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School Closures and Parental Control: Reinterpreting the Scope and Protection of Parents' Due Process Right to Direct Their Children's Education

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SCHOOL CLOSURES AND PARENTAL CONTROL: REINTERPRETING THE SCOPE AND PROTECTION OF PARENTS' DUE PROCESS RIGHT TO DIRECT THEIR CHILDREN'S EDUCATION

*Timothy W. Schubert**

When COVID-19 hit U.S. shores, it was not long until state governments shuttered both public and private schools. As the closures continued, some parents, hoping to get their children back into the classroom, challenged the constitutionality of school closures, alleging that the closures abridged their due process right to direct the upbringing of their children—commonly referred to as the Meyer-Pierce right. However, the U.S. Supreme Court has yet to articulate the contours of this right or the level of constitutional protection it commands. With little guidance from the Court, lower courts have come to differing conclusions about how to interpret the right. As such, it is unclear whether school closures do indeed unconstitutionally abridge parental rights.

*This Note analyzes the history of the Meyer-Pierce right, how it has been interpreted over time, and how courts have come to differing conclusions about it. Specifically, this Note investigates how these differing views have come to bear in the context of school closures by investigating the Ninth Circuit's since-vacated opinion in *Brach v. Newsom*. To help resolve the confusion and disagreement among circuits and to promote consistency within Meyer-Pierce case law, this Note proposes a new framework for interpreting the Meyer-Pierce right. Applying this framework to school closures, this Note concludes that the *Brach* majority's conclusion was correct and outlines circumstances under which school closures may indeed unconstitutionally abridge parental rights.*

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INTRODUCTION

Few things are more familiar to the average American than the structure of formal education: teachers guiding students through lecture and interactive activities conducted in an in-person, congregative setting. Historically, in-person education was taken for granted—how else would kids receive an education? Although distance learning options have existed for some time in America, they have hardly represented the norm.¹ Enter the digital age, where virtual technology has enabled schools to conduct online learning through third-party software and websites. With online education, teachers can conduct class when in-person instruction is inconvenient, impracticable, or potentially something worse.

That “something worse” came in the form of a virus, SARS-CoV-2, which is responsible for COVID-19—a highly contagious and deadly disease that led states to institute social distancing measures and bring large sectors of their economies online, including schools.²

While the accessibility of technology presented a practical solution for society to continue to educate generations of children, over time, many have voiced frustration and opposition to virtual learning.³ Some also worry that the virtual mode is not a comparable substitute for in-person learning.⁴ Indeed, many hold school closures responsible for weaker academic gains over the 2020–2021 school year.⁵ Studies also indicate that school closures have negatively affected children’s mental health.⁶

Given these concerns, both public and private school parents have sought relief from the closures by challenging their constitutionality in the courts.⁷ Specifically, some parents have argued that the measures violate their due process right to direct the upbringing of their children.⁸

1. Distance learning options arose during the eighteenth century, but they were by no means the norm. See Edward J. Banas & W. Frances Emory, *History and Issues of Distance Learning*, 22 PUB. ADMIN. Q. 365, 365–66 (1998) (noting that distance learning was considered “non-traditional” and that it has only recently become “mainstream”).

2. See *infra* notes 173–75 and accompanying text.

3. See *infra* note 177 and accompanying text.

4. See *infra* note 178 and accompanying text.

5. See, e.g., EMMA DORN ET AL., MCKINSEY & CO., COVID-19 AND LEARNING LOSS—DISPARITIES GROW AND STUDENTS NEED HELP, at 8 exhibit 6 (2020), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-learning-loss-disparities-grow-and-students-need-help> [https://perma.cc/Z5CH-UA62] (comparing various degrees of improvement in remote learning and concluding that even with significant improvements, students would still suffer greater academic loss than if in-person instruction resumed); see also *infra* notes 179–82 and accompanying text.

6. See DEP’T OF EDUC., EDUCATION IN A PANDEMIC: THE DISPARATE IMPACTS OF COVID-19 ON AMERICA’S STUDENTS 2–3 (2021).

7. Some parents have challenged closures on First Amendment grounds. See, e.g., *Kentucky ex rel. Danville Christian Acad.*, 981 F.3d 505, 507 (6th Cir. 2020); *Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep’t*, 984 F.3d 477, 479 (6th Cir. 2020); *Beahn v. Gayles*, No. 20-2239, 2021 WL 3172272, at *1 (D. Md. July 26, 2021). Others have challenged closures on due process grounds. See, e.g., *Brach v. Newsom*, 6 F.4th 904, 924–25 (9th Cir.), *vacated*, 18 F.4th 1031 (9th Cir. 2021) (mem.); *Aviles v. De Blasio*, No. 20 Civ. 9829, 2021 WL 796033, at *1 (S.D.N.Y. Mar. 2, 2021).

8. See, e.g., *Brach*, 6 F.4th at 909.

The U.S. Supreme Court has long recognized the due process right of parents to guide their children's education⁹—commonly referred to as the *Meyer-Pierce* right.¹⁰ This right developed early in the Supreme Court's due process jurisprudence and was subject to a different constitutional analysis than courts use to evaluate abridgements of individual rights today.¹¹ And while the Court has continuously reaffirmed the *Meyer-Pierce* right,¹² it has not yet articulated how to interpret it within the modern framework.¹³ With so little guidance from the Court, lower courts have come to different conclusions about how the *Meyer-Pierce* right fits into the modern framework of due process.¹⁴

For example, many federal courts see the right as only protecting parents' ability to select private schools.¹⁵ However, not all courts have adopted this view,¹⁶ and scholars tend to find that the right affords parents something more than merely an interest in selecting privately operated schools.¹⁷ Courts have also split on what level of scrutiny infringements of the *Meyer-Pierce* right should be subject to.¹⁸ Some have concluded that state infringements of the *Meyer-Pierce* right are only subject to rational basis review¹⁹—a highly deferential standard that almost always results in the state actions to which it is applied being upheld.²⁰ Yet the Court's *Meyer-Pierce* jurisprudence, as well as scholarly analysis of the case law, suggests that parental rights warrant stronger protection than is available under rational basis review.²¹ And indeed, some courts apply strict scrutiny to

9. See *infra* Parts I, II.

10. See *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1204 (9th Cir. 2005). The *Meyer-Pierce* right comes from two Supreme Court cases from the early twentieth century. See *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925).

11. See *infra* Part I.A.

12. See, e.g., *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 881–82 (1990) (acknowledging that the *Meyer-Pierce* right is a constitutionally protected right); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (acknowledging that the *Meyer-Pierce* right is a long-protected liberty under the Due Process Clause); see also *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (noting the fundamental right of parents to control their children's education).

13. See David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 537 (2000) (explaining that the Court has left "considerable doubt" as to how parental rights fit into the modern framework).

14. See *infra* Parts I.B, II.

15. See *infra* Part II.A.

16. See *Circle Sch. v. Phillips*, 270 F. Supp. 2d 616 (E.D. Pa. 2003), *aff'd on other grounds sub nom. Circle Sch. v. Pappert*, 381 F.3d 172, 182 (3d Cir. 2004) (finding that a law mandating the recitation of the Pledge of Allegiance at private schools violated parents' *Meyer-Pierce* right).

17. See *infra* notes 86–91, 129–30 and accompanying text; see also *infra* Parts I.A, II.A.

18. See *infra* Part II.A.

19. See *infra* Part II.A.2.

20. See *infra* note 149 and accompanying text (discussing the limited burden states must satisfy under rational basis review).

21. See *infra* Part I.

abridgements of the right—a standard that typically finds the relevant state action unconstitutional.²²

Notwithstanding the circuit courts' differing views concerning parental rights among circuits, in *Brach v. Newsom*,²³ a panel of the Ninth Circuit Court of Appeals held that California's school closures abridged parents' *Meyer-Pierce* right.²⁴ The court found that imbedded in the *Meyer-Pierce* right was a protected parental interest in procuring in-person education.²⁵ Additionally, the court held that strict scrutiny was the proper standard to review the closures.²⁶

But is *Brach's* analysis and robust protection of the *Meyer-Pierce* right correct?²⁷ Indeed, the Ninth Circuit later vacated its opinion in *Brach*, signaling that the decision by the three-judge panel may have been incorrect.²⁸ Moreover, might the context of a pandemic warrant greater deference to the state?²⁹ For instance, some argue that during public health crises, courts should exercise greater deference toward state public health prerogatives, in part because, unlike states, the judiciary lacks the expertise necessary to respond to and resolve such crises.³⁰ Given these differing views of both parental rights and the need for deference to states' public health judgments, courts (and states) must have clear standards to properly accommodate parental rights and the interests of public health.

This Note clarifies the proper scope of the *Meyer-Pierce* right and the protection it is entitled to under the U.S. Constitution. Part I of this Note examines the legal basis for the *Meyer-Pierce* right.³¹ Part I then analyzes subsequent Supreme Court cases to understand how the Court has interpreted the *Meyer-Pierce* right over time.³² Part II looks at the competing views of parental rights and investigates how each view bears on parental rights in the context of pandemic-related school closures.³³ Part III resolves the differing views among courts by setting forth a consistent framework that courts

22. See *infra* note 149 (discussing the heavy burden states must satisfy under strict scrutiny).

23. 6 F.4th 904 (9th Cir.), *vacated*, 18 F.4th 1031 (9th Cir. 2021) (mem.).

24. *Id.* at 929.

25. *Id.*

26. *Id.* at 931.

27. *Id.* at 945 (Hurwitz, J., dissenting) (arguing that precedent compels the application of rational basis review).

28. See *Brach v. Newsom*, 18 F.4th 1031 (9th Cir. 2021) (mem.).

29. *Brach*, 6 F.4th at 945 (Hurwitz, J., dissenting) (calling for deference to the state's response to the COVID-19 pandemic).

30. See Michelle M. Mello & Wendy E. Parmet, *Public Health Law After Covid-19*, 385 NEW ENG. J. MED. 1, 3 (2021); see also *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613–14 (2020) (Roberts, C.J., concurring) (arguing that states must have broad authority to act and that judges should not interfere where that broad authority has not been exceeded); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 78 (2020) (Breyer, J., dissenting) (agreeing that states must have wide authority to act expeditiously in response to changing facts during a pandemic).

31. See *infra* Part I.A.

32. See *infra* Part I.B.

33. See *infra* Part II.

should use to review *Meyer-Pierce* claims.³⁴ Applying this test, Part III concludes that under certain circumstances, the closure of *private* schools³⁵ infringes on parental rights and should be subject to strict scrutiny.³⁶

I. SUBSTANTIVE DUE PROCESS AND THE PROTECTION OF PARENTS' RIGHT TO DIRECT THEIR CHILDREN'S EDUCATION

The Fourteenth Amendment states, in part, that no state shall “deprive any person of life, liberty, or property, without due process of law.”³⁷ The Supreme Court has long interpreted the Due Process Clause of the Fourteenth Amendment as containing a substantive component that protects unenumerated rights from government interference.³⁸ However, it is not always clear which rights are protected. During the *Lochner* era,³⁹ the Court only protected a laundry list of generally defined unenumerated liberties.⁴⁰ However, the Court eventually repudiated *Lochner* as an instance of unwarranted judicial activism.⁴¹ Following *Lochner*'s repudiation, and in an effort to contain the potential for judicial activism flowing from substantive

34. See *infra* Part III.A.

35. For reasons set forth in Part III, the scope of the *Meyer-Pierce* case law suggests that public school parents' interests are not constitutionally burdened by the administrative discretion of the state in operating public schools. Hence, this Note concludes that the closure of public schools need only satisfy rational basis review. This Note does not endeavor to agree or disagree with this state of affairs as a normative matter and instead seeks to describe what the law says about this area of parental rights.

36. See *infra* Part III.B.

37. U.S. CONST. amend. XIV, § 1.

38. See *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (protecting the right of parents to bring up their children); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) (protecting the parents' ability to select private schools for their children); see also *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 278 (1990) (protecting the fundamental right to be free from unwanted medical treatment); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (acknowledging the “long line of cases” in which the Due Process Clause has been invoked to protect individual liberties from governmental infringement); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015) (finding the right of same-sex couples to marry protected by the Due Process Clause). For a discussion of the long history of substantive due process jurisprudence, see Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501 (1999).

39. The *Lochner* era is a since-repudiated period of Supreme Court jurisprudence in the first third of the twentieth century, which lasted until about 1937 and is characterized by an aggressive protection of economic liberties under the Due Process Clause. See generally *Lochner v. New York*, 198 U.S. 45 (1905). See also Chemerinsky, *supra* note 38, at 1502–03.

40. Among the rights protected were the right to be free from bodily restraint, to contract, “to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God . . . and to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.” *Meyer*, 262 U.S. at 399.

41. See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955) (“The day is gone when this Court uses the Due Process Clause . . . to strike down . . . laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”); see also Timothy M. Tymkovich et al., *A Workable Substantive Due Process*, 95 *NOTRE DAME L. REV.* 1961, 1979 (2020) (noting that the court “renewed” on its *Lochner* jurisprudence); Chemerinsky, *supra* note 38, at 1503 (stating that the Court has since repudiated its *Lochner* jurisprudence).

due process,⁴² the Court’s approach shifted to providing heightened constitutional protection only for narrowly defined liberties that are deemed sufficiently “fundamental.”⁴³

Another difficulty involves what level of protection to afford liberties—fundamental or otherwise—under the Due Process Clause. During the *Lochner* era, the Court would strike down state actions for “unreasonabl[y]” abridging protected rights.⁴⁴ However, in part because substantive due process “place[s] the matter outside the arena of public debate,”⁴⁵ the Court developed a new test in an attempt to do what *Lochner* did not: properly account for the will of the voting public.⁴⁶ It is enough, for our purposes, to say that the post-*Lochner* test, which is used to determine how rigorously courts should scrutinize abridgements of protected rights under the Due Process Clause, is as follows: when a state action infringes on a “fundamental” right, the action must satisfy strict scrutiny, but when it does not touch on a fundamental right, it need only satisfy rational basis review.⁴⁷ Strict scrutiny requires that the state action be narrowly tailored to achieve a compelling state interest.⁴⁸ Rational basis review, however, requires only

42. See *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (“In an attempt to limit and guide interpretation of the [Due Process] Clause, we have insisted not merely that the interest . . . be ‘fundamental’ . . . but also that it be an interest traditionally protected by our society.”); *Griswold v. Connecticut*, 381 U.S. 479, 481–82 (1965) (declining to apply the Due Process Clause as in *Lochner* because the Court “do[es] not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions”); see also Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 541–42 (2015) (noting that one of the main critiques of *Lochner* and substantive due process was that it “allowed judges to import their political values into the Constitution”).

43. See, e.g., *Michael H.*, 491 U.S. at 122; *Glucksberg*, 521 U.S. at 720; see also Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 427 (2010). Some consider a “fundamental right” to be only those rights rooted in historical tradition and routinely protected against government interference throughout history. See, e.g., *Michael H.*, 491 U.S. at 122. However, history may not always be dispositive in determining whether a given liberty interest is “fundamental.” See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (noting that history is a “starting point” for substantive due process but not the “ending point”).

44. See *Lochner*, 198 U.S. at 56; *Meyer*, 262 U.S. at 399; see also Tymkovich et al., *supra* note 41, at 1979.

45. *Glucksberg*, 521 U.S. at 720.

46. See LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-5, at 1451, § 16-6, at 1451–54 (2d ed. 1988) (noting that the framework of tiered scrutiny attempts to balance the interests of political control and individual rights); see also Colby & Smith, *supra* note 42, at 542 (noting that one of the main critiques of *Lochner* was the Court’s failure to defer to the judgment of the legislature on matters of policy).

47. See, e.g., *Glucksberg*, 521 U.S. at 720–22; see also Williams, *supra* note 43, at 427. Some courts have also applied “intermediate scrutiny” in reviewing fundamental rights. See, e.g., *Hutchins v. District of Columbia*, 188 F.3d 531, 541 (D.C. Cir. 1999) (concluding that intermediate scrutiny is the proper standard of review for parental rights). Intermediate scrutiny requires that the government action be substantially related to an important state purpose. See, e.g., *Craig v. Boren*, 429 U.S. 190, 198 (1976). However, some argue that intermediate scrutiny is merely a vessel for judicial activism because of the uncertainty surrounding what constitutes an “important” state purpose and whether the action is “substantially” related to it. See *id.* at 220–21 (Rehnquist, J., dissenting).

48. See, e.g., *Glucksberg*, 521 U.S. at 720–22 (noting that abridgements of fundamental rights require that the state action be “narrowly tailored to serve a compelling state interest”);

that the state action be rationally related to achieving a legitimate state interest.⁴⁹ Going forward, this Note will refer to the post-*Lochner* test as either the “modern framework” or “tiered scrutiny.”

A. *The Origin of Parents’ Right to Direct the Upbringing of Their Children*

The right of parents to direct their children’s upbringing originated from three *Lochner*-era cases: *Meyer v. Nebraska*,⁵⁰ *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*,⁵¹ and *Farrington v. Tokushige*.⁵² As such, this part looks at each of these cases to understand the history and original conception of parental rights in Supreme Court jurisprudence.

1. *Meyer v. Nebraska*

On April 9, 1919, then Governor of Nebraska Samuel McKelvie signed into law a bill prohibiting anyone from teaching any subject to any person in any language other than English until such person had successfully passed the eighth grade.⁵³

The bill was passed in response to a perceived threat of German-American disloyalty in the wake of World War I.⁵⁴ It was also emblematic of complex societal and cultural tensions that had long been brewing between immigrant groups and multigenerational Americans.⁵⁵ Some states, fueled by anti-immigrant sentiment, tried to promote assimilation and subvert purported anti-American disloyalty among immigrant populations by adopting universal common schooling.⁵⁶ Others—like Nebraska—targeted the teaching of foreign languages.⁵⁷

Meyer, an instructor at Zion Parochial School, was convicted of unlawfully instructing a student in German.⁵⁸ Following his conviction,

see also *Roe v. Wade*, 410 U.S. 113, 155 (1973) (requiring that legislation abridging fundamental rights be narrowly drawn to serve a compelling state interest); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992). For a discussion of strict scrutiny, see *TRIBE*, *supra* note 46, § 16-5, at 1451, § 16-6, at 1451–54.

49. See, e.g., *Glucksberg*, 521 U.S. at 728 (finding that a state action not abridging a fundamental right need only be “rationally related to [a] legitimate government interest[.]”); see also *Roe*, 410 U.S. at 173 (Rehnquist, J., dissenting) (noting that rational basis review requires only that legislation be rationally related to a legitimate government interest); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985); *Casey*, 505 U.S. at 871 (Blackmun, J., concurring). For a discussion of rational basis review, see *TRIBE*, *supra* note 46, § 16-2, at 1439–43.

50. 262 U.S. 390 (1923).

51. 268 U.S. 510 (1925).

52. 273 U.S. 284 (1927).

53. See Jack W. Rodgers, *The Foreign Language Issue in Nebraska, 1918–1923*, 39 *NEB. HIST.*, no. 1, 1958, at 1, 12–13.

54. See *id.* at 2–3 (noting that the loyalty of German Americans to the United States was deemed “suspect”).

55. Barbara Bennett Woodhouse, “*Who Owns the Child?*”: *Meyer and Pierce and the Child as Property*, 33 *WM. & MARY L. REV.* 995, 1009 (1992).

56. See *id.* at 1007.

57. *Id.* at 1011–12.

58. *Meyer v. Nebraska*, 262 U.S. 390, 396 (1923); see Woodhouse, *supra* note 55, at 1013.

Meyer challenged the statute in Nebraska state court, arguing that it improperly prevented citizens from procuring foreign language instruction for their children.⁵⁹

After an unsuccessful challenge in state court, Meyer appealed to the U.S. Supreme Court.⁶⁰ The question before the Court was whether the statute abridged protected liberties under the Due Process Clause of the Fourteenth Amendment.⁶¹ While the Court did not “define with exactness” the liberties protected by the Fourteenth Amendment, it noted that among them was the right to “bring up children.”⁶² The Court also found that Nebraska’s law abridged this right by preventing parents from procuring instruction for their children in German.⁶³

The Court noted that there was no emergency to justify completely prohibiting German instruction,⁶⁴ and there was little basis for believing—as the state had argued—that the statute was meant to protect children’s health and the public welfare because it only targeted the teaching of German, leaving untouched “other matters.”⁶⁵ Nor could the Court find that mere knowledge of the German language was harmful.⁶⁶ To the Court, even if the German language posed some risk of fostering disloyalty, such risk was not enough to justify completely prohibiting German instruction.⁶⁷ Accordingly, the Court found Nebraska’s law unreasonable and consequently unconstitutional.⁶⁸ However, the Court acknowledged that the state possessed broad power to “reasonably” regulate schools and to even require instruction in English.⁶⁹

2. *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*

On November 7, 1922, Oregon adopted a statute that compelled parents to send their children between the ages of eight and sixteen to public school.⁷⁰ The statute, by requiring that children be sent to public school, threatened the elimination of private schools.⁷¹ Accordingly, two private elementary schools—Hill Military Academy and the Roman Catholic Society of

59. *Meyer v. State*, 187 N.W. 100, 102 (Neb. 1922).

60. *See Meyer*, 262 U.S. at 397.

61. *Id.* at 399.

62. *Id.*

63. *See id.*

64. *Id.* at 403.

65. *Id.*

66. *Id.* at 400.

67. *See id.* at 403 (“[M]ere abuse incident to an occupation ordinarily useful is not enough to justify its abolition, although regulation may be entirely proper.”).

68. *Id.* at 402. *Meyer* follows in *Lochner*’s footsteps by requiring state action to be reasonable. *See supra* note 44 and accompanying text.

69. *See Meyer*, 262 U.S. at 402; *see also* Aaron Saiger, *State Regulation of Curriculum in Private Religious Schools: A Constitutional Analysis*, in JASON BEDRICK ET AL., RELIGIOUS LIBERTY AND EDUCATION: A CASE STUDY OF YESHIVAS VS. NEW YORK 49, 51 (2020) (noting that *Meyer* preserved room for states to impose “fairly demanding” regulations on private schools).

70. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 530 (1925).

71. *Id.* at 534.

Sisters—challenged the law.⁷² The schools posited that the bill conflicted with parents’ right to choose schools that provided “appropriate mental and religious training.”⁷³ The lower court agreed.⁷⁴

On appeal, the Supreme Court affirmed the lower court’s decision and, relying on *Meyer*, found the bill to have “unreasonably interfere[d]” with parents’ right to direct the upbringing of their children.⁷⁵ In the Court’s view, “[t]he child is not the mere creature of the state; those who nurture him . . . have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”⁷⁶ The Court followed *Meyer* in acknowledging that states may do a lot to reasonably regulate private schools.⁷⁷ However, in the Court’s view, completely abolishing private schools went beyond the state’s reasonable regulatory power.⁷⁸ The Court also noted that there were no unusual circumstances, emergencies, or dangers inherent in private schooling to justify its total abolition.⁷⁹

3. *Farrington v. Tokushige*

Two years after *Pierce*, the Court yet again had a parental rights case on its docket. In *Farrington*, plaintiffs⁸⁰ challenged an act of Hawaii’s legislature⁸¹ that restricted attendance at foreign language schools and required such schools to comply with a myriad of regulations and fees.⁸² Under the act, a “foreign language school” was one that “conducted [classes] in any language other than the English language or Hawaiian language.”⁸³

The Court found that the legislation at issue impermissibly infringed on plaintiffs’ *Meyer-Pierce* right.⁸⁴ According to the Court, the legislation went “far beyond mere regulation of privately-supported schools” by effectively “depriv[ing] parents of [a] fair opportunity to procure for their children instruction which they think important and we cannot say is harmful.”⁸⁵

Broadly speaking, scholars tend to see *Meyer*, *Pierce*, and *Farrington* as representing the values of pluralism underlying the Constitution,⁸⁶ while also

72. *Id.* at 531–33.

73. *Id.* at 532.

74. *Id.* at 533–34.

75. *Id.* at 534–35.

76. *Id.* at 535.

77. To the Court, states were able to “reasonably regulate” schools, to inspect them as well as their students and teachers, to regulate their curriculum, to compel attendance at *some* school—public or private—and to ensure that nothing “*manifestly inimical to the public*” be taught. *Id.* at 534 (emphasis added).

78. *Id.* at 535.

79. *Id.* at 534.

80. The plaintiffs in *Farrington* were privately operated foreign language schools operating in Hawaii. See *Farrington v. Tokushige*, 273 U.S. 284, 291 (1927).

81. 1920 Haw. Sess. Laws 30.

82. See *Farrington*, 273 U.S. at 291–94.

83. *Id.* at 291.

84. *Id.* at 298.

85. *Id.*

86. See WILLIAM A. GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE 18–20 (2002) (discussing the zone of free

preserving some room for state regulation.⁸⁷ Although the cases left the exact scope of parental rights undefined,⁸⁸ many scholars read them as preventing state regulations that completely prevent, or substantially obstruct, parents' ability to obtain a specific type of instruction for their children⁸⁹ that is not inherently harmful or injurious to the public welfare.⁹⁰ Accordingly, some note that, at a minimum, these cases prevent the interests of the public or parents from presumptively trumping the other.⁹¹

B. The Evolution of the Meyer-Pierce Right and the "Reasonable Relation" Test

Following *Farrington*, the Court did not address parents' interest in controlling their children's education until after *Lochner's* repudiation. The first such case was *Wisconsin v. Yoder*.⁹²

In *Yoder*, Amish families wishing to keep their children out of traditional primary schools challenged Wisconsin's compulsory education laws, which required parents to send their children to public or private schools until the age of sixteen.⁹³ The Court read *Pierce* narrowly, limiting its holding to the right of parents to direct their children's *religious* education.⁹⁴ In doing so,

association produced by *Meyer-Pierce* and warning that if such a zone were abolished in favor of uniformity, social pluralism would cease to exist); George M. von Stamwitz, *Constitutional Limitations on a State's Ability to Regulate Private Schools*, 2 ST. LOUIS U. PUB. L.F. 131, 146–47 (1982) (reading *Pierce* as “preserving the diversity and creativity” private schools offer); TRIBE, *supra* note 46, § 15-6, at 1319 (noting that *Meyer* and *Pierce* protect individuals' ability to “heed the music of different drummers”); *see also* Woodhouse, *supra* note 55, at 996–97 (describing *Meyer-Pierce* as “liberal icons” standing for the ideal of “pluralism”). While there are legitimate critiques of *Meyer* and *Pierce* regarding their illiberal understanding of children's rights, this critique goes beyond the scope of this Note. *See generally* Woodhouse, *supra* note 55.

87. GALSTON, *supra* note 86, at 19–20 (discussing the distinct and permissible zones of regulation produced by *Meyer* and *Pierce*).

88. *See* von Stamwitz, *supra* note 86, at 143; Vivian E. Hamilton, *Immature Citizens and the State*, 2010 BYU L. REV. 1055, 1088–89 (noting that *Meyer* and *Pierce* left intact the state's ability to regulate children's education to some extent).

89. *See* TRIBE, *supra* note 46, § 15-6, at 1319 (noting that *Meyer* and *Pierce* prevent the state from “completely foreclosing the opportunity of individuals and groups to heed the music of different drummers”); Saiger, *supra* note 69, at 51 (noting that *Meyer* and *Farrington* “establish that the federal Constitution prohibits not only a ban on private schooling, but also regulatory regimes that hobble them”); Kelly Rodden, Note, *The Children's Internet Protection Act in Public Schools: The Government Stepping on Parents' Toes?*, 71 FORDHAM L. REV. 2141, 2170 (2003) (noting that so long as the regulation does not completely foreclose opportunity for parental decision-making, it is constitutional under *Meyer* and *Pierce*).

90. *See* Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 1005–06 (1996) (noting that *Meyer* and *Pierce's* test of reasonableness looks at whether the object of state regulation is “manifestly inimical to public welfare” or inherently harmful).

91. *See* GALSTON, *supra* note 86, at 18–19 n.8; *see also* TRIBE, *supra* note 46, § 15-6, at 1319; Saiger, *supra* note 69, at 51; Rodden, *supra* note 89, at 2170.

92. 406 U.S. 205 (1972).

93. *Id.* at 207.

94. “As . . . [*Pierce*] suggests, the values of parental direction of the *religious* upbringing and education of their children . . . have a high place in our society.” *Id.* at 213–14 (emphasis added).

the Court distinguished between secular interests on the one hand, which did not prevent states from reasonably regulating education, and religious interests on the other, which the Court found to trigger First Amendment protections.⁹⁵

Ultimately, the Court held that Wisconsin's law abridged the Yoders' ability to direct their children's religious upbringing, and applying strict scrutiny, found the law unconstitutional.⁹⁶ As such, *Yoder* created a dichotomy of less searching review for state actions abridging parents' secular interests in their children's education and heightened scrutiny for actions abridging parents' religious interests in their children's education.⁹⁷ Additionally, Justice Byron White stressed the limited scope of the *Pierce* decision, noting that it only protected parents' ability to choose an educational forum.⁹⁸

Following *Yoder*, the Court again addressed the *Meyer-Pierce* right in *Runyon v. McCrary*.⁹⁹ There, Black families sued a Virginia private school under the Civil Rights Act of 1866¹⁰⁰ after being denied admission because of the school's race-based admissions practices.¹⁰¹ The school's proprietors—the Runyons—argued that the Act abridged parents' *Meyer-Pierce* right by limiting parents' ability to pursue racially segregated private schooling.¹⁰² The Court stated that, while parents have a right to choose private schools offering “specialized instruction,” private schools were still subject to “reasonable government regulation.”¹⁰³ The Court then concluded that the Act was “reasonable” and thus constitutional under *Meyer-Pierce*.¹⁰⁴

The next major case discussing the *Meyer-Pierce* right was *Troxel v. Granville*.¹⁰⁵ At issue in *Troxel* was a Washington state statute that allowed courts to permit visitation rights for individuals, against the wishes of the parents, if the court found that doing so was in the child's best interest.¹⁰⁶ The Troxels, the children's grandparents, sought visitation rights of their

95. “A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.” *Id.* at 215.

96. *Id.* at 234–35.

97. See Gilles, *supra* note 90, at 942.

98. See *Yoder*, 406 U.S. at 239 (White, J., concurring); see also *Norwood v. Harrison*, 413 U.S. 455, 461–62 (1973) (stressing the “limited scope of *Pierce*” and noting that it simply “affirmed the right of private schools to exist”).

99. 427 U.S. 160 (1976).

100. 42 U.S.C. § 1981(a). Under subsection (a), every citizen of the United States shall have the same right in every state to “make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings . . . as is enjoyed by white citizens.” *Id.*

101. See *Runyon*, 427 U.S. at 165.

102. See *id.* at 175–78.

103. *Id.* at 178.

104. See *id.*

105. 530 U.S. 57 (2000).

106. *Id.* at 60.

grandchildren in Washington Superior Court.¹⁰⁷ Granville, the children’s mother, wanted to limit visitation, but pursuant to the statute, the lower court rejected Granville’s proposal and opted for a middle ground between the two parties’ proposals.¹⁰⁸

On appeal, the Court noted that the Due Process Clause provides “heightened protection” against government abridgement of fundamental rights.¹⁰⁹ Concluding that the *Meyer-Pierce* right was fundamental,¹¹⁰ the Court found the statute at issue unconstitutional.¹¹¹ Though the plurality did not specifically articulate the precise standard of review it was applying,¹¹² Justice Thomas, in concurrence, noted that in his view, strict scrutiny was appropriate.¹¹³ Dissenting, Justice Anthony Kennedy stressed that because the *Meyer-Pierce* right exists only in broad formulation, courts must interpret the right narrowly when applying it to novel facts.¹¹⁴

II. DISAGREEMENT OVER THE *MEYER-PIERCE* RIGHT IN THE LOWER COURTS

Since the Court’s decision in *Troxel*, lower courts have split on how to interpret the *Meyer-Pierce* right within the modern framework. Principally, the disagreement revolves around (1) the proper scope of parental rights under *Meyer* and *Pierce*¹¹⁵ and (2) how heavily courts must scrutinize abridgements of the *Meyer-Pierce* right.¹¹⁶ Part II.A discusses the differing views among lower courts, and Part II.B explores these competing views in the context of school closures by looking at the majority and dissenting opinions in *Brach v. Newsom*.¹¹⁷

A. Areas of Disagreement Among Lower Courts

This part reviews the circuit split surrounding the scope of the *Meyer-Pierce* right. It then discusses the circuit split surrounding the proper level of scrutiny state actions abridging the *Meyer-Pierce* right must be subject to.

107. *Id.* at 61.

108. *Id.* at 71.

109. *Id.* at 65 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997)).

110. *See id.* at 67.

111. *Id.* at 72–73.

112. The plurality in *Troxel* used a combination of factors test and concluded that the lower court impermissibly supplanted its own view of the child’s best interests for that of the parents. *See id.*

113. *See id.* at 80 (Thomas, J., concurring).

114. *See id.* at 95–96 (Kennedy, J., dissenting). “[C]ourts must use considerable restraint, including careful adherence to the incremental instruction given by the precise facts of particular cases, as they seek to give further and more precise definition to the [*Meyer-Pierce*] right.” *Id.*

115. *See infra* Part II.A.1.

116. *See infra* Part II.A.2.

117. 6 F.4th 904 (9th Cir. 2021).

1. The Scope of the *Meyer-Pierce* Right

Since *Troxel*, a split has developed among courts regarding the scope of parental rights. *Fields v. Palmdale School District*¹¹⁸ and *C.N. v. Ridgewood Board of Education*¹¹⁹ represent the competing views.

In the early 2000s, the Palmdale School District in California approved the administration of a survey of elementary school students to learn about childhood trauma.¹²⁰ Several questions involved sexual content, and while parental consent was solicited, parents were not informed of the survey's sexual content.¹²¹ Some parents sued on *Meyer-Pierce* grounds, noting that they would not have consented to the survey had they known their children would be exposed to sexual topics.¹²² The Ninth Circuit disagreed.¹²³

The court noted that while the *Meyer-Pierce* right was fundamental, it was not absolute.¹²⁴ The court stated that the *Meyer-Pierce* right merely protects parents' ability to choose where to educate their children.¹²⁵ Once parents exercise that choice, the court held, their *Meyer-Pierce* right is "substantially diminished."¹²⁶ Because the survey did not interfere with parents' choice of forum, the court found no fundamental right implicated, applied rational basis review, and held for the state.¹²⁷

While the outcome in *Fields* is consistent with other jurisdictions' treatment of parental rights in the public school context,¹²⁸ some scholars

118. 427 F.3d 1197 (9th Cir. 2005).

119. 430 F.3d 159 (3d Cir. 2005).

120. *Fields*, 427 F.3d at 1200.

121. *Id.* at 1201.

122. *Id.* at 1202.

123. *Id.* at 1207.

124. *Id.* at 1204. The court cited a variety of cases, including *Pierce*, to support the notion that parental interests are subject to "reasonable" regulation. *Id.*

125. *See id.*

126. *Id.* at 1206.

127. *Id.* at 1208.

128. *See, e.g.,* Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381 (6th Cir. 2005) (finding no parental right to exempt one's child from the school district's dress code); Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 289 (5th Cir. 2001) (holding that parents have no "fundamental right . . . to control the clothing their children wear to public schools"); Immediato v. Rye Neck Sch. Dist., 73 F.3d 454, 462 (2d Cir. 1996) (holding rational basis review to be the appropriate standard for *Meyer-Pierce* claims and finding the public school district's community service requirement to be constitutional); Herndon by Herndon v. Chapel Hill-Carrboro City Bd. of Educ. 89 F.3d 174, 179 (4th Cir. 1996) (concluding that rational basis review is the proper standard for *Meyer-Pierce* claims and finding the school district's community service requirement to be constitutional); Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 533-34 (1st Cir. 1995) (finding no right on the part of public school parents to "dictate individually what the schools teach their children"). *But see* Gruenke v. Seip, 225 F.3d 290, 305 (3rd Cir. 2000) (finding parental rights violated and requiring a "compelling interest" to justify the violation when a coach became involved in a teen student's pregnancy and neglected to involve the parents); Arnold v. Bd. of Educ. of Escambia Cnty., Ala., 880 F.2d 305, 313-14 (11th Cir. 1989) (finding a violation of parental rights where a school counselor coerced a student into obtaining an abortion and encouraged the student not to discuss it with her parents); Alfonso v. Fernandez, 606 N.Y.S.2d 259, 265-67 (App. Div. 1993) (finding the condom distribution component of HIV health instruction to infringe on parental rights).

have taken issue with this reading of the right as a general matter.¹²⁹ Professor Kathleen Conn notes that *Meyer* and *Pierce* afford parents not just the right to choose where to educate their children but also to choose “what kind of instruction [they] receive.”¹³⁰ To Conn, the dispositive element in *Fields* was the fact that the parents were challenging the administration of public schools,¹³¹ not, as the *Fields* court stated, that the *Meyer-Pierce* right is generally limited to the choice of educational forum.¹³² However, Conn also lends some support to *Fields*’s formulation of parental rights, even in the private school setting, by noting that parents exercise their interest in the substance of their children’s education by selecting which private schools to send their children to.¹³³

Nonetheless, at least one court has expressly rejected *Fields*’s interpretation of parental rights. In *Ridgewood*, parents alleged their *Meyer-Pierce* right was violated by the administration of a survey containing information they wished to shield their children from.¹³⁴ The parents claimed that they were not apprised of the survey’s content and were thus prevented from deciding whether to allow their children to participate.¹³⁵

The Third Circuit in *Ridgewood* also noted that the *Meyer-Pierce* right was fundamental but not absolute.¹³⁶ Among its limitations, the court noted, was the inability of parents to control the administration of public schools.¹³⁷ However, the court made one caveat: when schools usurp control over matters that “strike at the heart of parental decision-making,” parental rights may prevail.¹³⁸ Though the court did not elaborate on what precisely those matters might be, the court ultimately held that the survey did not violate the parents’ rights because it did not entirely prevent them from contextualizing the information for their children in a way that comported with their

129. See, e.g., Kathleen Conn, *Parents’ Right to Direct Their Children’s Education and Student Sex Surveys*, 38 J.L. & EDUC. 139, 146–47 (2009); James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 101, 157–58 (2000) (noting that parents have a protected interest in what transpires in private schools); see also Saiger, *supra* note 69, at 51; TRIBE, *supra* note 46, § 15-6, at 1319; Elliott M. Davis, *Unjustly Usurping the Parental Right: Fields v. Palmdale School District*, 427 F.3d 1197 (9th Cir. 2005), 29 HARV. J.L. & PUB. POL’Y 1133, 1141 (2006) (rejecting the approach in *Fields*).

130. Conn, *supra* note 129, at 146–47 (noting that parents have an interest in what their children learn and how their children are instructed).

131. See *id.* at 147–49 (noting that the *Meyer-Pierce* right does not afford parents control over the administration of public schools).

132. See *id.*

133. See *id.* at 147. This view, however, does not address the degree to which the state may regulate the substance of private schooling. See Ryan, *supra* note 129, at 158 (noting that if *Meyer* and *Pierce* only protect parents’ ability to choose private school, “the right to attend a private school would be an empty shell”); see also Saiger, *supra* note 69, at 51–52 (explaining that state regulations cannot be such that private schools are effectively required to operate as public schools).

134. *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 184–85 (3d Cir. 2005). The survey contained information relating to drug and alcohol abuse, sex, and suicide. See *id.* at 163.

135. *Id.* at 184–85.

136. *Id.* at 182–83.

137. *Id.*

138. *Id.* at 184.

values.¹³⁹ In doing so, the Third Circuit explicitly rejected the approach in *Fields* in exchange for a more flexible understanding of the *Meyer-Pierce* right's scope.¹⁴⁰

2. The Level of Protection the *Meyer-Pierce* Right Demands

A circuit split has also developed around what level of scrutiny to apply to abridgments of parents' *Meyer-Pierce* right. Representing the competing views are *Immediato v. Rye Neck School District*¹⁴¹ and *Circle School v. Phillips*.¹⁴²

In *Immediato*, parents challenged the mandatory community service requirement of New York's Rye Neck Public School District, which required high school students to complete forty hours of community service to receive their diplomas.¹⁴³ The *Immediatos* (the parents) alleged that the *Meyer-Pierce* right encompassed the ability of parents to exempt their children from the school's community service requirement.¹⁴⁴

The Second Circuit found that the parents had a "cognizable" right to direct the upbringing of their children under the Due Process Clause¹⁴⁵ but noted that it was not yet clear what level of scrutiny the right compels.¹⁴⁶ To resolve this, the court emphasized that *Meyer*, *Pierce*, *Yoder*, and *Runyon* all used the language of reasonableness with respect to secular parental interests.¹⁴⁷ From this, the court concluded that where parents assert an infringement of their *Meyer-Pierce* right on the basis of secular interests, the state action need only satisfy rational basis review.¹⁴⁸

While *Immediato* found support for rational basis review in the language of reasonableness, some scholars believe that the *Meyer-Pierce* "reasonable relation" test is distinct because, unlike rational basis review, it appears to afford little deference to the state.¹⁴⁹

139. *Id.* at 185.

140. *See id.* at 185 n.26; *see also* Davis, *supra* note 129, at 1141 (describing the *Fields* approach as a "bright-line rule" and contrasting it with *Ridgewood*'s "less predictable" and more "nuanced" understanding of parental rights).

141. 73 F.3d 454 (2d Cir. 1996).

142. 270 F. Supp. 2d 616 (E.D. Pa. 2003), *aff'd on other grounds sub nom.* Circle Sch. v. Pappert, 381 F.3d 172, 183 (3d Cir. 2004); *see also* Gruenke v. Seip, 225 F.3d 290 (3d Cir. 2000) (applying strict scrutiny to a violation of parents' *Meyer-Pierce* right).

143. *Immediato*, 73 F.3d at 458.

144. *Id.* at 461.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 462.

149. *See* Maxine Eichner, *School Surveys and Children's Education: The Argument for Shared Authority Between Parents and the State*, 38 J.L. & EDUC. 459, 468 (2009) (noting that *Meyer* and *Pierce* gave more "teeth" in their scrutiny of the state action than courts otherwise give today under rational basis review); *see also* Jon S. Lerner, Comment, *Protecting Home Schooling Through the Casey Undue Burden Standard*, 62 U. CHI. L. REV. 363, 372-73 (1995) (noting that the *Meyer-Pierce* test, contrary to the modern framework, does not defer to the state as does rational basis review). The modern rational basis test, as employed by courts, contrary to the test applied in *Meyer* and *Pierce*, affords nearly complete deference to the state.

Some have also argued that *Yoder* improperly truncated the *Meyer-Pierce* right.¹⁵⁰ James Mason, for example, notes that *Pierce* included both secular and parochial schools and that the *Pierce* Court afforded parents of both schools the same level of protection.¹⁵¹ Accordingly, some have instead read *Yoder* as a Free Exercise case, rather than a parental due process case, thereby nullifying the application of *Yoder*'s secular-religious distinction for parental rights.¹⁵²

In contrast to *Immediato*, some courts have found that strict scrutiny applies to *Meyer-Pierce* claims. In *Circle School*, Pennsylvania enacted a law¹⁵³ mandating that private schools display the American flag and begin each school day with a recitation of the Pledge of Allegiance.¹⁵⁴ A number of parents from different private schools sued, alleging that the law promoted

See FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314 (1993) (finding that statutes being scrutinized under rational basis review “bear[] a strong presumption of validity”); *see also* Jeffrey D. Jackson, *Classical Rational Basis and the Right to Be Free of Arbitrary Legislation*, 14 GEO. J.L. & PUB. POL'Y 493, 494 (2016) (stating that “because the modern rational basis test operates on the basis of what the legislature ‘could have thought,’ without regard to what the legislature’s actual purpose was . . . it is the judicial equivalent of no test at all” and stating that nearly all legislation can survive rational basis review); TRIBE, *supra* note 46, § 16-3, at 1443 (describing rational basis review as equivalent to a “strong presumption of constitutionality” in favor of the state); Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court*, 86 HARV. L. REV. 1, 8 (1972) (describing rational basis review as “minimal scrutiny in theory and virtually none in fact”). *But see generally* Meyer v. Nebraska, 262 U.S. 390 (1923) (affording no presumption of constitutionality to Nebraska’s law); Pierce v. Soc’y of Sisters, 268 U.S. 510 (1925) (affording no presumption of constitutionality to Oregon’s law); Farrington v. Tokushige, 273 U.S. 284 (1927) (affording no presumption of constitutionality to Hawaii’s law). Judged by their outcomes, *Meyer*, *Pierce*, and *Farrington* bear more relation to cases employing strict scrutiny than those employing rational basis review. *See* Jackson, *supra*, at 511–12; Gilles, *supra* note 90, at 1005–06 (reasoning that courts have improperly found rational basis review to govern *Meyer-Pierce* claims); *see also* Gunther, *supra*, at 8 (describing strict scrutiny as “strict in theory and fatal in fact”).

150. *See* James R. Mason, III, Comment, Smith’s *Free-Exercise “Hybrids” Rooted in Non-Free-Exercise Soil*, 6 REGENT U. L. REV. 201, 253 (1995) (noting that if *Pierce* did stand for the proposition that secular interests received no constitutional protection, then its principle would need to be restated); *see also* TRIBE, *supra* note 46, § 15-6, at 1318 n.3 (noting that the presence of Hill Military Academy as a party “mak[es] it clear that *Pierce* was not merely a free exercise holding”).

151. *See* Mason, *supra* note 150, at 253. Indeed, the Knights of Columbus underwrote Hill Military Academy’s involvement in *Pierce* “to ensure that a *nonparochial* school was represented.” *See* William Cornett & Kenneth R. Coleman, *Hill Military Academy*, OR. ENCYCLOPEDIA (emphasis added), https://www.oregonencyclopedia.org/articles/hill_military_academy/#.Yes5BVjMIUp [<https://perma.cc/S5EN-S6GL>] (Mar. 17, 2018); *see also* PAULA ABRAMS, CROSS PURPOSES: *PIERCE V. SOCIETY OF SISTERS* AND THE STRUGGLE OVER COMPULSORY PUBLIC EDUCATION 130 (2009) (noting that Hill Military Academy was added to the *Pierce* complaint to ensure that a *nonsectarian* school was represented).

152. *See* Gilles, *supra* note 90, at 1009–12 (analyzing *Wisconsin v. Yoder* as a case using the Free Exercise clause as a source of parental rights, rather than a limitation); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 566–67 n.4 (1993) (Souter, J., concurring) (noting that *Yoder* should be understood as a Free Exercise case, not a parental rights case).

153. 24 PA. STAT. AND CONS. STAT. § 7-771 (West 2022) (effective Feb. 7, 2003).

154. *Id.* § 7-771(c)(1).

values adverse to those they wished for their children to learn in private school.¹⁵⁵

Judge Robert Kelly of the Eastern District of Pennsylvania noted that the parents had a fundamental right to direct the upbringing of their children.¹⁵⁶ From this, Judge Kelly concluded that the law must be subject to strict scrutiny.¹⁵⁷ On appeal, the Third Circuit left the district court's reasoning intact.¹⁵⁸

Scholars largely agree that the splits seen in *Immediato*, *Circle School*, *Fields*, and *Ridgewood* have emerged because *Meyer* and *Pierce* are “product[s] of [their] time”¹⁵⁹ and do not fit neatly within the modern framework.¹⁶⁰ Professor Margaret Ryznar argues that the complexity of parental rights and the unique public and private interests they give rise to is largely to blame for this.¹⁶¹ Indeed, Justice John Paul Stevens, dissenting in *Troxel*, acknowledged the complexity of parental rights by noting that they give rise to different sets of constitutional principles in the “schooling context” than they do in other contexts.¹⁶² For instance, the “schooling

155. *Circle Sch. v. Phillips*, 270 F. Supp. 2d. 616, 626 (E.D. Pa. 2003).

156. *Id.*

157. *Id.*

158. *See Circle Sch. v. Pappert*, 381 F.3d 172, 183 (3d Cir. 2004). The Third Circuit declined to address Judge Kelly's parental rights reasoning because it had already concluded that the act was unconstitutional on other grounds. *Id.*

159. *See, e.g., Margaret Ryznar, A Curious Parental Right*, 71 SMU L. REV. 127, 144 (2018).

160. *Id.*; *see also Gilles, supra* note 90, at 1005–07 (noting that *Meyer* and *Pierce*'s concept of “reasonableness” is distinct from the way modern courts interpret it); *Meyer, supra* note 13, at 561–64 (noting that the Court's current approach to handling *Meyer-Pierce* claims trends away from rigid reference to historical practice and tiered scrutiny analysis toward a more balanced approach leaving behind a “fundamental right whose boundaries are . . . tortuous and bizarre”); Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 1035 (1991) (noting that contrary to the modern framework, *Meyer* and *Pierce* were “predicated on limits to the use of governmental force, even when deployed to promote objectives within the government's legitimate authority”). Professor McConnell notes that *Meyer*, for example, does not suggest that regulating language instruction is beyond the power of the state, whereas a case like *Roe v. Wade* is predicated on the government's inability to regulate abortion. *Id.* at 1035–36. Supporting McConnell's thesis, Jon Lerner notes that the *Meyer-Pierce* analysis is outcome-based, rather than input-based. *See Lerner, supra* note 149, at 376. In other words, the state's interest in education does not revolve around the substantive content within schools but rather ensuring that the content provides children with a sufficient education. *See id.*

161. *See Ryznar, supra* note 159, at 146.

162. *Troxel v. Granville*, 530 U.S. 57, 86 n.7 (2000) (Stevens, J., dissenting); *see also ABRAMS, supra* note 151, at 230–31 (explaining that *Pierce* provides little guidance in familial relations cases); *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1354 (1980) [hereinafter *The Constitution and the Family*] (positing that because the interests of both children and society can weigh against parental rights to varying degrees, “[p]arental rights . . . deserve different degrees of constitutional protection in different circumstances”). The Court also interprets *Meyer* and *Pierce* as creating a right to “familial privacy.” *See Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (finding a “private realm of family life which the state cannot enter”); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (“[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in *their own household* to direct the rearing of their children is basic in the structure of our society.” (emphasis added)); *see also Emily J. Brown, Note, When Insiders Become*

context,” unlike the “family law visitation context” does not necessarily implicate the competing interests of various parties.¹⁶³ Rather, the schooling context involves a “bipolar struggle” over whose authority—parents’ or the state’s—should govern children’s education.¹⁶⁴ Yet even within the schooling context, some note that the constitutional analysis of parental rights in the public school context is different than the private school context.¹⁶⁵ The crux of the issue, to Ryznar, is that it is not always clear which specific parental rights are entitled to strict scrutiny.¹⁶⁶

To resolve this, Ryznar calls for a detangling of parental rights into distinct elements: (1) care, (2) custody, and (3) control, with each element commanding a different level of scrutiny depending on how related to the

Outsiders: Parental Objections to Public School Sex Education Programs, 59 DUKE L.J. 109, 121 (2009) (discussing a successful parental rights case against a public school, *Gruenke v. Seip*, 225 F.3d 290 (3rd Cir. 2000), and noting that the court placed great emphasis on the state’s deprivation of parents’ ability to handle family matters discretely and internally). The Court has signaled that the interests in familial privacy and in the direction of children’s education are analytically distinct. See *Runyon v. McCrary*, 427 U.S. 160, 176–80 (1976) (analyzing the *Meyer-Pierce* claim under two distinct categories: (1) parental rights and (2) the right to privacy). Notably, *Runyon* stated that a “person’s decision . . . concerning the manner in which his child is to be educated may fairly be characterized as [an] exercise[] of familial rights and responsibilities.” *Id.* at 178. However, courts have yet to universally analyze parental interests in education this way. See, e.g., *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1207–08 (9th Cir. 2005) (analyzing the *Meyer-Pierce* claim and familial privacy claim separately but noting that courts have construed the rights as “one and the same”).

163. See *Troxel*, 530 U.S. at 86 n.7 (Stevens, J., dissenting).

164. See *id.* at 86.

165. See Conn, *supra* note 129, at 147–49 (noting that when parents enroll their children in public school, the “calculus changes” with respect to constitutional protection of their parental interests). Indeed, when public school parents level *Meyer-Pierce* challenges against school policy, in addition to generally finding such claims outside the scope of the *Meyer-Pierce* right, courts also weigh the interests of school districts against parental rights—something they do not do in the private school context. Compare *Fields*, 427 F.3d at 1206 (weighing the interests of public schools against parental rights), with *Circle Sch. v. Phillips*, 270 F. Supp. 2d 616, 626–27 (E.D. Pa. 2003) (neglecting to weigh the interests of the state against parental rights). For example, courts note that school districts may act as *parens patriae* to promote children’s welfare in deciding, over parental objections, what kind of material should be incorporated into the school curriculum. See, e.g., *Davis*, *supra* note 129, at 1138; see also *Fields*, 427 F.3d at 1204. *Parens patriae* is a doctrine used to protect children from the harmful decisions or conduct of their parents. See *The Constitution and the Family*, *supra* note 162, at 1221. Additionally, courts also take note of the administrative difficulties public schools would face if they had to cater a curriculum to children based on the idiosyncratic views of their parents. See, e.g., *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 534 (1st Cir. 1995) (noting that if parents had constitutional rights to control how schools educated their children, “the schools would be forced to cater a curriculum” for each student whose parents disagreed with the school’s curriculum); see also *Davis*, *supra* note 129, at 1133–34 (explaining that some courts have noted the administrative burden schools would face if public school parents’ interests received heightened protection by the courts). And, courts note, *Pierce*’s proclamation that the state may not “standardize” children is inapplicable in the public school context because parents have implicitly accepted the type of education provided at public schools by voluntarily sending their children to them rather than to private schools. See, e.g., *Brown*, 68 F.3d at 533 (limiting the *Meyer-Pierce* right because parents had “chosen” to send their children to public school).

166. See *Ryznar*, *supra* note 159, at 147–48.

“core of parenting” it is.¹⁶⁷ Under Ryznar’s framework, state actions abridging parental “control” (i.e. the *Meyer-Pierce* right) would receive rational basis review because this parental interest is the “least weighty.”¹⁶⁸ However, some scholars argue that parents are in a better position, and possess greater incentives, than the state to provide their children with a proper education.¹⁶⁹ As such, these scholars argue parents’ control over their children’s education deserves robust protection against state action.¹⁷⁰

B. The Right of Parents to Select Private Schools Providing In-Person Instruction During the COVID-19 Pandemic

This section will provide background information on the COVID-19 pandemic, the school closures employed by states to curb it, and concerns surrounding the effects of school closures on children. This section will then discuss a recent successful *Meyer-Pierce* challenge to California’s school closures.

1. The Evolving COVID-19 Pandemic and Concerns Surrounding School Closures

In December 2019, the World Health Organization (WHO) learned that patients in Wuhan, China, were suffering from a “viral pneumonia” of an “unknown cause”—later designated as COVID-19.¹⁷¹ By January 2020, it was clear that the disease was transmitting from human to human¹⁷² and on March 13, 2020, then President Donald J. Trump declared a national emergency to cull the spread of the disease.¹⁷³ The Trump administration also issued guidance recommending that governors close schools to prevent community spread.¹⁷⁴ Following this guidance, every state and territory took

167. *See id.* at 147–49.

168. *Id.* at 154.

169. *See, e.g.,* Gilles, *supra* note 90, at 951–55; Eichner, *supra* note 149, at 465–66 (expressing the need for a framework that does not usurp the important role parents play in their children’s education); *see also* Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1429–31 (2020).

170. *See* Gilles, *supra* note 90, at 951–55; Eichner, *supra* note 149, at 465–71; Huntington & Scott, *supra* note 169, at 1429–31 (noting that parental decision-making should be protected by courts because parents are generally best positioned to guide their children’s education).

171. *Listings of WHO’s Response to COVID-19*, WORLD HEALTH ORG. (Jan 29, 2021), <https://www.who.int/news/item/29-06-2020-covidtimeline> [https://perma.cc/4F8U-LLTE].

172. *Id.*

173. Andrew Resuccia et al., *Trump Declares National Emergency to Confront Coronavirus*, WALL ST. J. (Mar. 13, 2020, 6:03 PM), <https://www.wsj.com/articles/coronavirus-strikes-key-figures-in-politics-sports-as-infections-spread-globally-11584093470> [https://perma.cc/67JJ-XYVS].

174. *See* THE WHITE HOUSE, 15 DAYS TO SLOW THE SPREAD (Mar. 16, 2020), <https://trumpwhitehouse.archives.gov/articles/15-days-slow-spread/> [https://perma.cc/D2KZ-HFEQ]; THE PRESIDENT’S CORONAVIRUS GUIDELINES FOR AMERICA: 15 DAYS TO SLOW THE SPREAD, CTRS. FOR DISEASE CONTROL & PREVENTION (2020), <https://www.justice.gov/doj/page/file/1258511/download> [https://perma.cc/WX9V-3UXC]. Despite the Trump administration’s recommendations, the Centers for Disease Control and Prevention (CDC) coterminously noted that mitigation measures may more efficaciously limit the spread of COVID-19 than outright school closures, both short-term and long-term. *See* CTRS. FOR

some action to close schools, though the responses between states differed.¹⁷⁵ With in-person instruction restricted, educators shifted to virtual and other forms of distance learning.¹⁷⁶ However, as school closures persisted, parents have expressed concern and frustration over distance learning.¹⁷⁷

The shift to virtual learning has raised several concerns. First, many worry that the virtual mode provides an inferior educational experience than traditional in-person instruction.¹⁷⁸ Indeed, year-over-year comparisons

DISEASE CONTROL & PREVENTION, CONSIDERATIONS FOR SCHOOL CLOSURE (2020), <https://stacks.cdc.gov/view/cdc/85832> [<https://perma.cc/K7KB-523F>].

175. See Jim Alrutz, *Legislative Update: Early State and Federal Response to Coronavirus-Related School Closures*, 40 CHILD. LEGAL RTS. J. 146, 146–47 (2020).

176. NEAL MCCLUSKEY, CATO INST., PRIVATE SCHOOLING AFTER A YEAR OF COVID-19: HOW THE PRIVATE SECTOR HAS FARED AND HOW TO KEEP IT HEALTHY 2 (2021).

177. See Michael B. Henderson et al., *Pandemic Parent Survey Finds Perverse Pattern: Students Are More Likely to Be Attending School in Person Where COVID Is Spreading More Rapidly*, 21 EDUC. NEXT, no. 2, 2020, at 34, <https://www.educationnext.org/pandemic-parent-survey-finds-perverse-pattern-students-more-likely-to-be-attending-school-in-person-where-covid-is-spreading-more-rapidly/> [<https://perma.cc/JSV6-N84M>] (determining that parents whose children were learning virtually were less satisfied and more likely to report adverse physical and psychological outcomes for their children than were their in-person counterparts); see also Christina Rexrode & Lauren Weber, *Working Parents Are Hitting Their Coronavirus Breaking Point—and Paying for It*, WALL ST. J. (Aug. 15, 2020, 5:30 AM), <https://www.wsj.com/articles/working-parents-are-hitting-their-coronavirus-breaking-point-and-paying-for-it-11597483801> [<https://perma.cc/4QQC-GJPE>]; Ashley Fetters Maloy, *Distance Learning Is Straining Parent-Teacher Relationships*, WASH. POST (Nov. 12, 2020, 6:00 AM), <https://www.washingtonpost.com/lifestyle/2020/11/12/parent-teacher-relationships-covid/> [<https://perma.cc/UC73-TW79>]; Karen D’Souza, *Distance Learning Stokes Fears of Excessive Screen Time*, EDSOURCE (Nov. 23, 2020), <https://edsource.org/2020/distance-learning-stokes-fears-of-excessive-screen-time/644165> [<https://perma.cc/V52T-5CS4>].

178. Susanna Loeb, Opinion, *How Effective Is Online Learning?: What the Research Does and Doesn’t Tell Us*, EDWEEK (Mar. 20, 2020), <https://www.edweek.org/technology/opinion-how-effective-is-online-learning-what-the-research-does-and-doesnt-tell-us/2020/03> [<https://perma.cc/FP2n-PWG7>] (“In comparisons of online and in-person classes . . . online classes aren’t as effective as in-person classes for most students.”); EMMA DORN ET AL., MCKINSEY & CO., COVID-19 AND STUDENT LEARNING IN THE UNITED STATES: THE HURT COULD LAST A LIFETIME 3 (2020), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-student-learning-in-the-united-states-the-hurt-could-last-a-lifetime#> [<https://perma.cc/E29W-5UUT>] (noting that while the *best* online schools available may produce an equivalent education to traditional schools, “most studies have found that full-time online learning does not deliver the academic results of in-class instruction”); Jeremy N. Bailenson, *Nonverbal Overload: A Theoretical Argument for the Causes of Zoom Fatigue*, AM. PSYCH. ASS’N, Feb. 23, 2021, at 1, <https://doi.org/10.1037/tmb0000030> [<https://perma.cc/36UL-KRWV>] (discussing possible underlying causes of the phenomenon of “Zoom fatigue” experienced by many using the virtual platform “Zoom” for online learning and videoconferencing); see also *Preparing K–12 School Administrator for a Safe Return to School in Fall 2020*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 26, 2020) [hereinafter *C.D.C. Guidance*], <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/prepare-safe-return.html> [<https://perma.cc/GNM8-X6AF>] (noting that in-person instruction offers many advantages over virtual learning, including greater teacher involvement in learning and more interpersonal interaction among students, their teachers, and their peers); Sébastien Goudeau et al., *Why Lockdown and Distance Learning During the COVID-19 Pandemic Are Likely to Increase the Social Class Achievement Gap*, 5 NATURE HUM. BEHAV. 1273 (2021), <https://doi.org/10.1038/s41562-021-01212-7> [<https://perma.cc/5RAM-NQPB>] (noting that the shift to virtual learning has made education

indicate that students made smaller academic gains in fall 2020,¹⁷⁹ when most schools were operating remotely.¹⁸⁰ By year's end, learning gains in the 2020–2021 school year still lagged behind those in years past.¹⁸¹ Responding to weaker academic gains, some teachers have reported that a return to in-person learning will help students catch up.¹⁸² Second, data suggest that school closures have negatively impacted children's mental health, making online learning particularly difficult.¹⁸³ Third, some argue that school closures will negatively impact the future economic output and financial position of students affected by the closures.¹⁸⁴ Fourth, while early data and expert guidance left states with conflicting messages about the need to close schools,¹⁸⁵ evidence has mounted that wholesale closures may not be necessary in all circumstances to curb the spread of COVID-19. For one, studies have demonstrated that while children spread the virus at rates comparable to the rates at which adults spread the virus,¹⁸⁶ the risk posed to children by COVID-19 is low¹⁸⁷ and transmission in school settings is controllable when proper mitigation measures are in place.¹⁸⁸ Additionally, at least in counties where hospitalization rates are below 36 to 44 hospitalizations per 100,000 people per week, data suggest that school

more reliant on parental engagement given the limited control teachers are able to maintain over the virtual classroom).

179. Henderson et al., *supra* note 177.

180. See MEGAN KUHFIELD ET AL., NWEA RSCH., LEARNING DURING COVID-19: INITIAL FINDINGS ON STUDENTS' READING AND MATH ACHIEVEMENT AND GROWTH 3–4 (2020), <https://www.nwea.org/content/uploads/2020/11/Collaborative-brief-Learning-during-COVID-19.NOV2020.pdf> [<https://perma.cc/X4WA-4CKZ>].

181. RENAISSANCE LEARNING, HOW ARE KIDS PERFORMING: TRACKING THE SCHOOL-YEAR IMPACT OF COVID-19 ON READING AND MATHEMATICS ACHIEVEMENT 8 (2021).

182. HORACE MANN, CLOSING THE LEARNING GAP: HOW FRONTLINE EDUCATORS WANT TO ADDRESS LOST LEARNING DUE TO COVID-19, at 10 (2021).

183. See DEP'T OF EDUC., *supra* note 6, at 2–3.

184. See FED. RESERVE BANK OF S.F., FUTURE OUTPUT LOSS FROM COVID-INDUCED SCHOOL CLOSURES 2–4 (2021), <https://www.frbsf.org/economic-research/files/ei2021-04.pdf> [<https://perma.cc/E8RZ-JMWD>]. School closures may have caused a reduction of college-educated workers by roughly 3 percent in 2045, contributing to what is estimated to be a \$150 billion reduction in economic output by 2045. *Id.* at 3–4; see also DORN ET AL., *supra* note 178, at 6–8. Learning loss resulting from school closures may result in “the equivalent of a year of full-time work.” *Id.* at 7. “With lower levels of learning and higher numbers of drop-outs, students affected by COVID-19 will probably be less skilled and therefore less productive than students from generations that did not experience a similar gap in learning.” *Id.* at 7.

185. See Erica L. Green, *Administration Offers Guidance to Schools as They Shut Down on Their Own*, N.Y. TIMES (July 29, 2020), <https://www.nytimes.com/2020/03/13/us/politics/virus-school-closings-education.html> [<https://perma.cc/QEC3-FZUN>] (noting the conflicting messages from experts surrounding the efficacy and necessity of school closures).

186. See *Science Brief: Transmission of SARS-CoV-2 in K–12 Schools and Early Care and Education Programs*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 17, 2021), https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/transmission_k_12_schools.html [<https://perma.cc/9JEE-PBLS>]. However, transmission between children is rare. See *id.*

187. See *id.*

188. See *id.* (“The majority of cases that are acquired in the community and are brought into a school setting result in limited spread inside schools when multiple layered prevention strategies are in place.”).

reopenings present limited risk of increasing hospitalizations.¹⁸⁹ Indeed, the Centers for Disease Control and Prevention acknowledged that schools could reopen safely as early as fall 2020 with proper mitigation measures in place.¹⁹⁰

With these concerns in mind, and with school closures in some areas lasting through spring 2021, parents have looked to the courts for relief from COVID-19 related school closures.¹⁹¹

2. *Brach v. Newsom*: Parents' Legal Challenge to California's School Closures

In March 2020, California Governor Gavin Newsom issued an executive order¹⁹² instructing citizens to “immediately heed the current [s]tate public health directives.”¹⁹³ Concurrently, the state public health officer issued a directive requiring residents to shelter in place.¹⁹⁴ Between July 2020 and June 2021, periodically revised guidance allowed schools to reopen based on their respective county's positive COVID-19 test rates.¹⁹⁵ Over a year into the pandemic, Governor Newsom formally revoked the aforementioned stay-at-home order and public health guidance as to businesses and other

189. See DOUGLAS N. HARRIS ET AL., EFFECTS OF SCHOOL REOPENINGS ON COVID-19 HOSPITALIZATIONS 1 (2021). Using hospitalizations as a metric for determining the relative safety of in-person activity is also unlikely to be affected by whether schools reopen or not, unlike COVID-19 test positivity rates. *Id.* at 4. Moreover, the effect of transmission, reflected in positive tests results, does not necessarily translate into negative health outcomes. *Id.*

190. See *C.D.C. Guidance*, *supra* note 178.

191. As of spring 2022, data indicate that around 99 percent of school districts are operating in person. See *School Learning Modalities*, U.S. DEP'T OF HEALTH & HUM. SERVS. (2022), <https://protect-public.hhs.gov/pages/learning-modalities> [https://perma.cc/7CSZ-V932]. However, periodic school closures have nonetheless persisted throughout the 2021–2022 school year in part due to the surge of the Omicron variant. See *Burbio's K-12 School Opening Tracker*, BURBIO (Feb. 11, 2022, 6:30 PM), <https://cai.burbio.com/school-opening-tracker/> [https://perma.cc/4A68-GZS4].

192. See Cal. Exec. Order No. N-33-20 (2020).

193. *Id.*

194. CAL. DEP'T OF PUB. HEALTH, ORDER OF THE STATE PUBLIC HEALTH OFFICER: MARCH 19, 2020 (2020), <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Health%20Order%203.19.2020.pdf> [https://perma.cc/67TW-SHH9].

195. See Guidance from Cal. Dep't of Pub. Health on COVID-19 and Reopening In-Person Instruction Framework & Public Health Guidance for K–12 Schools in California, 2020–2021 School Year (June 4, 2021), <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID19-K12-Schools-InPerson-Instruction.aspx> [https://perma.cc/KZ7E-5JX4]. The guidance first released on July 17, 2020, has since been revised, with the last update occurring on June 4, 2021. See *id.* Initial guidance permitted reopening only if counties' positive test rates fell below seven per 100,000 people per day. See *Brach v. Newsom*, 6 F.4th 904, 911–15 (9th Cir.), *vacated*, 18 F.4th 1031 (9th Cir. 2021) (mem.); see also CAL. DEP'T OF PUB. HEALTH, ORDER OF THE STATE PUBLIC HEALTH OFFICER: AUGUST 28, 2020 (2020), https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/8-28-20_Order-Plan-Reducing-COVID19-Adjusting-Permitted-Sectors-Signed.pdf [https://perma.cc/L79Q-2B67]. As revised, the guidance eventually increased the reopening threshold to twenty-five per 100,000 people per day. See Guidance from Cal. Dep't of Pub. Health, *supra*; see also *Brach*, 6 F.4th at 914.

in-person activities.¹⁹⁶ However, the state public health officer preserved the guidance as to school reopenings through a contemporaneous order.¹⁹⁷ These orders effectively prevented some parents from obtaining in-person private school instruction for their children, as desired, for upwards of one year.¹⁹⁸

In *Brach v. Newsom*, fourteen parents from both public and private schools challenged California's reopening framework on Fourteenth Amendment grounds, claiming that the state had violated their parental rights.¹⁹⁹ The district court denied plaintiffs' application to enjoin the reopening restrictions, and the case was appealed to the Ninth Circuit.²⁰⁰

In their reply brief, the appellants analogized their case to *Meyer*, arguing that the prohibition of in-person education was akin to the prohibition of German language instruction.²⁰¹ According to appellants, *Meyer* and *Pierce* protected parents' right to choose a particular educational program and the prohibition of in-person education prevented them from exercising this right.²⁰²

The state disagreed and, relying on *Fields*, argued that the *Meyer-Pierce* right was limited to parents' choice of educational *forum*.²⁰³ Under the state's reading, *Meyer* and *Pierce* did not protect parents' ability to choose a school offering a desired *mode* of instruction.²⁰⁴ Accordingly, as the orders did not prevent appellants from choosing to send their children to private schools, the state argued that the guidance did not abridge appellants' *Meyer-Pierce* right.²⁰⁵

In a since-vacated 2–1 majority opinion, the Ninth Circuit held for the parents.²⁰⁶ The court began by noting that the *Meyer-Pierce* right must be

196. See Cal. Exec. Order No. N-07-21 (2021) (rescinding the restrictions for “businesses and activities” but preserving the authority of the state public health officer to impose public health mandates).

197. See CAL. DEP'T OF PUB. HEALTH, ORDER OF THE STATE PUBLIC HEALTH OFFICER: JUNE 11, 2021 (2021), <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Beyond-Blueprint.aspx> [<https://perma.cc/BL8L-QZFF>] (preserving the restrictions as to schools).

198. *Brach*, 6 F.4th at 932–33 (noting that the state's school closures for some plaintiffs lasted nearly a year); see also Howard Blume, *LAUSD to Fully Reopen Schools in the Fall Plus Offer an Online Option*, L.A. TIMES (May 24, 2021, 8:49 PM), <https://www.latimes.com/California/story/2021-05-24/post-covid-laUSD-fully-reopen-schools-in-the-fall> [<https://perma.cc/3K93-WUBU>].

199. First Amended Complaint at 31, *Brach v. Newsom*, No. 20-cv-06472 (C.D. Cal. July 29, 2020).

200. See *Brach*, 6 F.4th at 909–10.

201. See Reply Brief of Plaintiffs-Appellants at 21, *Brach v. Newsom*, 6 F.4th 904 (9th Cir. 2021) (No. 20–56291).

202. See *id.* at 21.

203. See Appellees' Answering Brief at 37–38, *Brach v. Newsom*, 6 F.4th 904 (9th Cir. 2021) (No. 20–56921).

204. See *id.*

205. See *id.* at 38.

206. See *Brach v. Newsom*, 6 F.4th 904, 928 (9th Cir. 2021). The court did not address any *Meyer-Pierce* interest as to the public school parents. *Id.*

narrowly interpreted.²⁰⁷ Accordingly, the court proceeded under the modern framework by granularly defining the asserted parental interest as the right to choose in-person education.²⁰⁸ However, the court did not attempt to determine whether the right to choose in-person education *itself* was a fundamental right, as would have been its task under the modern framework.²⁰⁹ Instead, the court asked whether the interest would have fallen within the scope of those interests protected in *Meyer* and *Pierce*.²¹⁰ As such, the court held that the state's interpretation of the right was "unquestionably too narrow"²¹¹ because the original case law not only protected parents' ability to choose where to send their children but also parents' ability to procure the type of instruction they desired for their children from schools that, absent regulation, were otherwise willing to offer such instruction.²¹² The court further concluded that the *Meyer-Pierce* right necessarily encompassed an interest in choosing in-person instruction because it was the predominant mode of instruction during that era.²¹³

The court also found that the *Meyer-Pierce* right was "fundamental"²¹⁴ and noted that regulations abridging fundamental rights are strictly scrutinized.²¹⁵ Thus, turning to the question of scrutiny, because the *Meyer-Pierce* right encompassed an interest in selecting in-person instruction and the *Meyer-Pierce* right was "fundamental," the court held that strict scrutiny was the appropriate standard to review California's reopening framework.²¹⁶

Applying strict scrutiny, the court found that "[s]temming the spread of COVID-19 is unquestionably a compelling interest."²¹⁷ However, the court explained that because the Supreme Court had recently struck down less rigid COVID-19 restrictions on religious services,²¹⁸ California's reopening framework must be unnecessarily broad because the framework created an effective attendance cap of zero.²¹⁹ The court also found that California's closures were "more severe" than those in other jurisdictions²²⁰ and noted that the framework was not responsive to evidence of the limited risk posed

207. *Id.* at 928–29.

208. *Id.* at 929.

209. *See id.*; *see also supra* Part I.

210. *See Brach*, 6 F.4th at 929 ("Here, a consideration of historical practices and tradition confirms that California has deprived the private-school Plaintiffs *of a core aspect of the Meyer-Pierce right.*" (emphasis added)).

211. *Id.* at 928.

212. *See id.* at 928 (noting that the statute struck down in *Meyer* did more than merely interfere with parents' ability to choose private school for their children).

213. *See id.* at 929.

214. *See id.* at 931 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

215. *See id.*

216. *See id.*

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

218. *See Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 63 (enjoining New York's numerical attendance caps on religious services).

219. *See Brach*, 6 F.4th at 931.

220. *See id.* at 932.

to children by the virus.²²¹ The court found the record sufficient to justify a variety of mitigation requirements within schools but insufficient to justify “wholesale closure.”²²² Finally, the court noted that the state failed to show why it preserved the restrictions on in-person education while permitting other congregative activities to carry on.²²³ Consequently, the court found that it could not conclude that California’s reopening framework satisfied strict scrutiny.²²⁴ Accordingly, the court remanded the case to the district court for further proceedings.²²⁵

Judge Andrew D. Hurwitz dissented.²²⁶ Judge Hurwitz began by chastising the majority for what he saw as its overbroad reading of *Pierce*.²²⁷ According to Judge Hurwitz, the *Meyer-Pierce* right only protected parents’ choice of educational forum and California’s reopening framework did not encumber that interest.²²⁸ Judge Hurwitz also argued that the majority erroneously concluded that strict scrutiny applied.²²⁹ In his view, the only question courts must ask is whether the regulation is “reasonable.”²³⁰ He noted further that, of the Supreme Court justices, only Justice Thomas has stated that abridgements of the *Meyer-Pierce* right should be subject to strict scrutiny.²³¹ Accordingly, in Judge Hurwitz’s view, even regulations abridging parents’ *Meyer-Pierce* right should be able to survive so long as they are “reasonable.”²³²

Finally, Judge Hurwitz argued that given the context of the pandemic, the court should have been “particularly deferential.”²³³ Indeed, the Supreme Court has recognized that states must have significant latitude to act “in areas fraught with medical and scientific uncertainties.”²³⁴ Still, the Court has

221. *Id.* According to the court, the state’s only response was to highlight that asymptomatic transmission was possible in school settings. *Id.* But see *supra* Part II.B.1 (discussing the limited risks posed by the virus to children and the limited rates of transmission in school settings when mitigation measures are in place).

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

223. *Id.*

224. *Id.* at 933–34.

225. *See id.* at 934.

226. *Id.*

227. *See id.* at 944 (Hurwitz, J., dissenting) (noting that the Supreme Court instructed for a narrow reading of *Pierce* and that such a reading does not include the right of parents to choose a particular *mode* of education).

228. *See id.*

229. *See id.* at 945. Judge Hurwitz argued that the majority ignored controlling precedent suggesting that the *Meyer-Pierce* right was subject to reasonable regulation. *Id.*; *cf., e.g., Runyon v. McCrary*, 427 U.S. 160, 178 (1976) (holding that parents’ *Meyer-Pierce* interests are still subject to “reasonable” regulation).

230. *Brach*, 6 F.4th at 945 (Hurwitz, J., dissenting) (“If every regulation touching on a *Meyer-Pierce* interest must survive [strict scrutiny], a host of ‘reasonable’ regulations would not survive . . .”).

231. *Id.*

232. *Id.*

233. *Id.*

234. *See, e.g., S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613–15 (2020) (Roberts, C.J., concurring) (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974)).

signaled that even during a pandemic, individual rights merit relief.²³⁵ Scholars, too, dispute that the law requires abandoning tiered scrutiny during public health crises in favor of deference to the state.²³⁶ To them, the modern framework is calibrated to properly balance the interests of the state and individuals, and hence, courts need not exercise greater deference.²³⁷

III. RESOLVING THE INCONSISTENT *MEYER-PIERCE* ANALYSIS AMONG COURTS AND THE CONSTITUTIONALITY OF SCHOOL CLOSURES

The fractured *Brach* opinion, its subsequent vacatur, and the split among circuits demonstrate the need for a consistent framework for analyzing *Meyer-Pierce* claims. This part resolves the conflict among courts by articulating a standard for analyzing *Meyer-Pierce* claims built upon the foundation of the case law and the modern framework's interest in curbing judicial activism. Applying this test to school closures, this Note argues that, in certain circumstances, the closure of private schools may be unconstitutional.

A. *The Appropriate Constitutional Analysis of Meyer-Pierce Claims*

The primary difficulty courts face when analyzing *Meyer-Pierce* claims is how to interpret the right under the modern framework. Some courts forego any analysis into whether the particularized interest is fundamental,²³⁸ implicitly adopting a broad formulation of parental rights. Other courts ask whether the particularized interest is of the kind the original case law would have protected.²³⁹

235. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (“[E]ven in a pandemic, the Constitution cannot be put away and forgotten.”).

236. *See, e.g.*, Erwin Chemerinsky & Michelle Goodwin, *Civil Liberties in a Pandemic: The Lessons of History*, 106 CORNELL L. REV. 815, 834–36 (2021); Jeffrey D. Jackson, *Tiered Scrutiny in a Pandemic*, 12 CONLAWNOW 39, 43 (2020). Others argue that at the outset of crises, the judiciary should exercise greater deference, but as the “emerging crisis” becomes a “managed and regulated one,” that deference should cease. *See* David K. Thomson, *Constitutional Long Haulers: The Undiagnosed Long-Term Impact of Judicial Review on Emergency Public Health Orders*, 60 JUDGES’ J., no. 3, 2021, at 6, 7. This view also seems consistent with the Court’s treatment of recent public health orders relating to COVID-19. *Compare S. Bay United Pentecostal*, 140 S. Ct. at 1613–14 (Roberts, C.J., concurring) (exercising greater deference early in the pandemic), *with Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 68 (affording no deference to the state and applying strict scrutiny later in the pandemic).

237. *See, e.g.*, Chemerinsky & Goodwin, *supra* note 236, at 836–38.

238. *See* *Circle Sch. v. Phillips*, 270 F. Supp. 2d 616, 626 (E.D. Pa. 2003) (neglecting to analyze whether the parents’ interest in procuring private education to avoid recitation of the national anthem was “fundamental”); *see also* *Brach v. Newsom*, 6 F.4th 904, 922 (9th Cir.) (neglecting to ask whether the particular interest in in-person education was “fundamental”), *vacated*, 18 F.4th 1031 (9th Cir. 2021) (mem.).

239. *See* *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1205 (9th Cir. 2005) (asking whether parents have a right to dictate the curriculum in public schools under *Meyer* and *Pierce*, as opposed to whether their alleged right to do so is “fundamental”); *Brach*, 6 F.4th at 929 (noting that the *Meyer-Pierce* right “necessarily embraced a right to choose *in-person* private school instruction”).

Regardless of why courts are deviating from the modern framework,²⁴⁰ they are right to do so because *Meyer* and *Pierce* are products of an entirely different constitutional analysis.²⁴¹ The “reasonable relation” test, as applied in *Meyer* and *Pierce*, did not ask which particularized parental interests were deserving of protection;²⁴² the only question was whether the state’s action was reasonable. If it was unreasonable, the regulation was unconstitutional.²⁴³ Thus, unlike the modern framework,²⁴⁴ the “reasonable relation” test scarcely discriminated between which particular parental interests were protected under the Constitution and which were not.²⁴⁵

Simply applying one level of scrutiny any time a parent alleges that their rights have been abridged also does not resolve the conflict noted above. For example, uniformly applying rational basis review for all *Meyer-Pierce* claims, as Professor Ryznar proposes and as Judge Hurwitz suggests, is inconsistent with the outcomes in the *Meyer-Pierce* case law because, unlike rational basis review, the reasonable relation test from *Meyer* and *Pierce* offers no deference to the state.²⁴⁶ By contrast, a default rule of strict scrutiny would overprotect parental rights because *Meyer* and *Pierce* contemplated a permissible degree of regulation that, even if touching on parents’ ability to control their children’s education, would nonetheless survive.²⁴⁷

To prevent these inconsistencies, this Note proposes that in determining whether the *Meyer-Pierce* right has been abridged, courts must first ask whether the breadth of the contested state action goes beyond that which was permitted under *Meyer*, *Pierce*, and *Farrington* instead of asking whether the particularized interest is “fundamental.” Then, courts must apply the appropriate level of scrutiny depending on whether the right has been abridged. This test will promote consistency and judicial economy, while staying within Justice Kennedy’s cautionary dictate that the *Meyer-Pierce* right be interpreted narrowly.²⁴⁸ It will also further the policy goals the

240. For a discussion of possible reasons for the Court’s reluctant interpretation of parental rights see Ryznar, *supra* note 159, at 142–46.

241. *See id.* at 133 (noting that the Court’s parental rights “jurisprudence predates the current constitutional analytic framework of the various levels of scrutiny”); *see also supra* notes 159–65 and accompanying text.

242. Under *Meyer* and *Pierce*, the only parental rights that were not protected were those that were inherently harmful, injurious to the public welfare, or justifiably regulated because of an emergency. *See Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (noting that no emergency existed to justify the regulation); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925) (noting that the state retains the power to regulate education to the extent that it is “manifestly inimical to the public welfare” and that the plaintiff schools were not engaged in any activity that was “inherently harmful”).

243. *See McConnell*, *supra* note 160, at 1035; *see also Lerner*, *supra* note 149, at 375 (discussing the “reasonable regulation” test from *Meyer* and *Pierce*).

244. *See supra* Part I.A.

245. *See McConnell*, *supra* note 160, at 1035 (discussing the contrasting conceptions of individual rights underlying the “reasonable relation” test and the modern framework).

246. *See supra* notes 149–52 and accompanying text.

247. *See supra* notes 77, 86–91 and accompanying text; *see also Troxel v. Granville*, 530 U.S. 57, 86 (2000) (Stevens, J., dissenting) (noting the “bipolar struggle” created by *Meyer* and *Pierce* over whose authority should govern children’s education, parents or the state).

248. *See supra* note 114 and accompanying text.

modern framework set out to achieve by helping to curb judicial activism²⁴⁹ and by striking a balance between the interests of the public and individuals.

However, to apply this test, courts must have a clear understanding of what the *Meyer-Pierce* right protects and what standard of review to apply when it has been abridged.

1. *The Proper Scope of the Meyer-Pierce Right*

Fundamentally, *Meyer* and *Pierce* protect pluralism by shielding parental prerogatives from majoritarian prohibition.²⁵⁰ The cases presume that parental interests are protected unless they are inherently dangerous, inimical to the public welfare, or justifiably abridged because of an emergency.²⁵¹ However, the cases also acknowledge that parental interests are not absolute and are subject to reasonable regulation. So, when does state action become unreasonable? *Fields* essentially posits that only regulations abridging parents' ability to send their children to private schools are unreasonable.²⁵² But this is inconsistent with the results in *Meyer* and *Farrington* because the parents in those cases were not prevented from procuring private instruction per se, but rather from obtaining particular *types* of instruction.²⁵³

Some scholars, like Professor Conn, suggest that the private or public school context in which the claim arises may be dispositive.²⁵⁴ Yet this cannot explain why, for example, the parents' claim in *Runyon* failed.²⁵⁵ Moreover, this view may underestimate the scope of parental rights in the context of public schooling.²⁵⁶

The Ninth Circuit panel in *Brach* suggests that the scope of parental rights may be assessed by asking whether the asserted interest is analogous to those

249. See *Meyer*, *supra* note 13, at 576–77 (noting that a consistent test will help curb the propensity for judicial activism that the current parental rights jurisprudence enables).

250. See *supra* notes 86–87 and accompanying text.

251. See *supra* note 242.

252. See *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206–07 (9th Cir. 2005).

253. See *supra* Parts I.A.1, I.A.3 (discussing *Meyer* and *Farrington*).

254. See *supra* notes 130–31 and accompanying text.

255. If whether the claim arose in the public or private context was dispositive, then presumably the Court in *Runyon v. McCrary* would have held that 42 U.S.C. § 1983 unreasonably burdened parents' *Meyer-Pierce* right. *But see* 427 U.S. 160, 178 (1976) (finding a law abridging the race-based admissions policies of private schools “reasonable”).

256. See *Eichner*, *supra* note 149, at 464 (noting that Conn's view of parental rights in the public schools “would give the state too much power over children's education”); *see also* *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 265–67 (App. Div. 1993) (finding a public school condom distribution program in contravention of parents' *Meyer-Pierce* right). Admittedly, *Alfonso* would probably be decided differently under the framework set forth in this Note because the condom distribution program did not foreclose the ability of parents to send their children to alternative educational forums that did not afford their children access to condoms. *See* *Rodden*, *supra* note 89, at 2173 (noting that the *Alfonso* court ignored that parents were not deprived of the ability to seek alternative educational arrangements for their children); *see also infra* notes 266–72 and accompanying text. Indeed, when challenging public school policy, parents face an uphill battle in demonstrating that their *Meyer-Pierce* right has been abridged because their claims will likely fail as long as the state has not hobbled their ability to pursue alternative educational options. *See infra* notes 266–72 and accompanying text.

protected in the original case law.²⁵⁷ While this may yield the correct outcome in some cases, this approach shifts the focus onto the parental interest and away from the reasonableness of the state action, contrary to the test outlined in the original case law.²⁵⁸ In doing so, it risks overprotecting parental rights against otherwise reasonable state regulation simply because the interest at issue is analogous to those protected in the original cases.²⁵⁹ It may also, at least in the abstract, underprotect some parental interests not falling within the scope of the original cases, despite their being unreasonably regulated.

The Third Circuit in *Ridgewood* took a different approach. In *Ridgewood*, the court held that a state action is unreasonable only when it usurps those interests that “strike at the heart of parental decision-making.”²⁶⁰ But this merely adds another interpretive hoop for judges to jump through when analyzing these claims.

However, beyond *Ridgewood*’s broad formulation of parental rights, the court gave some guidance as to their proper scope. The court ultimately held that the survey at issue did not usurp parental rights because it did not entirely prevent parents from procuring alternative sources of information for their children to counter the influence the survey may have had on them.²⁶¹ This comports with how scholars have characterized the *Meyer-Pierce* right’s scope, noting that the threshold of reasonableness is breached when the state action completely prevents or substantially hobbles parents’ ability to procure the educational opportunities they desire for their children.²⁶² Other courts have also indicated that this is the proper scope of parental rights,²⁶³ and this view is consistent with the *Meyer-Pierce* case law.²⁶⁴ Accordingly, to determine whether a state action has abridged parents’ *Meyer-Pierce* right,

257. See *supra* notes 210–13 and accompanying text.

258. See Lerner, *supra* note 149, at 376 (noting that *Meyer-Pierce*’s test scrutinizes the state’s action and recognizes the state’s regulatory interest as being outcome-oriented, not input-oriented).

259. See *Brach v. Newsom*, 6 F.4th 904, 945 (9th Cir.) (Hurwitz, J., dissenting) (“If every regulation touching on a *Meyer-Pierce* interest must survive [strict scrutiny], a host of ‘reasonable’ regulations would not survive . . .”), *vacated*, 18 F.4th 1031 (9th Cir. 2021) (mem.).

260. *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 184 (3d. Cir. 2005).

261. See *id.* at 185.

262. See *supra* note 89 and accompanying text.

263. See, e.g., *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197 (9th Cir. 2005) (holding that parental rights do not encompass the ability to direct the administration of public school curriculum); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 533 (1st Cir. 1995) (holding that *Meyer* and *Pierce* are really about preventing the state from “completely foreclosing the opportunity of individuals and groups to *choose* a different path of education” (emphasis added)).

264. See *generally* *Farrington v. Tokushige*, 273 U.S. 284 (1927) (finding a statute that did not prevent, but severely hobbled, parents’ ability to procure private foreign language instruction for their children to be unreasonable); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (finding a statute that prevented parents from procuring private education to be unreasonable); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (finding a statute that prevented parents from procuring education conducted in languages other than English to be unreasonable).

courts must ask whether the state action forecloses or substantially hobbles parents' ability to procure desired educational opportunities for their children, which are not inherently dangerous, inimical to the public welfare,²⁶⁵ or justifiably curbed because of an emergency.²⁶⁶ If so, then the state action has abridged parents' *Meyer-Pierce* right.

This view of parental rights is consistent with cases like *Fields*, which find parental interests substantially diminished in the public school setting.²⁶⁷ It is also consistent with the original case law, as well as modern cases involving parental rights in the context of private schools.²⁶⁸ Admittedly, *Runyon* at first glance appears anomalous because the abridgement of racist school admissions policies hobbles the ability of parents to procure segregated educational environments for their children. However, this may be explained by arguing (rightly) that racially segregated schooling is inimical to the public welfare and within the substantive limits that the original cases imposed on parental rights²⁶⁹—or, alternatively, that the state action satisfied strict scrutiny.

While the reading of the *Meyer-Pierce* right set forth above is consistent with the case law, it leaves open an area that must be clarified. Some parents have argued, for example, that by regulating the school curriculum, the state has abridged their *Meyer-Pierce* right by foreclosing their ability to *not* expose their children to certain things.²⁷⁰ However, if this was the standard, the state would not be able to affirmatively regulate *anything* in schools without abridging parental rights, for any affirmative regulation of schools prevents parents from choosing not to have their children subject to the regulation. This cannot possibly be the scope of parental rights the original cases contemplated because those cases explicitly acknowledged that the state may affirmatively regulate schools.²⁷¹ So, under *Meyer* and *Pierce*, parents have a right to procure desired alternatives, but those desired alternatives are still subject to reasonable regulation.²⁷²

265. Regarding the “intrinsicly dangerous or manifestly inimical” qualification, the *Meyer* Court asked whether the activity was necessarily harmful. *Meyer*, 262 U.S. at 400. Recall that the legislation in *Meyer* was promulgated to address a perceived threat of German-American disloyalty. *See supra* notes 53–55 and accompanying text. In the face of this threat, the Court asked whether “[m]ere knowledge of the German language” was harmful, rather than asking whether it *could be* harmful. *Meyer*, 262 U.S. at 400.

266. An “emergency,” as contemplated by *Meyer* and *Pierce*, is a situation in which limited information or alternative measures are reasonably available to the state to enable it to regulate the risky activity without entirely prohibiting it. *See Meyer*, 262 U.S. at 403 (“[M]ere abuse . . . is not enough to justify . . . abolition, although regulation may be entirely proper.”).

267. *See supra* notes 128–31 and accompanying text; *see also supra* note 256.

268. *See generally* Brach v. Newsom, 6 F.4th 904 (9th Cir.) (finding parental rights abridged by school closures and applying strict scrutiny), *vacated*, 18 F.4th 1031 (9th Cir. 2021) (mem.); Circle Sch. v. Phillips, 270 F. Supp. 2d. 616 (E.D. Pa. 2003).

269. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1950) (discussing the deleterious effects segregation has on minority communities).

270. *See, e.g.*, C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 184–85 (3d. Cir. 2005).

271. *See supra* Part I.A.1–3 (discussing *Meyer*, *Pierce*, and *Farrington*).

272. *Cf. Meyer v. Nebraska*, 262 U.S. 390 (1923) (finding Nebraska’s prohibition on the teaching of German unreasonable but finding that “the power of the state . . . to make

2. The Proper Level of Scrutiny for Abridgements of Parents' Meyer-Pierce Right

Once the court determines that the state action in question has or has not abridged parents' Meyer-Pierce right, the next step is to properly scrutinize the state action. If the court has determined that the state action has not abridged parents' Meyer-Pierce right, then the state need only satisfy rational basis review.²⁷³ However, if the court determines that the state's regulation does abridge parents' Meyer-Pierce right, then the state should have to satisfy strict scrutiny. The reason strict scrutiny should apply is four-fold.

First, the analysis cannot end purely upon a finding that parents' rights have been abridged, as it would have under the original cases,²⁷⁴ because doing so would privilege parental interests above any and all public interests, no matter how compelling the public interests may be. This would undermine one of the principal reasons the court developed the modern framework: to properly balance the interests of individuals and the interests of the voting public.²⁷⁵ Accordingly, states must still have the opportunity to demonstrate that the action at issue was necessary.

Second, to apply anything less than strict scrutiny may lead to results inconsistent with the original case law, contrary to Judge Hurwitz's dissenting view in *Brach*.²⁷⁶ Rational basis review contemplates total deference to the state, which cannot be reconciled with the results in *Meyer*, *Pierce*, or *Farrington*,²⁷⁷ and while intermediate scrutiny allows for closer scrutiny than rational basis review, it also may lead to results inconsistent with the original case law because it does not provide the certainty of outcome that rational basis review and strict scrutiny do.²⁷⁸ Moreover, the ambiguity of the intermediate scrutiny standard has the propensity to

reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned" (emphasis added)).

273. See *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1208 (9th Cir. 2005) ("[G]overnment actions that do not affect fundamental rights . . . will be upheld if they are rationally related to a legitimate state interest.").

274. Under the "reasonableness" test as applied in *Meyer-Pierce*, finding parental rights abridged through a determination that the state action in question was "unreasonable" was sufficient to deem the law at issue unconstitutional. See, e.g., *Meyer*, 262 U.S. at 403 (finding Nebraska's law to be unreasonable and striking it down).

275. See *TRIBE*, *supra* note 46, § 16-5, at 1451, § 16-6, at 1451-54.

276. Judge Hurwitz in *Brach v. Newsom* argued that even if parental rights were abridged, rational basis should still apply, lest a host of reasonable regulations otherwise fail. See 6 F.4th 904, 945 (9th Cir.) (Hurwitz, J., dissenting), *vacated*, 18 F.4th 1031 (9th Cir. 2021) (mem.). However, this analysis mischaracterizes the function of the "reasonable relation" test as only relating to the level of scrutiny the right is entitled to. As noted above, a finding of reasonableness served to determine both whether the law was unconstitutional and whether the parental right was protected against state action. See *supra* notes 242-45 and accompanying text. Hence, there could never be a reasonable regulation that infringed on parental rights under the original test, contrary to Judge Hurwitz's analysis, because a regulation abridging parental rights was necessarily unreasonable. See *supra* notes 242-43 and accompanying text.

277. See *supra* Part III.A.1; see also *supra* note 149 and accompanying text.

278. See *Craig v. Boren*, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting) (noting the ambiguous nature of intermediate scrutiny).

facilitate judicial activism.²⁷⁹ Hence, in the interest of promoting the modern framework's goal of limiting judicial activism, strict scrutiny, rather than intermediate scrutiny, should apply.²⁸⁰

Third, strict scrutiny should apply because the *Meyer-Pierce* right has long been regarded as “fundamental” by the Court,²⁸¹ and courts routinely apply strict scrutiny to abridgements of fundamental rights under the modern framework.²⁸² As the anthology of the *Meyer-Pierce* jurisprudence acknowledges, parental authority over children's education is “deeply rooted in this Nation's history and tradition.”²⁸³ Indeed, the “primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”²⁸⁴ Hence, there is little question, then, that the Court understands the *Meyer-Pierce* right to be fundamental. On that basis, the right merits the protection afforded by strict scrutiny.

Fourth, from a policy perspective, the *Meyer-Pierce* right should receive heightened protection against state action because parents are generally better positioned to further their children's educational interests than the state.²⁸⁵ School closures have been detrimental to children's education in part because of the inadequacies of the virtual mode of instruction.²⁸⁶ What's more, states have alternative mitigation strategies available to them that allow in-person instruction to continue.²⁸⁷ Providing parental rights heightened protection will help ensure that states adequately balance the interests of children's education with public health goals and utilize alternative mitigation measures where they are available and practicable.²⁸⁸

B. School Closures May Infringe on Parents' Meyer-Pierce Right

Having laid out the proper test to analyze *Meyer-Pierce* claims, this Note concludes that in certain cases, the closure of private schools unreasonably abridges parental rights and should therefore be subject to strict scrutiny.

279. *See id.* (arguing that intermediate scrutiny “invite[s] subjective judicial preferences or prejudices”); *supra* Part I.A.; *see also supra* notes 42–43 and accompanying text.

280. *See Craig*, 429 U.S. at 221 (noting that intermediate scrutiny invites “judicial preferences”). In contrast to intermediate scrutiny, scholars note that strict scrutiny and rational basis review tend to lead to the same results, suggesting that they may curb judgments influenced by judicial preferences. *See, e.g.,* Gunther, *supra* note 149, at 8.

281. *See, e.g.,* *Troxel v. Granville* 530 U.S. 57, 65–66 (2000); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Michael H. v. Gerald D.*, 491 U.S. 110, 121–22 (1989); *Roe v. Wade*, 410 U.S. 113, 152 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 487–88 (1965) (Goldberg, J., concurring).

282. *See supra* Part I; *Glucksberg*, 521 U.S. at 720 (stating that fundamental rights require heightened scrutiny); *Troxel*, 530 U.S. at 65; *Brach*, 6 F.4th at 931.

283. *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977).

284. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

285. *See supra* notes 169–70 and accompanying text.

286. *See supra* notes 177–84 and accompanying text.

287. *See supra* notes 186–89 and accompanying text.

288. *See Huntington & Scott, supra* note 169, at 1416–17 (noting that robust protection of parental rights can help safeguard children's well-being).

1. Whether School Closures Abridge Parents' *Meyer-Pierce* Right

To determine whether school closures unreasonably abridge parental rights, we must determine (1) whether they foreclose or substantially hobble the ability of parents to procure certain types of alternative education they desire for their children and (2) whether in-person instruction is inherently dangerous, inimical to the public welfare, or justifiably regulated because of the COVID-19 pandemic.²⁸⁹

As to the first question, by prohibiting the carrying on of in-person instruction, the closure of private schools²⁹⁰ unquestionably hobbles parents' ability to procure alternative forms of desired instruction for their children.²⁹¹ Thus, we turn to the second question.

Answering the second question is more difficult because the answer is highly fact-dependent. The spread of deadly communicable diseases, like COVID-19, surely renders in-person education risky. And the spread of COVID-19 is undoubtedly inimical to the public welfare. Yet, the proper question under *Meyer* and *Pierce* is whether the activity is *necessarily* harmful.²⁹² And where mitigation measures are in place, in-person instruction has largely proven to be safe.²⁹³ Thus, in-person instruction is not necessarily harmful or inimical to the public welfare as contemplated by *Meyer* and *Pierce*.²⁹⁴

However, as noted above, the analysis does not end there, for it must next be determined whether school closures could be justified on the basis of an "emergency."²⁹⁵ The *Meyer* Court presumed that where alternative measures were available to effectuate the state's goals, completely prohibiting the risky activity was unreasonable.²⁹⁶ Accordingly, school closures occurring at the onset of a public health crisis like COVID-19 will surely be reasonable, as states may have limited access to information and alternative measures and will need to act swiftly and broadly to limit the spread of the disease.²⁹⁷

289. See *supra* Part III.A.1.

290. As noted above, closing public schools does not in and of itself foreclose the ability of parents to procure in-person private school instruction, if they so desire and are able to. See *supra* note 256 and accompanying text.

291. See *supra* note 177 (discussing parents' frustration over virtual learning).

292. See *supra* note 265 and accompanying text.

293. See *supra* notes 186–90 and accompanying text.

294. See *supra* note 265 and accompanying text. Of course, where mitigation measures are insufficient to maintain control of viral spread or hospitalization rates, in-person education may be properly considered dangerous or inimical to public health. Cf. HARRIS ET AL., *supra* note 189, at 5 (suggesting that in-person instruction may be unsafe where hospitalization rates exceed 36 to 44 per 100,000 people per week).

295. See *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923).

296. See *supra* note 266 and accompanying text.

297. See Green, *supra* note 185, at 1 (noting the dearth of information, data, and guidance regarding the necessity and efficacy of school closures early in the COVID-19 pandemic); see also *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) (noting that states must have "especially broad" latitude when acting in "areas fraught with medical and scientific uncertainties" (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974))); Thomson, *supra* note 236, at 7–8 (noting the need for judicial deference early in crises).

However, when and if information and mitigation measures become available and feasible such that schools may reopen safely, the “emergency” justifying wholesale closures has likely come to an end.²⁹⁸

Thus, although the three-judge panel *Brach* majority opinion has since been vacated, and although its analysis differed from the test set forth in this Note, the panel was correct in finding that California’s public health policy abridged parental rights under the scope of *Meyer* and *Pierce* because closing private schools completely foreclosed parents’ opportunity to procure in-person education for their children.²⁹⁹ Moreover, in-person learning in California was not necessarily harmful,³⁰⁰ and California’s regulations were “far more severe than ha[d] been shown to be required to prevent the spread of [COVID-19],”³⁰¹ such that they were no longer justified on the basis of an “emergency.”

2. Whether School Closures Can Satisfy Strict Scrutiny

Having determined that school closures may indeed abridge parental rights under certain circumstances, in such cases they must satisfy strict scrutiny.³⁰² Culling the spread of COVID-19 and other diseases is “unquestionably a compelling [state] interest.”³⁰³ Turning to whether closures are narrowly tailored, *Brach* is instructive.³⁰⁴ Where public health measures, like

298. See Thomson, *supra* note 236, at 7–8 (stressing the need for courts to distinguish between an ongoing crisis and a managed one in determining whether to afford states greater deference). This view of what constitutes an “emergency” is also supported by the Court’s COVID-19 jurisprudence. See *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613–14 (Roberts, C.J., concurring); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring) (suggesting that while deference may be warranted early on during pandemics, as states learn to combat the disease, deference is no longer warranted). However, the presence and potential spread of COVID-19 would still constitute an “emergency” reasonably justifying the implementation of mitigation measures such as mask mandates, attendance caps, and the like, unless it could be shown that less stringent alternatives are available and practicable. So, if parents, for example, level challenges against mask mandates as entirely foreclosing their ability to obtain the kind of face-to-face, in-person instruction they desire for their children in private school, so long as the evidence does not suggest that alternatives are available and practicable, the mandates would, for the purpose of *Meyer* and *Pierce*, still likely be justified by an “emergency.” See *supra* note 266 and accompanying text.

299. See *Brach v. Newsom*, 6 F.4th 904, 929 (9th Cir. 2021) (noting that California’s reopening framework deprived parents of the ability to send their children to private school); see also Blume, *supra* note 198 (noting that some students in California were precluded from attending school in person for upwards of one year).

300. “On this record, the State’s concerns about transmission would justify a potential range of more narrowly drawn prophylactic measures *within* schools to mitigate such risks; it cannot justify wholesale closure.” *Brach*, 6 F.4th at 932, *vacated*, 18 F.4th 1031 (9th Cir. 2021) (mem.).

301. *Id.* at 931 (quoting *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 67).

302. The mere context of a pandemic does not on its own justify imposing lesser scrutiny. See *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 68.

303. *Id.* at 67.

304. See Part II.B.2. It is important to note that *Brach* only answered whether California’s evidence was sufficient to demonstrate no genuine issue of material fact as to whether it was narrowly tailored. See *Brach*, 6 F.4th at 933 (reversing the district court’s grant of summary judgment in favor of the state).

California's, are more stringent than those imposed by other jurisdictions, they may be unnecessary to cull the spread of COVID-19.³⁰⁵ Moreover, the availability of less restrictive alternative measures indicates that school closures may be unnecessary.³⁰⁶ Additionally, if the state has barred in-person learning but allowed other comparable activities to continue in person, then school closures may be unnecessary to achieve the state's goals.³⁰⁷ Accordingly, where parents can establish that school closures abridge their rights under the scope of *Meyer* and *Pierce* and where the state is unable to satisfy strict scrutiny, such school closures are indeed unconstitutional.

CONCLUSION

While the *Meyer-Pierce* right has long received protection from courts, current attempts to analyze the right under the modern framework risk both underprotecting and overprotecting parental rights. COVID-19 school closures have burdened families, and they portend long-term damage for the futures of the children affected by them. Since parents serve as the best advocates for their children's education and future, courts must ensure that parental rights are adequately protected. However, public health crises demand immediate action from states to adequately safeguard the public from disease. As such, courts must also ensure that a proper balance is being struck between the interests of the public and of parents. To strike this balance, courts must first determine whether the state action has completely foreclosed or substantially hobbled parents' ability to procure educational opportunities for their children as desired. If so, courts must determine whether the state action can be justified by either an emergency or any intrinsic public or private harm those educational options may cause. If not, then the state action has abridged parents' *Meyer-Pierce* right and must satisfy strict scrutiny.

305. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 67 (finding regulations that were "far more restrictive" than those adopted in other jurisdictions to be insufficiently narrowly tailored). However, this finding on its own should not be dispositive because it is possible that the state's goals are more aggressive than those in other jurisdictions. Moreover, the facts on the ground may differ between states. Hence, the question is whether the state's actions are necessary to effectuate those more aggressive compelling goals or respond to their unique situations.

306. *See Brach*, 6 F.4th at 932 (noting that the record was not sufficient to justify closures but was sufficient to justify other less restrictive regulations); *see also supra* notes 186–90 and accompanying text.

307. *See Brach*, 6 F.4th at 932 (finding the state's failure to justify prohibiting in-person education while allowing other comparable activities to continue in person to be insufficient to satisfy strict scrutiny); *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 67 ("It is hard to believe that admitting more than 10 people to a 1,000-seat church or 400-seat synagogue would create a more serious health risk than the many other activities that the State allows.").