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The Centennial of *Meyer* and *Pierce*: Parents' Rights, Gender-Affirming Care, and Issues in Education

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This paper was prepared for a Symposium marking the centennial of the Supreme Court's decisions in Meyer *v.* Nebraska *(1923) and* Pierce *v.* Society of Sisters *(1925). At their inception,* Meyer *and* Pierce *reflected constitutional principles of economic freedom and parental control of their children's education. Part I traces the path of ideas put in motion by* Meyer *and* Pierce*. These include the decline of their economic freedom component and the broader grounding of their doctrines of parental authority. Eventually, the legacy of* Meyer *and* Pierce *expanded to include First Amendment concerns of religious exercise and knowledge acquisition; Fourteenth Amendment themes of minority vulnerability; family privacy; and parental concerns beyond education.*

Part II searches for lessons from the Meyer-Pierce *legacy in several contemporary contexts. Part II.A. focuses on a topic where* Meyer-Pierce *rights seem exceptionally strong -- regulation of parental consent to gender-affirming medical care for minors suffering from gender dysphoria. Petitions for certiorari in cases on this subject, arising out of Kentucky and Tennessee, are now pending at the Supreme Court, and a grant seems likely. Part II. B. analyzes issues in education. These include parents' rights to control the content of public-school curricula, including instruction about matters of race, sexual orientation, and gender identity; to receive information about gender-related changes in how their children present themselves at school; and to gain access to the financial support of the state in making educational choices, including religious education. In all these contexts,* Meyer-Pierce *rights appear in varying degrees of relevance and strength. Comparison among them illuminates the current scope and likely future of parents' constitutional rights.*

[1] Ira C. Lupu is the F. Elwood & Eleanor Davis Professor of Law Emeritus, George Washington University. Many thanks to Professor Maimon Schwarzschild of the University of San Diego for the kind invitation to participate in the Symposium; Professor Richard Epstein and the Classical Liberal Institute at NYU Law School for hosting the gathering; the Journal of Contemporary Legal Issues for the opportunity to publish the paper; and Bob Bruno, Naomi Cahn, Adam Conner-Sax, Clare Huntington, Peter Smith, Bob Tuttle, and John Ward for encouragement and thoughtful comments at various stages of the project. I offer a special salute and thanks to John Ward, a student of mine during his 1L year and my rookie teaching year at Boston University Law School in 1973-74. John is a civil rights pioneer and hero, who founded GLAD (Gay and Lesbian Advocates and Defenders) in 1978. In Fall 2023, in seminars taught by John on "LGBTQ Rights and the Courts" at Boston College and Boston University, John, his students, and I (as a one-day guest) explored many of the issues addressed in Part II of this paper. The errors are mine.

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With the rhetoric of parents' rights all around us, marking the Centennial of *Meyer v. Nebraska*[2] and *Pierce v. Society of Sisters*[3] with a Symposium seems like an ingenious concentration of academic energy. As this paper will show, the current collection of parents' rights claims under the Constitution reveals occasional strength and more frequent weakness.[4]

The fundamentals are well-known. *Meyer* struck down a law that barred instruction, within any school, in any modern foreign language to a child who had not yet completed the eighth grade. *Pierce* invalidated an Oregon scheme that required all children between eight and sixteen to attend public school, thereby effectively prohibiting the choice of private schools, secular or religious. The conventional and contemporary takeaway from these decisions is that parents have constitutional rights, resting on the Due Process Clause of the 14th Amendment, to direct the education and upbringing of their minor children.

The paths which *Meyer* and *Pierce* have followed over the last 100 years, however, are far more complex than that. Law students frequently learn that the laws blocked in *Meyer* and *Pierce* were the products of nativism and bigotry. The Nebraska legislature was concerned about assimilation of immigrants into the state's population.[5] The State of Oregon, through a voter-approved initiative, was lashing out against perceived radical influence[6] and the asserted anti-

[2] 262 U.S. 390 (1923).
[3] 268 U.S. 510 (1925).
[4] The political movement for "parents' rights" has faced setbacks. See, e.g., Lisa Lerer & Patricia Mazzei, Florida Sex Scandal Shakes Moms for Liberty as Group's Influence Wanes, N.Y. Times, Dec. 16, 2023, available here: https://www.nytimes.com/2023/12/16/us/politics/moms-for-liberty-sex-scandal.html.
[5] 1923 U.S. LEXIS at ****5 - ****6 (argument for the State).

American character of Catholic schools.[7] Does this contextual information limit the significance of *Meyer* and *Pierce*? Or does it broaden them out to other contexts, not involving parental rights, where nativism and bigotry are operating?

Students also learn that *Meyer* and *Pierce* are products of the *Lochner* era, in which the Supreme Court protected freedom of contract and other economic concerns against hostile state legislation. *Meyer* involved the right of a German teacher to practice his vocation, as well as the rights of parents to educate their children in foreign languages. *Pierce* involved the economic interests of those who owned and operated private schools, as well as the right of parents to select a school. The repudiation of economic due process in the late 1930's invited questions concerning the continued vitality of *Meyer* and *Pierce*. It did not take very long, however, for the Supreme Court to recast those decisions as part of the new constitutional project of protecting vulnerable minorities.[8] Later, the Court famously re-rationalized *Meyer* and *Pierce* as decisions in the penumbra of the First Amendment concern about acquisition of knowledge.[9] Eventually, the Court broadened the ambit of these decisions to encompass parental rights of control over many aspects of their children's lives.[10] Post-New Deal, nothing seems to remain of the constitutional concern for the economic rights of those who provide educational services, but parents' rights remain robust.

Meyer and *Pierce* endure, but much of their framing has changed. Part I of this paper traces the principles of *Meyer* and *Pierce* from their common law antecedents through their invocation in the 1920's, and then extends the narrative to their most recent mention in *Dobbs v. Jackson Women's Health Organization.*[11] Among the stops along the way will be a reminder that *Meyer* and *Pierce* are the first two decisions in a trilogy, all authored by Justice McReynolds, on the subject of parents' rights to control their children's upbringing. The third, *Farrington v. Tokushige*,[12] has vanished from view. The tour provided in Part I will both 1) enmesh the story of *Meyer-Pierce* within the far larger narrative of Fourteenth Amendment adjudication over the past century, and 2) leave the reader with questions about the current scope of *Meyer-Pierce*. Their legacy reflects the larger story of a century's worth of adjudication under the 14th Amendment, and – like that larger story – their legacy is up for grabs.

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[6] 1925 U.S. LEXIS at ****5 (". . . a State can prevent the entire education of a considerable portion of its future citizens being controlled and conducted by bolshevists, syndicalists and communists. . .) (argument for the State of Oregon). In 2024, that rhetoric sounds familiar.

[7] See Paula Abrams, Cross Purposes: Pierce v. Society of Sisters and the Struggle over Compulsory Education (U Mich. Press 2009) (describing the Oregon initiative as KKK-inspired and aimed at Catholic schools); see also Robert Bunting, Pierce v. Society of Sisters, https://www.oregonencyclopedia.org/articles/pierce_vs_society_of_sisters_1925_/..

[8] United States v. Carolene Products, 304 U.S. 144, 152, n.4 (1938).

[9] Griswold v. Connecticut, 381 U.S. 479 (1965).

[10] See, e.g., Troxel v. Granville, 530 U.S. 57 (2000).

[11] 142 S. Ct. 2228, 597 U.S. ___ (2022).

[12] 273 U.S. 284 (1927). I am not including in the count Bartels v. Iowa, 262 U.S. 409 (1923), which involved precisely the same language teaching restriction as *Meyers*. Justice Holmes, joined by Justice Sutherland, dissented in *Meyer* and *Bartels* on the ground that the restriction on teaching a particular subject in the schools was reasonable and therefore satisfied the Due Process Clause.

In the uncertain light of *Meyer* and *Pierce*, Part II of the paper will analyze a series of current problems in the constitutional law of parental authority. Part II.A. analyzes the rights of parents to direct and control medical care of their children who are suffering from gender dysphoria, a subject of intense legal interest. As of this writing, petitions for certiorari to the 6th Circuit, in companion cases arising in Kentucky and Tennessee, are pending at the U.S. Supreme Court.[13] Part II.B. turns to the context of education, in which *Meyer-Pierce* arose. The analysis focuses on parents' rights to control the content of public-school curricula, for their own children and others; to receive information about the ways that their children present themselves at public school; and to gain access to the financial support of the state in making educational choices for their children. These problems are not conceptually parallel, and the analysis of each involves very different considerations.

The political rhetoric and constitutional meaning of parents' rights frequently diverge. I hope that the paper's examination of various contexts will shed light on that divergence. Please note, however, that the paper is not an attempt to systematically advance a particular view of family law and policy,[14] nor does it offer a theory of parents' constitutional rights. The paper reflects a journey through constitutional law over the past hundred years, not an attempt to arrive at a doctrinally correct destination.

I. The Path of *Meyer-Pierce* -- From Blackstone to *Dobbs*

A. The 1920's Trilogy

Meyer v. Nebraska. Zion Evangelical Lutheran Congregation maintained a parochial school, where Meyer taught the German language through Bible stories. He was prosecuted and fined twenty-five dollars under a World War I era statute that had been enacted out of hostility to the large German-speaking population in Nebraska.[15]

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[13] See *L.W.* v. *Skrmetti*, 83 F. 4th 460 (6th Cir. 2023), petition for cert filed, No. 23-466, Nov.1, 2023, available here: https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/23-466.html. I was among the scholars who participated in an amicus brief in the 6th Circuit on the side of the parents in *L.W. v. Skrmetti* and *Doe I v. Thornbury*, a companion case from Kentucky decided together with *Skrmetti*, as well as in the *en banc* appeal to the 8th Circuit in *Brandt v. Rutledge*. The *Doe I* plaintiffs have also filed a petition for certiorari, available here: https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/23-492.html. The United States has also filed a certiorari petition, covering both cases, available here: https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/23-477.html.

[14] As an approach to policy in the area, I find congenial the general views advanced by Clare Huntington and Elizabeth S. Scott in their article, Conceptualizing Legal Childhood in the Twenty-First Century, 118 Mich. L. Rev. 1371 (2020) (advancing the idea that "child well-being" should be the overarching concern of the law) (hereafter cited as Huntington & Scott, "Conceptualizing Legal Childhood"). Professors Huntington and Scott elaborate on their theory of child well-being as the justification for parental rights in The Enduring Importance of Parental Rights, 90 Ford. L. Rev. 2529 (2022).

[15] For an insightful and detailed discussion of the legislative background of *Meyer*, and the connection of Lutheran church concerns to both *Meyer* and *Pierce*, see William G. Ross, Meyer v. Nebraska: A Lutheran Contribution to Constitutional Law, available here: https://www.lutheranforum.com/blog/meyer-v-nebraska-a-lutheran-contribution-to-constitutional-law. Ohio and Iowa had similar statutes, enacted as part of a broader "Americanization" movement against foreign language instruction in immigrant communities. Id.

When the case arrived at the Supreme Court, what were the relevant legal principles? The Court's prior treatment of substantive claims made under the Due Process Clause had been focused on matters of economic liberty. and most of the arguments presented in *Meyer* depended on that line of decision.[16] Nevertheless, Justice McReynolds' opinion famously expanded the relevant zone of substantive liberties protected by the Clause:

"While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, [or] establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[17]

This passage is followed by a string cite of decisions, none of which involve rights "to marry, establish a home and bring up children," or otherwise control the education of children. The opinion explains that the state may not interfere with liberty "by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect."[18] The Court acknowledges that the State has a legitimate interest in the goal of encouraging assimilation by the children of immigrants, whose mother tongue is not English, "but this cannot be coerced by methods which conflict with the Constitution -- a desirable end cannot be promoted by prohibited means."[19]

In attempting to explain why the chosen means are prohibited by the Constitution, Justice McReynolds turned to the thought and practice of ancient Greece.[20] The Republic idealized by Plato, the opinion tells us, would have removed children from their parents immediately and put them with nurses. No parent should know their own child. The Spartans removed children from parents at age seven and put them in barracks to be reared by guardians. But moderns in a free society have different ideas and customs.

What are they? McReynolds concedes that "[t]he power 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, is not questioned. Nor has challenge been made of the State's power to prescribe a curriculum for institutions which it supports."[21] What follows as the conclusive reasoning is astoundingly superficial:

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[16] 1923 U.S. LEXIS 2655, ****1 - ****3 (arguments on behalf of Meyer). For a rich exploration of the relevant themes, see Robert C. Post, Defending the Lifeworld: Substantive Due Process in the Taft Court Era, 78 B.U. L. Rev. 1489, 1532 et seq. (1998) (suggesting that the Court extended fundamental rights protection to "cultural practices deemed necessary to sustain the individuality presupposed by democracy," id. at 1534; David Bernstein, Class Legislation, Fundamental Rights, and the Origins of *Lochner* and Liberty of Contract, 26 Geo. Mason L. Rev. 1023, 1038-1043 (2019) (analyzing *Meyer* as a forerunner of modern fundamental rights jurisprudence).

[17] 262 U.S. at 399.

[18] Id. at 399-400.

[19] Id. at 401.

[20] Id. at 401-402.

[21] Id. at 402.

"[M]ere abuse incident to an occupation ordinarily useful is not enough to justify its abolition, although regulation may be entirely proper. No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State."[22]

Exactly which "rights long freely enjoyed" had been infringed? Perhaps those of the teacher, who would have to teach other subjects in the school and be left at best to teach German in an extra-curricular program. But did the parents have any rights long freely enjoyed that the legislation infringed? Keep in mind that the state compelled the children to attend school, and that the state regulated the curriculum at the schools that sought to satisfy the compulsory attendance law. They taught reading and arithmetic, along with some lessons in morality and civics. At grades up to eighth, they did not teach calculus, advanced physics, or tennis skills. If parents wanted that instruction, they were on their own, left to self-help or purchase of instruction outside school hours. They had no right to insist that those subjects be taught to any grade in the public schools.

Was the very institution of compulsory education an infringement of rights long freely enjoyed? Massachusetts had first compelled education of the young, and by 1923, every state had enacted a compulsory school law. And every state prescribed the elements of the curriculum. I have found no indication that such laws were ever challenged in court as violations of the federal or state constitutions.[23] Both before and after education became compulsory, parents in several states successfully asserted a right to have a child opt out of a particular course of study,[24] but no decision protected the right to demand one.

Meyer, when focused on parental rights to insist on language instruction in the school, invites a deeper explanation. Two decades ago, Professor Jill Hasday analyzed the common law background of parental rights. She wrote: "The Anglo-American common law understood the connection between parent and child as a relation of both reciprocal obligation and hierarchical obedience. At common law, a father enjoyed an almost absolute right to the custody, labor, and earnings of his minor children,[25] and was in turn expected to maintain, protect, and educate them."[26]

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[22] Id. at 403.

[23] In their early years, compulsory education laws were attacked politically as tyrannical. See Daniel B. Rice, Civic Duties and Cultural Change, Cal. L. Rev. (forthcoming 2025), available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4695367, at pp. 23-25.

[24] Sch. Bd. Dist. 18 v. Thompson, 24 Okla. 1 (1909) (right to opt out of singing lessons); Trustee of Schools v. People, 87 Ill. 303 (1877) (right to opt out of studies in grammar in high school); Morrow v. Wood, 35 Wisc. 59 (1874) (right to opt out of course in geography); but see State v. Webber, 108 Ind. 31, 8 NE 708 (1886) (parent may not withdraw child from music instruction).

[25] Jill Hasday, Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations, 90 Geo. L. J. 299, 310 & n. 25 (2002) (citing1 William Blackstone, Commentaries *441; 2 James Kent, Commentaries on American Law 254-55 (O.W. Holmes, Jr., ed., Boston, Little, Brown, & Co.,12th ed. 1873).

[26] Id. at 310 & n. 26 (also citing Blackstone and Kent). The common law also gave a father the authority to use physical punishment to correct his child, a moderation of paternal rights of life and death over minor children afforded by Roman law. Id. at 311.

The gendered character of this aside, what appears from this account is a parental right focused in part on economic considerations, in the form of labor and earnings. But the reference to duties – "maintain, protect, and educate" – perhaps reflects a broader account of parent-child relations,[27] as well as obligations to the community. Children who are not properly maintained, protected, and educated may behave in destructive and anti-social ways, and the burden of supporting (or perhaps incarcerating) them may fall on the community at large.

This is a common law story that at least begins to explain the trilogy of decisions that begin with *Meyer*, though the narrative requires more detail. Why should it matter if a child in Nebraska in the 1920's learns to read or speak German in school? Social capital and earning opportunities in an immigrant community may be enhanced by that knowledge. The child's experience of worship and inculcation of religious values, including moral teaching, are likely reinforced by his language skills.[28] Perhaps the child's ability to communicate with her family (and vice versa) in their native tongue may be enhanced by this instruction. These considerations suggest a cultural and economic picture of familial and communitarian solidarity, driven by the rights of parents.[29] None of this has the flavor of a child's self-actualization, a concept to which later generations might refer in explaining parental rights.[30]

One final point about *Meyer* deserves emphasis. The law was not limited to the public schools, where the state has full and presumptive authority over the curriculum. The Nebraska law applied to all accredited schools. What legitimate state interest explained a mandatory exclusion from a private school curriculum? Accreditation standards properly mandate inclusions, but exclusions demand a different story. Nebraska did not have a story good enough to justify this kind of intrusion on parental authority and corresponding family life.

Pierce v. Society of Sisters.[31] Two years later, the decision in *Pierce* built on *Meyer* by explaining more thoroughly what was at stake. In November 1922, Oregon had by voter-approved initiative enacted the Compulsory Education Act, which required parents or other guardians of children between the ages of 8 and 16 to send them each year to a public school.[32] The Act exempted children who had completed the eighth grade, so the effect of the law, scheduled to go into effect in the Fall of 1926, was to outlaw the offering of the primary grades by all private schools, secular or religious. The Hill Military Academy, and the Society of Sisters of the Holy Names of Jesus and Mary,[33] brought suit to enjoin the enforcement of the Act.

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[27] See, e.g., Sch. Bd. Dist. 18 v. Thompson, 24 Okla. 1 (1909) (citing Blackstone for conception of paternal duty to children).

[28] In the Missouri Synod (widespread in the Midwest) of the Lutheran Church, German remained the language of worship services in the early 1920's, though there was intra-church conflict about continuing the use of German in worship services. William G. Ross, Meyer v. Nebraska: A Lutheran Contribution to Constitutional Law, available here: https://www.lutheranforum.com/blog/meyer-v-nebraska-a-lutheran-contribution-to-constitutional-law.

[29] See Huntington & Scott, Conceptualizing Legal Childhood, note __ supra, at 1414 (analyzing *Meyer* and *Pierce* as decisions that recognize American pluralism).

[30] Id. at 1413 et seq. (arguing that parental rights are an instrument for protecting the well-being of children)>

[31] 268 U.S. 510 (1925).

[32] Id. at 530. The Act also exempted children who were "not normal" or who lived far from any public school. Id.

[33] The Society was originally formed in Canada, https://snjm.org/en/, and the schools it founded include St. Mary's Academy, an all-girls high school in Portland, Oregon.

Much of the argument in the lower court and the Supreme Court was taken up with the question of whether corporations could assert the liberty of parents under the Due Process Clause of 14th Amendment. Justice McReynolds, in a unanimous opinion, made short work of that. The corporations could sue to protect their own property rights, which were substantial. And in doing so, the schools could assert the liberty of third parties not before the Court – the parents.[34]

The merits portion of the *Pierce* opinion is concise, to say the least:[35]

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

This language is more sweeping and forceful than that used in *Meyer*, and for good reason. *Meyer* involved a relatively narrow restriction on modern language instruction within accredited schools. The Oregon scheme, in contrast, outlawed the entire class of private schools, upsetting settled expectations of institutions that owned and operated these schools, as well as expectations of parents, children, and teachers. Moreover, the arguments that the state deployed in defense of the Act reeked with prejudice against immigrants, associating them with Bolsheviks and other undesirable elements. The State had made no showing in the lower court that public schools would assimilate immigrant children more successfully than private schools. Expensive private schools, like Hill Military Academy,[36] were hardly likely to cater to left-wing revolutionaries.

The Oregon proposal had been sponsored by, among others, the Ku Klux Klan, and was defended on the ground that it was necessary to protect "a homogeneous American culture."[37] Schools run by the Catholic Church and other religious groups were the obvious target, so the Act (had it gone into operation) would have substantially inhibited parental choice to inculcate religious beliefs, values, and customs.

Far more than the Nebraska restriction on teaching a foreign language in schools otherwise conducted primarily in English, the Oregon law was an entirely novel attempt to force all children into the public schools. In this regard, the Compulsory School Act disturbed long-standing practices of education and the dedication of institutional resources in support of those

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[34] Id. at 535.

[35] Id. at 534-35.

[36] Id. at 533 (noting the $800 annual tuition at Hill Military Academy). Eight hundred dollars in 1925 is the equivalent of approximately fourteen thousand dollars today.

[37] Robert Bunting, Pierce v. Society of Sisters, https://www.oregonencyclopedia.org/articles/pierce_vs_society_of_sisters_1925_/.

practices. In *Pierce*, unlike *Meyer*, the argument that the law undid "rights long freely enjoyed" was overpowering, and the state interests were served dubiously, if at all.

Farrington v. Tokushige.[38] The third decision in the trilogy, all authored by Justice McReynolds[39] in the 1920's, is the least well-known. *Farrington* involved the Territory of Hawaii, which in 1925 had enacted the Foreign Language School Act. The Act heavily regulated such schools, defined as "any school conducted in any language other than English or the Hawaiian language." The Court's opinion gives us the flavor of what drove the legislation:

"There are one hundred and sixty-three foreign language schools in the Territory. Nine are conducted in the Korean language, seven in the Chinese and the remainder in the Japanese. Respondents are members of numerous voluntary unincorporated associations conducting foreign language schools for instruction of Japanese children. These are owned, maintained and conducted by upwards of five thousand persons; the property used in connection therewith is worth two hundred and fifty thousand dollars; the enrolled pupils number twenty thousand; and three hundred teachers are employed. These schools receive no aid from public funds. All children residing within the Territory are required to attend some public or equivalent school; and practically all who go to foreign language schools also attend public or such private schools. It is affirmed by counsel for petitioners that Japanese pupils in the public and equivalent private schools increased from one thousand, three hundred and twenty in 1900 to nineteen thousand, three hundred and fifty-four in 1920, and that out of a total of sixty-five thousand, three hundred and sixty-nine pupils of all races on December 31, 1924, thirty thousand, four hundred and eighty-seven were Japanese."

The concern of the Hawaii legislature was the assimilation and loyalty of this substantial population of Japanese descent. The Act (and regulations promulgated under it) imposed a variety of heavy-handed and burdensome demands on foreign language schools. The Court's opinion quotes at length from the Circuit Court opinion re: the details of the regulatory scheme. These include the imposition of substantial per student fees; state control of the choice of textbooks; a limitation on hours of attendance per week; and, most egregiously, a regime of state control of all teachers. Under the Act, those seeking a permit to teach in the language schools had "to satisfy state officials that the applicant for the same is possessed of the ideals of democracy; knowledge of American history and institutions, and knows how to read, write and speak the English language."[40] Beyond that, each applicant had to pledge that he "will, to the best of his ability, so direct the minds and studies of pupils in such schools as will tend to make them good and loyal American citizens, and will not permit such students to receive instructions in any way inconsistent therewith."[41] The scheme oozed suspicion of disloyalty of its targets.

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[38] 273 U.S. 284 (1927).

[39] There is an irony in the authorship of these three decisions, all of which operated to constrain various forms of bigotry in state legislation. Justice McReynolds was quite infamous, in his own time and later, for his racism, anti-Semitism, misogyny, and other forms of bigotry, which he apparently took no pains to hide. Ian Milhiser, The Five Worst Supreme Court Justices in American History, Ranked, Think Progress, March 24. 2015, https://archive.thinkprogress.org/the-five-worst-supreme-court-justices-in-american-history-ranked-f725000b59e8/ (ranking McReynolds third and commenting on his "unique blend of self-centered bigotry"). That he led the Court's consistent invalidation of laws reflecting comparable bigotry may suggest his deep commitment to the parental rights themes contained in the trilogy.

[40] 273 U.S. at 293.

The challenge to the Act was based on the Due Process Clause of the Fifth Amendment, applicable in the Territories. The lower courts had no hesitation in relying on *Meyer* and *Pierce* to hold that the Act infringed on the liberty of parents to direct the upbringing of their children.[42] For the Supreme Court, Justice McReynolds saw the case precisely the same way: "The Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue."[43] With little additional discussion, the Court affirmed the grant of preliminary relief to the plaintiffs. Apparently, the state did not attempt to litigate the matter further and the schools thrived for the next 14 years,[44] though they faded away after the attack on Pearl Harbor.[45]

Perhaps *Farrington* was an easier case than *Meyer* and *Pierce*. The foreign language schools in Hawaii existed outside of the schools designed to satisfy compulsory education requirements. Students attended the language schools before or after regular school hours. The language schools thus were supplements to required education, not substitutes for it. To our contemporary eyes, as well as to the eyes of federal judges in the mid-1920's, the Act seems like an outrageous slur on the loyalty and integrity of families of Asian descent.

Whatever its ease, *Farrington* extended *Meyer* and *Pierce* to a more general protection of parental choices of how their children should be reared and taught. Animus toward part of the population – a theme that also animates *Meyer* and *Pierce* – cannot justify interference with a parent's choice to add layers of language, customs, and culture to her child's experience. Even a notorious bigot like James McReynolds could see that.[46]

B. From the 1920's to the 2020's -- The Evolving Character of the Trilogy

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[41] Id. at 293-94.

[42] Farrington v. Tokushige, 11 F. 2d 710 (9th Cir. Haw. 1926). The Circuit Court affirmed a broad injunction that the district court had entered against enforcement of the Act. Id. at 713.

[43] 273 U.S. at 298.

[44] Yoshihide Matsubayashi, The Japanese Language Schools in Hawaii and California, 1892 – 1941 (D.Ed., dissertation Univ. of San Francisco, 1985), available here: https://www.proquest.com/openview/145b055659629d1c2226dc743ab54ede/1?pq-origsite=gscholar&cbl=18750&diss=y. Chapter V is entitled "The Golden Period of Japanese Language Schools: 1928 – 1941." (Permission to look at microfilm required).

[45] "Japanese Schools in Hawaii," https://sites.google.com/a/hawaii.edu/ndnp-hawaii/Home/historical-feature-articles/japanese-schools-in-hawaii (schools were shut down during WW II and re-opened in smaller numbers thereafter).

[46] See Milhiser, note ___, supra. *Meyer* and *Pierce* involved a predominantly White population, but *Tokushige* obviously did not.

1. The late 1930's and onward

Between the mid-1920's and the rise of the New Deal Court in the late 1930's, the Court very rarely cited the decisions in the trilogy.[47] Despite the trilogy's multiple emphases on parental rights and economic liberties of teachers and school proprietors, the apparent death of substantive due process in the late 1930's could have been fatal to the trilogy. All three cases had been brought by an economic actor, complaining of injury to occupation or proprietorship, rather than by a parent.[48]

The Court quickly addressed the question of whether these decisions retained vitality after *West Coast Hotel Co. v. Parrish*.[49] The first move toward re-rationalizing *Meyer*, *Pierce*, and (occasionally) *Farrington* appeared in *Palko v. Connecticut*,[50] decided in 1937 just nine months after *West Coast Hotel*. In the course of explaining why the double jeopardy provision of the Fifth Amendment was not absorbed by the Due Process Clause of the 14th, Justice Cardozo's opinion explained that some parts of the Bill of Rights, but not others, were "implicit in the concept of ordered liberty."[51] In a key passage, Cardozo wrote that "the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge . . . the freedom of speech which the First Amendment safeguards against encroachment by Congress [citations omitted] or the like freedom of the press [citations omitted] or the free exercise of religion . . . cf. Pierce v. Society of Sisters."[52]

Palko thus represented an early move toward folding *Pierce* into the First Amendment, the Free Exercise Clause in particular, even though *Pierce* made no mention of the First Amendment and protected the choice to attend secular as well as religious private schools. Whatever the scope of the *Palko* dictum, it pushed away from treatment of *Pierce* as resting on a free-floating conception of substantive liberty under the Due Process Clause.

Just four months later, the Court once again reframed the story of the trilogy in the third paragraph of the famous footnote 4 to *United States v. Carolene Products Co.*:[53]

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[47] A rare mention of *Pierce* appears in Hamilton v. Regents of California, 293 U.S. 245 (1934), a decision that rejected a claim of conscientious exemption from required military training at the University of California. The *Hamilton* opinion cites *Pierce* for the proposition that the liberty protected by the due process clause includes the right to hold and teach religious beliefs. Id. at 262.

[48] Today, we might think of these decisions as involving standing to raise the rights of third parties, though none were explained that way at the time. Nevertheless, it is ironic that the constitutional concept of parents' rights arose in three decisions in which no parent appeared as a party.

[49] 300 U.S. 379 (1937) (upholding minimum wage law for women, and overruling Adkins v. Children's Hospital, 261 U.S. 525 (1923)). The Court decided *Adkins* on April 9, 1923, in the same Term as *Meyer* v. *Nebraska*, decided June 4, 1923.

[50] 302 U.S. 319 (1937).

[51] Id. at 324.

[52] Id. Justice Cardozo did not cite Gitlow v. New York, 268 U.S. 652 (1925) or Whitney v. California, 274 U.S. 357 (1927), both of which held that the due process clause of the 14th Amendment protected freedom of speech, though both decisions re3jected the claims of the speaker. The Court decided *Pierce* on June 1, 1925, and *Gitlow* just seven days later.

[53] 304 U.S. 144, 152, n.4 (1938) (citations omitted).

"Nor need we enquire whether similar considerations [of presumptive deference to legislative actions] enter into the review of statutes directed at particular religious, *Pierce v. Society of Sisters,* or national, *Meyer v. Nebraska, Bartels v. Iowa*, *Farrington v. Tokushige,* or racial minorities, *Nixon v. Herndon, Nixon v. Condon:* whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. . ."

This paragraph represents the second re-rationalization of *Meyer* and *Pierce*. Apart from *Farrington*, the Court in the trilogy had said very little about whether the challenged enactments had been directed at specific minorities. The opinions, particularly those in *Meyer* and *Pierce*, paid far more attention to questions of property loss and the scope of corporate liberty. Blending *Meyer*, *Pierce*, and *Farrington* into a focused concern for prejudice against vulnerable minorities thus moved away from a narrative of substantive rights and toward a model of concern with political processes.

The *Carolene Products* footnote version of the trilogy overlapped with *Palko*'s reference to *Pierce*, but also revealed inner tension. A general conception of free exercise and a concern for religious minorities obviously fit together, however imperfectly. In contrast, a concern for ethnic and racial minorities did not necessarily overlap with any particular provision in the Bill of Rights, and so rested on a 14th Amendment theory disconnected from Amendments 1-8.

At the time, these ideas were nascent, ripe for future development, and both have influenced the interpretation of decisions in the trilogy thereafter. In the 1940's, mentions of the trilogy were sparse but important. The most striking pieces of the story are the disappearance of *Farrington* from the litany of citations, the boundary imposed on parents' rights in *Prince* v. *Massachusetts*, and the use of *Pierce* as a counterweight to Establishment Clause limitations on state support of religious schools.

The disappearance of Farrington v. Tokushige. In the first Flag Salute Case, *Minersville* v. *Gobitis*,[54] Chief Justice Stone's dissenting opinion cites (in passing) all three decisions in the trilogy, as part of plea for judicial protection of the civil liberties of minorities.[55] Two years later, in *West Virginia Board of Education v. Barnette*,[56] only Justice Frankfurter's dissent cited *Farrington*.[57] Abruptly and continuing to this date, *Farrington* v. *Tokushige* thereafter vanishes from all references to parents' rights in the Supreme Court.

What happened to *Farrington*? On June 7, 1943, the Supreme Court announced its decision in *Hirabayashi* v. *United States*,[58] upholding a curfew order imposed on all person of

[54] 310 U.S. 586 (1941).
[55] Id. at 606 (Stone, CJ, dissenting),
[56] 319 U.S. 624 (1943).
[57] Id. at 658 (Frankfurter, J., dissenting). The citation was oddly in service of an unpersuasive argument that parents choose public school and therefore consent to all obligations imposed therein on their children. The idea seemed to be that the state may not control the "intimate and essential" details of private education but should be free to impose such control over public schools. *Farrington* had said nothing about the degree of state control over the ideological demands imposed in public schools.
[58] 320 U.S. 81 (1943).

Japanese descent in various Western areas of the United States. There is good reason to think that the Justices who sided with the United States in the Japanese Exclusion Cases, premised on deference to military judgment about the security risks posed by American citizens of Japanese ancestry, were not keen to highlight an earlier decision from the Territory of Hawaii in which the Court scoffed at the notion of disloyalty among this population.[59]

That thesis is borne out by the Court's opinion in *Prince* v. *Massachusetts*,[60] announced on January 31, 1944, barely more than six months after *Hirabayashi*. Sarah Prince was a member of the Jehovah's Witnesses, and she brought her nine-year-old niece onto a public street in Brockton, Massachusetts, to sell copies of that faith's publications, The Watchtower and Consolation. Ms. Prince was convicted of violating the state's child labor laws, which prohibited children from selling goods of any kind on a public street and made it an offense for anyone to supply children with the goods to be sold.[61]

Ms. Prince raised defenses under the Free Exercise Clause of the First Amendment, which had recently been incorporated into the Fourteenth,[62] as well as under a due process theory of parents' rights. In a series of prior cases involving street preaching and distribution of religious literature, the Jehovah's Witnesses had fared very well in the Supreme Court in the early 1940's.[63] The opinion by Justice Rutledge for the Court in *Prince* expressed considerable sympathy for the claimant:[64]

"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. . . . And it is in recognition of this that [*Barnette*, *Meyer*, and *Pierce*] have respected the private realm of family life which the state cannot enter."

Nevertheless, the State prevailed in *Prince*, for reasons succinctly explained:[65]

"But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither 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

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[59] As will be discussed further below, Justice Douglas struck the coup de grace by omission against *Farrington* in Griswold v. Connecticut, 381 U.S. 479 (1965), by way of the famous reference to *Meyer* and *Pierce* as penumbral First Amendment decisions. Douglas concurred in *Hirabayashi*, involving curfew orders in his home state of Washington, and a year later was in the majority in *Korematsu* v. *United States*.

[60] 321 U.S. 158 (1944).

[61] The law differentiated boys, who were prohibited from such street selling before the age of 12, and girls, for whom the age of prohibition was 18. Id. at 160-61. But Sarah Prince's niece was only 9, so the sex distinction made no difference in this case.

[62] Cantwell v. Connecticut, 310 U.S. 296 (1940).

[63] See, e.g., Murdock v. Pennsylvania, 319 U.S. 105 (1943); Jones v. Opelika, 316 U.S. 584 (1942); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Cantwell v. Connecticut, 310 U.S. 296 (1940).

[64] 321 U.S. at 166.

[65] Id. at 166-167.

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. . .. [T]he 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."

As noted above, *Farrington* v. *Tokushuige* is nowhere to be seen in any of the opinions in *Prince*.[66] More generally, *Prince* is an important episode in the evolution of decisions about parental rights. Here, in an otherwise sympathetic context, the Court is refusing to recognize religious exemptions from generally applicable laws and affirming state power over children in the public realm, including public schools and places of child labor. *Prince* sets boundaries, uncertain as they may be at the margin, that remain in place.

Everson v. Ewing Township.[67] The last principal mention in the 1940's of any decision from the trilogy (now reduced to the binary of *Meyer* and *Pierce*) arrived in the Court's first major encounter with the question of whether the Establishment Clause applies to the states, and how the Clause is to be construed. *Everson* involved the seemingly simple question of whether a New Jersey Township could reimburse the cost of bus fares to parents of children attending Catholic high schools. The Court was unanimous on the incorporation question, and likewise on the notion that the State could not directly assist schools that engaged in religious indoctrination. But the Court was bitterly divided on the merits of the fare reimbursement. The majority opinion upheld the reimbursement while insisting that the Constitution has built a wall between church and state.[68] Near the end, the opinion included this: "This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose. See Pierce v. Society of Sisters."[69]

Everson's broad embrace of a bar on direct state support of religious education makes it easy to overlook that Justice Hugo Black, the sworn enemy of substantive due process adjudication, is citing *Pierce* favorably. Perhaps he accepted Justice Cardozo's revisionist view of *Pierce* as a free exercise case, though Black doesn't say so, or perhaps this sentence was just necessary to get a fifth vote to uphold the reimbursement scheme.

In any event, *Everson* has been foundational for the Constitution's longstanding dichotomy between parental rights to choose a religious school for their children, and the disability of the state to finance religious education. Much has changed in this corner of the constitutional universe, to which the paper will return in Part II.B.

2. *Meyer*, *Pierce*, and the Rise of Privacy Rights.

[66] Justice Jackson, joined by Roberts and Frankfurter, concurred, Id. at 176. Justice Murphy dissented. Id. at 171.
[67] 330 U.S. 1 (1947)
[68] Id. at 18.
[69] Id.

The 1950's were a quiet time for constitutional development of parental rights. The story picks up dramatically in *Griswold* v. *Connecticut*,[70] which held that the Constitution protects a right of privacy extending to use of contraceptives by a married couple. The Court opinion, written by Justice Douglas, explicitly rejected the notion that the case involved an exercise in pure substantive due process.[71] Instead, Douglas famously articulated the idea that "specific guarantees of the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[72] Those penumbras include areas of "privacy and repose."[73]

For purposes of this paper, the most significant part of this exegesis is its opening:

"The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice -- whether public or private or parochial -- is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights. By *Pierce v. Society of Sisters,* . . . the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyer v. Nebraska,* . . . the same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge [other citations omitted]. Without those peripheral rights, the specific rights would be less secure. And so we reaffirm the principle of the *Pierce* and the *Meyer* cases."

Notice all that is happening in *Griswold*. The Bill of Rights does not mention parental rights to educate a child in particular subjects or places. And yet, Douglas (citing *Pierce* and *Meyer*) writes that the First Amendment has been construed to include such rights. Moreover, Douglas could have added *Farrington* v. *Tokushige*, but did not, and this omission conclusively terminated the narrative of a parents' rights trilogy, originating in the 1920's.

As we all know, *Pierce* and *Meyer* never mention the First Amendment. They are entirely about the substantive meaning and protection of liberty in the Due Process Clause, and *Griswold* tried to discredit that move. The liberty protected by the Clause, under the *Griswold* approach, is limited to Bill of Rights liberties and their penumbras. *Griswold* emphatically reaffirmed *Meyer* and *Pierce*, but ignored their constitutional foundation, and relocated their principle. On this narrative, *Meyer* and *Pierce* have become part of the Warren Court project of incorporation of the Bill of Rights into the Fourteenth Amendment.[74]

If this view of *Meyer* and *Pierce* – that they involve First Amendment limits on State power to "contract the spectrum of available knowledge," in a context where parents sought to expand that spectrum for their children --were to hold, those decisions would be bounded accordingly. But even at the time of *Griswold*, several Justices challenged those boundaries.

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[70] 381 U.S. 479 (1965).

[71] Id. at 481-82 (insisting that *Lochner* was not the Court's guide).

[72] Id. at 484.

[73] Id. at 485.

[74] This move also represents echoes of *Palko* v. *Connecticut*, and *Carolene Products*, footnote 4. Douglas joined the Court in 1939, shortly after those decisions.

Justice Goldberg's concurring opinion, joined by Chief Justice Warren and Justice Brennan, asserted that the Ninth Amendment reinforced the general idea that the liberty protected by the Fourteenth had a substantive component.[75] In Goldberg's elucidation of this argument, he cited *Meyer* as a leading illustration of the idea that the Fourteenth Amendment protects unenumerated fundamental rights. His opinion quotes *Meyer* for the proposition that Fourteenth Amendment liberty "denotes not merely freedom from bodily restraint but also [for example] the right . . . to marry, establish a home and bring up children . . . .".[76] And, in affirming that the right of privacy attaches to matters of " the marital relation and the marital home," the concurrence cites *Prince* v. *Massachusetts* for the conclusion that "the *Meyer* and *Pierce* decisions 'have respected the private realm of family life which the state cannot enter.'"[77]

Eventually, this more honest and less confined view of *Meyer* and *Pierce* triumphed in *Roe* v. *Wade*. Shortly before the expansion of privacy rights in *Roe*, however, the decision in *Wisconsin* v. *Yoder*[78] brought *Meyer* and *Pierce* back to center stage. *Yoder* protected the right of the Old Order Amish to remove their children from the requirement of compulsory education at age 14, rather than age 16 as provided by state law. The opinion drew heavily from a view of *Pierce* that built upon a *Griswold*-driven penumbral account. Chief Justice Burger's opinion emphasized aspects of *Pierce* relating to religious upbringing:

"As *Pierce* suggests, the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society . . .. Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce*, 'prepare [them] for additional obligations.'"[79]

As we know, *Pierce* involved a claim by secular as well as religious private schools in Oregon, and *Meyer* (which *Yoder* also cites) was not tied to the religious context of language instruction. But the Court in *Yoder* purposely treated the Amish claim as one of free exercise by a traditional, unique, and highly insular religious group, rather than as a case about parental liberty per se.[80]

A year later, in *Roe* v. *Wade*,[81] a seven-Justice majority expanded the range of sources for the constitutional right of privacy. These included the First, Fourth, and Fifth Amendments; the penumbras of the Bill of Rights; and – citing *Meyer* v. *Nebraska* – "the concept of liberty guaranteed by . . . the Fourteenth Amendment." Citing both *Meyer* and *Pierce*, the opinion added that the right extends to matters of "child rearing and education." And, leaving no doubt as to its

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[75] 381 U.S. at 486.
[76] Id. at 488.
[77] Id. at 495.
[78] 406 U.S. 205 (1972).
[79] Id. at 213-214.
[80] Id. at 235. Chief Justice Burger wrote, "It cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some "progressive" or more enlightened process for rearing children for modern life."
[81] 410 U.S. 113 (1973).

own reasoning, the opinion proceeded to explain that this right of privacy is founded upon the Fourteenth Amendment's "concept of personal liberty and restrictions upon state action."

Concurring in *Roe*, Justice Stewart explicitly declared that *Griswold* must be understood as a substantive due process case rather than a Bill of Rights decision. He went on to say "[t]he Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the "liberty" protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights." The string citation following that sentence included *Meyer* and *Pierce*.

With respect to *Meyer* and *Pierce*, *Roe* thus undid what the Douglas opinion in *Griswold* had tried to do – that is, to fully re-rationalize those decisions as applications of the First Amendment. *Roe* returned *Meyer* and *Pierce* to the setting of unenumerated constitutional rights in which they had originated.

I am aware of no Symposia marking the 50th anniversary of *Meyer* and *Pierce*, but an article prepared for that imaginary collection would have appropriately remarked that the Court had taken *Meyer* and *Pierce* on a remarkable journey across a half-century. They began as decisions that recognized, as substantive constitutional rights, the common law rights of parents to direct and control the upbringing of their children. By the 1940's, *Pierce* had become a free exercise decision, and *Meyer-Pierce-Farrington* had become exhibits in the "discrete and insular minority" collection. By the 1960's, *Farrington* had vanished, but *Meyer-Pierce* were affirmed as First Amendment cases about parents' rights with respect to access of their children to the "spectrum of available knowledge." By the 50th anniversary of *Meyer*, *Meyer-Pierce* had gone full circle to decisions about the unenumerated, substantive due process rights of parents in matters of family life, including questions of "child rearing and education."

3. *Meyer*, *Pierce*, and post-Roe developments.

In the half-century since *Roe*, references to *Meyer* and *Pierce* have reappeared sporadically. The most important reaffirmation of a broad understanding appeared in the plurality and other opinions in *Troxel* v. *Granville*.[82] In contrast, the Court opinion in *Dobbs v. Jackson Women's Health*[83] hints at an effort to cut back *Meyer* and *Pierce*.

A few years after *Roe*, all-white academies that had been sued for racial discrimination under a 19th century civil rights statute attempted a constitutional defense of parents' rights to control the association of their children. In *Runyon* v. *McCrary*,[84] the Court summarily disposed of that argument: "The Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction [citing *Pierce* and *Meyer*], they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation. Indeed, the Court in *Pierce* expressly acknowledged "the power of the State

[82] 530 U.S. 57 (2000).
[83] 597 U.S. ___ ; 142 S. Ct. 2228 (2022).
[84] 427 U.S. 160 (1976).

reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils…."[85]

Griswold and *Roe* involved privacy rights that would facilitate the choice to not become a parent. The context of abortion soon invited judicial attention to the scope of parental authority over their pregnant minor daughters. Soon after *Roe*, Missouri enacted a new set of restrictions on abortion, including a requirement of parental consent for a non-emergency abortion by an unmarried child under the age of 18. In general, the background law of parental authority at the time protected parents' rights to be informed of, and withhold consent for, non-emergency health care decisions involving their minor children.

Nevertheless, in *Planned Parenthood* v. *Danforth*[86] and *Bellotti* v. *Baird*,[87] the Court invalidated parental consent requirements and imposed an obligation on the states to provide a judicial bypass around parental notice rules. Both decisions recognized that minors have constitutional rights to control their bodies; that a decision about whether to continue or terminate a pregnancy has enormous significance, physical and emotional; and that involvement of parents may in some cases may be far more damaging than helpful.

These decisions presented a configuration of the state-parent-child triad different from those in *Meyer*, *Pierce*, *Prince*, and *Yoder*. In all the earlier cases, the state had prohibited parents' decisions on behalf of their minor children. None of the decisions focused on any conflict between parent and child.[88] In sharp contrast, the challenges in *Danforth* and *Bellotti* involved claims on behalf of minor children seeking to vindicate their rights while excluding their parents from information and decision-making authority.

In *Danforth*, the State of Missouri argued to no avail that "parental discretion . . . has been protected from unwarranted or unreasonable interference from the state," citing *Meyer*, *Pierce*, and *Yoder*.[89] The Court held (8-1) that the state could not protect that discretion to the extent of a parental veto over a minor's abortion decision.

Three years later, in *Bellotti* v. *Baird*,[90] where the central issue was the notice requirement, the Court splintered in its reasoning, though less so in result. Justice Powell's plurality opinion offered three reasons why children's constitutional rights of bodily autonomy were sometimes different from those of adults.[91] These included the notions that children are especially vulnerable, and sometimes unable to make critical decisions in an informed way. Moreover, the parental role of care and concern is particularly important when serious matters are at stake. The plurality opinion included a footnote that read: "*Pierce* [and] *Yoder* all have

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[85] Id. at 178-79 (citing *Pierce*, 268 U.S. at 534). In Part II.B., below, this treatment of state power to regulate all schools will turn out to be of considerable contemporary importance.

[86] 428 U.S. 52 (1974).

[87] 443 U.S. 622 (1979)

[88] Justice Douglas' dissent in *Yoder* raised the question, but nothing in the record supported the premise of parent-child conflict. 406 U.S. at 241-246 (Douglas, J., dissenting).

[89] 428 U.S. at 73.

[90] 443 U.S. 622 (1979).

[91] Id. at 634.

contributed to a line of decisions suggesting the existence of constitutional parental rights against undue, adverse interference by the State [citing, inter alia, Meyer v. Nebraska].” And it quoted in detail the words of Justice McReynolds in *Pierce* that those who nurture a child and direct his destiny, not the State, “have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[92]

Nevertheless, eight Justices agreed that the constitution requires a judicially administered bypass from parental notice requirements.[93] When judges determine that the minor seeking to terminate a pregnancy is mature enough to make the decision without parental involvement, or that avoiding parental notice is in the minor’s best interests, the constitution requires permission to proceed with the abortion without such notice. Abortion involves a decision sufficiently weighty and time-sensitive that the State may not allow parental rights to interfere.[94]

The abortion cases, unlike *Meyer-Pierce-Yoder*, involved the problem of conflict between parents and children, with the state taking the parents’ side. Just days before the decision in *Bellotti* v. *Baird*, the Court announced its decision in *Parham* v. *J.R.*,[95] a case involving the question of what procedural safeguards were due to minors when their parents sought to commit them to state mental institutions. Thus, *Parham*, like *Bellotti*, involved contexts in which the interests of parents and their children had significant potential for adversity. Unlike in *Bellotti*, where the Court overrode the state legislative judgment about the scope of parental rights, the Court in *Parham* upheld Georgia’s detailed scheme for involuntary commitment of minors, initiated by parents or guardians.

In analyzing the problem in *Parham*, Chief Justice Burger’s majority opinion said this:

” Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally ‘have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligation.’ [citing *Pierce*; see also *Yoder*, *Prince*, and *Meyer*.] Surely, this includes a "high duty" to recognize symptoms of illness and to seek and follow medical advice. 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. 1 W. Blackstone, Commentaries 447; 2 J. Kent, Commentaries on American Law 190.’”[96]

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[92] 442 U.S. at 637.

[93] Id. at 632, 642-644 (plurality opinion of Justice Powell); id. at 652-655 (Justice Stevens, concurring, joined by Justices Brennan, Marshall, and Blackmun).

[94] See Huntington & Scott, Conceptualizing Legal Childhood, note __ supra, at 1443-1444 (analyzing the decisions about abortions and minors as consistent with an overarching family law goal of advancing children’s well-being).

[95] 442 U.S. 584 (1979).

[96] Id. at 602.

Parham thus gazes back to Blackstone and Kent on the common law rights of parents, and to *Meyer-Pierce* on the constitutional character of those rights. The liberty interests of children, in the setting of a confinement decision, limit those parental rights, but the latter remain as a firm and broad constitutional backdrop. Moreover, as Part II.A. below highlights, those rights extend beyond education to the duty "to recognize symptoms of illness and to seek and follow medical advice."[97]

Nearly two decades later, on a Court with seven Justices who had been appointed after *Bellotti* and *Parham*, an important passage in the Court's crucial decision in *Washington* v. *Glucksberg*[98] confirmed that understanding of *Meyer* and *Pierce*. *Glucksberg* rejected the claim that the Due Process Clause of the Fourteenth Amendment protected a right of assisted suicide for terminally ill patients. In explaining the relevant precedents, Chief Justice Rehnquist affirmed that the Clause has a substantive component, providing "heightened protection against government interference with certain fundamental rights and liberty interests."[99] In addition to freedoms protected by the Bill of Rights, "the liberty specially protected by the Due Process Clause includes the rights to marry;[100] to have children;[101] to direct the education and upbringing of children [citing *Meyer* and *Pierce*]; to marital privacy;[102] to use contraception;[103] to bodily integrity;[104] and to abortion."[105]

The *Glucksberg* opinion went on to assert that the methodology for determining what interests are specially protected by the Clause involves two steps. First, the Court must determine whether the claimed right is "deeply rooted in the Nation's history and tradition."[106] Second, because these interests get special protection from the Constitution, courts must provide "a 'careful description' of the asserted fundamental liberty interest."[107] Deploying this methodology,[108] the Court rejected the claimed right of assisted suicide.

Glucksberg was of course not a decision about the rights of parents to direct the upbringing of their minor children. Nevertheless, its description of the scope of *Meyer* and *Pierce* matched that provided in *Bellotti* and *Parham* eighteen years earlier. In the years following *Roe*, therefore, the Court's understanding of *Meyer* and *Pierce* was consistent. Those decisions were not tethered to the Bill of Rights. Moreover, that understanding extended beyond questions of education to matters of medical care, reproductive autonomy, and freedom from physical confinement.

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[97] Id.

[98] 521 U.S. 702 (1997).

[99] Id. at 719-720.

[100] *Citing* Loving v. Virginia, 388 U.S. 1 (1967).

[101] *Citing* Skinner v. Oklahoma, 316 U.S. 535 (1942).

[102] *Citing* Griswold v. Connecticut, 381 U.S. 479 (1965).

[103] *Citing* Baird v. Eisenstadt, 405 U.S. 438 (1972).

[104] *Citing* Rochin v. California, 342 U.S. 165 (1952).

[105] *Citing* Planned Parenthood v. Casey, 505 U.S. 833 (1992). The full sentence, with all the citations in its text, is at 521 U.S. 720.

[106] 521 U.S. at 720-721 (quoting *Moore* v. *City of East Cleveland*, 431 U.S. 494, 503 (1977).

[107] Id. at 721 (citing, inter alia, Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990).

[108] Justice Souter also referred to *Meyer* and *Pierce* as substantive due process cases, 521 U.S. at 761-62, though he disagreed with the methodology. Id. at 755-773. No Justice dissented in *Glucksberg*.

This capacious notion of parental rights was on vivid display just a few years later, in *Troxel* v. *Granville*,[109] the Court's last major engagement with the constitutional status of parental rights. *Troxel* involved a dispute between a mother (the custodial parent), and paternal grandparents who wanted more frequent contact than the mother allowed with her two minor children.

Washington was one of several states that had enacted laws designed to limit the rights of custodial parents to completely exclude others (including parents, grandparents, and other family members) from contact with children. The Washington scheme, however, was in two respects an outlier among state laws of this type. First, "any person" could seek visitation. Second, the standard for determining whether courts should grant visitation was "the best interests of the child." The opinion of the custodial parent was given no weight. A family court in Washington had ruled for the Troxels (the grandparents), and the Washington Supreme Court had decided that the statute was unconstitutional on its face as a violation of parental rights, protected by the Fourteenth Amendment.

The U.S. Supreme Court splintered on its reasoning, with only a four Justice plurality agreeing with the Washington Supreme Court that the state law was invalid on its face. Two Justices concurred in the disposition,[110] and three dissented. In two separate dissents, Justices Stevens and Kennedy wrote that the facial invalidation was too broad, and that the case should be remanded for a narrower ruling. Justice Scalia (generally a foe of substantive due process adjudication), dissented more broadly, on the ground that the Court should not extend *Meyer* and *Pierce* to the context of child visitation.

For purposes of this paper, the lonesomeness of Justice Scalia's treatment of *Meyer* and *Pierce* is conspicuous. The plurality opinion, written by Justice O'Connor, took a very broad view of *Meyer-Pierce* and their progeny:

"The liberty interest at issue in this case -- the interest of parents in the care, custody, and control of their children -- is perhaps the oldest of the fundamental liberty interests recognized by this Court. [citing *Meyer*] Two years later, [in *Pierce*]. we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in *Pierce* that 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 . . .. 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." [citing *Prince*, at 166].[111]

In substituting a judge acting under an unqualified "best interests of the child" standard for the judgment of a custodial parent about visitation, the plurality concluded, the Washington

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[109] 530 U.S. 57 (2000).

[110] Id. at 75-79 (Souter, J., concurring); id. at 80 (Thomas, J., concurring).

[111] Id. at 65-66. Justice O'Connor added: "In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children." Id. at 66. A long list of post-1970 citations followed this sentence.

statute was facially unconstitutional. Justice Souter's concurrence also cited *Meyer* and *Pierce* approvingly,[112] and Justice Thomas noted that *Pierce* "holds that parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them."[113] Of the three dissenters, only Scalia challenged the breadth of the *Meyer-Pierce* rights of parents.

For the next two decades, nothing disturbed the expansiveness of the *Meyer-Pierce* narrative that had been unfolding since 1923. First and foremost, the rights involved care and control in matters of education, health, and physical liberty. States may intervene if parents (or other custodians) abuse or neglect their minor charges, but otherwise parents have strong rights to rear their own children without state interference, because parents are presumed to know their children best and care for them most. Beyond those rights, rooted in the Due Process Clause, the Court had built an elaborate structure on the foundation of *Meyer-Pierce*. This included a nexus to First Amendment freedoms of speech and religion; egalitarian themes of judicial protection of vulnerable minorities; and rights of reproductive liberty. As recently as 2020,[114] the assertion that *Meyer-Pierce* contains multitudes seemed well borne out.

The only dissonant note in this chorus is a recent, small, and subtle one that appeared in 2022, in *Dobbs* v. *Jackson Women's Health*.[115] As we all know, *Dobbs* held that the Due Process Clause does not protect a woman's right to terminate a pregnancy, and thereby overruled *Roe* v. *Wade*. *Dobbs* claimed to adhere to the approach to substantive due process announced in *Washington* v. *Glucksberg*.

Justice Alito's opinion for the Court in *Dobbs* focused, *inter alia*, on the reliance on precedent in *Roe* and *Planned Parenthood* v. *Casey*. The opinion made mention of *Meyer* and *Pierce* only through that lens. That discussion began:

"Nor does the right to obtain an abortion have a sound basis in precedent. *Casey* relied on cases involving the right to . . . make decisions about the education of one's children [citing *Meyer* and *Pierce*]."[116]

Later in the opinion, the Court turned to the use of precedent in *Roe* itself. Justice Alito criticized the *Roe* opinion for conflating "two very different meanings of the term [privacy]: the right to shield information from disclosure and the right to make and implement important personal decisions without governmental interference. Only the cases involving this second sense of the term could have any possible relevance to the abortion issue, and some of the cases in that category involved personal decisions that were obviously very, very far afield. See *Pierce* (right

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[112] Id. at 77.

[113] Id. at 80. Thomas noted that no party to the case had challenged the basic notion of substantive due process. Id..

[114] In Espinoza v. Montana Department of Revenue, 591 U.S. ___, 140 S. Ct.2246 (2020), Chief Justice Roberts wrote: "Drawing on 'enduring American tradition,' we have long recognized the rights of parents to direct 'the religious upbringing' of their children [Citing *Yoder*]. Many parents exercise that right by sending their children to religious schools, a choice protected by the Constitution [citing *Pierce*]." Id. at 2261.

[115] 597 U.S. ___ ; 142 S. Ct. 2228 (2022).

[116] 142 S. Ct. at 2257. The sentence also mentions the right to marry, use contraceptives, engage in same sex intimacy and marriage, among others. Id.

to send children to religious school); *Meyer* (right to have children receive German language instruction)."[117]

Please reflect on those descriptions of *Meyer* and *Pierce*. They are both significantly underinclusive. *Pierce* included a secular military school as a plaintiff. The forbidden category of instruction in *Meyer* was all modern foreign languages, not German only. Suggesting that *Meyer* and *Pierce* are limited in these ways represents a significant inroad on the path of precedent during the prior fifty years, in which the Court had invoked *Meyer-Pierce* as protecting a broad right of parents to direct the upbringing of their children, including matters of education, health, and general well-being. Suddenly, without explanation, Justice Alito's opinion frames *Meyer-Pierce* in ways that resemble Justice Cardozo's treatment of *Pierce* in *Palko*, and Justice Douglas' treatment of both decisions in *Griswold*. For the first time in almost 60 years, *Dobbs* stuffs *Meyer-Pierce* into highly confining First Amendment frames.

Perhaps we should not make so much of this. *Dobbs* said nothing about *Troxel*, the most recent and expansive of the due process decisions about parental rights. More generally, *Dobbs* is not a parents' rights decision, and a passing parenthetical or two should not be taken as a solemn pronouncement on the status of oft-cited, 100-year-old precedents.

But this Symposium is, after all, focused on the question of that status, going forward. So it seems appropriate to notice the treatment of these decisions in *Dobbs*, wonder about how deliberate it was, and ask whether *Dobbs* is a vise in which parental rights are now to be squeezed. There are no reasons to think that other Justices who joined the *Dobbs* opinion were closely focused on those references. The case was entirely and monumentally about the future of *Roe*. The failure of the dissenters (or concurring Justices) in *Dobbs* to challenge those brief descriptions of *Meyer* and *Pierce* cannot be seen as dispositive of any of their views. Every one of the nine Justices had his or her eyes on the obvious prize – whether a constitutional right to terminate a pregnancy would still exist when the litigation concluded. The status of *Meyer-Pierce* was for most – though perhaps not for Alito, who snuck in these references – an afterthought, or a non-thought.

II. The Scope and Future of Parents' Rights

Despite *Dobbs*, it remains appropriate to the call for this Symposium, as well as to a fair appraisal of the state of the law, to treat as completely open the questions of the current scope and likely future of parents' constitutional rights.[118] In this Part, I address two general topics that

[117] Id. at 2267-68.

[118] The paper does not address systematically the subject of statutory rights for parents, of which there has been a recent explosion. Many of these laws are collected, with links, at https://www.future-ed.org/legislative-tracker-parent-rights-bills-in-the-states/ and https://parentalrights.org/states/. Most of these are context specific, with a focus on education or child custody matters. The paper will touch on a few of these as relevant to the topics explored below. In Mid-February 2024, the Wisconsin legislature passed a Parents' Bill of Rights, which included rights to determine the names and pronouns used for their child at school; to have notice of instruction and discussion in controversial subjects; and to opt their child out of instruction based on religion or other conviction. Governor Evers has promised to veto the bill. The text of the Bill is linked at "Wisconsin Legislature Passes Parental

fit under that heading. Part A. focuses on the most urgent and compelling narrative in the parents' rights space – the sudden explosion of state laws aimed at controlling the care that parents provide, with full medical approval, to minor children suffering from gender dysphoria. I will focus only on the due process issue of parents' rights, but the litigation involves serious equal protection issues as well, and Supreme Court intervention seems likely.

Part B. addresses a series of timely topics involving parents' rights in the educational process – control over the curriculum in the public schools; access to information from public school personnel about children's presentation of gender identity; and equal access to state funds for education in schools that promote worship and inculcation of religious beliefs. In these contexts, *Meyer* and *Pierce* frequently show up in the conversation, but few if any of the parents' rights claims are meritorious. If these causes succeed, other constitutional theories will be doing the work.

A. Matters of Physical and Mental Health – The Case of Gender Affirming Care

Had this Symposium taken place as recently as 2020, I suspect few of us would have predicted the forthcoming assault on rights protected by *Meyer-Pierce*. The legislative onslaught against the interests of transgender people has arrived in a rush.[119] The enactments involve, inter alia, bathroom and locker room access; eligibility to compete in gendered sports competitions; policies of school disclosures; and, most frequent of all, regulation of treatment of minors for gender dysphoria. Fights over pronoun use and other duties of respect imposed on teachers have also become commonplace, usually in the name of teachers' religious freedom.[120] Add to the list the sudden Red State preoccupation with drag shows.[121]

Rights Bill; Governor Will Veto," http://religionclause.blogspot.com/2024/02/wisconsin-legislature-passes-parental.html.

[119] For a comprehensive collection of anti-transgender legislation over the last several years, see translegislation.com (collecting proposed and enacted laws). States enacted over 80 such laws in 2023, including laws relating to bathroom access, athletic competitions, and treatment of minors with gender dysphoria. The 2023 enactments are collected here: https://translegislation.com/bills/2023/passed. The anti-trans legislative efforts have increased in the 2024 session, with an increased emphasis on adults. See Chase Strangio, Trans Visibility Is Nice. Safety Is Even Better, NY Times, Feb. 15, 2024, available here: https://www.nytimes.com/2024/02/15/opinion/trans-visibility-legislative-rights.html; Casey Parks, Trans adults on edge as legislative branches focus bewyond children. Washington Post, Feb. 15, 2024, available here: https://www.washingtonpost.com/dc-md-va/2024/02/15/trans-adults-bathroom-medical-identity/ season;

[120] Meriwether v. Hartop, 992 F. 3d 492 (6th Cir. 2021) (Free Exercise Clause protects teacher autonomy in use of pronouns); Vlaming v. West Point Sch. Bd., https://www.vacourts.gov/opinions/opnscvwp/1211061.pdf (state constitution protects religious freedom of teacher to not use gender transition pronouns; http://religionclause.blogspot.com/2023/12/florida-transgender-teachers-challenge.html; see also Mirabelli v. Olson, 2023 U.S. Dist. LEXIS 163880, at *27-*31 (S.D. Ca. Sept. 14, 2023) (Free Exercise Clause protects teachers' right to contradict state and local policy re: disclosure to parents of a student's gender transition at school). See generally Katie R. Eyer, Anti-Transgender Constitutional Law, ___ Vand. L. Rev . ___ (forthcoming 2024) (describing the constitutional backlash to transgender legal gains), available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4627458. Professor Eyer's slightly earlier work focused on the promise of constitutional law for the transgender community. Katie B. Eyer, Transgender Constitutional Law, 171 U. Pa. L. Rev. 1 (2023).

[121] See, e,g., Griffin v. HMI _ Orlando, 2023 U.S. Dist. LEXIS 134671 (M.D. Fla. July 19, 2023). See also Rachel Monroe, The Drag Queens Fighting Performance Bans in Texas, The New Yorker, Dec. 6, 2023.

These laws are driven by a moral panic, exploited for political purposes, about gender fluidity.[122] Moreover, these campaigns play to a set of religious beliefs that a child's sex is Divinely determined, fixed in the womb, and immutable thereafter.

As of late 2023, twenty-one states had prohibited parents from authorizing the use of gender affirming drugs – puberty blockers and hormone treatments - to minors in gender transition.[123] The drugs remain available to adults, and to minors (with parental consent) who use them in ways that are consistent with the biological sex assigned at birth. That is, their use is prohibited *only* for those minors who use them as treatment for gender dysphoria.[124] The prohibitions extend to members of the medical profession who prescribe and administer such substances.[125]

These children are typically in early adolescence, old enough to understand what they are facing in the arrival of puberty. They are suffering – the apt word – from what they experience as an extreme disconnect between what is happening to their bodies and their sense of gender.[126]

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[122] For a comprehensive catalogue and analysis of the animus behind these laws, see generally Scott Skinner-Thompson, Trans Animus, B.C. L. Rev. forthcoming 2024), available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4563643.

[123] Id. See also https://www.nytimes.com/2023/10/03/us/transgender-care-lawsuits-courts.html. As of the date of the article, litigation challenges had been commenced in fourteen states. Id. Late in 2023, Governor DeWine of Ohio vetoed a bill that prohibited parents from approving, and medical professionals from providing, gender-affirming medical care for minors. Anumita Kaur, Ohio Governor vetoes ban on gender-affirming care for minors, Washington Post, Dec. 29, 2023, available here: https://www.washingtonpost.com/dc-md-va/2023/12/29/ohio-transgender-care-bill-dewine/.

[124] See, e.g., Doe v. Ladapo, 2023 US Dist. LEXIS 99603 (N.D. Fla, June 6. 2023), at *10: "The challenged parts of the statute and rules apply to patients under age 18. The statute prohibits the use of "puberty blockers" to "stop or delay normal puberty in order to affirm a person's perception of his or her sex if that perception is inconsistent with the person's [natal] sex." Fla. Stat. § 456.001(9)(a)1.; *see id*. § 456.52. And the statute prohibits the use of "hormones or hormone antagonists to affirm a person's perception of his or her sex if that perception is inconsistent with the person's [natal] sex." *Id*. § 456.001(9)(a)2. This purpose-driven focus is typical of this set of state laws. See, e.g., L.W. v. Skrmetti, 2023 U.S. Dist. LEXIS 111424 (D. Tenn. June 28, 2003), at *6: ([The Tennessee law] permits administration of medical procedures as defined in the law if the purpose of the procedures is to resolve a congenital defect or precocious puberty but prohibits the administration of such procedures if the purpose is to enable a minor to live with a gender identity that is different from that minor's sex at birth.')

[125] See, e.g., Doe v. Ladapo, at *10: "The statute makes violation of these provisions a crime and grounds for terminating a healthcare practitioner's license. *See id.* § 456.52(1) & (5)."

[126] Every piece of litigation on this subject presents highly sympathetic stories of minors for whom gender dysphoria is agonizing, and who have benefitted enormously for gender-affirming medical care. See, e.g., the descriptions of L.W., Ryan Roe, and John Doe in the petition for certiorari in L.W. v. Skrmetti, No. 23-466, available here: https://www.supremecourt.gov/DocketPDF/23/23-466/288540/20231101094123880_No.%20__%20Petition%20For%20A%20Writ%20Of%20Certiorari.pdf. See also the narratives in the Amicus Brief of Elliot Page, Nicole Maines, and 55 other individuals in Support of the Petitioners in L.W., available here: https://www.supremecourt.gov/DocketPDF/23/23-466/292238/20231204173511032_23-466%20-477%20-492%20TLDEF%20Amicus%20Brief.pdf. For a moving story of the plight of a family forced to go out of state for treatments for their transgender child, see Emily Witt, A Trans Teen in an Anti-Trans State, New Yorker, October 9, 2023 (Tennessee family with transgender daughter compelled

This presents a highly inviting case for recognition of parents' rights claims, among others, because parents, their fully aware children, and well-informed, specialized medical professionals treating these children all concur in the prohibited treatment.[127] That is, those who know the child best and care for the child most have chosen this course. On what basis may the state intervene in choices of that character?[128]

As Part II.B. of this paper suggests, some claims of parents' rights present close questions and invite analytical nuance. That cannot be said about claims arising from the prohibition on parent-authorized use of pharmaceutical products to treat gender dysphoria in minors. These laws are cruel, stupid, and unconstitutional.[129] For an extended stretch of time, the federal courts were overwhelmingly of the same view. As of this writing, every federal district court but one has declared unconstitutional the laws prohibiting pharmaceutical treatment of minors for gender dysphoria.[130] Many of the constitutional arguments rest on the Equal Protection Clause, including claims of discrimination based on sex, and discrimination based on transgender status. The challenges also rest on the concept of parents' rights to direct and control the upbringing of their children.

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to leave Tennessee to continue treatment), available at https://www.newyorker.com/magazine/2023/10/16/a-trans-teen-in-an-anti-trans-state.

[127] For a thorough set of articles and arguments from the perspective of medicine and medical ethics, see Symposium, Transgender Health Equity and the Law, 50 J. of Law, Medicine & Ethics, Issue #3, Fall 2022, available here: https://www.cambridge.org/core/journals/journal-of-law-medicine-and-ethics/issue/F33FB21A447A98F7072B8621C8967173

[128] When the state has tried to intervene in medical treatment by a physician, provided with parental approval to a child in an individual case, courts have given wide latitude to choices made by parents. See, e.g., In re Hofbauer, 393 N.E. 2d 1009, 1014 (N.Y. 1979) (In a neglect proceeding, "the court's inquiry should be whether the parents, once having sought accredited medical assistance and having been made aware of the seriousness of their child's affliction and the possibility of cure if a certain mode of treatment is undertaken, have provided for their child a treatment which is recommended by their physician and which has not been totally rejected by all responsible medical authority.") See generally Joseph Goldstein, Medical Care of the Child at Risk: On State Supervision of Parental Autonomy, 86 Yale L.J. 645 (1976). I am grateful to Kevin Barry and Maxine Eichner for calling this point to my attention in connection with the preparation of a scholars' amicus brief in Brandt v. Rutledge in the 8th Circuit.

[129] For a comparable appraisal, which I discovered after writing the sentence in text, see Developments in the Law, Intersections in Health Care and Legal Rights, 134 Harv. L. Rev 2163, 2164 (2021) ("This Chapter shines light on attempts to outlaw necessary gender-affirming medical treatment for minors, drawing on scientific evidence and legal doctrine to show why such legislative efforts are harmful, prejudiced, and unconstitutional.")

[130] Poe v. Labrador, 2023 U.S. Dist. LEXIS 229332 (D. Idaho, Dec. 26, 2023); Doe v. Ladapo, 2023 US Dist. LEXIS 99603 (N.D. Fla, June 6, 2023); Koe v. Noggle, 2023 U.S. Dist. LEXIS 147770 (N.D. Ga., Aug. 20, 2023); K.C. v. Individual Members of Indiana Medical Bd., 2023 U.S. Dist. LEXIS 104870 ((D. Ind. June 16, 2023); L.W. v. Skrmetti, 2023 U.S. Dist. LEXIS 111424 (D. Tenn. June 28, 2003), rev'd 83 F. 4th 460 (6th Cir. 2023), petition for cert. filed, Nov. 1, 2023; Jane Doe 1 v. Thornbury, 2023 U.S. Dist. LEXIS 111390 (June 28, 2023, W.D. Ky), rev'd 83 F. 4th 460 (6th Cir. 2023); Brandt v. Rutledge, 551 F. Supp. 3d 882 (E.D. Ark. 2021) (preliminary injunction granted), aff'd 47 F.4th 661 (8th Cir., 2022), 2023 U.S. Dist. LEXIS 106517 (June 20, 2023) (permanent injunction granted); Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131 (M.D. Ala. 2022), rev'd 80 F. 4th 1208 (11th Cir. 2023). The one exception is Poe v. Drummond, No. 23-cv-177, 2023 WL 6516449 (N.D. Okla. Oct. 5, 2023), appeal pending, No. 23-5110 (10th Cir. filed Oct. 10, 2023). At least one state court has joined the chorus, see Van Garderen v. Montana, available here: https://s3.documentcloud.org/documents/23993157/montana-order-granting-plaintiffs-motion for-preliminary-injunction.pdf.

After a year or more of consistent district court victories for the challengers, however, the 6th Circuit reversed the decisions involving Tennessee and Kentucky,[131] and the 11th Circuit reversed the decision enjoining enforcement of the Alabama law.[132] On November 1, 2023, the plaintiffs in *L.W. v. Skrmetti*, the Tennessee case, filed a petition for certiorari, asserting equal protection and due process grounds for reversal of the 6th Circuit.[133]

I believe that the equal protection arguments against these statutes are very strong.[134] In light of our Symposium topic, however, my analysis will be limited to the parents' rights claims based on *Meyer-Pierce* and their progeny. I will also add some thoughts about the possibility of religious liberty claims, under state or federal law, for parents facing the dilemma of legal prohibitions on the best medical treatment of their children. To my knowledge, no one has yet in litigation advanced religious liberty arguments, but if the laws are ultimately upheld against equal protection and due process challenges, we can expect to see religion-based approaches on an as-applied basis.

Study of the opinions, quite careful and lengthy, in the district courts reveals a stark pattern of repetition. The state laws, inspired by architects of a burgeoning anti-transgender movement,[135] all are structured quite similarly. The district court opinions emphasize a set of key facts.[136] Any reasonable synthesis of these findings includes the following:

- Approximately one percent of Americans are transgender.
- Transgender people may suffer from gender dysphoria, a condition that involves feelings of great distress at the disconnect between sex assigned at birth[137] and psychological experience of gender.

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[131] L.W. v. Skrmetti, 83 F. 4th 460 (6th Cir. 2023), petition for cert. filed, Nov. 1, 2023, No. 23-466, available here: https://www.supremecourt.gov/DocketPDF/23/23-466/288540/20231101094123880_No.%20__%20Petition%20For%20A%20Writ%20Of%20Certiorari.pdf..

[132] Eknes-Tucker v. Marshall, 80 F. 4th 1208 (11th Cir. 2023)

[133] L.W. v. Skrmetti, Case No 23_ 466, U.S. Sup. Ct., filed Nov. 1, 2023, available here: https://www.supremecourt.gov/DocketPDF/23/23-466/288540/20231101094123880_No.%20__%20Petition%20For%20A%20Writ%20Of%20Certiorari.pdf. On November 6, 2023, the United States (an intervenor-plaintiff in *Skrmetti*) also filed a petition for certiorari, No. 23-477, available here: https://www.supremecourt.gov/DocketPDF/23/23-477/288875/20231106135238432_U.S.%20v.%20Skrmetti%20-%20Pet.pdf. The petition from the United States focuses only on equal protection grounds and does not address the parents' rights questions under the Due Process Clause. See id. at 17, n. 6.

[134] See id. at 18-26 (capably presenting the arguments that the bans constitute sex discrimination and transgender discrimination, both of which should trigger heightened judicial review). See generally Kevin M. Barry, Brian Farrell, Jennifer L. Levi, & Neelima Vanguri, A Bare Desire to Harm; Transgender People and the Equal Protection Clause, 57 B.C. L. Rev. 507 (2016). See also Quinn Yeargain, Litigating Trans Rights in the States, Forthcoming, Ohio St. L. J. (2024), available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4555941.

[135] See legislation collected at https://translegislation.com. The laws involve a variety of contexts, including bathroom privacy, gendered athletic competition, and gender affirming care.

[136] See, e.g., Doe v. Ladapo, 2023 U.S. Dist. LEXIS 99603 (N.D. Fla., June 6, 2023), at *7 - *17; Brandt v. Rutledge, 2023 U.S. Dist. LEXIS 106517 (June 20, 2023) (permanent injunction granted), at *10-*90. *Brandt* is now on appeal to an en banc panel of the 8th Circuit.

[137] On the importance of the terminology, see Jessica Clarke, Sex Assigned at Birth, 122 Colum. L. Rev. 1821 (2022).

- The World Professional Association of Transgender Health and the Endocrine Society have published evidence-based standards of treatment for gender dysphoria.[138] All major medical and mental health organizations in the U.S. recognize these guidelines as appropriate for the guidance of health professionals treating patients with gender dysphoria.
- The guidelines include specific and detailed recommendations for the treatment of adolescents.
- Before puberty, treatment of gender dysphoria does not involve drugs or surgery.
- As puberty approaches, the distress of gender dysphoria becomes much stronger.
- Without treatment, many adolescents with gender dysphoria are at serious risk of harm, including depression, eating disorders, substance abuse, and self-harm including suicide.
- Once adolescents experience significant gender dysphoria for a sustained period, it is very unlikely that they will later identify with their sex assigned at birth.
- The treatments include careful and lengthy counseling, and, in cases considered medically and psychologically appropriate, use of the drugs in controversy.
- The patient and the patient's parents must give informed consent, after extended and careful counseling about risks and benefits.
- These uses of the drugs are off label but are not disapproved as unsafe by any reputable medical authorities.
- Puberty blockers pause puberty and permanent body changes from puberty.
- Puberty blockers help to avoid heightened gender dysphoria and are reversible.
- Later in adolescence, in some cases it is medically appropriate to provide hormone treatment to induce puberty that is consistent with the patient's gender identity.
- In a very high percentage of cases, use of these drugs, carefully monitored, provides great relief to those receiving them.
- Adverse side effects are limited, infrequent, and subject to mitigation.[139]

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[138] The WPATH Standards of Care for the Health of Transgender and Gender Diverse People, Version 8, published on-line in September 2022, is available here: https://www.tandfonline.com/doi/pdf/10.1080/26895269.2022.2100644. Chapter 6, pp. 543-567, is devoted to the professional care of adolescents. The material in the chapter is very careful in its discussion of care protocols, and of the evidence that supports current recommendations. The field is relatively new, and subject to revision like any health science. At every stage, the standards recommend caution and elaborate consultation with the patient and parents or other guardians. Among other recommendations is Standard 6.12.b., which recommends gender-affirming care only if "the experience of gender diversity/incongruence is marked and sustained over time." Id. at 560. Among patients whose treatments have conformed to the protocols, regret appears very infrequently. Id. at 561.

[139] The district courts occasionally note that the state's testimony against this use of the drugs is extremely weak – offered by so-called experts who have never treated anyone with gender dysphoria. See, e.g., Brandt v. Rutledge, 2023 U.S. Dist. LEXIS 106517 (June 20, 2023) (permanent injunction granted), at *90 ("Most of the State's expert witnesses, Professor Mark Regnerus, Dr. Stephen Lappert, and Dr. Paul Hruz, were unqualified to offer relevant expert testimony and offered unreliable testimony. Their opinions regarding gender-affirming medical care for adolescents with gender dysphoria are grounded in ideology rather than science." In its opposition to certiorari in L.W. v. Skrmetti, discussed below, Tennessee advances an elaborate parade of medical horribles that the state argues are connected to the prohibited uses of these drugs. L.W. v. Skrmetti, Sup. Ct. No- 23-477, Respondents' Brief in Opposition at pp. 1-10, available here: https://www.supremecourt.gov/DocketPDF/23/23-477/299674/20240202161645864_23-466%20-477%20Brief%20in%20Opposition%20Final.pdf. One is left to wonder where all this evidence has been during earlier stages of litigation across the country over these issues.

These district court opinions have emerged from a range of judges, both Republican and Democratic appointees.[140] Where the opinions diverge, but only slightly, is in the emphasis on different constitutional grounds of attack. Because standards of judicial review appear to be far more settled in equal protection than parental rights' cases, most of the evaluation of state interests has arisen in the context of equal protection review. Having determined that the statutes involve a classification based on sex,[141] district court judges have applied intermediate scrutiny – the classification must be substantially related to important state interests. In light of the detailed record on the physical and mental health justifications for the use of these drugs to treat gender dysphoria, and the flimsy support for the state's concerns about the well-being of the minors being treated,[142] judges have repeatedly concluded that the laws do not survive equal protection review.

Equal protection reasoning will be especially important in the context of other forms of regulation directly affecting transgender people who are not minors.[143] In this paper, however, the parents' rights claims will be the central focus. In one case, plaintiffs made no such claim.[144] In another, the court did not address that claim.[145] In two more, the treatment of the parents' rights claim was perfunctory;[146] the judges apparently thought the equal protection analysis could do all the work, and the due process claim did not add anything important.

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[140] *Doe* 1, Kentucky, David Hale (Obama); K.C., Indiana, James P. Hanlon (Trump); L.W., Tennessee, Eli Richardson (Trump); Brandt, Arkansas, James M. Moody, Jr. (Obama); *Doe v. Ladapo*, Florida, Robert Hinkle (Clinton); *Eknes-Tucker*, Alabama, Liles C. Burke (Trump); *Koe*, Georgia, Sarah E. Garaghty (Biden); *Poe v. Labrador*, Idaho, B. Lynn Winkill (Clinton).

[141] Some also conclude that the statutes classify based on transgender status. The appropriate constitutional standard for such classifications is uncertain, but judges have concluded that such classifications are highly questionable and invite non-deferential review. See, e.g., L.W. v. Skrmetti, 2023 U.S. Dist. LEXIS 111424 (D. Tenn. June 28, 2003, at *23 – 33 (citing many other decisions that hold transgender classifications quasi-suspicious); see also Doe v. Ladapo, 2023 US Dist. LEXIS 99603 (N.D. Fla, June 6, 2023) at *24 - *28.

[142] A very different scenario appears in the context of state laws that ban the use of sexual orientation change efforts ("SOCE"), also known as conversion therapy. Several states have prohibited licensed psychotherapists from offering such therapy to minors. In Pickup v Brown, 740 F. 3d 1208 (9th Cir. 2014), cert. denied, ___ U.S. ___, the Ninth Circuit upheld such a ban against free speech attack by professional therapists. The panel wrote "The legislature relied on the well-documented, prevailing opinion of the medical and psychological community that SOCE has not been shown to be effective and that it creates a potential risk of serious harm to those who experience it. Id. at 1223. In *Pickup*, the court also rejected a parents' rights argument that the therapists had advanced as a third-party claim. Id. at ___1235-36. The 11th Circuit reached a different result in Otto v. City of Boca Raton, 981 F.3d 854 (11th Cir. 2020) (invalidating on free speech grounds a ban on SOCE for minors), primarily because it refused to recognize professional speech as being subject to broad regulation. For thorough analysis and discussion, see Claudia Haupt, Professional Speech, 125 Yale L.J. 1238 (2016). Note that parents always retain the right to bring their children for counseling with clergy and pastoral counselors, not licensed by the state as mental health professionals.

[143] The treatment of transgender prison inmates is of particular importance. See generally Jennifer Levi and Kevin M. Barry, Transgender Rights and the Eighth Amendment, 99 S. Cal. L. Rev. 109 (2021).

[144] K.C. v. Individual Members of Indiana Medical Bd., 2023 U.S. Dist. LEXIS 104870 ((D. Ind. June 16, 2023)

[145] Koe v. Noggle, 2023 U.S. Dist. LEXIS 147770 (N.D. Ga., Aug. 20, 2023).

[146] Doe v. Ladapo, 2023 U.S. Dist. LEXIS 99603 (N.D. Fla., June 6, 2023), at *31 (concluding that "there is no rational basis, let alone a basis that would survive heightened scrutiny, for prohibiting these treatments in appropriate circumstances."); Brandt v. Rutledge, 551 F. Supp. 3d 882, 892-893 (E.D. Ark. 2021).

In four others, however, the due process theory received considerable attention. And three of these – *L.W. v. Skrmetti* (Tennessee), *Doe 1 v. Thornbury* (Kentucky) and *Eknes-Tucker v. Marshall* (Alabama)[147] – turn out to be the decisions that have been reversed at the Circuit Court level, with *L.W.* now being the likely vehicle for Supreme Court review. In these district court decisions, the judges' due process reasoning emphasized the Supreme Court's more recent decisions in *Parham* and *Troxel*, discussed in Part I, rather than the older decisions in *Meyer* and *Pierce*. This emphasis is not just about vintage. *Meyer* and *Pierce* are about education; in contrast, *Parham* and *Troxel* both addressed broader contexts of parental control.

Indeed, *Parham* specifically references decisions about medical care:
". . . [P]arents generally 'have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligation.' [citing *Pierce*] Surely, this includes a 'high duty' to recognize symptoms of illness and to seek and follow medical advice."[148]

None of the Supreme Court's parents' rights precedents, however, involved substantive choices of particular treatments or drugs, approved by medical authorities. The district court decisions all referred to Circuit precedent that touched on matters of medical care,[149] though none involved a parental choice to consent to their children's use of a pharmaceutical substance that was lawful except for the challenged prohibition. The absence of directly on-point decisions from these or other Circuits is no surprise, considering the totally unprecedented quality of the intrusion into the parent-child-doctor relationship presented by the challenged laws.

All four of the district court judges concluded that the laws interfered with the parents' rights, protected by the Due Process Clause, to choose otherwise lawful and medically approved treatments for gender dysphoria.[150] Adults were free to use these treatments for themselves. Most significantly, adults remained free to use these treatments for their minor children for purposes other than treating gender dysphoria. The character of the restrictions strongly suggested prejudiced hostility against the transgender population. Whether the constitutional norm was equal protection or due process, the restrictions invited close scrutiny, which none could survive considering the medical evidence in cautious support of these treatments, and the flimsy medical case against them.

That the parents' rights claims succeeded repeatedly, across a range of district court judges, should come as no surprise. Recall the narrative in Part I about the multitude of considerations and constitutional themes that the Supreme Court had attached to the *Meyer-Pierce* legacy over the past hundred years. These included parental autonomy; the *Carolene Products* concern for the vulnerability of minority groups, frequently targets of prejudice; familial privacy; and First Amendment protections of religious freedom. These concerns all

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[147] L.W. v. Skrmetti, 2023 U.S. Dist. LEXIS 111424 (D. Tenn. June 28, 2003, at *17; Jane Doe 1 v. Thornbury, 2023 U.S. Dist. LEXIS 111390 (June 28, 2023, W.D. Ky), at *8, *1 ; Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131, at 1144 (M.D. Ala. 2022). The fourth is Poe v. Labrador, 2023 U.S. Dist. LEXIS 229332, at *48 - *57 (D. Idaho, Dec. 26, 2023).
[148] 442 U.S. 584, 602 (1979) (citations omitted).
[149] In L.W. v. Skrmetti, 2023 U.S. Dist. LEXIS 111424, at *16, Judge Richardson relied on Kanusewski v. Mich. Dept. of HHS, 927 F. 3d 396 (6th Cir. 2019). In Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131, at 1144 (M.D. Ala. 2022), Judge Burke relied on Bendiburg v. Dempsey, 909 F. 2d 463 (11th Cir. 1990). Both *Kanusewski* and *Bendiburg* are quite far afield from the bans on gender-affirming care.
[150] See, e.g., Poe v. Labrador, 2023 U.S. Dist. LEXIS 229332, at *50 (D. Idaho, Dec. 26, 2023).

appear vividly in the narratives of gender dysphoria in adolescents and parental decisions about how to best care for their children in distress.

Nevertheless, on appeal the tone and substance of the judicial opinions changed dramatically. Both Judge Lagoa in *Eknes-Tucker* v. *Marshall*[151] and Judge Sutton in *L.W. v. Skrmetti*[152] began their due process analysis with a *Dobbs*-flavored emphasis on history, tradition, and restraint. Judge Lagoa aggressively narrowed the relevant rights to those which could be found, at a very high degree of specificity, in 1868. Parents' use of these pharmaceutical products to treat gender dysphoria in minors was not, she argued, deeply rooted in the 19th century history of parents' rights.[153]

That move seems entirely result-oriented and jurisprudentially unsound. Manipulating the level of generality of protected parental rights would permit legislatures to interfere freely with new choices that fall within widely accepted categories of parental authority. May the state prohibit the use of penicillin and its derivatives for minors because the drug was not discovered until 1928?[154] Similarly, and within the core of *Meyer-Pierce*, may the state outlaw instruction for children in computer technology, or the use of artificial intelligence?

Once medical care is included in the general concept of parental control over development and upbringing of children, the state should have to justify under strict standards any interference with choices of treatments available to adults and medically approved in other contexts for children. The rights-narrowing move in *Eknes-Tucker* permitted the panel to avoid those questions of justification, which the district court had answered strenuously in the negative.

As Judge Winkill put it in *Poe v. Labrador*: ". . . [T]he appropriately precise way to frame the issue is to ask whether parents' fundamental right to care for their children includes the right to choose a particular medical treatment, in consultation with their healthcare provider, that is generally available and accepted in the medical community. . . . [S]uch a right is deeply rooted in our nation's history and traditions and implicit in our concept of ordered liberty."[155]

In *L.W. v. Skrmetti*, Judge Sutton was more sophisticated in his arguments but eventually wound up in the same place, letting the state escape the burden of justification associated with interfering with fundamental rights. Rather than beginning (as many district court judges had) with the question of whether parental rights include matters of medical decision, Judge Sutton opened with questions about whether the Constitution is neutral with respect to the relevant subject, leaving it presumptively to legislative judgement.[156]

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[151] 80 F. 4th 1205 (11th Cir. 2023).

[152] 2023 U.S. App. LEXIS 25697, 83 F. 4th 460 (6th Cir. 2023).

[153] 80 F. 4th 1205, 1219-1225.

[154] "Discovery and development of penicillin,"https://www.acs.org/education/whatischemistry/landmarks/flemingpenicillin.html. In Poe v. Labrador, 2023 U.S. Dist. LEXIS 229332 (D. Idaho, Dec. 26, 2023), Judge Winkill used penicillin (among other treatments and procedures) as an example of medical interventions that the due process clause would not protect as a parental choice because they were discovered in the 20th Century. Id. at *55-*56.

[155] Id. at *50.

[156] 2023 U.S. APP Lexis 25697, at *21-*25.

Reasoning from the posture of restraint he attributed to *Washington* v. *Glucksberg* and *Dobbs*, Judge Sutton treated the medical care context as an expansion rather than an application of parental due process rights. He wrote: "No such expansion is warranted here. This country does not have a "deeply rooted" tradition of preventing governments from regulating the medical profession in general or certain treatments in particular, whether for adults or their children. . .. State and federal governments have long played a critical role in regulating health and welfare, which explains why their efforts receive 'a strong presumption of validity.'"[157]

Judge Sutton was correct about the general role of government in regulating health care. Nothing in *Meyer*, *Pierce*, or their progeny, however, support framing the relevant question this way. The methodology of substantive due process has never involved the opening move of focusing on the existence of government power. Rather, it focuses on the category and quality of the individual rights foreclosed by the challenged legislation. In *Meyer* and *Pierce*, the Court did not emphasize the history of state power over education, which was considerable. In *Troxel*, the Court did not begin its analysis with discussion of state power, likewise extensive, over custody and visitation decisions. The question of justification for the exercise of state authority should arrive at the back end of the analysis, after the court has evaluated the claimed right and chosen an appropriate standard of review. Accordingly, one might conclude that parents cannot successfully assert a right to consent to their children's use of drugs if the FDA has not licensed them as safe and effective; in that case, the government may have a compelling interest in prohibiting use of the drug for anyone.[158]

In *L.W.*, the path to reversal of the district court depended on minimizing the standard of review. Accordingly, on both the equal protection and substantive due process claims, Judge Sutton analyzed the questions in ways that enabled him to do just that. With respect to the due process claim, he framed the question as whether parents had rights to consent to treatments for gender dysphoria that had been "reasonably banned."[159] Comparing the bans to those on use of substances that the FDA had never approved, he analyzed the state interests in a highly deferential way, emphasizing concerns about the experimental quality of the treatments and their possible irreversibility. Only by relying on a strong presumption of validity, inconsistent with the concept that parents had fundamental rights at stake, could Judge Sutton reject the conclusion of unconstitutionality that so many district courts had reached.[160]

Indeed, Judge Sutton never fully confronts the parents' central constitutional argument – that states may not legislate against the purpose of gender transition as a reason for using these products, as distinguished from legislating broadly against their use. At its core, the states'

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[157] Id. at *23-*24 (citation omitted).

[158] If the relevant question is whether the state law violates parental rights as they existed in 1868, parents' rights to choose treatment for their children might be much broader. The FDA did not exist at that time, and the only legal limitations on using pharmaceutical products were tort law limits on sellers, and the prohibition on abuse and neglect of children by parents. If the courts were to go this far, every FDA decision would have to meet the compelling interest standard when parents used the drug for their children. This would dramatically shift power from the FDA to the courts, a move that seems consistent with some recent trends in administrative law.

[159] Id. at *28 - *29.

[160] Judge Sutton similarly avoided stricter scrutiny by ruling that the prohibitions did not involve a sex classification, and by not reaching the question of whether transgender classifications were suspect or quasi-suspect. Id. at ___, ___. Judge Helene White dissented on all grounds, including the parental rights claim, see id. at 491-513.

regulatory target is the parents' philosophy of care for their children rather than the medical safety of their choices.[161] The closest that Judge Sutton comes to addressing this argument is a reliance on the idea that use of these drugs for cross-sex purposes is experimental. He writes that "[a] state may reasonably conclude that a treatment is safe when used for one purpose but risky for another, especially when . . . the treatment is being put to a relatively new use."[162] This judgment is reasonable only if grounds exist to believe that the risks of the newer treatment (cross-sex) are appreciably greater than the risks of the established treatments (intra-sex). Judge Sutton's opinion does not try to make that case, and there are good reasons to doubt it.[163]

Moreover, Judge Sutton makes no effort to appraise those risks against the benefits of the prohibited treatment, which – used in medically and psychologically appropriate cases – are substantial.[164] That sort of selective evaluation reveals a more basic problem with this line of argument about the reasonableness of the state's policy. It rests on a pretext of state concern for the health and well-being of minors who suffer from gender dysphoria. But the entirety of the legislative context in Tennessee reveals something quite different from care and concern. The prohibition on use of drugs in treatment of dysphoria was part of a legislative package aimed at discouraging transgenderism among minors. The measures include a definition of a person's sex as fixed at birth; limitation on athletic participation by transgender minors; permission to teachers to ignore the student's choice of pronouns; and a declaration that the state has "a compelling interest in encouraging minors to appreciate their sex, particularly as they approach puberty."[165] Concern for health and well-being is not advanced by a policy of legislative denial that transgenderism is real.[166]

The Circuits are now split, though they may not remain that way.[167] If the Supreme Court grants the petitions for certiorari in *L.W.*, many dispositions are possible. Perhaps a majority of Justices will agree with the 6th and 11th Circuit on all grounds. The full merits of the equal protection arguments are outside the scope of this paper, but I do want to offer a few thoughts on which ground of decision for the challengers might be preferred, by the litigants or by the Justices.

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[161] As Judge Helene White argued in dissent, "both the (Tennessee and Kentucky) statutes effectively reveal that that their purpose is to force boys and girls to *look* and *live* like boys and girls." Id. at 505.

[162] Id. at 480.

[163] Petition for Certiorari, United States v. Skrmetti, Sup. Ct. No. 23-477, at 7 (risks of puberty blockers and hormone treatments "generally do not vary based on the condition they are being prescribed to treat.") (citing record in district court).

[164] Id. at 4-6 (describing and documenting the benefits of the banned treatments in relieving the profound distress sometimes experienced by adolescents suffering from gender dysphoria).

[165] Id. at 8, & n.3 (citing Tennessee Code, sections 68-33-101 et seq.)

[166] In dissent in *Skrmetti*, Judge White noted that widespread medical approval of the use of these pharmaceutical treatments for gender dysphoria in minors and the flimsiness of the states' medical concerns – all well established in the district court record – supported the notion that the states were not acting to protect the health of minors. Id. at 506. For a helpful discussion of the uses and misuses of empirical argument in matters of family law, see Clare Huntington, The Empirical Turn in Family Law, 118 Colum. L. Rev. 227 (2018).

[167] The Eighth Circuit in Brandt affirmed the district court, 48 F. 4th 661 (8th Cir. 2022), but there is now a petition for en banc review in Brandt, and it is possible that the full 8th Circuit will agree with the 6th and 11th Circuits. Other appeals are also pending in the Circuit Courts. See Petition of the United States, No. 23-477, available here: https://www.supremecourt.gov/DocketPDF/23/23-477/288875/20231106135238432_U.S.%20v.%20Skrmetti%20-%20Pet.pdf., note ___ supra, at 27-31.

Because the equal protection arguments are the broadest bases for decision, the challengers to the statutes and their cause-oriented lawyers will prefer the Court to reverse on those grounds. Moreover, the Solicitor's General's petition for the United States has raised only equal protection grounds for reversal.[168] An equal protection ruling, whether based on sex discrimination or transgender discrimination, would logically and inevitably extend to all direct regulation of transgender persons, adults or minors. It would implicate controversies involving third parties, such as questions about the fairness of athletic competitions, or the separation of men and women in prisons or other facilities. In contrast, a due process ruling in favor of the parents' rights claims would be limited to issues involving transgender minors, and to a context in which the interests of parties outside the family unit would not be at stake.[169]

An analogy to the judicial choices made in *Lawrence* v. *Texas*[170] and *Obergefell v. Hodges*[171] seems stark and obvious. In those cases, challengers to laws that restricted the rights of LGBT people to sexual privacy (*Lawrence*) and access to marriage (*Obergefell*) raised equal protection and due process arguments. Had the Court focused on the equal protection arguments – in particular, in *Lawrence*, decided in 2003 – all restrictions on the rights of LGBT people might thereafter have become subject to strict judicial review. The marriage question itself might have been settled far more quickly had the *Lawrence* Court made that move. Instead, the Court focused on due process grounds of privacy in *Lawrence* and access to marriage in *Obergefell*. This approach, championed by Justice Kennedy (who wrote both Court opinions), left both decisions subject to attack in the wake of *Dobbs* and its emphasis on history as the source of due process rights. Equal protection rulings would not face that kind of vulnerability to revision.

By reasoning similar to what apparently motivated Justice Kennedy in *Lawrence* and *Obergefell*, a ruling in the families' favor in *L.W.* based solely on due process and parents' rights would once again be the more restrained path. It would leave other regulation of transgender status untouched, neither approved nor disapproved constitutionally.

However disappointing a due process ruling might be for LGBT advocates, any invalidation of these state laws would constitute a major victory. Because parents' rights have deep common law antecedents, such a ruling would not be vulnerable in the ways that *Lawrence* and *Obergefell* are. More broadly, perhaps, it would be a signal to lawyers and judges that, despite *Dobbs*, substantive due process doctrines remain available in appropriate cases. That would be a memorable marker for the 100th anniversary of *Meyer-Pierce*!

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[168] Id. at 17, n. 6.

[169] If the case involved mature minors seeking treatments for gender dysphoria without parental notice or consent, the parents' competing interests would be at stake. Cf. Bellotti v. Baird, 443 U.S. 622 (1979). But that is not this case or any of the other cases being litigated at this time. For discussion of application of the mature minor doctrine in this context, compare F. Lee Francis, Who Decides: What the Constitution Says About Parental Authority and Rights of Minor Children to Seek Gender Transition Treatment, 46 S. Ill. U.L.J. 535 (2022) with Emily Ikuta, Overcoming the Parental Veto: How Transgender Adolescents Can Access Puberty-Suppressing Hormone Treatment in the Absence of Parental Consent under the Mature Minor Doctrine, 25 S. Cal. Interdisc. L.J. 179 (2016).

[170] 539 U.S. 558 (2003).

[171] 576 U.S. 644 (2015).

Beyond this case-specific analysis, we should remember that the core of the legislative attacks on transgenderism is not about the scope of parental authority. Rather, this sudden and loud campaign is about the validity of the concepts of gender fluidity and transgender status. For many people, the roots of the campaign are religious, rooted in the notion that we are each Divinely created at birth as male or female, and that any effort to transform that identity is unnatural and ungodly.[172]

In other contexts, promoters of anti-trans legislation can hide behind a variety of plausible masks. The sponsors of legislation about competition in sports wave the banner of fair play.[173] The bathroom wars supposedly rest on suddenly unsettled expectations of privacy.[174] In both of those contexts, some third-party interests (however marginal) are at stake. When the legislation turns to denial of necessary medical and psychological care to children, however, with no pretense of protection for others, its roots in religion-based animus toward transgenderism are most fully exposed.

I suspect this is why Judge Sutton and others work so hard to conclude that broad deference to legislatures is constitutionally appropriate in the context of gender dysphoria. Without that deference – that is, with a clear look at the medical knowledge that supports such treatments in appropriate cases, and the weak case on the other side – the pretextual, anti-trans, religion-based story of opposition comes more starkly into view.[175]

The narrative of animus drives the equal protection theories in the case, especially the line of argument that transgender classifications are constitutionally suspicious. Once upon a time, this observation might also have invited an Establishment Clause attack on anti-trans legislation. The model would be *Epperson* v. *Arkansas*,[176] which invalidated a law that banned the teaching of Darwinian evolution in public schools. The Supreme Court held that the law

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[172] See https://www.pewresearch.org/short-reads/2022/07/07/attitudes-about-transgender-issues-vary-widely-among-christians-religious-nones-in-u-s/ (reporting on influence of religious beliefs on attitudes of Protestants, white and black, re: transgender status); Marianne Campbell, Jordan D.X. Hinton, Joel R. Anderson, A systematic review of the relationship between religion and attitudes toward transgender and gender-variant people, 20 Int. J. Transgenderism 21-38 (2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6830999/. The "pronoun cases" are all about religious objection to gender transition. See Meriwether v. Hartop, 992 F. 3d 492 (6th Cir. 2021) (Free Exercise Clause protects teacher autonomy in use of pronouns); Vlaming v. West Point Sch. Bd., https://www.vacourts.gov/opinions/opnscvwp/1211061.pdf (state constitution protects religious freedom of teacher to not use gender transition pronouns). See also http://religionclause.blogspot.com/2023/12/florida-transgender-teachers-challenge.html

[173] See generally Erin Buzuvis, Sarah Litwin, & Warren K. Zola, Sport is for Everyone: A Legal Roadmap for Transgender Participation in Sport, 31 J. Lega. Aspects of Sport 312 (2021). A district court in Florida recently upheld that state's statutory prohibition on transgender males competing in girls' high school sports. D.N. v. DeSantis, 2023 U.S. Dist. LEXIS 198678 (S.D. Fla. Nov. 6, 2023).

[174] The leading case is Grimm v. Gloucester Cty. Sch. Bd., 972 F. 2d 586 (4th Cir. 2020), cert denied, 2021 U.S. LEXIS 3441 (June 28, 2021). See generally Susan Hazeldean, Privacy as Pretext, 104 Corn. L. Rev. 1719 (2019); Laura Portuondo, Note, The Overdue Case Against Sex-Segregated Bathrooms, 29 Yale J. Law & Feminism 465 (2018).

[175] Doe v. Ladapo, 2023 US Dist. LEXIS 99603 (N.D. Fla, June 6, 2023) at *31-*32 (state's justifications for prohibition on gender affirming care for minors "are largely pretextual.")

[176] 393 U.S. 97 (1968). See also Edwards v. Aguillard, 482 U.S. 578 (1987) (Louisiana law mandating "Balanced Treatment" of Creationism and Darwinism lacks a secular purpose).

lacked a secular purpose, because its only justification was the constitutionally illicit promotion of Creationism through suppression of competition from modern biology. In the context of legislative prohibitions on treatment of gender dysphoria, one might readily conclude that similar arguments obtain – that the laws are designed to protect a particular, religion-based view of gender as fixed against a rival of gender as fluid.

In 2023, however, such an argument runs up against the formidable obstacle of a Court that has been gutting the Establishment Clause.[177] After *Kennedy v. Bremerton School District,*[178] which announced a wholesale repudiation of the *Lemon* test,[179] it is an open question whether the law still requires that legislation have a secular purpose. Even if a glimmer of that requirement remains, many judges (including a majority of the Supreme Court) would be likely to defer to the possibility that secular, health-based purposes support the prohibition on gender-affirming care for minors.

The invocation of religious beliefs in the context of gender dysphoria, however, invites a different, promising, and quite parent-focused angle of approach to the laws restricting treatment of transgender minors. As noted in Part I, the Free Exercise Clause frequently dovetails with parents' rights, including in *Pierce* itself and later in *Yoder*. It is highly likely that at least some parents of minors who suffer from gender dysphoria have deep and non-traditional religious convictions about parental love and God's plan for their children. For such parents, helping their children cope with the dysphoria is a religious imperative, rooted in their sense of parental duty. Indeed, for such parents, *not* providing appropriate medical care for their adolescent children with this condition would be a violation of religious conscience.

This theory, which might provide such parents with as-applied relief from the prohibitions, deserves its own law journal article. But the elements of this approach, modeled on comparable litigation in the post-*Dobbs* world of abortion restrictions,[180] are easy to see and may be (in a particular factual context) very difficult to refute. The prohibitions on gender affirming treatment substantially burden the religious exercise of parents who have sincere religious beliefs motivating them to provide this care. As such, the prohibition triggers the religious freedom restoration acts which many of the regulating states have on the books.[181] The flimsy

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[177] See generally Ira C. Lupu & Robert W. Tuttle, The Remains of the Establishment Clause, 74 Hastings L.J. 1763 (2023) (hereafter "Remains").

[178] 597 U.S. ___ , 142 S. Ct. 2407 (2022) (holding that a high school football coach's prayer at 50 yard line immediately after a game is protected by the Free Exercise Clause and not prohibited by the Establishment Clause).

[179] Id. at 2427-2428.

[180] See discussion in Elizabeth Sepper, Free Exercise of Abortion, 49 BYU L. Rev, forthcoming 2023, available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4553079; Micah Schwartzman & Richard Schragger, Religious Freedom and Abortion, 108 Iowa L. Rev. 2299 (2023); Caroline M. Corbin, Religious Liberty for All? A Religious Right to Abortion, 2023 Wisc. L. Rev. 475; Elizabeth Platt, The Abortion Exception: A response to Abortion and Religious Liberty, 124 Colum. L. Rev. Forum (forthcoming 2024), available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4557180. See id. at note 4 for a list of state law complaints, based on religious liberty, against state abortion laws. Appeals in the Indiana cases were argued on December 6, 2023. http://religionclause.blogspot.com/2023/12/appeals-court-hears-religious.html

[181] Tennessee, Kentucky, Arkansas, Alabama, Florida, Kansas, and Oklahoma all have RFRA's as well as prohibitions on gender affirming care for minors. Other, similar overlaps are likely.

justifications for the prohibitions of treatment cannot survive honest application of the strict scrutiny that state laws demand in such cases.[182]

With respect to federal constitutional law, the Supreme Court's decision in *Employment Division* v. *Smith* is a limitation of free exercise exemption claims with respect to generally applicable laws. But the Court in recent years has been shrinking the category of general applicability and widening the exceptions to it.[183] In cases that fall within those exceptions, courts are instructed to apply strict scrutiny.[184] The treatment prohibitions are far from generally applicable. They discriminate based on age and purpose of use. They frequently make exceptions for those who have begun treatment prior the law's effective date.[185] Their targeted quality makes them easy pickings for any good lawyer, armed with the latest precedents and supportive academic arguments. And, for the same reasons that these prohibitions will fail strict scrutiny at the state statutory or constitutional level, they should likewise fail under the Free Exercise Clause. Their flimsy justifications cannot withstand a close judicial look. If prohibitions on medical treatment for gender dysphoria survive due process and equal protection review in the courts, theories of parents' religious freedom should be next up.[186] Relief for religiously motivated parents seems better than relief for none at all.[187]

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[182] See, e.g., Tenn. Code sec. 4-1-407 (c) (state imposed burdens on religious exercise are unlawful unless essential to a compelling interest and the least restrictive means of furthering that interest)

[183] See, e.g., Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam); Fulton v. City of Philadelphia, 593 U.S. ___ , 141 S. Ct. 1868 (2021). For useful analysis of these developments, see James Oleske, Free Exercise Uncertainty: Original Meaning? History and Tradition? Pragmatic Nuance?, __ Wayne State L. Rev. ___ (forthcoming 2024); Andrew Koppelman, The Increasingly Dangerous Variants of the Most Favored Nation Theory of Religious Liberty, 108 Iowa L. Rev. 2237 (2023); Zalman Rothschild, Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause, 131 Yale L.J.F. 1106 (2022); Christopher Lund, Second Best Free Exercise, 91 Ford. L. Rev. 843 (2022); Ira C. Lupu & Robert W. Tuttle, The Radical Uncertainty of Free Exercise Principles: A Comment on Fulton v. City of Philadelphia, American Constitution Society Sup. Ct. Rev., 5th ed., 221-256 (2021); Nelson Tebbe, The Principle and Politics of Equal Value, 121 Colum. L. Rev. 2397 (2021); Douglas Laycock and Thomas Berg, Free Exercise Under Smith and After Smith, 2020-21 Cato Sup. Ct. Rev..

[184] Fulton v. City of Philadelphia, 593 U.S. ___, 141 U.S. 1868, 1881-1882 (2021).

[185] See, e.g., Tenn. Code sec. 68-33-103(b)(1)(B).

[186] If the religious exemption claims were presented only after a full-scale challenge to these laws failed, they would not be vulnerable to the criticism offered (in general terms) by Professor Schwarzschild that the parents were seeking special treatment rather than working to defeat the policy as a whole. See Maimon Schwarzschild, Do Religious Exemptions Save?, 53 San Diego L. Rev. 185, 194-198 (2016) (expressing concern that religious exemptions lead to political Balkanization). In general, religious liberty is often best protected by umbrella rights that include but are not limited to those with religious motivation. See Ira C. Lupu & Robert W. Tuttle, Secular Government, Religious People (Eerdmans Pub. Co. 2014), at 183-190 (discussing Meyer, Pierce, the Second Flag Salute Case, and other decisions as part of a general constitutional strategy for protecting religious freedom).

[187] Perhaps the parents' religious liberty claim would need accompaniment from a medical professional's comparable religious liberty claim to be free to provide the treatment as a matter of conscience. See Micah Schwartzman & Richard Schragger, Religious Freedom and Abortion, 108 Iowa L. Rev. 2299, 2339-2340 (2023). Just as medical professionals may assert unwanted complicity in what they consider the sins of others, medical professionals should likewise be free to claim a positive form of complicity in religiously motivated acts of parents to care wisely for their children. See generally Elizabeth Sepper, Taking Conscience Seriously, 98 Va. L. Rev. 101 (2012) (arguing for medical professionals' rights of conscience to provide controversial services, including abortion).

B. Matters of Educational Choice

Meyer, *Pierce*, and *Farrington* involved state efforts to limit parental choices in education. Whether the question involved language, culture, or religion, each of those germinal decisions protected the right to add perspective and information to a child's upbringing. As Justice Douglas in *Griswold* later re-rationalized *Meyer* and *Pierce* under the First Amendment, those decisions forbade the state from restricting the spectrum of knowledge that parents provided to their children.

In contrast, many contemporary parents' rights claims present the opposite character. They involve parental efforts to restrict what their children will learn about controversial subjects. Some of these disputes do not involve claims of constitutional right at all; rather, they represent efforts to subtract from what children are taught, including the children of others. This section of the paper first considers parental efforts to control public school curricula, and then evaluates efforts by parents to withdraw their children from certain assignments in the public schools.

Next, the paper turns to an issue that seems particularly knotty and difficult. Do public schools have a duty to disclose information to parents about their child's presentation of gender identity? This question pits parental rights to learn what school officials already know about their children against their children's rights to physical security and control over information.

The paper's final section focuses on claims that *Meyer* and *Pierce* buttress an affirmative state duty to fully finance schools with a religious character. Of late, aided by a sudden and highly questionable set of interpretations of the Free Exercise Clause, these arguments have taken on a new resonance under the mantle of nondiscrimination. By mid-2023, the Archdiocese of Oklahoma City had obtained state approval for a charter school that will teach the Roman Catholic faith as truth. The school's proponents are asserting the right to full and equal financing with other charter schools, while also claiming free exercise exemptions from nondiscrimination conditions with which other charter schools must comply. Not long ago, the case for comprehensive state financing of religious education would have faced nearly insurmountable Establishment Clause objections, deeply rooted in the very history and tradition that now represent the Supreme Court's constitutional reference point for many matters.[188] *Meyer-Pierce* alone cannot possibly account for the sudden inversion of constitutional concerns.

Like the question of gender-affirming care, each of the subjects discussed in this Part II B. invites a fully developed law journal article. In the interests of brevity, I am providing only a glance at each context, offering insights as they seem appropriate.

Example 1. Parental Control Over Curricula in the Public Schools

In several states, assertions by parents' groups and government officials that public schools are defying the rights of parents have proved politically potent. The Covid-19 pandemic provoked the first round of such complaints. Switching to virtual education in grades K-12, and

[188] For extended discussion of how we arrived at this new and very different situation, see Lupu & Tuttle, The Remains, at 1774 -1781.

imposing mandates of masking and/or vaccination once in-person education resumed, were quite unpopular with significant portions of the electorate.

On top of that pandemic-related discontent, conservative factions and supportive officials continued to build a political movement centered on rhetoric of parents' rights.[189] The focus shifted to matters of curricular substance and cultural atmosphere. Led chronologically by Florida's perversely labeled Individual Freedom Act,[190] states began to exclude from instruction in elementary and secondary schools (and sometimes beyond)[191] various themes on matters of race, sexual orientation, and gender identity. Building on a right-wing media campaign against what was labeled as "critical race theory," several states legislated against the teaching of what they labeled as "divisive" concepts of race and racial history in America.[192]

The crude inconsistency between support for collective parents' rights over curriculum and suppression of individual parents' rights to attend to their own children's gender dysphoria is deeply revealing. The crucial conceptual point is not, however, the popular right-left dichotomy between traditional and progressive values. Rather, the conservative version of parents' rights with respect to curricular content is not about *Meyer-Pierce* rights or any other theory of constitutional freedoms. The claims cannot be sustained in court on any plausible theory of rights. The arguments involve conflict between political interests, not rights against the state.[193]

This simple point has been apparent since the pre-*Meyer* common law decisions about parental authority. As discussed in Part I, common law judges recognized parental rights to influence their own children's curricular choices – e.g., should a child study Latin or grammar – but recognized that the limit of such rights was the point at which a parent's choices affected the educational interests of others. No individual, progressive or conservative, has a claim of legal right to impose their preferred version of the public-school curriculum on other, dissenting parents and children. Parents who want increased attention to racial history and equity, or more resources for students wrestling with issues of sex and gender, are on the same political plane as those who want to move in the opposite direction. To prevail, each side must win the struggle for political control of state and local offices that have authority to set curriculum. Accordingly, the

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[189] For a comprehensive account of the ways in which this parents' rights movement did little for the autonomy of parents and instead undermined progressive cultural change and rights of minors, see Naomi Cahn, Mary E. Ziegler, & Maxine Eichner, The New Law and Politics of Parental Rights, 123 Mich. L. Rev. (forthcoming 2024), available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4552363.

[190] Florida Statutes (2022), § 1000.05(4)(a).

[191] In Pernell v. Fla. Bd. of Governors of the State Univ. Sys., 641 F. Supp. 3d 1218 (N.D. Fla. 2022), a district court granted, on free speech grounds, a preliminary injunction against enforcement in colleges and universities of the portions of the Individual Freedom Act Florida law banning "divisive topics" related to race. The prevailing view of government speech will make it exceedingly difficult to succeed on a similar claim in grades K-12. For a comprehensive discussion of the speech rights of teachers in higher education as compared to those in K-12 education, see Keith Whittington, Professorial Speech, The First Amendment, and Legislative Restriction on Classroom Discussion, 58 W.F. L. Rev. 463 (2023).

[192] For leading examples and analysis, see La Toya Baldwin Clark, The Critical Racialization of Parents' Rights, 132 Yale L.J. 2139 (2023); Cahn, Eichner, and Ziegler, The New Law and Politics of Parental Rights, note ___ supra, at ____.

[193] Id. at 6.

rhetoric of parents' rights is just that – a framing of political interests in the jargon of legal entitlements.

The few litigated cases about attempts by parents to alter the content of a public-school curriculum confirms this narrative. In the 1980's, in the context of a successful challenge to school sponsored prayer in Alabama,[194] a group of intervenor parents alleged that a wide number of books approved for use by the Alabama Board of Education unconstitutionally promoted a religion of secular humanism. These parents argued that the challenged books should be excluded from the curriculum, or that books promoting theistic religion should be given "equal time." Although District Court Judge Brevard Hand famously accepted some of these claims and enjoined the use of forty-four books in the public-school curriculum,[195] the 11th Circuit reversed and ended the litigation. In an opinion by Judge Frank Johnson, the 11th Circuit reasoned that the challenged books were not being used to indoctrinate anyone in secular humanism, regardless of whether secular humanism qualified as a religion under the First Amendment.

An inch beneath the surface of the 11th Circuit opinion is the notion that the public schools cannot survive assertions by one set of parents that other groups of parents had taken control, and that the courts should force a balance among them in the curriculum. Repeatedly, the 11th Circuit emphasized the need for judicial deference to duly elected and appointed school officials. Without that deference, any choice of curriculum, or books in support of curriculum, would invite endless attack from parents who believed that someone else's world view, rather than their own, had taken over the public schools. Where would that stop? How would judges ever confidently conclude that the aggrieved parents' view had been given "equal time"?[196] Would there not always be still other sets of parents to complain that their views had been denigrated by the curriculum and deserved a pro rata share of time?

The dynamics of *Smith v. Board of Commissioners* have recently been re-played, driven by different causes. The claims have relied primarily on norms of non-discrimination, freedom of speech, and age-appropriateness of instruction, but the conceptual problems of asserting and enforcing parents' rights are very similar. Challenging county-wide or state-wide policies about the content of a curriculum may be an effective way to bring attention to alleged vices of a policy, but these challenges are highly unlikely to produce favorable rulings or appropriate remedies for the problem. Below, I offer and analyze two examples, one from the right and one from the left. I intend these examples to be typical rather than exhaustive of the field.

Anti-racism and Ibanez v. Albemarle County School Board. After the violence of the "Unite the Right" rally in August 2017 in Charlottesville, Virginia,[197] the Albemarle County (home to Charlottesville) School Board responded to the white supremacist aggressions of the rally by adopting an Anti-Racism Policy.[198] The Policy is highly detailed, and commits the Board

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[194] The lawsuit ultimately resulted in the decision in Wallace v. Jaffree, 472 U.S. 38 (1985) (invalidating legislation requiring moments of silence in public schools for meditation or prayer).

[195] Smith v. Board of School Commissioners of Mobile County, 655 F. Supp. 939 (SD Ala 1987), rev'd 827 F. 2nd 684 (11th Cir. 1987).

[196] Cf. Edwards v. Aguilllard, 482 U.S. 578 (1987) (invalidating Louisiana's requirement for "Balanced Treatment" in high school biology classes of Creationism and Darwinian theories of evolution of species).

[197] https://www.vox.com/2017/8/12/16138246/charlottesville-nazi-rally-right-uva

and its Public School Division to "establishing and sustaining a school community that shares the collective responsibility to address, eliminate, and prevent actions, decisions, and outcomes that result from and perpetuate racism."[199] The Policy requires that administrative staff and teachers be trained under the policy, and that "[c[urriculum and instructional materials for all grades shall reflect cultural and racial diversity and include a range of perspectives and experiences, particularly those of underrepresented groups of color."[200]

Almost three years later, in late 2021, Alliance Defending Freedom filed a lawsuit in Virginia state court on behalf of several families with children in the County schools. The complaint alleged that the Anti-Racism Policy had been implemented in ways that infringed the plaintiffs' rights under various provisions of the state constitution, including those dealing with non-discrimination and freedom of speech.[201] Notably, the complaint also included allegations that implementation of the Policy violates the plaintiffs' parental rights under state constitutional law, statutory law, and common law.[202] In particular, the complaint alleged that a "parent's fundamental right prohibits schools from indoctrinating their children against the parent's wishes."[203] Moreover, the complaint included a request for an injunction against implementation of allegedly unlawful educational practices, and (in the alternative) a request for parents to be allowed to opt their children out of the complained of practices.

The County moved to dismiss the complaint on justiciability grounds, including lack of standing. In the Spring of 2022, as reported in the news,[204] Circuit Court Judge Worrell responded to the plaintiffs' arguments about injury to white students in this way:

"You never make an argument about the problem with teaching a child this way. You tell me that the policy discriminates against white students and it's just not true. I've read all the many hundreds of pages [of briefings] and I don't see it. You just assert there is discrimination. Why can't Albemarle County teach its students about racism? . . . There is no compulsion here. Why is this actionable? . . .

I reject your premise that the structure of the policy is pejorative. Your parents [plaintiffs in the case] simply don't like that [the school board] has chosen this way to teach [anti-racism]. You don't have standing to complain. The Albemarle County School Board doesn't exist to create a curriculum that's particular to any student. If we take that claim to its endpoint then we have to have a separate curriculum for each student, separate from others, because this student felt bad."[205]

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[198] https://www.k12albemarle.org/our-division/anti-racism-policy/policy (adopted February 28, 2019).
[199] Id.
[200] Id.
[201] The complaint is available here: https://adfmedialegalfiles.blob.core.windows.net/files/CIcomplaint.pdf.
[202] Id. at pars. 324-337 (citing, inter alia, *Meyer*, *Pierce*, and *Troxel* v. *Granville*, without stating any federal constitutional claims).
[203] Id. at par. 333.
[204] Lisa Martin, School Board Lawsuits Ebb and Flow, https://www.crozetgazette.com/2022/05/06/school-board-lawsuits-ebb-and-flow/.
[205] Id.

The Circuit Court dismissed the complaint on justiciability grounds,[206] and the case is now on appeal.[207]

"Don't say Gay" and Equality Florida v. Florida State Board of Education. In late March, 2022, the Florida legislature enacted and Governor DeSantis enthusiastically signed a bill "relating to parental rights in education." Some portions of it were about parental rights, as properly understood – for example, the provisions about the rights of parents to be informed of various changes in the school records of their own children, which I discuss in a separate section below. What received the most immediate attention by far, however, was the so-called "Don't Say Gay" provision:

"Classroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur in kindergarten through grade 3 or in a manner that is not age-appropriate or developmentally appropriate for students in accordance with state standards."[208]

Unlike the school records provision, this prohibition on instruction was not an attempt to enforce the rights of all parents. More precisely, it did not enforce the rights of any parents. Rather, it vindicated the concerns of some parents while undermining the interests of others. In its focus on "sexual orientation or gender identity," it excluded from explicit classroom attention matters of homosexual orientation and transgender identity, and thereby implicitly normalized majoritarian patterns of heterosexual orientation and cisgender identity.

Within a few days of the signing, Equality Florida and several students, teachers, and parents of children in the Florida public schools filed suit, seeking to enjoin enforcement of this provision, in the federal district court for the Northern District of Florida.[209] The essence of the lengthy Equality Florida complaint seemed to be that the very enactment of the "Don't Say Gay" provision was constitutionally injurious because it would inhibit or intimidate students, parents, teachers, and school staff from acknowledging the existence of LGBT identity. Teachers and staff would reasonably fear that their jobs might be jeopardized if they made the slightest reference to LGBT identity – for example, in noting that one or more children in the class had a same sex couple as parents. LGBT parents would fear that consciousness of their existence among school children would be erased by compliance with the law, to their detriment as well as that of their children.

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[206] Ibanez v. Albemarle Cty. Sch. Bd., No. cl21001737-00 (Va. Cir. June 1, 2022). The precise language of the order of dismissal is "Plaintiffs lack standing to bring their claims, and . . . Plaintiffs have not stated a cause of action arising under Virginia law because their claims under the Constitution of Virginia are not self-executing and the statute on which they rely does not create a cause of action."

[207] The appeal was argued in the Court of Appeals of Virginia on September 12, 2023. https://www.vacourts.gov/courts/cav/dockets/Region%202%20-%20Central%20Virginia%20Writ-Merit%20Dockets/091123_web_central_region_docket.pdf

[208] Codified at Fla. Stat. 1001.42(8)(c)3. Other sections of the so-called Individual Freedom Act prohibited instruction and training designed to advance various concepts that the legislature associated with Critical Race Theory. Id. at 1000.05(4)(a)1. – 8.

[209] The complaint is available here: https://www.nclrights.org/wp-content/uploads/2022/03/Equality-Florida-et-al.-v.-DeSantis-et-al.-Complaint.pdf.

The litigation problem for the plaintiffs, however, was the difficulty in tracing these fears to any enforcement of the law.[210] The law had been enacted only days earlier. It prohibited certain instruction and did not by its terms prohibit references to LGBT identity. And its addressees were public school districts, not their employees, however reasonable those employees' apprehension of negative job actions might be. These concerns about whether the law caused material injury to the plaintiffs, fairly traceable to the defendants' actions in enforcing the law, and susceptible to effective judicial remedy – all standard Article III concerns about justiciability – led Judge Winsor to dismiss the case in September 2022.[211] He gave the plaintiffs leave to re-file the complaint, which they did months later, but in March 2023, that complaint too was dismissed on justiciability grounds.[212] The dismissal has now been appealed to the 11th Circuit Court of Appeals.

Their political valence aside, the lawsuits in *Ibanez*, attacking the Albemarle County's Anti-Racism Policy, and *Equality Florida*, attacking Florida's "Don't Say Gay" law, are in some ways strikingly dissimilar. *Ibanez* is a suit against a county school board, objecting to a county policy, on state constitutional grounds. The plaintiffs filed suit almost three years after the County adopted the policy, and the allegations include many details about its training requirements and its implementation. *Equality Florida* is a case against a variety of state defendants, generated by a state legislative policy, on federal constitutional grounds. The suit appeared immediately after enactment, which led inevitably to more speculative allegations about the harms caused by its eventual enforcement.

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[210] The presence of such a threat is what distinguishes *Equality Florida* from GLBT Youth in Iowa Schools Task Force v. Reynolds, Case No. 4:23-cv-00474, S.D. Iowa, Dec. 29, 2023, slip op. available here: https://s3.documentcloud.org/documents/24245982/injunction-1.pdf. In May 2023, the Iowa legislature enacted Senate File 496, Iowa Code Sec. 279.80(2), which provided that ""[a] school district shall not provide any program, curriculum, test, survey, questionnaire, promotion, or instruction relating to gender identity or sexual orientation to students in kindergarten through grade six." Slip op. at 8. The statute defined gender identity as covering all identities (cisgender or transgender) and sexual orientation as "actual or perceived heterosexuality, homosexuality, or bisexuality." Id. The district court concluded that teachers in grades K-6 had standing to challenge the enactment, because they had shown a credible threat of enforcement against them. In contrast, GLBT Youth and its members, all in grades 7 and above, lacked standing to challenge the provision. On the merits, the court held that the provision was a violation of the due process clause on grounds of vagueness. On its face, it seemed to prohibit all mentions of any orientation or gender identity, including calling a boy a boy, or using Mr. or Miss as an appellation. Although the statute would likely be applied more narrowly, it was impossible for teachers to know exactly what was forbidden, Id. at 41-44, and enforcement would inevitably be arbitrary and unpredictable.

[211] Equality Florida v. Florida State Bd. of Educ. 2022 U.S. Dist. Lexis 240375 (N.D. FL 9/29/2022).

[212] M.A. v. Florida State Bd. of Educ. 2023 U.S. Dist. Lexis 52144 (N.D. FL 2/15/2023). A separate lawsuit with multiple plaintiffs and claims arising out of the "Don't Say Gay" law similarly failed on justiciability and other grounds. Cousins v. Sch. Bd. of Orange Cty., 2023 U.S. Dist. LEXIS 162782 (M.D. Fla. Aug. 16, 2023). For a similar result in a case challenging the restrictions on teaching about race in grades K-12, see Falls v. DeSantis, 609 F. Supp. 3d 1273 (ND Fla 2022). Note the very different outcome in Pernell v. Fla. Bd. of Governors of the State Univ. Sys., 641 F. Supp. 3d 1218 (N.D. Fla. 2022) (preliminary injunction against the enforcement of restrictions on teaching about race in colleges and universities). Chief Judge Mark Walker presided in both *Falls* and *Pernell*.

Still more deeply, the Albemarle County policy represents an affirmative inclusion of controversial material, spelled out in considerable detail, in the curriculum and staff training in the County's public schools. In contrast, the Florida enactment represents a complete exclusion from the curriculum in kindergarten through 3rd grade, and a partial exclusion in higher grades ("classroom instruction on sexual orientation and gender identity . . . that is not age-appropriate or developmentally appropriate for students in accordance with state standards.") These differences between the Albemarle County policy and the Florida policy help explain why the Albemarle plaintiffs had litigation specifics in which to sink their teeth, while the Florida plaintiffs had to rely on allegations of chilling effects and atmospheric harms.[213]

And yet, at least as of this round of the litigations, the outcomes are essentially the same. Judges have dismissed both complaints on grounds of justiciability – lack of standing and/or remedial incapacity in the judiciary to cure the alleged harms. Though I am sure that advocates in each of these cases could explain intelligently why I am wrong about theirs and right about the other, both cases structurally resemble *Smith v. Board of Commissioners of Mobile County*.[214] Both alleged that a general policy designed to broadly influence the curriculum violated the constitutional rights of parents and their children attending the public schools. Both of those policies, despite their structural differences, are designed to shape the content and socio-political atmosphere of public education. They affect the learning of every child – to be sure, some more than others.[215]

Moreover, if either piece of litigation succeeds on its substantive merits, judges will be obliged to craft and supervise remedies that will intrude deeply and continuously on the administration of the public schools. In Albemarle County, would judges have to decide what instruction about race and history is constitutionally permitted? In Florida, would judges have to decide whether the state could ever impose any less severe boundary in discussing sexual orientation or gender identity?

These are all matters of great import, but they are ordinarily left to the politics of educational reform and the discretion of properly constituted government agencies.[216] What is at

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[213] I have no doubt that the atmospheric harms are real and substantial, see Cahn, Eichner, and Ziegler, The New Law and Politics of Parental Rights, note __ supra, at 29-30, but they do not readily translate into justiciable questions.

[214] 655 F. Supp. 939 (SD Ala 1987), rev'd 827 F. 2nd 684 (11th Cir. 1987).

[215] Investigations by journalists in several Florida counties have identified the negative effects on the climate of respect for librarians, teaches, parents, and children in various school districts. See Reshma Kirpalani and Hannah Natanson, The Lives Upended by Florida School Book Wars, Washington Post, Dec. 21, 2023, available here: https://www.washingtonpost.com/education/2023/12/21/florida-school-book-bans-escambia-county/;

[216] Decisions by school officials to remove books or films from a school library invite the possibility of a different outcome re: justiciability and the merits. See island Trees Sch. Dist. v. Pico, 457 U.S. 853 (1982). Even in that context, proving that the removals are viewpoint discriminatory (rather than based on age appropriateness or other legitimate criteria) is very difficult. Nevertheless, book bans have an impact on the climate of equal respect and support for various groups within a school system. See Hannah Natanson, Half of challenged books return to schools. LGBTQ books are banned most, Washington Post, Dec. 24, 2023, available here: https://www.washingtonpost.com/education/2023/12/23/school-book-challenges-shelves-lgbtq-authors/. For a recent decision striking down a statutory ban on books that address sexual matters in grades K-6, see GLBT Youth

stake in these contexts are concerns about political morality, pedagogical soundness, and the well-being of children. Parents, children, teachers, school administrators routinely show up on all sides and fight for their preferred outcomes. In most circumstances, none have constitutional rights, based on *Meyer-Pierce* or otherwise, to triumph over the others.[217]

Example 2. Opt-out rights.

The idea that significant negative effects on third parties should bound parental rights helps in the analysis of a more authentic and difficult category of parental rights -- opt-outs from otherwise mandatory school assignments, experiences, or courses. The classic case is the recitation of the Pledge of Allegiance, an ideological rather than a curricular exercise. Resting on a theory of freedom from compelled speech, the decision in *West Virginia Board of Education v. Barnette*[218] protects the right of individual schoolchildren to refuse to recite the Pledge. The logic of *Barnette* extends to any attempt by a public school to compel an affirmation with ideological content.

In cases where the school does not require students to engage in affirmation of an idea, do parents have constitutional rights to withdraw their children from otherwise mandatory courses, reading assignments, or substantive lessons?[219] Over the past fifty years, disputes over such opt out rights have typically been centered on the Free Exercise Clause of the First Amendment. The most likely explanation for that is two-fold. First, opt-out requests are usually driven by religious

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in Iowa Schools Task Force v. Reynolds, Case No. 4:23-cv-00474, S.D. Iowa, Dec. 29, 2023, slip op. available here: https://s3.documentcloud.org/documents/24245982/injunction-1.pdf, at 22-41. The law "require[d] the removal of any book from Iowa public school libraries that contains a description or visual depiction of a 'sex act." Id. at 3. Teachers, affected students, and publishers of the books banned all had standing to sue. Id. at 13-22. The district court concluded that the ban violated the First Amendment because it was vastly overbroad. Id. at 38. It "has resulted in the removal of hundreds of books from school libraries, including, among others, nonfiction history books, classic works of fiction, Pulitzer Prize winning contemporary novels, books that regularly appear on Advanced Placement exams, and even books designed to help students avoid being victimized by sexual assault." Id. at 3.

[217] The decision in Local 8027 v. Edelblut, 2023 U.S. Dist. LEXIS 5593 (D.N.H., Jan. 12, 2023) suggests the possibility that a teacher dismissal based on a law banning the teaching of divisive racial concepts might be subject to challenge on due process vagueness grounds. Id. at *38-*51. Curriculum challenges based on the Establishment Clause concerns, reflected in The School Prayer Cases and in the fights over teaching Darwinism, see Epperson v. Arkansas, 393 U.S. 97 (1968), involve matters of structure, not matters of individual right, and so fall outside this analysis. Under the Constitution, local school boards lack jurisdiction to authorize a curriculum that promotes belief in a religious faith. Of course, as a matter of right, all parents can control what is taught to their own children in their own home or in private tutorials. With respect to all venues of learning, parents have rights of entry and exit (e.g., from a school, religious community, or a voluntary association like Scouts or a sports league) but no legal rights of control over the teaching once they enter. For a very different take on parents' rights against public school policies, see Helen Alvare, Families, Schools, & Religious Freedom, 54 Loyola Univ. Chicago, No. 2 (forthcoming), available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4119844.

[218] 319 U.S. 624 (1943).

[219] Compare the common law cases about parental rights to withdraw a child from a particular course, cited in the discussion of *Meyer* in Part I, supra. In Hamilton v. Regents of the Univ. of California, 293 U.S. 245 (1934), the U.S. Supreme Court held that the Free Exercise Clause did not provide grounds to exempt university students from compulsory military training.

beliefs, though the compelled speech doctrine does not include any requirement that the relevant beliefs be religious.[220] Second, in the context of schools, the decision in *Wisconsin* v. *Yoder*[221] – exempting the Old Order Amish from compulsory education laws for their children who had completed eighth grade -- adds constitutional fuel to the withdrawal engine.

Despite the decision in *Yoder*, however, successful opt out claims based on the Constitution are rare. Most states now legislatively recognize a right to home education, but courts have been reluctant to find a constitutional right to home educate a child. They tend to distinguish *Yoder* as a case about the long-term survival of a religious community, rather than an individual right to withdraw children from all accredited schooling.[222]

What about opt-outs from specified reading assignments? The most prominent judicial decision about opt-outs of this character has long been *Mozert* v. *Hawkins County*.[223] In *Mozert*, a group of public-school students and their parents objected on free exercise grounds to the County's adoption of the Holt, Rinehart, and Winston series of basic reading materials for grades 1-8. The families described themselves as fundamentalist Christians, and they complained that books in the series promoted ideas in conflict with their faith – for example, evolution, mental telepathy, secular humanism, pacifism, and magic. They sought relief in the form of exemption for their children from the readings they found objectionable. Although they suggested that an entirely different set of books for all children might alleviate their concerns, the particular remedy sought was excuse of individual children from the room when their classes read the complained-of books.

The district court ruled for the plaintiffs, but the 6th Circuit reversed. Although the panel was unanimous on the outcome, the three judges each wrote lengthy and careful opinions. Chief Judge Lively (writing for himself and Judge Cornelia Kennedy) argued that the reading assignments did not substantially burden the religious freedom of the plaintiffs or their children, because the school did not require the children to affirm the truth of the ideas advanced in the books, or to engage in a devotional exercise.[224] Reading these books involved exposure to new ideas, not indoctrination in them. The panel readily distinguished *Yoder* as a case involving complete withdrawal from school and the survival of a long-standing religious community.[225]

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[220] In addition to *Barnette*, where religious beliefs provided the motivation for the opt-out claim but not grounds of decision, 319 U.S. at 634-635, see the recent decision in 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (religiously motivated objector prevailed on speech grounds).

[221] 406 U.S. 205 (1972).

[222] See, e.g., Care and Protection of Charles, 399 Mass. 324, 504 N.E. 2nd 592 (1987); Duro v. Dist. Att'y, Second Judicial Dist., 712 F. 2d 96 (4th Cir. 1983), cert. denied 465 U.S. 1006 (1984). For a comprehensive appraisal and critique of the home education movement, see James G. Dwyer & Shawn F. Peters, Homeschooling: The History and Philosophy of a Controversial Practice (2019), and Elizabeth Bartholet, Homeschooling: Parents Rights Absolutism vs. Child Rights to Education and Protection, 62 Ariz. L. Rev. 1 (2020). I discuss home education in greater detail in Ira C. Lupu, The Separation of Powers and the Protection of Children, 61 U. Chi. L. Rev 1317, 1356-1359 (1994); Ira C. Lupu, Home Education, Religious Liberty, and the Separation of Powers, 67 B.U. L. Rev 971 (1987).

[223] 827 F. 2d 1058 (6th Cir. 1987).

[224] Id. at 1063-67.

[225] Id. at 1068.

Judge Kennedy, concurring, agreed on the burden point but went on to argue that the reading curriculum is justified by a compelling state interest. "Teaching students about complex and controversial social and moral issues," she wrote, "is just as essential for preparing public school students for citizenship and self-government as inculcating in the students the habits and manners of civility."[226]

Mozert remains the template for evaluating parent demands that their children be permitted to opt out of reading assignments to which parents object on constitutional grounds. The reasoning of *Mozert* proved decisive in a recent case in my home jurisdiction of Montgomery County, Maryland.[227] In *Mahmoud* v. *McKnight*,[228] several families challenged the inclusion of their children in portions of the reading program in grades K-5. The County School Board had recently added books to its reading curriculum to further goals of nondiscrimination with respect to LGBTQ persons. After a careful review, a committee of experts recommended storybooks with that goal in mind.

The plaintiff families claimed rights under the Free Exercise Clause and the parents' rights wing of substantive due process to opt their children out of "readings and discussions of books that included lesbian, gay, bisexual, transgender, and queer characters because the books' messages contradict their sincerely held religious beliefs about marriage, human sexuality, and gender."[229] As described by the district court judge, the books attached to the complaint were the following:

"*Pride Puppy*! chronicles a family's visit to a "Pride Day" parade and their search for a runaway puppy, using the letters of the alphabet to illustrate what a child might see at a pride parade. *Uncle Bobby's Wedding* tells the story of a girl who is worried that her soon-to-be-married uncle will not spend time with her anymore, but her uncle's boyfriend befriends her and wins her trust. *Intersection Allies: We Make Room for All* features nine characters who proudly describe themselves and their diverse backgrounds and connects each character's story to the collective struggle for justice. *My Rainbow* tells the story of a mother who creates a rainbow-colored wig for her transgender child. *Prince & Knight* tells the story of a young prince who falls in love with and marries a male knight after they work together to battle a dragon. *Love, Violet* chronicles a shy child's efforts to connect with her same-sex crush on a wintry Valentine's Day. *Born Ready: The True Story of a Boy Named Penelope* is about an elementary-aged child who experiences triumphs and frustrations in convincing others what the child knows to be true—that he's a boy, not a girl. *Pride Puppy*! is for pre-kindergarten and the Head Start program; the other books are for kindergarten through fifth grade."[230]

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[226] Id. at 1071. Judge Boggs took an entirely different direction from his colleagues on the panel. Boggs argued that the County had imposed a substantial burden on these families' religious beliefs. Nevertheless, as a matter of judicial restraint and respect for the authority of the elected school board over matters of educational policy, Judge Boggs concluded (reluctantly) that the curriculum of the public schools was entirely in the control of school officials, constrained only by the Establishment Clause. Id. at 1079-1081.

[227] The County is adjacent to the District of Columbia. Two of my children attended County schools, elementary and secondary, but graduated long before this dispute arose.

[228] 2023 U.S. Dist. Lexis 150057 (D. Md. 8/24/2023).

[229] Id. at *1-*2. The plaintiffs include Muslim, Roman Catholic, and Greek Orthodox parents. Id. at *(- *10.

[230] Id. at *5-*7

Most of the opinion is devoted to the plaintiffs' free exercise claims. Citing five circuit courts and a number of district courts, Judge Boardman writes that "Every court that has addressed the question has concluded that the mere exposure in public school to ideas that contradict religious beliefs does not burden the religious exercise of students or parents."[231] These courts relied on two reasons: "(1) students were not required to behave contrary to their faiths or affirm any views contrary to their religious beliefs, and (2) parents were not prevented from discussing and contextualizing any contrary views at home."[232] The court in *Mahmoud* concluded that the plaintiffs and their children had not experienced the kind of conflict between their religious beliefs and the curriculum necessary to state a prima facie case of a free exercise violation. Teachers were not engaged in indoctrinating or coercing children to affirm any belief about sexual orientation or gender identity. Rather, the program was designed to instill respect for LGBT people, among others, and the parents had not asserted that their beliefs included any disrespect for that group.

With respect to parents' rights norms, Judge Boardman concluded that the fundamental right of parents to direct the education of their children does not extend to control of "how a public school teaches their child."[233] This led her to apply rational basis review, which the County's reading program easily satisfied.[234]

The same result on the parents' rights claim would follow if the first step lined up with the those taken in free exercise cases. With respect to both, a prima facie case must include a showing that the state has burdened the right. For example, a school policy that insisted that children specifically denounce their parents or renounce their parents' belief on some subject would burden a parent's constitutionally protected place. Parents' rights to control their children's education are not substantially burdened, however, by everything the school teaches that may conflict with parental beliefs. The parents maintain control through the options of 1) exit from the school and 2) rivalry with the school for influence with their children. Parents may not like competition from the school, just as teachers sometimes dislike competition from parents. Nevertheless, as I wrote many years ago, when such rivalries are maturely managed, they can enrich children's understanding of the world, help protect children from abuse or other forms of domination, and foster the development of children as independent adults.[235]

In addition, the opinion in *Mahmoud* v. *McKnight*, though correct in its result, might have been strengthened by the approach taken by Judge Cornelia Kennedy, concurring in *Mozert*. She argued that even if the plaintiff families had demonstrated the requisite conflict between the

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[231] Id. at *51.

[232] Id. at *52.

[233] Id. at *87 (citing and quoting Blau v. Fort Thomas Pub. Sch. Dist., 401 F. 3rd 381, 395 (6th Cir. 2001).

[234] The plaintiffs in Mahmoud v. McKnight have appealed to the U.S. Court of Appeals for the 4th Circuit. The 4th Circuit heard argument in the case on December 6, 2023. Nicole Asbury & Michelle Boorstein, Religious MD parents appeal to court to skip books with LGBTQ+ characters, Washington Post, Dec. 5, 2023, available here: https://www.washingtonpost.com/dc-md-va/2023/12/05/opt-out-montgomery-lgbtq-storybooks/

[235] Ira C. Lupu, The Separation of Powers and the Protection of Children, 61 U. Chi. L. Rev 1317 (1994). The idea that educational arrangements may foster a strong and democratic civic polity is hardly new or original with me. See Amy Gutmann, Democratic Education. For a recent and more state-centered version of this thesis, see Ann C. Dailey, In Loco Republicae, 133 Yale L.J. 419, 463-473 (2023) (parents' duty to children includes giving them exposure and access to the ideas of others).

reading curriculum and their religious beliefs, the state's interests in maintaining the goals of its curriculum were sufficient to prevail.

On the facts in *Mahmoud*, those interests were both substantive and administrative. The substantive interests revolve around the goals of this aspect of the reading program. As described by the district court, the no opt-out policy serves the School Board's interest in "'[f]oster[ing] social integration and cultural inclusiveness of transgender and gender nonconforming students' by ensuring all students are exposed to [relevant] instructional materials."[236] Opt-outs reduce the number of students exposed to the lessons of inclusion and equal respect for LGBT persons and families. Moreover, the opt out students are not selected at random. They come from families which do not teach normalization of such families and may indeed teach against it. In addition, for students from LGBT families as well as all others, the opt out and attendant disruptions may become a focal point among children at school. Of course, students whose parents want the opt out may initiate such discussion about these books in any event, but allowing an opt out will draw special attention at the school to the reasons for it.

The administrative interests relate to the number of students seeking the opt outs. If it were only a handful, as was the case in Montgomery County when the initial objections from parents arose, it may have been possible to accommodate the objectors. They would be excused from the class during the objectionable readings and would have to go elsewhere in the school where they could be given alternative readings, or at least be supervised. This would require school resources, but perhaps the re-allocation would be manageable if the numbers were small and the requests infrequent.

After a few months of the new reading program being in place in the County, however, the number of objectors mounted swiftly.[237] Accommodating so many objectors would involve a significant reallocation of resources, involving space and personnel. At some point, quickly reached, the accommodation burdens would become so great that the County might well abandon this portion of the reading program. Opt-out requests, in sufficient number, may effectively combine and become program vetoes.

In this regard, note that the complaint in *Ibanez v. Albemarle County* re: the anti-racism curriculum, analyzed in the section above, included an opt-out remedy as an alternative to injunctive relief against the anti-racism program as a whole. Opt-outs appear to function at retail, protecting dissenters only.[238] Program vetoes operate at wholesale, eliminating programs and practices for all subject to them. In certain circumstances, however, they operate to reinforce each other, even if the opt-outs seem at first glance to be less intrusive.

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[236] Mahmoud, at *93

[237] Id. at *31 ("In one instance, for example, parents sought to excuse dozens of students in a single elementary school from instruction.")

[238] History suggests that opt-outs from the Pledge of Allegiance will rarely if ever be large enough to end the enterprise of Pledge recital in public schools, but one can imagine a political climate in which larger numbers of opt-outs occur. In any event, the number of refusals cannot alter the right of each individual to be free of compulsion to recite the Pledge.

Moreover, opt-outs may be partial (e.g., some objected-to lessons but not all), and injunctive relief against a program is likely to invite controversy about exactly what anti-racist (or LGBT respectful) messages would still be allowed as part of ordinary instruction. Monitoring the allegedly objectionable content of public education will be intrusive at best, and a chronic administrative nightmare for judges and schools at worst. The scope of available remedies, and the precision with which they can be deployed, thus represents an especially crucial question in any litigation by parents against curricular choices.[239]

Example 3. Parents' rights to know vs. children's informational privacy.

Several of the most difficult dilemmas about the appropriate scope of *Meyer-Pierce* rights arise from questions about conflicts between parental control, on the one hand, and the privacy and liberty interests of minors, on the other. As minors approach adulthood in age and physical capacity, these problems become more acute. Recall the discussion in Part I about the rights of pregnant unmarried minors. The issues involve both information and autonomy. Must a minor who seeks to terminate a pregnancy notify her custodial parents? The relevant law, not yet disturbed by *Dobbs* and its aftermath, is that states may not authorize a parental veto, and must provide a procedure for judicial bypass of notice requirements for minors who are mature, or whose best interests would not be served by parental notice.[240] Thus, parental rights to control this extremely serious medical and emotional decision are limited by the rights of privacy and reproductive autonomy of their child, who has the most at stake.

In several respects, pregnancy presents an unusually compelling case about information privacy and reproductive autonomy. Minors who seek to avoid notice to parents may want to keep the fact of their sexual activity, as well as the pregnancy, hidden from their parents. And they want to make the abortion decision free of parental coercion. This context, in which the crisis of decision is temporary, acute, and potentially life-changing, in some cases demands both secrecy and medical independence from parents.

Compare the more subtle, triangulated problem of the role of public schools when minors present a case of gender dysphoria. The school is involved on many levels because the minor may request the use of a different name, pronouns, gender-based athletic competition, and/or facilities for changing clothes or using toilets. Inescapably, schools are actors in the drama of gender transition. Under what circumstances should school officials disclose signs of transgender presentation to parents? Should disclosure be mandatory, because parents have a right to know what their child is experiencing and to participate in any relevant decisions about how the school reacts? Or should disclosure depend entirely on the minor's consent, because

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[239] For more detailed discussion of the remedial problem that would have been proposed by an opt-out remedy in the context of *Mozert*, see Ira C. Lupu, Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion, 102 Harv. L. Rev. 933, 949-953 (1989). The plaintiffs had requested the remedy of public payment of tuition for their children at a private, religious school, which would have presented quite different problems under the Establishment Clause. See id. at 952, note 71 (citing Richard Epstein, The Supreme Court, 1987 Term –Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent, 102 Harv. L. Rev. 5, 87 (1988).)

[240] Planned Parenthood v. Danforth, 482 U.S. 52 (1976) (holding parental consent requirement unconstitutional); Bellotti v. Baird, 443 U.S. 622 (1979) (constitution requires judicial bypass to parental notice policy). These decisions are discussed in Part I, *supra*, as well as in Huntington & Scott, Conceptualizing Legal Childhood, note ___ supra, at 1443-1444.

minors have privacy rights to control who has access to the information, and may reasonably fear an unsupportive or abusive parental reaction?

Considering the heated quality of issues of transgenderism in the culture wars, it is not surprising that legal and political battles have broken out over the question of school policies related to disclosure of transgender presentation. Attempts to mandate disclosure against the will of the minor and the judgment of school officials have appeared at state as well as local levels.

At one extreme, consider the Virginia model policy, promulgated in 2022 as a "guiding principle" during the administration of Governor Youngkin:

"**Schools shall keep parents informed about their children's well-being**: To ensure parents are able to make the best decisions with respect to their child, school personnel shall keep parents fully informed about all matters that may be reasonably expected to be important to a parent, including, and without limitation, matters related to their child's health, and social and psychological development."[241]

The new policy, which replaced the progressive policy of Youngkin's predecessor Governor Northam,[242] is without question directed at policies related to treatment of students who present as transgender. Beyond that, the Youngkin Administration policy creates significant dilemmas for guidance counselors and other personnel at public

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[241] VA. DEP'T OF EDUC., 2022 MODEL POLICIES ON THE PRIVACY, DIGNITY, AND RESPECT FOR ALL STUDENTS AND PARENTS IN VIRGINIA'S PUBLIC SCHOOLS (2022), Guiding Principles, Section B.3. Other states have enacted similar policies. See, e.g., SB 184, Alabama Statutes 2022, sec. 5 (prohibiting nurses, teachers, counselors, principals, and other officials at a public or private school from withholding from a parent or legal guardian, or encouraging a minor to similarly withhold, information related to a minor's perception that his or her gender or sex is inconsistent with his or her sex). Litigation has been instituted against the range of Virginia policies concerning transgender students. See Justin Jouvenal & Karina Elwood, Students sue over Va's controversial transgender policy in school, Wash. Post, Feb. 15, 2024, available here: https://www.washingtonpost.com/education/2024/02/15/aclu-lawsuit-virginia-transgender-policy. Plaintiffs in Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1311 (M.D. Ala. 2022) did not challenge the Alabama notice provisions, which apply to private as well as public schools. Id. at 1139, n. 5. See also the policy enacted in Florida's recent legislation on parental rights in education: "[Schools must] adopt procedures for notifying a student's parent if there is a change in the student's services or monitoring related to the student's mental, emotional, or physical health or well-being and the school's ability to provide a safe and supportive learning environment for the student." Fla. Stat. sec. 1001.42(8)(c)(1). The Florida policy is narrower than Alabama's or Virginia's in the duty to disclose, because it is triggered only by a "change in the student's services or monitoring . . ." A request by a student for a change of name or gender pronouns would presumably be such a trigger. The Florida law is sweeping and has created significant headaches for school administration. See Dana Goldstein, "In Florida, New School Laws Have an Unintended Consequence: Bureaucracy," N.Y. Times, Jan. 10. 2024, https://www.nytimes.com/2024/01/10/us/florida-education-schools-laws.html.

[242] VA. DEP'T OF EDUC., MODEL POLICIES FOR THE TREATMENT OF TRANSGENDER STUDENTS IN VIRGINIA'S PUBLIC SCHOOLS 2 (2021) (reflecting concerns about bullying, privacy, and respect for students' sense of their own gender identity, and requiring respect for the student's views about sharing information with their family). Professor Huntington compares the Northam and Youngkin policies in Pragmatic Family Law, 136 Harv. L. Rev 1501, 1579-1583 (2023) (advocating a pragmatic, empirically based resolution of the problem rather than one based strictly on rights or values).

schools. What is covered by the reference to "all matters that may be reasonably expected to be important to a parent, including, and without limitation, matters related to their child's health, and social and psychological development"? Are schools obligated to fully inform parents about any consensual sexual experiences, with a person of different sex or same sex, that may come to the attention of a teacher or counselor? Any performance on a test or school exercise that is beneath the student's usual performance? The policy is purposely vague, a quality that increases the pressure to disclose. Nondisclosure may lead to official trouble for an employee; excessive disclosure will rarely if ever violate the Virginia policy, though at times it may be inconsistent with a school counselor's professional ethics.[243]

In California, controversies over policies of mandatory disclosure of transgender presentation have arisen at the local level and have generated conflict with state law.[244] For example, the Chino Valley Unified School District recently enacted a policy that requires school personnel to notify parents whenever a student asks to be identified or treated as a gender different from that identified as the sex assigned at birth on the student's birth certificate.[245] The California Attorney General quickly brought suit against the District. The Attorney General's complaint asserted that the District's Policy violated the California Constitution's provisions on equal protection and the right of privacy, as well as the state's Education Code.[246] The complaint asserted that the District's policy "has placed transgender and gender nonconforming students in danger of imminent irreparable harm from the consequences of forced disclosures. These students are currently under threat of being outed to their parents or guardians against their express wishes and will."[247]

As a matter of federal constitutional law, are the diametrically opposed, statewide policies of either Virginia or California required? Do parents have a federal constitutional right to immediate disclosure from public schools under *Meyer-Pierce*? Or, completely to the contrary, do students have a right to keep the information away from their parents, under the due process and privacy principles the Supreme Court has applied in the decisions about abortion access for unmarried minors?[248]

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[243] See American School Counselor Association, Ethical Standards for School Counselors, section A.2.g. (recognizing primary obligation to student but recognizing need for balance with rights of parents to have information and make decisions for their child). The Standards are available here: https://www.schoolcounselor.org/About-School-Counseling/Ethical-Responsibilities/ASCA-Ethical-Standards-for-School-Counselors-(1).

[244] Jill Cowan, California Republicans Target School Boards on Gender Identity Policies, New York Times, October 30, 2023, available here: https://www.nytimes.com/2023/10/30/us/california-school-transgender-policy.html

[245] California Attorney General Challenges School District's Policy on Disclosure to Parents of Student's Gender Dysphoria, http://religionclause.blogspot.com/2023/09/california-ag-challenges-school.html. See also Melissa Gira Grant, The Christian Right Wants to Force Teachers to Out Trans Kids, The New Republic, Nov. 30, 2023, available here: https://newrepublic.com/article/177180/christian-right-wants-force-teachers-trans-kids.

[246] Complaint in The People of the State of California v. Chino Valley Unified School District, Superior Ct. of CA, Cty. of San Bernardino, available here: https://oag.ca.gov/system/files/attachments/press-docs/Stamped%20-%20CVUSD%20Complaint.pdf.

[247] Id. par. 11. A state Superior Court has issued preliminary injunctive relief against the policy. https://oag.ca.gov/news/press-releases/attorney-general-bonta-san-bernardino-superior-court's-decision-protects

Comparing the issue of notice of a minor's abortion choices to the question of school duties to disclose transgender presentation is illuminating in several respects. First, the state's role in the two settings is quite different. In the abortion context, the state is acting as a regulator. Its policies limit non-emergency medical treatment for minors without parental notice and consent. The addressees of such policies are medical providers, private and public, as well as minors and their parents. In this setting, the pregnant minor seeking to bypass parental notice is trying to maximize secrecy.

In contrast, in the context of public-school disclosure to parents, the state is an actor, running its own institutions. Student who present as transgender may be doing much more than disclosing information; they are likely requesting revisions in records, changes in names and pronouns used to refer to them, and access to school facilities like sports teams, restrooms, and lockers. For any of that to work smoothly, there must be dissemination of information to coaches, teachers, and many students in the school. None of this can be characterized overall in terms of secrecy.

Second, transgender status involves identity, rather than conduct alone. A minor's private conduct, including sexual activity and termination of a pregnancy, can be kept secret from parents, perhaps forever. In contrast, a minor's gender identity will eventually manifest itself in physical appearance, choice of dress, social relations, and other ways that will be very difficult to hide. Disclosure to family ultimately may be about timing and circumstance – questions of how and when rather than whether a minor will consult with parents.

With these distinctions in mind, consider the opposing constitutional claims of parents' *Meyer-Pierce* rights and minors' privacy rights in the context of school disclosure policies. As I argued in Part II.A. parents have very strong *Meyer-Pierce* rights to make decisions about medical treatment, together with their children and medical professionals. But *Meyer-Pierce* and their progeny have never been about the state's duty to provide information to parents. The parents' decision-making autonomy will without question be enriched by more information and impoverished by less. But this observation proves too much. Government and its employees cannot function under a constitutional duty to report every bit of information that parents, even reasonable ones, want to know. The boundary problems would be endless. The proper concerns will be not only what parents should know, but also what information might lead to parental abuse. The judgments here are too granular to be subject to a constitutionally mandated rule of immediate and compulsory disclosure.[249]

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[248] Planned Parenthood v. Danforth, 482 U.S. 52 (1976) (holding parental consent requirement unconstitutional); Bellotti v. Baird, 443 U.S. 622 (1979) (constitution requires judicial bypass to parental notice policy).

[249] In Regino v. Staley, 2023 U.S. Dist. LEXIS 118967 (ED Ca, July 10, 2023), a federal district court similarly decided that the due process rights of parents do not give them a right of immediate disclosure from the school district of gender transition discussion with their child. See also "Mother Sues School for Socially Transitioning her Daughter," http://religionclause.blogspot.com/2024/02/mother-sues-school-for-socially.html (describing lawsuit by mother of middle school student against school officials for using a masculine name and plural pronouns for her daughter without the mother's consent).

What of the privacy rights of minors, concerned about responses from parents that are unsupportive or far worse? In the context of transgender presentation, it is reasonable to assume that the parents will eventually learn of their child's identity crisis. Whether or not that is accurate, the school is being asked to do much more than hold the information in confidence. It is being asked to create a supportive plan, which requires affirmative steps and the distribution of information within the school to teachers, staff, and other students. With such a plan in place, the information will eventually be widely known. Only the parents will remain in the dark. A judicial bypass system cannot be effective when the relevant matter is not a secret, and parents may learn of their child's gender transition through ordinary networks of information.

Neither side has a strong case for constitutional rights in this context, but better and worse policy choices exist. In this regard, consider the case of *John & Jane Parents 1 v. Montgomery County Board of Education*.[250] Several parents challenged the policy in Montgomery County, Maryland on disclosure to parents of transgender presentation. The policy reads as follows:[251]

"Prior to contacting a student's parent/guardian, the principal or identified staff member should speak with the student to ascertain the level of support the student either receives or anticipates receiving from home. In some cases, transgender and gender nonconforming students may not openly express their gender identity at home because of safety concerns or lack of acceptance. Matters of gender identity can be complex and may involve familial conflict. If this is the case, and support is required, the Office of School Support and Improvement or the Office of Student and Family Support and Engagement (OSFSE) should be contacted. In such cases, staff will support the development of a student-led plan that works toward inclusion of the family, if possible, taking safety concerns into consideration, as well as student privacy, and recognizing that providing support for a student is critical, even when the family is nonsupportive."

The district court entered judgment in favor of the County on the merits in *Parents 1*, although the 4th Circuit later vacated the judgment on standing grounds.[252] The district court rejected the notion that *Meyer-Pierce* rights extended to the flow of information from schools to parents. The court relied on Circuit and District Court precedents involving parental attempts to control curricular choices. Those decisions quite correctly excluded attempts at curricular control from the ambit of *Meyer- Pierce* rights, which are designed to keep government from

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[250] 622 F. Supp. 3d 118 (D. Md. 2022), vacated on standing grounds, 2023 U.S. App. LEXIS 21097 (4th Cir. 2023).
[251] Id. at 125-126.
[252] 2023 U.S. App. LEXIS 21097 (4th Cir., Aug. 14, 2023). The three plaintiff-parents in the case did not allege that any of their children presented at County schools as transgender or were planning to do so. For a decision denying standing to LGBT students and an LGBT student group the right to challenge a state law with strict requirements that teachers and other school personnel disclose requests for gender transitions to parents, see GLBT Youth in Iowa Schools Task Force v. Reynolds, Case No. 4:23-cv-00474, S.D. Iowa, Dec. 29, 2023, slip op. available here: https://s3.documentcloud.org/documents/24245982/injunction-1.pdf, at 18-19. The court relied on the fact that the students were already "out" and therefore were not injured by the disclosure requirements. Id.

interfering with individual family decisions, rather than to empower families to undermine government policies for the administration of schools.[253]

Applying rational basis review to the County policy, the district court upheld it as consistent with the County's interests in providing a safe and supportive environment for its students. It emphasized the textured quality of the policy, which the court describes as one that encourages family involvement even as it protects the student against forced disclosure:[254]

"The Guidelines do not aim to exclude parents, but rather anticipate and encourage family involvement in establishing a gender support plan. . .. Even where family support is lacking, the inclusion of family is identified as an eventual goal. The Guidelines, on their face, are noncoercive, and serve primarily as a means of creating a support system and providing counseling to ensure that transgender children feel safe and well at school. And, importantly, they apply to each student on a case-by-case basis. By advising that school personnel keep a transgender or gender nonconforming student's gender identity confidential unless and until that student consents to disclosure, they . . . protect the student's privacy and create . . . "a zone of protection . . . in the hopefully rare circumstance when disclosure of [the student's] gender expression while at school could lead to serious conflict within the family, and even harm." . . . A transgender child could hardly feel safe in an environment where expressing their gender identity resulted in the automatic disclosure to their parents, regardless of their own wishes or the consequences of the disclosure."

This time-sensitive policy emphasis seems salutary.[255] School personnel must be confident they are not inviting harm to the student by disclosure.[256] At the same time, school staff (and the students themselves) will realize that an elaborate plan of school support, across a range of facilities and activities, will eventually come to the attention of all but the most inattentive parents. The Montgomery County policy, though not required by the federal constitutional right of privacy, is supportive of the student's well-being while taking seriously the concerns, interests, and possibility of beneficial inputs from other family members.[257]

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[253] 622 F. Supp.3d at 130-134. The court in Parents 1 distinguished cases involving allegations that school staff encouraged or facilitated abortions for students, and strenuously discouraged them from notifying parents. Id. at 133-134, citing Arnold v. Bd. of Educ. of Excambia Cty, AL, 880 F. 2d 305 (11th Cir. 1989). But see Mirabelli v. Olson, 2023 U.S. Dist. LEXIS 163880, at *27-*31 (S.D. Ca. Sept. 14, 2023) (relying on *Meyer-Pierce* rights as justification for teachers' religious liberty claims to be free to disclose gender dysphoria to parents).

[254] 622 F. Supp. 3d at 138-139 (internal citations omitted). A very different situation would be presented in a case where school officials take repeated and affirmative steps to conceal information from parents about gender transition, as is alleged to have occurred in the recently filed lawsuit in Mead v. Rockford Public School District. The complaint in *Mead*, alleging free exercise and due process violations, is linked here: http://religionclause.blogspot.com/2023/12/parents-sue-school-for-using-teens.html.

[255] The Montgomery County Policy is a striking example of the kind of win-win solutions to conflict advocated in Professor Martha Minow's recent article, Walls or Bridges: Law's Role in Conflicts over Religion and Equal Treatment, 48 BYU L. Rev. 1586 (2023).

[256] In Mirabelli v. Olson, 2023 U.S. Dist. LEXIS 163880(S.D. Ca. Sept. 14, 2023), the district court ruled that the Free Exercise Clause protected several public-school teachers against dismissal for defying school district policy regarding notice to parents about their children's gender dysphoria. Id. at *40-*49. This decision invites harm to the affected students and undermines the trust between the school district and its students. The district court's opinion suggests that the teachers' claims are in service of the constitutional rights of parents. Id. at *27-*31 (citing cases from *Meyer* and *Pierce* through *Troxel*).

Moreover, the parents of a public-school child in a process of gender transition retain the right to remove the child from the school, so long as they have a substitute plan that satisfies compulsory education requirements. Abrupt removals inflict their own species of harm. If earlier rather than later disclosure to parents helps to facilitate trust and discourage the removal possibility, school officials might counsel the child accordingly.

Example 4. Parents' rights, school choice, and religious education.

Do *Meyer* and (more directly) *Pierce* have anything to do with the public financing of school choice, including the selection of religious schools? The courts have never deployed the doctrine of *Meyer-Pierce* to demand full state financing of religious instruction, or to justify religion-based exemption from conditions on that financing. The libertarian premises of *Meyer*-Pierce – that is, that the state should not interfere with parental choice of how to educate their children – do not readily connect with the demand that the state pay for all possible options.

This is consistent with the general understanding that most constitutional liberties are negative, protecting rights to act without state interference rather than rights to affirmative state support. For example, the state has no obligation to put newspapers in the public library and can select reasonably among newspapers if it chooses to stock them. Even in contexts in which the state is obliged to provide constitutionally significant services, such as counsel in criminal cases, the state is under no obligation to equalize resources among criminal defendants, or otherwise to empower them to choose counsel from among the entire membership of the Bar.

Does any of this analysis change when the state excludes only the religious option from constitutionally important opportunities available at public expense? In the case of public speech forums for private speech, exclusion of religious perspectives is appropriately a matter of constitutional concern.[258] But the broad free speech principle barring content discrimination does not apply to the very different contexts of state policy with respect to which private schools will be accredited, or will receive state financial support. States may reasonably regulate the content of curriculum in a school that seeks or has accreditation. For example, states need not guarantee that schools teaching astrology or Creationism as science, or white supremacy as civics, can satisfy accreditation criteria.[259]

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[257] In March 2023 the Republican controlled U.S. House of Representatives passed on a narrow, party line vote H.R. 5, a "Parents Bill of Rights," https://www.congress.gov/118/bills/hr5/BILLS-118hr5ih.pdf. The focus of the Bill is entirely on federally funded public schools, and most of its provisions relate to access to general information on curriculum, library books, and school budgets. Several provisions, however, adopt the strict "parents' rights" policy of requiring schools to disclose to parents if their children have requested a change in pronouns or a change in the locker rooms or bathrooms they use at schools. See Annie Karni, Divided House Passes G.O.P. Bill on Hot-Button Schools Issues, New York Times, March 24, 2023, available here: https://www.nytimes.com/2023/03/24/us/politics/parents-bill-of-rights-act.html. The Bill received no attention in the Senate, and appeared to be primarily a Republican messaging bill. See Lexi Lonas & Michael Schnell, House Republicans Pass Parents Bill of Rights, The Hill, March 24, 2023, available here: https://thehill.com/homenews/house/3916114-house-republicans-pass-parents-bill-of-rights/

[258] See, e.g., Rosenberger v. University of Virginia, 515 U.S. 819 (1995).

[259] See Runyon v. McCrary, 427 U.S. 160 (1976) (parents do not have constitutional right to send their children to "white academies").

Religious instruction in schools presents a constitutionally special case. As Professor Tuttle and I have recently explained, *Pierce*, *Everson*, and the *School Prayer Cases* for fifty years "formed a hard triangle around educational choices. First, parents have the right to select private or public schools for their children. Second, the state will not subsidize private, religious education. Third, for those who choose or are compelled to attend the public schools, the state will not engage in religious indoctrination of students. Religious training will be left to families and religious institutions."[260] With respect to elementary and secondary schools, this combination of free exercise and non-establishment norms was the church-state settlement for a full half-century.[261]

More recently, however, developments in the Supreme Court have begun to undermine those arrangements. *Pierce* remains solid,[262] but *Kennedy* v. *Bremerton School District*[263] has destabilized the authority of the *School Prayer Cases*. What remains of *Everson*, and its once-unanimous view that the Establishment Clause prohibits direct state support of religious education?[264]

Within the context of education, the constitutional exclusion from state support of schools that promote worship and religious indoctrination has attracted considerable criticism over the years.[265] Among the critics, Professor Nicole Stelle Garnett has published recent, important, and well-respected work about school choice.[266] She acknowledges the existence of possible Establishment Clause constraints,[267] unlike some other scholars who have inveighed against selective funding of schools.[268] But her writing tends to treat those constraints as nothing more

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[260] Ira C. Lupu & Robert W. Tuttle, The Remains of the Establishment Clause, 74 Hastings L.J. 1763 (2023), at 1800.

[261] As one would expect, this settlement had its critics, including most prominently Professor Steven Douglas Smith. See Steven Douglas Smith, Constitutional Divide: The Transformative Significance of the School Prayer Decisions, 38 Pepperdine L. Rev. 945 (2011).

[262] In the past 100 years, challenges to the *Pierce* proposition that parents have constitutional rights to direct and control their children's education, including the right to choose a private, religious school instead of a public school have been extremely rare. James Dwyer is the most conspicuous critic of that proposition. See, e.g., James G. Dwyer, Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights, 82 Cal. L. Rev. 1371 (1994).

[263] 142 S. Ct. 2407 (2022). For discussion of the impact of *Kennedy* on the School Prayer Cases, see Lupu & Tuttle, Remains, note ___ supra, at 1799-1805.

[264] The prohibition pertains to direct state support of the activities of worship and religious education, not to state support of religious institutions per se. Bradfield v. Roberts, 175 U.S. 291 (1899); Lupu & Tuttle, Remains, note ___ supra, at 1775-76.

[265] See Michael W. McConnell, The Selective Funding Problem: Abortions and Religious Schools, 104 Harv. L. Rev. 989 (1991); Thomas C. Berg, Anti-Catholicism and Modern Church-state Relations, 33 Loy. U. Chic. L.J. 121 (2001). It is telling that no one seems to challenge the exclusion of worship per se – usually in the material form of support for the building of houses of worship and payment of the salary of clergy -- from the permissible objects of state support. This category of prohibition of state support has significant pre-constitutional antecedents. See Virginia Bill on Religious Liberties, set out in the Appendix to Everson v. Bd. of Educ., 330 U.S. 1 (1947),

[266] Among many other works, see Nicole Stelle Garnett, Religious Charter Schools: Legally Permissible? Constitutionally Required?, Manhattan Inst. Policy Report (hereafter cited as Garnett, Religious Charter Schools), available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3744246; Nicole Stelle Garnett, Sector Agnosticism and the Coming Transformation of Education Law, 70 Vand. L. Rev. 1 (2017).

[267] Garnett, Religious Charter Schools, at 7-13.

than impediments to realization of her preferred policy goals, rather than matters of substantive constitutional commitment.[269] In the name of free exercise and nondiscrimination, the Supreme Court has moved quite far in her direction, as discussed further below.

Norms of free exercise, even when hinged to the legacy of *Meyer-Pierce*, are not sufficient to resolve the discrete controversy over direct state support for religious education. For a period far longer than the 100 years since *Meyer-Pierce*, the conventional arrangement in the United States has been one of separation of government from that enterprise. The state is secular, and its jurisdiction is limited accordingly.[270] It may not appoint priests, prescribe criteria for the priesthood, or disqualify anyone from that status.[271] The state's values are not justified by appeal to Divine guidance. Its power comes from the People, not from any conception of the Lord. Since the School Prayer Cases of the early 1960's, these norms have included a promise to parents that the public schools will not sponsor or promote prayer. The state leaves religious truth to families and religious communities.

With respect to the constitutional norms against direct state financing of religious education, the substantive concerns have been multiple – among others, avoiding competition among religious sects for state resources, eliminating state favoritism among religious denominations and their worship traditions, and minimizing the corruption of religious teaching by the need to satisfy state authorities.[272] These norms have never precluded state support for enterprises on grounds of religious affiliation alone. State support of religious hospitals, and other religious charities, has a long history.[273] Rather, these constitutional norms have been the source of a prohibition on state support of religious uses, including preaching and teaching a particular set of religious beliefs as true.

Several decades ago, the principal controversy about state funding of religious schools involved state financed vouchers for use at private schools. Building on a wide base of work about government partnerships with faith-based organizations, Professor Tuttle and I argued that the central constitutional question concerning such vouchers was whether they rendered the state responsible for religious indoctrination.[274] We offered qualified approval of the Cleveland school

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[268] Stephen Gilles, Selective Funding of Education: An Epsteinian Analysis, 19 Quinnipiac L. Rev. 745 (2000); Philip Hamburger, Education is Speech: Parental Free Speech in Education, 101 Tex. L. Rev. 415 (2022).

[269] Garnett, Religious Charter Schools, at 10-15 (analyzing ways of working around Establishment Clause limitations on state support of religious education).

[270] Professor Tuttle and I develop this argument fully in Secular Government, Religious People (Eerdmans Pub. Co. 2014), at 16-29. For a comprehensive appraisal of its historical underpinnings, see Steven K. Green, Separating Church and State: A History (Cornell Univ. Press 2022). As Professor Epstein described the Establishment Clause, it "prohibit[s] the state from going into the business of religion." Richard A. Epstein, Bargaining with the State (Princeton Univ. Press 1993), at 255.

[271] See Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 565 U.S. 171 (2012). For explication of the best theory of Hosanna-Tabor, see Ira C. Lupu & Robert W. Tuttle, The Mystery of Unanimity in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 20 Lewis & Clark L. Rev. 1265 (2017) (explaining that the ministerial exception rests on the constitutional disability of government to answer exclusively ecclesiastical questions).

[272] For a comprehensive list of constitutional objections to direct state support of religious instruction, See Mitchell N. Berman, Religious Liberty and the Constitution: Of Rules and Principles, Fixity and Change, available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4593397, at 71-72.

[273] See, e.g., Bradfield v. Roberts, 175 U.S. 291 (1899).

[274] Ira C. Lupu & Robert W. Tuttle, Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of

voucher program, upheld in *Zelman v. Simmons-Harris*,[275] with caveats that focused on whether the program steered parents into choosing unwanted religious education for their children as the price of escaping troubled public schools. The Cleveland system would have been far better if it had included more secular choices, including public schools in surrounding suburban counties. The bottom-line question, however, remained whether families had an authentic choice to pursue or avoid a religious education. The *Zelman* opinion effectively left the states with policy discretion over the creation and scale of such programs. They have expanded, but not as far or quickly as proponents had hoped.

As the title of this Symposium reveals, however, the legacy of *Meyer* and *Pierce* hangs over the school choice conversation. Drawing on that legacy, Professor Stephen Gilles and Professor Philip Hamburger have argued that state support limited to secular public schools should be viewed as an unconstitutional condition on the provision of a public benefit. Professor Gilles asserts that "the unconstitutional conditions doctrine seems tailor-made for selective educational funding: although the Federal Constitution does not entitle parents to state subsidies to help them educate their children, the state cannot condition such subsidies on the parents' abandonment of their free speech and free exercise rights to communicate their preferred educational messages to their children."[276] More recently, Professor Hamburger wrote that "[p]ublic education is a government benefit and so cannot come with a condition that abridges the freedom of speech. All the same, states offer this subsidy on the condition that parents accept government educational speech in place of their own. In other words, parents are being pressured in a way that abridges their own educational speech and compels them to adopt the government's."[277]

Neither Professor Gilles nor Professor Hamburger bothered to mention the Establishment Clause as a possible source of constraint on their arguments, which invite state subsidy of religious education. Independent of that concern, they both ignore a crucial consideration. As the Court explained in *Regan v. Taxation with Representation*,[278] "[A] legislature's decision not to

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Constitutional Battles, 78 Notre Dame Law Review 917 (2003); Ira C. Lupu & Robert W. Tuttle, Sites of Redemption: A Wide-Angle Look at Government Vouchers and Sectarian Service Providers, 18 J. L. & Politics 537 (2002). Our broader work on the faith-based and community initiative begun under President George W. Bush includes Ira C. Lupu & Robert W. Tuttle, Government Partnerships with Faith-Based Service Providers: The State of the Law, The Roundtable on Religion and Social Welfare Policy, Nelson A. Rockefeller Institute of Government, SUNY (December, 2002) (first in a series of annual reports, 2002-2007); and Ira C. Lupu & Robert W. Tuttle, The Faith-Based Initiative and the Constitution, 55 DePaul L. Rev. 1 (2005).

[275] 536 U.S. 639 (2002).

[276] Stephen G. Gilles, Selective Funding of Education: An Epsteinian Analysis, 19 Quinnipiac L. Rev. 745, 748 (2000). Professor Gilles concedes that the current state of constitutional law does not support his arguments. Id. at 748-49. In keeping with the title of his essay, Gilles quotes Professor Epstein: ". . . even if a state has absolute discretion to grant or deny any individual a privilege or benefit, it cannot grant the privilege subject to conditions that improperly "coerce," "pressure," or "induce" the waiver of that person's constitutional rights. Thus, in the context of individual rights, the doctrine provides that, at least on some occasions, receipt of a benefit to which someone has no constitutional entitlement does not justify making that person abandon some right guaranteed under the Constitution." Id., citing Richard A. Epstein, Bargaining with the State, supra note ___, at 5.

[277] Philip Hamburger, Education is Speech: Parental Free Speech in Education, 101 Tex. L. Rev 415, 419 (2022) (citing *Brown v. Board of Education* and *Pierce* as support).

[278] 461 U.S. 540 (1983). The Court has cited *Regan* with approval in Rust v. Sullivan, 500 U.S. 173, 193 (1991) and later in United States v. American Libraries Ass'n, 539 U.S. 194, 212 (2003).

subsidize the exercise of a fundamental right does not infringe the right."[279] Parents who send their children to public schools retain all their speech rights, and all their *Meyer-Pierce* rights to instruct their children in the family's faith. They can regularly bring their children to worship services, and animate their children's lives with faith in the plentiful hours away from the public-school day. Early mornings, post-school afternoons, evenings, weekends, periods of school breaks – all are available for religious instruction from parents. Moreover, public schools are forbidden from offering instruction or guidance on questions of faith, so the parents will not be facing competition from the state on religious matters.

Taken on its terms, the unconstitutional conditions argument against exclusion of religious schools from state financial support is unpersuasive. Within the past decade, however, the constitutional conversation about school choice has shifted enormously. The Supreme Court has -- with little or no explanation -- subverted the major premises of longstanding separationist norms. In what has become a decisional Trilogy about state legal restrictions on support of religious institutions, the Court has recharacterized longstanding separationist concerns as violations of the Free Exercise Clause of the First Amendment.

In this piece, I will do no more than quickly summarize the three episodes in this New Trilogy.[280] In 2013, *Trinity Lutheran Church of Columbia, Inc. v. Comer*[281] invalidated Missouri's refusal, on state constitutional grounds, to consider a church run pre-school for a grant to install safe playground surfacing. A footnote in *Trinity Lutheran* suggested that grants for educational use might stand on a more questionable constitutional footing.[282] In 2020, however, the Court in *Espinoza v. Montana Department of Revenue*[283] held that Montana's constitutional exclusion of religious entities from a system of tax credits in support of education likewise violated the federal Free Exercise Clause. *Trinity Lutheran* and *Espinoza* both emphasized the vice of status discrimination against religious enterprise. Most recently, in *Carson v. Makin,*[284] a six Justice majority rejected the use-status distinction, holding unconstitutional a state law restriction on using tuition benefits at private schools that maintained a religious curriculum. A ban on state support of religious uses, wrote Chief Justice Roberts, was just a proxy for discrimination based on religious status, and therefore the state may not impose funding disabilities on entities engaged in religious uses.[285]

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[279] 461 U.S. at 549. *Regan* provides an instructive comparison. The Court upheld the restriction on lobbying by non-profit organizations organized under IRC section 501(c)(3). Contributions to such organizations are tax deductible. The same non-profits could organize a separate arm under IRC sec. 501(c)(4) to engage in lobbying, and many do. Contributions to the (c)(4) are not deductible. No one has a constitutional right to make tax deductible contributions to candidate campaigns or lobbying activities.

[280] For considerably more detail, see Lupu & Tuttle, Remains, note ___ supra, at 1781–1792.

[281] 137 S. Ct. 2012 (2017).

[282] Id. at 2024, note 3.

[283] 140 S. Ct. 2246 (2020)

[284] 142 S. Ct. 1987 (2022).

[285] Id. at 2001. The faith-based initiative has for the past twenty years rested on the contrary and constitutionally correct premise that government is free to partner financially with religious institutions so long as it does not directly finance their specifically religious activities, including worship, religious indoctrination, and proselytizing. Ira C. Lupu & Robert W. Tuttle, The Faith-Based Initiative and the Constitution, 55 DePaul L. Rev. 1, 75-102 (2005).

The primary trope in the Court's development of the New Trilogy has been the recasting of longstanding, state-created separationist policies as invidious discrimination against religion. To be sure, these state constitutional provisions, like the federal Establishment Clause, single out religion for special treatment, but they burden all religious denominations equally.[286] The sudden claim of invidiousness demands a full-blown narrative, especially when it is sharply contrary to the history and tradition the Court otherwise has recently elevated as sources of decision.[287] Other than a passing suggestion in *Espinoza* that state separationist principles are systematically corrupted by anti-Catholic animus,[288] that narrative has been remarkably absent.

The Trilogy of the 1920's protects parents' rights to choose various educational options, but nothing in it presented any tension with longstanding church-state norms, state or federal. The New Trilogy, in sharp contrast, has brought church-state law to a dramatically different place. Although the Court has not yet extended its anti-discrimination principle to state refusal of full and direct support for schools that teaching religion as truth, not a syllable in the New Trilogy suggests the Court would stop short of that position.[289]

This intuition about the rate and trajectory of constitutional change has begun to crystallize in the context of charter schools. Charter schools are fully funded by the state, and subject to extensive state regulation about admission of students, among other subjects, though they are typically free of the tight control over labor relations found in conventional public schools. If states are now constitutionally required to give charters to schools that promote worship, teach religion as truth, and exclude students, families, and prospective teachers who do not conform to the school's religious identity, we will be witnessing a complete revolution in constitutional norms.

This possibility is now being tested concretely in Oklahoma, where a state agency in 2023 approved a charter for a virtual school to be operated by the Archdiocese of Oklahoma City.[290] As proposed, the school would reach out to various populations of indigenous people on reservations and would inculcate students in traditional principles of the Roman Catholic faith. The approval flies in the face of several provisions in the Oklahoma Constitution – one barring all state financial support of "any sect, church, denomination, or system of religion,"[291] and

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[286] Id. at 1781-1784.

[287] As we wrote in "Remains," ". . . the Court's turn to originalism has been notoriously selective. *See generally, e.g.*, Richard H. Fallon, Jr., Selective Originalism and Judicial Role Morality (Feb. 3, 2023) (unpublished manuscript), http://ssrn.com/abstract=4347334; Caroline Corbin, Opportunistic Originalism and the Establishment Clause, 53 WAKE FOREST L. REV. 617 (contrasting *Trinity Lutheran* with *Town of Greece v. Galloway*). Only in the Trilogy, however, has the Court managed to achieve a trifecta—radically change the law, totally ignore the original public meaning of the text, and repudiate the relevant constitutional history." Lupu & Tuttle, Remains, note __ supra, at 1787, n. 31.

[288] 140 S. Ct. at 2259.

[289] The plurality opinion in Mitchell v. Helms, 530 U.S. 793 (2000) would have eliminated the current Establishment Clause bar on direct state support for religious education, so long as government provided the same assistance to religious entities as it provided to their secular counterparts. For now, however, the concurring opinion in *Mitchell* by Justices O'Connor and Breyer, requiring safeguards against diversion of state support to religious training, represents the controlling law. Id. at 836, 861-866. For further discussion, see Lupu & Tuttle, Remains, note ___ supra, at 1775-1781.

[290] Sarah Mervosh, *Oklahoma Approves First Religious Charter School in the U.S.*, N.Y. TIMES (June 7, 2023), https://www.nytimes.com/2023/06/05/us/oklahoma-first-religious-charter-school-in-the-us.html.

another requiring that public schools be "free of sectarian control and open to all students."[292] Defenders of the charter school have insisted that those provisions violate the federal Free Exercise Clause, as construed in the New Trilogy.[293]

Moreover, the Supreme Court's decision in *Fulton v. City of Philadelphia*[294] invites the school to resist any state law obligations that would compromise its religious identity.[295] These include the requirement of a secular curriculum, and norms of non-discrimination generally imposed on charter schools in Oklahoma. The latter, which protect employees and students, include prohibitions on religious discrimination and LGBTQ discrimination. Thus, if the school has its way, it will benefit from 100% state funding while maintaining a set of religion-based privileges against regulatory norms that accompany that funding.

A group of state taxpayers has filed suit in Oklahoma state courts, alleging that the approval of the charter and the terms of approval violate the state Constitution and a variety of state laws concerning the operation of charter schools.[296] More recently, the Oklahoma Attorney General has filed a separate petition, seeking on similar grounds to enjoin the approval of the charter, directly with the Oklahoma Supreme Court.[297]

Commentators on this situation have argued that the crucial question for the courts to decide in this context is whether charter schools are private schools (and therefore not state actors), or public schools (and therefore state actors).[298] If the schools are private, this line of thinking holds, they are protected by the Free Exercise Clause. Under the New Trilogy, such

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[291] Okla. Const., Art. II, sec. 5.

[292] Id. at Art. I, sec. 5.

[293] The Oklahoma Attorney General agreed with this assessment, Okla. Att'y Gen., Attorney General Opinion Letter, https://oklahoma.gov/content/dam/ok/en/governor/documents/Attorney%20General%20Opinion%202022-7.pdf. His successor soon after disagreed. "Drummond says Religious Charter School Approval is Unconstitutional," OFF. OKLA. ATT'Y GEN. (June 5, 2023), https://www.oag.ok.gov/articles/drummond-says-religious-charter-school-approval-unconstitutional. The newly developed free exercise doctrine of nondiscrimination, profoundly ahistorical and nonoriginalist, is doing all the work in Oklahoma. *Pierce* is cited only once in the trilogy, in passing in Espinoza. 140 S. Ct. at 2261.

[294] 141 S. Ct. 1868 (2021) (Catholic Charities entitled to a religious exemption from the City's contractual nondiscrimination provisions for nonprofits screening prospective foster parents).

[295] In Colorado, religious pre-schools eligible for state funds have filed suit, asserting that the Free Exercise Clause exempts them from funding conditions inconsistent with their religious identity, see (http://religionclause.blogspot.com/2023/10/christian-pre-school-may-get-state-aid.html). A similar suit is pending in Maine in light of post-Carson v. Makin charges in state law. Christian School Sues Over "Poison Pill" Provision that Excludes It from Maine's Tuition Payment Program, https://religionclause.blogspot.com/2023/03/christain-school-sues-over-poison-pill.html.

[296] "Suit Challenges Oklahoma's Approval of Catholic Charter School, https://religionclause.blogspot.com/2023/08/suit-challenges-oklahomas-approval-of.html.

[297] http://religionclause.blogspot.com/2023/10/oklahoma-ag-sues-states-charter-school.html. The Brief in support of the petition is here: https://www.oag.ok.gov/sites/g/files/gmc766/f/documents/2023/sgu_brief_in_support_of_application_and_petition_-_st_isidorefinal-clean.pdf

[298] Compare Justin Driver, *Three Hail Marys:* Carson, Kennedy, *and the Fractured Détente Over Religion and Education*, 136 HARV. L. REV. 208, 228–33 (2022) (charter schools are state actors) *with* Nicole S. Garnett, *Sector Agnosticism and the Coming Transformation of Education Law*, 70 VAND. L. REV. 1, 42–65 (2017) (charter schools are not state actors). See generally Julie F. Mead, Devilish Details: Exploring Features of Charter School Statutes That Blur the Public/Private Distinction, 49 Harv. J. Legis. 349 (2003).

schools must be treated no worse than secular applicants for charters.[299] Their Free Exercise status also means that, under decisions like *Fulton v. City of Philadelphia*[300] and *Our Lady of Guadalupe v. Morrissey-Berru*,[301] the schools may be entitled to free exercise exemptions from various kinds of non-discrimination conditions.[302] If, by contrast, the schools are considered state actors, the Establishment Clause prohibits them from teaching the truth of any religion, and the Free Exercise Clause would give them no ground on which to refuse to comply with non-discrimination conditions in hiring and admissions.[303]

There are plausible arguments against the state actor label. As Professor Nicole Stelle Garnett has explained, charter schools came into being as an option to traditional public schools, operated by local school districts.[304] They typically are proposed and operated by some sort of private enterprise, usually but not always not-for-profit.[305] By design, they are given freedom to innovate denied to conventional public schools.[306] Those considerations push away from the notion of charter schools as state actors, and the question of state funding is not itself wholly dispositive.[307]

In Oklahoma, however, the arguments the other way seem far stronger. As explained in the Brief by the Oklahoma Solicitor General in support of its application to the state Supreme Court to enjoin approval of the Catholic charter school, the state legislature has explicitly designated charter schools as "public schools."[308] In addition to the 100% state financing of charter schools and the State's role in bringing charter schools into existence, the Brief emphasizes the extensive oversight of charter schools by state authorities.[309] This oversight includes the imposition of accreditation standards stricter than those in force for public schools; requirements regarding health, safety, civil rights, and insurance; and extensive obligations to report student performance.[310]

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[299] To be clear, this is not my view. I believe that the Establishment Clause precludes direct state support of religious indoctrination, regardless of whether the schools are state actors.

[300] 593 U.S. ___, 141 S. Ct. 1868 (2021).

[301] 591 U.S. ___, 140 S. Ct. 2409 (2020) (ministerial exemption from non-discrimination laws applies to early grade teachers in Roman Catholic school).

[302] Professor Tuttle and I criticize the growing tendency toward institutional free exercise exemptions in Ira C. Lupu & Robert W. Tuttle, The Radical Uncertainty of Free Exercise Principles: A Comment on Fulton v. City of Philadelphia, American Constitution Society Sup. Ct. Rev., 5th ed., 221-256 (2021); see Lupu & Tuttle, Remains, note ___ supra, at 1805-1809.

[303] The leading decisions on the status of charter schools include Peltier v. Charter Day Sch., Inc. 37 F. 4th 104 (4th Cir. 2022) (en banc) (holding that charter schools in North Carolina are state actors), and Caviness v. Horizon Community Learning Center, 590 F. 3d 806 (9th Cir. 2010) (holding that charter schools in Arizona are not state actors). Neither *Peltier* nor *Caviness* involved questions of Establishment Clause compliance.

[304] Garnett, Religious Charter Schools, at 8-10.

[305] Id. at 9.

[306] Id. at 10.

[307] Id. at 9 (citing Rendell-Baker v. Kohn, 457 U.S. 830 (1982)

[308] Gentner Drummond, Attorney General vs. Oklahoma Statewide Virtual Charter School Board, Brief in Support of Petition for Writ of Mandamus and Declaratory Judgment, available here: https://www.oag.ok.gov/sites/g/files/gmc766/f/documents/2023/sgu_brief_in_support_of_application_and_petition_-_st_isidorefinal-clean.pdf, at 11 (citing Okla. Stat. tit. 70, sec. 3-132(D)).

[309] Id. at 13.

[310] Id.

Despite this sort of combination of exclusive funding and widespread control by states over charter schools, I fear that a decision on this point by the U.S. Supreme Court will be the product of a rising tide of favor for religious schools rather than a principled view of state action. Before the enactment of a broad set of federal civil rights laws in the 1960's, courts had incentives to find state action in ambiguous contexts,[311] as a way of triggering the applicability of the Equal Protection Clause and thereby outlawing race discrimination in arguably private contexts. The charter school problem invites the reverse – refusing to find state action in arguably public, state-infused situations, as a way of de-constitutionalizing them.

Even if the Supreme Court were inclined to go this far in a situation of state law ambiguity, there would remain the question of state legislative control over the designation of charter schools as state actors. Politically liberal states are likely to maintain secular charter schools while refusing to charter schools that teach religious faith. These states would be well advised to explicitly designate charter schools as agents of the state. Red states like Oklahoma would have the opposite incentives and might try to weaken state control over charter schools, and/or relabel them as private,[312] to confer upon them a different constitutional status.

Leaving the matter to clear statement by the states, however, would recreate the structure condemned in the New Trilogy, whereby some states expressed clear constitutional preference for funding secular over religious enterprise. The Trilogy thus raises the possibility that states are powerless to create any option to traditional public schools unless schools teaching religious faith are afforded equal opportunity to participate in the scheme. This three-step move – charter schools are presumptively private actors, states may not alter that status for the purpose of excluding religious schools from charters, and states may not exclude thickly religious charter applicants – would mean that charter schools teaching religion as truth will soon appear in many states. Whether all faiths, no matter how unpopular in certain states, will get the opportunity to operate their own charter schools remains to be seen.

The charter school arrangements that I am describing represent quite a tumble. The architects of *Meyer-Pierce* (and their progeny over the next 100 years) never contemplated anything like this scenario. Indeed, the nine Justices unanimous on the most basic principle in *Everson* v. *Board of Education* (1947) would be flabbergasted at the notion that the states could undermine the basic structure of school finance and Religion Clause policy by the innovation of charter schools.[313] Perhaps that is where we are headed, though the legacy of *Meyer-Pierce* so far appears to have had little to do with this fast-growing trend. Rather, the Court's recent, rabid, and ahistorical Free Exercise activism is doing all the work.

CONCLUSION

[311] See, e.g., Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

[312] Garnett, Religious Charter Schools, at 14 (recommending this sort of legislative action).

[313] Justice Breyer raised this precise concern in his dissenting opinion in *Espinoza*. 140 S. Ct. at 2281, 2291 (Breyer, J., dissenting). Justice Kagan did not join in this part of the dissent.

As my work on this paper progressed, I became drawn to the image of the old Trilogy -- *Meyer, Pierce* and *Farrington* -- as a slow-moving vehicle, traveling across time. The journey began with rights of contract, property, and parental authority aboard.

Within fifteen years, protection of property and contractual freedom had been jettisoned, and *Farrington* had been cut loose. But the *Meyer-Pierce* vehicle for parental rights picked up new cargo along the way, including sensitivity for the vulnerability of minorities, First Amendment concerns about religion and speech, and family privacy. The vehicle eventually grew long and strong enough to carry parental interests in the well-being of their children in matters of health, physical and mental, as well as in education.

Ths metaphor captures the movement and expansion of *Meyer* and *Pierce* as of the turn of the Millennium, when the Court decided *Troxel*, the last decision in the line originating in *Meyer*. Since then, so much in constitutional law has changed abruptly that scholars might fruitfully ask whether that vehicle has been abandoned, and others taken its place.

Parents seeking treatments, otherwise available for both cisgender minors and adults, for their children suffering gender dysphoria have due process claims as strong as any the law has seen since *Meyer*, *Pierce*, and *Farrington*. Yet those claims are at risk of failure. In their place, the rhetoric of parents' rights has been corrupted to justify book banning and various conservative curricular goals. Moreover, religious schools seeking full state financing of religious education, while trying to stymie enforcement of conditions designed to protect equal educational opportunity, are finding a legal landscape far more hospitable than any in our history.

Culture wars of the 1920's produced *Meyer* and *Pierce*, whose anniversary we mark. The culture wars of the 2020's may dramatically undo that legacy and replace it with an entirely different constitutional narrative. Nevertheless, we can expect constitutional lawyers to operate in the name of the *ancien regime*, pretending to continuity in a world that our forebears would scarcely recognize.