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The Mixed Blessing/Curse of the *Meyer-Pierce* Legacy

ELIZABETH BARTHOLET*

The Supreme Court decisions in *Meyer v. Nebraska*[1] and *Pierce v. Society of Sisters*[2] left us a mixed legacy, one part blessing and one part curse. Many would agree on this but differ on which part is blessing and which part curse.

In my view the blessing is the doctrine of substantive due process protecting personal liberty. The Court did not use this language in these cases, but it did rule that the states' attempts to interfere with parent rights in those cases violated the 14th Amendment to the U.S. Constitution, and the Court made it clear that in future cases the state would bear a heavy burden to justify any such attempts. In later cases, the Court looked back to *Meyer* and *Pierce* as the foundational law when it created important reproductive freedom and relationship rights—the right to contraception and abortion, the rights to sex and marriage for same-sex couples.

In my view the curse is the doctrine of parent rights, given the Court's failure to create any comparable rights for children. More on this later, but first a word on legacy.

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* © 2025 Elizabeth Bartholet. Morris Wasserstein Public Interest Professor of Law, *Emeritus*. This article is a modestly rewritten version of a talk given March 9, 2024, at a conference sponsored by the Classical Liberal Institute at NYU, held at NYU March 8–9, 2024, titled "Educational Choice: The Legacy of Meyer v. Nebraska and Pierce v. Society of Sisters." For a more extensive discussion of many of the issues discussed here, see https://bartholet.wpengine.com/publications and https://bartholet.wpengine.com/child-welfare-issues/#homeschool.

1. Meyer v. Nebraska, 262 U.S. 390 (1923).
2. Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

Legacy connotes something solid and permanent or with long-lasting impact. Supreme Court precedent doesn't necessarily have those characteristics, and today's Court is in the process of shredding many once-important prior rulings. Notably in the *Dobbs*[3] decision, this Court radically weakened substantive due process law in the context of abortion. This constitutional development may also prove a mixed blessing/curse, problematic in that it limited adult autonomy and largely destroyed women's rights to abortion, but promising in that it enabled policy-makers to protect child rights with greater freedom from fear that such efforts will be struck down as unconstitutional interference with parent rights. More on this later also, along with a question as to how parent religious rights will play into the mix.

Meyer and *Pierce* hold that parents have constitutionally protected rights to guide their children's education. The cases do not entirely ignore child *interests*, indicating without specifically holding that states have rights to protect child interests by establishing reasonable regulations regarding education. But the cases provide children no *rights* to education and give states no *duties* to ensure that children's education rights are honored. *Pierce* mentions in passing that children have the right to influence parents in their educational choices, but that is not much of a right. In the subsequent *Prince v. Massachusetts* case involving issues of child labor and religion, the Court talks more specifically of child rights, as if they had been established in *Meyer* and *Pierce*, but again gives the child nothing more than a vacuous right to influence the parent's choice of religion, and even that is really dictum.[4] The Court's actual holding simply finds constitutional the government's decision to prohibit child labor in the face of a parent's claim that it violates her religious and parental rights.

In much later cases, decided in the 1960s and 1970s, when the Court was at its most enthusiastic about establishing individual rights, it did endorse child rights in certain limited areas—speech,[5] criminal justice,[6] and abortion[7]—but as Barbara Woodhouse pointed out in a telling article, these are areas where children look adult-like, capable of exerting adult-like action.[8] The Court has not only retreated from that enthusiasm, but also has never endorsed child rights for the most vulnerable children most

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3. Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).
4. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).
5. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (1969).
6. *In re* Gault, 387 U.S. 1, 13 (1967).
7. Bellotti v. Baird, 443 U.S. 622, 639–40 (1979).
8. Barbara Bennett Woodhouse, *Who Owns the Child: Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1051–52 (1992).

in need of rights, infants and young children. Nor has the Court ever endorsed children's rights to what they as children most need—a nurturing upbringing, free from abuse.[9]

I believe in the vision represented by the Convention on the Rights of the Child, which finds children entitled to equivalent human rights as adults.[10] Some claim that children will be better served by creating powerful parent rights, arguing that parents will make better decisions for children than the state. But I think this is wrong and that our experience in the areas of child welfare and education demonstrate that children are badly served by a parent rights regime in which children are denied any comparable rights.

It is true that the *Meyer*/*Pierce* legacy involves what is often termed a balancing test. Substantive due process in the Supreme Court's parent rights world appears to mean a standard somewhere between strict scrutiny and rational relationship. *Meyer* and *Pierce* themselves contemplate a world in which states can regulate to ensure that children receive an adequate education, requiring for example that children attend some school, and that some topics be taught. *Troxel v. Granville*, the Court's most recent pronouncement on parent rights, calls parenting a fundamental right, but only one Justice, Thomas, states that the strict scrutiny standard would apply, and he thinks that the substantive due process doctrine should be overruled.[11] So according to Supreme Court law, child rights can be balanced against parent rights in assessing the constitutionality of regulation.[12]

But the fact that the Supreme Court gave parents rights under the federal constitution, and only allowed for child rights if the state chose to assert them in legislation or regulation, creates a severe *imbalance.*

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9. *See* ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION (1999) [hereinafter BARTHOLET, FAMILY BONDS]; ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE (1999) [hereinafter BARTHOLET, NOBODY'S CHILDREN].

10. Elizabeth Bartholet, *Ratification by the United States of the Convention on the Rights of the Child: Pros and Cons from a Child's Rights Perspective*, 633 ANNALS AM. ACAD. POL. & SOC. SCI. 80, 80–81 (2011).

11. Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring).

12. *See* David D. Meyer, *Family Law Equality at a Crossroads*, 2013 MICH. ST. L. REV. 1231, 1236–37, 1245–46 (2013) ("[D]espite describing parent rights as fundamental, the Court's family-privacy cases strongly suggest that the Court in fact applies a less stringent form of review."); *see also* David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 545–46 (2000) ("[T]he Court regards some form of heightened scrutiny as appropriate whenever the state intrudes significantly upon a parent's basic decision concerning child rearing . . . . And yet the Court . . . stops short of embracing strict scrutiny as the governing standard.").

I have written extensively about this imbalance in the area of child abuse and neglect and related protection issues.[13] This is not the focus of this conference, so I will address it here just briefly. Law gives the impression that states have created extensive rights for children to be protected against abuse and neglect, with legislation in every state creating child protection agencies mandated to protect children, to intervene in the family to remove those at serious risk to foster care, and in the most extreme cases to terminate parental rights freeing children to be adopted. But these rights look very different from how they would if children had *constitutional* rights to protection. The legislation is written so as to ensure that agencies do not interfere unduly with parent rights, providing parents with extensive procedural protections, and limiting severely the kind of parental unfitness justifying intervention. The laws are interpreted by both agencies and courts with the same parent rights perspective. And state courts often apply a strict scrutiny standard in assessing the constitutionality of state intervention, based either on a misunderstanding of Supreme Court law, or on their own state constitutions.

The Supreme Court has helped skew the system in the direction of protecting parent rights at the expense of children's. Its *Santosky v. Kramer*[14] case provides an illustration. New York child protection authorities had moved to terminate parent rights in a case involving serious allegations of abuse and neglect. New York had provided the parents an extensive set of hearings before arriving at this decision. In the end New York had finally decided that the parents were unfit, justifying termination of parent rights, and enabling the children to be given a permanent adoptive home. The Court held that it was unconstitutional for New York to make its termination decision based on a preponderance of the evidence standard, and that instead it had to show parental unfitness by clear and convincing evidence. While the Court claimed that this was consistent with child interests, since children had an interest in not being wrongfully removed from parents, its result seems driven by its understanding of parent rights as sacred. The opinion says little about the children's interests in being free from the kind of abuse at issue in the case, or their interest in moving out of temporary foster care into a permanent parenting situation. The standard chosen provides no real balance between parent and child interests, biasing decisions toward preserving parent rights to hold on to their children, even when the evidence shows a likelihood of parental unfitness.

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13. *See* BARTHOLET, FAMILY BONDS, *supra* note 9; BARTHOLET, NOBODY'S CHILDREN, *supra* note 9; *see also* child welfare articles listed at https://bartholet.wpengine.com/publications/.

14. Santosky v. Kramer, 455 U.S. 745 (1982).

The entire child protection system is skewed, as I discuss in my book *Nobody's Children*,[15] and in many articles and book chapters, in the direction of protecting parent rights. The overwhelming emphasis in written law and unwritten policy is on keeping children with their parents regardless of child best interests. While many claim that the pendulum swings over the years between family preservation and child protection, the pendulum only really swings between various degrees of extreme family preservation. One small but telling example of the problematic skew in the system is the fact that in determining whether to terminate parent rights, state law almost always says that child best interests *cannot even be considered* until and unless parents are found unfit.

The net is that our child welfare system and our child protection systems are truly *parent* welfare and *parent* protection systems.

The imbalance created by *Meyer* and *Pierce* is similarly apparent in the area of education. Homeschooling is a realm of unfettered parent choice and parent control, as I discuss in detail in a recent law review article.[16] And essentially unregulated homeschooling is only one of the educational choice options being promoted by parent rights advocates. Now the demand is for the parent's right to choose and get financial support for charter schools, private schools, and mini schools (taking whatever form a parent wants), as well as homeschooling.[17]

Homeschooling is the area where the parent rights regime is most fully developed, and here what I have termed "parent rights absolutism" reigns. There is simply no meaningful regulation, in any state, limiting parent choice. Parents are free to educate in whatever way they want, or not at all. They can, as one father I write about did, teach nothing but competitive video gaming from early elementary school through the end of high school, they can choose, as many homeschooling parents now do, to teach that women should play entirely different roles in society from men, and be subjugated to men, they can teach racism and fascism, all while

15. *See* BARTHOLET, NOBODY'S CHILDREN, *supra* note 9.

16. Elizabeth Bartholet, *Homeschooling: Parent Rights Absolutism vs. Child Rights to Education & Protection*, 62 ARIZ. L. REV. 1, 3 (2020) [hereinafter Bartholet, *Homeschooling*]; *see also* Elizabeth Bartholet, *Homeschooling, in* EXPLORING NORMS AND FAMILY LAWS ACROSS THE GLOBE 149 (Melissa L. Breger, ed., 2022) [hereinafter Bartholet, *Homeschooling in* EXPLORING NORMS].

17. Charting New Terrain: A Conference on Emerging School Models, conference hosted by the Harvard Kennedy School's Taubman Center for State and Local Government (Sept. 22–23, 2022), https://www.hks.harvard.edu/centers/taubman/programs-research/pepg/events/charting-new-terrain.

simultaneously preventing their children from being exposed to the values and views of the larger society.[18]

The Homeschooling Legal Defense Fund is the advocacy organization leading the movement to eliminate all regulation from homeschooling. It has to date failed to win its battle in the courts, based on claimed constitutional protection for parent rights. But it relies on a similar parent rights ideology in pressing its claims in legislatures. This, together with brutally aggressive advocacy, has been extraordinarily effective, eliminating almost all regulation restricting homeschooling, and preventing the introduction of any new regulation designed to address serious violence against homeschooled children, or even to require registration of those homeschooled.

The net: a huge loss for children and for the larger society. Of course, some homeschooling is effective, some is better than what parents could find in their local schools, and some provides children a good education while simultaneously making available sports or arts opportunities that would not otherwise be possible. But many children are missing out on the kind of education that would allow them to take advantage of important future education and employment options. Many are being deprived of any understanding of the views and values of the larger society, and thus again limited in terms of their future options, including their ability to break free from the particular communities their parents have chosen. Many are being subjected to abuse and neglect, since homeschooling parents are free to raise them in the kind of isolation that enables and indeed breeds maltreatment. By definition, homeschooled children lack the protection thought central by those designing our child protection system—exposure on a regular daily basis to mandated reporters with a duty to report all suspected abuse and neglect to child protection authorities. School personnel are mandated reporters and constitute the largest group of those who actually report child maltreatment.

The loss to society has to do with all of the above. And unregulated homeschooling, enabling children to grow up in isolated communities without exposure to alternative views and values, is especially problematic in today's embattled society, in which different segments see only their own reality.

Private schools are subject to more regulation than homeschooling, but still it is too limited to adequately protect children. The yeshivas discussed by Slugh & Bedrick[19] are illustrative. They complain about the interference

18. Bartholet, *Homeschooling*, *supra* note 16, at 13–14.

19. *See* Howard Slugh & Jason Bedrick, *Yeshivas and the Legacy of Meyer and Pierce: Is Substantive Due Process Substantial Enough?*, 26 J. CONTEMP. LEGAL ISSUES 241 (2025).

posed by New York's recent attempt to regulate. But I worry about what children in the yeshivas are and are not learning. And I find it striking not that New York is now attempting to assert some regulatory control, but that for many years the yeshivas have been free from regulation, despite the many complaints that children are not learning the essentials that would enable them to advance in any world other than their parents' narrow religious community.

It is important to contrast laws related to child rights to education and protection here in the United States with the rest of the world.[20] It is easy otherwise to think that the way we now do and don't regulate is the way it has to be.

The rest of the world regulates homeschooling to protect the child's right to be educated, and society's right to design that education. Some countries prohibit homeschooling altogether. Those that allow it generally regulate to require, for example, that parents are qualified to teach, that they teach the basic curriculum required in the public schools, and that children are meaningfully tested to ensure they are actually learning.

This is related to the fact that other countries don't have comparable constitutional protection for parent rights to the exclusion of child rights. All other countries have ratified the Convention on the Rights of the Child, thus formally recognizing that children have human rights equal to adult human rights. Other countries very often have built into their national constitutions guarantees for child rights generally, as well as specific guarantees for their rights to education and to protection against abuse and neglect. Indeed, these latter are two of the four most popular positive social and economic rights in foreign constitutions.

In sum, *Meyer* and *Pierce* set us down a destructive path for children.

But as I said at the start, the *Meyer*/*Pierce* legacy is in the process of being unraveled, and given that that legacy has to date been a mixed blessing/ curse, so may be its demise. The Court that issued *Dobbs* is extremely unlikely to expand 14th Amendment substantive due process or related liberty rights. So, while I and others have argued that children should be seen as having constitutional rights under the due process and equal protection sections of the federal constitution,[21] this Court is extremely unlikely to develop such doctrines. But for similar reasons, it is unlikely to expand parent rights, and much more likely than earlier Courts to find

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20. *See* Bartholet, *Homeschooling in* EXPLORING NORMS, *supra* note 16.
21. Bartholet, *Homeschooling*, *supra* note 16, at 65–69.

that legislative and other efforts to protect child rights are constitutional. This means that if policy makers are only willing to take action, we could see greater protection for children's rights in the education and maltreatment areas.

However, religion is the wild card. This Court has been active in expanding religious rights. Religion plays a major role in the homeschooling and the private school areas, with many homeschooling parents identifying as religious, and with religious entities sponsoring many of our private schools. In the *Wisconsin v. Yoder*[22] case, the earlier Court gave a high level of constitutional protection to the Amish in keeping their children out of school in certain high school grades, when other parents were required to send their children to school. Many, including me, have argued that *Yoder* is an aberration, and that restrictions on parent rights should not be subject to additional scrutiny under the constitution simply because the parents at issue could claim a religious as well as a parent right. But in today's Court, religion might count for more, and make *Yoder* newly and unfortunately relevant.

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22. Wisconsin v. Yoder, 406 U.S. 205, 233 (1972).