Abstract

This article is concerned with understanding the historical and theoretical origins of the concepts of “parents’ rights” and “family privacy.” Neither is explicitly mentioned in the Constitution, but both concepts were among the earliest substantive due process rights recognized by the Supreme Court in the 1920s. Unlike other substantive due process rights that originated in the Lochner era, such as the right to contract or the right to an occupation, parental and family rights survived well past the New Deal era to the present day. But, as Barbara Bennett Woodhouse recognized seventeen years ago, the originating cases of Meyer and Pierce had darker sides to them than previously recognized. Since Woodhouse published her article, we have had more detailed studies of the Progressive Era, out of which emerged the laws struck down as interfering with parents’ rights. More importantly, a heretofore-unpublished memoir of one of Justice McReynolds’s law clerks has been made available. McReynolds authored both Meyer and Pierce, and thus the memoir serves as a unique insight into his views on family life and privacy rights. These new sources confirm Woodhouse’s earlier findings that “parents’ rights” and “family privacy” originated as reactionary and elitist doctrines.

Following the historical examination above (and because the constitutional origins are so troubling), this article then examines family privacy from a theoretical perspective to understand whether such a concept can be squared with our liberal and democratic traditions. Specifically, the theories of Hobbes and Locke permit us to fully examine parent-state conflicts with one eye toward the consequences for democracy, and the other directed at the consequences for individual rights. This article ends with some thoughts about the future of the Supreme Court’s unfortunate parents’-rights jurisprudence and how abandonment of it might better serve both democracy and liberty.
Next day he was drunk, and he went to Judge Thatcher’s and bullyragged him and tried to make him give up the money, but he couldn’t, and then he swore he’d make the law force him.

The judge and widow went to law to get the court to take me away from him and let one of them be my guardian; but it was a new judge that had just come, and he didn’t know the old man; so he said courts mustn’t interfere and separate families if they could help it; said he’d druther not take a child away from its father. So Judge Thatcher and the widow had to quit on the business.¹

Thereafter, Huck Finn was returned to his father shortly before he ran away and began his well-known “Adventures.” As one author shrewdly remarks, “[a]s a result of the judge misapplying the law . . . the law now forces Huck to take the law into his own hands.”²

Twain intended to highlight the disjunction between what was legal and what was just. As one Twain scholar writes, “The new judge’s strict adherence to the rule as he knew it, rather than the facts as he could have found them, led to an unjust result.”³ Another commentator refers to the actions of the “new judge” as “an imprudent general reluctance to separate children from their natural parents, and partly . . . a foolish effluence of compassion toward pap.”⁴ However, rather than the new judge’s adherence to the law, the bulk of the blame for the unjust result lies with the presumptions underlying the rules themselves. Ideally, the “new judge” should not have had to “know the old man” in order to determine that Huck’s best interests lay elsewhere. The real problem with the legal proceeding was that the default rule failed Huck, and more importantly, failed society, in favor of the static principle of family preservation. Of course, family preservation, in a great many cases, is coeval with both the child’s and society’s overall wellbeing—but not always, as in Huck’s case. The important lesson to draw from Twain is that the new judge began with the incorrect motivation—family preservation over social utility—and thus his resolution contravened our instinctual sense of justice. Fortunately for Huck, his sense of social justice was stronger than that of the legal system and we are left with a happy ending. Unfortunately, not every child’s life story ends up as romantically satisfying as Huck’s. Nor can every adolescent boy

¹ Mark Twain, Adventures of Huckleberry Finn 26 (Univ. of Cal. Press 2001) (1885).
² Teresa Godwin Phelps, The Story of the Law, in Huckleberry Finn, 39 Mercer L. Rev. 889, 896 (1988). Phelps further notes how the “civil law . . . played a catalytic role in forcing the plot to unfold.” Id. See also Alvin Waggoner, A Calendar of Mark Twain’s Celebrated Causes, 13 Tenn. L. Rev. 211, 212 (1935) (listing this incident among the many legal cases that appear throughout Twain’s works).
view the world through the wit of Mark Twain’s critical eye. Nevertheless, many courts, including the United States Supreme Court, continue to hold formalist 19th century notions of family life, not the least of which is that “courts mustn’t interfere and separate families if they [can] help it.”

INTRODUCTION

While the origins of the modern substantive-due-process right to privacy are most frequently located in Justice William O. Douglas’s 1965 pronouncement for the Supreme Court in Griswold v. Connecticut, the true starting points are the 1920s cases of Meyer v. Nebraska and Pierce v. Society of Sisters of the Holy Names of Jesus and Mary—cases that Justice Douglas himself used as precedent and that the Court cited in Roe v. Wade, and most recently in Lawrence v. Texas. But upon close examination of the historical sources, it appears that the true motivation for the Meyer and Pierce decisions was not a charitable concern for the preservation of a pluralistic society, but rather an anti-progressive philosophy grounded in social Darwinian ideology.

What follows is a reexamination of the constitutional origins of the right to family privacy, succeeded by a discussion of family privacy through the lens of classical liberalism. Part II sets out the seeming paradox in early 20th century Supreme Court historiography, and seeks to unify the concededly anti-progressive child-labor decisions and the supposedly progressive family privacy opinions. Part III focuses on the author of Meyer and Pierce, Justice James McReynolds, and explains how his extremely conservative social and political outlooks came to bear on the family privacy decisions. Part IV raises some modern concerns about the application of family privacy in today’s world, and emphasizes the troubling existence of the old McReynolds-style conservatism, which can still be seen in action. Part V then exposes the theoretical unsoundness of excessive family privacy by examining the classical theories of Hobbes and Locke. Finally, Part VI closes by looking ahead to a future project in which the historical and philosophical lessons of this article can be applied more generally to current parent-child-state controversies, especially those that intersect with gay rights.

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5 Mark Twain, supra note 1, at 26.
10 Lawrence v. Texas, 539 U.S. 558, 564 (2003) (“There are broad statements of the substantive reach of liberty under the Due Process Clause in earlier cases, including Pierce v. Soc’y of Sisters of the Holy Names of Jesus and Mary and Meyer v. Nebraska.”).
Reformers of the Progressive Era ushered-forth new legislation during the first three decades of the 20th century that had the potential to greatly affect the way in which children were treated by the state as well as their parents. Legislative successes occurred at both the state and national levels. Among the Progressives’ noteworthy local successes were compulsory common schools and the establishment of juvenile courts. The most prominent progressive reform, several times enacted by Congress, was the regulation of child labor.11 Each of the three reform efforts increased the reach of the law in an attempt to save the nation’s children from ignorance, crime and vice, and capitalistic exploitation. In one sense, the new legislative agendas favored the power of the state over the power of the parents in mandating schooling, prohibiting the use of children as sources of family income, and in removing unruly children from the custody of their parents. In another sense, the new policies had a distinct leveling quality to them by assuring that all children went to school, stayed out of factories, and received the same moral upbringing regardless of socioeconomic familial background. Through the proponents’ eyes, the reforms simply assured all children an equal opportunity as they started out life. To certain opponents, however, the measures seemed to have a socialistic, egalitarian quality of the type a communist regime might have enacted. Chief among these opponents were a majority of the members of the United States Supreme Court.12 Unfortunately for reformers, these were the final arbiters of the question whether or not the laws would remain standing.

To understand how the Supreme Court reacted to these various child-centered reforms, it is necessary to understand fully the major cases handed down during this era, especially those focusing on schooling and child labor. Understanding of the Court’s actions will require us to move beyond a simple consideration of the legal decisions in order to get at the personal and social views of this elite group regarding family life. Thus, the everyday reactions to educational laws and child labor laws as set out in political tracts and public opinion journals are essential to comprehending how the Court viewed the motivations for these laws. Moreover,


12 For a challenge to this standard view, see Barry Cushman, The Secret Lives of the Four Horsemen, 83 VA. L. REV. 559 (1997).
an understanding of the justices’ personal views on family life, such as those garnered through private correspondence and personal memoirs, helps to illuminate ways in which they might have viewed these legal cases at the decisional stage. Through the use of these sources, seemingly irreconcilable cases concerning the wellbeing of children begin to coalesce into a coherent view of not only the parent-child relationship, but the family-state relationship as well.

However the pre-New Deal Court is characterized—conservative, laissez-faire, a group of “Nine Old Men,”13 or the *Lochner* Court14—it is generally remembered for promoting business interests and eventually hampering FDR’s economic revitalization efforts. The Court is famous for the “Four Horsemen,”15 the group of justices so hostile to the New Deal that they drove Roosevelt to undertake his court-packing plan. During much of the first third of the 20th century, however, the Court was also renowned for the membership of Justice Oliver Wendell Holmes, Jr., who was later joined by Louis Brandeis. These two great progressives16 frequently found themselves in the minority, criticizing the Court for imposing its economic and social views on the nation, rather than limiting itself to its proper judicial role. Thus, it may seem odd to anyone familiar with this traditional history of the Court when one learns that this conservative group of judges was also the first to articulate a theory of personal and familial privacy contained in the due process clause of the Fourteenth Amendment—a doctrine later used to support constitutional rights to contraception and abortion.

The theory of personal and familial privacy is found in two cases decided in the 1920s, both written by Justice James C. McReynolds.17 Traditionally, students are taught that the cases hold that a fundamental right of privacy exists which encompasses the right to raise one’s own children, including how to best educate them, and upon which the state cannot infringe. That traditional understanding, no doubt aided by the Warren Court’s subsequent decisions, simply cannot be maintained. This is not only the result of a rereading of the cases in their historical and legal contexts, but especially by placing them back into the elitist and racist views of the author of those opinions. Moreover, I will further argue that decisions

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14 Named after the famous decision *Lochner v. New York*, 198 U.S. 45 (1905), *overruled* by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), in which the Court struck down the first of many hours regulations on the basis of freedom of contract, founded in the due process clause of the Fourteenth Amendment.
15 The four members were Willis Van Devanter, James C. McReynolds, George Sutherland, and Pierce Butler. They frequently managed to garner at least a fifth vote to invalidate New Deal legislation.
16 Whether or not Holmes was a political progressive is beside the point. He was progressive in the sense of abandoning old jurisprudential foundations. See Louis Menand, *The Metaphysical Club: A Story of Ideas in America* 3–69 (Farrer, Straus, and Giroux 2002).
striking down child labor laws were in perfect keeping with the justices’ views of children and family life and social relations more generally.

A. The Foundation of Fundamental Rights: The Privacy Doctrine of Meyer and Pierce

Open any textbook on constitutional law, turn to the section on implied fundamental rights, and immediately preceding lengthy discussions of Griswold v. Connecticut18 and Roe v. Wade,19 one will come across two cases decided in the 1920s usually relegated to an introductory paragraph or even a footnote stating that they are the basis for modern privacy decisions.20 The first case, decided on June 4, 1923, is Meyer v. Nebraska,21 in which the Court struck down a state law forbidding grade schools from teaching subjects in any language other than English. The second case, handed down just two years later on June 1, 1925, is known as Pierce v. Society of Sisters.22 In Pierce, the Court struck down another state law, this time one that mandated that all children attend public grade schools. The basis for those decisions, according to child law scholars, is recognition of the constitutional status of parental rights in disputes with governmental authority.23 A leading hornbook describes the opinions as holding that the invalidated laws “restricted individual freedom without any relation to a valid public interest.”24 The same authors thought “[f]reedom of choice regarding an individual’s personal life was recognized as constitutionally protected.”25 “If nothing else,” the authors continue, “they show a historical recognition of a right to private decision-making regarding family matters as inherent in the concept of liberty.”26 According to this interpretation, the Court that decided Meyer and Pierce must have been very

18 Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (holding that the Constitution creates a “zone of privacy,” which provides a fundamental right to contraception for married persons).
19 Roe v. Wade, 410 U.S. 113, 164 (1973) (holding that the due process clause of the Fourteenth Amendment prohibits certain criminal abortion statutes).
21 See Meyer, 262 U.S. at 390.
25 Id.
26 Id.
progressive indeed, recognizing some rather modern civil liberties some four decades before the Warren Court would again take up that task.

The case of Meyer v. Nebraska arose out of a law approved by the Nebraska legislature on April 9, 1919. The pertinent provision declared: “No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language other than the English language.”27 The statute applied only to students who had not yet passed the 8th grade. Furthermore, it provided a punishment of a fine ranging from $25–100 or confinement to thirty days in jail for anyone violating its prohibitions. In the case at hand, Robert T. Meyer, a 5th grade teacher at Zion’s South School, a German-American Lutheran school, was indicted for teaching out of a German-language Bible. Meyer was convicted and fined $25.00. The Supreme Court of Nebraska affirmed his conviction, ruling that the language law was a valid exercise of the state’s police power, i.e., its power to legislate for the health, welfare, and morals of its citizenry.28

Meyer brought his case to the United States Supreme Court in 1922. There he argued that the law violated the liberty guaranteed to him by the Fourteenth Amendment to engage in his chosen calling, namely, that of a foreign language teacher.29 While the Court agreed with him that the legislation worked a violation of his due process right, it did not stop there. Instead the Court proceeded in broad language, beginning with the observation that “liberty,” as used in the due process clause, meant more than “freedom from bodily restraint,” it also included “the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuits of happiness by free men.”30 With this in mind, the Court then addressed the cause for hypothetical parents whose wishes might be stymied by the law. In a tone evocative of modern-day tolerance, the Court disagreed with the law and said, “The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue.”31 The supposed implication of this language was that foreign parents had every right to have their children educated just as native English speakers did. If the dissenting opinion of Justice Holmes gets any mention in modern legal texts, it is simply to note that it existed.

According to one Meyer scholar, “the magisterial prose” employed by Justice McReynolds in the Meyer opinion left no room for doubt that his primary concerns

29 See Meyer, 262 U.S. at 392 (argument for plaintiff in error).
30 Id. at 399.
31 Id. at 401.
in the case were the “rights of parents and students.”"32 In attempting to downplay
the fact that the main party in interest, Meyer, had won his case on the grounds of
unjust economic depravation, the same author wrote that Meyer was the first time
the Court had acknowledged constitutional protection for “civil liberties against
infringements by states involving matters other than racial discrimination and the
enactment of economic regulations.”33 The most troubling aspect of this type of
conclusion is that it accepts at face value only one interpretation of a broadly
worded public pronouncement. Little analysis is put in to uncovering what might
underlie Justice McReynolds’s “magisterial prose.” As Robert Post has noted, the
libertarian strain of the decision “suggests that Meyer can be read as extending
‘fundamental rights’ to the kinds of cultural practices deemed necessary to sustain
the individuality presupposed by democracy.”34 Most interpretations of Meyer
ignore the reality that presuppositions about cultural practices change over time,
and that modern, and even 1960s assumptions, about essential values are radically
different from Justice McReynolds’s own cultural practices. Perhaps personal
motivations are not of immediate concern to a legal interpretation of a judicial
ruling.35 However, any fair historical interpretation must at least recognize and
attempt to explain how the public writing comports with the judge’s personal
beliefs on the subject matter at issue. While separating an especially unsavory
author from his words—words that have become sacrosanct—might be comforting
to modern sensibilities; it can greatly hamper an accurate historical understanding.
This same separation has occurred with the second case of concern.

Pierce v. Society of Sisters of the Holy Names of Jesus and Mary was the
result of a referendum adopted by Oregon voters on November 7, 1922. The law
provided that any custodian of a child between ages eight and sixteen “who shall
fail or neglect or refuse to send such child to a public school . . . shall be guilty of a
misdemeanor and each day’s failure . . . shall constitute a separate offense.”36
Punishment for noncompliance ranged from a fine of $5–100 to jail time of two to
thirty days. In this case, the complainants were two organizations that operated
private schools in the state of Oregon. One was a Roman Catholic organization, the
Society of Sisters, and the other was Hill Military Academy, a military training

32 William G. Ross, A Judicial Janus: Meyer v. Nebraska in Historical Perspective,
33 WILLIAM G. ROSS, FORGING NEW FREEDOMS: NATIVISM EDUCATION, AND THE
CONSTITUTION, 1917–1927, at 5 (Univ. of Nebraska Press 1994).
34 Robert C. Post, Defending the Lifeworld: Substantive Due Process in the Taft Court
35 This is the particularly troubling sentiment of one scholar who wishes to ignore the
reactionary and patriarchal nature of the opinions. See Stephen G. Gilles, On Educating
may have been the private views of Justice McReynolds, his opinions for the Court adopt a
parental theory, not a patriarchal one.”).
36 Pierce v. Soc’y of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 530
n.1 (1925).
school for boys. Both sought preliminary injunctions, claiming destruction of their businesses if the law was permitted to take effect. A three-judge federal district court issued the injunctions, ruling that the law not only deprived the schools of their property without due process of law, but the law also deprived parents (again hypothetically) of their liberty to direct the education of their children. The Supreme Court agreed with this ruling.

As in the foreign language case, the Pierce Court embraced broad language of parental rights even though parents were not parties to the case: “Under the doctrine of Meyer v. Nebraska, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.” This time, however, the Court’s language was framed in even more emotional rhetoric: “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.” In true parents’ rights language, the Court continued, “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.” Thus the Court disposed of Oregon’s argument in fewer than eight pages of the United States Reports. The presumed motivation for the opinion, according to one Pierce scholar, was a sophisticated rejection of “the old unconscious conservatism.” “Fundamentalists in politics and religion” as well as “racists who deplored the ‘mongrelization’ of the American people” met their foes in the nine members of the Court. That is also where the usual narrative leaves off. This version of the story was popularized by no less than the Supreme Court itself, during its “liberal” era under the leadership of Chief Justice Earl Warren (1953–1969).

The Supreme Court of the 1960s often found itself as the sole defender of civil liberties, frequently holding at bay wayward state legislation infringing upon the rights of minorities. One of the most celebrated cases from this era is the

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37 See id. at 531-33.
38 Soc’y of the Sisters of the Holy Names of Jesus and Mary v. Pierce, 296 F. 928, 932 (D. Or. 1924) (“the field of inquiry . . . pertains, not only to whether the complainants’ constitutional rights are affected adversely by the act in controversy, but to whether the constitutional rights of the parents and guardians are also adversely affected”).
39 Pierce, 268 U.S. at 534–35.
40 Id. at 535.
41 Id.
43 Id. at 98; see also DAVIS ET AL., supra note 23, at 8 (describing Meyer and Pierce as protecting “ethnic, racial and cultural subgroups” that might be “vulnerable to majoritarian politics”); Cushman, supra note 12, at 581 (describing Meyer and Pierce as a “stealthy jurisprudence of multiculturalism”).
1965 opinion in *Griswold v. Connecticut*. In *Griswold*, Justice William O. Douglas held that “the zone of privacy created by several fundamental constitutional guarantees,” proscribed the state of Connecticut from outlawing the use of drugs to prevent conception. The major analytical barrier for Justice Douglas was the fact that he could point to no specific language in the Constitution prohibiting the actions of Connecticut. Thus he turned to two familiar cases from which he drew the following:

The right to educate a child in a school of the parents’ choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular foreign language. Yet the First Amendment has been construed to include certain of those rights.

By *Pierce v. Society of Sisters*, the right to educate one’s children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyer v. Nebraska*, the same dignity is given the right to study the German language in a private school. In other words, the State may not consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach—indeed the freedom of the entire university community. Without those peripheral rights the specific rights would be less secure. And so we reaffirm the principle of the *Pierce* and the *Meyer* cases.

Thus a particular reading of *Meyer* and *Pierce* was given the imprimatur of the highest court in the land.

Less than a decade later, the 1973 ruling in *Roe v. Wade* would compound this interpretation. The Court in *Roe*, per Justice Blackmun, invalidated a Texas

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46 *Id.* at 485.

47 *Id.* at 482–83.

48 See BELKNAP, supra note 44, at 204 (discussing the difficulties Douglas faced in crafting a convincing opinion, the first draft of which rested solely on the First Amendment). It is interesting to point out that Justice McReynolds made absolutely no mention of First Amendment concepts in either *Meyer* or *Pierce*. This is especially noteworthy since counsel in both cases argued the point. See Transcript of Oral Argument at 13, 15, *Meyer v. Nebraska*, 262 U.S. 390 (1923), in 21 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 774, 776 (Philip B. Kurland & Gerhard Casper eds., Univ. Pub. of America 1975) [hereinafter 21 LANDMARK BRIEFS] (claiming that the Fourteenth Amendment incorporated free speech and free exercise of religion).

statute that made it a crime to “procure an abortion.”\textsuperscript{50} Again the rationale was based on a right of privacy: “The Constitution does not explicitly mention any right of privacy. In a long line of decisions, however, . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.” Justice Blackmun then cited \textit{Griswold}, \textit{Meyer}, and \textit{Pierce} as beginning that line of decisions.\textsuperscript{51} It was also clear that by then, the specific location of the “right” was not important. Until recently, few have been willing to question the correctness of the \textit{Griswold} understanding of \textit{Meyer} and \textit{Pierce}. Much more ink has been spent on defending the rationale of the privacy cases, than inquiring into the anomaly that James C. McReynolds, William O. Douglas, and Harry A. Blackmun could all have shared the same view of the Constitution regarding individual rights. One need only consider the child labor cases to see that McReynolds, and the New Dealer, Douglas, could not have been further apart when it came to the extent the state could go in legislating for its future citizenry, and against the wishes of parents.

\textbf{B. The Bane of Progressives: The Child Labor Decisions}

In 1916, Congress passed an act prohibiting the shipment in interstate commerce of any product of any mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment, in which children had been employed “within thirty days prior to the removal of such product.”\textsuperscript{52} Children were those under the age of sixteen with certain modifications permitted for older children.\textsuperscript{53} Clearly, Congress was reacting to the increasing strength of the progressive movement and its child saving efforts. Not all were pleased with Congress’s efforts, most notably factory owners and poverty-stricken families who depended upon the labor of their own children to make ends meet. Ultimately, the two teamed up to challenge the Keating-Owen Act, as the legislation came to be called.\textsuperscript{54}

A father of two children encompassed by the Act, who were employed at a cotton mill in Charlotte, North Carolina, brought suit to enjoin the Act’s enforcement. Urged and financially supported by southern mill owners, Dagenhart, the father of the children, based his claim on two grounds. First, he argued that enforcement of the Keating-Owen Act would deprive him of his vested right to the labor of his children. Second, since he was a man of meager means, the support received from his children’s labor was essential to the subsistence of his family.\textsuperscript{55}

However, as is often the case with high profile litigation, “counsel and bench abandoned the pretense that the suit concerned the private rights of the Dagenharts,” and instead tacitly resolved to adjudicate the facial constitutional

\textsuperscript{50} Id. at 117.
\textsuperscript{51} Id. at 152–53.
\textsuperscript{52} Keating-Owen Act, ch. 432, 39 Stat. 675 (1916).
\textsuperscript{53} Id.
\textsuperscript{54} Id.
challenge to the Act. In other words, Dagenhart’s legal benefactors got their day in court, and argued that the law exceeded the commerce-clause authority of Congress, rather than arguing that Dagenhart himself was deprived of his property without due process of law. Nevertheless, the fact that it could and should have been conceived solely as a father’s, Dagenhart’s, claim is essential to understanding the link to the Meyer and Pierce outcomes.

The case of *Hammer v. Dagenhart* reached the Supreme Court during its 1917 term. There it was argued that the Act exceeded Congress’s commerce power because rather than regulating commerce, Congress was forbidding commerce from moving. Five members of the Court accepted that reasoning, including Justice McReynolds. A good deal of the Court’s opinion was spent distinguishing “commerce” from that which Congress attempted to regulate. The ultimate conclusion was that prohibition of transportation was not the same thing as regulation of commerce in this case. Moreover, the Court thought Congress’s real attempt was to regulate child labor, not commerce. That subject, the majority believed, was for the states alone to tinker with: “In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities to regulate the hours of labor of children in factories and mines within the states, a purely state authority.” Thus one avenue of national regulation—the commerce clause—was closed to Congress, but there was at least one other, so it first appeared.

To compensate for the invalidation of the Keating-Owen child labor law, Congress passed the Child Labor Tax Acts of 1919. This time the law required that anyone operating a mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment in which children were employed past certain maximum hours, “shall pay . . . an excise tax equivalent to 10 per centum of the entire net profits received or accrued for such year” from the sale of its products. For its new enactment, Congress rested its authority on the taxing power.

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56 Id. at 96-97, 102.
58 Id. at 270.
59 Id. at passim.
60 Id. at 271-77.
61 See id. at 271 (explaining that this case is different from constitutional laws that prohibit the transportation of women for immoral purposes and the transportation of alcohol).
62 See id. at 271-72 (“The act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states.”).
63 Id. at 276.
66 Id.
67 U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes.”).
Drexel Furniture Company, an entity assessed a tax under the 1919 law, challenged the statute as exceeding Congress’s constitutional power, similar to the way it had exceeded its commerce power in the *Dagenhart* case.68

*Bailey v. Drexel Furniture Co.* reached the Supreme Court in 1922. On May 15, of that year, by a vote of 8-1, the Court agreed with Drexel that Congress had again overstepped its constitutional boundary.69 Chief Justice Taft thought the legislation so blatantly unconstitutional, and Congress’s attitude so cavalier, that he took to chastising Congress in his opinion: “[A] court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others see and understand this. How can we properly shut our minds to it?”70 The Chief Justice then became more serious and somber in his tone: “The good sought in unconstitutional legislation is an insidious feature, because it leads citizens and legislators of good purpose to promote it, without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards.”71

What about a national regulation of child labor threatened the “ark of our covenant”? To answer that question, we first have to speculate as to just what the covenant is. One possible answer is that the covenant is federalism, the agreed-upon relationship between the state and federal governments, which was breached in this case by the attempted federal regulation of a matter of state concern. However, there is clearly more to the ark than pure political science. By limiting realms of government to certain spheres, individuals and families are free to live unencumbered by legal restrictions. The real breach comes from the attempted interference with a realm of personal and family life. The language of the opinion is clear: the Court was not striking down an improper tax; it was striking down a regulation of child labor—an interference with the covenant that permits families to operate within their own sphere. It is enough to note that this concept was not obvious to contemporaries of either of the child labor decisions.72

Progressive publications and law professors could not see past the Court’s rhetoric. Legal critics argued with the Court’s logic in expounding the commerce

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69 See id. at 44.
70 Id. at 37.
71 Id.
72 Before Taft was appointed to the Court, he wrote an introduction to an essay by Herbert Spencer in which he criticized paternalistic legislation: “Laws which are adapted to an ideal people, moved only by the highest moral considerations and governed by every proper self-restraint are ill adapted to people as we know them.” William Howard Taft, *Herbert Spencer’s “The Duty of the State,”* 56 Forum 240, 242 (1916). Thus, in an ideal world, where there was no jar between morality and legality, children would not be permitted to work, but instead they would be schooled and well looked-after by their parents. But in the reality that was early 20th century America, to suggest that children be kept out of factories was simply asking too much of ordinary Americans.
and taxing clauses. Lay critics appealed to readers’ humanity to expose the plight of child laborers. Both criticized the Court as incompetent and heartless, and both likely suspected a tacit sympathy towards factory owners and managers. Neither was able to perceive and acknowledge the fundamentally different assumptions and values regarding family and social life inherent on each side of the debate. Law Professor Thomas Reed Powell thought the Court was engaged in a “nimble metamorphosis” and was using language “in some Pickwickian sense.” He thought it “difficult to accept such a theory of the impotence of national authority” and was confused by the “vacuum in legislative power” created by the Court’s decision. Members of the Court even received hate mail mirroring what they read in the media. McReynolds had a postcard addressed to him: “Just-Ice J.C. McReynolds.” Another citizen wrote, “Some people never learn anything—human or real. You old Crab are one of them. If you had some heart, some sense, some regard for the rights of the poor the Lord would not now have left you like Cardinal Wolsey.” As will become clear below, McReynolds did have a heart, as undoubtedly did all of the other Justices. That, however, was not the crucial matter in the child labor cases or in the school cases. What truly mattered was the extent to which the state permitted social relations to continue along their natural path, unobstructed by artificial legislation. This meant that parents had to be left free to their own devices, whether it was sending their child to Catholic school, or to a factory to support the family—only through this natural means could the downtrodden be sifted out of the mainstream of the society, thereby permitting progress to take place.

73 See Henry Wolf Biklé, The Commerce Power and Hammer v. Dagenhart, 67 U. PA. L. REV. 21, 21 (1919) (“instead of clarifying the scope of the commerce power” Dagenhart “seems to perpetuate old doubts, if not indeed to create new ones”); see also Thurlow M. Gordon, The Child Labor Law Case, 32 HARV. L. REV. 45, 57 (1918) (suggesting that the focus on congressional intent of what was otherwise clearly commercial regulation was an “entirely new” doctrine). For a contemporaneous suggestion that Dagenhart was wrongly decided, but that Drexel Furniture was correctly decided, see William A. Sutherland, The Child Labor Cases and the Constitution, 8 CORNELL L.Q. 338, 343, 351-52 (1923) (arguing that the commerce power permitted regulation for the general welfare, but that the taxing power could only be used for raising revenue, not for regulating private activity).


75 Id.


77 Id.
II. RECONSIDERING MEYER AND PIERCE: THE WORLDVIEW OF MR. JUSTICE McREYNOLDS

In reviewing the existing writing on Meyer and Pierce, it is quite astonishing how little attention is actually devoted to the fact that both opinions were written by Justice James C. McReynolds. McReynolds is usually remembered, if at all, for two things: these two cases, and his nasty, racist, anti-Semitic temperament. One of the interesting questions raised by the gap in the existing literature is why these two facts have never been considered together. Certainly there is nothing to suggest that McReynolds was able to distance his personal beliefs from any of his other legal work. Thus, those personal beliefs would appear to be central to a complete understanding of how the Court handled the treatment of children, and especially how the Court viewed the role of family in society at large.

In attempting to integrate McReynolds, the man, with his judicial opinions, it will be necessary to consider all that McReynolds himself knew about the subject matter on which he was passing judgment. Thus, I will begin this section with a brief overview of the intellectual climate of the times, explaining what political ideologies were available to those participating in policy debates. Next, I will focus particularly on what transpired in the state of Oregon with respect to the compulsory school law approved by the voters. Then, I will consider McReynolds’s personal views on the particular social issues raised during the Oregon debate. Finally, I will reconsider the Meyer and Pierce opinions with this fresh perspective in mind.

A. The Sociopolitical Climate: Progressives vs. Social Darwinists

Revisionist legal historians and political scientists have recently been engaged in propping up the stature of the pre-New Deal Court, mostly by suggesting that its members were actually principled jurists simply carrying out a juridical tradition that eventually wore itself out in the public mind. These scholars are especially critical of the Holmesian interpretation and that of the contemporaneous legal realists, which stated that the Court majority was rendering decisions based upon economic and political motivations, especially laissez-faire and social Darwinism. As to the rationales of Meyer and Pierce, however, I believe that the

78 See PEARSON & ALLEN, supra note 13, at 222–23 (“The Supreme Court’s greatest human tragedy is James Clark McReynolds.” Furthermore, they note of McReynolds’s attitude toward his Jewish colleague, Justice Brandeis, “no other member treated him with more disdain.”).

79 See Stephen A. Siegel, The Revision Thickens, 20 LAW & HIST. REV. 631, 632 (2002) (describing the new historiographical orthodoxy on public law in the Gilded Age as not “promot[ing] the economic interests of the Gilded Age’s emergent corporate plutocracy,” but rather “reflect[ing] the application of principles opposed to laws favoring any class of citizens, principles that had a respectable heritage in antebellum, and, some say, even Founding era, America”). See also HOWARD GILLMAN, THE CONSTITUTION
evidence is overwhelming that the older and contemporaneous criticisms of the Court are sound. The education legislation in both Nebraska and Oregon was supported by progressives and opposed by mainstream conservatives. Moreover, the most lucid arguments made against the laws by counsel in the Supreme Court were distinctly reactionary and anti-socialistic.

As Gregory Claeys has explained, “By 1900 . . . Social Darwinist ideas of ‘struggle,’ ‘fitness,’ and ‘survival,’ of the eternal Hobbesian war of all against all . . . had become virtually omnipresent and definitive of the most important modern trends in European and American thought.” The Meyer Court of 1923, therefore, was composed of judges who had been born into this intellectual milieu. The Social Darwinian ideology of “survival of the fittest” actually dates back to an 1852 article by Herbert Spencer. Darwin, however, provided the vocabulary that would be co-opted by the social theorists and thus gets most of the credit (or blame) for it. However, Spencer’s role in popularizing the ideas of individualistic Social Darwinism cannot be understated when it comes to scrutinizing the thought of early 20th century American elites.

Spencer’s work, which Holmes accused the Court of adopting on one occasion,82 was written in reaction to Jeremy Bentham’s theories of legislation. Richard Hofstadter described Spencer’s famous 1850 work, Social Statics, as “an attempt to strengthen laissez-faire with the imperatives of biology.”83 What Spencer hoped to show was that legislation interfered with the natural workings of the economic and social worlds. Legislation only slowed down and hampered the inevitable perfection of the human race. This is why Spencer was so strongly opposed to poor laws. With regard to the poor, he said, “the whole effort of nature is to get rid of such, to clear the world of them, and make room for the better.”84 Spencer was also opposed to state-supported education and sanitary supervision. He considered any state aid socialistic and argued against it “because it would

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81 See id. at 227.
82 Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics.”).
83 Richard Hofstadter, Social Darwinism in American Thought 40 (Beacon Press 1992) (1944). We can contrast Spencer’s thinking with Bentham’s—as Hofstadter suggests—by understanding that Bentham’s efforts to do away with the common law in favor of codification were based on the assumption that all individuals were more or less the same biologically, and thus could all be acted upon equally by uniform legislation. Hence, “[t]he whole community’s social system, no less than the whole of its legal system, was to be located analytically within the province of legislation.” See also David Lieberman, The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain 286 (Cambridge Univ. Press 1989).
84 Hofstadter, supra note 83, at 41 (quoting Spencer).
penalize superior citizens and their offspring in favor of the inferior, and a society adopting such practices would be outstripped by others."^{85}

Spencer’s major contribution to social thought was his 1872–1873 publication of *The Study of Sociology*, first printed in serial form in *Popular Science Monthly*.^{86} The goal of this work was to show the futility of trying to control societal evolution. It argued against quick social transformations and the artificial preservation of the weak of the species.^{87} As Hofstadter notes, this line of thought was a major force in the last quarter of the 19th century. Thus it is not surprising that those growing up during this period and forming their first impressions of the world around them were deeply influenced by Spencer and Darwin. So popular was Spencer with the generation that grew up with his thought that a collection of his individualistic essays was reprinted from 1915–1916 in *The Forum*.^{88} The reprints were accompanied by commentary from Republican Party leaders— including two future Chief Justices of the United States^{89}—in which they made clear that the project was undertaken as a manifesto against Woodrow Wilson’s domestic agenda.^{90}

The ideas of Herbert Spencer and Social Darwinism were diametrically opposed to the proposals of the Progressives of the early 20th century. In 1924, *The Nation* reprinted some responses to a contest in which contestants were asked to define progressivism. The journal’s subheading for one response was “With Apologies to Herbert Spencer.”^{91} The respondent who provoked that subheading answered as follows: “Progressivism is an integration of humanity and a dissipation of riches, during which the people rise from an indefinite incoherent heterogeneity to a definite coherent homogeneity and during which the retained capital undergoes a parallel transformation.”^{92} A more descriptive contemporaneous metaphor for the homogeneity described by the author of that definition was the “melting pot.” And for early 20th century progressives, unlike early twenty-first century progressives, an assimilative melting pot was a positive good.

Recalling the context of the early 20th century, the United States was experiencing a wave of immigration that not only bewildered, but also frightened

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85 Id. at 43. In contrast to these Darwinian ideas of Spencer, Bentham preferred an elaborate scheme of poor relief, which was clearly a public responsibility. See Michael Quinn, *Jeremy Bentham on the Relief of Indigence: An Exercise in Applied Philosophy*, 6 UTILITAS 81, passim (1994).

86 See HOFSTADTER, supra note 83, at 43.

87 See id. at 43-44.

88 See Truxtun Beale, *The State v. The Man in America*, 54 FORUM 129, 130 (1915) (describing how republication of Spencer’s essays was “to demonstrate the necessity of a return to conservatism”).

89 Harlan F. Stone, *Herbert Spencer’s “The Sins of Legislators,”* 55 FORUM 352 (1916); Taft, supra note 72, at 240-43.

90 HOFSTADTER, supra note 83, at 49–50.


92 Id. at 161.
and threatened, many Americans. Unlike the conservatives, however, the progressives believed that education was the solution to the immigrant problem. That is, progressives assumed, first, that education was a social good, and second, that everyone should be and was capable of being educated. Progressives began conceiving of the family as the primary social training ground, which was failing because of the poor state in which immigrants found themselves upon their arrival. Thus, socialization was now squarely the domain of the public schools. John Dewey epitomized this progressive hope for the schools by describing them as not just “instrument[s] of morality and citizenship,” but “democratic and participatory” as well. Critics of both Dewey and his likeminded progressive brethren pointed out a paradox of their philosophy: they wanted democratic education, but not diversity. Or, as historian Paula Fass has written, the progressives were arguing for a democracy of a “common point of view.”

B. Fast Forward to Oregon—McReynolds Did

First, an explanation is in order as to why the background of the Meyer case detains us less than the Pierce case. Among the several reasons is the fact that the language law at issue in Meyer was enacted by the Nebraska legislature, and thus the political debate was not as rich as that in Oregon, where the law was a public referendum. Also, the Oregon law was a more extreme version of the Nebraska law—all of the issues regarding state control over education versus parental control, raised in Nebraska, applied with extra force in Oregon. But perhaps the strongest rationale is that Justice McReynolds himself had the Oregon case in mind as early as the oral argument stage of Meyer v. Nebraska.

As mentioned above, the sole issue in Meyer was the constitutionality of the foreign language prohibition as enforced against a 5th grade teacher. However, that clearly was not the sole issue in Justice McReynolds’ mind. During the presentation by Arthur F. Mullen, the lawyer for Meyer at oral argument, Justice McReynolds posed the question of whether a state could mandate that children attend public schools only. Mullen responded in a very lengthy reply reciting the history of schooling in America and noting the recent vintage of the public school system. As Barbara Bennett Woodhouse has pointed out, William Guthrie, a prominent Catholic lawyer who would eventually be counsel of record for the Society of Sisters in Pierce, briefed the impending Oregon law by appearing as amicus curiae in Meyer. By virtue of Guthrie’s reminder of events transpiring in

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94 Id.


Oregon, McReynolds and the rest of the Court were well aware how their decision could be precedent for the upcoming case. Since the author of Meyer was so keenly and prematurely interested in the issues concerning the Oregon school law, it is sensible to immediately proceed to it.

C. Badgering Crusaders: Politics in the Beaver State

Since the compulsory school act was put before the voters of Oregon for their approval, all aspects of direct democracy were at work in 1922, including heavy pamphleteering and editorializing. While certain groups, most notably the Catholic Church and the Ku Klux Klan, quickly drew unambiguous lines in the sand, support for and opposition to the ballot measure was not as black and white as some have suggested. In fact, the most recent and thorough study of Progressive Era Portland, Oregon suggests that the Klan’s involvement has been “likely overrated” by previous historians. The supporters of the act also counted among their numbers those whose political rhetoric sounded in populist and egalitarian tones. In fact, it is difficult to find much that was overtly racist, anti-Catholic, or anti-immigrant—the traditionally assumed KKK philosophy. Any such interpretations must necessarily be the result of reading between the lines. The opponents’ rhetoric, however, rather than responding directly to the proponents’ points, takes the tack of appealing to fundamental rights and natural law. Thus was the scene of 1922 Oregon.

According to Richard Hofstadter, the Ku Klux Klan of the 1920s appealed to the “unprosperous and uncultivated native white Protestants who had in them a vein of misty but often quite sincere idealism.” Indeed, it would be hard to imagine a better description of the Klan’s principal publication in support of the Oregon law—The Old Cedar School appeals to just such a crowd. Published as a fictional tale recounting the inevitable and dire consequences of failing to pass the school law, The Old Cedar School tells of the decline and eventual destruction of a one-room schoolhouse in rural Troutdale, Oregon, caused by the mass exodus of

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98 See generally Tyack, supra note 42 (arguing that the Oregon law was primarily a reactionary Klan proposal intended to target Catholics).

99 ROBERT D. JOHNSTON, THE RADICAL MIDDLE CLASS: POPULIST DEMOCRACY AND THE QUESTION OF CAPITALISM IN PROGRESSIVE ERA PORTLAND, OREGON 243 (Princeton Univ. Press 2003). The failure to appreciate Johnston’s work is apparent in the writings of Paula Abrams, who has recently taken up the study of Pierce in a new article and book, the latter of which was published just as this article was going to press: Paula Abrams, The Majority Will: A Case Study of Misinformation, Manipulation, and the Oregon Initiative Process, 87 OR. L. REV. 1025, 1041 (2008) (Abrams says that the Klan “became the most powerful political force in the state.” But it is unclear what the basis of that statement is.); PAULA ABRAMS, CROSS PURPOSES: PIERCE V. SOCIETY OF SISTERS AND THE STRUGGLE OVER COMPULSORY PUBLIC EDUCATION (Univ. of Michigan Press 2009). Abrams is, however, to be complimented on exposing the dangers of the initiative process.


The narrator of The Old Cedar School is a backwoods grandfather talking to one of his sons, trying to urge him not to send the grandchildren to a private school, but instead to the old Cedar School. Apparently all of the older children had moved away and married spouses of different faiths and sent the grandchildren to religious schools.\footnote{102 See infra notes 106–10.} The narrator sees his son Jim’s children as the last opportunity to maintain a link to the old public schoolhouse, the embodiment of an idealistic past.\footnote{103 See infra notes 104–05.} Throughout the narrative, the grandfather speaks in an uncultivated manner, while Jim’s language is rather refined: “Well, Jim, Mam an’ me both went to the old Cedar School mor’n sixty years ago an’ I tell you there wasn’t many places here in Oregon where you could get any book learnin’ them times.”\footnote{104 ESTES, supra note 101, at 11.} The grandfather’s concerns are practical and nostalgic while Jim’s concerns immediately turn to high-minded concepts like those of the lawyer who is going around saying that “if folks want to send their children to big high-priced schools it’s Unconstitutional not to let ’em, an’ it’s religious persecution to boot.”\footnote{105 Id. at 13.}

On its face, the tract is full of statements of religious tolerance. According to his father, the reason Jim is considering not sending the grandchildren to the old Cedar School is because he “got a ’Piscopalyun wife, she don’t want your children started in that there old Cedar School on the ridge there—No! She wants ’em sent away to that wonderful big place they call Oxford Towers where there’s a hull lot of big bishops.”\footnote{106 Id. at 16.} However, actually being a “Piscopalyun’ is good as any far’s I know.”\footnote{107 Id. at 13.} As for Jim’s sister, Sally: “She married a Seventh Day Adventist which was all right with me, ’cause I think any o’ them religions is good if a feller actually believes in ’em an’ they ain’t run for show an’ to make places for a lot o’ grub eaters.”\footnote{108 Id. at 17.} Jim’s other sister, Ryar, “married a Methodist, an’ he ’pears to be a purty good feller. He don’t seem so darned sot as some o’ them others.”\footnote{109 Id.}

Finally there was Jim’s brother:

“An’ then there’s John, he married a Roman Catholic. I kinda winced when he told me he was goin’ to an’ then I said to myself, “Dad uster say that all kinds o’ religions was the same.” He said you might put some of each kind in a sack naked an’ you couldn’t tell one from tother when they was shook out. I guess that’s all true enuff but after they are shook out they don’t all act the same. Some of ’em will shake hands with
each other an’ make the best of it, but not the Catholic. He’ll go off an’ herd to himself.”

As a result of Sally’s and Ryar’s husbands and John’s wife, all of the grandchildren thus far had been sent to fancy private schools.

If any anti-Catholic hostility is present in the above quote, it is directly related to perceived self-isolation of the Catholics. Progressive supporters of the school law, and other proponents of the melting-pot theory, characterized that isolation as elitism. The Klan’s strongholds were rural cities in the West and Midwest, usually set up in reaction against northeastern urban centers. Those urban centers were draining away population from the farming communities. Rather than trying to rally the dwindling communities together, the Catholics and other religious sects seemed to be splitting them farther apart, an especially troubling sentiment after the recent war. Nor would the Catholics deny their separatist efforts. During oral argument in Pierce, counsel for Oregon cited the Canon law stating that “Catholic children must not attend non-Catholic, neutral or mixed schools; that is, such as are open to non-Catholics.” In their tracts, the Church argued for the special religious needs of Catholic parents and their children. The KKK, as much as it was involved in the debate, was not the official sponsor of the bill; that distinction belonged to the Scottish Rite Masons. David Tyack seems to suggest that the Klan had underground political connections in Oregon that may have been responsible for it. One thing is unmistakable, however, the Klan and Church were mutually in each other’s bull’s-eye: “The Klan . . . challenges Rome to submit our difference to democratic education in a Public School System as an educated electorate, and is willing to wait the required generation to impanel the jury.”

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110 Id. at 24.
111 In criticizing both Catholic separatism and the Protestant-centric nature of the public schools, one author lamented that “a wholesome civilization cannot be predicated upon the basis of Catholic parochialism and Protestant hypocrisy.” Instead, the author called for an educational system that stressed the “unity of mankind,” and which was “devoted consciously to furthering social progress.” David Henry Pierce, May Catholics Teach School?, THE NATION, Apr. 29, 1925, at 485, 486.
112 See HOFSTADTER, supra note 83, at 291–95.
114 See JOHNSTON, supra note 99, at 228.
115 See Tyack, supra note 42, at 78; see also ABRAMS, supra note 99, at 52–56. But see JOHNSTON, supra note 99, at 221–53 (arguing that the primary motivation behind the bill was class-based, and that the Klan’s nativist sentiments simply coincided with the more populist nature of this particular issue).
Unlike the amateurish organization of the Klan, the Catholic Church was extremely prepared for its self-appointed task of fighting the Oregon school bill. The National Catholic Welfare Council’s Bureau of Education printed a series of at least ten “Educational Bulletins.” Although all are apparently dated “February, 1923,” perhaps suggesting that they were issued more for the post-election court battle, at least one was written before the election, _The Truth About the So-Called Compulsory Education Law_. The author of this piece argues that the proposed law would work a deprivation of three natural rights of man based on the Declaration of Independence: (1) parental authority, (2) religious liberty, and (3) freedom in education.

Of course, arguments based on natural rights were in vogue at the Supreme Court during this time, further suggesting that a Catholic lawyer, more politically astute than the Klan’s Estes, may have been behind the pamphlets. “Nature is opposed to the Bolshevist doctrine that the child is to be treated as a ward of the state,” the tract stated, “and it is well to remember that it is impossible to violate a law of nature with impunity.” Those readers curious about the exact penalty for a violation of a law of nature were naturally left in suspense. Nevertheless, the Church’s pamphlet goes on to state an argument that very much resembled the eventual language of _Pierce_. By virtue of the law of nature, “parents, not the state, have the authority and the responsibility for the proper care of their children, for feeding, clothing, housing, yes, and also for educating them.” While the state’s interest in its future citizens is not lost on the author, in his opinion, the natural rights of parents necessarily limit it.

The Church completely separated the issue of “parental authority” from any religious overtones. Instead, what the pamphlet provided was language akin to the 19th century parent-child contractual conception. If parents were responsible for “feeding, clothing, and housing” their children, then the least they could expect was something in return. Or as the Church’s brief argued, “In return for the enormous sacrifice they make and burden they bear, parents have the right to guide and rear their children to be worthy of them.” Perhaps the public debate between the Catholic Church and the Ku Klux Klan was not explicitly framed in terms of “parental ownership” versus “state as super parent,” but the terms Bolshevist,

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117 NAT’L CATHOLIC WELFARE COUNCIL, EDUCATIONAL BULLETIN NO. 2: THE TRUTH ABOUT THE SO-CALLED COMPULSORY EDUCATION LAW (Nat’l Catholic Welfare Council 1923) (My assumption that this work was written before the election is based upon its argumentative style indicating that the question had not yet come up for a vote.).

118 Id. at 4-5.

119 Id. at 5.

120 Id.

121 See MARY ANN MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS 106–07 (Columbia Univ. Press 1994); see also MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 153 (The Univ. of N.C. Press 1985).

communist, and socialist were tossed about with abandon. It was clear that whichever side could paint the other the reddest would be victorious. 123

Undoubtedly, the Church’s greatest asset in accomplishing its victory was lawyer and Columbia University law professor, William D. Guthrie. 124 As mentioned above, he submitted an amicus brief in Meyer alerting the Court that Pierce was on the horizon. More importantly, however, the Church managed to retain Guthrie to argue the Pierce case for its side in the Supreme Court in 1925. Evidence abounds that more than Guthrie’s legal acumen carried the day; his inside connections to the 1920s Court are rather startling. Though I am unaware of any detailed study of Guthrie’s direct influence on the Court, in a footnote Woodhouse lists his known social and professional connections which include: McReynolds’s succession to Guthrie’s position in a Wall Street law firm, Guthrie’s home address and phone number in McReynolds’s personal address book, prior professional collaboration with Justice George Sutherland, and a letter from Sutherland to Guthrie one month before Meyer was handed down. 125 Personal connections aside, Guthrie’s public and academic writings suggest that he was an ideological fit with the conservative wing of the Court.

In 1916, several of Guthrie’s major speeches were collected and published by his home institution of Columbia University. 126 Much of his writing is a vigorous defense of the Lochner-style decisions so heavily criticized by the emerging legal realists within legal academia. When not speaking directly on a legal issue, Guthrie was discussing morality and religion and its importance to family and civic life. Given that he had the ear of at least several members of the Court, the ideas espoused in those speeches and subsequently published were most certainly of interest to the Court in Meyer and Pierce.

Some ten years before Guthrie defended religious schools in the Supreme Court, he was doing so on Long Island. 127 At a 1915 dedication ceremony for a new school, Guthrie gave a speech entitled Catholic Parochial Schools in which he stated his case for the religious and moral training of children. For Guthrie, the importance of a Catholic school was to “publicly emphasize[d] the religious character of the educational work to be undertaken” there. 128 From the very beginning of his speech it was clear that the religious elements of Catholic schools

123 See, e.g., JOHNSTON, supra note 99, at 243 (Johnston quotes the appellee’s oral argument in Pierce: “[W]hy should Oregon and the Soviet Union be the only governments ‘to have a monopoly of education, to put it in a straitjacket, by the fixing of unalterable standards and thereby to bring their people and their citizens to one common level?’”).

124 Guthrie’s centrality to both the Meyer and Pierce cases is well stated in Woodhouse, supra note 97, at 1070–80 (Though I have examined Guthrie’s writings myself, many peripheral details come from Woodhouse.).

125 Id. at 1071 n.396 (It should be noted that Sutherland dissented in Meyer, thus, not ultimately agreeing with Guthrie in the case.).

126 WILLIAM DAMERON GUTHRIE, MAGNA CARTA AND OTHER ADDRESSES (Columbia Univ. Press 1916) [hereinafter MAGNA CARTA].

127 See WILLIAM DAMERON GUTHRIE, Catholic Parochial Schools, in id. at 247 n.1.

128 Id. at 247.
were not incidental to the educational program. If most Catholic schools were similarly touted as being overt expressions of difference and isolation, then perhaps Klan opposition becomes more understandable. Guthrie rebutted charges that Catholics were opposed to the public school system and that they were unpatriotic. He also developed several creative arguments for why the Catholic system of education was superior to other forms and why that was good for democracy.129

Borrowing from Lord Bryce, Guthrie asserted that the more democratic a nation becomes, and the more its citizens realize their power, the greater its need develops for sources of reverence and methods of self-control.130 For Catholics, those sources “are to be found in religion.”131 According to Guthrie, the Church benefited society as a whole. “In teaching morality the churches are rendering a patriotic service and promoting the best interests and the highest policy of the state.”132 Naturally, the state benefited most if this inculcation occurred “while the mind and character of the child are plastic.”133 The Catholic argument did not end there, however. Guthrie thought that the Church should be compensated for its services to the public; “they should be allotted a reasonable part of the public educational fund raised from general taxation, measured by and limited to the actual saving to that fund, provided also that a required standard of education be maintained.”134 This part of Guthrie’s speech appeared somewhat antagonistic to all but Catholics. First, he stated that only a Catholic education benefited the public and that he hoped “the day will come when the people of all denominations” appreciated the service the Catholics provided. Then, he called for public reimbursement for that service, almost contradicting his earlier assertion that Catholics supported free public schools. Given Guthrie’s assertions of the Church’s position, perhaps it is not difficult to see where some of the Klan’s charges came from. At the same time, it is also easy to perceive a conservative slant to Guthrie’s argument—if government was not needed for services better provided by the private sector, then why should taxpayers have to support excessive spending?

129 See infra notes 130-34.
130 See 1 Viscount James Bryce, The American Commonwealth 474, 479 (3d ed., Liberty Fund, Inc. 1995) (1888) (Especially relevant is chapter thirty-nine, “Direct Legislation by the People.”) Therein Bryce asks, “What are the practical advantages of the plan of direct legislation by the people in it various forms?” He thought, “Its demerits are obvious.” With specific regard to Oregon and other western states, he noticed that “the risk of careless and even reckless measures is undeniable.”); see also 2 Viscount James Bryce, The American Commonwealth (3d ed., Liberty Fund, Inc. 1995) (1888) (Part four is devoted to the topic of “Public Opinion.”). The extent to which Guthrie’s arguments were faithful to Bryce’s ideas is beyond the scope of this present study.
131 Catholic Parochial Schools, supra note 127, at 252.
132 Id.
133 Id. at 253.
134 Id. at 256.
Other proponents, besides the Ku Klux Klan, abounded in the 1922 Oregon political scene, namely progressive politicians and public school teachers. Politicians argued that private schools were divisive and created “cliques, cults, and factions, each striving, not for the good of the whole, but for the supremacy of themselves.” Schools for the rich also cultivate snobbery and encouraged class distinction. Educational experts, like Dean Ellwood P. Cubberley of the Stanford University School of Education and I.N. Edwards of the University of Chicago, thought that the goal of assimilating foreigners was one of the major difficulties facing schools and that localities should be left to deal with the matter themselves. If America was to be a melting pot, the argument went, then the schools might as well be the kettles simmering in anticipation of this ideal phenomenon. Siding with the proponents, the voters of Oregon approved the measure by a vote of 115,506 to 103,685.

The stage was set for the Supreme Court to enter and weigh-in upon the matter. Before arriving at that significant event, however, it is necessary to more fully understand Justice McReynolds and how he viewed the world.

D. Making Sense of Pussywillow: The Private Life of James C. McReynolds

A great aid in my research has been the recent publication of a memoir written by a former McReynolds law clerk, John Knox. Knox was an intense diarist since high school and continued his daily writings throughout his clerkship year with McReynolds. Nearly two decades after his yearlong stint on the Court, Knox decided to compose a memoir based upon his diaries and memory. Unfortunately for Knox, he never managed publication of the work during his lifetime. Since Knox clerked during the 1936–1937 term, most of the interest in his writing will undoubtedly be centered on the Court’s reaction to FDR’s court-packing plan. However, Knox’s knack for relating personal and intimate details of

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135 It is important to appreciate the history of Catholic education within the context of Progressivism, and progressive educational reforms in particular. Doing so helps us understand how the Church could draw opponents as diverse as the Klan and Progressives. As Paula Fass tells us, “the Catholic schools have throughout most of the twentieth century resisted the implications . . . of ‘progressive’ education.” FASS, supra note 93, at 192.


138 Woodhouse, supra note 97, at 1016.

139 KNOX, supra note 76, at 35 (Pussywillow was the nickname McReynolds’ servants gave him so that they might talk about him openly without his knowledge.).

140 Id. passim.

141 See Dennis J. Hutchinson & David J. Garrow, Forward to KNOX, supra note 76, at vii.
his daily existence with McReynolds proves invaluable for my purposes—it exposes McReynolds in a way otherwise unknowable.

James Clark McReynolds was born in Elkton, Kentucky, on February 3, 1862. His childhood household was typically southern, that is, aristocratic, patriarchal, and sympathetic to the Confederacy. His father was a physician with a strong independent streak who opposed public schools. McReynolds attended Vanderbilt University where he studied science and graduated in three years as valedictorian in 1882. He then abandoned science after one year of postgraduate work and entered the University of Virginia Law School, which he completed in only fourteen months. In 1896, he waged an unsuccessful campaign for Congress as a Gold Democrat. He served as Assistant Attorney General beginning in 1903 in the Roosevelt Administration where he excelled as a trustbuster. President Woodrow Wilson appointed McReynolds as Attorney General in 1913 but soon came to regret his cabinet choice as McReynolds alienated a number of legislators with his abrasive mannerisms. With a vacancy on the Supreme Court having been created by a death in 1912, Wilson found an easy way to dispose of the McReynolds problem and in 1914 elevated him to that bench.

Justice James C. McReynolds served on the Supreme Court for twenty-seven years (1914–1941). While presumably little changed for McReynolds over that period, two things definitely remained constant: he was a lifelong bachelor and employed a black servant, Harry Parker, who was always at his side. He worked out of his thirteen-room apartment, which included an office for his clerk, and traveled to the Court building only on days the Court was in session. An anti-Semite, he refused to associate with his two Jewish colleagues, Justices Louis Brandeis and Benjamin Cardozo. He explained to his colleague, Justice Holmes, “that for four thousand years the Lord tried to make something out of Hebrews, 

143 Burner, supra note 142, at 204.
144 Id.
145 Id. at 2024-25.
146 Id. at 2025.
147 Id. at 2025-26.
148 Id. at 2026.
149 Id.
150 Id.
151 Id.
152 See KNOX, supra note 76, at 3 (mention of McReynolds’s bachelorhood); id. at passim (mention of McReynolds’s black servant Harry).
153 Id.
154 See Hutchinson & Garrow, supra note 141, at xix (“He detested Justices Brandeis and Cardozo.”).
then gave up as impossible and turned them out to prey on mankind in general—like fleas on the dog for example.”155 At times, he questioned the competence of his other colleagues as well. Justice Holmes once privately observed: “Poor MacReynolds [sic] is, I think, a man of feeling and of more secret kindliness than he would get the credit for. But as is so common with Southerners, his own personality governs him without much thought of others when an impulse comes, and I think without sufficient regard for the proprieties of the Court.”156 Although appointed as a Democrat by Woodrow Wilson, McReynolds felt that FDR had betrayed the party in 1933 by turning socialist. He would oppose the New Deal more strenuously than any other member of the Court.

Justice McReynolds had a strong distaste for both communism and foreigners. He was convinced that Professor Felix Frankfurter of the Harvard Law School was a socialist who was influencing the Roosevelt Administration to break its platform promises of 1932.157 FDR’s first sin was in recognizing Soviet Russia. Astonished with the president, McReynolds told Knox, “Imagine restoring diplomatic relations with that country! Justice Van Devanter was over there last year, and he saw even pregnant women working on the railroads in section gangs.”158 In almost paranoid fashion he continued, “And yet the Communists propose to infiltrate their ideas throughout the world. And Roosevelt recognizes them and installs the Soviets in the old embassy of the Czars right here on Sixteenth Street!”159 He was convinced that Roosevelt had put the nation “on the road to Socialism and the destruction of states’ rights.”160 McReynolds would not, however, be a yielding victim to this disturbing trend. Instead, he saw the Court as a bulwark against FDR’s destructive plan: “[W]ere it not for the Court, this country would go too far down the road to socialism ever to return.”161

This hostility towards foreign communists came out in public display in 1921 when the Court received a case involving German socialist defendants. In 1918, several defendants, some German born and some of “German extraction,” were charged with violating the Espionage Act by distributing socialist propaganda.162 The trial judge had remarked, “One must have a very judicial mind, indeed, not [to be] prejudiced against the German Americans in this country. Their hearts are reeking with disloyalty.”163 The judge’s refusal to recuse himself because of those

155 Woodhouse, supra note 97, at 1082 (quoting letter from McReynolds to Holmes, 1920).
157 See Knox, supra note 76, at 70–71.
158 Id. at 71.
159 Id.
160 Id.
161 Id. at 71–72.
162 Berger v. United States, 255 U.S. 22, 28 (1921).
163 Id.
and other prejudicial remarks was the issue before the Supreme Court. By a vote of 7-3, the majority of the Court thought that the judge’s prejudice was sufficient to disqualify him from presiding over the original trial.\textsuperscript{164}

Justice McReynolds was one of the three dissenters in the \textit{Berger} case and delivered his own dissent. The Justice “was unable to follow the reasoning approved by the majority.”\textsuperscript{165} McReynolds thought, “A public officer who entertained no aversion towards disloyal German immigrants during the late war was simply unfit for his place.”\textsuperscript{166} In further praise of the magistrate he said, “And while ‘An overspeaking judge is no well tuned symbol’ neither is an amorphous dummy unsotted by human emotions a becoming receptacle for judicial power.”\textsuperscript{167} Even Holmes could not help but note that McReynolds’s dissent was “improper in its rhetoric.”\textsuperscript{168}

McReynolds was a southerner in most all of his mannerisms, especially those concerning interpersonal race relations. In his view, the world was composed of a distinct racial hierarchy. However, using the term “racist” to describe McReynolds is largely unproductive. Arguably, no one was closer to McReynolds than his black servant, Harry.\textsuperscript{169} Members of the Court even referred to Harry as the Justice’s alter ego, behind his back, of course. On the other hand, while Harry may have been indispensable, he was by no means an equal. Rather than making use of a hunting dog during duck season, McReynolds would make Harry fetch the kill out of ice-cold water waist deep.\textsuperscript{170} When McReynolds thought his secretary, John Knox, was becoming too friendly with Harry and his maid, Mary, he chastised Knox. Knox recalled the conversation:

\begin{quote}
I realize you are a Northerner who has never been educated or reared in the South, but I want you to know that you are becoming much too friendly with Harry. You seem to forget that he is a negro and you are a graduate of the Harvard Law School. And yet for days now, it has
\end{quote}

\begin{footnotes}
\item[164] Id. at 36.
\item[165] Id. at 42 (7-3 decision) (McReynolds, J., dissenting).
\item[166] Id. at 43.
\item[167] Id. It is unclear from the opinion who McReynolds was quoting.
\item[169] Although there is no suggestion that McReynolds was associated with the Klan, his attitudes mirror some of their ideology and reveal to us how ideas that might seem incoherent today, were rationalized back then. For example, the Klan justified its anti-Semitism, anti-Catholicism, and anti-foreigner attitudes, but at the same time claimed, “We harbor no race prejudices. The Negro never had and has not today a better friend than the Ku Klux Klan. The law-abiding Negro who knows his place has nothing to fear from us.” Albert De Silver, \textit{The Ku Klux Klan—“Soul of Chivalry.”} \textit{The Nation}, Sept. 14, 1921, at 285 (quoting an Imperial Wizard).
\item[170] See KNOX, supra note 76, at 24.
\end{footnotes}
been obvious to me that you are, well, treating Harry and Mary like equals. Really, a law clerk to a Justice of the Supreme Court of the United States should have some feelings about his position and not wish to associate with colored servants the way you are doing.\textsuperscript{171}

McReynolds ended his thoughts with the entreaty, “I do wish you would think of my wishes in this matter in your future relations with darkies.”\textsuperscript{172}

The Justice’s race consciousness was extreme. While dictating a letter to an African-American, he insisted that Knox put “colored” in the salutation.\textsuperscript{173} Moreover, his use of the word “darkey” was a frequent occurrence throughout his Court career.\textsuperscript{174} However, the incidents are somewhat toned-down versions of his earlier public expressions at Vanderbilt. In the school newspaper, he referred to blacks as “‘ignorant, superstitious, immoral, . . . improvident, lazy,’ ‘unfit’ for politics, and ‘unworthy’ of equality.”\textsuperscript{175}

His hierarchical view of social relations, however, undoubtedly extended beyond race. It is this social hierarchy that is essential for understanding Meyer and Pierce. Although McReynolds never had children, he took a special interest in youth, yet not all young people were equal in his eyes. He once asked, “Harry, what are you going to do with those sons of yours?” When Harry responded that he hoped to send them to college, McReynolds was aghast, “College! Do you mean to say they are going to college? Why don’t you train them to be handymen like yourself? There’s no need for them to go to college!” Harry gave a typically American response that he wanted his children to do better than he did. Justice McReynolds did not see any sense in that, however, pointing out, “One of your sons has a good job in the Supreme Court cloakroom. Why doesn’t he plan to stay there?”\textsuperscript{176} At the very least, this exchange exhibits McReynolds’s racial elitism. However, it also demonstrates his commitment to a static social system, one in which social differentiation was predetermined and unrelated to merit. McReynolds did not question the mental capacities of Harry’s sons, nor did he display any racial hostility. Instead, he merely believed that certain people should not go to college and should perpetually be handymen.

For certain children, however, the Justice’s “kindliness” that Holmes had detected shone through. For example, in one instance McReynolds and Knox came upon a woman and her infant sitting on a public bench.\textsuperscript{177} McReynolds’s change of demeanor was sudden according to Knox: “he became so gracious and gallant that

\textsuperscript{171} Id. at 51.
\textsuperscript{172} Id.
\textsuperscript{173} Id. at 160.
\textsuperscript{174} Id. at 51 n.1, 123.
\textsuperscript{175} Woodhouse, supra note 97, at 1081 n.464 (quoting Vanderbilt Observer, May 1883).
\textsuperscript{176} KNOX, supra note 76, at 20. Cf. Silver, supra note 169 (quoting a Klansman to the effect that a respectable Negro needs to “know his place” in society).
\textsuperscript{177} See KNOX, supra note 76, at 27–28.
I was almost transported back to the days of chivalry.178 Approaching the woman, McReynolds asked, “Madam, you and your child would make a most charming picture. Would you mind if my secretary took a photograph of you holding the baby?”179 Knox took the woman’s address and eventually sent her prints of the photographs upon the Justice’s instructions.180 McReynolds was also quick to mail off autographs upon request, especially to children.181 His most benevolent act, though, was the 1941 adoption of thirty-three British children who were the victims of the Nazi blitzkrieg.182 Not only was he financially supporting them, but he also corresponded with each and every one.183 Knox reported that some newspapers ran cartoons caricaturing McReynolds as “a crusty old bachelor who resembled the ‘old woman who lived in a shoe.’”184

Perhaps McReynolds’s lack of his own family instilled in him an idealistic notion of family life. Certainly there is evidence to suggest that he was not happy with his marital status. In giving advice to Knox, he implored him not to be a bachelor. “I think a lawyer can be more successful as a general rule if he has a wife and family to work for.”185 One can assume, however, that McReynolds’s ideal family would have been highly patriarchal. One reason Knox performed both legal and secretarial functions was because McReynolds refused to hire women.186 After several attempts, he ceased employing them because they always tried to control things.187 According to another account, when women lawyers appeared in the courtroom, McReynolds would exclaim, “I see the female is here again.”188 Though he had a soft spot for others’ children, it is likely that had he had his own, he would have been a strict disciplinarian. He disliked the way his nephews were turning out, and let his brother know this.189 He thought his younger brother, Robert, was not being stern enough with them. “Boys are like pups.”190 McReynolds told Robert, “There comes a time when a firm hand and a sharp command is the only thing.”191 For the Justice, patriarchal control was essential for every family to be successful.

One need not be a legal realist to accept the fact that McReynolds’s worldviews were strongly shaped by his southern upbringing and his lack of

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178 Id. at 27.
179 Id. at 28.
180 See id. at 29.
181 See id. at 50.
182 See id. at 262.
183 See id.
184 Id.
185 Id. at 73.
186 See id. at 17.
187 See id. (“I have had women working for me in the past and have always had to discharge them. They became very possessive and wished to run the whole show.”).
188 Burner, supra note 142, at 1007.
189 Woodhouse, supra note 97, at 1083 n.473.
190 Id.
191 Id.
family life. If the 1936 Supreme Court term that Knox detailed was anything like the 1922 and 1924 terms, then those views were transferred over to his opinion writing as well. With this in mind, _Meyer_ and _Pierce_ can be reconsidered with an eye constantly towards their author.

**E. Rereading Meyer and Pierce**

Since McReynolds wrote _Meyer_ looking ahead to _Pierce_, it is not surprising that the earlier decision is richer in content, in terms of laying out a foundational view of the parent-child and family-state relationships. As the Court’s first exposition of this area of law, it is also not surprising that the Justices did not unanimously agree upon the disposition of the case. Two members of the Court dissented—Justice Holmes and Justice George Sutherland, Holmes writing for both.\(^{192}\)

1. **McReynolds’s Conservatism**

I have thus far suggested that public debate over these school laws focused on which side was more akin to soviet Russia, i.e., which side’s policies were more susceptible to the socialist label. While grappling with the Nebraska law, McReynolds made two comparisons that let the reader know communism was not far from his mind. After the frequently quoted material described above, extolling the virtues of liberty and freedom and tending to show that _Meyer_ was solely concerned with civil liberties, McReynolds, again almost from nowhere, stated: “For his Ideal Commonwealth, Plato suggested a law which should provide….”\(^{193}\)

Plato? If anyone on the Court understood Plato it was surely not McReynolds, but more likely Holmes. Nonetheless, McReynolds described the platonic law that he saw mirrored in the Nebraska—and likely, the soon-to-be Oregon—law:

> That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. … The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the

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\(^{192}\) _Id. See also_ KNOX, _supra_ note 76, at 74 (describing the Justice’s falling out with one of his nephews over the playing of jazz music).

\(^{193}\) _Meyer_ v. _Nebraska_, 262 U.S. 390, 412 (1923) (Holmes, J., dissenting). The location of Holmes’s dissent is somewhat confusing. At the end of _Meyer_, all we are told is, “Mr. Justice Holmes and Mr. Justice Sutherland, dissent.” _Id._ at 403. However, attached to the end of a second language case, decided the same day, and located immediately after _Meyer_ in the _United States Reports_, is Holmes’s dissent on the Nebraska law. _See_ Bartels v. _Iowa_, 262 U.S. 404, 412 (1923). For purposes of convention and clarity, I use the case name of _Meyer_ when referring to Holmes’s dissent.
inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.194

Additionally, McReynolds considered the “ideal citizens” of Sparta, where males were put into barracks and educated and trained by guardians. “Although such measures have been deliberately approved by men of great genius[,] their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest . . . .”195

Several images from McReynolds’s citations stand out. First, is the condemnation of parent-child separation. As John Knox described in his memoir, McReynolds seemed to have a wistful sense about being without a wife and children. This particular sensitivity likely produced those lines. The second, and more important, point to note is the anti-standardization sentiment. In both of McReynolds’s examples—Plato and the Spartans—the state determines who is superior and who is inferior. In McReynolds’s own life, it was social custom that dictated that determination. Imagine the shock to the Justice’s sensibilities if little black children were forcibly schooled and trained with little white children. As David Tyack has noted, this would have been the effect of the Oregon law.196

Of course, McReynolds did not pull Plato and the Spartans out of the history books himself. His aid in that feat was none other than William Guthrie via his amicus brief in Meyer.197 But that brief was not the first time Guthrie has used those allusions. On a Thanksgiving Day speech in 1915, honoring the Pilgrims, Guthrie used Plato’s ideas as examples of tried and rejected communist theories of government. Guthrie’s interpretation of history is quite useful for understanding the motivation of Meyer. He told his audience, “The Pilgrims began government under the Mayflower Compact with a system of communism or common property. The experiment almost wrecked the colony.”198 The Pilgrims had a lesson to teach the 20th century progressives:

194 Meyer, 262 U.S. at 401.
195 Id. at 402. It is curious to note that the Eleventh Circuit more recently mimicked McReynolds’s language—without any attribution whatsoever—in an opinion that was even more reactionary. The Court upheld Florida’s discriminatory adoption law, which categorically prohibits homosexual couples from adopting children. They compared homosexual households to the radical thinking of Plato and de Beauvoir. Lofton v. Sec’y of Dep’t of Children & Family Services, 358 F.3d 804, 820 (11th Cir. 2004) (“Although social theorists from Plato to Simone de Beauvoir have proposed alternative child-rearing arrangements, none has proven as enduring as the marital family structure, nor has the accumulated wisdom of several millennia of human experience discovered a superior model.”).
196 Tyack, supra note 42, at 80.
197 See Woodhouse, supra note 97, at 1077.
198 WILLIAM DAMERON GUTHRIE, The Mayflower Compact, in MAGNA CARTA, supra note 126, at 27, 37. This address was delivered on November 23, 1915.
All who now urge communism in one form or another, often in
disguise, might profitably study the experience of Plymouth, which
followed a similarly unfortunate disaster in Virginia. History often
teaches men in vain. Governor Bradford’s account of this early
experiment in communism in his annals of “Plimoth Plantation” is
extremely interesting.199

Bradford proceeds as follows:

The experience that was had in this comone course and condition,
tried sundrie years, and that amongst godly and sober men, may well
evince the vanitie of that conceite of Platos & other ancients, applauded
by some of later times;—that yᵉ taking away of propertie, and bringing
in comunitie into a comone wealth, would make them happy and
flourishing; as if they were wiser then God.200

Guthrie further explained how church and state had never really been
separated at Plymouth and how that was its strength.201 This historical
interpretation conveniently supported his belief that Catholicism was doing the
state a public service in educating children.202 Moreover, the Bradford quote
supported Rome’s opposition to communism as being unnatural or ungodly. One
final hint that Guthrie was extraordinarily prepared for Pierce was his observation
that the recent “fad” of “the referendum” was a menace to the subsequent
Plymouth republic.203 All McReynolds had to do was pick up Guthrie’s brief, or
any one of his relevant writings, and explain that only communists would make the
child a “mere creature of the state.”204 Just how much this type of rhetoric was
determinative of the outcome in Meyer is evident by constant references to Plato
and communism in Guthrie’s Pierce brief.205

Recall the earlier discussion above of the argument between progressives and
social Darwinists and it will soon become clear why conservatives viewed the
Oregon school law as a threat to the natural order of things.206 In order to

199 Id. at 37-38.
200 Id. at 38.
201 Modern historians who have studied Plymouth would certainly disagree. See, e.g.,
JOHN DEMOS, A LITTLE COMMONWEALTH: FAMILY LIFE IN PLYMOUTH COLONY 162 (2d
ed., Oxford Univ. Press 2000) (1970) (discussing how marriage was “a civil
ceremony, not

202 See supra text accompanying notes 132-33.
203 The Mayflower Compact, supra note 198.
204 Pierce v. Soc’y of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 535
(1925).
205 See Brief of Appellee at 67, Pierce v. Soc’y of Sisters of the Holy Names of Jesus
206 See supra notes 93-94, discussing the progressive and conservative ideologies
regarding immigration and education.
understand why conservatives like Guthrie reacted so hostilely to the law, we need only look to the arguments put forth by its proponents. The affirmative argument printed in the official voter pamphlet was quite coherent and persuasive, and difficult to rebut.207

The authors of the argument addressed the problems of immigration in a way that appeared thoughtful and deliberate and decidedly non-reactionary. Appealing to voters’ patriotic instincts, the proponents contended: “The assimilation and education of our foreign born citizens in the principles of our government, the hopes and inspiration of our people, are best secured by and through attendance of all children in our public schools.”208 The explicit goal of assimilating foreign-born citizens, while clearly indicating a nativist tendency, did not extend to hostility towards immigrants. That is to say, the law’s supporters obviously preferred American ways, but not at the expense of foreign exclusion.209 Instead, they further explained their assimilationist plan: “We must now halt those coming to our country from forming groups, establishing schools, and thereby bringing up their children in an environment often antagonistic to the principles of our government.”210 A preference for assimilation and a prohibition on self-isolation was their recipe for Americanization: “Mix the children of the foreign-born with the native-born, and the rich with the poor. Mix those with prejudices in the public school melting pot for a few years while their minds are plastic, and finally bring out the finished product—a true American.”211 These lines of argument were progressive because they included a place in the American family for immigrants. Compare that thought to the more conservative strains, which argued for exclusionary laws on the grounds that immigrants were unassimilable. There simply was no organized group contending that America should celebrate pluralism and diversity of culture, before or after the war.212 Supporters of the Oregon law made one final call for national unity when they claimed: “Our

207 See Brief of Appellee, supra note 205, at 96.
208 Id. at 97.
210 Brief of Appellee, supra note 205, at 97.
211 Id.
212 To be sure, there were individual voices calling for cosmopolitanism and pluralism. See Horace M. Kallen, Democracy Versus the Melting-Pot (pts. 1 & 2), THE NATION, Feb. 18, 1915, at 190, THE NATION, Feb. 25, 1915, at 217; Randolph S. Bourne, Trans-national America, ATLANTIC MONTHLY, July 1916, available at http://www.theatlantic.com/issues/16jul/bourne.htm (criticizing “Americanism” and asking “whether perhaps the time has not come to assert a higher ideal than the ‘melting-pot’”); see also DAVID A. HOLLINGER, POSTETHNIC AMERICA: BEYOND MULTICULTURALISM 11–12, 92–98 (10th anniv. ed., Basic Books 2005) (arguing that Kallen and Bourne were both precursors to modern-day multiculturalism).
children must not under any pretext, be it based upon money, creed or social status, be divided into antagonistic groups, there to absorb the narrow views of life, as they are taught.”213 The argument of the school law proponents looks even more progressive when contrasted against the arguments made by conservative William Guthrie.

In his brief for the Catholic school run by the Society of Sisters of the Holy Names of Jesus and Mary, Guthrie claimed that the “whole notion [of ‘proponents’] is founded upon a misconception of the situation.”214 So as not to further that “misconception” in the Supreme Court, Guthrie explicitly stated, “The public school is not a ‘melting pot.’”215 What Guthrie was really arguing was that the whole notion of a melting pot itself was fanciful. He said: “No legislation can proscribe social discrimination . . . and no force thus far vouchsafed to man has ever been equal to the destruction or elimination of social distinctions.”216 This is precisely the language of social Darwinism. For social Darwinists, social distinctions within the human population were as natural as the flowers and the trees, and no amount of human legislation could alter that fact. Rather, man’s attempt to fool with Mother Nature usually resulted in human regress instead of the natural progress that occurred as the socially superior took their place in a well and naturally ordered society. In other words, the citizens of Oregon who voted for assimilation and against the idea of “antagonistic groups” were voting against nature itself. For conservatives like Guthrie, distinction based upon “money, creed or social status” were no mere “pretexts” that could be untaught—they were very real differences based upon men’s natural abilities.

This philosophy of the human condition led to a very clear view of the relationship between children, their parents, and the rest of society. The parent-child relationship was very much one of ownership: “For them parents struggle and amass property and put forth their greatest efforts and strive for an honored name. In return for the enormous sacrifice they make and burden they bear, parents have the right to guide and rear their children to be worthy of them.”217 The language of contract and the quid pro quo inherent in this description must not be overlooked.218 However, neither must we take the contract analogy too far. The children, of course, never freely consented to their parents’ dominion, but for conservatives that was irrelevant. What mattered was the natural fact of procreation and childbirth and the belief that the institution of the family into which a child was born was as natural as those social distinctions that differentiated classes, religions, and nationalities. If it were otherwise—if children

213 Brief of Appellee, supra note 205, at 97.
214 Id. at 60.
215 Id.
216 Id. at 63.
217 Id. at 66.
218 Conservative critics of Woodhouse claim that “there is no such suggestion” that the Court was “treating the children as their parents’ property.” Stephen L. Carter, Parents, Religion, and Schools: Reflections on Pierce, 70 Years Later, 27 SETON HALL L. REV. 1194, 1203, n.28 (1997). But the ideological context of Pierce suggests just the opposite.
were not the property of their parents—“gone would be the most potent reason for women to be chaste and men to be continent.” How this natural law, social Darwinian, view of social differentiation and parental ownership fit together becomes clearer as Guthrie’s fears are explicated through his understanding of Plato and communism, which as we have seen were liberally used by McReynolds in his opinion for the Court. Even though Plato described an “ideal commonwealth” in great detail, his Republic was entirely antithetical to the American Republic, or so conservatives contended.

2. Holmes’s Pragmatism

Justice Holmes, in his usual impatient tone, refused to give credence to the majority’s fears. Limiting his consideration to the Nebraska language law, he observed: “We all agree, I take it, that it is desirable that all the citizens of the United States should speak a common tongue, and therefore that the end aimed at by the statute is a lawful and proper one.” Holmes was not prepared to hold that the student who only heard a foreign language at home was prevented by the Constitution from being taught only English in school. “I think I appreciate the objection to the law,” he said, “but it appears to me to present a question upon which men reasonably might differ and therefore I am unable to say that the Constitution of the United States prevents the experiment being tried.” It was clear to one of Holmes’s longtime correspondents that presented the opportunity for Holmes to say much more. Privately, Holmes “didn’t think the dissent on teaching languages worth sending” to his friend. He simply reiterated that he thought it was legitimate “to try to make the young citizens speak English.” For Holmes, if citizens wanted to legislate away their freedoms, that was all part of the democratic process. Holmes could have used his dissent to once again berate the majority for substituting its views of family life upon a disagreeable electorate, but instead he held his pen. The majority’s actions frequently tried Holmes’s patience, and McReynolds was usually his ideological foe. Referring to one of McReynolds’s opinions in 1929, which could just as easily have been Meyer or Pierce, Holmes remarked, “McReynolds has the popular side—but to my mind it is another case of treating the XIV Amendment as prohibiting what 5 out of 9 old gentlemen don’t think

\[\text{\footnotesize\textsuperscript{219}}\text{Brief of Appellee, supra note 205, at 66.}\]
\[\text{\footnotesize\textsuperscript{220}}\text{Meyer v. Nebraska, 262 U.S. 390, 412 (1923) (Holmes, J., dissenting).}\]
\[\text{\footnotesize\textsuperscript{221}}\text{Id.}\]
\[\text{\footnotesize\textsuperscript{222}}\text{Letter from Harold J. Laski to Oliver Wendell Holmes, Jr., Justice of the U.S. Supreme Court (June 6, 1923), in 1 HOLMES-LASKI LETTERS, supra note 168, at 507 (“I wait eagerly to see your dissent in the Nebraska language case.”).}\]
\[\text{\footnotesize\textsuperscript{223}}\text{Letter from Oliver Wendell Holmes, Jr., Justice of the U.S. Supreme Court to Harold J. Laski (June 24, 1923), in 1 HOLMES-LASKI LETTERS, supra note 168, at 508.}\]
\[\text{\footnotesize\textsuperscript{224}}\text{Id.}\]
Holmes understood better than any of his contemporaries that that was all the disagreement was ever about. Technical, clause-by-clause interpretation was only the craft by which the majority would assert its view of “right”—in the school cases that was an unobstructed socially static world; it most certainly was not protection for freedom of thought or for religious or foreign minorities.

The *Hammer v. Dagenhart* child labor case presented the same problem for Holmes, only with a different constitutional clause. Referring to the majority’s opinion, he said, “I should have thought that if we were to introduce our own moral conceptions where [in] my opinion they do not belong, this was preeminently a case for upholding the exercise of all its powers by the United States.” What were those moral conceptions of McReynolds and the other four on the popular side? Again it was laissez-faire—a hands off policy regarding parental expectation of his child’s economic contribution informed by a Darwinian understanding of social relations. Recognizing the Court’s hypocrisy in sustaining other congressional commercial prohibitions, Holmes pointed out, “It is not for this Court to pronounce when prohibition is necessary to regulation if it ever may be necessary—to say that it is permissible as against strong drink but not as against the product of ruined lives.” To demonstrate the correctness of Holmes’s observation we need only consider McReynolds’s personal views of right: McReynolds hated alcohol and anyone who drank. Similarly, he thought children should work hard and not exhibit laziness as his nephew was beginning to do.

So why, then, did Holmes join the majority in *Pierce*, the second schooling case, and *Bailey*, the second child labor case? That answer is also simple. Holmes had a great deal of respect for precedent, and saw that each case was a mirror image of its predecessor. Holmes’s respect for precedent is again privately recorded as a being counter to McReynolds. Holmes wrote that McReynolds had been the “mouthpiece for . . . the overruling of a number of decisions written by me—without, so far as I can see, any more convincing argument than that he had a majority behind him.” For Holmes, popularity was not a sufficient reason for voting against existing case law.

One final case, which best demonstrates the two differing thought processes of Holmes and the majority, is one Holmes wrote, *Buck v. Bell*. The commonwealth of Virginia had enacted a law providing for the sterilization of institutionalized inmates with hereditary imbecility in order to facilitate their

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225 Letter from Oliver Wendell Holmes, Jr., Justice of the U.S. Supreme Court to Harold J. Laski (Dec. 18, 1929), in 2 HOLMES-LASKI LETTERS, supra note 156, at 1209.
227 Id. at 280.
228 Id.
229 See Burner, supra note 142, at 2024.
230 See Woodhouse, supra note 97, at 1083 n.473 (quoting McReynolds telling his nephew that he should “shut up and go to work”).
231 Letter from Oliver Wendell Holmes, Jr., Justice of the U.S. Supreme Court to Harold J. Laski (Oct. 24, 1930), in 2 HOLMES-LASKI LETTERS, supra note 156, at 1291.
release. Carrie Buck was a “feeble minded white woman,” who was “the daughter of a feeble-minded mother in the same institution, and the mother of an illegitimate feeble-minded child.” Justice Holmes, writing for seven other members, including McReynolds, held that the substance of the law did not offend some unenumerated right protected by the due process clause. Holmes thought:

It would be strange if [the public] could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.

Holmes thought very highly of his opinion and was quite proud of the result. Despite the fact that Holmes’s “lad” informed him that the “religious are astir” over the case, he was grateful for having been assigned it. Upon delivering the opinion in open court, Holmes wrote that he “felt that [he] was getting near to the first principle of real reform,” noting a move away from natural law and first principles. The reform to which Holmes referred, of course, was a rejection of a Fourteenth Amendment due process argument, the same argument used to strike down laws in Meyer and Pierce. So, how does one explain the concurrence of those defenders of civil liberties, such as the Meyer majority? Of course, one cannot, unless the notion of McReynolds and his fellow conservative brethren as civil libertarians is abandoned.

For McReynolds, sterilization of imbeciles likely provoked not even a second thought. Carrie Buck, “a feeble minded white woman,” was probably not much above, perhaps even below, Harry’s college-bound sons on McReynolds social hierarchy. If McReynolds heard Catholic cries of religious persecution in Meyer and Pierce, they certainly did not faze him in Buck. If McReynolds valued social

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233 Id. at 205.
234 Id. at 207 (citation omitted).
235 Letter from Oliver Wendell Holmes, Jr., Justice of the U.S. Supreme Court to Harold J. Laski (Apr. 25, 1927), in 2 HOLMES-LASKI LETTERS, supra note 156, at 938.
236 Letter from Oliver Wendell Holmes, Jr., Justice of the U.S. Supreme Court to Harold J. Laski (May 12, 1927), in 2 HOLMES-LASKI LETTERS, supra note 156, at 942; see also id. at 938 (“The Chief has given me a pretty interesting lot of cases this term—and I have enjoyed writing them.” He was specifically referring to Buck v. Bell.).
237 See Buck, 247 U.S. at 208. Only Justice Pierce Butler dissented, and did so without opinion. Butler, one of the four horsemen, was the only Catholic on the Court. On the religious affiliations of the members of the Court, see Religious Affiliation of the U.S. Supreme Court, http://www.adherents.com/adh_sc.html (last visited Dec. 4, 2009) (None of the other twelve Catholics listed served with Butler in 1927.).
diversity—religious, linguistic, and ethnic—then he drew the line at mental
diversity (imbeciles). But if, in fact, McReynolds was concerned not about civil
liberties, but instead about socialistic interference with his idealized, white,
patriarchal family, then Carrie Buck had no chance at ever receiving a sympathetic
ear from him. Her family was not the kind McReynolds recognized.

In a very recent, full-length treatment of *Buck*, Paul Lombardo attempts to
explain Holmes’s opinion, as well as the other justices’ reactions to it. He
characterizes Justice McReynolds’s vote as “predictable,” but Justice Brandeis’s as
“seem[ingly] an anomaly.” He further states that McReynolds “rarely voted to
strike down state enactments.” Obviously, *Meyer* and *Pierce* were not in his
sights. In explaining Holmes’s letter to Laski, in which Holmes says *Buck* was
“‘getting near the first principle of real reform,’” Lombardo attempts to equate
“reform,” with eugenics rather than with judicial minimalism.

Lombardo’s interpretation is quite unfortunate because it mischaracterizes
Holmes’s fundamental legal holding, which was judicial non-interference with the
struggle for survival—the very same reasons which led him to dissent in *Lochner*
and other similar cases. While I agree with Lombardo that McReynolds’s vote was
“predictable” because of his inability to separate his general social outlook from
his legal decisions, Brandeis’s vote was almost as predictable as Holmes’s for just
the opposite reason. If the *legal* principle of *Buck* was to serve as precedent, then
gone were *Lochner, Meyer,* and all other opinions that interfered with democratic
majories codifying into law their reasonable disagreements—that was the “real
reform.” To be sure, Holmes reveled in being called a “monster” by religious
“cranks” and in being told he should expect the “judgment of an outraged God.”
But those were merely the fringe benefits of a legal job well done.

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238 PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE
239 Id. at 172-73.
240 Id. at 172.
241 Id. at 173 (quoting Holmes to Laski, May 12, 1927, Howe, Holmes-Laski Letters,
vol. 2, 941-42). It is true that Holmes thought people generally put too high a value on
human life. Or as he once said, in mocking pacifism, “this hyperaethereal respect for
human life seems perhaps the silliest [-ism] of all.” Yet, unlike the majority of his
colleagues, which included McReynolds, Holmes voted to grant a pacifist citizenship
despite her “silly” beliefs. Steven J. Macias, Rorty, Pragmatism, and Gaylaw: A Eulogy, a
Celebration, and a Triumph, 77 UMKC L. Rev. 85, 89 (2008) (quoting Holmes’s private
correspondence in Letter from Oliver Wendell Holmes, Jr., Justice of the U.S. Supreme
Court to Harold J. Laski (Apr. 13, 1929), in 2 HOLMES-LASKI LETTERS, supra note 156, at
1146, regarding the pacifist’s case, United States v. Schwimmer, 279 U.S. 644 (1929)). The
point is, that while Holmes did not have any principled objection to eugenics (which is
quite different from embracing it), neither did he view the judicial province as one in which
judges imposed their philosophical or policy preferences upon the public. But cf. Mary L.
Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of
Constitutional Law*, 71 IOWA L. Rev. 833, 855–59 (1986) (arguing that the rhetorical style
of *Buck* somehow indicates that Holmes was promoting eugenics).
242 LOMBARDO, supra note 238, at 173.
It has not been the task of these two sections to undermine the legal foundations of the privacy doctrine, or of *Griswold* or *Roe*. The sole purpose behind these sections was to show how the Supreme Court, during a brief time in the early 20th century, was not as progressive with regard to its treatment of children and families as other scholars have argued. Whatever reasons Justices Douglas and Blackmun had for their rulings some forty and fifty years after *Meyer* and *Pierce*, those are for others to explain. I only mention them because of their profound influence on subsequent Supreme Court historians in interpreting the earlier Court.

Much more could be written about the colorful James C. McReynolds. Though perhaps not a household name like his colleague Oliver Wendell Holmes, Jr., McReynolds was instrumental in shaping the pre-New Deal Court. A southern gentleman with dashed political aspirations and with no family to comfort him, he set out to create and maintain an American society as he saw fit. His vision was of a stable, male-headed household, independent of any governmental assistance. The children were obedient, worked for their families, and were schooled at their parents’ direction. A firm believer in capitalism, McReynolds eschewed any attempt to socialize this country, including taking children’s labor and control away from the rightful owners. By 1941, when McReynolds retired from the Court, he was the last of the conservative lot to depart. By then, the country and the Court had finally put to rest the ideal southern society and turned their backs on McReynolds’s social views. Somehow, his words began to take on new meaning, eventually to a point that would surely have made him aghast. A true appreciation of the history of families before the Supreme Court bar requires that McReynolds’s decisions be returned to their original context.

III. MODERN PARENTAL LIBERTY

Thanks largely to the legacies of *Meyer* and *Pierce*, when a child is born today, its parents—however defined243—acquire some set of legal rights, as parents, to the care, custody, and control of that child.244 In modern parlance, one would say that a parent has a fundamental legal right to raise his or her child without excessive governmental interference. Most non-lawyers, moreover, would also say that parents have some sort of natural or moral right to raise their children as they see fit. This is so well accepted that everyone has probably heard some indignant parent, in public or at least on television, tell another individual, “Don’t tell me how to raise my kid!” Even children themselves accept their role as the

243 That is, however defined for legal purposes, and thus could include adoptive parents, presumptive parents, etc. *See*, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (holding that a state may create a legal presumption of parentage in someone other than a biological parent, such as a husband whose wife has a child).

244 *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (citing *Meyer* and *Pierce* for the proposition that “. . . 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.”).
children of their parents. Anyone who has ever been around a poorly mannered child may have heard, “You’re not my mom; you can’t tell me what to do!” The rights of parents—both moral and legal—thus permeate our culture. But is this a good thing? Is the parent-child relationship best seen—in both legal and moral terms—as an individualistic relationship impermeable by outsiders? Should non-parents always been seen as outsiders, as strangers, in relation to any particular child? The extent to which this social conception manifests itself in daily intercourse is wide-ranging to say the least. The examples I consider below are all drawn from legal controversies concerning religious parents’ rights in the education and custody realms. It will be my suggestion that we reconsider the whole parent-child relationship in order to discover what is actually occurring under the cover of parental rights.

The approach I will take is more jurisprudential than doctrinal. The following two sections will be highly critical of arguments made by lawyers and judges that have refused to consider the implications behind their citations to precedent. I am especially troubled by the poorly-reasoned, philosophically-weak opinions delivered by courts that purport to be basing their decisions on policy implications. The most egregious example of this judicial failing was the Troxel case “decided” by Supreme Court in 2000. Since then, Troxel has been cited for contradictory purposes, and has even been used by opposing amici who, in the Troxel case itself, were on the same side of the issue. All of this confusion, I will suggest, has arisen because we refuse to consider the moral implications of the parent-child relationship within the legal realm, even though legal opinions have perhaps the greatest effect on this aspect of our social being. Lawyers and judges cannot close their eyes to the moral implications of their decisions or pass them off as solely the concern of the legislatures. This responsibility is especially heavy when the legal decision decides the fate of a child—a future citizen who will be a participant in the very democracy courts so oftentimes trump in these cases. The fact that children are not yet full members of the body politic, however, should cause any judge pause in resting a decision upon a rights-based regime, weighted

245 This is not to suggest that the political philosophy I discuss below, or moral philosophy or any other rigorous theory, should be determinative in judicial opinions. What I am suggesting, however, is that courts use something other than precedential notions of parents’ rights that apparently rest on no modern rationale. The alternative would be opinions rendered because the judges have some reason to believe they will advance social utility.

246 “Mangled” might be a better word than “decided” because all they gave us was a plurality opinion, two inconsistent concurrences, and three inconsistent dissents. See Troxel, 530 U.S. at 57.

247 Thus, evangelical Christians and the ACLU, groups that were both on the same side in Troxel, have since used that opinion in their favor in subsequent cases in which they have been on opposing sides. See infra Part VI.B.
down with individualistic assumptions that frequently ignore the unique role a child fills (and will fill) in his society.248

A. The Stakes Involved

This issue is especially timely as this country currently finds itself embroiled in a “culture war” over gay marriage where some opponents’ main line of argument is that sanctioning such marriages will harm children.249 At the same time, six states have actually made gay marriages legal and some constitutional scholars argue that it follows that other states will be required to give recognition to those marriages. Some even argue that the Court’s recent decision in Lawrence v. Texas renders discriminatory marriage laws unconstitutional.250 Whatever eventually happens on the gay marriage front, one thing is clear: the battle lines will be drawn using children as pawns in adults’ self-serving efforts to promote inward-looking agendas.251

But the culture wars extend to more than just marriage, and frequently invade the classroom as well. Consider the recent dispute over the Pledge of Allegiance where a father argued that recitation of the words “under God” in a public school violated the Establishment Clause.252 Rather than addressing his argument, the Court found that the father lacked standing to pursue the claim as a matter of family law.253 However, not all liberal democracies take such a parent-centered view of childrearing. The U.S.’s neighbor to the north, Canada, is one such example that will provide us with a comparison.

It will be my contention in what follows, that whatever the virtues of family autonomy, a strong form of parental rights, such as exists in the United States, is inconsistent with protecting the liberty of future generations. I will proceed by

248 Cf. Anne C. Dailey, Developing Citizens, 91 IOWA L. REV. 431, 435 (2006) (arguing that we need “to undertake a close empirical examination of the family’s contribution to children’s development as citizens . . . .”). I sympathize with Dailey’s project so long as the social science findings are but one aspect of our evaluation of citizenship preparation.

249 See, e.g., ProtectMarriage.com, Yes on 8 TV Ad: It’s Already Happened, available at http://www.youtube.com/watch?v=0PgjcgqFYP4 (last visited Dec. 5, 2009) (arguing that gay marriage will be taught in public schools if it is legalized).


251 See Nancy D. Polikoff, For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark, 8 N.Y. CITY L. REV. 573 passim (2005) (critiquing both opponents and proponents of marriage equality for using child-welfare arguments instead of arguments based on equality and overall social welfare).


253 Id. at 17-18.
setting out some court decisions that illustrate the dangers to liberalism posed by excessive deference to parental choices. After a critique of those decisions, I will turn to various theories of liberty and freedom, namely those of Hobbes and Locke, to get a sense of the foundations of modern statehood and some of the tensions inherent in liberal polities. Then I will return to the cases initially presented and apply the foundational frameworks to their facts to demonstrate how more thoughtful solutions might have been achieved. Simply put, I hope to show that assertions of parental rights have the potential to negatively impact a liberal polity by disrupting the training ground of the concerned child—and future citizen—thereby undermining the shared values of the community.

B. Case Studies in Conflict: (Religious) Parents against the State

The following examples all have the common theme of parents claiming that some inviolable liberty of theirs, as parents with rights over their children, has been breached. The parents did not win every case, but the claims presented show how strongly the culture of rights has extended to the parent-child relationship. As we analyze the facts of the cases presented below, we should keep in mind several key questions that will help to guide our later inquiries into the application of political theory. First, what was the nature of the decision made on behalf of the children involved in the dispute? By clarifying the nature of the decision, we can better assess to what extent the case bears on liberal ideals. Cases whose nature affects how a child acquires ideas seem to strike at the heart of the maintenance of a liberal society. Whereas cases that concerned with ordinary child custody disputes might cause us less concern where no larger issue is involved. Second, who made the decision, and who was contending for the competing right to decide otherwise? We are interested in the child’s decision-maker primarily to recognize a parent-state conflict when we see one. Once it is clear who that party is, then we can make more use of the answer to our last query, what was the basis for the decision actually made, and what is the basis for the competing decision of the complaining party? Fundamentally, we want to know if the basis of the decision was a liberal one. Suppose we have a case that concerns what new ideas a child is to learn. Two possibilities might present themselves in the form of a conflict: one party wants to restrict the child’s knowledge base, while the other is fighting for exposure. If the state is involved, and it considers itself a liberal state, then almost certainly it will be on the side of more, not less, idea exposure. As I will argue below, there can be no legitimate liberal perspective that urges limited exposure under the guise of parental rights.

The first case we will consider is Mozert v. Hawkins County Board of Education, decided by the United States Court of Appeals for the Sixth Circuit in 1987. The case caused quite a stir in the legal journals shortly after it was

254 Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987).
handed down. In Mozer, a group of “born again Christian” parents sued the Tennessee school district where their children were enrolled because they objected to the mandatory Holt reader series utilized in classrooms district-wide. The parents felt the children’s exposure to the readers violated their (the parents’ and the students’) free exercise rights protected by the First Amendment. A unanimous panel of the Sixth Circuit rejected the plaintiff-parents’ claims, but the extreme nature of those claims is what calls our attention to the case.

The religious parents specifically objected to stories in the readers that they felt portrayed “evolution, and ‘secular humanism’ . . . [as well] as ‘futuristic supernaturalism,’ pacifism, magic and false views of death.” Assurances from the school district that the children were not required or taught to subscribe to any particular belief did not satisfy the parents. Even with a teacher “not[ing] on the student worksheets that the student was not required to believe the stories” was not enough for these plaintiffs. Instead, plaintiff parents “objected to passages . . . that contradict[ed] the plaintiff’s religious views without a statement that the other views are incorrect and that the plaintiffs’ views are the correct ones.” As one parent testified:

it would be acceptable for the schools to teach her children about other philosophies and religions, but if the practices of other religions were described in detail, or if the philosophy was “profound” in that it expressed a world view that deeply undermined her religious beliefs, then her children “would have to be instructed to [the] error [of the other philosophy].”

The nature of the decision in the Mozer case regards the range of ideas thought necessary by the community to communicate to its young through the public schools. Simply put, the heart of this case was exposure to ideas, some of which the parents found objectionable. If we look at the claims more closely, however, we can also detect a desire by the complainants for the state to reaffirm their view of the world. In the testimony quoted above, one parent explicitly

256 Mozer, 827 F.2d at 1060.
257 Id. at 1062.
258 Id. at 1060.
259 Id.
260 Id. at 1062.
261 Id. at 1064.
demanded that the school pass judgment on all philosophies, and affirm only hers. Thus, the plaintiffs in Mozert were asking that their children not be permitted to form any critical faculties that might undermine the parents’ religious views.

The competing decision-makers here were the elected school board and the complaining parents. The school board had decided upon a certain curriculum that required exposure to a range of existing ideas. The parents wanted the children to read less provocative material. The competing bases of the decision-makers are the more interesting questions in this case. The school board presumably based its initial decision on adoption of the Holt reading series on the quality of the books to promoting reading skills to the youngsters in its charge. There was no evidence, not even a suggestion from the plaintiffs, that the decision was based on hostility to religious groups, nor was there evidence that the board knew in advance that some religious peoples would be offended by the contents. The apparent basis of the parents’ objections was a concern for their children’s spiritual well being. Because of the religious views of the parents, they felt that unless their views were reinforced and unchallenged in the schools, then permitting their children to read to the textbooks undermined their own religious rights. We will analyze the implications of these circumstances below.

The other case we will consider involving a dispute over the role of religion in childrearing is Young v. Young, decided by the Supreme Court of Canada. The question in Young was whether a divorced father, who did not have custody but only visitation rights, could be required by court order not to discuss his religion with his children because it was not in their best interest. The father had recently converted to the Jehovah’s Witness religion, and that apparently was one of the main reasons for the divorce from his wife. In making the order providing for visitation and access to his children, the trial court added the following conditions on the father: he could not discuss his religion with his children nor take them to religious activities without the consent of their mother, he could not prevent blood transfusions should the need arise, and he could not make disparaging remarks about the mother’s religious beliefs or lack thereof. The father challenged the access order as a violation of his right to freedom of religion, thought, and association under the Canadian Charter of Rights and Freedoms.

The Canadian Supreme Court held that the statutory basis of the trial court’s decision—the best interest of the child—did not violate the father’s Charter

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262 See id. at 1060 (explaining that Hawkins County schools taught “critical reading” designed to ensure that children become “effective participants in modern society.”).
263 See id. at 1059–60 (describing the school district’s reading program).
264 Id. at 1060.
265 Young v. Young, [1993] 4 S.C.R. 3, 49 R.F.L. (3d) 117 (Can.) [for sake of convenience, future references will be to paragraph numbers].
266 Id. at ¶ 1.
267 Id. at ¶ 3.
268 Id. at ¶ 5.
269 Id. at ¶ 9.
“The reason is that the guarantees of religious freedom and expressive freedom in the Charter do not protect conduct which violates the best interest of the child test,” the Court explained. The Court further elucidated why a parent’s religious claim could not trump the best interest standard: “The vulnerable situation of the child heightens the need for protection; if one is to err, it should not be in favour [sic] of the exercise of the alleged parental right, but in favour [sic] of the interests of the child.” This analysis, however, also led to a reversal of the access order because it vested too much of a parental right in the mother to decide what ideas her children were exposed to. In reversing the order, the majority explained:

The trial judge’s undue emphasis on the “rights” of the custodial parent, coupled with her failure to consider the benefits to be gained from unrestricted contact with the access parent or whether those benefits were offset by a greater risk of harm to the children, may have clouded her appreciation of what was in their best interests.

The nature of the decision in Young was idea exposure, just as in the Mozert case described above. The fact that the contested ideas here were those of a father and those in Mozert were contained in a school textbook is of no consequence to the nature of the childrearing decision. The competing decision-makers in this case were the mother, the father, and the courts. The mother desired a veto over what ideas the children’s father could explore with them. The father wanted to discuss his beliefs and question his children about religion. The Supreme Court, however, held that it would decide what ideas were and were not in the children’s best interest, with both parents’ preference only of secondary concern. The bases of the various decisions were all quite different. The father certainly wanted to provide his children spiritual guidance, but he also was concerned with his own exercise of religion, which involved spreading his beliefs to others. The mother expressed concern that her children suffered stress at having to listen to their father’s religious messages, but because this was part of a divorce proceeding, there was some vengeance in her decision as well, especially since the religious issue was a cause of the divorce. The Court’s basis for its decision was the statutorily required “best interest of the child” standard. That basis was taken quite seriously by the Court and applied as objectively as possible.

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270 Id. at ¶ 30.
271 Id. at ¶ 28.
272 Id. at ¶ 33.
273 Id. at ¶ 45.
274 Id. ¶ 48 (noting that “the notions of custody and access unite in a common purpose of promoting the child’s best interests” and thus neither the custodial nor non-custodial parent’s right was paramount).
275 Id. ¶ 257 (describing children’s reactions to their father’s proselytizing).
276 Id. ¶ 96 (explaining that the husband had been involved in the Jehovah’s Witness faith for two years without telling his wife).
Mozert and Young both provide examples of parental claims of the right to control the ideas exposed to their children. When we return to consider the consequences of such claims of right, we will want to remember what position the children would have been in had their parents’ claims succeeded.

C. The Problems Raised by Parental Rights

In this section, I will briefly sketch out some problems I see caused by claims of parental rights. Let me begin by taking the abstract claim that there is a moral right conferred by natural parenthood that the state is required to respect by not infringing too deeply into the childrearing realm. The most basic problem this claim presents is that it ignores the fact that the child will one day be an independent, reasoning being, who will have to interact with a diverse community. Allowing too great an amount of unrestricted liberty in the parents has the tendency to isolate the child from points of view due to parental parochialism. It might seem as though I am suggesting that recognizing the state’s power to act as parens patriae will result in a greater respect for pluralism and that this is a good thing. On that point, however, my position is agnostic. Not only does excessive deference to parental rights result in limited idea exposure for the children, it also exacerbates the number of different points of view within a society because of the privatization of families. As a result of family privacy, we are left with an increase in parochialism and an increase in diversity of views—a sure recipe for social, cultural, and political strife as children become full citizens, expected to interact with others to govern a society foreign to them because of their narrow upbringing.

Consider the Mozert case again. Admittedly, this case is the easiest to criticize because the claims made by the religious parents were so extreme and troubling to those who believe in the centrality of a humanistic education for civic success. Perhaps the easiest way of explaining the problems with the plaintiffs’ views is to consider the arguments of an academic defender of the parents. Nomi Maya Stolzenberg claimed that there was a paradox in the idea of a liberal education that did not respect the values of fundamentalist Christians, who find the liberal values of “tolerance and evenhandedness” offensive. She asserted that exposing the children to a diversity of viewpoints was interference per se with the free exercise of the parents’ religion. I have no difficulty conceding the point that many religious parents do indeed feel that in practicing their religion they must transfer their beliefs onto their children. What I object to, however, is the assertion that such control over a third-party, even a child, is in any way consistent with liberal individualism. In other words, molding a child’s plastic mind to unquestioningly accepting a particular worldview seems to be the farthest thing from liberal education as possible.

Stolzenberg tries to play the role of liberal sympathizer with the evangelical parents. A better description of her endeavor might be that of an anthropologist, objectively observing a lost tribal culture, doing her best to make non-judgmental

277 Stolzenberg, supra note 255, at 591.
assessments. This leads her to make the following claim regarding the appellate court’s failure to see things her way:

Chief Judge Lively’s incomprehension reflects no purely personal intellectual failing, however. The fundamentalists’ argument against exposure is truly difficult for one raised in the liberal tradition to grasp, because it relies on a dizzying subversion of the contrast between the objective and inculcative methods of education. The contrast is denied in the plaintiffs’ charge that exposure has an indoctrinating effect, and, again, in the proposition that the legitimate alternative to the state inculcating values . . . is not mere exposure but rather “opting out” to allow the parents to inculcate the appropriate values. Such a viewpoint challenges the conventional wisdom that critical reflection, rational thought, and individual choice are the antithesis of, and the best safeguards against, indoctrination.278

At this point, one wishes Stolzenberg had applied some critical reflection and rational thought of her own. The fact that we are dealing with a child—a future citizen—seems to have been lost on her entirely. No liberal would deny anyone from holding whatever view he desires, even if that includes turning his back on rationality and adopting the Bible as his literal truth. What a liberal can, and it seems to me must, deny is that an illiberal parent can retard a child’s intellectual growth in the face of opposition from a liberal democratic state.279

Stolzenberg tries to acknowledge the existence of the child by asserting that the real problem is locating the locus of child belonging, whether in the state, the parents, or both. She claims the primary locus of belonging is with the parents, and thus they should have the right to rear their children through indoctrination. This tension, however, is more imaginary that real; it is entirely irrelevant to the intellectual development of the child. Regardless of family or national origin, there is a transcendent characteristic of children, namely, they are all capable of acquiring knowledge. Moreover, all children will one day cease being children and

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278 Id. at 613.

279 Apparently, Stolzenberg would also disagree with my characterization of liberalism. In a rather non-historical essay she claims that “Fundamentalism . . . is not the enemy of reason, but rather its truest defender . . . By the same token, it is not antagonistic to liberalism; it is rather liberalism’s truest defender.” Nomi Maya Stolzenberg, Liberalism in a Romantic State, 5 LAW, CULTURE & HUMAN. 194, 210 (2009). Although I do not claim to speak for “true” liberalism, I can say, on behalf of historical liberalism, that Stolzenberg’s list of “most exponents of liberal political philosophy” omits an entire strain of negative liberty theorists beginning with Hobbes, continuing with Bentham and Mill, and, in the 20th century, Isaiah Berlin. Id. at 197. But see infra Section V.A & note 295 (discussing Hobbes as a liberal theorist). I do think that Stolzenberg accurately portrays a tension between negative and positive conceptions of liberty, and between Lockean liberalism and what she calls “romantic” liberalism. I simply object to the historical claim, which she then uses to make the valuation about “true” liberalism.
will “belong” not to their parents, but to their community. It is quite ridiculous to worry that if the children of evangelical parents are exposed to profound ideas, then the survival of evangelical religion is under threat. It is feared by many of these religious sects that if their children are provided with a more philosophical education they will turn their backs on their faith, thus diminishing its numbers.280 But we can trace historically the rise of particular religions, and know from that that all religions had their origins in the free choice of the original founders.281 The fact that a smaller number of educated citizens would choose to follow the fundamentalist religions would not be the result of liberalism per se, but the result of education. It is an odd type of liberal who advocates keeping a segment of its society mentally enslaved from exercising the free and rational choice that becomes available to one educated in a liberal polity.

IV. THEORIES OF LIBERTY AND THE PATERNAL ROLE

Now we will consider various theories of liberty within an organized state with the goal of understanding how to best conceive the parental role consistent with a liberal polity. While the main concern here is to explore to what extent a denial of parental rights is inconsistent with the liberty of parents qua parents, other values must also be kept in mind as we proceed. In addition to parents’ liberty, we will also consider the eventual liberty of the children to lead autonomous lives as adults, the implications for a community dedicated to pluralism, and the role of democracy in preparing children for civic life.282 As

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280 See Stephen L. Carter, Religious Freedom as if Family Matters, 78 U. DET. MERCY L. REV. 1, 12 (2000) (arguing that a decision like Mozert allows the state “to decide which religions should be allowed to survive and in what forms.”).

281 In a fascinating article about the tension between freedom of contract and the “environmental model of child development” in 19th century England, Sarah Abramowicz discusses how “Religion, in particular, caused judges to struggle most directly with their recognition that adults are indelibly formed by childhood experiences they did not choose.” Sarah Abramowicz, Childhood and the Limits of Contract, 21 YALE J.L. & HUMAN. 37, 85 (2009). Abramowicz suggests that judges rejected the idea that children could choose religion after the age of majority, recognizing that it had to be implanted “before the child developed the capacity for rational thought.” Id. But, of course, the judges never explained how religion came about in the first place, if not from the rational thought of someone, at some earlier point in time.

282 See RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 156 (Harvard Univ. Press 2003). As Judge Posner correctly notes, “in contemporary American political discourse ‘democracy’ is an all-purpose term of approbation, virtually empty of meaning.” Id. Posner distinguishes what he calls “Concept 1” and “Concept 2” democracy, the former being “[i]dealistic, [d]eliberative, and Deweyan,” the latter being “[e]lite, [p]ragmatic, and Schumpeterian.” Id. at 131, 143. When I say that we should worry about preparing children for democracy, I mean something like aspiring to the unattainable Millian and Deweyan type of democracy, while making full use of the more elitist pragmatic type that Posner thinks actually describes American democracy in action. Thus we would teach a child to spread Mill’s harm principle by example and through discussion, but also teach him that
Francis Edward Devine has noted, the theories of Hobbes and Locke form the basis for competing ideologies of “absolute democracy” and “indefeasible right” in modern society.\textsuperscript{283} It is the goal here to explore how parental power fits into these foundational philosophies. Even if one is skeptical about Devine’s thesis, Hobbes and Locke both provide sophisticated theories of liberty that we can use to evaluate our two case studies of Mozert and Young.\textsuperscript{284} Moreover, it should not be surprising that both 17th century philosophers had something to say about the basis of the family structure, especially since they were abstractly interested in general power structures and forms of governance. Thus the metaphor of the family as a miniature government serves their purposes well in analyzing notions of sovereignty and subjection. Perhaps, that very fact should caution us against taking their writings on family structures too seriously as theories of domestic relations. I will argue, however, that their writings are important, and should be taken seriously, as statements about what is required of subjects or citizens in securing their liberty, and \textit{a fortiori} what every child must learn to be a successful and productive member of his political community.

\section*{A. Hobbes on Liberty}

In understanding Hobbes’s \textit{Leviathan}, it is important to appreciate his concept of nature and the natural state of man as opposed the artificial state of man, which is carried out under the auspices of the civil state. In Hobbes’s state of nature, everybody enjoys complete liberty, but this includes the liberty to interfere with others’ peaceful existence.\textsuperscript{285} As such, man is in constant competition and conflict, a perpetual state of war. Through the use of reason, man comes to realize that peace and security and self-preservation all justify the imposition of sovereign rule by a single artificial man—the state. Hence, those subsequently subject to the state are constrained by artificial chains called laws. The laws are entirely the creation of the sovereign without question. It is important to emphasize, however, that the artificial shackles of the laws do not infringe man’s natural liberty. Hobbes understands the agreement to enter into civil society to be the result of conscious deliberation, and that one is always at liberty not to follow the laws of society.\textsuperscript{286}

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  \item \textsuperscript{283} See Francis Edward Devine, \textit{Absolute Democracy or Indefeasible Right: Hobbes Versus Locke}, 37 J. Pol. 736, passim (1975).
  \item \textsuperscript{284} See generally Abramowicz, supra note 281, passim (discussing the importance of John Locke, John Stuart Mill, and Henry Sumner Maine throughout). As Abramowicz explains, liberal theory was central to modern Anglo-American conceptions of the parent-child relationship. \textit{Id.} at 40-47.
  \item \textsuperscript{285} \textsc{Thomas Hobbes, Leviathan} 117 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651) (explaining that the “Lawes [sic] of Nature . . . without the terrou [sic] of some Power” are insufficient to guarantee personal security).
  \item \textsuperscript{286} For further refinement on Hobbes’s distinction between “the natural” and “the artificial,” see QUENTIN SKINNER, \textit{Hobbes on the Proper Signification of Liberty}, in \textit{3...}
Of course, the result of one’s failure to obey may be physical confinement or death, but it is a free choice nonetheless—a Hobbesian choice.

This same sort of reasoning is extended to the domestic realm when Hobbes discusses the rule of parents over children as “[d]ominion by [g]eneration.”287 What Hobbes concludes is that such dominion is acquired in the same way a people acquire a government, through rational choice. As Hobbes explains, this paternal dominion, “is not so derived from the Generation, as if therefore the Parent had Dominion over his Child because he begat him; but from the Childs [sic] Consent, either expresse, [sic] or by other sufficient arguments declared.”288 We will turn to the “other sufficient arguments” shortly, but we should note that Hobbes also seems to be acknowledging that a child of vocalizing age is not only capable of expressing consent to governance by his parents, but that such words of an infant are to have some moral effect. This must then presume that the child is aware, that without such guardianship, he is likely to face the perils of the state of nature. Perhaps the ability to vocalize is not even necessary to imply consent, and the child’s clinging to a parent would suffice for acceptance of his subjection.

Absent the ability to express consent, we turn to other sufficient arguments that justify parental dominion over children. As a preliminary matter, it must be settled that only one parent can have true dominion over his children, “for no man can obey two Masters.”289 Here, Hobbes seems to be reinforcing the point that sovereignty must be absolute and indivisible. But, it should be noted that such a definition of sovereignty is entirely for the benefit of the subject, so that he knows exactly of what his artificial duties consist. Once it is established that a child can have only one dominant parent, we learn that the only reason it is usually the father by law, is because men have been the ones who have established the artificial states and thus the artificial laws. Not so in nature.

“In the condition of meer [sic] Nature”290 it is the mother who is dominant. Hobbes explains this role reversal: “seeing the Infant is first in the power of the Mother, so as she may either nourish, or expose it; if she nourish it, it oweth its life to the Mother; and is therefore obliged to obey her, rather than any other; and by consequence the Dominion over it is hers.”291 It thus follows that “if she expose it, and another find, and nourish it, the Dominion is in him that nourisheth it.”292 But surely it is the case, even in an artificial state of government, that the mother almost always nourishes her children, regardless of an artificial law providing for...
the dominion in the father. Thus there must be something more than mere sustenance of life that leads to a dominant-subjective relationship. Hobbes has one final thought on this matter that might help to clarify this confusion. Regarding the child, he says, “it ought to obey him by whom it is preserved; because preservation of life being the end, for which one man becomes subject to another, every man is supposed to promise obedience, to him, in whose power it is to save, or destroy him.”\footnote{Id. at 141.} The key lies in unpacking what Hobbes means by preservation of life.

In one sense, of course, the child’s life is preserved when it receives nourishment from its mother. In another sense, a more removed sense, but also a higher sense, the artificial laws regarding domestic relations preserve the child. In other words, by law, the father is responsible for the maintenance of a child born into wedlock, and also for the maintenance of his wife. In turn, the civil law provides for the peaceful coexistence of various families in society, so that no man may lawfully take from another that property necessary to maintain his wife and children. Ultimately, the child owes its preservation to one supreme sovereign lawgiver, who has made the laws that allow for its family’s peaceful existence. The hierarchy of subjection thus goes from child to mother to father to sovereign. “For he that hath Dominion over the person of a man, hath Dominion over all that is his; without which, Dominion were but a Title, without the effect.”\footnote{Id.} For Hobbes, the sovereign has absolute dominion over the children of all its subjects; how it exercises that dominion is entirely the sovereign’s prerogative. Lest that sound ominously despotic, it must be emphasized that the sovereign retains this absolute power only so long as the subjects restrain their natural liberty because they calculate the advantages provided by subjection worthwhile. I suppose we could add that acceptance of the sovereign’s rule can be either express or implicit, such as in the subjects’ act of clinging to civilized society.

The final point we need to make about Hobbes’s theory of liberty returns us to the distinction between the artificial and the natural. Hobbes is generally regarded as the progenitor of the modern doctrine of negative liberty.\footnote{By “negative liberty” I mean to adopt the same notion developed by Bentham and then Berlin, that the greatest amount of artificial freedom (to use Hobbes’s term) is achieved by the absence of artificial law. To read more on the concept of “negative liberty,” see ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY, in LIBERTY: INCORPORATING FOUR ESSAYS ON LIBERTY 118, 171-72 (Henry Hardy ed., Oxford Univ. Press 2002) (1958).} He begins his chapter dedicated to the “[l]iberty of [s]ubjects” with a definition: “LIBERTY, or FREEDOME, [sic] signifieth (properly) the absence of Opposition . . . .”\footnote{HOBBS, supra note 285, at 145.} This idea of negative liberty is entirely centered on the individual, and only concerns itself with whether the person in question has been prevented from taking action by some particular impediment. To understand Hobbes, however, we must distinguish between natural liberty and artificial liberty, or the “liberty of subjects”; otherwise, we might fall into the trap of believing falsely that the creation of the state
somehow impinges our natural liberty. But as Hobbes explicitly tells us, “the Consent of a Subject to Soveraign [sic] Power” results in “no restriction at all, of his own former naturall [sic] Liberty . . . .”

Matthew Kramer has criticized this formulation of negative liberty as devoting too much attention to the freedom to do a particular act, and not enough attention to the result laws have on overall freedom. Take, for example, a law that forbade the beating of one’s children and provided for a year’s confinement if convicted of disobeying the law. Kramer understands Hobbes to be saying that regardless of the existence of the law, a man is free to beat his son because he is able and nothing is physically preventing him from doing so. Kramer then asks us to consider the consequences of this hypothetical child beater: he would be confined for a year and unfree to do a whole number of things he would otherwise have been free to do but for his violation of the law. Thus Kramer concludes, the Hobbesian view of freedom is short-sighted and ignores the long-term effects of liberty-restricting laws.

Kramer is correct, however, only in a very superficial sense. Hobbes would not deny that the liberty of subjects is curtailed by the existence of laws in society. So in this sense he is in agreement with Kramer that law itself is liberty-restricting. He goes so far as to say, “The Greatest Liberty of Subjects, dependeth on the Silence of the Law.” But Hobbes’s denial that natural liberty is restricted is really meant to emphasize the contractual nature of the sovereign-subject relationship. To understand why the restriction of artificial liberty is consistent with the exercise of natural liberty, we must carry our analysis out a little further.

Let us return to our law prohibiting child abuse. The subject of a sovereign who has enacted such a law is not at liberty to abuse his offspring. Under this regime, a parent may be at liberty to conduct himself any number of ways with regard to his children; so long as there is no law expressing what he must do or refrain from doing. Thus a subject parent potentially retains a great deal of sovereignty over his children, despite the explicit limitations. Contrast this, however, to a natural parent—a mother—who has absolute sovereignty over the infant she preserves by nourishing it. The natural parent is at liberty to strike the child as much as she pleases. It should be obvious that the subject parent and natural parent can be one in the same person, differing only on which state he chooses to place himself in. If this parent obeys the commands of the sovereign, then he retains all the advantages of civil society; however, should the parent freely choose to disobey the sovereign, and abuse his child, then he has returned himself to a state of nature and potentially put himself at war with others. In this case the main “other” he has to be concerned with is the artificial man, known as the civil

297 Id. at 151.

298 See MATTHEW H. KRAMER, THE QUALITY OF FREEDOM 38–40 (Oxford Univ. Press 2003). Kramer explains that “overall freedom” is “reduced pro tanto by a well-enforced legal directive that proscribes the doing of A,” where, in my example above, A was child abuse. Id. at 40.

299 HOBBES, supra note 285, at 152.
state, who will exercise its natural liberty to invade and confine the natural liberty of the parent who returned himself to nature. It is, of course, possible that this natural parent may evade and outsmart the artificial man by avoiding capture, again, exercising his natural liberty all the meanwhile.

In a sense, all I have done here is detail the choice every individual must make for himself: obey the laws of the artificial state, or exercise one’s natural liberty to the contrary and accept the consequences. The main questions left unanswered for our purpose is where that leaves children in the grand scheme of things. We have established that a child is no less a subject of the sovereign than its parents because all owe their preservation to the state. Within civil society, Hobbes also seems to be implying that there is no special relationship between a parent and her child, as would be the case in nature. Take, for example, the rules of any modern sovereign where a parent has no option to expose her child, and thus really has no life or death power over her child once it is born, as she would in the state of nature. From every subject’s earliest and most vulnerable moments on earth, it owes its life to the sovereign’s protection. The fact that most sovereigns require a child’s parents to nourish and maintain it is really of no significance to the child. The child would be as well preserved if the sovereign took it at the moment of birth and distributed it to another person to maintain or kept it in a state-run facility to be looked after by common nurses. The point here is that any relationship created by nature between parent and child is inoperative in the artificial state of civil society.

Hobbes is notably quiet on anything further in which we might be interested; such as, what makes for a good subject or what sort of sovereign is most compatible with expansive liberty of the subject. For these answers we will have to turn to others.

B. Parental Rights in Hobbes’s State of Nature

Let us now consider how our case studies would play out in Hobbes’s state of nature. Recall that Hobbes understood sovereignty over children to reside in whoever had a life and death power over them, but preserved their lives nonetheless. Usually it was the mother who was sovereign over her children because she fed and cared for them. In the state of nature, the mothers could instruct their children as to any philosophy or religion they chose and could keep their children from visiting with anyone to whom they objected. The problem, of course, is that anyone—a cult leader, a grandparent, a disgruntled father—might exercise his liberty to take a child by force, feed and preserve it, and demand obedience from it. In other words, anarchy would ensue.

C. Reconciling Parental Rights with a Hobbesian Peace

Because every subject of a Hobbesian sovereign owes absolute obedience to the laws, any right of parents over their offspring would only exist within the interstices of the existing sovereign commands. In the Mozert case, the parents
would not have been heard to complain that a governmental decision regarding the school curriculum violated some right of theirs. The only right the parents could have exercised would have been in the area where the law was silent. In that case, the only option would have been for the parents to send their children to a private school of their choosing, or to home school their children. All things considered, the liberty of the Mozert parents was actually quite great. The sovereign in the shape of the state of Tennessee did not exercise the limit of its authority over the education and rearing of children. The parents were not prohibited from conducting religious teachings at home, including instructing their offspring as to the error of the teaching of the state schools if that is what they desired. The parents were not even prevented from keeping their children out of the state schools altogether. They had the right to send their children to a private religious school, where the truth of scripture was taught. If we are counting the number of freedoms given to parents in the state of Tennessee, even by Kramer’s tallying they have to be quite substantial.

Despite the fact that the artificial (legal) liberties of the parents were great in Mozert, the sovereign command was the only voice of liberalism in the dispute. The only reason the parents had the freedom they did was because a state committed to liberty permitted it. If liberty is valued, and its continuance as a political and moral principle is desired, then the sovereign must be permitted to carry out its prerogative that its future citizens (and futures sovereigns where a democracy is concerned) are reared in a liberal tradition. It would be a perverse result if parents were able to thwart future liberty by the exercise of their current liberty.

In Young, it appears as though a Hobbesian court was at work. The Supreme Court of Canada refused to acknowledge either parent in the dispute to have what amounted to sovereignty over the children. Instead, the Court reserved the absolute sovereignty of the state over its own children. Such a strong and unequivocal pronouncement indicates that liberty is quite secure in Canada for future generations to enjoy.

D. Locke on Liberty

Locke’s state of nature shares with Hobbes’s a state of complete liberty or perfect freedom. Their notions of liberty, however, differ to some extent; Locke places more restrictions on what it means to be free:

For Liberty is to be free from restraint and violence from others which cannot be, where there is no Law: But Freedom is not, as we are told, A Liberty for every Man to do what he lists: (For who could be free, when every other Man’s Humour might domineer over him?).300

300 JOHN LOCKE, SECOND TREATISE, in TWO TREATISES OF GOVERNMENT § 57, ll. 20–24, at 306 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) [hereinafter SECOND TREATISE].
Men form civil society so that violence might be restrained and individuals’ natural liberty can flourish. Locke is similar to Hobbes only to the extent that they both believed civil society was instituted to prevent war among persons, which would otherwise occur without sovereign pronouncements regulating men’s actions. The main disagreement occurs over the extent of sovereign authority. For Hobbes the sovereign’s power was absolute, whereas for Locke the power of government only extends to whatever is necessary to guard natural liberty from oppression.  

Locke takes a very non-rational turn when he speaks of natural liberty. In a sense, Locke tries to mix Hobbes’s natural and artificial states by having the latter protect the supposed benefits of the former. Let us see how a Lockean interpretation of paternal power fits into civil society and whether retaining the notion of natural liberty within state government poses a problem for such analysis.

According to Locke, “all Parents were, by the Law of Nature, under an obligation to preserve, nourish, and educate the Children, they had begotten, not as their own Workmanship, but the Workmanship of their own Maker, the Almighty, to whom they were to be accountable for them.” Nature dictates these parental obligations because children, unlike adults, are not yet subject to the Law of Reason. Locke explains: “For Law, in its true Notion, is not so much the Limitation as the direction of a free and intelligent Agent to his proper Interest, and prescribes no farther than is for the general Good of those under that Law.” Since children are not yet free and intelligent agents, they must receive direction as to what is in their own interest. “To inform the Mind, and govern the Actions of their yet ignorant Nonage, till Reason shall take its place, and ease them of that Trouble, is what the Children want, and the Parents are bound to.” However, once children become subjects to the law of reason, the parental authority ceases. The natural duty to preserve offspring “will scarce amount to an instance or proof of Parents Regal Authority.” “And thus we see how natural Freedom and Subjection to Parents may consist together, and are both founded on the same Principle.”

In discussing the parent-child relationship, Locke refers to two sets of laws—the Law of Nature and the Law of Reason. As we saw, he says parents are under a natural duty to care for their children, but only until they attain the age of

301 See id. § 138, at 360–61 (explaining that government could not take property from any individual “without his own consent”). For Locke, “property” meant people’s “Lives, Liberties, and Estates.” Id. § 123, l. 16, at 350.
302 Id. § 56, ll. 10–13, at 305. For analyses of Locke’s attitude toward children, see David Archard, John Locke’s Children, in THE PHILOSOPHER’S CHILD, supra note 287, at 85; Margaret J. M. Ezell, John Locke’s Images of Childhood, 17 EIGHTEENTH-CENTURY STUD. 139, passim (1983).
303 SECOND TREATISE, supra note 300, § 57, ll. 10–13, at 305.
304 Id. § 58, ll. 3–6, at 306.
305 Id. § 60, ll. 19–20, at 308.
306 Id. § 61, ll. 3–5, at 308.
307 See id. §§ 56–57, at 305–06.
reason. This leads to the question what is the Law of Nature and how do parents know they are bound by it? Recall Hobbes’s state of nature had no laws, only perfect liberty, and that was the whole problem. For Hobbes, it was reason that led men to prefer and form civil society. But for Locke, the process is reversed; it is only through reason that man can discover the law of nature. The best sources for definitions of these terms are Locke’s earlier essays on the law of nature. There he specifically tells us that lex naturae can be described as “ordinatio voluntatis divinae lumine naturae cognoscibilis.” And the lumen he has in mind is reason. Lex naturae is know to us “lumine quod natura nobis insitum est.” Locke deliberately rejects a rationalist definition of reason, in favor of one that is consistent with acceptance of natural law: “Per rationem autem hic non intelligendum puto illam intellectus facultatem quae discursus format et argumenta deducit, sed certa quaedam practica principia e quibus emanant omnium virtutum fontes et quicquid necessarium sit ad mores bene effermandos.” Thus, a child attains the age of reason, not when he can argue like a philosopher or perform mathematical calculations, but when he can distinguish virtue from vice, good morals from ill.

It is important to remember how Locke’s discussion is also a metaphor for the relation of the sovereign to its subjects. Locke wants us to keep in mind that natural freedom and subjection to the sovereign are consistent, because they are founded on the same principle of protection, not restraint, of liberty. The same way children need guidance until they develop their rational faculties, subjects need guidance in the exercise of their own freedom. Moreover, in the same way that a parent’s authority is limited to preparing the child for the “general Good,” the sovereign’s power is also limited to promoting the general good. As Locke reminds us, the power exercised by parents, “to speak properly … is rather the Priviledge [sic] of Children, and Duty of Parents, than any Prerogative of Paternal Power.” To thus speak properly of the state’s power, we would have to conclude that it is rather the privilege of its citizens, and duty of the state, than any prerogative of the sovereign.

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308 See id. § 55, at 304.
309 See supra text accompanying notes 285–86.
310 See infra note 312.
311 JOHN LOCKE, ESSAYS ON THE LAWS OF NATURE AND ASSOCIATED WRITINGS 110 (W. von Leyden ed., Oxford Univ. Press 1954) (1664). The law of nature is “an ordinance of divine will known by the light of nature.”
312 Id. The law of nature is known to us “by the light that nature has instilled in us.”
313 Id. “However, by reason, I think is not meant that made intelligible through the intellectual faculty which forms discursions and deduces arguments, but that practical principle out of which the founts of all virtue emanate and whatever is necessary for forming good morals.”
314 SECOND TREATISE, supra note 300, § 67, ll. 11–13, at 312.
E. Parental Rights in Locke’s State of Nature

As we learned above, Locke considered parental power more appropriately termed parental duties imposed by the law of nature. Moreover, the law of nature required that parents exercise no more power than is necessary to allow their offspring to develop their own reason, so that they might then know the laws of nature for themselves. Thus, unlike in Hobbes’s state of nature, we do not inquire who the child’s sovereign is, and then end our inquiry. Instead, we must ask whether the claimed parental right is in accord with a parent’s natural duty to his children.

Thus in 
Mozert
 we must ask whether withholding exposure to the fictional stories in the reading textbook accorded with the natural duty of parents to prepare their children to exercise liberty. The answer must be that it did not; that is, the religious parents were not helping their children to develop their own reason, but were in fact attempting to stult it. We do not even need to know what the laws of the state of Tennessee were regarding education, because even if they were silent about how a parent was to educate his child, Locke would say that natural law requires that they do not hamper the infant’s development. The only sort of negative duty a parent could have in the educational realm would be to shield his children from patently harmful information that warped his moral development, for example, teaching that promoted cruelty to other humans would have to be shunted by a dutiful parent.

Young is more difficult to analyze because there was no obvious interference with moral development by either competing parent. Certainly, the father thought his children needed religion to be moral adults, but there is no suggestion that either childrearing method would have been positively detrimental to the children’s development in society. By employing the “best interest of the child” test, it seems the Court struck a good Lockean balance. Locke is not interested in any parental or sovereign “right.” And indeed, the Court openly disavowed any parental right. Moreover, the “best interest” standard can fairly be equated with the parental duty to lead his children to reason. While it is true that earlier I counted the Court’s action as one of a Hobbesian sovereign, I do not think the two interpretations are mutually exclusive. For we can understand the Canadian Supreme Court to have exercised a sovereign duty, rather than a right in casting the decision it did.

By making use of the frameworks of liberty set out by Hobbes and Locke, we can better analyze contemporary parent-state conflicts. Hobbes can be deployed to assure that illiberal decisions are not made on behalf of a child and against the interest of the liberal nation to which he belongs. Locke can be called into action to assure that parents do not prevent their children from acquiring right reason, even in the absence of contrary sovereign declarations. As we saw in the realms of education and parental visitation, parents can and do ignore the interests of their children in favor of their own supposed claim right to their offspring. In their own distinct ways, Hobbesian and Lockean analyses assure that “parental rights” play no part in the decisional outcome.
V. LOOKING AHEAD

A. Grandparent Visitation—The New Menace to Constitutional Liberty?

In 2000, the Supreme Court heard the case of *Troxel v. Granville*, in which a single mother challenged the constitutionality of a Washington law that permitted her children’s paternal grandparents to petition a court for visitation rights over her objection. In a sign that the Court should not have taken the case in the first place, no majority was able to articulate a rationale for siding with Tommie Granville, the mother of the children involved, and upholding her challenge to the law. What resulted was an opinion by four members of the Court, led by Justice O’Connor, which expressed that since Granville was a fit parent, no court could constitutionally second guess her child-rearing decisions regarding with whom her children could visit. The plurality did not strike down the statute, but only held it unconstitutional as applied to Granville. Justices Souter and Thomas would each have affirmed the Supreme Court of Washington’s facial invalidation of the law. Justices Stevens, Scalia, and Kennedy, each filed very distinct dissenting opinions, further undermining any sense of coherence in this area of family constitutional law.

The state of Washington, along with forty-nine other states, provided for some form of grandparent visitation. Washington’s law that was challenged by Granville read as follows: “Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.” Based on those words, the Troxels, whose son and father of their grandchildren had committed suicide, petitioned the superior court for “two weekends of overnight visitation per month and two weeks of visitation each summer.” For her part, Granville was willing to concede one day of visitation per month. The superior court compromised and ordered “one weekend per month, one week during the summer, and four hours on both of the petitioning grandparents’ birthdays.” But, according to Justice O’Connor, because this case involved “nothing more than a simple disagreement between the Washington Superior Court and Granville concerning her children’s best interests,” the trial court’s application of the law.

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316 Justice O’Connor was joined in the plurality opinion by the Chief Justice and Justices Ginsburg and Breyer.
317 *Id.* at 75 (Souter, J., concurring in the judgment); *id.* at 80 (Thomas, J., concurring in the judgment).
318 *Id.* at 73 (citing statutes of all fifty states relating to grandparent visitation).
319 *Id.* at 61 (quoting WASH. REV. CODE § 26.10.160(3) (1994)).
320 *Id.*
321 *Id.* at 61.
322 *Id.* at 71.
violated Granville’s fundamental right to “the care, custody, and control” of her children.  \(^{323}\)

A democratic theory of child-rearing would of course disagree with Justice O’Connor’s new trio of parental rights—the 3-C’s (care, custody, and control). But more fundamentally, democratic theory as applied to this case requires that much more attention be paid to the Troxel children—little Isabelle and Natalie—and less to the disruption caused to Tommie Granville’s weekend or summer plans. As the plurality saw things, a superior court judge was no better qualified than Tommie Granville to make a “best interest” determination for the children, and when and if those two determinations diverge, then under the Washington law “the judge’s view necessarily prevails.” \(^{324}\) It was this sort of “mere disagreement” that had occurred in this case, concluded O’Connor. \(^{325}\) That may be, but there is every reason for the Court to permit the state of Washington, in its democratic capacity, to determine that it is in the best interest of its future citizens if they are exposed to a variety of people in their formative years. The people of Washington may very well have concluded that family isolation is not in keeping with its value system, and that children whose parents shield them from society at large have been deprived of a civic and social education. As Justice Stevens noted, “even a fit parent is capable of treating a child like a mere possession.” \(^{326}\) And in pointing out the plurality’s obsessive focus on the 3-C’s, Justice Stevens reminded us that “there is at minimum a third individual, whose interests are implicated in every case to which the statute applies—the child.” \(^{327}\) I stress “at minimum” because only Justice Stevens planted the seeds for recognizing that Isabelle and Natalie Troxel are one day going to have to interact with more folks than just their mother, and that the society they enter should have an even stronger claim on their upbringing than Tommie Granville.

**B. Evangelicals and Homosexuals—Agreeing on the Wrong Front**

This case created strange bedfellows. On the side of Washington was a slough of state attorneys general—no surprise given that their states’ laws would be negatively impacted by an adverse decision. \(^{328}\) But, on the side of Tommie Granville were a motley crew of amici curiae. They ranged from groups like the American Civil Liberties Union and Lambda Legal Defense and Education Fund, to the Center for the Original Intent of the Constitution, the Christian Legal Society and the National Association of Evangelicals, and the Coalition for the Restoration of Parental Rights. \(^{329}\) Several themes running through the briefs of

\(^{323}\) Id. at 65, 71, 75.  
\(^{324}\) Id. at 67.  
\(^{325}\) Id. at 67–68.  
\(^{326}\) Id. at 86 (Stevens, J., dissenting).  
\(^{327}\) Id. (emphasis added).  
\(^{328}\) Id. at 59 n. * (listing the state attorneys general who signed on to an amicus brief for Washington).  
\(^{329}\) Id. (listing “amici curiae urging affirmance”).
Tommie Granville’s amici include the following claims: the special interests and peculiarities of adults should be permitted free range, the state is the enemy to family integrity, children are the property of their parents, and other members of society have no interests in how its future members are educated and socialized.330

Throughout the briefs is an intense sentiment for privatization of the family. Thus, it is common when referring to children that they are discussed as “mere possession[s]” and as “so much chattel.”331 In the proprietarian vein, the Christians criticize Washington for permitting an individual to claim a welfare interest in “someone else’s child.”332 And most colorfully, they claim that the indoctrination of children is “for many parents . . . their most lasting and important statement.”333 I suppose under that theory, far from an independent being, the child is a mere medium for the expression of the parent’s free speech rights—indeed the First Amendment is precisely what they cite as authority for such a claim.334 Surely the Court rejected this proposition in *Prince v. Massachusetts*, when it stated that “the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation.”335 In urging the Washington law struck down, the ACLU distinguished the visitation law from compulsory education laws by stating: “The state has no comparable interest in interfering with a fit parent’s decisions about what adults will have a familial relationship with her child, and what forms those relationships will take.”336 From this it follows that “the ‘best interest of the child’ standard will never give proper deference to the sanctity of the parent-child relationship and will always hold those seeking visitation to a lower threshold than is constitutionally permissible.”337 Indeed, once the 3-C’s are deemed fundamental, the best interest of the child necessarily takes a back seat to constitutional principle. Rather than concluding that the Washington law must fall, I would conclude that the 3-C’s are what should go. How can stubborn principle rationally be permitted to trump the best interest of any child and future citizen?

330 See infra notes 331–44.
331 *Troxel*, 530 U.S. at 86, 89 (Stevens, J., dissenting).
333 Id. at 8.
334 Id. (“And this ‘speech,’ this ‘expressive association,’ is protected by the First Amendment.”). Putting quotation marks around “speech” to describe the rearing of children does not make the claim anymore palatable.
336 Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Washington in Support of Respondent at 18 n.15, *Troxel*, 530 U.S. 57 (No. 99-138). Later their brief claims that unlike compulsory vaccination laws, “the state simply has no interest of comparable weight in acting on behalf of a third party to veto a fit parent’s judgment concerning with whom her children should spend time.” Id. at 20.
337 Id. at 21 n.16.
Lambda Legal Defense took a similar tack in arguing that the state had little to no interest in children’s contacts with presumably anyone other than the one or two parents. They worried that under the Washington law, petitions would be brought by “persons with no unique relationship meriting the state’s interest.” According to the brief, there are “few relationships that warrant the concern of the states.” Under this reasoning, there would be little to no room for the state to make a best interest determination contrary to that of the parents. One could imagine paranoid parents not letting their children out of the house, even home schooling them to keep them completely isolated from society. Yet, according to Lambda, “parents should not be inappropriately chilled in exercising their liberty interest in caring for and socializing their children.” It is unclear whether Lambda would add to that principle: “or not socializing them.” Clearly this is not a recipe for rearing future citizens of a democracy.

Being too much of a legal realist to accept the fact that both Lambda Legal—a gay and lesbian advocacy group—and the evangelical Christian groups—avowed opponents of gay and lesbian family formation and stability—share common legal goals, I am skeptical that either organization fully comprehended what was at stake in the *Troxel* case, or in the very concept of “family privacy.” To demonstrate just how far apart these organizations are, one need only examine their political statements and activities. The Christian Legal Society and the National Association of Evangelicals both openly proclaim opposition to marriage equality for same-sex couples. The Lambda Legal Marriage Project, on the other hand, “work[s] toward the goal of marriage equality,” and the ACLU has filed a number of briefs on behalf of gay couples seeking to marry in various states. Clearly, the right to marry implicates issues of child-rearing, which must now implicate the 3-
C’s of parental rights. So, just what are the practical implications of family privacy for evangelical Christians and gays and lesbians?

The clash between gay rights groups and evangelical Christians came to a head in the 2008 case of Parker v. Hurley—a case in which the disputed meaning of Troxel was front and center. The facts of Parker were similar to those of Mozert, except that the controversial books in question did not teach evolution or secular humanism, but instead taught about families with same-sex parents. The plaintiffs, evangelical parents, claimed that by not allowing them to opt their children out of such lessons, the Massachusetts school district was engaged in “an intentional attempt to wipe [their] faith away altogether.” The plaintiff-parents heavily relied on Troxel, arguing, “Troxel is the Supreme Court’s most recent ‘parental rights’ decision. Therein, the Court reiterated that parents have a fundamental liberty interest to ‘direct the upbringing and education of children under their control.’ Moreover, because this right is vested in the Due Process Clause of the Fourteenth Amendment, it ‘provides heightened protection against government interference.’” Indeed, this is a fair reading of the Troxel plurality. But where did this leave the groups who wanted to do nothing more than teach tolerance in the public schools by normalizing the existence of gay and lesbian families? They were left arguing that Troxel really did not mean all that.

The ACLU asserted, “the proposition that mere exposure of students to ideas offensive to a parent for religious or moral reasons does not violate the constitutional rights of parental control over the upbringing of a child or of religious freedom.” Undoubtedly, this is the preferred legal option, and the one that ultimately prevailed in Parker. But there is nothing logically compelling about such a conclusion, especially given the broad parental right to “care, custody, and control” that the Supreme Court announced in Troxel. Instead, O’Connor would have been wiser to follow the advice of Barbara Bennett Woodhouse, someone who had studied the motivations and origins of constitutional family privacy. In her amicus brief in Troxel, Woodhouse “urge[d] the Court to proceed with caution.” She argued that the “Court should avoid sharpening the battle of rights

345 Parker v. Hurley, 514 F.3d 87, 101 (1st Cir. 2008) (“Troxel is not so broad as plaintiffs assert.”).
346 See supra notes 254-61 (discussing the facts of Mozert).
348 Plaintiffs’ Memorandum in Opposition to Defendants’ Motion to Dismiss at 7, Parker, 474 F. Supp. 2d at 261 (citations omitted).
349 Memorandum Amicus Curiae of the American Civil Liberties Union of Massachusetts et al. in Support of Defendants’ Motion to Dismiss at 6, Parker, 474 F. Supp. 2d at 261.
350 See Woodhouse, supra note 97, at 1085-87.
over children by delineating a fixed scheme of constitutional priorities. Most importantly, Woodhouse asked the Court to emphasize the relationship between “family autonomy” and “democratic society.” Instead of heeding that advice, the Court gave us an inward looking decision that failed to recognize that every family is part of a larger community.

C. The Final Lesson: Mutual Respect

The Meyer–Pierce–Troxel line of cases will continue to have relevance especially at the intersection of family law and gay rights. The history of Justice McReynolds’s 1920s decisions in Meyer and Pierce show us how “family privacy” and “parents’ rights” can serve as weapons in a reactionary’s arsenal. McReynolds believed in a socially static landscape, one in which the state should not artificially save and prolong the unfit children of immigrants and the poor by schooling them with the better-off and teaching them English. In a similar way, conservative parents, especially evangelical Christians, believe that the public schools should not artificially promote homosexuality, and that if the schools do not discuss or “teach” it, then it will go away. As I have argued, the better lessons to follow are those of the early 20th century progressives, and the classical liberal theorists, all of which teach us to put our individual desires into the larger context of our social nature. The progressive legacy I wish to reinvigorate is not one that mandates a common point of view. Rather, I wish to recapture the original hopes for the common school expressed by Horace Mann in the antebellum era and echoed by the progressives at the turn of the century. This vision is “tremendously impressed with the diversity of the American people,” but at the same time fears “that conflicts of value might rip them apart and render them powerless.” In order to channel America’s diversity into mind-opening experiences and away from the reckless deluge it might otherwise become, some common value system is necessary to act as the floodwall. This value system must be mutual respect. Without a social commitment to mutual respect, over and above privacy, especially family privacy, then individuals will soon forget why individuality and privacy are important concepts at all. Without mutual respect, the social (and perhaps physical) space in which to exercise one’s privacy will increasingly diminish.

352 Id. at 2.
353 Id. at 10–11.
355 See Gutmann, supra note 255, at 562 (explaining why the concept of “mutual respect” is central to the maintenance of a liberal polity, and thus should trump strong claims of parents’ rights).