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

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David M. Wagner* 

Is homeschooling a constitutional right? A homeschooling advocate asked 
me this question several years ago, and I have been struggling with it since, as I 
believe on one hand that homeschooling is the best option for some families, and 
that its legal availability is a critical check-and-balance on government heavy-
handed power to educate children1; but I also have a Scalian preference for 
democratic decision-making where the Constitutional text is unclear, and a distaste

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(University of Arkansas School of Law, Fayetteville), Prof. Saikrishna Prakash (University of Virginia School of 
Law), and Prof. Dermot Quinn (Seton Hall University). All conclusions and (of course) all errors are my own. 
1 This governmental power is ominously leveraged by academics who argue that it should be exclusive and 
enforced. See e.g. Kimberly A. Yuracko, Education off the Grid: Constitutional Constraints on Homeschooling, 96 
CAL.L.REV. 123 (2008); JAMES DWYER, RELIGIOUS SCHOOLS V. CHILDREN’S RIGHTS (1998); Barbara Bennett 
and Parental Liberty as a Core Value in Educational Policy, 78 U.DET.MERCY L.REV. 491 (2001); Richard W. 
(1996)
for Rights-R-Us jurisprudence.²

Before the two key Taft Court decisions that we examine in this essay, Meyer v. Nebraska³ and Pierce v. Society of Sisters,⁴ “rights talk”⁵ was rarely used in regard to the parental function in education in American law. As we will see, before these decisions, organized schooling proceeded from the 1850s forward on the crest of apparent progressive inevitability. When, however, the line was crossed between compulsory organized schooling of some sort, often with considerable parental input, and compulsory schooling in schools run by the government (though local), with parents seen more as irrelevant⁶ or even a problem,⁷ a constitutional order preoccupied with traditional rights and freedoms eventually drew a line in the sand, and despite current attempts to erase that line, it appears to retain, and deserves to retain, sufficient support across the ideological spectrum to hold.

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² Meaning by this, an approach to constitutional judging that sees an appropriate and indeed urgent role for the judiciary in discovering heretofore unrecognized rights in the Constitution, with a view to keeping the Constitutional flexible and “facilitative.” This view is defended, using the term “facilitative,” by Justice Brennan in his dissent in Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Brennan, J., dissenting). As implied in the text, Justice Scalia, author of the plurality opinion in Michael H., is a leading opponent of this type of judging – and, as will be discussed, even has his doubts about the two cases on which parental rights in education principally rely as far as Supreme Court support is concerned; see notes 3 and 4 infra. 3 262 U.S. 390 (1923) 4 268 U.S. 510 (1925)
³ The term comes from Prof. Mary Ann Glendon’s book, M. GLENDON, RIGHTS TALK (1991), critiquing the isolated individualism that undergirds some rights claims and rights rhetoric in modern constitutional law. Meyer and Pierce do not come within this ban, as they explicitly match rights with duties, just as Prof. Glendon would have it.
⁶ See infra note 64 and accompanying text
⁷ See infra note 39 and accompanying text
If the right of parents to choose private schools, including religious ones, is secure for now, what about a right to homeschool? In roughly the period from 1970 to the present, homeschooling in the United States has gone from outrageous to trendy – hardly the only social phenomenon to accomplish this in American history. Through legislative reforms, not judicial decisions, it went during the 1980s from being at best only marginally legal in most states to being fully legal in all of them, with varying degrees of regulation. Does this progress indicate it is

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9 One need only think of, for example, the postwar change in attitudes toward sexual conduct that usually goes by the name of “the sexual revolution.” Another example might be recent shifts in views of medicinal marijuana use or even non-habitual recreational marijuana use.

now a constitutional right? Or, to approach the same question from a very different angle, is there a strand of practice of and respect for homeschooling in the American legal history and tradition, such that the claim of its being “deeply rooted” in such history and tradition can be made?

My argument will proceed along these lines. In Part One, I will discuss a recent case that brought into discussion a hypothetical right to homeschool, in the context of U.S. refugee law. The asylum-seekers lost (as of this writing), but the court’s discussion did not, though it could have, dismiss the claim that homeschooling is a right of American citizens. In Part Two, I will show that homeschooling has many of the features of a substantive due process right as outlined by a Supreme Court majority in Washington v. Glucksberg and by a plurality in Michael H. v. Gerald D.  

(Internal citations omitted but including, inter alia, Meyer and Pierce)
Shifting gears, I will then show in Part III that the Supreme Court precedents that ground the right to choose private over public schooling, *Meyer v. Nebraska*\textsuperscript{14} and *Pierce v. Society of Sisters*\textsuperscript{15}, are above all cases about the Lochnerian\textsuperscript{16} right to freedom in one’s chosen profession, and therefore, for consistency, the concessions those cases make to legitimate state regulation of the parental interest in education, which have been interpreted broadly, should in fact be interpreted narrowly. This part will require consideration of a partial rehabilitation of the long-rejected *Lochner*.\textsuperscript{17} My conclusion is that homeschooling has historical and case support for substantive due process protection.\textsuperscript{18}

**Part One**

The *Romeike* case, 2012-14 and counting

\textsuperscript{14} 262 U.S. 390 (1923)
\textsuperscript{15} 268 U.S. 510 (1925)
\textsuperscript{16} See *Lochner v. New York*, 198 U.S. 45 (1905)
\textsuperscript{17} This is occurring. See *e.g.* DAVID BERNESTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM, 2011; TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING, 2010
\textsuperscript{18} Those (mostly on the “right”) who maintain that substantive due process is “spinach,” as Justice Scalia has called it in off-the-bench speeches, will have a fundamental problem with my argument. But remember that at oral argument in *McDonald v. Chicago*, 561 U.S. 3025, Justice Scalia urged counsel for the Mr. McDonald to choose Due Process rather than Privileges or Immunities as the vehicle for incorporating the Second Amendment against the states, see Transcript of Oral Argument at http://www.buckeyefirearms.org/publicfiles/pdf/McDonald-v-Chicago-Oral-Arguments.pdf, pages 6-7, so apparently the “spinach” theory goes only so far. And consider *Troxel v. Granville*, 530 U.S. 57 (2000): Scalia did indeed call for not extending the substantive due process precedents of *Meyer* and *Pierce*, but not for overruling them. *Id.* at 92. Justice Thomas, meanwhile, agreed with the rest of the Court’s continuing confidence in them by calling for clarification that the rights they protect are fundamental and deserving of strict scrutiny. *Id.* at 80.
Members of an Evangelical Free Church in Germany, the Romeike family's religiously-grounded need to teach their children clashed with Germany's education laws that reflect profound fear of “parallel societies.”

The Romeike family sought asylum in the United States on the grounds that that had, as the asylum statute requires, a “well-founded fear” of persecution based on their homeschooling if they were returned to Germany, where they were already subjected to “increasingly burdensome fines[.]” The first hearing officer they faced granted them asylum, but that ruling was overturned, and the family's appeal to an Article III court upheld the second Board ruling. The Home School Legal Defense Association, representing the Romeikes, has appealed to the Supreme Court; that is where matters stand in their case as of this writing.

The Romeikes' problem lies more with statutory asylum law – which speaks vaguely in terms of “race, religion, nationality, membership in a particular social group, or political opinion[,]” any of which could plausibly include

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19 Romeike v. Holder, 718 F.3d 528 (C.A. 6, 2013), at 534. A similar concern, pushed by the Ku Klux Klan, helped propel the Oregon School Bill to approval in 1922, setting the stage for Pierce. See ABRAMS, supra note 6, 52-57.
20 Id. at 530
21 Id. It should be noted that the decision to appeal the immigration judge’s decision to allow the family asylum was an executive one, and therefore one that is at least notionally attributable, in constitutional terms, to the Obama administration. Whether any other administration would have made a different decision is of course speculation.
22 http://www.hslda.org/legal/cases/romeike.asp (last visited Feb. 9, 2014)
23 8 U.S.C. Sec. 1101(a)(42)(A)
24 Id.
homeschoolers or not (though “race” and “nationality” might usually be more of a stretch) – than with U.S. constitutional law as it applies to homeschooling.

The majority opinion by Judge Sutton held, and a concurrence by Judge Rogers underscored, that the United States would have difficulty serving as a universal situs for the exercise of rights guaranteed by our laws but not by those of other countries, and Congress should say so clearly if it desires such a result. To this common-sense observation, a common-sense reply may be given: the categories that are stated in the asylum statute, taken as a whole, have the look of generosity rather than careful enumeration. Be that as it may, the more plausibly one can argue that homeschooling is a constitutional right in the United States, the better positioned the Romeikes, and future similarly-situated families, will be.

Before we leave the Romeike case to look at that question, it is worth noting the Circuit's dismissal of any conclusions to be drawn from the uncontested fact that Germany's present laws against homeschooling date from 1938, the heart of the Nazi era:

If as the Romeikes claim, the law emerged from the Nazi era, that

25 “race, religion, nationality, membership in a particular social group, or political opinion” 8 U.S.C. Sec. 1101(a)(42)(A)
26 Romeike v. Holder, 718 F.3rd 528 at __
would understandably make anyone, including the Romeikes, skeptical of the policy underlying it. But such a history would not be itself doom the law. The claimants must still show that enforcement of the law amounts to persecution under the immigration laws. They have not done so.27

Perhaps not (I do not undertake a study of refugee law here), but for context, we may note that the growing threat to the educational freedom of Catholics as well as others in Nazi Germany, even before 1938, had prompted Pope Pius XI to release the only encyclical ever officially issued in German, *Mit Brennender Sorge* (With Burning Care),28 warning about the anti-Christian and even neo-pagan tendencies of Nazi doctrine, the regime's growing assault on religious freedom in education, and the inescapable responsibility of Catholic parents for their children. No one would maintain that the education environment in Germany today is the same the one that called forth *Mit Brennender Sorge*. But oddly enough, that nation's law is remarkably similar.29 And the German education system remains

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27 Id.
28 [http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_14031937_mit-brennender-sorge_en.html](http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_14031937_mit-brennender-sorge_en.html) In Section 39 of this encyclical, Pius wrote specifically to Catholic parents: “[D]o not forget this: none can free you from the responsibility God has placed on you over your children. None of your oppressors, who pretend to relieve you of your duties can answer for you to the eternal Judge, when he will ask: ‘Where are those I confided to you? May every one of you be able to answer: ‘Of them whom thou hast given me, I have not lost any one’ (John xviii. 9).’”
29 “German law requires all children to attend public school or state-approved private schools.” *Romeike*, 718 F3d. 528, 530
So much, then, for the menacing side of the Sixth Circuit's *Romeike* decision. The opinion also has, from the point of view of homeschooling, something of a bright side as well. While no Supreme Court decision has held *in terms* that a constitutional right to homeschool exists, the *Romeike* decision is virtually willing to assume that such a constitutional right exists: “That the United States protects the rights of ‘parents and guardians to direct the upbringing of and education of the children under their control, *Yoder*, 406 U.S. at 233, see *Pierce*, 268 U.S. at 534-35; *Meyer*, 262 U.S. at 400-01, does not mean that a contrary law in another country establishes persecution on religious or any other protected ground.”31 Again, one may regret, and perhaps dispute, the assertion of a disconnect between U.S. parent-child law and U.S. asylum law, but one should note, at least, the breadth of the court's hypothetical concept of the parental right (and duty) recognized in *Meyer* and *Pierce*.

**Part Two**

31 *Id.*
Theory Before *Meyer-Pierce*

If what we today call parental rights in education first leapt into constitutional case-law with *Meyer-Pierce* in the early 1920s, what are some of the background traces of that doctrine — evidence that might suggest that homeschooling has deep roots in American history and tradition, thus strengthening its case for constitutional protection?\(^{32}\)

Early discussion about education among U.S. statesmen was mostly about a national university,\(^{33}\) despite the absence of the power of erecting one from the powers specifically given to Congress in the Constitution. Theoretical discussion about elementary education also tended to assume it would take place outside the home. But one significant exception, perhaps a surprising one, is Locke.

Locke is best known for “launching liberalism”\(^{34}\). With the various shades of meaning the word “liberalism” can have and the ways it has changed over the centuries, it is, perhaps unfairly, not commonly associated today with enhancing

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\(^{32}\) *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) (“We begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices.”)

\(^{33}\) THOMAS AND LORRAINE PANGLE, THE LEARNING OF LIBERTY 146-152 (1993)

\(^{34}\) See generally MICHAEL ZUCKERT, LAUNCHING LIBERALISM (2002)
and affirming parents' rights in the education of their children. Perhaps it is best to set aside the term and look at some of what Locke said on our issue. Locke writes in the Epistle Dedicatory to his *Some Thoughts Concerning Education*:

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

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

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

From him [Adam], the world is peopled with descendants who are all born infants, weak and helpless, without knowledge or understanding; but to supply the defects of this imperfect state till the improvement of growth and age has removed them, Adam and Eve, and after them all parents, were by the law of nature, “under an obligation to preserve, nourish, and educate the children” they had begotten; not as their own workmanship, but the workmanship of their own maker, the Almighty, to whom they were to be accountable for them.37

The domestic strain in Locke’s view of education ran fairly deep. Describing the difference between Franklin’s and Locke’s advocacy of teaching young people classical history, the Pangles note that Franklin wanted them to read it in translation as a way of learning history, while Locke wanted them to read it in Latin (the historians being generally easier than the poets), as way of learning Latin. A sideline in this curricular debate is how Locke envisioned Latin instruction taking place as part of his home education program:

37 J. Locke, Second Treatise on Government (1690, repr. 19520 [Library of Liberal Arts ed. At 32] Sec. 56. Internal quote not identified. Locke's references to Adam and Eve should not be dismissed as “fundamentalism,” but rather as participation in a standard mode of argument of his time: his First Treatise on Government, rarely cited now, is a reply to Sir Robert Filmer, a theorist whose fame seems to rest today mostly on Locke's decision to refute him, and who had argued that Adam is both are father and our king, and therefore, paternal and political authority are the same thing. If that were the case, it would be difficult to see why the state (our “father”) could not remove all our children from us for education. See Sir Robert Filmer, Patriarcha (1680)
With a view to educating gentlemen, he offered fascinating new methods of learning Latin, with a stress on beginning by way of daily conversation and reading aloud, especially with the mother (who Locke was sure could teach herself Latin as they went, “if she will but spend two or three hours in a day with him” and later with the tutor.\textsuperscript{38}

Locke's view was, of course, not the only one among the Founders. Those more directly influenced by, and optimistic, about the French Revolution, which Locke of course did not live to see, were more enthusiastic and an early state role in education. Diplomat Joel Barlow, an ally of Jefferson’s, wrote in a letter from France that the Revolution – theirs – had not gone far enough in certain respects and that he expected more from us:

We must not content ourselves with saying, that education is an individual interest and a family concern; and that every parent, from a desire to promote the welfare of his children, will procure them the necessary instruction, as far as may be in his power. These assertions are

\textsuperscript{38} PANGLE, supra note 34, at 83, citing JOHN LOCKE, SOME THOUGHTS CONCERNING EDUCATION (1693), sec. 177
not true; parents are sometimes too ignorant, and often too inattentive or avaricious, to be trusted with the sole direction of their children; unless stimulated by some motive other than a natural sense of duty to them.\textsuperscript{39}

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

B. Practice Before Meyer-Pierce

Discerning American attitudes towards the parental role in education before \textit{Meyer} and \textit{Pierce} is more difficult than it seems. It is easy enough to note the views of those who, so to speak, crowd the microphone among the historical sources: the education reformers who wrote and published, and have thereby fixed the historical record. Less in evidence are the hearty frontiersman whose children worked with the parents on the farm and were taught the Bible and such arithmetic as they needed for their trade – an education much like that of Lincoln reading

\textsuperscript{39} Cited in PANGLE, \textit{supra} note 34, at 99
Bunyan, Aesop, some Shakespeare, and an elocution book,\textsuperscript{40} before became a great lawyer by reading Blackstone, Chitty's *Pleadings*, Greenleaf's *Evidence*, and Story's *Equity Jurisprudence* in the intervals of his duties as a postman.\textsuperscript{41}

Before the “common school” was available, homeschooling of some sort occurred. Whether the hiring of a clergymen to serve as a tutor in wealthier households, to prepare its sons for the young nation's rapidly developing universities, or the teaching of ABCs and basic arithmetic by parents in humbler households, it was a known phenomenon.\textsuperscript{42} Even use of common schools can be misleading, because family input into the content of education remained high in the antebellum period.\textsuperscript{43} Some esteemed Americans considered organized, professionalized schooling better; none that I have found thought that parents who seriously taught their children at home were intruding without claim of right on a state function.

\textsuperscript{40} D. H. DONALD, LINCOLN (1995), 31. Of course it is speculative how many poor farm boys also read books of American history, as Prof. Donald says Lincoln did. Speculatively, too, one must concede the likelihood that a great many children in poorer families went uneducated except insofar as learning their parents’ trade.

\textsuperscript{41} Id. at 55

\textsuperscript{42} “Elementary education among white Americans was accomplished through parental initiative and informal, local control of institutions. In a few cases, New England colonial legislatures tried to ensure that towns would provide schools or that parents would not neglect their children’s education, but these laws were weakly enforced.” CARL KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860, 3 (1983). Emphasis added. The “weak enforcement” is less the point, it seems to me, than the fact that parental teaching was considered a complete substitute for use of schools. I would also call attention to the “parental initiative and informal, local control....”

\textsuperscript{43} “Most teachers attempted to group children according into 'classes' based on the level of their primers, but this was often frustrated by the diversity of texts owned by parents. By jealously defended tradition, children studied from the texts their families sent with them to school.” KAESTLE, id., at 17.
American law in the post-Civil War 19th century, in continuity with common law, saw the parental role in education more in terms of duties than rights. 44 Where there is a legal duty, there is a legal space within which to fulfill it. Thus, early public schools did not so much impose on parents a novel duty and dictate its contours, but rather enabled them to fulfill more adequately a duty they already had, with considerable discretion remaining in the parents. In terms of a core legal claim, today’s homeschool movement asks little else, while today’s education law vests far more authority in schools.

As Prof. Ben-Asher 45 puts it, schools in the late 19th century, and in some cases up to the age of Meyer and Pierce themselves, were seen by state courts not as governmental directors of education but as “service provider[s]” with a “mandate limited to managing the schools and providing services to families, and that they were not authorized to manage individual students.” 46 The provision of non-mandatory services, in the absence of authority to manage individual students, is a legal arrangement that would please most homeschoolers today, and evidently, it has deep roots in our nation’s history and tradition.

44 See e.g. Bd. of Ed. v. Purse, 28 S.E. 896, 899 (Georgia 1897) (referring to “the common-law rule, that education is a duty owed by the parent to the child”)
45 Noa Ben-Asher, The Law-Making Family, 90 GEO.WASH.L.REV. 393 (2012). My debt to Prof. Ben-Asher’s case-research is considerable, and hereby acknowledged.
46 Id. at 372
47 Id. at 379
For example in 1874 in *Morrow v. Wood*, a father instructed his son to pursue only certain studies, of which geography was not one, and made this known to the public school teacher. When the teacher nonetheless used corporal punishment against the student (as teachers were permitted to do at that time) for not studying geography, the father brought an action against her for assault and battery, which was sustained on appeal. This parent had consented to some public school courses but not all; parents had an undoubted right to do this.

In 1875 in *Rulison v. Post*, a student was expelled from a public school because, at the direction of her parents, she refused to study book-keeping. The court stressed the breadth of the legislature’s intent in making education available, and the propriety of using expulsion only as a tool to keep order in the classroom. By these standard, the expulsion could not stand, and implicitly, the parents’ decision to delete book-keeping from the child’s curriculum was given force. This became more or less explicit when the court – in language directly anticipating *Pierce* fifty years later – said:

Parents and guardians are under the responsibility of preparing children intrusted to their care and nurture, for the discharge of duties

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48 35 Wis. 59, 1874 WL 3360 (WL), 17 Am. Rep. 471 (1874).
49 79 Ill. 567, 1875 WL 8690 (Ill.) (1875)
in after life. Law-givers in all free countries, and, with few exceptions, in despotic government, have deemed it wise to leave the education and nurture of the children of the State to the parents and guardians. This is, and ever has been, the spirit of our free institutions.\textsuperscript{50}

In Illinois in 1877, in\textit{Trustees v. People} ex rel.\textit{Martin van Allen},\textsuperscript{51} a father did not want his son, otherwise eligible to attend the public high school, to study grammar. For this reason the son was denied admission. Held, for the father and son: “No particular branch of study is compulsory upon those who attend school, but schools are simply provided by the public in which prescribed branches are taught, which are free to all within the district between certain ages.”\textsuperscript{52} This supports Prof. Ben-Asher’s “service provider” model of late 19\textsuperscript{th} century public schooling. More fundamentally for our purposes here, it points to a model in which education is (still) basically homeschooling, but now with more resources. Some parents (whose primacy in knowing what’s best for their children may be rebutted,

\textsuperscript{50} Id. at *4. (The Westlaw edition does not have conventional page break indications.) Compare this passage with the canonical passage from\textit{Pierce}: “Under the doctrine of\textit{Meyer v. Nebraska}, 262 U. S. 390, we think it entirely plain that the [Oregon Schools Act] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control: as often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” 268 U.S. 510, 535 (emphasis added to point out echoes from\textit{Rulison}).

\textsuperscript{51} 87 Ill. 303, 1877 WL 9862 (Ill.) 1877

\textsuperscript{52} Id. at *3
but is otherwise something the state is “presuming,” as the *Martin van Allen* court puts it) use more of those resources, others less. Many homeschoolers today are happy with – even demand – access to certain resources of the local public school, and make extensive use of community colleges. The sometimes very different values of the 1870s should not distract us from the similarities between educational arrangements existing then and educational arrangements that homeschoolers today either desire, or have and want to protect.

Moving over to Nebraska in 1891, we find a virtually homeschooling family in *State ex rel. Sheibley v. School District No. 1*.[54] The student, 15-year-old Anna Sheibley, was “pursuing studies outside of those taught in the school, which occupy a portion of her time.”[55] The school-prescribed study deemed most easily jettisoned by Mr. Sheibley to make room in Anna’s schedule was that apparent perennial unfavoritie of the era, grammar.[56] The school tried to expel Anna.[57] The court: “[N]o pupil can be compelled to study any prescribed branch against the protest of the parent that the child shall not study such branch, and any rule of regulation that requires the pupil to continue such studies is arbitrary and
unreasonable.”

The first reference to homeschooling, however elliptical, that I have found, is in a 1909 case from Oklahoma called *School District 18 v. Garvin*. A now-familiar pattern: family wants the children opted out of a particular item in the curriculum (in this case it is singing; from all that appears, they were fine with the grammar; part of the point is, this isn’t a point!), the children were expelled, the parents sued. This time, mandatory attendance was a factor considered by the court—but not so as to turn the court against the parents, or even against a variety of alternatives to public schools as means of compliance:

Our [state] Constitution provides for compulsory education, but it leaves the parents free to a great extent to select the course of study. They may send their children to public schools and require them to take such of the studies prescribed by the rules as will not interfere with the efficiency or discipline of the school, or they may withdraw them from entirely from the public schools and send them to private

58 Id. at 395
59 24 Okla. 1 103 P. 578 (1909)
60 Some states at first introduced public schools without compulsory attendance laws, e.g. Georgia. See *Bd. of Ed. v Purse*, 101 Ga. 422, 28 S.E. 896, 900 (1897)
schools, or provide for them *other means of education*.\textsuperscript{61}

These cases do not represent the sole view of parental authority versus institutional school authority even in their own time; the last-discussed case, *Thompson*, even mentions a contrary case.\textsuperscript{62} They even fall short of showing that homeschooling *per se* was a widespread and judicially protected practice in the post-Civil War era, that dictum in *Thompson* notwithstanding. What they show, however – and what they need to show in order to make a case that home jurisdiction over education is deeply rooted in our nation’s legal history within the meaning of *Glucksberg*\textsuperscript{63} – is that public schools were introduced into the states amid a homeschooling spirit, or more precisely, amid a set of legal assumptions congenial to homeschooling: they were introduced as “service providers” (to borrow Prof. Ben-Asher’s term once again) to parents who would delegate some, but not necessarily all, of their teaching authority to that provider, without losing that authority.

\begin{itemize}
\item A changeover to statism
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\textsuperscript{61} Thompson, *supra* n. 56, 103 P. 581; emphasis added
\textsuperscript{62} State v. Webber, 108 Ind. 31, 8 N.E. 708 (1886) (Music instruction may be required by a public school, and recalcitrant students may be expelled for refusing to take part.) Cited in Thompson, 103 P 581, 581.
\textsuperscript{63} See *supra* notes 12 and 13 and accompanying text.
And yet, as the 19th century progressed, so did the “progressive” idea that this reception could best, or only, take place outside the home.64

In 1912, just three years after Oklahoma’s parent-friendly opinion in *Thompson*, the Supreme Court of Washington State delivered *State v. Counort*, in which it held that “[w]e have no doubt many parents are capable of instructing their own children, but to permit such parents to withdraw their children from the public schools, without permission from the superintendent of schools of schools, and to instruct them at home, would be to disrupt out common school system, and destroy its value to the state.”65

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

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64 ABRAMS, supra note 6, 93-98; KAESTLE, infra note __
65 *State v. Counort*, 69 Wash. 391, 124 P. 910 (1912), at 363, 911. See also *State v. Hoyt*, 146 A. 170 (N.H, 1929) (rejecting a claim of right to homeschool and giving broad interpretation to dicta in *Pierce* concerning state’s right to inspect private schools)
Our schools are, in a sense, factories in which the raw products
(children) are to be shaped and fashioned into products to meet the
various demands of life. The specifications for manufacturing come
from the demands of the twentieth-century civilization, and it is the
business of the school to build its pupils to the specifications laid
down.66

I do not accuse the Counort court of being Cubberlian; I suggest only that
what Prof. Callahan calls the “cult of efficiency”67 in education was a new and
strong force in the decade before Meyer-Pierce, and that therefore, cases that
strongly affirm a state's power to take a child from the home for part of the
day/year may represent a then-recent trend, not a tradition with deep roots in either
the original Constitution or the Civil War Amendments.

Yet clearly, between the post-Civil War gelling of the public school system
and the post-World War II gelling of modern First Amendment law, in which
parents’ claims such as we have seen earlier in this article have actually fared
worse than they did under the Free Exercise Clause than they did under common

66 E. Cubberly, Public School Administration (1916), 338; cited in R. E. CALLAHAN, EDUCATION AND THE CULT OF
EFFICIENCY (1962), 152
67 Callahan, id.
law of the late 19th century, something happened.

What, exactly? Prof. Ben-Asher detects a shift in the parent-v-school cases from a pro-parent presumption to a pro-school presumption – a shift coming paradoxically after Meyer and Pierce. Did the judicial back-stop of Meyer-Pierce give judges – a sense that we judges can now call the cases for the schools in the confidence that if we go too far, an appeals court will, so to speak, Pierce us down?

Or (I would suggest this as more likely) was the growth of school bureaucracies itself a part of the deliberate and directed growth of bureaucracy at all levels of government, part of the phenomenon that historian Stephen Skowronek has aptly taught us to call “state-building.” Though his classic work by that title leaves schools as such to one side, it describes the systematic nourishment by Progressives of new forms of government, to which courts gradually and reluctantly learned to defer. Historians of state growth who cover

68 The most media-covered example of such a parental loss was Mozart v. Hawkins County, 827 F.2d 1058 (6th Cir. 1987). There, similarly to the cases from 1874 to 1909 we have looked at here, parents and their children objected to specific elements in the curriculum and requested study hall during that time, without seeking any effect on other students’ exposure to the controverted materials. The result, though, was quite different from the late 19th century outcomes. It was effectively impossible, as well, for the plaintiffs to influence the “spin”: they were widely reported as wanting to ban everyone else’s books as well avoid certain materials for their own families, or else as mere exemplars of a social disease called “fundamentalism.” See e.g. Eugene F. Provenzo, Religious Fundamentalism and American Education 26-27 (1990). This distinction – private exemption versus schoolwide suppression – has even been lost on federal courts of appeals, as in Brown v. Hot, Sexy & Safer Productions, 68 F3d 525 (1st Cir. 1995), where the court solemnly told the exemption-seeking parents that they cannot “dictate the curriculum.” Id. at 533. Prof. Ben-Asher discusses this trend in general in her article, supra n. 1, at 385-398.

education, such as Raymond A. Callahan, in his *Education and the Cult of Efficiency*, tell a similar story.

Part Three

**CATEGORIZING MEYER-PIERCE WITHIN CONSTITUTIONAL DOCTRINE:**

occupational freedom, and narrowness of permissible regulation

*Meyer* and *Pierce* have, it must be said, undergone frequent changes in the Court's reception of them. Their immediate effect was to curb government limits on parental options in education for their children; in *Prince v. Massachusetts* they were broadened (though arguably in dicta, since the parental interest, while recognized, did not prevail) to include parental options in upbringing more generally. Though *Prince* subordinated the parental rights claim to the claims of the state to regulate child labor, it also affirmed that *Meyer* and *Pierce* had survived the wreckage of pre-1937 substantive due process. Twenty-two years

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70 *Supra*, note 66
72 321 U.S. 158 (1943)
73 *Id.* at 166-67
74 Handed down six years after Lochnerian substantive due process had supposedly breathed its last, the *Prince* court wrote: “It is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” *Id.* at 166, citing *Pierce*; emphasis added.
later, *Griswold v. Connecticut*, trying to achieve substantive due process results without substantive due process methods, the Court reinterpreted *Meyer* and *Pierce*, somewhat improbably, as First Amendment free speech and free press cases. From *Griswold*, the precedents we are tracking migrate to the string-cites in *Roe v. Wade* and *Planned Parenthood v. Casey*, a result that can be seen as quite surprising by comparing what they originally accomplished and what *Roe* and *Casey* hold.

But perhaps *Meyer* and *Pierce* can be best understood not by examining their later itinerary, as one must in litigating or teaching constitutional law, but in examining what they themselves said.

For example, who were the plaintiffs, and what does this tell us? Mr. Meyer was not a parent, seeking to have his children taught German: he was a teacher. The Society of Sisters of the Holy Name of Jesus and Mary, and their co-plaintiff, the Hill Military School, were not parents, either, but people who ran schools: educators; teachers. They had been blocked by state legislation from exercising

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75 381 U.S. 479
76 *Id.* at 482
77 410 U.S. 113 at 152-53 (1973)
78 505 U.S. 833 at __ (1992)
79 Meyer, 262 U.S. 390, 396 (“Plaintiff in error was tried and convicted [on the grounds that he] unlawfully taught the subject of reading in the German language....”)
80 Pierce, 268 U.S. 510, 531 (“Appellee the Society of Sisters is an Oregon corporation...has long devoted its
their profession. And what kind of profession was it? One, perhaps, deemed disreputable at common law, or one traditionally closely regulated or even banned by states under their health, safety, welfare, and morals powers? Quite the contrary: “the calling [of teacher] always has been regarded as useful and honorable, essential, indeed, to the public welfare.”

Laws restricting such professions were thought to call for the kind of means-ends test that the Court applied in the *Lochner*-type cases, which today we might call strict scrutiny but for which the Court during the first era of substantive due process had no separate name, saying only, e.g.: “Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.”

Thus: primarily, though not entirely, *Meyer* and *Pierce*, like *Lochner*, were

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81 When in his dissent in *Troxel v. Granville*, 530 U.S. 57, 91 (2000) Justice Scalia labeled *Meyer* and *Pierce* as coming from “an era rich in substantive due process holdings later repudiated,” 530 U.S. at 92 (Scalia, J., dissenting), he had a point about the first part - “an era rich in substantive due process holdings” - but less so about the second - “later repudiated.” The latter requires modification, since, as we have seen, *Meyer* and *Pierce* were singled out for non-repudiation in *Prince v. Massachusetts* – preserved from the tide that otherwise swept away pre-1937 substantive due process, one might say – and have remained good law under one meaning or another. Furthermore, certain of the most heavily criticized precedents of the era under discussion, though often disapproved by the Court, have never been overruled, and are enjoying a period of rehabilitation among commentators. See DAVID BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2012); TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING (2010)

82 E.g. in *Lochner*: “Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground.” 198 U.S. 45, 57 (1905)

83 *Meyer*, 262 U.S. 390, 400, citing Lawton v. Steele, 152 U.S. 133, 137 (1894)
cases about the permissible limits of the states' police powers to regulate the exercise of a traditional and respectable profession.\textsuperscript{84} Why not entirely? One reason was a litigation tactic adopted by the Sisters’ counsel, William Guthrie, a prominent New York attorney, Columbia law professor, and proponent both of parents’ rights and Catholic schools, who had also submitted an amicus brief in Meyer\textsuperscript{85}: he urged the Court to link the right to of teachers to earn a living with the right of parents to choose a school; thus, from the first-order right of a citizen to exercise an honorable profession without unreasonable regulation, there follows a second-order but still well-grounded right of parents to choose to patronize the establishment at which the holder of the first right (the teaching) is exercising that right (by teaching).\textsuperscript{86} But the first-order right – the right to earn a living in a respectable profession without unreasonable state interference – was Guthrie’s, and then the Court’s, starting point.

Was the actual holding of Meyer-Pierce only the “right to earn a living” part, making the parents' rights parts dicta? On the day each case was handed down, that argument could have been made (and it was made, concerning Meyer, by counsel for Oregon in Pierce\textsuperscript{87}). But given the still more extensive uses to which the

\textsuperscript{84} This point is developed more fully infra, notes 110 and 111 and accompanying text.
\textsuperscript{85} ABRAMS, supra note 6, at 118
\textsuperscript{86} Id. at 167-68
\textsuperscript{87} Abrams, supra note 6, at 150
Meyer-Pierce doctrine has been put, confinement to their facts is not a likely fate for these precedents. They can more easily be confined to their holdings plus the dicta that the Court stressed in urgent terms.

Parents who homeschool are not exercising a profession in the Meyer-Pierce sense. But Meyer and Pierce go further in their dicta – dicta that have been given enhanced status by the Court's frequent references to them in later cases. For example, the Court attempts to give an idea of the “liberty” protected by the Due Process Clause of the 14th Amendment.

First, fulfilling amply its own observation that “this Court has not attempted to define with exactness the liberty thus guaranteed,” the Meyer Court gives a veritable sketch of the respectable, ordinary, probably-not-in-New-York-or-L.A. citizen of the era: “Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common

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88 See supra notes 71 and accompanying text
89 Id.
90 262 U.S. 390, 399
law as essential to the orderly pursuit of happiness by free men."  

This does not get our present inquiry very far, because as far as we know, few if any Americans (at least among those within travel distance of a public or private school) practiced homeschooling in the early 1920s. But then the Court takes an unpredictable turn. Neither before nor since has it quoted Plato very often, either as an authority, or (as here) an example to be rejected. But be that as it may, the Court takes very seriously the proposal put forth by Socrates in Plato’s REPUBLIC for state-run collective child-rearing. It also cites similar practices that may actually have existed at Sparta. Conceding the “great genius” of those who produced these schemes, the Court then announces that “their ideas touching the relation between individual and state were wholly different from those upon which our fundamental institutions rest.” To be “wholly different” from collectivist, statist ideals (such as the Court took Plato to have advocated) is to be in line with individualist, domestic ideals. Homeschooling at this point has come within contemplation, though not advocated in terms.

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91 Id.
92 Id. at 401-02. See PLATO, THE REPUBLIC (CA. 380; TR. ALLAN BLOOM, 2nd ED., 1991), BOOKS III-V. But given the time at which Meyer and Pierce appeared, the Court was probably using Benjamin Jowett’s translation (praised by Bloom in the latter’s preface). No REPUBLIC cite is given in Meyer itself.
93 Id. at 402
94 Id.
95 Id.
96 Others take these proposals as thought experiments with which Plato’s Socrates induces his young listeners to think harder about the difficulties of constructing, even in imagination, any kind of ideal political society. PLATO, THE REPUBLIC, TR. ALLAN BLOOM, INTERPRETIVE ESSAY (2nd ED. 1991).
Pierce, concessions to state power, and the Lochnerian background

Pierce makes concessions to the state’s interest in education, even as to its authority to “regulate” some aspects of private schooling.97 These state powers, according to Pierce, are to be used “reasonably”98—a tight restriction indeed in this era “rich in substantive due process holdings.”99

After these concessions, Pierce pivots and repudiates state dominance of children at the expense of their parents’ “liberty…to direct the upbringing of children under their control,”100 in addition to the injury to the economic injury to the actual plaintiffs (interference with their right to earn a living and exercise the honorable profession of teacher), denying that such purposes are “within the competency of the state.”101 The means-ends fit between the law at issue in Pierce (which required all children between eight and 16 to attend public school, not any

97 268 U.S. 510, 534
98 Id.
99 See supra note 80
100 268 U.S. 510, 534-35
101 Id.
other type of school, “for the period of time a public school shall be held…."

was not thin: it was non-existent. This is the context in which appears the perhaps most-quoted dictum from either Meyer or Pierce:

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

Attorney William Guthrie, for the Sisters, wanted to make sure the Court moved from economic freedom to parental rights generally. Are we at a right to homeschooling with a dictum like this? We cannot say yes with certainty, because no mention is made of the practice, and the facts of the case did not concern it. But if the rule against state standardization of children – which does cover the facts before the Court here – is still good, there is no clear reason it should not apply to homeschooling, which is the ultimate anti-standardization methodology; though

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102 Id. at 536 (citing the statute)
103 Id. at 535
104 ABRAMS, supra note 6, 118-19 and 166-67
room would also be left for “reasonable” regulations, such as prevail in most U.S. states today where homeschoolers get along comfortably enough.¹⁰⁵

As Prof. Richard Garnett has argued, *Pierce* is more about what government *may not* do than about what parents *may do*¹⁰⁶ – a distinction made all the more urgent by the on-going process of state-building. And if the state “may not” interfere with parents’ selection of a private school, it is not a leap to posit that the state “may not” interfere with their selection of homeschooling. In one case as in the other, we are talking about limits on what government may do as regards education, not about what rights parents have.

Furthermore, in one case as in the other, the Court concedes a residual power in the state to make sure that education takes place adequately in those school-settings that it does not control. But how extensive can that residual power be?

The more *Meyer-Pierce* are understood as drawing from the *Lochner* tradition, the narrower these regulations must be read. *Lochner* acknowledged the legitimacy of state regulation of bakeries, but looked for a rational ends-means fit

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¹⁰⁵ Or not. Sometimes they need help from the Home School Legal Defense Association, [www.hslda.org](http://www.hslda.org). Their website is an ongoing source of information on how state officials exceed their legislated regulatory power, and how legislative proposals are made from time to time to increase those powers. This writer is a past member of HSLDA but not presently affiliated with it.

between the ones challenged and state’s asserted health and safety goals.\textsuperscript{107} We need not agree in order to see how this analysis should be applied in \textit{Pierce}: regulations of private education enjoy no presumption of rationality, but rather must be examined for means-ends fit, where the end is one that the Society of Sisters plainly fulfilled.

But this treatment of the \textit{Pierce}’s authorization of regulations has not been applied. As Prof. Garnett observes, the “reasonable regulations” permitted in \textit{Pierce} have been over-interpreted, because they have “caused many courts to treat the freedom vindicated in that case as a ‘poor relation’ which must ride piggy-back on some other right in order to enjoy meaningful constitutional protection.” \textsuperscript{108}

Let us momentarily let \textit{Lochner} out of the constitutional drydock where it usually dwells and examine it for parallels with \textit{Pierce} for parallels that may help us understand the breadth or narrowness of the permissible regulations that the \textit{Pierce} Court understood itself to be authorizing. Said \textit{Lochner}:

\begin{quote}
The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment
\end{quote}

\begin{flushleft}
\textsuperscript{107} See \textit{infra} note 107 and accompanying text. \\
\textsuperscript{108} \textit{Id.} at fn. 77
\end{flushleft}
valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.\textsuperscript{109}

Now, in view of the over-interpretation of the \textit{Pierce} “reasonable regulations” dicta to which Prof. Garnett alludes, \textsuperscript{110} let’s rewrite this as the \textit{Pierce} Court might well have meant its own dicta on reasonable regulation of non-public schools:

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

\textsuperscript{109} 198 U.S. 45, 57-58 (1905)
\textsuperscript{110} Supra note 107
I made only two changes from the previously-quoted *Lochner* text: “public health” became “education,” and I added “as a teacher” at the end. The latter change may not even have been necessary to get the point across.\(^1\)\(^1\)

*Lochner* is not considered in good odor as a precedent today, but *Pierce* is. If we want to get *Pierce* right, we cannot ignore its Lochnerian background. It is because of the background that we should take the background seriously. That means reading its concessions to state regulatory power over private education narrowly, to the advantage of homeschooling, as well as of private schools.

This is because the regulations, the breadth or narrowness of which we are considering, are the Court’s tertiary, not primary or even secondary, concern. To go back and read *Meyer* and *Pierce* with fresh eyes is to realize that they are not fundamentally about parents’ rights at all: they are about teachers’ rights to practice their honorable profession. Mr. Meyer wasn’t an annoyed father whose child was denied German classes: he was a teacher of German.\(^2\)\(^2\) The Society of Sisters

\(^1\) Or consider this passage from *Lochner*: “Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health, or to the health of the employees, if the hours of labor are not curtailed.” Id. at 61. Recall that the statute in *Pierce* functioned as a work-hours restriction. Private schools were not forbidden to exist, or even to take pupils, provided they did not take core school-age pupils during core school-hours. Apart from that, they were free to exist - if they could - as supplementary educational institutions; just not as schools. 268 U.S. 510, 530-531.

\(^2\) 262 U.S. 390, 396
weren’t parents, unless someone was naughty: they were teachers. 113 In other words, we are looking here at freedom of contract in the labor market, as applied to teaching. Parents’ rights, though important, and extensively elaborated, are derivate of the teachers’ rights to teach, according to the Court. The state’s acknowledged regulatory interests must be read in that context: as interests in regulation of an otherwise-unrestricted right to practice an honorable profession. But such interests were narrowly construed in that era – “an era rich in substantive due process holdings that have since been repudiated[,]”114 though Pierce of course has not been. Thus, such attempts to assimilate Meyer and Pierce to Lochner make my point for me: insofar as we are trying to understand the Meyer and Pierce Courts as those Courts understood themselves, we must construe its concessions to state regulatory power narrowly. A power to regulate them (and, by implication, homeschoolds) as if these were public schools must be an interpretation of this regulatory power that exceeds by far what was meant by it by the Pierce Court.

The language we are debating – Pierce’s concessions to state regulatory power over private education – consist of this:

No question is raised concerning the power of the State reasonably to

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113 268 U.S. 510, 531-32 (Society of Sisters), 532-33 (Hill Military Academy)
114 Troxel v. Granville, 530 U.S. 57, 92 (Scalia, J., dissenting)
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.

Let us look at those in light of their Lochnerian background, which teaches that concessions to state power should be construed narrowly in the presence of a constitutional right. 1. “No question is raised…” – in this case. We leave these issues for another day. 2. “reasonably” – subject to Lochnerian means-end analysis. 3. to “supervise” schools means, etymologically, to “watch over” (videre + super) them, rather than to run them, or to substitute the state’s judgment for that of the schoolmasters on what their mission or basic pedagogy should be; 4. “attend some school” – and homeschoolers do in fact “attend some school”; 5. “good character and patriotic disposition” – so criminal background checks for teachers are presumably constitutional; what’s more, in those days of residual “red

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115 The identification of “supervise” with “manage” or “direct” has worked its way into our Appointment Clause jurisprudence, thus affecting the way we hear the word. E.g. “[I]n the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that ‘inferior officers’ are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.” Edmond v. U.S., 520 U.S. 651, 663 (1997). However, the Oxford Online Dictionary preserves, as definition 1.2, “keep watch over (someone) in the interest of their or others' security,” a sense that conveys preserving the object’s safety from a distance, rather than micro-managing it from up close. [http://www.oxforddictionaries.com/us/definition/american_english/supervise](http://www.oxforddictionaries.com/us/definition/american_english/supervise) (last visited Feb. 16, 2014)
scares,” screening out adherents of revolutionary foreign governments was not a power the Court wished to take away from the state even as regard private schools; 6. “plainly essential,” “manifestly inimical” (emphasis added): under assumptions that take regulatory powers to their farthest logical lengths, these terms would swallow Pierce itself, allowing states to do virtually what Oregon did in fact in the Schools Act, by controlling private and religious schools’ content, rather than be physically placing schoolchildren in public schools. This cannot have been the Pierce Court’s intention. Under the Lochner mandate to construe regulatory scope narrowly, we have here (as with “good character” and “patriotic disposition”) mere recognition of the state’s “police power” in the (relatively) non-threatening, 19th century sense of that term – to make sure that utter chaos is not breaking loose: recognizing that definition of deeply rooted traditions as constitutional rights does not deprive the democratic process of all vitality or responsibility.

Does the fact that Lochner is officially disapproved mean that Meyer and Pierce should be interpreted without help from it? Not, again, if we want to

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116 See e.g. KENNETH ACKERMAN, YOUNG J. EDGAR: HOOVER AND THE RED SCARE, 1919-1920 (2011). See also See Schenck v. U.S., 249 U.S. 47 (1919) and Gitlow v. New York, 268 U.S. 625 (1925), upholding, respectively, convictions for anti-draft activities under the Espionage Act, and subversive activities under a state statute, as instances of the Court going too far (most now agree) to accommodate that era’s ideas of what was “inimical to the public welfare” – always a dangerous concept, which the Pierce Court did well to restrain with the modifier “manifestly.”

117 The Court continued to be of like mind until Yates v. U.S., 354 U.S. 298 (1957) (applying the “clear and present danger test” to Smith Act prosecutions, thus substantially halting them)
understand the *Meyer-Pierce* Courts in terms of what they thought they were saying, of what they meant to convey. What we want to do with the interpretive accretions of later decades is a separate question.

Whatever may be one’s opinion of it, or its future prospects, there is a vigorous movement of *Lochner* revisionism under way at present.\textsuperscript{118} This is well-timed to allow us to reevaluate *Meyer* and *Pierce* and to discern their implications for homeschooling, an issue they did not address directly. Like *Pierce*, *Lochner* considered the state’s legitimate goal, and considered the means-ends fit between the chosen means and that goal\textsuperscript{119} – much the way the Court in 1987 in *Nollan v. California Coastal Commission*,\textsuperscript{120} a 5\textsuperscript{th} Amendment Takings case, measured the fit between the action demanded of the Nollans as a condition of approving an otherwise-routine building permit, and the goal that this condition was meant to achieve.\textsuperscript{121} What was valid for the regulatory taking of property should be valid for

\begin{footnotesize}
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\item[\textsuperscript{118}] See supra n. 17.
\item[\textsuperscript{119}] See supra n. 107-109 and accompanying text.
\item[\textsuperscript{120}] 483 U.S. 825 (1987)
\item[\textsuperscript{121}] “The Commission’s principal contention to the contrary essentially turns on a play on the word ‘access.’ The Nollans’ new house, the Commission found, will interfere with ‘visual access’ to the beach. That in turn (along with other shorefront development) will interfere with the desire of people who drive past the Nollans’ house to use the beach, thus creating a ‘psychological barrier’ to ‘access.’ The Nollans’ new house will also, by a process not altogether clear from the Commission’s opinion but presumably potent enough to more than offset the effects of the psychological barrier, increase the use of the public beaches, thus creating the need for more ‘access.’ These burdens on ‘access’ would be alleviated by a requirement that the Nollans provide ‘lateral access’ to the beach.

“Rewriting the argument to eliminate the play on words makes clear that there is nothing to it. It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans’ property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any “psychological barrier” to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans’ new house.
\end{itemize}
\end{footnotesize}
the regulatory taking of labor, whether as a property-owner, baker, or teacher.

I have not forgotten the difference between the more general Due Process Clause and the more specific Takings Clause: I am questioning whether the freedom-goals they serve are all that different.

*Meyer-Pierce* put some limits on a tide of regulation and state-building that put the family at some risk. Despite the growth of the American public school system (which *Meyer-Pierce* in no way attacked), and despite an agenda some of that system’s advocates may have harbored that was not sympathetic to the integrity or autonomy of the family or to its building-block role in society (an agenda that *Meyer-Pierce*, of course, *did* attack), the role of parents in the education of their children has deep roots in our nation’s history and traditions, as affirmed by the Court in *Washington v. Glucksberg*, and may therefore claim to be a constitutional right.

**CONCLUSION**

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

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*122 See infra* note 12 and accompanying text.
The case of the Romeike family is (so far) a regrettable one, but at least the Sixth Circuit did well in not excluding, even while denying the family’s asylum claim, the possibility that U.S. constitutional law might protect their rights to homeschool if they were nationals of the U.S. and not of Germany.

Did *Meyer* or *Pierce* articulate, in terms, a right of parents to homeschool their children? No, because the issue was not in the record before the Court in those cases, and because attorney Guthrie's strategy required pushing the Court somewhat but not too much.

Nonetheless, *Meyer* and *Pierce*, in going beyond the right to practice one’s profession, which were at their core, reached out not merely to a right of parents to choose private schools (the situation actually before the Court in *Pierce*) but beyond that, to a “liberty of parents and guardians to direct the upbringing and education of children under their control,” because our “fundamental theory of liberty…excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only.” 123 As this Article has shown, the Court held this against a background in which state law had widely, and for decades, upheld the rights of parents to be the decision-makers in their

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123 268 U.S. 510, 528
childrens education, even after public schools had opened up and parents were making use of them, whether whole or selective – a choice that was, again, up to them.

By the standard of “examining our Nation’s history, legal traditions, and practices”\textsuperscript{124} and of being “deeply rooted in this Nation’s history and tradition,”\textsuperscript{125} this practice is eligible as a constitutional right.\textsuperscript{126}

\textsuperscript{124} Washington v. Glucksberg, 521 U.S. 702, 710 (1997)
\textsuperscript{125} Snyder v. Massachusetts, 291 U.S. 97, 105 (1937) (“deeply rooted in this Nation’s history and tradition”)
\textsuperscript{126} Whether under the doctrine of substantive due process, as the Court’s now-traditional practice would indicate, or under the 14\textsuperscript{th} Amendment Privileges or Immunities Clause, as Justice Thomas would eloquently urge, I do not take a position here. Compare McDonald v. Chicago, 103 S.Ct. 3020 (2011) (Alito, J., for the Court in part and plurality in part), with id. at 3058 (Thomas, J., concurring).