CLARIFYING THE TRUE BREADTH AND STRENGTH OF PARENTAL RIGHTS UNDER *PIERCE*

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INTRODUCTION

Pierce v. Society of Sisters declared that parents have a fundamental constitutional right "to direct the upbringing and education of children under their control."[1] At issue in *Pierce*—the centenary of which we celebrated last year—was an Oregon law requiring all children to attend public schools. A unanimous Supreme Court found the law unconstitutional, stating famously: "[t]he 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."[2]

Pierce drew upon *Meyer v. Nebraska*, decided two years prior, which had overturned a law forbidding the teaching of foreign languages to grade school children. *Meyer* claimed that education is "the natural duty of the parent," and that the liberty guaranteed by the Fourteenth Amendment includes the right "to marry, establish a home and bring up children," along with other "privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[3] Despite *Pierce* and *Meyer*'s lofty rhetoric about the natural rights and duties of

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[1] 268 U.S. 510, 534–35 (1925).

[2] *Id.* at 535.

[3] 262 U.S. 390, 399–400 (1923).

parents—and the corresponding limits on the power of the state—many subsequent court decisions have interpreted *Pierce* quite narrowly, and parental rights jurisprudence is currently confused and inconsistent.[4]

How did this happen? The story is complex, but a major culprit appears to be Justice White's narrow interpretation of *Pierce* in his concurring opinion in *Wisconsin v. Yoder*, in which Amish parents sought an exemption from the state's compulsory education law so that they could educate their children at home in the Amish way of life after the eighth grade.[5] Although the Court ruled in favor of the Amish and granted them the exemption, the ruling was based primarily on the First Amendment's Free Exercise Clause, and Justice White insisted in his concurring opinion—without any historical analysis to support his interpretation—that "in *Pierce* . . . the Court held simply that while a State may posit [educational] standards, it may not pre-empt the educational process by requiring children to attend public schools."[6] In other words, on Justice White's reading, the *only* parental right that *Pierce* protects is the right of parents to send their children to a private school at their own expense.

The following year, the Supreme Court latched on to Justice White's narrow reading of *Pierce* to dismiss the parental rights argument in *Norwood v. Harrison*;[7] the same approach was used in *Runyon v. McCrary* a few years later.[8] Given the fraught political context surrounding *Norwood* and *Runyon*—which both related to the movement to end racial segregation in private schools—it seems that the Court was all too eager to make use of dicta from *Yoder* (however ill-founded) to quickly dismiss the parental rights arguments in these cases without having to provide substantive

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[4] *See* Elizabeth R. Kirk, *Parental Rights: In Search of Coherence*, 27 TEX. REV. L. & POL. 729, 742 (2023) (analyzing the current state of parental rights jurisprudence and concluding that it is "weak, chaotic, and inconsistent").

[5] 406 U.S. 205 (1972).

[6] *Id.* at 239 (White, J., concurring).

[7] 413 U.S. 455, 462 (1973).

[8] 427 U.S. 160, 177 (1976).

arguments for why ending the racist educational practices at issue was necessary to achieve a compelling state interest in racial equality, and thus sufficient to defeat the parental rights claim.

Until the Supreme Court's recent decision in *Mahmoud v. Taylor*—which held that it violates parents' religious exercise rights for public schools to refuse parents' request to opt their children out of lessons involving controversial storybooks about sexuality and gender[9]—disputes related to parents' right to direct their children's education had been decided exclusively by lower courts. Most (but not all) of the lower courts have adopted Justice White's narrow understanding of *Pierce*, according to which parents' constitutional right to direct their children's education effectively "ends at the threshold of the school door."[10] Although *Mahmoud* significantly strengthens the constitutional rights of religious parents to direct their children's education (even within public schools), because the decision was based entirely on religious free exercise jurisprudence, it fails to correct the narrow interpretation of *Pierce*, and leaves the rights of non-religious parents unprotected.

Both the Supreme Court and the lower courts' interpretations of *Pierce* have often been not only *narrow*, but also *weak*, in the sense that parental rights claims have often been examined using the lenient "rational basis" standard of review, rather than the more rigorous strict scrutiny standard, which is supposed to apply when

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[9] 145 S. Ct. 2332, 2353 (2025).

[10] *See, e.g.*, Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1207 (9th Cir. 2005). Note, however, that this line was later amended to soften and add more nuance to the claim. *See* Fields v. Palmdale Sch. Dist., 447 F.3d 1187, 1190–91 (9th Cir. 2006); *see also, e.g.*, Mozert v. Hawkins Cnty. Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987); Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525 (1st Cir. 1995); Curtis v. Sch. Comm. of Falmouth, 652 N.E.2d 580 (Mass. 1995); Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275 (5th Cir. 2001); Leebaert v. Harrington, 332 F.3d 134, 141 (2d Cir. 2003); Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 395 (6th Cir. 2005); Parker v. Hurley, 514 F.3d 87, 102 (1st Cir. 2008); Cal. Parents for the Equalization of Educ. Mats. v. Torlakson, 973 F.3d 1010 (9th Cir. 2020); Jones v. Boulder Valley Sch. Dist. RE-2, 2021 WL 5264188 (D. Colo. Oct. 4, 2021); Ibanez v. Albemarle Cnty. Sch. Bd., 897 S.E.2d. 300 (Va. Ct. App. 2024).

"fundamental" constitutional rights are at stake.[11] Although the Supreme Court in *Troxel v. Granville* referred to parental rights as "fundamental," it did not apply strict scrutiny or declare strict scrutiny to be the appropriate standard of review for parental rights cases, thus leading to confusion and inconsistency in the lower courts, where "various levels of scrutiny have been used . . . without much method, logic, or reason."[12]

As a result of the mixed signals sent by the Supreme Court, parental rights—especially with regard to education—have often been given short shrift by lower courts over the past half century. Lack of clarity on the scope and strength of parental rights has led many lower courts to be dismissive of parental rights claims in educational contexts, which in turn has led litigators to focus their arguments on other constitutional rights, such as the First Amendment right to the free exercise of religion, because such arguments seem to offer greater promise of success. This dismissive approach to parental rights claims can be seen in a number of circuit court cases regarding parental rights in education, including *Mozert v. Hawkins*, *Brown v. Hot, Sexy and Safer*, *Fields v. Palmdale*, and *Parker v. Hurley*.[13] The common thread in these cases is that the parents

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[11] For an explanation and historical analysis of the strict scrutiny standard, see generally Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355 (2006).

[12] Margaret Ryznar, *A Curious Parental Right*, 71 SMU L. REV. 127, 131–32 (2018). *Compare, e.g.*, Immediato v. Rye Neck Sch. Dist., 73 F.3d 454, 461 (2d Cir. 1996), Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 89 F.3d 174, 179 (4th Cir. 1996), Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 291 (5th Cir. 2001), *and* Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 396 (6th Cir. 2005) (all applying a rational basis test to cases regarding parental rights in education), *with* N.Y. Youth Club v. Town of Smithtown, 867 F. Supp. 2d 328, 338 (E.D.N.Y. 2012) (applying intermediate scrutiny), Gruenke v. Seip, 225 F.3d 290, 305 (3d Cir. 2000) (arguing that when there are "collisions" between the fundamental rights of parents and public school policies, "the primacy of the parents' authority must be recognized and should yield only where the school's action is tied to a compelling interest"), *and* Circle Sch. v. Phillips, 270 F. Supp. 2d 616, 626 (E.D. Pa. 2003) (applying strict scrutiny to a case regarding parental rights in education), *aff'd on other grounds sub nom.* Circle Sch. v. Pappert, 381 F.3d 172, 183 (3d Cir. 2004).

[13] *See supra* note 10 (collecting cases).

claimed the right to be informed in advance of and/or to be able to exempt their children from certain aspects of the school curriculum. And in all of the above-mentioned cases, the parents lost in part due to the courts' narrow and weak interpretations of *Pierce*.

Although I cannot go over all these cases in detail here, by way of example, I will briefly explain the dispute and relevant arguments in *Brown v. Hot, Sexy and Safer*.[14] There, students at Chelmsford High School and their parents brought a complaint against Hot, Sexy and Safer Productions (a sex education provider) and the Chelmsford School Committee for requiring the students to participate in a sexually-explicit assembly.[15] According to the plaintiffs—whose allegations were accepted as true by the Court—the assembly was full of "profane, lewd, and lascivious language," as well as sexually-explicit conduct, which included a simulation of masturbation, inviting a male student to lick a condom on stage, and inviting a female student to pull the condom over the male student's head.[16]

The plaintiffs alleged, among other things, that the defendants violated their "right to direct the upbringing of their children and educate them in accord with their own views," claiming that this is a "fundamental right" that the state can only infringe upon for the sake of a "'compelling state interest' that cannot be achieved by any less restrictive means."[17] The plaintiffs based this claim on *Meyer* and *Pierce*. The court, however, questioned whether parental rights are "among those [fundamental] rights whose infringement merits heightened scrutiny," and argued further that even if the right of parents to direct their children's education is considered fundamental, "the plaintiffs have failed to demonstrate an intrusion of constitutional magnitude upon this right."[18]

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[14] For further details on these cases, see Melissa Moschella, *Do Parental Rights Extend Beyond the Schoolhouse Door?*, 100 NOTRE DAME L. REV. (forthcoming 2026).

[15] Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525 (1st Cir. 1995).

[16] *Id.* at 529.

[17] *Id.* at 532.

[18] *Id.* at 533.

The basis for this argument was a very narrow reading of *Meyer* and *Pierce* as implying *only* that the state cannot require all children to attend public school (or forbid parents from seeking foreign language instruction for their children). Once parents *do* choose to send their children to a public school, however, the First Circuit's view was that parents have no rights regarding what their children are taught or exposed to within the school: "it is fundamentally different for the state to say to a parent, 'You can't teach your child German or send him to a parochial school,' than for the parent to say to the state, 'You can't teach my child subjects that are morally offensive to me.'"[19] The court argued that while the former would violate parents' constitutional right to educate their children, the latter would involve "a burden on state educational systems" that goes beyond what "the Constitution imposes."[20]

The bottom line in all of these cases is perhaps most pithily expressed by the Ninth Circuit in *Fields v. Palmdale School District*: "the *Meyer-Pierce* right does not extend beyond the threshold of the school door."[21]

Is it true, then, that parents' constitutional rights to direct their children's education end at the schoolhouse door? More broadly, are these narrow and weak readings of *Pierce* correct? I argue, on the basis of the relevant history and tradition, that they are not, and that the Supreme Court should clarify and correct the confused and largely erroneous state of current jurisprudence regarding parental rights in education.[22] Such clarification and correction is especially

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[19] *Id.* at 534.

[20] *Id.*

[21] 427 F.3d 1197, 1207 (9th Cir. 2005), *amended by* 447 F.3d 1187, 1190–91 (9th Cir. 2006). Although this line was replaced by something more nuanced, the original opinion still captures the upshot of the decision—indeed, despite the amendment, the Ninth Circuit itself quoted the original line in a subsequent case regarding Hindu parents who complained that the school's curriculum discriminated against their religion. *See* Cal. Parents for the Equalization of Educ. Mats. v. Torlakson, 973 F.3d 1010, 1020 (9th Cir. 2020) (quoting *Fields*, 427 F.3d at 1207).

[22] In this article, I use case law to elucidate the relevant history and tradition, but additional sources in statutory law, natural law, and common law also support my claims. *See* Eric A. DeGroff, *Parental Rights and Public School Curricula: Revisiting* Mozert

appropriate in the wake of *Dobbs v. Jackson Women's Health Organization*'s reaffirmation of the *Washington v. Glucksberg* test for identifying and defining unenumerated constitutional rights on the basis of a careful analysis of our nation's history and tradition.[23] And such clarification and correction is sorely needed given the increasingly controversial and ideological nature of public school policies and curricula,[24] and the resulting proliferation of disputes between parents and schools across the country.[25]

After 20 Years, 38 J.L. & EDUC. 83, 108–24 (2009). *See generally* Melissa Moschella, *Strict Scrutiny as the Appropriate Standard of Review for Parental Rights Cases: A Historical Argument*, 28 TEX. REV. L. & POL. 771 (2024) [hereinafter Moschella, *Strict Scrutiny*]; Melissa Moschella, *Natural Law, Parental Rights, and Education Policy*, 59 AM. J. JURIS. 197 (2014); Christine Gottlieb, *The Enduring Vitality of* Meyer *and* Pierce *Post-*Dobbs, 100 NOTRE DAME L. REV. (forthcoming 2026).

[23] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2246–47 (2022); *see also* Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (first quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion); and then quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)); It should be noted—particularly for those who are skeptical in principle of all substantive due process claims—that this historical analysis could also serve to support the anchoring of parents' constitutional rights in the Privileges or Immunities Clause, or in the Ninth Amendment. *See, e.g.*, Randy E. Barnett & Evan D. Bernick, *The Privileges or Immunities Clause Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*, 95 NOTRE DAME L. REV. 499, 501–04 (2019) (arguing that the original meaning of the Fourteenth Amendment's Privileges or Immunities Clause does protect unenumerated rights); Daniel E. Witte, People v. Bennett*: Analytic Approaches to Recognizing a Fundamental Parental Right Under the Ninth Amendment*, 1996 BYU L. REV. 183, 261; *see also* Stephen E. Sachs, Dobbs *and the Originalists*, 47 HARV. J.L. PUB. POL'Y 539, 541 (2024) (arguing the *Dobbs* majority opinion is "an originalism-*compliant* opinion, the kind a faithful originalist *should* write, reaching the right originalist result for what were essentially the right originalist reasons." (emphases in original)).

[24] *See generally* Helen Alvare, *Families, Schools, and Religious Freedom*, 54 LOY. U. CHI. L.J. 579 (2023) (detailing many instances in which public schools taught controversial lessons regarding sensitive issues such as sexuality and gender, with content that conflicts with, and undermines, the teachings of many religious traditions).

[25] *See, e.g.*, Mahmoud v. Taylor, 145 S. Ct. 2332 (2025); Foote v. Ludlow Sch. Comm., 128 F.4th 336 (1st Cir. 2025), *petition for cert. filed*, (July 22, 2025) (No. 25-77); Littlejohn v. Sch. Bd. of Leon Cnty., 132 F.4th 1232 (11th Cir. 2025), *petition for cert. filed*, (Sep. 5, 2025) (No. 25-259); Complaint, Encinas v. Grey, No. 3:24-cv-01611 (S.D. Cal. Sep. 9, 2024); Complaint, Wailes v. Jefferson Cnty. Pub. Schs., No. 1:24-cv-2439 (D. Colo. Sep. 4, 2024); Complaint, Vitsaxaki v. Skaneateles Cent. Sch. Dist., No. 5:24-cv-00155 (N.D.N.Y. Mar. 20, 2025); Ibanez v. Albemarle Cnty. Sch. Bd., 897 S.E.2d 300 (Va. Ct.

To make my argument, I will first examine the *Meyer* decision upon which *Pierce* was based, and then examine the *Pierce* opinion itself. Finally, because I think that *Meyer* (and by extension *Pierce*) declared the common law understanding of parental rights to be part of the liberty protected by the Fourteenth Amendment, the last section illustrates that common law view of parental rights by looking at pre-*Meyer* state supreme court decisions that granted parents, on the basis of common law, the right to exempt their children from some aspects of the public school curriculum.[26]

MEYER V. NEBRASKA

In *Meyer v. Nebraska*, the Supreme Court overturned a law that forbade the teaching of subjects in foreign languages prior to the ninth grade. Although the *Meyer* ruling is primarily based on the right of teachers to pursue an honest calling, the opinion makes striking claims regarding the fundamental duties and rights of parents, and comments at length on the way in which respecting the childrearing authority of parents as prior to that of the state is at the very heart of limited, constitutional government. For instance, the *Meyer* court highlights the right "to marry, establish a home and bring up children" as among "those privileges long recognized at common law" that are protected by the Fourteenth Amendment, and also echoes the language of the common law

App. 2024); Evan Goodenow, *Loudon Schools Curriculum Attacked, Defended at Protests Before Board Meeting*, LOUDOUN TIMES-MIRROR (Sep. 14, 2022), https://www.loudountimes.com/news/education/loudoun-schools-curriculum-attacked-defended-at-protests-before-board-meeting/article_b612b086-345a-11ed-ba89-ef87bd168506.html [https://perma.cc/7CW9-EWMY]; Ellen Evaristo, *The Fight for Education*, USC ROSSIER SCH. OF EDUC. (Nov. 14, 2024), https://rossier.usc.edu/news-insights/news/2024/november/fight-education [https://perma.cc/XM3A-T2GT] ("Across the nation, school board meetings have become increasingly contentious in recent years, with parents and community members expressing frustration and anger over a variety of issues.").

[26] For a more direct and extensive examination of the common law view of parental rights, see Moschella, *Strict Scrutiny*, *supra* note 22; Gottlieb, *supra* note 22; DeGroff, *supra* note 22, at 108–24.

tradition by stating that "it is the natural duty of the parent to give his children education suitable to their station in life."[27]

The opinion also emphasizes how our form of government contrasts with Plato's famous proposal for communal childrearing in the *Republic*, and with the Ancient Spartan practice of taking children away from their parents to be educated by state officials. The Court comments that the theories underlying these proposals are "wholly different from those upon which our institutions rest;" such approaches to education would do "violence to both the letter and spirit of the Constitution."[28] In other words, the *Meyer* Court emphasizes the inherent connection between respect for parental rights, and limited, constitutional government. Indeed, this connection seems obvious, for taking control over the education of all children is a favored tool for would-be dictators to mold future citizens in line with their preferred ideological vision.[29]

It is also worth pointing out that *Meyer*, like *Pierce* (as I argue in the next section), implicitly applies what today we would call strict scrutiny. The Court recognizes that the law has a rational relationship to a legitimate end, but nonetheless holds that "the means adopted . . . exceed the limitations upon the power of the State."[30] Why? These means are beyond the competency of the state because they are ultimately based on the same statist views of childrearing exemplified in more extreme form by the communal education schemes of Plato's *Republic* and ancient Sparta, schemes which are inimical to limited government.

For the *Meyer* Court (and the *Pierce* Court that built upon *Meyer*), the purposes that are "within the competency of the State" in the educational realm are limited by the primacy of parental educational authority. Thus, the state exceeds its competency when it intrudes upon that authority in ways that are not truly necessary

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[27] 262 U.S. 390, 399–400 (1923).

[28] *Id.* at 402.

[29] *See* MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 24–25 (2005) (arguing that "the ideal of government serving the people's will" is nullified if the state has the power to shape the will of future citizens by controlling children's education).

[30] *Meyer*, 262 U.S. at 402.

for the state's end of ensuring that all children receive an education sufficient to be law-abiding and productive citizens. As the next section indicates, this view of the state's limited competency in the educational arena is reflected in *Pierce*'s quite narrow list of the sorts of regulations that are within the competency of the state to enact, such as requiring all children to be educated up to a certain minimal level, requiring studies "plainly essential" to good citizenship, and forbidding studies that are "manifestly inimical" to good citizenship.[31]

THE *PIERCE* OPINION

Let us now turn the *Pierce* opinion to answer two questions: (1) What standard of review is being used? and (2) What is the scope of parental rights in education under *Pierce*?

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

Due to space constraints, I cannot present an in-depth answer to this question, but here is a synthesis of the argument[32]: although *Pierce* claims to use a rational basis standard,[33] the case was decided prior to the development of the tiers of scrutiny doctrine,[34] and the law at issue in *Pierce*—requiring all children to attend public school—*does* have a rational relationship to one or more legitimate state interests, such as promoting the assimilation of immigrants.[35] Therefore, the fact that the law was declared unconstitutional in

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

[32] For a more in-depth version of the argument, see Moschella, *Strict Scrutiny*, *supra* note 22.

[33] *See Pierce*, 268 U.S. at 535 ("[R]ights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state.").

[34] *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (establishing tiers of scrutiny).

[35] *Cf.* City of Chicago v. Shalala, 189 F.3d 598, 604–05 (7th Cir. 1999) (applying rational basis review to a statute involving aliens' eligibility for welfare benefits, citing self-sufficiency interests).

itself gives strong evidence that the Oregon law was assessed against what we would today call a higher tier of scrutiny. Further evidence for this claim is found in that both the Oregon district court and the Supreme Court shifted the burden of proof to the state, and argued that the law was unconstitutional on the grounds that the state failed to show that the law was *necessary* (not just reasonably related) to the state's educational interest (which is presumed to be compelling). For instance, the district court argued that although "[c]ompulsory education [is] the paramount policy of the state"—thus acknowledging the state's educational interest and the law's relationship to that interest—the law was nonetheless unconstitutional because it was "neither necessary nor essential for the proper enforcement of the state's school policy."[36] The Supreme Court affirmed and echoed this line of reasoning, noting that "there are no peculiar circumstances or present emergencies which demand extraordinary measures [such as the law in question] relative to primary education."[37] In short, requiring the state to prove that the law is *necessary* to its interest—to show that the measures adopted by the legislature are *demanded* to achieve the state's educational goals—is the same as requiring the state to show that the law is the least restrictive means to achieve its goal, for if the law is proven to be *necessary* for or *demanded by* the state's interest, that implies that no less burdensome means is available. Thus, the main elements of strict scrutiny are present: a shift in burden of proof, plus a least restrictive means test.[38]

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[36] Soc'y of Sisters v. Pierce, 296 F. 928, 937 (D. Or. 1924).

[37] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925).

[38] *See* Stephanie H. Barclay, *Replacing Smith*, 133 YALE L.J.F. 436, 456 (2023) (arguing that, in practice, the shift in the burden of proof and the least-restrictive-means test are the most important elements of strict scrutiny, given that, "[a]s a practical matter, courts . . . often assume without deciding that the government's interest is compelling, and then simply move on to assessing whether the government satisfied its evidentiary burden.").

B. The Scope of Parents' Educational Rights Under Pierce

What about the scope of parents' educational rights under *Pierce*? First, we need to consider the implications of what are perhaps the most famous lines in the opinion:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[39]

It could be argued that the clause, "by forcing them to accept instruction from public teachers only," limits the scope of the right protected by *Pierce*, leaving us with the narrow interpretation offered by Justice White in his *Yoder* concurrence; this interpretation has been adopted by many federal circuit courts—according to which *Pierce* means *only* that the state may not require all children to attend public schools.[40] Yet, this narrow interpretation seems incompatible with those same Justices' interpretation of their own ruling just two years later in *Farrington v. Tokushige*, which held on the basis of *Pierce* and *Meyer* that a law undermining the autonomy of private schools through extensive government regulation was also an unconstitutional violation of parental rights under the Fourteenth Amendment.[41]

The next sentence in the *Pierce* opinion seems to enunciate *why* the "fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children," and understanding this rationale is

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[39] *Pierce*, 268 U.S. at 534–535.

[40] *See supra* Introduction.

[41] 273 U.S. 284, 298–99 (1927).

helpful for determining the scope and limits of the state's educational authority vis a vis parents. This power to "standardize" children is excluded from the competence of government because *parents*, not the state, have primary educational authority. Parents, not the state, are the ones who bring children into the world, and so parents by nature—by virtue of their unique relationship to their children—have responsibility for their children and the corresponding authority to carry out their childrearing duties.[42] Those familiar with the common law view will see clear echoes of influential common law jurists such as Blackstone and Kent here.[43]

The text of the *Pierce* opinion also provides more explicit guidance regarding the scope and limits of the state's educational authority. The decision acknowledges "the power of the State reasonably to regulate all schools . . . . " It then goes on (after a semicolon) to indicate what the scope of that reasonable regulation is, listing four things that the state may require: (1) "that all children of proper age attend some school," (2) "that teachers shall be of good moral character and patriotic disposition," (3) "that certain studies plainly essential to good citizenship must be taught," and (4) "that nothing be taught which is manifestly inimical to the public welfare."[44] The implication is that coercive state action that

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

[43] *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *435 ("The duty of parents . . . is a principle of natural law; an obligation . . . laid on them not only by nature herself, but by their own proper act, in bringing them into the world."); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 159, 169 (O. Halsted ed. 1827) (stating that parents' natural duties to their children "consist in maintaining and educating them," and indicating that parents have these duties by nature because "[t]he wants and weaknesses of children render it necessary that some person maintain them, and the voice of nature has pointed out the parent as the most fit and proper person."); *see also supra* note 22 (collecting sources).

[44] *Pierce*, 268 U.S. at 534. ("No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their

does *not* clearly fall into one of these categories *would* be beyond the proper competence of the state, and would therefore be unconstitutional (because it would be encroaching on matters that belong to the proper competence of parents and would amount to an attempt by the state to "standardize" children). This interpretation is also supported by the decision in *Farrington*.

Moreover, this interpretation of *Pierce*'s implications regarding the scope and limits of the state's educational authority sheds further light on the opinion's claim that the Oregon law in question "has no reasonable relation to some purpose within the competency of the State."[45] For, as already noted, the law *does* have a reasonable relation to many state interests. Nonetheless, the law falls outside the four elements of reasonable state educational regulation listed above, and is arguably *for that reason* beyond the competency of the State.

State court decisions regarding parental rights in education in the half century prior to *Meyer* further support this analysis of *Meyer* and *Pierce*, according to which the primacy of parental educational authority effectively limits coercive state action in the educational arena to actions that are justifiable under what today would be called strict scrutiny. These pre-*Meyer* state court decisions provide important insight into the common law understanding of parental rights that *Meyer* (and, by extension, *Pierce*) declared to be part of the liberty guaranteed by the Fourteenth Amendment.

PRE-*MEYER* STATE SUPREME COURT DECISIONS REGARDING PARENTAL RIGHTS IN EDUCATION

From the mid-nineteenth to the early twentieth century, there was a string of seven state supreme court cases brought by parents who

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teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.").

[45] *Id.* at 535.

sought to exempt their children from aspects of the public school curriculum, while still retaining the ability to avail their children of a free public school education. The parents prevailed in six out of seven of such cases, several of which were cited and quoted in the brief for the Society of Sisters in *Pierce*.[46] In these cases, the courts argued that the common law understanding of parents as possessing primary educational authority implies that parents have the right to direct the education of their children, even within the public schools, as long as the exercise of this right is compatible with the schools' ability to fulfill their basic purpose of educating future citizens.

For instance, in an 1891 Nebraska case, the Court held that students attending public schools cannot "be compelled to study any prescribed branch against the protest of the parent that the child shall not study such branch."[47] In arguing for this conclusion, the court asks:

> Now, who is to determine what studies she shall pursue in school,—a teacher who has a mere temporary interest in her welfare, or her father, who may reasonably be supposed to be desirous of pursuing such course as will best promote the happiness of his child? The father certainly possesses superior opportunities of knowing the physical and mental capabilities of his child. . . . The right of the parent, therefore, to *determine* what studies his child shall pursue is paramount to that of the trustees or teacher.[48]

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[46] For the six state supreme court cases where the parents prevailed, see Sch. Bd. Dist. No. 18 v. Thompson, 103 P. 578, 582 (Okla. 1909); Morrow v. Wood, 35 Wis. 59, 66 (1874); Rulison v. Post, 79 Ill. 567, 573–74 (1875); Trs. of Schs. v. People *ex rel.* Van Allen, 87 Ill. 303, 308–09 (1877); State *ex rel.* Sheibley v. Sch. Dist. No. 1 of Dixon Cnty., 48 N.W. 393, 395 (Neb. 1891); State *ex rel.* Kelley v. Ferguson, 144 N.W. 1039, 1044 (Neb. 1914). *See also* Hardwick v. Bd. of Sch. Trustees of Fruitridge Sch. Dist., 205 P. 49 (Cal. App. 1921) (ruling in favor of the parents). The outlier is State *ex rel.* Andrew v. Webber, 8 N.E. 708, 713 (Ind. 1886), which ruled against the parents.

[47] State *ex rel.* Sheibley, 48 N.W. at 395.

[48] *Id.* (emphasis added).

This echoes the language and argument of the Wisconsin Supreme Court in an 1874 case: "we can see no reason whatever for denying to the father the right to direct what studies, included in the prescribed course, his child shall take."[49] The court also noted that "[o]rdinarily . . . the law gives the parent the exclusive right to govern and control the conduct of his minor children."[50] Similarly, in 1875 the Illinois Supreme Court stated:

> Parents and guardians are under the responsibility of preparing children intrusted [sic] to their care and nurture, for the discharge of their duties in after life. Law-givers in all free countries, and, with few exceptions, in despotic governments, have deemed it wise to leave the education and nurture of the children of the State to the direction of the parent or guardian. This is, and has ever been, the spirit of our free institutions. The State has provided the means, and brought them within the reach of all, to acquire the benefits of a common school education, but leaves it to parents and guardians to determine the extent to which they will render it available to the children under their charge.[51]

This case, along with the Wisconsin case, were decided less than a decade after the ratification of the Fourteenth Amendment, and are thus illustrative of the era's understanding of parental rights.[52]

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[49] *Morrow*, 35 Wis. at 64.

[50] *Id.*

[51] *Rulison*, 79 Ill. at 573.

[52] Although my focus here is on parental rights in education, another Illinois case related to parents' custody rights provides further evidence of the ratification-era understanding of parental rights. *See* People *ex rel.* O'Connell v. Turner, 55 Ill. 280 (1870). This case was decided in 1870—just two years after the Fourteenth Amendment was ratified—and Judge Thornton, who decided the case, was a member of the 39th Congress which passed the Fourteenth Amendment in 1866. *See* CONG. GLOBE, 39th Cong., 2d Sess. xxxi (1866). Judge Thornton overturned the laws in question—which empowered the state to commit children to a reform school if they lack "proper parental care"—on the grounds that the laws allowed the state to remove children from their

Because space does not permit me to describe each of these cases in detail, here I will focus on *School Board District No. 18 v. Thompson*, an Oklahoma case that is representative of—and refers to—similar cases from other states.[53] Because the Oklahoma Supreme Court in this case based its decision explicitly on the common law understanding of parental authority over children as prior to the authority of the state, it is a helpful illustration of this common law view—which *Meyer* affirmed as part of the liberty guaranteed by the Fourteenth Amendment—and of how this common law view applies concretely when there is a conflict between parental authority and state authority.

The background of the *Thompson* case is that the parents did not want their children to take the singing lessons in the public school, and the children were expelled from the school because they obeyed their parents and refused to participate in the lessons. The parents sued, petitioning the court to order the school board to reinstate their children in the schools without requiring them to take the singing lessons. The Oklahoma Supreme Court granted the parents' petition.

To defend its ruling, the court began by invoking the common law view that parents are the ones who are, by nature, responsible for the maintenance, protection and education of their children. "These duties," wrote the Court, "were imposed upon principles of natural law and affection laid on them not only by Nature herself, but by their own proper act of bringing them into the world."[54] In

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parents' custody without proof of genuine unfitness on the part of the parent, and that this was in violation of the common law standard according to which the state should defer to parents except when "gross misconduct or almost total unfitness on the part of the parent, should be clearly proved." *Turner*, 55 Ill. at 282, 284–85.

[53] 103 P. 578, 579 (Okla. 1909).

[54] *Id.* (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *447); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *435–40 (arguing that parents have natural duties to maintain, protect, and educate their children, and corresponding authority to fulfill those duties); 2 KENT, *supra* note 43, at 159, 169 (explaining that the duties of "maintaining and educating" children belong naturally to the children's parents, because "[t]he wants and weaknesses of children render it necessary that some person maintain them, and the voice of nature has pointed out the parent as the most fit and

response to arguments to the contrary on behalf of the school board, the court insisted that this common law principle stands even after compulsory education laws are enacted.[55] Echoing Blackstone and Kent, the Court also argued that the state should defer to parents' educational judgments because the parent has greater interest in the child's welfare and greater knowledge of the child's capacities.[56] Summarizing its common-law based view about the primacy of parental authority vis-à-vis the state, the Court stated: "[u]nder our form of government, and at common law, the home is considered the keystone of the governmental structure. In this empire parents rule supreme during the minority of their children."[57]

Although the *Thompson* court acknowledged the right of the school authority to make "reasonable rules and regulations," the Court nonetheless concluded that, for all the reasons just mentioned: "[t]he parent . . . has a right to make a reasonable selection from the prescribed course of study for his child to pursue, and this selection must be respected by the school authorities, as the right of the parent in that regard is superior to that of the school officers and the teachers," as long as this does not "interfere with the efficiency or discipline of the school[s]."[58]

INTERPRETING *MEYER* AND *PIERCE* IN LIGHT OF THE PRE-*MEYER* STATE SUPREME COURT CASES

How do these cases help us to determine the proper interpretation of *Meyer* and *Pierce*? First, *Thompson*—along with the five other similar cases—provides evidence that, under the common law view, parental rights *do* extend beyond the

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proper person. The laws and customs of all nations have enforced this plain precept of universal law[.]" Kent claims later that "[t]he rights of parents result from their duties").

[55] *Thompson*, 103 P. at 581 (quoting State *ex rel.* Sheibley v. Sch. Dist. No. 1 of Dixon Cnty., 48 N.W. 393, 395 (Neb. 1891)).

[56] *Id.* at 580.

[57] *Id.* at 581.

[58] *Id.*

schoolhouse door, and include (at least) the parents' right to exempt children from certain classes, as long as this is not incompatible with the schools' ability to fulfill their purpose. If, as I have argued, *Meyer* (and by extension, *Pierce*) declared parents' common-law rights to be included within the liberty guaranteed by the Fourteenth Amendment, this means that the narrow reading of *Pierce* as *merely* prohibiting the state from requiring all parents to send their children to a public school is incorrect.

Further, if my analysis of the *Pierce* opinion is correct, then the state's competence in the educational arena is limited to what the opinion indicates to be within the scope of reasonable state regulation—namely, requiring all children to receive an education up to some minimal standard, requiring that teachers "be of good moral character and patriotic disposition," requiring that "studies plainly essential to good citizenship" be taught, and forbidding the teaching of anything "manifestly inimical to the public welfare."[59] The state might go beyond this in the educational services that it *offers* to parents, but it would be a violation of parental rights for the state to *enforce* anything outside of these categories. *Thompson* and similar pre-*Meyer* cases also support this interpretation, given their claim that the state lacks the authority to force children to study *all* the subjects offered at the public school against a parent's objection (even *after* the enactment of compulsory education laws, which are presumed to be legitimate).

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

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[59] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925). The common law tradition also provides guidance regarding this minimal standard of education. James Kent, for instance, speaks favorably of state enforcement of "ordinary education," and specifies that it consists in basic literacy, numeracy, and knowledge of the law. 2 KENT, *supra* note 43, at 165.

contemporary rational basis test, the Court would have ruled against the parents and in favor of the school board, as occurred in *State v. Webber*, which was the only prior case of this sort that ruled against the parents precisely because it applied a more deferential standard of review that placed the burden of proof on the parents rather than state.[60] By contrast, *Thompson* and the five other state supreme court cases ruling in favor of the parents all placed the burden of proof on the state,[61] and implicitly required that the state's action be narrowly tailored to its interest in the education of future citizens, and necessary for the efficient operation of the schools established for that purpose. Because the states in these cases failed to provide evidence indicating that granting the exemption requested by the parents would be incompatible with the "proper discipline, efficiency and well-being of the common schools," each state's refusal to allow parents to opt their children out of certain lessons or branches of study was deemed a violation of parents' rights.[62]

CONCLUSION

Analyzing *Pierce* in light of the relevant legal history and tradition—in accord with the guidance offered by *Glucksberg* and *Dobbs* for identifying and defining enumerated constitutional rights—reveals that the narrow and weak interpretation of parents' constitutional rights under *Pierce* that has been adopted by many circuit courts is deeply flawed. On the contrary, a careful analysis of both the *Pierce* opinion itself, and of the relevant historical

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[60] State *ex rel.* Andrew v. Webber, 8 N.E. 708 (Ind. 1886).

[61] *Thompson*, 103 P. at 582 (criticizing the *Webber* court for placing the burden of proof on the parents) ("We think it would be a reversal of the natural order of things to presume that a parent would arbitrarily and without cause or reason insist on dictating the course of study of his child in opposition to the course established by the school authorities. A better rule, we think, would be to presume, in the absence of proof to the contrary, that the request of the parent was reasonable and just, to the best interest of the child, and not detrimental to the discipline and efficiency of the school.").

[62] Morrow v. Wood, 35 Wis. 59, 66 (1874).

background—especially *Meyer* and the common law tradition as reflected in pre-*Meyer* state supreme court cases dating back to the era of the Fourteenth Amendment's ratification—should lead us to conclude that parents' constitutional rights to direct their children's education are both broad and strong. Furthermore, the state's authority in this area is correspondingly circumscribed—limited, as *Pierce* says, to requiring studies that are "plainly essential" to good citizenship, forbidding those that are "manifestly inimical," and setting up schools to ensure that all children have access to an education that will enable them to be responsible citizens.[63] Thus, Justice White's narrow interpretation of *Pierce* in his *Yoder* concurrence was unfounded and historically inaccurate. And federal district court cases relying on that interpretation—like *Mozert*, *Brown*, and *Fields*—were wrongly decided. The circuit courts in these and similar cases also erred in failing to apply strict scrutiny.

Given the proliferation of current disputes between parents and school districts, the time is ripe to correct these misinterpretations of *Pierce*. Correcting these misinterpretations will help make it possible for all parents, including parents with limited financial means, to fully exercise their natural and constitutional right to direct the upbringing and education of their children.

Critics might object that if the Supreme Court adopts this broad and strong interpretation of parents' constitutional rights in the educational arena, this will open the floodgates of parental rights litigation. However, I think these worries are exaggerated. Given the high costs of litigation, parents are unlikely to sue for frivolous reasons, and once parents win an important victory in the Supreme Court that clarifies the true strength and breadth of parental rights, schools will be more accommodating of parents at the outset. It might then be objected that providing these accommodations will be unworkable for schools, but this objection seems unreasonable and implausible given the already-common practice of opt-outs for

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[63] *Pierce*, 268 U.S. at 534.

sex education classes, along with things like individual education programs for special needs students, and programs tailored to gifted students.[64] Of course, accommodations will involve some burden for the schools, but surely schools should have to take on more than a minimal burden to respect fundamental constitutional rights. But the burden of allowing students whose parents object to a particular class or lesson to go to a study hall or sit outside the classroom during the lesson is tiny by comparison with special education services—which are estimated to have an average per-pupil cost of over $13,000.[65] Further, a full vindication of parental rights in education likely also requires ending the public schools' monopoly on public educational funding through programs that give all parents genuine school choice—and this would lessen the need for exemptions and accommodations by giving parents who object to aspects of the curriculum a meaningful opportunity for exit.[66] But while I do believe that a strong constitutional case can be

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[64] *See, e.g.*, *Opt-Outs and Sex Ed: What Are the Percentages?*, SIECUS: SEX ED FOR SOC. CHANGE, https://siecus.org/opt-outs-and-sex-ed-what-are-the-percentages-2/ [https://perma.cc/B5SV-NEV2] (last visited Feb. 1, 2025) (finding "[m]ost states have opt-out provisions in their state education laws . . . sources . . . suggest an average opt-out rate of under 5%"); Eesha Pendharkar, *3 Reasons Why More Students Are in Special Education*, EDUC. WEEK (Oct. 10, 2023), https://www.edweek.org/teaching-learning/3-reasons-why-more-students-are-in-special-education/2023/10 [https://perma.cc/V7GL-QNHR] ("Almost 7.3 million students, or 14.7 percent of all public school students nationwide, needed special education services in the 2021–22 school year. . . . Under the Individuals with Disabilities Education Act (IDEA) . . . every student in special education has to be served by an individualized education program, also known as an IEP."); *Percentage of Public School Students Enrolled in Gifted and Talented Programs, by Sex, Race/Ethnicity, and State or Jurisdiction: Selected School Years, 2004 through 2020–21*, NAT'L CENTER EDUC. STUD., https://nces.ed.gov/programs/digest/d23/tables/dt23_204.90.asp [https://perma.cc/E5ZV-M5R9] (last visited Feb. 1, 2025).

[65] Krista Kaput & Jennifer O'Neal Schiess, *Who Pays for Special Education? An Analysis of Federal, State, and Local Spending by States and Districts*, BELLWETHER (Oct. 2024), https://bellwether.org/publications/who-pays-for-special-education/ [https://perma.cc/9JM5-XYAB].

[66] On the importance of school choice programs to fully vindicate parents' constitutional rights by giving all parents—not just the wealthy—the ability to "exit" the public school system, see generally Nicole Stelle Garnett & John A. Meiser, *Preserving the Exit Option: State Public Education Mandates and Parental Rights in Education*, 100 NOTRE DAME L. REV. (forthcoming 2026) (on file with author); Richard F.

made for some form of universal school choice program, making that case is beyond the scope of this article.[67]

Finally, it is worth remembering that strong parental rights protections ultimately redound to the well-being of children, because, as the common law tradition emphasized, and as the Supreme Court has affirmed, parents are much more likely than the state to know what is best for their children, and to be motivated to promote their children's welfare. Vindicating parental rights through a more robust interpretation of *Pierce* would therefore be beneficial not only to parents themselves, but also—and primarily—to their children.[68]

Duncan, *Why School Choice is Necessary for Religious Liberty and Freedom of Belief*, 73 CASE W. RESV. L. REV. 1055, 1058 (2023) (calculating that, in order to send his five children to a religious school that aligned with his beliefs, his family had to forgo $845,000 in state educational benefits, a sum which does not even include the cost of private school tuition).

[67] *See* Philip Hamburger, *Education Is Speech: Parental Free Speech in Education*, 101 TEX. L. REV. 415, 432, 459 (2022) (arguing that state schools' monopoly on public educational funding is an unconstitutional condition on parents' educational speech because it "presses parents to give up their educational speech and substitute the state's," and also that it violates the Establishment Clause by privileging the state's preferred views—which align with those of theologically liberal denominations—and disfavoring or criticizing theologically conservative beliefs); Melissa Moschella, Carson v. Makin*, Free Exercise, and the Selective Funding of State-Run Schools*, J. RELIGION, CULTURE & DEMOCRACY, 1, 7 (Mar. 3, 2025) https://jrcd.scholasticahq.com/article/129427-_carson-v-makin_-free-exercise-and-the-selective-funding-of-state-run-schools [https://perma.cc/B947-QX6Y] (arguing, "on the basis of *Carson v. Makin* and its precedents, that the selective government funding of only state-run schools" places an unconstitutional condition on the free exercise of religion by forcing many religious parents to choose between forgoing a significant state benefit or forgoing "the ability to exercise their religion by providing their children with an education that aligns with their faith").

[68] Parham v. J.R., 442 U.S. 584, 602 (1979) ("[H]istorically [the law] has recognized that natural bonds of affection lead parents to act in the best interests of their children."); *see also, e.g.*, State *ex rel.* Sheibley v. Sch. Dist. No. 1, 48 N.W. 393, 395 (Neb. 1891) ("[W]ho is to determine what studies she shall pursue in school,—a teacher who has a mere temporary interest in her welfare, or her father, who may reasonably be supposed to be desirous of pursuing such course as will best promote the happiness of his child?"); Richard W. Garnett, *Taking* Pierce *Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109, 133–34 (2000) ("What reason is there for thinking that, in contested matters of education, values, and faith, a child's dignity

is more respected, and her autonomy better served, when her 'best interests' in those matters are determined by the State, rather than by her family?" Garnett continues that "*Pierce* promises children that decisions about their best interests will be made by those who, generally speaking, are most likely to work conscientiously, motivated by love and moral obligation, to advance their best interests."). Emily Buss argues similarly, saying,

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

See also MOSCHELLA, PARENTAL RIGHTS, *supra* note 42, at 133–45 (arguing that children benefit significantly from coherence and consistency between the values that they are being taught at home and at school).