

PIERCE'S PROBLEMS

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The Supreme Court invented federal constitutional parental rights in a series of decisions in the 1920s. Pierce v. Society of Sisters continues to be widely cited and celebrated. The practical outcome of the case, prohibiting states from requiring that children attend a public school for any period of time, seems to most unassailable, and the idea of constitutional protection of parental power has intuitive appeal for many. This Article dives into the historical record and finds the outcome not so obviously correct. It digs into the Court's opinion and finds a complete lack of legal or other normative support for fabricating this federal constitutional right of parents. This doctrine should be regretted rather than celebrated. Also regrettable is the missed opportunity to develop a doctrine of children's rights regarding state exertion of power over their education and other central aspects of their lives.

For years I have approached discussion with my students of *Meyer v. Nebraska*¹ and *Pierce v. Society of Sisters*² by saying the practical outcome in each case seems obviously for the good, because the state laws at issue appeared pointless and ill-intentioned,³ but that we should interrogate the Court's reasoning nonetheless. The point of a legal education is not to decide what legal rules we like or dislike but to develop analytical and other skills, and as members of the legal profession we should care about the rule of law and the integrity of the legal system's institutions. We cannot justifiably or effectively complain of others' misuse of the power of government in ways we dislike unless also prepared to acknowledge and condemn misuses of that power when we like the immediate practical result of it. So, I have taken this

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

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

3 On motivations behind state legislation targeting private schooling in the early twentieth century, see Nicole Stelle Garnett, *Parental Rights, Parental Choice, and State Public Education Mandates*, 26 J. CONTEMP. LEGAL ISSUES 73, 73-74 (2025), and her prior work cited therein.

approach with the Supreme Court's foundational parents' rights cases,⁴ because they receive near-universal endorsement, even adulation on the political right,⁵ and also with decisions of the Court that are favorites of the political left, such as *Obergefell v. Hodges*.⁶

A deeper dive into *Pierce*, on the occasion of its centennial, including its case history and the societal circumstances that formed the backdrop of the decision, reveals a more complicated practical picture as well as the weakness of the support lawyers on both sides gave for their positions. These aspects of the background to the case might explain the complete lack of coherent analysis in Justice McReynolds's opinion. This Article will in part explain why the Oregon Compulsory Education Act of 1922 ("the Act") was more defensible than is generally supposed and deserved a better defense than the State's lawyers gave it. It also deconstructs what Justice McReynolds seemed to offer by way of analytical support for invalidating the Act. Part I describes emergence of the doctrine of parental rights in the 1920s and the lasting impact of this notion that parents are entitled to override legislative judgments regarding schooling and other aspects of children's lives. Part II clarifies what exactly the Oregon law did and did not do. Part III aims to decipher the Court's constitutional analysis in *Pierce*—that is, what textual basis it invoked and what sort of scrutiny it applied. Part IV presents pertinent information about the nature of schooling in Oregon in the 1920s. Part V focuses on the passage in Justice McReynolds's *Pierce* opinion most often cited as the site of his reasoning and explains why my students and I have always found it incoherent.⁷

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

5 See, e.g., Lindsey M. Burke, *Department of Education*, in MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 319, 34–44 (Paul Dans & Steven Groves eds., 9th ed. 2023); *Model School Board Policy on Parental Rights in Education and Safety, Privacy, and Respect for All Students in the District*, THE HERITAGE FOUND., <https://www.heritage.org/model-legislation/model-school-board-policy-parental-rights-education-and-safety-privacy-and-respect> [<https://perma.cc/2SAV-LYW4>] (last visited 25 Apr., 2025).

6 See James G. Dwyer, *Same-Sex Cynicism and the Self-Defeating Pursuit of Social Acceptance Through Litigation*, 68 SMU L. REV. 3 (2015) (discussing *Obergefell v. Hodges*, 576 U.S. 644 (2015)).

7 Even some scholars who favor constitutionalizing of parental power over children acknowledge the analytical shortcomings of Meyer and Pierce. See, e.g., Steven D. Smith, *Meyer, Pierce, and the Formation of Persons*, 26 J. CONTEMP. LEGAL ISSUES 55, 68 (2025) ("The decisions are unsatisfactory because they provide no clear and convincing explanation of how the Constitution actually forbids states to prohibit teaching in foreign languages at the lower levels, or to require everyone to attend public schools.").

I. JUDICIAL FIAT

In fabricating a federal constitutional right of parents in *Meyer* and *Pierce*, Justice McReynolds offered little that even purported to be a justification for doing so.⁸ In *Meyer*, he simply asserted that it was “[w]ithout doubt” that the Fourteenth Amendment Due Process Clause guarantees, among a litany of other things, the “liberty” to “bring up children.”⁹ The litany also included “the right of the individual to contract, to engage in any of the common occupations of life.”¹⁰ That echoed the Court’s prior renderings of the Due Process Clause during the *Lochner* era and would be pertinent to Mr. Meyer, a teacher under contract with a private school.¹¹ It is not immediately clear that this reference to bringing up children was meant to be relevant to the case, but the opinion would go on to posit a “right of parents” to enter into a contract with a teacher to instruct their children in a foreign language.¹² After the litany, Justice McReynolds suggested what they had in common was that they were “privileges long recognized at common law as essential to the orderly pursuit of happiness by free men,”¹³ but the citations following this were to cases none of which mentioned parents or childrearing nor established that all the listed privileges had become federal constitutional rights.¹⁴ The cited cases themselves contained their own

8 See generally James G. Dwyer, *Mired in Meyer’s Mischief a Century After Fabrication of Constitutional Parents’ Rights*, 26 J. CONTEMP. LEGAL ISSUES 107, 109-11 (2025).

9 *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

10 *Id.*

11 *Id.* at 396.

12 *Id.* at 400 (“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.”).

13 *Id.* at 399.

14 See *Slaughter-House Cases*, 83 U.S. 36, 74-75 (1872) (“Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State, . . . only the former . . . are placed by this clause under the protection of the Federal Constitution, and . . . the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment. If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such, the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment.”); *id.* at 78 (“[T]he privileges and immunities . . . are those which belong to citizens of the States as such, and that they are left to the State governments for security and protection, and not by this article placed under the special care of the Federal government . . .”). Cf. Brief of Appellant, *The Governor of the State of*

litanies of constitutionally-protected freedoms, and those also focused on pursuit of economic interests, not control over childrearing.¹⁵

As to economic interests and commerce, the state ordinarily acts in a police power role, serving as an agent for all members of society by promoting the collective good and facilitating social interaction. In this role, the state acts based on consideration of everyone's interests, giving equal weight to like interests of all persons and balancing interests that conflict. It promotes general welfare and guards against harms to property and person.¹⁶ Paradigmatic exercises of police power are managing the economy, building infrastructure, creating a social safety net, enacting and enforcing statutes criminalizing violence and theft, protecting public goods like the environment, creating rules for orderly movement in public and for transacting, resolving property or contract disputes, and promoting public health (e.g., mandating masks, funding medical research).¹⁷

However, the state regularly acts in capacities other than the police power. At one level or another, government can be: actor in international affairs, competitive business operator, employer, jailor, speaker in commercial advertising or the public square, service provider, funder of private service provision, party to contracts, or educator. Each of these roles has its own scope of authority and concerns,

Oregon at 43–44, *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (Nos. 583, 584) (“There cannot be found in any of them or in any other decision ever rendered by the Supreme Court either any direct decision, or any expression of opinion, that the Fourteenth Amendment gives the Federal Courts any power to interfere between a State and its citizens relative to questions of religion, education, or domestic relations including the question of the division of the power of control over children between their parents and the state. . . . [T]hese matters have been so universally recognized as being entirely within the field of state control that no one has previously considered it worth while to take up such a question for the adjudication of this court.”).

15 See, e.g., *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (“The liberty mentioned in that amendment means 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.”).

16 See Maureen E. Brady, *Turning Neighbors into Nuisances*, 134 HARV. L. REV. 1609, 1659 (2021) (“[The police power] demarcates the boundaries within which the government can affirmatively regulate for the health, safety, and welfare of its citizens, limiting some rights to protect the greater good.”).

17 See Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 794 (“‘[P]olice power’ normally refers to the authority of the states for the promotion of public health, public safety, public morals, and public welfare.”).

powers and duties, and governing norms and constraints. In the United States, different lines of constitutional doctrine pertain to those functions.¹⁸ For example, individual rights that constrain government when it acts in its police power role might do so less or nothing at all when it operates in one of the other roles.¹⁹ This is especially so when a state function approximates that of a private actor; for example, government employees have diminished free speech rights in relation to the government qua employer.²⁰ At the same time, government might be under additional *duties* to individuals in any of these nonpolice-power roles—for example, duties qua employer that it owes to employees, such as paying a salary, creating healthy work conditions, and providing health insurance.

The limits of the police power are not defined solely by the state's own choice about where to wield it; there are areas of life that, in a liberal society, are simply in principle off-limits for the police power. One such area is the choice to receive particular forms of education. The state may offer to pay for certain forms of education for me because it is in society's interest to have more people receiving them. But it may not order me, in the name of the police power, to leave my home and go to another place to receive that sort of instruction; my education is a matter of self-determining right for me. It is not subject to the police power even though the state might well further the public interest by forcing me to learn particular things. So, too, with my medical

18 See, e.g., *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008) (“[T]here is a crucial difference, with respect to constitutional analysis, between the government exercising ‘the power to regulate or license, as lawmaker,’ and the government acting ‘as proprietor, to manage [its] internal operation.’” (alteration in original) (quoting *Cafeteria & Rest. Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 896 (1961))); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (“[V]iewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker.”); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (“A school need not tolerate student speech that is inconsistent with its ‘basic educational mission,’ even though the government could not censor similar speech outside the school.” (citation omitted) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986))); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303–04 (1974) (holding that a public bus is not a public forum for free speech purposes, because it is a commercial enterprise); *Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661 (E.D. Pa. 2018) (conditions impinging religious freedom in “a state contract for . . . services” are not subject to constitutional challenge, *id.* at 687), *rev'd*, 593 U.S. 522 (2021).

19 See Johanna Kalb, Gideon *Incarcerated: Access to Counsel in Pretrial Detention*, 9 U.C. IRVINE L. REV. 101, 111 (2018) (discussing greater judicial deference to governments in their operation of prisons).

20 See *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (“[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”).

care and many other matters we consider personal, it is not the state's business.

Nevertheless, the state does properly enter such realms of children's lives and of incompetent adults' lives, because of their special needs and inability to fulfill those needs themselves. It has done so in the English-speaking world for centuries, with pride and out of a sense of collective moral obligation to those vulnerable persons.²¹ The propriety of its doing so does not, however, obviate the in-principle exclusion of the police power from those realms. The state must act in a different capacity in those realms. It must act as an agent for the individual rather than as an agent for the state. This is the *parens patriae* role that the state in the Anglo-American legal system has taken upon itself for the past several centuries. It is a fiduciary role, entailing a duty of loyalty owed to the non-autonomous person, a duty to act solely in furtherance of that person's interests and no one else's.²² The

21 Cf. *Vidal v. Girard's Ex'rs*, 43 U.S. 127, 168 (1844) ("Take this away and we become a nation of savages."); Legarre, *supra* note 17, at 764 ("The doctrine of *parens patriae* is present in some form and under some name in every reasonable legal system, for no reasonable state would wish to violate the basic ethical imperative of looking after children deserted by their parents . . .").

22 See *H v. AC* [2024] NSWSC 40 (2 February 2024) ¶¶ 54-55 (Austl.) ("In a case such as the present, the Court is not balancing the interests of the individual against broader public or governmental interests . . . All humans affect others and are affected by a myriad of relationships. . . . However, the *parens patriae* jurisdiction is not used for or directed to the benefit of parents or others related to or connected with a child that is the subject of the Court's consideration. Its exercise is directed to, and in that sense circumscribed to, doing what is necessary for the benefit and protection of such child."); *L.S. v. British Columbia*, 2018 BCSC 255, ¶ 30 (Can.) ("Courts have frequently stated that it is to be exercised in the 'best interest' of the protected person, or again, for his or her 'benefit' or 'welfare.' . . . This jurisdiction is to be exercised to protect children and other vulnerable individuals, not their parents . . ."); *J.P. v. British Columbia*, 2015 BCSC 1216, ¶ 70 (Can.) (concluding that social workers in a pediatric psychiatric facility "should not have to weigh what is best for the child on the scale with what would make the family happiest" (quoting *Syl Apps Secure Treatment Ctr. v. B.D.* 2007 SCC 38, ¶ 48 (Can.))); *E. (Mrs.) v. Eve*, 2 S.C.R. 388, 426-27, 429-31, 434 (Can.) ("The *parens patriae* jurisdiction is . . . founded on necessity, namely the need to act for the protection of those who cannot care for themselves. The courts have frequently stated that it is to be exercised in the 'best interest' of the protected person, or again, for his or her 'benefit' or 'welfare.' . . . It must be exercised in accordance with its underlying principle. Simply put, the discretion is to do what is necessary for the protection of the person for whose benefit it is exercised . . . The discretion is to be exercised for the benefit of that person, not for that of others. . . . This is particularly so in cases where a court might be tempted to act because failure to do so would risk imposing an obviously heavy burden on some other individual. . . . One may sympathize with Mrs. E [Eve's mother]. . . . But the *parens patriae* jurisdiction cannot be used for her benefit. Its exercise is confined to doing what is necessary for the benefit and protection of persons under disability like Eve. . . . So we are left to consider whether the purposes underlying the operation are necessarily for Eve's benefit and protection. . . . Many [such persons who conceive a child], it is true, may have difficulty in coping, particularly with the financial burdens

inherent dignity of the individual child or mentally disabled adult precludes domination and instrumental treatment of them in these areas of their lives in service to other individuals—any other individuals—or society as a whole.²³

Thus, the Supreme Court, lower courts, attorneys in cases such as *Pierce* that the Court has considered, and innumerable scholars have simply misconceptualized the state's relationship to children when they have referred to compulsory education laws as exertions of police power.²⁴ The debate in *Pierce* was really entirely on police power grounds, with competing arguments about the state interests at stake in children's education.²⁵ In the world as it is, we can see that governments can and do use control over primary and secondary education in part to serve state ends—for example, a stronger economy. But it is wrong to force children to have certain experiences for the sake of such ends. That treats them instrumentally, as raw material for creating a product desired in the market. The aspect of the *Meyer* and *Pierce*

involved. But this issue does not relate to the benefit of the incompetent; it is a social problem Above all it is not an issue that comes within the limited powers of the courts, under the *parens patriae* jurisdiction, to do what is necessary for the benefit of persons who are unable to care for themselves. . . . Accordingly, the procedure should never be authorized for non-therapeutic purposes under the *parens patriae* jurisdiction. . . . The fact that others may suffer inconvenience or hardship from failure to do so cannot be taken into account. The Crown's *parens patriae* jurisdiction exists for the benefit of those who cannot help themselves, not to relieve those who may have the burden of caring for them.”); *Rogers v. Okin*, 634 F.2d 650, 654, 657, 661 (1st Cir. 1980) (“Following a determination of incompetency, state actions based on *parens patriae* interests must be taken with the aim of making treatment decisions as the individual himself would were he competent to do so.”), *vacated by Mills v. Rogers*, 457 U.S. 291 (1982).

23 See James G. Dwyer, *Clarifying Parens Patriae*, 30 J. ETHICS & SOC. PHIL. 339, 373 (2026); Evan J. Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law*, 95 TEX. L. REV. 993, 995 (2017) (explaining that the duty of loyalty guards against domination “by ensuring that a fiduciary’s actions are legally required to track the terms of her mandate and the interests of her beneficiaries”).

24 See *Soc’y of Sisters v. Pierce*, 296 F. 928, 936 (D. Or. 1924); Brief on Behalf of the Appellee at 69–70, 79, *Pierce*, 268 U.S. 510 (No. 583); Brief of Appellee at 3, 16, 35–36, *Pierce*, 268 U.S. 510 (No. 584); Brief of Wm. A. Williams as Amicus Curiae at 5, *Pierce*, 268 U.S. 510 (Nos. 583, 584); Transcript of Oral Argument at 38, *Pierce*, 268 U.S. 510 (No. 583); Brief of Appellant, the Governor of the State of Oregon, *supra* note 11, at 55–57; Brief of Appellant, Isaac H. Van Winkle at 13–15, 20, 25–26, *Pierce*, 268 U.S. 510 (1925) (No. 583). Some such authorities at times mention *parens patriae*. See, e.g., *Pierce*, 296 F. at 936; Brief of Appellant, Isaac H. Van Winkle at 6, 30, *Pierce*, 268 U.S. 510 (No. 583). But, they fail to understand the nature of the role, which cannot be carried on simultaneously with police power, and the duties to children it entails, including a duty not to treat them instrumentally. See *Pierce*, 296 F. at 936 (explaining the state’s *parens patriae* aim as “preparing the child, in future life, to support itself, to serve the state and in all the relations and duties of adult life to perform well and capably its part.”); Dwyer, *Clarifying Parens Patriae*, *supra* note 23, at 343.

25 E.g., Brief of Appellee, Hill Mil. Acad. at 19, *Pierce*, 268 U.S. 510 (No. 584) (setting forth and responding to the State’s arguments).

opinions denying any power of the state to make children its “creature[s]” or to “standardize” them for state ends was therefore apt, though irrelevant hyperbole.²⁶ The Court’s framing of these cases as contests between state interests and parental interests in controlling children’s lives was, however, a category error, one entailing a profound denigration of children.²⁷ The Court, mirroring the litigants’ arguments, misconceived the state’s role in making educational choices for children among available options as a police power one, rather than a *parens patriae* one in which only children’s interests and rights matter.

Consistent with the view that education law should be solely about the needs of individual children is McReynolds’s inclusion in his litany of the right “to acquire useful knowledge,”²⁸ which presumably would mean a right of children to an education of some character. Also consistent is the view of parenting that prevailed in the mid-nineteenth century, as an entrustment by the state rather than an entitlement of parents.²⁹ A challenge to such state action thus did not fit comfortably at all within the doctrines that Justice McReynolds cited. Indeed, the Court should have said that police power doctrine was entirely inapt and that the only parties that could have any constitutional rights at stake in how the state controls children’s education were children themselves.

In any event, the foregoing was the full extent of the *Meyer* Court’s introduction of the idea of a parental right under the federal

26 *Pierce*, 268 U.S. at 535.

27 *Cf.* JAMES G. DWYER, MORAL STATUS AND HUMAN LIFE: THE CASE FOR CHILDREN’S SUPERIORITY (2011) (explaining how treating any person as an object of others’ rights constitutes an insult to human dignity).

28 *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

29 *See* Jeffrey Shulman, THE CONSTITUTIONAL PARENT: RIGHTS, RESPONSIBILITIES, AND THE ENFRANCHISEMENT OF THE CHILD (2014). *Cf.* *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Homes, J., dissenting) (“I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.”), *overruled by* *Ferguson v. Skrupa*, 372 U.S. 726, 733 (1963); Brief of Appellant, The Governor of the State of Oregon, *supra* note 11, at 29 (“The rights which they claim are certainly not granted them by the Federal Constitution, and no cases have been cited which hold that such rights existed at common law.”). There were common law decisions referring to a right of parents to direct certain aspects of children’s lives, but the right referred to was a state law conferral of decision making authority with no hint of moral or federal constitutional entitlement to its possession. *See* Dwyer, *supra* note 8, 26 J. CONTEMP. L. ISSUES at 130–39. As the Governor’s brief pointed out, it would be absurd to suggest the federal Constitution forces states forever to retain whatever laws it has at some point in time conferring advantages on certain people. Brief of Appellant, The Governor of the State of Oregon, *supra* note 11, at 30.

Constitution—a hint, in dicta, with not the slightest effort to explain how prior cases or any rational argument supported the idea. Then in *Pierce*, Justice McReynolds simply cited his own *Meyer* dicta and elevated it to the status of a “doctrine,” one that made it “entirely plain” that the law at issue was unconstitutional.³⁰ Notably, in neither case were any parents parties to the litigation, and Mr. Meyer had not even made any allegation about parental constitutional rights in any of his pleadings.³¹ It had not occurred to his lawyers to do so, because at the time no such rights were thought to lie in the federal Constitution, and in *Pierce* the Society of Sisters asserted constitutional rights of parents only because it filed suit immediately after the *Meyer* decision came down and picked up on that hint in dicta.³²

The invention of parental rights under the federal Constitution is thus one of the clearest examples of judicial activism in the Court’s history. One might expect members of the legal profession who are sincere textualists, originalists, federalists, classical liberals, or proponents of judicial restraint to condemn this unjustified fabrication of an unenumerated and never-intended federal right of parents to force states to give them greater legal power over children’s lives than political majorities at the state and local level think they ought to have.³³

30 *Pierce*, 268 U.S. at 534–35 (“Under the doctrine of *Meyer v. Nebraska* . . . we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children.”).

31 *Cf. DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 195 n.2 (1989) (refusing to consider an argument “not pleaded in the complaint, argued to the Court of Appeals as a ground for reversing the District Court, or raised in the petition for certiorari,” (first citing *Youngberg v. Romeo*, 457 U.S. 307, 316 n.19 (1982); then citing *Dothard v. Rawlinson*, 433 U.S. 321, 323 n.1 (1997); then citing *Duignan v. United States*, 274 U.S. 195, 200 (1927); and then citing *Old Jordan Mining & Milling Co. v. Société Anonyme des Mines*, 164 U.S. 261, 264–65 (1896))). *See also Pierce*, 268 U.S. at 530 (making a point of confirming that the constitutional claims had been properly pled in that case: “Rights said to be guaranteed by the federal Constitution were specially set up, and appropriate prayers asked for their protection.”).

32 *See* Transcript of Record at 8, *Pierce*, 268 U.S. 510 (No. 583) (asserting also a right of teachers, again presumably inspired by the *Meyer* decision). The Catholic school also asserted a right of children. *Pierce*, 268 U.S. at 532 (“[T]he Society’s bill alleges that the enactment conflicts with the right of parents to choose schools where their children will receive appropriate mental and religious training, the right of the child to influence the parents’ choice of a school, [and] the right of schools and teachers therein to engage in a useful business profession.”). A half century later, in *Wisconsin v. Yoder*, the Court would reject out of hand the notion that children have any right to a voice in decisions about schooling. *See* 406 U.S. 205, 233–34 (1972). The other school that was a party in *Pierce*, Hill Military Academy, asserted only its own right as a corporation to operate a business. *See* Transcript of Record, *supra*, at 5–7.

33 *Cf. Lochner*, 198 U.S. at 75 (Holmes, J., dissenting) (“It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical, as this, and which equally

But that expectation would be disappointed.³⁴ Of particular note, law professors inclined to click ‘thumbs up’ on parental rights will not be found acknowledging that the constitutionalizing of them was an act of judicial fiat.³⁵

The law at issue in *Pierce* was Oregon’s Compulsory Education Act of 1922, adopted by popular referendum and set to go into effect in 1926. It amended the State’s school law by requiring public school attendance for most children during particular years of their childhood, when aged eight through sixteen.³⁶ Two operators of private schools challenged the law, primarily complaining that this would damage their economic interests as for-profit businesses and property

with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics. The other day we sustained the Massachusetts vaccination law.” (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)); *Slaughter-House Cases*, 83 U.S. 36, 82 (1873) (“Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the perfect working of our complex form of government . . .”).

34 Two Supreme Court Justices in the modern era have signaled inclination to overturn the doctrine. See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2301, 2304 (2022) (Thomas, J., concurring) (referring to substantive due process as “an oxymoron that ‘lack[s] any basis in the Constitution,’” stating that “in future cases, we should reconsider all of this Court’s substantive due process precedents,” and concluding that “Substantive due process conflicts with that textual command and has harmed our country in many ways” and that [a]ccordingly, we should eliminate it from our jurisprudence at the earliest opportunity” (quoting *Johnson v. United States*, 576 U.S. 591, 608 (2015) (Thomas, J., concurring in judgment))); *United States v. Carlton*, 512 U.S. 26, 40–41 (1994) (Scalia, J., concurring) (“I believe that the Due Process Clause guarantees *no* substantive rights, but only (as it says) process. . . . But *economic* legislation was not the *only* legislation subjected to ‘exacting review’ in those bad old days, and one wonders what principled reason justifies ‘discarding’ that bad old approach *only as to that category*. For the Court continues to rely upon ‘exacting review’ cases . . . for its due process ‘fundamental rights’ jurisprudence.”); see also *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (“[W]e reaffirm the principle of the *Pierce* and the *Meyer* cases.”). “I would follow the text of the Constitution, which sets forth certain substantive rights that cannot be taken away, and adds, beyond that, a right to due process when life, liberty, or property is to be taken away.” *Carlton*, 512 U.S. at 42 (Scalia, J., concurring). Justice Scalia is gone, however, and many believe Justice Thomas will simply try to shift the doctrine to the Privileges and Immunities Clause.

35 See, e.g., Richard A. Epstein, *A Natural Law Approach to Parental Rights*, 26 J. CONTEMP. L. ISSUES 11 (2025); David E. Bernstein, *The Supreme Court’s Mysterious 1920s Due Process Education Trilogy*, 26 THE JOURNAL OF CONTEMPORARY LEGAL ISSUES 41 (2025); Garnett, *supra* note 3.

36 *Pierce*, 268 U.S. at 530.

owners, because it would cause their enrollment to drop.³⁷ Incidentally, one of the parties, the Society of Sisters, asserted that the law also violated the brand new federal constitutional right of parents to control their children's education.³⁸

The Society also picked up on the *Meyer* opinion's allusion to children's rights and charged that the law attempted "[to] deprive children of their right to acquire useful knowledge in a private school."³⁹ The Court, however, while mentioning a right of children in its opinion—recasting it as a peculiar "right of the child to influence the parents' choice of a school"⁴⁰—made no effort to weave that claim into its discussion of why the Society should win. *Pierce* was not to be the origin of a doctrine of children's constitutional rights relating to their education, even though it was their education at stake. Defenders of school choice have also generally chosen to eschew consideration of whether children have any rights in connection with their education, apparently finding parental entitlement more conducive to their purposes.⁴¹ Children are to be objects of others' rights, not holders of their own.⁴²

Ultimately, both *Meyer* and *Pierce* rested at their core on *Lochner*-era economic substantive due process rationales—specifically, rights to

37 *Id.* at 531–33 (“[W]ithout doubt enforcement of the statute would seriously impair, perhaps destroy, the profitable features of appellees’ business and greatly diminish the value of their property. . . . [T]he primary schools are essential to the system and the most profitable. . . . [T]heir income has steadily declined. . . . [U]nless enforcement of the measure is enjoined the corporation’s business and property will suffer irreparable injury. . . . By reason of the statute and threat of enforcement appellee’s business is being destroyed and its property depreciated . . .”).

38 Transcript of Record, *supra* note 29, at 8.

39 Brief on Behalf of Appellee at 29–30, *Pierce*, 268 U.S. 510 (No. 583).

40 *Pierce*, 268 U.S. at 532; *see also* Oral Argument on Behalf of Appellee at 19, *Pierce*, 268 U.S. 510 (No. 583) (“[Children] often, as all parents well know, instinctively have decided preferences, to which frequently parents and guardians wisely conform.”). The attorney did not consider how this supposed constitutional right of children would operate if parents refused to conform to children’s decided preferences. The Court in *Wisconsin v. Yoder* would cursorily dismiss the idea that even adolescents should have a choice-protecting right in connection with their schooling. *See Wisconsin v. Yoder*, 406 U.S. 205, 212 (1972).

41 One exception is JAMES G. DWYER, *VOUCHERS WITHIN REASON: A CHILD-CENTERED APPROACH TO EDUCATION REFORM 3* (2002). *See also* James G. Dwyer, *The Parental Choice Fallacy in Education Reform Debates*, 87 NOTRE DAME L. REV. 1837, 1838 (2012); James G. Dwyer, *The Liberal State’s Response to Religious Visions of Education*, 44 J. CATH. LEGAL STUD. 195, 195 (2005); James G. Dwyer, *School Vouchers: Inviting the Public into the Religious Square*, 42 WM. & MARY L. REV. 963, 964 (2001).

42 Some people are under the mistaken impression that rights only protect choices of autonomous persons, or at least take that stance when they do not want to think about children’s rights. The interest-protecting conception of rights has long since won the jurisprudential debate on this issue, and real life overtook the Will Theorists at least as early as *Brown v. Board of Education*, 347 U.S. 483 (1954). *See* James G. Dwyer, *Clarifying Questions About the Nature of Rights*, 12 JURIS. 47, 47 (2021).

carry on a profession or business.⁴³ Though in neither case would the law at issue itself have put anyone out of employment or business, the Court supposed the laws might have that effect indirectly by making it more difficult for parents to engage them. But in *Pierce*, Justice McReynolds more boldly attempted to bolster the decision by proclaiming a “doctrine” of parental “liberty” and intertwining that “liberty” with the school operators’ economic rights via a third-party standing rational.⁴⁴ That proclamation is what has survived from a decision otherwise relegated to the dunghill of constitutional history.

The greatest lasting real-world impact of this judicial trick has been—thanks to a great deal of overreading or misreading of that proclamation by courts, legislators, and advocates for parents—to shift power over children’s lives considerably from state legislatures and administrative agencies to parents and courts. The shift has not been from a status of state dominance to one of balance, but rather from a status of balance to parental monopoly. Today there is no meaningful regulation or oversight of private education in any form,⁴⁵ even though states are pouring billions of dollars into the coffers of religious and other private schools.⁴⁶ Parents in some states and local school districts are gaining power to dictate what is taught (or more often, not taught) in public schools. All states grant parents freedom to engage in a practice—corporal punishment—that experts uniformly say is antithetical to healthy child development.⁴⁷ Nearly all states empower parents to opt their children out of health mandates.⁴⁸ And every state effort to

43 See *Pierce*, 268 U.S. at 535–36; *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

44 *Pierce*, 268 U.S. at 534, 534–36 (“[T]he Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . Generally[,] . . . no person in any business has such an interest in possible customers as to enable him to restrain exercise of proper power of the State upon the ground that he will be deprived of patronage. But the injunctions here sought are not against the exercise of any *proper* power. Plaintiffs asked protection against arbitrary, unreasonable and unlawful interference with their patrons and the consequent destruction of their business and property.”); see also Brief on Behalf of Appellee at 32–40, *Pierce*, 268 U.S. 510 (No. 583) (advancing the standing argument).

45 See JAMES G. DWYER & SHAWN F. PETERS, *HOMESCHOOLING: THE HISTORY AND PHILOSOPHY OF A CONTROVERSIAL PRACTICE* 85–102 (2019) (describing state legislatures’ capitulation to the homeschool lobby’s assertion of absolute parental entitlement).

46 See Laura Meckler & Michelle Boorstein, *Billions in Taxpayer Dollars Now Go to Religious Schools via Vouchers*, WASH. POST (June 3, 2024), <https://www.washingtonpost.com/nation/2024/06/03/tax-dollars-religious-schools/> [https://perma.cc/SK5T-WTEM].

47 See Doriane Lambelet Coleman et al., *Where and How to Draw the Line Between Reasonable Corporal Punishment and Abuse*, 108 J. CONTEMP. L. PROB. 107 (2010); Joan E. Durrant, *Corporal Punishment and the Law in Global Perspectives*, in JAMES G. DWYER, *THE OXFORD HANDBOOK OF CHILDREN AND THE LAW* 293, 293 (2018).

48 See James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Law as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321, 1323–24 (1996).

create some counterbalance to the immense power parents have over young children in the home triggers complaints on the political left or right (rarely both at the same time) sounding in parental entitlement.⁴⁹ The trope of parental rights is so powerful in the U.S. now that it is the only nation on earth not to have ratified the United Nations Convention on the Rights of the Child, because America collectively has such heightened sensitivity to (almost) anything that might compromise parental power⁵⁰ (An interesting current exception being gender-affirming care.) The shift to such an unbalanced distribution of power has demonstrably harmed children in many ways, sometimes grievously, sometimes resulting in their death.⁵¹

49 See James G. Dwyer, *The Kincare Craze in Child Protection: Romanticism, Subterfuge, and Racial Separatism*, 19 FIU L. REV. 1, 147–48 (2025) (describing efforts of “CPS abolitionists” to undermine child protection and adoption laws, in part for the sake of sparing maltreating parents from termination of their legal-parents status); James G. Dwyer, *The Real Wrongs of ICWA*, 69 VILL. L. REV. 1, 42–52 (2024) (explaining how the Indian Child Welfare Act diminishes for Native American children state-law protections against maltreatment, for the sake of protecting parents’ supposed interest in retaining custody of children they are abusing); JAMES G. DWYER, LIBERAL CHILD WELFARE POLICY AND ITS DESTRUCTION OF BLACK LIVES 70–77 (2018) (describing a series of legislative efforts by parents’ rights advocates to undermine any permanency option for maltreated children other than return to parental custody); Linda L. Bryant & James G. Dwyer, *Promising Protection: 911 Call Records as Foundation for Family Violence Intervention*, 102 KY. L.J. 49, 73–80 (2013) (discussing objections by advocates for domestic violence victims to any state response to children’s exposure to such violence that deprives the victims of the possession of their children); James G. Dwyer, *Parents’ Self-Determination and Children’s Custody: A New Analytical Framework for State Structuring of Children’s Family Life*, 54 ARIZ. L. REV. 79, 86–91 (2012) (responding to arguments that judicial decisions in custody disputes between parents should not take into account any speech or conduct that is ordinarily constitutionally protected).

50 See Durrant, *supra* note 43, at 298. Some advocates for children themselves oppose U.S. adoption of the CRC, but for the opposite reason that it is actually too much about parental rights. See James G. Dwyer, *Inter-Country Adoption and the Special Rights Fallacy*, 35 U. PA. J. INT’L L. 189, 201–02 (2013).

51 See generally JAMES G. DWYER, LIBERAL CHILD WELFARE POLICY AND ITS DESTRUCTION OF BLACK LIVES (2018); Dwyer, *supra* note 46 (describing how concern for parental interests in recovering children they have abandoned causes children to remain institutionalized throughout childhood); James G. Dwyer, *Jailing Black Babies*, 2014 UTAH L. REV. 465 (describing the fate of children forced to live in prison with their birth mothers); Bryant & Dwyer, *supra* note 45 (describing parental-rights-based resistance to measures aimed at preventing children’s repeated exposure to domestic violence); James G. Dwyer, *No Place for Children: Addressing Urban Blight and its Impact on Children Through Child Protection Law, Domestic Relations Law, and “Adult-Only” Residential Zoning*, 62 ALA. L. REV. 887 (2011) (explaining how deference to parental rights causes children to live in inhospitable locations); James G. Dwyer, *Parental Entitlement and Corporal Punishment*, 73 L. & CONTEMP. PROBS. 189 (2010) (addressing America’s exceptionalism in explicitly authorizing physical attacks on children); James G. Dwyer, *A Constitutional Birthright: The State, Parentage, and the Rights of Newborn Persons*, 56 UCLA L. REV. 755 (2009) (deconstructing constitutional doctrine extending parental rights to family formation); James G. Dwyer, *The Child Protection Pretense: States’ Continued Consignment of Newborn Babies to Unfit Parents*, 93 MINN. L. REV. 407 (2008)

To many, the Court's invocation of parental right was simply recognition of a self-evident truth, or a moral or natural right.⁵² But efforts to present rational support for this view fall apart upon interrogation. Many attempt to defend parental rights on the grounds that it is good for children, and some support this with a blanket empirical claim that parents know what is best for their children. The normative aspect of that defense, justifying the rights by reference to children's interests, reflects a lack of understanding of rights; it is conceptually incoherent to tie one person's rights to another person's interests (or societal interests).⁵³ For some, there is also or instead a confusion of rights and authority. A right entails duties on someone else's part, owed to the right holder, because of the right holder's interests. Authority, in contrast, is decision-making power, which a person can enjoy without having a right to it—that is, even though the state or other private entity does not owe the person a duty to confer that power. If parents ought to have some degree of authority in some realms of children's lives because that is good for children, then children's interests are the normative foundation for any duty to confer that authority, and

(describing the ways child protection agencies fail children because of adherence in practice to parental rights principles); James G. Dwyer, J. Steven Svoboda, & Robert S. Van Howe, *Informed Consent for Neonatal Circumcision: An Ethical and Legal Conundrum*, 17 J. CONTEMP. HEALTH L. & POL'Y 61 (2000) (showing how America's exceptionalism in the practice of routine genital surgery for nonmedical reasons rests on assumptions of parental entitlement, even absent a religious significance); James G. Dwyer, *Spiritual Treatment Exemptions to Child Medical Neglect Laws: What We Outsiders Should Think*, 76 NOTRE DAME L. REV. 147 (2000) (critiquing near-universal authorization of parents to deny children basic preventive and remedial medical care); JAMES G. DWYER, *RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS* ch. 1 (1998) (describing ways some religious schools cause children to experience what the state regards as detrimental, with the state's blessing).

52 See, e.g., Richard A. Epstein, *A Natural Law Approach to Parental Rights*, 26 J. CONTEMP. L. ISSUES 11 (2025).

53 See James G. Dwyer, *Misused Concepts and Misguided Questions: Fundamental Confusions in Family Law Debates*, 4 INT'L J. JURIS. FAM. 239 (2013); James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CALIF. L. REV. 1371 (1994). Positing that the normative foundation and the right exist on different planes might remove the conceptual incoherence, but it would leave a seemingly insurmountable justificatory obstacle. Specifically, one might say children have a *moral* right that their parents have decision-making authority as to certain aspects of their lives, because this is good for the children, and, further, that children have a moral right that this authority held by parents be characterized *in law* as held pursuant to a right of parents themselves rather than a right of their children, even though parents have no *moral* right to that authority, because that characterization is good for children. The challenge would be establishing the truth of that last empirical premise, and I would posit that it is patently false. Locating the right in parents serves only to shift moral focus to the parents and their interests and desires, to children's detriment. Having the law instead say that parents have authority as a matter of children's rights, and only to the extent that we can justify it in child welfare terms, would be far more salutary from a child-centered perspective.

one should therefore say that children have a right to that. Similarly, we can coherently say, and we do say, that criminal defendants have a right that their lawyers possess certain authority and powers in connection with their cases. We do not say that the lawyer has a right to, for example, enter the prison where the defendant is being held or file pleadings for the defendant, but instead that the client has a right to those things. The role of guardian for incompetent adults, which is analogous to parenthood, is viewed in this way, as entailing authority held as a matter of the ward's rights rather than any entitlement on the part of the guardian to possess it.

A conceptually coherent defense of parental rights, therefore, must appeal to parents' own interests. Philosophers who write about parental rights have understood this for quite some time now, and they have made numerous and varied attempts to construct a defense on that grounds, without success.⁵⁴ A pervasive problem with such attempts is an inability to articulate a general and plausible principle of rights-ascription that would apply in any similar circumstances (e.g., of great sacrifice, of duties undertaken, of responsibility for someone's being alive) involving any other type of relationship (e.g., friends or spouses, guardian and incompetent adult, doctor-patient). Absent such a principle, it appears that people are simply inclined to treat children instrumentally in the cause of serving adults, and to make children alone in the world today objects of other persons' entitlements, because they can.⁵⁵

As for the empirical claim that parents know best, typically asserted in blanket fashion, it is so silly that hearing intelligent people utter it never ceases to amaze me. It is, first, self-contradictory. One is implicitly saying "*I know* that all parents know what is best for their children." That invites the question, "How do you know that?" The speaker is effectively presuming to be omniscient about what is best for all children and judging all parents by reference to the speaker's complete and infallible knowledge, so actually the speaker is saying that *they* know best. Second, it makes inexplicable that different parents have quite different beliefs about what is best for children in general, some diametrically opposed to others, and as a simple matter of logic they cannot all be correct. Parents sometimes make judgments based in part on their child's unique characteristics or history, but they also routinely make judgments based on "truths" about all children that they embrace. (E.g., no parents say "My younger daughter is just the

54 See generally James G. Dwyer, *Deflating Parental Rights*, 40 LAW & PHIL. 387 (2021).

55 Cf. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 ("For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.").

kind of person for whom gender-subordinating indoctrination works best, but a liberal feminist approach was right for her older sister.”) If conservative parents believe X is best for children in general, and liberal parents believe just as strongly that not-X is best for children in general, they cannot both be right, cannot both know what is best for their children.

Third, this bold empirical claim does not sit well with the phenomena of parental regret and offspring resentment. Ask a large sample of empty-nesters: “Are there any decisions you made as parents that you think were mistakes, that in hindsight you would make differently?” Probably most, including this author, would identify at least one significant example. Ask a large sample of adults whether they think their own parents made any mistakes in parenting them, and probably a large portion of them, including this author, would identify something significant. In fact, many young parents are determined to raise their own children very differently from the way they were raised. A survey of mental health professionals regarding the perceived causes of their clients’ struggles would likely also be revealing.

Fourth, there is the reality that some knowledge about children in general requires expertise. The idea that procreating generates instant omniscience about child welfare is fanciful, and it would be difficult to find a parent who does not seek out expertise from others (e.g., medical professionals) and even defer to the judgment of experts (e.g., “We’ll go with your recommendation, doctor”). Something about schooling makes a lot of people less humble than they are with respect to other aspects of children’s lives, but that might not be warranted. Relatedly, half of all parents are of below-average intelligence, and a significant percentage operate in the realm of cognitive disability. Sitting in a juvenile court for any appreciable amount of time will expose one to many stories of poor decision-making by such parents, arising from inability to discern what children need and/or what decisions and actions will fulfill those needs. Further, there is the disconnect between expertise, even if it existed, and constitutional rights. There is no connection in any theory of constitutional interpretation of which I am aware between being really good at something and having a constitutional right to do it and to block state efforts to regulate it.

These are general points about parental entitlement and capacity, which should engender greater skepticism about the Court’s creation of constitutional rights for parents. The remainder of the Article focuses on the *Pierce* case specifically, identifying what was at stake, considering what justifications the state could legitimately have had for the 1922 Act, and explaining why the closest thing to an argument for parental rights in *Pierce* is actually unintelligible.

II. WHAT WAS AT STAKE

Though the school operators tried to characterize it as such, the Oregon law challenged in *Pierce* did not prohibit private schooling.⁵⁶ It was not directed at private schools at all. The law required that for a small portion of their childhood, most people should attend a public school where they would be integrated with children of every class, ancestry, race, and religion.⁵⁷ Specifically, the law required, subject to certain exceptions, that parents send their children to a public school during the days such school was in session during the years when the children were of age eight through fifteen and had not yet completed eighth grade.⁵⁸ In the 1920s, public schools typically were required to operate for 120 days of the year (twenty-four school weeks), and in some places far fewer, for six or seven hours per day.⁵⁹ Thus, if a child attended public school for a full eight years for the required number of days, he or she would be under the tutelage of state-employed teachers for a total of at most 6,720 hours, which is roughly four percent of childhood, or six percent if one counts only hours awake (assuming eight hours of sleep on average).

The notion that this small portion of children's lives could be enough for public-school teachers to "standardize" children, whatever that means, or make them "creatures" of the state, whatever that means, even if the teachers wanted to do so (there was no evidence that any teachers wanted to), has no plausibility. It is the sort of

56 See Brief on Behalf of Appellee, *supra* note 21, at 47 (calling the law a "total and indiscriminate prohibition"); Brief of Appellee, Hill Military Academy, *supra* note 22, at 42 (stating that the effect of the law was "a distinctly useful and beneficial business being absolutely prohibited by statute"). The Attorney General did not help the State's case by stating in his brief that the State aimed to ensure "all children shall be educated exclusively in the public schools." Brief of Appellant, Isaac H. Van Winkle, *supra* note 21, at 72.

57 See Brief of Appellant, the Governor of the State of Oregon, *supra* note 11, at 40, (noting rise of tension among religious groups and the intent behind the new law to ensure interaction among youth from "all races and sects"); Supplement to Brief of Appellant, the Governor of the State of Oregon at 3, *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (Nos. 583, 584) ("The law does guarantee the privilege and right of every child to receive a *portion* of his education under such environments as will render it free from class or religious bias.").

58 See Transcript of Record, *supra* note 29, at 6–7.

59 See Transcript of Record, *Meyer v. Nebraska* (filed 4/11/1922), at 28 (indicating that most children in Nebraska were required to attend for 120 days per year (60 in rural areas), and that instruction each day was for six hours.); *Quigley v. State*, 1891 WL 289, at *4 (Ohio Cir. Ct. Oct. 1891) ("The language of the law is: 'Every parent, guardian or person having control and charge of any child between the ages of eight and fourteen years shall be required to send any such child or children to a public or private school for a period of not less than twenty weeks in each year.'"); Brief of Louis Marshall, Amicus Curiae, on Behalf of Appellees at 6, *Pierce*, 268 U.S. 510 (Nos. 583, 584) ("[I]n the rural districts, the public schools . . . give instruction for four months only").

strawman more fit for a saloon rant than a judicial opinion. Likewise with the corresponding contention that the law would deprive parents of the ability to pass on their worldview and way of life. Parents would have retained complete control over more than ninety percent of their offsprings' childhood.

With respect to schooling specifically, Oregon parents remained free to enroll their children in private schools up until age eight, by which time the children might have completed two or three elementary grades. Today in America a substantial portion of parents enroll their children in a private preschool prior to the compulsory education age, so there is nothing odd about that idea.⁶⁰ Oregon parents remained free also to enroll their children in private schools as soon as they turned sixteen, or at a younger age if they had completed eighth grade, as most children today have done by age fourteen. Likewise, many parents today send their child to public elementary school and then switch to private school for middle or high school.⁶¹ Even during the years when children had to attend public school, parents would have remained free to enroll their children in private schools during the half of the year when public schools were not in session. Summer school has been a reality in modern America for many children, and many school districts have in recent years moved toward year-round schooling. Parents could also send their children to private schools for before- and after-school classes and on weekends during the half of the year when public schools were in session. After-school catechism classes and Sunday school have been common features of American life for quite a long time and remain so. Several of the Society's schools were boarding schools, which could have sent the children out to public school in the morning and given them more instruction after they returned.⁶²

Further, some parents were exempt under the Act. One exception was for children living more than a reasonable walking distance (defined as 1.5 miles for those under eleven and three miles for those aged eleven to fifteen) from the nearest public school, if the school district did not provide transportation for them.⁶³ The record of the

60 See National Center for Education Statistics, "School Enrollment Rates of Young Children," <https://nces.ed.gov/programs/coe/indicator/cfa/enrollment-of-young-children> (May 2024) [<https://perma.cc/JDR8-ED88>].

61 Colyn Ritter, "Support for School Choice Rose in December 2022, Quarter of Parents Report Switching School Types," <https://www.edchoice.org/engage/support-for-school-choice-rose-in-december-2022-quarter-of-parents-report-switching-school-types/> (Jan. 12, 2023) [<https://perma.cc/PM3F-D64X>].

62 The Attorney General made this point. See Brief of Appellant, Isaac H. Van Winkle, *supra* note 21, at 34.

63 See Transcript of Record, *supra* note 29, at 7.

case did not disclose for how many children that was true. Another exception was that state law allowed parents to forego public school attendance for a child entirely, in favor of teaching the child themselves or having a “private teacher” do so, if the local superintendent gave “written permission” and for so long as periodic examinations showed the child was “being properly taught.”⁶⁴ There is no mention in the case record of any parents thwarted in their efforts to do this. And as noted, once a child finished eighth grade (which they might have done by homeschooling), regardless of age, they could attend private school.

So, the relevant childrearing policy question—that is, whether the outcome is “correct”—is not whether it is bad to foreclose religious or other non-state-controlled education for children, but rather whether it is bad or good to require that most children have a common school experience for one-half of the year for eight years or less. Thus, although the Court might have been correct that “without doubt enforcement of the statute would seriously impair, perhaps destroy, the profitable features of appellees’ business and greatly diminish the value of their property,”⁶⁵ that is constitutionally irrelevant, and it is not the policy outcome on which anyone focuses in assessing *Pierce*. Rather, it is which educational options are permitted or required for children. But the Oregon law did not change this; it did not eliminate any options for parents or children. The Court was therefore patently incorrect in insinuating that the Oregon law was “forcing them to accept instruction from public teachers only.”⁶⁶ And its point that the “parties are engaged in a kind of undertaking not inherently harmful” was impertinent.⁶⁷ As the Court conceded, the law did not purport to “amend the charters” of the private schools or to do anything else to them whatsoever.⁶⁸ It did not even mention private schools.

This reality about the practical division of children’s lives that the Oregon law would have affected also belies every assertion of a parental “natural right” to convey their beliefs, to play a central role in a child’s life and so forth; surely, having control over more than ninety percent of a child’s life before adulthood is sufficient for that purpose. To pit a supposed natural parental right against the law would require casting it as a right to 100% control and, concretely, to exclude every other

64 *See id.*

65 *Pierce*, 268 U.S. at 531.

66 *Id.* at 535.

67 *Id.* at 534.

68 *Id.* at 535.

influence in a child's life.⁶⁹ I have rarely seen any proponent of this mystical notion of natural rights characterize the content of the right that way, and I have never seen any attempt to defend giving the notion that content. It is a slogan, not the conclusion of any rational thought. The political motivation for propounding this slogan-masquerading-as-political-theory is evident from the conspicuous absence of any consideration for what natural rights children have in this supposed pre-political universe.⁷⁰

III. WHAT CONSTITUTIONAL TEST DID OREGON HAVE TO PASS?

The constitutional question in *Pierce* was whether the Oregon law so understood violated an unenumerated right of private schools and /or of parents that somehow arose from the Fourteenth Amendment Due Process Clause. The Court ultimately appeared to rest the decision on rights of the schools, but it suggested they had third-party standing to invoke constitutional rights of non-parties, in order to make a right of parents (who were not parties to the case) relevant in some way to its analysis.⁷¹ And it is the posited parental right that is of continuing significance.

A. Nature of the Right

From a jurisprudential perspective, the nature of that supposed right is unclear. The Court characterized the parents' relevant constitutional position as "the liberty" they enjoy with respect to "upbringing and education."⁷² One thing to note about that passage is the implication that the "liberty" the Court will ascribe to parents was not limited to education, though what "upbringing" means as distinct from education goes unspecified. In the ensuing century, parents have cited *Pierce* in a great variety of cases—not just cases involving private schooling, but also when trying to control what public-school teachers discuss with students,⁷³ when objecting to a family court's orders regarding

69 Cf. Supplement to Brief of Appellant, the Governor of the State of Oregon, *supra* note 53, at 3 ("Those who seek to create a monopoly of education are to be found among the opponents, not the supporters, of the new Oregon School Law.").

70 See, e.g., Melissa Moschella, *Defending the Fundamental Rights of Parents: A Response to Recent Attacks*, 37 NOTRE DAME J.L. ETHICS & PUB. POL'Y 397 (2023); Brief of Wm. A. Williams as Amicus Curiae, *supra* note 21, at 5–14.

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

72 *Id.* at 534.

73 See, e.g., *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 265 (N.Y. App. Div. 1993) (holding that parents have a right to rear and educate children according to their religious views—especially regarding conversations around sex education where a school is distributing condoms and discussing HIV/AIDS without parental consent—because the "Constitution gives parents the right to regulate their children's sexual behavior as best they can"); *Price v.*

third-party visitation,⁷⁴ and when opposing recommended preventative or remedial health care for children.⁷⁵ Putting a child's life at risk because of religious objection to medical treatment does not easily fit within the concept of "upbringing," but courts have not attempted to narrow the meaning of that term nor the subject-matter reach of parental constitutional rights. The rights are assumed to apply, and thus to constitute a potential basis for invalidating or blocking state action, whenever parents object to anything state actors do that appears to interfere with their control over a child's life (including its continuation). The *Pierce* Court might not have anticipated how far-reaching parental-rights doctrine would become, but after the fact we can say much more was at stake than just whether children must attend public school for some portion of their childhood.

Beyond the question of reach, there is the question of what exactly the Court gave parents. A liberty in a jurisprudential sense is absence of a duty.⁷⁶ The law at issue did put parents under a duty, to "send" a child to a public school at certain times.⁷⁷ The holding might therefore be read as stating simply that the state may not impose that positive

N.Y.C. Bd. of Educ., 837 N.Y.S.2d 507, 525 (N.Y. Sup. Ct. 2007) (holding that parents who oppose cellphone ban in schools and claim fundamental parental rights have control in educational decisions regarding their children); *Parents for Educ. & Religious Liberty in Schs. v. Young*, 215 N.Y.S.3d 552, 560 (N.Y. App. Div. 2024) (Egan Jr., J., dissenting) (dissenting judge expressing concern that the decision made by the majority takes away parental discretion to make decisions for their children's education, quoting *Pierce's* "liberty of parents and guardians to direct the upbringing and education of children under their control" as basis for this (quoting *Pierce*, 268 U.S. at 534–35)); *New York State United Teachers ex rel. Ianuzzi v. State*, 993 N.Y.S.2d 475, 691 (N.Y. Sup. Ct. 2014) (acknowledging Supreme Court creation of a constitutional parental right but holding that a majority-vote rule for school budget approval does not violate that right), *aff'd sub nom.* *State United Teachers ex rel. Magee v. State*, 31 N.Y.S.3d 618 (N.Y. App. Div. 2016).

74 See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65, 67 (2000).

75 See, e.g., *Michael N. v. Montgomery Cnty. Dep't of Soc. Servs.*, 185 N.Y.S.3d 493, 517–18 (N.Y. Sup. Ct. 2022) (Parent arguing that *Pierce* and *Meyer* allowed him to be free from interference by the state with the court upholding his right to rear and educate his child but also substantiating the need for interference in instances where abuse is alleged and determined to be present); *In re Cicero*, 421 N.Y.S.2d 965, 968 (N.Y. Sup. Ct. 1979) (holding that parental rights are not absolute when medical care is life saving and necessary for a child to live or live without severe handicaps); *In re Matthew V.*, 68 N.Y.S.3d 796, 801 (N.Y. Fam. Ct. 2017) (holding that parents have a right to decide their children's medical care *unless* an ACS intervention is necessary for the safety of the child); *In re Sampson*, 317 N.Y.S.2d 641, 650 (N.Y. Fam. Ct. 1970) (holding that parents' right to encourage their children's religious beliefs do not always extend to opposing necessary medical intervention, such as a blood transfusion), *aff'd*, 323 N.Y.S.2d 253 (N.Y. App. Div. (1971), *aff'd*, 278 N.E.2d 918 (N.Y. 1972).

76 *Liberty*, BLACK'S LAW DICTIONARY (2024).

77 See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 530–31 (1924).

duty on parents, that parents have a legal immunity under the Fourteenth Amendment as to sending children somewhere.

It would have been more difficult for the Court, if it cared about conceptual niceties, to treat the law as a “liberty” problem for parents if the law instead said, as many state laws now do, that every child within a certain age range “shall attend” public school while it is in session, without mentioning parents. Truancy actions today, notably, typically name the child as defendant/respondent. So, a law thus phrased arguably imposes a legal duty on children, not parents, and one wonders how the Court would have handled a constitutional challenge predicated on the Fourteenth Amendment “liberty” of children.⁷⁸ As the Governor pointed out in *Pierce*, “it is a strange perversion of the meaning of the word ‘liberty’ to apply it to a right to control the conduct of others.”⁷⁹

The Court seemed not to construe “liberty” in jurisprudential terms, however. It seems to have understood “liberty” in a more common-parlance sense of being able to do what one wants, and that is likely how the drafters of the Fourteenth Amendment meant it. “Liberty” in everyday discourse connotes freedom of speech and action, without constraint.⁸⁰ The Oregon law, however, did not proscribe any speech or action by parents. And anyway, possessing legal power over another person’s life is not speech or action; it is occupying a certain legal position or status that makes one’s choices legally effective. But the law did coerce parents to do something they did not want to do, and liberty also has this dimension of freedom from coercion and compulsion, freedom not to. Among the things that irked Patrick Henry, the slaveholder famous for supposedly valuing “liberty” above life, was compulsion to pay a tax.⁸¹

But this again raises the question of what the Court would have done with a statute that commanded children to attend school and that did not mention parents. Such a law still would have shrunk to some degree parents’ *ability* “to direct the upbringing and education

78 I offer an analysis of homeschooling in these terms—that is, beginning by positing a right of children, against the state ordering them to leave their homes in order to receive an education—in DWYER AND PETERS, *supra* note 45, at 193.

79 Supplement to Brief of Appellant, the Governor of the State of Oregon, *supra* note 53, at 8. The Governor also contended that prior Court decisions reflected the federalist view that the Constitution did not empower the federal government to intrude into family matters. See *id.* at 8–9.

80 See, e.g., *Liberty*, THE MERRIAM-WEBSTER DICTIONARY (2024).

81 See “Give Me Liberty or Give Me Death!”, COLONIAL WILLIAMSBURG (Mar. 3, 2020), <https://www.colonialwilliamsburg.org/learn/deep-dives/give-me-liberty-or-give-me-death/> [https://perma.cc/XR8Y-UGL4] (noting, *inter alia*, that this proclamation was attributed to Henry by a biographer writing roughly sixty years after he delivered the speech in Richmond, Virginia).

of children under their control,"⁸² by requiring that children be out of their direct control for some period of time, and it would have deprived them of some increment of other-regarding legal power, but neither of those effects amounts to constraint of parents' speech or action nor compulsion of parents to speak or act. So it would have been more difficult to fit in a "liberty" box, even on an ordinary language interpretation of that term. And the Court has not (yet) taken the step of characterizing parental rights as property rights.⁸³

B. *Level of scrutiny*

An important question for courts subsequent to *Pierce* is what the Court ends up saying states must show in order to defend education laws against constitutional challenges. It turns out to be very modest. The clearest indication of a "test" is the Court's conclusion that the Act "unreasonably interferes" with parents' liberty because it "has no reasonable relation to some purpose within the competency of the state."⁸⁴ The schools themselves used the same language in their briefs, suggesting the constitutional test was not much in dispute in the case.⁸⁵ This suggests a standard of judicial review that would later come to be called rational basis review, which is itself significant, because some commentators have claimed parental rights are fundamental ones in due process doctrine, and ordinarily fundamental rights trigger heightened scrutiny.⁸⁶ (It is probably best to ignore as superfluous rhetoric the Court's suggestion that the law must fail because it

82 *Pierce*, 268 U.S. at 534–535 (1925).

83 *But see* Brief on Behalf of Appellee, *supra* note 21, at 66 ("[T]he child of man is his parent's child and not the state's."); Appendix I to Brief on Behalf of Appellee at 26, *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1924) (No. 583) (an argument against the referendum, included in the official ballot, stating: "Who owns your child? . . . Do not you? . . . If you don't own your own child, what in the wide world do you own?").

84 *Pierce*, 268 U.S. at 534–35.

85 *See, e.g.*, Brief on Behalf of Appellee, *supra* note 21, at 41, 44; Brief of Appellee, Hill Military Academy, *supra* note 22, at 5–6, 34; *see also* Brief of Appellant, Isaac H. Van Winkle, *supra* note 21, at 23. *But see* Brief of Appellee, *supra* note 21, at 7–8 (citing one precedent hinting at more robust scrutiny, demanding that state law have a "real substantial relation" to its aim and not "interfere . . . beyond the necessities of the case," *id.* at 7, and "must be reasonable and must clearly appear to be for the public welfare," *id.* at 8).

86 *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring). *Meyer v. Nebraska* similarly rested on a finding "that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State," 262 U.S. 390, 403 (1923), though that decision alluded vaguely at one point to "fundamental rights." *Id.* at 401 ("That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected.").

“standardize[d]” children and made them “mere creature[s] of the State,”⁸⁷ as that would likely lead to parents losing in every case where courts actually cared to consider evidence of a law’s impact. Indeed, a common conservative complaint today is that public schools are too tolerant of—indeed unduly promoting—diversity in ideas, values, and lifestyles, a complaint manifest in, e.g., calls to ban certain books from school libraries and to prevent expression of gender non-conformity.)

Potential further guidance for the Fourteenth Amendment test Justice McReynolds had in mind, and further indication that the Court’s initial construction of parental constitutional rights was quite modest, is the majority opinion’s statement:

No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.⁸⁸

“No question is raised” is ambiguous, of course. It could mean “the power of the state to do these things is unquestionable,” in which case the implicit explanation might be that the state clearly has legitimate reasons for doing these things. Or it could mean “we will not be getting into the question of whether the state has the power to do these things because no one asked us to do so,” leaving an opening for the numerous challenges to state regulation of private schools later in the century. The phrasing of the first and last items on the list, though, support the first reading; it would be odd to say “we put off for another day the question whether the state may do something reasonable regarding private schools and may stop practices inimical to the public welfare.”

Thus, if we were to reconsider the Court’s holding—its application of this test—in light of actual circumstances in Oregon in the mid-1920s, we should ask whether Oregon, if it had better lawyers, could

87 *Pierce*, 268 U.S. at 535. In *Meyer*, Justice McReynolds had alluded hyperbolically to an ancient Greek philosopher’s vision of child rearing (never realized in practice anywhere), in which “no parent is to know his own child, nor any child his parent,” 262 U.S. at 401–02, and to one actual ancient Greek state’s practice with respect to boys’ upbringing. Ironically, the experience of boys in Sparta, which “assembled the males at seven into barracks and intrusted [sic] their subsequent education and training to official guardians,” *id.* at 402, sounds very much like that of children who attended the Hill Military Academy, a residential military training facility. *Pierce*, 268 U.S. at 533.

88 *Pierce*, 268 U.S. at 534. Similarly cagey language appears in his *Meyer* opinion: “The power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned.” *Meyer*, 262 U.S. at 402.

have shown that the law served any legitimate state purpose. That question constitutes the background to Part IV.

IV. SCHOOLING IN 1920S OREGON

To assess whether the Oregon law, properly understood, was good or bad for children in Oregon in the 1920s, we should ask what benefits for them would arise from public school attendance and whether there was anything problematic about private schooling there and then.

The total population of Oregon in the mid-1920s was approaching 900,000, less than a fourth of what it is today.⁸⁹ The population was fairly evenly divided between urban and rural settings.⁹⁰ The largest city then, as now, was Portland.⁹¹ It had roughly 275,000 people,⁹² and that is where several of the schools involved in the *Pierce* litigation were located.⁹³ As of 1922, the year the legislation at issue in *Pierce* was enacted, Oregon had 2,825 public schools (with 160,924 students) and 92 private schools (with 12,031 students).⁹⁴ So, 93% of children attending primary or secondary school were already attending public school. According to the Society's attorney, the great majority of public schools then "were one-room schools, where all grades and both sexes were intermingled" and one in five teachers had not themselves completed a "normal school."⁹⁵ Presumably those in cities were in big buildings with children divided by grades. Most of the private schools

89 *Oregon Population 1900–2024*, MACROTRENDS, <https://www.macrotrends.net/global-metrics/states/oregon/population> [https://perma.cc/SW7M-YC4Z] (last visited Feb. 2, 2025).

90 2 BUREAU OF THE CENSUS, CENSUS OF POPULATION: 1950, pt. 37, at 37-10, tbl. 1 (1952).

91 *See id.*

92 *Id.* at 37-12, tbl. 12.

93 *See* Robert Bunting, *Sisters of the Holy Names of Jesus and Mary*, OREGON ENCYCLOPEDIA, https://www.oregonencyclopedia.org/articles/sisters_of_the_holy_names/ [https://perma.cc/XHD9-UNN7] (last visited Feb. 2, 2025); William Cornett & Kenneth R. Coleman, *Hill Military Academy*, OREGON ENCYCLOPEDIA, https://www.oregonencyclopedia.org/articles/hill_military_academy/ [https://perma.cc/8Y25-PG9W] (last visited Feb. 2, 2025).

94 *Cost for 4,862 More Kids*, 30 OR. VOTER 72, 364 (1922). This includes both primary and secondary schools. By 1924, the number in private schools had shrunk to under six thousand, supporting the schools' claim that the law immediately impacted them even though it would not be enforced till 1926. *See* Brief on Behalf of Appellee at 7, 26–32, *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1924) (No. 583).

95 Transcript of Oral Argument, *supra* note 21, at 17 (referring to "the little schools in the wild prairie and in the dense timber districts," *id.* at 31, lacking the funds to employ competent teachers).

were Catholic, and the great majority of children who attended private school attended a Catholic school.⁹⁶

Proponents of the Oregon law expressed concern about the assimilation of immigrants and children of immigrants.⁹⁷ They made up over twenty percent of all school-aged children at the time.⁹⁸ The record does not make clear how many such children attended private school,⁹⁹ but it seems reasonable for state actors to suppose that requiring all children to interact with peers outside their social class and cultural community for parts of several years would be good for all of them.

Conversely, what negative experience in private schools would it prevent? Justice McReynolds's *Pierce* opinion asserted: "[Appellees] are engaged in a kind of undertaking not inherently harmful, but long regarded as useful and meritorious. Certainly there is nothing in the present records to indicate that they have failed to discharge their obligations to patrons, students or the State."¹⁰⁰ Importantly, private schools' legal obligations in Oregon in 1925 were fairly robust. The filings in the case are replete with statements that state law required the education in private schools in secular subjects to be effectively the same as that in public schools, entailing even use of the same textbooks, and that it was in fact so.¹⁰¹ The Court's decision should be understood in that light and, arguably, as dependent on such a legal backdrop of real academic expectations and accountability.

Justice McReynolds also endorsed the trial court's finding that the two particular schools involved in the litigation were "not unfit or harmful to the public."¹⁰² The Court's decision, however, struck down the state statute in its entirety, rather than merely holding it unconstitutional as applied to those two schools, and the Court had before it no evidence about other private schools.

96 Brief on Behalf of Appellee, *supra* note 21, at 7, 14–15; *Cost for 4,862 More Kids*, *supra* note 75, at 364.

97 *Id.* at 59; Appendix I to Brief on Behalf of Appellee, *supra* note 76, at 24–25, 59 (affirmative argument included with ballot).

98 See Brief of Appellee, Hill Military Academy, *supra* note 22, at 20.

99 The Governor asserted that it was "the vast majority of children not now attending the Public Schools." Brief of Appellant, The Governor of the State of Oregon, *supra* note 11, at 4. Hill asserted that such children were those whose parents were too poor to pay private school tuition, but that was just speculation. Brief of Appellee, Hill Military Academy, *supra* note 22, at 20–21.

100 *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925).

101 See Brief on Behalf of Appellee, *supra* note 21, at 4–5; Brief of Appellee, Hill Military Academy, *supra* note 22, at 29–30; Appeal from the District Court of the United States for the District of Oregon, *supra* note 29, at 2.

102 *Pierce*, 268 U.S. at 534.

Within the private elementary school population, eight thousand children attended Catholic schools, and some 750 students Adventist schools, 400 Lutheran, and 310 “other” schools.¹⁰³ The “other” included boarding schools, which a contemporary source characterized as allowing more “thorough” discipline for children with “special educational and character-building” needs.¹⁰⁴ Hill Military Academy was among the boarding schools that emphasized physical training and more severe discipline.¹⁰⁵ It had been founded in 1901 by Joseph Wood Hill, a Yale classmate and lifelong friend of William Howard Taft, who was Chief Justice of the Supreme Court (and former POTUS) in 1925.¹⁰⁶ It was for boys only.¹⁰⁷ The school remained in operation till 1959, when declining enrollment made it unprofitable.¹⁰⁸ There were also private schools in Oregon for girls only.¹⁰⁹

Racial animus and discrimination were prevalent in Oregon in the 1920s,¹¹⁰ yet public schools had been racially integrated already for a half century.¹¹¹ St. Mary’s Academy in Portland, which had been operated by the Society of Sisters of the Holy Names of Jesus and Mary since 1859, accepted only white children at that time.¹¹² Presumably this was true as well of the eleven other schools the Society operated in Oregon,¹¹³ and might have been true of most private schools.

Private schools also included some of the infamous “Indian boarding schools.” Native American children in America were at that time forcibly removed from their communities and placed in special “Americanizing” Dickensian institutions.¹¹⁴ The federal government

103 Brief on Behalf of Appellee, *supra* note 21, at 15.

104 30 OR. VOTER 64, 72 (July 15, 1922).

105 See Cornett & Coleman, *supra* note 87.

106 See *id.*

107 30 OR. VOTER 136, 144 (July 29, 1922). For many years it sent one graduate per year to the US Military Academy at West Point. *The Hill Military Academy*, HILL MIL. ACAD. (Jan. 20, 2009), <http://hillmilitary.blogspot.com/> [<https://perma.cc/J4BE-TU9N>].

108 Cornett & Coleman, *supra* note 87.

109 30 OR. VOTER 136, 144 (July 29, 1922).

110 See Longreads, “Oregon’s Racist Past,” <https://longreads.com/2018/07/12/oregons-racist-past/> [<https://perma.cc/BS2Z-P5RY>] (July 12, 2018).

111 See Ethan Johnson & Felicia Williams, *Desegregation and Multiculturalism in the Portland Public Schools*, 111 OR. HIST. Q. 6, 6 (2010). Immigrants, who made up thirteen percent of the state population, generally attended public school, regardless of their race. Appendix I to Brief on Behalf of Appellee, *supra* note 76, at 42 (“Few of the students attending private schools are children of foreign born parents. The vast majority of the children of foreign born parentage in Oregon attend the public schools.”).

112 Bunting, *supra* note 87.

113 See Transcript of Oral Argument, *supra* note 21, at 3–4 (describing that the schools operated in four counties, *id.* at 6); Brief on Behalf of Appellee, *supra* note 21, at 6.

114 See SuAnn M. Reddick & Eva Guggemos, *Chemawa Indian School*, OR. ENCYCLOPEDIA (Dec. 27, 2022), https://www.oregonencyclopedia.org/articles/chemawa_indian_boarding_school/ [<https://perma.cc/EPB8-W5YE>].

supplied much of the funding for such schools, but the government partnered with churches and other private organizations to operate some.¹¹⁵ Oregon had at least one such school in the 1920s, the Salem Indian School at Chemawa, situated on land once inhabited by the Kalapuya tribe, designed to “forcefully assimilate Native children into the white, Christian man’s image.”¹¹⁶ Chemawa’s enrollment peaked in 1927 at 1,100 students.¹¹⁷ The 1920 U.S. Census reported that 1,466 American Indians in total attended school in Oregon, so some might have attended public schools.¹¹⁸

When Native children went to Chemawa, “for a term that could last from three to ten years, their clothes were replaced with military-style uniforms, their hair was cut, and they were forbidden to speak their Native languages.”¹¹⁹ The students were given Christian names and punished for speaking anything other than English or practicing their tribal traditions.¹²⁰ Some students lost their ability to speak their Native languages and therefore to communicate with their parents, if and when they returned home.¹²¹ Their daily life was a mixture of education and labor:

Academics were cursory, emphasizing basic competence in reading and writing English. Vocational training was designed to prepare students for trades or domestic work, such as carpentry, shoemaking, farming, laundry, and cooking. At the same time, however, the students’ labor in these tasks was critical to the daily upkeep of the school. Boys learning carpentry built most of the school buildings, while the girls did nearly all of the cooking, serving, washing, and sewing. Most of this labor was unpaid. Other activities included military drills and athletics and compulsory attendance at the local Congregational church. . . . Chemawa students were taught agricultural, mechanical, industrial, and domestic skills along with some formal education, although the curriculum minimized literacy

115 *Id.*

116 Natalie Pate, Capi Lynn & Dianne Lugo, *Chemawa Indian School Families Seek Answers, Healing Through Federal Investigation*, USA TODAY (Oct. 25, 2021, 10:53 AM), <https://www.usatoday.com/in-depth/news/nation/2021/10/24/native-american-assimilation-boarding-schools-chemawa-salem-oregon-deb-haaland/6165318001/> [https://perma.cc/BF29-NNWC]. The military officers who led these schools used “Kill the Indian and save the man” as their motto. Reddick & Guggemos, *supra* note 108.

117 Reddick & Guggemos, *supra* note 94.

118 2 BUREAU OF THE CENSUS, FOURTEENTH CENSUS OF THE UNITED STATES—1920, at 1053 (1922).

119 Reddick & Guggemos, *supra* note 108.

120 Pate et al., *supra* note 110.

121 See Carolyn J. Marr, *Assimilation Through Education: Indian Boarding Schools in the Pacific Northwest*, U. WASH. LIBRS.: AMERICAN INDIANS OF THE PACIFIC NORTHWEST COLLECTION, <https://content.lib.washington.edu/aipnw/marr.html> [https://perma.cc/4TLL-J7BW] (Aug. 15, 2024). For an example of the daily schedule for the students, see *id.*

and mandated military regimentation, obedience, and servitude. Uniforms and marching were the norm for decades. Boys attended courses in farming, painting, baking, shoemaking, drafting, machining, blacksmithing, and masonry. Girls were taught to sew, cook, launder, make beds, and sweep floors. All school operations depended on their labor, and all students were placed as laborers, servants, or cooks in “outing” programs in local businesses, farms, and homes.¹²²

Unfortunately, many students died in the cramped and harsh conditions at Chemawa Indian School, from communicable diseases such as tuberculosis, meningitis, and influenza.¹²³ From 1880 to 1945, at least 270 children died in the school’s custody, and 175 are buried in Chemawa’s cemetery, mostly in unmarked graves.¹²⁴ Students were commonly physically and sexually assaulted by staff members.¹²⁵ When students at Indian boarding schools tried to run away, they were punished severely.¹²⁶

Proponents of the Oregon law, and the Oregon Attorney General in defending it, emphasized assimilation and cohesive integration of children from immigrant groups.¹²⁷ The private schools’ response in *Pierce* was principally that there were too few children attending private schools to worry about their posing any threat to the State.¹²⁸ But that is a police power concern, whereas the State could be understood as advancing a child welfare rationale from a *parens patriae* perspective. Having attended Catholic schools throughout childhood, I can attest that it has an insulating effect that handicaps one in adulthood if one attempts to thrive in more diverse settings. The State might also have

122 Reddick & Guggemos, *supra* note 108.

123 *Welcome*, PAC. U. OR.: DEATHS AT CHEMAWA INDIAN SCH., <https://heritage.lib.pacificu.edu/s/deaths-chemawa/page/welcome> [<https://perma.cc/5EG7-HH9D>] (last visited Aug. 15, 2024); Addie C. Rolnick, *Assimilation, Removal, Discipline, and Confinement: Native Girls and Government Intervention*, 11 COLUM. J. RACE & L. 811, 860 (2021).

124 *Welcome*, *supra* note 117.

125 Pate et al., *supra* note 110.

126 Marr, *supra* note 115.

127 See Brief on Behalf of Appellee, *supra* note 21, at 59, 63 (responding to this argument). Common belief is that the KKK was behind it, and it did support the law. See Kristin Dimick, *The Ku Klux Klan and the Anti-Catholic School Bills of Washington and Oregon*, https://depts.washington.edu/civilr/kkk_i49.htm [<https://perma.cc/JW9G-WA87>] (last accessed Apr. 29, 2026). In fact, Governor Pierce had a close relationship with the Klan. See DeNeel L. Brown, “When Portland banned blacks: Oregon’s shameful history as an ‘all-white’ state,” <https://www.washingtonpost.com/news/retropolis/wp/2017/06/07/when-portland-banned-blacks-oregons-shameful-history-as-an-all-white-state/> [<https://perma.cc/3RGP-MLJH>] (June 7, 2017). In terms of who wrote arguments to voters, to be included in the referendum literature, however, it was certain Freemason organizations that were also anti-Catholic. See Dimick, *supra*; Appendix I to Brief on Behalf of Appellee, *supra* note 76, at 24–25.

128 Brief on Behalf of Appellee, *supra* note 21, at 60.

pointed out that the numbers could change, as indeed they have, with roughly fifteen percent of parents in the United States now choosing a private option for their children's education.

In addition, the State's case could have been stronger if the Attorney General and Governor had thought more comprehensively about differences between the public and private schools and collected information about problems with the latter.¹²⁹ They could have pointed to the facts that many private schools were racially exclusive, that some engaged in what the State regarded as excessively harsh treatment of children, and that some aimed to stifle critical and independent thinking.¹³⁰ The Freemasons' argument for the law, included in the referendum ballot, did allude to racial integration as a benefit of the law, which might have been an indirect reference to the racist policies of many private schools.¹³¹

The schools argued that, if there were any deficiencies in any private schools, the State could regulate rather than drive them out of business.¹³² The State could have responded, however, that ensuring private entities' conformity with regulations is quite difficult,¹³³ especially with entities that resist and resent government oversight and/or operate on the basis of a very different set of expectations for children, which has been true of many private schools in the past century and still today.¹³⁴ Indeed, the schools contended in *Pierce* that it was unconstitutional to give local superintendents authority to decide whether exemptions to the compulsory education law were warranted.¹³⁵

129 Cf. Brief of Appellee, Hill Military Academy, *supra* note 22, at 18 (“[N]o where in the briefs of either the Attorney General or the Governor does there appear a single fact, a single citation of authority, or a word about local conditions in the State . . .”); Transcript of Oral Argument, *supra* note 21, at 22 (attorney for Society stating that the Attorney General had presented “not the slightest suggestion or pretense either in argument or brief that the private or parochial schools were in any way inferior to the public schools”).

130 They did refer to mixing of all races as a virtue of public schools, which might be read as an indirect reference to the racial uniformity of most private schools. See, e.g., Brief of Appellant, the Governor of the State of Oregon, *supra* note 11, at 40. On religious schools' suppression of independent thinking later in the twentieth century, see *supra* note 45. It is difficult to locate any descriptions of religious school operations in the 1920s in Oregon, but it seems safe to assume they were even more authoritarian then.

131 Appendix I to Brief on Behalf of Appellee, *supra* note 76, at 25.

132 Brief on Behalf of Appellee, *supra* note 21, at 45–46, 64; Transcript of Oral Argument, *supra* note 21, at 32.

133 The Attorney General did make this point in his supplemental brief. See Supplement to Briefs of Appellant, Isaac H. Van Winkle, at 3, 6–7, *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (Nos. 583, 584) (noting that not all local superintendents can be relied upon to undertake the task in other than a superficial way, “[h]uman nature being what it is, and political conditions being what they are”).

134 See DWYER, *supra* note 45.

135 See Brief of Appellant, Isaac H. Van Winkle, *supra* note 21, at 47 (responding).

Conversely, given that a huge amount of the children's time remained available for parents to control, the law did not significantly diminish opportunity for religious education and classes provided by private educators. In short, passing rational basis review should have been a no-brainer.

V. MYSTERIOUS COUPLING

The Fourteenth Amendment analysis in *Pierce* is longer than a Tweet, but not by much:

[W]e think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.¹³⁶

I addressed some aspects of this passage above—in particular, the meaning of “liberty.”¹³⁷ I also noted the falsity of the suggestion that the law would force children to receive instruction only from public-school teachers.¹³⁸ I note here also that the statement about what our fundamental theory of liberty is about is directed at the state's treatment of children, so would suggest an analysis, if it were at all meaningful, in terms of children's rights rather than parents' rights. Likewise with the beginning of the next sentence. But then the passage ends with a shift to “those who nurture [the child]”¹³⁹ when it appears to say something about rights. In this Part, I focus on that partial sentence at the very end of the passage, which is the closest thing in all of Justice McReynolds's words in his *Meyer* and *Pierce* opinions to resembling a line of reasoning and the most-oft cited passage from *Pierce*.¹⁴⁰

This semi-sentence seems to have intuitive appeal for many people, with its reference to rights and duties,¹⁴¹ which we are used to

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

137 *See supra* Section III.A.

138 *See supra* Part II.

139 *Pierce*, 258 U.S. at 534–35.

140 A Westlaw search for “direct his destiny” generates roughly eight hundred results just in law review articles.

141 *See, e.g.*, Silbaugh and Caplan-Bricker, *Regulating Social Media Through Family Law*, 15 UC IRVINE L. REV. 1, 14 (“when the United States Supreme Court articulated a

hearing discussed simultaneously in law and politics. Many courts and scholars repeat it with fervor, as if it were a self-evident, undeniable, and profound truth, but without attempting to explain what it means.¹⁴² Because it is the only attempt the Court made in the 1920s cases to defend its creation of this unenumerated right, which has done tremendous mischief over the past century, I hope I can be forgiven for wanting to dissect it in the hope of establishing whether it expresses any coherent thought, and if so what exactly that thought is.

Here is the passage again: “*those who nurture [the child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.*”¹⁴³

The first thing one notices on a close reading is the potential circularity. What is at issue is whether parents have a constitutional right to direct the child’s destiny, yet the Court begins by positing that certain people just do direct the child’s destiny and (therefore?) have a right to “recognize and prepare him for additional obligations,” which seems an aspect of directing a child’s destiny. Whether it is actually circular might depend on what kind of “right” Justice McReynolds had in mind here. And that is radically unclear.

But “right” is not the first ambiguity in the passage. There are a number of possibilities for “those who nurture [them] and direct”¹⁴⁴; not just parents, but also other family members, extended family, neighbors, mentors in the community, schoolteachers, etc. might nurture a child and participate in directing his or her destiny. There are a couple of million children being raised by their grandmothers in this country, for example, and millions more being co-raised by, or at least receiving some nurturing and guidance from, grandmothers and other family members. If the law were upheld, public-school teachers would also be among those who nurture and direct as to every child and so

fundamental right of parents to make decisions about child-rearing without state interference, it did so in clear recognition that these parental rights are entwined with parental obligation”).

142 See, e.g., Nicole Stelle Garnett, *Parental Rights, Parental Choice, and State Public Education Mandates*, 26 J. CONTEMP. LEGAL ISSUES 73, 76 (2025) (reversing the passage so that directing a child’s destiny is the content of rather than the basis for a right of some unspecified nature); Jennifer Hendricks, *Domestic Supply (A Feminist Proposal)*, 51 UC L. CONST. Q. 177, 182 (2024); Silbaugh and Caplan-Bricker, *supra* at 18; Rena M. Lindevaldsen, *Sacrificing Our Children at the Altar of Modern K-12 Public Education*, 18 LIBERTY U. L. REV. 961, 994 (2024); Lois A. Weithorn, *The Intrusive State: Restrictions on Gender-Affirming Healthcare for Minors, Exceptions to the Doctrine of Parental Consent, and Reliance on Science and Medical Expertise*, 75 UC L. J. 713, 756 (2024). See also *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 2060, 147 L. Ed. 2d 49 (2000) (reciting the passage without attempting to explain it); *H. L. v. Matheson*, 450 U.S. 398, 447, 101 S. Ct. 1164, 1191, 67 L. Ed. 2d 388 (1981) (same).

143 *Pierce*, 268 U.S. at 535.

144 *Id.*

would, according to this passage, have a right also as to every child. Public-school teachers would already have had that right, whatever its nature, as to 93% of school-aged children.¹⁴⁵ So, do all nurturers and destiny directors have a right and “high duty” with respect to recognition and preparation for additional obligations? There is no language of limitation attached to this phrase. But perhaps there is some definite meaning to the concept of directing someone else’s destiny that would include only some and exclude others?

As for “right,” there are many kinds—moral or natural or positive law, federal or state, constitutional or statutory or common law. If it means moral or natural right, then the opinion lacks both an explanation for why the Court is ascribing such right to anyone and a syllogism leading from that ascription to a conclusion about constitutional rights. Moral rights theorists recognize that one cannot create a moral right just by saying it is so, and presumably natural rights believers do so as well. And proponents of moral or natural rights must also concede that not every one of them that they believe in is protected by every constitution of the world, or even necessarily by the United States Constitution (which makes no mention of natural rights). The few political theorists who find the notion of natural rights appealing (rather than “nonsense upon stilts” as Jeremy Bentham put it)¹⁴⁶ would concede that entering into civil society necessarily entails forfeiting some of the “rights” we had in a supposed prepolitical universe, or retaining them only as against other private individuals, not holding them against this new entity, the state, to which we have delegated some of our “natural” authority.

Alternatively, the “right” referred to could be one of state law. What little mention there was of a parental right in popular or legal discourse before the 1920s averted to state law as the source of the right, including state constitutions,¹⁴⁷ and typically with no explication of who bore the corresponding duty. But if this is just a statement of state law at the time—that is, a description of what the State of Oregon had already given parents by way of power over children’s lives, then the passage is irrelevant; it cannot say anything about why the Court should invalidate any state law.

For this passage to support the Court’s holding, it seemingly must mean a federal constitutional right, entailing a corresponding duty of forbearance on the part of the state. But then it is merely stipulative unless the subsequent five words supply an argument.

145 See *supra* note 97 [*Cost for 4,862 More Kids*, 30 OR. VOTER 72, 364 (1922).]

146 JEREMY BENTHAM, *ANARCHICAL FALLACIES* (n.d.), reprinted in 2 *THE WORKS OF JEREMY BENTHAM* 489, 501 (Simpkin, Marshall & Co, London 1843).

147 See Dwyer, *supra* note 5, at 9–10 & n.26.

The next normative concept in the passage, duty, is likewise ambiguous, along the same dimensions. A moral or natural law rendering again makes the syllogism incomplete (how does it connect with our federal Constitution?), and it raises the question of whether it is legitimate for federal courts to be pronouncing that people just have certain moral or natural law duties (and without citation to the moral or natural code!). A state-law rendering of the duty (whether state constitution, state statute, or state common law) makes it merely an irrelevant statement of existing law.

Further, we might wonder what the modifier “high” means in this context. It is not a legal term; nowhere does American law differentiate among duties based on altitude, nor it seems does anyone in popular or philosophical discourse.¹⁴⁸ It suggests a contrast with a low duty, but what is that? Or at least a lower duty, perhaps a duty of ordinary height, but what determines the height of a duty? Is “high” meant to be a synonym for moral, to distinguish the duty from a legal duty? That would return us to the question of how a nonlegal concept can underwrite a conclusion of constitutional law.

And then there is the matter of coupling. What could it possibly mean to have a right coupled with a duty? Figuring that out might help us decide the meaning of the many ambiguous terms in the passage.¹⁴⁹ Rights and duties are sometimes correlates, but as correlates they do not reside in the same person. If I have a right, then someone else owes a duty to me. If I am under a duty to someone, then that person has a right against me. So, it cannot be a Hohfeldian coupling or logical entailment meant here, because the right and duty appear to reside in one and the same persons.

The more promising reading, it seems, is that there is a particular sort of practical or moral connection between having a duty, or believing one has a duty, and having a right with respect to the same subject matter. The practical connection could be that a person bearing the duty to “recognize and prepare [a child] for additional obligations” must have a right in order to fulfill that duty; absent the right, they will be thwarted. It makes no sense, though, to say parents need a constitutional right against the state in order to satisfy a duty *the state* has imposed on them. If the state tells parents not to do X, then they

148 The OED reports the commonness of its usage as “Fewer than 0.01 occurrences per million words in modern written English,” and what usage there is as a descriptor for imported goods and power tools. See *High-duty*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/dictionary/high-duty_adj [<https://perma.cc/3AH6-JZDM>] (last visited Jan. 21, 2025) (“a. Subject to heavy customs duty; b. designed to perform heavy tasks; = heavy-duty”).

149 Cf. Silbaugh and Caplan-Bricker, *supra* at 14 (unhelpfully translating “coupled” as “intertwined with” and “paired”).

cannot be under a state-imposed duty to do X, and so they need no right against the state in order to refuse to do X. The need for a right against the state would arise only if the duty is not state imposed, in which case we must ask from whence it derives. The most likely answer, at least for those uncomfortable with federal courts telling us what our moral obligations to our children are, is that parents *believe* they are under a moral duty to raise their child in a certain way and need a right against the state in order for them to fulfill that duty because the state is indifferent or hostile to the decisions or actions that the nonlegal duty compels. Then the challenge becomes explaining how parents' moral beliefs, or parents' interest in satisfaction of their desire to act on their moral beliefs, in ways the agent for society as a whole (the state) deems harmful to children, give rise to, or become "coupled with," a constitutional right—in particular, an other-regarding constitutional right (i.e., a right to control someone else's life). And correspondingly, how parents' belief or interest in acting on a belief triggers a duty on the part of the state to stay out of parents' way. Is there a general duty on the part of the state presumptively not to interfere with how anyone acts upon another person if they are acting on a belief about their moral duties?

I will not delve here into the various arguments philosophers have made in favor of ascribing to parents control rights on the basis of parents' beliefs.¹⁵⁰ Instead I will simply note that the challenge cannot be met without invoking a general principle that would apply broadly to anyone similarly situated (e.g., someone sacrificing greatly to fulfill what they believe to be their "high duty" to care for their elderly parents, or their "high duty" to stop pregnant women from having abortions). And that an understanding of the coupling that posits a moral connection, such as a quid pro quo relationship between the two,¹⁵¹ faces the same challenge. That is, if the idea is that parents fulfill childrearing duties at great sacrifice and as compensation deserve constitutional rights to control the course of children's lives, then defense is needed for the general principle that when one person sacrifices a lot for another they should receive as compensation a constitutional right to control the other's life, or perhaps more specifically to dictate what education or training the other receives.

Lastly, there is the mystery of the "obligations" for which the Supreme Court says children must be prepared. They are "additional," but the *Pierce* Court gives no hint of what they are additional to. The

150 See generally Dwyer, *supra* note 49; Dwyer, *supra* note 3.

151 Cf. Brief on Behalf of Appellee, *supra* note 21, at 66 ("In return for the enormous sacrifice they make and burden they bear, parents have the right to guide and rear their children to be worthy of them.").

schools' attorneys in *Pierce* were not shy about asserting that children must receive religious instruction for their good and the good of society.¹⁵² Some courts, including the Supreme Court at times, have in fact interpreted *Pierce*'s reference to "additional obligations"¹⁵³ to mean religious duties,¹⁵⁴ suggesting they are additional to legal obligations that the state imposes on people once they become adults. These courts thus interpret the highest judicial authority in the United States to have proclaimed that parents have a "high duty" to identify and prepare children to fulfill religious obligations. The Establishment Clause problem with this interpretation seems not to have troubled anyone during the past century.

Perhaps the interpretation of this passage as a whole that is closest to being coherent and plausible is this: Parents, in the view of most people, have a moral duty that the people of the state have not chosen to embody in law. It is a nonlegal, moral duty to prepare children to fulfill moral obligations that the people of the state have also chosen not to embody in law. The Society's Complaint asserted that it was providing "moral training" that was "essential to the moral and spiritual welfare of their children and wards, and to a proper preparation for the duties and responsibilities of life and good citizenship."¹⁵⁵ Legal duties imposed on parents are somewhat bare-bones, and whereas they might require provision of inputs that prepare a child for self-sufficiency, they might not require inputs that ensure children will later be good citizens—for example, voting diligently and volunteering to do good works. The state also wants children to become good citizens, so it will aim not to interfere with any parental efforts to make that happen, which would mean parents should have no need for rights against the state to fulfill this nonlegal duty. But the state can get things wrong. It might fail to see how some parents' choices are more

152 *E.g.*, Transcript of Oral Argument, *supra* note 21, at 35. *See also* Brief Amici Curiae on Behalf of the Domestic and Foreign Missionary Soc'y of the Protestant Episcopal Church at 6, *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (No. 583) ("With unanimity thoughtful people attribute this weakening of the moral fiber of our time to the lack of religious and moral training . . .").

153 *Pierce*, 268 U.S. at 510.

154 *See* *Wisconsin v. Yoder*, 406 U.S. 205, 233, 92 S. Ct. 1526, 1542, 32 L. Ed. 2d 15 (1972) ("The duty to prepare the child for 'additional obligations,' referred to by the Court, must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship."); *People ex rel. Lewis v. Graves*, 215 N.Y.S. 632, 637 (Sup. Ct. 1926). *See also* *Bellotti v. Baird*, 443 U.S. 622, 637, 99 S. Ct. 3035, 3045, 61 L. Ed. 2d 797 (1979) (repeating the passage from *Yoder*). There was not a great deal of religious skepticism in the western U.S. in its early years of settlements by Europeans. *See* Northwest Ordinance of 1787, 1 Stat. 50, 52 (declaring that religion is necessary to good government and the happiness of mankind); Brief on Behalf of Appellee, *supra* note 21, at 17–19, 23–24 (quoting numerous public figures extolling the necessity of religious education).

155 Transcript of Record, *supra* note 29, at 5.

conducive to producing good citizens than are the state's own choices. Then it would be good if parents could wield a constitutional shield against state interference. But on this understanding of the high duty, it is owed to society, in which case it is society, not parents, who would possess a corresponding right. An alternative reading in which the "additional obligations" are owed instead to parents (e.g., to take care of them in old age) would entail a right of parents (to be cared for by their children in old age). However, then the right would operate against the children, not the state. Further, it would make it very odd, even conceptually incoherent, to say parents are under a "high duty" to prepare children to fulfill them.

This is as far as my students and I have gotten in trying to find a shred of rational justification in Justice McReynolds's tremendously impactful decision to create parental federal constitutional rights out of thin air. Undoubtedly there are other possible renderings of this semi-sentence, and so perhaps someday someone will show *Pierce* to be a good decision. For now, it appears to be a profound insult to children and perpetual cause of harm to them. The missed opportunity to make children's education, and children's upbringing more generally, about children and their rights is cause for profound regret.