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"WHO OWNS THE CHILD?": MEYER AND PIERCE AND THE CHILD AS PROPERTY

BARBARA BENNETT WOODHOUSE*

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* Assistant Professor of Law, University of Pennsylvania Law School. B.S., University of the State of New York, 1980; J.D., Columbia Law School, 1983.

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I. THE NATURE OF THE PROJECT

This is a revisionist history of two liberal icons, *Meyer v. Nebraska*¹ and *Pierce v. Society of Sisters*.² In these cases, the

1. 262 U.S. 390 (1923).

2. 268 U.S. 510 (1925).

Supreme Court of the *Lochner* era struck down state laws from Western and Midwestern states prohibiting the teaching of the elementary grades in foreign languages and requiring that all elementary students attend public school. We have long revered *Meyer* and *Pierce* as expressions of a liberal and libertarian spirit. Today they stand for the values of pluralism, family autonomy, and the right "to heed the music of different drummers."³ A critical examination of the historical context, the events and personalities that shaped the cases, and the testimony of contemporaries, suggests this account is incomplete. I will argue that they were animated, as well, by another set of values—a conservative attachment to the patriarchal family, to a class-stratified society, and to a parent's private property rights in his children and their labor. Along with protecting religious liberty and intellectual freedom, *Meyer* and *Pierce* constitutionalized a narrow, tradition-bound vision of the child as essentially private property. This vision continues to distort our family law and national family policy, so that we fail as lawmakers to respect children and fail as a nation to recognize and legitimate all American children as our own.

In *Meyer*, closely followed by *Pierce*, the Court first recognized parental rights of custody and control and added to the list of substantive due process economic liberties the right "to marry, establish a home, and bring up children."⁴ We like to think of these as the good personal liberty gold of substantive due process left when the evil dross of economic due process was purged. They are the foundation cases for an entire constitutional theory of family. In spite of the fact that the several lines of precedent they generated cover the most controversial territory of our times,⁵ the Court seems to accept *Meyer* and *Pierce* themselves as pure and uncomplicated, virtual products of an immaculate

3. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-6, at 1319 (2d ed. 1988).

4. *Meyer*, 262 U.S. at 399.

5. *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990) (who speaks for a pregnant child?); *DeShaney v. Winnebago County*, 489 U.S. 189 (1989) (when is state responsible for a child's welfare?); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (what makes a father a father?); *Bowers v. Hardwick*, 478 U.S. 186 (1986) (what defines marriage and family, tradition or affection?); *Lehr v. Robertson*, 463 U.S. 248 (1983) (what creates legal rights in genetic fathers?); *Santosky v. Kramer*, 455 U.S. 745 (1982) (when may state sever child/parent relationship?); *Parham v. J.R.*, 442 U.S. 584 (1979) (who speaks for an incarcerated or institutionalized child?); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (may state condition marriage on fulfillment of parental obligations?); *Roe v. Wade*, 410 U.S. 113 (1973) (may state regulate the decision to abort?); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (are children a medium for parents' religious expression?).

conception. Justice Brennan remarked of *Meyer* and its progeny, "I think I am safe in saying that no one doubts the wisdom or validity of those decisions."⁶ For once, no voices spoke in dissent.

To take *Meyer* and *Pierce* at face value is tempting, because the cases speak so eloquently for themselves. Consider the marvelous words that Justice McReynolds penned: "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."⁷ Recall McReynolds's stark picture of Plato's *Republic*, in which children are expropriated at birth by the state and "no parent is to know his own child, nor any child his parent."⁸ How can we disagree when he rejects these ideas as un-American?

Why do we accept these cases so uncritically? One reason is that post-War anti-German and anti-Catholic hysteria played such a visible role in their genesis diverting attention from longstanding social and political conflicts that predated the school laws and colored public and judicial response to them. Historical commentary thus has focused on the religious liberty and intellectual freedom issues that figured so prominently, neglecting the laws' relation to family law, child labor, common schooling, children's rights, and other contemporary phenomena. Legal scholars recognize the cases' seminal role in the constitutional law of family but do not question the social and political genealogy of the fundamental family rights they announced.

Neither historians nor constitutional scholars have adequately studied the configurations of liberals, conservatives, radicals, progressives, and reactionaries⁹ that formed around the cases, from

6. *Michael H.*, 491 U.S. at 142 (Brennan, J., dissenting).

7. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

8. *Meyer*, 262 U.S. at 401-02.

9. These terms have many possible meanings. I use them here not with any attempt at philosophical precision but in the colloquial sense current in early twentieth-century America: *liberal* to imply broadmindedness and support of free speech and democratic change; *conservative* as tending to preserve established institutions and values and to resist change; *reactionary* as wishing not only to retard change but to return to the old order; *Progressive* as believing in progress through political reform; *radical* as espousing extreme change going to the root of social and political structures. See WEBSTER'S NEW INTERNATIONAL DICTIONARY 1424, 568, 1978, 2070, 2051 (2d ed. 1934). Such terms also evolve with use and are easily molded to the purposes of the speaker. See, e.g., JOHN DEWEY, LIBERALISM AND SOCIAL ACTION 3-8, 18, 26-27, 62, 87-93 (1935) (contrasting nineteenth-century laissez-faire economic liberalism with modern liberalism, and arguing that modern liberalism must become radical in espousing social change); ALFRED LIEF, THE BRANDEIS GUIDE TO THE MODERN WORLD 73 (1941) (citing to a memorandum dated Oct. 19, 1915, stating that "progressiveness . . . is far-seeing conservatism."). Despite the relativity and

the voters and politicians who supported the laws, to the attorneys who argued the briefs, to the Justices who authored the opinions. Modern observers remark on the odd fact that the Court's most inflexible "conservative," Justice James C. McReynolds, authored the decisions in *Meyer* and *Pierce*. They note, in *Meyer*, the cogent dissent from the "liberal" Justice Oliver Wendell Holmes, Jr., yet they tend to interpret *Meyer* as a character lapse for Holmes and an isolated liberal episode in McReynolds's career.¹⁰ Ultimately, *Meyer* and *Pierce* must be integrated into the evolution of power relations in the family and in society, especially the erosion of patriarchal family government and hereditary class structures. These two trends were intimately related, and both entailed profound changes in the meaning and place of children.

As contemporaries realized, *Meyer* and *Pierce* were about children, parents, and the state, as well as about intellectual or religious freedom. Over and over, as this Article shows, ordinary people described *Meyer* and *Pierce* as posing the question, "Who Owns the Child?" In a time of ferment over private ownership and unregulated deployment of assets and of rapid changes in philosophies of government, childhood, and family, the answer was by no means simple. The questions latent in these cases are still with us. Who owns the child? What are the interests of the community in the child? If not a resource of the state, is the child a private asset of the parent? What, then, is the nature and origin

ambiguity of labels, I believe the constellation of players in *Meyer* and *Pierce* illuminates inherent tensions often lost on modern observers. I occasionally use "scare quotes" to remind the reader of the subjectivity and relativity of a given label.

These definitions refer primarily to attitudes toward change. As modern scholars such as Professor Joan Williams have shown, however, when the family was concerned, philosophies often divided along more fundamental fault lines of community and individualism. The progressives' attempt to inject "caring, non-self-interest" back into political discourse was at odds with both the conservative and the liberal *individualist* views that saw family as the extension of self rather than as an organ of society. See Joan C. Williams, *Domesticity as the Dangerous Supplement of Liberalism*, 2 J. OF WOMEN'S HIST. 69 (1991).

10. See, e.g., GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 571 (10th ed. 1980) (classifying McReynolds as "one of the most opinionated and reactionary" of the Court's conservatives); FRED RODELL, NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955, at 205 (1955); William G. Ross, *A Judicial Janus: Meyer v. Nebraska in Historical Perspective*, 57 U. CIN. L. REV. 125, 183 & n.330 (1988). Professor Martha Minow is one of the few to question whether these cases form an unbroken line with modern family privacy precedents or to ask what meaning they held for contemporaries. See Martha Minow, *We, the Family: Constitutional Rights and American Families*, 74 J. OF AM. HIST. 959 (1987). Professor Minow illustrates how the family in *Meyer* and *Pierce* figured as a terrain for group conflict over immigrant identity and religious freedom. I would suggest as well that the conservative urge to protect traditional family, economic, and class structures played an as yet unacknowledged role.

of a parent's title? If not property, is the child an extension of the parent? Or is it an individual with its own rights and its own voice? Are these substantive rights to a safe and nurturing childhood or merely negative liberties? Who speaks for the preverbal or the immature child? What happens when child and parent are at odds? What does it mean to privatize the family? And how does our individual investment in the private child affect our communal stake in the public child?

Swirling beneath the surface in *Meyer* and *Pierce*, these questions continue to plague family law, as it referees disputes over control of procreational and reproductive technology, stumbles towards a redefinition of parenthood, and is called to intervene in family break-up and family violence. These questions are at the heart of current family policy debates, as our schools re-segregate by race and class, the gap between poor children of color and rich white children widens, and legislatures wrangle over children's allowances, education policies, day care, and public health.

My project is storytelling. I do not pretend, at least in this Article, to present definitive answers to these questions. Nor is my objective, in proposing a revisionist account of *Meyer* and *Pierce*, to denigrate the important religious and intellectual liberty strands in the opinions or to negate their precedential value. I make no claim conclusively to prove the objective truth of my narrative, but I *do* claim to challenge the received wisdom with another plausible, richly detailed, and strongly contextual account.¹¹ By presenting a more panoramic, and perhaps, more skeptical, tale of the context in which the cases were decided, I hope to bring into view the dark side of *Meyer* and *Pierce*. *Meyer*

11. Judicial precedents, like religious icons, develop their own tradition of faith, having independent meaning. I propose to provide not a substitute but a "'dialectic' with the believers' [*Meyer* and *Pierce*], prodding believers to look at their tradition with new eyes and correcting the natural impulse to domesticate [it] into familiar, unthreatening images." Peter Steinfels, *Beliefs: Reconciling the Historical Jesus with the Living Jesus of Christians' Faith*, N.Y. TIMES, April 11, 1992, at 10. See also *infra* notes 385-87 and accompanying text. Likewise, history does not consist in "fixing" historical truths but "involves the frequent rethinking of the past." JOHN LUKACS, HISTORICAL CONSCIOUSNESS AND THE REMEMBERED PAST 331, 333 (1985). Constitutional history in particular may be ripe for rethinking. Some suggest its focus on a traditional body of authoritative interpretations—primarily Supreme Court opinions—has overlooked the rights consciousness and constitutional aspirations of ordinary people and may be enriched by the "historical experiences of groups and individuals throughout American history who have invested that arena of struggle with meaning and significance." Hendrik Hartog, *The Constitution of Aspiration and "The Rights That Belong to Us All,"* J. AM. HIST. 1013, 1033 (Dec. 1987).

announced a dangerous form of liberty, the right to control another human being. Stamped on the reverse side of the coinage of family privacy and parental rights are the child's voicelessness, objectification, and isolation from the community.¹²

I begin my narrative with the language laws at issue in *Meyer*, sketching the history in the Midwest of foreign language schooling and its relation to the common school movement and to the Americanization movement. I show that the language laws, although strongly influenced by post-War bias, were also a widely-praised, popular social reform. They mediated long-standing tensions not only between immigrants and native-born Americans but also between generations within the immigrant communities and between public and private educators.

In Part II, I turn to the Oregon universal common schooling law at issue in *Pierce*, and draw attention to its radical rhetoric of class leveling, integration, and democratization, grounded in a conception of the child as belonging first to the nation. I relate this rhetoric not only to the bigotry and super-patriotism of the Klan, the traditional villain, but also to the Populist legacy of the agrarian West and Midwest, and its egalitarian vision of class unity.

I then profile Governor Walter M. Pierce, the Oregonian who gave his name to the case, and show how he personifies the links between populism, progressivism, nativism, and the New Deal that, in part, explain the popular support for universal common schooling.

Having placed the two school laws in their historical context, I turn to concurrent trends in family law and family policy. In Part IV, I sketch the accepted schematic history of family in the nineteenth and early twentieth century and argue that it fails to convey the turmoil that marked family law in this era, the tenacity of tradition, or the strength of reactionary countertrends. Most dramatic of these was a devotion to patriarchy and its embedded notions of ownership of the child, ideas that I develop in historical perspective and illustrate in case law.

In Part V, I examine two movements that greatly influenced contemporary legal and social images of children: the movement for children's rights and the child labor movement. Both of these

12. I borrow this image from Professor Mary Ann Glendon's description of alienation, powerlessness, and dependency as the reverse side of individual liberty, family privacy, and sex equality. See MARY A. GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 147 (1989).

causes challenged the private model of patriarchal family with a collectivist ethos stressing the child's relation to and claims upon the community.

Turning back to the cases themselves, I describe their progress through the courts and illustrate their political context by letting three key players in the drama of *Meyer* and *Pierce* speak for their respective positions. First, I present William Dameron Guthrie, Columbia Law Professor, archconservative Catholic, champion of laissez-faire, and foe of child labor regulation, who briefed and argued the issues and, I suggest, influenced the Court deeply.¹³ Second, I give you James Clark McReynolds, the reactionary Associate Justice, a legendary bigot who hated Germans, Catholics, and Jews, and yet authored the famous icons of liberal toleration. Third, I examine the role of Oliver Wendell Holmes, Jr., described by contemporaries as "one of the best liberals on the Court," whose dissent in *Meyer* so baffled his admirers.

Finally, after a brief Epilogue putting our players and their passions to rest, I conclude by suggesting ways in which the legacy of *Meyer* and *Pierce* continues to play a role in shaping family law and family policy. I argue that our attachment to this property-based notion of the private child cuts off a more fruitful consideration of the rights of all children to safety, nurture, and stability, to a voice, and to membership in the national family.

II. LANGUAGE LAWS, COMMON SCHOOLING, AND THE POLITICS OF PLURALISM

We know that our offspring will become Americanized, but we ought not to be blamed when we try to make this change a gradual one.¹⁴

Many others have written about the language laws at issue in *Meyer*. Much of the literature, however, portrays these laws as reflecting a sudden explosion of anti-German sentiment in the

13. For a narrative of Mr. Guthrie's role aimed at a general audience, see Barbara B. Woodhouse, *William Dameron Guthrie: The Case of the New York Conservative and the Birth of Fundamental Family Liberties*, in *NEW YORK AND THE UNION: CONTRIBUTIONS TO THE AMERICAN CONSTITUTIONAL EXPERIENCE* 637 (Stephen Schechter & Richard Bernstein eds., 1990) (New York State Commission on the Bicentennial of the United States Constitution).

14. Lutheran Witness 8:53-54 (Sept. 7, 1889) (statement of Lutheran Missouri Synod President), *quoted in* RICHARD JENSEN, *THE WINNING OF THE MIDWEST: SOCIAL AND POLITICAL CONFLICT, 1888-1896*, at 125 & n.7 (1971).

wake of World War I.¹⁵ This account oversimplifies the long history of political tension surrounding school and language. The *Meyer* controversy was simply one episode—admittedly an extreme case—in the long-playing drama of who would control the country's education policies and what ends they should serve.

This section sketches the historical landscape in which the language laws arose and traces *Meyer's* journey to the steps of the Court in 1923. Placed in perspective, the language laws, at least in their less extreme versions, were a popular measure supported by many who described themselves as progressive. I do not claim that bigotry played no role in shaping public opinion. By all accounts, it played a large and shameful role. I offer rather, this contemporary background of progressive support as useful evidence on several unexplored fronts: First, to aid in understanding why one of the Court's most famous "liberals," Oliver Wendell Holmes, Jr., dissented from the decision in *Meyer* and would have voted to uphold the laws as a rational means to achieve the end of a common national language; second, to sow suspicion as to why the archconservative Justice McReynolds should have opposed a law that not only seemed tailor-made to his personal prejudices but also garnered broad public support; third, to show how the notion of parental control as a God-given right first surfaced in the debates and in the opinions; and finally, to serve as a reminder of the inherent tensions between parental autonomy and the public interest and between the private and the public child, underlying the choices between individualized private and common public education.¹⁶

A. *Language Laws and Common Schooling in Historical Context*

The law at issue in *Meyer*, known as the "Siman law" after its sponsor, Nebraska State Senator Harry Siman, passed the legis-

15. See, e.g., ORVILLE H. ZABEL, *GOD AND CAESAR IN NEBRASKA* 138-39 (1952); Neil M. Johnson, *The Missouri Synod Lutherans and the War Against the German Language 1917-1923*, 56 NEB. HIST. 136, 137-38 (1975); Jack W. Rodgers, *The Foreign Language Issue in Nebraska, 1918-1923*, 39 NEB. HIST. 1 (1958); Ross, *supra* note 10, at 130-34.

16. This problem is as current and challenging today as it was in the epoch of *Meyer*. See, e.g., JOHN CHUBB & TERRY MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* (1990) (proposing plan allowing parents to choose schools with moneys from public funds); Diane Ravitch, *Pluralism vs. Particularism in American Education*, 1 THE RESPONSIVE COMMUNITY 32 (1991) (warning that pluralism in school curricula can degenerate into filiopietistic racism); David Boaz, *The Big Flaw in School Reform*, N.Y. TIMES, May 30, 1991, at A25 (criticizing Secretary of Education Lamar Alexander's school voucher proposal).

lature of Nebraska in 1919.¹⁷ It prohibited the teaching of foreign languages in the primary grades of all schools, public or private.¹⁸ The Siman law was not an aberration. Sixteen states enacted similar laws in 1919 alone.¹⁹ By 1923, thirty-one states had laws mandating English as the sole language of instruction either in public or in all schools.²⁰ These language laws sprang, in some measure, from anti-German bias of the war years.²¹ They were rooted, however, in a more enduring conflict—the struggle between cultural pluralism and the felt need to articulate a national identity, evident in the long-standing tensions between English-speaking settlers of the Midwest and the large German, Polish, and Scandinavian communities in these states.²² These immigrant groups often formed isolated cultural enclaves with clubs, parochial schools, ethnic parishes, banks, stores, and insurance companies in which all business was conducted in the language of the home country.²³ To their American-born neighbors, coming from a tradition that mixed the meliorative, unifying strains of populism and progressivism with a nativist distrust for anything foreign, this failure to assimilate seemed at once a threat and a challenge for progressive reform.²⁴

17. 1919 Neb. Laws ch. 249. For extensive discussions of the Siman law, see Frederick C. Luebke, *Legal Restrictions on Foreign Languages in the Great Plains States, 1917-1923*, in *LANGUAGES IN CONFLICT: LINGUISTIC ACCULTURATION ON THE GREAT PLAINS* (Paul Schach ed., 1980); Ross, *supra* note 10, at 140-55.

18. See ZABEL, *supra* note 15, at 139-40; Kenneth B. O'Brien, *Education, Americanization and the Supreme Court: The 1920's*, 13 AM. Q. 161, 163 (1961).

19. O'Brien, *supra* note 18, at 163 n.11. Luebke suggests that these laws were a response to the Smith-Towner bill that Congress introduced in 1918, requiring such state laws as a condition of receiving federal funds. See Luebke, *supra* note 17, at 11-12.

20. See I.N. Edwards, *The Legal Status of Foreign Languages in the School*, 24 ELEMENTARY SCH. J. 270, 272 (1923) (showing table identifying 31 state laws); Brief for Appellee at 24-29, *Meyer v. Nebraska*, 262 U.S. 390 (1923) (No. 325) (identifying 22 state laws).

21. See, e.g., *Meyer v. State*, 187 N.W. 100 (Neb. 1922); O'Brien, *supra* note 18, at 162-63.

22. See, e.g., MALDWYN A. JONES, *AMERICAN IMMIGRATION* 148 (1960) (cataloging periods of nativist political activity beginning in 1790); Luebke, *supra* note 17, at 2. Nativist sentiment was not, of course, restricted to the western states. For example, Jones discusses the founding of the Immigration Restriction League in 1894 by a group of Boston "bluebloods," including Charles Warren, motivated by fears for the future of their "race" and "class." JONES, *supra*, at 259.

23. See, e.g., MARCUS L. HANSEN, *THE IMMIGRANT IN AMERICAN HISTORY* 136-45 (1940); Carol P. Heming, *Schulhaus to Schoolhouse: The German School at Hermann, Missouri, 1839-1955*, 1988 MO. HIST. REV. 280, 281; Timothy J. Klobardanz, *Symbols of German-Russian Ethnic Identity on the Northern Plains*, 8 GREAT PLAINS Q. 3, 5-7 (1988); Bruce Kochis, *Czech in Nebraska*, in *LANGUAGES IN CONFLICT: LINGUISTIC ACCULTURATION ON THE GREAT PLAINS* 111, 113 (Paul Schach ed., 1980).

24. Populism had been strongest in the midwest agrarian belt, and the Populist strains

The growth of private religious schools, importing teachers from the Old Country who taught in German, Polish, Italian, or Czech,²⁵ posed a particular threat to a cherished agent of social equality and acculturation—the common school movement. One classic rationale for free public education was stated by the Working Men's Committee of Philadelphia in 1830: "The original element of despotism is a monopoly of talent, which consigns the multitude to comparative ignorance, and secures the balance of knowledge on the side of the rich and the rulers."²⁶ Many nineteenth-century advocates perceived common schools as essential if America was to realize the promise of equal opportunity.

Contemporary historians of American education have hotly debated both the aims and effects of the common school movement. Until recently, historians depicted the story of American education as a steady march, led by benevolent and disinterested reformers, from the darkness of ignorance to the light of equal opportunity through free public education.²⁷ Beginning in the 1960's, however, revisionist historians sought to debunk this view as myth. Their studies of class conflict portray the common school movement and "progressive" school reformers as agents of a ruling business elite that effectively subjugated working-class and especially immigrant children through a form of cultural imperialism.²⁸

of 1890's social democracy and revolt against industrialism remained strong features of midwestern political progressivism in the early twentieth century. *See infra* notes 134-37 and accompanying text; *see also* Carroll Engelhardt, *Schools and Character: Educational Reform and Industrial Virtue in Iowa, 1890-1930*, *ANNALS OF IOWA* 618, 621 (1985); O'Brien, *supra* note 18, at 162.

25. Lutheran-sponsored schools often taught classes in German or Scandinavian languages. *See* Luebke, *supra* note 17, at 2-3. The Catholic Church established separate ethnic parishes offering primary and secondary schooling in the language of the Czech, Polish, German, Lithuanian, or Italian immigrant. Marvin Lazerson, *Understanding American Catholic Educational History*, *HIST. OF ED. Q.* 297, 301-03, 308 (Fall 1977).

26. Professor Tyack cites this statement as emblematic of an egalitarian strand in the philosophy of public education. DAVID B. TYACK, *TURNING POINTS IN AMERICAN EDUCATIONAL HISTORY* 140-41 (1967) (quoting report on education by the Working Men's Committee of Philadelphia in 1830); *see also* DAVID B. TYACK ET AL., *LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785-1954*, at 16 (1987) (stating that major claim of common school promoters is that mixing of rich and poor would erase artificial distinctions).

27. *See* PAUL E. PETERSON, *THE POLITICS OF SCHOOL REFORM, 1870-1940*, at 4 (1985) (describing the writings of influential 1920's scholar Ellwood Cubberly).

28. *See, e.g.*, MICHAEL B. KATZ, *THE IRONY OF EARLY SCHOOL REFORM: EDUCATIONAL INNOVATION IN MID-NINETEENTH CENTURY MASSACHUSETTS* (1968); DAVID NASAW, *SCHOoled TO ORDER: A SOCIAL HISTORY OF PUBLIC SCHOOLING IN THE UNITED STATES* (1979); *see also* DAVID B. TYACK, *THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION* (1974) (tracing continuing impact of administrative progressives on centralization of education).

Other modern historians have suggested that pluralist politics kept the public schools from becoming the captive of any one group and that issues of schooling as it affected class, ethnicity, status, and economics were mediated through many subtle and changing political alliances.²⁹ Regardless of which account one now finds persuasive, Americans in the half-century before *Meyer* and *Pierce* generally viewed the mission of the common school as threefold: to train citizens to exercise their rights in a democracy; to imbue immigrants and the poor with "American" ideals and culture; and to equalize opportunity for advancement in an egalitarian society. "Americans understood that mass education and egalitarian citizenship were inextricably linked."³⁰ The common schools would function not as vehicles for private advancement but as servants of the community, dedicated to socialization of children to life in a modern America. English, as the language of instruction, would be the primary agent of acculturation.³¹

Into this idealized setting came the immigrant parents, who bypassed public education and turned to church schools to meet their need to reaffirm cherished traditions.³² In the reformers'

Other scholars have focused on the conflicts between "pietist" and "liturgist" religious groups, with the native Protestant pietists dominating common schooling and causing the liturgists, often Catholic or Lutheran immigrants, to found religious schools that would reflect their religious beliefs. See, e.g., TYACK ET AL., *supra* note 26, at 162-65; Murray N. Rothbard, *The Progressive Era and the Family*, in *THE AMERICAN FAMILY AND THE STATE* 109, 113 (1986).

29. See, e.g., LAWRENCE CREMIN, *AMERICAN EDUCATION: THE METROPOLITAN EXPERIENCE, 1879-1980* (1988); CARL F. KAESTLE & MARIS A. VINOVSIS, *EDUCATION AND SOCIAL CHANGE IN NINETEENTH-CENTURY MASSACHUSETTS 1-2* (1980); PETERSON, *supra* note 27, at 1-10, 203-07. See generally Oliver Zunz, *American History and the Changing Meaning of Assimilation*, J. OF AM. ETHNIC HIST. 53 (1985) (stating view that class conflict analysis underplays role of ethnicity in social history).

30. Marvin Lazerson et al., *Learning and Citizenship: Aspirations for American Education*, DAEDALUS, Fall 1984, at 59-60.

31. A perusal of 2 REPORT OF THE COMMISSIONER OF EDUCATION FOR 1893-1894 (Wash. GPO 1896) shows that, long before the War, many states had passed laws mandating English as the language of instruction and/or prohibiting foreign language schooling: Maine, *id.* at 1068; Massachusetts, *id.* at 1086; Rhode Island, *id.* at 1093; Georgia, *id.* at 1150; Indiana, *id.* at 1184; Wisconsin, *id.* at 1204; Minnesota, *id.* at 1211; Iowa, *id.* at 1216; Missouri, *id.* at 1221; North Dakota, *id.* at 1227; Kansas, *id.* at 1244; Oklahoma, *id.* at 1248; Montana, *id.* at 1253; Colorado, *id.* at 1263; Washington, *id.* at 1280; California, *id.* at 1296.

32. This phenomenon was by no means universal. Immigrant schooling patterns varied widely by group and by geography. Germans appeared more likely than other groups to favor separate German language schools. The German language school played an important role in organized programs to create "a new German fatherland" in the West. See Heming, *supra* note 23, at 286 (noting that the schools also taught English). Norwegians generally attended public schools but established "hverdagsskolen" or "everyday schools" to teach Norwegian when public schools were not in session. See CARL H. CHRISLOCK, *ETHNICITY*

eyes, the vision of common schools in which all of the children of a community might meet and learn from each other could never be realized as long as the common schools must compete with schools that were "agents of churches and immigrant communities and dedicated to their service."³³ School boards tried a variety of strategies to promote universal common schooling, from frankly pluralist policies, such as offering classes in foreign language and culture to attract immigrant students, to restrictive rules that sought to force assimilation by suppressing foreign languages. In St. Louis, Missouri, for example, in the year 1860, one third of the approximately 15,000 pupils—and eighty percent of all German-American children—attended private schools in which German was the official language of instruction.³⁴ Hoping to lure these children to the melting pot of the public school system, the St. Louis school board in 1864 rescinded its long-standing English-only policy and introduced a German language curriculum.³⁵ The strategy appears to have been effective. Twenty years later, four out of five St. Louis German children attended public schools.³⁶ By 1887, however, the tide had turned and opponents succeeded in abolishing German from the program.³⁷

Elsewhere, as in Missouri, the balance of power between the nativist and common school groups and the immigrant communi-

CHALLENGED: THE UPPER MIDWEST NORWEGIAN-AMERICAN EXPERIENCE IN WWI 25 (1981). In San Francisco, anti-Asian racism led to laws in the 1880's barring "mongolians" from the common schools. The response of the Chinese and Japanese communities varied. The small Japanese community used diplomatic pressure to force integration. The Chinese community in San Francisco, already subject to discriminatory immigration rules, at first supported separate Chinese schools because many intended to return to China. With increased permanence, increasing pressure came for entrance into English-speaking common schools. See generally PETERSON, *supra* note 27, at 105-11 (depicting the differences between the Chinese and Japanese communities' efforts at education). Established ethnic and religious communities also influenced newcomers' choices. Eastern European Jews arriving in New York in the 1880's and 1890's were channeled to public schooling by a German-Jewish community that placed a high premium on Americanizing the newcomers. See STEPHAN F. BRUMBERG, GOING TO AMERICA, GOING TO SCHOOL: THE JEWISH IMMIGRANT PUBLIC SCHOOL ENCOUNTER IN TURN-OF-THE-CENTURY NEW YORK CITY 60-70 (1986).

33. SELWYN K. TROEN, THE PUBLIC AND THE SCHOOLS: SHAPING THE ST. LOUIS SYSTEM 1838-1920, at 53 (1975).

34. *Id.* at 61.

35. *Id.* at 60.

36. *Id.* at 64.

37. *Id.* at 69. San Francisco and Chicago also adopted the strategy of offering German language instruction to lure immigrant students from private German-language schools. See PETERSON, *supra* note 27, at 52-71. In each city, however, the programs provoked criticism and were cut in times of budget crisis, as "fads and frills" outside the school's mission of giving "the rising generation a thorough grounding in the English language and those accomplishments which form the basis of ordinary commercial intercourse." *Id.* at 56-57 (quoting the SAN FRANCISCO BULL., July 21, 1880).

ties remained fluid, shifting over time.³⁸ In 1913, only five years before the Nebraska legislature passed the Siman law, the German-American Alliance in Nebraska had gained sufficient power to pass the Mockett laws requiring that the public elementary school teach a modern language if fifty parents in the district so requested.³⁹ The "language issue" caused dissension not only between immigrants and nativists but also within immigrant communities. Attitudes toward language preservation divided Progressives from traditionalists and the young from the older generation.⁴⁰ Although the conservative Lutheran synods fought to preserve their power through separate parochial schools, "modern" German-Americans such as Senator Gratz Brown of Missouri saw common education as the key for immigrants of every tongue to attain "a common destiny" and a "single nationality."⁴¹

The younger generation often voted with its feet. In 1890, at the time of the Bennett law, the newspaper of the Missouri Synod

38. In 1889 and 1890 the Edwards and Bennett laws were passed in Wisconsin and Illinois, mandating that all schooling—private or public—at the elementary level be in English. See Lloyd P. Jorgenson, *The Oregon School Law of 1922: Passage and Sequel*, 54 CATH. HIST. REV. 455 (1968); William H. Hobbs, *A Pioneer Movement for Americanization*, OUTLOOK, Apr. 24, 1918, at 666. These laws included not only English language provisions but also prohibitions on child labor and provisions strengthening compulsory schooling laws. The Catholic and Lutheran Churches organized to fight the language restrictions, condemning them as violations of religious liberty and of the natural right of parental control. See JENSEN, *supra* note 14, at 22-125; Lazerson, *supra* note 25, at 305. The Republicans who supported the laws were defeated and the laws were repealed. See Jorgenson, *supra*, at 456. Twelve years later, some 55% of Chicago's Catholic school pupils were in ethnic parish schools in which much of a child's schooling was conducted in foreign languages. In Minnesota, in 1894, lawmakers had struck a bilingualist compromise: classes were to be taught in English, but a teacher who was able "to speak a language that is the vernacular of a pupil" could use "that language to aid in the teaching of English words," and might conduct formal classes in the foreign language for no more than one hour per day. WAYNE E. FULLER, *THE OLD COUNTRY SCHOOL: THE STORY OF RURAL EDUCATION IN THE MIDDLE WEST* 199 (1982) (quoting 2 REPORT OF THE COMMISSIONER OF EDUCATION FOR 1893-1894, at 1211 (Wash. GPO 1896)).

39. See O'Brien, *supra* note 18, at 139 & n.127. *American Students Boycotting German*, LITERARY DIG., Mar. 30, 1918, at 29, mentioned the existence of similar laws in other western states and noted objections that such early language instruction results in the neglect of English. The *Digest* reported that the Indiana State Teachers Association led the movement to repeal legislation requiring the teaching of German if 25 patrons requested it. *Id.* at 47.

40. Carl H. Chrislock describes divisions over the "language question" within the Norwegian Lutheran community, with the pro-English faction apparently dominating in the early 1900's. CHRISLOCK, *supra* note 32, at 25-28. Timothy L. Smith, in *Immigrant Social Aspirations and American Education 1880-1930*, 21 AM. Q. 523, 526-27 (1969), describes how parents pressed sometimes reluctant leaders of immigrant schools to offer English as well as their native tongue.

41. TROEN, *supra* note 33, at 56-57 (quoting from address by B. Gratz Brown, Mar. 28, 1853).

reported that half its recent confirmands were abandoning German language churches for English-speaking Lutheran and even non-Lutheran denominations: "We know that our offspring will become Americanized," lamented the Synod President, "but we ought not to be blamed when we try to make this change a gradual one."⁴²

In an odd twist, nativists and others seeking to restrict immigration actually found themselves advocating foreign language fluency as a condition of entry. In the 1890's, diverse groups including the Immigration Restriction League, the Knights of Labor, and the Populist Party pressed Congress for a measure requiring immigrants to demonstrate literacy in the immigrants' *native* language. The measure was a thinly disguised method of stemming the tide from southern and eastern Europe, where illiteracy rates were higher,⁴³ but the two policies in tandem conveyed the mixed message, "send us your culturally literate and we will make of them clean slates."

Thus, the clash of immigrant cultural identity with the ideal of assimilation through the mandatory teaching of English was nothing new in 1918. The law at issue in *Meyer* was not solely a response to wartime panic but reflected preexisting tensions—political, educational, generational, and cultural—which the war had exacerbated but did not create. The Siman law reached an extreme, however, in extending beyond English as the basic school language to prohibit *any* foreign language instruction in formal elementary school settings, public or private.

B. Americanization as a National Progressive Reform Movement

The English language initiatives unfolding in the Midwest must also be recognized as part of a contemporary preoccupation with

42. JENSEN, *supra* note 14, at 125 & n.7 (citing LUTHERAN WITNESS 8:53-54 (Sept. 7, 1889)). Likewise, second-generation German Catholics in the 1880's began attending Irish church schools in which English was the language of instruction. CREMIN, *supra* note 29, at 135. The fears expressed by Nebraska opponents of the English language laws that Americanized children would "despise" their "foreign" elders and flout parental authority were not entirely groundless. JOHNSON, *supra* note 15, at 141.

43. Literacy tests, proposed in the Immigration Commission Report of 1911 and repeatedly vetoed by President Wilson, became part of the Immigration Act in 1917. See JOHN HIGHAM, SEND THESE TO ME: IMMIGRANTS IN URBAN AMERICA 41-52 (1984). Labor and the Populists appear to have been most concerned about stemming the tide of cheap nonunion labor and avoiding "pauperization" of the working man, while the Immigration Restriction League voiced alarm over mongrelization of the American race. See, e.g., WALTER K. NUGENT, THE TOLERANT POPULISTS: KANSAS POPULISM AND NATIVISM 100-02 (1963); STANLEY B. PARSONS, THE POPULIST CONTEXT: RURAL VERSUS URBAN POWER ON A GREAT FRONTIER 106-10 (1973); Luebke, *supra* note 17, at 9.

assimilation that spanned the entire country.⁴⁴ War and international unrest intensified the demand for a more tightly knit nation.⁴⁵ Patriotic societies and politicians joined with settlement houses and educators to take up "Americanization" as an organized national campaign. Armed with the hindsight of modern cultural sensitivity, construing Americanization as a code word for anti-foreign bias and discrimination is easy. Undeniably, at some times and in some places, bigotry and prejudice were the dominant forces.⁴⁶ Contemporary sources, however, suggest that in 1918 large segments of the public and prominent educators viewed Americanization as a responsible answer to a serious sociological challenge.⁴⁷ "Americanization of the immigrant" became the catch phrase to identify a group of policies aimed at assimilation of the immigrant into American life.⁴⁸ Fluency in

44. Stephan Brumberg identifies Americanization as a conscious objective of the New York City Board of Education in the common schooling of Jewish immigrants. See BRUMBERG, *supra* note 32, at 112.

45. Fears excited by the Bolshevik revolution of 1917 contributed to the campaign. The "Red Scare" and its role in the post-War stages of Americanization is documented in ROBERT K. MURRAY, *RED SCARE: A STUDY IN NATIONAL HYSTERIA, 1919-1920* (1955); see also WILLIAM E. LEUCHTENBURG, *THE PERILS OF PROSPERITY 1914-32*, at 204-24 (1958).

46. See, e.g., JOHN HIGHAM, *STRANGERS IN THE LAND* 254-63 (1955) (describing how early humanitarianism turned to bigotry during "Red Scare" of 1919-1920); Eckard V. Toy, Jr., *The Ku Klux Klan in Tillamook, Oregon*, 53 PAC. N.W.Q. 60 (1962) (describing Klan support of Americanization in early 1920's).

47. See, e.g., Nicholas M. Butler, *How the United States Should Face Future's Problems*, N.Y. TIMES, Feb. 17, 1918, at 2 (address of Nicholas Murray Butler, President of Columbia University, urging English-only schooling). The immediate problem cited by proponents of language laws was widespread illiteracy in English among the ranks of World War I draftees. See *id.*; see also Brief for Appellee at 17, *Meyer v. Nebraska*, 262 U.S. 390 (1923) (No. 325); 56 National Education Association Addresses and Proceedings 906 (1922) [hereinafter NEA Proceedings]. The latent issue was, of course, the role that immigrant groups would play and the nature of democratic society that would emerge from the melting pot. For widely divergent contemporary views of assimilation, compare JULIUS DRACHSLER, *DEMOCRACY AND ASSIMILATION: THE BLENDING OF IMMIGRANT HERITAGES IN AMERICA* (reprint 1970) (1920) with HENRY P. FAIRCHILD, *THE MELTING-POT MISTAKE* (1926). Drachsler, a Professor of Sociology at Smith College, writing in 1920, hoped for a genuinely pluralist society. He saw Americanization as an earnest, if oversimplified, attempt to deal with the practical barriers faced by immigrants. DRACHSLER, *supra*, at 61-63, 237-38. Fairchild condemned Americanization as a popular crusade by educators eager to render social service that distracts attention from the real danger that unrestricted immigration will result in the destruction of the true "American nationality." FAIRCHILD, *supra*, at 1-40.

48. See, for example, Owen A. Hoban, *Americanization-Wise and Unwise*, 1922 NEA Proceedings, *supra* note 47, at 906, in which a Massachusetts educator characterized as wise his program of pluralistic adult education in America and as unwise the common attitude that immigrants are ignorant, not worth teaching, and should be left to their own devices. *Id.* at 907-08. In the years after World War I, assimilation was the enlightened progressive's alternative to racism. Higham describes the humanistic side of progressivism, contrasting it with the exclusionary thrust of nativist sentiment that sought to purge

English was widely regarded as the key to fully realized citizenship.

In 1918, United States Secretary of the Interior Franklin K. Lane convened a group of governors, social workers, industrialists, and educators from eighteen states to formulate a comprehensive plan of education and cooperation with immigrant groups. The plan included a recommendation that "in all schools in which the elementary subjects are taught they shall be taught in the English language only."⁴⁹ At its 1919 annual meeting held in Milwaukee, the National Education Association adopted a recommendation in favor of "[l]egal provision for the use of English as the language of instruction in all schools," and for "compulsory classes in Americanization for all . . . who are not able to read and write the English language" at the sixth grade level.⁵⁰

Public opinion, at least as reflected in popular magazines of the day, seemed solidly behind these initiatives. *Outlook* magazine's April 24, 1918, issue carried an article entitled "A Pioneer Movement for Americanization,"⁵¹ praising the vision of the originator of the 1889 Bennett law. The article began with a quote: "To speak German is to remain German," and a dominant theme was the need to combat "Kaiserism," but it also stressed the social problems faced by immigrant children raised in ignorance of the English language.⁵²

The Literary Digest also viewed Americanization as a progressive endeavor firmly rooted in pluralism. On March 30, 1918, it printed a survey of the use of German in public schools, noting

rather than assimilate the immigrants. Higham posits that cultural pluralism could not have gained acceptance until assimilation had made substantial progress. HIGHAM, *supra* note 43, at 195-97, 199-214; see also Julius Weinberg, *E.A. Ross: The Progressive as Nativist*, 50 WIS. MAG. OF HIST. 242 (1966) (discussing nativist themes in work and life of E.A. Ross, a western progressive reformer).

49. DRACHSLER, *supra* note 47, at 28-29. A similar meeting was convened the following year. See U.S. Dep't of Interior, Bureau of Educ. (Americanization Division), PROCEEDINGS OF THE AMERICANIZATION CONFERENCE, May 12-15, 1919 (Wash. 1919), cited in Rodgers, *supra* note 15, at 3 n.7; see also Smith-Towner bill (introduced in October 1918, conditioning federal funds on states' enactment of laws making English the basic language of instruction); Smith-Bankhead Americanization bill S. 5464, 65th Cong., 3d Sess. (1919), H.R. 15402, 65th Cong., 3d Sess. (1919), (suggesting a national policy of Americanization), reprinted in DRACHSLER, *supra* note 47, at 262.

50. 57 NEA Proceedings, *supra* note 47, at 25 (1919). See also Address of U.S. Comm'r of Educ., *id.* at 81-88, and the discussion of the proposed Senate bill which would allocate \$7,500,000 for Americanization efforts, including English language education, *id.* at 509-14.

51. Hobbs, *supra* note 38, at 666.

52. *Id.* (recounting that the Bennett laws had been inspired by an incident in which a swindler, posing as a census taker, tricked German-speaking farmers into signing promissory notes).

that German was the exclusive language of instruction in certain Nebraska Lutheran schools.⁵³ The *Digest* stressed that this practice interfered with the pupils' acquiring fluency in English and cited with apparent approval a string of newspaper editorials criticizing the practice.⁵⁴ The guiding sentiment, however, was one of pluralist assimilationism. Throughout 1918 and 1919, The *Digest* ran a series of features entitled "Education in Americanism,"⁵⁵ each highlighting a different immigrant group and its cultural heritage. The thrust of the series is that Americanism includes appreciating each other's culture as well as imparting a common language and political tradition. Fluency in English is a recurrent theme, as the editors assure us of each unique group's ability to contribute to American life.⁵⁶

C. *A Test Case: Metamorphosis from Religious Liberty to Parental Rights*

Inevitably, Nebraska's campaign to promote a common language precipitated a constitutional challenge. At first, the case seemed to revolve around religious liberty, but it soon refocused on parental rights. The English language drive in Nebraska had been renewed in 1918 beginning with repeal of the Mockett law.⁵⁷ With

53. *American Students Boycotting German*, *supra* note 39, at 29.

54. *Id.* The editorials cited are from the *Duluth Herald*, the *New York Sun*, and the *Des Moines Capital*. The *Literary Digest* points out that the outcry against German would "doubtless not have arisen had it not been discovered that the schools were being used as the medium for propaganda." *Id.* at 30. Nevertheless, the *Digest* did not seem to have adopted hysterical attitudes to German texts since its Feb. 23, 1918, issue carried a lampoon of the popular hysteria over a German-language text titled *Im Vaterland*. *German School-Book Camouflage*, LITERARY DIG., Feb. 23, 1918, at 26.

55. See, e.g., *Magyars in the United States*, LITERARY DIG., Sept. 27, 1919, at 36; *Jugo-Slavs in the United States*, LITERARY DIG., June 7, 1919, at 41; *The American of Austrian Birth*, LITERARY DIG., Sept. 28, 1918, at 37. The first installment featured President Wilson's message to school teachers on their role in instilling patriotism. *Education in Americanism, Patriotism in the Schools*, LITERARY DIG., Sept. 21, 1918, at 37. The series, prepared with assistance of the Education Department, was intended as a teaching aid for use with high school students to familiarize them with the various immigrant groups. *Id.*

56. See, e.g., *Magyars in the United States*, *supra* note 55, at 36 (observing that most Magyars cannot converse in Hungarian); *The American of Austrian Birth*, *supra* note 55, at 37 (stating that Americans of Austrian birth are fluent in English).

57. ZABEL, *supra* note 15, at 140. Luebke contends that by 1919, English had become the dominant language of instruction and characterizes the furor over foreign languages as "much ado about very little." Luebke, *supra* note 17, at 6. A study of Nebraska schools in 1918, however, identified 59 counties reporting schools taught in languages other than English and seven counties with schools whose total programs were taught in German. Of particular concern in the political climate of that day, 100 schools neither displayed the United States flag nor sang the anthem, and three superintendents reported schools that

both outgoing and incoming governors supporting it, the Siman Language law forbidding the teaching of foreign languages below the eighth grade was passed and immediately put into effect.⁵⁸ The Missouri Synod of the Lutheran Church challenged the law in *Nebraska District of Evangelical Lutheran Synod v. McKelvie*.⁵⁹ The law was upheld as a reasonable exercise of the police power.⁶⁰ It was narrowly construed, however, as banning only the teaching of foreign languages insofar as they displaced the required curriculum.⁶¹ Dissatisfied with this restriction, the Missouri Synod decided to mount a second test case.⁶²

The volunteer was Robert T. Meyer, a mild-mannered and God-fearing father of five, who taught in the white clapboard Evangelical Lutheran Church school in the farming community of Zion Corners, Nebraska. He was fined for instructing a ten-year-old child in the story of Die Himmelsleiter (Jacob's Ladder) from a German Bible text, during a "recess" that previously was devoted to formal studies.⁶³ He appealed to the Nebraska Supreme Court, but the conviction was upheld, in an opinion that interpreted the Siman law as covering all times when pupils were assembled in school for the purposes of instruction.⁶⁴ Judge Charles B. Letton, the author of the earlier opinion in *McKelvie*, dissented. The critical issue for Judge Letton was not religious freedom, but the fundamental "God-given and constitutional right of a parent to have some voice in the bringing up and education of his children."⁶⁵

opened the day by singing the German national anthem. See Robert N. Manley, *Language, Loyalty, and Liberty: The Nebraska Council of Defense and the Lutheran Church, 1917-1918*, 37 CONCORDIA HIST. INST. Q. 1, 9 (1964).

58. See Ross, *supra* note 10, at 141-55, for a detailed discussion of the procedural history of the *McKelvie* and *Meyer* cases.

59. 175 N.W. 531, 532 (Neb. 1919).

60. *Id.* at 535-36.

61. *Id.* at 534.

62. ZABEL, *supra* note 15, at 145. Catholics and Lutherans joined in fighting the bill from its inception and were involved throughout the case. See ARTHUR F. MULLEN, WESTERN DEMOCRAT 213 (1940) (memoirs of Catholic attorney who argued the case at the Supreme Court).

63. See, e.g., Record at 13, 18, 22, 39, *Meyer v. Nebraska*, 262 U.S. 390 (1923) (No. 325); MULLEN, *supra* note 62, at 217-19.

64. *Meyer v. State*, 187 N.W. 100 (Neb. 1922).

65. *Id.* at 104 (Letton, J., dissenting) (quoting *State v. Ferguson*, 144 N.W. 1039, 1043 (Neb. 1914)). The dissent concluded: "Resistance to the arbitrary power of kings was necessary in days gone by. It seems now to be necessary to resist encroachment by the Legislature upon the liberty of the citizen protected by the Constitution." *Id.* at 105. Letton's views had changed substantially since his own concurrence in *Ferguson*, in which he argued that the parental right of control should apply only to non-mandatory subjects. *Ferguson*, 144 N.W. at 1044.

The Synod appealed to the United States Supreme Court, which noted jurisdiction and set the case for early argument so that it could be considered together with others from Iowa and Ohio.⁶⁶

During *Meyer's* progress through the state courts, it underwent a strange metamorphosis. *Meyer* began its journey to the Nebraska Supreme Court as a religious liberty case.⁶⁷ At trial, counsel presented testimony that the text *Meyer* used was a German Bible and that religious instruction in German was necessary for parents and children to be able to worship together in the Lutheran faith.⁶⁸ Parental authority was mentioned only in relation to religion.⁶⁹ The Pastor of the Lutheran Church at Zion Corners testified that "[t]he parents would have lost a good deal of their influence over their children if they had not learned the German religion."⁷⁰ On appeal to the Nebraska Supreme Court, Judge Flansburg, writing for the majority, stated that "[t]he whole question resolves itself to this: Does the statute interfere with the right of religious freedom, by prohibiting the teaching of a foreign language, when that language is taught with the idea and purpose of later using it . . . in religious worship?"⁷¹ The Nebraska Supreme Court held that it did not.

The first reference in the case to a constitutionally protected parental right of control came in Judge Letton's dissent to the Nebraska Supreme Court opinion. For support he cited *State v. Ferguson*,⁷² a 1914 Nebraska Supreme Court decision on a parent's right to keep his daughter out of a home economics class. *Ferguson*

66. ZABEL, *supra* note 15, at 148. *Meyer* was consolidated with *Nebraska District of Evangelical Lutheran Synod v. McKelvie*, 175 N.W. 531 (Neb. 1919), challenging the Nebraska successor to the *Siman* law. Two other cases, *Pohl v. Ohio*, 132 N.E. 20 (Ohio 1921), and *State v. Bartels*, 181 N.W. 508 (Iowa 1921), are reported at 262 U.S. 404 (1923). These companion cases to *Meyer* challenged the Iowa language law and the similar Ohio statute, which singled out the German language for regulation. The *Bartels* and *Pohl* cases had been submitted, and *Bartels* had been argued, on November 29, 1922, but decision was delayed until *Meyer* had been briefed and argued.

67. Record at 1, *Meyer* (No. 325). The record developed at trial was clearly gauged to support a free exercise of religion argument. The argument of Zion Corner's Lutheran Pastor Brommer was that the parents who were used to worshipping in German relied on the school to teach their children religion in German so that families might worship together. *Id.* at 33. The trial judge, however, sustained a number of objections to evidence emphasizing the religious nature of the subject matter. *Id.* at 33-36; see also Ross, *supra* note 10, at 145; *infra* notes 493-94, 579 and accompanying text (describing the tenuous status of First Amendment incorporation).

68. Record at 33, *Meyer* (No. 325).

69. *Id.* at 33-34.

70. *Id.* at 34.

71. *Meyer*, 187 N.W. at 102.

72. 144 N.W. 1039, 1043 (Neb. 1914).

itself cites no authority, merely asserting the existence of a "God-given and constitutional right of a parent to have some voice in the bringing-up and education of his children."⁷³

The briefs that Arthur Mullen prepared for the Lutheran Synod's appeal to the Supreme Court also failed to stress parental rights, but dwelt instead on the teacher's right to pursue a vocation and the inherent harmlessness of the German language.⁷⁴ Appellee Nebraska's brief touched the issue in its defense of the language laws as an exercise of the police power.

If it is within the police power of the state to . . . compel landlords to place windows in their tenements which will enable their tenants to enjoy the sunshine, it is within the police power of the state to compel every resident of Nebraska to so educate his children that the sunshine of American ideals will permeate the life of future citizens of this republic. A father has no inalienable constitutional right to rear his children in physical [sic], moral or intellectual gloom.⁷⁵

The litigants in *State v. Bartels*,⁷⁶ too, focused primarily on religious freedom and the Fourteenth Amendment right of the teacher to pursue his livelihood.⁷⁷ The three dissenters on the Iowa Supreme Court based their objections on religious freedom grounds. They argued that German language instruction was related to religious exercise, and thus it was protected by the Iowa Constitution.⁷⁸ By the time the appellants' brief in *Bartels* was filed with the United States Supreme Court on August 2, 1922,⁷⁹ it appears the Letton dissent in *Meyer* had made its mark. Parental rights became a focal point of the schools' brief to the Supreme Court which cited the *Meyer* dissent as authority.⁸⁰ Appellee Iowa, however, contrived to stress children's and teachers' rights. As to parental rights, Iowa remarked only that all statutes regarding children infringe somewhat on the rights of parents, but that this was justifiable for general welfare purposes

73. *Id.*

74. Brief for Appellant at 9-14, *Meyer v. Nebraska*, 262 U.S. 390 (1923) (No. 325).

75. Brief for Appellee at 14-15, *Meyer* (No. 325).

76. 181 N.W. 508 (Iowa 1921).

77. *See id.* at 513-15.

78. *Id.* at 515 (Evans, C.J., dissenting).

79. Brief for Appellants, *Bartels v. Iowa*, 262 U.S. 404 (1923) (No. 134) (stamped "Filed Aug. 2, 1922").

80. *Id.* at 22.

in light of the wartime evidence of the subversive effects of German language instruction.⁸¹

III. UNIVERSAL COMMON SCHOOLING AND THE POPULIST LEGACY

Free Public Schools—"Open to All, Good Enough for All, Attended by All. All for the Public School and the Public School for All."⁸²

Meanwhile, another more radical school reform movement had been taking shape.⁸³ The same Nebraska legislature that adopted the Siman law came within one vote of adopting a revolutionary proposal—a law compelling all elementary pupils to attend public schools.⁸⁴ Similar measures were proposed but defeated in Michigan, Washington, Ohio, Oklahoma, and California.⁸⁵

Victory came in Oregon, where in 1922 the voters approved by a vote of 115,506 to 103,685, an initiative mandating public schooling for all children under sixteen.⁸⁶ These initiatives, like their

81. Brief for Appellee at 10-14, *Bartels* (No. 134).

82. Slogan coined by the Masonic Rite in support of universal common schooling, quoted in M. Paul Holsinger, *The Oregon School Bill Controversy 1922-1925*, 37 PAC. HIST. REV. 327, 332 (1968).

83. Modern scholars have revitalized discussion of universal public schooling as a solution to persistent problems of racial and class division in American education. Professor James S. Liebman has argued that "voice," or universal active participation in public schools, may be superior to "choice," or the ability to move from public to private school, as a method of improving overall quantity and quality of distribution of education. See James S. Liebman, *Voice, Not Choice*, 101 YALE L.J. 259 (1991) (book review). He proposes exit-reduction measures that present similar issues to the Oregon law invalidated in *Pierce*, and believes *Pierce* could be construed narrowly to allow such an experiment. *Id.* at 302-08. Philosopher Amy Gutmann breaks with liberal tradition by accepting the premise that a democratic society might require all students to attend public schools, but she rejects the notion on empirical grounds as not likely to enhance education for citizenship. AMY GUTMANN, *DEMOCRATIC EDUCATION* 115-23 (1987).

84. See Brief of Defendant in Error at 2, *Meyer v. Nebraska*, 262 U.S. 390 (1923) (No. 325); Jorgenson, *supra* note 38, at 456.

85. Brief of Amici Curiae at 3, *Meyer* (No. 325) (co-authored by William D. Guthrie and Bernard Hershkopf and filed Feb. 20, 1923) [hereinafter Guthrie Amicus Brief]; William D. Guthrie, *The Oregon Compulsory Public School Law*, reprinted in COLUM. MAG. (June 1924) [hereinafter Oregon Law]; Jorgenson, *supra* note 38, at 456. The battle in Michigan was especially fierce. An active and well-organized campaign spearheaded by Catholic, Lutheran, and Seventh Day Adventist groups defeated a constitutional amendment in 1920 and again in 1924. See generally Timothy M. Pies, *The Parochial School Campaigns in Michigan, 1920-1924: The Lutheran and Catholic Involvement*, 72 CATH. HIST. REV. 222 (1986).

86. Oregon Law, *supra* note 85, at 2. The law applied to children over eight and under 16, unless they had completed the eighth grade, and made exceptions for disabled children, children living over three miles from a public school without transportation, and children taught by parents and tutors. Oregon Law, *supra* note 85, at 1-2.

cousins, the language laws, were not products of spontaneous generation, nor were they free from ambivalence and internal contradiction. Past discussions have stressed that the laws were motivated by divisive, anti-Catholic prejudices exacerbated by the War.⁸⁷ Yet, paradoxically, these laws proposed a radical plan for equality through class, race, and religious integration that makes *Brown v. Board of Education*⁸⁸ seem tame. Far from ignoring the social implications of their plan, the proponents of the plan drew upon a rhetoric that recalled the egalitarian Populist imagery of the 1890's—one common people, united for the common good in a just society, free from divisions of class and race. These universal common schooling laws and the Supreme Court's response to them can be understood only in the context of this Populist past.

A. *The Oregon School Law*

The Oregon initiative originated with the national organization of the Scottish Rite Masons and was sponsored by a variety of organizations, including the American Legion⁸⁹ and the respected Federation of Patriotic Societies.⁹⁰ The Ku Klux Klan, though not an official sponsor, was instrumental in its passage.⁹¹ Quality of instruction, problems with teacher certification, and neglect of English in parochial and private schools had drawn some criticism in educational journals.⁹² The guiding sentiment behind the Oregon

87. See, e.g., TYACK ET AL., *supra* note 26, at 177; Jorgenson, *supra* note 38, at 456; O'Brien, *supra* note 18, at 161.

88. 347 U.S. 483 (1954).

89. See MURRAY, *supra* note 45, at 270 (discussing American Legion involvement in Americanization of education).

90. The Federation of Patriotic Societies was formed in 1917 to combat government corruption, special interests, and corporate power. ROBERT E. BURTON, *DEMOCRATS OF OREGON: THE PATTERN OF MINORITY POLITICS, 1900-1956*, at 49 (1970); Holsinger, *supra* note 82, at 329.

91. See, e.g., Oregon Law, *supra* note 85, at 2, 22; O'Brien, *supra* note 18, at 166; Toy, *supra* note 46, at 64 (describing how Klansmen feared the abstract stereotypes of Catholics, Negroes, Chinese, and Jews, as well as the menace of Bolshevism). The Klan also played a leading role in the 1924 vote in Michigan. See Pies, *supra* note 85, at 231-37. The very public Klan of the 1920's was different from the secretive Klan of the Reconstruction era South. On August 8, 1925, the Klan held a march in Washington, D.C., that drew some 50,000 Klansmen. SAMUEL E. MORISON ET AL., *A CONCISE HISTORY OF THE AMERICAN REPUBLIC 590-91* (1977). The new Klan, whose power center was now the Midwest, was strongly anti-Catholic. The Klan openly engaged in politics, electing a governor of Colorado, for example, but still occasionally employed clandestine intimidation.

92. *Supervision of Private Schools*, 27 SCH. REV. 790-91 (Dec. 1919); cf. *The Michigan Controversy Regarding Private Schools*, 32 SCH. REV. 82, 83 (Feb. 1924) (asserting that Michigan proposal was response to failure of inspection systems to bring private schools into conformity with state standards).

law, however, seems to have been an odd commingling of patriotic fervor, blind faith in the cure-all powers of common schooling, anti-Catholic and anti-foreign prejudice, and the conviction that private and parochial schools were breeding grounds of Bolshevism.⁹³

Another motive, however, was largely neglected by historians but noted by contemporaries. The argument in favor of the initiative printed in the Official Ballot added a second theme—that of class leveling—to the cultural assimilationism of the language laws.

Mix the children of the foreign-born with the native-born, and the rich with the poor. Mix those with prejudices in the public school melting pot for a few years while their minds are plastic, and finally bring out the finished product—a true American.

The permanency of this nation rests in the education of its youth in the public schools . . . where all shall stand upon one common level.

When every parent in our land has a child in our public schools, then and only then will there be a united interest in the growth and higher efficiency of our schools.

Our children must not under any pretext, be it based upon money, creed or social status, be divided into antagonistic groups, there to absorb the narrow views of life, as they are taught. If they are so divided, we will find our citizenship composed and made up of cliques, cults and factions, each striving, not for the good of the whole, but for the supremacy of themselves."⁹⁴

Voters rallied behind such slogans as "Free Public Schools—Open to All, Good enough for All, *Attended* by All. All for the Public School and the Public School for All. One Flag, One School, One Language."⁹⁵ The Exalted Cyclops of the Klan, Frederick Gifford, declared: "We do not believe in snobbery and are just as much opposed to private schools of the so-called 'select' kind as

93. *Pierce v. Society of Sisters*, 268 U.S. 510, 526 (1925); Brief of Appellant, the Governor of the State of Oregon at 46, *Pierce* (No. 583) (stating that schoolhouses will be red on inside as well as outside). The Scottish Rite paper, *The New Age*, pointed to the known "Bolshevist control of the education of Ukrainian citizens in Toronto" as a reason for the Oregon law. Jorgenson, *supra* note 38, at 458.

94. Appendix to Brief on Behalf of Appellee at 24-25, *Pierce* (No. 583) (Official Ballot Argument (Affirmative)); see Ernest Harvier, *What the Klan Did in Oregon Elections*, N.Y. TIMES, Dec. 3, 1922, § 2, at 8 (reprinting texts of Ballot arguments).

95. Holsinger, *supra* note 82, at 332 n.21 (quoting the slogan coined by the Masonic Rite).

we are to denominational private schools. All American children should be educated on the same basis."⁹⁶

This strange coalition of ideologies defies any easy synthesis. It mixed the leveling spirit of populism with a frontier brand of Klan bigotry and a western strain of meliorist assimilationism. Blending elements of bias, redemption, and unity, the Oregon law was an incongruous recipe for radical change.⁹⁷ One thing is certain, the strong flavor of class and status leveling was not lost on the establishment observers from the East. The editors of the *New York Times* commented on the Oregon law: "A further motive was resentment of special educational opportunities maintained for their children by the rich or well-to-do. 'What is good enough for my children is good enough for anybody's children'—this became a slogan in the period of discussion."⁹⁸

Although public reaction to the language laws had been largely favorable, the idea of abolishing private primary education raised widespread alarm. The initiative drew scattered support from educators. William Jasper Kerr, president of the Oregon Agricultural College, was one ardent supporter.⁹⁹ Another was the editor of the *Oregon Teacher's Monthly*, who defended the initiative, pointing to the "Boss Crokers, who grew up without schools, and the Morgans who were splendidly but selfishly educated" as examples of society's most hated and caricatured class-conscious villains who would have benefitted from "the humanizing influences of the public schools."¹⁰⁰ Most prominent educators and

96. *Id.* at 330 n.13 (quoting Interview with Frederick Gifford, in OREGON VOTER, Mar. 25, 1922, at 5).

97. Tyack, James, and Benavoot remarked on the peculiar marriage of Klan ideas about racial inferiority and Klan support for bringing children together in public schools. TYACK ET AL., *supra* note 26, at 178. Yet during the 1920's, Klan dogma in the Northwest, especially when aimed at Catholics, stressed coerced conformity to pure Americanism more than segregation.

98. *The Oregon School Law*, N.Y. TIMES, Aug. 5, 1923, § 2, at 4. The article went on to state that "[d]islike of a proposal founded in religious hatred and in the leveling spirit was intense and aggressive" and noted without comment the proponents' view that "private schools tend to the fixing of social classes and to promotion of snobbery." *Id.* (emphasis added). Ballot arguments submitted by private schools perhaps unwittingly exacerbated this anti-snob sentiment by stressing that their schools were more costly, but afforded smaller classes and a superior education. See Harvier, *supra* note 94, at 8. Note that charges that private schooling served and was defended by the wealthy were not confined to Oregon. In Michigan, for example, the drafters of the compulsory public education amendment claimed that "the plutocrats" were behind Catholic opposition to the law. Pies, *supra* note 85, at 224.

99. Holsinger, *supra* note 82, at 333.

100. TYACK ET AL., *supra* note 26, at 185-86 (quoting from the October 12, 1922, issue of the *Oregon Teacher's Monthly*). A convention of 133 teachers in Columbia County also

national opinionmakers opposed the law.¹⁰¹ *The Literary Digest*, which favored English-schooling laws as vehicles of Americanization, came out against the Oregon law in 1922¹⁰² and in 1924 praised the district court decision striking it down.¹⁰³ With the exception of the Scottish Rite paper *The New Age*, newspapers throughout the country editorialized against it.¹⁰⁴ Some criticized it as "Prussian to the Core,"¹⁰⁵ others criticized it as an infringement on religious or intellectual freedom, and others assailed it as an interference with parental authority.¹⁰⁶

The goal of equality through common schooling had been voiced before, from the Working Men's Committee in 1830,¹⁰⁷ to Horace Mann and other school reformers of the Progressive era,¹⁰⁸ to

voted to support the law. *Id.* at 186. The Hill Military Academy, soliciting contributions for its war chest, claimed that "public school teachers, nationally [were] backing this movement." Letter of Hill Military Academy, ELEMENTARY SCH. J., Sept. 1924, at 39. The Academy may have exaggerated the eagerness of public school teachers. Local educators roundly opposed a similar initiative in Michigan. The Detroit School Board, realizing it would have to open 41 new public schools if parochial schools were closed, told teachers to instruct their students to tell parents to vote "NO." Pies, *supra* note 85, at 230.

101. See Jorgenson, *supra* note 38, at 458-61; O'Brien, *supra* note 18, at 168-69. Columbia University President Nicholas Murray Butler, who had favored English-only language laws, called this bill "fundamentally un-American." Holsinger, *supra* note 82, at 333. John Dewey condemned the Oregon law as "striking at the root of American toleration." John Dewey, *The School as the Means of Developing Social Consciousness and Social Ideas in Children*, 1 J. SOC. FORCES, Sept. 1923, at 515.

102. *Oregon's Outlawing of Church Schools*, LITERARY DIG., Jan. 6, 1923, at 34-35. The *Digest's* opposition was primarily based on religious freedom but also echoed the parental rights/nationalization-of-the-child themes discussed *infra* notes 364-69. The editorial begins "'Whose is the Child?' So far as its education is concerned, Oregon has answered that it is the State's." *Oregon's Outlawing of Church Schools*, *supra*, at 34. A similar slogan had been used in 1920 on 50,000 campaign buttons that opponents of the Michigan compulsory public school law distributed. Pies, *supra* note 85, at 226.

103. *Wiping Out Oregon's School Law*, LITERARY DIG., Apr. 26, 1924, at 33.

104. See Jorgenson, *supra* note 38, at 465 (listing *Baltimore Sun*, *Boston Transcript*, *Chicago Tribune*, *Minneapolis Tribune*, *Newark News*, *Pittsburgh Gazette*, *Portland Oregonian*, *Washington Evening Star*); see also *Wiping Out Oregon's School Law*, *supra* note 103, at 34 (quoting *Columbus Dispatch*, *Norfolk Virginian Pilot*, *St. Paul Pioneer Press*).

105. *Wiping Out Oregon's School Law*, *supra* note 103, at 34 (quoting *Houston Chronicle*).

106. *E.g.*, *id.* at 33-34 (quoting *St. Paul Pioneer Press*) ("parental discipline will be greatly impaired, parental responsibility weakened and the home or family will cease to be the unit that it is traditionally"); N.Y. TIMES, Dec. 3, 1922, § 2, at 8 ("takes from the parent all discretion and makes the child a compulsory ward of the state"); *The Oregon School Law*, N.Y. TIMES, Apr. 2, 1924, at 18 (praising district court decision as "protecting the parental right against a socialistic invasion").

107. See *supra* note 26.

108. Horace Mann wrote of the common schools:

Education, then, beyond all other devices of human origin, is the great equalizer of the conditions of men—the balance-wheel of the social machinery. . . . It does better than to disarm the poor of their hostility towards

John Dewey in the first decades of the twentieth century.¹⁰⁹ Although modern scholars have questioned whether common schools actually achieved these goals,¹¹⁰ certainly the egalitarian rhetoric of common schooling contrasted markedly with the manifest role of private schools in maintaining class and cultural divisions.¹¹¹ In the past, however, proponents of common schooling had used price and product competition to entice private school students into the melting pot.¹¹² Now public education was to be not only free but universal, bringing everyone's children, rich and poor alike, into a melting pot which would obliterate class as well as ethnicity. This rhetoric of social leveling and classless unity has been overshadowed by the divisive, anti-Catholic biases of some of the Oregon law's key supporters. It should not be dismissed as an aberration, however, for it has roots in the rhetoric of the agrarian revolts of the 1800's and rekindles a Populist vision in which divisions of class, race, and religion would give way to one unified community.

B. Populism and the Rhetoric of Class Leveling

Populism, like common schooling, has been the focus of controversy among historians who debate whether Populists were radicals, liberal precursors of progressivism, proto-Fascists, or simply

the rich; it prevents being poor. . . . [I]f this education should be universal and complete, it would do more than all things else to obliterate factitious distinctions in society.

HORACE MANN, THE TWELFTH ANNUAL REPORT (1848), in *THE REPUBLIC AND THE SCHOOL* 87 (Lawrence Cremin ed., 1957).

109. JOHN DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* 101-02 (1916). Dewey, however, opposed coercive methods such as the Oregon law. See Dewey, *supra* note 101, at 515.

110. See *supra* notes 27-31 and accompanying text.

111. Peterson identifies education as key to class and status in America. PETERSON, *supra* note 27, at 4-10. Private education conferred an extra measure of status and class distinction. See LEONARD L. BAIRD, *THE ELITE SCHOOLS* 9-13 (1977) (discussing role of private schools in sorting out elite and channelling them into elite colleges); CHOICE AND CONTROL IN AMERICAN EDUCATION (William H. Clune & John F. Witte eds., 1990); Norman Fenton, *Aspects of the Private School Problem*, 18 SCH. & SOC. 202, 202-04 (1923) (arguing that private schools are enhanced by selectivity that keeps out nouveau riche and undesirables); Brian O'Reilly, *How Much Does Class Matter?*, FORTUNE, July 30, 1990, at 123-28 (noting that prep-schools established 150 years ago by elites frightened of immigrant rabble still are important talisman of class status). For a radical critique of class stratification in both public and private education, see SAMUEL BOWLES & HERBERT GINTIS, *SCHOOLING IN CAPITALIST AMERICA* 108-14, 209-13 (1976).

112. See *supra* notes 32-37 and accompanying text; see also Michael B. Katz, *The Origins of Public Education: A Reassessment*, 16 HIST. OF EDUC. Q. 381, 383 (1976).

ineffectual malcontents.¹¹³ Although Populist orators left a legacy of revolutionary speeches and writings, some analyses have suggested their talk was more revolutionary than their actual political deeds.¹¹⁴ Nevertheless, the movement, at its height, drew together individuals of various racial, ethnic, and religious backgrounds, cut across party lines, and unified labor unions and farmers' alliances under a common banner. Despite disputes about the impact and politics of populism, it seems clear that "Populism as a mythic source of a radical tradition"¹¹⁵ has made a significant contribution to reform in twentieth-century America. This radical tradition and its resonances were important to the universal common schooling laws.

Midwestern populism grew out of the Granger movement of the 1870's and the Farmers' Alliance of the 1880's. These grass roots movements were a response to economic crisis and the decline of agrarian power. Farmers shared a conviction that they were being exploited, with government's connivance, by middlemen, by bankers, and by railroads. In common with organized labor, they felt powerless to affect national and local policies on money supply and credit, taxes, and tariffs. The grievances brewing in farming communities erupted into a powerful third-party protest movement when the western land speculation bubble burst in 1887-1888. In states like Kansas and Nebraska, farmers who had moved West with high hopes saw their land values plummet and bad weather or insects ruin their crops. They blamed exorbitant freight rates and usurious bank credit, especially on chattel mortgages, for dealing the final blow.¹¹⁶ Many failed and were forced to return East in defeat. Between 1888 and 1892, as many as one half of the farmers in western Kansas simply gave up and abandoned their hard-won claims.¹¹⁷

113. See, e.g., NUGENT, *supra* note 43, at 1-27; POPULISM: THE CRITICAL ISSUES vii-ix, 166-67 (Sheldon Hackney ed., 1971). As these and other works on Populism illustrate, modern historians continue to develop deeper, yet conflicting, understandings of the movement's origins, politics, and legacies. POPULISM: THE CRITICAL ISSUES, *supra*, at 158. I offer here only a rough synthesis, without pretending to resolve these current debates. I use the term "Populist" broadly to refer not only to the formal People's Party that blossomed in the last decade of the nineteenth century but also to the radical agrarian cooperative world view from which it grew and which continued to color the politics of the Midwest and West long after the People's Party was gone.

114. Sheldon Hackney, *Neither Revolution nor Reform*, in POPULISM: THE CRITICAL ISSUES, *supra* note 113, at 133.

115. *Id.* at xxii.

116. PARSONS, *supra* note 43, at 27-31.

117. MORISON ET AL., *supra* note 91, at 437. Many settlers left with only their wagons, bearing the slogan "In God We Trusted, in Kansas we busted." O. GENE CLANTON, KANSAS POPULISM: IDEAS AND MEN 29 (1969).

In 1892, the People's Party, later dubbed the Populists, called its first convention in Omaha, Nebraska. On July 4th, the party issued a radical platform calling for solidarity with labor, opposing accumulations of wealth, seeking government control of railroads and utilities, calling for currency reform (including a subtreasury and unlimited silver and gold coinage), demanding abolition of land speculation and absentee ownership, and calling for a graduated income tax to redistribute wealth from rich to poor. The most radical part of the platform, however, may well have been its Preamble, a stirring, almost apocalyptic image of a "plundered people" reduced to servitude on the 116th anniversary of its Declaration of Independence. It was rich with rhetoric suggestive of the same dualities of unity and disunity, class division and class leveling, that we encountered in the Oregon school law ballot.

[W]e meet in the midst of a nation brought to the verge of moral, political, and material ruin. . . . The fruits of the toil of millions are boldly stolen to build up colossal fortunes for a few, unprecedented in the history of mankind From the same prolific womb of governmental injustice we breed the two great classes—tramps and millionaires.

. . . .
 . . . We declare that this republic can only endure as a free government while built on the love of the whole people for each other and for the nation

. . . We believe that the powers of government—in other words, of the people—should be expanded . . . to the end that oppression, injustice, and poverty shall eventually cease in the land.¹¹⁸

The farmers' rhetoric of class polarization and decay may seem extreme.¹¹⁹ But farm men and women had experienced two decades of unremitting hardship played out against a national backdrop of economic crisis and change, extremes of wealth and depths

118. *The Omaha Platform*, THE NATIONAL ECONOMIST, July 9, 1892, reprinted in THE POPULIST MIND 59, 60-62 (Norman Pollack ed., 1967) [hereinafter THE POPULIST MIND].

119. Historian Sheldon Hackney remarked of this Preamble:

It captures the desperation experienced by Populists as they perceived all about them social dissolution, polarization of the classes, and conspiracies to oppress the weak. One must make a great effort to put himself in the position of a farmer in 1892 in order to understand the resonance of this extreme rhetoric.

POPULISM: THE CRITICAL ISSUES, *supra* note 113, at 1.

of poverty, urban upheaval, and rural ruin.¹²⁰ Populist rhetoric portrays labor and agrarian woes as stemming from the same root,¹²¹ the usurpation of the People's government by rapacious corporations, special interests, and plutocrats. These forces were fast dividing all America into two classes—the millionaires and the paupers, the robbers and the robbed, the privileged Plutocrats and the impoverished People.¹²²

This polarity of rich and poor is captured in the 1894 vignette of "Coxey's Army" of destitute "industrial veterans," hauled off to jail for trespassing on the grass outside the Capitol, just steps away from the courtroom where the income tax was shortly thereafter declared unconstitutional.¹²³ Only a return to unity, the

120. Populist farmers were allied with the Knights of Labor and were keenly aware of labor unrest and repression. See NORMAN POLLACK, *THE JUST POLITY: POPULISM, LAW AND HUMAN WELFARE* 37-42 (1987). Although famous events such as the railroad strikes of 1877, the Haymarket affair in 1886, the Homestead strike in 1892, and the Pullman strike in 1894 made lasting impressions, the year 1890 actually saw more strikes than any other year in the nineteenth century. MORISON ET AL., *supra* note 91, at 437.

121. Populist speeches refer frequently and passionately to repression of labor. The Omaha platform expresses solidarity with the urban workman prevented from organizing and decries "a hireling standing army . . . established to shoot them down." It also includes a resolution condemning the Pinkertons and "the recent invasion of the Territory of Wyoming by the hired assassins of plutocracy, assisted by federal officials." *The Omaha Platform*, reprinted in *THE POPULIST MIND*, *supra* note 118, at 60, 65; see, e.g., Speech to Congress by Rep. Thomas Watson in support of his anti-Pinkerton resolution, May 12, 1892 (arguing that the Pinkertons' actions violated the peace and the law), reprinted in *THE POPULIST MIND*, *supra* note 118, at 190; *Farmers' Alliance*, Lincoln, Neb., Aug. 30, 1890 (editorial condemning corporation's employing of private armies of Pinkertons as a usurpation of the people's rights), reprinted in *THE POPULIST MIND*, *supra* note 118, at 459.

122. See, e.g., Editorials from *Farmers' Alliance*, Lincoln, Neb., Sept., 1890 and Feb., 1891 ("They have amassed wealth for other people while they themselves are without the necessities of life."), reprinted in *THE POPULIST MIND*, *supra* note 118, at 16-22; Editorial from *Platte County Argus*, Columbus, Neb., Sept. 3, 1896 ("To avoid further degeneration, humiliation, and violence, personal and class rule must cease."), reprinted in *THE POPULIST MIND*, *supra* note 118, at 41-42; *The Omaha Platform* (corporate power threatens free institutions and has captured government, law, and the Courts), reprinted in *THE POPULIST MIND*, *supra* note 118, at 63.

123. "Colonel Coxey" was a charismatic Populist who led a march on Washington of unemployed men, seeking various relief programs that later became features of the New Deal. Their radical rhetoric frightened some citizens, whereas the unceremonious reception they received offended others deeply. MORISON ET AL., *supra* note 91, at 443-44; *THE POPULIST MIND*, *supra* note 118, at 155-56; The income tax was enacted in the Wilson-Gorman tariff in the wake of the agricultural depression of 1887 and financial panic of 1893. It imposed a two percent tax on incomes over \$4000. This was considered a desperate measure for a desperate time, with four million jobless and rates of farm foreclosure as high as 75% in some western counties. William Guthrie, who would later play a major role in *Meyer and Pierce*, challenged this graduated or progressive tax as lead counsel in a marathon argument and reargument that consumed eight days of the high Court's calendar. The Court held the tax unconstitutional by a vote of five-to-four. Justice Field,

Populists believed, could save the nation from the armageddon of class warfare.

The Populist antidote to revolution had both a hard side—specific economic reforms—and a soft side—the spirit expressed in the rhetoric of democratic unity and harmony. Populist leader Tom Watson, speaking to “The Negro Question in the South,” invoked what Richard Hofstadter called the “natural harmony of interests”¹²⁴ that unify the common people:

[T]he crushing burdens which now oppress both races in the South will cause each to make an effort to cast them off. They will see a similarity of cause and a similarity of remedy. . . . It will be in the interest of both that each should have justice. And on these broad lines of mutual interest, mutual forbearance, and mutual support the present will be made the stepping-stone to future peace and prosperity.¹²⁵

Populists sharply criticized the prevailing Darwinist, individualist philosophy: “The survival of the fittest is the government of brutes and reptiles, and such philosophy must give place to a government which recognizes human brotherhood.”¹²⁶ An editorialist in the *Farmer's Alliance* wrote: “Society must enlarge itself to the breadth of humanity. A stage must be reached in which each will be for all and all for each.”¹²⁷

explaining his reasons for invalidating the tax, revealed much about the political climate in the Court. “The present assault upon capital is but the beginning. It will be but the stepping-stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich . . .” *Pollock v. Farmers Loan & Trust Co.*, 157 U.S. 429, 607 (Field, J., concurring), *reh'g granted*, 158 U.S. 601 (1895). To the Populist farmers and workingmen, the Court's decision was proof positive of the class bias of government. See *MORISON ET AL.*, *supra* note 91, at 437, 442-44. Justice Brown, no Populist himself, called the Court's tortured interpretation “a national calamity” and added, “I hope it may not prove the first step toward the submergence of the liberties of the people in a sordid despotism of wealth.” *Pollock*, 158 U.S. at 695 (Brown, J., dissenting); see *infra* notes 397-98 and accompanying text (detailing William Guthrie's involvement in the Income Tax Cases).

124. Richard Hofstadter, *The Folklore of Populism*, in *POPULISM: THE CRITICAL ISSUES*, *supra* note 113, at 71.

125. Thomas E. Watson, *The Negro Question in the South*, 6 *ARENA* 540, 550 (1892). Sadly, Tom Watson later developed into a vocal racist. See NORMAN POLLACK, *supra* note 120, at 189. Populist platforms on racial issues favored voting reforms like the Australian or secret ballot, equality of education, and elimination of the color line, but did not necessarily extend to social equality or mixing of the races. See, e.g., *THE POPULIST MIND*, *supra* note 118, at 370, 397-399.

126. Inaugural address of Governor Lorenzo D. Lewelling of Kansas, Jan. 20, 1893, reprinted in *People's Party Paper*, in *THE POPULIST MIND*, *supra* note 118, at 51.

127. Editorial from *Farmers' Alliance*, Feb. 28, 1891, reprinted in *THE POPULIST MIND*, *supra* note 118, at 18-19.

Similar themes of harmony and inclusiveness, mirrored by distrust of concentrated power, figure as well in other contemporary social reform movements. The evangelical women's temperance and suffrage movements, and later the Progressive movement, provide a communitarian counterpoint to the individualist self-interest that dominated both liberal and conservative thought of the day. Like Populists, they challenged an ethic that measured justice in individual rather than social terms.¹²⁸ Populist talk of social justice and unity was not all empty rhetoric. Populists put forth immigrants, blacks, and women as candidates for office, and they supported women's suffrage.¹²⁹ Although some historians claim the Populists were strongly nativist,¹³⁰ detailed studies of voter records in the Midwest show that large numbers of foreign-born candidates and voters joined the Populist tickets.¹³¹

The term "nativist" has been misused to cover any view or policy in opposition to unrestricted immigration or denigrating or undermining foreign cultures or minority religions. Under this definition, most of America was nativist in the late 1800's. Cultural conflict, laden with prejudice and distrust against Jews, Catholics, foreigners, and even between minority groups, was an ever-present feature of nineteenth-century society. "The nativists, however, made it a central element in both their analysis of the

128. See, e.g., BARBARA L. EPSTEIN, *THE POLITICS OF DOMESTICITY: WOMEN, EVANGELISM, AND TEMPERANCE IN NINETEENTH-CENTURY AMERICA* (1981); Elizabeth B. Clark, *Religion, Rights, and Difference in the Early Woman's Rights Movement*, 3 WIS. WOMEN'S L.J. 29, 45 (1987); Williams, *supra* note 9, at 77-79.

129. On African-American Populists, see, for example, Letter of "Hayseeder," to *Southern Alliance Farmer*, August 2, 1892 (discussing Black delegate to Georgia Populist Party Convention), reprinted in *THE POPULIST MIND*, *supra* note 118, at 386-87; and Jack Abramowitz, *The Negro in the Populist Movement*, in *POPULISM: THE CRITICAL ISSUES*, *supra* note 113, at 40-41.

130. Some Populists supported ideas also endorsed by nativists, such as prohibition and English language laws. PARSONS, *supra* note 43, at 107 (citing R. Stough, *The American Protective Association* 73 (1931) (unpublished M. thesis, University of Nebraska, which asserts that Populists may have sympathized with English language laws but did not become embroiled in cultural conflicts)). Some nativists undoubtedly were drawn to populism, but the mainstream of populism does not appear to have endorsed or capitalized on nativist biases or antagonisms. NUGENT, *supra* note 43, at 100-01 (arguing that bias was based upon economic realities, not nativism); PARSONS, *supra* note 43, at 105-09 (stating that Nebraska Populists passed a resolution condemning nativism).

131. See, e.g., NUGENT, *supra* note 43, at 85-90, 138-41, 231-35 (identifying Swedish, Irish, German, Norwegian, Welsh, Canadian, and English officeholders); PARSONS, *supra* note 43, at 100-01, 148, 162-65 (identifying candidates from German, French, Danish, Irish, Swiss, Norwegian, and Swedish communities). Relations were not always smooth, and tensions arose between immigrant communities and Populists in areas where Populists supported issues that triggered cultural conflict, such as prohibition and women's suffrage. *Id.*

troubles of society and in their proposed solutions."¹³² Nativism and populism both shared a profound concern about the deterioration of American democracy and the plight of the common man,¹³³ but the nativists, intent on purging foreign influences, did not share the Populist vision of unity and brotherhood.

Populist ideas had a powerful regional influence. In 1892, Populist candidates ran strongly in the Midwest and Mountain states and their presidential candidate, James Baird Weaver, garnered eight percent of the national popular vote, concentrated primarily in those states.¹³⁴ In 1896, William Jennings Bryan, the fusion candidate carrying the Populist and Democrat standard, failed to win the presidency, but polled 46.8 percent of the popular vote, carrying many of the Midwestern and Mountain states.¹³⁵ The Populists' political power was waning by 1898, but many of the Populists' radical ideas about restructuring public and private interests found their way into the Progressive movement of the early 1900's and ultimately into the New Deal.¹³⁶

In the West and Midwest, the ideas and images of populism persisted in local Populist and fusion parties and were absorbed into Progressive and Democratic ideology,¹³⁷ to resurface espe-

132. PARSONS, *supra* note 43, at 103-05 (citing the American Protective Association as an example). Julius Weinberg, discussing the nativist tendencies of a famous midwesterner, draws another useful distinction, which seems to fit the "nativism" latent in the school laws. He differentiates between the pessimistic, conservative nativism of the eastern blue-blood and what he calls the "meliorative nativism" of the western Progressive. The former was class conscious and reactionary whereas the latter was "Midwestern in temper, rural in origin, optimistic in tone, liberal in politics, partly environmental in social theory, reform-minded and egalitarian in purpose." Weinberg, *supra* note 48, at 251. Thus the label nativist must be read in context.

133. PARSONS, *supra* note 43, at 106.

134. Weaver received 41% of the votes cast in Nebraska and 16.24% of the votes in Oregon. JOHN HICKS, *THE POPULIST REVOLT* 263 (1961). In 1892, Oregon Democratic Governor Sylvester Pennoyer joined the Populists, and the Oregon voters elected Nathan Pierce, cousin and mentor of the future Governor Walter Pierce, as presidential elector for Weaver. Gerald Schwartz, *Walter M. Pierce and the Tradition of Progressive Reform: A Study of Eastern Oregon's Great Democrat* 43 (1969) (unpublished Ph.D. dissertation, Washington State University). In 1894, the Oregon state Democratic platform adopted most of the Populist planks. BURTON, *supra* note 90, at 18-19. In Nebraska, in 1892, over half the representatives in the state House of Representatives were Populists, and Nebraska elected two Populist governors and sent a Populist Senator to Washington. PARSONS, *supra* note 43, at 81, 98.

135. MORISON ET AL., *supra* note 91, at 446.

136. LEUCHTENBURG, *supra* note 45, at 138; KENNETH C. MACKAY, *THE PROGRESSIVE MOVEMENT OF 1924*, at 258-259, 9-12 (1966).

137. Theodore Roosevelt ran for the presidency on a Progressive ticket in 1912, and Robert Lafollette in 1924. Both lost. Progressives were most influential in local and state government. To trace the exact relationship between populism and progressivism is

cially in times of social and economic strain. The 1920's, when universal public schooling proposals appeared, were such a time of strain. For Wall Street, the era between World War I and the Depression may have been one of prosperity. For the midwestern and western farmers, the War's end brought the familiar cycle of deflation and falling prices, increasing the strain of high taxes, high freight rates, and large mortgages.¹³⁸ In the post-War deflation, agriculture was hardest hit and slowest to recover. For labor, the War's end also brought falling wages, unemployment, and rising unrest.¹³⁹ In addition to the panic of the Red Scare,¹⁴⁰ documented by many students of *Meyer* and *Pierce*, the early 1920's witnessed a very real resurgence of agrarian/labor activism.¹⁴¹ It culminated in establishment of the Conference for Progressive Political Action (CPPA) in February of 1922, joining together labor, farmers, Progressives, Socialists, and aging Populists.¹⁴² In 1924, Robert LaFollette of Wisconsin was nominated

difficult, but many contemporaries believed they saw Populist ideas in the new movement's platforms. POPULISM: THE CRITICAL ISSUES, *supra* note 113, at xxii. Progressive reforms such as the direct primary initiative and referendum shared the Populist concern with government by the people, and Progressives' trust-busting and muckraking targeted the Populist demons of corporate power and special interests. See MORISON ET AL., *supra* note 91, at 508-10. On the Populist contribution to progressivism, see HICKS, *supra* note 134, at 404-23.

138. MORISON ET AL., *supra* note 91, at 580; STUART A. RICE, FARMERS AND WORKERS IN AMERICAN POLITICS 59 (reprint 1969) (1924). By February 1922, the average price of ten leading farm crops was only a third of what it had been in June 1920. See U.S. DEPT OF AGRICULTURE, YEARBOOK 1921, at 13 (1922).

139. Three thousand strikes occurred in 1919 and almost as many in 1920. MORISON ET AL., *supra* note 91, at 580.

140. See MURRAY, *supra* note 45.

141. This activism was manifested in such groups as the Non-Partisan League, the Farmer Labor Party, and the Farmers' Educational and Cooperative Union [hereinafter Farmers' Union], which tried to unite labor and agrarian political interests. LEUCHTENBURG, *supra* note 45, at 128-29. Conservative observers expressed concern over the renewed unity of labor and farmers. MACKAY, *supra* note 136, at 80-81; JAMES SHIDELER, FARM CRISIS 1919-1923, at 9-10, 219 (1957); *Deadly Opposites*, N.Y. TIMES, Aug. 6, 1923, at 10. One scholarly 1924 study of the rebirth of radicalism identified 18 states as "insurgent" (including Iowa, Kansas, Michigan, Nebraska, and Washington, but not California, Ohio, or Oregon). RICE, *supra* note 138, at 50-51. The study mapped a "culture area of political discontent" radiating through Iowa, Nebraska, North Dakota, and South Dakota. *Id.* at 179.

142. See MACKAY, *supra* note 136, for a colorful narrative drawn from interviews and first person accounts of participants. Ruminating over the movement's genealogy, MacKay says:

They called themselves "Progressives" in 1924. What did the term mean? To be accurate, we must admit, at once, that the term probably meant all things to all people. But if we analyse the 1924 movement with reference to earlier progressive movements, protest and reform forces, a bond of common interest

at the CPPA convention.¹⁴³ The CPPA platform included a host of reforms, many of which recalled the Populist Omaha convention thirty-two years before, including an antimonopoly provision, farm relief, public ownership of power and railroads, and a bar on the labor injunction. CPPA rhetoric echoed the Populist theme of unity of interests in a classless society. "It is our faith that we all go up or down together—that class gains are temporary delusions and that eternal laws of compensation make every man his brother's keeper."¹⁴⁴

Two new planks were added, both aimed at curbing the Supreme Court's power to block progressive change: passage of the Child Labor Amendment and a provision permitting Congress to override decisions of the Supreme Court invalidating state or federal legislation.¹⁴⁵ But the CPPA had not reckoned with the Court's role in the Oregon and Nebraska school law cases. This second plank apparently alienated the Catholic and Lutheran farmers who had just seen the Court come to their aid in *Meyer* and eagerly awaited its decision in *Pierce*. Many immigrant farmers must have been torn between Populist and cultural loyalties. Historically wary of the reactionary role of the Court in squelching popular reforms, they were newly aware that it could also shield minorities from the coercive power of the people.¹⁴⁶

and purpose—reaching back to the policies of such early insurgent organizations as the Greenbackers of 1876, the Union Labor Party of 1888, and the Populists of the Nineties and extending forward to account for many of the reforms and experiments of the New Deal—holds them all together.

Id. at 17.

143. LaFollette received 16.6% of the popular vote and 32.5% of the vote in the Pacific Coast states of Washington, Oregon, and California. *Id.* at 222; MORISON ET AL., *supra* note 91, at T17.

144. MACKAY, *supra* note 136, at 270 (reprint of Report of Committee on Resolutions of the CPPA, July 5, 1924).

145. LEUCHTENBURG, *supra* note 45, at 132; MACKAY, *supra* note 136, at 11. Recall that the Court in the prior decade invalidated two popular child labor laws and rendered a series of blows to labor beginning in 1915 with *Coppage v. Kansas*, 236 U.S. 1 (1914). See ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., *THE OLIVER WENDELL HOLMES DEVISE, IX HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910-1921*, at 415 (Paul A. Freund & Stanley N. Katz eds., 1984). The CPPA drafters drew a distinction that might have struck a chord in Justice Holmes, between enforcement of First Amendment guarantees essential to democratic governance, and use of due process constitutional theory to invalidate democratically enacted economic and social reforms. See *infra* notes 539-43 and accompanying text. Plank two of the platform called for "Unqualified enforcement of the constitutional guarantees of freedom of speech, press and assemblage," while plank eleven urged "Abolition of the tyranny and usurpation of the courts, including the practice of nullifying legislation in conflict with the political, social or economic theories of the judges." MACKAY, *supra* note 136, at 270-71.

146. See Letter to the Editor, dated Nov. 10, 1924, of Chester C. Platt, Secretary,

C. *Walter M. Pierce: Popo-crat Champion of Public Schools*

Oregonians, it should be noted, had given new meaning to the term "government by the People." In Oregon, although Populist candidates had never garnered a majority, strong populist sentiment fueled enthusiasm for a program for popular government that included voter registration, the secret ballot, initiative and referendum, recall, and direct primaries.¹⁴⁷ The Oregon system made the state a "glass-walled laboratory of political experimentation."¹⁴⁸ Into this laboratory strode universal common schooling's Dr. Jekyll, and its Mr. Hyde.

Walter M. Pierce, the sixteenth governor of Oregon, would be remembered primarily for endorsing the radical school initiative during his 1922 campaign and lending his name to the famous Supreme Court case. But Pierce's was a long and active political life that spanned the half-century between Bryan and "FDR," combining old-fashioned populism, "TR" progressivism, nativism, radical economics, New Deal liberalism, and cussed individualism.¹⁴⁹ A lifelong Democrat in a strongly Republican state, he enjoyed enormous personal popularity.¹⁵⁰ Central to his philosophy were faith in popular government and the conviction that

Wisconsin Non-Partisan League, *THE NATION*, Nov. 26, 1924, at 573-74. The writer defended the Supreme Court plank as "one of our best planks," but "an unwise issue to raise. Some Catholics and some Lutherans were made to believe that the permanence of their parochial schools depended upon constitutional guaranties which they thought might be over-ridden some day by Congress." *Id.*; see also MACKAY, *supra* note 136, at 217 (citing letter of Charles G. Ross, *ST. LOUIS POST DISPATCH*, Nov. 5, 1924).

147. See DOROTHY O. JOHANSEN & CHARLES M. GALTZ, *EMPIRE OF THE COLUMBIA: A HISTORY OF THE PACIFIC NORTHWEST* 447-54 (1967) (detailing linkage between populism and Oregon's Progressive era enactments of measures, spanning from 1891 to 1908, designed to restore the lawmaking power to the people); Marion Harrington, *The Populist Movement in Oregon 1889-1896*, 22 U. OR. THESIS SERIES 49-50 (1940). Interestingly, support for these programs cut across class lines, lending credence to the Populist faith in a classless harmony of interests. JOHANSEN & GALTZ, *supra*, at 457.

148. JOHANSEN & GALTZ, *supra* note 147, at 456, 368, 447-63. Some have suggested that Oregon developed a "moralistic political culture" which viewed politics as entailing "a moral obligation to promote the public good." BURTON, *supra* note 90, at 14. Thus Oregon voters were both more likely to follow independent candidates and less in need of escape, as the major party candidates were quick to support and assimilate laudable third party ideas into their platforms. See *id.* at 14-15; JOHANSEN & GALTZ, *supra* note 147, at 368, 471-75.

149. Bryan first ran for President in 1896; Theodore Roosevelt, nicknamed "TR," became President in 1901; and Franklin Delano Roosevelt, called "FDR," died in office in 1945. MORISON ET AL., *supra* note 91, at T6, T17-18.

150. See, e.g., Collins, Yes, *This Is Walter*, 60 WOMAN'S HOME COMPANION 24 (1924) (reporting that everyone in Oregon appeared to know the gregarious Governor by his first name).

precious natural resources were held in trust for the people, regardless of private ownership or title.¹⁵¹

Born in 1861 in Illinois, Pierce was a ninth generation descendant of a Plymouth Colony settler. He headed West at age twenty-one to seek his fortune, arriving in Oregon in 1883. Before settling down to ranching and politics at age forty-two, he worked his way up, studying at night, from dirt farmer and cowboy, to public school teacher and school superintendent, to county clerk and lawyer.¹⁵² Pierce was an inveterate activist, a founding member of the executive board of the Farmers' Union and of the Grange.¹⁵³ He served two terms as a state senator, following in the steps of Oregon's great "Popo-crats."¹⁵⁴

In person, as in Oregon politics, Pierce loomed bigger than life. Although he was short and round, "his large head, broad shoulders, intense countenance, and round blue eyes conspired to present an aura of great size and strength."¹⁵⁵ In 1922, the

151. Typical of Pierce's dicta, arousing great fury among lumbermen, "No man has the moral right to cut down an unripe tree, even on his own land." OREGONIAN, Feb. 23, 1923, at 1, *quoted in* Schwartz, *supra* note 134, at 76.

152. NATIONAL CYCLOPAEDIA OF AMERICAN BIOGRAPHY 226-27 (1934) [hereinafter PIERCE BIOGRAPHY]. Pierce began his career in the public sector by teaching public school in Umatilla County. He was elected and then reelected school superintendent before going on to run for county clerk and later the state senate. He sat as a regent of the State Agricultural College at Corvallis from 1905 to 1927.

153. He followed in the footsteps of his mentor, Nathan Pierce, *see supra* note 134, who had been a Granger, President of the Farmers' State Alliance, and a key Populist figure. Harrington, *supra* note 147, at 14. The Grange, a farmers' coalition, was an active force behind populism in the 1890's, and behind the Oregon system of popular democracy in the first decades of the 1900's. JOHANSEN & GALTZ, *supra* note 147, at 451. By 1920, more radical groups such as Walter Pierce's Farmers' Union had emerged. *See supra* note 141. The Farmers' Union "brought together local farm groups that had persisted . . . since the Farmers' Alliance movement" of the Populist era to agitate for drastic economic reforms, such as price fixing and cooperative marketing. SHIDELER, *supra* note 141, at 9. The Farmers' Union had strong ties with organized labor. *Id.* at 9-10, 219.

154. According to Johansen, the term "Popo-crat" developed from a saying in the 1890's, "Scratch a Western Democrat and you find a Populist." A handbill supporting James C. McReynolds's 1896 campaign as a Tennessee "Gold" Democrat, *see infra* note 468, uses "Popo-crat" as a derogatory label for "free silver" Bryan supporters. *See* Handbill to the Voters of Houston County by T.J. Mahoney Supporting James C. McReynolds in 1896 Tennessee Campaign, PAPERS OF JAMES C. McREYNOLDS (on file at University of Virginia Law Library, Special Collections (No. MSS85-1)) [hereinafter McREYNOLDS PAPERS]; JOHANSEN & GALTZ, *supra* note 147, at 360. Sylvester Pennoyer, whom Pierce was said to emulate, won the governorship in 1890 calling himself a Democrat but campaigning like a Populist, "stump[ing] the small towns of Oregon, decrying the evils of monopoly, accumulated wealth, and the oppression of the masses by the industrial order." BURTON, *supra* note 90, at 18. Governor George E. Chamberlain, another Pierce model, was instrumental in bringing the Oregon system of direct government by the people to fruition. *Id.* at 27.

155. Collins, *supra* note 150, at 24, 88; Schwartz, *supra* note 134, at 13.

Conservative Republican newspaper, the *Oregon Voter*, described Pierce, with grudging admiration, in terms that perfectly conjure up the Republican caricature of populism: "One of the most effective and eloquent debaters in the senate; [he] excelled in sob eloquence; invariably favored [the] so-called 'popular' side of every issue; rejoiced in denunciation of business and industry as selfish and rapacious."¹⁵⁶ The "popular" or Populist side taken by Pierce included public ownership of utilities, reduction of corporate power and excessive profits, farm reform, prohibition, tax reform, welfare and labor legislation, and, his cherished dream, a hydro-electric power authority to redistribute power from the Columbia River at cost to farms and communities.¹⁵⁷ His Populist leanings were pronounced. He served as elector for William Jennings Bryan in 1900, and, despite party loyalty, he backed Progressive Robert LaFollette in 1924 over his own party's choice, the aristocratic John W. Davis.¹⁵⁸ Defeated in his 1926 bid for a second term as governor, he went on to serve in Congress from 1932 to 1942, campaigning tirelessly from the liberal wing of his party for New Deal measures, many of which he had advocated decades before in the Oregon State House.¹⁵⁹

Pierce's strong nativist streak showed in his opposition to Catholics holding office and his support for restrictions on Asian immigration and alien land ownership.¹⁶⁰ Like many western

156. BURTON, *supra* note 90, at 48 (quoting from editorial by C.C. Hammond, of May 13, 1922); see also *id.* at 12. Others described his folksy style and distinctive "Walter weep" capable of moving juries to sudden tears. COLLINS, *supra* note 150, at 24.

157. BURTON, *supra* note 90, at 48, 51, 74-85; JOHANSEN & GALTZ, *supra* note 147, at 496. Walter Pierce failed in his objective to make the Bonneville Dam another TVA. BURTON, *supra* note 90, at 78, 83 & n.87; JOHANSEN & GALTZ, *supra* note 147, at 528. It is immortalized, however, in Woody Guthrie's "Roll on, Columbia," written in 1941 when the folk-singer was employed by the Bonneville Power Administration. Timothy Egan, *Forties Songs by Guthrie for Project Found*, N.Y. TIMES, Aug. 4, 1991, at 20.

158. See BURTON, *supra* note 90, at 50; Schwartz, *supra* note 134, at 4.

159. Pierce was a member of a number of fraternal orders, including the Masonic Fraternity, which he joined in his 20's; the Knights of Pythias; and Benevolent and Protective Order of the Elks. The Masons strongly supported the universal common schooling law. PIERCE BIOGRAPHY, *supra* note 152, at 227.

160. See JOHANSEN & GALTZ, *supra* note 147, at 495-96. There is no doubt of Pierce's nativist convictions. Pierce maintained throughout his life that the "Roman Catholic Church was an authoritarian institution bent upon subverting democratic thought and human progress." Schwartz, *supra* note 134, at 61 n.97. He also believed Asians were so different they could never be assimilated or "amalgamated." *Id.* at 69. These were fairly common views, grounded in suspicion of the Pope, as well as resentment and distrust of the "alien" Japanese. See *Useless Controversy*, 121 CATH. WORLD 261 (1925) (cataloging supposed Catholic conspiracies to take over politics and education). A number of states passed legislation, upheld by the federal courts, barring aliens from holding land. See, e.g., *Oyama v. U.S.*, 332 U.S. 633 (1948).

nativists, he combined hostility toward unassimilated groups with an evangelical fervor toward assimilation. Through assimilation, America's democratic promise could be realized. Those who thwarted assimilation thwarted democracy.¹⁶¹ Educator and father of six, Pierce saw public schools as the key to moral and social reform and to equal opportunity for all classes of children. Looking back, at age ninety, he identified as the finest creation of his political life a hard-fought school tax reform in 1903. The new measure equalized per pupil expenditures throughout the state, eliminating the gross disparities, created by funding based on local property taxes, between schooling for children of the rich and children of the poor.¹⁶² Fittingly, when Pierce ran for Governor in 1922, the issue that captured national attention was another radical school reform—universal common schooling. Republican incumbent Ben Olcott unequivocally opposed it. Pierce unequivocally supported it. What were his motivations: anti-Catholic animus? opportunism? idealism? Pierce seems a poor candidate for Red Scare hysteria. In 1918 he had cast the lone vote against a criminal syndicalism bill that would have made advocacy of revolutionary class struggle a felony.¹⁶³ Coming out for the school bill, Pierce pointedly stressed his own Protestant, ninth generation American roots, but his central message was egalitarian. "Every one of [my] six children was educated in the public schools from the primary to the college and university. . . . I believe we would have a better generation of Americans free from snobbery and bigotry if all children . . . were educated in the free public schools of America."¹⁶⁴

Although Pierce's stand on the school initiative won the Klan's backing, he later denied affiliation with the Klan and did not

161. Schwartz, *supra* note 134, at 70, 80.

162. This bill apparently became the pattern for others across the country. *Id.* at 48. The inequalities of basing school funding on property taxes continue and have been highlighted in modern court cases. *See, e.g., School Spending Suits in New York Area*, N.Y. TIMES, Oct. 9, 1991, at B10. To date, property-poor districts in twenty-four states have challenged financing systems on constitutional grounds. *Reform Educ. Fin. Inequities Today* (R.E.F.I.T.) v. Cuomo, 578 N.Y.S.2d 969 (N.Y. Sup. Ct. 1991); *see, e.g., Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971); *Washakie County Sch. Dist. No. 1. v. Horschler*, 606 P.2d 310 (Wyo. 1980), *cert. denied sub nom. Hot Springs County Sch. Dist. v. Washakie County Sch. Dist.*, 449 U.S. 824 (1980) (all recognizing equal protection claims resulting from property-based funding of local schools). *But see Board of Educ. v. Nyquist*, 439 N.E.2d 359 (N.Y. Ct. App. 1982) (finding property-based funding constitutional).

163. This type of measure was usually associated with nativist "100 percent American" loyalty programs. *See KERMIT HALL, THE MAGIC MIRROR: LAW IN AMERICAN LEGAL HISTORY* 249 (1989).

164. PORTLAND OREGONIAN, Sept. 13, 1922, *quoted in* Holsinger, *supra* note 82, at 334-35 & n.31.

campaign on racial and religious issues.¹⁶⁵ Instead, "Pierce campaigned on proposals that were politically more hazardous," coming out for government reorganization, taxes on timber holdings and utilities, and a state income tax.¹⁶⁶ His opponents charged him with trying to "Sovietize" the state, and his friends excoriated his enemies as those "holders of hidden wealth," the timbermen, utilities, and operators, "now exempt from taxation."¹⁶⁷

Pierce won by a fifteen percent margin, the largest margin in any gubernatorial contest up to that time, and the school law carried by a slimmer five percent margin.¹⁶⁸ Within months of his election, the utility and timber interests were circulating petitions for his recall.¹⁶⁹

Whatever assortment of Populists, Progressives, Klansmen, and Republican businessmen formed around Pierce to give the Democratic candidate his victory, they certainly made for strange bedfellows. It was widely rumored that the timber and utility interests had purposefully exploited the Klan appeal to "religious prejudices and racial animosity" as a "means of sidetracking the public mind from economic issues."¹⁷⁰ In fact, Governor Pierce found himself saddled with a Klan-dominated legislature, which

165. BURTON, *supra* note 90, at 47-50.

166. JOHANSEN & GALTZ, *supra* note 147, at 496. Federal power to levy income taxes was less than 10 years old, the Sixteenth Amendment having been ratified in 1913.

167. *Id.* at 497 (quoting Ralph Watson from an article published in the OREGON JOURNAL a month before the election).

168. See Holsinger, *supra* note 82, at 335. Some historians suggest Pierce was swept into office by the school bill. *Id.*; LEUCHTENBURG, *supra* note 45, at 210. This overstates the case. See BURTON, *supra* note 90, at 49 (difficult to untangle support of school bill from support of economic and social programs); JOHANSEN & GALTZ, *supra* note 147, at 496-97. Pierce's victory was one of a string (1902, 1906, 1910, 1922, 1930 (independent), 1934) in which Oregon Democrats or Independents were elected Governor with the help of Republicans who deserted their party. BURTON, *supra* note 90, at 13. One study of the special political culture of Oregon concludes that "when Republicans crossed party lines to elect a Democrat or Independent, the primary issue, whether political reform, conservation, prohibition, or public development of hydroelectric power, was advanced by the winning candidate in the rhetoric of social improvement or community betterment, aimed at all the people." *Id.* at 15. This tactic was certainly taken by Pierce, both in his remarks on universal common schooling and in his energetic campaigning for economic reform.

169. In his unpublished memoirs, Pierce asserted that the special interests tried unsuccessfully to blackmail him with these recall petitions. JOHANSEN & GALTZ, *supra* note 147, at 498. On the other hand, he was accused of making a deal with the Klan, but flatly denied the charge. BURTON, *supra* note 90, at 47; JOHANSEN & GALTZ, *supra* note 147, at 497. Schwartz believes the charge was true, but other scholars are not persuaded. Compare Schwartz, *supra* note 134, at 67 with BURTON, *supra* note 90, at 49 & n.31 and JOHANSEN & GALTZ, *supra* note 147, at 497.

170. JOHANSEN & GALTZ, *supra* note 147, at 497 (quoting George Putnam, writing in the SALEM CAPITAL JOURNAL).

passed bills prohibiting sectarian garb in public schools and alien ownership of land, but gave little support to his economic reforms.¹⁷¹ Of all of Pierce's cherished Populist measures, he was successful only in enacting the income tax, and even that was repealed a year later.¹⁷²

Some have suggested that Pierce made a bargain with the Devil and lived to regret it. To the contrary, his support for the school initiative was obviously genuine, grounded both in his meliorist brand of nativism and in his Populist belief in democratization and class unity. He carried the issue all the way to the Supreme Court and, even after the Court's sharp rebuke in *Pierce*, he called for a constitutional amendment to establish universal common schooling nationwide.¹⁷³

If Pierce was the school law's Mr. Hyde, an opportunist and a bigot, he was also its Dr. Jekyll, a quixotic inventor of new ways to bring power to the common people. It is impossible to untangle the web of nativist tendencies, democratic ideals, and Populist principles of class leveling that bound Pierce to the common schooling initiative and the voters to Pierce. As Pierce's example illustrates, students of the universal common schooling laws may have discounted the laws' complexity and overlooked their relation to populism and progressivism.

The laws on their face called for complete integration of class, race, and creed. Yet historical commentary assumes that those who voted for these laws could not actually have intended to bring children of all races and creeds together. Historians have hypothesized that the Oregon law's supporters either had not thought about its implications or dismissed the danger of ethnic and class integration in a homogenous society like Oregon.¹⁷⁴ It must be remembered, however, that similar laws were proposed and gained substantial support in states with large immigrant, Catholic, and nonwhite populations.¹⁷⁵ Bias and religious bigotry alone do not persuasively account for the Oregon law and others like it. A stronger hypothesis would imagine that voters had many motives for supporting the initiative and responded not only to the Ku Klux Klan rhetoric of divisiveness but also to the

171. *Id.* at 498.

172. *Id.*

173. Holsinger, *supra* note 82, at 340 (citing PORTLAND OREGONIAN, June 2, 1925, at 8).

174. See TYACK ET AL., *supra* note 26, at 177-79; Toy, *supra* note 46, at 60-62.

175. Although Census figures for 1920 showed Oregon having only 14,859 nonwhite inhabitants, the figure for Michigan was 68,129, California, 283,326 and for Ohio, 188,443. CHARLES E. HALL, NEGROES IN THE UNITED STATES 1920-1932, at 9 (1935).

Populist rhetoric of egalitarian unity.¹⁷⁶ The experiment was born of religious suspicion and super patriotism, married with a Populist and Progressive spirit of radical democratic reform. Whatever its origin, the idea of compulsory universal public schooling must have been profoundly disturbing to observers from the establishment, for whom the freedom to educate one's children according to one's position in society was a cornerstone of cherished class distinction.

IV. "WHO OWNS THE CHILD?": COMPETING VISIONS OF CHILD, PARENT, AND STATE

God gave parents their children, government cannot rightfully take them away.¹⁷⁷

The child is first a national child. He belongs to the nation even before he belongs to himself.¹⁷⁸

Who owns the child? If the parent owns him—mind, body and soul—we must adopt one line of argument; if, as a free-will human being, he owns himself, we must adopt another.¹⁷⁹

As we have seen, the debate about the Nebraska and Oregon laws touched on longstanding differences over the proper relations between individual and community, between private property and public resources, and between classes in a democracy. These differences were mirrored in sharply divergent visions of relationships between child, parent, and state that competed for ascendancy during the period leading up to the *Meyer* and *Pierce* decisions. These contradictory models of family and society vied for supremacy not only of the hearth but of the courts and the ballot box. *Meyer* and *Pierce*, in the popular mind, posed a question that lay at the heart of these controversies: "Who owns the child?" Predictably, a conservative Supreme Court confirmed

176. Such a hypothesis is suggested by the materials marshalled here, both secondary and primary. Testing the hypothesis to provide a conclusive answer, if one exists, must await a detailed study of the demographics and political history of the voters in the states (California, Michigan, Nebraska, Ohio, Oklahoma, Oregon, and Washington) in which these laws gained significant support, a project beyond the scope of this Article.

177. Advertisement in Opposition to the Oregon School Law, in *PORTLAND OREGONIAN*, Nov. 2 & 5, 1922, quoted in Holsinger, *supra* note 82, at 333.

178. Brief of William A. Williams as Amicus Curiae at 13, *Pierce v. Society of Sisters*, 268 U.S. 510 (1924) (No. 583) (quoting from Masonic statement favoring universal common schooling law).

179. Kate D. Wiggins, *Children's Rights*, 12 *SCRIBNER'S MAG.* 243 (1892).

the rights of the traditional owner, the parent. The Court's elastic construction of Fourteenth Amendment liberty to include parental control of the child served—just as in the economic due process cases—to defend traditions of private ownership, hierarchical structures, and individualist values against claims of collective governance.

A. *The American Family: A Brief History in Time*

History is in the business of synthesis over time. Family history is no exception. The generally accepted synthesis may be true in its broad outlines but, as this section reveals, masks important tensions that played a role in *Pierce* and *Meyer*. Modern historians generally depict American family law as having undergone a process of transformation, from the hierarchical, patriarchal¹⁸⁰ model of the family of colonial times toward a more egalitarian model.¹⁸¹ Under the earlier patriarchal model, the father's power over his household, like that of a God or King, was absolute.¹⁸² Law employed a property theory of paternal ownership and treated children "as assets of estates in which fathers had a vested right. . . . Their services, earnings, and the like became the property of their paternal masters in exchange for life and maintenance."¹⁸³

Long before the time of *Meyer*, some American and British legal scholars were depicting parental rights not as absolute or fundamental but as corollary to specific parental duties. For example, *Kent's Commentaries* indicate that the rights of parents

180. "Patriarchy," can be used in a narrow sense to describe the historic legal and economic power of the male head of household over dependents, derived from Greek and Roman law, which disappeared as women were granted civil rights. The term may also be used generally to mean domination by men in any form. I use it in the historic sense and to describe the residual traditions of male dominance, in the family and in society, that historic, legally enforced patriarchy left behind. See also BARBARA ROTHMAN, *RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY* 29 (1989); cf. GERDA LERNER, *THE CREATION OF PATRIARCHY* 238-39 (1986).

181. See, e.g., MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 235 (1985); STEVEN MINTZ & SUSAN KELLOGG, *DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE* *passim* (1988). Jamil S. Zainaldin, *The Emergence of A Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U. L. REV. 1038, 1084-85 (1979). Grossberg describes an emerging "republican family," and Mintz & Kellogg talk of the "democratic family." GROSSBERG, *supra*, at 4-9; MINTZ & KELLOGG, *supra*, at 43.

182. The punishment in several Colonies for striking or cursing one's father was death. MINTZ & KELLOGG, *supra* note 181, at 54.

183. GROSSBERG, *supra* note 181, at 25.

result from their duties, and "[i]n consequence of the obligation of the father to provide for the maintenance, and, in some qualified degree, for the education of his infant children, he is entitled . . . to the value of their labour and services."¹⁸⁴ That paternal rights were paired with duties does not mean the relationship was one of freedom or equality. Children could hardly decline the invitation into this system of "paternalistic dominance,"¹⁸⁵ in which as natural dependents they owed submission in exchange for support and protection.¹⁸⁶

Influential courts in the mid-1800's, however, began to articulate a theory that parental control was not an absolute power conferred by God, but a civic duty conferred and regulated by the state, in the interests of children and of the public.¹⁸⁷ In 1905, in *Wadleigh v. Newhall*,¹⁸⁸ a father seeking to regain custody of his children argued that his Fourteenth Amendment rights had been violated by state action. The court rejected the father's claim that parental custody rights were encompassed in the liberty protected by the Due Process Clause: "[T]here is no parental authority independent of the supreme power of the state."¹⁸⁹ Thus, by the twentieth century, historians suggest, the concept of parental obligations as an outgrowth of divinely con-

184. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 169, 162-63 (1827); see 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 440 (1979) (1st ed. 1765) [hereinafter BLACKSTONE'S COMMENTARIES] (power of parents derives from duty); GROSSBERG, *supra* note 181, at 234-37, 259-68; Karen Czapinsky, *Child Support and Visitation: Rethinking the Connections*, 20 RUTGERS L.J. 619, 646-47 (1989) (discussing the historic notion of custody and support as reciprocal). Justice McReynolds alluded to this traditional reciprocity when he identified the "natural duty of the parent" to educate his child to its station in life as "corresponding" to the right of control. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

185. Paternalism denotes the relationship of a dominant group to a subordinate group in which "[t]he dominated exchange submission for protection, unpaid labor for maintenance." LERNER, *supra* note 180, at 239-40.

186. Theorists proposing family systems grounded in contract or free will devised ways to get around the infant's obvious lack of rationality or freedom. Thomas Hobbes, for example, assumed a tacit agreement between child and parent, based on the parent's decision to nurture rather than expose the infant. "For it ought to obey him by whom it is preserved; . . . every man is supposed to promise obedience, to him, in whose power it is to save, or destroy him." THOMAS HOBBS, *LEVIATHAN* 254 (Penguin ed., 1968). John Locke posited that God assigned the task of caring for the child to its parents in order to develop the innate capacity to reason that will allow it to exercise its freedom. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, BOOK II, § 58 (Peter Laslett ed., 1988). See PHILLIP ABBOTT, *THE FAMILY ON TRIAL* Ch. 2-3 (1981).

187. See, e.g., *Mercein v. People*, 25 Wend. 65, 102-03 (N.Y. 1840).

188. 136 F. 941 (N.D. Cal. 1905).

189. *Id.* at 947-48, 945-46 (citing Justice Story as rejecting the notion of an absolute vested parental right in custody, and quoting *Mercein*, 25 Wend. at 102-03).

ferred paternal ownership and control of children had given way to that of parental trusteeship in the child's "best interests."¹⁹⁰ This transformation reflected changing ideas about the relation of the individual to the state in a democratic republic, where individual liberty was the value most highly prized.¹⁹¹

Meanwhile, the redefinition of the family as a grouping of individuals with individual rights and interests created tensions among family members which, in turn, led to a growing involvement of legislatures and judges in setting standards of family behavior and in mediating disputes among family members.¹⁹² The social havoc wrought by the Civil War, industrialization, and mass immigration led to reformist concern over perceived erosions of the family and resulted in increased state intervention.¹⁹³ Historian Michael Grossberg quotes a statement by Frank Fessenden, penned in 1900, to illustrate the change he perceives in family ideology: "'Acts of legislation and judgments of courts abound in evidence of the zealous care which the public exercised over children. [These children] belong to the public no less than to their parents.'"¹⁹⁴

According to the modern narrative synthesis, by the end of the nineteenth century, married women had gained a separate legal identity,¹⁹⁵ and children, formerly private economic assets of parents, increasingly were viewed as individuals and proper subjects of public concern.¹⁹⁶ Public policy, now drawn into molding and monitoring family relations, had joined forces with republican individualism to make obsolete the view of the child as paternal property subject to paternal whim.

This narrative, however valid as a fusionist account, fails to capture the overlapping images, turmoil, and inner contradictions of family culture and family law.¹⁹⁷ As with the profound altera-

190. GROSSBERG, *supra* note 181, at 281-83; Zainaldin, *supra* note 181, at 1068-74; see Mercein, 25 Wend. at 103.

191. GROSSBERG, *supra* note 181, at 24-27; MINTZ & KELLOGG, *supra* note 181, at 45.

192. See, e.g., GLENDON, *supra* note 12, at 294-95; GROSSBERG, *supra* note 181, at 11.

193. GROSSBERG, *supra* note 181, at 11; MINTZ & KELLOGG, *supra* note 181, at 113-20.

194. GROSSBERG, *supra* note 181, at 219 (quoting Frank Fessenden, *Nullity of Marriage*, 13 HARV. L. REV. 110 (1899)).

195. Women could hold property, and, as of 1920, they could vote. The Nineteenth Amendment to the United States Constitution, establishing women's suffrage, was ratified on August 26, 1920.

196. MINTZ & KELLOGG, *supra* note 181, at 119-20; Zainaldin, *supra* note 181, at 1086-88; cf. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 69 (1872) (holding that lengthy apprenticeships violated the Thirteenth Amendment ban on involuntary servitude).

197. See GLENDON, *supra* note 12, at 4-6 (arguing that law reflects social flux and that

tions in economic and political life in America, the "domestic revolutions" described above encountered powerful resistance and obstinate counter-trends. Despite Locke, Lincoln, and Elizabeth Cady Stanton, the belief that women and children were figuratively owned by men did not suddenly disappear from people's religions or their culture of family, nor was it purged from statutes and judicial opinions. Patriarchal ideals and structures that treated the child as property of the parent continued to exist side-by-side with Lockean theories of individual liberty, in which the child was essentially free, merely entrusted to the parent for nurture.¹⁹⁸

At the same time, a host of changes within society and the family, including abolition of slavery, women's rights, women's employment outside the home, the declining importance of inheritance, mass immigration, and public schooling, created counter-currents that affected the political as well as the domestic community. Drawing on their collectivist conception of family and community, women often spearheaded reform activism focusing on children and family life. As women entered political life, they tended to share the Populist and Progressive faith that the generations and classes, however divided, enjoyed a natural unity of interest. Evangelical feminists drew political and legal discourse away from individualism and towards an ethos of collectivity that stressed obligations to the social family rather than individual rights and interests.¹⁹⁹ Central to this collectivist notion of family and community was child welfare.

By the 1890's, children had captured the attention of social reformers.²⁰⁰ Child welfare grew into a recognized social science thought capable of directing and systematizing community stewardship of children. Child welfare efforts were, at first, channeled through private agencies²⁰¹ but soon spawned public

social institutions may be at variance with legal norms); Martha Minow, "Forming Underneath Everything that Grows:" *Toward a History of Family Law*, 1985 WIS. L. REV. 819, 827-39 (revealing how family history often ignores women's unique experiences); see also PHILIP GREVEN, *THE PROTESTANT TEMPERAMENT: PATTERNS OF CHILD-REARING, RELIGIOUS EXPERIENCE, AND THE SELF IN EARLY AMERICA* (1977) (detailing how philosophies of parent/child relations varied by religious affiliation and social class).

198. See Zainaldin, *supra* note 181, at 1068 (noting the "enduring dualism in modern American and English family law" of the antithetical concepts of parental rights versus needs of the child).

199. Clark, *supra* note 128, at 29-30; Minow, *supra* note 197.

200. Michael B. Katz, *Child-Saving*, 26 HIST. OF ED. Q. 413 (1986).

201. Typical was the Children's Aid Society of New York, which received almost half its funds from public sources. C. Loring Brace, *Child-Helping as a Means of Preventing Crime in the City of New York*, 18 J. OF SOC. SCI. 289, 305 (1883).

bureaucracies on local, state, and federal levels.²⁰² Active in child and maternal health, abuse and neglect, child labor, and juvenile correction, these bureaucrats and social workers have drawn fire from modern commentators for their intrusions on individual liberties.²⁰³ Indeed, these child welfare initiatives reflected values in sharp conflict with entrenched individualist traditions. Of all the elements of conflict present in turn-of-the-century family law, perhaps the one that best illustrates the tensions between conservative traditions and the novel and expansive visions of child, parent, and state is the stubborn tenacity of patriarchal property thinking.

B. A Legacy of Patriarchy: Parental Ownership of Children

When my mother died I was very young,
And my father sold me while yet my tongue,
Could scarcely cry weep weep weep weep.²⁰⁴

We live in a time that no longer formalizes ownership of human beings and finds stories of parents selling children shockingly newsworthy.²⁰⁵ At the time of *Meyer* and *Pierce*, ownership of humans was a legal fact within living memory.²⁰⁶ Ironically, the

202. See, e.g., MINTZ & KELLOGG, *supra* note 181, at 124-31 (noting first White House Conference on Child Welfare in 1901, establishment of federal Children's Bureau in 1912, and enactment during following decades of legislation on mothers' pensions, maternal and infant health). See generally ROBERT BREMNER, *CHILDREN & YOUTH IN AMERICA* (1979) (collecting documentary materials on rising public involvement).

203. Compare the benevolent contemporary view of Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909), with that of Sanford Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970), who charges juvenile court reformers with destroying poor families.

204. WILLIAM BLAKE, *SONGS OF INNOCENCE, The Chimney Sweeper* (New York 1971).

205. See *People v. Daniel*, 241 Cal. Rptr. 3 (Cal. Ct. App. 1987) (upholding conviction for selling baby in violation of laws on slavery); MARTHA FIELD, *SURROGATE MOTHERHOOD* 17 (1988) (exchanging children for money is a crime in all 50 states). On November 20, 1989, the United Nations General Assembly adopted a Convention on the Rights of the Child, stating that the child "shall not be the subject of traffic, in any form," or of economic exploitation. Even the drafters of the modern document could not seem to agree, however, on whether the parent-child relationship is one of duty conferred by the state or of state-protected prerogative. See Walter Bennett, *A Critique of the Emerging Convention on the Rights of the Child*, 20 CORNELL INT'L L.J. 1, 7, 11-12 n.62 (1987).

206. See, e.g., A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Property First, Humanity Second: Recognition of the Slave's Human Nature in Virginia Civil Law*, 50 OHIO ST. L.J. 511, 513 (1989). Moreover, the Peonage Cases, decided in 1911 and 1913, show that practices constituting ownership of humans survived the Emancipation Proclamation. See BICKEL & SCHMIDT, *supra* note 145, at 820-907.

Court in *Meyer* and *Pierce* chose to hang parental control of children on the branch of Fourteenth Amendment "liberty."²⁰⁷ Courts before *Meyer* had generally been slow to extend Fourteenth Amendment protection to the parent's rights over the child.²⁰⁸ *Pierce* himself observed that "it is a strange perversion of the word 'liberty' to apply it to a right to control the conduct of others."²⁰⁹ Yet adopt, for a moment, the perspective that children are patriarchal property. Suddenly, the right of parental control in *Meyer* and *Pierce*—authored and joined by the Court's most inflexible laissez-faire conservatives and grounded on economic substantive due process precedents—acquires a logical framework. Property and ownership were indeed a powerful subtext of parental rights rhetoric in the era of *Pierce* and *Meyer*.

A property model asserts not that children *are* property but that our culture makes assumptions about children deeply analogous to those it adopts in thinking about property.²¹⁰ In positing a property model of parenthood, I do not claim that it represents the whole of a parent's relationship to his or her child but rather that it is useful in clarifying the historic responses of parents and judges to legislative and court interventions in the family. Nor do I quarrel with those who, like philosopher Colin Wringle, consign the claim that modern children are property "to the language of rhetoric" rather than that of fact.²¹¹ I quarrel only with the latent assumption that rhetoric is unimportant.²¹² In my view, this property rhetoric sheds important light not only on *Meyer* and *Pierce*, but on the many ways in which courts and authorities act inconsistently with a trusteeship or best interest theory of adult power over children.²¹³ If we look at history and

207. The Court's decision was ironic because the Fourteenth Amendment was unambiguously designed to guarantee liberty to enslaved persons formerly owned as chattels. U.S. CONST. amend. XIV, § 1.

208. See *Wadleigh v. Newhall*, 136 F. 941 (N.D. Cal. 1905).

209. Supplement to the Brief of the Appellant, the Governor of the State of Oregon, at 8, *Pierce v. Society of Sisters*, 268 U.S. 510 (1924) (No. 584); see also Symposium, *Developments in the Law, The Constitution and the Family*, 93 HARV. L. REV. 1156, 1353 (1980) (writing that liberty as control of another is an unusual oxymoron); Janet F. Smith, *Parenting and Property*, in *MOTHERING* (Joyce Trebilcock ed., 1983).

210. Smith, *supra* note 209, at 201-02.

211. COLIN WRINGLE, *CHILDREN'S RIGHTS: A PHILOSOPHICAL STUDY* 94 (1981).

212. See GLENDON, *supra* note 12, at 6 (essential to be alert to differences between institutions elaborated in law and the family as imagined and lived in society).

213. WRINGLE, *supra* note 211, at 95-96 (discussing British laws that presume natural parents' custody is in child's interest, allow natural parents to refuse consent to adoption by foster parents, and permit authorities to incarcerate children without due process).

listen to legislators, judges, and parents speaking about parental rights, clearly children were, and are, often conceptualized as closely akin to property.

The notion of the child as property is at least as ancient as the Greek and Judeo Christian traditions identifying man as the procreative force. Consider scripture: God created Eve from Adam's rib,²¹⁴ blessed Abraham's seed,²¹⁵ and required male circumcision as a primary symbol of the covenant.²¹⁶ The patriarchs, and not the matriarchs, begat sons who themselves begat sons.²¹⁷ The Greek philosophers also accentuated male procreativity as proof of the natural correctness of male dominance over women, slaves, and children.²¹⁸ Aristotle believed the child was a parent's possession because it came physically from the parent, like a tooth or a lock of hair.²¹⁹ In Aristotle's cosmology, it was the male seed, more divine than the base matter contributed by the female, that gave the child its life.²²⁰ "The essential concept [in a patrilineal society] is the 'seed,' the part of men that grows into the children of their likeness within the bodies of women."²²¹ In order to increase their dynastic wealth, men appropriated "as property, the product of the reproductive capacity of subordinate women—children, to be worked, traded, married off, or sold as slaves, as the case might be."²²²

214. *Genesis* 2:18-25 (creation of Eve).

215. *Id.* 15:4-5 (blessing of Abraham's seed).

216. *Id.* 17:9-10 (covenant of circumcision); see LERNER, *supra* note 180, at 182-84, 190-93.

217. *Genesis* 10 (the generations of Noah).

218. Plato, unlike other Greek philosophers, treated women as equals, assigning them roles as guardians in his Republic and giving male and female children equal education. PLATO, *THE REPUBLIC* Book V, argument 466 (Benjamin Jowett trans., 3d ed. 1888).

219. ARISTOTLE, *NICOMACHEAN ETHICS*, Book VIII, Ch. XII, 1161b (J.A.K. Thomson trans., 1986) (observing that parents feel that children are their own because "that which comes from something else belongs to that from which it comes (as a tooth or hair or whatever it may be belongs to its owner)").

220. 2 ARISTOTLE, *DE GENERATIONE ANIMALIUM* 1, 732a, 8-10; LERNER, *supra* note 180, at 205-10.

221. ROTHMAN, *supra* note 180, at 30.

222. LERNER, *supra* note 180, at 215. Slavery and bride prices were a feature of many patriarchal civilizations. In Mesopotamia, wives and children could be taken as debt slaves by creditors. *Id.* at 213. One poignant American case illustrates the complex linkage of slavery with commodification of women and children generally. A free black man had been advised that the only way to secure his wife from his former master was to assume ownership of her. When he later defaulted on a debt, his creditors seized her as his chattel. *Kyler v. Dunlap*, 18 B. Mon. 561 (Ky. 1857). Unsurprisingly, the law in slave states refused legal recognition to marriages between slaves, as discussed in MINTZ & KELLOGG, *supra* note 181, at 67, as this would muddy the ownership interests in wives

Roman law treated children as chattels. The Roman *Paterfamilias* could not only sell his children at will, but also kill them.²²³ Women and children, in fact, may have represented the first accumulation of private property.²²⁴ Patriarchal theories of state and theories of domestic government were mutually reinforcing. Men, it was said, ruled over their families like sovereigns over their subjects—or kings like fathers over their families.²²⁵

Paternal property rights grew naturally from a patriarchal account of procreation—fathers gave children material being through their seed. The familiar statement that a child is flesh of the parent's flesh²²⁶ is a case in point. This oneness with the parent has powerful implications for the role of law. As Aristotle explained:

There cannot be injustice in an unqualified sense towards that which is one's own; and a chattel, or a child until it is of a certain age and has attained independence, is as it were a part of oneself; and nobody chooses to injure himself (hence there can be no injustice toward oneself); and so neither can there be any conduct towards them that is politically just or unjust.²²⁷

Beneath its archaic logic, this statement corresponds to a common justification offered by parents who physically or sexually abuse their children—the child is mine and it is nobody's business what I do with it.²²⁸ That we tacitly accept this proposition as true

and children. As Judge Higginbotham and Barbara Kopytoff document, children were deemed "bond or free" according to the status of their mothers, with the result that ownership of the mother conferred ownership of her child, even if fathered by a free man. A. Leon Higginbotham & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 1971 (1989). This system "provided slaveowners with easy and cheap ways to increase the number of slaves they held." *Id.* at 2006.

223. BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 65-68 (1969). English common law treated children as "possessions," "feudal concepts of ownership permeated the family sphere," and the father's interest in custody was "essentially a right of property" that could only be lost through gross malfeasance or inadequacy. WRINGE, *supra* note 211, at 94 & nn.13-16.

224. LERNER, *supra* note 180, at 213; see also JOHN HOLT, ESCAPE FROM CHILDHOOD 47 (1974).

225. Lee Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1139.

226. Phrases like "my own flesh and blood" have Biblical roots. For example, in *Genesis*, Adam greets Eve as "bone of my bones, flesh of my flesh." *Genesis* 2:33 (King James).

227. ARISTOTLE, *supra* note 219, Book V, Ch. VI, argument 1134b, at 188.

228. Two stories, one first hand and the other second hand, are illustrative. I once knew a woman who would beat her child with a stick shouting, "I brought you into the world and I can send you to the cemetery." Cf. BLACKSTONE'S COMMENTARIES, *supra* note

goes far toward explaining society's reluctance to intervene in the family.²²⁹

But what does it mean to say a thing is "property"? Above all, to call something property is to conjure the paradigmatic American right.²³⁰ Property ownership is often described as a bundle of rights, including the right to use, the right to transfer, and the right to exclude, as well as rights of transmissibility and security.²³¹ In practice, all of these rights were functional features of paternal power with respect to the child in Colonial and even nineteenth-century America. The father was entitled to use the child as a productive asset to herd, spin, farm, or care for younger siblings.²³² The other face of use is abuse, and, under the "rule

184, at 452 (Roman law gave father power of death on principle that "he who gave had also the power of taking away."). A South African attorney and judge told me of the man who was charged with rape of his daughter and defended by asking, "Is it not better that I take from my own corral than from my neighbor's?" Statement of Yvonne Jennifer Mokgoro, L.L.M.

229. RICHARD J. GELLES & MURRAY A. STRAUS, *INTIMATE VIOLENCE* 30-32, 34 (1988) (attributing abuse to inequality, need to enforce control, and historic concept of women and children as property); Jean M. Goodwin, *Obstacles to Policymaking About Incest: Some Cautionary Folktales* (noting barriers to protecting children arising from perception that parents have rights of "ownership"), in *LASTING EFFECTS OF CHILD SEXUAL ABUSE* 28-30 (Gail Wyatt & Gloria Powell eds., 1988); PHILIP GREVEN, *SPARE THE CHILD: THE RELIGIOUS ROOTS OF PUNISHMENT AND THE PSYCHOLOGICAL IMPACT OF PHYSICAL ABUSE* 199-200 (1991) (tracing connections between patriarchy, authoritarianism, and violence to children); cf. *People v. Liberta*, 474 N.E.2d 567 (N.Y. 1984) (stating that the marital rape exemption, still law in 40 states, arose from the common law doctrine that a woman was her husband's property); BLACKSTONE'S COMMENTARIES, *supra* note 184, at 430-32 (arguing that husband and wife are one and husband may chastise and command her).

230. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF AMERICAN POLITICAL DISCOURSE* 20-32 (1991). Professor Glendon illustrates how, especially in the nineteenth and early twentieth centuries, Americans endowed property rights with unparalleled, almost absolute inviolability and tended to propertize every valued thing, building from Locke's assertion that "every Man has a Property in his own Person."

231. LAWRENCE BECKER, *PROPERTY RIGHTS: PHILOSOPHICAL FOUNDATIONS* 18 (1977); ANDREW REEVE, *PROPERTY: ISSUES IN POLITICAL THEORY* 11 (1986). In the analysis made famous by Wesley Newcomb Hohfeld in *FUNDAMENTAL LEGAL CONCEPTIONS* (1919), a claim of property may implicate some combination of rights, liberties, powers, and immunities requiring action or forbearance on the part of others. Applied to children, the Hohfeldian scheme might describe parental custody as a right (creating a positive right to use and possession plus a duty in others to forbear from interfering with use and possession); their rights to transfer and of transmissibility, as liberties or powers (freedom to alter the duties or liberties of another); and their right to security as an immunity (here, immunity from expropriation). BECKER, *supra*, at 7-23. That parents owe duties to children does not negate a property analogy; ownership may also entail duties imposed by law, such as payment of taxes, maintenance of safe conditions, and so on.

232. *Eustice v. Plymouth Coal Co.*, 13 A. 975 (Pa. 1888) (upholding parent's right to have child's wages paid to parent); JOHN DEMOS, *A LITTLE COMMONWEALTH* 140 (1970); JACQUELYN DOWD HALL ET AL., *LIKE A FAMILY: THE MAKING OF A SOUTHERN COTTON MILL WORLD* 18 (1987); MINTZ & KELLOGG, *supra* note 181, at 16; EDWARD MORGAN, *THE PURITAN FAMILY* 67 (1966) (noting that children aged five and seven begin needlework).

of thumb," patriarchs had a right to enforce control over their households by beatings administered with a stick no thicker than a man's thumb.²³³ Into the mid-1880's, the law gave parents the right to transfer children by formalized instruments of indenture or apprenticeship, giving up their rights to use the child as labor in exchange for the master's assuming the duty to provide food, clothing, and vocational education.²³⁴ The parent could exclude others—both in the contemporary sense of exercising sole custody and control and in other ways, such as by refusing permission to marry or seeking damages for a daughter's seduction.²³⁵ A further attribute of ownership is power of transmissibility—the right to devise or bequeath—which was reflected, well into the nineteenth century, in the father's testamentary power to appoint a guardian, often someone other than the child's mother.²³⁶ A final element of property ownership is the right to security or immunity from expropriation—the right that Oregon parents invoked when they accused government of Bolshevism in taking their children, and the most jealously guarded right under modern constitutional law.²³⁷ Even the restraints on transfer that grew up around parental rights reflected the conviction that such rights were "absolute, proprietary, and God-given, and consequently unalterable by man."²³⁸

233. *State v. Jones*, 95 N.C. 588 (1886) (holding that father, in exercise of domestic government, may beat daughter with stick as thick as his thumb provided he does not cause permanent injury); GELLES & STRAUS, *supra* note 229, at 31.

234. MINTZ & KELLOGG, *supra* note 181, at 15-16; MORGAN, *supra* note 232, at 75; Zainaldin, *supra* note 181, at 1077-78. Ownership of children entailed the obligation to feed, clothe, and train them. The value of children's labor, at least in colonial times, exceeded the cost of their maintenance. MORGAN, *supra* note 232, at 131 & n.81. See *infra* notes 358-63 and accompanying text for a discussion of the parent's right to hire a child out as a laborer.

235. MORGAN, *supra* note 232, at 79, 84. Morgan quotes the Massachusetts Laws of 1648 to the effect that it was against the law for anyone to "draw away the Affections of any Maid within this Jurisdiction under pretence of Marriage, before he hath obtained liberty and allowance from her Parents or Governours." In pre-Revolutionary America and into the 1900's, the father of a seduced woman could receive damages but the woman herself could not. DEMOS, *supra* note 232, at 152-54; GROSSBERG, *supra* note 181, at 45; see also *O'Brien v. City of Philadelphia*, 64 A. 551 (Pa. 1906) (holding seduction of daughter redressed as injury to father). This tradition has Biblical Roots. See *Deuteronomy* 22:28-29.

236. *Hernandez v. Thomas*, 39 So. 641 (Fla. 1905) (father alone has power of testamentary disposition); GROSSBERG, *supra* note 181, at 242-43.

237. See, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982); *Stanley v. Illinois*, 405 U.S. 645 (1972). These cases establish that both state termination of parental rights and expropriation of children implicate core substantive due process interests of parents and trigger heightened procedural due process protection.

238. Zainaldin, *supra* note 181, at 1045. Laws on adoption and surrogacy, creating

Although, as we have seen, new political developments and social theories loosened the grip of patriarchy on America,²³⁹ women's emancipation from husbands, and even their enfranchisement, did not alter male dominance in public life. Nor did it alter the market-based and property-oriented framework in which the family operated.²⁴⁰ As Grossberg observed, when patriarchs lost power, or shared power with their wives, the role of guardian and mediator was handed over to a judiciary that tended to perpetuate patriarchal models of family governance.²⁴¹ Judges acted "to promote and protect the republican family and its constellation of economic, social, cultural, and class interests."²⁴²

Children, if not parental property in themselves, were important conduits and conservers of parental property. Even after the demise of patriarchy as the official legal benchmark in custody disputes, judges often defined the child's "best interests" in terms of money and class.²⁴³ The rationale was that wealth and social status "depended upon the happy maintenance of the paternal tie [and] the preservation of the patriarchal power," because it was the father who "bestowed education, advancement, and inheritance" upon the child.²⁴⁴

restraints on alienability of children for money, reflect the belief that parental rights are a particularly exalted form of ownership that ought not be commodified. See Margaret Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1854 (1987).

239. Ownership of children, whether through labor or as extensions of the parent's body, was obviously antithetical to seventeenth-century theories of political liberty that stressed individual freedom. John Locke explicitly renounced the notion that children were property of their fathers or that "begetting produces authority." LOCKE, *supra* note 186, at §§ 52-76; see ABBOTT, *supra* note 186, at 32-33 (remarking that Locke uses a theocentric origin of family, reasoning that God who gives life is the owner of children and commanded parents to care for them). Most families are hierarchical to some degree because small children require structure and protection. Yet philosophers, anthropologists, and family historians have drawn important associations between the theories offered for adults' authority over children and the ways in which they exercise authority. Abbott contrasts the theories of family of Locke, Hobbes, Rousseau, and Marx, all of whom undoubtedly influenced thinking in the 1920's. See also GREVEN, *supra* note 197.

240. Even modern observers, let alone students of the 1920's, find it difficult to deny the legacy of hierarchy that "our society perpetuates to a large extent through the force of its economic and domestic structures and customs and the ideology inherited from its highly patriarchal past." SUSAN M. OKIN, *JUSTICE, GENDER, AND THE FAMILY* 65 (1989).

241. GROSSBERG, *supra* note 181, at 300.

242. *Id.* at 293. Grossberg identified these as including racial and ethnic animosities and domestic-relations individualism. *Id.* at 293-94.

243. See Zainaldin, *supra* note 181, at 1067 (discussing nineteenth-century cases). Some modern judges continue to view children's best interest through a class and money lens. See, e.g., *Burchard v. Garay*, 724 P.2d 486 (Cal. 1986) (reversing a judge who removed child from poor but devoted mother and awarded him to uninvolved but better educated and economically advantaged father); *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981) (same).

244. Zainaldin, *supra* note 181, at 1067; see *infra* notes 591-92 and accompanying text.

Significantly, even as courts grew more gender-neutral, they still gave primacy to parents' natural rights of possession. The child's "best interests" served as a tie-breaker in disputes between parents but fell by the wayside in disputes between parents and a "stranger"—an odd word to use for a person, often a relative, who had raised the child from infancy.²⁴⁵ Courts ruled that the child must be returned to the natural parent on demand, absent a showing of the parent's delinquency or of severe danger to the child.²⁴⁶ In the words of one court, "the voice of nature, which declares that the father is the natural guardian of his minor child, cannot be silenced."²⁴⁷

Thus, in some ways, only the locus and distribution of power over children shifted. Judges and litigants still often reasoned in the language of ownership and possession.²⁴⁸ Many of the judicial opinions historians cite to illustrate the march of family history betray the persistence of property images. In the judges' words, children "belong" either to parents or to the state;²⁴⁹ courts treat custody cases as if "setting up conflicting claims to a property in the child;"²⁵⁰ and fathers have "the better title to the custody

The same claim could be made today regarding the downward mobility of children of divorce. See Barbara B. Woodhouse, *Towards a Revitalization of Family Law*, 69 TEX. L. REV. 245, 260-62 (1990) (reviewing GLENDON, *supra* note 12).

245. See, e.g., *Hernandez v. Thomas*, 39 So. 641, 645 (Fla. 1905) ("As against strangers," here the grandmother, father had paramount rights.).

246. See, e.g., *In re Salter*, 76 P. 51, 52 (Cal. 1904) (holding that court has no discretion to appoint grandmother as guardian of a child if father is not incompetent); *Lee v. Lee*, 65 So. 585, 588 (Fla. 1914) (ordering child raised by cousins from nine days of age returned at age seven to father). Judges sometimes flouted this rule, as in *State v. Jones*, 36 So. 973 (La. 1904), which held that "exceptional features," including the child's delicate health and attachment to its grandmother, justified granting her guardianship petition, over the father's objection. *Id.* at 974. "The child, under nature's laws, has some rights, not always to be overlooked." *Id.* In a custody dispute between a natural parent and a third party, the notion that the parent's right is paramount remains the rule in some states today. The child's best interest may be considered only in exceptional circumstances. See, e.g., *In re Sanjivini K.*, 391 N.E.2d 1316, 1320-21 (N.Y. 1979) (observing that long separation is not sufficient to terminate parent's right); *In re J.P.*, 648 P.2d 1364, 1375-76 (Utah 1982) (holding unconstitutional the termination of parental rights so as to serve the child's best interests, absent a showing of parental unfitness).

247. *Harper v. Tipple*, 184 P. 1005, 1006 (Ariz. 1919) (holding that a child who lived three and one half years with the grandparents must go to the father, absent a clear showing of incompetency).

248. See, e.g., *Lee*, 65 So. at 585 (petitioners alleged that they were "joint 'owners'" of the female child).

249. *Heaton v. Jackson*, 171 N.E. 364, 365 (Ohio Ct. App. 1930) (children referred to as "belong[ing]" to their parents); see *supra* note 192 and accompanying text.

250. *In re Gregg*, 6 Pa. L.J. 528, 533 (N.Y. Cty Super. Ct. 1847) (reprinted from *N.Y. Legal Observer*, July, 1847) (decrying this tendency).

of their minor children."²⁵¹ In these opinions, children pass from owner to owner in the formal language of property: a father "gave, assigned, and transferred" a nine day old infant;²⁵² a "mother was not vested with the testamentary disposition of the child;"²⁵³ and another mother acted outside her authority when she "gave and bequeathed" her children to relatives.²⁵⁴ The remedies, too, speak in property terms: one may "bring suit for recovery of the child where it has come into the possession of a third person,"²⁵⁵ and "there is no doctrine of right by adverse possession in the custody of children."²⁵⁶

A look at a pair of articles appearing in 1919 and 1920 in a popular magazine illustrates how the old property and patriarchy models still support the facade of "modern" family law. Mary Sumner Boyd, in an article entitled *Is Your Child Yours?*,²⁵⁷ related that "in more than half the states in the Union . . . [f]ull ownership lies with the father."²⁵⁸ Dean Joseph R. Long of the School of Law of Washington and Lee University responded to the inflammatory piece in a subsequent issue, assuring the readers of the *Ladies' Home Journal* that

[f]ew more pointless questions could be addressed to an American mother. . . . [Her children] are hers just so far as she

251. *Mercein v. People ex rel. Barry*, 25 Wend. 64, 72 (N.Y. 1840) (quoting lower court opinion). As Zainaldin points out, the *Mercein* opinions illustrate how various ideas of parents' relation to children clashed, as conservative theorists in the New York courts fought to stave off the modernists. See Zainaldin, *supra* note 181, at 1067. References to "title" in children are not surprising, as family law mirrors property law in providing detailed systems for establishing or transferring ownership or title, including birth certificates, adoption and custody decrees, registration of paternity, and formal surrenders or terminations of parental rights.

252. *Lee*, 65 So. at 585.

253. *Harper v. Tipple*, 184 P. 1005, 1007 (Ariz. 1919).

254. *Hernandez v. Thomas*, 39 So. 641, 642 (Fla. 1905) (holding mother's death-bed gift ineffective because only the father has the right of testamentary disposition and father has "consigned" children to an orphanage).

255. *In re Williams*, 77 A. 350 (N.J. Ch. 1910).

256. *In re Wakefield*, 283 S.W.2d 467, 473 (Mo. 1955); *In re Feemster*, 751 S.W.2d 772, 773 (Mo. Ct. App. 1988). Modern courts continue to draw the analogy to property if only to limit or dismiss it. Ironically, in cases like *Wakefield* and *Feemster*, traditional property theory would allow exceptions to absolute, inalienable title. Perhaps there *should* be a mitigating doctrine in child custody, analogous to adverse possession, that discourages absentee ownership and confers parental status on persons who actually tend the child.

257. Mary S. Boyd, *Is Your Child Yours? It May Surprise You to Know That It Is Not*, *LADIES' HOME J.*, Nov. 1919, at 43. The article reviews numerous cases of fathers deeding children away during the mother's life, obtaining custody although unfit, and generally exercising unrestrained ownership.

258. *Id.*

binds them to herself by the exercise of her own powers of affection and character . . . by a tie which neither time, nor space, nor even death itself can ever wholly sever.²⁵⁹

Nevertheless, Long stressed that "[m]ost of the legal rights and duties of members of a family are based upon the general principle that in law the husband and father is the head of the family. This is a principle of the highest importance."²⁶⁰ Parental rights, he explained, flow from duties, and the duties happen to fall primarily on fathers not mothers.²⁶¹ Although the courts' mandate in deciding custody cases is to protect the welfare of the child, Long hastened to note that "[t]he natural rights of the parent are not ignored, and as an abstract rule of law the father, and not the mother, has a legal right to the custody of the child,"²⁶² as well as the right to the child's wages and to name a testamentary guardian.²⁶³ Displaying his modernity, Dean Long protested that "children are not chattels,"²⁶⁴ but he illustrated his point with a case that treated a young boy precisely as a chattel, to be transferred and reclaimed at the parents' will, in disregard of his own wishes and welfare.²⁶⁵

V. PATRIARCHY MEETS THE NEW LANGUAGE OF CHILDREN'S RIGHTS

Out of the nature of children arise their needs; and out of children's needs, children's rights.²⁶⁶

259. Joseph R. Long, *Your Child and the Law*, LADIES' HOME J., June 1920, at 75.

260. *Id.*

261. *Id.*

262. *Id.* at 76.

263. *Id.* at 78.

264. *Id.* at 76.

265. *Id.* at 78. Dean Long describes a Mississippi case in which a 10-year-old child was given by his laborer father to be brought up by a well-to-do gentleman of good character until the boy came of age. When the father died, three years later, the mother sued for custody. Although the boy, now 13, had been treated well and wished to stay with his benefactor, the court returned him to his mother despite the fact that she was "poor and illiterate and dependent upon her daily labor for the support of herself and five children." That the court refused to consider the 13-year-old child's preference because he was "too young to make a controlling choice," confirms the impression that he was treated more as a chattel than as a sentient person. One suspects that the utility to the widowed mother-of-six of an able-bodied teenage son may have influenced the court.

266. Raymond G. Fuller, *Child Labor and Child Nature*, 29 PEDAGOGICAL SEMINARY 44 (1922), reprinted in JULIA E. JOHNSON, SELECTED ARTICLES ON CHILD LABOR 33, 36 (1925).

Although the patriarchal ownership model of family still held great force in the early 1900's, the notion of patriarchal governance was being challenged in skirmishes on many fronts.²⁶⁷ On the home front, women were fast acquiring and using property and civil rights. Even as patriarchy fought to maintain its ground, the boundaries of its kingdom were blurring. Progressive reforms, such as children's welfare bureaus, juvenile courts, and, of course, the expansion of public schools, pushed at the borders of the domestic realm. The crusaders in these movements summoned up a new weapon; in magazines and meetings, opinionmakers and activists were beginning to talk of children's rights.²⁶⁸ Moreover, an ideology of childhood and of children's collective rights or claims upon the community was evolving.²⁶⁹ The community, for its part, asserted claims upon the child, contending that the child's highest duty was no longer obedience to parents, but preparation for citizenship.²⁷⁰ These changing relations of child and community are illustrated in two closely related social movements, both unfolding at the same time as the events in *Meyer v. Nebraska*²⁷¹ and *Pierce v. Society of Sisters*²⁷²: the children's rights movement and the movement to outlaw child labor. Both of these movements illustrate the competition between concepts of the child as parental property and as a collective resource, and both pit the emerging rights of children against the ancient rights of parents.

A. *The Language of Children's Rights*

Children's rights, of course, usually means rights that adults think children should have.²⁷³ Historically, children's rights have been severely limited in practice because they depend upon adults

267. LINDA GORDON, *HEROES OF THEIR OWN LIVES* 56-58 (1988).

268. See *infra* notes 286-90 and accompanying text.

269. See *infra* notes 291-308 and accompanying text.

270. See *infra* notes 279, 329 and accompanying text.

271. 262 U.S. 390 (1923).

272. 268 U.S. 510 (1925).

273. HOLT, *supra* note 224, at 149 (1974). Adults seldom ask children their opinions. Many children would certainly choose play or work over school and the right to live independently over the right to live with parents. See *id.* at 30. Martha Minow has pointed out the inherent tension between children's rights to autonomy and rights to protection, both by the state and by their parents. See Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 11-14 (1986).

for articulation, assertion, and enforcement.²⁷⁴ The concept of children's rights, however, provided a key tool for use by adults in protecting individual children and in advancing programs of child welfare. The language of the children's rights movement was a natural offshoot of a prior movement, self described as "child-saving," which dated back to at least the 1850's.²⁷⁵ This movement began with the mission of rescuing immigrant children from the poverty and unhealthiness of their urban surroundings by providing lodging houses, foster homes, and industrial schools.²⁷⁶ In the late 1800's, child-savers took jurisdiction over a new category of child in need of saving—the abused child.²⁷⁷ Abused children, unlike "foundlings," were not abandoned property. These new targets of child-saving had to be sought out in the parent's home, and a legal basis—children's rights—had to be articulated for their seizure. "The [child-saver's] claim to speak on behalf of children's rights, and to intervene in parental treatment of children, was an attack on patriarchal power."²⁷⁸ In place of patriarchal control, child-savers raised the notion of community control and justified the assault on parental rights by invoking the child's rights.²⁷⁹ Children's rights, when set up against parents' rights, operated both as standards for parental behavior and as limitations on parental power. Parental failure to live up to these standards violated children's rights and justified community intervention.²⁸⁰

274. Most scholars identify *Brown v. Board of Education*, 347 U.S. 483 (1954), as the first Supreme Court case directly recognizing children's substantive rights, and *In re Gault*, 387 U.S. 1 (1967), as the first directly recognizing children's procedural due process rights. See, e.g., Minow, *supra* note 273, at 11. I am indebted to my colleague Gerald Neuman for the suggestion that the earliest Supreme Court cases vindicating children's rights under the Equal Protection Clause may have been those challenging alien land laws that prevented American born children of aliens from holding land given them by their parents. See, e.g., *Oyama v. California*, 332 U.S. 633 (1948).

275. See *Half a Century of Child Saving*, 9 CHARITIES 550 (1902) (50th Annual Report of Children's Aid Society of New York).

276. See Brace, *supra* note 201, at 289. By 1902, the New York Children's Aid Society could boast of having shipped almost 50,000 of New York's orphaned, abandoned, or homeless children to family homes in the West. *Half a Century of Child Saving*, *supra* note 275, at 551-52. Child savers were later accused of sending children into virtual slavery on western farms, but defended with statistics on the number of city waifs who grew up to be western businessmen, bankers, lawyers, farmers, and mayors. *Id.* at 552.

277. GORDON, *supra* note 267, at 55-57.

278. *Id.*

279. One author even spoke of the state's interest in its own "helpless future self." Olivia H. Dunbar, *A Crusade for the Child*, 193 N. AM. REV. 91, 98 (1911).

280. Such intervention, of course, was not a new idea. Colonial communities paid close attention to parents' success or failure in meeting community standards of childrearing,

Reformers began the assault on parental rights by dismissing them as a thinly disguised cover for paternal brutality. In 1888, Helen Campbell, writing in the *Chautauquan* about *The Child and the Community*,²⁸¹ pitied the child's lot under common law as worse than a dog's.²⁸² She pointed out that the Englishman "did not knock his cattle about, because that would injure their working possibilities, but did knock his child about, because that was part of his theory of parental rights."²⁸³ In the brutality of America's cities, she reported, children are "hurt, degraded, and killed [so] 'that reckless men may sing songs to personal liberty, parental rights, and God knows what.'"²⁸⁴ Although inveighing against parental rights, Campbell did not speak of children's rights, except to note that children traditionally have had none.²⁸⁵

In 1892, Reverend M.J. Savage explicitly advanced children's rights in themselves as superior to any rights of parents.²⁸⁶ In

and often intervened to assume responsibility. See MINTZ & KELLOGG, *supra* note 181, at 7 (noting that local authorities could remove an unruly child and apprentice him); MORGAN, *supra* note 232, at 78, 88 (stating that a court would remove unruly children or fine parents for failure to educate them). New, however, was the language of children's rights. Cf. 2 HERBERT SPENCER, *PRINCIPLES OF ETHICS* §§ 337, 340 (New York 1897) (distinguishing between adult rights and children's "rightful claims" for parental support, noting expansion of such claims in industrial society and criticizing the United States for granting its youth excessive rights).

281. Helen Campbell, *The Child and the Community*, 9 CHAUTAUQUAN 458 (1888-89).

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.* Emma C. Bascom, writing in *Education*, in 1884, titled her piece *The Rights of Children*, which include the right to be "well-born" and the right to educational and religious training. Emma C. Bascom, *The Rights of Children*, 4 EDUC. 360, 360-63 (1884). Scant evidence indicates, however, that she intended these rights to be claims against the community or even the parent, as opposed to ideals of childrearing and charitable childsaving. See *id.* Well-born is not a class term but a Darwinist term meaning born to healthy parents with good heredity. *Id.* at 360. Miss Bascom, foreshadowing the Oregon law, favored public over private schooling because "[t]he larger and more promiscuous attendance give better conditions for self-restraint and mutual forbearance." *Id.* at 363.

286. Minot J. Savage, *The Rights of Children*, 6 ARENA MAG. 8, 13 (1892). Professor Hendrik Hartog has described three ways of characterizing rights claims: the right as a "trump"; the right as a duty on government to undo structures of oppression; and the right as a duty on government to reconstruct itself so as not to lose legitimacy. Hartog, *supra* note 11, at 1020. All three of these concepts figure in the writings of Reverend Savage and other early children's rights advocates as they labored to mold the language of individualistic rights consciousness to the individual dependency and collective needs of children. The first or "trump" form of claim, closely akin to property rights, is especially problematic for children as it asserts the rights-holder's autonomy. Ironically Professor Hartog points to the Court's articulation in *Pierce* of the right not to be standardized, as an example of such a claim. *Id.* at 1021. However, *Meyer* and *Pierce*, as contemporaries recognized, vindicated not so much the child's autonomy as the parent's right of control. See *infra* note 517 and accompanying text; see also *supra* notes 102-06 and accompanying

The Rights of Children, he described children's rights as moral, not legal rights, and included the right to be born in health, to have a happy childhood, and to have proper education.²⁸⁷ Parents, by contrast, have no rights, only a sacred trust.²⁸⁸ Savage specifically attacked as selfish absorptions of the child's life, parents' traditional rights to use the child for labor or income, instant obedience, and the withholding of permission to marry in order to retain a daughter's services.²⁸⁹ Speaking in 1921, a Colorado Juvenile Court judge discerned a "reversal of the ancient doctrine of the ownership of the child by the parent to the ownership of the parent by the child."²⁹⁰

Meanwhile, children's rights began appearing in a different guise in reformers' speeches and writings, not as a shields against parental power, but as positive claims on the community.²⁹¹ These articulations of children's collective rights reflected a sense of the child not as private property of his parent, nor of himself, but as belonging to the community, the collective family. In 1901, the Reverend Hastings H. Hart made explicit both the collective ethos of the movement and the dual principles of children's claims on society and society's stake in children:

There is in progress in the United States an organic Child-Saving Movement. It is not a plan devised and put in execution

text. When viewed in context with the contemporaneous struggles of child-savers to articulate collective children's rights, these case actually exemplify the very conundrum that Professor Hartog highlights: how to construct a language of family rights out of a tradition in which "[e]ither family rights became individualistic, libertarian rights of individuals within a family, or they were equated with the property rights of a patriarchal head of household." *Id.* at 1027.

287. *Id.* at 7-9.

288. *Id.* at 13.

289. *Id.* at 14-17.

290. Ben B. Lindsey, *The Parenthood of the State*, 1921 NAT'L EDUC. ASS'N, GEN. SESSIONS 42.

291. Philosopher Colin Wringle would call children's rights in the sense of claims on the community "welfare rights," including the right to be given basic necessities by the community. WRINGLE, *supra* note 211, at 74-83. Early children's advocates, like the social work professionals that followed, were most concerned about children's welfare rights, seeking for them both protection from harm and entitlement to medicine, food, shelter, and education. Cf. William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1 (1985) (describing a social work jurisprudence emerging from progressivism that focused on notions of interdependence and need). More recently, constitutional scholars have argued for a substantive right to basic necessities. See, e.g., C. Edwin Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933, 940, 993 (1983) (articulating a theory of "just wants" as an element of Fourteenth Amendment equality); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973) (analyzing Rawls's theory of justice to determine its applicability to welfare rights).

by some wise individual or society. It is an evolution, developed by inward and unseen forces; but certain principles are now clearly defined and generally accepted.

. . . .

The first principle underlying the child-saving movement is this: The great mother state is responsible for the welfare of the dependent and neglected child [F]irst, because the child has a natural right to an opportunity for normal and healthy development; second, because the care of such children is essential to the preservation of the community.²⁹²

By the turn of the century, reformers described children as the last disenfranchised class.²⁹³ Observing that men had been given civil rights in the eighteenth century, and women and blacks in the nineteenth, they dubbed the twentieth "The Century of the Child."²⁹⁴ Child-saving efforts intensified as did the rhetoric of children's rights. A National Child Labor Committee was formed in 1909,²⁹⁵ and in 1912, a Children's Bureau was established within the Labor Department.²⁹⁶ Commentators called for systemization of child-saving reforms through a national Children's Charter.²⁹⁷ In the view of these reformers, to identify a need—for food, health care, or education—was to inaugurate a "right."²⁹⁸ And such moral rights cried out to be translated into concrete welfare rights through legislation, the voice of the community.

In 1919, Julia C. Lathrop, then chief of the Children's Bureau in Washington, D.C., remarked how public health studies during the recent "Children's Year" had led to a better understanding of the "*physical rights* of the child."²⁹⁹ The National Child Labor

292. Hastings H. Hart, *The Child-Saving Movement*, 58 BIBLIOTHECCA SACRA 520 (1901). Under Reverend Hart's description, the state is obligated to step in should the "natural protectors of the child fail to meet their obligation." *Id.*

293. Francis G. Blair, *Legislation in the Interests of Childhood*, 1926 NAT'L EDUC. ASS'N, GEN. SESSIONS 99, 103 (arguing that as with women and blacks, society must recognize that children are endowed with inalienable rights).

294. See, e.g., ELLEN KEY, *THE CENTURY OF THE CHILD* (1909); Anna G. Spencer, *The Child's Bill of Rights*, LADIES' HOME J., Feb. 1930, at 31.

295. BICKEL & SCHMIDT, *supra* note 145, at 447.

296. *Id.*

297. E.N. Clopper, *A Plan for a National Children's Charter*, 35 SURVEY 651-52 (1915); *A Children's Charter*, 1915 Conference of Charities and Corrections 106-11.

298. See Fuller, *supra* note 266, reprinted in JOHNSEN, *supra* note 266, at 36.

299. Julia C. Lathrop, *Children's Year and the Children's Era*, 44 SURVEY 169, 170 (1919) (emphasis added). The planks of the Children's Year program, in fact, included solutions to real needs, such as "[t]he realization of an economic standard of life, permitting mothers to remain at home and care for their children," and "[t]he prevention of child labor by the substitution of school for work." *Id.* at 169.

Committee's version of the Children's Charter adopted not only prohibitions of child labor but also proposals for welfare rights, including public health, schooling, and mothers' pensions to attack family poverty, the root cause of children's labor.³⁰⁰ Children's claims on society made their first appearance in international law as well. In 1924, the League of Nations adopted the Declaration of Geneva, a largely aspirational "declaration of the rights of the child," including the right to material, educational, vocational and relief assistance, and the right to be free from exploitation, all of which "mankind owes to the child."³⁰¹

These descriptions of children's rights had a decidedly different ring from the political rights of the liberal tradition. Children's rights spring from children's essential nature. This way of conceptualizing rights echoed the women's and abolitionist movements of the 1800's. Faced with the similar task of elaborating why rights should be extended to ignorant women and slaves, these groups spoke in terms of each being's right to develop innate capacities and talents.³⁰² As "[t]he wing of the bird indicates its right to fly,"³⁰³ so children's dependency and capacity for growth proved their right to receive nurture and protection. Children's rights, like women's rights, were paired with duties and existed so that children might grow and learn to *do* right.³⁰⁴

Changing notions of the nature of childhood also fueled the development of children's rights. As middle-class children were culturally redefined as a priceless trust rather than a money-earning asset, childhood became a precious interlude; they ac-

300. Studies showed that many children worked because parents were dead, disabled, or unemployed. Clearly many young workers enjoyed the status and respect conferred by wage earning, compared to the corporal punishment and humiliation meted out in schools. Effective reforms would require wage and welfare measures to improve the family economy and reforms to improve school environments. See Helen M. Todd, *Why Children Work*, 40 *McCLURES MAGAZINE*, Apr. 1913, at 68-79, reprinted in *JOHNSEN, supra* note 266, at 133-50, for a moving account in children's own words of their work, school, and home lives.

301. Declaration of Geneva, LEAGUE OF NATIONS O.J. Spec. Supp. 21 (1924); Spencer, *supra* note 294, at 31.

302. Clark, *supra* note 128, at 47.

303. *Id.* at 48 (quoting a statement from the 1852 Syracuse National Women's Rights Convention).

304. As Professor Elizabeth Clark observed of early Christian feminists:

This concept of rights as following physical function ordained by natural laws is at odds with the idea of inalienable rights as settled during the struggle for independence. But it provided far greater scope for claims to economic and social justice than the revolutionary model, which effectively limited feminists to claims to political rights.

Id.

quired a "right"—part of their national patrimony—to a sheltered and carefree youth.³⁰⁵ The discovery by child psychologists of the benefit of play became a potent weapon against children's work. If, as child-savers reasoned, children's rights grow from their essential natures,³⁰⁶ then the child's essential nature, according to child development experts, was play. "To rob children of childhood as playtime is to rob them of childhood itself 'Children do not play deliberately from ulterior motives; with them it is play for play's sake; play is life, they live to play; they are children because they play.'"³⁰⁷ In 1923, the year in which *Meyer* was handed down, subscribers to the popular *Woman's Home Companion* could read about a golden "Right to Childhood."³⁰⁸ In an editorial extolling the Child Labor Amendment, the editors wrote that it

will bestow upon hundreds of thousands of boys and girls the Right to Childhood. . . . [F]reedom to go to school, to play, to read, to camp in summer and skate in winter, to grow up straight and strong in body and mind, fit sons and daughters of the Great Republic.³⁰⁹

Judges were slow to respond. Judicial opinions on custody generally described children as having "interests," not "rights," and used the child's "best interest" not as a neutral principle but as a tie-breaker between natural parents.³¹⁰ In a few cases, however, one encountered explicitly "the right of the child." One brave court, adjudicating an adoption dispute, said:

The right of the parent or the state to surround the child with proper influences is of a governmental nature, while the right of the child to be surrounded by such influences as will best promote its physical, mental, and moral development is an

305. See MINTZ & KELLOGG, *supra* note 181, at 58; VIVIANA A. ZELIZER, *PRICING THE PRICELESS CHILD* 58-72 (1985).

306. See *supra* note 266 and accompanying text.

307. See Fuller, *supra* note 266, reprinted in JOHNSEN, *supra* note 266, at 40 (quoting a child-development expert).

308. *Uncle Sam as Santa Claus*, WOMAN'S HOME COMPANION, Dec. 1923, at 2.

309. *Id.*

310. See *supra* notes 243-47 and accompanying text. While slow to recognize children's natural or social welfare rights, courts often talked about children's "rights secured to them by law," for example, to a specific property or to monetary support from a parent. *E.g.*, *State v. Seghers*, 49 So. 998 (La. 1909) (holding that divorce does not deprive children of rights secured to them by law or marriage). Cf. SPENCER, *supra* note 280 (defining children's rights as "rightful claims" to parental support).

inherent right, of which, when once acquired, it cannot lawfully be deprived.³¹¹

Welfare legislation, including childsaving and education laws, operated as an important source for judicial recognition of children's independent rights.³¹² The Massachusetts Supreme Court, construing a state statutory policy favoring raising an orphan or dependent child in its parents' religion, rejected a parent's claim that her religious rights were violated by the child's adoptive placement outside the parent's religion.³¹³ The court countered, stating that "it is the right of the children that is protected by this statute."³¹⁴

Half a century before *Brown v. Board of Education*,³¹⁵ early school segregation cases showed how children's rights could advance an inclusive notion of community. African-Americans in northern cities at the turn of the century began using state statutes and constitutions assuring all children the "right" to a free public school education to argue that racial segregation violated children's rights. Some of these early suits, such as *People ex rel. Bibb v. Mayor of Alton*,³¹⁶ were successful.³¹⁷ In others, the court excused segregation as a reasonable regulation.³¹⁸ These cases, by building upon school laws and child welfare laws, strengthened a conception of children as belonging,

311. *Legate v. Legate*, 28 S.W. 281, 282 (Tex. 1894); see also *State ex rel. Taylor v. Jones*, 36 So. 973 (La. 1904) ("child, under nature's laws, has some rights").

312. As a result of children's immaturity, parents, the state, or others still acted as guardian or next friend in asserting a child's independent rights. Ironically, the children's status as wards saved children's rights from being "*Lochnerized*." See *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating state law that restricted the number of hours bakers could work per week because of interference with liberty to contract). When opponents challenged child labor laws as violating the guarantee to "all men" of "unalienable rights" to liberty and property, the courts replied that minors were not "men" but wards of the state. See, e.g., *Bryant v. Skillman Hardware Co.*, 69 A. 23, 24 (N.J. 1908) (holding that a child labor provision did not violate the state constitution).

313. *Purinton v. Jamrock*, 80 N.E. 802, 805 (Mass. 1907). This opinion paints the child as a member of the civil community—as the child owes allegiance to government from birth, the government must also protect the child. Parents had no absolute rights of property, only a trust. *Id.* Modern Supreme Court cases like *Wisconsin v. Yoder*, 405 U.S. 205, 232-34 (1972), take a different path, emphasizing the right of the parent to use the child as a conduit of the parent's religious expression.

314. *Purinton*, 80 N.E. at 805.

315. 347 U.S. 483 (1954).

316. 61 N.E. 1077 (Ill. 1901).

317. *Id.*

318. E.g. *People ex rel. Cisco v. School Bd.*, 56 N.E. 81 (N.Y. 1900) (legislature may "exercis[e] its discretion . . . to separate classes, as determined by nationality, color, or ability, so long as it provides for all alike").

first and foremost, to the civil community. They were the first to establish children as possessors of civil rights.

Thus collective concern for children's needs and interests forced a flowering of children's rights. Although many writers of the late nineteenth and early twentieth centuries used the notion in a hortatory way to drive home the importance of their advice on aspects of childrearing,³¹⁹ a growing number began to use the notion of children's rights to express, as Savage does, an exaltation of children's rights over parents' rights,³²⁰ to assert children's rights to inclusion in the community, as do the school laws in *Bibb*;³²¹ or to propose, as Lathrop does, children's moral claims on society, to be actualized through legislation.³²² In any guise, children's rights inevitably conflicted with parental and especially paternal rights. Defenders of patriarchy viewed them with alarm. Of all the supposed children's rights, it was the "right to childhood"—the state-enforced right to play and attend school rather than to work—that most directly clashed with the traditional patriarchal scheme.

B. Ownership Rhetoric, Children's Rights, and the Regulation of Child Labor

Children have always worked. In colonial times, children had jobs on family farms and as apprentices.³²³ The Industrial Revolution, however, with urban factories and textile mills ushering in a new mechanized age, altered the context and rhythm of child labor. In 1900, one out of every six children between the ages of ten and fifteen worked for wages.³²⁴ One-third of the workforce in southern textile mills was children aged ten to thirteen.³²⁵ Stories of sixty-hour workweeks in the deafening roar of the mill,

319. See, e.g., Bascom, *supra* note 285, at 360-63; Minna T. Antrim, *The Rights of Children*, LIPPINCOTT MAG., 1912, at 282-83.

320. See *supra* notes 286-89 and accompanying text.

321. See *supra* notes 316-18 and accompanying text.

322. See *supra* notes 288-89 and accompanying text. Social welfare legislation was intensely controversial, often condemned by conservatives as a communistic invasion of parental authority. Although I focus on child labor laws in the next sections, other legislation, such as the Sheppard-Towner Maternity bill, produced equally passionate opposition. See BREMNER, *supra* note 202, at 1003-25 (detailing charges of Bolshevism levelled at bill providing federal grants-in-aid to states to reduce infant and maternal mortality).

323. See, e.g., DEMOS, *supra* note 232, at 140-41; MORGAN, *supra* note 232, at 65-68.

324. STEPHEN WOOD, CONSTITUTIONAL POLITICS IN THE PROGRESSIVE ERA: CHILD LABOR AND THE LAW 3-4 (1968).

325. ZELIZER, *supra* note 305, at 60.

the perpetual gloom of the coal mine, or the blazing sun of industrialized farms supplanted cultural images of children learning a skill in apprenticeship to a local craftsman or tending farm animals at mother's or father's side.³²⁶ At the same time, a cultural uncertainty grew over the proper role of children in the economic scheme.³²⁷ Whereas children's work in the eighteenth and early nineteenth centuries had been an integral part of both the child's education and the family's economy, by the twentieth century, child labor was increasingly condemned as "commercialization" of the "sacred" child.³²⁸ Moreover, the emergence in family theory of a new model challenging the patriarchal family model—that of a family composed of individuals—undercut the established family hierarchy and the presumed unity of interests between parent and child that had served as a theoretical justification for paternal authority freely to exploit the child as a family asset. Also challenging the patriarchal tradition, as I have shown, was the reformers' image of the child as a public and societal asset, not to be exploited for private ends, but to be nurtured and educated for long-term economic productivity and responsible citizenship.³²⁹

States responded to these pressures by enacting various child labor laws.³³⁰ The economics of price competition, however, placed those states that enacted stricter reforms at a disadvantage.³³¹ Nationwide uniformity was essential. During the first two decades of the century, reform-minded Progressives, in coalition with child-savers, trade unionists, and religious leaders, made enormous strides on a state-by-state basis toward raising the

326. One common shibboleth was that regulation of child farm workers would stop the barefoot farm boy from doing chores. In 1923, Harold Cary wrote an article for *Collier's*, exposing the grinding labor of children on industrial farms. Harold Cary, *No Chores for Jimmie: He's a Laborer*, *COLLIER'S*, Aug. 11, 1923, at 10. He described one family of four—Jimmie, aged 7; his sister, 14; brother, 9; and mother. *Id.* The children wore time tickets pinned to their overalls and punched in at seven a.m. and out at six p.m. *Id.* They were Italians who were recruited by "padrones" and knew no English. *Id.*

327. See ZELIZER, *supra* note 305, at 66.

328. See *id.* at 70-71. One observer pinpointed the tension between old (or Old World) ideas and new ideas of children's work:

The parents like the idea [of child labor] because most of them have the old idea of children for work and the more children the more work. It is about as different from the modern idea—the idea of some work for children for educational purposes—as the straight bondage of slavery is from a high school manual training course.

Cary, *supra* note 326, at 10.

329. See *supra* notes 267-318 and accompanying text.

330. BICKEL & SCHMIDT, *supra* note 145, at 447; BREMNER, *supra* note 202, at 666-750.

331. *Id.*

ages and reducing the hours of child workers.³³² Yet their goal of enacting uniform protective laws in every state was frustrated by opposition from the South, where low wages were deemed essential to the revitalization of the textile industry and, in the conservative business community of the North, where distrust of any federal economic regulation was widespread.³³³

The movement to enact federal laws regulating child labor suffered a heavy blow in 1918 when the Supreme Court, in *Hammer v. Dagenhart*,³³⁴ invalidated the immensely popular³³⁵ Keating-Owens child labor bill as exceeding Congress's Commerce Clause powers.³³⁶ Reformers soon made another attempt, this time under the taxing power. In the 1923 *Child Labor Tax Case*,³³⁷ however, the Court held again that Congress lacked the power to regulate this area of "local" concern.³³⁸ The reformers' only recourse was an amendment to the United States Constitution that would explicitly empower Congress to regulate the employment of children under eighteen.³³⁹ This was the impasse facing

332. MARY S. CALLCOTT, *CHILD LABOR LEGISLATION IN NEW YORK* (1931) (reviewing a quarter century of child labor reforms). By the 1920 Census, taken while the federal child labor tax was in effect, the proportion of wage-earning children had fallen to one in 12, but the number was still over one million, and 378,063 of these were children aged 10 to 13. No statistics were gathered on children under 10. See H.R. Rep. No. 395, 68th Cong., 1st Sess., at 5-6 (1924). Observers believed the number rose again when the Supreme Court overturned the child labor tax. *Id.* at 7-8; see *infra* notes 337-38 and accompanying text. It should be noted that economists have credited the decline of child labor to a number of factors in addition to regulation, including the emergence of immigrant labor as a superior low cost substitute and mechanization of many of the simple factory jobs once performed by children. See, e.g., PAUL OSTERMAN, *GETTING STARTED: THE YOUTH LABOR MARKET* 60-71 (1980).

333. See Florence Kelley, *Industrial Conditions as a Community Problem with Particular Reference to Child Labor*, 103 ANNALS OF AM. ACAD. 60 (1922), reprinted in JOHNSEN, *supra* note 266, at 299.

334. 247 U.S. 251 (1918). The most enduring words from this case are those of dissenting Justice Oliver Wendell Holmes, Jr., in defense of Congress's power to prohibit commerce in "the products of ruined lives." *Id.* at 280 (Holmes, J., dissenting).

335. WOOD, *supra* note 324, at 78.

336. *Id.* The law prohibited transportation in interstate commerce of articles produced by children under 14, or children over 14 who had worked more than eight hours in a day or more than six days in a week. *Hammer*, 247 U.S. at 269.

337. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

338. *Id.* at 38. For a review of Congress's attempts to regulate child labor and the Court's responses, see H.R. REP. NO. 395, 68th Cong. 1st Sess., (1924). See also *Regulation of Child Labor Resurrected*, 25 GEO. L.J. 671 (1937) (reviewing various attempts by Congress to regulate child labor). William D. Guthrie, a key opponent of the laws in *Meyer and Pierce*, was also credited with devising the theories that defeated the federal child labor laws. See *infra* notes 406-09 and accompanying text.

339. The Amendment, submitted to the states by Joint Resolution of Congress on June 2, 1924, read:

child labor reform at the time *Meyer v. Nebraska*³⁴⁰ went before the Court.

Predictably, the political alliances for and against education and labor laws tended to be similar. The progressive "child-savers" viewed child labor legislation and compulsory education laws as integral parts in a unified campaign to improve the lot of children.³⁴¹ Likewise, organized labor strongly supported both child labor laws and compulsory school laws as keys to an increased living wage for working-class parents and equal opportunity for working-class children.³⁴² Among the most active opponents of the Child Labor Amendment, and of expansion of compulsory education in general, were many leading Catholic organizations, churchmen, and laymen.³⁴³ Mainstream Catholics viewed the Amendment with alarm, believing it posed a danger to parochial education and transferred to the state powers that ought to belong to parents.³⁴⁴ Business also had cause to oppose both compulsory education and child labor regulation. Although business promoted education, and especially vocational training, as necessary to create competent workers,³⁴⁵ businessmen were often arrayed against reformers when it came to passing the taxes to support expanded common schooling.³⁴⁶ Likewise, employers benefitted from using children as workers. Not only were they cheap labor, but their contributions to family income meant adults would accept less than a living wage. Moreover, children who went to work at an early age provided a future docile

Section 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under 18 years of age.

Section 2. The power of the several States is unimpaired by this article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by Congress.

H.R.J. Res. 184, 68th Cong., 1st Sess. (1924). *Outlook* magazine's response to the proposed Amendment was typical of the popular response: distress over continued exploitation of children and unfair competition, tempered with trepidation at the expanse of federal power. *The Child and the Constitution*, 136 *OUTLOOK*, Apr. 9, 1924, at 587-88; *The Child Labor Amendment*, 137 *OUTLOOK*, July 30, 1924, at 496-97; see also *The Child Labor Amendment*, 74 *LITERARY DIG.*, Sept. 16, 1922, at 12 (collecting national editorials).

340. 262 U.S. 390 (1923).

341. See, e.g., RAYMOND J. FULLER, *CHILD LABOR AND THE CONSTITUTION* 124 (1923).

342. PETERSON, *supra* note 27, at 36-37.

343. See REV. VINCENT A. MCQUADE, *THE AMERICAN CATHOLIC ATTITUDE ON CHILD LABOR SINCE 1891*, at 82-100 (1938); Thomas R. Greene, *The Catholic Committee for Ratification of the Child Labor Amendment, 1935-1937: Origin and Limits*, *CATH. HIST. REV.*, Apr. 1988, at 248, 249-50.

344. MCQUADE, *supra* note 343, at 86-87; Greene, *supra* note 343, at 248.

345. See Katz, *supra* note 112, at 394.

346. PETERSON, *supra* note 27, at 40-41.

workforce.³⁴⁷ Parents were divided between the two camps. Many middle class parents embraced the new notions of childhood, but conservative or traditional parents, particularly immigrant parents who depended on children's wages for survival, felt that compulsory education and labor laws infringed upon their rights in their children.³⁴⁸

Functionally and historically, child labor regulation and compulsory education laws were intimately related.³⁴⁹ Though some disputed whether the eventual decline in child labor was the cause or the effect of government intervention,³⁵⁰ obviously the amount of time children could spend at school closely correlated with the time spent at work.³⁵¹ Reformers' concerns over education, English fluency, and child labor all converged in communities like the German-speaking "Russian-Germans" of Lincoln, Nebraska.³⁵² Each year, some 400 fathers hired out their entire families to work the beet fields,³⁵³ leaving the city for the beet field shacks in early spring before school closed and remaining

347. See HALL ET AL., *supra* note 232, at 57; Pamela B. Walters & Phillip J. O'Connell, *The Family Economy, Work, and Educational Participation in the United States, 1890-1940*, 93 AM. J. SOC. 1116, 1124-26 (1988). A Nebraska farmer who employed child laborers in 1923 said: "Children are cheap labor. They get nothing out of it but board and clothes." Sara A. Brown & Robie O. Sargent, *Children in the Sugar Beet Fields of the North Platte Valley of Nebraska, 1923*, 67 NEB. HIST., Fall 1986, at 256, 287. Most working children earned money wages, whether directly or as part of the family package. Judging from studies of child workers of the 1890's to 1920's, they more than earned their keep. See, e.g., MINTZ & KELLOGG, *supra* note 181, at 90-91 (explaining that during slumps, children might be the primary source of support); Brown & Sargent, *supra*, at 277 (reporting that children aged five to nine worked an average of 6.1 acres, children aged 10 to 16 worked an average of 9.3 acres, and adults worked an average of 9.7 acres); Claudia Goldin, *Family Strategies and the Family Economy in the Late Nineteenth Century: The Role of Secondary Workers*, in PHILADELPHIA: WORK, SPACE, FAMILY, AND GROUP EXPERIENCE IN THE NINETEENTH CENTURY: ESSAYS TOWARD AN INTERDISCIPLINARY HISTORY OF THE CITY 277, 277-310 (Theodore Hershberg ed., 1981) (stating that children provided from 33% to 46% of family income in Irish and German two-parent families).

348. See Walters & O'Connell, *supra* note 347, at 1121-22.

349. Note, for example, that the Edwards and Bennett laws, *supra* note 38 and accompanying text, were broad-based reforms including compulsory education and child labor provisions as well as provisions on English language education. See also MCQUADE, *supra* note 343, at 10 (describing early child labor reform as motivated by concerns that work would interfere with education); Grace Abbott, *The Law's Protection of Childhood*, 24 SCH. & SOC'Y 64, 64-66 (1926) (noting that compulsory education laws, like child labor laws, had been condemned as communistic assaults on parents' rights).

350. See, e.g., OSTERMAN, *supra* note 332, at 60-61.

351. See Walters & O'Connell, *supra* note 347, at 1146. Even when children worked as seasonal agricultural laborers, conflicts arose between school attendance and farm work. See Brown & Sargent, *supra* note 347, at 282-83.

352. Brown & Sargent, *supra* note 347, at 302.

353. *Id.* at 279.

until late fall after the start of the new school year.³⁵⁴ Said one farmer, "Kinder eat—must work."³⁵⁵ For these families, the "family system" of contract labor operated to preserve German culture and patriarchal family structures at the expense of common schooling and English language fluency.³⁵⁶ One father explained, "In the city, I'd have to get me a job and work the year round. This way, in the country all the kids and the woman works"³⁵⁷

Children's labor in early twentieth-century America was still, quite literally, parental property.³⁵⁸ Under the "family labor system," the employer would contract with the head of a family to pay to him a given sum in exchange for the labor of all or some family members.³⁵⁹ Children who received pay envelopes were expected to turn them over to the parent unopened.³⁶⁰ As oral histories reveal, young workers sometimes balked. One boy of nineteen decided to leave the mill, live on his own, and work on the railroad. He recalled how his father canceled that plan, saying "'You're too young, you belong to me.' I said, 'Yes that's right, but I can make my own money, Daddy.' He said, 'Well you ain't going to make none, because I'll forbid them paying you if you go.' So that knocked that in the head."³⁶¹ Walter Pierce, the future governor of Oregon, was treated more liberally when, at seventeen, he wanted to leave farming for school mastering.³⁶² He was allowed

354. *Id.* at 282-83.

355. *Id.* at 287.

356. *Id.* at 257.

357. *Id.* at 287. In 1920, Mexican workers had just begun to travel in family groups to the beet farms. *Id.* at 302; see also Charles E. Gibbons, *Extent and Control of Rural Child Labor*, reprinted in JOHNSON, *supra* note 266, at 105, 111-12.

358. A father's vested rights in his children's earnings formed the legal basis for Dagenhart's petition challenging the federal child labor law, which he claimed deprived him of his rights to the services of his two minor sons and to any wages they might receive from their labors. Bill of Complaint at 2, reprinted in Record, *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (No. 704).

359. See HALL ET AL., *supra* note 232, at 52, 162 (explaining that employers often advertised for whole families). A father in the beet fields would contract to work a specific number of acres, based on the number and ages of workers in his family. Brown & Sargent, *supra* note 347, at 262.

360. See ZELIZER, *supra* note 305, at 100-01; see also *Eustice v. Plymouth Coal Co.*, 13 A. 975 (Pa. 1888) (ordering 13-year-old son's wages paid directly to his parent); Beverly Stadum, *Family Casework with the Minneapolis Poor 1900-30*, 51 MINN. HIST. 43, 53 (1988).

361. HALL ET AL., *supra* note 232, at 162 (noting the recollections of Charles Foster of North Carolina). A daughter's lot could be doubly unfair. One woman recalled her life on a North Dakota farm: "[W]e worked like slaves to build the sod house, barn and other abodes. Plus all the man and house work. After we had grown up and left home, our father gave all the homestead enterprise to his oldest son." Elizabeth Hampsten, *A German-Russian Family in North Dakota*, 20 HERITAGE GREAT PLAINS 1, 8 (1987).

362. Schwartz, *supra* note 134, at 43.

to take up his new career but was expected to hire an Irish boy to work as his substitute until he turned twenty-one.³⁶³

Given this legacy, it is not surprising that public debates on child labor analogized the family to a kingdom and parental rights to property rights. Proponents descended to the enemy's turf and argued that even horses were protected by law from their owner's abuse, and children should receive at least the protection given to a chattel. Detractors minimized the furor over parents' abuse of their children, comparing it to the antebellum furor over the slaveholder's abuse of his human property. In a letter to Congress, one former senator suggested that the evil of child labor, like the evil of slavery, was exaggerated because "men do not in general treat their property" with brutality.³⁶⁴

Echoing arguments raised against the school laws, opponents of child labor regulation predicted that it would undermine parental authority and ultimately result in the downfall of the Republic, if not a revolution. The Child Labor Amendment, critics said, "would dethrone parents and subvert family government."³⁶⁵ President Butler of Columbia University added that "[n]o American mother would favor the adoption of an amendment that would empower Congress to invade the rights of parents and to shape family life to its liking."³⁶⁶ It is doubtful, however, that America's mothers were those who felt most threatened by the Amendment. One Nevada assemblyman spoke for multitudes when he complained, "They have taken our women away from us by constitutional amendments; they have taken our liquor away from us; and now they want to take our children."³⁶⁷

363. *Id.* Out of his \$35 teacher's salary, Pierce paid \$18 for the Irish boy, \$8 to his mother for room and board, and saved the rest.

364. 65 CONG. REC. 10,078 (1924) (letter of Sen. Charles S. Thomas); *see also id.* at 9995 (stating that Jesus worked from age 12); *id.* at 9999 (stating that laws invade sacred precincts of home); *id.* at 10,005 (predicting breakup of entire family economic relation and war of child against parent); 53 CONG. REC. 12,194 (1916) (Sen. Husting arguing that even horses are protected).

365. James A. Emery, *Examination of the Proposed Twentieth Amendment* (1924) (quoting Rt. Rev. Warren A. Candler, Bishop of Episcopal Church), *reprinted in* JOHNSEN, *supra* note 266, at 361, 365; *see also* MCQUADE, *supra* note 343, at 91 n.31 (Georgia Senate declared amendment "would destroy parental authority . . . [and] give irrevocable support to a rebellion of childhood which menaces our civilization"). *See, e.g.,* 65 CONG. REC. 10,007 (1924) (stating that "under the guise of the amendment they will take charge of the children same as the Bolsheviks are doing in Russia.").

366. N.Y. TIMES, Dec. 7, 1924, at 19.

367. *Not to Mention Our Common Sense*, AM. CHILD, Apr. 1925, at 6 (remark of Nevada assemblyman Henrich). Such linkage of suffrage, prohibition, child labor, and the evils of

If children were a form of property, the Amendment's critics were firmly committed to *private* ownership. Like universal common schooling, the Child Labor Amendment was condemned as "a communistic effort to nationalize children."³⁶⁸ Commenting on the Amendment, Senator Ransdell of Louisiana said:

Parents will remain in the background after being permitted to bring children into the world and nurture them during their tender years of toddling infancy. Just as soon as the children are large enough to be of some assistance to their real parents they must be delivered to their statutory father in Washington.³⁶⁹

Faced with such passionate opposition, the Child Labor Amendment languished. By 1934, New York had become the critical state in the ratification process.³⁷⁰ The Catholic community and the New York State Committee Opposing Ratification chose William Dameron Guthrie, a key champion of parental rights in *Meyer* and *Pierce*, to speak for their organizations. He appeared at hearings, spoke on radio, and authored arguments presented to the New York Legislature's Judiciary Committee in 1934 when it considered and ultimately refused to report the Amendment.³⁷¹ Guthrie painted a picture of moral decay, with idle children devoid of individualist values failing to milk the cows or gas the family Ford or help their widowed mothers with the dishes. Parents who had been deprived of their children's services would be forced to turn to the taxpayer for support.³⁷² On February 25,

nationalizing men's property was not unusual. See, e.g., *Warns of Danger in Child Labor Ban*, N.Y. TIMES, Feb. 26, 1934, at 19 (reporting fears that forces behind prohibition were trying to Russianize children); *Warns of Danger in Child Labor Law*, N.Y. TIMES, May 8, 1934, at 22 (stating that a women's club debater reminded audience that many had charged that suffrage would nationalize women).

368. William D. Guthrie, *The Child Labor Amendment: Argument in Opposition to Ratification Prepared for Submission to the Legislature of the State of New York* 36 (1934) [hereinafter *Child Labor Argument*] (collection of Columbia Law Library).

369. 65 CONG. REC. 10,097 (1924) (statement of Sen. Ransdell); see, e.g., MCQUADE, *supra* note 343, at 89 (quoting an editorial in *America*, Sept. 6, 1924: "Out of the Federalized clinic, along a Federalized road comes a Federalized child to the Federalized school.").

370. Greene, *supra* note 343, at 252, 268.

371. See 68 *Leaders Fight Law on Child Labor*, N.Y. TIMES, Apr. 16, 1934, at 1; *Child Labor Argument*, *supra* note 368; William D. Guthrie, *The Federal Child Labor Amendment: Reply by William D. Guthrie of the New York Bar* (1934) [hereinafter *Reply*] (collection of the Columbia Law Library).

372. *Child Labor Argument*, *supra* note 368. Guthrie's argument concluded with extensive quotations from the Supreme Court opinions in *Meyer* and *Pierce*. Having sown the language creating a parental right of control in those cases, he reaped the benefits of the new constitutional doctrine. See *infra* notes 432-52 and accompanying text.

1934, Guthrie addressed the citizens of New York on WOR radio. He condemned the Child Labor Amendment as a "menace to the family to the home and to our local self-government. . . . [Under its language, Congress] could regulate the help children might give their parents in the home, or on the farm," and thereby control the education of children under the guise of limiting or regulating their mental labor.³⁷³ The Amendment was defeated. Again on January 23, 1935, Guthrie debated the Amendment with Mayor Fiorello La Guardia before a crowd that overflowed the Albany Senate Chamber.³⁷⁴ He charged that it would bring the federal government into the home and reach "the boy on the farm [picking] blueberries on the mountain, the schoolboy [carrying] newspapers out of school hours, or the boy of 16 to 17 [earning] money to pay his way through college."³⁷⁵ The Amendment was again defeated.³⁷⁶ It was to die unratified.

In 1918, Justice Holmes wrote in his *Hammer v. Dagenhart*³⁷⁷ dissent, "[I]f there is any matter upon which civilized countries have agreed . . . it is the evil of premature and excessive child labor."³⁷⁸ Holmes's assessment was correct. The Court *was* out of step with the times, but it was not alone. The entrenched resistance to child labor legislation, evident in the votes of five Justices in *Hammer* and the travails of the Child Labor Amendment, did not spring from callousness so much as from fear of losing parental prerogatives to an all-consuming state. Alongside notions of children as individuals and national assets, Americans cherished deeply etched images of children as their God-given, inalienable property; treasures, to be sure, but private treasures under the control and custody of their parents. As Herbert Spencer, oracle of conservative doctrine, complained, "Not the parent but the nation is now in chief measure the owner of the child"³⁷⁹ The Court, like many members of the public, reacted with ambivalence and concern when it saw these most

373. *Warns of Dangers in Child Labor Ban*, *supra* note 367, at 19.

374. *La Guardia Urges, Guthrie Assails Child Labor Ban*, N.Y. TIMES, Jan. 24, 1935, at 1.

375. *Id.* at 15.

376. The Amendment was debated again in New York in 1936, 1937, and 1938, and each time failed largely because of the opposition of Catholics. Greene, *supra* note 343, at 264-68.

377. 247 U.S. 251 (1918).

378. *Id.* at 280 (Holmes, J., dissenting).

379. 3 HERBERT SPENCER, PRINCIPLES OF SOCIOLOGY § 850 (1915).

precious of vested interests threatened with expropriation.³⁸⁰

The child, in the era of *Meyer* and *Pierce*, thus was gaining new and conflicting dimensions, both public and private. Although still viewed as belonging to their parents, children were reconceptualized both as public treasure, belonging to and having claims upon the larger community, and as free individuals, possessors of individual rights actualized through parents or judges. No wonder the opponents of the school laws and child labor laws framed the issue as "Who Owns the Child?"³⁸¹ The answer was no longer obvious because the parent's claim now competed with the community's claim and the child's own claim.

VI. THREE MEN AND THE CHILD IN *MEYER v. NEBRASKA*

[A]n amorphous dummy unspotted by human emotions [is not] a becoming receptacle for judicial power.³⁸²

Three men would play especially critical roles at the birth of a constitutional theory of child, parent, and state: James Clark McReynolds, the reactionary and intolerant Associate Justice who authored the "liberal" *Meyer* opinion; William Dameron Guthrie, the prominent apostle of laissez-faire and foe of child labor regulation who inspired him; and Oliver Wendell Holmes, Jr., the great dissenter who needs no introduction. The three had at least this much in common: all were trained in the law, all were conversant with Plato's *Republic* (the pivotal metaphor in *Meyer* and *Pierce*), and, ironically, all three were childless. What other experiences and values did they share? What principles or proclivities divided them, and how did these contribute to the *Meyer* and *Pierce* decisions?

As legal realists have long understood, "[t]he peculiar traits, dispositions, biases and habits of the particular judge will . . .

380. The Court in *Hammer* and *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922), reverted to its fiercest model of laissez-faire and interpreted the Commerce Clause especially narrowly in comparison to other contemporary cases. BICKEL & SCHMIDT, *supra* note 145, at 460-61. I would argue that the subject matter of the legislation—parents' rights in children—shaded the Justices' views and made them ready to find this evil beyond Commerce Clause regulation, although they had held lesser evils justified federal intervention.

381. See *supra* notes 177-78 and *infra* notes 522-27 and accompanying text.

382. *Berger v. United States*, 255 U.S. 22, 43 (1921) (McReynolds, J., dissenting).

often determine what he decides to be the law.”³⁸³ Judges, in candor, have agreed. Benjamin Cardozo treasured the story of the judge who explained how he reached decisions: “[A]fter listening with full consciousness to all the evidence, and following as carefully as he could all the arguments, he waited until he ‘felt’ one way or the other.”³⁸⁴ Of course, even a judge who consciously acknowledges the role of subjectivity is compelled to discipline his or her feelings by expressing the decision in the logical framework of a written opinion.³⁸⁵ And it is this opinion alone that we recognize and apply as law. The fact remains that judicial decisionmaking is, in part, a product of judicial values and personality. This human context shapes judicial opinions and our understanding of them. Such value interpretation obviously has its pitfalls. Even when dealing with a single judge, it offers only a contextual story *about* lawmaking. When deliberations take place in secret, draw upon numerous sources, and involve nine separate individuals, many of whom leave no record of their thoughts, to capture a single true and complete story of the decision is impossible. We still can be alive, however, to the existence behind the written opinion constituting the formal public account of the case, of multiple personal, political, and social narratives.³⁸⁶ In a sense, each of these contextual narratives is implicit in the decision and, uncovered, may illuminate the

383. JEROME FRANK, *LAW AND THE MODERN MIND* 111 (1930); *see also* Karl Llewellyn, *A Realist Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930) (arguing that scholarship should focus on interaction of behavior of lawyers and judges and the law). The legal realists challenged the notion of law as rigorous logical deduction and suggested instead that judges operated “not as impersonal and impartial vehicles of judgment, but as people like all others with class affiliations, economic interests, and social assumptions.” ALEXANDRA K. WIGDOR, *THE PERSONAL PAPERS OF SUPREME COURT JUSTICES* 13 (1986).

384. BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 60-61 (1928).

385. CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 11 (1969). Miller asserts that the function of opinions is to convince the judge, the parties, and the public that the judge has made the correct decision. Opinions are “the most permanent and public manifestation of the work of the courts, and . . . the chief demonstration that reasoning is the essential element of the judicial process.” *Id.* at 11-12. A Supreme Court Justice must, as a primary matter, convince at least four of the other Justices. Whether they join because they agree with the reasoning or only with the result is not always apparent, and was even less apparent in the 1920’s when concurrences were rare.

386. Justice Felix Frankfurter believed that to understand the Supreme Court, it is necessary to understand what manner of people inhabit it. “The fact that [the Supreme Court Justices] were ‘there’ and that others were not, surely made decisive differences. To understand what manner of men they were is crucial to an understanding of the Court.” FELIX FRANKFURTER, *A Note on Judicial Biography*, in *OF LAW AND MEN* 107 (1956).

Court's opinion or even surface in a later application of the opinion as a seemingly novel construction of it.³⁸⁷

Substantive due process, in particular, is notoriously dependent upon a judge's moral vision and ability "to articulate untouchable areas of autonomy or freedom."³⁸⁸ The *Meyer* opinion occupies less than eight pages of the United States Reports.³⁸⁹ It cites virtually no precedent to support its major propositions, violating Holmes's famous dictum that "law . . . does not exist without some definite authority behind it."³⁹⁰ Realistically, an opinion such as *Meyer* may owe as much to the values and moral vision of those present at the creation as to any reporter or legal treatise. In examining the opinion in *Meyer*, therefore, I will let the lives of Guthrie, the advocate, McReynolds, the author, and Holmes, the dissenter, speak for their respective positions.

A. William Dameron Guthrie: Conservative Crusader

Perhaps the most effective foe of Oregon's universal common schooling law was a wealthy New York Catholic attorney and Columbia University law professor named William Dameron Guthrie. Paradoxically, Guthrie's enlistment in the battle against universal common schooling had its greatest impact not on the Oregon law but on the Supreme Court's handling of the language laws in *Meyer v. Nebraska*.³⁹¹ Guthrie might have seemed an unlikely champion of nonconformity. Sixty-two years of age, of medium height and always meticulously attired, he was a prominent New York lawyer, scholar, and gentleman. John W. Davis said of him: "[T]he word 'exactitude' seems to me more descriptive

387. The many permutations of *Meyer* and *Pierce* are good illustrations, from the original economic due process theory of their holding, transmuted to parents' liberty interests, *see, e.g.*, *Stanley v. Illinois*, 405 U.S. 645 (1972); to religious freedom, *see, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972); to family privacy, *see, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965). The Court's recent interpretations of *Meyer* and *Pierce* may signal yet another revision. *See Employment Div. v. Smith*, 494 U.S. 872, 881 n.1 (1990) (minimizing religious freedom and stressing parents' rights aspects of these precedents).

388. Anthony Lewis, *Abroad at Home: Bork on Liberty*, N.Y. TIMES, Sept. 6, 1987, § 4, at 15 (quoting Prof. Herbert Wechsler).

389. *Meyer v. Nebraska*, 262 U.S. 390, 396-403 (1923). Although Justices were far more terse in those days, volume 262 of the *United States Reports* contains many opinions less momentous but longer than *Meyer*. *See, e.g.*, *Cunard Co. v. Mellon*, 262 U.S. 100, 119-33 (1923); *Penna. v. West Virginia*, 262 U.S. 553, 581-600 (1923); *Farmers Bank v. Federal Reserve Bank*, 262 U.S. 649, 651-67 (1923).

390. *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

391. 262 U.S. 390 (1923).

. . . than any other He was exact in his mental processes, exact in his personal convictions, exact in all the relations of his life."³⁹²

Exactitude, however, was not Guthrie's sole virtue. He also had ample experience representing conservative business interests before the United States Supreme Court.³⁹³ Archbishop Hanna of San Francisco enlisted Guthrie in the fight to save parochial education.³⁹⁴ Guthrie was an obvious choice for the assignment. He was a staunch Irish Catholic and defender of parochial education.³⁹⁵ More importantly, his face, voice, writings, and reputation were well known to the Justices.³⁹⁶ While still in his mid-thirties, he appeared before the Court as standard bearer in a major conservative coup. As lead counsel in *Pollock v. Farmers' Loan & Trust Co.*,³⁹⁷ he persuaded the Justices to invalidate a

392. JOSEPH S. AUERBACH, *THE BAR OF OTHER DAYS* 283 (1940) (quoting from a memorial eulogy delivered by Davis to the Bar Association of the City of New York).

393. Among the cases Guthrie briefed and argued to the Court, many had earned the notoriety of an alias. *See, e.g.*, *National Prohibition Cases*, 253 U.S. 350 (1920); *McCray v. United States*, 195 U.S. 27 (1904) (The Oleomargarine Case); *Champion v. Ames*, 188 U.S. 321 (1903) (The Lottery Case); *Cotting v. Kansas City Stock Yards Co.*, 183 U.S. 79 (1901) (The Stockyards Case); *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, *modified*, 158 U.S. 601 (1895) (The Income Tax Cases). Guthrie also argued, but lost, a notorious group of cases, *Billings v. United States*, 232 U.S. 261 (1914), which challenged a tax "more piquant than productive" on foreign-built pleasure yachts owned by the likes of James Gordon Bennett, Cornelius Vanderbilt, and Jay Gould. *See BICKEL & SCHMIDT, supra* note 145, at 250.

394. Oregon Law, *supra* note 85, at 6-7.

395. He was hardly Emma Lazarus's wretched refuse, however; his ancestors came to the new world from Ireland in 1718, and he belonged to the Sons of the Revolution. JOHN J. DOLAN, *DICTIONARY OF AMERICAN BIOGRAPHY* 367-68 (Supp. I 1944) [hereinafter DOLAN BIOGRAPHY]; *W.D. Guthrie Dies Suddenly at 76*, N.Y. TIMES, Dec. 9, 1935, at 21 [hereinafter *Times Obituary*].

396. Guthrie knew a number of Justices socially and professionally. When Guthrie left the prominent Wall Street firm of Cravath, Henderson & deGersdorff in 1907, the firm recruited the rising litigator James C. McReynolds to fill his place. John B. McGraw, Jr., Justice McReynolds and the Supreme Court: 1914-1941 (unpublished Ph.D. dissertation, Univ. of Texas, 1949), in *MCREYNOLDS PAPERS, supra* note 154; *see also BICKEL & SCHMIDT, supra* note 145, at 343. Their paths must have crossed fairly often, as Guthrie's home and office addresses appear in the little black address book among McReynolds's personal effects. *See MCREYNOLDS PAPERS, supra* note 154. He collaborated with future Justice George Sutherland in constructing the legal argument in *The National Prohibition Cases*, 253 U.S. 350 (1920), and Sutherland read and admired Guthrie's work. BICKEL & SCHMIDT, *supra* note 145, at 543-44; Letter from George Sutherland to William Guthrie, May 11, 1923, in *SUTHERLAND PAPERS*, Library of Congress, Manuscript division [hereinafter *SUTHERLAND PAPERS*] (expressing admiration for Guthrie's work and its "sane, instructive and scholarly qualities"); *see also MULLEN, supra* note 62, at 22 (reporting conversation overheard by Father John Burke in which Taft remarked to Guthrie on impact of *Meyer* on decision in *Pierce*).

397. 157 U.S. 429 (1895).

graduated tax on income, the decision that so embittered the Populist farmers and workingmen in 1895.³⁹⁸ By the time of the Nebraska and Oregon cases, "[h]is talent as counsel for great corporations and property interests [had] brought him wealth and influence, his talent as a constitutional lawyer and scholar, national fame."³⁹⁹ Guthrie had long been active in the battle to preserve parental prerogatives. He believed firmly in limiting the power of government over men's freedoms, and it was he who had devised the constitutional arguments that ultimately persuaded the Supreme Court to cut back on Congress's freedom to effect child labor reforms through its commerce and taxing powers. Legal historian Benjamin Twiss credited Guthrie with the systematic elaboration of the doctrine of "dual federalism"—a strategy that created a twilight zone of laissez-faire in the gap between limited federal and state powers.⁴⁰⁰ Guthrie had formulated his theories of limited federal powers and of substantive due process in his essays on the *Magna Carta*⁴⁰¹ and in the Dwight Lectures⁴⁰² delivered at Columbia in April and May of 1898. Incorporated in his briefs in the *Lottery Case*⁴⁰³ and the *Oleomargarine Case*,⁴⁰⁴ these theories failed to capture a majority of the Supreme Court. Guthrie's arguments were not forgotten, however. Said Twiss, "Guthrie's prophetic ability in blazing a doctrinal trail for the Court's laissez faire impulses was ultimately

398. See *supra* note 123 and accompanying text. Guthrie challenged this tax as lead counsel in a grueling argument and reargument that consumed eight days of the Court's calendar. See *Pollack*, 157 U.S. at 429. *Pollock* held a special place not only in Guthrie's life but in the lore of the farm belt, confirming Populist suspicions of the Supreme Court's complicity in a "sordid despotism of wealth." *Id.* at 695 (Brown, J., dissenting).

399. DOLAN BIOGRAPHY, *supra* note 395, at 367. Professional advocacy and constitutional scholarship were one and the same to Guthrie. "For throughout his career Guthrie seems always to have been convinced that he was waging war—and a holy war—for the Constitution itself rather than for the interests whose retainer he had taken." BENJAMIN R. TWISS, *LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT* 217 (1962).

400. TWISS, *supra* note 399, at 217-20. Opposing labor reforms, for example, Guthrie attacked federal regulation as impinging on powers reserved to the states, and state regulation as impinging on personal liberties preserved by the federal Constitution. "Thus the conflict of 'the commerce power versus states' rights' is seen in its true colors as one between laissez-faire and regulation, rather than as the academic political science controversy that lawyers and judges have tried to make it out to be." *Id.* at 214.

401. WILLIAM D. GUTHRIE, *MAGNA CARTA AND OTHER ADDRESSES* (Books for Libraries Reprint 1969) (1916) [hereinafter *MAGNA CARTA*].

402. WILLIAM D. GUTHRIE, *LECTURES ON THE FOURTEENTH ARTICLE OF AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES* (Johnson Reprint 1970) (1898) [hereinafter 1898 LECTURES].

403. *Champion v. Ames*, 188 U.S. 321 (1903).

404. *McCray v. United States*, 195 U.S. 27 (1904).

vindicated."⁴⁰⁵ In 1918, the Court adopted Guthrie's theories in *Hammer v. Dagenhart*,⁴⁰⁶ invalidating the Keating-Owen child labor bill.⁴⁰⁷ Historian Stephen B. Wood remarked that the Court's 1922 decision in *Bailey v. Drexel Furniture Co.*,⁴⁰⁸ striking down the child labor tax, "reads page and paragraph straight from Guthrie's brief" in the *Oleomargarine Case*.⁴⁰⁹

Guthrie's writings and speeches reveal a man of strong convictions who believed that the Constitution and religion stand as twin bulwarks against assaults on traditional values.⁴¹⁰ Among these values were the inviolability of individual liberty and property interests,⁴¹¹ religious but not racial tolerance,⁴¹² the sanctity of parental authority,⁴¹³ and old-fashioned individualism.⁴¹⁴ Guthrie became one of the foremost exponents of conservative theories of laissez-faire and substantive due process. In 1908, he delivered both the William L. Storrs Lectures on constitutional law at Yale and a series entitled "The Judicial Power Under the Constitution" at Columbia Law School.⁴¹⁵ Appointed to the Columbia faculty in 1909 and holding the Ruggles Chair of Constitutional Law at

405. TWISS, *supra* note 399, at 223.

406. 247 U.S. 251 (1918).

407. TWISS, *supra* note 399, at 220.

408. 259 U.S. 20 (1922).

409. WOOD, *supra* note 324, at 280.

410. See, e.g., Brief by William D. Guthrie for Appellee at 68, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (No. 583) [hereinafter Guthrie Brief for Appellee]; *Catholic Parochial Schools*, in MAGNA CARTA, *supra* note 401, at 247, 250-53 (a 1915 address rebutting charge that parochial schools undermine patriotism and calling for public funding of parochial schools); 1898 LECTURES, *supra* note 402, at 30-32 (identifying the Fourteenth Amendment as the bulwark against socialism and the bar as the "great conservative force in American politics"); Oregon Law, *supra* note 85, at 20-21.

411. See *Mayflower Compact*, in MAGNA CARTA, *supra* note 401, at 37-41. In this 1915 address, Guthrie contrasted "pure democracy" to "the right to private property" and used the failure of communism in the Plymouth Colony to illustrate that pure democracy is incompatible with liberty because it leads to redistribution of property. He rejected the initiative and referendum as communism in disguise.

412. Compare *Catholic Parochial Schools*, in MAGNA CARTA, *supra* note 401, at 247 and Oregon Law, *supra* note 85 with *Duty of Citizenship*, in MAGNA CARTA, *supra* note 401, at 198 (anti-Asiatic remarks).

413. See Guthrie Brief for Appellee, *supra* note 410, at 66-69 ("Children are, in the end, what men and women live for."); Oregon Law, *supra* note 85, at 5 ("sacred and holy rights of parents over their children").

414. See, e.g., TWISS, *supra* note 399, at 227 (quoting Guthrie's testimony before the Judiciary Committees of the Senate and Assembly of the Legislature of New York in 1935 that child labor was a source of "character upbuilding and implanting of a sense of duty and responsibility"); *Mayflower Compact*, in MAGNA CARTA, *supra* note 401, at 27.

415. A HISTORY OF THE SCHOOL OF LAW OF COLUMBIA UNIVERSITY 210 (Julius Goebel, Jr., ed., 1955) [hereinafter COLUMBIA LAW HISTORY].

Columbia from 1913 to 1922,⁴¹⁶ he was well known for his works construing the Magna Carta and the Fourteenth Amendment's Due Process Clause as importing guarantees not only of procedural but of substantive standards of justice.⁴¹⁷ The business community, New York society, and the Bar welcomed him to the mainstream of the eastern establishment.⁴¹⁸ His elections as President of the New York State and New York City Bar Associations attest to his standing within the legal community.⁴¹⁹ Columbia University was somewhat less hospitable. There, Guthrie's critics attacked his personality, his stature as a scholar, and his influence at the University.⁴²⁰ The official history of Columbia Law School describes him as "not personally a likeable man. He was nervously energetic, highly irascible, increasingly inconsiderate, and totally lacking in a sense of humor; and he had an 'ultra-legalistic mind which made him approach new and strange problems with stiff inflexibility.'"⁴²¹

According to biographer John Dolan, "there [could] be little doubt of [Guthrie's] ultraconservatism."⁴²² The *Harvard Law Review* praised Guthrie's Dwight Lectures on the Fourteenth

416. DOLAN BIOGRAPHY, *supra* note 395, at 368.

417. For Guthrie's views on constitutional law, see MAGNA CARTA, *supra* note 401. The address on the Magna Carta, delivered before the Constitutional Convention of New York State on June 5, 1915, perhaps best expresses Guthrie's view that the word "process" in the Fourteenth Amendment must be defined "to mean *substantive provision* as well as procedure." *Id.* at 24; see also William D. Guthrie, Syllabus of Lectures by Professor Guthrie, Introduction to American Constitutional Law 1912-1913, Columbia University School of Law, at 13-15 (collection of Columbia Law Library).

418. See DOLAN BIOGRAPHY, *supra* note 395, at 368 (listing clubs and associations).

419. *Id.*

420. See COLUMBIA LAW HISTORY, *supra* note 415, at 211 (stating that Guthrie contributed little to the educational or administrative life of the school, yet noting that he taught the required first year course in constitutional law from 1909 to 1922).

421. *Id.* (footnotes omitted).

422. DOLAN BIOGRAPHY, *supra* note 395, at 368. Indeed, although Guthrie's conservative views won him few friends on Columbia's law faculty, they apparently won him his faculty appointment and his prestigious chair. Charles A. Beard, writing in *The New Republic* in 1917, complained that Guthrie owed his professorship to his reactionary constitutional politics and his powerful friends on the Board of Trustees, and that his appointment to the Ruggles chair had been a "backstairs" strategy by Columbia's administration to thwart appointment of a liberal candidate. Charles A. Beard, *A Statement by Charles A. Beard*, NEW REPUBLIC, Dec. 29, 1917, at 249. Beard apparently believed that the chair should have gone to Frank J. Goodnow. Retiring Ruggles Professor John W. Burgess opposed Goodnow's candidacy because Goodnow "represented a state-socialist point of view that [Burgess felt] should not completely dominate the faculty of Political Science." COLUMBIA LAW HISTORY, *supra* note 415, at 210. The Trustees agreed, and selected Guthrie as more in accord with Burgess's conservative views. *Id.*; see also John W. Burgess, *A Columbia Appointment*, N.Y. TIMES, Jan. 15, 1918, at 12 (defending appointment and praising Guthrie as a "constitutional lawyer of national fame").

Amendment as "interesting" and "scholarly" but warned that Guthrie's theories threatened to shift the responsibility for government from legislatures to the courts, by making of the Constitution a "solution of political problems, [and] a curb on legislation *bona fide*, even though erratic."⁴²³ According to the *Review*,

An ethical theory runs through the work, that the Fourteenth Amendment embodies a broad bill of rights; that the country is greatly menaced by improper legislation, and that its salvation is to be found in a broad construction of the Fourteenth Amendment. To this end the author gives to the word "liberty" its widest meaning, as equivalent to "freedom in the pursuit of happiness"⁴²⁴

To be sure, Guthrie's reverence for the Fourteenth Amendment often translated into protection of traditional power and class structures, including vested property interests.⁴²⁵ He feared democracy unrestrained by "constitutional morality" and distrusted calls for social reform and social justice as thinly veiled favoritism of one class at the expense of another.⁴²⁶ He deplored progressive taxation.⁴²⁷ He staunchly defended the authority of patriarchal family government and actively opposed the Child Labor Amendment, as well as other education and maternity bills, as unwarranted federal interference in domestic relations.⁴²⁸

In Guthrie's view, laws regulating the wages, working hours, and education of children put at risk something more fundamental than the balance of state and federal power. Although he pro-

423. John G. Palfrey, Reviews, *Lectures on the Fourteenth Article of Amendment to the Constitution of the United States*, 12 HARV. L. REV. 439, 440 (1899).

424. *Id.*

425. See, for example, *Constitutional Morality*, in MAGNA CARTA, *supra* note 401, at 43, in which Guthrie defends *In the Matter of Jacobs* (the Tenement House Tobacco Case), 98 N.Y. 98 (1885), and *Lochner v. New York*, 198 U.S. 45 (1905). See also *The Eleventh Amendment*, in MAGNA CARTA, *supra* note 401, at 87-129, and in particular the discussion of legislative invasions of constitutionally protected property interests, *id.* at 124-25.

426. *Constitutional Morality*, in MAGNA CARTA, *supra* note 401, at 42. Guthrie had a low opinion of Theodore Roosevelt, whom he attacked at every opportunity, and loathed progressivism, which he viewed as "pandering to the mob spirit." *The Duty of Citizenship*, in MAGNA CARTA, *supra* note 401, at 217. Guthrie dismissed progressivism's precursor, populism, as the "exploded claptrap of demagogues." *Id.* at 181.

427. See *Graduated or Progressive Taxation*, in MAGNA CARTA, *supra* note 401, at 159-77.

428. TWISS, *supra* note 399, at 226 (noting Guthrie's opposition to the Sheppard-Towner Maternity bill as well as the Smith-Towner Education bill); see also DOLAN BIOGRAPHY, *supra* note 395, at 368 (opposition to the Child Labor Amendment); *supra* note 322 (discussing conservative opposition to Sheppard-Towner bill); *supra* notes 406-14 and accompanying text.

tested that he was motivated by federalism, his writings and speeches showed that he shared the popular conservative conviction that these so-called child-saving laws were the first step toward expropriating the children of America and ending the supremacy of their fathers as governors of hearth and home. For example, he praised the New York State Courts for striking down a law regulating tenement-house work as depriving a man of "his right and liberty to use his occupation in his own house for support of himself and family, and tak[ing] away the value of his labor, which is his property protected by the Constitution."⁴²⁹ Surely Guthrie understood that the law aimed to regulate not the man's own labor so much as the labor of the women and children in his control.⁴³⁰ Guthrie's rugged individual "laboring in his own home for support of his family" is a euphemism to describe a whole family of urban sweat shop workers. Tenement work had attracted the notice of child-savers precisely because it perpetuated the traditional structures in which men—whether husbands, fathers, or manufacturers—were able to exploit the labor-value of women and children free from state interference. To Guthrie, however, laws that usurped the parent's authority and introduced the state as mediator of family relations and referee of family conflicts violated the divinely ordained natural order and contravened a man's liberty, property, and religious freedoms—guaranteed by the First, Fifth, and Fourteenth Amendments—to direct the life of his family.⁴³¹

When the Oregon school law was passed on November 7, 1922, Guthrie was poised for action.⁴³² The Oregon statute would not take effect until 1926, yet Guthrie faced an acute emergency: the

429. *Constitutional Morality*, in *MAGNA CARTA*, *supra* note 401, at 54 (quoting *In the Matter of Jacobs* (The Tenement House Tobacco Case), 33 N.Y. Sup. Ct. 374, 380-83, *aff'd*, 98 N.Y. 98 (1885)). Guthrie attacked the law as a pretext for reducing competition and depicted the "workman and the working members of his family [driven] into crowded and generally unhealthful factories, to be harassed and oppressed by strikes and lockouts." *Id.* at 51.

430. *See, e.g.*, CALLCOTT, *supra* note 332, at 196-213 (describing sweat shop conditions).

431. Some present-day philosophers share Guthrie's reservations about the degrading influence government regulation has on the home. *See, e.g.*, CHRISTOPHER LASCH, *HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED* (1977) (arguing that the "socialization of reproduction" that began in the Progressive Era has undermined the ability of the family to nurture independent citizens). Others, such as Professor Carl Schneider, are skeptical of the constitutionalization of social policy. *See* Carl E. Schneider, *State Interest Analysis in Fourteenth Amendment "Privacy" Law: An Essay on the Constitutionalization of Social Issues*, 51 *LAW & CONTEMP. PROBS.* 79 (1988).

432. *See Oregon Law*, *supra* note 85, at 1, 6-7.

pending Supreme Court consideration of *Meyer v. Nebraska*⁴³³ and *Bartels v. Iowa*.⁴³⁴ As Guthrie well knew, "there was danger that something might be said in the argument or decision of these cases which would prejudice the issue in Oregon."⁴³⁵ On February 20, 1923, he filed a slender amicus brief on behalf of "various religious and educational institutions."⁴³⁶ The amicus brief explicitly disclaimed any position on the language laws.⁴³⁷ Its sole objective was to forestall the Court from deciding *Meyer* in language that might undermine the challenge to Oregon's universal common schooling law.⁴³⁸ Although unnoticed by subsequent historians, the Guthrie brief brilliantly succeeded in its aim; it influenced the *Meyer* Court in two important ways. First, it brought the abolition of private education into the foreground of the Justices' thinking, thereby converting *Meyer* into a case not about curriculum but about expropriation and extinction.⁴³⁹ Second, it provided Justice McReynolds with a dramatic centerpiece for his opinion—his denunciation of communistic child-rearing under Plato's *Republic* as antithetical to American tradition.⁴⁴⁰ As Chief Justice Taft later remarked to Guthrie, the opinion in the Nebraska case ultimately controlled the decision

433. 262 U.S. 390 (1923).

434. 262 U.S. 404 (1923), *rev'g* State v. Bartels, 181 N.W. 508 (Iowa 1921), and *rev'g* Pohl v. State, 132 N.E. 20 (Ohio 1921), and *rev'g* Nebraska Dist. of Evangelical Lutheran Synod. v. McKelvie, 187 N.W. 927 (Neb. 1922).

435. Oregon Law, *supra* note 85, at 7.

436. Guthrie Amicus Brief, *supra* note 85, at 1-2; see also *Meyer*, 262 U.S. at 396; Oregon Law, *supra* note 85, at 7.

437. See Guthrie Amicus Brief, *supra* note 85, at 1-2.

438. Oregon Law, *supra* note 85, at 7; Guthrie Amicus Brief, *supra* note 85, at 1.

439. See Guthrie Amicus Brief, *supra* note 85, at 6-7 (stressing threat of wholesale prohibition of private education).

440. Compare Guthrie Amicus Brief, *supra* note 85, at 3 with *Meyer*, 262 U.S. at 401-02. Of course, McReynolds nowhere stated that Guthrie inspired his interest in either the Oregon law or the Plato reference. Nor did his use of the Plato analogy establish a connection to the brief—it would be ridiculous to suggest that a gentleman educated at Vanderbilt and the University of Virginia in the 1880's, as was McReynolds, would be unfamiliar with Plato. Nevertheless, a number of circumstances support the inference that Guthrie's brief was the source of McReynolds's dramatic inspiration. The only appearance in the record of the analogy to Plato was in Guthrie's amicus brief. Guthrie Amicus Brief, *supra* note 85, at 3 (referring to "[t]he notion of Plato that in a Utopia the state would be the sole repository of parental authority"). Undoubtedly, the brief was read with interest. It had the advantage of recency, having been filed only three days before the argument; it was the lone amicus brief; and it was short and eloquent. Moreover, its author was a prominent advocate before the Supreme Court, whose voice the Court conservatives had often found persuasive. Finally, the analogy to Plato fits the Oregon law but seems strained when applied to the Nebraska law. See *infra* notes 512-13 and accompanying text. This discontinuity strengthens the inference that McReynolds drew inspiration from the Guthrie brief's treatment of the Oregon law.

of the Oregon cases.⁴⁴¹ Justice McReynolds's language was so sweeping that it covered not only the German language laws but the Oregon universal common schooling law as well.

The Guthrie brief touched on religious and intellectual liberty⁴⁴² and on the property rights of schools and teachers.⁴⁴³ The first theme mentioned, however, and the one most thoroughly developed, was Guthrie's theory that the state's usurpation of parental authority is fundamentally un-American.⁴⁴⁴

The most casual perusal of the Oregon act will at once disclose that it is, indeed, an extraordinary and revolutionary piece of legislation. It adopts the favorite device of communistic Russia—the destruction of parental authority, the standardization of education despite the diversity of character, aptitude, inclination and physical capacity of children, and the monopolization by the state of the training and teaching of the young. The love and interest of the parent for *his* child, such a statute condemns as evil; the instinctive preferences and desires of the child itself, such a law represses as if mere manifestations of an incorrigible or baneful disposition.

Anything more un-American and more in conflict with the fundamental principles of our institutions, it would be difficult to imagine. It had always been supposed that "the law does not interfere with the freedom of private instruction." The notion of Plato that in a Utopia the state would be the sole repository of parental authority and duty and the children be surrendered to it for upbringing and education, was long ago repudiated as impossible and impracticable in a workaday world where men and women lived, loved, had children and sought advancement in the struggle of life.⁴⁴⁵

Guthrie's brief cited John Stuart Mill,⁴⁴⁶ Herbert Spencer,⁴⁴⁷ and *State v. Ferguson*⁴⁴⁸ as rejecting state monopoly of education

441. MULLEN, *supra* note 62, at 221.

442. Guthrie Amicus Brief, *supra* note 85, at 2.

443. *See id.* at 6 (discussing the role of private instructor or teacher as an occupation).

444. *Id.* at 3.

445. *Id.* at 3-4 (citations omitted). The linkage of children with the "advancement in the struggle of life," *id.*, is a common theme of patriarchy and primogeniture, see *supra* notes 241-44 and accompanying text (discussing the role of children in transmission of wealth and status), as well as a pragmatic rationale for the attainment of private property—people will not work unless the benefit flows to *their own* children.

446. Guthrie Amicus Brief, *supra* note 85, at 4 (citing JOHN STUART MILL, ON LIBERTY 204-06 (1859)).

447. *Id.* at 4. Herbert Spencer disapproved not only of a state monopoly on education

and referred to a speech by former Vice-President Thomas R. Marshall on the parents' right to train the child in accordance with the parents' own religion.⁴⁴⁹ It closed with a paragraph quoting Freund on the historical relationships between suppression of literature and suppression of religious liberty and urging the Court to reserve any decision on the issue of state monopoly of education until the Oregon school law came before it.⁴⁵⁰

Guthrie's eight page brief was economical and focused. Guthrie made no secret that he feared the popular language laws might be upheld, sweeping parochial schools along with them in a tide of sympathy for Americanization. His goal, therefore, was to alert the Justices to the Oregon case, distinguish it, and persuade the Court of the special evil of the Oregon law. He captured that special evil in the contrast between a parent's tender care for *his* children and the systematic relinquishment of children within Plato's *Republic*, the very image of communistic expropriation.⁴⁵¹

but of *any* free public education. See 1 HERBERT SPENCER, PRINCIPLES OF SOCIOLOGY § 321 (1897) (classifying state education, along with Poor Laws, as novel moves contributing to disintegration of the family). Spencer constructed a slippery slope that would have delighted advocates of children's welfare rights, such as Julia Lathrop, *see supra* note 299, at 170. He reasoned: "If the mental wants of the rising generation ought to be satisfied by the state, why not their physical ones? The reasoning which is held to establish the right to intellectual food, will equally well establish the right to material food" HERBERT SPENCER, SOCIAL STATICS OR THE CONDITIONS ESSENTIAL TO HUMAN HAPPINESS 331 (Augustus M. Kelley 1969) (1851).

448. Guthrie Amicus Brief, *supra* note 85, at 4 (citing *State ex rel. Kelley v. Ferguson*, 144 N.W. 1039 (Neb. 1914)).

449. *Id.* at 5 n.*. The Marshall speech was printed in the *Chicago Daily News* on January 14, 1922. Guthrie also cited Freund on Police Power for the proposition that the state could not suppress all private schools because this would interfere with religious liberty. *Id.* at 6.

The Guthrie Amicus Brief discussed the difference between regulation and total suppression of an occupation. *Id.* at 7 (citing *Adams v. Tanner*, 244 U.S. 590 (1917), *overruled by* *Ferguson v. Skrupa*, 372 U.S. 726 (1963)). With McReynolds writing, the Court in *Adams* had invalidated as a complete prohibition of a lawful profession a Washington initiative barring private agencies from taking fees from those seeking work, although the agencies could collect fees from the employer. *Adams*, 244 U.S. at 591, 596-97. Justice Brandeis, joined by Justices Holmes and Clarke, dissented in an opinion that exhaustively laid out the evils of fraud and exploitation addressed by the law. *Id.* at 600-05 (Brandeis, J., dissenting). In citing *Adams*, Guthrie clearly intended to distinguish the Oregon law's total prohibition from Nebraska's partial regulation.

450. Guthrie Amicus Brief, *supra* note 85, at 8.

451. See *supra* note 440. Plato's *Republic* was convenient shorthand for the Socialist menace. The Guthrie Brief explicitly associated the Plato analogy with the Soviets. See *supra* note 445 and accompanying text (referring to state acquisition of child rearing as a tool of communistic Russia). Plato also appeared in Guthrie's discussion of Bradford's experiment with communism: "All who now urge communism in one form or another, often in disguise, might profitably study the experience of Plymouth . . . 'evin[cing] the vanitie of that conceite of Platos . . . that ye taking away of propertie, and bringing in comunitie into a comone wealth, would make them happy and flourishing.'" *Mazflower Compact*, in *MAGNA CARTA*, *supra* note 401, at 37-38.

Apparently, however, Guthrie's brief may have accomplished even more than he had hoped. The Oregon school law's foes anticipated a ruling from the conservative Justices endorsing English-language schooling as necessary under the states' police power to promote the general welfare and combat threats to domestic national security.⁴⁵² Guthrie set out to contain any damage from such a ruling. Apparently, Guthrie's brief may actually have helped turn the current of the Justices' sympathies, so that the widely supported language laws, instead of sweeping along public school laws, were themselves swept away on a tide of antipathy toward abolition of private education.

B. James C. McReynolds: Unlikely Champion of Toleration and Pluralism

If an advocate pitches to a particular judge, hoping to shift a key vote, then Guthrie may have had McReynolds in mind. Of all the Justices, McReynolds was perhaps the man most likely to be predisposed against the religious toleration and pluralism arguments of the German-Lutheran and Polish-Catholic appellants.⁴⁵³ James C. McReynolds, born in 1862, was the oldest son of a doctor.⁴⁵⁴ McReynolds, whose ancestors arrived in America in the mid-1700's, was educated in private preparatory schools and went on to Vanderbilt College, where he was valedictorian, and to the University of Virginia School of Law.⁴⁵⁵ "If not a member of the Southern landed aristocracy, McReynolds certainly belonged to the professional upper class."⁴⁵⁶ The child of a devout

452. See, e.g., *Gilbert v. Minnesota*, 254 U.S. 325 (1920) (stating that states may legitimately concern themselves with military readiness of citizenry); *Bacon v. Walker*, 204 U.S. 311 (1907) (stating that police power embraces measures to promote general welfare).

453. See MULLEN, *supra* note 62, at 221 (singling out McReynolds as "from the Bible Belt, and possibly predisposed against the premise of our argument"). McReynolds's views survive not only in his opinions and the comments of contemporaries, but also in his personal papers. He evidently destroyed the bulk of legal materials relating to his work on the Court, but he saved a number of items of personal interest. Ranging from family correspondence and favorite recipes to assorted reprints and news clippings, this small collection sheds valuable light on his personal beliefs and idiosyncracies. Interview with Marsha Trimble, Archivist of the University of Virginia Law Library Special Collections.

454. *DICTIONARY OF AMERICAN BIOGRAPHY* 536 (John A. Garraty & Edward T. James eds., Supp. 4 1974) [hereinafter *AMERICAN BIOGRAPHY*].

455. *Id.* McReynolds's father strongly opposed free public schooling as undermining self-reliance. James E. Bond, *James Clark McReynolds: I Dissent* 6 (unpublished manuscript, McREYNOLDS PAPERS, *supra* note 154).

456. BICKEL & SCHMIDT, *supra* note 145, at 342.

and kindly mother and of a father who was nicknamed "The Pope" because of his belief in his own infallibility,"⁴⁵⁷ his family reflected the Victorian patriarchal ideal. His religious training likewise sowed the seeds of his future conservative, authoritarian philosophy. He was raised in the Church of the Disciples of Christ or "Christian Church," "a somewhat intolerant sect, which viewed the world in absolute terms of good and evil."⁴⁵⁸

McReynolds was blessed with a physical beauty that made him strangely attractive even to those who had reason to hate him.⁴⁵⁹ "He was a large, six-foot frame of a man, with erect, military bearing and the aspect of an early Roman senator. He had a face of great strength, which might have seemed carved from Tennessee granite, but for the illumination of steel-blue eyes and a suddenly flashing smile."⁴⁶⁰ McReynolds's official Court portrait depicts a strikingly handsome, patrician figure in formal dress, with a finely sculpted nose and an imposing jaw.⁴⁶¹

McReynolds's beauty was only skin deep, however. He was the most bigoted, vitriolic, and intolerant individual ever to have sat on the Supreme Court.⁴⁶² He was "crotchety," "overbearing," "rude," and "savage."⁴⁶³ He openly despised most everyone from Jews to women lawyers to legislators to African-Americans.⁴⁶⁴

457. AMERICAN BIOGRAPHY, *supra* note 454, at 536.

458. BICKEL & SCHMIDT, *supra* note 145, at 342. Toy identifies the Christian Church as a fertile recruiting ground for Ku Klux Klan organizers of the 1920's. Toy, *supra* note 46, at 63. McReynolds evidently was interested in Klan activities, as among his papers at his death was a reprint of an apologia by George Van Horn Moseley attributing the recent Klan revival to legitimate fears of communism. Reprint from the ADVERTISER (Atlanta, Ga.), July 6, 1946, in McREYNOLDS PAPERS, *supra* note 154.

459. BICKEL & SCHMIDT, *supra* note 145, at 356. Justice Louis D. Brandeis remarked "He would have given Balzac great joy . . . I watch his face closely and at times, with his good features, he has a look of manly beauty, of intellectual beauty. . . ." (quoting from Brandeis-Frankfurter conversations, on file at the Harvard Law School Library).

460. III MEMORIALS OF THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES 381 (Roger F. Jacobs ed., 1981) [hereinafter MEMORIALS].

461. BICKEL & SCHMIDT, *supra* note 145, at 368e (illustration 2).

462. *See id.* at 352-56 (discussing McReynolds's difficult nature in general, as well as noting specific instances of his belligerent conduct).

463. *Id.* That others considered McReynolds *sui generis* is evident in the wry comment of Laski to Holmes, "Keep well and remember that there is the image of God even in McReynolds." HOLMES-LASKI LETTERS 545 (Mark D. Howe ed., 1953) (consisting of correspondence between Justice Holmes and Harold J. Laski from 1916 to 1935).

464. BICKEL & SCHMIDT, *supra* note 145, at 352; AMERICAN BIOGRAPHY, *supra* note 454, at 537. He referred derisively to Jews as "Hebrews" or the "orient," to women lawyers as the "female," to Blacks as "darkeys." BICKEL & SCHMIDT, *supra* note 145, at 354; Bond, *supra* note 455, at 12-13. He thought Blacks "ignorant, superstitious, immoral, . . . improvident, lazy," "unfit" for politics, and "unworthy" of equality. *Id.* (quoting from an editorial in the May, 1883, *Vanderbilt Observer* by J.C. McReynolds).

His antisemitism was legendary, even in those intolerant times. He was unspeakably rude to his Jewish colleagues, Brandeis and Cardozo, refusing to shake hands, turning his back on them in conference, disdaining their writings, and explaining "that for four thousand years the Lord tried to make something out of Hebrews, then gave it up as impossible and turned them out to prey on mankind in general—like fleas on the dog for example."⁴⁶⁵ He refused to attend functions to which the Jewish Justices were invited, as he "[f]ound it hard to dine with the *Orient*."⁴⁶⁶

McReynolds also loathed Populists. His only foray into elective politics had been in 1896 when, "aghast at the economic and class ideas of William Jennings Bryan,"⁴⁶⁷ he had run for Congress as a Gold Democrat and lost.⁴⁶⁸ President Woodrow Wilson viewed him as a liberal appointment to the office of Attorney General in 1913 because of his accomplishments as a trust buster, yet on all other issues McReynolds proved to be implacably conservative.⁴⁶⁹ He was one of the "Four Horsemen" who led the Court's resistance to the New Deal.⁴⁷⁰ Not one to pander to collegiality, he registered a record 310 dissents during his twenty-six years on the bench.⁴⁷¹

McReynolds's papers, however, expose a sentimental side to the bachelor McReynolds's nature. McReynolds "adopted" thirty-three British refugee children during World War II, and left a part of his estate to a seminary for young ladies.⁴⁷² McReynolds's

465. BICKEL & SCHMIDT, *supra* note 145, at 354 (quoting reprints from a "return to Holmes in a case [Evans v. Gore, 253 U.S. 245 (1920)] in which Holmes and Brandeis were dissenting").

466. *Id.* (quoting from a letter to Chief Justice Taft).

467. III THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS 2025 (Leon Friedman & Fred L. Israel eds., 1969) [hereinafter JUSTICES].

468. The Gold Democrats threw their support to conservative Republican McKinley, rejecting the Populist/Democrat fusion candidate William Jennings Bryan. See MORISON ET AL., *supra* note 91, at 447. McReynolds remained passionate about the Gold Standard. When it was abrogated in 1935, see Gold Clause Cases, 294 U.S. 361 (1935), he read his dissent from the bench, tossed it violently aside, and shouted "The Constitution is gone." See *Justice McReynolds at 78 Has No Intention of Retiring*, unidentified clipping, McREYNOLDS PAPERS, *supra* note 154.

469. BICKEL & SCHMIDT, *supra* note 145, at 344.

470. JUSTICES, *supra* note 467, at 2029-30; AMERICAN BIOGRAPHY, *supra* note 454, at 537.

471. AMERICAN BIOGRAPHY, *supra* note 454, at 538.

472. *Id.* at 537-38. While at college, McReynolds developed a sentimental attachment to Will Ella Pearson, the daughter of a Presbyterian minister, but she died at 23. Almost 60 years later, when McReynolds was over 80, he commissioned a plaque, with a tribute composed for her village church and replaced the worn marker on her grave with one

attitudes toward the young ranged from harshly authoritarian to tenderly affectionate. A stern disciplinarian when his nephews Robert and James were concerned, he saw "small hope" for Robert, warning the boy's father that he "lack[ed] the fundamentals of obedience, courtesy, consideration & desire to learn," and predicting James would go down the same road, unless someone used "the bullwhip if necessary" to "make him follow orders."⁴⁷³ With girls and little children, however, McReynolds was fond and indulgent. He went out of his way to befriend them and please them with parties and presents.⁴⁷⁴

McReynolds's reputation as a jurist owed more to his personal idiosyncracies and blistering dissents than to his jurisprudence.⁴⁷⁵ Whatever induced Chief Justice Taft to assign McReynolds the *Meyer* opinion, clearly the impetus was not McReynolds's prior writing in the area of intellectual freedom, his tolerance of nonconformity, or his sympathy for the downtrodden German-American. After his dissent in *Berger v. United States*,⁴⁷⁶ his feelings were public record. In *Berger*, the Court sustained German defendants' due process claims based on the trial judge's statement that, like all German-Americans, "[y]our hearts are

that read "Blessed are the pure in heart." Letter from Fred. D. Stichter to Justice McReynolds (June 13, 1945), MCREYNOLDS PAPERS, *supra* note 154. According to historian William Leuchtenburg, "Only after his death did it become known that he had resolved to remain true to [her] memory." AMERICAN BIOGRAPHY, *supra* note 454, at 537.

473. Letter from Justice McReynolds to younger brother Robert McReynolds (April 11 [no year]), MCREYNOLDS PAPERS, *supra* note 154. In another characteristic diatribe, he wrote his brother advising that nephew Robert stop "whining like an infant [, and] shut up and go to work" and opining that "Boys are like pups. There comes a time when a firm hand and a sharp command is the only thing." Letter from Justice McReynolds to Robert McReynolds (Jan. 25, 1928), MCREYNOLDS PAPERS, *supra* note 154.

474. *See, e.g.*, Bond, *supra* note 455, at 7 (describing how McReynolds would load a carriage with toys at Christmas to distribute to District of Columbia children). In an undated letter from Mark MacClelland, Jr., to Justice McReynolds, a working-class Irish lad writes to remind McReynolds of their meeting some 11 or 12 years earlier: "[Y]ou made our acquaintance travelling by Great Northern Railway Ireland. It was on a Sunday night we (my two sisters & myself) . . . happened into your carriage[,] you took my younger sister [age 2] on your knee and told my elder sister to look after her nice teeth . . . and [the] following day we received a parcel of sweetmeats & a nice workbasket to my sister." MCREYNOLDS PAPERS, *supra* note 154.

475. Perhaps because of his cantankerous personality, he was "[r]arely assigned opinions in important cases . . . [He] averaged only nineteen opinions a year, mostly on minor questions in such fields as maritime law." AMERICAN BIOGRAPHY, *supra* note 454, at 537; *see also* HOLMES-LASKI LETTERS, *supra* note 463, at 1135 (noting Holmes's low opinion of McReynolds's admiralty opinions).

476. 255 U.S. 22 (1921) (McReynolds, J., dissenting). Justice Holmes, in a letter to Harold Laski, characterized McReynolds's dissent as "improper in its rhetoric." HOLMES-LASKI LETTERS, *supra* note 463, at 308-09.

reeking with disloyalty."⁴⁷⁷ In dissent, McReynolds contended that the fault was not with the judge but with those "malevolents from Germany, a country then engaged in hunnish warfare and notoriously encouraged by many of its natives who, unhappily, had obtained citizenship here,"⁴⁷⁸ and he praised the judge for showing a proper "detestation for all persons of German extraction who were at that time wickedly abusing privileges granted by our indulgent laws."⁴⁷⁹

One of the great anomalies of Supreme Court history is that the only enduring opinions authored by the archconservative Mr. Justice McReynolds should be the liberal icons *Meyer v. Nebraska*⁴⁸⁰ and *Pierce v. Society of Sisters*.⁴⁸¹ The explanation may lie in the fact that, although *Meyer*'s result was pluralist and libertarian, its underlying philosophy was emphatically reactionary. It is interesting to speculate on how the decision might have been shaped by a Justice more attuned to theories of privacy, the First Amendment, and intellectual liberty, such as Justice Brandeis.⁴⁸² In any event, McReynolds heartily approved the

477. *Berger*, 255 U.S. at 29 (McReynolds, J., dissenting).

478. *Id.* at 42.

479. *Id.* at 43. McReynolds, characteristically, asserted that nothing was wrong with judicial animosity toward a class of people, only against individual parties. *Id.*

480. 262 U.S. 390 (1923).

481. 268 U.S. 510 (1925). Despite McReynolds's reputation as a reactionary, his *Meyer* opinion is held out in JUSTICES, *supra* note 467, at 2034, as a "representative opinion" of his tenure on the Court. See also AMERICAN BIOGRAPHY, *supra* note 454, at 537 (identifying *Meyer* as one of McReynolds's most significant opinions).

482. Brandeis's remarks to Frankfurter indicated that he would have invalidated the Nebraska language law not under a property theory but as an impairment of the right to education—which he viewed as an aspect of the right to free speech—and would have applied a "clear and present danger" test. Strum conjectures that he did not write separately because he wished to preserve "harmony on the Court." PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 465-66 nn.29-30 (1984). In fact, Chief Justice Taft valued highly a harmonious bench, and he was not above using his power to assign opinions to promote this end. ROBERT J. STEAMER, CHIEF JUSTICE: LEADERSHIP AND THE SUPREME COURT 177 (1986). Perhaps McReynolds's surprising but passionate interest in the case at oral argument and (one may assume) at conference inspired Taft to assign him the opinion, and Brandeis, to avoid offending the likable Taft, did not take issue with the reasoning as he agreed with the result.

First Amendment free speech theories would suggest a focus on the interests of scholar and democratic society rather than on the liberty or property of the parent. Moreover, the application of First Amendment theory to family relationships holds intriguing prospects. Professor C. Edwin Baker proposes a First Amendment theory of human liberty that would protect against suppression by a dominant majority of expressive conduct, including formation of intimate relationships. He contrasts this approach, and its capacity to accommodate change and diversity, with substantive due process analysis, noting the latter's conservative role in preserving traditions in the realm of family and sexuality. C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 70-88 (1989); see also *infra* notes 636-40 and accompanying text.

notion that decisions are stamped with the characters of those who make them—in his own words, “an amorphous dummy unspotted by human emotions [is not] a becoming receptacle for judicial power.”⁴⁸³ As crafted by Justice McReynolds, the thrust of the new constitutional theory of child, parent, and state was deeply conservative, to sustain traditional patriarchal structures, and the property interests of schools and teachers, in a society threatened by radical social reform.⁴⁸⁴

1. *The Oregon School Law Dominates Oral Argument*

The fact that McReynolds was more interested in the upcoming challenge to the Oregon law than in the language laws at issue in *Meyer* is immediately evident from the transcript of the oral argument,⁴⁸⁵ in which Arthur F. Mullen appeared for Mr. Meyer.⁴⁸⁶ In his autobiography, entitled *Western Democrat*, Mullen reflected, with hindsight, on what was at stake:

[*Meyer* and *Bartels*] were popularly known as the Foreign Language Cases. As a matter of fact, this was a misnomer. They should have been called the Private School Cases or the Freedom of Education Cases: for upon them rested the right of every private school in the United States to operate and the right of every American citizen to direct the education of his child The fact that the laws enacted dealt with the question of teaching foreign languages was purely adventitious. They might as easily have dealt with the teaching of algebra or rhetoric.⁴⁸⁷

483. *Berger v. United States*, 255 U.S. 22, 43 (1921) (McReynolds, J., dissenting).

484. Should this description seem hyperbolic, note that among McReynolds's papers was a copy of Babson's Reports, July 3, 1933, linking the abrogation of the Gold Clause to the advance of communism and advising that children are the only safe form of personal wealth or financial security. Babson's Reports, *The Best Insurance*, Special Letter (July 3, 1933), in McREYNOLDS PAPERS, *supra* note 154.

485. 21 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 769-71 (Philip B. Kurland & Gerhard Casper eds., 1975). Apparently, there are no extant copies of the other arguments for Plaintiffs-in-Error. *Id.* at 761 n.*.

486. *Id.* at 761. Mullen was listed as one of the counsel for Nebraska District of Evangelical Lutheran Synod v. McKelvie, 262 U.S. 404, 408 (1923), a case joined with *Meyer* and seeking an injunction against enforcement of the Nebraska language law passed after the *Siman* law. See *Bartels v. Iowa*, 262 U.S. 404 (1923). The oral argument took place on Friday, Feb. 23, 1923, before the full Court. Oral Argument of Arthur F. Mullen on Behalf of the Plaintiff on Feb. 23, 1923, at 16, *Meyer* (No. 325), reprinted in 21 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES, *supra* note 485 [hereinafter *Meyer* Oral Argument].

487. MULLEN, *supra* note 62, at 209.

Chief Justice Taft and Justice McReynolds were by far Mullen's most active questioners.⁴⁸⁸ Following the lead of William Guthrie,⁴⁸⁹ Mullen drew the coming threat to private education into the foreground. He told the Justices,

Now, language prohibition arose in our legislature under these circumstances: It came immediately after the war, in the legislature of 1919. Early in that session a bill was introduced, and passed, through the house and was beaten by a vote of only one majority in the senate, that forbade absolutely, the maintenance of primary private schools in that State. . . . *That is the atmosphere under which the [language] act was passed.*⁴⁹⁰

Mullen went on to argue that the language law was an unconstitutional interference with religious liberty, although on questioning by Justices Holmes and Sutherland, he admitted that the parent retained the right to teach his child religion in the German language at home.⁴⁹¹ One of the Chief Justice's major concerns throughout the oral argument was pinning down which particular provision of the Constitution was being violated.⁴⁹² As Mullen was keenly aware, an 1845 precedent, *Permoli v. Municipality No. 1*,⁴⁹³ foreclosed any First Amendment argument by holding that the First Amendment did not apply to the states.⁴⁹⁴ Mr. Mullen therefore relied on the Fourteenth Amendment, arguing that the Fourteenth Amendment incorporates religious liberty,⁴⁹⁵ freedom of speech, and the liberty of "controlling [one's] own family."⁴⁹⁶ Justice McReynolds himself turned the argument back

488. See Meyer Oral Argument, *supra* note 486 (showing that Taft asked Mullen the most questions (22), with McReynolds next (19), followed at a distance by Brandeis (4), Holmes (3), Sutherland (3), and Van Devanter (3)).

489. See *supra* notes 432-41 and accompanying text.

490. Meyer Oral Argument, *supra* note 486, at 2.

491. *Id.* at 6.

492. *Id.* at 10.

493. 44 U.S. (3 How.) 589 (1845).

494. *Id.* at 609; MULLEN, *supra* note 62, at 222.

495. Meyer Oral Argument, *supra* note 486, at 12. At least one member of the Court apparently was considering incorporation of the religion clauses. At oral argument, the Chief Justice invited Mullen to assert a First Amendment incorporation claim, and Mullen did so, *id.*, but McReynolds's opinion ultimately did not rest on First Amendment grounds. See Meyer v. Nebraska, 262 U.S. 390 (1923) (shifting the focal issue to Fourteenth Amendment concerns).

496. Meyer Oral Argument, *supra* note 486, at 12. Hindsight may have sharpened Mullen's perceptions of the Court's openness to natural rights arguments. In his biography he claimed that he argued that the Fourteenth Amendment gave the Court the power to protect against "legislation hostile to the natural rights of man." MULLEN, *supra* note 62, at 223.

to the issue of the abolition of private schools.⁴⁹⁷ In fact, responding to McReynolds's obvious interest, Mullen devoted the most extensive, uninterrupted portion of his argument to this point.⁴⁹⁸ He vehemently denied "the power of a legislative majority to take the child from the parent," which he labeled the "principle of the soviet."⁴⁹⁹ If the oral argument tells us anything specific, it is that McReynolds was already preoccupied by the movement to abolish private schools.

2. *McReynolds's Opinion*

McReynolds's opinion skims lightly over the broad range of possible grounds before the Court for striking down the language law. Powerful pluralism and religious and intellectual liberty arguments were made, yet McReynolds focused primarily on the statute's interference with teachers' property rights⁵⁰⁰ and the rights of parents to control the activities of their children.⁵⁰¹ After repeating the Nebraska court's findings on the necessity for restricting German language instruction,⁵⁰² McReynolds framed the issue as whether the statute unreasonably infringed on liberty guaranteed by the Fourteenth Amendment.⁵⁰³

McReynolds began his analysis with an enumeration, in dicta, of concepts included under the term "liberty," adding to the list Justice Bradley began in his dissent in *The Slaughter-House Cases*,⁵⁰⁴ and Justice Beckham continued in *Allgeyer v. Louisiana*,⁵⁰⁵ new rights "to acquire useful knowledge, to marry, establish a home and bring up children."⁵⁰⁶ For authority,

497. *Meyer* Oral Argument, *supra* note 486, at 7 ("Mr. Justice McReynolds (interposing). How did they abolish private schools? Did the State prohibit private schools?").

498. *Id.* at 7-9.

499. *Id.* at 8.

500. *Meyer v. Nebraska*, 262 U.S. 390, 400-01 (1923) (describing the legislature's action as interfering with "the calling of modern language teachers").

501. *Id.*

502. *Id.* at 397-99.

503. *Id.* at 399.

504. 83 U.S. (16 Wall.) 36, 116, 122 (1872) (Bradley, J., dissenting). Justice Bradley identified the right to life, liberty, and property as including the right to pursue a chosen occupation. *Id.* at 116. He described a liberty interest and a property interest that combine to form complementary elements of this fundamental right. "[Citizens'] right of choice is a portion of their liberty; their occupation is their property." *Id.* at 122.

505. 165 U.S. 578, 591 (1897) (identifying a right to contract; to pursue an ordinary calling; and to acquire, hold, and sell property).

506. *Meyer*, 262 U.S. at 399.

[Liberty] denotes not merely freedom from bodily restraint but also the right

McReynolds cited a long line of precedents involving regulations burdening economic rights, challenged under either substantive due process or equal protection theories as deprivations of economic liberty or private property rights.⁵⁰⁷ None of the cited cases, however, provided any authority for a parental right to control the child, save by analogy to other models of private ownership.

McReynolds continued by noting that "corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life."⁵⁰⁸ The opinion held that because mere knowledge of German was not harmful, the teacher's right to pursue his occupation and the parents' right to engage him in the instruction of their children were within the liberty of the Amendment.⁵⁰⁹ Noting that the statutory ban at issue applied to all modern languages other than English, McReynolds concluded that it was an interference with "the calling of modern language teachers, with the opportunities of

of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id.

507. *Id.* The cited cases include, among others, *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (invalidating minimum wage laws as an infringement on one's liberty to contract); *Truax v. Corrigan*, 257 U.S. 312 (1921) (invalidating restrictions on injunctions in labor disputes without due process); *Adams v. Tanner*, 244 U.S. 590 (1917) (striking down the regulation of employment agencies); *Truax v. Raich*, 239 U.S. 33 (1915) (invalidating a prohibition on employing aliens); *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating laws regulating bakers' work hours); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (upholding liberty to contract for insurance); *Minnesota v. Barber*, 136 U.S. 313 (1890) (striking down the regulation of meat sales); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (invalidating the regulation of laundry business); *The Slaughter-House Cases*, 83 U.S. (16 Wall) 36 (1873) (invalidating the regulation of the meat packing industry).

508. *Meyer*, 262 U.S. at 400. Socioeconomic class was and remains a common measure of levels of family obligations. See, e.g., BLACKSTONE'S COMMENTARIES, *supra* note 184, at 438-39 (stating that a parent must provide education suitable to station in life); HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 16.4 n.11 (2d ed. 1988) (stating that alimony award takes into account family's standard of living). O'Brien remarks that McReynolds's statement relating education to one's station in life "indicated McReynolds' recognition of a basic inequality in social attitudes in America which permitted different types of educational facilities for people in varying walks of life." O'Brien, *supra* note 18, at 164. In view of McReynolds's background and known elitist prejudices, one could safely conjecture that the statement represented *approval* of such social stratification and the class distinctions that private education served to perpetuate.

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

pupils to acquire knowledge, and with the power of parents to control the education of their own."⁵¹⁰

The dramatic focal point of the opinion, however, is the specter of communal ownership of wives and children in the Ideal Commonwealth of Plato and in the Spartan City-State.⁵¹¹ This image, most likely inspired by the Guthrie amicus brief,⁵¹² seems a far more appropriate response to the prospect of forcing all children into universal common schools than to the relatively limited requirement that private schools teach in English.⁵¹³ McReynolds wrote:

For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: "That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. . . . The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be." In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians.⁵¹⁴

Both Plato's *Commonwealth* and Sparta⁵¹⁵ advocated taking the child from its parents and placing it in the hands of the state.

510. *Id.* at 401.

511. *Id.*

512. See *supra* note 440 and accompanying text (discussing the possible influence of the brief on McReynolds's opinion).

513. See *Meyer*, 262 U.S. at 401-02 (discussing the common rearing of children advocated by Plato). One writer has described this as "an hysterical interlude in an otherwise rational argument." Laura K. Ray, *The Figure in the Judicial Carpet: Images of Family and State in Supreme Court Opinions*, 37 J. LEGAL EDUC. 331, 344 (1987); see also MAX LERNER, *THE MIND AND FAITH OF JUSTICE HOLMES* 319 (1943) ("From the Iowa and Nebraska of the postwar years to Platonic communism seems a far cry . . ."); O'Brien, *supra* note 18, at 164 (finding this comparison of Plato's *Republic* to the language laws "somewhat erroneous"). The discontinuity is easily understood once one recognizes that the real subject of discussion was the Oregon school law. Guthrie suggested the Plato analogy in the context of the laws on compulsory public education, with their avowed goal of forcibly mixing native and immigrant, rich and poor to create the "true American." See *supra* notes 83-88. The analogy is strained in cases in which the state merely prescribed the language of instruction in an otherwise private religious school.

514. *Meyer*, 262 U.S. at 401-02.

515. The analogy to Sparta does not appear in the Guthrie Brief, though it may have

In what may be taken as a reference to Plato (and, with some irony, to the Marxist theorists), McReynolds noted that "[a]lthough such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest."⁵¹⁶

The modern reader easily assumes that the "individual" to whom McReynolds referred is the child. This is one plausible reading. It is important to understand, however, that many of McReynolds's contemporaries, more accustomed to thinking of children as belonging to parents than as individuals having a direct relationship with government, interpreted the individual whose rights McReynolds meant to vindicate as the parent. They read the analogy to Plato as an oblique reference to nationalization of children, as of every form of private asset, under communism. They viewed the decisions in *Meyer* and *Pierce* as, above all, championing the individual's right to control his own—free from government interference.⁵¹⁷ McReynolds's defense of the privatized family and flat rejection of public control of child-rearing as "wholly different"⁵¹⁸ from American institutions were all the more ardent and categorical, because they denied present reality. By 1923, the family citadel was crumbling under assaults from common schooling, child welfare, juvenile justice, child labor laws, and a host of government assumptions of paternal prerogatives designed to standardize child-rearing and make it responsive to community values.⁵¹⁹

been suggested by the reference to Plato. Guthrie Amicus Brief, *supra* note 85, at 3. The Sparta analogy had occurred as well to an editor of the *New York Times* in November, 1922, who charged that the Oregon school law mirrored "the Spartan communism of the tribe in bringing up the youth at the public table." *An Oregon Venture*, N.Y. TIMES, Nov. 12, 1922, at 6.

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

517. See, e.g., Arthur Dean, *A Point of View*, 27 INDUS. EDUC. MAG. 37-38 (1925) (hailing *Pierce* as establishing that "children belong primarily to parents and only to a limited extent to State"); Jorgenson, *supra* note 38, at 456 & n.28 (quoting an article in a local Omaha newspaper stating that "Supreme Court . . . held that children are not wards of the State"); *School Laws and Parental Rights*, CATH. WORLD, July, 1923, at 551, 552-53 (italicizing references in *Meyer* to parental rights and individual rights and stating that the opinion vindicates "especially the parents' right to control the education of their children"); *The Oregon School Law*, *supra* note 106, at 18 (stating that invalidating the Oregon law would "have its greatest value in protecting the parental right against a socialistic invasion"); *An Oregon Venture*, *supra* note 515, at 6 (characterizing the Oregon law as adopting Spartan communism and making the child a compulsory ward of state).

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

519. See, e.g., MINTZ & KELLOGG, *supra* note 181, at 119-31 (noting changes in family law, child welfare, and maternal health care); Minow, *supra* note 197, at 832, 881.

McReynolds's opinion largely neglected the religious liberty and intellectual freedom arguments developed at oral argument.⁵²⁰ The rights of children received passing mention in dicta.⁵²¹ Overall, McReynolds's opinion may be seen as voicing, in a more sophisticated form, the question asked by the Oregon school law opposition pamphlets: "Who Owns Your Child?"⁵²² The answer is clear—the parent. The parent's right to control the child was a fundamental right protected from state infringement by the Fourteenth Amendment.⁵²³ In reaching this conclusion, McReynolds ignored contrary precedents such as *Wadleigh v. Newhall*⁵²⁴ and *Mercein v. People*.⁵²⁵ Instead, he threw the weight of the Court against the movement, inaugurated in the nineteenth century, toward conceptualizing the relation of child, parent, and state as a triangular arrangement instituted and regulated by the state for protection of the child. Much less did he concede the Progressive vision of the child as public resource and public ward, entitled both to make claims upon the community and to be claimed by the community.⁵²⁶ In McReynolds's view, parental control of the child, like private ownership of property, was not a feature of social organization that might be tampered with in the name of reform. Like a man's right to his own labor, his freedom to contract, and his right to the child's labor—all protected properties and economic liberties under the Due Process Clause—the child itself began to resemble "an isolated *human* property, largely beyond the domain of social control."⁵²⁷

520. See *supra* note 495 (discussing Taft's questions regarding incorporation of the religion clauses).

521. *Meyer* mentions such rights only once. *Meyer*, 262 U.S. at 401. The New York Times nevertheless characterized the opinion, in part, as deciding that "pupils have [a] constitutional right to be taught [modern languages]." *Ends 21 States' Ban on Foreign Tongues*, N.Y. TIMES, June 4, 1923, at 1.

522. See Appendix to Brief on Behalf of Appellee at 26, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (No. 583) (arguing it is the parent, not the state); *Oregon's Outlawing of Church Schools*, LITERARY DIG., Jan. 6, 1923, at 34 (asking "Whose is the Child?"); cf. Boyd, *supra* note 257, at 43 (posing question in context of mothers' versus fathers' rights).

523. See *supra* notes 496-99 and accompanying text (discussing parental control of children).

524. 136 F. 941 (N.D. Cal. 1905).

525. 25 Wend. 64 (N.Y. 1840).

526. See *supra* notes 180-202, 291-301 and accompanying text.

527. WOOD, *supra* note 324, at 106 (emphasis added) (commenting on the opinion of the lower court striking down the child labor law in *Hammer v. Dagenhart*, 247 U.S. 251 (1918)).

C. Oliver Wendell Holmes, Jr.: "One of the Best Liberals"⁵²⁸

Justice Holmes, joined by Justice Sutherland,⁵²⁹ dissented from the majority opinions in *Meyer* and *Bartels v. Iowa*.⁵³⁰ Holmes framed the issue more narrowly than McReynolds: "The only question is whether the means adopted [to promote a common tongue] deprive teachers of the liberty secured to them by the Fourteenth Amendment."⁵³¹ In Holmes's view, the liberty at stake was not the parent's liberty interest in controlling the child, but the schools' and teachers' economic interests in conducting activities that the state sought to regulate, and perhaps the scholars' liberty interest in studying a modern language in the elementary grades.⁵³² Holmes wrote:

It is with hesitation and unwillingness that I differ from my brethren with regard to a law like this [I]f there are sections in the state where a child would hear only Polish or French or German spoken at home I am not prepared to say

528. *The Week*, THE NEW REPUBLIC, June 13, 1923, at 57.

529. *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (Holmes, J., dissenting). Sutherland's concurrence in Holmes's dissenting opinion is perplexing. Later in his career, as one of the "Four Horsemen," he was far from deferential to legislative reform. But he was also a Westerner, a senator from Utah, a strong proponent of states' rights, and wary of federalization of local problems. His biographer remarked, "Sutherland had substantial basis in his own experience for this [wariness]. Conditions in Utah could not be duplicated anywhere else in the world. For example, it was exceedingly difficult, if not impossible, for outsiders to know just how to dispose of the problem of polygamy." JOEL F. PASCHAL, MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE 138 (Greenwood Press 1969) (1951).

Sutherland's concerns about federalizing sensitive local issues were surely heightened during oral argument. Justice Sutherland queried whether a right to teach particular religions in school existed. *Meyer* Oral Argument, *supra* note 486, at 13. Mullen replied that it did in private schools, unless the religion included something "wrong," such as polygamy. *Id.* This may have been an unfortunate misstep because Sutherland, the former senator from Utah, had bravely defended Mormon moral and religious integrity. See, e.g., *Polygamy: Hearing Before the Subcomm. No. 1 of the Comm. on Judiciary*, 57 Cong., 2d Sess. (1903) (draft of statement of George Sutherland), in SUTHERLAND PAPERS, *supra* note 396; PASCHAL, *supra*, at 51-53. Perhaps Sutherland, like defenders of minority religions today, concluded that it was better to eschew entirely constitutional protection than to have First Amendment protection that favored dominant religions and excluded unusual or unpopular practices. One Sutherland correspondent, however, assumed the Justice had a less tolerant, anti-Catholic motive. The President of the Idaho State Board of Education wrote to congratulate Sutherland on his *Meyer* vote. He lamented that "the 'K.C.' have won," and noted gloomily that "Oregon is beginning 'literally to sweat blood.'" Letter from Irwin E. Rockwell to Justice Sutherland (July 12, 1923), in SUTHERLAND PAPERS, *supra* note 396.

530. 262 U.S. 404, 412 (1923).

531. *Id.* (Holmes, J., dissenting).

532. *Id.* (stating that "if it is reasonable, it is not an undue restriction of the liberty of either teacher or scholar").

that it is unreasonable to provide that in his early years he shall hear and speak only English at school I think I appreciate the objection to the law but it appears to me to present a question upon which men reasonably might differ and therefore I am unable to say that the Constitution of the United States prevents the experiment being tried.⁵³³

Holmes's vote in *Meyer* aroused considerable consternation in those who viewed Holmes as a "liberal" and his dissent in *Meyer* as a deviation from the path of the angels.⁵³⁴ Immediately after the case was handed down, an editorial in the magazine *The New Republic* remarked, "We are sorry that one of the best liberals in the Court, Mr. Justice Holmes, found himself compelled to dissent."⁵³⁵ To Holmes, however, the case did not present a civil liberties issue. It was essentially a liberty of contract case, raising the familiar questions regarding legislative power to establish social and economic policy free from judicial interference. Holmes's dissent was a return volley to McReynolds's invocation of the individualistic perspective, a familiar move in the game of laissez-faire constitutionalism. Invoking individual economic rights—and especially property rights, as illustrated in McReynolds's citations to the *Allgeyer v. Louisiana*⁵³⁶ line of cases⁵³⁷—had long been a conservative tactic for overriding majority reforms that encroached on traditional prerogatives. Holmes proved consistent: government could restrict men's freedom to deploy their assets and energies as long as some explicit constitutional command did not forbid the end and as long as the means was not unreasonable.

In fact, despite his reputation in liberal circles, Holmes was not really a liberal.⁵³⁸ In Holmes's view, the Constitution from

533. *Id.*

534. It continues to arouse consternation among legal historians and biographers. See, e.g., RODELL, *supra* note 10, at 205 (noting *Meyer* as Holmes's most "illiberal" vote); Ross, *supra* note 10, at 184-85 & nn.338-43 (stating that *Meyer* vies for the honor of "most illiberal" Holmes's vote). Compare SAMUEL J. KANEFSKY, *THE LEGACY OF HOLMES AND BRANDEIS* 258 (1956) (debating whether Holmes's vote was reactionary or merely consistent with his respect for legislative power) with LERNER, *supra* note 513, at 318-19 (discussing Holmes's dissent as consistent with his respect for legislative power and wariness of judicial review).

535. *The Week*, *supra* note 528, at 57.

536. 165 U.S. 578 (1897).

537. See *supra* note 507 and accompanying text (discussing McReynolds's references to cases involving Fourteenth Amendment challenges to liberty and property rights).

538. To do justice to the enormous body of writings dissecting Holmes's life and jurisprudence would be impossible. Few scholars, however, would now be comfortable with *The New Republic's* description of Holmes as one of the Court's best liberals. *The*

which he derived his power as a judge established law-making as a function of legislative will. He therefore dissented when the Constitution was used to nullify the majority will. During Holmes's tenure, the majority will often took the form of progressive social reforms, frustrated by conservative courts.⁵³⁹ Holmes, the dissenter, became known by the enemies he kept. Had he sat on the Court during a period in which conservatism dominated the legislatures and liberalism the courts, he doubtless would have been known as the enemy and not the friend of liberalism.⁵⁴⁰

With respect to free speech, however, Holmes was relatively libertarian, if not liberal. One of Holmes's most famous quotes explains his philosophy:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market That at any rate is the theory of our Constitution.⁵⁴¹

Holmes drew the line of deference to the majority at laws which unduly impaired the First Amendment free flow of ideas upon which democratic government rested.⁵⁴² Thus, Holmes joined the Court in *Bohning v. Ohio*,⁵⁴³ the companion case to *Meyer and Bartels*, striking down the Ohio law that singled out only the German language for prohibition. To suppress German alone was not reasonably related to insuring fluency in English, and it

Week, *supra* note 528, at 57. Various definitions of "liberal" (then as now) included favoring progress or reform; favoring the freedom of individuals to act or express themselves in a manner of their own choosing; and being tolerant of others' views. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1303 (1986); see also *supra* note 9. It is unclear that Holmes was any of these. See *infra* notes 544-57 and accompanying text.

539. See, e.g., MINTZ & KELLOGG, *supra* note 181, at 119-31.

540. See Yosai Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 254 (1963) (reviewing Holmes's votes, attempting to show Holmes's indifference to claims of civil liberties). Indeed, some of Holmes's opinions are far from liberal. See, e.g., *Buck v. Bell*, 274 U.S. 200, 205-08 (1927) (upholding sterilization of the mentally retarded); *Bailey v. Alabama*, 219 U.S. 219, 245 (1911) (Holmes, J., dissenting) (stating that he would have upheld a peonage contract).

541. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

542. See *Gitlow v. New York*, 268 U.S. 652 (1925) (Holmes, J., dissenting) (disagreeing with majority's decision sustaining law that prohibited speech advocating anarchy without applying clear and present danger test); *Schenck v. United States*, 249 U.S. 47 (1919) (holding speech may be prohibited if it presents "clear and present danger").

543. 262 U.S. 404 (1923).

singled out a specific viewpoint, compromising the mechanics of democracy.

Holmes's dissent in *Meyer* should not be read to signify a lack of sympathy for the elite or for the traditional family. He was a confirmed Boston Brahmin, both by temperament and by heredity. If McReynolds's father was known as the Pope, Holmes's famous progenitor signed himself "The Autocrat of the Breakfast Table."⁵⁴⁴ Holmes, too, had been educated in private schools, and he attended, sat on the Board, and taught at Harvard.⁵⁴⁵ Holmes was no Populist or Progressive. He had scant faith in a harmony of class interests or the essential goodness of humans.⁵⁴⁶ He shared many of the elitist enthusiasms and class prejudices of his time, including an admiration for Spencer's *Social Statics* and a Darwinist disdain for the lower classes.⁵⁴⁷ Unlike many of his peers, however, he was skeptical both of natural law and of other absolute truths.⁵⁴⁸ According to Holmes, it was the duty of the

544. On Holmes's patrician roots and education, see, for example GARY J. AICHELE, OLIVER WENDELL HOLMES, JR., SOLDIER, SCHOLAR, JUDGE 1-36 (1989); MARK D. HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS, 1841-1870, at 1-79 (1957) [hereinafter SHAPING YEARS]. "Autocrat of the Breakfast-Table" was the title of a collection of sketches by the elder Oliver Wendell Holmes. See AICHELE, *supra*, at 16.

545. See MARK D. HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS, 1870-1882, 257 (1963) [hereinafter PROVING YEARS]. Holmes was married for 57 years to the daughter of his prep school headmaster. AICHELE, *supra* note 544, at 167-70.

546. See AICHELE, *supra* note 544, at 143.

547. See, e.g., *id.* at 143 (noting Holmes's confession that Progressives made him "puke"); 1 HOLMES-POLLACK LETTERS 122 (Mark D. Howe ed. 1941) (Holmes dismisses socialism as "drool"); SHAPING YEARS, *supra* note 544, at 140 (quoting Holmes: "I loathe the thick-fingered clowns we call the people."); SHAPING YEARS, *supra* note 544, at 156 (indicating Holmes' admiration for Spencer and Darwin); Oliver W. Holmes, *Law and Social Reform*, reprinted in LERNER, *supra* note 513, at 399-400 (dismissing dreams of economic paradise through redistribution of property as "twaddle"); Oliver W. Holmes, *Law and the Court*, Speech given at a dinner of the Harvard Law School Association of N.Y. (Feb. 15, 1913), reprinted in LERNER, *supra* note 513, at 387, 391 [hereinafter *Law and the Court*] (defending capitalism).

548. Philippa Strum contrasted Holmes's skepticism about the possibility of judging the goodness or badness of a law with Brandeis's belief in absolute truths, including human educability and human dignity. Philippa Strum, *Brandeis and the Living Constitution*, in BRANDEIS AND AMERICA 126-29 (Nelson L. Dawson, ed., 1989). The difference of philosophy may explain their differing approaches to *Meyer*. Holmes was disappointed that Brandeis did not join his dissent in *Meyer*, as both Justices shared a distrust of Fourteenth Amendment substantive due process. STRUM, *supra* note 482, at 322, 465-66 nn. 29-30. Even more than Holmes, Brandeis consistently defended the power of the state to protect health, safety, and morals, and promote the public good against claims that such regulation abrogated due process liberties or confiscated private property. See Natalie Wexler, "The Prophet Stumbles": Brandeis, the Bill of Rights, and Prohibition, 13 CARDOZO L. REV. 1355, 1359-60 (1991). But Brandeis viewed *Meyer* as a free speech case. See *supra* note 482. For Brandeis, speech was an end in itself, but for Holmes speech

judge to be skeptical of his own views and to remember that "what seem to him to be first principles are believed by half his fellow men to be wrong."⁵⁴⁹

Perhaps Holmes's Civil War experiences contributed to his skeptic's philosophy. He volunteered at eighteen as an ardent abolitionist; distinguished himself in battle; and was wounded three times, each time returning to the front.⁵⁵⁰ He saw all his comrades die.⁵⁵¹ One gathers from his letters and writings that he left his faith in deathless truths on the battlefield, and took away a profound respect for the truth of force and for intellectual and physical valor.⁵⁵² One faith, perhaps also bred by war, Holmes shared with the Populists. He had concluded that evolution through the democratic process was the Constitution's antidote to class warfare. Said Holmes, we must "learn to transcend our own convictions and to leave room for much that we hold dear to be done away with short of revolution by the orderly change of law."⁵⁵³ In *Gitlow v. New York*,⁵⁵⁴ Holmes reasoned, "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces in the community, the only meaning of free speech is that they should be given their chance and have their way."⁵⁵⁵ Truth, if such a thing existed, was to be found in the imperatives of dominant social forces, not in any immutable principle.

At the time of the *Meyer* and *Pierce* decisions, Holmes had already spoken to the issue of the state and the family in a 1918 piece called *Natural Law*.⁵⁵⁶ In this article, Holmes speculated about the future of familiar institutions:

The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar

was the means to determine in a democracy what opinions shall become law. This difference led Brandeis to see the First Amendment as a positive command to protect speech when Holmes saw it as a negative duty not to interfere unnecessarily. Strum, *supra*, at 126-29. If the value of free speech was not absolute or intrinsic but relative to its utility to democratic debate, then Nebraska was not unreasonable, in Holmes's view, in requiring that citizens speak a common language.

549. Holmes, *Law and the Court*, *supra* note 547, at 387, 390.

550. See AICHELE, *supra* note 544, at 55-66.

551. *Id.*

552. For Holmes's Civil War experiences, see AICHELE, *id.* at Chs. 3 & 4, and SHAPING YEARS, *supra* note 544, at 140-45, 170, 175.

553. Holmes, *Law and the Court*, *supra* note 547, at 390.

554. 268 U.S. 652 (1925).

555. *Id.* at 673 (Holmes, J., dissenting).

556. Oliver W. Holmes, *Natural Law*, 32 HARV. L. REV. 40 (1918).

and accepted by them and their neighbors as something that must be accepted by all men everywhere. No doubt it is true that, so far as we can see ahead, some arrangements and the rudiments of familiar institutions seem to be necessary elements in any society that may spring from our own and that would seem to us to be civilized—some form of permanent association between the sexes—some residue of property individually owned—some mode of binding oneself to specified future conduct—at the bottom of all, some protection for the person. But without speculating whether a group is imaginable in which all but the last of these might disappear and the last be subject to qualifications that most of us would abhor, the question remains as to the *Ought* of natural law.⁵⁵⁷

Holmes concluded that attachment to these institutions was based purely on social habits and the willingness to fight to enforce them, not on any preexisting right. It would be remarkable for a man who contemplated with equanimity the death of marriage, property, and contract to find an immutable Fourteenth Amendment liberty interest in parental control of the child's education.

If Holmes had nothing to say about Plato's *Republic*, it was not out of ignorance. In 1860, as a nineteen-year-old Harvard senior, Holmes was awarded the *University Quarterly* prize for his essay entitled *Plato*.⁵⁵⁸ The philosopher did not come away unscathed. Referring to Plato's *Republic*, Holmes painted Plato as "laboring as vainly as one who should endeavor to find the successive actual positions of the moon from [imperfect] mathematical knowledge."⁵⁵⁹ But young Holmes's admiration for Plato, and for Plato's intellectual valor in the face of uncertainty, is clear:

[T]o see a really great and humane spirit fighting the same fights with ourselves, and always preserving an ideal faith and a manly and heroic conduct; doubly recommended, moreover, to our hearts by the fact of his having only himself to rely on, and no accepted faith that killed a doubt it did not answer . . . fills my heart with love and reverence at one of the grandest sights the world can boast.⁵⁶⁰

557. *Id.* at 41.

558. Oliver W. Holmes, *Plato*, reprinted in Michael H. Hoffheimer, *The Early Critical and Philosophical Writings of Justice Holmes*, 30 B.C. L. REV. 1224, 1260-73 (1989).

559. *Id.* at 1272.

560. *Id.* at 1272-73. Contemporaries interpreted this as a rejection of orthodox religion. *Id.* at 1231.

Holmes returned often to Plato, albeit no longer "expecting to find the secrets of life revealed," as he had at seventeen.⁵⁶¹ We find a sadder and older Holmes revisiting Plato in 1863, while recovering from a war wound,⁵⁶² and again in 1924, in the interim between the *Meyer* and *Pierce* decisions.⁵⁶³ When Franklin D. Roosevelt visited the retired Justice in 1933, he found Holmes reading. "Why do you read Plato, Mr. Justice?" he inquired.⁵⁶⁴ "To improve my mind," the ninety-two-year-old Holmes replied.⁵⁶⁵ What did Holmes make of McReynolds's negative invocation of his old friend? Surely Holmes would have said, if Plato's genius could persuade the dominant social forces of Nebraska to his views, "he should be given his chance and have his way."⁵⁶⁶

D. Meyer's Aftermath

Perhaps the most immediate repercussions from *Meyer* were felt in Hawaii. The Japanese community had established 147 foreign language schools in the territory employing 300 teachers and serving 20,000 pupils.⁵⁶⁷ In the early 1920's, the Hawaii Legislature passed laws regulating these schools and requiring that students complete the third grade before entering a foreign language school. After *Meyer*, a federal court entered an injunction against these laws. In *Farrington v. Tokushige*,⁵⁶⁸ the Supreme Court, with McReynolds once again authoring the majority opinion, upheld the injunction, applying the reasoning of *Meyer* to the Fifth Amendment context of territorial regulation.⁵⁶⁹

Scholarly commentary on *Meyer* was divided. Many legal periodicals merely commented on the new "right" without discussion.⁵⁷⁰ A note in the *Michigan Law Review*, however, criticized "[t]he majority opinion, with its vague allusions to 'fundamental rights' and 'traditions of freedom'" as an unwelcome return to

561. Letter from Holmes to Learned Hand (May 8, 1924), reprinted in SHAPING YEARS, *supra* note 544, at 54 & n.30.

562. SHAPING YEARS, *supra* note 544, at 156.

563. See Letter from Holmes to Learned Hand, *supra* note 561.

564. AICHELE, *supra* note 544, at 159.

565. *Id.*

566. See *supra* note 555 and accompanying text.

567. O'Brien, *supra* note 18, at 170.

568. 273 U.S. 284 (1927).

569. *Id.* at 298-99.

570. See, e.g., *Constitutional Law—Due Process of Law—Statutes Prohibiting Teaching of Foreign Languages*, 37 HARV. L. REV. 151 (1923); Note, *Constitutional Law—Schools—Constitutionality of Statute Requiring Attendance at Public Schools*, 10 MINN. L. REV. 63 (1925).

individualism.⁵⁷¹ Several noted educators, including Ellwood Cubberly of Stanford University and I.N. Edwards of University of Chicago, also reacted with alarm to the Supreme Court's use of its Fourteenth Amendment powers to reverse an important and widely supported educational policy.⁵⁷² These critics, like Holmes, questioned the appropriateness of the Court substituting its judgment in educational matters for the judgment of local officials, educators, and the electorate. They argued that the critical importance of education to the welfare of the state traditionally justified wide latitude under the police power, first in compelling parents to forego their children's labor in the farm or factory and later in setting uniform curricular requirements conducive to good citizenship.⁵⁷³

Viewed in this perspective, with an awareness of the politics of language in education and assimilation of the immigrant into American society and with an eye alert to the influence of the Oregon school law, *Meyer* is less simple than it at first appears. The legislation at issue in *Meyer* involved a popular social experiment, adopted by more than half of the states through orderly legislative process,⁵⁷⁴ that still failed to meet with the approval of a majority of the Justices.⁵⁷⁵ It concerned pluralism and intellectual freedom, but it also concerned private property, class, and traditional institutions threatened by change. As in *Lochner*,⁵⁷⁶ the Justices' arsenal for confronting the novel and shocking was the Due Process Clause and the discovery of a "liberty" that seems closer to the Thirteenth than the Fourteenth Amendment.⁵⁷⁷

571. John P. Dawson, *Constitutional Law—"Liberty" Under Fourteenth Amendment—Validity of Foreign Languages Statutes*, 22 MICH. L. REV. 248, 251 (1923). "Individualism" refers to individual rights of property and liberty outweighing societal interests, and was formerly a code word to describe the Court's laissez-faire constitutionalism. See, e.g., DEWEY, *supra* note 9, at 33.

572. See I.N. Edwards, *The Legal Status of Foreign Languages in the Schools*, ELEMENTARY SCH. J., Dec. 1923, at 270-78 [hereinafter Edwards, *Legal Status*] (disapproving Nebraska's total prohibition but wary of Court's power); I.N. Edwards, *State Educational Policy and the Supreme Court of the United States*, ELEMENTARY SCH. J., Sept. 1925, at 22 [hereinafter Edwards, *State Educational Policy*]; O'Brien, *supra* note 18, at 165 & n.21, 166 & n.22 (citing comments of Ellwood Cubberly, Dean of Stanford University School of Education).

573. See, e.g., *Legal Status*, *supra* note 572.

574. See *supra* notes 19-20 and accompanying text.

575. *Id.* at 403.

576. *Lochner v. New York*, 198 U.S. 45 (1905).

577. In both *Lochner* and *Meyer*, liberty became a yoke. *Lochner* vindicated a baker's "liberty" to work unrestricted hours in unhealthy conditions, *Lochner*, 198 U.S. at 53

The decision touched on an area of rapidly changing social realities. Relations of parent and child to each other and to the family, and of the family to the state were as much a zone of social ferment as relations between capital and labor, and employer and employee. *Meyer* elevated into constitutional doctrine a particular notion of those relations, grounded in patriarchal traditions that had acquired the force of natural law in the opinions of a majority of the Justices. As Edwin S. Corwin remarked, commenting on the Supreme Court's elastic construction of "liberty" in the 1920's, "what 'due process of law' means today in relation to state legislative power is the approval of the Supreme Court."⁵⁷⁸

VII. THE OREGON LAW GOES TO COURT IN *PIERCE v. SOCIETY OF SISTERS*: A SEQUEL AND ANTICLIMAX

The newly minted parental right of control, of course, took center stage in the briefs for *Pierce v. Society of Sisters*⁵⁷⁹ in 1925. Now that the challenge to the Oregon school law was

(Harlan, J., dissenting); in *Meyer*, the Court vindicated the "liberty" to control another human being, see *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) ("Under the doctrine of *Meyer* . . . we think it entirely plain that [the challenged law] unreasonably interferes with the liberty of parents . . . to direct the upbringing and education of children under their control.").

578. EDWIN S. CORWIN, *THE TWILIGHT OF THE SUPREME COURT* 89 (1934).

579. 268 U.S. 510 (1925). A federal district court in Oregon invalidated the Oregon law in 1924. *Society of Sisters v. Pierce*, 296 F. 928 (D.C. Or. 1924); see also *Wiping Out Oregon's School Law*, *supra* note 103, at 33. In addition to briefs for the parties, amicus briefs were filed by the American Jewish Committee, the Episcopal Church, and the Seventh Day Adventists. See Brief for American Jewish Committee, *Pierce* (No. 584); Brief by William A. Williams as Amicus Curiae, *Pierce* (No. 583); Brief Amici Curiae on Behalf of the Domestic and Foreign Missionary Society of the Protestant Episcopal Church, *Pierce* (Nos. 583, 584). The Society of Sisters and Amici argued, in addition to the substantive due process claims drawn from *Meyer*, that the law burdened free exercise of religion. Of course, whether the First Amendment of the Constitution placed restraints on state action was then open to question and was denied strenuously by Oregon. Brief for Appellant Isaac H. Van Winkle at 34, *Pierce* (No. 583). *Meyer*, in dicta, had identified religious freedom as an aspect of Fourteenth Amendment liberty, yet the holding rested on property and parental interests. See *Meyer v. Nebraska*, 262 U.S. 390, 399, 400 (1923). The doctrine of incorporation, which looks to specific constitutional provisions to give content to due process, made its debut in *Gitlow v. New York*, 268 U.S. 652, 666 (1925), only a week after *Pierce* was handed down. See Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 455 (1926) (decrying this expansion of federal power). *Gitlow*, however, had been briefed, argued, and presumably, voted upon before *Pierce*, clearing the way for a narrower First Amendment holding in *Pierce*. The Court apparently chose to build on *McReynolds*'s earlier opinion. See Ross, *supra* note 10, at 188-98, for a discussion of the role of *Meyer* in the development of incorporation theory.

actually before the Court, the parties hotly debated the question of who owned the child. Both sides mustered famous names and formidable legal talent. Governor Walter M. Pierce enlisted former senator and two-time Oregon governor George E. Chamberlain to brief and argue his case.⁵⁸⁰ "[T]hat constitutional lawyer of national fame,"⁵⁸¹ William Dameron Guthrie, was now in the front lines, heading one of two teams of lawyers for the Society of Sisters and taking the lead at oral argument.⁵⁸² He now enjoyed the advantage of arguing his own analogy to Plato, first drawn in his *Meyer* amicus brief, as an account of American constitutional values that had been endorsed by seven members of the Court.⁵⁸³

Controversy centered on constitutional jurisdiction, the nature and scope of parental and states' rights in children, and the purpose, wisdom, and efficacy of the universal common schooling law. Pierce conceded that parental rights existed and were protected by the state, but only as "legal restraints" on the child's liberty and not as liberties of the parent.⁵⁸⁴ Parents' rights were subject to the child's and the public's welfare. As neither property nor liberty interests, parents' rights did not fall within the scope of the Due Process Clause. Pierce recited the many cases, including *Hammer v. Dagenhart*,⁵⁸⁵ holding that states had exclusive jurisdiction over domestic relations.⁵⁸⁶

580. *Pierce*, 268 U.S. at 521. Chamberlain was a friend and confidant of Theodore Roosevelt, scrupulously honest, a conservationist, and famous for taking nonpartisan stands. BURTON, *supra* note 90, at 27, 42, 30 & n.38; JOHANSEN & GALTZ, *supra* note 147, at 459-60.

581. Burgess, *supra* note 422, at 12.

582. *Pierce*, 268 U.S. at 513; *The Oregon School Law in Court*, LITERARY DIG., Apr. 18, 1925, at 32; *Oregon School Law Before High Court*, N.Y. TIMES, Mar. 17, 1925, at 23. In addition to Chamberlain appearing for Pierce, Willis S. Moore, Assistant Attorney General argued for the State of Oregon. *Id.* The case was argued on March 16 and 17. Holmes was not present on either day, but Taft asked leave to "vouch him in" so he could participate in the decision. Stone was absent on the second day. Record at 444, 475, *Pierce* (No. 583); see also *Conclude Arguments on Oregon School Law*, N.Y. TIMES, Mar. 18, 1925, at 2.

583. See *Pierce*, 268 U.S. at 518.

584. Supplement to Brief for Appellant, the Governor of the State of Oregon, at 8, *Pierce* (No. 583).

585. 247 U.S. 251 (1918).

586. See Brief for Appellant, the Governor of the State of Oregon, at 41-45, 47-53, *Pierce* (No. 583); Supplement to Brief for Appellant, the Governor of the State of Oregon, at 8, *Pierce* (No. 583). The brief cites *Andrews v. Andrews*, 188 U.S. 14 (1903), to illustrate how the Court, in the past, had declined to use the Constitution to deprive states of power over domestic relations, reasoning that this would leave a vacuum of power, because the federal government had no authority in these areas. Supplement to Brief for

Guthrie, referencing Plato and *Meyer*, countered that parents' rights of control were constitutionally protected and essential to American conceptions of liberty.⁵⁸⁷

What were the origins and scope of such rights? In addition to the powerful stare decisis effect of *Meyer*,⁵⁸⁸ the brief for the Society of Sisters asserted a higher authority: "[P]atriarchal government was established by the Most High [and] rests on foundations far more sacred than the institutions of man."⁵⁸⁹ Guthrie told the Court, in a peroration that also linked the Oregon law with Plato, communistic Russia, and the Leopold and Loeb murder,⁵⁹⁰ that "reflection" should convince it that parental rights are the "very essence" of liberty.

Children are, in the end, what men and women live for. Through them parents realize, as it were, a measure of immortality. . . . All that we missed, lost, failed of, our children may have, do, accomplish in fullest measure. . . . For them parents struggle and amass property and put forth their greatest efforts and strive for an honored name. . . . In this day and under our civilization, the child of man is his parent's child and not the state's. Gone would be the most potent reason for women to be chaste and men to be continent, if it were otherwise.⁵⁹¹

Appellant, the Governor of the State of Oregon, at 9, *Pierce* (No. 583). This vacuum of power, of course, was precisely the conservative aim of dual federalism. See *supra* note 400 and accompanying text. Under *Hammer*, Congress must leave regulation of parent and child to the state, but under *Meyer*, the state could not reform traditional relations of parent and child without violating parents' federal constitutional rights. See *Meyer*, 262 U.S. at 400-03; *Hammer*, 247 U.S. at 276-77.

587. Guthrie Brief for Appellee, *supra* note 410, at 67, 70-71.

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

589. Brief by J.P. Kavanaugh for Appellee, at 36-41, *Pierce* (No. 583) [hereinafter Kavanaugh Brief for Appellee] (quoting from *Commonwealth v. Armstrong*, 1 Pa. L.J. 146, 149 (Q. Sess. Lycoming City. 1842)). References to scripture abound. See *id.* The law's opponents marshalled a few state cases and much argumentation about natural law and natural rights. See Guthrie Brief for Appellee, *supra* note 410, at 65-66. Guthrie cited only two legal authorities for parental rights. He relied instead on such authorities as Jules Simon's *L'Ecole*, Pufendorf's *Law of Nature and Nations*, and Taparelli's *Natural Law*. *Id.* at 66-71, 75.

590. *Id.* at 68-69. Leopold and Loeb were wealthy youths who murdered a neighborhood child for thrills. Supplement to Brief for Appellant, the Governor of the State of Oregon, at 13, *Pierce* (No. 583). Guthrie attributed their deed to lack of religious training, but *Pierce*, in his Supplemental Brief, delivered the parting shot: "The fact was that these young men had been educated in private schools." *Id.*

591. Guthrie Brief for Appellee, *supra* note 410, at 66-67. This is but one example of the role played by the rhetoric of ownership in the contest between state and parent waged in *Pierce*. See, e.g., *Meyer* Oral Argument, *supra* note 486, at 13 (reflecting

Subtle as well as clear-cut overtones of class and ownership were present in Guthrie's images. Children were viewed as instruments, not as separate persons. The very essence of liberty was to live through and survive in one's child, emotionally, socially, and materially.⁵⁹²

Each side accused the other of playing into the hands of Bolsheviks, Syndicalists, and Communists.⁵⁹³ Guthrie condemned the antireligious bias of the law, and Pierce rebutted by pointing to the enactment of a provision giving release time for religious education.⁵⁹⁴ The point of the law, he asserted, was to require public schooling in secular subjects, not to impinge on religious schooling in sectarian subjects. Arguing for Pierce, Chamberlain depicted the law as an engine of tolerance, democracy, and class harmony:

I feel that the average voter [supported the law] because it brought the child in contact and touch with rich and poor alike, and with those of different religious faiths, and taught him when he went out into the world to be tolerant of the

"philosophy of autocracy that the child belongs primarily to the state"); *Meyer Oral Argument*, *supra* note 486, at 31 (state in Oregon is not an autocrat but is people controlling their own affairs); Brief for Appellant, Isaac H. Van Winkle, *supra* note 579, at 31, *Pierce* (No. 583) (noting that a child "is not a chattel like pigs, chickens or furniture") (quoting *State v. Bailey*, 157 Ind. 324 (1901)); Kavanaugh Brief for Appellee, *supra* note 589, at 37 (stating that the "child is not a chattel" and that parents' natural right in children "transcends property"); see also *supra* notes 177-78 and accompanying text.

592. Modern Christian feminists would discern in this a Christological language of "confusion," in which the parent is seen as living through the child, reflecting a value system in which "all subordinates to the reigning patriarch are considered extensions of his identity." Rita N. Brock, *And a Little Child Will Lead Us: Christology and Child Abuse*, in *CHRISTIANITY, PATRIARCHY, AND ABUSE* (Joanne C. Brown & Carole R. Bohn eds., 1989).

593. *Id.* at 526; Brief for Appellant, the Governor of the State of Oregon, at 46, 61, 62, *Pierce* (No. 583); Supplement to Brief for Appellant, the Governor of the State of Oregon, at 10, *Pierce* (No. 583); Kavanaugh Brief for Appellee, *supra* note 589, at 35-36; Guthrie Brief for Appellee, *supra* note 410, at 67, 74-75.

594. See Oral Arguments of William D. Guthrie and J.P. Kavanaugh for the Appellee, and George E. Chamberlain for the Appellants on March 17, 1925 at 13, 17-18, *Pierce* (No. 583), reprinted in 23 *LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW* (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter *Pierce Oral Argument*]. Chamberlain's (and doubtless Pierce's) hostility to religious power showed in his frequent references to the "Cannons of the Church" and "ecclesiastical state." He accused these of telling parents what to do, in contrast to popular government, which is of their own choosing. As far as Chamberlain was concerned, Catholic parents' rights of control were not even implicated because the Church allowed them no control and required them to send their children to parochial schools. Brief for Appellant, the Governor of the State of Oregon, at 37-40, *Pierce* (No. 583); *Pierce Oral Argument*, *supra*, at 27-28, 33-34.

views of others, whether political, sectarian or otherwise. . . . It was adopted . . . not to Americanize particularly, but to democratize the children, and to cut out this social and group class feeling that exists when they attend any sectarian or private school.⁵⁹⁵

Guthrie called this a pretext and countered that local public schools could never serve as class melting pots because of the "natural" residential segregation of rich and poor and because "no force thusfar vouchsafed to man has ever been equal to the destruction or elimination of social distinctions."⁵⁹⁶

The battle over universal common schooling had already been won, however, in the sweeping language of *Meyer v. Nebraska*.⁵⁹⁷ On June 1, 1925, Justice McReynolds announced the opinion, this time for a unanimous Court. He repeated his reasoning in *Meyer* and expanded upon it further:

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.⁵⁹⁸

No Justices dissented.⁵⁹⁹ Perhaps Brandeis had persuaded Holmes that exclusive state control of all organs of education and the closing of all religious schools would be a frontal assault on the existence of an independent, informed electorate and on the constitutionally explicit rights of free speech. It was also an assault on a certain way of life. As the brief for Society of Sisters pointed out: "If the state can thus destroy the primary

595. *Pierce* Oral Argument, *supra* note 594, at 36.

596. Guthrie Brief for Appellee, *supra* note 410, at 62-63.

597. 262 U.S. 390 (1923).

598. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

599. An exchange of letters between Justice Sutherland and William H. Church of St. Albans, the National (Episcopal) Cathedral School for Boys, where Sutherland's grandson was a pupil, sheds some light on the Justices' positions. Church writes, "private school-masters throughout the country have been much heartened by the stand which the Supreme Court has taken on the Oregon School Law!" Letter from William H. Church to Justice George Sutherland (June 3, 1925), in *SUTHERLAND PAPERS*, *supra* note 396. Sutherland replied, "There was never any division of sentiment in the Court from the beginning." Letter from Justice George Sutherland to William H. Church (June 8, 1925), in *Sutherland Papers*, *supra* note 396.

school, it can destroy the secondary school, the college and the university. Harvard, Yale, Columbia, Princeton . . . [a]ll could be swept away, and with them would depart an influence and an inspiration that this country can ill afford to lose."⁶⁰⁰ Whether the Justices were influenced by a belief in the First Amendment values of independent education or by a belief in the conservative mission of their class, they could hardly fail to disapprove a social experiment that would threaten the survival of both.

Praise of the Court's opinion was almost—but not quite—unanimous. An exchange of views in *The New Republic* betrayed a certain uneasiness. One writer was troubled that the Court had invalidated the law not because of the complex issues of public education, but because the law confiscated property.⁶⁰¹ Another observed that if "taking away the parent's right to send his children to whatever school he deems right, is a taking away of his property [then] . . . the Supreme Court has stretched the term property to include most personal relation."⁶⁰² Moreover, Felix Frankfurter, in an unsigned editorial, argued that the costs to liberalism of using the Fourteenth Amendment to strike down illiberal legislation outweighed any gains. "[T]he real battles of liberalism are not won in the Supreme Court," he claimed, but in public opinion.⁶⁰³ Both the Oregon and Nebraska laws had passed by narrow margins; hysteria and chauvinism would subside and bring repeal of these "silly measure[s]."⁶⁰⁴ But invalidation by the Supreme Court could

600. Kavanaugh Brief for Appellee, *supra* note 589, at 93, *Pierce* (No. 583); see also Guthrie Brief for Appellee, *supra* note 410, at 25 (mentioning Groton, St. Paul's, and St. Mark's); *Pierce* Oral Argument, *supra* note 594, at 6 ("those great Episcopal schools" Groton, St. Marks, St. Paul's, Kent, Pomfret, and St. Margaret's). For others who trembled for the Ivies, see Ward G. Reeder, *State Control of Private and Parochial Schools*, 17 SCH. & SOC'Y 426, 428 (1923) (Chicago, Harvard, Yale, Princeton, and Columbia); James H. Ryan, *The Proposed Monopoly in Education*, 138 ATLANTIC MONTHLY, Jan./June 1924, at 172, 177 (Harvard, Yale, and Princeton).

601. *School, Church and State*, THE NEW REPUBLIC, June 24, 1925, at 114.

602. Morris S. Cohen, *Social Policy and the Supreme Court*, THE NEW REPUBLIC, July 15, 1925, at 195.

603. *Can the Supreme Court Guarantee Toleration?*, THE NEW REPUBLIC, June 17, 1925, at 85, 87. Frankfurter is identified as author of this piece in LAW AND POLITICS, OCCASIONAL PAPERS OF FELIX FRANKFURTER 1913-1938, at 196-97 (Archibald MacLeish & E.F. Pritchard eds., 1962). Events in Nebraska seem to confirm Frankfurter's view. In 1920, a proposal to place a prohibition against foreign language study in the Nebraska Constitution was defeated in favor of a more moderate provision requiring that the common school subjects be taught in English. Interest in the foreign language issue subsided, and by the time the decision in *Meyer* was handed down "it aroused very little stir." Rodgers, *supra* note 15, at 22.

604. *Can the Supreme Court Guarantee Toleration?*, *supra* note 603, at 86.

strike at liberal as well as illiberal laws and was an "action more far-reaching, because ever so much more durable and authoritative than even the most mischievous of repealable state legislation."⁶⁰⁵

In a strange quirk of history, some of the most enthusiastic praise of the new doctrine came from McReynolds's old nemesis William Jennings Bryan, who by 1925 was embroiled in the "monkey trial" of Tennessee teacher John J. Scopes.⁶⁰⁶ Bryan hailed the *Meyer* and *Pierce* opinions. He interpreted them, however, as declaring not the child's intellectual freedom but the parents' right to control what their children would be taught in religious matters.⁶⁰⁷ Thus, he was sure the cases would justify suppression of dangerous blasphemies like Darwin's theory of evolution.

VIII. EPILOGUE

[T]hat they may live on without visible symbol, woven into the stuff of other men's lives.⁶⁰⁸

Justice Oliver Wendell Holmes retired from the bench in 1931 and died on March 6, 1933. He was buried, with full dress military ceremony, next to his wife in Arlington National Cemetery. Childless, he left his entire estate to his country⁶⁰⁹—adding to his measure of immortality by endowing the ongoing *Oliver*

605. *Id.* at 85-86; see also Edwards, *State Educational Policy*, *supra* note 572, at 26 (expressing alarm at extent of judicial control of local education policies).

606. WILLIAM J. BRYAN & MARY B. BRYAN, *MEMOIRS OF WILLIAM JENNINGS BRYAN* 483, 526 (1925).

607. *Id.* at 530 (interpretation in text of Bryan's intended closing argument in *Scopes v. State*, 289 S.W. 363 (Tenn. 1927)). Bryan argued that *Pierce* fit the anti-evolution law exactly, because it established the parent's right and duty to guard his children's religious welfare and established the state's authority to pass a law embodying what parents wanted taught. *Id.* Although many observers drew a connection between *Meyer* and *Pierce* and the anti-evolution law, most concluded they undercut the law by diluting state power. See, e.g., *Oregon School Law Declared Unconstitutional*, 121 CATH. WORLD 551 (1925) (linking Tennessee and Oregon laws); *The Supreme Court on Educational Freedom*, SURVEY, July 1, 1925, at 379-381 (noting *Scopes* case will turn on *Pierce* dicta regarding state power to prescribe curriculum); *Death of the Oregon School Law*, LITERARY DIG., June 13, 1925, at 1, 8 (quoting *New York Herald Tribune* and *Portland Oregonian*: "Mr. Bryan 'will learn something decidedly to his disadvantage'"); *A Bad Law Voided*, N.Y. TIMES, June 2, 1925, at 22 (stating the same); *A Decision for Liberty*, SCH. & SOC'Y, June 16, 1923, at 668-69 (linking Bryan and the decision in *Meyer*).

608. AUERBACH, *supra* note 392, at 283.

609. AICHELE, *supra* note 544, at 160-61.

Wendell Holmes Devise History of the Supreme Court of the United States.⁶¹⁰ Guthrie, almost twenty years Holmes's junior, died not long after, on the morning of December 8, 1935. At his side was his friend and neighbor John W. Davis, the 1924 Democratic presidential candidate.⁶¹¹ In a eulogy before the Association of the Bar of the City of New York, Davis declared "[W]e owe it to ourselves and to posterity to make lasting record of worthy men that they may live on without visible symbol, woven into the stuff of other men's lives."⁶¹² Indeed, Guthrie's record has been obscured and his name all but forgotten, but in *Meyer* and *Pierce*, his principles are woven into the stuff of constitutional law.

Guthrie died decrying Roosevelt's New Deal⁶¹³ but believing he had won a decisive victory in the battle to preserve the traditional family.⁶¹⁴ His victory over child labor regulation was short-lived. The nation faced a deepening economic crisis and yet the Four Horseman—Justices McReynolds, Sutherland, Van Devanter, and Butler—often joined by Justice Owen Roberts, continued to invoke the Constitution to block Franklin D. Roosevelt's New Deal programs at every turn.⁶¹⁵ Personal liberties and liberties of contract guaranteed by the Due Process Clause, coupled with a narrow view of the Commerce Clause, left small constitutional margin for government to intervene in the economy.

In the 1936 Term, the Supreme Court struck down one after another of Roosevelt's legislative projects, turning the tide of opinion against the "Nine Old Men" and their conservative vision of the Constitution.⁶¹⁶ Then on February 5, 1937, Roosevelt sent to Congress the notorious "Court-packing plan" that would have allowed him to add as many as six new Justices to the Court.⁶¹⁷

610. See THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES (Paul A. Freund & Stanley N. Katz eds., 1984). Professor Robert C. Post of the University of California at Berkeley is currently working on volume X, covering the years 1921 to 1930.

611. *W.D. Guthrie Dies Suddenly* at 76, N.Y. TIMES, Dec. 9, 1935, at 21.

612. AUERBACH, *supra* note 392, at 283. The eulogy continues, "None better deserves such honor at our hands than William D. Guthrie. Let us write him down a learned and able lawyer, a wise and prudent counsellor, a patriotic and loyal citizen, a gentleman unafraid." *Id.*

613. William D. Guthrie, *The Constitution of the United States and Its Amendment*, Address to Sentinels of the Republic (Oct. 14, 1935) (collection of Columbia Law Library).

614. See *supra* notes 371-76 and accompanying text.

615. MORISON ET AL., *supra* note 91, at 615-16.

616. RODELL, *supra* note 10, at 213-54.

617. See HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF AP-

Less than two months later, the Court handed down its opinion in *West Coast Hotel Co. v. Parrish*,⁶¹⁸ validating a minimum wage law and essentially repudiating Guthrie's absolute view of due process as forbidding substantive economic regulation: "Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."⁶¹⁹

The restrictions on the states' and Congress's power to regulate labor were soon to fall. In 1936 and 1937, the Court in *Whitfield v. Ohio*⁶²⁰ and *Kentucky Whip & Collar Co. v. Illinois Central R.R. Co.*⁶²¹ had sustained federal laws that authorized sister states to block export of prison-made goods and closed channels of interstate commerce to such goods. These cases opened the way to federal regulation of child labor. The Child Labor Amendment was obsolete.⁶²² In 1938, Congress passed the Fair Labor Standards Act (FLSA),⁶²³ containing provisions restricting child labor. After the 1941 opinion in *United States v. Darby*,⁶²⁴ sustaining the FLSA, it was clear that *Hammer v. Dagenhart*⁶²⁵ too had been overruled. Imagine the delight of Walter M. Pierce, now Congressman from Oregon, as he joined in Roosevelt's Populist revolution and witnessed the taming of the Court.⁶²⁶

POINTMENTS TO THE SUPREME COURT 206-10 (2d ed. 1985); FRANKLIN D. ROOSEVELT, THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 122-33 (1941) (fireside chat attempting to win public support for Roosevelt's court-packing plan). Accounts vary as to whether the plan precipitated a "switch in time that saved nine," or the shift came independently of the court-packing plan. Cf. Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311 (1955) (indicating that vote had taken place prior to announcement of court-packing plan).

618. 300 U.S. 379 (1937).

619. *Id.* at 391.

620. 297 U.S. 431 (1936).

621. 299 U.S. 334 (1937).

622. See, e.g., *Information as to the Referendum upon Child Labor Amendments and Legislation*, 23 A.B.A. J. 819, 823-25 (1937) (arguing that the *Whitfield* and *Kentucky Whip* decisions opened the way for federal and state legislation producing uniform laws, and thus an amendment was unnecessary); cf. James B. Smith, Note, *A Child Labor Amendment Is Unnecessary*, 27 CAL. L. REV. 15, 25 (1938) (arguing that an amendment was unnecessary because Congress could now regulate child labor under the taxing power).

623. See 29 U.S.C. §§ 201-219 (1988). Section 212 contains the provisions prohibiting shipment in interstate commerce of goods produced by "oppressive child labor," defined in § 203(l) to cover most employment of children under 16, as well as hazardous employment of children 16 to 18.

624. 312 U.S. 100 (1941).

625. 247 U.S. 251 (1918).

626. Pierce served in Congress from 1932 to 1942 and outlasted them all, dying in 1954 (the year of *Brown v. Board of Education*) at age 93. See PIERCE BIOGRAPHY, *supra* note 152.

By the time of his retirement in 1941, McReynolds had lost his Court and had become an impotent last survivor of the conservative wing: "It was not James Clark McReynolds who had changed. It was the times, the country, the prevailing constitutional views and the Supreme Court that changed. Justice McReynolds remained standing in his place, like a granite mountain."⁶²⁷ On November 12, 1947, John W. Davis again stood to deliver a eulogy, this time in the United States Supreme Court to the memory of the late James C. McReynolds.⁶²⁸ Said Davis: "I think it clear that to a much larger extent than is generally conceded men are what their blood and up-bringing have made them."⁶²⁹ Davis invited McReynolds's own written words to speak for the man:

Until now I had supposed that a man's liberty and property—with their essential incidents—were under the protection of our charter and not subordinate to whims or caprices or fanciful ideas of those who happen for the day to constitute the legislative majority. The contrary doctrine is revolutionary and leads straight towards destruction of our well-tried and successful system of government.⁶³⁰

This is the philosophy that imbued—and still colors—*Meyer* and *Pierce*.

McReynolds's and Guthrie's economic due process—their shield against the whims and caprices of the day—was discredited. But the family liberty strand of substantive due process lived on in cases like *Skinner v. Oklahoma*,⁶³¹ *Moore v. East Cleveland*,⁶³² and *Roe v. Wade*.⁶³³ Far from a conservative force, the new substantive due process seemed to open up traditional forms and dissolve traditional constraints. It operated to protect expanding conceptions of the family and enforce the liberty and individuality of

627. MEMORIALS, *supra* note 460, at 382 (resolution of Supreme Court Bar).

628. McReynolds retired from the bench on February 1, 1941, and died on August 24, 1946. His Memorial took place in one of the ornate conference rooms of the new Supreme Court building (which McReynolds had condemned as a "mess," "a failure," and "a decided detriment to the Court") on November 12, 1947. *Id.* at 375-77; Letter from Justice McReynolds to Robert McReynolds (Oct. 24, 1935), in MCREYNOLDS PAPERS, *supra* note 154.

629. MEMORIALS, *supra* note 460, at 391-92 (Davis eulogy).

630. *Arizona Employers' Liab. Cases*, 250 U.S. 400, 450-51 (1919) (McReynolds, J., dissenting).

631. 316 U.S. 535 (1942).

632. 431 U.S. 494 (1977).

633. 410 U.S. 113 (1973).

family members.⁶³⁴ The open-ended term "liberty" (and progressive judges) seemed to invite a new, liberating Fourteenth Amendment jurisprudence of personhood. Surely, Guthrie and McReynolds would turn over in their graves if they could see the family revolution *Meyer* has wrought.

Yet the complex stories of *Meyer* and *Pierce* should serve as a reminder that substantive due process can be a conservative as well as a liberating force in the family arena as it once was in the economic arena, shielding the status quo of traditional social structures from reform-minded legislatures. Especially in family law, which deals with collective organisms, liberty is a difficult concept: one individual's liberty can spell another's suppression or defeat.⁶³⁵ The meaning of "liberty" remains a subject of debate among the current Justices. The options range from the narrowest definition of legal tradition to the broadest reaches of individual freedom. In *Michael H. v. Gerald D.*,⁶³⁶ Justice Scalia, writing for a plurality of the Court, suggested that *tradition*, and moreover the most specific level of relevant legal tradition, must be consulted to determine whether the Constitution recognizes an alleged liberty.⁶³⁷ In Scalia's view, it is the purpose of the Due Process Clause to prevent us from discarding our traditions too lightly. Justice Brennan, by sharp contrast, saw substantive due process as protecting broad values such as the parent-child relationship and conferring the "freedom *not* to conform" to restrictive social definitions of them.⁶³⁸ Justice O'Connor, joined by

634. See, e.g., *Turner v. Safley*, 482 U.S. 78 (1987) (defining prisoner's right to marry); *Moore*, 431 U.S. 494 (extending definition of "family" to include grandparents); *Stanley v. Illinois*, 405 U.S. 645 (1972) (recognizing unwed father's rights); *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating miscegenation laws); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (upholding family's procreational privacy); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (forbidding involuntary sterilization).

635. One can argue that recognizing a natural father's rights invades a marital father's family privacy, see *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality opinion); that recognizing a lesbian partner's claims on a co-parented child invades the birth mother's rights, see *Alison D. v. Virginia M.*, 155 A.2d 11 (N.Y. App. Div. 1990); that recognizing a child's voice dilutes parental freedoms, see *Wisconsin v. Yoder*, 406 U.S. 205 (1972); and, most controversial of all, that recognizing a fetus's interests invades maternal integrity, see *Roe*, 410 U.S. at 153-56.

636. 491 U.S. 110 (1989) (plurality opinion).

637. At the risk of oversimplifying, *Michael H.* concerned two men, a woman's husband and her lover, competing for recognition as the father of the woman's child. See *id.* at 113-17. The general tradition of parentage through genetics competed with the more specific tradition of paternity presumptions protecting the marital family. The case raised tensions between personal liberty and family unity. See *id.* at 130-31.

638. *Id.* at 141 (Brennan, J., dissenting).

Justice Kennedy, would preserve some avenue for change.⁶³⁹ Citing precedents that had protected interracial marriage, marriage between prisoners, and contraception, clearly not traditional liberties under Scalia's test, O'Connor wrote, "I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis."⁶⁴⁰

It remains to be seen how the current debate on tradition will play out. It seems improbable that the Court will provide a forum for creating new family forms. Individuals and groups who believe traditional law fails to serve or forecloses their visions of family will have to take their fight to the legislatures. But what would Holmes think of Scalia's notion of due process as a buffer against social change? What margin of freedom does it leave to legislators to experiment with family forms and to adjust the relations of child, parent, and state? Or to courts to examine whether specific legal traditions are still meaningful or merely the detritus of history left behind by broad social change, as was the case with patriarchal traditions affecting children's rights, child custody, and child labor in the nineteenth century, and laws on contraception, miscegenation, and prisoner marriages in the twentieth century.⁶⁴¹

The American family, and the state's relation to it, is certainly experiencing a crisis comparable to that of the American farmer in the 1890's.⁶⁴² We can only hope that our system is still suffi-

639. *Id.* at 132 (O'Connor, J., concurring).

640. *Id.* Professor Baker comments on the essentially conservative nature of substantive due process's regard for tradition, but holds out the prospect that we might someday "reconize governmental respect for liberty as the bedrock of our tradition." BAKER, *supra* note 482, at 88. More problematic still is the relation of substantive due process to newly articulated constitutional values, such as cooperative interdependence and mutual responsibility, see *The Responsive Communitarian Platform: Rights and Responsibilities*, 2 RESPONSIVE COMMUNITY 4-20 (Winter 1991-92), that may get caught between the rock of individual liberty and the hard place of conservative tradition. See also Hartog, *supra* note 11, at 1027-34 (stating that rights consciousness of outsiders and ordinary people, often expressed as collective claims, forms a valid source of constitutional interpretation, but one that is inevitably in tension with traditional texts).

641. The social and legal histories of interracial marriage and reproductive choice are familiar to everyone. The tradition of banning prisoners from marrying was firmly rooted and longstanding but based on antiquated rules about prisoners' civil status and the purpose of incarceration.

642. For discussions of the contemporary plight of American families and children, see generally GIVING CHILDREN A CHANCE: THE CASE FOR MORE EFFECTIVE NATIONAL POLICIES (George Miller ed., 1989); SYLVIA HEWLETT, WHEN THE BOUGH BREAKS: THE COST OF NEGLECTING OUR CHILDREN (1991); REBUILDING THE NEST: A NEW COMMITMENT TO THE AMERICAN FAMILY (David Blankenhorn et al. eds., 1990) [hereinafter REBUILDING THE NEST]; MILTON SENN, SPEAKING OUT FOR AMERICA'S CHILDREN (1977). Family breakdown and

ciently vital that some new age of reformers will appear to walk the same road as the Populists and Progressives. How will they be received? Will they find their way barred by the dead hand of tradition (whether a "liberal" tradition or a "conservative" one), calling itself family liberty? If such a day should come, think of it as Guthrie's and McReynolds's revenge.

IX. CONCLUSION

This revisionist history has asked the reader to take a fresh look at two old icons. Most people think of *Meyer*⁶⁴³ and *Pierce*⁶⁴⁴ as primarily about intellectual liberty and secondarily about family autonomy. I have suggested that they are also about property—property in children. I have exposed the links between assimilationist pluralism and the language laws, and the related tensions over what part of a child's cultural identity belongs to the parent and what part to the state.⁶⁴⁵ I have exposed the linkage between populism, progressivism, and the notions of class unity and egalitarianism evident in universal common schooling laws.⁶⁴⁶ The idea of all children attending public schools challenges parents' exclusive right to control their children's destinies and to use children to preserve and express parents' status and class. Finally, I have exposed the links between economic due process and family liberties.⁶⁴⁷ Both grow from a Spencerian conviction that men should be free to deploy their properties as they wish. That parental rights of control in *Meyer* and *Pierce* had a strong

proposals for family reform, figure heavily in current debates about the root causes of "crises" in education, economic competitiveness, and racial and class violence. See *infra* notes 660-75, 680-84 and accompanying text. Two recent studies by the bipartisan National Commission on Children document the difficulties facing today's families and youth. See NATIONAL COMMISSION ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES (1991) [hereinafter BEYOND RHETORIC]; NATIONAL COMMISSION ON CHILDREN, SPEAKING OF KIDS: A NATIONAL SURVEY OF CHILDREN AND PARENTS (1991) [hereinafter SPEAKING OF KIDS]. Although the Commissioners reached a remarkable degree of consensus, they divided over issues that recall the cultural and political conflicts surrounding *Meyer* and *Pierce*. See BEYOND RHETORIC, *supra*, at 159-75 (Minority Chapter of Health Care recommending that nutrition and health care programs should promote the two-parent family, stress individual responsibility, and avoid undermining parental authority); *id.*, at 207-08 (stating that Commissioners were divided over whether school choice policies should be extended to private and parochial schools); *id.*, at 265 (noting a minority of Commissioners strongly opposed federally mandated family leave).

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

644. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

645. See *supra* notes 14-56 and accompanying text.

646. See *supra* notes 83-176 and accompanying text.

647. See *supra* notes 364-81, 391-527 and accompanying text.

property' component is evident in their descent from *Allgeyer*,⁶⁴⁸ in their genesis as patriarchal rights of ownership, and in the rhetoric of property that greeted attempts to define children's rights and to mitigate parental control of children's labor. I have flipped the coin of family autonomy to show its underside, stamped with "liberty" but standing for the power to own another human being and to cast social regulation of this power as an assault on freedom.

Much of the old story of *Meyer* and *Pierce* remains valid. But although the historical context confirms that these school initiatives were tainted by prejudice and religious bias, my project has been to show that other tensions also played key roles. After almost three quarters of a century, these tensions remain a part of our present social, legal, and political story. To fully document this claim would call for a paper as long as this one. But I will briefly illustrate, under the rubrics of "Child as Property" and "Private Child vs. Public Child."

A. *Child as Property*

Among the bundle of rights that make up property are the right to exclusive possession and the right to use. Both of these aspects of parental control are alive today. By constitutionalizing a patriarchal notion of parental rights, *Meyer* and *Pierce* interrupted the trend of family law moving toward children's rights and revitalized the notion of rights of possession. Earlier, I highlighted (as stubborn hold-outs) various cases from the turn of the century in which genetic parents' rights, considered superior because they were grounded in laws of nature, were used to take possession of the child from a so-called stranger who had raised the child from infancy.⁶⁴⁹ In modern family courts, similar cases occur every day, under contemporary rules of law that are unfriendly to children's interests in preserving relationships with

648. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); see also *supra* notes 506-07.

649. See *supra* notes 245-47 and accompanying text; see also Katherine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988) (criticizing emphasis in custody law on possessiveness and proposing new focus on relationships of responsibility and concern). This retreat to the primacy of "natural" parents' custody claims was reinforced by *Meyer* and *Pierce* and their progeny, which seemed to constitutionalize the preference. See, e.g., *Caban v. Mohammed*, 441 U.S. 380 (1979) (Stevens, J., dissenting); *Stanley v. Illinois*, 405 U.S. 645 (1972). The Court's attempts to fine tune the role of genetics in conferring constitutional rights have only deepened the confusion and heightened the caution of family courts. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality opinion); *Lehr v. Robertson*, 463 U.S. 248 (1983).

extended family members or guardians.⁶⁵⁰ Patriarchal notions of ownership do not lend themselves to a child-centered theory of custody or parenthood. The patriarchal tradition assumes that parents' rights exist for the parent and not, as Reverend Savage would have it, for the child.⁶⁵¹ Doctrines that focus on genetic parentage to the exclusion of those who care for the child disserve children as a class.⁶⁵² The incentives they create are skewed to overvalue procreation and undervalue nurture, at a time when nurture is in very short supply. They also disserve the individual child by treating her as a movable chattel rather than a person who has put down her own roots and formed her own attachments. These rules are one exhibit for my claim that the property theory latent in *Meyer* and *Pierce* adversely affects the way the law views children.

I have also claimed that our legal system fails to respect children. Children are often used as instruments, as in *Meyer* and *Pierce*. The child is denied her own voice and identity and becomes a conduit for the parents' religious expression, cultural identity, and class aspirations. The parents' authority to speak for and through the child is explicit in *Meyer*'s "right of control" and *Pierce*'s "high duty" of the parent to direct his child's destiny.⁶⁵³ Later cases, like *Wisconsin v. Yoder*,⁶⁵⁴ seem to ratify this

650. In many cities in which drugs and violence take a high toll, perhaps as many children live in the care of grandmothers and other relatives today as at the turn of the century. In Philadelphia, for example, 16.5% of children live with relatives other than parents. See PHILADELPHIA CITIZENS FOR CHILDREN AND YOUTH FOR UNITED WAY OF SOUTHEASTERN PENNSYLVANIA, OUR VILLAGE OUR CHILDREN 11 (1991). These caregivers face a difficult future, made more difficult through their worries about legal status and problems in obtaining benefits and medical care for their dependent children.

651. See *supra* notes 286-89 and accompanying text; see also Woodhouse, *supra* note 244, at 282 (proposing a "child-centered" theory of family).

652. This observation is not to discount the meaning, especially to older children, of biological relationships, or to suggest that they play no role in the child's life. A child-centered view (unlike property-based notions which see a right to exclude as part of the bundle of ownership rights) would not see relationships with genetic and social parents as mutually exclusive. The child's welfare might well be furthered by preserving ties to both social and genetic parents. See Katherine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984); Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423 (1983).

653. *Pierce*, 268 U.S. at 535; *Meyer*, 262 U.S. at 400. This power of speech is illustrated poignantly in the recollections of Reuben Dagenhart. See *supra* note 358. Looking back at age twenty, Reuben recalled a childhood of hard labor in the mills and mourned the loss of his health and education. When asked what he told the judge at the time of the *Hammer v. Dagenhart* case, he replied, "Oh, John and me was never in court! Just Paw was there. John and me was just little kids in short pants. I guess we wouldn't have

instrumentalism. The minor child is a key tool of the parents' free exercise but has no independent free exercise protections.⁶⁵⁵ Even when *Meyer* and *Pierce* lead to the vindication of First Amendment liberties, it is thus the parent's voice and choice that we hear and not the child's. Obviously, good reasons exist for presuming that the parent speaks for the child. I am sure that Brandeis and McReynolds would both agree that, ordinarily, the best guardian of the child's intellectual liberty and welfare is the parent. But constitutionalizing this presumption as the parents' "right" to speak, choose, and live through the child has led to its being too often invoked in situations in which it is, at best, unnecessary or, at worst, oppressive.⁶⁵⁶

This is not an easy area. Recent bitterly disputed Supreme Court cases on children as witnesses have tested the Constitu-

looked like much in court. We were working in the mill when the case was going on. But Paw went up to Washington." Lowell Mellett, *The Sequel of the Dagenhart Case*, 6 THE AMERICAN CHILD 3 (Jan. 1924), reprinted in BRENNER, *supra* note 202, at 716-17.

654. 406 U.S. 205 (1972).

655. See *id.* at 242 (Douglas, J., dissenting in part and concurring in judgment). In a recent Pennsylvania case that cited both *Meyer* and *Yoder*, divorcing parents battled over the religious upbringing of their three-, four-, and eight-year-old children. *Zummo v. Zummo*, 574 A.2d 1130 (Pa. Super. 1990). The parents had agreed that the children should be raised in their mother's Jewish faith (identifying themselves as Jews, attending synagogue, and celebrating Jewish holidays), but their Catholic father, after the divorce, had begun taking them to Mass. *Id.* at 1141. Mother and father each sought a court order protecting their personal rights to incorporate the children in their own religious exercise. Although holding that each parent had an individual right to teach the child his or her religion, the appeals court reversed the trial judge's conclusion that the children's free exercise interests should be considered. Citing *Yoder* and *Meyer*, the appeals court ruled that the children had no free exercise rights independent of their parents'. *Id.* at 1150. The children were conceptualized only as conduits for their parents' expression of religion, with no religious lives of their own. Compare *Burrows v. Brady*, 1992 R.I. LEXIS 74, in which the Rhode Island Supreme Court affirmed the custody modification of the trial court allowing a child confirmed in the Catholic religion to continue mass and Sunday school and denying custodial parent equal time for Episcopal religious training.

656. Cf. *Parham v. J.R.*, 442 U.S. 584 (1979) (deferring to parents' choice to commit teenage child to state institution). I am not suggesting that children should be treated exactly like adults in the adversary system. I believe, however, that we must be more flexible than we have been in restructuring our system so that children's voices can be heard. The sharpest critiques to giving a voice to children condemn the practice as violating constitutionally protected parental rights and family autonomy. See Martin Guggenheim, *A Right to be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76 (1984). The charges once levelled at child labor laws, that they constituted totalitarian expropriation of children, are now levelled at laws on parental abuse and neglect. See Family Rights Committee, Inc., *Child Abuse Witch Hunt: The Rise of Fascism in Florida*, N.Y. TIMES, Apr. 14, 1992, at B5 (advertisement depicting, in cartoons, state child protective agency as Stalin and Hitler engaged in totalitarian conspiracy aimed at ending parental authority and achieving state control of children).

tion's capacity to integrate children's voice into an adult legal system.⁶⁵⁷ The Court has also quarrelled over presumptions, such as the presumption that abused children's interests in reunification of the family are coextensive with their parents'. The Court has shown a disturbing willingness to deny the child's reality in order to protect a hollow family integrity.⁶⁵⁸ These disputes over acknowledging children's independent voices and independent

657. See *Idaho v. Wright*, 110 S. Ct. 3139 (1990) (disallowing a hearsay exception for child sexual abuse victim); *Maryland v. Craig*, 110 S. Ct. 3157 (1990) (allowing testimony by a child sex abuse victim via one way television). *Craig* contains a passage by Justice Scalia that is fully worthy of James McReynolds. *Craig*, 110 S. Ct. at 3172 (Scalia, J., dissenting). Justice O'Connor, for the Court, tested the use of the closed circuit television against the truth-finding purpose of the Confrontation Clause and found it acceptable if shown to be necessary. *Id.* at 3166 (opinion of Justice O'Connor). Although the case concerned a teacher, Scalia, in dissent, raised the spectre of a father (or mother) jailed under the child's false accusation of sexual abuse, kept from seeing his child for months, and never permitted to confront the child, face to face, and say "It is really not true, is it, that I—your father (or mother) whom you see before you—did these terrible things." *Id.* at 3172. Like the drama of Plato's *Republic*, this drama of the treacherous child and the betrayed father (or mother), distracts from the difficult project of understanding how children tell their stories and how their voices can be integrated into truth-finding. See Teena Sorensen & Barbara Snow, *How Children Tell: The Process of Disclosure in Child Sexual Abuse*, 70 *Child Welfare* 3 (1991) (analyzing 116 confirmed cases in which sexual abuse is established through conviction, confession, or medical proof, shows 79% of children initially denied abuse; 80% progressed to disclosure but mixed with denial; and 22% made false recantations, often under pressure from the perpetrator or when questioned in judicial proceedings).

658. See *Santosky v. Kramer*, 455 U.S. 745 (1982). This case involved a challenge to New York's child protective law providing for termination of parental rights. In the course of a *Mathews v. Eldridge*, 424 U.S. 319 (1976), analysis of the standard of proof, the Court weighed the private and public interests. The dissenters, with Rehnquist writing for Burger, White, and O'Connor, argued that the child possessed a distinct interest in a "stable, nurturing homelife" that might or might not be served by reunification with natural parents after confirmed episodes of abuse and a period of stress and separation. *Santosky*, 455 U.S. at 770-91 (Rehnquist, J., dissenting). Justice Blackmun, writing for the majority, disagreed. Under his view, until the state proves parental unfitness at the termination hearing, the interests of the child and his natural parents coincide, in spite of the fact of long separation and a prior judicial finding of severe abuse. *Id.* at 752-54. Although I agree that family unity must be presumed at investigation and that the parents and children shared an interest in reunification throughout, see *supra* note 652, once a finding of abuse is entered, the children's reality must be recognized as more complex. The joy of reunion also carries the risk of injury or death. See GELLES & STRAUS, *supra* note 229, at 178 (stating abused children are at high risk of reinjury); MURRAY A. STRAUS & RICHARD J. GELLES, *PHYSICAL VIOLENCE IN AMERICAN FAMILIES* 427 (1990) (stating that 1.5 million children seriously assaulted in the United States each year); Ross E. Zumwalt & Charles S. Hirsch, *Pathology of Fatal Child Abuse and Neglect*, in RAY E. HELFER & RUTH S. KEMPE, *THE BATTERED CHILD* 247 (1987); David Hechler, *Abused Children, Official Silence*, N.Y. TIMES, Oct. 21, 1991, at A33 (reporting that in 1988, 58 New York City children already known to child protection services were killed); cf. *Deshaney v. Winnebago County*, 489 U.S. 189 (1989) (child who was not removed from abusive home suffered severe brain damage).

interests indicate the tenacity of the Arisotelian idea, establishing the impossibility of intrafamily oppression, that parent and child are one, and "there can be no injustice to oneself."⁶⁵⁹

B. *The Private vs. the Public Child*

Central to *Meyer* and *Pierce* was the public/private dichotomy. Was the child private property of parents or a public resource? In the language of children's rights, the public child had needs that created rights that became, through legislation, positive claims on the community. In the language of laissez-faire, the parent controlled the destiny of the private child in keeping with its station in life. The Court in *Meyer* rejected Plato in favor of Spencer.⁶⁶⁰ The laissez-faire, private property model of *Meyer* and *Pierce* survives in national family policy, according to Norton Grubb and Marvin Lazerson, in the chasm that divides "our children" from "other people's children."⁶⁶¹ While lavishing material goods on the private child, we neglect the public child. Neglect is a relative concept, but as taxpayers we spend less to meet children's needs than almost any other industrial nation.⁶⁶² The situation of American children is deteriorating.⁶⁶³ Many are suffering from a deficit of money, safety, parenting, housing, and health care that might shock even turn-of-the-century child sav-

659. See *supra* note 227 and accompanying text. Recall the common law principle that, "husband and wife were one person," cited for the proposition that marital rape was an impossibility as a man could not be convicted of raping himself. *E.g.* *State v. Smith*, 426 A.2d 38 (N.J. 1981).

660. Plato maintained that children must belong to all to prevent "amoral familism"—the tendency to sacrifice the general good for advancement of family. ALAN RYAN, *PROPERTY* 11 (1987). Herbert Spencer places the private family at the core of society and finds absurd the notion that man might love his neighbor's children as his own. See 3 SPENCER, *supra* note 379, at § 843.

661. W. NORTON GRUBB & MARVIN LAZERSON, *BROKEN PROMISES: HOW AMERICANS FAIL THEIR CHILDREN* 43-66, 78-80 (1988). Grubb and Lazerson attribute this to historic classism, racism, and privatization of the family and argue that America's will to help disadvantaged children is poisoned by the need to view them as someone else's abandoned property, some parent's failure, before extending help.

662. Timothy M. Smeeding & Barbara B. Torrey, *Poor Children in Rich Countries*, 242 *SCI.* 873 (1988). By virtually every measure, the United States lags behind other industrialized countries in income transfers and services to poor children. We also take far better care of the elderly than we do of the young. See *CHILDREN'S DEFENSE FUND, THE STATE OF AMERICA'S CHILDREN* (1991) [hereinafter *STATE OF CHILDREN*]; Smeeding & Torrey, *supra*, at 873.

663. Child poverty rates in the United States increased from 16% to 20% between 1979 and 1987. Smeeding & Torrey, *supra* note 662, at 877.

ers.⁶⁶⁴ Children are now the largest group living below the poverty line, many in overburdened single parent families.⁶⁶⁵ Most children who live apart from their fathers received partial or no support, and as many as half have not seen their fathers in the past year.⁶⁶⁶ America has fallen to twentieth place in international infant mortality rates and ranks twenty-sixth in low birthweight babies, yet government programs such as the Supplemental Food Program for Women, Infants, and Children (WIC) are funded to reach only half of the eligible mothers and children.⁶⁶⁷ As more families slip into poverty, child labor is on the rise, while diseases we thought were eradicated, such as measles and whooping cough, are back in epidemic proportions because so many of our children go unvaccinated.⁶⁶⁸ I could go on, but after a while the march of statistics grows numbing. In our national discourse, the idea of nationalizing the American child as a precious resource seems like a Populist pipe dream, and Spencer sounds postmodern.⁶⁶⁹

This has been a difficult era for the public child, and it is disturbing to see threatened the one area in which the public child's claim has seemed most secure—the public schools. Current “choice” proposals would involve a shift of vision, to see schooling as essentially privatized—driven by the engine of the parents' concern for the private child, rather than the community's concern for the public child. Everyone seems persuaded that our schools are in terrible shape.⁶⁷⁰ President Bush has advanced a

664. See *BEYOND RHETORIC*, *supra* note 642; see also MARIAN W. EDELMAN, *FAMILIES IN PERIL* (1987); HEWLETT, *supra* note 642; STATE OF CHILDREN, *supra* note 662; THE VULNERABLE (John L. Palmer et al. eds., 1988); Victor R. Fuchs, *Are Americans Underinvesting in Children?*, in *REBUILDING THE NEST*, *supra* note 642, at 53.

665. Some 12.6 million American children live below the poverty line, and some six million live in families with incomes below *half* the poverty line, allowing just \$412 per month for all of the needs of a family of three. STATE OF CHILDREN, *supra* note 662, at 21-24.

666. *Id.* at 27; FRANK F. FURSTENBERG, JR. & ANDREW CHERLIN, *DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART* 34-39 & n.28 (1991) (collecting studies). SPEAKING OF KIDS, *supra* note 642, at 22.

667. STATE OF CHILDREN, *supra* note 662, at 60, 68.

668. *Id.* at 63. Only 70 to 80% of children are fully immunized, with rates falling much lower in poor communities. *Id.*; see also Gina Kolata, *More Children Are Employed, Often Perilously*, N.Y. TIMES, June 21, 1992, at 1 (attributing recent rise in child labor to increased immigration, child poverty, lax enforcement, and cultural ambivalence about children's work).

669. “How shall we regulate our pecuniary beneficence as to avoid assisting the incapables and degraded to multiply.” 2 HERBERT SPENCER, *THE PRINCIPLES OF ETHICS*, Ch. 7, § 458 (1977) (following text of 1897 ed.).

670. See, e.g., CHUBB & MOE, *supra* note 16, at 6-11; see also NATIONAL COMMISSION ON EXCELLENCE IN EDUCATION, *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (1983); CHESTER E. FINN, JR., *WE MUST TAKE CHARGE: OUR SCHOOLS AND OUR FUTURE* 12-14 (1991); JONATHAN KOZOL, *SAVAGE INEQUALITY* (1991).

plan to permit parents to use government tax dollars in the form of vouchers to pay for their children's education in private and parochial schools.⁶⁷¹ Some argue that creating a market economy would improve quality by making all schools, both public and private, more competitive.⁶⁷² I concede that others have far greater expertise than I in education law and economics. But my journey through *Meyer* and *Pierce* and their relation to children's rights and compulsory schooling highlights the critical role that free public schools have played in giving meaning to children's membership in the community. Schools represented community responsibility toward *all* children, opened the door to protecting children from labor exploitation and abuse, conferred children's first welfare rights, and first recognized children's civil rights. Public schools have been a place in which all children were equally entitled, as the community's children, to be.

Schools, I recall, can also be dreadful places of tedium and torture.⁶⁷³ Any school can become an agent of repression, whether dictating the parents' orthodoxy or the dogma of the state. As Professor James Liebman persuasively argues, however, public schooling makes children's autonomy possible: first, by expanding their range of exposure to different options and values in a forum somewhat but not completely independent of their parents; and second, by preparing the child for democratic citizenship.⁶⁷⁴ Balanced against the public schools' positive contributions to children's status, the ramifications for class and race disparity of wholesale choice are sobering. I am concerned that choice would tend to leave behind the poorest children from families least able

671. See Tamara Henry, *Americans Surveyed Support School Choice*, PHIL. INQUIRER, Aug. 23, 1991, at A12. Most Americans support choice within the public system but oppose use of vouchers for private education. *Id.* At this writing, however, California proponents of a plan to provide \$2600 per child per year for tuition at private secular and religious schools claim to have gathered enough signatures to place an amendment on the 1992 November ballot in that state. Robert Reinhold, *California Braces for Battle Over School Vouchers*, N.Y. TIMES, May 13, 1992, at B7. These plans, of course, raise Establishment Clause issues that are beyond the scope of this discussion.

672. See, e.g., CHUBB & MOE, *supra* note 16, at 221-23; Chester E. Finn, Jr., *Education That Works: Make the Schools Compete*, 65 HARV. BUS. REV. 63-68 (1987).

673. Modern urban schools can be places of danger, as well. See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (noting that drug use and violent crime in schools have become major social problems); Anemona Hartocollis, *School Violence Felt Nationwide*, NEWSDAY, Feb. 28, 1992, at 27.

674. James S. Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1639-40 (1990). Professor Liebman stresses as part of democratic citizenship "equal concern" or the according of equal worth to each person as a self-realizing individual. *Id.* at 1542-45.

to advocate for their needs.⁶⁷⁵ The ballot in *Pierce*, which proposed a zero-choice model,⁶⁷⁶ reads like an index to the modern arguments against choice: that it would sharpen divisions of class and ethnicity, create enclaves of exclusiveness, foster schools run by groups more intent on political indoctrination than education, and destroy civic commitment to public schools.⁶⁷⁷ Liebman proposes instead that *all* children attend public schools, counting on their parents' vocal involvement in school management to improve the quality of education.⁶⁷⁸ Amy Gutmann has also considered the role of universal common schooling in a democratic society. Writing as a philosopher and not a lawyer, she is neither persuaded nor bound by *Pierce*. Gutmann concludes that the option is *not* barred by any inherent right of parents to control their children's education. She rejects the option, however, because she believes that universal common schooling would not, in practice, advance the goals of democratic education.⁶⁷⁹

The question remains, would today's Court still forbid the experiment? My guess is it would, and for much the same range

675. Chubb and Moe have proposed a model of a choice system in which all schools, private and public, would accept voucher "scholarships" while maintaining complete autonomy as to admissions, tuitions, and curricula. Their assumptions about funding and access are somewhat cavalier. For example, children from different districts would receive different levels of funding based "on how important education is to [the taxpayers]" measured by how much they are willing to tax themselves. CHUBB & MOE, *supra* note 16, at 220. Walter Pierce, who believed in graduated taxes and equalization of school funding for poor and rich, would certainly have challenged the assumption that dollars equate with levels of commitment rather than levels of resources. See *supra* note 162 and accompanying text. Parents would go to "Parent Information Centers" to review data about and choose the school. It seems inevitable that children whose parents were apathetic, confused or absent would stay behind in impoverished public schools.

676. See *supra* notes 94-98 and accompanying text.

677. See Reinhold, *supra* note 671; *supra* notes 94-98 and accompanying text.

678. Liebman, *supra* note 83, at 308-13. Professor Liebman would recognize a religious exception to his universal common schooling program, but argues that public "voice" rather than private "choice" is the route to more effective schools. *Id.* He recognizes, of course, that *Pierce* would cast doubt on the constitutionality of such a program. Professor Liebman suggests a number of reasons why *Pierce's* authority has been weakened or may be distinguished, including its close relation to *Lochner* economic due process, subsequent developments in equal protection law, the increasingly public nature of education, and Oregon's absolute prohibition of private schools. In fact, as to this last point, McReynolds was being less than candid in his written opinion because the briefs and arguments established the availability of after school programs and even school release time for religious education. Brief for Appellant, the Governor of the State of Oregon, at 41, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (No. 583); Kavanaugh Brief for Appellee, *supra* note 589, at 62 (citing release time law passed Feb. 9, 1925, by Oregon legislature); Supplement to Brief for Appellant, the Governor of the State of Oregon, at 3, *Pierce* (No. 583); *Pierce* Oral Argument, *supra* note 594, at 17.

679. See GUTMANN, *supra* note 83, at 115-23.

of reasons as in 1925, although this time one could expect all the variations on each theme—parents' rights, intellectual freedom, deference to legislatures, religious liberty (though perhaps not racism, property or class privilege)—to be articulated in a raft of concurrences and dissents.

At this writing, the American family, American education, and the fabric of American pluralism seem frayed and strained. "Populist" is again a prominent term in the political vocabulary.⁶⁸⁰ As in the 1920's, we have seen renewed Ku Klux Klan activity and third party opposition movements.⁶⁸¹ Meanwhile, in academia and political circles, recent critiques of the liberal/conservative dichotomy have fueled a search for progressive alternatives.⁶⁸²

Yet again, longstanding tensions of culture, race, and class, exacerbated by structural change in the family and the economy, are played out in public debates about the relations of child, parent, and state. In the wake of the Los Angeles riots that erupted on April 29, 1992, politicians and commentators of every stripe—whether conservatives indicting welfare programs as encouraging family breakdown or liberals charging government neglect of the urban poor—pointed to government's relation with the family as a key element of the crisis.⁶⁸³ Current conflicts over ownership of children, their problems, and their futures have crystallized around the slogan "family values." But whose version of family values? For conservatives, they often seem to mean a return to the old order of patriarchy, a privatization of family.

680. See, e.g., Robert Shogun, *Clinton Follows Winning Playbook from '91 Pennsylvania Senate Upset Campaign; Democratic Candidate Hopes Wofford's Populist Strategy Against Thornburgh Will Hit Pay Dirt Again in this Bellweather State*, L.A. TIMES, Apr. 21, 1992, at A12.

681. Michael Riley, *White & Wrong: New Klan, Old Hatred*, TIME, July 6, 1992, at 25; Robin Toner, *Clinton Wins a Majority for Nomination But Perot's Appeal is Strong in 2 Parties*, N.Y. TIMES, June 3, 1992 (front page banner headline).

682. The "Communitarian" movement, for example, claims to seek a ground somewhere between the extremes of isolated "individual rights" and laissez-faire "economic liberties," and conceptualizes rights as linked to individual and community responsibility. See, e.g., *The Responsive Communitarian Platform: Rights and Responsibilities*, supra note 640, at 4-20 (advocating policies that promote mutual obligations of communities, polities, and individuals, and stressing family and education as primary planks); Peter Steinfels, *A Political Movement Blends Its Ideas From Left and Right*, N.Y. TIMES, May 24, 1992, at E6.

683. See, e.g., Jack Kemp, *America Needs New Agenda for Ending Poverty*, HOUSTON CHRON., May 6, 1992, at 112 (arguing that solution to urban crisis is increasing economic opportunities for inner city Blacks, while decreasing their dependence on welfare programs that reward unemployment and family breakdown); Tom Morganthau, *The Price of Neglect*, NEWSWEEK, May 11, 1992, at 54 (stating that neglect of inner-city families contributed to rage).

For liberals, family values demand a major commitment of public funding to healthcare, welfare, education, and daycare—programs that conservatives fear will undermine parental authority and erode the individualist virtue instilled in the privacy of the home.⁶⁸⁴

We have come full circle. Who owns the child? Morally, I believe children own themselves. Neither the state nor the parent owns them, although each must genuinely love them and take responsibility for their future. Legally and politically? See the next page of your *Law Week*, your *Ladies' Home Journal*, or your *New York Times*. Story to be continued.

684. See, e.g., *Excerpts from Vice President's Speech on Cities and Poverty*, N.Y. TIMES, May 20, 1992, at A20 (Vice President Dan Quayle tracing Los Angeles riots to family breakdown and remarking: "A welfare check is not a husband. The state is not a father."); Todd S. Purdum, *Quayle Attacks New York as Home of Liberal Failure*, N.Y. TIMES, June 16, 1992, at A22 ("there is only one school of life's true values and that is the family, especially the traditional family"); Joe Klein, *Whose Values?*, NEWSWEEK, June 8, 1992, at 18 (cover story); *A Mother's Guiding Message*, NEWSWEEK, June 8, 1992, at 27 (Children's Defense Fund President Marian Wright Edelman arguing that "family values" means taking collective responsibility for needs of families and children).