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## The Parent as (Mere) Educational Trustee: Whose Education Is It, Anyway?

Jeffrey Shulman

*Georgetown University*, [shulmanj@law.georgetown.edu](mailto:shulmanj@law.georgetown.edu)

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Jeffrey Shulman\*

# The Parent as (Mere) Educational Trustee: Whose Education Is It, Anyway?

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“Custody should not be made to depend on the accident of possession; the question should be, not who has the child, but to whom should it be entrusted, for its own sake and that of society.”

Lewis Hochheimer  
The Law Relating to the Custody of Infants<sup>1</sup>

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\* Associate Professor, Legal Research and Writing, Georgetown University Law Center. J.D., Georgetown University Law Center; Ph.D., University of Wisconsin-Madison. I dedicate this Article to the memory of Carol O’Neil, Associate Dean, Academic Administration, of the Law Center, and Professor Steven Goldberg, both of whom ennobled the work and lives of everyone at Georgetown Law. They are and will remain sorely missed. I am deeply indebted to Professor Robin West, Associate Dean, Research and Academic Programs, Georgetown University Law Center, for her enthusiastic and unwavering support of my research. I am also grateful for the longstanding support of Alex Aleinikoff, former Dean of the Georgetown University Law Center. Many thanks as well to Professor David Wolitz, whose intellectual camaraderie it has been my pleasure and privilege to enjoy. May Chiang provided expert and tireless research assistance. The assistance of the Georgetown Law Library Faculty Services Department was invaluable. This Article was supported by a grant from the Georgetown University Law Center.

1. LEWIS HOCHHEIMER, THE LAW RELATING TO THE CUSTODY OF INFANTS 61 (Baltimore, H.B. Scrimger, 3d ed. 1899).

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[T]hen wilt thou not be loath  
To leave this Paradise, but shalt possess  
A paradise within thee, happier far.

John Milton  
Paradise Lost<sup>2</sup>

## I. INTRODUCTION

In the fall of 2009, President Barack Obama spoke to public school students at the beginning of the new school year.<sup>3</sup> Though previous presidents (Republicans among them) had made similar speeches, President Obama's address to students generated intense opposition, and many school districts made some form of accommodation to those offended by the President's plan.<sup>4</sup> While our era rarely sees political opposition that is not intense, this protest reflected something more than short-lived, knee-jerk contrarianism. Driving the opposition was a profound suspicion that the public school system is a primary agent in "Big Government's" efforts to indoctrinate children in a left-wing ideological agenda.<sup>5</sup> The chairman of the Florida Republican Party spoke for many when he said that the speech was an effort to "spread President Obama's socialist ideology."<sup>6</sup> Indeed, the fear that our schools were being "turned over to some socialist movement" was the emphatic undercurrent of objection to the President's speech.<sup>7</sup> Of course, this protest was not about the takeover of our nation's industries. The concern—more grave than fear of Soviet-style economic planning—was that our children's values, if not their very souls, were being collectivized.

This fear is not new to political and social disagreements. The furor over President Obama's speech bears provocative resemblances to other campaigns to determine how the nation's schools should inculcate values in children (or, *if* they should inculcate values) and what values should be transmitted. The nineteenth century saw a protracted and, at times, even violent struggle to decide whether public schools would hold onto their monopoly over public funding.<sup>8</sup> Fiercely protesting that the public schools had "assumed the exclusive right of

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2. JOHN MILTON, *Paradise Lost*, in JOHN MILTON: THE COMPLETE POEMS 119, 404 (John Leonard ed., Penguin Books 1998) (1667).

3. James C. McKinley, Jr. & Sam Dillon, *Some Parents Oppose Obama Speech to Children*, N.Y. TIMES, Sept. 3, 2009, at A1.

4. See Sam Dillon, *In School Speech Obama Avoids Political Issues*, N.Y. TIMES, Sept. 7, 2009, at A14. In a wealth of accommodating spirit, some school districts decided not to show the speech at all. *Id.*

5. See McKinley & Dillon, *supra* note 3.

6. *Id.*

7. *Id.*

8. See DIANE RAVITCH, *THE GREAT SCHOOL WARS* 20–158 (1974).

monopolizing the education of youth,”<sup>9</sup> Catholics argued that the seemingly secular education provided by the schools was really instruction in the “sectarianism of infidelity.”<sup>10</sup> In their view, state control of education would lead to even more ominous monopolies:

Should the professors of some weak or unpopular religion be oppressed today, the experiment may be repeated tomorrow on some other. Every successful attempt in that way will embolden the spirit of encroachment and diminish the power of resistance; and, in such an event, the monopolizers of education after having discharged the office of public tutor, may find it convenient to assume that of public preacher. The transition will not be found difficult or unnatural from the idea of common school to that of a common religion . . .<sup>11</sup>

Catholics lost this battle, but the war against state-controlled education would remain a hotly contested one.<sup>12</sup> In 1922, the voters of Oregon approved an initiative mandating public education for children under sixteen years old. The case that arose from this monopolistic measure, *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*,<sup>13</sup> reached the Supreme Court in 1925, destined to become a constitutional and cultural landmark. The shadow of socialist child-raising was never far from the legal debate. Two years earlier, in a separate education case concerning a state prohibition of foreign language teaching,<sup>14</sup> law professor William Dameron Guthrie filed an amicus brief specifically to address the Oregon compulsory public school law, the constitutionality of which was certain to come before the Court. Guthrie described the Oregon act as “a revolutionary piece of legislation,” evoking images of Bolshevik menace:

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.<sup>15</sup>

The law was not only communistic, it was platonic. Guthrie deplored “[t]he 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.”<sup>16</sup> On behalf of the

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9. *Id.* at 49 (quoting W.M. OLAND BOURNE, HISTORY OF THE PUBLIC SCHOOL SOCIETY OF THE CITY OF NEW YORK 334 (New York, WM. Wood & Co. 1870)).

10. *Id.* at 48 (quoting BOURNE, *supra* note 9, at 332).

11. *Id.* at 49 (quoting BOURNE, *supra* note 9, at 338).

12. For a rich and provocative treatment of this contest, see generally Barbara Bennett Woodhouse, “Who Owns the Child?": Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995 (1992).

13. 268 U.S. 510 (1925).

14. See Meyer v. Nebraska, 262 U.S. 390 (1923).

15. Brief for William D. Guthrie & Bernard Hershkopf as Amici Curiae Supporting Plaintiff-in-Error at 3, Meyer v. Nebraska, 262 U.S. 390 (1923) (No. 325).

16. *Id.*

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defendants opposing the language prohibition, attorney Arthur F. Mullen portrayed the case as one about “the power of a legislative majority to take the child from the parent.”<sup>17</sup> This, Mullen insisted, was “the principle of the soviet.”<sup>18</sup> It was strong rhetoric—and it was effective. Striking down the foreign language prohibition, Justice McReynolds followed, and bettered, Guthrie’s dislike of classical models of education. He compared the language prohibition statute to the communistic parenting measures of ancient Sparta<sup>19</sup> and Plato’s *Republic*.<sup>20</sup> For the Court, such measures rested on an allocation of educational control wholly at odds with the letter and spirit of the Constitution.<sup>21</sup>

In 1925, the Supreme Court struck down Oregon’s compulsory education law, finding that it “unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control.”<sup>22</sup> The Court rejected a ban on private schooling, but cautiously supported the broad regulatory authority of the state:

No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.<sup>23</sup>

Yet, *Pierce* was more about its rhetorical reach than its legal holding. Writing for the Court, Justice McReynolds focused the majority opinion on the power of the state “to standardize its children by forcing them to accept instruction from public teachers only.”<sup>24</sup> His anti-stat-

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17. Transcript of Oral Argument at 10, *Meyer v. Nebraska*, 262 U.S. 390 (1923) (No. 325).

18. *Id.*

19. “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.” *Meyer*, 262 U.S. at 401–02.

20. “[T]he 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.” *Id.*

21. *Cf.* *Bowen v. Gilliard*, 483 U.S. 587, 632–33 (1987) (Brennan, J., dissenting).

In *The Republic* and in *The Laws*, Plato offered a vision of a unified society, where the needs of children are met not by parents but by the government, and where no intermediate forms of association stand between the individual and the state. The vision is a brilliant one, but it is not our own . . . .

If we are far removed from the Platonic Republic, it is because our commitment to diversity and decentralized human relationships has made us attentive to the danger of Government intrusion on private life.

*Id.* (citations omitted).

22. *Pierce v. Soc’y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925).

23. *Id.* at 534.

24. *Id.* at 535.

ist rhetoric on high display, Justice McReynolds drafted what the Supreme Court would later call “a charter of the rights of parents to direct the religious upbringing of their children.”<sup>25</sup>

What role should the state play in the transmission of values? What values can the state successfully transmit? How can it do so? To approach these questions, this Article begins with principles laid down by the Supreme Court. It is the state’s duty to ensure that all schools, public or private, inculcate habits of critical reasoning and reflection, a way of thinking that implies a tolerance of and respect for other points of views.<sup>26</sup> In pursuit of this lofty goal, the state need not make public schooling compulsory. However, the state must see that all children are provided an education that is, in the fullest sense, public—a schooling that gives children the tools they will need to think for themselves, a schooling that exposes children to other points of view and to other sources of meaning and value than those they bring from home. This effort may well divide child from parent, not because socialist educators want to indoctrinate children, but because learning to think for oneself is what children do. It is one facet of the overall movement toward the individuation and autonomy that is “growing up” and is, perhaps, the most natural and vital part of healthy maturation. Likewise, we should be entirely candid about the fact that the inculcation of such habits will be more compatible with the beliefs of some religious groups than others.

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25. *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972); cf. Richard W. Garnett, *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109, 143 (2000) (describing *Pierce* as a “ringing endorsement of religious freedom and of limited government dominion over citizens”).

26. See, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (“These fundamental values of ‘habits and manners of civility’ essential to a democratic society must, of course, include tolerance of divergent political and religious views.”); *Ambach v. Norwick*, 441 U.S. 68, 77 (1979) (“These perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists.”); cf. Stephen Macedo, *The Constitution, Civic Virtue, and Civil Society: Social Capital as Substantive Morality*, 69 FORDHAM L. REV. 1573, 1593 (2001) (“The patterns of social life that support liberal democratic forms of civil flourishing embody definite rankings of competing human goods, which will be associated with some versions of religious truth and not others. In this sense, the project of promoting a healthy liberal democratic civil society is inevitably a deeply judgmental and non-neutral project.”). But see, e.g., George W. Dent, Jr., *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 863 (1988) (rejecting the argument that teaching values is a sufficiently compelling interest to override religious objections to public school curriculum); Charles L. Glenn, *How Government Schools (May) Displace the Family*, in THE FAMILY, CIVIL SOCIETY, AND THE STATE 219 (Christopher Wolfe ed., 1998); Michael W. McConnell, *Education Disestablishment: Why Democratic Values Are Ill-Served by Democratic Control of Schooling*, in MORAL AND POLITICAL EDUCATION 87 (Stephen Macedo & Yael Tamir eds., 2002) (arguing that public schools cannot inculcate democratic values without compromising liberal commitment to neutrality).

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The state as educator, then, is no ideologically neutral actor. The philosophical foundations supporting a truly public education are the liberal biases of our nation's intellectual forbearers, biases in favor of a non-authoritarian approach to truth, of free argument and debate (what Jefferson called truth's "natural weapons"<sup>27</sup>), and of a healthy sense of human fallibility—the foundation, in other words, of our nation's governmental blueprint.<sup>28</sup> Unless children are to live under "a perpetual childhood of prescription,"<sup>29</sup> they must be exposed—intellectually, morally, and spiritually—to the dust and heat of the race. Whether one considers the formation of moral commitments a matter of choice or duty, of reflective self-directedness or cultural embeddedness, the child must not be denied the type of education that will allow him, as an adult, to choose whether (and in what way and to what degree) to honor those commitments. A public education is the engine by which children are exposed to "the great sphere" that is their world and legacy.<sup>30</sup> It is their means of escape from, or free commitment to,

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27. Thomas Jefferson, *The Statute of Virginia for Religious Freedom*, in *THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES FOR AMERICAN HISTORY*, xvii, xviii (Merrill D. Peterson & Robert C. Vaughan eds., 1988).

28. *Cf.*, e.g., *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) ("[N]either exclusively, nor even primarily, are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."). *But see* Stanley Fish, *Children and the First Amendment*, 29 *CONN. L. REV.* 883, 884 (1997) ("[W]ithout 'authoritative selection,' education, whether public or private, would be impossible."). For a defense of the ideologically liberal biases of public education, see generally EAMONN CALLAN, *CREATING CITIZENS: POLITICAL EDUCATION AND LIBERAL DEMOCRACY* (1997); AMY GUTMANN, *DEMOCRATIC EDUCATION* (1987); STEPHEN MACEDO, *DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY* (2000).

29. JOHN MILTON, *Areopagitica*, in *THE PROSE OF JOHN MILTON* 265, 286 (J. Max Patrick ed., 1968) (1644).

30. *See* BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 159 (1980) ("The entire educational system will, if you like, resemble a great sphere. Children land upon the sphere at different points, depending upon their primary culture; the task is to help them explore the globe in a way that permits them to glimpse the deeper meanings of the life dramas passing on around them. At the end of the journey, however, the now mature citizen has every right to locate himself at the very point from which he began—just as he may also strike out to discover an unoccupied portion of the sphere.")

the social group in which they were born.<sup>31</sup> It is their best guarantee of an open future.<sup>32</sup>

It is naïve to think that the state could not standardize its children. Yet, it is no less naïve to think that children sent to religiously or ethnically homogeneous private schools, or those kept cloistered at home, might not suffer a similar fate. We are cautioned by family law historian Barbara Bennett Woodhouse that “[s]tamped on the reverse side of this coinage of family privacy and parental rights are the child’s voicelessness, objectification, and isolation from the community.”<sup>33</sup> It is often assumed that state control of education “disserve[s] the values of pluralism and experimentation,”<sup>34</sup> but public education can bring its students a much needed respite from the ideological solipsism of the enclosed family. Public education can physically and intellectually transport the child across the boundaries of home and community. Of course, this transportation comes at a cost. It disrupts the intramural transmission of values from parent to child. It threatens to dismantle a familiar world by introducing the child to multiple sources of authority—and to the possibility that a choice must be made among them.

Indeed, the open world of public schooling *should* challenge the transmission of any closed set of values, whether those values belong to parent or state. To the extent that public education fosters “the cultivation of serious and independent ethical criticism, and the enlargement of the imagination that process entails,”<sup>35</sup> it not only challenges parental authority but provides a brake on efforts at state

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31. Cf. JOHN DEWEY, *DEMOCRACY AND EDUCATION* 20 (Free Press 1997) (1916) (“[I]t is the office of the school environment to balance the various elements in the social environment, and to see to it that each individual gets an opportunity to escape from the limitations of the social group in which he was born, and to come into living contact with a broader environment.”). For a critique of Dewey’s philosophy of democratic education as “civic totalism,” see MACEDO, *supra* note 28, at 119–45.

32. See Joel Feinberg, *The Child’s Right to an Open Future*, in *WHOSE CHILD?: CHILDREN’S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER* 124 (William Aiken & Hugh LaFollette eds., 1980). *But see, e.g.*, Shelley Burt, *The Proper Scope of Parental Authority: Why We Don’t Owe Children an “Open Future,”* in *CHILD, FAMILY, AND STATE* 243 (Stephen Macedo & Iris Marion Young eds., 2003); Michael W. McConnell, *Government, Families, and Power: A Defense of Educational Choice*, 31 *CONN. L. REV.* 847, 847–52 (1999).

33. Woodhouse, *supra* note 12, at 1001; cf. ACKERMAN, *supra* note 30, at 160 (criticizing educational proposals that would “legitimate[] a series of petty tyrannies in which like-minded parents club together to force-feed their children without restraint”).

34. Emily Buss, *Allocating Developmental Control among Parent, Child and the State*, 2004 *U. CHI. LEGAL F.* 27, 28 (2004).

35. CALLAN, *supra* note 28, at 5.



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indoctrination as well.<sup>36</sup> Ideally, the interests of the state and parent would be identical—that is, both would want to cultivate the child's capacity to make free choices. In fact, however, both parent and state can behave despotically toward young people, demanding (often in a compassionate voice) uncritical obedience toward authority. It might be only natural for parents to want a child to embrace their values and to believe their beliefs,<sup>37</sup> but the expressive liberty of parents becomes despotic when the child is given no real opportunity to embrace other values and to believe other beliefs. Similarly, the liberal state wants to pass on its traditions of freedom and equality,<sup>38</sup> but the surest way *not* to do so would be to pass on those traditions as moral absolutes to be accepted uncritically.<sup>39</sup> To guard against indoctrination at home or at school, (or elsewhere, for that matter), the liberal state must establish a program of education that encourages—perhaps, requires—children to question authority, including the authority to choose skepticism. Like any good parent, the state prepares its children to make choices that are as free and independent as possible.

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36. Cf. Stanley Ingber, *Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in the Public Schools*, 1987 U. ILL. L. REV. 14, 19 (1987) ("Society must indoctrinate children so they may be capable of autonomy. They must be socialized to the norms of society while remaining free to modify or even abandon those norms."); Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 188–89 (1995) ("[A] citizen needs to be able both to understand and internalize the norms of her society and to judge those norms against rational attack. A predisposition to adopt certain values, coupled with the knowledge and critical skills necessary for citizenship, is likely to yield slow but careful changes that jeopardize neither the stability of the polity nor the liberties of its citizens.").
37. See CALLAN, *supra* note 28, at 138–45; WILLIAM GALSTON, *LIBERAL PLURALISM* 101–09 (2002).
38. On education as a means of conscious social reproduction, see generally GUTMANN, *supra* note 28.
39. Of course, the state as educator may have interests other than the child's intellectual welfare. On the mixed motives undergirding nineteenth century efforts to regulate public schooling, see generally CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY* (1983); *infra* notes 101 and 102. On the threat of state indoctrination in the public schools, see, for example, Stephen Arons and Charles Lawrence III, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 HARV. C.R.-C.L. L. REV. 309 (1980); George W. Dent, Jr., *Of God and Caesar: The Free Exercise Rights of Public School Students*, 43 CASE W. RES. L. REV. 707 (1993); Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CAL. L. REV. 1104 (1979); Nadine Stroessen, "Secular Humanism" and "Scientific Creationism": Proposed Standards for Reviewing Curricular Decisions Affecting Students' Religious Freedom, 47 OHIO ST. L.J. 333 (1986); Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863 (1979). *But see, e.g.*, Stanley Ingber, *Religious Children and the Inevitable Compulsion of Public Schools*, 43 CASE W. RES. L. REV. 773 (1993).

No one would suggest that parents may not introduce their children to personal sources of moral or religious meaning.<sup>40</sup> However, to those parents who want their children untouched by other points of view, the state must say that the rights of parents, while profound, are circumscribed—contingent, as the Supreme Court has always noted, on preparing the young for the additional obligations they will take on as members of a pluralistic society.<sup>41</sup> “In a democracy,” political theorist William Galston writes, “parents are entitled to introduce their children to what they regard as vital sources of meaning and value, and to hope that their children will come to share this orientation.”<sup>42</sup> Yet, children have freestanding intellectual and moral claims of their own, claims that Galston goes on to remind us, “imply enforceable rights of exit from the boundaries of community defined by their parents.”<sup>43</sup> If children are granted this right of exit, they must be able to exercise it freely. They must not be disempowered from making their own intellectual and moral claims in the first place. The state has a duty to make sure they are not disempowered, and one of its best resources to that end is public schooling.

The full capacity for individual choice is the presupposition of First Amendment freedoms. It is for this reason that the state has a strong obligation to see that free choice is not strangled at its source.<sup>44</sup> The state may not sponsor particular religious or political beliefs, but that is not enough; it must protect children from being forced to adopt particular religious or political beliefs.<sup>45</sup> The state must work to protect the moral and intellectual autonomy of all children. Further, if the state has the obligation to ensure the child’s opportunity to become autonomous, that obligation, as educational theorist Harry Brighouse has pointed out, “cuts against the differential regulation of public and private schools with respect to religious instruction.”<sup>46</sup> Children are owed this obligation “regardless of whether it is the state, their par-

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40. Cf. GALSTON, *supra* note 37, at 105.

41. See *Pierce v. Soc’y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925) (“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.”), *quoted in* *Troxel v. Granville*, 530 U.S. 57, 79 (2000); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Lehr v. Robertson*, 463 U.S. 248 (1983); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Belotti v. Baird*, 443 U.S. 622 (1979); *Parham v. J.R.*, 442 U.S. 584 (1979); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

42. GALSTON, *supra* note 37, at 104.

43. *Id.*

44. See *Ginsburg v. New York*, 390 U.S. 629, 649 (1968) (Stewart, J., concurring in the result).

45. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1944).

46. Harry Brighouse, *School Vouchers, Separation of Church and State, and Personal Autonomy*, in *MORAL AND POLITICAL EDUCATION* 244, 247 (Stephen Macedo & Yael Tamir eds., 2002).

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ents, or a religious foundation that pays for their education, and regardless of whether they attend privately-run or government-run schools.”<sup>47</sup> The constitutional freedom to choose is not guaranteed only to be so circumscribed that it exists in principle but not in fact.

The purpose of this Article is two-fold. First, the Article argues that the parent’s right to educate his or her children is strictly circumscribed by the parent’s duty to ensure that children learn habits of critical reasoning and reflection. The law has long recognized that the state’s duty to educate children is superior to any parental right. Indeed, the “parentalist” position to the contrary rests on an inflation of rights that is, in fact, a radical departure from longstanding legal norms. Indeed, at common law the parent had “a sacred right” to the custody of his child,<sup>48</sup> and the parent’s right to control the upbringing of the child was “almost absolute.”<sup>49</sup> The great legal authorities—William Blackstone, James Kent, and their scholarly successors—are cited to this effect.<sup>50</sup> Nevertheless, this reading of the law is sorely anachronistic—less history than advocacy on behalf of parental rights. If “fundamental” describes rights with a deep historical pedigree, the right to parent free of state interference cannot be numbered among fundamental rights. What is deeply rooted in our nation’s history is the notion that the state *entrusts* the parent with custody of the child only so long as the parent meets his duty to take proper care of the child. Whether this authority is called a power or a right, it has always been contingent on the welfare of the child and the needs of the state.<sup>51</sup> It has always been “in the nature of a trust, reposed in [the

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47. *Id.*

48. *See, e.g.*, Daniel E. Witte, Note, *People v. Bennett: Analytic Approaches to Recognizing a Fundamental Parental Right Under the Ninth Amendment*, 1996 BYU L. REV. 183, 190 (quoting *In re Appeal in Maricopa County*, Juv. Action No. J-75482, 536 P.2d 197, 206 (Ariz. 1975) (en banc)).

49. Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299, 310 (2002).

50. Throughout this Article I use “common law” to refer to judge-made law, whether formally derived at law or in equity. On the early embrace of equitable principles by American custody courts, see, for example, MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 234–307 (1985); MARY ANN MASON, *FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS* 1–83 (1994).

51. *Cf. Etna*, 8 F. Cas. 803, 806 (D. Me. 1838) (No. 4,562) (“It may be true that the paternal power is sometimes described in terms more general, for men who are most accurate in the use of language, do not always, whether in speaking or writing, annex to a general truth all the limitations and qualifications with which it is to be understood. It is perfectly true, as a general proposition, that the father has the right to the custody and control of the person of his child; and it is equally true that if he abuses this power the law will interpose and take his child from him.”).

parent] by the State . . . , which may be extended or contracted as the public welfare may require.”<sup>52</sup>

Second, the Article suggests that this trust principle—the notion that the parent’s educational authority is bound by the parent’s pedagogical duty—may, first, help us better understand the doctrinal modesty of the Court’s seminal “right to parent” cases, and, second, help the courts approach some difficult types of cases in a more principled way, especially cases involving the allocation of educational authority in the public schools. If the courts were to apply the principle that no authority, public or private, may deny children exposure to the full measure of intellectual incitement that should be the heart (and soul) of every young person’s education, they would more consistently and correctly sort out the competing claims of parents and public school officials to make educational choices on behalf of the child.

Part II of this Article argues that at common law and, for most of the nation’s history, under state statutory regimes, the authority of the parent to direct the child’s upbringing was a matter of duty, not right. Chief among parental obligations was the duty to provide the child with a suitable education. Indeed, it was the child who possessed “a perfect *right*”:<sup>53</sup> the right to proper parental care, including the right to an education that would prepare the child for eventual enfranchisement from the primary familial culture. The scope of the parent’s authority to direct the child’s education has always been limited, determined by the best interests of the child and the legitimate needs of the state. In the United States, custody courts created a composite system that allowed the state as *parens patriae* to regulate family relations, but as a general matter entrusted parents with the task of providing the child a proper education.

Part III looks at the Supreme Court’s seminal cases establishing a parent’s right to educate: *Meyer v. Nebraska*<sup>54</sup> and *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*.<sup>55</sup> Commonly read to state broad claims about the fundamental nature of parental rights, these cases stand for a much more modest proposition: the state does not have exclusive authority over the child’s education and, more particularly, the state cannot prohibit parents from teaching their children subject matter outside the scope of the state-mandated curriculum. Fearful that the state was claiming exclusive power to educate children, the seminal Supreme Court parenting cases sought to restore the composite character of educational authority over the

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52. CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES 553 (St. Louis, Da Capo Press 1886).

53. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 435 (Oxford, Clarendon Press 1765).

54. 262 U.S. 390 (1923).

55. 268 U.S. 510 (1925).

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child. Rhetoric aside, *Meyer* and *Pierce* are hardly a charter of fundamental parental rights.

Part IV considers several types of cases that involve the allocation of educational authority within the public schools. While a full treatment of these cases lies outside the scope of the Article, this Part suggests that courts should look with skepticism at any educational program—whether imposed by the parent or by the state—that, by restricting the spectrum of available knowledge, fails to prepare the child for obligations beyond those of familial obedience.

In *Meyer v. Nebraska*, Arthur Mullen stood before the Supreme Court to argue against the power of the state “to take the child from the parent.”<sup>56</sup> He denounced “the principle of the soviet” that made the state superior to the family.<sup>57</sup> No state, Mullen argued, should “prescribe the mental bill of fare” that the child will follow.<sup>58</sup> He would not accept, and neither would the Court, that the child is not the parent’s to begin with, and certainly not the mere recipient of whatever mental bill of fare is prescribed by the parent. Yet, surprisingly, the law of parent-relations, as developed by the American courts, did understand that, in the words of John Locke, the child must “grow up to the use of reason”<sup>59</sup> and that if he is not the mere creature of the state, he is more than a placid reflection of the parental image. In short, the history of custody cases testifies to the enduring belief that the child is born to intellectual and moral freedom.

## II. PARENTING AND EDUCATION: THE SACRED TRUST

The right to parent—that is, the right to parent as a constitutional guarantee—is based on the most fragile of historical and doctrinal foundations. The Supreme Court has echoed the popular assumption that the right of parents to make decisions concerning the care, custody, and control of their children is a fundamental, time-honored one.<sup>60</sup> However, no Supreme Court holding directly supports this claim.<sup>61</sup> Justice Scalia has correctly observed that there is little sup-

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56. Transcript of Oral Argument, *supra* note 17, at 10.

57. *Id.*

58. *Id.*

59. JOHN LOCKE, SOME THOUGHTS CONCERNING EDUCATION 110 (John W. Yolton & Jean S. Yolton eds., Oxford University Press 1989) (1693).

60. The right to parent is “perhaps the oldest of the fundamental liberty interests recognized by this Court.” *Troxel v. Granville*, 530 U.S. 57, 64 (2000). “[W]e have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children.” *Id.* at 66.

61. Though the *Troxel* Court stated that parents have a fundamental right to direct the upbringing of their children, it did not identify the appropriate standard of review. Concurring in the judgment, Justice Thomas argued for strict scrutiny, the level of judicial scrutiny that would apply in cases involving fundamental rights. *Id.* at 80 (Thomas, J., concurring). In *Wisconsin v. Yoder*, 406 U.S. 205,

port for the notion that the right to parent is a “substantive constitutional right,” let alone a fundamental one: “Only three holdings of this Court rest in whole or in part upon a substantive constitutional right of parents to direct the upbringing of their children—two of them from an era rich in substantive due process holdings that have since been repudiated.”<sup>62</sup> The mixed doctrinal history of rights of parents cuts across traditional political lines. On one hand, that this right to parent is the product of judicial activism—specifically, a brand of judicial activism that would set the stage for a new era of privacy rights—does not deter conservative advocates of parental rights from celebrating the court cases that rested on this basis. On the other hand, that this right was the product of a *Lochner*-era constitutionalism bent on delimiting the police powers of the state—indeed, the product of a natural law anti-statism that would strike down basic health and safety protections for children—does not much bother liberal advocates of parental rights. Thus, it appears that, to advocates on both sides of the political spectrum, the privilege of parenting trumps concerns about doctrinal consistency or principle.

Though the Court has used loose language<sup>63</sup> about the fundamental right of parents to rear their children, the fact is that the “right to parent,” even in its more discrete guises—such as a right to direct the education or religious upbringing of children—has always been made to subserve the best interests of the child and the legitimate interests of the state. Like the parenting right in general, the right to educate is assumed to belong to the ages, to be a foundational pillar of the common law and a bedrock principle of our constitutional order. This assumption rests more on wish fulfillment than on a careful reading of the common law tradition or the relevant case law. The doctrine’s sur-

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233 (1972), the Court stated that “when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a ‘reasonable relation to some purpose within the competency of the State’ is required to sustain the validity of the State’s requirement under the First Amendment.” The right of religious parenting may thus be construed as a “hybrid” claim subject to strict scrutiny. See *Employment Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 879, 881–82 (1990) (“The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections . . .”).

62. *Troxel*, 530 U.S. at 92 (Scalia, J., dissenting); see *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Soc’y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

63. Imprecise language regarding parents’ fundamental rights has led to inconsistent lower court decisions. See generally Jeffrey Shulman, *What Yoder Wrought: Religious Disparagement, Parental Alienation, and the Best Interests of the Child*, 53 VILL. L. REV. 173 (2008).

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vival speaks to a yearning for control, for something that is “mine.”<sup>64</sup> It evokes a time when parents could tell the state to mind its own business and when the family was a private place where parents could build a bulwark against the loss of control that accompanies unsettling social change.<sup>65</sup> However, nostalgia aside, there never existed such a time. The state has always claimed that the parent–child relation is subject to ordinary municipal regulations. One nineteenth century court put it quite succinctly: “There is no parental authority independent of the supreme power of the state.”<sup>66</sup>

### A. Doctrinal Beginnings

In 1925, the same year the Supreme Court decided *Pierce*, the Court of Errors and Appeals of New Jersey heard a dispute in which the maternal grandparents of John Lippincott sought to obtain custody of their grandson for a portion of the year.<sup>67</sup> Prior to his death, John’s father executed a writing in which he delegated John’s custody to his parents.<sup>68</sup> There was no question about the fitness of either the paternal or the maternal grandparents.<sup>69</sup> The only question was whether the chancery court, which had granted the maternal grandparents custody for two months a year, had jurisdiction over the matter—whether, in the absence of any question of fitness, the chancery court had the power to order John’s parents, against the wishes of the child’s father, to share custody of the child.<sup>70</sup> In the words of the appellate court, “the essential inquiry presented is whether, exercising its judgment as *parens patriae* in behalf of the state, the court of chancery, intent alone upon promoting the best interests of the infant, may in the situation confide [John’s] custody for two months of the year to his maternal grandparents.”<sup>71</sup> This was a question of obvious importance to the court, “comprehending as it does the extent of the chancery jurisdiction in a cause of this character,”<sup>72</sup> and it led the court to

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64. *But see* GALSTON, *supra* note 37, at 103 (“Everyone can agree that children are not the ‘property’ of their parents. Still, when I say that the child is ‘mine,’ I am both acknowledging responsibilities and asserting authority beyond what I owe or claim vis-à-vis children in general. As parent, I am more than the child’s caretaker or teacher, and I am not simply a representative of the state delegated to prepare the child for citizenship.”).

65. Or, when a father could take his children on an adventurous boat trip in lieu of having them attend compulsory health education classes. *See infra* text accompanying notes 358–69.

66. *Mercein v. People ex rel. Barry*, 25 Wend. 64, 103 (N.Y. 1840).

67. *Lippincott v. Lippincott*, 128 A. 254 (N.J. 1925).

68. *Id.* at 254.

69. *Id.* at 255.

70. *Id.*

71. *Id.* at 265 (emphasis added).

72. *Id.*

consider the nature and scope of state power to interfere in custody disputes.

The court began its inquiry by stating that “the touchstone of our jurisprudence in matters dealing with the custody and control of infants is the welfare and happiness of the infant.”<sup>73</sup> The best interests of the child were the court’s paramount consideration, “not the final affections naturally arising from parental or family relationship.”<sup>74</sup> Citing case law that went back to 1840, the court went on to explain that because the child’s welfare was the judiciary’s primary concern in custody cases, “it has been quite generally held that even the natural right of the father to the custody of his child cannot be treated as an absolute property right.”<sup>75</sup> Rather, the right of the father to custody of the child should be thought of “as a trust reposed in the father by the state, as *parens patriae* for the welfare of the infant.”<sup>76</sup> This notion of parenting as a trust was a longstanding principle of the common law.<sup>77</sup> The court surveyed the history of state efforts to control the upbringing of children, and concluded, “The power of the court to intervene for the protection of the infant was not the creature of statute, but is an inherent power in the court derived from the common law.”<sup>78</sup> In deciding to hear the case, in other words, the court was merely affirming well-settled principles of custody law.<sup>79</sup>

The *Lippincott* court observed how some countries “considered the child as a charge of the state,”<sup>80</sup> while others “conceded to the father absolute dominion over the child.”<sup>81</sup> The court would not take its cue from either of these approaches. Rather, the court looked to English and American common law, which conceded absolute control of the child to neither parent nor state. For the court, “[t]he English com-

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73. *Id.*

74. *Id.*

75. *Id.* (citing *Mercein v. People ex rel. Barry*, 25 Wend. 64 (N.Y. 1840)).

76. *Id.* (emphasis added).

77. *See id.* at 255.

78. *Id.* (citing *People ex rel. Barry v. Mercein*, 8 Paige Ch. 47, 53 (N.Y. Ch. 1839), *rev'd*, 3 Hill 399 (N.Y. Sup. Ct. 1842)).

79. The court cited *In re Nicoll*, 1 Johns. Ch. 25 (N.Y. Ch. 1814) (“[T]his Court has the care and protection of infants during their minority.”); *People ex rel. Barry v. Mercein*, 8 Paige Ch. 47, 53 (N.Y. Ch. 1839), *rev'd*, 3 Hill 399 (N.Y. Sup. Ct. 1842) (“[T]he power of the chancellor to issue a habeas corpus is not derived solely from the statute, but is also an inherent power in the court, derived from the common law . . .”).

80. 128 A. at 255. (“Greece, Egypt, Persia, and the ancient civilizations generally . . . considered the child as a charge of the state, which after early infancy took the child into its control and educated him throughout youth, in the manners, customs, traditions, and laws of the state, emphasizing in the curriculum loyalty to the state as the first consideration from the child.”).

81. *Id.* (“The early Roman law, on the other hand, conceded to the father absolute dominion over the child, including the power of death as a corrective.”).



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mon law . . . presented a composite system,”<sup>82</sup> one that, “within reasonable limitations, conceded to the parent absolute control, subject to the power of the King, as *parens patriae*, to control the infantile status in the interest of the child, as well as in the interest of the state.”<sup>83</sup> Such a composite system, which according to the court was the basis for American cases as well,<sup>84</sup> allowed the state as *parens patriae* to regulate family relations, but as a general matter did not expect the state to “assum[e] the Spartan role of absolute possession of the infant in the interest of the state.”<sup>85</sup>

For the most part, the *Lippincott* court got it right. The *Lippincott* court correctly contrasted the composite system of English and American custody law with monopolistic legal regimes, both those that give the state “absolute possession” of the child (a Spartan regime) and those that give the father “absolute dominion” (a Roman regime). The court stumbled a bit when it described the authority of the parent as absolute “within reasonable limitations.”<sup>86</sup> In fact, the common-law tradition was one that treated paternal absolutism and its rights foundation—that is, the idea that the parent had a proprietary interest in the child—as barbaric.<sup>87</sup>

For William Blackstone, the parent is only entrusted with custody of the child. This trust makes sense because, as the common law presumes, the natural affection of the parent will lead him to take care of his child. Nonetheless, the law is not content to leave the child at the mercy of the parent’s good nature. The civil law obliges the parent to provide for the child, imposing upon the parent the duties of maintenance, protection, and education. To enable the parent better to meet these obligations, the law provides the parent with a set of legal privileges—that is, with the instruments of power the parent

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82. *Id.*

83. *Id.* (emphasis added).

84. *Id.*

85. *Id.*; cf. GUTMANN, *supra* note 28, at 32 (“There is no simple solution to the tension between the freedom of parents and the welfare of children. The state may not grant parents absolute authority over their children’s education in the name of individual freedom, nor may it claim exclusive educational authority in the name of communal solidarity.”).

86. *Id.*

87. *See* State v. Clottu, 33 Ind. 409, 411 (Ind. 1870) (“The duties and authority pertaining to the relation of parent and child have their foundations in nature, it is true. Nevertheless, all civilized governments have regarded this relation as falling within the legitimate scope of legislative control. Except in countries which lie in barbarism, the authority of the parent over the child is nowhere left absolutely without municipal definition and regulation.”); People *ex rel.* Barry v. Mercein, 3 Hill 399 (N.Y. Sup. Ct. 1842) (“Those countries in which the father has a general power to dispose of his children, have always been considered barbarous. Our own law never has allowed the exercise of such power except for some specific and temporary purpose, such as apprenticeship during the father’s life, or guardianship after his death.”).

will use to direct the upbringing of the child. However, the power of the parent is solely derived from the duties owed to the child. If the parent fails to meet these obligations, the state will take custody of the child; indeed, if need be, the state will entrust some third party with custody. For Blackstone, state regulation of parental custody is entirely consistent with the common-law principle that parental authority is contingent on parental responsibility. His is hardly a portrait of the parent-child relation drawn in absolutist strokes.

In his *Commentaries on the Laws of England*, Blackstone breaks his discussion of parent-child relations into three sections: 1) the duties of parents to their children, 2) the power of parents over their children, and 3) the duties of children to their parents.<sup>88</sup> The order of this discussion testifies to the principle that parental will is bounded by parental obligation. As Blackstone says, “The power of parents over their children is derived from . . . their duty.”<sup>89</sup> In effect, parental authority is a civil stipend earned by the parent. The power of the parent enables him “more effectually to perform his duty,” and it serves “partly as a recompense for his care and trouble in the faithful discharge of it.”<sup>90</sup> Blackstone discusses three types of parental duty: maintenance, protection, and education. The duty to provide maintenance is “a principle of natural law,”<sup>91</sup> but it is also premised on the core principles of contract law. By begetting children, the parent has voluntarily assumed this obligation.<sup>92</sup> Thus, it is the child who has rights—children have what Blackstone calls “a perfect *right*” to maintenance from their parents.<sup>93</sup> That right will be enforced by law. Natural affection should ensure that parents fulfill their obligations, but the municipal laws of the state provide a more failsafe enforcement

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88. See BLACKSTONE, *supra* note 53, at 434–42.

89. *Id.* at 440; see also 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 203 (Boston, Little, Brown & Co., O.W. Holmes, Jr. ed., 12th ed. 1873) (1851) (“The rights of parents result from their duties.”).

90. BLACKSTONE, *supra* note 53, at 440; see also KENT, *supra* note 89, at 228–30 (observing that the father is entitled to value of his child’s labor and services “in consequence of” parental obligations).

91. BLACKSTONE, *supra* note 53, at 435.

92. *Id.* (“The duty of parents to provide for the maintenance of their children 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: for they would be in the highest manner injurious to their issue, if they only gave the children life, that they might afterwards see them perish. By begetting them therefore they have entered into a voluntary obligation, to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved.”).

93. *Id.* at 435 (“[T]he children will have the perfect *right* of receiving maintenance from their parents.”); cf. HOCHHEIMER, *supra* note 1, at 22 (“The terms ‘right’ and ‘claim,’ when used in this connection, according to their proper meaning, virtually import the right or claim of the *child* to be in that custody or charge which will subserve *its* real interests.”).

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mechanism. If the parent fails to do his duty, “*judex de ea re cognoscet* [the judge will take notice of it].”<sup>94</sup>

Blackstone discusses the duty of protection briefly<sup>95</sup> before he moves on to the duty he considers “of far the greatest importance of any,” that of providing an education suitable to the child’s station in life.<sup>96</sup> Here, too, the common law operates on the principle that the parent has obligated himself voluntarily. Having brought a child into the world, the parent does the child little good “if he afterwards entirely neglects his culture and education.”<sup>97</sup> Blackstone observes that the municipal laws of most states are inadequate in this regard, “by not constraining the parent to bestow a proper education upon his children.”<sup>98</sup> He does not exempt the laws of England from this general censure,<sup>99</sup> but he takes evident pride in the fact that under English law the children of the poor are taken out of the hands of their parents and, for their good and the good of the state, are bound to apprenticeships.

Our laws, though their defects in this particular cannot be denied, have in one instance made a wise provision for breeding up the rising generation; since the poor and laborious part of the community, when past the age of nurture, are taken out of the hands of their parents, by the statutes for apprenticing poor children; and are placed out by the public in such a manner, as may render their abilities, in their several stations, of the greatest advantage to the commonwealth.<sup>100</sup>

This “wise provision” of binding children to third parties would be the state’s basic child welfare instrument in the eighteenth and nineteenth centuries. These measures are, no doubt, suspect to a modern temperament, reflecting, as they do, historical prejudices about class and ethnicity.<sup>101</sup> Still, they also reflect a genuine concern for the wel-

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94. BLACKSTONE, *supra* note 53, at 435.

95. *Id.* at 438 (“From the duty of maintenance we may easily pass to that of *protection*; which is also a natural duty, but rather permitted than enjoined by any municipal laws: nature, in this respect, working so strongly as to need rather a check than a spur.”).

96. *Id.*

97. *Id.* at 439.

98. *Id.*

99. *Id.*

100. *Id.*

101. On the history of common education as reflecting historical prejudices, see generally, SAMUEL BOYLES & HERBERT GINTIS, *SCHOOLING IN CAPITALIST AMERICA: EDUCATIONAL REFORM AND THE CONTRADICTION OF ECONOMIC LIFE* (1976); MICHAEL B. KATZ, *THE IRONY OF EARLY SCHOOL REFORM: EDUCATIONAL INNOVATION IN MID-NINETEENTH CENTURY MASSACHUSETTS* (1968); ANTHONY PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* (1969); DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* (1971); DAVID TYACK, *THE ONE BEST SYSTEM: A HISTORY OF URBAN EDUCATION* (1974). *But see generally* DIANE RAVITCH, *THE REVISIONISTS REVISITED: A CRITIQUE OF THE RADICAL ATTACK ON THE SCHOOLS* (1978).

fare of disadvantaged children.<sup>102</sup> Moreover, they illustrate the important common law understanding that the welfare of children is a matter of deep public concern, linked closely to the general welfare of the state. In separating child from parent, the apprenticeship laws treated children as a public good, one that, like other public goods, should be managed to “the greatest advantage to the commonwealth.”

Because it derives from the duty entrusted to him, the power of the parent is only as great as is needed to secure the child’s welfare. Blackstone observes that, though sufficient to keep a child in order, “the power of a parent by our English laws is much more moderate” than that prescribed by the municipal law of other nations.<sup>103</sup> He rejects a “very large and absolute authority” for the parent,<sup>104</sup> insisting that the parent may “lawfully correct his child,” but only “in a reasonable manner.”<sup>105</sup> Correction must be “for the benefit of [the child’s] education,”<sup>106</sup> and it must serve the child, not the will of the parent. The legal power of the parent is finite in duration as well as scope, for it is directed toward the eventual enfranchisement of the child, the point when “the empire of the father . . . gives place to the empire of reason.”<sup>107</sup> The child is enfranchised “by arriving at years of discretion.”<sup>108</sup> This is why the parent’s duty to provide the child with a suitable education is so important. The parent has no right to suffer a child “to grow up like a mere beast, to lead a life useless to others, and shameful to himself.”<sup>109</sup> Rather, it is the parent’s duty to encourage the discretion that is the signpost to the child’s enfranchisement.

With regard to a child’s estate, Blackstone states, “A father has no other power . . . than as his trustee or guardian; for, though he may receive the profits during the child’s minority, yet he must account for them when he comes of age.”<sup>110</sup> It is with regard to the child’s moral and intellectual estate—that is, the child’s psychological and emotional development—that the principle of parent as trustee would have its greatest resonance.<sup>111</sup> For American jurists and legal scholars, the principle that the parent serves the child, providing the child a “due education” as preparation for his enfranchisement, is the foun-

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102. On nineteenth century child welfare efforts as “a complex and highly ambivalent affair,” see, for example, Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1187–230 (1970).

103. BLACKSTONE, *supra* note 53, at 440.

104. *Id.*

105. *Id.*

106. *Id.*; cf. KENT, *supra* note 89, at 254.

107. BLACKSTONE, *supra* note 53, at 441.

108. *Id.*

109. *Id.* at 439.

110. *Id.* at 441.

111. Cf. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 325 (Peter Laslett ed., 1988) (1689) (“[W]hen he comes to the Estate that made his *Father a Freeman, the son is a Freeman too.*”).

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dation of parental authority. According to James Kent, the duty to provide for the maintenance and education of the child is “a sacred trust,”<sup>112</sup> and it is thus the true foundation of parental power.<sup>113</sup> The parent is “absolutely bound” to serve the child.<sup>114</sup> Similarly, for Joseph Story, parents are only “intrusted with the custody of the persons and the education of their children” and only so long as they properly take care of the child.

For, though in general, parents are intrusted with the custody of the persons and the education of their children; yet this is done upon the natural presumption, that the children will be properly taken care of, and will be brought up with a due education in literature, and morals, and religion; and that they will be treated with kindness and affection. But, whenever this presumption is removed . . . in every such case, the Court of Chancery will interfere, and deprive him of the custody of his children, and appoint a suitable person to act as guardian, and take care of them, and superintend their education.<sup>115</sup>

For Lewis Hochheimer, whose legal treatise on child custody was a common reference for the courts, the result of the case law was “an utter repudiation of the notion, that there can be such a thing as a proprietary right of interest in or to the custody of an infant.”<sup>116</sup> Hochheimer notes that “the general drift of opinion is in the direction of treating the idea of trust as the controlling principle in all controversies in relation to such custody.”<sup>117</sup>

On the controlling principle of the parent as trustee, the courts of the United States would construct doctrine that made the rights of the parent subordinate to those of the child and the interests of the state.<sup>118</sup> The doctrinal structure was built on the following premises:

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112. KENT, *supra* note 89, at 252.

113. *Id.*

114. *Id.* at 227.

115. 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 574–75 (Boston, Hilliard, Gray & Co. 1836). The courts still act upon this presumption. See Parham v. J.R., 442 U.S. 584, 602 (1979) (“The law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.”).

116. HOCHHEIMER, *supra* note 1, at 22 (“The general result of the American cases may be characterized as an utter repudiation of the notion, that there can be such a thing as a proprietary right of interest in or to the custody of an infant.”); cf. ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 248 (1904) (describing the “tendency to treat [the right to parent] altogether as a power in trust, which may not only be checked in the case of manifest abuse, but the exercise of which may be directed by such rules as the legislature may establish as best calculated to promote the welfare of the child”).

117. HOCHHEIMER, *supra* note 1, at 22.

118. For a modern defense of the trust principle, see JAMES G. DWYER, RELIGIOUS SCHOOLS V. CHILDREN’S RIGHTS 62–101 (1998) (arguing that the law should grant parents only a legal privilege to care for children in ways consistent with their best temporal interests); Richard Arneson & Ian Shapiro, *Democratic Autonomy and Religious Freedom: A Critique of Wisconsin v. Yoder*, in DEMOCRACY’S PLACE

1. The child has independent interests. The conception that underlies the status of minors at common law, according to Hochheimer, “is that of the separate legal personality of the child . . . . From the very moment of birth a child becomes a citizen, or subject of the government under whose jurisdiction born, entitled to the protection of that government.”<sup>119</sup> The individual child, not the family, is the legal unit with which the law must deal.<sup>120</sup> The right of custody belongs to the child—it is “the right or claim of the *child* to be in that custody or charge which will subserve *its* real interests.”<sup>121</sup>

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137, 138 (Ian Shapiro ed., 1996) (stating that “the relationship between parents and children is best thought of as one of trusteeship”); cf. Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents’ Rights*, 14 CARDOZO L. REV. 1747, 1755 (1993) (viewing parenthood as stewardship); Ira C. Lupu, *Home Education, Religious Liberty, and the Separation of Powers*, 67 B.U. L. REV. 971, 976–77 (1987) (“The legal tradition of authorizing parents to speak for their offspring need not become a device by which children are made to disappear. Children, not fully competent to make decisions because of insufficient awareness of the decisions’ long-term consequences, are normally subject to parental control. Parents are presumptively trustworthy decisionmakers for their children because parents generally feel affection for their young and are knowledgeable about their interests. Custodial power of this sort is never absolute, however, for it is based on a theory of fiduciary obligation. If the custodian mistreats his ward, public or private remedies designed to protect the child may be available.”). See generally Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2401–02 (1994) (characterizing parents as fiduciaries).

119. HOCHHEIMER, *supra* note 1, at 2; cf. *Etna*, 8 F. Cas. 803, 806 (D. Me. 1838) (No. 4,562) (“As soon as a child is born, he becomes a member of the human family, and is invested with all the rights of humanity.”); MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 304 (1985) (“Perhaps the most enduring product of the distinctive domestic-relations law hammered out in nineteenth-century America was the legal concept of the family as a collection of separate legal individuals rather than an organic part of the body politic. This occurred at the expense of traditional notions of parental sovereignty and household legal unity.”).
120. HOCHHEIMER, *supra* note 1, at 2 n.3. Hochheimer notes the contrast with the Roman legal system, under which “the identity of the child was merged in that of the family.” See *id.* at 2 n.3; see also *Etna*, 8 F. Cas. at 804 (stating that courts should not award fathers “something like that preëminent and sovereign authority which has never been admitted by the jurisprudence of any civilized people, except that of ancient Rome, whose law held children to be the property of the father, and placed them in relation to him in the category of things instead of that of persons”).
121. HOCHHEIMER, *supra* note 1, at 22; cf., e.g., *Legate v. Legate*, 28 S.W. 281, 282 (Tex. 1984) (“The law recognizes the parent as the natural guardian of, and entitled to the custody of, his minor child, so long as he discharges the obligation imposed upon him by social and civil law, of protecting and maintaining his offspring. It does not, however, recognize in him any property interest in his child, but merely accords to him the benefits resulting from the child’s services during minority, and such probable benefits as may result to him thereafter, in return for the tender care, the anxious solicitude, and the physical, mental, and moral training

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2. The state has an independent interest in the welfare of the child. Parental authority to control the child is constrained by the assumption that “children are not born for the benefit of the parents alone, but for the country.”<sup>122</sup>

3. The state has inherent and plenary power to legislate on behalf of the child.<sup>123</sup> The interest of the state in children is so broad “as to almost defy limitations.”<sup>124</sup>

4. The power of the state to secure the child’s welfare is superior to parental “rights” to control the child.<sup>125</sup>

5. The state may entrust its power to a parent or guardian. The state delegates its power because it does not possess the “requisite knowledge” necessary to care for the child.<sup>126</sup> The state presumes that the parent will fulfill the duties owed to the child.<sup>127</sup> “There is no parental authority independent of the supreme power of the state.”<sup>128</sup> All parental power and authority over children is a mere delegated function.<sup>129</sup>

6. The authority of the parent is “inseparably connected with the parental obligations, and arises out them.”<sup>130</sup> This authority “is not a power granted to the parent for his benefit, but allowed to him for the benefit of the child.”<sup>131</sup>

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bestowed by the parent, as well as the pecuniary and social benefits derived by the child from the parent. . . . 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 inherent right, of which, when once acquired, it cannot be lawfully deprived.*”) (emphasis added).

122. JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE 517–18 (Boston, Little, Brown & Co. 1852).

123. *See, e.g., Allison v. Bryan*, 97 P. 282, 286 (Okla. 1908) (“A child is primarily a ward of the state. The sovereign has the inherent power to legislate for its welfare, and to place it with either parent at will, or take it from both parents and to place it elsewhere.”).

124. *In re Lippincott*, 124 A. 532, 533 (N.J. Ch. 1924), *aff’d*, 128 A. 254 (1925).

125. *See, e.g., State v. Bailey*, 61 N.E. 730, 731–32 (Ind. 1901) (“The natural rights of a parent to the custody and control of his infant child are subordinate to the power of the state, and may be restricted and regulated by municipal laws.”).

126. *Mercein v. People ex rel. Barry*, 25 Wend. 64, 103 (N.Y. 1840).

127. *See, e.g., STORY*, *supra* note 115.

128. *Mercein*, 25 Wend. at 103.

129. HOCHHEIMER, *supra* note 1, at 4.

130. *Cf. Etna*, 8 F. Cas. 803, 804 (D. Me. 1838) (No. 4,562).

131. *Id.*

7. That power is revocable by the state;<sup>132</sup> it is “subject to such restrictions and limitations as the sovereign power of the nation thinks proper to prescribe.”<sup>133</sup>

8. Because the control of children by parents “is subject to the unlimited supervisory control of the state,”<sup>134</sup> it is the sole province of the legislature to determine how far to regulate or restrict the authority of the parent. On the matter of parent–child relations, “[t]he judiciary has no authority to interfere with the exercise of legislative judgment.”<sup>135</sup>

9. In the absence of any statutory mandates, the custody of children “must always be regulated by judicial discretion, exercised in reference to their best interests.”<sup>136</sup>

10. The parent owes a duty not only to the child, but to the state as well.<sup>137</sup>

Under this composite system, the parent’s control of the child was far from absolute. The parent was entitled to the custody of his chil-

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132. *See, e.g., Mercein*, 25 Wend. at 103; STORY, *supra* note 115.

133. *Mercein*, 25 Wend. at 103.

134. *State v. Shorey*, 86 P. 881, 882 (Or. 1906) (Minors are “wards of the state and subject to its control. As to them the state stands in the position of *parens patriae* and may exercise unlimited supervision and control over their contracts, occupation, and conduct, and the liberty and right of those who assume to deal with them. This is a power which inheres in the government for its own preservation and for the protection of the life, person, health, and morals of its future citizens.”); *see also* HOCHHEIMER, *supra* note 1, at 2 (“The only limitations upon the governmental power are those resulting from the obligation towards the infant himself. . .”).

135. *See, e.g., State v. Clottu*, 33 Ind. 409, 412 (Ind. 1870) (“The subject [of parent–child relations] has always been regarded as within the purview of legislative authority. How far this interference should extend is a question, not of constitutional power for the courts, but of expediency and propriety, which it is the sole province of the legislature to determine. The judiciary has no authority to interfere with this exercise of legislative judgment; and to do so would be to invade the province which by the constitution is assigned exclusively to the law making power.”); *infra* text accompanying notes 209–12.

136. *Mercein*, 25 Wend. at 101; *cf., e.g.,* HOCHHEIMER, *supra* note 1, at 24 (“[I]n the determination of every case affecting the custody of a child, the child’s welfare is the paramount consideration.”).

137. *See, e.g., Kelley v. Ferguson*, 95 Neb. 63, 72, 144 N.W. 1039, 1044 (Neb. 1914) (stating that the parent’s duty to educate is “owe[d] not only to the child but to the commonwealth”); *cf. KENT, supra* note 89, at 233 (“A parent who sends his son into the world uneducated, and without skill in any art or science, does a great injury to mankind, as well as to his own family, for he defrauds the community of a useful citizen, and bequeaths to it a nuisance.”).



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dren and to the value of their labor and services.<sup>138</sup> He was entitled to the benefit of the child's labor "in order the better to discharge his duty."<sup>139</sup> In custody cases, the courts did not automatically defer to the claims of the parent. They would "act according to sound discretion," even consulting the child "if it be of sufficiently mature age to judge for itself."<sup>140</sup> Of course, the presumption that a parent would act in the child's best interests was a strong one, and in the absence of effective welfare and educational bureaucracies, the state would continue to depend on the "insuperable . . . affection" that, according to Blackstone, nature had implanted in every parent's breast.<sup>141</sup>

Returning to *In re Lippincott*, the Court of Errors and Appeals of New Jersey decided that the chancery court was right: it was in young John Lippincott's best interests to spend two months a year with his maternal grandparents.<sup>142</sup> The appellate court reasoned that even though John's father had assigned custody to the paternal grandparents, denying visitation to the maternal grandparents was not in "the manifest interest of the child"—which, for the court, was "the material and only ground for judicial interposition."<sup>143</sup> Sometimes, poetry trumps formalism, even where the supposedly sacred and absolute right of the father to the custody of the child is concerned. For, whatever else might be said about the manifest interest of John Lippincott, it was certainly not a prosaic one: "[A]s if by an ordinance of nature," the court wrote, "the companionship of parental old age brings to the confiding nature of roseate youth the balmy benediction of an expiring day, the mellow and indelible memories of a family recession."<sup>144</sup> Yet, there was more than sentiment at work here. The chancery court acknowledged, as the paternal grandparents contended, that there was no "appreciable difference in the material advantages" that the parties were able to give John.<sup>145</sup> There were, however, other advantages that John would never know. He would never know "that devotion and love that is materially fostered by the association of one with those in whose affection he should hold a prom-

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138. See BLACKSTONE, *supra* note 53, at 441 ("[The father] may indeed have the benefit of his children's labour while they live with him, and are maintained by him: but this is no more than he is entitled to from his apprentices or servants.").

139. *Id.*

140. KENT, *supra* note 89, at 231; see also HOCHHEIMER, *supra* note 1, at 54–59 ("In certain cases . . . special regard is had to the wishes of children in any degree capable of forming or expressing a choice."). On the rule of "infant discretion," see, for example, GROSSBERG, *supra* note 119, at 259 n.56 (listing cases); 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 (1979).

141. See BLACKSTONE, *supra* note 53, at 435.

142. *Lippincott v. Lippincott*, 128 A. 254, 256 (N.J. 1925).

143. *Id.*

144. *Id.*

145. *In re Lippincott*, 124 A. 532, 533 (N.J. Ch. 1924), *aff'd*, 128 A. 254 (1925).

inent place.”<sup>146</sup> When the court considered John’s best interests, it weighed that devotion and love, and decided that John’s father, regardless of fitness, did not get to dictate the boy’s happiness.<sup>147</sup> The appellate court agreed, taking a similarly broad view of the child’s welfare: “That it will be for the material and moral interests of the child in its parental isolation to know and enjoy the affection and love of its mother’s people will be conceded by all who are so fortunate as to be able to revive the delectable memories of a youth so placed.”<sup>148</sup> Where a sense of parental duty did not press parents to pursue the child’s best interests, it was the duty of the court to do so.<sup>149</sup> In the words of the chancery court, “the day has long since passed when the rights of infants to be properly nurtured are subordinate to the strict legal rights of parents.”<sup>150</sup>

## B. The Revolutionary Family

In 1855, in *Herman v. State*, the Supreme Court of Indiana decided that the state’s liquor act, which prohibited the manufacture, sale, and use of assorted liquors, was in violation of the state constitution.<sup>151</sup> The court rejected the argument that the law was justified by the principle “that you shall so use your own as not to injure an-

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146. *Id.* Some modern courts have reached a similar conclusion, albeit in a more prosaic fashion. See, e.g., *Bishop v. Piller*, 637 A.2d 976, 978–79 (Pa. 1994) (“It must be remembered that grandchildren, too, have the natural right to know their grandparents and that they benefit greatly from that relationship. Grandparents give love unconditionally—without entanglement with authority or discipline, and often without pressures of other burdensome responsibilities. Children derive a greater sense of worthwhileness from grandparental attention and better see their place in the continuum of family history. Wisdom is imparted that can be attained nowhere else.”).

147. *Lippincott*, 124 A. at 533; cf. *In re Waldron*, 13 Johns. 418, 420 (N.Y. 1816) (ruling that “it will be more for the benefit of the child to remain with her grandparents than to be put under the care . . . of her father”). But cf. *Troxel v. Granville*, 530 U.S. 57 (2000) (striking down state visitation statute as unconstitutional infringement on parental rights).

148. *Lippincott*, 128 A. at 256.

149. See *Lippincott*, 124 A. at 533 (“In a controversy over [a child’s] possession, its welfare will be the paramount consideration in controlling the discretion of the court. The strict right of the parent will be passed by, if a judgment in observance of such right would substitute a worse for a better custodian.”) (quoting *Richards v. Collins*, 17 A. 831, 832 (N.J. 1889)).

150. *Id.* Of course, not all courts were willing to subordinate the strict legal rights of parents to the rights of children. See, e.g., *In re Salter*, 76 P. 51 (Cal. 1904) (holding that, under the state statutory scheme, a court has no discretion to appoint the grandmother as the child’s if the father is not incompetent, notwithstanding the trial court’s finding that the child’s health and general welfare would be better served by placement with grandmother). On the emergence of a robust legal defense of parental rights, see, *infra* section II.D.

151. *Herman v. State*, 8 Ind. 545 (Ind. 1855).

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other.”<sup>152</sup> Here, the court asserted, the principle was misapplied because “this prohibitory law forbids the owner to use his own in any manner. . . . It is based on the principle that a man shall not use at all for enjoyment what his neighbor may abuse.”<sup>153</sup> This doctrine would, “if enforced by law in general practice, annihilate society, make eunuchs of all men, or drive them into the cells of the monks, and bring the human race to an end.”<sup>154</sup> The court was not prepared to have a hand in such dire consequences.

Rejecting what it perceived as a paternalistic attempt to protect individuals from their own inclinations, the court relied on John Milton’s famous endorsement of intellectual freedom. Citing Milton’s *Areopagitica*, a tract opposing pre-publication licensing, the court advanced a moral world order based on mankind’s free agency:

Such, however, is not the principle upon which the Almighty governs the world. He made man a free agent, and to give him opportunity to exercise his will, to be virtuous or vicious as he should choose, he placed evil as well as good before him, he put the apple into the garden of *Eden*, and left upon man the responsibility of his choice, made it a moral question, and left it so. He enacted as to that, a moral, not a physical prohibition. He could have easily enacted a physical prohibitory law by declaring the fatal apple a nuisance and removing it. He did not. His purpose was otherwise, and he has since declared that the tares and wheat shall grow together to the end of the world. Man cannot, by prohibitory law, be robbed of his free agency.<sup>155</sup>

For the *Herman* court, Milton’s God was an ideal parent, at least with regard to the moral education of his children, for God would not rob his children of the responsibility that attends moral choice. He would not keep them, to quote Milton, under “a perpetual childhood of prescription.”<sup>156</sup> The duty to educate means that the parent must help the child to enter the empire of reason. The child must be prepared for a world where he will be obliged to make moral choices, to be virtuous or vicious as he should choose—for a world, that is, without the parent as his trustee.

The idea that the parent is only entrusted with the custody and care of his child until the child reaches the age of intellectual and

152. *Id.* at 563. On the common-law principle *sic utere tuo ut alienum laedas* as the foundation of the state’s police power, see generally WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996).

153. *Herman*, 8 Ind. at 563.

154. *Id.*

155. *Id.* (citing 1 JOHN MILTON, *Areopagitica*, in *THE PROSE WORKS OF JOHN MILTON* 166 (Philadelphia, John W. Moore, Rufus Wilmot Griswold ed., 1847) (1644)).

156. MILTON, *supra* note 29. On Milton in colonial America and the early republic, see GEORGE F. SENSABAUGH, *MILTON IN EARLY AMERICA* (1964); Roland Mushat Frye, *The Dissidence of Dissent and the Origins of Religious Freedom in America: John Milton and the Puritans*, in 133 *PROCEEDINGS OF THE AMERICAN PHILOSOPHICAL SOCIETY* 475, 485 (1989) (“In Milton’s clear vision, the processes of thought and discovery are far too subtle and even fragile to be controlled by any authority, however well meaning.”).

moral discretion translated easily to colonial shores. The revolution against king and mother country was understood by both sides as a conflict between parent and child.<sup>157</sup> While Tory writers criticized the wayward colonists for their filial ingratitude,<sup>158</sup> the rebellious children framed the war as one against the empire of the father, citing the duty of the parent to assure the child's enfranchisement.<sup>159</sup> The political argument against the authoritarian monarch went hand in hand with a new conception of the parent's domestic authority. James Henretta has observed how "[f]athers had begun to consider their role not as that of patriarchs . . . , but rather as that of benefactors responsible for the future well-being and prosperity of their offspring."<sup>160</sup> The new order of the ages brought with it "a new and different type of family life, one characterized by solicitude and sentimentality toward children and by more intimate, personal and equal relationships."<sup>161</sup> The new republic needed a new republican family, and the inculcation of private virtue was a matter of public concern.<sup>162</sup> In the new and different type of colonial family, the child's moral development was the parent's foremost responsibility.<sup>163</sup>

No figure was more responsible for this new interest in family education than John Locke.<sup>164</sup> In a thoughtful study of colonial anti-patriarchalism, Jay Fliegelman describes how Locke's "educational theory redefined the nature of parental authority in very much the way that the Revolution of 1688, which replaced an absolute monarch with a constitutional one, redefined the rights and duties of the crown."<sup>165</sup> For Locke, the controlling principle of family education, like social arrangements more generally, is that of self-governance—the child learning to guide himself by reason's light and the parent learning to trust the self-governing capacity of the child. The differ-

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157. *See generally*, JAY FLIEGELMAN, *PRODIGALS AND PILGRIMS: THE AMERICAN REVOLUTION AGAINST PATRIARCHAL AUTHORITY, 1750–1800* (1982).

158. *Id.* at 96–97.

159. *See id.* at 97–105.

160. JAMES HENRETTA, *THE EVOLUTION OF AMERICAN SOCIETY, 1700–1815*, at 30 (1973).

161. *Id.*; *see also* GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION 145–68* (1992) (noting the development of enlightened standards of paternalism and the evolution of familial relations during this period).

162. On the emergence of the "republican" or "democratic" family, *see* GROSSBERG, *supra* note 119, at 3–30; MASON, *supra* note 50, at 51–83; STEVEN MINTZ & SUSAN KELLOGG, *DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE 43–65* (1988); and *see also* FLIEGELMAN, *supra* note 157, at 9–12 (noting the development of a "different type of family life" during the late eighteenth century).

163. On "enlightened paternalism," *see* WOOD, *supra* note 161, at 145–68.

164. On the influence of Locke on educational theory and practice, *see* HOLLY BREWER, *BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY 87–128* (2005); FLIEGELMAN, *supra* note 157, at 12–16; WOOD, *supra* note 161, at 149–51.

165. FLIEGELMAN, *supra* note 157, at 13.

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ence between a child and an adult “lies not in the having or not having Appetites, but in the Power to govern, and deny our selves in them.”<sup>166</sup> Children must grow “to the Use of Reason.”<sup>167</sup> By gradually weaning the child from the “strict hand” of authority,<sup>168</sup> the parent fosters the child’s free and rational self-mastery, not slavish obedience to the imperious temper of the parent.<sup>169</sup> True obedience must mean more than mere servility.

Like Milton before him,<sup>170</sup> Locke would not praise a fugitive and cloistered virtue, unexercised and unbreathed.<sup>171</sup> More than knowing how to read and write, education was a matter of moral exercise. In a world of temptation, a fallen world where good and evil grow up together—where “the tares and wheat shall grow together to the end of the world”—only the educated mind is free to make the right moral choices.<sup>172</sup> According to Fliegelman, Locke’s *mélange* of educational theory and moral injunction would raise questions of freedom and authority that were both personal and political.<sup>173</sup> Fliegelman reads popular eighteenth-century educational guidebooks as making the point that parents “thwart the development of their children’s reason by insisting that they accept without examination or inquiry all doctrines taught them.”<sup>174</sup> In so doing, they “put their children’s salvation in jeopardy; for saving faith is, by definition, that faith one freely

166. LOCKE, *supra* note 59, at 105 (“The having Desires accommodated to the Apprehensions and Relish of those several Ages is not the Fault; but the not having them subject to the Rules and Restraints of Reason: The Difference lies not in having or not having Appetites, but in the Power to govern, and deny our selves [sic] in them. He that is not used to submit his Will to the Reason of others, *when* he is *young*, will scarce hearken to submit to his own Reason when he is of an Age to make use of it. And what kind of a Man such an one is like to prove, is easie [sic] to foresee.”).

167. *Id.* at 110.

168. *Id.*

169. *Id.* at 113 (noting that “*slavish Discipline* makes a *slavish Temper*”).

170. MILTON, *supra* note 29, at 287 (“He that can apprehend and consider vice with all her baits and seeming pleasures, and yet abstain, and yet distinguish, and yet prefer that which is truly better, he is the true warfaring Christian. I cannot praise a fugitive and cloistered virtue, unexercis’d and unbreath’d, that never sallies out and sees her adversary, but slinks out of the race, where that immortal [sic] garland is to be run for, not without dust and heat.”).

171. See LOCKE, *supra* note 59, at 111 (“He that has not a Mastery over his Inclinations, he that knows not how to *resist* the importunity of *present Pleasure or Pain*, for the sake of what Reason tells him is fit to be done, wants the true Principle of Virtue and Industry, and is in danger never to be good for anything.”).

172. *Herman v. State*, 8 Ind. 545, 563 (Ind. 1855).

173. FLIEGELMAN, *supra* note 157, at 14 (“The great challenge of eighteenth-century politics, familial and national, was to make authority and liberty compatible, to find a surer ground for obligation and obedience than ‘the fear of the rod.’”).

174. *Id.* at 19; cf. WOOD, *supra* note 157, at 148 (“From every corner of the cultivated world, [parents] were besieged with advice on what it meant to be a parent. No theme was more central to the popular writing of the eighteenth century. Nearly every work of the age . . . dwelt on issues of familial responsibility and warned

and rationally chooses to embrace.”<sup>175</sup> The upshot of this Protestant stress on rational freedom was a pedagogical scheme that “concern[ed] itself less with content, doctrinal or otherwise, than with perfecting the mind’s ability to evaluate and judge. The ideal teacher trains his charges in the free use of their judgment that they might not only become independent of his authority, but of the authority of all others.”<sup>176</sup>

The parental duty to educate was enjoined by public regulation. Beginning in 1647, Massachusetts enforced by fine a “compulsory system upon parents and masters to teach their children and servants to read, and to give them some knowledge of the Scriptures, and of the capital laws, and to bring them up in some lawful employment.”<sup>177</sup> Other states adopted similar compulsory education statutes.<sup>178</sup> These measures reached beyond the traditional target audiences of colonial welfare. In his eighteenth-century treatise on family law, Tapping Reeve pointed out that the duty to educate “is not enforced by the law of England, any farther than that overseers of the poor have, by statute, a power to bind out the children of paupers to masters, where they may receive a proper education.”<sup>179</sup> The colonies also had their poor laws, under which the children of pauper parents were separated from their parents and bound out as apprentices. These statutes targeted the children of “undeserving” parents, as would the child rescue schemes of the nineteenth century.<sup>180</sup> In part, compulsory education laws served a similar purpose, enforcing a parental duty that, as James Kent pointed out, would provide children with a means of economic self-sufficiency:

Without some preparation made in youth for the sequel of life, children of all conditions would probably become idle and vicious when they grow up, either from the want of good instruction and habits, and the means of subsistence, or from want of rational and useful occupation. A parent who sends his son into the world uneducated, and without skill in any art or science, does a great injury to mankind, as well as to his own family, for he defrauds the community of a useful citizen, and bequeaths to it a nuisance.<sup>181</sup>

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against the evils of parental tyranny and the harsh and arbitrary modes of child-rearing of an older, more savage age.”).

175. FLIEGELMAN, *supra* note 157, at 19.

176. *Id.* at 20.

177. KENT, *supra* note 89, at 196 n.(g).

178. *See id.* at 196–202.

179. TAPPING REEVE, *THE LAW OF BARON AND FEMME* 287 (New Haven, Oliver Steele 1816).

180. For a discussion of the “child saving” movement of the nineteenth century, see, for example, Woodhouse, *supra* note 12, at 1052–54.

181. KENT, *supra* note 89, at 195.

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Where parents could not—or would not—adequately educate their children, the state was free to employ the same coercive mechanism that separated parent from child under the poor laws.<sup>182</sup>

Compulsory education laws also suggest the moral focus of early child welfare efforts. The duty of the parent to educate was not just a matter of the *poor* child's economic self-sufficiency (and the economic welfare of the community); it was a matter of *every* child's rational self-sufficiency (and the political welfare of the community).<sup>183</sup> Such laws had always expressed a Protestant concern with the individual's direct knowledge of the Bible.<sup>184</sup> For Reeve, the point of education was not to keep down relief costs, but to create children who “may be able, for themselves, to search scriptures of truth.”<sup>185</sup> The child needs an education to both join the community as a contributing member and if he is ever to move beyond the empire of the father. Thus, (then, as now) state control of education could seem to undermine parental authority in a way that other welfare measures did not.<sup>186</sup> For if the point of the child's education is to question authority—that is, to substitute a self-mastery for parental control<sup>187</sup>—then, from the parent's point of view, the child's growing intellectual and moral autonomy may be far more alarming than any political infringement of parental

182. See REEVE, *supra* note 179, at 287 (“[I]f the parents will not teach their children in such manner, the selectmen of the town are enjoined to take their children from their parents, and bind them out to proper masters; where they will be educated to some useful employment, and will be taught to read and write, and the rules of arithmetic, so far as is necessary to transact ordinary business.”).

183. Cf. S.M. Heslet, *Compulsory Education*, 14 ILLINOIS TEACHER 86, 87 (1868) (“The man that will not feed and clothe his children is compelled to surrender them, that they may be fed and clothed at public expense. . . . Should not he, then, who starves the minds of his children be compelled to send them where mental food is furnished free of charge.”).

184. See KENT, *supra* note 89, at 196 n.(g). The Massachusetts School Act of 1647, popularly known as the Old Deluder Satan Act, equated educational neglect with a satanic project “to keep men from a knowledge of the Scriptures.” See Eric R. Eberling, *Massachusetts Education Laws of 1642, 1647, and 1648*, in HISTORICAL DICTIONARY OF AMERICAN EDUCATION 225, 225–26 (Richard J. Altenbaugh ed., 1999).

185. REEVE, *supra* note 179, at 286.

186. The Connecticut compulsory education law, Reeve noted, “has, by some, been branded as tyrannical, and as an infringement of parental rights.” *Id.* at 287.

187. See FLIEGELMAN, *supra* note 157, at 14 (“The ultimate point of the education and childrearing was not to secure a child's obedience, but to prepare a child for his eventual emergence into the world—in effect, to prepare him for the death of his parents. Thus, according to Locke, it is essential that parental instruction encourage the development of a child's reason, or ‘internal governor’; for it will be reason along with a carefully ingrained set of habits, that ultimately will replace the external parent as that ‘power of restraint which permits an individual to deny himself his own Desires and cross his inclinations,’ to restrain his own passions and act according to his own best interest.”) (quoting JOHN LOCKE, *Some Thoughts Concerning Education*, in THE EDUCATIONAL WRITINGS OF JOHN LOCKE 114, 139 (James Axtell ed., 1968) (1693)).

rights. Once children begin to think for themselves, they may find truths that to their parents are surprising and unsupportable.

New republican ideas about the family would lead to increased state regulation of parent-child relations. The traditional presumption that custody should be allocated to the father was less and less acceptable against the background of “the republican vision of the family as a collection of individuals.”<sup>188</sup> Michael Grossberg has pointed to the 1809 case of *Prather v. Prather* as an early instance of how post-Revolutionary courts “undermined the primacy of paternal custody rights.”<sup>189</sup> Complaining of ill usage, Jeanette Prather sued her husband William for a separate maintenance and custody of their infant daughter.<sup>190</sup> The court candidly admitted that it was “it [was] treading new and dangerous grounds,”<sup>191</sup> but it nonetheless ordered that custody of the child be surrendered to the mother.<sup>192</sup> Under the doctrine of *parens patriae*, nineteenth-century courts would gradually assume “sovereign custodial power over children,”<sup>193</sup> eroding the law’s biases in favor of patriarchal authority.<sup>194</sup> Grossberg describes how, as the “father’s custody power evolved from a property right to a trust tied to his responsibilities as a guardian,”<sup>195</sup> a new republican custody law emerged, “first in scattered decisions early in the nineteenth century and then in an increasingly intricate and expansive body of rules

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188. GROSSBERG, *supra* note 119, at 234. On the development of a child-centered custody law in nineteenth-century America, see *id.* at 289–307; Mason, *supra* note 150, at 51–83; Zainaldin, *supra* note 140, at 1052–68.

189. GROSSBERG, *supra* note 119, at 238.

190. *Prather v. Prather*, 4 S.C. Eq. (4 Des. Eq.) 33, 33–34 (1809).

191. *Id.* at 44.

192. *Id.*

193. GROSSBERG, *supra* note 119, at 236.

194. For a discussion of how republican anti-patriarchalism shaped nineteenth-century custody law, undermining the legal presumption in favor of the father over the mother, see *id.* at 238–53. Grossberg also describes the steady erosion of the legal presumption in favor of biological over surrogate parents. See *id.* at 254–80. Nineteenth-century courts anticipated the concept of psychological parenthood, advanced most famously in JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1973). See, e.g., *Chapsky v. Wood*, 26 Kan. 650, 657 (Kan. 1881) (“The affection which a mother may have and does have, springing from the fact that a child is her offspring, is an affection which perhaps no other one can really possess; but so far as it is possible, springing from years of patient care of a little, helpless babe, from association, and as an outgrowth from those little cares and motherly attentions bestowed upon it, an affection for the child is seen in [the foster mother] that can be found nowhere else. And it is apparent, that so far as a mother’s love can be equaled, its foster-mother has that love, and will continue to have it.”); *Hoxsie v. Potter*, 16 R.I. 374 (R.I. 1888) (employing “established ties” doctrine to deny remarried mother’s petition to take child from paternal uncle); HOCHHEIMER, *supra* note 1, at 16–17 (citing cases decided on “established ties” principle).

195. GROSSBERG, *supra* note 119, at 236.



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as the [century] came to an end.”<sup>196</sup> A growing concern with child nurture would bias courts in favor of maternal custody rights.<sup>197</sup> This concern did not just dictate a devaluation of the father’s claims. The law “reduced the rights of parenthood generally” as courts increasingly made the final determination of child placement a matter of judicial discretion.<sup>198</sup>

To those who built a nation on the liberal legacy of Milton and Locke, the stress of accommodating multiple truths was a cost of true freedom. Thomas Jefferson thought that governmental efforts to coerce moral agreement “tend only to beget habits of hypocrisy and meanness.”<sup>199</sup> Like Milton, Jefferson would leave the mind free to choose, following the dictates of reason and conscience. According to Jefferson, the coercive unification of opinion is “a departure from the plan of the Holy author of our religion, who being Lord both of body and mind yet chose not to propagate it by coercions on either.”<sup>200</sup> Similarly, the Virginia Statute for Religious Freedom embodies confidence that “[t]ruth will prevail if left to herself,”<sup>201</sup> the same faith in free argument and debate that would later lead to constitutional guarantees of freedom of conscience. While Jefferson was fearful that succeeding generations might not follow the path of moral freedom and responsibility, he and his contemporaries believed that the only saving faith is the one that is freely chosen.<sup>202</sup>

### C. The State as Common Guardian

The nineteenth century witnessed the birth of new laws “that placed far less value on familial autonomy, authorized much greater

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196. *Id.* at 237.

197. *See* GROSSBERG, *supra* note 119, at 238–53. Grossberg writes that “[b]y the 1820s traditional paternal custody rights had declined so precipitously that some judges began to seek a means by which fathers could be given presumptive but not absolute rights.” *Id.* at 239.

198. *Id.* at 248.

199. JEFFERSON, *supra* note 27, at xvii.

200. *Id.*

201. *Id.* at xviii (“[T]ruth is great, and will prevail if left to herself, that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons free argument and debate, errors ceasing to be dangerous when it is permitted freely to contradict them . . .”).

202. *See id.* (“And though we well know that this assembly elected by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding assemblies, constituted with powers equal to our own, and that therefore to declare this act irrevocable would be of no effect in law; yet we are free to declare, and do declare, that the rights hereby asserted, are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its operation, such act will be an infringement of natural right.”); *cf.* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943) (“Compulsory unification of opinion achieves only the unanimity of the graveyard.”).

intervention into parental relations, and enthusiastically contemplated the reshaping of family life.”<sup>203</sup> For Jill Elaine Hasday, these measures were at sharp variance with common law principles.<sup>204</sup> “The principles that the new bodies of law applied to family relations were diametrically opposed to those that governed the common law.”<sup>205</sup> Legislatures and courts created what Hasday refers to as a bifurcated law of parent–child relations: a deferential legal regime consistent with common law principles for “successful” families and a regime that operated outside the confines of family law altogether by subjecting “failed” families to aggressive state action.<sup>206</sup> However, interference in “failed” families was precisely the point of the common law. State laws that restricted parental custody were entirely consistent with the principle that parental authority derived from the fulfillment of parental duty.<sup>207</sup>

On this principle, the courts repeatedly held that parental control of the child is subject to ordinary state regulation. In 1816, in *United States v. Bainbridge*,<sup>208</sup> the federal circuit court rejected—as “not a little extraordinary”—the argument that Congress could not enlist minors to serve in the military without the consent of their parents.<sup>209</sup> Writing for the Court, Justice Story agreed that at common law the father is entitled to the custody of his children during their infancy, but this right “is not unlimited; for whenever it is abused by improper conduct on the part of the parent, courts of law will restrain him in its exercise, and even take the custody permanently from him.”<sup>210</sup> The

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203. Hasday, *supra* note 49, at 309.

204. *Id.*

205. *Id.*

206. *Id.*

207. On the evolution of the *parens patriae* doctrine in the nineteenth century, see generally Douglas R. Rendleman, *Parens Patriae: From Chancery to Juvenile Court*, 23 S.C. L. REV. 205 (1971).

208. *United States v. Bainbridge*, 24 F. Cas. 946, 950 (C.C.D. Mass. 1816) (No. 14,497).

209. Compare this with Justice Story’s opinion in *United States v. Green*, 26 F. Cas. 30, 31–32 (C.C.R.I. 1824) (No. 15,256) (“As to the question of the right of the father to have the custody of his infant child, in a general sense it is true. But this is not on account of any absolute right of the father, but for the benefit of the infant, the law presuming it to be for his interest to be under the nurture and care of his natural protector, both for maintenance and education. When, therefore, the court is asked to lend its aid to put the infant into the custody of the father, and to withdraw him from other persons, it will look into all the circumstances, and ascertain whether it will be for the real, permanent interests of the infant; and if the infant be of sufficient discretion, it will also consult its personal wishes. It will free it from all undue restraint, and endeavour, as far as possible, to administer a conscientious, parental duty with reference to its welfare. It is an entire mistake to suppose the court is at all events bound to deliver over the infant to his father, or that the latter has an absolute vested right in the custody.”).

210. *Bainbridge*, 24 F. Cas. at 949.

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power of the courts in this regard rested on the fact that “the right of parents, in relation to the custody and services of their children . . . are rights depending upon the mere municipal rules of the state, and may be enlarged, restrained, and limited as the wisdom or policy of the times may dictate, unless the legislative power be controlled by some constitutional prohibition.”<sup>211</sup> Justice Story was unperturbed at the prospect of infringing upon parental rights: “And if this exercise [of a valid congressional power] should sometimes trench upon supposed private rights, or private convenience, it is to be enumerated among the sacrifices, which the very order of society exacts from its members in furtherance of the public welfare.”<sup>212</sup>

That parental rights could be abridged by “ordinary legislation” was also assumed by the Pennsylvania Supreme Court when it decided the 1839 case of *Ex parte Crouse*.<sup>213</sup> This was a habeas case, in which the father of Mary Ann Crouse sought her release from the state’s House of Refuge (a juvenile reformatory), where she had been committed upon her mother’s petition.<sup>214</sup> The court declared that “[t]he right of parental control is a natural, but not an unalienable one. It is not excepted [by the state constitution] out of the subjects of ordinary legislation; and it consequently remains subject to the ordinary legislative power.”<sup>215</sup> More specifically, according to the court, the business of educating children properly belongs to the state as part of its *parens patriae* power. The right of parents to educate their children is at most provisional, held at the sufferance of the state; when circumstances dictate, the parent can be superseded by the state as the “common guardian of the community”:

The object of [the House of Refuge] is reformation, by training its inmates to industry; by imbuing their minds with principles of morality and religion; by furnishing them with means to earn a living; and, above all, by separating them from the corrupting influence of improper associates. To this end, may not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by the *parens patriæ*, or common guardian of the community? It is to be remembered that the public has a paramount interest in the virtue and knowledge of its members, and that, of strict right, the business of education belongs to it.<sup>216</sup>

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211. *Id.*; see also *id.* at 950 (“Can there be a doubt, that the state legislature can, by a new statute, declare a minor to be of full age, and capable of acting for himself at fourteen, instead of twenty-one years of age? Can it not emancipate the child altogether from the control of its parents?”).

212. *Id.* at 950.

213. *Ex Parte Crouse*, 4 Whart. 9, 11 (Pa. 1839).

214. *Id.*

215. *Id.*

216. *Id.*; cf. *Etna*, 8 F. Cas. 803, 804 (D. Me. 1838) (No. 4,562) (“[T]his paternal power is not of the nature of a sovereign and independent power. It is subject to the restraints and regulation of law. Upon the principles of the law of nature, as well as of the municipal law of this country, it is inseparably connected with the parental obligations, and arises out of them. It is not a power granted to the parent

Underlying the idea of parental custody as a trust is what New York's highest court called "the great principle" that the custody of children "must always be regulated by judicial discretion, exercised in reference to their best interests."<sup>217</sup> In *Mercein v. People ex rel. Barry*, the court came to the "undoubting conclusion, that the right of the father to the custody of his child is not absolute."<sup>218</sup> The welfare of the child is properly "a portion of the sovereign power,"<sup>219</sup> and because the sovereign lacks "the requisite knowledge necessary to a judicious discharge of the duties of guardianship and education of children, such portion of the sovereign power as relates to the discharge of these duties, is transferred to the parents."<sup>220</sup> However, "[t]here is no pa-

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for his benefit, but allowed to him for the benefit of the child . . ."); *State v. Clottu*, 33 Ind. 409, 411–12 (Ind. 1870) ("Except in countries which lie in barbarism, the authority of the parent over the child is nowhere left absolutely without municipal definition and regulation. . . . The right of the parent to ruin his child either morally or physically has no existence in nature. The subject has always been regarded as within the purview of legislative authority. How far this interference should extend is a question, not of constitutional power for the courts, but of expediency and propriety, which it is the sole province of the legislature to determine. The judiciary has no authority to interfere with this exercise of legislative judgment; and to do so would be to invade the province which by the constitution is assigned exclusively to the law making power."); *Bennet v. Bennet*, 13 N.J. Eq. 114, 118 (N.J. Ch. 1860) ("The argument [that state statute transferring custody of young children from father to mother is unconstitutional] proceeds on the assumption that the parent has the same right of property in the child that he has in his horse, or that the master has in his slave, and that the transfer of the custody of the child from the father to the mother, is an invasion of the father's right of property. The father has no such right. He has no property, whatever, in his children. The law imposes upon him, for the good of society and for the welfare of the child, certain specified duties. By the laws of nature and of society, he owes the child protection, maintenance, and education. In return for the discharge of those duties, and to aid in their performance, the law confers on the father a qualified right to the services of the child. But . . . the domestic relations and the relative rights of parent and child are all under the control and regulation of municipal laws.")

217. *Mercein v. People ex rel. Barry*, 25 Wend. 64, 101 (N.Y. 1840), *rev'd* 3 Hill 399 (N.Y. Sup. Ct. 1842).

218. *Id.* at 105.

219. *See id.* at 103 ("It seems then, that by the law of nature, the father has no paramount inalienable right to the custody of his child. And the civil or municipal law in setting bounds to his parental authority, and in entirely or partially depriving him of it in cases where the interests and welfare of his child require it, does not come in conflict with or subvert any of the principles of the natural law. The moment a child is born, it owes allegiance to the government of the country of its birth, and is entitled to the protection of that government. And such government is obligated by its duty of protection, to consult the welfare, comfort and interests of such child in regulating its custody during the period of its minority.")

220. *Id.* ("By the law of nature, the father has no paramount right to the custody of his child. . . . On the establishment of civil societies, the power of the chief of a family as sovereign, passes to the chief or government of the nation. And the chief or magistrate of the nation not possessing the requisite knowledge necessary to a judicious discharge of the duties of guardianship and education of children, such

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rental authority independent of the supreme power of the state,”<sup>221</sup> and the delegation of state duties is “subject to such restrictions and limitations as the sovereign power of the nation think proper to prescribe.”<sup>222</sup> In all cases, “[t]he rights of the parents must . . . yield to the interests and welfare of the infant.”<sup>223</sup>

The trust model of parent–child relations was enthusiastically embraced by the child advocates of the nineteenth century,<sup>224</sup> but it was not the intellectual property of welfare reformers alone. In his treatise on the constitutional limits of the state’s police power, Christopher Tiedeman argued that “[t]he authority to control the child is not the natural right of the parents; it emanates from the State, and is an exercise of police power.”<sup>225</sup> Tiedeman was anything but partial to the assertion of state authority. For him, popular government was a repudiation of absolutism “in its most repulsive form”—the divine right of kings.<sup>226</sup> Because the king obtained his authority “from above,” there were no definite limitations on royal power:

The king ruled by divine right, and obtaining his authority from above he acknowledged no natural rights in the individual. If it was his pleasure to give to his people a wide room for individual activity, the subject had no occasion for complaint. But [the subject] could not raise any effective opposition to the pleasure of the ruler, if he should see fit to impose numerous restrictions, all tending to oppress the weaker for the benefit of the stronger.<sup>227</sup>

When divine right was replaced by a theory of popular government, Tiedeman continued, “the opposite principle [was] substituted: that all

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portion of the sovereign power as relates to the discharge of these duties, is transferred to the parents, subject to such restrictions and limitations as the sovereign power of the nation think proper to prescribe.”)

221. *Id.*

222. *Id.*; see also *id.* at 101 (“The father’s right to his child is not absolute and inalienable. In those American cases which uphold to the greatest extent the right of the father, it is conceded that it may be lost by his ill usage, immoral principles or habits, or by his inability to provide for his children.”).

223. *Id.* at 102; see also *Lippincott v. Lippincott*, 128 A. 254, 255 (N.J. 1925) (“Manifestly, the touchstone of our jurisprudence in matters dealing with the custody and control of infants is the welfare and happiness of the infant, and not the final affections naturally arising from parental or family relationship. Thus, it has been quite generally held that even the natural right of the father to the custody of his child cannot be treated as an absolute property right, but rather as a trust reposed in the father by the state, as *parens patriae* for the welfare of the infant.”) (citations omitted). Of course, not all nineteenth century courts were ready to disregard patriarchal notions of parental custody rights. See Zainaldin, *supra* note 140, at 1059–68 (describing “traditionalist interlude” of the 1830s); Rendleman, *supra* note 207, at 233 (noting that the development of governmental authority to control family affairs was not without “some setbacks”).

224. See, e.g., Woodhouse, *supra* note 12, at 1050–68.

225. TIEDEMAN, *supra* note 52, at 554.

226. *Id.* at v.

227. *Id.*

government power is derived from the people.”<sup>228</sup> But this principle, too, was subject to abuse. For many years after popular government was established, “there was no marked disposition manifested by the majority to interfere with the like liberties of the minority.”<sup>229</sup>

On the contrary the sphere of governmental activity was confined within the smallest limits by the popularization of the so-called *laissez-faire* doctrine, which denies to government the power to do more than to provide for the public order and personal security by the prevention and punishment of crimes and trespasses. Under the influence of this doctrine, the encroachments of government upon the rights and liberties of the individual have been comparatively few.<sup>230</sup>

However, the economic pressures of the nineteenth century eroded doctrines of governmental inactivity and subjugated the rights of the minority (presumably, what Tiedeman refers to as the conservative classes) to a constitutionally impermissible “assumption by government of the paternal character altogether.”<sup>231</sup> For Tiedeman, it was as though the state, acting as *parens patriae*, was too generous a father and too solicitous of its many weak children.

Governmental interference is proclaimed and demanded everywhere as a sufficient panacea for every social evil which threaten the prosperity of society. Socialism, Communism, and Anarchism are rampant throughout the civilized world. The state is called on to protect the weak against the shrewdness of the stronger, to determine what wages a workman shall receive for his labor, and how many hours daily he shall labor. Many trades and occupations are being prohibited because some are damaged incidentally by their prosecution, and many ordinary pursuits are made government monopolies. The demands of the Socialists and Communists vary in degree and in detail, and the most extreme of them insist upon the assumption by government of the paternal character altogether, abolishing all private property in land, and making the State the sole possessor of the working capital of the nation.

Contemplating these extraordinary demands of the great army of discontents, and their apparent power, with the growth and development of universal suffrage, to enforce their views of civil polity upon the civilized world, the conservative classes stand in constant fear of the advent of an absolutism more tyrannical and more unreasoning than any before experienced by man, the absolutism of a democratic majority.<sup>232</sup>

Tiedeman’s goal was to demonstrate that this new form of the patriarchal principle—democratic absolutism—is “impossible in this country, as long as the popular reverence for the constitutions, in their restrictions upon governmental activity, is nourished and sustained by a prompt avoidance by the courts of any violations of their provi-

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228. *Id.* (“[I]nstead of the king being the vicegerent of God, and the people subjects of the king, the king and other officers of the government were servants of the people, the people became the real sovereign through the officials.”).

229. *Id.* at vi.

230. *Id.*

231. *Id.* at vii.

232. *Id.* at vi–vii.

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sions, in word or in spirit.”<sup>233</sup> The proper object of government is to protect private rights.<sup>234</sup> These rights “do not rest upon the mandate of the municipal law as a source. They belong to man in a state of nature.”<sup>235</sup> The object of government, through its police power, is “to impose that degree of restraint upon human actions which is necessary to the uniform and reasonable conservation and enjoyment of private rights.”<sup>236</sup> Any further use of the police power is “a governmental usurpation.”<sup>237</sup>

Any law which goes beyond that principle, which undertakes to abolish rights, the exercise of which does not involve an infringement of the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security, cannot be included in the police power of the government.<sup>238</sup>

What, then, about laws restricting parental authority? Tiedeman distinguishes the family as a political institution (a subdivision of the body politic) from the family as a “domestic relation.” In “early history,” the family was an independent political entity, with the father as autocrat.<sup>239</sup> During this “patriarchal age,” the father ruled “without constraint, could command the service of the child, make a valid sale of the adult children as well as the minor, and punish them for offenses, inflicting any penalty which his wisdom or caprice may suggest, even to the taking of life.”<sup>240</sup> The father was the king of the family, ruling with the same absolutism as the monarch whose authority came from above. This absolute control, according to Tiedeman, derived from the political character of the family as an institution of government. Absolute paternal authority was part of a larger political arrangement—and that authority dissolved as part of new political arrangements. When the family “ceases to be a subdivision of the body politic, and becomes a domestic relation instead of a political institution, . . . this absolute control of the children is taken away.”<sup>241</sup> The children become autonomous members of the body politic and “acquire political and civil rights, independently of the father.”<sup>242</sup>

By the abolition of the family relation as a political institution, the child, whatever may be his age, acquires the same claim to liberty of action as the adult, viz.: the right to the largest liberty that is consistent with the enjoyment of a like liberty on the part of others; and he is only subject to restraint,

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233. *Id.* at vii.

234. *Id.* at 1.

235. *Id.*

236. *Id.* at 1.

237. *Id.* at 4.

238. *Id.*

239. *Id.* at 551.

240. *Id.* at 551–52.

241. *Id.* at 552.

242. *Id.*; cf. *Mercein v. People ex rel. Barry*, 25 Wend. 64, 103 (N.Y. 1840) (“On the establishment of civil societies, the power of the chief of a family as sovereign, passes to the chief or government of the nation.”).

so far as such restraint is necessary for the promotion of the general welfare or beneficial as a means of protection to himself. *The parent has no natural vested right to the control of the child.*<sup>243</sup>

Thus, the father's "supreme control" is "transferred to the State, the father retaining only such power of control over his children during minority, as the promptings of nature and a due consideration of the welfare of the child would suggest."<sup>244</sup> As a result, the parent's power over the child "is in the nature of a trust, reposed in him by the State . . . , which may be extended or contracted as the public welfare may require."<sup>245</sup> What the state gives, it can take away. Parental control of the child can be extended or contracted because it is only "as a police regulation," not as a right, "that the subjection of minor children to the control of parents may be justified under constitutional limitations."<sup>246</sup> *The authority to control the child is not the natural right of the parents; it emanates from the State, and is an exercise of police power.*<sup>247</sup>

For Tiedeman, there is no right of parents to direct the upbringing of their children. Because the control of children is an exercise of police power, parental control is a privilege or a duty.<sup>248</sup> Of course, not every denial of parental authority would be "enforcible or beneficial."<sup>249</sup> Tiedeman would trust that "[t]he natural affection of parents for their offspring is ordinarily the strongest guarantee that the best interests of the child as well as society will be subserved."<sup>250</sup> State interference with the natural bond between parent and child should be reserved for exceptional cases.<sup>251</sup> Quoting Philemon Bliss's 1886 treatise, *Of Sovereignty*, Tiedeman returns to his anti-communitistic theme, this time focusing on the abolition of private familial rights: "Constitutions fail when they ignore our nature. Plato's republic, abolishing the family, making infants but children of the State, exists only in the imagination."<sup>252</sup> To ignore human nature is to invite popular discontent.<sup>253</sup> It would be startling, Tiedeman writes, if the police

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243. TIEDEMAN, *supra* note 52, at 552 (emphasis added).

244. *Id.*

245. *Id.* at 553.

246. *Id.* at 554.

247. *Id.* (emphasis added). *But cf.* *People ex rel. O'Connell v. Turner*, 55 Ill. 280 (Ill. 1870) (discussing parental authority as inherent and inalienable right). On *Turner*, see Fox, *supra* note 102, at 1215–22; Rendleman, *supra* note 207, at 233–36; David S. Tanenhaus, *Between Dependency and Liberty: The Conundrum of Children's Rights in the Gilded Age*, 23 LAW & HIST. REV. 351 (2005).

248. TIEDEMAN, *supra* note 52, at 554.

249. *Id.* at 561.

250. *Id.*

251. *Id.*

252. *Id.* (quoting PHILEMON BLISS, ON SOVEREIGNTY 17 (Boston, Little, Brown & Co. 1865)).

253. "[A] law, which interferes without a good cause with the parental authority, will surely prove a dead letter." *Id.*



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power were to be “carried to its extreme limit . . . that, . . . the State may take away the parental control altogether, and assume the care and education of the child, whenever in the judgment of the legislature such action may be necessary for the public good, or the welfare of the child.”<sup>254</sup> Yet, these are policy considerations,<sup>255</sup> and such considerations are not the concerns of the court. “[T]hey cannot bring the constitutionality of the law into question, enabling the courts to refuse to carry the law into execution in any case that might arise under it.”<sup>256</sup>

Tiedeman concludes his discussion of the parent–child relation with a brief review of the compulsory school attendance question.<sup>257</sup> By mid-century, child rescue schemes had broadened beyond the law of apprenticeship and institutional commitment.<sup>258</sup> In 1852, Massachusetts became the first state to make school attendance compulsory.<sup>259</sup> By 1900, more than thirty states had enacted compulsory attendance statutes.<sup>260</sup> The impact of this legislation was to make state regulation of the parent–child relation a matter that affected all parents. Who properly had custody of the child—or, at least, who properly controlled the child’s education—was no longer a matter of concern primarily to marginal communities. Tiedeman accepts that it is within the police power of the state to establish free schools, but considers it a serious question whether the state can require school attendance against the wishes of the parents.<sup>261</sup> The constitutionality of compulsory attendance laws depends on whether the control of children is a parental right or is held to be a privilege or duty. Tiedeman

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254. *Id.* at 554.

255. *Id.* at 561.

256. *Id.* The determination that parental custody is a privilege, and not a right, imposes upon the courts a position of deference to legislative judgment. *See id.* at 560 (“If it is the parent’s natural right, then the State cannot arbitrarily take the child away from the care of the parents; and any interference with the parental control must be justified as a police regulation on the grounds that the assumption of the control of the child by the State is necessary for the public good, because of the evil character of the parents; and like all other similar cases of restraint upon natural right, the commitment of the child to the care of the State authorities must rest upon a judicial degree, after a fair trial, in which the parents have a right to appear and defend themselves against the charge of being unfit to retain custody of the child. Whereas, if the parental control be only a privilege or duty, granted or imposed by the State, it rests with the discretion of the legislature to determine under what circumstances, if at all, a parent may be entrusted with the rearing of his child, and it is not a judicial question whether the legislative judgment was well founded.”).

257. *Id.* at 561–63.

258. *See id.*

259. *See* MICHAEL S. KATZ, A HISTORY OF COMPULSORY EDUCATION LAWS 17 (1976).

260. *Id.* at 17–18. In 1918, Mississippi became the last state to pass a compulsory school attendance law. The law was repealed in 1956. *Id.* at 18. On the history of the common-school system, see generally, for example, KAESTLE, *supra* note 39.

261. TIEDEMAN, *supra* note 52, at 562.

predicted that “under the influence of social forces now at work” the state’s authority to compel attendance at some school would prevail “and compulsory education become very general.”<sup>262</sup>

Tiedeman was right, of course. Compulsory education would become very general—universal, in fact. However, requiring school attendance against the wishes of parents, and, more particularly, mandating curricular requirements against the wishes of parents, would create a parental rights backlash.<sup>263</sup> For the last quarter of the nineteenth century and the first quarter of the twentieth, education would be at the forefront of a great cultural and constitutional debate to determine the proper scope of state authority to regulate the family.

#### D. The Parental Rights Backlash

By 1918, all states had passed school attendance legislation, and state enforcement mechanisms were increasingly efficient.<sup>264</sup> The success of compulsory attendance laws prompted the beginning of rights-based constitutional challenges to state control of education. For the most part, these challenges saw only modest success. Direct assaults on compulsory attendance laws were rejected by the courts on the ground that “[t]he natural rights of a parent to the custody and control of his infant child are subordinate to the power of the state, and may be restricted and regulated by municipal laws.”<sup>265</sup> The

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262. *Id.* at 563.

263. On parental resistance to common schooling prior to 1860, see, for example, KAESTLE, *supra* note 39, at 136–81, and RAVITCH, *supra* note 8, at 33–76.

264. On the history of compulsory attendance statutes, see generally MICHAEL S. KATZ, *supra* note 259; LAWRENCE KOTIN & WILLIAM F. AIKMAN, *LEGAL FOUNDATIONS OF COMPULSORY SCHOOL ATTENDANCE* (1980); Martin Jay Eisenberg, *Compulsory Attendance Legislation in America, 1870 to 1915* (1988) (unpublished Ph.D. dissertation, University of Pennsylvania) (on file with author); Stephen J. Provasnik, *Compulsory Schooling, from Idea to Institution: A Case Study of the Development of the Compulsory Attendance in Illinois, 1857–1907* (1999) (unpublished Ph.D. dissertation, University of Chicago) (on file with author).

265. *See, e.g.*, *State v. Bailey*, 61 N.E. 730, 731–32 (Ind. 1901) (“The natural rights of a parent to the custody and control of his infant child are subordinate to the power of the state, and may be restricted and regulated by municipal laws. One of the most important natural duties of the parent is his obligation to educate his child, and this duty he owes not to the child only, but to the commonwealth. If he neglects to perform it or willfully refuses to do so, he may be coerced by law to execute such civil obligation. The welfare of the child and the best interests of society require that the state shall exert its sovereign authority to secure to the child the opportunity to acquire an education.”); *State v. Jackson*, 71 N.H. 552 (N.H. 1902); *Stephens v. Bongart*, 189 A. 131, 132 (Essex County Ct., N.J. 1937) (“This statute is a legitimate exercise of the police power of the state. The object of the legislation was to create an enlightened American citizenship in sympathy with our principles and ideals, and to prevent children reared in America from remaining ignorant and illiterate. If it is within the police power of the state to regulate wages, to legislate respecting housing conditions in crowded cities, to prohibit dark rooms in tenement houses, to compel landlords to place windows in

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courts echoed the longstanding principle that parental power derives from parental duty, a duty owed both to the child and the state.<sup>266</sup> There is no parental right that would allow a parent to deprive his child of a proper education.<sup>267</sup>

However, several courts upheld parental challenges to specific requirements as part of the public school curriculum.<sup>268</sup> Because specific curricular requirements so directly challenged the educational prerogatives of public school parents, these cases provided a platform from which some courts sought to create new limits on state regulation of the family. In doing so, they relied on a reading of the common law that more or less rejected the contingent nature of parental power. The parent was given a “paramount right” to choose what courses his child would take from those prescribed by the state-mandated curriculum.<sup>269</sup> Though the presumption was that the parent would make “a

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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 New Jersey so to educate his children that the light of American ideals will permeate the life of our future citizens.”); *State v. Williams*, 56 S.D. 370 (S.D. 1929).

266. *See, e.g., Bailey*, 61 N.E. at 732 (“One of the most important natural duties of the parent is his obligation to educate his child, and this duty he owes not to the child only, but to the commonwealth. If he neglects to perform it or willfully refuses to do so, he may be coerced by law to execute such civil obligation. The welfare of the child and the best interests of society require that the state shall exert its sovereign authority to secure to the child the opportunity to acquire an education.”).
267. *Id.* (“To carry out the enlightened and comprehensive system of education enjoined by the constitution of this state, a vast fund, dedicated exclusively to this purpose, has been set apart. Revenues to the amount of more than \$2,000,000 annually are distributed among the school corporations of the state. No parent can be said to have the right to deprive his child of the advantages so provided, and to defeat the purposes of such munificent appropriations.”).
268. *See Hardwick v. Bd. of Sch. Trs.*, 205 P. 49 (Cal. Dist. Ct. App. 1921) (compelling admission of students whose parents objected to dance classes); *Trs. of Schs. v. People ex rel. Van Allen*, 87 Ill. 303 (Ill. 1877) (grammar); *Rulison v. Post*, 79 Ill. 567 (Ill. 1875) (bookkeeping); *State ex rel. Kelley v. Ferguson*, 95 Neb. 63, 71–73, 144 N.W. 1039, 1043 (Neb. 1914) (compelling admission of student whose father objected to the study of domestic science); *State ex rel. Sheibley v. Sch. Dist. No. 1*, 31 Neb. 552, 48 N.W. 393 (Neb. 1891) (objection to the study of grammar); *Morrow w. Wood*, 35 Wis. 59 (Wis. 1874) (geography). Other courts deferred to school authorities. *See State ex rel. Andrews v. Webber*, 8 N.E. 708 (Ind. 1886) (music); *Kidder v. Chellis*, 59 N.H. 473 (1879) (public speaking); *Sewell v. Bd. of Educ.*, 29 Ohio St. 89 (1876) (rhetoric); *Guernsey v. Pitkin*, 32 Vt. 224 (Vt. 1859) (composition).
269. *Morrow*, 35 Wis. at 66; *see also id.* at 64 (“We do not really understand that there is any recognized principle of law, nor do we think there is any rule of morals or social usage, which gives the teacher an absolute right to prescribe and dictate what studies a child shall pursue, regardless of the wishes or views of the parent, and, as incident to this, gives the right to enforce obedience even as against the orders of the parent. From what source does the teacher derive this authority? From what maxim or rule of the law of the land? Ordinarily, it will be conceded, the law gives the parent the exclusive right to govern and control the conduct of

wise and judicious selection,”<sup>270</sup> the rights of the parent, not the best interests of the child, were the focus of judicial attention.<sup>271</sup>

Typical of these curricular requirements cases is *School Board District No. 18, Garvin County v. Thompson*.<sup>272</sup> In *Thompson*, school officials expelled several children who, “under the direction of their parents,” refused to take singing lessons, which were part of the prescribed course of study.<sup>273</sup> In its judgment for the parents, the Supreme Court of Oklahoma began its analysis with a restatement of basic common-law principles.

At common law the principal duties of parents to their legitimate children consisted in their maintenance, their protection, and their education. These duties were imposed upon principles of natural law and affection laid on them not only by Nature herself, but by their own proper act of bringing them into the world. It is true the municipal law took care to enforce these duties, though Providence has done it more effectually than any law by implanting in the breast of every parent that natural insuperable degree of affection which not even the deformity of person or mind, not even the wickedness, ingratitude, and rebellion of children, can totally suppress, or extinguish.<sup>274</sup>

Oklahoma state law was “in the main declaratory of the common law,” and compulsory school laws had no doubt “modif[ied] more or less the authority of the parent over the child in school matters.”<sup>275</sup> The *Thompson* court insisted that the parent’s paramount right to determine what studies his child shall pursue is consistent with the common law duty to provide children with a suitable education.<sup>276</sup> This selection right of the parent “is superior to that of the school officers and the teachers.”<sup>277</sup> Some courts deferred to school authorities

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his minor children, and he has the right to enforce obedience to his commands by moderate and reasonable chastisement. And furthermore, it is one of the earliest and most sacred duties taught the child, to honor and obey its parents. The situation of the child is truly lamentable, if the condition of the law is that he is liable to be punished by the parent for disobeying his orders in regard to his studies, and the teacher may lawfully chastise him for not disobeying his parent in that particular.”).

270. *Id.* at 66. (“It is unreasonable to suppose any scholar who attends school, can or will study all the branches taught in them. From the nature of the case some choice must be made and some discretion be exercised as to the studies which the different pupils shall pursue. The parent is quite as likely to make a wise and judicious selection as the teacher.”).

271. *See* *Bd. of Educ. v Purse*, 28 S.E. 896 (Ga. 1897).

272. *Sch. Bd. Dist. No. 18, Garvin County v. Thompson*, 103 P. 578 (Okla. 1909).

273. *Id.* at 578.

274. *Id.* at 578–79.

275. *Id.* at 579.

276. *Id.*

277. *Id.* at 582. (“The school authorities of the state have the power to classify and grade the scholars in their respective districts and cause them to be taught in such departments as they may deem expedient. They may also prescribe the courses of study and text-books for the use of the schools, and such reasonable rules and regulations as they may think needful. They may also require prompt attendance, respectful deportment, and diligence in study. The parent, however,

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where the parent refused to offer any reason for his objection to a curricular requirement.<sup>278</sup> The *Thompson* court, however, was not prepared to make even this concession to state authority. It thought the better rule was “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.”<sup>279</sup>

The *Thompson* court was defending more than a parent’s right to take his child out of singing lessons. Underlying these cases was the fear that educational authority was being made subject to what Tiedeman called the “assumption by government of the paternal character altogether.”<sup>280</sup> Where Blackstone saw the absolute control of the child by the parent as barbaric, these courts saw exclusive state control of the child as the hallmark of despotism.<sup>281</sup> Where Kent saw the child’s proper education as a prerequisite for social and political engagement, these courts looked to the autonomous family as “the keystone of the governmental structure.”<sup>282</sup> These courts lacked Tiedeman’s general skepticism toward the patriarchal principle, and their vision of the home was hardly that of an educational forum where children learned to think for themselves. “Under our form of government, and at common law, the home is considered the keystone

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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.”); *cf.* *Trs. of Schs. v. People ex rel. Van Allen*, 87 Ill. 303 (Ill. 1877) (“[T]he policy of our law has ever been to recognize the right of the parent to determine to what extent his child shall be educated, during minority—presuming that his natural affections and superior opportunities of knowing the physical and mental capabilities and future prospects of his child, will insure the adoption of that course which will most effectually promote the child’s welfare.”).

278. *See, e.g.*, *State v. Webber*, 8 N.E. 708 (Ind. 1886); *State ex rel. Sheibley v. Sch. Dist. No. 1*, 31 Neb. 552, 48 N.W. 393 (Neb. 1891).

279. *Thompson*, 103 P. at 582.

280. TIEDEMAN, *supra* note 52, at vii.

281. *Cf.* *Rulison v. Post*, 79 Ill. 567, 573 (Ill. 1875) (“Parents and guardians are under the responsibility of preparing children intrusted 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.”).

282. *Id.*; *cf.* *State ex rel. Kelley v. Ferguson*, 95 Neb. 63, 74, 144 N.W. 1039, 1043 (Neb. 1914) (“But in this age of agitation, such as the world has never known before, we want to be careful lest we carry the doctrine of governmental paternalism too far, for, after all is said and done, the prime factor in our scheme of government is the American home.”).

of the governmental structure. In this empire parents rule supreme during the minority of their children.”<sup>283</sup> The family as a domestic relation was replaced by the family as a political institution, where “the parent, and especially the father, was vested with supreme control over the child.”<sup>284</sup> This perfectly explains the reminder of the Wisconsin Supreme Court that God considered filial obedience a sacred duty: “it is one of the earliest and most sacred duties taught the child, to honor and obey its parents.”<sup>285</sup>

Where the subject of state authority to regulate the family had been considered “a question, not of constitutional power for the courts, but of expediency and propriety, which it is the sole province of the legislature to determine,”<sup>286</sup> the courts that upheld curricular objections were defending rights considered superior to ordinary legislation. This defense had a strong patriarchal ring to it. The state simply could not take from the father his right of parental control. The curricular requirement cases were often decided quite literally on the principle that father knows what is best for his child:

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.<sup>287</sup>

But even where the best interests of the child were threatened, the child’s rights might be considered as entirely dependent on the will of the father. In *Board of Education v. Purse*, the Supreme Court of Georgia went so far as to uphold the suspension of a child because the child’s parent had disrupted the classroom.<sup>288</sup> The court acknowledged that “it is hard upon the child to be deprived of the benefit of an education because his parent will not submit himself to the reasonable rules, regulations, practices, and customs incident to the system providing for the education of his child,”<sup>289</sup> but the court concluded that

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283. *Thompson*, 103 P. at 581.

284. *Id.* at 579.

285. *Morrow v. Wood*, 35 Wis. 59, 64 (Wis. 1874).

286. *Cf. State v. Clottu*, 33 Ind. 409, 412 (Ind. 1870) (“The subject has always been regarded as within the purview of legislative authority. How far this interference should extend is a question, not of constitutional power for the courts, but of expediency and propriety, which it is the sole province of the legislature to determine. The judiciary has no authority to interfere with this exercise of legislative judgment; and to do so would be to invade the province which by the constitution is assigned exclusively to the law-making power.”).

287. *Kelley*, 95 Neb. at 69, 144 N.W. at 1043 (quoting *State v. Sch. Dist. No. 1*, 31 Neb. 552, 556, 48 N.W. 393, 395 (Neb. 1891)); *Sch. Bd. Dist. No. 18, Garvin County v. Thompson*, 103 P. 580 (Okla. 1909) (quoting same).

288. *Bd. of Educ. v. Purse*, 28 S.E. 896 (Ga. 1897). Though the mother had caused the disruption, under state law the wife had no legal existence of her own. *Id.* at 902. Thus, her husband was responsible for her conduct. *Id.*

289. *Id.* at 900.

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to grant the child an independent right to an education would be to undermine the supreme control of the father. In a remarkable reversal of the idea that the parent's duty to educate his child is owed to the state, the *Purse* court concluded that the public ought not to be deprived of the benefits of parental absolutism.

It would be contrary to the policy of our law, based, as it is, upon the common law, to bestow upon the child, in the matter of its education, any right independent of the parent. It needs no argument to sustain the proposition that the father is, and ought to be, the head of the family, and the public has the right to look to him to control his children. A law which would take from him this control, and deprive the public of the benefits to be derived from such control, would be in conflict with our established institutions.<sup>290</sup>

To reach this conclusion, the *Purse* court, like other courts that struck down curricular education requirements, had to read the common law in absolutist terms. The child was no worse off, according to the court, than he would have been at common law. The common law

left the child completely at the mercy of the parent's will, so far as obtaining an education was concerned; in fact, the status of the child is the same. At common law he was at the mercy of an arbitrary parent whether he should be placed at school or not; placed at school in [the state of] Georgia he is still at the mercy of an arbitrary parent, who may so conduct himself as to deprive the child of the benefits to be derived from an education.<sup>291</sup>

By ceding to the parent a "paramount right" to select courses from the prescribed state curriculum, the courts created the right they purported to find, a right to contract the spectrum of available knowledge and to forbid the acquisition of useful learning. However, the common law did not propose a legal regime that made children's educational best interests secondary to parental rights. Not only was the matter of education "deemed a legitimate function of the state," parental custody itself was made "to depend upon considerations of moral fitness in the parent to be entrusted with the formation of the character of his own offspring."<sup>292</sup> Thus, consistent with common law principles, state compulsory attendance statutes not only set minimal educational requirements for the public schools, but also required private schools to offer "equivalent instruction."<sup>293</sup> In the half-century before *Meyer* and

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290. *Id.*

291. *Id.*

292. *State v. Clottu*, 33 Ind. 409, 412 (Ind. 1870).

293. *See, e.g., Hardwick v. Bd. of Sch. Trs.*, 205 P. 49 (Cal. Dist. Ct. App. 1921) ("To the end that the public school system may in full measure function according to its purposes, there must, of course, be rules and regulations for the government thereof, and these the Legislature has either directly provided or has vested the school authorities with plenary power to establish and, quite naturally and with eminent propriety, has committed to said authorities the right and power to prescribe the courses of study to be followed in the various grades of the system and to maintain at all times the discipline indispensably necessary to the successful prosecution of the high purposes thereof."); *State ex rel. Andrews v. Webber*, 8 N.E. 708, 712 (Ind. 1886) ("It cannot be doubted, we think, that the legislature

*Pierce*, the courts tended to defer to the regulatory discretion of school authorities (the curricular requirements cases notwithstanding), a trend that would finally result in state efforts to require attendance at public schools only.

In 1919, Nebraska and sixteen other states passed statutes prohibiting the teaching of foreign languages in private as well as public schools.<sup>294</sup> To the Nebraska Supreme Court, hearing a challenge to the state language prohibition law, the salutary purpose of the legislation was clear and well within the sphere of the state's police power.<sup>295</sup> In dissent, Judge Charles B. Letton protested that the measure upset the proper allocation of educational control between parent and state.<sup>296</sup> Citing one of the curricular requirement cases, Letton conceded that the state could manage and control private schools, but the state had no right "to prevent parents from bestowing upon their children a full measure of education in addition to the state required branches."<sup>297</sup>

Has it the right to prevent the study of music, of drawing, of handiwork, in classes or private schools, under the guise of police power? If not, it has no power to prevent the study of French, Spanish, Italian, or any other foreign or classic language, unless such study interferes with the education in the language of our country, prescribed by the statute.<sup>298</sup>

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has given the trustees of the public school corporations the discretionary power to direct, from time to time, what branches of learning, in addition to those specified in the statute, shall be taught in the public schools of their respective corporations.); *cf.* *Bd. of Educ. v. Allen*, 392 U.S. 236, 245–46 (1968) ("[A] substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction.").

294. On the language prohibition statutes, see Woodhouse, *supra* note 12, at 1004 ("By 1923, thirty-one states had laws mandating English as the sole language of instruction either in public or in all schools. These language laws sprang, in some measure, from anti-German bias of the war years. 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. 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. 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.") (footnotes omitted).

295. *Meyer v. State*, 107 Neb. 657, 187 N.W. 100 (Neb. 1922).

296. *Id.* at 667–68, 187 N.W. at 104–05 (Letton, J., dissenting)

297. *Id.* at 668, 187 N.W. at 104.

298. *Id.*



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In dissent, Judge Letton relied on *State ex rel. Kelley v. Ferguson*,<sup>299</sup> in which the Nebraska Supreme Court upheld a parent's paramount right to select what classes he wanted his child to take from the state-prescribed course of studies. In *Kelley*, the parent had objected to his child's attendance at a domestic science class.<sup>300</sup> Judge Letton concurred, but in the judgment only. Unwilling "to go so far [as did the majority] with respect to the right of parental control," Letton based his decision in *Kelley* on the fact that domestic science was not a "plainly essential" course.<sup>301</sup> He would extend the right of parental control "only to such studies as are not plainly essential or which are not at least impliedly required to be taught in the grade of school in which the pupil may enroll."<sup>302</sup>

In effect, Judge Letton was trying to accommodate the competing concerns of parent and state. Under the common law composite model of parent-child relations, parents had no right to prevent the state from setting minimal educational requirements. Conversely, under the curricular requirement cases, parents possessed a veto power over the state-mandated curriculum, and this threatened to upset the balance of power in favor of parental control. From these two alternatives, Judge Letton ultimately supported the state's authority, though he would have limited it to mandatory subjects.<sup>303</sup> However, Judge Letton indicated that no principle of law gave the state authority to prevent parents from teaching their children subjects "in addition to the state required branches."<sup>304</sup> Thus, when Nebraska passed its language prohibition statute, the balance of power was upset in favor of state control. Here, Judge Letton drew his line, knowing that it would likely fall to the United States Supreme Court to sort out the proper allocation of educational control between parent and state.

### III. MEYER AND PIERCE: PARENTING, EDUCATION, AND THE RHETORIC OF RIGHTS

The *Pierce* Court famously pronounced that the child is not the mere creature of the state.<sup>305</sup> It is a curiously understated proposition. When *Pierce* is read against the history of custody case law, how-

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299. *State ex rel. Kelley v. Ferguson*, 95 Neb. 63, 144 N.W. 1039 (Neb. 1914).

300. *See id.* at 64, 144 N.W. at 1040.

301. *Id.* at 75, 144 N.W. at 1044 (Letton, J., concurring in conclusion only).

302. *Id.*

303. *Id.*

304. *Meyer*, 107 Neb. at 668, 187 N.W. at 104 (Letton, J., dissenting) ("The state . . . has no right to prevent parents from bestowing upon their children a full measure of education in addition to the state required branches. Has it the right to prevent the study of music, of drawing, of handiwork, in classes or private schools, under the guise of police power?").

305. *Pierce v. Soc'y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925).

ever, the defensiveness of the Court's posture makes good sense, for the courts had consistently maintained that the child is "primarily a ward of the state."<sup>306</sup> *Meyer* and *Pierce* have been read to state broad claims about the fundamental nature of parental rights, but, in fact, they stand for a much more modest proposition: that the state does not have exclusive authority over the child's education, and, more particularly, that the state cannot prohibit parents from teaching their children subject matter outside the scope of a state-mandated curriculum.<sup>307</sup>

The fear that the state was claiming exclusive control of the child's education was a theme of the curricular requirement cases. Accordingly, the Wisconsin Supreme Court asked, "Whence, we again inquire, did the teacher derive this exclusive and paramount authority over the child, and the right to direct his studies contrary to the wish of the father?"<sup>308</sup> For those courts eager to see the pendulum of educational authority swing back to the parent, the answer was to grant parents the right to keep the child from taking subjects required by school authorities. Importantly, in the curricular requirements cases, the state was not prohibiting parents from teaching their children subject matter beyond that required by the state or prohibiting parents from teaching their children outside the public school setting. However, this is precisely what the state wanted to do in *Meyer* and *Pierce*. In *Meyer*, the state wanted to prohibit the teaching of modern foreign languages to children in the primary grades of all schools, public and private.<sup>309</sup> In effect, the state was claiming the authority to establish a curricular monopoly. In *Pierce*, the monopoly demanded by the state was institutional. The state wanted to prohibit private schooling for children between ages eight and sixteen.<sup>310</sup> In both cases, the Supreme Court was driven by a passionate concern "lest the state carry the doctrine of government paternalism too far."<sup>311</sup> However, the Court did not grant parents the right to reject state curricular requirements. As expressed in later opinions, the Court merely granted parents, in *Meyer*, the right to do something in addition to what the public schools required, and, in *Pierce*, "the right . . . to provide an equivalent education in a privately operated system."<sup>312</sup>

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306. See, e.g., *Allison v. Bryan*, 97 P. 282, 286 (Okla. 1908).

307. The secondary literature on *Meyer* and *Pierce* is voluminous. On the historical background, see generally David B. Tyack, *The Perils of Pluralism: The Background of the Pierce Case*, 74 AM. HIST. REV. 74 (1968); Woodhouse, *supra* note 12.

308. *Morrow v. Wood*, 35 Wis. 59, 65 (1874).

309. See *Meyer*, 107 Neb. 657, 187 N.W. 100.

310. See *Pierce*, 268 U.S. at 530-31.

311. *State ex rel. Kelley v. Ferguson*, 95 Neb. 63, 74, 144 N.W. 1039, 1044 (Neb. 1914).

312. *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) ("Providing public schools ranks at the very apex of the function of a State. Yet even this paramount responsibility

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Neither *Meyer* nor *Pierce* rejects the statist notion that the government can enforce the parental duty to educate. The *Meyer* Court did not question the authority of the state “to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English.”<sup>313</sup> In *Pierce*, the Court pointedly noted that the case raised no question “concerning the power of the state reasonably to regulate all schools,” and that the power of the state included a good deal of curricular control—“that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.”<sup>314</sup> The question that these cases both consider is how far the state can go in dictating what *the parent* can do. *Meyer* teaches that the state may not set up a standard of education for children and prohibit any additional instruction.<sup>315</sup> The court’s reasoning was based on the arbitrariness of the language prohibition. That is, “the mere knowledge of [a foreign] language could not reasonably be regarded as harmful.”<sup>316</sup> Thus, in proscribing foreign language instruction in private schools, the legislature exceeded its police powers.<sup>317</sup> The Court agreed with the plaintiff that, unless the teaching of a subject is so clearly harmful “as to justify its inhibition,”<sup>318</sup> the parent has a right to supplement the state’s educational offerings. To put it simply, the parent cannot be prohibited from teaching his child subjects in addition to those required by the state. If there is a fundamental right at stake in *Meyer*, it is the right of the parent, “after he has complied with all proper requirements by the state as to education, to

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was, in *Pierce*, made to yield to the right of parents to provide an equivalent education in a privately operated system.”)

313. *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

314. *Pierce v. Soc’y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534 (1925); cf. *Bd. of Educ. v. Allen*, 392 U.S. 236, 247 (1968) (“[I]f the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function.”).

315. *See Meyer*, 262 U.S. 390.

316. *Id.* at 400.

317. *Id.* at 403; *see also Nebraska Dist. of Evangelical Lutheran Synod v. McKelvie*, 108 Neb. 448, 455, 187 N.W. 927, 930 (Neb. 1922) (Morrissey, C.J., dissenting) (“I cannot regard as a reasonable exercise of the police power a provision which arbitrarily forbids the acquisition of useful learning—learning that is not harmful in itself, learning that the well to do parent may employ a private tutor to impart to his child, or that the cultured parent may personally impart to his child, if not done in a school. The police power has never been held to extend to the prohibition of acts not injurious to society or which cannot reasonably be said to be harmful to the public welfare. It is an arbitrary classification which reason will not support.”).

318. *Meyer*, 262 U.S. at 403.

give his child such further education in proper subjects as he desires and can afford.”<sup>319</sup>

This is the narrow right for which Arthur T. Mullen, on behalf of the plaintiff Robert T. Meyer, argued before the Court. Mullen was careful to “concede the power of the State to require the study of English, under the police power.”<sup>320</sup> Yet, he was unwilling to “concede for a moment that the legislature has the power, when we comply with the curriculum of study prescribed by the State, to deny us the right to teach a foreign language as an optional subject.”<sup>321</sup> What the plaintiff wanted was the “right to teach these foreign languages and other branches in addition to the curriculum required by the public schools.”<sup>322</sup> If such teaching did not disrupt the required curriculum, Mullen argued, there was no sound reason under the police power to prohibit it:

The only objection they can make to the teaching of foreign languages in a private or parochial school is this: I can conceive that, if it was done in such a way as to interfere with the regular course of study, there might be reasonable objection to it. But when we get above the minimum requirements in our State, qualifications of teachers, equipment, and everything else, it is none of the State's business what we teach the child, so long as we do not teach it sedition, or something of that kind. We have a right to teach any useful or harmless study—gymnastics, dancing, or anything else; and languages as well as anything else—because there is nothing inherently bad about learning a foreign language.<sup>323</sup>

Central to the argument was whether the statute merely regulated or actually prohibited the teaching of foreign languages. On this point, both sides agreed that teaching children while they were young was the key to educational success. The State argued that the law was regulatory in character,<sup>324</sup> noting that the statute did not “forbid the use of foreign languages by persons of maturity or prevent the study of foreign languages by persons who have passed the eighth

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319. *Meyer v. State*, 107 Neb. 657, 667, 187 N.W. 100, 104 (Neb. 1922) (Letton, J., dissenting); *cf.* *Berea College v. Kentucky*, 211 U.S. 45, 67 (1908) (Harlan, J., dissenting) (“The capacity to impart instruction to others is given by the Almighty for beneficent purposes and its use may not be forbidden or interfered with by Government,—certainly not, unless such instruction is, in its nature, harmful to the public morals or imperils the public safety.”).

320. Transcript of Oral Argument, *supra* note 17, at 14.

321. *Id.*

322. *Id.*

323. *Id.* at 15.

324. Brief and Argument of State of Nebraska, Defendant in Error at 14–15, *Meyer v. Nebraska*, 262 U.S. 390 (1923) (No. 325) (“If it is within the police power of the state to regulate wages, to legislate respecting housing conditions in crowded cities, to prohibit dark rooms in tenement houses, 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 on Nebraska to so educate his children that the sunshine of American ideals will permeate the life of the future citizens of this republic.”).

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grade.”<sup>325</sup> The purpose of the law was “to prevent children reared in America from being trained and educated in foreign languages and foreign ideals before they have had an opportunity to learn the English language and observe American ideals.”<sup>326</sup> The State’s concern was based on the “well known fact that the language first learned by a child remains his mother tongue and the language of his heart.”<sup>327</sup> By forcing children to wait until they passed the eighth grade, the law worked “to insure that the English language shall be the mother tongue and the language of the heart of the children reared in this country who will eventually become the citizens of this country.”<sup>328</sup> The plaintiff fully agreed with the State’s pedagogical premises. However, artfully drawing upon Pharaoh’s edict to the Hebrews to make bricks without straw,<sup>329</sup> attorney Mullen countered that because the law prohibited children from studying a foreign language “when they are most impressionable,”<sup>330</sup> it amounted to a total prohibition on foreign language instruction.<sup>331</sup> “[I]t is more difficult for a child to learn a language after it gets into high school than it is in the lower grades; and [the statute’s] purpose is to discourage the study of foreign languages; that is the only theory upon which it was enacted.”<sup>332</sup>

The *Meyer* Court accepted the argument that the statute imposed a blanket prohibition on the ability of parents to supplement the required curriculum with foreign language instruction.<sup>333</sup> It noted that “[p]ractically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto.”<sup>334</sup> Thus, the law was really a *de facto* ban. In his amicus brief, William Guthrie pointed the Court to *Adams v. Tanner*<sup>335</sup> for

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325. *Id.* at 12.

326. *Id.* at 12–13.

327. *Id.* at 13.

328. *Id.*

329. *See Exodus* 5.

330. Transcript of Oral Argument, *supra* note 17, at 14.

331. *Id.* at 14–15 (“[T]he theory of requiring a child to study a language at a period of its life when it is more difficult for it to learn is the same theory that was invoked by the Pharaohs, when they required their subjects ‘to make bricks without straw,’ there is no doubt about it; what they were trying to do is to prevent the study of foreign languages, and the use of foreign languages . . .”).

332. *Id.* The argument about regulation versus prohibition was doubly important because Oregon’s recent enactment of a statute prohibiting private schooling for the primary grades was effectively a secondary object of the Court’s deliberations. Before the Court, Mullen repeatedly made what amounted to a slippery slope argument: the prohibition of foreign language teaching had already led to the prohibition of private schools. *See id.* at 8–10.

333. *See* Brief for William D. Guthrie & Bernard Hershkopf as Amici Curiae Supporting Plaintiff-in-Error, *supra* note 15, at 7.

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

335. 244 U.S. 590 (1917). In *Adams*, the Court struck down a state law prohibiting the collection by employment agencies of fees from applicants for work. Con-

the proposition that “mere abuse incident to an occupation ordinarily useful is not enough to justify its abolition, although regulation may be entirely proper.”<sup>336</sup> Relying on *Adams*, the Court held that without an emergency that would justify a prohibition on foreign language teaching, the state law was without “reasonable relation to any end within the competency of the State.”<sup>337</sup> Similarly, the *Pierce* Court found that private schools were not harmful, that the result of enforcing the state legislation would be the destruction of private schools, and, finally, that there was no emergency to justify the State’s exclusive institutional control of the child’s education.<sup>338</sup>

If the doctrinal results of *Meyer* and *Pierce* are modest, the same cannot be said of the Court’s rhetoric. Like the courts in the curricular requirements cases, the Court paid homage to “rights long freely en-

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vinced that the statute was one of prohibition rather than regulation, the Court found that the law had “no just relation to the protection of the public within the scope of legislative power.” *Id.* at 596–97. The real issue in *Adams* was state regulation of the marketplace and the Court’s fear that “[s]killfully directed agitation” would interfere with one’s right “to follow a distinctly useful calling in an upright way”:

Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one’s right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked.

*Id.* at 594–95.

336. *Meyer*, 262 U.S. at 403.

337. *Id.* But see *Bartles v. Iowa*, 262 U.S. 404, 412 (Holmes, J., dissenting) (“It is with hesitation and unwillingness that I differ from my brethren with regard to a law like this but I cannot bring my mind to believe that in some circumstances, and circumstances existing it is said in Nebraska, the statute might not be regarded as a reasonable or even necessary method of reaching the desired result. The part of the act with which we are concerned deals with the teaching of young children. Youth is the time when familiarity with a language is established and if 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 that it is unreasonable to provide that in his early years he shall hear and speak only English at school.”).

338. *Pierce v. Soc’y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534 (1925). (“The inevitable practical result of enforcing the act under consideration would be destruction of appellees’ primary schools, and perhaps all other private primary schools for normal children within the state of Oregon. Appellees are engaged in a kind of undertaking not inherently harmful, but long regarded as useful and meritorious. Certainly there is nothing in the present records to indicate that they have failed to discharge their obligations to patrons, students, or the state. And there are no peculiar circumstances or present emergencies which demand extraordinary measures relative to primary education.”).

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joyed.”<sup>339</sup> The thematic thrust of the Court’s opinions was its fear of a brave new world where the state would indoctrinate children in a standardized state-endorsed ideology.<sup>340</sup> While the anti-statist rhetoric of *Meyer* and *Pierce* would long resonate with those seeking to make education an essentially private, parenting matter, these cases cannot be made to support the claim that parental rights are fundamental.<sup>341</sup> The Court set an outer limit to the state’s authority to limit the child’s access to educational options. The state cannot “standardize its children by forcing them to accept instruction from public teachers only.”<sup>342</sup> Yet, while “[t]he child is not the mere crea-

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339. *Meyer*, 262 U.S. at 403.

340. *Id.* at 401–02; *Pierce*, 268 U.S. at 535 (“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.”).

341. *See Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944) (“[N]either rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth’s well being, the state as *parens patriae* may restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child’s course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. The catalogue need not be lengthened. It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare; and that this includes, to some extent, matters of conscience and religious conviction.”) (footnotes omitted) (citations omitted); *Baker v. Owen*, 395 F. Supp. 294, 299 (M.D.N.C. 1975) (“We reject Mrs. Baker’s suggestion that this right is fundamental, and that the state can punish her child corporally only if it shows a compelling interest that outweighs her parental right. We do not read *Meyer* and *Pierce* to enshrine parental rights so high in the hierarchy of constitutional values. In each case the parental right prevailed not because the Court termed it fundamental and the state’s interest un compelling, but because the Court considered the state’s action to be arbitrary, without reasonable relation to an end legitimately within its power. Nor has the Court subsequently spoken of parental rights as fundamental; on the contrary, its references to them lend support to the view that they are not.”) (citations omitted), *judgment aff’d per curiam*, *Baker v. Owen*, 423 U.S. 907 (1975); *cf. Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (distinguishing cases “where nothing more than the general interest of the parent in the nurture and education of his children is involved” from cases where “the interests of parenthood are combined with a free exercise claim”).

342. *Pierce*, 268 U.S. at 535; *cf. Leebaert v. Harrington*, 332 F.3d 134, 140–41 (2d Cir. 2003); *Swanson v. Guthrie Ind. Sch. Dist. No. 1-L*, 135 F.3d 694 (10th Cir. 1998); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 533–34 (1st Cir. 1995) (“The *Meyer* and *Pierce* cases, we think, evince the principle that the state cannot prevent parents from choosing a specific educational program—whether it be religious instruction at a private school or instruction in a foreign language. That is, the state does not have the power to ‘standardize its children’ or ‘foster a homogeneous people’ by completely foreclosing the opportunity of individuals and groups

ture of the state,” the right of parents to direct the education of their children is “coupled with the high duty, to recognize and prepare him for additional obligations.”<sup>343</sup> This is the contingent right so deeply embedded in the history of custody law. Fearful that the state was claiming exclusive educational authority, the Court swung the parent–child pendulum back to its customary position, restoring the composite system that had prevailed since the time of Blackstone.

#### IV. RELIGIOUS PARENTING AND EDUCATIONAL ENFRANCHISEMENT

If courts took seriously the longstanding legal principle that the parent is only entrusted with the child’s educational welfare, some hard cases might be subject to more principled decision making. More specifically, the courts should look skeptically at any educational program, whether imposed by the parent or by the state, that restricts the spectrum of knowledge available to the child.<sup>344</sup> If courts sought to heed the Supreme Court’s admonition that “students must always remain free to inquire, to study and to evaluate,”<sup>345</sup> they would have a surer compass when adjudicating conflicts between the competing claims of parent and state to direct the education of young children.

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to choose a different path of education. . . . We think 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.’ The first instance involves the state proscribing parents from educating their children, while the second involves parents prescribing what the state shall teach their children.” (citations omitted).

343. *Pierce*, 268 U.S. at 535; see *Yoder*, 406 U.S. at 233 (“The duty to prepare the child for ‘additional obligations,’ referred to by the Court, must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship.”); *Prince*, 321 U.S. at 166 (“It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”).

344. On children’s intellectual rights, see generally David Moshman, *Children’s Intellectual Rights: A First Amendment Analysis*, in CHILDREN’S INTELLECTUAL RIGHTS 25 (David Moshman ed., 1986); Harvey Siegel, *Critical Thinking as an Intellectual Right*, in CHILDREN’S INTELLECTUAL RIGHTS 39 (David Moshman ed., 1986); but compare with *Wisconsin v. Yoder*, 406 U.S. 205, 245 (1972) (Douglas, J., dissenting in part) (“It is the future of the student, not the future of the parents, that is imperiled by today’s decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. The child may decide that that is the preferred course, or he may rebel. It is the student’s judgment, not his parents’, that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny.”).

345. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).



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On this basis, for example, the courts should uphold the prohibition of homeschooling arrangements that are too socially reclusive. Home instruction should provide an education that is more than merely the academic equivalent of the public schools, and some courts have decided that social isolation can be its own form of intellectual incapacitation. Where the geography of education sequesters the child from divergent points of view, the state has a compelling interest in “removing the child from the immediate family for his or her education. By bringing children into contact with some person, other than those in the excluded group, those children are exposed to at least one other set of attitudes, values, morals, lifestyles and intellectual abilities.”<sup>346</sup> Isolation may involve separation from other children, or it may also involve separation from other adults, including teachers, who can offer a non-parental role model that the Supreme Court has deemed “crucial to the continued good health of a democracy.”<sup>347</sup> In

346. *State v. Edgington*, 663 P.2d 374, 378 (N.M. Ct. App. 1983); cf. MEIRA LEVINSON, *THE DEMANDS OF LIBERAL EDUCATION* 58 (1999) (arguing that “it is difficult for children to achieve autonomy solely within the bounds of their families and home communities—or even within the bounds of schools whose norms are constituted by those held by the child’s home community”); Brighthouse, *supra* note 44, at 244 (“[T]he state has an obligation to ensure that every child has a full opportunity to become personally autonomous.”); Emily Buss, *The Adolescent’s Stake in the Allocation of Educational Control between Parent and State*, 67 U. CHI. L. REV. 1233 (2000) (suggesting that compulsory public education might be applied universally in order for the state to facilitate adolescent associational activity with unlike peers); Rob Reich, *Testing the Boundaries of Parental Authority over Education: The Case of Homeschooling*, in *MORAL AND POLITICAL EDUCATION* 275, 299 (Stephen Macedo & Yael Tamir eds., 2002) (“I submit that even in a minimal construal of autonomy, it must be the function of the school setting to expose children to and engage children with values and beliefs other than those of their parents. To achieve minimal autonomy require that a child know that there are ways of life other than that into which he or she has been born. Minimal autonomy requires, especially for its civic importance, that the child be able to examine his or her own political values and beliefs, and those of others, with a critical eye. It requires that a child be able to think independently. If this is all true, then at a bare minimum, the structure of schooling cannot replicate in every particularity the values and beliefs of a child’s home.”) (footnote omitted). *But see, e.g.*, Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937 (1996) (defending a broad conception of parental educational authority).

347. *Ambach v. Norwich*, 441 U.S. 68, 78–79 (1968) (“Within the public school system, teachers play a critical part in developing students’ attitude toward government and understanding of the role of citizens in our society. Alone among employees of the system, teachers are in direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school. In shaping the students’ experience to achieve educational goals, teachers by necessity have wide discretion over the way the course material is communicated to students. . . . Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen’s social responsibilities. This influence is crucial to the

any event, as one state supreme court concluded, the state has a duty to ensure that children are not “released upon the world only after their opportunities to acquire basic skills have been foreclosed and their capacity to cope with modern society has been so undermined as to prohibit useful, happy or productive lives.”<sup>348</sup>

On this basis, too, the courts should refuse to allow public school parents to opt-out of educational programs they consider objectionable. In cases like this, the parent denies the child an opportunity to learn about other viewpoints, religious or secular. The child is silenced, as it were, by default. The most well-known example of such a case is *Mozert v. Hawkins County Board of Education*, where parents had religious objections to a prescribed set of reading textbooks used as part of a school-wide critical reading program.<sup>349</sup> The parents’ re-

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continued good health of a democracy.”) (footnotes omitted); see also *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (“Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models.”).

348. *State v. Riddle*, 285 S.E. 2d 359, 366 (W. Va. 1981). The defendants were “Biblical Christians” who, according to the court, “[were] determined to have their children totally indoctrinated and educated in their religious beliefs, with no smattering of heresy.” *Id.* at 361. The parents “never requested the county superintendent of schools to approve their home as a place for instruction,” as required by law. *Id.* at 363. With less than abundant generosity of spirit, the court thought it was

inconceivable that in the twentieth century the free exercise clause of the first amendment implies that children can lawfully be sequestered on a rural homestead during all of their formative years to be released upon the world only after their opportunities to acquire basic skills have been foreclosed and their capacity to cope with modern society has been so undermined as to prohibit useful, happy or productive lives.

*Id.* at 366; see also *State v. Hoyt*, 146 A. 170, 170–71 (N.H. 1929) (“Education in public schools is considered by many to furnish desirable and even essential training for citizenship, apart from that gained by the study of books. The association with those of all classes of society, at an early age and upon a common level, is not unreasonably urged as a preparation for discharging the duties of a citizen.”); *Knox v. O’Brien*, 72 A.2d 389, 392 (Cape May Cnty. Ct., N.J. 1950) (“Cloister and shelter have its place, but not in the every day give and take of life. . . . The entire lack of free association with other children being denied to [the O’Brien children], by design or otherwise, which is afforded them at public school, leads me to the conclusion that they are not receiving education equivalent to that provided in the public schools in the third and fifth grades.”). *But see* *State v. Massa*, 231 A.2d 252, 255 (Morris Cnty. Ct., N.J. 1967) (“The Legislature must have contemplated that a child could be educated alone provided the education was equivalent to the public schools. Conditions in today’s society illustrate that such situations exist. Examples are the child prodigy whose education is accelerated by private tutoring, or the infant performer whose education is provided by private tutoring.”).

349. 827 F.2d 1058, 1059 (6th Cir. 1987); see also *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008) (challenge to books portraying diverse families); *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003) (requiring health education classes); *Immediato v. Rye Neck School Dist.*, 873 F. Supp. 846 (2d. Cir. 1996) (community service);

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ligious beliefs compelled them to refrain from exposing their children to viewpoints not consistent with strict adherence to biblical teaching,<sup>350</sup> and, accordingly, they sought to opt-out of the reading program.<sup>351</sup> The Court of Appeals for the Sixth Circuit concluded that mere exposure to opposing viewpoints did not create an impermissible burden on the students' exercise of their religion, reasoning (1) that the reading curriculum did not contain religious or anti-religious messages, and (2) that participation did not require students "to affirm or deny a religious belief or to engage or refrain from engaging in a practice forbidden or required in the exercise of a plaintiff's religion."<sup>352</sup> This is a weak and doctrinally dangerous—and unnecessary—line of reasoning.<sup>353</sup> While public school officials may refuse to shield a young child from exposure to diverse viewpoints, some of which might be offensive to the child's personal religious beliefs, they may not do so because such exposure is unburdensome, but because the state has a compelling interest in creating a curriculum that truly trains children through wide exposure to a robust exchange of ideas.<sup>354</sup>

The state's interest is more than a matter of administrative convenience. It is the protection of "the prospective interest in personal sovereignty our children have."<sup>355</sup> Compulsory education requirements presuppose "sympathetic and critical engagement with beliefs and ways of life at odds with the culture of the family or religious or ethnic

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Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 533 (1st Cir. 1995) (challenge to sex education); *Fleischfresser v. Dirs. of Sch. Dist. 200*, 15 F.3d 680 (7th Cir. 1994) (supplemental reading program). On the background to *Mozert*, see generally STEPHEN BATES, *BATTLEGROUND: ONE MOTHER'S CRUSADE, THE RELIGIOUS RIGHT AND THE STRUGGLE FOR CONTROL OF OUR CLASSROOMS* (1993). On opt-out cases and liberal education, compare, for example, MACEDO, *supra* note 28, at 298–99, and CALLAN, *supra* note 28, at 132–61, with, for example, GALSTON, *supra* note 37, at 110–23; Nomi Maya Stolzenberg, "He Drew a Circle that Shut Me Out": *Assimilation, Indoctrination, and the Paradox of Liberal Education*, 106 HARV. L. REV. 581 (1993); and Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047 (1990).

350. Vicki Frost, one of the lead plaintiffs, testified "that she did not want her children to make critical judgments and exercise choices in areas where the Bible provides the answer." See *Mozert*, 827 F.2d at 1069.

351. *Id.*

352. *Id.*

353. See, e.g., Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989) (finding that application of the substantial burden doctrine "creates an intolerable risk of discrimination against unconventional religious practices and beliefs, and threatens to narrow the protection of religious liberty overall").

354. *Mozert*, 827 F.2d at 1071 (Kennedy, J., concurring) (concluding that the state had a compelling interest in having students "read and discuss complex, morally and socially difficult issues").

355. CALLAN, *supra* note 28, at 152.

group into which the child is born.”<sup>356</sup> They entail the effort to foster respect for difference and a willingness to entertain, if only for the sake of argument, ideas that go against the familial grain. Respect for difference does *not* presuppose the child’s rejection of his primary culture—just the opposite may be the case. The classroom should be a place where the child’s primary commitments can be strengthened. What compulsory education requirements ensure is that, at a minimum, the child learns that there are choices to be made and that no source of authority—parent or teacher—has the right to deny someone else the capacity to make critical judgments. This, for Eamonn Callan, is the lesson of the great sphere.

The lesson it teaches is that each of us must learn to ask the question of how we should live, and that how we answer it can be no servile echo of the answers others have given, even if our thoughts commonly turn out to be substantially the same as those that informed our parents’ lives. Agreement with those we love, even when it is in large part due to a concord of thought and feeling that love has fed, is not the same as ethical servility.<sup>357</sup>

The case of Turk Leebaert and his son Corky illustrates the point.<sup>358</sup> Mr. Leebaert wanted his son excused from attending health education classes required as part of the seventh-grade public-school curriculum.<sup>359</sup> By law, Leebaert was permitted to excuse his child from classes related to family-life instruction or AIDS education.<sup>360</sup> However, Leebaert contended that health education was really a matter of “character development education,” a subject that properly belongs only to the parent.<sup>361</sup> For Leebaert, the right of the parent to mold his child’s moral character was a matter of religious faith: “I believe that God has empowered human beings with the right to bring their children up with correct moral principles in dealing with the issues taught in this course, not the school system.”<sup>362</sup> Leebaert had no objection to “normal curriculum subjects,”<sup>363</sup> but relying on the curricular requirement cases of the late nineteenth and early twentieth centuries, Leebaert argued that where the public school curriculum

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356. *Id.* at 154–55.

357. CALLAN, *supra* note 28, at 154–55; *cf.* *Wisconsin v. Yoder*, 406 U.S. 205, 239 (1972) (White, J., concurring) (“A State has a legitimate interest not only in seeking to develop the latent talents of its children but also in seeking to prepare them for the life style that they may later choose, or at least to provide them with an option other than the life they have led in the past.”).

358. *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003).

359. *Id.*

360. *Id.* at 137.

361. *Id.* at 136; *see* Brief for Plaintiff–Appellant at 18, *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2002) (No. 02-7399) (“Character’ is something that Mr. Leebaert believes that he alone must teach his sons.”).

362. *Leebaert*, 332 F.3d at 138.

363. Brief for Plaintiff–Appellant, *supra* note 361, at 18.

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conflicts with a parent's religious beliefs,<sup>364</sup> the parent has the right "to choose alternatives for [his or her] own children inside the public schools."<sup>365</sup>

Leebaert's objection to the health education curriculum reflected his greater concern that the true goal of public education was the "coercive standardization" of the nation's children.<sup>366</sup> Interposing the Constitution as a bulwark against state-mandated uniformity, *Meyer* and *Pierce* were, in his view, a clear denunciation of "the intellectual roots of the 'it takes a village to raise a child' philosophy in favor of parents['] rights."<sup>367</sup> Accordingly, Leebaert argued that philosophy would produce sons who grew up "like 'Stepford children,' mere carbon copies of all the other students . . . when it comes to their values and their character."<sup>368</sup> However, Leebaert's argument against state-mandated conformity was anything but a plea for the intellectual and moral autonomy of his children. What Leebaert wanted was "to impart to his sons *his* own religious, moral and ethical values free of interference or preemption by school officials."<sup>369</sup> That a child may grow up to be a carbon copy of his parent, serving only to mirror his father's values, was acceptable—not because there is any difference between state-mandated and parent-mandated conformity as far as the welfare of the child is concerned, but simply because it is the parent's God-given right to create the child in his own image. In Leebaert's view, the parent has a moral proprietary right in the child, not a fiduciary responsibility to ensure that the child grows up with the capacity to choose his own values, free of interference or preemption.

No matter what curriculum is required by the public schools, parents remain free to inculcate their values in countless formal and informal ways. This is the lesson of *Meyer* and *Pierce*. To support his argument that only the parent has the authority to teach subject mat-

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364. For Leebaert's objection to the health education curriculum, see *Leebaert*, 332 F.3d at 138 ("I believe that the way the school system teaches the subjects to which I sought to opt my son out of, is anti-religion. For one example, it doesn't support a married man and woman together as the basic unit of the family. The school teaches that this unit can be comprised of anything or anyone, that anything you say can be a family. This contradicts my religious beliefs.").

365. Brief for Plaintiff-Appellant, *supra* note 361, at 27. In support of his opt-out argument, Leebaert relied on the curriculum requirement cases. See *id.* at 23–33.

366. *Id.* at 27.

367. *Id.* at 26; see also *id.* at 27 ("At the time, it was the culturally conservative and religiously Protestant elements of society that were generally aligned with the forces advancing the coercive standardization of children. They were exceptionally hostile to the world view of Catholic immigrants, and sought to use universal public education as a tool to create a homogenized, Protestant society.") (footnote omitted).

368. *Id.* at 18–19.

369. *Id.* at 19.

ter related to character education, Leebaert described how, when he teaches his children, he goes beyond the conformist character-building methods of the public schools. He cited as an example a boat trip that he and his sons took down the Connecticut River. They built the boat themselves, and traveled more than 400 miles from the river's source in New Hampshire to the Long Island Sound.<sup>370</sup>

This is not something that the average parent teaches his children, and it demonstrates the extent to which Mr. Leebaert wants his sons to go *beyond* the secular teachings of the Fairfield School system which he believes reduce the potential of his sons to the secular culture's views on the development of character and right and wrong. Mr. Leebaert's sons, Corky and Timmy Bruce, are both honor students at Roger Ludlowe Middle School and, in addition to everything else, are adept at violin, full-contact karate, animal tracking and other interests. The flat boat Connecticut River trip is just one example of the lengths to which Mr. Leebaert goes to personally build character in his sons.<sup>371</sup>

Leebaert is exactly right, but he proves too much. Of course, the state does not replace the parent as moral educator. Under *Meyer* and *Pierce*, the parent remains a private source of moral authority (as do a host of private entities). Indeed, against these private sources "the state is normally at a disadvantage."<sup>372</sup> Thus, even if the state mandated curricular requirements for all schools, public and private, the allocation of educational authority would be shared by parent and state. Indeed, without some kind of compulsory curriculum, educational pluralism exists only in the sense that different schools are each free to teach a closed set of values, not in the "thicker" sense that each child's world is opened to divergent sets of values. In this sense, a regime of compulsory curricular requirements for all schools means more diversity, not less.<sup>373</sup>

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370. Brief for Plaintiff-Appellant, *supra* note 361, at 19-20

371. *Id.* at 20.

372. See *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 599 (1940), *overruled by* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) ("What the school authorities are really asserting is the right to awaken in the child's mind considerations as to the significance of the flag contrary to those implanted by the parent. In such an attempt the state is normally at a disadvantage in competing with the parent's authority, so long—and this is the vital aspect of religious toleration—as parents are unmolested in their right to counteract by their own persuasiveness the wisdom and rightness of those loyalties which the state's educational system is seeking to promote.")

373. See CALLAN, *supra* note 28, at 5 ("The cultivation of serious and independent ethical criticism, and the enlargement of the imagination that process entails, will naturally conduce to the diversity in how people live . . ."); Abner S. Greene, *Why Vouchers are Unconstitutional, and Why They're Not*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 397, 407 (1999) ("Requiring all children to attend public schools, while leaving parents free during non-public-school hours to teach their children at home or at church or synagogue, would ensure that all children are exposed to multiple sources of authority and of knowledge."); see also *Parker v. Hurley*, 514 F.3d 87, 105 (1st Cir. 2008) ("[T]he mere fact that a child is exposed on occasion in public school to a concept offensive to a parent's religious belief does not inhibit

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Finally, if courts made the child's educational best interests a paramount concern, it would be less likely that the classroom would become a forum for a parent's personal religious agenda. The fear of this outcome has led some public school officials to deny young children the opportunity to express religious viewpoints at school.<sup>374</sup> Here, the

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the parent from instructing the child differently. A parent whose 'child is exposed to sensitive topics or information [at school] remains free to discuss these matters and to place them in the family's moral or religious context, or to supplement the information with more appropriate materials.'" (quoting *C.N. v. Ridge-wood Bd. of Educ.*, 430 F.3d 159, 185 (3d Cir. 2005)); cf. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (finding that a school requirement to recite Pledge of Allegiance does not impair parent's right to instruct his daughter in his religious views); GUTMANN, *supra* note 28, at 42 ("A democratic state of education recognizes that educational authority must be shared among parents, citizens, and professional educators even though such sharing does not guarantee that power will be wedded to knowledge, that parents can successfully pass their prejudices on to their children, or that education will be neutral among competing conceptions of the good life."); Ira C. Lupu, *Home Education, Religious Liberty, and the Separation of Powers*, 67 B.U. L. REV. 971, 976-77 (1987) ("Adults other than parents may serve as sources of information, models of behavior, and safe outlets for concerns that children feel they cannot share with their parents, including concerns about the parents themselves. Parents, of course, can be similarly supportive in helping their children cope with the tensions of other relationships in their lives. Children raised in a regime of separated power are rather less likely to feel at risk and far more likely to feel themselves to be citizens of their larger communities than children raised in a regime of highly concentrated authority. Parents should have substantial power to choose their children's teachers, but there is reason to be troubled, and sufficient constitutional warrant for states to act, when parents choose only themselves."). See generally Ira C. Lupu, *The Separation of Powers and the Protection of Children*, 61 U. CHI. L. REV. 1317 (1994) (arguing that the concept of power separation can be used productively to mediate conflicts in the family setting).

374. For cases involving religious speech by children in the public schools, see *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89 (3d Cir. 2009); *Curry ex rel. Curry v. Hensiner*, 513 F.3d 570 (6th Cir. 2008); *Peck v. Baldwinville Cent. Sch. Dist.*, 426 F.3d 617 (2d Cir. 2005); *Settle v. Dickson Cnty. Sch. Bd.*, 53 F.3d 152 (6th Cir. 1995); *DeNooyer v. Merinelli*, 12 F.3d 211 (6th Cir. 1993); *M.B. ex rel. Martin v. Liverpool Cent. Sch. Dist.*, 487 F. Supp. 2d 117 (N.D.N.Y. 2007); *O.T. ex rel. Turton v. Frenchtown Elementary Sch. Dist.*, 465 F. Supp. 2d 369 (D.N.J. 2006); *Duran v. Nitsche*, 780 F. Supp. 1048 (E.D. Pa. 1991); and see also Chad Allred, *Guarding the Treasure: Protection of Student Religious Speech in the Classroom*, 22 SEATTLE U. L. REV. 741 (1999) (stating that private religious expression should be allowed in the classroom when accompanied by teacher explanation); Lisa Shaw Roy, *Inculcation, Bias, and Viewpoint Discrimination in Public Schools*, 32 PEPP. L. REV. 647 (2005) (arguing that religious speech could be allowed in classroom under a "no-bias" principle); Jennifer L. Specht, Note, *Younger Students, Different Rights?: Examining the Standard for Student-Initiated Religious Free Speech in Elementary Schools*, 91 CORNELL L. REV. 1313 (2006) (advocating adoption of a standard that gives substantial discretion to school officials but still allows student speech).

child is silenced directly. In *C.H. v. Oliva*,<sup>375</sup> for example, a first-grade teacher, Ms. Oliva, invited students to read a favorite story to the class. The only condition placed on the student's selection of material "was that Ms Oliva would review the stories proposed by the students to insure that their length and complexity were appropriate for first graders."<sup>376</sup> One student, Z.H., chose to read a story titled "A Big Family," which told part of the biblical account of Jacob and Esau.<sup>377</sup> The passage itself was free of any overt religious content, but Z.H. was not allowed to read the story to the class because of its biblical pedigree.<sup>378</sup> Concerned that young students would not be able "to distinguish messages a teacher specifically advocates from those she merely allows to be expressed in the classroom," the Court of Appeals for the Third Circuit upheld the school's decision.<sup>379</sup> The court was also worried that the school might infringe upon the right of parents to direct the religious upbringing of their children:

It is not unreasonable to expect that parents of non-Christian children would resent exposure of their six-year-old children to a reading from the Bible. Nor is it unreasonable to expect that some parents of Christian first graders would regard a compelled classroom exposure to material from the Bible as an infringement of their parental right to guide the religious development of their children at this stage.<sup>380</sup>

This is caution to a fault. The duty of the state to inculcate "tolerance of divergent political and religious views" is poorly served when public school officials deny children freedom of religious expression. Too often, the public school classroom is "cleansed" of religious points of view.<sup>381</sup> Yet, such caution is not always unwarranted, for some of these cases involve parents who engage in their own form of religious silencing by using their child as a religious spokesperson. In order to promote a particular religious viewpoint, these parents are willing to put religious words in the mouth of a child. In *Walz ex rel. Walz v. Egg Harbor Township Board of Education*,<sup>382</sup> Daniel Walz wanted to distribute candy canes at a kindergarten classroom party, an innocuous enough request—except that attached to these candy canes was a re-

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375. 195 F.3d 167, 172 (3d Cir. 1999), *vacated and reh'g granted*, 197 F.3d 63 (3d Cir. 1999), *aff'd in part on reh'g*, 226 F.3d 198 (3d Cir. 2000) (en banc) (affirming dismissal of religious viewpoint discrimination claim).

376. *Id.* at 169.

377. *Id.*

378. *Id.*

379. *Id.* at 175.

380. *Id.*

381. See, e.g., WARREN NORD, RELIGION & AMERICAN EDUCATION: RETHINKING A NATIONAL DILEMMA 138–59 (1995); Jay D. Wexler, *Preparing for the Clothed Public Square: Teaching about Religion, Civic Education, and the Constitution*, 43 WM. & MARY L. REV. 1159, 1181–82 (2002) (describing studies that show how "history and other social studies textbooks systematically ignore[] religious topics and themes").

382. 342 F.3d 271 (3d Cir. 2003).



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ligious story titled “A Candy Maker’s Witness.” The story (apocryphal, it turns out) tells how the candy came to “incorporate[] several symbols for the birth, ministry, and death of Jesus Christ.”<sup>383</sup> The candy maker chose the color white to symbolize “the Virgin Birth and the sinless nature of Jesus”; he made it hard “to symbolize the Solid Rock, the foundation of the Church, and firmness of the promises of God”; he made the candy “in the form of a ‘J’ to represent the precious name of Jesus, who came to earth as our Savior”; and he used three small stripes “to show the stripes of the scouring [sic] Jesus received by which we are healed,” with the large red stripe “for the blood shed by Christ on the cross so that we could have the promise of eternal life.”<sup>384</sup>

Where a public school restricts religious speech, the question is whether the child has been subjected to discrimination on the basis of religious viewpoint. The resolution of that question usually turns on the court’s choice of a standard by which to judge the constitutionality of such restrictions. Can schools discriminate on the basis of religious viewpoint if such regulation is reasonably related to pedagogical concerns? Or, does the constitutional standard require that a school’s restriction be not only reasonable, but also viewpoint neutral, a standard that would require schools to show a compelling interest for restricting speech on the basis of religious viewpoint? The circuit courts are split on this issue.<sup>385</sup> However, under either standard, the court must distinguish between expression that *describes* religious belief (generally acceptable to the courts) and expression that *promotes* religious belief (generally unacceptable). It is a nearly impossible line to walk, and one that takes courts perilously close to making forbidden judgments about religious belief.

Here, too, the courts need not weave such a tangled constitutional web. The *Walz* court distinguished personal religious observance from outward religious promotion, and concluded that Daniel sought to promote a specific religious message. Yet, Daniel sought no such thing.

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383. *Id.* at 274.

384. *Id.*

385. Compare *Ward v. Hickey*, 996 F.2d, 448, 452 (1st Cir. 1993) (holding that educators may make viewpoint-based decisions about school-sponsored speech), and *Fleming v. Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918, 926–28 (10th Cir. 2002) (same), with *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991) (en banc) (applying viewpoint neutrality standard), and *Searcey v. Harris*, 888 F.2d 1314, 1319 n.7 (11th Cir. 1989) (same). In *C.H. v. Oliva*, a panel of the Third Circuit held that “a viewpoint-based restriction on student speech in the classroom may be reasonably related to legitimate pedagogical concerns and thus permissible.” On a rehearing en banc, the circuit was equally divided on the question. See 195 F.3d 167, 172 (3d Cir. 1999), *vacated and reh’g granted*, 197 F.3d 63 (3d Cir. 1999), *aff’d in part on reh’g*, 226 F.3d 198 (3d Cir. 2000) (en banc) (affirming dismissal of religious viewpoint discrimination claim).

It was, in the court's words, "[h]is mother's stated purpose . . . to promote a religious message through the channel of a benign classroom activity."<sup>386</sup> Daniel was simply a litigation foil for a parent, one who effectively sought to make her child a spiritual foil as well. Where the child speaks in a way that is otherwise appropriate for an assignment or activity, religious expression need not be silenced. But, cases like *Walz* have little, if anything, to do with the religious expression of children, and school officials rightly refuse to allow the classroom to become a forum for the parent's personal religious agenda.

The state has a compelling interest in teaching children the fundamental "habits and manners of civility" essential to a democratic society," but if children are to learn a civility that is more than mere manners, then the state must let them speak for themselves, whether they speak the language of reason or faith, and for their community and culture, whether that background is informed by religious or secular values.<sup>387</sup> If, as the Court has said, "[t]he classroom is peculiarly the 'marketplace of ideas,'"<sup>388</sup> the voices of religious children must be allowed to be heard for the educational benefit of the entire class. The public school classroom, at every level, should be a forum where students are exposed to a variety of viewpoints, secular and religious. The idea that students benefit from exposure to opposing viewpoints only makes sense if that benefit flows in both directions. It is a benefit whose very basis is reciprocity. The classroom that welcomes appropriate religious expression may also be a less threatening place for some religious parents.<sup>389</sup>

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386. *Walz*, 342 F.3d at 280.

387. *Cf.*, e.g., *NORD*, *supra* note 381, at 202–03 ("Liberal education has both a conservative and a liberating task: it should provide students a ballast of historical identities and values at the same time that it gives them an understanding of alternatives and provides critical distance on the particularities of their respective inheritances. . . . The central tension of a liberal education, properly understood, lies in its commitment to initiating students into the communities of memory which tentatively define them, and, at the same time, nurturing critical reflection by initiating them into an ongoing conversation that enables them to understand and appreciate alternative ways of living and thinking."); Steven C. Rockefeller, *Comment*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 87, 97–98 (Amy Gutmann ed., 1994) ("[A]ny liberal democratic politics committed to the ideals of freedom and equality cannot escape the demand that it create inclusive and sustaining social environments that respect all peoples in their cultural diversity, giving them a feeling of belonging to the larger community.").

388. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

389. *Cf.*, e.g., *Brighthouse*, *supra* note 46, at 271 (exposing children to a wide array of religious and non-religious views may "address the reasonable fear of many religious parents that views like their own will be either ignored or, worse, ridiculed in the schools").

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In fact, it would be the better approach to make teaching about religion a regular part of the public school curriculum.<sup>390</sup> Where states regulate the curriculum of private schools, they could impose the same requirement.<sup>391</sup> Can our schools teach about religion without teaching religion? The Supreme Court thought so, even as it struck down state-mandated religious exercises.<sup>392</sup> Can our public schools provide a basic education without teaching about religion? The Supreme Court thought not,<sup>393</sup> and, given the place that religion occupies historically and culturally, for good reason. Teaching about religion can be a productive part of a more broadly based civic education.<sup>394</sup> It might, as its proponents contend, breed tolerance and respect<sup>395</sup> and let students navigate some of the moral cross-currents that accompany religious pluralism.<sup>396</sup> Still, it would be a mistake to proceed as though the study of religion could be, or should be, cabined within the civics classroom. The study of religion may be a productive part of classrooms devoted to other social sciences as well as the humanities. It would also be a mistake to underestimate the emotional and psychological effect of studying religion. Once admitted to the public school curriculum, the study of religion may work—indeed, we can be certain that, for some students, it will work—to prompt ques-

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390. On the movement to teach about religion in the public schools, see, for example, KENT GREENAWALT, DOES GOD BELONG IN PUBLIC SCHOOLS? 79–159 (2005); Wexler, *supra* note 381, at 1172–91.

391. Greenawalt argues that “[i]f parents who choose against public education need not expose their children to offensive ideas, that is *some* basis, though hardly a conclusive one, for believing that the state may also accommodate parents whose children are in public schools.” *See id.* at 180. This argument begs the question whether parents who choose against public education should be allowed to shield their children from offensive ideas. *See* GUTMANN, *supra* note 28, at 115–25 (arguing that state can require all schools to teach common democratic values, including religious toleration).

392. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963) (“Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.”).

393. *Id.* at 255 (“[I]t might well be said that one’s education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization.”); *see also id.* at 300 (Brennan, J., concurring) (“[I]t would be impossible to teach meaningfully many subjects in the social sciences or the humanities without some mention of religion.”).

394. On teaching about religion as part of civic education, see, for example, NORD, *supra* note 382, at 199–235; Wexler, *supra* note 382, at 1200–42. The challenge of teaching about religion in the public schools is not a new one. *See* WILLIAM CLAYTON BOWER, CHURCH AND STATE IN EDUCATION 57–77 (1944).

395. *See* Wexler, *supra* note 382, at 1219–20.

396. *Cf. id.* at 1170 (arguing that “schools should teach about religion so that students can make fully informed decisions about laws and other government actions affecting religious belief and practice and so they can understand the myriad ways that religious beliefs affect the way that many Americans think and talk about issues of public importance”).

tions about self and family, to create uncertainty about religious traditions, and to cause some degree of separation from parents and other spiritual mentors. If the public school curriculum embraces the necessity of free, bold, and continuing inquiry—as it must—then it is precisely this kind of free-thinking, in matters religious as well as secular, that public school curriculum ought to encourage—and this is precisely why provisions to allow parents to opt out of religious studies are a bad idea.<sup>397</sup> Of course, the state cannot restrict what else parents teach their children, but the law of parent-child relations teaches that the state can and should work to guarantee every child an open intellectual and spiritual future.

## V. CONCLUSION

“The child is not put into the hands of parents alone. It is not born to hear but a few voices. It is brought at birth into a vast, we may say an infinite, school. The universe is charged with its education.”

William Ellery Channing<sup>398</sup>

Though John Milton protested pre-publication censorship, Milton's God was less troubled by restrictions on the spectrum of available knowledge. When God's children disobey his sole commandment—a commandment that would deny Adam and Eve moral knowledge, or the capacity, that is, to choose good over evil—they are cast out of their home and sentenced to death for their disobedience. Their fall, it turns out, is a fortunate one, because their disobedience is a prerequisite to “[a] Paradise within . . . , happier far.”<sup>399</sup> The law of parent-child relations has long embodied a similar belief that education (translated literally, a “leading away from”) is the path away from childhood and toward moral and intellectual enfranchisement. The work of preparing the child to make free and independent choices is entrusted to the parent. It is a challenging and somber task, for it means the loss of the child—it means allowing children to leave their homes and leave behind the ways of their parents. Or, at least, it means giving children the choice to do so. It is little wonder, then,

397. *But see* Wexler, *supra* note 382, at 1261–62; *cf.* Steven G. Gey, *When Is Religious Speech Not “Free Speech”?*, 2000 U. ILL. L. REV. 379 (2000) (arguing that religious expression violates the Establishment Clause where non-adherents are forced to opt out of the benefits of a public education).

398. WILLIAM ELLERY CHANNING, REMARKS ON EDUCATION, *in* THE WORKS OF WILLIAM ELLERY CHANNING 117, 117–18 (Boston, American Unitarian Association 1886). Channing writes that parents “are not the only educators of their offspring, but must divide the work with other and numerous agents.” In this, they should rejoice, “for, were the young confined to domestic influences, each generation would be a copy of the preceding, and the progress of society would stop.” *Id.* at 117.

399. *See* MILTON, *supra* note 2, at 404.

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that we would want to transform this sacred trust into a sacred right, a right that effectively allows parents to shield their children from choice and its attendant responsibilities and sufferings. Yet, such a right comes at too great a cost. The law of parent-child relations shields children from this sort of “protection,” ensuring that children receive a truly public education, one that transports them beyond familiar boundaries and that burdens them with the necessity of moral judgment. In this way, the liberal state provides a much needed check on the narcissism of the child’s guardians, both public and private. It provides an education that, at its best, makes young adults truly free—free to stand and free to fall. When Adam and Eve leave Paradise, as Milton tells the story, they shed some natural tears, but “the world was all before them,”<sup>400</sup> as it should be for all children at the end of a proper education.

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400. *Id.* at 406.