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## ARTICLE

### HOMESCHOOLING AS A CONSTITUTIONAL RIGHT: A CLOSE LOOK AT *MEYER* AND *PIERCE* AND THE *LOCHNER*-BASED ASSUMPTIONS THEY MADE ABOUT STATE REGULATORY POWER

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Is homeschooling a constitutional right? A homeschooling advocate asked me this question several years ago, and I have been struggling with it ever since. I believe, on one hand, that homeschooling is the best option for some families, and its legal availability is a critical check-and-balance on the government's heavy-handed power to educate children;<sup>1</sup>

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1. Academics ominously leverage this governmental power and argue it should be exclusive and enforced. *See, e.g.*, JAMES G. DWYER, *RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS* (1998); Barbara Bennett Woodhouse, *"Who Owns the Child?": Meyer and*

but I also have a Scalian preference for democratic decision-making where the constitutional text is unclear and distaste for Rights-R-Us jurisprudence.<sup>2</sup>

Before the two key Taft Court decisions examined in this essay, *Meyer v. Nebraska*<sup>3</sup> and *Pierce v. Society of Sisters*,<sup>4</sup> American law rarely used “rights talk”<sup>5</sup> regarding parental functions in education. Prior to these decisions, organized schooling proceeded forward from the 1850s on the crest of apparent, progressive inevitability. When, however, the line was crossed between compulsory organized schooling *of some sort*—often with considerable parental input—and compulsory schooling run by local government, with parents seen more as irrelevant<sup>6</sup> or even a problem,<sup>7</sup> a constitutional order preoccupied with traditional rights and

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*Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992); Kimberly A. Yuracko, *Education off the Grid: Constitutional Constraints on Homeschooling*, 96 CALIF. L. REV. 123 (2008). *But see* Noa Ben-Asher, *The Lawmaking Family*, 90 WASH. U.L. REV. 363, 366–67 (2012); Stephen L. Carter, *Parents, Religion, and Schools: Reflections on Pierce, 70 Years Later*, 27 SETON HALL L. REV. 1194, 1195 (1997); Edward McGlynn Gaffney, Jr., *Pierce and Parental Liberty as a Core Value in Educational Policy*, 78 U. DET. MERCY L. REV. 491, 493 (2001); Richard W. Garnett, *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109, 114 (2000); Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 938 (1996).

2. This is an approach to constitutional judging that recognizes an appropriate and urgent role for the judiciary in discovering unrecognized rights in the Constitution, with a desire to keep the Constitution flexible and “facilitative.” Justice Brennan defends this view of “facilitative” in his dissent in *Michael H. v. Gerald D.*, 491 U.S. 110, 141 (1989) (Brennan, J., dissenting). As implied in the text, Justice Scalia, author of the plurality opinion in *Michael H.*, is a leading opponent of this type of judging. *Id.* at 122 (plurality opinion). As will be discussed, Justice Scalia even has his doubts about the two cases on which parental rights in education principally rely, as far as the Supreme Court support is concerned. *See Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

3. *See generally Meyer*, 262 U.S. 390 (holding that Nebraska exceeded its police power by enacting a statute prohibiting the teaching of foreign languages).

4. *See generally Pierce*, 268 U.S. 510 (invalidating an Oregon statute that interfered with parents’ right to choose their child’s education).

5. The term comes from Professor Mary Ann Glendon’s book, *Rights Talk*. MARY ANN GLENDON, *RIGHTS TALK* (1991) (critiquing the isolated individualism that undergirds some rights claims and rights rhetoric in modern constitutional law). *Meyer* and *Pierce* do not come within this ban as they explicitly match rights with duties, just as Professor Glendon would have it.

6. PAULA ABRAMS, *CROSS PURPOSES: PIERCE V. SOCIETY OF SISTERS AND THE STRUGGLE OVER COMPULSORY PUBLIC EDUCATION* 94–95 (2009); CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780–1860*, at 3 (1983).

7. *See infra* note 46 and accompanying text.

freedoms eventually drew a line in the sand. Despite current attempts to erase that line, sufficient support across the ideological spectrum has retained the recognition it deserves.

Does a parent's right to choose private schools, including religious ones, extend to home school? From around 1970 to the present, homeschooling in the United States has gone from outrageous to trendy.<sup>8</sup> This is hardly the only social phenomenon to accomplish this in American history.<sup>9</sup> Legislative reforms have made homeschooling fully legal in all states, with varying degrees of regulation.<sup>10</sup> Does this

8. Linda Perlstein, *Why Urban, Educated Parents Are Turning to DIY Education*, NEWSWEEK (Jan. 30, 2012, 9:46 AM), <http://www.newsweek.com/why-urban-educated-parents-are-turning-diy-education-64349>; see also Jennifer Kulynych, *Owning Up to Being a Home-schooling Parent*, N.Y. TIMES (Jan. 22, 2014, 8:11 PM), [http://parenting.blogs.nytimes.com/2014/01/22/owning-up-to-being-a-home-schooling-parent/?\\_php=true&\\_type=blogs&\\_php=true&\\_type=blogs&\\_php=true&\\_type=blogs&\\_r=2](http://parenting.blogs.nytimes.com/2014/01/22/owning-up-to-being-a-home-schooling-parent/?_php=true&_type=blogs&_php=true&_type=blogs&_php=true&_type=blogs&_r=2).

9. One need only think of, for example, the postwar change in attitudes toward sexual conduct that usually goes by the name of "the sexual revolution." Deborah Anapol, *Whatever Happened to the Sexual Revolution?*, PSYCHOLOGY TODAY (Aug. 15, 2012), <http://www.psychologytoday.com/blog/love-without-limits/201208/what-ever-happened-the-sexual-revolution>. Another example might be recent shifts in views of medicinal marijuana use or even nonhabitual recreational marijuana use. The Editorial Board, *Repeal Prohibition, Again*, N.Y. TIMES (July 27, 2014), <http://www.nytimes.com/interactive/2014/07/27/opinion/sunday/high-time-marijuana-legalization>.

10. See ALA. CODE §§ 16-28-1, -2, -2.1, -6 (2012 & Supp. 2014) (referring to home schools as "church schools"); ALASKA STAT. § 14.30.010 (2012); ARIZ. REV. STAT. ANN. §§ 15-802 to -802.01 (2014); ARK. CODE ANN. §§ 6-15-501 to -509 (2013) (featuring an entire subchapter dedicated to homeschooling); CAL. EDUC. CODE §§ 48222-48225 (West 2006); COLO. REV. STAT. § 22-33-104.5 (2013) (recognizing a "primary right and obligation of the parent[s] to choose" schools, including a "nonpublic home-based educational program"); CONN. GEN. STAT. § 10-184 (2013); DEL. CODE ANN. tit. 14, § 2703A (2013); FLA. STAT. §§ 1002.41, .43 (2012); GA. CODE ANN. §§ 20-2-690 to -690.1 (2012 & Supp. 2014) (referring to home schools as "home study programs"); HAW. REV. STAT. § 302A-1132 (2007); IDAHO CODE ANN. § 33-202 (2008); 105 ILL. COMP. STAT. 5/26-1 (2012 & Supp. 2013) (using the term "private school," which the Illinois Supreme Court has held refers to a home school in *People v. Levisen*, 90 N.E.2d 213, 215 (1950)); IND. CODE § 20-33-2-4 (2007); IOWA CODE §§ 299A.1-.12 (2014); KAN. STAT. ANN. § 72-1111 (2013); KY. REV. STAT. ANN. § 159.030 (2006 & Supp. 2013) (recognizing an exemption for "church schools" that may include home schools); LA. REV. STAT. ANN. §§ 17:236-:236.2 (2013); ME. REV. STAT. ANN. tit. 20-A, § 5001-A (2008 & Supp. 2013); MD. CODE ANN., EDUC. § 7-301 (LexisNexis 2014); MASS. GEN. LAWS. ch. 76, § 1 (2012) (including home schools within the definition of "private schools"); MICH. COMP. LAWS § 380.1561 (1979); MINN. STAT. § 120A.22 (2012 & Supp. 2013); MISS. CODE ANN. § 37-13-91 (2013); MO. REV. STAT. § 167.031 (2000 & Supp. 2013); MONT. CODE ANN. § 20-5-102 (2013); NEB. REV. STAT. § 79-1601 (2008 & Supp. 2013) (including home school within the definition of "private schools"); NEV. REV. STAT. § 392.700 (2013); N.H. REV. STAT. ANN. § 193-A:1-:11 (2008 & Supp. 2013); N.J.

progress indicate homeschooling is now a constitutional right? Or, approaching the same question from a very different angle, is there a strand of practice and respect for homeschooling in the American legal history and tradition that a claim of it being “so rooted” in such history and tradition<sup>11</sup> can be made?

My argument will proceed along these lines: In Part I, I will discuss a recent case that discusses a hypothetical right to homeschool in the context of U.S. refugee law. Although the asylum-seekers lost (but have been temporarily reprieved by the executive branch), the Sixth Circuit did not dismiss the claim that homeschooling is a right afforded to American citizens. In Part II, I will show that homeschooling has many features of a substantive due process right, as outlined by a Supreme Court majority decision in *Washington v. Glucksberg*<sup>12</sup> and by a plurality opinion in *Michael H. v. Gerald D.*<sup>13</sup>

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STAT. ANN. § 18A:38-25 (West 2013); N.M. STAT. ANN. § 22-1-2.1 (2006); N.Y. EDUC. LAW § 3204(1) (McKinney 2007 & Supp. 2014); N.C. GEN. STAT. §§ 115C-563 to -565 (2013); N.D. CENT. CODE §§ 15.1-20-04, 15.1-23-01 to -19 (2003 & Supp. 2013); OHIO REV. CODE ANN. § 3321.01(A)(2) (2013); OHIO ADMIN. CODE 3301-34-01 to -06 (2014); OKLA. STAT. tit. 70, § 10-105(A) (2013) (OSCN through 2014 Leg. Sess.) (referring to homeschooling simply as “other means of education”); OR. REV. STAT. § 339.030(1)(e) (2013 & Supp. 2013); 24 PA. CONS. STAT. § 13-1327.1 (2013); R.I. GEN. LAWS § 16-19-1 to -2 (2013); S.C. CODE ANN. § 59-65-40 (2004); S.D. CODIFIED LAWS § 13-27-3 (2004) (providing for “alternative instruction” by a parent or guardian); TENN. CODE ANN. § 49-6-3050 (2002); TEX. EDUC. CODE ANN. § 25.086 (2012) (including homeschooling within the definition of “private school,” *see* Texas Educ. Agency v. Leeper, 893 S.W.2d 432, 433 (Tex. 1994)); UTAH CODE ANN. § 53A-11-102 (2014); VT. STAT. ANN. tit. 16, §§ 11(a)(21), 1121 (2004 & Supp. 2013); VA. CODE ANN. § 22.1-254.1 (2011 & Supp. 2014); WASH. REV. CODE § 28A.225.010(1)(b), (4)–(5) (2012); W. VA. CODE § 18-8-1 (2012); WIS. STAT. ANN. §§ 118.15, .165 (2014); WYO. STAT. ANN. §§ 21-4-101 to -102 (2013).

11. *Cf. Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (citing *Twining v. New Jersey*, 211 U.S. 78, 106, 111–12 (1908)) (holding that Massachusetts could regulate as it saw fit unless it interferes with a right), *overruled by* *Malloy v. Hogan*, 378 U.S. 1 (1964).

12. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the “liberty” specially protected by the Due Process Clause includes the rights to marry, to have children, to direct the education and upbringing of one’s children, to marital privacy . . . . But we “ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.”

*Id.* at 720 (citations omitted) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)).

13. *Michael H. v. Gerald D.*, 491 U.S. 110, 112 (1989) (plurality opinion).

Shifting gears in Part III, I will demonstrate that the U.S. Supreme Court precedents that ground the right to choose private over public schooling, *Meyer v. Nebraska*<sup>14</sup> and *Pierce v. Soc'y of Sisters*,<sup>15</sup> are cases about the *Lochnerian*<sup>16</sup> right to freedom in one's chosen profession. Therefore, for consistency, the concessions these cases make to legitimate state regulation of parental interests in education, which have been interpreted broadly, should in fact be interpreted narrowly. This Part will require consideration of a partial rehabilitation of the long-rejected *Lochner*.<sup>17</sup> My conclusion is that homeschooling historically has substantive due process protection.<sup>18</sup>

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In an attempt to limit and guide interpretation of the [Due Process] Clause, we have insisted not merely that the interest denominated as a "liberty" be "fundamental" (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society. . . . [T]he legal issue in the present case reduces to whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection. We think it impossible to find that it has. In fact, quite to the contrary, our traditions have protected the marital family (Gerald, Carole, and the child they acknowledge to be theirs) against the sort of claim Michael asserts.

*Id.* at 124.

14. *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923).

15. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 532–35 (1925).

16. *Lochner v. New York*, 198 U.S. 45, 64 (1905).

17. DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 1–7 (2011); *see also* TIMOTHY SANDEFUR, *THE RIGHT TO EARN A LIVING: ECONOMIC FREEDOM AND THE LAW* (2010).

18. Conservatives, who maintain that substantive due process is "spinach," as Justice Scalia has called it on at least one off-the-bench speech that I have heard, will have a fundamental problem with this argument. David M. Wagner, *Thomas v. Scalia on the Constitutional Rights of Parents: Privileges and Immunities, or Just "Spinach"?*, 24 REGENT U. L. REV. 49, 49 (2011). But remember that at oral argument for *McDonald v. Chicago*, 561 U.S. 3025 (2010), Justice Scalia urged counsel for Mr. McDonald to choose substantive due process rather than the Privileges and Immunities Clause as the vehicle for incorporating the Second Amendment against the states. *See* Transcript of Oral Argument at 6–7, *McDonald v. Chicago*, 561 U.S. 3025 (2010) (No. 08-1521). Apparently the "spinach" theory goes only so far. *See, e.g., Troxel v. Granville*, 530 U.S. 57 (2000). Scalia did not vote to extend the substantive due process precedents of *Meyer* and *Pierce* but also did not vote to overrule them. *Id.* at 92 (Scalia, J., dissenting). Meanwhile, Justice Thomas agreed with the plurality's continued confidence in *Meyer* and *Pierce* calling for clarification that the rights they protect are fundamental and deserving of strict scrutiny. *Id.* at 80 (Thomas, J., concurring).

I. THE *ROMEIKE* CASE: 2012–2014 AND COUNTING

As members of an Evangelical Free Church in Germany, the Romeike family's religiously grounded educational philosophies clashed with Germany's education laws that reflect profound fear of "parallel societies."<sup>19</sup> The Romeike family sought asylum in the United States on the grounds that they had a "well-founded fear"<sup>20</sup> of being prosecuted if they returned to Germany, where they already had been subjected to "increasingly burdensome fines" for homeschooling.<sup>21</sup> The first hearing officer granted them asylum; however, that ruling was overturned by the Board of Immigration Appeals, and the Sixth Circuit subsequently affirmed the Board's ruling.<sup>22</sup> Representing the Romeikes, the Home School Legal Defense Association appealed to the Supreme Court, but the petition was denied.<sup>23</sup> Within a day of the Supreme Court's decision, however, the Department of Homeland Security indefinitely extended the Romeike family's "deferred action status."<sup>24</sup>

The Romeikes' problem lay more with statutory asylum law—which speaks vaguely in terms of "race, religion, nationality, membership in a particular social group, or political opinion,"<sup>25</sup> any of which *could plausibly include homeschoolers or not*—than with U.S. constitutional law as it applies to homeschooling. The majority opinion by Judge Sutton held, and a concurrence by Judge Rogers underscored, that the United States would have difficulty serving as a universal situs for exercising rights guaranteed by our laws but not those of other

19. *Romeike v. Holder*, 718 F.3d 528, 534 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1491 (2014). A similar concern, pushed by the Ku Klux Klan, helped propel the Oregon School Bill to approval in 1922, setting the stage for *Pierce*. See ABRAMS, *supra* note 6, at 50, 52–57.

20. *Romeike*, 718 F.3d at 530 (quoting 8 U.S.C. § 1101(a)(42)(A) (2012)).

21. *Id.*

22. *Id.* at 530–32 (quoting 8 U.S.C. § 1252(b)(4)(A)–(C)). It should be noted that the decision to appeal the immigration judge's ruling to allow the family asylum was an executive decision and therefore at least notionally attributable, in constitutional terms, to the Obama administration. See 8 U.S.C. §§ 1252(b)(4)(D), 1158(a). Whether any other administration would have made a different decision is, of course, speculation.

23. Michael Farris, *Dangerous Policy Lurks Behind Romeike Triumph*, HOME SCH. LEGAL DEF. ASS'N (Mar. 11, 2014), <http://www.hslda.org/legal/cases/romeike.asp>.

24. *German Home-School Family Will Not Be Deported from US*, BBC NEWS (Mar. 5, 2014, 1:39 PM), <http://www.bbc.com/news/world-us-canada-26454988>; Ben Waldron, *Home Schooling German Family Allowed to Stay in US*, ABC NEWS (Mar. 5, 2014), <http://abcnews.go.com/US/home-schooling-german-family-allowed-stay-us/story?id=22788876>.

25. See 8 U.S.C. § 1101(a)(42)(A) (defining "refugee").

countries.<sup>26</sup> Judge Sutton noted that any congressional attempt to clarify such a result was absent.<sup>27</sup> To this common-sense observation, a common-sense reply may be given: the categories that *are* stated in the asylum statute, taken as a whole,<sup>28</sup> appear generous rather than carefully enumerated. The more plausibly one can argue that homeschooling is a constitutional right in the United States, the better positioned the Romeikes, and future similarly situated families, will be.

It is worth noting the circuit's dismissal of any conclusions drawn from the uncontested fact that Germany's present laws against homeschooling date from 1938, the heart of the Nazi era:

If, as the Romeikes claim, the law emerged from the Nazi era, that would understandably make anyone, including the Romeikes, skeptical of the policy underlying it. But such a history would not by itself doom the law. The claimants still must show that enforcement of the law amounts to persecution under the immigration laws. They have not done so.<sup>29</sup>

Perhaps not.<sup>30</sup> The growing threat to the educational freedom of Catholics, as well as others in Nazi Germany even before 1938, prompted Pope Pius XI to release the only encyclical officially issued in German, *Mit Brennender Sorge* ("With Burning Care").<sup>31</sup> It warned about the anti-Christian, neo-pagan tendencies of Nazi doctrine, the regime's growing assault on religious freedom in education, and the inescapable responsibility of Catholic parents for their children.<sup>32</sup> No one would maintain that the educational environment in Germany today is

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26. *Romeike*, 718 F.3d at 535.

27. *Id.*

28. See 8 U.S.C. § 1101(a)(42)(A).

29. *Romeike*, 718 F.3d at 534.

30. I do not undertake a study of refugee law here.

31. POPE PIUS XI ET AL., GERMANY AND THE CHURCH: ENCYCLICAL OF HIS HOLINESS POPE PIUS XI 203 (*MIT BRENNENDER SORGE*) (1937). Pope Pius wrote specifically to Catholic parents:

[D]o not forget this: none can free you from the responsibility God has placed on you over your children. None of your oppressors, who pretend to relieve you of your duties can answer for you to the eternal Judge, when He will ask: "Where are those I confided to you?" May every one of you be able to answer: "Of them whom thou hast given me, I have not lost any one."

*Id.* (quoting *John* 18:9).

32. *Id.*

the same government that called forth *Mit Brennender Sorge*. But oddly enough, that nation's law is remarkably similar,<sup>33</sup> and the German education system remains strongly statist.<sup>34</sup>

So much, then, for the menacing side of the Sixth Circuit's *Romeike* decision. The opinion also has, from the homeschooling point of view, something of a bright side. While no Supreme Court decision has held that a constitutional right to homeschool exists, the *Romeike* decision is virtually willing to assume the existence of that right: "That the United States Constitution protects the rights of 'parents and guardians to direct the upbringing and education of children under their control,' *Yoder*, 406 U.S. at 233; see *Pierce*, 268 U.S. at 534–35; *Meyer*, 262 U.S. at 400–01, does not mean that a contrary law in another country establishes persecution on religious or any other protected ground."<sup>35</sup> Again, one may regret, and perhaps dispute, the assertion of a disconnect between U.S. parent-child law and U.S. asylum law; one should at least note the breadth of the Court's hypothetical concept of the parental right and duty recognized in *Meyer* and *Pierce*.

## II. SETTING THE STAGE: THE BACKDROP TO *MEYER* AND *PIERCE*

### A. *Theory Before Meyer–Pierce*

If parental rights in education first leapt into constitutional case law with the *Meyer–Pierce* decisions in the early 1920s, some evidence may suggest that homeschooling has deep roots in American history and

33. "German law requires all children to attend public school or state-approved private schools." *Romeike*, 718 F.3d at 530.

34. See Aaron T. Martin, Note, *Homeschooling in Germany and the United States*, 27 ARIZ. J. INT'L & COMP. L. 225, 233–34, 237–38 (2010) (quoting GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. 1 (Ger.)) (noting the continuity of government domination and strict regulation even of private schools in German education between the 1938 Nazi-era law and the present German constitution's articles 6, 7, and 13). The statist policies underlying the German education system effectively run counter to the International Covenant on Economic, Social, and Cultural Rights, which Germany signed on October 9, 1968. International Covenant on Economic, Social, and Cultural Rights art. 13, Oct. 9, 1968, 993 U.N.T.S. 3 ("State Parties to the present Covenant undertake to have respect for the liberty of parents . . . to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions." (emphasis added)).

35. *Romeike*, 718 F.3d at 534 (citations omitted).



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tradition, thus strengthening its case for constitutional protection.<sup>36</sup> Despite the fact that the Constitution did not specifically grant this power over education to Congress, early discussion about education among U.S. statesmen centered on establishing a national university.<sup>37</sup> Theoretical discussion of elementary education also tended to assume it would take place outside the home.<sup>38</sup> However, John Locke raised a surprising and significant exception.

Locke is best known for “launching liberalism.”<sup>39</sup> With various shades of meaning, the word “liberalism” has changed over the centuries and is, perhaps unfairly, not commonly associated with today’s enhancing and affirming parental rights to educating their own children.<sup>40</sup> Let’s set aside the term and look at some of what Locke said on our issue. In the epistle dedicatory to his *Some Thoughts Concerning Education*, Locke writes:

The well Educating of their Children is so much the Duty and Concern of Parents, and the Welfare and Prosperity of the Nation so much depends on it, that I would have every one lay it seriously to Heart; and after having well examined and distinguished what Fancy, Custom or Reason advises in the Case, set his Helping Hand to promote every where that Way of training up Youth, with regard to their several Conditions, which is the easiest, shortest, and likeliest to produce vertuous, useful, and able Men in their distinct Callings . . . .<sup>41</sup>

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36. *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) (“We begin, as we do in all due process cases, by examining our Nation’s history, legal traditions, and practices.”).

37. LORRAINE SMITH PANGLE & THOMAS L. PANGLE, *THE LEARNING OF LIBERTY: THE EDUCATIONAL IDEAS OF THE AMERICAN FOUNDERS* 147–49 (1993).

38. *See, e.g.*, THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 157 (J.W. Randolph ed., Chas. E. Wynne 1853) (1787), *available at* <https://archive.org/download/notesonstateofvi01jeff/notesonstateofvi01jeff.pdf>.

39. *See* MICHAEL P. ZUCKERT, *LAUNCHING LIBERALISM ON LOCKEAN POLITICAL PHILOSOPHY* (2002).

40. It is beyond the scope of this Article to trace how liberalism, once a doctrine of emancipation from state control, came to view private control of education with suspicion in many instances.

41. PANGLE & PANGLE, *supra* note 37, at 54 (quoting *THE EDUCATIONAL WRITINGS OF JOHN LOCKE* 24 (John Williams Adamson ed., Cambridge Univ. Press 2d ed. 1922)). Professor Thomas L. Pangle, coauthor of the work cited above, believed the American founding was a highly Lockean project. *See* THOMAS L. PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM: THE MORAL VISION OF THE AMERICAN FOUNDERS AND THE PHILOSOPHY*

Locke also took up the subject in the *Second Treatise on Government*:

From him [Adam] the world is peopled with his descendants who are all born infants, weak and helpless, without knowledge or understanding; but to supply the defects of this imperfect state till the improvement of growth and age has removed them, Adam and Eve, and after them all parents, were, by the law of nature, “under an obligation to preserve, nourish, and educate the children” they had begotten; not as their own workmanship, but the workmanship of their own Maker, the Almighty, to whom they were to be accountable for them.<sup>42</sup>

The domestic strain in Locke’s view of education runs fairly deep. Contrasting Benjamin Franklin’s and Locke’s advocacy of teaching young people classical history, the Pangles note that Franklin wanted students to read history in Latin as a way of learning history while Locke wanted students to read history in Latin (the historians being generally easier than the poets) as a way of learning Latin.<sup>43</sup> A sideline to this curricular debate is how Locke envisioned Latin instruction taking place as part of his home-education program:

With a view to educating gentlemen, he offered fascinating new methods of learning Latin, with a stress on beginning by way of daily conversation and reading aloud, especially when very

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OF LOCKE (1988). *But see* BARRY ALAN SHAIN, *THE MYTH OF AMERICAN INDIVIDUALISM: THE PROTESTANT ORIGINS OF AMERICAN POLITICAL THOUGHT* (1994). Whatever the extent of Locke’s influence on the Founders, he was a posthumous player in their discussions through his writings.

42. JOHN LOCKE, *THE SECOND TREATISE ON GOVERNMENT* 32 (Thomas P. Peardon ed., Liberal Arts Press, 2d reprinted 1954) (1690). Locke’s references to Adam and Eve should not be dismissed as “fundamentalism” but rather accepted as participation in a standard mode of argument of his time. Locke’s *First Treatise on Government*, rarely cited now, is a reply to Sir Robert Filmer, a theorist whose fame seems to rest today mostly on Locke’s decision to refute him. JOHN LOCKE, *TWO TREATISES ON GOVERNMENT* v (R. Butler et al. eds., 1821) (1690). Filmer argued that Adam is both our father and king, and therefore, paternal and political authority are the same thing. If that were the case, it would be difficult to see why the state (our “father”) could not remove all our children from us for education. *Compare id.* at x–2, with SIR ROBERT FILMER, *PATRIARCHA, OR THE NATURAL POWER OF KINGS* (1680).

43. PANGLE & PANGLE, *supra* note 37, at 83 (quoting JOHN LOCKE, *SOME THOUGHTS CONCERNING EDUCATION* 264–65 (1693)).

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young with the mother (who Locke was sure could teach herself Latin as they went, “if she will but spend two or three hours in a day with him”) and later with the tutor.<sup>44</sup>

Locke’s view was, of course, not the only one among the Founders. Those more directly influenced by and optimistic about the French Revolution, which Locke never lived to see, were more enthusiastic and took an early role in state education.<sup>45</sup> Diplomat Joel Barlow, Thomas Jefferson’s ally, wrote in a letter from France during the Revolution that France had not gone far enough in certain respects and that he expected more from the United States:

We must not content ourselves with saying, that education is an individual interest and a family concern; and that every parent, from a desire to promote the welfare of his children, will procure them the necessary instruction, as far as may be in his power . . . . These assertions are not true; parents are sometimes too ignorant, and often too inattentive or avaricious, to be trusted with the sole direction of their children; unless stimulated by some other motive than a natural sense of duty to them.<sup>46</sup>

As the next section will show, Barlow’s views lost out in the formation of American legal tradition in the 19th century but made something of a comeback in the 20th century. In any case, they cannot be said to be the only American legal tradition concerning parents, children, and education.

*B. Practice Before Meyer–Pierce*

Discerning American attitudes toward the parental role in education before *Meyer* and *Pierce* is complicated. It is easy enough to note the views of those who, so to speak, crowd the microphone among the historical sources—the education reformers who wrote, published, and thereby fixed the historical record. Less evident are the hearty frontiersmen whose children worked with their parents on the farm and were taught the Bible and as much arithmetic needed for their trade—an

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44. *Id.*

45. *Id.* at 99.

46. *Id.* (quoting a letter from Joel Barlow to American citizens, Mar. 4, 1799).

education much like that of Abraham Lincoln, who read Bunyan, Aesop, some Shakespeare, and an elocution book<sup>47</sup> before becoming a great lawyer by reading Blackstone, Chitty's *Pleadings*, Greenleaf's *Evidence*, and Story's *Equity Jurisprudence* in the intervals of his duties as a postman.<sup>48</sup>

Before common school was available, homeschooling was common practice. Whether by wealthier households hiring a clergyman to prepare their sons for the young nation's rapidly developing universities or by parents in humbler households teaching ABCs and basic arithmetic, homeschooling was a known phenomenon.<sup>49</sup> Even where common schools were available, family input into the educational content remained high in the antebellum period.<sup>50</sup> Some esteemed Americans considered professionally organized schools better; few thought that parents who seriously taught their children at home were intruding without claim of right on a state function.

After the Civil War, 19th-century American law saw the parental role in education more in terms of duties than rights, a view continued from common law.<sup>51</sup> Where there is a legal duty, there is a legal obligation to fulfill it. Thus, early public schools did not impose on parents a novel duty and dictate its contours but rather enabled parents to fulfill more adequately a duty they already owed. In terms of a core legal claim, today's home school movement asks little else, while today's education law vests far more authority in schools.

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47. DAVID HERBERT DONALD, LINCOLN 30–31 (1995). Of course, it is speculative how many poor farm boys also read books of American history as Professor Donald says Lincoln did. One must concede the valid likelihood that a great many children in poorer families went uneducated, except insofar as learning their parents' trade.

48. *Id.* at 55.

49. "Elementary education among white Americans was accomplished through parental initiative and informal, local control of institutions. In a few cases, New England colonial legislatures tried to ensure that towns would provide schools *or that parents would not neglect their children's education*, but these laws were weakly enforced." KAESTLE, *supra* note 6, at 3 (emphasis added). The "weak enforcement" is less the point, it seems to me, than the fact that parental teaching was considered a complete substitute for use of schools. I would call attention to the "parental initiative and informal, local control." *Id.*

50. "Most teachers attempted to group children into 'classes' based on the level of their primers, but this was often frustrated by the diversity of texts owned by parents. By jealously defended tradition, children studied from the texts their families sent with them to school." *Id.* at 17.

51. *See, e.g., Bd. of Ed. v. Pusey*, 28 S.E. 896, 899 (Ga. 1897) (referring to "the common-law rule, that education is a duty owed by the parent to the child").

As Professor Ben-Asher<sup>52</sup> points out, state courts saw schools in the late 19th century, and in some cases up to the age of *Meyer* and *Pierce* themselves, not as governmental directors of education but as “service provider[s]”<sup>53</sup> with a “mandate . . . limited to managing the schools and providing services to families, and that they [were] not authorized to manage individual students.”<sup>54</sup> In the absence of authority to manage individual students, the provision of nonmandatory services is a legal arrangement deeply rooted in our nation’s history and tradition that would please most homeschoolers today.

For example, in 1874 in *Morrow v. Wood*,<sup>55</sup> a father instructed his son to pursue only certain studies, excluding geography, and made this known to the public school teacher.<sup>56</sup> When the teacher nonetheless used corporal punishment against the student (as teachers were permitted to do at that time) for not studying geography, the father brought an action against her for assault and battery, which was sustained on appeal.<sup>57</sup> This parent consented to some, but not all, public school courses.<sup>58</sup> Undoubtedly, parents had a right to determine their children’s educational subject matter.<sup>59</sup>

A year later, in *Rulison v. Post*,<sup>60</sup> a public school expelled a student because, as her parents directed, she refused to study book-keeping. The Court stressed the breadth of the legislature’s intent in making education available and the propriety of using expulsion only as a tool to keep order in the classroom.<sup>61</sup> By these standards, the expulsion could not stand and implicitly gave force to the parents’ decision to remove book-keeping from their child’s curriculum.<sup>62</sup> This premium on the parents’ decision became more or less explicit when the court—in language directly anticipating *Pierce* 50 years later—said:

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52. See generally Ben-Asher, *supra* note 1. My debt to Professor Ben-Asher’s case research is considerable and hereby acknowledged.

53. *Id.* at 372.

54. *Id.* at 379.

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

56. *Id.* at 60, 62.

57. *Id.* at 63–64, 66.

58. *Id.* at 65, 66.

59. *Id.* at 64 (noting that “it is one of the earliest and most sacred duties taught the child, to honor and obey its parents”).

60. *Rulison v. Post*, 79 Ill. 567, 569 (1875).

61. *Id.* at 570–71.

62. *Id.* at 573–74.

Parents and guardians are under the responsibility of preparing children intrusted to their care and nurture, for the discharge of their duties in after life. Law-givers in all free countries, and, with few exceptions, in despotic governments, have deemed it wise to leave the education and nurture of the children of the State to the . . . parent or guardian. This is, and has ever been, the spirit of our free institutions.<sup>63</sup>

In the 1877 Illinois case, *Trustees of Schools v. People ex rel. Martin van Allen*,<sup>64</sup> a father did not want his son, otherwise eligible to attend the public high school, to study grammar. For this reason, the school denied admission.<sup>65</sup> The Court held for the father and son: “No particular branch of study is compulsory upon those who attend school, but schools are simply provided by the public in which prescribed branches are taught, which are free to all within the district between certain ages.”<sup>66</sup> This supports Professor Ben-Asher’s “service provider” model of late 19th-century public schooling.<sup>67</sup> More fundamentally for our purposes, it points to a model where education is basically homeschooling, but now with more resources. Some parents (whose primacy in knowing what is best for their children may be rebutted but is otherwise something the state is “presuming,”<sup>68</sup> as the *Martin van Allen* Court puts it) use more of those resources while others use less. Many homeschoolers today are happy with and even demand access to certain resources of the local

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63. *Id.* at 573. Compare this passage with the canonical passage from *Pierce*:

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

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

64. *Trs. of Sch. v. People ex rel. Martin Van Allen*, 87 Ill. 303, 305 (1877).

65. *Id.*

66. *Id.* at 308.

67. See *supra* note 53 and accompanying text.

68. *Martin Van Allen*, 87 Ill. at 308.

public school and make extensive use of community colleges.<sup>69</sup> The sometimes very different 1870s values should not distract us from the similarities between educational arrangements existing at that time and those that homeschoolers today either desire or want to protect.

Moving over to Nebraska in 1891, *State ex rel. Sheibley v. School-Dist. No. 1* virtually involved a homeschooling family.<sup>70</sup> The student, 15-year-old Anna Sheibley, was “pursuing studies outside of those taught in the school, which occup[ied] a portion of her time.”<sup>71</sup> To make room in Anna’s schedule, Mr. Sheibley jettisoned the disfavored perennial of the era in the school’s prescribed study—grammar.<sup>72</sup> The school tried to expel Anna.<sup>73</sup> The Court held: “[N]o pupil . . . can be compelled to study any prescribed branch against the protest of the parent that the child shall not study such branch, and any rule or regulation that requires the pupil to continue such studies is arbitrary and unreasonable.”<sup>74</sup>

The first specific reference to homeschooling, however elliptical, is found in a 1909 Oklahoma case called *School Board Dist. No. 18 v. Thompson*.<sup>75</sup> The family wanted to opt their children out of singing; the children were subsequently expelled and the parents sued.<sup>76</sup> This time, the court considered mandatory attendance a factor<sup>77</sup> but not so as to turn the court against the parents or even against a variety of alternatives to public schools as means of compliance:

Our [state] Constitution provides for compulsory education, but it leaves the parents free to a great extent to select the course of study. They may send their children to public schools and require them to take such of the studies prescribed by the rules as

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69. See Paul J. Batista & Lance C. Hatfield, *Learn at Home, Play at School: A State-by-State Examination of Legislation, Litigation and Athletic Association Rules Governing Public School Athletic Participation by Homeschool Students*, 15 J.L. ASPECTS SPORTS 213 (2005); Mary Rice Hasson, *The Changing Conversation Around Homeschooling: An Argument for More Data and Less Technology*, 7 U. ST. THOMAS J.L. & PUB. POL’Y 1, 8–11 (2012).

70. *State ex rel. Sheibley v. Sch.-Dist. No. 1*, 48 N.W. 393 (Neb. 1891).

71. *Id.* at 394–95.

72. *Id.* at 394.

73. *Id.*

74. *Id.* at 395.

75. *Sch. Bd. Dist. No. 18 v. Thompson*, 103 P. 578, 581 (1909).

76. *Id.* at 578. They appeared to be fine with the grammar, but that is not the point.

77. *Id.* at 581. Some states at first introduced public schools without compulsory attendance laws; for example, Georgia. See *Bd. of Ed. v. Purse*, 28 S.E. 896, 900 (Ga. 1897).

will not interfere with the efficiency or discipline of the school, or they may withdraw them entirely from the public schools and send them to private schools, or provide for them *other means of education*.<sup>78</sup>

These cases do not represent the sole view of parental authority versus institutional school authority; *Thompson* even mentions a contrary case.<sup>79</sup> These cases even fall short of showing that homeschooling, *per se*, was a widespread and judicially protected practice in the post-Civil War era, the dictum in *Thompson* notwithstanding. However, they do show that public schools were introduced into the states amid a homeschooling spirit, or more precisely, amid a set of legal assumptions congenial to homeschooling. Such a showing is essential to making the case that home jurisdiction over education is deeply rooted in our nation's legal history within the meaning of *Glucksberg*.<sup>80</sup> Public schools were simply introduced as "service providers"<sup>81</sup> to parents who would delegate some, but not necessarily all, of their teaching authority to that provider, without losing that authority.

### C. A Changeover to Statism

As the 19th century progressed, so did the "progressive" idea that education could best—or only—take place outside the home.<sup>82</sup> In 1912, just three years after Oklahoma's parent-friendly opinion in *Thompson*, the Supreme Court of Washington State delivered *State v. Counort*.<sup>83</sup> The court shifted away from a parental rights focus:

We have no doubt many parents are capable of instructing their own children, but to permit such parents to withdraw their children from the public schools, without permission from the superintendent of schools, and to instruct them at home, would

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78. *Thompson*, 103 P. at 581 (emphasis added).

79. See *State ex rel. Andrews v. Webber*, 8 N.E. 708, 713 (Ind. 1886) (holding that music instruction may be required by a public school and that recalcitrant students may be expelled for refusing to take part).

80. See *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Michael H. v. Gerald D.*, 491 U.S. 110, 112, 124 (1989).

81. Ben-Asher, *supra* note 1, at 372.

82. ABRAMS, *supra* note 6, at 93–98; see also KAESTLE, *supra* note 6, at 63.

83. *State v. Counort*, 124 P. 910 (Wash. 1912).



be to disrupt our common school system, and destroy its value to the state.<sup>84</sup>

The trend toward statism, evident in the *Counort* opinion, is evidence that America's rapid industrialization constituted a multi-decade growth in a vision of public schools with an innovative leap in the ambitions of those schools' leaders as directors of society. If a historian seeks the influence of "big business" in the *Lochner* era, perhaps now it will be found more in the plans of public school theorists than in the Supreme Court's doctrine of freedom of contract. For example, Ellwood Cubberly of Stanford University wrote in 1916:

Our schools are, in a sense, factories in which the raw products (children) are to be shaped and fashioned into products to meet the various demands of life. The specifications for manufacturing come from the demands of the twentieth-century civilization, and it is the business of the school to build its pupils according to the specifications laid down.<sup>85</sup>

I do not accuse the *Counort* court of being Cubberlian: I suggest only that what Professor Raymond A. Callahan calls the "cult of efficiency"<sup>86</sup> in education was a new and strong force in the decade before *Meyer-Pierce*. Therefore, cases that strongly affirmed a state's power to take a child from the home for part of the day or year may have represented a then-recent trend that ran against a deep-rooted tradition in either the original Constitution or the Civil War Amendments.

Yet something happened between the post-Civil War gelling of the public school system and the post-World War II gelling of modern First Amendment law (where parental claims such as those seen earlier in this Article have actually fared worse under the Free Exercise Clause than they did under common law of the late 19th century).<sup>87</sup> What happened

84. *Id.* at 91. *See also* *State v. Hoyt*, 146 A. 170 (N.H. 1929) (rejecting a claim of right to homeschool and giving broad interpretation to dicta in *Pierce* concerning the state's right to inspect private schools).

85. ELLWOOD P. CUBBERLY, *PUBLIC SCHOOL ADMINISTRATION* 338 (1916).

86. RAYMOND E. CALLAHAN, *EDUCATION AND THE CULT OF EFFICIENCY* 152 (1962).

87. The example of such parental defeat most covered by the media is *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987). Similarly to the cases from 1874 to 1909, parents and their children objected to specific elements in the curriculum and requested study hall during that time without seeking any effect on other students' exposure to the controverted materials. *Id.* at 1063. The result was quite different from

exactly? Professor Ben-Asher detects a shift paradoxically coming *after Meyer and Pierce*, a shift in the parent-versus-school cases from a pro-parent presumption to a pro-school presumption.<sup>88</sup> Did the judicial backstop of *Meyer–Pierce* give judges a sense that they could now favor schools, confident that if they went too far, an appeals court would “*Pierce* them down”? Or was the growth of school bureaucracies itself a part of the deliberate and directed growth of bureaucracy at all levels of government, a part of the phenomenon that historian Stephen Skowronek has called “state-building”?<sup>89</sup> Though state-building leaves these schools to one side, it describes Progressives’ systematic nourishment of new government forms, to which courts gradually and reluctantly learned to defer.<sup>90</sup> State growth historians who cover education, such as Professor Callahan in his *Education and the Cult of Efficiency*,<sup>91</sup> tell a similar story.

### III. CATEGORIZING *MEYER–PIERCE* WITHIN CONSTITUTIONAL DOCTRINE

#### A. Occupational Freedom and the Narrowness of Permissible Regulation

The Court’s reception of *Meyer* and *Pierce* has evolved.<sup>92</sup> Their immediate effect was to curb governmental limits on parental options in their children’s education; *Prince v. Massachusetts*<sup>93</sup> broadened *Meyer* and *Pierce* (though arguably in dicta, since the parental interest, while recognized, did not prevail) to include parental options in upbringing

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the late 19th-century outcomes. It was effectively impossible for the plaintiffs to influence the “spin”: they were widely reported as wanting to ban everyone else’s books as well as avoid certain materials for their own families, otherwise seen as mere exemplars of a social disease called “fundamentalism.” See, e.g., EUGENE F. PROVENZO, JR., RELIGIOUS FUNDAMENTALISM AND AMERICAN EDUCATION 26–27 (1990). This distinction—private exemption versus school-wide suppression—has even been lost on federal courts of appeals, as in *Brown v. Hot, Sexy & Safer Productions*, 68 F.3d 525, 533 (1st Cir. 1995) (stating solemnly that exemption-seeking parents could not “dictate the curriculum”). *Id.* at 533. Professor Ben-Asher generally discusses this trend in her article. Ben-Asher, *supra* note 1, at 385–98.

88. Ben-Asher, *supra* note 1, at 372.

89. STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877–1920, at 3, 14–15 (1982).

90. *Id.* at 287.

91. See, e.g., CALLAHAN, *supra*, note 86.

92. I have discussed this previously. See, e.g., David M. Wagner, *The Constitution and Covenant Marriage Legislation: Rumors of a Constitutional Right to Divorce Have Been Greatly Exaggerated*, 12 REGENT U. L. REV. 53, 55–56 (2000).

93. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

more generally. Though *Prince* subordinated the parental rights claim to the claims of the state to regulate child labor,<sup>94</sup> it also affirmed that *Meyer* and *Pierce* had survived the wreckage of pre-1937 substantive due process.<sup>95</sup> Twenty-two years later, *Griswold v. Connecticut*<sup>96</sup> tried to achieve substantive due process results without substantive due process methods. It reinterpreted *Meyer* and *Pierce*, somewhat improbably, as First Amendment free speech and free press cases.<sup>97</sup> From *Griswold*, the precedents migrate to the string-cites in *Roe v. Wade*<sup>98</sup> and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>99</sup> a surprising result compared to what both cases originally accomplished and held.

But perhaps *Meyer* and *Pierce* can be best understood not by examining their later itinerary, as one must in litigating or teaching constitutional law, but rather in examining what they actually hold. For example, Mr. Meyer was not a parent seeking to have his children taught German: he was a teacher.<sup>100</sup> The Society of Sisters of the Holy Name of Jesus and Mary and their coplaintiff, the Hill Military School, were not parents either but educators and teachers.<sup>101</sup> State legislation blocked plaintiffs from exercising their profession.<sup>102</sup> But common law never deemed teaching disreputable, nor did states traditionally regulate it closely or even ban it under health, safety, welfare, and morals powers.

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94. *Id.* at 168–69.

95. Handed down six years after Lochnerian substantive due process had supposedly breathed its last, the *Prince* Court wrote: “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.” *Id.* at 166 (emphasis added) (citing *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925)).

96. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

97. *Id.* at 482 (citing *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943); *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring)).

98. *Roe v. Wade*, 410 U.S. 113, 152–53 (1973).

99. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 951 (1992).

100. *Meyer v. Nebraska*, 262 U.S. 390, 396 (1923) (“Plaintiff in error was tried and convicted . . . [on the grounds that] he unlawfully taught the subject of reading in the German language.”).

101. *Pierce*, 268 U.S. at 531–32. “Appellee, the Society of Sisters, is an Oregon corporation . . . [that] has long devoted its property and effort to the secular and religious education and care of children . . . Appellee Hill Military Academy is . . . engaged in owning, operating, and conducting for profit an element, college preparatory and military training school . . .” *Id.* at 531–33.

102. *Id.* at 514.

Quite the contrary: “The calling [of teacher] always has been regarded as useful and honorable, essential, indeed, to the public welfare.”<sup>103</sup>

Laws restricting such professions were thought to call for the kind of means–ends test that the Court applied in the *Lochner*-type cases,<sup>104</sup> which today is called strict scrutiny. However, during the first era of substantive due process, the Court was reluctant to name the analysis, saying only: “Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.”<sup>105</sup>

Thus, primarily, *Meyer* and *Pierce*, like *Lochner*, were cases about the permissible limits of the states’ police powers to regulate the exercise of a traditional and respectable profession.<sup>106</sup> This was not entirely regulated partly because of a litigation tactic adopted by the Society of Sisters’ counsel, William Guthrie, a prominent New York attorney, Columbia law professor, and proponent of both parents’ rights and Catholic schools, who had also submitted an amicus brief in *Meyer*.<sup>107</sup> Guthrie urged the Court to link teachers’ rights to earn a living with parental rights to choose a school. Thus, from the first-order right of a citizen to exercise an honorable profession without unreasonable regulation, there followed a second-order, but still well-grounded, parental right to patronize the establishment at which the holder of the first right (the teacher) is exercising that right (by teaching).<sup>108</sup> But the first-order right—the right to earn a living in a respectable profession

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103. *Meyer*, 262 U.S. at 400. Justice Scalia labeled *Meyer* and *Pierce* as coming from “an era rich in substantive due process holdings . . . [later] repudiated.” *Troxel v. Granville*, 530 U.S. 57, 92 (2000) (Scalia, J., dissenting). He had a point about the first part—“an era rich in substantive due process holdings”—but less so about the second—“[later] repudiated.” *Id.* The latter requires modification since, as we have seen, *Meyer* and *Pierce* were singled out for nonrepudiation in *Prince v. Massachusetts*—preserved from the tide that otherwise swept away pre-1937 substantive due process, one might say—and have remained good law under one meaning or another. Furthermore, certain of the most heavily criticized precedents of the era under discussion, though often disapproved by the Court, have never been overruled and are enjoying a period of rehabilitation among commentators. See generally BERNSTEIN, *supra* note 17; SANDEFUR, *supra* note 17.

104. *Lochner v. New York*, 198 U.S. 45, 57–58 (1905). “Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground.” *Id.* at 57.

105. *Meyer*, 262 U.S. at 400 (citing *Lawton v. Steele*, 152 U.S. 133, 137 (1894)).

106. This point is developed more fully *infra*, notes 134–35, and accompanying text.

107. ABRAMS, *supra* note 6, at 118.

108. *Id.* at 167–68.

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without unreasonable state interference—was Guthrie’s and the Court’s starting point.<sup>109</sup>

Is the actual holding of *Meyer–Pierce* only the “right to earn a living” part, making the parents’ rights parts dicta? When the Court handed each case down, that argument could have been made (and it was made, concerning *Meyer*, by counsel for Oregon in *Pierce*<sup>110</sup>). But given the still more extensive uses of the *Meyer–Pierce* doctrine,<sup>111</sup> the cases are better used not by a narrow interpretation of their facts but by reading their holdings *plus* the dicta that the Court urgently stressed.

Homeschooling parents are not exercising a profession in the *Meyer–Pierce* sense. But *Meyer* and *Pierce* go further in their dicta, dicta that have been given enhanced status by the Court’s frequent references to them in later cases.<sup>112</sup> For example, the Court attempts to give an idea of the “liberty” protected by the Due Process Clause of the 14th Amendment.<sup>113</sup>

First, amply fulfilling its own observation that “this Court has not attempted to define with exactness the liberty thus guaranteed,”<sup>114</sup> the *Meyer* Court gives a veritable sketch of the respectable, ordinary, probably-not-in-New-York-or-L.A. citizen of the era:

Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.<sup>115</sup>

Although the above passage does not expressly place homeschooling within “liberty” protected by the 14th Amendment, the Court draws an interesting distinction between American child-rearing traditions and Socrates’ plan for state-run collective child-rearing in Plato’s *The*

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109. *Id.* at 121–22.

110. *Id.* at 150.

111. *See* Wagner, *supra* note 92, at 72, and accompanying text.

112. *Id.* at 59–61.

113. *Id.* at 56.

114. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

115. *Id.*

*Republic*,<sup>116</sup> which Sparta practiced as well.<sup>117</sup> Conceding the “great genius” of the state-run child-rearing schemes, the Court then announced that “their ideas touching the relation between individual and state were wholly different from those upon which our [fundamental] institutions rest.”<sup>118</sup> To be “wholly different” from collectivist, statist ideals (such as the Court took Plato to have advocated)<sup>119</sup> is to be in line with individualist, domestic ideals. At this point, homeschooling has come within contemplation, though not advocated in terms.

*B. Pierce, Concessions to State Power, and the Lochnerian Background*

*Pierce* makes concessions to the state’s interest in education, even as to its authority to “regulate” some aspects of private schooling.<sup>120</sup> These state powers, according to *Pierce*, are to be used “reasonably,”<sup>121</sup> a tight restriction in “an era rich in substantive due process holdings.”<sup>122</sup> After these concessions, *Pierce* pivots and repudiates state dominance over children at the expense of parental “liberty . . . to direct the upbringing of children under their control,”<sup>123</sup> in addition to the plaintiffs’ actual economic injury (interference with their right to earn a living and exercise the honorable profession of teacher), denying that such regulations are “within the competency of the State.”<sup>124</sup> The means–ends fit between the law at issue in *Pierce* (which required all children between 8 and 16 to attend exclusively public school “for the period of time a public school shall be held”<sup>125</sup>) was not thin: it was non-existent. This is the context where perhaps the most-quoted dictum from either *Meyer* or *Pierce* appears:

116. *Id.* at 401–02. See PLATO, THE REPUBLIC 147, 151 (Benjamin Jowett trans., Colonial Press 1901). The Court does not provide a citation to the translation of *The Republic* quoted in the case, but, noting the time frame, the Court likely used Benjamin Jowett’s translation.

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

118. *Id.*

119. *Id.* Others take these proposals as thought experiments with which Plato’s Socrates induces his young listeners to think harder about the difficulties of constructing, even in imagination, any kind of ideal political society. See Allan Bloom, *Interpretative Essay* to PLATO, THE REPUBLIC 307–19 (Allan Bloom trans., 2d ed. 1991).

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

121. *Id.*

122. *Troxel v. Granville*, 530 U.S. 57, 92 (2000) (Scalia, J., dissenting).

123. *Pierce*, 268 U.S. at 534–35.

124. *Id.*

125. *Id.* at 530 (quoting 1923 Or. Laws 9 1923).

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.<sup>126</sup>

Guthrie wanted to make sure the Court moved generally from economic freedom to parental rights.<sup>127</sup> This dictum cannot provide an affirmative answer about whether there is a right to homeschooling because it does not mention the practice, and the facts of the case did not concern it. If the rule against state standardization of children—which *is* covered by the facts before the Court in *Pierce*—is still good, there is no clear reason why it should not apply to the anti-standardization methodology of homeschooling. There would still be room left for today’s prevalent “reasonable” regulations in most U.S. states where homeschoolers get along comfortably enough.<sup>128</sup>

As Professor Richard Garnett argued, *Pierce* is more about what the government *may not* do than about what parents *may* do<sup>129</sup>—a distinction made all the more urgent by the ongoing process of state-building. If the state “may not” interfere with parental selection of a private school, it is not a leap to posit that the state “may not” interfere with parental homeschooling. In each case, it is about the limits on what the government may do regarding education, not about parental rights.

Furthermore, in either case, the Court concedes a state residual power to make sure that education takes place adequately in those school settings that it does not control.<sup>130</sup> The question becomes: how extensive can that residual power be? The more *Meyer–Pierce* are understood as drawing from the *Lochner* tradition, the narrower these regulations must be read. *Lochner* acknowledged the legitimacy of state regulation of

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126. *Id.* at 535.

127. ABRAMS, *supra* note 6, at 118–19, 166–67.

128. Sometimes parents need help from the Home School Legal Defense Association (HSLDA). Their website is an ongoing source of information on how state officials exceed their legislated regulatory power and how their legislative proposals increase those powers from time to time. *About HSLDA*, HOME SCH. LEGAL DEF. ASS’N, <http://www.hslda.org/about/> (last visited Aug. 19, 2014). The Author is a past member of HSLDA but not presently affiliated with it.

129. Garnett, *supra* note 1, at 133.

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

bakeries but looked for a rational ends–means fit between those challenged and the state’s asserted health and safety goals.<sup>131</sup> Similarly, *Pierce* held that regulation of private education enjoyed no presumption of rationality but rather must be examined for means–ends fit, where the end is one that the Society of Sisters plainly fulfilled. However, this treatment of *Pierce*’s authorization of regulations has not been applied. As Professor Garnett observed, the “reasonable regulations” permitted in *Pierce* have been over-interpreted because they have “caused many courts to treat the freedom vindicated in that case as a ‘poor relation’ which must ride piggy-back on some other right in order to enjoy meaningful constitutional protection.”<sup>132</sup>

Bringing *Lochner* momentarily out of its constitutional dry-dock and comparing it with *Pierce* may help to understand the breadth or narrowness of the permissible regulations that the *Pierce* Court understood itself to be authorizing. *Lochner* stated:

The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.<sup>133</sup>

In view of the over-interpretation of the *Pierce* “reasonable regulations” dicta, to which Professor Garnett alludes,<sup>134</sup> this may be what the *Pierce* Court meant in its own dicta on reasonable regulation of non-public schools:

The mere assertion that the subject relates though but in a remote degree to [education] does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general

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131. *Lochner v. New York*, 198 U.S. 45, 57–58 (1905).

132. Garnett, *supra* note 1, at 126 n.77 (citing *Pierce*, 268 U.S. at 534).

133. *Lochner*, 198 U.S. at 57–58.

134. Garnett, *supra* note 1, at 126 n.77.



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right of an individual to be free in his person and in his power to contract in relation to his own labor [as a teacher].

Note the only two changes from the previously quoted *Lochner* text: “public health” became “education” and “as a teacher” was added at the end. The latter change may not even have been necessary to get the point across.<sup>135</sup>

*Lochner* is not considered good precedent today, but *Pierce* is. In order to get *Pierce* right, Lochnerian background cannot be ignored. It is precisely because of its contextual background that we should take the background seriously. Against this backdrop, *Pierce*’s concessions to state regulatory power over private education must be read narrowly to the advantage of both homeschooling and private schools.

The breadth or narrowness of these regulations is the Court’s tertiary concern. To go back and read *Meyer* and *Pierce* with fresh eyes is to realize that they are not fundamentally about parental rights at all; they are about teachers’ rights to practice their honorable profession.<sup>136</sup> In other words, *Pierce* is about the freedom of contract in the labor market as applied to teaching. According to the Court, parental rights, though important and extensively elaborated, are derivative of teachers’ rights to teach. The state’s acknowledged regulatory interests must be read in the context of interests in regulation of an otherwise unrestricted right to practice an honorable profession. But such interests were narrowly construed in that “era rich in substantive due process holdings that have since been repudiated,”<sup>137</sup> though *Pierce* of course has not been. Thus,

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135. Consider this passage from *Lochner*:

Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employ  s, if the hours of labor are not curtailed.

*Lochner*, 198 U.S. at 61. Recall that the statute in *Pierce* functioned as a work-hours restriction. Private schools were not forbidden to exist, or even to take pupils, provided they did not take core school-age pupils during core school hours. Apart from that, they were free to exist, if they could, as supplementary educational institutions, just not as schools. *Pierce*, 268 U.S. at 530–31.

136. *Meyer v. Nebraska*, 262 U.S. 390, 396 (1923); *Pierce*, 268 U.S. at 531–33.

137. *Troxel v. Granville*, 530 U.S. 57, 92 (Scalia, J., dissenting).

such attempts to assimilate *Meyer* and *Pierce* to *Lochner* make this point: Insofar as our goal is understanding *Meyer* and *Pierce* as those Courts understood themselves, their concessions to state regulatory power must be construed narrowly. A power to regulate parents' rights (and, by implication, home schools) as if these were public schools must be an interpretation of this regulatory power that by far exceeds what the *Pierce* Court meant.

The debated language—*Pierce*'s concessions to state regulatory power over private education—consist of this:

No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.<sup>138</sup>

In light of the *Lochnerian* background, which teaches that concessions to state power should be construed narrowly in the presence of a constitutional right, this passage evokes several observations. First, "[n]o question is raised" in this case; this is an issue left for another day. Second, "reasonably" is subject to *Lochnerian* means—ends analysis. Third, to "supervise" schools etymologically means to "[k]eep watch over" (*videre* + *super*) them, rather than to run them or to substitute the state's judgment for the schoolmaster's judgment on what their mission or basic pedagogy should be.<sup>139</sup> Fourth, homeschoolers do in fact "attend

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

139. The identification of "supervise" with "manage" or "direct" has worked its way into our Appointment Clause jurisprudence, thus affecting the way we hear the word. *See, e.g.,* *Edmond v. United States*, 520 U.S. 651, 663 (1997) ("[I]n the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."). However, the *Oxford Online Dictionary* preserves, as definition 1.2, "Keep watch over (someone) in the interest of their or others' security," a sense that conveys preserving the object's safety from a distance, rather than micromanaging it from up close. *Supervise*, OXFORD DICTIONARIES: LANGUAGE MATTERS, [http://www.oxforddictionaries.com/us/definition/american\\_english/supervise](http://www.oxforddictionaries.com/us/definition/american_english/supervise) (last visited Aug. 19, 2014).

some school.” Fifth, does “good moral character and patriotic disposition” mean that criminal background checks for teachers are presumably constitutional? Even in those days of residual “red scares,”<sup>140</sup> screening out adherents to revolutionary foreign governments was not a power the Court wished to take away from the state, even with regard to private schools.<sup>141</sup> Sixth, under assumptions that take regulatory powers to their farthest logical lengths, “plainly essential” and “manifestly inimical”<sup>142</sup> would swallow *Pierce* itself, allowing states to do virtually what Oregon did in the Schools Act by controlling private and religious schools’ content rather than by physically placing schoolchildren in public schools. This cannot have been the *Pierce* Court’s intention. Under the *Lochner* mandate of narrow construction (as with “good character” and “patriotic disposition”), the mere recognition of the state’s police power in the relatively nonthreatening 19th century sense of that term—to make sure that utter chaos is not breaking loose—recognizing that definition of deeply rooted traditions as constitutional rights does not deprive the democratic process of all vitality or responsibility. Does the fact that *Lochner* is officially disapproved mean that *Meyer* and *Pierce* should be interpreted without its help? Not if we want to understand *Meyer–Pierce* in terms of what they meant to convey. What to do with the interpretive accretions of later decades is a separate question.

Whatever one’s opinion may be, there is a vigorous movement of *Lochner* revisionism presently under way.<sup>143</sup> This is well-timed to reevaluate *Meyer* and *Pierce* and to discern their implications for homeschooling. Like *Pierce*, *Lochner* considered the state’s legitimate goal and the means–ends fit,<sup>144</sup> much the way *Nollan v. California*

140. See, e.g., KENNETH D. ACKERMAN, YOUNG J. EDGAR: HOOVER, THE RED SCARE, AND THE ASSAULT ON CIVIL LIBERTIES 391 (2007). See also *Schenck v. United States*, 249 U.S. 47 (1919) (upholding convictions for antidraft activities under the Espionage Act); *Gitlow v. New York*, 268 U.S. 652, 670–72 (1925) (holding that a conviction for subversive activities under a state statute did not violate the Constitution). These are examples of the Court going too far to accommodate that era’s ideas of what was “inimical to the public welfare”—always a dangerous concept, which the *Pierce* Court did well to restrain with the modifier “manifestly.” *Pierce*, 268 U.S. at 534.

141. The Court continued to narrowly construe state powers, like this patriotic disposition power that *Pierce* concedes. See, e.g., *Yates v. United States*, 354 U.S. 298, 329–34 (1957) (substantially halting Smith Act prosecutions because there was insufficient nexus between the conspiracy charges and Communist Party members’ advocacy for the forcible overthrow of the government at some future time).

142. *Pierce*, 268 U.S. at 534 (emphasis added).

143. See BERNSTEIN, *supra* note 17, at 6–7.

144. *Lochner v. New York*, 198 U.S. 45, 57–58 (1905).

*Coastal Commission*, a 1987 Fifth Amendment Takings case, measured the fit between the action demanded of the Nollans as a condition of approving an otherwise routine building permit and the goal that condition was meant to achieve.<sup>145</sup> What was valid for the regulatory taking of property should be valid for the regulatory taking of labor, whether as a property owner, baker, or teacher.

*Meyer-Pierce* put some limits on regulation and state-building that risked familial input. Despite the growth of America's public-school system (which *Meyer-Pierce* in no way attacked) and the system's agendas unsympathetic to the autonomy of the family's building-block role in society (an agenda that *Meyer-Pierce*, of course, *did* attack), the role of parents in the education of their children has deep roots in our nation's history and traditions, as affirmed by the Court in *Washington v. Glucksberg*,<sup>146</sup> and, therefore, may claim to be a constitutional right.

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145. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836–38 (1987).

The Commission's principal contention to the contrary essentially turns on a play on the word "access." The Nollans' new house, the Commission found, will interfere with "visual access" to the beach. That in turn (along with other shorefront development) will interfere with the desire of people who drive past the Nollans' house to use the beach, thus creating a "psychological barrier" to "access." The Nollans' new house will also, by a process not altogether clear from the Commission's opinion but presumably potent enough to more than offset the effects of the psychological barrier, increase the use of the public beaches, thus creating the need for more "access." These burdens on "access" would be alleviated by a requirement that the Nollans provide "lateral access" to the beach.

Rewriting the argument to eliminate the play on words makes clear that there is nothing to it. It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any "psychological barrier" to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house. We therefore find that the Commission's imposition of the permit condition cannot be treated as an exercise of its land-use power for any of these purposes.

*Id.* at 838–39. I offer this not to show that beach access is analogous to private education or homeschooling but to show that close scrutiny of state and local action by the Supreme Court, with a view to determining the fit between its concededly legitimate ends and the means chosen to achieve them, is alive and well in the Supreme Court, the supposed death of *Lochner* notwithstanding.

146. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

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## IV. CONCLUSION

The judicial obstacles the Romeike family faced are certainly regrettable, but at least the Sixth Circuit did well not to exclude, even while denying the family's asylum claim, the possibility that U.S. constitutional law might protect their rights to homeschool if they were citizens of the United States instead of Germany. Neither *Meyer* nor *Pierce* articulated a parental right to homeschool children because that right was not at issue before the Court in those cases. Additionally, attorney Guthrie's strategy required pushing the Court somewhat, but not too much. Nonetheless, *Meyer* and *Pierce*, in going beyond the right to practice one's profession, encompassed a parental right to choose private schools (the situation actually before the Court in *Pierce*) and a "liberty of parents and guardians to direct the upbringing and education of children under their control."<sup>147</sup> This was because our "fundamental theory of liberty . . . excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."<sup>148</sup> As this Article has shown, the Court held this against a background in which state law had widely, and for decades, upheld the rights of parents to be the decision-makers in their children's education, even after public schools had opened up and parents were making use of them, whether whole or selective—a choice that was, again, up to them. By the standard of "examining our Nation's history, legal traditions, and practices"<sup>149</sup> and of being deeply rooted in this Nation's history and tradition,<sup>150</sup> homeschooling is eligible as a constitutional right.<sup>151</sup>

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147. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 391–92 (1923).

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

149. *Glucksberg*, 521 U.S. at 710.

150. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1937) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental").

151. Whether a constitutional right to homeschool would fall under the doctrine of substantive due process, as the Court's now-traditional practice would indicate, or under the Fourteenth Amendment Privileges and Immunities Clause, as Justice Thomas would eloquently urge, I do not take a position here. Compare *McDonald v. Chicago*, 130 S. Ct. 3020, 3043 (2011), with *id.* at 3059–62 (Thomas, J., concurring).

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