Education Is Speech: Parental Free Speech in Education

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Education is speech. This simple point is profoundly important. Yet it rarely gets attention in the First Amendment and education scholarship.

Among the implications are those for public schools. All the states require parents to educate their minor children and at the same time offer parents educational support in the form of state schooling. States thereby press parents to take government educational speech in place of their own. Under both the federal and state speech guarantees, states cannot pressure parents, either directly or through conditions, to give up their own educational speech, let alone substitute state educational speech. This abridges their freedom of speech and even compels them to adopt government speech.

The argument can be understood in terms of Pierce v. Society of Sisters*. That case forbids compulsory state education. Here it must be added that states cannot evade that decision by using other means to impose state education.*

The vindication of parents' freedom of educational speech would have far-reaching consequences. It would secure parental authority, protect against governmental conformity, defend religious liberty, accomplish a second disestablishment, and move toward fulfilling Brown v. Board of Education*'s promise of equality. Last but not least, it would serve the best interest of each child.*

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Introduction

Is education speech? If so, what does this mean for the speech rights of parents in educating their minor children?

The question has long simmered below the surface of public school debates from the time of Horace Mann to the present. There has been a tendency, however, to frame the debate in terms of parental rights or religious liberty. Perhaps for this reason, the speech angle has gotten short shrift. It was proposed a quarter-century ago by Professor Stephen Gilles.[1] Otherwise, it has yet to be addressed, academically or judicially.

This is a pity because the speech analysis fits. Education consists almost entirely of speech, whether speech to or with students. Education therefore cannot stand outside familiar constitutional analysis. Being predominantly speech, education is as susceptible to First Amendment inquiry as any other sort of expression.

Once one recognizes that education is (almost entirely) speech, much that previously was puzzling becomes clear. There is a widespread, even if inchoate, feeling that parents enjoy a sort of constitutional freedom in educating their children. Yet the foundation and extent of any such right has remained unresolved. In the leading case, *Pierce v. Society of Sisters*,[2] the Supreme Court held compulsory state education unconstitutional.[3] Although the decision seemed to rest on parental rights, the exact basis and extent of

1. *See* Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 1012–33 (1996) [hereinafter Gilles, *Parentalist Manifesto*] (arguing that state educational regulation that pressures parents to conform their children's education to state values is a violation of the parents' free speech rights and is presumptively unconstitutional); *see also* Stephen G. Gilles, *Liberal Parentalism and Children's Educational Rights*, 26 CAP. U. L. REV. 9, 9–10 (1997) (discussing the need for states to defer to parents' "reasonable conception of the child's educational good"); Stephen G. Gilles, *Selective Funding of Education: An Epsteinian Analysis*, 19 QUINNIPIAC L. REV. 745, 747–48 (2000) (arguing that selective funding of public education is at odds with first amendment principles). *See also* Richard F. Duncan, *Why School Choice Is Necessary for Religious Liberty and Freedom of Belief*, 73 CASE W. RSRV. L. REV. (forthcoming 2022).

2. 268 U.S. 510 (1925).

3. *See id.* at 534–35 (holding that the Oregon Compulsory Education Act of 1922 "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control").

any such right are unclear. Another riddle is *Wisconsin v. Yoder*.[4] The opinion relies on religious freedom to let the Amish avoid any formal schooling for their children after age fifteen.[5] One might suppose that the case vindicates a religious freedom from compelled upper-grade education, but the Supreme Court concluded its decision by cautioning that other religious groups should not expect similar accommodation.[6] So these cases do not make it easy to generalize about parental or religious rights in education.

In contrast, the speech argument is clear and forceful. It rests on a well-established constitutional right with relatively well-defined implications. So it does not get bogged down in questions about the uncertain foundation and reach of parental rights. And in offering a powerful argument against the pressures on parents to send their children to public schools, the speech argument goes further than familiar religious liberty claims. To be precise, it avoids any dispute about a religious right of exemption, and it secures the rights of all parents, not just those who are religious. So the speech analysis fits in ways that other constitutional frameworks do not.

Of course, this is not to say that the speech right avoids all difficulties. It collides with deeply entrenched commitments to state institutions and to government dominance in education.

Yet parents' freedom of educational speech—whether at home or in choosing a private school—deserves serious consideration.[7] So squarely does it fit within existing doctrine that it is difficult to understand on what ground the right could legitimately be denied. And this freedom of parents vindicates a host of profoundly important constitutional and societal ideals.

A. The Doctrinal Arguments

This Article makes two doctrinal arguments about speech. One argument involves direct constraint. States simultaneously require parents to educate their minor children and offer state education free of charge. The combination means that states are forcing parents to choose between state education at no additional cost and their own choice of education at their own expense.

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4. Wisconsin v. Yoder, 406 U.S. 205 (1972).

5. *Id.* at 227, 233–34.

6. *See id.* at 235–36 (noting that the claim made by the Amish in this case was "one that probably few other religious groups or sects could make").

7. The choice of a private school and even a public school to teach one's children is as much an exercise of the freedom of speech as teaching them oneself at home. *See* Gilles, *Parentalist Manifesto*, *supra* note 1, at 1018 ("[S]tate regulation that interferes with the speech of parentally chosen schools and teachers also interferes with the educative speech of the parents themselves . . . . [A] person's freedom of speech includes the right to select and employ other persons to speak on his or her behalf.").

Being forced to educate their children, parents are not acting entirely voluntarily when they pay considerable sums to educate their children outside state schools. The combination of mandatory education and tuition-free state education is a direct constraint, compelling them to submit their children to government educational speech or pay to avoid it. To be sure, the requirement that parents must educate their children is not formally a requirement that they subject their children to government educational speech or that they pay for the freedom of speech. But the combination of mandated education and subsidized state schooling forces parents either to submit to government educational speech or pay to avoid it.

The second argument rests on the doctrine relating to unconstitutional conditions. Public education is a government benefit and so cannot come with a condition that abridges the freedom of speech. All the same, states offer this subsidy on the condition that parents accept government educational speech in place of their own. In other words, parents are being pressured in a way that abridges their own educational speech and compels them to adopt the government's.

The condition argument here can be summed up in terms of *Brown v. Board of Education*.[8] The Court in *Brown* held that public education was a government opportunity or benefit that could not be offered in violation of the Fourteenth Amendment[9]—to which this Article merely adds, nor in violation of the First. This most central of cases thus reveals the doctrinal force of the speech-condition argument. At the same time, it will be seen that both of the speech arguments give life to *Brown*'s unfulfilled promise of equality.

Both the direct-constraint and the condition arguments can also be put in terms of *Pierce v. Society of Sisters*. In that 1925 case, the Supreme Court held that states cannot make state schooling compulsory.[10] Now it must be added that states cannot use other pressures to achieve the same unlawful end.

B. Prior Scholarship

Although these arguments scarcely appear in the free speech or education literature, there is one notable exception. An article published more than a quarter-century ago by Stephen Gilles observed that parental education is parental speech.[11] It argued that the state subsidy for public schooling "pressures parents to conform their child's education to the state's preferred

8. 347 U.S. 483 (1954).

9. *Id.* at 493, 495.

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

11. Gilles, *Parentalist Manifesto*, *supra* note 1, at 1015–16.

values" and that this "constitutes viewpoint-based interference with parental speech."[12]

The Gilles article is valuable for adumbrating the point about speech. But the argument could go further. The goal here is therefore to pursue the connection between education and speech in greater depth—at least for purposes of understanding the rights of parents against the current system of school funding.[13]

The key additional arguments here include the following: All education, not just parental education, is speech. The pressure on parents comes in two forms: through direct constraints and through conditions. In both ways, states simultaneously abridge the speech of parents and compel them to adopt state speech. And the conditions argument rests on no less a precedent than *Brown v. Board of Education*.

It also is necessary to say more about the possible justifications for current policy. The parental speech interests are not negligible. The abridgments of the freedom of speech are not narrowly tailored to a compelling government interest. The abridgments have no defense in precedent. Nor can state funding of educational speech be excused as mere government speech.

Last, but not least, it is important to recognize that the speech analysis effectuates a host of profoundly important ideals. For example, it advances religious liberty, the equality promised in *Brown*, and freedom from government-imposed conformity.

C. What the Argument Is Not

The constitutional argument is sufficiently unfamiliar that it is apt to be misunderstood. So at the outset, this Article must explain what it does not claim.

This piece does not assert the speech rights of students or teachers. Their speech rights have been recognized by the courts,[14] but not the speech rights of parents. This Article therefore moves in a new direction.

The argument makes no objection to the preservation of public schools. Instead, it simply observes that state education cannot be offered to parents in a manner that, by direct force or by condition, pressures parents to accept government speech in place of their own. Although there are economic implications for government schools, such schools can and probably will

12. *Id.* at 1012.

13. Other implications—notably, for laws regulating private schooling—are left aside here, not because they are unimportant, but for the sake of focusing on the funding issue. *See* discussion *infra* subpart II(E).

14. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969) (upholding student speech rights in public schools); Keyishian v. Bd. of Regents, 385 U.S. 589, 609–10 (1967) (upholding teachers' speech rights).

survive (as will be discussed below in subpart II(A)). For now, the point is that the argument is merely against government pressures on parents, not against government schools.

Nor does the argument here propose anything about parental control over school boards or school curricula. That is an interesting topic. But it is not the subject of this inquiry, which instead is only about pressures on parents to adopt the government's educational speech and curtail their own.

More generally, it must be emphasized that this Article does not object to laws mandating education. Many such laws surely conflict with the freedom of speech—not to mention that of religion. But state regulation of private education is its own topic, subject to at least some considerations that are not relevant here. Such regulation is therefore left aside here so that the argument can focus systematically on state education.

Also not within the scope of this argument are questions about the merits of vouchers, charter schools, and so forth. States could avoid the constitutional problem identified by this Article by offering parents a range of measures, including relief from taxation, educational subsidies (such as vouchers), and perhaps other policies that have not yet been identified. But those policy choices are not part of this argument. The claim here is simply that states cannot pressure parents in ways that abridge their freedom of speech in educating their minor children. Once this legal conclusion is established, there remains a policy question about how states should avoid the unconstitutionality. But there are multiple possible answers to that question, and they rest on considerations that lie outside this more narrowly constitutional inquiry.

Similarly, this Article does not suggest that judges should direct states to avoid the unconstitutionality in any particular way. Some state legislatures may provide tax relief, others may prefer to offer vouchers, yet others will find additional pathways. But these are legislative choices, so judges have no business ordering states to adopt one such policy or another. This Article therefore merely observes the unconstitutionality of the pressures on parents, without proposing that judges do more than issue a declaratory judgment or injunction against the unlawful pressures.

D. Neither Left nor Right

This Article appears amid considerable political and cultural controversy over public school curricula. But it is not narrowly a response to either side of the political spectrum. At stake is a freedom that over time has been equally important to Americans on the left and on the right, as well as to all who do not fit within that simplistic division.

Today, the dissatisfaction with curricula is salient among religious and conservative parents. But it also comes from discontent liberals. And in the 1940s through the 1960s, the most prominent opponents of public school

messaging were religious, liberal, atheist, and socialist parents, who resented public schools for their prayers, Bible reading, and patriotic rituals.[15] So neither left nor right, nor any other perspective, has a monopoly on legally or morally justified dissent. On the contrary, the freedom of speech must be a shared blessing precisely because moral and other truths are and should be contestable. So the arguments here are for the benefit of all parents—indeed, all Americans—not any narrow group of them.

By way of illustration, the underlying claim that education is speech developed in another context. In 2019, New York State proposed to harden its 1895 nativist regulations of private schools.[16] It contemplated pressing such schools to teach in English (as if that were clearly better than teaching in Latin, Mandarin, Arabic, or German).[17] And it wanted to push them into offering curricula "substantially equivalent" to that of the state's public schools (as if that were a model, let alone *the* model, of excellence).[18] The state's main goal was candidly to reconfigure or shut down Jewish schools known as "Yeshivas."[19] In response, I wrote *Education Is Speech: Why New York's Attempts to Control Private Schools Are Unconstitutional*.[20] The premises enunciated in that article are the foundation for the argument in this one.

Already in the nineteenth century, Native American children were forced into government schools that forbade them from speaking in their own languages.[21] In 1923, after Nebraska required teaching in English and prohibited teaching foreign languages to young children, the latter restriction was held unconstitutional in *Meyer v. Nebraska*.[22] But states still attack private educational speech. They continue to force private schools to teach in English and to mimic public school education. Much more seriously, as

15. *See* SUSAN DUDLEY GOLD, ENGEL V. VITALE: PRAYER IN THE SCHOOLS 13–16 (2006) (discussing constitutional challenge by a group of atheist and Jewish parents to state-mandated religious prayer in schools); *see also* Bruce J. Dierenfield, *"The Most Hated Woman in America": Madalyn Murray and the Crusade against School Prayer*, 32 J. SUP. CT. HIST. 62, 68–69 (2007) (describing Madalyn Murray O'Hair, who brought legal challenges against state-mandated Bible reading in schools, as a socialist).

16. Philip Hamburger, *Education Is Speech: Why New York's Attempts to Control Private Schools Are Unconstitutional*, THE FEDERALIST (Aug. 22, 2019), https://thefederalist.com/2019/08/22/education-speech-new-yorks-attempts-control-private-schools-unconstitutional/ [https://perma.cc/4Z3R-DKMW].

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. Mark Walker, *Report Catalogs Abuse of Native American Children at Former Government Schools*, N.Y. TIMES (May 11, 2022), https://www.nytimes.com/2022/05/11/us/politics/native-american-children-schools-abuse.html [https://perma.cc/5TD5-UJYN].

22. 262 U.S. 390, 400, 403 (1923).

explored in this Article, states pressure parents into adopting government educational speech in place of their own.

E. Organization

Part I lays out the two basic doctrinal arguments that the pressures on parents violate federal and state speech guarantees. Part II confirms this conclusion with secondary doctrinal considerations, such as compelling state interests. Part III expands upon the doctrinal reasoning by showing how the speech right vindicates important legal and societal ideals—about parental authority, government-imposed conformity, religious liberty, disestablishment, equality, and the best interest of the child. Together, the doctrinal arguments and the idealistic rewards require reconsideration of the pressures on parents to adopt government educational speech and forgo their own.

I. Abridgment of the Freedom of Speech

Education is very largely speech, and this means that parents, constitutionally, have a freedom of speech in educating their children. States therefore cannot lawfully pressure parents, either directly or through conditions on benefits, to adopt state educational speech in lieu of their own. Such pressure is both compelled government speech and the suppression of parents' speech.

A. Education as Speech

Education is speech.[23] Even when it is not strictly speech, it usually is expressive conduct.[24] Education is therefore within the protection of the First Amendment and similar state guarantees of the freedom of speech and the press.

1. Education Is Constitutionally Protected Speech.—Speech is the essential core and dominant reality of almost all education. This observation may initially provoke surprise. But from kindergarten up through high school, education is almost entirely speech—indeed, constitutionally protected speech.

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23. Speech is understood here in line with free speech doctrine to include not only words but also numbers, images, and other expression. *Cf.* Gilles, *Parentalist Manifesto*, *supra* note 1, at 1012 (arguing that "parents have a free speech right to communicate their values to their children").

24. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968) (holding that a government regulation of expressive conduct is constitutional if it is within the constitutional power of government, if it furthers a substantial governmental interest that is unrelated to the suppression of free expression, and if the incidental restriction of free expression is no greater than necessary to further that interest).

If speech is understood to include verbal and mathematical languages, there is little public school education that is not largely speech. This is true not only in classes but also in reading and research assignments. And it is evident in subjects as varied as reading, writing, English, foreign languages, history, social sciences, math, and the hard sciences. So education is predominantly speech—indeed, speech with a distinctive content and viewpoint.

Of course, playtime, art, sports, and physical experiments in the sciences are not purely speech. But the educational elements of these activities are largely, often crucially, a matter of speech. To the extent such pursuits are not narrowly speech, they are often expressive conduct. Consider, for example, the lessons of playing cooperatively, trying hard, and being a good sport.

Not merely speech, education is speech with a political mission—the goal of inculcating the knowledge and attitudes that make good citizens. Since at least the era of Horace Mann, education—especially public schooling—has been touted as the instrument of forming young people into the sort of citizens that are desirable in a republic, with the requisite skills to exercise the vote responsibility.[25] This has included educating children in appropriately democratized conceptions of government. Increasingly, moreover, education has also been understood as essential for forming the citizenry's understanding of things such as evolution, hygiene, health, social and racial relations, sex and sexuality, and so forth.

These political ambitions for education have made the speech employed by schools a matter of profound contention. Controversies have long swirled around public education and state regulation of private education. In the nineteenth century, the debates centered most dramatically on public school attempts to make Catholic students think more like little Protestants.[26] In the next century, the controversies expanded to include public school teaching on evolution and public school efforts to dislodge all religion from education.[27] Much disputed nowadays are programs to inculcate varying racial, sexual, and other politically or culturally controversial attitudes.

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25. *See* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) ("Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government."); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S.1, 113–14 (Marshall, J., dissenting) (noting that "[e]ducation serves the essential function of instilling in our young an understanding of and appreciation for the principles and operation of our governmental processes" and "may instill the interest and provide the tools necessary for political discourse and debate" and adding "[i]ndeed, it has frequently been suggested that education is the dominant factor affecting political consciousness and participation").

26. PHILIP HAMBURGER, LIBERAL SUPPRESSION, SECTION 501(C)(3) AND THE TAXATION OF SPEECH 99–102 (2018) [hereinafter HAMBURGER, LIBERAL SUPPRESSION].

27. PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 476–78 (2002) [hereinafter HAMBURGER, SEPARATION].

The point is not that education shouldn't venture into these contested realms, but simply that religiously and politically significant speech has long been a central goal of American education, particularly public education. Rather than a bug, this has been a feature.

So the speech that comprises public education is often a sort of political speech. And it involves choices that fit within the doctrines on content and viewpoint discrimination. The pressures on parents to accept government educational speech and give up their own thus fall neatly within the judicial doctrines on the freedom of speech.

2. The Familiar Freedom of Speech, Not a Distinct Parental Right.—In saying that education is constitutionally protected speech, this Article is not saying this is a distinctive speech right of parents. Rather, it is the same freedom of speech claimed by others in other circumstances. But here the speech right happens to belong to parents in the education of their minor children.

Pierce has long been understood to uphold a distinctive parental right in educating children. It has been suggested that parents have a natural right and duty to educate their children as they judge best for them.[28] In addition, there is reason to view families as nongovernmental societies that are historically and even perhaps sociologically prior to political society.[29] Of course, if civil government rises above families or derives its power from individuals, then families are not constitutive, or otherwise politically prior to, government.[30] Yet the very rise of civil government suggests that families under parental control are an essential counterbalance—that the authority of family is necessary to tame the authority of the state. For any of these reasons, one might reasonably conclude, as suggested by *Pierce*, that parents have a substantive due process right to choose a private education for their children.[31]

But this Article does not rest on any such substantive due process parental right. Instead, it focuses on the freedom of speech in education that can be claimed by parents. In *Meyer v. Nebraska*, the Supreme Court denied

28. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

29. ANTHONY D. SMITH, THE ETHNIC ORIGINS OF NATIONS 48–49 (1991) (regarding the familial character of early ethnic nations). One might have said *prior to civil society*, but the phrase *civil society* has been used for such divergent purposes that its older meaning can no longer be assumed.

30. Aristotle already took this view. GEORGE H. SABINE, A HISTORY OF POLITICAL THEORY 120 (1941) ("The family, Aristotle says, is prior in time but the state is prior 'by nature.'"). More recently, the liberal elevation of the authority of individuals in relation to the state left much liberal political theory largely devoid of serious discussion of the family.

31. *Pierce*, 268 U.S. at 535.

the constitutionality of a state law barring the teaching of foreign languages, in private or public schools, until after the eighth grade.[32] Although the Court relied on substantive due process, it also recognized that the case concerned speech: "The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue."[33] Indeed, the Court might have paid more attention to the speech question.

There are several advantages in shifting from a parental right to the freedom of speech that can be asserted by parents. Already at this stage, several implications deserve mention: the speech right rests on a more stable constitutional foundation, it is more familiar, and it has clearer implications.

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Education is speech, and even at the edges, it is expressive conduct. So it comes within the federal and state constitutional protections for speech.

B. Not Excusable as Government Speech

The freedom of speech is not ordinarily an objection to government speech. So in the absence of other considerations, neither parents nor children can mount a First Amendment challenge to the speech of, say, the U.S. Department of Transportation. Nor, absent special circumstances, can parents or their children sue a public university attended by their children on account of its expressed views. One therefore may suppose that this Article's speech argument fails before getting off the ground. But not so fast!

Unlike government funding for the speech of the U.S. Department of Transportation or the University of Connecticut, the funding of public schools intrudes upon parents. It comes in the context of compulsory education, it interferes with parents' speech, and it intrudes on parental authority. It therefore is not merely government speech.

1. Compulsion.—As will be seen in subpart I(C), the state funding does not stand alone, but is accompanied by state laws mandating that parents educate their children. The state funding of state educational speech thus comes in a context in which educational speech is compulsory. This compulsion forces parents to accept state educational speech or pay to avoid it.

2. Interference with Parental Speech.—Another reason the state funding goes further than supporting government speech is that it interferes with parental speech—as will be pursued in subparts I(C) and I(D). It is one thing for a state to fund a program sharing information with the public—for example, an STD awareness program. But it is quite another for a state to

32. 262 U.S. 390, 403 (1923).

33. *Id.* at 401.

fund a program that displaces much private speech. State schooling occupies much of the day for students and thereby inevitably displaces parental speech, whether at home or at a parentally chosen school.

The justification that the funding is merely for government speech is therefore mistaken. Such funding comes in the context of mandatory education, and it interferes with the speech of parents. For either reason, public support for public schools finds no excuse in the legitimacy of government funding for government speech. And there is a third reason.

3. Parental Authority.—The conclusion that the problem is not just one of government speech is reinforced by parents' authority over their minor children. Although the freedom of speech at stake here is not distinctively a parental right, the distinctive situation of parents is relevant.

The authority of parents explains why parents have speech rights that others do not in the education of their minor children. It also explains why parents have speech rights in the education of their minor children that they do not have in the education of their adult children. Of particular significance, it accentuates why the funding of state schools interferes with the speech rights of parents.

Parental authority has long been considered fundamentally religious and natural.[34] But more to the point here, it also is recognized by the law in three ways.

First, the law recognizes parents' custody. By common law and statute, parents have legal custody of their children, meaning that, at least in the first instance, they are free to choose the educational speech for their children, not other decisionmakers, public or private.[35]

Second, state laws require parents to educate their children. These laws recognize the custodial discretion or freedom of parents while also reinforcing their custodial duties.[36] Thus, not only by right but also by duty, educational speech for minor children belongs to their parents.

Third, and most powerfully, the claims of parents to choose the educational speech for their children was recognized in *Meyer* and *Pierce* to have a constitutional foundation.[37] This is, as put in *Pierce*, echoing *Meyer*, "the liberty of parents and guardians to direct the upbringing and education of children under their control."[38] Whatever one thinks of substantive due process as a mechanism for protecting rights, *Pierce* offers a substantial

34. *See id.* at 400 (alluding to parents' "right of control" and corresponding "natural duty").

35. *Id.*

36. *Id.* ("Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the States, including Nebraska, enforce this obligation by compulsory laws.").

37. *Id.*; Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

38. *Pierce*, 268 U.S. at 534–35.

foundation for the right of parents to choose the educational speech for their minor children.

The argument here, however, as already noted, eschews the substantive due process right of educational control to rest on the more basic recognition in *Meyer* and *Pierce* that parents have a distinctive authority over their minor children.[39] Within this sphere of authority—whether established by custody, compulsory education laws, or *Meyer* and *Pierce*—parents have a constitutional freedom of speech in their children's education.

The speech argument here is thus not against government speech, but against intrusions on parents and their speech. This is clear because education is mandatory, because state funding interferes with parental speech, and because such funding intrudes on parental authority.

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Education is largely speech. And under the First Amendment and state constitutions, parents have the freedom of speech in the education of their children—a speech right that can be understood and applied with the same strength and clarity as in more familiar circumstances.

C. Direct Abridgment

All states both mandate education and offer state education free of charge. This arrangement is so familiar that it may seem utterly unremarkable. But the combination of generic educational constraint and more specific educational benefit may be constitutionally significant.

The combination means that when parents pay for private schooling, their payment is not merely voluntary, but an expense imposed on parents to escape compelled state education. States thus impose a direct financial cost on parents who do not accept government educational speech in place of their own. And states require impecunious parents to accede to state education for their children.[40]

1. Direct Constraint.—The combination of state-mandated education and tuition-free state education means that parents are forced by law to pay to escape government education. It would be odd to suggest that government largess in offering education creates a direct constraint. But the largess does not stand alone. It comes in the context of the legal duty to educate one's

39. *See Meyer*, 262 U.S. at 401 (discussing "the power of parents to control the education of their own"); *Pierce*, 268 U.S. at 534–35 (discussing "the liberty of parents and guardians to direct the upbringing and education of children under their control").

40. When speaking of states, this Article includes school districts. There is a substantial literature and body of case law that distinguishes school districts and states for purposes of understanding duties to equalize, or otherwise ensure, adequate funding for public schools. But for purposes of First Amendment violations, which is the goal of this Article, there is little to be gained by drawing such a distinction.

minor children. Parents thus must pay to avoid government educational speech for their children.

None of this is to deny that, even without mandated education, parents would have to pay for their home or other private schooling. So if the point were merely that parents need to pay for their own educational choices, nothing here would be constitutionally offensive.

But there is a constitutional difficulty in forcing parents to educate their children and allowing parents to opt out of government educational speech only by paying for private educational speech. This is coerced educational speech with differential rates for government and private versions. Against the background of mandatory education, the need to pay to escape government tutelage looks like a direct financial constraint or penalty on parents for not submitting their children to government educational speech in lieu of their own.

Reinforcing this legal point is the grim social reality that all but the wealthiest are herded into state schools. Of course, even wealthy parents are penalized by having to pay to opt out of government speech—so the unconstitutionality is equal for the poor and the wealthy. But it is worth noting that the combination of mandatory education and subsidized state education gives any but the most affluent parents little choice but to place their children in government educational institutions. Such parents must, at risk of court proceedings, subject their children to government educational speech.

2. Many Parents Like Public Schools?—Of course, there are some facile responses—one being that many parents like their public schools and therefore do not experience state education as coerced. They may have chosen to live in their neighborhood precisely because they liked its schools. Or they simply may be content with the curriculum and teaching in their local schools.

True as this may be for many parents—perhaps even most—it does not cure the constitutional problem. The freedom of speech belongs to each person, regardless of the contrary views of others. Even if all parents in a community, except those of one child, were content with the local state school, this near unanimity would not extinguish the dissenters' freedom of speech.

Inevitably, schools run by school boards will tend to satisfy a significant number of local parents—if not a majority, then at least many. But the tendency of these government institutions to reflect majority or at least common views only reinforces the importance of protecting the freedom of educational speech for dissenting parents.

3. Opting Out?—Another facile response is that if parents don't like the government speech, they can pay to opt out. But coerced education cannot be cured by providing that parents can avoid government educational speech by paying a hefty price. That just bolsters the conclusion that the system is directly coercive.

The financial opt-out is an especially repugnant excuse when one recognizes that only the wealthy can easily avail themselves of this escape. In contrast, middle-class parents can elude government educational speech only by straining all their resources. Although some of the poor and middle class are admitted to parochial and other private schools with scholarships or other subsidies, this sort of opportunity is at best sporadic. So for most poor and many middle-class parents, the financial escape is not just a financial penalty on their speech, but coerced submission to state schooling.

A related excuse is that parents who don't like government education can always just home school. But parents can do this only by not working, and so once again, the opt-out is a penalty—if not on their bank account, then at least on their time.

4. Involuntary Payment or Speech.—The combination of mandatory education and subsidized educational benefit means that although parents can choose to pay or submit to government education, neither option is voluntary.

The parents who pay to escape government education are not merely acting voluntarily. They are being forced to pay to escape such instruction. And the parents who cannot afford to pay must abandon their educational speech and adopt the government's. So the combination of mandatory education and subsidized educational benefit abridges the freedom of speech of parents. It forces them either to accept government educational speech in place of their own or to pay to escape this abridgment.

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The mandate and the benefit, considered together, directly abridge the freedom of speech. The combination simultaneously confines parents' speech and compels them to substitute government speech.

This point about a direct abridgment of the freedom of speech may come as a surprise. But it is unavoidably clear. And this Article's thesis does not rest merely on the direct abridgment. The Article also makes another claim, about a condition.

D. Unconstitutional Condition

Under the doctrine on unconstitutional conditions, parents cannot be pressured by government benefits into substituting government educational speech for their own. Unlike the point about a direct constraint, this argument about an unconstitutional condition does not rest on the mandatory character of education. In other words, even without any such direct governmental

command, the mere offer of educational support can be unconstitutional if it comes with an unconstitutional condition.[41]

The application of this argument to the public school system is sufficiently unfamiliar that it may seem unnerving. But the argument falls squarely within Supreme Court doctrine. The condition on educational support is clearly an unconstitutional condition as understood in the Court's cases.[42] So, however surprising the argument may seem, it cannot easily be pushed aside.

1. Benefit and Condition.—In what sense does public school funding involve an unconstitutional condition? Education is almost entirely speech—speech to and with children. And since the mid-nineteenth century, it has been predominantly state speech—not because state educational speech is distinctively good, but because of financial pressure.[43]

State support for education comes with the condition that parents send their children to state schools. The largess is not unlawful. But it comes with a condition that unconstitutionally pressures parents to substitute government speech for their own, whether at home or in a private school.

One might protest that the offer of tuition-free state schooling does not quite fit the usual model of a government benefit subject to an unconstitutional condition. States do not crudely say that they are placing a condition on their educational support, let alone that they are conditioning that support on the displacement of parental speech with government speech.

But there is no doubt that public schooling is a government benefit subject to a condition—as the Supreme Court recognized long ago in *Brown v. Board of Education*.[44] The contemporary understanding of that case is that it held public school segregation contrary to the Fourteenth Amendment's Equal Protection Clause.[45] But more was going on. The case rested on an analysis of state education as a state subsidy subject to a condition. According to *Brown*, state schooling is a state benefit or opportunity, and "[s]uch an

41. For unconstitutional conditions, see generally PHILIP HAMBURGER, PURCHASING SUBMISSION: CONDITIONS, POWER, AND FREEDOM (2021) [hereinafter, HAMBURGER, PURCHASING SUBMISSION].

42. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954) as discussed below in section I(D)(1); *see also* Frost v. R.R. Comm'n of State of Cal., 271 U.S. 583, 594 (1926) ("[The state] may not impose conditions which require the relinquishment of constitutional rights.").

43. *See* ROBERT L. CHURCH & MICHAEL W. SEDLAK, EDUCATION IN THE UNITED STATES: AN INTERPRETATIVE HISTORY 56 (1976) (discussing how state officials in the nineteenth century enforced standards in public schooling by asserting "financial leverage" and "threatening to withhold money" from school districts).

44. *See* 347 U.S. 483, 493 (1954) (discussing the importance of education in a democratic society and recognizing that such a benefit, if subsidized by the government, must be available to all children irrespective of their race).

45. *Id.* at 495.

opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[46] *Brown* makes clear that a state cannot offer its education subject to an unconstitutional condition.[47]

The unconstitutionality of current state incentives becomes apparent from *Pierce v. Society of Sisters*.[48] If state educational speech cannot be compulsory by direct command of law, it also cannot be imposed on most parents by financial pressures.[49]

Together, *Brown* and *Pierce* are dispositive. They show that educational benefits cannot be offered in a manner that presses parents to give up their educational speech and substitute the state's.[50]

2. Coercion.—Of course, it is often assumed that constitutional rights are not violated without some state coercion. It therefore may be thought that the financial pressure behind this condition is not enough to render it unconstitutional. It clearly, however, is more than sufficient.

The prototypical legal coercion is the force of law—whether its internal obligation or its physical coercion.[51] But even before one gets to unconstitutional conditions cases, it is clear that a host of lesser pressures are more than enough.[52] For example, when a police officer finds a home with

46. *Id.* at 493.

47. One might protest that *Brown* is narrowly a precedent only against an unconstitutional condition on the offer of state education, not education in general. But this seems an artificially confined reading of the case. Of course, the decision focused on state education because it considered discrimination in public schools. But an offer of state-subsidized education is inevitably an offer of education on the condition that one attend a state school. And tellingly, the Court generalized about the importance of "education," not merely state education. *Id.* So notwithstanding the focus of the case on state schools, the Justices were fully aware that at stake was education in general. An emphasis on an especially strong state interest in state education might have been understood to undermine its holding in *Pierce v. Society of Sisters*, overturning state law requiring state education. Indeed, the Court has consistently said that there is a compelling government interest in education, in contrast to state education. *See infra* note 70.

48. *See* 268 U.S. 510, 534–35 (1925) (striking down the Oregon Compulsory Education Act of 1922, requiring parents to send their children to be educated in public schools in the district where they resided).

49. As I have explained elsewhere, when a forbidden abridgment of the freedom of speech is accomplished indirectly through conditions, it is equally an unconstitutional abridgment. *See* HAMBURGER, PURCHASING SUBMISSION, *supra* note 41, at 169–80 (observing that when a direct restriction on speech would abridge the freedom of speech, then the same restriction in a condition clearly abridges the freedom).

50. If, as shown here, the offer of tuition-free education creates an unconstitutional condition, one might wonder whether other government programs, from Medicare to welfare, also suffer this sort of failing. But Medicare and welfare are not primarily of speech, and the conditions on the provision of these benefits are not primarily restrictions on speech. Even if one thinks that there should be a constitutional right to medical care or other welfare, it is not yet clearly constitutionally protected. In contrast, speech is an enumerated right and relatively well-delineated by doctrine.

51. HAMBURGER, PURCHASING SUBMISSION, *supra* note 41, at 187–89.

52. *See id.* (detailing the spectrum of unconstitutional government actions, including many involving pressures less than coercion).

the door ajar and gently slides in to search the house without a warrant or reasonable cause, there is a violation of the Fourth Amendment—without any coercion.[53] And when a state university unconstitutionally discriminates in denying admission to an applicant, there is no force in any conventional sense. So when one gets to unconstitutional conditions, it should be unsurprising that rights can be violated even in the absence of any actual coercion or force.

To be sure, the Supreme Court occasionally generalizes that conditions cannot violate rights without "coercion."[54] But this clearly is an overstatement, especially in First Amendment decisions. In cases such as *FCC v. League of Women Voters*,[55] the Court has held economic pressure sufficient to doom speech conditions.[56] The Court's departure from its generalization about coercion became especially clear in *Trinity Lutheran Church v. Comer*.[57] Although the Court repeated its expectation of coercion, it concluded that even the very mildest economic pressure on religious liberty meant that the condition violated the First Amendment.[58]

A state's economic pressure on parents is therefore more than enough for a First Amendment violation. For poor and middle-class parents, the pressure often is overwhelming, and the poorer the parents, the greater the coercive effect.[59] The pressure, however, applies to all parents. Even if it is very mild for the wealthiest of them, that is enough for the condition to be unconstitutional—as evident from *Trinity Lutheran*. So the condition is unconstitutional regardless of parental wealth.

Accentuating the constitutional significance of the pressure is the long line of Establishment Clause decisions recognizing the risk of coercion in public school messages. In *Grand Rapids School District v. Ball*,[60] the

53. *See* United States v. Bute, 43 F.3d 531, 540 (10th Cir. 1994) (finding an officer had violated the Fourteenth Amendment when he entered through an open door of a commercial building without a warrant, when there were no circumstances justifying a warrantless search).

54. *See* Trinity Lutheran Church v. Comer, 137 S. Ct. 2012, 2020 (2017) (saying there is no free exercise violation when affected individuals are "not being 'coerced by the Government's action into violating their religious beliefs'" (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 449 (1988)).

55. 468 U.S. 364 (1984).

56. *See id.* at 395 (holding that federal funding for noncommercial, federally funded broadcasting stations cannot, consistent with the First Amendment, come with a condition barring them from editorializing).

57. *See* 137 S. Ct. at 2022 (holding that the denial of a grant for rubberized surfacing for a playground amounted to "coercion" in violation of the First Amendment as applied to the state by the Fourteenth Amendment).

58. *Id.* It cannot be supposed that the church would have abandoned its faith for the sake of rubberized playground surfacing.

59. This is not the only wealth distortion. Because wealthy parents can opt out, less wealthy parents are left without crucial legal and political allies against the deprivation of their educational speech.

60. 473 U.S. 373 (1985).

Supreme Court condemned private religious teaching in rooms leased from public schools.[61] "Such indoctrination, if permitted to occur," said Justice Brennan writing for the majority, "would have devastating effects on the right of each individual voluntarily to determine what to believe (and what not to believe) free of any coercive pressures from the State."[62] Coercion seemed central in such cases because of the vulnerability of children to indoctrination. Summarizing the Court's jurisprudence, Justice O'Connor, concurring in *Wallace v. Jaffree*,[63] observed that "when government-sponsored religious exercises are directed at impressionable children who are required to attend school, . . . government endorsement is much more likely to result in coerced religious beliefs."[64]

These precedents concern only religion under the Establishment Clause—in particular, the coercive effect on children of public school associations with religion. But the danger of coerced belief is not confined to official religious speech. Imposing official political, racial, sexual, and antireligious speech on children can be equally coercive. This is why the Establishment Clause cases matter for the speech of parents. If public school messages (even just indirect endorsements) are so coercive against children, it is all the more worrisome that parents are being financially pressured to adopt public educational speech in place of their own. Under both speech and religion precedents, such pressures are easily sufficient for a constitutional violation.

The cost of avoiding public schooling is perhaps the most forceful government economic pressure experienced in quotidian family life. It is rivaled only by the cost of housing and higher education, which are not imposed by government. So under the Supreme Court's precedents, the economic pressure certainly is enough for a constitutional violation.

Although speech is a constitutional right for each person, and thus must be measured personally, it is revealing to add an institutional measure of the loss. Put simply, the pressure to accept government educational speech crowds out much parental educational speech. Again, it is difficult to argue that the pressure is not constitutionally significant.

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The argument about direct abridgment of parents' freedom of speech is thus joined by an argument in terms of unconstitutional conditions. This condition argument falls neatly within Supreme Court precedents and doctrine on unconstitutional conditions. It therefore would seem to be unconstitutional for states to offer educational support only to parents who

61. *Id.* at 385.

62. *Id.*

63. 472 U.S. 38, 67 (1985) (O'Connor, J., concurring).

64. *Id.* at 81.

allow government educational speech to displace their own.[65] Whether directly or by condition, state educational speech is compelled, and the educational speech of parents is inhibited.

II. Confirming the Violation

Having seen in Part I the prima facie case against the pressures on parents, this Article in Part II evaluates the doctrinal considerations that might possibly cut in another direction. In each instance, these secondary factors confirm the prima facie conclusion that the pressures on parents are unconstitutional. The deeper one digs into doctrine, the clearer it becomes that such pressures deprive parents of their own educational speech and compel them to adopt the government's.

A. Compelling Government Interest and Narrowly Tailored?

Although the current system abridges the freedom of speech of parents, both directly and by condition, this is only the beginning of the constitutional analysis. According to Supreme Court doctrine, a compelling government interest can defeat a claim of constitutional right. It therefore is necessary to consider whether there is a compelling state interest or other justification for not recognizing parental speech rights in the education of their minor children.

1. Compelling Government Interest?—Is there a compelling interest in government education? Do the states have an interest in state education that is so pressing that it overcomes parents' freedom of educational speech?

All state constitutions contain provisions that in one way or another require states to provide public education.[66] These provisions themselves

65. Incidentally, notice that this condition argument does not rest on the taxation of parents for public schooling. One could analyze the constitutional question in terms of double taxation. But the pressure to accept government educational speech is felt even by parents who do not pay taxes. So taxation is irrelevant to the condition argument—as also to the direct constraint argument. Nonetheless, in an era in which the tax system is used to distribute benefits even to those who do not owe taxes, tax relief could be used to provide remedy—as will be seen in subpart II(F).

66. Emily Parker, *50-State Review: Constitutional Obligations for Public Education*, EDUC. COMM'N OF THE STATES 5–22 (Mar. 2016), http://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf [https://perma.cc/E8S7-AMYT] (surveying constitutional provisions in all of the states). Some of these state guarantees, and the cases interpreting them, candidly disclose the low expectations for government education. Some require the provision of a "thorough and efficient" education, "an adequate public education," or an "ample" education. Michael A. Rebell, *Education, Adequacy, Democracy, and the Courts*, *in* ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL: CONFERENCE SUMMARY 218, 232 (Timothy Ready et al. eds., 2002). Cases interpreting state constitutions echo the meager constitutional standards. *See, e.g.*, Vincent v. Voight, 614 N.W.2d 388, 396 (Wis. 2000) (stating "Wisconsin students have a fundamental right to an equal opportunity for a sound basic education[,]" and "the state must

don't stand in the way of the speech rights of parents because free public schooling can be offered in ways that don't pressure parents into public schools. In addition, state legislative powers and even duties are trumped by state and especially federal speech rights. Still, the state guarantees of public education could be understood to mean that state education is a compelling government interest.

Yet just because a government interest relates to an enumerated government power or duty doesn't mean it is compelling in the sense that it defeats a constitutional right. Many claims of compelling government interests arise directly under specified powers—for example, under the federal government's commerce power. But the specification of the power doesn't predetermine that the government interest claimed under the power will overwhelm a claim of a constitutional right. So the mere recitation of public education as a state power does not answer the question of whether a state's interest in state education is compelling—that is, whether it will defeat the state's or the First Amendment's speech guarantee.

Reinforcing this initial doctrinal observation is the historical and philosophical reality that rights are understood to defeat power. At both the state and the federal level, constitutions elevate rights over power. James Madison and Alexander Hamilton explained that rights are "exceptions" from power.[67] More recently, Ronald Dworkin summarized that rights are "trumps."[68] They have this effect regardless of whether the powers are expressly stated. Consequently, there is reason to doubt whether state interests should ever defeat the freedom of speech or any other constitutional right.[69]

For purposes of the argument here, it suffices to recognize that if rights are limits on power, the question for a court is not whether a state constitution

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guarantee that a basic educational opportunity be available to each pupil" (citing WIS. STAT. ANN § 121.01 (West 1997–1998)); Columbia Falls Elementary Sch. Dist. No. 6 v. State, 109 P.3d 257, 261 (Mont. 2005) (holding that the funding system for the state's public schools violated the state constitution's requirement that the legislature provide for a "basic system of free quality" public schools (internal quotation marks omitted)); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 397 (Tex. 1989) (holding financial inequalities among school districts to violate state constitutional requirement that the legislature establish and provide for an "efficient" system of public free schools). Sound, basic, adequate, ample, thorough, and efficient are valuable qualities, but in education they aim too low.

67. FEDERALIST NO. 78, at 524 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); James Madison, *Debate in the House of Representatives* (June 8, 1789), *in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 77, 83 (Helen E. Veit et al. eds., 1991); *see also* Philip Hamburger, *Inversion of Rights and Power*, 63 BUFF. L. REV. 731, 749 (2015) [hereinafter, Hamburger, *Inversion*] (explaining that Federalists thought of rights as exceptions to powers).

68. Ronald Dworkin, *Rights as Trumps*, *in* THEORIES OF RIGHTS 153, 153 (Jeremy Waldron ed., 1984). For the debate over Dworkin's observation, see Hamburger, *Inversion*, *supra* note 67, at 733–34.

69. Hamburger, *Inversion*, *supra* note 67, at 733.

specifies a power to establish public schooling. Rather, the inquiry is whether there is a state interest in state schooling that could defeat the state and federal freedom of speech.

The question suggests the answer. So sweeping a government interest against the freedom of speech is utterly improbable.

Imagine that state education was a compelling state interest, which would defeat the speech rights of parents. On such an assumption, *Pierce* would have been mistaken, and states could compel attendance at state schools.

Perhaps understanding this, the courts have recognized a compelling government interest in education, but not in government education.[70] States have good reason to want an educated populace, and this is reflected in their constitutions.[71] But the cases do not recognize a compelling or rights-defeating state interest in state education.

States thus do not have an interest that could overpower the speech claims of parents against being pressured into public schools. Whatever the state interest in education, there is no compelling interest in state education.

2. Civic Ideals.—Notwithstanding the absence of a compelling state interest in public schooling, it may be said that state education is necessary to inculcate civic ideals. This sort of claim was popularized by nativists in the nineteenth century and has been echoed ever since.[72] But it is simply untrue that the promotion of civic ideals depends on state education.

Civic ideals can be acquired just as well through private schooling, at home, or in private institutions. Indeed, empirical evidence strongly indicates

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70. Meyer v. Nebraska, 262 U.S. 390, 400–01 (1923) (stating, "[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted," and "[t]hat the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected").

Courts have split on whether education is a fundamental right for purposes of the Fourteenth Amendment, but what is telling for the argument here is that the debate has centered on the fundamental nature of education, not public education. *See, e.g.*, Serrano v. Priest, 5 Cal. 3d 584, 608–09 (1971) ("[T]he distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest.'"); Horton v. Meskill, 376 A.2d 359 (Conn. 1977) ("[I]n Connecticut, elementary and secondary education is a fundamental right . . . ."); *Vincent*, 614 N.W.2d at 415 ("Wisconsin students have a fundamental right to an equal opportunity for a sound basic education."); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37–38 (1973) (holding that "education" had not been shown to be a "fundamental right").

71. *See supra* note 66.

72. BOB PEPPERMAN TAYLOR, HORACE MANN'S TROUBLING LEGACY: THE EDUCATION OF DEMOCRATIC CITIZENS 102 (2010) ("The burden of our civic culture traditionally falls . . . on our educational system."); Diane Ravitch & Joseph P. Viteritti, *Introduction* to MAKING GOOD CITIZENS: EDUCATION AND CIVIL SOCIETY 1, 5 (Diane Ravitch & Joseph P. Viteritti eds., 2001) ("Ever since the late nineteenth century, Americans have relied on government schools as a principle purveyor of deeply cherished democratic values.").

that private schools do much better than state schools at inculcating widely accepted civic values.[73] At stake in the state teaching of such ideals is therefore not so much civic ideals as the opportunity to align them with governmental expectations. Consequently, there is a serious risk that the states' versions of such ideas will displace the public's conception of them—indeed, that under the guise of civic ideals, children will be taught state ideals.

When government can press its version of civic education upon parents, it can reshape the rising electorate to its needs. This is a way, as quipped by Bertholt Brecht, "for the government [t]o dissolve the people [a]nd elect another."[74] Little could be more dangerous.

3. Common Culture.—Another enduring nativist trope is that public schools inculcate our common culture and so establish the glue that holds the nation together. But just how much state schools have done this is an empirical question. Thus far, there is little if any empirical data supporting this position, and there is good reason to take a very different view.[75]

It certainly is true that private schools will teach different points of view, and so will not produce a fully common culture. But a diversity of beliefs is inevitable in an expansive and diverse nation. And diverse views in teaching, by themselves, are not necessarily problematic. At least some such diversity surely is advantageous.

In contrast, the use of state schools to impose a "common culture" comes with inevitable costs. The difficulty is structural. State schools are under the control of elected bodies and so, at best, are majoritarian institutions. The very existence of such institutions is a temptation for those

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73. Patrick J. Wolf, *Myth: Public Schools Are Necessary for a Stable Democracy*, *in* SCHOOL CHOICE MYTHS: SETTING THE RECORD STRAIGHT ON EDUCATION FREEDOM 39, 39–40 (Corey A. DeAngelis & Neal P. McCluskey eds., 2020) [hereinafter SCHOOL CHOICE MYTHS].

74. Commenting on the East German uprising of 1953, Brecht wrote his satire *Die Lösung*:

> After the uprising of the 17th June
> The Secretary of the Writers Union
> Had leaflets distributed in the Stalinallee
> Stating that the people
> Had forfeited the confidence of the government
> And could win it back only
> By redoubled efforts. Would it not be easier
> In that case for the government
> To dissolve the people
> And elect another?

Bertolt Brecht, *The Solution*, ALL POETRY, https://allpoetry.com/The-Solution [https://perma.cc/B6JF-9TXN].

75. Neal P. McClusky, *Myth: School Choice Balkanizes*, *in* SCHOOL CHOICE MYTHS, *supra* note 73, at 7, 7–8 (arguing that rather than pull Americans apart, school choice is the key to building bridges).

who control them (whether or not they really are a majority) to impose a common culture by coercion.

In fact, being instruments for some to shape the children of others, state schools have become the focal point for all that is tearing the nation apart.[76] The schools are thus an obstacle to working out a genuine common culture. This is not to deny that some state schools are very good. But because the system pressures parents into sending their children to state schools, the system is often exploited by some to impose their views upon others at the cost of social harmony.

Beginning around 1840, vast numbers of Catholics resented being pressed into schools that attempted to Protestantize their children. Since the 1960s, many religious Americans have disliked being stuck in public schools that assiduously exclude traditional religion and even undermine it—often on a spurious, even prejudiced vision of the Establishment Clause.[77] Now many parents are troubled by what they consider misleading and offensive public school teachings on race, sex, sexuality, and other questions.[78] The point is not that the parents on one side or another of such controversies are necessarily correct. Rather, the observation is merely that public schools have offered an opportunity for capturing control over other people's children, and so they inevitably produce public disputes and even social divisions.

However good some state educational speech may be, a system that pressures parents into submission is a threat to our ability to find common ground. That is the opposite of a compelling government interest.

4. Divisiveness.—A further defense of state schools is that at least some private schools will inculcate divisive teachings. This is an old concern, long pressed by nativists, who condemned Catholicism and its teachings as "divisive."[79] The very history of the concern is therefore a reminder that

76. *See Public Schooling Battle Map*, CATO INST., https://www.cato.org/public-schooling-battle-map [https://perma.cc/8M6A-W6YT] (mapping public school controversies in the United States); *see also* STEPHEN ARONS, COMPELLING BELIEF: THE CULTURE OF AMERICAN SCHOOLING 189–90 (1983) (arguing that without separation of school and state, "the governing process of American schooling has been increasingly undermined by unresolvable value conflict").

77. HAMBURGER, SEPARATION, *supra* note 27, at 10.

78. *See, e.g.*, *Sex Education Controversy: Some San Diego Parents Holding Children Out of School*, CBS8, https://www.cbs8.com/article/news/sex-education-controversy-some-san-diego-parents-holding-children-out-of-school/509-924f360f-9b1e-446b-b40e-f4cd9619ca6c [https://perma.cc/Y3PU-BP88] (May 30, 2018, 2:30 AM) (reporting about parents holding their children out of school because of "inappropriate sex education curriculum," including what parents called "graphic and inappropriate" materials that were "too much, too soon" for sixth graders).

79. *See* Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667, 1682 (2006) (showing the anti-Catholic history and tenor of complaints about "divisiveness"); JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM: A HISTORY 38 (2003) (describing anti-

divisiveness may be in the eye of the beholder—indeed, that it is a term that too often has been used to attack loyal minorities for their nonconformity.

Still, there is no doubt that some private schools will teach a sort of social discord. This is a serious problem. But far from being a cure, state schools are worse than the disease.

The point is not to agree with the parents nowadays who worry that their state schools are actively promoting divisions. Whether or not their concerns are correct, the observation here is more structural. As noted in the prior section, public schools invite capture and social conflict and impose the views of some on the children of others. Accordingly, since at least the 1840s, government schools have been the center of much more division than private schools. State schooling comes with a structurally embedded tendency to elicit social tension.

5. Diversity.—A related defense of the financial pressure on parents to send their children to state schools is that this is needed to advance diversity. A salient illustration of this point is the white flight from public to private schools that occurred after *Brown v. Board of Education*.[80] That happened even with the financial pressures to remain in those public schools. Without that pressure, there might have been even more white flight.

But today the central problem is that the state school system pressures parents, especially the poor, including many minority Americans, into accepting second-rate government education. So nearly seventy years after *Brown*, why not let poor, Black, and other minority children flee state schools? Although racial segregation is no longer constitutional, minority children still must live with the economic, social, and racial segregation created by two tiers of education and preserved by unconstitutional pressures.

It is difficult to know exactly how ending those pressures will affect private school diversity. Some private schools will continue to be relatively nondiverse, and the proportion of such schools may well expand. But if minority parents are no longer financially pressured into state schools, then many private schools may be greatly diversified. One way or the other, if diversity is to be achieved by pressuring the relatively poor and minorities into state schools, the end may not justify the means. A policy that achieves diversity by denying poor and minority children the best possible education seems utterly reprehensible.

Catholic concerns about "divisive" curricula); HAMBURGER, SEPARATION, *supra* note 27, at 453 (noting that "increasing numbers of theologically and politically liberal Protestants complained Catholics were 'divisive'").

80. *See, e.g.*, Susheela Jayapal, *School Desegregation and White Flight: The Unconstitutionality of Integration Maintenance Plans*, 1 U. CHI. LEGAL F. 389, 389 (1987).

6. Funding.—State funding difficulties are also relied upon to justify the pressure on parents to choose public schools.[81] The concern is that if parents leave, such schools will get less public funding.[82]

Yet even if reduced funding ensued, this is not to say that public schools would collapse. On the contrary, many would probably survive. And smaller public schools may turn out to be blessing.[83]

Regardless, financial concerns are no excuse for denying a constitutional right. Constitutional law protects the freedom of speech, including the educational speech of parents to and with their children. Against this elevated freedom, the preservation of government dominance over educational speech is not a compelling interest.

7. Narrowly Tailored?—Even when the government can point to a compelling government interest, Supreme Court doctrine requires the government policy to be narrowly tailored to the compelling end.[84] Put another way, if it is not a tight fit, then the government policy is unjustified by the compelling interest. That is precisely the situation here.

Because any compelling state interest here is merely in education, not state education, the current system is not narrowly tailored to the state's compelling interest. Under both the direct constraint and the condition, parents are being pressured to substitute government speech for their own, and this imposition of government speech is far more restrictive than is needed for the government interest in education.

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State education is not a compelling state interest. And the pressure on parents to subject their children to state educational speech in place of their own is not narrowly tailored to securing education (which is a compelling state interest). So it is difficult to justify denying parents their freedom of speech in the education of their children.

B. Only a Negligible Parental Speech Interest?

Although the direct constraint and the condition abridging the freedom of speech cannot be justified with a compelling government interest, it may be imagined that the speech interest of parents is not very substantial. In

81. *See, e.g.*, Margo Miller, *Private Schools Are the Antithesis to Social Justice*, THE MAC WKLY. (Nov. 5, 2020), https://themacweekly.com/79128/opinion/private-schools-are-the-antithesis-to-social-justice/ [https://perma.cc/YNJ6-B83E] (describing how public school funding diminishes when students attend private schools).

82. *Id.*

83. In addition, there is reason to think that private competition tends to improve public schools. Matt Ladner, *Myth: School Choice Harms Children Left Behind in Public Schools*, *in* SCHOOL CHOICE MYTHS, *supra* note 73, at 97, 97.

84. Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

particular, it may be supposed that many topics of instruction are so objective that it makes no difference whether they are taught under government control by its teachers or under parents' authority by tutors of their choice. On this assumption, the objections to being pressed into state schools narrow down to the few topics of instruction that are open to reasonable dispute.

1. Most Subjects of Instruction Are Objective?—At first glance, there is much appeal to the claim that many or even most subjects of instruction are relatively objective. Put simply, there is no politics to math, and numbers have no religion. So to the extent that what is taught in public schools is akin to math, it seems free from value judgments, let alone religious or political dispute.

Such an argument can even be made, for example, about history and other "social sciences" and about English and other language classes. From this perspective, these subjects are about objective facts, information, and other established knowledge. What is excluded is merely "misinformation," and what is taught is simply true.

On such assumptions, one might suppose that there is little constitutional speech interest in teaching these subjects at home or in a private school. Of course, current doctrine on the freedom of speech points in another direction; it protects the freedom to disagree about history, English, and so forth. Even the freedom to dispute math. Nonetheless, some observers may think it makes little difference to have such topics taught in state institutions.

The difficulty, of course, is that there is ample room for disagreement, even reasonable disagreement, about subjects such as history and English. What seems merely factual, informational, or settled can easily turn out to be wrong. Whether on this account or merely because of changing fashions, historical and literary ideas are continually in flux, often being contested, even thoroughly overthrown.

Tellingly, this fluidity of knowledge is most familiar in science. Modern empirical science assumes that knowledge develops through the formulation of theories, which must be open to proof of error and displacement by alternative theories.[85] Scientific inquiry is thus an evolving process, and at the cutting edge, little is stable. What is propounded by one theory is apt to be upended by the next. And as science develops at ever-greater speed,

85. *See Karl Popper*, STAN. ENCYC. OF PHIL., https://plato.stanford.edu/entries/popper/ [https://perma.cc/X7W5-L5Y9] (Sept. 12, 2022) (describing Popper's view of scientific knowledge). The leading alternative view does not altogether challenge empiricism but points to the importance of "tacit knowledge," which cannot without difficulty be verbally expressed. *See Polanyi's Paradox*, WIKIPEDIA, https://en.wikipedia.org/wiki/Polanyi%27s_paradox [https://perma.cc/S4CG-WCKY] (Aug. 4, 2022, 2:35 AM) (describing Michael Polanyi's ideas about "tacit knowing").

the alleged solidities of scientific knowledge are apt to look ever more tentative. Scientific truths no longer evolve from one century to another, nor even from one generation to another, but often change more rapidly, from decade to decade, sometimes from year to year. Thus, even subjects as objective as the hard sciences are not free from reasonable dispute. On the contrary, they rest on it.

Math is the most revealing topic, precisely because it seems so objective. Math can be taught in different ways. Not just well and poorly, but with different slants. At the most obvious level, it can be taught with respect for religion or with an antireligious edge, with respect for government regulation or with a degree of skepticism. And so forth.

Even the methodology can be political. Consider the New Math, which went far in displacing old math in the 1960s, and which long persisted in some school districts.[86] Not merely a matter of math, the New Math sought to "remove the rigidity of thought found in the older arithmetic books" and introduce "freedom of thought."[87] The New Math thereby echoed the tropes of theological liberalism. Now, yet other cultural and political disputes, including racial controversies, center on math.[88] If even the teaching of math is part of broader theo-political controversies, there is no reason to think any subject can rise above the fray.

And when government invests in teaching methods for math, the cultural conflict inherent in math teaching becomes political. The Common Core approach, for example, had political implications, and it was difficult to avoid politics in supporting or opposing it.[89]

Not only are all topics of instruction disputable and disputed, but many state schools embrace overarching socio-political visions that are applicable across disciplines. These cross-disciplinary ideals currently include Anti-Racism, Critical Race Theory, and Diversity, Equity, and Inclusion.[90] This is

86. *New Math*, WIKIPEDIA, https://en.wikipedia.org/wiki/New_Math [https://perma.cc/H5HV-N5JM] (June 8, 2022, 9:07 AM).

87. Richard P. Feynman, *New Textbooks for the "New" Mathematics*, ENG'G & SCI., Mar. 1965, at 9, 10, 15 (emphasis omitted).

88. The Editorial Board, *Squaring Up to Defend Mathematics*, WALL ST. J. (Dec. 5, 2021, 3:45 PM), https://www.wsj.com/articles/defending-mathematics-science-stem-equity-education-california-k12-math-matters-11638728196?mod=hp_opin_pos_3#cxrecs_s [https://perma.cc/NMV5-Z7NC].

89. *See* Allie Bidwell, *The Politics of Common Core*, U.S. NEWS (Mar. 6, 2014, 10:27 AM), https://www.usnews.com/news/special-reports/a-guide-to-common-core/articles/2014/03/06/the-politics-of-common-core [https://perma.cc/J8Q8-CXJN] (describing the political debate surrounding the adoption of the Common Core standards as a means to procure Race to the Top funding).

90. *See* SELFA CHEW, AKIL HOUSTON & ALISA COOPER, THE ANTI-RACIST DISCUSSION PEDAGOGY 6, 8 (2020), https://sph.unc.edu/wp-content/uploads/sites/112/2020/08/Anti_Racist_Discussion_Pedagogy__1.pdf [https://perma.cc/Z3G7-CT6W] (advising how to adopt anti-racist

not to dispute the merits of these visions, but merely to observe that they add to the contestable character of education. Some parents will favor such teaching, others will want to avoid it, and both have strong free speech interests in these choices.

Amid all these considerations—about objectivity and different points of view, about teachers and teaching methods, and about overarching visions—it is clear that serious choices are at stake in the teaching of any class. Whatever the quality of government education in some schools, state education is never the same as private education. And the differences are deeply enmeshed in questions of religion, culture, and politics. So parents have a profound speech interest in the education of their children.

2. Freedom to Speak in One's Own Voice.—What matters is not merely what is said, or even how, but by whom. Voice matters. And the freedom of speech includes the freedom to speak in one's own voice.

Freedom of speech is so often analyzed in terms of content and viewpoint that it is easy to forget the underlying reality that the freedom is most basically a freedom to speak for oneself, in one's own voice.[91] Thus even if some subjects could be removed from the vortex of cultural and political conflicts, it is not for courts to decide that a government teacher should be acceptable to parents.

Different teachers have different tones, sensibilities, and sensitivities. These differences matter immensely to children and their parents. In contrast, a school board, let alone a judge, may not discern such variations or why they matter to some parents and not others. Judges generally are not even capable of discerning the theological differences between the old and the New Math. So they are even less likely to recognize the subtle ways in which individual teachers vary. And if a parent is sensitive to such differences, why should the government have the power to compel her to accept a government speaker in place of a teacher of her choosing?

The whole point of the freedom of speech is the freedom to decide for oneself what one will say, and that includes not only content and viewpoint, but something as subtle as tone. Tone can be everything. We know this from everyday experience. When someone says, "Have a good day!" in one tone, it is cheerful and well-meaning; in another tone, it is sardonic and aggressive.

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pedagogy in the classrooms); *see also* Isabella Zou, *What Is Critical Race Theory? Explaining the Discipline that Texas' Governor Wants to "Abolish*,*"* TEX. TRIB. (June 22, 2021, 5:00 AM), https://www.texastribune.org/2021/06/22/texas-critical-race-theory-explained/ [https://perma.cc/YX8W-KFLC] (explaining critical race theory as an analytical approach to education); Erica E. Hartwell, Kirsten Cole, Sarah K. Donovan, Ruth L. Greene, Stephanie L. Burrell Storms & Theodora Williams, *Breaking Down Silos: Teaching for Equity, Diversity, and Inclusion Across Disciplines*, 39 HUMBOLDT J. SOC. RELS. 143, 143 (2017) (presenting teaching strategies involving diversity, equity, and inclusion).

91. HAMBURGER, LIBERAL SUPPRESSION, *supra* note 26, at 33–34, 243–45.

Even with no variation in tone, voice matters in the sense that it matters who is speaking. Instruction in Darwinism from an atheist teacher can mean something very different from exactly the same class taught by a devout Christian. Regardless of what a teacher says, his mere identity as an atheist may leave room for students to assume that Darwinism undercuts Christianity, whereas his mere identity as a Christian may suggest that Darwinism is compatible with religion.

So it doesn't matter whether state school speech is a perfect substitute—in content, viewpoint, and tone—for the speech of a parent or a parentally chosen school. Government speech is not the same, if only because the identity of the speaker matters.[92]

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It thus is abundantly clear that parents have a profound speech interest in avoiding state schools and in making their own choice of teachers and educational speech for their children. No matter how objective the subject, there is a clear speech interest in avoiding government teachings and teachers and, instead, enunciating one's own teachings in one's own voice or a voice of one's own choosing.

C. Merely Expressive Conduct?

Of course, judges may wish to avoid the First Amendment's implications for education, and one excuse might be to claim that education is expressive conduct, not pure speech. This "off ramp," however, runs into factual and legal difficulties.

Some elements of education involve at least as much conduct as speech, but that is not true of most education. The vast bulk of schooling—including English, other languages, history, civics, and math—remains almost entirely a matter of words and numbers. Physics and chemistry can involve some physical experimentation but still are mostly speech, and the experiments are meaningless acts without speech—without the theorizing and explanation that make sense of the experiments. Instrumental music shades off into expressive conduct, but singing is more purely speech. Only physical education is clearly more conduct than speech, but even gym classes are profoundly expressive. They can inculcate very different messages about competition versus cooperation, about ability versus effort, about gender differences, and so forth. So it is difficult to conclude that states merely pressure parents to adopt government conduct, not government speech or expressive conduct, in place of their own.

92. *Cf. id.* at 33–34, 243–48 (discussing the importance of voice in connection with 26 U.S.C. § 501(c)(3), which prevents churches from speaking in the same voice about political and personal morality).

Even if (just for the sake of argument) education were conceded to be mostly expressive conduct, this would not save the states from the unconstitutionality of their pressures on parents. According to *United States v. O'Brien*,[93] government regulation of expressive conduct is "sufficiently justified" if it meets four criteria:

1. "if it is within the constitutional power of the Government";
2. "if it furthers an important or substantial governmental interest";
3. "if the governmental interest is unrelated to the suppression of free expression"; and
4. "if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[94]

The last two elements make it difficult to evade this Article's speech argument on the theory that education is merely expressive conduct.

One problem is that since the 1840s, public schooling has not been "unrelated to the suppression of free expression."[95] On the contrary, public education has all along been a means of displacing what parents would tell their children about religion and civics, eventually even science and sex, with state-approved theo-political messages.[96] This displacement of parental speech was central for Horace Mann, the nativists, and other theological liberals, and it has not diminished for contemporary advocates of state schooling.[97] So it cannot be said that public schooling is unrelated to suppression.

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93. 391 U.S. 367 (1968).

94. *Id.* at 377.

95. *Id.*

96. This not only was true as a structural matter but also was widely feared. A nineteenth-century commentator observed that public schools "assimilate" the "children of alien parentage" so "they grow up with the state, of the state and for the state." CHARLES LESLIE GLENN, JR., THE MYTH OF THE COMMON SCHOOL 83 (1988) (quoting the Congregationalist journal *New Englander*). To the extent the public school system established by Horace Mann drew upon French and Prussian models, the danger of state control was all too clear. Critics protested that "the French and Prussian system of public schools appears to have been devised, more for the purpose of modifying the sentiments and opinions of the rising generation, according to a certain government standard, than as a mere means of diffusing elementary knowledge." *Id.* at 122. The critics added: "The right to mould the political, moral, and religious opinions of his children is a right exclusively and jealously reserved by our laws to every parent; and for the government to attempt, directly or indirectly, as to these matters, to stand in the parent's place, is an under-taking of very questionable policy." *Id.*

97. *See* TAYLOR, *supra* note 72, at 31 (regarding Mann's belief that "private schooling threatens democratic cohesion and equality"); *infra* note 133 for nativist opinion (quoting Imperial Wizard Hiram Evans); HAMBURGER, LIBERAL SUPPRESSION, *supra* note 26, at 104–05 (quoting James Bryant Conant—President of Harvard University—that public schools were "instruments of our democracy" and that an "increase [in] the scope and number of private schools" would "threaten the democratic unity provided by our public schools," which were essential for reconciling

The second awkwardness is that the restriction on expression is much "greater than is essential" for the furtherance of any lawful state interest.[98] The state interest in state education includes maintaining the quality of education, teaching civics and tolerance, getting students to bridge their differences, and so forth. But there is no reason to think that pressuring parents to adopt state education is the best, let alone the only, way to offer quality education and teach civics, tolerance, and getting along. The restriction on expression is thus far greater than is essential to the furtherance of such interests.

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The "expressive conduct" evasion of this Article's argument fails on both the facts and the law. Education is almost entirely speech, not mere expressive conduct. And in any case, the pressure on parents to submit to public schooling goes beyond what can be justified by *O'Brien*.

D. Precedent and Institutional Longevity?

There remains another possible "off ramp" for judges—that they will express reluctance to question a system of providing state education that has endured for so long. Certainly, the system has enjoyed long continuance, and this is a serious emotional obstacle to this Article's arguments. But neither judicial nor political precedents stand in the way of the arguments. And mere longevity is no excuse for a deprivation of rights—let alone a deprivation that burdens the poor and minorities with diminished educational opportunities.

1. Judicial Precedent.—This Article's speech arguments encounter no impediment in judicial precedent or doctrine. The speech claim apparently has not been significantly addressed by the courts. So there are no judicial decisions on the subject that need to be overcome.

Indeed, the unconstitutional conditions argument here rests on long-standing judicial authority. The claim about speech is novel. But the underlying point that state schools are government benefits, which must not come with any unconstitutional condition, rests on the weightiest of precedents.

Recall the statement in *Brown* that "[s]uch an opportunity, where the state has undertaken to provide it, is a right which must be made available to

"uniformity and diversity"; and quoting "[t]he president of the American Association of School Administrators, Kenneth Oberholtzer, . . . that the dual system of schools was 'divisive' and that 'the ideas or philosophy behind the nonpublic schools' was 'dangerous.'"). Note that the liberal opinion of upper-crust men such as Conant largely echoed, with greater polish, the ideas expressed in nativist tracts of the prior decades. *Id.* at 105.

98. *See O'Brien*, 391 U.S. at 377 (requiring that government restrictions on expressive conduct be no greater than what are essential for achieving a lawful state interest).

all on equal terms."[99] The opportunity of state education cannot come with an unconstitutional condition, whether it violates equal protection as in *Brown* or the freedom of speech as here. A judge can reject this point only by repudiating the reasoning in *Brown*.

And the crucial holding in *Brown* is reinforced by *Pierce v. Society of Sisters*.[100] As noted earlier, if submission to state education cannot be imposed by direct command of law, it also cannot be imposed by financial pressures.[101]

So far from being an obstacle, judicial precedent strongly supports the unconstitutional conditions argument. But there is another type of precedent.

2. Political Precedent.—When the political branches of government reach a decision about a constitutional question, and there has been long acquiescence to that decision, there are reasons to defer to the resulting practice or precedent. Although not as authoritative as a judicial precedent, this sort of political precedent is recognized to be at least somewhat significant.

For example, when evaluating the constitutionality of the Second Bank of the United States in *McCulloch v. Maryland*,[102] Chief Justice Marshall acknowledged the weight of past political decisions.[103] But he cautioned that he would defer to such a decision only when the constitutional issue was a "doubtful question, one on which human reason may pause, and the human judgment be suspended."[104] And he said he would not defer to such a decision when it concerned the "great principles of liberty."[105]

So his statement about the strength of political precedent does not apply here. The constitutional question about parents' speech is not so evenly balanced as to leave the judgment suspended. And in any case, it involves a great principle of liberty.

Even more basically, a political precedent established by the states cannot have much weight for a federal court. It is one thing for a federal court to defer to a practice or precedent established by the coordinate branches of the federal government, but quite another for it to defer to the political practice or precedent of a state.

Last but not least, the speech question here is novel. It has never before been considered by the political branches of the states, let alone determined by them. So there is no past decision that would amount to a political

99. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

100. *See* 268 U.S. 510, 535 (1925) (holding compulsory state education unconstitutional).

101. *See supra* text accompanying note 48.

102. 17 U.S. (4 Wheat.) 316 (1819).

103. *Id.* at 401.

104. *Id.*

105. *Id.*

precedent. Rather, there is merely institutional longevity. And mere longevity, without debate and a considered decision about the speech question, does not amount to what is ordinarily understood as a political precedent.

3. Institutional Longevity.—Still, judges will be reluctant to question a system of pressuring parents into state education that has been for so long embedded in American society. The system's mere longevity does not by itself create a political precedent. All the same, many judges will hesitate to confront the unconstitutionality of a system that has endured since the mid-nineteenth century. It therefore is important to observe mere antiquity is no excuse for a system that is unconstitutional and still less for one that is also unjust.

The weakness of the longevity excuse is especially clear because the public school system achieved popularity in response to prejudice. For at least a century after its development circa 1840, the system was backed and influenced by nativist forces.[106] From its inception until the present, moreover, it has been an instrument for inculcating theologically liberal animosities against all sorts of orthodoxies.[107] In pursuit of these popular prejudices, the system has pressured parents into accepting government schooling. The long-standing prevalence of this system therefore cannot be taken to legitimize its pressures on parents to give up their speech rights. On the contrary, the combination of longevity, popular prejudice, and lost speech rights should make judges cautious.

Mere longevity is not the same as political, let alone judicial, precedent. And longevity associated with prejudice and a loss of rights is almost an anti-precedent—an argument for reconsidering what long seemed beyond question.

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Far from conflicting with any judicial precedents, the constitutional argument here, especially about unconstitutional conditions, rests on central judicial precedents, *Brown* and *Pierce*. And it does not collide with any political precedents, in the sense of political branch decisions, about the constitutional question. So all that is left in the way of precedent that might excuse the loss in freedom is longevity tainted with prejudice.

106. HAMBURGER, SEPARATION, *supra* note 27, at 219–29 (regarding nativist and more generally theologically liberal influences in formation of public schools in New York).

107. *Id.* at 453–54 (regarding mid-twentieth-century liberal dedication to public schooling in opposition to Catholicism and parochial schools); HAMBURGER, LIBERAL SUPPRESSION, *supra* note 26, at 299–301 (regarding use of public schools to homogenize children in accord with nativist and theologically liberal views).

E. Compatible with Regulation of Private Schooling

Although the doctrinal argument about parents' speech has by now been established, a skeptic may wonder whether it is compatible with the power of states to regulate private education. That is, if states can constitutionally regulate the content of private schooling, why shouldn't they be able to pressure parents into accepting state educational speech?

It is especially necessary to ask such questions because a shift toward more private education will surely invite more regulation of it. If this Article is correct that states cannot pressure parents into state schools, many parents will move toward private schooling. And states may well respond by increasing their regulation of private education. But the constitutionality of some such state regulation does not really undercut the conclusion that it is unconstitutional to pressure parents into state education.

The substitution of government speech for parents' speech is much more intrusive than mild curricular regulation of parents' educational speech. Some states require curricula (such as reading, writing, math, history, science, and civics) and some demand testing.[108] But even these states leave parents free to choose how these subjects are taught and by whom. So these curricular and testing requirements are no excuse for the pressures on parents more broadly to abandon their own educational speech and substitute the government's. The constitutionality of the one does little, if anything, to undermine the conclusions here about the unconstitutionality of the other.[109]

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It makes sense to calibrate this Article's argument by comparing the pressures for public schooling with the regulation of private schooling. But the regulation of private educational speech is not nearly as invasive as the pressures to adopt government educational speech. Whereas the one merely places parameters on the private speech, the other largely displaces it.

F. Modest Remedy

Judicial decisions about public schools have all too often resulted in ambitious remedies, which strain the competence and lawful power of the

108. *See generally* U.S. DEPARTMENT OF EDUCATION, STATE REGULATION OF PRIVATE SCHOOLS (2009), https://www2.ed.gov/admins/comm/choice/regprivschl/regprivschl.pdf [https://perma.cc/KSX6-JXD7] (surveying state regulations of private education, including required curricula).

109. Of course, some state regulation goes further—for example, by requiring accreditation or licensing of private schools. *Id.* at 317–27. When such mechanisms evaluate schools for how they teach (as opposed to how, say, they protect the health of children), they are a form of prior review of speech and so raise serious constitutional questions. Similarly, when state curricular and testing requirements become too detailed and restrictive, they drift into unconstitutional territory. So while it is true that state regulation of private schooling can easily reach deep into private decisions, they then encounter their own constitutional problems.

courts. This Article therefore closes its doctrinal arguments by emphasizing the modesty of the proposed remedy.

The arguments here make no objection to the continued existence of state schools. Nor do the arguments assert parental control over the state schoolteachers or their curricula. So nothing in this piece involves any judicial supervision of schools, their faculty, or their curricula.

Instead, what is at stake is that parents are being pressured by force of law or at least by conditions to adopt government educational speech in place of their own. This constitutional difficulty will eventually require a reconfiguration of how states offer educational support. But that is a legislative matter, and nothing here would require the courts to involve themselves in such legislative concerns.

All that would be necessary or justified in any free speech litigation would be to petition a court to recognize the unconstitutionality of the current pressures on parents. For example, one could ask the court for a declaratory judgment or an injunction. Alternatively, the attorney general of a state could issue an opinion on the unconstitutionality of the pressures.

At that point, the legislature would have to choose a constitutional policy on education. Its choices would include:

- tax credits or other tax relief for parents who home school or send their children to private schools;[110]
- vouchers or other subsidies for parents who choose home schooling or other private schooling;
- some other policy solution that has not yet been figured out but probably lurks just beyond the horizon.

No solution will be perfect. But the point is simply that there are multiple legislative options for avoiding the constitutional difficulties identified in this Article. So a court must leave these policy questions to the legislature and confine itself to deciding only the unconstitutionality of the current system.

Of course, a legislature may refuse to adopt a constitutional funding system. But still, the courts should simply hold any unconstitutional system void and refuse to order the legislature to act. Under such decisions, there will be more than enough political pressure on the legislature to fund education constitutionally. So the courts have no excuse for intruding into legislative questions.

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Such is the doctrinal argument about parents' freedom of speech in the education of their minor children. A state cannot use pressure, either directly

110. Note that tax credits can be used to distribute money to individuals who do not owe taxes. *Credits and Deductions for Individuals*, IRS, https://www.irs.gov/credits-deductions-for-individuals [https://perma.cc/ZRK4-3T7R] (Aug. 25, 2022). So this use of the tax system is not restricted to taxpayers. Although it uses the tax system, it is not really a matter of taxation.

or through conditions, to abridge the educational speech of parents and compel them to adopt state educational speech.

III. Ideals Vindicated

This Article's claim is not just narrowly doctrinal. It also rests on more expansive grounds. As now will be seen in Part III, the freedom of speech of parents vindicates some profoundly important ideals.

A. Parental Authority

This Article's speech argument has the advantage of giving concrete and forceful protection to the authority of parents over their children. The freedom of speech places that authority on an enumerated and well-developed constitutional right, not on the vagaries of substantive due process. And it thereby clarifies the extent of parental authority in education vis-à-vis the state.

1. Speech Right vs. Parental Authority.—The constitutional freedom of parents in their educational speech is a narrow legal right. It therefore cannot give full expression to the breadth of parental freedom as understood in American traditions and life. The legal right, however, is crucial for protecting parental freedom and so should be recognized as an essential foundation for broader familial values.

The family is the most basic of social groupings—the intimate space where parents can inculcate their religious, moral, and other traditions. It thus is the most fundamental mechanism of civilizational continuity. Familial attachment and support, moreover, preserves individuals from being drawn into over-attachment to, and dependence upon, government. So it is important that families remain strong and relatively independent from government. In education, this means that parents need great freedom in choosing how to raise their children. But this generic parental freedom is a point of moral or political theory, not obviously a constitutional right—unless one adopts a theory of substantive due process.

Under that theory, in *Meyer v. Nebraska*, the Supreme Court upheld "the right of parents" to engage a teacher to "instruct their children" and "the power of parents to control the education of their own."[111] In *Pierce*, the Court similarly defended "the liberty of parents and guardians to direct the upbringing and education of children under their control."[112]

But how firmly grounded is this parental authority? Substantive due process is nearly an oxymoron—a claim of substantive rights imposed on

111. Meyer v. Nebraska, 262 U.S. 390, 400–01 (1923).

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

guarantee of procedural freedom. The rights thereby protected have fluctuated between economic liberties in one era and mostly sex-related liberties in another.[113] So if the parental claim is based in substantive due process, its foundation seems precarious.

And how far does the parental authority go? It evidently protects against compulsory state education and against laws barring the teaching of foreign languages.[114] But does it secure parents against being pressured into sending their children to state schools? On that, the claim of parental authority is unclear.

In contrast, the educational speech rights of parents are firmly based in the First Amendment and state speech guarantees. And the implications for public schools are especially clear because of *Brown*. In a crucial passage, it recognizes that government educational largess cannot come with an unconstitutional condition—in this instance, a condition that violates the freedom of speech.[115]

So notwithstanding that general ideas of parental authority are constitutionally recognized under the rubric of substantive due process, the speech rights of parents offer something stronger. The speech rights are narrower than a general freedom of parents in raising their children. But the speech rights of parents in educating their children have a firmer constitutional foundation and a clearer reach. Such rights therefore can be pursued in court. They give force to what otherwise are apt to seem abstract claims of moral or political theory.

2. Pierce v. Society of Sisters.—This 1925 case illustrates the value of the speech claims. A state law had made public school education compulsory.[116] The Supreme Court held the law unconstitutional, but without being entirely clear as to why.[117] The case was brought by a school rather than a parent—so the Court said, among other things, that it was protecting the economic rights of the school, leaving any speech rights of parents unmentioned.[118] But substantive due process is a weak and amorphous justification for something so essential. It leaves the parental right without much of a textual foundation and without clearly defined boundaries.

For example, although the Supreme Court generalized about a parental "right" to choose private education, it was not very clear about the extent of

113. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 64 (1905) (protecting freedom of contract); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (protecting a right of privacy in contraceptives).

114. *See Pierce*, 268 U.S. at 535; *Meyer*, 262 U.S. at 403.

115. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954); *see supra* notes 44–47 and accompanying text.

116. *Pierce*, 268 U.S. at 530.

117. *Id.* at 534–35.

118. *Id.*

this right. The open-endedness of the Court's substantive due process analysis is painfully apparent in statements such as: "The child is not the mere creature of the State."[119] Like *Meyer*, *Pierce* recognizes a constitutional right in parents but leaves it without much of a footing or definition.

The court's opinion in *Pierce*, however, doesn't consider the possibility that education is speech. This lack of attention to the speech question was probably inevitable because of the way the case arose—in a suit by the school. But just because the court had no occasion to explore the speech rights of parents doesn't mean we can't do so.

In retrospect, it is important to understand *Pierce* in terms of speech—an approach hinted by Justice Douglas in *Griswold v. Connecticut*.[120] Although speech is not the only possible explanation of that case, the freedom of speech is an enumerated and relatively well-defined right. So the freedom of speech strengthens the justification for parental authority, at least in education and other speech matters. And the freedom of speech clarifies the extent of the parental claim against government.

Of course, the freedom of speech does not protect the full extent of parental authority. In other words, it offers only a partial analysis of that question. But at least in education, it offers a relatively authoritative and clear barrier against government intrusion. In such matters, the speech right goes a long way toward buttressing the more general ideal of parental authority.

3. Parental Failure.—Of course, even the best of parents can make poor choices, and this may raise doubts about the value of parental authority in education. But all freedom comes with the risk of error, and the danger of poor educational decisions by parents does not undermine the broader value of parental authority secured by the freedom of speech.

Some commentators on the draft of this Article have urged that many poor and minority parents are uninvolved and not entirely capable of making sensible choices. This may sometimes be true. But there is no empirical evidence that, on average, poor and minority parents have significantly worse educational judgment than their wealthy and majority peers. Although public school parents may be less involved with their institutions than private school parents, this may just reflect their realistic understanding that they have been deprived of agency—that they have been denied their freedom in educational

119. *Id.* at 535.

120. *See* Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (stating, in reference to *Pierce*, that "the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments"); Gilles, *Parentalist Manifesto*, *supra* note 1, at 944 ("If *Pierce* and *Meyer v Nebraska* arose today, they might best be viewed as cases involving the free speech rights of parents." (footnote omitted)).

speech. The concerns about poor and minority parents therefore sound more patronizing than accurate.[121]

In a slightly different challenge to this Article's free speech argument, it has been suggested that even when parents get involved, they will impose abusive views—meaning views that seem politically dangerous. One such risk is that parents will teach racist views. Another is that they will teach traditional views on sex and sexuality, such as the distinction between the sexes, the value of specialized roles for men and women, and the importance of traditional marriage. But of course, politically worrisome teachings come from more than one direction. Many parents think it prejudiced to inculcate the generalization that white individuals, including white children, are "white supremacists." Many parents also see dangers in teaching the fluidity of sexual distinctions, the need to break up specialized sex roles, and the value of untraditional marriages and other relationships.

The argument that parents will abuse their freedom of educational speech thus looks somewhat political. It is nearly a protest that parents should not have authority in teaching their children because too many parents will not take the right point of view. Of course, the danger of what are conventionally considered racist and other prejudiced teachings is real. But so too is the danger of differently prejudiced teachings in public schools. And the risk that some parents will teach what is false and socially damaging does not justify the even greater risk of depriving parents of their freedom of speech with their children.

The possibility of misjudgment is an inescapable risk of any freedom, including the freedom of speech. And the educational authority of parents, as protected by their freedom of speech, has the advantage of dispersing the risk of teaching morally or otherwise erroneous views. In contrast, when children are pushed into state schools, there is a risk of community-wide teaching of prejudice—as evident from public schools' long history of inculcating prejudiced views on religion, race, sex, disabilities, political dissent, and so forth.

So yes, parents can fail their children by making wrong choices. There consequently are dangers in protecting the educational authority of parents. But these dangers are greatly outweighed by the benefits. Most notably, parental authority disperses the risk of error. In particular, it avoids the risk of concentrating control of educational speech in government.

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Parental authority is valuable, and it is protected by the freedom of speech. It is valuable to recall *Meyer*, *Pierce*, and ideals of parental choice.

121. Virginia Walden Ford, *Myth: Only Rich Parents Can Make Good Choices*, *in* SCHOOL CHOICE MYTHS, *supra* note 73, at 177, 177 (arguing that poor families care about their children and tend to make good decisions when they have choices).

Yet these relatively amorphous assertions of parental freedom acquire a sharper constitutional edge when asserted in terms of parental speech rights. Notwithstanding that parents have powerful arguments based in morals and political theory, the speech claim offers something more: the force and clarity of an enumerated constitutional right. And parental authority not only preserves the role of parents but also limits the danger from government.

B. Government Imposed Conformity

Pressuring much of the populace into government education comes with risks of conformity. Conformity, of course, can be valuable as well as dangerous, depending on the details. But government-induced conformity is distinctively worrisome because it reinforces what already is the nation's most powerful institution. Across history, government attempts to secure conformity have had tragic consequences, and there is no reason to believe that Americans are exempt from the dangers.

The structural dangers include governmental homogenization, the politicization of inquiry and knowledge, and a loss of familial independence.

1. Governmental Homogenization.—When states pressure parents into accepting government educational speech, there inevitably will be governmental homogenization. It is difficult to think of a greater structural danger. In his essay *On Liberty*, John Stuart Mill—the leading philosopher of liberalism—explained:

> The objections which are urged with reason against State education, do not apply to the enforcement of education by the State, but to the State's taking upon itself to direct that education: which is a totally different thing. That the whole or any large part of the education of the people should be in State hands, I go as far as any one in deprecating. All that has been said of the importance of individuality of character, and diversity in opinions and modes of conduct, involves, as of the same unspeakable importance, diversity of education. A general State education is a mere contrivance for moulding people to be exactly like one another: and as the mould in which it casts them is that which pleases the predominant power in the government, whether this be a monarch, a priesthood, an aristocracy, or the majority of the existing generation, in proportion as it is efficient and successful, it establishes a despotism over the mind, leading by natural tendency to one over the body.[122]

122. JOHN STUART MILL, ON LIBERTY AND THE SUBJUGATION OF WOMEN 187–88 (Henry Holt & Co. 1879) (1859), https://oll.libertyfund.org/title/mill-on-liberty-and-the-subjection-of-women-1879-ed [https://perma.cc/D5EM-ABT5].

Nonetheless, homogenization, or at least the inculcation of shared ideals, has long been one of the primary justifications for public schools.[123]

Some commentators have been particularly candid about the homogenization. An early twentieth-century nativist tract grimly declared:

> Our public school is the mill that is to grind out this standard of morality, knowledge and patriotism to all . . . . Our American school is like a great paper mill, into which are cast rags of all kinds and colors, but which lose their special identity and come out white paper, having a common identity. So we want the children of the state, of whatever nationality, color or religion, to pass through this great moral, intellectual and patriotic mill, or transforming process.[124]

There they would have "the common identity of morality, knowledge and patriotism that is essential to true American citizenship and good government stamped upon their minds . . . ."[125] Although contemporary commentary on education is not so heavy-handed, it continues to include overt demands for shared or common democratic values and experiences.[126]

The allocation of education to the states and even to localities may seem a structural protection against the homogenization. Public schools are state schools and are overseen by local school boards. So they may seem to have built-in brakes against being used as instruments of conformity.

But they have long been coordinated by political and educational forces. For at least a century, from roughly the mid-nineteenth century to the mid-twentieth, myriad nativists, educators, and other theological liberals sought to homogenize children in public schools in accord with theologically liberal and often overtly nativist ideals.[127] They did this partly through fraternal and

123. HAMBURGER, LIBERAL SUPPRESSION, *supra* note 26, at 299–301.

124. BERNARD FRESENBORG, "THIRTY YEARS IN HELL" OR "FROM DARKNESS TO LIGHT" 211 (1904).

125. *Id.*

126. For example, a recent Brookings Institute report argues for "helping young people develop and practice the knowledge, beliefs, and behaviors needed to participate in civic life," and that for this a "shared or common experience across all schools is needed." REBECCA WINTHROP, BROOKINGS INST., THE NEED FOR CIVIC EDUCATION IN 21ST-CENTURY SCHOOLS 2, 4 (2020), https://www.brookings.edu/wp-content/uploads/2020/04/BrookingsPolicy2020_BigIdeas_Winthrop_CivicEducation.pdf [https://perma.cc/W87Y-A5UF].

127. HAMBURGER, SEPARATION, *supra* note 27, at 219–29 (regarding nativist and more generally theologically liberal influences in formation of public schools in New York); HAMBURGER, LIBERAL SUPPRESSION, *supra* note 26, at 299–301 (regarding nativist and liberal ambitions for homogenization through public schools). John Dewey aimed for the subordination of intellectual inquiry to "social dispositions" so that the minds of children would be "socialized" in line with civic ends. TAYLOR, *supra* note 72, at 98–99. Stephen Macedo observes that "Dewey seems to . . . flirt with a civic totalism that leave too little to the extrapolitical dimensions of human experience." *Id.* at 99–100.

professional organizations that worked with public schools across the nation, and when that was not enough, they enlisted the federal government.[128]

In the 1920s, nativists and other theological liberals campaigned for a federal department of education. The National Education Association (NEA) had long made such demands, and in the 1920s the Scottish Rite, Southern Jurisdiction, and the Ku Klux Klan joined the NEA in this effort.[129] Although this unholy trinity failed in their efforts, they got the attention of politicians.[130] Even after the collapse of the Klan, the NEA and Scottish Rite persisted in their demands.[131] The ideal was thereby launched, and beginning in 1953 education became a federal departmental concern, initially in the Department of Health, Education, and Welfare.[132]

Education is therefore no longer merely a matter of local or even state policy. It is subject to national pressures, both private and federal.

For many nativists and other liberals, the goal has been to educate students for participation in a liberal democracy with theologically liberal

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128. For example, the Junior Order of United American Mechanics, founded in 1853, was a white nativist fraternal order which aimed to "maintain the Public School System" and "prevent sectarian [that is, Catholic] interference therewith, and to uphold the reading of the Holy Bible therein." HAMBURGER, SEPARATION, *supra* note 27, at 455. It eventually allied itself with the Ku Klux Klan in some states, and in the 1930s:

> It proudly declared itself "Patriotic" and "Progressive" and preached the "glorious trinity" of "[t]he Bible, the Flag, and the School," in part by presenting flags and Bibles to public schools . . . . The Junior Order exaggerated less than might be supposed when it boasted: "EVERY LAW for the promulgation of American principles, Compulsory Education, Free Text Books, Reading of the Holy Bible in the Schools, Placing the Flag upon the Schools . . . have in a large measure been prepared and fostered by the Jr. O.U.A.M."

Id. at 456 (omissions in original). David Tyack and Elisabeth Hansot write that the leaders of educational associations worked through their organizations to "create a potent professional consensus despite the formal decentralization of power in American public education." DAVID TYACK & ELISABETH HANSOT, MANAGERS OF VIRTUE: PUBLIC SCHOOL LEADERSHIP IN AMERICA, 1820–1980 140 (1982).

129. HAMBURGER, SEPARATION, *supra* note 27, at 415–16. For the demands for such a department, see also DOUGLAS J. SLAWSON, THE DEPARTMENT OF EDUCATION BATTLE, 1918–1932: PUBLIC SCHOOLS, CATHOLIC SCHOOLS, AND THE SOCIAL ORDER 122 (2005).

130. President Warren Harding took up the cause for a federal department of education in 1923 and even did so in nativist terms. MESSAGE OF THE PRESIDENT OF THE UNITED STATES AT A JOINT SESSION OF THE TWO HOUSES OF CONGRESS, DECEMBER 8, 1922, H.R. DOC. NO. 67-615, Pt. 1, at xvi–xvii (1922) (stating "the education of the immigrant becomes a requisite to his Americanization," and although "public education has been left mainly in the hands of the States . . . it is the especial obligation of the Federal Government to devise means and effectively assist in the education of the newcomer from foreign lands").

131. Scottish Rite publications continued for decades to publish their demands for such a department. HAMBURGER, SEPARATION, *supra* note 27, at 415 n.57.

132. Reorganization Plan No. 1 of 1953, 67 Stat. 631.

commitments against any orthodoxy.[133] Of particular significance, theological liberals in government, accreditation organizations, professional groups, and foundations have worked to have public schools homogenize pupils along theologically liberal lines—that is, against any dogma or orthodoxy.[134]

Traditionally, this attitude to dogmas or orthodoxies meant inculcating anti-Catholic views.[135] Increasingly, it also means inducing students to question ideas of truth, merit, morals, sex differences, and so forth.

There is a risk that such teaching can easily become indoctrination and can even lead to its own sort of intolerance.[136] But the goal here is not to disparage such attitudes. Rather, the point is structural.

Even without the history of theo-political homogenization, the structural dangers are obvious. As already noted in subpart II(A), one risk is that public schools will be captured and so will impose the views of some on the children of others. An even more basic danger is that when parents are pressured into state schools, these institutions will tend to align public opinion with government views. The pressure on parents thus undermines independent public opinion and its capacity to limit government. It even tends to shape the future electorate in line with government expectations. The hazard (again,

133. That this was a central ambition of nativists as well as other theological liberals is clear from their numerous writings. *See, e.g.*, H.W. EVANS, THE RISING STORM 300, 302, 310 (1930) (regarding the Catholic use of parochial schools "to prevent the spread of Liberal ideas" and for "drilling an army—unified, disciplined and blindly submissive—that can be used against American Liberalism" and arguing that "Catholic children would be exposed to the principles of Liberal education if they attended the public schools"). Hiram W. Evans was Imperial Wizard of the Ku Klux Klan.

134. HAMBURGER, LIBERAL SUPPRESSION, *supra* note 26, at 299–301 (regarding use of public schools to homogenize children in accord with nativist and theologically liberal views). In this conflict, theological liberals used a strained interpretation of the Establishment Clause to establish themselves and their views.

135. Philip Hamburger, *Illiberal Liberalism: Liberal Theology, Anti-Catholicism, & Church Property*, 12 J. CONTEMP. LEGAL ISSUES 693, 701, 703–10 (2002).

136. Stepping back from the fray, J. Roland Pennock—a professor of political science at Swarthmore—worried about the difficulty of achieving "democratic unity" and noted in 1951 that "liberal democrats" increasingly were focusing on the "role of the state" in maintaining the "liberal-democratic myth." J. ROLAND PENNOCK, LIBERAL DEMOCRACY: ITS MERITS AND PROSPECTS 267 (1950). In particular, they were asking: "Should the state teach democratic ideals in the public schools? . . . Should it ban criticism of democratic ideals and institutions in the schools, on the theory that the liberal doctrine of freedom of criticism and discussion applies only to mature minds?" *Id.* at 291–92. There evidently was "a limit beyond which a state cannot go and remain in any sense 'liberal,'" but the question was "[w]here should the line be drawn?" *Id.* at 292. In Pennock's view, there was no harm in "indoctrinating" children where the case for democratic ideas was "based upon rational analysis." *Id.* at 292–93. It thus was acceptable for public schools to homogenize students along the lines of liberal dogma by teaching them to be "skeptical of all dogma." *Id.* at 293. An anonymous reader sardonically translated the subtitle (on the title page of my copy): "Oh, how lucky we are."

as put by Brecht) is that government will thereby "dissolve the people and elect another."[137]

The Supreme Court has recognized the danger of governmental homogenization. In *Meyer*, it acknowledged:

> The desire of the legislature to foster a homogenous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate . . . . But the means adopted, we think, exceed the limitations upon the power of the State and conflict with rights assured to the plaintiff in error.[138]

In *Pierce*, it declared: "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."[139]

But it isn't enough merely to bar states from making public schooling compulsory, for what the court in *Pierce* forbade*,* states still largely accomplish with a combination of mandatory education and tuition-free state schools. States still pressure most of the non-wealthy into state schools and so tend to standardize them in line with government teachings.

So it is essential to recognize the evasion and its unconstitutionality. What *Pierce* forbids cannot be done to parents through other means. Put another way, it is important that parents cannot be pressured into accepting government educational speech, as only on this basis can Americans be protected from governmental homogenization of children.

2. Politicization of Inquiry and Knowledge.—Beyond the generic problem of governmental homogenization, there is a risk of politicizing inquiry and knowledge. Throughout American government, public policy depends on science. And science gets vast federal funding.[140] So science and politics almost inevitably become intertwined.[141] Although the goal is to have politics follow science, the opposite often happens: science gets shaped by politics.[142]

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137. Brecht, *supra* note 74. According to Orestes Brownson, "To entrust . . . the government with the power of determining the education which our children shall receive, is entrusting our servant with the power to be our master." TAYLOR, *supra* note 72, at 69 (omission in original).

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

139. Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

140. Nathan Drucker, *Competing Visions of Science Funding in Congress*, HARV. UNIV.: SCI. IN THE NEWS (July 18, 2022), https://sitn.hms.harvard.edu/flash/2022/competing-visions-of-science-funding-in-congress/ [https://perma.cc/28EA-BQP8].

141. *See id.* ("Comparing the USICA and the America COMPETES Act sheds light on how science and technology shape political debate, and conversely, how political debate molds science and technology.").

142. *Id.*

Government invests both financially and politically in science. It chooses what it considers scientific pathways—whether in drugs, transportation, or communications—and it thereby becomes politically committed to scientific theses that ought to be open to dispute. On the one hand, government funding, positions, and other favors lure scientists into conformity. On the other, disagreement with the government's scientific policy is often viewed as political dissent, even political opposition, thus discouraging necessary scientific questioning.[143] The result is politically twisted inquiry and knowledge, in which science is distorted by external considerations.

The pressures to go to public schools brings these sorts of tensions into the education of children. Being government schools, such institutions educate children within political parameters and often in pursuit of political policies that range far beyond basic education. This is costly for education because politics and real education are usually incompatible. Put simply, politicized education is destructive of the pursuit of truth.[144]

And it is equally dangerous politically. By educating children in a world of politically limited, let alone politically oriented, education, the current system inculcates an eagerness to pursue politically acceptable visions and agendas. At the same time, it instills a hesitation to explore and address realities that do not neatly fit within a politically acceptable framework. The resulting caution about inquiry and truth-telling bodes ill for our society.

Again, therefore, there are good reasons to fend off the pressures on parents to place their children in government schools. This cannot fully avoid the politicizing of inquiry and knowledge. At least, however, it can limit the politicization for children.

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143. Long before COVID-19, questioning of government-favored science was at times denigrated as opposition to the government and a threat to science. To take a familiar example, those who questioned the safety of fluoridating the water supply were once dismissed as just cranky or politically extreme. It turns out, however, that fluoridated water is associated with harm to babies in utero, with diminished chances of survival and lower IQ when they survive. *See* Lajya Devi Goyal, Dapinder Kaur Bakshi, Jatinder Kaur Arora, Ankita Manchanda & Paramdeep Singh, *Assessment of Fluoride Levels During Pregnancy and Its Association with Early Adverse Pregnancy Outcomes*, 9 J. FAM. MED. & PRIMARY CARE 2693, 2696 (2020) (summarizing findings that "females with elevated urinary fluoride levels have more chances of pregnancy complications such as anemia and adverse fetal outcomes"); Rivka Green, Bruce Lanphear, Richard Hornung, David Flora, E. Angeles Martinez-Mier, Raichel Neufeld, Pierre Ayotte, Gina Muckle & Christine Till, *Association Between Maternal Fluoride Exposure During Pregnancy and IQ Scores in Offspring in Canada*, 173 JAMA PEDIATRICS 940, 940 (2019) ("A 1-mg higher daily intake of fluoride among pregnant women was associated with a 3.66 lower IQ score (95% CI, -7.16 to -0.14) in boys and girls."); Charles V. Howard, Henry S. Micklem & Chris Neurath, *Association Between Maternal Fluoride Exposure and Child IQ*, 174 JAMA PEDIATRICS 215 (2020) ("The amount and quality of evidence for fluoride causing IQ loss can be compared with that available for low-level lead in 1990.").

144. *See* TAYLOR, *supra* note 72, at 104–05, and works quoted there ("Promoting civic virtue all too easily threatens and trumps the pursuit of truth and rational inquiry.").

3. Familial Independence.—Discussions of parental freedom often present it as an abstraction. But when the authority of parents is examined narrowly but concretely as their freedom of speech in education, it becomes clear that the freedom of education speech is necessary for protecting the independence of families and thereby limiting the power of government to shape the people.

John Stuart Mill famously wrote:

> As it is useful that while mankind are imperfect there should be different opinions, so is it that there should be different experiments of living; that free scope should be given to varieties of character, short of injury to others; and that the worth of different modes of life should be proved practically, when any one thinks fit to try them.[145]

This freedom to experiment in living, including in education, could be viewed merely individualistically. And for some children, it is asserted individualistically against their families. But for all children in their early years and for many even in their later childhood, the freedom to experiment in living finds expression in the independence of families from social and governmental demands for conformity.

Parental freedom of educational speech is essential for securing familial independence. It also is crucial for preserving the layered or federal quality of American culture.[146] Although religious, ethnic, and local cultures have often been at odds with our national culture, they also have often undergirded it, providing the cohesion and moral depth often missing from our common culture.

The generic culture—quite apart from governmental and commercial influences—necessarily must be popular. So it tends to take the easy path of vapid overgeneralizations, which fail to capture the human predicament or to sustain individuals in their travails. In contrast, our distinctive cultures, if they are to remain distinct, must offer more solace than the common culture and must wrestle with the tension between general American and more distinctive identities. They therefore have a least a chance of inculcating more reflective and serious thought than is possible in the general culture. For example, our shared culture has much to say about injustice, but little about mercy, charity, and forgiveness. Our communal culture has much to say about respect and avoiding discrimination, but for a more profound affection and even love for others amid difference, Americans typically must look inward to their distinct religious traditions.

It therefore is crucial to preserve the opportunity for familial independence, not least in education. In Mill's terms, this independence is

145. MILL, *supra* note 122, at 101–02.

146. Carol Weisbrod, *Emblems of Federalism*, 25 U. MICH. J.L. REFORM 795, 795 (1992) (tracing the variety of non-state federalisms in America).

invaluable as a pathway for "human happiness" and "individual and social progress."[147] But it also preserves our cultural federalism and limits government. So it is no small matter that this obstacle to governmental conformity is secured by the freedom of speech.

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The risks of government-imposed conformity are wide ranging. They include governmental homogenization, politicized knowledge, and losses in familial independence and cultural variation. Fortunately, the speech claim of parents can limit the dangers.

C. Religious Liberty

The speech rights of parents also protect their religious liberty—not completely, but more than would be possible with religious liberty alone.

This Article's speech argument is suggestive about a similar religious liberty argument. *Pierce* and other discussions of parental rights are sometimes understood in terms of a right of religious exemption from general laws. But there is a simpler religious claim. The pressures to send children to state schools, which violate the parents' speech rights, can also be more direct violations of their free exercise of religion. Such pressures interfere with their freedom to espouse their religious beliefs to their children.

Although there is substantial overlap between the speech and the religion claims, each benefits from the other. On the one hand, demands for religious liberty tend to come with an intensity that bolsters the legal arguments. On the other, the freedom of speech more completely explains the educational authority of parents, as this right belongs to all parents, not just those who are religious. And this breadth of the speech right offers greater security even for religious parents, because the more who enjoy a right, the wider the support for it.[148] In other words, the speech claim more completely maps onto existing ideas about parental rights and more completely captures the predicament faced by all parents.

The speech claim, moreover, lets parents object to government instruction in subjects that they consider religiously significant but that judges might consider merely secular. From a court's perspective, there may be no reasonable religious interest in who teaches math or biology or how it is taught. There consequently is a serious risk that the religious liberty interest will be understood narrowly. Yet even if a judge does not see religious freedom in the teaching of math or biology, he probably will be able to see the freedom of speech. There are different pedagogical views on such

147. MILL, *supra* note 122, at 102.

148. *Cf.* HAMBURGER, LIBERAL SUPPRESSION, *supra* note 26, at 287–88 ("Equality is a key structural protection for liberty, for it allows Americans to feel a shared interest in protecting their rights," the effect being to secure "the broadest possible societal commitment to such rights.").

matters, and so the pressures to subject children to government math and government biology clearly threaten parents' freedom of speech.

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Without denying the importance of the religion argument for the freedom of speech, the speech argument does much to protect religious liberty. It more closely corresponds to parental rights in education, it secures the interests of all parents, and it protects religious parents where their religious liberty claims are apt to be construed narrowly.

D. Second Disestablishment

The contemporary demands against state schools are very similar to the eighteenth-century demands against established churches. Whereas the old establishment was overtly religious and even relatively orthodox, the current one is more theologically liberal and often even secular. Nonetheless, the structural dangers then and now are very similar. At stake therefore is almost a second disestablishment.[149]

1. The First Disestablishment.—The nation's first civil rights movement was for religious freedom, especially disestablishment.[150] Eighteenth-century American states were relatively tolerant of religious dissent, but many burdened dissenters with established churches.[151] Congregationalism was established in most New England states, and Anglicanism in most Southern states.[152] In such states—with notable exceptions—the favored church was elevated as the official religion and privileged with tax funding.[153]As today with schools, the laws required attendance, and although individuals typically were not required to attend established churches, there was financial pressure to attend them because the established churches already had government tax support.[154] In contrast, persons attending dissenting churches had to pay extra to sustain them.[155]

149. I am grateful to Inez Stepman for suggesting both this phrase and the substantive point.

150. *See generally* WILLIAM G. MCLOUGHLIN, NEW ENGLAND DISSENT, 1630-1833: THE BAPTISTS AND THE SEPARATION OF CHURCH AND STATE (1971) (analyzing the New England dissenting effort for religious liberty as the nation's first civil rights movement).

151. HAMBURGER, SEPARATION, *supra* note 27, at 89–90.

152. *Id.* at 90.

153. *Id.* (regarding Connecticut, Massachusetts, and Virginia).

154. The exceptions largely prove the generalization. Notably, in Massachusetts, the law permitted ecclesiastical taxes to be paid in support of a dissenting church, but the process made this option difficult, and many Baptists, for example, objected to coerced payments even in support of their own meeting houses. MCLOUGHLIN, *supra* note 150, at 539–40.

155. *Id.* at 443–45.

The establishment of religion, moreover, came with established schooling.[156] The established ministers had the advantage of higher education—at colleges and universities that often were theologically aligned with the locally established religion, whether Congregationalism at Harvard and Yale or Anglicanism at William and Mary. And the established ministers often taught minor children in their parishes.[157] Tellingly, when pro-establishment forces tried to justify at least an ecumenical establishment in Virginia, they proposed a bill for the establishment of Christian "teachers."[158] Whether in the pulpit, in private devotions, or in parish schools, the establishment was in many ways about teaching. So the contemporary establishment of public schools has at least some substantive overlap with the old establishment of religion.

Then, as now, the established institutions were often, even if not always, highly ossified and much resented. Many individuals, including many women, walked away from their established churches out of disgust with what was taught, how it was taught, and who was teaching.[159] Religious minorities increasingly despised a system that taxed them to support the establishment and left them to pay extra for the worship that pleased them.[160] They thought it unjust that they were being pressured to attend state-established churches.[161]

Underlying the antiestablishment movement was the diversity of belief among Americans. Today, it is widely assumed that our eighteenth-century predecessors were relatively homogenous. Certainly, the vast majority were at least nominally Protestant. But they were unable to agree about religion. So much so that many came to view religious establishments, even those aligned with their own beliefs, as incompatible with an individual's religious duty and freedom.[162] Indeed, many considered any establishment a threat to social harmony.[163]

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156. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2171 (2003) (providing that "most schools were taught or directed by the local minister").

157. *Id.* at 2173.

158. A Bill Establishing a Provision for Teachers of the Christian Religion, H.D. 1784 Leg. (Va. 1784).

159. *See Reasons for Their Separation* (1746), *in* FREDERIC DENISON, NOTES OF THE BAPTISTS AND THEIR PRINCIPLES IN NORWICH, CONN., FROM SETTLEMENT OF THE TOWN TO 1850 24, 24–27 (1857) (reciting the reasons given by individuals, including women, for separating from the established church in Norwich under the ministry of the Rev. Benjamin Lord).

160. *See generally* MCLOUGHLIN, *supra* note 150.

161. *Id.*

162. *Id.*

163. Philip Hamburger, *Equality and Diversity: The Eighteenth-Century Debate about Equal Protection and Equal Civil Rights*, 1992 SUP. CT. REV. 295, 356–57 (1992).

2. A Second Disestablishment.—Although the contemporary educational establishment declares itself to be secular, the disestablishment analogy remains applicable.

Like the old establishment, the new one is in the teaching business. Whereas the old teaching was religious and somewhat theologically orthodox, the new teaching is more theologically liberal and even secular.[164] But both have been involved in the business of conveying truths, whether confident or critical, to a populace that was, and is, divided on such questions.

No less than the old establishment, the new one indulges in hortatory teaching. Not content merely to inquire and teach others to inquire, both old and new have sought to instill values and ideals.

As in the past, government support creates pressures to attend the established institutions. And now, as then, this grates against the feelings of a diverse populace.

The old and new establishments and the movements against them thus have at least some structural similarities. The threat, as in the past, comes from a privileged state monopoly. Now, as then, the establishment rests on economic pressures for conformity. Once again, it enables some to shape the children of others. Unsurprisingly, therefore, dissenters from diverse backgrounds are uniting to secure their freedom. Their claims against state schools have a familiar feel. It is a movement for a second disestablishment.

One might object that the current revulsion against public schools is contingent on relatively recent events, that it is narrowly political, and that for either reason it cannot be associated with the eighteenth-century movement for disestablishment. But such a critique fails to recognize that the current discontents are merely the latest iteration in a long history of bearing down on nonconforming families. The state school system has always pressured parents to submit their children to state education. And this has always created an opportunity for some, in the name of the state, to impose their views on others.

Generation after generation of parents learned this the hard way, whether their dissent was religious, political, or cultural. One does not have to be Catholic or Jewish, Black or White, Native American or Eastern European, socialist or capitalist, to understand this heritage of grinding down different viewpoints at the cost of parents' freedom of speech.

The point, as throughout this Article, is not merely historical or religious but structural. State schools are governmental and thus, at best, majoritarian institutions. They inevitably are somewhat in tension with minority or

164. The current establishment is not as distant from religion as is often supposed. HAMBURGER, SEPARATION, *supra* note 27, at 481, 484 (regarding the development of separationism as an expression of theologically liberal prejudice); HAMBURGER, LIBERAL SUPPRESSION, *supra* note 26, at 84, 119 (regarding the theological animosities of liberal educators).

individualistic opinion. And as society becomes more diverse, their threat to parents' freedom of speech only increases. Even when school boards are relatively responsive to parents, parents find themselves pressured to substitute the government's educational speech for their own. No wonder parents increasingly resent the state-school establishment. It is incompatible with their diversity and their freedom to choose their own educational speech.

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Although the educational establishment is now more secular than religious, it is a government establishment—so it increasingly invites a second disestablishment. This challenge to its power is nearly unavoidable amid our diversity. And nothing gives clearer legal expression to this demand for disestablishment than the freedom of educational speech.

E. Brown*'s Unfulfilled Promise of Equality*

For most of the history of state schools, they have been segregated. Not until *Brown v. Board of Education*, in 1954, did such schools begin to undo their inequality.[165] But *Brown*'s promise of equality has not been fulfilled.

Notwithstanding the ideals of *Brown*, the scandalous reality of American education is that states pressure parents, especially poor and middle-class parents, into government education. This means that many racial and other minorities are herded into the government version of education while wealthier, and often whiter, Americans escape it.

Of course, public schools can be admirable. But all too many fail their pupils, thus perpetuating racial and class inequalities. Put another way, the public schools that once elevated the poor now tend to keep them down.

The reasons are complex and vary from school to school. Still, the failings of public schools are not altogether surprising from institutions that are accountable to elected boards, that depend on government pressure to secure students, that enjoy a sort of monopoly, that are highly bureaucratized, that cannot discipline students without political consequences, and that often have the sensitivity of the Post Office or the Internal Revenue Service.

Judges in the past half-century have paid much attention to the inequalities among school districts.[166] But there is a more basic inequality between the children who are pressured into government schools and those whose parents can afford to opt out of government education. The government pressure on parents to adopt government schooling falls on the relatively impecunious, including a disproportionate number of minorities, not least descendants of slaves. Again, this economic and racial inequality of

165. Brown v. Board of Educ., 347 U.S. 483, 487–88, 495 (1954).

166. *See* Jeffrey S. Sutton, San Antonio Independent School District v. Rodriguez *and Its Aftermath*, 94 VA. L. REV. 1963, 1973–76 (2008) (detailing the court decisions regarding educational inequity after *Rodriguez*).

a system that purports to secure equality is not an accident. It is exactly what one would expect of a governmental, coercive, monopolistic, bureaucratized, and insensitive establishment.

Justice Thurgood Marshall, who argued in *Brown*, regretted that the courts had not lived up to the promise of that case. In *San Antonio Independent School District v. Rodriguez*,[167] the Supreme Court held that unequal funding across school districts did not violate the U.S. Constitution and left the resolution of such inequalities to a political solution.[168] Marshall dissented: "I, for one, am unsatisfied with the hope of an ultimate 'political' solution sometime in the indefinite future while, in the meantime, countless children unjustifiably receive inferior educations that 'may affect their hearts and minds in a way unlikely ever to be undone.'"[169]

Judge Jeffrey Sutton later wrote that "Justice Marshall surely appreciated . . . the possibility that the promises of *Brown* would never be fulfilled unless the courts not only eliminated de jure segregation by race but also curbed the effects of de facto segregation by wealth."[170] Indeed, during the half-century since *Rodriguez*, state courts have gone far in equalizing funding across school districts on state constitutional grounds.[171] But such decisions have not addressed the underlying concern that the poor and minorities suffer disproportionately in public schools.

What has yet to be considered is that segregation by wealth and other inequalities are inherent in a system that financially pressures parents into sending their children to government schools.[172] Once the system does that, it is inescapable that the poor and minorities will be disproportionately stuck in government schools—often, the worst of government schools.

These layers of inequality—between private, public, and lesser quality public schools—would not be so unequal or harmful if parents were not pressured to accept government educational speech, but were left free to choose their own, whether at home or in private schools.

It may be feared that a freedom from pressures to stay in government schools would leave the poor and minorities in second-rate private schools. This is a serious concern. But there is no reason to assume that private schools won't compete for students, especially if they come with the funding that

167. 411 U.S. 1 (1973).

168. *Id.* at 55, 59.

169. *Id.* at 71–72 (citing *Brown*, 347 U.S. at 494).

170. Sutton, *supra* note 166, at 1970.

171. Sutton, *supra* note 166, at 1971–76.

172. For segregation by wealth, see generally GROVER J. WHITEHURST, RICHARD V. REEVES, & EDWARD RODRIGUE, SEGREGATION, RACE, AND CHARTER SCHOOLS: WHAT DO WE KNOW? (2016), https://www.brookings.edu/wp-content/uploads/2016/10/ccf_20161021segregation_version-10_211.pdf [https://perma.cc/HBE9-YCMX] ("School segregation by family income, as distinct from race, is at high levels and has increased since 1990, both within and between school districts.").

otherwise would go to a government school. In light of what is known about existing state schools, there is every reason to expect that private schools on the whole would be an improvement.

Another worry will be that if parents are not pushed into integrated state schools, they will seek out segregated private schools. De facto segregation, however, is not just a risk of private education. There are widespread complaints about the public school system's "highly segregated status quo."[173] Because of the concentration of minorities in inner cities, de facto segregation seems almost intractable in many urban public schools.[174] In contrast, in suburban and exurban areas, where middle-class parents can choose where to live, public schools tend to be racially integrated. This is partly a matter of law. But that's not all. The demands for segregation that prevailed in the 1950s have partly, even if not entirely, given way to preferences for integration. So many parents themselves expect integrated schools, and further pressure for integration comes from college admissions offices. None of this is very predictive of what will happen when the pressure to attend state schools comes to an end. But it cannot be simply taken for granted that a flight from public schools will be a flight to de facto segregation.

What can be expected is that education will be better tailored to the individual needs of each student. Although this point will be elaborated in the next subpart, it already can be put in terms of equality. When not pressed into accepting state schools, parents of all backgrounds will have a more equal role in actively choosing and overseeing their children's education. And all children will have the opportunity for a sort of education that is chosen for them as individuals, on the basis of their individual characteristics.

The current regime already is profoundly unequal. Its inequalities are government induced and are inherent in the very structure of the existing establishment. So one cannot shy away from the need to break up these inequalities. As *Brown* makes clear, a state's offer of education cannot come with an unconstitutional condition.[175] So when parents are pressured into

173. Will McGrew, *U.S. School Segregation in the 21st Century: Causes, Consequences, and Solutions*, WASH. CTR. FOR EQUITABLE GROWTH (Oct. 15, 2019), https://equitablegrowth.org/research-paper/u-s-school-segregation-in-the-21st-century/?longform=true#trends_in_school_segregation_since_brown_v._board_of_education [https://perma.cc/UST5-Y8YR].

174. *See* WHITEHURST ET AL., *supra* note 172, at 10 (noting that "[t]he population of students enrolled in many large urban public school districts is so overwhelmingly minority and poor that the opportunities for school integration by race and economics are limited if the policy option is intra-district transfers of students among schools," and providing the statistic that "91 percent of students attending the Chicago Public Schools are minority and 84 percent are poor").

175. *See supra* notes 44–47 and accompanying text.

adopting state educational speech in place of their own, they have a speech claim that can free them from the inequality of state schooling.[176]

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Brown v. Board of Education has never been more relevant. By asserting their educational speech rights, parents can help all children, not just their own, escape the inequalities inherent in the current system. It is time to move our reality closer to *Brown*'s aspirations for educational equality.

F. Best Interest of the Child

Last, but not least, one of the ideals vindicated by parents' freedom of speech is the best interest of the child.[177] This is not the best interest of children—a generalized view often allegedly pursued by government. Rather it is the best interest of each child, considered as an individual.

The best interest of the child is best secured when its parents can choose the education that they deem best for it and they can seek education that is sufficiently individualized to meet their child's needs.

Parents tend to be in a better position than any school to know their children—to understand their strengths and weaknesses, to appreciate their needs and wants. They therefore typically have a better understanding of what is best for their children. So if only for the sake of each child, it is crucial that government be stopped from pushing parents into sending their children into government institutions.

When parents go with their children to the Department of Motor Vehicles, they may regret the loss of time, but on the whole they and their children will leave intact. In contrast, when government pressures them to place their children in government schools, there is a substantial chance that many of the children will suffer long-term consequences. Education matters for the future, not just the experience at the time. And it can affect the full range of an individual's life, including wealth, social mobility, respect, cultural understanding, identity, and personal happiness. So there is good reason to worry that children will have diminished opportunities after spending a dozen years in what often is the intellectual, moral, and emotional equivalent of the Department of Motor Vehicles.[178]

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176. Of course, the inequalities of the state school system could be analyzed in terms of equal protection. U.S. CONST., amend. XIV, § 1. That approach would be interesting, but there is no need to pursue it, given that the speech analysis is more clearly applicable.

177. *See* Gilles, *Parentalist Manifesto*, *supra* note 1, at 951–72 (arguing that parentally chosen education is most likely to further the best interest of the child).

178. *Cf.* Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005, 1017 (Colo. 1982) (stating education "can be a major factor in an individual's chances for economic and social success as well as a unique influence on a child's development as a good citizen and on his future participation in political and community life"); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 113 (1973) (Marshall, J.,

In an increasingly individuated society, children are especially in need of individualized teaching, chosen by those who know them best. Yet this is difficult when children are pressed into common schools serving common ends. The system is designed for uniformity, conformity, and even homogenization. So the chances of meeting the particularized needs of particular children are inevitably much diminished while children are stuck in the system.

The point is not that private schools are necessarily better than public schools. But when parents are pressured by government to send their children to government schools and cannot choose the individualized schooling they think best, a child is less likely to get the education that is best for them.

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Parents have a constitutional right not to be pressured by government into substituting government educational speech for their own. This speech right is important not only for its own sake but also to vindicate essential ideals. It preserves parental authority, it limits government-imposed conformity, it contributes to a second disestablishment, it moves toward fulfilling *Brown*'s promise of equality, and it secures the best interest of the child.

Conclusion

The current educational regime abridges the freedom of speech of parents in educating their minor children. It deprives them of their educational speech and compels them to substitute government educational speech.

At one level, the problem involves the direct force of law. The combination of mandatory education and subsidized state education forces parents to pay if they are to escape state educational speech; such payments therefore cannot be considered voluntary. And for parents who do not pay, the combination of mandatory education and subsidized state education forces them to submit their children to government educational speech. To be sure, there is no formal requirement that parents must subject their children to government educational speech. But because education is mandatory, there is direct constraint. Parents must pay to opt out of government educational speech or they must accept such speech.

A second layer of the difficulty involves an unconstitutional condition. Regardless of state-mandated education, state support for state educational speech is an offer of a benefit on the condition that parents adopt the state's educational speech in place of their own. The speech condition both restricts

dissenting) ("[I]n the final analysis, the pivotal position of education to success in American society and its essential role in opening up to the individual the central experiences of our culture lend it an importance that is undeniable.") (internal quotation marks omitted)).

private speech and compels state speech. This unconstitutional condition argument rests squarely on Supreme Court precedent and doctrine. Of particular importance, it follows naturally from the principle underlying *Brown*, that state schooling is a state-provided opportunity that cannot be subject to an unconstitutional condition.

Both arguments can be understood in terms of *Pierce*. That case forbids compulsory state education. Here it has been added that states cannot evade that decision by using other means to impose state education.

Whether viewed as a matter of direct force or an unconstitutional condition, the free speech claim goes far in protecting other ideals. At stake is parental authority, the risk of government-imposed conformity, religious liberty, the need for a second disestablishment, *Brown*'s unfulfilled promise of equality, and the best interest of the child. As parents, children, and citizens, we all can benefit.

There will be much reluctance to depart from the status quo—a deep hesitation to question current institutional arrangements and interests. But even when the current state system is justified in egalitarian terms, the existing reality is grim. The state system remains ineluctably unequal among districts, and the inequality is even greater when one compares the state system to what is available outside it. So, rather than struggle to make the best of an arrangement that is both unconstitutional and dismally unequal and dysfunctional, Americans should welcome shifting to a system that would be constitutional, much more equal, and otherwise advantageous.

The basic insight, that education is (almost entirely) speech, obviously has broader implications than those pursued here.[179] For now, however, the point is simply about parents. They have a freedom of speech under the federal and state constitutions against being pressured, directly or by condition, to submit their minor children to government educational speech in place of their own educational speech, whether at home or in private school. This application of the freedom of speech is doctrinally strong, unburdened by contrary precedent, and profoundly valuable.

179. Some state regulations of private curricula (such as "substantial equivalence" and English language requirements) surely violate the First Amendment and state speech guarantees. Also in conflict with the freedom of speech is much regulation of private teachers. Consider, for instance, the certification and other licensing that some states impose on private teachers. This is difficult to distinguish from prior licensing of educational speakers.