

Removing Classrooms from the Battlefield: Liberty, Paternalism, and the Redemptive Promise of Educational Choice*

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I. INTRODUCTION

Utah's new school voucher law has meant many things to many people. For the thirty-seven percent of our Hispanic and African-

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Details regarding Richard Henry Pratt herein are based upon research compiled by Daniel E. Witte, some of which is published. See Daniel E. Witte, Comment, *Getting a Grip on National Service: Key Organizational Features and Strategic Characteristics of the National Service Corps (AmeriCorps)*, 1998 BYU L. Rev. 741, 772-73 nn.145-47, 791 n.215, 793 n.219; Daniel E. Witte, Comment, *People v. Bennett, Analytic Approaches to Recognizing a Fundamental Parental Right Under the Ninth Amendment*, 1996 BYU L. Rev. 183, 250 nn.217-18; Quaqu Society Inc., <http://www.quaqu.org/history.htm> (last visited Mar. 25, 2008) (providing a historical overview based on research compiled by Mr. Witte); Quaqu Society Inc., <http://www.quaqu.org/list.htm> (last visited Mar. 25, 2008) (providing links to Web sites about alternative education law and history).

It is anticipated that material included in (and related to) this present preview Article will be more comprehensively discussed in a forthcoming book.

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American public-school¹ students who do not graduate with a high-school diploma, Utah's voucher law represented a sense of hope and opportunity.² For opponents of educational choice, the voucher law is un-American and a threat to democratic values.

This Article argues that opposition to vouchers is rooted in a disturbing paternalism.³ This sentiment is emphasized more than any other in opposition to the law—many anti-voucher arguments seem to gravitate to an idealized view of the common good—and, not coincidentally, it has been a central historical theme in the relationships between the federal government and indigenous, immigrant, and religious minority groups. To understand perhaps the most beneficial impact of the new school-voucher law is to first recognize the existence of the philosophy of paternalism underlying the establishment and maintenance of our public education system.

Utah's new school voucher law, as it is written, is primarily⁴ about helping low-income minority students and others who are

1. "Public school" and "government school" are used as interchangeable terms in this Article. Note, however, that many education choice advocates define the term "public school" to include both government schools and public accommodations for learning that are privately owned.

2. See SUPERINTENDENT'S ANNUAL REPORT: SECTION II: HIGH SCHOOL COMPLETION STATUS 2006, http://www.usoe.k12.ut.us/FINANCE/other/AnnualReport/06ar/Statistics/STUDENTS/High_School_Completion_Status06.xls (last visited Feb. 12, 2008).

3. As discussed in more detail herein, compulsory government education in the United States has its historical origins in political efforts to subdue various racial, ethnic, cultural, and religious demographic minority groups. Paternalism provided a common and ostensibly high-minded political ideology to justify discrimination, oppression, and exploitation against disparate minority groups (and, later, lower-income students from any demographic group). The paradigms developed in that context became the basis for modern government education. As overt racism and bigotry fell out of political fashion, the unsavory historical facts were quietly ignored, but the paternalistic philosophy was necessarily retained to justify ongoing use of the current educational system.

This Article argues that vouchers and other educational choice programs are best understood as a civil rights remedy designed to directly address the profound ongoing harms caused by entrenched historical abuses perpetrated through the American education system. As with other areas of civil rights law, an understanding of current political and legal events in Utah cannot be properly understood apart from the historical context that shaped the existing Utah education system. Discussion of prospective educational solutions must be informed by a candid acknowledgement of the trajectory of past educational (and civil rights) mishaps. A debate over vouchers that merely dickers over the finer details of malleable statutory tax and revenue allocation provisions loses sight of the forest for the trees.

4. The Utah voucher law is a product of practical legislative politics as well as idealism. The Utah law is not a perfect avenue to educational choice; it is merely better than the abysmal status quo. The Utah law is only the best scheme capable of garnering a requisite number of

currently failing in our public schools.⁵ In their current socio-economic circumstances, and unlike struggling students from wealthier families, these students are essentially segregated in their neighborhood schools and told by the keepers of the common good that their challenges do not warrant any intervention transcendent of the higher priority to maintain the alleged seedbed of democracy, our government public school system. Indeed, the socio-disadvantaged are told, the system was created for *them*—not for the

votes to pass, and many of its supporters understood that the best ought not to be the enemy of the good. Thus, the authors do not feel obliged to philosophically defend every politically pragmatic quirk the enacted statute may contain. This is particularly true with respect to the fund allocation pattern selected, the ineligibility of home educators, and the ineligibility of existing private school students.

An optimal educational-choice program would afford simple, *universal* access to a family tax credit for 100% of the tax revenue that would otherwise be allocated to a public school on the basis of a weighted pupil unit. Universal access to educational choice is the only long-term way to *remediate* the wrongs of the past and *prevent* new patterns of abuse from emerging in the future; any arrangement short of full universal access is merely a laudable interim step in the progressive direction. To paraphrase Chief Justice John Roberts, the way to eliminate discrimination on the basis of demographic characteristics and income levels is to stop discriminating on the basis of demographic characteristics and income levels. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, No. 05-908, slip op. at 40–41 (U.S. June 28, 2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

5. Unfortunately, some Utah educators have gone to considerable effort to conceal the underperformance of Utah schools and of certain minority student populations. These efforts include the use of “averaging” and other statistical manipulations that violate the current federal No Child Left Behind law (NCLB). *E.g.*, Jennifer Toomer-Cook, *Ed Board Won’t Accept Test Averages*, DESERET MORNING NEWS, Jan. 11, 2008, at A1 [hereinafter *Ed Board*]; Jennifer Toomer-Cook, *Utah Schools Warned On Test-Score Reports*, DESERET MORNING NEWS, Jan. 7, 2008, at A1 [hereinafter *Utah Schools Warned*]. Granite School District, which is known to encompass a geographic area in Salt Lake County with a disproportionate number of minorities and low-income students relative to other school districts in the state, has been particularly aggressive about averaging. *Id.*; *see also* U.S. CENSUS BUREAU, CENSUS 2000 DATA FOR UTAH TABLE 5: POPULATION BY RACE AND HISPANIC OR LATINO ORIGIN, FOR THE 15 LARGEST COUNTIES AND INCORPORATED PLACES IN UTAH: 2000, http://www.census.gov/Press-Release/www/2001/tables/ut_tab_5.PDF (last visited Mar. 28, 2008) (providing the geographic distribution of demographic minority populations according to the most recent census).

But even the imperfect data available suggests that demographic minorities are suffering even more than others from the current Utah education system. It is hardly a surprise, for example, that after seven years of failing to meet very modest minimum NCLB standards, the first mandatory NCLB closure announced in Utah was also one of the few schools with predominantly American Indian enrollment—West Junior High School in Fort Duchesne. Julia Lyon, *School’s Out for Tribal Youth?*, SALT LAKE TRIB., Dec. 18, 2007, at A1; Lezlee E. Whiting, *Seeking A Turnaround: Ute Tribe Wants To Partner With Parents And School Board To Build Success*, DESERET MORNING NEWS, Jan. 8, 2008, at C1.

rich and the influential who have far greater choices and opportunities⁶ and who are able to leverage their successes to benefit their struggling children, but for disadvantaged people who could not succeed without the beneficent (if coercive) hand of government.

If Utah's new school voucher law only does one thing—eradicate the concept of public school paternalism—it will have done more for the freedoms of all Utahns than any other single policy reform in the past century. But to appreciate the power of that statement, we must first uncover its historical narrative, and this narrative begins with the issue of black slavery. Part II discusses a few historical examples of coercion in our nation's history of minority education. Specifically, this section outlines General Richard Henry Pratt's astounding approach to educating minorities after the Civil War. Part III describes how current proponents of the government school system and opponents of education choice make arguments descended from those General Pratt espoused. This section concludes that Utahns and Americans should avoid this paternalistic approach to education by incorporating greater modes of parental choice in our education systems, such as school vouchers. Part IV offers a brief conclusion.

II. GENERAL PRATT, PATERNALISM, AND HISTORICAL COERCION IN GOVERNMENT EDUCATION

General Pratt's paternalistic approach to the education of minorities incorporated contemporary cultural influences and social class theory. Homebuilders, past and present, know that "mudsill" is a pounded earthen floor prevalent in most primitive homes. In the mid- to late-nineteenth century, the term mudsill was eventually ascribed derogatorily to poor people. A well-known "mudsill theory" held that poorer classes, especially black slaves, were natural and essential to human progress.

The chief proponent of mudsill theory in the Civil War era was a South Carolina planter and United States senator named James

6. As documented elsewhere, the elite political and economic class of the United States tends to use private education for their own children while vociferously extolling the virtues of government public education for everyone else. Daniel E. Witte, Comment, *People v. Bennett: Analytic Approaches to Recognizing a Fundamental Parental Right Under the Ninth Amendment*, 1996 BYU L. REV. 183, 255 n.225.

Henry Hammond. In a speech delivered on the Senate floor in 1858, Senator Hammond explained,

In all social systems there must be a class to do the mean duties, to perform the drudgery of life. . . . Such a class you must have, or you would not have that other class which leads progress, refinement, and civilization. It constitutes the very mud-sills of society and of political government; and you might as well attempt to build a house in the air, as to build either the one or the other, except on the mud-sills.⁷

Hammond's contemporary, and a popular pro-slavery advocate, George Fitzhugh added,

[T]he Negro is but a grown up child, and must be governed as a child The master occupies toward him the place of parent or guardian The [N]egro is improvident He would become an insufferable burden to society. Society has the right to prevent this, and can only do so by subjecting him to domestic slavery [T]hey would be far outstripped or outwitted in the chaos of free competition.⁸

The paternalism of slavery is deftly described by one historian this way:

Masters hoped that if they articulated the rules clearly enough and enforced them reliably, slaves would accept the legitimacy of their masters' authority "You must convince them you are not a tyrant but act on the principle of justice," [one southern planter] explained. The plantation, in other words, must become a just and well-ordered world of familial devotion. Nothing captured this ideal more precisely than the slaveowners' language of paternalism. Slaves, essentially childlike, incapable of higher reasoning, and only haltingly responsive to moral tutelage, required the combination of kindness and discipline that only a father could provide. Since no slave parent's authority had any legal standing—slaves' children literally belonged to someone else—paternal responsibility fell to the slaveholder.

But this paternalism characterized planters' fantasies far better than it did their society, for forbearance and benevolence could exist

7. CONG. GLOBE, 35th Cong., 1st Sess. 962 (1858) (statement of Sen. Hammond).

8. George Fitzhugh, *The Universal Law of Slavery*, in *THE BLACK AMERICAN: A DOCUMENTARY HISTORY* 91, 91 (Leslie H. Fishel, Jr. & Benjamin Quarles eds., 3d ed. 1976).

only in the space created by terror. At the core of paternalism, in other words, lay brutal coercion.⁹

Paternalism has enabled brutality against African-Americans, Native Americans,¹⁰ and others by positing that government-facilitated violations of human (and constitutional) rights are necessary means to ostensibly beneficent ends. The coercive imposition of paternalism has become one of the great ironies of a free nation, and perhaps no person exemplified this irony in the arena of American education more than a seemingly obscure Union Army general named Richard Henry Pratt.

It was against the backdrop of the muddsill theory that Richard Henry Pratt emerged from the shadows of history to seize control of America's educational destiny.¹¹ We are fortunate that General Pratt left behind a lengthy and detailed journal, now his formal autobiography appropriately titled *Battlefield & Classroom*, about the ideas and actions supporting his paternalistic quest to turn black slaves, American Indians,¹² and Puerto Ricans into "real Americans."

9. STEPHEN KANTROWITZ, BEN TILLMAN AND THE RECONSTRUCTION OF WHITE SUPREMACY 14–15 (2000).

10. For Native Americans, paternalism tended to be rhetorically described as a necessarily imposed teacher-student relationship rather than a master-slave relationship. *E.g.*, *Hollister v. United States*, 145 F. 773, 776 (8th Cir. 1906) ("Indians are yet the wards of the nation, in a condition of pupilage or dependency . . .") (quoting *U.S. v. Rickert*, 188 U.S. 432, 437 (1903)).

11. Richard Henry Pratt developed the practical political, legal, pedagogical, and economic paradigms now undergirding the entire American compulsory education system. As discussed in more detail throughout this Article, Pratt's scheme was first developed using Native Americans but was explicitly expanded to minority education generally and then—in many respects—to American education generically. Pratt's ideas were widely adopted and applied outside of Carlisle and programs directly implemented by Pratt. As discussed below, because Utah is home to numerous racial, ethnic, and religious minorities, Utah was directly targeted by Pratt and his contemporary allies and has suffered ongoing effects. Utah's general education system today cannot be accurately appreciated without a detailed understanding of Pratt's views and actions.

12. To reflect the rhetorical flavor and terminology of the relevant historical period, this Article uses the terms "Negro," "Black," "American Indian," and "Indian" on some occasions to refer to people often described by some academics today as "African-Americans," "Native Americans," or "indigenous tribal populations of North America." The term "Hispanic" is used with an acknowledgement that some academics advocate use of "Latino" instead. The term "white" is used to refer to persons (including Americans) who are predominantly descended from pre-Columbus Anglo or European racial ancestry and are readily associated in modern American public perception with a corresponding "traditional" "white" European cultural heritage.

In recounting some unpleasant historical events, images, ideas, theories, and quotations, and in attempting to accurately use terminology, the authors do not intend to communicate

Pratt's military career began with the April 1861 bombardment of Fort Sumter during the Civil War.¹³ He fought as a Union soldier for four years in Kentucky, Tennessee, and Georgia, participating in some of the most vicious and bloody battles of the entire conflict.¹⁴ It was there that Pratt developed an important network with influential military and political friends, including General William Tecumseh Sherman.

After briefly leaving the military on May 29, 1865, Pratt re-enlisted and was appointed a second lieutenant¹⁵ on March 7, 1867.¹⁶ He was assigned to command a newly-organized "Negro" regiment consisting of African-American enlisted men supervised by white officers.¹⁷ Of that time, Pratt later wrote:

As a Civil War cavalryman [over Negro soldiers], I marched over vast stretches of slavery's domain, serving the four years in a war which led to broader Americanization, through participation in the duties of American citizenship, for the recent primitive Africans . . . [M]y government used me in war to end a system which had forcibly transformed millions of primitive black people by transferring them from their torrid zone homes and life across a great ocean and compelling them to live with, and make themselves individually useful in, our temperate national family and by abandoning their own meager languages and adopting the supremely prolific language, life, and purpose of America [T]hrough forcing Negroes to live among us and become producers, slavery became a more humane and real civilizer, Americanizer, and promoter of usefulness for the Negro It is

any personal disrespect of any tribes, peoples, or religions, any personal endorsement of historical abuses, any general disrespect for military service, any suggestion that general demographic categories should obscure the significance of more localized identities, or any personal endorsement of offensive racial terminology.

13. RICHARD HENRY PRATT, *BATTLEFIELD & CLASSROOM* xviii (Robert M. Utley ed., 2003) [hereinafter *BATTLEFIELD*].

14. *Id.*

15. Pratt was promoted to first lieutenant on July 31, 1867; captain on February 17, 1883; major on July 1, 1898; lieutenant colonel on February 2, 1901; colonel on January 24, 1903; and, after retiring on February 17, 1903, to brigadier general on April 23, 1904, pursuant to military law and procedure at the time. *Id.* & n.3.

16. *Id.*

17. *Id.* at xix.

impossible that any man entering any national family can become acceptable therein unless made useful to it.¹⁸

Pratt believed that the same insights and managerial tactics also applied to other demographic minority groups, including Native Americans and Puerto Ricans.¹⁹

When the Civil War came to a close, General Sherman²⁰ and his network of career military officers turned their attention to subduing Indian Territory in the mid-western and western United States, as well as Texas. In spring of 1867, Pratt was assigned to Fort Arbuckle in what is now Oklahoma.²¹ At that time, various Indian tribes were involved in an insurgency against the United States military's effort to gain permanent and exclusive territorial control. Pratt participated in eight years of battles and negotiations²² involving various tribes,

18. *Id.* at 311–12. In the introduction to General Pratt's autobiography, modern historian Robert Utley writes of Pratt's efforts at Fort Marion that

Pratt attempted to gain adoption and implementation of the personal philosophy he had evolved in his frontier years In Pratt's mind the Negro furnished the example. Slavery transplanted him from his native habitat and tribal affiliation into a new cultural environment, where he had to adopt a new language, new dress, and new customs. As a result, in a span of several generations he had been shorn of his primitivism and elevated to American citizenship. Pratt believed profoundly that as the Negro had been civilized, so could the Indian be civilized. The ideal, in short, was no less than the complete eradication of aboriginal culture and the complete assimilation of the Indian by the American people.

Id. at xxii.

19. *See, e.g., id.* at 175; Sonia M. Rosa, *The Puerto Ricans at Carlisle Indian School*, J. OF CARIBBEAN AMERINDIAN HIST. & ANTHROPOLOGY, <http://www.kacike.org/SoniaRosa.html> (last visited Mar. 25, 2008). Some abolitionists saw parallels of a different kind and took up the Indian cause after winning the campaign against black slavery. BATTLEFIELD, *supra* note 13, at 154 n.1.

20. Pratt's friend and superior, Lieutenant General W. T. Sherman, applied the same no-holds-barred approach during the Indian Wars that he had earlier utilized to defeat the Confederacy. Sherman famously ordered Atlanta burned to the ground after its civilian inhabitants had already surrendered. *See* DAVID NEVIN ET AL., SHERMAN'S MARCH: ATLANTA TO THE SEA 14–15, 44–46 (1986) (describing how Sherman pioneered "total warfare" scorched-earth tactics designed to psychologically discourage opponents and as part of the effort burned Atlanta after Confederate troops had already relinquished control of the city). General Sherman, unlike Pratt, felt "it is better the Indian race be obliterated." BATTLEFIELD, *supra* note 13, at 15.

21. *Id.* at xix.

22. Negotiations typically involved military officers meeting with tribal leaders to arrange voluntary surrender and signature of treaty terms prepared by the military.

The conference opened with a speech from the Captain, the substance of which was the desire of the Great Father that we should live at peace with one another, and that the Indians must begin to recognize the fact that we were to become one people and together develop and make use of this great country in the way the white

including the final conquest of the Kiowas, Comanches, Cheyennes, and Arapahos.²³

One of the primary grievances of the warring Indian tribes was encroachment of white settlers and the resultant reduction of available land and resources. In particular, the elimination of the buffalo herds caused Indian starvation.²⁴ As the natural game was depleted and Indians were confined to territorial boundaries on reservations and elsewhere, Indian tribes were forced to rely upon the federal government for food.²⁵

However, experience demonstrated that the federal government often sent insufficient or inadequate rations in violation of government obligations set forth under treaties the federal government had forced the Indians to sign.²⁶ The Indian tribes complained that the white man was a first aggressor who had driven the Indians from their traditional lands, declared war on the Indians, and killed Indian women and children unnecessarily and indiscriminately.²⁷ The Indians believed that their own brutal attacks against white settlements and supply convoys constituted a natural and justified tactic of self-defense and self-preservation. As a result, Indian Territory at that time was enmeshed in a vicious war on all sides, characterized by insurgency, terrorism, gruesome atrocities, sexual assault, kidnappings, torture, involuntary servitude, dismemberment, and scorched-earth tactics.²⁸

Pratt was surprised to learn that the Cherokee Indians, who by then had been relocated to Oklahoma from Georgia as part of the “Trail of Tears” migration coercively supervised by the military in

men had found best to advance the prosperity, comfort, and happiness of both the Indians and whites; that the Government was anxious to have the Indians adopt our ways of living and unite with us to use and develop the land of our great and good country which was big and rich enough to give all its people wealth and happiness; that there was no good reason why we should not live peacefully together.

Id. at 16.

23. *Id.* at xix.

24. *Id.* at 37, 63 n.5.

25. *Id.* at 37.

26. *See, e.g., id.*

27. *Id.* at 16. The federal government also had a policy of compelling polygamous Indians to disband their families and abandon their “extra” wives and children. *Id.* at 90, 289.

28. *See, e.g., id.* at 48–49. For a detailed and lengthy recitation of various atrocities seen by eyewitnesses, see generally PETER COZZENS, EYEWITNESSES TO THE INDIAN WARS, 1865–1890 (2005).

1838,²⁹ were already quite “civilized” and had their own self-sufficient system for education:

I talked more with the Indian sergeant and his men of the [Indian] scouts and found that most of them had received English education in their home schools^[30] conducted by their Cherokee tribal government. They had manly bearing and fine physiques. Their intelligence, civilization, and common sense was a revelation, because I had concluded that as an army officer I was [in Fort Gibson, Arkansas] to deal with atrocious aborigines.³¹

Notwithstanding this discovery, Pratt decided that neither the Cherokee nor other Indians should be permitted to run their own schools or control the upbringing of their own children.³²

29. President Andrew Jackson utilized the federal Indian Removal Act of 1830 and the 1835 Treaty of New Echota in conjunction with federal soldiers, military installations, and state militia to remove the Cherokee from Georgia and re-settle the tribe in Oklahoma. Randy Golden, *Cherokee Removal Forts*, <http://ngeorgia.com/history/cherokeeforts.html> (last visited Mar. 25, 2008) (describing in part “The Trail of Tears”). The Act of 1830 was successfully challenged before the United States Supreme Court, in *Cherokee Nation v. State of Georgia*, 30 U.S. 1 (1831), and *Worcester v. Georgia*, 31 U.S. 515 (1832). However, when the Indian Removal Act that Jackson signed into law was declared unconstitutional, President Jackson successfully defied the decision by ordering federal military forces to continue with his initiative notwithstanding the admonitions of the Supreme Court. “[Chief Justice] John Marshall has made his decision,’ Jackson is claimed to have said, ‘now let him enforce it!’” Stephen Breyer, *Boston College Law School Commencement Remarks*, http://www.supremecourtus.gov/publicinfo/speeches/sp_05-23-03.html (last visited Mar. 25, 2008). Pratt would take the Jacksonian paradigm introduced against the Cherokee and refine it to a much greater level of sophistication.

30. Although a precise count is probably impossible, most traditional tribal cultures appear to have used home education and apprenticeship to pass knowledge to children. Extended relatives and tribal leaders often provided support to parental efforts. Introduction of mediating institutions designed to educate children in other ways and with entirely different organizational cultures was inherently antithetical to traditional tribal culture, quite apart from the nature of any curriculum content presented.

31. BATTLEFIELD, *supra* note 13, at 4–5.

32. *See, e.g., id.* at 312–13. An alternative approach could have entailed voluntary cooperation with Indian families to provide educational resources actually requested by them to meet their own defined needs. In re Lelah-Puc-Ka-Chee, 98 F. 429 (N.D. Iowa 1899) (Indian student released from Pratt-system school under Writ of Habeas Corpus); Daniel E. Witte, Habeas Corpus Protection of Parental Liberty, <http://www.quaqua.org/hurd.htm> (last visited Mar. 2005) (During Framer eras in 1789 and 1865–68, judicial vindication of parental rights under the Constitution was most often accomplished through a Writ of Habeas Corpus filed against the offending government entity, private entity, school, cleric, or other third-party interloper in order to assert all relevant constitutional, statutory, and common law parental prerogatives).

Throughout his career, Pratt would organize publicity campaigns and espouse policies based upon the premise that Indians could only become literate and civilized through removal of Indian children from their Indian parents and instruction in off-reservation boarding schools controlled by white federal government officials.³³ The objective was not simply (or perhaps even primarily) to educate Indian children, but to permanently control and transform indigenous societies in ways designed to suit Pratt's political constituency.³⁴

The federal military prevailed in the war. The tribes were conquered and compelled—often by starvation, confinement, and threats—to sign treaties, giving control of tribal education over to the federal government.³⁵ Indians suspected of participating or supporting acts of violence were killed. The remainder were collected as prisoners of war and confined in frontier military forts and prisons. The military decided to create a prison in Fort Marion, Florida, for the Indians identified as the most violent, dangerous, or destabilizing actors.³⁶ Indeed, Fort Marion had many similarities to the contemporary Guantanamo Bay military prison for suspected terrorists in Cuba: Fort Marion was created to indefinitely incarcerate, without trial,³⁷ despised prisoners of war who in most cases were believed to have committed atrocities against white civilians or to have killed United States military personnel.

33. *See, e.g., id.* at 322–23 (describing the demonstrations conducted “to show the public what the [Carlisle] school was doing in all its branches”).

34. *See, e.g., id.* at 258, 268, 271, 335.

35. Pratt later recounted:

[E]ducation and training for the young is our only sure way to relief from Indian complications and burdens. You will remember that in all the great treaties of 1868, with the Sioux, Cheyennes, Arapahoes, Kiowas, Comanches, Navajos, Shoshones, Bannocks, Pawnees, and other tribes, composing all our nomadic Indians east of the mountains, a special educational clause was inserted, promising educational advantages to every child between 6 and 16 years of age.

Id. at 246.

36. Fort Marion was originally built when the Spanish occupied Florida. *Id.* at 117. After the United States took possession from the Spanish, the fort was used as a prison for Indians involved in earlier military skirmishes in Florida and the southeast United States. *Id.* The fort was pressed into service again for the post-Civil War Indian War. *Id.* The fort still stands today in St. Augustine and has a moat, a drawbridge, and a very large stone fort wall. *Id.*

37. Military commissions were used before executing or imprisoning some selected Indians. *Id.* at 106 n.4. However, confinements were of uncertain duration, *id.* at 122, and did not necessarily require a specific accusation of crime. *Id.* at 139.

In 1875, Pratt was assigned to oversee the transportation and ongoing incarceration of the Indian prisoners of war.³⁸ Some unruly prisoners were branded.³⁹ The POWs were gathered at Fort Leavenworth, Kansas, crowded into rail cars, and confined in iron shackles.⁴⁰ They were then shipped from Fort Leavenworth to St. Louis, Louisville, Nashville, Atlanta, Jacksonville, and finally, Fort Marion, Florida. During transport and subsequent incarceration at Fort Marion, some Indians died from humidity, exposure, harsh treatment, and prolonged confinement.⁴¹

A visceral climate of racial animosity pervaded America's relationship with American Indians of that era, skewing nearly every aspect of federal Indian policy and reversing America's original tradition of educational choice. Pratt was America's point man to deal with those Indians considered to be the worst of the worst, resulting in a powerful and almost unlimited mandate for this previously obscure army officer.

Pratt had a goal to "reform"⁴² young Indian POWs and proved to be very adept at maintaining strict order, discipline, and security at Fort Marion. He forced the POWs to cut their hair and wear military clothes in the manner of a white man.⁴³ Indians were punished, marched about, and forced to perform regular military drills.⁴⁴ They were forced to clean, cook, present themselves for military inspections, and maintain a "spit-shine" military environment.⁴⁵

Pratt realized he could control the Indians and change their culture more effectively by mixing different tribes together and using Indians to guard, scout out, and punish each other.⁴⁶ He forced

38. *Id.* at xviii–xix, 106–11 (recounting Pratt's requests for the transportation and incarceration detail after expressing frustration that the prisoners would not be punished in front of the native tribal populations, and military orders grant his request).

39. *Id.* at 105 n.3 (describing an Indian prisoner who fled before being "ironed"); *see also* COZZENS, *supra* note 28, at VOL. 4, at 74 (detailing the United States military's use of branding with a hot iron as a tool for punishment and marking, including discipline for American soldiers who were involuntarily discharged for misconduct).

40. BATTLEFIELD, *supra* note 13, at 105 n.3, 109, 118, 181.

41. *Id.* at 118, 181. At various stages of confinement under Pratt, some Indians attempted to escape and others hung or stabbed themselves to death. *Id.* at 48, 109, 112–15, 147–48.

42. *Id.* at 107.

43. *Id.* at 118, 163.

44. *Id.* at 124–25, 132, 174, 299.

45. *Id.* at 147, 156, 163, 181.

46. *Id.* at 119–20, 125, 163, 174, 227.

Indians to conduct court proceedings in prison and declare that fellow prisoners were guilty and deserving of banishment to the prison dungeon.⁴⁷ He found that Indians would guard each other quite effectively, reducing the need for white military security guards.⁴⁸ Pratt later applied the divide-and-conquer strategy associated with mixing tribes to maintain control and break down cultural resistance to his later governance of the Carlisle Indian School.⁴⁹

Pratt also forced the Indians to attend and participate in church services, primarily services from the Massachusetts Puritan tradition.⁵⁰ Among other things, the Indians were apparently compelled to read passages from the New Testament aloud in unison each Sunday.⁵¹ According to H.B. Whipple, an ally quoted in Pratt's autobiography, the first lesson the Indians were taught was "to obey."⁵² The Indians were to be culturally cleansed and become "leaders of their people in the path of civilization."⁵³ Pratt allowed selective access to the media in order to promote his ideas and show off Indians that he believed became more civilized through efforts at the prison.⁵⁴

Pratt's role in history might have ended with the closure of Fort Marion's Indian incarceration program. In a fateful twist, however, Pratt decided that the paradigm and tactics he had refined for *adult military Indian POWs* could accomplish the perpetual economic and cultural assimilation of *non-criminal civilian Indian children* across the United States.⁵⁵ With the help of his old Civil War political network, including General William Sherman and General Philip Henry Sheridan, Pratt mounted a remarkably effective lobbying and publicity campaign to create a perpetual system of Indian schools

47. *Id.* at 174–75.

48. *Id.* at 163, 174.

49. *Id.* at 227.

50. *Id.* at 158–59, 163–64. To a lesser extent, Pratt apparently also recruited Baptist missionaries for the task when instruction of a more Puritan/Congregationalist variety was not available. *Id.* at 48.

51. *Id.* at 181.

52. *Id.* at 163.

53. *Id.* at 164.

54. *Id.* at 203.

55. *E.g., id.* at 251 (explaining that the St. Augustine POW program and program to civilize Navajos with government schooling were "one" and were explicitly endorsed by General Sherman).

based upon the Fort Marion model for managing Indian POWs.⁵⁶ Indeed, Pratt would spend the rest of his career lobbying over the course of decades for new federal Indian schools, more funding for Indian schools, and educational subjugation of all tribes.

Pratt's key strategic insight was that Indian children⁵⁷ were the key to controlling the permanent future of Indian relations and to making a so-called primitive people "productive" to an American society in the throes of the Industrial Revolution.

Pratt's concept was not implemented under a cloak of secrecy or in circumvention of countervailing humanitarian impulses harbored by the nascent educational establishment. To the contrary, Pratt wrote to, and met with, key military and political allies. He arranged for an August 1877 *National Teacher's Monthly* article lauding the Fort Marion prison education program.⁵⁸ He lobbied the President of the United States and the federal Indian Commissioner. He secured the help of General John Eaton, United States Commissioner of Education, and Julius H. Seelye, who was President of Amherst College and a sitting congressional representative.⁵⁹ He lobbied New England churches, telling the clergy and congregations that Indians could become white in manner and lifestyle, and become useful farm labor.⁶⁰ He arranged for a presentation for General Winfield Scott Hancock at the St. Augustine prison designed to elicit support.⁶¹ He also lobbied

56. *Id.* at 172–73.

57. Children have "no social awareness or political affinities" necessitating extensive deconstruction, and thus are more ideal for a designed "transformation process." Witte, *supra* note 6, at 244 nn.208–09, 246 n.212 (citations omitted) (quoting Saddam Hussein, a studious practitioner of historic social engineering techniques). The transformational cleansing effect is particularly effective when, pursuant to Pratt's innovative approach as described in Part II of this Article, children are physically separated from their families for long periods of time, isolated from competing sources of information, cut off from native cultural influences, placed in a disorienting and blended demographic environment devoid of natural peer allies, controlled by a single regimented institution, and continuously subjected to a uniform, normative, repetitious pedagogical curriculum. *Cf. id.* Unless each component is implemented in a hermetic manner, the effectiveness and speed of the cultural cleansing effort will be *reduced* (but often profound) and the confounding impact of competing independent variables will be enhanced.

58. *Id.* at 181.

59. *Id.* at 187–88. Eaton and Seelye became important lifelong political allies of Pratt. *Id.*

60. *Id.* at 193–94.

61. *Id.* at 188.

General Samuel Chapman Armstrong in New England to create civilian Indian schools.⁶²

Pratt's public message was that Indians could and should be civilized, that civilized Indians could be an economic asset, and that "[c]reating opportunities for this is a reasonable duty of government."⁶³ He claimed that forcing Indians to interact with whites was essential in order for Indians to enjoy their rights under the Fourteenth Amendment and Declaration of Independence.⁶⁴ He

62. *Id.* at 195.

63. *Id.*

64. *Id.* at 7, 195. Pratt was, of course, rationalizing a retreat from Reconstruction's initial promises. The Framers of the Reconstruction Amendments explicitly stated that they intended to protect parental liberty and family autonomy. In the debate over the Thirteenth Amendment, Republican Senator James Harlan of Iowa noted:

Another incident [of slavery] is the abolition practically of the parental relation, robbing the offspring of the care and attention of his parents, severing a relation which is universally cited as the emblem of the relation sustained by the Creator to the human family. And yet, according to the matured judgment of these slave States, this guardianship of the parent over his own children must be abrogated to secure the perpetuity of slavery.

CONG. GLOBE, 38th Cong., 1st Sess. 1439 (1864). Republican Senator Henry Wilson of Massachusetts endorsed the same justification:

[W]hen this amendment to the Constitution shall be consummated . . . the sharp cry of the agonizing hearts of severed families will cease to vex the weary ear of the nation Then the sacred rights of nature, the hallowed family relation of husband and wife, parent and child, will be protected by the guardian spirit of that law which make sacred alike the proud homes and lowly cabins of freedom.

CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864). *See also* CONG. GLOBE, 38th Cong., 2d Sess. 193 (1865) (statement of Senator John A. Kasson) (arguing that abolition would protect "the right of father to his child—the parental relation"); CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866) (statement of Sen. Howard) (including familial rights in the definition of the word "freeman"); CONG. GLOBE, 38th Cong., 1st Sess. 2990 (1864) (Statement of Sen. Ingersoll) (discussing the "right to the endearments and enjoyment of family ties").

The Thirteenth Amendment, by its own terms, is self-enacting and enforceable against the behavior of individuals, local governments, state governments, federal government, and all other institutions subject to the jurisdiction of the United States. U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."). It protects law-abiding, non-combatant civilians from exploitation, confinement, child abduction, and the taking of labor without just compensation. *See* Daniel E. Witte, Comment, *Getting a Grip on National Service: Key Organizational Features and Strategic Characteristics of the National Service Corps (AmeriCorps)*, 1998 BYU L. REV. 741, 784–91 (1998) (citations omitted). The Thirteenth and Fourteenth Amendments reaffirm the principle that some individual liberties sheltered by the "liberty" and substantive "due process" clauses are beyond the legitimate interference of any government, including state government. U.S. CONST. amend. XIII; U.S. CONST. amend. XIV §1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of the law."); *see*

indicated that Indian education institutions should be located in the Northeast, far away from the homelands of most tribes, so that government and administrative officials could visit with greater ease.⁶⁵ This proximity may also have magnified political and economic benefits bestowed upon Pratt's own political constituency.⁶⁶ Privately, he pointed out to military officials that Indian children in boarding schools would serve as useful hostages to ensure that tribal parents would always toe the line.⁶⁷

also U.S. CONST. art. I §9 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”); U.S. CONST. art. IV §2 (“Privileges and Immunities”); U.S. CONST. amend. I (“no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, . . . or the right of the people peaceably to assemble”); U.S. CONST. amend. III (“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”); U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, shall not be violated, and no Warrants shall issue, but upon probable cause, . . . and particularly describing . . . the persons or things to be seized.”); U.S. CONST. amend. V (“liberty”); U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”); U.S. CONST. amend. X (“powers . . . reserved to . . . the people”).

65. BATTLEFIELD, *supra* note 13, at 221. The long distance also presumably curtailed the number of visits from the parents of Indian students.

66. Eventually Pratt's scheme came to be challenged by white politicians representing states in other regions of the country besides the northeast, who began to demand a bigger piece of the “Indian education” revenue stream for their own local white contractors. *Id.* at xi, 291, 307. In addition, the Bureau of Indian Affairs finally prevailed in a bureaucratic turf battle with Pratt and the federal military, arguing that Indian schools should conduct assimilation on the reservations under Bureau supervision rather than off-site under the control of the military. *Id.* at xxv, 33, 266, 293. Captive audiences subjected to coercive government “assistance” programs generate lucrative revenue streams for third parties with the political connections to take advantage of the situation—one reason why increased educational spending is an unlikely social cure.

67. During the early phases of Pratt's initiative, participation by children was voluntary according to parent choice. *Id.* at 197. But as the system entrenched, tactics changed and coercion was used. From the very beginning, it was secretly understood that Indian children in boarding schools would serve as hostages to monitor the rest of the tribes and keep such tribes under control. *Id.* at 202, 227. The concept was well summarized by Pratt's friend, Ino. D. Miles, who wrote a letter fondly recalled by Pratt, as follows:

The [Arapahoe and Cheyenne] children *must* be taken *from* [their families in] the [Indian] camps if we expect them to advance from savage life. . . . Congress may go ahead from year to year and appropriate means to supply the youth *in* [tribal] *camp* and they will still be the same dirty, ignorant, camp Indians; while if it would increase the appropriation just sufficient to clothe and support them *in school* (Industrial schools) and make it available while in attendance at school, either on their reservations or at “Training Schools” similar to the Carlisle School, then we might expect a decided forward movement. . . . The child being in school the parents are much easier managed; are loyal to the Government, to the Agent . . .

Pratt explicitly discussed educating the Indian and Negro together so that they could both be civilized.⁶⁸ He went to New York and New England on several occasions for political and fundraising trips, along with General Samuel Chapman Armstrong and several Black and Indian students to put on display.⁶⁹ Pratt wrote:

All immigrants . . . had a full fair chance to become assimilated with our people and our industries. Why not the Indian? . . . The fitness . . . [the Negro] had gained by the training he was given during slavery . . . made him individual, English speaking, and capable industrially. . . . Both the white man and the red man must learn the possibilities of the usefulness the Indian could gain through seeing it demonstrated.⁷⁰

Pratt's pitch paid off. He secured a location in connection with Hampton Normal and Agricultural Institute, a school for African-Americans.⁷¹ General Sherman ordered that Pratt work with the Secretary of the Interior to gather Indian children for placement at Hampton.⁷²

Pratt then went to Bismarck, Dakota (now North Dakota) to enlist help from Congregationalist Reverend C.L. Hall to obtain

and never dare, or desire, to commit a serious wrong. . . . This may look to you like *compulsory* education. Well if it is, is there any serious objection to such a course? Was not the taking of thirty-three Cheyenne braves and chiefs from this reservation *in chains* in the spring of 1875 compulsory in the superlative degree? Who is there today that would question the charity and justice of that measure? . . .

[B]y having their children in school the parent becomes personally interested in . . . the prosperity of the school. This induces a desire to locate in the vicinity of the agency, and his habits are consequently localized. This effect is still more apparent in the case of those who have children away—at Carlisle and other points in the States. The parents of these children are as completely committed to the general welfare of the whole people of the United States as any other loyal citizen, and by this mixing and blending of common interests they will soon be prepared to enter into and take upon themselves the duties and responsibilities of common citizenship. . . . In the management of the school upon the reservation the service of the police is called into requisition—looking up truants, absentees, etc., and in this way the Indian police force becomes interested in the school and its progress.

Id. at 242–43.

68. *Id.* at 213–14.

69. *Id.* at 214–15.

70. *Id.* at 214.

71. *See id.*

72. *Id.* at 196.

children from three local tribes for the project.⁷³ The children were to be gathered and transported by steamer ship.⁷⁴ Pratt also made use of his Civil War military connections, including former Catholic chaplains he knew and local government Indian agents.⁷⁵ He even used Episcopal Church missionaries.⁷⁶ Despite Indian skepticism that “[t]he white people are all thieves and liars,” Pratt managed to eventually collect his quota of children by persuading selected Indian parents that it was hopeless to resist white railroads, towns, and farms, and that their children should learn to live like whites.⁷⁷ Pratt then used German-immigrant military officers to impose Prussian discipline on the assembled Indian children.⁷⁸

Hampton was, however, only an initial stopgap demonstration project. To launch his vision nationwide, Pratt needed a new flagship institution associated wholly with his paternalistic concept. Pratt’s break came in 1878 when he secured political support for a new school from General Carl Schurz, a German immigrant who fought in the Civil War and subsequently became Secretary of the Interior.⁷⁹ With the help of Indian Commissioner Hayt and General Sherman, Pratt was able to persuade Secretary Schurz to create a prototype Prussian-style military Indian boarding school in Carlisle, Pennsylvania, on the grounds of an old military base.⁸⁰

Pratt recruited a New England schoolteacher who had helped him run the Fort Marion Indian prison.⁸¹ He organized an Episcopal operation to oversee a “delegation” of Indian students to Carlisle under “General Grant’s Peace Policy.”⁸² Pratt consulted with General Sherman about how to administer Carlisle.⁸³ Pratt pioneered the tactic of using compulsory education to coerce mandatory medical examinations of children.⁸⁴ The official “slogan” of Carlisle

73. *Id.* at 197.

74. *Id.* at 198.

75. *Id.* at 198–200.

76. *Id.* at 200, 202.

77. *Id.* at 222. Pratt also told the Indians that the education would result in economic and lifestyle benefits that in many cases never materialized. *See, e.g., id.* at 222–23.

78. *Id.* at 200 n.8.

79. *Id.* at xxi, 215 n.1.

80. *See id.* at 215–16, 219, 288.

81. *Id.* at 230–31.

82. *Id.* at 237.

83. *Id.* at 240.

84. *See id.* at 225–27.

echoed this sentiment: “To civilize the Indian, get him into civilization. To keep him civilized, let him stay.”⁸⁵ Or, as the sentiment was also commonly expressed, “kill the Indian and save the child.”⁸⁶

Carlisle scrupulously utilized the Fort Marion paradigm. Indian students were groomed in a white manner, wore soldier uniforms, participated in mandatory drills, slept in military barracks, ate in a mess hall, and experienced punishments or severe confinements issued by courts-martial made up of their Indian peers.⁸⁷ Students were not permitted to leave Carlisle, and student contact with their tribes and parents was carefully regulated.⁸⁸

Once Carlisle was established, Pratt remained as an active commissioned military officer and school headmaster until his retirement in 1903.⁸⁹ For twenty-five years, Pratt aggressively lobbied for more government money, more political support, and more private donations.⁹⁰ Pratt believed that the Carlisle paradigm could be used across America and perhaps throughout the world⁹¹ on demographic minorities of every kind.⁹² He successfully lobbied

85. *Id.* at 283.

86. Witte, *supra* note 6, at 250 n.218.

87. BATTLEFIELD, *supra* note 13, at 231–32, 234, 237.

88. As might be expected, Indian students frequently attempted to run away from Carlisle and other Indian boarding schools. *Id.* at 308–09. When this occurred, truant officers and law enforcement hunted down the students much like escaped prison inmates and then punished them. *See, e.g.*, Witte, *supra* note 6, at 250 n.218.

89. BATTLEFIELD, *supra* note 13, at 337.

90. *Id.* at xxv–xxvi.

91. During Pratt’s era and afterwards, the United States would pursue its manifest destiny to the Pacific coast, the current Mexican border, Puerto Rico, Cuba, the Philippines, Guam, Hawaii, and Alaska. It appears that Pratt understood the potential application of his Carlisle techniques to native people in other new territories. Unfortunately, variations of the approach advocated by Pratt were also used by the United States on Pacific Islanders, by Canada on indigenous tribes, and by Australia on Aborigines. *See* Witte, *supra* note 64, at 793 n.219 (1998) (citations omitted) (pointing to Canadian and Australian actions); Rohan Sullivan, *Australian Government to Say Sorry to Aborigines*, SALT LAKE TRIB., Jan. 31, 2008, at A3 (describing Australian, Canadian, and United States use of boarding schools and forcible relocation of indigenous minority children into adoptive families).

92. Pratt wrote:

To successfully accomplish the Americanization of the millions of immigrants we invite to membership in our national family, we give them individual welcome to citizenship and through compelling participation in our affairs absorb them. . . . It is self-evident that the greatest glory to government and highest beneficence to the Indian was to be achieved in at once transforming him into a capable, coordinated citizen When the Declaration [of Independence] announced, “We hold these

for the Carlisle blueprint to be replicated in other Indian boarding schools across the United States,⁹³ often using converted military facilities.⁹⁴ He also demonstrated that Carlisle could be used not only for tribal Indians in the United States, but also for Puerto Ricans in the aftermath of the Spanish-American War.⁹⁵ Most importantly, Pratt's model incorporated a paternalistic philosophical premise—which persists to this very day⁹⁶—that defended compulsory government schooling at any cost.

Pratt's tireless public relation efforts with American clergy and public educators culminated in his triumph at the 1899 National Education Convention in Los Angeles. Pratt drafted a set of resolutions that were then sponsored by Dr. Merrill E. Gates and enthusiastically adopted by the entire Convention:

truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness," it meant nothing unless it included the native Indian even more than the foreign immigrant. Inasmuch as all the Indian's former vast game resources had been destroyed by our people, and his free roving life ended through our wresting from him his immense regions, his place and needs were preeminently a righteous burden on us, in which the integrity of enforcing our national principles was being tested. . . . [T]he Indian himself saw the inevitable and desired the change from aboriginal to civilized life . . . to "get on the white man's road[. . .]"

BATTLEFIELD, *supra* note 13, at 268–69. He also noted:

The [Indian and Immigrant] recipients must prove through apprenticeship and productivity in our great Americanizing workshop that they can fit in and become valuable as a very part of the general population. In no other way can they secure these benefits; in no other way can we be released from the expense their inefficiency entails.

Id. at 271.

93. *Id.* at xii.

Between 1879 and 1900 the Bureau of Indian Affairs created twenty-four off-reservation schools roughly modeled after the Carlisle prototype. By 1900 the Indian school system had taken on the shape of an institutional hierarchy. . . . [S]tudents progressed from reservation day schools to reservation boarding schools to Carlisle-style off-reservation schools. By 1900 three quarters of all Indian children were enrolled in boarding school, with approximately a third of this number in off-reservation schools.

Id.

Pratt advocated off-reservation schools for all Indians, but it is important to remember that Carlisle's penological pedagogy heavily influenced the on-reservation Indian schools. *See, e.g.*, Witte, *supra* note 6, at 250 n.218 (eyewitness accounts of students in on-reservation boarding schools, similar in nature to the scheme at Carlisle).

94. *See, e.g.*, BATTLEFIELD, *supra* note 13, at 258.

95. *See generally* Rosa, *supra* note 19.

96. *See infra* Part III.

RESOLVED, that the true object of the Indian schools and of Indian management is to accomplish the release of the Indian from the slavery of tribal life and to establish him in the self-supporting freedom of citizenship to take his place in the life of the nation, and that whatever in our present system hinders the attainment of this object should be changed. . . .

RESOLVED, that the public schools of the United States are fundamentally and supremely the Americanizers of all people within our limits and our duty to the Indian requires that all Indian school effort should be directed toward getting the Indian youth into these schools. . . .

WHEREAS, local prejudice on the part of the whites against the Indians in the vicinity of every tribe and reservation is such as to make attendance of Indian youth in the public schools there impracticable, and WHEREAS there is no prejudice preventing the attendance of Indian youth in public schools from such nonreservation schools as are remote from the tribes or reservations, therefore BE IT RESOLVED that it is the duty of the government to establish industrial schools in our well-populated districts as remote from the tribes as possible, and it is hereby suggested that ten more such schools be tentatively established at once, each with a capacity for carrying 300 at the school, with a distinct understanding that each such school shall carry 300 additional pupils placed out in public schools living in white families where the children shall give service in the home to pay for their keep.⁹⁷

Over the course of Pratt's career, the plan initially presented to Indians and the general public experienced dramatic mission creep as ostensibly "voluntary" school attendance became compulsory.⁹⁸

97. BATTLEFIELD, *supra* note 13, at 292. Carlisle students were compelled to perform one year of involuntary servitude as part of an "outing" rotation into local white homes and local state government schools for whites. Daniel T. Chapman, *The Great White Father's Little Red Indian School*, AM. HERITAGE MAG., Dec. 1970, http://www.americanheritage.com/articles/magazine/ah/1970/1/1970_1_48_print.shtml (last visited Mar. 25, 2008). The modern incarnation of the "outing" concept is called "service learning" and is advanced in connection with the "national service"/AmeriCorps movement. Witte, *supra* note 64, at 743-44, 764 n.112, 773 n.147, 747-74, 787 n.203, 791 n.215, 793 n.219, 805-08.

98. See BATTLEFIELD, *supra* note 13, at 238. Commissioner of Indian Affairs Thomas Jefferson Morgan explained the tactics for removing Indian children:

I would . . . use the Indian police if necessary. I would withhold [. . .] rations and supplies . . . and when every other means was exhausted . . . I would send a troop of

Reservation Indian parents who objected to the federal government curriculum and refused to send their children to government schools were denied government food and supply rations so that they had to choose between starvation and compliance.⁹⁹ If Indian parents actually did successfully request a return of their children, they had to find enough money to pay for the long return trip from Carlisle.¹⁰⁰ If a tribe or faction of a tribe showed solidarity in resisting compulsory education, rations were cut off to the group and the resisting parents were imprisoned for “sedition” or other

United States soldiers, not to seize them, but simply to be present as an expression of the power of the government. Then I would say to these people, “Put your children in school”; and they would do it.

ALVIN M. JOSEPHY, JR., 500 NATIONS: AN ILLUSTRATED HISTORY OF NORTH AMERICAN INDIANS 432 (1994). Once the children were in federal schools and boarding schools, the minors were used as political hostages. Tribes and parents were reluctant to resist federal edicts when their isolated children were vulnerable to abuse and retaliation. *See id.* at 430–32.

99. Many of the American Indian tribes were coerced into dependence upon the federal government for food because white settlers depleted buffalo and other natural sources of sustenance. *See, e.g.*, BATTLEFIELD, *supra* note 13, at 63 n.5. Because Indian parents had no independent resources from which to supply their families with necessities, let alone private schools that complied with the new federal compulsory attendance policies, Indian agents could coerce the attendance of Indian children at schools designated by the agents. *See, e.g.*, JOSEPHY, *supra* note 98, at 432. On Mar. 2, 1895, Congress responded to the escalating human rights abuses of the federal executive branch by passing a “Consent of Parents to Send Child Out of State Act,” which read in part:

That hereafter no Indian child shall be sent from any Indian reservation to a school beyond the State or Territory in which said reservation is situated without the voluntary consent of the father or mother of such child if either of them are living, and if neither of them are living without the voluntary consent of the next of kin of such child. Such consent shall be made before the agent of the reservation, and he shall send to the Commissioner of Indian Affairs his certificate that such consent has been voluntarily given before such child shall be removed from such reservation. And it shall be unlawful for any Indian agent or other employee of the Government to induce, or seek to induce, by withholding rations or by other improper means, the parents or next of kin of any Indian to consent to the removal of any Indian child beyond the limits of any reservation.

Consent of Parents to Send Child Out of State Act, ch. 188, 28 Stat. 906 (1895). Unfortunately, the statute was rarely enforced.

100. BATTLEFIELD, *supra* note 13, at 238.

imagined offenses.¹⁰¹ Even the most resistant tribes eventually succumbed.¹⁰²

Pratt and his allies directly targeted Utah, an annexed region of Mexico that at the time was predominantly populated by demographic minorities such as Native Americans, Mexicans, and members of the Church of Jesus Christ of Latter-day Saints (commonly known as “Mormons”).¹⁰³ He confided to the Secretary of the Interior, “I am most anxious to make a telling break on the Navajoes, and goad on the Presbyterians. The Navajoes furnish the most promising field for educational and industrial training of any Indians we have”¹⁰⁴ In a letter to President Rutherford B. Hayes, Pratt exulted:

[T]he Department contemplates soon adding from the Utes and Navajoes. . . . There a Major General has charge with all this immense staff and corps of instructors to help. The objective there is mostly like that at Carlisle, *the Indian* . . . [c]ivilization out of savagery! Cleanliness out of filth! and is forced to educate the courage of his own instructors to the work, and see that all the interests of his government and the Indian as well are properly protected and served. . . . [Lt. Brown] can be detailed by your order to go after the Ute and Navajoe youth If I could advise

101. For example, the Hopi Tribe in Arizona fiercely resisted compulsory education en masse and attempted to conceal their children. Indian Agents initially attempted persuasion, then cut off government rations in the middle of a freezing winter, and then imprisoned nineteen Hopi men at the Alcatraz military prison for “sedition” from January 3 to August 7, 1895. Wendy Holliday, *Hopi History: The Story of the Alcatraz Prisoners, Part 2*, 1998, <http://www.nps.gov/archive/alcatraz/tours/hopi/hopi-h2.htm>. The Hopi men were treated to a Fort Marion-style experience complete with forced labor involving sawing timber into lumber. *Id.*; see also BRENDA J. CHILD, BOARDING SCHOOL SEASONS: AMERICAN INDIAN FAMILIES 1900–1940, at 13 (1998).

102. With regard to the notoriously uncooperative Seminoles and other Florida Indians who had earlier rebuffed Pratt, Pratt was eventually able to assure the Secretary of Interior: “I [now] find that there is a growing interest which will soon develop into an opportunity to get hold of these people through education of the children.” BATTLEFIELD, *supra* note 13, at 256.

103. The federal political establishment of the day regarded Mormons as uncivilized and a strategic obstacle to desired economic development of the West. Mormons were treated as an uncivilized, un-American, non-Christian, large white tribe that required assimilation in the tradition of Andrew Jackson, William Sherman, and Richard Pratt. Pratt’s sophisticated educational paradigm was adapted for application to Mormon society. The details are too lengthy to discuss here but are set forth by the authors in a separate publication. See generally PAUL T. MERO, VOUCHERS, VOWS, AND VEXATIONS: THE HISTORIC DILEMMA OVER UTAH’S EDUCATION IDENTITY (2007), <http://www.sutherlandinstitute.org/uploads/vouchersvows.pdf>.

104. BATTLEFIELD, *supra* note 13, at 252.

in this matter, I would urge the immediate establishment of fifty more schools like this, and the detail of a hundred officers to manage them. . . . General Sherman himself, four years ago . . . endorsed my course at St. Augustine [Florida, where Pratt incarcerated the Indian POWs in the Fort Marion prison]. This and that are one, only this has grown bigger. Knowing as I do that I am supremely right, it would be wicked to falter¹⁰⁵

Pratt also assured Senator Henry L. Dawes that

If a majority of the Senate and the House concur in the . . . Ute Bill . . . in reference to the education of Indian youth . . . the ‘beginning of the end’ of Indian troubles is reached. Education and industrial training for Indian youth, *for all Indian youth*, will, in a very short period, end the Indian wars¹⁰⁶

In Utah, Pratt’s paradigm would be dutifully carried forward in vintage form until 1984, when the Intermountain Indian School in Brigham City finally closed its doors as a boarding institution for reluctant Utes, Navajos, and Piutes.¹⁰⁷ At the end of his career, on June 30, 1904, Pratt was relieved of command of Carlisle and he retired.¹⁰⁸ On the historic marker now memorializing a Native American student cemetery at the old Carlisle school site, the

105. *Id.* at 251.

106. *Id.* at 252; *see also id.* at 283 (“I would . . . demand that [the Bureau of Indian Affairs] Moses its [Navajo] charges into the promised land of our American citizenship.”).

107. Carma Wadley, *War & Remembrance: Brigham Festival Will Recall Wartime Activities*, DESERET MORNING NEWS, June 10, 2005, at C1, C2 (noting, among other things, that Intermountain Indian School was a converted military prisoner of war facility for World War II prisoners held in the United States), *available at* <http://deseretnews.com/dn/view/0,1249,600140239,00.html>; *see also*, Nat’l Indian Youth Council Intermountain Indian Sch. Chapter v. Bruce, 485 F.2d 97, 99–100 (10th Cir. 1973) (summarily affirming dismissal of Native American class action lawsuit on the ground that a litany of alleged civil rights abuses against the students constituted “discretionary acts” of a federal agency subject to the “political question” doctrine); Lehman L. Brightman, *Intermountain Indian School: A Case Study of Educational Failure*, 2 NEW SCH. EDUC. J. 56, 62–68 (1973) (describing conditions at Intermountain Indian School to be in total disregard of educational, physical, and psychological needs of Native Americans, including filthy dormitory conditions, overcrowding, constant surveillance, inadequate food, alcohol problems with half of the student body, a complete lack of homework, a lack of books or access to library materials, institutional discrimination against Indian employees, use of handcuffs, shaving heads of students as punishment, drugging of students with Thorazine, physical beatings, religious and cultural persecution, warrantless searches of student luggage and postal items, prison incarceration of uncooperative students, and attempted suicide by students).

108. BATTLEFIELD, *supra* note 13, at 337.

Pennsylvania Historical and Museum Commission of 2003 printed these words:

This school was the model for a nation-wide system of boarding schools intended to assimilate American Indians into mainstream culture. Over 10,000 indigenous children attended the school between 1879 and 1918. Despite idealistic beginnings, the school left a mixed and lasting legacy, creating opportunity for some students and conflicted identities for others. In this cemetery are 186 graves of students who died while at Carlisle.¹⁰⁹

The mixed language referred to by the language on the plaque is also temporal in nature, with the passage of time revealing more of the program's damaging effects to the students who participated and to America's moral compass generally.

As one who attained the rarified rank of General in the United States Army and was invited to speak at numerous prestigious social gatherings, Pratt was a well-respected government servant who necessarily had to satisfy the political standards of his day. He was considered to be a Christian man, a man possessing high moral integrity, and a man who believed deeply in the Americanizing value of the government public school system. He believed "that the public schools of the United States are fundamentally and supremely the Americanizers of all people,"¹¹⁰ and he utilized a historical period of ethnic, racial, and religious turmoil to gain power.

The modern review of General Pratt's legacy conflicts with the notions of his day. At worst, General Pratt was a Machiavellian man with vile streaks of opportunism and sadism running through his character. At best, General Pratt's expressed intentions can be accepted at face value, making him a sincere, well-meaning, if misguided, individual who genuinely intended to serve as a compassionate and beneficent American patriot. The second possibility is at least as frightening as the first.¹¹¹ Regardless of the actual subjective motives of Pratt or his paternalistic political

109. ExplorePAHistory.com, Marker Details: Carlisle Industrial Indian School, <http://www.explorepahistory.com/hmarker.php?markerId=769> (providing photograph of historical marker, along with explanation) (last visited Mar. 25, 2008).

110. BATTLEFIELD, *supra* note 13, at 292.

111. "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479 (1928).

constituency, however, we should never forget that Pratt's crusade was a paternalistic terror in the lives of American minority communities. Pratt ripped families apart in the name of the common good, filling his autobiography with heart-wrenching story after heart-wrenching story of Indian families bereaved and broken-hearted as a result of his cultural cleansing.¹¹²

Let us remember, Pratt's image-conscious *autobiography* is filled with these stories—he saw nothing wrong and everything right in his paternalism. For Pratt, his higher calling and his noble cause was to civilize savages—not because he hated them, but precisely because he professed to be expressing his love for them.

III. PATERNALISM IN MODERN EDUCATION: PRATT'S LEGACY IN ITS CONTEMPORARY INCARNATION

Historical trends are typically evolutionary, with the innovations of each era accruing upon those prior in a chronological succession. Military science is gradually refined by adopting innovations from past wars, such as the anti-insurgent tactics developed by Pratt and others during the Civil War, Indian Wars, and the Spanish-American War. Political science is influenced by political campaigns and lobbying tactics developed by prior political figures, such as the innovative techniques used by Pratt to raise funds and political support for his cause. Educational history is no different. Modern management of the masses in public education was profoundly shaped by the paradigms pioneered by Pratt at Fort Marion and Carlisle. In fact, a full forensic discussion of the myriad institutional and educational changes wrought by Pratt is well beyond the scope of this Article.¹¹³

112. There were also, undoubtedly, some Indian families and students who accepted and appreciated Pratt's vision for them. It should be noted that under a scheme of educational choice, demographic minority families always remain free to *voluntarily* enroll in military academies, participate in placement programs, or assimilate into new cultural, religious, and racial identities. The issue is voluntary, informed, family-based choice, not the outcomes of choice.

113. One of the authors, Daniel E. Witte, wrote a collection of papers from 1994–98 for his graduate degree project designed to develop and illustrate certain techniques of forensic organizational behavior (the bulk of which are still being prepared for publication). Specifically, Witte asserted that organizational templates from various mediating institutions could be identified through organizational behavior research methodology and then compared to other mediating institutions in order to search for possible correlations. If template correlations were identified, intentional copying or other forms of influential causality would

The struggle to wean Utah's government school system from Richard Henry Pratt's vision of educational conformity and establish genuine educational and cultural pluralism in its place has once again grabbed the spotlight in conjunction with the Utah voucher controversy. The public is being told, once more, that educational choice is un-American and must be rejected in order to maintain a paternalistic system of arbitrarily-imposed cultural conformity. Thus, the *Deseret Morning News* ran an opinion from Don Gale entitled, *Utah's Proposed Voucher Law Subverts our American Values*, wherein Mr. Gale argues that "[t]he genius of America is not that our people are different but that our people are more like all other people than

be a possibility and could be confirmed by instigating other techniques of verification research. *E.g.*, Witte, *supra* note 64, at 747 n.19.

Witte focused most prominently on verification research that borrowed from paradigms used by historical legal researchers (especially in the field of civil rights) and by litigators seeking to demonstrate copyright infringement through a showing of access and "striking similarity." For example, Witte used case law and treaty law to trace certain educational ideas and common institutional templates back to various common historical origins. By comparing the lineage of sequential legal developments with other historical evidence concerning social and economic networks, Witte could identify latent patterns of access, striking similarity, and ultimately, causation. One outcome of Witte's research indicated that an obscure and initially unfamiliar army officer, Richard Henry Pratt, had exerted an enormous practical influence upon the contours of modern public education and many other institutions.

The forensic concepts above are not unfamiliar to those who study art history. In many cases, two historical paintings share so many similarities that one painting is an obvious copy or loose imitation of the other. Moreover, some artists like Leonardo da Vinci introduced transcendent innovations that noticeably changed the style, technique, and understanding of virtually all subsequent European artists. A profound influence is often exercised without any conscious knowledge, or direct contact, on the part of da Vinci or subsequent artists. *See generally* GERALD F. BROMMER, *DISCOVERING ART HISTORY* 76, 246, 526 (2d ed. 1988); BERNARD S. MYERS, *UNDERSTANDING THE ARTS* 10-11, 159-60, 288-89, 309, 345-46, 355-56 (1963).

Templates have value from both a predictive and forensic standpoint. One of the basic premises of the organizational behavior discipline is that organizations can be engineered or reengineered by intervening with design templates and techniques known to reliably achieve desired corollary effects. *See, e.g.*, NED HERRMAN, *THE WHOLE BRAIN BUSINESS BOOK* 178 (1996) (quoting the well-known Paul Gustavson maxim that "[o]rganizations are perfectly designed for the results they achieve."). In other words, a design template can be used to replicate effects achieved elsewhere, subject to independent variables acting upon the human subjects involved (such as the religion, culture, social cohesion, family cohesion, age, education level, competing external institutions, competing environmental factors, and external information sources). Subject to independent variables that can hamper speed or quality control, Pratt's innovations can be used to gradually cleanse human populations of *any* demographic background.

Pratt's influence upon American public education and other institutions was transcendent. In this short Article, it is impossible to detail all the direct, indirect, and latent impacts he exerted upon modern society and mass education.

any nation's people have ever been."¹¹⁴ In a most revealing statement (that would likely incur considerable skepticism from the man whose name Brigham Young University bears¹¹⁵), Mr. Gale also dismisses educational choice advocates by stating, "You cannot develop goodness . . . if you separate yourself from others."¹¹⁶

Even at an institution of higher learning such as Brigham Young University, where the founding history of its people was written in the blood and persecution of gross paternalism in the face of federal suppression, the historical and philosophical implications of Pratt's assimilation ideology are too often ignored or whitewashed. For example, Winn Egan, chairman of Brigham Young University's Department of Teacher Education, spoke glowingly of the Americanizing role of public education at a university forum in 2002. He said, "Public education is a moral enterprise. Learning that is not accompanied by the development of character, particularly democratic character, the capacity to cooperate with others different from ourselves in pursuing the public good, is incomplete, empty, and self-centered." Egan concludes, "At the heart of our democracy is the public school system."¹¹⁷

Then, in an eerie echo of Pratt's pulpit-pounding expositions,¹¹⁸ Egan praises public schooling as "providing young people with a profound hope in the future; with the trust and skills necessary to join with others, divergently different from themselves, in supporting our democracy; and with the dispositions necessary to become one

114. Don Gale, Editorial, *Utah's Proposed Voucher Law Subverts Our American Values*, DESERET MORNING NEWS, Oct. 20, 2007, at A11.

115. See Brigham Young, *Discourse by President Brigham Young* (Apr. 6, 1877), in 18 JOURNAL OF DISCOURSES 353, 357 (1967) ("I am opposed to free education as much as I am opposed to taking away property from one man and giving it to another . . ."); *A Mormon Tramp*, SALT LAKE TRIB., Jan. 23, 1877, at 2 (noting that Brigham Young declared he was "opposed to free schools, . . . and to all legislation in favor of free schools"); see also Brigham Young, *Discourse by President Brigham Young* (Apr. 7, 1873), in 16 JOURNAL OF DISCOURSES 15, 19–20 (1967) (counseling Mormon women to avoid "free schools" and educate their children themselves).

116. Gale, *supra* note 114.

117. M. Winston Egan, Chair, Dep't of Teacher Educ., Brigham Young University Forum Speech: The Public Schools, Social Capital, and Our Democracy (July 23, 2002).

118. Remember that Pratt argued for the same virtues in support of public education. It was his professed goal to develop democratic character, to help minorities learn to cooperate with those different from themselves, and a lack of trust in the individual family's ability to perform this function in the manner they best saw fit that led to initiation of the Carlisle school. Again, through the lens of history we should be wary to accept an argument based on a paternalistic view of assimilating those that are different in our society.

from many—*e pluribus unum*.”¹¹⁹ Egan neglects to mention that this stock tenet of the educational establishment traces back directly to Pratt’s *Battlefield & Classroom* (and to similar offensive concepts from the same era perpetuated by Pratt’s ideological allies). Egan makes no mention of Pratt’s historical exploits, nor does he acknowledge that forcible *e pluribus unum* assimilation has been pursued at considerable cost.¹²⁰ Egan offers no hint that Native Americans and alternative educators may have a rational competing intellectual perspective, implying instead that those not on the government education bandwagon are incomplete, empty, self-centered, anti-democratic, and amoral.

Distortions of this kind in the academic community lead to real-life consequences in the courtroom. A vivid reminder of this recently occurred on February 28, 2008, when a California¹²¹ Court of

119. Egan, *supra* note 117.

120. Indeed, all students considering education as a career should read Pratt’s seminal autobiography. Teachers and education graduates need to understand that the history of public education derives from Pratt’s legacy and was not characterized by spontaneous hordes of stary-eyed demographic minority families voluntarily knocking on the public schoolhouse door.

Every would-be teacher, particularly any teacher with ties to Utah or Mormon cultural heritage, needs to understand the historical contours of the controversies surrounding their future profession.

121. It should be remembered that Japanese-Americans were interned at Topaz, Utah, during World War II because of California’s effort to impose the Pratt paradigm on coastal Asian populations. California Attorney General Earl Warren campaigned for the internment because “[the Californians] brought the Japanese in . . . for farm labor” but the immigrants “were too smart, and they started owning the farms.” G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 68 (1982). But Warren’s cultural suppression effort was legally impeded by *Farrington v. Tokushige*, 273 U.S. 284 (1927), a United States Supreme Court case protecting educational choice for Asian Americans.

Over the objections of J. Edgar Hoover and Senator Robert Taft, Attorney General Earl Warren and President Franklin D. Roosevelt utilized wartime fear to persuade the United States Supreme Court that the internment scheme was needed to dismantle the Japanese-Americans’ private “Japanese language schools,” one of numerous considerations the Court characterized as “a source[] of irritation and . . . isolation” that prevented the “social intercourse” of Japanese-Americans and “prevented their assimilation as an integral part of the white population.” *Hirabayashi v. United States*, 320 U.S. 81, 96–98 (1943); Witte, *supra* note 64, at 741 n.215.

The Japanese-Americans were interned in militarized camps placed on or near existing Indian Reservations, then subjected to a coercive program of compulsory schooling and forced labor that was administered jointly by the War Relocation Authority and the Bureau of Indian Affairs. PAUL BAILEY, CITY IN THE SUN 62, 79–80, 104, 107, 123 (1971); ALLAN R. BOSWORTH, AMERICA’S CONCENTRATION CAMPS 137, 145, 178–79 (1967). While in captivity, the Japanese-American community noticed increased rates of unwed pregnancy, alcohol abuse, and family disintegration. BAILEY, *supra*, at 172, 197.

Appeal held that “parents do not have a constitutional right to home school their children” and parents who utilize home education or distance-learning religious private schools may be “found guilty of [a criminal] infraction,” fined, ordered to complete parent education, subjected to involuntary “counseling,” and deprived of legal parental control over their children.¹²² In his *Rachel L.* opinion, Justice H. Walter Croskey borrowed from the Pratt playbook by asserting that home-educated children required firm government training to assure “knowledge and intelligence” and “good citizenship, patriotism, and loyalty to the state.”¹²³ Justice Croskey primarily relied upon questionable state court decisions from 1929, 1953, and 1961¹²⁴ to conclude that the “sincerely held religious beliefs” of Evangelical Christians were irrelevant because “the educational program of the State of California was designed to promote the general welfare of all the people and was not designed to accommodate the personal ideas of any individual in the field of education.”¹²⁵

With all due personal respect to Mr. Gale, Professor Egan, Justice Croskey, and others who hold to similar views, such sentiments are microcosms of a romanticized paternalism held by a historical figure that most today would characterize as arrogant and

In a reprise of General Richard Henry Pratt’s bureaucratic disputes with the Bureau of Indian Affairs, Dillon Myer of the War Relocation Authority lobbied for forced dispersal of the Japanese-Americans across the entire United States, while John Collier of the Indian Bureau advocated continued concentration of the population in isolated communities resembling Indian Reservations. *Id.* at 122–23 (1971); BOSWORTH, *supra*, at 163, 207, 211. Although Asian alternative education has never fully recovered from the historic pressure to disband, Japanese-Americans were fortunate to avoid the permanent reservations, permanent relocations, and permanent federal government education that applied to Native Americans. After World War II, some of the internees decided to take up permanent residence in Utah rather than returning to the Pacific Coast.

122. See *In re Rachel L.*, No. B192878, 2008 Cal. App. LEXIS 292, at *1–2, *14 (Cal. Ct. App. Feb. 28, 2008), *vacated* No. B192878 (Cal. Ct. App. Mar. 25, 2008) (order granting rehearing).

123. *Id.* at *4 (citations omitted).

124. *Id.* at *5–7, *9.

125. See *id.* at *22, *13–14 (citations omitted); see also *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1205–07 (9th Cir. 2005) (positing that parents in public schools have no right to dictate curriculum because they are always free to use home education or private school).

Responding to the public outcry, Governor Arnold Schwarzenegger called the *Rachel L.* decision “outrageous” and pledged to take any action that might be needed to protect parents’ “right to decide what’s best for their children.” Press Release, Governor Arnold Schwarzenegger, Gov. Schwarzenegger Issues Statement Regarding Court of Appeals Home Schooling Ruling (Mar. 7, 2008), <http://gov.ca.gov/press-release/8951>; see also Bob Egelko & Jill Tucker, *Homeschoolers Suffer Setback*, S.F. CHRON., Mar. 7, 2008, at A1.

even delusional. Many good citizens have been persuaded to violate the fundamental liberty interests of others, time and again, to defend the perceived honor of a coercive, restrictive, and often brutal educational philosophy.¹²⁶ People of good conscience should not allow the trappings of faith, pluralism, Biblical belief,¹²⁷ and patriotism to mask abusive ventures that dramatically undermine those very values. Americans do share a profound common heritage that binds us together, but that commonality is our mutual belief in

126. It would be comforting for some to imagine that Pratt's coercive tactics ended with his retirement in 1903 or were confined to enforcements against Native Americans. In truth, compulsory attendance and compulsory education continues to be enforced against a wide range of individuals at the point of a gun. Penalties imposed upon school choice advocates in the recent past have included imprisonment, deprivation of child custody, and even death. *See, e.g.*, *Jernigan v. State*, 412 So.2d 1242, 1246–47 (Ala. Crim. App. 1982) (involving the criminal conviction of two Catholic parents who were not in compliance with a compulsory attendance statute); *State of Iowa v. Bear*, 452 N.W.2d 430, 431–32 (Iowa 1990) (describing and resolving an armed standoff between law enforcement officers and a Native American mother who objected to the school attendance policy applied to her son); *Singer v. Wadman*, 595 F. Supp. 188 (D. Utah 1982), *aff'd*, 745 F.2d 606 (10th Cir. 1984); DAVID FLEISHER & DAVID M. FREEDMAN, *DEATH OF AN AMERICAN: THE KILLING OF JOHN SINGER* (1983) (describing the fatal shooting of a man by Utah law enforcement officials seeking to enforce compulsory attendance law against home educator); Witte, *supra* note 64, at 776 n.162 (quoting *Mohawks Take Over School*, DAILY HERALD (Provo, Utah), Sept. 5, 1996, at A4) (describing how Mohawk Indians took over a school in upstate New York and sent the teachers home because the Indians needed more “control over [their] children’s education”); Daniel E. Witte, *Road to Wisconsin v. Yoder*, <http://www.quaqua.org/mennonites.htm> (outlining information gained in interview from *Yoder* attorney about abuses committed against Mennonites until the early 1970s, including criminal convictions, fines, and abrogation of child custody).

127. To garner political support for his educational scheme, Pratt routinely represented to the public that his approach was consistent with biblical and religious precepts. *E.g.*, *BATTLEFIELD*, *supra* note 13, at xxiii, 335 (describing how Pratt, a non-Baptist, told the New York World Convention of the Baptist Church, “In Indian civilization I am a Baptist, because I believe in immersing the Indians in our civilization and when we get them under holding them there until they are thoroughly soaked”); *id.* at 272 (showing that Pratt identified the Massachusetts Puritan tradition of law, religion, and education as the philosophical inspiration for his own assimilation campaign).

But a contrary interpretation is at least as plausible. The United States Constitution Parental Liberty Doctrine traces back to the English Common law tradition in favor of parental liberty, which tradition was in turn influenced by biblical precepts in favor of parental autonomy. Witte, *supra* note 6, at 190–93; *see also* Daniel E. Witte, *Evolution and Dissemination of the Parental Liberty Doctrine*, <http://www.quaqua.org/commonlaw.htm> (last viewed April 2, 2008); *Deuteronomy* 4:10, 5:16, 6:7; *1 Kings* 3:16–28; *Proverbs* 1:8, 29:15, 22:6; *Daniel* 1:1–8; 3:9–22; 6:6–17; *Malachi* 4:6.

“liberty”¹²⁸ and other related interests protected by the United States Constitution.

The United States Supreme Court has repeatedly and emphatically rejected Platonic assimilation and child rearing, as invoked by Southern slave masters, Pratt, and well-intentioned modern apologists for the educational status quo. In the early part of the twentieth century, Oregon passed a law backed by the Ku Klux Klan that required all children to attend government schools.¹²⁹ Not long after its passage, the Supreme Court ruled in *Pierce v. Society of Sisters* that “[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state. . . .”¹³⁰ Unfortunately, many interest groups continue to defy *Pierce* and seek creative indirect ways to accomplish in practice what the case holding forbade as a matter of law.¹³¹

The Court more recently reiterated this liberty interest in *Troxel v. Granville*, with a majority (a plurality of Justices O’Connor, Rehnquist, Ginsburg, and Breyer, along with a concurring Justice Thomas) describing the interest as “fundamental.”¹³² In Utah, this

128. U.S. CONST. amend. XIV, § 1 (“No State shall . . . deprive any person of . . . liberty, . . . without due process of the law.”); *see also* U.S. CONST. amend. V (“liberty”).

129. *See generally* David B. Tyack, *The Perils of Pluralism: The Background of the Pierce Case*, 74 AM. HIST. REV. 74 (1968) (describing the Oregon mandatory education law passed at the behest of the Ku Klux Klan and the factual background of the *Pierce* decision).

130. *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925).

131. Recall that *Pierce* was the public educators’ attempt to categorically outlaw all forms of non-government education through state statute. *Id.* at 530–31. Public educators in many jurisdictions openly defied *Pierce* until the United States Supreme Court reaffirmed the case in *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). (The leading precedent for that defiance was *State v. Hoyt*, 146 A. 170 (N.H. 1929), as discussed in Daniel E. Witte, *State v. Hoyt*, 146 A. 170 (N.H. 1929), <http://www.quaqu.org/hoyt.htm>.) But creative use of tax law and economic barriers can serve to preclude educational choice through means other than state criminal statutes, and it is primarily the extra-legal “indirect” barriers that tax credits and vouchers threaten to dislodge.

132. *Troxel v. Granville*, 530 U.S. 57, 65–66, 80 (2000). As *Troxel* noted,

The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923), we held that the “liberty” protected by the Due Process Clause includes the right of parents to “establish a home and bring up children” and “to control the education of their own.” Two years later, in *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925), we again held that the “liberty of parents and guardians” includes the right “to direct the upbringing and education of

same doctrine of “fundamental” parental liberty was upheld in a much earlier custody case, *In re J.P.*, written by Justice Dallin H. Oaks.¹³³ In contrast to Professor Egan’s view that democracy is based upon a homogeneity of “disposition” (and by extension, eradication of universal educational freedom), Justice Oaks wrote:

[F]amily autonomy helps to assure the diversity characteristic of a free society. There is no surer way to preserve pluralism than to allow parents maximum latitude in rearing their own children. Much of the rich variety in American culture has been transmitted from generation to generation by determined parents who were acting against the best interests of their children, as defined by official dogma. Conversely, there is no surer way to threaten pluralism than to terminate the rights of parents who contradict officially approved values imposed by reformers empowered to determine what is in the “best interest” of someone else’s child.¹³⁴

Parental liberty is a “fundamental” right protected by strict scrutiny under the United States Constitution, the Utah Constitution, and Utah statutes.¹³⁵ Compliance is not

children under their control” We returned to the subject in *Prince v. Massachusetts* and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children

. . . . In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.

Id. (citation to *Prince* omitted).

A “fundamental” right is a constitutional law term of art. “Classifications based on race or . . . affecting fundamental rights are given the most exacting scrutiny.” *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (citations omitted). Put another way, “A measure which is found to adversely affect a ‘fundamental right’ will be subject to the strict scrutiny test.” *In re Valenti*, 224 Cal. Rptr. 10, 12 (Cal. Ct. App. 1986) (citing *Sail’er Inn, Inc. v. Kirby*, 485 P.2d 529 (Cal. 1971) (en banc)).

133. *In re J.P.*, 648 P.2d 1364, 1372 (Utah 1982).

134. *Id.* at 1376.

135. UTAH CODE ANN. § 62A-4a-201(1)(a-c) (2007) (“Under both the United States Constitution and the constitution of this state, a parent possesses a fundamental liberty interest in the care, custody, and management of the parent’s children.”); *Troxel*, 530 U.S. at 65–66, 80; *Doe v. Heck*, 327 F.3d 492, 517–19 (7th Cir. 2003) (noting that *Troxel* requires fundamental rights to be protected by strict scrutiny or at least “heightened” scrutiny); *Doe v. Doe*, 172 P.3d 1067, 1077–79 (Haw. 2007) (combining Justice Thomas’ concurring *Troxel* opinion with the four-justice plurality opinion to recognize that a parent’s right to direct the upbringing of a child is “fundamental,” and “infringement of [the parent’s] fundamental right to direct the upbringing of [a child] triggers a strict scrutiny analysis, requiring that the statute be narrowly tailored to further a compelling governmental interest,” and therefore the Hawaii

optional.¹³⁶ Moreover, sound public policy does not search for the minimum constitutional standard of civil liberty, but instead seeks innovative ways to affirmatively empower the family institution as the main engine of economic, educational, and civic life. Parents—not federal, state, local, or tribal government—should be afforded maximum de facto latitude in directing the upbringing of children.

On the flip side of the coin, vouchers or tax credits are clearly constitutional if actually enacted. Justice Clarence Thomas put it well in his concurrence with the landmark majority opinion of the United States Supreme Court that upheld the constitutionality of school vouchers, *Zelman v. Simmons-Harris*:

Frederick Douglass once said that “education . . . means emancipation. It means light and liberty. It means the uplifting of the soul of man into the glorious light of truth, the light by which men can only be made free.” Today many of our inner-city public schools deny emancipation to urban minority students . . . [, and] urban children have been forced into a system that continually fails them

. . . .

Although one of the purposes of public schools was to promote democracy and a more egalitarian culture, failing urban public schools disproportionately affect minority children most in need of educational opportunity. At the time of Reconstruction, blacks considered public education “a matter of personal liberation and a necessary function of a free society.” Today, however, the promise of public school education has failed poor inner-city blacks While the romanticized ideal of universal public education resonates with the cognoscenti who oppose vouchers, poor urban families just want the best education for their children¹³⁷

statute unconstitutionally interfered with parental autonomy); *In re D.W.*, 827 N.E.2d 466, 481 (Ill. 2005) (noting that *Troxel* identified the rights of parents in their children’s upbringing as a fundamental right protected by strict scrutiny); *In re J.P.*, 648 P.2d at 1372–74 (“For example, in *Santosky v. Kramer*, 455 U.S. 745 (1982), the majority refers to the ‘fundamental liberty interest of natural parents in the care, custody, and management of their child’ The Court was unanimous on this point.”).

136. Indeed, just as federal and state judicial nominees are routinely asked whether they acknowledge a constitutional right of privacy, such nominees should also be asked whether they will respect the constitutional right of a parent to direct the upbringing of a child.

137. *Zelman v. Simmons-Harris*, 536 U.S. 639, 676, 681–82 (2002) (Thomas, J., concurring) (quoting Frederick Douglass, *The Blessings of Liberty and Education: An Address*

Utah's educational choice renaissance, which as a legal and political movement encompasses far more than the new school voucher law, clearly runs contrary to the "cognoscenti who oppose vouchers."¹³⁸ But it runs true to the pluralistic American value of self-determination, of the sort of freedom, hope, and opportunity that have made America great.

There is no Establishment Clause difference or government-funded distinction between paying for a student whose parents have chosen to have that student attend a private school and paying for a student whose parents have chosen to have that student attend a public school—both are subsidized, both are paid for, partially, with tax dollars.¹³⁹ Conversely, when the constitutionally-protected liberty to utilize home or private school is effectively denied by economic coercion that has arisen due to the continuing absence of vouchers or tax credits, an ongoing affront to the principles of the Reconstruction Amendments continues unabated.¹⁴⁰

Delivered in Manassas, Virginia (Sept. 3, 1894), in 5 THE FREDERICK DOUGLASS PAPERS 623 (J. Blasingame & J. McKivigan eds., 1992)). The current government education system was expressly designed to *deconstruct* minority cultures, *maintain* current social stratification and power structures, and *redistribute* wealth away from the lower and middle economic classes to enrich the already rich.

138. The authors support educational choice and acknowledge that there are many legislative schemes designed to bring it about. Vouchers of various kinds are one option; tax credits or tax deductions are perhaps even more ideal because of the reduced danger of government monitoring, pre-conditions, and interference.

139. Daniel E. Witte, *Nothing in U.S. or Utah Constitutions Prohibits Vouchers*, SALT LAKE TRIB., Sept. 29, 2007, at O1, O4 (explaining application of Establishment Clause and similar state constitutional provisions to vouchers).

140. Demographic minorities and the economically disadvantaged typically lack the financial means or the political clout to access the education they would prefer. When the compulsory attendance laws combine the threat of criminal prosecution for truancy with the imposition of compulsory taxation, the resulting economic coercion effectively nullifies the ability of such populations to exercise their constitutional rights.

Coercion from the denial of government Indian rations has now been supplanted by coercion from the double assessment for would-be alternative educators created by allocation of all education tax revenues to government schooling without any allowance for vouchers or tax credits. Families of modest means cannot choose to forgo a governmental education service they have already been forced to fund out-of-pocket. See, e.g., MERO, *supra* note 103, at 17 (citation omitted). Congregational Reverend J.B. Thrall, as part of the October 1889 *Ninth Annual Report of the New West Education Commission* in Chicago, Illinois, exults that

"the Mormon Church will be forced, like the Catholic, to establish parochial schools for their own children in order to keep their integrity as a sect Mormons who now boycott [the "Gentile"-controlled public schools promoting "broad Christian and national ideas"] or send to parochial school, will gradually weary of paying double school money [taxes and tuition], and will send their children to the free

IV. CONCLUSION

In conclusion, we must return to our opening observation: thirty-seven percent of Hispanic and African-American public school students in Utah do not graduate with a high school diploma.¹⁴¹ West Junior High in Fort Duchesne, one of the few Utah schools with predominantly American Indian enrollment, has failed to meet very modest minimum No Child Left Behind standards for seven straight years and has been identified as the first mandatory NCLB closure.¹⁴² Granite District, which encompasses perhaps the most demographically diverse area of Utah (West Valley and South Salt Lake),¹⁴³ has used illegal “averaging” and statistical manipulation to ensure that accurate performance information is not available to voters.¹⁴⁴ The historical record demonstrates that federal government and state government are both incapable of adequately serving demographic minority students.

Pratt’s legacy of stifling paternalism prevents reforms from addressing, let alone benefiting, struggling Utah students. The only real solution is to put control of minority children in the hands of minority parents, and then empower minority families to directly decide how their own allocated government revenues will be used.¹⁴⁵

public schools [resulting in] an immense deflection from Mormon political adherence—an apostasy [forcing Mormonism] to lie down by the lion like a lamb.” *Id.* at 16–17.

141. *See supra* note 2 and accompanying text.

142. Lyon, *supra* note 5; Whiting, *supra* note 5. In addition to tax credits or vouchers, federal and state governments should ensure that Native Americans are afforded an option to implement geographically-proximate Thomas Jefferson Charter Schools, run in accordance with the Jeffersonian parent-governance model. *See* MERO, *supra* note 103, at 32–34. Only direct control of children and education revenue assets by interested parents can prevent profound abuse by government agencies. *Cf., e.g.,* Mary C. Jalonick, *Judge: Delayed Accounting of Indian Trust Unreasonable*, SALT LAKE TRIB., Jan. 31, 2008, at A3 (describing a recent federal judge ruling, which held that the U.S. Department of Interior had breached its fiduciary duty by mismanaging over \$100 billion in Indian trust fund royalties accrued from 1887 onward, and that the Department is incapable of accounting for the funds).

143. *See* Granite School District Precinct Map, http://www.graniteschools.org/C15/Boundary%20Maps/Document%20Library/District_Precincts.pdf (official District map); U.S. CENSUS BUREAU, *supra* note 5 (providing the geographic distribution of Utah’s demographic minority populations according to the most recent census).

144. *E.g., Utah Schools Warned, supra* note 5; *Ed Board, supra* note 5.

145. The United States’ failure to take this approach has greatly exacerbated historical racial, ethnic, cultural, political, and religious tensions. The emotional association engendered by Pratt-style compulsion has also fed into an incredibly destructive (and inaccurate) perception by many alienated minority youth that all forms of education necessarily entail

The new school voucher law is about beginning to remedy an ongoing civil rights problem with deep historical roots.¹⁴⁶

The real “school choice” is about freedom. It is about letting go of old racial, religious, and ethnic hatreds;¹⁴⁷ embracing transparency;¹⁴⁸ abandoning coercive school-based social engineering of every kind; relinquishing a failed ideology;¹⁴⁹ and ultimately

subjugation or exclusively “white” behavior. Effective education depends upon the voluntary initiative of students and their families.

146. It also should be noted that legal assaults on civil rights tend to begin first with the targeting of unpopular or politically weak minority groups, often surreptitiously or under the pretext of some emergency. Once a legal precedent is achieved with the minority victim as a foil, the precedent is then expanded to the general population.

For example, religious liberty has been attacked in the same way that parental liberty was attacked: by starting with the Indians. In *Employment Division v. Smith*, 494 U.S. 872 (1990), opponents of strict scrutiny protection for First Amendment free exercise achieved a victory by carefully selecting an anomalous fact pattern involving Indian use of peyote. It is fitting that when the Church of Jesus Christ of Latter-day Saints subsequently took the rare step of joining a political coalition to expressly denounce and statutorily overturn the Supreme Court decision, the author of *In re J.P.*, Dallin H. Oaks, was chosen as the point man. See *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary*, 102d Cong., 2d Sess., 30–31 (1993) (statement of Dallin H. Oaks, Quorum of the Twelve Apostles of the Church of Jesus Christ of Latter-day Saints).

147. Many contemporary opponents of school choice do not harbor racial, religious, or ethnic hatred, but merely facilitate the ongoing operation of an oppressive system originally designed by people who did harbor such views. Unfortunately, a compulsory system structurally designed to keep demographic minorities and the poor “in their place” cannot afford those same disadvantaged populations the ladder of opportunity and genuine self-empowerment needed to reverse the ongoing damage.

148. A pedagogical approach focused on engineering social norms is not necessarily conducive to optimal academic performance. Transparency is an obstacle to coercive, artificial transformation.

149. As once noted by United States Supreme Court Justice Robert Jackson, a home-educated man who presided over the German war-crimes tribunal held after World War II:

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find

removing American classrooms from America's battlefield. It is about America finding its way to a new civic and intellectual enlightenment. It is about a goal that people in Utah and around the world will continue to pursue, regardless of persecution, economic barriers, or temporary political setbacks.

This debate today is about giving hope and freedom to all students, especially those who struggle under the legacy of past civil rights abuses. Indeed, from Pratt down to the present time, that is really what the educational choice movement has always been about.

themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.
W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 640-41 (1943).