

THE ENDURING VITALITY OF MEYER AND PIERCE POST-DOBBS

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In overturning the right to abortion, Dobbs v. Jackson Women's Health has provoked conjecture—fear on the part of some, hope for others—that additional unenumerated rights related to “heart and home” may also topple. Often views on substantive due process align with politics, with those on the left generally viewing rights more expansively, and those on the right tending to be more skeptical. Parental rights, however, offer an opportunity for constitutional agreement across the contemporary political divide. Despite fierce disagreement over the parameters of parental rights, there is broad, underappreciated consensus that the right to raise one's children is a fundamental right within the meaning of the Fourteenth Amendment.

This Article argues that the earliest parental rights cases, Meyer vs. Nebraska and Pierce v. Society of Sisters, are best understood as resting on a political theory that parents' rights to direct their children's upbringing are essential to maintaining pluralism and self-governance in the American version of democracy. Thus, these cases have a different logic than the economic-rights cases of the Lochner era, and they are not—as has often been suggested—grounded in natural law.

Parental rights, the Article explains, are anchored by the twin fundamental-rights analyses emphasized in Dobbs and other recent Supreme Court jurisprudence. These rights are (i) deeply rooted in history and tradition, and (ii) essential to the American scheme of ordered liberty. A comprehensive review of the case law in the lead up to ratification of the Fourteenth Amendment—the period Dobbs identifies as most significant for history-and-tradition analysis—demonstrates that states consistently recognized parental rights. Indeed, there is not a single published decision in the two decades

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preceding ratification that denies parents have protected rights that can only be overcome by a particularized showing of unfitness or waiver.

The Article makes two points regarding the ordered-liberty analysis. First, properly understood, Meyer and Pierce are grounded in a structural account of parental rights that deems them essential to our version of ordered liberty. Second, past failures to respect rights to family integrity in oppressed communities offer additional support for the claim that our scheme of ordered liberty requires that parental rights be recognized as fundamental to democratic citizenship. This latter point responds to a concern of Dobbs's critics that history-and-tradition analysis often reifies historical inequities. In the realm of parental rights, recognizing past injustices provides a more robust and equitable understanding of ordered liberty. In this light, both those on the left and those on the right of the political spectrum should be heartened that Meyer and Pierce can be expected to survive and thrive

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INTRODUCTION

The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*¹ has brought conflict over constitutional questions to a new pitch—both in the political arena and among legal scholars. The discord reflects not only deeply held views on abortion, but grave concern—fear on the part of some, and hope for others²—that in overturning the right to abortion established in *Roe v. Wade*,³ *Dobbs* destabilizes other rights that are understood to be grounded in substantive due process, including the right to marry;⁴ the right to engage in private, consensual sexual activity;⁵ and the right to contraception.⁶ So clear is the threat to these unenumerated “rights of heart and home”⁷ that it is referenced in every opinion in *Dobbs*. In their dissent, Justices Breyer, Sotomayor, and Kagan identify and bemoan the threat to other substantive due process rights,⁸ even as the majority is at pains to disclaim this prospect.⁹ In his concurrence, Justice Kavanaugh insists that the decision impacts only abortion rights, while Justice Thomas's concurrence baldly invites the Court to reconsider constitutional protection for other due process rights.¹⁰ The debates among the members of the *Dobbs* Court and among commentators on the decision speak not only to desired outcomes, but also to interpretive methods, fidelity to those methods, and the existential question of whether the Fourteenth Amendment's Due Process Clause has a substantive component.¹¹ In short, in overruling *Roe*, which established a fiercely contested unenumerated constitutional right, *Dobbs* casts doubt on the very idea that the Constitution protects unenumerated rights.

1 *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

2 See, e.g., Melissa Murray, John Garvey, Mary Ziegler, Mary Bonauto, Kathryn Kolbert & Erika Bachiochi, Opinion, ‘Abortion Is Just the Beginning’: Six Experts on the Decision Overturning *Roe*, N.Y. TIMES (June 24, 2022), <https://nyti.ms/3yhP7Rp> [<https://perma.cc/6ZEW-3PH9>]; Erwin Chemerinsky, *The Future of Substantive Due Process: What Are the Stakes?*, 76 SMU L. REV. 427, 438–39 (2023).

3 *Roe v. Wade*, 410 U.S. 113, 166 (1973), *overruled by Dobbs*, 142 S. Ct. 2228.

4 *Obergefell v. Hodges*, 576 U.S. 644, 665 (2015); *Loving v. Virginia*, 388 U.S. 1, 2 (1967).

5 *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

6 *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); see also *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972).

7 David H. Gans, *Reproductive Originalism: Why the Fourteenth Amendment's Original Meaning Protects the Right to Abortion*, 75 SMU L. REV. F. 191, 198 (2022).

8 *Dobbs*, 142 S. Ct. at 2331–32 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

9 See *id.* at 2280–81 (majority opinion).

10 *Id.* at 2309 (Kavanaugh, J., concurring); *id.* at 2301 (Thomas, J., concurring) (“[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.”).

11 See, e.g., Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 728 (2024); Reva B. Siegel, *The History of History and Tradition: The Roots of Dobbs's Method*

Yet in this time of extreme division over unenumerated constitutional rights, there is notably broad—though unappreciated—agreement on one point: parents have a substantive constitutional right to raise their children. Of course, this does not mean that there is agreement over the exact parameters of this right, some of which are hotly contested. But if one puts to the side debates that use the term “parents’ rights” colloquially rather than legally,¹² there is even strong agreement on the core substance of this substantive legal right: parents have the right to direct the upbringing of their children, particularly with regard to value inculcation. The disagreements over the metes and bounds of parental rights are indisputably important, but it is worth reflecting on this rare pocket of constitutional agreement—to clarify, justify, and celebrate it, as well as to examine where it comes from and where it might lead.

This Article will argue that those on both the left and the right of the political spectrum should be reassured and heartened that *Meyer v. Nebraska*¹³ and *Pierce v. Society of Sisters*,¹⁴ the first Supreme Court cases to recognize parental rights, remain good law. As explained below, there is good reason these two cases, alone, survived the death of the first era of substantive due process. They have a different logic than both the economic-rights cases of the *Lochner* era and the second-era line of privacy cases, which was curtailed in *Dobbs*. What’s more,

(and Originalism) in the Defense of Segregation, 133 YALE L.J.F. 99 (2023); Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs*, Bruen, and Kennedy: *The Role of History and Tradition*, 118 NW. U. L. REV. 433 (2023); Joy Milligan & Bertrall L. Ross II, *We (Who Are Not) the People: Interpreting the Undemocratic Constitution*, 102 TEX. L. REV. 305 (2023); *Roe v. Wade is Gone—What Now?*, N.Y.U. L. (July 6, 2022), <https://www.law.nyu.edu/news/-supreme-court-roe-wade-dobbs> [<https://perma.cc/EC8J-BWBH>].

12 I mean here to put to the side debates in which partisans assert “parental rights” as a basis for particular positions in the legislative and executive branch arenas, for example, the use of “parental rights” rhetoric to promote policies that constrain public school curricula on the teaching of race. As important as these debates are, they are often ones in which those invoking parental rights are pursuing their preferred policies through majoritarian processes. Regardless of one’s perspective on the substance of such positions, it should be clear that such uses of the term are not meant to invoke the constitutional doctrine of parental rights that is the subject of this Article, which refers to rights-based protections for individuals against majoritarian policies and other exercises of state power. See Clare Huntington, *Parental Rights: Rhetoric Versus Doctrine*, 91 U. CHI. L. REV. 503, 508 (2024) (explaining “it is critical to distinguish parental-rights rhetoric from parental-rights doctrine”); VIVIAN E. HAMILTON, NAT’L EDUC. POL’Y CTR., *THE CONFLICT OVER PARENTS’ RIGHTS* 15 (2024) (contrasting parental rights in constitutional doctrine to political uses of the term). Other invocations of “parental rights” clearly do involve constitutional claims, such as certain assertions of the right to opt out of specific aspects of a public-school curriculum. See, e.g., *Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525 (1st Cir. 1995).

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

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

the vitality of *Meyer* and *Pierce* is independently anchored by the twin analyses that *Dobbs* and other recent constitutional jurisprudence have emphasized: whether a claimed right is fundamental and therefore entitled to heightened constitutional protection depends on whether it is “‘deeply rooted in [our] history and tradition’ and whether it is essential to this Nation’s ‘scheme of ordered liberty.’”¹⁵ While these two phrases are often linked, they are conceptually distinct. They can be examined separately, and doing so highlights the depth and breadth of support for parental rights. Indeed, it is in the fissure between ordered-liberty analysis and history-and-tradition analysis that much of the heat of current disagreement over substantive due process lies. Because both analyses strongly support parental rights, *Meyer* and *Pierce* can be expected to survive and thrive even if the Supreme Court questions the underpinnings of other substantive due process rights.

To be sure, there will always be questions about who counts as a parent¹⁶ and the extent to which the state may burden parental rights, but those questions are ancillary to the constitutional starting point that parents have a *fundamental* constitutional right to direct their children’s upbringing. This Article returns to the issue’s first principles—enunciating in *Meyer* and *Pierce*—to establish the vibrancy and stability of this core unenumerated right. Demonstrating that there is surprisingly broad agreement on the starting point—indeed, that it should be understood to be uncontroversial that the parental right to rear one’s children is a protected fundamental right—will have significant consequences for the more specific, controverted questions involving parental rights that affect families in trial courts every day. To be clear, recognizing the status of parental rights as a fundamental, constitutional right will not, without further analysis, resolve the pending controversies that are most associated with assertions of parental rights today—issues involving transsexual rights, public funding of parochial schools, and debates over school curricula. The claim here is that parental rights are a fundamental, protected constitutional right and that *Dobbs* should be understood to reinforce, rather than threaten, that point. As with other fundamental rights, appreciation of that status leaves much still to be resolved, but it is a critical first step.¹⁷

15 *Dobbs*, 142 S. Ct. at 2235 (alteration in original) (quoting *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019)); see also *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2128 (2022).

16 See, e.g., Douglas NeJaime, *Parents in Fact*, 91 U. CHI. L. REV. 513 (2024).

17 For example, understanding that *Meyer* and *Pierce* remain good law will not alone resolve the question of whether parental rights to make child-rearing decisions renders unconstitutional laws banning puberty blockers for youth. In *Williams v. Skrametti*, the Sixth Circuit found that there is no parental right to obtain particular medical treatments without disavowing the claim that parents have protected decision-making rights, instead parsing

Part I situates *Meyer* and *Pierce* within the broader landscape of the first era of substantive due process jurisprudence, explaining how these two cases are conceptually distinct from the classic *Lochner*-era cases with which they are misleadingly lumped. This Part first describes the rise and fall of the *Lochner* period right-to-contract cases and then unpacks *Meyer* and *Pierce*'s justification for parental rights, which rests in a structural argument that privatizing child-rearing is essential to maintaining pluralism and self-governance in the American form of democracy. *Meyer* and *Pierce* are often mistakenly taken to be based on a natural rights theory like the one that underpins *Lochner*'s economic rights cases—a theory, that, as urged by Justice Holmes, was ultimately rejected. Because *Meyer* and *Pierce* were not similarly grounded, it makes sense that they would not fall with the economic line of cases, and the Part explains how they survived in *Prince v. Massachusetts*,¹⁸ the first Supreme Court case to address parental rights post-*Lochner*. The discussion of *Meyer* and *Pierce*'s structural justification for the substantive rights they protect foreshadows the argument in Part IV that this distinctive justification is best understood as a contention that parental rights are essential to our version of ordered liberty.

Part II explains *Meyer* and *Pierce*'s role in the development of the second era of substantive due process, which began with *Griswold v. Connecticut*.¹⁹ The Court relied on *Meyer* and *Pierce* to expand substantive due process rights in a line of privacy-related cases from *Griswold* through *Obergefell v. Hodges*.²⁰ This line repeatedly cited *Meyer* and

those rights and concluding that the history and tradition of parental rights does not preclude government regulation of medical treatment. *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 475 (6th Cir. 2023), *aff'd sub nom. United States v. Skrmetti*, 145 S. Ct. 1816 (2025). The Supreme Court declined to grant certiorari on the parental rights question. Petition for a Writ of Certiorari at i, *Doe v. Kentucky*, 144 S. Ct. 389 (2023) (No. 23-492); *Doe*, 144 S. Ct. 389 (denying certiorari). Such questions of the level of generality at which to identify a right are often critical and are open to abuse. See Cary Franklin, *History and Tradition's Equality Problem*, 133 YALE L.J.F. 946, 949 & n.13 (2024) (citing sources on the "growing body of scholarship demonstrating that selecting the appropriate level of generality in a history-and-tradition case is not an objective or value-neutral enterprise," *id.* at 949). This Article leaves to another day the many important questions regarding the level of generality at which the Constitution protects parental rights on the understanding that those questions are best addressed from the starting point that the parental rights articulated in *Meyer* and *Pierce* survive *Dobbs*. Otherwise, disagreements about the *bounds* of parental rights may blur what should be the point of agreement: the right to parent one's child is fundamental. See Chris Gottlieb, *Remembering Who Foster Care Is for: Public Accommodation and Other Misconceptions and Missed Opportunities in Fulton v. City of Philadelphia*, 44 CARDOZO L. REV. 1 (2022) (discussing the dangers of parental rights questions being misunderstood when they arise in high-profile cases driven by culture war disputes).

18 *Prince v. Massachusetts*, 321 U.S. 158 (1944).

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

20 *Obergefell v. Hodges*, 576 U.S. 644 (2015).

Pierce as good law, but did not reference or develop the core principle of the parental rights cases. For better or worse, as the new line of cases developed, it veered away from the underlying logic of *Meyer* and *Pierce*. Meanwhile, during this period, in the cases that addressed parental rights, the Supreme Court *did* rely on the *Meyer* and *Pierce* logic. This jurisprudence cemented the enduring aspect of *Meyer* and *Pierce* that was unique among cases associated with the *Lochner* era: the structural commitment to democratic pluralism through restraining government interference with child-rearing. Thus, the second era of substantive due process shows parental rights to be deeply rooted in our constitutional firmament and not entirely entwined with the privacy cases they seeded.

Part III argues that there should be no question that the parental rights announced in *Meyer* and *Pierce* are deeply rooted in American history and tradition. State cases prior to *Meyer* and *Pierce* routinely recognized and protected parental rights. According to *Dobbs*, the lead-up to ratification of the Fourteenth Amendment is the most significant period for the required history-and-tradition analysis of rights asserted under that Amendment. This Part explains that an exhaustive search of caselaw in the twenty years prior to ratification reveals that in this period parental rights to the care and custody of their children were strongly entrenched. Parental rights were routinely identified and protected, and in cases in which a nonparent prevailed over a parent, courts unfailingly identified a basis in the record of the case that justified intruding on the parent's rights. Indeed, there is *not a single* published case in the two decades preceding the Fourteenth Amendment's ratification that denies parents have protected rights that can only be overcome by a particularized showing. Whatever debate there may be about the dangers of resting constitutional interpretation too heavily on the history-and-tradition test, there should be no doubt that parental rights pass that test with flying colors.

Part IV explains how parental rights are implicit in ordered liberty and central to the American conception of democracy. Although the phrase "ordered liberty" was not introduced into Supreme Court jurisprudence until after *Meyer* and *Pierce*, these decisions articulate a robust theory of the relation between parental rights and the American version of ordered liberty. This Part will explain there is a deeply shared commitment to parental rights that should be celebrated by both those with the most restrained and those with the most full-bodied approaches to substantive due process. In particular, progressive critics who worry that history-and-tradition analysis may reify historical inequities can be heartened that with respect to parental rights, ordered-liberty analysis provides a much-needed corrective to historical

injustices. Drawing on the work of Peggy Cooper Davis,²¹ this Part explains that slavery and the decimation of Native American families were violations of the family integrity principle at the heart of *Meyer* and *Pierce*, which recognizes that parental rights are essential to democratic citizenship. In this light, the American history of indefensible family separations defines by contrast a more fulsome version of ordered liberty.

A Conclusion briefly considers some of the implications of appreciating that parents' rights to direct the upbringing of their children are fundamental within the meaning of Fourteenth Amendment jurisprudence. This point has direct consequences for cases that are routinely heard in family courts around the country, where, too often, the constitutional principle is left gathering dust for lack of engagement. In particular, the Conclusion argues that one indisputable consequence of correctly understanding the constitutional status of parental rights is that efforts by the government to separate children from their parents and to terminate parental rights are subject to strict scrutiny. Thus, appreciating the protected status of parental rights has immediate consequences in child protective proceedings, even as other important pending questions will be informed, but not resolved, by clarifying this fundamental right.

Close study of *Meyer* and *Pierce* reveals a rare piece of common ground amidst today's constitutional battlegrounds—a shared commitment to parental rights which, properly understood, reflect and fortify the capacity for pluralism and democratic accommodation.

I. *MEYER* AND *PIERCE*: IN *LOCHNER* BUT NOT OF *LOCHNER*

Few, if any, doctrines in constitutional law have evoked as much consternation and heated debate as substantive due process.²² Even those who have promoted the expansion of substantive due process agree it is “a treacherous field” that brings a particular danger of judicial overreach.²³ There is broad agreement that when judges identify rights that are not specifically named in the Constitution, judicial humility is imperative, lest judges impose their personal views.²⁴ No one

21 PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* (1997).

22 See *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion); *United States v. Windsor*, 570 U.S. 744, 794 (2013) (Scalia, J., dissenting) (referring to “the dread words ‘substantive due process’” and “the disrepute into which that doctrine has fallen”).

23 See *Moore*, 431 U.S. at 502 (plurality opinion).

24 See, e.g., *id.* (noting the “history [of substantive due process] counsels caution and restraint”); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (explaining judges must

defends the ignominious birth of substantive due process in *Dred Scott*²⁵ and few defend its disreputable youth in the *Lochner* era when it was used to strike down progressive social legislation. Indeed, *Lochner* is now invoked as the quintessential example of the dangers of substantive due process run amok.²⁶ And yet, two cases from the *Lochner* era survived unscathed as the rest of the substantive due process jurisprudence of the time was renounced: *Meyer v. Nebraska*²⁷ and *Pierce v. Society of Sisters*.²⁸ To understand why, we must begin by examining how these cases were related to, but were importantly different from, their fellow *Lochner*-era cases.

A. *The Lochner Era and Its Repudiation*

As every American law student is taught, at the turn of the twentieth century, the Supreme Court began striking down progressive economic regulations based on the idea that the liberty protected by the Fourteenth Amendment included economic liberty and specifically the “right to contract.”²⁹ In the case for which the era is named, the Court held unconstitutional a law that prohibited bakers from working over sixty hours a week.³⁰ Noting a trend of increasing legislative “interference” with matters of trade, the Court said “the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.”³¹ A string

“exercise the utmost care” in identifying implied fundamental rights, “lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court” (first quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992); and then citing *Moore*, 431 U.S. at 502 (plurality opinion))).

25 *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). It has been noted that *Dred Scott*’s role in the history of substantive due process has been overstated. See James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 317–18 (1999).

26 See, e.g., David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 373 (2003) (“You have to reject *Lochner* if you want to be in the mainstream of American constitutional law today.”); 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 40 (1991) (“For a modern judge, one of the worst insults is that she is reenacting the sin originally committed by the pre-New Deal Court in cases like *Lochner v. New York*.”).

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

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

29 See *Allgeyer v. Louisiana*, 165 U.S. 578, 590 (1897), *abrogated by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

30 *Lochner v. New York*, 198 U.S. 45, 52 (1905), *abrogated by* *W. Coast Hotel*, 300 U.S. 379.

31 *Id.* at 63, 64.

of cases from 1897 through 1937 similarly struck down economic legislation, including minimum wage laws,³² laws protecting unions,³³ child labor laws,³⁴ and other New Deal legislation. Although this legislation was clearly intended to benefit the working class, the Court's decisions were grounded in the idea that both sides to an economic agreement had rights to bargain that were constrained by the laws in question. To the *Lochner*-era Court's mind "[t]he right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell."³⁵

The view that the Due Process Clause provided not only procedural, but also substantive protection to these economic rights was based in the natural law theory that certain rights pre-date and are protected by the Constitution.³⁶ As Roscoe Pound explained at the time, the *Lochner*ian right to contract was based in a theory of natural law that can be traced to Herbert Spencer.³⁷ It is this natural rights theory that Justice Holmes rejected when he famously said in his *Lochner* dissent that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."³⁸ According to Justice Holmes, the Constitution does not "embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez*

32 See, e.g., *Adkins v. Child's Hosp.*, 261 U.S. 525 (1923), *overruled by W. Coast Hotel*, 300 U.S. 379.

33 See, e.g., *Adair v. United States*, 208 U.S. 161 (1908), *overruled by Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *Coppage v. Kansas*, 236 U.S. 1 (1915), *overruled by Phelps*, 313 U.S. 177.

34 See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *overruled by United States v. Darby*, 312 U.S. 100 (1941).

35 *Adair*, 208 U.S. at 174.

36 See Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 66 (1989); Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 548 n.157 (2015) ("*Lochner*, and similar cases of that age, were seen as instances of 'natural law reasoning.' Thus, criticism of 'the *Lochner* era' became bound up with criticism of the natural law." (quoting Diarmuid F. O'Scannlain, *The Natural Law in the American Tradition*, 79 FORDHAM L. REV. 1513, 1515 (2011))); Roscoe Pound, *The Ideal Element in American Judicial Decision*, 45 HARV. L. REV. 136, 141 (1931) ("Closely related to the political philosophical natural law is an economic philosophical type in which the doctrine of *laissez faire*, as set forth in the classical political economy, is taken as the ideal of an economic order under an American constitution, and constitutional guarantees are taken to be declaratory thereof.").

37 Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 455 (1909); see also Charles Grove Haines, *The Law of Nature in State and Federal Judicial Decisions*, 25 YALE L.J. 617, 646 n.107 (1916).

38 *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), *abrogated by W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

faire,” and he specifically criticized the idea that what seems “natural” should be given weight in constitutional analysis.³⁹

In the long run, of course, Justice Holmes’s view prevailed. Beginning in 1937 with *West Coast Hotel Co. v. Parrish*,⁴⁰ the “switch in time saved nine” and the 5-4 majorities that had been striking down New Deal legislation based on the substantive due process theory about the right to contract began coming out the other way. *West Coast Hotel* overturned *Adkins v. Children’s Hospital*, a key *Lochner*-era case that had struck down a minimum wage law for women,⁴¹ and upheld a claim made by a woman against her former employer for the difference between her earnings and the minimum wage required by state statute.⁴²

The decision in *West Coast Hotel* rejected the idea that there is a specially protected right to contract,⁴³ highlighting the significance of the economic conditions of the Great Depression and rejecting the idea that parties come to contract on equal footing.⁴⁴ Throughout the next decade, the Supreme Court “steadily rejected the due process philosophy enunciated in the [*Lochner*] line of cases.”⁴⁵ As Justice Black—President Franklin Roosevelt’s first appointment to the Court⁴⁶—later put it, “the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare.”⁴⁷

Although the reasons for the Court’s shift are debated,⁴⁸ it was clear the *Lochner* era’s understanding of economic rights was dead. But before it died, another substantive due process right was born.

B. Parental Rights: A Distinct Genus in the First Era of Substantive Due

39 *Id.* at 75–76.

40 *W. Coast Hotel*, 300 U.S. 379.

41 *Adkins v. Child.’s Hosp.*, 261 U.S. 525 (1923), *overruled by W. Coast Hotel*, 300 U.S. 379.

42 *W. Coast Hotel*, 300 U.S. at 388.

43 *See id.* at 391–92.

44 *Id.* at 393–94.

45 *Lincoln Fed. Lab. Union v. Nw. Iron & Metal Co.*, 335 U.S. 525, 536 (1949).

46 Daniel M. Berman, *Hugo L. Black: The Early Years*, 8 CATH. U. L. REV. 103, 103 (1959).

47 *Lincoln Fed.*, 335 U.S. at 536–37.

48 *See generally* Daniel A. Farber, *Who Killed Lochner?*, 90 GEO. L.J. 985 (2002) (reviewing G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000)).

Process

During the heart of the *Lochner* era, the Supreme Court issued *Meyer*⁴⁹ and *Pierce*, substantive due process cases that focused on a very different kind of right: parental rights.

1. *Meyer v. Nebraska*

Meyer was a constitutional challenge by a teacher who was convicted of teaching German in violation of a Nebraska law that banned the teaching of foreign languages in schools through the eighth grade.⁵⁰ The statute, like many passed in the wake of World War I, was blatantly motivated by nationalism and xenophobia.⁵¹ The Court found that this statute violated both the teacher's right to engage in his occupation and the parents' right to engage him to teach their children.⁵²

The *Meyer* decision is quite short and includes little traditional legal analysis. Instead, it asserts matter-of-factly that the term "liberty" in the Fourteenth Amendment "[w]ithout doubt" includes

not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.⁵³

For this proposition, the Court provided a long string cite that included several of the economic-rights cases of the *Lochner* era, but not a single cite to a case that had addressed the asserted rights to marry, establish a home, or bring up children.⁵⁴ As discussed below, there were numerous state cases the Court could have cited on the right to rear one's children, but it did not do so.⁵⁵ Additionally, given that *Meyer* had been brought by a teacher exerting his own rights (and the

49 On the day it issued *Meyer*, the Court also issued a companion case that relied entirely on the reasoning in *Meyer*. See *Bartels v. Iowa*, 262 U.S. 404 (1923).

50 *Meyer v. Nebraska*, 262 U.S. 390, 396–97 (1923).

51 See, e.g., Kenneth B. O'Brien Jr., *Education, Americanization and the Supreme Court: The 1920's*, 13 AM. Q. 161, 161–63 (1961); William G. Ross, *A Judicial Janus: Meyer v. Nebraska in Historical Perspective*, 57 CIN. L. REV. 125, 126 (1988). For an account of the statute at issue in *Meyer* that recognizes the anti-immigrant motivation, but provides additional context, see Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1002–12 (1992).

52 *Meyer*, 262 U.S. at 400.

53 *Id.* at 399 (emphasis added).

54 See *id.*

55 See *infra* Part III.

rights of parents to obtain his services), the Court could have struck the Nebraska law as unconstitutional based solely on the right-to-contract cases of the time.⁵⁶ That it chose instead to also substantively protect parents' decisionmaking rights turned out to be seminal for constitutional jurisprudence.

The Court found that the liberty protected by the Fourteenth Amendment includes the right of parents to decide that their children will learn German in school and justified that right with a single, pointed explanation—a political explanation of limits on government power in American democracy. At the heart of the *Meyer* decision is a discussion of Plato's proposal in *The Republic* for an idyllic system in which children are raised communally, apart from their parents.⁵⁷ The Court described that system, modeled on Greek the city-state of Sparta, as having been "deliberately approved by men of great genius."⁵⁸ But, the Court explained, that model was based on ideas about "the relation between individual and State" that are "wholly different from those upon which *our* institutions rest."⁵⁹ Such a system, in which parents are not in charge of rearing their own children, cannot be imposed by legislation, the Court said, "without doing violence to both letter and spirit of the Constitution."⁶⁰

This explanation is different in kind from any justification offered for economic rights during the *Lochner* era. And, notably, it is not a natural rights argument, although, as discussed below,⁶¹ there was widespread support for a natural rights understanding of parental rights at the time. Rather, the Court provided a *structural* argument about what is definitive of "our institutions."⁶² As Alice Ristroph and Melissa Murray have observed, this is an "antitotalitarian argument for institutional and ideological diversity," which is comparable to the institutional pluralism promoted by religious disestablishment.⁶³

56 The case was initially brought on a claim of religious liberty. *Meyer* was convicted for teaching a child to read the Bible in German and argued that learning German was necessary for children to be able to worship with their Lutheran parents. Woodhouse, *supra* note 51, at 1014. Barbara Bennett Woodhouse describes a "strange metamorphosis" of the argument from one of religious liberty to one of parental rights, with the advocates picking up on a parental rights argument made in dissent in the Nebraska Supreme Court (perhaps de-emphasizing the religious liberty argument because the Supreme Court had not yet incorporated the First Amendment). *Id.* at 1014 & n.67 (citing Ross, *supra* note 51).

57 *Meyer*, 262 U.S. at 401–02.

58 *Id.* at 402.

59 *Id.* (emphasis added).

60 *Id.*

61 See *infra* notes 214–15 and surrounding text.

62 *Meyer*, 262 U.S. at 402.

63 Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1265 (2010); *id.* at 1266 (describing the *Meyer* approach as "akin to a right to familial free exercise").

The Court's description of Sparta, of course, evoked for contemporary readers the authoritarian, communist form of government that loomed all too large at the time. The Court was contrasting Athenian/American democracy with Spartan/Soviet centralized authoritarianism⁶⁴ by recognizing the temptation "to foster a homogeneous people," but explaining that it is the Spartan way—i.e., the *anti*-American way—to "submerge the individual and develop ideal citizens."⁶⁵ This is a succinct tutorial designed to clarify that privatized child-rearing is constitutive of the American form of democracy because government control of child-rearing threatens American individualism: if the government is able to indoctrinate the next generation, government is no longer subservient to the people.⁶⁶

The Court's message in *Meyer* was particularly pointed because those defending the law at issue had argued it was critical that immigrant children be taught English to "Americanize" them, and to ensure, as one commentator put it, "that school children grew into loyal and patriotic citizens."⁶⁷ The Court said this impulse was understandable in light of experiences during the recent war,⁶⁸ but explained that the Constitution prohibits acting on it. Thus, the Court was emphasizing that the American values fought for during the war (and threatened by Soviet communism) were directly at odds with homogenizing the populace and that, therefore, to adopt Nebraska's proposed strategy to assimilate newcomers would be to become like the enemy.⁶⁹

64 At oral argument, the appellant specifically made the comparison to Soviet Russia. *Hold Nebraska Law Is Curb on Religion*, N.Y. TIMES, Feb. 24, 1923, at 5.

65 *Meyer*, 262 U.S. at 402.

66 See Ristorph & Murray, *supra* note 63, at 1265 ("Homogeneity of the sort advocated by Plato and sought by the Nebraska legislature was 'coerc[ive]' and yielded citizens who could neither discern nor challenge tyranny in their midst. Such homogeneity was more in keeping with totalitarianism than with democracy." (alteration in original) (footnote omitted)); MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 25 (2005) (explaining a democratic state must be constrained from interfering in child-rearing "because childrearing means forming the values, interests, ideas, and religious beliefs of the next generation"); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 903 (1st ed. 1978) (describing *Meyer* and *Pierce* as protecting "the opportunity of individuals and groups to heed the music of different drummers").

67 Ross, *supra* note 51, at 175.

68 *Meyer*, 262 U.S. at 402 ("The desire of the [L]egislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate.").

69 Without suggesting *Meyer* was as high profile a case, a parallel might be drawn to the sense in which the decision in *Brown v. Board of Education* was an important international statement about American values in contrast to those of totalitarian regimes. See Ruth Bader Ginsburg, *Brown v. Board of Education in International Context*, 36 COLUM. HUM. RTS. L. REV. 493, 494 (2005).

2. *Pierce v. Society of Sisters*

Two years later, the Court relied on *Meyer* in the case *Meyer* has been associated with ever since: *Pierce v. Society of Sisters*.⁷⁰ In *Pierce*, two private schools (one religious, one secular) challenged an Oregon compulsory education law that required all children between eight and sixteen years old to attend public school.⁷¹ As with the law in *Meyer*, the statute at issue was driven largely by nativism and bigotry, though, as with the earlier one, more enlightened motives were also in play.⁷² Once again, while underscoring the state's power to require that children receive an education and that the state has some power to regulate schools, the Court emphasized the limitation on the government's power when it comes to value inculcation in children.⁷³ The Court declared the challenged laws unconstitutional because requiring children to attend public school violated the right of parents to direct their children's education.⁷⁴

Where *Meyer* reasoned concisely through a literary analogy, *Pierce*'s reasoning is positively epigrammatic—just two sentences—again sounding in political theory: “The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children The child is not the mere creature of the State”⁷⁵

Doubling down on parental rights, the *Pierce* Court did not rely at all on the asserted *Lochner*ian economic rights of the schools (though the Oregon Court below had⁷⁶). Instead, at the height of the *Lochner* era, the sole decision cited by the Court on the substantive question was *Meyer*. The opinion makes no reference to *Lochner* or any right-to-contract cases.⁷⁷ This would be surprising if *Meyer* and *Pierce* were of a

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

71 *Id.* at 530.

72 Oregon's law was backed by the KKK and others with clear anti-Catholic bias. See Stephen L. Carter, *Parents, Religion, and Schools: Reflections on Pierce, 70 Years Later*, 27 SETON HALL L. REV. 1194, 1197–1202 (1997). At the same time, there were good faith calls for universal public education as a mechanism to build equality and connection among diverse populations. Woodhouse, *supra* note 51, at 1035–36.

73 *Pierce*, 268 U.S. at 534–35.

74 *Id.* at 535.

75 *Id.*

76 *Soc'y of the Sisters of the Holy Names of Jesus and Mary v. Pierce*, 296 F. 928, 935–36 (D. Or. 1924).

77 Two years later, in *Farrington v. Tokushige*, 273 U.S. 284 (1927), the Court overturned a statute that required schools to obtain a permit to teach foreign languages, similarly citing *Meyer*, *Pierce*, and *Bartels* (the companion case to *Meyer*), and not citing any of the right-to-contract cases. *Id.* at 298–99. The Court again emphasized the rights of parents

piece with those cases. But it makes a great deal of sense once we recognize that *Meyer* and *Pierce* are better understood to be grounded on very different principles.

3. *Meyer* and *Pierce* Differentiated from Classic *Lochner* Cases

Like the quintessential *Lochner* cases, the *Meyer* and *Pierce* decisions provide substantive due process protection to an unenumerated right, but that is where the commonality ends.⁷⁸ *Meyer* and *Pierce* embody a structural commitment to limiting legislative authority for a political purpose for which there is no analogy in the economic rights cases. Notably, although Justice Holmes dissented in *Meyer*, his language in dissent was substantially milder than when he dissented in the economic rights cases.⁷⁹ And, even more significantly, Holmes joined the unanimous holding in *Pierce*. This is a clear indication that parental rights cases were not seen as resting on the same (contested) grounds as the economic rights cases. And why would they be? The Holmesian view that a particular economic theory should not be constitutionalized does not have a parallel with respect to the issue of parental rights. Indeed, the doctrines are better understood as having *inverse* structures: while the economic rights doctrine privileged and ensconced a particular economic theory, the parental rights doctrine

of diverse backgrounds to direct their children's education. *Id.* at 298 ("The Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue.").

78 But see Woodhouse, *supra* note 51, at 1037 (suggesting that *Meyer* and *Pierce* are aligned with the economic-rights cases in that "[t]he Court's elastic construction of Fourteenth Amendment liberty to include parental control of the child served—just as in the economic due process cases—to defend traditions of private ownership, hierarchical structures, and individualist values against claims of collective governance.") Woodhouse argues that "[p]roperty and ownership were indeed a powerful subtext of parental rights rhetoric in the era of *Pierce* and *Meyer*." *Id.* at 1042. Although a full response to Woodhouse is beyond the scope of this paper, I believe she overestimates the extent to which state caselaw reflected a property conception of parental rights and underestimates the break that *Meyer* and *Pierce* represented from *Lochner*'s natural law approach.

79 Justice Holmes's dissent was issued in a companion case decided the same day as *Meyer*. *Bartels v. Iowa*, 262 U.S. 404, 412 (1923) (Holmes, J., dissenting). Compare *id.* ("It is with hesitation and unwillingness that I differ from my brethren with regard to a law like this but I cannot bring my mind to believe that in some circumstances, and circumstances existing it is said in Nebraska, the statute might not be regarded as a reasonable or even necessary method of reaching the desired result."), with *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."), *abrogated by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), and *Adkins v. Child. 's Hosp.*, 261 U.S. 525, 567–68 (1923) (Holmes, J., dissenting) (stating that "[t]o me, notwithstanding the deference due to the prevailing judgment of the Court, the power of Congress seems absolutely free from doubt" and referring to liberty of contract as "dogma"), *overruled by* *W. Coast Hotel*, 300 U.S. 379.

aims to prevent any one parenting/child-rearing theory from dominating others.

Of course, if Holmes is read to only and absolutely be prioritizing majoritarian will, that would be at odds with *Meyer* and *Pierce*. But in his *Lochner* dissent Holmes explained the Constitution “is made for people of fundamentally differing views.”⁸⁰ That point can be seen as both anti-*Lochner* and aligned with the *Meyer-Pierce* commitment to pluralism. What Alexander Meiklejohn said of free speech doctrine in the post-*Lochner* era applies here as well: neither free speech nor parental rights have a *Lochner* problem because they “spring[] from the necessities of the program of self-government.”⁸¹

Two further aspects of *Lochner*’s repudiation are worth highlighting because they reveal critical distinctions between the right-to-contract cases and the parental rights cases. First, the rejection of *Lochner* was fundamentally a rejection of the theory of natural law upon which it was based.⁸² Indeed, the shift was a vindication for Holmes’ canonical admonition in dissent: “[T]he accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.”⁸³ This rejection of natural law as a grounding for constitutional rights did not undermine *Meyer* and *Pierce* because they did not rest on a natural law theory of parental rights. The Court certainly could have grounded them in a natural law theory—many state parental rights cases at the time did rest on natural law claims,⁸⁴ and *amici* in *Pierce* made a natural rights argument.⁸⁵ But *Meyer* and *Pierce* did not accept that invitation, relying, instead, on the political structure theory discussed above. Thus, the rejection of natural rights theory, which felled the economic rights cases, did not weigh against the parental rights doctrine, which had not rested on that theory.⁸⁶

80 *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting).

81 ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT*, 26 (1948).

82 See *supra* notes 37–38; see also Colby & Smith, *supra* note 36, at 542–48.

83 *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting).

84 See *infra* 214–15 and surrounding text.

85 Brief of Wm. A. Williams as Amicus Curiae at 6–14, *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (No. 583).

86 Similarly, to the extent *Lochner*’s rejection is best understood more broadly, as Cass Sunstein suggests, as a rejection of treating a legally constructed status quo as a neutral baseline, that understanding also leaves *Meyer* and *Pierce* intact. See Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 882 (1987); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 501 (1987) (“When the Court rejected *Lochner*, it did so

Second, the reversal on economic due process rights was inspired by a recognition of a social reality that conflicted with a core *Lochner* claim. The classic *Lochner* cases reasoned that “the parties have an equal right to obtain from each other the best terms they can as the result of private bargaining”⁸⁷ and “the employer and the employee have equality of right.”⁸⁸ As Roscoe Pound pointed out even as those sentences were being written, “everyone acquainted at first hand with actual industrial conditions” knows that this “academic theory of equality” is a “fallacy,” at odds with the “practical conditions of inequality.”⁸⁹ By the height of the Depression, as it repudiated *Lochner*, the Court finally acknowledged:

There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community.⁹⁰

This language makes clear that, whatever continued debate there may be about the precise effects on the Court of the economic, social, and political turmoil of the time,⁹¹ that turmoil ultimately undermined the Court’s commitment to a right to contract. That turmoil did not, however, undermine the Court’s commitment to parental rights, though it could have, particularly given the interest of New Deal progressives in limiting child labor. Instead, as discussed in the next Section, in the wake of the upheaval of the Depression and the New Deal, the Court strongly reaffirmed its commitment to parental rights at the first opportunity it had to do so after *Lochner*’s economic-rights line fell.

4. *Prince v. Massachusetts*

The first direct opportunity the Court had to address the status of *Meyer* and *Pierce* following the fall of the classic *Lochner*-era cases came in *Prince v. Massachusetts*, which challenged a child labor law that made

largely on the ground that the common law baseline from which the Court had been operating could no longer be justified.”). Recognizing parental rights did not reify a particular parenting approach baseline but rather protected a diversity of parenting approaches.

87 *Adkins v. Child. ’s Hosp.*, 261 U.S. 525, 545 (1923), *overruled by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

88 *Adair v. United States*, 208 U.S. 161, 175 (1908), *overruled by* *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

89 Pound, *supra* note 37, at 454.

90 *W. Coast Hotel*, 300 U.S. at 399.

91 *See generally* Farber, *supra* note 48.

it a crime for a parent or guardian to permit a child to offer periodicals for sale in a public place.⁹² Sarah Prince was convicted for allowing her child, Betty, to distribute Jehovah's Witnesses' publications in the street one evening.⁹³

Mrs. Prince challenged the statute on both First and Fourteenth Amendment grounds.⁹⁴ Significantly, while the Court could have decided the case solely on Free Exercise grounds (it describes the case as "another episode in the conflict between Jehovah's Witnesses and state authority"),⁹⁵ the Court instead directly engaged the claim that the statute as applied was unconstitutional because it violated the right of parents, "to bring up the child in the way he should go,"⁹⁶ and "the parent's claim to authority in her own household and in the rearing of her children."⁹⁷ The Court ultimately rejected this parental rights claim, but the basis on which it did so is critical to understanding the current status of the doctrine laid down in *Meyer* and *Pierce*. Instead of disavowing *Meyer* and *Pierce*, as the late New Deal Court disavowed one *Lochner*-era case after another, the *Prince* Court embraced the *Meyer-Pierce* doctrine while establishing a boundary on the protected right—namely, that parents may not harm their children in exercising parental prerogatives.⁹⁸

There is a danger of misreading *Prince* as watering down the protections of *Meyer* and *Pierce* because the particular risks posed to children by violations of the statute at issue in *Prince* do not seem as compelling today as they did at the time. The *Prince* Court's assessment of that danger was informed both by the recent development of child labor protections and the case's place in a string of hotly contested lawsuits involving Jehovah's Witnesses' First Amendment claims.⁹⁹ *Prince*

92 *Prince v. Massachusetts*, 321 U.S. 158, 160–61 (1944).

93 Mrs. Prince was actually the aunt of the child at the heart of the case, but Mrs. Prince was acting *in loco parentis* and the Court made no distinction between a legally recognized parent and someone acting in a parent's stead with respect to child-rearing and value inculcation. See *id.* at 159, 162, 164–68 (discussing Mrs. Prince's claim as an assertion of parental rights).

94 *Id.* at 164.

95 *Id.* at 159.

96 *Id.* at 164.

97 *Id.* at 165 (also stating "[t]he parent's conflict with the state over control of the child and his training is serious enough when only secular matters are concerned").

98 *Id.* at 165, 170 (describing the interest at stake as protecting children from "abuses" and "harmful possibilities," including "psychological or physical injury").

99 *Id.* at 159 ("Th[is] case brings for review another episode in the conflict between Jehovah's Witnesses and state authority."); see also William Shepard McAninch, *A Catalyst for the Evolution of Constitutional Law: Jehovah's Witnesses in the Supreme Court*, 55 U. CIN. L. REV. 997, 1043 (1987) (noting that "[t]he very first sentence of the Court's opinion hints of a degree of weariness with these cases" and "was followed by a reference to the story's having become familiar").

was the tenth Witness case in as many months, and the majority opinion and both dissents are clearly concerned about the broader sweep of Witnesses' legal claims.¹⁰⁰ Child labor protections were, of course, a critical component of progressive New Deal legislation.¹⁰¹ Indeed, the constitutionality of child labor protections was a key point of contention during the *Lochner* era. Although the Court primarily addressed child labor laws in cases focused on the Commerce Clause, rather than the Fourteenth Amendment, those cases generally followed the trajectory of the classic economic rights cases: during the *Lochner* era, federal child labor laws were struck down as unconstitutional (with Holmes dissenting), but after 1937, they were upheld.¹⁰²

The *Prince* Court was at pains to condemn the "evils" of child labor.¹⁰³ But notably, while the exploitation of child labor in the Industrial Era could have been viewed—*West Coast Hotel*-like—as "recent economic experience"¹⁰⁴ that undermined the assumptions of a *Lochner*-era rule, and therefore could have led to the repudiation of parental rights as that recent experience led to the repudiation of the right to contract, the Court took a wholly different tact.¹⁰⁵ Instead, the Court strongly embraced the parental rights at issue and identified a compelling interest that at times justifies intruding on that right.

Both *Meyer* and *Pierce* had suggested there were limits to parental rights,¹⁰⁶ and *Prince* was the first opportunity for the Court to identify

100 *Prince*, 321 U.S. at 170–71 ("However Jehovah's Witnesses may conceive them, the public highways have not become their religious property merely by their assertion."); *id.* at 177 (Jackson, J., concurring) ("This case brings to the surface the real basis of disagreement among members of this Court in previous Jehovah's Witness cases."); *id.* at 176 (Murphy, J., dissenting) (noting "the Jehovah's Witnesses are living proof of the fact that even in this nation, conceived as it was in the ideals of freedom, the right to practice religion in unconventional ways is still far from secure" and that "[t]o them, along with other present-day religious minorities, befalls the burden of testing our devotion to the ideals and constitutional guarantees of religious freedom").

101 See Philip Harvey, *Combating Joblessness: An Analysis of the Principal Strategies that Have Influenced the Development of American Employment and Social Welfare Law During the 20th Century*, 21 BERKELEY J. EMP. & LAB. L. 677, 692–93, 693 n.42 (2000).

102 Compare *Hammer v. Dagenhart*, 247 U.S. 251, 276–77 (1918), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941), and *Child Labor Tax Case*, 259 U.S. 20, 44 (1922), with *Darby*, 312 U.S. at 116–17 (overruling *Hammer*).

103 *Prince*, 321 U.S. at 168 (explaining that "[a]mong evils most appropriate for such [child protective] action are the crippling effects of child employment"); see also *Sturges & Burn Mfg. Co. v. Beauchamp*, 231 U.S. 320, 325 (1913) ("It cannot be doubted that the State was entitled to prohibit the employment of persons of tender years in dangerous occupations." (first citing *Holden v. Hardy*, 169 U.S. 366, 392, 395 (1898); and then citing *Chi., Burlington & Quincy R.R. Co. v. McGuire*, 219 U.S. 549, 568, 569 (1911))).

104 *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937).

105 See *Prince*, 321 U.S. at 166–69.

106 See *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925).

one. The decision does so in a way that solidifies the underlying principle of *Meyer* and *Pierce*. *Prince* not only explicitly cites them both as good law,¹⁰⁷ but also reaffirms parental rights in even stronger language than the earlier cases used, calling them “sacred private interests,”¹⁰⁸ and expounding: “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”¹⁰⁹

Three additional aspects of *Prince* are significant for understanding its relationship to *Meyer* and *Pierce*. First, *Prince* endorses their structural justification for parental rights, saying they are “basic in a democracy.”¹¹⁰

Second, although the Court was not yet speaking in the language of “strict scrutiny” for fundamental rights, *Prince* makes clear that a high bar must be overcome to allow infringement of parental rights and nods in directions that can now be understood as requiring narrow tailoring to a compelling state interest. The law at issue, the Court explains, protects “no mere corporate concern”; rather, it protects the interest in “children be[ing] both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens.”¹¹¹ Further, the Court notes that simply serving children’s “health and welfare” would *not* be a sufficient basis to overcome a parent’s rights.¹¹² To put this in modern terms, the Court identified a *compelling* state interest; it then offered an analysis of how *tailored* the statute was to that interest, explaining that the statute’s absolute prohibition on children selling periodicals was justified because it may have been the only way to fully protect the state interest at stake.¹¹³ Thus, even as it denied the particular parental rights claim of Mrs.

107 *Prince*, 321 U.S. at 166; see also *id.* at 171 (“The religious training and indoctrination of children may be accomplished in many ways, some of which, as we have noted, have received constitutional protection through decisions of this Court. These and all others except the public proclaiming of religion on the streets, if this may be taken as either training or indoctrination of the proclaimer, remain unaffected by the decision.”).

108 *Id.* at 165.

109 *Id.* at 166.

110 *Id.* at 165.

111 *Id.*

112 *Id.* at 171.

113 *Id.* at 169–70 (“The case reduces itself therefore to the question whether the presence of the child’s guardian puts a limit to the state’s power. That fact may lessen the likelihood that some evils the legislation seeks to avert will occur. But it cannot forestall all of them. . . . Massachusetts has determined that an absolute prohibition, though one limited to streets and public places and to the incidental uses proscribed, is necessary to accomplish its legitimate objectives. Its power to attain them is broad enough to reach these peripheral instances in which the parent’s supervision may reduce but cannot eliminate entirely the ill effects of the prohibited conduct.”).

Prince, the Court affirmed the *Meyer-Pierce* doctrine that parental rights are entitled to substantive protection under the Fourteenth Amendment.

Third, it is worth noting that nothing in the opinion suggests that the limits *Prince* imposes on the substantive right to parental decisionmaking have anything to do with *Lochner's* repudiation. The opinion did not cite *West Coast Hotel* or any other cases that upheld economic regulations, instead relating the rights at issue in *Prince* to those recently upheld in *West Virginia State Board of Education v. Barnette*,¹¹⁴ which—like *Meyer* and *Pierce*—celebrated diversity and restrained democratic majorities from imposing orthodoxy on children. The Court's first post-*Lochner*-era consideration of parental rights not only cemented *Meyer* and *Pierce* but also treated them as wholly unconnected to *Lochnerian* mistakes.

Thus it became clear quite quickly that the Court understood *Meyer* and *Pierce* to survive what has been called the first death of substantive due process,¹¹⁵ but would more accurately be called the death of *economic* substantive due process. And they survived wholly intact. That is to say, they did not need to be resuscitated at the birth of the second era of substantive due process because they had not been weakened.¹¹⁶

After *Prince*, the Court would not look much at parental rights again until 1972.¹¹⁷ In the meantime, the second era of due process had begun.¹¹⁸ If the first one was heated, this one has been scorching.

II. THE SECOND ERA OF DUE PROCESS: MEYER AND PIERCE AFFIRMED AND EXTENDED

Unsurprisingly, later cases took up some of the many questions left open about parental rights by *Meyer*, *Pierce*, and *Prince*, but before any further parental rights cases reached the Supreme Court, *Meyer* and *Pierce* became the seeds of the most hotly contested line of cases

114 *Id.* at 165–66 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)).

115 See James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211, 211–12 (1993); Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215, 215 (1987).

116 See PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 946 (3d ed. 1992).

117 See *Stanley v. Illinois*, 405 U.S. 645 (1972). In the interim, the Court did have the occasion to touch on parental rights in *May v. Anderson*, 345 U.S. 528, 529, 533 (1953), calling them “[r]ights far more precious to appellant than property rights,” in a case that was between private parties. *Skinner v. Oklahoma* also addressed the right to become a parent during this period, but it was decided on equal protection rather than substantive due process grounds. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

118 See BREST & LEVINSON, *supra* note 116, at 946–58..

of the last sixty years—those related to privacy and bodily autonomy. This Part will trace the development of substantive due process in its second era, explaining how *Meyer* and *Pierce* seeded the new line, but also how the new line diverged from the underpinnings of parental rights. Second-generation substantive due process rights were restrained in *Washington v. Glucksberg*¹¹⁹ and, ultimately, one vein was repudiated in *Dobbs*, leaving others in doubt. But a close reading of this line of cases demonstrates that nothing in it undercuts *Meyer* or *Pierce*. On the contrary, the Supreme Court's treatment of parental rights throughout this era has entrenched them even more firmly in the constitutional firmament.

A. *Meyer and Pierce's Privacy Progeny*¹²⁰

Beginning with *Griswold v. Connecticut*¹²¹ in 1965, the Supreme Court expanded on the seeds sown in *Meyer* and *Pierce* to protect unenumerated rights for the first time since the *Lochner* era. In *Griswold*, the Court struck as unconstitutional a Connecticut statute that made it illegal for married couples to use contraceptives.¹²² In the opinion, Justice Douglas began the post-*Lochner* effort to give new life to substantive due process. The holding explicitly relied on *Meyer* and *Pierce* to find that the Constitution protects certain unenumerated rights. The decision distinguished the disavowed *Lochner*-esque rights that relate to “economic problems, business affairs, or social conditions,” which, it said, are not for courts to address, from other unenumerated rights, which are protected, citing *Meyer* and *Pierce* as providing an example of the latter.¹²³ For present purposes, this distinction between economic and noneconomic rights is the key takeaway from *Griswold*.

Some of Justice Douglas's opinion for the Court has not fared well over time. Undoubtedly motivated to differentiate the *Lochner* mistake of protecting the right to contract, Justice Douglas suggested that some unenumerated rights remain protected because “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”¹²⁴ This penumbral metaphor did not survive very long, but the opinion also drew

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

120 I use the term “privacy progeny” as a concise way to label the line of cases discussed in this Section and distinguish them from the parental rights cases that flowed more directly from *Meyer* and *Pierce*. As discussed in the text, I do not mean to suggest that the reasoning in these cases is fully explained by a “right to privacy”; it is also connected to rights to autonomy, dignity, and expression.

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

122 *Id.* at 485–86.

123 *Id.* at 482.

124 *Id.* at 484.

on Justice Harlan's dissent in *Poe v. Ullman*¹²⁵ to explain that the specific, enumerated "guarantees create zones of privacy."¹²⁶ The right of a married couple to use contraception, the Court held, was within such a zone.¹²⁷ *Griswold*'s privacy principle became the basis for a string of cases that protected additional unenumerated rights.

First, in light of *Griswold*'s holding of the right of married couples to use contraceptives, in *Eisenstadt v. Baird*, the Court extended, on equal protection grounds, the right to distribute contraception to unmarried persons.¹²⁸ The Court then went on to use the privacy right discussed in the contraception cases to address the right to abortion and gay rights issues, elaborating the underlying idea of liberty.

In *Roe v. Wade*, the Court famously built on *Griswold* to find a right to terminate a pregnancy based on a "right of privacy" "founded in the Fourteenth Amendment's concept of personal liberty."¹²⁹ This right to abortion was reaffirmed in additional cases, most importantly in *Planned Parenthood v. Casey*, again using the language of "personal liberty."¹³⁰ As the Court discussed abortion, it began to broaden the language it used to describe the liberty protected by the Fourteenth Amendment, explaining it covers "choices central to personal dignity and autonomy" and "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."¹³¹

The Court would continue to expand privacy rights in the 2000s, but took an important pause in 1997 with *Washington v. Glucksberg*.¹³² *Glucksberg* presented a challenge to a state statute prohibiting assisted suicide.¹³³ The Court held the statute did not violate the Constitution and, in doing so, laid out what is now viewed as the canonical conservative approach to determining whether a right is fundamental and therefore entitled to substantive protection.¹³⁴

125 *Poe v. Ullman*, 367 U.S. 497, 522–55 (1961) (Harlan, J., dissenting). *Poe* had denied a challenge to a statute banning contraceptives for lack of standing. *Id.* at 498, 508–09 (plurality opinion).

126 *Griswold*, 381 U.S. at 484.

127 *Id.* at 485.

128 *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972).

129 *Roe v. Wade*, 410 U.S. 113, 153 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

130 *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992) ("It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."), *overruled by* *Dobbs*, 142 S. Ct. 2228.

131 *Id.* at 851.

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

133 *Id.* at 705–06.

134 *Id.*; see also Kenji Yoshino, *A New Birth of Freedom? Obergefell v. Hodges*, 129 HARV. L. REV. 147, 149 (2015) (comparing the "closed-ended" approach of *Glucksberg* with the "open-ended" approach of Justice Harlan's dissent in *Poe v. Ullman*, which was adopted by the majority in *Casey*).

The *Glucksberg* Court took several steps important for the present discussion. First, it reaffirmed—citing *Meyer* and *Pierce*, among other cases—that the Due Process Clause provides substantive protection to certain unenumerated aspects of liberty.¹³⁵ Second, it emphasized the dangers of expanding the realm of substantive due process, expressing concern to avoid “the liberty protected by the Due Process Clause be[ing] subtly transformed into the policy preferences of the Members of this Court.”¹³⁶ Third, it spelled out a narrow rule for determining whether a right is substantively protected: “the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition’” and “‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’”¹³⁷ Fourth, it reiterated that if a right is fundamental, there is a high bar for infringing on it, which can only be justified by a compelling state interest to which the infringement is narrowly tailored.¹³⁸

Where the contraception and abortion cases had taken a more expansive view of substantive due process, *Glucksberg* pulled back, articulating sharper limits and a narrower set of justifications for identifying when an unenumerated right receives substantive protection through the Fourteenth Amendment. But the case did not end the conversation. Indeed, although Justice Souter concurred in the result, his concurring opinion endorsed the more expansive view of substantive due process that was associated with *Griswold* and Justice Harlan’s *Poe* dissent.¹³⁹ The Court soon returned to the more expansive approach.

In *Lawrence v. Texas*, the Court relied on the broadened understanding of liberty scaffolded in the contraception and abortion cases to overturn a statute that criminalized sodomy, explaining that “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”¹⁴⁰ Then, in *Obergefell v. Hodges*, the Court developed this view further, holding that because “liberty . . . includes certain specific rights that allow persons,

135 See *Glucksberg*, 521 U.S. at 719–20.

136 *Id.* at 720.

137 *Id.* at 720–21 (first quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); and then quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)).

138 *Id.* at 721 (“[T]he Fourteenth Amendment ‘forbids the government to infringe . . . ‘fundamental’ liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.’” (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993))).

139 See *id.* at 767 (Souter, J., concurring in judgment).

140 *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

within a lawful realm, to define and express their identity,” the Fourteenth Amendment protects the right to marry someone of the same sex.¹⁴¹

Thus the second-era line of substantive due process cases from *Griswold* through *Obergefell* was one of significant expansion, with *Glucksberg* as the canary signaling retrenchment to come. There is, of course, much to say about this line of cases that is beyond the scope of this Article—on privacy,¹⁴² the role of personhood and autonomy,¹⁴³ and how equal protection might offer alternative grounds for the rights,¹⁴⁴ among many important topics. As the constitutional protection of privacy rights in general, and abortion in particular, became central points of political dispute, their constitutional underpinnings became a renewed center of debate as well.¹⁴⁵ The culture war over abortion and gay rights became entwined with constitutional theories about judicial activism and constitutional interpretation, and reinvigorated the question of whether the Constitution protects unenumerated rights.¹⁴⁶ Though there are nuanced positions across the spectrum on these issues, schematically it is fair to say that substantive outcomes considered politically progressive have become associated with a view of the Constitution as a “living” document that is meant to evolve expansively,¹⁴⁷ while conservative political outcomes are associated with originalism and the idea that the Constitution is a static document that enshrined fixed rights (i.e., that the Constitution is, as Justice Scalia put it, “dead, dead, dead”).¹⁴⁸ The later Parts of this Article will reveal this to be a false dichotomy with respect to understanding the status of *Meyer* and *Pierce* because the concept of parental rights is both deeply rooted in history *and* has evolved to expand protections in

141 *Obergefell v. Hodges*, 576 U.S. 644, 651–52 (2015).

142 *See id.* at 666.

143 *See generally* Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989).

144 *See, e.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985); Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, and Reva Siegel as Amici Curiae in Support of Respondents, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984).

145 *See, e.g.*, Reva B. Siegel, *How Conflict Entrenched the Right to Privacy*, 124 YALE L.J.F. 316 (2015).

146 *See, e.g.*, Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641 (1990); Robert H. Bork, *The Judge’s Role in Law and Culture*, 1 AVE MARIA L. REV. 19 (2003).

147 *See Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting); Thurgood Marshall, *The Constitution: A Living Document*, 30 HOW. L.J. 915 (1987).

148 *Constitution a ‘Dead, Dead, Dead’ Document, Scalia Tells SMU Audience*, DALL. MORNING NEWS (Jan. 28, 2013, 11:08 PM CST), <https://www.dallasnews.com/news/2013/01/29/constitution-a-dead-dead-dead-document-scalia-tells-smu-audience/> [https://perma.cc/Z9VN-AWH6].

the face of historical lessons. But the next steps are to examine the roles played by *Meyer* and *Pierce* in the privacy cases and in later parental rights jurisprudence before turning to consider their status in light of the Court's recent treatment of unenumerated rights.

1. *Meyer* and *Pierce*'s Role in the Privacy Line of Substantive Due Process Cases

Although each of the cases in the privacy line that extends from *Griswold* through *Obergefell* cites either *Meyer* or *Pierce* or both, *Griswold* is the only one to offer an analysis of them.¹⁴⁹ Justice Douglas, writing for the *Griswold* majority, gives several examples of protected zones of privacy that emanate from the penumbras of various amendments in the Bill of Rights, including the Third, Fourth, and Fifth Amendments.¹⁵⁰ But his first and most important example of a penumbral right comes in his discussion of *Meyer* and *Pierce*. In a notable move, Justice Douglas locates the rights of *Meyer* and *Pierce* squarely in the First Amendment,¹⁵¹ describing them as standing for the proposition that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge."¹⁵² While *Meyer* did refer to the "acquisition of knowledge" as a matter of "supreme importance,"¹⁵³ there is nothing in the four corners of either opinion that suggests the Court based *Meyer* or *Pierce* in the First Amendment,¹⁵⁴ though it had been invited by the parties to do so.¹⁵⁵

149 Most of the cases on abortion and gay rights cite, but do not discuss, *Meyer* and *Pierce*. The *Obergefell* decision discusses *Meyer* and *Pierce* to the extent of noting that they describe "the varied rights . . . to marry, establish a home and bring up children" "as a unified whole." *Obergefell v. Hodges*, 576 U.S. 644, 668 (2015) (internal quotation marks omitted) (quoting *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978)).

150 *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

151 *Id.* at 482 ("The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.").

152 *Id.*

153 *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

154 The Court held for the first time that the First Amendment was incorporated against the States just after *Pierce* was decided. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

155 See Ross, *supra* note 51, at 170–72; see also *Troxel v. Granville*, 530 U.S. 57, 95 (2000) (Kennedy, J., dissenting) (explaining that if *Meyer* and *Pierce* had been decided later, they might have been grounded in the First Amendment, but that, in fact, "[t]heir formulation and subsequent interpretation have been quite different [from a First Amendment analysis], of course; and they long have been interpreted to have found in Fourteenth Amendment concepts of liberty an independent right of the parent in the 'custody, care and nurture of the child,' free from state intervention" (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944))).

Another aspect of *Griswold*'s treatment of *Meyer* and *Pierce* is worth underscoring. *Griswold*'s majority opinion,¹⁵⁶ one of the concurrences,¹⁵⁷ and the dissent¹⁵⁸ all suggest *Meyer* and *Pierce* are based in natural rights, despite the fact, discussed above, that the opinions did not assert any natural rights argument.¹⁵⁹ For the dissent, claiming *Griswold*'s majority decision rested on a natural rights theory clearly serves the strategy of associating it with the mistake of *Lochner*.¹⁶⁰ Although Justice Douglas never mentions "natural rights," the opinion for the Court evokes them when it ends by explaining, "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system."¹⁶¹ This not only feeds into the dissent's effort to tie *Meyer* and *Pierce* to *Lochner*, but ignores the core political/structural argument at their base, to which the opinion never refers.¹⁶² In fact, in its final lines, the *Griswold* decision explicitly downplays any political aspect of the marital relation it is protecting, concluding that "[marriage] is an association that promotes a way of life, not causes; a harmony in living, not political faiths."¹⁶³

Likewise, none of the substantive due process decisions that build on *Griswold* note or develop the political/structural justification provided in *Meyer* and *Pierce*. Some of them might have built on the *Meyer-Pierce* principle that families play a key structural role in maintaining American pluralism and fending off totalitarianism,¹⁶⁴ but, for better

156 *Griswold*, 381 U.S. at 486 ("We deal with a right of privacy older than the Bill of Rights . . .").

157 *Id.* at 495–96 (Goldberg, J., concurring) (concluding that the government cannot "disrupt[] the traditional relation of the family—a relation as old and as fundamental as our entire civilization," *id.* at 496).

158 *Id.* at 516 (Black, J., dissenting) ("[T]he reasoning stated in *Meyer* and *Pierce* was the same natural law due process philosophy which many later opinions repudiated . . .").

159 *See supra* Section I.B.

160 *See Griswold*, 381 U.S. at 514–15 (Black, J., dissenting) (arguing that the concurring opinions are of a piece with the *Lochner* economic rights cases and describing *Meyer* and *Pierce* as "decided in opinions by Mr. Justice McReynolds which elaborated the same natural law due process philosophy found in *Lochner v. New York*," *id.* at 515).

161 *Id.* at 486 (majority opinion).

162 Justice Goldberg's concurring opinion is the only opinion in the case that even gestured toward the structural argument. In an opinion focused mainly on arguing that the Ninth Amendment, as well as the Fourteenth, protects the right to contraception, Justice Goldberg said the Constitution "protect[s] against such totalitarian limitation of family size, which is at complete variance with our constitutional concepts." *Id.* at 497 (Goldberg, J., concurring).

163 *Id.* at 486 (majority opinion).

164 *See Ristroph & Murray, supra* note 63, at 1238 ("Families are institutions in which individuals find meaningful relationships, necessary nurturing and support, and a structure of authority independent of the state. Individuals with strong family ties are more likely to be capable of critical reflection about organized political institutions; individuals who are

or worse, they did not. As the next Sections show, the Court has provided strong reason to believe that that principle is more firmly enshrined than ever in the constitutional firmament. First, *Meyer* and *Pierce* have a different line of progeny that cement the status of parental rights. Second, as the Court put limits on the line of privacy cases, it spelled out the current test for unenumerated rights—a test that *Meyer* and *Pierce* unquestionably pass.

B. Parental Rights Reaffirmed

Although the Supreme Court has not taken many cases that address the substantive component of parental rights,¹⁶⁵ on the three occasions when it has, it has strongly reaffirmed the parental rights articulated in *Meyer* and *Pierce*.

First came *Stanley v. Illinois*, in 1972.¹⁶⁶ There, the Court found unconstitutional an Illinois statute that allowed the State to take custody of a child from his father without a hearing when the mother was deceased and the parents had not been married.¹⁶⁷ The decision cited *Meyer* for the proposition that “[t]he rights to conceive and to raise one’s children have been deemed ‘essential,’” and championed the interest in rearing one’s children as one that “undeniably warrants deference and, absent a powerful countervailing interest, protection.”¹⁶⁸ The *Stanley* Court quoted from Justice Frankfurter’s concurrence in *Kovacs v. Cooper*: “It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children ‘come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.’”¹⁶⁹ It is worth noting that Justice Frankfurter began the sentence quoted in *Stanley* by saying, “[I]n considering what interests are so fundamental as to be enshrined in the Due Process Clause, those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this

family members before they are citizens are less susceptible to organized public indoctrination.”).

165 See Emily Buss, *Passively Virtuous Parental Rights*, 100 NOTRE DAME L. REV. 1533, 1557 (2026).

166 *Stanley v. Illinois*, 405 U.S. 645 (1972).

167 See *id.* at 658. Although the case had been argued on equal protection grounds, the Court decided it on due process grounds as well. See Josh Gupta-Kagan, *The Strange Life of Stanley v. Illinois: A Case Study in Parent Representation and Law Reform*, 41 N.Y.U. REV. L. & SOC. CHANGE 569, 580–82 (2017).

168 *Stanley*, 405 U.S. at 651 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

169 *Id.* (alteration in original) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)).

Court with a momentum”¹⁷⁰ Thus the Court is again recognizing the importance of parental rights to the structure of American democracy.

Next, in *Wisconsin v. Yoder*, the Court struck down criminal convictions of Amish parents who violated a state law requiring children to be in school until they turned sixteen, where their religious convictions required their children stay home after age fourteen to learn Amish ways and avoid exposure to “worldly” ways.¹⁷¹ The Court found that, although the State has a right to require and regulate education, Wisconsin’s application of its compulsory education requirement to Amish youth violated their parents’ rights.¹⁷² Unlike the other parental rights cases, the *Yoder* Court considered the rights at issue primarily as free exercise rights and much of the decision is grounded in religious liberty.¹⁷³ Nonetheless, the decision reaffirmed *Meyer* and *Pierce* in strong language, saying, “[The] primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition,” and quoted *Pierce*’s entire discussion of the limitations on state power to standardize children.¹⁷⁴

Finally, in the Court’s most recent treatment of substantive parental rights, *Troxel v. Granville*, the Court held unconstitutional the application of a statute granting grandparents visits with their grandchildren over the mother’s objection.¹⁷⁵ The plurality opinion reviewed prior caselaw, including *Meyer* and *Pierce*, and concluded that “[i]n light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”¹⁷⁶

Troxel is known for its many opinions, but, despite the lack of a majority opinion, it demonstrated the breadth of recognition of parental rights. Not only did the plurality, which included Justices from across the political spectrum, reaffirm *Meyer* and *Pierce*’s basic premise, but one of the concurrences and two of the dissents also firmly endorsed the view that parental rights are substantively protected by the Fourteenth Amendment.¹⁷⁷ Justice Souter, who did not join the plurality, nonetheless cited *Meyer* and *Pierce* to stress that the Court has

170 *Kovacs*, 336 U.S. at 95 (Frankfurter, J., concurring).

171 *Wisconsin v. Yoder*, 406 U.S. 205, 207, 210 (1972).

172 *Id.* at 233–34.

173 *See id.* 235.

174 *See id.* at 232, 232–33.

175 *Troxel v. Granville*, 530 U.S. 57, 60, 63 (2000) (plurality opinion).

176 *Id.* at 66.

177 *See id.* at 77 (Souter, J., concurring in judgment); *id.* at 86–87 (Stevens, J., dissenting); *id.* at 95 (Kennedy, J., dissenting).

"long recognized that a parent's interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment."¹⁷⁸ And, in line with the political theory of *Meyer* and *Pierce*, Justice Souter noted the danger of "indoctrinat[ion]" of children by adults given access to them by state officials over the objection of their parents.¹⁷⁹

As important, two of the dissents included strong language demonstrating their view that *Meyer* and *Pierce* remain good law. Justice Stevens, who would have remanded because he believed the Washington Supreme Court erred in holding the visitation statute facially unconstitutional,¹⁸⁰ endorsed the view that "the right of a parent to maintain a relationship with his or her child is among the interests included most often in the constellation of liberties protected through the Fourteenth Amendment."¹⁸¹ He emphasized that the caselaw "leave[s] no doubt that parents have a fundamental liberty interest in caring for and guiding their children, and a corresponding privacy interest—absent exceptional circumstances—in doing so without the undue interference of strangers to them and to their child."¹⁸²

Justice Kennedy, who also would have reversed the facial invalidation,¹⁸³ used strong language to endorse substantive parental rights as well:

[T]here is *a beginning point that commands general, perhaps unanimous, agreement* in our separate opinions: As our case law has developed, the custodial parent has a constitutional right to determine, without undue interference by the State, how best to raise, nurture, and educate the child. The parental right stems from the liberty protected by the Due Process Clause of the Fourteenth Amendment.¹⁸⁴

178 *Id.* at 77 (Souter, J., concurring in judgment) (first citing *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923); then citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925); then citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); then citing *Yoder*, 406 U.S. at 232; then citing *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); then citing *Parham v. J.R.*, 442 U.S. 584, 602 (1979); then citing *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); and then citing *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

179 *Id.* at 78, 78–79.

180 *Id.* at 85 (Stevens, J., dissenting).

181 *Id.* at 86–87.

182 *Id.* at 87.

183 *See id.* at 94–95 (Kennedy, J., dissenting).

184 *Id.* at 95 (emphasis added) (first citing *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923); then citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925); then citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); then citing *Stanley v. Illinois*, 405 U.S. 645, 651–52 (1972); then citing *Wisconsin v. Yoder*, 406 U.S. 205, 232–33 (1972); and then citing *Santosky v. Kramer*, 455 U.S. 745, 753–54 (1982)).

Only Justices Thomas (in concurrence) and Scalia (in dissent) expressed skepticism regarding the substantive protection of parental rights, indicating that they had not revisited *Meyer* and *Pierce* only because no party had sought that.¹⁸⁵ But the language of the other seven Justices, like the language from *Stanley* and *Yoder*, makes clear that, at least through the beginning of the twenty-first century, a significant majority of all Justices who have sat on the Court since *Pierce* was decided have considered parental rights to be protected substantively by the Fourteenth Amendment's Due Process Clause. As significantly, none of the strife surrounding the privacy line of cases has riven the post-*Lochner* parental rights cases. We return to the strife-ridden realm of the privacy cases to see that even the developments there provide reason to be confident in the continued vitality of *Meyer* and *Pierce*.

C. Retrenchment of Unenumerated Rights

The 2022 decision in *Dobbs v. Jackson Women's Health Organization*¹⁸⁶ was, of course, a game changer for the line of privacy cases. In overturning *Roe*, the Court withdrew all constitutional protection from a right that had previously been protected. Because the decision to overrule the right to abortion was based, at least in part, on the fact that "the Constitution makes no mention of abortion,"¹⁸⁷ the decision raised alarm that all unenumerated rights are vulnerable.¹⁸⁸ Indeed, the *Dobbs* dissenters warned: "The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation."¹⁸⁹ The *Dobbs* majority was at pains to disavow (repeatedly) the threat to other unenumerated rights, asserting that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion."¹⁹⁰ And Justice Kavanaugh emphasized that point in his concurrence.¹⁹¹ What are we to make of these divergent views regarding what *Dobbs* means for the future of *Meyer* and *Pierce*?

With respect to *Meyer* and *Pierce* in particular, a careful reader of *Dobbs* might see mixed messages. The majority says that the rights at

185 See *id.* at 80 (Thomas, J., concurring in judgment); *id.* at 92 (Scalia, J., dissenting).

186 *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

187 *Id.* at 2240; see also *id.* at 2283 ("[P]rocurring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution's text or in our Nation's history."); *id.* at 2304 (Kavanaugh, J., concurring) ("The issue before this Court is what the Constitution says about abortion.").

188 Murray et al., *supra* note 2; Chemerinsky, *supra* note 2.

189 *Dobbs*, 142 S. Ct. at 2319 (Breyer, Sotomayor & Kagan, JJ., dissenting).

190 *Id.* at 2277–78 (majority opinion); see also *id.* at 2261.

191 See *id.* at 2309 (Kavanaugh, J., concurring).

issue in *Meyer* and *Pierce* “were obviously very, very far afield” from the right to abortion.¹⁹² Yet the majority repeatedly holds up the repudiation of *Lochner* as a model for constitutional decisionmaking at its best,¹⁹³ and cites John Hart Ely’s takedown of *Roe*,¹⁹⁴ which described *Meyer* and *Pierce* as “products of ‘the *Lochner* era.’”¹⁹⁵ More broadly, given the current widespread distrust of the Court and the division between the *Dobbs* majority and dissenters, the proffered assurance that *Dobbs* was only about abortion does not seem likely to convince many on either side of contemporary culture wars.

But for all the distrust, there is an aspect of *Dobbs* on which both sides of the divide agree: the decision doubles down on the narrower, *Glucksberg* approach to fundamental rights that requires the two-pronged test that considers history and tradition and ordered liberty. Conservatives tend to be pleased with what this test augurs, while many progressives are concerned. Yet in contrast to the issues on which implementing this test can be expected to lead to contentious disputes, on the issue of parental rights it leads, as the next two Parts show, to a broadly shared commitment to *Meyer* and *Pierce*.

III. THE HISTORY AND TRADITION OF PARENTAL RIGHTS

Disagreement over the role of history and tradition in constitutional adjudication runs deep, as do disagreements over particular empirical claims about what rights are embedded in our history and tradition.¹⁹⁶ But it seems clear that, at least for the foreseeable future, the

192 *Id.* at 2268 (majority opinion) (first citing *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); and then citing *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

193 *See id.* at 2248, 2278–79.

194 *See id.* at 2270 (citing John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973)).

195 Ely, *supra* note 194, at 931 n.79; *see also id.* at 937 (describing the *Lochner*-era error as “frequently though not always [occurring] under the rubric of ‘liberty of contract’”). Ely also claimed that “[t]he vitality of the theory on which they rested has been questioned.” *Id.* at 931 n.79. As the preceding Part argued, that claim is incorrect, *see supra* Part I, and the one cite Ely offers for it—*Epperson v. Arkansas*—is better understood as an anti-Establishment decision. *Epperson v. Arkansas*, 393 U.S. 97, 105–06 (1968) (“For purposes of the present case, we need not re-enter the difficult terrain which the Court, in [*Meyer*], traversed Today’s problem is capable of resolution in the narrower terms of the First Amendment’s prohibition of laws respecting an establishment of religion or prohibiting the free exercise thereof.”).

196 *See, e.g.*, *United States v. Rahimi*, 144 S. Ct. 1889, 1899–1901 (2024); *id.* at 1931–44 (Thomas, J., dissenting); *id.* at 1904 (Sotomayor, J., concurring); *id.* at 1907–09 (Gorsuch, J., concurring); *id.* at 1913–20 (Kavanaugh, J., concurring); *id.* at 1924–26 (Barrett, J., concurring); *id.* at 1928–29, (Jackson, J., concurring). There are important critiques of the Supreme Court’s approach to historical analysis in *Dobbs* and other Roberts’ Court decisions. *See, e.g.*, Melissa Murray, *Making History*, 133 YALE L.J.F 990 (2024); Aaron Tang, *Lessons from Lawrence: How “History” Gave Us Dobbs—And How History Can Help Overrule It*, 133

history-and-tradition rubric will play a significant role in the Supreme Court's analysis of unenumerated rights. This Part demonstrates that, even in the face of the surrounding conflicts, there should be broad consensus that parental rights are deeply rooted in American history and tradition in ways that firmly establish it is a fundamental right entitled to constitutional protection.

The first Section of this Part explains that parental rights were widely protected in state common law in the lead up to ratification of the Fourteenth Amendment, which is the period *Dobbs* deems most important for assessing the status of substantive due process rights.¹⁹⁷ The second Section shows that following ratification, states not only continued to recognize parental rights but strongly embraced them and, in a few instances, even began to ground these rights within the meaning of "liberty" protected by the Fourteenth Amendment, as well as in the common law, which had historically protected them. The third Section explains that throughout the hundred years of jurisprudence since *Meyer* and *Pierce*, the Supreme Court has consistently recognized parental rights to be grounded in history and tradition.

A. *The Ubiquity of Parental Rights in State Common Law Prior to Ratification of the Fourteenth Amendment*

State common law has long recognized parental rights as protected against state interference. As far back as the early 1800s, courts made clear that parents had rights to the custody of their children that courts did not have authority to infringe upon except upon a showing that the parent was unfit to raise them.¹⁹⁸

YALE L.J.F. 65 (2023); Siegel, *supra* note 11; Mary Ziegler, *The History of Neutrality: Dobbs and the Social-Movement Politics of History and Tradition*, 133 YALE L.J.F. 161 (2023); Franklin, *supra* note 17; Reva B. Siegel, *Dead or Alive: Originalism As Popular Constitutionalism In Heller*, 122 HARV. L. REV. 191 (2008). This Article does not engage those critiques but rather attempts to explain why both those who embrace a Dobbsian approach and those who do not can agree on the vitality of *Meyer* and *Pierce*.

197 See *Dobbs*, 142 S. Ct. at 2242–43, 2267 (identifying "how the States regulated abortion when the Fourteenth Amendment was adopted" as "the most important historical fact" in the constitutional analysis, *id.* at 2267); see also Aaron Tang, *After Dobbs: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. 1091, 1096–97, 1100 (2023) (noting that the *Dobbs* Court focused its historical analysis on the time the Fourteenth Amendment was ratified).

198 See *Boescher v. Boescher*, 7 Ohio N.P. 418, 418 (C.P. Lucas Cnty. 1804) ("The right to the possession and society of his minor child, is a right of which the parent may be deprived, for proper reasons, but only when he has forfeited that right by misuse of the child, or by something that will justify a court of chancery in interfering and for the protection of the child."); *People v. Landt*, 2 Johns. 375, 376 (N.Y. Sup. Ct. 1807) (holding a mother has a "right" to the custody of her illegitimate child except "under special circumstances of ill treatment").

1. State Common Law in the Lead Up to Ratification Unequivocally Recognized Parental Rights

Dobbs identified the key factor in history-and-tradition analysis of substantive due process claims to be how states treated an asserted right at the time leading up to ratification of the Fourteenth Amendment.¹⁹⁹ A review of the reported cases involving parents' claims to their children in the twenty years before ratification reveals a clear, widespread understanding that parents had a protected right to the custody of their children and to make child-rearing decisions. Indeed, a broad search of state court decisions between July 1848 and July 1868 did not find any case in which courts discussed claims of or against parental rights without acknowledging that the parent had rights either by: (1) vindicating that right to hold for the parent or (2) explaining the right was being overcome by particular circumstances in the record of the case.²⁰⁰

199 See *supra* note 197.

200 A search was conducted of all state and federal caselaw that included the terms "parent" and "child" (or variations of those terms) in the twenty years preceding the ratification of the Fourteenth Amendment. The exact search, which was conducted in Westlaw, is: "DA(aft 07-08-1848) & DA(bef 07-09-1868) & parent! & child!". Note that to ensure the search was not artificially skewed toward cases that recognized parental rights, the search was not limited to cases that used the word "right." Reviewing all cases involving disputes concerning children reveals that parents' claims involving their children (whether made offensively or defensively) routinely framed these claims as matters of a parental "right." See, e.g., *infra* notes 208, 213–14. Three cases might arguably be viewed as exceptions to the assertion in the text—*Macready v. Wilcox*, 33 Conn. 321 (1866); *Gardenhire v. Hinds*, 38 Tenn. (1 Head) 402 (1858); and *Brewer v. Harris*, 46 Va. (5 Gratt.) 285 (1848)—but close reading demonstrates they are not. In *Macready v. Wilcox*, the mother's rights were deemed inferior to the uncle-guardian's rights, see *Macready*, 33 Conn. at 328, but it is not a meaningful counterexample to the assertion in the text for two reasons. First, the decision acknowledged that a father would have had rights—i.e., the lack of acknowledgment of the parent's rights stemmed from a gendered rule that was in the process of dying out. See *id.*; *infra* note 215. Second, the mother's rights could have been understood to be waived by the fact that, prior to the order of guardianship having been entered, she had taken the children to the uncle and asked him to care for the children until their majority. *Macready*, 33 Conn. at 321–22. In *Gardenhire v. Hinds*, the court granted custody of a child to her grandmother over the claim of the child's father. *Gardenhire*, 38 Tenn. (1 Head) at 410–11. The decision focused mainly on a dispute over the interpretation of a conveyance and its effect on the devolution of property and did not analyze the custody claim in detail or specifically conduct a parental fitness analysis. *Id.* at 404–10. But the opinion notes evidence in the record that could have supported a finding of parental unfitness, including that the father had previously abandoned the child, had no home, and had limited means to educate the child. *Id.* at 408, 411. In *Brewer v. Harris* a mother's custody claim was denied where her children had been indentured pursuant to a court order based on a statute that allowed overseers of the poor to execute indentures for legitimate children "of parents incapable of supporting them," *Brewer*, 46 Va. (5 Gratt.) at 300, and for all "bastard" children, *id.* The former category clearly falls within an unfitness exception that justifies infringing a parental right; the

The majority of state cases that discussed parental rights claims during this period involved disputes over the custody of children.²⁰¹ The parent's right to custody was routinely vindicated in these decisions, with courts at times returning a child to a parent even after the child had been in the custody of a nonparent for some time.²⁰² The decision of a New Hampshire court in 1860 is illustrative. In *Herrick v. Richardson*, the father of a ten-year-old girl filed a writ of habeas corpus seeking her return from the maternal uncle, with whom the child had resided most of her life.²⁰³ The girl had been taken to the uncle's home

latter does not sound like unfitness to the modern ear but would have been viewed as a recognizable exception to parental rights at the time. (It should be noted that a "bastard" exception could be exploited to impose on the rights of enslaved or formerly enslaved parents, see *infra* note 226 and surrounding text, who were often unable to legitimate their children, see *Brewer*, 46 Va. (5 Gratt.) at 303.) Additionally, there is language in *Adams v. Adams*, 62 Ky. (1 Duv.) 167 (1864), that seems at odds with the assertion in the text, where the court says, "the interest of the child and of the public may authorize a transfer of the custody to a stranger." *Id.* at 170. Taken in isolation this dicta might seem to suggest the parent does not have a right to custody, but the opinion is clear that the child's interests only come into play if the parent is unworthy, and the court gave custody of the child to the mother. See *id.* at 169–70.

201 Some of these cases involved disputes over guardianship—in the sense of being a guardian for a child with respect to financial decisionmaking, usually with respect to an inheritance. See, e.g., *Barney v. De Kraft*, 6 D.C. (1 Mackey) 361 (C.C.D.C. 1862). While the term "guardian" is sometimes used to refer to guardianship over the person, in the sense of control over the care of the child, this Article uses the term "custody" to refer to rights to control the care of a child (including all decisionmaking unrelated to a child's property), and "guardianship" to refer to rights to control (as a trustee) property of a child. See *id.* at 368–72 (explaining that it is well settled that when a will bequeaths property to a child, the testator can select a guardian with respect to the inheritance but cannot thereby infringe the parent's right to custody).

202 See, e.g., *Ramsay v. Ramsay*, 20 Wis. 507, 508 (1866) (giving custody to mother over paternal uncle with whom the child was residing at the time the dispute arose and holding that "[the mother] has a right to the person of her child, unless it appears that she is an unfit person to have control of it" and that the evidence did "not show that her character or conduct has been such that a court would be authorized to interfere and deprive her of the care and custody of this infant child"); *State ex rel. Hodgdon v. Libbey*, 44 N.H. 321, 321, 325 (1862) (granting custody to a father where he had made an agreement placing the child with the respondent and the child had been with the respondent for close to four years and stating, "Ordinarily a father is entitled to the custody of his minor children . . . [unless] it is made clearly to appear that by reason of unfitness in the father for the trust, or other causes, the permanent interests of the child would be sacrificed by such change of custody," *id.* at 321); *Taylor v. Jeter*, 33 Ga. 195, 198, 202 (1862) (affirming a grant of custody to the father, although the child had been in the custody of others for many years, and explaining it would be an unnecessary "expenditure of time and labor to adduce either argument or authority in support of the general proposition, that the father is the natural guardian of his own minor child, and as such entitled to its custody and management," *id.* at 198). The claim in the text is not meant to suggest that custody disputes were common at this time, but simply that parents were expected to prevail when they arose.

203 *State ex rel. Herrick v. Richardson*, 40 N.H. 272, 275–76 (1860).

as a baby when her mother was fatally ill and raised there by the uncle, an aunt, and the maternal grandmother.²⁰⁴ The court recognized that they had cared for the child well, and that she wished to remain with them.²⁰⁵ Yet the court granted custody to the father because “[i]t is a well settled doctrine of the common law, that the father is entitled to the custody of his minor children.”²⁰⁶ The court explained that a father could be denied custody “upon the ground that he is unfit for the trust, by reason of grossly immoral conduct, harsh usage of his child, or other cause,” but emphasized that “a proper regard to the sanctity of the parental relation will require that [such allegations] be sustained by clear and satisfactory proofs.”²⁰⁷ A father’s “paramount right” is one “no court is at liberty to disregard.”²⁰⁸

Similarly, in the 1850s, a Virginia appellate court upheld a grant of custody to a mother who filed a writ seeking the return of her seven-year-old daughter from the paternal grandfather.²⁰⁹ The child had resided with the paternal grandparents since the death of the father, but the court held that where the father was deceased, “the mother, by reason of nurture, is entitled to the custody as of right.”²¹⁰ Notably in discussing this parental right, the opinion foreshadowed more modern cases that emphasize the dyadic aspect of the right,²¹¹ saying also that: “the child had a natural right to the care and nurture of her mother.”²¹²

204 *Id.* at 275, 278.

205 *Id.* at 275–76.

206 *Id.* at 273.

207 *Id.* at 274–75 (citing *Commonwealth v. Briggs*, 33 Mass. (16 Pick.) 203 (1834)).

208 *Id.* at 275. Notably, while the court recognized it has a duty to consider the child’s interests, it saw those interests as served by respecting the father’s rights. *Id.* at 275 (“[W]hile we are bound also to regard the permanent interests and welfare of the child, it is to be presumed that its interests and welfare will be best promoted by continuing that guardianship which the law has provided, until it is made plainly to appear that the father is no longer worthy of the trust.” (citing *Mercein v. People ex rel. Barry*, 25 Wend. 64 (N.Y. 1840))). Since then, as courts have focused more on children’s best interests, there has been growing recognition that those interests generally provide an additional justification for parental rights, beyond natural rights or political justifications. See *infra* notes 269–71 and surrounding text.

209 *Armstrong v. Stone*, 50 Va. (9 Gratt.) 102, 102–03 (1852).

210 *Id.* at 106.

211 See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 760 (1982) (“[T]he child and his parents share a vital interest in preventing erroneous termination of their natural relationship.” (footnote omitted)); *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) (“Th[e] right to the preservation of family integrity encompasses the reciprocal rights of both parent and children.”).

212 *Armstrong*, 50 Va. (9 Gratt.) at 107–08. While this case was typical of its time in recognizing a mother’s right to custody (at least where the father was deceased), the reference to the child’s right to be in the custody of her parent was atypical. The dyadic/relational aspect of the right is a more modern framing. See, e.g., Shanta Trivedi, *My Family*

When the parents did not prevail in custody disputes, courts were often at pains to emphasize that their starting point was that parents had protected rights, and there were sufficient grounds in the record of the case to infringe those rights.²¹³ Again and again, these decisions—from across the country—explicitly stated that parents had a protected, common law right to their children, often characterizing it as a “natural right,”²¹⁴ and made clear that “[t]he common law regards

Belongs to Me: A Child's Constitutional Right to Family Integrity, 56 HARV. C.R.-C.L. L. REV. 267 (2021).

213 See, e.g., *In re Goodenough*, 19 Wis. 274 (1865) (leaving a child with a nonparent but explaining, “If the father apply, the child should, if within the age of nurture, which is fixed at fourteen years, be delivered over to him, unless there be something in his situation or conduct which renders him unfit for the trust. . . . It is furthermore said, that a proper regard to the sanctity of the parental relation will require that the objection be sustained by clear and satisfactory proofs,” *id.* at 278–79.); *Albert v. Perry*, 14 N.J. Eq. 540 (Prerog. Ct. 1862) (denying the mother’s guardianship claim, but stating, “The mother, and after the mother the next of kin of the infant, are entitled to be appointed guardian of a minor under the age of fourteen years; and such claim cannot be disregarded unless for some satisfactory reason apparent to the court,” *id.* at 542). Other decisions that denied parents custody explained the reasons in various ways that indicated the courts understood the denial of parental custody to be an exception to the governing rule. See, e.g., *Houston v. Kimball*, 22 Vt. 575 (1850) (holding the father did not have rights in a dispute between a plaintiff who claimed custody of a “pauper” child through a contract made with the town and a defendant overseer of the poor who claimed he had the father’s permission to bind out the child as an apprentice because “the father could not come forward and claim to exercise the rights of a parent and natural guardian, and control and direct as to the custody and disposition of the boy, until he was also prepared to assume the obligations and liabilities of the same relation, and furnish the means of support,” *id.* at 580); *In re Murphy*, 12 How. Pr. 513 (N.Y. Sup. Ct. 1856) (denying custody to the parents where they had “given” their son to an aunt and uncle to raise for the first nine years of his life and explaining the parents “had by law the right to make the gift,” and that while a father’s placement of a child with another guardian usually requires a written agreement, there are exceptions to that requirement, *id.* at 515); *Parton v. Hervey*, 67 Mass. (1 Gray) 119 (1854) (granting a writ filed by a teenager’s husband against her mother where the teenager, who was above the common law age of consent, had consented to the marriage); *In re Celina*, 7 La. Ann. 162 (1852) (upholding denial of father’s custody where the district court was convinced “of the unsoundness of the father’s mind,” and the child had been placed with a guardian for cause in a prior proceeding); *Farrar v. Olmstead*, 24 Vt. 123 (1852) (granting guardianship to a nonparent where the child’s father was deceased and the governing statute said the mother shall be the guardian following a father’s death unless the mother remarries, and the mother had remarried, and explaining that had she been unmarried, she could not be deprived of guardianship unless “found incompetent or unsuitable,” but that “she ha[d] extinguished that right and authority by her own act,” so that it was “as if the relation of parent and child did not exist,” *id.* at 126).

214 E.g., *Hutson v. Townsend*, 27 S.C. Eq. (6 Rich. Eq.) 249, 254 (1854); *Gishwiler v. Dodez*, 4 Ohio St. 615, 621 (1855); *Vanartsdalen v. Vanartsdalen*, 14 Pa. 384, 388 (1850); *Wand v. Wand*, 14 Cal. 512, 516 (1860).

the father as the natural guardian of his children, and recognizes his right to their custody."²¹⁵

Where cases relied on statutes rather than common law to determine custody, the statutes consistently recognized parents' rights to custody.²¹⁶ Parents' rights to make decisions regarding custody of their children were sometimes even understood to survive the parent's death.²¹⁷ When cases involved custody disputes between two parents, the opinions indicate the law was in flux at this time regarding the relative rights of mothers versus fathers,²¹⁸ but wherever the cases came down on that question, they affirmed parental rights generally.²¹⁹

215 *Dumain v. Gwynne*, 92 Mass. (10 Allen) 270, 271 (1865). As the quote in the text exemplifies, the caselaw in this period focused primarily on the rights of fathers rather than mothers. Mothers, however, typically had rights to children born out of wedlock. See, e.g., *People ex rel. Davenport v. Kling*, 6 Barb. 366, 366 (N.Y. Gen. Term. 1849). These mothers, though, often lost these rights if they married. See, e.g., *Farrar*, 24 Vt. at 125; *State v. Scott*, 30 N.H. (10 Fost.) 274, 277 (1855). By the time of the period under consideration, a significant shift toward recognizing mothers' right had begun. See, e.g., *Tarkington v. State*, 1 Ind. 171, 172 (1848) (noting that "[v]ery recently, the common law, by which the father, when the husband and wife lived in a state of separation, was entitled to the absolute dominion over the children to the exclusion of the mother, has been materially modified by statute, both in *England* and in this country"); *Cole v. Cole*, 23 Iowa 433, 447 (1867) (stating that "[i]n the absence of statute, the stern rule of the common law unquestionably makes the rights of the father, under ordinary circumstances, paramount to the mother's," but noting "the tendency of all the modern decisions is to deny that this [right of the father over the mother] is an absolute right"). In the following decades, the shift continued, with the privileging of fathers' custodial rights giving way to privileging mothers' rights, at least for younger children. MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 248 (1985) (discussing the "tender years" doctrine that shifted rights from fathers to mothers for children under age seven). While important, this shift in the relative rights of fathers and mothers is tangential to the claim in the text that parental rights were broadly recognized. Later, equal protection rulings addressed the state's obligation to be equitable in their treatment of father and mothers. See *Stanley v. Illinois*, 405 U.S. 645, 658 (1972); *Caban v. Mohammed*, 441 U.S. 380, 394 (1979).

216 See, e.g., *Taff v. Hosmer*, 14 Mich. 249, 255 (1866) ("Our statutes give to the father, and where there is no father to the mother (where capable of acting), control of the infant's person." (citing MICH. COMP. LAWS §§ 3303-3304 (1857))).

217 See, e.g., *In re Turner*, 19 N.J. Eq. 433, 435-36 (Prerog. Ct. 1868) ("Parents while living have a right to control the religious education of their children, and their wishes in this respect must be regarded after their death."); *Taff*, 14 Mich. at 259-60 (granting standing to a grandfather in a guardianship proceeding after the death of both parents but stating that next of kin may only oppose appointment of the guardian directed in a father's will by challenging the validity of the will); cf. *Ramsay v. Ramsay*, 20 Wis. 507, 508 (1866) (mother's right to custody trumps deceased father's right to select guardian).

218 See *supra* note 215.

219 See, e.g., *Baird v. Baird*, 18 N.J. Eq. 194, 197-98 (Ch. 1867) ("The father, at common law, is entitled to the custody of his children; and in no case will the courts take them away from him when he has them in his custody fairly obtained, except where the father, from notorious grossly immoral character or great impurity of life, with which his children come in contact so as to be in danger of contamination, is an improper person to have the custody

Strong statements of parents' right to the care and custody of their children came even in cases in which a parent's custody was not directly in dispute.²²⁰

None of this is to say parental rights in this period were absolute. Courts and legislatures made exceptions to the parental right to custody when a parent was deemed unfit.²²¹ But these exceptions were explicitly understood to be the exceptions that prove the rule.²²² Indeed, while courts at the time did not speak in the language of strict scrutiny, they described the exceptions in ways that made clear a high bar had to be cleared to justify any infringement of parental rights. For example, in 1865, the Wisconsin Supreme Court denied a father custody of his indentured twelve-year-old daughter, where she had resided with the nonparent custodian for six years after having been placed there when the father was incarcerated and her mother was in a poor house.²²³ The court clarified that a parent is presumptively entitled to the custody of his child, "unless there be something in his situation or conduct which renders him unfit for the trust."²²⁴ Using language that is familiar to practitioners today, the court emphasized that "a proper regard to the sanctity of the parental relation will require" the father

of his own children. This is the law of this state, except as to infants under seven years of age, the custody of whom, by the act of March 20th, 1860, is given to the mother if she is not unfit for it. . . ."), *rev'd*, 21 N.J. Eq. 384 (1869).

220 See, e.g., *Nashville & Chattanooga R.R. Co. v. Elliott*, 41 Tenn. (1 Cold.) 611, 621 (1860) (discussing in a negligence action parents' "paramount right" to the custody and services of their children); *Townsend v. Kendall*, 4 Minn. 412, 417 (1860).

221 See, e.g., *Young v. State*, 15 Ind. 480, 480–81 (1860) (leaving custody with a nonrelative where the litigant claiming to be the mother had previously denied she was the mother and there was evidence in the record that she was unfit to parent); *People ex rel. Roddy v. N. Y. Juv. Asylum*, 12 Abb. Pr. 92, 93 (N.Y. Sup. Ct. 1860) (denying a writ filed by a father against an agency that had taken custody of his child pursuant to a child neglect statute). For an analysis of litigation challenging the state's authority to intrude on the custodial rights of fit parents over a broader time period than examined in this article, see Laura Savarese, *The Origins of Family Rights and Family Regulation: A Dual Legal History*, 78 STAN. L. REV. 63 (2026) (excavating the late nineteenth and early twentieth century history of habeas litigation by parents seeking return of their children from juvenile institutions), <https://ssrn.com/abstract=5177810> [<https://perma.cc/ZA9C-N7YE>].

222 Similarly, courts also at times found parents had "relinquished" their rights, with the language of relinquishment affirming the underlying principle that parents had rights to custody that could only be intruded upon with justification. See, e.g., *State ex rel. Jewett v. Barrett*, 45 N.H. 15, 16 (1863) (denying custody to father where he made an agreement to "relinquish[] and surrender[]" them and explain that "[u]nder these circumstances the question is whether the [father] has so parted with his parental right to the custody of the child that he is not entitled to the aid he seeks"); *Curtis v. Curtis*, 71 Mass. (5 Gray) 535, 537 (1855) ("[T]he court are all of opinion that, so far as the rights of the mother are concerned, she has relinquished them.").

223 *In re Goodenough*, 19 Wis. 274, 279 (1865).

224 *Id.* at 278.

prevails unless the current caretakers carry the burden of proving otherwise “by clear and satisfactory proofs.”²²⁵

Thus, both when protecting parental rights and when identifying their limits, the state law in the time period that is most critical under *Dobbs* shows that parental rights were deeply rooted in history and tradition.

2. Pre-ratification Cases Extended Parental Rights to Formerly Enslaved Parents

One notable aspect of the state common law on parental rights during the period most relevant for history-and-tradition analysis of Fourteenth Amendment claims is state courts’ protection of the parental rights of Black parents against former slave owners who tried to retain custody of formerly enslaved children through so-called “apprenticeships” authorized by Black Codes as Southern states attempted to continue to subjugate freed slaves.²²⁶ These custody cases carry special weight in understanding the relevant history and tradition because they illustrate that at the time of the Reconstruction Amendments, emancipation was understood to provide parental rights to freed slaves.²²⁷

For instance, in 1867, the Supreme Court of Georgia recognized a mother’s right to custody of her fourteen-year-old son against a man to whom the child had been apprenticed.²²⁸ Although the child was born out of wedlock, the court held: “[T]he mother of an illegitimate

225 *Id.* at 279; *cf.* *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982) (requiring “clear and convincing evidence” to terminate parental rights, *id.* at 748). This state court opinion noted that where a young person has been indentured out, at fourteen, that youth has the right to choose whether to return to a parent who asserts a right to custody. *Goodenough*, 19 Wis. at 278. That difference from later understandings of the age of majority at which parental rights to custody end does not affect the point in the text about the strength of parental rights in the caselaw pre-ratification.

226 See Margaret A. Burnham, *Property, Parenthood, and Peonage: Reflections on the Return to Status Quo Antebellum*, 18 CARDOZO L. REV. 433, 435 (1996) (“The emancipation should have brought the curtain down on this most wrenching feature of bondage—the inability to exercise parental control. . . . However, children were also the most vulnerable members of the community, and planters rushed to exploit their tentative economic and legal status by holding them as apprentices.”); see also Savarese, *supra* note 221, at 83–84 & nn.60–62 (drawing a comparison between freed Black parents efforts to secure custody of their children with legal challenges by working-class, European immigrant parents seeking to retrieve custody of their children from juvenile institutions).

227 I draw here on Peggy Cooper Davis’s work *NEGLECTED STORIES*, which is discussed further in Section IV. DAVIS, *supra* note 21.

228 *Alfred v. McKay*, 36 Ga. 440, 441–42 (1867) (“This mother, the wife of plaintiff in error, has the right to the custody of her child, unless there exist some legal reason why she should be deprived of it.” *Id.* at 441.).

is entitled to the possession of the child. Being the only recognized parent, she may exercise all the paternal power.”²²⁹ The court made clear that the parental right is “the right to the custody of her child, unless there exist some legal reason why she should be deprived of it.”²³⁰ Similarly, the Texas Supreme Court held that a child could not be kept in an apprentice placement over the wishes of a mother, regardless of the child being illegitimate, noting that the child was illegitimate because the parents could not marry while enslaved.²³¹ The Court of Appeals of Kentucky extended the familial custody right to a grandfather, where the parents were deceased, so he could reclaim the subject child who had been apprenticed to his former owner.²³²

In another case, when a child ran away from his former owner to go to his father, the former slave owner filed a writ to try to reclaim the child, but the court upheld the father’s parental right to custody.²³³ The court left no doubt that its protection of this parental right was directly linked to the abolition of slavery, proclaiming:

It should be borne always in mind, and at all times should regulate the conduct of the white man, that slavery is with the days beyond the flood; that it is prohibited by the Constitution of the State of Georgia, and by that paramount authority, the Constitution of the United States; and that its continuance will not by any honest public functionary be tolerated, under the forms of law or otherwise, directly or indirectly.²³⁴

229 See *id.* at 441. The decision indicates the parents married many years after the birth of the child. *Id.* at 440. Although the opinion does not address the point, as Black parents in Georgia before the war, they likely were enslaved and therefore unable to marry.

230 *Id.* at 441; see also *Adams v. Adams*, 36 Ga. 236, 242 (1867) (reversing decision binding out children for apprenticeship and granting custody to father where the parents were married after the birth of the child and concluding “these children were the legitimate children of the petitioner, and he had the legal right to their custody”).

231 See *Timmins v. Lacy*, 30 Tex. 115, 137 (1867).

232 *Thomas v. Newcom*, 64 Ky. (1 Bush) 83, 85 (1866); see also *In re Ambrose*, 61 N.C. (Phil.) 91, 92–93 (1867) (granting a writ to free two formerly enslaved teenagers who had been bound out without notice to them or their emancipated parents); *Coston v. Coston*, 25 Md. 500 (1866) (denying appellate review where criminal court had granted writ filed by mother to free her children who were being detained by their former owner, who claimed they were apprenticed to him), *superseded by statute*, 1945 Md. Laws 768. But see *Cox v. Jones*, 40 Ala. 297, 298 (1866) (denying on procedural grounds an appeal of an order dismissing a petition filed by a Black father seeking to revoke the indenture of his children, where the indenture had been based on the claim “that their parents are unable to provide a support for them, and cannot support themselves without the assistance of some white person of experience”).

233 *Comas v. Reddish*, 35 Ga. 236, 236–38 (1866).

234 *Id.* at 237–38.

Such disputes were not limited to the South, as vividly demonstrated by a 1853 Brooklyn case, *Trainor v. Cooper*.²³⁵ Charles Trainor, a free Black man, filed a writ seeking custody of his daughter, nine-year-old Jane, from her former owner.²³⁶ Jane had been enslaved, but became free when her owner moved to Ohio.²³⁷ The former owner had then brought Jane to New York and was keeping her in what the court described as “a house of ill fame,” where the child reportedly wished to remain.²³⁸ The court granted the writ, giving custody to the father.²³⁹ The case having had some notoriety at the time,²⁴⁰ the court used the opportunity to make strong statements about parental rights across race. “[T]he law, in this State, recognizes no distinction of color or race; and that all fathers, whatever may be their standing in society, have precisely the same legal authority and control over their children,” said the court,²⁴¹ explaining what that legal authority entailed: “[T]he father has a title superior to any stranger, is not less the doctrine of the authorities, than it is a principle of human nature. . . . He is . . . the natural guardian and entitled to its custody, care and education.”²⁴² And the court went on to emphasize how more privileged parents’ rights are treated:

[I]f [this father] moved in the higher walks of life—if he were a white man of standing and influence in the community, the truth of this proposition would be universally acknowledged; and any tribunal that, having authority, should hesitate to afford him relief, would subject itself to just reproach.²⁴³

B. Parental Rights Affirmed in State Common Law Following Ratification

Although under *Dobbs* the understanding of a right at the time of ratification is most important, the decision makes clear that the understanding after ratification is also relevant to the history-and-tradition analysis.²⁴⁴ State common law following ratification continued to recognize parental rights. In some cases, the rights language became even stronger, celebrating parental rights in glowing terms that emphasized

235 People *ex rel. Trainor v. Cooper*, 8 How. Pr. 288 (N.Y. Sup. Ct. 1853).

236 *Id.* at 291–92.

237 *Id.* at 292.

238 *Id.* at 291–92.

239 *Id.* at 297.

240 *Id.* at 289 (noting “an unnatural interest and notoriety [surrounding] the matter”). The entire opinion was printed in the *New York Times*. See *The Trainor Case: Jane Trainor Delivered into the Custody of Her Father*, N.Y. TIMES, June 14, 1853, at 8.

241 *Trainor*, 8 How. Pr. at 292.

242 *Id.* at 293 (internal quotation marks omitted).

243 *Id.*

244 *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2260 (2022).

the high bar required to infringe on them. For instance, an 1879 case decided by the Mississippi Supreme Court captured the understanding during this era of the fundamental nature of parental rights when it granted custody of a thirteen-year-old to his mother who had filed a writ for his return from a nonrelative, explaining:

Nature gives to parents that right to the custody of their children which the law merely recognizes and enforces. It is scarcely less sacred than the right to life and liberty, and can never be denied save by showing the bad character of the parent, or some exceptional circumstances which render its enforcement inimical to the best interests of the child.²⁴⁵

The Indiana Supreme Court explained that parents may be denied the right to the care and custody of their children only upon “strong and cogent” reasons “that would justify a court in withholding from him a right thus conferred by the positive law of the land, and in consonance with the law of nature and the dictates of common humanity.”²⁴⁶ The Wisconsin Supreme Court characterized a father’s right to custody as among “his most sacred natural rights in respect to his child, so jealously guarded and protected by the laws,” and which is grounded on “principles which lie at the foundation of all judicial systems not essentially despotic in their character and methods of procedure.”²⁴⁷ By 1920, the Supreme Court of California described as “settled” the rule that:

the care, custody, and control of a minor child under the age of 14 years must be committed to its parents, rather than to strangers, unless it be shown and found that the parent is unfit to perform the duties imposed by the relation, or has, by abandonment of the child, forfeited the natural right to its custody.²⁴⁸

This is not to say that parents always prevailed in this era any more than before ratification. But the starting point in all of these cases, as summarized by the Virginia Supreme Court of Appeals in 1886, was that “[t]he father is entitled to the custody of his child, when he is a fit and suitable person, and when he has not voluntarily relinquished it.”²⁴⁹ And, as that Court emphasized, “when a father is refused the custody of his child, it should not be for light or trivial considerations.”²⁵⁰

245 *Moore v. Christian*, 56 Miss. 408, 410 (1879).

246 *Henson v. Walts*, 40 Ind. 170, 172 (1872).

247 *Schiltz v. Roenitz*, 56 N.W. 194, 196 (Wis. 1893).

248 *In re Akers’ Guardianship*, 194 P. 706, 710 (Cal. 1920).

249 *Coffee v. Black*, 82 Va. 567, 569 (1886).

250 *Id.* at 570.

A handful of the state cases in this period between ratification and the decisions in *Meyer* and *Pierce* even begin to suggest that the parental rights they were addressing were protected by the Fourteenth Amendment.²⁵¹ A particularly robust opinion was issued by the Wisconsin Supreme Court just a year before *Meyer*. *Lacher v. Venus*²⁵² illustrates both that concern for children's best interests did not undermine parental rights and that state courts understood parental rights to be grounded in the Fourteenth Amendment. A juvenile court had found Mr. and Mrs. Lacher unfit and placed their children in a state-run facility.²⁵³ The facility consented to have one of the children adopted by the Venuses and a county court issued an adoption order without notice to the Lachers.²⁵⁴ The Lachers subsequently sought custody of all their children back from the State and obtained an order determining they were now fit parents and granting them custody.²⁵⁵ The Lachers then learned their daughter had been adopted and filed a motion to vacate the adoption.²⁵⁶ That case was appealed to the state's high court, which held that allowing the adoption to stand would be a violation of the Lachers' parental rights.²⁵⁷

Although the court could have decided the case on statutory grounds, it instead took the opportunity to write an opinion making clear that even where there had been a prior finding of dependency (i.e., parental unfitness), the parents were entitled to further due process protections before their child could be adopted.²⁵⁸ And the court made clear that the due process rights were substantive, holding there is a "constitutionally guaranteed right to form and preserve the family"

251 See, e.g., *Tillman v. Tillman*, 66 S.E. 1049, 1052 (S.C. 1910) (referring to the rights in the Due Process Clause and the Privileges and Immunities Clause as "clearly embrac[ing] family rights; that is, the right of parents to the care and custody of their children, and the right of children to receive from their parents maintenance and care").

252 See *Lacher v. Venus*, 188 N.W. 613 (Wis. 1922). As I have explained elsewhere, *Lacher* was a key case in addressing an important question that arose in the wake of adoption statutes: whether a finding of dependency was sufficient to waive a parent's consent to adoption. *Id.* at 616. Because that issue was central to clarifying parental rights vis-à-vis the growing acceptance of adoption, it offered a rich opportunity to discuss the contemporary understanding of parental rights. See Chris Gottlieb, *The Birth of the Civil Death Penalty and the Expansion of Forced Adoptions: Reassessing the Concept of Termination of Parental Rights in Light of Its History, Purposes, and Current Efficacy*, 45 CARDOZO L. REV. 1319, 1346–48 (2024).

253 See *Lacher*, 188 N.W. at 614. In an amusing coincidence, the school in the case was named the State School for Children at Sparta. *Id.* Presumably the school administration did not have the same associations with Sparta that the *Meyer* Court did. See *supra* notes 64–66 and accompanying text.

254 *Lacher*, 188 N.W. at 614.

255 *Id.*

256 *Id.*

257 *Id.*

258 *Id.* at 618.

and that “such is a right of substance, though based on sentiment.”²⁵⁹ To read the relevant statute to allow adoption without the consent of or notice to the parents, the court said, would be a “violation of the constitutional rights secured to the individual in his family relationship.”²⁶⁰ A number of aspects of the opinion are particularly notable for present purposes.

First, the Wisconsin Supreme Court makes clear that parental rights, not children’s best interests, are the lodestar, declaring, “[u]ndoubtedly many children would be better cared for were the state to shift them to other homes than those nature gave them,” but the “natural right of parenthood” prevails.²⁶¹ Second, the opinion explicitly locates the source of these rights in the due process clauses of the Wisconsin Constitution and the Fourteenth Amendment to the U.S. Constitution.²⁶² Finally, in emphatic language the opinion explains how historically deep-seated and beyond question the existence of parental rights is:

That natural parenthood implies both substantial responsibilities and gives substantial rights needs no discussion. . . .

. . . [Parenting one’s child] has always been recognized as an inherent, natural right, for the protection of which, just as much as for the protection of the rights of the individual to life, liberty, and pursuit of happiness, our government is formed. We trust that it will never become the established doctrine that the state shall say to the parents, and particularly to the mother, she who doth travail, and in great pain bring forth her child and after labour doth rejoice that the child is born, that there is but a mere privilege and not a right to the subsequent affection, comfort, and pride of and in such child.²⁶³

While unusually thoughtful and eloquent, this opinion captures a legal principle broadly held by state courts at the time, the existence of which allowed the United States Supreme Court to understand that in deciding *Meyer* and *Pierce* it was upholding a traditional right, not establishing a new one.

Two additional points regarding the caselaw discussed in this section are worth noting. First, although courts in this period were often explicitly articulating a natural rights theory of parental rights, that

259 *Id.* at 617.

260 *Id.*

261 *Id.* at 618.

262 *Id.*

263 *Id.* at 617.

should not be mistaken to suggest, as Justice Black²⁶⁴ and some commentators have,²⁶⁵ that *Meyer* and *Pierce* were grounded in natural law. The contention here is that the state law demonstrates the strong history and tradition of parental rights that existed when *Meyer* and *Pierce* were decided. To appreciate that parental rights were deeply rooted in history and tradition, some of which reflected natural law views, does not require attaching a natural law theory to the Supreme Court cases.²⁶⁶ As discussed earlier, the *Meyer* and *Pierce* opinions did not rely on a natural rights theory, but rather on a structural theory about the anti-democratic danger of state intervention in child-rearing.²⁶⁷ It is, therefore, unsurprising that *Meyer* and *Pierce* did not cite any state cases, and that the Court has not understood *Meyer* and *Pierce* to fall with the post-*Lochner* rejection of natural law.²⁶⁸

Second, nothing in this section is meant to downplay the growing attention that courts were paying to the concept of children's best interests during the late nineteenth and early twentieth century. Historians have explained that, by the turn of the twentieth century, a "republican vision of the family" emerged, in which each individual was understood to have distinct interests, and childhood took on a new,

264 *Griswold v. Connecticut*, 381 U.S. 479, 511, 515 (1965) (Black, J., dissenting) (asserting that *Meyer* and *Pierce* "were both decided in opinions by Mr. Justice McReynolds which elaborated the same natural law due process philosophy found in *Lochner v. New York*," *id.* at 515, and involved "formulas based on 'natural justice,'" *id.* at 511); *see also infra* Section III.C.

265 *See, e.g.*, Janet L. Dolgin, *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship*, 61 ALB. L. REV. 345, 382 (1997). Barbara Bennett Woodhouse also suggests *Meyer* and *Pierce* can be viewed as natural law decisions, though her analysis is more nuanced, viewing the cases as multifaceted. *See* Woodhouse, *supra* note 51, at 1092–98 (discussing "how the notion of parental control as a God-given right first surfaced in the debates and in the [*Meyer* and *Pierce*] opinions," *id.* at 1003).

266 Nor does grounding some unenumerated constitutional rights in natural law necessarily lead to constitutionalizing all natural rights. In an exhaustive study of pre-1868 caselaw interpreting what they call "Lockean Natural Rights Guarantees" in state constitutions, Steven Calabresi and Sofia Vickery found that there was a distinction between how states protected personal liberties such as those at issue in *Meyer* and *Pierce* and how they applied natural rights involving property. *See* Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 TEX. L. REV. 1299, 1304–06 (2015). While not focused on parental rights cases, which were not typically based on state constitutions, their study supports the idea that states understood there to be natural rights to certain unenumerated "personal liberties" that were constitutionally protected and also understood there to be natural law property rights that were not constitutionally protected. *See id.* at 1304.

267 *See supra* subsections I.B.1, 2.

268 *See supra* subsection I.B.3.

more sentimental social status.²⁶⁹ These trends led to a number of important, related legal changes, including increased consideration of children's welfare in custody determinations, more emphasis on parental nurturing, greater empowerment of mothers' claims of custody as against fathers when parents divorced, and a shift toward conceiving of parents as trustees of their children's interests.²⁷⁰ As significant as these developments were, they did not alter the strong default rule that parents had a right to custody of their children except under extraordinary circumstances.²⁷¹

C. The Supreme Court's Recognition that Parental Rights are Grounded in History and Tradition

Although *Meyer* and *Pierce* did not explicitly rely on history and tradition in announcing parental rights—resting instead on the structural argument discussed above and below²⁷²—the Supreme Court has subsequently clarified on numerous occasions that, in addition to the initial justification, parental rights are also protected because they are deeply grounded in American history and tradition.

269 See GROSSBERG, *supra* note 215, at 234; VIVIANA A. ZELIZER, *PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN* 9 (1985).

270 See GROSSBERG, *supra* note 215, at 234–85; MARY ANN MASON, *FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES* 49–83 (1994); ZELIZER, *supra* note 269.

271 See, e.g., *Stapleton v. Poynter*, 62 S.W. 730, 731 (Ky. 1901) (“The welfare of a child, its life, health, and moral and intellectual being, should be, and are, kept well in view by the courts in determining its legal disposition in litigations over it. This is not upon the ground, sometimes supposed, that courts of equity will overrule the claims of nature, or substitute their discretion as to the child's welfare for the responsibilities imposed by God upon the parent. . . . [T]his course is justified and applied only in cases where a parent asks the court to change the child's possession, basing his claim upon a legal right,—such, for example, as the legal right of the parent to the custody of his child. Then, and then only, will the court look to the welfare of the child . . .”); *Moore v. Christian*, 56 Miss. 408, 411 (1879) (“It is, indeed, held that this parental right must give way to the permanent interest of the child, if it be shown that the life, or health, or morals of the latter will be prejudiced, or his usefulness as a citizen seriously jeopardized, by remaining under the parental control; but it is not meant by this that the courts can sit in judgment upon the question whether a wealthy stranger can give to the child more worldly advantages than an indigent parent.”). See also *Recent Case*, 25 HARV. L. REV. 478, 478 (1912) (noting that in conflicts between two parents, the trend was to prioritize the interests of the child, but also noting that where the dispute was between a parent and a third party, “if the parent is able to give the child proper care and is not positively unsuitable for the trust, he will be given custody of the child, even though another can offer it greater material advantages”).

272 See *supra* subsections I.B.1, 2; *infra* Section IV.B.

Time and again, the Court not only has cited *Meyer* and *Pierce* as good law,²⁷³ but has also emphasized that they protect rights that are embedded in history and tradition. For example, in *Yoder*, the Court said: “The *history and culture of Western civilization* reflect a strong *tradition* of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as *an enduring American tradition*.”²⁷⁴ In *Parham v. J.R.*, when assessing a statute that allowed parents to admit their children to psychiatric facilities, the Court said, “[o]ur jurisprudence *historically* has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children.”²⁷⁵ And in *Moore v. City of East Cleveland*, where the Court recognized a right to live with extended family members, it said “[o]ur decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is *deeply rooted in this Nation’s history and tradition*.”²⁷⁶

In cases involving questions of procedural due process requirements respecting parental rights, the Court has also repeatedly emphasized the longstanding history, concluding “[t]his Court’s decisions have by now made plain beyond the need for multiple citation that a parent’s desire for and right to ‘the companionship, care, custody, and management of his or her children’ is an important interest that ‘undeniably warrants deference and, absent a powerful countervailing interest, protection.’”²⁷⁷ These themes of historical longevity and tradition have been routinely repeated in the Court’s discussions of parental rights.²⁷⁸ Thus, this jurisprudence is both describing parental

273 See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (“[W]e reaffirm the principle of the *Pierce* and the *Meyer* cases.”); see also *Washington v. Glucksberg*, 521 U.S. 702, 761 (1997) (Souter, J., concurring in judgment) (referring to *Meyer* and *Pierce* as “the more durable precursors of modern substantive due process”); *Michael H. v. Gerald D.*, 491 U.S. 110, 142 (1989) (Brennan, J., dissenting) (“I think I am safe in saying that no one doubts the wisdom or validity of [*Meyer*, *Prince*, and *Skinner*].”).

274 *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (emphasis added).

275 *Parham v. J.R.*, 422 U.S. 584, 602 (1979) (emphasis added) (first citing *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); and then citing *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925)).

276 *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion) (emphasis added).

277 *Santosky v. Kramer*, 455 U.S. 745, 787 (1982) (Rehnquist, J., dissenting) (quoting *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27 (1981)).

278 See, e.g., *Troxel v. Granville*, 530 U.S. 57, 77 (2000) (Souter, J., concurring in judgment) (“We have long recognized that a parent’s interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment.”); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116–17 (1996) (noting the “the close consideration the Court has *long* required when a family association so undeniably important is at stake” (emphasis added)); *Lehr v. Robertson*, 463 U.S. 248, 270 (1983)

rights in the language of the history-and-tradition test and itself constituting a tradition that is now over a century old.²⁷⁹

Taken together, these three points—that (i) parental rights were protected by the state common law in the period leading up to ratification of the Fourteenth Amendment, (ii) state courts continued to protect parental rights following ratification, and (iii) the Supreme Court has repeatedly reaffirmed parental rights and remarked on their longstanding history—make it indisputably clear that these rights are deeply rooted in history and tradition in the sense *Glucksberg* and *Dobbs* require to establish that a right is fundamental within the meaning of the Fourteenth Amendment. The fundamental status of parental rights is, to use a phrase one could expect the Court to apply to the subject, beyond peradventure.

IV. PARENTAL RIGHTS AND ORDERED LIBERTY

Although history-and-tradition and ordered-liberty analyses are often considered together, it is important, at least at times, to consider them separately. Although rights that are integral to ordered liberty will often be deeply rooted in history and tradition, that will not always be the case. *Brown v. Board of Education*²⁸⁰ and *Loving v. Virginia*²⁸¹ are

(White, J., dissenting) (noting “the interest that a natural parent has in his or her child, one that has long been recognized and accorded constitutional protection”); *Santosky*, 455 U.S. at 753 (noting “this Court’s *historical* recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment” (emphasis added)).

279 Questions of who counts as a parent for constitutional purposes have presented complicated applications of the history-and-tradition analysis because they often turn on the level of generality at which the right is articulated. For instance, in 1989, in *Michael H. v. Gerald D.*, a sharply divided Court denied a birth father legal rights to his child because the mother was married to another man at the time the child was born, making him the legal father under California law. *Michael H. v. Gerald D.*, 491 U.S. 110, 119 (1989) (plurality opinion). While all the Justices agreed that history and tradition protected certain parental rights, a plurality found tradition did not protect the rights of all unwed fathers, but rather privileged the “marital family.” *Id.* at 124; *see also* Ristorph & Murray, *supra* note 63, at 1254–55. Because only one of the two men could acquire legally recognized parental rights, the Court rejected the birth father’s claim of constitutional protection. *Michael H.*, 491 U.S. at 119–20. Read in this light, nothing in the plurality’s decision undermined the substantive protection of previously recognized parental rights, though it refused to extend them outside traditional parameters. Even Justice Scalia—one of the loudest skeptics of substantive due process—was comfortable stressing: “Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.” *Id.* at 123–24 (quoting *Moore*, 431 U.S. at 503). This echoes Justice Brennan’s dissenting remarks that “I think I am safe in saying that no one doubts the wisdom or validity of those [parental rights] decisions [including *Meyer*].” *Id.* at 142 (Brennan, J., dissenting).

280 *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

281 *Loving v. Virginia*, 388 U.S. 1 (1967).

examples of canonical cases that protect rights now deemed essential to our version of ordered liberty despite an American history and tradition that actively refused to protect them. Transcending that history in order to extend the Constitution's protection in those cases is now widely recognized as critical progress toward justice.²⁸² It is this category of rights—those that are essential to American aspirations, but that we learned to honor only painfully through their breach—that most troubles progressive critics of the history-and-tradition test. These critics warn that we freeze liberty as it was once defined (often unjustly) at our moral peril.²⁸³ In contrast to the history-and-tradition test, ordered-liberty analysis is a mechanism that not only allows for progress in overcoming historical injustice, but can be seen to *invite* progress as it calls for continually reconsidering what is central to our sense of liberty. Thus it is a mechanism that addresses some of the progressive concerns about reifying historical norms, while remaining within the conservative approach to substantive due process espoused in *Dobbs*.

This Part will draw on the discussions of *Meyer* and *Pierce* in Part I to argue that ordered-liberty analysis provides an extremely strong basis for parental rights, distinct from the historical arguments that support those rights. It will further contend that the *Meyer-Pierce* ordered-liberty analysis holds distinct kinds of appeal to those who approach constitutional analysis from the left and right of the political spectrum.

A. *The Concept of Ordered Liberty*

Justice Cardozo famously introduced the term “ordered liberty” into Supreme Court vernacular when discussing incorporation in *Palko v. Connecticut*.²⁸⁴ But the idea was seeded as far back as 1798, in *Calder*

282 See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2262 (2022) (describing *Brown* as one “of [the Court’s] most important constitutional decisions”).

283 See, e.g., Joseph Blocher & Reva B. Siegel, *Guided by History: Protecting the Public Sphere from Weapons Threats Under Bruen*, 98 N.Y.U. L. REV. 1795 (2023); Siegel, *supra* note 11 at 108 (criticizing the history-and-tradition test because it “defines the Constitution’s liberty guarantee through lawmaking in 1868 from which women and minorities were excluded, and the democratic processes it sanctions perpetuate these same political inequalities”); Vicki C. Jackson, *Exclusionary Originalism as Anti-Constitutionalist: Dobbs and Bruen as Threats to Constitutionalism*, 18 HARV. L. & POL’Y REV. 221, 224–25 (2024) (arguing that *Dobbs*’s approach to history and tradition “magnif[ies] the continued anti-democratic effects of past practices of political inequality,” *id.* at 225); Milligan & Ross, *supra* note 11 (arguing *Dobbs*’s history-and-tradition test “constrains the Constitution’s meaning by reference to periods and sources that were deeply undemocratic,” *id.* at 311).

284 *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (“[The Due Process Clause of the Fourteenth Amendment protects those rights which are] of the very essence of a scheme of ordered liberty. To abolish them is . . . to violate a ‘principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’” (quoting Snyder

v. Bull,²⁸⁵ and the term “fundamental principles” appeared in 1823 in *Corfield v. Coryell*.²⁸⁶ The *Corfield* court introduced the core idea that underlies the concept of ordered liberty: that there are certain protections, “which belong, of right, to the citizens of all free governments,”²⁸⁷ even if those protections are not named in the Constitution. As one commentator put it, ordered liberty “has come to represent a counter-majoritarian protection of the rights of the individual against arbitrary or unfair treatment at the hands of the government.”²⁸⁸ In the words of the *Dobbs* Court: “Ordered liberty sets limits and defines the boundary between competing interests.”²⁸⁹

The phrase “ordered liberty” has been used regularly by the Court since *Palko*,²⁹⁰ but an important gloss came to be added later: “The Court made it clear that the governing standard is not whether *any* ‘civilized system [can] be imagined that would not accord the particular protection.’ Instead, the Court inquired whether a particular Bill of Rights guarantee is fundamental to *our* scheme of ordered liberty and system of justice.”²⁹¹

This focus on distinguishing the American version of ordered liberty from other possible versions reflects and illuminates the remarkable aspects of *Meyer* and *Pierce* that we began discussing above. We can now see that, although *Palko*’s coinage did not come until 1937, it is difficult to imagine a jurisprudential theory more shaped by a concept of ordered liberty than the political justification for parental rights that was articulated in *Meyer* and *Pierce*.

B. Child-rearing in Our Scheme of Ordered Liberty

As explained above, the short opinions in *Meyer* and *Pierce* encapsulate a structural argument for privatizing child-rearing. Parental rights, the Court said, involve “sacred private interests” that are “basic

v. Massachusetts, 291 U.S. 97, 105 (1934))), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969). Though Cardozo brought it into caselaw, he did not coin the term “ordered liberty,” which was used by George Washington and Herbert Hoover, who nominated Cardozo to the Court. Christopher R.J. Pace, *The Disorderly Origin of ‘Ordered Liberty’: Why the Dobbs Standard for Substantive Due Process Is Unlikely to Endure*, 86 TEX. BAR J. 30, 30 (2023).

285 See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798).

286 *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823).

287 *Id.* at 551, 551–52.

288 Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1513–14 (1991).

289 *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2257 (2022).

290 Howard J. Vogel, *The “Ordered Liberty” of Substantive Due Process and the Future of Constitutional Law as a Rhetorical Art: Variations on a Theme from Justice Cardozo in the United States Supreme Court*, 70 ALB. L. REV. 1473, 1474 (2007).

291 *McDonald v. City of Chicago*, 561 U.S. 742, 764 (2010) (alteration in original) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968)).

in a democracy.”²⁹² In what sense are they basic? Notably *Meyer* and *Pierce* do not justify parental rights in the way they are most often justified today—as serving children’s interests because parents generally are best situated and best motivated to serve those interests.²⁹³ Instead, *Meyer* and *Pierce* hold that parents have rights because parental rights are basic to restraining the power of the State in our form of government. In *Pierce*’s words: “The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children The child is not the mere creature of the State”²⁹⁴

The entire Athens-Sparta analogy for the choice between democracy and totalitarianism that *Meyer* elaborates is all about defining “our scheme of ordered liberty and system of justice.”²⁹⁵ The sense in which *Meyer* and *Pierce* were distinct from the *Lochner*-era right-to-contract cases—and the reason the former survived the latter—is because *Meyer* and *Pierce* were protecting a *deliberately chosen*²⁹⁶ structural practice (privatized child-rearing) that is constitutive of our system of liberty. In contrast, *Lochner* protected economic practices that, as Holmes explained, were mistakenly taken to be basic, when they had only by “accident” come to seem “natural and familiar.”²⁹⁷ Indeed, Holmes’ dissenting language in *Lochner* that the Constitution “is made for people of fundamentally differing views”²⁹⁸ would have fit comfortably in the *Meyer* and *Pierce* opinions because it is entirely consistent with their notion of ordered liberty.

This is why when the Court addressed the limits on parental rights in *Prince*,²⁹⁹ in its first opportunity to reconsider *Meyer* and *Pierce* in the post-*Lochner* era, it not only affirmed those rights, but also referenced their ordered-liberty justification by explaining that parents’ “primary

292 *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

293 See *Troxel v. Granville*, 530 U.S. 57, 95 (2000) (Kennedy, J., dissenting); Clare Huntington & Elizabeth Scott, *The Enduring Importance of Parental Rights*, 90 FORDHAM L. REV. 2529, 2533 (2022). A theory that children’s best interests are served by parental rights is not inconsistent with the structural justification for parental rights. See *id.* at 2534. The point in the text is that these rights were justified in the first instance on an ordered-liberty theory.

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

295 Compare *Meyer v. Nebraska*, 262 U.S. 390, 401–02 (1923), with *McDonald*, 561 U.S. at 764 (citing *Duncan*, 391 U.S. at 149).

296 Recall *Meyer*’s discussion of the alternative system that has “been deliberately approved by men of great genius,” but whose “ideas touching the relation between individual and State were wholly different from those upon which our institutions rest.” *Meyer*, 262 U.S. at 402; accord *supra* notes 57–69 and surrounding text.

297 See *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (emphasis added), *abrogated by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

298 *Id.*

299 *Prince v. Massachusetts*, 321 U.S. 158 (1944).

function and *freedom* include preparation for obligations the state can neither supply nor hinder.”³⁰⁰ That the state cannot “hinder” this freedom is to say it is out of the realm of typical legislative oversight, protected from limitation by the majority’s preferences. This “counter-majoritarian protection” is associated with ordered liberty³⁰¹ and with *Carolene Products*’³⁰² famous footnote, which notably cites *Meyer* and *Pierce*.³⁰³ Interestingly, *Prince*’s idea that the state “can neither supply nor hinder” parental freedom mirrors the dual restraints on the government with respect to religious liberty—establishment and free exercise.³⁰⁴ In short, *Meyer* and *Pierce* identified the fundamental right of parents to make child-rearing decisions by determining that such a right is implicit in our concept of ordered liberty—before that phrase was coined.

Like the Supreme Court’s repeated reaffirmation of the history and tradition of parental rights traced in Part III, the hundred years of caselaw since *Meyer* and *Pierce* has also repeatedly reaffirmed their ordered-liberty underpinnings. Parental rights cases do not reach the Court often and, and when they do, the substantive right to parent is not typically challenged, but several Justices have nonetheless found opportunities to underscore the structural, pluralism-protecting view of parental rights this Section has been discussing. For instance, in *Moore v. City of East Cleveland*, the Court extended the rights of *Meyer* and *Pierce* beyond the nuclear family with an explanation by the plurality that drew explicitly on the ordered-liberty theory of *Pierce*, explaining:

Pierce struck down an Oregon law requiring all children to attend the State’s public schools, holding that the Constitution “excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.” By the same token the Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns.³⁰⁵

Moore also specifically highlighted the value-inculcation role that makes privatizing child-rearing integral to pluralistic democracy, noting: “It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”³⁰⁶

300 *Id.* at 166 (emphasis added).

301 Brown, *supra* note 288, at 1513.

302 United States v. *Carolene Prods. Co.*, 304 U.S. 144 (1938).

303 *Id.* at 153 n.4.

304 See Ristroph & Murray, *supra* note 63 at 1266.

305 *Moore v. City of East Cleveland*, 431 U.S. 494, 506 (1977) (plurality opinion) (citation omitted).

306 *Id.* at 503–04.

In the same vein, Justice Souter's concurrence in *Glucksberg* is notable for calling *Meyer* and *Pierce* "the more durable precursors of modern substantive due process" in a paragraph that directly links them to *Palko* and its key ordered-liberty question: "Does [the challenged statute] violate those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?"³⁰⁷ In this way, the opinion is not only embracing *Meyer* and *Pierce*, but also indicating that they are quintessential examples of protecting rights that lie at the heart of our civil and political commitments.

C. Lessons of Disordered Liberty

It is unsurprising that those on the political right celebrate *Meyer* and *Pierce*'s protection of the right of parents to choose religious education for the children,³⁰⁸ and that conservatives believe "that religious education, the transmission of religious beliefs and traditions, and the religious or religion-based content of education should not be a permissible basis for government intervention or second-guessing."³⁰⁹ Indeed, for many conservatives, the question is not whether parental rights are protected by the Constitution, but whether those rights can be extended to support—or even require—public funding for religious schools.³¹⁰ Some on the right would prefer to view parental rights as grounded in the First Amendment,³¹¹ or the Ninth,³¹² or the Privileges or Immunities Clause,³¹³ rather than in substantive due process, but there have never been the political calls from the right to overturn

307 *Washington v. Glucksberg*, 521 U.S. 702, 762, 76162 (1997) (Souter, J., concurring in judgment) (quoting *Palko v. Connecticut*, 302 U.S. 319, 328 (1937)).

308 See William G. Ross, *A Century of Meyer v. Nebraska: The SCOTUS Case that Defined Personal Liberties*, JURISTNEWS (June 2, 2023, 9:08 AM), <https://www.jurist.org/commentary/2023/06/meyer-v-nebraska/> [<https://perma.cc/2KC5-LWYG>] (noting *Meyer* and *Pierce* "are beloved by many or most conservatives"); Adam Shelton, *A Supreme Court Anniversary*, INST. FOR JUST. (June 1, 2020), <https://ij.org/cje-post/a-supreme-court-anniversary/> [<https://perma.cc/S2HK-GWLW>].

309 Richard W. Garnett, *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109, 138 (2000).

310 See, e.g., Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989 (1991).

311 See, e.g., *id.* at 992 (interpreting *Pierce* as protecting free exercise).

312 See, e.g., *Troxel v. Granville*, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting) ("[I]n my view [the right of parents to direct the upbringing of their children] is also among the 'othe[r] [rights] retained by the people' which the Ninth Amendment says the Constitution's enumeration of rights 'shall not be construed to deny or disparage.'" (third and fourth alterations in original) (quoting U.S. CONST. amend. IX)).

313 See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2302 (2022) (Thomas, J., concurring) (suggesting certain rights currently protected under substantive due process doctrine might be protected by the Privileges or Immunities Clause); *Troxel*, 530 U.S. at 80 n.* (Thomas, J., concurring in judgment).

Meyer and *Pierce* that there have been with respect to *Roe* and *Obergefell*. It is fair, if a bit simplified, to say that parental rights have been more associated with the political right, while rights of privacy and autonomy have been more associated with the left. The purpose of this Part is to provide an additional argument that buttresses *Meyer* and *Pierce*, one which centers concerns that are typically more at the fore for those on the left end of the political spectrum.

The previous Section discussed how the Supreme Court has already recognized that parental rights are integral to our scheme of ordered liberty. Additional support for the role of parental rights in that scheme can be found in arguments that have not yet been considered by the Court. The claim here is that our principles of ordered liberty are defined in part by what we reject over time—not what we reject as a matter of policy, but as part of the definition of American liberty, which has been burnished by the most striking historical failures to live up to our own ideals.

While the injustice of slavery (and *Dred Scott*) had to be “overruled on the battlefields,”³¹⁴ some of our most celebrated constitutional moments have come from an understanding of ordered liberty that was realized only long after the bloodshed ended. As Peggy Cooper Davis has explained:

The lesson of *Brown v. Board of Education*, holding that official school segregation violates the Fourteenth Amendment regardless of its acceptance by the Amendment’s framers and supporters, and the lesson of *Loving v. Virginia*, holding that anti-miscegenation laws violate the Fourteenth Amendment regardless of their acceptance by the Amendment’s framers and supporters, is that Reconstruction’s principles of liberty, equality and civic place are deservedly more robust and enduring than postbellum political actors imagined.³¹⁵

I take Davis here, and throughout her book, *Neglected Stories: The Constitution and Family Values*,³¹⁶ to be providing an account of ordered liberty, which explains that to understand the full meaning of the Reconstruction Amendments, we must appreciate that protecting family integrity was a driving force behind them. Davis uses narratives of slaves, former slaves, and other abolitionists to demonstrate that the fight for abolition centered the insight that “[t]o be recognized as human was to be recognized as morally autonomous, and moral as well

314 See *Obergefell v. Hodges*, 576 U.S. 644, 696 (2015) (Roberts, C.J., dissenting).

315 Peggy Cooper Davis, *Neglected Stories and the Sweet Mystery of Liberty*, 13 TEMP. POL. & C.R. L. REV. 769, 771 (2004) (footnotes omitted).

316 DAVIS, *supra* note 21.

as religious autonomy required *family* autonomy.”³¹⁷ This is not an argument about the Amendment framers’ intent so much as about abolitionists’ vision.³¹⁸ The Fourteenth Amendment was not understood at its passage to overturn anti-miscegenation or other segregation laws, which remained in effect for decades. Yet the understanding of ordered liberty matured, so that in 1967 the Supreme Court overturned anti-miscegenation laws in part because they violated the liberty protected by the Fourteenth Amendment.³¹⁹ Though it did not use the exact phrase, the *Loving* Court’s due process discussion was, in significant part, a discussion of ordered liberty.³²⁰ Put differently, perfecting the American vision of ordered liberty required learning the hard lessons of Jim Crow.

No lessons about American liberty have been harder won than those learned through the violations of parental rights. A significant literature traces the United States’ shameful history of separating children from their parents under circumstances that are now understood to be indefensible.³²¹ Two particular strands of that history have been critical to understanding what America defines itself against: slavery and the decimation of Native American families.

Davis and Dorothy Roberts, among others, have documented that violating family integrity—i.e., violating parental rights—was a central component of the injustice of slavery.³²² Davis quotes historian James McPherson explaining that family separation was “the greatest perceived sin of American slavery,”³²³ and Roberts quotes Harriet Beecher Stowe attesting: “The worst abuse of the system of slavery is its outrage

317 *Id.* at 38.

318 There is an intent argument as well. For example, during debate over the Fourteenth Amendment, Congressman Kasson explained:

[T]here are three great fundamental natural rights of human society which you cannot take away without striking a vital blow at the rights of white men as well as black. They are the rights of a husband to his wife—the marital relation; the right of father to his child—the parental relation; and the right of a man to the personal liberty with which he was endowed by nature and by God . . .

CONG. GLOBE, 38th Cong., 2d Sess. 193 (1865), *cited in* DAVIS, *supra* note 21, at 116 n.4.

319 *Loving v. Virginia*, 388 U.S. 1, 2 (1967).

320 See *id.* at 12 (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.” (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942))).

321 *E.g.*, LAURA BRIGGS, *TAKING CHILDREN: A HISTORY OF AMERICAN TERROR* (2020); DAVIS, *supra* note 21, at 90–108; DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* 85–108 (2022).

322 DAVIS, *supra* note 21, at 90; ROBERTS, *supra* note 321, at 88–96.

323 DAVIS, *supra* note 21, at 106 (quoting JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 37 (1988)); ROBERTS, *supra* note 321, at 95 (same).

upon the family It is one which is more notorious and undeniable than any other.”³²⁴ It hardly need be said that the worst aspect of slavery is contrary to the American version of ordered liberty. And perhaps that is why the Supreme Court has not been called upon to say it. The point here is that slavery’s violation of family integrity provides not only a moral, but also a legal basis for the constitutional status of parental rights. We know from the abject injustice of family separation during slavery that parental rights to the care and custody of one’s children are essential to our concept of ordered liberty.

The history of routine violation of Native American parents’ rights is another stain on American history sufficiently horrific as to define by opposition the contours of ordered liberty. The wholesale taking of tens of thousands of Native children from their parents—first through forced removal to boarding schools and then through the U.S. Bureau of Indian Affairs’ Indian Adoption Project and Adoption Resource Exchange—is now recognized as one of the most shameful parts of American history.³²⁵ Congress has acknowledged the harm³²⁶ and the U.S. government has apologized for the forcible taking of Native American children from their parents.³²⁷ One critical aspect of this chapter of the American experience is that it exemplifies the dangers of allowing majoritarian claims of children’s best interests to overtake parental rights. In issuing a formal apology, President Biden called this history of separating families “a sin on our soul”³²⁸ and committed to ensuring

324 ROBERTS, *supra* note 321, at 96 (quoting HARRIET BEECHER STOWE, A KEY TO UNCLE TOM’S CABIN 133 (Boston, John P. Jewett & Co. 1853)).

325 Maggie Blackhawk, *Foreword: The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 3–5 (2023) (citing BRYAN NEWLAND, U.S. DEP’T OF THE INTERIOR, FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT (2022)).

326 25 U.S.C. § 1901 (4) (2018) (finding “that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions”); *see also* Meg Devlin O’Sullivan, “*More Destruction to These Family Ties*”: *Native American Women, Child Welfare, and the Solution of Sovereignty*, 41 J. FAM. HIST. 19, 23 (2016) (noting that during these programs between twenty-five and thirty-five percent of Indigenous American children were taken from their parents by child welfare officials).

327 S.J. Res. 14, 111th Cong. (2009); Kevin Gover, Assistant Sec’y–Indian Affs., U.S. Dep’t of Interior, Keynote Remarks on the 175th Anniversary of the Establishment of the Bureau of Indian Affairs (Sept. 8, 2000) (“Never again will we seize your children, nor teach them to be ashamed of who they are. Never again.”).

328 President Joe Biden, Remarks by President Biden on the Biden-Harris Administration’s Record of Delivering for Tribal Communities, Including Keeping His Promise to Make this Historic Visit to Indian Country (Oct. 25, 2024), <https://bidenwhitehouse.archives.gov/briefing-room/speeches-remarks/2024/10/25/remarks-by-president-biden-on-the-biden-harris-administrations-record-of-delivering-for-tribal-communities-including-keeping-his-promise-to-make-this-historic-visit-to-indian-country-lavee/> [https://perma.cc/9947-DECM].

“it is never repeated.”³²⁹ The President’s remarks on the importance of remembering and learning from this history underscore the evolving nature of our self-definition: “[W]e must know the good, the bad, the truth of who we are as a nation.”³³⁰ This is the language of lessons on achieving a more perfect liberty.

To the extent that there is shared agreement that emerging from these shameful chapters has pressed us closer to the American ideal of ordered liberty—sharpening our sense of what is unacceptable and thereby improving our understanding of what is essential—that consensus offers additional support for the constitutive role of parental rights in our notion of ordered liberty. Such an understanding that ordered-liberty analysis can incorporate the lessons of past failures into respect for the rights of those who have historically been oppressed offers a patch of potential common ground between the fans and foes of *Dobbs*’s approach to identifying fundamental rights.

CONCLUSION

The primary goal of this paper has been to show that *Meyer* and *Pierce* should be understood to remain good law in the post-*Dobbs* world. Simply stated, the right to raise one’s children is a fundamental right embedded in American law and culture. Parental rights should be expected to thrive in the post-*Dobbs* era because they easily meet the history-and-tradition test and are “essential to our Nation’s scheme of ordered liberty.” Notably, the ordered-liberty analysis can be understood as buttressed by recognition of past failures to respect the right to family integrity in marginalized communities and renewed commitment to universally protecting parental rights against prejudices of the present and future. For these reasons, whatever else is contested in the post-*Dobbs* era of substantive due process, we should expect the protected status of parental rights to be strongly defended across the political spectrum.³³¹

Elaborating the full consequences of this conclusion is largely work for other arenas—work in which various scholars are engaged

329 Arlette Saenz, *Biden Expected to Apologize for Federal Government’s Role in Indian Boarding Schools*, CNN (Oct. 24, 2024, 4:39 PM EDT), <https://www.cnn.com/2024/10/24/politics/joe-biden-apology-native-american-boarding-schools/index.html> [<https://perma.cc/6KSV-BVSW>].

330 President Biden, *supra* note 328.

331 As throughout the paper, I mean the term “parental rights” here in the constitutional sense, not the colloquial sense. See *supra* note 12. And, of course, to say there is agreement that parental rights are constitutionally protected as a fundamental right is not to say there will be agreement on the outcomes of all individual disputes that involve that protected right.

and that advocates fight to bring to life in courts every day.³³² As warned at the outset, recognizing that parental rights are constitutionally protected does not clinch dispositive answers to the most high-profile disputes over parental rights today.³³³ But appreciating that parents' rights to direct the upbringing of their children are fundamental rights within the meaning of the Fourteenth Amendment has some consequences that are immediately clear and critical to hundreds of thousands of less visible legal disputes that impact families around the country daily. Big picture, appreciating the status of parental rights means that constitutional law is as central to dependency proceedings—in which the state seeks to impose constraints on individual parents' rights—as it is to criminal proceedings. Family court judges and practitioners, therefore, must be as versed in constitutional law as their criminal analogues. More specifically, recognizing that parental rights are protected fundamental rights means that certain infringements on them are subject to strict scrutiny.

Since at least *Reno v. Flores*, it has been clear that infringements of fundamental rights are subject to strict scrutiny, requiring narrow tailoring to a compelling government interest.³³⁴ While not every infringement on parental rights necessarily invokes strict scrutiny,³³⁵ it is clear that two must: efforts by government to separate children from their parents and to terminate parental rights. “A termination of parental rights is both total and irrevocable,” with “the State’s aim[ing] . . . not simply to influence the parent-child relationship but to *extinguish* it.”³³⁶ If entirely and permanently extinguishing a parent’s rights—not only to custody, but even to standing to seek contact with their child or to weigh in on any child-rearing decision—does not require strict scrutiny, it would be meaningless to call parental rights fundamental.³³⁷

332 See, e.g., Josh Gupta-Kagan, In re Sanders and the Resurrection of Stanley v. Illinois, 5 CALIF. L. REV. CIR. 383 (2014).

333 See *supra* note 17.

334 *Reno v. Flores*, 507 U.S. 292, 301–02 (1993); see also *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (applying strict scrutiny for an equal protection challenge regarding infringement of a fundamental right).

335 See Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75, 111 (2021); Margaret Ryznar, *A Curious Parental Right*, 71 SMU L. REV. 127 (2018).

336 *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 39 (1981) (Blackmun, J., dissenting); see also *M.L.B. v. S.L.J.*, 519 U.S. 102, 119 (1996) (“It was also the Court’s unanimous view that ‘[f]ew consequences of judicial action are so grave as the severance of natural family ties.’” (alteration in original) (quoting *Santosky v. Kramer*, 455 U.S. 745, 787 (1982) (Rehnquist, J., dissenting))).

337 See *Santosky*, 455 U.S. at 753 (“The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.

But it is not only when the state seeks to extinguish a fundamental right that the Constitution matters. The more quotidian work of dependency courts, which routinely remove children from their families, temporarily place them in foster care, and issue countless orders requiring parents to comply with court directives as a condition of keeping custody of their children, infringes the core parental right that is protected from state interference by the Constitution—the right to rear one’s child. Government has a compelling interest in protecting children, to be sure, but the Fourteenth Amendment’s guarantee of substantive liberty means that assertions of that interest must be scrutinized and court orders limiting parental custody rights narrowly tailored.³³⁸ Although the Supreme Court has yet to address either the substantive showing required to terminate parental rights or the substantive standard for family separation, it is clear from its discussions of parental rights from *Meyer* onward that state interference with parental custody must be accorded the highest level of scrutiny.³³⁹ Failing to abide by that standard risks repeating tragic failures to protect family integrity from violation by the state.

Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs.”); *see also* Vivek S. Sankaran & Christopher E. Church, *The Ties That Bind Us: An Empirical, Clinical, and Constitutional Argument Against Terminating Parental Rights*, 61 FAM. CT. REV. 246, 262–64 (2023) (arguing that parental rights may only be constitutionally terminated when no less restrictive alternative is available, and collecting state cases that apply strict scrutiny in termination cases); Melissa Moschella, *Strict Scrutiny as the Appropriate Standard of Review for Parental Rights Cases: A Historical Argument*, 28 TEX. REV. L. & POL. 771 (2024); Chris Gottlieb, *A Path to Eliminating the Civil Death Penalty: Unbundling and Transferring Parental Rights*, 19 HARV. L. & POL’Y REV. 43, 68–70 (2024).

338 *See* Stanley v. Illinois, 405 U.S. 645, 651–58 (1972); *see also* *Reno*, 507 U.S. at 318 (O’Connor, J., concurring) (“To be sure, government’s failure to take custody of a child whose family is unable to care for her may also effect harm. But the purpose of heightened scrutiny is not to prevent government from placing children in an institutional setting, where necessary. Rather, judicial review ensures that government acts in this sensitive area with the requisite care.”); *Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring in judgment) (“If a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest, I should have little doubt that the State would have intruded impermissibly on ‘the private realm of family life which the state cannot enter.’” (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944))); Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 565 (2019). Even those who argue for lesser standards of scrutiny for parental rights in other contexts agree strict scrutiny applies to child removals. *See, e.g.,* Dailey & Rosenbury, *supra* note 335, at 81 (“[O]ur model adopts the strictest level of judicial review for state action that threatens the physical separation of parents and children.”).

339 *See supra* subsections I.B.1, 2, 4; Section II.B.

Many important questions regarding parental rights remain to be determined, some of which will be intensely contested. But in this time of extreme uncertainty regarding unenumerated rights, it is worth illuminating and celebrating the constitutional principles on which there can be agreement. A century on from *Meyer* and *Pierce*, those on the left and the right of the political spectrum can join the Court in embracing parents' constitutional rights. That is a fitting reflection of the underlying commitment to plurality at the heart of these cases.