Does the Constitution protect a fundamental right to parent?

July 8, 2014 by Jeffrey Shulman (/blog/author/jeffrey-shulman)

In the first of a three-part series, Jeffrey Shulman from Georgetown Law looks at how the right to parent as a matter of constitutional law is especially tenuous.

(/images/uploads/blog/theconstitution-390x300aaa.jpg)Part I: *Meyer v. Nebraska* and *Pierce v. Society of Sisters*

It is commonly assumed, by academic and lay audiences alike, that parents have long enjoyed a fundamental legal right to control the upbringing of their children, but this reading of the law is sorely incomplete and anachronistic. If by "fundamental" we designate rights with a deep historical pedigree, the right to parent free of state interference cannot be numbered among them.

Read Part Two In Series The Supreme Court's religious parenting precedent (/constitution-daily-blog/the-supreme-courts-religious-parenting-precedent/)

What *is* deeply rooted in our legal traditions and social conscience is the idea that the state *entrusts* parents with custody of the child, and the concomitant rule that the state does so only as long as parents meet their legal duty to take proper care of the child. Whether custodial authority was called a power or a right, it was made contingent on the welfare of the child and the needs of the state. "[T]he right of parents, in relation to the custody and services of their children," Joseph Story wrote in 1816, "are rights depending upon the mere municipal rules of the state, and may be enlarged, restrained, and limited as the wisdom or policy of the times may dictate." Custodial authority, maintained the nineteenth-century libertarian treatise-writer Christopher Tiedeman, "is not the natural right of the parents; it emanates from the State, and is an exercise of police power."

These assertions of the "ordinariness" of parental authority are not isolated instances. Reviewing the case law of the nineteenth century, Lewis Hochheimer—his treatise on the law of child custody was a familiar reference for courts in the late nineteenth and early twentieth centuries—concluded that "[t]he general

result of the American cases may be characterized as an utter repudiation of the notion, that there can be such a thing as a proprietary right of interest in or to the custody of an infant." It is true, of course, that in the eighteenth and nineteenth centuries, as today, claims of right (natural and civil) were advanced in support of parental power. Still, as Hochheimer observed, the prevailing legal current, driven by the equitable force of trust principles, had swept away such "narrow contentions."

The entire tendency of the American courts is, to put aside with an unsparing hand all technical objections and narrow contentions whereby it may be attempted to erect claims of supposed legal right, on a foundation of wrong to persons who are a peculiar object of the solicitude and protecting care of the law.

Under a trust model of parent-child relations, biology does not beget rights. It begets responsibilities. The trust model was built on the Lockean principle (see *Two Treatises*, Book II, Chapter 6) that it is the child who has a fundamental right: the right to appropriate parental care, including an education that will prepare the child for eventual enfranchisement from parental authority. To Locke, the "right of *Tuition*" is "rather the Priviledge of Children, and Duty of Parents, than any Prerogative of Paternal Power." "The terms 'right' and 'claim,' when used in this connection [that is, the custody of children]," declared Hochheimer, "according to their proper meaning, virtually import the right or claim of the *child* to be in that custody or charge which will subserve *its* real interests."

Far from being absolute, the rights of the parent were not even the custody courts' primary consideration. "The true view," as one mid-nineteenth century court put it, "is that the rights of the child are alone to be considered, and those rights clearly are to be protected." The very idea that parents have rights *as parents* was called into question. The New York Court for the Correction of Errors was not alone when it declared that "there is no parental authority independent of the supreme power of the state. But the former is derived altogether from the latter."

Indeed, the child's entitlement—the child's right "to be surrounded by such influences as will best promote its physical, mental, and moral development"—was thought to be in the way of a natural vested right. In contrast, the right of the parent "to surround the child with proper influences [was] of a governmental nature,"in the sense that parental authority over the child was considered a trust granted by the state in return for parental care of the child. If parental authority is derivative and contingent, the parent does not obtain rights merely by virtue of being a parent. Rather, the parent obtains authority over the child by virtue of *acting as a parent*. This is the core consideration of the trust model of parent-child relations, and the basis on which the Court has formulated what might be called the doctrine of "constitutional parenthood."

This trust was subject to the principle—again, the debt is to Locke—that what is due the child is defined, in a general sense, by basic developmental needs and, more particularly, by the developmental needs of the child destined from birth to be a member of a liberal constitutional order. Accordingly, the metes and bounds of parental duty were not considered a matter solely for private determination. Parents in a liberal society, it was traditionally assumed, had no right to parent as they see fit.

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The right to parent as a matter of constitutional law is especially tenuous. In federal constitutional law, the right to parent would be considered an unenumerated right, protected from governmental interference by the Due Process Clauses of the Fifth and Fourteenth Amendments. The "liberty" of the Due Process Clauses safeguards those substantive rights "so rooted in the traditions and conscience as to be ranked as fundamental." Laws or other forms of state action that impinge upon rights considered to be "fundamental" get a skeptical judicial reception; under a "strict scrutiny" standard, courts will presume that a law is unconstitutional. Because the hurdle of strict scrutiny is so difficult to clear, the level of review employed by the court can easily dictate the outcome of a case. So, it is a high-stakes determination whether a right is fundamental or not.

The Supreme Court has echoed the popular assumption that the right of parents to make decisions concerning the care, custody, and nurture of their children is a deeply rooted one, time-honored and honored by the work of the Court. But no Supreme Court case has held that the right of parents to make such choices is a fundamental one. If the rigor of the Court with regard to the regulation of parental authority has varied, its scrutiny has never been strict. In fact, as Justice Scalia has observed, there is little decisional support for the notion that the right to parent is a substantive constitutional right at all, let alone a fundamental one.

In 1923, in *Meyer v. Nebraska*, the Court struck down a state law that prohibited both the use of foreign languages as a medium of instruction and the study of foreign languages before the eighth grade. These restrictions applied to any school, public or private. In 1925, in *Pierce v. Society of Sisters*, the Court struck down Oregon's Compulsory Education Act, which required attendance at public schools. Neither case was really brought to the Court as, primarily, a matter of parental rights; nonetheless, in both cases, the Court concluded that the state laws unreasonably interfered with the liberty of parents to direct the upbringing and education of their children.

But *Meyer* and *Pierce* both accept as uncontroversial the principle that the state can define and enforce the parental duty to educate. The *Meyer* Court did not question the authority of the state "to compel attendance at some school and to make reasonable regulations for all schools." Here, the Court reviewed a law that

"sought not to require what children must learn in schools, but to prescribe, in the first case, what they must not learn." The question *Meyer* considers is how far the state can go in dictating what *the parent* can and cannot do. The Court answered that the state may not set up a standard of education and then prohibit any additional or supplemental instruction. If there is a fundamental right at stake in *Meyer*, it is the right of the parent, "after he has complied with all proper requirements by the state as to education, to give his child such further education in proper subjects as he desires and can afford." In *Pierce*, the Court pointedly noted that the case raised no question "concerning the power of the state reasonably to regulate all schools." If there is a fundamental right at stake in *Pierce*, it is the right of the parent "to provide an *equivalent* education in a privately operated system."

Broad claims are made for the legacy of these seminal due process cases, but, as Justice White put it, *Meyer* and *Pierce* "lend[] no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society." *Meyer* and *Pierce* have been read to affirm the fundamental nature of parental rights, but, in fact, they stand for a much more modest proposition: that the state does not have *exclusive* authority over the child's education.

Though the doctrinal results of *Meyer* and *Pierce* are modest, the same cannot be said of the Court's rhetoric. Striking down Nebraska's foreign language prohibition, Justice McReynolds compared the language prohibition statute to the communistic parenting measures of ancient Sparta ("In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians.") and Plato's *Republic* ("[T]he 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."). Again writing for the Court in *Pierce*, McReynolds made the case one about the power of the state "to standardize its children by forcing them to accept instruction from public teachers only." He famously declared that "[t]he child was not the mere creature of the state."

This anti-statist sentiment would serve as a constitutional beacon for those ready to march under the banner of parental rights. But even if *Meyer* and *Pierce* were doctrinally more ambitious, reliance on them would pose a difficulty for supporters of parental rights. For one thing, *Meyer* and *Pierce* required only that the state not restrict the right to parent—or more precisely, the right of parents to direct the education of their children—unreasonably or arbitrarily. And for those who read the Constitution on strict constructionist principles, the comfort offered by *Meyer* and *Pierce* is especially cold. After all, these are substantive due process cases, decided at the height of the Court's crusade against social and economic legislation. Whatever right they establish is entirely dependent on the Supreme Court's protection of unenumerated rights. (This point is not lost on parental rights advocates. Consider the concern voiced by Michael Farris, of the Home

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