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MODERN FAMILY LAW
Cases and Materials

Second Edition

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b. Roots of Privacy

Griswold and Eisenstadt break new ground in explicitly recognizing a constitutional right to privacy. Yet some 40 years earlier the Supreme Court expressed an understanding of the family that established a foothold for this right.

**MEYER v. NEBRASKA**

262 U.S. 390 (1923)

Mr. Justice McREYNOLDS delivered the opinion of the Court. Plaintiff in error was tried and convicted ... under an information which charged 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 Farburt, a child of 10 years, who had not attained and successfully passed the eighth grade. [A Nebraska statute prohibited any person from teaching languages other than English, except to pupils who had successfully completed the eighth grade, and classified a violation as a misdemeanor, punishable by a fine and/or imprisonment. The state supreme court affirmed the conviction.]

The question before this court 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."

While this court has not attempted to define with exactness the liberty thus guaranteed, it has always been held to be the right to be let alone, the most comprehensive of liberties and the freest from prescription. It is the right of the mind to remain free from restraint; to use in its combination and control anything over which it has control; to pursue its own goals, whatever they may be, so long as they do not infringe upon the rights of others. In short, it is the right of the human mind to be free from restraint by restraint. The liberty of the individual is clearly the basis of the Fourteenth Amendment...
harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the state.

As the statute undertakes to interfere only with teaching which involves a modern language, leaving complete freedom as to other matters, there seems no adequate foundation for the suggestion that the purpose was to protect the child's health by limiting his mental activities. It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child. [Reversed.]

PIERCE v. SOCIETY OF SISTERS
268 U.S. 510 (1925)

Mr. Justice McReynolds delivered the opinion of the Court.

These appeals are from decrees, based upon undenied allegations, which granted preliminary orders restraining appellants from threatening or attempting to enforce the Compulsory Education Act adopted November 7, 1922.

The challenged act, effective September 1, 1926, requires every parent, guardian, or other person having control or charge or custody of a child between 8 and 16 years to send him "to a public school for the period of time a public school shall be held during the current year" in the district where the child resides; and failure so to do is declared a misdemeanor. . . . The manifest purpose is to compel general attendance at public schools by normal children, between 8 and 16, who have not completed the eighth grade. And without doubt enforcement of the statute would seriously impair, perhaps destroy, the profitable features of appellees' business and greatly diminish the value of their property.

Appellee, the Society of Sisters, is an Oregon corporation, organized in 1880, with power to care for orphans, educate and instruct the youth, establish and maintain academies or schools, and acquire necessary real and personal property. . . . The Compulsory Education Act of 1922 has already caused the withdrawal from its schools of children who would otherwise continue, and their income has steadily declined. The appellants, public officers, have proclaimed their purpose strictly to enforce the statute.

After setting out the above facts, the Society's bill alleges that the enactment conflicts with the right of parents to choose schools where their children will receive appropriate mental and religious training, the right of the child to influence the parents' choice of a school, the right of schools and teachers therein to engage in a useful business or profession, and is accordingly repugnant to the Constitution and void. And, further, that unless enforcement of the measure is enjoined the corporation's business and property will suffer irreparable injury.

Appellee Hill Military Academy is a private corporation organized in 1906 under the laws of Oregon, engaged in owning, operating, and conducting for profit an elementary, college preparatory, and military training school for boys between the ages of 5 and 21 years. . . . By reason of the statute and threat of enforcement appellee's business is being destroyed and its property depreciated; parents and guardians are refusing to make contracts for the future instruction of their sons, and some are being withdrawn. [The Academy alleges a violation of its Fourteenth Amendment rights and seeks an injunction.]

The matter was heard by three judges on motions for preliminary injunctions upon the specifically alleged facts. The court ruled that the Fourteenth Amendment guaranteed appellees against the deprivation of their property without due process of law consequent upon the unlawful interference by appellants with the free choice of patrons, present and prospective. It declared the right to conduct schools was property and that parents and guardians, as a part of their liberty, might direct the education of children by selecting reputable teachers and places. Also, that appellees' schools were not unfit or harmful to the public, and that enforcement of the challenged statute would unlawfully deprive them of patronage and thereby destroy appellees' business and property. . . .

No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

The inevitable practical result of enforcing the act under consideration would be destruction of appellees' primary schools, and perhaps all other private primary schools for normal children within the state of Oregon. Appellees are engaged in a kind of undertaking not inherently harmful, but long regarded as useful and meritorious. Certainly there is nothing in the present records to indicate that they have failed to discharge their obligations to patrons, students, or the state. And there are no peculiar circumstances or present emergencies which demand extraordinary measures relative to primary education.

Under the doctrine of Meyer v. Nebraska, 262 U.S. 590 ([1923]), 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. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the
competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by compelling them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations. 

The decrees below are affirmed.

Notes and Questions

1. *Meyer* and *Pierce* establish the foundation for the right to privacy. Why? Whose interests does each case vindicate? What is the connection between privacy and the professional and proprietary interests (of teachers and schools) protected by the Court? Note that neither *Meyer* nor *Pierce* mentions "privacy." Nonetheless, *Griswold*, the first case to articulate a constitutional right to privacy, relies on both these precedents.

Despite holdings addressing the economic claims raised by a school teacher and private schools, respectively, *Meyer* and *Pierce* include dicta establishing parental autonomy—the freedom of parents to control the upbringing of their children. Through such dicta, these cases extend substantive due process, found in the constitutional protection of personal "liberty," to limit the authority of government to interfere in certain family matters.


2. Does the nascent interest in privacy recognized in *Meyer* and *Pierce* belong to the family unit or individual family members? Do these precedents help answer similar questions posed about *Griswold* and *Eisenstadt*? What similarities are shared by the two contexts, birth control and childrearing? What distinguishes them?

3. Professor Peggy Davis emphasizes how *Meyer* and *Pierce*, rooted in antislavery traditions that originally produced the Fourteenth Amendment, promote pluralism. Slavery imposed natal alienation on slaves, prohibiting slave parents from teaching chosen moral values to their children. Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 Harv. L. Rev. 1348, 1363 (1994). By contrast, the autonomy recognized by *Meyer* and *Pierce* allows families room to make their own choices and embrace their own values:

To think of family liberty as a guarantee offered in response to slavery's denials of natal connection is to understand it, not as an end in itself, but as a means to full personhood. People are not meant to be socialized to uniform, externally imposed values. People are to be able to form families and other intimate communities within which children might be differently socialized and from which adults would bring different values to the democratic process. This reconstructed Constitution gives coherence and legitimacy to the themes of autonomy and social function sounded in *Meyer*, *Pierce* [and later cases]. The idea of civil freedom that grows out of the history of slavery, antislavery, and Reconstruction entails more than the right to continue one's genetic kind in private. It also entails a right of family that derives from a human right of intellectual and moral autonomy. It entails the right of every individual to affect the culture and embrace, act upon, and advocate privately chosen values. For parents and other guardians, civil freedom brings a right to choose and propagate values. For children, civil freedom brings nothing less than the right to grow to moral autonomy, because the child-citizen, like the child-slave, flowers to moral independence only under authority that is flexible in ways that states and masters cannot manage, and temporary in ways that states and masters cannot tolerate.

Id. at 1371-1372. See also William A. Galston, *The Legal and Political Implications of Moral Pluralism*, 57 Md. L. Rev. 236, 236-243 (1999) (defending protection of diversity in *Meyer* and *Pierce*).

4. What reasons prompted enactment of the laws struck down in *Meyer* and *Pierce*? What standard of review does the Court use to assess the state interests? Why does the Court find no "emergency" in either case?

Professor Barbara Woodhouse identifies the social and political context in which the cases arose. She explains that the Nebraska law in *Meyer* stemmed from post-World War I anti-German bias. At the time, 16 states had similar English-only laws.

[These language laws were rooted in] the struggle between cultural pluralism and the felt need to articulate a national identity, evident in the long-standing tensions between English-speaking settlers of the Midwest and the large German, Polish, and Scandinavian communities in these states. These immigrant groups often formed isolated cultural enclaves with clubs, parochial schools, ethnic parishes, banks, stores, and insurance companies in which all business was conducted in the language of the home country. To their American-bred neighbors, coming from a tradition that mixed the meritocratic, unifying strains of populism and progressive with a nativist distrust for anything foreign, this failure to assimilate seemed at once a threat and a challenge for progressive reform.