

DO PARENTAL RIGHTS EXTEND BEYOND THE SCHOOLHOUSE DOOR? CORRECTING MISINTERPRETATIONS OF *PIERCE* IN LIGHT OF HISTORY AND TRADITION

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This Article argues that current parental rights jurisprudence is confused, inconsistent, and largely erroneous. As a result of unclear guidance from the Supreme Court, many lower courts have interpreted parents' educational rights under Pierce to be narrow (limited to the right to send one's child to a private school at one's own expense) and weak (not requiring strict scrutiny). Yet when—following Glucksberg and Dobbs—we look to history and tradition to determine the scope and strength of parents' constitutional rights, it becomes clear that these interpretations are deeply flawed. The Supreme Court should step in to correct these errors at the earliest opportunity. The argument proceeds as follows: Part I will discuss federal circuit court decisions related to parental rights in education that exemplify how the confusion in parental rights jurisprudence has often led in practice to the sidelining of parental rights arguments and/or to narrow and weak interpretations of those rights. Section II.A will examine the Pierce opinion in detail, arguing that a careful reading of the opinion in its historical context indicates that such a narrow and weak interpretation of parental rights under Pierce is not warranted. Next, because Pierce relied explicitly upon Meyer, the first portion of Section II.B will examine the Meyer opinion and conclude that Pierce (along with Meyer) should be read as an explicit affirmation of the understanding of parental rights in the common law tradition, and

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of previous state supreme court cases decided on the basis of that tradition. Accordingly, the second part of Section II.B will then discuss the string of pre-Meyer state supreme court cases in which parents sought the right to exempt their children from some aspect of the public school curriculum—seven out of eight of which were decided in the parents’ favor—arguing that a correct, historically informed interpretation of parental rights under *Pierce* should take *Pierce* (following Meyer) to be implicitly confirming the common law view upon which these decisions were based. And because the common law tradition had a broad and strong understanding of parental rights, the Article will conclude that a careful analysis of *Pierce* in light of our nation’s history and tradition supports a broad and strong interpretation of parents’ constitutional rights—broad in the sense that parents’ rights to direct their children’s education extends well beyond the right to send one’s child to a private school at one’s own expense, and strong in the sense that violations of those rights ought to trigger strict scrutiny.

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INTRODUCTION

Pierce v. Society of Sisters, following *Meyer v. Nebraska*, unequivocally affirmed that parents have the right “to direct the upbringing and education of children under their control.”¹ As Justice McReynolds famously wrote in his majority opinion:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.²

Yet despite the *Pierce* Court’s lofty rhetoric about the natural rights and duties of parents—and the corresponding limits on government power—the current state of parental rights jurisprudence often fails to live up to *Pierce*’s promise. Due to confusions and inconsistencies in the interpretation of *Pierce*, judges often seem unsure of how to adjudicate parental rights claims, leading in practice to decisions that unduly limit and weaken *Pierce*’s scope and force.³ To take just one prominent example of this confusion, the Supreme Court in *Troxel v. Granville* stated unequivocally that “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.”⁴ Yet in that very same case the Supreme Court failed to apply strict scrutiny, the most stringent standard of judicial review, which is supposed to

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

2 *Id.* at 535.

3 *See, e.g.*, *Hodge v. Jones*, 31 F.3d 157, 164 (4th Cir. 1994) (“There is little, if any, clear guidance in the relevant caselaw that would permit us to chart with certainty the amorphous boundaries between the Scylla of familial privacy and the Charybdis of legitimate governmental interests.”); *see also* Elizabeth R. Kirk, *Parental Rights: In Search of Coherence*, 27 TEX. REV. L. & POL. 729, 742 (2023) (analyzing the current state of parental rights jurisprudence and concluding that it is “weak, chaotic, and inconsistent”).

4 *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion). Further evidence of this confusion can be found in the fact that—by contrast with decisions regarding parental rights in the educational context—courts have tended to recognize stronger constitutional protections for parental rights in medical decisionmaking. Notably, the stronger interpretation of parental rights in the medical context is grounded in careful historical analysis, while the weak interpretation of parental rights in the education context is not (as I argue in the remainder of this Article). *See generally* Eric A. DeGroff & Steven W. Fitschen, *The Not-So-Silent Epidemic of Secret Gender Affirming Policies in the Nation’s Schools: Parental Rights and the Promise of Pierce v. Society of Sisters*, 100 NOTRE DAME L. REV. 1795 (2025).

apply when fundamental rights are at stake.⁵ Because the standard of review that ought to be used in parental rights cases has never been explicitly clarified by the Supreme Court, in lower courts “various levels of scrutiny have been used . . . without much method, logic, or reason.”⁶

Further, confusion about the strength and scope of parental rights claims often leads both litigators and judges to give parental rights arguments short shrift, focusing instead on other constitutional claims, such as First Amendment claims regarding free exercise of religion. In almost all the circuit court cases regarding parental rights in education that are discussed in Part I of this Article, for example, parental rights arguments tend to be sidelined in favor of free exercise arguments or arguments related to other rights.

The upshot of this confusion is that, at least in the educational arena, *Pierce* has often been read by courts over the past half century as a narrow and weak ruling—narrow in the sense that it is said to merely protect the right not to be compelled to send one’s child to a public school, and weak in the sense that intrusions upon parental rights in education are not thought to merit strict scrutiny. This narrow and weak reading of *Pierce* is most pithily captured in the Ninth Circuit’s claim that “the *Meyer-Pierce* right does not extend beyond the threshold of the school door.”⁷

How did we get from *Pierce*’s sweeping rhetoric, which seems to suggest broad and strong constitutional protections for parental rights, to this current state of affairs? This narrowing and weakening of *Pierce*, especially in relation to parental rights in education, seems to have

5 *Troxel*, 530 U.S. at 80 (Thomas, J., concurring in judgment). For an explanation and historical analysis of the strict scrutiny standard, see Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355 (2006).

6 Margaret Ryznar, *A Curious Parental Right*, 71 SMU L. REV. 127, 131–32 (2018) (footnote omitted). *Compare, e.g.*, *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 461 (2d Cir. 1996) (applying a rational basis test to cases regarding parental rights in education), and *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174, 179 (4th Cir. 1996) (same), and *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 291 (5th Cir. 2001) (same), and *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 396 (6th Cir. 2005) (same), with *N.Y. Youth Club v. Town of Smithtown*, 867 F. Supp. 2d 328, 338 (E.D.N.Y. 2012) (applying intermediate scrutiny), and *Gruenke v. Seip*, 225 F.3d 290, 305 (3d Cir. 2000) (arguing that when there are “collisions” between the fundamental rights of parents and public school policies, “the primacy of the parents’ authority must be recognized and should yield only where the school’s action is tied to a compelling interest”), and *Circle Sch. v. Phillips*, 270 F. Supp. 2d 616, 626 (E.D. Pa. 2003) (applying strict scrutiny to a case regarding parental rights in education), *aff’d on other grounds sub nom.* *Circle Sch. v. Pappert*, 381 F.3d 172 (3d Cir. 2004).

7 *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1207 (9th Cir. 2005). Note, however, that this line was later amended to soften and add more nuance to the claim. *Fields v. Palmdale Sch. Dist.*, 447 F.3d 1187, 1190–91 (9th Cir. 2006); see *infra* Section I.D.

occurred in large part via three Supreme Court cases in the 1970s. After *Pierce*, the next major case regarding parental rights in education to be taken by the Supreme Court was *Wisconsin v. Yoder*, in which Amish parents sought an exemption from the state's compulsory education law so that they could educate their children at home in the Amish way of life after the eighth grade.⁸ Although the Court ruled in favor of the Amish and granted them the exemption, Justice White's concurrence in that case claimed that "in *Pierce* . . . the Court held simply that while a State may posit [educational] standards, it may not pre-empt the educational process by requiring children to attend public schools."⁹

Just one year later, in *Norwood v. Harrison*, the Supreme Court approvingly quoted Justice White's narrow reading of *Pierce* and relied on this reading to emphasize the "limited scope" of the decision, which, according to the *Norwood* Court, merely "affirmed the right of private schools to exist and to operate."¹⁰ In 1976, the Supreme Court in *Runyon v. McCrary* adopted *Norwood*'s limited view of *Pierce*'s scope, also quoting White's concurrence in *Yoder*.¹¹ The Court's desire to be able to quickly dismiss the parental rights claims in *Norwood* and *Runyon* by latching on to dicta from Justice White's concurrence in *Yoder* is understandable given the context of these cases, which were part of the movement to end racial segregation in private schools.¹² But what matters for the purposes of this Article is that these cases' narrow interpretation of *Pierce* had an extremely flimsy foundation; it was rooted in only one sentence from a concurring opinion, unaccompanied by any analysis of the *Pierce* decision or of the history of the right in question.

8 See *Wisconsin v. Yoder*, 406 U.S. 205, 207–09 (1972).

9 *Id.* at 239 (White, J., concurring).

10 *Norwood v. Harrison*, 413 U.S. 455, 461, 462 (1973).

11 *Runyon v. McCrary*, 427 U.S. 160, 177 (1976).

12 I should note here that I think there were good reasons to dismiss the parental rights claims in *Norwood* and *Runyon* even if one adopted the broad and strong reading of *Pierce* I defend below—according to which state educational regulations can be legitimately enforced over parental objections only if those regulations are necessary to ensure that certain minimal education requirements are met. On my interpretation, those minimal educational requirements come down to requiring studies "plainly essential" to good citizenship or forbidding those "manifestly inimical to the public welfare." See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925); see also *infra* Part II. Determining what counts as "plainly essential" or "manifestly inimical" to good citizenship and the public welfare will always be a matter of debate at the margins, but a strong argument can be made that expressly racist educational practices undermine societal recognition of the basic legal equality of all citizens that is guaranteed by the Fourteenth Amendment, and should thus count as "manifestly inimical" to good citizenship. See *Pierce*, 268 U.S. at 534.

Until the Supreme Court's recent decision in *Mahmoud v. Taylor*—which indicates that it violates parents' religious exercise rights for public schools to refuse parents' request to opt their children out of lessons involving controversial storybooks about sexuality and gender—subsequent disputes related to parents' right to direct their children's education had been decided by lower courts.¹³ Most (but not all) of the lower courts have adopted Justice White's narrow understanding of *Pierce*, according to which parents' constitutional right to direct their children's education includes *only* the right not to be directly and explicitly compelled by law to send their children to a public school.¹⁴ Although *Mahmoud* significantly strengthens the constitutional rights of religious parents to direct their children's education even within the public schools, because the decision was based entirely on religious free exercise jurisprudence, it fails to correct the narrow interpretation of *Pierce*, and leaves the rights of non-religious parents unprotected.

The narrow interpretation of parental rights in education under *Pierce* has tended to go along with a weak interpretation, according to which purported parental rights violations do not necessarily merit strict scrutiny. In *Yoder*, for instance, the parental rights claim was not viewed as warranting strict scrutiny on its own; rather, strict scrutiny was applied because this was a hybrid case in which “the interests of parenthood are combined with a free exercise claim.”¹⁵ This has contributed to the confusion discussed above regarding the appropriate standard of review in parental rights cases, with some lower courts failing to apply strict scrutiny even in hybrid cases involving both parental rights and the free exercise of religion,¹⁶ and

13 *Mahmoud v. Taylor*, 606 U.S. ____ (2025)

14 *See, e.g.*, *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1067 (6th Cir. 1987); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 533 (1st Cir. 1995), *abrogated by* *Cnty. of Sacramento v. Lewis*, 523 U.S. 833 (1998); *Curtis v. Sch. Comm. of Falmouth*, 652 N.E.2d 580, 585 (Mass. 1995); *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 290 (5th Cir. 2001); *Leebaert v. Harrington*, 332 F.3d 134, 140–41 (2d Cir. 2003); *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1205–06 (9th Cir. 2005), *amended by* 447 F.3d 1187 (9th Cir. 2006); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395 (6th Cir. 2005); *Parker v. Hurley*, 514 F.3d 87, 102 (1st Cir. 2008); *Cal. Parents for the Equalization of Educ. Materials v. Torlakson*, 973 F.3d 1010, 1017 (9th Cir. 2020); *Jones v. Boulder Valley Sch. Dist.* RE-2, No. 20-cv-03399, 2021 WL 5264188, at *16 (D. Colo. Oct. 4, 2021).

15 *Yoder*, 406 U.S. at 233 (“[W]hen the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a ‘reasonable relation to some purpose within the competency of the State’ is required to sustain the validity of the State’s requirement under the First Amendment.” (quoting *Pierce*, 268 U.S. at 535)).

16 This is true of most of the cases discussed. *Infra* Part I.

others arguing that parental rights violations merit strict scrutiny in and of themselves.¹⁷

But what is the correct interpretation of *Pierce*? Is the narrow and weak interpretation of *Pierce*—and, more generally, of the constitutional right of parents to direct their children’s education—correct? This Article will argue that it is not, and that the Supreme Court ought to rectify this unwarranted narrow and weak reading of *Pierce* whenever the opportunity arises (and with a number of educational disputes currently being litigated, there is no shortage of opportunities on the horizon).¹⁸

The need for such rectification is heightened by the fact that the now well-established *Glucksberg* test for analyzing constitutional rights purportedly protected by the Due Process Clause of the Fourteenth Amendment requires a careful historical analysis to determine whether those rights are “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty,” and also to define the contours of the right in question.¹⁹ The importance of this method has been reaffirmed recently in *Dobbs v. Jackson Women’s Health Organization*.²⁰ However, this careful historical analysis is completely lacking in Justice White’s narrow interpretation of parental rights in *Yoder* (decided two decades prior to *Glucksberg*) and in the subsequent Supreme Court and lower court decisions that, following Justice White’s view, see constitutional protections for parental rights in education as narrow and weak. Thus, a careful historical analysis to re-examine these historically uninformed narrow and weak interpretations of parental rights is called for, in order to bring parental rights jurisprudence into line with the standards set forth in *Glucksberg* and *Dobbs*. And the conclusion of such careful historical

17 See, e.g., *Circle Sch. v. Phillips*, 270 F. Supp. 2d 616, 626 (E.D. Pa. 2003) (applying strict scrutiny to a case regarding parental rights in education), *aff’d on other grounds sub nom.* *Circle Sch. v. Pappert*, 381 F.3d 172 (3d Cir. 2004).

18 The Supreme Court recently passed up one such opportunity in *Parents Protecting our Children, UA v. Eau Claire Area School District*, but three justices indicated that they would have taken the case. *Parents Protecting Our Children, UA v. Eau Claire Area Sch. Dist.*, 145 S. Ct. 14, 14 (2024) (Alito, J., joined by Thomas, J., dissenting from denial of certiorari); *id.* (Kavanaugh, J., dissenting from denial of certiorari). In addition to a recent case the Court did take, *Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025), there are other cases at various stages of litigation that could eventually make their way to the Supreme Court. See, e.g., *S.E. v. Grey*, 782 F. Supp. 3d 939 (S.D. Cal. 2025); *Wailes v. Jefferson Cnty. Pub. Schs.*, No. 24-cv-02439, 2024 WL 4433942 (D. Colo. Oct. 6, 2024); *Vitsaxaki v. Skaneateles Cent. Sch. Dist.*, 771 F. Supp. 3d 106 (N.D.N.Y. 2025).

19 *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (first quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); and then quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

20 *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2247 (2022).

analysis, as this Article will show, is that the narrow and weak view of parental rights is out of step with our nation's history.

Before proceeding, it should also be noted that although *Pierce* (following *Meyer v. Nebraska* and the favored jurisprudence of the day) anchors parents' constitutional rights in the Due Process Clause, this Article's historical analysis of parental rights in the common law tradition²¹—and particularly of how that tradition was interpreted in pre-*Meyer* state supreme court cases, the earliest of which was decided less than a decade after the ratification of the Fourteenth Amendment—can also serve to illuminate a proper understanding of parents' constitutional rights anchored in other constitutional clauses, such as the Fourteenth Amendment's Privileges or Immunities Clause,²² or the Ninth Amendment.²³ Thus, even for those who are

21 In this Article, the common law tradition regarding parental rights is examined indirectly via its interpretation in a string of nineteenth and early-twentieth century state supreme court cases, and the examination focuses on parental rights in education. For a more comprehensive and direct interpretation of the common law understanding of parental rights, see 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, *The Enduring Vitality of Meyer and Pierce Post-Dobbs*, 100 NOTRE DAME L. REV. 1645, 1667–78 (2025); Eric A. DeGroff, *Parental Rights and Public School Curricula: Revisiting Mozart After 20 Years*, 38 J.L. & EDUC. 83, 108–24 (2009); and J. Bohl, “*Those Privileges Long Recognized*”: *Termination of Parental Rights Law, the Family Right to Integrity and the Private Culture of the Family*, 1 CARDOZO WOMEN’S L.J. 323, 328 (1994) (“For Blackstone, writing in 1758, the family formed the ‘first natural society,’ a response to the mutual ‘wants and[. . .] fears’ of individuals. This ‘society’ was separate from the State and predated the formation of civil government. Lord Coke, too, in his detailed breakdown of the ‘divers law[e]s within the realm[e] of England’ described familial relationships as arising by virtue of ‘lex naturae’ Even Sir Matthew Hale . . . echoed Blackstone’s conception of the family as an ancient and autonomous little ‘society,’ categorizing familial matters as part of the ‘[U]nwritten [L]aw[s]’ already in existence before time of memory.” (footnotes omitted) (first quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *47 (quote corrected); then quoting 1 EDWARD COKE, INSTITUTES *11 (quote corrected); then quoting 1 BLACKSTONE *supra*, at *47; and then quoting MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 19 (Charles M. Gray ed., 1971) (quote corrected))).

22 Randy E. Barnett & Evan D. Bernick, *The Privileges or Immunities Clause, Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*, 95 NOTRE DAME L. REV. 499, 506 (2019) (arguing that the original meaning of the Fourteenth Amendment’s Privileges or Immunities Clause protects unenumerated rights). For interesting research indicating that—because slaves had been denied parental rights—one of the public justifications for the Fourteenth Amendment was precisely the need to protect parental rights, see Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1362–64, 1371–72 (1994). For a discussion of abolitionists’ claims that the severing of family ties caused by slavery was a violation of natural rights, see generally Joseph K. Griffith II, “*Tender and Sacred Ties*”: *The Abolitionist Defense of Parental Rights and the Thirteenth and Fourteenth Amendments*, in CONSTITUTIONALISM AND LIBERTY: ESSAYS IN HONOR OF DAVID K. NICHOLS 216 (Anthony D. Bartl & Jordan T. Cash eds., 2025).

23 See Daniel E. Witte, *People v. Bennett: Analytic Approaches to Recognizing a Fundamental Parental Right Under the Ninth Amendment*, 1996 BYU L. REV. 183, 261 (“Natural

skeptical of *all* substantive due process rights, the historical analysis offered below can still offer important insights.

The argument will proceed as follows: Part I will discuss federal circuit court decisions related to parental rights in education that exemplify how the confusion in parental rights jurisprudence has often led in practice to the sidelining of parental rights arguments and/or to narrow and weak interpretations of those rights—leading to a dismissal of the parent-plaintiffs’ complaints in these cases. Section II.A will examine the *Pierce* opinion in detail, arguing that a careful reading of the opinion in its historical context indicates that such a narrow and weak interpretation of parental rights under *Pierce* is not warranted. Next, because *Pierce* relied explicitly upon *Meyer*, the first portion of Section II.B will examine the *Meyer* opinion and conclude that *Pierce* (along with *Meyer*) should be read as an explicit affirmation of the understanding of parental rights in the common law tradition, and of previous state supreme court cases decided on the basis of that tradition. Accordingly, the second part of Section II.B will then discuss the string of pre-*Meyer* state supreme court cases in which parents sought the right to exempt their children from some aspect of the public school curriculum—seven out of eight of which were decided in the parents’ favor—arguing that a correct, historically informed interpretation of parental rights under *Pierce* should take *Pierce* (following *Meyer*) to be implicitly confirming the common law view upon which these decisions were based. And because the common law tradition had a broad and strong understanding of parental rights, the Article will conclude that a careful analysis of *Pierce* in light of our nation’s history and tradition supports a broad and strong interpretation of parents’ constitutional rights—broad in the sense that parents’ right to direct their children’s education extends well beyond the right to send one’s child to a private school at one’s own expense, and strong in the sense that violations of this right ought to trigger strict scrutiny.

This analysis and correction of the flawed, historically uninformed interpretation of *Pierce* that has been common in the courts up to this point is important and timely, not only because we are approaching the centenary of that landmark decision, but also because the

law, original intent, and public policy approaches all lead to the same inevitable conclusion: substantial justification exists for recognizing a broad, fundamental parental right under the Ninth Amendment of the United States Constitution. . . . [S]trict scrutiny is the appropriate level of protection for a fundamental constitutional right.”); see also Stephanie Hall Barclay, *Retained by the People: Federalism, the Ultimate Sovereign, and Natural Limits on Government Power*, 23 WM. & MARY BILL RTS. J. 257, 265 (2014) (“Certain sovereign powers were understood to remain with the people and have not been delegated to any government—such as the power to arbitrarily violate natural rights.”).

increasingly controversial nature of the ideas and topics taught in public schools has made this a live issue for many parents, including some who are seeking to vindicate their constitutional rights in the courts. This analysis could therefore have immediate relevance to cases that are currently being litigated, and that may end up being argued soon before the Supreme Court.²⁴

I. NARROW AND WEAK INTERPRETATIONS OF *PIERCE* BY CIRCUIT COURTS

Narrow interpretations of *Pierce*—limiting it to the right of parents to send their children to private schools (at their own expense)—have been common in many circuit court decisions regarding disputes between parents and public schools. Further, many courts have also interpreted *Pierce* weakly, failing to apply strict scrutiny in parental rights cases. Of course, there are some exceptions to this²⁵—and not all circuits have addressed this matter—but this Part will examine several such cases to illustrate this trend toward narrow and weak interpretations of parental rights (which, as noted above, seems to be due in part to the confused state of parental rights jurisprudence) and thus to highlight the need for a clarification of the true strength and scope of parental rights by the Supreme Court.

A. *Mozert v. Hawkins County Board of Education*

In *Mozert v. Hawkins County Board of Education*, Christian parents objected to the public school's reading curriculum, which they believed inculcated religious relativism and was unbalanced in its presentation of diverse worldviews—consistently omitting positive portrayals of Christianity, while sympathetically portraying opposing belief systems.²⁶ They sought to have their children exempted from the reading curriculum because they claimed that it undermined their

24 See, e.g., *S.E. v. Grey*, 782 F. Supp. 3d 939 (S.D. Cal. 2025); *Wailes v. Jefferson Cnty. Pub. Schs.*, No. 24-cv-02439, 2024 WL 4433942 (D. Colo. Oct. 6, 2024); *Vitsaxaki v. Skaneateles Cent. Sch. Dist.*, 771 F. Supp. 3d 106 (N.D.N.Y. 2025).

25 See, e.g., *Gruenke v. Seip*, 225 F.3d 290, 305 (3d Cir. 2000) (stating that when there is a conflict between parents' rights and public school policies, "the primacy of the parents' authority must be recognized and should yield only where the school's action is tied to a compelling interest"); *Circle Sch. v. Phillips*, 270 F. Supp. 2d 616, 626 (E.D. Pa. 2003) (applying strict scrutiny to a case regarding parental rights in education), *aff'd on other grounds sub nom.* *Circle Sch. v. Pappert*, 381 F.3d 172 (3d Cir. 2004); *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 185 n.26 (3d Cir. 2005) (rejecting the view that parental rights in education do not extend beyond the schoolhouse door).

26 *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1080 (6th Cir. 1987) (Boggs, J., concurring).

ability to pass on their religious faith to their children²⁷. The Hawkins County School Board did not contest the plaintiffs' claim that the readings were offensive to their beliefs—on the contrary, they accepted this claim as a stipulation in the pretrial hearing.²⁸ The district court ruled in favor of the parents, arguing that the reading program burdened the plaintiffs' religious exercise and that it was not narrowly tailored to the state's interest in education, which was compatible with the parents' request to exempt their children from the reading program and provide alternative reading instruction to them at home.²⁹

The plaintiffs claimed that, in addition to violating their free exercise rights, the school board's unwillingness to grant an exemption from the reading program also violated their right to direct their children's education, citing *Pierce* and *Yoder*. However, the district court decided the case purely on free exercise grounds.³⁰ Similarly, the circuit court failed to even mention the parental rights claim at issue. The opinion did discuss *Yoder*, but treated it as if it were purely a free exercise case, and argued that *Yoder* was inapplicable because it relied on "a singular set of facts" that did not apply to the present case.³¹ In particular, they denied that mere "exposure without compulsion to act, believe, affirm or deny creates an unconstitutional burden."³² Unlike the situation in *Yoder*, in which the Amish parents would have been in violation of the compulsory education law if they removed their children from the schools after eighth grade, in this case the "school attendance laws offer several options to those parents who want their children to have the benefit of an education which prepares for life in the modern world without being exposed to ideas which offend their religious beliefs."³³ In particular, the parents had the option to send their children to a private school or homeschool them.³⁴

Even though this case was decided purely on free exercise grounds, it is nonetheless telling that the judges said nothing specific about the parental rights issue, perhaps because the confused state of parental rights jurisprudence left judges unsure of how to handle the issue. For in the face of confusion about the right, the default seems

27 *Id.* at 1060–61 (majority opinion).

28 *Id.* at 1061.

29 *Id.* at 1062–63.

30 *See Mozert v. Hawkins Cnty. Pub. Schs.*, 647 F. Supp. 1194, 1204 (E.D. Tenn. 1986), *rev'd*, 827 F.2d 1058.

31 *Mozert*, 827 F.2d at 1067.

32 *Id.*

33 *Id.*

34 *Id.*

to be to ignore it entirely—as we see in this case—or to downplay and quickly dismiss it by latching on to Justice White’s narrow reading of *Pierce*—as we see in the following cases.

B. Brown v. Hot, Sexy & Safer Prods., Inc.

Brown v. Hot, Sexy & Safer Productions, Inc. is a case in which students at Chelmsford High School and their parents brought a complaint against Hot, Sexy & Safer Productions and the Chelmsford School Committee for requiring the students to participate in a sexually explicit assembly.³⁵ According to the plaintiffs, whose allegations were accepted as true by the court, the assembly included “profane, lewd, and lascivious language,” the promotion and approval of “oral sex, masturbation, homosexual activity, and condom use during promiscuous premarital sex,” a simulation of masturbation, inviting a male student to lick a condom on stage, inviting a female student to pull an oversized condom over the male student’s head, and other sexually explicit content.³⁶

The plaintiffs alleged, among other things, that the defendants violated their “right to direct the upbringing of their children and educate them in accord with their own views,” claiming that this is a “fundamental right” that the state can only infringe for the sake of a “‘compelling state interest’ that cannot be achieved by any less restrictive means.”³⁷ They based this claim on *Meyer* and *Pierce*.³⁸ The court, however, questioned whether parental rights are “among those fundamental rights whose infringement merits heightened scrutiny,” reflecting uncertainty about the status of the right, and argued further that even if the right of parents to direct their children’s education is considered fundamental, “the plaintiffs have failed to demonstrate an intrusion of constitutional magnitude upon this right.”³⁹

The basis for this argument is a very narrow reading of *Meyer* and *Pierce*. These cases, according to the court’s interpretation, only forbid the state from “completely foreclosing the opportunity of individuals and groups to choose a different path of education” other than the public school.⁴⁰ Once parents choose to send their children to a public school, however, the First Circuit’s reading of *Pierce* in this case implies that they have no rights regarding what their children are taught or

35 *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 529 (1st Cir. 1995), *abrogated by* Cnty. of Sacramento v. Lewis, 523 U.S. 833 (1998).

36 *Id.* at 529.

37 *Id.* at 532.

38 *Id.* at 532–33.

39 *Id.* at 533.

40 *Id.* (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

exposed to within the school. Interestingly, even though the plaintiffs only argued that they had the right to be informed in advance about sexually explicit educational programming and to be able to opt their children out of such programming, the court characterized them as seeking “to dictate the curriculum at the public school to which they . . . send their children,” which the court viewed as an unworkable “burden on state educational systems.”⁴¹ As a result (in part) of this narrow reading of *Meyer* and *Pierce*, the court dismissed the plaintiffs’ complaint and ruled in favor of the defendants.⁴²

C. Swanson v. Guthrie Independent School District

Swanson v. Guthrie Independent School District was a case in which Mr. and Mrs. Swanson sought the right to send their daughter Annie to public school on a part-time basis in order to supplement the education that they were providing at home.⁴³ The plaintiffs argued that this right is part of their constitutional right to direct their children’s education (and also their First Amendment right to the free exercise of religion).⁴⁴ The Tenth Circuit ruled against the Swansons. Citing *Pierce*, the court recognized that “Annie’s parents have a constitutional right to direct her education,” but qualified this recognition by adding they have the right to direct her education only “up to a point.”⁴⁵ The “point” up to which the Swansons’ constitutional right extends is, in the court’s view, the “right to send [Annie] to a private school, whether that school is religious or secular.”⁴⁶ Thus, on the basis of previous cases, including the ones mentioned above, the court claimed that “this constitutional right is limited in scope.”⁴⁷ The court portrayed the plaintiff as seeking to establish “the right of parents to send their children to public school on a part-time basis, and to pick and choose which courses their children will take from the public school,” even when the local school board had explicitly decided “to disallow such part-time attendance.”⁴⁸ Yet according to the court, such decisions “are uniquely committed to the discretion of local school authorities.”⁴⁹ The court’s narrow reading of *Pierce* therefore led it to conclude that “Plaintiffs have

41 *Id.* at 533, 534.

42 *Id.* at 541. I say “in part” because there were other constitutional issues raised by the plaintiffs that do not relate directly to the current discussion. See *id.* at 534–41.

43 *Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 696 (10th Cir. 1998).

44 *Id.*

45 *Id.* at 699.

46 *Id.*

47 *Id.*

48 *Id.* at 699–700.

49 *Id.* at 700.

shown no colorable claim of infringement on the constitutional right to direct a child's education" in this case.⁵⁰ Further, while the court considered (and dismissed) the plaintiffs' claim that this was a hybrid-rights case (involving both parental rights and free exercise rights) that merited strict scrutiny under *Smith*, the court did not even entertain the claim that the alleged infringement on parental rights would itself merit a heightened standard of review.⁵¹

D. *Fields v. Palmdale School District*

In *Fields v. Palmdale School District*, parents of elementary school children argued that their constitutional right to control the upbringing of their children was violated by the school's administration of a survey including questions related to sexual topics.⁵² Although the parents had given permission for their children to take the survey, they had been told that it was a survey about psychological barriers to learning and were not informed that some of the questions would touch on sexual topics.⁵³ They claimed that if they had been so informed, they would not have permitted their children to take the survey.⁵⁴

Citing *Brown v. Hot, Sexy & Safer*, the Ninth Circuit argued that "*Meyer, Pierce*, and their progeny . . . do not afford parents a right to compel public schools to follow their own idiosyncratic views as to what information the schools may dispense."⁵⁵ The court went on to argue that "[n]either *Meyer* nor *Pierce* provides support for the view that parents have a right to prevent a school from providing any kind of information—sexual or otherwise—to its students."⁵⁶ According to the Ninth Circuit's interpretation of *Meyer* and *Pierce* in this case (and following the interpretation in *Brown*),

once parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at the least, substantially diminished. The constitution does not vest parents with the authority to interfere with a public school's decision as to how it will provide information to its students or what information it will provide⁵⁷

50 *Id.*

51 *Id.*

52 *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1200–02 (9th Cir. 2005), *amended by* 447 F.3d 1187 (9th Cir. 2006).

53 *Id.* at 1200–01.

54 *Id.* at 1202.

55 *Id.* at 1205–06.

56 *Id.* at 1206.

57 *Id.*

As in prior cases, the Ninth Circuit here reads *Meyer* and *Pierce* very narrowly: “[W]hat *Meyer-Pierce* establishes is the right of parents to be free from state interference with their choice of the educational forum itself.”⁵⁸ And the clear implication is that the parents’ constitutional rights with regard to education extend no further than the right to choose which school their child will attend. Indeed, the original opinion in the case stated starkly that “the *Meyer-Pierce* right does not extend beyond the threshold of the school door.”⁵⁹ The opinion was amended the following year, however, and the amended version deleted that statement and replaced it with a more nuanced version:

[T]he *Meyer-Pierce* due process right of parents to make decisions regarding their children’s education does not entitle individual parents to enjoin school boards from providing information the boards determine to be appropriate in connection with the performance of their educational functions, or to collect monetary damages based on the information the schools provide.⁶⁰

This amendment seems to be based on the court’s desire to clarify that parents have the right “to influence or change the conduct of school boards through all lawful means generally available to citizens of this nation.”⁶¹ Nonetheless, the limited interpretation of parents’ constitutional rights under *Meyer* and *Pierce* remains essentially the same. Indeed, despite the amendment, a later Ninth Circuit case regarding Hindu parents who complained of discrimination against their religion in the school district’s curricular materials dismissed the parents’ parental rights claims, and defended this decision in part by quoting *Fields*’ original statement that parents’ substantive due process right to direct their children’s education “does not extend beyond the threshold of the school door.”⁶²

E. *Parker v. Hurley*

In *Parker v. Hurley*, two sets of parents objected to the school’s exposure of their kindergarten, first-grade, and second-grade children to books celebrating same-sex marriage or positively depicting families with same-sex parents.⁶³ The parents argued that they had the right to receive prior notice of such instruction and to have the option to

⁵⁸ *Id.* at 1207.

⁵⁹ *Id.*

⁶⁰ *Fields v. Palmdale Sch. Dist.*, 447 F.3d 1187, 1191 (9th Cir. 2006).

⁶¹ *Id.* at 1190.

⁶² *Cal. Parents for the Equalization of Educ. Materials v. Torlakson*, 973 F.3d 1010, 1013, 1020 (9th Cir. 2020) (quoting *Fields*, 427 F.3d at 1207).

⁶³ *Parker v. Hurley*, 514 F.3d 87, 90 (1st Cir. 2008).

exempt their children.⁶⁴ They claimed that “their request for notice and exemption is simply a logical extension of their parental rights under *Meyer* and *Pierce*, as reinforced by their free exercise rights.”⁶⁵ The First Circuit disagreed with the parents’ argument, however, stating that “we have found no federal case under the Due Process Clause which has permitted parents to demand an exemption for their children from exposure to certain books used in public schools.”⁶⁶ Accordingly, the court dismissed the parents’ claim.⁶⁷

We therefore once again see that this pattern of narrow and weak interpretations of *Meyer* and *Pierce* has, in effect, resulted in a situation in which parents’ constitutional rights regarding education end once they “choose” to send their children to a public school.⁶⁸ (I place “choose” in quotation marks here because in practice many parents—particularly those with limited financial means—have no real choice in the matter.)

II. INTERPRETING *PIERCE* IN LIGHT OF HISTORY AND TRADITION

Are the narrow and weak interpretations of *Pierce* discussed in the previous Part correct? This Part will argue that they are not, and that a careful analysis of *Pierce* in historical context supports a broader and stronger view of parents’ constitutional right to direct the education and upbringing of their children. In accordance with the guidance offered by *Glucksberg* and *Dobbs* for the identification and definition of unenumerated constitutional rights,⁶⁹ the historical context that I believe is most relevant for a proper understanding of *Pierce*—and of parental rights more broadly—is the context of the common law tradition regarding the rights and duties of parents. I will argue that *Pierce* (following *Meyer*) was implicitly affirming this common law understanding of parental rights and proclaiming the common law understanding to be part of the liberty guaranteed by the Due Process Clause of the Fourteenth Amendment. To make my case, I will begin by looking at the relevant portion of the *Pierce* decision, then work back from there to examine *Meyer* (upon which *Pierce* is explicitly based). I

64 *Id.*

65 *Id.* at 102.

66 *Id.*

67 *Id.* at 107.

68 This pattern continues in more recent cases. *See, e.g.,* Cal. Parents for the Equalization of Educ. Materials v. Torlakson, 973 F.3d 1010 (9th Cir. 2020) (regarding a complaint by Hindu parents alleging discrimination against the Hindu religion in the school district’s curricular materials); Jones v. Boulder Valley Sch. Dist. RE-2, No. 20-cv-03399, 2021 WL 5264188 (D. Colo. Oct. 4, 2021) (seeking advance notice and the ability for parents to opt their children out of transgender tolerance programming).

69 *See supra* notes 18–19 and accompanying text.

will go on to argue that to understand what *Meyer* was affirming when it declared that the constitution protects the liberty of parents to direct their children's education and upbringing, we need to examine the common law tradition via a string of pre-*Meyer* state supreme court decisions that relied on that tradition to adjudicate disputes regarding parental rights in education.

A. *The Pierce Opinion*

In *Pierce*, the Society of Sisters, a religious order that operated Catholic schools in the State of Oregon, challenged the 1922 Oregon law requiring all parents to send their children to public school.⁷⁰ They argued that the law was unconstitutional because it “conflicts with the right of parents to choose schools where their children will receive appropriate mental and religious training, the right of the child to influence the parents’ choice of a school,” and “the right of schools and teachers therein to engage in a useful business.”⁷¹ Although the Court’s ruling addresses both the parental rights claim and the claim about the rights of schools and teachers, here I will focus only on what the Court says about the former. The portion of the opinion relevant to the parental rights claim states the following:

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

The inevitable practical result of enforcing the Act under consideration would be destruction of appellees’ primary schools, and perhaps all other private primary schools for normal children within the State of Oregon. These parties are engaged in a kind of undertaking not inherently harmful, but long regarded as useful and meritorious. Certainly there is nothing in the present records to indicate that they have failed to discharge their obligations to patrons, students or the State. And there are no peculiar circumstances or present emergencies which demand extraordinary measures relative to primary education.

70 *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 530–32 (1925).

71 *Id.* at 532. A companion case, *Pierce v. Hill Military Academy*, was argued and decided at the same time. That case regarded the rights of Hill Military Academy, a private military training school for boys, to continue to operate its business and maintain the value of its property. *See id.* at 532–33.

Under the doctrine of *Meyer v. Nebraska*, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.⁷²

Below I will analyze this text (1) to determine whether or not a heightened standard of review is being used—and thus to implicitly question the weak reading of *Pierce* as not requiring that strict scrutiny be applied in parental rights cases—and (2) to determine how broad the parental education rights protected by *Pierce* are.

1. What Standard of Review is *Pierce* Using?

The first thing to point out about this text is that, while it appears to adopt what we would today call a rational basis test—requiring that legislation have a “reasonable relation to some purpose within the competency of the state”—this case predates doctrines regarding tiers of scrutiny, so the use of language that sounds like a rational basis test cannot be directly translated into contemporary terms.⁷³ Indeed, as Justice Holmes pointed out in his dissent in *Bartels v. Iowa*, the law at issue in *Meyer v. Nebraska*—which, as we will see, employed similar language—clearly did have a reasonable relationship to a legitimate state interest and therefore should have survived what we today call a rational basis test.⁷⁴ This indicates that the majority in *Meyer* actually applied a more stringent test. I will discuss this further in the next Section on *Meyer*.

Returning to *Pierce*, is there any indication that the Court was actually applying a heightened level of scrutiny in this case? Because the *Pierce* decision is extremely brief, answering this question requires examining the prior district court decision that the Court is affirming. Unsurprisingly, given that the doctrine of tiers of scrutiny had not yet been developed, the district court also articulated what sounds like a

⁷² *Id.* at 534–35 (citation omitted).

⁷³ *Id.* at 535.

⁷⁴ *Bartels v. Iowa*, 262 U.S. 404, 412 (1923) (Holmes, J., dissenting).

rational basis standard of review.⁷⁵ The court also acknowledged as uncontroversial that the state had a legitimate interest in children's education, and that it could enact compulsory education statutes and run public schools for that end.⁷⁶ If the State of Oregon believed that the children of the state would be better educated in public schools than in private schools, or that educating all children in public schools would better ensure that immigrants are properly assimilated into society, then the 1922 Act did clearly have a rational relationship to one or more legitimate state interests (children's education and the assimilation of immigrants).

Why, then, did the district court declare the Act unconstitutional, and why did the Supreme Court affirm this holding? Here is what the district court said on the matter:

Compulsory education being the paramount policy of the state, can it be said, with reason and justice, that the right and privilege of parochial and private schools to teach in the common school grades is inimical or detrimental to, or destructive of, that policy? Such schools and their patrons have the same interest in fostering primary education as the state, and appropriate regulation will place them under supervision of school authorities so they will not escape the duty of proper primary instruction. No one has advanced the argument that teaching by these schools is harmful, or that their existence with the privilege of teaching in the grammar grades is a menace, or of vicious potency, to the state or the community at large, and there appears no plausible or sound reason why they should be eliminated from taking part in the primary education of the youth. It would seem that the act in question is neither necessary nor essential for the proper enforcement of the state's school policy.⁷⁷

Note that this line of argument—which proves decisive for the case—clearly seems to have shifted the burden of proof to the state to defend its Act, rather than placing the burden of proof on the plaintiffs to show that the Act lacks a reasonable relation to a legitimate state interest. Note also that the court has shifted here from asking whether the Act has a rational basis, to asking whether it is “necessary” or “essential” to the state's end of ensuring that all children receive an education. What we see, therefore, in the district court's reasoning is that the court is implicitly employing what today we would call the strict

75 *Soc'y of the Sisters v. Pierce of the Holy Names of Jesus & Mary*, 296 F. 928, 935 (D. Or. 1924) (stating that the powers of the state “cannot be exercised arbitrarily and despotically, nor unless there exists a reasonable relation between the character of the legislation and the policy to be subserved”).

76 *See id.* at 936–37.

77 *Id.* at 937.

scrutiny test, shifting the burden of proof onto the state and requiring that state action be necessary for or narrowly tailored to its interest.⁷⁸ As a result of this implicit use of a heightened standard of review, the district court declared the Oregon Act unconstitutional.⁷⁹

Although the language is less explicit in the Supreme Court opinion, the Court likewise seems to be following the district court in placing the burden of proof on the state to defend its law. The Court notes regarding the schools which would be put out of business by the Act:

These parties are engaged in a kind of undertaking not inherently harmful, but long regarded as useful and meritorious. Certainly there is nothing in the present records to indicate that they have failed to discharge their obligations to patrons, students or the State. And there are no peculiar circumstances or present emergencies which demand extraordinary measures relative to primary education.⁸⁰

Yet under rational basis review, the state would not need to prove that the private schools are doing something harmful or are failing in discharging their obligations; nor would the state need to prove that there was some special circumstance or emergency to justify its law. Under the rational basis test, the state would only have to show that the law has a rational relationship to some legitimate state interest, and, as the attorneys for the state pointed out in their brief, the Act in question has a rational relationship to many possible state interests, including an interest in the education of future citizens, an interest in addressing the rise in juvenile crime, and an interest in overcoming religious suspicions and fostering mutual trust among citizens by educating children of diverse religions together in the public schools.⁸¹

It seems clear, therefore, both from its own reasoning and from the fact that it affirmed the district court's reasoning, that the Supreme Court was implicitly using a heightened standard of review in *Pierce*.⁸²

78 See Stephanie H. Barclay, *Replacing Smith*, 133 YALE L.J.F. 436, 456–61 (2023) (conceptualizing the strict scrutiny standard as consisting essentially of “a type of exclusionary reason (or exclusionary norm)” that “directs courts to exclude all but the permissible reasons for interfering” with the right in question, “combined with a heavy evidentiary burden”—i.e. the least-restrictive-means test—and presenting historical precedent for both elements of this test, *id.* at 456).

79 *Pierce*, 296 F. at 938.

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

81 See Brief of Appellant, the Governor of the State of Oregon, at 39–40, 46, *Pierce*, 268 U.S. 510 (Nos. 583, 584).

82 Christine Gottlieb makes a similar argument about the Supreme Court’s reasoning in *Prince v. Massachusetts*, arguing that the Court was implicitly using a heightened level of scrutiny when addressing the parental rights claims in this case. See Gottlieb, *supra* note 20, at 1663.

2. The Scope of Parents' Educational Rights Under *Pierce*

The previous subsection argued that the weak reading of *Pierce* as not requiring strict scrutiny for laws that undermine parents' right to direct the education of their children is incorrect given the *Pierce* Court's implicit use of strict scrutiny. This subsection will begin to make the case that the narrow reading of *Pierce*—as requiring *only* that parents not be legally forbidden to educate their children at private rather than public schools—is also mistaken. The full case for this point (and additional evidence for the previous point) will also require looking in greater detail at *Meyer*—which *Pierce* affirmed and relied upon—and at the common law tradition regarding parental rights that *Meyer* was arguably incorporating into the liberty protected by the Fourteenth Amendment. Here, however, I will begin to make the argument for a broader reading of *Pierce* by looking at the text of the opinion and analyzing its logic. I will also consider the insights we can gain into the opinion's meaning by considering *Farrington v. Tokushige* (decided just two years later), and by highlighting the striking resemblance between the language in the opinion and the arguments made in the case brief for the Society of Sisters.

First, we need to consider the implications of what are perhaps the most famous lines in the opinion:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.⁸³

It could be argued that the clause “by forcing them to accept instruction from public teachers only” limits the scope of the right protected by *Pierce*, leaving us with the narrow interpretation that has dominated in subsequent decisions.⁸⁴ Yet this narrow interpretation seems incompatible with the same Justices' interpretation of their own ruling just two years later in *Farrington v. Tokushige*, which held on the basis of *Pierce* and *Meyer* that a law undermining the autonomy of private schools through extensive government regulation (but not requiring that children be sent to public schools) was also an unconstitutional violation of parental rights under the Fourteenth Amendment.⁸⁵ This case makes it clear that the *Pierce* Court made the specification “by forcing them to accept instruction from public

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

84 *Id.*

85 *Farrington v. Tokushige*, 273 U.S. 284, 298–99 (1927).

teachers only” simply because the ability to educate one’s child at a private school was the specific issue in the case, but not to indicate that making public schooling compulsory was the *only* way that the state could attempt to “standardize its children” in violation of parents’ constitutional liberty.⁸⁶

Further, the next sentence in the *Pierce* opinion seems to enunciate *why* the “fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children.”⁸⁷ This power is excluded from the competence of government because *parents*, not the state, have primary authority in this matter: “The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”⁸⁸ The text also suggests the reason *why* parents possess this primary educational authority—namely, that parents, not the State, are the ones who bring children into the world, and thus that parents are the ones who by nature (even in the absence of any government) have responsibility for their children and corresponding authority to carry out their childrearing duties.⁸⁹ This interpretation will be further supported below when I discuss the common law understanding of parental rights as based on parents’ natural duties to their children, and argue that *Meyer* and *Pierce* implicitly drew upon and affirmed that common law understanding of parental rights as implicit in the Fourteenth Amendment’s guarantee of liberty.

There are also striking resonances between the text of these famous lines of the *Pierce* opinion and the text of the brief submitted on behalf of the Society of Sisters. That brief, for instance, cites the French publicist Guizot, who stated, “The first rights [in the matter of education] are the rights of families. Children belong to families before they belong to the state.”⁹⁰ Likewise, the brief also states emphatically that “the child of man is his parent’s child and not the state’s,” and contrasts this view with the approach taken in Soviet Russia, where “children do belong to the state” rather than belonging primarily to their parents.⁹¹ In addition, the brief quotes President

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

87 *Id.*

88 *Id.*

89 For a philosophical defense of this claim, see generally MELISSA MOSCHELLA, TO WHOM DO CHILDREN BELONG? PARENTAL RIGHTS, CIVIC EDUCATION, AND CHILDREN’S AUTONOMY (2016); Melissa Moschella, *Defending the Fundamental Rights of Parents: A Response to Recent Attacks*, 37 Notre Dame J.L. ETHICS & PUB. POL’Y 397 (2023).

90 Brief on Behalf of Appellee at 69, 69–70, *Pierce*, 268 U.S. 510 (No. 583) (citation omitted).

91 *Id.* at 66–67.

Butler of Columbia University, who declares: “In our American theory, the state steps in, not to monopolize education or attempt to cast all children in a common mold . . . but merely to prevent damage to itself.”⁹² It seems quite plausible to think that the *Pierce* opinion’s language about the state not having the right to “standardize” children, and about the child not being the “mere creature of the State,” are inspired by the strikingly similar phrases found in the Society of Sisters’ brief.⁹³

The text of the *Pierce* opinion also provides guidance regarding the scope and limits of the state’s educational authority. As noted above, the decision acknowledges “the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils.”⁹⁴ The opinion then goes on (following a semicolon) to indicate what the scope of that reasonable regulation is, and lists four things that the state may require: (1) “that all children of proper age attend some school,” (2) “that teachers shall be of good moral character and patriotic disposition,” (3) “that certain studies plainly essential to good citizenship must be taught,” and (4) “that nothing be taught which is manifestly inimical to the public welfare.”⁹⁵ These are the four elements of state educational regulation about which *Pierce* raises “no question.”⁹⁶ The implication, it seems, is that coercive state action *not* clearly falling into one of these categories, *would* be constitutionally questionable as beyond the proper competence of the state (and thus as intruding unconstitutionally into matters that belong to the proper competence of parents). The decision in *Farrington* supports this interpretation, given that the

92 *Id.* at 70 (citation omitted).

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

94 *Id.* at 534.

95 *Id.*

96 *Id.* This interpretation of the limits of coercive state authority in the educational arena is also supported by an examination of the common law tradition. See Moschella, *supra* note 20, at 781–82 (“Kent portrays the state’s role in education as primarily one of *assisting* parents in the fulfillment of *their* educational duties, and of ensuring that they fulfill those duties. . . . Kent’s comments also indicate that the state educational interest limiting the scope of parental rights is relatively restricted and minimal. Kent speaks of enforcing ‘ordinary education,’ which he specifies as consisting primarily in basic literacy, numeracy and knowledge of the law. According to the common law standard, therefore, even when education is made legally compulsory, parents retain broad educational authority as long as this minimal educational bar is met. While what counts as a minimal level of education may shift somewhat over time, the historical tradition indicates that the government interest limiting the natural right of parents with regard to education is an interest in establishing and enforcing a minimum bar sufficient for children to be law-abiding and productive citizens.” (quoting 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 165 (New York, O. Halsted 1827))).

private school regulations deemed unconstitutional by the Court in that case went beyond these four categories.⁹⁷

Moreover, this interpretation of *Pierce*'s implications regarding the scope and limits of the state's educational authority sheds further light on the opinion's claim that the Act in question "has no reasonable relation to some purpose within the competency of the State."⁹⁸ For, as noted above, the Act does have a reasonable relation to many state interests.⁹⁹ But it nonetheless goes beyond those four categories of things that the state may require with regard to children's education, and is arguably *for that reason* outside the competency of the State.

Here again, it is interesting to note resonances with the quote from Guizot in the Society of Sisters' case brief, which, after stating that in the educational arena, the rights of families are prior to those of the state, goes on to indicate the extent of the state's rights in this matter: "The state has the right to furnish teaching, to supervise it, to direct it in its own establishments; it has not the basic right to impose its teaching arbitrarily and exclusively upon all families without their consent and contrary to their wishes."¹⁰⁰ Likewise, the line from President Butler already referred to above indicates that the reason the state "steps in" to the educational arena is "merely to prevent damage to itself" by ensuring that all children receive an education sufficient to enable them to be law-abiding and productive future citizens.¹⁰¹

More broadly, the fact that there are such notable resonances between the text of the *Pierce* opinion and the section of the appellee's brief offering a robust defense of parental educational authority as prior to that of the state, and of the state's competence in this arena as limited to what is necessary for the state's own interest in law-abiding, self-sufficient citizens, seems to be an indication that the Justices in *Pierce* were effectively affirming the views on this matter put forth in the brief. This in itself seems to call into question a narrow reading of *Pierce*.

Finally, as already noted, the *Pierce* decision relies upon *Meyer*: "[u]nder the doctrine of *Meyer v. Nebraska*, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."¹⁰² To understand the scope of this "liberty of parents and guardians to direct" their children's education, therefore,

97 See *Farrington v. Tokushige*, 273 U.S. 284, 294–95 (1927).

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

99 See *supra* subsection II.A.1.

100 Brief on Behalf of Appellee, *supra* note 89, at 69–70 (citation omitted).

101 *Id.* at 70 (citation omitted).

102 *Pierce*, 268 U.S. at 534–35 (citation omitted).

it will be necessary to look more closely at the *Meyer* opinion, which will be the task of the next Section.

B. *Meyer v. Nebraska and the Common Law Tradition*

This Section will argue, first, that *Meyer* implicitly incorporated the common law understanding of parental rights into the liberty protected by the Fourteenth Amendment's Due Process Clause. Next, the Section will examine the common law understanding of parental rights as natural rights that are prior to the state, through an analysis of state supreme court cases related to parental rights in education that relied upon the common law in their decisions. This analysis will show that the common law tradition understood parental rights to extend well beyond the threshold of the schoolhouse door, and that courts applying that tradition to concrete cases recognized that state interference with parental rights warranted what today would be called strict scrutiny.¹⁰³

1. The *Meyer* Opinion

In *Meyer v. Nebraska*, the Supreme Court overturned a Nebraska statute forbidding the teaching of subjects in foreign languages prior to the ninth grade.¹⁰⁴ The Court found that the statute “unreasonably infringes the liberty guaranteed . . . by the Fourteenth Amendment.”¹⁰⁵ To explain its reasoning, the Court provides some examples of what is included in “the liberty thus guaranteed,” stating:

Without doubt, it denotes 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.¹⁰⁶

Although the ruling is directed most explicitly at the right of teachers to pursue an honest calling, much of the opinion is devoted to emphasizing the idea that respecting the childrearing authority of parents as prior to that of the state is a fundamental principle of limited government.¹⁰⁷ In addition to highlighting the right “to marry,

103 For a more detailed argument that the application of strict scrutiny in parental rights cases is supported by history and tradition, see Moschella, *supra* note 20.

104 *Meyer v. Nebraska*, 262 U.S. 390, 397, 403 (1923).

105 *Id.* at 399.

106 *Id.*

107 *Id.* at 399–400.

establish a home and bring up children” as among “those privileges long recognized at common law” that the Court considers to be protected by the Fourteenth Amendment, the Court also states—echoing, as we will see, the language of the common law tradition—that “it is the natural duty of the parent to give his children education suitable to their station in life.”¹⁰⁸ Although the opinion notes that states “enforce this obligation by compulsory laws,” it clearly indicates that the obligation to educate children belongs primarily *to the parent*, not the state.¹⁰⁹ The Court then goes on to explain that, although “the State may do much . . . in order to improve the quality of its citizens, . . . the individual has certain fundamental rights which must be respected.”¹¹⁰ Thus, “a desirable end”—such as, in this case, ensuring that all citizens have “ready understanding of our ordinary speech”—“cannot be promoted by prohibited means.”¹¹¹ The implication is that means which fail to respect fundamental rights—including parental rights—are prohibited.

The opinion then goes on to discuss Plato’s famous proposal for communal childrearing in the *Republic*, along with the Ancient Spartan practice of taking male children away from their parents at seven to be educated by state officials. The Court comments that

[a]lthough such measures have been deliberately approved by men of great genius, their ideas touching the relation between [the] individual and [the] State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both [the] letter and spirit of the Constitution.¹¹²

In other words, the *Meyer* court is implying that there is a crucial and inherent connection between respect for the primacy of parental educational authority and limited, constitutional government committed to preserving the liberty of the people. Indeed, this connection seems obvious, for there is no surer way for would-be autocrats to shape society in accord with their own ideological vision than to have control over the education of all children.¹¹³

It is also noteworthy that the *Meyer* opinion, like the *Pierce* opinion, uses language that sounds like the application of a rational basis test—

108 *Id.*

109 *See id.* at 400.

110 *Id.* at 401.

111 *Id.*

112 *Id.* at 402.

113 *See* MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS 24–25 (2005) (arguing that “the ideal of government serving the people’s will” is incompatible with state power to mold people’s will by controlling the education of children, *id.* at 25).

stating that the liberties guaranteed by the Fourteenth Amendment “may not be interfered with . . . by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect”—but in fact applies what today would be called strict scrutiny.¹¹⁴ For, as the *Meyer* Court states, “The desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate,” and the Court does not question that the means adopted have some reasonable relation to that end.¹¹⁵ Nonetheless, the Court holds that “the means adopted . . . exceed the limitations upon the power of the State.”¹¹⁶ It seems that one reason why these means are beyond the competency of the state is that—by intruding not only on the right of teachers to engage in an honest profession, but also on the right of parents to direct their children’s upbringing—such means are ultimately based on the same statist view of childrearing exemplified in more extreme form by the communal education schemes in Plato’s *Republic* and ancient Sparta, schemes which the Court considers inimical to limited, constitutional government.

In sum, for the *Meyer* Court (and the *Pierce* Court that built upon *Meyer*), the purposes that are “within the competency of the State” in the educational realm are limited by the primacy of parental educational authority.¹¹⁷ On this view, the state exceeds its competency when it intrudes upon parental authority in ways that are not truly necessary for the state’s end of ensuring that all children receive an education sufficient to be law-abiding and productive citizens.¹¹⁸ Accordingly, *Pierce* offers a narrow list of the sorts of regulations that it is within the competency of the state to enact—i.e., requiring all children to be educated up to a certain minimal level, requiring studies “plainly essential” to good citizenship, and forbidding studies that are “manifestly inimical” to good citizenship.¹¹⁹

This analysis of *Meyer* (and, by extension, of *Pierce*)—according to which the primacy of parental educational authority effectively limits coercive state action in the educational arena to actions that are

114 *Meyer*, 262 U.S. at 399–400.

115 *Id.* at 402.

116 *Id.*

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

118 See *supra* note 95 and accompanying text; see also Stephen G. Gilles, *Liberal Parentalism and Children’s Educational Rights*, 26 CAP. U. L. REV. 9, 25–26 (1997) (“[I]n *Pierce*, the realm within which the state wielded this authority was limited and secondary, because primary authority over education vested in parents as a matter of substantive due process liberty . . .”).

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

justifiable under what today would be called strict scrutiny¹²⁰—is further supported by examining state court decisions in the preceding half century. These decisions, which I will discuss in the following subsection, give us important insight into the common law understanding of parental rights that *Meyer* (and, by extension, *Pierce*) proclaimed to be part of the liberty guaranteed by the Fourteenth Amendment.

2. Pre-*Meyer* State Supreme Court Decisions Regarding Parental Rights in Education

From the mid-nineteenth to the early twentieth century, as compulsory education laws were being enacted throughout the country and more children were being educated in public schools,¹²¹ there were a number of disputes between parents and school boards that eventually made their way to the supreme courts of various states. In particular, there was a string of eight cases brought by parents who sought to exempt their children from aspects of the public school curriculum, while still retaining the ability to avail their children of a free public school education. The parents prevailed in seven out of eight of these cases, in which the courts argued that the common law understanding of parents as possessing primary educational authority implies that parents have the right to direct the education of their children, even within the public schools, as long as the exercise of this right does not undermine the ability of the schools to fulfill their purpose.¹²²

Here I will focus on one of these cases—*School Board District No. 18 v. Thompson*—an Oklahoma case which is representative of (and makes reference to) similar cases from other states.¹²³ Because the court bases its decision largely on the common law understanding of parental authority over children as prior to the authority of the state, it is a helpful illustration of this common law view—which *Meyer* affirmed—

120 For an account of how historical analysis can offer a guide to the proper application of strict scrutiny in these cases, see Moschella, *supra* note 20, at 778–84.

121 See generally MICHAEL S. KATZ, A HISTORY OF COMPULSORY EDUCATION LAWS 17–20 (1976).

122 *Sch. Bd. Dist. No. 18 v. Thompson*, 103 P. 578, 582 (Okla. 1909); *Morrow v. Wood*, 35 Wis. 59, 66 (1874); *Rulison v. Post*, 79 Ill. 567, 573–74 (1875); *Trs. of Schs. v. People ex rel. Van Allen*, 87 Ill. 303, 308–09 (1877); *State ex rel. Sheibley v. Sch. Dist. No. 1*, 48 N.W. 393, 395 (Neb. 1891); *State ex rel. Kelley v. Ferguson*, 144 N.W. 1039, 1044 (Neb. 1914); *Hardwick v. Bd. of Sch. Trs. of Fruitridge Sch. Dist.*, 205 P. 49 (Cal. Dist. Ct. App. 1921), *hearing denied*, 205 P. 56 (Cal. 1921). The outlier is *State ex rel. Andrews v. Webber*, 8 N.E. 708, 713 (Ind. 1886), which ruled against the parents.

123 *Thompson*, 103 P. 578.

and of how it applies concretely when parental authority and state authority come into conflict.

At issue in *Thompson* (and in the seven other cases mentioned above) is whether or not parents have the right to excuse their children from certain prescribed courses of study in the public school.¹²⁴ In *Thompson*, the parents directed their children to refuse to participate in the school's singing lessons, and the children were expelled from the school as a result.¹²⁵ The parents sued, wishing their children to be reinstated in the schools but exempted from the singing lessons.¹²⁶ The Oklahoma Supreme Court decided in favor of the parents.¹²⁷

The court's argument begins by making reference to the common law recognition that parents are the ones who are by nature responsible for the maintenance, protection and education of their children:

At common law the principal duties of parents to their legitimate children consisted in their maintenance, their protection, and their education. These duties were imposed upon principles of natural law and affection laid on them not only by Nature herself, but by their own proper act of bringing them into the world.¹²⁸

The court then considers the argument offered on behalf of the school district "that the compulsory education clause of the [state] Constitution absolutely destroys the old common-law doctrine that the parent had the entire control over the education of his child."¹²⁹ However, the court rejects this argument, instead claiming that the common law rule that parents have the right to control their children's education remains largely intact, except that now the state makes it legally compulsory for parents to fulfill their natural duty to educate their children either by sending them to school for at least three months each year, or by providing other means of education.¹³⁰

124 *Id.* at 578.

125 *Id.*

126 *Id.*

127 *Id.* at 582.

128 *Id.* at 578–79 (citing 1 BLACKSTONE, *supra* note 20, at *447); *see also* 1 BLACKSTONE, *supra* note 20, at *435–40 (arguing that parents have natural duties to maintain, protect, and educate their children, and corresponding authority to fulfill those duties); 2 KENT, *supra* note 95, at 159, 169 (Kent explains that the duties of "maintaining and educating" children belong naturally to the children's parents, because "[t]he wants and weaknesses of children render it necessary that some person maintain them, and the voice of nature has pointed out the parent as the most fit and proper person. The laws and customs of all nations have enforced this plain precept of universal law," *id.* at 159, and "[t]he rights of parents result from their duties," *id.* at 169.) For more details on the common law view of parental rights and duties, *see supra* references accompanying note 20.

129 *Thompson*, 103 P. at 579.

130 *See id.* at 581.

Nonetheless, parents remain “free to a great extent to select the course of study,” and this includes the freedom to select among the courses offered at the public school, as long as this does not “interfere with the efficiency or discipline of the school[s].”¹³¹

The court also cites several similar cases from other states that had upheld the right of parents to make a selection among the prescribed branches of study for their children and concurs with their reasoning.¹³² In particular, two arguments from these previous cases are highlighted. The first argument is that recognizing the right of parents to select among the courses offered is fully compatible with the “proper discipline, efficiency, and well-being of the common schools,” and thus will not “prejudice the equal rights of [other students].”¹³³ The second argument is that the parent has greater interest in the child’s welfare, and greater knowledge of the child’s capacities, than the teacher:

“Now who is to determine what studies she shall pursue in school,—a teacher who has a mere temporary interest in her welfare, or her father, who may reasonably be supposed to be desirous of pursuing such course as will best promote the happiness of his child? The father certainly possesses superior opportunities of knowing the physical and mental capabilities of his child.”¹³⁴

In the course of its argument, the court also makes strong statements about the primacy of parental authority vis-à-vis the state: “Under our form of government, and at common law, the home is considered the keystone of the governmental structure. In this empire parents rule supreme during the minority of their children.”¹³⁵ Thus, the court denies that “the mere act of sending the children to school amounts to a delegation of the parental authority which the law of the land places in the hands of the parent.”¹³⁶ Indeed, as one scholar puts it, “[s]chools in the common-law era were viewed as service providers whose authority stems from the delegation of parents.”¹³⁷

While acknowledging the right of the school authority to “classify and grade the scholars,” to “prescribe the courses of study and textbooks,” and to make “reasonable rules and regulations,” the court nonetheless concludes:

131 *Id.* at 581.

132 *See id.* at 579–80 (first citing *Morrow v. Wood*, 35 Wis. 59 (1874); then citing *State ex rel. Sheibley v. Sch. Dist. No. 1*, 48 N.W. 393 (Neb. 1891); and then citing *Trs. of Schs. v. People ex rel. Van Allen*, 87 Ill. 303 (1877)).

133 *Id.* at 580 (quoting *Morrow*, 35 Wis. at 65–66).

134 *Id.* (quoting *State ex rel. Sheibley*, 48 N.W. at 395).

135 *Id.* at 581.

136 *Id.*

137 Noa Ben-Asher, *The Lawmaking Family*, 90 WASH. U. L. REV. 363, 381 (2012).

The parent . . . has a right to make a reasonable selection from the prescribed course of study for his child to pursue, and this selection must be respected by the school authorities, as the right of the parent in that regard is superior to that of the school officers and the teachers.¹³⁸

And the right of the parent is superior for the reasons noted above: that, by nature and common law, education is primarily the duty of the parent, and that the parent has greater interest in the child's welfare and greater knowledge of the child's capacities.

Similar language is also used in a 1914 Nebraska case involving the same sort of dispute between parent and school. In that case, the Nebraska Supreme Court wrote:

[W]e should be careful to avoid permitting our love for this noble institution [the public school] to cause us to regard it as "all in all" and destroy both the God-given and constitutional right of a parent to have some voice in the bringing up and education of his children. . . . [W]e want to be careful lest we carry the doctrine of governmental paternalism too far, for, after all is said and done, the prime factor in our scheme of government is the American home.¹³⁹

It is noteworthy that this passage is also cited in the brief for the Society of Sisters in *Pierce*, and that the brief also cites two other cases from this line of state supreme court cases regarding parental rights in education.¹⁴⁰

3. Interpreting *Meyer* and *Pierce* in Light of the Pre-*Meyer* State Supreme Court Cases

How do these cases help us to determine the proper interpretation of *Meyer* and *Pierce*? First, *Thompson*—along with the six other similar cases that were also decided in favor of the parents on the basis of essentially the same reasoning—provides evidence that, under the common law understanding, parental rights do extend beyond the threshold of the schoolhouse door, and include (at least)

138 *Thompson*, 103 P. at 582.

139 *State ex rel. Kelley v. Ferguson*, 144 N.W. 1039, 1043–44 (Neb. 1914).

140 Brief on Behalf of Appellee, *supra* note 89, at 74 (first citing *State ex rel. Sheibley v. Sch. Dist. No. 1*, 48 N.W. 393 (Neb. 1891); and then citing *Trs. of Schs. v. People ex rel. Van Allen*, 87 Ill. 303 (1877)). In addition, counsel for the State of Oregon in *Pierce* referred to several cases from this line as among those which "come nearest" to the "question involved in the present case," but claimed (falsely) that "[t]he decisions on this question are in hopeless conflict." *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 526. The reason why I say that the claim is false is that, as already noted, seven out of eight cases dealing specifically with the question of parents' right to select among the courses offered at the public school were decided in favor of the parents. See *supra* notes 120–21 and accompanying text.

parents' right to exempt children from certain classes, as long as this is not incompatible with the maintenance of discipline and efficiency in the schools. If, as I argued above, *Meyer* (and by extension, *Pierce*) declared parents' common law rights to be included within the liberty guaranteed by the Fourteenth Amendment, this means that the narrow reading of *Pierce* as *merely* guaranteeing the right to send one's child to a private school at one's own expense is incorrect.¹⁴¹

Second, these cases also call into question the weak reading of *Pierce* as requiring only a rational basis test for parental rights cases. For, just as in *Meyer* and *Pierce* themselves, an examination of *Thompson* and of the six other similar cases already mentioned indicates that a heightened standard of review was implicitly being applied in these cases.

To understand why I believe that a heightened standard of review was being applied in *Thompson*, three features of the case need to be highlighted:

First, the state's action clearly bears a rational relationship to the state's legitimate interest in the education of future citizens, and in establishing school curricula to that end. Thus, if the court were implicitly applying a deferential, rational basis standard of review, the state's action would be upheld.

Second, the *Thompson* court places the burden of proof on the state to justify its action, rather than placing the burden of proof on the parents to show that the state action is illegitimate. This is highlighted by contrasting the *Thompson* court's argument with the argument made in *State v. Webber*, the only prior case of this sort that ruled against the parents.¹⁴² The *Webber* court had effectively placed the burden of proof on the parent to show why the state's rule regulating what studies students should pursue was unreasonable, and why there was "sufficient or satisfactory excuse for the non-compliance therewith, and the disobedience thereof, of his son."¹⁴³ Because the

141 Joseph Griffith also draws on common law and these pre-*Meyer* state supreme court cases to argue that recent federal court cases such as those I discussed in Part I erred in their interpretations of *Pierce* and *Meyer*. On Griffith's view, the flaw in these recent decisions is that

they misbalanced the competing interests at stake, weighing the general authority of the state against the specific exemption requested by parents. The state supreme court decisions upon which *Meyer* and *Pierce* drew, by contrast, asked whether protecting a particular instantiation of parental liberty would prevent the state from accomplishing its purpose of forming an educated citizenry.

Joseph K. Griffith II, "Long Recognized at Common Law": *Meyer* and *Pierce*'s Nineteenth- and Twentieth-Century Precedent on Parental Educational Rights and Civic Education, 53 PERSPS. POL. SCI. 1, 8 (2024).

142 State *ex rel.* Andrews v. Webber, 8 N.E. 708 (Ind. 1886).

143 *Id.* at 711.

parent failed to prove either of these points, the court ruled in favor of the State.¹⁴⁴ In its critique of this decision, the *Thompson* court argues that the burden of proof should be on the state to prove that it cannot accommodate the parents' request, not on the parent to prove that his request is reasonable:

We think it would be a reversal of the natural order of things to presume that a parent would arbitrarily and without cause or reason insist on dictating the course of study of his child in opposition to the course established by the school authorities. A better rule, we think, would be to presume, in the absence of proof to the contrary, that the request of the parent was reasonable and just, to the best interest of the child, and not detrimental to the discipline and efficiency of the school.¹⁴⁵

In placing the burden of proof on the state to justify its action, the *Thompson* court is implicitly applying a heightened level of scrutiny.

Third, and finally, the *Thompson* court is also implicitly requiring that the state prove that its action in this case is narrowly tailored to the state's interest in the education of future citizens and in the discipline and efficiency of the public schools established for that end—an interest that is presumed to be compelling.¹⁴⁶ Because, as previous cases cited by *Thompson* had noted, there was no indication that accommodating the parents' request would be incompatible with the “proper discipline, efficiency and wellbeing of the common schools,” the state's insistence that every child participate in all of the standard branches of study was unnecessarily restrictive of the parents' educational authority.¹⁴⁷

These features of the opinion indicate that the *Thompson* court, in line with the other pre-*Meyer* cases addressing the same issue, effectively applied what today would be called strict scrutiny in adjudicating this conflict, and that this heightened standard of review was used because, on the basis of the common law view that parents' educational authority is prior to the state's, the court determined that “the right of the parent [in regard to the selection of studies] is superior to that of the school officers and the teachers.”¹⁴⁸

144 *Id.* at 713.

145 Sch. Bd. Dist. No. 18 v. Thompson, 103 P. 578, 582 (Okla. 1909).

146 Arguably, the most important aspects of the strict scrutiny test are the shifting of the burden of proof to the state and the least-restrictive-means test, as courts often simply grant the state's claim that its interest is compelling. Barclay, *supra* note 77, at 456 (“As a practical matter, courts also often assume without deciding that the government's interest is compelling, and then simply move on to assessing whether the government satisfied its evidentiary burden.”).

147 *Morrow v. Wood*, 35 Wis. 59, 66 (1874).

148 *Thompson*, 103 P. at 582.

CONCLUSION

Analyzing *Pierce* in light of its historical context—and especially in light of *Meyer* and the pre-*Meyer* state supreme court cases reflecting the common law understanding of parental rights that *Meyer* declared to be protected by the Fourteenth Amendment—suggests that the narrow and weak interpretation of *Pierce* (and thus of parents' constitutional right to direct their children's education) is historically inaccurate, out of line with *Glucksberg* and *Dobbs's* call for careful historical analysis to accurately identify and describe unenumerated constitutional rights. On the contrary, a careful analysis of both the text of the *Pierce* opinion itself, and of the relevant historical background, should lead us to conclude that parents' constitutional rights to direct their children's education and upbringing are both broad and strong, and that the state's authority in this area is correspondingly circumscribed—limited to requiring studies that are “plainly essential” to good citizenship, to forbidding those that are “manifestly inimical,” and to ensuring that all children have access to an education that will enable them to be law-abiding and productive citizens.¹⁴⁹

On this historically informed reading of *Pierce*, parents' constitutional rights are broad in the sense that they include much more than merely the right to send one's child to a private school at one's own expense. Rather, they include at least the right of parents to exempt their children from aspects of the public school curriculum to which they have an objection. Thus, parental rights do extend well beyond the schoolhouse door, and federal district court cases like *Mozert*, *Brown*, *Parker*, and *Fields*¹⁵⁰ were decided on the basis of a faulty interpretation of *Pierce*, which in turn was based on a superficial and ahistorical, narrow interpretation of *Pierce* by the Supreme Court in *Yoder*, *Norwood*, and *Runyon*.¹⁵¹ Likewise, the courts in these cases also erred in arguing that violations of parental rights under *Pierce* do not in themselves require strict scrutiny.

One might worry that this broad and strong interpretation of *Pierce* will open the floodgates of parental rights litigation, but I think these worries are exaggerated—the high costs of litigation are a strong disincentive, and once parents win one or two significant victories in court, schools will take notice and be more accommodating of parents at the outset. One might then object that this would be unworkable

149 *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925); see also *supra* note 95 and accompanying text.

150 See *supra* Part I.

151 See *supra* Introduction.

for schools,¹⁵² but this seems implausible given the already common practice of opt-outs for sex ed classes, along with things like individual education programs for students with special needs, as well as programs for gifted students.¹⁵³ If schools are willing to make special accommodations for students for these other reasons, surely they ought to do at least as much to respect parents' constitutional rights. Further, a full vindication of parental rights in education would also require giving *all* parents (including those with limited financial resources) genuine school choice—and this would lessen the need for exemptions and accommodations by giving parents who object to aspects of the curriculum a real opportunity for exit, and by removing or at least lessening the significant financial penalty that currently accompanies the choice to forgo the benefit of free public education.¹⁵⁴ But making the constitutional case for school choice is beyond the scope of this Article, and requires drawing not only on *Pierce* but also on First Amendment jurisprudence.¹⁵⁵

152 Judges commonly make this argument but cite no evidence to support it. See, e.g., *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 534 (1st Cir. 1995), *abrogated by* *Cnty. of Sacramento v. Lewis*, 523 U.S. 833 (1998); *Jones v. Boulder Valley Sch. Dist.* RE-2, No. 20-cv-03399, 2021 WL 5264188, at *12 (D. Colo. Oct. 4, 2021). For a refutation of this argument, see Helen M. Alvaré, *Families, Schools, and Religious Freedom*, 54 LOY. U. CHI. L.J. 579, 621 (2022).

153 See, e.g., *Opt-Outs and Sex Ed: What Are the Percentages?*, SIECUS: SEX ED FOR SOC. CHANGE, <https://siecus.org/opt-outs-and-sex-ed-what-are-the-percentages-2/> [<https://perma.cc/B5SV-NEV2>] (“Most states have opt-out provisions in their state education laws . . . [S]ources . . . suggest an average opt-out rate of under 5% . . .”); Eesha Pendharkar, *3 Reasons Why More Students Are in Special Education*, EDUC. WK. (Oct. 10, 2023), <https://www.edweek.org/teaching-learning/3-reasons-why-more-students-are-in-special-education/2023/10> [<https://perma.cc/V7GL-QNHR>] (“Almost 7.3 million students, or 14.7 percent of all public school students nationwide, needed special education services in the 2021–22 school year. . . . Under the Individuals with Disabilities Education Act (IDEA), . . . every student in special education has to be served by an individualized education program, also known as an IEP.”); NAT’L CTR. FOR EDUC. STAT., *Percentage of Public School Students Enrolled in Gifted and Talented Programs, by Sex, Race/Ethnicity, and State or Jurisdiction: Selected School Years, 2004 through 2020–21*, INST. EDUC. SCIS., https://nces.ed.gov/programs/digest/d23/tables/dt23_204.90.asp [<https://perma.cc/E5ZV-M5R9>].

154 On the importance of school choice programs to fully vindicate parents’ constitutional rights by giving all parents—not just the wealthy—the ability to “exit” the public school system, see Nicole Stelle Garnett & John A. Meiser, *Preserving the Exit Option: State Public Education Mandates and Parental Rights in Education*, 100 NOTRE DAME L. REV. 1709 (2025), and Richard F. Duncan, *Why School Choice Is Necessary for Religious Liberty and Freedom of Belief*, 73 CASE W. RES. L. REV. 1055, 1058 (2023) (calculating that, in order to send his five children to a religious school that aligned with his beliefs, his family had to forgo \$845,000 in state educational benefits, a sum which does not even include the cost of private school tuition).

155 See Philip Hamburger, *Education Is Speech: Parental Free Speech in Education*, 101 TEX. L. REV. 415, 432, 459 (2022) (arguing that state schools’ monopoly on public educational

Given that public schools are increasingly incorporating highly controversial views on sensitive matters into their curricula,¹⁵⁶ and that this is giving rise to a proliferation of disputes between parents and school districts,¹⁵⁷ the time is ripe to correct these misinterpretations of *Pierce*. Correcting these misinterpretations will make it possible for all parents, including parents with limited financial means, to fully exercise their constitutional liberty—grounded in their natural duty—“to direct the upbringing and education of [their] children.”¹⁵⁸ Such a vindication of parental rights would be beneficial not only to parents themselves, but also—and primarily—to their children. Strong parental rights protections redound to the well-being of children, because, as the common law tradition emphasized, and as the United States Supreme Court has affirmed, parents are much more likely than the state to know what is best for their children, and to be motivated to promote their children’s welfare.¹⁵⁹

funding is an unconstitutional condition on parents’ educational speech because it “presses parents to give up their educational speech and substitute the state’s,” and also that it violates the Establishment Clause by privileging the state’s preferred views—which align with those of theologically liberal denominations—and disfavoring or criticizing theologically conservative beliefs); Melissa Moschella, *Carson v. Makin, Free Exercise, and the Selective Funding of State-Run Schools*, J. RELIGION, CULTURE & DEMOCRACY (arguing, on the basis of *Carson v. Makin* and its precedents, that the selective government funding of state-run schools places an unconstitutional condition on the free exercise of religion by forcing many religious parents to choose between forgoing a significant state benefit or forgoing the ability to exercise their religion by providing their children with an education that aligns with their faith).

156 See generally Alvaré, *supra* note 151 (citing numerous examples of public schools teaching highly controversial views about marriage, sexuality, and gender that are directly contrary to the tenets of many religious traditions).

157 See, e.g., *Ibanez v. Albemarle Cnty. Sch. Bd.*, 897 S.E.2d 300 (Va. Ct. App. 2024); *Mahmoud v. McKnight*, 102 F.4th 191 (4th Cir. 2024), *rev’d sub nom.* *Mahmoud v. Taylor* 145 S. Ct. 2332 (2025); *S.E. v. Grey*, 782 F. Supp. 3d 939 (S.D. Cal. 2025); *Wailles v. Jefferson Cnty. Pub. Schs.*, No. 24-cv-02439, 2024 WL 4433942 (D. Colo. Oct. 6, 2024); *Vitsaxaki v. Skaneateles Cent. Sch. Dist.*, 771 F. Supp. 3d 106 (N.D.N.Y. 2025).

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

159 *Parham v. J.R.*, 422 U.S. 584, 602 (1979) (“[H]istorically [the law] has recognized that natural bonds of affection lead parents to act in the best interests of their children.”); see also, e.g., *State ex rel. Sheibley v. Sch. Dist. No. 1*, 48 N.W. 393, 395 (Neb. 1891) (“[W]ho is to determine what studies she shall pursue in school,—a teacher who has a mere temporary interest in her welfare, or her father, who may reasonably be supposed to be desirous of pursuing such course as will best promote the happiness of his child?”); Richard W. Garnett, *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109, 133–34 (2000) (“What reason is there for thinking that, in contested matters of education, values, and faith, a child’s dignity is more respected, and her autonomy better served, when her ‘best interests’ in those matters are determined by the State, rather than by her family? *Pierce* promises children that decisions about their best interests will be made by those who, generally speaking, are most likely to work conscientiously, motivated by love and moral obligation, to advance their best interests.”);

Emily Buss, *Adrift in the Middle: Parental Rights After Troxel v Granville*, 2000 SUP. CT. REV. 279, 287, 290–91 (“[C]hildren may be best served by a legal regime that bolsters their parents’ rights and sharply restricts the state’s authority to intervene on their behalf. Children are likely to benefit from such a system for two primary reasons, one straightforward and one counterintuitive. The first, already briefly acknowledged, is that parents are generally best situated to make good judgments on their children’s behalf. The second is that parents, good and bad, can be expected to perform better as parents if afforded near absolute control over the upbringing of their children. . . . [G]iving parents near absolute freedom to raise their children as they see fit may enhance their enjoyment of, and commitment to, the child-rearing task, thereby making them better parents. In negative terms, intruding on that freedom may undermine those parents’ effectiveness, even where the intrusions are designed to help.”); MOSCHELLA, *supra* note 88, at 133–45 (arguing that children benefit significantly from coherence and consistency between the values that they are being taught at home and at school).