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Parental Rights and State Authority: The Family in United States Supreme Court Rhetoric

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Parental Rights and State Authority: The Family in United States Supreme Court Rhetoric

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Abstract

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With increasing frequency, the United States Supreme Court has faced questions pertaining to the Constitutional rights of parents. Contemporary conflicts between states' authority and parents' rights to shape the moral education of children are manifestations of a tension in liberal political thought. Although liberalism assigns responsibility for the education of children to private institutions, such as families and churches, there is a public need in liberal regimes for citizens to possess certain skills, habits, and beliefs. When these competing interests have come before the Supreme Court, its rhetoric has not always done justice to the importance of both interests. Here, I examine the Court's nineteenth-century jurisprudence on polygamy, its important early twentieth-century cases on the family, and a selection of recent cases relating to the education of children. I conclude that the Supreme Court has in recent years put too little emphasis on the legitimate interests of states in shaping the moral education of children.

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INTRODUCTION

Two federal appellate courts have struck down state efforts to restrict gay marriage,[1] and the Supreme Court has announced that it will hear two cases pertaining to gay marriage in the upcoming term.[2] It remains to be seen exactly what the Court aims to accomplish in these cases, but in any case it seems only a matter of time before the Court will rule on the constitutionality of excluding gays and lesbians from marriage. The question will not be an easy one to decide. Nevertheless, despite the Constitution's silence on the form that families should take in the United States and the functions that they should perform, it will be far from the first time that the Court decided a case pertaining to the constitutional rights and duties of individuals in their private capacities as family members.

Clearly, the family is a locus of political and legal controversy in American politics. To speak in very rough terms, it would appear that the partisans in conflicts over the family can be divided into two groups. On one hand are those who would support a traditional understanding of the family as a hierarchical institution aimed primarily at the rearing of children. According to the views of these "traditionalists," parents have rights and duties associated with educating their children in religious and cultural mores. For

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[1] *Windsor v. United States* (2012) and *Perry v. Schwarzeneggar* (2010).

[2] *United States v. Windsor* involves the Defense of Marriage Act, while *Hollingsworth v. Perry* raises questions about California's Proposition 8.

"traditionalists," marriage ought to be permanent and to adhere to traditional forms because this will be most beneficial for the rearing and education of children.[3] At the opposite extreme are those who would view the family as a collection of individuals who have made personal choices to live together. According to such "progressives," families aim at satisfying the material and spiritual needs of their members. Because individuals have different needs, families can take different forms, and because the needs and characters of individuals can change, families can disband and reform. According to "progressives," the duties parents have to their children are fulfilled less through moral education in particular traditions than through preparing children to make choices that will be personally fulfilling to them.[4] Of course, most Americans would fall between these two extremes. Few "traditionalists" would deny that adults should be able to divorce one another in some situations, and few "progressives" would deny that children must be taught some moral rules.

When conflicts concerning families raise constitutional issues, it is usually because there is a dispute about the level of control that states can exercise over the forms and functions of the family. In such disputes, both "traditionalists" and "progressives" can formulate arguments that draw on the history of the Court's jurisprudence with

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[3] Cecil (1991), for example, argues that this conception of the family is threatened by "undisciplined individualism" (37). For Cecil, "group marriages, homosexual marriages, children deliberately conceived out of wedlock, and other forms of cultural nihilism" are indicators of the disintegration of "characteristic values of family life" (36-37).

[4] Cf. Glendon (1991b), p. 58 for a description of the "progressive" view of family life as well as a more extensive typology of alternative conceptions of the family.

respect to the family as well as the US Constitution and traditions that are part of the country's "prescriptive constitution."[5] For example, in cases involving compulsory school attendance or related questions, "traditionalists" tend to invoke the Court's recognition of the privacy and authority of parents in order to preserve parents' ability to guide the moral education[6] of their children. "Progressives," on the other hand, are more likely to invoke the Court's traditional deference to the power of the state to act in the public interest in order to secure for children equitable access to education that will develop their potential to live in the context of the broader social environment.[7] When it comes to other issues, such as the rights of homosexuals, it is the "progressives" who are most likely to invoke a narrative about the Court's recognition of the privacy of individuals in sexual matters, while the "traditionalists" tend to assert that it is within the power of states to restrict homosexual activity since the Constitution explicitly grants no rights to homosexuals specifically.[8]

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[5] Jacobsohn (2010) draws on Burke's understanding of the prescriptive constitution to describe the long-standing traditions that are relevant, in at least some constitutional regimes, to the task of constitutional interpretation. Cf., for example, Burke (2000, 273).

[6] I use the terms *moral education* and *education* interchangeably throughout the thesis. I use these terms rather broadly in order to refer not merely to the education received in formal school settings but also to the education that comes from exposure to popular media, interaction with family members, friends, and neighbors, and much of what we would today call "socialization."

[7] Consider, for example, *Pierce v. Society of Sisters* (1925).

[8] Cf. *Lawrence v. Texas* (2003).

The fact that both "traditionalists" and "progressives" can draw upon traditions deeply rooted in the nation's history and construct constitutional arguments to support their preferences in a given case points toward a disharmony in US constitutional law.[9] In other words, the competing narratives of the privacy of family matters as well as the responsibility and power of public authorities to regulate the education of the young for the good of the community are "identifiable continuities of meaning within which dissonance and contradiction play out in the development of constitutional identity" (Jacobsohn 2010, 4). Of course, as we have noted, the Constitution says nothing about the family. If, however, we understand the American constitution to include more than the written document but also "the peculiar circumstances, occasions, tempers, dispositions, and moral, civil, and social habitudes of the people, which disclose themselves only in a long space of time" (Burke 1782, quoted in Jacobsohn 2010, 96), then it is clear that the American constitution may have a great deal to say about families and the education of children.

Indeed, there are traditions in American life and thought that can be adduced to support the constitutional arguments of both the defenders of parental rights and authority and the advocates of public involvement in education. In *Meyer v. Nebraska* (1923), for example, the Supreme Court concludes that the 14th Amendment protects "the right of parents to engage [a teacher] so to instruct their children" because it is a privilege "long

[9] Jacobsohn (2010) has developed at length the notion of the "constitutional disharmony." I suggest that the disharmony expressed in constitutional law here is rooted in fundamental notions about the limits of liberal government.

recognized at common law as essential to the orderly pursuit of happiness by free men" (399). In *Michael H. v. Gerald D.* (1989), members of the majority and minority debate the question of whether the United States has traditionally recognized the interest of an unmarried man in his illegitimate offspring. Similar debates about the prescriptive constitution of the United States can be found in most of the Supreme Court's cases that have implicated the rights of parents and the interests of the political community in the education of children.

This disharmony concerning the appropriate role of the family in the moral education of children does not, however, arise out of the unique cultural experience of the United States. Indeed, the constitutional disharmony that we see played out in federal US courts can be traced to a tension in liberal political thought.[10] On the one hand, modern liberal regimes are committed to protecting a private sphere free from public interference. On the other hand, liberal regimes, like all other political regimes, require that every new generation of citizens receive a moral education that is compatible with the principles of that regime. At the very least, children must learn the basic function of political institutions in which they are expected to participate. Those who are to be active and successful in public life may need to learn a good deal more. Certainly, there is evidence that the American Founders saw the importance of private education for the success of

[10] The family has always been a source of tension in the context of the political order. As Elshtain (1982) notes, the question of whether "the social relations of the family" are "a threat to political order and authority or a constituent feature of that order" is one that "has bedeviled Western political discourse from its inception" (7). I wish to examine aspects of this tension as it manifests itself in the context of a liberal regime, i.e., a regime that is committed to protecting the privacy of individuals to engage in family life.

public institutions, as can be gathered from Thomas Jefferson's September 28, 1820 letter to William C. Jarvis, in which he writes:

> I know no safe depository of the ultimate powers of the society, but the people themselves: and if we think them not enlightened enough to exercise their controul with a wholsome discretion, the remedy is, not to take it from them, but to inform their discretion by education. This is the true corrective of abuses of constitutional power. (Jefferson 1903, 278)

John Locke, one of the earliest modern political thinkers and arguably the most influential philosopher for the American Founders, identified and responded to this tension in his works on politics and education. In the *Second Treatise*, Locke argues that the protection of a sphere of privacy in which citizens can enjoy life, liberty, and estate is the sole legitimate aim of government, and this sphere of privacy clearly includes one's relationships with family members.[11] Locke follows Hobbes in rejecting the Socratics' insistence that the discussion of moral education is a central theme of political philosophy.[12] The political order would be more stable, Locke and Hobbes thought, if it relied only on the self-interested passions shared by all human beings rather than if it depended on educating all citizens in civic virtue. The moral education of children was largely to be the prerogative and duty of parents and churches acting in their private

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[11] *Second Treatise*, IX, 123-124. Cf. VI, 54; XV, 170. At XV, 174, Locke makes clear that the grounds of parental authority are wholly distinct from the grounds of public authority.

[12] Cf. Plato *Laws* 641b-c, *Republic* 492b-493c.

capacities,[13] while the state was to depend on the universal concern of human beings for their property.

But although Locke wished to exclude public interference in the moral education of children and family life in general, he was far from thinking that a kind of moral education was irrelevant to the success of the liberal project. Locke's political doctrine, as outlined in the *Second Treatise*, requires that all men be considered naturally equal and capable of understanding their own long-term self-interest.[14] Only men considered as such can consent to give up part of their natural liberties so as to secure the enjoyment of their property. But, as Locke admits, not all men are born equally capable of thinking rationally (in Locke's sense of the term *rational*) about their long-term self-interest.[15] The education described by Locke in *Some Thoughts Concerning Education*, ostensibly a series of private letters addressed to a personal friend, requires children to be trained by their parents for many years in the habits of moderation, industry, honesty, and other virtues as well as in the capacity for independent thought.[16] Even in the *Second Treatise*,

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[13] *Second Treatise*, XV, 170.

[14] For example, cf. *ibid.*, IX, 131.

[15] *Ibid*. Cf. *Some Thoughts Concerning Education*, 34.

[16] Cf. *Some Thoughts Concerning Education*, 34-37; 71. Also, cf. Galston (1995); Tarcov (1984), p. 83.

Locke gives indications of the importance that reform of the family carries for his political thought.[17]

This brief consideration of Locke's thought suggests that he thought the success of liberal government depended to some degree upon the moral education that children received from families, churches, and other private institutions. But Locke also seems to have assumed that since liberal political thought requires a relatively minimal moral education as compared with ancient and medieval political thought, families would continue to perform this essential function. Thus, from Locke's point of view, it seemed safe—indeed, it seemed advisable and consistent with his entire project—to deny that government had the authority to take over from families and other institutions the function of educating children.

Locke's assumption that parents, acting merely in their private capacities, would provide an adequate moral education to children living under a liberal regime has been criticized by contemporary thinkers from various quarters. Susan Shell (2009) argues that Americans have fallen away from the egalitarian yet still affectionate families of the nineteenth century that Tocqueville described.[18] In her view, the increased autonomy

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[17] For example, Locke's preference for the term *parental power* in favor of *paternal power* suggests an incompatibility between a family structure in which the father holds sole authority and legitimate government. *Second Treatise*, VI, 52-53; Tarcov (1984), pp. 72-73. Of course, later thinkers in the liberal tradition felt that Locke did not go far enough in advocating reform within the family, e.g., Mill (2002); Okin (1989). Nevertheless, it is clear that Locke sought a change in the way that the family was understood in his time as a part of his political project.

[18] *Democracy in America*, II 3.8.

enjoyed by individuals in the modern United States has threatened the family's ability to perform the important function of rearing future generations of liberal citizens. Allan Bloom (1987) argues that the family has, in late modernity, become utterly unequal to the task of providing for the needs of adults, much less children. In his words, "The dreariness of the family's spiritual landscape passes belief" (57).[19]

Feminists have also challenged Locke's assumption that families acting within a sphere of privacy will adequately prepare children for life in a modern, liberal political order if that order is to approach the egalitarianism that seems to be promised by the state of nature teaching. Susan Moller Okin (1989), responding to John Rawls as well as other contemporary theorists shows that "the family, while neglected, is *assumed* by theorists of justice" (9). After showing that the assumption of just family structures plays a crucial role in Rawls's own account of the moral development of children, Okin asks:

> Unless the households in which children are first nurtured, and see their first examples of human interaction, are based on equality and reciprocity rather than on dependence and domination—and the latter is too often the case—how can whatever love they receive from their parents make up for the injustice they see before them in the relationship between these same parents? (99-100)

Rawls (1993) argues, consistent with the liberal view that family life and the moral education of children should be private concerns, "We wouldn't want political principles of justice—including principles of distributive justice—to apply directly to the internal

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[19] The arguments of both Bloom and Shell seem to be informed in part by their readings of Rousseau, who, of course, was very critical of the moral education that families were offering to children in his time. Cf., e.g., *Emile* I, pp. 45-46. In *Emile*, however, Rousseau offered some hope that families could be reformed so as to prepare children more adequately for life in modern society. Both Shell and Bloom seem to be somewhat more pessimistic.

life of the family" (469). Okin's critique, however, points to the political relevance of "the internal life of the family" and the crucial role that families play in the moral development of the next generation.[20]

Without delving into the particulars of the important contemporary debates in political theory over the status of the family in the context of modern liberal regimes, we may conclude that the tension in liberal thought between the need for a moral education that is consistent with liberal self-government and the need to respect the privacy of families has not gone away.[21] Indeed, it has become more salient over time. In light of the reflections of these thinkers, it would seem that the constitutional disharmony between parental rights to conduct the moral education of their children and the authority of states to put limits on these rights is more than a conflict between opposing continuities of meaning within the American constitutional identity. It also reflects a deeply seated tension in liberal political thought. Thus, when the US Supreme Court hears cases involving conflicts between parental rights and state attempts to govern the activities of childrearing and education, parties on both sides can draw on traditions of thought about political liberalism as well as aspects of American political identity. The Court, in turn,

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[20] Christopher Lasch (1977; 1991) has also suggested that families in the West have proven unable to prepare individuals for modern life, although he does so on grounds very different from Okin, Shell, or Bloom.

[21] Indeed, Elshtain (1981), even as she joins feminists in critiquing the subjugation of women in late twentieth-century families, argues convincingly that we would not want to sacrifice either the privacy of the family or the need to educate new citizens in principles consonant with modern liberalism. Cf. especially chapter 5. If she is right, then we should perhaps not expect any resolution of this tension.

can interpret the Constitution so as to draw out of it traditions that are peculiar to the United States as well as lines of argument that have been developed in modern political thought in support of either parents or states.

Given the Constitution's silence on the family as an institution, it would seem that the Court has a degree of freedom when it comes to deciding cases involving conflicts between parental rights or public authority. The profound disagreements among justices on the Court about how to characterize the rights that the Constitution protects would seem to indicate that the Court's decisions are not dictated in any straightforward way.[22] That is not to say, of course, that the Court has total freedom in deciding such contests. As Jacobsohn (2010) argues:

> [Constitutional] identity emerges *dialogically* and represents a mix of political aspirations and commitments that are expressive of a nation's past, as well as the determination of those within the society who seek in some ways to transcend that past. It is changeable but resistant to its own destruction, and it may manifest itself differently in different settings (7).

If the Supreme Court is to engage in a dialogue with political actors about US constitutional identity, it cannot expect to offer meaningful contributions if it transcends the particular legal and constitutional traditions and commitments of the American regime.

But given that the American regime is identified in part by its attachment to the principles of modern, liberal government and that liberal political thought is characterized

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[22] Consider, for example, the debate between the Court's liberal and conservative justices in *Bowers v. Hardwick* (1986).

by public authority's dependence on families to educate children, it would appear that the tension between parental rights and state power raises questions not only about American legal and constitutional identity but also about the practice of liberal politics in the United States. The Court's decisions may play an important role in shaping how families are understood in relation to public authority at a given time, but so long as American constitutional law is viewed as essentially a liberal project, advocates before the Court will always be able to defend either the rights of families to be left alone or the need for states to shape the moral education of children. The Court may affirm the constitutionality of either parental rights or state authority, but it surely cannot foreclose constitutional arguments on the opposing side.

We do not have to conclude, however, that the Court has no significant role to play in shaping public discourse about the appropriate relationship between families and public authority when it comes to the question of the moral education of children. Supreme Court opinions are more than mere explications of the legal reasoning behind judicial decisions; they are also opportunities for the Court to shape discourse about the constitutional identity of the U.S. and about politics in general. As Mary Ann Glendon (1991a) has noted, "The way the Court decides hard cases inevitably affects the way the parties, their causes, and the future development of the issues are perceived by a large public that, for better or worse, increasingly regards the Supreme Court as a moral arbiter" (155). The Court, by taking "serious arguments seriously," can help to point the

political branches toward a more nuanced understanding of both parental and public interests in the education of children (155).[23]

Throughout its history, however, the Supreme Court has not always given each of these interests its due when it has decided cases pertaining to education. The Court has taken various approaches to the family. Not all of these approaches have succeeded equally well in communicating to readers the fact that conflicts between parental rights and public authority in particular cases touch on a profound tension in liberal political thought concerning the public need for children to be educated. In the nineteenth century, the Court rarely heard cases pertaining directly to parental rights to shape the moral education of their children, but the Court did hear cases involving the practice of polygamy. In some of these cases, particularly *Reynolds v. United States* (1878), the Supreme Court hinted that concerns for moral education could justify Congressional restrictions on the practice of polygamy. The Court did not, however, flesh out these concerns or explicitly develop them, and in subsequent polygamy cases, these concerns tended not to be emphasized. The polygamy cases establish the constitutionality of certain restrictions on the ability of individuals to marry, and they also attempt to show how such restrictions must be limited by the privacy interests of individuals in their

[23] Elsewhere, Glendon distinguishes two aspects of "the rhetorical activity of law": the "interpretive" and "constitutive" functions (1987, 9). "Law is interpretive when it is engaged in converting social facts into legal data and systematically summarizing them in legal language" (9). This function of the law involves abstracting from many contextual details that are viewed as not legally relevant at a given time. When law, in turn, begins "to affect ordinary language and to influence the manner in which we perceive reality," it performs a constitutive function (9). In this thesis, I focus on law as it performs these rhetorical functions in Supreme Court opinions.

capacities as family members.[24] But because the opinions in these cases fail to make explicit the most fundamental reasons that a liberal government might seek to control family life, they miss an opportunity to educate their readers adequately about the tension between parental and state authority in the education of children.

The Court began to treat the tension between parental rights and public authority to govern education more explicitly in the first half of the twentieth century. With the advent of the Court's substantive due process jurisprudence and the possibility that parental rights could be found in the 14th Amendment's Due Process Clause, the Court was forced to reassess its traditional deference to state authority in the areas of family and education. In light of the challenge that was now posed to this authority by claims of parental rights to govern the education of children based on *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, the Court was forced to consider new arguments for public authority to control education, more rigorous arguments than those that proved sufficient in the earlier polygamy cases. In cases like *Pierce* and *Prince v. Massachusetts* (1944), the Court's opinions reflect an attempt to grapple with the full implications of the tension between parental and public claims to shape education.

In the last three decades of the twentieth century and the first decade of the twenty-first century, the Court's rhetoric on the family and education became increasingly focused on the question of whether parental rights are fundamental rights

[24] Of course, in the polygamy cases, the justices do not use the language of privacy rights. As we shall see, however, they are very concerned to establish a limit beyond which public regulations of family life ought to be considered unconstitutional.

under the Due Process Clause. Simultaneously, the Court tended to focus less on states' legitimate interests in shaping the education of children. Whatever the legal or political reasons for this shift in the Court's focus, the effect of this shift has been to obscure rather than to illuminate the basic tension in the American regime's approach to the moral education of children in the principles of that regime. In some cases, especially over the last 50 years, the Court has attributed state restrictions on parents' ability to shape their children's education to inadmissible majoritarian efforts to suppress cultural and religious minorities, and it likely had good reasons for doing so in many cases. But the fact that many, even most, efforts on the part of states to provide for a level of uniformity in the education of children are motivated by animus does not necessarily imply that states never have any good reasons for such efforts. In the last four decades, the Court has preferred simply to strike down state attempts to regulate education in the name of the fundamental rights of private individuals or the protection of minorities from majoritarian excesses rather than to engage dialogically the legitimate arguments in favor of such attempts.

That is not necessarily to say that the Court's decisions over the last four decades in cases relating to education have been misguided or imprudent. Indeed, when the Court claims that a particular activity associated with parenting is protected by a fundamental right, it can draw upon the very bases of liberal political thought—in addition to whatever legal precedents it may cite—in order to justify its ruling. Nevertheless, when the Court treats contests between parents and public authority solely or primarily by considering the

question of whether a particular parental right is a fundamental liberty interest, its rhetoric tends to obscure rather than to illuminate the public need for an education that is compatible with the American regime. Of course, the Court cannot reasonably be expected to resolve the difficult tension between the need to respect the privacy of families and the need for citizens to be educated, a tension that has troubled thinkers throughout the history of liberal political thought. It can, however, draw attention to this tension in its opinions and thereby encourage legislators, members of the judiciary, and the public at large to consider seriously the claims of both parental and state interests when it comes to education.

In the following sections, I will discuss the Court's rhetoric surrounding the tension between parental and state interests in the education of children. In the first section, I shall consider the opinions of *Reynolds v. United States* (1878), *Murphy v. Ramsey* (1885), and *Davis v. Beason* (1890). I argue that of the opinions in these cases the majority opinion of *Reynolds* offers the clearest analysis of the arguments both in favor of the privacy interests of individuals and the interests of the public in the moral education of children. Nevertheless, this opinion fails to go far enough in outlining the legitimate reasons that Congress had for combating the practice of polygamy and instead evinces relatively undisguised intolerance of the Mormons who were targeted by existing anti-bigamy legislation.

In the following section, I consider two important cases from the first half of the twentieth century: *Pierce v. Society of Sisters* (1925) and *Prince v. Massachusetts* (1944).

I argue that in these cases, and especially in *Prince*, the Court's rhetoric takes seriously the arguments to be made in favor of both parental rights and public interests in education.

In the third section, I shall consider several diverse cases from the last three decades of the twentieth century, including *Wisconsin v. Yoder* (1972), *Stanley v. Illinois* (1972), *Moore v. East Cleveland* (1977), *Michael H. v. Gerald D.* (1989), and *Troxel v. Granville* (2000). Although the argument in the opinions of these cases is often complicated and discussion of the interests of the public in the education of children is not altogether absent, the Court often does not take seriously the legitimate claims of states that regulation of the activity of individuals in their capacities as family members is necessary to protect vital interests. Especially when the Court frames cases merely as debates over whether some activity of families or individuals is protected by the Constitution as a fundamental right, it tends not to consider the strongest arguments in favor of state involvement in education on their own terms. The strongest arguments in favor of such involvement are not considered in a few of these cases. This would seem to constitute the best evidence of the Court's failure to draw out the basic tension between parental and state interests in education.

In the final section, I shall conclude by reviewing my argument and by offering some brief reflections on how the Court might address contemporary constitutional questions concerning families without excluding consideration of the merits of state efforts to shape the moral education of children.

SUPREME COURT RHETORIC ON THE FAMILY

The Polygamy Cases

In the latter half of the nineteenth century, the Supreme Court heard a series of cases relating to Congressional attempts to stamp out the practice of polygamy—attempts that were likely motivated in part by animus toward the Mormon Church but were ostensibly aimed only at stopping polygamy. These cases were among the first in which the Supreme Court considered constitutional challenges to laws that attempted to regulate family life. Unsurprisingly, all of these cases, the most important of which are *Reynolds v. United States*, *Murphy v. Ramsey*, and *Davis v. Beason*, were decided against the Mormon practitioners of polygamy, and also somewhat unsurprisingly the opinions in these cases sometimes bear the marks of animus against the unpopular, fringe religious group.[25] But whether or not the justices who decided these cases were motivated to uphold anti-polygamy legislation due to intolerance, the Court's opinions offer some nascent articulations of reasons that could justify a liberal regime's involvement in certain aspects of family life. The Court argues—more clearly in some cases than in others—that even a liberal regime is not constrained by legal institutions to tolerate forms of family life that threaten its political institutions over the long term.

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[25] Cf. *Reynolds v. United States*, p. 164: "Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people."

At the same time, the Court's opinions in the polygamy cases struggle to define the limits of Congress's authority to regulate family life in the western territories. Clearly, the justices are concerned to show how their decisions in the Mormon cases do not condone just any public efforts to regulate family life, even in the name of safeguarding liberal political institutions. This concern on the part of the Court is expressed as a matter of legal doctrine in the Court's various attempts to read the First Amendment's protection of the free exercise of religion so as to distinguish between kinds of activities that may be regulated and kinds that must be tolerated. Upon examination, most of these attempts come to light as either incomplete as legal rules that would guide the Court in future cases dealing with regulations of the form and function of families or inadequate to the task of resolving even the case at hand. Nevertheless, the fact that the Court's opinions in these cases do struggle with this issue indicates that the justices are aware of the tension between a liberal regime's dependence on the family and its aim of protecting the privacy of its citizens in their capacity as family members. Moreover, the Court's rhetoric succeeds to a limited degree in directing our attention to this tension and forcing political actors to reflect on it.

REYNOLDS V. UNITED STATES

The Court's clearest articulation of this tension in the Mormon cases comes in *Reynolds v. United States*. George Reynolds, a Mormon living in the Utah territory, was indicted and convicted under the Morrill Anti-Bigamy Act in October of 1874 for maintaining marriages to two women at the same time. Reynolds argued that his practice

of polygamy, which was required of all male members of the Mormon Church, was protected by the Free Exercise Clause of the First Amendment. Thus, the case called for the Supreme Court to evaluate the claims of an individual right to participate in a form of family life that was sanctioned by a religion though it was morally unacceptable in the eyes of most members of the polity. Against these claims of individual rights, the federal government claimed the authority to regulate family life in a US territory through its plenary powers.

Since the case is framed in terms of religious freedom, the issues of moral education and the state's interest in future generations is not implicated directly in the case. Nevertheless, as we shall see, the Court's understanding of Congress's authority to regulate family life is at the center of its judgment of the free exercise issue. Moreover, its understanding of state authority over the family is shaped by considerations relevant to the moral education of citizens. Although the importance of moral education for the Court's decision is not articulated fully, we can gather from the majority opinion that the Court recognized the importance of such education.

Chief Justice Waite, writing for the majority in *Reynolds*, begins by drawing a distinction between "mere opinion," over which Congress has no power, and actions "in violation of social duties or subversive of good order" (164). Chief Justice Waite quickly acknowledges the obvious point that many actions are protected by the First Amendment. In reviewing the circumstances that led to the adoption of the Free Exercise Clause, he indicates that punishments were once imposed for "a failure to attend public worship"

and implies that enforcing such punishments would be impermissible under the Constitution today (162).

On the other hand, it is obvious that not all actions are protected by the First Amendment. As Chief Justice Waite argues, no one would contend that sects practicing "human sacrifices" or other religious ceremonies that are grossly harmful to the public interest or to the rights of others must be tolerated under the First Amendment (166). It would seem, then, that the real distinction is not between opinions and actions but between opinions and innocuous actions, on the one hand, and actions that are "in violation of social duties or subversive of good order," on the other (164).[26] For Chief Justice Waite, the real question is: does the polygamist violate his social duties or subvert good order?

Thus, the Court must enter into the substantive question of whether the practice of polygamy in the Utah Territory threatens the order of the political regime. Chief Justice Waite claims that it does:

> Upon [marriage] society may be said to be built, and out of its fruits spring social relations and social obligations and duties with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests. Professor Lieber says, polygamy leads to the patriarchal principle, and which [*sic*], when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy. (165-166)

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[26] Even this formulation may be problematic in a post-*Carolene Products* context since the First Amendment might be read to protect even some religious activities of minority groups that are subversive of good order in relatively minor ways, since these activities would be in great need of protection.

Waite thus alludes to a link between the principles of government in a given regime and the form that families under that regime take. Polygamy threatens "good order" because it attempts to establish the "patriarchal principle" and "fetters the people in stationary despotism." It is easy enough to see the connection between patriarchy and despotism, on the one hand, and polygamy—or, to speak more precisely, polygyny—on the other. In a system of marriage in which one male has access to multiple female sexual partners, that male will generally acquire powers—most obviously the power to withhold sex or affection—that the female members of the marriage cannot similarly monopolize. Many contemporary political thinkers who have considered polygamy have noted this incompatibility of polygamy and egalitarian marriage.[27]

Nevertheless, we may wonder, after reading Chief Justice Waite's argument against polygamy, *how* exactly the practice of polygamy "fetters the people in stationary despotism," if in fact it does.[28] This statement on the incompatibility of polygamy and democratic self-government is very brief, but we may perhaps expound a bit on what Chief Justice Waite writes in order to understand the argument more fully. We might imagine, for example, that the Chief Justice would have gone on to argue that polygamy

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[27] Cf. Brooks (2009); Okin 1999. Nussbaum (2008) raises a number of important considerations that might call into question Chief Justice Waite's contention that polygamy posed a threat to public order. Cf. chap. 5. She seems, however, to assume that Waite's decision was made solely on the basis of intolerance of an unpopular minority. She does not consider the legitimate reasons, alluded to by Chief Justice Waite, for Congressional restriction of polygamy.

[28] I shall leave to others to consider whether the actual practice of polygamy contributes to making government more patriarchal or despotic, though I do not think it is too difficult to believe that it does. Cf., e.g., Al-Krenawi and Lightman 2000; Elbedour, et al. 2000.

fosters the "patriarchal principle" by serving as a model not of equal partnership but of the rule of one man over many. Both adults and children might observe the example of the men and women participating in polygamous marriages and learn certain habits of mind that are consistent with deference to autocratic rulers but not with the independent exercise of critical faculties and virtues that allow one to excel as a citizen in a liberal democracy. Presumably the children of polygamous marriages would be the most vulnerable to such examples since, as children, they are still very impressionable and since they would observe the polygamous relationships of their parents for a long period of time. Children who grow up in such families, who first learned about social interaction through the observation of unequal relations characterized by power and domination rather than by mutual assistance and respect, might not be apt to respect and defend the rights of their fellow citizens when they reach the age of adulthood. In this way, Chief Justice Waite might say, polygamy will have the effect of putting communities on the path toward "stationary despotism."

This is a compelling argument, and it would seem to imply a certain understanding of the relationship of the family to public authority in the context of a liberal regime. Although a liberal government protects a large sphere of private activity and although decisions relating to family life usually fall within this private sphere, there are some forms of family life that can endanger a liberal political order since such an order depends on families to educate children in the basic principles of democratic self-government and respect for rights. And, indeed, on the basis of this rhetorically powerful

argument, it would seem quite reasonable to allow the public authority to prohibit certain forms of the family. This exercise of public authority is necessary in order to ensure the endurance of liberal government, without which the very distinction between private and public could not be maintained as a matter of policy.

But although the Court comes down solidly on the side of affirming the authority of Congress to prohibit some forms of family relationships, there are indications in Chief Justice Waite's opinion in *Reynolds* that the Court had reservations about permitting Congress to become too involved in regulating family life and religion. As we have already seen, Waite, by drawing a distinction between action that disrupts social order and mere religious opinion, attempted to show that the practice of polygamy did not fall under the protection of the Free Exercise Clause. By showing that polygamy does threaten social order, Waite would appear to have satisfied his own criteria, and he might have concluded his treatment of the First Amendment. But Waite goes on to affirm the relevance of the fact that the practice of polygamy involves a "positive act" rather than a mere omission to act (167). According to the Chief Justice, positive acts may subject to regulations to which mere omissions to act cannot be subject. Whatever the legal significance of the distinction between positive acts and omissions, the fact that Chief Justice Waite brings it into his discussion of the First Amendment after it would appear that he had disposed of the argument concerning free exercise indicates that he saw a need to specify further limits on Congress's power with regard to the regulation of family activities.

Thus, we can see that Chief Justice Waite struggles in *Reynolds* to define what distinguishes polygamy from the sorts of activities that are protected by the First Amendment and that would be beyond the authority of a limited government. His attempts to define this distinction indicate that the Court is confronting a difficult, perhaps irresolvable, tension in liberal politics. Moreover, the very fact that at least some of these attempts to limit Congressional authority to regulate the family prove, upon examination, to be not entirely satisfactory would seem to point toward a problem that is beyond the Supreme Court's ability to resolve. For example, the distinction between omissions and positive acts provides a neat, legalistic way for the Court to distinguish between permissible and impermissible regulations of family life, but we may wonder whether it really holds up to critical scrutiny. After all, it is possible to imagine situations in which an omission to act would be just as damaging to the public interest as many criminal activities.[29] It seems that the distinction between omissions and positive acts is not itself crucially important but is rather significant as an expression of the liberal principle that individuals should be left free to conduct their own affairs as much as possible.

It was certainly not the Chief Justice's intention in *Reynolds* to expound upon the difficulties of specifying the limits of Congress's power to regulate family life when activities normally considered private matters threaten the enduring welfare of liberal government. Indeed, the Supreme Court is tasked with resolving practical problems

[29] This would seem to be at least part of the justification for child negligence laws.

consistent with law and precedent, not with elaborating theoretical difficulties in liberal political thought. Nevertheless, the majority opinion in *Reynolds* does show, to a greater degree than some later cases, that the Court did struggle with the difficulty posed by liberal governments' dependence on families to educate children. Moreover, although the Court perhaps did not confront this difficulty as transparently as it might have, it makes a relatively strong case for its decision while at least acknowledging the need to protect individuals' freedom to engage in family life in the way that they choose in cases not involving polygamy.

Certainly, it is true that Chief Justice Waite would probably not view it as a strength of his opinion if it was suggested to him that his distinction between positive action and omission was not entirely satisfactory as a legal rule—and perhaps he would have solid arguments to make in defense of the distinction. Nevertheless, to the extent that Supreme Court opinions are not merely pronouncements of decisions but also public explanations of those decisions, Waite's opinion in *Reynolds* succeeds where many later opinions failed. Namely, it succeeds in directing our attention to a very real difficulty in liberal political thought concerning the role and function of the family, and the fact that some of the legal rules that Chief Justice Waite adduces are unsatisfactory as final resolutions of this difficulty actually helps to bring this difficulty to our awareness. The openness and seriousness with which Chief Justice Waite attempts to develop legal rules to resolve this difficulty serve to educate us about the relationship of liberal regimes to families even though the rules themselves seem to fail.

MURPHY V. RAMSEY

Later cases dealing with Mormons and polygamy did not treat the claims of state interest and the rights of individuals to privacy in family matters with the seriousness that these competing interests received in Chief Justice Waite's opinion in *Reynolds*. In *Murphy v. Ramsey*, for example, the Court's rhetoric does not acknowledge either the need to protect the privacy of individuals and families or the reasons for the public's dependence on families nearly so well as Chief Justice Waite had in *Reynolds v. United States*. Although *Murphy* is decided a mere seven years after *Reynolds*, Justice Matthews, writing for the Court in *Murphy*, declines even to mention the earlier case, in spite of the similarities of the two cases.

Murphy, like *Reynolds*, involved a constitutional challenge to a Congressional act restricting the practice of polygamy in the Utah Territory. It is true that the Edmunds Act, at issue in *Murphy*, was challenged on the basis not that it violated the First Amendment but that, among other things, it went beyond Congress's limited powers granted by the Constitution. Nevertheless, as Justice Matthews is drawn into a consideration of the substantive reasons for restrictions on the practice of polygamy and the limits of Congress's authority to legislate such restrictions, one might have expected him to cite the relevant parts of Chief Justice Waite's opinion, especially since the Court's decision (in favor of Congress) is so similar to its judgment in *Reynolds*. Perhaps Justice Matthews chose not to enter into an extended discussion of the limits of Congressional authority over family life because he sensed the grave difficulties involved therein. The result is an

opinion that obscures rather than points toward a fundamental tension between the public authority's dependence on families and a liberal public authority's need to avoid intruding on the privacy of the family.

Compared to Chief Justice Waite's struggle to define the limits of Congress's authority to regulate religious and familial life, Justice Matthews's treatment of the same seems almost flippant. In discussing the constitutional authority of Congress to pass the Edmunds Act, Justice Matthews acknowledges, as a matter of course, that the power of Congress "as to every power of society over its members . . . is not absolute and unlimited" (44). He goes on to write, "The personal and civil rights of the inhabitants of the territories are secured to them, as to other citizens, by the principles of constitutional liberty, which restrain all the agencies of government, state and national" (44-45). He does not consider in detail, however, what the limits on Congress's authority in this area are. It is true that Justice Matthews is not considering regulations of family life in the context of an explicit Constitutional guarantee of liberty, as Chief Justice Waite did in *Reynolds*. As compared with *Reynolds*, then, there is not as strong of a legal reason to consider the limits of public authority to become involved in the private sphere of family and religious life. Still, in his *Murphy* opinion, Justice Matthews declined to enter the struggle to clarify the limits of Congressional authority as Chief Justice Waite had done in *Reynolds*.

Furthermore, when Justice Matthews considers the substantive issue of the propriety of Congress's regulation of polygamy, he fails to make the compelling

argument that is made—or, at least, alluded to—in *Reynolds v. United States*. Where Chief Justice Waite had indicated that the "patriarchal principle" fostered by polygamy threatens citizens' attachment to the principles of liberal self-government, Justice Matthews merely claims that the family, defined as "the union for life of one man and one woman in the holy estate of matrimony," is "the sure foundation of all that is stable and noble in our civilization" and "the best guarantee of that reverent morality which is the source of all beneficent progress in social and political improvement" (45). In short, Justice Matthews praises the family as the moral educator of children, but he says absolutely nothing about why the moral education provided in a polygamous family is inappropriate for children who are to live under a liberal regime. Indeed, Justice Matthews's argument seems to rest on a conception of marriage as involving the union of one man and one woman in "holy" matrimony, but surely it is precisely this point that the Mormon respondents in this case would have contested most forcefully, arguing that polygamous marriage was, according to their faith, sanctioned by God.

The Court's opinion in *Murphy* does not succeed as well as its opinion in *Reynolds* at focusing our attention on certain theoretical difficulties attending the relationship of the family to a liberal political order. That is not to say that the Court's decision in *Murphy* was misguided as a practical or legal response to the facts before the Court. But *Murphy* does not serve to educate legislators, other members of the judiciary, or us about the underlying theoretical issues that informed the Supreme Court's thinking about the family and its relationship to the national government. Justice Matthews's

argument in favor of legislation regulating polygamy, stripped of its appeals to divine authority, is not compelling, and thus, it appears to be merely the assertion of the superiority of one sectarian view of marriage over another. The strongest arguments suggesting that polygamy threatens liberal self-government are obscured. Moreover, the Court's failure in *Murphy* to make any effort to define the limits of Congress's authority to regulate family life might give the impression that the protection of family life from inappropriate or overweening regulation is not a serious matter.

DAVIS V. BEASON

In *Davis v. Beason*, decided five years after *Murphy v. Ramsey*, the Court returned to the question of whether restrictions on the practice of polygamy violate the Free Exercise Clause of the First Amendment. Justice Field, writing for a unanimous Court, largely follows the legal reasoning of Chief Justice Waite's majority opinion in *Reynolds*. According to Field, the First Amendment protects religious beliefs and some religious practices, certainly, but it cannot be "invoked as a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society" (342). But where Waite alluded to a persuasive argument that would link polygamy with fostering a "patriarchal principle" at odds with republican self-government, Justice Field speaks only in very general terms about the social ailments caused by polygamy. He writes, "[Bigamy and polygamy] tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman, and to debase man" (341). Although Justice Field may certainly have been correct, it is for the most part impossible to tell exactly what he had

in mind in writing these words. The harm attributed by Field to polygamy that is easiest to understand is perhaps the degradation of women, and indeed, if a measure of equality between the sexes is a crucial part of political liberalism, as we would generally hold today, it would seem that polygamy poses a major problem.[30] But Justice Field does not pursue this argument any further, and thus, he misses an opportunity to elaborate on the ways that even a liberal government, committed to protecting the privacy of family activities, depends upon families to perform certain functions and take certain forms.

Like Chief Justice Waite does in *Reynolds*, Justice Field acknowledges that the authority of Congress to regulate most religious activity is limited by the First Amendment. Justice Field, however, does not enter into a sustained discussion of what distinguishes the activity that is subject to regulation from that which is not. Instead, he introduces a distinction between "religion," which refers to "one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will," and "*cultus*," which is the "form of worship of a particular sect" (342). *Cultus*, according to Justice Field, is not necessarily protected by the First Amendment. It must be admitted that the First Amendment could not have been intended to protect all religious practices; we must merely mention the religious practice of human sacrifice, as Justice Field does, to see that some religious practices were never meant to fall under the protection of the First Amendment (343). But the distinction between religion and *cultus*, as Field defines these terms, does very little to resolve the

[30] Cf. Okin 1999.

constitutional issue in *Davis*, as becomes clear from even a cursory examination. For the Mormon respondents in this case almost certainly believed that "obedience to [God's] will" required their practice of polygamy.[31]

Even Justice Field must have realized that it would have been fruitless to pursue in depth the question of whether the practice of polygamy is commanded by religion or is merely the *cultus* of a particular sect. Rather, it would seem that Justice Field is relying not so much on a distinction between religion and *cultus* as on a distinction between beliefs and lawful religious activity, on the one hand, and actions that threaten social order, on the other—i.e., a distinction much like the one contemplated by Chief Justice Waite in *Reynolds*. But Chief Justice Waite's discussion of the ways that the Free Exercise Clause limits Congressional authority was instructive in directing our attention to the question of whether it was possible for the decisions made by individuals in their capacities as family members to disrupt the political order. By contrast, Justice Field's discussion of the difference between religion and *cultus* makes it seem as if the mere wording of the Free Exercise Clause can resolve the problem posed by polygamy for liberal government. The truth, as Justice Field occasionally seems to admit, is that genuine religious activity, which normally ought to be protected by a liberal government, can occasionally threaten the public's interest in political order and stability. Trying to escape this difficulty by pretending that familial and religious activities that threaten public order can be easily distinguished from normal familial and religious activities as

[31] Cf. Nussbaum 2008, pp. 184-185.

an entirely separate category of activities obscures a very serious tension within liberal political thought.

Justice Field himself seems to leave aside the distinction between religion and *cultus*, as, later in his opinion, he implies, quoting Chief Justice Waite's opinion in *Reynolds*, that the practice of polygamy can be made "a part of . . . religion," as opposed to *cultus* (343). This would imply that there is the potential for a direct conflict between an individual's religious practices and the requirement for public order. Field continues to quote and discuss Waite's opinion, arguing persuasively that there are some cases in which the law must be able to compel or prohibit actions regardless of whether doing so runs counter to the religious beliefs of the individuals involved (343). But Field never returns to discuss in detail why the change in the form of family life portended by polygamy is actually prejudicial to public order. He makes a reasonable argument in general terms, but his opinion does not succeed even as well as Chief Justice Waite's *Reynolds* opinion did in directing our attention to the tension surrounding a liberal government's dependence on the private activity of families in educating citizens in the principles of liberal self-government.

Early Twentieth Century Conflicts between States and Parents

The Mormon cases furnished opportunities for the Court to voice some of the arguments in favor of allowing public authority to regulate the activity of individuals in their capacities as family member, but they did not serve as occasions on which the Court

could give full voice to the arguments on the other side, i.e., the arguments in favor of individual freedom in the areas of family and religious life. Either because polygamy is in tension with democratic self-government or because the Court was unwilling to express support for the vilified Mormons, the decisions in favor of the authority of Congress in the polygamy cases were all but foregone conclusions. By contrast, in the early twentieth century, as the Court began to wrestle with the relatively new doctrine of substantive due process, the Court offered full-throated defenses of the rights of private actors in the areas of childrearing and education, and it weighed the arguments in favor of such rights against the strongest arguments against such rights and in favor of deference to the police power of the states.

In this chapter, I shall consider two very important cases in which the Court was asked to decide between the authority of a state government to determine what is in the best interests of a child and the rights of parents to choose the content of their children's educations: *Pierce v. Society of Sisters* and *Prince v. Massachusetts*. In many ways these cases are very different. *Pierce* involved an Ohio law that directly attempted to regulate private educational institutions in order to enhance the ability of the state to socialize children in the history, customs, and institutions of the state of Ohio and the United States generally. *Prince*, by contrast, involved a challenge on First Amendment grounds to a child labor law in Massachusetts that would have prevented a Jehovah's Witness from involving her child in the activity of proselytizing in a public place. Moreover, the Court in *Prince* upheld the authority of the state to restrict the ability of parents to involve their

children in certain religious activities, while the Court's opinion in *Pierce* became one of the most important precedents affirming the rights of parents and private educational institutions as well as a fundamental precedent in the development of substantive due process.

Despite these differences, however, the Court's opinions in *Pierce* and *Prince* have something in common. Both opinions take very seriously the arguments in favor of parental rights as well as the need for states to become involved—in some cases, intimately involved—in the education of children. To a greater degree than the opinions in the polygamy cases, the Supreme Court's opinions in *Pierce* and *Prince* openly confront the tension between the need for a liberal regime to respect the privacy of parents and families and the need to ensure that children are prepared for life in a liberal democratic political community. That is not to say the opinions in these cases are equally successful in directing our attention to this attention; I shall argue that Justice Rutledge's opinion in *Prince* surpasses the much shorter opinion in *Pierce*. Nevertheless, the opinions in both cases might serve as models of judicial rhetoric that succeed in conveying the difficulty of navigating the tension between parents' and states' rights to control education and the impossibility of resolving conflicts between these competing claims through simplistic, legal reasoning that fails to take account of the circumstances attending any given case.

PIERCE V. SOCIETY OF SISTERS

In 1922, Ohio passed a law requiring all children in the state between the ages of eight and sixteen to attend public school. The law made exceptions for disabled children and children who had graduated eighth grade, were home-schooled, lived in an area without access to public schools, or otherwise received special permission not to attend public school. Nevertheless, the law threatened the existence of most private and parochial schools in the state, including schools operated by the Society of Sisters. The Society of Sisters objected to the Ohio law on First Amendment grounds.[32]

Of course, *Pierce* is now known as one of the Court's earliest substantive due process rulings, and indeed, the Court's unanimous opinion, authored by Justice McReynolds, says nothing about the First Amendment. Instead, the Court, citing *Meyer v. Nebraska*, ruled that "the Act . . . unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control" (534-535). Justice McReynolds continues:

> [A]s 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. (535)

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[32] The Society of Sisters, as well as the secular Hill Military Academy, also objected to the law on the grounds, consistent with *Lochner*-era jurisprudence on the Due Process Clause of the Fourteenth Amendment, that the law violated their rights to own and use their property for lawful purposes. The Court's opinion, however, addresses this argument only briefly. Cf. p. 535.

Justice McReynolds's argument is certainly open to criticism on the grounds that the Due Process Clause was never meant to establish a constitutional right of parents to direct the education of their children against general legislation viewed by state legislatures as reasonable and proper for the achievement of legitimate goals. Even if there is some justification for claiming that the Fourteenth Amendment protects such a right, Justice McReynolds is arguably incorrect in claiming that the 1922 Act was not related to "some purpose within the competency of the State."[33]

Nevertheless, Justice McReynolds's argument gives voice to at least one aspect of the "fundamental theory of liberty upon which all governments in this Union repose" (535): namely, the principle that the rights of human beings "generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men" ought to be respected (*Meyer v. Nebraska*, 399). The right of parents to determine the manner and content of the education of their children surely has a strong

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[33] After all, the Court's opinion in *Pierce v. Society of Sisters* represented a somewhat novel reading of the Due Process Clause. If this case had arisen prior to *Meyer v. Nebraska*, the Court would most likely have held that the police powers that traditionally have belonged to the state encompass the ability to make reasonable regulations for the education of children. Of course, the Court does imply that legislation with a "reasonable relation" to legitimate ends would be permissible (535), but relative to the Court's pre-*Meyer* jurisprudence, the standard of reasonableness seems to be substantially harder to satisfy in *Pierce*.

A question might be raised as to whether Ohio had any legitimate ends in mind in passing the 1922 Act. Rubin (1986) points out that anti-Catholicism was a major motivation for the law (121-122). Cf. Stokes (1950), vol. 2, p. 737. Nevertheless, even Rubin acknowledges that the anti-Catholic sentiments current at the time were not based merely on religious or ethnic animus but also on a legitimate, if misguided, concern that certain Catholic teachings threatened the loyalty of citizens to the United States (122).

claim to inclusion among these privileges. When we consider the fact that Locke and many liberals who have followed him have assigned responsibility for moral and religious education to private institutions as part of an effort to make public authority acceptable to those who disagree profoundly about moral questions,[34] Justice McReynolds's claim that the right of parents to shape the education of their children finds support in this "fundamental theory of liberty" becomes imminently plausible.

But although Justice McReynolds goes perhaps a bit too far in discounting the justifications that might have been given for the Ohio law at issue in *Pierce,* he also does not ignore the legitimate claims of the state to play a large role in the education of children, even when the ability of parents to shape the moral education of children might thereby be restricted. He writes:

> 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. (534)

Of course, all that Justice McReynolds literally says here is that certain questions are not raised in the present case. In a subsequent case, it would have been entirely possible for McReynolds to hold, consistent with this statement, that, in fact, parents do have a right to exercise full control over choosing the teachers of their children, even if parents should disagree with the state about what constitutes "good moral character" and a "patriotic

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[34] In addition to the works of Locke considered in the introduction to this thesis, consider Rawls (1999), pp. 596-597.

disposition." Nevertheless, as a part of Justice McReynolds's rhetoric in his *Pierce* opinion, this statement serves to remind readers that there are some legitimate ends that could justify state involvement in educational institutions and the moral education of children generally. However limited the state's power to influence the education of children may be, such a power does exist, according to Justice McReynolds, and he digresses for an entire paragraph in a very short opinion to point this out.

Moreover, the Court does evaluate the education provided by the Society of Sisters in terms of its compatibility with the broader political regime. Of course, the criteria it applies to this education—whether it is "inherently harmful" or "useful and meritorious" (534)—are extremely minimal. Nevertheless, the Court's brief consideration of such questions invites states to consider carefully the ends sought by efforts to shape the education of children and suggests some criteria by which the efforts of private educational institutions might be judged by state legislatures and other members of the judiciary.

This is not to say that the Court could not have done a better job of striking a balance between the authority of Ohio and the right of parents to shape the education of children in the state. We might also wonder whether the Court's rhetoric might have done a better job of emphasizing how important it is for the state to ensure that all citizens are prepared for "good citizenship" in a liberal democratic regime if that regime is to endure (534). Arguably, in the 1944 case *Prince v. Massachusetts*, we get a more satisfactory treatment of the relative importance of the interests of parents and the state.

PRINCE V. MASSACHUSETTS

In *Prince,* the Court confronts more squarely and more explicitly than perhaps in any other Supreme Court case before or since the tension between the state's dependence on families to provide an education suitable for life in a liberal democratic regime and the freedom of private individuals to conduct the moral education of their children. Justice Rutledge's majority opinion in *Prince* makes a genuine attempt to present the strongest arguments in favor the rights of parents and the strongest arguments in favor of state authority and to weigh these competing interests. Moreover, his rhetoric in the opinion, while building a strong case for the Court's decision in favor of Massachusetts, succeeds to a much higher degree than all previous cases in pointing our attention to the tension between individuals' freedom to set the terms of family life in a liberal regime and the public's interest in the educational activities of families.

Sarah Prince, a Jehovah's Witness, was approached by a police officer as she and her nine-year-old daughter were preaching, distributing religious literature, and accepting donations on a public street. Upon being asked the name and age of her child, Prince refused to answer. She was taken into custody and eventually convicted of violating Massachusetts's child labor laws. Prince argued that the child labor law, which prohibited all boys under the age of twelve and girls under the age of eighteen from selling literature in a public place, violated her rights under the Due Process Clause of the Fourteenth Amendment and contravened the Equal Protection Clause by denying her daughter the right to the free exercise of her religion as well.

After recounting the facts of the case, Justice Rutledge acknowledges the grave difficulty of deciding cases in which parental authority and freedom of conscience come into conflict with state authority. He writes:

> To make accommodation between these freedoms [of conscience and freedom of the mind] and an exercise of state authority always is delicate . . . On one side is the obviously earnest claim for freedom of conscience and religious practice. With it is allied the parent's claim to authority in her own household and in the rearing of her children. (165)

Rutledge goes on to explain that even the "parent's claim to authority," in the absence of any religious claim, would be a very serious matter, calling both the rights of parents as well as the rights of conscience and religious freedom "sacred private interests" (165). The word *sacred* could refer to a private religious conviction on Justice Rutledge's part, but it seems also fair to take the word as expressing the seriousness of the Court's concern for the privacy of family and religious life as well as for the protections that the Constitution provides for activities associated with family and religious life. Indeed, Justice Rutledge explicitly calls these private interests "basic in a democracy" (165).

Arrayed against the parental rights and religious freedoms of Prince is, according to the Court, the state's authority to protect "the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well developed men and citizens" (165). Justice Rutledge then concludes, "Between contrary pulls of such weight, the safest and most objective recourse is to the lines already marked out, not precisely but for guides, in narrowing the no man's land where this battle has gone on" (165). Rutledge does not

foresee the discovery of a neat, "precise" legal rule that would guide the Court's decision in *Prince* or in any other case that involves both parental and religious rights as well as children's and the community's interest in encouraging a moral education that would produce "free and independent . . . men and citizens," i.e., individuals who are fitted to life in a free and democratic society. Though Rutledge does not say it explicitly, we can easily gather from his opinion that he believes that the interests on both sides are connected in profound ways to the principles underlying liberal democratic government. When these interests come into conflict, we should not expect a facile solution; one of these crucial interests, either the interest in the privacy of familial and religious life or the requirement of moral education in liberal democratic citizenship, will have to give way to the other.

This is not necessarily to say that there is no way to move forward with legal argument or that the Court must simply choose one interest over the other. Justice Rutledge does not throw up his hands but turns to a consideration of legal history as well as the facts of the case in order to formulate an argument for the way that he decides *Prince v. Massachusetts*. As the quotations from his opinion cited above show, however, Justice Rutledge does not pretend that the answer he reaches in *Prince*, namely that the Court must favor the states' authority over parental and religious rights, should apply in every set of circumstances in which these two interests come into conflict. Indeed, one could certainly question whether even Justice Rutledge's decision in *Prince* adequately accounted for the parental and familial rights that are a part of liberal political thought in

general and American tradition in particular. Nevertheless, given that the Supreme Court must come to a decision, Justice Rutledge's opinion does a much better job than most other comparable opinions of explaining candidly the real dilemma faced whenever the Court must decide between the privacy of the family and the public need for families to fulfill certain educational functions.

Justice Rutledge then proceeds to consider the disharmony manifest in the tension between parental and public claims to authority over the education of children. Citing *Meyer* and *Pierce*, he emphasizes the Court's view 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" (166). American constitutional law recognizes, then, a "private realm of family life which the state cannot enter" (166). As compared with the opinions in the Mormon cases, the Court's opinion in *Prince* is informed by the development of the Fourteenth Amendment Due Process Clause in these precedents. In *Prince*, as opposed to in the nineteenth-century polygamy cases, the Court never treats the privacy of the family in a dismissive manner; rather, the opinion of the Court authored by Justice Rutledge demonstrates clearly that this side of the constitutional disharmony, the side of familial privacy, is reflected in the history of American constitutional law.

But Justice Rutledge also does not ignore the polygamy cases and the important arguments made in the opinions of these cases. According to Justice Rutledge, "Acting to guard the general interest in youth's wellbeing, the state, as *parens patriae*, may restrict

the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways" (166). Rutledge does not quite go so far as to connect the state's role as *parens patriae* with the need to encourage the moral education of children in the habits and principles required for citizenship in a liberal, democratic state. Nevertheless, he does allow that a parent's "claim to control the child's course of conduct on religion or conscience" can sometimes be overridden by the state's interest in the child (166). His citation of *People v. Pierson* (1903), in which the state of New York's interest in combating disease was privileged over a parent's religious objection to a compulsory vaccination, implies that a political community's interest in children can extend even into childrearing decisions that are profoundly shaped by religious belief.[35] At the very least, the community can limit the parent's freedom in this area—Justice Rutledge does not say whether the community can become involved in shaping moral education in more pervasive ways.

In any case, it is fair to say that Justice Rutledge's opinion acknowledges both the privacy of family life and the community's interest in the moral education of children and brings out the potential tension between these two principles as it is manifest in American constitutional law. Rutledge brings the issue into even sharper focus when he admits that a regulation that would prohibit an adult from proselytizing in a public space would be invalid under the First Amendment (167). This means that the Court must focus specifically on the state's authority to regulate the activity of children when it is claimed

[35] Cf. also *Jacobson v. Massachusetts* (1905).

that parents have an antecedent right to dictate their children's participation in religious activity. It is in this context that Justice Rutledge writes, "A democratic society rests, for its continuance, upon the healthy, well rounded growth of young people into full maturity as citizens, with all that implies" (168). One may, of course, question whether this justifies the Court's decision in *Prince*. In other words, it might be a matter for argument whether the continuance of a democratic society really requires children to be protected from "the possible harms arising from . . . activities subject to all the diverse influences of the street" (168). Even if we grant that children should be protected from such influences as well as the further point that child labor is destructive of the moral education of children required in a democratic society, we may question whether the activity in question in *Prince* may be fairly called "child employment," without any further qualification (168).[36] Nevertheless, Justice Rutledge clearly understands that although a liberal democratic political order requires a moral education of a certain character and that this requirement must be weighed against the freedom of parents to

[36] In dissent, Justice Murphy writes, "The record makes clear the basic fact that Betty Simmons, the nine-year old child in question, was engaged in a genuine religious, rather than commercial, activity" (171). He would appear to be on relatively solid ground. But given that our interests are not so much in the Court's decision in *Prince* as in its rhetorical approach to a theoretical problem that would persist even if it were granted that distributing pamphlets in public areas is a religious rather than commercial activity, we may be justified in looking past this part of the majority's opinion to the way that the Court portrays the conflict between familial rights and state authority over children. That this conflict does persist is implied in Justice Murphy's own opinion when he writes, "As the opinion of the Court demonstrates, the power of the state lawfully to control the religious and other activities of children is greater than its power over similar activities of adults" (173).

engage in family activities without interference and to conduct the moral education of their children.

Recent Characterizations of Parental and State Authority over Education

In the latter part of the twentieth century and the first decade of the twenty-first century, the rhetoric of Supreme Court justices has generally failed to acknowledge the interests of states in the education of children with the degree of openness and clarity that the Court had in the early twentieth century or even the polygamy cases of the nineteenth century. There are certainly exceptions to be found, and arguments in favor of parental rights have not been entirely unopposed in the important cases involving conflicts between families and states over the education of children. Nevertheless, as the Court's jurisprudence has come increasingly to focus on the question of whether parents possess fundamental rights over the care and education of their children under the Fourteenth Amendment, it has not directly engaged the question of whether states can become involved in the private sphere of the family in order to protect the interests of the community at large. It would seem that the Court tends to view state attempts to regulate family and religious life as aimed merely at suppressing undesirable forms of family life. It is not apt to consider in addition the legitimate reasons that a state may attempt to regulate the forms and functions of families for the sake of preparing the next generation

for life in a given political regime. That is to say, the Court has tended not to revive the arguments of *Prince* in favor or state authority over education.

WISCONSIN V. YODER

In the 1972 case of *Wisconsin v. Yoder*, the Court was again faced with a conflict between parental claims to control over the moral education of children and a state's countervailing need to exert control over such education. Chief Justice Burger's majority opinion in *Yoder* does not bring out the importance of both of these competing claims so clearly as Justice Rutledge's opinion in *Prince*, but, in contrast to some later cases, it does acknowledge both claims even as it decides in favor of the protection of parental rights. *Yoder* involves an Amish community that does not wish to send its children to high school. The Amish respondents in the case claimed that Wisconsin's law requiring attendance at a high school violated the Free Exercise Clause of the First Amendment, but as some have noted, the Court's decision rests not only on First Amendment grounds but also on the claim that parents in some situations are entitled to exercise a degree of control over the education of their children.[37]

In the majority opinion, Chief Justice Burger concedes that states have strong reasons for compelling children to attend high school (213-214), but he also allows that

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[37] Cf. p. 214: "Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce*, "prepare [them] for additional obligations.'"

> a State's interest in universal education . . . is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children . . . (214)

In other words, Chief Justice Burger, like Justice Rutledge in *Prince*, holds that the authority of parents over their children and the state's interest in the education of children can come into conflict, and that conflicts between these interests must be resolved by weighing them in the circumstances particular to a given case. And indeed, Chief Justice Burger's opinion represents a sincere attempt to weigh these competing interests.

Burger reviews the relevant case history establishing constitutional protections for parental rights to govern the education of children, but he does not stop at merely asserting the primacy of the family over the political community or suggesting that the private sphere of family life cannot be touched by the political community—though he would arguably have some basis in American constitutional law and liberal political theory to make either of these claims. Instead, Chief Justice Burger's decision rests on an evaluation of the actual effects of the Amish education. For example, he writes, "evidence also showed that the Amish have an excellent record as law abiding and generally self-sufficient members of society" (212-213). Moreover, he claims that although "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system . . . an additional one or two years of formal high school for Amish children" is unlikely to make a difference (221-222). Finally, he claims:

> It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith. (222)

According to Chief Justice Burger Amish education actually prepares students quite well for life in an Amish society. This society "emphasizes informal 'learning through doing'" as opposed to classroom learning as well as "separation from, rather than integration with, contemporary worldly society" (211).

One can gather from these quotations that the criteria according to which Chief Justice Burger evaluates the education that children receive in Amish communities are diverse. The Amish education produces law abiding and self-sufficient citizens; it prepares children for a productive life in a "separated agrarian community"; it does not take away significantly from the state's ability to prepare citizens to participate in the institutions of American democracy. These criteria represent state interests that could justify state efforts to promote universal education. Unfortunately, the Chief Justice does not go into detail about these criteria, and it is impossible to tell, on the basis of his opinion, which or which combinations, if any, of these interests might be so compelling as to justify an abridgment even of the rights to the free exercise of religion or to parental control over education. Presumably, if the Chief Justice had considered these interests in detail, additional light would have been shed on the strength of these interests relative to the interests of parents in the education of their children. Moreover, such a discussion might have revealed tensions among some of the criteria that the Chief Justice used to

evaluate the Amish education. For example, it is conceivable that the effectiveness of the Amish education in preparing children for life in a "separated agrarian community" actually detracts from its capacity to develop citizens that the state of Wisconsin would consider adequately prepared for participation in the institutions of self-government.[38]

Indeed, when one reads the Chief Justice's opinion with a critical eye, it would seem that his evaluation of the Amish education is rather superficial. The state of Wisconsin argued, for example, that if Amish young adults chose to leave their communities, they would be ill prepared without a high school education and diploma (224). Here, Chief Justice Burger must resort to the excuse that on "this record" there is "no specific evidence of the loss of Amish adherents by attrition, nor is there any showing that, upon leaving the Amish community, Amish children, with their practical agricultural training and habits of industry and self-reliance, would become burdens on society because of educational shortcomings" (224). "This record" did not stop Justice Douglas from observing that "the future of the student . . . is imperiled by today's decision" (245). The Chief Justice's argument on this point seems strained as it is not clear from his opinion that the state's interest in ensuring that its citizens become self-sufficient would not require the Amish to attend high school.

Nevertheless, if we set aside Chief Justice Burger's perhaps idealized view of subsistence farming as an alternative to participation in a modern economy, we may see that his evaluation of the Amish education is more than perfunctory. The criteria of law-

[38] Cf. Justice Douglas's dissent, p. 244; Justice White's concurrence, p. 240.

abidingness, self-sufficiency, and preparation for participation in public life are centrally important for the maintenance of a political system of ordered liberty. Thus, Chief Justice Burger's invocation of these criteria in his evaluation of the Amish education implies that the education that Amish children receive must meet certain criteria that are imposed on it by the broader political community. Presumably, if Amish parents were not teaching their children to obey the law, etc., the state would have some justification to compel high school attendance. The right of Amish parents to shape the education of their children is not absolute. Justice White's concurring opinion emphasizes these implications of the Chief Justice's approach to the case even more forcefully.[39] Whether Chief Justice Burger's opinion is based on a sober assessment of the actual education received by children in Amish communities or not, its rhetoric is suggestive of one way that the Court might seek to negotiate the difficult tension between the independence of families and the political community's need for families to provide an appropriate moral education to children.[40]

As in the cases discussed above, I do not wish to engage in a discussion of whether the Court reached the correct decision in *Yoder*. I shall rest content with

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[39] Cf. p. 238.

[40] Rubin (1986) correctly points out that "the rhetoric of the opinion . . . [emphasizes] the traditional rights of parents to supervise the education and religious training of their children" (130). Indeed, one might criticize Burger for failing to make more explicit the interests that might qualify the rights of parents. Rubin, however, does not consider the ways that the Court's praise of the Amish education do implicitly specify certain criteria that private educational institutions must meet.

observing that I believe its decision is open to serious criticism.[41] Nevertheless, given that the Court made the decision it did,[42] Chief Justice Burger's opinion appears to succeed to a greater degree than the other opinions in the case at drawing attention to the conflict between the rights of parents and the legitimate interests of the public authority in shaping the education of children.

Justice Douglas, for example, focuses on the Court's failure to consider the independent interests of children in their own education. He writes, "if an Amish child desires to attend high school, and is mature enough to have that desire respected, the State may well be able to override the parents' religiously motivated objections" (242). Douglas is right to note that "[r]ecent cases . . . have clearly held that the children themselves have constitutionally protectable interests" (243). But in considering the issue of children's rights to shape their own education, Justice Douglas seems to imply that the interests of the political community, as distinct from those of either the parents or children involved in the case, are ultimately not especially important. Indeed, Justice Douglas claims, "the emphasis of the Court on the 'law and order' record of this Amish group of people is quite irrelevant" (246). For Justice Douglas, it is more or less assumed that the rights of individuals to privacy in the areas of education and religion are to be privileged over the needs of the political community. The only question is whether parents' or children's rights take precedence.

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[41] Cf. Berns (1985), p. 38.

[42] It is worth noting that six of the seven justices participating in the case voted with Chief Justice Burger.

STANLEY V. ILLINOIS

In the same year that *Yoder* was handed down, the Supreme Court decided another case implicating the power of states to shape the educational and childrearing practices of parents. Peter Stanley had fathered and raised three children with Joan Stanley, with whom he had lived intermittently for some time but to whom he was not married. When Joan died, the children were declared wards of the state in accordance with Illinois law. Stanley objected on equal protection grounds, arguing that since unmarried mothers and married fathers could not be deprived of their children unless they were shown to be unfit as parents and since he had never been shown to be an unfit father, the law unfairly burdened him as an unmarried father.

As in *Wisconsin v. Yoder* and other earlier cases, but not in the later cases that will be considered below, the Court does acknowledge the importance of state efforts to ensure that children are provided for as well as the need to secure the rights of parents to a degree of privacy in making educational and childrearing decisions. A reading of the opinions in the case makes clear the importance of both sets of interests. Nevertheless, the way that both the majority and the dissenters frame the question in the case fails to bring these competing interests into direct contact with one another, as Justice Rutledge had done in *Prince*. Rather, the justices seem to view these interests in isolation, thus minimizing the extent to which they come into conflict.

The majority, in an opinion authored by Justice White, sides with Stanley in the case, arguing that Illinois's procedure for assigning custody of children after the death of

the mother unfairly burdens Stanley and violates the Equal Protection Clause. But the Court does not rely exclusively on equal protection grounds in making the decision;[43] it also argues that Stanley, as an unmarried father of children who have lost their mother, receives some degree of protection from the Due Process Clause, citing the familiar precedents to the effect that the "private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection" (651).

But Justice White also acknowledges that the state of Illinois has interests in the way that children are raised. He writes:

> For its part, the State has made its interest quite plain: Illinois has declared that the aim of the Juvenile Court Act is to protect "the moral, emotional, mental, and physical welfare of the minor and the best interests of the community" and to "strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal. . . ." (652)

Justice White thus recognizes that the political community's interests are implicated in childrearing and education, especially when a question as to custody arises. But Justice White, not unreasonably, concludes that the means selected by the state in this case—namely, separation of the children from their unmarried father—does nothing to advance its legitimate ends (652-655).

This seems a reasonable approach to the facts of *Stanley*, but we may observe that this approach does have the effect of minimizing the extent to which the rights of parents

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[43] See Rubin (1986), p. 39, for a helpful discussion.

and the interests of the community may come into real conflict. The fact remains that Illinois passed the law in question in this case because it judged that unmarried fathers are generally not fit to be sole custodians of their children either with respect to the interests of the child or the political community or both.[44] Justice White's opinion holds that Peter Stanley's fitness to be a parent should have been considered, but such a consideration would likely focus on questions related to Stanley's character as an individual and father. As Justice White implies, such a consideration would focus primarily on the question of whether Stanley would be a "neglectful" parent (652). By contrast, it would not consider the question of whether unmarried fathers, as a class, are apt to serve the interests of their children or the political community in the best way possible. It is conceivable, at least in theory, that the least neglectful, most caring father would not, in the state's view, adequately prepare children for life in a given community without the assistance of the children's mother. Any judicial proceeding aimed at determining Stanley's fitness as a father would presume that it is possible for unmarried fathers to be declared fit parents. Perhaps this is a safe assumption, but Justice White should have made this assumption explicit, as doing so would have clearly shown how respecting the rights of unmarried fathers to the custody of their children can come into conflict, at least theoretically, with the interests of the political community.

Chief Justice Burger's dissenting opinion, however, does not take up this line of argument. Instead, the Chief Justice argues that the Court should never have raised the

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[44] Cf. p. 647.

due process question. Stanley's claim was on equal protection grounds, and the case could have been decided on such grounds. According to Chief Justice Burger, the state of Illinois has chosen to award responsibility for the children born to unmarried parents to the mother, a sensible procedure since the mother is "readily identifiable" (664). Unmarried fathers can claim responsibility for their children through several procedures, including a marriage contract with the mother of the children. Stanley never claimed a constitutional right to the custody of his children but merely that the Illinois law had treated him unfairly.

But this way of approaching the case, although perhaps more consistent with the record of the case as it came before the Supreme Court,[45] obscures even more than the majority opinion the fact that the Illinois law at issue in the case does involve a real curtailment of Stanley's liberties in matters pertaining to family life. For whatever reason, Stanley chose not to marry the mother of his children, though he lived with her intermittently over a period of almost 20 years. If individuals are truly entitled to a degree of liberty in decisions such as whether to marry and whether to have children, as the Court's decisions in *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, among other cases, seem to indicate, it would appear that a man in Stanley's position could make a reasonable claim on the basis of the Due Process Clause. Chief Justice Burger's opinion does not acknowledge this possibility.

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[45] Cf. pp. 659, 661n1.

MOORE V. EAST CLEVELAND

Five years after the Court handed down *Yoder* and *Stanley,* it decided an important case expanding dramatically the freedoms associated with family life that were protected by the Due Process Clause of the Fourteenth Amendment. *Moore v. East Cleveland* involved an East Cleveland ordinance restricting residency in a household to only a single family. Moore, who lived with her son and two grandsons, one of whom was a child of the son but the other of whom was not, was charged and convicted under the ordinance. Thus, whereas in *Stanley* and *Yoder*, the Court affirmed the rights of parents over their children, in *Moore v. East Cleveland,* the Court ruled that the Due Process Clause protects the rights of individuals to live with various other members of their families (e.g., aunts, uncles, grandparents, cousins, grandchildren).

The plurality's opinion, written by Justice Powell, rests on the claim that the East Cleveland ordinance was not substantially related to the ends that the city professed to be seeking to attain. As Justice Powell writes:

> The city seeks to justify it as a means of preventing overcrowding, minimizing traffic and parking congestion, and avoiding an undue financial burden on East Cleveland's school system. Although these are legitimate goals, the ordinance before us serves them marginally, at best. (499-500)

Here, the Court seems to be on solid ground. Justice Powell adduces a list of examples of single family arrangements (as defined by the law) that would compromise these ends and also argues that the four people living in Mrs. Moore's household do very little, if anything, to compromise these ends. In other words, the ordinance is not tailored to the legitimate ends sought by the city of East Cleveland. The ordinance comes to seem even

more questionable when one reads Justice Brennan's opinion. Brennan denies that "East Cleveland's enforcement of its ordinance is motivated by a racially discriminatory purpose" (510), but he convincingly shows that it is nonetheless characterized by "cultural myopia" and an arbitrary preference for the "nuclear family" of "white suburbia" over the experiences of "immigrants" and "poor and deprived minorities" (508).[46]

Indeed, although it is likely that Justice Brennan romanticizes living with an extended family,[47] his criticisms of the East Cleveland ordinance would seem to apply with equal force to the dissenting opinions. Justices Stewart and White acknowledge that the Constitution protects some rights of parents but object to expanding the family that is protected by the Constitution to include "the interest in residing with more than one set of grandchildren" (547). As compared with the justices of the plurality, the dissenters seem to have a very narrow view of the form that the family may take and receive Constitutional protection.

Without entering into a detailed discussion of the legal arguments on either side, we may observe that the plurality seems to do a better job rhetorically of presenting the

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[46] Burt (1979) points out that East Cleveland's ordinance was not ruled out of bounds on grounds of racial discrimination because most of the city government as well as populace of East Cleveland is African-American. He suggests, however, that the case did represent a conflict between "the current city majority, who purport to uphold middle-class nuclear family values, and other black families who prize extended family households" (390). Burt criticizes the Court for failing to take into account this conflict in its decision, as, in his view, the Court's decision denied the majority in East Cleveland the opportunity to define itself as a community within the context of the greater Cleveland area and broader culture.

[47] Cf. Rubin (1986), p. 146.

interests of individuals in being able to live with various family members. It is difficult to understand why the Constitution should protect a very broad sphere of freedom for parents to engage in familial activities without interference but should permit very intrusive regulation of familial relationships other than the parent-child relationship, especially in a case such as *Moore*, where some of the affected children's parents seem to be absent. Surely, if family life is a private matter, then a liberal democratic government should not permit interference in the relationships between grandparents and grandchildren any more than it should permit it in parent-child relationships, unless truly important state interests are at stake. The rhetoric of the plurality's opinion as well as Justice Brennan's concurrence draws out this point and affirms the need to protect family relationships from undue public interference.

But the Court's affirmation of the right of family members to live together goes perhaps too far in that it appears to be almost unqualified. In fact, the plurality opinion says almost nothing about what arguments, if any, might justify an ordinance imposing any restrictions on what family members can live together. It says merely, "Of course, the family is not beyond regulation" (499) and cites *Prince v. Massachusetts*. Perhaps we cannot criticize the plurality's opinion too much. After all, Justice Powell's opinion does not claim to be a full discussion of the rights of family members; rather, it aims at explaining the Court's reasoning in overturning a particularly intrusive law that is also ill-suited to achieving the ends at which it is aimed. Nevertheless, given that the plurality opinion represents a fairly dramatic expansion of the rights that family members have

under the Due Process Clause, one might have thought that Justice Powell would have devoted some time to putting the new right in context and discussing the limits of the right. Instead, I think that a reader of Justice Powell's opinion may be left very unsure whether the city of East Cleveland could ever establish restrictions on the family members who can reside together in order to prevent overcrowding, minimize traffic congestion, or any other end.

MICHAEL H. V. GERALD D.

As Justice Scalia notes in his plurality opinion, the facts of the 1989 case *Michael H. v. Gerald D.* are "extraordinary" (113); they are certainly extraordinary for a case heard by the Supreme Court. Carole D., the wife of Gerald D., gave birth to a daughter, Victoria D., that she had conceived in an affair with Michael H. Although Carole informed Michael that she believed he might be the father,[48] Gerald was listed as the girl's father on her birth certificate. Within a year after her daughter was born, Carole and her daughter lived for a brief time with Michael before taking up a longer-term residence with a third man. During this time, Carole continued to visit and vacation with her husband, Gerald, with whom she subsequently reconciled, took up a permanent residence, and had two other children. Michael, along with the guardian ad litem for Michael and Carole's biological daughter, sought and was initially awarded limited visitation rights, but he was later denied these rights after Gerald intervened, claiming

[48] It was later confirmed that Michael was the father.

that under California law parental rights are presumed to belong to the husband of a woman who gives birth. The question before the Supreme Court, then, is whether Michael has a claim to the legal rights of parenthood on the basis of his biological relationship with his daughter.

Justice Scalia begins by briefly outlining the now well established procedure for evaluating due process claims: "we have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' . . . but also that it be an interest traditionally protected by our society" (122). Unsurprisingly, given Justice Scalia's jurisprudential and political leanings, he finds that "traditionally" our society has privileged the rights of "the marital family" over the claims of a biological, unmarried father (125). Moreover, he claims that it would be impossible to require the state to declare Michael the natural father of his biological daughter, since such a declaration would imply that Michael possessed all "parental prerogatives" (126). Moreover, "our society has traditionally allowed a natural father in his circumstances to establish paternity" (126).

But although the importance of "tradition" in the determination of due process rights is well established, there is no established understanding of what "tradition" means or includes. As Justice Brennan points out in his dissenting opinion, "this concept can be as malleable and elusive as 'liberty' itself" (137). Brennan ridicules the plurality opinion; the nation's traditions, he writes, cannot be gathered from a perusal of "Bracton, or Blackstone, or Kent, or even the American Law Reports" (137). Once one looks beyond sources such as these and considers "tradition" more broadly, it becomes clear, according

to Brennan, that the nation's traditions do protect the rights of a natural father—a claim with which five of the justices on the Court seem to agree (139, 136). Indeed, his criticisms of Justice Scalia seem weighty. As we observed in the introduction to this thesis, insofar as the constitutional identity of the United States is characterized by a commitment to the principles of political liberalism, there are reasons deeply rooted in our country's traditions to be skeptical of public attempts to define and regulate family life when doing so infringes on the liberty of individuals in their family lives and the "freedom not to conform" (141).

In light of these criticisms, Justice Scalia's arguments seem somewhat weaker than they might have at first. One wonders how, on the basis of Justice Scalia's understanding of tradition, the Court could ever find that the Fourteenth Amendment protected a right in a novel situation, i.e., a situation that did not conform to any precedents in which the right was affirmed. But perhaps this is precisely the point. Scalia's concern is perhaps not to consider the types of liberties that have traditionally been protected in the United States but rather simply to "limit and guide interpretation of the [Due Process] Clause" in order to avoid judicial law making (122). Though he does not do so explicitly in this opinion, Justice Scalia seems to long for the days before substantive due process, when the Supreme Court did not gainsay the judgments of state legislatures so long as the states pursued ends within their (broad) area of competence.

But as we have seen, in its earlier precedents related to the family, such as *Reynolds v. United States* and *Prince v. Massachusetts*, the Supreme Court did not merely

assume that any state regulation of family life was reasonable. Rather, it claimed that a measure of respect for the privacy of family life is required by the Constitution, and thus it saw a necessity to subject state laws pertaining to the family to a minimal evaluation according to the standard of reasonableness. In Justice Scalia's opinion, however, we find no similar examination or enumeration of the reasonable justifications for California's law restricting parenthood to a mother and husband who are cohabitating to the exclusion of the biological father. It is true that Justice Scalia did not need to elaborate on the reasons for the California law to reach his decision in the case, but it seems that his opinion might have been more persuasive if he had. It is at least possible that a consideration of the reasons for the law could allow Justice Scalia to discover the interests and "traditions" that are represented by the law. In other words, Justice Scalia perhaps did not have to construe "traditions" as narrowly as he did in order to reach the decision in this case that he wanted to reach. Instead of considering, for example, the American tradition of allowing states to become involved in family life in order to protect the interests of the community, Justice Scalia assumes that the case involves merely the competing claims of two individuals. Again, a consideration of the reasons behind the California law was not necessary for his argument, but such a consideration would have succeeded in directing our attention to the basic tension between parental and public authority over the education of children.

Although Justice Brennan's critique of Scalia's reading of Due Process Clause doctrine is plausible, he does not acknowledge the legitimate, if ultimately not

compelling, reasons for the California law any more than Justice Scalia does. Justice Brennan briefly acknowledges Gerald D.'s claim that the operative California law "promotes marriage, maintains the relationship between the child and presumed father, and protects the integrity and privacy of the matrimonial family" (154), but he immediately declares that this law is completely inapplicable because of a later statute that establishes a best-interest standard in the determination of visitation rights. Justice Brennan says nothing more about why Gerald D.'s claims are not relevant but claims disdainfully that the "purported state interests here . . . stem primarily from the State's antagonism to Michael and Victoria's constitutionally protected interest in their relationship with each other and not from any desire to streamline procedures" (154). Brennan's reduction of the state's interests in this case to the streamlining of procedures obscures the fact that the state may have good reasons for "antagonism" toward the relationship of Michael and his daughter relative to the relationship of Gerald and Victoria.

Both the plurality and the dissenters in *Michael H. v. Gerald D.* view the case through a relatively narrow lens. For both, the case raises a question of whether our country has traditionally protected a right of natural fathers against the rights of marital fathers and mothers to determine who has access to a child. Justice Scalia upholds a California law that would give parental rights to the married parents because he can find no support for the rights of a natural father in his examination of "tradition," narrowly construed. By contrast, Justice Brennan plausibly finds support for such a right. In line

with substantive due process doctrine, however, Brennan only belatedly comes to the question of the state's compelling interest in certain forms of family life, and his treatment of this question, though perhaps correct in its conclusion, leaves much to be desired. A reading of the opinions in the case gives one very little indication of what the state's interests in passing a law assigning parental rights to a marital father might be, and the focus is instead on only one side of the constitutional disharmony, namely the rights of the individuals involved in the case.

TROXEL V. GRANVILLE

Like *Michael H. v. Gerald D.*, the 2000 case *Troxel v. Granville* is framed by the Court primarily as a conflict between two private parties, but again the case implicates questions of a state's authority to constrain the decisions individuals make in acting in their capacities as parents. Citing a Washington law allowing "any person" to petition for child visitation rights, Jenifer and Gary Troxel sought the rights to visit their grandchildren after the death of their son, Brad Troxel, the father of their grandchildren. Tommie Granville, the mother of the grandchildren, who had never been married to Brad, claimed that the state court's award of visitation rights to Jenifer and Gary infringed upon her right to care for and raise her children without interference.

The legal and constitutional issues in *Troxel* are complex, and the opinions of the justices raise a number of interesting questions about the proper role of the Supreme

Court in relation to state courts[49] and in relation to state legislatures.[50] Understandably, given these attendant difficulties, the justices seem reluctant to enter into a full discussion of the power of states to enforce legislation such as the Washington statute at issue in *Troxel*. Nevertheless, a few of the opinions do take the opportunity to comment on the relative weight of parental rights and state power to shape the education of children. Unfortunately, we again do not find any compelling elaboration of the legitimate interests of a state in the education of children or of the importance of such interests in the maintenance of a liberal political order.

As compared with Justice Scalia's opinion in *Michael H.*, the plurality opinion in *Troxel*, authored by Justice O'Connor, goes farther in recognizing the authority of states to award visitation rights against the wishes of parents. Justice O'Connor writes, for example:

> The nationwide enactment of nonparental visitation statutes is assuredly due, in some part, to the States' recognition of these changing realities of the American family. Because grandparents and other relatives undertake duties of a parental nature in many households, States have sought to ensure the welfare of the children therein by protecting the relationships those children form with such third parties. The States' nonparental visitation statutes are further supported by a recognition, which varies from State to State, that children should have the opportunity to benefit from relationships with statutorily specified persons—for example, their grandparents. (64)

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[49] Cf. the opinions of Justices Kennedy and Souter.

[50] Cf. the opinion of Justice Scalia, which serves as an instructive contrast to Justice Thomas's opinion, given that the justices seem to agree that the Constitution protects a very strong right of parents to make decisions pertaining to childrearing without the interference of the states.

But although Justice O'Connor admits here some ways that states have attempted to adapt to "changing realities," she says very little about why states see a need to play a role in determining visitation rights to begin with. She does not, for example, indicate that the public interest might be implicated in the determination of such rights in the way that, for example, Justice Rutledge indicates that the public interest justifies some restrictions on the freedom of parents to engage in religious activities with their children in *Prince v. Masschusetts*. Instead, Justice O'Connor's characterization of the issue seems to assume that the contest merely involves parental rights, on the one hand, and concern for the "welfare of the children," on the other.

But given that Justice O'Connor's invalidation of the Washington statute as overbroad rests upon the fact that "the court must accord at least some special weight to the parent's own determination" (70), her opinion would seem to invite one to consider just how much weight ought to be given to parents and to the state respectively. A full consideration of the issue would require one to consider carefully the reasons that states have some authority to act in the best interests of children in order to determine how far that authority reaches. Strictly speaking, Justice O'Connor does not need to enter into such a consideration to reach the decision she does in the case, but she certainly could have. The Supreme Court of Washington had ruled that the Constitution would require a standard not of the best interests of the child but of actual "harm or potential harm to the child as a condition precedent to granting visitation" (73). O'Connor is able to reach a decision in the case without considering this question, but she is so hesitant about

commenting on the constitutionality of child visitation laws in general that she fails to note any problems with the harm-to-the-child standard, though this standard would seem to eviscerate *any* claim that a state could make to the authority to make such laws in the public interest.[51]

In fact, Justice Stevens is the only justice in the case to recognize that there are actually three distinct interests, not merely two, at stake in the case. He argues that a reading of the relevant precedents suggests that "a parent's interests in a child must be balanced against the State's long-recognized interests as *parens patriae* . . . and, critically, the child's own complementary interest in preserving relationships that serve her welfare and protection" (88). But although the interests of the state as *parens patria*e are "long-recognized," they are not widely recognized by the justices in *Troxel* as an independent factor that may attenuate parental rights. Justice Stevens does not go into detail about how specifically the state's interests are implicated in the present case, instead moving on to critique other aspects of the plurality opinion. Unfortunately, the other justices did not take up Justice Stevens on this point, preferring—perhaps not entirely inappropriately—to focus on other relevant questions. If they had taken up this point, however, the case might have done more to clarify and affirm the idea that states do have strong interests in the way that families educate the next generation of citizens. Instead, the fact that states have a crucial interest in the activities of childrearing and

[51] Justice Kennedy's dissenting opinion makes a very similar point.

education seems to be all but forgotten in the analysis of the rights of the private actors involved.

CONCLUSION

Our discussion began with the observation that the Supreme Court is likely to decide the question of whether the Constitution protects a right to marry an individual of the same sex in the near future. Such a change would represent a dramatic change in American family life. Michael Bronski, an advocate of gay rights, writes: "Homosexuality strikes at the heart of the organization of Western culture and societies. Because homosexuality, by its nature, is nonreproductive, it posits a sexuality that is justified by pleasure alone" (8). We might wish to revise Bronski's assessment somewhat given that heterosexual unions are increasingly viewed in terms of pleasure and love and that many gay couples view childrearing—though, of course, not reproduction narrowly understood—as an important part of their partnership or marriage. Moreover, there is evidence that the notion of gay parenthood is becoming more accepted among mainstream Americans.[52] It would seem that there is, at any rate, less reason to be concerned about the political implications of gay marriage than there was to be concerned in the nineteenth century with the practice of polygamy.

Nevertheless, it is clear that gay marriage would have important implications for the activities of childrearing and education. The Supreme Court may decide that these implications cannot justify prohibitions on gay marriage or that the Constitution protects, to some greater or lesser degree, a right of gay marriage. Though this would represent a

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[52] The Associated Press, "US Pediatricians Back Gay Marriage, Cite Research," *NPR.org*, http://www.npr.org/templates/story/story.php?storyId=174898868 (accessed March 22, 2013).

truly novel development, it would be unfair to say that such a decision could find no support in the deeply rooted traditions of the country or in the Court's precedents. As we have seen, political liberalism as understood by the American Founders, by many contemporary thinkers, and by some of the earliest political philosophers in the liberal tradition protects a large sphere of individual freedom in activities that do not relate directly to the protection of property through the application of public authority. This sphere has generally been understood to include most activities of family life and certainly the religious and moral education of children. The importance of the privacy of the family for US constitutional identity can be gathered from cases such as *Meyer v. Nebraska* (1923), *Griswold v. Connecticut* (1965), *Loving v. Virginia* (1967), *Planned Parenthood v. Casey* (1992), and many of the cases discussed above.

On the other hand, given the dramatic implications for the activities of childrearing and education that the Court's protection of gay marriage might have, it would also be incorrect to assume that the legitimate interests of political communities will never be implicated by gay parenthood. As we have seen, the activities of heterosexual parents often conflict with the interests of political communities, and the activities of gay parents will likely conflict with such interests in ways that may not be fully appreciated, especially since homosexual parenthood is a fairly new phenomenon. For the Supreme Court to affirm unqualifiedly a constitutional right to gay marriage would likely make it more difficult in the future for states to justify regulations of gay marriage that may become necessary or expedient in the pursuit of the legitimate interests

of their political community. That, of course, is not to say that gay marriage is undeserving of constitutional protection. Nevertheless, how the Supreme Court views gay marriage in the context of competing interests will have an effect on future judicial holdings and legislative efforts. One need only take notice of the fact that the Court's opinion in *Meyer*, which mentioned a Constitutional right to heterosexual marriage in passing, has served as an important precedent in numerous subsequent cases pertaining to all kinds of individual and family activities in order to appreciate the importance that the Supreme Court's rhetoric in cases relating to gay marriage might have for future questions pertaining to gay relationships and parenthood.

Recent Supreme Court precedents involving conflicts between political communities and the interests of families have not, however, done much to illuminate states' interests in the moral education of children. The small sample of important cases from the last four decades that were discussed above demonstrates a lack of interest on the part of contemporary Supreme Court justices in the arguments that were once deployed to defend political communities' interests in the activities of childrearing and education.

Several patterns of jurisprudential reasoning that are especially common today actually work to exclude such arguments. First, some justices sometimes assume that many laws regulating family life are motivated by impermissible hostility or antagonism toward racial or religious minorities or other groups participating in non-preferred forms of family life. In *Michael H. v. Gerald D.*, for example, Justice Brennan argues that the

statutory language at issue in the case is motivated primarily by such antagonism. He does not go on to consider the possibility that language assigning paternity over a child to a man married to the mother may be aimed at encouraging a certain kind of moral education.

Second, the Court's substantive due process doctrine tends to direct judicial reasoning along channels that emphasize the question of whether an asserted claim is a fundamental right under the Constitution and deemphasize considerations of the context in which the claim is made as well as the interests of the political community. A decision on the part of the justices that some right is a fundamental right makes the case for the state's interests all but impossible, and when the Court determines that some right is not fundamental, the state's victory is almost a foregone conclusion. Whatever the merits of this procedure for directing the Court's Due Process Clause jurisprudence, it tends to mean that the Court considers the interests of the public in decisions relating to the education that children receive in families only belatedly. This pattern of reasoning can also be observed in Justice Brennan's opinion in *Michael H. v. Gerald D.*

Additionally, the Court's substantive due process doctrine tends to obscure the extent to which the rights of individuals and families to engage in activities that we ordinarily think ought to be protected from government interference and the government's pursuit of ends that we ordinarily think are legitimate can come into conflict with one another. In *Stanley v. Illinois*, for example, the Court acknowledged that the state of Illinois has interests in the family structures involved in raising children, but it

claimed that these interests were not served by a law that would make children of unmarried parents wards of the state upon the death of the mother. By focusing narrowly on Stanley's rights and the question of his fitness for parenthood, however, the Court obscured the fact that unmarried fathers in general may threaten precisely the interests that the state sought to protect.

Finally, the Court has increasingly tended to view conflicts surrounding the family as contests between private individuals without taking into account that the interests of the community as a whole may be implicated. In *Michael H. v. Gerald D.* and *Troxel v. Granville*, for example, at least some members of the Court explicitly indicate that they view the constitutional issues in the cases as conflicts between the rights of two individuals. They do not consider the arguments that might have been offered to the effect that the statutory language at issue protected the interests of the political community. Burt (1979) makes a similar argument with regard to *Moore v. East Cleveland*, in which he says that the Court ignored the larger political context that moved the city of East Cleveland to restrict residency in individual dwellings to single families.

There may be additional jurisprudential modes that contribute to the relative lack of recognition in judicial rhetoric of the important public interests in the education of children in recent cases. But we may also speculate that the Court, like many political actors in the United States, has simply forgotten the arguments that can be made in favor of limited state regulation of family life for the sake of the education of children. Glendon (1991) argues that the Court's focus on rights to the exclusion of other legal and

constitutional themes has impoverished our political discourse. If she is right, then it is not too hard to believe that the Court itself may have forgotten the arguments that it once took seriously. The Court's failure to rehearse the arguments in favor of public involvement in education may be evidence of a general insensitivity to the ways that children complicate the notion that public authority has no role to play in the privacy of the home. Tubbs (2007), for example, has argued that the Court tends to be indifferent to the needs and interests of children in the areas of privacy rights and obscenity.

There have been exceptions to the rule that the Court has generally failed in recent decades to acknowledge the arguments that would justify state intrusion into private family life. In *Yoder*, for example, the Court implicitly suggested that some religious practices and some kinds of religious education are not protected under the First or Fourteenth Amendments. Members of the Court paid at least lip service to such arguments in *Stanley* and *Moore*, and Justice Stevens alluded to the state's traditional authority in some family matters in his dissenting opinion in *Troxel*. Nevertheless, the opinions in these cases do not consider such arguments fully.

But the Court is not without resources upon which to draw in order to revive arguments to the effect that, at least hypothetically, states may need to become deeply involved in the activities of childrearing and education, even when the rights of parents are implicated. As we have seen, in the polygamy cases of the nineteenth century, the Court recognized that there was a connection between the form that families in US territory took and the prospects for the success of liberal self-government. It is true,

however, that, as Jacobsohn (2010) notes, "[*Reynolds*'s] standing as a respectable precedent has been compromised by the aura of intolerance that surrounds it" (232). As a result, *Reynolds* is rarely cited today.

By contrast, *Prince v. Massachusetts* and *Pierce v. Society of Sisters* are cited quite often, though it would seem that the opinions of these cases are rarely read carefully as rhetorical expressions of the tensions and conflicts that inevitably arise between the rights of parents and the interests of a political community in education. In fact, the opinions of these cases, and especially the Court's opinion in *Prince*, go far beyond the polygamy cases. Justice Rutledge's *Prince* opinion acknowledges the need to respect both the interests of families in conducting the education of children in private and the public interests that depend upon children being educated in particular ways. He also clearly sees that these interests can come into conflict, so that a decision in favor of one set of interests will sometimes mean a real sacrifice of the other set of interests.

As Justice Rutledge notes in *Prince v. Massachusetts*, "To make accommodation between these freedoms [of conscience and of the mind] and an exercise of state authority always is delicate" (165). For one thing, it is not always clear that state efforts to become involved in education are particularly successful. Moreover, the arguments that would justify state action in areas of family life that impact education—e.g., action that would favor two-parent households as presumably more suited to the education of children—are complicated and are obviously not without important exceptions. It is important, however, for the Supreme Court to acknowledge at least the possibility for such

arguments if rights relating to family life are to be understood in larger political context of which they are a part.

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