

# THE LITTLE RED SCHOOLHOUSE: *PIERCE*, STATE MONOPOLY OF EDUCATION AND THE POLITICS OF INTOLERANCE

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If the Oregon School Law is held to be unconstitutional it is not only a possibility but almost a certainty that within a few years the great centers of population in our country will be dotted with elementary schools which instead of being red on the outside will be red on the inside.

– Brief of Appellant, Governor of State of Oregon, in *Pierce v. Society of Sisters*<sup>1</sup>

It need, therefore, not excite our wonder that today no country holds parenthood in so slight esteem as did Plato or the Spartans—except Soviet Russia. There children do belong to the state; . . . In final analysis, it is submitted, the enactment in suit is in consonance only with the communistic and bolshevistic ideals now obtaining in Russia, and not with those of free government and American conceptions of liberty.

– Brief of Appellee, The Society of the Sisters of the Holy Names of Jesus and Mary, in *Pierce v. Society of Sisters*.<sup>2</sup>

In the aftermath of World War I, the specter of communism cast shadows deep into the American psyche. Nativist sentiments, spiked during World War I, combined with fears of leftist revolution to create a culture hostile both to immigrants and to ideas perceived as anti-American.<sup>3</sup> From 1919 to 1929, Attorney

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1. Brief of Appellant, The Governor of the State of Oregon, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), reprinted in OREGON SCHOOL CASES, COMPLETE RECORD 102-03 (Belvedere Press, 1925).

2. Brief on Behalf of Appellee, The Society of the Sisters of the Holy Names of Jesus and Mary, in OREGON SCHOOL CASES, *supra* note 1, at 275.

3. David Rabban, *The First Amendment in its Forgotten Years*, 90 YALE L.J. 514, 581

General A. Mitchell Palmer and his young assistant, J. Edgar Hoover, led a campaign to deport immigrant members of the Communist Party.<sup>4</sup> The drive to assimilate immigrants became a patriotic mission to protect national security.<sup>5</sup> Public education presented a powerful mechanism of assimilation, training impressionable children to become good American citizens.<sup>6</sup> By 1919, thirty-seven states enacted laws restricting the teaching of foreign languages.<sup>7</sup> Questions of patriotism, loyalty, and the meaning of American citizenship dominated public discourse.<sup>8</sup>

Threats to national security also preoccupied the Supreme Court, which upheld the conviction of immigrants, antiwar activists, and socialists for subversive speech under the Espionage and Sedition Acts.<sup>9</sup> The speech cases were representative of the

(1981); Zechariah Chaffee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919).

4. *The Evil That Lurks in the Enemy Within*, N.Y. TIMES, June 16, 2002, §4, at 14. *Look Magazine* published an article on "How to Spot a Communist." *Id.*

5. See e.g., *Harding and Hughes Ask Patriotic Help at D.A.R. Convention*, N.Y. TIMES, April 17, 1923, at 1. Between 1901 and 1920, over 14 million immigrants came to America, the large majority of them from southern and eastern Europe, most of them Catholics and Jews. LOUIS MENAND, *THE METAPHYSICAL CLUB* 381 (Farrar, Straus, Giroux, 1st ed., 2001). For a discussion between the tensions of pluralism and assimilation, see *id.* at 377-408.

6. The common school movement originating in the nineteenth century yielded a well-developed system of universal free public education. See DAVID TYACK ET AL., *LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785-1954*, at 20-42 (1987). In 1920, the sociologist John Daniels described the virtues of public education as children who "go into the kindergarten as little Poles or Italians or Finns, babbling in the tongues of their parents, and at the end of half a dozen years or more he sees them emerge, looking, talking, thinking, and behaving generally like full-fledged Americans." JOHN DANIELS, *AMERICA VIA THE NEIGHBORHOOD* 249-50 (Harper & Bros., 1920).

7. Brief in Behalf of Appellee, *The Society of the Sisters of the Holy Names of Jesus and Mary* at App. II, *supra* note 1, at 767.

8. One publication, *AMERICA VIA THE NEIGHBORHOOD*, analyzed the process of "Americanization of the immigrant" through community institutions, including the public schools. DANIELS, *supra* note 6; see also *Try a New Method With Foreigners, Why Not Let Them Americanize Themselves?* N.Y. TIMES Aug. 24, 1919, at 32; *Meet to Formulate Immigration Policy*, N.Y. TIMES, April 8, 1920, at 21; *Harding Proposes Immigration Curb*, N.Y. TIMES, Sep. 15, 1920, at 3; *Would Have Nation Teach Citizenship, Secretary Davis Urges Federal System to Educate Aliens for Naturalization*, N.Y. TIMES, Dec. 13, 1922, at 23.

9. *Schenck v. United States*, 249 U.S. 47 (1919) (affirming a conviction while acknowledging that had the same words been uttered, and actions taken place during a time of peace rather than war, Schenck would have been acting within his constitutional rights); *Frohwerk v. United States*, 249 U.S. 204 (1919) (upholding a conviction for conspiracy to obstruct military recruiting by publishing and distributing anti-war materials); *Debs v. United States*, 249 U.S. 211 (1919) (upholding the conviction of Debs, the leader of the Socialist movement in the United States and a former presidential candidate who garnered over a million votes in the 1912 election, based on a speech Debs gave expressing opposition to the war); *Abrams v. United States*, 250 U.S. 616 (1919) (upholding conspiracy convictions based on distribution of leaflets to workers in ammunition factories. The Court determined that defendants urged curtailment of the production of war material with the intent to cripple or hinder the nation's war efforts); *Gitlow v. New York*, 268 U.S. 652, 670 (1925) (upholding the conviction of Gitlow, a communist and former New York legislator, based on a state law that "utterances of a certain

Court's larger concern with articulating the appropriate relationship between individual and state in a world of vast and rapid technological and social change. These changes, coupled with the massive political, economic, and social upheavals rendered by World War I, pressed the Court continually to address the proper balance between state control and individuality in a constitutional democracy. The Court's persistent protection of economic liberties during the 1920s reflected its assessment of the limits of governmental regulation in a democratic society.<sup>10</sup>

This focus on defining the limits of government power in a constitutional democracy illuminates *Pierce v. Society of Sisters*,<sup>11</sup> one of only two substantive due process cases from the *Lochner* era based on personal rather than economic liberties.<sup>12</sup> *Pierce* struck down an Oregon law requiring all children to attend public schools. The Oregon ballot initiative was largely the product of anti-Catholic and anti-immigrant sentiments.<sup>13</sup> The Court found the law unconstitutional because it "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."<sup>14</sup> In the opinion's most quoted passage, the Court concluded:

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, cou-

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kind involve such danger of substantive evil that they be punished").

10. See, e.g., *Adkins v. Children's Hospital*, 261 U.S. 525, 545 (1923), quoting approvingly from *Adair v. U.S.*, 208 U.S. 161, 175 (1908) ("In all such particulars the employer and the employee have equality of right and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."); *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 513 (1924) ("[A] State may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."); *Weaver v. Palmer Bros. Co.*, 270 U.S. 402, 415 (1926) ("The constitutional guaranties may not be made to yield to mere convenience. The business here involved is legitimate and useful; and, while it is subject to all reasonable regulation, the absolute prohibition of the use of [materials in the manufacture of quilts] is purely arbitrary and violates the due process clause of the Fourteenth Amendment."); see also Robert C. Post, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 B.U. L. REV. 1489, 1533 (1998).

11. 268 U.S. 510 (1925).

12. The other case is *Meyer v. Nebraska*, 262 U.S. 390 (1923) decided two years before *Pierce*. See *infra* text accompanying note 68.

13. See *infra* text accompanying note 25.

14. 268 U.S. at 534-35.

pled with the high duty, to recognize and prepare him for additional obligations.<sup>15</sup>

The language employed by the Court was no accident. It spoke clearly to the theme of the limits on governmental power in democracy, and particularly to the question of whether a state monopoly of education can exist in a democracy. The language invites a comparison of democracy and autocracy, a competition persistently characterized by both sides of the dispute as the heart of the case. *Pierce* invites numerous analytical adventures. It has been heralded as a triumph of pluralism over nativism and bigotry,<sup>16</sup> a victory for religious freedom,<sup>17</sup> and the foundational case for the right of privacy.<sup>18</sup> It is all of these. But it also has been perceived as something of an anomaly, a somewhat unexplainable departure into previously unarticulated parental rights amidst the jurisprudence of a Court firmly committed to seeing the world through the narrow lens of economic liberties.<sup>19</sup> Even more puzzling in this respect is that *Pierce* offered the Court the opportunity to decide the case on economic grounds, which the Court declined.<sup>20</sup> Instead, the Court, faced with the question of state monopoly of education, drew from the larger political controversy about communism the opportunity to make a statement about the limits of government power over education that transcended economic concerns. The Court's analysis of the compatibility of state monopoly of education with democracy shapes the decision far more than the minimal effort it expended in carving the constitutional contours of parental rights.

Highlighting the *Pierce* Court's preoccupation with state power does not ignore the fact that power and rights are two sides of the same coin. But doing so may help to shed light on the case, particularly in understanding the Court's failure to articulate the scope of parental rights. *Pierce*, a case cited extensively but rarely discussed in modern substantive due process

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15. *Id.* at 535.

16. See e.g., Martha Minow, *Before and After Pierce, A Colloquium on Parents, Children, Religion and Schools*, 78 U. DET. MERCY L. REV. 407 (2001).

17. Stephen L. Carter, *Parents, Religion, and Schools: Reflections on Pierce*, 70 *Years Later*, 27 SETON HALL L. REV. 1194 (1997).

18. Jeb Rubinfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 743 (1989).

19. See e.g., Michael J. Gerhardt, *The Rhetoric of Judicial Critique: From Judicial Restraint to the Virtual Bill of Rights*, 10 WM. & MARY BILL RTS. J. 585, 601 (2002); Lois Shepard, *Looking Forward with the Right of Privacy*, 49 U. KAN. L. REV. 251, 258-59 (2001).

20. See Brief of Appellant *Pierce*, *supra* note 1, at 89-94; Supplement to Brief of Appellant *Pierce*, *supra* note 1, at 123-26; Brief of Appellant Van Winkle, *supra* note 1, at 154-57; Brief of Appellee Society of Sisters, *supra* note 1, at 248-54, 290-92, 304-07, 318-21, 330-36, 347-58.

cases, dominated the analysis in *Troxel v. Granville*,<sup>21</sup> the 2000 Supreme Court case dealing with grandparent visitation. In *Troxel*, the Court relied upon the parental rights established in *Pierce* to hold that a court order compelling visitation between children and their grandparents violated the mother's due process rights to control the upbringing of her children.<sup>22</sup> The lack of consensus on the *Troxel* Court as to the scope of the right protected by *Pierce* and the standard of review to be applied is better understood in the context of the minimalist treatment accorded parental rights in *Pierce*. *Pierce*'s abbreviated discussion of parental rights makes sense when it becomes clear that state monopoly of education, not parental rights, absorbed the Court. In a political era dominated by the perceived polarities of communism and democracy, communism provided the Court a convenient barometer for assessing constitutional democracy. From a broader constitutional perspective, *Pierce* illuminates the substantive due process cases beginning with *Griswold v. Connecticut*.<sup>23</sup> At the heart of these cases also lies the question of the extent of government power in a constitutional democracy.

This article examines *Pierce* in its historical context. Its thesis is that the parental rights protected in *Pierce* augment an opinion focused primarily on whether state monopoly of education is permissible in a democracy. While *Pierce* is legitimately viewed as a seminal case for the constitutional protection of parental rights, the case provides far greater insight into fundamental attributes of democracy. Part I analyzes the political and legal history of the case in Oregon, exploring the anti-Bolshevik and nativist sentiments underlying the case. Part II examines *Pierce* and relevant precedent as presented to the Supreme Court, highlighting the debate about democracy central to the case. Part III traces the relationship between the state, parental authority, and education. This section analyzes both the general importance of education to democracy and the particular significance of "citizenship" education in the political climate after World War I. It

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21. 530 U.S. 57 (2000). The Court relied upon *Pierce* in *Griswold v. Connecticut*, 381 U.S. 479 (1965) as foundational precedent to the right of privacy. Numerous substantive due process cases have cited *Pierce* to support the Court's protection of liberty interests under the Fourteenth Amendment. See e.g., *Carey v. Population Services, Int'l*, 431 U.S. 678, 685 (1977); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996); *Planned Parenthood v. Casey*, 505 U.S. 833, 834 (1992); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986); *Zablocki v. Redhail*, 434 U.S. 374, 385 (1978); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977).

22. 530 U.S. at 65-66.

23. 381 U.S. 479 (1965).

places *Pierce* in the context of the broader legal and political debate over the perceived threat from communism. Part IV evaluates *Pierce* as precedent, from its *Lochner* era origins through the recent case of *Troxel v. Granville*.

## I. ORIGINS OF THE OREGON SCHOOL BILL CASE

### A. THE CAMPAIGN ON THE INITIATIVE

On November 7, 1922, the people of Oregon approved a ballot initiative mandating compulsory public education for children between the ages of eight and eighteen.<sup>24</sup> Its passage was sparked by a synergy of interests representative of the country's mood following World War I. Oregon, largely white, native, and Protestant, responded to nativist arguments that immigrants and non-Protestants, particularly Catholics, threatened the political and cultural security of the country.<sup>25</sup> Politically populist and progressive in orientation, Oregonians perceived the public school as the fundamental tool of assimilation.<sup>26</sup> In 1919, Oregon became one of twenty-eight states to pass laws prohibiting schools from teaching in any language other than English.<sup>27</sup> Oregon also passed laws in the early 1920s prohibiting the publication of newspapers in language other than English<sup>28</sup> and forbidding public school teachers from wearing religious garb.<sup>29</sup>

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24. The law provided exceptions for physical disability, distance from school, those who had completed the eighth grade, or those allowed by the county superintendent to have private tutoring. 1923 Or. Laws § 5259 (a-d), in OREGON SCHOOL CASES, *supra* note 1, at 9-10.

25. In 1920 only 13% of Oregonians were foreign-born. Ninety-three percent of the children in school were already in public school. David P. Tyack, *The Perils of Pluralism: The Background of the Pierce Case*, 74 AM. HIST. REV. 74, 75-76 (1968).

26. WILLIAM G. ROSS, FORGING NEW FREEDOMS, NATIVISM, EDUCATION AND THE CONSTITUTION, 1917-1927, at 150 (University of Nebraska Press, 1994). Chief Justice Taft, speaking at a Bar meeting in the Northwest commented, "[t]he State of Oregon served a useful function in the life of the nation, as a sort of laboratory for trying out new and dangerous experiments in the political and social world, since her remoteness from the centers of population in the older portion of the Union enabled her to conduct such exploits without serious hazard to the rest of the country." LAWRENCE SAALFELD, FORCES OF PREJUDICE IN OREGON, 1920-1925, at 63 (1984) (originally appearing in Dudley G. Wooten, REMEMBER OREGON 3 (1923)). The assimilation advocated was comprehensive—cultural, political, and class. The Voter's Pamphlet argument in favor of the measure stressed the need to "[m]ix the children of the foreign-born with the native-born, and the rich with the poor." *Reprinted in* OREGON SCHOOL CASES, *supra* note 1, at 732.

27. Brief on Behalf of Appellee, The Society of the Sisters of the Holy Names of Jesus and Mary at App. II, *supra* note 2, at 928-30.

28. Chapter 17, GENERAL LAWS OF OREGON, 1920.

29. Brief on Behalf of Appellee, The Society of the Sisters of the Holy Names of Jesus and Mary at App. II, *supra* note 2 at 882.

The Ku Klux Klan fueled nativist fires in Oregon. The Klan's success in appealing to Oregonians as "the soul of Americanism" and "the spirit of Protestantism" yielded between fourteen and twenty thousand new members by the 1920s.<sup>30</sup> Immigrants and Catholics were the primary targets of the Klan outside the South, and it is not surprising that the Klan's hands were all over the Oregon public school initiative.<sup>31</sup> Compulsory public education was a key strategic issue for the Klan, whose members were sworn to uphold public education as the true protector of American values.<sup>32</sup> Walter M. Pierce, the Democratic candidate for governor in 1922, won the election after he succumbed to Klan pressure to support the public school initiative and received the Klan's endorsement.<sup>33</sup>

In the campaign for the initiative and in the subsequent legal challenges, nativist sentiments merged with postwar politics. Whatever was foreign was anti-American. Sectarianism equaled lack of patriotism. And with Bolshevism and communism perceived as the great threats to democracy, immigrants and non-Protestants were linked with subversive politics.<sup>34</sup> The menace to American democracy presented a justification far more politically acceptable than explicit intolerance for religious and ethnic pluralism, particularly since this theme not only capitalized on widespread postwar anxieties, but also appealed to those progressives who believed that universal common schooling provided the class-leveling essential to democracy.<sup>35</sup> The official Voter Pamphlet's argument in favor of

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30. Comments of Imperial Wizard Hiram Wesley Evans. David A. Horowitz, *Social Morality and Personal Revitalization: Oregon's Ku Klux Klan in the 1920s*, OR. HIST. Q., Winter 1989, at 367, 369. The population of Oregon at that time was approximately 750,000 people. The Klan's power in Oregon was the subject of a Proclamation by the Governor, Ben Olcott, in May 1922, announcing that "[d]angerous forces are insidiously gaining a foothold in Oregon" and calling upon all law enforcement officers to "insist that unlawfully disguised men be kept from the streets." THE OREGON SCHOOL FIGHT: A TRUE AND COMPLETE HISTORY 21-22 (A.B. McCain ed., 1924).

31. While the origins of the campaign for the initiative can be traced to a 1920 resolution by the Scottish Rite Masons, there is evidence the Klan had infiltrated the Masons and that two of the original sponsors of the initiative were Klan officials. The Klan subsequently became an aggressive public supporter of the initiative. Tyack, *supra* note 25, at 77. Many Masons actually ended up opposing the measure. ROSS, *supra* note 26, at 152.

32. Klan members swore that "I believe that our Free Public School is the cornerstone of good government, and that those who are seeking to destroy it are enemies of our Republic and are unworthy of citizenship." Tyack, *supra* note 25, at 79. Compulsory public education also was the highest priority of the Klan in Michigan, where a compulsory public education amendment to the state constitution failed in 1920. ROSS, *supra* note 26, at 140-43.

33. ROSS, *supra* note 26, at 151.

34. The perceived threat of papal influence, which fueled anti-Catholic sentiment, was also deemed politically subversive. Tyack, *supra* note 25, at 85.

35. Walter Pierce's support for the initiative was at least partially due to his view of the public schools as a positive egalitarian influence. ROSS, *supra* note 26, at 151; Barbara

the initiative, named the "Compulsory Education Bill" by its sponsors, asserted that the public school exists for the "sole purpose of self-preservation" and insisted that "[w]e must now halt those coming to our country from forming groups, establishing schools, and thereby bringing up their children in an environment often antagonistic to the principles of our government."<sup>36</sup> Newspaper ads in support of the initiative described the public school as a "democratic baptism" and as the "only" truly American school, its mission "citizenship."<sup>37</sup> The ads urged voters to consider support for the school bill the litmus test of patriotism.<sup>38</sup> Proponents of the bill labeled supporters of private schools "traitors."<sup>39</sup> The Klan campaign played heavily on anti-Catholic sentiments, accusing Catholics of trying to destroy public education.<sup>40</sup> But the Klan also rang the patriotism bell, with its "100% Americanism" campaign, characterized by the slogan "One Flag-One School-One Language."<sup>41</sup> The Klan, the Scottish Rite Masons, and the Oregon Federation of Patriotic Societies sponsored the majority of organized support on behalf of the school measure.<sup>42</sup>

By contrast, the campaign against the initiative brought together a diverse group of religious and secular organizations. Catholic, Protestant (primarily Lutheran), and Jewish groups joined business and civil rights groups.<sup>43</sup> Concerned that charges of bigotry would only inflame nativist and anti-Catholic senti-

Bennett Woodhouse, *Who Owns the Child?*, 33 WM. & MARY L. REV. 995, 1033 (1992).

36. Official Pamphlet, Argument (Affirmative), reprinted in OREGON SCHOOL CASES, *supra* note 1, at 732. The designation of the initiative as a "compulsory education bill" may have led to some voter confusion because Oregon already had a compulsory education law, § 5259 of the Oregon Laws. ROSS, *supra*, note 26, at 153-54.

37. *Free Public Schools, America's Noblest Monument*, OREGONIAN, Nov. 5, 1922.

38. *Id.* The ad described a politician who did not support the school bill as a "traitor to the spirit of the United States."

39. *Speaker for School Bill*, OR. STATESMAN, Nov. 3, 1922.

40. SAALFELD, *supra* note 26, at 71; Tyack, *supra* note 25, at 85; ROSS, *supra* note 26, at 154. The Klan's tract in support of compulsory public education, *The Old Cedar School*, combined populism and bigotry to argue that elitists saw the public school as "not good enough" for their children while Catholics were more interested in learning religion than multiplication or democracy. Curiously, the Grand Dragon of the Oregon Klan sent his daughter to St. Mary's Academy, a Catholic school which became one of the plaintiffs in the *Pierce* case. WILFRED P. SCHOENBERG, S.J., *A HISTORY OF THE CATHOLIC CHURCH IN THE PACIFIC NORTHWEST, 1743-1983*, at 523 (Pastoral Press, 1987).

41. David Horowitz, *Klansman as Outsider*, PAC. N.W. Q., Jan. 1989, at 12, 14-15.

42. ROSS, *supra* note 26, at 151-52. The Oregon Federation of Patriotic Societies, comprised of delegates from various fraternal organizations, including the Orange Lodges, Knights of Pythias, and Odd Fellows, well-connected, and active in public service, particularly public school issues, became increasingly identified with the Klan and nativism. OREGON CATTLEMAN/GOVERNOR, CONGRESSMAN; MEMOIRS AND TIMES OF WALTER M. PIERCE 152-53 (Arthur H. Bone ed., Oregon Hist. Soc., 1981).

43. Tyack, *supra* note 25, at 86-88.

ments, the opposition also claimed patriotism as its ally, denouncing state monopoly of education as a form of totalitarianism inconsistent with American values and parental authority. Governor Olcott led the assault on the bill, asserting the bill "aims to Russianize the State, since it deprives parents of their rights to educate their children as they see fit."<sup>44</sup> The Voter Pamphlet's arguments against the initiative repeatedly stressed two themes: the rights of parents to direct the education of their children, and the anti-Americanism of attempts to "standardize" children through state monopoly of education.<sup>45</sup> One of the most popular slogans of the opposition read, "Who Owns Your Child? The State?"<sup>46</sup> Opposition ads designated the initiative "the school monopoly bill" and called on voters to "[r]emember that Russia now has state monopoly of schools."<sup>47</sup> Numerous pamphlets and leaflets focused their arguments on parental authority and democratic principles, with specific comparisons to Bolshevik or Soviet educational practices.<sup>48</sup> Local newspapers echoed this reasoning in editorials.<sup>49</sup> An editorial cartoon in the *Portland*

44. Quoted in THE WASHINGTON POST, December 12, 1922.

45. The Evangelical Lutheran Synod argued for the "natural and inalienable" right of parents to provide children with a religious education. Another submission by private individuals compared the measure to Bolshevik Russia, where the child is a ward of the state. Other Voter Pamphlet submissions in opposition made the same points. OREGON SCHOOL CASES, THE COMPLETE RECORD, *supra* note 1, at 727-55 (reprinting Voter Pamphlet submissions). Additional arguments included the threat of tax increases and overcrowded public schools and the loss of economic and property rights. *Id.*

46. The Catholic Civil Rights Association also sponsored an ad entitled "God Gave Parents Their Children." OREGONIAN, Oct. 29, 1922. For an argument that Meyer and Pierce constitutionalized a tradition of the child as the private property of the family, particularly the father, see Woodhouse, *supra* note 35.

47. Ad sponsored by the Non-Sectarian and Protestant Schools Committee, OREGONIAN, Nov. 3, 1922. Other ads by the same committee appealed to "A Mother's Guiding Hand." OREGONIAN, Oct. 30, 1922.

48. For example, one pamphlet, entitled "24 Reasons" made numerous connections between state educational monopoly and political tyranny. Reason 11, entitled "The proposed bill is inspired by the principles and practices of Russian Sovietism," quotes the Commissary for public instruction in Soviet Russia in 1920, who declared, "The private schools, those hotbeds for the cultivation of class distinction, were abolished or taken over by the State. That was one of our easier tasks." Over half a million copies of this pamphlet were distributed. Another pamphlet, entitled "Autocracy versus Parochial Schools," used "Bolsheviks" and "Socialists" as synonyms for traitors and tyrants. Various pamphlets published by the National Catholic Welfare Council, including a Handbook for Speakers, argued that the bill would "Sovietize" education. HANDBOOK FOR SPEAKERS, CAMPAIGN FOR CATHOLIC EDUCATION 20 (1923).

49. After denouncing the power of "invisible governments" from a secret society, the *Daily Capital-Journal* in Salem, Oregon, condemned state monopoly of education as "being given a full trial in Soviet Russia, where the child is treated as the ward of the state and the control of family abolished." PUBLIC OPINION AND THE OREGON SCHOOL LAW 5 (1923). The *Portland Telegram* also called the measure state monopoly of education. *Id.* at 11.

*Telegram* showed gubernatorial candidate Pierce and Lenin embracing a Klan figure who held a sign that read "State Monopoly of Schools Is An Absolute Success in Russia."<sup>50</sup>

Just prior to the election, a labor strike in Portland called by the Industrial Workers of the World, a well-publicized police round up of "Wobblies," and arson of a local high school raised fears of radical "foreign" agitation.<sup>51</sup> These fears combined with anti-Catholic sentiments to bring out a large vote in favor of the school bill in the Portland area, a vote sufficient to gain passage in what was considered a political upset.<sup>52</sup> The outcome in Oregon was monitored across the nation, for although Oregon was the only state to pass a compulsory public education law, numerous other states were considering such legislation.<sup>53</sup> The national press denounced the Oregon law as autocratic and violative of parental, religious, and educational liberties.<sup>54</sup>

#### B. THE DISTRICT COURT CASE

The campaign against the initiative helped shape subsequent legal strategy. Representatives of the Catholic Church, the Knights of Columbus, and nonsectarian private schools jointly challenged the law in federal court. The National Catholic Welfare Council, which supervised the litigation, pledged \$100,000 to

50. BONE, *supra* note 42, at 167.

51. See *I.W.W. Ordered to Invade City*, OREGONIAN, Oct. 25, 1922, at 1; 225 *Arrested in Dock Strike*, OREGONIAN, Oct. 19, 1922, at 1.

52. Although the school bill lost in 21 of 36 counties, half of the majority for the bill registered from Multnomah County, Portland's home county. All Klan-endorsed legislative candidates from Multnomah County also won. The major newspapers in Oregon had predicted defeat for the compulsory public school bill. Tyack, *supra* note 25, at 91. Press in other parts of the country also had predicted defeat. The *New York Times* expressed "surprise" at the adoption of the law. *What the Klan did in Oregon Elections*, N.Y. TIMES, Dec. 3, 1922, at E8. A sign posted at midnight on the chapel door of St. Mary's Academy in Portland said simply, "The School Bill passed. Fiat!"

53. ROSS, *supra* note 26, at 160; see N.Y. TIMES, Dec. 11, 1922, at 7. Archbishop Michael J. Curley claimed that the ultimate purpose was constitutional amendment. In a speech in Baltimore, Archbishop Curley charged "[t]he whole trend of such legislation is a state socialism, setting up an omnipotent state that will claim ownership of individuals, body and soul, on the principles of Carl Marx [sic] whose teachings have created Soviet Russia."

54. The *New York Times* blasted the law for taking "from the parent all discretion" and making "the child a compulsory ward of the state." *An Oregon Venture*, N.Y. TIMES, Nov. 12, 1922, at E6. The *Omaha Evening World-Herald* criticized the law for attempting to standardize children, and ultimately adults, asserting that "Despotism, enforced uniformity, whether imposed by a few or the many, is its own death warrant." PUBLIC OPINION AND THE OREGON SCHOOL LAW, *supra* note 49, at 7. The *Virginian-Pilot* in Norfolk called "[a] plague on all this intolerance masquerading as Americanism" *Id.* at 9. The *Newark News* commented that "The salvation of America lies in individualism, not in mass thinking" and questioned the "concept that the citizen is the theoretical chattel of the state." *Id.* at 10.

the legal challenge. The Knights of Columbus offered a minimum of \$10,000.<sup>55</sup> The Church selected the Society of the Sisters of the Holy Names of Jesus and Mary, with several schools throughout Oregon, as plaintiff. Hill Military Academy, a nonsectarian school, also filed a complaint. The law was not due to go into effect until 1926 and there were concerns the court might find the suit premature. The choice of the federal forum was largely due to the Supreme Court's recent decision in *Meyer v. Nebraska*.<sup>56</sup> There was some disagreement as to whether parents, pupils, or teachers should be joined. Ultimately, the schools ended up arguing both on behalf of their own interests and on behalf of the interests of parents, a representation the court accepted.<sup>57</sup>

The complaints relied heavily on the schools' economic liberty interests schools but also alleged a violation of the rights of parents to "direct and control the education of their own children."<sup>58</sup> The complaint filed by the Sisters specifically alleged that the state had advised parents it would be "unpatriotic" to send their children to private school.<sup>59</sup>

At oral argument on a motion to dismiss, the attorney for the Sisters focused primarily on the economic liberty interests of the teachers and the private institutions. But the Sisters also argued that the law violated natural "inherent" liberty rights protected by the Fourteenth Amendment, including the right of parents to control the education of their children and the right of children to receive an education in private school.<sup>60</sup> The Sisters responded directly to accusations that private schools were unpatriotic, denouncing such claims as unfounded and deceptive.<sup>61</sup> Conceding the state's legitimate authority to regulate all schools, the Sisters argued that the state exceeded its authority when it moved from regulation to prohibition of private schools. Linking state monopoly of education to tyranny in what would become a recurring theme of

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55. See *The Case of the Sisters of the Holy Names vs. The State of Oregon*, on file in the archives of the Society of Sisters of the Holy Names of Jesus and Mary.

56. 262 U.S. 390 (1923); see *infra* text accompanying note 68.

57. ROSS, *supra* note 26, at 162.

58. The complaints also alleged violation of the contracts clause, U.S. CONST. art. I, § 10, and deprivation of the children's right to acquire knowledge, and interference with religious liberty under the Fourteenth Amendment. This latter claim was based on religious freedom as a "liberty" under the Fourteenth Amendment and did not directly argue for incorporation of the First Amendment to the states through the Fourteenth. *Gitlow v. New York*, 268 U.S. 652 (1925), in which the Court first applied the First Amendment to the states through the Fourteenth Amendment, was decided the week after *Pierce*.

59. Plaintiff's Complaint, ¶ XVII, ¶ XVIII (b), *supra* note 1, at 26-28.

60. THE OREGON SCHOOL FIGHT, *supra* note 30, at 82.

61. *Id.* at 81.

the case, the Sisters charged that “[t]here is no country of the world, save one, which undertakes to have a monopoly of education . . . and that is soviet Russia.”<sup>62</sup> Hill Military Academy argued that the initiative was unreasonable since there was no evidence private schools failed either to educate or to produce good citizens.<sup>63</sup>

The defendants sought to establish the patriotic necessity for the law. The attorney for Governor Pierce warned the law was intended “to meet one of our great national dangers . . . the great danger overshadowing all others which confronts the American people . . . the danger of class hatred.” He argued, “History will demonstrate . . . that it is the rock upon which many a republic has been broken.”<sup>64</sup> The state described the school bill as a reasonable use of its legitimate authority to educate children and secure the assimilation necessary for national security. The defendants also argued that the plaintiffs lacked standing to raise the parents’ liberty interests.<sup>65</sup>

Ten weeks later, on March 31, 1924, the district court declared the law unconstitutional.<sup>66</sup> The opinion relied primarily on economic liberties, chiefly the interest of the schools in maintaining educational institutions, but also on the interest of the parents in contracting with the schools to educate their children. Conceding the state’s authority to require compulsory education, the court nonetheless found that the state presented insufficient evidence of harm caused by private schools to justify the interference with economic liberties. The court rejected the assimilation justification as “an extravagance in simile” providing “no reasonable basis” for the law.<sup>67</sup> In June, Oregon filed an appeal with the Supreme Court.

## II. THE CASE BEFORE THE SUPREME COURT

*Pierce* was not the first case that pressed the Supreme Court to consider the relationship between education and state authority. In June 1923, the Court in *Meyer v. Nebraska*<sup>68</sup> invalidated a Nebraska state law prohibiting instruction conducted in any foreign language

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62. *Id.* at 87-88.

63. *Id.* at 98-103.

64. *Id.* at 115.

65. *Id.* at 117.

66. Opinion of the United States District Court, March 31, 1924, reprinted in OREGON SCHOOL CASES, *supra* note 1, at 41-54.

67. *Id.* at 53-54.

68. 262 U.S. 390 (1923).

in public or private grammar schools.<sup>69</sup> English-only laws, products of nativism and World War I hostility toward immigrants, were aimed primarily at German instruction in private Lutheran schools. By the time *Meyer* reached the Court, 37 states had laws mandating English instruction.<sup>70</sup> Not surprisingly, many of these laws were enacted in 1919, during the Red Scare, amid concerns that residents or citizens who could not speak English posed a national security threat.<sup>71</sup> Nebraska defended the English language law as part of an assimilation program intended to “prevent children . . . from being trained and educated in foreign languages and foreign ideals before they have had an opportunity to learn the English language and observe American ideals.”<sup>72</sup> Nebraska argued that “it is within the police power of the state to compel every resident . . . to so educate his children that the sunshine of American ideals will permeate the life of the future citizens of this republic.”<sup>73</sup> The state insisted that “[a] father has no inalienable constitutional right to rear his children in physical, moral or intellectual gloom.”<sup>74</sup>

Nebraska justified the law as a response to the threat to state security posed by foreign language instruction. Describing “isolated communities” where “foreign languages are used” as communities which are “under the control of foreign leaders,” Nebraska warned that “these communities are growing up as little Germanys, little Italys and little Hungarys.”<sup>75</sup>

This danger justified an infringement on the appellant’s economic liberties because the legislature “should not be handicapped in its reasonable effort to prohibit a menace not only to the public welfare but to the safety of the state itself.”<sup>76</sup>

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69. The statute did allow foreign languages to be taught as a language course after eighth grade.

70. See *supra* note 7. While most of these laws mandated English instruction, some specifically prohibited the teaching of German. See Brief of Defendant in Error at 24-29. Five challenges to these laws reached the Supreme Court, which rendered the opinion in *Meyer* and companion cases, *Bartels v. Iowa*, *Bohning v. Ohio*, *Pohl v. Ohio*, *Nebraska Dist. of Evangelical Lutheran Synod v. McKelvie*, 262 U.S. 404 (1923).

71. William Ross, *A Judicial Janus: Meyer v. Nebraska in Historical Perspective*, 57 U. CIN. L. REV. 125, 133-34 (1988). The Nebraska Supreme Court upheld the law.

72. Brief of Defendant in Error at 12-13, *Meyer v. Nebraska*, 262 U.S. 390 (1923).

73. *Id.* at 15.

74. *Id.*

75. *Id.* at 13. The state’s brief also quoted extensively from the opinion of the Nebraska Supreme Court, which emphasized the need to “teach love for his country, and hatred of dictatorship, whether by autocrats, by the proletariat, or by any man or class of men.” *Id.* at 16. In the companion cases, *Iowa* and *Ohio* made similar arguments. See Ross, *supra* note 71, at 175-76.

76. Brief of Defendant in Error, *supra* note 70, at 36.

Robert Meyer, a private school teacher, was convicted of teaching German during recess. Meyer argued that the state lacked evidence of security threats sufficient to justify a prohibition on instruction in foreign languages. He also claimed that the law interfered with economic liberties. While not disputing the state's interest in assimilation or in citizens proficient in English, Meyer charged that the state's methods violated the "spirit" of "liberty and toleration" which in other times has "prevented the efforts of tyrannical governments to suppress minority languages."<sup>77</sup> Meyer contrasted American "toleration" with the oppressive suppression of linguistic diversity by the Germans and the Russians.<sup>78</sup> Interestingly, Meyer's brief conceded the authority of the state to require children to attend public school, a concession which appellant repudiated at oral argument.<sup>79</sup>

But the real tone for the Court's opinion in *Meyer* and the groundwork for *Pierce* were set by an amicus brief filed by William Guthrie on behalf of "various religious and educational institutions."<sup>80</sup> Guthrie, a prominent Catholic attorney and Columbia University law professor, was an influential advocate before the Supreme Court. He was a strong proponent of limited federal power over economic and property rights and is credited with influencing the Court's decisions in key economic liberties cases.<sup>81</sup> Guthrie was also chief counsel for the Society of Sisters in the Oregon school case.<sup>82</sup> Strongly opposed to the Oregon law, which

77. Brief of Plaintiff in Error at 16-17, *Meyer v. Nebraska*, 262 U.S. 390 (1923).

78. *Id.* at 17. Appellants in the companion cases directly disputed any substantial connection between German immigrants and Bolshevik sympathies. Ross, *supra* note 71, at 166-67.

79. *Cf.* Brief of Plaintiff in Error at 14 with Oral Argument of Arthur F. Mullen, On Behalf of Plaintiffs-In-Error, 262 U.S. 390 (1923). See *infra* text accompanying note 89.

80. Brief of Amici Curiae, *Meyer v. Nebraska*, 262 U.S. 390 (1923).

81. Historian Stephen B. Wood credits Guthrie with influencing the Court's decisions in *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (striking down the federal child labor laws) and *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922) (child labor tax case). In fact Wood points out that the Court's decision in *Bailey* is excerpted straight from Guthrie's (losing) brief in *McCray v. U.S.*, 195 U.S. 27 (1904) (Oleomargarine case). See STEPHEN WOOD, *CONSTITUTIONAL POLITICS IN THE PROGRESSIVE ERA: CHILD LABOR AND THE LAW* 280 (University of Chicago Press, 1968). In 1925, Guthrie was recommended to President Coolidge to fill the Supreme Court seat of Justice McKenna, who had just retired, but Coolidge decided that Guthrie was too old. 1 NICHOLAS MURRAY BUTLER, *ACROSS THE BUSY YEARS, RECOLLECTIONS AND REFLECTIONS BY NICHOLAS MURRAY BUTLER* 357-58 (Scribner, 1939).

82. While the Oregon school bill case was pending in the Federal District Court in Oregon in February 1924, Guthrie sent a letter to attorney J.P. Kavanaugh, who represented the Society of Sisters in the District Court, expressing his approval of Kavanaugh's presentation of the case. Letter from J.P. Kavanaugh to Society of Sisters, St. Mary's Academy, Portland, CHRONICLES (Feb.11, 1924). Guthrie appeared before the Supreme Court on behalf of the Society of Sisters. Thomas J. Shelley, *The Oregon School Case and the Na-*

was passed only three months before the oral arguments in *Meyer*, Guthrie anticipated that the *Meyer* case could prejudice the Court's analysis in the Oregon case.<sup>83</sup> Explicitly refusing to take a position on the outcome of *Meyer*, the amicus brief was intended to educate the Court on the Oregon case and focus the Court on the broader question of state monopoly of education relevant to both *Meyer* and *Pierce*.<sup>84</sup> Labeling the Oregon act "revolutionary," Guthrie charged that it "adopt[ed] the favorite device of communistic Russia—the destruction of parental authority, the standardization of education . . . and the monopolization by the state of the training and teaching of the young."<sup>85</sup> The brief characterized the Oregon law as un-American because state monopoly of education is "plainly repugnant to the spirit of Anglo-Saxon individualism," which has rejected the "notion of Plato that in a Utopia the state would be the sole repository of parental authority and duty."<sup>86</sup> Ceding such power to the state destroyed the natural and constitutional rights of parents to raise and educate their children" and was "[i]nseparable from the dogma of Sovietism."<sup>87</sup> By joining the foreign language cases to the broader question of state monopoly of education, the brief challenged the Court to see *Meyer* not as a narrow example of state encouragement of assimilation, but as part of a more comprehensive, and more troubling, assertion of total state authority over education.

Guthrie's strategy succeeded. The Oregon case arose early in the oral arguments in *Meyer*. Justice McReynolds interrupted Meyer's attorney, Arthur F. Mullen, to ask: "What about the power of the State to require the children to attend the public schools? . . . You will admit that, will you not?" When Mullen refused to agree, Justice McReynolds pressed him again: "You do not admit that?"<sup>88</sup> Mullen took the hint and proceeded to direct a large part of his argument to convincing the Court that the state lacks the power to

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*tional Catholic Welfare Conference*, 75 CATH. HIST. REV., 439, 445-47 (1989).

83. Thomas O'Mara, an attorney advising the National Catholic Welfare Conference, recommended that the Conference file an *amicus* brief in *Meyer*. Guthrie quickly responded. Archives of the Catholic University of America, letter from Thomas O'Mara to Father James Hugh Ryan, March 5, 1923, cited in Shelley, *supra* note 82, at 450. Guthrie wrote, "there was danger that something might be said in the argument or decision of these cases which would prejudice the issue in Oregon."

84. Amicus Brief, *supra* note 80, at 2.

85. *Id.* at 3.

86. *Id.* at 4. The brief also cited John Stuart Mill and Herbert Spencer as authorities condemning state monopoly of education. *Id.*

87. *Id.* at 4-5.

88. Transcript of Oral Argument of Arthur F. Mullen, 7, *Meyer v. Nebraska*, 262 U.S. 309 (1923). *But cf.* Mullen's statement in his brief, *supra*, note 79.

“take complete control of education and give it a monopoly of education.”<sup>89</sup> Mullen argued such power is “not in accordance with the history of our people” and cannot exist in a “constitutional government.”<sup>90</sup> He insisted that “it is one of the most important questions that has been presented for a generation; because it deals with the principle of the soviet.”<sup>91</sup> Indeed, the oral argument focused primarily on the limits on governmental authority over education. Although Mullen argued that the language law violated numerous liberties, including religious and economic liberties, freedom of conscience, and the right of parental control over education, the Court was less interested in the nature of the liberty interest infringed. Near the end of the argument, Chief Justice Taft reminded Mullen: “You know when we come to consider the question of the constitutionality of a law, we have, if we hold it invalid, to be able to put our fingers on the particular provision of the Constitution that is violated. Will you point out before you are through the particular provision which is violated?”<sup>92</sup>

The Court’s decision in *Meyer* attests to the influence of Guthrie’s brief. In holding that the language laws unreasonably interfered with liberty interests guaranteed by the Fourteenth Amendment, the Court articulated a definition of liberty extending far beyond economic interests. Justice McReynolds’s opinion, admitting that the Court “has not attempted to define with exactness the liberty thus guaranteed,”<sup>93</sup> proceeded to describe many aspects of that interest. “Without doubt,” he wrote, “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>94</sup> The Court concluded that “[c]orresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in

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89. *Id.* at 9.

90. *Id.* at 9-10.

91. *Id.* at 10.

92. *Id.* at 13. The Court had not yet incorporated any provisions of the Bill of Rights through the Fourteenth Amendment. There was some discussion at oral argument of whether the Fourteenth Amendment’s due process clause incorporated religious liberty and free speech. Mullen also claimed that religious liberty was protected as a “privilege and immunity” under the Fourteenth Amendment. *Id.* at 15.

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

94. *Id.*

life.”<sup>95</sup> The Court held that the language laws impermissibly interfered with the plaintiff’s right to teach and the parents’ right to engage foreign language instruction.<sup>96</sup> In reaching this conclusion, the Court considered the relationship between state power and education in language remarkably similar to Guthrie’s brief. The Court explicitly recognized Guthrie’s argument that Anglo-Saxon society had repudiated the Platonic ideal of state control of child rearing and education. Justice McReynolds’s opinion, in a powerful rejection of state monopoly power over education, described Plato’s Ideal Commonwealth as the prime example of “measures . . . approved by men of great genius” whose “ideas touching the relation between individual and state were wholly different from those upon which our institutions rest.”<sup>97</sup> Recognizing that “the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally,” the Court nevertheless concluded that “a desirable end cannot be promoted by prohibited means.”<sup>98</sup> The Court’s opinion sent a clear message to progressives that assimilation could not be accomplished by state monopoly power over education.<sup>99</sup>

Justice Holmes, in a brief dissent joined by Justice Sutherland, argued that the Court should have deferred to the legislative judgment because the language statutes were reasonable means of achieving the permissible goal of “a common tongue” among all citizens of the United States and therefore did not pose an “undue restriction” on economic liberty.<sup>100</sup>

Guthrie’s success in getting the Court to cast the *Meyer* opinion in the broader context of state monopolization of education cemented the litigation strategy for *Pierce*.<sup>101</sup> Prior to the trial court hearing on *Pierce* in January 1924, Guthrie advised Oregon counsel: “In the first place, it is, of, course, important

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95. *Id.* at 400.

96. *Id.*

97. *Id.* at 402.

98. *Id.* at 401.

99. ROSS, *supra* note 26, at 27-29.

100. *Bartels v. Iowa*, 262 U.S. 404, 412 (1923) (Holmes, J., dissenting). Justices Holmes and Sutherland did join the Court in striking down an Ohio law prohibiting only the teaching of German. *Bohning v. Ohio*, 262 U.S. 404 (1923).

101. Just after passage of the Oregon law, and prior to the *Meyer* decision, Guthrie told a Catholic Church official that it is “indisputable” that the State may compel parents to send children to school and that the state may require schools to comply with educational standards. Guthrie argued that the strategy in challenging the Oregon law must be “imbued” with the “danger of attempting to urge extreme views limiting the power of the State over education.” Letter from William D. Guthrie to Father John J. Burke (January 5, 1923) (Catholic University Archives, Collection #10 NCWC-OSG, File Folder #7, Oregon School Case 1922-1925).

that we should not seem to challenge the power of the State to make education compulsory and to prescribe that certain minimum standards of instruction shall be complied with."<sup>102</sup> After quoting language from the Supreme Court's opinion in *Meyer*, Guthrie stressed, "It is the attempted *monopolization* of education by the State that we now challenge, and this presents a novel proposition in our day and in this country . . . but no government, however radical or revolutionary, has attempted to monopolize education except Soviet Russia."<sup>103</sup>

The relationship between state monopoly of education and democratic principles appeared as a central theme in the *Pierce* briefs. Both sides invoked the threat of communism. The brief for the Governor of Oregon argued that the law was within the permissible police power of the state as a means of "Americanizing its new immigrants and developing them into patriotic and law-abiding citizens."<sup>104</sup> It then asked the Court to consider "not only the classes of private schools now in existence but also the kinds of private schools which may be established in the future."<sup>105</sup> Reminding the Court that the "vast" majority of private schools are religiously affiliated, the brief argued:

They may be followed, however, by those organized and controlled by believers in certain economic doctrines entirely destructive of the fundamentals of our government.

If the Oregon School Law is held to be unconstitutional it is not only a possibility but almost a certainty that within a few years the great centers of population in our country will be dotted with elementary schools which instead of being red on the outside will be red on the inside.

Can it be contended that there is no way in which a state can prevent the entire education of a considerable portion of its future citizens being controlled and conducted by bolshevists, syndicalists and communists?<sup>106</sup>

The connection between religious intolerance and state monopoly of education surfaced when the state argued that manda-

102. Letter from William D. Guthrie to Judge J. P. Kavanaugh (January 2, 1924), (Catholic University Archives, Collection #10 NCWC-OSG, File Folder #8, Oregon School Case: January-June 1924).

103. *Id.* (emphasis in original)

104. Brief for Appellant, *supra* note 1, at 102. Governor Pierce was represented by former senator and Oregon governor, George E. Chamberlain.

105. *Id.*

106. *Id.* at 102-03.

tory public education was justified to reduce the “religious suspicions” caused by separating children “along religious lines during the most susceptible years of their lives.”<sup>107</sup> The Oregon law ensured that a “portion” of education could occur without “class or religious bias.”<sup>108</sup>

Citing a number of cases upholding state authority to limit speech or other activities during war, the brief warned that the invalidation of the Oregon law would leave “nothing to prevent the establishment of private schools, the main purpose of which will be to teach disloyalty to the United States or at least the theory of the moral duty to refuse to aid the United States even in the case of a defensive war.”<sup>109</sup> The state cautioned that “it is hard to assign any limits to the injurious effect, from the standpoint of American patriotism, which may result.”<sup>110</sup>

The Governor’s brief also warned that private religious schools presented a particular danger to the state because children may be taught greater allegiance to their religion than to their country. This disparagement of the patriotism of religious schools provoked an angry response by the Sisters. Describing the assertion in the Governor’s brief as “inexcusable and cruel . . . libel,” the Sisters’ brief explained that “patriotism, obedience to the law and loyalty to the Constitution are taught, not merely as a patriotic duty, but a religious duty as well, and the best and highest ideals of American patriotism and citizenship are exalted.”<sup>111</sup> The state responded disingenuously by stating, “no charge against any religion is contained in that brief.”<sup>112</sup>

Even though the First Amendment had not yet been applied to the states through the Fourteenth Amendment, other religious liberty arguments found their way into the briefs as the subtext of religious bigotry became overt. The Attorney General of Oregon, after claiming that religious liberty issues did not present a federal question, argued that separation of church and state justified the law to prevent private schools from giving religious instruction to children while fulfilling the state’s compulsory education requirements.<sup>113</sup> This argument provoked a

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107. *Id.* at 97-98.

108. *Id.* at 98.

109. *Id.* at 115.

110. *Id.* at 116.

111. Brief for Appellee Society of Sisters, *supra* note 2, at 239-42.

112. Brief for Appellant Pierce, *in* OREGON SCHOOL CASES, *supra* note 1, at 130.

113. Brief for Appellant Van Winkle, *in* OREGON SCHOOL CASES, *supra* note 1, at 174-80.

lengthy response from the Sisters on the state's "frank" and "astounding" efforts to prohibit the free exercise of religion.<sup>114</sup> During oral argument, Oregon's Assistant Attorney General, appearing on behalf of the Oregon Attorney General, denied that the law was an attack on religious liberty.<sup>115</sup> The state's denial proved ludicrous when the attorney representing the Governor of Oregon proceeded to describe the parental liberty argument as a sham because Catholic parents cede control over the education of their children to the dictates of the Catholic church.<sup>116</sup>

The Governor's brief spent little time on parental rights. Despite recognizing that parents may have some liberty interest in the education of their children, the brief asserted that parental rights were subject to the "paramount" right of the state to exercise control over minors.<sup>117</sup> The brief dismissed the broad language in *Meyer* supporting the liberty interest of parents in the upbringing of their children with the notable comment that the "dicta in this case would appear to be somewhat broader than can be supported by the previous decisions of the United States Supreme Court."<sup>118</sup> According to the Governor's brief, no previous Supreme Court decision contained "any expression of opinion that the Fourteenth Amendment gives the Federal courts any power to interfere between a state and its citizens relative to questions of religion, education or domestic relations including the question of the division of the power of control over children between their parents and the state."<sup>119</sup> To neutralize *Meyer*, the state sought to link the Oregon law to *Meyer's* dictum accepting the "power of the state to compel attendance . . . and to make reasonable regulations for all schools."<sup>120</sup> The state argued that

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114. Brief for Appellee Society of Sisters, *supra* note 2, at 340-47. At oral argument, Guthrie argued that religious intolerance was the "true and real motive and intent of this measure." *Id.* at 653-54.

115. Oral Argument of Appellant Van Winkle, in OREGON SCHOOL CASES, *supra* note 1, at 642.

116. Oral Argument of Appellant Pierce, in OREGON SCHOOL CASES, *supra* note 1, at 683.

117. Brief for Appellant Pierce, *supra* note 112, at 95; see also Brief for Appellant Van Winkle, *supra* note 113, at 157. Van Winkle's brief did admit the "inherent" right of parents to the custody and control of their children as one "recognized and protected in every civilized nation" but went on to argue that parental rights are subject to the "paramount" right of the state. *Id.* The state also argued regulation of education was solely within state authority and not subject to federal control. *Id.* at 104, 116.

118. *Id.* at 100.

119. *Id.*

120. *Meyer v. Nebraska*, 262 U.S. 390, 402; see Brief for Appellant Pierce, *supra* note 112, at 109-10; Brief for Appellant Van Winkle, *supra* note 113, at 158-67.

its legitimate authority over education prevailed over both economic liberty and personal liberty interests.

Guthrie's brief for the Sisters expanded on the themes of democracy and parental liberty developed in his *amicus* brief in *Meyer*. Taking care to recognize explicitly the state's legitimate authority to require compulsory education, the brief argued that mandatory public education crossed the line into totalitarianism.<sup>121</sup> It described the Oregon law as embodying the "pernicious policy of state monopoly of education."<sup>122</sup> Guthrie argued that "[e]xcept in Soviet Russia, there has been none in modern time so poor as to do that discarded doctrine of tyrants any reverence."<sup>123</sup> Asserting that the "standardization of education" through "state monopolization . . . has found well-nigh universal condemnation," the brief repeatedly associated state monopoly of education with tyranny.<sup>124</sup> While disputing that the state had provided any evidence that private schools teach "disloyalty and subversive radicalism or bolshevism," the Sisters argued that patriotism could be ensured by licensing and regulating curricula.<sup>125</sup> Regulation, not prohibition, was the lesson of *Meyer*.<sup>126</sup> The Sisters' specific comparison of the Oregon law to Sovietism provoked an angry response in the state's supplemental brief. Oregon complained that "the cry of Bolshevism" had been overused by special interests to the detriment of the "great mass of people of this country [who will] lose their fear" of Bolshevism.<sup>127</sup>

The link between democratic principles and parental rights formed the core argument of Guthrie's brief. Claiming that "children

121. Brief of Appellee Society of Sisters, *supra* note 1, at 238, 256. Guthrie made the same point at oral argument, stressing that the appellees did not challenge the authority of the state to enact a compulsory education law. OREGON SCHOOL CASES, *supra* note 1, at 654.

122. Brief of Appellee Society of Sisters, *supra* note 1, at 281.

123. *Id.* Not surprisingly, the brief specifically asserted "there is no challenge whatever" on the state's power to enact compulsory education laws or reasonably regulate teacher qualifications or curriculum. *Id.* at 238.

124. The brief quoted philosophers, legal scholars, historians and educators, including John Stuart Mill, Chancellor Kent, and Herbert Spencer. For example, the brief quoted Mill: "A general state education is a mere contrivance for moulding people to be exactly like one another; . . . it establishes a despotism over the mind." *Id.* at 281-84. It also revisited Plato. *Id.* at 275.

125. *Id.* at 258-59.

126. *Id.* at 262.

127. Supplemental brief, in OREGON SCHOOL CASES, *supra* note 1, at 129. Appellee's brief claimed that "until the Russian Soviet system came into being in Russia, determined to destroy personal liberty, parental control and religion, and until the statute . . . was enacted in Oregon, for pernicious and intolerant purposes perhaps better left undiscussed in this court, it was doubtless true . . . that the total absorption of the individual in the body politic and his entire subjection to the state was . . . 'totally inadmissible.'" Brief of Appellee Society of Sisters, *supra* note 1, at 282.

are, in the end, what men and women live for," Guthrie described parental rights as "the essence of liberty."<sup>128</sup> Modern American society recognized this liberty Guthrie contended because "[i]n this day and under our civilization, the child of man is his parent's child and not the state's."<sup>129</sup> Describing Plato's "ideal commonwealth" as creating a "state-bred monster," the brief argued:

It need, therefore, not excite our wonder that today no country holds parenthood in so slight esteem as did Plato or the Spartans—except Soviet Russia. There children do belong to the state. . . . In final analysis, it is submitted, the enactment in suit is in consonance only with the communistic and bolshevistic ideals now obtaining in Russia, and not with those of free government and American conceptions of liberty.<sup>130</sup>

By contrast, Guthrie argued, "children mean everything" to Americans "living under the blessings of free institutions and of the Constitution which guarantees them."<sup>131</sup> Such a culture, he wrote, would find it "natural" that parents should be "tenderly solicitous" about their children's education and "keenly zealous" of their own right to guide and control it.<sup>132</sup> After quoting extensively from cases broadly defining economic liberties under the Fourteenth Amendment, Guthrie argued for a broad interpretation of parental rights because "the right to engage in a business, to teach, to acquire knowledge, to contract . . . verily shrink into relative inconsequence" when compared to parental rights.<sup>133</sup>

Religious liberty arguments enhanced the appellees' appeal to democratic principles. The Sisters' brief referred repeatedly to the connection between religious tolerance and democracy.<sup>134</sup> At oral argument, Guthrie read a statement from Presbyterian ministers linking abolition of religious education with "the philoso-

128. *Id.* at 274

129. *Id.* at 275.

130. *Id.* at 275.

131. *Id.*

132. *Id.*

133. *Id.* at 279-80.

134. *E.g., id.* at 240 ("there has never been a civilized nation without religion"); *id.* at 241 ("the more democratic republics become . . . the more do they need to live, not only by patriotism, but by reverence and self-control") (quoting Lord Bryce in *The American Commonwealth*); *id.* at 277 ("In our American theory, the state steps in, not to monopolize education or attempt to cast all children in a common mold, or forcibly deprive them of all religious training and instruction.") (quoting Columbia University President Butler); *id.* at 271 ("it is unreasonable and unjust in the extreme to suggest obliquely and by innuendo that the religious schools of the state, Catholic, Episcopalian, Presbyterian, Methodist, Lutheran, etc., do not inculcate reverence and righteousness and are to be classed as "red" or grouped with "bolshevists, syndicalists and communists").

phy of autocracy that the child belongs primarily to the state."<sup>135</sup> He argued that the purpose of preventing religious instruction paralleled "any atheistic or sovietic measure ever adopted in Russia."<sup>136</sup> By tying educational freedom to religious liberty, appellees directed the Court's attention to an issue "reaching to the very roots and spring of American constitutional liberty."<sup>137</sup>

The Court issued a unanimous decision on June 1, 1925. Justice McReynolds's brief opinion acknowledged the state's power to regulate education and schools.<sup>138</sup> It also recognized that the law would effectively destroy private schools in Oregon.<sup>139</sup> Citing *Meyer*, the Court concluded that the law "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of their children."<sup>140</sup> The Court's opinion gave little consideration to the content or scope of the parental rights upheld. It focused instead on the limits of state power. The Court's failure to articulate the scope of parental power is particularly interesting given the opinion's emphasis on the state's extensive authority to compel school attendance and regulate education.<sup>141</sup> The Court explicitly declared state monopoly of education to be inconsistent with democratic principles: "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."<sup>142</sup> Responding to the antitotalitarian

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135. OREGON SCHOOL CASES, *supra* note 1, at 668.

136. *Id.* at 669.

137. *Id.* at 665. The *amicus curiae* brief submitted by the American Jewish Committee focused heavily on the relationship between educational choice, religious liberty, and democracy, arguing that the legislation conferred "a monopoly of education" which will result "in precisely the same situation that now prevails in Russia." The brief explained that in Russia "it is strictly forbidden under severe penalties to impart religious instruction of any kind to children until they reach the age of eighteen years." *Id.* at 614.

138. *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925)

139. *Id.*

140. *Id.*

141. "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." *Id.* at 534. Felix Frankfurter described this dictum as one in which the Court "temptingly indicated to those bent on coercion how much room for mischief there is still left under the aegis of the Constitution." He further stressed that the Court left "ample room for the patrioteers to roll in their Trojan horses." Frankfurter's unsigned editorial appeared in the *New Republic*, June 17, 1925, reprinted in FELIX FRANKFURTER ON THE SUPREME COURT, EXTRAJUDICIAL ESSAYS ON THE COURT AND THE CONSTITUTION, 177-78 (Philip B. Kurland ed., 1970).

142. 268 U.S. at 535.

themes running through the briefs, the Court concluded: “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>143</sup> The Court rejected state monopoly of education as inconsistent with parental rights and, ultimately, with democracy.

### III. EDUCATION, DEMOCRACY, AND PARENTAL RIGHTS

The relationship between the state, parental authority, and education of children has absorbed the principal philosophers of Western civilization. Both Aristotle and Plato viewed education as essential to the survival of the state and envisioned a dominant role for the state.<sup>144</sup> John Locke, by contrast, argued that parents have a duty to care for their offspring, including the duty and authority to control their education.<sup>145</sup> John Stuart Mill maintained a role both for state and parents, contending that the state should require education but “leave to parents to obtain the education where and how they pleased.”<sup>146</sup> Locke and Mill’s recognition of parental interests squared with common law principles of parental duty and control.<sup>147</sup>

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143. *Id.*

144. Aristotle describes the factor “which most contributes to the permanence of constitutions is the adaptation of education to the form of government.” ARISTOTLE, *THE POLITICS AND THE CONSTITUTION OF ATHENS* 139 (Stephen Everson ed., Jonathan Barnes trans., 1996) (Book V 9). A distinguishing characteristic of tyranny is the suppression of education. *Id.* at 145-46 (Book V 11). Aristotle saw education as a responsibility of the state: “No one will doubt that the legislator should direct his attention above all to the education of youth; for the neglect of education does harm to the constitution. . . . The character of democracy creates democracy.” *Id.* at 195 (Book VIII 1). Unlike Plato, Aristotle accepted some role for the family in education. *Id.* at 31. Plato envisioned a state which assumes responsibility for raising and educating children from age ten “far away from those dispositions they now have from their parents.” *THE REPUBLIC OF PLATO* 220 (541a) (Allan Bloom trans., 1968). The Supreme Court explicitly rejected Plato’s model as undemocratic in *Meyer*. See *supra* note 97 and accompanying text.

145. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, Ch. VI, § 58, at 306, § 69, at 313 (1988).

146. JOHN STUART MILL, *ON LIBERTY*, Ch. V, ¶12 ¶13 (1869) (available online at <http://www.bartleby.com/130/5.html>). For further analysis of educational philosophy, see AMY GUTMANN, *DEMOCRATIC EDUCATION* 19-41 (Princeton Univ. Press 1987).

147. WILLIAM BLACKSTONE, *COMMENTARIES* 47, 434 (1753). Parental duty and authority include maintenance, protection, and education. *Id.* at 434. Rousseau similarly described the father as the “true teacher.” JEAN JACQUES ROUSSEAU, *EMILE* (Barbara Foxley trans., 1966). The Catholic Church also has articulated a divine, and “inalienable” mission and obligation of parents to educate their children. Pope Pius XI Encyclical, *Rappresentanti In Terra*, ¶¶ 32-33 (Dec. 31, 1929).

The philosophy supporting compulsory education in this country relied heavily upon the significance of education to a successful republic.<sup>148</sup> Thomas Jefferson, John Adams, James Madison, and George Washington all stressed the importance of education to government.<sup>149</sup> An educated populace would safeguard both government and individual liberties. The association of the public good with education stimulated the passage of compulsory education laws.<sup>150</sup> Federal land grants provided to new states for the establishment of public schools further linked federal and state policy to education.<sup>151</sup> The connection between education and democracy became increasingly important in the second half of the nineteenth century as schools became the focal point for assimilation and "Americanization" of new immigrants.<sup>152</sup> By 1900 more than thirty states and the District of Columbia had enacted compulsory attendance laws.<sup>153</sup>

Cases challenging compulsory attendance laws as violating parental rights failed primarily because the courts recognized the importance of education not only to the child, but also to the state.<sup>154</sup> These cases, while recognizing parental rights of care and control, held that the duty of parents to educate their children is owed both to the children and to the state.<sup>155</sup>

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148. The Northwest Ordinance of 1787 included the following clause: "Religion, morality and knowledge being necessary to good government . . . schools and the means of education shall forever be encouraged." See also U.S. House Committee on Public Lands, Report on Educational Land Policy (1826) published in BARNARD'S AMERICAN JOURNAL OF EDUCATION 28, 939, 942, 944 (1878) ("The foundation of our political institutions . . . rests in the will of the People. . . . How then is this will to be corrected, chastened, subdued? By education—that education, the first rudiments which can be acquired only in common schools.").

149. See TYACK, *supra* note 6, at 23-24. Jefferson wrote that education is necessary to enlightened government. Washington, in his Farewell Address as President, advised: "In proportion as the structure of government gives force to public opinion, it is essential that public opinion should be enlightened." *Id.* Noah Webster argued, "[i]n our American republics, where government is in the hands of the people, knowledge should be universally diffused by means of public schools." *Id.*

150. Massachusetts enacted the first statewide school law in 1789, requiring communities of certain populations to provide schooling. Massachusetts also enacted the first general compulsory attendance statute in the country in 1852. LAWRENCE KOTIN & WILLIAM F. AIKMAN, LEGAL FOUNDATIONS OF COMPULSORY SCHOOL ATTENDANCE 24-25 (Nat'l Univ. Public. 1980).

151. After the Civil War, Congress required new states to establish nonsectarian public schools as a condition for admission to the Union. TYACK, *supra* note 6, at 29.

152. ROSS, *supra* note 26, at 12-13.

153. KOTIN & AIKMAN, *supra* note 150, at 25. Reconstruction spurred the common school movement in the South. TYACK, *supra* note 6, at 133-36.

154. See e.g., State v. Bailey, 61 N.E. 730, 732 (Ind. 1901); State v. O'Dell, 118 N.E. 529 (Ind. 1918).

155. Bailey, 61 N.E. at 732 ("One of the most important natural duties of the parent is his obligation to educate his child, and this duty he owes not to the child only, but to

The drive to use public schools to inculcate Americanism on impressionable young minds took on a heightened urgency with the advent of World War I. Schools became the focal point for teaching patriotism and the dangers of nonconformity.<sup>156</sup> The country's preoccupation with nativism, patriotism, and ideological conformity extended beyond the war, reaching its apex with the Red Scare of 1919-20.<sup>157</sup> "Bolshevist" quickly became an epithet, not only for radicalism, but also for difference, whether political, religious, or cultural.<sup>158</sup> The crusade to purge America of Bolshevist influence spread through all facets of society.<sup>159</sup> Public education played a significant role in this crusade. States implemented patriotic instruction in the schools through mandated courses, patriotic ceremonies, and regulation of the content of textbooks.<sup>160</sup>

Paradoxically, while many viewed public education as the bulwark against radicalism, the public schools' pursuit of knowledge left them particularly vulnerable to claims of Bolshevist influence. Colleges were branded "hotbeds of bolshevism" and professors were accused of leading a "parlor pink seminary."<sup>161</sup> Public school teachers were suspended or dismissed for teaching

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the commonwealth.").

156. TYACK *supra* note 6, at 155.

157. See ROBERT K. MURRAY, RED SCARE, A STUDY IN NATIONAL HYSTERIA, 1919-1921, at 3-17 (Univ. of Minn. Press 1955) (describing how the fear of domestic Bolshevism resulted in the persecution of American communists and radicals).

158. *Id.* at 166-69. One English journalist observed: "No one who was in the United States . . . in the autumn of 1919, will forget the feverish condition of the public mind at that time. It was hag-ridden by the spectre of Bolshevism. . . . Property was in an agony of fear, and the horrid name 'Radical' covered the most innocent departure from conventional thought with a suspicion of desperate purpose." *Id.* at 17.

159. Politicians, clergy, labor leaders, farmers, factory workers, aliens, and civil libertarians were among those targeted. MURRAY, *supra* note 157, at 166-89. Even military officers were investigated for "Bolshevist views" such as criticizing the U.S. government. See, *Link Capt. Hibben with Red Activity, Army Board Opens Inquiry into Fitness of Officer to Hold Reserve Commission*, N.Y. TIMES, Sept. 3, 1924, at 16. The newspapers were filled with Bolshevist charges against individuals or groups. See, e.g., *Brings Plea to Aid Northwest Farms; Governor Nestos of North Dakota Refutes Reports of Wave of Radicalism*, N.Y. TIMES, Nov. 16, 1923, at 8 (reporting that Governor Nestos denied that North Dakota and North Dakota farmers were "either radical or Bolshevist"); *Reds Rely on Cash of 'Pink' Bolsheviki; Mine Union Expose Asserts Wealthy Liberals Here Kept Movement Going*, N.Y. TIMES, Sep. 15, 1923, at 20 (reporting that American "parlor" Bolsheviki funded U.S. communism); *Tell of Bolshevist Drive; Rubin and Smith Warn Chicagoans of Propaganda*, N.Y. TIMES, Aug. 17, 1923, at 16 (warning that Chicago was becoming a center of Bolshevism).

160. For example, Oregon banned any textbook "that speaks slightly of the founders of the republic, or of the men who preserved the union, or which belittles or undervalues their work." TYACK, *supra* note 6, at 169-70. This language was not removed from the statute until 1985, ch. 388, §2, OREGON LAWS (1985).

161. MURRAY, *supra* note 157, at 170.

about Bolshevism.<sup>162</sup> Charges that Bolsheviks had infiltrated the public school system appeared nationwide.<sup>163</sup> In 1921, the American Bar Association warned that radical teachers were corrupting children by indoctrinating “questions into the unformed minds of the coming generation.”<sup>164</sup> Numerous states instituted loyalty oaths for teachers.<sup>165</sup>

The postwar Bolshevik hysteria posed, in stark relief, fundamental questions about democratic principles. Bolshevism reflected the antithesis of democracy, the antimatter to democracy’s matter. The “Bolshevist” label was not only an epithet for difference, it was code for all things considered antidemocratic.<sup>166</sup> But as the war years receded, increasing concerns surfaced that repressive and intolerant public responses to nonconformity were themselves tyrannical and thus undemocratic.<sup>167</sup> Political leaders who had proclaimed loyalty as the dominant characteristic of “Americanism” after the war now warned that an “intolerant spirit” was “the most ominous sign of [their] times.”<sup>168</sup> For example, in 1923, Charles Evans Hughes, Secretary of State under President Harding, vigorously defined patriotism as “loyalty to the actual laws of the land” that does not allow efforts “to breed disrespect for law.”<sup>169</sup> By 1925, Hughes, as President of the American Bar Association, cautioned that “[o]ur institutions were not devised to bring about uniformity of opinion.”<sup>170</sup> Hughes stressed that “the essential characteristic of

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162. *Id.* at 170-73.

163. In 1923, President Harding spoke at the opening session of the annual meeting of the Daughters of the American Revolution, where the president of the D.A.R. claimed that 8,000 teachers across America preached disloyalty. *Harding and Hughes Ask Patriotic Help at D.A.R. Convention*, N.Y. TIMES, April 17, 1923, at 1. Addresses on communism in the public schools were common. *See, e.g., Ousted By A Woman At Anti-Red Meeting*, N.Y. TIMES, Jan. 8, 1924, at 7 (charging a “stream of radicalism which is flowing from Moscow to our public schools”). Patriotic societies such as the D.A.R. and the American Legion were aggressive proponents of “100% Americanism.” MURRAY, *supra* note 157, at 264-65. The resurgence of the Ku Klux Klan was in large part attributable to their campaign for “Americanism.” *Id.*

164. TYACK, *supra* note 6, at 173. The Portland *Oregonian* charged that children were “the prey of theoretical propagandists in our institutes of education.” MURRAY, *supra* note 157, at 172.

165. MURRAY, *supra* note 157, at 270.

166. *See* Bradley C. Bobertz, *The Brandeis Gambit: The Making of America’s “First Freedom,” 1909-1931*, 40 WM. & MARY L. REV. 557, 615 (1999).

167. The rise of fascism in Italy provided a powerful example of how intolerance breeds repression. *Id.* at 616.

168. *Hughes Fears Laws Endanger Liberty*, N.Y. TIMES, Sept. 3, 1925, at 27.

169. *Harding and Hughes Ask Patriotic Help at D.A.R. Convention*, *supra* note 163, at 6.

170. *Hughes Fears Laws Endanger Liberty*, *supra* note 168. Hughes specifically mentioned the Oregon law as an example of an “obstruction” to education and “freedom of learning.” *Id.*

true liberty is, that under its shelter many different types of life and character and opinion and belief can develop unmolested and unobstructed."<sup>171</sup>

*Pierce* thus arrived at the Court during a time of great national debate on the basic meaning of democracy. The Court had demonstrated that it was quite receptive to concerns that radicalism posed real dangers for democracy. In a series of cases upholding convictions under the Espionage Act against First Amendment challenges, the Court repeatedly held that teaching or advocating socialist or communist principles justified the convictions.<sup>172</sup> In *Gitlow v. New York*,<sup>173</sup> decided just one week after *Pierce*, the Court upheld the conviction of a member of the Socialist Party for the preparation and distribution of publications describing socialist and communist principles and advocating revolutionary "mass action" against the government.<sup>174</sup>

That both sides of the *Pierce* dispute played the radicalism card attests to some disagreement within the Court, as within the country, on the proper response to perceived threats to democracy. The wartime intolerance for expression of Bolshevik ideas, while still present in the 1920s, met a countervailing theory that free expression offered the best avenue for defusing radicalism in America.<sup>175</sup> Justice Holmes's dissent in *Gitlow*, joined by Justice Brandeis, argued that suppression of radical speech by the government, absent immediate incitement, is inconsistent with democratic principles: "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."<sup>176</sup> For Holmes and Brandeis, radicalism posed less of a

171. *Id.*; see also Bobertz, *supra* note 166 (describing the postwar move from intolerance to tolerance in matters of speech).

172. *Schenck v. United States*, 249 U.S. 47 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Abrams v. United States*, 250 U.S. 616 (1919); *Schaefer v. United States*, 251 U.S. 466 (1920); *Pierce v. United States*, 252 U.S. 239 (1920).

173. 268 U.S. 652 (1925).

174. 268 U.S. 652 (1925). In *Gitlow*, the Court upheld the validity of a state statute prohibiting criminal anarchy or the advocacy of criminal anarchy, and "assumed" that freedom of speech is one of the liberties protected against state infringement by the Fourteenth Amendment. *Id.* at 666. The Court applied a highly deferential standard of review, concluding that the state's determination that utterances advocating overthrow of the government by violent means present a serious danger "must be given great weight" with "[e]very presumption . . . indulged in favor of the validity of the statute." *Id.* at 668.

175. See Bobertz, *supra* note 166, at 610-14 (discussing free speech as a "safety valve" to reduce social unrest).

176. *Gitlow*, 268 U.S. at 632 (Holmes, J., dissenting); see also *Abrams v. United States*,

threat to democracy than the danger of tyranny from official suppression of speech.<sup>177</sup> To the *Pierce* Court, the peril of insurgency through radicalism had to be weighed against the prospect of state monopoly of education, a system vigorously assailed as antidemocratic. The religious and ethnic bigotry infusing *Pierce* highlighted the relationship between intolerance and tyranny. In addition, the appellees' joinder of their attack on the state's educational monopoly with an appeal to traditional parental prerogative resonated with a conservative Court suspicious of extensive regulation.<sup>178</sup> The Court already had emphasized the connection between education and liberty in *Meyer*: "The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. The Ordinance of 1787 declares, 'Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and means of education shall forever be encouraged.'<sup>179</sup> In fact, prior to oral argument on *Pierce*, Chief Justice Taft told Guthrie that *Meyer*

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250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market. . . . That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.")

177. The Court's hostility to economic regulation during this era can in part be attributed to its perception that such legislation constituted social and economic engineering inconsistent with basic democratic principles. See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383 (2001); Michael J. Phillips, *The Progressiveness of the Lochner Court*, 75 DENV. U. L. REV. 453 (1998); Note, *Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered*, 103 HARV. L. REV. 1363 (1990).

178. For a full exploration of the perspectives of Chief Justice Taft and his conservatism, see Carl McGowan, *Perspectives on Taft's Tenure as Chief Justice and Their Special Relevance Today*, 55 U. CIN. L. REV. 1143 (1987). "The new Chief Justice was conservative in his political and social views. Of major concern to Taft was the need to reduce the power that the national government had assumed during the First World War and in the adjustment to peace conditions." *Id.* at 1149-50. McGowan argues that "the Taft Court's hesitancy to tolerate the new social and economic legislation led to a period of extensive judicial activism toward state legislatures." *Id.* at 1153. McGowan describes Taft's view that "judicial review was the hallmark of the American system of free government" and "necessary to protect individual liberty." *Id.* at 1154; see also David P. Currie, *The Constitution in the Supreme Court: 1921-1930*, 1986 DUKE L.J. 65.

179. *Meyer*, 262 U.S. at 400. Justice Brandeis included education as a fundamental interest, on the same level as speech. During consideration of *Meyer*, Brandeis advised Felix Frankfurter that the "right to your education and to utter speech is fundamental except clear and present danger." BRANDEIS ON DEMOCRACY 210 (Philippa Strum ed., 1995). In 1915, Brandeis spoke on "True Americanism" in Boston on the Fourth of July and asserted, "Every citizen must have education, broad and continuous. This essential of citizenship is not met by an education which ends at the age of fourteen, or even at eighteen or twenty-two." *Id.* at 27. In an address in 1906 to the Civic Federation of New England, Brandeis addressed at length the critical importance of education, concluding that "[t]he educational standard required of a democracy is obviously high." *Id.* at 93.

controlled the disposition of *Pierce*.<sup>180</sup> Ultimately the pairing in *Pierce* of monopolistic state means and conformity enforcing state ends reinforced the law's antidemocratic attributes. The state's interest in fostering citizenship could not justify treating citizens as mere instrumentalities of the state.

The *Pierce* decision met with widespread approval. Both the popular and academic press uniformly described the case as a triumph for tolerance and a defeat for state coercion.<sup>181</sup> Shortly after the decision, Felix Frankfurter published an unsigned article entitled "Can the Supreme Court Guarantee Toleration?" in which he described the *Pierce* decision: "Thus comes to an end the effort to regiment the mental life of Americans through coerced public school instruction."<sup>182</sup> The broad appreciation of the

180. Prior to argument, Chief Justice Taft entered a room where Guthrie and counsel Kavanaugh were waiting. When Guthrie requested additional time to present his argument, Taft responded, "I don't see why you want any more time. In principle this case is simply the *Meyer* case over again." ROSS, *supra* note 26, at 171 (citing Correspondence from John H. Burke to Thomas O'Mara, Mar. 25, 1925, Archives of the United States Catholic Conference).

181. The *New York Times* described the case as holding that "the inherent right of a parent to send his boy or girl to any school he deems best was upheld and the right of a state to insist that the children must attend certain institutions was sharply denied." N.Y. TIMES, June 2, 1925, at 1. According to the *New York Times* editorial describing the statute as "born of prejudice," the case held that "the guarantees of religious freedom and individual liberty are violated when the attempt is made to say exactly how and where children shall be educated." N.Y. TIMES, June 2, 1925, at 22. The Portland *Oregonian* declared that Eastern newspapers were "unanimous" in commending the decision. See *Eastern Press Commends Oregon School Decision*, OREGONIAN, June 4, 1925. The article quoted numerous newspapers, including *The Philadelphia Public Ledger* ("Few supreme court decisions in years have been more important. . . . The decision upholds a cherished right. It is sound in Americanism and common sense. . . . Standardized education has been defeated"); *The New York Herald Tribune* ("The . . . decision is one of great importance . . . since it clarifies the problem of state control over education . . . maintaining . . . that the state may not monopolize education"); *The Baltimore Sun* ("Any other decision would have been revolutionary. No other decision could have been rendered without dealing a deadly blow to the principles on which our government is based, adding a final nail to the coffin of freedom which fanatical tyranny has been fashioning since the close of the world war"). The academic commentators varied in describing the nature of the interest protected but agreed in endorsing the soundness of the limitation on state power. See e.g., *Oregon School Law Invalid*, 9 CONST. REV. 150 (1925) (parental and religious liberty); J.P. Chamberlain, *The Legislature and the Schools*, 11 A.B.A.J. 492 (1925) (parental liberty); Charles Warren, *The New 'Liberty' Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 455 (1925-1926) (parental rights and property rights); Note, *State Control of Education*, 74 U. PA. L. REV. 77, 78 (1925) (parental rights and limitation on state ability to prohibit rather than regulate); Notes, *Constitutional Law*, 12 VA. L. REV. 146 (1925-1926) (property rights).

182. Frankfurter's description of the decision as "just cause for rejoicing," is particularly significant in so far as the article attacked the Supreme Court's "control of legislation" and called on the states to protect liberalism. FRANKFURTER, *supra* note 141 at 174-75.

Court's recognition of liberty interests over loyalty concerns signified the shift in the national mood from suspicion to tolerance.

#### IV. *PIERCE* AS PRECEDENT

Given the timing of *Pierce*, it might not have endured as precedent. The demise of *Lochner* and the economic liberties cases in the 1930s could easily have discredited *Pierce*. In the alternative, *Pierce* might have been subsumed into the speech and religion cases that incorporated the First Amendment into the due process clause of the Fourteenth Amendment.<sup>183</sup> Neither scenario occurred. More than 144 Supreme Court cases have cited *Pierce* as authority.<sup>184</sup>

*Pierce* appears as a constitutional chameleon from the 1920's through the 1960's. The description of the constitutional right protected by *Pierce* varies considerably. In addition to parental rights, the case is cited in support of economic liberty,<sup>185</sup> free speech,<sup>186</sup> and religious liberty.<sup>187</sup> The perception of *Pierce* as a religious liberty case is particularly prevalent. Cases in this vein blend religious liberty with parental liberty. For example, *Prince v Commonwealth of Massachusetts*<sup>188</sup> cited *Pierce* as precedent supporting both religious liberty ("The rights of children to exercise their religion, and of parents to give them reli-

183. *Gitlow v. New York*, 268 U.S. 652 (1925) (speech); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (free exercise). *Gitlow* was decided only one week after *Pierce*.

184. See generally Richard Seid, *75 Years After Pierce v. Society of Sisters*, 78 U. DET. MERCY L. REV. 373 (2001) (listing and discussing cases).

185. *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 527 (1926); *Village of Euclid v. Ambler Realty*, 272 U.S. 365, 386 (1926); *Bridges v. State of California*, 314 U.S. 252, 281 (1941) (Frankfurter, J., dissenting).

186. *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) ("The right of free speech, the right to teach . . . are of course fundamental rights"); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"); *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 599 (1940) ("[T]he Bill of Rights bars a state from compelling all children to attend the public schools").

187. *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) ("The rights of children to exercise their religion, and of parents to give them religious training, . . . have had recognition here"); *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947) ("This Court has said that parents may . . . send their children to a religious rather than a public school."); see also *id.* at 33 (Rutledge, J., dissenting). Justice Rutledge relied extensively upon *Pierce* as a religious liberty case, reasoning that "education which includes religious training and teaching . . . have been made matters of private rights by the very terms of the First Amendment." He concluded: "It was on this basis . . . that this Court held parents entitled to send their children to private, religious schools." *Id.* at 51; *accord Palko v. Connecticut*, 302 U.S. 319, 324 (1937).

188. 321 U.S. 158 (1944).

gious training . . . have had recognition here.") and parental liberty ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents."<sup>189</sup> Similarly, in *Wisconsin v. Yoder*,<sup>190</sup> the Court stated, "It is clear that such an intrusion by a State into family decisions in the area of religious training would give rise to grave questions of religious freedom comparable to those raised here and those presented in *Pierce*. . . ."<sup>191</sup> *Yoder* accepted *Pierce's* recognition of parental control in the upbringing of their children established by *Pierce* as "beyond debate."<sup>192</sup> The Court concluded: "However read, the Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children."<sup>193</sup> Although the Court distinguished parental interests from free exercise rights, it nonetheless characterized *Pierce* as a religious liberty case decided on parental rights grounds primarily because the Court had not yet incorporated the free exercise clause into the Fourteenth Amendment.<sup>194</sup>

The most thorough discussions of *Pierce* occur in *Prince* and *Yoder*. In both of those cases, the analysis of the scope of parental rights resounds with ambiguity. While careful to characterize parental rights as "fundamental," the Court emphasized with equal clarity the power of the state to regulate in ways that may conflict with parental interests.<sup>195</sup> This ambiguity arises directly from the failure of *Pierce* to address the tension between parental rights and legitimate state control over children.

The resurgence of substantive due process analysis in the 1960s refocused the Court on parental interests as a matter of personal and family privacy.<sup>196</sup> The importance of *Pierce* as a

189. *Id.* at 165-66.

190. 406 U.S. 205 (1972).

191. *Id.* at 231-32.

192. *Id.* at 232.

193. *Id.* at 233.

194. *Id.*; see also *School District of Abington Township v Schempp*, 374 U.S. 203, 312 (1963) (Stewart, J., dissenting) ("It has become accepted that the decision in *Pierce* . . . was ultimately based upon the recognition of the validity of the free exercise claim involved in that situation.").

195. In *Prince*, the Court said that "the state as *parens patriae* may restrict the parents' control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways." 321 U.S. at 166. In *Yoder*, the Court stated: "There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education." 406 U.S. at 213. Both cases cite *Pierce* for these limitations on parental rights.

196. See e.g., *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) ("[T]he *Meyer* and *Pierce* decisions have respected the private realm of family life which the state cannot enter."); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) ("this guarantee of personal privacy

foundational case for the right of privacy is perhaps best described by Justice Harlan in his dissent in *Poe v. Ullman*.<sup>197</sup>

[Liberty] . . . is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints. . . . Thus, for instance, . . . in that case [*Meyer*] and in *Pierce*, . . . I do not think it was wrong to put those decisions on "the right of the individual to . . . establish a home and bring up children" . . . or on the basis that "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children. . . . I consider this so, even though today those decisions would probably have gone by reference to the concepts of freedom of expression and conscience . . . derived from the specific guarantees of the First Amendment. . . . For it is the purposes of those guarantees and not their text, the reasons for their statement by the Framers and not the statement itself . . . which have led to their present status in the compendious notion of "liberty" embraced in the Fourteenth Amendment."<sup>198</sup>

Justice Harlan interpreted the "purposes" and "reasons" of the textual guarantees to include "a most fundamental aspect of 'liberty,' the privacy of the home in its most basic sense".<sup>199</sup>

Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to protection the principles of more than one explicitly granted Constitutional right. . . . This same principle is expressed in the *Pierce* and *Meyer* cases. . . . These decisions . . . have respected the private realm of family life which the state cannot enter.<sup>200</sup>

The connection between *Pierce* and privacy is further illuminated by *Pierce's* focus on the democratically compelled limits on state power over individual lives. The privacy cases explore the outer limits of government authority over intimate personal and family decisions.<sup>201</sup> They share with *Pierce* a preoccupation

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. . . has some extension to activities relating to . . . child rearing and education"); *FCC v. Pacifica Found.*, 438 U.S. 726, 770 (1978) ("*Yoder* and *Pierce* hold that parents, not the government, have the right to make certain decisions regarding the upbringing of their children").

197. 367 U.S. 497 (1961).

198. *Id.* at 543-44.

199. *Id.* at 548.

200. *Id.* at 551-52.

201. See e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating a state law prohibiting the use of contraceptives); *Roe v. Wade*, 410 U.S. 113 (1973) (invalidating a

with draconian governmental control over significant personal choices.<sup>202</sup> The antitotalitarian concerns of the privacy cases generally lead to an analysis which, like *Pierce*, eschews substantial consideration of the scope of the right in question in favor of focusing on the government's use of impermissible means.

After two decades in which *Pierce* appeared primarily in string citations, *Troxel v. Granville*<sup>203</sup> finally focused attention on the parental rights protected by *Pierce*. *Troxel* held that a Washington statute permitting broad judicial discretion to override parental decisions concerning third-party visitation, as applied to a claim by paternal grandparents, violated a mother's due process right to control her children's upbringing. The 6-3 decision generated six opinions, including the plurality opinion by Justice O'Connor. Though splintered, the Court showed considerable consensus on the recognition of parental rights. Eight Justices recognized a constitutionally protected right of parents to control their children's upbringing.<sup>204</sup> At the same time, none of these eight Justices was willing to give significant weight to parental rights; all eight recognized the authority of the state to intrude on parental rights in appropriate situations.<sup>205</sup> In addition, five out of the six opinions, including the plurality opinion, did not articulate a standard of review.<sup>206</sup> Most significantly, even while recognizing a parental right, the various opinions admit that the right is ill-defined and show no interest in articulating its "metes and bounds."<sup>207</sup>

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state law prohibiting abortion except to save the life of the woman); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (invalidating a city ordinance prohibiting extended family members from living together).

202. See Rubinfeld, *supra* note 18.

203. 530 U.S. 57 (2000).

204. Only Justice Scalia disputed the existence of a constitutional right, although Justice Thomas upheld the right primarily on the basis of *stare decisis*. *Id.* at 80, 91-93. The dissents by Justices Kennedy and Stevens explicitly accepted the legitimacy of parental rights. *Id.* at 81-96.

205. Both Justice O'Connor's plurality opinion and Justice Souter's concurrence expressed concern with the Washington law because it did not require some consideration of parental interests. Neither suggested parental interests would always be deemed paramount. *Id.* at 69 (O'Connor, J.); *Id.* at 77 (Souter, J., concurring). Justice Stevens's dissent said that "we have never held that the parent's liberty interest in this relationship is so inflexible as to establish a rigid constitutional shield." *Id.* at 86 (Stevens, J., dissenting).

206. The plurality spoke only in conclusory terms of "unconstitutional infringement." *Id.* at 72. Justice Thomas, concluding that *stare decisis* supported fundamental parental rights, applied strict scrutiny. *Id.* at 80.

207. "Our cases, it is true, have not set out exact metes and bounds to the protected interest of a parent." *Id.* at 78 (Souter, J., concurring). "We do not, and need not, define today the precise scope of the parental due process right in the visitation context." *Id.* at 73 (O'Connor, J., plurality opinion).

Justice Stevens affirmatively rejected Justice Thomas's suggestion that *Pierce* resolved the case because, unlike *Pierce*, *Troxel* did "not present a bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interests."<sup>208</sup> Justice Stevens's comment clarifies some of the analytical disarray in *Troxel*. *Pierce* provides little guidance for a case like *Troxel*, in which the legitimacy of some level of governmental regulation of visitation is accepted and the Court is faced with the difficult task of sorting out relative degrees of authority among multiple parties. Because *Pierce* is fundamentally grounded in antitotalitarian principles, it offers little insight into the more complex analysis of defining the scope of parental rights in the context of permissible state means.

The *Pierce* Court was deeply absorbed with defining the limits of state power in a constitutional democracy; it was less concerned with the scope and meaning of parental rights. The endurance of parental rights in constitutional doctrine owes more to the profound respect for these interests throughout our legal and cultural history than to explicit constitutional analysis. In that regard *Pierce* offers only the most skeletal analytical frame for parental rights. Rather, its richness rests in the Court's eloquent description of the threat posed by monopolistic state means and conformity-enforcing state ends to democratic principles of tolerance and pluralism.

## V. CONCLUSION

The brevity of the *Pierce* decision belied the complexity of the principles at stake. The Oregon initiative presented in stark relief the question of whether the state's interest in fostering citizenship justified state monopoly of education. This question's profound implications for democracy were colored by a national obsession with the perceived evils of communism. With its strong language rejecting state authority to "standardize" children, *Pierce* treated the controversy as one directly pitting democracy against totalitarianism. The nativism and religious bigotry underlying the Oregon law provided the subtext for this pitched political struggle. In holding the law unconstitutional, the Court sent a

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208. *Id.* at 86 (J. Stevens, dissenting). Justice Stevens also argued that while *Pierce* "is a source of broad language about the scope of parents' due process rights . . . the constitutional principles and interests involved in the schooling context do not necessarily have parallel implications in this family visitation context, in which multiple overlapping and competing prerogatives of various plausibly interested parties are at stake." *Id.* at 86 n.7.

strong message that tolerance is a fundamental constitutional value. *Pierce*'s protection of parental rights was incidental to the decision's primary concern: whether state monopoly of education is permissible in a democracy. Although *Pierce* serves legitimately as a point of origin for the constitutional protection of parental rights, it tells us far more about the fundamental attributes of democracy.