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## PARENTS AND EDUCATION IN EUROPE AND THE U.S.

Recent actions aimed at curtailing parents' rights to direct their children's education in Germany have underscored the dramatic difference between the liberty parents are accorded in some parts of Europe and that protected in the United States. This article describes that difference but also warns that the United States is seeing significant challenges to the historic liberty of parents.

"MANY OF TODAY'S THEORIES OF LIBERALISM, LIKE YESTERDAY'S NATIVISTS, SEEM DETERMINED TO USE 'PUBLIC' EDUCATION TO CREATE A NATION WHERE EVERYBODY THINKS THE SAME WAY."  
— STEPHEN CARTER

In September 2006, the European Court of Human Rights issued a decision in a key case involving a parent's right to direct the education of their children. The case was before the court as an appeal by the parents of two children who had been denied their request to home school their children based on religious convictions. The German Constitutional Court had upheld the refusal citing as justification the state's obligation to educate children. The court said this obligation includes (1) giving children "social competence in dealing with other persons who hold different views" and (2) "integration of minorities." To the German court, the first part of the obligation meant school attendance should be required and the second that minorities "should not exclude themselves" from out-of-home schooling.

The European Court of Human Rights concluded that the German court's decision was not clearly erroneous. The court said that "respect is only due to convictions on the part of the parents which do not conflict with the right of the child to education." This "means that parents may not refuse the right to education of a child on the basis of their convictions."<sup>1</sup>

A fictional character in Ray Bradbury's dystopian novel *Fahrenheit 451* made the same general argument, only more bluntly: "Heredity and environment are funny things. You can't rid yourselves of all the odd ducks in just a few years. The home environment can undo a lot you try to do at school. That's why we've lowered the kindergarten age year after year until now we're almost snatching them from the cradle." The speaker in this passage is a leading "fireman" whose job is to destroy books on behalf of the state.

At the beginning of the last century, the United States Supreme Court heard two cases involving situations very similar to those addressed by this European Union decision. Thankfully, the Court's result and reasoning starkly contrast with that of the European court.

The first of these cases was decided in 1923 and involved the prosecution of a parochial school teacher who had given instruction in German.<sup>2</sup> In deciding the case, the Court recognized a constitutional right of parents to control the education of their children premised in part on "the natural duty of the parent" to educate their children.<sup>3</sup> In

its decision, the court specifically addressed a state-centered understanding of the family and concluded that although there have been societies which see the child as a creature of the state and disregard family obligations and prerogatives, these “ideas touching the relation between the individual and the State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.”<sup>4</sup>

Shortly thereafter, the Court struck down a prohibition on non-public schools enacted by a popular referendum in Oregon.<sup>5</sup> A Catholic school and a private military academy challenged the law. In invalidating the law, the Court again recognized “the liberty of parents and guardians to direct the upbringing and education of children under their control.”<sup>6</sup> Interestingly, the Court once again repudiated state-centered approaches to the family: “[t]he child is not the mere creature of the State.”<sup>7</sup>

The difference between the United States and European Union decisions is explained, at least in part, by their philosophical underpinnings. The U.S. decisions repudiated a persistent ideology about the place of family, parents and children vis-à-vis the state. One of the ideology’s earliest formulations occurs in the thought of Jean-Jacques Rousseau. Rousseau had abandoned his own children to a foundling’s home to be raised (if, given the conditions such children were subject to, they survived) by the state. As a historian notes:

Rousseau’s self-justification of his abandonment of his own children evolved “into the proposition that education was the key to social and moral improvements and, this being so, it was the concern of the State. The State must form the minds of all, not only as children (as it had done to Rousseau’s in the orphanage) but as adult citizens. By a curious chain of infamous moral logic, Rousseau’s iniquity as

a parent was linked to his ideological offspring, the future totalitarian state.”<sup>8</sup>

Rousseau’s philosophy held that education was “the key to the success of the cultural engineering needed to make the State acceptable and successful; the axis of his idea was the citizen as child and the State as parent, and he insisted the government should have complete charge of the upbringing of all children.”<sup>9</sup>

Much of this philosophy was inherent in the movement that enacted the Nebraska and Oregon laws. Proponents, including the Klu Klux Klan, were motivated by racial and religious bigotry.<sup>10</sup> They believed that “[c]ommon schooling, in English, would ensure a more homogenous population in the future.”<sup>11</sup> Opponents of the law rejected the state-centered values the laws would have enforced. A modern commentator notes: “One of the most popular slogans of the opposition [to the Oregon law] read, ‘Who Owns Your Child? The State?’”<sup>12</sup>

As already noted, to the great credit of the U.S. Supreme Court, it sided with family autonomy against the homogenizing effort of the state. Thus, “*Pierce* and *Meyers* stand as a beacon against too singular a uniformity in the life of the mind being imposed upon all our children.”<sup>13</sup> This is not to say that our current political and legal system has entirely abandoned its designs for a uniformity that would coopt family functions like education to advance a vision of society that values sameness over liberty. As Professor Stephen Carter has noted: “...many of today’s theories of liberalism, like yesterday’s nativists, seem determined to use ‘public’ education to create a nation where everybody thinks the same way.”<sup>14</sup>

In fact, a more recent U.S. Supreme Court case may call into question the protective precedents of *Meyers* and *Pierce*, while nominally following their holding. In this case, *Troxel v. Granville*, the Court ruled 5-4 that a Washington statute that allowed any person to seek

visitation with children was unconstitutional because the statute should have given special weight to the wishes of a fit parent.<sup>15</sup> It could be argued that instead of following the earlier decisions in recognizing parents' *fundamental* right to direct the upbringing of their children (as Justice Thomas urged in his *Troxel* concurrence), the court has replaced the earlier robust doctrines with a formulaic test that would only require the state to treat a parent's wishes as an important factor in disputes with non-parents even if the state ultimately disregards those wishes.

Professor Robert Nagel has pointed out that the Supreme Court's reliance on such formulae is inherently problematic:

Despite their superficial precision, neither the content nor the shape of modern formulae communicates clarity and constraint. The formulae are demands—multiple, repetitive, shifting, and sometimes inconsistent demands. The style reflects intellectual embarrassment about the existence of judicial discretion but is designed to assure plentiful opportunities for its exercise. In combination with the mechanical tone of formulaic opinions, the palpable range of choice inherent in the formulae communicates, not objectivity, but power without responsibility. Rather than binding, the formulaic style frees the Court, like some lumbering bully, to disrupt social norms and practices at its pleasure.<sup>16</sup>

In *Troxel*, the Court's formula can create the appearance of protection of parental rights while leaving lower courts free to ignore an actual parent's preference by saying "we're treating the parent preference as a plus factor but in balancing it all out, we are going to disregard it in this instance."

Indeed, this is what appears to be happening in recent cases. For example, the supreme courts of Ohio and Utah issued decisions in cases where grandparents sought

visitation over the objection of a fit parent (the same fact scenario as *Troxel*). In both instances, the courts allowed visitation.<sup>17</sup> The courts believed that as long as the parents' wishes were consulted, the "best interests of the child" would be determinative even if lower courts used that standard to justify disregarding the parental preference. In a Washington case, that state's supreme court ruled that the former same-sex partner of a child's biological mother was entitled to visitation over the objection of the mother because the partner was essentially a parent to the child.<sup>18</sup> An appeals court in Maryland reached the same result in a dispute between an adoptive parent and her former partner.<sup>19</sup> These examples are not exhaustive.

Though these cases do not call into question a parent's prerogatives about their children's education, by employing a test that treats a parent's wishes as only one consideration for the ultimate decisionmaker, the state, to consider, we may justifiably be concerned that our courts may be repudiating the traditional principle of family autonomy in favor of an ideology characteristic of the European Union's homeschool decision.

In a 75-year retrospective on the *Pierce* case, professor William G. Ross said:

While the Court's declarations that 'the individual has certain fundamental rights which must be respected' and that 'the child is not the mere creature of the state' are likely to endure for as long as America is a free society, the interpretation and form of those rights will depend upon persons and institutions who will fight for their rights as courageously as did the opponents of the compulsory public education laws.<sup>20</sup>

We can hardly be too vigilant in preserving the heritage of family liberty that is at the core of our traditions but which is still seen as an obstacle to the state-centered uniformity so earnestly desired by some.

## ENDNOTES

1. *Konrad v. Germany*, Application no. 35504/03 (European Court of Human Rights 2006).
2. *Meyer v. Nebraska*, 262 U.S. 390 (1923).
3. *Id.* at 400-401.
4. *Id.* at 402.
5. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).
6. *Id.* at 534.
7. *Id.* at 535.
8. Paul Johnson, *Intellectuals* 23 (1988).
9. *Id.* at 25-26.
10. David B. Tyack, "The Perils of Pluralism: The Background of the *Pierce* Case" 74 *American Historical Review* 74 (Oct. 1968).
11. Jay S. Bybee, "Substantive Due Process and Free Exercise of Religion: *Meyer*, *Pierce* and the Origins of *Wisconsin v. Yoder*" 25 *Capital University Law Review* 887, 893 (1996).
12. Paula Abrams, "The Little Red Schoolhouse: *Pierce*, State Monopoly of Education and the Politics of Intolerance" 20 *Constitutional Commentary* 61, 69 (2003).
13. Edward McGlynn Gaffney, Jr., "*Pierce* and Parental Liberty as a Core Value in Educational Policy" 78 *University of Detroit Mercy Law Review* 491, 545 (2001).
14. Stephen L. Carter, "Parents, Religion, and Schools: Reflections on *Pierce*, 70 Years Later" 27 *Seton Hall Law Review* 1194, 1224 (1997).
15. *Troxel v. Granville*, 530 U.S. 57 (2000).
16. Robert F. Nagel, "The Formulaic Constitution" 84 *Michigan Law Review* 165, 202-203 (1985).
17. *Harrold v. Collier*, 836 N.E.2d 1165 (Ohio 2005); *In re Estate of S.T.T.*, 144 P.3d 1083 (Utah 2006).
18. *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005).
19. *Janice M. v. Margaret K.*, 910 A.2d 1145 (Md. App. 2006).
20. William G. Ross, "*Pierce* After Seventy-Five Years: Reasons to Celebrate" 78 *University of Detroit Mercy Law Review* 443, 462 (2001).

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