

Meyer, Pierce, and the History of the Entire Human Race: Barbarism, Social Progress, and (the Fall and Rise of) Parental Rights

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Introduction: The Past is Prologue. But Whose Past?

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. Although such measures have been deliberately approved by men of great genius their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.

-*Meyer v. Nebraska*, 262 U.S. 390, 402 (1923)

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In this day and under our civilization, the child of man is his parent's child and not the state's. Gone would be the most potent reason for women to be chaste and men to be continent, if it were otherwise. It was entirely logical for Plato, in his scheme for an "ideal commonwealth," to make women common; if their children were to be taken from them, and brought up away from them by the state for its own ends and purposes, personal morality was, after all, a secondary matter. The state-bred monster could then mean little to his parents; and such a creature could readily be turned to whatever use a tyrannical government might conceive to be in its own interest. In such a society there would soon be neither personal nor social liberty.

-Brief of Appellee, *Pierce v. Society of Sisters* (1925)¹

On February 23, 1923, attorney Arthur F. Mullen stood before the United States Supreme Court to protest a state law that, in his words, would "change the history of the entire human race."² For Mullen, as for the Court, this dire declaration was not mere hyperbole. *Meyer v. Nebraska* would determine the fate, if not of the entire human race, of a 1919 Nebraska state statute prohibiting the teaching of modern foreign languages in the primary grades of all schools, public and private.³ On its face, the law would not seem to hold such apocalyptic implications, but the statute touched the highly sensitive twin nerves of both parental authority and family autonomy. For the plaintiff in error, Mullen argued that, in effect, the state was claiming the authority to establish a curricular monopoly at school, and, practically perhaps, at home. By "mere fiat," the state could "take the child from the parent and prescribe the mental bill of fare which that child shall follow in its education."⁴ Taking the child away

1. Brief of Appellee, *Pierce v. Society of Sisters of the Holy Names of Mary and Joseph*, 268 U.S. 510 (1925), in *OREGON SCHOOL CASES: COMPLETE RECORD* 275 (1925).

2. Transcript of Oral Argument at 8, *Meyer v. Nebraska*, 262 U.S. 390 (1923) (No. 325).

3. *Meyer v. Nebraska*, 262 U.S. 390 (1923). The state statute also had imposed restrictions on the use of foreign languages as a medium of instruction.

4. Transcript of Oral Argument, *supra* note 2.

from the parent, Mullen warned the Court, was “the principle of the soviet.”⁵

Meyer was a creature of its judicial time, one of many early-twentieth century cases that dealt with challenges to state educational regulation. Compulsory attendance and curricular requirements generated heated debate, both in and out of the courtroom, because these cases were not just about the legal question of who controls the child’s education. These cases were about the more profound question of to whom the child belongs. On this question some people—among them, it would turn out, Supreme Court justices—did believe that the history of the human race might hang.

Mullen’s reference to soviet principle was not mere window-dressing. The Russian Revolution, which brought with it a radical skepticism toward the private family, seemed to make only too concrete the threat from an all-grasping state.⁶ Communist theory taught that the abolition of the family was the fruit of history’s steady and upward march to an antipatriarchal and propertyless new world order. For Karl Marx and Friedrich Engels, history is the story of social progress, the central motif of which involves the demise of privacy and possession. The idea that the child belongs to the parent, so the story runs, is symptomatic of cultures mired in a primitive patriarchy. As society progresses, the family assumes a public responsibility—and thus becomes part of the ordinary business of the state, and subject to ordinary state regulation. In time, the private family, like the material conditions of which it is a product, will be no more than a vestige of the patriarchal past.

In the 1920s, it appeared to many that state paternalism was already running amok at home, and that, as Mullen warned, the state as educator would soon be able to take children from their parents and bring them up for its own ends and purposes. In 1922, the year before *Meyer* reached the Court, the voters of Oregon approved an initiative mandating public education. The following year in *Meyer*, William Dameron Guthrie, a leading advocate at the New York bar, filed an amicus brief specifically, and preemptively, to address the Oregon compulsory public school law, the constitutionality of which

5. *Id.*

6. The Red Scare has been described as “a nation-wide anti-radical hysteria provoked by a mounting fear and anxiety that a Bolshevik revolution in America was imminent—a revolution that would destroy property, church, home, marriage, civility, and the American way of life.” MURRAY B. LEVIN, *POLITICAL HYSTERIA IN AMERICA: THE DEMOCRATIC CAPACITY FOR REPRESSION* 29 (1971).

was decided in *Pierce v. Society of Sisters* in 1925.⁷ Guthrie described the Oregon act as “a revolutionary piece of legislation,” his brief evoking images of Bolshevik menace:

It adopts the favorite device of communistic Russia—the destruction of parental authority, the standardization of education despite the diversity of character, aptitude, inclination and physical capacity of children, and the monopolization by the state of the training and teaching of the young. The love and interest of the parent for *his* child, such a statute condemns as evil; the instinctive preferences and desires of the child itself, such a law represses as if mere manifestations of an incorrigible or baneful disposition.⁸

In the Court’s first Lochnerian foray into non-economic substantive due process, the shadow of socialist child-raising was never far from the legal debate.

History is sometimes referenced as the final court of judgment. But in *Meyer* and *Pierce*, the Court sat in judgment of history. The Soviet Principle was not just on trial, but one of the driving historical principles of the late-eighteenth and nineteenth centuries. The era witnessed the emergence of new disciplines that embraced a materialistic theory of cultural progress and an evolutionary view of law. In place of right reasoning, to say nothing of revealed dogma, sociologists and cultural anthropologists brought the methods of empirical research, or at least what at the time passed for empirical research, to bear on questions relating to family and the state. One result of these early social science efforts was the enormously

7. *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925). For historical background of *Meyer* and *Pierce*, see generally PAULA ABRAMS, *CROSS PURPOSES: PIERCE V. SOCIETY OF SISTERS AND THE STRUGGLE OVER COMPULSORY PUBLIC EDUCATION* (2009); WILLIAM G. ROSS, *FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION 1917–1927* (1994); DAVID TYACK, THOMAS JAMES & AARON BENAVIDE, *LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785–1954* 177–92 (1987); Barbara Bennett Woodhouse, “*Who Owns the Child?*”: *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992); William G. Ross, *A Judicial Janus: Meyer v. Nebraska in Historical Perspective*, 47 U. CIN. L. REV. 125 (1988); David B. Tyack, *The Perils of Pluralism: The Background of the Pierce Case*, 74 AM. HIST. REV. 74 (1968).

8. Brief for William D. Guthrie & Bernard Hershkopf as Amici Curiae Supporting Plaintiff-in-Error at 3, *Meyer v. Nebraska*, 262 U.S. 390 (1923) (No. 325).

influential stage-theory of societal development.⁹ Simply enough, stage-theory describes how a society moves from a primitive to a civilized state of development, and how it might fail to do so. For some stage-theorists, their own society provided a model of civilized achievement; for others, more work remained to be done. In either case, stage-theorists, and the legal scholars they influenced, concluded with remarkable uniformity that social “progress” entails the decline and, by some accounts, the demise of parental authority.

This “research” was primitive by modern standards and blatantly ethnocentric. But the accuracy of the science is beside the point. This body of work helps us see that prior to the Court’s seminal parenting cases some of the most influential students of law and society considered a rigid domestic paternalism, unhampered by governmental interference, to be nothing less than a mark of social primitivism. Progress did not lie in the direction of parental rights, in the direction, that is, of a family unit walled off from the public domain by constitutional considerations. Progress occurred as the authority of the parent—including the authority of the father—was checked by public considerations, including the welfare of the child.

The Supreme Court struck back at this “progressive” model by making its own evolutionary claim. History remained progressive, but, as the Court would have it, the betterment of society brings with

9. On “stadial” or “conjectural” history, see generally CHRISTOPHER J. BERRY, *SOCIAL THEORY OF THE SCOTTISH ENLIGHTENMENT* (1997); DAVID SPADAFORA, *THE IDEA OF PROGRESS IN EIGHTEENTH-CENTURY BRITAIN* (1990); RONALD L. MEEK, *SOCIAL SCIENCE AND THE IGNOBLE SAVAGE* (1976). See also KAREN O’BRIEN, *WOMEN AND ENLIGHTENMENT IN EIGHTEENTH-CENTURY BRITAIN* 85–109 (2009). On stadial theory and European colonialism, see Jennifer Pitts, *Empire, Progress, and the “Savage Mind,”* in *COLONIALISM AND ITS LEGACIES* 21–52 (Jacob T. Levy ed. with Iris Marion Young, 2011). Gordon S. Wood, among others, has shown how important stage theory was in America’s early intellectual and cultural history. See, e.g., *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815* 42–43, 38–99 (2009). Thomas’s observations on America’s stadial geography are well known: “Let a philosophic traveler commence a journey from the savages of the Rocky Mountains, eastwardly towards our seacoast. These he would observe in the earliest stage of association, living under no law but that of nature, subsisting and covering themselves with the flesh and skin of wild beasts. He would next find those on our frontiers, in the pastoral state, raising domestic animals to supply the defects of hunting. Then succeed our own semi-barbarous citizens the pioneers of advance civilization, and so in his progress he would meet the gradual shades of improving man until he would reach his, as yet, most improved state in our seaboard towns. This, in fact, is equivalent to a survey, in time, of the progress of man from the infancy of creation to the present.” Letter from Thomas Jefferson to William Ludlow, September 6, 1824, reprinted in 7 *THE WRITINGS OF THOMAS JEFFERSON* 377 (H. A. Washington ed. Taylor and Maury, Washington, D.C. 1864). On Jefferson and the development of early American anthropology, see ROBERT L. BETTINGER, RAVEN GARVEY & SHANNON TUSHINGHAM, *HUNTER-GATHERERS: ARCHAEOLOGICAL AND EVOLUTIONARY THEORY* 35–36 (2d ed. 2015).

it the steady diminution of state authority. For the Court, this was nowhere more so than in state regulation of the family. This diminishment is evident in state regulation of the family. *Meyer* is famous for its repudiation of ancient models of the paternalistic state. Justice James Clark McReynolds, writing for the Court, compared Nebraska's language prohibition 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."¹⁰) 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."¹¹). Such measures, said McReynolds, rested on an allocation of educational control wholly at odds with the letter and spirit of the Constitution.¹² This cautionary note was heard again in *Pierce*. Once more writing for the Court, McReynolds made the case about the power of the state "to standardize its children by forcing them to accept instruction from public teachers only."¹³ He famously declared that "[t]he child is not the mere creature of the state."¹⁴ In a civilized society, the child is decidedly his parents'.

McReynolds might have agreed with Judge, and later Supreme Court Justice, Rufus Peckham, who authored *Lochner*,¹⁵ that history had reached a turning point at last. Writing in 1899, Peckham described the seventeenth and eighteenth centuries as a time "when views of governmental interference with the private concerns of individuals were carried to the greatest extent."¹⁶ He denounced state paternalism as a throwback to the false ideas of a bygone time when "[r]ights which we would now regard as secured to us by our bill of rights against all assaults, from whatever quarter, were . . . regarded

10. *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923). In American political thought, Sparta—or, perhaps more accurately, the idea of Sparta—held a richer repository of meanings than McReynolds' representation of the city-state suggests. For some of the Founding Fathers, Sparta served as a model of republican virtue, see GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* 424 (1969) as an example of self-sacrifice that led Samuel Adams to hope that America would become "the *Christian Sparta*." *See id.* at 118.

11. *Meyer*, 262 U.S. at 401–02.

12. *Id.* at 402.

13. *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 535 (1925).

14. *Id.*

15. *Lochner v. New York*, 198 U.S. 45 (1905).

16. *People ex rel. Annan v. Walsh*, 22 N.E. 682, 686 (N.Y. 1899) (Peckham, J., dissenting).

as the proper subjects of legislative interference and suppression.”¹⁷ Similarly, Judge David Brewer, who would join Peckham’s opinion for the *Lochner* Court, wrote in 1892 to deplore the effects of unwarranted state regulation (pictured so well in Edward Bellamy’s bestselling look backward at the future)¹⁸:

The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government. If it may regulate the price of one service, which is not a public service, or the compensation for the use of one kind of property, which is not devoted to a public use, why may it not with equal reason regulate the price of all service, and the compensation to be paid for the use of all property? And, if so, “Looking Backward” is nearer than a dream.¹⁹

Thankfully, from Peckham’s point of view, a new era was embracing “the more correct ideas which an increase of civilization and a fuller knowledge of the fundamental laws of political economy, and a truer conception of the proper functions of government have given us at the present day.”²⁰ Looking backward, the Court’s *Lochnerians* saw the odious features of paternalistic government. Looking forward, they saw the promise of a modern libertarian state.

With regard to America’s family law past, the claim that a paternalistic past had made “rights” the subject of legislative interference was not far off the mark. It is commonly assumed that “[h]istorically, fathers were entitled to possession of their children In essence, fathers had an absolute right to their

17. *Id.* at 687.

18. See EDWARD BELLAMY, *LOOKING BACKWARD: 2000-1887* (Ticknor & Co. 1888).

19. *Budd v. People*, 143 U.S. 517, 551 (1892) (Brewer, J., dissenting).

20. *People v. Budd*, 117 N.Y. 1, 47 (1889) (Peckham, J., dissenting).

children, ‘owning’ them as if they held ‘title’ to them.”²¹ For many parentalists,²² the right to parent is considered a time-honored staple of personal liberty deeply rooted in the common law and guaranteed by core constitutional principles. For some, of course, the right to parent emanates from law with an even more compelling lineage. As James Madison put it, parenting is a right often presented as prescribed by natural law, as higher than the Constitution, a kind of right “precedent both in order of time and in degree of obligation, to the claims of Civil Society,”²³ and state interference with parental rights is thus a betrayal of even greater proportions. Whether the right to parent is understood as man-made or the work of some greater author, parentalists argue that state interference with parental decision-making erodes the historical—and perhaps timeless—bedrock of fundamental personal liberties.

It turns out, though, that in the American legal tradition the roots of parental rights are relatively shallow. In fact, this is a tradition that treated paternal absolutism and its rights foundation as barbaric.²⁴ “That the father had any such absolute right to the care and custody of his children,” that the state lacked the authority to “control the conduct of the father in the education of his children”—these propositions—Joseph Story wrote, “would strike all civilized countries with astonishment.”²⁵ In the nineteenth century, court after court, and commentator after commentator, declared that the “old

21. Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 737 (1988); see, e.g., Elizabeth S. Scott and Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2406 (1995) (“Before the twentieth century, the combined status of biological parenthood and marriage signified a legal authority [over children] of almost limitless scope.”); Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 645 n.29 (1993) (Before the Industrial Revolution, “under common law, fathers had an absolute right to the custody of their children. The common law view [of paternal rights] represented a modification of Roman law under which children were fully defined as paternal property.”) (citation omitted).

22. I take the term “parentalist” from the strongly argued essay by Stephen Gilles *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937 (1996).

23. JAMES MADISON, THE SUPREME COURT ON CHURCH AND STATE, JAMES MADISON’S “MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS” 18 (Robert S. Alley ed., Oxford Univ. Press 1988).

24. See, e.g., *State v. Clottu*, 33 Ind. 409, 411 (1870) (“The duties and authority pertaining to the relation of parent and child have their foundations in nature, it is true. Nevertheless, all civilized governments have regarded this relation as falling within the legitimate scope of legislative control. Except in countries which lie in barbarism, the authority of the parent over the child is nowhere left absolutely without municipal definition and regulation.”).

25. JOSEPH STORY, 2 COMMENTARIES ON EQUITY JURISPRUDENCE 578 (§ 1347) (Boston, Hilliard, Gray & Co. 1836).

barbarity has gradually given way until the modern civilization concedes to the child the same human attributes which it acknowledges in the father.”²⁶ The New York State Supreme Court of Judicature was hardly alone when it declared that “[t]hose countries in which the father has a general power to dispose of his children, have always been considered barbarous. Our own law never has allowed the exercise of such power.”²⁷

Long before the Supreme Court’s seminal parenting cases took a due process turn, American courts had been working to fashion family law doctrine on the premise that parents are only entrusted with custody of the child, and then only as long as they meet their fiduciary duty to take proper care of the child. This theme was embraced enthusiastically by American jurists. It was with no little self-satisfaction that they endorsed a child-centered jurisprudence that bypassed the paternalistic family law of their British counterparts. American courts, to quote family law treatise writer Joel Bishop, travelled “more rapidly toward the light than in England.”²⁸ However deeply rooted paternal prerogatives were in British common law, such rights found tough purchase in American

26. JOEL PRENTISS BISHOP, 2 NEW COMMENTARIES ON MARRIAGE, DIVORCE, AND SEPARATION 454 (§ 1163) (Chicago, T. H. Flood & Co. 1891) (“Under laws which have prevailed in some ages and countries, rendering the child a sort of chattel in the hands of its father, who could sell or kill it, the paternal right to its custody was necessarily inflexible. But this old barbarity has gradually given way until the modern civilization concedes to the child the same human attributes which it acknowledges in the father.”) (footnote omitted).

27. *People ex rel. Barry v. Mercein*, 3 Hill 399, 411 (N.Y. Sup. 1842); *cf.* JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 205 (O.W. Holmes, Jr., ed., 12th ed. Littleton, Co., Fred B. Rothman & Co. 1873) (code of parent-child relations under Roman law “was barbarous and unfit for a free and civilized people”). Reviewing the history of custody case law, the New York State Court for the Correction of Errors observed that “the American cases . . . showed it to be the established law of this country that the court, or officer, were authorized to exercise a discretion, and that the father was not entitled to demand a delivery of the child to him, upon habeas corpus, as an absolute right.” *Mercein v. People ex rel. Barry*, 25 Wend. 64, 93 (N.Y. 1840). This was, the court pointed out, “also the law of England at the time of our separation from the mother country.” *Id.* But since that period the decisions of the English courts “appeared to have gone back to the principles of a semi-barbarous age, when the wife was the slave of the husband, because he had the physical power to control her, and when the will of the strongest party constituted the rule of right.” *Id.* The Court of Errors took evident pride in noting that “[t]his state has never been disgraced by laws so subversive of the welfare of infant children, of the rights of mothers, and of the morals of the people.” *Id.* at 105 (opinion of Alonzo C. Paige).

28. BISHOP, *supra* note 26, at 454–55 (§ 1163); *cf.* NORMA BASCH, FRAMING AMERICAN DIVORCE: FROM THE REVOLUTIONARY GENERATION TO THE VICTORIANS 24 (1999) (“From both a substantive and procedural perspective, divorce law in the early republic was light years beyond its English equivalent.”).

soil.²⁹ By the last quarter of the nineteenth century, one American court could confidently—admittedly, too confidently—proclaim that “[t]he substantial reality of the old common-law right [of custody] has faded almost to fiction under the ameliorating influence of the modern common law.”³⁰

This anti-patriarchal sentiment was no respecter of ideological boundary lines. It was congenial to the moral philosophers and social theorists of the Scottish Enlightenment, whose confidence in human progress was a philosophic seedbed for America’s revolutionary generation; to libertarian-minded contractualists of late-nineteenth century America, from whose lack of confidence in government emerged a model of social evolution that equated liberty with individual self-assertion and natural rights; and to the founding fathers of revolutionary socialism. It was a part of the nineteenth century’s great idiom of secular progress and pragmatic social engineering, a story of worldly advancement and human achievement in which the courts had their own significant role to play. If Marx and Engels took anti-patriarchalism to its radical end-point, they were travelling on a well-worn path.

Part I of this article looks at what might be the most formative application of stage-theory to family relations, John Millar’s *The Origins of the Distinctions of Ranks* (1771).³¹ Drawing on the

29. The great precedent regarding the proper response of the court was Lord Mansfield’s twofold declaration in *Rex v. Delaval*, 3 Burr. 1434, 1436 (K.B. 1763), that “[i]n cases of writs of habeas corpus directed to private persons, ‘to bring up infants,’” (1) “the Court is bound, *ex debito justitiae*, to set the infant free from an improper restraint,” but (2) the courts “are not bound to deliver them over to any body nor to give them any privilege.” The child’s deliverance was not an abstract question of rights. “It was a matter that ‘must be left to [the courts’] discretion, according to the circumstances that shall appear before them’; and if the child were of sufficient age, it was a matter on which the court would defer to his or her discretion.” See JEFFREY SHULMAN, *THE CONSTITUTIONAL PARENT: RIGHTS, RESPONSIBILITIES, AND THE ENFRANCHISEMENT OF THE CHILD* 48–49 (2014).

30. *Dixon v. Dixon*, 2 Pa. C.C. 125, 127 (Pa. Com. Pl. 1886) (internal quotation marks omitted); see also *Lippincott v. Lippincott*, 124 A. 532, 533 (N.J. Ch. 1924) (The day had long passed “when the rights of infants to be properly nurtured are subordinate to the strict legal rights of parents.”).

31. JOHN MILLAR, *THE ORIGIN OF THE DISTINCTION OF RANKS: OR, AN INQUIRY INTO THE CIRCUMSTANCES WHICH GIVE RISE TO INFLUENCE AND AUTHORITY IN THE DIFFERENT MEMBERS OF SOCIETY* (Aaron Garrett ed., 4th ed. 1806). The fourth edition, with an Introduction by Aaron Garrett, is available at http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=287&Itemid=27, as part of the Online Library of Liberty, a project of Liberty Fund, Inc. The third edition, with an Introduction by William Lehman, is reprinted in WILLIAM C. LEHMAN, *JOHN MILLAR OF GLASGOW 1735-1801: HIS LIFE AND THOUGHT AND HIS CONTRIBUTIONS TO SOCIOLOGICAL ANALYSIS* 167–322 (Cambridge Univ. Press 1960). Quotations herein to *THE ORIGIN OF THE DISTINCTION OF RANKS* are from the Lehman edition.

sociohistorical work of David Hume and Adam Smith, Millar provides an empirical account of how rights of personal authority (the right of husband over wife, father over children, and master over servant) arise out of and evolve in response to changing socioeconomic conditions. For Millar, these rights do not exist “above” or “before” society; rather, they are the product of material circumstances, and they evolve as the human condition, both socially and individually—for the two are intertwined³²—progresses. Parental rights are thus both adventitious (deriving from specific human conditions) and normative (deriving their authority from their contribution to human fulfillment). They change in response to changing conditions, and they ought to move, though they do not do so inevitably or permanently, in the direction of greater liberty and equality. The material and moral development of the parent-child relationship, Millar seeks to demonstrate, mirrors in microcosm the processes of social evolution.³³ The personal replicates the political; it shapes it and is shaped by it. For Millar, there is little doubt that parental authority “has been reduced within narrower bounds, in proportion to the ordinary improvements of society.”³⁴

A product of the Scottish Enlightenment’s focus on sociability, Millar’s historical critique of paternal authority translated comfortably to the individualistic currents of the nineteenth century. Part II of this article looks at the work of two prominent libertarian legal theorists: the British comparative cultural historian Henry Maine and the British moral philosopher Herbert Spencer. Though these writers took different routes through the emerging sociological territory of the nineteenth century, they both employed the tools of comparative and historical jurisprudence, and they agreed that the historical record dictates the conclusion that there is no social progress without the repudiation of patriarchy.

32. See, e.g., DANIEL I. O’NEILL, *THE BURKE-WOLLSTONECRAFT DEBATE: SAVAGERY, CIVILIZATION AND DEMOCRACY* 44 (2007) (noting how “successive stages of social development” were considered “part of a positive natural progression, analogous to that of an individual human being as he passed from infancy to maturity”).

33. Stage theory, for Millar and for such theorists as Adam Smith and Adam Ferguson, did not entail an unqualified belief in progress. On this point, Duncan Forbes very usefully compares the scientific evolutionism of Millar with the radical utopianism of more polemical writers like Joseph Priestly and William Godwin. See “*Scientific Whiggism*”: *Adam Smith and John Millar*, 7 *CAMBRIDGE J.* 643, 648–52 (1953).

34. LEHMAN, *supra* note 31, at 239.

Sir Henry Maine is most famous for his argument that society and its legal framework evolved “*from Status to Contract*.”³⁵ Less attention has been paid to the fact that Maine follows from his contractualist thesis: that the movement of “progressive” societies involves a steady reduction in both paternal power and family dependency. The early stage of the family empire, as described by Maine, was a true “domestic despotism.”³⁶ But imperial rule at home followed the course of the political empire, falling before a legal order based on voluntary association, under which the family, like society at large, is the product of free agreement among free individuals.

Herbert Spencer has the dubious distinction of being closely associated with—indeed, perhaps of being the philosophical progenitor of—the Supreme Court’s foray into classical liberalism (and its case law poster child, *Lochner v. New York*³⁷). The radical libertarianism of Spencer on parent-child relations is rarely discussed. Spencer applied his principle of equal liberty to besiege the archaic precincts of despotic paternalism—the “arbitrary rule of one human being over another, no matter in what form it may appear.”³⁸ Even when it appeared in the form of parental care. Spencer held a particular antipathy toward the assertion of despotic domestic sovereignty. “Uncover its roots,” he writes, “and the theory of paternal authority will be found not to grow out of man’s love for his offspring but out of his love of dominion.”³⁹

The libertarian treatise writer Christopher Tiedeman also belongs in this category.⁴⁰ His exposition of constitutional law, *A Treatise on the Limitations of Police Power in the United States*, has earned him a place in the pantheon of proponents of limited

35. HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* 170 (4th ed., London, John Murray 1870).

36. *Id.* at 137.

37. HENRY SPENCER, *SOCIAL STATICS; OR, THE CONDITIONS ESSENTIAL TO HUMAN HAPPINESS* (New York, D. Appleton & Co. 1872). Henry Spencer is most well known, thanks in no small part to Justice Oliver Wendell Holmes, Jr., for his *Social Statics*. See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer’s *Social Statics*.”).

38. SPENCER, *supra* note 37, at 183.

39. *Id.* at 211.

40. For a more in depth discussion of Tiedeman, see SHULMAN, *supra* note 29, at 67–73.

government.⁴¹ A foe of state paternalism and a fierce critic of socialism, Tiedeman nonetheless considered parental authority to be “in the nature of a trust, reposed in [the parent] by the State.”⁴² He makes the historical argument that when the ancient family evolved from a freestanding political entity to what he calls a “domestic relation,” children became autonomous members of the collective polity, at which point they “acquire[d] political and civil rights, independently of the father.”⁴³ For Tiedeman, “[t]he parent has no natural vested right to the control of his child”; to the contrary, parental control “may be extended or contracted, according as the public welfare may require.”⁴⁴

With its focus on economic conditions and its pragmatic approach to rights, stage-theory could be put to far more radical uses. In the socialist utopia imagined by Marx and Engels, the private family would vanish along with private property and profit. In fact, the Soviet Union had the opportunity to practice what it preached, unleashing the chains of domestic oppression with the 1918 Code on Marriage, the Family, and Guardianship. Part III of this article has two points: first, socialist history-making considered the dissolution of the bourgeois family as a key step toward a stateless state, and second, this repudiation of the family was no mere doctrinal abstraction for American legal professionals. As the Supreme Court weighed the competing claims of parent and state, the threat of a socialist takeover of the family—“the principle of the soviet”—was always close at hand.⁴⁵

In response to this unhappy prospect, the Court drew from the murky, mysterious well of state-constraining liberties we refer to as substantive due process. *Meyer* and *Pierce* widened the constitutional portal for a deeply individualistic and fiercely libertarian notion of natural law that the Court had opened in its economic regulation cases.⁴⁶ Compelled to seek some objective measure of what process is constitutionally due, the Court began to write its own narrative of social progress, a story whose theme was the deep-rootedness of

41. CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES (St. Louis, F. H. Thomas Law Book Co. 1886).

42. *Id.* at 553.

43. *Id.* at 552.

44. *Id.*

45. Transcript of Oral Argument, *supra* note 2, at 8.

46. Of course, natural law theory need not be dominated by a focus on individual rights. On natural rights “being mere means to the fulfillment of duties.” See KNUD HAAKNOSSEN, NATURAL LAW AND MORAL PHILOSOPHY: FROM GROTIUS TO THE SCOTTISH ENLIGHTENMENT 6 (Cambridge Univ. Press 1996).

deference to parental authority.⁴⁷ Repudiating statist, communistic models like Sparta, this story, premised on a cursory and tendentious treatment of ancient family law, put forward a new legal ethnohistory. Sparta was the barbaric beginning of the cultural negotiation between parent and state; social primitivism lay not in the patriarchal family but in the paternalistic state, and progress lay not in a movement from personal rights to public responsibilities, but just the reverse. With regard to domestic life, this narrative of progress was one of struggle: The struggle of parents against an ever encroaching state. In time, however, regulation of the family would no longer be considered one of the proper functions of government. By making a claim loosely based on historical sociology—that is, a claim about the origin and development of family life and parental authority—McReynolds co-opted the methodology of a substantial body of “scientific” research that had challenged and rejected the progressiveness of legal regimes affording great deference to parental rights. Now, the Supreme Court had its own history to recount. If history has an ash heap, and if the Court had its way, Sparta would be relegated to it.

I. John Millar: Anti-Patriarchalism and the Social State

For the moral philosophers of the Scottish Enlightenment—whose influence on American legal history and culture was considerable—sociability was the key to understanding human nature and civil society.⁴⁸ The principle of sociability takes society as the true

47. David Upham argues that the *Pierce* Court declined the invitation to embrace a spacious, natural rights position in support of parental authority. He notes that the Court “indicated that the right to direct a child’s education results not from a natural familial relation, but simply as a necessary concomitant to the power of custody, however defined and assigned. For the Court, it was not natural parenthood that gave both custodial and educational rights; it was custodial power—whether resulting from biology, positive law, or otherwise—that gave educational rights.” David R. Upham, *Pierce v. Society of Sisters, Natural Law, and the Pope’s Extraordinary—But Undeserved—Praise of the American Republic* (manuscript at 12), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2018396 (footnote omitted).

48. On the influence of the Scottish Enlightenment on American revolutionary ideology, see generally GARRY WILLS, *INVENTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE 168–255* (1978). *But see* Gordon S. Wood, “Influence in History” in *THE PURPOSE OF THE PAST: REFLECTIONS ON THE USES OF HISTORY* 17–29 (2008) (reviewing GARRY WILLS, *EXPLAINING AMERICA: THE FEDERALIST* (1st ed. 1981); *c.f.* WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 19–50 (3d ed. 1996)). On “The Bonds of Affection” in early American history, see MELVIN YAZAWA, *FROM COLONIES TO COMMONWEALTH: FAMILIAL IDEOLOGY AND THE BEGINNINGS OF THE AMERICAN REPUBLIC* 9–18 (1st ed. 1985). On “The Missing Dimension of Sociality” in modern law, see MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF SOCIAL DISCOURSE* 109–44 (1991).

state of nature. Mankind is made, and has always been made, for society; we are endowed with an instinctive fellow feeling, and it is from this natural well of human benevolence that rights arise. Within this moral framework, as Aaron Garrett explains, “[w]e have various duties and roles as humans, as parents, as parishioners, etc., which arise from different features of our human ‘frame’; they are natural to us, as sociable human beings who seek and need other human beings.”⁴⁹ “Natural” rights, in other words, are a product of our social roles and their accompanying social obligations. They enable social beings to act on their natural sympathetic endowment, to carry out the duties attendant upon the roles that social beings naturally assume. Garrett illustrates the idea this way: “We are granted a right to property, in order to feed our families and ourselves. We have a right over our children, in order to teach them and help them to grow.”⁵⁰ Or, as Mark Hopkins, a professor of moral philosophy at Williams College from 1836 to 1872, put it, “[a] man has rights in order that he may do right.”⁵¹

It is hardly surprising that moral theorists like Francis Hutcheson would tie the right to parent to the parent’s role as educational trustee. It is the parent who teaches the child how to cultivate natural benevolence, not just by direct instruction, but by example as well. If benevolence is the source of public duty, its practice begins at home. Its domestic starting point is the repudiation (contrary to “natural justice”) of the ancient idea that the father possesses a sovereign power over family affairs. The “grand end of the parental power,” Hutcheson writes:

49. Aaron Garrett, *Francis Hutcheson and the Origin of Animal Rights*, 45 J. HIST. OF PHIL. 243, 249 (2007); cf. NATHANIEL CHIPMAN, SKETCHES OF THE PRINCIPLES OF GOVERNMENT 34 (1793), *quoted in* NOVAK, THE PEOPLE’S WELFARE, *supra* note 48, at 34 (“The rights of man are relative to his social nature, and the rights of the individual exist, in a coincidence only with the rights of the whole, in a well-ordered state of society and civil.”); CHIPMAN, SKETCHES, 111–12 (“[Rights] arise in society, and are relative to it. Antecedently to that state, they could only exist potentially. The rights of all have a reciprocal relation to the rights of each, and can never be rightly apprehended, distinct from that relation.”). For a contemporary statement of this theme, we might turn to Michael Sandel: “[t]he morality of right . . . speaks to that which distinguishes us, the morality of good corresponds to the unity of persons and speaks to that which connects us.” LIBERALISM AND THE LIMITS OF JUSTICE 133 (1982); JOSEPH RAZ, THE MORALITY OF FREEDOM 256 (1986) (“The importance of liberal rights is in their service to the public good.”).

50. Garrett, *supra* note 49, at 249.

51. MARK HOPKINS, LECTURES ON MORAL SCIENCE 256 (1876), *cited in* NOVAK, *supra* note 48, at 33. For a recent effort to link rights and responsibilities, see generally JAMES E. FLEMING AND LINDA C. MCCLAIN, ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES (2013).

shows that it includes few of those rights contained in the *patria potestas* of the Romans. The child is a rational moral agent, with rights valid against the parents; though they are the natural tutors or curators, and have a right to direct the actions, and manage the goods of the child, for its benefit, during its want of proper knowledge.⁵²

Parental authority is a right only in the sense that a fiduciary has the right to fulfill his or her delegated social responsibility, assumed for the eventual enfranchisement of the child, and thus it is an authority limited in scope, time, and means.⁵³

By the time of the Scottish Enlightenment, this focus on parenting as mentorship for a state of common sociability had a strong pedigree among natural rights theorists. In *On The Duty of Man and Citizen According to the Natural Law*, to cite one example, jurist and philosopher Samuel von Pufendorf declared that “the fundamental natural law is this: that every man must cherish and maintain sociability, so far as in him lies.”⁵⁴ It follows from this that “all things which necessarily and universally make for that sociability are understood to be ordained by natural law, and all that confuse or destroy it forbidden.”⁵⁵ Whether we think of the state of nature “either as it is represented by a figment, or as it really exists,”⁵⁶ Pufendorf maintains it is no sociable place. It is a place of “immunity from all subjection” and thus equal subjection to “the rule of passion, war, fear, poverty, ugliness, solitude, barbarism, ignorance,

52. FRANCIS HUTCHESON, *A SYSTEM OF MORAL PHILOSOPHY* 192 (Glasgow: R. & A. Foulis; London: A. Millar & T. Longman 1755).

53. William Blackstone observes that, though sufficient to keep a child in order, “[t]he power of a parent by our English laws is much more moderate” than that prescribed by the municipal law of other nations. Blackstone rejects a “very large and absolute authority” for the parent, insisting that the parent may “lawfully correct his child,” but only “in a reasonable manner.” Correction must be “for the benefit of [the child’s] education.” The power of the parent is finite in duration as well as scope, for it is directed toward the time, that is, when “the empire of the father . . . gives place to the empire of reason.” The child is “enfranchised by arriving at years of discretion.” 1 *COMMENTARIES ON THE LAWS OF ENGLAND* 440–41 (Oxford, Clarendon Press, 1765).

54. SAMUEL VON PUFENDORF, 2 *ON THE DUTY OF MAN AND CITIZEN ACCORDING TO THE NATURAL LAW* 19 (Frank Gardner Moore trans., William S. Hein & Co. 1682 ed. 1927).

55. *Id.*

56. *Id.* at 90.

savagery.”⁵⁷ Nasty, brutish, and short: This is what natural liberty looks like, and we gladly exchange it for the adventitious states,⁵⁸ the social bonds we cultivate as members of the civil state. Because “[t]he nature of man is so constituted that the race cannot be preserved without the social life,”⁵⁹ the parent’s task is to “bring up his children well, that they may turn out fit members of human society.”⁶⁰

Pufendorf cites two main causes from which the authority of parents over their children arises. First, the natural law “in commanding man to be social, enjoined upon parents the care of their children.”⁶¹ That parents might not neglect this care, “[n]ature at the same time implanted in them the tenderest affection for their offspring.”⁶² The focus here is on parental duty, not parental right, as natural. For the proper care of children, “there is needed the power to direct the actions of children,” but it is a power to direct, not control; and it is a power to direct the actions of children “for their own welfare, which they do not yet understand themselves, owing to their lack of judgment.”⁶³ Second, Pufendorf contends that parental authority “rests upon the tacit consent also of the offspring.” This is, needless to say, a presumed consent, but rightly presumed because of the following proposition:

[I]f an infant had had the use of reason at the time of its birth, and had seen that it could not save its life without the parents’ care and the authority therewith connected, it would gladly have consented to it, and would in turn have made an agreement with them for a suitable bringing-up.⁶⁴

The parents’ authority, Pufendorf stresses, “is established when they take up the child and nurture it, and undertake to form it, to the best of their ability, into a fit member of human society.” It is the nurturing task that provides the proper measure of parental authority. Parents have only “so much authority . . . as suffices for this

57. *Id.* at 91.

58. *Id.* at 104.

59. *Id.* at 19.

60. *Id.* at 98.

61. *Id.* at 97.

62. *Id.*

63. *Id.*

64. *Id.*

purpose.”⁶⁵ This fiduciary model of the parent-child relationship would have great appeal to consent-oriented political theorists like John Locke, and no little influence on the political temper and educational practices of the emerging American republic.⁶⁶

It was John Millar’s accomplishment to bring natural law speculation about the origin of parental authority down to earth. He did so by describing in historical terms how forms of authority, including parental authority, arise from and evolve in response to specific material conditions. Millar’s *The Origin of the Distinction of Ranks* (1771; revised in 1779) has been hailed as “one of the most important works in all the history of family studies.”⁶⁷ By looking at the family through the lens of “conjectural” history, Millar was able to present a history of personal rights as the product of social progress. In his work, as Ronald L. Meek claims, “the new social science of the Enlightenment comes of age”: “No one before Millar had ever used a materialist conception of history . . . so ably and so consistently to illuminate the development of such a wide range of social phenomena.”⁶⁸

65. *Id.* at 98.

66. See SHULMAN, *supra* note 29, at 23–29, 36–39.

67. Arland Thornton, John Millar, and Other Scholars of the 1700s and 1800s Using the Developmental Paradigm, Reading History Sideways, and International Cross-Sectional Data to Reach Conclusions about Changes in Family Relationships and Practices 3 (2005) (unpublished manuscript) (on file with the University of Michigan Population Studies Center), http://developmentalidealism.org/pubs/docs/thornton_John_MillarOthersWorkingPaper.pdf.

On Millar’s life and career, see LEHMAN, *supra* note 31, at 7–86; see also John Craig’s “Account of the Life and Writings of John Millar, Esq.,” *Introduction to the Fourth Edition* of JOHN MILLAR, *THE ORIGIN OF THE DISTINCTION OF RANKS: OR, AN INQUIRY INTO THE CIRCUMSTANCES WHICH GIVE RISE TO INFLUENCE AND AUTHORITY IN THE DIFFERENT MEMBERS OF SOCIETY* (4th ed. 1806). For treatment of Millar’s work, see O’BRIEN, *supra* note 9, at 89–96; JOHN DWYER, SMITH, MILLAR AND THE NATURAL HISTORY OF LOVE, in *THE AGE OF THE PASSIONS: AN INTERPRETATION OF ADAM SMITH AND SCOTTISH ENLIGHTENMENT CULTURE* 81–100 (1998); MICHAEL IGNATIEFF, JOHN MILLAR AND INDIVIDUALISM, in *WEALTH AND VIRTUE: THE SHAPING OF POLITICAL ECONOMY IN THE SCOTTISH ENLIGHTENMENT* 317–43 (Istvan Holt and Michael Ignatieff eds. 1983); LEHMAN, *supra* note 31, at 89–163; Paul Bowles, *Millar and Engels on the History of Women and the Family*, 12 *HIST. OF EUR. IDEAS* 595 (1990); Paul Bowles, *John Millar, The Four-Stages Theory, and Women’s Position in Society*, 16 *HIST. OF POL. ECON.* 619 (1984); MEEK, *supra* note 9, at 160–76.

68. MEEK, *supra* note 9, at 161. In his biographical account of Adam Smith, Dugald Stewart explains how conjectural history works:

“[We] are under the necessity of supplying the place of fact by conjecture; and when we are unable to ascertain how men have actually conducted themselves upon particular occasions, of considering in what manner they are likely to have proceeded, from the principles of their nature, and the circumstances of their external situation. In such inquiries, the detached facts which travels and voyages afford us, may frequently serve as

Though tender affection for one's offspring may be a feature of human nature, the shape that that affection takes is, for Millar, a social phenomenon. His treatment of family relations and the feelings that "belong" to them as the product of particular socioeconomic circumstances boldly rejects any idealistic notion of paternal mastery. The husband is not the wife's natural superior, nor does some higher law proclaim the parent to be the child's natural guardian. There is nothing "natural" about these relationships. They evolve (or fail to) as society evolves (or fails to).⁶⁹ Millar does speak of natural rights "which belong to mankind antecedent to the formation of civil society."⁷⁰ In a state of nature, "we should be entitled to maintain our personal safety, to exercise our natural liberty, so far as it does not encroach upon the rights of others; and even to maintain a property in those things which we have come to possess, by original occupancy, or by our labour in producing them."⁷¹ Yet if these rights are not entirely lost when we enter into society, they are "differently modified," and a part of them is resigned "for the sake of those advantages to be derived from the social state."⁷²

The genius of the social state, Millar writes, is to compensate us for the resignation of natural rights, and to burden us with restraints no greater "than are necessary for the general prosperity and happiness."⁷³ A political system may be "defective by too great strictness of regulation," but, Millar hastens to add, more "have

land-marks to our speculations; and sometimes our conclusions, *a priori*, may tend to confirm the credibility of facts, which on a superficial view, appear to be doubtful or incredible. . . . To this species of philosophical investigation, which has no appropriated name in our language, I shall take the liberty of giving the title *Theoretical or Conjectural History*."

DUGALD STEWART, ACCOUNT OF THE LIFE AND WRITINGS OF ADAM SMITH, in ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS IV (London, Charles Knight 1835).

69. See O'BRIEN, *supra* note 9, at 88 (observing that although the sociological impulse led to a "highly contingent sense" of what is natural to human beings, this materialism "was often tempered by jurisprudential ascriptions of 'naturalness' to the historical process itself, or to a sense of underlying uniformity in the way that different societies experience each stage").

70. JOHN MILLAR, AN HISTORICAL VIEW OF THE ENGLISH GOVERNMENT FROM THE SETTLEMENT OF THE SAXONS IN BRITAIN TO THE REVOLUTION OF 1688 294 (4th ed., London, J. Mawman 1818). On Millar and natural law, see HAAKONSSON, *supra* note 46, at 154–81.

71. MILLAR, *supra* note 70, at 294.

72. *Id.* Similarly, William Blackstone observes that even where a right arises from nature, "the particular circumstances and mode of doing it become right or wrong, as the laws of the land shall direct." 1 COMMENTARIES, *supra* note 53, at 55.

73. MILLAR, *supra* note 70, at 295.

deviated widely from the purpose by too great laxity.”⁷⁴ And this laxity allows for a tyranny of individuals or of ranks that produces nothing “but a residue of despotism”⁷⁵:

[T]he greatest number [of political systems] have almost totally failed in producing happiness and security from the tyranny of individuals, or of particular orders and ranks, who, by . . . acquiring exorbitant power, have reduced their fellow-citizens into a state of servile subjection.⁷⁶

The same might be said of family “systems.” Indeed, for Millar, the treatment of the family’s vulnerable members—women and children—serves as a barometer of social evolution.⁷⁷ The tyranny of individuals in the private life of the family and the public life of the community—it is one and the same.⁷⁸ The new cultural historiography of the eighteenth century (so reminiscent of the new historicism of the late twentieth century) made the interior life of the family, with its shifting social dynamics, as much the scholar’s business as are public affairs of state.

Family life and the course of its evolution are not identical from culture to culture, which Millar attributes to “the differences of situation, which have suggested different views and motives of action to the inhabitants of particular countries.”⁷⁹ These differences of situation are the material conditions of culture:

74. *Id.*

75. *Id.* at 296.

76. *Id.* at 295.

77. *Cf.* O’BRIEN, *supra* note 9, at 88 (“In many conjectural versions of history, the figure of the woman functioned as a barometer of social evolution, revealing the deep structure of each stage of development.”). O’Brien writes that almost all Scottish writers “equated the sexual and political subjection of women with early, barbarous phases of development, and good treatment of them with the advance of civilization.” *Id.*

78. Mary Catherine Moran, “*The Commerce of the Sexes*”: *Gender and the Social Sphere in Scottish Enlightenment Accounts of Civil Society*, in *PARADOXES OF CIVIL SOCIETY: NEW PERSPECTIVES ON MODERN GERMAN AND BRITISH HISTORY* 61 (Frank Trentmann ed., 2000). Moran remarks that “Scottish Enlightenment accounts of the rise of civil society thus break down the distinction between public and private that is one of the founding assumptions of classical historiography. The private concerns of household and economy are merged with the public concerns of government and polity in order to trace the progress of man through the various stages of society.” *Id.* at 68.

79. LEHMAN, *supra* note 31, at 83.

Of this kind, are the fertility or barrenness of the soil, the nature of its productions, the species of labour requisite for procuring subsistence, the number of individuals collected together in one community, their proficiency in arts, the advantages which they enjoy for entering into mutual transactions, and for maintaining an intimate correspondence.⁸⁰

Such material circumstances—in effect, a people’s mode of subsistence—Millar maintains, “have a prodigious influence upon the great body of a people.”⁸¹ Particular circumstances “giv[e] a peculiar direction” to a people’s inclinations and pursuits; they are “productive of correspondent habits, dispositions, and ways of thinking.”⁸²

Particular circumstances notwithstanding, social progress, if unimpeded, moves “from ignorance to knowledge, and from rude to civilized manners.”⁸³ Advances in the material world produce alterations in the moral world:

By such gradual advances in rendering their situation more comfortable, the most important alterations are produced in the state and condition of a people: their numbers are increased; the connections of society are extended; and men, being less oppressed with their own wants, are more at liberty to cultivate the feelings of humanity: property, the great source of distinction among individuals, is established; and the various rights of mankind, arising from their multiplied connections, are recognised and protected: the laws of a country are thereby rendered numerous; and a more complex form of government becomes necessary, for distributing justice, and for preventing the disorders which proceed from the jarring interests and passions of a large and opulent community.⁸⁴

80. *Id.* at 83–84.

81. *Id.* at 84.

82. *Id.* at 85.

83. *Id.* at 176.

84. *Id.* Millar borrowed from the four-fold model of Adam Smith. See ADAM SMITH, LECTURES ON JURISPRUDENCE 210–21 (R. L. Meek, D. D. Raphael, & P. G. Stein eds., 1978); cf. J. G. A. POCOCCO, POLITICS, LANGUAGE AND TIME 102 (1973) (“[Stage-theorists] were able furthermore to relate the historicisation of property to the historicisation of social personality; as man moved through these successive phases of

Human society is the fruit of human cultivation—cultivation of the natural world, of the humane feelings—not the product of pre-social contracting.⁸⁵ What is natural is the human capacity to civilize nature. (Man “has in himself a principle of progression, and a desire for perfection,” writes Adam Ferguson in *An Essay on the History of Civil Society* (1767). So it is improper to say “that he has quitted the state of his nature, when he has begun to proceed; or that he finds a station for which he was not intended, while, like other animals, he only follows the disposition, and employs the powers that nature has given.”⁸⁶) The natural order *is* the social order. The social order *is* the moral order, the order that is built on the human “disposition and capacity for improving [one’s] condition, by the exertion of which, he is carried on from one degree of advancement to another.”⁸⁷ Thus, Garrett can describe the *Ranks* as “offer[ing] the elements of an empirical moral theory.”⁸⁸ Daniel J. O’Neill puts it nicely when he writes that the theorists of the Scottish Enlightenment sought “to trace how human beings . . . developed a second nature in the move from ‘rude’ to ‘civil’ society, the latter state in some sense a convention, but a convention that was entirely natural to human beings, as ‘art itself is natural to man.’”⁸⁹

Millar goes so far as to reject a concept that remains today one of the most commonplace of family law commonplaces: That parents have a natural affection for the child that causes them to secure the child’s welfare. Millar observes that “parental fondness . . . has been found so extensive and universal that it is commonly regarded as the

relationship with his environment, his social, political, and cultural needs and aptitudes, and with them his intellectual and imaginative capacities, changed accordingly. A historical science of culture now seemed possible.”)

85. Cf. 3 DAVID HUME, *THE PHILOSOPHICAL WORKS OF DAVID HUME* 465–87 (Eugene F. Miller ed., Liberty Fund, Inc. 1985).

86. ADAM FERGUSON, *AN ESSAY ON THE HISTORY OF CIVIL SOCIETY* 14 (Fania Oz-Salzberger ed., Cambridge Univ. Press 1995) (1767).

87. LEHMAN, *supra* note 31, at 176.

88. Aaron Garrett, *Introduction* to JOHN MILLAR, *THE ORIGIN OF THE DISTINCTION OF RANKS: OR, AN INQUIRY INTO THE CIRCUMSTANCES WHICH GIVE RISE TO INFLUENCE AND AUTHORITY IN THE DIFFERENT MEMBERS OF SOCIETY* at xvi (Aaron Garrett ed., 4th ed. 1806); cf. O’NEILL, *supra* note 31, at 22–23 (“The basic goal of the Scottish Enlightenment was to establish what David Hume, one its leading lights, termed a ‘Science of Man’ applicable to the increasingly complex commercial societies of Europe. The Scots sought a scientific understanding of individual ideas and beliefs as the key to understanding their social world and its historical development. They aimed, that is, to provide an empirical account of human mental processes as the first step in analyzing human social arrangements and their development over time.”) (footnotes omitted).

89. O’NEILL, *supra* note 32, at 34 (quoting FERGUSON, *supra* note 85, at 12).

effect of an immediate propensity,”⁹⁰ but the real origin of such solicitude is to be explained in more pragmatic terms.⁹¹ It is only to be expected that the father, as the head of his family, “should have an inclination to promote the welfare and prosperity of his children.”⁹² This inclination is reinforced by “[t]he helpless and miserable state in which [children] are produced,” which can hardly fail “to excite [the father’s] pity, and to solicit, in a peculiar manner, the protection of that person from whom they have derived their existence.”⁹³ As children grow, the father “is more warmly engaged on their behalf in proportion to the efforts which he has made for their benefit, and his affection for them is increased by every new mark of his kindness.”⁹⁴ Paternal fondness grows by the same behavioralistic principles as any relation of fondness does⁹⁵:

By retaining them afterwards in his family, which is the foundation of a constant intercourse, by procuring their assistance in the labour to which he is subjected, by connecting them with all his plans and views of interest, [the father’s] attachment is usually continued and strengthened from the same habits and principles which, in other cases, give rise to friendship or acquaintance.⁹⁶

90. See LEHMAN, *supra* note 31, at 229–38.

91. See Ignatieff, *supra* note 67, at 319–20 (speaking of “the demolition of the ‘innateness’ of family feeling”).

92. LEHMAN, *supra* note 31, at 229.

93. *Id.*

94. *Id.*

95. It also diminishes by the same behavioristic principles. See MILLAR, *supra* note 70, at 256–57 (“The effects of opulence and luxury are no less hurtful to the parental and filial affections. The father, immersed in the sordid pursuits of the world, is apt to look upon his family as a tax upon his pleasures, and to find himself elbowed by children; who, as they grow up in years, require from their increasing demands, a suitable retrenchment of his own personal expences.”); cf. Ignatieff, *supra* note 67, at 337–41 (describing Millar’s concern that commercial society could be hurtful to family affections).

96. LEHMAN, *supra* note 31, at 229. Moran has observed that some writers “treat maternal, but not paternal, affection as natural and unchanging.” Moran, *supra* note 78, at 74; cf. HENRY HOME (Lord Kames), 1 SKETCHES OF THE HISTORY OF MAN 280–81 (James A. Harris ed., Liberty Fund 1774) (based on 3d ed. 2007) (“It is wisely ordered by Providence, that the affection of a woman to her children commences with their birth; because, during infancy, all depends on her care. As during that period, the father is of little use to his child, his affection is but slight, till the child begin to prattle and show some fondness for him. The exposing an infant therefore shows, that the mother was little regarded: if she had been allowed a vote, the practice never would have obtained in any country.”).

The “science” of stage-theory allowed Millar to chart the historical course of parent-child relations—and how that course led away from a primitive domestic patriarchy. The jurisdiction of the father, Millar notes, is of the same nature as that of the husband: the power of the strong to oppress the weak. In primitive societies, this authority is absolute. The young child is entirely governed by “the severe and arbitrary will of the father.”⁹⁷ This is hardly a matter of consent. Children have no choice but to submit to the family sovereign:

From their inferiority in strength, they are in no condition to dispute his commands; and being incapable of maintaining themselves, they depend entirely upon him for subsistence. To him they must apply for assistance, whenever they are exposed to danger, or threatened with injustice; and looking upon him as the source of all their enjoyments, they have every motive to court his favour and to avoid his displeasure.⁹⁸

But it is not just children who suffer under the yoke of parental authority. The adult who “has been accustomed from his infancy to serve and to obey his father”⁹⁹ will carry with him—within him—the lasting effects of a childhood of acquiescence:

Even after he is grown up, and has arrived at his full strength of body, and maturity of judgment, he retains the early impressions of his youth, and remains in a great measure under the yoke of that authority to which he has hitherto submitted. He shrinks at the angry countenance of his father, and trembles at the power of that arm whose severe discipline he has so often experienced, and of whose valour and dexterity he has so often been a witness. He thinks it the highest presumption to dispute the wisdom and propriety of those commands to which he has always listened, as to an oracle, and which he has been taught to regard as the infallible rule of his conduct. He is naturally led to acquiesce in that jurisdiction which he

97. LEHMAN, *supra* note 31, at 230.

98. *Id.*

99. *Id.* at 234.

has seen exerted on so many different occasions, and which he finds to be uniformly acknowledged by all the members of the family.¹⁰⁰

It was the “gradual advancement of a people in civilized manners” that “limit[ed] and restrain[ed] this primitive jurisdiction.”¹⁰¹ One might think that these ameliorating circumstances softened the paternal character and made the father himself less despotic, Millar says. To some extent, this is the case. In a life of affluence and security, the father can afford to moderate his power and “to cultivate those arts which tend to soften and humanize the temper”;¹⁰² engaged in a world of business and social intercourse, the father had to “conform[] to the humours of those with whom he converses,” to become more patient of being contradicted, and less apt to indulge in bouts of passion.¹⁰³ Yet such humanizing is not the first reason Millar advances for greater restraint on the part of the family patriarch. Millar notes that “[w]hen different families are united in a larger society,” the father conducts himself on a less private stage. His actions will “excite the attention of the public.” And this publicness will subject the father to the scrutiny of others who have a concern for the welfare of the child:

When different families are united in a larger society, the several members of which have an intimate correspondence with each other, it may be expected that the exercise of domestic authority will begin to excite the attention of the public. The near relations of a family, who have a concern for the welfare of the children, and who have an opportunity of observing the manner in which they are treated, will naturally interpose by their good offices, and endeavour to screen them from injustice and oppression. The abuses which, on some occasions, are known and represented with all their aggravating circumstances, will excite indignation and resentment, and will at length give rise to such regulations as are necessary for preventing the like disorders for the future.¹⁰⁴

100. *Id.*

101. *Id.* at 238.

102. *Id.*

103. *Id.* at 238–39.

104. *Id.* at 238.

What is more, progress brings about a weakening of the father's power, allowing other members of the family to raise themselves "to a state of freedom and independence."¹⁰⁵ In nations that have made the greatest economic advances, "great liberty is enjoyed by the members of every family; and the children are no farther subjected to the father than seems necessary for their advantage."¹⁰⁶ The introduction of "commerce and manufactures" tends to disperse members of the family; children leave home to learn a profession and earn a livelihood, and, in the process, "are put in a condition to procure a maintenance without having recourse to the [father's] bounty."¹⁰⁷ The paternal jurisdiction is "reduced within narrower bounds, in proportion to the ordinary improvements of society."¹⁰⁸ By material necessity, Millar writes, children "are emancipated from their father's authority."¹⁰⁹ Indeed, Millar concludes his discussion of parental jurisdiction by cautioning against the tendency of a commercial age to a lessening of parental authority of such magnitude that it threatens "proper domestic subordination."¹¹⁰

The language of "proper" domestic jurisdiction reminds us that, for Millar, the parent should have only the degree of authority consistent with "[t]he interest of those who are governed."¹¹¹ Like mankind in general, the child must be allowed to follow the natural course of human maturation from infancy to adulthood.¹¹² This

105. *Id.* at 239.

106. *Id.* at 243.

107. *Id.* at 239.

108. *Id.*

109. *Id.*

110. *Id.* at 243 ("The tendency, however, of a commercial age is rather towards the opposite extreme, and may occasion some apprehension that the members of a family will be raised to greater independence than is consistent with good order, and with a proper domestic subordination. As, in every country, the laws enforced by the magistrate are in a great measure confined to the rules of justice, it is evident that further precautions are necessary to guard the morals of the inhabitants, and that, for this purpose, the authority of parents ought to be such as may enable them to direct the education of their children, to restrain the irregularities of youth, and to instil those principles which will render them useful members of society."). On Millar's view that the commercial spirit could wreak havoc in "the private and intimate relations of human life," see Ignatieff, *supra* note 67, at 332-43.

111. *Id.*

112. The analogy between child development and social evolution was a Scottish Enlightenment commonplace. See WILLIAM ROBERTSON, THE HISTORY OF AMERICA (1777), in 2 WORKS OF WILLIAM ROBERTSON 99 (Edinburgh, Thomas Nelson 1840) ("As the individual advances from the ignorance and imbecility of the infant state to vigour and

interest “is the chief circumstance which ought to regulate the powers committed to a father, as well as those committed to a civil magistrate.”¹¹³ More authority than this is not proper. Whenever the prerogative of the magistrate, familial or paternal, “is further extended than is requisite for this great end, it immediately degenerates into usurpation, and is to be regarded as a violation of the natural rights of mankind.”¹¹⁴ Echoing Locke’s equation of public and private patriarchalism, Millar takes a (somewhat gratuitous) swipe at Locke’s nemesis, Sir Robert Filmer, “who found[ed] the doctrine of passive obedience to a monarch, upon the unlimited submission which children owe to their father.”¹¹⁵ This, Millar contends, is a position that refutes itself. “To say that a king ought to enjoy absolute power because a father has enjoyed it,” he argues, “is to defend one system of oppression by the example of another.”¹¹⁶

“By focusing on familial rights,” Garrett observes, “Millar brought the problem of natural rights into sharp focus.”¹¹⁷ Millar’s ethnohistory of the family, his “stadial genealogy of particular rights” (Garrett’s phrase), is built on the notion that rights ought to be construed as social, not individualistic; as dynamic, not static.¹¹⁸ If the natural condition of human life is social, then, as O’Neill remarks, “‘natural rights’ have to be discussed within the context of natural sociability”; they cannot “be divorced either conceptually or normatively from social existence.”¹¹⁹ For Millar, this is as true of the right to parent as any other. The nature and scope of parental authority, grounded as they are on the educative role of the parent, evolve in response to the changing material conditions and moral circumstances of social life. Even this most “natural” of rights is artificial; even this most personal of rights is socially constructed. If this is so, Garrett is right to ask the question inevitably, if implicitly, posed by John Millar’s empirical moral theory: “What is one to make of natural rights at all?”¹²⁰

maturity of understanding, something similar to this may be observed in the progress of the species.”).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. Garrett, *supra* note 88, at xv.

118. *Id.*

119. O’NEILL, *supra* note 32, at 34.

120. Garrett, *supra* note 88, at xv (“Millar’s *Ranks* goes beyond [Hume and Smith] in providing a stadial genealogy of particular rights and showing that rights should be understood as evolving responses to human needs. By focusing on familial rights Millar

II. Henry Maine and Herbert Spencer: Anti-Patriarchalism and the Libertarian State

The work of comparative historical jurisprudence was carried on by nineteenth-century libertarian legal scholars and social theorists, though it was sometimes carried to places where the moral sentiments of the Scottish Enlightenment were left far behind. In British and American law, contractualist and libertarian-minded writers relied on stage-theory to outline a course of progress marked by a growing commitment to individual rights. As free-market economics and pseudo-Darwinian theory gained a hold on jurisprudential trends, social progress would be increasingly identified with the protection of personal rights from the reach of the paternalistic state.¹²¹ One might assume that the libertarian theorists of the second half of the nineteenth century, with their gaze concentrated on personal freedom, would consistently support a strong regime of parental rights. But this is not the case. It is largely forgotten, or largely ignored, by those who posit a longstanding heritage for parental rights that some influential anti-statists also objected to paternal authoritarianism as incompatible with the progress of liberty.

Sir Henry Maine is familiar to students today—if, indeed, he is familiar—for his contractualist reading of legal and social history. Herbert Spencer is perhaps known as a rights theorist who bore the brunt of Justice Oliver Wendell Holmes' considerable powers of caustic comment. Today, these writers find themselves subsumed in the general animosity to all things Lochnerian. It would be more accurate to say *almost* all things, for one aspect of Lochnerian jurisprudence has had a celebrated, if not uncontroversial, legacy. It was the *Lochner*-era Court that pointed out the means by which unenumerated rights would make their constitutional appearance; and while the use of substantive due process to guarantee economic liberties, such as the right to contract, in time would fall out of favor

brought the problem of natural rights into sharp focus. If the most basic social rights are mutable and artificial, and if man is social, what is one to make of natural rights at all? Hume had pointed the way in his analyses of property . . . and of the history of love by implying that all rights are to some degree adventitious, and natural rights of the Lockean sort are highly questionable. Millar's contribution was to push this analysis in a single-minded way within a well-worked-out historical theory." (footnote omitted).

121. Think Adam Smith of *The Wealth of Nations* divorced from Adam Smith of *The Theory of Moral Sentiments*. This is known as "The Adam Smith Problem," on which there is a very considerable body of literature. A recent treatment can be found in RUSS ROBERTS, *HOW ADAM SMITH CAN CHANGE YOUR LIFE: AN UNEXPECTED GUIDE TO HUMAN NATURE AND HAPPINESS* (2014).

(though not entirely disappear¹²²), the personal rights heritage of *Meyer* and *Pierce* would lie dormant, only to flourish in a second coming of unenumerated rights.

A. Henry Maine

Sir Henry Maine was, to use his own comparison, something of a juridical geologist.¹²³ For him, the rudimentary ideas of the ancients were “what the primary crusts of the earth are to the geologist,” an empirical record of our own legal lineage.¹²⁴ And a far more useful record than metaphysical speculation about a Law of Nature or the unverifiable assumptions of Social Compact theory.¹²⁵ It is only upon a base of “sober research into the primitive history of society and law,”¹²⁶ Maine concludes, that a science of jurisprudence can be founded.

For Maine, the path of social progress is the path away from patriarchalism.¹²⁷ In the “infancy of the race, men could only account for sustained or periodically recurring action by supposing a personal agent.”¹²⁸ The wind, the sun, the earth were divine persons. So, too, in the moral world, where the king adjudicated disputes by divine inspiration, “[a] supernatural presidency is supposed to consecrate and keep together all the cardinal institutions of those times, the State, the Race, and the Family.”¹²⁹ The rule of the patriarch was more akin, in Maine’s words, to commands—and capricious ones at that—than to laws.¹³⁰ In time, the authority of the king “gave way to

122. See generally David N. Mayer, *Substantive Due Process Reconsidered: The Rise and Fall of Liberty of Contract*, 60 *MERCER L. REV.* 536 (2009).

123. See generally GEORGE A. FEAVER, *A BIOGRAPHY OF SIR HENRY MAINE, 1822–88* (1969) (detailing Maine’s life and career).

124. MAINE, *supra* note 35, at 3.

125. *Id.*

126. *Id.*

127. *Id.* at 104; see also Adam Kuper, *The Rise and Fall of Maine’s Patriarchal Society*, in *THE VICTORIAN ACHIEVEMENT OF SIR HENRY MAINE: A CENTENNIAL REAPPRAISAL* 99–110 (Alan Diamond ed., 1991). On Maine and patriarchy, Kuper suggests that Maine’s “patriarchal theory is best read as a direct inversion of the radical notion of the state of nature. The traditional radical theory was that men were originally free and equal individuals, who chose to combine, by agreeing to a contract, in order to protect their interests. Later, however, despots managed to pervert the contractual order, and to subjugate free men. Patriarchal theory asserts precisely the opposite. Maine insists again and again that the original state of society was despotic. It was a society not of individuals but of family corporations, and the patriarch had untrammled control over his dependents.”

128. MAINE, *supra* note 35, at 4.

129. *Id.* at 6.

130. See *id.* at 8–9.

the dominion of aristocracies,” political or religious ruling councils of chiefs who usurped the royal lawmaking role.¹³¹ This conciliar rule was not legitimated “by supposing an extra-human interposition.”¹³² Rather, the claim of the “juristical oligarchy . . . [was] to monopolize the *knowledge* of the laws, to have the exclusive possession of principles by which quarrels are decided.”¹³³ From monopolistic authority we move to the great epoch of public codes, which might afford protection “against the frauds of the privileged oligarchy and also against the debasement of the national institutions.”¹³⁴ However, the laws of social development do not guarantee what Maine calls the “upward march” of society.¹³⁵ The codes themselves can act as a form of patriarchal despotism—reifying ancient superstitions, rendering the law little more than a fetishistic observance—to be obeyed as servilely as the most despotic of rulers.

The evolution of the family, too, follows the path away from patriarchalism. The “natural” family is itself a legal fiction, Maine observes. In tracing the origin of society, he remarks that it would be a simple explanation to “suppose that communities began to exist wherever a family held together instead of separating at the death of its patriarchal chieftain.”¹³⁶ The assumption that “kinship in blood is the sole possible ground of community”¹³⁷ held fast as Families aggregated to form Houses, Houses aggregated to form Tribes, and, finally, Tribes aggregated to form the Commonwealth.¹³⁸ Members of the Commonwealth owed their political status, it was presumed, to a common blood line. According to Maine, this fundamental assumption is false.¹³⁹ In fact, the family was not held together by blood, but by the admission of others outside the blood line. The family “was being constantly adulterated by the practice of adoption,”¹⁴⁰ that is, by “the absorption of strangers within its circle.”¹⁴¹ From Family to House to Tribe to Commonwealth, the

131. *Id.* at 10.

132. *Id.* at 12.

133. *Id.*

134. *Id.* at 18.

135. *Id.* at 19.

136. *Id.* at 128.

137. *Id.* at 129.

138. *Id.* at 128–29.

139. *Id.* at 129.

140. *Id.* at 130.

141. *Id.* at 133.

composition of society, though assumed to be natural, is, in fact, “in great measure artificial.”¹⁴²

Though not descended from a common ancestor, the members of the family nonetheless used this fiction to hold together the primary social unit. The theory of common descent cloaked the practical reality of “common obedience to the . . . highest living ascendant.”¹⁴³ The family was the “empire of its ruler,” held together by the patriarchal authority of its chieftain, the type of command most commonly known by its Roman name, *Patria Potestas*.¹⁴⁴ “It is this patriarchal aggregate,” claims Maine, “which meets us on the threshold of primitive jurisprudence.”¹⁴⁵ In the early stage of the family empire, the father—or, more precisely, the eldest male parent—governed a true “domestic despotism.” His word was law, his dominion supreme. The father held over his children the power of life and death, of uncontrolled corporal punishment, of dictating marriage and divorce; and like the rest of the father’s property, the child could be sold or transferred by adoption.

Change in family law—here, as elsewhere, Maine relies on the law of ancient Rome—was slow in coming. When it did come, Maine argues, it was part of a greater alteration in what might be called legal ontology. The ancient law was “binding not on individuals, but on Families.”¹⁴⁶ According to Maine, ancient family lawmaking reached only to the paternal head of the family. To every other family member, “the rule of conduct is the law of his home, of which his Parent is the legislator.”¹⁴⁷ The ancient law is thus “so framed as to be adjusted to a system of small independent corporations,” each family being “perpetual and inextinguishable.”¹⁴⁸ Yet, as Millar suggested, the public sphere, with all its legal apparatus and social pressure, tends to enlarge its scope, and encroachments upon the family’s private domain are inevitable: “[A]t every point of the progress, a greater number of personal rights and a larger amount of property are removed from the domestic forum to the cognizance of the public tribunals.”¹⁴⁹

142. *Id.* at 130.

143. *Id.* at 133.

144. *Id.*

145. *Id.* at 133–34.

146. *Id.* at 167.

147. *Id.*

148. *Id.* at 126.

149. *Id.* at 167.

In Roman law, Maine finds “a nearly complete history of the crumbling away of an archaic system.”¹⁵⁰ Like a child, the law grew up by leaving behind a code of obedience to paternal dictum, and “a new morality . . . displaced the canons of conduct and the reasons of acquiescence which were in unions with the ancient usages.”¹⁵¹ The new morality made the individual, not the family, “the unit of which civil law takes account;” it made individual obligation, not family dependency, the measure of the law’s binding power.¹⁵² The hallmark of social progress is a legal regime in which rights and duties are defined by contract, the free agreement of free individuals. “Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family,” Maine claims, “we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of individuals.”¹⁵³

As the slave is superseded by the servant, as the woman is freed from paternal tutelage (though not, Maine seems to say, from the tutelage of her husband¹⁵⁴), “[s]o too the status of the Son under Power has no true place in the law.”¹⁵⁵ Of course, when the child lacks the capacity to judge his or her own best interests, the principle of contract cannot apply, but beyond this, “[i]f any civil obligation binds together the Parent and the child of full age, it is one to which only contract gives its legal validity.”¹⁵⁶ Maine is not sure what causes “helped to mitigate the stringency of the father’s power over the persons of his children.”¹⁵⁷ Interestingly, he suggests that the circumscribed empire of the father perforce gave way to the needs of Rome’s vast colonial Empire. The constant wars of conquest must have resulted in the unwillingness of sons “to regard themselves as the slaves of a despotic master.”¹⁵⁸ If the family was “an imperium in imperio,”¹⁵⁹ the route of escape from paternal despotism may have run from empire to empire.

150. *Id.* at 168.

151. *Id.*

152. *Id.*

153. *Id.* at 169.

154. *Id.*

155. *Id.* at 169.

156. *Id.*

157. *Id.* at 141.

158. *Id.* at 139.

159. *Id.* at 150.

In work subsequent to *Ancient Law*, as David Rabban points out, Maine tempered his frequent assertions . . . about the ubiquity of the patriarchal family in primitive societies,”¹⁶⁰ assertions that had not gone unchallenged.¹⁶¹ But Maine’s legacy does not rest on scientific rigor. His historical jurisprudence (which meant the rejection of theoretical abstractions and speculation about the state of nature), his evolutionary understanding of cultural norms, his sociology of power relations—it was on these bases that Maine made such a strong, if relatively short-lived, contribution to the study of law. And it was on these ethnological underpinnings that other pioneers in the study of law and society, of various stripes, would build their own jurisprudential structures.

B. Herbert Spencer

Herbert Spencer, unlike Millar and Maine, begins his sociological inquiries first by deducing principles of social morality. Social morality because, for Spencer, mankind’s social state is an unalterable fact, a necessity of being.¹⁶² These first principles or laws, from which there is no rational appeal, have their origin in mankind’s impulse to right action. Though human nature is always changing, always adapting itself to changing circumstances, the Moral Sense leads us to nature’s unchanging moral rules. These operate with a systematic constancy equal to the universal and inevitable forces of the physical world—with, Spencer would say, the unvaryingness that is an essential attribute of the Divine Will. Thus, Spencer speaks of his work as an effort to understand the moral world as one would the physical: scientifically.¹⁶³

The essence of a scientific morality is to understand the process by which mankind is “moulded into fitness” for the necessary conditions of life,¹⁶⁴ and it is here that Spencer drinks deeply of comparative jurisprudential history. Put simply, he links his philosophical speculations to a progressive sociological history. The more obedient we are to the Divine Will, the more adapted our society becomes to nature’s laws—the freer we are. This, for Spencer, is social progress. And mankind, he insists, is a work in progress. Why, he asks, “is not man adapted to the social state?” His answer:

160. DAVID M. RABBAN, *LAW’S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY* 137 (Cambridge Univ. Press 2013).

161. *See id.* at 137, 142–49; *see also* Kuper, *supra* note 127, at 105–08.

162. SPENCER, *supra* note 37, at 82–85.

163. *Id.* at 87–88.

164. *Id.* at 85.

Simply because he yet partially retains the characteristics that adapted him for an antecedent state. The respects in which he is not fitted to society are the respects in which he is fitted for his original predatory life. His primitive circumstances required that he should sacrifice the welfare of other beings to his own; his present circumstances require that he should not do so; and in as far as his old attribute still clings to him, in so far is he unfit for the social state. . . .

Concerning the present position of the human race, we must therefore say, that man needed one moral constitution to fit him for his original state; that he needs another to fit him for his present state; and that he has been, is, and will long continue to be, in process of adaptation. By the term *civilization* we signify the adaptation that has already taken place. The changes that constitute *progress* are the successive steps of the transition. And the belief in human perfectibility, merely amounts to the belief, that in virtue of this process, man will eventually become completely suited to his mode of life.¹⁶⁵

Originally fitted for a predatory life, one where we sacrifice the happiness of other beings to our own, mankind must adapt to the moral necessities of a social state. The musculature of the Moral Sense grows by use—Lamarck, not Darwin, guides the way—and will do so until mankind is “moulded into complete fitness for the social state.”¹⁶⁶ Then, there will be no need for government to render justice, whether government acts through “the gentle whisperings of benevolence” or “the harsh threats of law.”¹⁶⁷ He continues:

Thus, as civilization advances, does government decay. To the bad it is essential; to the good, not. It is the check which national wickedness makes to itself, and exists only to the same degree. Its continuance is proof of still-existing barbarism. What a cage is to the wild beast, law is to the selfish man. Restraint is for

165. *Id.* at 77–78.

166. *Id.* at 80.

167. *Id.* at 349.

the savage, the rapacious, the violent; not for the just, the gentle, the benevolent. All necessity for external force implies a morbid state. Dungeons for the felon; a strait-jacket for the maniac; crutches for the lame; stays for the weak-backed; for the infirm of purpose a master; for the foolish a guide; but for the sound mind, in a sound body, none of these. Were there no thieves and murderers, prisons would be unnecessary. It is only because tyranny is yet rife in the world that we have armies. Barristers, judges, juries—all the instruments of law—exist, simply because knavery exists. Magisterial force is the sequence of social vice; and the policeman is but the complement of the criminal. Therefore it is that we call government “a necessary evil.”¹⁶⁸

When the human faculties are “moulded into complete fitness for the social state,” there will be no need for the state to restrain the wicked—or to support the poor, or to protect the consumer, or regulate commerce, or to educate the young. These “mechanical” measures, so Spencer argues, only retard the growth of the sympathetic faculty—the charity prompted by the heart—that is the hallmark of social progress.¹⁶⁹ There will be no need for government at all. Then, at last, “the things we call evil and immorality will disappear; so surely must man become perfect.”¹⁷⁰

We must follow, Spencer reminds us, where scientific morality leads. First, we must listen to the monitions of the Moral Sense, to this “*instinct of personal rights*—a feeling that leads [each of us] to claim as great a share of natural privilege as is claimed by others”—a feeling that leads mankind to repel anything like an encroachment upon personal freedom.¹⁷¹ This instinct is a purely selfish one, “leading each man to assert and defend his own liberty of action,”¹⁷² but it is through this same “instrumentality” of the Moral Sense that

168. *Id.* at 25.

169. *Id.* at 341–60.

170. *Id.* at 80.

171. *Id.* at 110.

172. *Id.* at 114.

“we receive satisfaction on paying another what is due to him.”¹⁷³ Justice, that is, “is nothing but a sympathetic affection of the instinct of personal rights—a sort of reflex function of it.”¹⁷⁴ From this yoking together of Self and Sympathy emerges the law of equal freedom: “*Every man has freedom to do all that he wills, provided he infringes not the equal freedom of any other man.*”¹⁷⁵ Second, we must adapt so that we are fitted to the law. Because it is derived “directly” from the Divine Will, the law of equal freedom “is of higher authority than all other laws.”¹⁷⁶ It is absolute moral law. All man-made institutions, all merely social forms, are subordinate to it; they must “marshal themselves as it commands.”¹⁷⁷ There is no safety, he writes, “but in entire obedience” to this principle.¹⁷⁸

Spencer insists on this point because some of the conclusions “inevitably following” from them will seem strange or impracticable.¹⁷⁹ This is a warning he is at pains to make again before turning to a discussion of parental authority. If “that first principle from which rights are derived, turns out to be a source from which we may derive the rights of children,” he cautions, “we have no choice but to abide by the result.”¹⁸⁰ The caution is warranted, Spencer contends, because the demonstration of equal liberty “is fully as complete when used on behalf of the child, as when used on behalf of the man.”¹⁸¹ To get here, Spencer retraces the basic steps of his moral philosophy:

1. God wills human happiness.
2. Happiness is attainable only through the use of our faculties.
3. For the production of happiness, these faculties must be exercised.

173. *Id.* at 116.

174. *Id.*

175. *Id.* at 121. (emphasis in original).

176. *Id.* at 217–18.

177. *Id.* at 218. The law of equal liberty “dates from creation; [all other institutions and social forms] are of yesterday. It is constant; they are changeable. It appertains to the perfect; they to the imperfect. It is coenduring with humanity; they may die tomorrow. As surely then as the incidental must bow before the necessary, so surely must all conventional arrangements be subject to the absolute moral law.” *See id.*

178. *Id.* at 65.

179. *Id.* at 65.

180. *Id.* at 191.

181. *Id.* at 192.

4. The exercise of these faculties presupposes liberty of action.¹⁸²

“The child’s happiness, too, is willed by the Deity,” Spencer maintains; “the child, too, has faculties to be exercised; the child, too, needs scope for the exercise of those faculties.”¹⁸³ And, therefore, the child “has claims to freedom—rights as we call them—coextensive with those of the adult. We cannot avoid this conclusion, if we would.”¹⁸⁴

Like Millar, Spencer treats parent-child relations as part of history’s grand procession. Social progress occurs at the same time on two fronts: the family and the state. “Despotism in the state,” Spencer asserts, “is necessarily associated with despotism in the family. The two being alike moral in their origin, cannot fail to coexist.”¹⁸⁵ Indeed, and here we find an echo of the Scottish Enlightenment, the condition of a people can be judged by how its most vulnerable members—women and children—are treated, publicly and privately: “To the same extent that the triumph of might over right is seen in a nation’s political institutions, it is seen in its domestic ones.”¹⁸⁶ Spencer applauds the fact that society was sloughing off the ancient subordination of women (though too slowly; as an advocate of full political and social rights for women, Spencer knew there was much work left to be done). Gender subordination “implies the use of command,” according to Spencer, and whenever authority has to use the voice of command—to use, as Spencer puts it, “the modern forms of bygone despotism and slavery”—it “reveals its descent from barbarism”¹⁸⁷:

The desire to command is essentially a barbarous desire. . . . Command cannot be otherwise than savage, for it implies an appeal to force, should force be needful. Behind its “You Shall,” there lies the scarcely hidden, “If you won’t, I’ll make you.” Command is the growl of coercion crouching in ambush. Or we might aptly term it—violence in a latent state. All its accessories—its frown, its voice, its

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 179.

186. *Id.*

187. *Id.* at 191.

gestures, prove it akin to the ferocity of the uncivilized man. Command is the foe of peace, for it breeds war of words and feelings—sometimes of deeds. It is inconsistent with the first law of morality. It is radically wrong.¹⁸⁸

Spencer defines despotism “as the making of another’s will bend to the fulfillment of our own;” slavery is simply despotism’s counterpart: “having our will subordinated to the will of another.”¹⁸⁹ Though we usually use these terms “only when the rule of one will over another is extreme,” Spencer refuses to let the petty autocrat escape moral censure just because his rule does not take the most oppressive form: “[I]f the subjection of man to man is bad when carried to its full extent, it is bad in any degree.”¹⁹⁰ The “arbitrary rule of one human being over another” must be rejected, “no matter in what form it may appear.”¹⁹¹

It must be rejected even when it appears in the form of parental care. By way of analogy to marital relations, Spencer looks at parent-child relations with an unsentimental eye: “If it be true that the dominion of man over woman has been oppressive in proportion to the badness of the age or the people, it is also true that parental authority has been stringent and unlimited in a like proportion.”¹⁹² Spencer sees, as mentioned, an oppressive harmony “between the political, connubial, and filial relationships,”¹⁹³ the common denominator being the use of coercion, prompted by selfishness and moral blindness. But Spencer has a special antipathy toward the assertion of paternal control: “Uncover its roots, and the theory of paternal authority will be found not to grow out of man’s love for his offspring but out of his love of dominion.”¹⁹⁴

It is paternal authority that Spencer considers “the main obstacle to the right conduct of [a child’s] education.”¹⁹⁵ Spencer thinks that education, properly understood, is leading away from dependency—this is what he means by the development of “character”—but coercive parenting is utterly unfit for this task. Instead of changing

188. *Id.* at 180–81.

189. *Id.* at 181.

190. *Id.*

191. *Id.* at 183.

192. *Id.* at 198.

193. *Id.*

194. *Id.* at 211.

195. *Id.* at 210.

character, “coercion can manifestly do nothing but forcibly mould externals into a coarse semblance of such a state.”¹⁹⁶ Coercion can only change conduct. Here, again, Spencer treats the state and the family as analogous: “In the family, as in society, [coercion] can simply restrain; it cannot educate.”¹⁹⁷ Left alone, children might somehow find their way to maturity, but they are not left alone. They are mis-educated, taught by example the lessons of selfishness, taught what Spencer calls the “evil disposition” to sacrifice the happiness of others to our own¹⁹⁸:

Fathers and mothers who enlarge upon the trouble which filial misbehaviour entails upon them, strangely assume that all the blame is due to the evil propensities of their offspring and none to their own. Though on their knees they confess to being miserable sinners, yet to hear their complaints of undutiful sons and daughters you might suppose that they were themselves immaculate.¹⁹⁹

Of course, parents are not immaculate. They issue commands “for their own convenience or gratification,” rather than for “corrective purposes.”²⁰⁰ They enact a new era of old despotism and slavery, where parental power (“the ire of an offended ruler”) is substituted for moral force:

Observe, too, the impulse under which a refractory child is punished. Instead of anxiety for the delinquent’s welfare, that severe eye and compressed lip denote rather the ire of an offended ruler—express some inward thought as “You little wretch, we’ll soon see who is to be master. . . . Let any one who doubts this listen to that common reprimand, “How dare you

196. *Id.* at 203.

197. *See id.* (“Just as the recollection of Bridewell, and the dread of a policeman, whilst they serve to check the thief’s depredations, effect no change in his morals, so, although a father’s threats may produce in a child a certain outside conformity with rectitude, they cannot generate any real attachment to it. As some one has well said, the utmost that severity can do is to make hypocrites; it can never make converts.”).

198. *Id.* at 211.

199. *Id.* at 210.

200. *Id.*

disobey me?” and then consider what the emphasis means.²⁰¹

It is not that what Spencer calls “moral-force education” is impracticable; it is that parents are not “civilized enough to use it.”²⁰²

Spencer saw signs, in modern society and the modern family, that times were changing. “[T]he decline in the rigour of paternal authority and in the severity of political oppression,” he remarks, “has been simultaneous.”²⁰³ The rapid growth of “democratic feeling” was accompanied “by a tendency toward systems of non-coercive education, that is, toward a practical admission of the rights of children.”²⁰⁴ But, Spencer hastens to add that the growth did not accompany the rights of parents. Whatever claim parental care establishes for the parent, it establishes “no title of dominion.”²⁰⁵ However solicitous parents are in the fulfillment of their obligations, they obtain no right thereby “to play the master” over the child.²⁰⁶

IV. Meyer, Pierce, and the Specter of the Paternalistic State

The specter of the socialist state was no new bogeyman when Arthur Mullen stood before the Supreme Court to denounce “the principle of the soviet.” It was state control of the economy that drew cries of socialist menace at the turn of the nineteenth century. But for the prime movers of socialism, Karl Marx and Friedrich Engels, it was not just private property that was holding back progress toward a truly egalitarian state. It was the private family as well. Working within the sociohistorical tradition of the Scottish Enlightenment,²⁰⁷ Marx and Engels saw the “freedoms” of the libertarian minimalist state as but a stage, and a barbaric one at that, that would be superseded, both materially and morally, by a higher stage where mankind would be liberated from all patriarchal relations.²⁰⁸ As

201. *Id.* at 211.

202. *Id.*

203. *Id.* at 199.

204. *Id.* at 199–98.

205. *Id.* at 194.

206. *Id.*

207. On the Scottish Enlightenment and historical materialism, see Meek, *supra* note 9, at 270–320; ANAND C. CHITNIS, *THE SCOTTISH ENLIGHTENMENT: A SOCIAL HISTORY* 118 (1976).

208. See Karl Marx & Friedrich Engels, *The Communist Manifesto* (Chapter 2), in 1 *MARX/ENGELS SELECTED WORKS* 123–24 (Moscow, Progress Publishers 1969) (1848): “Abolition of the family! Even the most radical flare up at this infamous proposal of the Communists.

others have pointed out, Marx criticized Maine “for not recognizing that in progressive societies individualism would be superseded by collectivism, for not being enough of an evolutionist to recognize that evolution would reach later and better stages.”²⁰⁹

Working within its own variant of stage theory, communist ideology made the dissolution of the family the last step of the

On what foundation is the present family, the bourgeois family, based? On capital, on private gain. In its completely developed form, this family exists only among the bourgeoisie. But this state of things finds its complement in the practical absence of the family among the proletarians, and in public prostitution.

The bourgeois family will vanish as a matter of course when its complement vanishes, and both will vanish with the vanishing of capital.

Do you charge us with wanting to stop the exploitation of children by their parents? To this crime we plead guilty.

But, you say, we destroy the most hallowed of relations, when we replace home education by social.

And your education! Is not that also social, and determined by the social conditions under which you educate, by the intervention direct or indirect, of society, by means of schools, &c.? The Communists have not invented the intervention of society in education; they do but seek to alter the character of that intervention, and to rescue education from the influence of the ruling class.

The bourgeois clap-trap about the family and education, about the hallowed co-relation of parents and child, becomes all the more disgusting, the more, by the action of Modern Industry, all the family ties among the proletarians are torn asunder, and their children transformed into simple articles of commerce and instruments of labour.

But you Communists would introduce community of women, screams the bourgeoisie in chorus.

The bourgeois sees his wife a mere instrument of production. He hears that the instruments of production are to be exploited in common, and, naturally, can come to no other conclusion that the lot of being common to all will likewise fall to the women.

He has not even a suspicion that the real point aimed at is to do away with the status of women as mere instruments of production.

For the rest, nothing is more ridiculous than the virtuous indignation of our bourgeois at the community of women which, they pretend, is to be openly and officially established by the Communists. The Communists have no need to introduce community of women; it has existed almost from time immemorial.

Our bourgeois, not content with having wives and daughters of their proletarians at their disposal, not to speak of common prostitutes, take the greatest pleasure in seducing each other's wives.

Bourgeois marriage is, in reality, a system of wives in common and thus, at the most, what the Communists might possibly be reproached with is that they desire to introduce, in substitution for a hypocritically concealed, an openly legalised community of women. For the rest, it is self-evident that the abolition of the present system of production must bring with it the abolition of the community of women springing from that system, *i.e.*, of prostitution both public and private.”

209. RABBAN, *supra* note 160, at 146 (footnote omitted); *see also* Alan D. J. Macfarlane, *Some Contributions of Maine to History and Anthropology*, in THE VICTORIAN ACHIEVEMENT OF SIR HENRY MAINE: A CENTENNIAL REAPPRAISAL, *supra* note 12, at 134–35.

upward march of society.²¹⁰ Of course, Marx and Engels were not the first to imagine the abolition of the family. Nineteenth-century communitarians had envisioned new family structures,²¹¹ but where earlier Utopians like Charles Fourier and Robert Owen saw the abolition of the family as a means to liberate natural desire, Marx and Engels “held forth the hope that, instead of submitting to nature, communist society would be shaped by humans freely creating. People would no longer be subject to what is natural.”²¹² Marx and Engels wanted a new human nature, a new human constitution, brought into being by new political constitutions. As Richard Weikart writes, the decisive move of communist theory was a “move away from the naturalism of their predecessors.”²¹³ What was natural was to coerce, and utopian social arrangements could render human relationships free from the dictates of nature. Including the relationship of parent to child. “Even if people had a natural bond to their children,” Weikart observes, “no provision would be made for this in communist society.”²¹⁴ The public domain would not just check domestic patriarchy; it would altogether abolish the hold of the parent on the child.

So Mullen knew what he was about. What Robert Meyer wanted was modest enough: the “right to teach . . . foreign languages and other branches in addition to the curriculum required by the public schools.”²¹⁵ Meyer, who was a schoolteacher at a parochial school, had framed the case as implicating his due process rights to pursue a calling and to enter into contracts. Here, as in *Pierce*, the parents upset by state educational regulations were not parties to the litigation. But Mullen was betting that the Court would take a broader view of the interests at stake. He was right. Writing for the Court, Justice McReynolds was not reluctant to widen the field of constitutional inquiry: “Evidently the Legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the

210. See generally Richard Weikart, *Marx, Engels, and the Abolition of the Family*, 18 HIST. OF EUR. IDEAS 657, 669 (1994).

211. See, e.g., J. F. C. HARRISON, *QUEST FOR THE NEW MORAL ORDER: ROBERT OWEN AND THE OWENITES IN BRITAIN AND AMERICA* 54–62 (1969).

212. Weikart, *supra* note 210, at 669.

213. *Id.*

214. *Id.*

215. Transcript of Oral Argument, *Meyer v. Nebraska*, *supra* note 2, at 11.

power of parents to control the education of their own.”²¹⁶ Of these three interferences, as it turned out, it was the last would count most.

The courts had voiced before concern about a state educational monopoly. By 1918, all states had passed compulsory school attendance legislation, and state enforcement mechanisms were increasingly efficient. The success of such laws prompted a number of rights-based challenges to state control of education. For the most part, these constitutional claims met only limited success. Direct assaults on the state’s power to mandate compulsory school attendance were rejected on the familiar ground that “[t]he natural rights of a parent to the custody and control of his infant child are subordinate to the power of the state, and may be restricted and regulated by municipal laws.”²¹⁷ Indeed, as the Supreme Court of Indiana maintained, what was truly “natural” was the fiduciary educational duty of the parent:

One of the most important natural duties of the parent is his obligation to educate his child, and this duty he owes not to the child only, but to the commonwealth. If he neglects to perform it or willfully refuses to do so, he may be coerced by law to execute such civil obligation. The welfare of the child and the best interests of society require that the state shall exert its

216. *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923). In *Pierce*, as James Dwyer notes, “attorneys thought to assert a right of parents, precisely because *Meyer* had announced such a right two years earlier. And Justice McReynolds could cite his own dictum in *Meyer* as doctrinal support for the existence of this unenumerated constitutional right.” JAMES DWYER, *FAMILY LAW: THEORETICAL, COMPARATIVE, AND SOCIAL SCIENCE PERSPECTIVES* 497 (Wolters Kluwers 2012).

217. *State v. Bailey*, 61 N.E. 730, 731–32 (Ind. 1901); *cf.* *State v. Clottu*, 33 Ind. 409, 412 (1870) (“The matter of education is deemed a legitimate function of the state, and with us is imposed upon the legislature as a duty by imperative provisions of the constitution In some countries, and even in some of our American states, education has for more than a century been made compulsory upon the parent, by the infliction of direct penalties for its neglect. The right of the parent to ruin his child either morally or physically has no existence in nature. The subject has always been regarded as within the purview of legislative authority.”); *Stephens v. Bongart*, 189 A. 131, 132 (N.J. Juv. & Dom. Rel. 1937) (“This statute is a legitimate exercise of the police power of the state. The object of the legislation was to create an enlightened American citizenship in sympathy with our principles and ideals, and to prevent children reared in America from remaining ignorant and illiterate. If it is within the police power of the state to regulate wages, to legislate respecting housing conditions in crowded cities, to prohibit dark rooms in tenement houses, to compel landlords to place windows in their tenements which will enable their tenants to enjoy the sunshine, it is within the police power of the state to compel every resident of New Jersey so to educate his children that the light of American ideals will permeate the life of our future citizens.”); *State v. Williams*, 56 S.D. 370 (1929).

sovereign authority to secure to the child the opportunity to acquire an education.²¹⁸

Yet several late-nineteenth century courts, seeking some check on state regulation of the family, did uphold parental challenges to specific courses that were a (sometimes required, sometimes optional) part of the public school curriculum. In these cases, the parent was given a paramount right to choose what courses his child would take from those dictated by the state-mandated curriculum. Though the presumption was that the parent would make “a wise and judicious selection,” the rights of the parent, not the best interests of the child, were the focus of judicial attention.²¹⁹

In 1919, Nebraska and sixteen other states passed statutes prohibiting the teaching of foreign languages in private as well as public schools. To the Nebraska Supreme Court, hearing a challenge to the state language prohibition law, the salutary purpose of the legislation was clear, and well within the sphere of the state’s police

218. *State v. Bailey*, 61 N.E. at 732. In the 1886 case *State v. Webber*, the Indiana state supreme court found nothing arbitrary in the enforcement of state educational requirements. “The power to establish graded schools carries with it, of course,” the court pointed out, “the power to establish and enforce such reasonable rules as may seem necessary to the trustees, in their discretion, for the government and discipline of such schools, and prescribing the course of instruction therein.” *State v. Weber*, 8 N.E. 708, 711 (Ind. 1886). It was the will of the parent that smacked of arbitrariness, and the state was under no obligation to accommodate it: “The important question arises, which should govern the public high school of the city of La Porte, as to the branches of learning to be taught and the course of instruction therein—the school trustees of such city, to whom the law has confided the direction of these matters, or the mere arbitrary will of the relator [i.e., the parent], without cause or reason in its support? We are of opinion that only one answer can or ought to be given to this question. The arbitrary wishes of the relator in the premises must yield and be subordinated to the governing authorities of the school city of La Porte, and their reasonable rules and regulations for the government of the pupils of its high school.” *Id.* at 713–14. For the supreme court of New Hampshire, it was novel doctrine that “each parent had the power . . . to decide the question what studies the scholars should pursue, or what exercises they should perform.” *Kidder v. Chellis*, 59 N.H. 473, 476 (1879). This would be a power “of disorganizing the school, and practically rendering it substantially use-less;” and “however judicious it may be to consult the wishes of parents, the disintegrating principle of parental authority to prevent all classification and destroy all system in any school, public or private, is unknown to the law.” *Id.*

219. *Rulison v. Post*, 79 Ill. 567, 573 (1875); *cf. Kelley v. Ferguson*, 144 N.W. 1039, 1043 (Neb. 1914) (“But in this age of agitation, such as the world has never known before, we want to be careful lest we carry the doctrine of governmental paternalism too far, for, after all is said and done, the prime factor in our scheme of government is the American home.”); *State v. Rhodes*, 61 N.C. 453, 456 (1868) (“Our conclusion is, that family government is recognized by law as being as complete in itself as the State government is in itself, and yet subordinate to it; and that we will not interfere with or attempt to control it in favor of either husband or wife, unless in cases where permanent or malicious injury is inflicted or threatened, or the condition of the party is intolerable.”).

power.²²⁰ In dissent, Judge Charles B. Letton protested that the measure upset the proper allocation of educational control between parent and state, and thereby “infringe[d] upon the fundamental rights and liberty of a citizen protected by the state and federal Constitutions.”²²¹ Letton conceded that the state could manage and control private schools, but the state had no right “to prevent parents from bestowing upon their children a full measure of education *in addition to the state required branches*.”²²² He continued:

Has it the right to prevent the study of music, of drawing, of handiwork, in classes or private schools, under the guise of police power? If not, it has no power to prevent the study of French, Spanish, Italian, or any other foreign or classic language, unless such study interferes with the education in the language of our country, prescribed by the statute.²²³

Before the Court in 1923, Mullen held out the awful prospect of a state parenting monopoly. He portrayed the case as one about “the power of a legislative majority to take the child from the parent.”²²⁴ In this he had the support of law professor William D. Guthrie, whose amicus brief addressed the constitutionality of state laws requiring attendance at public schools, specifically the Oregon statute that had been adopted by popular initiative in 1922.²²⁵ In her pioneering study of the Court’s seminal due process parenting cases, Barbara Bennett Woodhouse notes that “[p]aradoxically, Guthrie’s enlistment in the battle against universal common schooling had its greatest impact not on the Oregon law but on the Supreme Court’s handling of the language laws in *Meyer v. Nebraska*.”²²⁶

By 1923, Guthrie was no stranger to litigation pitting parent against state. He had opposed child welfare measures, Woodhouse explains, because they “were the first step toward expropriating the children of America and ending the supremacy of their fathers as

220. *Meyer v. State*, 187 N.W. 100 (Neb. 1922).

221. *Id.* at 104 (Letton, J., dissenting).

222. *Id.* (emphasis added)

223. *Id.*

224. Transcript of Oral Argument, *Meyer v. Nebraska*, *supra* note 2, at 8.

225. See generally Brief of Amici Curiae, *Meyer v. Nebraska*, *supra* note 8.

226. Woodhouse, *supra* note 7, at 1070. On William Guthrie more generally, see *id.* at 1070–81.

governors of hearth and home.”²²⁷ This “supremacy,” for Guthrie, was not an expression of command, as it might have been for Spencer; it was the most natural expression of a parent’s hopes for the child:

Children are, in the end, what men and women live for. Through them parents realize, as it were, immortality. To the parent the child represents the sum of all his hopes. One’s defeated aspirations, his children may achieve; his unfulfilled ambitions, they may realize. All that we missed, lost, failed of, our children may have, do, accomplish, in fullest measure.²²⁸

What business had the state meddling in matters like these? To Guthrie, as Woodhouse says, state regulation of the domestic sanctuary “violated the divinely ordained natural order and contravened a man’s liberty, property, and religious freedoms—guaranteed by the First, Fifth, and Fourteenth Amendments—to direct the life of his family.”²²⁹

Writing while the Red Scare continued to grip the nation, Guthrie described the Oregon act as “a revolutionary piece of legislation,” evoking images of Bolshevik menace.²³⁰

But communism, as revolutionary as it was, was just the latter-day face of a state paternalism that would turn back the cultural clock to a social stage “long ago repudiated”:

Anything more un-American and more in conflict with the fundamental principles of our institutions, it would be difficult to imagine. . . . The notion of Plato that in a Utopia the state would be the sole repository of parental authority and duty and the children be surrendered to it for upbringing and education, was long ago repudiated as impossible and impracticable in a workaday world where men and women lived, loved, had children and sought advancement in the struggle of life.²³¹

227. *Id.* at 1076.

228. Brief of Appellee, *Pierce v. Society of Sisters*, *supra* note 1, at 274.

229. Woodhouse, *supra* note 7, at 1076.

230. Brief of Amici Curiae, *Meyer v. Nebraska*, *supra* note 8, at 3.

231. *Id.* at 3–4 (internal citations omitted).

With communism providing a ready target, with Plato's *Republic* "a convenient shorthand," as Woodhouse writes, for the socialist state,²³² parental advocates, like Mullen and Guthrie, turned on its head the anti-patriarchal model of social progress. They deplored "[t]he notion of Plato that in a Utopia the state would be the sole repository of parental authority and duty and the children be surrendered to it for upbringing and education."²³³ In their view, a state educational monopoly would "change the entire course of the human race."²³⁴ Socialism was just modern barbarism, and the barbarians were at the gates.²³⁵

Conclusion: A New Constitutional Starting Point

For supporters of parental rights, *Meyer*, *Pierce*, and their progeny are a measure of how far we have traveled from the paternalism of the past. These cases would become the constitutional starting point for those who argue that the right to parent is a legal and moral bulwark against state regulation.

In the 1920's, as today, the radical open-endedness of the "liberty" protected by the Due Process Clause was, to say the least, problematic. Then, as now, the Court sought some historical marker to guide the due process inquiry:

While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included

232. Woodhouse, *supra* note 8, at 1079, n.451. The shorthand continues to serve its purpose. See *Bowen v. Gilliard*, 483 U.S. 587, 632–33 (1987) (Brennan, J., dissenting) (citation omitted): "In *The Republic* and in *The Laws*, Plato offered a vision of a unified society, where the needs of children are met not by parents but by the government, and where no intermediate forms of association stand between the individual and the state. The vision is a brilliant one, but it is not our own." *Id.*

233. Brief of Amici Curiae, *Meyer v. Nebraska*, *supra* note 8, at 3. Proponents of compulsory public schooling could also play the communist card. In *Pierce*, the state argued that "[i]f the Oregon School Law is held to be unconstitutional it is not only a possibility but a certainty that within a few years the great centers of population in our country will be dotted with elementary schools which instead of being red on the outside will be red on the inside." Brief of Appellant, *Pierce v. Society of the Sisters*, *supra* note 1, at 102–03.

234. Transcript of Oral Argument, *Meyer v. Nebraska*, *supra* note 2, at 8.

235. See generally "Suspension of Socialists by New York Assembly" (remarks at annual meeting of The Association of the Bar of the City of New York, January 13, 1920) and "Suspension of Socialists by New York Assembly" (report prepared as chairman of the Committee on Political Reform of the Union League Club of New York, presented on February 12, 1920), in WILLIAM D. GUTHRIE, *THE LEAGUE OF NATIONS AND MISCELLANEOUS ADDRESSES* 211–23, 224–44 (Columbia Univ. Press 1923).

things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, *and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.*²³⁶

Which leaves an obvious question: Was the right to parent among those privileges long recognized at common law? The answer is not as obvious.

In 1879, Louise Hart left her husband Charles, taking with her the couple's infant son, Charles Hart, Jr. Louise claimed that her separation was justified by her husband's abusive conduct. Denying the allegations of cruelty, Charles countered that Louise was without legal right to possess and restrain the child. He petitioned the court on a writ of habeas corpus to obtain custody of his son.²³⁷

The Pennsylvania Supreme Court began its analysis by pointing out that the conflict's resolution really depended on whose common law is being talked about. If the controversy were to be decided by the ancient common law of England, "there would be little difficulty in granting the prayer of the petitioner [i.e., the father]."²³⁸ British common law (prior to nineteenth-century reforms) "conceded to a father the undoubted right as guardian by nature and for nurture of his minor child."²³⁹ The doctrine was a stringent one, "founded on . . . the recognized relation in which a husband stood, as the head of the family, to both wife and children, having a right to control the person of his wife, so that he could enforce a restoration to conjugal duty, and to the persons and services of his children."²⁴⁰

236. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (emphasis added).

237. *Commonwealth ex rel. Hart v. Hart*, 14 Phil. Rep. 352, 353 (Pa. 1880). On habeas corpus as the key procedural mechanism that allowed courts to develop a discretionary custody standard based on the best interests of the child, see SHULMAN *supra* note 29.

238. *Commonwealth ex rel. Hart*, 14 Phil. Rep. 352 at 353.

239. *Id.*

240. *Id.* at 353–54.

The problem for Mr. Hart was that the British common law doctrine—“it may safely be affirmed,” the court said—“was never received as recognized law of Pennsylvania.”²⁴¹ Pennsylvania courts:

have given a more liberal, a more humane application the principle of the controlling power of the State as *parens patriae*, looking more to the defense of those who are unable to defend themselves, and to the interest which society has in the proper care and training of children upon whom it is to depend upon its future existence.²⁴²

For the *Hart* court, the parent-child relation was not a legal entity unto itself. The relation has a public dimension, making the family in part a public franchise:

As in the contract of marriage, there are three parties whose interests and rights are to be considered: those of the husband; the wife; and the State; so in all questions touching the custody of children there are three interests involved: those of the parents; of the State; and of the infant; and of these three the consideration which is most important and controlling is the latter, because upon its proper determination the interests of the other two are in a great degree dependent.²⁴³

This network of interests, so the court said, is protected by the equitable principles that play an “illustrious part” in the state’s common law. And it has been this way, the court went on, “from the beginning.” The state of Pennsylvania had never “been bound to a strict adherence as to the old common law rules as to the custody of children.”²⁴⁴

241. *Id.* at 354.

242. *Id.* at 356.

243. *Id.*

244. *Id.* (internal citation and quotation omitted); cf. R. Collin Mangrum, *Exclusive Reliance on Best Interest May be Unconstitutional: Religion as a Factor in Child Custody Cases*, 15 CREIGHTON L. REV. 25 (1981) (“The feudal structure out of which the property-oriented rule of paternal preference arose was never part of our tradition. The English common law was ‘received’ by the newly-formed states after the Revolution only insofar as it fit the circumstances of the respective states.”). On local custom and the adaptability

In this regard, Pennsylvania was hardly unique. 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.”²⁴⁵ 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.²⁴⁶ 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.²⁴⁷

of American common law, see ELLEN HOLMES PEARSON, *REMAKING CUSTOM: LAW AND IDENTITY IN THE EARLY AMERICAN REPUBLIC* 11–30 (2011).

245. LEWIS HOCHHEIMER, *THE LAW RELATING TO THE CUSTODY OF INFANTS*, 22 (§ 22) (3d ed. Baltimore: Harold Scrimger, 1899) 22 (§ 22).

246. Uniformity is hardly to be expected from “[t]he American federal system in which each state had jurisdiction over domestic relations,” a system which “produced a range of custody and other family laws.” Michael Grossberg, Comment, *Who Determines Children's Best Interests?*, 17 L. & HIST. REV. 309, 313–14 (1999).

247. HOCHHEIMER, *THE CUSTODY OF INFANTS*, *supra* note 244, at 22–23 (§ 22); *cf.*, *e.g.*, ROLLIN C. HURD, *A TREATISE ON THE RIGHT OF PERSONAL LIBERTY AND ON THE WRIT OF HABEAS CORPUS*, 461 (2d ed. Albany, W. C. Little, 1876) (“In controversies between parents for the custody of their legitimate children, the right of the father is held to be paramount to that of the mother; but the welfare of the child and not the technical legal right is the criterion by which to determine to whom the custody of the child shall be awarded.”); JAMES SCHOUER, *A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS*, 365 (§ 339) (2d ed. Boston, Little, Brown, 1874) (“The cardinal principle relative to such matters is to regard the benefit of the infant; to make the welfare of the children paramount to the claims of either parent. . . . [J]udicial precedents, judicial *dicta*, and legislative enactments all lead to one and the same irresistible conclusion. The primary object of the American decisions is then to secure the welfare of the child, and not the special claims of one or the other parent.”) (footnote omitted); *English v. English*, 32 N.J. Eq. 738, 742–43 (N.J. Err. & App. 1880) (“In considering the grounds which should have weight in deciding controversies of this character, while the rights of parents will not be disregarded or their interests overlooked, the court will not be controlled in its decision by the strict rights of either party, but will determine the question of custody mainly upon considerations of advantage to the infant; the cardinal rule of action governing the court being regard to the benefits of the minor, holding its welfare superior to the claims of either parent.”); *cf. also* Developments in the Law: *The Constitution and the Family*, 93 HARV. L. REV. 1156, 1223 (1980) (“[Nineteenth-century custody courts] often held that

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."²⁴⁸ 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."²⁴⁹

When the Supreme Court in *Meyer* and *Pierce* enrolled the right to parent among those privileges long recognized at common law, it fabricated the right it purported to find. It was an ambitious task, one that involved a rewriting of legal history. And more. In the shadow of the Russian Revolution, the Court set itself in opposition to the antipatriarchal story of progress that had such currency throughout the nineteenth century. With Sparta as its communistic demon, the Court took two cases about state educational regulations and made them the vehicle for a statement about the history of the entire human race.

the presumption of parental custody was based upon the extent to which the parent successfully served the *state's* interest in promoting the child's welfare, rather than upon any inherent right of the parent. Most late-nineteenth century courts thus acknowledged that the *child's* welfare, not the parent's legal right, was the determinative factor in private custody decisions under the *parens patriae* power.") (footnotes omitted).

248. *In re Gregg* 5 New York Legal Observer 265, 267 (N.Y. Super. 1847).

249. *Mercein v. People ex rel. Barry*, 25 Wend. 64, 103 (N.Y. 1840).