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"HE DREW A CIRCLE THAT SHUT ME OUT": ASSIMILATION, INDOCTRINATION, AND THE PARADOX OF A LIBERAL EDUCATION

Nomi Maya Stolzenberg

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"HE DREW A CIRCLE THAT SHUT ME OUT": ASSIMILATION, INDOCTRINATION, AND THE PARADOX OF A LIBERAL EDUCATION

*Nomi Maya Stolzenberg**

Jurists and scholars have long misapprehended or avoided a complaint by fundamentalist Christians and other insular communities that "liberal" Western education violates their cultural integrity by exposing their children to alternative lifestyles. In essence, they claim that rationalist, subjectivist education indoctrinates them in tolerance. Courts have generally either ignored this critique or responded that "mere" exposure cannot constitute indoctrination because it leaves the exposed free, perhaps freer, to choose her own way of life. But this response is inadequate, for it is exactly this intellectual freedom to pick one's own lifestyle that the fundamentalists see as an injurious violation of free exercise.

In this Article, Professor Stolzenberg exposes the inability of our traditional philosophical tools to deal with our society's paradoxical intolerance of the intolerant. Through an analysis of Mozert v. Hawkins County Public Schools, Professor Stolzenberg traces the evolution of Christian fundamentalism to demonstrate that the fundamentalists' claim — however foreign to mainstream scholars — is neither hasty nor new. Indeed, an almost identical critique of emerging Western rationalism sparked the fundamentalist movement almost a century ago. Having explained the necessity of taking this claim seriously, Professor Stolzenberg then explores the justification offered by civic republican scholars and jurists for indoctrination in tolerance and concludes that neither this tradition nor the communitarian tradition adequately answers the fundamentalist complaint because both contain within them the same commitment to subjectivism that paralyzes the liberal response.

Tolerance is prescribed as a defense against enforced assimilation. Indeed, both conventional wisdom and much of our First Amendment jurisprudence assume that government can avoid assimilation, that insidious cousin of totalitarianism, by respecting cultural differences.[1] Increasingly, however, critics argue that "pluralistic" and

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[1] As Justice Brennan put it, "We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellant practice because the same tolerant impulse protects our own idiosyncracies." Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Brennan, J., dissenting).

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"multi-cultural" education is neither pluralistic nor multicultural, but instead inculcates students in Western values.[2] This critique suggests not only that our educational system has failed to attain the ideal of universalism, but also that there is a defect in the ideal itself.

The most stinging of these attacks has been leveled not by "the left" or by subcommunities grouped by race or gender, but rather by guardians of tradition — fundamentalist Christians who resist the quintessentially pluralist practice of "merely" exposing school children to differing ideas.[3] The fundamentalists' assault goes far beyond their now-familiar resistance to evolutionary theory and sex education. In several recent suits, they have asserted that the teaching of diverse viewpoints in a tolerant and objective mode threatens the survival of their culture.[4] This Article uses the most articulate of these challenges

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Justice Brennan was not referring specifically to the educational context in this dissent. Rather, he was criticizing the plurality's imposition of "traditional" norms in the course of singling out those family relationships worthy of constitutional protection. *See id.* at 140–41. For Justice Brennan's views on the transmission of culturally-specific norms through the public schools, see p. 658 below.

[2] Some opponents of racism have portrayed integration and color-blindness as expressions of hegemony that hinder the establishment of separate African-American schools. *See, e.g.*, Comment, *Black Neighborhoods Becoming Black Cities: Growing Empowerment, Local Control, and the Implications of Being Darker than* Brown, 23 HARV. C.R.-C.L. L. REV. 415, 473–76 (1988). The new "critical race theory" or "outsider's jurisprudence," *see* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323 (1989), criticizes the hegemonic function of seemingly neutral principles, but simultaneously cautions against overlooking the potentially liberating function of such principles. *See, e.g.*, Kimberle W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1357 (1988); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 381–87 (1987); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 404–06 (1987). In a similar vein, some feminists have assailed gender-neutrality and argued that basic liberal institutions are egalitarian in ways that reflect distinctively male values. *See, e.g.*, MARTHA MINOW, MAKING ALL THE DIFFERENCE 58 (1990) (noting that the labor market is based upon assumptions that accommodate the reality of men who have "full-time" wives to take care of their home and children); Nadine Taub & Wendy W. Williams, *Will Equality Require More than Assimilation, Accommodation or Separation from the Existing Social Structure?*, 37 RUTGERS L. REV. 825, 829–30 (1985) (critiquing the gender-neutral approach); Iris M. Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 ETHICS 250, 268–74 (1989) (arguing that the civic republican ideal of transcending private differences to achieve a common will is based on norms derived from masculine experience and thus requires assimilation to male norms).

[3] In these times, when the label "politically correct" is a convenient way of dismissing criticism, the fundamentalist complaint is an important reminder that not all criticism of the Western humanist tradition stems from "the left." Nor are all subcommunities that voice such complaints grouped by race, gender, or the status of an historically disadvantaged minority.

[4] *See, e.g.*, Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528, 1534 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985); Rhode Island Fed'n of Teachers v. Norberg, 630 F.2d 850, 853–54 (1st Cir. 1980); McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255, 1258–60 (E.D. Ark. 1982).

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— the litigation of *Mozert v. Hawkins County Board of Education*[5] — as a prism through which to examine the problem of assimilation in a liberal society.[6]

The basic question raised by the fundamentalists' attack is whether the courts should recognize as unconstitutional the coerced exposure of children to competing value systems. The *Mozert* plaintiffs challenged their local schools' requirement that children read from a textbook series that introduced the students to a variety of perspectives and attitudes.[7] *Mozert* thus crystallizes the paradox of tolerance for the intolerant: the fundamentalists' call for eliminating tolerance from the public schools can be rebuffed only at the expense of maintaining an environment that is exceedingly inhospitable to the fundamentalists, and is potentially inimical to the survival of their way of life.[8]

The problem was intuitively grasped by Judge Boggs, who joined in the final judgment against the plaintiffs with great reluctance. Like the rest of the Sixth Circuit panel, Judge Boggs agreed that "Hawkins County is not required by the Constitution to allow plaintiffs the latitude they seek"[9] to opt out selectively of the offending school program, but remain enrolled in the public school.[10] For Judge Boggs, however, this decision elicited "a profound sense of sadness,"[11] which he expressed with a poem taken from a popular poetry anthology:

> He drew a circle that shut me out—
> Heretic, Rebel, a thing to flout.

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[5] The five published opinions that form the core of the *Mozert* litigation are Mozert v. Hawkins County Pub. Schs. (Mozert I), 579 F. Supp. 1051 (E.D. Tenn. 1984); Mozert v. Hawkins County Pub. Schs. (Mozert II), 582 F. Supp. 201 (E.D. Tenn. 1984); Mozert v. Hawkins County Pub. Schs. (Mozert III), 765 F.2d 75 (6th Cir. 1985); Mozert v. Hawkins County Pub. Schs. (Mozert IV), 647 F. Supp. 1194 (E.D. Tenn. 1986); and Mozert v. Hawkins County Bd. of Educ. (Mozert V), 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988).

[6] Another useful discussion of the dilemma of assimilation in a liberal society is contained in Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297, 299–301 (1988).

[7] *See Mozert V*, 827 F.2d at 1060.

[8] This paradox of tolerating intolerance also figured in the debate over whether (or to what extent) to permit the expression of communist views that are subversive of liberal democracy. *See* ROBERT P. WOLFF, BARRINGTON MOORE, JR. & HERBERT MARCUSE, A CRITIQUE OF PURE TOLERANCE (1965); *cf.* Kirstie M. McClure, *Difference, Diversity, and the Limits of Toleration*, 18 POL. THEORY 361, 364 (1990) (analyzing the limitations of liberal principles of tolerance); Martha Minow, *Putting Up and Putting Down: Tolerance Reconsidered*, *in* COMPARATIVE CONSTITUTIONAL FEDERALISM 77, 77 (Mark Tushnet ed., 1990) (analyzing the paradoxical tension between liberal tolerance and cultural diversity).

[9] *Mozert V*, 827 F.2d at 1073 (Boggs, J., concurring).

[10] This was the remedy granted by the trial court. *See Mozert V*, 827 F.2d at 1063; *Mozert IV*, 647 F. Supp. at 1203.

[11] *Mozert V*, 827 F.2d at 1073 (Boggs, J., concurring).

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But Love and I had the wit to win:
We drew a circle that took him in![12]

Judge Boggs lamented the fact that the school board "drove the children from the school," instead of enfolding them in a more inclusive "hybrid program."[13] As he saw it, accommodations in the form of exemptions from the reading program would have represented the inclusive "circle" of "Love," whereas the imposition of the reading requirements constituted a circle of exclusion.[14]

However, the poem can be interpreted in just the opposite way with the school board's insistence on including all schoolchildren in one reading program seen as the canny, agappic "circle that took [them] in!" Conversely, permitting parents to insulate their children from exposure to foreign ideas can be seen as a way of drawing a circle that "shut[s] [their children] out" from the larger democratic society.

These two readings reflect the tension between cultural pluralism and assimilation that underlies the fundamentalists' complaint against secular humanist education. On the one hand, exposing children to diverse positions and attitudes assimilates them into pluralist culture, thereby preparing them for participation in a democratic society. Hence, this exposure *includes* children in civic life, but also threatens the survival of certain traditional ways of life. On the other hand, insulating children from exposure to diversity helps to protect and perpetuate their parents' traditional way of life, but it also renders the children less fit for participation in a pluralist democracy.

Mozert both exemplifies this dilemma and illustrates the confusion that shrouds it. The notion that tolerance and exposure to competing ideas violate the right to the free exercise of religion has confounded the courts.[15] Indeed, the anti-assimilationist complaint has been only dimly perceived, as it has often been conflated with complaints of offense or compulsion to violate one's personal, religious code of con-

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[12] *Id.* (quoting Edwin Markham, *Outwitted*, *in* THE BEST LOVED POEMS OF THE AMERICAN PEOPLE 37, 37 (Hazel Felleman ed., 1936)).

[13] *Id.* at 1074. For Judge Boggs, a "hybrid program" was one in which the plaintiffs could combine selective opting-out with participation in the public schools by following a separate reading program under parental supervision. *See id.* at 1075.

[14] *See id.* at 1074. Why Judge Boggs then ruled against the plaintiffs remains slightly mysterious. His position seemed to rest on his "reluctant[] conclu[sion] that under the Supreme Court's decisions as we have them, school boards may set curricula bounded only by the Establishment Clause." *Id.* at 1080. Judge Boggs's view that the Free Exercise Clause does not constrain public school curricula, *see id.* at 1078–79, is a dubious one, but it apparently provided the basis for his concurrence.

[15] Similar confusion has greeted the claim that humanist education constitutes "secular religion," in violation of the Establishment Clause. *See* Smith v. Board of Sch. Comm'rs, 655 F. Supp. 939, 942, 968–71, 980–88 (S.D. Ala.), *rev'd*, 827 F.2d 684 (11th Cir. 1987).

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duct.[16] Thus, Part I of this Article uses *Mozert* to exhibit the common failure of critics, defenders, and adjudicators of liberal institutions alike to distinguish complaints about identity- and belief-*formation* from complaints about liberal institutions that assume the *retention* of one's original identity and beliefs.[17] As I explain in this Part, courts and commentators have exacerbated this confusion by equating the interest of autonomous individuals in retaining their beliefs with the interest of parents or communal authorities in transmitting their beliefs to their children.[18]

Part II explores the history of fundamentalism in order to assess the charge that liberalism transforms values through exposure to competing views.[19] This charge is grounded in a rejection of commonly-assumed liberal oppositions — reason versus affect, free choice versus conditioning, individual liberty versus social will[20] — and the acceptance of a competing, essentially communitarian, philosophical tradition that recognizes and values the power of formative cultural contexts to create and shape beliefs.[21]

Mozert raises the fundamental question of what, if anything, is wrong with assimilation. If liberalism condemns indoctrination but refuses to acknowledge its own reliance upon it, and communitarianism condemns the effect of liberalism's alleged indoctrination, a third strand of legal thought both recognizes and offers to justify "indoctrination in tolerance" as necessary to democracy and individual self-fulfillment.[22] Part III describes how a series of precedents that draw on this civic republican approach may be taken to refute the claim that assimilative exposure is necessarily bad.[23]

However, an answer to the fundamentalists' complaint is not supplied by relying on any one of these three philosophies. From the vantage point of the *Mozert* complaint, the asserted distinctions among liberalism, communitarianism, and republicanism seem overstated, if not illusory. Confronted with the question whether to treat assimilation as a harm or a good, each of these philosophies can be manipulated to support either result. As *Mozert* demonstrates and Part IV

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[16] *See infra* p. 600.

[17] *See infra* pp. 607–11.

[18] A rare exception is Marc Galanter's important article delineating the "constellation of overlapping and sometimes conflicting claims for specific freedoms" contained under the "general notion of religious liberty." Marc Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 WIS. L. REV. 217, 217. Galanter explicitly distinguishes the concepts by including separate subsections on the "Freedom to Choose and Change Religion" and the "Freedom to Transmit and Implant Religion in Children." *Id.* at 227–28.

[19] *See infra* pp. 611–29.

[20] *See infra* pp. 611–12, 633–34.

[21] *See infra* pp. 633–34.

[22] *See infra* pp. 644–46.

[23] *See infra* pp. 634–46.

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explains,[24] this is because all three philosophies take beliefs and values to be subjective — and such subjectivism is paradoxically and unavoidably assimilationist.[25]

The Article thus uses *Mozert* to dispel the confusion that clouds our jurisprudence of assimilation. If we accept as true the fundamentalists' allegation that the schools teach tolerance and rationality,[26] the

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[24] *See infra* pp. 647–65.

[25] Subjectivism here refers to a posture toward values that eschews truth-claims and refuses to take a position on claims to objective truth. Subjectivism instead treats all philosophies and religions as subjective beliefs. *See infra* p. 665.

[26] To accept this proposition does not imply the belief that liberal education necessarily achieves the goal of teaching every student to be tolerant and rational. Some scholars dispute the assertion that schooling has any significant impact on students' values and attitudes, and particularly on their political values and attitudes. *See, e.g.*, Tyll van Geel, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197, 262–71 (1983) (citing empirical evidence that schools have little effect on students' political beliefs). There is an oddity in Professor van Geel's argument that the government's authority to inculcate youth should be limited *because* its asserted compelling interest in transmitting democratic values is practically unattainable. According to Professor van Geel, if the government cannot achieve the goal of transmitting values, then it lacks the compelling interest asserted to justify the program of inculcation. But if the government is unable to transmit values successfully, then by definition it is not engaged in the kind of "inculcation of youth" that Professor van Geel seeks to curtail. To the contrary, one might argue that if his empirical contention is correct, then the plaintiffs' claim fails on the simple ground that the harm they allege — liberal indoctrination — cannot be shown to occur. This, however, strikes me as too easy an argument, despite the intuitive plausibility of Professor van Geel's contention that the school lessons do not "take" as firmly as educators might like.

It is difficult to evaluate evidence for or against the empirical claim that liberal or democratic education has no effect on students' values. For example, Professor van Geel disputes that studies showing a correlation between higher levels of schooling and stronger attachments to democratic values support the conclusion that it is the schooling that breeds the attachment to democratic values; instead, he suggests that students who acquire more schooling may be socially predisposed to have a greater attachment to democratic values. *See id.* at 269. This is a reasonable, cautionary interpretation of the evidence, but it is speculative, and one can easily imagine equally speculative and equally plausible interpretations that support the opposite conclusion. More importantly, the empirical claim is difficult to assess because varying descriptions of what is being tested *for* can lead to different conclusions. If we ask whether schools succeed in creating students with an unwavering attachment to democratic values, the answer is clearly no — as noted by Professor van Geel, *see id.* at 267. A different result might, however, emerge if we ask whether schooling *tends* to promote democratic or liberal values. *That* claim is *not* clearly negated by the evidence about the tenuousness of the attachment to such values or by any of the other evidence adduced by Professor van Geel.

Finally, this Article takes the view that the fundamentalists are not concerned only with the case in which their children unequivocally reject their values; they are also concerned with the case in which their children remain attached to their parents' views, but only after coming to see those views as *such* — as subjective, contestable matters of opinion. There is a subtle but important difference between the faith that is innocent of alternatives and that which is not. As Paul Mendes-Flohr remarks in a related context, "To be traditional in the modern age is to be self-consciously so." PAUL MENDES-FLOHR, DIVIDED PASSIONS: JEWISH INTELLECTUALS AND THE EXPERIENCE OF MODERNITY 55 (1991). The introduction of such self-consciousness — what I call "subjectivism" — is a large part of what the fundamentalists oppose, and accordingly, of what this Article is about. This effect, however, is not measured in Professor

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question remains whether such indoctrination is harmful. Unfortunately, our philosophical resources provide inadequate answers to this question. This failure leaves us with troublingly little guidance on that quintessentially American, but also global, conflict between cultural diversity and assimilation.

I. Exposure — What's The Harm?

In December 1983, seven fundamentalist families filed suit against the public schools in Hawkins County, Tennessee.[27] They alleged that the schools' use of the Holt Basic reading series violated the students' and parents' free exercise of religion by exposing children to ways of life contrary to that of their parents.[28] Exposure, the plaintiffs implicitly claimed, indoctrinated students in the liberal traditions of rationalism and cultural relativism, and thereby directly interfered with the parents' ability to raise their children as fundamentalists.[29]

The resulting litigation revealed America's deep confusion over — and ambivalence toward — the use of education to inculcate its children in the ideals of democracy. *Mozert*'s judicial opinions barely acknowledged, let alone resolved, the relationships between indoctrination and assimilation, or the distinction between government actions that offend one's values or coerce one's behavior and those that shape the minds of the citizenry.[30] Instead, the confusion in these decisions reflects doctrinal and philosophical inconsistencies that pervade judicial and academic discussions of assimilation.

This Part shows how the *Mozert* courts failed to confront the plaintiffs' concerns. Section A examines how the plaintiffs conceived of the harm of "mere exposure" and how the courts received and framed that conception in terms of governing constitutional doctrine. Section B analyzes the distinct components of the plaintiffs' alleged injury in order to lay the groundwork for a more general discussion of indoctrination and assimilation in Part II.

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van Geel's analysis. Notwithstanding proper reminders that the public school's claim to influence "civic values" needs to be deflated, it seems improbable that the school has *no* significant effect on the development of the student's values. Accordingly, this Article adopts a middle ground, and therefore assumes for the purposes of argument that education designed to promote values like tolerance is not ineffectual, but also is not so powerful as to overcome competing influences on the student's values, like the family.

[27] *See Mozert V*, 827 F.2d at 1060.

[28] *See id.* at 1060–62; *Mozert II*, 582 F. Supp. at 201–02.

[29] *See Mozert V*, 827 F.2d at 1060–62; *Mozert II*, 582 F. Supp. at 201.

[30] *See infra* pp. 600–01.

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A. The Litigation of Mozert v. Hawkins County Board of Education

The case of *Mozert* is unique even among religious challenges to liberal humanist institutions. Because the *Mozert* plaintiffs did not present an Establishment Clause[31] claim that their public schools were effectively transmitting an alternative "religion of secularism,"[32] the litigation avoided semantic arguments about the defining characteristics of "religion" and "secularism." Instead, it focused sharply on the claim that the plaintiffs' religion was violated by secular education — a focus expressed by the plaintiffs' exclusive reliance on the federal constitutional guarantee of the free exercise of religion and parallel state constitutional provisions in the original complaint.[33]

The distinction between Free Exercise and Establishment Clause arguments against secular humanism is significant for another reason. A finding that the challenged program results in the establishment of a "religion" would require at the very least a reformation of the program. It might even lead to the radical conclusion that public education is unconstitutional per se.[34] In either case, it would subject all students, not just the plaintiffs, to a remedy. By contrast, the *Mozert* plaintiffs brought a more modest free exercise claim. They sought only to have their children excused from the Holt reading program — a remedy that in theory would permit the rest of the students to continue participating in the program and would not require teachers to alter their general course of instruction.[35]

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[31] The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. The Free Exercise Clause provides that Congress shall likewise make no law "prohibiting the free exercise thereof." *Id.*

[32] *See, e.g.*, George W. Dent, Jr., *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 863, 877–79 (1988); Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 234, 241, 249–77 (1989). For the kinds of semantic arguments necessitated by reliance on the Establishment Clause, see Nadine Strossen, *"Secular Humanism" and "Scientific Creationism": Proposed Standards for Reviewing Curricular Decisions Affecting Students' Religious Freedom*, 47 OHIO ST. L.J. 333, 334, 365–67 (1986); and Jay Schlosser, Note, *Secular Humanism in Public School Textbooks: Thou Shalt Have No Other God (Except Thyself)*, 63 NOTRE DAME L. REV. 358, 358–68 (1988).

[33] The plaintiffs specifically relied on the students' rights of conscience and religious liberty guaranteed under the Free Exercise Clause of the First Amendment of the United States Constitution, and article I, sections 2 and 3 of the Constitution of the State of Tennessee; they also relied on the parents' rights to control their children's "religious and moral instruction," allegedly secured by the First, Ninth, and Fourteenth Amendments to the U.S. Constitution. *See* Complaint for Preliminary and Permanent Injunctive Relief and for Damages for Violation of Federal Civil Rights at 8–9, *Mozert I* (No. Civ-2-83-401) [hereinafter Complaint].

[34] I have been told by colleagues and friends that Robert Cover ventured this opinion. John Stuart Mill held a similar view. *See* JOHN S. MILL, ON LIBERTY 176–77 (Penguin Books 1974) (1859).

[35] The defendants in *Mozert* argued that the proposed opt-out remedy could not in practice

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The *Mozert* plaintiffs did not challenge all or even most of the public school program.[36] Nor did they assert the desire to opt out of public schooling altogether. For whatever reason, the plaintiffs indicated that they wished to participate in the public education system but not on conditions that violated their religious rights.[37]

Ironically, it is this apparently moderate posture that makes the *Mozert* claim so difficult.[38] Because the plaintiffs did not represent themselves as insular outsiders seeking to inhabit a perfectly separated sphere, their right to exit the public school system completely did not respond to their complaint.[39] Conversely, because they did not seek to reshape or convert the public sphere, the school authorities could not readily dismiss their claim as an interference with the right of other students to be free from religious impositions.[40] The *Mozert*

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be so constrained and that it would in fact require the teachers to change their course of instruction generally. *See Mozert IV*, 647 F. Supp. 1194, 1201–02. For a general review of cases that involved plaintiffs seeking a right of excusal from instruction on religious grounds, see Malcolm Stewart, *The First Amendment, the Public Schools, and the Inculcation of Community Values*, 18 J. L. & EDUC. 23, 81–85 (1989).

[36] The Complaint specifically requested:

> That a preliminary and permanent injunction be issued prohibiting the defendants from:
> 1. Compelling the student plaintiffs [to read] the Holt Basic Readers; and
> 2. Taking adverse action against said plaintiffs for their refusal to read said books, including but not limited to any further suspension from school and the giving of any adverse grades for the work missed as a result of said suspension.

Complaint, *supra* note 33, at 10. The plaintiffs also requested "[d]amages in such amounts as shall be proven at trial for the violation of their civil rights," *id.*, and damages for the costs of private school tuition incurred by the families whose children were removed by the defendants from school, *see id.* at 9–10.

[37] Prior to the commencement of litigation in *Mozert*, some of the plaintiffs in the case did remove their children to a parochial private school. *See id.* at 3. The other parent-plaintiffs kept their children enrolled in public school. One might speculate that they, too, would have opted for private schooling, but for the cost; however, the plaintiffs did not advance this position. Detractors of the fundamentalists might raise the concern that the plaintiffs really wanted not an opt-out remedy, but a voucher system to support parochial schooling. That argument overlooks the extent to which fundamentalists may legitimately regard participation in mainstream democratic institutions, including public schools, as a benefit. One commentator on *Mozert* suggested that "[a]lthough the public schools promote some values and beliefs that plaintiffs dislike, they also teach skills and perhaps other values that plaintiffs prize." Dent, *supra* note 32, at 897. It is impossible to discern what the plaintiffs' real preferences were, but to the extent that they genuinely desired to participate in the public school system, vouchers are no more responsive to their complaint than the option of unsubsidized private schooling.

[38] *Cf.* Stewart, *supra* note 35, at 87 (arguing that suits claiming a right of excusal from portions of the curriculum present greater problems because of the state's interest in educating other children).

[39] States are constitutionally required to allow private alternatives to public school. *See* Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925). They are, however, entitled to regulate private schools. *See id.*

[40] One might articulate a *societal* interest in preventing children from opting out — or being opted out — of reading programs. Moreover, this task is made easier by recent developments in the Supreme Court's interpretation of the Free Exercise Clause that suggest that the Court will grant broad judicial deference to the assertion of state interests. *See infra* p. 592; *see also*

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plaintiffs were neither outsiders nor insiders. They sought to be both — and this posture made their resistance to exposure to diversity especially difficult to understand.

Mozert is unusual in another respect. Although the *Mozert* plaintiffs identified particular offensive "teachings," such as evolutionary theory and the alleged illiteracy of Jesus,[41] their quarrel with the assigned series of textbooks was broader than that. They explicitly objected to the school's presentation of differing values and beliefs.[42] It was not exposure to a particular hostile value or belief, such as Darwinism, but rather exposure to the diversity of values and beliefs that, to the plaintiffs, represented a violation of the Free Exercise Clause. In other words, the plaintiffs objected to the very principles — tolerance and evenhandedness — traditionally used to justify liberal education.[43]

The defense mounted by the Hawkins County superintendent of schools exemplified the traditional liberal justification. He noted that although "these textbooks expose the student to varying values and religious backgrounds, neither the textbooks nor the teachers teach, indoctrinate, oppose or promote any particular value or religion."[44] According to the superintendent, the idea that "exposure to something" could "constitute teaching, indoctrination, opposition or promotion of the things exposed" is just a "misunderstanding."[45] Indeed, the free exercise complaint against exposure runs counter to the common sense notion that exposure is a position of restraint — a consequence of *refraining* from active interference with religious practices or beliefs. This notion of restraint is built into the word "mere" that the courts used to qualify "exposure."[46] In fact, the desire to avoid interfering with beliefs largely explains the adoption of exposure without "moral lessons" as a pedagogic practice in the public schools.[47] One is strongly tempted to follow the superintendent in defining "exposure"

Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 950 (1989) ("Permitting a group of parents in the public schools . . . to remove their children . . . from the required . . . curriculum would threaten all of the asserted state ends to some degree. The more numerous and complex the state objectives . . . the more difficult the judicial task in making the requisite calculation whether the set of objectives would be so strongly undermined as to justify denial of the free exercise claim.").

[41] For objections to evolutionary theory, see *Mozert V*, 827 F.2d at 1062. For objections to supposed representations of Jesus' illiteracy, see p. 595 below.

[42] *See Mozert V*, 827 F.2d at 1068–69.

[43] *See, e.g.*, DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION 150–55, 162 (1986).

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

[45] *Id.*

[46] *Id.* at 1067.

[47] *See* Michael A. Rebell, *Schools, Values, and the Courts*, 7 YALE L. & POL'Y REV. 275, 282–83 & n.31 (1989). Alternatively, schools might simply omit all references to controversial subjects, like religion. *See* Dent, *supra* note 32, at 871–72.

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in terms of its motive, as the very opposite of interference with religion. However, practices are not wholly defined by their intended purposes.

In determining the effect of "mere" exposure, it is important not to confuse the question of the state's interest in requiring exposure with the preliminary question of whether or not exposure burdens the plaintiffs' free exercise of religion.[48] Ever since the seminal case of *Sherbert v. Verner*,[49] free exercise questions have been governed by a balancing test, under which burdens on an individual's free exercise of religion are weighed against the state's interest in imposing those burdens.[50] If the state's interest is sufficiently weighty, then an infringement does not violate the Free Exercise Clause.[51] Throughout the time *Mozert* was litigated, between 1983 and 1988, the balance was tilted toward the individual through the requirement that the state demonstrate a "compelling" interest that could not be accomplished by less restrictive means.[52] Since that time, the Supreme Court has explicitly relaxed its scrutiny of the state's interests.[53] Under this new approach, state actions that deliberately target religion continue to trigger strict scrutiny, but generally applicable state regulations that only "incidentally" interfere with free exercise (without purporting to do so on their face) will pass constitutional muster if they bear some rational relationship to a plausible state interest.[54]

However, this development in free exercise doctrine has not altered the basic distinction between the balancing question — whether the state's interest outweighs the plaintiff's interest in being free from interference — and the threshold question — whether the plaintiff's free exercise is interfered with at all. Plaintiffs must still demonstrate

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[48] *See generally* Lupu, *supra* note 40, at 934–36, 942–46 (distinguishing the threshold question of the existence of a burden on the plaintiffs' free exercise of religion from the balancing analysis of constitutionality; noting the increased use of the threshold inquiry for discussing free exercise claims; and identifying and analyzing *Mozert* as an exemplar of this strategy).

[49] 374 U.S. 398 (1963).

[50] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-13, at 1251, 1256 (2d ed. 1988). On the rise of balancing in constitutional analysis in general, see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 943–44, 963–72 (1987).

[51] Nor do the other elements of a free exercise claim — sincerity, religiosity, and centrality of asserted beliefs — need to be addressed if sufficient state interest is shown. As Professor Lupu argues, a threshold burden requirement offers "another way of weeding out certain free exercise claims without forcing judges to enter the thicket of theology." Lupu, *supra* note 40, at 959.

[52] *See* TRIBE, *supra* note 50, § 14-13, at 1256.

[53] *See* Employment Div. v. Smith, 494 U.S. 872, 884–85 (1990) (denying the claim that the withholding of unemployment benefits from employees discharged for the crime of smoking peyote constituted a violation of the right to free exercise when peyote-smoking was part of a religious ritual).

[54] *See id.* at 882–90.

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a restraint on their free exercise before they will be permitted to challenge the legitimacy of the state action.[55]

The *Mozert* plaintiffs eventually lost their case at this threshold,[56] but only after four years of tortuous litigation exposed the courts' and litigants' deep confusion both about what kind of harm the plaintiffs were asserting and about what doctrine required them to prove. In the end, seven judicial opinions ignored or dodged these questions — reflecting back the very same questions and confusions that had engendered the complaint.

What, then, is the harm or burden involved in *Mozert*? The history of the litigation reveals a sort of moving target, a shifting portrait of the injury matched against an equally unstable representation of the doctrinal requirements for establishing a constitutionally cognizable burden. However, the immediate cause of the alleged injury is clear enough.

The fight began in 1983 when Vicki Frost read "A Visit To Mars," one of the stories in her daughter's reading text.[57] Mrs. Frost viewed the story as an endorsement of mental telepathy. Incensed, she read on, discovering in the Holt series excerpts from *The Wizard of Oz* and *The Diary of Anne Frank*,[58] the Witches' Chant from *MacBeth*, and depictions of women in nontraditional roles.[59] She saw in these read-

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[55] If the *Mozert* case were to pass the threshold test, how it would fare under the new *Smith* standard is open to interpretation. Under the old test, if the threshold were passed, the conclusion of an unjustified violation of free exercise would almost inevitably follow. Under *Smith*, it is more difficult to determine whether a violation has occurred. On the one hand, it would seem easy for the state to meet the extremely deferential standard of showing a plausible, rational relationship between requiring all public school students to participate in the reading program and a legitimate state goal. On the other hand, *Smith* created an exception to the deferential test for so-called "hybrid cases," in which the free exercise interest, which is to receive only a low level of constitutional protection, overlaps with some other constitutionally protected interest that independently receives a high level of protection. *See Smith*, 494 U.S. at 881 & n.1. One of the enumerated hybrid cases in *Smith* involved the overlap between free exercise rights and the interest of parents in controlling the moral and spiritual education of their children. *See id.* at 881 (citing Wisconsin v. Yoder, 406 U.S. 25 (1972); and Pierce v. Society of Sisters, 206 U.S. 510 (1925)). One might argue that *Mozert* ought to come under this exception and, therefore, trigger strict scrutiny. One might also argue that, to the extent that public education is *intended* to inculcate tolerance — an empirical question — it "targets" the religion of the intolerant and deserves strict scrutiny.

[56] *See Mozert V*, 827 F.2d at 1070.

[57] *See* Brief for the Appellees at 3, *Mozert V* (Nos. 86-6144, 86-6179 & 86-6180) [hereinafter Brief for the Appellees]; Dudley Clendinen, *Fundamentalist Parents Put Textbooks on Trial*, N.Y. TIMES, July 15, 1986, at A14.

[58] Frost and the other plaintiffs specifically objected to the passage in *The Diary of Anne Frank* in which Anne urges her friend Peter to find "some religion" without insisting on the necessity or truth of Frost's religion. *See* Michael Silence, *A Denial of Religious Freedom?*, NAT'L L.J., Oct. 13, 1986, at 6.

[59] *See* Brief for the Appellees, *supra* note 57, at 25; Melinda Beck, *A Reprise of Scopes*, NEWSWEEK, July 28, 1986, at 18–19.

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ings a host of ideas, images, and representations that she believed to be anti-Christian and therefore dangerous.

Some members of Vicki Frost's church — the fundamentalist Presbyterian Church of America — shared her qualms about the reading curriculum. She found more allies among parents in several other local fundamentalist churches,[60] including Robert and Alice Mozert, who eventually topped the list of plaintiffs who sued the Hawkins County public schools. Before a lawsuit was filed, the parents formed Citizens Organized for Better Schools, a group that represented thirty-nine parents and schoolchildren in the Church Hill public school system.[61] The parents decided that, for religious reasons, their children must not be exposed to the Holt reading series, which was assigned in grades one through eight. They contacted the principals of their children's elementary and middle schools and requested an alternative reading program.[62] One school refused the request and sent the children home.[63] Others allowed the children to work from more acceptable readers in the school library while regular reading instruction was in progress.[64] However, six weeks later — after soliciting the opinions of their own pastors — the members of the school board voted unanimously to require exclusive use of the Holt reading series in all of the Hawkins County public schools.[65] Children who refused to participate in the regular reading program were to be suspended.[66]

A few days after the vote, Vicki Frost marched into her daughter's school room to remove her from the reading class. She was promptly arrested for trespassing and disrupting school.[67] Meanwhile, Frost's crusade gained momentum. The Church Hill group attracted the support of Beverly LaHaye, founder of Concerned Women for America, one of several national women's groups dedicated to the fight against secular humanism.[68] With LaHaye's legal and financial assistance, seven families filed an action that alleged the violation of their civil rights by the Hawkins County public schools and school district officials.

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[60] *See* Brief for the Appellants at 9, *Mozert V*, (Nos. 86-6144, 86-6179 & 86-6180) [hereinafter Brief for the Appellants].

[61] *See* David Treadwell, *Christian Group's School Text Trial May Set Precedent*, L.A. TIMES, July 17, 1986, at 16.

[62] *See* Brief for the Appellees, *supra* note 57, at 3.

[63] *See id.* at 4–5.

[64] *See id.* at 3–4.

[65] *See id.* at 5–6.

[66] *See id.* at 7; Complaint, *supra* note 33, at 6.

[67] The charges were eventually dropped, leading to a $70,000 judgment in federal court for false arrest. *See* Cindy McAfee, *Mother Praises God For Judge's Decision*, UPI, Dec. 9, 1983, *available in* LEXIS, Nexis Library, UPI File.

[68] *See* Treadwell, *supra* note 61, at 16.

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The December 1983 action identified eighteen schoolchildren and their parents as the plaintiffs.[69] According to the complaint, "[i]t is a violation of the religious beliefs and convictions of the plaintiff-students to be required to read said books," and "[i]t is a violation of the religious beliefs and convictions of the plaintiff-parents to permit their children to read said books."[70] As summarized by the trial court, the plaintiffs alleged that the Holt books violated their beliefs by:

(1) teach[ing] witchcraft and other forms of magic and occult activities;
(2) teach[ing] that some values are relative and vary from situation to situation;
(3) teach[ing] attitudes, values, and concepts of disrespect and disobedience to parents;
(4) depict[ing] prayer to an idol;
(5) teach[ing] that one does not need to believe in God in a specific way but that any type of faith in the supernatural is an acceptable method of salvation;
(6) depict[ing] a child who is disrespectful of his mother's Bible study;
(7) imply[ing] that Jesus was illiterate;
(8) teach[ing] that man and apes evolved from a common ancestor; and
(9) teach[ing] various humanistic values.[71]

Under the plaintiffs' theory of liability, the school system violated their rights by "coerc[ing]" the children into reading the textbooks by threatening to "force [them] out" of the public schools if they do not.[72]

During the course of the litigation the plaintiffs made a number of more general allegations that may be summarized as follows:

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[69] *See* Complaint, *supra* note 33, at 2–5.

[70] *Id.* at 6.

[71] *Mozert I*, 579 F. Supp. at 1052.

[72] *See* Complaint, *supra* note 33, at 7. One might object that exposure to the materials is not officially required as long as public school attendance is not compulsory and similar requirements are not imposed on private education. *Cf.* Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (holding that parents may not be prohibited from using private alternatives to public education). The standard response to this objection is that conditioning the substantial benefit of a free public education on a waiver of the right to exercise one's religion constitutes coercion of the type that establishes a constitutional violation. This reasoning is embodied in the doctrine of "unconstitutional conditions." *See generally* Richard Epstein, *The Supreme Court, 1987 Term — Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 7 (1988) (describing the problem of unconstitutional conditions as arising "whenever a government seeks to achieve its desired result by obtaining bargained-for *consent* of the party whose conduct is to be restricted"); Lupu, *supra* note 40, at 977 (arguing that the idea that the Free Exercise Clause is triggered whenever the government conditions its benefits "can be squared with the common law approach to defining free exercise burdens by supplementing the traditional common law conception of property with the concept of 'entitlement'"); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1415 (1989) (arguing that "when government conditions a benefit on the recipient's waiver of a preferred liberty," courts must review the conditioned benefit strictly as a burden on a preferred liberty).

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1. The content of the readings in the Holt reading series is contradictory to the plaintiffs' beliefs.[73]
2. The content of the books is false; the readings teach schoolchildren false beliefs.[74]
3. The content of the Holt reading series is "evil," "polluted," and "heathen."[75]
4. The readings induce children to stray from the way of God.[76]
5. Permitting the children to read the Holt series contravenes the parents' duty, mandated by the Bible, to safeguard children from "all influences of evil that might lead them away from the way of God."[77]
6. Parents face eternal damnation for letting their children read the books.[78] Such disobedience to biblical commands results in spiritual or physical punishment.[79]
7. The children will be punished with eternal damnation if they read the books.[80]
8. The content of the readings is offensive; accordingly, the plaintiffs feel offended by the readings.[81]
9. The Holt readers contain "a pervasive bias against the religious beliefs of the parents."[82] They communicate the message to students that religion is exotic and foreign — not something characteristic of ordinary American life. Conversely, they communicate the message that exotic forms of belief are good and attractive.[83]
10. By disparaging the parents' religion, the readings have the potential effect of making children feel embarrassed and ashamed of who they are, in much the same way that textbooks make black children feel inferior by omitting references to black culture.[84]

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[73] *See* Brief for the Appellants, *supra* note 60, at 16–17; Michael Hirsley, *Bible, Science Hold Tennessee Rematch*, CHI. TRIB., July 15, 1986, at 5.

[74] *See Parents Charge Textbooks Equate Humans, Animals*, L.A. TIMES, July 18, 1986, at 2; *see also* Silence, *supra* note 58, at 6 ("'The idea that there are several religions through which one can find God is not correct.'" (quoting the testimony of Vicki Frost)).

[75] *See* Jack Maltby, *Plaintiffs Rest in Textbooks Trial*, UPI, July 18, 1986 (quoting testimony of parents and a student), *available in* LEXIS, Nexis Library, UPI File.

[76] *See id.*

[77] *Id.*

[78] Jack Maltby, *'Scopes II' Half Over; Parents Establish They're Offended*, UPI, July 19, 1986, *available in* Lexis, Nexis Library, UPI File.

[79] The biblical commands allegedly violated were: "learn not the ways of the heathen" and "have no fellowship with the unfruitful works of darkness, but rather reprove them, for it is shameful even to mention what the disobedient do in secret." *See* Brief for the Appellees, *supra* note 57, at 14.

[80] *See Fundamentalists' Witness Tells of Textbooks' Harm*, L.A. TIMES, July 18, 1986, at 23.

[81] *See Parents Charge Textbooks Equate Humans, Animals*, *supra* note 74, at 2.

[82] Brief for the Appellees, *supra* note 57, at 28.

[83] *See id.* at 33. The apparent contradiction between the latter two statements did not seem to trouble the plaintiffs.

[84] *See* Brief for the Appellees, *supra* note 57, at 44 (citing testimony of Dr. Paul Vitz,

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11. The readings have the potential to make Christian children wish to be other than who they are;[85] to create in them a desire to change from their heritage to the one positively portrayed in the text;[86] and to lead them to a world view such as feminism, humanism, or pacifism.[87]
12. The readings impart a skeptical view of religion[88] and teach children to "view Scriptural truth as myth."[89]
13. The readings pressure children "to accept the view that all religions lead to God and are equally valid."[90]
14. The reading program is a subtle form of brainwashing or indoctrination — an effort to change or influence the children's values, or to coerce them into adopting humanist beliefs.[91]
15. The reading program turns the children into cookie-cutter models; it homogenizes and standardizes their values and beliefs.[92]
16. Reading the books causes the children to become more rebellious,[93] to believe that they are their own authority.[94]
17. By encouraging children to believe that they are their own authority, the readings could lead to anarchy.[95]
18. By giving credence to alien philosophies, the reading program confuses the children[96] and unfetters their imaginations when their imaginations ought to be bounded.[97]
19. The development of the students' reading comprehension skills could be stunted because children's understanding decreases when they are presented with materials with which they disagree.[98]

These allegations were treated by the plaintiffs in an undifferentiated manner, encapsulated in the single formulaic assertion that the reading program violated the plaintiffs' religious beliefs. However,

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Professor of Psychology, New York University); *'Anti-Christian' Passages in Texts Could Embarrass Students, Prof. Tells Court*, L.A. TIMES, July 16, 1986, at 2.

[85] *See* Amy McRary, *Domestic News*, UPI, July 17, 1986, *available in* LEXIS, Nexis Library, UPI File.

[86] *See* Brief for the Appellees, *supra* note 57, at 44–45.

[87] *See* Maltby, *supra* note 75; McRary, *supra* note 85.

[88] *See* Hirsley, *supra* note 73, at 5.

[89] Brief for the Appellees, *supra* note 57, at 19.

[90] *Id.* at 22; *see also* Judy Mann, *Religious Readings*, WASH. POST, Oct. 29, 1986, at B3 (stating that the plaintiffs view the reading as implying that all religions are equal).

[91] *See* Brief for the Appellees, *supra* note 65, at 41–43, 63–71; Ewen MacAskill, *Schoolbooks Under Fire In Bible Belt Court*, WASH. POST, July 19, 1986, at A3.

[92] *See* Michael Burns, *Tennessee Textbook Case Goes Before Appeals Court*, UPI, July 9, 1987, *available in* LEXIS, Nexis Library, UPI File.

[93] *See Parents Charge Textbooks Equate Humans, Animals*, *supra* note 74, at 2.

[94] *See Teacher Tells Problems of Using Two Sets of Texts in Same Class*, L.A. TIMES, July 19, 1986, at 25.

[95] *See id.*

[96] *See* John Dart, *Victors in Textbook Trial Look to Alabama Case for Another Triumph*, L.A. TIMES, Nov. 1, 1986, at 4.

[97] *See Slaying Dragons in Tennessee*, N.Y. TIMES, July 18, 1986, at A26.

[98] *See Fundamentalists' Witness Tells of Textbooks' Harm*, *supra* note 80, at 23.

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even a cursory review reveals that they are extremely heterogeneous. The plaintiffs' blanket statements about the violation of religious convictions conflated radically different notions of harm, that range from error and contradiction to coercion, indoctrination, and offense.

Unfortunately, the *Mozert* litigation did more to compound than to dispel the confusion. On February 24, 1984, United States District Judge Thomas Hull dismissed the bulk of the complaint because allegations of "mere exposure to this broad spectrum of ideas and values which [the plaintiffs] find offensive" do not amount to the statement of a constitutional violation.[99] Less than a month later, Judge Hull granted the defendants' motion to dismiss the one remaining claim — that the books teach that any type of faith in the supernatural is acceptable — on the ground that this charge also amounted to nothing more than an objection to an "underlying philosophy" of tolerance for diverse religious views.[100] Explaining why this claim had to be rejected, Judge Hull insisted that the First Amendment guarantees only "that the state schools will be neutral on the subject [of religion],"[101] not that "nothing offensive to any religion will be taught."[102]

Subsequently, the Court of Appeals for the Sixth Circuit found that the existence of a constitutional violation could not be determined without further development of the evidence and remanded the case for trial in district court.[103] Obediently, Judge Hull concluded that "it seems hardly possible to question the fact that the plaintiffs' free exercise rights have been burdened."[104] Finding inadequate justification for the state's interference,[105] Judge Hull ordered officials to permit the plaintiff-schoolchildren to opt out of the reading program while remaining enrolled in the public schools.[106]

The Sixth Circuit again reversed, this time endorsing the trial court's initial view that, by definition, "mere exposure" to ideas could not violate the right to the free exercise of religion.[107] The Supreme Court's later refusal to review the case left this holding as the last official word.[108]

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[99] *Mozert I*, 579 F. Supp. at 1052–53.

[100] *Mozert II*, 582 F. Supp. at 202–03.

[101] *Id.* at 203.

[102] *Id.* (citations and quotations omitted).

[103] *See Mozert III*, 765 F.2d at 78.

[104] *Mozert IV*, 647 F. Supp. at 1200.

[105] Judge Hull considered the adequacy of the state's justification under the then prevailing standard of strict scrutiny. For a consideration of how that analysis would be altered by the shift, announced in Employment Division v. Smith, 494 U.S. 872 (1990), to a generally looser standard of review, see note 55 above.

[106] *See Mozert IV*, 647 F. Supp. at 1203.

[107] *See Mozert V*, 827 F.2d at 1065.

[108] The Court denied certiorari in Mozert v. Hawkins County Pub. Schs., 484 U.S. 1066 (1988).

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B. *Analysis of the Harm in* Mozert

Four years of litigation did nothing to clarify the ambiguous notions of harm in the plaintiffs' complaint, or to illustrate precisely how the school's pluralist practices were thought to interfere with religious liberty, or to define what rights — or even *whose* rights — of religious liberty were at stake. The focus of the claims shifted between the children's autonomy and the parents' rights of control. This section articulates each of those claims in preparation for an examination, in Part II, of the sources of the *Mozert* judges' confusion.[109]

As a starting point, note that the plaintiffs did not believe that the reading requirement affected children and parents in the same way. They asserted that the children would be eternally damned if they *read* the books, whereas the parents would be damned if they *permitted* their children to read them. Indeed, the adults apparently were *required* to read the books in order to fulfill their parental duty. The parents' faith was taken to be unshakable; only the children were thought to be at risk. When the parents read the books, they may have felt offended. However, apart from offense, they did not perceive themselves to suffer directly from reading the books. Instead, they stood to suffer by witnessing their children's estrangement from their heritage and by incurring divine retribution for their failure to perform their parental duties.

This contrast suggests not only differences in the experiences of parents and children, but also differences in the types of effects that the reading requirement could produce. Some were purely emotional, like feeling embarrassed or offended. Some, like the alleged changes in the children's personalities or ways of thinking, had a cognitive component. Other effects consisted of actions performed in violation of the plaintiffs' religious duty. Finally, the possibility of divine retribution represented its own peculiar category of alleged effects.

These distinctions are important. Different types of effects trigger different doctrinal tests for showing a constitutional violation. Because they did not fully parse and address each of the alleged effects, the judges in *Mozert* seemed sometimes to be speaking different languages. Before proceeding, therefore, I will articulate each supposed effect of liberal exposure.[110]

1. Offense. — Most attempts to take seriously complaints against pluralist institutions focus on the complainants' experience of offense, or, sometimes, on the connection between acts that cause offense and

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[109] *See infra* pp. 611–34.

[110] A premise of this Article is that the ambiguities that shroud our understanding of harm ought to be dispelled. It must be acknowledged, however, that greater clarity about assertions of harm may lead to reduced protection under the Free Exercise Clause.

ones that produce more violent kinds of injury.[111] The trial court's first opinion in *Mozert* illustrates this preoccupation with claims of offense. Judge Hull initially granted the defendants summary judgment on the bulk of the complaint because he could not accept the plaintiffs' assertion "that the mere exposure to this broad spectrum of ideas and values which they find offensive amounts to a constitutional violation."[112] He echoed the prevailing view that "distaste" — even "a sincere and passionate distaste" motivated by religious views — does not warrant legal protection.[113] As Judge Hull explained, offense is practically unavoidable "[i]n this highly diverse nation."[114]

2. Coercion of Conduct in Contravention of Religious Commands.— Judge Hull initially failed to note the many allegations that went beyond assertions of mere offense. This oversight was partially corrected in his second opinion. In that opinion, Judge Hull acknowledged the assertions of the parents "that their religion compels them not to allow their children to be exposed to the Holt series" and "that

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[111] *See, e.g.*, Post, *supra* note 6, at 313, 318, 322–23; sources cited *infra* note 113.

[112] *Mozert I*, 579 F. Supp. at 1052.

[113] *Id.* at 1052–53. In other cases, this same view has provided the rationale for limiting the legal liability of individual actors who engage in group libel, "hate speech," and other forms of expressive conduct that injure the feelings — and only the feelings — of others. *See, e.g.*, Collin v. Smith, 578 F.2d 1197, 1206 (7th Cir.) (overturning a group-libel ordinance enacted by the village of Skokie after a threatened march by Nazis provoked wide outcry), *cert. denied*, 439 U.S. 916 (1978). *But see* Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (denying First Amendment protection to group libel). The prevailing dismissive attitude toward the emotional injury of offense is now being seriously questioned in revisionist approaches to the protection of minority rights, in radical feminist critiques of pornography, and in communitarian theories about the necessity of basic norms of civility. *See, e.g.*, CATHERINE A. MACKINNON, FEMINISM UNMODIFIED 163–97 (1987) (arguing for laws against pornography); Matsuda, *supra* note 2, at 2360, 2374–79 (arguing that certain forms of racist speech fall outside the protection of the First Amendment); Note, *A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682, 690–92 (1988) (justifying the constitutionality of group libel laws on communitarian grounds). *But see* William Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 IND. L.J. 351, 375 (1991) (arguing that even if the "right" to be free from offense is grounded in religious tenets, that right is in conflict with the First Amendment). A more exhaustive list of works that analyze restrictions on hate speech is contained in Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 267 n.5 (1991). For now, defining offense as a violation of legal rights remains largely an academic position.

It should be noted that the feminist arguments against pornography, like some of the parallel arguments against hate speech, do not rest primarily on an assertion that the targeted speech wounds the victims' feelings. Rather, they rely on stronger assertions about causal connections between offensive speech and violent behavior and crime. Nevertheless, these works do differentiate hateful or offensive messages from the violent actions or threats to personal security with which they are often associated, and conclude that the non-physical, emotional, or psychological effects resulting from offensive statements themselves warrant protection. *See, e.g.*, Matsuda, *supra* note 2, at 2336–41.

[114] *Mozert I*, 579 F. Supp. at 1052–53.

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the Board's policy interferes with the inherent right of the parents to 'direct the upbringing and education of children under their control.'"[115] In recognizing the plaintiffs' complaint, he thus posited a compulsory violation of a religious obligation.

The forced transgression of a religious command presents a far stronger doctrinal case for a finding of interference with the free exercise of religion than does the experience of being insulted. Offensiveness may count as a violation of rights only in legal theoreticians' dreams;[116] but, ever since *Sherbert v. Verner*,[117] compulsion to breach a religious duty has been *the* doctrinally-defined burden on religious rights.

Sherbert treated religious conduct as a subject of protection under the Free Exercise Clause,[118] thus eroding a distinction that had limited the application of the Clause to government interference with beliefs alone.[119] More significantly, *Sherbert* and its progeny defined the pressure to act *in violation of a religious command* as the paradigmatic free exercise burden.[120]

The plaintiffs invoked *Sherbert*'s conception by arguing that the reading program effectively forced the children to transgress divinely-ordained laws against reading objectionable ideas. Moreover, by permitting such exposure, they suggested, the parents would be forced to break *their* religious obligations.

Nevertheless, only two of the seven opinions in *Mozert* even acknowledged the plaintiffs' claim of a forced violation of religious duty. Judge Hull's first two opinions reduced the plaintiffs' complaint to a

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[115] *Mozert IV*, 647 F. Supp. at 1197 (quoting Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925)).

[116] *See supra* note 113.

[117] 374 U.S. 398 (1963).

[118] *See id.* at 403–04; TRIBE, *supra* note 50, § 14-17, at 1193.

[119] *See* Reynolds v. United States, 98 U.S. 145, 166 (1879) (holding that a Mormon's choice to take more than one wife could be proscribed by the state, because religious beliefs, once carried into practice, fall within the realm of state regulation). Professor Tribe notes generally that the belief-action dichotomy is an oversimplification. *See* TRIBE, *supra* note 50, § 14-6, at 1184.

[120] Precisely the same conception of the burden on free exercise was reaffirmed by the Court years later in Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 139–41 (1987). Similarly, in Thomas v. Review Bd., 450 U.S. 707 (1981), the Court held that a state could not deny unemployment benefits to an individual who refused to work in armaments manufacturing on the ground that such conduct was enjoined by his religious faith. *See id.* at 716–18. Even the peyote case did not reject the prevailing view that being pressured to act in violation of a religion's command constitutes a free-exercise burden. *See* Employment Div. v. Smith, 494 U.S. 872, 890 (1990) (holding that the Free Exercise Clause does not prohibit the application of state drug laws to ceremonial ingestion of peyote and therefore does not prohibit denial of unemployment compensation to claimants fired for ceremonial use of peyote). The question was rather under what circumstances such a burden is unconstitutional. *See id.* at 1602–03.

charge of offensive teaching.[121] Not until his second opinion did he characterize the complaint as being based on claims of religious obligations cognizable under the *Sherbert* standard.[122] Similarly, on appeal, Judge Boggs likened the plaintiffs' assertion of biblical duties to the Roman Catholic Church's *Index Librorum Prohibitorum*, "a list of those books the reading of which was a mortal sin, at least until the second Vatican Council in 1962."[123] Notwithstanding his concurrence in the Court of Appeals's holding against the plaintiffs,[124] Judge Boggs was emphatic about the analogy:

> I would hardly think it can be contended that a school requirement that a student engage in an act (the reading of the book) which would specifically be a mortal sin under the teaching of a major organized religion would be other than "conduct prohibited by religion," even by the court's fairly restrictive standard. Yet, in what constitutionally important way can the situation here be said to differ from that?[125]

Judge Boggs concluded that "it could hardly be clearer that [the plaintiffs] believe their religion *commands*, not merely suggests, their course of action."[126]

Yet Chief Judge Lively, writing for the court of appeals, seemed to deny the existence of such a command. Rejecting the district court's reliance on the *Sherbert* doctrine, he explained that this case presented no

> governmental compulsion to engage in conduct that violated the plaintiffs' religious convictions. . . . 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.[127]

Thus, Chief Judge Lively assumed that "mere exposure" could not constitute coercion to violate a religious duty. He did not even enter-

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[121] *See supra* p. 581.

[122] Thus, he explained:

> Plaintiffs' religious beliefs compel them to refrain from exposure to the Holt series. The Board has effectively required that the student-plaintiffs either read the offensive texts or give up their free public education. This case is clearly in line with *Thomas*, *Sherbert*, and their progeny.

Mozert IV, 647 F. Supp. at 1200. The obligation "to refrain from exposure to the Holt series" applied only to the plaintiff-children. Earlier in the opinion, Judge Hull also recognized the distinct obligation of the plaintiff-parents "not to allow their children to be exposed to the Holt series." *Id.* at 1199.

[123] *Mozert V*, 827 F.2d. at 1075 (Boggs, J., concurring).

[124] *See id.* at 1073–81.

[125] *Id.* at 1075–76.

[126] *Id.* at 1076 (emphasis added).

[127] *Mozert V*, 827 F.2d at 1065.

tain the proposition that a religious proscription against exposure to the reading program might exist. Instead of disproving this proposition as a factual matter, he simply ignored it.

Acknowledging and then ignoring the assertion of religious obligations does not seem to have been an intentional sleight-of-hand. Instead, Chief Judge Lively appears to have been genuinely uncertain about the nature of the plaintiffs' allegations — a confusion also reflected in Judge Hull's dramatic change of opinion after remand. Chief Judge Lively obviously was aware of the issue of religious duty, because he noted at the outset that "[t]he district court held that the plaintiffs' free exercise rights have been burdened because their 'religious beliefs compel them to refrain from exposure to the Holt series.'"[128] Yet he ignored Judge Boggs's direct refutation of his position "that there 'was no evidence that the conduct required of the students was forbidden by their religion.'"[129]

This oversight becomes more understandable — though no less surprising — when we see that the plaintiffs themselves did not keep a steady focus on the issue of religious obligation. The plaintiffs raised the idea of a biblical contravention of the reading program only in passing.[130] Chief Judge Lively's oversight also reveals an intuitive resistance to viewing reading — and, more generally, exposure — as a form of *conduct* proscribed by religious law. This resistance stems in part from the difficulty of substantiating religious proscriptions.[131] Absent a reminder of the *Index Librorum Prohibitorum*, the idea of an enforceable duty not to read ("hear no evil, see no evil") may not fit popular intuitions about the content of religious obligations.[132] Perhaps this is why Chief Judge Lively never inquired into either the substance or the veracity of the plaintiffs' allegation that the reading program contradicted a biblical command.[133]

Instead, Chief Judge Lively repeatedly characterized reading as a matter of "mere exposure,"[134] *as opposed to activities* such as "acting out"[135] ideas, "engag[ing] in role play, mak[ing] up magic chants,"

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[128] *Id.* at 1062 (quoting *Mozert IV*, 647 F. Supp. at 1200) (emphasis omitted).

[129] *Id.* at 1076 (Boggs, J., concurring) (quoting *Mozert V*, 827 F.2d at 1070).

[130] *See* Brief for the Appellees, *supra* note 57, at 14. By contrast, the claim of a parental duty to control education was fleshed out in an amicus brief filed in support of the plaintiffs in the appellate court. *See* Brief For the National Council of Churches of Christ in the U.S.A. as Amicus Curiae at 4–5, *Mozert V* (Nos. 86-6144, 86-6179, 86-6180). The cursory nature of plaintiffs' development of this theme is especially striking given the heavily doctrinal, duty-laden character of the religious faith to which they subscribed.

[131] *See infra* notes 281–287 and accompanying text.

[132] Of course, this assumes a set of intuitions very different from those possessed by the fundamentalist plaintiffs, which suggests that such intuitions are not natural, but are rather reflexes produced by years of socialization.

[133] *See Mozert V*, 827 F.2d at 1065.

[134] *Id.* at 1067.

[135] *Id.* at 1064.

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participating in "roundtable discussions,"[136] or even "read[ing] aloud."[137] The contrast seems to imply that the program did not interfere with the free exercise of religion because it did not require the performance of any act. The notion that "mere exposure" cannot violate freedom of religion because exposure does not make one *do* anything builds on the culturally-entrenched assumption that the exercise of religion consists in acting out a code of positive behavior.[138]

But, of course, reading is an activity. As both Judge Hull and Judge Boggs observed, reading has often been regulated by religious law. Indeed, reading has been, and to some extent continues to be, regulated by civil law, both through outright bans and through public control of library holdings and curricular material.[139] Chief Judge Lively refused to classify reading as conduct regulated by religious law not because he had shown the absence of a religious prescription, but rather because he supposed that reading was not really conduct at all. The supposedly passive state of exposure supplanted the activity of reading in Chief Judge Lively's analysis.

Chief Judge Lively's sharp distinction between reading and reading aloud demonstrates the difficulty of mapping reading onto the passive side of an active-passive line. The notion that the challenged program does not require conduct redescribes the *act* of reading as the *condition* of *being* exposed. Yet reading aloud involves *being* exposed at least as much as does reading to oneself. One activity is silent, the other vocal. One is solitary, the other participatory. But whatever the significance of these distinctions, they do not seem to rest on a contrast between active and inactive states.[140]

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[136] *Id.*

[137] *Id.* at 1066.

[138] Other commentators have criticized this implicit model of religion. *See* Ronald R. Garet, *Dancing to Music: An Interpretation of Mutuality*, 80 KY. L.J. 893, 944–45 (1992); David C. Williams & Susan H. Williams, *Volitionalism and Religious Liberty*, 76 CORNELL L. REV. 769, 791 (1991) (discussing nonvolitionist religions in which "something other than the free choices of a particular individual can create religious consequences for that individual").

[139] *See* Board of Educ. v. Pico, 457 U.S. 853, 869–71 (1982) (overturning school board decision to remove "anti-American, anti-Christian, anti-Semitic, and just plain filthy" books from school library).

[140] An alternative reason for refusing to apply the *Sherbert* doctrine could be a concern that the asserted claim of religious duty, breached by compliance with the law, is spurious. To filter out such spurious assertions, the Court's free exercise doctrine requires that plaintiffs demonstrate that the asserted duty is rooted in a "sincerely held" religious belief that conflicts with the state law at issue. *See* TRIBE, *supra* note 50, § 14-12, at 1242–51. Perhaps Chief Judge Lively was skeptical of the convenience of the assertion of a biblical proscription against the reading, recognized by Judge Hull. Skepticism about the sincerity of this claim would be reinforced by the fact that the plaintiffs hardly emphasized their religious duty. *See supra* note 130 and accompanying text.

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3. Coercion of Declarations. — By molding the complaint into an inadequate allegation of a *Sherbert*-style burden, Judge Lively purported to show that "mere exposure" does not violate the free exercise of religion. But his arguments against the existence of governmental pressure to act in the breach of religious commands were simply too shallow to constitute a genuine *Sherbert* analysis. Instead of applying a *Sherbert* analysis, Chief Judge Lively subtly shifted his attention to the doctrine expounded in *West Virginia State Board of Education v. Barnette*,[141] a 1943 decision that forbade mandatory flag salutes in the public schools.[142] In that case, Justice Jackson proclaimed: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[143] *Barnette* overturned the Court's decision in *Minersville School District Board of Education v. Gobitis*[144] and seemed to enshrine the notion of state-imposed ideologies as the ultimate First Amendment harm.[145] The Hawkins County reading program prescribed no such orthodoxy, according to Chief Judge Lively, and therefore caused no First Amendment violation.[146]

Barnette itself is unclear as to whether it is proscribing government efforts to change people's beliefs or forbidding government from forcing people to affirm beliefs they do not hold. A condemnation of both effects can be read into the *Barnette* opinion. Thus, the opinion suggests a close connection between the two.[147] After all, requiring impressionable children to exhibit adherence to beliefs that they do

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[141] 319 U.S. 624 (1943).

[142] *See id.* at 642.

[143] *Id.*

[144] 310 U.S. 586 (1940).

[145] *See Barnette*, 319 U.S. at 642. Interestingly, in the recent peyote case, which relaxed judicial scrutiny of free exercise claims, Justice Scalia invoked the long-repudiated Frankfurter opinion in *Gobitis* for the proposition that "'[t]he mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.'" Employment Div. v. Smith, 494 U.S. 872, 879 (1990) (quoting Minersville Sch. Dist. Bd. of Educ. v. Gobitis, 310 U.S. 586, 594–95 (1940)). Justice Frankfurter's *Gobitis* opinion, resurrected by Justice Scalia, has been read as a paean to assimilation. *See* Richard Danzig, *Justice Frankfurter's Opinions in the Flag Salute Cases: Blending Logic and Psychologic in Constitutional Decisionmaking*, 36 STAN. L. REV. 675, 679–96 (1984); Nomi M. Stolzenberg, Jews, Jurisdiction and Judicial Review: Un-Covering the Tradition of Jewish "Dissimilation" 7–8 (Nov. 14–17, 1991) (presented at the Conference on Jews and the Law in the United States, University of Wisconsin-Madison) (copy on file at the Harvard Law School Library).

[146] *See Mozert V*, 827 F.2d at 1063–64.

[147] For scholarship interpreting *Barnette* as a prohibition against indoctrination, see Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989), in which Professor Rubenfeld notes that "[t]he specter of an insidious, thought-numbing standardization underlay the *Barnette* decision." *Id.* at 785.

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not (yet) hold is an effective way of cultivating adherence to those beliefs.

From this point of view, the distinction between reading and reading aloud takes on a different meaning. Reading and discussion are not so much *passive* as *reflective*. The sense in which they "merely" expose the student to different ideas is that they allow — or require — her to keep a critical distance from the ideas presented, so that they can be evaluated by rational modes of thought, without any particular claim being pressed upon her, apart from a bid for rational, critical assessment.[148] By contrast, a ritualized profession of belief, such as the flag salute ceremony condemned in *Barnette*, instills ideas and values in the hearts and minds of the participants.[149] From this point of view, reading aloud is distinguishable from reading, insofar as the participatory, group nature of the former may be thought to create the sort of social pressure or "group think" processes that bypass purely rational modes of analysis to appeal directly to the emotions or to a desire for social acceptance. To put the same point in less pejorative terms, reading aloud in class, in contrast to reading by oneself or at home, might produce a sense of shared experience that confirms the acceptability — and hence, tolerability — of the ideas read.

Chief Judge Lively's invocation of *Barnette* suggests that his reason for dismissing reading as "mere exposure" was not that exposure can never be *conduct* proscribed by a religious code, although he sometimes seemed to imply that rather improbable proposition. Rather, his reasoning appears to be based on the belief that "mere exposure" does not require students to *affirm* any particular belief. This understanding explains why he repeatedly stressed the idea that "the exposure to materials in the Holt series did not compel the plaintiffs to 'declare a belief,' 'communicate by word and sign [their] acceptance' of the ideas presented, or make an 'affirmation of a belief and an attitude of mind.'"[150]

Chief Judge Lively made his ultimate reliance on *Barnette*'s anti-indoctrination rationale difficult to perceive by misleadingly implying that the same harm characterizes both governmental requirements to

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[148] For the argument that respect for critical reason should be incorporated into the interpretation of the Free Exercise Clause, see RICHARDS, cited above in note 43, at 133–40.

[149] For a discussion of the particular import of ritual to group identity, see Ronald R. Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1072–74 (1983).

[150] *Mozert V*, 827 F.2d at 1066 ("As we have pointed out earlier, there is no proof in the record that any plaintiff student was required to engage in role play, make up magic chants, read aloud or engage in the activity of haggling [an activity the plaintiffs alleged to be encouraged]. . . . Being exposed to other students performing these acts might be offensive to the plaintiffs, but it does not constitute the compulsion described in the Supreme Court cases, where the objector was required to affirm or deny a religious belief or engage . . . in a practice contrary to sincerely held religious beliefs.").

declare prescribed beliefs and governmental requirements to engage in "practice[s] contrary to . . . religious beliefs."[151] In fact, these two notions of harm are entirely distinct. Although theoretically a free exercise complaint could be based on religious prohibitions against making "false" declarations, *Barnette* does not depend on such allegations. The conception of harm inherent in *Barnette* is as distant from the *Sherbert* conception of a forced violation of religious obligations as it is from the (doctrinally unrecognized) conception of offense as injury.

The failure to distinguish these effects manifests a general failure to differentiate state influence on belief-formation from state-inflicted injuries to already-formed beliefs. Charges of offensiveness and of violating a religious duty both presuppose that plaintiffs retain their traditional values and beliefs, whereas *Barnette* addresses the threat that the government will cause people to *lose* their beliefs. True, *Barnette* also protects plaintiffs from having to make declarations contrary to retained beliefs. But the opinion's thrust is not to prevent the government from forcing individual believers to transgress religious law, nor to shield believers from offensive spectacles. Rather, it is to prevent the government from inculcating a particular ideology or set of beliefs in its citizens.[152] Indeed, were a government program,

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[151] *Id.* Chief Judge Lively repeatedly coupled the *Barnette* indoctrination prohibition with the *Sherbert* notion of forced violations of religious commands as if the two represented identical conceptions of the harm proscribed under the Free Exercise Clause. Thus, he reasoned:

> In *Barnette* the unconstitutional burden consisted of compulsion either to do an act that violated the plaintiff's religious convictions or communicate an acceptance of a particular idea or affirm a belief. No similar compulsion exists in the present case.
>
> It is clear that governmental compulsion *either to do or refrain from doing an act forbidden or required by one's religion, or to affirm or disavow a belief forbidden or required by one's religion,* is *the* evil prohibited by the Free Exercise Clause.

Id. at 1066 (emphasis added). Conversely, he reasoned 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.

Id. at 1065 (emphasis added).

[152] *Barnette* (which did not differentiate between the freedom of speech and freedom of religion implications of the mandatory flag salute) established a ban on the promotion of secular beliefs parallel to the Establishment Clause proscription against the sponsorship of religious beliefs. *See* Board of Educ. v. Barnette, 319 U.S. 624, 633–34 (1943). This prohibition of compulsory demonstrations of belief does not depend on the religious character of the favored beliefs, but on the religious and non-religious rights of conscience accorded to individuals under the Free Speech and Free Exercise Clauses of the First Amendment. *Cf.* William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression,* 67 MINN. L. REV. 545, 566–68, 580–88 (1983) (arguing that the protection accorded in *Barnette* and other cases is best understood, descriptively and prescriptively, as being based on the presence of a free expression claim, and arguing that extending such protection to claims based only on free exercise constitutes an improper favoring of religious over secular views). Justice Scalia's argument in *Smith* that protections previously accorded in nominally free exercise cases were actually based on "hybrid"

like the one challenged in *Mozert*, to cause people to lose their religious beliefs, then the basis for claims of coercion and offense would evaporate — that basis being the plaintiff's subjective religious belief.[153] Similarly, there would be no basis for feeling *personally* offended by the challenged governmental program.

Thus, there is a fundamental inconsistency between claims of offense or coerced duty-violation and *Barnette*-style claims of indoctrination. Yet it is the *Barnette* notion of indoctrination — not offense or violation of religious duty — that is invoked in the plaintiffs' charges that the reading program "coerc[ed]" the children into "adapt[ing] to the beliefs"[154] portrayed in the text; that the text taught the children to "doubt the veracity of the Bible, and view Scriptural truth as myth";[155] that it "pressured [the children] to accept the view that all religions lead to God and are equally valid";[156] that it "inculcate[d] values [like feminism, pacifism, and humanism] in violation of [plaintiffs'] religious beliefs,"[157] and that it ultimately caused the children to change their personalities.[158] Chief Judge Lively reflected the plaintiffs' main concern when he focused upon governmental influence on the formation of beliefs rather than upon conflicts between solidified beliefs and government requirements.

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claims of religion plus speech or religion plus parental rights captures the gist of Professor Marshall's argument. *See* Employment Div. v. Smith, 494 U.S. 872, 881–82 (1990).

[153] *Cf.* AMY GUTMANN, DEMOCRATIC EDUCATION 32 (1987) ("For children who are not yet free (in any case) to make their own choices, teaching the lesson of mutual respect is not a cost. . . . It is a good in itself to all citizens who are *not yet committed* to a way of life that precludes respect for other ways of life." (emphasis added)). This argument overlooks the cost to children of estrangement from their parents' way of life; it also overlooks the possibility that a child may become "committed" to the parents' way of life before developing the faculties of choice. One of the problems running throughout the analysis of claims like Mozert's is that we lack settled criteria for what constitutes commitment. We commonly hold that children automatically "belong" to their parents, before any socialization has occurred. Thus, although Gutmann asserts that "[c]hildren are no more the property of their parents than they are the property of the state," *id.* at 33, she does assume that children can be uncontroversially matched to a particular set of parents and to a specific nation-state, *see id.* at 43. Only slightly less frequently is it held that children naturally "belong" to the community or nation into which they are born. Yet we lack even basic agreement about what defines parenthood, *see* Katherine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 297–306 (1988) (contrasting biological, psychological, and socially-based definitions of paternity and maternity); Sherry F. Colb, *Words that Deny, Devalue, and Punish: Judicial Responses to Fetus-Envy?*, 72 B.U. L. REV. 101, 107–17, 124–25 (1992) (same), and there is even less consensus about the criteria by which children are assigned membership in a particular nation.

[154] Brief for the Appellees, *supra* note 57, at 45.

[155] *Id.* at 19.

[156] *Id.* at 22.

[157] Complaint, *supra* note 33, at 8.

[158] One of the mothers testified that the reading "caused a personality change that made the boy 'rebellious.'" McRary, *supra* note 85. The theme of inducing a rebellious personality is reiterated in Brief for the Appellees, cited above in note 57, at 25–26.

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4. Indoctrination or Interference with Parental Control. — The dispute in *Mozert* was not over whether the reading program had *any* influence on the children's values and beliefs; everyone tacitly agreed that it was designed to have some effect on the character of the students. Although the plaintiffs acknowledged that the influence of the reading program was neither total nor irreversible and that other influences, including the children's families and communities, would continue to exercise their force over the children's development, Vicki Frost and her compatriots feared that even if their children continued to empathize with their parents, they would nonetheless feel alienated from their religious tradition. Exposed to competing ideas, they might feel torn and confused, ashamed of their parents' heritage, skeptical, questioning, desirous of being "'other than what they are,'"[159] but still tenuously attached to their parents, community, and faith.[160]

This raises the critical question: What rights, and whose rights, are violated by this kind of estrangement of children from parents, of maturing individuals from the cultural tradition into which they were born?[161] *Barnette* suggested that schoolchildren, like all citizens of the United States, have the right to be protected against state-imposed indoctrination. But although the *Mozert* plaintiffs repeatedly warned of "brainwashing," the specific interest they asserted most strongly was the parents' exclusive right to control their children's upbringing.[162]

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[159] Amy McRary, *Domestic News*, UPI, July 16, 1986, *available in* LEXIS, Nexis Library, UPI File (quoting testimony of Paul Vitz, a Catholic psychology professor who testified for the plaintiffs).

[160] *See supra* p. 599. A problem with most analyses of indoctrination is that they imagine the student-plaintiffs *either* at the end of the process of indoctrination — at which point their original values, or those of their parents, are lost — *or* wholly outside such a process. It might well be that in the middle of such a process of indoctrination, some degree of self-reflection makes possible the desire to hold on to — or to revive — the beliefs one had at the starting point. But at this point, a degree of self-consciousness about beliefs has been introduced, which may well alter the experience of belief itself.

[161] *See* Lupu, *supra* note 40, at 981, n.166 (raising "the question of who speaks for the children on such matters").

[162] *Cf.* Davis v. Page, 385 F. Supp. 395, 398 (D.N.H. 1974) (denying the claim of Apostolic Lutheran parents to have their children excused from health and music classes on the ground that "the freedom asserted is the right of the parents to inculcate and mold their children's religious beliefs to conform to their own," whereas "[t]he children's rights and interests are not limited to those which their parents assert"). For further analysis of this case, see Stewart, cited above in note 35, at 82–83. Amy Gutmann offers a similar argument against lodging control over education *exclusively* either in the family or in the state. Her argument is based on assertions about children's natural affiliations: "Because children *are* members of both families and states, the educational authority of parents and of polities has to be partial to be justified." GUTMANN, *supra* note 153, at 30 (emphasis added). Gutmann thereby adopts the method of justification explicitly articulated and advocated by Garet, *see* Garet, *supra* note 149, at 1065–68, of grounding rights on claims of existence. The problem with Gutmann's reliance on this methodology is that it begs the questions: to whom *do* the children belong, and who makes that determination? Unless membership automatically or naturally exists at birth, it must be created

The complaint against interference with parental control was explicitly recognized in *Mozert* by Judge Hull. Relying on *Pierce v. Society of Sisters*,[163] Judge Hull referred to the inherent right of parents "'to direct the upbringing and education of the children under their control.'"[164] Even this recognition, however, was blurred by Judge Hull's conflation of the *Pierce* conception of parental authority with the assertion of a biblical duty to direct the upbringing and education of children under one's control. Just as Chief Judge Lively misleadingly equated *Sherbert* and *Barnette*, Judge Hull elided *Pierce* with a *Sherbert*-style claim "that [plaintiffs'] religion compels them not to allow their children to be exposed to the Holt series."[165]

For it is one thing for parents to claim a religious duty to control education, and quite another to claim control over education as a fundamental constitutional right.[166] The doctrinal claim of a parental right to control education is not rooted in the Free Exercise Clause, but rather in the Supreme Court's "substantive" interpretation of the right to liberty protected under the Constitution's Due Process Clause.[167] And if control over education is indeed the parents' constitutional right, then it does not matter whether they can prove the existence of a religious obligation, either on their part, or on that of their children.

It therefore is clear that neither Judge Hull nor Judge Lively saw the fact that the children were not forced to affirm any particular belief as a sign of the absence of *compulsion to violate a religious duty*. Rather, under both *Barnette* and *Pierce*, it signified an attempt by the state to avoid imposing an orthodoxy. The opposition drawn by the court between "mere exposure" and active participation demonstrates the conventional belief that only the latter — reading aloud, role playing, roundtable discussions, or calling upon the student to

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— and education is an instrument in that process. Therefore, questions about who possesses the educational authority to shape a child's identity or affiliation cannot be resolved by a priori claims about the child's identity and affiliation. *See* Stewart, *supra* note 33, at 76–77 ("There is . . . something vaguely troubling about the [*Yoder*] Court's uncritical assumption that children do and should adopt the faith of their parents as a matter of course.").

[163] 268 U.S. 510, 534–35 (1925) (holding that states must allow private alternatives to public education).

[164] *Mozert IV*, 647 F. Supp at 1197.

[165] *Id.*

[166] *Cf.* Ira C. Lupu, *Home Education, Religious Liberty, and the Separation of Powers*, 67 B.U. L. REV. 971, 988–90 (1987) (arguing that states are constitutionally warranted to regulate education).

[167] *See Pierce*, 268 U.S. at 533–35; Meyer v. Nebraska, 262 U.S. 390, 399–401 (1923) (holding that a state law forbidding the teaching of foreign language in school "infringe[d] the liberty to 'acquire useful knowledge' guaranteed by the Fourteenth Amendment"); *see also* TRIBE, *supra* note 50, § 15-6, at 1318 ("At the height of the *Lochner* era, this limitation on state power [to control education] was found to derive from the 'liberty' guaranteed by the due process clause of the fourteenth amendment . . . ." (footnote omitted)).

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affirm or deny a religious belief — result in the inculcation of values.[168]

But the plaintiffs' most challenging claim was precisely that the objective technique of "mere exposure" is itself a form of value-inculcation. This claim, which all but one of the *Mozert* opinions studiously ignored, raises the empirical question of *whether* and to what degree exposure affects the formation of children's values, identities, and beliefs.[169] At a more basic level, the disagreement is over whether to consider the cultivation of individual reason, objective judgment and rational, critical thought — all qualities admittedly "encouraged" by the program — as a form of indoctrination.

II. What Is Indoctrination?

Part I used *Mozert* to identify and disentangle confusions that plague our Free Exercise jurisprudence and obscure our understanding of the First Amendment claims of semi-insular minority communities. In this Part, I narrow my focus to confusions surrounding the claim that the objective, tolerant institution of exposure is itself a form of indoctrination. Through an inquiry into the origins of Christian fundamentalism, this Part exposes inadequacies in our usual conception of indoctrination, and sets the stage for an analysis, in Part III, of the philosophical tensions that have shaped this conception and fostered the confusions that pervade *Mozert.*

A. The Standard Dichotomy: Objectivity vs. Indoctrination

Conventional First Amendment jurisprudence assumes a dichotomy between coercion and free will.[170] On this view, the state eschews indoctrination by encouraging its citizens freely and critically to choose among competing beliefs. By unpreferentially exposing its citizens' children to myriad perspectives, the state fosters rational judgment while affirming its own ideological neutrality.[171] Nowhere can this purported dichotomy be seen more clearly than in the opinions and briefs in *Mozert*, which depict the dispute as a contest between two radically different methods of pedagogy: objective exposure to different points of view versus overtly symbolic inculcation. Chief Judge Lively, for example, enthusiastically endorsed the testimony of

[168] *See Mozert V*, 827 F.2d at 1064.

[169] *See supra* note 26.

[170] An excellent analysis of the proper bounds of education in its confrontation with religion, based on the dichotomy between compulsion and free choice, is contained in RICHARDS, cited above in note 43, at 150–62.

[171] *Cf. id.* at 140–41, 154–55 (explaining the common principles of the Free Exercise and Establishment Clauses as "equal respect for our twin moral powers at three relevant stages: the formation, the expression, and the revision of conscience").

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the Hawkins County school superintendent "'that exposure to something does not constitute teaching, indoctrination, opposition or promotion of the things exposed.'"[172] The reason that "mere exposure" does not amount to unconstitutional indoctrination is that it does not require students to accept or reject the truth of any particular idea. As Judge Hull explained, "[w]hat is guaranteed is that the state schools will be neutral on the subject [of religion], neither advocating a particular religious belief nor expressing hostility to any or all religions."[173] By definition, refraining from the prescription of beliefs cannot result in the prescription of beliefs.

By not affirming — or requiring students to affirm — the truth of any particular view, the Hawkins County school board argued that it had maintained an appropriately non-invasive stance toward the plaintiffs' religion. For the plaintiffs, however, it was precisely this neutrality that was the problem. The Court's reasoning, based on the standard dichotomy between indoctrination and neutral exposure, failed adequately to answer the truly radical assertion that the critical approach of neutrality may itself constitute an assault on the plaintiffs' beliefs.[174]

B. The Critique of the Dichotomy: Objectivity As Indoctrination

To the *Mozert* plaintiffs, the neutral face of exposure was a mask that disguised a mechanism of cultural reproduction. Mere exposure to competing ideas undermined the fundamentalist religious faith because it permitted, even encouraged, rational analysis and collective debate. In their eyes, the standpoint of neutrality estranged the children from their parents' tradition by turning religious absolutes into matters of personal opinion. The schools' seemingly objective appeal to individual reason plainly inculcated the values of individual choice,

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[172] *Mozert V*, 827 F.2d at 1063. A similar distinction informed Judge Hull's initial judgments in favor of the defendants, which hinged on the observation that:

> The complaint contains no allegation that the defendants are attempting to coerce the school children into performing any symbolic act, subscribing to any particular value, or professing any particular form of belief. The plaintiffs' assertion appears to be that the mere exposure to this broad spectrum of ideas and values which they find offensive amounts to a constitutional violation.

Mozert I, 579 F. Supp. at 1052.

[173] *Mozert II*, 582 F. Supp. at 203.

[174] Judge Boggs's concurrence and Judge Hull's opinion also failed to confront this assertion, as they relied on the wholly separate question of whether the reading, or the act of permitting the reading, might constitute conduct in violation of the plaintiffs' prescriptive religious code. *See Mozert V*, 827 F.2d at 1075–76 (Boggs, J., concurring); *Mozert IV*, 647 F. Supp. at 1199–1202. For a discussion of how this command-based view of religion obscures the determination of "neutrality" and thereby may discriminate against "nonvolitionalist" religions, see Williams & Williams, *supra* note 138, at 795–97.

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toleration, and reason — values that, rather than transcending culture, derive from and reproduce a liberal, pluralist society.

Chief Judge Lively dismissed this critique summarily. Although he acknowledged that "Mrs. Frost did testify that she did not want her children to make critical judgments and exercise choices in areas where the Bible provides the answer,"[175] he insisted that "[t]here is no evidence that any child in the Hawkins County schools was required to make such judgments. It was a goal of the school system to encourage this exercise, *but nowhere was it shown that it was required.*"[176]

In light of the asserted antagonism between exposure and tradition — between objective analysis and fundamentalist thought — Chief Judge Lively's comment that the public schools did not *require* the students to exercise critical judgment seems confused, if not disingenuous. The fact that students would "be *free* to give the Biblical interpretation of the material"[177] as Chief Judge Lively observed, was no answer to the parents' concern that the students should *not* be free, but rather should be trained in correct biblical interpretation.

Chief Judge Lively's incomprehension reflects no purely personal intellectual failing, however. The fundamentalists' argument against exposure is truly difficult for one raised in the liberal tradition to grasp, because it relies on a dizzying subversion of the contrast between the objective and inculcative methods of education. The contrast is denied in the plaintiffs' charge that exposure has an indoctrinating effect,[178] and, again, in the proposition that the legitimate alternative to the state inculcating values, which they claim is proscribed by *Barnette*, is not mere exposure but rather "opting out" to allow the parents to inculcate the appropriate values.[179] Such a viewpoint challenges the conventional wisdom that critical reflection, rational thought, and individual choice are the antithesis of, and the best safeguards against, indoctrination.

Years before *Mozert* and the onslaught of challenges to secular humanist education, the Supreme Court, in *School District v. Schempp*,[180] distinguished improper religious instruction from objective studies, such as "comparative religion or the history or reli-

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175 *Mozert V*, 827 F.2d at 1069.

176 *Id.* (emphasis added).

177 *Id.*

178 *See* Brief for the Appellees, *supra* note 57, at 40–45, 63–71.

179 Naturally, the plaintiffs did not explicitly argue for the parents' right to indoctrinate their children. But this claim was acknowledged implicitly in the plaintiffs' references to "the religious beliefs *of the parents*," *id.* at 28 (emphasis added), and their reliance on *Pierce v. Society of Sisters* for the proposition that "[p]arents have the higher right to control the lives and values to be adopted by their children." *Id.* at 66

180 374 U.S. 203 (1963).

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gion."[181] The Court praised the latter as the necessary components of a complete education.[182] Ironically, that same opinion also differentiated the constitutionally permissible "objective[]"[183] study of religion from a hypothetical "religion of secularism"[184] — and thereby 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.

1. Fundamentalism's Historic Opposition to Objective Modes of Thought. — The fundamentalist challenge to "secular humanism" and "liberalism" represents an attack on the entire worldview of modernity — a worldview that emphasizes the ascendancy of reason over social conditioning and "superstition." This worldview is pervasive and diffuse. Apart from a small group of philosophers who have brandished the term,[185] most of the targets of the attack on secular humanism would not recognize themselves as secularists, humanists, or common followers of any particular mindset.[186] Secular humanism has been defined and recognized as an ideology mainly by its opponents.[187] Secular humanism is not, however, a paranoid fantasy of its opponents. The fundamentalists have indeed reacted to something "out there" that impinges upon their belief system. Because the concept of "secular humanism" has been defined by the fundamentalists, it is to their history that we must turn for its elucidation.

(a) Fundamentalism in the Churches. — Christian fundamentalism arose in response to the perceived threat of "liberal" practices, theories, and worldviews.[188] Among these were Darwin's evolution-

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[181] *Id.* at 225.

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *See* Eric C. Freed, Note, *Secular Humanism, the Establishment Clause, and Public Education,* 61 N.Y.U. L. REV. 1149, 1155 (1980).

[186] *See* Strossen, *supra* note 32, at 337–38; Freed, Note, *supra* note 185, at 1153.

[187] Attempts to define secular humanism often ignore the history of the fundamentalist reaction to the ascendance of scientific modes of thought and, in so doing, they founder on one of two fallacies. Either they define secular humanism ahistorically by identifying it with a static, bounded set of principles, *see, e.g.,* Freed, Note, *supra* note 185, at 1153–56 ("[S]ecular humanism reduces to a set of beliefs valuing humans over God, and reason over faith."); or they dismiss it as a figment of the fundamentalists' imagination, *see, e.g.,* Strossen, *supra* note 32, at 336–38. The latter position has the relative virtue of avoiding the formalist fallacy, which holds that secular humanism is the name of an uncontroversially definable philosophy, a term with a fixed referent, recognized by adherents and opponents alike. But it fails to respect the genuine philosophical substance of the fundamentalists' position.

[188] It is worth noting that "liberals" view the Christian fundamentalist movement as equally as threatening. This is evidenced by the scornful treatment of fundamentalists in the popular press. *See, e.g., Slaying Dragons in Tennessee, supra* note 97, at A26 (comparing a modern opponent of secular humanism to a medieval counterpart); *Jim and Pat Cook. Jim Cooks First,* N.Y. TIMES, Mar. 13, 1986, at A26 (describing opposition to humanism as "know-nothing alarmism"). Type-casting is typical of the media image of secular humanism's opponents,

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ary science, atheism, and, more lately, moral and cultural relativism, sex education, and feminism. Equally threatening was a practice that at first blush seems both different and less dogmatic: "mere exposure" to varied ideas. For the fundamentalists, however, there is an inextricable link between the objective method of exposure and the particular substantive ideas exposed.

Fundamentalism has its roots in theological battles within the Protestant church in the nineteenth and early twentieth centuries. At that time, most Americans were Protestant, and most Protestant churches saw themselves as "evangelical."[189] These churches subscribed to the twin principles, established by Luther, of *sola Scriptura, sola fide* — "the authority of Scripture and the belief in salvation by grace through faith."[190] The Lutheran principle of *sola Scriptura* was interpreted to imply "biblical inerrancy." This was *not* a literalist approach to the Bible (as the defendants in *Mozert* asserted),[191] but rather a radical emphasis on the divine authorship of all of the letters of the Scripture — including its authorized translations.[192] The practices adopted by American evangelicals in the name of "inerrancy" retained the symbolic, allegorical, and tropological methods of tradi-

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purveyed by reporters as well as editorial writers. Reporters habitually refer to "the fundamentalists," "born-again Christians," and the "Christian right" as if these were interchangeable terms, designating a monolithic religious and political movement. The common assumption is that the Bible Belt is home to a bunch of Southern Baptists or Evangelists (two more terms that are incorrectly interchanged) who, under the leadership of "televangelists" such as Pat Robertson, Jim Bakker, and Jerry Falwell, have formed a "Christian Right," "New Right," or "New Christian Right" crusade against something called secular humanism, which itself is just "a screen upon which the New Christian Right projects all that is hostile to its own mythology." Donald Heinz, *The Struggle To Define America*, *in* THE NEW CHRISTIAN RIGHT: MOBILIZATION AND LEGITIMATION 133, 133 (Robert C. Liebman & Robert Wuthnow eds., 1983); *see also* GABRIEL FACKRE, THE RELIGIOUS RIGHT AND CHRISTIAN FAITH 7 (1982) ("The typical inclusive term which the Religious Right uses for the values, institutions, programs, policies, and persons that express and embody the power of Satan in our society is 'secular humanism.'"); Dent, *supra* note 32, at 867 (noting the ridicule received by the *Mozert* plaintiffs); *cf.* James D. Hunter, *The Liberal Reaction*, *in* THE NEW CHRISTIAN RIGHT: MOBILIZATION AND LEGITIMATION, *supra*, at 149, 151–56 (describing liberal prejudice against and intolerance of fundamentalism); John N. Moore, *Fundamentalism and the Creation-Evolution Debate*, *in* FUNDAMENTALISM TODAY: WHAT MAKES IT SO ATTRACTIVE? 115, 115 (Marla J. Selvidge ed., 1984) (describing the intolerance of fundamentalist views); Anson Shupe & David G. Bromley, *Interpreting the New Christian Right: A Commentary On the Substance and Process of Knowledge Creation*, *in* NEW CHRISTIAN POLITICS 3, 4-7 (David G. Bromley & Anson Shupe eds., 1984) (identifying biases against fundamentalism in scholarship).

[189] *See* David A. Rausch, *Fundamentalist Origins*, *in* FUNDAMENTALISM TODAY: WHAT MAKES IT SO ATTRACTIVE?, *supra* note 188, at 11, 12; Phillip E. Hammon, *Foreword*, *in* NEW CHRISTIAN POLITICS, *supra* note 188, at ix, x–xi.

[190] FACKRE, *supra* note 188, at 5. As scholars of religious studies have noted, "[t]he word evangelical . . . is subject to such variations these days that it no longer conveys a clear meaning." *Id.*

[191] *See* Brief for the Appellants, *supra* note 60, at 9.

[192] FACKRE, *supra* note 188, at 31.

tional Christian biblical interpretation.[193] However, the evangelicals regarded the biblical words as "referential truth" that implied "a correspondence between the details of the text and some event or reality outside the text."[194] In its most extreme formulation, biblical inerrancy meant not only that "the Bible is without error in everything that it asserts,"[195] but also that "everything that Christianity is is articulated in the Bible and . . . apart from a belief in its inerrancy it is not possible to know what Christianity is."[196]

This "Old Evangelicalism"[197] was severely challenged by the importation to America of "higher [biblical] criticism."[198] Higher criticism was a mode of analysis developed by liberal Protestant theologians and philologists in Germany in the nineteenth century.[199] On the basis of critical historical and literary methods of interpretation that revealed discrepancies within the biblical texts, the higher critics called into question the divine authorship (although not necessarily the divine inspiration) of the Scripture. Professor Vincent Branick has recently described the critical method and its role in the development of modern Christian fundamentalism:

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[193] *See* Vincent P. Branick, *The Attractiveness of Fundamentalism, in* FUNDAMENTALISM TODAY: WHAT MAKES IT SO ATTRACTIVE?, *supra* note 188, at 21, 21 ("On the contrary, modern fundamentalist writers are speedy to forego a literal interpretation for the most bizarre symbolic or figurative reading whenever the truth of the Bible is at stake."); *see also* WALTER H. CAPPS, THE NEW RELIGIOUS RIGHT 15 (1990) (discussing the continued use of non-literal methods of interpretation as a basis for political commentary).

[194] Branick, *supra* note 193, at 21.

[195] Edgar A. Towne, *Fundamentalism's Theological Challenge to the Churches, in* FUNDAMENTALISM TODAY: WHAT MAKES IT SO ATTRACTIVE?, *supra* note 188, at 31, 31–32.

[196] *Id.* at 34. Interestingly, some Christian theologians regard this as a principle which tends toward idolatry because it "assimilates" God to the Bible and "involves the displacement of Christ by the Bible as the head of the church." *Id.* at 37. These theologians hold that by denying the authority of the ecclesial tradition of the church, and by denying that human experience, unmediated by biblical interpretation, constitutes a source of knowledge of God, and by insisting on the infallibility and exclusive authority of their reading of the "plain meaning" of the Bible, the adherents of the doctrine of biblical inerrancy are practitioners of their own kind of "secular humanism," in which their inevitably fallible, human interpretations of the Bible are disguised as the divine truth. *See* FACKRE, *supra* note 188, at 33.

[197] Old Evangelicalism refers to this reading of *sola scriptura* combined with an interpretation of *sola fide* as requiring the kind of conversion experience and fervent devotion characteristic of the "born-again" Christian. *See* FACKRE, *supra* note 188, at 5–7. It should be noted that "fundamentalist" or evangelical revivals, emphasizing this version of *sola fide*, also developed in response to stimuli other than the rise of critical scholarship. *See generally* WHITNEY R. CROSS, THE BURNED-OVER DISTRICT 18–19, 43, 114–25, 211–15, 268, 275, 325–26, 344–45 (Octagon Books 1981) (1950) (describing deism, Unitarianism, Catholicism, Freemasonry, the decline of the business cycle, spiritualist cults such as mesmerism, and Swedenborgianism as factors to which evangelicals responded); ALICE F. TYLER, FREEDOM'S FERMENT 27–28, 79–80 (Harper Torchbook 1962) (1944) (describing Unitarianism, Universalism, Spiritualism, and Swedenborgianism).

[198] *See* Rausch, *supra* note 189, at 13.

[199] JOHN H. HAYES, AN INTRODUCTION TO OLD TESTAMENT STUDY 120 (1979).

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> Historical criticism as *critical* has long insisted on an objective reading of Scripture. The historical critic, furthermore, models this objectivity on that of the empirical sciences, where a personal distancing from the object, a certain neutrality before the proposed discovery, forms a necessary presupposition to correct procedure. Absolute neutrality is impossible, but the empirical method requires enough detachment to allow questions to be asked and to let the data speak for themselves. For objective results people don't want a tobacco company to research the relationship between smoking and lung cancer. In somewhat the same way historical critics do not set out to "prove" that the Bible is right. They want to know what an author or some community meant when it produced a particular piece of literature. Critical scholars intend to let the text speak regardless of how they might want it to speak.
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> In so doing historical criticism must bracket the truth question. It does not question whether the text accurately describes the way things are or were concerning God and humanity. It asks, rather, how the text relates to the linguistic constraints and possibilities arising from the authors' world. It deals with "meaning" or "nonsense," not "truth" or "error."[200]

Higher criticism did not initially divide Christian from non-Christian, theist from atheist. Instead, it created a barrier within the faith between orthodox Christian believers and more liberal scholars in the (largely Christian) universities.[201] Most nineteenth-century evangelicals accepted — or were at least open to — higher criticism, just as they were to Darwin's theory of evolution.[202] "Conservative" evangelicals, by contrast, rebuffed both higher criticism and evolutionary theory as threats to the true Christian faith.[203] In response to these challenges, they redoubled their commitment to biblical inerrancy.

By the turn of the century, the minority of evangelicals who opposed liberal Christianity had begun calling for a return to "the fundamentals" of Christianity.[204] Between 1910 and 1915, the recently-formed Bible League of North America produced a twelve-volume paperback anthology of the writings of a broad range of conservative American and British evangelical Christians, including distinguished

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[200] Branick, *supra* note 193, at 21–22; *see also* VAN HARVEY, THE HISTORIAN AND THE BELIEVER 3–35 (1966) (arguing for an approach to historical criticism that relies on the work of modern linguistic philosophers for interpretive techniques).

[201] *See* Rausch, *supra* note 189, at 13.

[202] *See* Ralph C. Chandler, *The Wicked Shall Not Bear Rule: The Fundamentalist Heritage of the New Christian Right in* NEW CHRISTIAN POLITICS, *supra* note 188, at 41, 46–47 (noting the acceptance by nineteenth-century evangelicals of higher criticism of Darwinism).

[203] *See* Moore, *supra* note 188, at 115; Rausch, *supra* note 189, at 13.

[204] *See* Rausch, *supra* note 189, at 11; James A. Speer, *The New Christian Right and Its Parent Company: A Study in Political Contrasts, in* NEW CHRISTIAN POLITICS, *supra* note 188, at 19, 28–29.

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Princeton theologians, Bible teachers, and popular writers.[205] Financed by two Los Angeles oil magnates, Lymon and Milton Stewart, *The Fundamentals*, as the series was called,[206] was sent to three million people, including pastors, Sunday school directors, students, and professors of theology.[207] Although the many contributors represented different points of view, *The Fundamentals* as a whole "emphasize[d] personal salvation, individualistic religion, the doctrine of biblical inerrancy, the refutation of higher biblical criticism, the rejection of modern scientific method, the importance of foreign missions and evangelism, millenarian literalism, and attacks on 'heretical' faiths such as Roman Catholicism and Mormonism."[208]

During the First World War, some followers of *The Fundamentals* took a pacifist stance.[209] But for most of them, "[t]he war came to be viewed as a struggle against German rationalism, which was regarded as having laid the groundwork for German militarism and the moral breakdown of German culture."[210] In 1919, the World's Christian Fundamentals Association was established in Philadelphia.[211] By 1920, the existence — and threat — of fundamentalism was registered by a "mainline" Protestant pastor, Professor Harry Emerson Fosdick of the Union Theological Seminary, in a sermon tendentiously entitled *Shall The Fundamentalists Win?*[212]

The growing rift between fundamentalists and the Christian and American mainstream was symbolized by the famous *Scopes* "monkey trial" in 1925.[213] Technically, William Jennings Bryan won the suit against biology teacher John Scopes for violating a Tennessee anti-evolution law. However, the opposing lawyer, Clarence Darrow, was widely regarded as having made a monkey of Bryan and his fundamentalist beliefs.[214] The national press depicted the Scopes trial, in great detail, as a battle of enlightenment against ignorance.[215]

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[205] *See* DINESH D'SOUZA, FALWELL BEFORE THE MILLENNIUM 23 (1984); Chandler, *supra* note 202, at 43; Rausch, *supra* note 189, at 11; Speer, *supra* note 204, at 29.

[206] The full title, according to D'Souza, is *The Fundamentals: A Testimony To Truth*. *See* D'SOUZA, *supra* note 205, at 23.

[207] *See id.* at 23-24; Chandler, *supra* note 202, at 43.

[208] Chandler, *supra* note 202, at 43.

[209] Speer, *supra* note 204, at 29.

[210] *Id.* (citation omitted). "The fight against German higher criticism and Modernism became a contest for the survival of Christian civilization in America." *Id.*

[211] Rausch, *supra* note 189, at 12.

[212] *Id.*

[213] In the early 1920s, fundamentalists shifted their primary concern from higher biblical criticism to Darwinism, *see* Speer, *supra* note 204, at 29, and, in some states, succeeded in passing legislation outlawing the teaching of evolution. *See* D'SOUZA, *supra* note 205, at 28–29; Moore, *supra* note 188, at 120.

[214] *See* Speer, *supra* note 204, at 29–30.

[215] This intellectual and moral judgment, trumpeted by newspapers across the country, was intertwined with the complex politics of class and status in a rapidly changing society:

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Following the debacle of the Scopes trial, fundamentalism entered a new stage. Fundamentalists were shunned by mainstream academic institutions, like the Princeton Theological Seminary,[216] and by more moderate evangelicals. Their estrangement from mainline Protestantism was sealed by the fundamentalists' failure to remove the "liberals" from the church.[217] After this defeat, they withdrew and formed their own institutions. Children's schools and Bible camps, colleges and seminaries, radio programs and magazines explicitly devoted to fundamentalism mushroomed across the country.[218]

But the separatist impulse to withdraw from the corruption of political society competed with a theocratic impulse to redeem the realm of earthly power by harnessing it to spiritually correct purposes. This "dilemma of earthly power," which has been traced back to Calvin's reflections on "Civil Government," is a perpetual tension in Protestant thought.[219] For conservative American Protestantism, the tension is revealed by the fact that, despite their well-deserved reputation for political quiescence before the 1970s,[220] fundamentalists and evangelicals were active participants in the Prohibition movement[221] and flirted with anti-communism in the 1950s.[222] Nevertheless, the

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> Clearly, Roman Catholics, Jews, and the urban middle classes made cultural and political gains at the expense of the native Protestant right as a result of events in the 1920's and early 1930's. However, those sociologists and historians who interpret right-wing movements among Protestants since the early 1930's as primarily responses to threats posed by non-WASPs to WASP values and culture, overlook something of far greater importance to the social position of the Protestant religious Right than the portent of non-WASP ascendance — the solidification of a division among Protestants into two great camps, one disdainful of the other.

John H. Simpson, *Moral Issues and Status Politics*, *in* THE NEW CHRISTIAN RIGHT, *supra* note 188, at 187, 199.

[216] *See* D'SOUZA, *supra* note 205, at 29.

[217] *See* Speer, *supra* note 204, at 29.

[218] *See* D'SOUZA, *supra* note 205, at 29.

[219] David Little has identified the "dilemma of earthly power" as an inherent ambiguity of Calvinist thought. *See* DAVID LITTLE, RELIGION, ORDER AND LAW 54–56 (1984); *cf.* Chandler, *supra* note 202, at 58 (claiming that "[t]he new Fundamentalism resolves the old ambivalence about how to relate to the world — in a theocratic or separatist way — strongly on the theocratic side of the choice."); Robert M. Cover, *The Supreme Court, 1982 Term — Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 11–19, 28–40 (1983) (discussing the more general case, of which American Protestantism is one example, of the tension between insular and redemptive impulses in committed communities vis-à-vis civil society). This dilemma also recalls the tension between sacerdotal and temporal realms within the Catholic church hierarchy.

[220] *See* CAPPS, *supra* note 193, at 10 ("Virtually all of the textbook analyses confirm that the traditional stance of conservative or rightist religious groups in the United States is to opt for marginality. Characteristically, many of the evangelical and conservative religious communities have chosen to be both anti-intellectual and apolitical."); Robert C. Liebman, *The Making of the New Christian Right*, *in* THE NEW CHRISTIAN RIGHT, *supra* note 188, at 227, 227; Simpson, *supra* note 215, at 199; Robert Wuthnow, *The Political Rebirth of American Evangelicals*, *in* THE NEW CHRISTIAN RIGHT, *supra* note 188, at 167, 167–68.

[221] *See* Wuthnow, *supra* note 220, at 167.

[222] Fundamentalist anti-communist action was focused around Carl McIntire and Reverend

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doctrine of "separation from evil things" predominated for the fundamentalists between the late 1920s and the late 1970s.[223] Ever more pure and "fundamental" institutions were carved out by leaders like Bob Jones, Sr., who founded Bob Jones University in South Carolina in 1927, and J. Gresham Machen, who split off from the mainline Presbyterian Church in 1935 to found the alternative Presbyterian Church of America.[224] Even as the fundamentalist movement entered a period of expansion in 1949, the organizations it spawned were increasingly separatist in character.[225]

Machen's break with the liberal wing of Presbyterianism was a key moment in the ideological battle against secular humanism. Machen, a teacher of the New Testament at Princeton Theological Seminary, was one of the chief opponents of the liberal "Auburn Affirmation" of 1924. The Auburn Affirmation accorded Presbyterians greater flexibility in interpreting the Bible and repudiated the five fundamentals of Presbyterian faith: Scriptural inerrancy, virgin birth, the substitutionary atonement, the bodily resurrection, and the authenticity of biblical miracles.[226] One year earlier, in his book on *Christianity and Liberalism*, Machen had warned:

> [T]he present time is a time of conflict: the great redemptive religion which has always been known as Christianity is battling against a totally diverse type of religious belief, which is only the more destructive of the Christian faith because it makes use of traditional Christian

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Billy James Hargis. *See* D'SOUZA, *supra* note 205, at 30; Speer, *supra* note 204, at 34. Most fundamentalists were not, however, moved to abandon insularity by the anti-communist campaign. *See* D'SOUZA, *supra* note 205, at 30–31; Simpson, *supra* note 215, at 201.

[223] Moore, *supra* note 188, at 120. The separate institutions born of "separation from evil things" were "sect-type" churches which "distinguish[ed themselves] from [their] surroundings by the fervor of [their] faith and the rigor of [their] moral and spiritual disciplines." FACKRE, *supra* note 188, at 75 (drawing on the terminology of the liberal German theologian and historian, Ernst Troeltsch). Fackre describes their concept of the church as:

> [A] merging of the three varieties of sixteenth-century Anabaptist spirituality: evangelical, conventicular, and revolutionary. The fervent faith and evangelistic outreach of the Religious Right is related to early Anabaptists who saw their mission as conversion of sinners. Its withdrawal from the corruptions of the world and its creation of an alternative society are linked with Anabaptist conventicles, which can be still seen in contemporary Old Order Amish counter-culture. The feature that distinguishes the Religious Right most significantly from other forms of pietism in our time is the continuation of the revolutionary impulse of the Anabaptists of the city of Munster . . . .

Id.

[224] These separatists sharply criticized the more moderate new Evangelical movement started by Reverend Billy Graham in his first crusade in Los Angeles in 1949, a truly outward-reaching mass movement. *See* FACKRE, *supra* note 188, at 32; *see also* WILLIAM MARTIN, A PROPHET WITH HONOR 218–19, 239–41 (1991) (describing the harsh criticism of Graham by Bob Jones, Sr. and others).

[225] For example, when the ACCC spawned the International Council of Christian Churches in 1949, it did so expressly to protest against a meeting of the mainline International World Council of Churches. *See* Speer, *supra* note 204, at 33.

[226] *See* CAPPS, *supra* note 193, at 59–60.

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> terminology. . . . But manifold as are the forms in which the movement appears, the root of the movement is one; the many varieties of modern liberal religion are rooted in naturalism — that is, in the denial of any entrance of the creative power of God . . . .[227]

When Machen later refused to accept the liberalizations of the Auburn Affirmation, he was defrocked.[228]

Besides founding the fundamentalist Presbyterian Church of America — the church that Vicki Frost, the instigator of *Mozert*, belonged to sixty years later — Machen inspired generations of critics of secular humanism. He placed education at the center of the battlefield,[229] a sentiment popularized years later by Francis Schaeffer in *A Christian Manifesto*.[230] Schaeffer's *Christian Manifesto* was fashioned as a response to the *Humanist Manifesto*, a public letter originally signed by thirty-three representatives of the American intelligentsia in 1933. Chiefly authored by John Dewey, the original *Humanist Manifesto* referred to itself as a "religious" creed that neither denied nor affirmed the existence of God, but rather focused on individual responsibility for the development and fulfillment of the human personality.[231]

Although Schaeffer's *Christian Manifesto* took the form of a direct response to the *Humanist Manifesto*, it mounted an attack against a broader conception of secular humanism as the prevailing, overarching intellectual system in which "Man" instead of God has become "the measure of all things."[232] The result of this profound transvaluation

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[227] J. GRESHAM MACHEN, CHRISTIANITY AND LIBERALISM 2 (1923).

[228] *See* CAPPS, *supra* note 193, at 60.

[229] Capps quotes Machen as stating that "the most important thing of all [is] the renewal of Christian education." *Id.* at 63.

[230] *See* FRANCIS A. SCHAEFFER, A CHRISTIAN MANIFESTO 17, 110–13 (1982).

[231] Specifically, it held that:

> *First:* religious humanists regard the universe as self-existing and not created.
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> . . .
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> *Fifth:* humanism asserts that [the] nature of the universe depicted by modern science makes unacceptable any supernatural or cosmic guarantees of human values.
>
> . . .
>
> *Eighth:* religious humanism considers the complete realization of human personality to be the end of man's life and seeks its development and fulfillment in the here and now.
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> . . .
>
> *Ninth:* in the place of the old attitudes involved in worship and prayer the humanist finds his religious emotions expressed in a heightened sense of personal life and in a cooperative effort to promote social well-being.
>
> . . . Man is at last becoming aware that he alone is responsible for the realization of the world of his dreams, that he has within himself the power for its achievement.

A Humanist Manifesto, *reprinted in* THE HUMANIST, Jan.–Feb. 1973, at 13, 13–14.

[232] SCHAEFFER, *supra* note 230, at 24 ; *see also 2 Sides Wrap Up Arguments Over Textbooks in Tennessee*, N.Y. TIMES, Sept. 25, 1986, at B9 ("According to fundamentalist doctrine, secular humanism is a view that elevates transient human values over eternal, spiritual values.").

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is moral and cultural relativism.[233] In the view of Schaeffer and his followers, an indifference to biblical absolutes has been engendered over the centuries by such diverse media as modern science, Enlightenment philosophy, and Nietzschean nihilism, and, more recently, hallucinogenic drugs, surrealistic art, and rock music. The result was Communism and Nazism in Europe, and the culture of drugs, abortion, homosexuality, and nontraditional sex roles in the United States. From this same perspective, the most powerful vehicle of secular humanism today is the public school. There, the techniques of "values clarification,"[234] sex education, improper guidance counseling, and "a mish-mash of current social studies fads" foster self-indulgence, sexual permissiveness, and ethical relativism as part of a broader "socialist-utopian agenda."[235]

Among the most challenging claims against secular humanism are the assertions that it constitutes a form of totalitarianism or authoritarianism,[236] or is an alternative kind of religion.[237] In the eyes of the fundamentalist critics, secular humanism is dehumanizing[238] and liberalism is intolerant.[239] Fundamentalist political leaders capitalize on these paradoxical charges that seem to require liberalism's opposition to authoritarianism and intolerance to turn against itself.

This perspective has not been ignored by the courts. As early as 1961, in *Torasco v. Watkins*,[240] the United States Supreme Court classified "Secular Humanism," along with Ethical Culture, Buddhism, and Taoism, as a religion, despite the absence of a belief in God.[241] In 1963, the Court speculated that a "'religion of secularism,'" taught in the public schools, might violate the constitutional prohibition against the state establishment of religion.[242] During the last

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[233] *But see* GUTMANN, *supra* note 153, at 19 (distinguishing "'subjectivism,' which claims morality to be nothing more than personal opinion," from relativism, which is defined as the view that values are relative to the constitution of the particular state or community in which they are located).

[234] For a description of the concept of values clarification, see SIDNEY B. SIMON, LELAND W. HOWE & HOWARD KIRSCHENBAUM, VALUES CLARIFICATION: A HANDBOOK OF PRACTICAL STRATEGIES FOR TEACHERS AND STUDENTS 13–22 (1972); Rebell, *supra* note 47, at 284–86.

[235] CAPPS, *supra* note 193, at 76, 77; *cf.* Michael Isikoff, *The Robertson Right and the Grandest Conspiracy*, WASH. POST, Oct. 11, 1992, at C2 (describing a letter by Pat Robertson that charged that a state equal rights amendment was motivated by a "secret feminist agenda" that "encourages women to leave their husbands, kill their children, practice witchcraft, destroy capitalism and become lesbians").

[236] *See* CAPPS, *supra* note 193, at 77; SCHAEFFER, *supra* note 230, at 136.

[237] *See* CAPPS, *supra* note 193, at 74.

[238] *See id.* at 71.

[239] *See* D'SOUZA, *supra* note 205, at 26 (describing Machen's charge that liberalism is intolerant).

[240] 367 U.S. 488 (1961)

[241] *See id.* at 495 n.11.

[242] School Dist. v. Schempp, 374 U.S. 203, 225 (1963).

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three decades, this germ of an idea seems to have spread. Plaintiffs proceeding on the theory that their public schools were imposing a secular "religion" on students litigated cases in Arkansas, California, Rhode Island, Texas, and Washington.[243] And in Kansas, Nebraska, and Pennsylvania, plaintiffs litigated cases on the theory that public schools were interfering with the ability of fundamentalist students and parents to exercise their individual, religious rights.[244]

(b) Fundamentalism Outside the Churches. — The fight against secular humanist education both reflected and stimulated the growing politicization of conservative Christians. It united conservative Protestants with Catholics, including Phyllis Schlafly of the Eagle Forum, and with Mormons and orthodox Jews. The politicization of fundamentalism involved a rejection of the earlier doctrine of worldly separation, articulated as late as 1965 by the Reverend Jerry Falwell, in a sermon to his Lynchburg, Virginia church. According to Reverend Falwell in 1965:

> Nowhere are we commissioned to reform the externals. We are not told to wage war against bootleggers, liquor stores, gamblers, murderers, prostitutes, racketeers, prejudiced persons or institutions, or any other existing evil as such. Our ministry is not reformation but transformation. The gospel does not clean up the outside but rather regenerates the inside.[245]

But by the late 1970s, Reverend Falwell had become the leader of a powerful new conservative political movement, under the auspices of Moral Majority, Inc. He explained his about-face on the propriety of political participation as a response to the Supreme Court's 1973

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[243] *See* Jackson v. California, 460 F.2d 282, 283 n.1 (9th Cir. 1972); Wright v. Houston Indep. Sch. Dist., 366 F. Supp. 1208, 1209 (S.D. Tex. 1972), *aff'd* 486 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974); cases cited *supra* note 4.

[244] *See* Mergens v. Board of Educ., 867 F.2d 1076, 1077 (8th Cir. 1989), *aff'd*, 496 U.S. 226 (1990); Bender v. Williamsport Area Sch. Dist., 741 F.2d 538, 541 (3d Cir. 1984), *vacated*, 475 U.S. 534 (1986); Country Hills Christian Church v. Unified Sch. Dist., 560 F. Supp. 1207, 1209 (D. Kan. 1983). Although these kinds of lawsuits appeared as early as 1972, the real onslaught did not occur until the 1980s. The groundwork was laid by a number of activists, including Francis Schaeffer, his wife, Edith, and son, Franky; Timothy and Beverly LaHaye; Norma and Mel Gabler of Texas; Betty Arras of California; and Onalee McGraw of Washington, D.C. Phyllis Schlafly's national women's organization, the Eagle Forum, also joined the mission to uncover the "social engineering" and "brainwashing" programs in the nation's public schools. *See* CAPPS, *supra* note 193, at 73–84. The activism of women in this fundamentalist campaign is notable.

[245] Frances Fitzgerald, *A Reporter at Large: A Disciplined, Changing Army*, NEW YORKER, May 18, 1981, at 53, 60–63 (quoting Rev. Falwell); *see also* D'SOUZA, *supra* note 205, at 80–81 (describing Falwell's entry into politics and ultimate rejection of the quoted views); FRANCES FITZGERALD, CITIES ON A HILL 14–15 (1981) (describing the fundamentalists' movement from separatism to political action). Reverend Falwell's remarks were made in the context of his rejection of the calls of other religious leaders to become involved in the civil rights movement.

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decision in *Roe v. Wade*,[246] which constitutionalized the right to abortion.[247] That event, Falwell said, convinced him "that government

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[246] 410 U.S. 113 (1973).

[247] The traditional separatist approach did not seem adequate to many fundamentalist leaders after 1973. *See* D'SOUZA, *supra* note 205, at 82–86, 93–97; ERLING JORSTAD, THE POLITICS OF MORALISM: THE NEW CHRISTIAN RIGHT IN AMERICAN LIFE 17–18 (1981); Liebman, *supra* note 220, at 227–36. *But see* Anson Shupe & William Stacey, *The Moral Majority Constituency*, *in* THE NEW CHRISTIAN RIGHT: MOBILIZATION AND LEGITIMIZATION, *supra* note 188, at 103, 113–14 (reporting the results of a survey that suggests that there is no sizable constituency supporting religious involvement in politics). In 1973, fundamentalist churches were threatened with federal investigations by the SEC and the removal of tax-exempt status by the IRS. *See* D'SOUZA, *supra* note 205, at 86; Liebman, *supra* note 220, at 235. Watergate, the women's movement and the fight for ERA, the gay liberation movement, busing, and affirmative action have all been credited as spurs to fundamentalist political action. *See* Jerome L. Himmelstein, *The New Right*, *in* THE NEW CHRISTIAN RIGHT: MOBILIZATION AND LEGITIMATION, *supra* note 188, at 13, 16; Liebman, *supra* note 220, at 235; Simpson, *supra* note 215, at 202.

Roe v. Wade, 410 U.S. 113 (1973), in particular sparked the creation of numerous abortion protest groups, especially among Catholics and conservative Protestants. Other single-issue groups were organized, with people like Phyllis Schlafly leading Stop ERA and Donald Wildmon protesting pornography on television. *See* Himmelstein, *supra*, at 25. In California, evangelicals and other conservative Christians united to combat gay rights legislation. *See* Liebman, *supra* note 220, at 230. Meanwhile, right-wing Republicans without pronounced religious affiliations spied an opportunity in the making. *See* D'SOUZA, *supra* note 205, at 110–13; JORSTAD, *supra*, at 19–20; Himmelstein, *supra*, at 25–29; Speer, *supra* note 204, at 36. The political potential of the religious right seemed to be borne out by the proliferation of single-issue religious groups organized against pornography, abortion, gun control, and labor unions. *See* Himmelstein, *supra*, at 14.

These Republicans courted leading conservative politicians like Senators Jesse Helms and Strom Thurmond, while pursuing liaisons with the leaders of the increasingly influential and lucrative "televangelism." *See* JORSTAD, *supra*, at 72–73. In June 1979, they invited Reverend Jerry Falwell to a private meeting in which the establishment of the "Moral Majority" was first proposed. *See id.* at 73–74. Falwell's consent to their invitation to head the new political organization revealed a dramatic reversal in attitude both toward participating *in* politics and toward participating *with* the great mass of the "unsaved."

Reverend Falwell hesitated, but was convinced in short time that combining his prestige with the technology of the electronic church and the conservative direct-mail networks could result in a highly effective voting bloc. That calculation seemed to be validated by the national coverage that made Reverend Falwell a media celebrity. *See id.* at 88. The Moral Majority rapidly became the largest and most powerful organization of the "New Religious Right." *See id.* at 74. With a computerized mailing list of several million people, it played a visible role in Ronald Reagan's successful presidential campaign in 1980. *See* FACKRE, *supra* note 188, at 1–2; JORSTAD, *supra*, at 92–94; Liebman, *supra* note 220, at 55.

Falwell defended his unorthodox alliances with neat distinctions. The Moral Majority was not a Christian entity, but a political one. The participation of Catholics attracted to its pro-life stance did not, therefore, imply any change in the definition of the true believer. Political coalitions did not imply theological revisions. Americans could support the "moral" agenda of an essentially Christian country without having yet found the way, personally, to the true, Christian faith. (Appealing to his broader audience, Reverend Falwell explained that Jews were not necessarily damned — if they accepted Jesus Christ as their savior.) And in any event, political action by "a coalition of God-fearing, moral Americans" was necessary because government had shown that it "has the power to control various areas and activities of our lives." *See* D'SOUZA, *supra* note 205, at 39 (quoting Falwell).

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was going bad. And I realized that it was, in part, because we had absented ourselves from that process."[248]

This politicization was reviled by some fundamentalists, but it restored the focus of evangelicalism to its original impulse. The dichotomy between the principle of biblical inerrancy and the methods of critical scholarship, which had originally spurred the publication of *The Fundamentals* in 1910, was resurrected in the opposition of Reverend Falwell, Vicki Frost, and others to the practice of exposing students to competing belief-systems from a non-judgmental, critical-objective, tolerant point of view.[249]

Several major textbook publishers tried to accommodate this movement in order to retain their large market shares in states such as Texas and California.[250] For example, Holt, Rinehart and Winston revised its biology textbooks to avoid any hint of confirming Darwin's "suggest[ion] that humans may also have evolved from less specialized ancestors."[251] A spokeswoman for Holt explained, "[t]here *was* no 30 million years ago for the creationists. So you may say, 'Some scientists have theorized that dinosaurs lived millions of years ago.' Geologic ages are out . . . and Cro-Magnon man is out. All these things must

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[248] D'SOUZA, *supra* note 205, at 96 (quoting Falwell). Falwell recanted the doctrine of non-participation as "false prophecy." FitzGerald, *supra* note 245, at 63; *see* Speer, *supra* note 204, at 20. He specifically repudiated his opposition to the civil rights crusade of Martin Luther King, Jr., which had provided the immediate motivation for this 1965 sermon, entitled *Ministers and Marches*. *See* D'SOUZA, *supra* note 205, at 80 ("'I grew up from infancy believing that segregation was right and Christian,' Falwell admits. He preached against the *Brown* decision in 1958, saying, 'If Chief Justice Warren and his associates had known God's word, I am quite confident that the 1954 decision would never have been made.' He was particularly opposed to interracial marriage."); FACKRE, *supra* note 188, at 14.

[249] The belief in biblical inerrancy was surely not the sole motivation behind the fundamentalists' opposition to secular humanist education. In their desire to re-establish the traditional moral framework, which had only recently ceased to govern America's public schools, they joined a broader ecumenical opposition to secular humanism. In fact, Reverend Falwell's Moral Majority and similar political organizations admittedly practice a kind of "reverse ecumenism" by forging alliances between fundamentalists and other Protestants, Mormons, Jews, and even Catholics — their traditional whipping boys. D'SOUZA, *supra* note 205, at 115. For a discussion of the historical fundamentalist antipathy to Catholics and the importance and fragility of the Moral Majority alliance, see Chandler, cited above in note 202, at 51. The Moral Majority actually was the brainchild of Howard Phillips, a former aide to President Nixon, executive director of the Conservative Caucus, and a Jew, *see* D'SOUZA, *supra* note 205, at 109–10, and two other "secular conservative" organizers, Paul Weyrich and Richard Viguerie, *see id.* at 110–11; JORSTAD, supra note 247, at 73. *But cf.* Liebman, *supra* note 220, at 232 ("Several of the essays make it clear that New Right political entrepreneurs like Paul Weyrich and Howard Phillips played important roles in the birth of such conservative Christian groups as the Religious Roundtable and Moral Majority. . . . But it is doubtful that they were crucial to the making of the New Christian Right.").

[250] *See* Philip J. Hilts, *Creation vs. Evolution: Battle Resumes in Public Schools*, WASH. POST, Sept. 13, 1980, at A2.

[251] Pierce, *supra* note 214, at 81.

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be changed."[252] As for instructions to teachers, the spokeswoman added, "'Do not challenge these views' is the best advice we can give now."[253] Holt editors claimed they went to great lengths to be "neutral" about religion in their nonscientific textbooks as well.[254] The resulting products were criticized by liberals for their capitulations to conservative views, and by feminists for deficiencies in female role models.[255]

Given this backlash, it is ironic that it was the Holt series of reading textbooks that became the subject of the fundamentalist attack in Hawkins County, Tennessee. Yet given the historic conflict between the fundamentalist principle of biblical inerrancy and objective modes of thought, the fundamentalists' opposition to Holt's "neutrality" should come as no surprise. Professor Branick explains the fundamentalists' traditional antipathy toward objective scholarship in the following way:

> To the degree that the historical-critical method requires that I distance myself and my life decisions from the matter at hand, to the degree the method renders me a detached observer of the Bible "out there," it becomes a game. Such playfulness fails to do justice to the subject matter of Scripture.
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> . . . .
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> . . . To speak of the "myth of Resurrection" effectively brackets the question of the reality or truth of the Resurrection. It is neither affirmed nor denied. It is only analyzed as to its meaning. As simply having a particular meaning, *it makes no claim on my existence. It summons me to no response, positive or negative.* I am asked to look at the steps of a story, not at the impact of the story in my life. It does not require a "yes" or "no" on my part.[256]

Like the historical-critical method of modern biblical scholarship that Branick discussed, the "neutral" approach of the reading program challenged in *Mozert* threatens to turn serious matters into a game, in which there are no truths, only various positions.[257] In such a setting, Scriptural truth is "neither affirmed nor denied. It is only analyzed as to its meaning." In other words, Scripture becomes just

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[252] Hilts, *supra* note 250, at A2.

[253] *Id.*

[254] *See* Leslie M. Werner, *Religion Lack in Texts Cited*, N.Y. TIMES, June 3, 1986, at C1, C8.

[255] *See* Barbara Vobejda, *Conflict Sharpens over Nation's Textbooks*, WASH. POST, Nov. 10, 1986, at A1.

[256] Branick, *supra* note 193, at 22–24 (emphasis added).

[257] *See id.* at 23.

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one possible story, rather than *the* story whose unconscious internalization endows a life with its particular meaning.[258]

It is this implicit reduction of biblical inerrancy to one among many possible stories or beliefs that makes "mere" exposure a secular humanist practice and poses a threat to the transmission of fundamentalist beliefs. Fundamentalists adamantly oppose the notion that the significance of the Bible is a matter of opinion, for this notion presents fundamentalism as just one among many possible belief-systems from which an individual might choose. This presentation undermines the ability of fundamentalist parents to transmit the truth (as they see it) to their children.

Branick's work exhibits a profound comprehension of the psychological effects of having one's beliefs regarded *as such* — as subjective opinions — and no more. According to Branick, such subjectivism "lacks a certain seriousness." It distances participants in the critical project from the kind of commitments to the truth of one's beliefs that separate the mere observer from the participant in life.[259]

Branick's observations about the fundamentalist perspective recall the distinction drawn by Professor Robert Cover between the "paideic" mode of being *educated into* a specific normative and cultural tradition and the "imperial" mode of being *educated about* different things.[260] In the latter mode, the student remains impartial toward and detached from the things taught. By contrast, being educated *into* a tradition engenders a sense of personal commitment to that which is learned, along with "person-specific,"[261] as opposed to universalist, commitments that constitute membership in a "paideia," or a particular common culture. This kind of education does not occur through the "objective mode of discourse,"[262] but rather through affective modes

[258] *See id.* at 23–24.

[259] *But see* Joseph Raz, *Facing Diversity: The Case of Epistemic Abstinence*, 19 PHIL. & PUB. AFF. 3, 37–39 (1990) [hereinafter Raz, *Facing Diversity*]. Raz disputes the assertion that viewing one's own beliefs *as such*, rather than as the truth, is an inevitable result of appealing to impartial standards to gain agreement. Instead, Raz argues that both the outsider and the insider must recognize appeals to beliefs as appeals to truth, rather than as appeals to the mere fact that such beliefs exist, in order for the notion of beliefs to remain coherent. *See id.* at 39; *see also* Joseph Raz, *Liberalism, Skepticism, and Democracy*, 74 IOWA L. REV. 761, 767 (1989) [hereinafter Raz, *Liberalism*] (arguing that "the fact that someone reasonably disagrees with me [should not] weaken the trust I have in my view").

[260] *See* Cover, *supra* note 219, at 12–14 (1983); *see also* Lawrence, *supra* note 2, at 338–39 (contrasting the absorption of cultural preferences through unconscious or irrational processes with rational deduction from objective observation, and noting that the former is often experienced as the latter, or, in other words, "lessons learned" through acculturation "are learned as facts rather than as points of view"); Strossen, *supra* note 32, at 358 (distinguishing between beliefs presented in an "inculcative mode" that induces students to accept them and beliefs presented in an "analytical mode").

[261] Cover, *supra* note 219, at 13.

[262] *Id.*

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of education, like "shared ritual[s],"[263] that are "initiatory, celebratory, expressive, and performative, rather than critical and analytic."[264]

Similarly, in *Paradoxes of Education in a Republic*, Eva Brann contrasts the objective study of history to learning "by heart."[265] According to Brann, history "is *the* republican study"[266] precisely because it "displace[s] for pupils the religious dogmas of the Bible . . . [a]t the age when what is learned is learned 'by heart.'"[267] Brann invokes Nietzsche's diagnosis of "the anesthetizing pedagogical effect of this 'malady of history' on young students, who are made to live in a 'culture which is not a real culture but a knowledge about culture.'"[268] Continuing the Nietzschean lament, Brann deplores:

> [T]he characteristics of students in the protracted Age of Enlightenment [that] are known to every teacher: How multifariously "exposed" to and how little touched by experience; . . . how full of the vocables of rationality and how thin of speech; how stuffed with theory and how emptied of reflection![269]

In Brann's view, rational reflection grows only out of a particular *tradition*, a term which she translates (exactly as Cover defined "paideia"[270]) as the transmission of specific cultural values and beliefs, and conversely, as the antonym of mere exposure.[271]

2. The Doctrinal Absorption of Objective, Critical Thought and a "Subjectivist" View of Religion. — The "objective" stance shared by modern critical scholarship and the contemporary public school curriculum, which treats beliefs as purely subjective data, is also implicit in the judicial construction of the constitutional free exercise doctrine.[272] One instance of its operation is revealed in the inherent

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[263] *Id.* at 14.

[264] *Id.* at 13 ; *see also* Garet, *supra* note 149, at 1072 (arguing that celebration is the characteristic group act).

[265] EVA T.H. BRANN, PARADOXES OF EDUCATION IN A REPUBLIC 79–81 (1979).

[266] *Id.* at 82.

[267] *Id.* at 81.

[268] *Id.* at 79 (quoting FRIEDRICH NIETZSCHE, THE USE AND ABUSE OF HISTORY 23 (Adrian Collins trans., Liberal Arts Press, 2d ed. 1957) (1876)).

[269] *Id.* at 123–24.

[270] *See supra* note 20 and accompanying text; *supra* p. 597; *supra* note 250 and accompanying text.

[271] Interestingly, the tradition that Brann defended against "mere exposure" is the tradition of Western-humanist scholarship. Brann thus subverts the supposed opposition between humanism and a tradition in which one is inculcated and immersed.

[272] *See* Garet, *supra* note 138, at 946 ("The Court speaks . . . in terms of 'belief systems' and 'religious conceptualizations.'"). Garet criticizes the adoption of this subjectivist view of religion as "arid cognitivism." *Id.* Although I share Garet's view that such cognitivism — what I call the critical-objective perspective — is "arid" in its detachment (or even estrangement) from the felt experience of communal ways of life, I question his suggestion that such a perspective is to be avoided; indeed, I wonder whether it is not an inevitable part of the modern condition.

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difficulty of proving the existence of claimed religious beliefs.[273] In *Mozert*, the existence of a religious duty in contravention of the reading program was never clearly established. Nor was it definitively disproved. Chief Judge Lively did not attempt to do this, and a brief consideration of the argument that would be needed to do so indicates the difficult evidentiary problems confronting those who aim to substantiate religious duties. These evidentiary problems may partly explain why Chief Judge Lively failed to register the duty-based claim.[274] They also reveal the implicit reliance of the free exercise doctrine on an understanding of religion strikingly similar to that of critical biblical scholarship.

The judicial conception of free exercise burdens created by forced violations of religious law has always suffered from a tension between objective and subjective views of religious duty. Religious duty, almost by definition, is not self-imposed. For the fundamentalists in *Mozert*, God had imposed the relevant duties through the Bible, backed by the threat of eternal damnation. The objective reality of this cosmic regime was the very essence of the plaintiffs' religious belief, and it is precisely this sort of belief that the modern doctrine of the Free Exercise Clause seems designed to protect.[275] Yet the fact that the law considers religious obligations to be a matter of *belief* points up the subjective aspect of this doctrine.

Clearly, the federal courts could not have embraced the plaintiffs' allegations about eternal damnation as statements of objective truth without violating the constitutional prohibition against the state adopting a particular religious point of view.[276] Yet just as clearly, the

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[273] Notwithstanding the judicial commitment to define religion according to the plaintiff's subjectivist beliefs of religion, there are competing judicial tendencies to rely on objective factors. *See, e.g.*, Note, *Burdens on the Free Exercise of Religion: A Subjective Alternative*, 102 HARV. L. REV. 1258, 1265–68 (1989). The Note argues that despite being constitutionally committed to a subjective view of religion — a commitment expressed in cases like United States v. Seeger, 380 U.S. 163 (1965), in which the Court accorded the status of religious conscientious objector to an individual who denied conventional belief in God, *see id.* at 166–67, 186–87 — the Court has impermissibly adopted an objective test of free exercise burdens. *See* Note, *supra*, at 1265–70. Another argument that seemingly contradicts my theory that the courts are committed to viewing religion as subjective belief is contained in David R. Dow, *Toward a Theory of the Establishment Clause*, 56 UMKC L. REV. 491 (1988). Dow argues that "[i]nsofar as the first amendment is concerned, belief is irrelevant to rights." *Id.* at 498. Dow is not here concerned, however, with the issue of how religion is defined by the courts, but rather with the problem of eliminating a preference for religious over non-religious beliefs. *Id.* In this context, to hold, as does Dow, that under the Constitution "[a]ction may be rewarded; belief may not be" is not to deny that religion is treated by the courts "objectively" — that is, as a matter of subjective opinion.

[274] For other reasons why Chief Judge Lively did not pay heed to the duty based claim, see p. 603 and note 139 above.

[275] *See* Williams & Williams, *supra* note 138, at 790–92.

[276] "American courts — both state and federal — have uniformly held that '[c]ourts are not arbiters of scriptural interpretation.'" TRIBE, *supra* note 50, § 14-11, at 1231 (quoting Thomas

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Sherbert doctrine commits the courts to sparing believers from being forced to act in ways that *they believe* will lead to divine retribution.[277] The doctrine thus embodies the basic Lockean principle that religious skepticism and fundamental doubt about ultimate truth and the righteous "Way" of God do not justify campaigns against religion, but rather require the toleration of diverse religious views.[278]

The fundamentally agnostic attitude that underlies this principle of toleration strains against the respect for individual beliefs that the principle also requires. The inescapable tension between agnosticism and respect for religious beliefs is another manifestation of the opposition between the fundamentalist principle of biblical inerrancy and modern, critical approaches to religious claims. The doctrinal treatment of a plaintiff's beliefs *as that individual's beliefs and nothing more* denies them respect, or serious consideration, on their own terms.[279] For, on their own terms, the believer's representations of

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v. Review Bd., 450 U.S. 707, 716 (1981)). Indeed, "[a]t the very heart of first amendment theory is the proposition that '[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.'" *Id.* (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1871)).

[277] That is, *Sherbert* commits the judiciary to exempting believers in the absence of a compelling justification — it creates a balancing test, not an absolute right. As discussed earlier, the weight of the justification was lessened in the peyote case. *See* Employment Div. v. Smith, 494 U.S. 872, 881–82 (1990); *supra* notes 49–56 and accompanying text.

[278] *See* JOHN LOCKE, *A Letter Concerning Toleration, in* THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION 167, 181–82 (Charles L. Sherman ed., 1937) (3d ed. 1698) ("For every church is orthodox to itself; to others, erroneous or heretical. For whatsoever any church believes, it believes to be true; and the contrary unto those things, it pronounces to be error. So that the controversy between these churches about the truth of their doctrines, and the purity of their worship, is on both sides equal; nor is there any judge, either at Constantinople or elsewhere upon earth, by whose sentence it can be determined."); *see also* McClure, *supra* note 8, at 365–66 (describing how Locke's introduction of the concept of tolerance served to reconfigure what were formerly conceptualized as "wars of truth" into a picture of mutual intolerance among diverse religious groups). McClure goes on to explain her view of Locke by arguing that "[the] theoretical task [of advocates of toleration] was to articulate a point of view from which competing and incommensurable visions of religious practice could be seen *not as conflicting truth claims* requiring allegiance and defense, but rather as politically indifferent *matters of private belief.*" *Id.* at 366 (emphasis added). McClure further states that one of the "widely recognized central elements underpinning Locke's separation of religion and politics is the uncertainty of human knowledge regarding religious truth." *Id.*

[279] A similar point is made by Stephen Carter in his sympathetic analysis of religious objections to the teaching of evolution. *See* Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977, 981 (arguing that "[it] is not that the parents want the public schools to proselytize in their favor; it is rather that they do not want the schools to press their own children to reject what the parents believe by calling into question a central article of their faith"); *see also* Stanley Fish, *Liberalism Doesn't Exist*, 1987 DUKE L.J. 997, 997–98 (criticizing the liberal ideology of "reason," which itself may "[rest] on belief"); McClure, *supra* note 8, at 373–74 ("Within Locke's construction of the question, claims of conscience operated as purely subjective judgments, as mere opinions that mistakenly deployed an odd assortment of Scriptural references."). *But see* Raz, *Liberalism*, *supra* note 259, at 762–63, 784–85 (denying the logical coherence and moral force of the link between toleration and

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her beliefs are representations of truth, or, in Branick's terminology, "claims on our existence," that require either affirmation or rejection, but not impartiality.[280] Yet the judiciary, as an arm of the state, can no more properly accept the believer's assertions as truth-claims than it can reject them as such. For example, the judges in *Mozert* could not accept the plaintiffs' assertion that letting their children participate in the reading program would condemn them and their children to eternal damnation. Nevertheless, the *Sherbert* doctrine required the courts to find a burden on the free exercise of religion if the plaintiffs sincerely believed this to be so.

Modern free exercise doctrine also incorporates the basic subjectivist view of religion by requiring plaintiffs to prove that their claims are based on genuine, sincerely held religious beliefs.[281] Applied to the *Mozert* complaint, these doctrinal requirements mean that the plaintiffs had to show that proscriptions against the public school reading program existed *for them*; that these proscriptions were genuinely religious in nature; and further, that these proscriptions would be violated by complying with the public schools' demands. To substantiate these claims, the plaintiffs relied on passages from the Bible. With the quotation of injunctions like "learn not the ways of the heathen,"[282] "have no fellowship with the unfruitful works of darkness, but rather reprove them, for it is shameful even to mention what the disobedient do in secret,"[283] "depart from evil,"[284] "do not stray from the way of God,"[285] and so on, the plaintiffs urged the court of appeals to rely on an external source for objective evidence of their beliefs. The words of the biblical text were supposed to exhibit an obvious contradiction between its prohibitions and the requirements of the public schools.

But the contradiction was not as apparent to the courts as it was to the plaintiffs. Indeed, from the doctrinal standpoint of a court trying to ascertain the existence and substance of sincere, genuine

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skepticism, and arguing instead for a stronger principle of toleration that would require mutual involvement instead of indifference and would be based on a principle of value pluralism rather than value neutrality or skepticism).

[280] *See* Branick, *supra* note 193, at 25–27, 29–30.

[281] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 222–229, 234–236 (1972) (holding that Amish objections to formal education beyond the eighth grade were rooted in sincere religious beliefs and that the First and Fourteenth Amendments prevent Wisconsin from forcing the Amish to cause their children to attend high school until they reach age 16); Teterud v. Burns, 522 F.2d 357, 359–61 (8th Cir. 1975) (holding that beliefs requiring a Native American prison inmate to wear braids were religious in character). *See generally* TRIBE, *supra* note 50, § 14-12, at 1243–46 (discussing the extent of the Supreme Court's inquiry into whether a belief is religious or not).

[282] Brief for the Appellees, *supra* note 57, at 14.

[283] *Id.*

[284] *Id.*

[285] *Id.*

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religious beliefs, the presence of the contradiction could not be obvious; it had to depend on inherently subjective interpretations. The resulting interpretive problems are not unlike those connected to the debates over "original intent."[286] The biblical injunctions invoked by the plaintiffs are very general. The Bible does not expressly proscribe the Holt series; nor does it explicitly forbid reading. Whether the Holt series represents "the way of evil" that Christians are enjoined to avoid is, in short, a debatable — subjective — point.

Of course, the fundamentalists' position on interpreting the Bible was exactly the opposite. The "plain meaning" of the biblical text was an essential tenet of the plaintiffs' faith.[287] Nevertheless, as Chief Judge Lively noted, "There was evidence that other members of their churches, and even their pastors, do not agree with [the plaintiffs'] position in this case."[288] That is, the applicability of biblical proscriptions to the Holt reading series was debated even among adherents of the fundamentalist principle of biblical inerrancy, as the split between Vicki Frost and her fellow congregationists demonstrated.[289]

What this disagreement signifies, for legal purposes, is not that the biblical imperatives lack the meaning the plaintiffs attributed to them as an objective matter. As District Judge Hull stated, the courts could only be required to "determine whether this belief is essentially religious."[290] The divergence between the interpretations of the plaintiffs and their pastors, like those among different lay interpretations of the Bible, could only indicate that the meaning of specific biblical passages resided in inherently subjective interpretations and beliefs.

The absence of objective evidence to prove the violation of religious law confirms the implicit reliance of constitutional doctrine on the subjectivist model of religion. This doctrinal model, like the view of the higher biblical critics that Professor Branick described earlier, "brackets the truth question," and deals instead with personal, subjective beliefs.[291] But it is precisely this bracketing that defines the secular humanist attitude that the fundamentalists oppose.

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[286] *See, e.g.*, Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 477 (1981) ("[T]here is no such thing as the intention of the Framers waiting to be discovered . . . . There is only some such thing waiting to be invented."); Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551, 556 (1985) (arguing that even if the Framers' intent is discernible, its authority must still be questioned).

[287] *See infra* note 323 and accompanying text.

[288] *Mozert V*, 827 F.2d at 1061.

[289] *See id.* at 1061–62.

[290] *Mozert IV*, 647 F. Supp. at 1198.

[291] *See* Branick, *supra* note 193, at 21–24. McClure sees the same connection between the subjectivist conception of religion and an objective mode of discourse and traces it to Locke's philosophy of tolerance. *See* McClure, *supra* note 8, at 376. McClure views Locke's move as one of "denying" conceptions of truth "their empirical validity and relegating them to the category of speculative truths without worldly effect." *Id.* at 384.

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The point is not simply that the objective mode of exposure exhibits options, or even that it encourages rational selection among them. It is that even if the children adhere to their parents' beliefs, they do so knowing that those beliefs are matters of opinion. This knowledge enhances the likelihood that children will form their own opinions and deviate from at least some of their parents' beliefs. It also transforms the meaning of remaining (or in the case of children, becoming) attached to them. It is one thing for beliefs to be transmitted from one generation to another. It is another to hold beliefs, knowing that those beliefs are transmitted, that they vary, and that their truth is contested.

3. The Tension in the Law. — This critique of subjectivism explains why the fundamentalists see the objective mode of the reading program as a form of indoctrination. The plaintiffs did not deny that the reading program objectively exposed competing ideas. Instead, they criticized the effect on their tradition of sustained exposure to value-neutrality of that kind. Their criticism thus breaks down the normative distinction between coercive influences on individual beliefs and non-coercive appeals to individual reason, according to which indoctrination is conventionally defined.

Most academics and jurists would define indoctrination in individualist terms, and thus would sharply distinguish coercion from consent. This approach is expressed in Judge Lively's repeated references to the evil of compulsion[292] supposedly condemned in both *Sherbert* and *Barnette*.[293] Under this view, the exercise of individual reason is what keeps the evil of coercion at bay; and, conversely, it is only when emotion overwhelms individual reason that evil (coercion) has its way. Applying these notions to the domain of belief-formation, the assumption seems to be that beliefs should be selected by the individual autonomously, on the basis of informed, rational judgments.[294] The value placed on individual reason creates concern

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[292] *See Mozert V*, 872 F.2d at 1062, 1065, 1069.

[293] For criticisms of an exclusive focus on coercion, characteristic of liberal individualism, see JOSEPH RAZ, THE MORALITY OF FREEDOM 148–57, 377–78 (1986). *See also id.* at 156 ("It is easy to exaggerate the evils of coercion, in comparison with other evils or misfortunes which may fall to people in their life. Inasmuch as the liberal concern to limit coercion is a concern for the autonomy of persons, the liberal will [i.e., should] also be anxious to secure natural and social conditions which enable individuals to develop an autonomous life."); Jennifer Nedelsky, *Law, Boundaries, and the Bounded Self*, 30 REPRESENTATIONS 162, 167–69 (1990) (lamenting the reduction of the concept of autonomy to mere freedom from interference).

[294] This assumption is fundamental to the infrequent economic analysis of religious behavior. *See, e.g.*, Laurence R. Iannaccone, *Sacrifice and Stigma: Reducing Free-riding in Cults, Communes, and Other Collectives*, 100 J. POL. ECON. 271 (1992). Iannaccone argues that:

> Religion in modern, pluralistic societies is very much a market phenomenon. It is an industry that is easy to enter, highly competitive, and virtually devoid of intellectual property rights. More than a thousand faiths currently compete for Americans' attention.

about the occurrence of social conditioning and the processes of acculturation. However, because of its fixation on coercion, individualism often overlooks those forms of socialization that rely on subtler blends of coercion and consent.

The fundamentalists' condemnation of "objective" education rejects the conventional opposition between coercion and free choice. It relies, instead, on a conception of assimilation as indoctrination in which the elements of coercion and consent are not easily distinguished. In this conception, interference with the processes of belief-formation is defined not by coercion, but rather by the disruption of one culture's processes of socialization by another's.

This notion of cultural assimilation seems to be similar to what Professor Cover had in mind in labeling the objective mode of discourse "imperial."[295] The objective mode of exposure and critical discourse, characteristic of the liberal "marketplace of ideas," claims to stand outside particular traditions, mediating among them.[296] In the process, however, it also exerts a kind of authority over them. The glare of critical judgment does not just bring the affective, ritualistic processes of traditional cultural transmission into light. In illuminating traditional mechanisms of cultural reproduction, it also threatens to defeat them — as the plaintiffs in *Mozert* intuitively understood.

III. WHAT'S WRONG WITH INDOCTRINATION?

As we have seen in Parts I and II, the individualist outlook that pervades American legal thought has often caused judges to deny the existence of indoctrination in the absence of a clear showing of coercion. Yet denial has not been the *exclusive* judicial response to assimilation-based claims. Communitarian-leaning observers, along with advocates for particular groups, have been encouraged by the courts' occasional foray into more culturally- as opposed to coercion-oriented modes of thought.[297] Most notably, the Supreme Court in *Wisconsin*

> Religion is thus an object of choice: demanders *choose* what religion (if any) they will accept and how extensively they will participate in it.

Id. at 272. Similar assumptions underlie the economic analysis of public schools that views public education as a form of indoctrination. *See* John R. Lott, Jr., *An Explanation for Public Provision of Schooling: The Importance of Indoctrination*, 33 J. L. & ECON. 199, 200–01 (1990).

[295] *See supra* note 260 and accompanying text; *cf.* Williams & Williams, *supra* note 138, at 843–48 (discussing the courts' willingness to withhold protection from nontraditional religious cultures for the sake of "national order").

[296] *See* Fish, *supra* note 279, at 997–98.

[297] Communitarian political philosophy is associated with, *inter alia*, ALASDAIR MACINTYRE, AFTER VIRTUE (2d ed. 1984); RICHARD RORTY, CONSEQUENCES OF PRAGMATISM (1982); RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); LIBERALISM AND ITS CRITICS (Michael J. Sandel ed., 1984); CHARLES TAYLOR, HEGEL AND MODERN SOCIETY (1979). Other works occasionally

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v. Yoder[298] exempted an Old Order Amish community from a state compulsory education law, on the ground that the law interfered with the free exercise of the Amish religion.[299] A comparison of Justice Douglas's dissenting opinion with that of the majority in *Yoder* illuminates the difference between the coercion- and assimilation-based conceptions of indoctrination.[300]

As other commentators have observed, the Court's opinion in *Yoder* assumes both the existence and the importance of formative cultural contexts.[301] Chief Justice Burger, the author of the majority

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identified as communitarian include BENJAMIN R. BARBER, STRONG DEMOCRACY (1984); ROBERTO M. UNGER, KNOWLEDGE & POLITICS (1975); MICHAEL WALZER, SPHERES OF JUSTICE (1983); Charles Taylor, *Atomism, in* POWERS, POSSESSIONS, AND FREEDOM 39 (Alkis Kontos ed., 1979). *See generally* Amy Gutmann, *Communitarian Critics of Liberalism*, 14 PHIL. & PUB. AFF. 308 (1985) (discussing the new communitarian criticisms of liberal political theory, primarily the works of Alasdair MacIntyre and Michael Sandel); John R. Wallach, *Liberals, Communitarians, and the Tasks of Political Theory*, 15 POL. THEORY 581 (1987) (same). However, some of these scholars might distance themselves from other recognized communitarians, or from the label itself. Conversely, some philosophers who clearly identify with the liberal tradition of political philosophy — for example, Joseph Raz — nonetheless concede many of the criticisms offered by communitarians. *See* RAZ, *supra* note 293, at 17–18.

Communitarianism is a loosely-defined philosophy that faults the "liberal" principle of value-neutrality for producing a deracinated sense of self. As depicted by its communitarian critics, conventional liberal opinion conceives of value-neutrality in terms of a free "marketplace of ideas," in which all competing values and traditions are displayed before the individual, who essentially plays the role of "consumer." The free market of ideas is conventionally understood to be a neutral influence on individual beliefs because, in it, all ideas are submitted to individual reason and choice. However, the communitarian critique holds that choice, and more generally the marketplace metaphor, are illusory when it comes to selecting the values and beliefs constitutive of personal identity. In its most extreme formulation, communitarianism denies that there is any person to do the choosing in the absence of received values and inherited beliefs which endow each of us with a self. The communitarian position is that an official culture of value-neutrality produces vacuous selves, and it substitutes a knowledge *about* cultures for *real* culture. But implicit in this critique is the notion that even a liberal regime based on the principle of neutrality functions *as* a specific culture, which contributes to the formation of personal identity, values, and beliefs. Notwithstanding that communitarians pejoratively judge the liberal culture and the liberal selves it produces to be too "thin," they contend that liberalism *is* a particular cultural context, which has a formative influence on the beliefs people hold and the personalities they develop. For further amplification, see pp. 648–49, 661–63 below.

Similar views have been put forth in feminist criticism and other philosophical critiques of the individualist strand of liberalism, which denies the primacy of formative, cultural contexts in the selection of personal values. All of these critiques of individualism challenge the primacy of the faculty of reason. They recognize the distinctiveness (and perhaps even the value) of "objective" modes of thought and value-neutral regimes — like the method of "mere" exposure — but insist upon their paradoxical cultural particularism. By demonstrating the culturally-specific, formative influence of such regimes, these critiques reveal their inculcative aspect. *See* Garet, *supra* note 138, at 1034; Williams & Williams, *supra* note 138, at 883.

[298] 406 U.S. 205 (1972).

[299] *See id.* at 213–19.

[300] For criticism of *Yoder* and its "uncritical assumption that children do and should adopt the faith of their parents as a matter of course," see Stewart, cited above in note 35, at 76–77.

[301] *See* Garet, *supra* note 138, at 1031–35; Post, *supra* note 6, at 303–04.

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opinion in *Yoder*, repeatedly stressed that the Amish religion is not simply a matter of individual conscience, but rather a prescriptive social code that "pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community."[302] Chief Justice Burger employed the anthropological concept of a cultural "way of life" to encapsulate his recognition that the Amish religion was not merely a voluntary confession of faith, but rather a holistic, regulative culture — what communitarians label a "constitutive community"[303] or what Robert Cover called a "paideia"[304] — into which members are socialized as children.

The preclusion of individual choice by socialization is, of course, the traditional mark of an involuntary community.[305] As Justice Douglas saw it, the fetters on individual choice that result from the insulation of a traditional "way of life" constitute the paradigmatic violation of constitutional rights.[306] Conversely, the compulsory education law challenged by the Amish was constitutionally defensible in his eyes precisely because it opened children up to "the new and amazing world of diversity,"[307] which Justice Douglas implied was a precondition for exercising autonomous individual choice.

Significantly, Chief Justice Burger did not dispute this characterization of the effects of insulation. He simply did not share Justice Douglas's apprehension about undermining the conditions for developing the capacity for choice. Instead, he emphasized the threat to the ability of the Amish community to "integrate" its children.[308] In a rare deviation from the courts' customary embrace of individualism, Chief Justice Burger acknowledged[309] — and deplored — the fact that the conditions of individual choice were inimical to "the continued survival of Amish communities as they exist in the United States today."[310] He explicitly recognized that the Amish community depended on particular mechanisms of socialization that would be defeated by the cultivation of "intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students."[311]

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[302] *Yoder*, 406 U.S. at 216.

[303] *See* Michael Sandel, *Justice and the Good*, *in* LIBERALISM AND ITS CRITICS, *supra* note 297, at 159, 166–68.

[304] Cover, *supra* note 219, at 15–16.

[305] *See* Kathleen Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1714 (1988).

[306] *See Yoder*, 406 U.S. at 242 (Douglas, J., dissenting in part). Opposition to *Yoder* need not be based on such an individualistic outlook, which entrusts the selection of affiliations to children's "choice." *See* Stewart, *supra* note 35, at 76 & n.170 (asserting the right of the state to instill values as grounds for criticizing *Yoder*).

[307] *Yoder*, 406 U.S. at 245 (Douglas, J., dissenting in part).

[308] *See Yoder*, 406 U.S. at 211–12, 218.

[309] *See id.* at 218–19.

[310] *Id.* at 209.

[311] *Id.* at 211.

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These are precisely the sorts of cultural traits associated with the objective-critical mode of discourse, analyzed by Branick and Cover.[312] Like Professor Cover and other communitarian critics, Chief Justice Burger's *Yoder* opinion seems to recognize the "imperial" aspect of objective discourse, which although neutral in one sense nevertheless represents a form of socialization that rivals the Amish community's efforts to socialize adolescents into their traditional way of life.[313] In so doing, *Yoder* offers hope to advocates of communitarianism that the judicial system might protect cultural sub-groups from the public cultivation of liberal tolerance and rational, critical thought.

Yoder represents a vision of exposure in general and liberal education in particular that results in cultural assimilation. Moreover, it deems such a result to be a constitutionally proscribed harm.[314] As such, it would seem to be directly applicable to the *Mozert* complaint of indoctrination. Yet *Yoder*'s right to cultural autonomy was not extended to the *Mozert* case. The reason articulated by Chief Judge Lively for rejecting the application of *Yoder* to *Mozert* was that:

> Unlike the plaintiffs in the present case, the parents in *Yoder* did not want their children to attend any high school or be exposed to any part of a high school curriculum. The Old Order Amish and the Conservative Amish Mennonites separate themselves from the world and avoid assimilation into society, and attempt to shield their children from all worldly influences.[315]

A *Yoder*-style right to protection from assimilation was unwarranted, according to Chief Judge Lively, because the parents in *Mozert* "want[ed] their children to have the benefit of an education which prepares [them] for life in the modern world."[316] In other words, participation in general society "estopped" the plaintiffs from objecting to assimilation.[317]

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[312] *See* Cover, *supra* note 219, at 13, 16.

[313] *See Yoder*, 406 U.S. at 217–18.

[314] In comparing the opposition to exposure of the plaintiffs in *Yoder* and *Mozert*, it should be noted that, for the Amish, unlike the fundamentalists, this opposition did not depend on a particular conception of the authority of scripture and a corresponding opposition to higher criticism and associated modes of discourse. This difference suggests that exposure and the mode of critical objectivity can be seen as dangerously assimilationist even in the absence of a fundamentalist approach to scripture.

[315] *Mozert V*, 827 F.2d at 1067.

[316] *Id.*

[317] The technical doctrine of estoppel generally refers to situations in which a "party is prevented by his own acts from claiming a right to detriment of other party who was entitled to rely on such conduct and has acted accordingly." BLACK'S LAW DICTIONARY 551 (6th ed. 1990). *What* events entitle the opposing party to rely on the first party's failure to assert her rights is the key question in applying the doctrine of estoppel.

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Indeed, the difference in the extent of assimilation between *Yoder* and *Mozert* was substantial. The Old Order Amish — riding horse-and-buggies, clinging to a centuries-old German dialect and dress, shunning electricity and other forms of modern technology, and rejecting most forms of economic, social, and political intercourse with the larger society — epitomized the insular, separatist sect.[318] By contrast, despite the historic separatist tendencies of Christian fundamentalism, the plaintiffs in *Mozert* were far more integrated into American cultural, economic and political life. The difference between the two groups' relationships to the larger society is manifested by their attitudes toward public education. As Chief Judge Lively noted, whereas the Amish opposed *any* formal education past the eighth grade, fundamentalist and evangelical Christians historically relied on the public educational system.[319] Even in their period of withdrawal from public life following the *Scopes* trial, they continued to send their children to public schools in large numbers.[320] Although fundamentalist establishments such as Bob Jones University and Jerry Falwell's Liberty University drew a large percentage of college-bound fundamentalists,[321] evangelical and fundamentalist Christians never developed as extensive a parochial school system as did the American Catholic community.[322] On the contrary, most availed themselves of the public school system.[323]

Why conservative Protestants have generally welcomed public education as a benefit, instead of rejecting it as an imposition by the state, is a complicated question. Perhaps, in the communities in which fundamentalists and evangelicals were concentrated, locally-controlled public schools remained largely responsive to their interests, even after

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[318] *See Yoder*, 406 U.S. at 216–27.

[319] *See Mozert V*, 827 F.2d at 1067. It should be noted that the Amish have not always refused participation in the public schools. Like the fundamentalists, the Amish found local public schools to be congenial and responsive to their values before the consolidation of school districts eroded the homogeneity of the districts' constituencies. *See* COMPULSORY EDUCATION AND THE AMISH 11–14 (Albert N. Keim ed., 1975). Moreover, the Amish have not been active in establishing their own private schools — a lapse that may be attributable to their inability to meet certification standards because of their opposition to higher education. *See* JOHN A. HOSTETLER, AMISH SOCIETY 255, 259 (3d ed. 1980).

[320] *See Mozert V*, 827 F.2d at 1087.

[321] *See* James L. Guth, *The New Christian Right, in* THE NEW CHRISTIAN RIGHT: MOBILIZATION AND LEGITIMATION, *supra* note 188, at 31, 40; Liebman, *supra* note 220, at 228.

[322] *See generally* HAROLD A. BUETOW, OF SINGULAR BENEFIT 114–15 (1970) (describing the growth of parochial schools as a result of the domination of public schools by Protestant teachers). Indeed, the development of Catholic parochial schools was partly a response to the overwhelmingly Protestant character of the public school system. *See* ANDREW M. GREELEY & PETER H. ROSSI, THE EDUCATION OF CATHOLIC AMERICANS 2–4 (1966).

[323] *See* James C. Carper, *The Christian Day School, in* RELIGIOUS SCHOOLING IN AMERICA 110, 112 (James C. Carper & Thomas C. Hunt eds., 1984) ("Most evangelical Protestants have supported public schooling since its inception.")

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Scopes. The *Scopes* ruling, after all, had upheld the power of the state to exclude the teaching of evolutionary science;[324] and that exclusion continued in Tennessee and other states until 1975.[325] It was only in 1962 that prayer was eliminated from the public schools.[326] Moreover, in their curricula, teaching style, and choice of reading material, local public schools tended to reflect the "traditional values" of American society.[327] As a result, fundamentalists and evangelicals often perceived public schools to be receptive.[328]

However, even if, as Chief Judge Lively observed, the fundamentalists were more integrated than the Amish, that leaves unexplained the doctrinal significance of the distinction. Chief Judge Lively's distinction suggests that a sub-community has a right to be protected from assimilation only if it is not already substantially integrated into the general culture.[329] Precisely what degree of preexisting assimilation negates the right to protection from further assimilation remains unclear, however. Even the Old Order Amish absorbed some of the prevailing cultural values through their participation in the state-regulated school system until the eighth grade and through their use of the judicial system.[330] An even more fundamental question is *why* the right should be dependent on the extent of participation at all.

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[324] Scopes v. State, 289 S.W. 363, 366–67 (Tenn. 1927).

[325] In 1968, the Supreme Court finally held unconstitutional a state statute that made it a crime to teach evolution in public schools. *See* Epperson v. Arkansas, 393 U.S. 97, 109 (1968). In 1975, the Sixth Circuit relied on *Epperson* to hold unconstitutional a Tennessee law that required that Biblical accounts of creation be given preferable treatment in state schools. *See* Daniel v. Waters, 515 F.2d 485, 489 (6th Cir. 1975); Strossen, *supra* note 32, at 348–49.

[326] *See* Engel v. Vitale, 370 U.S. 421, 424–25 (1962).

[327] *See* Carper, *supra* note 323, at 112 ("[Evangelical Protestants] approved of early public education because it reflected the Protestant belief-value system of the society and was viewed as an integral part of the crusade to establish a Christian America."); *see also* Jeanne Heller, *Offering Moral Education*, 8 STREAMLINED 3, 7 (1989) ("For a considerable period in our nation's history — from Colonial days until well into the present century — 'moral education' was *the* kind of education the public schools offered."); Marilyn M. Maxson, *The Hidden Cornerstone of American Public Education*, *in* SOCIETY, CULTURE, AND SCHOOLS: THE AMERICAN APPROACH 58, 58 (Thomas C. Hunt ed., 1979) ("To the extent that public schools are tied to a local, homogeneous community, they have little trouble complying with community expectations (whether or not those expectations meet the letter of the law).").

[328] *See* Carper, *supra* note 323, at 112.

[329] *Cf.* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 590–91 (1st Cir. 1979) (affirming the denial of plaintiffs' status as a tribe because of a jury finding of extensive assimilation), *cert. denied*, 444 U.S. 866 (1979), *discussed in* JAMES CLIFFORD, THE PREDICAMENT OF CULTURE 277–346 (1988).

[330] *Cf.* CAROL WEISBROD, THE BOUNDARIES OF UTOPIA 34–35, 61–66 (1980) (analyzing nineteenth-century utopian separatist communities' reliance on American common law conventions); Cover, *supra* note 219, at 33 ("Neither religious churches . . . nor utopian communities . . . can ever manage a total break from other groups with other understandings of law."); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 750–59 (1989) (examining the implications of assimilation for the determination whether tribal membership should be adjudicated by tribal or federal courts).

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A. The Historicist Challenge to the Right Against Assimilation

One possible reason, suggested by *Yoder*'s emphasis on the unchanging quality of the Amish way of life,[331] is that the right to be free from state-fostered assimilation recognized by the courts is based on the value of an authentic, as opposed to an assimilated, culture.[332] Authenticity might be valued from the internal perspective of the culture it characterizes or from the external perspective of society at large. From either point of view, once assimilation has occurred, the value of an authentic culture already has been lost — there is nothing left worth preserving.

However, the enterprise of distinguishing between authentic and inauthentic cultures has been challenged by the perception that every culture is the product of a particular history in which human actors continually shape and reshape the contours of their identity. As was made clear by the testimony of cultural historians, sociologists, and anthropologists in *Yoder*, the Amish religion itself was an outgrowth of earlier religious and political movements.[333]

This historical perspective on religion is inextricably linked to the view that religion consists of subjective, personal beliefs. The subjectivist thesis holds generally that religious duties, and more broadly, all religious positions, are essentially matters of personal opinion or belief. The historicist perspective suggests that these beliefs are the malleable products of a variety of environmental factors; chief among them is the agency of the human mind, exercised both singly (by individuals) and collectively (by "peoples" or "cultures").[334] Thus, from the historicist perspective, each specific religion is an expression of temporal social forces — a particular culture or "way of life," subject to the dynamic forces of history.

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[331] *See* Wisconsin v. Yoder, 406 U.S. 205, 216 (1972) ("The record shows that the respondents' religious beliefs and attitude toward life, family, and home have remained constant — perhaps some would say static — in a period of unparalleled progress in human knowledge generally and great changes in education.").

[332] *But cf.* CLIFFORD, *supra* note 329, at 341–42 (challenging the notion of an either-or distinction between authentic and unauthentic cultures); Resnik, *supra* note 330, at 710–12 (questioning the normative significance of the Department of the Interior's distinctions between "historic" and "non-historic" tribes).

[333] *See Yoder*, 406 U.S. at 209–10.

[334] Historicism, as defined by Friedrich Meinecke, one of its foremost students, generally refers to a mode of thought which apprehends individual human organisms in their own temporally- and spatially-specific contexts. *See* Friedrich Meinecke, HISTORICISM: THE RISE OF A NEW HISTORICAL OUTLOOK lv–lvi (J.E. Anderson trans., 1972); *see also* Georg Iggers, HISTORICISM, *in* DICTIONARY OF THE HISTORY OF IDEAS 456, 457–58 (Philip P. Wiener ed., 1973). In applying this mode of analysis to beliefs, I am making explicit what I take to be implicit in historicism: a view that beliefs are a type of human event and, as such, are subject to the same principles of history and historical analysis that govern other human events.

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The most radical branch of the historicist perspective holds that there is no such thing as an authentic religious or cultural "essence" that can be distinguished from external cultural forces; all cultures are defined by encounters with and adaptations to their surroundings.[335] This "anti-essentialist" critique denies the existence of discrete cultural traditions or belief-systems, and thereby challenges the very basis of a communitarian, *Yoder*-style right to preserve a particular way of life "as it exists . . . today."[336] It also calls into question the identification of any group of authorities who claim to represent the essential identity of a belief-system. It thus challenges any equation of cultural autonomy with parental control exercised to insulate children from competing cultural forces.

Even without embracing this radical critique, one can recognize the difficulty in distinguishing authentic religious cultures from assimilated ones. It suffices to accept the basic subjectivist-historicist tenet that religions are cultural belief-systems — a position integral to both communitarian and liberal world views and tacitly acknowledged by the courts.[337] Given the ubiquity of this view, it seems highly unlikely that inauthenticity was the rationale for the refusal to apply *Yoder*'s right to cultural autonomy to the fundamentalists in *Mozert*. The significance of the fundamentalists' greater degree of participation in society had to lie elsewhere.

B. The Republican Challenge: Indoctrination as a Good

Judge Cornelia Kennedy, the third judge sitting on the *Mozert* court of appeals, offered a different view of the significance of social integration, linking public education to political participation, and both to the values of liberty, democracy, and civic peace. Assuming *arguendo* that a burden on the free exercise of religion may have been imposed by the school district's reading program, Judge Kennedy focused exclusively upon the countervailing state interest in requiring such a program.[338] Nevertheless, her argument suggests a way of denying, rather than justifying, the harm, not by denying the occurrence of indoctrination, but by embracing it as a civic good.

Judge Kennedy confronted this issue because she recognized that, in order to respond adequately to the parents' complaint, the state must establish a legitimate interest in its citizens' capacity "to think critically about complex and controversial subjects and to develop their own ideas and make judgments about these subjects."[339] She

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[335] *See, e.g.*, CLIFFORD, *supra* note 329, at 341–42.
[336] *Yoder*, 406 U.S. at 212.
[337] *See infra* Part IV.
[338] *See Mozert V*, 827 F.2d at 1070–72 (Kennedy, J., concurring).
[339] *Id.* at 1070.

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believed that the state *did* have such an interest, namely, its interest in maintaining liberty and democracy, and preserving the peace.[340] According to Judge Kennedy's notion of "citizenship in the Republic,"[341] critical thinking about controversial issues is "essential for preparing public school students for citizenship and self-government."[342] Moreover, the public schools have a "compelling interest in 'promoting cohesion among a heterogeneous democratic people'" and "avoid[ing] religious divisiveness."[343] This interest would be thwarted by releasing students from class if they find material objectionable.[344]

Judge Kennedy's opinion draws specific meaning from a long line of Supreme Court rulings that elaborate the significance of public education in terms of a general conception of republican government. For example, in *Bethel School District No. 403 v. Fraser*[345] the Court approvingly quoted two historians who had written: "'[P]ublic education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.'"[346]

As the *Fraser* Court noted, the essence of this statement echoed discussions of public education in earlier cases,[347] particularly in *Ambach v. Norwick*,[348] which had confirmed the constitutionality of a statute that prohibited non-citizens from teaching in public schools.[349] *Ambach* emphasized "[t]he importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests,"[350] and explicitly approved the public schools' role in "inculcating fundamental values necessary to the maintenance of a democratic political system."[351]

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[340] *See id.* at 1071–72.

[341] *Id.* at 1071 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986)).

[342] *Id.*

[343] *Id.* at 1072 (citation omitted).

[344] *See id.*

[345] 478 U.S. 675 (1986). *Bethel* upheld the authority of public schools to prohibit lewd speech by students. *See id.* at 683–85.

[346] *Id.* at 681 (quoting CHARLES A. BEARD & MARY R. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).

[347] *Id.*

[348] 441 U.S. 68 (1979).

[349] *See id.* at 80–81.

[350] *Id.* at 76.

[351] *Id.* at 77. The view that education is necessarily value-laden and inculcative is accepted by the vast majority of commentators, regardless of whether they favor the application of First Amendment rights against the public schools, *see, e.g.*, C. Thomas Dienes & Annemargaret Connolly, *When Students Speak: Judicial Review in the Academic Marketplace*, 7 YALE L. & POL'Y REV. 343, 381 (1989) ("Value neutral education is simply not possible."); Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1653 (1986) (arguing that government does have an interest

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The incantation of *Ambach*'s resonant phrases has become a ritual in cases dealing with public education. In *Board of Education v. Pico*,[352] for example, the Supreme Court acknowledged the dual goals articulated in *Ambach* of "prepar[ing] . . . individuals for participation as citizens," and "maint[aining] . . . a democratic political system"[353] even though it held that removing books from the school library was inconsistent with "the transcendent imperatives of the First Amendment."[354] Similarly, the practice of denying public education to illegal aliens was held unconstitutional because it violated these same goals.[355] Similarly, Justice Stevens defended extending preferential protection against layoffs to minority public school employees because of their value as role models in the context of "'inculcating fundamental values necessary to the maintenance of a democratic political system.'"[356] Even the *Yoder* Court affirmed that "education is necessary to prepare citizens to participate effectively and intelligently in our open political system."[357]

Beneath this rhetoric lies a belief, articulated most explicitly in *Pico*, that:

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in inculcation), or disfavor it, *see, e.g.*, David A. Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 498 (1981) ("[O]ne of public education's principal functions always has been to indoctrinate a generation of children with the values, traditions, and rituals of society."); Stewart, *supra* note 35, at 25 (asserting that "the process of education must inevitably be inculcative"), or fall somewhere in between, *see, e.g.*, MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW AND GOVERNMENT EXPRESSION IN AMERICA 216–18 (1983) (distinguishing for First Amendment purposes between schools' promotion of religious and nonreligious ideologies); Ingber, *supra* note 32, at 238–39 ("A value-free curriculum is clearly impossible."); Rebell, *supra* note 47, at 335 (arguing that judicial intervention in public schools promotes principled discussion about value inculcation by local school boards). Virtually all of these works are concerned with the perceived tension between liberal rights of conscience and expression and the competing value of a necessarily inculcative public education. Interestingly, even those most committed to individual rights do not suggest that public education is simply unconstitutional per se despite their view that a certain amount of inculcation is unavoidable. *But see* Dent, *supra* note 32, at 906–09 (acknowledging that public schools necessarily teach values, but denying that the transmission of values is a sufficiently compelling state interest to outweigh the individual right to the free exercise of religion); Tyll van Geel, *supra* note 26, at 237 ("[M]erely because government claims an important interest in indoctrinating youth does not mean that the interest is sufficiently important to warrant infringement of rights to freedom of belief and speech.").

[352] 457 U.S. 853 (1982) (plurality opinion).

[353] *Id.* at 864 (quoting *Ambach*, 441 U.S. at 76–77).

[354] *Id.* at 864; *see id.* at 872.

[355] *See* Plyler v. Doe, 457 U.S. 202, 221, 230 (1982) As often happens, the Court in *Plyler* linked the notion of civic education that prepares citizens to be effective political actors with the broader but more privatist notion of education as an instrument of personal self-sufficiency and success. *See id.* at 221–23.

[356] Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 315 n.8 (1986) (Stevens, J., dissenting) (quoting *Pico*, 457 U.S. at 864).

[357] Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

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> [T]he Constitution presupposes the existence of an informed citizenry prepared to participate in governmental affairs, and these democratic principles obviously are constitutionally incorporated into the structure of our government. It therefore seems entirely appropriate that the State use "public schools [to] . . . inculcat[e] fundamental values necessary to the maintenance of a democratic political system."[358]

Or, as Justice Stevens explained in *New Jersey v. T.L.O.*,[359] "[s]chools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry."[360]

This view echoes what political philosophers know as civic republicanism,[361] and it suggests why a greater degree of involvement in

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[358] *Pico*, 457 U.S. at 876 (quoting *Ambach*, 441 U.S. at 77).

[359] 469 U.S. 325 (1985).

[360] *Id.* at 373 (Stevens, J., concurring in part and dissenting in part). A much-quoted passage from Brown v. Board of Educ., 347 U.S. 483 (1954), the seminal court case proscribing school segregation, states that:

> Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.

Id. at 493. Similarly, in School Dist. v. Schempp, 374 U.S. 203 (1963), Justice Brennan described the public schools as "a most vital civic institution for the preservation of a democratic system of government." *Id.* at 203 (Brennan, J., concurring). Throughout the Court's opinions, the link between public education and democratic citizenship has been held to be confirmed by history, social science, and "common sense."

[361] The most important contemporary expositions of civic republicanism are historiographical. *See* JOYCE APPLEBY, LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION 116 (1992); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 282–84 (1967); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT 462–67, 506–45 (1975) [hereinafter POCOCK, THE MACHIAVELLIAN MOMENT]; J.G.A. POCOCK, VIRTUE, COMMERCE, AND HISTORY 37–50, 73–78 (1985); J.G.A. POCOCK, POLITICS, LANGUAGE AND TIME 96–103 (1971) [hereinafter POCOCK, VIRTUE]; GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787, at 46–74, 91–124 (1969). The lineage of republican philosophers includes Aristotle, Machiavelli, Harrington, Rousseau, and, more recently, Hannah Arendt. For discussions of civic republicanism in legal theory, see Richard H. Fallon, Jr., *What Is Republicanism, and Is It Worth Reviving?*, 102 HARV. L. REV. 1695, 1695–99, 1720–35 (1989); Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1493–1537 (1988) [hereinafter Michelman, *Law's Republic*]; Frank I. Michelman, *The Supreme Court, 1985 Term — Traces of Self-Government*, 100 HARV. L. REV. 4, 17 (1986) [hereinafter Michelman, *Traces of Self-Government*]; Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 29–87 (1985); Mark V. Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502, 1536–44 (1985); Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988). Some commentators have disputed the influence of civic republicanism on American legal and political thought. *See, e.g.*, Isaac Kramnick, *Republican Revisionism Revisited*, 87 AM. HIST. REV. 629, 630, 632–34 (1982); Don Herzog, *Some Questions for Republicans*, 14 POL. THEORY 473, 477 (1986) (suggesting that historians of civic republicanism are simply "mashing our political arguments in centuries-old disguise"); H.N. Hirsch, *The Threnody of Liberalism: Constitutional Liberty and the Renewal of Community*, 14 POL. THEORY 423, 439–40 (1986) (arguing that the Federalists had realized by the 1780s that "America was not homogeneous; [that] Americans could not be

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society might obviate a *Yoder*-style claim. The philosophy of civic republicanism rests on the reciprocal relationship between rulers and ruled in a political system of self-government. Moreover, it emphasizes the active role of the citizen in governance and political deliberation. "Citizenship," in the civic republican vocabulary, is not merely the status of a political subject; it denotes a share of political power and therefore entails responsibilities. In a system of collective self-government, in which every citizen is both political subject and political agent, both ruler and ruled, everyone is affected by everyone else. And because the polity, to which all are subordinate, is governed by its citizens, the polity has a strong interest in the character of its citizens, which can be maintained only through moral education.[362] Each participant has an interest in the character of every other participant because the laws that govern each reflect the values of the citizenry as a whole.

This is just the flip side of the proposition, put forward by Reverend Falwell at the moment of fundamentalist politicization, that "government was going bad" because "we had absented ourselves from the process."[363] Just as the "moral majority" had an interest in political participation because it was interested in the government's policies, so too the state had an interest in the nature of its participation, and hence, in its character as such.

This civic republican conception of mutual interest between the state and its citizen-participants most plausibly accounts for the different treatment of the Amish in *Yoder* and the fundamentalists in *Mozert*. As an insular sect that rebuffed most outside contacts and engagements with the larger society, the Amish, although technically citizens, were perceived as promising to keep themselves and their children out of local and national politics.[364] For this reason, they did not seem to pose any threat to the democratic character of the

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sufficiently molded by religion and moral education" and that "the true lesson of the American constitution is that community could not be sustained.").

[362] *Cf.* Hirsch, *supra* note 361, at 438 ("[A] system of moral education will be required to maintain and strengthen the community over time, thus raising the specter of indoctrination and the compromise of autonomy. In classical thought, politics require *paideia* — the moral and cultural education of members of a community. Yet how is such education to take place if citizens enjoy complete autonomy in matters of belief?").

[363] D'SOUZA, *supra* note 205, at 96 (quoting Falwell); *see supra* pp. 624–25.

[364] Two qualifications are necessary here. First, the perception that the Amish do not participate in politics or in society generally is not necessarily accurate. Second, making binding promises on behalf of someone else, including one's own children, is philosophically problematic. This problem motivated Justice Douglas's dissent in Wisconsin v. Yoder, 406 U.S. 205 (1972). Of course, the Amish could not actually promise that their children would stay out of civic life — they did not even make such a binding promise on their own behalf — as a certain percentage of the Amish community leaves the community and integrates into the larger society and into its democratic politics. *See id.* at 245 n.2.

state that governed — and was governed by — the rest of society.[365] By contrast, the fundamentalists clearly had no intention of avoiding national and local politics. On the contrary, their actions demonstrate the will to exert a profound influence on the character of our democracy.

The republican vision of interdependence between ruler and ruled thus supplies one republican rationale for "estopping" participants in the larger society from claiming protection against further assimilation. A related argument for estoppel also relies on the republican conception of legal norms that reflect the values of active citizens, but does not inquire into the group's general levels of participation and social integration. On this view, a group is not entitled to rely on the norms of the polity in a way that undermines them. Accordingly, the fundamentalists in *Mozert* are not permitted to rely on the ideal of tolerance as an argument for selective opting-out because that remedy involves the state in a palpable demonstration (reiterated each time the students are excused) of the acceptability of segregating some children and teaching them not to tolerate diverse points of view. Ultimately, such a demonstration threatens to undermine the state's legitimate commitment to transmitting the value of tolerance to those who willingly participate in the program. By contrast, the total withdrawal of the Amish after the eighth grade may be thought to have a less visible, and hence less threatening impact on the state's project of teaching its citizens to be tolerant.[366]

Thus, republicanism responds directly to the *Mozert* complaint. However, in so doing, it raises its own questions: If the state has an interest in the character of civic participation, should that interest override an individual's liberty interests? Or, for that matter, should it supersede the smaller, sub-state *community's* interest in the character of its constituents? And does "civic education" really draw students into an accommodating "circle of love," or are they more insidiously being "taken in"?

IV. Implications for Political Theory: The Liberalism Debates

Mozert vividly exposes the ambiguous moral status of assimilation in a society dedicated to cultural pluralism and tolerance. This am-

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[365] The Amish, it seems, simply did not figure into the Court's conception of the collective "self" of self-government. There is a problem with this analysis on civic republican terms: On what basis are civic republicans willing to give up on a body of citizens? Inevitably, civic republicanism presupposes a bounded body of citizens — "the people," the ones who count for political purposes. *See* Note, *Political Rights as Political Questions: The Paradox of* Luther v. Borden, 100 HARV. L. REV. 1125, 1125–26 & 1126 n.3 (1987) (noting that modern reformulations of civic republicanism have "retained the general idea that certain personal capacities are necessary to participate in political activity and that the fact that some persons lack these capacities justifies their exclusion").

[366] I owe the development of this line of argument to Professor Robert Burt.

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biguity, which is the source of the doctrinal confusions discussed in Part I, stems from the inability of our traditional philosophical resources to resolve what is perhaps the most difficult question concerning assimilation in our democratic society: Should courts recognize the assimilation produced by "mere" exposure as a violation of constitutionally protected rights to religious autonomy?

The arguments in *Mozert* and related precedents draw on three seemingly separate philosophical traditions.[367] The notion that "mere exposure to offensive ideas" does not qualify as a constitutional violation rests on a liberal individualistic view that there is no indoctrination if the state and its institutions are "neutral" toward competing religious and non-religious beliefs.[368] This philosophical tradition both

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[367] In her important book on the theory of education in a democracy, Amy Gutmann draws a tripartite scheme similar to my outline of liberalism, communitarianism, and republicanism. *See* GUTMANN, *supra* note 153, at 22–41. Her "state of individuals" viewpoint, *see id.* at 33–41, represented by John Stuart Mill, embodies the individualist strain of liberalism described above. Her "state of families" viewpoint, *see id.* at 28–31, resembles communitarianism in important respects (although families are surely not the only candidates for community status in communitarian thought). Interestingly, Gutmann invokes Locke — a paradigmatic liberal — as the representative theorist of the essentially communitarian state of families approach to education. *See id.* at 28–31. Gutmann's invocation of Locke and other liberals (like Charles Fried), *see id.* at 29–30, in support of delegating educational authority to the family reveals the tension within liberalism between its commitment to *individual* autonomy and its opposition to the power of the state (which leads some liberals to prefer "private" familial authority over the "public" variety). For a further elaboration of this tension, see Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. (forthcoming 1993). The third division in Gutmann's scheme is the "family state" idea, *see* GUTMANN, *supra* note 153, at 22–28, epitomized by Plato's vision of the philosopher-king redeeming children from the folly of their parents by assuming complete educational control (and guardianship) over them. *See id.* This vision bears many of the features of the civic republican tradition of education, and indeed that tradition is often traced back to Plato. However, Gutmann's discussion of the "family state" highlights an extreme statist strain of the republican tradition, and de-emphasizes the anti-statist strains also present.

Apart from her criticism of each of these three approaches, Gutmann offers her own "democratic theory" of education. *See id.* at 41–47. I am indebted to Gutmann's articulation of the point that "a democratic state recognizes the value of political education in predisposing children to accept those ways of life that are consistent with sharing the rights and responsibilities of citizenship in a democratic society." *Id.* at 42. The vision of education that I propose resembles Gutmann's democratic theory of education in joining this (what I call a "republican") commitment to both a "liberal" commitment to individual autonomy, and a "communitarian" appreciation for the interests of families in reproducing their own particular ways of life. Like Gutmann, I offer a vision of education in which these three traditions are merged, each one qualifying the other. However, whereas I focus directly on the content of education, Gutmann's democratic theory of education is chiefly concerned with the distribution of the authority to control that content. *See id.* at 41–46. For Gutmann, a democratic (as opposed to a liberal, republican, or communitarian) theory of education need not — indeed may not — always specify the content of education, but must rather guarantee that the *authority to control* the content of education is shared by all interested parties, including parents, educational experts, and the state. *See id.* at 42.

[368] The same philosophical stance fostered the *Mozert* defendants' insistence that, definitionally, exposure "does not constitute teaching, indoctrination, opposition or promotion of the things exposed" — the view eventually accepted by the Sixth Circuit. *Mozert V*, 827 F.2d at 1063.

assumes and values the ability of individuals to rationally, objectively, and critically determine their attachments to competing ways of life by distancing themselves from any particular worldview. *Barnette* clearly expresses the ascendance of this philosophy in constitutional interpretation through its strict distinctions between critical reason and affect, choice and coercion, value-neutrality and value-preference — and the premium it places on the first member of each of these pairs.[369] The *Mozert* court's ultimate reliance on the reasoning of *Barnette* indicates the role played by liberal individualism in the court's rejection of the fundamentalists' complaint.[370]

One might expect that the fundamentalists would have received a more sympathetic response if the court had relied instead on the communitarian inclinations expressed in *Wisconsin v. Yoder*.[371] Communitarianism is a loosely defined philosophy that values particular ways of life and subcommunities and simultaneously challenges the neutral pretenses of the liberal state. Communitarians reject the dichotomies between reason and affect and between free will and coercion. They believe that affective mechanisms of acculturation are what creates personhood, which is a prerequisite to being able to make choices.[372] Therefore, choice is necessarily

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[369] *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 640–42 ("[N]o official . . . can *prescribe* what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ." (emphasis added)). The *Barnette* approach has been read both as a condemnation of government coercion, *see* TRIBE, *supra* note 50, § 12-4, at 804, and as a governmental commitment to maintaining neutrality, *see id.* § 14-11, at 1231–32. Indeed, *Barnette* links freedom and neutrality (and, conversely, coercion and value-preference) by suggesting that in the classroom the prescription of values is inherently coercive when attendance is compulsory. *See Barnette*, 319 U.S. at 632. The distinction between reason and affect is displayed in *Barnette*'s attack on the *methods* of value-prescription — that is, ritualistic modes of pedagogy that *instill* beliefs, *see id.* at 631–32, as opposed to pedagogy that operates at a purely cognitive level.

[370] *Mozert V*, 827 F.2d at 1066; *see* p. 605.

[371] 406 U.S. 205, 211–12 (1977).

[372] *See* SANDEL, *supra* note 297, 142–44, 162–63; Michael J. Sandel, *The Procedural Republic and the Unencumbered Self*, 12 POL. THEORY 81, 87–91 (1984); *see also* Gutmann, *supra* note 297, at 309 (claiming that "the good society of the new [communitarian] critics is one of settled traditions and established identities"); Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 YALE L.J. 1, 5 (1989) (asserting that contemporary communitarian theories are centered on the belief that "[i]ndividual identity does not exist apart from the discourse that creates and sustains the community" (citing Michael Sandel, *Introduction*, *in* LIBERALISM AND ITS CRITICS, *supra* note 297, at 6)). Stephen A. Gardbaum identifies three distinct communitarian claims in Sandel's writings. *See* Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685, 691 (1992). Those three claims are: "(1) that the 'picture of the freely-choosing individual' is false, (2) that 'we cannot conceive our personhood without reference to our role as citizens, and as participants in a common life,' and (3) that 'political discourse [proceeds] within the common meanings and traditions of a political community, not appealing to a critical standpoint wholly external to those meanings.'" *Id.* (quoting Sandel, *supra*, at 5, 10)). Some avowed liberal philosophers also endorse the view that community — a received tradition — has value as a constitutive component of personal identity. *See* Gard-

bounded.[373] "Constitutive" cultural contexts — local communities which shape self-identity and endow it with values and attachments — are the building blocks of communitarian thought. Overarching structures that interfere with cultural transmission are their foil. *Yoder* captures this outlook in its reliance on the concept and value of the Amish "way of life," and in its depiction of the critical-scientific apparatus of modern life as merely one among many competing cultures.[374]

However, consideration of the philosophy of civic republicanism introduced by Judge Kennedy undermines the picture of a simple antithesis between communitarianism and liberal individualism.[375] From the civic republican standpoint, the "opt-out" remedy risks depriving children of precisely that aspect of their education that is

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baum, *supra*, at 693 (noting support for this "communitarian" claim and its compatibility with Raz's endorsement of liberal political arrangements); John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL & PUB. AFFAIRS 225–28 (1985) (conceding that a person's basic values are from an "overlapping consensus" that includes "the shared fund of implicitly recognized basic ideas and principles" that constitute "the public culture of a constitutional democracy . . . our public political culture , including its main institutions and the historical traditions of their interpretations."); Raz, *Facing Diversity*, *supra* note 259, at 3 ("People's individuality expresses itself in ways fashioned by social practices, and through their ability to engage in socially formed relations and pursuits. Concern for individual freedom requires recognition that an important aspect of that ideal is the freedom of people to belong to distinctive groups . . . ."); John R. Wallach, *Liberals, Communitarians, and the Tasks of Political Theory*, 15 POL. THEORY 581, 583–87 (1987) ("But Rawls [a paradigmatic liberal for communitarian critics] does not deny that the aforementioned attachments constitute our natures; he simply wants to minimize their effects on the public identities of citizens."). This convergence between liberal and communitarian thought underscores my belief that the two philosophical traditions are not as opposed to one another as is commonly asserted. *See* Gardbaum, *supra*, at 704 ("The atomism issue is, and always has been, that of the *extent to which*, individuals are, or are usefully conceptualized as, socially constituted." (emphasis added)); Wallach, *supra*, at 583–87 (claiming that communitarians place social context in the foreground while liberal theorists consign such considerations to the background); discussion at p. 659 below.

[373] *See* SANDEL, *supra* note 297, at 161–65, 177–78, 180. Some non-communitarians adopt a similar position. *See* GUTMANN, *supra* note 153, at 35 (criticizing other liberals for "fail[ing] to appreciate the value of our resistance to the ideal of unprejudiced individual freedom: the value of our desire to cultivate, and [to] allow communities to cultivate, only a select range of choice for children, to prune and weed their desires and aspirations so they are likely to choose a worthy life and sustain a flourishing society when they mature and are free to choose for themselves"). *But see id.* (asserting that all "sensible liberals" recognize "that the capacity for rational choice requires that we place some prior limitations on children's choices"); Raz, *Facing Diversity*, *supra* note 259, at 5–6 (arguing that Rawls's *Theory of Justice* applies only to those societies that possess "'the basic structure' of a modern constitutional democracy" (quoting Rawls, *supra* note 372, at 224)). Raz and Gutmann, in her latter quote, show that liberals may also embrace the "communitarian" view that choices are determined by social context.

[374] *Cf.* Post, *supra* note 6, at 303–04 (analyzing *Yoder* as an illustration of the distinction between individualist law, which protects "individuals vis-a-vis groups," and "pluralist law," which "protects the ability of groups to maintain their distinctive identities"). The tradition of "cultural pluralism" that Post discusses is closely related to contemporary communitarianism.

[375] *See Mozert V*, 827 F.2d at 1071 (Kennedy, J., concurring).

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supposed to make them good democratic citizens. The civic republican view is that, like literal disenfranchisement, *ineffective* or *incompetent* political participation imperils both the political liberty of the individual and the democratic polity itself. On this view, exposure is not neutral. It is the essence of a civic education, and opting-out prevents it and thus deprives children of the political ability that is its intended result.[376]

So, liberal individualism, communitarianism, and civic republicanism each has a story to tell about *Mozert.* Nevertheless, none of these three philosophical traditions is able to resolve the *Mozert* dilemma on its own terms. For liberal individualism, this is easy to see. The liberal ideals of tolerance and free choice would clearly be subverted by either the coerced reading program or the plaintiff's proposed opt-out remedy. The court's prevailing opinion, in principle, denied the requirements for sustaining the fundamentalist "way of life as it exists today" — except at the cost of turning down a free public education. This places a significant limit on the extent of official tolerance accorded to minority religious views. Yet the alternative result would have required the public schools themselves to shelter the plaintiff-children from exposure to the value of tolerance, and to the vista of value-options necessary for developing the faculties of critical judgment and meaningful individual choice.[377] Thus, *Mozert* clearly exposes the paradoxical limits of liberal tolerance.[378]

What is harder to see is that neither communitarian nor civic republican principles provide a way out. Indeed, I will suggest that although communitarianism and civic republicanism are conventionally understood to be philosophical rivals of liberalism,[379] all three

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[376] These propositions are amplified at pp. 652–53 below.

[377] It may be contended that, in practice, opting out of the reading program would not result in such a degree of isolation as to preclude the conditions of choice or, conversely, that school curricula are not designed to truly promote the ideal conditions of choice. (To capture more ideal conditions for promoting choice, imagine a more robust institution of exposing competing views, in which children would actually be encouraged to directly challenge one another's conceptions of the truth. It is almost impossible to imagine such an audacious version of dialogue and exposure being implemented in contemporary America. The contrast between this and the relatively tepid measures of the typical program challenged in *Mozert* illustrates the gap between the reality of existing programs and more strenuous ideals of choice; it also indicates the degree to which religious scruples are actually protected by existing norms of non-interference.) Despite the gap between ideal conditions of choice and those tested in the case, it seems fair to say that *as a matter of principle,* the court would have been sanctioning the deprivation of the conditions of choice under an opt-out remedy.

[378] For a developed inquiry into these paradoxical limits of liberal tolerance, see Herbert Marcuse, *Repressive Tolerance, in* WOLFF, MOORE & MARCUSE, cited above in note 8, at 81, 81–123.

[379] Many writers have expressed the standard view that liberalism and civic republicanism are separate, sometimes diametrically opposed philosophies. *See, e.g.,* J.G.A. POCOCK, *Virtues, Rights, and Manners, in* VIRTUE, *supra* note 361, at 38–39 (asserting a marked discontinuity

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are responses to the tensions and contradictions *within* a unified set of political commitments and beliefs. These observations help to explain the difficulty in meeting the fundamentalists' challenge — and the inadequacy of the intellectual resources we have to marshal in the battles over assimilation.

A. Civic Republicanism and Liberalism

1. The Apparent Disagreement Between Civic Republicanism and Liberalism.— Although *Ambach*'s endorsement of the teaching of "civic virtues" threatens to pluck from the constitutional firmament *Barnette*'s "fixed star"[380] of opposition to state indoctrination, the civic republican tradition offers an intriguing way to reconcile these two positions. Civic republicanism effects this reconciliation by linking the values of enlightened self-government and an informed citizenry to the inculcation of values through education. Without such education, the argument goes, democracy would either be corrupted by unenlightened, incompetent popular participation or deprived of its consensual character by a withdrawal from political participation.

However, even though the value of maintaining a democratic system of government may be weighty, it does not necessarily justify the invasion of personal liberty that civic education allegedly entails. The genius of civic republican thought is to tie the political value of collective self-government to a particular conception of individual freedom, and thus to form a coherent whole.

The civic republican conception of individual freedom that creates this link is often referred to as "political liberty" or "positive liberty" to distinguish it from the more familiar notion of "negative liberty."[381]

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between civic republican discourse and the "juristic" discourse of rights); Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 148–50 (1977-78) (differentiating a "public interest" — civic republican — from a "public choice" — liberal interest-group — model of democratic politics); Michelman, *Law's Republic*, *supra* note 361, at 21 ("Republicanism contests with a so-called pluralist vision, which regards the political system as, ideally, designed to serve the self-defined private interests of individuals or groups, fairly represented in political forums, where they compete under fair rules for fair shares of the outputs of public policy."); Sunstein, *supra* note 361, at 31–33 ("[W]hen the proposed Constitution was debated, the country faced a choice between two different conceptions of politics" — civic republicanism and liberal interest-group pluralism). *But see* STEPHEN MACEDO, LIBERAL VIRTUES 2–3, 203–85 (1990) (arguing that the values commonly ascribed to civic republicanism and communitarianism are part of a fully developed account of liberalism); Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273, 275–280 (1991) (asserting a dialectical relationship between republican and liberal thought); Sunstein, *supra* note 361, at 31–33 (identifying a "Madisonian" synthesis of classical liberalism and civic republicanism).

380 West Virginia St. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

381 ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118 (1969), is the classic source. *See id.* at 121–22. For a discussion linking these two conceptions of liberty to the civic republican tradition Michelman, *Law's Republic*, cited above in note 361, at 1503–05.

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"Negative liberty" expresses simple opposition to coercion. "Positive liberty," by contrast, is the freedom that results from participation in government. It is the freedom of autonomy or self-rule. In its most general formulation, positive liberty encompasses all aspects of individual autonomy that go beyond the merely negative injunctions against coercive interference.[382] But it is the particular one of *participation in government* that civic republicanism deems essential.

The recognition that individual self-rule requires participation in collective self-rule[383] transforms political participation into a species of individual liberty. For civic republicans, an individual who is denied a share of political power is subjugated in a way that cannot be remedied fully by society's extension of negative rights.

Positive liberty, moreover, necessitates a certain kind of education. Unlike the negative conception of liberty, which equates free will with whatever desires the individual expresses, the positive conception of liberty posits a possible discrepancy between those desires and the individual's "true" interests.[384] The latter supposedly unfold only through a process of reflection and deliberation, in which reason is brought to triumph over the baser, appetitive impulses. A lack of education not only threatens the survival of the democratic republic as such, but also denies the individual personal freedom from the baser impulses — instinct, need, and superstition — that confine free thought. Such a process of self-development is essential to the civic republican conception of self-rule; moreover it provides the essential connection between collective self-rule (democracy), individual self-rule (positive liberty or autonomy), and civic education. Education of the right sort is necessary to extricate the individual from the judgment-clouding appetites and exigencies to which she is otherwise enslaved.[385] Only by acquiring the capacity to make intelligent choices does the individual become truly free.[386] Education enables

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[382] *See* RAZ, *supra* note 293, at 156, 407–10.

[383] *Cf.* Michelman, *Traces of Self-Government*, *supra* note 361, at 27 ("This view of the human condition implies that self-cognition and ensuing self-legislation must . . . be socially situated: norms must be formed through public dialogue and expressed as public law.").

[384] *See* BERLIN, *supra* note 381, at 131–34.

[385] For a general discussion of the importance of education in civic republican theory, see Allen W. Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law*, 18 J.L. & EDUC. 93, 93–101 (1989).

[386] This sheds light not only on the value of civic education, and its relationship to individual freedom but also on its relationship to (in *Fraser*'s peculiar terminology, *see supra* p. 642) "happiness." "Happiness" has a distinctive meaning in the idiom of civic republicanism. For a general discussion of the republican idiom, see POCOCK, THE MACHIAVELLIAN MOMENT, cited above in note 361, at 338–40. As expressed by Hannah Arendt, one of the foremost modern exponents of civic republican thought, "public happiness" signifies the personal gratification stemming from public participation. *See* HANNAH ARENDT, ON REVOLUTION 123–24, 252–259 (1965). Happiness is the emotional reflection of positive liberty because the latter is, at bottom, a form of self-realization.

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the individual to participate effectively in deliberations and, moreover, to participate in such a way that she is not indifferent to the interests of others whom her decisions will affect.

More particularly, without an appreciation for the diversity of society, an individual might try to impose her opinion on others without first opening herself to their points of view. Given enough people like this, with a strong enough interest in political participation, the effect on democracy potentially could be disastrous. This threat — which, when applied to *Mozert* and similar cases, draws strength from apocalyptic images of the fundamentalists as fanatics — explains society's interest in insisting upon exposure to different points of view in order to protect *its* civic, democratic character. The value of civic participation must be instilled in order to make political liberty (and hence, personal freedom) effective. On this conception, the deprivation of religious freedom alleged in *Mozert* is justified because it actually *expands* other, more important, aspects of personal liberty — a potentially compelling constitutional argument that does not challenge the supremacy, in American constitutional thought, of the value of individual freedom.

This perspective is seemingly at odds with the tradition of negative liberty that is embodied in the individualist preoccupation with the evil of coercion. John Stuart Mill wrote that state-directed education casts people in the mold that "pleases the predominant power in the government . . . [and] establishes despotism over the mind."[387] Similarly, the liberal individualist tradition has tended to regard politics less as a fulfillment of than as an imposition on personal liberty. From this perspective, the opt-out remedy does not necessarily threaten the deprivation of an important freedom, because freedom consists not in civic participation, but rather in being left alone. To the extent that liberalism denies that effective political participation is either necessary or especially important for individual freedom, it gives no grounds for lamenting the absence of a truly civic education.

We saw earlier that the liberal tendency to diminish or deny the harm of "objective" instruction of the individual suggested rejecting the *Mozert* claim. Here we see that liberalism's tendency to depreciate the value of positive liberty can be manipulated to justify the opposite result. Thus, as we saw before, liberal principles are indeterminate: they guide courts equally well away from or toward acceptance of the *Mozert* plaintiffs' claim.

The telling point is that, despite the apparent opposition between liberalism and civic republicanism — between negative and positive liberty — civic republicanism is equally malleable. In Judge Kennedy's opinion,[388] civic republican principles were used to justify

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[387] MILL, *supra* note 34, at 177, *quoted in* Strossen, *supra* note 32, at 369 n.201.
[388] *See supra* pp. 641–42.

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coerced exposure as a necessary ingredient of civic education. Cases such as *Ambach v. Norwick* and *Bethel School District No. 403 v. Fraser* represent civic republicanism as an unabashedly statist and assimilationist ideology.[389] Yet civic republican premises, including the idea of civic education, can also support the opposite result. Indeed, historically, republicanism has been used to justify the autonomy of groups intermediate between the individual and the state. Republicanism has often been merged with a vision of groups, in particular, the family and the church, as the necessary "training grounds" for democracy.[390]

Were the malleability of civic republicanism based solely on its vision of such groups as training grounds, the apparent contradiction between more statist and more "groupist" strains of republicanism might be merely illusory. If republicanism construed group autonomy merely as an instrumental good — to the extent that it helps citizens achieve political liberty[391] — then such autonomy could legitimately be sacrificed whenever it interfered with good citizenship. Accordingly, Judge Kennedy's opinion in *Mozert* might be reconciled with the republican tradition of promoting religious subgroups on the grounds that the fundamentalist subgroup in question here was positively hostile to such civic values as tolerance, participation, and dialogue with others.[392]

This argument for internal consistency within republicanism parallels the argument that liberalism may legitimately — without contradicting itself — limit tolerance to groups not in conflict with the minimal prerequisites of negative liberty (that is, individual autonomy and choice). The parallel republican argument places even more stringent demands in furtherance of its goal of positive liberty. For, unlike

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[389] *See supra* notes 345–351 and accompanying text.

[390] On the autonomy of the church from a civic republican standpoint, see Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 735–38 (1986); on that of the family, see Linda K. Kerber, *The Republican Mother*, *in* WOMEN'S AMERICA 83, 88–90 (Linda K. Kerber & Jane De Hart-Mathews eds., 2d ed. 1987).

[391] A number of commentators have critiqued the supposed consonance between subgroups and the state. *See generally* F.M. Barnard & R.A. Vernon, *Pluralism, Participation, and Politics: Reflections on the Intermediate Group*, 3 POL. THEORY 180, 195 (1975) (arguing that the claim that intermediary groups play a "mediating" role is based more on an accident of terminology than on reasoning or evidence); Nomi M. Stolzenberg & David N. Myers, *Community, Constitution and Culture: The Case of the Jewish Kehilah*, 25 MICH. J.L. REFORM (forthcoming 1993); Sullivan, *supra* note 305, at 1722 (noting a tension between the heterogeneity of viewpoints associated with intermediate group membership and the republican "quest[] for universal truth").

[392] But this assertion overlooks the degree to which the fundamentalists *were* open to participation and dialogue with others. Fundamentalists in some contexts have been known to espouse a limited doctrine of tolerance. *See, e.g.*, Jerry Falwell, *Foreword* to FUNDAMENTALISM TODAY: WHAT MAKES IT SO ATTRACTIVE?, *supra* note 188, at 7, 7–8 (enjoining fundamentalists to be open to hearing criticism).

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negative liberty, which can presumably be satisfied in isolation from others, the goal of political liberty *requires* intercourse — dialogue, exposure, engagement, and debate — with others.

2. The Agreement Between Civic Republicanism and Liberalism. — Here, however, we encounter a more fundamental tension in civic republicanism — a tension that plagues the civic republican effort to avoid paradox just as it does the liberal effort. Modern civic republicanism cannot resolve the *Mozert* dilemma because it is dedicated to traditional liberal principles. As a result, it has come to embody the very paradox identified by the fundamentalist complaint. Civic republicanism, at least in its modern incarnation, professes the necessity of value-inculcation, yet among the values whose inculcation it requires — the "civic virtues" of a republican society — are the very principles that define a liberal society dedicated to the toleration of diverse values and the necessity of a free choice among them, based on the critical-objective faculties of thought.[393] Judicial precedents depict liberal principles *as* civic virtues. Thus, for example, *Fraser* specified that "fundamental values of 'habits and manners of civility' essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular."[394] Similarly, the Supreme Court found in an earlier case that "preparing minority children 'for citizenship in our pluralistic society'" required encouraging racial and ethnic diversity in schools.[395] Under this view, it is precisely "[*b*]*ecause* of the essential socializing function of schools," involved in the "promot[ion of] civic virtues," that the public school must encourage tolerance, respect for diversity, and individual freedom of thought.[396] Accordingly, the defeat to these principles required by either outcome in the *Mozert* case

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[393] *Cf.* Rebell, *supra* note 47, at 297 (observing the "intriguing paradox that traditional American political culture is largely grounded in an individualistic, liberal ethic; for this reason, the 'mainstream' political attitudes which the public schools convey tend to be supportive not only of the state, but also of individualism." (citation omitted)). Amy Gutmann has criticized the mode of thinking that formulates civic education and liberal conceptions of education as "a dichotomous choice." According to this false dichotomy:

> Either we must educate children so that they are free to choose among the widest range of lives (given the constraints of cultural coherence) because freedom of choice is the paramount good, or we must educate children so that they will choose *the* life that we believe is best because leading a virtuous life is the paramount good. Let children define their own identity or define it for them. Give children liberty or give them virtue. Neither alternative is acceptable: we legitimately value education not just for the liberty but also for the virtue that it bestows on children; and *the virtue that we value includes the ability to deliberate among competing conceptions of the good.*

GUTMANN, *supra* note 153, at 36 (second emphasis added).

[394] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

[395] Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 472 (1982) (quoting Estes v. Metropolitan Branches of Dallas NAACP, 444 U.S. 437, 451 (1980) (Powell, J., dissenting)).

[396] *See* Board of Educ. v. Pico, 457 U.S. 853, 876–879 (1982) (Blackmun, J., concurring in part and concurring in the judgment).

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undermines republicanism's civic virtues as well as the principles of liberal thought.

Nevertheless, it is tempting to argue that civic republicanism, as distinct from liberalism, does not really contain this paradox but instead provides a coherent justification for the inculcative education of exposure. Such an argument would proceed by asserting a rank ordering among civic republicanism's commitments to positive liberty and to liberal values.[397] If positive liberty is the higher principle, then it trumps liberal values when the two conflict. Given a vision of positive liberty that subsumes liberal values such as open-mindedness, dialogue, and even negative liberty, one can assume conflicts between the two to be rare. Under that assumption, the trumping of liberal principles becomes a narrow exception to a general rule of harmony between positive and negative liberty. Inculcation of civic values would be allowed to invade individuals' negative liberty whenever such an invasion was necessary to achieve positive liberty. In practice, however, this prioritization would require *only* exposure, the quiet kind of inculcation practiced in *Mozert*.[398]

Although this interpretation of republicanism is tempting, it overlooks the extent to which the contemporary revival of republicanism has adopted liberal values and attitudes, especially the liberal's reluctance to make value judgments and affirm a vision of the good.[399]

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[397] Gutmann offers such an ordering: she argues that the value of maintaining a democracy ("conscious social reproduction," in her terms) requires precluding any educational authority from "depriv[ing] any child of the capacities necessary for choice among good lives." GUTMANN, *supra* note 153, at 39–40. The positive liberty value of participating in the "conscious social reproduction" of democracy thus serves as the higher value under which the negative liberty of choice is subsumed (and defended within limits). Gutmann presents this as a "democratic theory" of education, and explicitly distinguishes it from both liberal individualism and republicanism. *Id.* at 25–41. However, this democratic theory incorporates less extreme strains of both the liberal and republican traditions that she depicts.

[398] *Cf. id.* at 29 ("It is one thing to recognize the right (and responsibility) of parents to educate their children as members of a family, quite another to claim that this right of familial education extends to a right of parents to insulate their children from exposure to ways of life or thinking that conflict with their own."); Rebell, *supra* note 47, at 314 n.167 (noting a "strong consensus" among participants at a Yale symposium on legal education that schools should inculcate tolerance as a substantive value by ensuring fair exposure to a broad range of ideas). Although this is an appealing position, it is important not to underestimate the impact of exposure, in particular, the subjective harm experienced by both parents and children whose beliefs are devalued and dislodged. We must not blink the harsh fact that Gutmann's "social reproduction," like Rebell's exposure, necessarily denies competing ideologies the opportunity to "reproduce."

[399] It is arguable that earlier interpretations of republicanism are interwoven with liberalism in the same way, but I do not attempt to advance that argument here. Amy Gutmann expresses the liberal's characteristic reluctance to make value judgments in plain and telling terms:

> Even if the philosopher-queen is right in claiming that a certain kind of life is objectively good, she is wrong in assuming that the objectively good is good for those of us who are too old or too miseducated to identify the objectively good with what is good for our own lives. "That may be the best life to which people — educated from birth in the

To the extent that republicanism adopts the critical perspective of objectivity, and thus renders values as subjective beliefs,[400] it loses its ability to assert the priority of the positive liberty of participation over the negative liberty right to be left alone. Rather than paying exclusive deference to positive liberty, this version of civic republicanism views negative and positive liberty as complementary and equally necessary guarantees.[401]

On either reading, civic republicanism does not issue a broad mandate for state indoctrination or acculturation. It only permits the imposition of those values, habits, and manners characteristic of a liberal society: open-mindedness, tolerance of diverse opinions, and the critical-objective mindset that underlies individual freedom of choice.[402] One of the best examples of this version of civic republicanism is Justice Brennan's dissent in *Hazelwood School District v.*

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proper manner — can aspire," we might admit, "but it's not the good life for *us*. And don't we have a claim to living a life that is good for us?"

GUTMANN, *supra* note 153, at 26. Gutmann goes on to argue that, imperfect as we are, we have a similar claim to have our vision of the good "counted in any claim about what constitutes a just society for us and our children," *id.* at 27, by virtue of our self-identification as parents and citizens. This sensitivity to the claims of personal identity counsels a considerable degree of deference to the extent preferences of actual people (despite their deviation from a posited objective ideal) just because they *exist*. This deference to a principle of existence similarly animates the communitarian impulse to protect extant groups. *See* Garet, *supra* note 162, at 1002, 1014–15, 1066–69, 1074 (postulating existence as the source of group rights in communitarian theory); *see also* Wisconsin v. Yoder, 406 U.S. 205, 218 (1972) (finding compulsory school attendance threatens to "undermin[e] the Amish community and religious practice *as they exist today*" (emphasis added)). The same sensitivity characterizes the more state-wary versions of liberalism. It is my contention that, contrary to the statist-Platonic version of republicanism presented and criticized by Gutmann, contemporary republicanism shares this sensitivity along with the assumption of a subjectivist view of values and beliefs.

400 In support of the view that modern expositors of republicanism have assumed this perspective, see APPLEBY, cited above in note 361, at 23. Appleby argues that republican revisionist scholarship relies on anthropological understandings of "culture" and "ideology" as means by which beliefs and consciousness are structured. *See id.* at 23, 285.

401 Of these two versions of republicanism, neither can be said definitively to be the "correct" reading of the tradition. One might try to adduce republican texts that seem to subordinate traditional liberal concerns to positive liberty. Conversely, one might try to find works that demonstrate an appreciation for the complex interplay between negative liberty values and the values of participatory democracy. But the question of which texts are properly denominated "republican" as opposed to liberal remains, as this is purely a matter of interpretation. In my view, some contemporary expositions — particularly judicial expositions — of the republican tradition incorporate elements of liberalism by virtue of their assumption of an objective-anthropological perspective toward beliefs. *See supra* note 400. I do not consider this view invulnerable to challenge. The essential point is that our constitutional tradition displays a commitment to both sets of values that does not easily yield to a simple rank ordering.

402 *Cf.* GUTMANN, *supra* note 153, at 23–24 ("The state may not argue simply: 'Because we wish to achieve social harmony, we shall indoctrinate all children to believe that *our* way of life is best.'"). Gutmann is not discussing the version of republicanism presented here, which adopts liberal criteria of a superior way of life. Nonetheless, she shows that even in its non-liberal form, republicanism has never offered a *general* justification for state-directed acculturation; it only justifies acculturation into a particular set of values.

Kuhlmeier.[403] Many critics argue that civic republicanism carries within it the seeds of totalitarianism.[404] But it was the majority in *Hazelwood*, without any recourse to republican rhetoric, that justified official censorship of a high school newspaper — and thus raised the specter of licensing the imposition of a statist ideology. By contrast, Justice Brennan's dissent, which relied on the philosophy of civic republicanism, argued in favor of free expression.[405] Thus, Justice Brennan's opinion exemplifies the fusion of civic republican and liberal principles analyzed above.

Moreover, just as we can see civic republicanism's commitment to liberal principles, we can demonstrate liberalism's covert dependence on the supposedly distinguishing characteristic of civic republicanism: its sanctioning of state inculcation. The same intertwining imperatives to inculcate and to tolerate that characterize modern republicanism also appeared in *Barnette*, whose "fixed star" passage is so often taken to epitomize an unequivocal commitment to liberal individualism.[406] In a less-quoted passage from *Barnette*, Justice Jackson explained: "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we

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[403] 484 U.S. 260 (1988). Such a fusion of the republican commitment to inculcate democratic values and a liberal conception of those values is adumbrated in Levin, cited above in note 351, at 1648, and even earlier in JOHN DEWEY, DEMOCRACY AND EDUCATION 81–99 (1916).

[404] The criticism that civic republicanism contains the seeds of modern totalitarianism is a standard one. *See, e.g.*, J.L. TALMON, THE ORIGINS OF TOTALITARIAN DEMOCRACY 83–86 (1960) (tracing totalitarian ideas to Rousseau's notion of the general will); *see also* Rubenfeld, *supra* note 147, at 764 ("[L]iberals soon begin insinuating that republicans are some sort of touchy-feely totalitarians."). A similar criticism is crystallized in Berlin's depiction of positive liberty. *See* BERLIN, *supra* note 381, at 131–34. *But cf.* GUTMANN, *supra* note 153, at 11 (commenting that "[*l*]*iberal* theories, in their more political version, . . . suggest[] that we need a philosopher-king (or philosopher-queen, if they are truly liberal) to impose the correct educational policies, which support individual autonomy, on all misguided parents and citizens." (emphasis added)).

[405] The very first line of Justice Brennan's opinion asserted, "When the young men and women of Hazelwood East High School registered for Journalism II, they expected a civics lesson." *Hazelwood*, 484 U.S. at 277 (Brennan, J., dissenting). Justice Brennan relied on the *Ambach* vision of public education as a tool for inculcating fundamental political values. *See id.* at 278–79. He insisted that the central lesson the students expected was "'an appreciation of their rights and responsibilities under the First Amendment to the United States Constitution.'" *Id.* at 277 (quoting Kuhlmeier v. Hazelwood Sch. Dist, 795 F.2d 1368, 1373 (8th Cir. 1986)). Justice Brennan affirmed "that the state educator's undeniable, and undeniably vital, mandate to inculcate moral and political values is not a general warrant to act as 'thought police' stifling discussion of all but state-approved topics and advocacy of all but the official position." *Id.* at 285–86 (Brennan, J., dissenting). Finally, Justice Brennan invoked *Barnette*'s opposition to "'teach[ing] youth to discount important principles of our government as mere platitudes,'" as he concluded that the Court's rejection of the students' First Amendment claim delivered a civics lesson, but not the correct one. *Id.* at 291.

[406] *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). For a reading of this passage as championing liberalism, see Post, cited above in note 6, at 304–05.

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are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[407] Thus, not only is civic republicanism committed to the inculcation of liberal individualist values, but the liberal individualist commitment to "the free mind" itself requires a certain kind of education — namely, education in the value of diversity, reason, and individual choice.[408]

This, of course, is precisely the profile of a civic education. As expounded by the courts, civic education must be liberal in content. It must promote the "critical thinking," objective judgment, and rational choice necessary to both free will and competent participation in a democratic, pluralistic society. Yet to do so is to inculcate the values of a *particular* way of life — one dedicated to the simultaneously liberal and civic republican values of freedom of conscience, equality, tolerance, and popular self-government.[409] Like every way of life, this one requires for its perpetuation the transmission of its constitutive values from one generation to another. This cultural reproduction takes place via the cultivation of critical thought, which inexorably shapes the individual's personal identity, values, and beliefs in a particular way.

The fundamentalists' opposition to "mere exposure" thus builds on the paradox common to liberalism and civic republicanism alike — a paradox that grows out of the intertwining of liberal and civic republican conceptions. Ultimately, the fundamentalists resisted the schools' mode because in "merely exposing" competing values and diverse ways of life, it implicitly teaches children that beliefs are matters of individual opinion; that values are the stuff of subjective thought; that religions are cultural systems which reflect the human hand of history; and that their doctrines are therefore open to debate. In so doing, the challenged educational program potentially estranges children from their parents' religious tradition and initiates them into the culture of

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[407] *Barnette*, 319 U.S. at 637.

[408] Thus, Justice Douglas's dissent in *Yoder* exalted exposure to "the new and amazing world of diversity" not because it would have no formative effect on the development of children's values and beliefs, but precisely because it would. *See* Wisconsin v. Yoder, 406 U.S. 205, 245–46 (1972) (Douglas, J., dissenting in part); *see also* GUTMANN, *supra* note 153, at 30 ("A state makes choice possible by teaching its future citizens respect for opposing points of view and ways of life. It makes choice meaningful by equipping children with the intellectual skills necessary to evaluate ways of life different from that of their parents.").

[409] The civic conception of education bears all the features of a "paideic" education *into* a particular cultural and normative tradition, as contrasted to the "imperial," non-inculcative education *about* diverse values and beliefs. In other words, the "imperial" education, based on the "objective mode of discourse," *is* a peculiar form of "paideic" education, steeped in a particular way of life. Simply put, liberalism is a belief-system or a way of life. Although Cover juxtaposed the "critical and analytic" mode of thought *against* the "initiatory, celebratory, expressive and performative," *see* Cover, *supra* note 219, at 13, the critical-analytic mode itself expresses, and initiates the student into, a particular way of life.

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modernity, a peculiar agglomeration of liberal and civic republican beliefs.

Our analysis shows that both civic republicanism and liberalism are torn between a disinclination to judge or to undermine diverse ways of life and the conflicting assumption of an objective-critical perspective that brackets the truth question and renders "belief-systems" as subjective, historical data. Embodying the same subjectivist and historicist tenets that defined secular humanism in the context of critical scholarship,[410] judicial doctrine,[411] and public education,[412] these twin philosophies are certain ultimately to disappoint the fundamentalists.

B. *Communitarianism and Civic Republicanism*

1. Agreements and Disagreements Between Communitarianism and Civic Republicanism. — At times, the *Mozert* complaint seems to resonate with communitarian positions, and indeed, some fundamentalist advocates have explicitly adopted both the idiom of communitarian philosophy and associated legal theories of group rights.[413] But, as I will show, the fundamentalists would be no better protected under a communitarian conception of education than by either of the other two philosophies.

Exponents of communitarianism often speak as if it were interchangeable with civic republicanism. For example, Professor Michael Sandel, perhaps the most prominent exponent of communitarianism, presents it as "a view that gives fuller expression to the claims of citizenship *and* community" and argues that "we cannot conceive our personhood without reference to our role as citizens, and as participants in a common life."[414] I will argue that civic republicanism

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[410] *See supra* pp. 616–17.

[411] *See supra* pp. 622, 631–32.

[412] *See supra* pp. 614, 625–28.

[413] *See* Frederick M. Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WISC. L. REV. 99, 107–08 (drawing extensively on MACINTYRE, *supra* note 297, at 222 (1981); Cover, *supra* note 219, at 14; and Garet, *supra* note 149, at 1052).

[414] Sandel, *supra* note 372, at 5 (emphasis added). With reference to public education, Sandel adds: "where liberals might support public education in hopes of equipping students to become autonomous individuals, capable of choosing their own ends and pursuing them effectively, communitarians might support public education in hopes of equipping students to become good citizens, capable of contributing meaningfully to public deliberations and pursuits." *Id.* at 6. Sandel thereby incorporates republican rhetoric into his account of communitarianism, while denying both the possible divergence between the roles of citizen and member of a particular subcommunity, and the possible convergence between liberal and civic republican justifications of public education. Other works, following Sandel, have conflated the communitarian claims for membership in a group with civic republican claims for citizenship in a democracy. *See, e.g.*, T. Alexander Aleinikoff, *Theories of Loss of Citizenship*, 84 MICH. L. REV. 1471, 1494 (1986) ("From the communitarian perspective, citizenship is seen as an organic relationship between the citizen and the state."); Fallon, *supra* note 361, at 1696 (describing communitarian

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agrees with communitarianism, just as it does with liberalism, on a common core of values and perspectives, but that this agreement does not extend nearly so far as is suggested by the work cited above.

Some of the affinities between communitarianism and civic republicanism are obvious. Both eschew the assertion of value-neutrality ascribed to liberalism.[415] Both insist upon the cultural specificity of any particular political arrangement, including liberal ones. Furthermore, they share a critique of the individualist strain of liberalism, seeing the individual as socially-situated, embodied in a culturally-inflected self, "embedded" in a particular tradition or culture, shaped by the involuntary forces of his or her particular context. Accordingly,

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theory as an intellectual source of the revival of civic republicanism); Note, *supra* note 113, at 682 ("Communitarian thinkers reject liberalism as reflecting an impoverished vision of the self, one that discounts our participation in common traditions and practices and ignores the fulfillment that individuals can achieve through citizenship." (citations omitted)); *see also* Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 2 n.8 (1989) (identifying tasks common to communitarians and civic republicans); Gardbaum, *supra* note 372, at 723 (1992) (asserting that Sandel and MacIntyre — both prominently identified with communitarianism — seek to promote "the morality of the historically and conceptually distinct political tradition of republican thought, which has its own conception of political association and community").

[415] *See* Sandel, *supra* note 372, at 3 (challenging the putatively liberal notion of justification which is "neutral among ends"); Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1321–24 (1987) (challenging the liberal distinction between law and politics, and criticizing the conception of law and judging as phenomena that transcend culturally embedded values). Robert Post points out that although communitarians often link a commitment to individual choice and a commitment to neutrality as inseparable elements of the liberal worldview, in fact "these two perspectives do not necessarily entail each other." Robert Post, *Tradition, the Self, and Substantive Due Process: A Comment on Michael Sandel*, 77 CAL. L. REV. 553, 554 (1989).

Some hold the depiction of liberalism by its critics — as resting on the principle of value-neutrality — to be a straw man. *See* Gutmann, *supra* note 297, at 311–12 (denying Sandel's ascription to Rawls of the view that "the foundations of justice must be independent of all social and historical contingencies"); *see also* DWORKIN, LAW'S EMPIRE 274 n.19 (1986) (criticizing Mark Tushnet's description of liberalism as positing a world in which people "'exist as isolated islands of individuality who choose to enter into relations that can metaphorically be characterized as foreign affairs'" (quoting Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 783 (1983)); Raz, *Liberalism*, *supra* note 259, at 762 (submitting a liberal conception of freedom "not infected by the individualism of which liberals are often accused"). *But see* MACEDO, *supra* note 379, at 262 (considering and rejecting attempts to distance liberalism from a core commitment to political neutrality, but insisting that it is "wrong to think that this core is in any important sense morally neutral"). For attempts by liberal thinkers to develop ideals of political neutrality, see, for example, Bruce Ackerman, *Why Dialogue?* 86 J. PHIL. 5, 12–21 (1989); and RICHARDS, cited above in note 43, at 67–162. For an effort to develop an account of liberalism that is not dependent on the ideal of neutrality, see RAZ, THE MORALITY OF FREEDOM, cited above in note 293, at 110–33; Stephen A. Gardbaum, *Why the Liberal State Can Promote Moral Ideas After All*, 104 HARV. L. REV. 1350, 1361–62, 1368–71 (1991). Of course, much of the dispute over principles of neutrality in liberalism arises out of the fact that neutrality can be defined in different ways.

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both philosophies place great emphasis on the social mechanisms by which traditions are transmitted. These include both formal and informal education.[416] Politics is not value-neutral. But this is not necessarily a vice.

What makes *liberal* politics a vice for communitarians marks the divergence between republican and communitarian views and, at the same time, it points to the latter's own internal paradoxes. Consider Professor Cover's evocative communitarian label for liberalism's objective mode, "imperialism."[417] This term connotes a system of values that rises above any particular culture.[418] This notion of transcending culture corresponds to the Nietzschean criticism of liberalism as being a poor substitute for a "'real culture'" that produces a population of deracinated selves.[419] In this view, the problem with exposure, as with other liberal institutions, is that it is too "thin." It remains

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[416] Jean-Jacques Rousseau provides the classic republican statement of the importance of education:

> To form citizens is not the work of a day; and in order to have men it is necessary to educate them when they are children . . . . If . . . they were early accustomed to regard their individuality only in its relation to the body of the State, and to be aware, so to speak, of their own existence merely as a part of that of the State, they might at length come to identify themselves in some degree with this greater whole, to feel themselves members of their country, and to love it with that exquisite feeling which no isolated person has save for himself; to lift up their spirits perpetually to this great object, and thus to transfer into a sublime virtue that dangerous disposition [passion] which gives rise to all our vices.

JEAN-JACQUES ROUSSEAU, *A Discourse on Political Economy*, *in* THE SOCIAL CONTRACT AND DISCOURSES 233, 252 (G.D.H. Cole trans., J.M. Dent & Sons, Ltd. 1913) (1762). Rousseau goes on to endorse public education as "one of the fundamental rules of popular or legitimate government." *Id.* at 252.

> If children are brought up in common in the bosom of equality; if they are imbued with the laws of the State and the precepts of the general will; if they are surrounded by examples and objects which constantly remind of the tender mother who nourishes them, of the love she bears them, of the inestimable benefits they receive from her, and of the return they owe her, we cannot doubt that they will learn to cherish one another mutually as brothers, to will nothing contrary to the will of society, to substitute the actions of men and citizens for the futile or vain babbling of sophists, and to become in time defenders and fathers of the country of which they will have been so long the children.

Id. at 136. *But see* MILL, *supra* note 34, at 176–77 (rejecting public education). The importance of formative traditions for communitarians permeates Alasdair MacIntyre's *After Virtue* and Michael Sandel's *Liberalism and the Limits of Justice* and *The Procedural Republic and the Unencumbered Self*. *See supra* note 372; *see also* Michael Oakeshott, *Political Education*, *in* LIBERALISM AND ITS CRITICS, *supra* note 297, at 233 ("[P]olitical education is not merely a matter of coming to understand a tradition, it is learning how to participate in a conversation: it is at once initiation into an inheritance in which we have a life interest, and the exploration of its intimations.").

[417] *See* Cover, *supra* note 219, at 13–16. Although I take Cover's criticism of liberalism to typify important features of the communitarian position, Cover is hardly a representative communitarian. His relationship to liberal values is rather ambivalent, and his brilliance lies in expressing the tension between particularism and universalism, rather than in definitely embracing one over the other. *See id.* at 12.

[418] *See supra* pp. 627–28.

[419] See BRANN, *supra* note 265, at 79.

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unclear how such culturally "thin" institutions could be responsible for any kind of value-inculcation or acculturation.

However, the designation, "imperial," also conjures up a different sense of cultural imperialism, one in which objectivity, choice, tolerance, and reason are the socially produced, enforced, and reproduced artifacts of a liberal culture. In this view, institutions like neutral exposure are "thick." The problem is no longer that they *lack* substance; the problem is that they *impose* substance. The puzzle, then, is how neutral exposure and similar liberal institutions can be both thick and thin. And what exactly is wrong with "imperialism" if culturally thick institutions are good?

For the civic republican, as we have seen, the answer is "nothing." Although the communitarian would oppose the inculcation of civic values if it interfered with the survival of particular, particularistic sub-groups, for a civic republican it is needed for the survival of her particular culture. Thus, the communitarians deplore precisely that which civic republicans celebrate — exposure's assimilative impact.[420] This disagreement highlights the distinction between the descriptive position that exposure causes assimilation and the prescriptive position that exposure causes assimilation and is therefore bad.

For the fundamentalist, the glide from description to prescription is natural. Resisting the effects of inculcation is nothing less than a matter of personal and communal survival. The communitarians' analysis of liberal institutions and their commitment to the value of "constitutive communities" appear initially to support the fundamentalist perspective. The puzzle, however, is why their general appreciation of culturally-specific traditions should not also embrace the tradition of civic republicanism, and why their commitment to the perpetuation of cultural communities should not apply to the civic community. In other words, why not view the chain of opinions based on citizenship — from *Brown* to *Ambach* and *Fraser* — just as much communitarian decisions as civic republican ones?

Any one of a host of specific criteria — the special connection between parents and children; the dangers of statism; the distinction between large-scale, heterogeneous societies and small-scale homogeneous groups[421] — might be used to elevate the value of the religious subcommunity over that of the polity. If such principles were ex-

[420] *See* Post, *supra* note 6, at 314 ("Efforts to establish pluralism will always shade, at one point or another, into assimilationism. The respect for diversity, on which pluralist law is based, may well run contrary to the beliefs of some groups; pluralist attempts to create a legal framework based on the value of toleration may well end up imposing this value on groups who do not share it.").

[421] Sociologists have been attending to the distinction between *Gemeinschaft* (community) and *Gesellschaft* (large scale society) since Ferdinand Tönnoes's *Gesellschaft und Gemeinschaft* appeared in the 1880s.

plicitly incorporated into communitarian theory, they might provide the grounds for favoring the perpetuation of the subgroup over the perpetuation of the liberal state. Few contemporary communitarian theorists have undertaken to elaborate such a set of principles, but nothing inherent in their philosophy prevents them from so doing.[422]

However, even if grounds for preferring the subgroup were constructed, communitarianism's ability to resolve the *Mozert* problem to the fundamentalists' satisfaction would still be in question. This is due to the most profound paradox that haunts the communitarian position. Communitarianism is dedicated to the continued survival of diverse ways of life. Hence, it aims to protect the conditions that enable a subgroup to reproduce itself. For this reason, fundamentalists might find in communitarianism precisely what they seek: recognition of the harm of interfering with their cultural reproduction, resistance to assimilation, and specific opposition to a liberal regime that views beliefs as subjective and consequently cultivates the faculties of critical judgment and choice.

However, communitarianism relies on the same basic axiom — that beliefs are subjective — that also characterizes liberal and civic republican thought,[423] judicial free exercise doctrine,[424] modern critical scholarship,[425] and, of course, the challenged programs of the public schools.[426] The subjectivism implicit in value-neutrality — the bracketing of the "truth question" in favor of a focus on personal beliefs — is also implicit in the idea of a cultural context or "way of life."[427] In other words, the commitment to protect cultural belief-systems *as such* — the commitment that animates communitarianism — embodies precisely that subjectivist view of religion that the fundamentalists condemn as the essence of secular humanism.[428] Indeed, the communitarian concept of a "way of life" is borrowed from the discipline of cultural anthropology that itself is an outgrowth of the same fundamental shift in perspective that gave rise, first, to German

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[422] Thus, much communitarian scholarship is oddly impervious to the long-noted distinction between the "gesellschaft" and the "gemeinschaft." Garet's work is exceptional in its reliance on the distinction. *See* Garet, *supra* note 149, at 1006–16 (differentiating the group from both society and the individual). However, Garet, like Cover, is atypical of communitarians in his simultaneous appreciation for subgroups and the more universal society. *See id.* at 1016; *see also* Garet, *supra* note 138, at 917–18 (arguing that claims for individual and group rights are symmetrical, neither one automatically trumping the other.).

[423] *See supra* pp. 655–56.

[424] *See supra* pp. 631–32.

[425] *See supra* pp. 616–17.

[426] *See supra* pp. 659–60.

[427] *See* McClure, *supra* note 8, at 384 (arguing that contemporary communitarians treat secular and religious communities alike "by performing the same operation on them that Locke performed on religion: by denying their empirical validity and relegating them to the category of speculative truths without worldly effect.")

[428] *See supra* pp. 613–14, 621–22, 626–28.

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higher biblical criticism and, eventually, to the "objective" studies of comparative religion and religious history that were lauded in *School District v. Schempp*.[429] Therefore, although the communitarian conception of the value of cultural belief-systems might be employed to support such provisional concrete results as the opt-out remedy, it can hardly protect a religious tradition from being rendered as an (implicitly subjective) belief system.[430]

2. The Basic Agreement Among Communitarians, Republicans, and Liberals. — Notice that communitarianism agrees with civic republicanism precisely where it agrees with liberal individualism. Indeed, the three may be seen as diverse expressions of *the same* political philosophy and of the tensions and ambiguities within it. The essence of this agreement lies in their joint assumption of the critical-objective perspective. All three are committed to the subjectivist and historicist point of view engendered by critical-objective modes of thought. Subjectivist attitudes — including the studied avoidance of "the truth question" and the treatment of beliefs as historical data, as creations of the human mind that one might or might not accept — are the inevitable outcome of adopting the critical perspective of objectivity. Together, subjectivism and the critical objective perspective support the basic principle of tolerance that can now be seen as the common property of liberal, communitarian, and civic republican thought. Since Locke, religious toleration has been justified on the ground of our inherent uncertainty about the true path to God.[431] It is the ultimate irony that the principle of uncertainty underlying subjectivism itself becomes axiomatic, constitutionally deified, and that it may interfere with the survival of a particular religious group.[432]

That contention was never disproved in the course of the *Mozert* litigation. Indeed, it seems plausible that continued exposure to a curriculum denying certainty about the truth and adopting an objective, neutral perspective might lead children away from the fundamentalist faith or at least might make them self-conscious about it. Pointing to the axiom of subjectivism implicit in the school curriculum, the fundamentalists opposed assimilation into the culture of di-

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[429] 374 U.S. 203, 225 (1963).

[430] *See* Gedicks, *supra* note 413, at 105–06 (arguing that the "right of religious group autonomy in making membership decisions is necessary to preserve religious pluralism").

[431] *See* LOCKE, *supra* note 278, at 188–192. The Letter is supposed to have been published in 1685. *See id.* at vii. Basic skepticism is not the only justification for tolerance. Another common justification is the prudential one, to avoid civil strife.

[432] To the position that subjectivism itself becomes axiomatic, it may be countered that subjectivism is not adopted by the state as a matter of truth, but only as a matter of prudence. Similarly, the adoption of the principle of tolerance can be defended as being based on consensus, rather than on an assumption of its objective validity. However, this argument overlooks the fact that such arguments themselves assume the soundness of prudence and consensus as principles. *See* Raz, *Facing Diversity*, *supra* note 259, at 15.

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versity as an impermissible form of indoctrination. The question of whether the Constitution should be interpreted to proscribe such assimilation remains unanswered.

V. CONCLUSION

Assimilation is regarded by many as the major threat to a pluralistic society. Once widely prescribed as the cure for discrimination, it is increasingly perceived as one of its chief forms — more insidious than outright exclusion and hence possibly more dangerous. Nevertheless, assimilation is still advocated as an ideal. The current battle over bilingualism is the latest chapter in a long history of absorbing "un-American" elements into the cultural mainstream. It is a characteristic of this process, as our culture has evolved from pristine Anglo-Saxonism to the "ethnic melting pot," that some members of cultural and racial minorities have been champions of assimilation. But, more and more, people have come to identify cultural assimilation as the problem rather than the cure.[433]

Nevertheless, people have not yet managed to explain what precisely makes assimilation a problem. In this paper, I have shown that complaints about interference with processes of belief-formation have not been adequately differentiated from an array of other alleged harms. I have also shown that court rulings about interference with the processes whereby people come to hold their beliefs have relied upon three different — and yet not so different — political philosophies, each entailing a commitment to the axiom of subjectivism.[434]

However, although neither liberal individualism, communitarianism, nor civic republicanism can resolve the dilemma of *Mozert*, each

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[433] *See, e.g.*, Patricia J. Williams, *A Kind of Race Fatigue*, N.Y. TIMES BOOK REV., Sept. 16, 1990, at 12; Goel, Lovett, Patten & Wilkins, Note, *supra* note 2, at 469–73. Although critical analyses of assimilation have been generated by a variety of groups, perhaps the oldest and most developed tradition of anti-assimilationist thought in the United States is rooted in African-American political thought. *See generally* Thomas Pettigrew, *Racially Separate or Together*, *in* BLACK SEPARATISM AND SOCIAL REALITY: RHETORIC AND REASON 79, 79–82 (Raymond L. Hall ed., 1977) (providing a lineage and analysis of black separatist and nationalist thought). Just as African-Americans have divided over separatist and assimilationist strategies, so too have national and ethnic sub-groups, like the Mexican-American community, for whom Richard Rodriguez's personal recollections, extolling cultural assimilation, became a cause celebre. *See* RICHARD RODRIGUEZ, HUNGER OF MEMORY 34–35 (1982). Indeed, memoirs by immigrants and their descendants, which reflect the competing urges to preserve and to escape traditional culture, now form a recognizable genre of literature. *See* Martha Minow, *Identities*, 3 YALE J.L. & HUMAN. 97, 100–10, 122–26 (1991). Perhaps even more than explicitly political writing, these personal reflections attest to the ambivalence that greets assimilation in a culturally pluralistic society.

[434] *See supra* pp. 634–46.

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has resources for illuminating it that we cannot do without. We can try to base constitutional interpretation on alternative philosophies or on no philosophy at all, but ultimately, the paradox of neutral exposure as indoctrination will haunt us and it is best to look this paradox in the face.

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