Notes

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Parents v. COVID: The Core and the Limits of the Parental Right to Direct Education

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INTRODUCTION

In the 1905 case *Jacobson v. Commonwealth of Massachusetts*, the U.S. Supreme Court upheld a defendant's conviction under a Massachusetts compulsory vaccination statute.[1] Because a state's police power embraces reasonable regulations to protect public health and safety,[2] and since an individual's liberty interest is necessarily subject to the common good,[3] Massachusetts could constitutionally compel vaccination for the protection of public health and safety from the spread of smallpox.[4] Thus, a state's power to guard itself against imminent emergencies is not limited in every case by an individual's willingness to submit to reasonable public health regulations, notwithstanding the Fourteenth Amendment.[5]

In 1923, and then again in 1925, the Court articulated the seemingly unrelated right of a parent to control the upbringing of his or her child. First, in *Meyer v. Nebraska*, the Court overturned a private school teacher's conviction under a statute banning instruction in a language other than English.[6] Two years later, in *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, the Court affirmed an injunction against an Oregon statute imposing misdemeanors against parents of children who did not attend public school.[7] The Court's rationale in both cases rested on the parental liberty right, located in the Due Process Clause, to direct the upbringing of one's child.[8] In *Meyer*, this liberty interest protected the parents' right to engage the defendant to teach their child in German.[9] In *Pierce*, the liberty interest protected parents' ability to choose whether to send their children to a Catholic school.[10] Thus, a state's power to regulate parental choices is sometimes limited by the Fourteenth Amendment.

Nearly a century later, the COVID-19 pandemic was the impetus for a clash between these two constitutional principles. Following the onset of the pandemic in 2020, California announced a series of executive

1 Jacobson v. Massachusetts, 197 U.S. 11 (1905).

2 *Id.* at 25.

3 *Id.* at 26.

4 *Id.* at 39.

5 *Id.* at 29–30.

6 Meyer v. Nebraska, 262 U.S. 390 (1923).

7 Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510 (1925).

8 *Id.* at 534–35; *Meyer*, 262 U.S. at 399–400.

9 *See Meyer*, 262 U.S. at 399–400.

10 *See Pierce*, 268 U.S. at 534–35.

measures to control the spread of COVID-19.[11] Some of these measures applied specifically to K–12 schools.[12] In general, these regulations mandated that both public and private schools shift to online education when certain objective criteria showed spread of COVID-19 in the "local health jurisdiction" where the schools were located.[13] In-person education could resume if benchmarks showed reduced spread of COVID-19 for fourteen consecutive days, reopened schools could remain open regardless of future outbreaks, and there was a waiver process for some elementary schools.[14] Nonetheless, the orders effectively required some public and private schools to teach remotely for an extended period.

In the subsequent case of *Brach v. Newsom*, fourteen parents and one student challenged these actions with equal protection and substantive due process claims in federal court.[15] Some parents had children attending public school, and some parents had children attending private school.[16] The district court granted summary judgment to the State.[17] On July 23, 2021, however, a panel of three Ninth Circuit judges reversed in part.[18]

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[11] EXEC. DEP'T, STATE OF CAL., EXECUTIVE ORDER N-33-20 (Mar. 19, 2020) [hereinafter EXECUTIVE ORDER N-33-20], https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf [https://perma.cc/V5XJ-8UJT] (stay home order); EXEC. DEP'T, STATE OF CAL., EXECUTIVE ORDER N-60-20 (May 4, 2020) [hereinafter EXECUTIVE ORDER N-60-20], https://www.library.ca.gov/wp-content/uploads/GovernmentPublications/executive-order-proclamation/40-N-60-20.pdf [https://perma.cc/Q256-MWFV] (initial tiered reopening roadmap); CAL. DEP'T OF PUB. HEALTH, ORDER OF THE STATE PUBLIC HEALTH OFFICER (May 7, 2020), https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/SHO%20Order%205-7-2020.pdf [https://perma.cc/U3D3-CZ4Z] (announcing intent to "progressively designate sectors, businesses, establishments, or activities that may reopen with certain modifications, based on public health and safety needs"); *see also* Brach v. Newsom, 6 F.4th 904, 911–15 (9th Cir. 2021), *vacated and reh'g granted en banc*, 18 F.4th 1031 (9th Cir. 2021).

[12] *See, e.g.*, CAL. DEP'T OF PUB. HEALTH, COVID-19 AND REOPENING IN-PERSON LEARNING FRAMEWORK FOR K-12 SCHOOLS IN CALIFORNIA, 2020-2021 SCHOOL YEAR (July 17, 2020) [hereinafter REOPENING FRAMEWORK], https://www.smcoe.org/assets/files/Alert_FIL/Schools%20Reopening%20Recommendations.pdf [https://perma.cc/272Q-QYU9]; CAL. DEP'T OF PUB. HEALTH, COVID-19 INDUSTRY GUIDANCE: SCHOOLS AND SCHOOL-BASED PROGRAMS (August 3, 2020) [hereinafter INDUSTRY GUIDANCE], https://files.covid19.ca.gov/pdf/guidance-schools.pdf [https://perma.cc/X9J5-PTN5].

[13] REOPENING FRAMEWORK, *supra* note 12.

[14] *Id.*

[15] *Brach*, 6 F.4th at 909.

[16] *Id.* at 910.

[17] *Id.*

[18] *Id.* at 909–10.

Over a dissent, a two judge majority reversed on the private school plaintiffs' equal protection and substantive due process claims.[19] Finding that the parental right derived from *Meyer* and *Pierce*[20] protected the private school parents' discretion to choose in-person education for their children, the majority applied strict scrutiny to their claims.[21] However, since the court did not find a due process right to a public school education,[22] the public school plaintiffs received rationality review and their claims were rejected on appeal.[23] Thus, according to this panel, the state's ability to regulate an individual's liberty in the face of a public health emergency is subordinate to the parental right to choose an in-person setting for his or her child's private school education.

On December 8, 2021, the Ninth Circuit vacated the panel's decision and granted en banc review.[24] Then, on June 15, 2022, the Ninth Circuit issued a new decision, en banc, finding the case moot but neglecting to address the vacated opinion's substantive arguments.[25] Unlike the en banc majority, this Note attempts to address the panel's conclusions on the merits.

My first objective is to articulate a framework for distinguishing state regulation like that at issue in *Brach* from the kinds rejected in cases like *Pierce* and *Meyer*. In short, I argue that the primary harm from which the *Meyer-Pierce* right defends is state-mandated indoctrination of values over the objection of a parent. Thus, the Court is more likely to strike down forms of state education regulation that tend to instill values against a parent's wishes. However, state regulation that merely alters the student experience within the parents'

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19 *Id.* at 909–10, 934.

20 Hereinafter the "*Meyer-Pierce* right" or the "parental right." In general, this term refers to a parent's substantive due process right to control the upbringing of his or her child, as first articulated in *Meyer* and *Pierce*.

21 *Brach*, 6 F.4th at 931.

22 *Id.* at 922; *see* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

23 *Brach*, 6 F.4th at 924, 933.

24 Brach v. Newsom, 18 F.4th 1031 (9th Cir. 2021) (vacating the panel's decisions and ordering rehearing en banc).

25 *See* Brach v. Newsom, 38 F.4th 6 (9th Cir. 2022) (en banc). Since the State had issued updated guidance lifting all restrictions on school reopening, the en banc majority found that the litigation presented "a classic case in which, due to intervening events, there [was] no longer a live controversy necessary for Article III jurisdiction." *Id.* at 11. Only one judge fully addressed the panel's substantive conclusions. *See id.* at 22–25 (Berzon, J., dissenting). In her dissent, Circuit Judge Berzon construed *Meyer* and *Pierce* narrowly and thus uniformly rejected the panel's findings with respect to the private school parents' rights. *See id.*

school of choice—for example, state-mandated change to admissions policies—falls outside this core of the parental right and is left unprotected by Supreme Court precedent. In other words, I argue that cases that are similar to *Brach*, where the regulation does not directly effectuate a change in the culture or values passed down by the instructors, should be subject to a less rigorous level of review.

My second objective is to scrutinize the vacated Ninth Circuit panel's substantive arguments through the lens of this framework. This review focuses on the panel's treatment of the private school plaintiffs' claim. Ultimately, I conclude that mandating online education on a temporary basis does not regulate culture or values in the same way as the regulations in *Meyer* or *Pierce* and thus falls outside the core of the parental right. Therefore, the Ninth Circuit panel erred in applying strict scrutiny to the private school plaintiffs' claim.

I
THE SUPREME COURT FRAMEWORK

This Part puts the *Meyer* and *Pierce* decisions into context by recounting the historical development of the parental right to control the upbringing of one's child. To understand the import of *Meyer* and *Pierce*, it is important to first understand the motivations that gave rise to the Nebraska and Oregon statutes. Ultimately, these various motivations had one thing in common—they sought to use the threat of criminal penalties against parents to shape the sociocultural outcomes of children. Thus, the most plausible reading of *Meyer* and *Pierce* is as a rebuke of state-mandated cultural socialization through education, either through regulating private school curricula or banning private schools altogether. However, both *Meyer* and *Pierce* hinted at limits to the parental right by expressly recognizing the state's power to make reasonable regulations.[26] Beyond this baseline, the language of the opinions does not give a clear sense of the scope or level of scrutiny of the parental right, or what constitutes a reasonable amount of state regulation.

The Supreme Court returned to the education context and reiterated the *Meyer-Pierce* right several times after the initial decisions. In *Yoder v. Wisconsin*, the Court upheld an Amish parents' challenge to a

[26] *See* Meyer v. Nebraska, 262 U.S. 390, 402–03 (1923); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 534 (1925).

compulsory school attendance statute.[27] In *Runyon v. McCray*, the Court cited *Meyer*, *Pierce*, and *Yoder*, finding that the right to direct education did not protect the parental choice to choose a private school with racially discriminatory admissions policies.[28] Finally, in the Court's most recent guidance, a four Justice plurality in *Troxel v. Granville* struck down a Washington State statute that allowed state trial courts to grant visitation to any petitioner on a showing of best interests of the child.[29]

The actual language in these decisions does not give precise guidance. Moreover, none of these cases definitively establish the generally applicable standard of review. Considering the lack of clear standards, this Part also focuses on the facts and sociohistorical context underlying each case. This context gives a useful lens for thinking about exactly what the Court sought to protect in *Meyer* and *Pierce*, and, on the other hand, what kinds of state discretion the Court sought to preserve.

A. Origins of Meyer *and* Pierce

One way of decoding the meaning behind *Meyer* and *Pierce* is to understand the statutes that the Justices decided to strike down. Both resulted from the efforts of a variety of interest groups, and each interest group hoped to use restrictions on education to shape other people's children.

The driving force behind the English-only statute challenged in *Meyer* was a long-standing desire by some to assimilate culturally isolated minority groups.[30] The objective of many settlers in the Midwest to shape an English-speaking national identity clashed with large German, Polish, and Scandinavian immigrant communities.[31] To maintain their cultural enclaves, these communities often formed private religious schools and imported teachers from Europe to instruct in German, Polish, Italian, or Czech languages.[32] This cultural autonomy posed a perceived threat to those who wanted to articulate a unified national identity.

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[27] Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).

[28] Runyon v. McCray, 427 U.S. 160, 175–77 (1976).

[29] Troxel v. Granville, 530 U.S. 57, 72–73 (2000).

[30] Barbara Bennett Woodhouse, *"Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY 995, 1004 (1992).

[31] *Id.*

[32] *See id.* at 1005.

World War I aggravated this conflict and especially inspired hostility against German Americans.[33] War propaganda and nationalism created an anti-German hysteria and invigorated the belief that students learning in schools that taught in the German language could not absorb American values.[34]

As a response, the English language mandate at issue in *Meyer* passed the Nebraska legislature in 1919.[35] The statute stated 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 then [*sic*] the English language."[36] The statute applied to teachers of students who had not graduated eighth grade and punished violators with a misdemeanor.[37] By 1923, thirty-one states had passed similar statutes controlling the languages that could be taught either in public or in all schools.[38]

In addition to the anti-foreign and antinationalist motivations that drove Nebraska's English-only laws, the Oregon ban on nonpublic schools at issue in *Pierce* was also motivated by a mixture of anti-Catholic sentiment, the belief that religious schools spread Bolshevism, and egalitarian populism.[39] This coalition of supporters sought to use compulsory public schooling for their various purposes—to curb the influence of ethnic minority communities over their children, to prevent well-off parents from passing on class hierarchy through private school, and to stem the teaching of disfavored religions.[40] This all culminated in Oregon's Compulsory Education Act, which required every parent, guardian, or other custodian having control or custody of a child between eight and sixteen to send the child to public school.[41] Failure to do so was punishable as a misdemeanor.[42]

Thus, although the statutes in *Pierce* and *Meyer* regulated different aspects of education, and although the statutes were the result of complex social forces, they shared one important commonality: each

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[33] *Id.* at 1009; *see also* William G. Ross, *A Judicial Janus:* Meyer v. Nebraska *in Historical Perspective*, 57 CIN. L. REV. 125, 130–31 (1988).

[34] Ross, *supra* note 33, at 132.

[35] Woodhouse, *supra* note 30, at 1003–04.

[36] 1919 Neb. Laws 1019.

[37] *Id.*

[38] Woodhouse, *supra* note 30, at 1003–04.

[39] *See id.* at 1017–19.

[40] *See id.*

[41] 1923 Or. Laws 9–10.

[42] *Id.*

was an attempt to use mandatory changes in education as a tool to effectuate social and cultural change in the students, regardless of the wishes of their parents. The proponents of the English-only statute in *Meyer* sought to use language in school as a tool to break the cultural influence of parents and assimilate the children of ethnic minority communities. The various proponents of the private school ban in *Pierce* sought to leverage common schooling to prevent children from taking on certain class characteristics, religious beliefs, or cultural characteristics. Thus, one way to read the Supreme Court's rebuke of these statutes is as a rebuke of their attempt to

opt education to socialize children without parental consent.

B. The Meyer *and* Pierce *Decisions: Vague Articulations of the Scope of the Parental Right*

Despite their status as foundational cases, the actual *Meyer* and *Pierce* decisions themselves do not clearly articulate the scope of the parental right. Apart from establishing, in general terms, both a substantive due process liberty interest and a role for state regulation of private and public education, the decisions give very little guidance.

In *Meyer*, Justice McReynolds first confronted the Nebraska English-only statute by noting that "[w]ithout doubt" the liberty guaranteed by the Fourteenth Amendment includes the right to "marry, establish a home and bring up children."[43] McReynolds proceeded to state that education is historically a matter of "supreme importance."[44] It was important enough that "[c]orresponding to the right of control" was the "the natural duty of the parent to give his children education suitable to their station in life."[45] However, to practically discharge this duty, the opinion suggests that parents must hire qualified people to teach their kids.[46] Since learning German was not harmful to the welfare of the child, and since the accused taught the language in school as his occupation, "[h]is right thus to teach and the right of the parents to engage him so to instruct their children . . . are within the liberty of the amendment."[47]

Thus, the Court established that parents have a liberty interest in directing the education of their children. However, apart from noting

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[43] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[44] *Id.* at 400.

[45] *Id.*

[46] *Id.*

[47] *Id.*

that the liberty interest exists, and including a brief reference to the welfare of the child, McReynolds gave very little indication of the level of rigor or the breadth of the right.

In the absence of guidance, one way to shed light on the right articulated in *Meyer* is through reference to the Court's rejection to the motivations behind the statute that the Court struck down. In response to Nebraska's argument that legislation promoted civil development by preventing children from learning foreign languages and values, McReynolds conceded that instilling a common language might be desirable but found that coercively violating the liberty interest at stake was unconstitutional.[48] Thus, while the opinion itself sparsely articulates the contours of the parental right, McReynolds expressly rejected Nebraska's argument that a state purpose of instilling desirable language skills and cultural values in children is a compelling enough purpose to override the parental right. This rejection signals that the import of the *Meyer* opinion directly targets state regulation enacted for the purpose of instilling values in children.

However, McReynolds expressly acknowledged a role for the state in setting regulations "for all schools."[49] Indeed, the regulations were allowed so long as they were "reasonable," including, for example, compelling student attendance.[50] However, since Nebraska's ban on non-English instruction had no "reasonable relation" to "any end within the competency of the state," the Court invalidated the statute.[51]

In describing an acceptable role for state regulation, McReynolds uses the language of rationality review. However, *Meyer* predated the Court's modern tiered scrutiny. Thus, while McReynolds certainly acknowledged a role for state regulation of public and private schools at least as intrusive as enforcing penalties on those who do not attend, the Court did not definitively adopt a standard of review for claims invoking the parental right to control the education of their children.[52]

Two years later in *Pierce*, the Court again relied on the liberty right of parents and guardians to direct upbringing of their children.[53] Writing again for the Court, McReynolds asserted that it was entirely

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[48] *Id.* at 401.
[49] *Id.* at 402.
[50] *Id.*
[51] *Id.* at 403.
[52] Margaret Ryznar, *A Curious Parental Right*, 71 SMU L. REV. 127, 133–37 (2018).
[53] Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 533–35 (1925).

plain that the ban on nonpublic schools violated the liberty right from *Meyer*.[54] Then he proceeded to announce that "[t]he 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."[55] While quotable, the fact that a child is not a "creature of the state" does not give clear guidance on what level of scrutiny to apply when reviewing state school regulations, or for how far a parent's preferences can go before they are subjected to reasonable state regulation. While *Pierce* does indicate that the parental right includes the option to choose between public school and nonpublic school options, the opinion leaves the scope of the parental right largely undefined.

Like in *Meyer*, *Pierce* expressly left space for state regulation of schools. McReynolds claimed that the parties did not question the power of the state "reasonably to regulate all schools," or "to inspect, supervise and examine them, their teachers and pupils."[56] Nor did McReynolds question the power of the state to compel attendance, ensure that teachers are of "good moral character and patriotic disposition," require that certain courses "essential to good citizenship" are taught, or to ban lessons that were "manifestly inimical to the public welfare."[57] This list of "reasonable" forms of regulation could be read broadly as preserving a very assertive role for state regulation in education, or more narrowly as a list of actions beyond which the state's action becomes unconstitutional. However, at a bare minimum, McReynolds established in *Meyer* and *Pierce* that states have some sort of role in regulating and supervising both public and nonpublic schools, and that this power is tied in some sense to the duty to prevent results that are "manifestly inimical to the public welfare."[58]

C. Wisconsin v. Yoder*: An Intersection Between Religious and Parental Rights*

More than forty years after *Meyer* and *Pierce*, the Court returned to the issue of parental rights in the schooling context. Many take the view that the resulting decision in *Wisconsin v. Yoder* is guidance about the right for parents to control the *religious* upbringing of their children

54 *Id.* at 534–35.
55 *Id.* at 535.
56 *Id.* at 534.
57 *Id.*
58 *Id.*

more than it is guidance on the scope parental rights in general.[59] However, the underlying conflict in the case accords neatly with the historical background of *Meyer* and *Pierce* and gives a clear sense of the kind of state control over child learning that the Court finds most problematic.

Yoder arose from Amish parents' challenge to a Wisconsin compulsory school attendance statute. The statute required parents to send their children to private or public school until reaching age sixteen.[60] The Amish parents refused to send their fourteen- and fifteen-year-old children to public school and were subsequently convicted.[61] The parents challenged their convictions on freedom of religion grounds and the Wisconsin Supreme Court sustained their claims.[62] The United States Supreme Court affirmed in an opinion that weaved together themes of both freedom of expression and parental control.[63]

Writing for the Court, Justice Burger first emphasized the nature of the Amish parents' concern with compulsory education. Where the respondents' Amish faith relied on informal learning, separation from society, and community welfare, modern secondary school taught the importance of competition, self-distinction, and social life with other students.[64] So, requiring secondary school not only put Amish youth in an environment antithetical to Amish religious beliefs but also "[took] them away from their community, physically and emotionally, during the crucial and formative adolescent period of life."[65] The Amish parents did not object to elementary school education, however, because this schooling did not "significantly expose their children to worldly values or interfere with their development in the Amish community during the crucial adolescent period."[66] Thus, the crux of the parents' claim, as described by the Court, was that secondary school would socialize their children with values and practices that were

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[59] *See* Jay S. Bybee, *Substantive Due Process and Free Exercise of Religion:* Meyer*,* Pierce *and the Origins of* Wisconsin v. Yoder, 25 CAP. U. L. REV. 887, 923–26 (1996); Susan E. Lawrence, *Substantive Due Process and Parental Rights: From* Meyer v. Nebraska *to* Troxel v. Granville, 8 J.L. FAM. STUD. 71, 82 (2006).

[60] Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).

[61] *Id.* at 207–08.

[62] *Id.* at 213.

[63] *See id.* at 214, 218, 223–24.

[64] *Id.* at 210–11.

[65] *Id.* at 211.

[66] *Id.* at 212.

antithetical to the Amish parents' religious beliefs, and this would be a violation of both the parents' right to freely express their religion and their right to direct the upbringing of their children.[67] The two constitutional claims were inextricably linked.

Burger initially focused his analysis on the respondents' free exercise claims. To except the Amish parents from the statute, Burger set up a balancing test between their First Amendment interest in freedom of expression and the state's interest in compelling universal school attendance.[68] Since the state's interest in universal compulsory education was not absolute,[69] Burger found that it was subordinate to the parents' legitimate desire to freely practice their Amish faith.[70]

Next, in rejecting the state's argument that its *parens patriae* power allowed the state to require secondary education regardless of the wishes of the parents, Burger built upon the standard set in *Pierce* and *Meyer*. Burger first framed the dispute as involving "the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children."[71] Then, invoking *Pierce* and *Meyer*, Burger noted that when "the interests of parenthood" were "combined with a free exercise claim," then "more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment."[72] While in theory state regulation could meet this higher standard through a showing that parental decisions would jeopardize the health or safety of the child or have significant social burdens, the Amish exception from the school-attendance statute did not raise these concerns.[73]

Thus, one interpretation of *Yoder* is as establishing some form of more rigorous review for the subset of parental rights cases that intersect with freedom of religion claims.[74] However, if this is the case, then *Yoder*'s precedential value in secular assertions of the parental right is unclear.[75] This is especially true given Burger's comments

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67 *Id.* at 213–14.

68 *Id.* at 214.

69 *Id.* at 215.

70 *Id.* at 221–29.

71 *Id.* at 232.

72 *Id.* at 233 (quoting Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 535 (1925)).

73 *Id.* at 233–34.

74 Lawrence, *supra* note 59, at 82–83, 88–89.

75 *See id.*; Bybee, *supra* note 59, at 923–24.

about the state's power to impose reasonable regulation on secular schools. While on the one hand requiring something "more than merely a 'reasonable relation'" when religious and regular parental rights claims intersect,[76] Burger also followed *Pierce* in reiterating the principle that states have the power to impose reasonable regulations on schools.[77] Indeed, during his analysis of the freedom of religion claim, Burger acknowledges that "[a] way of life . . . may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations."[78] If *Yoder*'s heightened scrutiny applied in all parental control cases, then the state's power to impose reasonable regulations would always be subject to a secular parent's right to opt for a different approach. This would contradict *Pierce*, *Meyer*, and Burger's own statements in *Yoder*. Thus, Burger's heightened scrutiny is limited to a parent's right to direct the religious upbringing of his or her child; *Yoder* does not directly speak to the standard of review in all secular assertions of parental rights.

However, the import of *Yoder* does indirectly speak to how the Court views the parental right to direct a child's education, even in the secular context. Indeed, the challenge in *Yoder* was not a large leap from the issues in *Meyer* or *Pierce*, which reviewed more targeted attempts to socialize children of culturally distinct parents. Similar to *Meyer* and *Pierce*, the Amish parents in *Yoder* refused to comply with the statute because schooling under the state regulation would have instilled cultural values to which the parents objected.[79] Where the Amish culture emphasized community welfare, American secondary school taught competition and individual achievement; where Amish culture emphasized separation from society, American secondary school entailed social life with non-Amish students.[80] These complaints accord with the German American parents in *Meyer*, who wanted to pass cultural values and linguistic skills to their children where the state wanted to instill American values through English instruction.[81] They are also analogous to the concerns of the Catholic parents in *Pierce*, who wanted to pass on religion in parochial schools but encountered

76 *Yoder*, 406 U.S. at 233 (quoting *Pierce*, 268 U.S. at 535).
77 *Id.* at 213.
78 *Id.* at 215.
79 *See id.* at 210–11.
80 *Id.* at 211.
81 *See* Lawrence, *supra* note 59, at 75; Ross, *supra* note 33, at 132–33; Woodhouse, *supra* note 30, at 1003–12.

state regulation aiming to instill different values through mandated public schooling.[82] Thus, although *Yoder* varies in some ways from *Meyer* and *Pierce*, all three cases support the underlying proposition that the harm from which the parental right to direct one's child's education defends is state-sponsored indoctrination of values to which the parent objects.

D. Runyon v. McCrary*: A Limit to the* Meyer-Pierce *Parental Right*

Where *Meyer*, *Pierce*, and *Yoder* considered statutes that would have exposed children to values to which their parents objected, in *Runyon v. McCrary* the Court considered intervention in schooling that would not "inhibit in any way the teaching . . . of any ideas or dogma."[83] In this context, the Court found that the government action did not implicate the parental right.[84]

Runyon arose from § 1981[85] claims by several Black children who challenged two secular private schools' racially exclusionary admissions policies.[86] Writing for the Court, Justice Stewart first found that § 1981 applied to the schools' discriminatory policies and then proceeded to consider the schools' constitutional defenses.[87]

In response to the schools' freedom of association defense, the Court assumed that parents have a First Amendment right to send their children to schools that promote the view that racial segregation is desirable.[88] However, Stewart wrote, the power to exclude racial minorities does not follow from this principle.[89] Moreover, and more

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82 Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 532 (1925); *see* Woodhouse, *supra* note 30, at 1017–21.

83 Runyon v. McCray, 427 U.S. 160, 176 (1976) (quoting McCray v. Runyon, 515 F.2d 1082, 1087 (4th Cir. 1975)).

84 *Id.* at 177.

85 Section 1981 provides in part that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981(a) (2018).

86 *Runyon*, 427 U.S. at 163–65.

87 *Id.* at 168–75.

88 *Id.* at 176.

89 *Id.* The *Runyon* Court relied on its previous ruling in *Norwood v. Harrison* to draw a distinction between private discrimination on one hand and otherwise protected freedom of association on the other: "[A]lthough the Constitution does not proscribe private bias, it places no value on discrimination as it does on the values inherent in the Free Exercise Clause. Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." Norwood v. Harrison, 413 U.S. 455, 469–70 (1973). Thus, the Court in *Runyon* found that, even if discriminatory admissions policies could be

importantly for parental rights purposes, Stewart noted that the schools did not show how disallowing racial exclusion would inhibit their ability to teach racially discriminatory ideas or dogma.[90] Specifically, Stewart wrote that, even if the First Amendment could in theory protect race-based admissions policies under some circumstances, in this specific instance "there [was] no showing that discontinuance of (the) discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma."[91] Thus, the Court dismissed the freedom of association defense and indirectly articulated a key difference from the regulation in *Meyer*, *Pierce*, and *Yoder*: noninterference with the parents' ability to instill good morals in their children.

Next, Stewart addressed the schools' parental rights defense. Quoting from *Meyer*, *Pierce*, and *Yoder*, Stewart emphasized the "limited scope" of the parental right.[92] Since the plaintiffs' claims did not challenge the right of the schools to operate, the right of the parents to send their children to private school rather than a public school, or the subject matter taught at the private school, the § 1981 challenge "infringe[d] no parental right recognized in *Meyer*, *Pierce*, . . . [or] *Yoder*."[93] According to Stewart, the schools "remain[ed] presumptively free to inculcate whatever values and standards they deem[ed] desirable" and "*Meyer* and its progeny entitle[d] them to no more."[94]

In *Runyon*, the Court addressed the parental right in the context of a statute that did not directly interfere with the parents' ability to

literally construed as falling under the First Amendment, in practice the Constitution rejected that result. *Runyon*, 427 U.S. at 176.

90 *Runyon*, 427 U.S. at 176.

91 *Id.* (quoting McCray v. Runyon, 515 F.2d 1082, 1087 (4th Cir. 1975)).

92 *Runyon*, 427 U.S. at 176–77 (quoting *Norwood*, 413 U.S. at 461).

93 *Id.* at 177; *see also Norwood*, 413 U.S. at 461. *Norwood* preceded *Runyon* by three years and confronted a similar issue. There, four parents challenged a Mississippi statutory program under which the state bought then lent out textbooks to private and public schools without consideration for whether the recipient schools maintained racially discriminatory policies. In dismissing Mississippi's parental right defense, the Court construed *Pierce* narrowly: "[T]he Court's holding in Pierce is not without limits. As Mr. Justice White observed in his concurring opinion in Yoder, Pierce 'held simply that while a State may posit [educational] standards, it may not pre-empt [sic] the educational process by requiring children to attend public schools.'" *Norwood*, 413 U.S. at 461 (quoting Wisconsin v. Yoder, 406 U.S. 205, 239 (1972) (White, J. concurring)). Under this more limited construction, the Court found that the parental right did not entitle private-school parents to the benefits of the state-run textbook loan program. *Id.* at 461–62.

94 *Runyon*, 427 U.S. at 177 (italics added).

socialize their children through education.[95] In doing so, Stewart decided to construe the *Meyer-Pierce* right narrowly.[96] One way to interpret this change in tenor is the Court marking a limit to the parents' liberty interest to choose whatever set of school policies they wish. Where limiting access to nonpublic school, mandating the languages used in instruction, and compelling attendance by isolated religious groups ran the risk of instilling state-mandated values at the expense of the parents' preferences, the Court found that requiring race-neutral admission policies did not. In other words, since forcing the schools to consider Black applicants did not invoke the core harm from which the *Meyer-Pierce* right protects—infringement on parents' ability to control the social and cultural upbringing of their children—the government could constitutionally foreclose the parents' choice to select a private school that categorically excluded applicants on the basis of race. This is a reasonable regulation "fully consistent with *Meyer*, *Pierce*, and the cases that followed in their wake."[97]

E. Troxel v. Granville*: Lack of Consensus on the Standard of Review*

Troxel v. Granville, decided in 2000, is the most recent effort by the Court to address the *Meyer-Pierce* parental right.[98] That case arose in the context of a visitation dispute, not in the schooling context. However, it is instructive in its failure to establish a standard of review, or even a five Justice majority, in an area that is arguably very central to the essence of parenting.

The subject of the *Troxel* decision was a Washington visitation statute that permitted "[a]ny person" to petition the trial court "for visitation rights 'at any time'" and assigned the court the power to grant such rights whenever doing so was in the "best interest of the child."[99] The issue arose when the paternal grandparents of two children petitioned a state trial court for visitation rights over the objection of the mother.[100] The father was deceased, but during his life the grandparents saw the children regularly.[101]

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95 *See id.*
96 *See id.*
97 *Id.* at 179 (italics added).
98 *See* Troxel v. Granville, 530 U.S. 57 (2000).
99 *Id.* at 60 (alteration in original) (quoting WASH. REV. CODE § 26.10.160(3) (2018) (repealed 2021)).
100 *Id.* at 60.
101 *Id.*

The trial court granted the grandparents' petition, and the mother's appeal eventually reached the Washington Supreme Court.[102] There, the court construed the statute broadly to mean that the only restraint on a trial court's discretion was whether granting visitation would be in the best interests of the child, and that any person could petition the trial court for visitation at any time, irrespective of an ongoing custody action.[103] The Washington court then struck down the statute and held that the parental right requires a showing of harm or potential harm before the State may overrule parental choices, and that, in any event, the best interests standard was an unconstitutionally broad incursion into parental rights.[104]

Writing for a four justice plurality, Justice O'Connor agreed that the statute was an unconstitutional infringement on the parental right but did not consider whether harm or potential harm is necessary before the State may constitutionally interfere with parental child-rearing choices.[105] O'Connor argued that the statute permitted the trial court to give insufficient weight to the custodial parent's preferences.[106] Since the rule required only a mere "best interest" finding to overrule the choice of a fit parent, O'Connor found the breadth of the Washington statute unconstitutional.[107]

Notably, O'Connor repeatedly identified the parental right as "fundamental" and, yet, did not identify a standard of review for parental rights claims.[108] Indeed, apart from Justice Thomas, who asserted that he would apply strict scrutiny review to all infringements of fundamental rights,[109] none of the Justices articulated a standard of review for parental liberty interest. In her plurality opinion, O'Connor hints at her reason for omitting more precise guidance:

> We do not, and need not, define today the precise scope of the parental due process right in the visitation context. . . . [T]he constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and . . . the

102 *Id.* at 61–62.
103 *Id.* at 62–63.
104 *Id.* at 63.
105 *Id.* at 71–73.
106 *See id.* at 72–73.
107 *Id.*
108 *See id.* at 65, 73.
109 *Id.* at 80 (Thomas, J., dissenting).

> constitutional protections in this area are best "elaborated with care."[110]

O'Connor seems to acknowledge that the issues surrounding the parental right are extremely complex. She cites Justice Kennedy's dissent, where he states that "a fit parent's right vis-à-vis a complete stranger is one thing; her right vis-à-vis another parent or a *de facto* parent may be another."[111] Thus, O'Connor and the Court's choice to not set a standard of review may be the result of a conscious decision that ambiguity is the best alternative in response to a very complex area of law.[112]

By extension, if the Court is unwilling to set the standard of review of the parental right to choose who may and who may not visit a child, an area that is arguably core to the essence of parenting,[113] then setting a universal standard of review for the parental right may be impractical. Thus, for our purposes, it makes sense to conceptualize the parental right to direct a child's education as a subset of the much broader parental right and this subset as a single subject of judicial review. The right of a parent to, in some instances, control the environment where his or her child is educated is a singular right within a network of related, but distinct, parental liberties. Thus, *Troxel* suggests that were the Court to order heightened scrutiny in the visitation context, that decision might bear on the level of rigor in the education context but would not necessarily bind the Court to that result.

II
A PRINCIPLE FOR ARTICULATING THE EDGES OF THE PARENTAL RIGHT TO DIRECT EDUCATION

While Supreme Court precedent clearly establishes that there is a parental right to control some aspects of one's child's education and a converse state power to reasonably regulate schools, the opinions by and large do not articulate in which matters a parent's choice is entitled to deference. In the absence of clear guidance, a rough framework for categorizing the kind of harm that the parental right protects against would be useful for evaluating the panel's decision in *Brach v. Newsom* and making predictions about future parental control disputes. This Part

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[110] *Id.* at 73 (quoting *id.* at 101 (Kennedy, J., dissenting)).

[111] *Id.* at 100–01 (Kennedy, J., dissenting).

[112] *See* Ryznar, *supra* note 52, at 143–44.

[113] *See id.* at 152–56 (proposing a tiered approach to setting a level of scrutiny for the parental right where courts would give issues of parental custody, which she considers core to parenthood, the more rigorous review than issues relating to care or control).

attempts to articulate that harm and then draw inferences about the kinds of state regulation that would or would not implicate the weight of the Court's precedent.

The opinions in *Meyer*, *Pierce*, *Yoder*, and *Runyon* suggest that the primary harm from which the parental right to direct one's child's education defends is state-mandated indoctrination of values over the objection of a parent. Thus, the Court is more likely to strike down forms of state regulation that tend to instill values against a parent's wishes and less likely to strike down regulation that merely alters a student's experiences in school.

The Supreme Court's precedent supports this distinction. In *Meyer*, prejudice and nationalism intersected and resulted in a series of bans on non-English languages in private and public schools. Thus, by design and in practice, Nebraska's regulation effectuated assimilation of ethnic minority communities by using state-mandated English language instruction as a tool to instill national values in children.[114] In *Pierce*, a coalition of supporters from ideological and religious groups sought to use the public school mandate to curb the influence of undesirable private schools and instill favorable views instead.[115] If the law had survived the legal challenge, it likely would have served its intended purpose. In *Yoder*, a statute compelling attendance at school, although general in its applicability, was unconstitutional as to the parents in an isolated Amish minority who raised concerns that modern secondary education would instill cultural values that were antithetical to the group's beliefs.[116] In all three cases, parents had credible claims that a state requirement would ultimately result in a form of schooling that could instill undesirable values in their children. Moreover, in all three cases, the Court invoked the Fourteenth Amendment liberty interest to protect the minority parents from submitting their children to the socializing effects of the statute. Thus, if there is a core to the *Meyer-Pierce* right, it is a parent's liberty to opt out of regulation that would otherwise teach their children undesirable cultural lessons.

Under this principle, *Runyon* came out differently because striking down the private school admissions policies did not prevent those schools from teaching racist dogma. In other words, the state regulation merely altered the students' experiences within their parents' school of

[114] *See* discussion *supra* Section I.A.
[115] *See* discussion *supra* Section I.A.
[116] *See* discussion *supra* Section I.C.

choice; it did not directly effectuate a change in the culture or values passed down by the instructors. While shutting down the school or forcing the students to learn in a different language than that of their parents might have inhibited this passage of values, compulsory integration with minority students against parental wishes did not, or at least not to an extent that outweighed the state's power to set reasonable regulations. Thus, the Court construed the parents' liberty interest narrowly and found that the § 1981 challenge did not implicate the parental right.

This core principle of the parental right, weaved throughout the Supreme Court's decisions in *Meyer*, *Pierce*, *Yoder*, and *Runyon*, also has implications for determining the most appropriate standard of review. While the Supreme Court has been reluctant to transparently choose between heightened scrutiny or rationality review, those regulations with the highest risk of forcibly conveying values contrary to the parent's wishes are likely to face a more rigorous standard of scrutiny from the Court. Conversely, regulations, like the one in *Runyon*, that merely create a change in schooling without influencing the cultural tenor or values conveyed by the instructors are likely to face a more limited variation of the *Meyer-Pierce* right. In her investigation of judicial review in parental rights cases, Margaret Ryznar suggests that one possible way to determine the appropriate level of scrutiny in a given context is to use a "sliding scale" method where the level of scrutiny varies depending on how "core to parenthood" the asserted right is.[117] One could conceptualize the Court's approach to parental rights cases in the educational context in a similar way—those regulations that forcibly inhibit or replace cross-generational cultural/religious exchange will likely be subject to something closer to heightened scrutiny, whereas those cases that merely tweak the student experience will be subjected to rationality review. Using this framework as a starting point, practitioners can begin to make sense of the Supreme Court's parental right precedent in the educational context and can begin to make predictions in cases like *Brach v. Newsom*.

III
REVIEW OF *BRACH V. NEWSOM*

This Part overviews the vacated majority opinion from the July 2021 *Brach v. Newsom* decision and then makes a few observations in light

[117] Ryznar, *supra* note 52, at 147–48.

of the framework articulated in Part II. Although the en banc majority disposed of the case on exclusively procedural grounds,[118] this overview focuses on the substantive issues that the majority's opinion opted to leave unaddressed. Specifically, this analysis focuses on the private school parents' claim and centers on the vacated panel's novel findings that (1) the parental right to direct education protects a private school parent's discretion to select in-person schooling, and (2) regulation infringing the parental right is subject to strict scrutiny. Ultimately, since the California orders changed the student experience but not the content of the values conveyed, Supreme Court precedent suggests that the Ninth Circuit panel erred in construing the parental right broadly in this context and thus decided incorrectly on both issues.

A. The Vacated Ninth Circuit Majority Opinion

The case began when on July 21, 2020, parents of private school children, parents of public school children, and one student brought equal protection and substantive due process challenges against the Newsom administration's plan to mandate remote instruction under certain conditions to slow the spread of COVID-19.[119]

The challenged regulations changed over time, but the general outlines of the state's approach to K–12 schools remained consistent. Under the initial round of executive actions in the fall and summer of 2020, all Californians were subject to a stay-at-home order requiring them to "to stay home or at their place of residence"[120] except as provided by less restrictive "criteria and procedures" set by the State Public Health Officer.[121] Initially, the regulations excepted only K–12 teachers from the general stay-at-home order for distanced learning.[122] However, on July 17, the California Department of Health issued the first framework for determining when schools could deviate from the otherwise applicable ban on in-person instruction.[123]

Under this new framework, a school could reopen for in-person instruction only if the school's "local health jurisdiction" had not

118 *See* Brach v. Newsom, 38 F.4th 6, 15 (9th Cir. 2022).

119 *Id.* at 9–10.

120 EXECUTIVE ORDER N-33-20, *supra* note 11.

121 EXECUTIVE ORDER N-60-20, *supra* note 11.

122 Brach v. Newsom, 6 F.4th 904, 911 (9th Cir. 2021); *see Essential Workforce*, COVID19.CA.GOV: YOUR ACTIONS SAVE LIVES 16 (Apr. 28, 2020), https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf [https://perma.cc/2HPB-388U].

123 *See* REOPENING FRAMEWORK, *supra* note 12.

appeared on the state's County Monitoring List during the preceding fourteen days.[124] If the school's jurisdiction had been on the state's County Monitoring List and that school had not previously reopened, then the regulations permitted only remote education.[125] A local health jurisdiction fell onto the monitoring list if either "(1) its 14-day case rate was over 100 per 100,000 people; or (2) *both* (i) its 14-day case rate was over 25 per 100,000 and (ii) its 7-day testing positivity rate was over 8 percent."[126] Once a school reopened under the framework, it was not required to close again, even if the school's county fell onto the State's County Monitoring List for a second time.[127] On August 28, the State Public Health Officer amended the framework to replace the County Monitoring List with "Tier 1" status as the instrument for deciding whether schools could resume in-person instruction.[128] A county fell into "Tier 1" status if either (1) its 7-day case rate was over 7 per 100,000 people, or (2) its 7-day positivity rate was over 8%.[129]

Although the regulations were eventually relaxed over the following year, the justiciability of the plaintiffs' claims stood upon the possibility that California would reimplement restrictions on in-person learning similar to those imposed in the early months of the pandemic.[130] Thus, the subsequent policy changes are not crucial to understanding the substantive rulings on the parental right.

First, the majority rejected the public school parents' substantive due process claim. On appeal, the public school plaintiffs argued that the state regulations violated a fundamental right to a basic minimum education.[131] Writing for the majority, Circuit Judge Collins wrote that since the Supreme Court has not recognized a fundamental right to public education, rationality review was appropriate.[132] The lockdown measures were rationally related to slowing the spread of COVID-19, a compelling governmental purpose under *Roman Catholic Diocese of*

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124 *Id.*

125 *Id.*

126 *Brach*, 6 F.4th at 913.

127 REOPENING FRAMEWORK, *supra* note 12.

128 *See* CAL. DEP'T OF PUB. HEALTH, STATEWIDE PUBLIC HEALTH OFFICER ORDER, AUGUST 28, 2020 (Aug. 28, 2020), https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/8-28-20_Order-Plan-Reducing-COVID19-Adjusting-Permitted-Sectors-Signed.pdf [https://perma.cc/Z76W-8LK4].

129 *Brach*, 6 F.4th at 913.

130 *See id.* at 916–20.

131 *Id.* at 922.

132 *Id.* at 923–24 (first citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); and then citing Pyler v. Doe, 457 U.S. 202, 221 (1982)).

Brooklyn v. Cuomo.[133] Thus, according to Collins, the public school plaintiffs' substantive due process claims failed.[134]

Second, the majority found that the private school plaintiffs' substantive due process claim succeeded.[135] Although both the public and private school plaintiffs articulated the same arguments about a fundamental right to education,[136] Collins construed the private school claims as necessarily a challenge to the government's interference with the parents' choice of a private school forum.[137] Thus, according to Collins, the private school parents' claims invoked the *Meyer-Pierce* right.[138]

In response to the State's argument that *Meyer* and *Pierce* merely protect a parental right to decide where to send one's children to school and do not implicate generally applicable regulation of the "mode" of instruction, Collins pointed out that the foreign language ban in *Meyer* was both generally applicable and did not interfere with the parents' ability to enroll their children.[139] Thus, Collins concluded that the State's interpretation of the right was too narrow.[140]

From this baseline, Collins proceeded to extend the right into new territory. Although acknowledging *Runyon*'s instruction to construe *Meyer* and *Pierce* narrowly,[141] the majority nonetheless found that the parental liberty interest "necessarily embraced a right to choose *in-person* private school instruction."[142] Whether private school parents have a protected liberty interest to avoid having their children educated over the internet was undeniably a novel issue before the court. Collins, however, reasoned that the "long-understood core of the right—the right to choose a private school offering in-person instruction" was impliedly embedded in the broader liberty interest recognized in *Meyer* and *Pierce*.[143] Since the advent of instruction over the internet could

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133 *Id.*; Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67 (2020).

134 *Brach*, 6 F.4th at 924.

135 *Id.* at 931.

136 *See id.* at 940–44 (Hurwitz, J., dissenting).

137 *Id.* at 925–26. Ninth Circuit precedent holds that the *Meyer-Pierce* right protects a parent's choice of "educational forum." Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1207 (9th Cir. 2005).

138 *Brach*, 6 F.4th at 925.

139 *Id.* at 928.

140 *Id.*

141 *Id.*

142 *Id.* at 929.

143 *Id.*

not remove this preexisting liberty interest for in-person schooling, the majority concluded that *Meyer* and *Pierce* supported the parents' claims.[144]

Breaking new ground for a second time, the majority chose to apply strict scrutiny to the State's COVID-19 regulations.[145] Although Collins cited *Troxel* and acknowledged the Supreme Court's lack of definitive guidance on the level of scrutiny applicable to the *Meyer-Pierce* right, he rested his decision on the general principle that "[g]overnmental actions that infringe upon a fundamental right receive strict scrutiny."[146] Thus, at least in situations where the regulation deprives "a central and longstanding aspect of the *Meyer-Pierce* right," Collins concluded that strict scrutiny is appropriate.[147]

Relying on *Diocese of Brooklyn*, the panel majority found that California's K–12 regulations failed to satisfy strict scrutiny.[148] First, slowing the spread of COVID-19 was a compelling governmental purpose.[149] However, Collins concluded that California's regulations were not narrowly tailored.[150] Analogizing from the *Diocese of Brooklyn* Court's decision that New York's ten- and twenty-five-person capacity limits on indoor religious services were not narrowly tailored to stem the pandemic, Collins concluded that prohibiting in-person instruction "effectively imposed an attendance cap of *zero*" on private schools and was similarly unconstitutional.[151] This analysis, along with complaints that California's school closure was "overbroad" when compared to COVID-19's lighter impact on children and other jurisdictions' responses, led the majority to the conclusion that the regulations were not narrowly tailored to the goal of stemming the pandemic.[152] Thus, the court reversed summary judgment on the private school plaintiffs' substantive due process claim.[153]

Lastly, relying on its analysis of the substantive due process claims, the court rejected the public school plaintiffs' equal protection claims

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144 *Id.*

145 *Id.* at 931.

146 *Id.* (quoting Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1208 (9th Cir. 2005)).

147 *Id.*

148 *Id.* at 931–33.

149 *Id.* at 931; *see also* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67 (2020).

150 *Brach*, 6 F.4th at 932.

151 *Id.* at 931–32.

152 *Id.* at 932–33.

153 *Id.* at 933.

and remanded the private school plaintiffs' equal protection claims.[154] The court found that since there is no fundamental right to public education, and since there was no evidence of an invidious distinction, the public school parents did not have a valid claim.[155] However, the court remanded the private school equal protection claims for the district court to decide in light of the panel's finding that the California regulations violated the fundamental *Meyer-Pierce* right.[156]

B. Evaluating the Panel Majority's Novel Substantive Findings

The vacated *Brach* majority's decision both to construe *Meyer* and *Pierce* as protecting a parent's right to choose in-person education and to apply strict scrutiny to that right is unsupported by Supreme Court precedent. Indeed, the issues in *Brach* are fundamentally different than *Meyer*, *Pierce*, and *Yoder* because the latter cases addressed the harm of state-enforced exposure to values through the education system. Instead, *Brach* is analogous to *Runyon* because both cases involved government regulation that, to address a societal harm that transcends the schooling context, altered the experience of education without infringing on a parent's ability to choose which values to pass onto his or her child. Thus, the vacated *Brach* majority erred in construing the *Meyer-Pierce* value broadly in this context.

The best starting point for evaluating the parental right in *Brach* is the nature of the harm incurred by the parents. We can ask: is the harm more like that of the parents in *Meyer*, *Pierce*, and *Yoder*, or is it analogous to the parents' complaints in *Runyon*? As discussed above, the harm in *Meyer*, *Pierce*, and *Yoder* was that the state regulation prevented the parents from choosing a school or curriculum that would teach the cultural or religious values that the parents wanted to pass on to their children.[157] Indeed, in each of these three cases, the parents affirmatively objected to the values taught under the state regulations. In *Runyon*, on the other hand, the court explicitly noted that § 1981 did not infringe on the parents' right to select a school that teaches the dogma of their choice. More precisely, requiring the private schools to consider Black applicants changed the experience of the schooling but did not change the values taught in the school.

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[154] *Id.*

[155] *Id.*

[156] *Id.* at 933–34.

[157] *See* discussion *supra* Part II.

The harm to the parents in *Brach* is analogous to the parents in *Runyon*. In *Runyon*, a broadly applicable statute, intended to prevent the transcendent harm of racial discrimination, had the collateral effect of tweaking the admissions policies of some private schools in a way that altered the student experience but not the content of the matter taught. In *Brach*, broadly applicable lockdown measures, intended to prevent the transcendent harm caused by the spread of a contagious disease, had the necessary effect of changing the mode of education in a way that altered the student experience but not the lessons or subject matter taught. In both instances, the government sought to regulate a pressing and transcendent harm, and in doing so, changed some aspects of private school education. Crucially, however, in both instances these changes did not inhibit the values, culture, or dogma taught in the private schools. Thus, the harm in *Brach* is like that in *Runyon*, and the correct line of reasoning on these facts would be to follow the guidance of the *Runyon* court and construe the *Meyer*-*Pierce* right narrowly.

By extension, the vacated *Brach* majority court erred when it construed the parental right broadly to encompass the parents' preference for in-person instruction. Like the private schools in *Runyon*, who could still teach dogma despite the change in admissions policies, the California private schools could still pass on values through online education. Thus, the harm from *Meyer*, *Pierce*, and *Yoder* is absent, and the outcome of *Runyon* should control.

Similarly, the distinction between *Meyer*, *Pierce*, and *Yoder* on one hand and *Runyon* on the other highlights how the court's decision to extend strict scrutiny to the parental right on these facts is especially egregious. Contrary to the panel majority's declaration that in-person education is a "core right" guaranteed by *Meyer* and *Pierce*,[158] a careful reading of the Supreme Court's precedent shows that the parental right is more limited. Indeed, if, as the *Brach* panel argues, tradition alone is enough to elevate any historically common aspect of private education to constitutionally protected status under *Meyer* and *Pierce*, then the private schools in *Runyon* would have asserted a valid constitutional defense since many private schools historically maintained admissions policies that discriminated on the basis of race.[159] Change in

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158 *Brach*, 6 F.4th at 931.

159 *See* Arthur S. Miller, *Racial Discrimination and Private Schools*, 41 MINN. L. REV. 145, 157 (1957) ("[R]acial separation, even in those states where it has not been required, has been a fact of life in private education."); Chris Ford et al., *The Racist Origins of Private School Vouchers*, CTR. FOR AM. PROGRESS (Jul. 12, 2017), https://www.americanprogress.org/article/racist-origins-private-school-vouchers/ [https://perma.cc/WPG5-97BQ].

traditionally common aspects of education is not the harm that *Meyer* and *Pierce* defend against—state-sponsored indoctrination is.

If heightened scrutiny is warranted at all in *Meyer-Pierce* cases that arise in the education context, it is in situations like *Yoder* where the particularly isolated and vulnerable Amish minority was subject to a compulsory school attendance statute that "carrie[d] with it a very real threat of undermining the Amish community and religious practice as they [then] exist[ed]."[160] Mandated learning over the internet on a temporary basis simply does not pose the same magnitude of threat to the private school plaintiffs in *Brach*.

In sum, the vacated majority in *Brach* erred on the substance because it overextended the guarantees provided by the *Meyer* and *Pierce* precedents. Those cases preserve a parent's discretion to select a school which will teach preferable cultural and religious values and the schools' related ability to deliver that service; their use outside that context is limited. Ignoring this, the vacated *Brach* majority not only read the precedent broadly but forged new ground to protect a wider scope of parental preferences and apply a higher standard of review. These changes go beyond the Supreme Court precedent and could unnecessarily subject the state's ability to address future health crises to the whims of parents who wish to control all aspects of private education. Future courts should stick to the established uses of the *Meyer-Pierce* right rather than expanding its scope to address new kinds of harm.

CONCLUSION

While at first glance the Supreme Court's interpretations of the parental liberty to control the education of children seem like a patchwork of generalized platitudes, the nature of harm incurred by the parents provides a guide to make sense of the right. *Meyer*, *Pierce*, and *Yoder* each upheld the parental right. Each of these three cases also addressed a specific kind of harm—the risk that coercive state regulation will ultimately teach one's children values contrary to the parent's cultural or religious preferences. Outside this limited scope, the "fundamental" power of the *Meyer-Pierce* right has held less weight with the Supreme Court. The result in *Runyon* illustrates this dynamic.

160 Wisconsin v. Yoder, 406 U.S. 205, 218 (1972).

Future courts considering invitations to extend the *Meyer-Pierce* right from parties like the parents in *Brach* should keep at least three factors in mind. First, the courts should consider the unique circumstances of ethnic minorities, like in *Meyer*, or religious minorities, like in *Yoder*, where the continuity of the group's way of life may depend on a parent's ability to engage instructors to teach unique cultural or religious traits and conversely to shield his or her child from the pressure to conform to mainstream American values. Specifically, courts should ask whether the claims brought by the private school parents carry the same sort of existential weight.

Second, future courts should consider the consequences of curtailing the parental right too far. This mistake could be especially costly amid a wave of book banning by public school boards.[161] Thus, to the extent that one thinks that parents should have the discretion to engage a teacher to instruct on subjects such as race, gender, and sexuality, even in jurisdictions where those subjects have otherwise been curtailed by a local school board, then perhaps a parental right that protects a parent's preferences for private school instruction in certain cultural values is desirable.

Lastly, future courts should recall that Due Process rights have never been absolute. As both *Runyon* and *Brach* demonstrate, the liberty interests of parents will sometimes inevitably come into conflict with a state's power to confront transcendent threats to public welfare. Moreover, as *Jacobson* held in 1905, sometimes an individual's liberty interest bends to the well-founded need of society. With this in mind, even those sympathetic to the *Brach* parents' claims must acknowledge that the Ninth Circuit panel had the convenience of over a year between the outbreak of COVID-19 and the time of its decision to weigh the nature of the threat and judge the prudence of the actions taken by the state. The district court that adjudicates in the next health crisis may

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[161] *See* Sophie Kasakove, *The Fight Over 'Maus' Is Part of a Bigger Cultural Battle in Tennessee*, N.Y. TIMES (Mar. 4, 2022), https://www.nytimes.com/2022/03/04/us/maus-banned-books-tennessee.html; Elizabeth A. Harris & Alexandra Alter, *Book Ban Efforts Spread Across the U.S.*, N.Y. TIMES (Feb. 8, 2022), https://www.nytimes.com/2022/01/30/books/book-ban-us-schools.html. The upshot of this point is that eroding the constitutional protections that insulate private schools from heavy-handed government regulation does not uniformly benefit those who hold conservative or those who hold liberal ideals. Instead, the impact would be a narrowing of choices for those parents who disagree with the prerogatives of local and state education regulators, whatever those prerogatives are. Thus, to the extent that future courts consider policy outcomes when interpreting the parental right case law, the policy question should be where to draw the line between government regulation and parental preferences and not which side to pick between a tug-of-war of conservative and liberal ideals.

not have the same convenience of hindsight. It is in part for this reason that the Supreme Court has been wise to proceed cautiously in shaping the limited scope of the parental right vis-à-vis state regulation of K–12 educational institutions. Although the Ninth Circuit en banc opted to address this instance on procedural grounds, future courts will have the opportunity to avoid the errors in the vacated *Brach* decision by reaffirming a limited *Meyer*-*Pierce* right that provides constitutional protection from the harms that matter most.