

DEFENDING THE PARENTAL RIGHT TO DIRECT EDUCATION: *MEYER* AND *PIERCE* AS BULWARKS AGAINST STATE INDOCTRINATION

I. INTRODUCTION

While conservative political forces push for an extension of parental rights, a number of voices in academia have called for parental rights to be curtailed. Many scholars propose legal regimes focused on identifying and satisfying the interests and rights of children.¹

The family is, and has always been, the foundation of American society.² One of the most important functions of the family is the education of children; this is especially true for families with deeply held religious beliefs. The right of parents to direct the education of their children has existed for centuries under the common law³ and has been a firmly established part of the American constitutional landscape for over eighty years.⁴ In the 1920s cases of *Meyer v. Nebraska*⁵ and *Pierce v. Society of Sisters*,⁶ the Supreme Court held that, while the State⁷ has a valid interest in ensuring that children receive some form of education, it cannot seize the parents' primary duty to direct that education.⁸ The recognition that parents and the State both have an interest in the education of children has led to a persistent tension between the two, which underlies several key educational issues. For example, parents of public school children often confront school officials concerning "health education" curricula and other issues of control over the values their children are taught.⁹ From time to time, States seek to exert more

¹ David Fisher, *Parental Rights and the Right to Intimate Association*, 48 HASTINGS L.J. 399, 422 (1997).

² See *infra* Part II.

³ *Id.*

⁴ See *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

⁵ *Meyer*, 262 U.S. 390.

⁶ *Pierce*, 268 U.S. 510.

⁷ The term "State" as used throughout this note refers to all levels of American civil government, whether federal, state, or local.

⁸ See *infra* Part II.B.1 and 2.

⁹ See generally *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525 (1st Cir. 1995); Michael J. Fucci, *Educating Our Future: An Analysis of Sex Education in the Classroom*, 2000 BYU EDUC. & L.J. 91; Roger J.R. Levesque, *Sexuality Education: What Adolescents' Educational Rights Require*, 6 PSYCHOL., PUB. POL'Y & L. 953 (2000); Jeffrey F. Caruso, Note, *Sex Education and Condom Distribution: John, Susan, Parents, and Schools*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 663 (1996); Miranda Perry, Comment, *Kids and Condoms: Parental Involvement in School Condom-Distribution Programs*, 63 U. CHI. L. REV. 727 (1996).

influence over the substance of curricula and manner of instruction used by homeschooling parents.¹⁰ Heated debate has taken place over the wisdom and constitutionality of voucher programs that provide public funds to defray the cost of attending private schools.¹¹

Like other time-honored family values, the parental right to direct education has recently come under fire from critics who endorse radical change. While some in the legal and academic communities have pushed for far-reaching changes to the definition of marriage and the framework of divorce, others have promoted weakening or eliminating the parental right to direct education. Advocates of a so-called “Children’s Rights” doctrine have questioned whether the law should still consider parents to be the best child-rearers. Although they speak of the rights of children, these scholars actually seek to transfer child-rearing authority from parents to the State by allowing judges, social workers, or other public officials to decide the type of education that children should receive.

This note will defend the parental right to direct education by confronting its challengers. Part II will trace how the law defining the relationship between parent, child, and State in the area of education has changed from the common law to the present day. Part III will detail the arguments made by two prominent critics of parental rights, Barbara Bennett Woodhouse and James G. Dwyer. Woodhouse asserts that parental rights reinforce the treatment of children as property,¹² and Dwyer contends that parental rights should be abolished because religious parents use them as a pretext to indoctrinate their children.¹³ Part IV will challenge the assumptions these critics rely upon and examine how a world without the parental right to direct education would look. This note concludes that abolishing parental rights would

¹⁰ See generally Ira C. Lupu, *Home Education, Religious Liberty, and the Separation of Powers*, 67 B.U. L. REV. 971 (1987); Judith G. McMullen, *Behind Closed Doors: Should States Regulate Homeschooling?*, 54 S.C. L. REV. 75 (2002); Lisa M. Lukasik, Comment, *The Latest Home Education Challenge: The Relationship Between Home Schools and Public Schools*, 74 N.C. L. REV. 1913 (1996).

¹¹ See generally *Zelman v. Simmons-Harris*, 536 U.S. 639 (2001); Ira Bloom, *The New Parental Rights Challenge to School Control: Has the Supreme Court Mandated School Choice?*, 32 J.L. & EDUC. 139 (2003); Andrew A. Cheng, *The Inherent Hostility of Secular Public Education Toward Religion: Why Parental Choice Best Serves the Core Values of the Religion Clauses*, 19 U. HAW. L. REV. 697 (1997); Eric A. DeGross, *State Regulation of Nonpublic Schools: Does the Tie Still Bind?*, 2003 BYU EDUC. & L.J. 363; Sean T. McLaughlin, *Some Strings Attached? Federal Private School Vouchers and the Regulation Carousel*, 24 WHITTIER L. REV. 857 (2003); Molly O’Brien, *Free at Last? Charter Schools and the ‘Deregulated’ Curriculum*, 34 AKRON L. REV. 137 (2000); Steven H. Shiffrin, *The First Amendment and the Socialization of Children: Compulsory Public Education and Vouchers*, 11 CORNELL J.L. & PUB. POL’Y 503 (2002).

¹² See *infra* Part III.A.

¹³ See *infra* Part III.B.

lead to the rebirth of compulsory public education and suggests that the current system should be left as is.

II. THE PENDULUM OF EDUCATIONAL CONTROL

Education, as the Framers knew it, was in the main confined to private schools more often than not under strictly sectarian supervision. Only gradually did control of education pass largely to public officials.¹⁴

Meyer and *Pierce* have been the subject of much scholarly research and debate in that they have shaped the relationship between parent, child, and State in the United States for over seventy-five years. These cases marked a critical moment in American history, as they rebuffed attempts by the State to take complete control over the educational system. The first section of this Part discusses the right of parents to direct their children's education as it existed at common law and then its gradual weakening by State regulation prior to *Meyer* and *Pierce*. The second section describes how this parental right was partially restored by *Meyer* and *Pierce*. The final section details how the parental right has now become fully entrenched in American law.

A. *The Demise of the Parental Right*

[By the early 1920s] the family citadel was crumbling under assaults from common schooling, child welfare, juvenile justice, child labor laws, and a host of government assumptions of paternal prerogatives designed to standardize child-rearing and make it responsive to community values.¹⁵

The historical background of *Meyer* and *Pierce* is well documented.¹⁶ The purpose of briefly discussing the legal history leading up to those cases is to show that the Supreme Court did not create the parental right to direct education in those decisions. Rather, the Court simply affirmed that the long-standing, common law parental right was among the liberties protected from unreasonable governmental interference by the Fourteenth Amendment's Due Process Clause.¹⁷

¹⁴ *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 238-39 (1963) (Brennan, J., concurring).

¹⁵ Barbara Bennett Woodhouse, *Who Owns the Child?: Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1090 (1992).

¹⁶ See, e.g., Edward McGlynn Gaffney, Jr., *Pierce and Parental Liberty as a Core Value in Educational Policy*, 78 U. DET. MERCY L. REV. 491 (2001); William G. Ross, *A Judicial Janus: Meyer v. Nebraska in Historical Perspective*, 57 U. CIN. L. REV. 125 (1988); Woodhouse, *supra* note 15.

¹⁷ See Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy: Balancing The Individual and Social Interests*, 81 MICH. L. REV. 463, 572 (1983).

1. The Common Law Parental Right

Several key features of the common law's treatment of the relationship between parent, child, and State in the area of education impacted *Meyer* and *Pierce* and still affect this area of law today. First and foremost, parents held the sole right and duty to educate their children. Over 125 years ago, the Illinois Supreme Court stated, "the policy of our law has ever been to recognize the right of the parent to determine to what extent his child shall be educated."¹⁸ The same court previously held that leaving the education and nurturing of children in the hands of parents "is, and has ever been, the spirit of our free institutions."¹⁹ Before World War I, the Oklahoma Supreme Court noted that one of the principal duties of parents at common law was the education of their children,²⁰ and the Georgia Supreme Court held that the parental duty to educate was "of far the greatest importance of any."²¹

The parental duty to direct education reflected the common law view of the family as the foundation of society and government.²² An

When the Court in 1923 first recognized that the right of parents to direct the upbringing of their children was part of the substantive liberty protected by the due process clause, it did not create a new legal right out of whole constitutional cloth. It merely acknowledged in constitutional language the traditions . . . that predated the Constitution.

Id.

¹⁸ *Tr. of Sch. v. People*, 87 Ill. 303, 308 (1877).

¹⁹ *Rulison v. Post*, 79 Ill. 567, 573 (1875). The court stated:

Parents and guardians are under the responsibility of preparing children intrusted [sic] to their care and nurture, for the discharge of their duties in after life. Law-givers in all free countries, and, with few exceptions, in despotic governments, have deemed it wise to leave the education and nurture of the children of the State to the direction of the parent or guardian. This is, and has ever been, the spirit of our free institutions.

Id.

²⁰ *Sch. Bd. Dist. v. Thompson*, 103 P. 578, 578-79 (Okla. 1909); see also *Sheridan Rd. Baptist Church v. Mich. Dep't of Educ.*, 396 N.W.2d 373, 407-08 n.30 (Mich. 1986) (Riley, J., dissenting) (stating that the parental "fundamental freedom of controlling the education and socialization of their children" that was discussed in *Pierce* was a right "recognized at common law") (citing *Thompson*, 103 P. at 578-79); *Abrego v. Abrego*, 812 P.2d 806, 811 n.21 (Okla. 1991) ("At common law the principal duties of parents to their legitimate children consisted of providing maintenance, protection, and education.") (citing *Thompson*, 103 P. at 578-79).

²¹ *Bd. of Educ. v. Purse*, 28 S.E. 896, 898 (Ga. 1897) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *450); see also *Thompson*, 103 P. at 581 ("Blackstone says that the greatest duty of parents to their children is that of giving them an education suitable to their station in life; a duty pointed out by reason, and of far the greatest importance of any.").

²² See *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children."); *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 769 (1978)

essential principle of this viewpoint is that parents, more than anyone else, have a natural inclination to further the best interests of their children.²³ The law has wisely presumed that children lack sufficient capacity to make important decisions for themselves and need adult guidance.²⁴ Parents were deemed the logical choice to provide guidance in education because of their desire to further their children's best

(Brennan, J., dissenting) (“[T]here is a time-honored right of a parent to raise his child as he sees fit – a right this Court has consistently been vigilant to protect.”); *Moore v. E. Cleveland*, 431 U.S. 494, 503-04 (1977) (“[T]he institution of the family is deeply rooted in this Nation’s history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (“[C]onstitutional interpretation has consistently recognized that the parents’ claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.”); *Gordon v. Bd. of Educ.*, 178 P.2d 488, 498 (Cal. Ct. App. 1947) (White, J., concurring) (“Under our system of government the family is the foundation of the social order, it does not spring from the state but the state springs from the family.”); *Thompson*, 103 P. at 581 (“Under our form of government, and at common law, the home is considered the keystone of the governmental structure.”).

²³ See *Parham*, 442 U.S. at 602 (“[H]istorically [the law] has recognized that natural bonds of affection lead parents to act in the best interests of their children.”) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *447 & 2 J. KENT, COMMENTARIES ON AMERICAN LAW *190); *State ex rel. Sheibley v. Sch. Dist. No. 1 Dixon County*, 48 N.W. 393, 395 (Neb. 1891) (“Now who is to determine what studies [a student] shall pursue in school: a teacher who has a mere temporary interest in her welfare, or her father, who may reasonably be supposed to be desirous of pursuing such course as will best promote the happiness of his child?”).

[Parental] duties were imposed upon principles of natural law and affection laid on them not only by Nature herself, but by their own proper act of bringing them into the world. It is true the municipal law took care to enforce these duties, though Providence has done it more effectually than any law by implanting in the breast of every parent that natural insuperable degree of affection which not even the deformity of person or mind, not even the wickedness, ingratitude, and rebellion of children, can totally suppress, or extinguish.

.....

There are certain virtues that may safely be attributed to the generality of mankind, among which are love of country and love of offspring. . . . [I]t would be a reversal of the natural order of things to presume that a parent would arbitrarily and without cause or reason insist on dictating the course of study of his child in opposition to the course established by the school authorities.

Thompson, 103 P. at 581-82.

²⁴ See *Schall v. Martin*, 467 U.S. 253, 265 (1984) (“Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*.”); *id.* at 265 n.15 (“Our society recognizes that juveniles in general are in the earlier stages of their emotional growth, that their intellectual development is incomplete, that they have had only limited practical experience, and that their value systems have not yet been clearly identified.”) (quoting *People ex rel. Wayburn v. Schupf*, 350 N.E.2d 906, 908-09 (N.Y. 1976)); *Parham*, 442 U.S. at 602 (“The law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions.”).

interests and their unique opportunity to know their children's abilities and traits.²⁵ Courts acknowledged that education is often most effective when tailored to a child's individual talents and shortcomings.²⁶

2. The Rise of Compulsory Common Schools

The common law parental right gave parents complete control to answer two questions. First, *should* my child be educated? Second, if so, *how* should he or she be educated? A harsh reality of the common law was that the answer to both questions was heavily influenced by the parents' economic status.²⁷ Families often needed their children to work in order to survive, and many parents who tried to educate their children were limited by their economic resources.²⁸ Indeed, one of the many reasons why public schools were created was to allow needy families to educate their children at public expense.²⁹ During the early days of

²⁵ See *Tr. of Sch. v. People*, 87 Ill. 303, 308 (1877) (“[T]he policy of our law has ever been to recognize the right of the parent to determine to what extent his child shall be educated, during minority, presuming that his natural affections and superior opportunities of knowing the physical and mental capabilities and future prospects of his child, will insure the adoption of that course which will most effectually promote the child's welfare.”); *Sheibley*, 48 N.W. at 395; *Morrow v. Wood*, 35 Wis. 59, 64 (1874) (“[W]e can see no reason whatever for denying to the father the right to direct what studies . . . his child shall take. He is as likely to know the health, temperament, aptitude and deficiencies of his child as the teacher, and how long he can send him to school.”).

²⁶ See *Tr. of Sch.*, 87 Ill. at 308 (“In most primary schools it would be both absurd and impracticable to require every pupil to pursue the same study at the same time. Discrimination and preference between different branches of study, until some degree of advancement is attained, is inevitable.”); *Morrow*, 35 Wis. at 65 (“It is unreasonable to suppose any scholar who attends school, can or will study all the branches taught in them. From the nature of the case some choice must be made and some discretion be exercised as to the studies which the different pupils shall pursue.”).

²⁷ *Bd. of Educ. v. Purse*, 28 S.E. 896, 900 (Ga. 1897) (“At common law the child's right to an education was dependent, not only upon the will, but upon the pecuniary ability of the parent.”).

²⁸ See Woodhouse, *supra* note 15, at 1059 (“Children have always worked. In colonial times, children had jobs on family farms and as apprentices. The Industrial Revolution, however, with urban factories and textile mills ushering in a new mechanized age, altered the context and rhythm of child labor.”).

²⁹ See *Purse*, 28 S.E. at 900 (“Under the present law in this State[, which provides for public schools,] the right of the child to an education is still dependent upon the will of the parent, but no longer dependent upon his pecuniary ability.”); Paul L. Tractenberg, *The Evolution and Implementation of Educational Rights Under the New Jersey Constitution of 1947*, 29 RUTGERS L.J. 827, 892 (1998) (“In New Jersey, as in many other states, the education of children originally was a family or private responsibility. The first ‘public’ schools were established in communities where some residents were unable to provide for their own children's education.”).

The first public schools also sought to instill and reinforce religious beliefs in the students. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 720 (2001) (Breyer, J., dissenting) (“[H]istorians point out that during the early years of the Republic, American schools—including the first public schools—were Protestant in character. Their students recited Protestant prayers, read the King James version of the Bible, and learned Protestant

American public schools, parents could send their children to a public or private school if they wanted to, but there were no compulsory education requirements.³⁰ Parents opting to send their children to a public school held a large degree of control over curricular decisions; they usually won court battles with teachers unless school operations would be disrupted.³¹

States eventually enacted compulsory education laws that required parents to either send their children to a public school or provide for an

religious ideals.”); M.G. “Pat” Robertson, *Religion in the Classroom*, 4 WM. & MARY BILL RTS. J. 595, 600 (1995) (“The Massachusetts School Law of 1647 enacted the first public school system in America. It was expressly intended to teach children to read and write so they could understand the Scriptures. In fact, the Bible was their textbook.”); John Witte, Jr., *The Theology and Politics of the First Amendment Religion Clauses: A Bicentennial Essay*, 40 EMORY L.J. 489, 499 (1991) (“The first public schools and universities had mandatory courses in religion and theology and compulsory attendance in daily chapel and Sunday worship services.”).

Champions of the public school movement of the early 1800s had other motives. See O’Brien, *supra* note 11, at 169-70 (“The ‘melting’ of American youth into one people was a concept favored by the earliest public school advocates.”); Gia Fonte, Note, *Zelman v. Simmons-Harris: Authorizing School Vouchers, Education’s Winning Lottery Ticket*, 34 LOY. U. CHI. L.J. 479, 493-94 (2003) (“[Horace Mann] termed his newly created schools ‘common schools.’ The purpose of these common schools was not simply to teach reading and math to American school children; the purpose was to create a youth with common values, morals, and loyalties.”).

³⁰ *Purse*, 28 S.E. at 900 (“If the parent in Georgia, notwithstanding the fund provided for the purpose of educating his children, is not willing to discharge the duty, even at the expense of the State, there is no power under the law to compel him to discharge it.”). Public education did not gain much support in the United States until the second quarter of the nineteenth century. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (Brennan, J., concurring) (“Public education was, of course, virtually nonexistent when the Constitution was adopted.”); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 238-39 n.7 (1963) (Brennan, J., concurring) (“It was not until the 1820’s and 1830’s, under the impetus of Jacksonian democracy, that a system of public education really took root in the United States.”).

³¹ See *Tr. of Sch.*, 87 Ill. at 308-09 (“[W]e are unable to perceive how it can, in anywise, prejudice the school, if one branch rather than another be omitted from the course of study of a particular pupil. . . . [I]t is for the parent, not the trustees, to direct the branches of education he shall pursue.”); *State ex rel. Sheibley v. Sch. Dist. No. 1 Dixon County*, 48 N.W. 393, 395 (Neb. 1891) (“The right of the parent, therefore, to determine what studies his child shall pursue, is paramount to that of the trustees or teacher. . . . [N]o pupil attending the [public] school can be compelled to study any prescribed branch against the protest of the parent that the child shall not study such branch.”); *Sch. Bd. Dist. v. Thompson*, 103 P. 578, 581 (Okla. 1909) (“Our laws pertaining to the school system of the state are so framed that the parent may exercise the fullest authority over the child without in any wise impairing the efficiency of the system.”); *Morrow*, 35 Wis. at 64 (“We do not really understand that there is any recognized principle of law, nor do we think there is any rule of morals or social usage, which gives the teacher an absolute right to prescribe and dictate what studies a child shall pursue, regardless of the wishes or views of the parent.”).

equivalent education.³² While previous laws sought to assist willing parents who were unable to educate their children, the new statutes were aimed at parents who did not want their children to be educated at all.³³ As a result, states took from parents the common law right to determine *whether* their children would be educated; parents, however, retained the authority to decide *how* their children would be educated. The purpose of these statutes was to ensure that all children would receive a basic education, not that all would receive a *public* education.³⁴

Not long after states enacted compulsory education laws, they began to limit parents' ability to determine the type of education their children would have. Mainly because of the intense nativism that arose during World War I, states sought to "Americanize" the ethnic groups that had emigrated to the United States.³⁵ The states feared that these groups would retain foreign ideas and sympathies instead of adopting

³² See *Wisconsin v. Yoder*, 406 U.S. 205, 226 (1972) ("The requirement for compulsory education beyond the eighth grade is a relatively recent development in our history. Less than 60 years ago, the educational requirements of almost all of the States were satisfied by completion of the elementary grades, at least where the child was regularly and lawfully employed."); Jay S. Bybee & David W. Newton, *Of Orphans and Vouchers: Nevada's 'Little Blaine Amendment' and the Future of Religious Participation in Public Programs*, 2 NEV. L.J. 551, 555 (2002) ("In 1852, Massachusetts adopted the first compulsory education law in the United States; other states followed after the Civil War.").

³³ See *Roemhild v. State*, 308 S.E.2d 154, 159 (Ga. 1983) (Weltner, J., dissenting) ("The child at the will of the parent could be allowed to grow up in ignorance and become a more than useless member of society.") (quoting *Purse*, 28 S.E. at 900); *People v. Levisen*, 90 N.E.2d 213, 215 (Ill. 1950) ("The [compulsory education] law is not made to punish those who provide their children with instruction equal or superior to that obtainable in the public schools. It is made for the parent who fails or refuses to properly educate his child."); *State v. Peterman*, 70 N.E. 550, 552 (Ind. Ct. App. 1904) ("The [compulsory education] law was made for the parent who does not educate his child, and not for the parent who employs a teacher and pays him out of his private purse."). These statutes sought to address a consequence of the common law rule. See *Purse*, 28 S.E. at 900 ("[W]hile the duty rested upon the parent to educate his child [at common-law], the law would not attempt to force him to discharge this duty, the child, so far as education is concerned, [was] completely at the mercy of the parent.").

³⁴ See *Yoder*, 406 U.S. at 227 ("[C]ompulsory education and child labor laws find their historical origin in common humanitarian instincts."); *Levisen*, 90 N.E.2d at 215 ("The object [of compulsory education laws] is that all children shall be educated, not that they shall be educated in any particular manner or place."); *Peterman*, 70 N.E. at 552 ("[The State's] purpose is 'to secure to the child the opportunity to acquire an education,' which the welfare of the child and the best interests of society demand. The result to be obtained, and not the means or manner of obtaining it, was the goal which the lawmakers were attempting to reach."); *Commonwealth v. Roberts*, 34 N.E. 402, 403 (Mass. 1893) ("The great object of these provisions of the statutes has been that all the children shall be educated, not that they shall be educated in any particular way. To this end public schools are established, so that all children may be sent to them unless other sufficient means of education are provided for them.")

³⁵ See discussion *infra* Part II.B.

American values.³⁶ Because many groups continued to use and teach their native languages, states enacted laws requiring that all instruction in public and private schools be given in English only.³⁷ The states sought to prevent foreign-born American parents, and the private schools they utilized, from teaching children “un-American” languages and ideas.

While the English-only laws severely *limited* parental control over education, the parental right was virtually *annihilated* by the states’ next endeavor. In an effort to save the nation from the perceived perils of alien beliefs, states banned private and home schooling altogether and enacted a system of compulsory public education.³⁸ While states had previously been content to regulate school curricula, they realized they could convey an official State message much more efficiently by appropriating the entire educational system. In one half-century, parents’ ability to make educational decisions for their children went from being absolute to being almost non-existent. It was in this context that *Meyer* and *Pierce* arose.

B. *The New Balance: Meyer and Pierce*

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.³⁹

Meyer and *Pierce* came at a time when the ability of parents to educate their children was less than at any other time in American history, before or since. In the wake of the fears and attitudes caused by World War I, states seized educational control in an attempt to “Americanize” children. While immigrants and religious groups felt the brunt of this action, it struck a serious blow to parental rights in general.

1. *Meyer v. Nebraska*

Meyer involved a challenge to a Nebraska law that required all instruction in public, private, and parochial schools to be given in English.⁴⁰ While the legislature viewed the statute as addressing an “emergency,” schools were allowed to teach other languages as a

³⁶ *Id.*

³⁷ *Id.*

³⁸ See Bybee & Newton, *supra* note 32, at 555 (“The public education movement reached its apex in the 1920s in state laws requiring a public education.”).

³⁹ *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925).

⁴⁰ *Meyer v. Nebraska*, 262 U.S. 390, 397 (1923). “[Nebraska] Laws 1919, ch. 249, ‘Section 1 provided, 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.’” *Id.*

separate subject to students that had completed the eighth grade.⁴¹ Meyer, an instructor at a Lutheran parochial school, was convicted under the statute for teaching ten-year-old Raymond Parpart to read the Bible in German.⁴²

The Nebraska Supreme Court affirmed Meyer's conviction.⁴³ The court held that the legislature had reasonably exercised its police power because it "had seen the baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land."⁴⁴ The court held that, even when a person's actions are motivated by religious belief, if they "either disturb the public peace, or corrupt the public morals, or otherwise become inimical to the public welfare of the state, the law may prohibit them."⁴⁵ According to the court, the religious teaching of Lutheran children could "be as fully and adequately done in the English as in the German

⁴¹ *Id.*

⁴² *Id.* at 396-97. Raymond had not completed the eighth grade. *Id.*

⁴³ *Meyer v. Nebraska*, 187 N.W. 100, 104 (Neb. 1922).

⁴⁴ *Id.* at 102. The court continued:

The result of that condition was found to be inimical to our own safety. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country. The statute, therefore, was intended not only to require that the education of all children be conducted in the English language, but that, until they had grown into that language and until it had become a part of them, they should not in the schools be taught any other language.

Id.

The statute, and the court's defense of its purpose, was mainly the product of the intense nativism resulting from World War I. *Id.* at 104 (Letton, J., dissenting) ("It is patent, obvious, and a matter of common knowledge that this restriction was the result of crowd psychology; that it is a product of the passions engendered by the World War, which had not had time to cool."). Other states took similar actions at the end of the war. *See Neb. Dist. of Evangelical Lutheran Synod v. McKelvie*, 175 N.W. 531, 533 (Neb. 1919) ("In 1919 the legislatures of Iowa, Kansas, Maine, Arkansas, Indiana, Washington, Wisconsin, and New Hampshire passed measures more or less drastic with regard to compulsory education in English, and the prohibition of the use of foreign languages in elementary schools."); Brief for Appellee at 23, *Meyer v. Nebraska*, 262 U.S. 390 (No. 325), in 21 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 723 (Philip B. Kurland & Gerhard Casper eds., 1975) ("The recognized general necessity for legislation similar to the Nebraska foreign language act, the recognition of the threatened menace and the proper remedy is shown by the fact that twenty-one states besides Nebraska have enacted similar foreign language laws.").

⁴⁵ *Meyer*, 187 N.W. at 103.

language,” since the Lutheran faith did not require that services be conducted in German.⁴⁶

Judge Letton dissented from the court’s grant of broad legislative discretion.⁴⁷ Less than three years earlier, the Nebraska Supreme Court upheld the same foreign language statute in *Nebraska District of Evangelical Lutheran Synod v. McKelvie*.⁴⁸ There, Judge Letton stated that the law had a legitimate purpose of ensuring that the teaching of foreign languages did not take time away from the teaching of the “elementary branches” dealing with democracy and American government.⁴⁹ However, when *Meyer* came before the Nebraska Supreme Court, the rationale offered in defense of the statute was that the teaching of foreign languages is itself harmful.⁵⁰ Judge Letton’s dissent stressed the importance of the parental rights at stake⁵¹ and the danger of unchecked legislative action.⁵²

⁴⁶ *Id.* at 101-02. The court stated that the burden on the Lutheran religion was acceptable because the statute “in no way attempts to restrict religious teachings, nor to mold beliefs, nor interfere with the entire freedom of religious worship.” *Id.* This is a questionable proposition because, arguably, the only thing more central to an ethnic group’s identity than its language is its religion, and the two are often thoroughly intertwined.

⁴⁷ *Id.* at 104 (Letton, J., dissenting) (“I am unable to agree with the doctrine that the legislature may arbitrarily, through the exercise of the police power, interfere with the fundamental right of every American parent to control, in a degree not harmful to the state, the education of his child.”).

⁴⁸ *McKelvie*, 175 N.W. at 531.

⁴⁹ *Id.* at 534. The court held:

The ultimate object and end of the state in thus assuming control of the education of its people is the upbuilding of an intelligent American citizenship, familiar with the principles and ideals upon which this government was founded, to imbue the alien child with the tradition of our past, to give him the knowledge of the lives of Washington, Franklin, Adams, Lincoln, and other men who lived in accordance with such ideals, and to teach love for his country, and hatred of dictatorship, whether by autocrats, by the proletariat, or by any man, or class of men. . . . The intent evidently is that none of the time necessarily employed in teaching the elementary branches forming the public school curriculum shall be consumed in teaching the child a foreign language.

Id.; see also *Meyer*, 187 N.W. at 104 (Letton, J., dissenting) (“As was pointed out in [*McKelvie*], the legitimate object of the statute has been accomplished when the basic and fundamental education of every child in the state has been acquired in the English language, instead of in the language of a foreign country.”).

⁵⁰ *Meyer*, 187 N.W. at 104 (Letton, J., dissenting) (“The supposition that this restriction in the statute might have been inserted in the interest of the health of the child is evidently an after-thought. . . . The idea that the legislature had in mind the protection of the child from over study, or lack of recreation, seems far-fetched.”).

⁵¹ *Id.* (“Every parent has the fundamental right, after he has complied with all proper requirements by the state as to education, to give his child such further education in proper subjects as he desires and can afford. . . . [The state] has no right to prevent parents from bestowing upon their children a full measure of education in addition to the

On appeal, the United States Supreme Court held, in a landmark decision, that the Nebraska law violated the Due Process Clause of the Fourteenth Amendment.⁵³ Justice McReynolds, writing for the majority, stated that the statute violated the right of foreign language teachers to contract their services.⁵⁴ More important, the Court also held that the statute infringed upon the parental right to direct education.⁵⁵ The Court

state required branches.”). Judge Letton quoted a passage of a case decided less than a decade earlier:

The public school is one of the main bulwarks of our nation, and we would not knowingly do anything to undermine it; but we should be careful to avoid permitting our love for this noble institution to cause us to regard it as all in all and destroy both the God-given and constitutional right of a parent to have some voice in the bringing up and education of his children.

Id. (quoting *State v. Ferguson*, 144 N.W. 1039, 1043 (Neb. 1914)) (alteration in original).

⁵² *Id.* at 104-05 (“[T]he legislature cannot, under the guise of police regulation, arbitrarily invade personal rights Resistance to the arbitrary power of kings was necessary in days gone by. It seems now to be necessary to resist encroachments by the legislature upon the liberty of the citizen protected by the Constitution.”).

⁵³ *Meyer*, 262 U.S. at 403. The Fourteenth Amendment provides in relevant part that, “No State shall . . . deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1. Long before *Meyer*, the Court viewed the Due Process clause as a guarantee that “liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect.” *Meyer*, 262 U.S. at 399-400. The *Meyer* Court stated that the “liberty” guaranteed by the Fourteenth Amendment included:

[T]he 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 pursuit of happiness by free men.

Id. at 399. For a discussion of the parental right to educate children as it existed at common law, see *supra* Part II.A.

⁵⁴ *Meyer*, 262 U.S. at 400, 403. The economic due process cases upon which this statement was based were later overruled. *Planned Parenthood v. Casey*, 505 U.S. 833, 861 (1992) (O’Connor, J., plurality) (“[The] line of cases identified with *Lochner* . . . imposed substantive limitations on legislation limiting economic autonomy in favor of health and welfare regulation . . . *West Coast Hotel Co. v. Parrish* . . . signaled the demise of *Lochner*.”). According to Justice Powell, the fact that *Meyer* and *Pierce* were built upon a long-standing American practice “explains why *Meyer* and *Pierce* have survived and enjoyed frequent reaffirmance, while other substantive due process cases of the same era have been repudiated.” *Moore v. E. Cleveland*, 431 U.S. 494, 501 n.8 (1977) (Powell, J., plurality). More recently, Justice Scalia remarked in a dissenting opinion that *Meyer* and *Pierce* came “from an era rich in substantive due process holdings that have since been repudiated.” *Troxel v. Granville*, 530 U.S. 57, 92 (2000) (Scalia, J., dissenting). However, as Justice Souter said of *Meyer* and *Pierce* three years earlier, “Even before the deviant economic due process cases had been repudiated, however, the more durable precursors of modern substantive due process were reaffirming this Court’s obligation to conduct arbitrariness review.” *Washington v. Glucksberg*, 521 U.S. 702, 761-62 (1997) (Souter, J., concurring).

⁵⁵ *Meyer*, 262 U.S. at 400-01.

characterized the parental interest in a child's education in strong terms, referring to it as a "right of control" and a "natural duty."⁵⁶ While the Court acknowledged that the State has an important interest in ensuring a well-educated citizenry,⁵⁷ it underscored that "a desirable end cannot be promoted by prohibited means."⁵⁸ The Court compared Nebraska's attempt to standardize its children to the communal raising of children advocated by Plato⁵⁹ and rejected the concept as unconstitutional and un-American.⁶⁰

⁵⁶ The Court stated:

Corresponding to the *right of control*, it is the *natural duty* of the parent to give his children education suitable to their station in life.

....

[T]he *right of parents* to engage [a German language teacher is] within the liberty of the Amendment.

....

Evidently the legislature has attempted materially to interfere with . . . *the power of parents to control* the education of their own.

Id. (emphasis added).

⁵⁷ *Id.* at 401-02. The Court acknowledged that "the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally," and that "[t]he desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate." *Id.*

⁵⁸ *Id.* at 401. The Court added, "Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution," and "the means adopted, we think, exceed the limitations upon the power of the State." *Id.* at 401-02.

⁵⁹ The Court stated:

For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: '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 inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.' In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted [sic] their subsequent education and training to official guardians.

Id.

⁶⁰ The Court remarked that Plato's "ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution." *Id.* at 402; see also *Gordon v. Bd. of Educ.*, 178 P.2d 488, 498 (Cal. Ct. App. 1947) (White, J., concurring) ("[There is a] long established doctrine in the United States that 'the alien philosophy that the child is the creature of the state finds no countenance in the American system of government.'") (quoting *Boens v. Bennett*, 67 P.2d 715, 717-18) (Cal. Ct. App. 1937)).

2. *Pierce v. Society of Sisters*

Pierce arose in the same context of post-War nativism as *Meyer*. *Pierce* involved a challenge to an Oregon statute enacted by public initiative that created a system of compulsory public education.⁶¹ The law required all children between eight and sixteen years of age to attend public school,⁶² with exceptions for children that were disabled, had completed the eighth grade, or lived too far from the nearest public school.⁶³ The statute was challenged by two groups that operated private elementary schools: Hill Military Academy and the Roman Catholic Society of Sisters.⁶⁴ They claimed that the law infringed upon their economic rights as well as the rights of parents, children, and teachers.⁶⁵

The United States District Court for the District of Oregon held that the law violated the Fourteenth Amendment's Due Process Clause.⁶⁶ Specifically, the court stated that the law violated the economic rights of schools and teachers to participate in a vocation not harmful to the public.⁶⁷ Relying on *McKelvie* and *Meyer*, the court also held that the statute violated the parents' right to control their children's education.⁶⁸ Parents, the court said, have a "natural and inherent right to the

⁶¹ *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 530 (1925).

⁶² *Id.*

⁶³ *Id.* at 530-31. Parents and private instructors teaching children at the time the statute was enacted could obtain permission to complete the current school year. *Id.*

⁶⁴ *Id.* at 531-33.

⁶⁵ *Id.* at 532-33. The Society claimed that the statute was unconstitutional because it "conflicts with the right of parents to choose schools where their children will receive appropriate mental and religious training, the right of the child to influence the parents' choice of a school, [and] the right of schools and teachers therein to engage in a useful business or profession." *Id.* at 532.

⁶⁶ *Soc'y of Sisters v. Pierce*, 296 F. 928, 937-38 (D. Or. 1924).

⁶⁷ *Id.* at 936. The court also remarked:

Compulsory education being the paramount policy of the state, can it be said, with reason and justice, that the right and privilege of parochial and private schools to teach in the common school grades is inimical or detrimental to, or destructive of, that policy? Such schools and their patrons have the same interest in fostering primary education as the state, and appropriate regulation will place them under supervision of school authorities so they will not escape the duty of proper primary instruction. No one has advanced the argument that teaching by these schools is harmful, or that their existence with the privilege of teaching in the grammar grades is a menace, or of vicious potency, to the state or the community at large, and there appears no plausible or sound reason why they should be eliminated from taking part in the primary education of the youth. It would seem that the act in question is neither necessary nor essential for the proper enforcement of the state's school policy.

Id. at 937.

⁶⁸ *Id.* ("[T]he right of the parents to engage [private grammar schools] to instruct their children, we think, is within the liberty of the Fourteenth Amendment.").

nurture, control, and tutorship of their offspring,” and the State cannot abridge that right in seeking to further its own educational interests.⁶⁹ The court examined the long history of private schooling and repeated *Meyer’s* statement that the Due Process Clause protects long-standing common law rights.⁷⁰

The United States Supreme Court affirmed.⁷¹ While recognizing that states have a valid interest in overseeing the functioning of schools, the Court held that the State has no authority to usurp the role of parents as the primary educator of children under a system of government that protects individual liberty.⁷² The Court held that the statute “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.”⁷³ In one of its best-known passages, the Court proclaimed: “[t]he 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.”⁷⁴

⁶⁹ *Id.* at 936 (“[P]arents possess a natural and inherent right to the nurture, control, and tutorship of their offspring, that they may be brought up according to the parents’ conception of what is right and just, decent, and respectable, and manly and noble in life,” which is “primordial and long-established.”). While the court acknowledged “[t]he right of the state to establish as its school policy compulsory education within its boundaries,” which is effective “for reducing illiteracy and raising the standard of citizenship,” it held that the State had “in the means adopted, exceeded the limitations of its power.” *Id.* at 937-38.

⁷⁰ *Id.* at 936 (“It cannot be successfully combated that parochial and private schools have existed almost from time immemorial—so long, at least, that [the private schools]’ privilege and right to teach the grammar grades must be regarded as natural and inherent, as much so as the privilege and right of a tutor to teach the German language with the grammar grades, as was held in *Meyer*.”). The court also said, “The court in the *Meyer* Case, in stating some things that are without doubt included by the term ‘liberty’ as guaranteed by the Constitution, concludes, ‘And generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.’” *Id.* at 937 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

⁷¹ *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 536 (1925).

⁷² *Id.* at 534. The Court said:

No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

Id. The Court added that “[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.” *Id.* at 535.

⁷³ *Id.* at 534-35.

⁷⁴ *Id.* at 535.

C. Affirmation of the Parental Right

[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the *fundamental right of parents* to make decisions concerning the care, custody, and control of their children.⁷⁵

Over the past seventy-five years, the holdings of *Meyer* and *Pierce* have become a widely accepted part of the American legal landscape. The Supreme Court has cited both cases on dozens of occasions, in various contexts, in support of the constitutionally protected parental right to direct the education of children.⁷⁶ It can be argued that *Meyer* and *Pierce* are such an integral part of the Court's elaborate substantive due process doctrine that an attack on the parental right to educate necessarily constitutes an attack on substantive due process itself.

The Supreme Court has routinely reaffirmed and extended the constitutional protections set out in *Meyer* and *Pierce*. Just two years after *Pierce*, the Court applied both cases to strike down a law in the

⁷⁵ *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (O'Connor, J., plurality) (emphasis added).

⁷⁶ The Court and its Justices have described the parental liberty recognized in *Meyer*, *Pierce*, and their progeny in a variety of ways. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 680 n.5 (2002) (Thomas, J., concurring) ("fundamental liberty to choose how and in what manner to educate their children"); *Troxel*, 530 U.S. at 65 (O'Connor, J., plurality) ("interest of parents in the care, custody, and control of their children"); *id.* at 77 (Souter, J., concurring) ("parent's interests in the nurture, upbringing, companionship, care, and custody of children"); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (right "to direct the education and upbringing of one's children"); *Planned Parenthood v. Casey*, 505 U.S. 833, 849 (1992) (O'Connor, J., plurality) (right to make "basic decisions about family and parenthood"); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 341 (1990) (Stevens, J., dissenting) ("liberty to make the decisions and choices constitutive of private life"); *Michael H. v. Gerald D.*, 491 U.S. 110, 141-42 (1989) (Brennan, J., dissenting) (interest "of a parent and child in their relationship with each other"); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (interest in the "relationship between parent and child"); *Moore v. E. Cleveland*, 431 U.S. 494, 501 (1977) (Powell, J., plurality) ("traditional parental authority in matters of child rearing and education"); *id.* at 505 ("[d]ecisions concerning child rearing"); *Roe v. Wade*, 410 U.S. 113, 169 (1973) (Stewart, J., concurring) ("freedom of personal choice in matters of marriage and family life"); *id.* at 170 ("right to send a child to private school"); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) ("right of parents to provide an equivalent education in a privately operated system"); *id.* at 213 ("interest of parents in directing the rearing of their offspring"); *id.* at 214 ("traditional interest of parents with respect to the religious upbringing of their children"); *id.* at 233 ("duty to prepare the child for 'additional obligations'"); *id.* (right "of parents to direct the religious upbringing of their children"); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (right "to conceive and to raise one's children"); *id.* ("integrity of the family unit"); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) ("right to educate a child in a school of the parents' choice"); *id.* ("right to educate one's children as one chooses"); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("parent's authority to provide religious with secular schooling").

Hawaiian territory that required all schools to pay a per-student fee if they taught in a language other than English or Hawaiian.⁷⁷ The Court said, “The Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue.”⁷⁸ In *Prince v. Massachusetts*,⁷⁹ a case decided during World War II, the Court discussed *Meyer* and *Pierce* in the following terms: “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”⁸⁰ The Court held that “these decisions have respected the private realm of family life which the state cannot enter.”⁸¹

In *Griswold v. Connecticut*,⁸² decided in 1965, the Court discussed the “peripheral rights” that it had previously recognized in cases such as *Meyer* and *Pierce* and said, “we reaffirm the principle of the *Pierce* and the *Meyer* cases.”⁸³ Eight years later, the Court relied heavily upon *Griswold* and similar cases in *Roe v. Wade*.⁸⁴ The *Roe* decision stated that “a right of personal privacy, or a guarantee of certain areas or zones of privacy,” has been recognized in a line of decisions including *Meyer* and *Pierce*.⁸⁵ When the Court reexamined *Roe* in 1992, a plurality cited cases including *Meyer*, *Pierce*, and *Griswold* for the proposition that, “[i]t is settled now, as it was when the Court heard arguments in *Roe v. Wade*, that the Constitution places limits on a State’s right to interfere

⁷⁷ *Farrington v. Tokushige*, 273 U.S. 284, 291-92 (1927). Similar to the statute struck down in *Meyer*, the statute in *Farrington* sought to ensure that teachers were “possessed of the ideals of democracy,” that the “Americanism of the pupils” would be promoted, and that teachers would “so direct the minds and studies of pupils in such schools as will tend to make them good and loyal American citizens.” *See id.* at 293-94.

⁷⁸ *Id.* at 298.

⁷⁹ *Prince*, 321 U.S. at 166.

⁸⁰ *Id.* This language has been quoted in numerous Supreme Court opinions in more recent cases. *See Troxel*, 530 U.S. at 65-66 (O’Connor, J., plurality); *Hodgson v. Minnesota*, 497 U.S. 417, 447 (1990) (quoting *Stanley*, 405 U.S. at 651); *id.* at 483-84 (Kennedy, J., concurring); *H.L. v. Matheson*, 450 U.S. 398, 410 (1981) (quoting *Quilloin*, 434 U.S. at 255); *Bellotti v. Baird*, 443 U.S. 622, 638 (1979); *Parham v. J.R.*, 442 U.S. 584, 621 n.1 (1979) (Stewart, J., concurring); *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 758 (1978) (Powell, J., concurring); *Quilloin*, 434 U.S. at 255; *Carey v. Population Serv.*, 431 U.S. 678, 708 (1977) (Powell, J., concurring) (quoting *Ginsberg v. New York*, 390 U.S. 629, 639 (1968)); *Smith v. Org. of Foster Families*, 431 U.S. 816, 843 (1977); *Oloff v. E. Side Union High Sch. Dist.*, 404 U.S. 1042, 1043 (1972) (Douglas, J., dissenting) *denying cert. to* 445 F.2d 932 (9th Cir. 1971); *Stanley*, 405 U.S. at 651; *Ginsberg*, 390 U.S. at 639.

⁸¹ *Prince*, 321 U.S. at 166.

⁸² *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁸³ *Id.* at 482-83.

⁸⁴ *Roe v. Wade*, 410 U.S. 113 (1973).

⁸⁵ *Id.* at 152-53. The *Roe* court read *Meyer* and *Pierce* to mean that the privacy right “has some extension to activities relating to . . . child rearing and education.” *Id.*

with a person's most basic decisions about family and parenthood."⁸⁶ Chief Justice Rehnquist noted in his dissent that the Court was "building on" *Meyer* and *Pierce* when it decided several other important cases as well.⁸⁷

In his concurring opinion in the 1997 case of *Washington v. Glucksberg*,⁸⁸ Justice Souter called *Meyer* and *Pierce* two of "the more durable precursors of modern substantive due process."⁸⁹ In 2000, a plurality of four Justices began its review of the doctrine of parental rights by citing *Meyer* and *Pierce* and stating, "[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."⁹⁰ In his concurring opinion, Justice Thomas emphasized that *Pierce* held that "parents have a *fundamental* constitutional right to rear their children, including the right to determine who shall educate and socialize them."⁹¹ In 2003, the Court again stated that *Meyer* and *Pierce* provided "broad statements of the substantive reach of liberty under the Due Process Clause."⁹²

Perhaps the Court's strongest affirmation of *Meyer* and *Pierce* came in its 1972 decision *Wisconsin v. Yoder*.⁹³ In *Yoder*, a Wisconsin statute requiring all children between seven and sixteen years of age to attend school was challenged by Amish parents who, for religious reasons, did not want their children to attend a formal school after they completed the eighth grade.⁹⁴ The Court ruled for the parents, affirming that "the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society."⁹⁵ The Court suggested that, if the State's asserted *parens*

⁸⁶ *Planned Parenthood v. Casey*, 505 U.S. 833, 849 (1992).

⁸⁷ *Id.* at 951 (Rehnquist, C.J., dissenting). In *Skinner v. Oklahoma*, the Court held that a law allowing sterilization of habitual criminals "involves one of the basic civil rights of man," and added, "[m]arriage and procreation are fundamental to the very existence and survival of the race." 316 U.S. 535, 541 (1942). In *Loving v. Virginia*, the Court struck down a statute which banned interracial marriage and stated that, in light of *Meyer* and *Skinner*, "the State [could] not contend . . . that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment." 388 U.S. 1, 9 (1967). In *Eisenstadt v. Baird*, the Court declared, "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 405 U.S. 438, 453 (1972).

⁸⁸ *Washington v. Glucksberg*, 521 U.S. 702 (1997).

⁸⁹ *Id.* at 761-62 (Souter, J., concurring).

⁹⁰ *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (O'Connor, J., plurality).

⁹¹ *Id.* at 80 (emphasis added).

⁹² *Lawrence v. Texas*, 539 U.S. 558, 564 (2003).

⁹³ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

⁹⁴ *Id.* at 207.

⁹⁵ *Id.* at 213-14.

patriae interest could defeat the wishes of the parents, “the State [would] in large measure influence, if not determine, the religious future of the child.”⁹⁶ The Court stated, “*Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children.”⁹⁷

III. MODERN CRITICISM OF PARENTAL RIGHTS

[W]e confront an interest—that of a parent and child in their relationship with each other—that was among the first that this Court acknowledged in its cases defining the “liberty” protected by the Constitution, *see, e. g., Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), and I think I am safe in saying that *no one doubts the wisdom or validity of those decisions*.⁹⁸

While Justice Brennan correctly noted in the above passage that a substantial part of the American legal community accepts “the wisdom or validity” of *Meyer*, his assertion that “no one” questions the decision’s soundness was an overstatement. Within legal academia, *Meyer* and *Pierce* have come under fire on several grounds. This Part presents an overview of two of the main critiques of the parental right to direct education, as well as the proposals offered to change the current state of the law.

A. The “Children’s Rights” Argument

I hope to bring into view the dark side of *Meyer* and *Pierce*. *Meyer* announced a dangerous form of liberty, the right to control another human being. Stamped on the reverse side of the coinage of family

⁹⁶ *Id.* at 232. The Court remarked:

Indeed it seems clear that if the State is empowered, as *parens patriae*, to ‘save’ a child from himself or his Amish parents by requiring an additional two years of compulsory formal high school education, the State will in large measure influence, if not determine, the religious future of the child. Even more markedly than in *Prince*, therefore, this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children.

Id.

⁹⁷ *Id.* at 233. The Court added:

The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.

Id. at 232. The Court acknowledged, “To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.” *Id.* at 233-34.

⁹⁸ *Michael H. v. Gerald D.*, 491 U.S. 110, 142-43 (1989) (Brennan, J., dissenting) (emphasis added).

privacy and parental rights are the child's voicelessness, objectification, and isolation from the community.⁹⁹

Perhaps the most vocal critics of *Meyer* and *Pierce*, and parental rights in general, are advocates of the "Children's Rights" movement. Barbara Bennett Woodhouse's "*Who Owns the Child?: Meyer and Pierce and the Child as Property*" best exemplifies this viewpoint.¹⁰⁰ In her review of *Meyer* and *Pierce*, Woodhouse admittedly conducts "a revisionist history of two liberal icons."¹⁰¹ Her thesis is that "*Meyer* and *Pierce* constitutionalized a narrow, tradition-bound vision of the child as essentially private property."¹⁰² She frames the question posed by those cases as, "Who owns the child?" and the Court's answer was "the traditional owner, the parent."¹⁰³ She claims that the Court, in so holding, rejected "the Progressive vision of the child as public resource and public ward, entitled both to make claims upon the community and to be claimed by the community."¹⁰⁴

The Woodhouse article contains themes that appear throughout arguments commonly made by Children's Rights advocates. One of these themes is that the parental right to direct a child's education is an indefensible vestige of the patriarchal common law, analogous to private property ownership, slavery, and the common law's treatment of women. For example, Woodhouse says, "At the time of *Meyer* and *Pierce*, ownership of humans was a legal fact within living memory. Ironically,

⁹⁹ Woodhouse, *supra* note 15, at 1000-01.

¹⁰⁰ See generally *id.* Other works by Woodhouse include: *Child Abuse, the Constitution, and the Legacy of Pierce v. Society of Sisters*, 78 U. DET. MERCY L. REV. 479 (2001); *Children's Rights: The Destruction and Promise of Family*, 1993 BYU L. REV. 497 (1993); *From Property to Personhood: A Child-Centered Perspective on Parents' Rights*, 5 GEO. J. ON POVERTY L. & POL'Y 313 (1998); *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993); *Out of Children's Needs, Children's Rights: The Child's Voice in Defining the Family*, 8 BYU J. PUB. L. 321 (1994).

¹⁰¹ Woodhouse, *supra* note 15, at 996.

¹⁰² *Id.* at 997, 1002 (asserting that this view of children "cuts off a more fruitful consideration of the rights of all children to safety, nurture, and stability, to a voice, and to membership in the national family"); see also *id.* at 1042 ("Property and ownership were indeed a powerful subtext of parental rights rhetoric in the era of *Pierce* and *Meyer*."); *id.* at 1114 ("[T]he property theory latent in *Meyer* and *Pierce* adversely affects the way the law views children."); *id.* ("Children are often used as instruments, as in *Meyer* and *Pierce*. The child is denied her own voice and identity and becomes a conduit for the parents' religious expression, cultural identity, and class aspirations."); *id.* at 1115 ("The minor child is a key tool of the parents' free exercise but has no independent free exercise protections. Even when *Meyer* and *Pierce* lead to the vindication of First Amendment liberties, it is thus the parent's voice and choice that we hear and not the child's."); *id.* at 1113 ("By constitutionalizing a patriarchal notion of parental rights, *Meyer* and *Pierce* interrupted the trend of family law moving toward children's rights and revitalized the notion of rights of possession.");

¹⁰³ *Id.* at 1036-37.

¹⁰⁴ *Id.* at 1091.

the Court in *Meyer* and *Pierce* chose to hang parental control of children on the branch of Fourteenth Amendment ‘liberty,’—ironically, she explains, because that Amendment “was unambiguously designed to guarantee liberty to enslaved persons formerly owned as chattels.”¹⁰⁵ Woodhouse discusses “the complex linkage of slavery with commodification of women and children,”¹⁰⁶ and states that the Children’s Rights concepts articulated by supporters of the laws struck down in *Meyer* and *Pierce* “echoed the women’s and abolitionist movements of the 1800s.”¹⁰⁷

Another common Children’s Rights argument is that the State sometimes needs to “save” children from their parents because parents may abuse their duty to care for their children.¹⁰⁸ A comparison is often made between compulsory education schemes, child labor laws, and child abuse proceedings, all instances where the State has intervened to

¹⁰⁵ *Id.* at 1041-42 n.207; *see also id.* at 1037 (“The Court’s elastic construction of Fourteenth Amendment liberty to include parental control of the child served—just as in the economic due process cases—to defend traditions of private ownership, hierarchical structures, and individualist values against claims of collective governance.”); *id.* at 1099 (“As in *Lochner*, the Justices’ arsenal for confronting the novel and shocking [in *Meyer*] was the Due Process Clause and the discovery of a ‘liberty’ that seems closer to the Thirteenth than the Fourteenth Amendment.”); *id.* at 1110 (“Especially in family law, which deals with collective organisms, liberty is a difficult concept: one individual’s liberty can spell another’s suppression or defeat.”); *id.* at 1113 (“I have flipped the coin of family autonomy to show its underside, stamped with ‘liberty’ but standing for the power to own another human being and to cast social regulation of this power as an assault on freedom.”); *id.* at 1046 (“A final element of property ownership is the right to security or immunity from expropriation—the right that Oregon parents invoked when they accused government of Bolshevism in taking their children, and the most jealously guarded right under modern constitutional law.”).

¹⁰⁶ *Id.* at 1043 n.222; *see also id.* at 1043 (“The Greek philosophers also accentuated male procreativity as proof of the natural correctness of male dominance over women, slaves, and children.”).

¹⁰⁷ *Id.* at 1056; *see also id.* at 1062 (“By the turn of the century, reformers described children as the last disenfranchised class. Observing that men had been given civil rights in the eighteenth century, and women and blacks in the nineteenth, they dubbed the twentieth ‘The Century of the Child.’”); *id.* at 1065 (“[Opponents of child labor regulation] minimized the furor over parents’ abuse of their children, comparing it to the antebellum furor over the slaveholder’s abuse of his human property.”).

¹⁰⁸ *See id.* at 1115 (“Obviously, good reasons exist for presuming that the parent speaks for the child. . . . [O]rdinarily, the best guardian of the child’s intellectual liberty and welfare is the parent. But constitutionalizing this presumption as the parents’ ‘right’ to speak, choose, and live through the child has led to its being too often invoked in situations in which it is, at best, unnecessary or, at worst, oppressive.”); *id.* at 1060 (“[T]he emergence in family theory of a new model challenging the patriarchal family model—that of a family composed of individuals—undercut the established family hierarchy and the presumed unity of interests between parent and child that had served as a theoretical justification for paternal authority freely to exploit the child as a family asset.”); *id.* at 1044 (“[A] common justification offered by parents who physically or sexually abuse their children [is:] the child is mine and it is nobody’s business what I do with it.”).

override parental decisions regarding their children.¹⁰⁹ Woodhouse described the language used by Children's Rights reformers during the era of *Meyer* and *Pierce* as "a natural offshoot of a prior movement, self described as 'child-saving,' which dated back to at least the 1850s."¹¹⁰ The "child-savers" of the late nineteenth century "took jurisdiction over" abused children, and the concept of Children's Rights was the justification "articulated for their seizure."¹¹¹ This group "began the assault on parental rights by dismissing them as a thinly disguised cover for paternal brutality."¹¹² By the early 1920s, "the family citadel was crumbling under assaults from common schooling, child welfare, juvenile justice, child labor laws, and a host of government assumptions of paternal prerogatives designed to standardize child-rearing and make it responsive to community values."¹¹³

While it is clear that Woodhouse and others would like to replace parental rights with "Children's Rights," they do not always clearly state

¹⁰⁹ See *id.* at 1051 ("[Both] the children's rights movement and the movement to outlaw child labor . . . illustrate the competition between concepts of the child as parental property and as a collective resource, and both pit the emerging rights of children against the ancient rights of parents."); *id.* at 1062 ("The progressive 'childsavers' viewed child labor legislation and compulsory education laws as integral parts in a unified campaign to improve the lot of children."); *id.* at 1063 ("Functionally and historically, child labor regulation and compulsory education laws were intimately related."); *id.* at 1065 ("Echoing arguments raised against the school laws, opponents of child labor regulation predicted that it would undermine parental authority and ultimately result in the downfall of the Republic, if not a revolution.").

¹¹⁰ *Id.* at 1052. The laudable efforts of these reformers included "providing lodging houses, foster homes, and industrial schools" for immigrant children in urban areas. See *id.* Woodhouse cites a passage written by the Reverend Hastings H. Hart as representative of "both the collective ethos of the [child-saving] movement and the dual principles of children's claims on society and society's stake in children," in which he says, "[t]he first principle underlying the child-saving movement is this: The great mother state is responsible for the welfare of the dependent and neglected child." *Id.* at 1054-55 n.292 (quoting Hastings H. Hart, *The Child-Saving Movement*, 58 BIBLIOTHECA SACRA 520, 520 (1901)).

¹¹¹ *Id.* at 1052; see *id.* at 1051 ("[I]n magazines and meetings, opinionmakers and activists were beginning to talk of children's rights. . . . The community, for its part, asserted claims upon the child, contending that the child's highest duty was no longer obedience to parents, but preparation for citizenship."); *id.* at 1052 ("In place of patriarchal control, child-savers raised the notion of community control and justified the assault on parental rights by invoking the child's rights. Children's rights, when set up against parents' rights, operated both as standards for parental behavior and as limitations on parental power."); *id.* at 1054 ("These articulations of children's collective rights reflected a sense of the child not as private property of his parent, nor of himself, but as belonging to the community, the collective family.").

¹¹² *Id.* at 1053.

¹¹³ *Id.* at 1090; see also *id.* at 1068 ("Although still viewed as belonging to their parents, children [in the era of *Meyer* and *Pierce*] were reconceptualized both as public treasure, belonging to and having claims upon the larger community, and as free individuals, possessors of individual rights actualized through parents or judges.").

what this would mean in practical terms. Would compulsory *public* education be revived? Would private and home schooling be abolished or weakened? Or would the current educational system remain largely intact? Although Woodhouse does not expressly state that compulsory public education should be re-enacted, she makes many open-ended statements that could reasonably be read to imply that conclusion.¹¹⁴ For example, she describes James Liebman's argument for public education, which he believes should be compulsory, as "persuasive."¹¹⁵ She expresses concerns about the ramifications of "wholesale choice" and adds that the ballot in *Pierce*, which proposed compulsory education, "reads like an index to the modern arguments against choice."¹¹⁶

B. *The Religious Education as Oppression Argument*

Courts should acknowledge the illegitimacy of the parents' rights doctrine and decline to recognize claims of parental rights in the future. The evolution of our social attitudes toward, and legal treatment of, children in recent decades would afford the Supreme Court an adequate rationale for departing from the rule of *stare decisis* and for overruling *Yoder* and *Pierce* to abolish parental child-rearing rights.¹¹⁷

¹¹⁴ See, e.g., *id.* at 1111-12 ("We can only hope that our system is still sufficiently vital that some new age of reformers will appear to walk the same road as the Populists and Progressives. How will they be received? Will they find their way barred by the dead hand of tradition . . . calling itself family liberty?"); *id.* at 1118 ("In our national discourse, the idea of nationalizing the American child as a precious resource seems like a Populist pipe dream."); *id.* ("This has been a difficult era for the public child, and it is disturbing to see threatened the one area in which the public child's claim has seemed most secure—the public schools."); *id.* at 1119 ("[M]y journey through *Meyer* and *Pierce* and their relation to children's rights and compulsory schooling highlights the critical role that free public schools have played in giving meaning to children's membership in the community. . . . Public schools have been a place in which all children were equally entitled, as the community's children, to be."); *id.* at 1104 ("No Justices dissented [in *Pierce*]. Perhaps Brandeis had persuaded Holmes that exclusive state control of all organs of education and the closing of all religious schools would be a frontal assault on the existence of an independent, informed electorate and on the constitutionally explicit rights of free speech. It was also an assault on a certain way of life."); *id.* at 1111 ("It seems improbable that the Court will provide a forum for creating new family forms. Individuals and groups who believe traditional law fails to serve or forecloses their visions of family will have to take their fight to the legislatures.")

¹¹⁵ *Id.* at 1119-20 n.674 (citing James S. Liebman, *Desegregating Politics: 'All-Out' School Desegregation Explained*, 90 COLUM. L. REV. 1463 (1990)).

¹¹⁶ *Id.* at 1120. These arguments include "that it would sharpen divisions of class and ethnicity, create enclaves of exclusiveness, foster schools run by groups more intent on political indoctrination than education, and destroy civic commitment to public schools." *Id.*

¹¹⁷ James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371, 1447 (1994).

Another facet of the attack on *Meyer* and *Pierce* comes from writers who object to the wide-ranging ability that those cases afford parents to instruct their children in the teachings of a religious faith. James G. Dwyer's, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*,¹¹⁸ illustrates this position.¹¹⁹ Dwyer asks "at a fundamental level what it means to say that individuals have rights as parents, and whether it is legitimate to do so."¹²⁰ He concludes that "parental child-rearing rights are illegitimate" and proposes what he calls a "substantial revision" in child-rearing law.¹²¹ This "revision" would be "that children's rights, rather than parents' rights, be the legal basis for protecting the interests of children," and "that the law confer on parents simply a child-rearing privilege, limited in its scope to actions and decisions not inconsistent with the child's temporal interests."¹²²

Dwyer's arguments are based on "the proposition that, as a general rule, our legal system does not recognize or bestow on individuals rights to control the lives of other persons."¹²³ He begins his defense of this proposition by noting that it is difficult to prove, even when it is limited to control over the lives of *adults*, "due to the lack of clear statements by the judiciary that this is in fact a controlling principle of law."¹²⁴ Dwyer attributes this judicial silence to "the self-evident nature of the proposition" or to the fact that "people simply do not claim a right to direct the lives of others," which may reflect "widespread recognition that other people have a right to personal autonomy."¹²⁵ He then argues

¹¹⁸ *Id.*

¹¹⁹ *See id.* at 1377 ("This Article focuses in the first instance on parental rights in religious contexts—that is, in situations where parents' religious beliefs shape their child-rearing preferences. It is in this context that the principal aspects of parent-state conflicts over child-rearing take on their most extreme form."). Other works by Dwyer include: RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS (1998); VOUCHERS WITHIN REASON: A CHILD-CENTERED APPROACH TO EDUCATION REFORM (2001); *School Vouchers: Inviting the Public Into the Religious Square*, 42 WM. & MARY L. REV. 963 (2001).

¹²⁰ Dwyer, *supra* note 117, at 1373.

¹²¹ *Id.* at 1374, 1447.

¹²² *Id.* at 1374.

¹²³ *Id.* at 1405.

[T]here is an in-principle limitation on legal rights that confines them to protection of a right-holder's personal integrity and self-determining activities. As such, it is illegitimate to construe an individual's rights to include an entitlement to exercise extensive control over another person, or any control over a non-consenting person apart from self-defensive measures.

Id. "[There is a] moral precept that no individual is entitled to control the life of another person, free from outside interference, no matter how intimate the relationship between them, and particularly not in ways inimical to the other person's temporal interests." *Id.* at 1373.

¹²⁴ *Id.* at 1406.

¹²⁵ *Id.*

that various legal doctrines, taken in the aggregate, establish his proposition.¹²⁶

Like Woodhouse, Dwyer uses slavery and the law's past treatment of women to support his argument.¹²⁷ He cites the Thirteenth Amendment's prohibition of slavery as "the strongest and most obvious embodiment of the principle that no person should have a right to control the life of another person."¹²⁸ While conceding that "[p]arental control over the lives of children certainly differs in important respects from the institution of slavery," he states, "it nevertheless can manifest some of the 'badges and incidents' of slavery."¹²⁹ Dwyer cites an article which calls the abuse of parental rights "state-enforced slavery," and adds that parental free exercise rights "ensure parents the freedom to exercise nearly complete domination over their children," and "arguably come closer to this understanding of slavery than to a legitimate custody privilege."¹³⁰ He asserts that parental rights "amount to legally sanctioned domination."¹³¹

¹²⁶ See generally *id.* at 1406-23. Some of the areas of law Dwyer discusses are free exercise of religion, civil divorce, free speech, due process, and abortion. *Id.* Dwyer makes the following inference after reviewing these areas of law:

Of course, the foregoing survey of Supreme Court rhetoric regarding rights outside of the parenting context does not amount to a conclusive demonstration that the Court subscribes to the proposition that rights are inherently limited to self-determining choices and activities. It is, however, entirely consistent with that proposition, and thus provides support by way of negative inference for finding the proposition to be true.

Id. at 1411.

¹²⁷ See *id.* at 1373 ("[W]e might be forced to conclude that parents' rights, like the plenary rights of husbands over their wives in an earlier age, ultimately rest on nothing more than the ability of a politically more powerful class of persons to enshrine in the law their domination of a politically less powerful class."). Dwyer also notes that the subordination of African Americans under the formal institution of slavery represents one, admittedly imperfect, analogy to the control parents exercise by legal right over their children. Women, particularly when they have entered into marriage, have also been subjected to legally sanctioned domination by [men] for much of our nation's history.

Id. at 1413. "[I]n the area of husband/wife relations, as in slave-holder/slave relations, the rights of some persons to control and dominate the lives of certain other persons rested on a characterization of the subordinated persons as 'property,' on a denial of their very personhood." *Id.* at 1415.

¹²⁸ *Id.* at 1411. In support of this statement, Dwyer cites to "the refusal of courts to order specific performance of personal service contracts," "rules limiting a creditor's right to the future income of a debtor who defaults on a loan," and "rules giving bankrupts a 'fresh start' free from the prior claims of creditors." *Id.* at 1411-12.

¹²⁹ *Id.* at 1413.

¹³⁰ *Id.* (citing Akhil R. Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to Deshaney*, 105 HARV. L. REV. 1359, 1364 (1992)).

¹³¹ Dwyer, *supra* note 117, at 1416. He adds, "as in the case of the slave or wife of old, parental rights today appear to rest on an assumption of ownership or on a denial of the child's separate existence." *Id.*

Dwyer then asserts that parental rights are an “anomaly,” and “[u]nless there is some rational justification for this anomaly, the extensive set of other-determining rights held by parents is indefensible.”¹³² He articulates several possible defenses for parental rights and rejects them all. First, he discards “the main rationale the courts have offered” for parental rights, which is “that parents have traditionally held such rights.”¹³³ He cites the trite axiom that an ancient tradition does not “mean that a practice or rule is just,” and uses slavery and past treatment of women as examples to prove his point.¹³⁴ Then he dismisses the rationale that parental rights are necessary to serve parents’ interests in the upbringing of children, concluding that this “ultimately depends either on a suspect understanding of the interests of parents and a morally unacceptable, instrumental view of children, or on an aberrant and unsupported notion of fairness.”¹³⁵

Dwyer further rejects the proposition that parental rights are necessary to protect the rights and interests of children. He begins by challenging the “[c]onventional wisdom” that “parents are in the best position to know what is best for their children and are likely to care more than any other adult about their children’s well-being.”¹³⁶ He states that, even if these ideas have some truth to them, “it simply does not follow from them that parents should have child-rearing rights, including plenary rights to effectuate their own ideologically-based judgment concerning how a child’s life should proceed.”¹³⁷

One problem that Dwyer sees with the “children’s interests” justification of parental rights is that parents have greater control over the upbringing of their children when they act upon religious beliefs.¹³⁸

¹³² *Id.* at 1423.

¹³³ *Id.* at 1424.

¹³⁴ *Id.*; *see also id.* at 1426 (“[P]arental rights of control may be no more just than was the centuries-old institution of slavery or the longstanding legal sanction of marital rape.”).

¹³⁵ *Id.* at 1442; *see also id.* at 1440-41:

[T]o show that it is rational for parents to demand child-rearing rights, one must argue that it is in parents’ interests to be able to treat their children in ways contrary to their children’s temporal interests. To show that parental rights are just, one must also argue that these parental interests are legitimate and outweigh any competing interests or considerations against creating those rights.

¹³⁶ *Id.* at 1427. He adds, “These beliefs are not entirely uncontroversial. There is disagreement, for example, about the age at which children become competent to make certain decisions for themselves and to engage responsibly in certain activities. Some writers also dispute the presumption that parents know what is best for their children.” *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* A critic of one of Dwyer’s more recent works has noted, “[i]n the eyes of James G. Dwyer, conservative religious schools compose a vast Gulag peopled by children

He claims that, because “[i]t is not self-evident that a connection exists between parents’ religious beliefs and children’s interests,” defenders of parental rights must “show that the very fact of adhering to a religion—any religion—whose tenets include preferred modes of parenting makes a parent better able or more disposed to further the temporal interests of the child.”¹³⁹ He makes this deduction from the premise that the Establishment Clause mandates that “temporal interests are the only interests which the State can properly concern itself in carrying its responsibility to protect the well-being of children.”¹⁴⁰ Dwyer concludes that parental rights cannot be justified on this basis since those who promulgate religious teachings about child-rearing do not have “concern for the temporal well being of children” as their primary motive.¹⁴¹

While much of Dwyer’s reasoning to this point merely implies that he views religion as an evil to be contained, his discussion of the societal rationale for parental rights leaves no doubt that this is so. According to Dwyer, the societal rationale asserts that parental rights are necessary to ensure that our society as a whole remains religiously diverse.¹⁴² He suggests that “[w]e should not so readily accept promotion of religious diversity as an aim of social policy.”¹⁴³ There are, he opines, “quite obvious costs to religious diversity; religious difference gives us yet another reason for distrusting and doing violence to one another.”¹⁴⁴

unfortunate enough to be born into traditionalist religious families.” Stephen G. Gilles, *Hey Christians, Leave Your Kids Alone!*, 16 CONST. COMMENT. 149, 150 (1999) (reviewing JAMES G. DWYER, *RELIGIOUS SCHOOLS V. CHILDREN’S RIGHTS* (1998)). The position advocated in this note is quite similar to what Gilles has previously argued. *See id.* at 154 (“Rather than abolishing parental rights and subjecting the decisions of religious parents to extensive regulation and oversight, I have argued that it is in children’s best interests to preserve—and even expand—parents’ traditional constitutional rights to direct and control the education of their children.”).

¹³⁹ Dwyer, *supra* note 117, at 1427-28.

¹⁴⁰ *Id.* at 1428. Dwyer remarks, “For the State to take account of children’s supposed spiritual interests would require it to assume the truth of particular religious beliefs,” and adds “[i]t would therefore require the state to endorse a particular religious view, which the State may not do.” *Id.* He claims that any reasonable interpretation of the Establishment Clause would “preclude the State from assuming that the parents’ belief is true and from weighing the child’s alleged spiritual interests against her temporal interests based on that assumption.” *Id.*

¹⁴¹ *Id.* at 1428-29.

¹⁴² *See id.* at 1443-46. “This argument states that giving parents the right to direct the upbringing of their children in accordance with the parents’ religious beliefs allows different religious communities to survive and thus fosters cultural and religious diversity in our country.” *Id.* at 1444.

¹⁴³ *Id.* at 1445. It appears obvious that the Free Exercise Clause mandates at least some respect for religious diversity.

¹⁴⁴ *Id.* at 1444-45. Dwyer also states his belief that “[i]t is not unreasonable to ask whether diversity of ethnic backgrounds, languages, occupations, political beliefs, hobbies, and tastes is not itself sufficient to prevent tyrannical majorities from forming.” *Id.* at 1445.

Rejecting the argument that “a uniform, state-imposed education or list of proscribed parenting behaviors would standardize this nation’s citizens,” he asserts that “the standardizing effect of public schooling is grossly overstated.”¹⁴⁵ He also claims that religious groups which defend parental rights are not motivated by “a desire for cultural diversity,” but rather their “aim is to standardize children in their own way.”¹⁴⁶

The practical implications of Dwyer’s proposed legal regime are clearer than the regime proposed by Woodhouse. Dwyer acknowledges that, “in a world without parents’ rights but with an appropriate set of children’s rights, the law could recognize parents as their children’s agents.”¹⁴⁷ Under this system, courts would resolve conflicts between parent and State over child-rearing practices by choosing which side’s proposal best suits the child’s temporal interests.¹⁴⁸ The law would impute to children a preference to receive certain things, including what Dwyer calls “an education that develops in them independence of thought, keeps open for them a substantial range of alternative careers, lifestyles, and conceptions of the good, and is sensitive to their

¹⁴⁵ *Id.* at 1444. He makes this claim because “there does not appear to be any want of diversity in our society today, despite the fact that for many decades now the vast majority of children in this country have attended public schools.” *Id.* He also asserts that “parental rights are not necessary to preserve the institution of the family, which many people believe is necessary to the maintenance of a free society. Instead, a limited parental privilege coupled with appropriate claim-rights for children would be sufficient for that end.” *Id.* at 1443. He adds, “Even if states were to make public school attendance compulsory, however, parents of different religious faiths could continue to model and teach their beliefs to their children at home.” *Id.* at 1444.

¹⁴⁶ *Id.* at 1445-46. He takes special exception with “the efforts of some religious groups today to reintroduce Christian teaching into the public school curriculum,” and he adds, “if they could, they would standardize everyone’s children in their way.” *Id.* at 1446.

¹⁴⁷ *Id.* at 1429; *see id.* at 1440 (“At bottom, parental rights are necessary only to ensure that parents can treat their children in a manner that is contrary to the children’s temporal interests.”).

¹⁴⁸ *Id.* at 1429-30. By eliminating parental rights, the State would remove an “obstacle” in the way of its ability to exert control over child-rearing and educational decisions:

For those who would have the State use its power and resources to improve the lives of children, parental rights constitute the greatest legal obstacle to government intervention to protect children from harmful parenting practices and to state efforts to assume greater authority over the care and education of children.

. . . .

Under this approach, a community seeking to restrict parents’ child-rearing freedom or authority would not need to argue that the interests of the child and of the rest of society outweigh the rights of the parents in a given case. Rather, the State would need only to argue that the harm to the child that non-intervention would allow is greater than the harm to the child that intervention would cause.

Id. at 1372, 1377.

developing, individual inclinations as they gain maturity.”¹⁴⁹ Despite the radical shift in the allocation of child-rearing authority that Dwyer advocates, he promises that “eliminating parents’ rights would not in itself permit or encourage an increased level of state regulation or intrusion into the family.”¹⁵⁰

IV. THE CASE FOR PARENTAL RIGHTS

The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition.¹⁵¹

In theory, the arguments raised by Woodhouse, Dwyer, and other opponents of parental rights may have a modicum of truth. However, several of the logical assumptions underpinning those arguments are severely flawed, and the proposed regimes to replace the current one would have serious, adverse effects on the American family. This Part will provide a two-part defense of the parental right to direct education by addressing the arguments made by its critics. First, it will challenge some of the main express and implied assumptions that critics of the parental right rely upon. Second, it will argue that the practical implications of abandoning parental rights are much more far-reaching, and detrimental to family and society, than the critics admit.

A. Theoretical Foundations

[T]he tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter.¹⁵²

¹⁴⁹ *Id.* at 1433. Dwyer argues that this type of education is “an aspect of a child’s welfare interests,” which it would “be rational for any child to want.” *Id.*

¹⁵⁰ *Id.* at 1438. Dwyer attempts to support this claim by arguing:

Because the child has an interest in the parent deriving satisfaction from parenting, adopting this approach would be unlikely to result in a drastic increase in the level of state regulation. Rather, the likely result would be a significant, but limited, lowering of the threshold of harm necessary to justify state intervention to protect a child.

Id. Dwyer also urges:

It is important to recognize that this alternative approach would not entail doing away with the institution of the family in favor of collectivized child-rearing. Nor would it transfer to the State vastly greater control over child-rearing or enable the State to intervene whenever social workers think a parent is performing less than optimally.

Id. at 1376.

¹⁵¹ *Parham v. J.R.*, 442 U.S. 584, 603 (1979).

¹⁵² *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (Powell, J., plurality).

Of all the arguments put forth by opponents of the parental right to direct education, perhaps the weakest claim—and the most absurd—is that the parental right is analogous to slavery or the law’s past treatment of women.¹⁵³ First, at a general level, the institution of slavery embodied the abhorrent side of humanity. Among other things, it treated human beings as property, fostered racial hatred and animosity, and encouraged greed. Virtually no one in modern America could argue, in good conscience, that slavery was good. On the other hand, the institution of the family is, and always has been, viewed as the foundation of American society.¹⁵⁴ The family represents the noble side of humanity; it encourages positive traits such as love, fidelity, and selflessness. Among the many wrongs caused by slavery, one of the most tragic was the destruction of the family unit, as wives were torn from husbands and children separated from parents. To cast an essential aspect of the functioning of the family in the same light as slavery is to disrespect those who suffered from the actual institution of slavery and to denigrate the institution of the family.

The most compelling argument why parental rights are vastly different from slavery and the law’s past treatment of women is also the simplest: children are fundamentally different in many respects from adults. The truth of this statement may be so obvious that it appears bizarre to challenge or attempt to support it. However, opponents of parental rights essentially ignore this fact by arguing that parental rights are immoral because they give one person (a parent) the right to control the actions and life of another (a child). Woodhouse, for example, characterizes parental rights as property rights, while Dwyer asserts that parental rights violate a basic principle of our legal system.¹⁵⁵ If children were the same in most respects as adults, then parental rights would seem to be unjust since one adult would be allowed to direct the actions of another “adult-like” person. Likewise, if our legal system gave the parents of a 44-year-old the same ability to direct their child’s life as the parents of a 4-year-old, the system would indeed be illogical.

Our legal system sensibly and legitimately recognizes the key differences between adults and children.¹⁵⁶ For example, there are

¹⁵³ See *supra* Part II.

¹⁵⁴ See *supra* note 22.

¹⁵⁵ See *supra* text accompanying notes 102, 123.

¹⁵⁶ See, e.g., *Bellotti*, 443 U.S. at 633 (Powell, J., plurality) (“The Court long has recognized that the status of minors under the law is unique in many respects.”); *id.* at 637 (“[T]he guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors. The State commonly protects its youth from adverse governmental action and from their own immaturity by requiring parental consent to or involvement in important decisions by minors.”); *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) (“[T]he mere fact a state could not wholly prohibit this form of adult activity . . . does not mean it cannot do so for children. Such a conclusion granted would mean that a state could impose

separate adult and juvenile criminal systems, and whether a particular activity is considered a crime often depends upon the age of the perpetrator or victim.¹⁵⁷ There are many things that minors cannot do that emancipated minors and adults can do, including vote, give consent to sexual activity, marry, contract, consume alcohol, smoke cigarettes, and gamble.¹⁵⁸ These legal disabilities, and countless others like them, illustrate the notion that children generally lack the kind of intellectual capacity adults have to fully appreciate the risks associated with certain forms of conduct, and to make responsible choices when faced with difficult decisions.¹⁵⁹ While it is possible to debate the precise age at

no greater limitation upon child labor than upon adult labor.”); *id.* at 168-69 (“The state’s authority over children’s activities is broader than over like actions of adults. . . . What may be wholly permissible for adults therefore may not be so for children.”).

¹⁵⁷ See *Bellotti*, 443 U.S. at 635 (Powell, J., plurality) (“[O]ur acceptance of juvenile courts distinct from the adult criminal justice system assumes that juvenile offenders constitutionally may be treated differently from adults.”); *id.* (“Viewed together, our cases show that although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children’s vulnerability and their needs.”); *Prince*, 321 U.S. at 168-69.

¹⁵⁸ See generally *Planned Parenthood v. Danforth*, 428 U.S. 52, 102 (1976) (Stevens, J., concurring in part) (“Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent.”); 42 AM. JUR. 2D *Infants* §§ 37, 40 (2000) (describing limitations on activity by minors); see also *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring):

I think a State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a State may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults.

¹⁵⁹ See *Bellotti*, 443 U.S. at 634 (Powell, J., plurality) (“We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.”); *id.* at 635 (“[T]he Court has held that the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences.”); *id.* (“[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”); *id.* at 638-39 (“Legal restrictions on minors, especially those supportive of the parental role, may be important to the child’s chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.”); *Parham v. J.R.*, 442 U.S. 584, 603 (1979) (“Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments.”); see also 42 AM. JUR. 2D *Infants* § 37 (2000):

Infancy, since common law times and most likely long before, is a legal disability, and an infant, in the absence of evidence to the contrary, is universally considered to be lacking in judgment, since his or her normal

which the law should assume a child has acquired sufficient capacity to make decisions for himself, it would be absurd to suggest that the law draw no such line at all. Although Woodhouse cited a reference to children as the “last disenfranchised class,”¹⁶⁰ it is unlikely that she would advocate the passage of a constitutional amendment giving children of all ages the right to vote.

While most people would agree that legal distinctions made between adults and children should not be discarded, the opponents of parental rights essentially argue that the law should treat children the same as adults with respect to education. If it is illegitimate in all instances for one person to control another’s educational future, as Dwyer asserts, then it follows that every person should have the right to control his or her own educational future. Thus, in Dwyer’s view, adults and children alike should have personal autonomy to make their own educational decisions, and the parental right to direct education violates this autonomy. He essentially concludes that the parental right to direct education is as illegitimate as if the law allowed one adult to direct another adult’s education, which explains why he compares the parental right to educate to slavery. If this reasoning were valid, the State itself should no sooner direct a child’s education than it would an adult’s.

The *illegitimacy* of the distinctions drawn between whites and blacks under the slave system, and between men and women under past legal regimes, affirms the *legitimacy* of the distinctions the law currently draws between adults and children. The slave system and the “separate but equal” system of discrimination operated under the erroneous assumption that blacks were inferior to whites.¹⁶¹ Similarly, our legal system often subjected women to legal disabilities due to the flawed notion that men were superior to women.¹⁶² These race and sex-based disparities violated basic concepts of human dignity; they were illegitimate because they treated two groups of people that had the same capacities as though they did not. Conversely, the notion that adults

condition is that of incompetency. Because of their lack of mature judgment, infants are under recognized disabilities in many respects, and their activities and conduct may be regulated and restricted to a far greater extent than those of others.

¹⁶⁰ See *supra* note 107.

¹⁶¹ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (“Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.”).

¹⁶² Our legal system has discarded aspects of the common law that were inconsistent with an understanding of women as full members of the legal and political community. See *Planned Parenthood v. Casey*, 505 U.S. 833, 896-97 (1992) (O’Connor, J., plurality). This, of course, does not weaken the vitality that the common law itself continues to hold.

have capacities superior to those of children is unassailable.¹⁶³ While a person's race and sex do not change throughout his or her life, all adults were children once. This fact, and common sense along with it, suggests that adults do not exert control over the activities of children because of animosity toward or bias against them. Decisions by lawmakers to treat children differently from adults stems from reasonable judgment, not prejudice or chauvinism.

Another faulty assumption that opponents of parental rights rely upon is that the law should not assume that parents generally act in a manner that they believe furthers their children's best interests. As discussed previously, the law has traditionally based parental rights upon the theory that parents have a natural inclination to care for their children. The law has assumed that parents are in the best position to know their children's traits and to determine the course of action best suited to their needs.¹⁶⁴ These ideas are questioned directly by some, and a challenge to them may be implied from Woodhouse's claim that parental rights are a shield for abusive parents and from Dwyer's allegation that parents use their rights to further their own goals.

Regardless of whether the criticism of the best interests assumption has any merit on its own, it is simply unavailing to argue that a right or power should be rescinded because it could potentially be abused. Litigants in various contexts have raised this argument in vain. For example, in the seminal case of *Martin v. Hunter's Lessee*,¹⁶⁵ one basis for the argument that the Supreme Court lacked the power to review the decisions of state courts was that the Court could easily abuse this "revising" power.¹⁶⁶ Justice Story addressed this claim directly: "[i]t is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse."¹⁶⁷ He acknowledged that "[f]rom the very nature of things, the absolute right of decision, in the last resort, must rest somewhere—wherever it may be vested it is susceptible of abuse."¹⁶⁸

In like manner, in *Near v. Minnesota*,¹⁶⁹ it was argued that a statute authorizing courts to enjoin the publication of "malicious, scandalous and defamatory" materials was necessary to prevent those who abuse

¹⁶³ Woodhouse acknowledges this by noting that children generally lack the capacity to articulate their own interests. See Woodhouse, *supra* note 15, at 1051-52 ("Historically, children's rights have been severely limited in practice because they depend upon adults for articulation, assertion, and enforcement.").

¹⁶⁴ See *supra* note 25.

¹⁶⁵ *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

¹⁶⁶ *Id.* at 344.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 345.

¹⁶⁹ *Near v. Minnesota*, 283 U.S. 697 (1931).

their rights of free speech and press from publishing such materials.¹⁷⁰ Justice Hughes responded to this assertion by stating, “[t]he fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct.”¹⁷¹ He added that “[s]ubsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege.”¹⁷² *Martin, Near*, and other cases show that the existence of a right is not subject to attack on the ground that it may be abused by the one holding it.¹⁷³

Even assuming that Woodhouse and Dwyer are correct in asserting that parental rights are abused by some parents who do not act in furtherance of their children’s best interests, the appropriate remedy would be to punish the abusers, not to abolish the rights. Those who abuse their rights should be punished for doing so. It seems odd, however, to take away the rights of the vast majority who exercise them lawfully in an effort to prevent the abuse of those rights by a few.¹⁷⁴

¹⁷⁰ *Id.* at 702, 719-20.

¹⁷¹ *Id.* at 720. Incidentally, Justices Holmes and Brandeis joined Justice Hughes’s opinion. *Id.* at 701.

¹⁷² *Id.* at 720.

¹⁷³ Similarly, courts will not take away the rights of some in an effort to enhance the ability of others to exercise that same right. *See generally* *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam):

[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . The First Amendment’s protection against governmental abridgment of free expression cannot properly be made to depend on a person’s financial ability to engage in public discussion.

¹⁷⁴ *Parham v. J.R.*, 442 U.S. 584, 602-03 (1979) (Stewart, J., concurring).

As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this. That some parents “may at times be acting against the interests of their children” . . . is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child’s best interests.

Id. “To be sure, the presumption that a parent is acting in the best interests of his child must be a rebuttable one, since certainly not all parents are actuated by the unselfish motive the law presumes.” *Id.* at 624.

Another example of this point comes from *Whitney v. California*, 274 U.S. 357 (1927), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969), where the Court upheld California’s Criminal Syndicalism Act. The Act prohibited the organization of a group that advocates the use of crime or violence to effectuate political change. *Whitney*, 274 U.S. at 359, 371. Justice Brandeis wrote a concurring opinion in which he said, “[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly.” *Id.* at 378. When *Whitney* was overruled by *Brandenburg*, the Court’s reasoning was similar to that of Justice Brandeis. The Court held that laws that treat the abstract teaching of the moral necessity for a resort to violence (protected activity) the same as the preparation of a group for violent action (unprotected activity) intrude upon constitutional rights. *Brandenburg*,

The justifications offered to support the attack on the presumption that parents act in their children's best interests are not persuasive. As Dwyer recognizes, the law assumes that parents take on parenting responsibilities willingly.¹⁷⁵ In light of the significant investment of time, money, and energy required to raise children, it is logical to assume that there is some set of impulses that motivates people to have children. The possible motives are endless, but some make more sense than others. Among the most plausible are: the natural human drive to procreate and nurture, the desire of a man and woman to commemorate their devotion to each other through the creation of a person that represents their union, and the hope that one's beliefs and memory will live on after one's death. Examining the parent-child relationship in light of any of these motivations, and virtually all others, supports the contention that parents generally act in their children's best interests. The law has always recognized this fact, and there is no reason to suggest that the age-old concept of the parent-child relationship should be discarded in favor of a "progressive," pessimistic view.

The attack on the view that parents act in their children's best interests is part of a much larger legal debate: how much weight, if any, should "tradition" be given in considering whether the law should continue to recognize a legal right?¹⁷⁶ This debate is especially relevant in the substantive due process context, where the Court must wrestle with the role of history and tradition in each case. If the Court decided cases based on tradition alone, parental rights would be among the safest substantive due process rights.¹⁷⁷ Even if the Court weighed tradition as one of several factors, parental rights would certainly be protected. The tradition factor would weigh heavily in favor of parental rights, and it is difficult to list *any* sensible factor that would counsel in favor of abandoning those rights, let alone one that would tip the scales in favor of abolishing them.

A final assumption underlying the attacks upon the parental right to educate is central to Dwyer's arguments against religious education. Dwyer clearly believes that there is one "best" way to educate a child (in public schools), and that allowing parents to educate their children from

395 U.S. at 448-49. Simply put, courts will not take away the rights of some in an effort to prevent others from abusing that right.

¹⁷⁵ Dwyer, *supra* note 117, at 1423 ("[T]he adults who bear the duties corresponding to children's claim-rights have, as far as the law is concerned, undertaken these duties voluntarily.").

¹⁷⁶ "Tradition" in at least one form is an essential aspect of our legal system, as *stare decisis* commands deference to past decisions in all but the most extraordinary circumstances.

¹⁷⁷ Marriage, procreation, and child-rearing rights are necessarily intertwined, have existed throughout human history, and were among the first to receive substantive due process protection.

a religious perspective sacrifices the child's secular interests to satisfy the parents' religious obligations.¹⁷⁸ He characterized *Wisconsin v. Yoder* as recognizing a Free Exercise right "to control the lives and minds of one's children, to keep them to oneself, isolated from outside influences, and to make them the type of persons one wants them to be in light of one's own religious beliefs."¹⁷⁹ This, of course, violates the child's ability to receive Dwyer's preferred type of education.¹⁸⁰

In opposition to Dwyer's view is the theory that reasonable people often disagree when asked what is "best" for a child. Realizing their limited capacity, courts often rely upon this assumption when asked to determine whether a certain practice is contrary to the best interests of the child.¹⁸¹ Dwyer and others implicitly challenge this theory when they opine on the question of whether public schools generally provide an education that is superior, inferior, or equivalent to an education provided by private or home schooling. Two propositions seem clear. First, it is virtually impossible to make accurate generalizations about the relative merits of such enormous and vastly different educational systems. There are some excellent public schools, some average public schools, and some poor public schools. The same can be said of private schools, and the quality of home schooling certainly varies with the skill, dedication, and resources of parents. While one can reasonably argue that public school A is better than private school B or home school C, an argument that public schools *in general* are better than private or home schooling *in general* is difficult to support.

Second, asking whether public, private, or home schooling provides the "best" education is simply the wrong question. The better question is whether the various educational systems really differ in *quality*, or are

¹⁷⁸ See *supra* note 136.

¹⁷⁹ Dwyer, *supra* note 117, at 1386.

¹⁸⁰ This type of education is one "that develops in them independence of thought, keeps open for them a substantial range of alternative careers, lifestyles, and conceptions of the good, and is sensitive to their developing, individual inclinations as they gain maturity." *Id.* at 1433. While Dwyer contends that an objective education is possible, Woodhouse acknowledges that education in any form transmits the values of the teacher. See Woodhouse, *supra* note 15, at 1119 ("Any school can become an agent of repression, whether dictating the parents' orthodoxy or the dogma of the state.").

¹⁸¹ The Supreme Court has recognized that there is not one "right" way to raise a child:

Unquestionably, there are many competing theories about the most effective way for parents to fulfill their central role in assisting their children on the way to responsible adulthood. While we do not pretend any special wisdom on this subject, we cannot ignore that central to many of these theories, and deeply rooted in our Nation's history and tradition, is the belief that the parental role implies a substantial measure of authority over one's children.

Bellotti v. Baird, 443 U.S. 622, 638 (1979) (Powell, J., plurality).

merely different in *kind*. One of the many reasons why the parental right to direct education is appropriate is that none of the educational systems is necessarily “better” or “worse” for every child. Each educational system has its strengths and weaknesses, and allowing parents to choose does not deprive children of any “right.”¹⁸² Rather, it allows parents to decide what type of education best suits the interests of their child based on numerous factors, including the child’s talents and interests, the family’s religious and political beliefs, and the quality and expense of the available options. If public, private, and home schooling are all valid ways to educate a child, and the quality of each type of education may vary from community to community, then why do Children’s Rights advocates attack the parental right to direct education so robustly? To answer this question, it is necessary to examine the real consequences of eliminating the parental right to direct education.

B. Practical Concerns

[*Meyer and Pierce*] must remain controversial in the absence of pure communism or pure libertarianism, for there is no obvious or perfect way to balance the competing interests of the parents and the state in matters of education in a free, but statist, society.¹⁸³

At the beginning of his article, Dwyer assures his readers that converting parental rights into a parental “privilege” would not “transfer to the State vastly greater control over child-rearing or enable the State to intervene whenever social workers think a parent is performing less than optimally.”¹⁸⁴ He adds that his proposed regime “would not entail doing away with the institution of the family in favor of collectivized

¹⁸² For example, public schools tend to expose students to a larger, more diverse student population. They also provide a “non-religious” education for students whose parents desire one, although it is certainly not “objective” and it can be argued that public education is even hostile to religion. See Cheng, *supra* note 11. On the other hand, the smaller class sizes of private and home schools tend to afford students more individual instruction and attention, which cannot be underestimated especially during a child’s younger, more formative years. Most of them also provide a religiously-based standard of moral ethics which challenges the notion of “moral relativism” prevalent in society at large and posits that there are certain absolute truths. This is often viewed as a vice by opponents of non-public schools, while supporters of private and home schooling champion this as one of its main virtues. See generally *id.*

¹⁸³ William G. Ross, *Contemporary Significance of Meyer and Pierce For Parental Rights Issues Involving Education*, 34 AKRON L. REV. 177, 207 (2000).

¹⁸⁴ Dwyer, *supra* note 117, at 1376. This is likely an attempt to make Dwyer’s proposed legal regime appear to offer only a slight change from the current one. See *Parham v. J.R.*, 442 U.S. 584, 638 (1979) (Brennan, J., dissenting) (“The social worker-child relationship is not deserving of the special protection and deference accorded to the parent-child relationship, and state officials acting *in loco parentis* cannot be equated with parents.”).

child-rearing.”¹⁸⁵ In fact, however, abolishing parental rights would radically and detrimentally alter American legal and family structures. Although *social workers* might not have much increased power to override parenting decisions, *courts* certainly would. And, while child-rearing would not be “collectivized” in the sense of Plato’s concept of separating all children from their parents, child-rearing would be collectivized in the sense that the “great mother state” would decide what control parents retained over their children’s lives.

Dwyer’s own arguments show that his proposed system would indeed give the State much more authority than it now has to interfere with child-rearing decisions. For example, he defines the word “privilege” as “the absence of any duty to refrain from a given activity.”¹⁸⁶ Dwyer illustrates what he means by this term: “[i]f, for example, I allow my neighbor to borrow my shovel, she then enjoys a privilege to take and use it; she is no longer under a duty to me not to take and use my shovel.”¹⁸⁷ But what if Dwyer and his neighbor have a dispute over how the shovel should be used? Dwyer explains that his neighbor’s privilege “does not entail any claim against me should I interfere in her use of the shovel or take it away from her.”¹⁸⁸

Under Dwyer’s legal regime, the State is analogous to the owner of the shovel, the parent is analogous to the neighbor who has a privilege to use the shovel, and the child is analogous to the shovel.¹⁸⁹ Accordingly, a parental privilege “would merely legally permit parents to engage in the types of behavior normally associated with child-rearing, e.g., housing, feeding, clothing, teaching, or disciplining a child,” although it “would not give parents themselves any legal claims against state efforts to restrict their behavior or decision-making authority.”¹⁹⁰ Thus, to modify Dwyer’s description of the parental “privilege,” it would not entail any claim against the State should it interfere in the parents’ child-rearing decisions or take the child from them.¹⁹¹ The very notion of a privilege implies that its holder has no authority with respect to the subject of the privilege that is not somehow derived from the one granting it.

Even putting the shovel analogy aside, the logical result of abandoning parental rights in favor of “Children’s Rights” would be to shift decisional authority in matters of child-rearing from parents to the

¹⁸⁵ Dwyer, *supra* note 117, at 1376.

¹⁸⁶ *Id.* at 1375.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Woodhouse and others may dislike the use of a child-as-property analogy, but this note is simply exposing the true consequences of the analogy that Dwyer proposed.

¹⁹⁰ Dwyer, *supra* note 117, at 1375-76.

¹⁹¹ *See id.* at 1375 (arguing that the neighbor’s privilege “does not entail any claim against me should I interfere in her use of the shovel or take it away from her”).

State, and to the courts in particular. As previously discussed, the law assumes that children lack the capacity to make important decisions for themselves. If this assumption is true, then it follows that some adult, or group of adults, must make such decisions for them. Under the current legal system, parents have the primary authority to make child-rearing decisions. If parental prerogatives are eliminated, then parental authority to decide educational questions would certainly be lessened. While parents would still make decisions in the first instance, courts would have much greater leeway to review and override them. As Justice Story said in *Martin v. Hunter's Lessee*, “[f]rom the very nature of things, the absolute right of decision, in the last resort, must rest somewhere,”¹⁹² and courts are not reluctant to declare their authority to decide all sorts of questions.

That courts would take on the role of child-rearer under a Children's Rights regime is evident from the fact that courts define themselves as having the authority to “say what the law is.”¹⁹³ The creation of a right requires interpretation of the scope of that right, and courts would naturally be asked to construe the breadth of Children's Rights. What level of education does this right guarantee? What type of governmental interest will be required for the State to justify an incidental burden upon this right? Most important, what *kind* of education does this right guarantee? Will children be deemed entitled to what Dwyer calls an education that leaves open “a substantial range of alternative careers, lifestyles, and conceptions of the good?”¹⁹⁴ Will courts declare that children have a right to receive an education free from “ideological bias?” One representative of a diverse set of philosophical, religious, and moral views? One free from “indoctrination?” Every person's description of the kind of education children should receive is likely to differ, and the courts would ultimately decide the question under a Children's Rights regime.

If our legal system replaced parental rights with a child's right to receive a court-defined type of education, the rebirth of compulsory public education would likely follow. This would likely occur either through legislation similar to that rejected in *Pierce* or through a judicial interpretation of the children's educational right that virtually bans private and home schooling. A regime without parental rights could only come about by overruling or ignoring *Meyer*, *Pierce*, and *Yoder*, as well as the numerous other cases that reaffirm the parental rights delineated in those decisions. Without parental rights, what legal interest could be

¹⁹² *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 345 (1816).

¹⁹³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

¹⁹⁴ Dwyer, *supra* note 117, at 1433. This appears to forbid religious education, which arguably does not keep open “a substantial range of . . . conceptions of the good.” *Id.*

asserted that would defeat an attempt to reinstall compulsory public education? Imagine the outcome of a modern day *Pierce v. Society of Sisters* if the parents could not assert their right to direct their child's education. They would have no interest of their own in the litigation, as they would be relegated to act merely as their child's custodians. The school could not assert its own interests without either relying on economic due process or arguing that it should be able to maintain a stake in the child's educational future although the parents no longer do.

The only possible obstacle to compulsory public education would be the child's newly-minted educational right itself. But this right would only block compulsory public education if it was interpreted in a way that prevented the State from cutting off the child's educational options. However, if the Supreme Court were actually persuaded to abandon parental rights in favor of Children's Rights, it is much more likely that the right would be interpreted to *require* or *allow* compulsory public education than it would to *prohibit* it. For the Court to discard the parental right to direct education, it would have to determine that the best interests of children would be better served by greater judicial oversight of child-rearing.

Upon what basis would the Court conclude that children's educational interests are not being adequately served by the parental right to direct education? If the Court adopted the views of Woodhouse and Dwyer, it would reject parental rights because they allow parents to treat children as private property or an extension of their own religious free exercise. To remedy these perceived wrongs, the Court would likely shape the child's educational right in a manner that precluded parents from basing educational decisions solely on religious grounds. Since most private and home schooling is conducted from a religious perspective, and parents often choose to forgo the use of public schools for religious reasons, a regime without parental rights would likely be one without private or home schooling.¹⁹⁵

While this note has shown that an attack on the parental right to direct education constitutes an endorsement of compulsory public education, it has not thoroughly discussed whether the reincarnation of

¹⁹⁵ This result would probably occur even in the unlikely event that the courts or legislatures did not expressly require all children to attend public schools. For example, if a trial court allowed parents to send a child to a religious school under a Children's Rights regime, its decision could be assailed on Establishment Clause grounds. The legal question in such a case would be what form of education best serves the child's (judicially defined) educational rights, and the parents would not have any interests of their own to assert. Since trial courts would be the nation's primary child-rearers under a Children's Rights regime, it would not be surprising if some appellate courts (including the Supreme Court) held that a trial court's approval of attendance at a religious school constituted an "endorsement" of the particular religion involved, or had the primary purpose or effect of advancing religion.

compulsory public education is wise from a policy perspective. Needless to say, a full discussion of that topic would require another article. However, it is clear that the religious groups that encourage and rely upon alternatives to public education would be severely harmed by compulsory public education.¹⁹⁶ Also, compulsory public education would severely limit the “marketplace of ideas” as well as the interests of minority groups and the democratic process as a whole.¹⁹⁷ We do not need compulsory *public* education to ensure that future generations of Americans share our devotion to democracy and other “American” ideas. Non-public schools are equally capable of achieving this goal, and true acceptance of an idea comes from a person’s realization of its inherent value, not from State-controlled education.¹⁹⁸

¹⁹⁶ This is true not because some religious groups cannot hold their own without “indoctrination,” as Dwyer suggests, but because it is difficult for these groups to combat the secularism and moral relativism that pervades public education. *See generally* Cheng, *supra* note 11. Public and religious schools approach the educating process from entirely different perspectives, and it is not enough to say that religious groups can teach children during evenings, weekends, and summers. Parents should be able to reinforce what their children learn at school instead of having to contradict what they are being taught.

¹⁹⁷ *See* Hafen, *supra* note 17, at 480-81 (“Monolithic control of the value transmission system is ‘a hallmark of totalitarianism’; thus, ‘for obvious reasons, the state nursery is the paradigm for a totalitarian society.’ An essential element in maintaining a system of limited government is to deny state control over childrearing, simply because childrearing has such power.”); *id.* (“Even if the system remains democratic, massive state involvement with childrearing would invest the government ‘with the capacity to influence powerfully, through socialization, the future outcomes of democratic political processes.’”); Joseph P. Viteritti, *Blaine’s Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL’Y 657, 665 (1998).

[M]aintaining a government monopoly over [imparting and nourishing the civic values that bolster a healthy democracy] presents certain risks in a free society, especially in a democratic order that purports to value social, political, and religious pluralism. These hazards are painfully evident in the history of the American common school.

. . . .

The history of the common-school movement is a telling story of the risks incurred when a ruling majority is allowed to establish a monopoly over the educational process and to impose its values upon everyone else’s children. . . . Under these conditions, the rights and concerns of minorities become easily dismissed, ignored, or trampled upon—often unknowingly, sometimes intentionally—but always with severe consequences. Without alternatives for the education of their children, minorities must frequently accept the majority’s worldview.

Id. at 665, 668-69.

If all children were “Americanized” by a uniform school system, as the proponents of the law in *Pierce* sought to do, would there be any room left for political, social, religious, or moral dissent? “The existence of dual (or multiple) educational systems is understood to be a safeguard against intrusive governmental power in the upbringing of children; the right to choose is cherished as an essential feature of self-government.” *Id.* at 665.

¹⁹⁸ *See* *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943) (“To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead

Finally, consider these questions: What legitimacy, if any, would the doctrine of substantive due process retain if *Meyer* and *Pierce* were overruled? How could the Supreme Court overrule the two cases that form the foundation of substantive due process without jeopardizing the rights that have been recognized in subsequent cases? If the parental right to direct education may be abolished, what prevents marriage, procreation, contraception, abortion, and other substantive due process rights from suffering the same fate? While Woodhouse laments that “substantive due process can be a conservative as well as a liberating force,”¹⁹⁹ this should be expected if the Court is really attempting to render a valid interpretation of the Constitution. If the Court is merely using substantive due process to enact its policy preferences into law, as some suspect, and “[i]f the Justices are just pulling our leg, let them say so.”²⁰⁰

V. CONCLUSION

[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.²⁰¹

At the heart of the dispute over the parental right to direct education is the idea that parents typically act in their children’s best interests. This note has shown that the law continues to rely upon this age-old presumption. Part II of this note examined the development of the legal relationship between parent and State in the context of education over the past few centuries. Part III presented the arguments of two opponents of parental rights, Barbara Bennett Woodhouse and James G. Dwyer, who suggest that such rights should be weakened or abolished because they allow children to be treated like property or be indoctrinated by religious parents. Part IV provided a defense of the parental right to direct education by confronting the critics’ arguments and revealing the negative consequences of creating a legal system with no parental rights. The note concluded that abandoning parental rights would severely weaken American families and religious heritage by

of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds.”); Viteritti, *supra* note 197, at 665 (“Although schools play a crucial role in imparting and nourishing the civic values that bolster a healthy democracy, most free societies do not accept the premise that only government-owned and -operated schools are capable of fostering these essential values.”).

¹⁹⁹ Woodhouse, *supra* note 15, at 1110.

²⁰⁰ See *Sherman v. Cmty. Consol. Sch. Dist.* 21, 980 F.2d 437, 448 (7th Cir. 1992).

²⁰¹ *Troxel v. Granville*, 530 U.S. 57, 68-69 (2000) (O’Connor, J., plurality).

shifting primary child-rearing authority to the State and opening the door to the rebirth of compulsory public education.

The attack on the parental right to direct education comes at a time when the American family is experiencing crisis. At the same time, the American public school seems to be falling apart due to problems from within and competition from without. While the public school is a noble institution, the family is one of the few institutions more valuable to individuals and society. By decreasing parental control over education, acceptance of the Children's Rights doctrine would exacerbate, not lessen, the troubles of the family. The law has traditionally and rightfully recognized that, in all but the most extraordinary circumstances, children's interests are best served by *encouraging* parents to be thoroughly involved in their lives. Even if "[t]he cry of 'Fire!' has been heard in the institution of public education,"²⁰² we should not discard parental rights as a way to put out the fire.

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²⁰² See Note, *The Hazards of Making Public Schools a Private Business*, 112 HARV. L. REV. 695, 712 (1999) ("The cry of 'Fire!' has been heard in the institution of public education. Exit should not be the only option. Instead of devoting all resources to finding an exit, the public should find a way to extinguish the fire.").