintain social order, the higher-level value sources must be given lexical priority over the lower-level sources; in order to prevent totalitarianism, the higher-level value sources must be kept thinner than the lower-level sources. In other words, when dominant society-wide norms conflict with local norms, the dominant social norms must prevail, but, as a society, we should be committed to exercising our power to override local norms only when necessary. The obvious analogy is to federalism: federal law is supreme,[123] but federal lawmaking power is constrained.[124]

The question, then, is how we can best promote society-wide values without unnecessary infringements on local values. The best answer is to attempt to match institutions to the level of value they are best able to promote. This is, in essence, a "separate spheres" approach—a recognition that different institutions will have different social roles and will promote different values.[125] Families promote the values important to the family; churches, synagogues, and mosques promote the values important to their religions; the promotion of popular culture is left to the market; and state institutions promote the values of society as a whole. Seen in this light, schools are ideally suited for the inculcation of social values. Schools are a place where children from very different sorts of families, religious

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its own aims and which in turn structures itself in harmony with those aims"—that is, the only possibility for freedom lies in the creation of open space).

[123] *See* U.S. CONST. art. VI, cl. 2.

[124] *See id.* amend. X.

[125] *See* MICHAEL WALZER, SPHERES OF JUSTICE 6 (1983) ("[T]he principles of justice are themselves pluralistic in form; ... different social goods ought to be distributed for different reasons, in accordance with different procedures, by different agents; and ... all these differences derive from different understandings of the social goods themselves.").

traditions, and ideological backgrounds are brought together and taught the same subjects. There is no other social institution which brings together *all* future citizens of the polity and has the capacity to teach them those traditions, values, mores, and practices that are essential to their participation in and reproduction of their culture. Education is thus that enterprise best suited to the inculcation of the values of higher-level value sources. In Michael Walzer's words, "Education expresses what is, perhaps, our deepest [social] wish: to continue, to go on, to persist in the face of time. It is a program for social survival."[126] No other institution could play this role as well, for it is *only* in schooling that all young citizens are brought together and taught about their common cultural heritage and ideals. In short, schools have a comparative advantage in the inculcation of the values of society at large, just as other social institutions have a comparative advantage in the inculcation of other sources of value.[127]

B. The Democratic Intuition

If schools are meant to inculcate large-scale social values, how are we to determine *which* values they should inculcate? In a democratic society, the only answer that can be offered definitively is a procedural one: the values should be determined democratically. Curricular choices should be made by the elected representatives of the community or directly by the community itself. As we saw in our discussion of the republican argument against *Yoder*, no substantive restraints on the democratically determined curriculum can be justified in the name of democracy—such restraints are always an attempt to entrench the republican's own preferred curriculum.[128] This is not to say that there can be no substantive constraints on the political process itself—clearly, discriminatory voting rules or rules violating the free speech rights of advocates of a particular educational philosophy would make the voting procedures themselves illegitimate. However, once a vote (whether that vote is a referendum on curricular specifics or, much more likely, an election for curriculum decision-makers) has been fairly held, any attempt to limit the substantive curricular decisions would be an

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[126] *Id*. at 197.

[127] *See* GUTMANN, *supra* note 100, at 69 ("[W]e need not claim that society has a greater interest in the education of children than do parents. The point is rather that parents command a domain other than schools in which they can—and should—seek to educate their children, to develop their moral character and teach them religious or secular standards and skills that they value." This is true, of course, not only of parents, but of religious institutions, civic groups, etc.).

[128] *See supra* Part III.

undemocratic attempt to entrench contested values in the face of majority opposition.

The question naturally arises: *which* democratic decision-makers should determine school curricula? After all, in a federalist system, there are a number of possibilities. The answer, again, must remain indefinite. Returning to our communitarian reasoning, it is clear that each level of government should impose only those restrictions necessary to inculcate the values shared at that level. The higher the percentage of the curriculum that is determined by higher levels of government, the more other value sources are squeezed out by something that, at the extreme, begins to look like Arendt's iron band. We can thus imagine that the federal government might regulate to promote values that are perceived to be integral to American citizenship—it might insist on basic proficiency in the "three R's" and some knowledge of American government and history. State governments might insist on some state history, and they might approve only certain textbooks for use throughout the state. Local schoolboards may insist on education in cultures or languages especially prevalent in the area. They may seek to teach traditional local customs, beliefs, or skills. They may place a special emphasis on preparing their students for entry into local industries. The precise division of power will remain a subject of political contention, for the relative importance of different value sources is inevitably contested. This should not worry us unduly—the political safeguards of federalism will operate to protect lower-level decision-makers from being overpowered by higher-level ones.[129] Indeed, recent years have seen robust debates and compromises on the amount of power the federal government should exercise in determining school curricula.[130]

C. The Democratic-Communitarian Answer to the Yoder *Problem*

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[129] *See generally* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). *See also* THE FEDERALIST NO. 28, at 181 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.").

[130] *Compare* Gina Austin, Note, *Leaving Federalism Behind: How the No Child Left Behind Act Usurps States' Rights*, 27 T. JEFFERSON L. REV. 337 (2005) (asserting that recently imposed federal curricular requirements usurp states' rights), *with* James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 987 (2004) (arguing that the federal government should enforce curricular standards on schools if the schools are unable to meet a high level of achievement on their own).

We are now in a position to articulate the democratic-communitarian position on *Yoder*. This position holds that *Yoder* was wrongly decided because it took educational decision-making power away from the democratic people and gave it to individual parents and to the courts, which were tasked with weighing the competing interests of the parents and the state. In the democratic-communitarian paradigm, judicial inquiry into educational policy should be limited to two questions: (1) was the policy-making procedure fair and democratic?, and (2) was the policy impermissibly motivated by animus toward a group or groups?[131] As long as question (1) is answered in the affirmative and question (2) is answered in the negative, the courts' role is over. As we have noted, counter-majoritarian substantive curricular constraints cannot be democratically justified.

But what the courts should do is only half of the question. What advice does the democratic-communitarian view have to offer the conscientious citizen or politician?[132] As we have seen, with a communitarian view of society comes a fear that too much authority will be exercised by high-level sources of value. The conscientious citizen is thus asked to make an honest judgment about how thick the communal norms are at each level and how much those communal norms need to be inculcated through schooling. The citizen is asked to keep in mind that the thickest sources of value will and should be those at the lowest level. This means that the citizen will want to ponder carefully what social values it is important to reproduce nation-wide, state-wide, and school district-wide. The citizen will also want to consider whether some topics should not be addressed in schools or should be addressed, but with parents having the option to pull their children out of class while that topic is being addressed. These decisions will entail a judgment that certain topics are properly dealt with by extracurricular value sources. The fact that *Yoder*'s judicially created exemption from generally applicable education laws was illegitimate does not mean that a similar exemption could not have been granted democratically. What was objectionable in *Yoder* was not the decision that some students need not be educated past eighth grade—the proper amount of schooling is a contestable and contested question, and eighth grade is no more arbitrary a line than any other. What was objectionable in *Yoder* was the fact that this contested question was taken

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[131] This is the *Church of the Lukumi Babalu Aye* standard discussed *supra* Section II.A.

[132] *See* Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975) (noting that courts and legislatures may apply different standards—and therefore come to different conclusions—when considering the constitutionality of the same law).

out of the hands of the democratic people and given to individual parents and courts. A democratic majority may decide not to require education past eighth grade, just as it may decide not to require sex education or to allow parents to remove their children from the sex education class. For that matter, a democratic majority may decide not to require any school at all. We may think that some of these decisions are profoundly unwise, but there is no democratic principle which allows us to enshrine our conception of wisdom in the face of a contrary majority.[133]

Likewise, a majority may decide whether or not to allow private schools or home schools to exist. The outcome in *Pierce* may have been justified by the *Church of Lukumi Babalu Aye* standard,[134] but this does not mean that a law requiring all children to be educated in public schools that was passed, not out of animus toward a group or groups, but rather because of a democratic judgment that all children should be educated together should be struck down.[135] Of course, the democratic-communitarian standard would counsel a citizen or legislator to ponder long and hard before passing a law prohibiting private schooling. In order to support such a law, the citizen would have to satisfy herself that necessary social values could not be effectively inculcated through regulated private schools. If they could be, then the communitarian principle of keeping high-level value sources as thin as possible will require her to vote against the law. Assuming the people do vote to allow private schooling, the question of how tightly to regulate private schools will also be up for democratic resolution.

In short, the democratic-communitarian answer to the *Yoder* problem is to suggest that the problem with *Yoder* was the identity of the decision-maker. The people may democratically choose to allow the Old

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[133] This is not to say that democracy never involves restraints on majoritarian decisions. I am, instead, making the more modest point that, in a democracy, a restraint on majoritarian decisionmaking must be justified by some principle other than the minority's belief that it is wiser than the majority. After all, the majority presumably thinks that it has wisdom on its side, as well.

[134] *See supra* Section II.A.

[135] The Supreme Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000), suggests that it remains convinced by the substantive due process reasoning of *Pierce*. An analysis of the doctrine of substantive due process is well beyond the bounds of this Article. Suffice it to say that Justice Scalia's dissent seems far more in keeping with a commitment to democracy than does the plurality opinion or the concurrences: "[W]hile I would think it entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the State has *no power* to interfere with parents' authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right." *Id.* at 91-92 (Scalia, J., dissenting).

Order Amish to remove their children from school after eighth grade, or they may choose to require them to satisfy the same educational requirements as all other students. But there is no constitutional principle that allows a court to remove this question from the democratic arena. The democratic-communitarian analysis does, however, suggest that conscientious citizens and legislators should take seriously a request to be exempt from generally applicable education laws and should grant that request unless it would prevent the transmission of what they consider to be important social values.

D. Objections and Responses

There are three likely objections to the democratic-communiarian analysis presented above. I shall describe and attempt to respond to each.

Objection 1. Under this proposal, most school districts in the country will throw out their biology textbooks and teach creationism. This objection seems to rest upon the large number of Americans who say they believe in creationism or "guided" evolution.[136] There are two responses to this objection. The first is empirical: it is not at all clear that the democratic people *want* creationism to be taught instead of evolution. It is a perfectly intelligible position to believe in creationism or guided evolution and yet think that it should not be taught in schools. Indeed, consider the recent controversy over the attempt to introduce a brief statement about intelligent design into the biology curriculum in Dover, Pennsylvania. It should be noted, first, that this statement was in addition to the teaching of evolution, not instead of it (the same is true of Kansas' recent decision to include "challenges to Darwinian theory in the state [educational] standards"[137]). That is, a divided school board opted for a compromise on a contentious issue. This compromise, however, proved unacceptable to the voters. In school board elections held four days after the end of the trial in a suit contesting the legality of the intelligent design statement,[138] eight candidates who ran on a slate opposing adding intelligent design to the curriculum were elected. Not a single candidate who supported intelligent design in the classroom won.[139] In other words, it is not at all clear that voters would

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[136] *See supra* text accompanying note 94.

[137] Margaret Talbot, *Darwin in the Dock*, NEW YORKER, Dec. 5, 2005, at 66, 66.

[138] After the school board elections, the court ruled that the intelligent design statement violated the First Amendment. Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707 (M.D. Pa. 2005).

[139] Talbot, *supra* note 137, at 77.

choose to eliminate evolution from the classroom and replace it with creationism.[140]

But the second response must be: so what if they did throw out evolution and teach creationism? I believe that any school board which made this decision would be making a horrible mistake, and I would protest against this mistake with every democratic means at my disposal. But why should my objection be privileged over the equally strong sentiments of the majority of my fellow citizens? We have discovered no principle that allows the entrenching of my minority point of view over that of the majority—appeals to neutrality fail,[141] as do appeals to non-repression and non-discrimination.[142] This is not a question of relativism—I still believe that my objections to teaching creationism are *right*—it is simply a matter of democratic humility. It is easy to be a democrat when one's compatriots agree with one's policy choices, but what allows democracy to function is that citizens commit in advance to recognizing the legitimacy of democratic decisions with which they disagree. My objections to teaching creationism or intelligent design, like my fellow citizens' objections to teaching evolution, belong in the public arena. If a fair democratic decision goes against me, then I will have to teach my children about evolution outside of school.

Objection 2. The democratic-communitarian analysis allows for the totalitarian suppression of dissent. It is the simple fact that I *can* teach my children about evolution—or creationism or sex or the novels of Faulkner—outside of school that prevents democratically controlled education from becoming democratic totalitarianism. We have seen Stephen Carter's fear that a democratically determined curriculum with no opt-out provision for disgruntled parents could become "totalizing" and suppress dissent.[143] But we have also seen that children *do* still learn things that are not taught in school (indeed, they still learn things that are directly

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[140] *See also* Neela Banerjee & Anne Berryman, *At Churches Nationwide, Good Words for Evolution*, N.Y. TIMES, Feb. 13, 2006, at A16 (noting a growing movement among churches to preach in favor of evolution); Laurie Goodstein, *Intelligent Design Might Be Meeting Its Maker*, N.Y. TIMES, Dec. 4, 2005, § 4, at 1 (noting that intelligent design is losing credibility, even among those thought to be "natural allies"); Jodi Rudoren, *Ohio Expected to Rein In Class Linked to Intelligent Design*, N.Y. TIMES, Feb. 14. 2006, at A12 (noting Ohio's move away from a curriculum critical of evolution that was adopted four years ago and seeing this move as part of a "sea change across the country against intelligent design"); Rudoren, *supra* note 7 (noting the final eleven to four vote in favor of scrapping challenges to evolution in Ohio's tenth grade biology curriculum).

[141] *See supra* Section I.A.

[142] *See supra* Part III.

[143] *See supra* Section II.C.

opposed to what they are taught in school, as when the young Stephen Carter learned that slaves were not content in the antebellum South). Value sources are myriad, and values not learned from one may well be learned from another. Complete democratic control over *one* value source (the schools) is not totalitarian; complete control of one value source over all others (Arendt's iron band) is. Moreover, democratic control of education will likely leave significant power in the hands of parents. If *Pierce* were overruled tomorrow, is it plausible that states would rush to outlaw private schools? Indeed, under the *Pierce* regime,

> No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.[144]

Yet most states have very few regulations on private schools.[145] The democratic impulse is not a totalitarian impulse; decisions that can be left to lower-level decision-makers while still allowing the values of society at large to be inculcated generally are left to the lower-level decision-makers; and dissent continues to flourish.

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[144] Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925).

[145] To take one example, in 2000, the federal Department of Education reported that Texas had the following curricular requirements for private schools:

> Students attending a private or parochial school are exempt from compulsory attendance at a public school if the school includes in its course a study of good citizenship.
>
> A school district must ensure that records or transcripts of a transfer student from a Texas nonpublic school are evaluated and that the student is placed in appropriate classes promptly. A transfer student from a Texas nonpublic school must complete all state requirements for graduation.
>
> Student credits earned in non-public schools accredited by members of [the Texas Private School Accreditation Commission] are transferable to Texas public schools.
>
> A driver's education school shall receive approval from the Texas Education Agency prior to conducting a course at a private school.

UNITED STATES DEPARTMENT OF EDUCATION, STATE REGULATION OF PRIVATE SCHOOLS: TEXAS (2000), http://www.ed.gov/pubs/RegPrivSchl/texas.html (internal citations to Texas law omitted). This author can attest from personal experience that the "study of good citizenship" requirement was not rigorously enforced.

Objection 3. Under the democratic-communitarian approach, nothing remains of religious freedom. On the contrary, I would assert that we have seen at least three important elements which form the core of democratic-communitarian religious freedom. First, we have the judicial component. As we saw, *Church of the Lukumi Babalu Aye* stands for the proposition that the state may not target a religious group or groups for disfavored treatment.[146] The Court's blessing of inquiries that go behind the text of the law to find animus in its intent gives this principle real teeth. This is a weighty principle—surely, it is at the very core of what we mean when we speak of religious freedom that the state may not punish me *because* I am Jewish or Muslim or Catholic.

The remaining two elements of democratic-communitarian religious freedom may not be judicially enforceable, but that does not make them any less potent. The second is the fact that, in line with the communitarian intuition discussed above, we do tend to exempt religious groups from generally applicable laws when we think that doing so will not be inimical to our attempt to inculcate social values. This takes many forms, ranging from allowing private education and home schooling to exempting wine used for religious purposes from the National Prohibition Act.[147] These exemptions indicate a democratic determination that religious belief as a source of value is important enough to overcome the goal of the otherwise applicable law. A society's willingness seriously to consider claims for such exemptions is an important element of religious freedom.

Finally, religious freedom is protected by our tradition of dissent, discussed above. The democratic-communitarian theory suggests that school curricular decisions should be made democratically, but it equally suggests that family decisions should be made by the family, church decisions by the church, etc. These institutions can pass on religious values, and they can serve as focal points for political activism in pursuit of democratically granted exemptions from laws which the religious group finds uncongenial. Taken together, these elements form a robust conception of religious freedom.

V. CONCLUSION

As continuing debates over religion and school curricula demonstrate, the *Yoder* problem is still very much with us. This should not be surprising—it is a difficult problem, necessitating an examination of some of the deepest principles underpinning our collective life. Thoughtful

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[146] *See supra* Section II.A.

[147] Pub. L. No, 66, tit. II, § 6, 41 Stat. 305, 311 (1919).

scholars have heretofore put forward four broad categories of arguments about the *Yoder* problem. There have been arguments both for and against *Yoder* sounding in liberal neutrality; there have been parentalist arguments for *Yoder*; and there have been republican arguments against *Yoder*. In this Article, I have tried to show that, while each of these arguments raises important questions and concerns, each of them is also deeply flawed. As an alternative, I have put forward a democratic-communitarian answer to the *Yoder* problem. I have attempted to show both that this answer corresponds to our communitarian and democratic intuitions, and also that it is able to address the important concerns raised by the other theories. It is my contention that the democratic-communitarian theory provides the best model for how a pluralist democracy can address the intersection of education and religious belief.