SYMPOSIUM

PIERCE V. SOCIETY OF SISTERS AND DIMINISHING PROTECTIONS FOR TEACHERS AT RELIGIOUS SCHOOLS

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In 1925 the U.S. Supreme Court held in Pierce v. Society of Sisters *that Oregon's Compulsory Education Bill "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education" of their children.* Pierce*'s legacy is at once far-reaching and narrow. Far-reaching in the sense that* Pierce *has been cited affirmatively in cases involving third-party standing in several contexts and in the Court's substantive due process jurisprudence. Narrow in the sense that the focus on parental rights sidestepped an opportunity to build on the Court's decision in* Meyer v. Nebraska, *which interpreted the Fourteenth Amendment broadly in a case involving the rights of both parents and teachers. This Article argues that this decision has had implications for teachers at religious schools, especially when their interests may not be aligned with those of their employer, such as in more modern controversies around union formation and the application of the ministerial exception in employment discrimination suits. The Court has tended to place religious teachers on a pedestal for what they represent for their employers while, at the same time, finding that laws passed to protect workers cannot reach them for the very same reasons, arguably placing these teachers in a kind of "sacred double bind."*

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INTRODUCTION

In summer 1923, the Society of the Sisters of the Holy Names of Jesus and Mary and Hill Military Academy filed suit in Oregon challenging the adoption of a law that required, with few exceptions, public school attendance for children between the ages of eight and sixteen.[1] The title of the ballot measure that produced the new law—the Compulsory Education Bill—confused voters unaware of its public school focus.[2] Organizers and backers of the initiative came from several nativist and anti-Catholic organizations, including the Ku Klux Klan.[3] Efforts to challenge the bill had been interreligious and interracial, with Lutheran, Presbyterian, and Seventh Day Adventist organizations joining Catholic and Jewish organizations and African American groups to oppose the measure.[4] The ACLU, too, opposed the law, concerned that it posed a threat to socialist private school projects and that state control over curriculum would ultimately serve industrial interests that were "purging radical teachers, dictating lesson plans, and prohibiting private education," all with the aim of instilling the values of "dominant capitalist culture."[5] The ballot measure passed in November 1922.[6] By 1924, the controversy had reached the U.S. Supreme Court.[7]

Today, debates about public and private schooling call to mind a divide between the secular and the religious. But in 1924, that divide was not at all clear. The influence of Protestantism on *public* education was still very much evident, and U.S. Supreme Court decisions holding that compelling students to pray or to engage in devotional Bible readings were unconstitutional were still a few decades away.[8]

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1 PAULA ABRAMS, CROSS PURPOSES: *PIERCE V. SOCIETY OF SISTERS* AND THE STRUGGLE OVER COMPULSORY PUBLIC EDUCATION 1, 129–30 (2009). Hill Military Academy filed in late June, the Society of Sisters in July. *Id.* at 129–30.

2 *Id.* at 36–37.

3 *Id.* at 37–38.

4 *Id.* at 45–46; *see also* Transcript of Oral Argument, Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (No. 583), *reprinted in* OREGON SCHOOL CASES: COMPLETE RECORD 625, 667–68 (1925) (reading into the record the statement of twenty-five Presbyterian ministers opposing the measure). Not all Protestants opposed the bill and the state's largest clergy association declined to take a stand due to Protestant support for the measure. ABRAMS, *supra* note 1, at 46.

5 LAURA WEINRIB, THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE 155 (2016). For more about the Rand School, a school for workers in New York that espoused socialist views and was targeted for government censorship during World War I, see *id.* at 151–53.

6 *See* ABRAMS, *supra* note 1, at 1.

7 *Id.* at 159.

8 *See, e.g.*, Engel v. Vitale, 370 U.S. 421, 424 (1962) (holding that school-sanctioned prayer violated the First Amendment).

Furthermore, the targeting of parochial schools for regulation had long been a tactic of those fearing the influence of Catholic institutions.[9] And debates about the role of religion in education were not confined to clashes about the types of *institutions* permitted to educate children, but also about what they could learn while they were there and why. The *Pierce* case reached the Supreme Court the same year the nation was enthralled by the "Scopes Monkey Trial," a controversy involving Tennessee's ban on the teaching of evolution in schools that brought to the fore what American religion historian Peter W. Williams has observed were "contrasts and conflicts between religious cultures."[10] With an eye toward the international sphere, efforts were also underway to showcase the religiosity of the nation—Protestantism and public schools in particular—to distinguish the United States from the Soviet Union.[11]

In *Pierce*, the U.S. Supreme Court held that the Compulsory Education Bill "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of [their] children."[12] Here, too, was yet another way to differentiate between the United States and communist nations seen to prioritize the state's interest over those of parents.[13] But, within a year, the Court was citing *Pierce* in decisions involving the proper scope of police powers in contexts well outside education or parental rights.[14] That corpus grew

9 *See* ABRAMS, *supra* note 1, at 51.

10 PETER W. WILLIAMS, AMERICA'S RELIGIONS: FROM THEIR ORIGINS TO THE TWENTY-FIRST CENTURY 244 (2002). For a discussion of the controversy with respect to civil liberties and academic freedom, see WEINRIB, *supra* note 5, at 155–70. Paula Abrams explains that the question of whether *Pierce* would provide the grounds for a decision in the Scopes trial if it reached the U.S. Supreme Court was "hotly debated." ABRAMS, *supra* note 1, at 209.

11 *See* ABRAMS, *supra* note 1, at 107, 119–20, 173–74.

12 Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925).

13 An amicus brief in *Meyer v. Nebraska* introduced the Oregon controversy to the Court, emphasizing the "destruction of parental authority" was the "favorite device of communistic Russia" and focusing on the question of the proper place for the state in regulating education. ABRAMS, *supra* note 1, at 119 (quoting Brief of Amici Curiae at 3, Meyer v. Nebraska, 262 U.S. 390 (1923) (No. 325)).

14 *See, e.g.*, Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 386 (1926) (citing *Pierce* to support equitable jurisdiction where complainant had not obtained a permit from the zoning board but challenged a zoning law as a violation of property rights); Yu Cong Eng v. Trinidad, 271 U.S. 500, 506, 509, 527 (1926) (challenging criminal prosecution under Chinese Bookkeeping Act in the Philippines as an unconstitutional limitation on the right to pursue lawful occupation); *see also* Farrington v. Tokushige, 273 U.S. 284, 298–99 (1927); Whitney v. California, 274 U.S. 357, 373 (1927), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam); Swift & Co. v. United States, 276 U.S. 311, 326 (1928); Louis K. Liggett Co. v. Baldridge, 278 U.S. 105, 113 (1928), *overruled by* N.D. State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973); Washington *ex rel.* Seattle Title Tr. Co. v. Roberge, 278 U.S. 116, 121 (1928); New State Ice Co. v. Liebmann, 285 U.S. 262, 280

throughout the decades that followed, and now includes cases that cite *Pierce* to affirm third party standing and to expand and clarify the scope of unenumerated privacy rights guaranteed by the Constitution's Due Process Clauses.[15] Viewed from this angle, *Pierce*'s legacy appears far-reaching.[16]

But parents and children were not the only groups with interests at stake in *Pierce*. Religious schools clearly had reasons to oppose Oregon's law, and the Society of Sisters for the Holy Names of Jesus and Mary, a religious corporation responsible for running a dozen schools in Oregon, decided to vindicate those interests by filing suit. The school's teachers, too, had significant interests at stake in the outcome of the case. But *Pierce*'s legacy has overlooked teachers, even as the interests of religious schools, often tied up with those of parents and students, have been protected by *Pierce*'s progeny. This observation and why it matters today lies at the heart of this Article.

Part II begins with a discussion of the strategic decision on the part of the Society of Sisters' legal team to include but not expound on the liberty interests of teachers, choosing instead to largely collapse those interests into those of the religious corporation. This Part continues by exploring *Pierce* within the context of the Court's Fourteenth Amendment jurisprudence in the decades before and after the decision. In doing so, it engages with *Pierce*'s relationship to *Meyer v. Nebraska*, a case decided just two years before *Pierce* that seemed to chart an expansive course for Fourteenth Amendment protection of interests, including those of teachers at religious schools to pursue their profession.

Part III analyzes three of *Pierce*'s prominent relational legacies, underscoring how the interests of parents and children and the interests of religious schools and parents have reinforced each other throughout the past 100 years. This Part also highlights how *Pierce* has been relied upon in weighing the interests of the state vis-à-vis these classes. Notably absent from these considerations has been the consideration of teachers as a separate class whose interests may or may not align with the others'.

(1932); Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace, 288 U.S. 249, 261 (1933); Nebbia v. New York, 291 U.S. 502, 547 (1934) (McReynolds, J., dissenting).

15 *See also Farrington*, 273 U.S. at 298–99; *Whitney*, 274 U.S. at 373; *Swift & Co.*, 276 U.S. at 326; *Louis K. Liggett Co.*, 278 U.S. at 113; *Seattle Title Tr. Co.*, 278 U.S. at 121; *New State Ice Co.*, 285 U.S. at 280; *Nashville, Chattanooga & St. Louis Ry.*, 288 U.S. at 261; *Nebbia*, 291 U.S. at 547.

16 According to Laura Weinrib, "In 1928, the ACLU counted *Meyer* and *Pierce* as the only two cases [during that period] in which the Supreme Court had upheld civil liberties." WEINRIB, *supra* note 5, at 179.

Part IV observes that teachers' rights in modern controversies involving religious schools have largely been subsumed by the interests of their employers, even as employment protections have grown significantly over the past 100 years due to the passage of landmark statutes that regulate many key aspects of employment relationships. Two controversies in recent decades over attempts to unionize faculty at religious schools and the robust development of the ministerial exception are prominent illustrations of how the interests of teachers and those of their employers can diverge.

Part V concludes with a discussion of how the Court's decisions to interpret *Pierce* narrowly has led to different groups—parents, children, religious schools, and teachers at those schools—experiencing the impact differently. This Article argues that by placing religious teachers on a pedestal for what they represent for their employers while simultaneously rendering them invisible under law by excluding them from workplace protections for the same reason places them in a "sacred double bind."

I. *MEYER*, *PIERCE*, AND DIVERGENT PATHS

To contextualize *Pierce*, many commentators begin with *Meyer v. Nebraska*.[17] Decided two years prior, *Meyer* involved a constitutional challenge by a teacher of German who had been prosecuted under a state law banning the teaching of languages other than English to children who had not yet completed the eighth grade.[18] While the *Pierce* Court relied on *Meyer*, the Court (and the Society in its arguments) took a significantly narrower approach when articulating the rights at stake in the controversy. While both *Meyer* and *Pierce* have figured prominently within the Court's evolving Fourteenth Amendment jurisprudence, the narrower approach has prevailed with at least one consequence being the elision of teachers' interests even as the interests of other classes (parents, children, and religious schools) have more fulsomely developed.

A. Teachers Among Classes with Interests

The deprivation of teachers' livelihoods was mentioned in the Society of Sisters' Complaint, but teachers did not figure prominently in its legal challenge.[19] In her detailed study of *Pierce* and the circumstances leading up to the case, legal scholar Paula Abrams explains that this was, at least in part, a strategic choice on the part of

17 Meyer v. Nebraska, 262 U.S. 390 (1923).

18 *Id.* at 396–97.

19 *See* ABRAMS, *supra* note 1, at 130–31.

William D. Guthrie, a prominent New York attorney and lead counsel for the Society of Sisters.[20] He was urged to consider adding a teacher or a parent as plaintiff, but feared doing so would send a signal that the religious school's economic harm argument was weak.[21]

In the brief to the Court written by Guthrie, the Society briefly emphasized the "history of the service rendered to education on this continent by Catholic religious teaching orders, both men and women" and the fact that there had been no challenge to the training, competence, or loyalty of the teachers at its schools.[22] In closing, the brief also noted that, in addition to parents' liberty not being limited by permitting private schools to operate, "[t]he liberty of teachers to teach in private schools in no way interferes with the liberty of other teachers to teach in public schools."[23] The brief also included teachers among the four "interrelated" classes whose freedoms were abridged by the Oregon law.[24] But, of the four classes, the discussion of teachers' freedoms was not separately distilled as those of schools, parents, or even of children, despite asserting that these classes should be "separately considered."[25] The discussion of teachers' freedoms was confined to addressing concerns over loyalty and assimilation, arguing that students attending private and parochial schools encounter "many thoroughly American teachers and scholars" and that such schools teach the same subjects as public schools and may be regulated to some degree by the state.[26] Parents' rights were described as the "far more important group" of the first three.[27] Notably, however, this discussion came after the brief explains the "irreparable injury" to

20 *See* ABRAMS, *supra* note 1, at 132–34.

21 *Id.* Guthrie also thought the Court was unlikely to rule in the schools' favor if the case was framed as a religious freedom issue and, as a result, began to lay the groundwork for a narrower focus on parental rights by filing an amicus brief in *Meyer*. *Id.* at 112, 118, 175; *see also* Brief on Behalf of the Appellee, Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (No. 583), *reprinted in* OREGON SCHOOL Cases: COMPLETE RECORD, *supra* note 4, at 223, 288–89 (discussing *Meyer* and describing *Pierce* as involving the "same interference with the freedom of property owners and of parents" and there being at stake in the two cases "the same social interest of freedom from state compulsion and bureaucracy in respect of the opportunities for self-advancement and self-development and the inalienable right to liberty," *id.* at 289).

22 Brief on Behalf of Appellee, *supra* note 22, at 234, 238–39.

23 *Id.* at 290; *see also* Transcript of Oral Argument, *supra* note 4, at 666.

24 Brief on Behalf of the Appellee, *supra* note 21, at 257 ("In the present case, the statute abridges the freedom of four classes closely interrelated: (1) the freedom of the private and parochial schools, (2) the freedom of teachers engaged in teaching in the private and parochial schools, (3) the freedom of parents and guardians, and (4) the freedom of children.").

25 *See id.* at 257, 257–84.

26 *Id.* at 270, 268–74; *see also* Transcript of Oral Argument, *supra* note 4, at 659–60.

27 Brief on Behalf of the Appellee, *supra* note 21, at 274.

schools that "plainly cannot exist" if parents are prohibited from sending their children to them.[28]

Guthrie repeated the theme of the "interdependent" rights of parents, children, teachers, and schools in his oral arguments before the Court.[29] He spoke eloquently of teachers who

> devote their lives to the noblest of all callings, the education of children; a profession which has existed and been highly esteemed in every age, in every country, and under every civilization, even long before Christianity; and which, to repeat, was recognized by Mr. Justice McReynolds in the conclusive opinion which he wrote in the *German Language* cases [sic], not only as a noble profession, but as a most useful one.[30]

In his oral argument before the Court, Guthrie included the rights of the Society's teachers to "pursue their profession," as one of his justifications for why the Society was an appropriate plaintiff to bring the case.[31] Citing *Meyer*, he also quickly dismissed the argument made by the State of Oregon that teachers' rights were not implicated since they could pursue their profession in public schools.[32]

Local counsel, the Honorable J.P. Kavanaugh, did include references to the teaching profession in the brief he filed on behalf of the religious corporation. Focusing first on natural rights, Kavanaugh began with excerpts from the *Slaughter-House Cases*, *Allgeyer v. Louisiana*, and *Meyer v. Nebraska*, all affirming an expansive interpretation of the Fourteenth Amendment that would cover lawful occupations and pursuits.[33] He then turned to making a case for the

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28 *Id.* at 248.

29 Transcript of Oral Argument, *supra* note 4, at 663.

30 *Id.* at 664.

31 *Id.* at 652 ("Even if not directly affected or entitled to sue in its own right, the appellee Society is entitled to complain of a law which directly destroys its patronage and prevents parents and guardians from sending their children to its primary schools, and which practically deprives its teachers in the primary grades of the right to pursue their profession.").

32 *Id.* at 653.

33 *See, e.g.*, Brief on Behalf of Appellee, Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (No. 583), *reprinted in* OREGON SCHOOL Cases: COMPLETE RECORD, *supra* note 4, at 297, 304–08 ("The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright." *Id.* at 305 (quoting Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co., 111 U.S. 746, 757 (1884) (Field, J., concurring), *abrogated by* Lincoln Union v. Nw. Iron & Metal Co., 335 U.S. 525 (1949))); *see also id.* at 312 (quoting Meyer v. Nebraska, 262 U.S. 390, 400 (1923)).

"teaching profession" and the "[c]onducting [of] schools" as a "useful occupation," here again seamlessly blending the work of teachers with the administration of the school.[34] And, relying on *Meyer*, he returned again to the argument that the "right to follow useful occupations" is rooted in natural rights and that "teachers are protected by the Fourteenth Amendment against arbitrary unreasonable invasion of their calling by the state."[35]

The Court largely followed counsel's lead. The Court in *Meyer* recognized the law infringed on a teacher's right to teach, the rights of parents to engage him, and rights of students to learn, which were intertwined,[36] and teachers received no such reciprocity in *Pierce* even as the interests of schools, parents, and students were noted. The Court briefly acknowledged that, as corporations, the schools could not claim Fourteenth Amendment protection, but also noted that prior opinions had "gone very far to protect against loss [in business and property] threatened by [unwarranted compulsion]."[37] The Court drew a distinction between a case where a person or business sued on the theory that he had such a strong interest in possible customers that the state should be restrained from exercising its power to one where the challenge was to exercise of police powers that were "arbitrary, unreasonable and unlawful."[38] *Pierce*, the Court determined, fell into this latter camp and the "clear and immediate" interests at stake fell within the realm of other cases in which "injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers."[39]

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34 *Id.* at 308.

35 *Id.* at 313.

36 *See Meyer*, 262 U.S. at 400 ("Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment."); *see also id.* at 401 ("Evidently the legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.").

37 *Pierce*, 268 U.S. at 535 (first citing Truax v. Raich, 239 U.S. 33 (1915); then citing Truax v. Corrigan, 257 U.S. 312 (1921); and then citing Terrace v. Thompson, 263 U.S. 197 (1923)).

38 *Id.* at 536, 535–36.

39 *Id.* at 536 (first citing Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917); then citing Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921), *superseded by statute*, Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932); then citing Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184 (1921); and then citing Bartels v. Iowa, 262 U.S. 404 (1923)). Throughout the 1950s and 1960s, *Pierce*'s permitting of third parties to vindicate others' rights was cited affirmatively in cases involving pressing social issues, including challenges to racially restrictive covenants, protection of the right to association, efforts to push back against the Red Scare, and the right of married couples to use contraceptives. *See, e.g.*, Barrows v. Jackson, 346 U.S. 249, 257 (1953) (finding the award of damages for

Linda Przybyszewski observed over a decade ago that both the Court and the subsequent scholarship about *Pierce* omitted the voices and the experiences of the sisters whose livelihoods were at stake if Oregon's law would have taken effect.[40] The lack of inclusion of perspectives from teachers is not limited to scholarship on *Pierce*. Historians of education have written of the gaps in and challenges of capturing the experiences of teachers at religious schools, including those who are members of religious orders and those who are not.[41] To the extent counsel or the Court in *Pierce* did not differentiate between the interests of the religious schools and the interests of teachers, perhaps it was because those interests were viewed as one and

enforcement of racially restrictive covenant unconstitutional); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) (permitting a national organization to sue on behalf of its members and holding that forced disclosure of names and addresses of members was a violation of due process because of likelihood of substantial restraint on exercise of freedom of association); Gibson v. Fla. Legis. Investigation Comm., 372 U.S. 539, 568–69 (1963) (Douglas, J., concurring) (similar); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 141 (1951) (plurality opinion) (permitting cases to proceed where organizations challenged their inclusion on a list of communist organizations furnished to the Loyalty Board of the U.S. Civil Service Commission); Communist Party of U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 79 (1961) (unsuccessful challenge to organizational registration requirement under the Subversive Activities Control Act of 1950, with *Pierce* cited by both the majority and dissent); *id.* at 186 (Douglas, J., dissenting); Griswold v. Connecticut, 381 U.S. 479, 481 (1965). Notably, the Court in *Button* cited *Patterson* for support that the organization could bring a challenge on behalf of its members *and* itself had a "right 'to engage in association for the advancement of beliefs and ideas.'" NAACP v. Button, 371 U.S. 415, 430 (1963) (quoting *Patterson*, 357 U.S. at 460); *accord id.* at 428. Unlike the Court's half-century about-face with *Lochner v. New York*, 198 U.S. 45 (1905), during the half-century following *Button*, the Court stayed the course. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 329, 342 (2010) (citing *Button* among other cases recognizing organizations had First Amendment rights, including to political speech).

40 *See* Linda Przybyszewski, *Cross Purposes:* Pierce v. Society of Sisters *and the Struggle over Compulsory Public Education*, 27 J.L. & RELIGION 207, 211–12 (2012) (book review) (noting in her review of *Cross Purposes* that the voices and experiences of the Catholic sisters are not heard directly in Court nor in the subsequent literature).

41 *See, e.g.*, Tom O'Donoghue & Anthony Potts, *Researching the Lives of Catholic Teachers Who Were Members of Religious Orders: Historiographical Considerations*, 33 HIST. EDUC. 469, 469 (2004); F. Michael Perko, *Religious Schooling in America: An Historiographic Reflection*, 40 HIST. EDUC. Q. 320, 337 (2000) (noting the "perpetual conundrum of gaining access to the 'inner life' of schools," and identifying teachers' experiences as "absolutely critical"); BART HELLINCKX, FRANK SIMON & MARC DEPAEPE, THE FORGOTTEN CONTRIBUTION OF THE TEACHING SISTERS: A HISTORIOGRAPHICAL ESSAY ON THE EDUCATIONAL WORK OF CATHOLIC WOMEN RELIGIOUS IN THE 19TH AND 20TH CENTURIES 13 (2009). *But see* Natalie Cloud, *Teaching in Catholic Schools from the Perspectives of Lay Teachers, 1940–1980*, 44 EDUC. RSCH. & PERSPS. 70, 74–75 (2017) (recounting scholarship on the teaching religious in Australia and offering perspectives from lay teachers within that context).

the same, given the teachers were members of a religious order.[42] Today, such close alignment arguably can no longer be assumed.[43]

B. The Development of Substantive Due Process

Given the parties involved, perhaps it should come as no surprise that the Court's treatment of unenumerated rights in *Pierce* diverged so significantly from its more expansive vision in *Meyer*. After all, *Meyer*, like *Truax v. Raich*,[44] involved an individual plaintiff-employee who challenged the constitutionality of state action. The plaintiff in *Pierce*, in contrast, was a corporate operator of parochial schools that the Court determined (without much discussion) had standing to challenge the law on behalf of parents and their children.[45]

Robert T. Meyer was a teacher at Zion Parochial School, a school supported by an Evangelical Lutheran congregation.[46] His offense? Teaching Bible stories in German to a ten-year old child.[47] That instruction, the prosecution argued, violated a Nebraska law forbidding the teaching of modern languages other than English to children who had not yet completed the eighth grade.[48] The Court considered whether the law infringed upon the teacher's constitutional right under the Fourteenth Amendment to not be deprived of "life, liberty, or property, without due process of law."[49] While the Court recognized that the contours of that right were still somewhat ill-defined, it acknowledged that it included the right

> 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.[50]

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42 *See* O'Donoghue & Potts, *supra* note 41, at 469; *see also* ABRAMS, *supra* note 1, at 125. The Society took on the cause of education in Oregon when, in 1859, twelve nuns responded to the Archbishop of Oregon's pleas that a school be founded to educate the children in the "wilderness" of the newly formed state. ABRAMS, *supra* note 1, at 126.

43 *See* O'Donoghue & Potts, *supra* note 41, at 469 (noting the increasing need to employ lay teachers within Catholic schools, among other changes, post-Vatican II).

44 Truax v. Raich, 239 U.S. 33 (1915).

45 Pierce v. Soc'y of Sisters, 268 U.S. 510, 531–33 (1925).

46 Meyer v. Nebraska, 262 U.S. 390, 397 (1923).

47 *Id.* at 396–97.

48 The teaching of Latin, Greek, and Hebrew were not proscribed, but only modern languages other than English. *Id.* at 401.

49 *Id.* at 399 (quoting U.S. CONST. amend. XIV, § 1).

50 *Id.* (first citing Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); then citing Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co., 111 U.S. 746 (1884), *abrogated by* Lincoln Union v. Nw.

The Court recognized that the "calling [of teaching] always has been regarded as useful and honorable, essential, indeed, to the public welfare," and concluded that the Constitution protected both the "right . . . to teach" and the right of parents to engage a teacher for the instruction of their children.[51] Although this list of unenumerated rights is broad, *Meyer*'s precedent could have been broader still: the Court considered and rejected the argument that the law was unconstitutional because it restricted the right of *all* citizens of the state, including those who are not foreign born, to have their children educated in a foreign language.[52]

Legal scholars have observed that, within the modern era, unenumerated rights pertaining to personal liberties have taken center stage in Fourteenth Amendment jurisprudence, eclipsing economic and property rights.[53] That was not always the case. Rewind to 1897 when, in *Allgeyer v. Louisiana*, the Court invalidated a state law forbidding the sale of marine insurance by a company not registered within the state.[54] The Court held that the law violated defendant's "liberty" without due process, explaining "liberty" meant

> not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.[55]

Legal scholars Toni Massaro and E. Thomas Sullivan observe that *Allgeyer* set off the Court's complicated use of substantive due process,

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Iron & Metal Co., 335 U.S. 525 (1949); then citing Yick Wo v. Hopkins, 118 U.S. 356 (1886); then citing Minnesota v. Barber, 136 U.S. 313 (1890); then citing Allgeyer v. Louisiana, 165 U.S. 578 (1897), *abrogated by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); then citing Lochner v. New York, 198 U.S. 45 (1905), *abrogated by Parrish*, 300 U.S. 379; then citing Twining v. New Jersey, 211 U.S. 78 (1908); then citing Chi., Burlington & Quincy R.R. Co. v. McGuire, 219 U.S. 549 (1911); then citing Truax v. Raich, 239 U.S. 33 (1915); then citing Adams v. Tanner, 244, U.S. 590 (1917), *overruled by* Ferguson v. Skrupa, 372 U.S. 726 (1963); then citing N.Y. Life Ins. Co. v. Dodge, 246 U.S. 357 (1918); then citing Truax v. Corrigan, 257 U.S. 312 (1921); then citing Adkins v. Child.'s Hosp, 261 U.S. 525 (1923); and then citing Wyeth v. Thomas, 86 N.E. 925 (Mass. 1909)).

51 *Id.* at 400. Although the teacher, Meyer, brought the suit, the Court understood the interests of teachers and parents to be aligned.

52 *Id.* at 398.

53 E. THOMAS SULLIVAN & TONI M. MASSARO, THE ARC OF DUE PROCESS IN AMERICAN CONSTITUTIONAL LAW 134 (2013).

54 *Allgeyer*, 165 U.S. at 593 .

55 *Id.* at 589.

turning the doctrine into "both a vehicle for and an opponent of social reform."[56]

A prominent example of the latter came in 1905 when, building on *Allgeyer*, the Court invalidated a New York state law that restricted the number of hours a baker could work per week.[57] Finding the statute exceeded the state's power to regulate labor and health, the Court in *Lochner v. New York* concluded the resulting interference with the contractual rights of employers and employees violated the Fourteenth Amendment.[58] The Court's 1923 decision in *Adkins v. Children's Hospital* followed similar reasoning, invalidating a Washington, D.C. minimum wage law intended to protect women and children.[59] In holding the law unconstitutional, the Court explained the law "takes account of the necessities of only one party to the contract," "ignor[ing] the necessities of the employer" by setting a wage floor without consideration of whether the business could sustain that amount.[60]

But in 1937 in *West Coast Hotel Co. v. Parrish*, the Court reversed course.[61] Elsie Parrish sued her employer for the hotel's failure to pay her the minimum wage Oregon required for women and children.[62] The Court upheld the law, emphasizing that the right to contract was not absolute.[63] In contrast to its decision in *Adkins*, the Court explicitly recognized the impact invalidating the law would have on employees. Without the guardrail of minimum wage laws like the one in Oregon, the Court acknowledged, workers held unequal bargaining power and therefore were "relatively defenceless against the denial of a living

56 SULLIVAN & MASSARO, *supra* note 53, at 28 (footnote omitted).

57 Lochner v. New York, 198 U.S. 45, 58 (1905), *abrogated by Parrish*, 300 U.S. 379.

58 *Id.* at 53. In the *Slaughter-House Cases*, a Louisiana law that outlawed the business of keeping or slaughtering livestock inside the city limits of New Orleans and other parishes, except as done by a single company created by the statute, was challenged on the grounds that it violated the Thirteenth and the Fourteenth Amendments. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 58–59 (1873). With respect to the Fourteenth Amendment, the butchers whose livelihood had been upended by the law argued that the law deprived them of equal protection and of their property without due process of law. *Id.* at 66. The Court disagreed by narrowly construing the Reconstruction Amendments. *Id.* at 82.

59 Adkins v. Child.'s Hosp., 261 U.S. 525, 560–62 (1923), *overruled by Parrish*, 300 U.S. 379. Adkins was a consolidated case in which suits were brought by a hospital that employed many women and a female elevator operator whose job had been eliminated because of the higher wage requirement. *Id.* at 542–43.

60 *Id.* at 557.

61 *Parrish*, 300 U.S. 379.

62 *Id.* at 388.

63 *See id.* at 396–97.

wage," leaving them vulnerable to exploitation, a result likely to ultimately saddle society with the bill.[64]

Meyer and *Pierce* fall within this tumultuous stretch of Supreme Court jurisprudence, coming after *Lochner* and *Adkins* (barely in the latter case) and before *Parrish.* Laurence Tribe long ago called *Meyer* and *Pierce* "the two sturdiest pillars of the substantive due process temple," recognizing them both as "survivors of the largely discredited *Lochner* era."[65] *Meyer* articulated the unenumerated rights protected by the Fourteenth Amendment broadly, and arguably blurring any neat lines between personal and economic liberty rights.[66] *Pierce* holds fast to some of *Meyer*'s vision, but elides any echoes of the right to an occupation included in *Meyer* and earlier in *Allgeyer*, choosing instead to affirm protection of the personal liberties of parents and economic interests of institutions without mentioning the interests of teachers for whom both personal and economic liberties interests were at stake.[67]

Another illustration of the divergence between *Meyer* and *Pierce* can be seen in their respective treatment of *Truax v. Raich*, a 1915 decision in which the Court invalidated an Arizona law that instituted a quota for native-born workers.[68] After being informed he would be fired because of the law, Mike Raich, an Austrian-born restaurant cook, sued his employer, the state attorney general, and the county attorney alleging the law was unconstitutional.[69] The Court agreed with Truax, explaining: "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity" that lies at the heart of the Fourteenth Amendment.[70] The *Meyer* Court cited *Truax* in

64 *Id.* at 399. Although the Court took pains to show how *Parrish* aligned with its earlier rulings, *id.* at 392–99, the outcome shocked many not only because of *Adkins* but because the Court had just the year before invalidated New York's minimum wage law in *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936). *See* Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69, 70 (2010).

65 Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1934 (2004); *see also* Luke Norris, *Constitutional Economics*, 28 YALE J.L. & HUMANS. 1, 35 (2016).

66 *See supra* notes 49–50 and accompanying text.

67 *See supra* notes 36–40 and accompanying text.

68 Truax v. Raich, 239 U.S. 33, 43 (1915).

69 *Id.* at 36.

70 *Id.* at 41 (first citing Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock & Slaughter-House Co., 111 U.S. 746, 762 (1884) (Bradley, J., concurring), *abrogated by* Lincoln Union v. Nw. Iron & Metal Co., 335 U.S. 525 (1949); then citing Barbier v. Connolly, 113 U.S. 27, 31 (1885); then citing Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); then citing Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897), *abrogated by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); and then citing Coppage v. Kansas, 236 U.S. 1, 14 (1915), *overruled by* Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941)).

support of its list of unenumerated rights, including the right to "engage in any of the common occupations of life."[71] In contrast, the *Pierce* Court cited *Truax* when it confirmed that the schools as corporations had rights under the Fourteenth Amendment, explaining the Court had "gone very far to protect against loss threatened by [actions like that of Oregon's law]"[72] and that the interest of the corporations was "clear and immediate."[73]

The Court in *Meyer* and *Pierce*, as in *Lochner*, defined substantive due process as a negative right—that is, freedom *from* state interference with, in both cases, unenumerated liberty interests.[74] But, importantly, Tribe has described these cases as framing substantive due process in "relational terms," that included "constitutional protection for a network of interpersonal arrangements."[75] Although writing in 2004 to reflect on the development of substantive due process in light of the Court's then-recent decision in *Lawrence v. Texas*,[76] his observation provides a useful lens through which to view *Pierce* and its progeny. By focusing on interpersonal connections, we can see not only *what* is being protected but also *whose* interests are bound up together in that protection and to what degree. Although precedent has often folded *Pierce* into the First Amendment Free Exercise discussions, a picture of a different kind of "network of interpersonal arrangements" emerges when we observe how parents, religious schools, and students figure prominently in the post-*Pierce* portrait. Teachers do not. At best, they appear in the shadows, partly in and partly out of frame; often, their employers stand in for them, regardless of whether their interests are aligned.

II. *PIERCE* AND ITS RELATIONAL LEGACIES

In the two decades that followed *Pierce*, the decision was often invoked in controversies involving religious expression and public schools, sometimes by both the majority and the dissent. An early throughline was affirmation that private schools were constitutionally entitled to operate but could be regulated by the state. These early cases invoke *Pierce* to either affirm the rights of parents to direct the

71 Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (citing *Truax*, 239 U.S. at 41).

72 Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) (first citing *Truax*, 239 U.S. 33; then citing Truax v. Corrigan, 257 U.S. 312 (1921); and then citing Terrace v. Thompson, 263 U.S. 197 (1923)).

73 *Id.* at 536.

74 *See* Norris, *supra* note 65, at 35–36.

75 Tribe, *supra* note 65, at 1904, 1934 n.156.

76 Lawrence v. Texas, 539 U.S. 558 (2003). In *Lawrence*, the Court struck down a Texas law criminalizing certain sexual conduct between members of the same sex, holding that the law violated liberty interests protected by the Fourteenth Amendment. *Id.* at 578–79.

education of their children or to affirm the regulatory power of the state (and sometimes both). As the decades wore on, the Court began to acknowledge that the interests of parents, children, and religious schools are often intertwined. The Court's decisions often took note of these shared, or at least overlapping, interests when assessing how to balance those interests with those of the state. As will be seen, notably absent from most of these discussions have been the interests of teachers, even where those interests would not necessarily have put them at odds with schools, parents, or children.

A. Parents and Children

Cases after *Pierce* have often recognized or assumed the interests of parents and those of their children are aligned, even as the Court has made it clear that *Pierce* protected children's rights. In *Tinker v. Des Moines Independent Community School District*, the Court in 1969 heard a constitutional challenge to public school principals' prohibition on students wearing of black armbands at school to protest the Vietnam War, a protest the Court determined was "akin to 'pure speech'" rather than a mere regulation of dress code.[77] In its condemnation of the school's attempt to avoid unpopular opinions, the Court made it clear that public schools "may not be enclaves of totalitarianism," where school officials exercise "absolute authority over their students."[78] *Tinker* extended *Pierce*'s logic to apply when students had their own opinions, not just when there was concern the state was trying to "standardize its children by forcing them to accept instruction from public teachers only,"[79] as *Pierce* had warned.

The Court's 1972 decision in *Wisconsin v. Yoder* was a win for parental rights, building directly on the path begun by *Meyer* and cut by *Pierce*. In *Yoder*, parents who were members of the Old Order Amish and the Conservative Amish Mennonite Church challenged Wisconsin's compulsory education law requiring children to attend a public or private school until the age of sixteen.[80] The law, they argued, violated their free exercise of religion because formal education beyond the eighth grade conflicted with Amish values and way of life.[81] In its decision siding with the parents, the Court cited *Pierce* when acknowledging the state's general power to impose reasonable regulations on education,[82] but with the recognition that

77 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508, 507–08 (1969).
78 *Id.* at 511.
79 Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).
80 Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).
81 *See id.* at 208–09.
82 *Id.* at 213.

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."[83]

There was tacit acknowledgement in *Yoder* that parents' and children's rights *could*, in some cases, diverge. In his partial dissent Justice Douglas took issue with what he saw as the majority's focus on parents and the state alone:

> I agree with the Court that the religious scruples of the Amish are opposed to the education of their children beyond the grade schools, yet I disagree with the Court's conclusion that the matter is within the dispensation of parents alone. The Court's analysis assumes that the only interests at stake in the case are those of the Amish parents on the one hand, and those of the State on the other. The difficulty with this approach is that, despite the Court's claim, the parents are seeking to vindicate not only their own free exercise claims, but also those of their high-school-age children.[84]

The majority responded by taking note of the fact that this was not a case where it was alleged the rights of parents were, in fact, at odds with those of their children.[85]

Even with the recognition that rights of parents and their children could diverge, the Court often sees their interests as inextricably linked, a decision that is not without consequence. Emily Buss has observed that the Court consistently limits the constitutional rights of children and justifies doing so, at least in part, because doing otherwise would impact the rights of parents, infringing on their authority and therefore curtailing their ability to direct their children's upbringing.[86] One example is *Troxel v. Granville*, a 2000 case in which a plurality of the Court upheld the Washington Supreme Court's decision that a state law permitting third parties to petition a court for visitation rights even if a child's parent objects violated the Constitution.[87] In a

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83 *Id.* at 213–14 (first citing Ginsberg v. New York, 390 U.S. 629, 639 (1968); then citing Meyer v. Nebraska, 262 U.S. 390 (1923); and then citing Rowan v. U.S. Post Off. Dep't, 397 U.S. 728 (1970)).

84 *Id.* at 241 (Douglas, J., dissenting in part).

85 *See id.* at 231 (majority opinion).

86 Emily Buss, *The Parental Rights of Minors*, 48 BUFF. L. REV. 785, 805–10 (2000); *see id.* at 805 ("Only by giving parents considerable authority over their children, the Court contends, can parents fulfill their obligation to 'inculcat[e] . . . moral standards, religious beliefs, and elements of good citizenship,' that will enhance a child's 'chances for [the] full growth and maturity that make . . . participati[ng] in a free society meaningful and rewarding.'") (first alteration in original) (quote corrected) (quoting Bellotti v. Baird, 443 U.S. 622, 638–39 (1979) (plurality opinion)). Children's vulnerability due to their ongoing development and the variation in their decision-making skills are also rationales the Court relies upon. *See id.* at 797–99.

87 Troxel v. Granville, 530 U.S. 57, 75 (2000) (plurality opinion).

concurrence, Justice Souter explained that "choice about a child's social companions is not essentially different from the designation of the adults who will influence the child in school"[88] and *Pierce* made it clear that a parent's choice of school prevails over the judgment of the state regarding "the preferable political and religious character of schoolteachers."[89] Justice Thomas, too, cited *Pierce* in his brief concurrence, and argued that infringements on such rights deserve strict scrutiny.[90]

Justice Scalia dissented in *Troxel*, starkly rejecting a constitutional protection for parental rights. Citing *Meyer*, *Pierce*, and *Yoder*, he wrote: "Only three holdings of this Court rest in whole or in part upon a substantive constitutional right of parents to direct the upbringing of their children—two of them from an era rich in substantive due process holdings that have since been repudiated."[91]

Now, more than two decades after *Troxel* and Buss's initial observation, it remains clear that some Justices are still quick to link students' interests back to those of their parents. In 2021, the Court determined that a public school violated a student's First Amendment rights when it suspended her from the cheerleading squad because of her vulgar Snapchat posts.[92] In a concurring opinion in *Mahanoy Area School District v. B.L.*, Justice Alito cited *Pierce*, explaining that "[i]n our society, parents, not the State, have the primary authority and duty to raise, educate, and form the character of their children."[93]

B. Weighing State Interests

The Society of Sisters, while focused on the liberty of parents, children, schools, and (to a lesser extent) teachers, tried to show that the state also would be harmed if the law were to be enforced.[94] The

88 *Id.* at 78 (Souter, J., concurring in judgment).

89 *Id.* (citing Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925)).

90 *Id.* at 80 (Thomas, J., concurring in judgment).

91 *Id.* at 92 (Scalia, J., dissenting) (footnote omitted) (first citing Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923); then citing *Pierce*, 268 U.S. at 534–35; and then citing Wisconsin v. Yoder, 406 U.S. 205, 232–33 (1972)). Such an expansive view of parental rights "under a Constitution that does not even mention them" would, Justice Scalia argued, put the Court in the business of creating a federal family law, without the advantages of state legislatures, namely being able to limit the harm to a "more circumscribed area" and "being able to correct their mistakes in a flash, and of being removable by the people." *Id.* at 92–93.

92 Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2042–43 (2021).

93 *Id.* at 2053 (Alito, J., concurring) (first citing *Yoder*, 406 U.S. at 232; and then citing *Pierce*, 268 U.S. at 534–35).

94 In its complaint, the Society estimated that, if the law should take effect, 9,000 children who were once enrolled in private schools would be transferred to public schools, costing the state $4 million. Transcript of Record, *Pierce*, 268 U.S. 510 (No. 583), *reprinted*

Court did not engage this point in its brief opinion in *Pierce*. Perhaps not surprisingly, the Court's consideration of state interests in the decades that followed often centered on the proper scope of the state's regulatory power, rather than on the costs of administration. What is interesting about those cases is how the Justices, both in the majority and in dissent, volleyed for *Pierce*'s legacy. For example, in *Minersville School District v. Gobitis*, a family of Jehovah's Witnesses challenged a state's compulsory flag salute law,[95] and, although the students' objections were religious, the Court upheld the constitutionality of the law, explaining that *Pierce* prevented states from compelling students to attend public schools, but it would be a "very different thing" if the Court began to second-guess legislative action intended to instill patriotism.[96] In dissent, Justice Stone cited *Pierce*, arguing a reasonable accommodation was needed where there were "competing demands" of the state and of constitutional liberty.[97] When the Court overturned *Gobitis* three years later in *West Virginia State Board of Education v. Barnette*,[98] it was Justice Frankfurter in dissent who briefly invoked *Pierce*, arguing that, while the state cannot compel public school attendance, it may regulate areas reasonably related to the state's general competence.[99]

Justice Stewart picked up that theme in his 1963 dissent in *School District of Abington Township v. Schempp*, a case in which the Court sided with a Unitarian family in Pennsylvania and an atheist family in Maryland who challenged their respective state's requirement that public schools begin their day with Bible reading.[100] For Justice Stewart, who expressed concern for the erosion of the rights of parents who wanted to expose their children to religious influences, *Pierce* reflected a kind of floor, not a ceiling for parental rights.[101] Here, the interests of parents were assumed to be parallel to those of the state in

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in OREGON SCHOOL Cases: COMPLETE RECORD, *supra* note 4, at 13, 30. While the Court in *Pierce* did not reference this consideration, this argument does resemble the Court's consideration of societal impact in *West Coast Hotel*. *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937).

95 Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 591–92 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). The Witnesses' rejection of salutes dates to the group's leader rejecting to salute Hitler in the 1930s. *See* SARAH BARRINGER GORDON, THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA 15 (2010).

96 *Gobitis*, 310 U.S. at 599, 598–99.

97 *Id.* at 603 (Stone, J., dissenting).

98 *Barnette*, 319 U.S. at 642.

99 *Id.* at 656, 661 (Frankfurter, J., dissenting) (citing *Pierce*, 268 U.S. at 535).

100 Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 205–06, 211 (1963).

101 *Id.* at 312–13 (Stewart, J., dissenting).

requiring the Bible reading, affording states latitude to integrate religion into public schools as they saw fit.[102]

Pierce was also invoked in cases involving state support to parochial schools, again often by the majority and the dissent. In 1947, the Court in *Everson v. Board of Education of Ewing Township* upheld a New Jersey law permitting the reimbursement of parents for the transportation of their children to school, including to parochial schools.[103] Citing *Pierce*, the majority took no issue with parochial schools meeting both parental obligations and state standards.[104] Here again, we see tacit recognition of parochial schools serving parallel interests of the state and parents. But both dissents also cited *Pierce*. Justice Jackson charged the majority with trying to "have it both ways," with religious teaching being both "a private affair when the state seeks to impose regulations which infringe on it indirectly, and a public affair when it comes to taxing citizens of one faith to aid another, or those of no faith to aid all."[105] A second dissent, written by Justice Rutledge and joined by three other Justices (including Justice Jackson), focused on the Establishment Clause implications of the majority's decision.[106] In contrast to Justice Stewart's dissenting position in *Schempp* fifteen years later, for Justices Jackson, Rutledge, Frankfurter, and Burton, *Pierce* articulated a desirable ceiling, not the floor.

Throughout the last 100 years, the Court has, on several occasions, determined state interests outweighed those of parents, children, and/or private schools. For example, in 1944, just a year after *Barnette*, the Court decided *Prince v. Massachusetts*, upholding the conviction of Sarah Prince, a Jehovah's Witness who had engaged her nine-year-old niece in the distribution of religious magazines, for violating state child labor laws.[107] The Court explained that *Pierce* protected both the rights of guardians to provide children with religious instruction and the

102 *Id.* ("It might be argued here that parents who wanted their children to be exposed to religious influences in school could, under *Pierce*, send their children to private or parochial schools. . . . 'Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way.'" (quoting Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943))).

103 Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

104 *Id.*

105 *Id.* at 27 (Jackson, J., dissenting). Citing *Pierce*, he continued, "If these principles seem harsh in prohibiting aid to Catholic education, it must not be forgotten that it is the same Constitution that alone assures Catholics the right to maintain these schools at all when predominant local sentiment would forbid them." *Id.* (citing *Pierce*, 268 U.S. 510).

106 *Id.* at 32–33, 51 (Rutledge, J., dissenting). Rutledge cites *Pierce* several times, including to assure the reader that free exercise is not "constricted" under the Court's precedent and that "daily religious education commingled with secular is 'religion'" and therefore protected, but, he argued, constitutional policy also prevents a state from undertaking support for religious training "in any form or degree." *Id.* at 32–33, 59.

107 Prince v. Massachusetts, 321 U.S. 158, 169–70 (1944).

"child's right to receive it."[108] However, the Court concluded that the state retained greater authority over children than over adults in matters involving public activities and employment.[109] And when parents and religious schools sought to opt out of racial desegregation in the 1970s, the Court made it clear that *Pierce* did not expand so far. In *Norwood v. Harrison*, the Court found that a Mississippi state law lending textbooks to private schools regardless of whether the schools restricted student enrollment based on race was unconstitutional.[110] Similarly, in *Runyon v. McCrary*, the Court heard a challenge to desegregation efforts brought by black children, through their parents, who argued that § 1981, a Reconstruction Era statute outlawing racial discrimination in contracts, prevented private schools from turning away students on the basis of race.[111] In response, the private schools argued that § 1981 unconstitutionally infringed on the freedom to associate, on the right to privacy, and on white parents' rights to direct the education of their children.[112] While the Court recognized that *Pierce* affirmed the rights of parents to send their children to a private school, it concluded *Pierce* could not be relied upon to thwart the state's interest in eliminating racial discrimination.[113]

In the early 1990s, the Court added a new thread to *Pierce*'s tapestry with respect to weighing state interests, one focused on claiming *Pierce*'s uniqueness in the constitutional order because of the multiple constitutional interests at stake. In *Employment Division v. Smith*, Justice Scalia, writing for the majority, explained that *Pierce* and *Yoder* were unique since they involved Free Exercise claims coupled with other protected constitutional interests.[114] This coupling, the Court opined, accounted for the deviation of *Pierce* and *Yoder* from the standard that the Court sought to elevate in *Smith*, that neutral and generally applicable laws were constitutional even if they burdened

108 *Id.* at 166.

109 *See id.* at 170.

110 Norwood v. Harrison, 413 U.S. 455, 470–71 (1973). The Court emphasized that *Pierce* was limited to the affirmation that private schools had the right to exist, not that they were entitled to public support. *Id.* at 461–62 ("[*Pierce*] said nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise. It has never been held that if private schools are not given some share of public funds allocated for education that such schools are isolated into a classification violative of the Equal Protection Clause." *Id.* at 462.).

111 Runyon v. McCrary, 427 U.S. 160, 163–64 (1976).

112 *Id.* at 175–79.

113 *Id.* at 176–79. To bolster its conclusion, the Court also noted that later cases had emphasized *Pierce*'s limited scope, the affirmation of "the right of private schools to exist and to operate." *Id.* at 177 (quoting *Norwood*, 413 U.S. at 462).

114 Emp. Div. v. Smith, 494 U.S. 872, 881 (1990).

religious exercise.[115] The *Smith* decision touched off a now decades-long discussion among scholars and in courts about, among other topics, the viability of "hybrid rights" and how to evaluate them.[116] *Smith* also prompted Congress to pass the Religious Freedom Restoration Act (RFRA), with the aim of restoring what it saw as the proper balancing test involving free exercise challenges.[117] One of the arguments for the passage of RFRA was that, in the wake of *Smith*, *Pierce* was on shaky ground, since the decision rested on the "unenumerated right of parents to educate their children."[118] In the decades that have followed, RFRA has taken on a life of its own and *Smith*—not *Pierce*—is the precedent likely to go the way of *Lochner*.[119]

C. Religious Schools and Parents

In *Pierce*, the Society foregrounded the constitutional interests of parents and successfully made the case that they were bound up with the corporation's own. In the century that has followed, the Court has often considered the interests of religious schools and parents in tandem. As discussed above, as early as 1947 with its decision in *Everson*, the Court permitted the reimbursement of parents for the transportation of their children to school, including to parochial

115 *Id.* at 881–82. In *Smith*, two members of the Native American Church were fired from their positions as drug counselors after ingesting peyote, and they challenged the denial of unemployment benefits by the state. *Id.* at 874. Since peyote was a controlled substance under Oregon law, their termination was considered work-related misconduct. *Id.*

116 *See, e.g.*, Dan T. Coenen, *Reconceptualizing Hybrid Rights*, 61 B.C. L. REV. 2355 (2020).

117 Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 693–95 (2014). That test included consideration of whether the law substantially burdened religious exercise, whether the government had a compelling interest in what the law sought to achieve, and whether the law was the least restrictive means of achieving that purpose, as set out in *Sherbert v. Verner*, 374 U.S. 398, 403, 407 (1963). For an analysis of RFRA's debated scope, see generally Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 Yale L.J.F. 416 (2016) .

118 Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV. 221, 224 (footnote omitted).

119 In its 2022 opinion overruling *Roe v. Wade*, the Court cited *Pierce* in its argument that *Roe v. Wade* had conflated two understandings of the "right of personal privacy," the "right to shield information from disclosure and the right to make and implement important personal decisions without governmental interference." Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2267 (2022) (first quoting Roe v. Wade, 410 U.S. 113, 152 (1973), *overruled by Dobbs*, 142 S. Ct. 2228; and then citing Whalen v. Roe, 429 U.S. 589 599–600 (1977)). The Court explained that two cases—*Pierce* and *Meyer*—were "obviously very, very far afield" from the case at bar since one affirmed the "right to send children to religious school" (*Pierce*) and the other the "right to have children receive German language instruction" (*Meyer*). *Id.* at 2268 (first citing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); and then citing Meyer v. Nebraska, 262 U.S. 390 (1923)). Missing entirely from both *Roe* and *Dobbs* is reference to the teacher in *Meyer* whose rights had been violated.

schools.[120] But in *Lemon v. Kurtzman*, the Court struck down laws that permitted reimbursements to private (including religious) schools for teachers' salaries, textbooks, and other instructional materials on secular topics in Pennsylvania, and compensated teachers in private schools up to fifteen percent of their annual salary in Rhode Island.[121] Citing *Everson*'s candid suggestion that the earlier decision took the Court to "the verge" of forbidden constitutional territory, the Court in *Lemon* looked to decipher whether the laws resulted in the "three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'"[122] More recently, the Court has abandoned the *Lemon* test and instead turned its focus on "historical practices and understandings."[123]

The landscape for religious schools began to change dramatically after the 1980s.[124] The Court became much more open to state funds being used to support programs at private, including religious, schools. For example, in *Agostini v. Felton*, the Court overturned *Aguilar v. Felton*[125] and held that the Establishment Clause did not bar a New York city program that used federal funding to send teachers into nonpublic schools serving low-income families.[126] And in 2000 in *Mitchell v. Helms*, the Court upheld the constitutionality of federal support for educational materials in private as well as public schools.[127] In both *Agostini* and *Mitchell*, the Court emphasized that each of the challenged programs in question was neutral since they depended on the private

120 Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

121 Lemon v. Kurtzman, 403 U.S. 602, 606–07 (1971), *abrogated by* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

122 *Id.* at 612 (first quoting *Everson*, 330 U.S. at 16; and then quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).

123 *Kennedy*, 142 S. Ct. at 2414 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

124 Two exceptions that were later overruled are *Aguilar v. Felton*, 473 U.S. 402 (1985), *overruled by Agostini v. Felton*, 521 U.S. 203 (1997) and *Wolman v. Walter*, 433 U.S. 229 (1977), *overruled by Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality opinion). In *Wolman*, the Court upheld the constitutionality of using public funds to purchase textbooks and standardized tests and scoring services and to provide offsite therapeutic services to children in nonpublic schools because, relying on *Pierce*, they served the state's long-established interest in ensuring adequate secular education. *Id.* at 240–48. But the Court struck down the provision of instructional materials directly to parents and students and bus costs for field trips controlled by the nonpublic school. *Id.* at 248–55. In their classification of this era of the Court's cases involving religious education, John Witte, Jr., Richard Garnett, and Joel Nichols note that *Aguilar* is the last of the line of "separationist" cases. *See* JOHN WITTE, JR., JOEL A. NICHOLS & RICHARD W. GARNETT, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 265 (5th ed. 2022).

125 *Aguilar*, 473 U.S. 402.

126 *Agostini*, 521 U.S. at 208–09.

127 *Mitchell*, 530 U.S. at 801 (plurality opinion).

choices of parents and children to determine which school would receive aid.[128] In 2002, the Court in *Zelman v. Simmons-Harris* upheld the constitutionality of an Ohio program providing parents with tuition scholarships and grants to send their children to the school of their choice.[129] Justice Thomas cited *Pierce* in his concurrence, explaining the Fourteenth Amendment should not be used to "handcuff the State's ability to experiment with education," emphasizing the program expanded parents' options without promoting religious "indoctrination."[130] All three cases involved Establishment Clause challenges to state funding to religious schools and in all three cases the majority, without citing *Pierce* directly, strongly echoed that case's emphasis on parental choice in an attempt to assuage concerns about state coercion. But even as the need to rely on parents' rights has diminished, their interests are no less represented as they are aligned with those of schools. These cases illustrate how the Court's focus on parental choice within its shifting Establishment Clause jurisprudence redounds not just to the benefit of parents but also to the benefit of religious schools.

The Court's shifting Free Exercise jurisprudence has similarly followed suit. A trio of cases illustrates. In 2017, the Court decided in *Trinity Lutheran Church of Columbia v. Comer*, that Missouri could not, consistent with the Free Exercise Clause, exclude schools owned or controlled by a religious entity from its competitive grant program for rubber playground surfaces.[131] Then, in 2020, the Court in *Espinoza v. Montana Department of Revenue* held that state program providing tax credits to private but not religious schools violated the Free Exercise Clause, burdening *both* religious schools and families.[132] Citing to *Pierce*, the Court explained that the no-aid provision "penalizes" the right of parents to choose to send their children to private religious schools.[133] And in 2022 in *Carson v. Makin*, the Court concluded that Maine's requirement that parents send their children to "nonsectarian" schools in order to benefit from the state's tuition assistance program violated the Free Exercise Clause as interpreted in both *Trinity Lutheran* and *Espinoza*.[134]

In *Cross Purposes*, Abrams explains that the Society of Sisters "took an additional risk" by including the free exercise of religion as a liberty

128 *Id.* at 829; *Agostini*, 521 U.S. at 226.

129 Zelman v. Simmons-Harris, 536 U.S. 639, 643–45 (2002).

130 *Id.* at 680, 680 & n.5 (Thomas, J., concurring).

131 Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2017, 2025 (2017).

132 Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2251, 2278 (2020).

133 *Id.* at 2261.

134 Carson *ex rel.* O.C. v. Makin, 142 S. Ct. 1987, 2002 (2022).

interest under the Fourteenth Amendment.[135] A century on, the free exercise interests of both parents and schools have benefited, often in tandem, from this emphasis.

III. TEACHERS: UNIQUENESS AND INTEREST INVISIBILITY

At the time of the controversy, the Society of Sisters of the Holy Names of Jesus and Mary in Oregon ran more than a dozen elementary schools, eight secondary or preparatory schools, and one college with just under 2,000 students enrolled in its primary and elementary schools.[136] This was a not insignificant portion of the Society's efforts nationally.[137] Ninety-six of the Society's 1,284 teaching sisters were in Oregon, women religious who had "consecrate[ed] themselves to the holy task of teaching children."[138] Although, as discussed above, the Society's lawyers included teachers among the four groups whose rights would be violated if the law were to go into effect, they did so without robust articulation of teacher's interests separate from those of the schools.[139] The Court, for its part, did little in *Pierce* to reiterate for teachers the broad vision of the Fourteenth Amendment's protections in *Meyer*.

In the century since *Pierce*, two developments within the employment law context underscore the extent to which teachers' interests continue to be obscured. First, statutory workplace protections at federal and state levels have increased dramatically, addressing issues such as wages and overtime, health and safety, and discrimination. Second, despite growing workplace protections, the Court has found that many of those protections do not reach teachers at religious schools, often ignoring how teachers' interests may diverge from the interests of their employers.

A. Expanding Employment Protections

Only a small handful of U.S. Supreme Court decisions invoking *Pierce* have explicitly involved teachers, and those have largely involved employment controversies playing out in public, not private religious, schools. The Court's cabining of liberties protected under the Fourteenth Amendment, focusing largely on personal rather than

135 ABRAMS, *supra* note 1, at 130.

136 *See* Transcript of Record, *supra* note 94, at 17–19; Brief on Behalf of the Appellee, *supra* note 21, at 225, 233; *see also* ABRAMS, *supra* note 1, at 125.

137 At the time, it ran forty-nine schools and taught 10,461 students in total. Brief on Behalf of the Appellee, *supra* note 21, at 233.

138 *Id.* at 233.

139 *See supra* notes 24–26 and accompanying text.

economic or property interests,[140] is evident within this sphere. For example, in 1968, in *Epperson v. Arkansas*, a case involving a constitutional challenge to state law forbidding the teaching of evolution in public schools, [141] the Court acknowledged *Meyer*'s expansive vision of what substantive due process entails, including "the freedom of teachers to teach and of students to learn," but chose instead to decide the case on "narrower" grounds through the Establishment Clause.[142] Even so, that more limited focus on personal liberties has, on occasion, protected the interests of teachers. In 1974, for example, the Court decided *Cleveland Board of Education v. LaFleur*, holding that mandatory pregnancy and maternity leave for public school teachers violated the Fourteenth Amendment's Due Process Clause. [143] The Court, relying on *Pierce*, explained it had "long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause."[144]

Even though the scope of substantive due process has been curtailed over the past 100 years, other employment protections within the United States have increased markedly during that same period. Several statutes have codified an expanded set of rights for employees, setting a floor for what is expected from employer-employee relationships. During the 1930s, Congress passed the National Labor Relations Act to address conflicts between labor and management[145] and established wage and hour protections through the Fair Labor

140 *See supra* note 53 and accompanying text.

141 Epperson v. Arkansas, 393 U.S. 97, 98 (1968). The law was modeled on the one in Tennessee that had been at the heart of the "Scopes Monkey Trial" more than forty years before. *Id.*

142 *Id.* at 105–06.

143 Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 649–50 (1974). *But see* Ambach v. Norwick, 441 U.S. 68, 80–81 (1979) (upholding a New York state law requiring public school teachers to be U.S. citizens or applicants for U.S. citizenship). The Court cited *Pierce* in support of the general proposition that education is important for children's cultural, professional, and social development. *Id.* at 77. Ultimately, the Court held that the law did not violate equal protection because rationally related to a legitimate state interest. *Id.* at 80–81.

144 *LaFleur*, 414 U.S. at 639 (first citing Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); then citing Loving v. Virginia, 388 U.S. 1, 12 (1967); then citing Griswold v. Connecticut, 381 U.S. 479 (1965); then citing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); then citing Meyer v. Nebraska, 262 U.S. 390 (1923); then citing Prince v. Massachusetts, 321 U.S. 158 (1944); and then citing Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942)).

145 National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2018)).

Standards Act, guaranteeing most workers a set minimum wage.[146] With the 1960s came the passage of the Equal Pay Act (amending the Fair Labor Standards Act), which prohibits sex discrimination in pay;[147] Title VII of the Civil Rights Act, which prohibits employment discrimination on the basis of race, sex, color, religion, and national origin;[148] and the Age Discrimination in Employment Act (ADEA), which protects workers over the age of forty.[149] The Americans with Disabilities Act (ADA) followed in 1990,[150] as did more recent amendments protecting workers from discrimination on the basis of pregnancy.[151] Many of these workplace protections extend to teachers within public and private schools, with at least one notable exception.[152] Although certainly not without their doctrinal or enforcement challenges, these statutes represent great strides—through hard-won struggles—toward balancing the interests of workers, employers, and society.[153]

B. The Unique Role of Teachers

Even as employment protections have increased for most employees over the past century, the Court has held that some of these protections do not reach teachers at religious schools. Prominent among them are the protections for union membership under the National Labor Relations Act and protections under federal antidiscrimination statutes. In both instances, the Court's reasoning for leaving teachers out is rooted in concerns about the First Amendment and shares a particular view about the role of teachers in carrying out a school's mission.

In 1979, the Court decided *National Labor Relations Board v. Catholic Bishop of Chicago*, a decision in which the Court held that lay teachers at religious schools fell outside the National Labor Relations

146 Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–204, 206–207, 209–219 (2018)).

147 *See* Equal Pay Act of 1963, Pub. L. No. 88-38, § 3, 77 Stat. 56, 56–57 (codified as amended at 29 U.S.C. § 206 (2018)).

148 *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-2(a)(1) (2018)).

149 *See* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 12, 81 Stat. 602, 607 (codified as amended at 29 U.S.C. § 631).

150 *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C. and 47 U.S.C. § 225).

151 *See* Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, 136 Stat. 4459 (2022) (codified as amended in scattered sections of U.S.C.).

152 The Fair Labor Standards Act generally excludes teachers from the minimum salary threshold triggering overtime pay. *See* 29 U.S.C. § 213(a)(1) (2018).

153 For a discussion of ongoing enforcement challenges, see Samuel R. Bagenstos, *Consent, Coercion, and Employment Law*, 55 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 409 (2020).

Act's associational protections.[154] In *Catholic Bishop*, lay teachers at Catholic high schools run by the Catholic Bishop of Chicago and the Diocese of Fort Wayne-South Bend sought to form unions.[155] The Chicago schools had traditionally been reserved for high school students with interests in becoming priests, but by the time of the lawsuit "definite inclination toward the priesthood" was no longer a prerequisite.[156] The second group, five schools located in Indiana, did not have the same requirement.[157] The teachers' unionization efforts in 1974 and 1975 came just a few years after the National Labor Relations Board, the agency responsible for enforcing the National Labor Relations Act,[158] determined it had jurisdiction over private schools because of their increased involvement in interstate commerce.[159]

After determining that the "church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school," the Court concluded First Amendment questions would be inevitable.[160] Finding that Congress expressed no affirmative intention in the legislative history to bring religious schools under the auspices of the National Labor Relations Act,[161] the Court declined to interpret the Act's scope in such a way as to require the resolution of thorny First Amendment questions.[162]

Nearly thirty-five years after *Catholic Bishop*, the Court decided *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, recognizing for the first time the existence of a "ministerial exception," rooted in both Religion Clauses of the First Amendment, and concluding that this exception applied to otherwise applicable antidiscrimination laws.[163] Cheryl Perich sued her religious school

154 NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 507 (1979).

155 *Id.* at 493.

156 *Id.* at 492. The Chicago schools did continue to offer some religious instruction not generally offered at Catholic secondary schools. *Id.*

157 *Id.* at 492–93.

158 29 U.S.C. §§ 156, 158(a)(1), (5) (2018).

159 Cornell Univ., 183 N.L.R.B. 329, 333–34 (1970); *see also Cath. Bishop*, 440 U.S. at 497. This decision overruled Trs. of Columbia Univ. in the City of N.Y., 97 N.L.R.B. 424 (1951). *Cornell Univ.*, 183 N.L.R.B. at 334.

160 *Cath. Bishop*, 440 U.S. at 504.

161 *Id.*

162 *Id.* at 507.

163 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012). To reach its conclusion, the Court considered historical controversies between church and state dating back to Magna Carta through its own jurisprudence in church property disputes in the nineteenth and twentieth centuries and took note of the fact that every circuit court of appeals had by that time recognized the exception, beginning with the Fifth Circuit in 1972. *Id.* at 182–90, 196. The ministerial exception is separate from the exceptions within Title VII and the Americans with Disabilities Act that permit religiously

employer under the ADA and Michigan's antidiscrimination statute alleging the school's termination of her employment was retaliatory.[164] Perich was a "called teacher" at Hosanna-Tabor, a school affiliated with the Lutheran Church-Missouri Synod.[165] In that capacity she taught secular subjects along with a religion class four days a week.[166] She led students in prayer and devotions daily and attended chapel weekly, leading it twice a year.[167] After becoming ill in June 2004, Perich went on leave for several months.[168] She attempted to return to her job after being medically cleared but was told that would not be possible.[169] When she refused to resign and announced her intention to pursue her legal rights, she was told the congregation was reviewing whether to rescind her call due to "insubordination and disruptive behavior" and the damage she had caused to her "'working relationship' with the school."[170] She was terminated after the congregation voted to rescind her call.[171] In a unanimous decision, the Court determined that Perich was a "minister" and therefore the ministerial exception precluded her claims under federal or state antidiscrimination statutes.[172] In reaching this conclusion, the Court looked at several factors, including whether the school held Perich out as a minister, whether she held herself out as a minister, her title, and whether there were "important religious functions she performed for the Church."[173]

In 2020, the Court again addressed whether teachers at religious schools fell within the scope of the ministerial exception. In the consolidated case *Our Lady of Guadalupe School v. Morrissey-Berru*, two teachers at Catholic elementary schools within the Archdiocese of Los Angeles challenged their respective terminations.[174] Agnes Morrissey-Berru, a lay teacher who taught fifth and sixth grade, alleged she had been demoted and her contract not renewed when the school sought to replace her with a younger teacher, in violation of the ADEA.[175]

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affiliated organizations to hire employees who share their faith. *See* 42 U.S.C. §§ 2000e-1(a), 2000e-2(e)(2), 12113(d)(2) (2018).

164 *Hosanna-Tabor*, 565 U.S. at 179–80.

165 *Id.* at 178, 177–78. Lay teachers, the title Perich initially had when she was hired, were not required to be Lutheran or have received special religious training. *Id.* In contrast, called teachers completed academic requirements, including a course in theology which Perich did at the invitation of the school. *Id.*

166 *Id.* at 178.

167 *Id.*

168 *Id.*

169 *Id.* at 178–79.

170 *Id.* at 179 (quoting Joint Appendix at 55, *Hosanna-Tabor*, 565 U.S. 171 (No. 10-553))

171 *Id.* at 179.

172 *Id.* at 175, 192.

173 *Id.* at 192.

174 Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2056–58 (2020).

175 *See id.* at 2056–58.

Kristen Biel, a long-term substitute teacher for first grade and then a full-time fifth grade teacher, alleged the school declined to renew her contract because she had requested a leave of absence for breast cancer treatments, in violation of the ADA.[176] The Court held that both Morrissey-Berru and Biel were ministers because they "performed vital religious duties," noting the operative handbooks "specified in no uncertain terms that they were expected to help the schools carry out [its mission to educate and form students in the Catholic faith]," and that the women prayed with students, attended Mass with them, and taught religion along with secular subjects.[177] The Court emphasized that the elements considered in *Hosanna-Tabor* such as title and specific training were not intended as a "checklist"[178] and that, "[w]hat matters, at bottom, is what an employee does."[179]

The Court's positions in these cases rests on First Amendment principles and a particular conception of the role that teachers play in fulfilling a religious school's mission.[180] For example, in *Catholic Bishop*, the Court explained that teachers played a "key role"[181] in systems that are "pervade[d]" by religious authority.[182] The Court went on to say that this reality was the "predicate" for its prior conclusion that "governmental aid channeled through teachers creates an impermissible risk of excessive governmental entanglement in the affairs of the church-operated schools"[183] because, unlike with textbooks, "[w]e cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education."[184]

As a general matter, the Court has abandoned much of its earlier analytical approach in Establishment Clause cases.[185] The locus of the Court's concern about teachers at religious schools has shifted from the impact of entanglement on the interests of the state and of religious schools to focusing almost solely on the impact of

176 *See id.* at 2058–59.

177 *Id.* at 2066.

178 *Id.* at 2067.

179 *Id.* at 2064.

180 *See* NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 501 (1979).

181 *Id.*

182 *Id.* (quoting Lemon v. Kurtzman, 403 U.S. 602, 617 (1971), *abrogated by* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022)).

183 *Id.*

184 *Id.* (quoting *Lemon*, 403 U.S. at 617).

185 *See Kennedy*, 142 S. Ct. at 2427–28 (recounting the abandonment of the *Lemon* test in favor of a "historical practices and understandings" approach, *id.* at 2428 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014))).

entanglement on the interests of religious schools.[186] In *Hosanna-Tabor*, Justice Alito, in a concurrence joined by Justice Kagan, explained:

> When it comes to the expression and inculcation of religious doctrine, there can be no doubt that the messenger matters. Religious teachings cover the gamut from moral conduct to metaphysical truth, and both the content and credibility of a religion's message depend vitally on the character and conduct of its teachers. A religion cannot depend on someone to be an effective advocate for its religious vision if that person's conduct fails to live up to the religious precepts that he or she espouses. For this reason, a religious body's right to self-governance must include the ability to select, and to be selective about, those who will serve as the very "embodiment of its message" and "its voice to the faithful."[187]

Justice Alito explained that, while "a purely secular teacher would not qualify for the 'ministerial' exception, the constitutional protection of religious teachers" is not diminished when teachers "take on secular functions in addition to their religious ones."[188] Striking in this formulation is complete elision of teachers as individuals: the concurrence claims this is a protection *of* teachers, when, in fact, the constitutional protection is *for* the teachers' employer, leaving the individual teacher without much protection at all. Put differently, there is a lack of recognition in *Hosanna-Tabor* that the interests of teachers and the interests of religious schools may not always be aligned.

In *Our Lady of Guadalupe*, deference to religious schools and their arguments about the function that teachers play in the work of the school also factored into the discussion.[189] Citing briefs by groups representing different religious traditions, the Court justified this deference by reiterating the "close connection that religious institutions draw between their central purpose and educating the young in the faith."[190] In dissent, Justice Sotomayor, joined by Justice

186 For a detailed analysis of this shift, which has resulted in what Richard Schragger, Micah Schwartzman, and Nelson Tebbe have called "structural preferentialism," see Richard Schragger, Micah Schwartzman & Nelson Tebbe, *Reestablishing Religion*, 92 U. CHI. L. REV. 199, 249–50, 249–54 (2025).

187 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 201 (2012) (Alito, J., concurring) (quoting Petruska v. Gannon Univ., 462 F.3d 294, 306 (3d Cir. 2006)).

188 *Id.* at 204.

189 *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2066 (2020) ("A religious institution's explanation of the role of such employees in the life of the religion in question is important.").

190 *Id.* at 2066, 2065 & nn.18–19, 2066 & n.24.

Ginsburg, argued the Court had extended *Hosanna-Tabor* too far, pointing out that the positions in question did not require a teacher to be a member of the Catholic faith.[191]

Returning to Tribe's observation that the Court's substantive due process decisions during the early to mid-twentieth century may be viewed as "constitutional protection for a network of interpersonal arrangements,"[192] the Court for a century on has largely overlooked teachers as a part of that network and sidestepped opportunities to bring them into that fold.[193] At the same time, as discussed in Part III, the Court's First and Fourteenth Amendment jurisprudence has amplified the connections between parents, students, and religious schools during that same period.

CONCLUSION

In *Meyer* and *Pierce*, the Society and the Court took for granted that the interests of schools, parents, students, and teachers were aligned. Constitutional protections for teachers at religious schools arguably have been forgotten, at least in part, because there has been a lack of judicial recognition that their interests may be separate from those of their employer, a distinction that sets *Pierce* apart from *Meyer*. The impact of that omission has come into starker focus as it becomes clear that the interests of teachers may not always align with those of the religious schools that employ them.

At the same time, the Court's growing constitutional appreciation for religious schools, demonstrated through its growing openness to state aid to such schools and by its deference to religious schools within the employment context, has both obscured the recognition of this interest misalignment and exacerbated its effects. To adapt a concept from employment discrimination law, the result has been that teachers find themselves in a *sacred double bind*: seen as integral to their employer's mission but made invisible under law without access to avenues of recourse that protect their individual associational and

191 *Id.* at 2076–78 (Sotomayor, J., dissenting) (noting that Biel's position, for instance, did not require the teacher to be Catholic and that the record stated that "[a]t no time" did Morrissey-Berru, who was not a practicing Catholic, "feel God was leading [her] to serve in the ministry" and that she did not "believe [she] was accepting a formal . . . call to religious service" when she took the job, *id.* at 2078 (alterations and omission in original) (quoting Brief in Opposition to Petition for a Writ of Certiorari app. at 2a, *Our Lady of Guadalupe*, 140 S. Ct. 2049 (No. 19-267))). Justice Sotomayor raised the fact that the handbook, too, had "promised not to discriminate on the basis of any protected characteristic," and had listed race, sex, disability, and age. *Id.* at 2078.

192 Tribe, *supra* note 65, at 1934 n.156.

193 Even where *Meyer* has been mentioned and *Pierce* has not, the Court has taken steps to limit *Meyer*'s import for teachers. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 105 (1968).

equality interests. While *Pierce* is by no means the sole contributor to this current result, the case's legacy is bound up in this current reality.