

THE McREYNOLDS MYSTERY SOLVED[†]

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Justice McReynolds' authorship of the celebrated case of Meyer v. Nebraska seems puzzling in view of McReynolds' known predilections. Developments in the law and revelations of fact cast a long shadow back upon Meyer, and McReynolds' positions in other cases support the conclusion that we have a plausible solution to the mystery of McReynolds' authorship of Meyer.

INTRODUCTION

Ordinary mortals may not have heard of the case of *Meyer v. Nebraska*,¹ but in American law schools, *Meyer*, a 1923 case in the Supreme Court, is mentioned reverently as a great fount of constitutional rights. It is the first modern civil rights case.² True, *Meyer* has been deplored as the source of a regrettable jurisprudence of open-ended, unanchored rights under the oxymoronic rubric of “substantive due process.”³ The Supreme Court itself seems to approach substantive due process with reluctance.⁴ A lecturer might mention *Meyer* with a certain

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1. 262 U.S. 390 (1923).

2. See, e.g., Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 109 (2007) (tracing to *Meyer v. Nebraska* modern civil rights protected by the Due Process Clause of the Fourteenth Amendment); David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L. Q. 1469, 1509 (2005) (finding that “[t]he expansion of Lochnerian due process jurisprudence to civil liberties began with *Meyer v. Nebraska* . . .”); Paul Finkelman, *German Victims and American Oppressors: The Cultural Background and Legacy of Meyer v. Nebraska*, in *LAW AND THE GREAT PLAINS: ESSAYS ON THE LEGAL HISTORY OF THE HEARTLAND* 33, 33 (John R. Wunder ed., 1996) (viewing *Meyer* “as the most significant civil liberties victory of the WWI period” and “the immediate prelude to the incorporation of the Bill of Rights through the Fourteenth Amendment.”).

3. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980); James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMM. 315 (1999).

4. See, e.g., *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (Stevens, J.) (stating that “the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered [sic] area are scarce and open-ended.”).

sophisticated irony, pointing out that *Meyer* was rooted in *Lochner v. New York*,⁵ a case as reviled as *Meyer* is admired.

None of these common responses to *Meyer* touch the riddle of the case's authorship: How on earth could the notoriously illiberal Justice James Clark McReynolds have written that liberal icon, *Meyer v. Nebraska*? At some level of consciousness the question must still perplex other toilers in the vineyard of constitutional law as it did me. It is no answer to say that *Meyer* was an exuberance of McReynolds' "Lochnerism."⁶ *Lochner* was not a fount of rights, and *Meyer* was. Nor can *Meyer* be explained as some inadvertence on McReynolds' part. Two years after *Meyer*, McReynolds wrote the opinion for the Court in *Pierce v. Society of Sisters*,⁷ an important reassertion of *Meyer*. Nor can we conclude, in our satisfaction with *Meyer*, that we have somehow exaggerated the Scrooge in McReynolds.⁸ It is not possible to exaggerate the Scrooge in McReynolds.⁹

No writer in constitutional law, as far as I can discover, has solved this riddle. Although many must have experienced this cognitive dissonance, few have troubled even to articulate it.¹⁰ This paper records one writer's working-out of a solution to the McReynolds mystery. With a deeper grasp of what was at stake in the case, we can see that *Meyer* has a dark side, one that links it to *Lochner*, but one that cannot be understood simply by fretting over *Meyer*'s roots in *Lochner*.

Part I of this paper recalls *Meyer* in its 1923 context, as well as its successor, *Pierce v. Society of Sisters*, and the celebratory light in which both cases came to be perceived. Part II focuses on the difficulty, for authorship of *Meyer*, that the character of Justice McReynolds presents. Part III grapples with the specific issue confronting the Court in *Meyer*: the persistent problem of the language of instruction in schools. Part IV then turns to *Wisconsin v. Yoder*,¹¹ decided a half century later — a

5. 198 U.S. 45 (1905) (striking down, under the Due Process Clause of the Fourteenth Amendment, a state statute providing a maximum ten-hour day for bakers as violating the "liberty of contract" of both worker and employer).

6. See, e.g., Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 *FORDHAM L. REV.* 459, 492–96 (2001).

7. 268 U.S. 510 (1925). See also *Farrington v. Tokushige*, 273 U.S. 284, 199 (1927) (McReynolds, J.) (striking down, under the Fifth Amendment's Due Process Clause, a local Hawaii statute barring Japanese parents from enrolling their children in Japanese language schools).

8. See, e.g., Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 *VA. L. REV.* 559, 560 (1997) (pointing out apparently anomalous liberal positions taken by Supreme Court Justices such as McReynolds, now more usually remembered as consistently seeking to balk New Deal legislation).

9. The point is developed *infra* Parts II and VI.

10. See, e.g., David P. Currie, *The Constitution in the Supreme Court: 1921–1930*, 1986 *DUKE L. J.* 65, 143 (opaquely attributing McReynolds' "liberal" decision in *Meyer* to judicial activism); Louise Weinberg, *Fear and Federalism*, 23 *OHIO N.U. L. REV.* 1295, 1334 (1997) (characterizing McReynolds as the "improbable author" of *Meyer*).

11. 406 U.S. 205 (1972).

significantly similar case. Part V finds in *Yoder* and its aftermath a key to the McReynolds mystery. Part VI then proposes and details a solution to the mystery. The proffered solution builds on the facts in both cases, the language and other features they share, the character of Justice McReynolds, and the judicial positions taken by McReynolds. Notwithstanding this paper's disturbing reinterpretation of *Meyer*, it concludes with an appreciation of *Meyer*'s legacy.

I. THE ROMANCE OF *MEYER V. NEBRASKA*

Meyer v. Nebraska has become even more illustrious today than it was in the decades immediately following it. But the Justices who decided *Meyer* would be astonished by the case's grand future as a bedrock of constitutional thinking in our time. Among other things, *Meyer* lies at the foundation of our modern constitutional rights of sexual privacy,¹² including the limited right to abortion first recognized in *Roe v. Wade*.¹³ *Meyer* itself, however, was only about a teacher teaching Bible stories in a private parochial school.

Meyer arose in a Nebraska courthouse, where Robert N. Meyer was found guilty of the charge that "on May 25, 1920, while an instructor in Zion Parochial School he unlawfully taught the subject of reading in the German language to Raymond Parpart, a child of 10 years, who had not attained and successfully passed the eighth grade, . . . a collection of biblical stories being used therefore [sic]."¹⁴

Meyer's little pupils were reading Luther's Bible in Luther's own German — surely a fine thing. But a Nebraska statute enacted shortly before Meyer's prosecution outlawed this. The statute prohibited the teaching of a foreign language even in English, deferring any such study to high school: "Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides."¹⁵ Moreover, the statute specifically provided that "[n]o person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language [other] than the English language."¹⁶

12. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 563 (2003) (citing *Meyer* as the origin of modern rights of sexual intimacy); *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (citing *Meyer* as the origin of modern substantive due process rights of parental autonomy).

13. 410 U.S. 113 (1973).

14. *Meyer*, 262 U.S. at 396–97.

15. Act of Apr. 9, 1919, ch. 249, § 2, 1919 Neb. Laws 1019.

16. *Id.* § 1.

Another section of the statute went so far as to attribute these proscriptions to a state of *emergency* in Nebraska: “Whereas, an emergency exists, this act shall be in force from and after its passage and approval.”¹⁷ Perhaps with this state of “emergency” in mind, Justice McReynolds, writing for the Court, attributed the statute to “[u]nfortunate experiences during the late war and aversion toward every character of truculent adversaries.”¹⁸ Indeed, in World War I, Americans had so reviled anything German that they had even troubled to rename sauerkraut “liberty cabbage” for the duration of the war.¹⁹ And now, unsettled conditions in Germany following the war had produced a fresh wave of German immigration, evidently stoking further xenophobia in Nebraska.²⁰

Justice McReynolds pointed out that the teacher surely had a right to teach. “[T]he [Nebraska] Legislature,” he observed, “has attempted materially to interfere with the calling of modern language teachers.”²¹ Then, forgetting that in a prosecution of the teacher the rights of neither the parents nor the children, strictly speaking, were at issue, McReynolds added that the legislature had also interfered “with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.”²² None of this could be due process.²³

Note this unemphatic ringing in of “the power of parents to control.” This is the faint improbable dawn of an articulated constitutional realm of parental autonomy.²⁴ In time, lawyers would

17. *Id.* § 4.

18. *Meyer*, 262 U.S. at 402. McReynolds here may have been referring not only to Germany, but to the German-Americans who, before the War, sought to influence American policy in ways favorable to Germany. See Reinhold Niebuhr, *The Failure of German-Americanism*, 118 THE ATLANTIC MONTHLY 13, 13 (1916).

19. See, e.g., JAMES GEARY, *I IS AN OTHER: THE SECRET LIFE OF METAPHOR AND HOW IT SHAPES THE WAY WE SEE THE WORLD* 120 (2011); TED WIDMER, *ARK OF THE LIBERTIES: AMERICA AND THE WORLD* 180 (2008).

20. German immigration to the United States resumed after World War I in reaction to uncontrolled inflation and growing street violence. For federal anti-immigration law at the time of *Meyer*, see *infra* note 51 and accompanying text.

21. *Meyer*, 262 U.S. at 401 (holding, in language reminiscent of *Lochner v. New York*, 198 U.S. 45, 61 (1905), that the Due Process Clause of the Fourteenth Amendment secures a “liberty of contract”). Interference with the right of the teacher to contract was an essential piece of reasoning for the *Meyer* Court. Constitutional theories more relevant today to *Meyer*’s facts were unavailable in 1923. See *infra* notes 33, 34 and accompanying text.

22. *Meyer*, 262 U.S. at 401.

23. *Id.* at 399 (“The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment: ‘No state . . . shall deprive any person of life, liberty or property without due process of law.’”).

24. This parental right also appears in *Meyer* in an accompanying laundry list: “While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and

come to see *Meyer* as grounding a regime of personal and family liberty, including the privacy of sexual intimacy, even in matters with which the Court at first had attempted to deal under some aspect of the Bill of Rights.²⁵ In time, *Meyer*'s substantive due process would come to allow women some freedom to decide whether or not to abort an early pregnancy.²⁶ *Meyer*'s most recent efflorescence is a constitutional right to homosexual intimacy.²⁷ Something that only a half-century ago compassionate doctors and liberal lawyers could argue was not a crime to be punished but only an illness to be cured, is now understood to be not an illness, but rather a part of a person's very being, the private expression of which, between consenting adults, is a fundamental constitutional right.²⁸

More broadly, *Meyer* grounds the modern theory under which the Constitution today, in its two provisions for due process²⁹ substantively protects fundamental human rights not specifically enumerated in the Constitution.³⁰ This, notwithstanding that "due process" strikes the ear as having something to do with procedure.

generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer*, 262 U.S. at 399 (emphasis added). This sort of list is first prominently encountered in *Corfield v. Coryell*, 6 F. Cas. 546 (Washington, Circuit Justice, C.C.E.D. Pa. 1823) (listing rights protected by the Privileges and Immunities Clause, U.S. CONST. art. IV).

25. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down as inconsistent with the penumbras and emanations of the First and Fourth Amendments a state law prohibiting the use of contraceptives, in a case involving a married couple); *Eisenstadt v. Baird*, 405 U.S. 438 (1971) (under the Equal Protection Clause, extending *Griswold* to unmarried couples); see also *Stanley v. Georgia*, 394 U.S. 557 (1969) (under the First Amendment, striking down law criminalizing the possession of pornography, in a case in which the offense took place in the privacy of the home).

26. *Roe v. Wade*, 410 U.S. 113 (1973) (striking down a state prohibition of abortion in the first trimester of pregnancy; stating that the state could regulate in the interest of the health of the mother in the second trimester, and the health of the fetus in the third); but see *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (approving, as not imposing "undue burdens" on the right recognized in *Roe*, a statutory waiting period, a requirement of parental consent; and requirements that the provider convey certain information to the patient seeking an abortion, and report to authorities).

27. *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down, under the Due Process Clause of the Fourteenth Amendment, a statute criminalizing sodomy), *overruling* *Bowers v. Hardwick*, 478 U.S. 186 (1986).

28. In a joint opinion by Justices O'Connor, Kennedy, and Souter, the Court declared sexual intimacy and procreation to be "matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, . . . central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Casey*, 505 U.S. at 851. Justice Scalia later dubbed this the "sweet-mystery-of-life" theory of constitutional interpretation. *Lawrence*, 539 U.S. at 588 (Scalia, J., dissenting).

29. U.S. CONST. amends. V, XIV.

30. For the discovery of a fully elaborated theory of substantive due process as early as 1843, protecting unenumerated rights acknowledged by the Ninth Amendment, see Louise Weinberg, *An Almost Archaeological Dig: Finding a Surprisingly Rich Early Theory of Substantive Due Process*, 27 CONST. COMMENT. 163 (2010).

Today a Supreme Court reluctant to endorse the concept of “substantive due process” might decide *Meyer* as a free speech case,³¹ or a religious freedom case.³² But in 1923 the First Amendment’s protection of speech was not quite established in its relation to state government,³³ and the First Amendment obligation to protect religious freedoms was not imposed on the states until many years later.³⁴ Instead, Justice McReynolds based *Meyer* on the right to transact. Citing *Lochner v. New York*,³⁵ McReynolds found applicable a “liberty of contract”³⁶ substantively protected by the Due Process Clause of the Fourteenth Amendment. The first section of the Fourteenth Amendment provides, among other things, that, “No State shall . . . deprive any person of life, liberty, or property, without due process of law” For decades the Court had been working up an old idea that certain fundamental liberties, like the freedom to transact — the “liberty of contract” — though not explicit in the Bill of Rights, were nevertheless protected by the Due Process Clause.³⁷

31. This was Justice Douglas’s view, writing for the Court in *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). See also *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (Marshall, J.) (striking down, under the First Amendment, a statute criminalizing the private possession of pornography; remarking that “also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy.”).

32. The similar case of *Wisconsin v. Yoder*, 406 U.S. 205 (1972), discussed *infra* Parts IV, V, was handled in this fashion.

33. See *Fiske v. Kansas*, 274 U.S. 380, 387 (1927) (holding the First Amendment right to freedom of speech applicable against a state).

34. *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (holding the First Amendment Free Exercise Clause applicable against a state); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (same, with regard to the First Amendment’s Establishment Clause).

35. *Lochner*, 198 U.S. at 45.

36. *Id.* at 56.

37. See, notably, *Allgeyer v. Louisiana*, 165 U.S. 578, 593 (1897) (holding that the Due Process Clause of the Fourteenth Amendment protects the right to transact with an out-of-state insurance company), and cases there cited; a Westlaw search finds sixty-six other Supreme Court cases predating *Meyer* and mentioning “liberty of contract” or “liberty to contract,” and twenty-two predating *Lochner*. Twenty-nine of the sixty-six precede a citation to the Fourteenth Amendment or the Due Process Clause. The Supreme Court has come to adopt Justice Harlan’s view, concurring in *Poe v. Ullman*, 367 U.S. 497 (1961), that enumerated and unenumerated constitutional rights both inhere in the fundamental due process right of liberty:

“[L]iberty” is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.

id. at 543, and that sexual privacy cases are properly due process cases:

In my view, the proper constitutional inquiry in this case is whether this [anti-contraception] statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values “implicit in the concept of ordered liberty” While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.

Griswold, 381 U.S. at 500 (Harlan, J., concurring).

In *Meyer*, Justice McReynolds buttressed his views of the rights of teachers and parents to contract, and the right of parents to control the upbringing of their children, with the strong point that there is something repellent about forced uniformity in education. In a rather startling excursus, McReynolds harked back to his classical education:

For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: "That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. . . . The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be."³⁸

The reader of McReynolds' opinion today, already sufficiently stunned by the Nazi quality of Plato's ideas, hardly needs to read McReynolds' conclusion:

Although such measures have been deliberately approved by men of great genius their ideas touching the relation between individual and 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.³⁹

Two years later, writing for the Court in *Pierce v. Society of Sisters*,⁴⁰ McReynolds returned to this theme of forced uniformity. *Pierce* is an important case in itself, but it flows directly from *Meyer*. In *Pierce*, the Court held that parents have a constitutional right to pull their children out of public school and to educate them in private schools instead, or, by extension, at home. Sustaining private schooling, the Court held compulsory public schooling unconstitutional. McReynolds did not impugn compulsory *education*, nor did he deny that the state might impose educational standards on home schooling or on private schools. But no family could be forced to send its children to *public* schools.

Legal scholars, even those who do not habitually view every step as a step forward, overwhelmingly perceive *Pierce* as an essential guarantee of freedom.⁴¹ And of course it is. Because of *Pierce*, no American child's

38. *Meyer v. Nebraska*, 262 U.S. 390, 401–02 (1923) (elision in original).

39. *Id.*

40. 268 U.S. 510 (1925).

41. *See, e.g.*, WILLIAM M. GORDON ET AL., *THE LAW OF HOMESCHOOLING* 8 (1994), and works there cited.

mind need be stuffed with one narrow set of approved ideas. (Take that, Plato!) Eighteen years later, in the Flag Salute Case,⁴² Justice Jackson would memorably express the centrality in American constitutional thought of this freedom from forced uniformity: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox”⁴³

Liberty! On first reading *Meyer*, I imagined that, as McReynolds read *Meyer* from the bench (if he did), the courtroom became flooded with a radiant American light. But by indulging this romantic fantasy I think I was unconsciously trying to suppress an inner doubt. *Meyer* was all very well, but it was hard to see Justice McReynolds in a radiant American light.

II. THE MCREYNOLDS MYSTERY

How could McReynolds have written *Meyer*? McReynolds is accounted by commentators as among the least distinguished of Supreme Court Justices.⁴⁴ The commentators are being kind. What they mean is that McReynolds was the most reactionary (not to mention bigoted and mean-spirited) curmudgeon ever to serve on the Supreme Court.⁴⁵

McReynolds is remembered as the longest-sitting of the “Four Horsemen,” a quartet of Supreme Court Justices⁴⁶ who generally could be counted on to vote to strike down progressive legislation. Their want of deference to Congress⁴⁷ was probably salutary in some respects in the early days of the New Deal, when Congress and the Roosevelt administration would unite with industry in a hopeful corporate statism. The early New Deal effort was to control wages, to support prices, and, most stunningly, to discourage competition. Congress would delegate to

42. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

43. *Id.* at 642.

44. See Albert P. Blaustein & Roy M. Mersky, *Rating Supreme Court Justices*, 58 A.B.A. J. 1183, 1183–87 (1972) (grading Supreme Court Justices from the best (Chief Justice John Marshall) to the worst (James Clark McReynolds and Charles Whittaker)); *Foreword*, in JOHN KNOX, *THE FORGOTTEN MEMOIR OF JOHN KNOX: A YEAR IN THE LIFE OF A SUPREME COURT CLERK IN FDR'S WASHINGTON*, at xx (Dennis J. Hutchinson & David J. Garrow eds., 2002).

45. See, e.g., Joel K. Goldstein, *Choosing Justices: How Presidents Decide*, 26 J. L. & POL. 425, 484 (2011) (referring to McReynolds as “a bigoted reactionary”); Michael J. Klarman, *Social Reform Litigation and Its Challenges: An Essay in Honor of Justice Ruth Bader Ginsburg*, 32 HARV. J. L. & GENDER 251, 267 (2009) (referring to “the notorious racist and anti-Semite, Justice James McReynolds”); David E. Bernstein & Ilya Somin, *Judicial Power and Civil Rights Reconsidered*, 114 YALE L. J. 591, 641 (2004) (describing McReynolds as “notoriously racist and anti-Semitic”).

46. Justices Pierce Butler, James Clark McReynolds, George Sutherland, and Willis Van Devanter. For a more complex evaluation, see Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 560–61 (1997) (discussing the occasional apparently “liberal” opinions of the four).

47. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935) (striking down the National Industrial Recovery Act). The *Schechter Poultry* Court focused on the minute regulation of sick chickens. Unfortunately the *Schechter Poultry* Court also struck down the Act’s provisions for maximum hours and a right to organize.

private companies, in coordination with the new administrative agencies, the task of developing intrusive and often unenforceable regulatory codes.⁴⁸ But the obstructionism of the surviving Horsemen persisted even when voting on more sensible legislation, even after 1937, when the balance of the Court had swung Roosevelt's way.⁴⁹

McReynolds' role as one of the Four Horsemen is not the worst aspect of his biography. Far from being well-disposed toward immigrants, as one might imagine from a reading of *Meyer v. Nebraska*, McReynolds, with a nativist's passion, loathed the greenhorn immigrants crowding the slums of the big cities.⁵⁰ He was not alone in this. At the time of *Meyer*, with the quota law of 1921,⁵¹ Congress had begun, fatefully, to close "the golden door." Among the wretched "huddled masses"⁵² who made it to safety in America before the quotas hit were millions of impoverished unassimilated Jewish refugees from Eastern Europe, fleeing persecution.⁵³ And McReynolds was possessed by the demon of anti-Semitism.⁵⁴ McReynolds' anti-Semitism was notable even in that day, when overt contempt of Jewry, humorous or rabid, infected American society at all levels and disfigured American literature.⁵⁵

When Louis Brandeis, "the people's lawyer"⁵⁶ having become the first Jewish Justice, ventured to express a view at a conference of the brethren, McReynolds would get up and leave.⁵⁷ We do not have an

48. See JEFF SESHOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* 56 (2011) (describing the codes industries purported to impose on themselves in an unprecedented privatization of legislative power).

49. See, e.g., JAMES E. BOND, *I DISSENT: THE LEGACY OF CHIEF JUSTICE JAMES CLARK MCREYNOLDS* 103-10 (1992) (describing McReynolds' Supreme Court opinions from 1937 through his retirement on February 1, 1941). McReynolds was the last of the Four Horsemen; Van Devanter retired in 1937; Sutherland retired in 1938; Butler died in 1939.

50. When ruling against an immigrant, as he tended to do, McReynolds could seem particularly harsh. See, e.g., *United States v. Manzi*, 276 U.S. 463, 467 (1928) (reversing a judgment, over strong dissent, that had approved citizenship for an immigrant's widow); *Chang Chan v. Nagle*, 268 U.S. 346, 353 (1925) (declaring, in response to a certified question, that four wives of Chinese immigrants were not entitled to entry); *United States v. Ginsberg*, 243 U.S. 472, 475 (1917) (declaring, in response to a certified question, that an immigrant's certificate of citizenship must be set aside).

51. Act of May 19, 1921, ch. 8, § 2(a), 42 Stat. 5, 5 (limiting the number of immigrants from any nation to three percent of the number of foreign-born residents of the same nationality listed in the 1910 census) (repealed 1952); Act of May 26, 1924, ch. 190, § 4, 43 Stat. 153, 155 (repealed 1952).

52. These references, of course, are to Emma Lazarus's 1883 poem, "The New Colossus," a portion of which is carved in the base of the Statue of Liberty.

53. See IRVING HOWE, *WORLD OF OUR FATHERS*, 20-36 (1976).

54. See Ruth Bader Ginsburg, *From Benjamin to Brandeis to Breyer: Is There a Jewish Seat?*, 41 *BRANDEIS L. J.* 229, 233 (2002).

55. See generally, e.g., LOUIS HARAP, *THE IMAGE OF THE JEW IN AMERICAN LITERATURE: FROM EARLY REPUBLIC TO MASS IMMIGRATION* (1974).

56. See, e.g., MELVIN UROFSKY, *LOUIS D. BRANDEIS: A LIFE* 201-27 (2009).

57. PHILIP J. COOPER, *BATTLES ON THE BENCH: CONFLICT INSIDE THE SUPREME COURT* 93-94 (1995); Ginsburg, *supra* note 54, at 233.

official photograph of the Supreme Court for 1924 because that year McReynolds refused to sit where protocol placed him, next to Brandeis.⁵⁸

For all McReynolds' apparent concern in *Meyer v. Nebraska* for family rights, he showed no interest in acquiring a wife and family of his own. He became the most alone of lone wolves, the most determined of lifelong bachelors, the most sour of misogynists. If a rare woman dared to argue a case before the Supreme Court, McReynolds would sigh, "I see the female is here," and exit the courtroom.⁵⁹

It is not too fanciful to suppose that McReynolds, who had been Woodrow Wilson's Attorney General, gained his nomination to the supreme bench simply because Wilson could no longer tolerate the curmudgeon in his cabinet and availed himself of the expedient of kicking McReynolds upstairs.⁶⁰

How could this awful man have given us a great fount of rights like *Meyer v. Nebraska*? Unable to solve this mystery, in an early article I tried to paper it over. "McReynolds was a curmudgeon," I wrote, "but he was an *American* curmudgeon."⁶¹ A McReynolds apologist has written that McReynolds loved children. But even this admirer acknowledges McReynolds' misogyny.⁶² Another McReynolds fan, a lifelong friend, admits to an intention, in his memoir of the Justice, "frankly to omit

58. Ginsburg, *supra* note 54, at 233; see also ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES, THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910-1921, at 354 (2007) (1984). McReynolds maintained a consistent rudeness to his later Jewish brethren, Justices Cardozo and Frankfurter.

59. BOND, *supra* note 49, at 10.

60. Accord PBS, *Biography of the Robes: James Clarke McReynolds* (Apr. 18, 2012), http://www.pbs.org/wnet/supremecourt/personality/robes_mcreynolds.html. This is not to say that McReynolds' earlier service as Assistant Attorney General and then as Attorney General lacked merit. McReynolds was a noted "trust-buster," prosecuting the great antitrust cases of his time. See Tom C. Clark, Attorney General, Address at the Memorial Ceremonies for Justice McReynolds before the Supreme Court of the United States (Mar. 31, 1948) (on file with author); see also Michael A. Kahn, Note, *The Politics of the Appointment Process: An Analysis of Why Learned Hand Was Never Appointed to the Supreme Court*, 25 STAN. L. REV. 251, 260-61 (1973) and literature there cited. When Wilson nominated McReynolds to the Court McReynolds was perceived by Wilson and others as a liberal. JOSEPHUS DANIELS, THE WILSON ERA: YEARS OF PEACE, 1910-1917, at 540-49 (1944). Nor would I wish to diminish McReynolds' achievements as a Justice of the Supreme Court, not only in *Meyer* and *Pierce*, but also in his contribution to the understanding of the allocation of lawmaking power in admiralty in the major case of *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917) — although Justice Brandeis, in effect, would supply the intellectual foundation for *Jensen* some twenty years later in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). *Jensen*, identifying national lawmaking power over maritime cases, is, in its own way, as mysterious as *Meyer*. As one of the "Four Horsemen," McReynolds tended to disfavor national power. He dissented, without opinion, in *Carolene Products*, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 155 (1938) (holding national economic regulation presumptively constitutional). But in making national power in *Jensen* not only applicable but also preemptive, and by obscuring the difference between seamen and harbor workers, McReynolds was able to strike a blow against state workers' compensation laws, incidentally depriving Jensen's widow and children of nine dollars a week.

61. Weinberg, *supra* note 10, at 1335.

62. BOND, *supra* note 49, at 9-10.

entirely those ill-tempered, personal criticisms that emanated from those against whose views he stood adamant.”⁶³

III. “ENGLISH ONLY”

Apart from the problem of *Meyer*’s authorship, I was also beginning to have problems with *Meyer* on its merits. I could not honestly say that I *agreed* with it. The statute that the Court struck down in *Meyer* was obviously what today we would call an “English-only” law, and *Meyer* evokes our own interminable anguished controversy over how to teach Spanish-speaking children in American schools (and whether it is racist to want to teach them in English). There is a range of expert opinion on these questions.⁶⁴ I could not say with any confidence that I was right about this; I could say only that I had an opinion.

Reinforced and advanced by *Pierce*, *Meyer* opened space in which even American children, American citizens born here, could receive their educations in the foreign tongue used by their parents at home, reading foreign books, becoming steeped in foreign ideas. Most liberals see this aspect of *Meyer* as a triumph of liberty. But it was not clear to me that this liberty was doing the children any favors. I worried that these children would become fixed in their parents’ language and culture. How could “freedom” from the usual American education in English advance their prospects for success in this English-speaking country? — indeed, in an English-speaking world? To spare Spanish-speaking children the pain of early immersion in English, educators might be putting them at a lifelong disadvantage. Nor could it much improve the fortunes of Spanish-speaking children to teach them their English in their own language. That would tend to make English the kind of “foreign language” one learns from a book. This could be the trap laid for Spanish-speaking children even in dual-language programs, in which all children learn in both languages. I feared that in such programs the children for whom English was the mother tongue would pick up Spanish while continuing to think in English, while the children for whom Spanish was the mother tongue, even as they picked up English, would continue to think in Spanish.

Justice Holmes dissented from *Meyer* in a companion case,⁶⁵ joined by Justice Sutherland. Holmes wrote:

63. Stirling Price Gilbert, “James Clark McReynolds (1862–1946): Justice of the Supreme Court of the United States of America” 3 (1946) (unpublished typescript) (on file with author).

64. See generally FRANÇOIS GROSJEAN, BILINGUAL: LIFE AND REALITY (2010); LANGUAGE LOYALTIES: A SOURCE BOOK ON THE OFFICIAL ENGLISH CONTROVERSY (James Crawford ed., 1992) and authorities there cited.

65. *Bartels v. Iowa*, 262 U.S. 404, 412–13 (1923) (Holmes, J., dissenting).

Youth is the time when familiarity with a language is established and if there are sections in the State where a child would hear only Polish or French or German spoken at home I am not prepared to say that it is unreasonable to provide that in his early years he shall hear and speak only English at school.⁶⁶

It is possible to dislike and criticize Holmes,⁶⁷ but on this point I had to agree with him. Holmes made a related argument about assimilation: “We all agree, I take it,” he wrote, “that it is desirable that all the citizens of the United States should speak a common tongue, and therefore that the end aimed at by the statute is a lawful and proper one.”⁶⁸

Reading this again, I am reminded that to this day American public schools typically do not teach modern foreign languages until their pupils are too old to learn them. Like Nebraska in the *Meyer* case, many states still postpone the study of modern foreign languages until the high-school years, at least in public schools. This delay means that we will rarely be able to master the foreign language we choose. To be sure, many can learn a foreign tongue even late in life. But it is the common experience that many cannot. Our country is notorious for sending American diplomats to places where they are unable to speak the local language. It might be a reason for this apparent stupidity that we take children from every corner of the globe and make Americans of them. That is something we are good at, and will remain good at, and proud of, as long as we do not allow a balkanizing multiculturalism to erode the American ideal of the melting pot.

Of course McReynolds was right about the perils of a forced conformity. But Holmes was right, too, about the importance, in a society worthy of it, of assimilation.

IV. THE *YODER* IDYLL

A half-century after *Meyer* and *Pierce*, the Court decided a case very like *Meyer* on its facts. *Wisconsin v. Yoder*⁶⁹ concerned the way of life of a community of strict Old Amish. Conservative Amish communities tend to stop their children’s education with grade school. The children are not sent to high school. In *Yoder*, an Amish parent was convicted of violating Wisconsin’s compulsory school law, but the state

66. *Id.* at 412.

67. See Louise Weinberg, *Holmes’ Failure*, 96 MICH. L. REV. 691, 691–92 (1997).

68. *Bartels*, 262 U.S. at 412.

69. 406 U.S. 205 (1972).

supreme court reversed the conviction. Wisconsin sought review and the Supreme Court granted certiorari.⁷⁰

It was for religious reasons, Mr. Yoder argued, that the Amish traditionally limit a child's education to grade school.⁷¹ Their religion forbids higher education because, in their view, higher education corrupts children, making them worldly. High school sports make children idle, taking time from their religious duties and vocational training. In some localities, the Amish avoid the public schools even at the grade school level, sending their children of all ages to their own one-room schoolhouses.⁷² There, the children might be taught their reading, writing, and arithmetic for a few hours a week, thus gaining a rudimentary "English" education. (To the Amish, who often still speak a variant of Pennsylvania Dutch, all persons and things outside the community are "English.") The rest of the time, and in the years in which other American children attend a secondary school, Amish children, Yoder argued, learn the vocational skills they need to contribute to the community's special way of life.⁷³

Chief Justice Burger explained that Amish girls were trained in care of the household and Amish boys in care of the farm. This vocational training of the Amish could scarcely be described as unsuccessful. The Amish, Burger pointed out, were self-supporting, prosperous, and peaceful. There was an ideal community in which there were no crimes and no welfare cases. The Amish had even obtained a waiver of the obligation to pay social security taxes, since they did not need or want social security. They looked after their own elderly.

Wisconsin, for its part, was hampered in defending its compulsory school law by the fact that the Wisconsin legislature, in its wisdom, required that its youngsters attend school only through the age of sixteen, in many instances a requirement satisfied with only two years of secondary schooling.⁷⁴ If the state's interest in universal high school education was as important as Wisconsin contended, why had the legislature not required Wisconsin's young to complete high school? To have done so might have inconvenienced Wisconsin's disappearing small farm families, but it might also have helped to secure a more informed and productive life for all Wisconsin's children. In view of the state's apparent lack of concern about high school diplomas, another couple of years of schooling for the Amish could hardly make a great difference to

70. *Id.* at 207. For much of the following background, see also Brief for Respondent, *Wisconsin v. Yoder*, 1970 WL 116895 (1971) (summary of facts); *State v. Yoder*, 182 N.W.2d 539 (Wis. 1971) and literature there cited.

71. *Yoder*, 406 U.S. at 209.

72. *Id.* at 212.

73. *Id.* at 211.

74. *Id.* at 207 n.2.

Wisconsin's educational interests. This consideration influenced the three concurring Justices.⁷⁵ Besides, as the Chief Justice pointed out, the Amish were not as bizarre in their rejection of high school as might be thought. Several states at the time did not require education beyond the eighth grade. Mississippi had no compulsory education laws at all.⁷⁶

Wisconsin insisted that Mr. Yoder had not been prosecuted for his religious belief.⁷⁷ The state acknowledged that religious *belief* could not be punished. But Mr. Yoder's keeping his children out of high school was *conduct*, which *could* be punished. Nevertheless Chief Justice Burger did not doubt that the free exercise of religion was at stake in *Yoder*.⁷⁸ In the Amish's sincere religion, Chief Justice Burger thought, belief could not be disentangled from conduct. The very essence of their religion was submission to a prescribed way of life. Their religion dictated every detail of their way of life — their language, their beards, their concealing dresses, their covered wagons, and their farming. Apparently charmed by the pastoral innocence of the scene the Amish painted for him, Burger pointed out that from the very beginning, three centuries before *Yoder*, the religion of the Amish had been all about a return to biblical simplicity and unworldliness, and about staying close to the land.⁷⁹ In America the Amish had been faithful to these ideals for two hundred years. Their religion was, in essence, a constant rejection of, and struggle against, modernity.

The Chief Justice had to acknowledge that compulsory schooling was originally, in part, a protection against child labor. But work on a farm or in the home was healthful, he thought. There was no danger to the child.⁸⁰ At all events, when a case so obviously fell under *Meyer* and *Pierce*, and so clearly invoked both religious freedom and parental freedom to control the upbringing of children, the prudent thing to do was to apply the law, as far as it was possible to extrapolate it from *Meyer* and *Pierce*.

The question was not whether Wisconsin's compulsory school law was constitutional. Of course the state had power to encourage the education of its workforce and its voters. As *Yoder* was argued, the question, rather, was whether the First Amendment's protection of religious freedom required Wisconsin to grant the Amish a religious *exemption* from prosecution for violating the compulsory school law.

75. *Id.* at 237–38 (White, J., concurring).

76. *Id.* at 226 n.15 (majority opinion).

77. *Id.* at 229.

78. *Id.* at 215. For prudential and process reasons, this assumption characterizes Free Exercise cases.

79. *Id.* at 210.

80. *Id.* at 228.

The then-recent case of *Sherbert v. Verner*⁸¹ would seem to require as much, in the absence of a showing of any compelling state interest to the contrary.

But there was a snag. A Supreme Court case had gone the other way. It was a less famous case, and an older case, but an important case nonetheless. This was *Prince v. Massachusetts*.⁸² In *Prince*, a Jehovah's Witness had been taking her child with her, out on street corners, to preach and distribute religious pamphlets and collect money. The mother had been warned at least twice by a school truancy officer that her child must attend school. There was testimony that the child always begged the mother to take her along with her; that the child thought it her religious duty to go — paralleling the equally zealous testimony of a little girl in *Yoder*.⁸³ Nevertheless the Jehovah's Witness mother had been convicted of violating the state's child labor law. The Supreme Court, splitting five to four, *sustained* the conviction. Justice Rutledge, writing for the Court, took into consideration not only the mother's but the child's right to follow the dictates of faith. He considered also the parental right of control shaped by *Meyer* and *Pierce*. But neither of these rights, in Rutledge's view, was absolute:

Against these sacred private interests . . . stand the interests of society to protect the welfare of children It is 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 . . . citizens.⁸⁴

A more direct contradiction of the Amish's position in *Yoder* could hardly be imagined. Clearly in *Prince* the Court had identified education as a "compelling state interest" — to use the Court's later formulation. Thus, *Prince* met the test later laid down in *Sherbert v. Verner*, that only on such a showing could a state deny a religious exemption from otherwise applicable law. The Court in *Sherbert* had considered *Prince*, however, and had confined it narrowly to situations in which the parents' control of the upbringing of their children presents "some substantial threat to public safety, peace or order."⁸⁵ Amish parental control did not involve loitering on street corners and presented no such threat. The

81. 374 U.S. 398, 410 (1963) (holding that a state may not, absent a compelling state interest, deny a religious exemption from restrictions on unemployment compensation), *overruled by* *Emp't Div. v. Smith*, 494 U.S. 872, 890 (1990) (holding that there is no constitutionally required religious exemption from neutral laws of general application).

82. 321 U.S. 158 (1944).

83. *Id.* at 162–63. *But see* THEODORE DREISER, AN AMERICAN TRAGEDY 1 (1925). At the start of this fictionalized account of such a childhood, perhaps the author's own, a boy is made to go out on the crowded streets with his fundamentalist family to sing hymns. Dreiser writes that the boy "appeared to resent and even to suffer from the position in which he found himself."

84. *Prince*, 321 U.S. at 165.

85. *Sherbert*, 374 U.S. at 403.

Yoder Court held, affirming the reversal of Mr. Yoder's conviction, that Wisconsin must allow the Amish a religious exemption from mandatory secondary education for their children.⁸⁶

Yoder goes considerably beyond *Meyer* and *Pierce*. Nothing in *Yoder* suggests that alternative home schooling or private instruction need meet state standards. Indeed, nothing in *Yoder* suggests that any schooling at all need be provided for Amish children. This troubled Justice White, concurring. White suspected that children who wanted to move on and leave the Amish community would need high school educations. But he thought additional skills could be picked up later in life.⁸⁷ Chief Justice Burger noted this concern, but he asserted that Amish children did not leave their communities. There was no significant attrition among the Amish.

Justice Douglas, dissenting, thought it unrealistic for the Court to imagine that the Old Amish were living some bucolic idyll.⁸⁸ Evidently there were certain pathologies. There were reports of drinking and rowdyism among the young. The teenagers were fixated on "filthy stories."⁸⁹ There was a high suicide rate. But Chief Justice Burger pointed out that such behaviors occur among all young people.⁹⁰ Justice Douglas also focused on the plight of under-educated youngsters who might have wanted to do something ambitious with their lives. They might have wanted to be pianists or astronauts or oceanographers.⁹¹ At the very least, Douglas argued, the children themselves needed to be heard from. The testimony of one young girl, who swore that she had a religious need to avoid high school, was hardly sufficient. The children's lives would be stunted. But he did not suggest the appointment of a guardian *ad litem* in cases in which the views of the parents might not be in the best interests of the child.

Re-reading *Meyer* and *Pierce* and *Yoder* today, after 9/11, we might well feel some previously unimaginable concerns. The overwhelming majority of American Moslems of course are good citizens, well educated and prosperous. We do not suppose that they invariably sympathize with Islamist religious extremists.⁹² But *Meyer* and *Pierce* and *Yoder* clear a space, partly for religious reasons, partly in deference to the right of parental control, in which American children would be

86. *Yoder*, 406 U.S. at 234.

87. *Id.* at 240 (White, J., concurring).

88. *Id.* at 244–45 (Douglas, J., dissenting in part).

89. *Id.* at 247 n.5.

90. *Id.* at 224 (majority opinion).

91. *Id.* at 244–45.

92. *But see, e.g.*, George Michael, *Steven Emerson: Combating Radical Islam*, 17 MIDDLE E. Q. 15 (2010), available at <http://www.meforum.org/2578/steven-emerson-combating-radical-islam> (recounting a Moslem event in Oklahoma City, replete with hate speech and exhortations to violence).

able to receive an Islamic education, whether in a parochial school or at home — in their parents' language, if desired, or in Koranic Arabic. All this would be fully authorized by *Meyer, Pierce, and Yoder*. Islam is most assuredly a sincere religion. However, as I understand it, it is also a way of life,⁹³ down to beards,⁹⁴ various degrees of concealing female dress,⁹⁵ hatred of others,⁹⁶ barbaric penalties,⁹⁷ and a rejection of modernity⁹⁸ — and, in some families, rejection of secular schooling.⁹⁹ Some Moslem schools may offer a substantially traditional Islamic education,¹⁰⁰ focused on recitation and memorization of the Koran, with only enough other material, if any, to satisfy minimal state standards. Some may inculcate Koranic and traditional elements of eliminationist

93. On this point and those following *see generally* IBN WARRAQ, WHY I AM NOT A MUSLIM (1995); *see also, e.g.*, Syed Abul A'ala Mawdudi, *Islamic Way of Life*, YOUNG MUSLIMS, http://web.youngmuslims.ca/online_library/books/islamic_way_of_life/index.htm (last visited Sept. 3, 2011) (praising Islam as a way of living, a culture, and an encompassing political and legal system, among other things).

94. *Islam*, ISLAMIC FAQ, <http://www.islamicfaq.org/islam/index.html#Q16> (“Muslims seek to follow the noble example of the Prophet of Islam The Holy Prophet . . . had a beard and wore a turban However, these were not done simply to follow custom or tradition.”).

95. *See, e.g.*, THE MUSLIM VEIL IN NORTH AMERICA: ISSUES AND DEBATES (Sajida Alvi, Homa Hoodfar & Sheila McDonough eds., 2003).

96. The Koran is repetitively explicit about this, especially in the authoritative Medina shuras: “So We planted amongst them enmity and hatred till the Day of Resurrection (when they discarded Allāh’s Book, disobeyed Allāh’s Messengers and His Orders and transgressed beyond bounds in Allāh’s disobedience); and Allāh will inform them of what they used to do.” (al-Mā’idah 5:14); “It is not for a Prophet that he should have prisoners of war (and free them with ransom) until he had made a great slaughter (among his enemies) in the land.” (al-Anfāl 8:67); “Then when the Sacred Months (the 1st, 7th, 11th, and 12th months of the Islāmic calendar) have passed, then kill the [idolators] wherever you find them, and capture them and besiege them, and lie in wait for them in each and every ambush.” (at-Taubah 9:5); “O you who believe (in Allāh’s Oneness and in His Messenger Muhammad)! Verily, the *Mushrikūn* (polytheists, pagans, idolaters, disbelievers in the Oneness of Allāh, and in the Message of Muhammad) are *Najasun* (impure).” (at-Taubah 9:28). *Translations of the Meanings of the Noble Qur’an*, KING FAHD COMPLEX FOR THE PRINTING OF THE HOLY QUR’AN, <http://www.qurancomplex.com/Quran/Targama/Targama.asp> (last visited Jan. 7, 2011) (An updated version of the Abdullah Y. Ali translation, revised and edited by a committee at The Presidency of Islamic Researches, IFTA, Call and Guidance (in Madinah, Saudi Arabia)). There are many other examples. *See, e.g.*, SPENCE KEEGAN, ISLAM: RELIGION OF INTOLERANCE (2011). *See generally*, BASSAM TIBI, THE CHALLENGE OF FUNDAMENTALISM: POLITICAL ISLAM AND THE NEW WORLD DISORDER (2nd ed. 2002).

97. *The Cutting of Hands and Feet*, APOSTATES OF ISLAM (2003), at <http://www.apostatesofislam.com/media/handcutting.htm> (“As to the thief, Male or female, cut off his or her hands: a punishment by way of example, from Allah, for their crime: and Allah is Exalted in power.’ - Quran 5:38”). This is from the Medina revelations, later in the life of Mohammed and thus authoritative because superseding anything to the contrary in the earlier (Mecca) revelations.

98. *See, e.g.*, Khaled Ahmed, *Why Muslims Reject Modernity*, THE EXPRESS TRIBUNE (Aug. 15, 2010), available at <http://tribune.com.pk/story/39367/why-muslims-reject-modernity/>.

99. *See* Conference on Islamic Education in North America (April 6, 2006), *Woodrow Wilson International Center for Scholars* (estimating that there were then some 6,000,000 Moslems in the United States; that there were at that time 235 Moslem schools, perhaps a fifth of them run by mosques, with a total of some 65,000 pupils, or three percent of American Moslem children. Still under debate in many of these schools in 2006 was whether to add secular studies to the traditional curriculum of Islamic studies).

100. *See* On Islam & Newspapers, *Islamic Schools of the Past Now the Present in America*, MUSLIMVILLAGE.COM (June 6, 2011), <http://muslimvillage.com/2011/06/06/islamic-schools-of-the-past-now-the-present-in-america/>.

Jew-hatred¹⁰¹ and violence.¹⁰² At most such schools, if girls are permitted to attend, classes will be segregated by sex,¹⁰³ and the girls required to wear varying degrees of Islamic covering.¹⁰⁴ Although we like to assume, in our self-congratulatory way, that in America there is a right to wear such covering, surely there must in any event be a right *not* to. But it is hard to see how to protect little girls, should they be deemed insufficiently shrouded, from bullying that will continue beyond the schoolyard. Many of these girls are born in America, and are American citizens. Yet throughout their lives they may be subject to traditional subordinations and restrictions unimaginable to most other American women and girls.¹⁰⁵ Moslem women to whom the state, with the best of intentions, has permitted an Islamic education¹⁰⁶ may tend to raise their own children in the same tradition.

Contrary to *Meyer*, *Pierce*, and *Yoder*, then, compulsory, secular, co-educational schooling for both boys and girls might, perhaps, contribute to greater freedom for American Moslem women. If we indulge the presumption that such schooling could at least make some Moslem women more broadly educated mothers, more willing and able to help their sons and daughters realize and give of their talents, *Meyer* and *Pierce* and *Yoder* would seem to stand as an impediment to progress.

Yoder was seriously undermined in 1990 by the case of *Employment Division v. Smith*.¹⁰⁷ The Supreme Court perceived *Smith*, like *Yoder*, to be a claim of religious exemption from otherwise applicable law. Actually, *Smith* was about a worker denied unemployment compensation. The worker, a Native American, had been fired “for cause.” Employed in a drug rehabilitation center, he had nevertheless

101. See generally MARK A. GABRIEL, ISLAM AND THE JEWS: THE UNFINISHED BATTLE (2003). See also *Translations of the Meanings of the Noble Qur'an*, *supra* note 96 (“[T]hose [Jews] who incurred the Curse of Allāh and His Wrath, and those of whom (some) He transformed into monkeys and swines” (al-Mā'idah 5:60); “And kill them wherever you find them” (al-Baqarah 2:191)).

102. See Kenneth Adelman, *U.S. Islamic Schools Teaching Homegrown Hate*, CITIZENS FOR PEACE AND TOLERANCE (Feb. 27, 2002), <http://www.hatefreeamerica.com/islamic-school.html>.

103. See, e.g., GEOGRAPHIES OF MUSLIM WOMEN: GENDER, RELIGION, AND SPACE 2 (Ghazi-Walid Falah & Caroline Nagel eds., 2005).

104. THE MUSLIM VEIL IN NORTH AMERICA: ISSUES AND DEBATES, *supra* note 95.

105. See, e.g., PATRICIA ROBINETT, THE RAPE OF INNOCENCE: FEMALE GENITAL MUTILATION AND CIRCUMCISION IN THE USA (2010) (2006); CASSANDRA, ESCAPE! FROM AN ARAB MARRIAGE: HORROR STORIES OF WOMEN WHO FLED FROM ABUSIVE MUSLIM HUSBANDS (2006); Syed Kamran Mirza, “Honor Killing” Is Absolutely Islamic!, ISLAM WATCH, http://www.islam-watch.org/SyedKamranMirza/honor_killing.htm (last updated Jan. 16, 2008); see also *Murder in the Family: Honor Killing in America* (Fox News broadcast, September 5, 2008) (DVD on file with author).

106. For an argument that the Constitution might have some application to the state's abdication of educational responsibility in cases of fundamentalist home schooling, see Kimberly A. Yuracko, *Education Off the Grid: Constitutional Constraints on Homeschooling*, 96 CALIF. L. REV. 123 (2008).

107. 494 U.S. 872, 881–82 (1990).

ingested peyote, a scheduled narcotic substance under state law. Native Americans use peyote, however, not as a recreational drug, but in a religious ritual. The worker claimed a religious exemption from the rule denying him unemployment compensation. Justice Scalia, writing for the *Smith* Court, took the plausible position that society cannot afford to provide some people, however religious, with a special dispensation to violate laws.¹⁰⁸ When a neutral law of general application incidentally burdens religious conduct — inextricable as such conduct may be from belief — the Free Exercise Clause does not require the state to grant a religious exemption.

Nothing in *Smith* denies the state power to *grant* religious exemptions if it wishes, short of establishing religion. To be sure, the state would be treading a fine line.¹⁰⁹ Yet most states traditionally have provided religious exemptions in a variety of circumstances. In the past, for example, “dry” states typically allowed the use of sacramental wine.¹¹⁰ *Smith* held only that the Constitution does not *require* the states to grant religious exemptions from otherwise applicable law.¹¹¹ After *Smith*, the Free Exercise Clause is reserved for cases of intentional, targeted persecution.¹¹² It offers no protection against neutral laws of general application.

This wisdom is not entirely new. An obligation to obey generally applicable law had informed the Supreme Court’s position all along.¹¹³ The Court had first adopted this view over a century ago, in the first free exercise case. Back then, Congress was the legislature for Utah because Utah was a United States territory. In 1878, in *Reynolds v. United States*,¹¹⁴ the Supreme Court held that nothing in the Constitution compelled Congress to exempt the Mormons from anti-polygamy law. To a modern reader it will surely appear that the anti-polygamy law for Utah Territory was targeted at the Mormons. But the Court saw the statute as neutral. After all, polygamy was universally regarded as

108. *Id.* at 888–89.

109. *See, e.g.*, *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (striking down, under the Establishment Clause, a tax exemption confined to religious publications).

110. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1419 (1990).

111. Congress had a hard time understanding why *Smith* could have been right. With the near unanimity of both houses, Congress reacted to *Smith* by attempting to restore the law as it stood prior to *Smith*. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *struck down by* *City of Boerne v. Flores*, 521 U.S. 507 (1997). Congress came back with a narrower statute, this time confining its scope to two particular subject matters. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (2006), *sustained in* *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005).

112. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993) (striking down a local ordinance targeted at a particular religious sect).

113. The exception, according to Justice Scalia writing in *Smith*, was confined to a small group of benefits cases. *Smith*. 494 U.S. at 883.

114. 98 U.S. 145, 165 (1878).

criminal in the United States. One wonders whether, today, *Smith* and *Reynolds*, rather than *Yoder*, would govern the availability of a religious exemption from anti-polygamy law, in a case, let us say, challenging the conviction thereunder of an American husband of four wives and father of twenty children — a devout Moslem immigrant, let us say, from Pakistan or Saudi Arabia. *Yoder* is implied by *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, all three mandating religious exemptions from law. But all three are in tension with *Reynolds* and *Prince* and *Smith*, and *their* emphasis on the general duty of compliance with law.

Notwithstanding this tension, in *Smith*, Justice Scalia purported to save *Yoder* and reconcile it with *Smith*. *Yoder*, he pointed out, was a *hybrid* case, decided on two different grounds.¹¹⁵ *Yoder* dealt not only with the Amish's free exercise rights, but also with the right of Amish parents to control the rearing of their young. *Smith* does kill the mandatory religious exemption part of *Yoder*, but it leaves intact *Yoder*'s parental control reasoning.¹¹⁶ Justice Scalia's attempt at saving the right of parental control in hybrid cases, then, should have left *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, and *Wisconsin v. Yoder* still beacons of liberty, at least for parents. Yet Justice Scalia's reasoning on this point is more obfuscating than convincing. What stronger claim *than* the religious claim could parents possibly muster to exempt them from the force of reasonable state law protecting their children? The mere assertion of a right of parental control could get a parent only so far, as against reasonable state law protective of the child.¹¹⁷

V. THE DARK SIDE

At the time *Yoder* was decided, the Court's picture of the Amish bore some reasonable resemblance to their lives. But the pace of Amish compromise with modernity was picking up.¹¹⁸ By the 1990s most Amish communities permitted the use of electricity, provided it was not obtained from a public utility but supplied by their own generators. Most began to permit telephones, if only at business. Later, the Amish seem to have decided that cell phones are permissible everywhere, perhaps

115. *Smith*, 494 U.S. at 881.

116. *Cf. Yoder*, 406 U.S. at 213 ("Providing public schools ranks at the very apex of the function of a State. Yet even this paramount responsibility was, in *Pierce*, made to yield to the right of parents to provide an equivalent education in a privately operated system."); *Id.* at 232–33 ("Under the doctrine of *Meyer v. Nebraska*, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925)) (internal quotation mark omitted)).

117. *See, e.g., Prince*, 321 U.S. at 162–63 (relying on state compulsory education law to protect a child from the mother's use of the child in religious street activity).

118. *See* Lisa Biedrzycki, "Conformed to This World": A Challenge to the Continued Justification of the *Wisconsin v. Yoder* Education Exception in a Changed Old Order Amish Society, 79 TEMP. L. REV. 249, 250 (2006).

because wireless.¹¹⁹ A typical Amish community might frown on driving cars, but permit *riding* in cars, hiring “English” drivers.¹²⁰ Covered wagons are still retained, and poke bonnets and long dresses and long beards as well — this sort of quaintness is what the tourists come for.

But there were deeper facts about the Amish, and another side to *Yoder* even darker than the denial of educational opportunity to Amish children. In 2003, the Amish in Pennsylvania lobbied their representatives in Congress, with particular pressure on Senator Arlen Specter,¹²¹ to grant them an exemption from the federal Fair Labor Standards Act.¹²² They wanted an exemption from the provision in the Act prohibiting child labor in certain circumstances.¹²³ And they got their exemption, in a 2004 amendment.¹²⁴

Good grief! I thought. Is *that* what it was all about? I remembered that business in *Yoder* about “vocational training” in the home and on the farm. Yet the Amish surely did not need an exemption for agricultural or domestic child labor. American children have traditionally been expected to help out on the family farm. Today’s urban schoolchildren struggle to retain what they have learned during the year in their overlong summer breaks, a vestige of this tradition. More importantly, the New Deal Congress had excluded agricultural and domestic labor altogether from federal fair labor standards. Perhaps this happened because Congress could not imagine bestowing upon uneducated rural black workers — a large contingent of the agricultural workforce in the 1930s — the same pay and hours the Act would provide for more educated urban and factory workers, who in those days were largely white. Perhaps domestic workers were excluded in part for racial reasons, and in part because Congress could not imagine bestowing upon women doing traditionally unpaid women’s work the same pay and hours the Act would provide for men. Since the Fair Labor Standards Act did not cover agricultural employment, you might suppose that the Amish would have had no difficulty in employing child labor on their farms. The protections of

119. Howard Rheingold, *Look Who’s Talking*, WIRED (Jan. 1999), available at <http://www.wired.com/wired/archive/7.01/amish.html>.

120. See, e.g., *FAQ: Frequent Amish Questions*, THE AMISH OUTLAWS, <http://www.amishoutlaws.com/faq.html> (last visited Sept. 25, 2011).

121. Steven Greenhouse, *Foes of Idle Hands, Amish Seek an Exemption from a Child Labor Law*, N.Y. TIMES, Oct. 18, 2003, at A9; see also, e.g., Ed Thomas, *NY Amish Facing Child Labor Law Pressure*, CROSSWALK.COM (Dec. 15, 2006), <http://www.crosswalk.com/1457683> (reporting that Amish sawmills in New York State had been put on notice concerning violations of the child labor laws); John Miller, *Letter from a Former Amish Child Sawmill Worker to Congress*, CHILD LABOR COALITION (Oct. 21, 2003), <http://web.archive.org/web/20081030080744/http://www.stopchildlabor.org/amish/miller.htm> (reporting personal experience of the danger and strenuousness of children’s work in the mills).

122. 29 U.S.C. §§ 201–219 (2006).

123. 29 U.S.C. § 212 (2006).

124. 29 U.S.C. § 213(c)(7) (2006) (signed into law January 23, 2004).

federal child labor law extend in the main only to “particularly hazardous” occupations.¹²⁵

It turns out that in the past quarter-century the world of the Amish has undergone greater changes than those thus far mentioned. Recall that, in *Yoder*, Chief Justice Burger mentioned a connection between compulsory attendance laws, like the one challenged in *Yoder*, and the problem of child labor. The Chief Justice reasoned that child labor was not a problem among the Amish because work on family farms was healthful.¹²⁶ There was no danger to the children. But Burger could not have predicted the recent growth of Amish furniture factories, and the decline in Amish agriculture.

The Amish originally had been centered in Pennsylvania. But, over time, with the natural increase in their numbers, and the arrival of tourist motels and shops, the Amish found farmland in Pennsylvania too expensive for their children to acquire enough of it, and offers from developers too enticing to resist. The Amish were continually fanning out to other states, ever seeking more and cheaper land, settling in Wisconsin, Ohio, Indiana, Iowa. Ironically, wherever the Amish settled, land prices would be driven up in part by their own demand, and in part by developers anxious to cash in on the attractions the Amish held for tourists. Some Amish communities were supporting themselves in the tourist industry, working in Amish souvenir shops and Amish restaurants, or as guides, or selling home-made jam and hand-sewn quilts. There was considerable demand for wooden Amish knick-knacks, hand-carved at first at home, and later made in small mills built on what once was farm land.

In time, the Amish expanded from wooden knick-knacks into far more profitable wood furniture, constructing it in their own factories, using their own sawmills.¹²⁷ They make civic furniture like gazebos and park benches, as well as household furniture. The once rural landscape of an Amish community is now dotted with noisy sawmills, where boys are receiving “vocational training” — that is, they are working there.

This, then, was why the Amish needed an exemption from the law against the exploitation of child labor in “particularly hazardous” occupations. They were putting their children to work, all right, but not on the farm. By 2003, most boys in an Amish community were working in the community’s furniture factories and sawmills. They had ceased to be agricultural labor. Yet as one journalist observed, “Federal law has long barred children under 18 from working in sawmills and

125. 29 C.F.R. §§ 570.50–570.72 (2011).

126. *Yoder*, 406 U.S. at 229.

127. See WOODWEB, *Some Perspectives on Amish Sawmill Operations* (June 27, 2000), http://www.woodweb.com/knowledge_base/Amish_mills.html.

woodworking factories because they are so dangerous. The Amish have upset opponents of child labor by pushing Congress for an exemption based largely on religious grounds.¹²⁸

Sawmills, indeed, are accounted among the most dangerous workplaces. Chief Justice Burger's observation in *Yoder*, that Amish children's work — agricultural work — was not dangerous or unhealthful, is now obsolete and irrelevant. Inspectors have found Amish youngsters working full time alongside grown men, with heavy, dangerous machinery, breathing unhealthy air filled with sawdust. Under federal law all workers in sawmills and woodworking factories are required to wear masks and protective gear, but the Amish children suffer injuries and illnesses nevertheless.¹²⁹

When making factory furniture became a way of life for many Amish men and boys, some began to take on outside factory jobs as well, usually in plants producing recreational vehicles — trailers.¹³⁰ Working on trailers is approved because building “homes” is deemed acceptable within the Amish tradition. But the current recession has seen massive layoffs in RV factories. Amish men and boys have been returning to their communities' sawmills and furniture factories, as well as to small-scale agriculture.¹³¹ The faith that had deemed government support unacceptable and inspired the Amish to obtain a waiver of social security taxes has not prevented laid-off Amish factory workers from lining up for unemployment benefits.¹³²

The experience of the girls has been a little different. Beyond the household chores to be performed mornings and evenings, they are kept at quilt-making, or sent to sell souvenirs in the Amish shops, or to wait table in tourist restaurants.

The Amish may not consider themselves to be exploiting their children's labor. In their thinking, children must learn a trade. They may see no difference between a field or a factory as a place in which children earn their keep. They may see only a religious difference between children worked all day to earn their keep and children permitted to have

128. CHARLES E. HURST & DAVID L. MCCONNELL, AN AMISH PARADOX: DIVERSITY AND CHANGE IN THE WORLD'S LARGEST AMISH COMMUNITY (2010); Steven Greenhouse, *For the Amish, Tradition and the Law Collide: Wary of Idle Hands, the Amish Are Seeking an Exemption from Child Labor Laws for their Teenage Boys*, N.Y. TIMES UPFRONT, Dec. 8, 2003.

129. See Miller, *supra* note 121.

130. See Marty Schladen, *Amish Caught in RV Slump*, J. GAZETTE (Mar. 22, 2009), <http://www.journalgazette.net/apps/pbcs.dll/article?AID=/20090322/BIZ/303229948>.

131. See Richard Mertens, *Indiana's Amish, Laid Off from RV Factories, Return to their Plows*, CHRISTIAN SCIENCE MONITOR (May 26, 2009), <http://www.csmonitor.com/Business/2009/0526/indianas-amish-laid-off-from-rv-factories-return-to-their-plows>; *Laid Off Amish RV Workers Return to Their Plows*, RV BUSINESS, (May 28, 2009), <http://www.rvbusiness.com/2009/05/laid-off-amish-rv-workers-return-to-their-plows/>.

132. See *RV Layoffs Cause Ethical Issue with the Amish*, RV BUSINESS, (May 11, 2009), <http://www.rvbusiness.com/2009/05/rv-layoffs-cause-ethical-issue-with-the-amish/>.

a childhood of play and school. But they knew they were working their children illegally when they persuaded Arlen Specter and others in 2003 to back the exemption they gained from the laws prohibiting child labor in sawmills and woodworking factories.¹³³

It is increasingly understood that these children have few options. Some Amish, whether remaining within or departing from their communities, have begun to write books about Amish life.¹³⁴ Although some Amish authors praise the serenity of the lives they led or are leading, others explain that the denial to them of an education when they were young made it difficult for them to live outside the community. Some charge that the children are kept uneducated for the very purpose of binding them to the community.¹³⁵

Other facts have been coming to light as well. The strongest measure of the community's confidence in its ultimate control over its children is the practice of *rumspringa*, a traditional "running around" period allotted to youngsters.¹³⁶ At about the age of eighteen, Amish youngsters are permitted, if they wish, to go off and do anything they like. Because the Amish are Anabaptists who believe in adult baptism,¹³⁷ these youngsters are not yet baptized, and therefore, technically, their sins somehow do not "count." *Rumspringa* can be imagined as a time to sew wild oats before taking on the heavy responsibilities baptism imposes on the Amish.

Rumspringa can last as long as a youngster likes, postponing baptism indefinitely. Many Amish youngsters prefer to stay home under the supervision of their parents, and at most may attend a dance or party, or an overnight visit to a friend. These youngsters submit to baptism eagerly. Many others go off in groups, interesting themselves in fornication, alcohol, and narcotics.¹³⁸

Looked at functionally, *rumspringa* is the ultimate demonstration to the children that they are substantially unable to leave the community, that for them there is no such thing as freedom. There is little room for these undereducated waifs in modern society. Such employment as they can find outside their community, even in good times, does not often improve on the labor awaiting them at home. Although statistics vary

133. See Greenhouse, *supra* note 121.

134. See, e.g., RUTH IRENE GARRETT & RICK FARRANT, *CROSSING OVER: ONE WOMAN'S ESCAPE FROM AMISH LIFE* (2003).

135. See generally JOHN A. HOSTETLER, *AMISH CHILDREN: EDUCATION IN THE FAMILY, SCHOOL, AND COMMUNITY* (2d ed. 1992).

136. See, e.g., TOM SHACHTMAN, *RUMSPRINGA: TO BE OR NOT TO BE AMISH* (2006); "Rumspringa: Amish Teens Venture into Modern Vices," NPR (June 7, 2006), <http://www.npr.org/templates/story/story.php?storyId=5455572> (reviewing Shachtman's book).

137. DONALD B. KRAYBILL, *WHO ARE THE ANABAPTISTS: AMISH, BRETHREN, HUTTERITES, AND MENNONITES* (2003).

138. See, e.g., DVD: *Devil's Playground* (Stick Figure Productions 2002).

widely, it appears that Chief Justice Burger's observation remains more true than he knew: There is very little attrition among the Amish.

With all this, we finally have the key to the McReynolds mystery. These cases, *Meyer*, *Pierce*, and *Yoder*, need to be understood against the background of *the relation between compulsory school laws and child labor*. The use of compulsory school laws to regulate child labor is centuries old.¹³⁹ In England, employed children at first were exempt from compulsory schooling, suggesting legislative and judicial accommodation of common family expectations.¹⁴⁰ But as compulsory school laws have evolved, their main purpose seems thereafter to have been to protect children from exploitation.

Of course compulsory schooling also promotes literacy and enhances the value of an adult's labor. It also preserves employment for adults, by keeping cheaper underage workers at school.¹⁴¹ This concern for adult labor, in our country, at least, probably has some roots in the "free labor" political movement of the antebellum period, which was also both anti-immigrant and anti-slavery out of similar concern for the free American worker.

VI. THE MCREYNOLDS MYSTERY SOLVED

This revelation about the Old Amish casts a long shadow back upon *Yoder*, *Pierce*, and *Meyer* itself. With this broader understanding, and in possession of the fact of child labor among the Old Amish, we can begin to see the dark side of these cases. We can begin to understand that Justice McReynolds' celebrated school cases were explainable by his *laissez-faire* politics.

The striking down of laws compelling attendance in public schools, the permission to parents to home-school their children, the disapproval of English-only teaching following upon a veritable flood of immigration, all served the interests of those who might wish to exploit child labor. McReynolds understood the value to employers of helping distressed families sell their children's labor. He understood the value to employers of permitting parents to deny their children the education which might offer them escape in later life from the sweat shops and

139. FOREST CHESTER ENSIGN, *COMPULSORY SCHOOL ATTENDANCE AND CHILD LABOR: A STUDY OF THE HISTORICAL DEVELOPMENT OF REGULATIONS COMPELLING ATTENDANCE AND LIMITING THE LABOR OF CHILDREN IN A SELECTED GROUP OF STATES* 3 (1921).

140. *See* 1 WILLIAM BLACKSTONE, *COMMENTARIES* 434-447 (1765); 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 189-203 (2d ed. 1832) (1827).

141. *See* MARIS M. PROFFITT & DAVID SEGEL, *U.S. OFFICE OF EDUC., SCHOOL CENSUS, COMPULSORY EDUCATION, CHILD LABOR: STATE LAWS AND REGULATIONS* (1945); RAYMOND GARFIELD FULLER, *THE MEANING OF CHILD LABOR* (1922); EDITH ABBOTT & SOPHONISBA P. BRECKINRIDGE, *TRUANCY AND NON-ATTENDANCE IN THE CHICAGO SCHOOLS: A STUDY OF THE SOCIAL ASPECTS OF THE COMPULSORY EDUCATION AND CHILD LABOR LEGISLATION OF ILLINOIS* (1917).

factories of that period. McReynolds' effort, in this view, had been to loosen the web of progressive-era legislation that sought to protect a child *from its parents*.

McReynolds, that most reactionary of judges, might well have thought that immigrant parents *ought* to have the "liberty" of diminishing their children's opportunity to obtain a secular public education in the English language. Those children, at once or later, could furnish a cheap, submissive, and trapped pool of workers. *Meyer* identified and advanced the parental authority, as against the state, that in *Pierce*, empowered the parent to pull a child out of public school, and, in *Yoder*, to provide the child with only minimal reading, writing, and arithmetic while forcing the child into work. McReynolds might well have thought that parents *ought* to have the "liberty" of pulling their children out of school and putting them out to work. Chief Justice Burger did not see *Yoder* in this stark light, but McReynolds in *Meyer* and *Pierce* would have been writing against the background of his political and economic views, disclosed to us in his career as one of the Four Horsemen, and by his known convictions.

Of course McReynolds would liken the goal of assimilation, in no way inconsistent with individualism, to the grotesque forced uniformity advocated by Plato. From McReynolds' point of view, I suppose, the urchin offspring of loathed immigrants had no place in mainstream American life. They belonged in the factories, contributing to their parents' support, and saving entrepreneurs the expense of employing their fathers. Justice McReynolds certainly would not have wanted those hordes in the public schools, consuming public resources at taxpayers' expense.¹⁴²

That McReynolds *avored* child labor is not in doubt. One has only to consult his votes in the child labor cases. In 1918, he voted with the five-to-four majority in *Hammer v. Dagenhart*,¹⁴³ denying Congress power to bar the products of child labor from interstate commerce.¹⁴⁴ In

142. It is sometimes reported that McReynolds' will made considerable bequests to children's charities, or that he contributed to children's charities all his life. *E.g.*, BOND, *supra* note 49, at 5. What are we to make of this? We do have an abbreviated statement purporting to be a description of McReynolds' will filed in a probate court in the District of Columbia. Gilbert, *supra* note 63, at 23–25. The will serves as an inadvertent revelation of McReynolds' personal isolation. It included a cash bequest of \$10,000 to a children's hospital. There was also a \$10,000 bequest to a college in Kentucky, to be used for the "instruction of girls in domestic affairs." The bulk of McReynolds' money (he left \$190,000) went to his servants, various colleges, universities, schools and hospitals (the latter institutions possibly including children's charities). The largest single bequest, \$25,000, went to McReynolds' church. There were modest gifts to two women friends, and \$10,000 to his brother. There was also a bequest of \$2500 to the mother of "lovely triplet girls." The bequest to a children's hospital (and such bequests to similar charities as may exist among the other institutional bequests) are consistent, at least, with McReynolds' view that the burden of supporting needy children should not fall on the state and thus the taxpayer.

143. 247 U.S. 251 (1918).

144. *Id.* at 277.

1922, only a year before *Meyer*, he voted to strike down the Child Labor Tax Law as beyond the power of Congress.¹⁴⁵ In the same year as *Meyer* he voted with the Court to strike down a state minimum wage law for women and children.¹⁴⁶ And in 1937, in alliance with the other three “Horsemen,” he dissented from the majority opinion in the watershed case of *West Coast Hotel Co. v. Parrish*.¹⁴⁷ That case finally sustained a state minimum wage law for women and children, and marked the year of change after which the Supreme Court began to defer more regularly to reasonable legislation.

Meyer's progeny, cases expansively building on *Meyer's* due process liberty, may explain if not excuse the blindness of so many writers on constitutional law, for so long, to *Meyer's* dark side.¹⁴⁸ Our current casebooks and treatises on constitutional law pay only cursory attention to *Meyer* and *Pierce*, and say little or nothing about the relation of compulsory education to the problem of child labor. It is true that, in commenting on *Yoder*, writers do see a troubling permission to some parents to reduce a child's education to the barest essentials.¹⁴⁹ But they seem unwilling to open their eyes to the same sort of problem in *Meyer* and *Pierce*. They fail to perceive, as Chief Justice Burger failed to perceive, a hidden motive spring in *Yoder* — the incentives parents have to require their children to serve them in the home, help support the family, and to deny their children, as a practical matter, the power of escape. Yet the parental interest in such exploitation has hardly been unknown to the common law — historically, the common law facilitated it.¹⁵⁰

We can now see the connection between Justice McReynolds' economic worldview and his opinion in *Meyer*.¹⁵¹ We can now read into *Meyer* McReynolds' conviction that law should not obstruct the efforts of needy families to augment their incomes by putting their children out to work. We can now see, in turn, that the facilitation of the exploitation

145. *Bailey v. Drexel Furniture Co. (Child Labor Tax Case)*, 259 U.S. 20, 44 (1922).

146. *Adkins v. Children's Hospital*, 261 U.S. 525 (1923). (Sutherland, J.) (over strong dissents by Chief Justice Taft, joined by Justice Sanford, and Justice Holmes) Justice Brandeis did not participate.

147. 300 U.S. 379 (1937).

148. I am finding partly corroborative work, however, in the field of family law. See, e.g., Steven J. Macias, *The Huck Finn Syndrome in History and Theory: The Origins of Family Privacy*, 12 J. L. & FAM. STUD. 87, 90–91 (2010) (building on Barbara Bennett Woodhouse, “Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992)). But see *infra* “Envoi” for my ultimate disagreement with this school of thought.

149. See, e.g., Emily Buss, *The Adolescent's Stake in the Allocation of Educational Control Between Parent and State*, 67 U. CHI. L. REV. 1233, 1244–45 (2000).

150. See *supra* note 140 and accompanying text.

151. For the view that *Meyer* reinforced class inequalities, see Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L. J. 814, 820 (2011) (“[*Meyer's*] rhetoric of choice . . . obscured inequality in economic resources that made the option of private schools available to some and not to others . . .”).

of labor is the link between *Meyer* and *Lochner*. It is only necessary to recall that, in *Lochner*, the Court struck down a state law regulating the hours of labor.

ENVOI

While acknowledging this unhappy side of *Meyer*, we can still appreciate, even in the face of continuing controversy, the importance of what *Meyer* has wrought.

From the perspective of those concerned with children's rights, the right to family privacy will seem a screen behind which the child is abused and exploited. In this view, the right to privacy in *Roe v. Wade* can be seen as stripping away the legal protections, as against their own parents, of the *unborn*, just as *Meyer* and *Pierce* and *Yoder* analogously strip away the legal protections, as against their own parents, of the *born*.

But from another perspective, the modern right to privacy has liberated, and continues to liberate, women and men from government intrusion upon and punishment for their most intimate acts and feelings. If we accord due weight to the suffering and desperation of those thus interfered with and punished, and the still pervasive social and religious hostility to them, we ought to prefer to see children's rights and adults' rights together, as part of the "rational continuum"¹⁵² of constitutional liberty.

Meyer's greatness lies in its progeny — cases creating a sphere of family and domestic privacy, and within that sphere, at last securing the liberties essential to it. All this considered, these developments, however unsettling, when viewed in their progressive character, must be counted as great advances in human freedom.

152. *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., concurring).