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From Diversity and Distrust

CHAPTER 6

Multiculturalism and the Religious Right

One of the great constitutional questions of our time is whether and when public officials should accommodate or exempt religious believers who argue that some general public rule or widely applicable policy imposes special burdens on them. The high water mark of judicial accommodationism was the famous Amish education case, *Wisconsin v. Yoder,* in which Amish families sought an exemption for their high-school-aged children from a Wisconsin law requiring school attendance for children up to age sixteen. The Amish did not object to having their children attend public grammar school to learn basic skills such as reading and arithmetic, but they did object to the two years of mandatory high school attendance on the ground that "secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child."[1] Formal high school attendance was objectionable not only because of the specific values of high schools, but also because any formal schooling at this stage outside the Amish community would take children "away from their community, physically and emotionally, during the crucial and formative adolescent period of life."[2]

The state of Wisconsin had refused to grant the Amish request for an exemption from the mandatory education laws, but the Supreme Court held that in doing so the state violated Amish religious rights of the parents and children. Chief Justice Burger, writing for the Court, emphasized that the Amish provided their children with an education that was fully adequate for life in the Amish community. Indeed, he suggested that the Amish were unusually successful at educating their children, as evidenced by their very low crime rates and refusal of welfare benefits. Burger's defense of the Amish drew on conservative values ("It cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children for modern life") and multicultural ideals: "[T]he Amish communities singularly parallel and reflect many of the virtues of Jefferson's ideal of the 'sturdy yeoman' who would form the basis of what he considered as the ideal of a democratic society. Even their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage." Not surprisingly, Burger also reached back to the Court's landmark decision in *Pierce* for support; "However read, the Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children."[3]

The great question raised by *Yoder,* as by *Pierce* half a century before, was whether these cases' central principles—of parental rights and religious diversity—would prove to be the basis for a constitutional and moral revolution. Would the Supreme Court, or the political community more broadly, embrace a new regime in which normative diversity would trump civic purposes? In the quarter century after *Yoder,* the Supreme Court has never again gone so far in insisting that particular religious communities have a basic right to exemptions from generally applicable laws. Indeed, if *Wisconsin v. Yoder* was the high water mark for accommodationism, the low water mark came twenty years later in *Employment Division of Oregon v. Smith.*

The *Smith* case concerned two men who were dismissed from their jobs with a private drug rehabilitation program because they ingested peyote as part of a Native American religious sacrament. They were subsequently deemed ineligible for unemployment compensation on the ground that they had been discharged for work-related "misconduct." The case raised the question, therefore, of whether Oregon had violated the free exercise clause by including "religiously inspired pe-

yote use within the reach of its general criminal prohibition on use of that drug."[4]

A sharply divided Supreme Court denied that the state was required to make an exception to the drug laws for the sacramental use of peyote. The Court went further. In a sweeping opinion by Justice Antonin Scalia, the Court insisted, "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[5] So long as criminal laws have public justifications and apply to citizens generally—so long, that is, that laws are backed by legitimate public purposes and are not *designed* to impose some special burden on a particular religious group—the Court will *never* require exceptions or accommodations to be made.

The *Smith* decision caused a torrent of academic and political outrage. Scalia did not simply say that in this case the state had available to it very important reasons for not making exceptions to the drug laws (drug laws, he might have said, are extremely important laws, partly designed to send a message to young people that drug use is bad, and the force of these laws would be undermined if exceptions were made for the use of drugs in religious ceremonies). Rather, Scalia sweepingly rejected the general notion that states should have to offer a "compelling interest" before denying the right to an exemption from a generally applicable law on free exercise grounds: "What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith?" Courts, Scalia insisted, should never engage in the project of making exceptions to general laws on the ground that the laws place special, albeit incidental, burdens on particular religious groups without adequate justification. Hearkening back to a long-repudiated opinion by Justice Frankfurter (in *Minersville School District v. Gobitis*, which upheld state laws making public school flag salute exercises mandatory in spite of religious objections by Jehovah's Witnesses), Scalia argued that the task of exception making should be left to the political process.[6]

Politicians as well as academics from both ends of the political spectrum denounced the *Smith* decision. In the House of Representatives, liberal Congressman Stephen J. Solarz found himself in the company of arch conservatives such as William Dannemeyer: "You know, Mr. Chairman, it took Deng Xiaoping, through the massacre in Tianan-

men Square, to bring Mr. Dannemeyer and myself together on a China policy. I see it has now taken Mr. Justice Scalia, in his opinion in *Oregon Employment Division v. Smith,* to bring us together on the question of religious freedom."[7]

Officials from the ACLU called *Smith* "the *Dred Scott* of First Amendment law" (thereby likening it to the most infamous Supreme Court decision of all times, *Dred Scott v. Sanford,* in which the Court had ruled that slavery was protected as a matter of constitutional principle).[8]

Congress promptly answered the Court by enacting the Religious Freedom Restoration Act (RFRA), which President Clinton signed into law in November 1993. The bill explicitly sought to reestablish the "compelling state interest" standard for cases involving government actions that have "a substantial external impact on the practice of religion."[9] Any government action burdening religious liberty could be challenged in court as a violation of the free exercise of religious belief, at which point the government would have to show that the action furthers a "compelling state interest" and is the "least restrictive means" available to further that government interest. This is the most stringent test that the Court applies to violations of fundamental liberties.

In signing the bill into law, President Clinton echoed Justice Burger's *Yoder* opinion by invoking both traditional values and multicultural concerns: "Religion helps to give our people the character without which a democracy cannot survive . . . [R]eligion and religious institutions have brought forth faith and discipline, community and responsibility over two centuries." In addition, the president asserted, we are "the most truly multiethnic society on the face of the Earth," and RFRA would help preserve that diversity.[10]

In 1997, the Supreme Court replied to Congress and the president by striking down RFRA as unconstitutional. The Court held that Congress cannot expand constitutional rights like the free exercise of religion without encroaching on the powers of the states, and that Congress has no business telling the Supreme Court how to interpret the Constitution. Once again, the decision was greeted by vigorous dissents from many quarters, and there is every reason to think that the Court's latest pronouncement will not be the last word in this ongoing conflict.

Striking down RFRA was the right thing to do. But neither the

Court nor the Congress seems to me to have responded adequately to this controversy, which raises questions at the very heart of our civic life about the appropriate stance toward normative diversity. On the one hand, the Court majority went too far in suggesting that it should never make accommodations and exceptions to generally applicable laws that impose substantial but indirect burdens on religious believers. On the other hand, RFRA goes too far in insisting that the law must, short of the most exacting forms of justification, accommodate pleas for these religious exemptions and accommodations. The Court and Justice Scalia made the mistake of insisting on an excessive and unnecessary form of judicial inflexibility, thereby provoking an extreme reaction. But Congress and the president, in passing RFRA, introduced too much flexibility into our system—flexibility that would encourage religious objections to generally applicable laws of all sorts, encourage people to constantly regard the law from the point of view of their religious beliefs, and impair the Constitution's transformative function.

The usual analyses of religious accommodation and exception making are plagued by a broader and deeper weakness: the mistake of thinking about these conflicts within the narrow confines of judge-made constitutional law. Neither the courts nor Congress seem disposed to put these and other cases in the larger context we have been examining: the fundamental political project of shaping diversity for civic purposes. That fundamental constitutive project—a basic task of positive constitutionalism—has not been given the attention it deserves. When we give the liberal transformative project due weight, I believe the entire project of accommodations looks different.

Mozert v. Hawkins: The Intolerance of Educating for Tolerance?

Mozert v. Hawkins involved a complaint lodged in 1983 by fundamentalist Christian families against the local school board in Hawkins County, Tennessee. The complaint began when some parents and their children objected to the Holt, Rinehart, and Winston basic reading series (the Holt series) used in the children's public schools in the first to the eighth grades. The parents had a variety of complaints about the readers, not all of which are worthy of being taken seriously. It was alleged that the texts taught, among other things, value relativism,

disrespect toward parents, the theory of evolution, humanistic values, and the notion that any belief in the supernatural is adequate to attain salvation.[11] These families also charged that the readers denigrated their religious views, both by their lack of religious "balance" and by the uncommitted, evenhanded nature of the presentations. If their children were to be taught about the religious views of others, the parents insisted, they should learn that the other religious views are false while theirs are true.[12] Vicki Frost, the parent who gave the most extensive testimony explained that "the word of God as found in the Christian Bible 'is the totality of my beliefs,'" and she and other parents insisted that it would be sinful to allow their children to use the readers.[13]

The parents seemed, in part at least, to object not that any particular religious claim was directly advanced by the readings, but that the program taken as a whole exposed the children to a variety of points of view. This very exposure to diversity, they claimed, interfered with the free exercise of their religious beliefs by in effect denigrating the truth of their particular religious views. I want here to focus on this complaint, which was central to the way the courts handled the case. In fact, this complaint is surprisingly revealing and indeed pivotal with respect to our deepest civic purposes.

The *Mozert* complaint recalls Bishop Hughes's objection in 1840, discussed at the end of Chapter 3, to having Catholic children exposed to reading selections describing the peaceful coexistence of New York City's religious communities in respectful terms that, he feared, might make religion seem like a matter of choice. To a remarkable degree, today's fundamentalist complaints resemble the Catholic dissent voiced at the beginning of the common school regime, including Bishop Hughes's insistence that only an impossible "perfect neutrality" would make the common schools acceptable.

The *Mozert* families asked school officials to allow their children to opt out of the reading program, and that program only, while remaining in the public schools. They agreed to cover the missed reading classes at home and have their children take the same statewide reading tests as other students. Some schools at first allowed these students to participate in an alternative reading series. Within a few weeks, however, the county school board had resolved to make the Holt series mandatory for all students, and to suspend children who refused to participate in the reading program.[14] A number of children were indeed suspended, after which some withdrew and went to Christian

schools, others resorted to home schooling, some transferred out of the county schools, and a few, too poor or unmotivated to do otherwise, returned to their public schools.[15]

The families were not satisfied with the school board's decision, so they went to federal court, charging that the mandatory nature of the reading program interfered with the free exercise of their religion as protected by the First Amendment. The parents and supporting witnesses testified that permitting their children to read the Holt series violated their duty to protect their children from "all influences of evil that might lead them away from the way of God." These parents claimed that to allow their children to read the Holt series would violate their understanding of biblical commands and cause them to risk eternal damnation.[16] Along the way, the parents gained legal support from various national Christian organizations such as the Concerned Women of America. The school district, on the other hand, received assistance from Norman Lear's People for the American Way.[17]

The litigation was complex and protracted, and we need not follow all of its twists and turns. A lower federal court at first dismissed the case without a trial on the grounds that "mere exposure" to a "broad spectrum of ideas and values"—even ones that children or their parents find offensive—could not amount to a constitutional violation. There simply was no showing, according to the lower court, that any religious belief was presented by the readers or the schools as *true* rather than as a "cultural phenomenon" to be studied.[18]

This initial "summary" judgment was reversed.[19] After eight days of testimony, the federal district court decided that there had been a violation of free exercise: the court determined that the state had presented the parents with the choice of either exposing their children to certain ideas that they find religiously offensive, or giving up the right to a free public education.[20] The state, moreover, had not shown that the uniform use of this reading series was essential to the pursuit of its important interest in promoting literacy and good citizenship. Other reading texts were approved by the state, and some of those were apparently acceptable to the parents.[21] The judge granted the Mozert family their claimed right to opt out of the reading program and to retire to the library or study hall during reading sessions.[22]

This decision was, however, finally reversed by a federal appeals

court, which upheld the school board and left the *Mozert* families without their claimed right.[23]

Mozert raises fundamental questions in an apparently moderate posture. The families did not seek to impose their ideas on anyone else through the public school curriculum and did not (apparently) challenge the general legitimacy of secular public schooling. They wanted only to opt out of a particular program while remaining in public schools—how much harm could there be in that? And yet, the *Mozert* objections went to the heart of civic education in a liberal polity: how can tolerance be taught, how can children from different religious and cultural backgrounds come to understand each other and recognize their shared civic identity, without exposing them to the religious diversity that constitutes the nation's history?[24]

The relatively restrained posture of the *Mozert* families—seeking only an exemption from a generally applicable policy—is unlike the "balanced treatment" act that was passed in Louisiana, which required evenhanded treatment of the theories of evolution and creationism in public school curricula. The Supreme Court struck down the Louisiana statute as a thinly veiled attempt to introduce religious views of man's origin into public schooling. That seems right. The logic of opting out, as in *Mozert,* is quite different: public monies and authority are not placed behind the views of religious families, but those children are merely allowed to remain in public schools while being exempted from exposure to ideas that they and their parents find religiously offensive.[25]

Mozert is reminiscent of the Amish education case discussed already, *Wisconsin v. Yoder.* As in *Mozert,* the Amish did not challenge the state's authority to promote basic skills such as reading and math and at least some civic virtues, such as law-abidingness. One thing that made *Yoder* politically easier was the fact that the Amish, unlike fundamentalist and evangelical Protestants, are not an especially large or powerful group. Sects such as the Amish pose no threat to the health of the wider liberal society, not only because of their small numbers, but also because of their lack of involvement in the wider political community.[26] Protestant fundamentalists are different. They are far more numerous and powerful, and they are actively engaged in political activity and are part of both our social and political orders. These elements make *Mozert,* in some respects, a harder and poten-

tially more important case. From the point of view of the children's interests, the cases may not be so different.

Mozert raises two very basic issues. Can respectful exposure to diversity interfere with the free exercise of religious beliefs? And if so, do state officials—operating on the basis of their democratic mandate—have the authority to condition a benefit such as free public schooling on the willingness of parents to have their children exposed to diversity, or does doing so violate fundamental rights or run afoul of some other principled limit on public authority? Should the school board and local officials have accommodated the Mozert parents' complaints? And if public officials had refused, should a Court have stepped in and required an accommodation as a matter of basic constitutional right?

Judge Lively, writing for the appeals court, reasserted the trial court's initial view—namely, that mere exposure to ideas could not constitute a violation of the free exercise of religion. The matter would have been quite different were the state directly to inculcate particular religious ideas, insist that children perform particular acts forbidden by the student's religious convictions, or require affirmations or professions of belief (such as the mandatory flag salute struck down by the Supreme Court in *West Virginia State Board of Education v. Barnette*).[27] Mere exposure to diversity, however, could not constitute a constitutional infringement. Judge Lively approvingly quoted the school superintendent's claim that the reading program was, in effect, neutral with respect to religion: "[P]laintiffs misunderstand the fact that exposure to something does not constitute teaching, indoctrination, opposition or promotion of the things exposed . . . neither the textbooks nor the teachers teach, indoctrinate, oppose or promote any particular value or religion."[28]

Other judges conceded that the reading program interfered with the parents' ability to pass along their religious values. Judge Danny J. Boggs argued that the reading program could be likened to requiring Catholic students to read items on the Catholic Church's official index of prohibited books. Requiring students to study these books is not "mere exposure," he said, but is state-imposed "conduct" at odds with plaintiff's religious beliefs.[29] The *Mozert* families can take advantage of the important benefit of public schooling only if they do things that they view as at odds with salvation—that is, if they read these

books or allow their children to read them.[30] Of course, the children are free to go to Christian schools or resort to home schooling, but even the modest tuition charged by the Christian schools to which some plaintiffs had resorted, Boggs noted, was equivalent "to about a doubling of the state and local tax burden of the average resident."[31]

The disposition of this case, Boggs argued, seemed to imply that local school boards had only to avoid directly teaching the truth or falsehood of particular religious views; beyond that they could require any curriculum, no matter how one-sided and objectionable on religious grounds:

> [P]upils may indeed be expelled if they will not read from the King James Bible, so long as it is only used as literature, and not taught as religious truth . . . Jewish students may not assert a burden on their religion if their reading materials overwhelmingly provide a negative view of Jews or factual or historical issues important to Jews, so long as such materials do not assert any propositions as religious truth.[32]

In spite of all these forcefully expressed concessions to the fundamentalist complaints, Boggs nevertheless joined the decision of his fellow judges on the basis of his convictions about judicial restraint.

I believe that we should begin by joining Boggs in conceding that the mandatory reading program interferes with the *Mozert* parents' ability to teach their children their particular religious views. The effects of a reading program that evenhandedly exposes children to religious and moral diversity may not be apparent from the perspective of those whose religious views have adjusted to the fundamental principles of our political order, but they are abundantly clear to people who hold certain religious views. Whether there is a violation of *moral or constitutional rights* here is another question. To address it, we will need to look more closely at just what sort of interference with freedom of religion might be involved here, and what is at stake from a civic standpoint. Let us begin by considering how some commentators have embraced the fundamentalist cause in the name of a "fairminded" extension of multicultural concern to the political right.

Mozert and the Multiculturalist Temptation

In Chapter 1 we examined the illusion that notions as abstract and morally contentless as diversity and difference are adequate for de-

scribing a civic life characterized by mutual understanding, peaceful cooperation, and a capacity for common deliberation. The temptation of at least certain versions of multiculturalism is similar: it leads otherwise thoughtful commentators to suppose that it is always right to adopt a posture of accommodation in the face of the claim that some public policy or social practice is biased against a particular culture and imposes special burdens upon it.[33]

Nomi Stolzenberg, writing in the *Harvard Law Review*, has defended the *Mozert* families' charge that teaching "diverse viewpoints in a tolerant and objective mode threatens," as she puts it, "the survival of their culture." Teaching the children of fundamentalist communities about the religious diversity that constitutes so vital a part of this nation's history is thus portrayed by Stolzenberg as a liberal means of assimilation, "that insidious cousin of totalitarianism."[34]

The *Mozert* parents insist that exposure to religious diversity interferes with their ability to teach their particular convictions to their children. They have a point. And yet the most basic forms of liberal civic education would be swept aside on the basis of the uncritical embrace of multicultural respect. The *Mozert* parents' claims seem based on certain liberal sensibilities. Freedom and equality are, after all, central commitments for liberals. People should be free to revise and shape their own deepest convictions and overall patterns of life, and all people merit what Ronald Dworkin has referred to as "equal concern and respect."[35] This freedom and equality is often allied with the notion that people almost always pursue their favored conceptions in groups of like-minded others. On these grounds, an imperative of multicultural concern seems to flow directly from liberalism.[36]

Stephen Bates, who has written an important account of the *Mozert* conflict, approvingly quotes a remark of two British educators: "What makes a particular culture identifiably that culture might include essentially sexist or racist practices and principles . . . Sexism can be, in theory, rooted in beliefs which are among the most strongly held and which are crucial to cultural identity. That is, they can be the very sort of belief which those of us who value a multicultural society think that minorities have the right to preserve."[37] Bates defends the accommodation of the *Mozert* parents because "tolerating everything except intolerance is circular. As Tom Lehrer once put it, 'I know there are people in this world who do not love their fellow men. And I hate people like that.'"[38]

Bates insists that those who refuse to accommodate dissenting families and communities misunderstand the American Constitution and its liberal guarantees: "The First Amendment requires the *state* to treat all faiths as equally valid. But *citizens* aren't obliged to follow suit. On the contrary: The separation of church and state is intended to safeguard each citizen's liberty to believe that his faith is valid and, if he chooses, that all others are heretical."[39] But Bates makes a mistake of his own by taking a narrow view of what it means to sustain a liberal democratic constitutional order. Such a political order makes demands not only on the state but on citizens as well.

While it is true enough that our liberal Constitution protects the freedom to proclaim that the religious doctrines of others are heretical, a more complex dynamic is at work here. A liberal democratic polity cannot endure without citizens willing to support its fundamental institutions and principles and to take part in defining those principles. We are citizens of a liberal democratic society, after all, not subjects of a state. Political power is our shared property and not something that is wielded over us. Liberal citizenship carries with it not only privileges but also obligations, including the obligation to respect the equal rights of fellow citizens, whatever their faiths. These obligations are part of the civic side of liberalism.

Citizens remain free to practice their religion and to condemn alternative belief systems. The lives of liberal citizens are in a sense properly divided: we have a public and a private side, and the public (or political) side is guided by imperatives designed to make our shared life together civilized and respectful. This division of spheres is only part of the story of the relation between liberalism and various systems of normative diversity, including religion. Liberalism does not simply divide our lives, and from certain angles at least, it really only divides our lives in a superficial sense. In a deeper sense, as we have begun to see, liberal institutions and practices shape all of our deepest moral commitments in such a way as to make them supportive of liberalism. That work is both legitimate and at odds with the notion that our basic commitment is to difference, diversity, or versions of multiculturalism designed without keeping civic aims in view.

Stolzenberg, Bates, and others neglect the civic side of liberal democratic politics and leap too quickly for accommodation. Our constitutional order must shape citizens, and not only establish political institutions. Citizens, not courts or legislatures, are the ultimate custodians

of our public morality. We have every reason to take seriously the political project of educating future citizens with an eye to their responsibilities as critical interpreters of our shared political traditions—that is, as participants in a democratic project of reason giving and reason demanding.

But how should we go about justifying our common civic project? Can a moral education for citizenship avoid being a religious education? Is a truly public justification for our basic political commitments possible?