

United States Supreme Court. The issue occupies a considerable part of the transcript of the oral arguments before the Court. Justice Rutledge, in his dissenting opinion in *Everson* gave recognition to the specific religious element in the *Pierce* decision.¹⁵⁸

The true significance of *Pierce* was never stated in the Department Memorandum. *Pierce* not only upholds the liberty of parent and child freely to choose for the education of the latter a church-related school; it also denies a power in the state to monopolize education:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.¹⁵⁹

It is not, of course, intended here to suggest that the economic compulsion which would be visited upon the Catholic parent and child by massive expenditures for public schools only would be legally comparable to a compulsory public education scheme such as was employed in Oregon. It is important to point out, however, that the same standardization of which the Court warned would be the probable eventual result of such a one-sided spending program. The great question of policy, upon which the Court in *Pierce* puts its finger, is whether the public interest lies in the creating of a unitary *Kultur*.

Irrelevant Criteria

The "criteria" for "aid" given in the Memorandum are, of course, nowhere to be found in the cases. They represent, rather, the Department's attempt to make the cases fit its thesis. The Department is able to create a thinly plausible reconciliation of the cases and the constitutional principles involved principally by refusing to define "religious function" and by refusing to state the specifics of *how* some sort of "aid" does in fact result in aiding "religion" or the carrying out of "religious functions." At this point in its Memorandum, of course, the Department assumes that it has conclusively established that nothing in the way of what it dubiously calls "across-the-board" aid can be made to religion.

The Memorandum thus justifies (as it must) *Everson* in that the aid there given was for a "legitimate public concern." But if aid is

¹⁵⁸ 330 U.S. at 51.

¹⁵⁹ 268 U.S. 510, 535 (1925).