McELROY LECTURES

RELIGIOUS FREEDOM AS IF FAMILY MATTERS

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The subject of my lecture is parents, religion, and the schools. I will seek to sketch, and partly defend, a controversial proposition about the relationship among the three. My goal is less to persuade than to provoke. I want us all to think about the relationship in ways a little bit different from the mainstream.

Let me begin by telling you a story involving my own family.

My wife and I have two wonderful children. After my book, *The Culture of Disbelief*, was published in 1993, the publisher sent me on a book tour. One morning, I found myself in the studio of a radio station in New York City, as the guest on a talk show. The host and I were having a wonderful time batting around various ideas about the separation of church and state, the role of religion in politics, and other things, when, all at once, I was brought up short by a caller who said something like this: "Excuse me Professor Carter, did I hear you say that you and your wife send your children to a religious school?" I said, "Yes." (I thought of answering no, we send them to an Episcopal school, but, as a good Episcopalian, I could hardly say that.) Upon hearing my answer, the caller asked: "Does that mean that you and your wife are trying to raise your children in your religion?" "Yes," I said, "we are."[1] She said, "I don't really think you should do that."

Now, as a lawyer and, still worse, a law professor, I'm very rarely at a loss for words, but I was not quite sure what to say. The good thing about being on a radio call-in show, however, is that the host is there to say things like, "Why do you say that caller?" The host did his

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1. At the time of the lecture, both our children attended a religious elementary school. They no longer do, although the opinions I express in the lecture have not changed.

job. The caller answered, "I think it's wrong to indoctrinate little children that way."

As I continued to flounder, the host asked, "What do you think Professor Carter and his wife should do instead?" The caller offered a practical solution: "I think there should be no discussion of religion in the home until the children reach a mature age." She suggested age 18 – perhaps because that is the age at which they can watch pornographic movies. She added a last comment along the following lines: "The responsibility of a parent is to tell the children about all of the world's great religions and encourage the child to pick one."

Now, I do not want to suggest that I can tell you in a clever anecdote that I have identified a national trend. But I do think it is useful to note the caller's premise—that you pick and choose your religion the way that you might change your tie or your dress. This premise suggests that religion is a relatively unimportant part of human personality, something easily (and, of course, unimportantly) modified into something else. In that premise, we can find the seeds of many of the conflicts that sometimes arise between well-intentioned and deeply religious parents, on one hand, and well-intentioned teachers and school boards, on the other. We have seen, in recent years, titanic battles over such matters as school curriculum, classroom prayer, the teaching of creationism, and a variety of other issues. The law in this area has been, in my judgment, established almost entirely from the point of view of the needs of the state, which is to say that virtually all of the decided cases in this area (and certainly the most important Supreme Court precedents) begin with the state and go on to try to find an appropriate place for the family, the children, and the family's religion within that entity.

I want to offer an inversion of our common way of thinking about these problems. I want to begin, not with the state, but with the family, because I view the family as logically prior to the state. What this means, as a matter of philosophy, is simply that you give the family, rather than the state, priority in weighing interests.[2] What it means as a matter of constitutional law is more complicated, and we are about to see why.

When you look at the public schools today, there are a lot of data that people use to prove a lot of different things. I want to focus on two data points. First, a very significant minority of public school parents say they would send their children to private schools, if they could afford to do so. Second, of parents in America who choose to

2. I recognize that beginning with the family rather than with the state is at least controversial and perhaps quite objectionable for many contemporary philosophers. I do not offer a justification here, because the lecture is more in the nature of a thought experiment than a settled proposition. I am asking, that is, "What would be different if we were to begin with the family rather than the state?"

send their children to private schools, roughly 88 percent choose religious schools. Another way of looking at this data, I would suggest, is that perhaps one of three public school parents would send their children to religious schools, if they could afford to do so.

Now, I do not mention these data to open a discussion about vouchers and charter schools, although I will have something to say about the subject of vouchers at the end of my remarks. My interest in this lecture, however, is not in what happens when parents decide to act on their desire to move their kids out of public schools. I am interested in accommodating the religious concerns of the parents while their children are still in the public schools. And I am interested in how one does this when beginning, remember, with the proposition that the family's needs have priority over the needs of the state.

A little over seventy years ago, the Supreme Court decided a very important case that for some reason tends to be omitted in the modern constitutional law courses: *Pierce v. Society of Sisters.*[3] *Pierce v. Society of Sisters* involved an Oregon ballot initiative that prohibited parents from sending their children to private schools without the permission of the state. It was, in effect, an effort to shut down all the private schools in Oregon. It was a closely watched ballot initiative and a closely watched case across the country because a number of other states were considering similar initiatives at the time. The case made it to the Supreme Court in 1925 in a lawsuit, interestingly enough, brought by two schools, one Roman Catholic school and one private military academy, claiming, in the terms so familiar in the days of so-called substantive due process, that the initiative interfered with their liberty of contract. The Supreme Court agreed with that argument and, in the course of a very brief opinion, (those were the good old days when the courts wrote brief opinions even for perhaps especially important cases) the Court referred to the fundamental liberty of parents to direct the upbringing and education of children subject to their control. Now, I want to place that case in a particular historical perspective.

One has to understand where the Oregon law came from. If you go back to the middle of the nineteenth century, you have in American history the genesis of that magnificent and democratic American invention: the common school. The idea of the common school was that what would make America special would be the creation of a place where children from all walks of life would come and study together, that everyone would have the chance to learn. As so beautifully articulated by Horace Mann, a founding father of the common school movement: "It may be an easy thing to make a

3. 268 U.S. 510 (1925).

republic, but it is a very laborious thing to make republicans."[4] What Mann meant was that a republic rests fundamentally upon a set of shared understandings—shared values, if you will, a common outlook on the world. He believed, fervently, that the American ideal would survive only if there was a place where all of the nation's children would come together, study, and learn what we might call the American ideal.

The notion is a lovely one. The only problem is, from the beginning, it did not work. It did not work because the states, from the beginning, declined to establish common schools. I emphasize the point because nowadays, when you read histories of the school, they often jump from Horace Mann to the establishment of public schools and compulsory education laws in the late nineteenth century. They leave out a big chunk of history in between the two.

The rise of the public schools in the United States resulted from the interplay of a number of complex factors, among them the needs of the industrial economy for an educated work force, the change in the demographics of American society from agrarian to urban, and the ideology of progressivism, which included the professionalization of school teachers. But another factor also entered in, playing both a positive role and a negative one. I refer to the wave of immigrants from Europe during the nineteenth century.

The positive role of immigration in the development of public schools is straightforward: the young nation, remarkably hospitable to strangers, absorbed the newcomers and took upon itself the responsibility of educating their children. The negative role, less talked about in the history, had consequences sufficiently profound that they last until this day. For the immigrants also aroused a nativist sentiment that, in an unhappy way, also led to a fervor for compulsory schooling.

The European immigrants who arrived on America's shores in the nineteenth century were seen by many Americans as bringing what were routinely referred to as foreign religions, a term that included, basically, Roman Catholicism and Judaism. Faced with what was widely perceived as a threat, one state after another began to enact compulsory schooling laws. Although the schools seemed to follow the wisdom of Horace Mann, they were defended, in one state after another, as simply involving the Americanization of the children of the immigrants. It did not take the Catholic and Jewish parents very long to realize that what was really going on was the Protestanization of the children of the immigrants. Many states

4. HORACE MANN, THE IMPORTANCE OF UNIVERSAL, FREE, PUBLIC EDUCATION (quoted in THE REPUBLIC AND THE SCHOOL: HORACE MANN ON THE EDUCATION OF FREE MEN 91-92 (Lawrence A. Cremin ed., Columbia University Teachers College 1957)).

established their schools with the clear and often openly stated intention of wiping out the "foreign religions."[5]

Indeed, it is no accident that the state of Massachusetts adopted the first compulsory education law in the 1840s, at a time when the rising political power in the state was the Know-Nothing Party, an outgrowth of the Know-Nothing Order, a nativist anti-Catholic organization of the era. By the mid-1850s, both houses of the state legislature, as well as the governorship, were controlled by the Know-Nothings. The Know-Nothing Order required its members to swear never to vote for or support a political candidate "unless he be an American-born citizen, in favor of Americans ruling America, nor if he be a Roman Catholic."[6]

By the middle of the century, it was plain that the nation's compulsory schooling laws had a decidedly anti-Catholic and anti-Semitic bias. Roman Catholic and Jewish parents responded to this realization in different ways. Two movements ran on parallel tracks. One was a movement to try to secularize public education. In the late nineteenth and early twentieth centuries, the so-called public schools routinely included Bible instruction (but only, of course, study of the Protestant Bible) as well as spoken prayer, not just to open the school day, but usually at various other times during the day as well. Many of the immigrant parents therefore chose to battle to remove the more explicit symbols of Protestant faith from the schools.

The parallel movement was the explosion of parochial schools – in particular, the Roman Catholic parochial schools. This movement was an understandable response to what the public schools were doing. The immigrant parents wanted to raise their children in their own faith instead of having their nation, with state money, wean them away. This movement to establish parochial schools provoked two remarkable and unprecedented developments. The first of those, as we have seen, was compulsory education laws. Ever since Horace Mann, advocates of common schools had argued that compulsory education was important, but no state paid serious attention to it, with the sole exception of Massachusetts, until the great wave of immigrants was upon them.

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5. For discussions of some of this history, *see, e.g.*, JAY P. DOLAN, THE AMERICAN CATHOLIC EXPERIENCE: A HISTORY FROM COLONIAL TIMES TO THE PRESENT (Doubleday 1985); CHARLES LESLIE GLENN JR., THE MYTH OF THE COMMON SCHOOL (University of Massachusetts Press 1988); and WARREN A. NORD, RELIGION AND AMERICAN EDUCATION: RETHINKING A NATIONAL DILEMMA (University of North Carolina Press 1995). The discussion in the lecture is drawn generally from these sources.

6. The oath is quoted in HUMPHREY J. DESMOND, THE KNOW-NOTHING PARTY 12 (New Century Press 1905). I discuss the party in more detail, along with other anti-Catholic movements of the day in STEPHEN L. CARTER, THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY 38-49 (Harvard University Press 1998).

The second development was a new principle of constitutional law. For the first time in American history, legislators explained that it was unconstitutional to give public money to religious education. Throughout the eighteenth and most of the nineteenth centuries, public money had flowed freely to support religious education, to support churches directly, to all kinds of things, but only when Roman Catholic schools were established did one state government after another suddenly announce that the aid was unconstitutional. Keeping tax dollars away from Catholic schools was certainly the true motive of the Blaine Amendment, proposed in the Congress in 1875, which covered in the innocuous language of disestablishment an effort to keep the schools Protestant.[7] Although the federal Blaine Amendment was rejected, several states adopted versions of it, many of which remain in their constitutions to this day. But, to the dismay of America's nativists, the withholding of funds made no difference. Catholic schools flourished anyway. It was that flourishing that led to the Oregon ballot proposition.

The ballot proposition was adopted in Oregon with a clear intention of making it impossible for the Catholic schools to exist, and, indeed, it was often defended by its supporters as simply clarifying the compulsory education laws, making plain that the need for every child to attend school was a need for every child to attend a public school. When the case reached the Supreme Court, Oregon defended the law explicitly on the ground that it was necessary to Americanize the immigrant children, which could not be done if they were sent to schools not under the control of the state.[8]

I mention so much history in order to strip away the presuppositions we tend to make about what has been, over the years, the balance of power among public schools, religious schools, and religious parents. It is not my intention to launch an attack on the public schools, an American institution in which I deeply believe. I only wish to point out that it is possible, if we look at the history, for parents to quite reasonably and rationally fear that what is going on in the schools represents, at least in part, an effort to wean their children away from the religion and values the parents are trying to teach. Like other institutions of government, the schools must be viewed with a healthy skepticism. The classroom has been, often in

7. *See, e.g.*, Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Non-Establishment Principle*, 27 ARIZ. ST. L.J. 1085, 1145-1150 (1995); and Joseph P. Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657 (1998) (providing background on the Blaine Amendment).

8. I review the history of the *Pierce* litigation in the Supreme Court in Stephen L. Carter, *Parents, Religion, and Schools: Reflection on Pierce, 70 Years Later*, 27 SETON HALL L. REV. 1194 (1997).

the past, a tool for making it harder for particular religions to survive. Parents who make that argument today, whether or not they are correct, certainly are not being irrational or "ahistorical."

Let us grant, then, that many parents have religious reservations about the public schools, believing, fairly or unfairly, that the curriculum or atmosphere might make it harder for them to raise their children to follow their faith. What are we to do about that?

One obvious solution is to consider a form of what used to be called vouchers and what are, more and more, known as school choice programs. No longer is school choice merely the favorite of scholars and activists on the right.[9] Although the tendency in our political debates is to argue over school choice as though the only important question is whether children whose parents take advantage of the programs improve their test scores once they have moved from public to private schools, the most interesting argument in favor of the programs is that they can help equalize the power disparity between rich and poor to make effective *moral* choices for their children. Right now, well-to-do parents can purchase for their children private educations they believe to be *morally* superior to public school educations. A program of educational assistance to impoverished and working-class parents might help them to afford similar choices. Most of the world's industrialized nations have chosen to set up programs of this sort, but America, for better or worse, has made a different choice.

Our different choice, I would suggest, carries with it a certain responsibility to the parents to whom we refuse to give educational assistance. The task, therefore, is to try to understand exactly what, within the confines of the Constitution, we can do to accommodate parental concerns – particularly moral concerns – within the public schools. If we decide we would rather not accommodate the parents' moral concerns, we are, I would suggest, well on the way to destroying public education in America. In the end, when you coerce people to patronize an institution that they do not like, you are going to lose both the people and the institution. In short, it is precisely those who most strongly oppose vouchers who should be most interested in finding ways to accommodate the moral concerns of parents within the public schools.

Let us now consider, briefly, two particular areas in which we see these battles fought today. One of these areas is school curriculum. The other classroom prayer and other religious observances.

Let us think, first, about curriculum.

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9. *See, e.g.*, the discussion in James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 310-15 (1999).

The paradigmatic case is as follows: A parent whose child is enrolled in a public school discovers that the child is learning in, say, a biology class or a history class something that the parent thinks will make it more difficult to raise that child in a particular religion. What is the correct response for the school when the parent says, "I don't want my child studying this stuff. I don't care what other children study, but this is not for my child?"

Many public schools around the country try very hard to accommodate those parental requests, and they are wise to do so. By honoring parental requests to excuse children from morally objectionable curricular matter, the school authorities show great respect for the parental decisions that might otherwise be expressed through leaving the schools. Unfortunately, some public schools act less wisely and, for reasons that I will admit I find obscure, when schools refuse to accommodate the parents, the courts often side with the schools.

Let me give you a couple of examples.

About a decade ago, some Christian parents in New York objected to particular aspects of the sex education curriculum in the high school. The parents did not ask to have the objectionable curriculum removed from the school. They asked only to have their own children excused from particular days of instruction. (On those days, the class would be discussing, among other subjects, so-called "safe sex.") The school refused the parental request. The parents sued, claiming that this interfered, not only with the directive of *Pierce*, but also with their more general First Amendment right of religious freedom, which they argued includes the right to raise their children in their religion. The case was decided in a New York state court, which seemed to want to have it both ways. The court honored the parental request by excusing the students, but on the condition that the parents agree to make sure the children received the objectionable instruction through some other means![10]

The problem with this decision, in the terms in which we have been speaking, is that it does not place the family prior to the state. Moreover, it suggests a peculiar vision of the family, in which parents are, in effect, conscripted by the state into raising the type of children the state prefers to have, whatever that type may be. The great Lutheran theologian, Dietrich Bonhoeffer, in his posthumously published *Ethics*, warned against ever allowing the states to try to standardize its citizens. The state, Bonhoeffer warned, must not be permitted "to direct and shape the coming generation." To do so, he argued, "constitutes a disastrous interference in the natural order of the world." Those who try to do it "deliberately deprive themselves of

10. Ware v. Valley Stream High Sch., 550 N.E.2d 420 (N.Y. 1989).

unsuspected human forces."[11] When parents are conscripted by the state to raise their children according to the state's moral preferences, the family is being coerced in a way that limits human possibility.

So Bonhoeffer was right. But there is also a deeper problem. Consider, as in the case just mentioned, a public school curriculum that includes instruction in what has come to be called "safe sex." What is the underlying message of safe-sex teaching? The message, I think, goes something like this: "Look, it's a risky world out there, it's a difficult and dangerous world, and some of the risks are sexual. You young people are growing into that world, and it is vitally important that you learn how to minimize those risks. The information we are going to give you could, quite literally, save your life."

That is not a bad message, but a nation that truly values diversity (as ours now and then claims to do) has to allow space for religious parents who want to offer a different message, one that runs something like this: "It is, indeed, a risky world out there, but we are building, for our children, a morally coherent story that has different answers to the same questions of risk, a story in which we believe they will be able to avoid these risks, or a story in which we will offer them different tools with which to handle these risks when they arise. But your tools are inconsistent with ours, and make our story harder to tell."

A claim of this kind strikes me as perfectly reasonable, not at all oppressive, entirely rational, and quite straightforward and clear. The parent who offers it sees the world somewhat differently than the school that proposes the safe-sex curriculum. Yet it is difficult to find a basis (other than hegemony, of course) for preferring one to the other. A nation that believes in the family, diversity, and religious freedom ought to find it acceptable, not because the parents are necessarily right, but because, on such fundamental religious and moral issues, the parents have the right to be wrong.

All through history, an important component of religion has been the preservation and transmission of moral understanding from one generation to the next. When parents seek the freedom, without the interference of the state, to raise their children in their religion, they are seeking no more than the freedom to continue to do what religious people have always done: to take responsibility for moral instruction. For the state to interfere in a significant way with this parental effort strikes me as a plain violation of the separation of church and state – a separation, if we go back to its seventeenth

11. DIETRICH BONHOEFFER, ETHICS 172-73 (Neville Horton Smith trans., Touchstone 1995).

century American roots, that was plainly intended to preserve the space for religious practice from state intrusion, not to protect the state or the larger culture from religion.[12]

Now let us consider a second case.

I have in mind the case of *Mozert v. Hawkins County Public Schools*,[13] decided in 1987 by the United States Court of Appeals for the Sixth Circuit. To oversimplify the case a little bit, *Mozert* involved a parental objection to a public school curriculum described as, among other things, teaching tolerance. The parents believed, rightly or wrongly, that the curriculum involved equipping the children with tools that would make more difficult the parental task of moral and religious teaching. The problem is difficult and sensitive. On the one hand, there is an obvious societal interest in the raising of children who are intellectually curious.[14] On the other, if we begin, as I suggested at the outset we try to, with the family, then there is an interest of at least equal strength in giving families the space they need to raise children according to their particular religious ethic. If the family is prior to the state, then the state's interest in creating these particular critical tools, I believe, has to yield to the parental interest.[15]

But might the case be different if the curriculum in question involves not teaching tolerance or the technology of relatively safe sex but, say, mathematics or science? Suppose, in other words, that we present the dissenting religious parent not with a moral question, but with a scientific one.

I find the case harder, but I still tend to side, in a limited way, with the parents. Absent some core curriculum that we might decide in a democratic fashion,[16] I think that parents, as part of the exercise of their religious liberty, should have a broad freedom to exclude

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12. *See, e.g.*, the discussion in TIMOTHY L. HALL, SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY (University of Illinois Press 1998).

13. 827 F.2d 1058 (6th Cir. 1987).

14. I reject the notion that there is a strong societal interest in raising children who are "tolerant" in the abstract, because I consider the category of "tolerance" a morally empty one. That does not mean I support what has come to be called "intolerance." It is simply that abstract tolerance, in the absence of a theory of what precisely should be tolerated and why, is incoherent. I discuss this problem in STEPHEN L. CARTER, CIVILITY: MANNERS, MORALS, AND THE ETIQUETTE OF DEMOCRACY 207-25 (Basic Books 1998).

15. An interesting analysis of these problems is in Stephen Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937 (1996). For a thoughtful argument to the contrary, *see* AMY GUTMANN, DEMOCRATIC EDUCATION (Princeton University Press 1987). I should specify that Professor Gutmann's view is far closer to the mainstream of academic thought on this problem than my own.

16. If the core curriculum is not decided democratically, I am uneasy with enforcing it against dissenting religious parents.

their children from objectionable programs and teaching in the schools. This would not include the freedom to prevent others from learning the material. I do not suggest that parents who believe evolution to be false should necessarily be able to keep it out of the classroom. I only suggest that they should be able to keep their own children out of the classroom while the objectionable material is being taught.

One might of course object to this proposal on the ground that a general parental freedom to remove children from objectionable instruction, even in science and mathematics, might mean we wind up with a nation of dunces. I do not find this claim persuasive. Even assuming what is by no means obvious – that the mass of material included in standard secondary school science and mathematics courses is necessary for appropriate exercise of the functions of democratic citizenship – we have no way to predict whether large numbers of parents would, in fact, insist on keeping their children out of large numbers of courses. In a nation as materially competitive as ours, this seems a dubious assumption: most parents will be too busy worrying about grades and test scores. If, on the other hand, it should turn out to be true that large numbers of parents would choose to reject large parts of the public school curriculum, I would suggest that we would learn from those decisions not that something was wrong with the parents, but that something was wrong with the curriculum.

Besides, we already allow parents of means to buy their children's way out of the public school curriculum. So, in effect, arguments over what "must" be taught are really arguments over what "must" be taught to those children whose parents send them to public schools. The notion that children should be forced to study subjects of which their parents disapprove, even when the great majority of parents in the same area also disapprove, strikes me as dangerous, even if we happen to think the parents are wrong. The notion is dangerous because, in coercing parents to expose their children to what their religion teaches is wrong, it runs against the grain of a serious respect for religious liberty. Perhaps my fellow citizens should have the authority to coerce me to send my children to study the aforementioned core, something decided by some consensus mechanism. But, even there, we have risk. For much of the nineteenth century and the first years of the twentieth, public education possessed a core that had, among its functions, the Americanizing (that is, as we have seen, the Protestantizing) of immigrant children.

The alternative is to deny to religious parents their ability to be religious *parents* – to, in effect, separate their religiousness from their parental role. Although contemporary liberalism teaches that the

dominant motif of religion (as of other aspects of life) is choice, a religion may teach otherwise, and many do. In orthodox Christian terms, for example, one cannot *decide* to be a Christian; one must be *called* to be a Christian. What might appear to the outsider as the free choice of an individual is actually an outward sign of the working of the Holy Spirit within that individual. For me as a Christian parent, moreover, this description is true. So, if the schools teach to the contrary that one actually interrogates and challenges the call, the schools are, in Christian terms, teaching something that is not only false, but dangerously false, because it sows confusion on a proposition that is, in the absence of any confusion, abundantly clear.

To recite in response the importance of the freedom of my children to choose whether or not to be Christian is simply for the state to take the position that my religious understanding is false. The state, in other words, takes sides against my religion and its teaching on the very nature of the religion itself – that is, the nature of Christianity. And it does so by intruding itself into the very heart of my family, the transmission of the faith from one generation to the next.

Most religions exist dynamically in time – partly in the past, partly in the present, partly in the future. A religion lives and grows by projecting itself over time, by working in the present to connect the future with the past. For most religions, an important tool of that projection is the family itself. If I am unable, as a parent, to protect my children from official interference in the process of that dynamic projection – the process of the formation of their faith – then the state is, in a real and frightening way, taking upon itself the authority to decide which religions should be allowed to survive and in what forms.

Enough on the curriculum. Let me talk briefly about prayer.

Let me first make my position clear. I count myself as an opponent of organized classroom prayer in public schools. I recognize that most Americans are in favor of it, and I do not consider the supporters of school prayer oppressive or tyrannical. I do not think they are dangerous fanatics or a lunatic fringe. I think they are, by and large, thoughtful people, deeply concerned about the nation's moral direction, trying to find ways to nudge the future in what they consider a better direction.

I share many of their concerns, but I disagree with their solution, precisely because I am beginning with the proposition that the family is prior to the state. Classroom prayer is simply another mechanism through which the state interferes with the ability of parents to raise children in their religion. Were my own children in public school, a classroom prayer would bother me, because the prayer in use would surely be a watered down, so-called non-sectarian prayer. As

Christian parents, my wife and I teach our children to pray in Jesus Christ's name. Prayer of other kinds may be interesting but it is not, in the orthodox sense, Christian. Consequently, were the school to teach my children that non-sectarian prayer was a proper way to pray, it would be interfering with our judgment as parents.

If, on the other hand, the school acceded to our view and decided to have the children recite a Christian prayer, it would equally violate the religious freedom of parents who pray in other traditions, of parents who do not pray, and of Christian parents who prefer prayers of other kinds. I see no way out of this paradox, other than to proclaim that there is one correct way for Americans and their children to be religious – precisely what the First Amendment forbids. So, by putting the family prior to the state, we readily wind up with a position against organized classroom prayer.[17]

We are left, then, to wonder whether there is a way to accommodate the desires of many, perhaps most parents (including the overwhelming majority of African American parents) for their children to pray in school in some organized fashion? Let me suggest two possible paths.

A few years ago, I was a member of a panel of scholars talking about religion in public life. Another member of the panel raised the question of whether public schools should have chapels. Now, I must say that I was immediately skeptical. But, as I have thought about it over the years, I wonder whether the idea is a good deal less ridiculous than it sounds. Airports have chapels, generally paid for by public money.[18] Nobody is forced to use an airport chapel, but it is there for anyone who wants to use it.

Now, what would it mean if a public school contained a chapel? It would mean that there was a place, a physical location, where children who wished to, could go for silent prayer or meditation. Students who preferred not to use it could ignore it entirely. One might reasonably object, however, that the very existence of a chapel might create pressure upon the children who did not want to pray, particularly if lots of their classmates were using it. I would quite agree that peer pressure of that kind is not a good thing in schools. I

17. Ironically, if we were to put the state prior to the family, we could easily justify classroom prayer, for the state could simply decide that praying in a particular way was best for all children. If the state's interests come first, it is difficult to see why this decision would be more objectionable than, say, a decision by the state to teach evolution and require all students to study it in the face of their parents' objection. (Do not rush to say that one is religious and the other is not, for the religious parent, as we have seen, might think otherwise).

18. I should add that chapels in public airports are hardly without controversy. *See, e.g., Hawley v. City of Cleveland*, 24 F.3d 814 (6th Cir. 1994), which upheld an airport chapel against an Establishment Clause challenge.

am not entirely certain, however, that the possibility of peer pressure alone should lead us to a judgment that a chapel would violate the Constitution.

Consider, after all, the other side of the problem. Suppose instead a school much like the schools we generally have today, a school where there is no safe haven for prayer, perhaps even a school in which praying is considered, by peers, to be "uncool." (Or "totally whack," as many teenagers today might say.) Now the school, by *not* providing a place of refuge, is fostering an atmosphere in which there is peer pressure not to pray. If we believe, as the courts keep telling us, that what the First Amendment commands of the government is neutrality toward religion, then it cannot be the case that it is worse for the school to foster an atmosphere in which there is pressure to pray than for the school to foster an atmosphere in which there is pressure not to. In constitutional terms, the two pressures should be seen as equally impermissible.[19]

A chapel might be one means for compromise. But there are others. For example, the children who want to pray together to open the school day might go collectively to some central location where they will pray, not under the leadership of a teacher, but under the leadership of each other. Plainly, a proposal of this kind possesses the same drawback: a collective departure of a large number of students might create pressure on those who would rather not pray. We might even conclude that this alternative is worse than a chapel because the collective departure could seem more ominous, or more desirable, to the dissenter than the use of a room somewhere in a less organized fashion.

One might answer all of this by insisting that no compromise is necessary because school children are always free to sit and pray silently if they like. But this answer should be troubling if we take religious liberty seriously. Insisting that the acceptable form of prayer in school is both silent and individual privileges one form of religious practice above others. Such a rule allows (no, requires) the state to say, in effect, that it will decide which forms of prayer may be practiced in school, and which may not. Although some judges and scholars occasionally write as though this is, indeed, what the Constitution commands, it is difficult to see why the schools should

19. One might object that the school is doing nothing in my second example, that the peer pressure results from the choices made by students. But we would not allow the school to escape its responsibility so easily if, say, some students were harassing others because of race or sexual orientation. If we treat religion seriously, we should take the view that the school certainly is responsible for creating an atmosphere in which either there is no serious peer pressure not to pray or there is a place of refuge in which to escape one's pressuring peers.

be so free to do battle with the family over what forms of prayer are appropriate.

I mentioned earlier that part of the task duty of raising children in a religion involves the creation of a morally coherent world for those children. Imagine, then, parents who have trained their children to such a world, raised them to pray several times a day, often in communion with others, when, suddenly, at age five or six, the children are thrust into a situation in which their religious practice is not merely discouraged but, possibly, forbidden. When I imagine such a scenario, I think about cultural shock. I also think about accommodation. But, mostly, I think about bilingual education.

I recognize that bilingual education is controversial. But one of the strongest arguments in its favor has always been that it might be, for a limited period of time, in the early years of public schooling, an important tool for acclimating children raised in households where the primary language is not English. My point here is not, however, to re-examine that old debate, but only to propose an analogy. For many children of religious parents, thrust suddenly into a school in which prayer is not spoken, could be very much like being thrust suddenly into a school in which the language of the home is not spoken. It is difficult to find any justice (in either case) in the view that we need do nothing to ease this transitional period to accommodate the religious needs of children who face this sudden cultural shock.

If we refuse to find ways to accommodate the desires of religious parents to raise their children without state interference, one of two things will happen. Either we will wipe out a lot of religions (which a simple respect for religious freedom would discourage) or we will drive an increasing number of families out of the public schools (which a belief in the importance of the common school would discourage). Moreover, if an increasing number of families leave the public schools, we will face growing pressure to spend tax dollars on private education, including religious education.

I am not an opponent of vouchers, even when they pay for religious education, and I do not believe that they are unconstitutional.[20] But I do think people who consider them a bad idea, or an unconstitutional one, should recognize how a too-vigorous, uncompromising secular ethos in the public schools can

20. I should inform the reader that I have deleted here a discussion of vouchers that was included in the original transcript, principally because it is dated. I discuss my views on vouchers in more detail in STEPHEN L. CARTER, GOD'S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS (Basic Books 2000), especially chapter 12, and STEPHEN L. CARTER, THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY (Harvard University Press 1998).

increase parental support for them. I suspect that much of the pressure could be decreased through a more thoughtful and sensitive effort to accommodate the religious needs of students in public schools, and to position the schools as allies rather than enemies of parents seeking to build moral cocoons around their children. To accomplish this, some compromises in the secular ethos of the public schools might be necessary. I have argued for ways in which we might be able to reach such compromises without treading on the rights of all the other families who might hold very different religious views.

All of this is necessary, of course, only if we begin with a view of the family that places it prior to the state, or, at minimum, reasonably high on the state's list of priorities. Perhaps it is too optimistic, or too naive, to imagine that we could ever agree on so radical a notion. But, if we do not, if we continue to insist that dissenting religious parents accommodate themselves to the schools, rather than the other way around, we will hardly be in a position to complain when those parents, alienated and angry, decide to fight back.